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# AN RSVP TO PROFESSOR WEXLER'S WARM THERAPEUTIC JURISPRUDENCE INVITATION TO THE CRIMINAL DEFENSE BAR: UNABLE TO JOIN YOU, ALREADY (SOMEWHAT SIMILARLY) ENGAGED

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**Abstract:** This Article responds to Professor David B. Wexler's recent suggestion that adopting Therapeutic Jurisprudence ("TJ") principles to create a new type of "rehabilitative" defense lawyer could improve the criminal defense bar. Contrary to the empirical foundation of the therapeutic justice movement, many of his proposed changes seem unsubstantiated. Others, such as calls for creative plea bargaining, are already part of the practice of quality defense attorneys. The "rehabilitative," TJ defense lawyer may be overly paternalistic, imposing his interpretation of the facts and his standards of appropriate behavior on the accused; such a lawyer also may not comport with express ethical standards. Instead, the tradition of zealous and quality advocacy, whether in a law school clinic or in a public defender's office, best serves the interests of defendants.

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\* © 2007, Mae C. Quinn, Associate Professor of Law, University of Tennessee College of Law ([mquinn3@utk.edu](mailto:mquinn3@utk.edu)). For offering tremendously helpful comments on this Article, I am most grateful to my colleagues Dwight Aarons, Ben Barton, Jerry Black, Doug Blaze, Joe Cook, Tom Davies, Iris Goodwin, Jennifer Hendricks, Glenn Reynolds, Dean Rivkin, Otis Stephens, and Paula Williams. Monroe Freedman, Kate Kruse, Paul Marcus, Michael Perlin, Jane Spinak, Tony Thompson, and Bruce Winick also were most kind to provide their thoughts and feedback. My deep appreciation is extended to Randy Hertz for organizing the first New York University Law School Clinical Writers Workshop, facilitating the Workshop's Criminal Practice Group, and introducing me to my fellow participants Adele Bernhardt, Lily Camet, and Kimberly Thomas, who, along with Professor Hertz, have provided important insights on earlier drafts. I also wish to thank the Southeastern Association of Law Schools ("SEALS") for allowing me to present an earlier version of this paper as part of the 2006 New Scholars Workshop; my SEALS mentor, Professor Arnold Lowey; fellow SEALS presenters Judith Barger, Adam Gershowitz, and Corinna Lain; and panel attendees, including my colleagues Joan Heminway, George Kuney, Donna Luper, Carol Parker, Tom Plank, and Greg Stein. Nick Zolkowski and Tara Wyllie provided excellent research assistance. Special thanks go to Laura Rosenbury for her ideas on RSVP etiquette, and of course, David Wexler, for offering the invitation in the first place, reading and commenting on a draft of this piece, and offering his continuing support of my work.

## INTRODUCTION

For nearly two decades, Professors David B. Wexler and Bruce J. Winick have considered, written about, and advocated a particular way to study law—one that explicitly considers the therapeutic impact of legal rules, procedures, and processes on those they affect. This distinct approach to the law, which has garnered significant support over the years, has been called the Therapeutic Jurisprudence (“TJ”) movement. Although the movement grew out of the mental health law arena and concern for the law’s treatment of the mentally ill, its scope has expanded to other substantive areas. It has also moved from being a school of thought largely rooted in theory to an affirmative reform effort that advocates a particular means of delivering justice in our courts. Most recently, the TJ movement and its reform efforts have turned to criminal law and practice. And most significantly, from this author’s perspective, it has set its sights on the unique work of criminal defense lawyers and students in law school criminal defense clinics. As this Article explains, however, this facet of the TJ movement presents serious implications for the modern justice system.

As part of a recent law school symposium entitled *Therapeutic Jurisprudence in Clinical Legal Education and Legal Skills Training*, Professor Wexler extended a “warm invitation” to “several communities,” including the criminal defense bar and clinical professors, to join him in the TJ movement.<sup>1</sup> His invitation asks those communities to unite to recognize explicitly a special kind of criminal defense practitioner—the “TJ criminal defense lawyer”—and to contribute to an agenda of research, writing, teaching, and practice to foster this “new” role.<sup>2</sup> As described by Professor Wexler, TJ defense attorneys would serve as therapeutic “change agents” within the justice system to actively encourage clients to rehabilitate themselves, modify behaviors, and ultimately

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<sup>1</sup> David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 746 (2005) [hereinafter Wexler, *Rehabilitative Role*]. Professor Wexler’s article is an extension of earlier work that sought to expand TJ’s application to criminal defense practice. Most notably, it builds upon themes Professor Winick raised in *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventative Law Model*, 5 PSYCHOL. PUB. POL’Y & L. 1034 (1999). Professors Wexler and Winick have continued to develop these ideas in further writings. See generally David B. Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, 38 CRIM. L. BULL. 205 (2002); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605 (2006).

<sup>2</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 746–47.

change their lives.<sup>3</sup> As a clinician and former public defender, and in the interest of contributing to the ongoing TJ conversation, I write to respond to Professor Wexler.<sup>4</sup>

I share some of Professor Wexler's concerns about the provision of quality legal representation in this country. I fear, however, that extending TJ principles to criminal defense practice and law school clinic work in the ways he suggests goes too far in pressing the limits of this still very much evolving school of thought. Indeed, doing so may negatively affect our legal system. This new practice-based "dimension" of TJ seems to depart significantly from TJ proponents' prior claim that TJ "is merely a 'lens' designed to shed light on interesting and normative issues relating to the therapeutic impact of the law . . . [and] does not itself provide any of the answers."<sup>5</sup> In fact, Professor Wexler's invitation clearly offers what is supposed to be a correct answer to the question of how lawyers and law school clinics should deliver criminal defense services—using the TJ criminal defense model.<sup>6</sup> Unfortunately, however, this model not only runs the risk of displacing existing defense and clinical community values, but may well conflict with ethical and legal mandates for defense attorneys.

Part I of this Article recounts the development of the TJ movement by Professors Wexler and Winick, its concern with the law's therapeutic and antitherapeutic consequences, and the movement's expansion from the mental health context and the world of theory to other substantive areas of law and the world of practice.<sup>7</sup> In Part II, I outline Professor Wexler's proposal to extend TJ's application to the field of criminal defense work, and his invitation to practitioners and clinicians to join him in promoting a TJ-focused criminal defense bar, whose members would act as therapeutic "change agents" within the legal system and view client rehabilitation as a core value.<sup>8</sup> In Part III, I consider and examine Professor Wexler's invitation, focusing on the

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<sup>3</sup> See *id.*

<sup>4</sup> Professor Wexler has, in turn, responded to my RSVP. David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597 (2007). The *Boston College Law Review* has been kind enough to permit me a few pages at the end of this Article to offer my thoughts on Professor Wexler's response. See *infra* notes 252–270 and accompanying text.

<sup>5</sup> David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 707, 708 (David B. Wexler & Bruce J. Winick eds., 1996).

<sup>6</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 773–74.

<sup>7</sup> See *infra* notes 14–55 and accompanying text.

<sup>8</sup> See *infra* notes 56–133 and accompanying text.

occasion (specifically, the advent of a new kind of defense bar), the menu of best practices it offers, and the list of invitees who have been asked to participate.<sup>9</sup>

As Part III explains, although I am intrigued by Professor Wexler's TJ ideas and agree in several respects with his observations about the criminal justice system, I fear that his current call to action is somewhat misguided.<sup>10</sup> On the one hand, many of the TJ practices Professor Wexler urges are wholly consistent with current conceptions of good defense lawyering.<sup>11</sup> On the other hand, some of the new ideas and practices suggested for TJ defense representation seem to be based upon faulty assumptions about current defense practices, raise serious normative questions, and present a host of legal and ethical concerns for defense attorneys and law clinic students alike.<sup>12</sup> TJ defense representation, then, is no panacea for the problems facing our criminal justice system.

Thus, despite the warmth with which it was extended, and my respect for his well-meaning call to action, I feel the need to decline Professor Wexler's invitation to join him in acknowledging a brand new model of practitioner—the TJ criminal defense lawyer—or to foster development of this special breed of attorney. Rather, as the Conclusion of this Article indicates, I will continue with my prior (somewhat similar) engagement of striving to provide good old-fashioned “zealous” and “quality” criminal defense representation, and encouraging my students to do the same.<sup>13</sup>

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<sup>9</sup> See *infra* notes 134–250 and accompanying text.

<sup>10</sup> See *infra* notes 134–250 and accompanying text.

<sup>11</sup> See *infra* notes 134–149 and accompanying text.

<sup>12</sup> See *infra* notes 150–172 and accompanying text.

<sup>13</sup> See NAT'L. LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 1.1 (1997); see also *infra* note 251 and accompanying text.

I. TJ THEORY: EVOLUTION OF A MOVEMENT<sup>14</sup>

In the 1970s, Professors Wexler and Winick became interested in "the interplay of law and psychology" in "the then nascent field of mental health law."<sup>15</sup> Some of their early work explored the tension between society's interest in controlling the behaviors of those seen as deviant because of mental health problems—for instance by way of civil commitment—and the often conflicting individual interests of mentally ill persons.<sup>16</sup> They expressed concern that the desire to use scientifically based treatments to address mental illness had the potential to eclipse other societal values, such as individual autonomy and personal freedom.<sup>17</sup> Thus, they cautioned against permitting "therapeutic efficacy" to trump all other considerations in mental health law.<sup>18</sup>

Over time, however, Professors Wexler and Winick shifted their focus in the mental health arena.<sup>19</sup> Indeed, they began asking whether mental health law, particularly in light of the expansion of client procedural rights and protections, was doing enough to meet clients' clini-

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<sup>14</sup> Attempting to provide a summary of the TJ movement's teachings is a daunting task. Professors Wexler and Winick's writings on the topic span many years and comprise thousands of pages of books, medical journals, and law reviews. See *infra* note 38 and accompanying text. Moreover, it is always challenging to summarize accurately others' views. This is especially true here because some TJ claims have been described as presenting conceptual dilemmas, and, at least to this reader, appear to conflict in a number of respects. See Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in LAW IN A THERAPEUTIC KEY, *supra* note 5, at 763, 766. Thus, the reader will note my extensive use of direct quotations in an attempt to convey as accurately as possible Professors Wexler and Winick's proposals and suggestions. I have also done my best throughout this Article to reconcile, for purposes of synopsis, what appear to be competing TJ claims, noting potential significant inconsistencies where relevant. I hope that this overview of TJ, particularly given my genuine attempts to grapple with its various teachings, is accepted in the light in which it is offered and not received as a personal indictment or characterized as a misinterpretation of the work. See Wexler & Winick, *supra* note 5, at 707 (arguing that in his review of their book, *Essays in Therapeutic Jurisprudence*, Professor John Petrila "puts words in [their] mouths and critiques [them] for writing a book [they] did not (and would not) write").

<sup>15</sup> David B. Wexler & Bruce J. Winick, *Introduction to ESSAYS IN THERAPEUTIC JURISPRUDENCE*, at ix, ix (David B. Wexler & Bruce J. Winick eds., 1991).

<sup>16</sup> See DAVID B. WEXLER, *MENTAL HEALTH LAW: MAJOR ISSUES* 11–57 (1981).

<sup>17</sup> *Id.* at 29–31; see David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 449, 452–53 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000).

<sup>18</sup> WEXLER, *supra* note 16, at 29–31; see David B. Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289, 313 (1972) (stating that "it should be clear that the eradication of deviance ought not be society's superseding goal").

<sup>19</sup> BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* 12 (1997) ("What can be called the first stage of mental health law was heavily influenced by the civil rights movement and the Warren Court era's developments in the areas of criminal procedure and prisoners' rights.").

cal needs.<sup>20</sup> They claimed that they still "applauded" mental health law's "civil libertarian" focus, but wondered if it was now failing to draw sufficiently from the behavioral sciences.<sup>21</sup>

Specifically, Professors Wexler and Winick feared that mental health law potentially harmed clients more than helped them by promoting "psychological dysfunction" rather than psychological well-being.<sup>22</sup> Such harm, they opined, could result from the application of substantive laws, procedures employed in courts, or the very roles played by judges and lawyers in mental health proceedings.<sup>23</sup> For instance, substantive rules that give individuals the right to refuse treatment might inhibit the underlying therapeutic aims of mental health law.<sup>24</sup> Commitment hearings, although intended to ensure that mentally ill clients receive treatment, might exacerbate clients' conditions by subjecting them to stress and embarrassment during the legal process.<sup>25</sup> Judges and lawyers, too, might individually behave in ways that undermine therapy goals.<sup>26</sup> Such consequences might be "antitherapeutic" for the very individuals mental health law was intended to assist.

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<sup>20</sup> David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* 3, 3 (David B. Wexler ed., 1990).

<sup>21</sup> *Id.* at 3-4.

<sup>22</sup> David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 15, at 17, 19-23.

<sup>23</sup> *Id.* at 24-35; see also WINICK, *supra* note 19, at 4. Winick notes:

Once it is understood that rules of substantive law, legal procedures, and the roles of various actors in the legal system such as judges and lawyers have either positive or negative effects on the health and mental health of the people they affect, the need to assess these therapeutic consequences . . . thus emerges as an important objective in any sensible law reform effort.

WINICK, *supra* note 19, at 4.

<sup>24</sup> See Wexler, *supra* note 22, at 24-30; see also WINICK, *supra* note 19, at 67-91 (examining the therapeutic and antitherapeutic implications of the right to refuse mental health treatment).

<sup>25</sup> See Wexler, *supra* note 22, at 30-32; see also David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Research Tool*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 15, at 303, 307-08 ("[O]ne interested in therapeutic jurisprudence could mine the procedural justice literature with a view to considering how legal proceedings in the mental health area—such as commitment and conditional release hearings—might be modified to increase a litigant-patient's perception of fairness and perhaps to increase treatment compliance and treatment efficacy.").

<sup>26</sup> Wexler, *supra* note 22, at 33-35; see also WINICK, *supra* note 19, at 4; Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of Zimermon v. Birch*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 15, at 83, 132 (opining that "[f]or too long, lawyers and doctors have been in an adversary posture in the hospitalization process, sometimes with the result that the patient becomes a casualty").

Thus, Wexler and Winick instructed that we should "be sensitive to those consequences" and "ask whether [they] can be reduced, and [the law's] therapeutic consequences be enhanced, without subordinating due process and other justice values."<sup>27</sup> As they stated elsewhere, the law's "positive and negative consequences [should] be studied with the tools of the behavioral sciences, and . . . consistent with considerations of justice and other relevant normative values . . . [should] be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones."<sup>28</sup>

This way of thinking formed the basis for "Therapeutic Jurisprudence," or "TJ"—the school of thought that Professors Wexler and Winick established around 1990.<sup>29</sup> Thus, TJ's initial underlying premise was "that mental health law would better serve society if major efforts were undertaken to study, and improve, the role of law as a therapeutic agent."<sup>30</sup> It sought, therefore, "to reorient the field of mental health law to better capitalize on its multidisciplinary potential"<sup>31</sup> and "become more sensitive to insights from the mental health disciplines."<sup>32</sup>

Notably, Wexler and Winick also claimed that "[b]y suggesting the need to identify the therapeutic and antitherapeutic consequences of legal rules and practices," they were not "necessarily suggest[ing] that such rules and practices be recast to accomplish therapeutic ends or avoid antitherapeutic results"<sup>33</sup> or that "therapeutic considerations should trump other considerations."<sup>34</sup> Rather, TJ was merely a tool—one that could be used to identify "questions in need of empirical re-

<sup>27</sup> David B. Wexler & Bruce J. Winick, *Introduction to LAW IN A THERAPEUTIC KEY*, *supra* note 5, at xvii, xvii.

<sup>28</sup> Dennis B. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 17, at 5, 7.

<sup>29</sup> *Id.*; see also WINICK, *supra* note 19, at 11 (explaining that Wexler and Winick began using the term "Therapeutic Jurisprudence" in conference presentations during the late 1980s, but first wrote about it in 1990); Slobogin, *supra* note 14, at 763 (noting that Wexler and Winick introduced the idea of Therapeutic Jurisprudence in the early 1990s); Dennis P. Stolle, *Introduction to PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 17, at xv, xv (noting that Wexler and Winick "formally introduced therapeutic jurisprudence as a distinct legal theory, about a decade ago").

<sup>30</sup> David B. Wexler, *Preface to THE LAW AS A THERAPEUTIC AGENT*, *supra* note 20, at vii, vii.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; see also WINICK, *supra* note 19, at 4 ("Accomplishing positive therapeutic consequences or eliminating or minimizing antitherapeutic consequences thus emerges as an important objective in any sensible law reform effort.").

<sup>33</sup> Wexler & Winick, *supra* note 15, at xi.

<sup>34</sup> Wexler & Winick, *supra* note 27, at xvii.



search" and that "set[s] the stage" for conversations about what might occur when therapeutic values happen to conflict with other societal values, such as "individual autonomy, integrity of the fact-finding process, community safety," or others.<sup>35</sup> Thus, TJ seemed to propose an affirmative agenda for reforming existing nontherapeutic laws and procedures, but also purported to serve as nothing more than a lens through which to examine and analyze such existing elements.

Over time, TJ received significant support, in no small measure due to Professors Wexler and Winick's thoughtful advocacy and genuine enthusiasm for its teachings. Indeed, although they conceded that TJ theory applied most naturally to mental health law, they forecast its eventual spread to a range of legal areas.<sup>36</sup> They themselves began using TJ to examine other legal issues, although at the outset their writings tended to have some connection to the mental health arena.<sup>37</sup>

Professors Wexler and Winick urged others to join them in embracing TJ, resulting in the production of a voluminous body of scholarship that applies TJ principles to a host of concerns.<sup>38</sup> In this way, TJ has shifted its focus from mental health, to dealing with "quasi" mental

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<sup>35</sup> *Id.*; see also Wexler & Winick, *supra* note 5, at 708. Wexler and Winick note:

We have repeatedly emphasized the fact that therapeutic jurisprudence is merely a "lens" designed to shed light on interesting and important empirical and normative issues relating to the therapeutic impact of the law. The therapeutic jurisprudence perspective sets the stage for the articulation and debate of those questions, and hence has the potential for reinvigorating the field, but it does not itself provide any of the answers.

Wexler & Winick, *supra* note 5, at 708.

<sup>36</sup> Wexler & Winick, *supra* note 15, at x (predicting TJ's future application to family, juvenile, and criminal law).

<sup>37</sup> For instance, Professor Wexler coauthored articles with Robert F. Schopp that examined mental health malpractice litigation and negligence claims against psychotherapists. See generally Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 15, at 157; David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, *supra* note 15, at 135.

<sup>38</sup> Marjorie A. Silver, *Professional Responsibility and the Affective Assistance of Counsel* 7 (Oct. 27, 2005) (unpublished manuscript), available at [http://www.law.ucla.edu/docs/silver\\_marjorie\\_-\\_profrespaffectiveasstocounsel.pdf](http://www.law.ucla.edu/docs/silver_marjorie_-_profrespaffectiveasstocounsel.pdf). Professor Silver notes:

A glance at the bibliography of the website of the International Network on Therapeutic Jurisprudence graphically demonstrates the impact and growth of TJ on our legal culture. It lists twenty-five books and monographs, twenty-one symposia and 749 articles, all published over the past fifteen years, the vast majority over the past five or six years.

*Id.* (citation omitted).

health issues,<sup>39</sup> to being an amorphous movement that advocates the application of "therapeutic" principles in a broad range of settings—even those where litigants have not been diagnosed with mental illness.<sup>40</sup> For instance, scholars have applied TJ to everything from duty-to-rescue rules in child abuse matters<sup>41</sup> to policies relating to gays and lesbians in the military.<sup>42</sup> They generally examine the "therapeutic" or "antitherapeutic" consequences of the laws under consideration, based on the extent to which they promote the "psychological well-being" of those affected by them.<sup>43</sup> TJ scholarship has gone so far as to consider the law's therapeutic impact on judges, lawyers, and juries, considering whether their psychological well-being is affected by the law and its processes.<sup>44</sup>

Despite TJ's popularity, it has not been without critics. For instance, in the mid-1990s, at least two scholars examined the tensions and ambiguities in its teachings. They warned that TJ's lack of clear parameters and terminology, if not addressed, would present serious effi-

<sup>39</sup> See *Table of Contents* to *LAW IN A THERAPEUTIC KEY*, *supra* note 5, at vii, vii (entitling section I.B. "'Quasi' Mental Health Law").

<sup>40</sup> WINICK, *supra* note 19, at 12 ("[T]herapeutic jurisprudence has now been applied to analyze issues in correctional law, criminal law, family law and juvenile law, sexual orientation law, disability law, health law, evidence law, personal injury law, labor arbitration law, contract and commercial law, workers' compensation law, probate law, and the legal profession.").

<sup>41</sup> See generally Daniel W. Shuman, *The Duty of the State to Rescue the Vulnerable in the United States*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 5, at 299.

<sup>42</sup> See generally Kay Kavanaugh, *Don't Ask, Don't Tell: Deception Required, Disclosure Denied*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 5, at 343.

<sup>43</sup> See Shuman, *supra* note 41, at 299–300 ("Rescue [of abused children] proceeds on the assumption that it will be therapeutic; we encourage rescue because we think it will be beneficial to the physical or emotional health of the person rescued. If legal intervention on behalf of abused children lacks a therapeutic outcome, then a duty to rescue may leave children worse off than if no intervention had occurred."); see also Kavanaugh, *supra* note 42, at 343–44 (arguing that rules relating to gays in the military are antitherapeutic both for homosexual service members who feel pressured to conceal their sexual identity, and for heterosexual service members "because [the rules] encourage and perpetuate prejudice that is based on ignorance and deter the development of productive relationships"). See generally Rose Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89 (1994); Ronald J. Rychlack & Corey D. Hinshaw, *From the Classroom to the Courtroom: Therapeutic Jurisprudence and the Gaming Industry's Impact on Law*, 74 Miss. L.J. 827 (2005).

<sup>44</sup> See, e.g., Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 17, at 465, 467; Daniel W. Shuman et al., *The Health Effects of Jury Service*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 5, at 949, 949; James L. Nolan, Jr., *Therapeutic Adjudication*, SOCIETY, Jan.–Feb. 2002, at 29, 38.

cacy problems for the movement.<sup>45</sup> Professor John Petrila, perhaps one of the strongest early critics of TJ theory, argued that despite TJ's reported concern for individual autonomy, its focus on therapeutic outcomes was largely paternalistic and could work to disempower individuals who were seen as psychologically impaired.<sup>46</sup> More fundamentally, he argued, Professors Wexler and Winick "fail[ed] to articulate clear decision rules for determining . . . whether and under what circumstances therapeutic values must yield to other values," or when any given outcome would be considered therapeutic as opposed to anti-therapeutic.<sup>47</sup> Professor Christopher Slobogin, although more sympathetic to TJ than Petrila, agreed that TJ theory presented serious conceptual dilemmas, including how best to define the term "therapeutic," measure the therapeutic value of any given outcome, and balance that value against others.<sup>48</sup>

Professors Wexler and Winick attempted to address these critiques. For instance, in a reply to Professor Petrila's article, they reaffirmed their commitment to the interests of the mentally ill, arguing, in relevant part, that autonomous decision making and individual choice are clearly stated core concerns of TJ.<sup>49</sup> As for the questions raised about the term "therapeutic," in a 1995 article, Professor Wexler offered:

Therapeutic jurisprudence has been criticized for not offering a clear-cut definition of the term therapeutic. As a mere lens or heuristic for better seeing and understanding the law, however, I think therapeutic jurisprudence has quite rightly opted not to provide a tight definition of the term, thereby allowing commentators to roam within the intuitive and common sense contours of the concept.

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<sup>45</sup> See John Petrila, *Paternalism and the Unrealized Promise of Essays in Therapeutic Jurisprudence*, in *LAW IN A THERAPEUTIC KEY*, *supra* note 5, at 685, 685-705; Slobogin, *supra* note 14, at 763-93. See generally Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82 (2006); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002); Arthur G. Christean, *Therapeutic Jurisprudence: Embracing a Tainted Ideal*, <http://psychrights.org/Articles/TherapeuticJurisprudenceTaintedIdeal.htm> (last visited Mar. 12, 2007).

<sup>46</sup> Petrila, *supra* note 45, at 695-700.

<sup>47</sup> *Id.* at 694-95.

<sup>48</sup> Slobogin, *supra* note 14, at 763-93.

<sup>49</sup> Wexler & Winick, *supra* note 5, at 711-12.

Although the definition of the term therapeutic . . . needs to be left very flexible for promoting research, it is also probably true that, to preserve the camaraderie (and efficient work) of a common scholarly community, there ought to be some notion about the core concept and its rough bounds. In that connection it is noteworthy that the therapeutic jurisprudence literature to date has overwhelmingly conformed to areas within the ordinary mental health connotation of the term therapeutic: mental health-mental illness and health, illness, injury, disability, treatment, rehabilitation, and habilitation . . . .

Therefore, what is meant by therapeutic far exceeds the reversal of psychosis. On the other hand, the term therapeutic has not yet become (and in my view for research purposes ought not to become) synonymous with simply achieving intended or desirable outcomes.<sup>50</sup>

With regard to the relative weight to be accorded therapeutic outcomes and what to do when therapeutic goals conflict with other normative values, in his 1997 book, Professor Winick claimed that such matters were not intended to be addressed by TJ:

While therapeutic jurisprudence is premised on the notion that [mental] health is a value that law should seek to foster, it makes no attempt to assign relative values to the various other goals of law. To resolve such conflicts of value, one must go outside therapeutic jurisprudence to some ethical or political theory that establishes a hierarchy of values. In our political system this balancing is often performed by the legislature which, within our democratic traditions, attempts to reflect the will of the citizenry. When fundamental constitutional rights are involved, the task is often performed by the courts, and ultimately by the Supreme Court, the institution in our governmental structure that is assigned the role of safeguarding constitutional values and protecting them from erosion by majoritarian pressure.

Therapeutic jurisprudence suggests that legislatures and courts should consider therapeutic values in the balancing of competing interests and concerns[—]that is the essential task

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<sup>50</sup> David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, in LAW IN A THERAPEUTIC KEY, *supra* note 5, at 811, 812–14.

of law-making. But although therapeutic jurisprudence is normative in this regard, it is careful to acknowledge the relevance of other normative values and does not suggest that they be subordinated to therapeutic considerations.<sup>51</sup>

Thus, although Professors Wexler and Winick seemed to concede TJ was striving to change the law and its focus, they suggested that TJ itself, as merely a school of thought, was not empowered to effectuate modifications.<sup>52</sup> Rather "true decisionmakers" like legislators and policymakers would need to reform the law and legal system.<sup>53</sup>

Adding to the layers and complexity of TJ's purpose and identity, in more recent years Professors Wexler and Winick have advanced another "dimension" of TJ—application of its teachings to real-world legal practice.<sup>54</sup> They claim that absent any changes in substantive laws, judges and practicing lawyers can use TJ principles to guide their ac-

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<sup>51</sup> WINICK, *supra* note 19, at 4-7. In a more recent text, Professors Wexler and Winick explained:

Therapeutic Jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological function of those it affects. Therapeutic Jurisprudence suggests that these positive and negative consequences be studied with the tools of the behavioral sciences, and that, *consistent with considerations of justice and other relevant normative values*, law be reformed to minimize anti-therapeutic consequences and to facilitate achievement of therapeutic ones.

Stolle et al., *supra* note 28, at 7 (emphasis added). Likewise, in the introduction to *Essays in Therapeutic Jurisprudence*, Wexler and Winick explained:

Let us, at the outset, emphasize that therapeutic jurisprudence does not embrace a vision of law . . . serving exclusively or primarily therapeutic ends. . . . The law serves many ends, and our suggestion that the impact on therapeutic values of legal rules and practices should be analyzed does not mean that therapeutic values should predominate over others.

Wexler & Winick, *supra* note 15, at xi.

<sup>52</sup> Wexler & Winick, *supra* note 5, at 708.

<sup>53</sup> *Id.*

<sup>54</sup> See David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 17, at 45, 45 (stating that this approach "looks not only at possible law reform, but pays attention, too, to how existing law—whatever it is—may be *applied* in a manner more conducive to the psychological well-being of those it affects"); see also David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 696 (1999).

tions and behaviors, thereby transforming their roles within the court system.<sup>55</sup>

## II. PROFESSOR WEXLER'S INVITATION TO HELP ESTABLISH A TJ-ORIENTED CRIMINAL DEFENSE BAR

In his recent article, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, Professor Wexler turns his attention to criminal defense practitioners.<sup>56</sup> He contends that although many criminal court judges have already begun applying TJ principles, for instance in drug and domestic violence cases, and in matters where defendants suffer from mental illness, few defense attorneys are doing the same.<sup>57</sup> Thus, he suggests defense attorneys should rethink the manner in which they represent clients, in light of TJ and its concern for therapeutic well-being.<sup>58</sup>

### A. TJ Theory: Defense Attorneys as Rehabilitative Change Agents

Indeed, Professor Wexler has extended a "warm invitation" to "involved practitioners" and what he calls "their academic counterparts"—clinical law professors—to join him in rethinking the role of defense counsel.<sup>59</sup> His invitation calls for "the explicit recognition" of a special breed of defense attorney, the "TJ criminal lawyer."<sup>60</sup> He explains that TJ criminal lawyers would have a far broader role than "traditional"<sup>61</sup> criminal defense attorneys, as they would not only serve as legal representatives, but therapeutic "change agents."<sup>62</sup> For Professor Wexler, this means encouraging "positive change" and transformation in clients by

<sup>55</sup> See generally PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 17; JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003).

<sup>56</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 743.

<sup>57</sup> *Id.* Wexler urges defense attorneys to keep pace with TJ's rapid move from the "world of theory to the world of practice." *Id.*

<sup>58</sup> *Id.* at 743–44.

<sup>59</sup> *Id.* at 746. Professor Wexler seems to count this author, along with defense attorneys Martin Reising and John V. McShane, among those who are considered "involved practitioners." See *id.* at 746 n.14.

<sup>60</sup> *Id.* at 746. Professor Wexler also suggests that "social workers, criminologists, psychologists . . . academics working in Therapeutic Jurisprudence and in criminal law . . . and their students . . . would be highly valuable partners in this enterprise." *Id.*

<sup>61</sup> As noted further at *infra* notes 134–149 and accompanying text, using the term "traditional" to describe the practices of defense counsel is somewhat problematic because it erroneously implies an existing monolithic method of providing defense representation.

<sup>62</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 745–46.

adopting a decidedly rehabilitation-focused stance.<sup>63</sup> And ideally, defense counsel's "rehabilitative role" would continue well after resolution of the charges, extending "beyond sentencing, into corrections, conditional or unconditional release, and to life in the community."<sup>64</sup>

Given this suggested metamorphosis in attorney role, the relationship between counsel and client would change, too.<sup>65</sup> Professor Wexler claims that "the proposed attorney-client relationship bears virtually no resemblance" to many of the attorney-client relationships that currently exist, particularly those involving public defenders.<sup>66</sup> Rather, he seems to envision the attorney-client relationship as being more like what is often seen in drug treatment courts.<sup>67</sup> In these relationships, Professor Wexler posits, attorneys spend time cultivating trust and respect, for instance, by allowing clients to tell their stories "unconstrained by rigid notions of legal relevance."<sup>68</sup> In addition to motivating those they represent to participate actively in rehabilitative efforts, TJ attorneys would also "foster[] client hope and expectancy."<sup>69</sup> What Professor Wexler refers to as "emotional intelligence and cultural competence" are also seen as key to the TJ attorney-client relationship.<sup>70</sup>

### B. TJ Theory in Practice: Suggested Methods

In inviting criminal defense lawyers and clinicians to recognize and encourage this "new" kind of practice, Professor Wexler urges them to write articles and practice-based materials that not only examine "the rehabilitative potential of applying the current law therapeutically," but also suggest reform of current laws, procedures, and practices to permit greater rehabilitative or therapeutic possibilities.<sup>71</sup> Despite this apparent tension between TJ goals and at least some current norms and rules, Professor Wexler provides a list of proposed "best practices" he suggests attorneys, clinicians, and clinic students can employ now at various

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<sup>63</sup> *Id.* at 747.

<sup>64</sup> *Id.* at 772. Notably, Professor Wexler does not provide a definition for the term "rehabilitative" as part of his invitation. See *infra* notes 153–155 and accompanying text.

<sup>65</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 747.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 748. In such courts, defense counsel is called upon to serve with the judge and prosecutor as part of a treatment "team." 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, 38 (2000–01).

<sup>68</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 748.

<sup>69</sup> *Id.* at 747–48.

<sup>70</sup> *Id.* at 748.

<sup>71</sup> *Id.* at 746.

"stages" of criminal proceedings to become TJ criminal defense lawyers.<sup>72</sup> These "stages"—none of which include trial—and the suggested model practices are outlined below.<sup>73</sup>

## 1. Diversion and Problem-Solving Courts

Professor Wexler describes effective TJ-focused attorneys as being aware of all nonadjudicative and plea-based options for resolving cases.<sup>74</sup> For instance, they should know about diversionary schemes available<sup>75</sup> and purported "problem-solving court" options, including eligibility requirements.<sup>76</sup> Professor Wexler concedes, however, that many "problem-solving courts" present efficacy issues. For instance, he notes that one studied court required a guilty plea prior to participation even though nearly one-third of defendants will fail out of the program, thereby resulting in imposition of jail or prison sentences.<sup>77</sup> He implies, however, that lack of knowledge of such shortcomings is what renders an attorney less than stellar by TJ measures. Thus, he urges attorneys to be aware of "the actual functioning of the[se] courts and programs, 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 [drug treatment court] program as compared to expected jail time in the conventional jail system."<sup>78</sup> In this way they can inform clients of the risks of such institutions, ensure "true client consent" in accepting a drug court plea, and

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<sup>72</sup> *Id.* at 745.

<sup>73</sup> See *infra* notes 74–118 and accompanying text.

<sup>74</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 747.

<sup>75</sup> *Id.* at 748–49. Professor Wexler suggests that "a worthwhile interdisciplinary research project would be to detail the law and practice of diversion in a particular jurisdiction." *Id.* Many forms of diversion allow a defendant to avoid any penalty whatsoever, for instance by agreeing to remain arrest free for a certain period of time, and also involve no admission of guilt. See N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1999).

<sup>76</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 749.

<sup>77</sup> *Id.* at 750. Professor Wexler also notes that some drug treatment programs used in specialty courts lack bona fides and that some clients will spend as much time in jail following a drug court plea, presumably through sanctions, as they would have under a standard guilty plea. *Id.* at 749–50 nn.32–33. Indeed, Wexler seems to favor the use of pre-plea treatment courts over post-plea institutions. See *id.* at 753.

Beyond this, Professor Wexler concedes that presently there may be limits placed on defense counsel involvement in drug treatment court review hearings, in part because they may be viewed as nonessential to the proceedings. *Id.* at 751, 763 n.84. After recounting that one judge only tells retained counsel to come if he expects "to be mean" to the client, he offers that "[t]his raises an interesting question regarding costs, therapeutic aims, and retained versus publicly-provided legal services." *Id.* at 762 n.82.

<sup>78</sup> *Id.* at 749.



protect against antitherapeutic results—like the client feeling “sold out.”<sup>79</sup>

Professor Wexler further suggests that potential drug treatment court clients should sit in on a treatment court session with their attorney or the lawyer's staff before deciding to enter a treatment court guilty plea.<sup>80</sup> The attorneys or staff could work to enhance the therapeutic nature of this experience by “maximizing . . . *vicarious learning* by sitting through the session and explaining to the prospective [drug treatment court] client exactly what is happening and why different clients are receiving different dispositions.”<sup>81</sup>

## 2. Pleas and Sentencing Consideration

Pointing out that most cases are resolved by a guilty plea, Professor Wexler submits that “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.”<sup>82</sup> If that does not occur, a TJ lawyer could share the information with the judge at sentencing.<sup>83</sup>

In advising a client whether to accept a plea offer, a TJ lawyer will explain how the client's early acceptance of responsibility might be perceived by the court and that the judge might offer sentence leniency where an early admission is seen as genuine rather than strategic.<sup>84</sup> Thus, a TJ lawyer might try “to work with the client to create genuineness even within a strategic legal context.”<sup>85</sup> This could be accomplished with a psychological “‘perspective-taking’ approach,” where the defendant is asked to “re-enact the crime, playing the role of the victim,” view videotapes of victim statements, or write an apology letter taking into account the ways in which the victim's life has been affected by the crime.<sup>86</sup>

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<sup>79</sup> *Id.* at 749–50.

<sup>80</sup> *Id.* at 751. Professor Wexler suggests that “many” clients are free on bail prior to entering into treatment court programs and can therefore attend such proceedings. *Id.*

<sup>81</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 752 (emphasis added). These could serve as therapeutically positive experiences by giving the client “a glimpse of the hard work, but also of the opportunity and hope for real recovery that lies ahead.” *Id.*

<sup>82</sup> *Id.* at 753.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 753–54. This advice would be in addition to any information about the potential sentence following an unsuccessful trial.

<sup>85</sup> *Id.* at 755.

<sup>86</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 755.

Beyond this, Professor Wexler explains that the TJ lawyer will consider the supposed intrinsic value of an admission of guilt: "A genuine acceptance of responsibility—especially if coupled with an apology—is generally regarded as therapeutically welcome by the victim and as a good first rehabilitative step for the defendant."<sup>87</sup>

### 3. Deferred Sentencing and Post-Offense Rehabilitation

According to Professor Wexler, even after the plea has been entered, defense attorneys can continue to engage in rehabilitation-focused, TJ practices.<sup>88</sup> For example, defense attorneys may postpone sentencing for as long as possible because "[i]n order to accomplish some meaningful rehabilitation—rather than a mere gesture, however genuine—it is of course important to have time on your side."<sup>89</sup> And even though the federal sentencing guidelines expressly permit the sentencing judge to take into account post-offense rehabilitation, as in the case of *United States v. Flowers*,<sup>90</sup> state courts without such legal authority might also be inclined to consider such conduct favorably at the time of sentencing.<sup>91</sup>

### 4. Probation

"The sanction of probation," too, Professor Wexler submits "is chock-full of TJ considerations, which can inform and enrich the role of defense counsel."<sup>92</sup> Although the TJ lawyer is not expected to be a therapist or social worker,<sup>93</sup> some psychology-based concepts like compliance and relapse prevention principles might be part of the tools used by an effective TJ lawyer in the context of a client facing a probationary sentence.<sup>94</sup>

Compliance principles include having the client actively propose the terms of probation.<sup>95</sup> The client, Professor Wexler submits, will be

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<sup>87</sup> *Id.* at 754.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 756.

<sup>90</sup> 983 F. Supp. 159, 163–65 (E.D.N.Y. 1997).

<sup>91</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 755–56.

<sup>92</sup> *Id.* at 756.

<sup>93</sup> *Id.* at 747–48.

<sup>94</sup> *Id.* at 757.

<sup>95</sup> *Id.*

more likely to comply with a plan when it is her own idea.<sup>96</sup> The TJ lawyer should talk about the plan as a "behavioral contract" the client has entered into with the court,<sup>97</sup> and consider having the client's family and friends help to enforce the contract.<sup>98</sup>

Relapse prevention principles can be used to come up with the proposed probationary terms.<sup>99</sup> For example, Professor Wexler suggests the lawyer should have clients "think through the chain of events that lead them to criminality so that they may be aware of patterns and of high risk situations" that may lead them to reoffend.<sup>100</sup> As an example of such a risky situation or pattern, Professor Wexler offers that youths often have car accidents when they have other youths in their vehicles.<sup>101</sup> Thus, a young person who is repeatedly "picked up for driving violations" might be asked by his lawyer: "Well, when do you seem to be picked up . . . ? Day or night? When you are alone or when you are with others? Which others? Your parents? Your friends?"<sup>102</sup> In this way, the client will come to realize what the risky behavior is, and the lawyer can ask the client how this could be used as part of a probationary plan.

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<sup>96</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 760. Professor Wexler explains that this is because the client will understand the terms fully and not view the plan as merely a matter of "judicial fiat." *Id.*

<sup>97</sup> *Id.* For even greater therapeutic benefit, the client should be encouraged to personally present the plan to the court and engage the judge on her own behalf at sentencing. *Id.* at 760-61.

<sup>98</sup> *Id.* at 757, 761. This is assuming, Professor Wexler offers, that "the client truly agrees with the idea of [family] involvement." *Id.* at 761.

<sup>99</sup> *Id.* at 760. The process of coming up with the proposed terms, Professor Wexler submits, is another TJ moment that can focus on compliance. The lawyer can prepare by pitching counterarguments to the client's claims that he will succeed. *Id.* at 761. According to Professor Wexler, "[o]ne would hope the client would personally come up with a suitable answer" that "this time is different." *Id.*

<sup>100</sup> *Id.* at 757. Professor Wexler suggests the TJ attorney might walk the client through potential future high risk situations, and problem-solve ways to avoid such situations. *Id.* In another text, Professors Wexler and Winick state:

[C]linical law students need to learn . . . the rewind exercise. It is a good technique both for *teaching clients* about how to avoid future problems and for teaching law students about how to see legal problems from a preventive perspective. The idea is a simple one. . . . In helping the client avoid a future reoccurrence of the problem, it is helpful for the lawyer to *assist the client to understand why the problem occurred*. Let us "rewind" the situation back in time to prior to the occurrence of the critical acts or omissions that produced the problem. What could the client have done at this point to have avoided the problem? What can he or she do now to avoid its reoccurrence?

Winick & Wexler, *supra* note 1, at 611.

<sup>101</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 759.

<sup>102</sup> *Id.* at 760.

That is, the youth "hopefully" will respond that she will agree to drive only with adults or responsible peers, or alone.<sup>103</sup>

The above exchange, Professor Wexler concedes, looks like "a kind of Socratic dialogue," where the lawyer is leading the client to the desired answer.<sup>104</sup> He suggests, however, that in the "division of labor," the client must think through alternatives and ultimately "buy into a change of behavior that should reduce the risk of criminality."<sup>105</sup> "[P]roposing a plan for the client's acquiescence" would be inappropriate in a TJ attorney-client relationship.<sup>106</sup>

Professor Wexler also says TJ lawyers should be open to innovative probation term possibilities.<sup>107</sup> For instance, without definitively offering his imprimatur, he raises the possibility of the TJ lawyer asking a client with several children, who has been convicted of failing to pay child support, whether he might consider having a vasectomy to influence the court favorably.<sup>108</sup> Thus, he implies clients might be encouraged to take steps to appease the court, even if the court were prohibited as a matter of law from ordering such steps to be taken.<sup>109</sup>

If probation is going well and it is permitted by law, TJ counsel would also move for early termination of probation.<sup>110</sup> Upon termination, as occurs in problem-solving courts, the TJ attorney should make sure that the court congratulates and acknowledges the client's success.<sup>111</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 759.

<sup>106</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 759.

<sup>107</sup> *Id.* at 762.

<sup>108</sup> *Id.* at 764–66. As an example, Professor Wexler points to the case of *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001). Wexler, *Rehabilitative Role*, *supra* note 1, at 764; see also generally Andrew Horowitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75 (2000) (criticizing the case for going too far in trying to control the life of a probationer). In *Oakley*, the defendant, a father of nine children, was convicted for refusing to pay child support. 629 N.W.2d at 202–03. The court ordered, as a condition of probation, that the defendant have no more children, unless he was able to support them—a condition that was upheld on appeal. *Id.*

<sup>109</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 766.

<sup>110</sup> Professor Wexler suggests that judges conduct probation review hearings, "taking a page from the apparently successful ongoing judicial supervision practices of drug treatment court." *Id.* at 761. TJ defense counsel can play a role at such hearings by "marshaling, with the client, impressive evidence of success, and presenting it to the court, thereby helping to reinforce desistance from criminal activity." *Id.* at 762.

<sup>111</sup> *Id.*

## 5. Corrections, Reentry, and Beyond

For clients facing incarceration, Professor Wexler offers that "the TJ criminal lawyer should, at some point, engage the client in a dialogue regarding the sentence and the future," including early release options and "good time" credit possibilities.<sup>112</sup> And although defendants are not constitutionally entitled to counsel at such proceedings, "[i]n Therapeutic Jurisprudence terms, there is much meaningful work for an attorney at the parole grant hearing stage," too.<sup>113</sup> Not only could a TJ lawyer advocate for the client's release before the parole board, but she could work with the client "and others to establish a plan . . . for conditional release."<sup>114</sup>

Once a client has been released from prison or jail, Professor Wexler submits that a TJ lawyer might continue in her therapeutic efforts by "help[ing the client] in the tremendously difficult task of reentry and readjustment, talking with the client about post-release conditions and collateral consequences that might impede the client's adjustment, and offering to assist the client with restoring her rights and expunging her criminal record."<sup>115</sup>

## 6. Appeal

The appellate process, Professor Wexler contends, is another stage where TJ criminal lawyering can take place because "TJ 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."<sup>116</sup> For instance, the TJ lawyer should communicate meaningfully with her client, notifying her of the issues to be raised and the law relating to the claims, and giving her a realistic sense of what outcome to expect.<sup>117</sup> TJ lawyers should also consider carefully how to convey an unsuccessful outcome on appeal, trying not to suggest to the

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<sup>112</sup> *Id.* at 769.

<sup>113</sup> *Id.* at 771.

<sup>114</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 771. Professor Wexler also mentions the recent development of reentry courts, which "borrow from the drug court model" as a means of "reinvigorat[ing] the parole process." *Id.* at 770. He notes that although some of these institutions actually have conditional release authority, like parole boards, others are intended to work with former inmates who are released unconditionally to ensure "smoother reentry." *Id.* Professor Wexler suggests that he is in favor of both kinds of reentry courts. *See id.* at 771 n.117.

<sup>115</sup> *Id.* at 771.

<sup>116</sup> *Id.* at 766.

<sup>117</sup> *Id.* at 768.

client that she did not have a "voice" before the court—especially because that might "affect adversely the client's acceptance of the ruling and adjustment to the situation."<sup>118</sup>

C. *TJ Theory, Criminal Practitioners, and Legal Clinics: Envisioning Lawyers Taking TJ "All the Way"*

Professor Wexler explains that some or all of the techniques outlined above may be used by "traditional" practitioners who wish to make their representation more consistent with TJ's goals and teachings.<sup>119</sup> He suggests, however, that some attorneys may "decide to go 'all the way,' and to limit their criminal practice to a concentration in Therapeutic Jurisprudence."<sup>120</sup> Professor Wexler offers the story of one such TJ criminal defense lawyer, John McShane:

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.<sup>121</sup>

Thus, McShane will take a client's case only if he is "willing to accept responsibility for his actions, submit to an evaluation, treatment, and relapse prevention program, and to use [a TJ] approach in mitigation of the offense in plea bargaining or the sentencing hearing."<sup>122</sup>

Once he has accepted a case, McShane tries to forestall final disposition to "allow the client the maximum opportunity to recover"<sup>123</sup>:

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<sup>118</sup> *Id.*

<sup>119</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 744. In this regard, Professor Wexler suggests that TJ practices may serve as mere "add ons" to current defender practices. *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* (internal quotations omitted).

<sup>123</sup> *Id.* (internal quotations omitted).

John McShane tries to delay the imposition of sentence for as long as possible 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 cannot be changed. On the other hand, suggests 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.<sup>124</sup>

In contrast to McShane, whose practice is wholly private and who can pick and choose his clients, Professor Wexler complains that many court-appointed lawyers and public defenders currently practice in "shameful systems," "where crushing caseloads allow for little client contact and where the only real objective is to secure a decent deal on a plea."<sup>125</sup> Thus, he proposes the possibility of "innovative privately funded organizations, such as the Georgia Justice Project, 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."<sup>126</sup> Such specialized programs may be able to be set up with "private funds" "to take over where the [public defender] leaves off," because publicly funded public defenders generally can only represent a defendant through sentence and appeal.<sup>127</sup>

Alternatively, Professor Wexler posits that public defender offices could establish special intake processes "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 a drug treatment court, mental health court, domestic violence court), plea negotiation,

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<sup>124</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 755-56.

<sup>125</sup> *Id.* at 747.

<sup>126</sup> *Id.* at 772. Professor Penny White describes the Georgia Justice Project as a "non-traditional indigent representation organization" that is "significantly different from the Bronx Defenders" and other "community-based lawyering programs." Penny J. White, *Mourning and Celebrating Gideon's Fortieth*, 72 UMKC L. Rev. 515, 553 (2003). Rather, it "is a private, not-for-profit organization that seeks to rehabilitate accused offenders and reduce recidivism." *Id.* Because it is supported by private funds alone, it can be "extremely selective in determining who it will represent and ultimately serve." *Id.* As a result, it generally will not take certain kinds of cases, including those that relate to allegations of family violence or child abuse. *Id.* at 553 n.287.

<sup>127</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 772.

and sentencing."<sup>128</sup> Thus, cases of clients for whom such dispositions seem "appealing" could be sent down a special TJ path and handled by a special TJ lawyer within the public defender's office.<sup>129</sup> Acknowledging that "some" such "models already exist," he suggests that additional "thought needs to be given . . . to integrating other professionals—such as social workers—into the law office context."<sup>130</sup>

Finally, Professor Wexler fears that law school clinics may "succumb to mimicking the structural ineffective assistance of counsel exhibited in many . . . public sector defense programs."<sup>131</sup> To help avoid this pitfall, he urges clinicians whose students practice in trial-level criminal courts to assign students TJ-focused projects, like producing manuals and other materials that outline the requirements of diversion programs and problem-solving courts.<sup>132</sup> He further suggests that clinicians develop and use exercises focused on "problem-solving court" practice. For instance, students might "consider the kind of dialogue a lawyer might have with a client about the pros and cons of opting into a [drug treatment court] or mental health court."<sup>133</sup>

### III. CONSIDERING PROFESSOR WEXLER'S INVITATION

Obviously, it is always flattering to receive an invitation. But before accepting, it is important to think it through. Even if you truly like the person who extended the request, there are other things to consider. What is the occasion? Is this an event to celebrate? What will be on the menu? Who else is included on the guest list? As tempting as it is to join Professor Wexler in his well-intended movement, as a criminal defense

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<sup>128</sup> *Id.* at 773.

<sup>129</sup> *Id.* Professor Wexler urges public defense institutions to "confront questions of relative caseload[s]" and "find ways of avoiding the development of intra-office resentment towards lawyers having [the] less frenzied daily diet" of TJ practice, likening the situation to judges who are resentful of others with greater resources in specialized, boutique "problem-solving" courts. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 747.

<sup>132</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 746–48.

<sup>133</sup> *Id.* at 751. Professor Wexler actually discusses the level of effort used in advising a client about "the collateral consequences of a proposed plea" and "whether enrollment in a treatment option should call for the same or a higher standard." *Id.* at 752.

Criminal appeals clinics, Wexler offers, should also use TJ exercises. *Id.* at 769. Although he does not offer a specific plan of action, Wexler suggests that such clinics should have students think about how to handle an appeal that lacks merit. *Id.* For instance, students might consider whether to file a "dressed up brief" for the benefit of making the client feel good, or to withdraw so as to avoid filing a frivolous appeal with the court. *Id.*



lawyer and clinician, his invitation presents a number of issues that give me pause.

### A. Proposed Change in Defense Counsel Role: The Occasion

#### 1. Misunderstanding Tradition

Despite the openness and warmth with which it was extended, Professor Wexler's call to establish a specialized TJ criminal defense bar is ultimately unconvincing. First, Professor Wexler's invitation erroneously implies that a single defense attorney model currently exists—which he refers to as “traditional.”<sup>134</sup> He never defines what constitutes “traditional” defense representation, however, or describes the traditional defense attorney in practice.<sup>135</sup> Thus, it is unclear why the alleged current model of representation needs to be replaced with a new model involving “TJ criminal lawyers.”

These failings may be explained, however, by the realities of modern criminal defense practice. In my mind, no single, monolithic, “traditional” means of representation currently exists.<sup>136</sup> Rather, good de-

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<sup>134</sup> See *id.* at 747.

<sup>135</sup> Although others have also used the term “traditional” when talking about some kinds of criminal defense and law school clinic representation, this description is somewhat misleading. Indeed, descriptions of “traditional” representation models are not uniform and demonstrate that no singular “traditional” defense bar currently exists. See, e.g., Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 402 (2006) (“The ‘traditional model’ of legal representation falls in line with th[e] justification for professional paternalism, creating a ‘means-objectives’ division of decision-making authority in the lawyer-client relationship, in which the client tells the lawyer what objective the client wishes to pursue, and the lawyer applies her legal expertise to decide the strategic means by which to attain the client’s objective.”); Mark H. Moore, *Alternative Strategies for Public Defenders and Assigned Counsel*, 29 N.Y.U. REV. L. & SOC. CHANGE 83, 104 (2004–05) (referring to the “radical” concept of “whole client” representation, noting that “those who advocate for and seek to practice” in this way “draw a sharp contrast between this [kind of practice] and the traditional kinds of representation”); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender’s Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123–24 (2004–05) (stating that “[t]he traditional defender office is lawyer-driven and case-oriented,” that “[t]raditional defenders address themselves primarily to the client’s immediate legal needs believing that removing or reducing the imminent threat of incarceration is their function,” and that “[b]y contrast the more holistic model of representation is client-focused, interdisciplinary, and community-based”); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 166 (2004–05) (describing some traditional lawyers as not being willing to “push beyond the comfort zone” of their courtroom role). Moore’s description of “traditional” defenders, to paraphrase a former colleague, may unnecessarily denigrate some lawyers by suggesting they represent only some component part of clients, perhaps “half.”

<sup>136</sup> Some public defender offices now use terms like “community-based,” “holistic,” or “client-centered” to describe the work they do beyond merely defending clients against

fense lawyers—no matter where they work or what they are called<sup>137</sup>—know that representation of each defendant calls for a range of skills and approaches in light of defense attorneys' legal and ethical obligations, existing practice standards, and the goals and wants of that individual client.<sup>138</sup>

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crimes alleged. See White, *supra* note 126, at 547 (discussing use of these terms by defense organizations that attempt to "coordinate legal services for a client, together with social services and community assistance"). Many lawyers and law school clinics, however, have engaged in such work for decades, some without referring to it by a specific name. See *infra* note 189 and accompanying text.

Beyond this, as Professor Kate Kruse describes, Professors David Binder and Susan Price popularized the "client-centered" lawyering concept nearly three decades ago in their influential book, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). See Kruse, *supra* note 135, at 369–70 (characterizing the "client-centered" model of representation as having enjoyed "unparalleled success" and serving as the "pre-dominant model for teaching lawyering skills" for over twenty-five years). As Professor Kruse explains, the client-centered approach to representation was intended to supplant "treat[ing] clients impersonally as bundles of legal issues . . . without exploring a client's actual values." *Id.* at 382. What is more, as "the client-centered approach has grown from its earliest articulation by Binder and Price to its current status as well-established bedrock of clinical education, it has evolved naturally into what might be called a plurality of approaches, which expand aspects of the original client-centered approach in different directions." *Id.* at 371. One of those directions is the "problem-solving . . . holistic lawyering [approach] that reach[es] beyond the boundaries of the client's legal case to address a broader range of connected issues in the client's life." *Id.* Nevertheless, some "[d]efenders of traditional zealous partisan advocacy" also describe themselves as client-centered in that "[t]he traditional model of devotion to a client's legal rights and interests is fundamentally client-centered, in the sense that it places fidelity to clients at the center of the lawyer's professional duties." *Id.* at 397–98 n.126 (recounting Abbe Smith's tribute to Monroe Freedman, whom Smith refers to as the first to use the term "client-centered"); see also Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 *WASH. U. J.L. & POL'Y* 83, 88 (2003). Thus, what may be considered "traditional" or "nontraditional" is open to debate.

<sup>137</sup> See Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461, 1500 (2003) (identifying various public defenders' offices, including the Public Defender Service for the District of Columbia, Neighborhood Defender Services of Harlem, and the Bronx Defenders, as consistently providing high-quality defense services to their clients); White, *supra* note 126, at 549 (recounting that more than half of 900 public defenders whom the Brennan Center for Justice surveyed in 2001 "responded that they were engaging in some community-based lawyering").

<sup>138</sup> Professor Kruse also criticizes misleading characterizations of modern lawyering methods:

[P]erhaps contributing to the gap between practical and theoretical conceptions of client-centered representation, the debates within legal ethics are often carried out in terms that reduce client-centered representation to a kind of caricatured "hired gun" lawyering, in which lawyers are impelled by the pursuit of client objective all the way to the limits of what the law arguably allows. While this simplification assists the elegance of theory, it renders clients and the lawyers who represent them unfamiliar—almost unrecognizable—to

For over a decade, the National Legal Aid and Defender Association (the "NLADA"), which serves as a voice for public defenders and other poverty lawyers,<sup>139</sup> has published criminal defense community standards entitled *Performance Guidelines for Criminal Defense Representation*.<sup>140</sup> The very first NLADA guideline addresses the "Role of Defense Counsel."<sup>141</sup> Rather than describing a single model or method of operating to fulfill that role, it explains that "[t]he paramount obligation of criminal defense counsel is to provide zealous and quality representation to their clients at all stages of the criminal process. Attorneys also have an obligation to abide by ethical norms and act in accordance with the rules of the court."<sup>142</sup> What constitutes "zealousness" or "quality" obviously depends on the particular circumstances

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lawyers seeking to engage in thoughtful ethical reflection in the contexts of practice in which they are embedded.

Kruse, *supra* note 135, at 440 (citations omitted); see MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYER'S ETHICS* 19 (3d ed. 2004) (discussing "the false metaphor of warfare" that is often used by "those who denigrate the adversary system" and noting "[t]he true picture is rather different from the physical violence and 'bloodletting' that is conjured up by that rhetoric"); see also Taylor-Thompson, *supra* note 135, at 167.

<sup>139</sup> Professors Backus and Marcus recently described the NLADA as:

the nation's leading advocate for legal professionals who work with and represent low-income clients, their families, and communities. Speaking on behalf of legal aid and defender programs, as well as individual advocates, it devotes its resources to serving the broad equal justice community. The NLADA provides a national voice in public policy and legislative debates on the many issues affecting the equal justice community.

Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1043-44 (2006); see also White, *supra* note 126, at 525-31 (describing the history and significance of criminal defense standards and guidelines promulgated by the NLADA and the American Bar Association).

<sup>140</sup> The NLADA's Performance Guidelines were first adopted in 1994.

<sup>141</sup> See NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 1.1.

<sup>142</sup> *Id.* The commentary to Guideline 1.1 explains:

All lawyers have a professional, ethical duty to provide "competent" legal representation to their clients, under the *Model Rules of Professional Responsibility* of the American Bar Association. When dealing with the provision of counsel to poor persons accused of crime, the ABA and NLADA have both called for "quality" legal representation, a more progressive standard. These Guidelines advocate the provision of zealous and quality representation to all clients charged with crime. . . . The duty to provide zealous and quality representation applies to all criminal defense attorneys, regardless of the financial status of their clients, or how (or how much) the lawyer is being paid.

*Id.* at Guideline 1.1 cmt.; see also MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

presented.<sup>143</sup> Indeed, in some, but by no means all, instances this might mean attempting to improve a client's circumstances,<sup>144</sup> or assisting in client rehabilitation efforts.<sup>145</sup> Thus, good criminal defense attorneys have long recognized their job calls for them to wear any number of hats throughout the course of a given case, not just that of trial lawyer or dogged adversary.<sup>146</sup>

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<sup>143</sup> See MODEL RULES OF PROF'L CONDUCT pmbl. (2002) (stating that a lawyer's responsibilities include serving as a legal advisor, legal advocate, negotiator, and evaluator for clients); AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4.12 cmt. (1993) (stating that the role of defense counsel is "complex, involving multiple obligations . . . including furthering the defendant's interest to the fullest extent of the law").

<sup>144</sup> See Taylor-Thompson, *supra* note 135, at 165 ("Defenders frequently need to locate and put in place treatment regimens for a client during the pre-trial period to provide her with the necessary support to make basic decisions about her case."); see also Andrew J. Liese, Note, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413, 1418-21 (2006) (discussing problems of the homeless, including their prosecution for quality of life offenses); Lola Velázquez-Aguilú, Comment, *Not Poor Enough: Why Wisconsin's System for Providing Indigent Defense Is Failing*, 2006 WIS. L. REV. 193, 195-97 (recounting the difficulties of many indigent criminal defendants, including homelessness and transience).

<sup>145</sup> Indeed, thirty-five years ago this question was thoughtfully examined in the very particular situation of representing clients struggling with drug addiction. See Thomas Rafalsky, *The Addicted Client: Rehabilitation as a Defense Strategy and the Role of an Attorney in the Rehabilitation Process*, 1 CONTEMP. DRUG PROBS. 399, 408-09 (1971-72). Rafalsky explained:

Attorneys have traditionally defended addicted clients in criminal matters without considering the fact that their clients are addicted. If the attorney is successful in the case by having the charges dismissed or by keeping his client out of jail, then he is returning an untreated addict to commit crimes, be rearrested, and eventually be returned to the street. The cycle continues relentlessly.

There is, however, the means of avoiding this cycle while at the same time improving the representation which can be given to an addicted client. This can be done by adding the informal defense strategy of rehabilitation to the existing array of formal, legal defenses. A lawyer should acknowledge that a client is addicted, should show that the crime in question is related to the addiction, and should demonstrate that the client is being treated for his addiction and is being rehabilitated. If a favorable disposition of the case cannot be reached in that way, the attorney could then proceed according to his normal defense strategies.

*Id.*

<sup>146</sup> As Marty Guggenheim, former New York City Legal Aid Society attorney, aptly noted two decades ago:

[L]et me say that in my experience there are two kinds of institutional lawyers who are doomed to be ineffective. First, there are the lawyers who do not care about their clients and do not work very hard to represent them. Second, there are lawyers who never give an inch. They fight over every detail, and are never reasonable and never do favors for the court or their adversaries. Such lawyers may think that they are obeying the injunction to represent each cli-

In addition to underestimating the complexity of current criminal defense representation practices, Professor Wexler fails to offer a clear motivation for his proposed change in the defense bar. For instance, no data or statistics are provided to demonstrate that the current and alleged "traditional" model of defense lawyering is responsible for "antitherapeutic" consequences in clients. This is particularly striking given TJ's stated concerns about the need for empirical research to support legal rules, procedures, and actions.<sup>147</sup>

Professor Wexler does say that the concept of TJ is increasing in popularity among some audiences, and that it is "moving rather rapidly from the world of theory to the world of practice."<sup>148</sup> Certainly, however, in and of itself that does not provide support for the kind of fundamental change he is advocating. That judges might be buying into TJ principles and trying to influence practitioners to do the same is not compelling as a basis for change either. Historically, defense attorneys and clinics have served as a check on the judiciary and its actions with regard to clients.<sup>149</sup> It would be wholly inappropriate to sign on to a

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ent zealously and with undiluted loyalty, but they are sure to fail. After they have proven who they are to their adversaries and to the judges, nobody makes reasonable deals with them. Their clients always seem to be the losers.

Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13, 21 (1986).

Similarly, social workers have been part of many public defenders' offices for decades. Taylor-Thompson, *supra* note 135, at 181 (noting that the Seattle Defender Association was using social workers in the delivery of services since the 1970s); see Mark H. Moore et al., *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 79 (2004-05) (explaining that Mary Hoban, Chief Social Worker in the Connecticut Division of the Public Defender Services, "began many years ago" as the agency's only social work intern and that now the agency employs forty social workers to staff its thirty-nine offices); Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping Gideon's Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 208 (2004-05) (commenting that in the years following *Gideon v. Wainwright*, 372 U.S. 335 (1963), "[i]n order to improve the quality of representation . . . public defender offices implemented training programs for new lawyers and allocated resources for investigators and social workers to prepare individualized sentencing proposals to the court"); see also Elizabeth Wright, *Diversion of Justice*, KNOXVILLE VOICE, Aug. 10, 2006, at 9 (discussing the educational and other services provided by the Community Law Office of Knox County, Tennessee, a public defender office run by Mark Stephens that in 2001 began modeling itself on the earlier efforts of programs like the Neighborhood Defender Services of Harlem—thereby making it a second-generation provider of expanded defense services).

<sup>147</sup> See *supra* notes 28, 35 and accompanying text.

<sup>148</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 743.

<sup>149</sup> *Polk Co. v. Dodson*, 454 U.S. 312, 320-21 (1981) (acknowledging that defense attorneys must exercise "professional independence," "free of state control," to satisfy the teachings of *Gideon v. Wainwright*); see Backus & Marcus, *supra* note 139, at 1069 ("Virtually everyone working in the criminal justice system appears to strongly agree with the notion

supposedly new, "therapeutic" way of representing clients simply because judges might think it is a good idea without first ensuring that modifications of current practices are necessary and appropriate.

## 2. A New Tradition Without Sufficient Form and Substance

Beyond failing to describe the lawyering model he calls for changing, or to offer clear rationales for the modification, Professor Wexler's proposed TJ alternative lacks clear parameters of its own. Despite the critiques offered nearly a decade ago about the need to clarify its mission and identity, the TJ movement seems to have become even more unwieldy and difficult to pin down, at least to this reader. For instance, it still seems to hold itself out as nothing more than a lens through which to examine laws, procedures, and practices to ascertain whether their consequences are therapeutic or antitherapeutic, but at the same time advocates affirmative legal reform.<sup>150</sup> And although the movement claims that it is not empowered to modify current norms, with this invitation, TJ is offering "new" practices for defense lawyers.<sup>151</sup>

More fundamentally, not only is the term "therapeutic" open to numerous interpretations, as Professors Petrila and Slobogin noted in their earlier critiques, it now seems to have had grafted upon it a primary meaning—"rehabilitative."<sup>152</sup> One could dispute, however, whether rehabilitative goals are truly therapeutic in terms of improving psychologi-

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that the defense function should be independent. It should not be too closely linked with, or controlled by, the legislature, the executive, the judiciary or the prosecution."); Thomas F. Geraghty, *The Criminal/Juvenile Clinic as a Public Interest Law Office: Defense Clinics; The Best Way to Teach Justice*, 75 Miss. L.J. 699, 699-700 (2006) (recounting six client stories from over thirty years of clinical teaching that demonstrate how handling their cases "taught . . . students," "informed judicial decision-making," and "supported the cause for reform in the public interest"); see also AM. BAR ASS'N, *supra* note 143, at Standard 4-1.2 ("A court properly constituted to hear a criminal case must be viewed as a tripartite entity constituting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.").

<sup>150</sup> See Wexler & Winick, *supra* note 5, at 708.

<sup>151</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 746. To be sure, Professor Wexler's current claims are more than just aspirational in nature, and do not read as a "mere lens or heuristic for better seeing and understanding the law." See Wexler & Winick, *supra* note 5, at 708. With the list of suggested practices offered for attorney and law clinic use, there can be little doubt that Professor Wexler is calling for some immediate changes. What is more, despite TJ's repeated assertion that empirical research should be used to determine how the law should be modified to attain more therapeutic outcomes, many of the proposed "new" TJ defense lawyer practices do not appear to be empirically supported. See *supra* note 35 and accompanying text; *infra* note 214.

<sup>152</sup> See Petrila, *supra* note 45, at 695-700; Slobogin, *supra* note 14, at 763.

cal well-being of defendants.<sup>153</sup> And, of course, what counts as truly rehabilitative itself is open to debate.<sup>154</sup> Thus, the very concept of TJ criminal defense lawyering seems to offer practitioners and clinicians little in the way of concrete guidance.<sup>155</sup>

### 3. Clash of Traditions and Values

Assuming we could agree on some basic understanding of the terms "therapeutic" and "rehabilitative" for purposes of envisioning Professor Wexler's proposal, the concept of TJ criminal defense lawyering raises additional concerns, given that its seemingly singularly-focused aims have the potential to conflict with important existing values and considerations of modern defense attorneys. Indeed, despite TJ's desire not to "subordinat[e] due process or other justice values," even in theory the new model seems to run the risk of doing just that.<sup>156</sup>

First, as already discussed, current norms indicate the paramount obligation for defense counsel is to provide "zealous" and "quality" representation. Quality representation at a particular time in a particular case might, in fact, involve therapeutic considerations. Therapeutic

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<sup>153</sup> One can easily imagine a defendant for whom the thought of participating in a rehabilitative plan would be so odious that to do so would have a negative effect on her psychological well-being.

<sup>154</sup> See Thom Brooks, *Rethinking Punishment* (July 20, 2006) (unpublished manuscript, on file with the Social Science Research Network), available at [www.ssrn.com/abstract=918045](http://www.ssrn.com/abstract=918045) (disputing some theorists' claims that rehabilitation involves teaching an offender that her crime was a moral wrong as some "victimless" offenses may not be morally reprehensible); see also NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY 527 (2004) (noting that although nearly four million adults were on probation in 2001, their conditions varied widely across the country). See generally Edgardo Rotman, *Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 J. CRIM. L. & CRIMINOLOGY 1023 (1986); David Shichor, *Following the Penological Pendulum: The Survival of Rehabilitation*, 56 FED. PROBATION 19 (1992).

<sup>155</sup> Perhaps the same could be said of the terms "quality" and "zealous," or even "competent." The defense community, however, has long embraced these defining attributes, and they appear to find their genesis in law and in other detailed standards that provide guidance for defense attorneys. See *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (Blackmun, J., concurring) (referring to "the values of zealous and loyal representation embodied in the Sixth Amendment"); *Avery v. Alabama*, 308 U.S. 444, 450 (1940) (concluding that the petitioner was "afforded the assistance of zealous and earnest counsel"); see also ALASKA STAT. § 13.26.111(a) (2004) (stating that the principal duty of an attorney representing a ward or respondent is to represent "zealously"); CAL. R. Cr. § 4.117(d)(7), (f)(2) (West 2006) (stating that to be appointed lead counsel in a capital case, a lawyer must demonstrate the "quality of representation appropriate to capital cases"); MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006) ("Competent representation requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

<sup>156</sup> Wexler & Winick, *supra* note 27, at xvii.

concerns, however, are not in and of themselves intended to be the paramount considerations for defense attorneys. A narrow focus on client rehabilitation, depending upon the situation, may be incongruent with current requirements.<sup>157</sup>

Beyond this, I fear Professor Wexler's TJ model, with its emphasis on rehabilitation and transforming clients' lives, is laden with assumptions about the criminal defense client population—not the least of which is that they are guilty, likely to offend again, and in need of transformation.<sup>158</sup> These assumptions seem somewhat misguided. First, this fails to take into account the many truly innocent clients whom defense attorneys represent. Although it may be true that a large number of criminal defendants have committed the crimes with which they are charged, defense attorneys play an integral role in ensuring that their constitutional right to be presumed innocent is protected. Encouraging lawyers, even indirectly, to undertake representation harboring a different presumption may work to undermine or at least discount this important justice consideration.

Moreover, many criminal defendants who plead guilty simply are not. Innocent clients falsely admit guilt for a variety of reasons—from doing whatever is necessary to assure their immediate release from jail to avoiding the risk that a judge will sentence them to a harsher sentence after an unsuccessful trial.<sup>159</sup> What is more, people who commit crimes do so for any number of reasons, some of which relate to the specific facts and circumstances surrounding the particular offense.

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<sup>157</sup> Interestingly, this tension may be best exemplified by a comparison of American and Cuban criminal defense work offered by Professors Monroe Freedman and Abbe Smith:

It is not surprising that in totalitarian societies, there is a sharp contrast in the role of the criminal defense lawyer from that in the American adversary system. As expressed by law professors at the University of Havana, "the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him."

FREEDMAN & SMITH, *supra* note 138, at 15 (citations omitted). See generally Anita Bernstein, *The Zeal Shortage*, 35 HOFSTRA L. REV. 1165 (2006).

<sup>158</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 753–55.

<sup>159</sup> Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1612 n.102 (2005) (citing Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 435, 494 nn.56–58 (2000)); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1153 (2005); see also Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 957 (2006) (stating that "[c]harge and fact bargains lie about the crime that actually happened and the facts surrounding it").



Thus, a client's admission of guilt is not proof positive that the client is at risk for offending in the future, and thus in need of correction or rehabilitation.<sup>160</sup> Nor is a determination of guilt dispositive of a defendant's psychological problems, much less problems that the criminal court system can correct through supposed "rehabilitation" processes.<sup>161</sup>

The therapeutically focused model that Professor Wexler offers also suggests a kind of omniscience on the part of defense lawyers that promotes a hierarchical arrangement between lawyer and client.<sup>162</sup> Unlike many persons involved in the mental health system whose clinical diagnosis may indicate what is most "therapeutically" indicated for that individual, clients in the criminal justice system generally do not arrive on a lawyer's doorstep with a diagnosis other than "accused." As suggested above, a great many defendants deserve no further diagnosis. Yet Professor Wexler's proposal implies that defense lawyers are in a position to, and should, assess the needs of their clients and decide whether they are in need of transformation.<sup>163</sup> Thus, criminal defense lawyers, regardless of their background or training, are given the affirmative duty of flagging those clients—apparently based to some degree on whether they are willing to admit "guilt"—who appear to need life-changing intervention. Not only does this run the risk of having lawyers step beyond their level of professional expertise,<sup>164</sup> it may denigrate the important values of client self-determination and auton-

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<sup>160</sup> See Daniel A. Krauss, *Evaluating Science Outside the Trial Box: Applying Daubert to the Federal Sentencing Guidelines' Criminal History Score*, 29 INT'L J.L. & PSYCHIATRY 289, 303 (2006) (arguing that defendant Criminal History Score evaluations under the federal sentencing scheme, "at best," function poorly to predict defendant recidivism); see also Barry C. Field, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1129 (2003).

<sup>161</sup> Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 637, 643 (2006) (noting that "even holistic advocacy proponents estimate that only ten percent of cases" require "holistic" intervention); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1230-31 (2004) ("Like the 'non-accused,' the accused come in myriad shapes and sizes, temperaments and tendencies.").

<sup>162</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 759.

<sup>163</sup> See *id.* at 747-49.

<sup>164</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1 (2006) ("In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include . . . the lawyer's general experience [and] the lawyer's training and experience in the field in question."). See generally JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 21-53 (1986) (discussing the importance of maintaining professional boundaries and cautioning lawyers against making mental health and other assessments beyond their area of expertise and qualification).

omy.<sup>165</sup> Indeed, many respected defense lawyers and clinicians have criticized this kind of best-interest-driven representation as being paternalistic, even if it is well-intended.<sup>166</sup>

The very concept of rehabilitation-centered lawyering also seems to conflict with an accused's right to conflict-free, unbiased representation.<sup>167</sup> Undertaking representation with a prior agenda of rehabilitation and correction would likely taint the attorney-client relationship. A client should be able to confide in his attorney about his alleged crime and any other "wrongdoings" for purposes of receiving zealous legal representation without fear of the lawyer's own personal desires coming into play. Existence of an underlying, potentially undisclosed,<sup>168</sup> TJ agenda would likely engender distrust of the entire defense bar, when trust has long been considered a core component of the relationship between lawyer and client.<sup>169</sup>

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<sup>165</sup> I suspect Professor Wexler would likely respond that in the TJ model, the client retains the final word and ultimately chooses whether to accept or reject therapeutic interventions. See Wexler, *Rehabilitative Role*, *supra* note 1, at 744. Thus, the client's autonomy is respected. Nevertheless, as is further explored in the context of the "best practices" offered by Professor Wexler, the TJ model of lawyering seems to encourage a fair amount of heavy-handed guiding on the part of lawyers to help clients to make what the lawyer believes is the "right" decision. See *id.* at 759-62. To this author, this seems much closer to client manipulation than client autonomy. See Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717, 718-27 (1987) (noting that lawyers sometimes engage in coercive tactics that work to manipulate clients); see also FREEDMAN & SMITH, *supra* note 138, at 62 (stating that "the attorney acts both professionally and morally in assisting clients to maximize their autonomy" and that "the attorney acts unprofessionally and immorally by depriving clients of their autonomy"); Kruse, *supra* note 135, at 400 (noting that "respect for client autonomy has emerged as the most salient argument in favor of the client-centered approach" to representation).

<sup>166</sup> See, e.g., FREEDMAN & SMITH, *supra* note 138, at 51 (expressing concern that some commentators think lawyers should behave paternalistically towards their clients); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1621 (2003) (warning against defenders engaging in paternalistic practices and client manipulation in problem-solving courts, even if "the client's ultimate autonomy is enhanced" by drug treatment and rehabilitation through the court). See generally Kristen Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005).

<sup>167</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 ("The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client.").

<sup>168</sup> See *id.* R. 1.4 cmt. 7 ("A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person.").

<sup>169</sup> See Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 212 (2006) (noting that the "core of the attorney-client relationship is trust"); see also Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against Client Perjury Rules*, 47 VAND. L. REV. 339, 364 n.91 (1994) (offering four factors that contribute to "greater distrust of court-appointed attorneys" as compared to retained counsel).

The TJ defense lawyering model that Professor Wexler posits also seems overly idealistic, particularly when it comes to representing the poor.<sup>170</sup> He suggests that TJ defense lawyers should assist in client change and transformation by fostering "hope and expectancy" on the part of criminal defendants.<sup>171</sup> For many indigent criminal defendants, however, this simply is not a realistic possibility. Many of the crimes committed by public defenders' clients stem from their extreme poverty. No rehabilitative plan of service provided through our overworked criminal courts can even begin to address this multifaceted problem.<sup>172</sup> Thus, the overly optimistic sentiments underlying TJ defense theory seem unrealistic and may provide clients with a false sense of what may lie ahead. They, too, run the risk of undermining client confidence in the defense bar in the long term.

Thus, despite TJ's assertion that it does not attempt to subordinate other values to therapeutic considerations, the TJ defense lawyering model—even in theory—may well displace existing rights of defendants and subvert existing values and professional standards of defense practitioners.

### B. *Role Change in Practice: The Menu*

Examination of Professor Wexler's proposed "menu" of TJ defense lawyer skills and behaviors vividly demonstrates some of these problems in practice. It reveals that, on the one hand, some of Professor Wexler's assumptions about the present, supposedly monolithic criminal defense model may be off the mark. Indeed, defense lawyers and clinics across the country employ many of the practices he suggests as part of the complex set of tools that quality lawyers use during the course of representation. On the other hand, some of the model TJ criminal defense practices not only conflict with existing practices of quality defense lawyers, thereby trumping those justice system norms, but run afoul of existing ethical and legal rules.

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<sup>170</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 747.

<sup>171</sup> *Id.*

<sup>172</sup> Indeed, the complex problem of poverty aside, although "[j]urisdictions have always recognized the importance of rehabilitating criminals . . . they rarely [have] devoted sufficient money and energy to the programs most likely to succeed." DEMLEITNER ET AL., *supra* note 154, at 12.

## 1. The Not-So-New Practices

Professor Wexler repeatedly indicates that TJ criminal defense lawyers must have thorough working knowledge of the criminal justice system and meaningfully communicate with clients.<sup>173</sup> This is nothing new, however. Lawyers who do not possess such awareness or fail to convey important information to those they represent simply are not complying with existing norms.<sup>174</sup> For example, as the NLADA warns:

(a) To provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law. Where appropriate, counsel should also be informed of the practices of the specific judge before whom a case is pending.

(b) Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation.<sup>175</sup>

The guidelines continue that defense attorneys have an obligation to keep their clients informed about developments in the case.<sup>176</sup>

Knowing the jurisdiction's system and sharing information with clients obviously include being familiar with diversionary programs, "problem-solving courts," and the "going rates" of cases in a given locale.<sup>177</sup> Lawyers are also required to timely convey to clients the specific terms of any proposed plea agreement<sup>178</sup> and the various sentencing

<sup>173</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 748–49.

<sup>174</sup> See generally MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006) (competence); *id.* R. 1.4 (communication).

<sup>175</sup> NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 1.2.

<sup>176</sup> *Id.* at Guideline 1.3.

<sup>177</sup> *Id.*; see *id.* Guideline 1.2 cmt. (emphasizing "the need to become familiar with a particular system before guiding clients through it," including becoming aware of the idiosyncratic practices of individual judges and courts); see also AM. BAR ASS'N, *supra* note 143, at Standard 4-6.19(a) ("Whenever the law, nature, and circumstances of the case permit, defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies."); Bibas, *supra* note 159, at 957 ("Repeat defense counsel already know the going rates for particular crimes.").

<sup>178</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 ("[A] lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer."); AM. BAR ASS'N, *supra* note 143, at Standard 4-6.2(b) ("Defense counsel should promptly communicate and explain to the accused all significant plea proposals made by the prosecutor."); NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 6.1(c) ("Coun-

implications.<sup>179</sup> Similarly, on appeal, a lawyer should always inform clients of the various issues that can be raised, as well as the risks that may be involved in raising such issues.<sup>180</sup>

Moreover, despite Professor Wexler's suggestion that such practices are an innovation of TJ, good defense lawyers have long collected mitigating evidence from the inception of the case and presented proof of rehabilitation, when appropriate, in plea negotiations and in seeking leniency at sentencing.<sup>181</sup> Such advocacy has often involved defense lawyers working with social workers and other mental health profes-

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sel should keep the client fully informed of any continued plea discussions and negotiations and convey to the accused any offers made by the prosecution for a negotiated settlement.").

<sup>179</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5 ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. . . . For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement."); AM. BAR ASS'N, *supra* note 143, at Standard 4-6.2 cmt. ("[T]he client should be given sufficient information to participate intelligently in the decision whether to accept or reject a plea proposal. . . . It cannot be emphasized too much that a crucial factor in plea discussions is the duty of counsel to explain fully to the accused the consequences of a guilty plea in terms of the range of sentences the court can and may impose."); NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 6.2 (noting that when discussing a proposed plea bargain, counsel should inform clients of the maximum term of imprisonment, fine, or restitution that might be ordered if the offer is not accepted, possible consequences of conviction, including deportation, whether good-time credits might be available, and where the client might be confined).

<sup>180</sup> AM. BAR ASS'N, *supra* note 143, at Standard 4-8.2 ("Defense counsel should give the defendant his or her professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. Defense counsel should also explain to the defendant the advantages and disadvantages of an appeal."); AM. BAR ASS'N, STANDARDS OF CRIMINAL JUSTICE: CRIMINAL APPEALS, at Standard 21-2.2 (1980) ("Defense counsel should advise a defendant on the meaning of the court's judgment, of defendant's right to appeal, on the possible grounds for appeal, and of the probable outcome of appealing. Counsel should also advise of any posttrial proceedings that might be pursued before or concurrent with an appeal."); NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 9.2 ("Counsel's advice to the defendant should include an explanation of the right to appeal the judgment of guilty and, in those jurisdictions where it is permitted, the right to appeal the sentence imposed by the court.").

<sup>181</sup> See AM. BAR ASS'N, *supra* note 143, at Standard 4-8.1; NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 8.1; *id.* at Guideline 8.6. Indeed, such practices were a basic part of my own training during the 1990s as a clinical law student at the University of Texas and as an E. Barrett Prettyman clinical teaching fellow at Georgetown University's Criminal Justice Clinic. It was also encouraged while I was a trial-level public defender at The Bronx Defenders in New York City. My professors and supervisors, it was my understanding, had engaged in such practices for years. See Rafalsky, *supra* note 145, at 403-05 (discussing various "practical applications" of the "rehabilitative defense strategy" when representing a drug-addicted client in the 1970s, including using proof of rehabilitation during plea discussions and sentencing proceedings).

sionals to help a client access desired treatment.<sup>182</sup> Similarly, good lawyers also represent clients in seeking modification of sentencing terms where appropriate. Although Professor Wexler suggests that TJ defense attorneys would move to have a client's probation terminated early if it seems appropriate, this is something that any zealous and quality defense attorney should do.<sup>183</sup>

To the extent that defense attorneys are failing to do the things outlined above, regardless of TJ considerations, their performance should be considered substandard. And although it is true, unfortunately, that some individual attorneys and institutional providers are not able to engage in such practices consistently, I do not think this is because defenders generally wish to provide less than adequate representation for their clients.<sup>184</sup> Rather, their inability to satisfy practice standards stems primarily from a lack of resources.<sup>185</sup> Underfunded defender systems have resulted in a lack of training,<sup>186</sup> overwhelming

<sup>182</sup> See generally Jack B. Weinstein, *When Is a Social Worker as Well as a Lawyer Needed?*, 2 J. INST. STUD. LEGAL ETHICS 391 (1999).

<sup>183</sup> For instance, last semester as a standard part of effective representation, one of my clinic students at the University of Tennessee made a successful motion to have a client moved from supervised to unsupervised probation.

<sup>184</sup> See Joan W. Howarth, *Women Defenders on Television: Representing Suspects and the Racial Politics of Retribution*, 3 J. GENDER RACE & JUST. 475, 485 (2000) (noting that although "feminist women defenders derive great satisfaction from their work," many are frustrated and fear they are not able to represent clients adequately given the constraints under which they operate); Silver, *supra* note 169, at 364 n.91 (explaining that although public defenders often are viewed as less devoted to clients than private counsel, "[i]n reality . . . many public defender offices employ enthusiastic, capable young attorneys who, to the extent their oppressive caseloads and limited investigative resources permit, ably defend their clients").

<sup>185</sup> As Professors Charles Ogletree and Yoav Sapir note:

The growth of the public defense system after the *Gideon* decision was never matched by sufficient increases in funding, and the situation has grown even worse in recent years. . . . Largely due to the lack of financial resources, the public defense system lacks a sufficient number of lawyers. The understaffing and lack of funding result in a situation in which the small number of lawyers who are willing to do the work are burdened with high caseloads, tremendous responsibility and pressure, a widely held presumption that public defenders are overworked and unqualified, a sense of isolation, and the frustration of doing work that includes a large bureaucratic, non-legal component.

Ogletree & Sapir, *supra* note 146, at 214–15 (footnotes omitted); see also Backus & Marcus *supra* note 139, at 1036 (stating that "we have known for decades" the only remedy for the deplorable "state of affairs" in public defense services is "decent financial support from the government for indigent defense, and the presence of well-prepared, reasonably paid, resourceful lawyers"); White, *supra* note 126, at 553 (discussing the history of the lack of resources provided to public defenders' offices).

<sup>186</sup> See Backus & Marcus, *supra* note 139, at 1093–96.

caseloads,<sup>187</sup> and other problems that undermine individual attorneys' ability to do the job they would like to do for their clients.<sup>188</sup> Thus, where lawyers are falling short in the level of representation they are providing, generally it is not as a result of adhering to a "traditional" lawyering model. Converting to TJ defense lawyering would not, therefore, correct this problem.

Professor Wexler's assertion that TJ lawyers attempt to assist clients beyond the confines of the specific legal case also fails to advance his agenda of recasting the role of defense counsel. As he seems to acknowledge, many private defense attorneys, public defenders' offices, and legal clinics currently assist clients with matters that extend beyond the parameters of the criminal prosecution, and they have done so for quite some time.<sup>189</sup> Such lawyers have helped clients, when appropriate, with parole applications,<sup>190</sup> housing issues, accessing government services, addressing civil disabilities that may stem from conviction, and more.<sup>191</sup> Most defense lawyers, however, offer such ancillary assistance<sup>192</sup>

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<sup>187</sup> *Id.* at 1053–59 (describing public defender caseloads as frequently far exceeding the recommended numbers of 150 felonies or 400 misdemeanors in one year). Indeed, in my own experience, New York City trial-level public defenders often represent approximately 100 clients at any one time. *See also* DAVID FEIGE, *INDEFENSIBLE* 30 (2006) (indicating that as an entry level public defender in New York City the author carried between 100 and 125 cases at a time).

<sup>188</sup> *See* Backus & Marcus, *supra* note 139, at 1080–87 (noting, for instance, that overburdened public defenders often do "not have the time or the resources to investigate, prepare, or communicate adequately with the client so that the client can make an informed decision and the attorney can advocate zealously for his client's best interests"); *see also* White, *supra* note 126, at 553.

<sup>189</sup> *See* Wexler, *Rehabilitative Role*, *supra* note 1, at 744.

<sup>190</sup> For instance, Professor Hastings Jones of Florida A&M University College of Law previously ran a very successful parole hearing representation program at the Public Defender Service for the District of Columbia, which he took over after it was founded by Kirby Howlett, an attorney and professor at Georgetown Law Center. Interview with Professor Hastings Jones, Fla. A&M Univ. Coll. of Law (Feb. 19, 2007). Georgetown Law Center's Criminal Justice Clinic students help provide representation to inmates and parolees through the program that Jones developed and ran. *See* Georgetown Law Ctr., Criminal Justice Clinic, [www.law.georgetown.edu/clinics/cjc](http://www.law.georgetown.edu/clinics/cjc) (last visited Mar. 12, 2007) (noting that participants in the clinic engage in post-conviction representation of incarcerated persons).

<sup>191</sup> In New York City, The Bronx Defenders, Brooklyn Defenders, Neighborhood Defender Service of Harlem and The Legal Aid Society currently provide a wide range of ancillary services to clients, including representation on immigration and other noncriminal matters, and have been doing so for several years. *See, e.g.*, The Bronx Defenders, The Civil Action Project, [http://www.bronxdefenders.org/?page=content&param=the\\_civil\\_action\\_project](http://www.bronxdefenders.org/?page=content&param=the_civil_action_project) (last visited Mar. 12, 2007) (describing the work of the lawyers with The Bronx Defenders' Civil Action Project); Brooklyn Defender Servs., Client Resources, [http://www.bds.org/client\\_resources.htm](http://www.bds.org/client_resources.htm) (last visited Mar. 12, 2007) (providing referral and contact information for a variety of social service providers); Legal Aid Soc'y, <http://www.legal-aid.org/>

only as time, resources, and other obligations permit.<sup>193</sup> Thus, there is nothing inherent in the current role of defense counsel—"traditional" or otherwise—that precludes such assistance or requires modification to allow for it. In fact, if there were more resources available for such expanded and continuing services, there is little doubt that they would be offered more regularly. Again, the real problem is one of funding. For these reasons, Professor Wexler's apparent discontent with the current defense bar seems somewhat misplaced, and his proposed solution of expanding its role with "new" proposed practices likely will not resolve the problem.

## 2. The New but Not at All Improved Practices

Although many of the "new" practices that Professor Wexler outlines are already very much a part of what quality defense attorneys do, a number of the suggested actions present ethical and professional responsibility concerns. TJ defense lawyering concepts, as applied, may well displace important normative principles that the criminal defense community has embraced for decades.

First and foremost, Professor Wexler's menu of TJ lawyering practices covers a number of stages of the criminal process, but fails to ad-

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(last visited Mar. 12, 2007) (explaining the array of services it provides, including representation in criminal, housing, immigration, and other matters); Neighborhood Defender Serv. of Harlem, NDS Programs, <http://www.ndsny.org/programs.htm> (last visited Mar. 12, 2007) (explaining that since 1990 the Neighborhood Defender Service of Harlem office has provided not just criminal defense representation but other services, like community education workshops).

<sup>192</sup> As will be discussed further *infra* notes 196–216 and accompanying text, providing ancillary "therapeutic" assistance to clients is a delicate matter. It is not appropriate in every case. Some clients might wish to access such services; others might not. Client boundaries and decisions must be respected. Certainly, defense attorneys are not in a position to decide how their clients should live their lives and should not assume such a paternalistic position.

Moreover, unlike TJ's seemingly unmitigated acceptance of judicial oversight and involvement in treatment and rehabilitation, many of the offices listed above try to offer services to clients outside of criminal court proceedings, in part to protect against the risk of punishment if the client fails in treatment or other rehabilitative efforts. See Steinberg & Feige, *supra* note 135, at 124–25 (stating that "much client-centered work occurs outside the hallways and stairwells of the courthouse" and "does not interfere with courtroom advocacy"); see also Spinak, *supra* note 166, at 1619 (noting that "defenders raise serious questions about funding the courts to provide services to their clients that may be more appropriately funded through other treatment and social services systems").

<sup>193</sup> 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, 21 (2004–05) (quoting an unnamed public defender as indicating that "[w]ithout the resources needed to free up time, people object that the time they have must be dedicated to direct client advocacy").



dress the possibility of trial—the constitutional “main course” of criminal defense work. This omission seems to suggest that Professor Wexler would accept two tiers of lawyers—those who try cases and those who do not. This kind of separation fails to acknowledge the complexities of criminal practice. A lawyer cannot always know how a case is going to be resolved.<sup>194</sup> A client always has the final word on whether he or she wishes to plead guilty or demand a trial, and is always entitled to change his or her mind.<sup>195</sup> In fact, experienced lawyers know that after spending endless hours preparing for trial, a case may be resolved by plea bargain on the eve thereof. And, conversely, many potential guilty pleas break down at the last minute, requiring a case to be tried on the merits. Thus, zealous and quality representation means keeping all options in mind and being prepared to provide the best representation possible no matter how things unfold. Quickly transferring a case when trial rears its head generally is not a sound option. Thus, both in theory and practice, TJ defense lawyering seems to subordinate zeal to therapeutic considerations.

Various other TJ scenarios that Professor Wexler has outlined drive home the tension between lawyers serving as change agents and zealous defenders. For instance, Professor Wexler makes clear that he is in favor of purported “problem-solving” courts and suggests that TJ defense attorneys should embrace such institutions, including drug treatment and reentry courts.<sup>196</sup> He concedes, however, that some of these institutions may harm defendants by requiring a guilty plea to obtain treatment, by setting them up for failure, or by placing them under supervision when they would not otherwise be subjected to such observation.<sup>197</sup> Even if such courts claim to be concerned with rehabili-

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<sup>194</sup> As will be addressed further, *infra* notes 238–248 and accompanying text, the tensions of assuming otherwise are borne out by examining John McShane’s practice—the paradigmatic TJ lawyer who, according to Wexler, has taken TJ “all the way.”

<sup>195</sup> See *Jones v. Barnes*, 463 U.S. 745, 751 (1983); MODEL RULES OF PROF’L CONDUCT R. 1.2 (2006) (Scope of Representation); AM. BAR ASS’N, *supra* note 143, at Standard 4-5.2 (Control and Direction of the Case).

<sup>196</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 749.

<sup>197</sup> *Id.* at 750–51; see also Mae C. Quinn, *Revisiting Anna Moscovitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the “Problem” of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 710–26 (2006) (discussing problems that specialized criminal courts present); Quinn, *supra* note 67, at 61–63; cf. U.S. GEN. ACCOUNTING OFFICE, DRUG COURTS: BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS 15 (2002), available at <http://www.gao.gov/new.items/d02434.pdf> (reporting that “[the Department of Justice] continues to lack vital information that the Congress, the public, and other program stakeholders may need to determine the overall impact of federally funded drug court

tation and the psychological well-being of defendants, encouraging clients to participate in such institutions could subject them to harsher sanctions or penalties. Indeed, if a particular drug court is known for sending a third of its participants to prison after making a good faith effort at treatment, defense counsel would do well to challenge the court's existence rather than merely advise clients that entering the court's program presents a risk.<sup>198</sup>

Professor Wexler's recommendations that clients propose conditions of probation they believe appropriate and that lawyers keep an open mind to being "innovative" leaves room for less-than-zealous representation as well.<sup>199</sup> Indeed, Professor Wexler goes so far as to imply that in some cases it might be appropriate for a lawyer to encourage a client to take preemptive steps to appease a court—as in the matter of a defendant with several children having a vasectomy—when it would be illegal for a court to order that such steps be taken as a term of probation. These suggested practices fail, however, to draw adequately upon a lawyer's legal expertise to attempt to protect the client from legal risks. Accordingly, such suggested practices underscore the likely conflict between TJ considerations in practice and current standards.

Some of the practices that Professor Wexler proposes also demonstrate the ways in which TJ defense lawyering might undermine the presumption of innocence, replacing it with a presumption of guilt and recidivist potential. The TJ lawyer apparently presses a client who has pleaded guilty to accept genuine responsibility for his actions by considering the perspective of his alleged victim, for instance by "re-enact[ing] the crime, playing the role of the victim," or watching videotapes of victims' statements.<sup>200</sup> Such actions are suggested, not only to convince the judge that leniency is warranted, but because it "is generally regarded as therapeutically welcome by the victim and a good first rehabilitative step for the defendant," especially if accompanied by an apology to the victim.<sup>201</sup> This set of TJ considerations, however, fails to acknowledge that many defendants plead guilty even though they are

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programs and to assess whether drug court programs are an effective use of federal funds" and that such information will not be available until at least 2007).

<sup>198</sup> See AM. BAR ASS'N, *supra* note 143, at Standard 4-1.2(d) ("Defense counsel should seek to reform and improve the administration of justice. When inadequacies or injustices in the substantive and procedural law come to defense counsel's attention he or she should stimulate efforts for remedial actions.").

<sup>199</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 761–63.

<sup>200</sup> *Id.* at 755.

<sup>201</sup> *Id.*

not,<sup>202</sup> and that many "guilty" defendants are forced by courts and prosecutors to allocute<sup>203</sup> to wrongdoings they did not commit as a condition of receiving the plea "bargain."<sup>204</sup> In such scenarios, it would be disingenuous to accept responsibility in the manner contemplated, and disrespectful for the lawyer to suggest that the client do so. In addition, these suggestions leave no room for the possibility that a defendant who has committed the crime charged may not ever reoffend and, therefore, does not need to be reformed.<sup>205</sup>

This example also drives home the extent to which the TJ criminal defense model may suggest erroneously a level of inherent wisdom on the part of defense attorneys that allows them to enjoy a position superior to their clients. There is, however, seldom any way for defense attorneys to "know" when clients are truly innocent or guilty, much less to "know" if they are feeling remorseful or "know" what would assist in rehabilitating them. Assuming such superior knowledge, and then trying to "teach[] clients about how to avoid future problems"<sup>206</sup> or offering advice based upon such supposed insights, seems potentially paternalistic and misguided. Professor Wexler underscores this impression that defense lawyers "know" more than their clients in his description

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<sup>202</sup> See *supra* note 159 and accompanying text. As noted *supra* notes 147 and 150–151, advocacy for these proposed new practices has not been accompanied by strong empirical evidence or other convincing social science proof.

<sup>203</sup> By "allocute" I am referring to the statement of facts that the defendant offers at the time of her guilty plea, which generally must satisfy the elements of the crime of conviction. This differs from the more traditional understanding of the term that Kimberly Thomas thoughtfully considers in her recent comprehensive history. See Kimberly Thomas, *Beyond Mitigation: Towards a Theory of Allocution* (Feb. 10, 2007) (unpublished manuscript, on file with author).

<sup>204</sup> Cf. Bibas, *supra* note 159, at 924 (noting that "[c]harge bargaining divorces convictions from actual crimes so that, in court, murder becomes manslaughter and burglary becomes breaking and entering").

<sup>205</sup> See *supra* notes 159–161 and accompanying text. Similarly, considering the intrinsic value of a plea of guilty—that is, its effect on the victim's therapeutic needs and on the defendant's rehabilitation—may be inconsistent with providing zealous representation. Indeed, it would be wholly inappropriate under present norms for a lawyer to advise a client to accept or reject a plea offer based upon the lawyer's concern for the victim's psychological well-being or his desire to reform the client. Thus, Professor Wexler's suggestion that TJ lawyers should consider such matters, if such consideration is for purposes of advancing substantive advice, is troubling. See Wexler, *Rehabilitative Role*, *supra* note 1, at 754–55. See generally Jeffrie G. Murphy, *Well Excuse Me!—Remorse, Apology, and Criminal Sentencing*, 38 ARIZ. ST. L.J. 371 (2006) (challenging the current "culture of apology" and expressing skepticism about the appropriateness of integrating apologies into criminal sentencing schemes).

<sup>206</sup> See *supra* note 100 and accompanying text; see also *supra* note 81 and accompanying text (discussing the encouragement of "vicarious learning" for the client through observation of drug court practices).

of the model exchange between a TJ lawyer and client on the topic of probation compliance, which Professor Wexler concedes sounds like "a kind of Socratic dialogue" to get the client to agree with counsel about proposed probation conditions and future behaviors that would be most rehabilitative.<sup>207</sup>

This paternalistic approach also colors the attorney-client relationship in the other TJ vignettes that Professor Wexler sketches. Again, looking at the "Socratic dialogue" example, it is clear that the lawyer has personal beliefs about the kinds of behaviors the client should avoid in the future, which he would like to offer to the court as proposed probation terms.<sup>208</sup> Thus, this agenda, coupled with the hierarchical attorney-client arrangement, appears to result in client manipulation.<sup>209</sup> Indeed, Professor Wexler is clear about his hope that the client will concur with defense counsel's suggestions about how he should live his life<sup>210</sup> and "buy into a change of behavior that should reduce the risk of criminality."<sup>211</sup> This hardly seems consistent with respect for autonomous decision making and individual choice, which TJ has steadfastly claimed to support.<sup>212</sup>

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<sup>207</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 759–60.

<sup>208</sup> *Id.*

<sup>209</sup> *See id.*

<sup>210</sup> Although Professor Wexler's desire to have criminal defense clients live "good lives" seems wholly well-intended, *see id.* at 757 n.73, over the years well-respected poverty lawyers and clinicians have examined and rejected such misguided good intentions to "fix" clients and the way they live. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 *BUFF. L. REV.* 1, 4 (1990). Professor Laurie A. Morin offers a particularly relevant description of such critiques:

It is not sufficient for legal service providers to identify clients who represent the community; in order to provide "client-centered" legal services, they must develop relationships of mutual trust and responsibility rather than lawyer domination and client subordination. Perhaps the best-known critic of the predominant form of lawyering for poor people is Gerald Lopez, whose book *Rebellious Lawyering* admonishes that good intentions do not necessarily prevent poverty lawyers from perpetuating patterns of injustice in their relationships with poor clients. His tales of "regnant" lawyers describe the perils of treating clients like objects to fix rather than like human beings.

Laurie A. Morin, *Legal Services Attorneys as Partners in Community Economic Development: Creating Wealth for Poor Communities Through Cooperative Economics*, 5 *D.C. L. REV.* 125, 168 (2000). *See generally* GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Anthony V. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 *HASTINGS L.J.* 769 (1992).

<sup>211</sup> *See* Wexler, *Rehabilitative Role*, *supra* note 1, at 759–60.

<sup>212</sup> As Professor Kruse aptly notes in her examination of client-centered representation: "There is a real difference—an important difference—between helping someone achieve what she really wants or values, and imposing what you think she should really

Not only may the TJ practice proposals encourage defense lawyers to assume that they know better than their clients, such proposals may invite lawyers to assume expertise they do not have. Although Professor Wexler contends that defense attorneys do not have to be psychologists or social workers to do TJ work,<sup>213</sup> his menu of best practices suggests such role enhancements. Both of the scenarios discussed earlier—pressing a client to feel remorse genuinely through the “perspective-taking approach” and purporting to know what kinds of behaviors a client should avoid if he wants not to offend—to some degree involve lawyers making assumptions about areas well beyond the law. More to the point, however, are the suggestions that Professor Wexler offers for helping clients to rehabilitate while on probation. Although he offers only a brief outline of such teachings, Professor Wexler recommends that defense lawyers employ relatively complex psychological concepts like compliance and relapse principles to help clients successfully complete a probated sentence.<sup>214</sup> Although thinking outside the legal box

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want or value on her. This distinction marks off the boundary between enhancing her autonomy and paternalistically intervening into her decision-making.” Kruse, *supra* note 135, at 410–11. Kruse goes on to note that “in practice” it is “often hard to tell the difference” between a client’s desires and values, and the desires and values of counsel. *Id.* When the TJ lawyer comes to the table with a pre-set agenda of advancing client change and rehabilitation, however, and “hopes” that the client will change his or her mind to see things from the lawyer’s perspective, there seems to be little question about whose values are superior in the attorney-client relationship. See also *supra* notes 103–106 and accompanying text.

It should be noted that Kruse also recognizes the value of challenging a client’s stated desires in some situations. For instance, she suggests that the “client-empowerment approach” might be necessary to “move the client in the direction of self-sufficiency and self-actualization.” Kruse, *supra* note 135, at 423–24. This approach is based on the notion “that a client’s stated wishes may not accurately reflect the client’s true desires, and that lawyers who too quickly accept the client’s stated wishes as ‘marching orders’ will end up working in ways that are at odds with the client’s real needs and interests.” *Id.* She is careful to point out that this kind of client-centered lawyering seems appropriate in limited circumstances, for instance when representing a battered woman who “face[s] internal obstacles to self-actualization” and may not have the present “capacity to make truly autonomous choices” based upon her history of abuse and oppression. *Id.* Although this author believes such an approach may be problematic as it can run the risk of client essentializing, it at least suggests narrowly drawn exceptions to accepting a client’s life choices from which TJ defense lawyering theory might benefit. See *id.*

<sup>213</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 747–48.

<sup>214</sup> *Id.* at 757. Here, again, these suggestions seem to be made without strong behavioral science and empirical data to support their adoption. See Wexler & Winick, *supra* note 5, at 708. For instance, Professor Wexler suggests, without any real social scientific evidence, that a client is more likely to comply with a probation plan if he has assisted in proposing it. See Wexler, *Rehabilitative Role*, *supra* note 1, at 761, 763; see also Winick & Wexler, *supra* note 1, at 621–22 (claiming, without any scientific support, that “[t]he direct involvement of the youth[ful offender] in preparation of the [deferred probation revoca-

might be useful to good defense lawyering, it would be wholly inappropriate for a lawyer to offer professional advice that he is not qualified to offer.<sup>215</sup> Lawyers who do so run the risk not only of undermining client confidence in their work, but also of running afoul of ethical rules.<sup>216</sup>

Perhaps most problematic is the extent to which the proposed TJ practices fail to account adequately for some of the real challenges that poverty lawyers and their clients face.<sup>217</sup> For example, Professor Wexler strongly suggests that defense lawyers delay sentencing for as long as possible to enable the lawyer to work with clients on post-offense rehabilitation, as in the case of *United States v. Flowers*.<sup>218</sup> Although McShane and others who are privately retained may find that clients are willing and able to work for weeks or months on personal improvement plans to get themselves back "on track," often this is not the overwhelming experience of attorneys who represent those struggling under the burden of poverty. First, many poor clients are forced to live transient lives, from street to shelter to hotel to wherever they might be able to find a

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tion] plan [offered to avoid immediate revocation of probation] would itself increase the likelihood that he will comply with it and benefit therefrom").

<sup>215</sup> See Taylor-Thompson, *supra* note 135, at 166 ("Some of the client's needs may reach well beyond the defender's area of expertise."). Take, for instance, the example of the "classic case" of the alleged repeat DUI offender. See Wexler, *Rehabilitative Role*, *supra* note 1, at 744. Professor Wexler seems to support attorney McShane's assessment of the "real" nonlegal problem plaguing such a client—alcoholism. See *id.* at 744. However, a recent study by the Pacific Institute for Research and Evaluation (the "PIRE"), a nonprofit public health research group funded largely with federal science grants, has found that a majority of alleged repeat DUI offenders suffer from serious mental health issues in addition to problems with alcoholism. See *Study Finds Repeat DUI Offenders Have High Mental Illness Rates*, MED. NEWS TODAY, Sept. 22, 2006, [www.medicalnewstoday.com/medicalnews.php?newsid=52450](http://www.medicalnewstoday.com/medicalnews.php?newsid=52450). Indeed, the PIRE study's principal investigator, a medical doctor, would seem to reject the simplistic assessment offered of this "classic case," noting that an "offender should be viewed as a unique person with a unique set of issues." *Id.*

<sup>216</sup> See *supra* note 164 and accompanying text.

<sup>217</sup> See Backus & Marcus, *supra* note 139, at 1034 ("Poor people account for more than 80% of individuals prosecuted.").

<sup>218</sup> 983 F. Supp. 159, 170 (E.D.N.Y. 1997); Wexler, *Rehabilitative Role*, *supra* note 1, at 756. Although Professor Wexler points to *Flowers* as instructive, this federal felony airport drug courier case is rather different from the majority of low-level street crime matters encountered by public defenders in local criminal courts. See Wexler, *Rehabilitative Role*, *supra* note 1, at 756. As a mother with a job and significant ties to the community, *Flowers* was released after arraignment on a \$250,000 appearance bond. See Docket Sheet, *Flowers*, No. 96-CR-01064 (E.D.N.Y. Nov. 26, 1996). At the time of her guilty plea, therefore, she was free on bail and able to demonstrate her commitment to rehabilitative efforts by complying with Pretrial Services conditions. *Flowers*, 983 F. Supp. at 161. In addition, the opinion of the Honorable Jack B. Weinstein deferring sentence for one year indicates that *Flowers* was not a drug user or substance abuser, as are many clients represented by public defenders in local criminal courts. *Id.* Therefore, from a defense lawyer's perspective, the risks of adjourning her case were relatively low.

safe place to stay.<sup>219</sup> Their day-to-day battle to survive, which is sometimes complicated by addiction or other issues, takes priority over returning to court when required, let alone staying in touch with therapists or attorneys.<sup>220</sup> Beyond this, there are simply not enough services available to poor clients who cannot afford private rehabilitation programs.<sup>221</sup> Thus, for many public defenders and law school clinics, routinely encouraging adjournment to allow elaborate rehabilitation efforts and further court appearances runs the risk of setting up clients for failure—and harsher sanctions from courts when they fail to follow through with promises. Accordingly, pursuing such a course is not as straightforward as Professor Wexler might imply.

Similarly, turning again to the “Socratic dialogue,” the tone and content of this suggested conversation simply do not capture the complex realities facing individuals that public defenders and legal clinics represent—many of whom are charged with crimes motivated by poverty.<sup>222</sup> Indeed, talking with a probation-eligible urban, teenage drug dealer about the “chain of events” that led him to sell drugs or about “patterns” that might lead him to want to sell more in the future—a conversation that is laden with judgment and blame—seems futile without offering some meaningful alternative.<sup>223</sup> Such situations differ from those of suburban youths repeatedly getting traffic tickets, and present nuances that are not accounted for in the TJ model. The socio-

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<sup>219</sup> See *supra* note 144 and accompanying text.

<sup>220</sup> As noted by Professor Kim Taylor-Thompson: “Quality-of-life campaigns have swept large numbers of individuals with mental health and substance abuse problems into the criminal justice system. Representing these individuals fairly and effectively often means stabilizing them sufficiently to enable them to make judgments about their cases.” Taylor-Thompson, *supra* note 135, at 165.

<sup>221</sup> My experience suggests that this problem is even greater for clients outside of urban areas where nonprofit agencies and social services providers seem to focus their attention. Smaller cities and rural areas seem to have the greatest dearth of services for the poor. See Debra Lyn Basset, *Distancing Rural Poverty*, 13 GEO. J. ON POVERTY L. & POL’Y 3, 15–24 (2006); Louise Trubek & Jennifer Farnham, *Social Justice Collaboratives: Multidisciplinary Practice for People*, 7 CLINICAL L. REV. 227, 248 (2000); see also Diane E. Courselle, *When Clinics Are “Necessities, Not Luxuries”: Special Challenges of Running a Criminal Appeals Clinic in a Rural State*, 75 MISS. L.J. 721, 733 (2006); Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=933352](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933352) (examining the unique legal and other hardships that women face living in rural areas in the United States).

<sup>222</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 760.

<sup>223</sup> Similarly, one wonders how this kind of interaction would translate in other scenarios—for instance, in dealing with an alleged gang member charged with assault while part of such a group. The somewhat artificial or unnatural tone of the conversation that might follow demonstrates the limits of this kind of client counseling: “When do you find that you get into fights with rival gang members? Is it when you are with others or by yourself?”

economic "patterns" that may lead an individual to sell drugs as a means of support may not be avoided as easily as speeding tickets. And there is little a defense lawyer can "teach" a client about avoiding poverty in the future.<sup>224</sup> Thus, the proposed lawyer behaviors do not seem to be sufficiently in tune with the work of those appointed to represent the indigent accused.<sup>225</sup> Accordingly, in theory and in practice, TJ defense lawyering may contribute to the already difficult issue of distrust on the part of such clients.<sup>226</sup>

### C. Role Change and Practitioners: The Guest List

#### 1. Public Defenders and Clinics

Turning to those who have been included in the invitation, public defenders and clinicians are high up on the TJ movement's guest list. Unfortunately, Professor Wexler has offered a far less than flattering take on them.<sup>227</sup> Yet, as already noted, many public defenders are already trying to do much of what has been suggested by attempting to stay abreast of developments in their jurisdiction, properly advising clients about the implications of guilty pleas, diligently preparing for sentencing, and involving clients in the appellate process—despite operating within very limited budgets.<sup>228</sup> Thus, these lawyers should not be vilified for failing to do more. Nor should it be suggested they take on additional tasks without providing meaningful suggestions about how they might be accomplished.

Unfortunately, Professor Wexler's proposal to improve services by using private funds, in part to provide for specialized lawyers to take on an "explicit TJ role," is somewhat unrealistic and potentially unwise. Indeed, many public defenders' offices already engage in significant fundraising and grant request efforts. Some, in fact, fund expanded

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<sup>224</sup> See *supra* note 206 and accompanying text.

<sup>225</sup> This is despite TJ's claim that it is concerned with "cultural competence." Wexler, *Rehabilitative Role*, *supra* note 1, at 748.

<sup>226</sup> See Taylor-Thompson, *supra* note 135, at 173 (stating that "in too many jurisdictions, clients and their families tend not to view the defender as an aggressive or especially effective voice in the courtroom"); see also Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 87 (2001). See generally Kenneth P. Troccoli, "I Want a Black Lawyer to Represent Me": Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer, 20 LAW & INEQ. 1 (2002).

<sup>227</sup> See Wexler, *Rehabilitative Role*, *supra* note 1, at 747.

<sup>228</sup> See *supra* note 185 and accompanying text.



legal services with such monies.<sup>229</sup> If more funds were out there, I suspect they would have tapped into them.<sup>230</sup> And using only private funds to run a public defenders' office may run the risk of relying upon the will and agenda of the funding entities.<sup>231</sup> Indeed, it is easy to imagine a situation where this kind of power might be abused, particularly if wealthy individuals wished to reform a given community with the use of defense lawyers who would employ only TJ approaches, as is further addressed below.<sup>232</sup>

In contrast to public defenders' offices, law school clinics have a wealth of resources and time to provide high-level services to their criminal clients.<sup>233</sup> As a matter of course, such programs, with their low client case loads frequently staffed with two student attorneys, are able to go the extra mile for clients.<sup>234</sup> In addition to being pushed to provide the best legal defense possible for their clients, student attorneys are able to spend time talking with clients about other problems they may be facing, assisting them to access social services, and helping to expunge their criminal record if possible. Thus, the notion of providing criminal defense services in a manner that is not myopically focused on the resolution of the criminal charge is very much a part of what clinics teach (and have taught) students to prepare them to provide both zealous and quality representation.<sup>235</sup> The real challenge for the clinical community is not to prevent students from merely replicating the practices of overworked public defenders while in clinic, but to prepare them for the differences between clinical practice—where they

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<sup>229</sup> See Equal Justice Works, Profiles, <http://info.equaljusticeworks.org/fellowships/profiles/02print.asp> (last visited Mar. 12, 2007) (announcing that The Bronx Defenders obtained funding from Equal Justice Works to help assign a lawyer to the local drug treatment court both to monitor the workings of the court and to ensure that clients were receiving adequate representation).

<sup>230</sup> See Wright, *supra* note 146, at 9–14 (reporting on the struggles of the Knox County Community Law Office in maintaining its social work and related programs as “the original grants have expired and funding shortfalls have required cuts in services and staff layoffs”).

<sup>231</sup> See Backus & Marcus, *supra* note 139, at 1046–53 (discussing various funding schemes for public defender programs, including private contract arrangements).

<sup>232</sup> See *infra* notes 237–248 and accompanying text.

<sup>233</sup> See Geraghty, *supra* note 149, at 717 (“Law school clinical programs have also taken the lead in modeling effective representation in juvenile courts and criminal courts and have provided technical support and training to defender organizations.”).

<sup>234</sup> See *id.* at 718 (explaining that in comparison to overworked public defender offices, law school clinics generally have the freedom to pick and choose cases and may decide to take on matters that allow them to make systemic challenges).

<sup>235</sup> See *id.* at 714–15 (noting that students in Northwestern’s criminal and juvenile clinic learn the importance of caring for clients and that “[c]aring involves empathy and a demonstration of commitment to advance the client’s interests”).

might handle a handful of cases at a time—and real-world practice with its “crushing caseload[s].”<sup>236</sup> Nonetheless, I would rather struggle to arm my students with appropriate responses to those less-than-ideal circumstances than suggest that they instead embrace a solely rehabilitative approach when they graduate—by taking “TJ all the way.”

## 2. Lawyers Taking “TJ All the Way”

From my perspective, rather than being held out as a guest of honor, the paradigmatic TJ criminal defense attorney who takes “TJ all the way” presents a host of serious concerns. The description of the wholly TJ practice that Professor Wexler offers seems potentially inconsistent with professional norms. Even Professor Wexler appears to concede that it would be inappropriate for a public defender to adopt the stance of John McShane and turn away clients who refuse to plead guilty in order to engage in rehabilitative efforts.<sup>237</sup> Presumably this is because conditioning representation on an admission of guilt and forfeiture of the right to trial would violate the defendant's Sixth Amendment rights to effective assistance of counsel and trial by jury.<sup>238</sup> It therefore seems inappropriate to celebrate such conduct and to promote it as an exemplar in the defense community. This is particularly true given the difficulty in enlisting lawyers to represent zealously the most reviled in our nation.<sup>239</sup>

What is more, the restrictions McShane places on his services, even for paying clients, present somewhat of an ethical quagmire. For instance, although the American Bar Association's Model Rules of Professional Conduct permit limits on representation, such limitations must

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<sup>236</sup> See Smith, *supra* note 161, at 1257.

<sup>237</sup> Wexler, *Rehabilitative Role*, *supra* note 1, at 772.

<sup>238</sup> See U.S. CONST. amend. VI; *Jones*, 463 U.S. at 753.

<sup>239</sup> Backus & Marcus, *supra* note 139, at 1063 (describing the difficulties inherent in attracting attorneys to represent the accused); White, *supra* note 126, at 545 (noting that defense attorneys are unpopular figures in the eyes of the general public and politicians); see also AM. BAR ASS'N, *supra* note 143, at Standard 4-1.6(a)–(b) (“Lawyers should be encouraged to qualify themselves for participation in criminal cases both by formal training and through experience as associate counsel. All such qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.”); *id.* at cmt. (“Lawyers who unabashedly state that they do not practice in the criminal courts denigrate their role and function as advocates. The bar should discourage lawyers from privately or publicly proclaiming that they disdain criminal practice.”).

be reasonable.<sup>240</sup> And such limitations do not exempt a lawyer from providing competent representation.<sup>241</sup> Questions of reasonableness and competence may arise, however, when a lawyer advises a client to plead guilty without first investigating the matter fully, regardless of the client's version of events, and without determining the strength of the prosecution's evidence and other possible weaknesses in the case.<sup>242</sup>

The "TJ all the way" paradigm also fails to take into account the unknowns in criminal practice. As already noted, defendants have the right to decide whether to plead guilty or proceed to trial, and have the right to change their mind on this all-important question. It is easily imaginable that a client who initially agrees with a solely TJ approach might change his mind.<sup>243</sup> If this should happen, presumably the TJ "all the way" lawyer would refer the client to another lawyer who would be willing to try the case. Particularly after the case has been pending for several months, however, important investigative time may be lost.<sup>244</sup>

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<sup>240</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2006) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

<sup>241</sup> The commentary to Rule 1.2 provides that "an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation." *Id.* R. 1.2 cmt. 7.

<sup>242</sup> AM. BAR ASS'N, *supra* note 143, at Standard 4-6.1(b) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."); NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 4.1 cmt. ("While the decision to enter a plea of guilty ultimately belongs to the defendant, counsel's duty to investigate is not negated solely by a client's initial stated desire to plead guilty."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

The commentary to the ABA Model Rules provides that "[a] lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1. Other commentary to the Rules provides that an "advocate has a duty to use legal procedure for the fullest benefit of the client's cause." *Id.* at R. 3.1 cmt. 1; *see also* Guggenheim, *supra* note 146, at 14 ("Lawyers cannot intelligently engage in plea bargaining, for example, until they have conducted an investigation into the facts of the case to determine the strength of the prosecution's case and the potential for mounting a defense.").

<sup>243</sup> Clarke & Neuhard, *supra* note 193, at 47 ("A criminal defense lawyer must never abandon the core of the defense function—effective trial advocacy skills—because there are always cases that need to be tried and won in court.").

<sup>244</sup> *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); AM. BAR ASS'N, *supra* note 143, at Standard 4-1.3; NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 13, at Guideline 4.1; *see also* Clarke & Neuhard, *supra* note 193, at 14 (noting that "[e]ffective representation requires" both trial and sentencing preparation, and that such preparation "should begin as early in the representation process as possible").

Moreover, TJ criminal defense lawyering raises the specter of a "noisy withdrawal" that could harm the client, especially if the TJ lawyer is known as someone who will only represent clients who initially admit guilt.<sup>245</sup>

What is more, if a prosecutor were dealing with a defense lawyer who is known for refusing to try certain kinds of cases, it is hard to imagine that he would extend favorable offers to the defender because there would be no fear that the client would reject an offer.<sup>246</sup> In light of this apparent lack of leverage, the "all the way" model raises an additional question of effective representation.<sup>247</sup>

One also wonders what the TJ "all the way" lawyer would do if a client relapsed. Is the model sufficiently nuanced to permit the attorney to defend the client fully and attempt to protect him from a judge who might hold the relapse against the client? Or would the limitation on representation, with its affirmative agreement on the part of the client that he will undertake rehabilitative efforts, be read as permitting the lawyer to inform on his client and provide less than zealous representation in the name of TJ?<sup>248</sup> Given these concerns, and the others outlined above, it is clear to me that the paradigmatic TJ defense lawyer is not one whom I wish to celebrate, much less encourage my students to emulate.

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<sup>245</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.16(b) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client."). The commentary provides, however, that "[a] lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as . . . an agreement limiting the objectives of the representation." *Id.* R. 1.16 cmt. 8.

<sup>246</sup> See AM. BAR ASS'N, *supra* note 143, at Standard 4-6.2 cmt. ("In a criminal case, unless advised to the contrary by his or her client, defense counsel may ordinarily proceed on the assumption, for purposes of discussion with the prosecution only, that the defendant may be willing to enter a plea of guilty to some charge. This does not mean that the lawyer should never yield on the position that the accused can and will, if the accused desires, put the prosecution to its proof.").

<sup>247</sup> I would like to thank my colleague Ben Barton for raising this concern.

<sup>248</sup> Henning, *supra* note 169, at 212 (arguing that although truth seeking might be the object of the court system, given a lawyer's duty to maintain confidences and protect her client's interests, it should not be the governing principle for lawyers); see also Richard Silverman, *Is New Jersey's Heightened Duty of Candor Too Much of a Good Thing?*, 19 GEO. J. LEGAL ETHICS 951, 961 (2006) ("The tension that a lawyer faces in balancing his role as zealous advocate for his client and as an officer of the court is an inherent conflict that is not easily resolved.").

### 3. Those Who Have Not Made the Guest List

Finally, in considering Professor Wexler's invitation and his agenda to change the way defendants live their lives, it is worth noting who has not been included on the guest list,<sup>249</sup> even though defenders and clinicians have been targeted for professional reform.<sup>250</sup> Given Professor Wexler's concern that defendants are not given enough encouragement and support as they attempt to complete probationary terms or transition from prison to the community, it seems that probation and parole agencies should be invited to think more about defendants' therapeutic needs. In light of Professor Wexler's statements about a lack of ancillary, therapeutic services for criminal defendants, it also strikes me that it might make more sense to promote a TJ legislature or executive branch to encourage government actors to better fund social service programs in poor communities and provide sufficient resources to already overworked public defenders' offices.

### CONCLUSION

Although our criminal justice system may be flawed, there likely is no panacea. In our desire for reform, we must be careful not to em-

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<sup>249</sup> Professor Wexler notes that his invitation does not expressly mention prosecutors and that they are beyond the scope of his article. He suggests, however, that it might be worth considering infusing their role with therapeutic considerations. Wexler, *Rehabilitative Role*, *supra* note 1, at 745 n.12. Notably, his focus seems to be on prosecutors' treatment of alleged victims with only passing reference to their "dealings with defendants." *Id.* at 772 n.122. Instead, and consistent with TJ's stated concern for the therapeutic well-being of accused persons, perhaps prosecutors should be asked to consider the impact of widespread criminal prosecution of indigent persons for poverty-related activity. In my opinion, such charging decisions amount to one of the biggest and, to borrow TJ jargon, most "antitherapeutic" features of our criminal justice system. See generally Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 704 (2005); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006). But see Darryl K. Brown, *Rethinking Overcriminalization* (Wash. & Lee Legal Studies Research Paper Series, Working Paper No. 2006-07, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=932667](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=932667).

<sup>250</sup> As a former public defender who has represented many indigent individuals and a clinician whose teaching focuses on defending the accused, I may have recent personal and professional experiences that Professor Wexler does not share. See Winick & Wexler, *supra* note 1, at 606 n.2 (indicating that Professor Wexler "teaches a course called 'Practicing Therapeutic Jurisprudence,' at the University of Arizona College of Law," which does not appear to involve direct legal representation as in a live-client clinic). Thus, I must confess a certain level of "defensiveness" about a nondefender focusing on transforming the current work of defenders and defender clinics to the exclusion of other institutional players and suggesting how they should behave and interact with clients. Cf. Spinak, *supra* note 166, at 1619.

brace novel-sounding solutions that may be no fix at all. Indeed, like other modern justice reform movements, I fear that TJ proponents, in their desire to improve the court system, inadvertently may be overselling their proposed solutions and failing to consider all of the implications of their call for "innovation." Indeed, much of what the TJ movement suggests, like the problem-solving court movement, parallels earlier paternalistic social reform efforts that were less than ideal and likely should not be repeated.<sup>251</sup> What is more, despite its claims to the contrary, TJ runs the risk of gutting worthwhile core values of our current criminal justice system.

Accordingly, although it is flattering to have received the invitation, and despite my respect for Professor Wexler and his well-intended desire to improve the lives of criminal defendants and the criminal justice system, I must decline his invitation to join him in the TJ movement or assist him in promoting a TJ criminal defense bar. Rather, I will continue with my prior (somewhat similar) engagement of providing zealous and quality criminal defense representation and will encourage my clinic students to do the same.

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<sup>251</sup> See Quinn, *supra* note 197, at 710; Christean, *supra* note 45, at 7. See generally Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002).

POSTSCRIPT TO AN RSVP<sup>252</sup>

Rather than make his invitation more inviting, with his response to my RSVP, Professor Wexler further substantiates my concerns about applying TJ principles to criminal defense practice. His response underscores the problem of TJ's amorphous and ever-shifting claims, its lack of appreciation for modern defense community values, and its potential incompatibility with the important and serious task of delivering constitutionally mandated effective representation to the criminally accused. Thus, despite his insistence that I misapprehend the extent to which I agree with him, I remain unsupportive of modifying the role of defense attorneys with something called a "TJ lens."<sup>253</sup>

A. *TJ's Amorphous, Shifting Positions*

Professor Wexler's response underscores the serious identity crisis that plagues TJ.<sup>254</sup> As I have already suggested, although they enthusiastically press for a new way to approach the law, many TJ writings fail to identify specifically the problems they seek to correct or fail to describe precisely the means by which they may be corrected. TJ may wish to reduce "antitherapeutic" consequences in the law by adopting more "therapeutic" approaches. Pressed on the details, however, TJ equivocates.<sup>255</sup> This is particularly problematic as TJ presses forward with its newest "dimension"—application to real-world legal practice—and downright troubling when extended to constitutionally mandated criminal representation.

For instance, at the outset of the analysis in my RSVP, I make the very simple, yet fundamental, point that Professor Wexler has failed to identify the very issue he seeks to resolve. Although his invitation suggests that "traditional" defense lawyers need to change their ways, Professor Wexler never explains what he means by "traditional" defense attorneys or what problem they currently present to the criminal justice system. Rather than addressing this significant deficiency, Professor

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<sup>252</sup> See generally Wexler, *supra* note 4.

<sup>253</sup> I also maintain this position notwithstanding an email exchange of over 3500 words that followed after I sent a draft of my paper to Professor Wexler, and during which we did, indeed, "discuss" my continued misgivings about his TJ proposals. See *id.* at 606–07.

<sup>254</sup> See Slobogin, *supra* note 14, at 763.

<sup>255</sup> This is a point that I have repeatedly made in communications with Professor Wexler which, of course, is quite different from "[n]ope, that's not what you're saying." Wexler, *supra* note 4, at 597.

Wexler explicitly declines to explain what he is talking about to the very community whose aid he seeks to enlist.<sup>256</sup> Instead, his response persists in calling for improvement of "traditional" criminal lawyers, while leaving readers to grapple with "whatever [he] might mean by that" term.<sup>257</sup>

Similarly, Professor Wexler takes issue with my interpretation of his vision for TJ criminal lawyers, suggesting that I have misread or over-read his proposal.<sup>258</sup> He did not intend for this new breed of specially named defense attorneys to replace the current representation model. TJ criminal lawyers are simply "traditional" attorneys who operate "with an important 'add-on' component of a TJ lens."<sup>259</sup>

Yet, Professor Wexler concedes that adding a "TJ lens" to criminal defense practice would have a "transformative effect" on the profession and result in a "role change."<sup>260</sup> Thus, beyond providing a justification and description of the role change that are, at best, ambiguous, it is impossible to see how a change in role that is admittedly "transformative" would not necessarily result in a new kind of practice that would displace—or replace—the current model.<sup>261</sup> It would appear that Professor Wexler vacillates in his conception of TJ defense lawyering, seeking the benefits of being a criminal justice reformer without bearing the heavy burden of all that is necessary to undertake significant structural change in our legal system.

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<sup>256</sup> *Id.* at 598.

<sup>257</sup> *Id.*

<sup>258</sup> As the reader will recall, this defense echoes a response to an earlier critique of TJ proposals. See Wexler & Winick, *supra* note 5, at 707 (arguing that in his review of their book, *Essays in Therapeutic Jurisprudence*, Professor John Petrila "puts words in [their] mouths and critiques [them] for writing a book [they] did not (and would not) write"); see also *supra* note 14 and accompanying text.

<sup>259</sup> Wexler, *supra* note 4, at 598–99.

<sup>260</sup> Professor Wexler describes that role change as "encourag[ing] criminal lawyers to practice explicitly and systematically with an 'ethic of care' and 'psychological sensitivity.'" *Id.* at 599. He goes on to explain that "psychologically sensitive techniques" would inform "*how*" defense attorneys would practice, pressing them to think about "*how* to reinforce client reform efforts, *how* to enhance [client] compliance with court orders, and *how* to increase problem-solving skills," also presumably of clients. *Id.* at 602.

<sup>261</sup> This is particularly striking given that Professor Wexler elsewhere suggests that defense attorneys might learn from the Restorative Justice ("RJ") model, noting that "[b]oth RJ and TJ . . . focus on healing the victim, rehabilitating the offender, and preventing future victimization." David B. Wexler & Bruce J. Winick, *Foreword: Expanding the Role of the Defense Lawyer and Criminal Court Judge Through Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 200, 202–03 (2002).



### B. *Defense Community Values and Ideals*

Professor Wexler's response also reflects TJ's continuing disconnection from modern indigent criminal defense community norms and values. He is surprised that I find it disrespectful to routinely ask urban youths about the "chain of events" that led them to engage in a criminal act so that I might suggest what "they" might "do" to avoid such conduct in the future.<sup>262</sup> These statements reflect a failure to appreciate my disdain, and the disdain of countless other defense lawyers, for the justice system's assumptions about, and treatment of, indigent criminal defendants.

Things are not as simple as Professor Wexler would like to believe.<sup>263</sup> Again, when asking about the "chain of events" that leads to the commission of many street crimes, it is often impossible to provide an account without incorporating the role of lifelong poverty and oppression in the mix. Poverty, oppression, and their incidents, however, are not easy to change or avoid in the future. Nor can their effect be erased in the course of a conversation. Thus, Professor Wexler's repeated suggestion that defense lawyers should simply help clients figure out how to "avoid" the "high-risk" situations in the future still fails to account for pernicious social ills largely beyond their control. It also continues to ignore that TJ's proposals appear to be built upon a conception of criminality and client pathology that many defenders reject.

### C. *TJ's Potential Incompatibility with Delivering Effective Representation*

Finally, despite Professor Wexler's clarification that "[t]he possibility of zealous trial advocacy needs to be built into the legal defense structure," his response belies commitment to seriously thinking through the delivery of quality, zealous representation.<sup>264</sup> For instance, in further contravention of his claim that he does not seek to displace current defense customs, Professor Wexler continues to argue that taking TJ "all the way" is an "attractive practice option" for at least "some" defense lawyers.<sup>265</sup> He clarifies, however, that he did not mean that TJ "all the

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<sup>262</sup> See Wexler, *supra* note 4, at 605-06.

<sup>263</sup> Thus, contrary to Professor Wexler's suggestion, I do not reject his proposals because he is not a defender. See *id.* at 598 n.2. Rather, his lack of understanding of day-to-day defender experiences results in his work reflecting somewhat incongruous and sometimes contrived descriptions of attorney-client interactions, which lead to unrealistic, unworkable, and ultimately objectionable proposals.

<sup>264</sup> *Id.* at 600.

<sup>265</sup> *Id.* at 599.

way" lawyers should not fully investigate cases or prepare for the possibility of trial.<sup>266</sup> Rather, in public defenders' offices, "though some lawyers may do exclusively or primarily TJ-type work, those lawyers can investigate or work with others who will focus on defenses, and other lawyers can be available to take the case to trial if negotiations or the therapeutic path breaks down."<sup>267</sup> He rebukes me for purportedly claiming that "the 'single attorney' model is required" in the delivery of indigent criminal defense services, based on his view that not all criminal defense lawyers should be required to act as vigorous trial attorneys.<sup>268</sup>

Although I did not argue, as Professor Wexler suggests, that assignment of a single lawyer at a time is what is required in cases involving an indigent criminal defendant, this is the dominant model for existing public defenders' offices. I suspect this is so because of efficiency and need.<sup>269</sup> I imagine most public defenders would relish the ability to assign two or more attorneys to handle each case from start to finish. A lack of resources, however, usually precludes this option. Therefore, absent a fundamental change in legal and ethical requirements of assigned counsel, or indigent defense funding, Professor Wexler's support of a relaxed view of trial skill competence is highly troubling. To meet constitutional requirements presently, an assigned lawyer generally should be sufficiently competent to try her client's case. Accordingly, Professor Wexler's blithe suggestion of a "Mutt and Jeff" approach to representation may fail to protect adequately an indigent accused's fundamental right to effective assistance of counsel under our current system.<sup>270</sup>

Thus, although it is true that we may agree in some respects about what it means to be a good defense attorney, I remain unconvinced of the wisdom of Professor Wexler's TJ proposals for transforming criminal representation in this country. Instead, as indicated in my RSVP, I maintain my prior commitment to delivering quality and zealous criminal defense representation—the professionally responsible and, for me, morally compelled alternative to Professor Wexler's invitation.

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<sup>266</sup> *Id.* at 600.

<sup>267</sup> Wexler, *supra* note 4, at 600.

<sup>268</sup> *Id.*

<sup>269</sup> There is, of course, the important additional concern with developing and earning client respect and trust throughout the representation process. Professor Wexler's suggestion that any competent trial lawyer could jump in once the "therapeutic path breaks down" to "take the case to trial" obviously precludes development of that kind of relationship between client and trial counsel, which would appear somewhat inconsistent with TJ's alleged support of an "ethic of care" and "psychological sensitivity." See *id.* at 599–600.

<sup>270</sup> See *id.* at 600.