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## THERAPEUTIC JURISPRUDENCE AND FAMILY-FRIENDLY CRIMINAL LAW PRACTICE

David B. Wexler\*

Therapeutic Jurisprudence (“TJ”) is a field of inquiry that focuses on the therapeutic and anti-therapeutic consequences of legal rules and procedures (the “legal landscape”) and on the roles and behaviors (the “practices and techniques”) of lawyers, judges, and others working in a legal context.<sup>1</sup> The practices and techniques component is terribly important, but is a less obvious subject of legal writing and discussion than are the more conventional topics of legal rules and legal procedures. Accordingly, I have, in recent years, made a special effort to encourage the development, collection, refinement, and dissemination of TJ practices and techniques. Early examples in the criminal law realm include a letter written by a judge in the United Kingdom to an incarcerated person, and a defense lawyer’s client questionnaire eliciting strengths and hopes.<sup>2</sup>

In fact, the collection and publication of such practices and techniques formed a major part of my 2008 edited book, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice*.<sup>3</sup> For instance, one innovative practice featured in the book was assistant federal public defender Joel Parris’s Probation Progress Report filed on behalf of a client who was doing well during her probationary period in the community.<sup>4</sup> Soon after the publication of *Rehabilitating Lawyers*, Professors Susan Brooks and Robert Madden, each with backgrounds in law and social work, published a TJ-oriented book, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice*,<sup>5</sup> for which my late colleague Bruce Winick and I were pleased to prepare a Foreword. Brooks and Madden introduced some new social science themes into their proposed process for effective lawyering and counseling.<sup>6</sup> Most relevant for our

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1. See generally David B. Wexler, *Therapeutic Jurisprudence: An Overview*, available at [www.therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org) (website of the International Network of Therapeutic Jurisprudence) and [www.facebook.com/TherapeuticJurisprudence](http://www.facebook.com/TherapeuticJurisprudence) (TJ Facebook page).

2. REHABILITATING LAWYERS, *infra* note 3, at 172.

3. REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 143–255 (David B. Wexler ed., 2008) [hereinafter REHABILITATING LAWYERS]. This text consists of original essays as well as reprinted pertinent articles. For the sake of convenience and simplicity, references to articles that are also contained in the book will simply be cited to the book; see also David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 MONASH U. L. REV. 33 (2011) (urging the importance of collecting creative practices and techniques).

4. *Id.* at 181–83.

5. RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden eds., 2010).

6. *Id.* at 4.

present purposes is their emphasis on the importance of understanding a client's situation within a family systems context.<sup>7</sup>

The Brooks-Madden work has induced me to look in retrospect, through family-sensitive eyes, at three of the practices collected in *Rehabilitating Lawyers*.<sup>8</sup> Interestingly, the three illustrations appear consecutively in the book and, conveniently for the purposes of our discussion, they move from the simplest to the more complex and thus will be reviewed in their order of appearance.

### I. CONDITIONAL SENTENCE TO BE SERVED IN THE COMMUNITY

We begin with an example from Ottawa, Canada, where attorney Michael Crystal's TJ-orientated criminal law office submitted a client sentencing brief urging, in lieu of incarceration, a conditional sentence (somewhat akin to probation) to be served in the community.<sup>9</sup> Dr. Karine Langley, a counselor and, at the time, legal assistant and Director of Therapeutic Solutions for the firm, filed an affidavit as part of the brief to explain that if granted a conditional sentence, the client, John X, would be living with his mother, Mrs. Sophie X.<sup>10</sup>

Working with Mrs. X, Dr. Langley drafted a form letter that was then circulated by Mrs. X to her neighbors, people who had known John for many years. With her affidavit, Dr. Langley attached a number of the neighbors' reply letters stating: a) they would have no fear for their safety or that of their family should John be released to live with his mother, and b) if they were provided a copy of John's sentencing conditions, they would not hesitate to report John to the police if he were in violation of the conditions.<sup>11</sup>

This example is a simple, straightforward, but powerful illustration of a creative and useful TJ practice and technique. The law firm was able to work with the defendant's mother not only to provide housing for the defendant, but also to go door-to-door seeking community support for the living arrangement.<sup>12</sup> At the same time, the neighbors agreed to provide a watchful eye if asked to do so.<sup>13</sup>

### II. CLIENTS WITH FETAL ALCOHOL SPECTRUM DISORDER (FASD)

In the next selection in *Rehabilitating Lawyers*, center stage is given to another Canadian, Vancouver attorney David Boulding, who specializes in working with clients with Fetal Alcohol Spectrum Disorder (FASD).<sup>14</sup> These clients are principally young adults, usually residing with foster or adoptive parents. Often

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7. *Id.*

8. REHABILITATING LAWYERS, *supra* note 3, at 185–206.

9. *Id.* at 185.

10. *Id.* at 192.

11. *Id.* at 185.

12. *Id.*

13. *Id.*

14. *Id.* at 186–93.

impulsive and suggestible, these young people often find themselves on the wrong side of the law.<sup>15</sup>

Despite their cognitive and behavioral problems resulting from maternal alcohol abuse, these young offenders are typically competent to face criminal proceedings and are legally responsible for their deeds.<sup>16</sup> In Boulding's experience, they overwhelmingly plead guilty, and are often granted probation—but very commonly breach their release conditions.<sup>17</sup> Accordingly, Boulding's legal representation—and advice to attorneys, judges, police, and parents—centers around making probation, and post-probation life, reasonably successful. Boulding suggests that probation orders should be short, simply worded, and easily understandable. For example, "You must be home by 7 p.m. every night."<sup>18</sup> Positive alternatives should also be given: "You cannot go to the 7/11, but you can go to the Quick Stop."<sup>19</sup>

Boulding's most dramatic recommendation is the creation of a family and community network to help with compliance.<sup>20</sup> Borrowing a term used by a doctor, Boulding calls the support system an "external brain," a graphic term that surely captures the concept he is trying to convey, but perhaps with an unnecessary stigmatizing side effect.<sup>21</sup> But the concept itself is reasonably clear; think of it as Dr. Karine Langley's technique on steroids: family and community members helping the client to make and keep important appointments, reminding the client to stay away from certain places and people and to go home at a certain hour.<sup>22</sup> Boulding would like family, friends, and community members to know of the client's condition, to know the probation conditions, and to understand how to make appropriate interventions.<sup>23</sup>

Boulding's approach is a clear example of a "family-friendly" approach, and in fact he and Susan Brooks have recently collaborated on an article.<sup>24</sup> And in subsequent work, Boulding gives advice to parents (often foster or adoptive) who are caring for young adults with FASD.<sup>25</sup> He recommends how, even in advance of legal trouble, parents should go about the task of screening and selecting legal counsel, how they might start to impose, within the family setting, certain behavioral conditions that could even be attached to refrigerator magnets ("be home by 7 p.m.," "don't go to such and such place," etc.) and how they can start

15. *Id.* at 188–89 (explaining that suggestibility and impulsivity are two examples of primary behaviors of FASD clients).

16. *Id.* at 188 ("Fetal Alcohol is not an acceptable excuse for crime—it's an explanation.").

17. REHABILITATING LAWYERS, *supra* note 3, at 191 ("[B]etween 80 and 90 percent of accused plead or are found guilty. . . . [T]his population already has several convictions on their record, so we know that none of the past interventions have worked.").

18. *Id.* at 191.

19. *Id.*

20. *Id.*

21. *Id.* at 192 ("An external brain is people standing in for missing brain cells.").

22. *Id.*

23. *Id.*

24. David M. Boulding & Susan L. Brooks, *Trying Differently: A Relationship-Centered Approach to Representing Clients with Cognitive Challenges*, 33 INT'L J.L. & PSYCHIATRY 448 (2010), available at <http://ssrn.com/abstract=1707618>.

25. David M. Boulding, *Fetal Alcohol and the Law*, available at <http://davidboulding.com>.

utilizing family, friends, and shopkeepers to form a reminder system or “external brain.”<sup>26</sup>

If and when there is an infraction, Boulding notes that the entire apparatus can quickly be put in overdrive. Imposition of curfews, specified “no go” places, no contact orders regarding certain people, and regular reminders will show the judge that the matter can be kept under control without major judicial action.<sup>27</sup> This “preventive” advice is typically geared toward the parents, and is especially interesting for it illustrates some blurring, between the youth and the family, and the identity of the true client.<sup>28</sup> That issue comes into sharp relief with the final example below.

### III. A JAILHOUSE INTERVENTION

In one sense, the so-called “jailhouse intervention” case of Dallas TJ attorney John McShane, whose practice involves only collaborative law and TJ-oriented criminal and professional discipline matters, seems reasonably straightforward. McShane planned to visit a jail inmate charged with arson and to try to arrange a conditional bond so that the inmate could be released to drug and mental health treatment.<sup>29</sup> However, any situation referred to as an “intervention” cannot, in the final analysis, be simple and straightforward, and McShane’s case was no exception.

In this case, the family had retained a well-known defense lawyer, who immediately filed a Motion for Bond.<sup>30</sup> The family then added McShane to the defense team because of his reputation as a therapeutic jurisprudence criminal lawyer. In McShane’s words, his “job was to intervene with the defendant, convince him to go to treatment, and then persuade the judge at the bond hearing to release him on a conditional bond so he could attend treatment.”<sup>31</sup>

McShane’s essay in *Rehabilitating Lawyers* contains copies of his briefs introducing the court to TJ and to McShane’s role as a TJ lawyer.<sup>32</sup> The essay demonstrates his remarkable intervention work facilitated by his own status as a twenty-six-year clean and sober recovering addict, and makes for spellbinding reading.<sup>33</sup> He recounts several interviews with the jailed defendant, which

26. *Id.* at 12 (TJ literature has something important to say about how judges might go about crafting and imposing probation conditions in a way that will further compliance (e.g., thinking of probation as a behavioral contract, seeking the offender’s input in devising a plan to avoid reoffending, and the like), and it would be interesting to educate parents on how they might use some of those judicial techniques in their own parenting when they find it important to impose some behavioral constraints on their child.). For the judicial techniques, see REHABILITATING LAWYERS, *supra* note 3, at 31–38.

27. Boulding, *supra* note 25, at 5 (“[T]he legal community needs to know you are prepared to make the necessary consequential interventions now . . . you may be able to convince a [j]udge jail is not necessary . . . or less jail is required.”).

28. *Id.*

29. REHABILITATING LAWYERS, *supra* note 3, at 194.

30. *Id.*

31. *Id.*

32. *Id.* at 193–206.

33. *Id.*

culminate in the defendant agreeing to accept McShane as his lawyer.<sup>34</sup> Moreover, the story displays a happy ending: successful treatment, a lenient plea bargain agreement, a successfully served probationary period and, as of the time that McShane wrote the essay, a clean and sober citizen, reunited with his family, holding a good job, and serving as an upright citizen.<sup>35</sup>

But this was a tricky case requiring complex legal logistics—we might even say juridical gymnastics. First, McShane was initially retained by the family to attempt an “intervention” with their jailed relative.<sup>36</sup> The defendant himself was indigent and any bond would have had to be paid by the family.<sup>37</sup> But as a condition of undertaking the intervention, McShane insisted the family pay only a “going to treatment” bond and not a “getting back on the street” bond.<sup>38</sup>

Later, when he saw the defendant at the family’s request, McShane discussed the agonies of addiction and depression, and suggested that treatment might offer another way to live.<sup>39</sup> Eventually, McShane offered to represent the defendant in an effort to have him released from jail and transferred to a treatment center.<sup>40</sup> Again, McShane imposed a condition on the representation, which the client ultimately accepted:

His family would only post this bond and stay committed to it if he remained in the treatment center. Leaving the treatment center against medical advice or being expelled from the treatment center would result in revocation of the bond and re-arrest.<sup>41</sup>

In an explanatory footnote, McShane notes that being able to discourage family members from posting “street bond” is “perhaps the luxury of having a private practice with my services being limited to therapeutic goals.”<sup>42</sup> “Of course,” McShane continues, “I always make sure the defendant has a traditional defense lawyer in place who can seek all appropriate avenues of jail release separate and apart from my therapeutic efforts.”<sup>43</sup> The defendant is “free to reject my offer and be represented only by his other defense counsel.”<sup>44</sup> Finally, McShane acknowledges that, “in an indigent defense practice, I would not always have the luxury of conditioning my representation on the defendant entering a treatment program.”<sup>45</sup> However, “in my *pro bono* cases, I am sometimes able to negotiate a

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34. *Id.* at 195.

35. *Id.* at 197–98.

36. REHABILITATING LAWYERS, *supra* note 3, at 194.

37. *Id.*

38. *Id.*

39. *Id.* at 195.

40. *Id.*

41. *Id.*

42. REHABILITATING LAWYERS, *supra* note 3, at 194 n.1.

43. *Id.*

44. *Id.*

45. *Id.*

scholarship bed for my client in a treatment center.”<sup>46</sup> This allows McShane to use this approach, even with consenting indigent clients.

### CONCLUSION: THE THREE CASES AS A POTENTIAL PRACTICE PACKAGE

These three cases as a package offer us an opportunity to start to conceptualize some components of a family-friendly criminal law practice, and to think about its challenges and potential benefits. McShane’s essay opens up many issues for discussion: 1) the family as client; 2) the charged individual as client; 3) the conditioning of representation on therapeutic choices; 4) representation shifting from client (family) to client (individual); 5) the coordination between traditional and TJ private counsel; 6) the impact of indigency; and 7) the possible relationship between private attorneys and public defenders.<sup>47</sup> Tackling these sorts of questions will be part of the excitement of developing and nurturing a family-friendly TJ criminal law practice.<sup>48</sup>

A practice with a heavily “preventive” role is a direction in which some of Boulding’s work leads us.<sup>49</sup> As both Boulding and Langley demonstrate, there is great potential for a lawyer to marshal family, friends, and other community members to serve as an effective support system. In some cases, the support system may operate in a purely *preventive* sense, in other cases as a criminal justice system *front-end* sense (as in diversionary<sup>50</sup> or probationary dispositions), and in still others as a criminal justice system *back-end* sense (as in parole and re-entry).<sup>51</sup>

46. *Id.*

47. For a very preliminary TJ discussion of the need to develop coordination of counsel, *see id.* at 131–32.

48. *See generally* Kristin Henning, *Defining the Lawyer-Self: Using Therapeutic Jurisprudence to Define the Lawyer’s Role and Build Alliances that Aid the Child Client*, in REHABILITATING LAWYERS, *supra* note 3, at 327–49 (discussing the issue of representing an individual client, rather than a family unit, in the area of juvenile delinquency). Of course, the issue of the juvenile’s decisional role will need to be discussed with the parents in a very tactful and sensitive way. *See also* Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001) (for a discussion of therapeutic jurisprudence of juvenile delinquency in an embedded family context, including questions of a court’s jurisdiction over the parents); Enid Coetzee, *Can the Application of the Human Rights of the Child in a Criminal Case Result in a Therapeutic Outcome?*, 13 POTCHEFSTROOM ELEC. L.J., NO. 3 (2010) (discussing how the law of South Africa should consider the human rights of the child in the context of parental sentencing), *available at* <http://dspace.nwu.ac.za/handle/10394/4052>.

49. Such a practice, largely involving parents as clients, could easily fit into private practice. But it raises interesting questions for the counseling of indigent families. Presumably, this function would fall outside the traditional scope of public defenders’ offices (unless advice were rendered to family members *after* a criminal case had been resolved and even then there would be complications to overcome because questions would arise about whether the lawyer was now representing the family as well as the youth). A preventive practice, with indigent parents as client, might open up new avenues for legal services offices, for foundations, and for law school or interprofessional clinics.

50. *See generally* David B. Wexler, *Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion*, 10 FLA. COASTAL L. REV. 361 (2009) (discussing TJ and diversion).

51. *See generally* David B. Wexler, *Retooling Reintegration: A Reentry Moot Court*, CHAPMAN J. OF CRIM. JUST. (forthcoming 2011) (discussing parole issues), *available at* <http://ssrn.com/abstract=1526626>. Some tribal courts authorize the judge to grant parole after the service of half the sentence. That legal structure, not known in American state or federal courts, can be infused with TJ principles to create a reentry court. For a proposal to do just that, and to create an interprofessional clinical program to help prepare incarcerated persons for parole and reentry, *see* REHABILITATING LAWYERS, *supra* note 3, at 313–16. Using the family and community approach discussed by Boulding might be particularly promising in this context because of family and community networks in tribal communities. For a proposal to introduce the power of a trial court to reconsider an already-imposed

Law school clinical programs—or inter-professional clinics (law, social work, etc.)<sup>52</sup>—might be involved in projects such as those noted above, providing a valuable public service while at the same time sensitizing future lawyers to the prospects and possibilities of a TJ practice. The growth of this dimension of law practice will be greatly facilitated if ways are devised to continually tap practitioners to share in the project of creating, refining, collecting, and disseminating family-friendly TJ criminal law practices and techniques. One promising forum for such activity might be in discussion sessions following continuing legal education lectures and the like. And as Monash Law Dean Arie Freiberg has noted, once attention has been directed to an area and a conceptual framework has been launched to think about the issue, the stage can be set for much more activity in that area.<sup>53</sup> I hope this essay will help to provide an initial framework for future thinking and development.

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sentence into American law, a mechanism that seems now to exist in robust fashion only in the state of Maryland, see Cecilia M. Klingele, *Changing the Sentence without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).

52. REHABILITATING LAWYERS, *supra* note 3, at 313–16 (discussing a proposed interprofessional clinic in tribal court); see also Jennifer L. Wright, *Therapeutic Jurisprudence in an Interprofessional Practice at the University of St. Thomas Interprofessional Center for Counseling and Legal Services*, 17 ST. THOMAS L. REV. 501 (2005).

53. Arie Freiberg, *Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation*, RG Myers Memorial Lecture (Oct. 25, 2010), available at <http://ssrn.com/abstract=172238>.



