Therapeutic Jurisprudence and Family-Friendly Criminal Law Practice

David B. Wexler
The University of Arizona
James E. Rogers College of Law

February 2011
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. 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 UK judge’s letter written to an incarcerated person, and a defense lawyer’s client questionnaire eliciting strengths and hopes.

In fact, the collection and publication of such practices and techniques formed a major part of my 2008 edited book, *Rehabilitating Lawyers: Principles and Techniques for Criminal Law Practice*. For instance, one innovative practice featured in the book was assistant federal public defender Joel Parris’ Probation Progress Report filed on behalf of a client doing well during her probationary period in the community.

Soon after the publication of *Rehabilitating Lawyers*, Professors Susan Brooks and Robert Madden, each with backgrounds in both law and social work, published a TJ-oriented book, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice*, 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. Most relevant for our present purposes is their emphasis on the importance of understanding a client’s situation within a family systems context.

---

1 Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico, and Distinguished Research Professor of Law Emeritus, University of Arizona. The author is best reached by email at davidbwexler@yahoo.com
4 Id. at 181-83.
5 Id. at 172-80.
6 Id. supra n. 3, at 172-80.
7 Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice (Susan L. Brooks & Robert G. Madden, eds.) (2010).
The Brooks-Madden work has induced me to look in retrospect through family-sensitive eyes at three of the practices collected in *Rehabilitating Lawyers*. 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.

1. **Conditional Sentence to be Served in the Community**

We begin with an example from Ottawa, where attorney Michael Crystal’s TJ-oriented 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. Dr. Karine Langley, a counselor and, at the time, a legal assistant and Director of Therapeutic Solutions for the firm, filed an affidavit as part of the brief, and explained that, if granted a conditional sentence, the client, John X, would be living with his mother, Mrs. Sophie X.

Working with Mrs. X, Dr. Langley drafted a form letter that was then circulated by Mrs. X to her neighbors, people who knew John for many years. With her affidavit, Langley attached of number of neighbor letters stating a) they would have no fear for their safety or for 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.

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. At the same time, the neighbors agreed to provide a watchful eye if asked to do so.

2. **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). These are principally young adults, usually residing with foster or adoptive parents. Often impulsive and suggestible, these young people often find themselves on the wrong side of the law.

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. In Boulding’s experience, they overwhelmingly plead guilty, and are often granted probation—but very commonly breach their release conditions.

Accordingly, Boulding’s legal representation—and advice to attorneys, judges, police, and parents—centers around making probation—and post-probation life—reasonably successful. Probation orders, he suggests, should be short, simply worded, and easily understandable: “you must be home by 7pm every

---

8 *Rehabilitating Lawyers*, supra n. 3, at 185-206.
9 Id. at 186-93.
night.” Positive alternatives should be given: “you cannot go to the 7/11: you can go to the Quick Stop.”

Boulding’s most dramatic recommendation is the creation of a family and community network to help with compliance. 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. 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, to go home at a certain hour, and the like. Boulding would like many 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.

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. And in other work, available online, Boulding gives advice to parents (often foster or adoptive) caring for young adults with FASD. 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 can even be attached to refrigerator magnets (“be home by 7pm”, “don’t go to such and such place”) and how they can start tapping family, friends, shopkeepers to form a reminder system or “external brain.”

If and when there is an infraction, Boulding notes that the entire apparatus can be quickly put in overdrive (imposition of curfews, specified “no go” places, no contact orders regarding certain people, regular reminders), all of which will show the judge the matter can be kept under control without major judicial action. But the “preventive” advice is basically geared to the parents, and is especially interesting for it illustrates some blurring, between the youth and the family, of the identity of the true client. That issue comes into sharp relief with our final example, immediately below.

3. 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: to visit a jail inmate charged with arson and to try to arrange a

---

10 Id. at 191.
11 Id. at 192.
14 I should add that the 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 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 n. 3, at 31-38.
conditional bond so that the inmate could be released to drug and mental health treatment. But any situation referred to as an intervention” cannot in the final analysis be simple and straightforward, and McShane’s case was no exception.

The family had in this case retained a well-known defense lawyer, who immediately filed a Motion for Bond, and the family then added McShane to the defense team because of his reputation as a therapeutic jurisprudence criminal lawyer. In McShane’s words, “my 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.”

McShane’s essay in *Rehabilitating Lawyers*, which contains copies of his briefs introducing the court to TJ and to McShane’s role as a TJ lawyer, and which demonstrates his remarkable intervention work facilitated by his own status as a 26 year clean and sober recovering addict, makes for spellbinding reading. He recounts his several interviews with the jailed defendant, culminating in the defendant agreeing to accept McShane as his lawyer. And, what’s more, the story has a happy ending: success in treatment, a lenient plea bargain agreement, a successfully-served probationary period, and, as of the time McShane wrote, a clean and sober citizen, reunited with his family, holding a good job, and serving as an upright citizen.

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. The defendant himself was indigent and any bond would have had to be paid by the family. 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.

Later, when he saw the defendant at the family’s request, McShane discussed the agonies of addiction and depression, and suggested treatment might offer another way to live. Eventually, McShane offered to represent the defendant in an effort to be released from jail and to be transferred to a treatment center. 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.

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.”

---

15 Rehabilitating Lawyers, supra n. 3, at 194.
16 Id. at 193-206.
17 Id. at 195.
18 Id. at 194.
19 Id. at 195.
20 Id at 194, n.1.
traditional defense lawyer in place who can seek all appropriate avenues of jail release separate and apart from my therapeutic efforts.” The defendant is “free to reject my offer and be represented only by his other defense counsel.” 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.” But “in my pro bono cases, I am sometimes able to negotiate a scholarship bed for my client in a treatment center,” and that allows McShane to use this approach in such cases 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: the family as client, the charged individual as client, the conditioning of representation on therapeutic choices, representation shifting from client (family) to client (individual), the coordination between traditional and TJ private counsel, the whole question of indigency and its impact, the possible relationship between private attorneys and public defenders, and much more. Tackling these sorts of questions will be part of the excitement of developing and nurturing a family-friendly TJ criminal law practice.

One can imagine, too, a practice with a heavily “preventive” role, a direction in which some of Boulding’s work leads us. And 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. The support system may operate in some cases in a purely preventive sense, in other cases in a

---

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

22 The issue of representing an individual client, rather than the family unit, has been discussed in the area of juvenile delinquency. See the discussion of that and many other issues in Professor Kristin Henning’s essay in Rehabilitating Lawyers, id at 327, 349. 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.


23 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.
criminal justice system *front-end* sense, as in diversionary\(^{24}\) or probationary dispositions, and in other cases in a criminal justice system *back-end* sense, as in parole and re-entry.\(^{25}\)

Law school clinical programs—or interprofessional clinics (law, social work, etc)\(^{26}\)—might rather easily 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. And the growth of this dimension of law practice will be greatly facilitated if we can devise ways of continually tapping 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.\(^{27}\) I hope this essay will help to provide an initial framework for future thinking and development.


\(^{25}\) For parole, see David B. Wexler, *Retooling Reintegration: A Reentry Moot Court*, Chapman J. of Crim. Just. (forthcoming), available at [http://ssrn.com/abstract=1526626](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 n. 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 into American law the power of a trial court to reconsider an already-imposed sentence—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. (discussing the proposal and the Maryland law), available at [http://ssrn.com/abstract=1576131](http://ssrn.com/abstract=1576131).

\(^{26}\) For a proposed interprofessional clinic in tribal court, see the discussion in *Rehabilitating Lawyers*, supra n. 3, at 313-16. 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).