

THERAPEUTIC JURISPRUDENCE AND THE REHABILITATIVE ROLE OF THE CRIMINAL DEFENSE LAWYER

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INTRODUCTION

Therapeutic Jurisprudence (“TJ”) is maturing, moving rather rapidly from the world of theory to the world of practice.¹ It is only natural, therefore, for Therapeutic Jurisprudence to work its way into the law school curriculum and, as this special law review issue attests, into legal clinics and clinical legal education.

In the area of criminal law, the practical side of Therapeutic Jurisprudence has, to date, been reflected more in judicial activity than among the practicing bar. Judicial interest is mounting internationally, especially in the areas of drug abuse, mental illness, domestic violence, and related concerns of the criminal justice system. Indeed, judges are the principal intended audience for the recently published book entitled *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*.²

Since judges are in an enviable position to influence local legal culture and climate,³ it is likely that courts will encourage the development

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1. For information about Therapeutic Jurisprudence and how it has evolved over time through the present, *see generally* The International Network on Therapeutic Jurisprudence, at <http://www.therapeuticjurisprudence.org> (last visited Mar. 13, 2005); *see also* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle et al. eds., 2000) [hereinafter PRACTICING].

2. JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003) [hereinafter JTK].

3. *E.g.*, Dave Moore, *Lessons Learned in Washington's King County*, COLUMBIA DAILY TRIB., Feb. 8, 2004 at 3 (detailing how “King County Superior Court Judge Patricia Clark led the charge to call 120 people to the table” to reform the juvenile justice system); *see also* Judge Leonard P. Edwards, *The Juvenile Dependency Drug Treatment Court of Santa Clara County, California*, in JTK, *supra* note 2, at 39-40. Studying how judges and others change the legal culture would be a significant strand of ethnographic/legal scholarship, and clinical law faculty would likely be in an excellent position to undertake such work.

of a criminal law bar attuned to these concerns.⁴ Indeed, even without a push from the judiciary, some lawyers have begun to practice criminal law in a specifically therapeutic key.⁵ Mostly, interested lawyers will likely augment a traditional criminal law practice with the more holistic approach suggested by Therapeutic Jurisprudence, and the present article seeks to point interested practitioners in that direction.

Some lawyers may even decide to go “all the way,” and to limit their criminal law practice to a concentration in Therapeutic Jurisprudence. For instance, in *The How and Why of Therapeutic Jurisprudence in Criminal Defense Work*,⁶ Dallas, Texas attorney John McShane provides a brief overview of his perspective and his practice:

Application of therapeutic jurisprudence in criminal defense work involves a threshold recognition that most criminal defense attorneys and the criminal justice system generally address the symptoms of the client’s legal problem rather than the cause. For example, in the classic case of the habitual driving under the influence (DUI) offender, the symptom is the repeated arrests and the cause is usually alcoholism. It is the long-standing policy of the firm of McShane, Davis and Nance to decline representation of this type of defendant unless he or she contractually agrees to the therapeutic jurisprudence approach. If this approach is declined by the potential client, referral is made to a competent colleague who will then represent the client in the traditional model.⁷

Referral to outside counsel is also made if the defendant has a viable defense. In the criminal arena, therefore, the firm “focuses solely on rehabilitation and mitigation of punishment.”⁸ Representation is agreed to if the client is in turn willing “to accept responsibility for his actions, submit to an evaluation, treatment, and relapse prevention program, and to use this approach in mitigation of the offense in plea bargaining or the sentencing hearing.”⁹ McShane seeks to defer disposition of the case so as “to allow the client the maximum opportunity to recover.”¹⁰ A packet of mitigating information is assembled and eventually submitted to the

4. See Judge Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What’s Wrong and How We Can Fix It*, 16 FED. SENT. REP. 76 (2002) (setting out Judge Marcus’s views on sentencing and instructing attorneys on how to argue sentencing matters before him).

5. David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 CRIM. L. BULL. 205, 205 (2002) (unpublished paper, on file with author).

6. JOHN V. MCSHANE, *THE HOW AND WHY OF THERAPEUTIC JURISPRUDENCE IN CRIMINAL DEFENSE WORK* (2000).

7. Wexler, *supra* note 5, at 206-07.

8. *Id.* at 207.

9. *Id.*

10. *Id.*

prosecutor in an effort at plea bargaining, or, failing that, to the court at sentencing. The packet consists of items such as “AA Meeting Attendance Logs, urinalysis lab reports, reports of evaluating and treating mental health professionals, and letters of support from various people in the community such as AA sponsor, employer, co-workers, clergyman, family, and friends.”¹¹

There is much more to this, of course, and there are indeed a variety of models that criminal defense attorneys might use in practicing Therapeutic Jurisprudence. Although McShane and his firm have chosen to refer a client to outside counsel unless the client chooses, from the beginning, to accept responsibility, that course of action is in no sense required. As noted earlier, a lawyer might well choose to practice “traditional” criminal law, but infuse the practice with Therapeutic Jurisprudence concerns throughout the process. Indeed, as we will see, a TJ criminal lawyer can play an essential role even after conviction in the appeal process, in release planning, in prisoner reentry, and beyond.

In the present article, I will identify the potential rehabilitative role of the attorney from the beginning stages—possible diversion, for example—through sentencing and even beyond—through conditional or unconditional release, and possible efforts to expunge the criminal record. This article has two principal purposes; first, to call for the explicit recognition of a TJ criminal lawyer, and to provide, in a very sketchy manner, an overview of that role; second, to propose an agenda of research and teaching to foster the development of the rehabilitative role of the criminal lawyer.¹² While much of the proposed research would discuss the rehabilitative potential of applying the current law therapeutically, practitioners and scholars working in this area will also naturally have occasion to consider alternative approaches, resulting in proposals for law reform.¹³

11. *Id.*

12. Of course, the legal profession alone cannot “solve” the problem of criminality or rehabilitate persons involved in the criminal justice system. See Jessica Pearson, 42 FAM. CT. REV. 384 (2004) (reviewing JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler, eds. 2003) (critiquing the ability of courts to achieve rehabilitation). But criminal lawyers can make a dent, salvage some lives, work with other professionals and advocate for services and changes in policy. Crucially important, too, but almost entirely ignored to date, are the potential therapeutic roles of prosecutors and police officers. For groundbreaking efforts in these areas see Carolyn Coops Hartley, *A Therapeutic Jurisprudence Approach to the Trial Process in Domestic Violence Felony Trials*, 9 VIOLENCE AGAINST WOMEN 410 (2003); see also 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).

13. *E.g.*, David B. Wexler, *Spain’s JVP (‘Juez de Vigilancia Penitenciaria’) Legal Structure*

The agenda is intended as a warm invitation to several communities, each of which, if so inclined, could contribute mightily to this effort, which ultimately should result in journal articles, practice manuals, anthologies, and texts. The most obvious community consists of involved practitioners¹⁴ and, especially, their academic counterparts, the community of clinical law professors. Law school clinical teaching and scholarship are uniquely suited to address many of the issues raised later in this article.¹⁵ Another relevant community is that of social workers, criminologists, psychologists, and the like, some of whom are connected with law school clinics¹⁶ or are working as practitioner-scholars in the Therapeutic Jurisprudence area.¹⁷ Finally, academics working in Therapeutic Jurisprudence and in criminal law, especially in sentencing and corrections,¹⁸ would be highly valuable partners in this enterprise. So would their students, and a number of the topics raised below might indeed

as a Potential Model for a Re-entry Court, 7 CONTEMP. ISSUES IN L. 1 (2003/2004) [hereinafter Wexler, *Spain's JVP*].

14. John V. McShane, *The Need for Healing*, 89 A.B.A. J. 59, 59 (2003); Robert Ward, *From Courtroom Advocacy to Systems Advocacy: Lessons Learned by a Drug Court Public Defender* (March/April 2000), available at http://www.nlada.org/Defender/Defender_IndigentDef/NLADA/Defender/Defender_IndigentDef/Publications/Indigent_Defense/Defender_Indigent_Archive/MarchApril2000/MarchApril2000/MarchApril_DrugCourts (last visited Mar. 14, 2005); Martin Reising, *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); Mae C. Quinn, *Whose Team am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 37 (2000-2001).

15. Legal clinics could readily produce valuable faculty-supervised, student-researched local TJ manuals, detailing relevant local statutory provisions, cases, and forms.

16. The manuals described above could also include descriptive information on local treatment programs, perhaps prepared by cooperating clinic students from social work, criminology, and psychology, again working under faculty supervision.

17. Michael D. Clark, *Change Focused Drug Court: Examining the Critical Ingredients of Positive Behavior Change*, 3:2 NAT'L DRUG CT. INST. REV. 35, 56-57 (2001); Eric Y. Drogin, *From Therapeutic Jurisprudence . . . to Jurisprudential Therapy*, 18 BEHAV. SCI. & L. 489, 490 (2000); Hartley, *supra* note 12, at 412; John Q. La Fond & Sharon G. Portwood, *Foreword: Preventing Intimate Violence: Have Law and Public Policy Failed?*, 69 UMKC L. REV. 3, 13 (2000); Robert G. Madden & Raymie H. Wayne, *Social Work and the Law: A Therapeutic Jurisprudence Perspective*, 48:3 SOC. WORK 338, 339-40 (2003); Robert G. Madden & Raymie H. Wayne, *Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model*, 18 TOURO L. REV. 487, 501 (2002); James McGuire, *Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework*, 4 W. CRIMINOLOGY REV. 108, 118 (2003); James McGuire, *Can the Criminal Law Ever be Therapeutic?*, 18 BEHAV. SCI. & L. 413 (2000); 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. 337, 340, 359 (2002); Leonore Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL. PUB. POL'Y & L. 43, 50 (1995)

18. See NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY (2004).

serve as interesting and useful exercises for course papers.

It is time, then, to begin to sketch more clearly the role and practice setting of the TJ criminal lawyer, taking into account certain important skills, legally-relevant doctrines, and the kind, content, and timing of certain important conversations with clients. In the effort of constructing an agenda, my approach will be to cite much of the relevant literature, but not generally to synthesize or summarize it in any detail. My main objective is to provide interested others with a jumping-off point, and to pose questions and suggest avenues of future inquiry.

The reader will note immediately that the proposed attorney-client relationship bears virtually no resemblance to many shameful systems of indigent defense, where crushing caseloads allow for little client contact and where the only real objective is to secure a decent deal on a plea. But legal clinics need to teach excellence, to push for expanded legal horizons, and to model and point the way to the provision of first-rate legal services. They cannot succumb to mimicking the structural ineffective assistance of counsel exhibited in many public sector defense programs. Indeed, this article ends with a discussion of the structure of legal services, and proposes that very area as one deserving the creative efforts of clinical legal scholarship.

1. THE CRIMINAL LAWYER AS CHANGE AGENT

Before proceeding to particular stages in the criminal process, and looking at the criminal defense lawyer's potential rehabilitative role in each, we need to address a more general and basic set of issues. A typical initial response to a proposed broadening of the traditional role of defense counsel is, "Hey, I'm not a therapist." True, a lawyer is not a therapist or social worker, and is not expected to be. But, as social worker and drug court consultant Michael Clark makes clear,¹⁹ lawyers (and others in the legal/judicial system) can nonetheless be quite effective as "change agents."

Clark notes that, if change is forthcoming, the lion's share of change will come from the client, together with whatever internal or social strengths and supports can be mustered. Client "hope and expectancy" accounts for another chunk of the change. And a whopping amount of positive change is attributable to "relationship" factors—the connection between client and change agent (e.g., relations characterized by empathy,

19. Michael D. Clark, *A Change-Focused Approach for Judges*, in JTK, *supra* note 2, at 137, 137.

acceptance, encouragement). Much rehabilitative work lies in encouraging active and meaningful client participation, in developing a strong relationship between client and change agent, and in fostering client hope and expectancy. Writing in the context of drug courts, Clark underscores that “all professionals working with drug court participants, especially judges, lawyers, and probation officers, may adopt and utilize techniques that most effectively induce positive behavior change.”²⁰

Clark and others have written about how a professional can strive to develop a relationship of respect²¹ and trust,²² and about the importance of giving a client “voice”—of clients being able to “tell their story,”²³ unconstrained by rigid notions of legal relevance.²⁴ Important, too, are matters of emotional intelligence and cultural competence.²⁵

These skills—on building a strong interpersonal relationship, on attentive listening, and on becoming an “effective helper”²⁶—can be acquired and improved by lawyers, and are increasingly important components of law school courses on interviewing and counseling and in legal clinics. Proposals are now emerging, too, to introduce lawyers and law students to techniques of “motivational interviewing.”²⁷ Keeping the

20. *Id.* at 147.

21. *Id.* at 148 (e.g., respectful communication, eye-contact, attentive listening).

22. Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development*, 22 BEHAV. SCI. & L. 197 (2004) (stating that lawyers should invite client participation, take client phone calls, ask for suggestions, and listen to suggestions).

23. Clark, *supra* note 19, at 142.

24. Cf. Jack Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY (David B. Wexler & Bruce J. Winick eds., 1996) 907, 909-10 (stating that patients prefer informal dispute resolution proceedings, for such proceedings allow for greater dialogue); 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).

25. Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 220-21 (2002); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133 (2004); Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1173 (1999).

26. Richard Sheehy, *Do You Have the Skills to be an Effective Helper*, FLA. B. NEWS, May 15, 2002, available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/b82d3f3cd077d99c85256bb200527098?OpenDocument> (last visited Mar. 16, 2005).

27. Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225 (2002) (stating that motivational interviewing, or MI, finds a line between a “heavy handed” approach and “hands off” approach). For a bibliography on motivational interviewing, including discussion of the impact a helping professional can have on a client’s stages of change, go to <http://www.motivationalinterview.org/library/index.html> (last visited Mar. 13, 2005).

importance of these skills always in mind, we may now turn our attention to the lawyer's role in various stages of the criminal process.

2. DIVERSION AND PROBLEM SOLVING COURTS²⁸

Lawyers need to be versed in the various treatment programs available in their jurisdictions,²⁹ and in informal and formal schemes for diversion. Diversion is sometimes spelled out by statute, and may operate either pretrial or post-adjudication (deferral of judgment). In diversion, issues often arise regarding the appropriateness of conditions, such as those relating to drug testing or to search and seizure.³⁰ A worthwhile interdisciplinary research project would be to detail the law and practice of diversion in a particular jurisdiction. The written product could be preserved as part of a practice manual, and could be periodically updated.

Problem solving courts, such as drug treatment courts ("DTCs"), may also operate pre- or post-adjudication; increasingly, they operate post-guilty plea. Lawyers need to know about these courts, their programs, their eligibility requirements,³¹ and about the actual functioning of the courts and programs,³² including rates of successful graduation versus the 'flunk out' rate, and the amount of time an average client might expect to spend in jail (for being sanctioned) under a DTC program as compared to expected jail time in the conventional system.³³

28. See generally JTK, *supra* note 2; DEMLEITNER ET AL., *supra* note 18, at 546-56.

29. This is true, of course, whether we are talking diversion, sentencing, or parole. For a good example of scholarship in this area, see David R. Katner, *A Defense Perspective of Treatment Programs for Juvenile Sex Offenders*, 37 CRIM. L. BULL. 371 (2001).

30. Terry v. Superior Court, 86 Cal. Rptr. 2d 653, 666 (Cal. Ct. App. 1999). Conditions may also be imposed when one is released pretrial on bail or on one's own recognizance. In *In re York*, 9 Cal. 4th 1133, 1151 (Cal. 1995), the California Supreme Court upheld conditions, such as random drug testing and unannounced searches, beyond those relating to assuring the defendant's presence in court. For a discussion of conditions of release, see *infra* Part 5. In *Alabama v. Shelton*, 535 U.S. 654, 656 (2002), the Supreme Court discussed the availability of 'pretrial probation' (adjournment in contemplation of dismissal), and noted that the conditions imposed under that arrangement are basically the same as those available under 'regular' probation.

31. In New South Wales, Australia, where the drug court is statutorily based, the drug court, in written opinions, decides eligibility requirements and other interpretative matters. See Lawlink New South Wales, *Caselaw New South Wales*, at http://www.lawlink.nsw.gov.au/lawlink/caselaw/lcaselaw.nsf/pages/cl_index (last visited June 4, 2005) [hereinafter New South Wales]. A body of case law is developing. For some TJ implications of this development for the lawyer's role, see *infra* Part 6.

32. For example, one of my students at the University of Puerto Rico reported that clients in one area of the island were expected to enroll in a treatment program that involved little more than hour upon hour of daily prayer.

33. See Mark A.R. Kleiman, *Drug Court Can Work: Would Something Else Work Better?*, 2 CRIMINOLOGY & PUB. POL'Y 167 (2003) (stating that recent research suggests a client, although successful in the program, may spend about as much time in jail under DTC as under the

There is emerging literature on the role of counsel in this area,³⁴ given the non-traditional aspects and atmosphere of DTCs and other problem solving courts (“PSC”). One of the most important issues relates to the client’s consent to opt out of the ‘ordinary’ criminal justice system and into a PSC program. In an important article, former drug court defense attorney Martin Reisig underscores the necessity of obtaining true client consent to enter the program.³⁵ According to Reisig, obtaining adequate client consent is always important, but it is clearly crucial in post-adjudication jurisdictions, given the fact that fully one-third of those who enter a DTC program may flunk out of it and be returned to the criminal court not to stand trial, but as a convicted defendant. Real consent is crucial, says Reisig, for purposes of due process. Moreover, consent is important therapeutically as well: imagine how ‘sold out’ a client may feel being rushed into a DTC program from which he/she later flunks out, only then to face the court as an already convicted defendant.

Reisig notes that, even in a therapeutically-oriented law practice, the criminal defense lawyer needs to convince the client that the strengths and weaknesses of the case can, and will, be evaluated more or less along traditional lines.³⁶ A study of clients in mental health court revealed that

traditional criminal justice option). In terms of their actual functioning, the operation of DTCs has been affected in several jurisdictions by the passage of drug treatment initiatives. These initiatives generally mandate treatment and probation, and forbid incarceration, for qualifying defendants. The initiatives have been worrisome to some DTC judges, for the laws may remove the motivational “stick” of possible incarceration. See Michael M. O’Hear, *Statutory Interpretation and Direct Democracy: Lessons from the Drug Treatment Initiatives*, 40 HARV. J. ON LEGIS. 281, 289-90 (2003).

34. For the most recent contributions, see generally Cait Clarke & 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); William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 AM. CRIM. L. REV. 1595 (2003); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender’s Role in Problem Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2003). For a recent defense of the traditional model, see Abbe Smith, *The Difference in Criminal Defense and the Difference it Makes*, 11 WASH. U. J.L. & POL’Y 83 (2003). Melding therapeutic elements and traditional ones will lead to interesting discussions about accommodating conciliatory and adversarial postures. This is a crucial—perhaps the crucial—future issue, but, at this early stage, is beyond the scope of the present article. As evidenced by Clarke & Neuhard, *supra* note 34, at 36-47, this is a case where the general will flow from the specific; where concrete examples will be necessary to confront ethical issues. In the present article, I try to present important but relatively non-controversial aspects of the lawyer’s role—aspects easy to accommodate in a traditional practice.

35. See Reisig, *supra* note 14 and accompanying text.

36. The conventional wisdom has it that the quicker the entry into a treatment program, the better. Judge Peggy F. Hora, Judge William G. Schma & John Rosenthal, *The Importance of Timing*, in JTK, *supra* note 2, at 178, 178. Be that as it may, the supposed advantage of early enrollment can be dwarfed by the due process considerations and by the anti-therapeutic aspects of having been rushed into a treatment track.

those who believe they have a real choice regarding participation also feel less perceived coercion than do others.³⁷ Yet, a number of clients reported that they were unaware they had a choice.³⁸

Apparently, some clients do not understand a general statement, made by the judge to the courtroom audience as a whole, regarding voluntary participation. This suggests the need for a change in the judicial role and, in any case, suggests a highly significant role for counsel. Although observations of mental health court reveal “there is little that reflects traditional ‘lawyering’ as the attorneys are relegated to relatively minor roles in the hearings,”³⁹ pre-selection legal advice and counseling are essential.

An important exercise in law clinics might be to consider the kind of dialogue a lawyer might have with a client about the pros and cons of opting into DTC or mental health court. What information should be provided the client regarding the program, the nature of the treatment, the consequences of success or failure, the alternatives, the amount of incarceration one might expect under either option?⁴⁰

What outcomes other than incarceration time might be important? Might success be measured not only by “graduation” rates, but also by small successful steps in peoples’ lives? What if drug court participation gives many clients a new outlook on life, or a glimpse of a way to live life without drugs, or a family who now backs his or her efforts to get clean?⁴¹

Should the client, if free on bail (as many are), visit any of the treatment programs before making a decision? Should the client be invited or encouraged by counsel to sit in on a drug court session (typically open to the public) before making up his or her mind? Note that in many drug treatment courts, case calendaring is used to promote vicarious learning by

37. Norman J. Poythress et al., *Perceived Coercion and Procedural Justice in the Broward Mental Health Court*, 25 INT’L J.L. & PSYCHIATRY 517, 526 (2002).

38. *Id.* at 530.

39. Roger A. Boothroyd et al., *The Broward Mental Health Court: Process, Outcomes, and Service Utilization*, 26 INT’L J.L. & PSYCHIATRY 55, 67 (2003).

40. Thus, consider the question asked critically by attorney Mae Quinn, “is it not a defense attorney’s ‘therapeutic jurisprudential’ obligation to inquire whether certain drug court practices are perceived by client as confusing or too invasive . . . ?” See Quinn, *supra* note 14, at 53 n.100. This question should be answered, assuming a correct understanding of Therapeutic Jurisprudence, with a resounding “yes.”

41. These are all examples given by New South Wales Magistrate Neil Milson, as reported by Michael Pelly, *When Treatment is Scarier than Jail*, SYDNEY MORNING HERALD, February 26, 2004. Magistrate Milson’s insights tie in nicely with the program development and evaluation research literature, where “outcomes” are defined as “measurable changes in the client’s life situation or circumstances.” PETER M. KETTNER ET AL., *DESIGNING AND MANAGING PROGRAMS: AN EFFECTIVENESS BASED APPROACH* 113 (2d. ed. 1999).

clients—cases are ordered so as to give new clients a glimpse of the hard work, but also of the opportunity and hope for real recovery that lies ahead.⁴² A lawyer, or paralegal, might play an important role in maximizing the vicarious learning by sitting through the session and explaining to the prospective DTC client exactly what is happening and why different clients are receiving different dispositions.

Legal clinics exploring the consent question should also consider how a client's active addiction impedes attentive listening and interacts with nuanced notions of consent. They should also ask how much effort is and should be expended in "regular" court to advise clients about the collateral consequences of a proposed plea—and should consider whether enrollment in a treatment option should call for the same or a higher standard.

The drug court community sometimes speaks of the four "Ls" that drive people to treatment: lovers, livers, law, and labor. Clients typically opt for drug court and like programs when faced with loss of family, or health, or liberty, or employment.

Some practitioners and judges in the field thus feel that an overly complex consent procedure is not workable with many clients. Those experts believe a preferable approach would be to keep things simple and allow for an easy exit if the client wants out of the program. Such an easy exit should, of course, be especially consistent with a "pre-plea" kind of program.

42. See Judge Peggy F. Hora et al., *Promoting Vicarious Learning Through Case Calendaring*, in JTK, *supra* note 2, at 300, 300-01:

DTCs (Drug Treatment Courts) design the courtroom process itself to reinforce the defendant's treatment. The court may set up its daily calendar so that "first-time participants appearing in Drug Court . . . are the last items on the session calendar. This gives them an opportunity to see the entire program in action, and know exactly what awaits them if they become a participant." The DTC may handle program graduates first in order to impart a sense of hope to the new and continuing program participants who may experience hopelessness at the beginning of the process. The court may then devote the next portion of the calendar to defendants who enter the court in custody. This procedure is designed to convey to all DTC participants the serious nature of the court and the gravity of the defendant's situation. This demonstrates that a violation of DTC rules may not get a defendant ejected from the program, but the court may use jail time as a form of "smart punishment" to get the defendant to conform to treatment protocol. Those DTCs that do not have treatment facilities in their jails recognize that incarceration represents a break in treatment for the individual. However, the shock of incarceration may serve to break down the person's denial of her addiction. Finally, the court handles the cases involving new defendants who wish to enter the DTC program. All of these procedures are founded on the therapeutic ideal that every aspect of a DTC can and does have a powerful impact on the success of the defendant in treatment.

Id.

3. PLEAS AND SENTENCING CONSIDERATIONS⁴³

It is always important to remember that the overwhelming majority of cases are resolved by plea,⁴⁴ and typically through a process of plea negotiation.⁴⁵ Accordingly, as noted earlier,⁴⁶ a TJ criminal lawyer will in appropriate cases try to assemble a rehabilitation-oriented packet to present to the prosecutor in hopes of securing a favorable plea arrangement. Failing that, the packet may be presented to a court at sentencing.

The area of plea negotiation is immense, and beyond the scope of this essay. What is within the essay's scope are some factors that may enter into a client's decision regarding a plea. For the most part, these factors have been the subject of case law, most notably under the federal sentencing guidelines. Here, the cases will be noted more for the relevant factors than for an interpretation of the federal guidelines.

Although the practice of TJ criminal law in federal court is an unexplored and very worthy research topic (and an excellent practice manual project), most TJ criminal lawyers will find themselves in state and local courts,⁴⁷ where there is typically greater flexibility than under the federal guidelines.⁴⁸

One factor that should enter into the determination of whether a client

43. See generally DEMLEITNER ET AL., *supra* note 18, at 405-32; JTK, *supra* note 2, at 165-76.

44. DEMLEITNER ET AL., *supra* note 18, at 405.

45. Plea negotiations may involve bargaining over the sentence or over the charge itself (an indirect way, of course, of affecting sentence). DEMLEITNER ET AL., *supra* note 18, at 413-25. The TJ literature has raised the question whether charge bargaining might feed into offender cognitive distortion and denial more so than sentence bargaining. See David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, in LAW IN A THERAPEUTIC KEY, *supra* note 24, at 157, 162 n.37. Therapeutic Jurisprudence thinking has also questioned whether "no contest" pleas feed into offender denial and minimization. *Id.* at 165-76.

46. See *supra* note 12 and accompanying text.

47. Another potential forum is tribal court, especially given the congruence of Therapeutic Jurisprudence with many indigenous dispute resolution practices. James W. Zion, Jr., *Navajo Therapeutic Jurisprudence*, 18 *TOURO L. REV.* 563 (2002).

48. Even in states with guidelines, the guidelines are not of the complex and mechanistic variety of the largely discredited federal guidelines. Kevin R. Reitz, *Model Penal Code: Sentencing Report* (2003), available at http://www.ali.org/ali/ALIPROJ_MPC03.pdf (last visited Mar. 15, 2005). A new ABA special commission report urges major changes in the criminal justice system, with "proposals that range from abandoning mandatory minimum sentences to better preparing prisoners for return to society." Terry Carter, *End Mandatory Minimums*, *ABA Commission Urges*, 3 No. 25 A.B.A. J. E-REPORT 1, June 25, 2004, WL 3 No. 25 ABAJEREP 1. In lieu of mandatory minimums, the report proposes the use of "guided discretion." *Id.* The Supreme Court's recent decision in *United States v. Booker*, 125 S. Ct. 738 (2005), discarding the mandatory force of the U.S. Sentencing Guidelines, will add flexibility to the federal sentencing scheme.

will go to trial or enter a plea is the likely loss, for one insisting on going to trial, of what in practice typically amounts to a ‘plea discount’⁴⁹ for a defendant’s saving the government the trouble of going to trial, and saving the victim and the government witnesses the trouble and often the trauma of a trial. Closely related to this is sentence leniency, often given for a defendant’s ‘acceptance of responsibility,’ which will kick in more clearly if it occurs early in the process, and is perceived as genuine rather than as purely strategic.⁵⁰

A genuine acceptance of responsibility—especially if coupled with an apology⁵¹—is generally regarded as therapeutically welcome by the victim⁵² and as a good first rehabilitative step for the defendant. Other cooperative efforts, such as rendering substantial assistance⁵³ and presenting proactive repayment of victims⁵⁴ (which often, but not always, accompany a guilty plea), are also typically considered by the sentencing judge.⁵⁵

The rub in all this, of course, especially as it relates to the role of the criminal lawyer, is that if courts regard these behaviors and gestures as being engaged in merely in the hopes of receiving a lesser punishment, the courts may find the acts to be without merit.⁵⁶ But there is also the other side to this coin: if a defendant does not plead guilty and goes to trial, he or she can, if convicted, expect to lose the typical “plea discount.”⁵⁷ Moreover, if the defendant goes to trial, testifies, loses, and is regarded by the judge as having committed perjury at the trial, the court may well enhance the sentence further for this supposed obstruction of justice.⁵⁸

In light of all the above, how should a defense lawyer go about

49. DEMLEITNER ET AL., *supra* note 18, at 305.

50. *United States v. Jeter*, 236 F.3d 1032 (9th Cir. 2001).

51. Petrucci, *supra* note 17.

52. Cf. Judge William G. Schma, *Judging for the New Millennium*, in JTK, *supra* note 2, at 87, 89 (victims prefer defendants to enter guilty pleas, rather than no contest pleas); see also Edna Erez, *Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversary Proceedings*, 40 CRIM. L. BULL. 483 (2004); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004).

53. DEMLEITNER ET AL., *supra* note 18, at 318.

54. *Id.* at 341; *United States v. Kim*, 364 F.3d 1235 (11th Cir. 2004).

55. Michael O’Hear, *Remorse, Cooperation, and “Acceptance of Responsibility”*: *The Structure, Implementation and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1510 (1997).

56. *United States v. Martin*, 363 F.3d 25 (1st Cir. 2004).

57. DEMLEITNER ET AL., *supra* note 18, at 314.

58. *United States v. Dunnigan*, 507 U.S. 87, 90-94 (1993); *United States v. Grayson*, 438 U.S. 41, 44-54 (1978).

advising a client, discussing these issues and potential consequences with a client, and trying to work with the client to create a genuineness even within a strategic legal context? Are there psychological approaches that may be useful? For example, one psychological approach to “empathy training” is a “perspective-taking” approach, where a psychologist working with an offender might ask the offender to re-enact the crime, playing the role of the victim:

The offenders read heart-wrenching accounts of crimes like their own, told from the victim’s perspective. They also watch videotapes of victims tearfully telling what it was like to be molested. The offenders then write about their own offense from the victim’s point of view, imagining what the victim felt. They read this account to a therapy group and try to answer questions about the assault from the victim’s perspective. Finally, the offender goes through a simulated reenactment of the crime, this time playing the role of the victim.⁵⁹

It is interesting to consider how the “perspective-taking” approach could be imported into the law office. Might lawyers, preferably in combination with social workers or like professionals, create a “bank” of videotapes of victim statements, and ultimately suggest that a client, in preparing a written apology letter (or videotape), include a section where he or she imagines the many ways in which the crime likely affected the victim’s life?⁶⁰

4. DEFERRED SENTENCE AND POST-OFFENSE REHABILITATION

Recall that, in his practice, John McShane tries to delay the imposition of sentence for as long as possible,⁶¹ and urges the client to begin to pick up the pieces and to engage in available rehabilitative efforts, whether they be attendance at Alcoholics Anonymous or a more elaborate treatment program. McShane emphasizes to the client that, up to this point, the existing evidence already, by definition, “exists”; it perhaps can be given a “spin,” but it cannot be changed. On the other hand, suggests

59. Allison R. Shiff & David B. Wexler, *Teen Court: A Therapeutic Jurisprudence Perspective*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 24, at 287, 297.

60. Note that such a procedure would work even if we are dealing with an early stage in the proceedings, where a victim impact statement, ARIZ. REV. STAT. § 13-4424 (2004), would not yet have been prepared. To establish the genuineness of an offender’s apology, an expert witness—a professional who is not part of the offender’s treatment team—might be called to counter any claim of malingering. See Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, in *PRACTICING*, *supra* note 1, at 245, 265-66.

61. See *supra* text accompanying note 10.

McShane, from here on out the client can build his or her own case, can help create evidence that is favorable and that can work to the client's advantage.

In order to accomplish some meaningful rehabilitation—rather than a mere gesture, however genuine—it is of course important to have some time on your side. For this reason, deferring the imposition of sentence can be highly important. Winick's writing on this topic⁶² applauds Federal District Judge Jack B. Weinstein's on-point scholarly opinion in *United States v. Flowers*.⁶³ This is a topic that clearly deserves attention on the state law level, where defense attorneys will urge courts to defer sentence to allow rehabilitation to begin and to facilitate its progress.

Winick's article also summarizes the law under the federal sentencing guidelines allowing for post-offense rehabilitation efforts to be taken into account when sentence is eventually imposed.⁶⁴ This is a highly important area that also needs to be researched on a state-by-state basis. Some state courts may be explicit on the matter.⁶⁵ In others, post-offense rehabilitation may not be the subject of case law, but may be the sort of factor that can be brought to bear where courts have considerable discretion in sentencing, perhaps under a statutory "catch-all" provision that allows for mitigation for "any other factor that the court deems appropriate to the ends of justice."⁶⁶

5. PROBATION⁶⁷

A client who successfully establishes a course of post-offense rehabilitation will typically hope for a probationary sentence in order to remain (relatively speaking) at liberty and to pursue a satisfying life path. The sanction of probation, when legally available for a given offense, is chock-full of Therapeutic Jurisprudence considerations,⁶⁸ which can inform

62. Winick, *supra* note 60, at 245, 267-71.

63. *United States v. Flowers*, 983 F. Supp. 159, 163-65 (E.D.N.Y. 1997).

64. Winick, *supra* note 60, at 258-63; DEMLEITNER ET AL., *supra* note 18, at 342. *United States v. Atlas*, 94 F.3d 447 (8th Cir. 1996). For a recent case, see *United States v. Smith*, 311 F. Supp. 2d 801, 804-06 (E.D. Wis. 2004). Note that, in a formalistic bow to notions of equality, the federal arena does not permit the consideration of post-sentence rehabilitation efforts, for such efforts would only inure to the benefit of those whose convictions or sentences have been disturbed on appeal. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 (Post-Sentencing Rehabilitative Efforts, 2003), available at http://www.uscourts.gov/2003guid/5k2_19.htm (last visited Mar. 15, 2005). Post-sentence rehabilitative efforts *can*, however, be taken into account in connection with early termination of supervised release. *Id.*

65. DEMLEITNER ET AL., *supra* note 18, at 343.

66. ARIZ. REV. STAT. § 13-702(D)(5) (2003).

67. See generally DEMLEITNER ET AL., *supra* note 18, at 519-34.

68. Faye S. Taxman & Meredith H. Thanner, *Probation from a Therapeutic Perspective*:

and enrich the role of defense counsel. Some of the relevant psychological and criminological work relates to bringing into the probation area notions of psychological compliance principles,⁶⁹ relapse prevention principles,⁷⁰ and reinforcement of desistance from crime.⁷¹ Let us consider some of these propositions and, following that, consider how they might be employed in the lawyer/client interaction. The assumption being made in these examples is that probation is legally available and that it is also a plausible disposition.

Regarding compliance, the suggestion is that adherence to probation conditions might be enhanced if probation is conceptualized more as a behavioral contract than as a judicial fiat. If certain family members are aware of the client's agreement to abide by certain conditions, that too is thought to increase the likelihood of compliance. Also, if a person is presented with some "mild counterarguments" regarding his or her likely compliance, the person may be encouraged to explain why "this time is different," and may thereby anchor himself/herself to the view that compliance is desirable and is now attainable.⁷² Regarding relapse prevention, some promising rehabilitative techniques urge offenders to think through the chain of events that lead them to criminality so that they may be aware of patterns and of high risk situations (e.g., going to a disco on weekend nights). The offenders are then encouraged to think of ways of avoiding or coping with the high risk situation (e.g., not going to that disco on weekends, and going to a movie instead), and of ultimately embodying their thinking in a "relapse prevention plan" that they may employ in the future to reduce the risk of reoffending.⁷³ Regarding the reinforcement of desistance from crime, the literature suggests that desistance is more a process than a specific event. Moreover, desistance can best be maintained

Results from the Field, 7 CONTEMP. ISSUES IN L. 39 (2004).

69. David B. Wexler, *Health Care Compliance Principles and the Judiciary*, in JTK, *supra* note 2, at 213, 213-26 [hereinafter *Health Care*].

70. David B. Wexler, *Problem Solving and Relapse Prevention in Juvenile Court*, in JTK, *supra* note 2, at 189, 189-99 [hereinafter *Problem Solving*].

71. David B. Wexler, *Robes and Rehabilitation*, in JTK, *supra* note 2, at 249, 249-54 [hereinafter *Robes*].

72. JTK, *supra* note 2, at 213-26.

73. *Problem Solving*, *supra* note 70, at 189-99. This is, of course, a highly skimpy and oversimplified summary of a meaty process. Moreover, the relapse prevention approach needs to be fused with an approach that looks at how offenders can lead "good lives," not simply at how they can avoid reoffending. Tony Ward & Claire Stewart, *Criminogenic Needs and Human Needs: A Theoretical Model*, 9 PSYCHOL. CRIME & L. 234 (2003). For a discussion of merging risk management and good lives considerations in the area of sex offenders, see Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycholegal Approach to Protection*, 16 SEXUAL ABUSE: J. RES. & TREATMENT 351 (2004).

if, especially in the early stages, it is reinforced through the recognition of respected members of the community.⁷⁴

How might these ‘principles’⁷⁵ be translated into law practice? Here are some ideas, presented as food for thought and discussion:

The defense lawyer could serve as a respected member of the community, proud of the client’s efforts and positive about the client’s prospects. The lawyer and client might talk about others who know the client and his/her genuine steps toward reform: an AA sponsor, the receptionist at the drug treatment clinic, a mental health professional, an employer, teacher, co-worker, member of the clergy, family member, and/or friend. The lawyer and client might decide which of them might approach which community figure regarding the willingness to provide a letter of support and the like.⁷⁶

The lawyer might be guided by the relapse prevention principles to work with the client to come up with and to present to the court a proposed

74. *Robes*, *supra* note 71, at 249-54.

75. “At this exciting—but early—stage of development, these ‘principles’ must, of course, be taken more as suggestions for ongoing discussion, dialogue, and investigation than as hard and fast rules to be set in stone.” JTK, *supra* note 2, at 105-06. A case that brings together many Therapeutic Jurisprudence principles, and is thus excellent for teaching purposes, is *United States v. Riggs*, 370 F.3d 382 (4th Cir. 2004). *Riggs* involves a case where, 1) the defendant’s mental condition began to assert itself two years before his first arrest, but where he did not receive psychiatric treatment until after his arrest, thus indicating how the legal system often serves as a back-door social service agency; 2) sentence was deferred for nearly two years after his arrest for the offense in question (a second offense), thus allowing the defendant to indicate how this post-offense treatment plan was working; 3) where, because the offense in question was precipitated by *Riggs* forgetting to take his oral medication for a few days, the revised treatment plan was augmented by long-acting intramuscular injections of antipsychotic drugs and by *Riggs*’ mother agreeing to remind him to take his daily oral medication; and where 4) the district judge reinforced *Riggs*’ medically compliant and law-abiding behavior over the two year period during which sentence was deferred by stating on the record how things now seemed to be under control. *Id.* The district court accordingly ordered a downward departure because of *Riggs*’ diminished mental capacity, and did not find the departure unavailable because of a likely danger to the public. The workable—and working—treatment plan, in the view of the district court, sufficiently alleviated public protection concerns. *Riggs* was accordingly sentenced to three years probation instead of being given a two or two and a half year incarcerative sentence. *Id.* at 384. A divided Fourth Circuit vacated the sentence and remanded the case for resentencing. *Id.* at 387. After deciding *U.S. v. Booker*, relating to the U.S. Sentencing Guidelines, the Supreme Court vacated and remanded *Riggs* to the Fourth Circuit. The *Riggs* case is an excellent vehicle for introducing a number of crucial Therapeutic Jurisprudence principles and techniques. The case also shows the potential of practicing Therapeutic Jurisprudence in the federal system, a topic that has received virtually no attention to-date.

76. See Wexler, *supra* note 5, at 214. The potential for introducing notions of Therapeutic Jurisprudence in federal court, recently advocated by Eighth Circuit Judge Donald P. Lay, has been given a major boost by the Supreme Court decision in *Booker*, in essence converting the rigid U.S. Sentencing Guidelines into a set of advisory guideposts. See Donald P. Lay, *Rehab Justice*, N.Y. TIMES, Nov. 18, 2004, § A.

probationary plan.⁷⁷ The lawyer, perhaps working with a social worker or like professional, might engage the client in a discussion of the chain of events that has led to criminality or drug abuse and might encourage the client to recognize situations which, for the client, seem to be high risk. The lawyer can also prompt the client to consider ways in which the high risk situations can be best avoided.

In terms of the division of labor between lawyer and client, it is important to recognize that it is the *client* who should develop an appreciation of the high risk situations and their alternatives. The goal is for the client to recognize this and to buy into a change of behavior that should reduce the risk of criminality. It is thus important for the client to be fully involved in the thinking process, and lawyers should resist the temptation of thinking for the client and of proposing a plan for the client's acquiescence.

Perhaps the best role for the lawyer here is to prompt and prod the client by asking a series of questions. For instance, UK psychologist James McGuire has developed a course to teach problem solving skills to offenders, and some of the questions he employs are: "Does most of your offending behavior occur in the same place? At similar times of the day or week? In the presence of the same person or persons?"⁷⁸

This is an area where psychologists and other professionals accustomed to the problem solving and relapse prevention approach might be very useful to lawyers. They might be able to suggest some interviewing techniques—or specific questions—to elicit from the client the high risk situations and ways of avoiding them. They may also be able to alert lawyers to the types of patterns and offense pathways often associated with particular offenses or offenders.

For example, youths usually get into car accidents not when driving alone but rather when other kids are in the car.⁷⁹ Criminologists and

77. The proposed probationary plan would be derived from some of the relapse prevention principles, and may serve in a very rough way to start a client on the road to relapse prevention, but it is of course no substitute for a full-fledged relapse prevention program led by mental health professionals and trained probation officers. The lawyer's effort might more properly be viewed as resulting in a "safety" plan rather than in a true "relapse prevention" plan. Indeed, one of the proposed conditions of the probationary plan might be a client's full participation in a relapse prevention program, ultimately resulting in the preparation of a true relapse prevention plan. *Problem Solving*, *supra* note 70, at 198 n.2.

78. *Problem Solving*, *supra* note 70, at 196.

79. Staff writer, *Passengers Hazardous to Teen Drivers*, ARIZ. DAILY STAR, March 22, 2000, at A6. See generally L. H. Chen et al., *Carrying Passengers as a Risk Factor for Crashes Fatal to 16- and 17-Year-Old Drivers*, 283 JAMA 1578 (2000); R. Foss, *Reducing Fatal Crash Risk Among Teenaged Drivers: Structuring an Effective Graduated Licensing System*, 283 JAMA

insurance companies—and now lawyers—may know this, but it is important for a youthful offender to personally realize it, and this may be accomplished by the lawyer engaging the client in what may appear to be a type of Socratic dialogue: “Well, when do you seem to get picked up for driving violations? Day or night? When you are alone or when you are with others? Which others? Your parents? Your friends?” And then, if the client recognizes that he or she gets into trouble when driving with certain peers, the lawyer might ask the client to propose a plan to reduce the likelihood of future violations or accidents, hopefully producing a response such as; “Well, I will make sure to drive alone, or with other kids only if an adult is present, or with Jane, who always wants me to drive carefully.”

This questioning process could result in a preliminary probationary plan to be presented to the court. Note that the proposed conditions are now in essence coming from the client, not from the lawyer or the court, and thus should be understandable to the client and perceived as reasonable, enhancing the chance for compliance if probation is granted.⁸⁰ Probation under this scheme will look more like a behavioral contract than like judicial fiat.

Ideally, the client should play some role in presenting the proposal to the court, and a give and take might follow, leading to acceptance, modification, or, in disappointing cases, to rejection of the plan.⁸¹ If the

1617 (2000). For a recent discussion of offense pathways, or offense process approaches, see Devon L. L. Polaschek, *Relapse Prevention, Offense Process Models, and the Treatment of Sexual Offenders*, 34 PROF. PSYCH.: RES. & PRAC. 361 (2003).

80. A related dialogue springs from some of the research on risk management and the difference between “static” (unchanging) and “dynamic” (changeable) risk factors. Gender and race would be static risk factors, whereas drug use and employment status would be dynamic ones. One approach to risk management is the changing or elimination of dynamic risk factors, factors theoretically within the control of the individual under assessment. Emerging Therapeutic Jurisprudence literature suggests a motivational role for lawyers in prompting clients to change some dynamic risk factors so as to maximize liberty and, at the same time, to take a substantial step in the rehabilitative direction. See Bruce J. Winick, *Domestic Violence Court Judges as Risk Managers*, in JTK, *supra* note 2, at 201, 201-11. An interesting exercise in the risk management area is to ask what the lawyer-client conversation might look like. Keeping with the legal education analogy, might the lawyer in this context sometimes need to do a bit of “lecturing” rather than relying principally on the “Socratic method?” “It is known that factor X makes people more at risk for engaging in violent behavior. If you can change factor X, we can present that to the judge, and hopefully the judge will be impressed. Would you like to give that a shot? How?” Note that the proposed sharing of decision-making between lawyer and client taps into standard social work notions of client empowerment and self-determination. See Hartley & Petrucci, *supra* note 25, at 177.

81. Even if the plan is rejected, the effort was not necessarily wasted: the process may have started the client on a course of cognitive restructuring and relapse prevention, and these cognitive/behavioral changes can benefit the client even during incarceration and can surely be

client is likely to speak to some of this in court, either proactively or at least in responding to the court's questions and concerns, the lawyer will need to prepare the client for the sentencing hearing.

As part of the preparation, the lawyer could present the type of 'mild counterarguments' that research suggests can be useful in grounding a client in the propriety of the present plan. For instance: "OK, now I want to ask you some questions that the judge or prosecutor might ask at the hearing, like: Why should I feel comfortable granting probation? Judge X granted you probation last time around, and probation was revoked very soon thereafter."

One would hope the client would personally come up with a suitable answer: "This time is different. I have been going to AA meetings for almost a year, and I have good attendance records. I have a job now, and I want to keep it. I don't go to that bar where I used to get into trouble. And I'm going to enroll in an anger management class that my lawyer and I visited a couple of weeks ago."

Knowing something about the compliance principles, including the fact that compliance is increased if some family or friends are aware of a client's proposed course of action, also suggests a role for the lawyer. The lawyer might discuss this with the client and suggest to the client the usefulness of having some agreed-upon family members or friends familiarize themselves with the proposed conditions and attend the hearing. But the lawyer should be clear that the client truly agrees with the idea of involvement of family and friends.

Ordinarily, if probation is granted, the court will have no further contact with the defendant unless revocation is sought for an alleged violation of the terms of probation. Some Therapeutic Jurisprudence writing, however, taking a page from the apparently successful ongoing judicial supervision practices of drug treatment court, has urged ordinary criminal courts to schedule periodic review hearings in probation cases.⁸²

Review hearings can monitor not only the defendant's compliance,

beneficial when planning for prison release and reentry. At some point, the lawyer should discuss with the client the usefulness of even the rejected plan, but of course should wait until the timing is right—until the dust settles and the client is able to think beyond having to face an incarcerative penalty. When a disappointing disposition occurs, this "long range" view of rehabilitation is also important in terms of defense counsel "believing in" the client and some of the client's strengths and achievements: "the defendant's forceful efforts and the intervention of a respected legal professional who 'believed in' the defendant may still, despite the setback, sow the seeds for eventual desistance on the part of the defendant." See Wexler, *supra* note 5 (referring to criminological work on offender desistance and the role of narrative development).

82. Robes, *supra* note 71, at 251.

but can also assess whether various agencies have been providing the offender with appropriate services.⁸³ If such hearings are held, defense counsel should recognize that there is a meaningful role to play even if all is going well.

Defense attorneys rapidly understand their role when violations are alleged and when revocation or other adverse sanctions will possibly result. But, attorneys can play an important role in routine review hearings by marshalling, with the client, impressive evidence of success, and presenting it to the court, thereby helping to reinforce desistance from criminal activity.⁸⁴

Drug treatment courts also hold “graduation ceremonies” for clients who successfully complete the program. Graduates and their families attend, and applause is common. Again, receiving praise in this sort of official setting seems to be very meaningful. Accordingly, these ceremonies are not merely “ceremonial,” but appear to have real rehabilitative value, and suggest an important, albeit unconventional, role for counsel.⁸⁵

Given the drug court graduation experience, courts and counsel should consider some sort of in-court acknowledgement when probation is terminated. Indeed, when the probationary period has been going well, counsel should, when available under local law, move for the early termination of probation, hopefully accompanied by an in-court acknowledgement of the probationer’s successful conduct.⁸⁶

83. This ties in with the “good lives” perspective mentioned earlier. See Ward & Stewart, *supra* note 73 and accompanying text.

84. Robes, *supra* note 71, at 251-52; see also Quinn, *supra* note 14, at 39 (counsel important at drug treatment court post-adjudication status hearings even when all is going well and when sanctions are not at issue). Caroline S. Cooper & Shanie R. Bartlett, *SJI National Symposium on the Implementation and Operation of Drug Courts*, available at <http://spa.american.edu/justice/publications/juvrptt.htm>. (last visited Jan. 27, 2005) (surveying drug court participants themselves report value in regular judicial contact). One DTC judge told me that, with retained counsel, to cut down on expenses, the judge only asks counsel to come to a review hearing if the judge expects “to be mean.” This raises an interesting question regarding costs, therapeutic aims, and retained versus publicly-provided legal services.

85. Robes, *supra* note 71, at 251.

86. ARIZ. REV. STAT. § 13-901(E) (2002).

The court, on its own initiative or upon application of the probationer, after notice and an opportunity to be heard for the prosecuting attorney, and on request, the victim, may terminate the period of probation or intensive probation and discharge the defendant at a time earlier than that originally imposed if in the court’s opinion the ends of justice will be served and if the conduct of the defendant on probation warrants it.

Id.

Under certain drug treatment initiatives, a similar court hearing can be held to underscore the “successful completion of treatment.” CAL. PENAL CODE § 1210(c) (2004).

This overall approach to probation urges lawyers and clients to craft innovative, individually-tailored probation conditions. Yet, for other reasons, the notion of innovative probation conditions has recently come under attack, most notably in a fascinating and thorough article by Professor Andrew Horwitz.⁸⁷

The Horwitz article should be required reading for lawyers and students contemplating a TJ-oriented criminal law practice. Horwitz details the many horrendous probation conditions sometimes employed by courts.⁸⁸ He notes, too, that such conditions are rarely reviewed by appellate courts, either because they were arrived at through plea negotiations, and are thus part of the deal accepted by the defendant, or, relatedly, because defendants are understandably reluctant to challenge conditions on appeal. This is because, in the event of success, the prevailing law would permit resentencing—and would therefore leave open the possibility of a sentence of incarceration.

His proposed solution is two-fold. First, he would leave the notion of innovative probation conditions to the legislature, and would basically restrict allowable conditions to those already common in the jurisdiction. Second, he would encourage defendants to appeal controversial conditions, and would disallow a sentencing court from imposing incarceration after a condition has been successfully challenged on appeal. It is hard to argue with anything Horwitz says about the abuses; they are really frightening. I wonder, though, if his proposed solutions might themselves pose some serious problems.

As noted above, Therapeutic Jurisprudence work urges defense lawyers to work with clients and helping professionals to craft and propose appropriate, responsive, innovative plans. Tying judges' hands to what is already common in the jurisdiction could therefore be a real impediment to lawyers trying to do more in the rehabilitative realm.

I also question whether it is wise to actually encourage defendants to

87. Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (2000).

88. Picture yourself having just been convicted of a relatively minor criminal offense. Imagine that you are living in a country in which the judge could prohibit you from participating in political speech or protest, prohibit you from associating with 'known homosexuals,' prohibit you from association with your spouse or fiancé, prohibit you from belonging to the religious organization of your choice, require you to submit to a search of your person or your home at any time of day or night, require you to wear a fluorescent pink bracelet proclaiming your offense, or banish you from the country altogether. This country must be an authoritarian dictatorship of some kind, a country that is not governed by a constitution or the rule of law, right? Wrong. This nation is the United States of America as the legal system exists today. A trial judge has imposed each of the sentences just listed, and an appellate court has allowed each to stand. *Id.* at 76.

challenge probation conditions on appeal. In many cases, they will challenge and lose. Will that only serve to increase their feeling that they have been treated unfairly? Would that be likely to adversely affect their compliance?

It would be helpful to learn, too, whether a study such as Horwitz' revealed any interesting/innovative cases where courts imposed unique but really appropriate conditions. My guess is that such conditions, if they exist, are even less likely to come to light in the appellate courts, but it would be useful to know what 'good' lawyering has led to in the area.⁸⁹

Finally, Horwitz speaks of "netwidening." Apparently, many who have been subjected to unusual conditions were persons who, with or without such conditions, would have been sentenced to probation; thus, these troublesome conditions were simply "add ons," widening the net of governmental power over the probationers. I am nonetheless concerned that, under Horwitz' proposal, defendants themselves will not be able to suggest certain conditions, and courts will thus often be inclined to incarcerate offenders rather than to order probation.

None of this is intended to suggest that what Horwitz has unearthed is not really troubling, or that what has gone on is not truly outrageous. He surely makes the case. It is only that this is an extremely difficult—and fascinating—area of the law. Indeed, it provides considerable food for thought for TJ lawyering whether or not Horwitz' law reform approach is accepted. Consider, for example, the lawyering implications of the condition of probation upheld in the Wisconsin Supreme Court case of *State v. Oakley*.⁹⁰

David Oakley, father of nine, was convicted of the Wisconsin felony of intentionally refusing to pay child support. In lieu of prison, the trial court sentenced him to probation, imposing as a condition that, during the probationary period, Oakley have no more children unless he could demonstrate his ability to support them and his other children.

Oakley challenged the condition, and the Wisconsin Supreme Court upheld it, putting in sharp relief the concerns expressed by Horwitz. But the case also raises another level of lawyering questions, worthy of attention in practice and clinical teaching:

89. A worthwhile project for clinic students might be to interview local lawyers and judges in an effort to determine creative, individually-tailored probation conditions that were never subject to appellate review.

90. See *Wisconsin v. Oakley*, 629 N.W.2d 200 (Wis. 2001); see also DEMLEITNER ET AL., *supra* note 18, at 520; Kelly R. Skaff, *Pay Up or Zip Up: Giving up the Right to Procreate as a Condition of Probation*, 23 ST. LOUIS U. PUB. L. REV. 399 (2004).

Since the court upheld this controversial condition, is it the sort of condition that might ever be urged to a court by the *defendant*? One can imagine the following dialogue between lawyer and client:

Lawyer: Ok, the court may want to let you stay in the community to continue your job and to start paying child support, for if it sentences you to prison, the payment of support would be out of the question. But still, is there any way we can try to convince the court of your genuine change of heart: that you don't want to continue to have children and to shirk your obligations to them?

Client: Well, I could promise not to have any more kids; at least not until I get my act together and can support them.

Lawyer: Would you be comfortable with such a promise?

Client: Yeah; I really shouldn't have any more kids; I don't really want any more kids.

The point is that the types of behaviors (or non-behaviors) contemplated by many of these controversial conditions may be the subject of lawyer/client discussion. This is especially true if the conditions, though controversial, are deemed to be constitutional. If so, is there anything wrong with them being discussed by lawyer and client, by their being proposed by the client, especially if they may be the key to a non-incarcerative penalty?

Indeed, even if the courts were to hold a condition like the above to be unconstitutional, the underlying issue will not necessarily be swept from the judicial mind, and it may still be the subject of lawyer/client dialogue. Consider the following:

Lawyer: The judge might want to give you a break and put you on probation so you can keep your job and start paying child support. But you already have nine kids, and this is freaking out the judge.

Client: What if I promise not to have any more kids? I really don't want any more kids anyway.

Lawyer: Well, the courts have said that such a promise would violate your constitutional rights, so they can't allow you to make such a promise, even if you want to.

Client: Damn. So I go to jail because the judge thinks I might have more kids, even though I don't want more kids?

Lawyer: How else might we be able to convince the court that you won't have any more kids?

Client: What if I got a vasectomy? I thought about doing it a year ago, even spoke to a doctor, who said it's not a difficult procedure. I think he said it might even be reversible if I changed my mind in the future,

but fat chance I would change my mind.

Lawyer: Are you really game for that? It may not be a difficult procedure, but it is a really significant thing to do.

Client: I think so. I'm surely willing to look into it. Like I said, I don't want any more kids anyway. Period.

Lawyer: Well, think about it. It might help. But there are no guarantees. If you do this, you still have to realize the judge might send you to jail. How would you feel in that case?

What all this suggests is that, with controversial and even potentially unconstitutional measures, lawyering may be involved. Although a 'behavioral contract' would not be possible in the case of unconstitutional conditions, the unilateral behavior of the client might eliminate the risk that will be of concern to the court. So, if presented with a *fait accompli*, the court might opt for probation rather than incarceration, although there is of course no guarantee.

These issues are set out as an area worthy of serious discussion. Should lawyers raise these topics? Should they not raise them but discuss them if clients bring them up? If they have a dialogue, can they do so in a way—again, an analogy to the Socratic method—that lessens the lawyer's role in suggesting these controversial procedures ("Listen, have you thought of getting a vasectomy? That might influence the court") but instead inches the client personally to think of and raise the point? Are there ethical or therapeutic distinctions between the two approaches?

6. APPEAL

Following conviction, and especially after the imposition of an incarcerative sentence, the issue of an appeal will arise. With retained counsel, counsel and client will engage in a cost/benefit analysis of sorts. In most cases, however, the client will be indigent, and, given the right to appointed counsel in the first appeal,⁹¹ there are no real disincentives to filing an appeal. Not surprisingly, therefore, the great bulk of appeals result in affirmances.

Therapeutic Jurisprudence considerations abound in the kind of conversations lawyers should have with clients both before an appellate brief is filed and in the aftermath of an appellate determination.⁹² The

91. *Douglas v. California*, 372 U.S. 252 (1963).

92. In the event of an appellate reversal, counsel will need to explain what has happened and what comes next, especially in terms of possible new trials and the like. It is crucial, in such cases, that a client not think incorrectly that complete freedom has been won. Of course, all of this should ideally have been first explained to the client earlier, at the time counsel explained the

relevant Therapeutic Jurisprudence literature on this topic actually relates to the therapeutic role of appellate courts, rather than to lawyers, but the concerns are closely connected.

Ronner and Winick have written about the antitherapeutic aspects of *per curiam* summary affirmances.⁹³ They note how an appellate ruling that says no more than “affirmed” may leave an appellant feeling that the court did not attend to his or her case. Ronner and Winick suggest that courts accord appellants a sense of “voice” by preparing very brief opinions that will at least indicate that the briefs have been read and understood. In essence, instead of a summary affirmance opinion, courts could write a type of “therapeutic” affirmance, though they would of course not be designated as such.⁹⁴

arguments to be made and the relief sought. A valuable educational exercise would be for lawyers and law students to contemplate the kind of conversation to have with a client before a brief is filed and after an appellate ruling. Also to be considered is whether the conversation should be face-to-face or through correspondence. Of course, the post-ruling conversation will differ markedly if the appellate court reverses or affirms the court below. Mainly, the lawyer will be dealing with appellate affirmances. The present article discusses possible lawyer-client dialogue and conversations not only in the context of appeals, but also in the context of diversion decisions and in the context of formulating proposed conditions of probation and parole. Important as they are, these are only illustrative of the TJ-tinged conversations that can be had throughout the criminal process. For example, the nature—or at least the tone—of a conversation regarding a motion to suppress evidence may be a bit different from the conventional one when it is inspired by a TJ perspective. Legal clinics can discuss what these conversations might look like.

93. Amy D. Ronner & Bruce J. Winick, *The Antitherapeutic Per Curiam Affirmance*, in JTK, *supra* note 2, at 316, 316; see also Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499, 500-07 (2000).

94. Interestingly, a debate currently raging in the federal arena might have an impact on the willingness of federal appellate courts to accept the therapeutic affirmance proposal (of course, the issue would be all the more important if it were transplanted to state appellate systems, where the great bulk of criminal appeals occur). The current debate is whether “unpublished” opinions—available to the parties and available online but not published in the reports—can properly be “cited” by lawyers. These opinions, prepared for the benefit of the parties only, are often not prepared with great care. The judges opposed to “citability” worry that, if these “junk law” opinions are allowed to be cited and quoted, courts will spend considerably more time in preparing them, thus adding significantly to the already immense workload of the appellate courts. See generally, Tony Mauro, *Judicial Conference Group Backs Citing of Unpublished Opinions*, LEGAL TIMES, April 15, 2004, available at <http://www.law.com/jsp/article.jsp?id=1081792928522> (last visited April 23, 2005). Moreover, in connection with our particular concern, consider the following potential consequence: Courts willing to consider the proposal to write brief therapeutic affirmances in lieu of summary *per curiam* opinions might be willing to do so only if such affirmances could be short, skimpy, and not subject to citation. Indeed, under the prospect of citability, many of the short, unpublished opinions now being written might dry up and become the very *per curiam* summary affirmances under attack by Ronner and Winick. This is a fascinating issue. Without the Therapeutic Jurisprudence lens, the arguments appear to put concerns of justice (what some call “secret law”) against concerns of workload and judicial efficiency. But from a Therapeutic Jurisprudence perspective, the justice issues are even richer,

The “real” way an appellant can be shown to have had “voice” is through a conversation with counsel, and, for that to happen, an appellate court opinion, however brief, is essential. Since criminal appeals are typically taken because there is nothing to lose, success on appeal is generally quite an uphill battle.

The appellate lawyer’s task is a highly sensitive one. On the one hand, it is important for counsel to convey the message of voice and validation. On the other hand, it is crucial that counsel not simply serve as an apologist for an appellate affirmance; that appellant know that counsel is truly on the appellant’s side, giving the case the best possible shot. The following remarks are intended to open a discussion about how to strike an appropriate balance.

If the appellate affirmance is much in line with what counsel anticipated (or feared), it is probably helpful for counsel to express that view to the client. “Yeah, as I feared, the court reaffirmed what it had said five years ago in *State v. Wilkins*. We tried to get the court to overrule *Wilkins* or at least to limit it, and the court seemed to understand what we were arguing, but they didn’t buy it.” Unless counsel truly believes the appellate court was muddled, inattentive, or outright stupid, it would seem to be without much purpose so to characterize the ruling. Such a characterization suggests that the client was not accorded “voice” and “validation,” even with a professional advocate speaking for the client, which would be likely to affect adversely the client’s acceptance of the ruling and adjustment to the situation. In the great majority of cases, one would hope the appellate opinion would reflect the fact that the appellant—and thus the attorney as well—was accorded voice and validation.⁹⁵

The conversation a lawyer might have with a client following an appellate ruling relates also to the conversation the lawyer should have had with the client earlier—when the appeal was filed or during the preparation of the appellate brief. Except when the attorney regards a case to be wholly without merit, a brief on the merits is likely to be filed. At that stage, it is important for the lawyer to explain the points and arguments to be made, but also to indicate the state of the prevailing law and the lawyer’s general assessment of what the appellate court will do and why. This is to give the client a realistic view of what to expect, and it also sets the stage for the

for now the “secret law” justice issue needs to be weighed against the procedural justice and Therapeutic Jurisprudence interests of some of the parties.

95. These issues, and conversations, can be applied as well to the trial level when trial courts prepare written opinions, as does the drug treatment court of New South Wales. See New South Wales, *supra* note 31 and accompanying text.

later conversation—the one following the appellate court’s ruling.

And what if the lawyer finds the case completely without merit? *Anders v. California* allows the lawyer to move to withdraw, accompanied by a “minor brief” referring to anything in the record that may arguably support an appeal.⁹⁶ The more recent case of *Smith v. Robbins*, although it does not contemplate attorney withdrawal, and does not require the lawyer to characterize the case as frivolous, in some ways permits a lawyer to do even less than in *Anders*: to merely summarize the case, with references to the record, and to offer to brief any points suggested by the appellate court.⁹⁷

A useful legal clinic exercise would be to discuss, keeping in mind the Therapeutic Jurisprudence considerations, what a lawyer faced with such a case should do, and what the lawyer/client conversation might look like. Might it be preferable for the lawyer to explain why the case, given the state of the law, seems without merit, but, in lieu of withdrawing, to offer to “dress up” the *Anders* brief as a short brief on the merits? Are there any ethical restrictions on such a strategy, such as an ethical obligation not to file a frivolous appeal?⁹⁸ If so, how might ethical considerations form part of the lawyer’s conversation with the client on why another course of action seems in order?

7. CORRECTIONS, RE-ENTRY, AND BEYOND

If a client is confronting an incarcerative sentence, the TJ criminal lawyer should, at some point, engage the client in a dialogue regarding the sentence and the future. Some of this discussion can occur in the legal context of an expected or hoped-for release or conditional release date.

Relevant legal considerations will be earning and forfeiting good time credits,⁹⁹ including sentence reductions for engaging in certain treatment programs.¹⁰⁰ Crucially important, too, is whether the jurisdiction authorizes discretionary parole release and, if so, when the client will be eligible for

96. *Anders v. California*, 387 U.S. 738 (1967).

97. *Smith v. Robbins*, 528 U.S. 259 (2000).

98. *Id.* at 278.

99. James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982).

100. *Lopez v. Davis*, 531 U.S. 230 (2001) (discussing operation and limitation of Federal Bureau of Prisons regulation according early release for completion of a substance abuse program). The U.S. Sentencing Commission’s Ad Hoc Advisory Group on Native American Sentencing Issues recently proposed the adoption of a similar program for sex offender treatment. Report of the Native American Advisory Group, 26-30, Nov. 4, 2003, available at <http://www.ussc.gov/NAAG/NativeAmer.pdf> (last visited April 23, 2005)

parole consideration.¹⁰¹

Over the last couple of decades, as part of the development to reduce sentencing disparity, many jurisdictions have abolished discretionary parole eligibility, perhaps throwing the baby out with the bathwater by sapping the system of a tool to motivate prisoners and to orient them toward release. Recently, however, the crucial question of prisoner reentry has surfaced as a major concern of public policy.¹⁰²

Proposals have emerged to reform and reinvigorate the parole process,¹⁰³ as well as to borrow from the drug court model and to create reentry courts.¹⁰⁴ A reentry court could have conditional release authority¹⁰⁵ or could operate post-unconditional release to work with ex-offenders who volunteer to participate in a program geared toward smoother reentry.¹⁰⁶

This new urgency should carry with it a major role for lawyers—and a very major need for the creation of new structures for providing legal services in this arena. Constitutionally, the Sixth Amendment right to counsel is inapplicable because a “criminal proceeding” terminates with sentencing.¹⁰⁷ The Supreme Court has held that due process applies to a parole revocation proceeding,¹⁰⁸ and the due process right to assigned counsel at such hearings is determined on a case-by-case basis rather than as a hard and fast rule.

In terms of hearings regarding the potential *granting* of parole, as opposed to its potential revocation, matters are even worse. In the 1994 case of *Neel v. Holden*,¹⁰⁹ for example, the Utah Supreme Court ruled that a prisoner was not denied any rights when the parole board refused to allow Neel’s *own* attorney to address the board. The court viewed “somewhat skeptically the suggestion that attorneys should be permitted to address the

101. Joan Petersilia, *What to Do? Reforming Parole and Reentry Practices*, in *WHEN PRISONERS COME HOME* 171, 171 (2003).

102. *See id.*; *see also* Fox Butterfield, *Repaving the Long Road Out of Prison*, N.Y. TIMES, May 4, 2004, at 25A (discussing strong interest in reentry, and innovative programs to provide released inmates immediately with clothing, housing, mental health and drug treatment, and employment opportunities); Carter, *supra* note 48.

103. Petersilia, *supra* note 101.

104. Wexler, *Spain’s JVP*, *supra* note 13.

105. *Id.*

106. Shadd Maruna & Thomas P. LeBel, *Welcome Home?: Examining the “Reentry Court” Concept from a Strengths-Based Perspective*, in *JTK*, *supra* note 2, at 255, 257.

107. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

108. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

109. *Neel v. Holden*, 886 P.2d 1097 (Utah 1994).

Board on their client's behalf in parole hearings."¹¹⁰

In Therapeutic Jurisprudence terms, there is much meaningful work for an attorney at the parole grant hearing stage. The prior detailed discussion of relapse prevention planning and probation is fully applicable.¹¹¹ That discussion proposes a very substantial role for the lawyer in working with the client and others to establish a plan—and proposed conditions—for conditional release.

Once the client has been released from confinement, conditionally or unconditionally, counsel can also help in the tremendously difficult task of reentry and readjustment.¹¹² On the strictly legal side, the client should be clearly informed of any imposed parole conditions. The possibility of parole revocation as well as the possible applicability of recidivist statutes¹¹³ will underscore the high stakes involved in a return to criminality.

Unfortunately, the collateral consequences of a criminal conviction¹¹⁴ are a further impediment to successful reentry, but they are crucial components of an important lawyer/client conversation.¹¹⁵ On a slightly positive note, the restoration of some rights is possible,¹¹⁶ and the lawyer can play an important role in restoration and expungement efforts.¹¹⁷

110. *Id.* at 1103 n.7; see generally Amanda N. Montague, *Recognizing All Critical Stages in Criminal Proceedings: The Violation of the Sixth Amendment by Utah in Not Allowing Defendants the Right to Counsel at Parole Hearings*, 18 *BYU J. PUB. L.* 249 (2003).

111. See *supra* text accompanying notes 67-91.

112. Alan Feuer, *Out of Jail, Into Temptation: A Day in a Life*, in *JTK*, *supra* note 2, at 13-19. See also Butterfield, *supra* note 102; Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 *B.C. L. REV.* 255 (2004) (a just-published excellent piece on the role of the lawyer in re-entry, and on the workings of the Offender Reentry Clinic at NYU law school).

113. Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 *CRIME AND JUST.* 303 (1997).

114. Sabra Micah Barnett, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 *ALA. L. REV.* 375 (2004).

115. These collateral consequences accompany the conviction, and thus attach to probationers as well. Joshua R. DeGonia, *Defining a Successful Completion of Probation Under California's Expungement Statute*, 24 *WHITTIER L. REV.* 1077 (2003).

116. *E.g.*, *ARIZ. REV. STAT. §§ 13-904-912* (2004).

117. Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705 (2003). These too could serve as reintegration ceremonies, or redemption rituals, praising and reinforcing the offender's desistance. *Robes*, *supra* note 71, at 250-51. Of course, some "collateral" consequences are purely informal rather than imposed by law: apartment complexes that may refuse to rent to those with a record, or employers who refuse to hire. Here is an area where the new reentry court concept may help, for landlords and employers may be more willing to consider one with a criminal record if the person is part of—or a graduate of—an official program. TJ criminal lawyers will need to play a role in the creation of these programs, and in informing clients of their

8. STRUCTURE OF LEGAL SERVICES

What is proposed in this essay is a rehabilitative role of the lawyer that extends beyond sentencing, into corrections, conditional or unconditional release, and to life in the community. Of course, such a role can be undertaken by attorneys in private practice, and, as we have seen,¹¹⁸ some, like John McShane, are already moving in that direction.

There is also the possibility of innovative privately funded organizations, such as the Georgia Justice Project,¹¹⁹ which is selective in the cases it takes, but which takes them with the objective of working with a defendant, win or lose, in a very broad, encompassing, and extensive way. Indeed, law school legal clinics could play a very major role in designing structures of legal services and in developing the role of the TJ criminal lawyer. Finally, there is the question of whether and how Public Defender (PD) offices might also be structured to accomplish this sort of role.¹²⁰

If publicly funded legal services are available only through sentencing and appeal (an issue that will be ultimately worthy of reconsideration given the growing importance of prisoner reentry, and of the potentially invaluable role of the lawyer in that enterprise), perhaps a privately funded or foundation funded agency could be set up, along modified Georgia Justice Project lines, to take over where the PD leaves off. And within the PD office, proper thought needs to be given to allowing at least some lawyers the opportunity to play an explicit TJ role.

existence, eligibility requirements, benefits, and potential costs.

118. See *supra* text accompanying notes 6-11.

119. Georgia Justice Project, available at <http://www.gjp.org> (last visited January 27, 2005).

120. With respect to legal clinics, Professor (and former DTC Judge) Greg Baker has established a legal clinic at the law school of William and Mary where supervised students play a role in DTC. Professor Baker's clinic is described under "Courses" in the website of the International Network on Therapeutic Jurisprudence. *Courses in Therapeutic Jurisprudence*, at <http://www.law.arizona.edu/depts/upr-intj/intj-c.html> (last visited Jan. 27, 2005). Gregory Baker & Jennifer Zawid, *The Birth of a Therapeutic Courts Externship Program: Hard labor but Worth the Effort*, 17 ST. THOMAS L. REV. 709 (2005). The recent report of the ABA Justice Kennedy Commission speaks explicitly of law school clinics, and urges such clinics to represent prisoners in the reentry process, reestablishing themselves in the community, regaining legal rights, obtaining relief from collateral disabilities, and the like. ABA Justice Kennedy Commission, *Report to the House of Delegates*, available at <http://www.abanews.org/nosearch/kencomm/rep121d.pdf> (last visited Jan. 27, 2005). See also, Clarke & Neuhard, *supra* note 34, at 47 (suggesting an "intake unit," a "trial unit," a "negotiation team," and a "treatment unit"); Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and the Communities they Serve*, 17 ST. THOMAS L. REV. 779 (2005); See also Nancy Gist, *Foreword to The Executive Session on Public Defense*, 29 NYU REV. L. & SOC. CHANGE 1, 1-2 (2004).

Perhaps these TJ lawyers should conduct initial intake interviews, to assess a defendant's likely interest in pursuing a path that would most likely look to diversion (or participation in a problem solving court such as drug treatment court, mental health court, domestic violence court), plea negotiation, and sentencing. And those lawyers might then follow through representing clients for whom that path seems appealing.

PD offices will need to confront questions of relative caseload and will need to find ways of avoiding the development of intra-office resentment toward lawyers having a less frenzied daily diet. In part, the issue is not unlike the judicial view that sometimes regards problem solving courts as 'boutique' courts tapping a disproportionate share of the resources.¹²¹

In the PD office as well as the other settings of potential TJ criminal law practice, thought needs to be given, as well, to integrating other professionals—such as social workers—into the law office context. Some models already exist, but much more work will need to be done here. A worthwhile project would be to survey the structure of various PD offices along this dimension, to see how they are working, to compare and contrast them, and to propose a model for blending traditional and TJ approaches.

CONCLUSION

This essay has merely scratched the surface of the ways in which lawyers interested in Therapeutic Jurisprudence might invigorate and enlarge their traditional roles, but I hope it will motivate the development of a true TJ criminal defense bar¹²² among private lawyers, public

121. Judge (rtr.) William F. Dressel, *Foreword to JTK, supra* note 2, at xiii-xiv.

122. The present article focuses on the role of the criminal defense attorney. A virtually untouched but crucial area of inquiry relates to the use of the Therapeutic Jurisprudence perspective in the role of the prosecutor in their dealings with defendants as well as with victims. Professor Hartley recently addressed the question of the prosecutor's obligation to domestic violence victims. Note the following interesting conclusion:

Some of the strategies I propose may not be legally necessary for successful prosecution. In cases involving overwhelming physical evidence or airtight eyewitness testimony introducing contextual evidence about the defendant's prior acts or rehabilitating the victim's credibility may seem superfluous. But allowing victims to describe the context of the violence and rehabilitating their character after a defense attack are essential to giving voice to and empowering women through due process.

Hartley, *supra* note 12. Note that Hartley is in essence arguing that the state has, through the operation of the law, caused some additional trauma to the victim (say, in opening her up to an attack on her credibility), and that the prosecutor might thus have a reason, even if not necessary to win the case, to use the law therapeutically—to "rehabilitate" the victim's credibility—and the victim herself. Therapeutic Jurisprudence thinking—but not published writing—has also turned to the prosecutor's obligation to child victim/witnesses. If a prosecutor develops a relationship with a child victim so as to prepare the child to be able to function effectively at an eventual trial,

defenders, law school clinics, and privately-supported defense organizations. Additionally, I hope the essay will be useful in legal education, both in general courses in criminal law and procedure, to explicate and legitimate a non-traditional role, and in sentencing and correction courses. I especially hope it will find its way into clinical legal education. There, the topics explored here can be further developed in teaching, in practice, and in student research projects. After all, the legal clinics are where the initial training of many of tomorrow's criminal lawyers is likely to begin.

what happens to the relationship after the end of the trial? Will the child feel abandoned by an adult he or she has reluctantly come to trust? If so, what might a prosecutor do to avoid this? Might the prosecutor pair with a volunteer from a community agency so that the volunteer will play the major role and the prosecutor a secondary one? After the trial, the prosecutor might gradually, rather than abruptly, fade out, but the volunteer could maintain an ongoing relationship with the child. Besides the prosecution, there is an important role Therapeutic Jurisprudence can play in police behavior, as Swedish psychologist/police officer Ulf Holmberg has begun to document. Holmberg shows how some police interviewing techniques lead to better responses from both victims and persons accused of crime. *See* Holmberg, *supra* note 12.