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New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices

David B. Wexler*

I. Introduction

Therapeutic jurisprudence ("TJ") has sought to look at the law in a richer way by pondering the therapeutic and antitherapeutic impact of "legal landscapes" (legal rules and legal procedures) and of the "practices and techniques" (legal roles) of actors such as lawyers, judges, and other professionals operating in a legal context. To date, the professional "practices and techniques" dimension has been prominent in the literature, largely because such TJ principles—basically, judging with an ethic of care and with insights gleaned from psychology, criminology, and social work—find easy application in the increasingly prevalent "problem-solving" (or "solution-focused") courts, such as drug treatment courts and mental health courts.[1]

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* Professor of Law and Director, International Network on Therapeutic Jurisprudence, University of Puerto Rico, and Distinguished Research Professor of Law Emeritus, University of Arizona. The author is best reached by email at davidBwexler@yahoo.com. The International Network on Therapeutic Jurisprudence has websites at www.therapeuticjurisprudence.org and at www.facebook.com/TherapeuticJurisprudence. This essay formed the basis of the opening keynote address at the Oxford University (Balliol College) Conference on Therapeutic Jurisprudence and Problem-Solving Justice, August 7-8, 2012.

[1] *See, e.g.*, Susan Goldberg, Problem-Solving in Canada's Courts: A Guide to Therapeutic Justice (2d ed. 2011) (prepared for the National Judicial Institute in Canada), *available at* http://www.law.arizona.edu/depts/upr-intj/pdf/Problem%20Solving%20in%20Canada's%20Courts.pdf; Michael S. King, Solution Focused Judging Judicial Bench Book (2009), *available at* http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf; Peggy F. Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court*

However, recent economic pressures have somewhat stunted the growth of, and enthusiasm for, special problem-solving courts, and talk has turned to how some of the "new" judging techniques might be employed in *mainstream* courts, especially criminal courts. A TJ perspective can be especially useful in this enterprise: after all, though a close cousin of problem-solving courts, TJ actually originated outside the context of such courts—and predated them by a couple of years—and TJ scholarship has always advocated the application of TJ approaches in a general judicial context.[2]

However, to allow TJ judging to thrive outside the problem-solving court arena, a TJ-friendly legal landscape is necessary. A useful heuristic is to think of TJ professional practices and techniques as "liquid" or "wine," and to think of the governing legal rules and legal procedures—the pertinent legal landscape—as "bottles." In some writing canvassing a handful of criminal law landscapes, I refer to "TJ-friendly" provisions, "TJ-unfriendly" provisions, and even to some dubbed "TJ-fair weather friends."[3] Roughly speaking, these designations refer to the amount of TJ liquid that can fit into a particular bottle.[4]

Movement: Revolutionalizing the Criminal Justice System's Response to Drug Abuse and Crime in America, 74 NOTRE DAME L. REV. 439 (1999).

[2] For the history of TJ, see David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691 (1999). For an overview of and introduction to TJ, see David B. Wexler, *Therapeutic Jurisprudence and its Application to Criminal Justice Research and Development*, 7 IRISH PROBATION J. 94 (2010). On the use of TJ principles both in problem-solving courts and in general courts see, JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce Winick & David B. Wexler eds., 2003) [hereinafter JUDGING IN A THERAPEUTIC KEY].

[3] David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice*, 7 FLA. COASTAL L. REV. 95, 103-05 (2005); David B. Wexler & Michael S. King, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, *in* DRUG TREATMENT COURTS: AN INTERNATIONAL RESPONSE TO DRUG DEPENDENT OFFENDERS 21, 23-31 (Caroline S. Cooper, Anna McG. Chisman & Antonio Lomba eds., 2013).

[4] Fitting liquid into bottles is a description that fits well with the statement, made by a Victoria Supreme Court Justice and former President of the Victoria Civil and Administrative Tribunal ("VCAT"), that TJ practices may be regarded as "*interstitial*", filling the spaces left open by the law governing administrative proceedings. David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 MONASH U. L. REV. 33, 38 (2011).

When we propose "TJ-friendly" legal processes, we obviously enter into a discussion of the "normative" notion of TJ. And, as I recently noted, the normative aspect of TJ is still being "worked out." *Id.* at 33 n.3. It will thus likely emerge as the horse after the cart, a result I regard as appropriate: as with the so-called "new public law" in general, TJ's orientation is overwhelmingly asking the simple question whether proposed results satisfactorily tackle the problem at issue. *See* David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17 (1993). To set a normative stage too early would work to restrict our thinking and options. I feel similarly with regard to formulating a tight (as opposed to an "intuitive") definition of the term "therapeutic" itself: a tight definition might simply be

A stiff mandatory sentence or a sentence of life without parole ("LWOP") would be quite TJ unfriendly, whereas, virtually by definition, provisions authorizing problem-solving courts would be highly TJ friendly; and fair weather friends are those where a creative and skilled judicial glass-blower has twisted and combined bottles so as to enable unfriendly ones to become friendlier. For example, in New Zealand, probation review hearings (recommended in the TJ literature to monitor compliance both of probationers and of social service agencies)[5] are not permitted on the court's own initiative. Yet, where there is more than a single charge, New Zealand judges have at times "creatively, if necessarily clumsily,"[6] allowed for periodic review hearings "by the device of holding one charge back and making it a condition of bail that the sentence of supervision imposed on the *other* charge be complied with."[7] That way, the court can then hold review hearings on the held-back charge. These types of complicated judicial glass-blowing devices should alert legislators to the need for revisiting the governing legal landscape. This evidently occurred in Victoria, Australia, where a Judicial Monitoring condition has now been made an option on a Community Corrections Order.[8]

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ignored by those who find it unduly narrow, rendering a proposed definition irrelevant; worse yet, if others were to take the tight definition seriously, that acceptance might prematurely restrict our thinking and creativity. These observations are highly consistent with a related one: that TJ thinking ought to allow for the playing of "the believing game" with policy proposals, instead of reacting immediately in a critical "doubting game" manner. *See* David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 265-72 (1999).

[5] Another TJ-friendly component of the law of probation is to permit the court, when appropriate, to call for the early termination of the originally imposed probationary period. REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 35 (David B. Wexler ed., 2008) [hereinafter REHABILITATING LAWYERS]. Thus, the legal availability of conducting periodic review hearings, and of terminating probation early in successful cases, would constitute a TJ –friendly "bottle" of probation. The section of the text immediately following—on "liquid"—indicates how TJ judging and lawyering may maximize the therapeutic potential of probation. *See also id.* at 31-38.

[6] *Id.* at 16.

[7] *Id.* at 17.

[8] Thus, amended Section 48K, Division 4, Section 21 of No. 65/2011 the Sentencing Act 1991(Victoria) as follows:

> 48K Judicial Monitoring Condition
>
> (1) A court which is making a community correction order may attach a condition to the order directing that the offender be monitored by the court, if the court is satisfied that it is necessary for the court to review (during the course of the order) the compliance of the offender with the order.
>
> (2) The court may make a direction for the following matters in a judicial monitoring condition—
>
> (a) a time or times at which the offender must re-appear before the court for a review under section 48L of the compliance of the offender with the order; and

> (b) any information, report or test that must or may be provided in the course of a review under section 48L.

Sentencing Amendment (Community Correction Reform) Act 2011 (Vic) s 21 (Austl.).

Another glass-blowing innovation, this one initiated by Arizona prosecutors but accepted by defense attorneys, was largely in response to the ineffectiveness of the state system of parole supervision. The innovative device, called a "probation tail", operates to bypass parole officers and to use instead the less burdened and better trained probation officers. The probation officer authority comes from a plea bargain that calls for the imposition of a consecutive sentence of probation following an incarcerative sentence. As explained to me by Professor (and former Judge) Michael Jones, now a full-time faculty member at Arizona Summit Law School (formerly Phoenix School of Law):

> At least four years ago when I returned to a criminal assignment after many years elsewhere, I discovered that the prosecutors were including in plea agreements for repetitive & dangerous offenders a requirement that they plead guilty to two serious offenses. Typically, when a repeat sex offender pled guilty to a sexual assault or a child molestation charge, the plea agreement would also include a plea to another charge, the second charge being "probation eligible" (such as an attempted sex assault or attempted child molest). The plea agreement includes requirements and stipulations that for the first offense the Defendant would be sentenced to prison, but for the second offense the Defendant would receive a consecutive probation term to begin upon "physical release from incarceration." The attorneys called this second offense probation a "Probation Tail." The plea agreement further provided (as an incentive to successful completion of probation) that if the Defendant rejected probation the prison sentence imposed in lieu of probation would be served consecutive to the prison sentence served for the first offense listed in the plea agreement.
>
> Prosecutors who originated this type of agreement were in a specialized unit called "repeat offenders"—somehow they used the acronym "ROPE." These prosecutors explained the plea agreements (many times in court I questioned the parties about what I thought were unusual terms) were used to impose a more rigorous form of parole after incarceration for a serious offense—to provide compelling incentives for a parolee/ probationer to avoid another prison term. Defense attorneys requested that I accept these "Probation Tail" sentence stipulations because they explained that their clients wanted assistance in drug programs or mental health treatment that had never been offered to them—or, which they had never taken advantage of before, and the client wanted to avoid an even greater prison sentence.
>
> In Arizona, our parole officers are seriously overloaded and underfunded. Parole was one of the "big cuts" in the Arizona state budget over the last several years. It is not unusual for people released from prison to have little or no contact with a parole officer. Ideally, the parole officer eases and facilitates re-integration back into society, but when there is little contact with a parole officer, people are forced to find jobs and housing on their own—many times failing miserably. In sharp contrast to the parole system in Arizona are the probation departments operated by the superior courts in each county. We pride ourselves on the education and expertise of our probation officers, many of whom have masters degrees in social work or counseling. Probation officers have significantly fewer people to supervise than parole officers—and many times, a "specialized case load probation officer" (like a Mental Health Court Officer) will have a reduced caseload because of the chronic nature of the Defendants' problems (such as drug addiction, mental illness, etc.). Our probation departments also are experienced in

If we are looking truly to be able to mainstream TJ practices, we thus must look at developing a TJ friendly legal landscape by sketching a kind of model code of TJ processes and practices. The provisions, or the "black-letter law," could be the bottles, but the important accompanying commentary should indicate how the liquid or wine can best be poured into the bottles.[9]

II. LIQUID

The commentary is an essential ingredient of a suggested TJ "code." As I noted in a related context, comments made to the U.S. sentencing commissioners, "the judiciary is in need of sentencing guidance not only in terms of *what* sentence to impose but also in terms of the *manner* and *process* of sentence imposition."[10] Here are some illustrative practices and techniques—some of the TJ wine that can be of use in probationary and even in incarcerative sentencing:

Individual judges handling particular cases may use TJ insights in the very act of engaging in the judicial function. For instance, the TJ literature abounds with examples, derived from social science findings, of how courts can increase

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> coordinating jobs/housing/treatment programs for drugs, alcohol and mental health issues, which are exactly the types of major issues for people just released from prison. In that sense there is a common need for people in crisis who have not been to prison and those who are recently released from prison. This is a simplification, and I realize the probation professionals understand the complex differences between these populations. So, the bottom line is that local county probation officers have more time, experience, and resources to offer parolees than parole officers.
>
> There is another benefit to the "Probation Tail" concept to prosecutors and the public. That is that dangerous offenders (such as sex offenders or child sex offenders) are more closely supervised upon their release from prison, and if they fail on the probation tail, then they receive another prison sentence as a result of the revocation of their probation. You can tell that I think this is an exciting concept—a creative problem-solving approach to the reality of our parole system's failures and the human effects of state budget cuts.

E-mail from Hon. Michael Jones (ret.), Associate Professor of Law, Ariz. Summit Law Sch. (formerly Phx. Sch. of Law), to David B. Wexler, Professor of Law & Dir., Int'l Network on Therapeutic Jurisprudence, Univ. of P.R., and Distinguished Research Professor of Law Emeritus, Univ. of Ariz. (May 5, 2012) (on file with author).

[9] There is already a Model Penal Code-Sentencing (MPC-S, Preliminary Draft No.8), and, although some of it seems be quite TJ friendly (i.e., provisions regarding deferred prosecution and deferred adjudication), some of it—such as the provision relating to supervised release—surely is not. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 8, 2012). Still, an interesting and worthwhile project might be to draft a TJ commentary to the MPC-S, indicating how TJ principles might be incorporated both in friendly and even unfriendly provisions. Later portions of this Article provide some examples.

[10] David B. Wexler, *The Relevance of Therapeutic Jurisprudence and Its Literature*, 23 FED. SENT'G REP. 278, 279 (2011).

compliance with conditions of probation. The psychological and criminological principles relate to the areas of relapse prevention planning, the psychology of health care compliance, and the reinforcing of law-abiding behavior.

Some simple suggestions flowing from that literature include: soliciting from the offender a list of proposed behavioral "do's" and "don'ts" (e.g., be home by 9 p.m.) that can form the basis of a discussion regarding appropriate probation conditions; encouraging the presence in court of some family members or friends who will learn of the imposed conditions; holding some follow-up hearings to monitor compliance by the offender (and by the relevant social service agencies); and making appropriate positive remarks at the termination (or early termination) of a successful probationary period.

Similarly, TJ has paid some attention to judicial remarks made at sentencing (including *judicial* "do's" and "don'ts"),[11] and in the careful crafting of statements of reason in the sentencing sphere, and even on the role of counsel in explaining those decisions and reasons.

Even when imposing incarcerative penalties, judges have been urged to condemn the act rather than the actor and to search for and comment on any offender strengths that might be used as building blocks in shaping a future with hope.[12] Training judges to draft statements of reasons may be especially relevant in addressing defense sentencing arguments. How rejected defense arguments are responded to can, in TJ terms, be either helpful or devastating to defendants and their responsiveness to rehabilitative efforts. If courts follow the traditional approach of showing why the government should surely win, why the defense arguments are stretches—in other words, if they write such opinions as congratulatory "letters to the winner," the practical results could be quite negative. "[I]f they follow the [TJ] advice of crafting a sensitive 'letter to the loser' (but always remaining mindful of the victim), the stage may be set for a more positive long-term outcome."[13]

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[11] For examples of what some judges have said, but should not have said, see David B. Wexler, *Robes and Rehabilitation: How Courts Can Help Offenders "Make Good"*, 38 CT. REV. 18 (2001) (the official journal of the American Judges Association, available online). The essay also speaks to what judges might appropriately say—even when ordering incarceration—to motivate offender readiness for rehabilitation.

[12] David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78, 79-80 (2007-2008).

[13] Wexler, *supra* note 10, at 279 (alteration in the original) (quoting David B. Wexler, *supra* note 12).

III. BOTTLES

There is, of course, much, much more to the "wine" of TJ[14] but it is time now to look at the "bottles." I make no attempt at all in this most preliminary of articles to canvass completely the pertinent legal landscape.[15] Instead, I

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[14] For a recent discussion of the newly-conceptualized field of "positive criminology" as constituting a principal "vineyard" for producing TJ wine, see David B. Wexler, *Getting and Giving: What Therapeutic Jurisprudence can Get from and Give to Positive Criminology*, 6 PHOENIX. L.REV. 907 (2013). For major discussions of TJ practices and techniques, see KING, *supra* note 1; Wexler & King, *supra* note 3, at 21-43; Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007-2008).

[15] Thus, I touch on bail only tangentially, but it is a topic surely worthy of attention in a code of suggested TJ practices. For a recent article on bail, see Laura I. Appelman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012). And the important area of good time credits, recently the subject of very thoughtful scholarly attention, obviously needs to be included in suggested standards. *See* Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777 (2009). Other important topics, but neglected here, are the propriety of courts accepting "no contest" or similar pleas in certain types of cases, such as sex offender matters, see JUDGING IN A THERAPEUTIC KEY, *supra* note 2, at 165-76, and the newly emerging area of neuropsychology and law relating to the solitary confinement for juvenile offenders. *See* Juvenile Justice Reform Committee, *Policy Statement: Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), http://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

One very important bottle that *did* attract my attention—and that of my co-author Judge Michael Jones—was written after the Oxford conference where the present Article was presented. That bottle is the "criminal settlement conference," a bottle that exists in some states, like Arizona, but not in U.S. federal criminal law. In David B. Wexler & Michael D. Jones, *Employing the "Last Best Offer" Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation*, 6 PHOENIX L. REV. 843 (2013), Jones and I show how criminal settlement conferences can be TJ-friendly, and we discuss how TJ practices—such as active listening, demonstrations of empathy, and techniques for encouraging the parties to think in terms of their underlying interests—can be utilized by a judge acting as a mediator. Jones has actually so conducted such conferences and has facilitated resolutions of cases in the presence of counsel, defendants, victims, and respective family members. Conferences are also good venues for discussing matters such as collateral consequences of criminal convictions and guilty pleas. Moreover, because matters discussed in such conferences are not usable in later criminal proceedings (if the matter is not resolved during the conference), the conference may also provide a legally-attractive setting for apologies. *See* Michael C. Jones, *Can I Say I'm Sorry? Examining the Potential of an Apology Privilege in Criminal Law*, 7 ARIZ. SUMMIT L. REV. (forthcoming 2014).

In my view, the criminal settlement conference has the potential of bringing therapeutic jurisprudence insights into the system of plea negotiations—a basically untamed system where about 95% of state and federal cases are resolved, see STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 178 n.62 (2012), and where sentences are treated as chips in a high-stake gamble. *Id.* at 182 n.83. Were TJ to be somehow poured into that system, we might indeed see a paradigm shift in the criminal law from an adversarial to a therapeutic approach. On the possibility of a paradigm shift, see Nigel Stobbs, *The Nature of Juristic Paradigms: Exploring the Theo-*

review certain legal provisions that have already attracted my attention, and I recast them in the context of suggested processes and related practices.[16] Much, but not all, of my focus is on U.S. law, both federal and state. But my purpose is to broadly illustrate the notion of friendly and not-so-friendly legal landscapes, and how we may best work with them through the use of TJ practices and techniques. My hope is that this exercise may be regarded as a sample and that similar efforts might be undertaken by others in each of the U.S. states and territories and in other jurisdictions, building an international and comparative law reservoir of TJ relevant provisions and commentary.

One of the areas of greatest contrast in TJ friendliness is in what might be termed "back-end" conditional release, and, if only for the powerful contrast that it offers, we shall basically "begin" at the "end."

IV. Back-end Conditional Release

> In the United States, with "truth in sentencing" measures and other legal provisions designed to promote uniformity, discretionary parole release was abolished in the federal criminal system and in many state systems. Instead, in the federal system, a specified incarcerative term is usually followed by a period of supervised release, and the length and conditions of that release are set at the time of sentencing. In TJ terms, this scheme[—which is also tracked in the new Model Penal Code-Sentencing project[17]—] is about as "unfriendly" as one can get.[18]
>
> The federal supervised release system constitutes a legal landscape entirely sapped of motivational strength—in no way does it reward or encourage inmate reform efforts. The length of an offender's incarceration and the period of supervised release are both set at the time of sentence imposition, as are the specific conditions of that release. Thus, there is no legal incentive to do well in prison in hopes of advancing one's release date. Nor is there any legal encouragement for an

retical and Conceptual Relationship between Adversarialism and Therapeutic Jurisprudence, 4 Wash. Univ. Jurisprudence Rev. 97 (2011).

[16] As such, I draw liberally on my cited work and on essays cited on my Social Science Research Network (SSRN) author's page, where digitalized copies of essays are available internationally and without charge. *See Wexler, David B.*, SSRN, http://ssrn.com/author=199142 (last visited Mar. 26, 2014). *See also generally* Rehabilitating Lawyers, *supra* note 5.

[17] Model Penal Code: Sentencing § 6.09 (Preliminary Draft No. 8, 2012).

[18] Wexler & King, *supra* note 3, at 28.

> offender, during incarceration, to think through his or her needs and risk factors, and to propose a relapse prevention plan with meaningful, individually tailored conditions that will help in a transition to community life. Indeed, supervised release may be so far off in the future that a current challenge to the reasonableness or constitutionality of imposed release conditions may even be dismissed on ripeness grounds.[19]

Contrast the U.S. scheme with the provisions of the Spanish law regarding the Juez de Vigilancia Penitenciaria ("JVP"). In Spain, the JVP monitors the offender through three correctional stages and can grant, monitor, and revoke conditional release.[20] From a therapeutic jurisprudence perspective, there are several attractive features of the Spanish law.[21] These features are set out below, not only with a description of the shape and contours of the bottle, but also with a hint of how those provisions could be animated by an infusion of TJ liquid:

> 1. Conditional release authority resides in a single judge rather than a multi-member board, allowing for the possibility of developing a one-to-one relationship between the judge and the offender, thereby increasing the judge's motivational influence.
> 2. The judge's role begins at the time of incarceration (much earlier than when the offender becomes eligible for conditional release), allowing the judge, from the beginning, to monitor and motivate the offender's progress in the correctional environment.
> 3. Under the statute, if a prisoner has served a certain portion of the imposed sentence, is in the third (the highest) clas-

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[19] *Id.* For example, in *United States v. Lee*, 502 F.3d 447, 450 (6th Cir. 2007), Lee was sentenced to long-term incarceration, followed by lifetime supervised release, which would begin in 2021. One of the conditions imposed at the time of sentencing was for Lee to eventually participate in a specialized sex offender treatment program that might include use of a penile plethysmograph. Lee challenged the penile plethysmograph portion of the condition, but the Sixth Circuit declined to review it, regarding it as not yet "ripe." The court noted that, after years of in-prison treatment, it was not certain Lee would be assigned to a treatment program that included penile plethysmograph. Additionally, the court noted the controversy, scientifically and otherwise, regarding the procedure, and wondered if penile plethysmograph technology would even be in use in the year 2021. A TJ analysis of these sorts of ripeness questions, occasioned by a TJ-unfriendly supervised release system, is worthy of scholarly attention.

[20] David B. Wexler, *Spain's JVP ('Juez De Vigilancia Penitenciaria') Legal Structure as a Potential Model for a Re-entry Court*, 7 J. Contemp. L. Issues 1 (2000) (source on file with author).

[21] *Id.*

> sification level, and has a good behavioral record and prognosis, conditional release should follow. Conditional release is not automatic once an offender serves a certain portion of the sentence (which would sap the system of motivational strength), nor does release lie in the unfettered discretion of the judge (which could lead to arbitrariness, helplessness, frustration and rage). Rather, a standard of "constrained discretion" seems to meet both therapeutic and justice objectives. It is important to note here that a *limitation* on discretion is the therapeutically preferable structure.
>
> 4. The judge can set appropriate conditions, including conditions for follow-up hearings, as part of the release process. The imposition of conditions can follow a dialogue between judge and offender, thus giving the offender active participation and voice in the process.[22]

Between these two extremes on the TJ "friendliness" scale are various other "intermediate" structural possibilities, such as:

> 1. The conventional parole system, which still exists in a number of U.S. jurisdictions and in other nations,
>
> 2. Tribal court parole, where under many U.S. tribal codes the court may entertain a parole application after an incarcerated person has served at least half of the imposed sentence, and
>
> 3. A proposed system for judicial reconsideration of imposed sentences.[23]

An accompanying commentary to a provision on back-end conditional release could highlight the judicial (and other) behaviors that might maximize the TJ element. For example, commentary regarding the Spanish law might focus on the benefit of early judicial involvement, the continuity of the particular judge with the particular offender, and the kind of dialogue that could result in the setting of appropriate release conditions.

With experience and commentary provided by academics and participants in the system, even more refined and nuanced suggestions can be made. For example, in an interesting thread on the listserv of the International Network on Therapeutic Jurisprudence, Professor Martine Herzog-Evans, of the University

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[22] *Id.*

[23] *See generally* Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010).

of Rheims law faculty, discussed the implementation of a French law rather similar to the Spanish law of the JVP (known in France as JAPs).[24] Herzog-Evans focused on the balance between personal, face-to-face judge/party contact versus detailed written opinions/explanations of the decision.[25] Thus, when a petition—for an increase in liberty—is granted, it may behoove the judge to animate the party by an in-court congratulatory remark and to skimp a bit on the written explanation, which need only reflect a responsible attentiveness to the legal issue at hand. In one of her emails dated April 21, 2012, Professor Herzog-Evans wrote:

> You may remember that I recently praised the simple way some JAP judges wrote their rulings, which saved them a lot of time, and allowed them to see offenders—as opposed to their colleagues who wrote much more detailed rulings but did not have time to see offenders (all this in big cities with a huge caseload). Well, recently I saw even better than this: when the JAP had enough evidence to rule (e.g., grant electronic monitoring in order to replace a custody sentence) then she would rule on the spot, by handwriting on a pre-prepared one page form.[26]

With the option of conventional parole, the commentary might discuss how a proposal for a "reentry moot court" has been recently implemented with apparent success in Hawaii.[27] The proposal suggests that an incarcerated person coming up for parole prepare a plan and run it by a group of similarly situated incarcerated persons; the latter, with the help of professional facilitators, would play the role of the parole board by asking questions, seeking clarification, and the like.[28] The idea is that this procedure will strengthen the petitioner's proposed plan for parole and, in the process, should serve to lead the other incarcerated persons to think of their own situations and eventual appearances before the board. In a February 9, 2012, email message to the TJ listserv, Lorenn Walker, a Hawaii-based public health educator, lawyer, and restorative justice specialist, touts the apparent early success of this TJ-inspired parole (and parole hearing) preparation:

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[24] Posting of Martine Herzog-Evans, martineevans@ymail.com, to tjsp@topica.com (Apr. 21, 2012) (on file with author).

[25] *Id.*

[26] *Id.*

[27] *See generally* David B. Wexler, *Retooling Reintegration: A Reentry Moot Court*, 2 CHAP. J. CRIM. JUST. 191 (2011).

[28] *Id.*

> You might want to know how we've applied [a TJ] idea to help imprisoned people prepare for parole hearings by practicing giving statements in a group before their hearings . . . . We have incorporated [the] idea into a 12 week training program for imprisoned people and last night heard our first two practice parole board statements. Not only was it excellent practice for the two people who provided their statements, but they also helped about 25 other imprisoned people in the training program who acted as the "parole board," and saw the strengths and weaknesses in their own situations.[29]

When we turn to the intermediate provision of tribal parole, which is similar to the Spanish JVP provision, we see it has the advantage of a single judge, rather than a board, thus facilitating the development of a relationship between the judge and the would-be parolee. However, unlike the JVP, the judge does not become involved until a petition is filed, which cannot occur until half the imposed incarcerative sentence has been completed. Thus, the liquid—the "judicial juice"—cannot operate from the early stage of incarceration. Nonetheless, the TJ literature advocates the establishment of interdisciplinary clinics of students from law, social work, and the like, to advise persons incarcerated in tribal jails of the eventual opportunity for parole, to help them think through their future problems and prospects, and to assist them in filing strong petitions with the tribal court.[30] While the liquid does not jump-start judicial behavior at an early stage, the establishment of a clinic from a nearby university could help fill the gap in the bottle.

Even with the least friendliest of supervised release options, such as the U.S. federal one and the one proposed by the Model Penal Code-Sentencing,[31] TJ practices can dribble in. First of all, the "predicate" of procedural fairness should now be a staple of judicial systems, regardless of the particular procedure at hand.[32] Beyond that, some of the practices and techniques noted above could surely take effect as employed, such as: condemning the act but not the actor when an incarcerative sentence is imposed, and soliciting a defendant's input on conditions of supervised release, even when such conditions will not apply until years later.

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[29] Posting of LorennWalker, to tjsp@topica.com (Feb. 9, 2012) (on file with author).

[30] *See generally* 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).

[31] MODEL PENAL CODE: SENTENCING § 6.09 (Preliminary Draft No. 8, 2012).

[32] Burke & Leben, *supra* note 14, at 4-5; Wexler, *Adding Color to the White Paper*, *supra* note 13, at 78.

This discussion of TJ commentary accompanying criminal processes should also indicate the dynamic character of TJ recommendations, such as reentry moot court and tribal court interdisciplinary clinics. As such, the commentary should be regularly updated and should always be regarded as a work in progress. This dynamic notion should also apply to black-letter recommended processes, where new models may continue to develop and, more frequently, may be profitably tweaked.

V. DIVERSION AND POST-OFFENSE AND POST-SENTENCE REHABILITATION

In a nod in the right direction, U.S. federal law generally allows an offender's post-offense rehabilitative efforts to be taken into consideration when a sentence is eventually imposed.[33] This consideration is facilitated by a judicial power to postpone the imposition of a sentence—an attractive way of establishing and following a treatment plan in the hope that the court will later, in essence, ratify the arrangement.[34]

On the other hand, a TJ-unfriendly feature of the federal scheme springs from the U.S. Supreme Court case of *Reno* v. *Koray*, a case forbidding sentence credit for pretrial confinement other than technical "jail" detention.[35] In other words, if a court grants a defendant bail to enter a treatment facility—even a fully residential facility—the defendant is on bail rather than in jail, and sentence credit will be unavailable.[36] In fact, students of mine had a case in their law school clinical program where an addicted client, largely for sentence credit concerns, refused to enter a pretrial residential drug rehabilitation pro-

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[33] *See* United States v. Flowers, 983 F. Supp. 159, 161-72 (E.D.N.Y. 1997).

[34] *See id. See, e.g.*, Jones, *supra* note 15. Note that the Model Penal Code-Sentencing, although creating useful provisions to defer prosecution and adjudication, does not permit the additional option of delaying imposition of sentence. MODEL PENAL CODE: SENTENCING art. 6 (Preliminary Draft No. 8, 2012). Such an additional option could, in TJ terms, be useful for a number of reasons. For example, coming after a finding or admission of guilt, the option may be more acceptable to victims—and to prosecutors, judges, and the public. Jurisdictions differ on the permissibility of deferring imposition of sentence, the length of time allowed to elapse before sentence is imposed, whether the government's consent is required, and the like. *See* REHABILITATING LAWYERS, *supra* note 5, at 15-16. These matters should be looked at carefully in crafting a TJ "code" of criminal processes and practices.

[35] Reno v. Koray, 515 U.S. 50, 65 (1995).

[36] Perhaps the case of *United States v. Booker*, 543 U.S. 220 (2005), which imports much more discretion into U.S. federal sentencing, may allow a court, through its exercise of sentencing discretion, to take into account a period of time spent in a pretrial rehabilitation program. But the fact that such credit would not be automatic might still dissuade defendants from availing themselves of the therapeutic opportunity.

gram.[37] Alternatives to the *Koray* rule should be explored in any code of TJ suggested processes.[38]

Closely related to these concerns is the entire area of Diversion, which has a number of components, some a bit too technical to dwell on here.[39] On the U.S. federal level, the legal landscape here is crafted not by the legislature but by the United States Attorneys' Manual.[40] There is much to critique here—such as, until April 2011, the Manual's blanket exclusion of addicts from eligibility for diversion, an archaic provision that obviously ignored our knowledge about legally-facilitated addiction treatment and well-functioning drug treatment courts.[41]

But beyond that, the Manual, which was last revised comprehensively in 1997, is crafted in a way that is highly legalistic and off-putting.[42] In practice, it leads federal prosecutors, when they consent to diversion at all, to do so in a very formalistic way. In other words, there is little opportunity for any TJ liquid to seep into the diversion bottle—even though a prosecutor's willingness to consent to diversion ought to be a move designed to boost a defendant's self-esteem and optimism. But it seems everything here must be done strictly "by the book," including written communication about the diversion option. Apparently, separate cover letters avoiding legalisms and written in plain English are not contemplated. Even in the Spanish-speaking District of Puerto Rico, a letter written "in plain Spanish" would presumably be *prohibida*.[43] Indeed, formality governs even when a defendant *successfully completes* diversion. For example, as detailed in a short essay on point, the Manual, at least as it is interpreted in the world of living law, discourages, if it does not downright prohibit, congratulatory statements by Department of Justice attorneys.[44]

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[37] *See also* John V. McShane, *Jailhouse Interventions, Treatment Bonds, and the So-Called "Recovery Defense"*, *in* REHABILITATING LAWYERS, *supra* note 5, at 193-206, discussing a fascinating procedure of a "jailhouse intervention," where a lawyer discusses the option of applying for a "treatment bond" to transfer a jailed addicted inmate to a treatment facility. The availability of credit for time served in a residential treatment facility would obviously facilitate an inmate's willingness to seek such a treatment bond.

[38] *See* David B. Wexler, *Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion*, 10 FLA. COASTAL L. REV. 361, 365-66 (2009) (citing the pre-*Koray* law on point as well as a Canadian alternative rule).

[39] For example, in a short essay on diversion, I have discussed what, in my view, is the most therapeutically appropriate standard of judicial review when a court is considering the appropriateness of a state prosecutor's denial of statutorily available diversion. *See id.* at 366-70.

[40] *Id.* at 374-76.

[41] *See* JUDGING IN A THERAPEUTIC KEY, *supra* note 2, at 4-5. *See also* Wexler, *supra* note 38, at 371, 377.

[42] *See generally* Wexler, *supra* note 38, at 371-76.

[43] *See id.* at 373.

[44] *Id.* at 366-70. The important address on August 12, 2013, by U.S. Attorney General Eric Holder to the American Bar Association, a speech highly critical of the U.S. federal criminal

An area where the U.S. federal sentencing structure has been made more sensible and more TJ friendly—but only because of the intervention of the U.S. Supreme Court—is in the area of re-sentencing and an offender's post-*sentence* rehabilitative gains.[45] Although, as we have seen, an offender's post-*offense* rehabilitative efforts have been reasonably well-treated, post-*sentence* rehabilitative efforts were, until the recent case of *Pepper v. US*,[46] not to be considered at all. That is, in the event of a reversal and an eventual resentencing, the portrait of the about-to-be re-sentenced defendant was to be painted disregarding positive developments in the defendant's recent history; instead, insofar as those factors were concerned, the defendant should be regarded as he or she *originally* appeared before the sentencing court. The supposed "reasoning," if it can be called that at all, was that a contrary rule would be unfair, because "such efforts would only inure to the benefit of those whose convictions or sentences have been disturbed on appeal."[47]

But post-*Pepper*, a far more sensible and therapeutic solution seems to be at hand to allow, and indeed to encourage, courts to *consider* such conduct. For equality purposes, the appropriate comparison should not be with those who made rehabilitative efforts but did not have their original sentence reversed. Instead, it should be with those whose sentences were reversed but who, upon reconviction, warrant an *increased* sentence because of non-vindictive factors such as "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."[48] That sort of symmetry would motivate offenders, whether or not incarcerated during the pendency of their appeals, to engage in rehabilitative efforts and to refrain from behavior that could later come back to haunt them.

VI. APPEAL

In the criminal law appellate area, the most important TJ work originated with Professor Amy Ronner[49] and her mentor, my late colleague, Professor

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justice system and one announcing a number of proposed reforms—including in the area of diversion—should, one hopes, lead to the building of a better federal diversion bottle. For more on the address, see *Some Sentencing-Related Highlights from AG Holder's Remarks Today to the ABA*, SENT'G L. & POL'Y (Aug. 12, 2013, 6:43 PM) [hereinafter *Holder's Remarks to ABA*], http://sentencing.typepad.com/sentencing_law_and_policy/2013/08/some-sentencing-related-highlights-from-ag-holders-remarks-today-to-the-aba.html

[45] *See* Pepper v. United States, 131 S.Ct. 1229, 1255 (2011).

[46] *Id.*

[47] Wexler, *supra* note 38, at 364.

[48] *Id.* (internal quotation marks omitted) (quoting N. Carolina v. Pearce, 395 U.S. 711, 726 (1969)).

[49] *See* Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, 37 CT. REV. 64 (2000).

Bruce Winick.[50] Invoking important principles of procedural justice, Ronner and Winick chastised appellate courts for, in the name of efficiency, issuing summary per curiam affirmances of convictions.[51] Instead, courts should, in their view, write very short "therapeutic" opinions—although of course not designated as such. Those opinions should give the appellant –ideally through a conversation with counsel—a sense that the court heard and attended to the appellant's arguments—even though the arguments were not accepted—-and that counsel had indeed served as an able advocate. Without such a sense, the appellant may be quite suspicious of the court and counsel—perhaps unwilling to accept the ruling and to go forward, maybe even to the point of defiance regarding participation in correctional programming. Needless to say, such a state of affairs is not likely to contribute to a person's "readiness" for rehabilitation[52] A TJ "code" of processes should accordingly contain black-letter language discouraging summary per curiam affirmances of criminal convictions.

VII. CONCLUSION

In this Article, I have tried to show the important relationship between the "new" judging (and lawyering) and the law itself—the legal rules and procedures that might facilitate new judging. In the U.S., a state-by-state look at legal structures would be a welcome subsequent step. As TJ is now of considerable interest internationally, I hope other jurisdictions will undertake exercises to analyze the TJ friendliness of their local landscapes. In fact, in collaboration with Judge Michael Jones and Australian magistrates Pauline Spencer, Michael King, and Jelena Popovic, an international "Mainstreaming TJ" project is now underway and an open invitation letter has been prepared

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[50] *See* Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000).

[51] *Id.* at 499-501.

[52] *See* David B. Wexler, Therapeutic Jurisprudence and Readiness for Rehabilitation, 8 FLA. COASTAL L. REV. 111 (2006). While the basic TJ prescription in the area of criminal appeals ought to be a proscription on summary per curiam affirmances, there are other TJ aspects to consider when courts draft full-blown opinions. As hinted earlier, from a TJ standpoint, an opinion may prove more useful—and therapeutic—if it is crafted not as a congratulatory letter to the winner but, instead, if it reads like a sensitive letter to the loser. This is generally true, and not only in the arena of the criminal appeal. The problem, however, is that in the normal course of events, a judicial opinion may well track the language, style, and tone of the successful appellate brief and, hence, constitute a congratulatory letter to the winner. In a recent paper, I proposed that court staff attorneys might be enlisted to help draft or redraft opinions in a more therapeutic vein. David B. Wexler, *Elevating Therapeutic Jurisprudence: Structural Suggestions for Promoting a Therapeutic Jurisprudence Perspective in the Appellate Courts*, 5 PHOENIX L. REV. 777, 780-81 (2012).

and published.[53] This project is already beginning to bear the fruit we are hoping for.[54]

Finally, the exercise in the present essay of drawing attention to the relationship between TJ practices and the law itself(the bottles) seems to me important because we are at a stage, at least in the US, where a renewed attentiveness to *the law* is very much in order. Many are—rightfully—upset at some of the excesses of the adversary system, and many are—rightfully—upset at how pernicious traditional legal education can be. Accordingly, many are drawn to TJ and to its "cousins"—like restorative justice, collaborative law, and the like—vectors in what is known as "nonadversarial justice" (especially in Australia) or "comprehensive law" (in the US), and, very recently, as "integrative law." In this movement, there is a very strong interest in the "new" lawyering, and in lawyering and judging with an ethic of care. This is all to the good. But my fear is that a number of lawyers attracted to the new lawyering are so disenchanted with *the law* as to be almost running away from it. This is not all to the good. Here, once again, I hope TJ can serve as an antidote. Originally, TJ urged us to look at the softer side of law, to infuse the law with an ethic of care. Now, TJ, with its emphasis on *the law* as a therapeutic agent,[55] and its search for appropriate "legal landscapes," will remind us of the importance of the law itself—and of how interesting, intellectually intricate, and important it is.

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[53] The letter is reproduced in Appendix A of Wexler & Jones, *supra* note 15, at 850-52. Subsequently, the project was officially launched by Professor Wexler, Magistrate Spencer, and Judge Jones through The Innovating Justice Forum of Hiil – the Hague Institute on the Internationalisation of Law. It is entitled *Integrating the Healing Approach to the Criminal Law*, and is described in David B. Wexler, *The International and Interdisciplinary Project to Mainstream Therapeutic Jurisprudence (TJ) in Criminal Courts: An Update, a Law School Component, and an Invitation*, ALASKA J. DISP. RESOL. (forthcoming 2014), *available at* http://ssrn.com/abstract=2399914.

[54] The criminal settlement conference paper is an explicit example of using a TJ-friendly bottle—the Arizona rule—and indicating how TJ wine can be introduced into it. *Id.* at 854-55. A recent paper by Dana Segev, *The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act*, 7 ARIZ. SUMMIT L. REV. (forthcoming 2014), is a perfect illustration of how the wine/bottle methodology of mainstreaming TJ can be utilized internationally. Additionally, at least in the United States, the recent important address by U.S. Attorney General Eric Holder to the American Bar Association should add ammunition to the importance of the Mainstreaming TJ project. *See Holder's Remarks to ABA*, *supra* note 44.

[55] DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990).

International Best Practice in Drug Courts

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> *Individuals who are addicted to drugs or alcohol require treatment in order to find long-term recovery, not the threat of punishment . . . if we are serious about reducing substance abuse, crime and recidivism, and saving taxpayers money, then we must accept that our criminal justice system is filled with seriously addicted people who need treatment to change their behaviour. Drug courts must be the foundation of that reform.*[1]

I. INTRODUCTION

This Article draws on research undertaken during 2011 and 2012 as part of a Master of Criminology and Corrections through the University of Tasmania, including the following:

- An extensive global literature review across the field of therapeutic jurisprudence ("TJ").
- Data from court sessions and interviews with twenty-two practitioners and sixteen participants in the Tasmanian Court Mandated Diversion ("CMD") program.
- Visits to seventeen drug courts and various associated programs in Australia and around the world, interviews with a wide range of stakeholders including judges, magistrates, prosecutors, lawyers, case managers, diversion teams, therapists, counselors and treatment specialists, researchers, evaluators, and other professionals working in the drug court environment. Countries and jurisdictions visited include: Australia (Tasmania, Victoria (Dandenong), New South Wales (Parramatta) and South Australia (Adelaide)); Chilé (Santiago); United States of America (Santa Barbara County, Los Angeles, Chicago, Washington,

[1] John R. Schwartz, Letter to the Editor, *The War on Drugs Itself Is Causing Most of the Damage*, WALL ST. J. (Apr. 29, 2012, 5:03 PM), http://online.wsj.com/news/articles/SB10001424052702303592404577364313277369518.

D.C., New York, and Baltimore); England (London); Wales (Cardiff and Bridgend); Netherlands (Amersfoort and Utrecht); Belgium (Ghent); France (Paris); and Austria (Vienna).

- My own experience of working in the Tasmanian CMD program for twelve months to date (2012-13 and from January 2014) (after twenty-two years of case management experience in custodial and community-based Corrective Services).

I will highlight some of the conclusions that this information and experience has led me to reach during this time, particularly in respect of practices that, in my assessment, work well in drug courts. It should be noted that cultural context is critical, and practices from one court cannot always be effectively transposed to another. Nevertheless, with due deference to Gerard Brennan's description of former High Court Judge Michael Kirby as a "bowerbird of ideas,"[2] I believe it is possible to gain knowledge and inspiration from sharing information about what happens in similar programs in other jurisdictions.

II. WHAT WORKS? A STRENGTHS-BASED APPROACH

An overwhelming body of evidence, evaluations, and meta-analyses support the conclusion that well-run drug courts work.[3] Drug courts have demonstrated, beyond reasonable doubt, to be a powerful and effective mechanism for breaking addiction, reducing drug use, decreasing criminal activity, and cutting public expenditure.[4] They can also increase the global functioning of participants who shift from a life of drug use supported by crime (a huge financial and social burden) to a law-abiding lifestyle featuring employment, restored families, and contribution to the community. Drug courts can even save lives. The National Association for Drug Court Professionals ("NADCP") in the United States, advises that in the twenty years since the first drug court was founded, there has been more research published on the effects of drug courts than on virtually all other criminal justice programs combined, and that "the scientific community has put drug courts under a microscope and concluded that drug courts work."[5] The NADCP provides an abundance of evidence to demonstrate

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[2] A J BROWN, MICHAEL KIRBY: PARADOXES & PRINCIPLES 120 (2011).

[3] Liz Moore, Measures of Success: Capturing the Impact of Drug Courts, at 45-55 (Dec. 20, 2012) (unpublished Masters thesis, University of Tasmania), *available at* http://ssrn.com/abstract=2236482.

[4] *See* DOUGLAS B. MARLOWE, NAT'L ASS'N OF DRUG COURT PROF'LS, RESEARCH UPDATE ON ADULT DRUG COURTS (2010), *available at* http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf.

[5] *Drug Courts Work*, NAT'L ASS'N DRUG CT. PROFS., http://www.nadcp.org/learn/facts-and-figures (last visited Mar. 13, 2014).

that drug courts reduce crime, save money, ensure compliance, combat drug addiction, and restore families.

A. The Ten Key Components

The starting point for effective drug court practice is the Ten Key Components;[6] guiding principles developed in 1997 for state courts in the United States by the Drug Court Standards Committee of the NADCP in partnership with the U.S. Department of Justice's Office of Justice Programs. Judge Peggy Hora (retired) concluded in 2011 that the Key Components "stand the test of time . . . in an era of tremendous growth of problem-solving courts with only a few necessary additions."[7] The United Nations added two new components in its 1999 report outlining principles for court-directed treatment and rehabilitation programs.[8] The first component states, "ongoing case management should include the social support necessary to achieve social reintegration."[9] The second component addresses cultural competence, indicating that programs should employ flexibility to address the needs of women, indigenous people, and minority ethnic groups.[10]

Public funding for drug court programs in the United States often requires compliance with these key principles. It is important that drug courts have sufficient resources to enable this to occur. The Key Components will be used as a framework in discussing my experience as to what works well in drug courts around the world.

1. Drug Courts Integrate Alcohol and Other Drug Treatment Services with Justice System Case Processing

The best examples of integration that I have witnessed are the experienced and highly-functioning dedicated drug court teams composed of knowledgeable and skilled professionals from a range of disciplines. Teams that have worked together for many years have a strong team identity and share values and understanding about their roles. They tend to adopt a calm, competent and professional approach to their work. The drug court teams I spent time with in Santa Barbara County and Los Angeles epitomized a culture of relaxed profes-

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[6] DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), *available at* http://www.ndci.org/sites/default/files/ndci/Key Components.pdf.

[7] Hon. Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 CHAP. J. CRIM. JUST. 7, 50 (2011).

[8] *Id.* at 32-33.

[9] *Id.*

[10] *Id.*

sionalism, which manifests as an efficient, well-oiled machine at work, reaping the rewards in terms of participant outcomes. These are dedicated drug courts with long-serving, highly committed judges who are passionate about Therapeutic Jurisprudence ("TJ"), and who have built strong relationships with a collaborative team of like-minded and long-serving professionals around them. The staff is highly skilled, the workplace satisfaction level is high and the culture of the courtroom is positive and friendly. Tailored approaches to individual participants may include the use of participants' first names, applause, humour, music, a hug or handshake from the judge, or even a toy as a reward for a participant's child. One of Tasmania's CMD magistrates bakes a cake for participants graduating from her list!

Throughout my visits to drug courts around the world, a recurring theme has been that people are more important than structures and processes. The mix of individuals in key positions can exercise a marked influence on the functioning of a drug court, and many drug courts have been initiated through the serendipitous presence of like-minded individuals responding to local circumstances. This was demonstrated by the Belgian drug court in Ghent, which was developed by a judge and a prosecutor in response to their frustration with bureaucratic processes that delayed the offender's ability to access treatment. Appropriate structures and processes followed, and it is now the most highly regarded drug court program in Europe. The program works well because of good levels of communication and respect between the various professionals, clear role definition and boundaries, and practitioners who share understanding and similar values centered on assisting clients to avoid criminality.

Notwithstanding the importance of people and relationships, processes and procedures must be instituted and systematized to ensure the longevity of such programs. It is important that programs do not remain dependent on the patronage of charismatic individuals. Succession planning is essential in this context.

2. Using a Non-adversarial Approach, Prosecution and Defense Counsel Promote Public Safety While Protecting Participants' Due Process Rights

The pre-court conference or "staffing" meeting is an almost universal feature of the highly functioning drug courts I have experienced to date, and a key element of successful drug courts such as Santiago, Santa Maria, Los Angeles, and Ghent. The team—dedicated drug court judge, prosecutor, public lawyer, and case managers (who also represent the treatment professionals)—meets in a closed session to discuss each case at length prior to the participant appearing in court. These meetings need not be held in the courtroom, but may be in the

judicial officer's chambers or in a conference room. The meetings are genuinely collaborative, rather than "top-down" and become the forum for the development of a therapeutic culture and a team approach to problem solving. The court session is thus more efficient, requiring fewer and less detailed written reports (or none at all), and is, more importantly, not the forum for adversarial disputes about progress or further offending or sanctions. By the time the participant is present in court, the team presents a united view as to the best way to proceed. This has been compared to separated parents resolving their differences without the children present and then providing a united front to the children; overall this is a constructive approach for the participant to experience.

Cases are triaged in an open courtroom, such that those demonstrating the most positive progress are dealt with first. This is both a reward for good behaviour (being free to leave earlier) and a show of public support for success, which provides peer role-modeling and encourages other participants who may not be doing as well. This practice has been endorsed and implemented by Tasmania's Deputy Chief Magistrate, who notes that justice is best served by allowing those who are performing well to leave early.[11]

3. Eligible Participants are Identified Early and Promptly Placed in the Drug Court Program

The adage that "justice delayed is justice denied" is certainly true in the drug court setting, in which timely access to treatment can be instrumental in achieving positive outcomes. One practice related to positive outcomes, identified by NPC Research, is limiting the time from a participant's arrest to drug court entry to twenty days or less.[12]

A case management response tailored to each participant is required. For example, individual treatment plans in Ghent do not merely focus on punishment for wrongdoing, but acknowledge the fact that individuals can face a range of complex problems beyond their criminality.

Assessment must be rigorous to identify the best candidates for drug treatment courts, and the evidence indicates that these will be high-risk offenders. The practice of "skimming," or allowing into programs low-risk offenders who are likely to succeed and artificially enhance graduation figures, should be avoided. Consent to participate is strongly associated with motivation to suc-

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[11] Moore, *supra* note 3, at 97.

[12] SHANNON M. CAREY ET AL., NPC RESEARCH, EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS (EXECUTIVE SUMMARY) 8 (2008), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf.

ceed and is intrinsically linked to success. This feature was notably absent in Wales, where a Drug Rehabilitation Requirement, the local form of a drug court order, can be imposed without the consent of the defendant.

4. Drug Courts Provide Access to a Continuum of Alcohol, Drug, and Other Related Treatment and Rehabilitation Services

It is advantageous to have a wide range of community-based interventions available to participants. These might include individual and group therapy, pharmacological interventions, detox and abstinence programs, and other forms of treatment and support. The Los Angeles program commences with a 90-day residential rehabilitation component for every participant (over 1000 to date).[13] In larger cities, a wider range of service providers can offer greater choice as to different approaches. Baltimore, with a population of 50,000 registered addicts, has sixty-four community-based substance abuse treatment programs.[14] The aim is for coordinated, rather than fragmented, care. The south of Wales boasts 150 community services for drug court participants to access.[15] The Queens, New York, drug court holds quarterly meetings with over 100 service providers.[16] Ghent, in Belgium, also has a large network of treatment services accessible through the drug court program.[17] The provision of co-located and in-house programs seems to correlate with success. In the Santa Maria court, treatment providers attend court and provide individual verbal reports on participant success.

5. Abstinence is Monitored by Frequent Alcohol and Other Drug Testing

It is noteworthy that some jurisdictions do not test for cannabis success. In Santiago, the focus is on offending rather than drug use, so no drug testing success is required or necessary. In Queens, New York, use of drugs does not prohibit access to the program as it is "to be expected."[18] Cardiff Drug Court in Wales has dispensed with testing for cannabis use because it is regarded as so prevalent it would be pointless and a waste of money.[19]

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[13] Moore, *supra* note 3, at 76.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 77.

[19] *Id.*

6. A Coordinated Strategy Governs Drug Court Responses to Participants' Compliance

Innovative sanctions I have seen implemented with positive effects in drug courts include a 1000 word biography or essay to explain breaches and a "day in the box" penalty, in which participants spend a day observing the drug court in action, later critique it, and discuss their observations with the judge. This was a surprisingly impressive technique, with Judge Fred Wiesberg (in Washington, D.C.) concluding that "sometimes it's easier to see yourself in someone else than in the mirror."[20] In some jurisdictions, including Queens, New York, payments of fines are a condition of graduation from the program. Queens also requires participants to have a job "on the books" as a condition of graduation. The Adelaide Drug Court in South Australia uses the sanction "next use to serve" (a short custodial sentence) as a clear warning and deterrent to further drug use.

7. Ongoing Judicial Intervention with Each Drug Court Participant is Essential

Judges perform a range of roles in effective drug courts, including those of parent, therapist, schoolteacher, school principal, service broker, guidance counsellor, and probation officer. Some cases take considerable time and energy as the judicial officer develops a workable relationship with each participant. Expressions of gratitude and positive feedback from participants in court are common. Some programs present a "Client of the Month" award to reward and encourage commitment to progress.

The feature of ongoing judicial intervention was notably absent in the Vienna drug court; after sentence, the judge only deals with the file, rather than the participant, except in cases of breaches. Although undoubtedly demonstrating classic Germanic efficiency, this is a much less rewarding experience for the judge and a process that lacks a crucial aspect of therapeutic jurisprudential practice for the participant.

The panels of lay citizen voluntary magistrates that deal with many drug court matters in England and Wales are not composed of the same members on each occasion and so do not provide continuity, consistency, or the opportunity for the participant to develop an ongoing relationship with the judicial officer. The panels also lack legal training and, in my experience, were inefficient and quite out of touch with the offender population. Judge Justin Phillips, the first drug court judge in the West London drug court, describes the importance of continuity: "Whoever sentences, reviews," he says, and thus, "you get con-

[20] *Id.* at 77.

tinuity, which in my view is the most important thing because you build a relationship and . . . a much more ready focus on the problem."[21]

8. Monitoring and Evaluation Measure the Achievement of Program Goals and Gauge Effectiveness

One of the major conclusions of this research is the importance of high-quality evaluation of program outcomes to objectively demonstrate success. Data collection can be thorough without being unnecessarily complex or time-consuming. This process is essential in order to enable programs to compete for limited funds in challenging economic and political climates.

The best examples of high-quality drug court evaluation seem to occur where the courts are closely associated with local universities that conduct ongoing evaluation, such as in Santa Maria, Washington, D.C., and Ghent. The Ghent drug court treatment program has strong links to Ghent University, which has subjected the program to rigorous evaluation (qualitative, quantitative, and process evaluation) since its inception as a pilot program in 2008.[22] It is significant that the Institute of International Research on Criminal Policy at Ghent University has twenty-five full time staff!

The most prevalent measure of success identified throughout this trip was graduation numbers, with around forty to fifty percent of participants estimated as graduating from many of these drug court programs. However, differences in program length and other requirements are relevant considerations in comparing results.

9. Continuing Interdisciplinary Education Promotes Effective Drug Court Planning, Implementation, and Operations

A culture of continuous improvement with respect to staff training and development is evident in the most effective drug courts I have visited, along with teams comprised of highly qualified and skilled professionals. Well-trained staff is regarded as a safeguard for quality work and programs are evidence-based and informed by expert knowledge, for example exhibiting a high degree of compliance with the Key Components. This seems to have the effect of quarantining programs to some extent from the influence of political opportunism, negative media criticism, and ill-informed public opinion. The Washington, D.C., drug court is an excellent example of this and operates as a "mentor court" to other problem-solving courts throughout the United States. Interdisciplinary professional development strengthens the team approach.

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[21] JAMES L. NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 49 (2009) (internal quotation marks omitted).

[22] *See* Moore, *supra* note 3, at 53.

Ongoing education about TJ should ideally extend across all stakeholders and include the wider legal profession, treatment professionals, and police. The drug courts in Ghent and Vienna also place a high value on continuing interdisciplinary education.

Collaboration between researchers and practitioners informs both research and practice, and the benefits of this were particularly evident in Santa Maria, Washington, D.C., and Ghent.

10. Forging Partnerships Among Drug Courts, Public Agencies, and Community-Based Organizations Generates Local Support and Enhances Drug Court Effectiveness

A feature that appears to be regularly associated with success in criminal justice (and beyond) is the multi-disciplinary team. This was exemplified in the Welsh Youth Offending Multi-Disciplinary Teams that bring together representatives of health, police, victims, social services, offender mediation, bail support, restorative justice, housing, drug treatment, parenting, crime prevention, and reparation. The teams function in a holistic manner, minimizing the conflict and misunderstandings that can sometimes arise when workers are dealing with the same case or family from different professional perspectives. The interdisciplinary approach brings diverse ideas together into a coherent whole,[23] thereby strengthening teams; effective teamwork is crucial to success in the drug court field.

Drug court partnerships with the community are demonstrated in Santa Barbara County where Wal-Mart donates children's toys to the program.[24] The judge presents these toys as rewards to drug court participants as gifts for their children. This practice recognizes the family members and strengthens community links, acknowledging that participants are members of the community and providing an opportunity for businesses to contribute to a worthwhile cause. Such partnerships can also help to "scaffold" drug court treatment programs that might be threatened by funding limitations or media negativity. In some jurisdictions, such community partnerships are facilitated by a committee representing government and non-government agencies, such as the Community Action Groups in New Zealand.

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[23] *See* Brown, *supra* note 2, at 120 (referencing Michael Kirby's approach to law reform).

[24] Moore, *supra* note 3, at 82.

III. Other Observations That Work—What Else Does Success Look Like?

The U.S. National Association of Criminal Defense Lawyers has produced an extensive report on America's problem-solving courts, making dozens of recommendations about: decriminalizing substance abuse; the operation of drug courts (including pleas of guilty and admission criteria and practices); ethical considerations about the role of defense counsel; concerns about minorities, the poor, and immigrants; the misallocation of public resources (to low rather than high risk participants); and the need for further methodologically sound research.[25]

Fortunately, in Australia, we do not have to contend with either elected judges, as in many parts of the United States, or volunteer lay magistrates with no requirement for legal training or experience, as in the United Kingdom. Alex de Savornin Lohman, a lawyer working for sustainable justice in the Netherlands, makes the interesting observation that judges and magistrates in common law countries such as Australia and New Zealand have, in effect, greater freedom than their continental European judicial counterparts to develop innovative responses in programs such as drug courts, as they are not as constrained by codified legal systems or generations of legal and cultural heritage and tradition.

The physical architecture of problem-solving courts is a factor that can facilitate or impede the therapeutic process. I have experienced many variations in courtroom styles, from the traditional courtroom structure with a raised bench and considerable distance and height between the defendant and the judge, to courts convened in an office, with or without a desk between the participant and the judicial officer. My conclusion is that the culture of the therapeutic process is more important than the physical structure of the courtroom, but the surroundings in which TJ is undertaken can certainly impact the process. This is borne out by my experiences of an extremely high-functioning drug court held in an old, somewhat run-down, temporary building housing a traditional court structure, compared with much less impressive drug courts convened with the judicial officer and participants sitting in close proximity around a coffee table or a desk. A purpose-built therapeutic courtroom could potentially incorporate features supportive of the therapeutic culture, such as a more level, "round-table" arrangement. However, not unlike the importance of relationships of personnel over structures and processes, the therapeutic culture of the court and the team is of primary significance and can mitigate the nega-

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[25] Nat'l Ass'n of Criminal Def. Lawyers, America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform 54-55 (2009), http://www.nacdl.org/criminaldefense.aspx?id=20191&libID=20161.

tive effects of the traditional adversarial courtroom setting. My experience endorses the perspective of a highly progressive drug treatment program, featuring "acudetox": the only acupuncture program run within a United States custodial environment and undertaken in the physically impoverished, rundown environment of the Baltimore prison complex.[26]

A. Promising Practices

Drug courts have employed a number of "promising practices" across a range of jurisdictions that are worthy of consideration in the context of best practice. The 2007 Multnomah "Mature Drug Court" analysis found that drug court judges who worked longer with the drug court had improved participant outcomes.[27] A study of Californian drug courts found the following promising practices:

- Drug courts where more agency staff attended drug court meetings and court sessions tended to experience more positive outcomes;
- Sites with either a single provider or with multiple referring options but a single overseeing provider had the most positive outcomes;
- Judges on voluntary assignment to drug court, with either no fixed term or a term of at least two years, help produce the most beneficial outcomes;
- The sites that require participants to be "clean" for at least six months before graduation had lower costs and higher net benefits; and
- Drug testing frequency greater than three times per week did not appear to have added benefit; however, lower frequencies were associated with less positive benefits.[28]

The same study identified the following practices related to positive outcomes:

- Court frequency starts at one session every two to three weeks;
- Treatment commences at two to three times per week; and
- Drug tests begin at three times per week.[29]

Findings of a study into twenty Oregon drug courts echoed sections of the Californian study:

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[26] *See* Ron Cassie, *Points of Light: Accupuncture Helps Addicts on the Road to Recovery*, BALTIMORE MAG. (Nov. 2009), http://www.baltimoremagazine.net/this-month/2009/11/points-of-light (last visited Mar. 14, 2014).

[27] MICHAEL W. FINIGAN, SHANNON M. CAREY & ANTON COX, NPC RESEARCH, IMPACT OF A MATURE DRUG COURT OVER 10 YEARS OF OPERATION: RECIDIVISM AND COSTS (FINAL REPORT) 38-39 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf.

[28] CTR. FOR FAMILIES, CHILDREN & THE COURTS, ADMIN. OFFICE OF THE COURTS, CALIFORNIA DRUG COURT COST ANALYSIS STUDY 5 (2006), *available at* http://jpo.wrlc.org/bitstream/handle/11204/2025/3505.pdf?sequence=1.

[29] *Id.*

- Drug courts that incorporated law enforcement into the drug court team had thirty-three percent less recidivism;
- Programs that had at least six team members attend staffing (the pre-court conference) had less than half the recidivism;
- Drug courts that used a standardized assessment to determine eligibility for the program had forty percent lower recidivism;
- Programs where treatment providers performed home visits had graduation rates fifteen percent higher. Those that had the coordinator perform home visits had almost half the recidivism and thirty-three percent higher cost savings;
- Drug courts requiring participants to pay program fees to graduate had forty percent lower recidivism; and
- Drug courts that trained staff on strengths-based philosophy had twenty-five percent lower recidivism and double the taxpayer savings.[30]

Relative to the enormity of scale of some of the difficulties facing innovative criminal justice programs in the United States (i.e., the disparity of the distribution of wealth, and the disconnect between rhetoric and reality apparent throughout the country), Australia is in a fortunate position to enable the continued implementation of progressive programs such as problem-solving courts. If the cost effectiveness of such programs can be quantified and demonstrated to governments, and if rational decision-making prevails over reactionary political responses, the future of drug court programs in Australia should be assured. However, recent political decisions to cut funding to drug and other specialist courts by conservative governments in New South Wales, Queensland, and the Northern Territory suggest that such decision-making is not necessarily conducted on a simple rational accounting basis.[31]

The Annual Report of the Magistrates Court of Queensland 2010-11 indicates that the drug court saved 588 years of prison time in 2010-11 by diverting people from prison.[32] Queensland Law Society President John de Groot highlighted the savings of the drug court alone to taxpayers, "[i]n dollar terms, based on a conservative estimate of the cost of imprisonment of $200 per day per person, the money saved for taxpayers and the government by the Drug Court is in excess of $41 million."[33] Judge Irwin from Queensland notes:

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[30] SHANNON M. CAREY & MARK S. WALLER, NPC RESEARCH, OREGON DRUG COURT COST STUDY: STATEWIDE COSTS AND PROMISING PRACTICES (FINAL REPORT) IV-VI (2011), *available at* http://jpo.wrlc.org/bitstream/handle/11204/2074/3439.pdf?sequence=1.

[31] Moore, *supra* note 3, at 69.

[32] Tony Moore, *Diversionary Courts Fall Victim to Funding Cuts*, BRISBANETIMES.COM.AU (Sept. 13, 2012), http://www.brisbanetimes.com.au/queensland/diversionary-courts-fall-victim-to-funding-cuts-20120912-25sj5.html#ixzz26m5elF23.

[33] *Id.*

> [T]here is no room for rational debate. The decisions have been made for policy reasons directed to reducing spending in the short term . . . they are part of an overall slash and burn philosophy. Because of the other cuts to the budget in many areas, diversionary programs have been lost in the process. It is not helped by having a News Limited media which is more interested in sensationalism (subject to a few journalists) and soft sentencing than any rational discussion of policy. As a result it is difficult to get the story out to the public in any meaningful way.[34]

Securing a bi-party (or multi-party) commitment to the drug court agenda in a non-election climate might be a sound approach for programs to take in order to safeguard funding commitments.

The United Kingdom experience should be a sobering warning for this industry to beware of privatization, "payment by results," and over-bureaucratization at the expense of good casework—all of which have had damaging effects on staff and client morale, which was particularly evident in the south of Wales.

A focus on budget issues to the detriment of specialist domain knowledge and a conscious shift towards a more managerialist approach in France has had dire consequences for the efficiency and effectiveness of corrective services in that country. Research has confirmed that recent managerialist reforms to the courts damaged relationships with the prison and probation services. "[A] terrible caseload and dreadful working conditions" have combined to make it increasingly difficult for judges to keep their therapeutic compass in mind, even though many of the judges (Juges de l'Application des Peines ("JAP")) are problem-solvers and therapeutic, humane judges.[35]

By way of contrast, the Santiago drug court was very well resourced and staffed by enthusiastic, young criminal justice professionals, keen to see the

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[34] Judge Marshall Irwin, Queensland, Comment to tjsp@topica.com (Sept. 18, 2012), http://lists.topica.com/lists/tjsp (source on file with author). See the discussion with members of the TJ community in Australia and overseas between September 13, 2012 and September 19, 2012, in response to this debate. Numerous high profile proponents of TJ from around the world express their dismay at the Queensland decision, describing it variously as "short-sighted," "ill-founded," "sad, stupid and heartless," "part of a slash and burn philosophy," "mindless punitivity," "a sad affront to justice and a false economy" and "wrong-headed and hard-hearted." *Id.* *See also* Matt Foley, *Court Closures a Savage Blow to Justice and Respect for Law*, HERALD SUN NEWS (Sept. 25, 2012, 12:00 AM), http://www.heraldsun.com.au/news/national/court-closures-a-savage-blow-to-justice-and-respect-for-law/story-fndo45r1-1226480447344.

[35] INT'L ACADEMY OF LAW AND MENTAL HEALTH, ABSTRACTS OF THE 33RD INTERNATIONAL CONGRESS ON LAW AND MENTAL HEALTH 419 (2013), *available at* http://www.ialmh.org/fr/Amsterdam2013/Abstract_book_Amsterdam2013.pdf.

development of TJ and social justice in their post-revolutionary country. As Chief Magistrate Michael Hill comments in the local context, "in a place the size of Tasmania I would have thought we could achieve some good results with the right approach."[36]

IV. Emphasis on Evaluation

Any rational and reasoned approach to the topical matter of law and order is vulnerable in a challenging political and media climate. Responses to the media and the public about these matters must be well informed and evidence-based to be convincing. Good quality evaluative research is essential to mount a persuasive and successful campaign for public and political support, with direct implications for securing program funding.

The Santa Barbara drug court uses the Addiction Severity Index ("ASI") to measure changes in functioning over time. The Level of Service/Case Management Inventory ("LS/CMI"), used in Tasmania, can provide a snapshot of criminogenic needs "before" and "after" program participation, which, in practice, effectively translates to a level of risk to be managed.[37] Each of these tools has strengths and weaknesses, and both are inherently deficit oriented, rather than strengths-based. Whichever method or tool is used to collect and calibrate outcome data, it is clear from my experiences that undertaking the task of evaluating participant progress in some form at the end of each drug court order is indispensable. It facilitates the collection of information about the impact and effectiveness of program participation, thereby rendering the data available for analysis, interpretation, and application, including in program modification and resource gathering.

NPC Research in the United States has developed a useful "logic model" to examine the performance of drug courts.[38] The model can assist in clarifying the best way to use resources and which outcomes (performance measures) should be measured. The model can guide evaluations of drug court programs including process evaluation, outcome evaluation, impact evaluation and cost-efficiency analysis.[39]

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[36] Michael Hill, *Wandering Down the Therapeutic Jurisprudence Road*, 20 Australian L. Libr. 70, 73 (2012).

[37] Success Works, Tasmania's Court Mandated Drug Diversion Program: Evaluation Report 60, 65 (2008), *available at* http://www.justice.tas.gov.au/__data/assets/pdf_file/0020/115463/CMD_Eval_Final_Report_Jan_09.pdf.

[38] *Specialty Areas: Drug Treatment Courts/Other Problem-Solving Courts, Speciality Areas*, NPCResearch.com, http://www.npcresearch.com/specialty_drug_courts.php (last visited Mar. 13, 2014).

[39] *Id.*

V. What's in it For Me? Benefits for Participants, Politicians, and the Public

A. Participant Feedback

Drug courts are often catalysts for other constructive change in many areas of participants' lives. "Before and after" photos are a useful visual indicator for participants and the team to see the progress made, typically reflected in the Washington, D.C., Judge's comment that "they just look better."[40]

Feedback from sixteen Tasmanian CMD participants interviewed between August and October 2012, identified the following areas as those in which the most substantial benefits had been gained from their participation in the program.[41] Comments under each area are direct quotes from the participants.

- *Physical health* (e.g., weight gain, joining a gym, playing sports, sleeping better, interest in appearance, engaging with medical and dental services): "People tell me how well I'm looking." "I'm trying to get fit and healthier." "I'm not strung out all the time." "I eat properly now." "I got sick of being sick all the time."[42]
- *Mental health / insight / attitude* (e.g., increased confidence, self-esteem, motivation and maturity, an improved attitude, improved thinking skills and coping techniques, victim empathy, learning about undiagnosed mental illness, achieving mental stability, and accessing mental health services): "My attitude has changed. I'm not a cocky-arsed c*nt[sic] anymore." "I'm more honest with myself instead of being in denial." "I'm not a paranoid head case anymore." "I'm listening more instead of thinking I know everything." "I feel bad about what I've done." "I can see where I'm going and where I was." "I assess things differently now and I resolve the issue instead of getting angry, walking out, and destroying property." "I now know I have a choice about using or not." "I learn[ed] strategies to deal with stress, which was why I used." "I'm getting better and I can actually sit still and have a conversation." "I'm able to reach out and ask for help." "I'm going for a mental health assessment next week." "I've settled right down and I have a new way of looking at life." "I'm trying to organize my life and pull my head in."[43]
- *Relationships with partners, children, peers, and parents* (e.g., repairing relationships and rebuilding trust, reconnecting with children and achieving access or custody, improved relationships with police, taking

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[40] Interview with Fred Wiesberg, Judge, Superior Court of D.C. (Mar. 16, 2012).
[41] Moore, *supra* note 3.
[42] *Id.* at 86-87.
[43] *Id.* at 87.

responsibility for pets, and showing respect for other people): "I don't want my family to go through that lifestyle every day." "I'm getting on better with my girlfriend because I'm not scamming and drugged off my head and she's not worried about me all the time." "There's no conflict now because I'm not lying about situations so there are no trust issues." "Gives my teenage daughter more confidence in me." "I'm heaps better at relating to my kids because I'm willing to do stuff with them instead of being down all the time." "I want to give my kids an upbringing without drugs, alcohol, and violence." "I'm doing a parenting program." "The CMD worker helped me contact Welfare to work towards custody of my son." "I get to see my family more and play with my son more. I take him to parks and to day care. I never used to do that because I was always out chasing money." "I've dealt with a lot of counselors, psychiatrists, and therapists for myself and my son." "I've been drug free from day one in my three-year-old's life." "The program saved my butt so I could get out [of prison] with my son." "I play football with my twelve-year old." "I'm no longer with my partner who is still using." "My M[o]m hadn't slept properly for five years and now she sleeps every night."[44]

- *Drug use* (e.g., reduced use and accessing ongoing treatment, including pharmacotherapy): "I used to use twenty times a day." "I was using upwards of $500 a day. Now I have positive strategies instead of using." "I knew the program would give me the structure I needed to give up the drugs." "I can talk about where I've been. Before, I could never talk about drugs without needing them." "This is the longest I've been clean for over ten years." "I used one weekend but the program helped me not to go into a downhill spiral. I was disappointed in myself for using and I was honest about it." "I've gone from using everything to just using cannabis."[45]
- *Offending / legal* (e.g., reduced offending, reduced manufacturing or dealing of drugs, reduced charges and court appearances, compliance with court orders (Drug Court, probation, Family Court, restraining orders, bail conditions), reduced negative interactions with police, reduced prison time, accountability to the program through urinalysis, and acquiring a drivers license): "I'm not making speed and ice anymore." "Not stealing . . . before I couldn't walk past something without taking it." "Thieving is something I was so used to doing before." "I'm not looking for trouble anymore. I've realized it's not worth it."

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[44] *Id.* at 87-88.

[45] *Id.* at 89-90.

"I'd be in prison without the program." "I'll never go to prison again." "The court order gives weight to my attempts to stay away from other users." "I don't hate the police and judges now." "When you go to court the judge treats you completely different . . . they talk to you and let you know you're doing a good job . . . it's a good feeling . . . I look forward to going to court." "I treat the judge with respect and he treats me with respect." "[The magistrate] is engrossed in the program and wants you to succeed and come out better. He saw me in the street and would come up and ask how I'm doing. Court is easier and more laid back." "The prosecutor apologized for not wanting me on the program and let me know I'm doing good."[46]

- *Education, employment, and other forms of productivity* (e.g., enrolling in formal education, finding work, and accessing schemes to support new business opportunities): "I've done lots of courses and got my white ticket for building sites and fork lift and traffic management tickets." "Casual paving led to roofing work and that led to more and more work." "I've set up a legal business now." "I'm trying to start my own business making furniture." "I want employment and I never wanted to work before."[47]
- *Financial management* (e.g., addressing rent arrears, debts, and court fines): "I pay my bills and debts and I have money for nice things." "I have less money because I'm paying my rent and power and groceries but I don't waste it on stuff I don't need." "My financial situation is bouncing back because I'm not buying drugs." "I got a super payout and before the program it would have been straight up my arm but I'm looking into buying a property. I've never owned property before."[48]
- *Social engagement and life skills* (e.g., volunteering and community activities that make a contribution to society, developing a pro-social peer network, and accessing other social services (such as social security and advocacy services)): "I now have nothing to do with drug dealers. I hang out with normal people." "My whole circle is different in every single way." "I have different friends now, including some Christians!" "I changed my phone numbers to avoid drug dealers—if you sleep with dogs, you catch fleas." "A really good hobby you're passionate about helps." "I'm spending time fishing and bike riding instead of smoking dope." "I've realised that what's normal is to stay home and watch TV and walk the dog and pay the rent." "I had to cut

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[46] *Id.* at 90-91, 114.

[47] *Id.* at 88.

[48] *Id.* at 88-89.

off my three best mates and my brother now that I have nothing to do with other users."[49] "This is the first house I've ever had." "I'm looking into buying my first house."[50]

The interview feedback was overwhelmingly positive and suggests a pattern of comprehensive change. This was reflected in comments such as: "It's changed my whole life around"; "I've never looked back since starting CMD"; "I felt that I was treated like a human"; "I feel normality now"; "My whole world is different . . . I have responsibilities now"; and "I don't have to wake up and figure out who I'm going to rob, and I'm not sick and a crook and hanging out."[51] This qualitative information about global functioning puts a human face on the statistical data used to evaluate program success. It can serve to remind us of the ripple effect of drug abuse and crime within families and communities, and the corresponding breadth of benefits that can accrue when drug abuse is treated and crime is reduced as a result. It is hoped that this data set can be usefully employed in conjunction with quantitative data that includes recidivism figures, drug use analysis, and calculations of costs saved and avoided to provide a comprehensive case in favour of adequately funding drug courts as an intelligent and strategic investment of public money.

B. Cost Savings

In March 2012, the Director of the Office of Drug Control Policy for the Obama Administration, Gil Kerlikowske, indicated that the United States spends around $300 billion per year on healthcare and corrections associated with illicit drug use.[52] The Obama Administration has responded to this dire situation by dropping the "war on drugs" rhetoric and is instead focussing on education, public health, and treatment.[53] The rapid growth of drug courts across the country, now numbering close to 3000, is in direct response to the expenses associated with incarceration.[54]

Drug courts can be shown to represent intelligent and effective use of public money and to be a wise long-term investment for governments to make. Well-run programs, which comply with the Ten Key Components, can return considerable financial benefits across the public sector in agencies such as public health, mental health, police and emergency services, legal services, courts, prisons, community corrections, child protection, public housing, social wel-

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[49] *Id.* at 89.

[50] *Id.* at 89.

[51] *Id.* at 91.

[52] Gil Kerlikowske, Address at the International Council of Police Representative Associations Conference (Mar. 2012) (source on file with the author)

[53] *Id.*

[54] *Id.*

fare, and unemployment services. The relevant literature in this field and my own research suggest that investment in such programs must be sufficient to ensure that the job is done properly and that "skimping" on the provision of services for what is typically a very complex, high-risk, and high-needs offender cohort is a false economy. The return on investment of this nature has the potential to pay dividends well into the future, serving the generations that follow. The U.S. National Institute of Justice concluded, "criminal justice intervention is a good investment of public funds."[55]

The field of cost analysis in drug courts has developed significantly from calculating simple savings in prison costs to a much more comprehensive analysis incorporating calculations of criminal justice system costs, public health costs, lost productivity costs, social welfare costs, and victimization costs. Based on extensive research, NPC Research has developed a list of twenty-seven practices related to "positive cost outcomes," specifically targeted to saving and avoiding costs in drug court programs.[56]

The seminal American financial study, CALDATA 1994, tracked 1821 Californian drug users in treatment and found that, despite an average treatment cost of $1400 per person, taxpayers saved approximately $10,000 "with the greatest share of benefit deriving from reductions in the economic burden of crime."[57] An estimate of the annual per person cost of program participation in the Los Angeles drug court is $14,000-$15,000, compared with an annual prison cost of $42,000.[58]

A series of cost analyses has been conducted on drug courts across the United States, finding average costs savings per participant ranging from $2615 to $12,218 and average benefits per $1 invested ranging from $1.74 to $6.32.[59] This increases up to $27.00 per $1 invested when savings from reduced foster care placements and healthcare utilization are taken into account.[60] The Multnomah County Drug Court in Oregon saved nearly $2.5 million per year in criminal justice costs, with the payoff rising to over $10 million per year when savings in victimization, theft reduction, public assistance, and medical costs were factored.[61] Recidivism savings to date in the Superior Court of Sacra-

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[55] ADELE HARRELL, SHANNON CAVANAGH & JOHN ROMAN, NAT'L INST. OF JUST., NCJ 178941, RESEARCH IN BRIEF: EVALUATION OF THE D.C. SUPERIOR COURT DRUG INTERVENTION PROGRAMS 1 (Apr. 2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/178941.pdf.

[56] CAREY & WALLER, *supra* note 30, at 23.

[57] Keith Roberts, *Focus on Problem-Solving Courts*, 51 JUDGES' J. 1 (2012) (reviewing a nationwide study of twenty-three drug courts in U.S.).

[58] Memorandum from the Bureau of Justice Assistance Drug Court Clearinghouse to Justice Programs Office of Am. Univ. (Mar. 3, 2011) (on file with author).

[59] Moore, *supra* note 3, at 58.

[60] *Id.* at 59

[61] *Id.* at 63

mento County Drug Court were calculated at $20,257,535.[62] Cost savings estimated across the Californian drug courts are in the range of $18 million per year, cost offset and cost avoidance are estimated at $43 million per year, and projections of future savings in California conclude that by the ninth year one million dollars would be saved for every 100 drug court participants.[63]

One program participant interviewed during the course of this research disclosed that he would regularly "binge steal," or break into twenty to thirty houses a night to secure the means to fund his illicit drug habit.[64] Another described his practice of using $100 worth of amphetamines before robbing numerous businesses to fund a further $1000 worth of drug use on the same night as "business as usual."[65] The extensive cost of such offending is a powerful argument for addressing the causes rather than the symptoms of crime in the community. A reduction in drug-related crime is a significant step towards achieving safer communities and has benefits for potential victims, insurance companies, and the criminal justice system.

A 2012 calculation of costs avoided in saved (state) prison days for fourteen participants of the Tasmanian Court Mandated Diversion ("CMD") program totalled $1.23 million, which is a similar amount to the annual (federal) budget allocation for the program.[66]

VI. A Problem-Solving Approach to Resources

Recognizing the complexity of the client group, their history, and the severity of the problems they face, Dr. Meredith Cosden, a university-based program evaluator in California, posed the question, "Why would it be cheap to fix this problem?"[67] This comment was endorsed by Judge Mike Tynan in the Los Angeles court, who elaborated that this particular client group already costs the state an extraordinary amount of money when expenditures across all public sector budgets such as housing, welfare payments, public health, mental health, police and emergency services, child protection, courts, legal aid, and corrections (particularly prisons) are considered.[68] Judge Tynan argued that it is unreasonable to expect drug courts to be a "silver bullet" but that a sensible investment in addressing the underlying problem could lead to enormous cost

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[62] *Id.* at 59.

[63] *Id.*

[64] *Id.* at 69.

[65] *Id.*

[66] *Id.* at 85.

[67] *Id.* at 41

[68] Global Centre for Drug Treatment Courts, International Best Practice in Drug Courts 14 (2013), http://globaldrugcourts.com/wp-content/uploads/2013/06/Intl-Paper-Tasmania.pdf.

savings for the public sector.[69] It is a complex economic task to calculate the comprehensive costs saved and avoided across agencies by addressing illicit drug use and related crime in this way, but a recurrent theme from these drug courts was that cost savings are considerable and that the courts represent good value for public money.

A prominent theme emerging from many of the drug courts I visited was the need for programs to be resourced to a sufficient level to enable the job to be done effectively. Failing to comply with the Ten Key Components based on an inadequate level of funding risks undermining the integrity of programs. This is likely to lead to an inferior outcome, reflected in a poor public and media response. The credibility of TJ is threatened in this manner but the United States has been particularly vigilant in ensuring that programs are well supported so they remain capable of achieving good outcomes. Access to a sufficient range of appropriate services is an important part of this equation, and according to the Chief Magistrate, the lack of residential rehabilitation locations in Tasmania needs "urgent attention."[70]

The application of a creative problem-solving approach can also resolve the problematic issue of securing funding to support drug court programs. In some jurisdictions I visited, funding originated from novel and innovative sources such as private health insurance companies and church groups. Donations in kind can also be sought. For example, Wal-Mart donates the toys given to participants as rewards in the Santa Barbara drug court.[71] Drug courts can seek donations for relatively low-cost items to support participants, such as diaries, drink bottles, bus passes, or other "rewards" presented in court in recognition of good progress or graduation. The availability of treatment programs during evenings and weekends is another example of an important aspect of drug court programs. The programs can achieve this through a creative and flexible approach to work hours without necessarily involving considerable additional costs. Close cooperation with local universities can reap significant benefits such as further education for staff, research, evaluation, assistance with grant applications, and placements for post-graduate students. All of these can bring material benefits to programs without the need for specific budget line-item expenditures.

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[69] *Id.*

[70] Hill, *supra* note 36, at 72.

[71] DRUG COURTS PROGRAM OFFICE, *supra* note 6, at 82.

VII. Reflections on the Tasmanian Experience

Tasmania's Court Mandated Diversion ("CMD") list is one of many lists (or dockets) managed by eight of the State's fourteen magistrates.[72] As such, it is very much a part-time jurisdiction, involving an average of one sitting session biweekly for each magistrate (four in the south, two in the north, and two in the north-west of the state).[73] The program is necessarily fragmented by virtue of this structure, and therefore does not reap all of the benefits of consistency and continuity that can flow from a "dedicated team" program. In practice, the "team" composition in Tasmania (including magistrate, prosecutor, lawyer, and Court Diversion Officer) can be different for almost every participant and can vary even for the same participant from one court review to the next. The program is capped at eighty participants around the state (forty in the south, twenty in the north, and twenty in the north-west) and is limited by the absence of any dedicated state government funding, being entirely funded through the Illicit Drugs Diversion Initiative of the federal government.[74] Chief Magistrate Hill notes, "resources will always be an issue with programs like this."[75] He also comments, "to obtain and retain properly qualified staff seems to have been an issue . . . consistency of staff retention means consistency and reliability in approach which I think is vital."[76] A high turnover of staff and managers has characterized the program since its inception as a pilot in 2008 and reduces the capacity for effective teamwork, continuity of practice, stability, and program development. Other issues Chief Magistrate Hill highlights include:

> [T]he lack of residential rehabilitation and the area of youth offending which . . . need urgent attention. We need more appropriately qualified counsellors and drug clinicians. We need administrative support in the court system to ensure our data collection processes are as good as they can be and to administer the list throughout the State. The restrictions on the number of participants are simply unacceptable from an access to justice perspective or from basic fairness. . . . We need to continue professional development in each of the areas, namely judicial, treatment provision, diversion administration and prosecutorial and defence roles.[77]

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[72] *See* Success Works, *supra* note 37.

[73] *See id.*

[74] *See id.*

[75] Hill, *supra* note 36, at 72-73.

[76] *Id.* at 72.

[77] *Id.* at 72-73.

Chief Magistrate Hill notes that the legislative provisions establishing this problem-solving court have inserted a non-adversarial approach into an adversarial structure.[78] In practice, CMD lists are regularly combined with other court matters, which inhibits the development of a therapeutic culture for the members of the drug court team.

In my experience at CMD (researching the program for a few months before working as a Court Diversion Officer for twelve months to date), the sort of dynamic and creative problem-solving approaches that I have witnessed in various successful programs around the world are not well-served by the risk-averse and process-oriented public service machine in which the program is currently embedded. This is notwithstanding the independence of the judiciary and the combined blessings of a progressive Chief Magistrate and CMD Magistrates, who are competent, intelligent, professional, and constructive in their approach and committed to the concept of therapeutic jurisprudence. As James Nolan observed:

> As it concerns problem-solving courts, I found—particularly in the early years of the international movement—a clear difference between the U.S. and the five other countries considered in the study (England, Scotland, Ireland, Canada, and Australia). Specifically, a comparison of the development of problem-solving courts internationally reveals an important difference between an American disposition characterised by enthusiasm, boldness, and pragmatism and the contrasting penchant of the other countries toward moderation, deliberation, and restraint.[79]

Arguments in favor of diversified, rather than dedicated, drug court teams include exposing more judicial officers to the therapeutic problem-solving culture with the possible attendant benefit that they transport elements of this approach to their decision-making practices in the "mainstream" body of their court work. It has also been argued that the security of funding for the program is enhanced by spreading the participant numbers across a number of courts, although I doubt this practicality would impact a political decision to cut funding to the program. The cost to the court of running the list is not substantially different to that of dealing with the participants in a mainstream list, which would have to occur in any case in the absence of this particular sentencing option. In fact, I suspect such a practice would have the opposite effect of

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[78] *Id.* at 71.

[79] James L. Nolan, Jr., *The International Problem-Solving Court Movement: A Comparative Perspective*, 37 MONASH U. L. REV. 259, 261 (2011).

increasing the risk of program funding being cut, with the work simply to be absorbed by mainstream adversarial courts instead.

Perhaps the last word should be left to judicial officers, who have described their work in therapeutic courts in terms ranging from "time consuming and draining but rewarding"[80] to "very satisfying,"[81] indeed to the extent that: "in all my years here it is one of the most satisfying and effective sentencing options."[82] Finally, "You can actually see it working and I think that is really positive, and I think the community can have confidence because we are putting a fair bit of work into it."[83]

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[80] Interview with Fred Wiesberg, *supra* note 40.

[81] Hill, *supra* note 36, at 72.

[82] Interview with Fred Wiesberg, *supra* note 40.

[83] Matt Smith, *Recovering Their Lives*, HOBART MERCURY, Oct. 25, 2011, at 17 (quoting Chief Magistrate Michael Hill).

Neighbors From Hell: Problem-Solving and Housing Laws in the Netherlands

Michel Vols*

I. Introduction

Neighbors can enrich, but also ruin your life. Housing related anti-social behavior such as noise nuisance, harassment, hoarding, the cultivation of cannabis and small-scale drug dealing can have devastating effects on neighbors (hereafter: "victims"). Unfortunately, the number and scale of these kinds of problems have undergone an enormous growth.

For that reason, the past decade has seen the rapid development of various ways of tackling this kind of anti-social behavior all over the world. For example, in the United Kingdom and Australia, registered social landlords and local authorities are entitled to request that a court give a "civil preventative court order" that prohibits people from acting in an anti-social manner.[1] In the

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[1] *See* Home Department, Putting Victims First: More Effective Responses to Anti-social Behavior, 2012, Cm. 8367 (U.K.); Andrew Millie, Anti-social Behavior (2009); Thomas Crofts, *The Law and (Anti-Social Behavior) Order Campaign in Western Australia*, 22 Current Issues Crim. Just. 399 (2011); John Flint & Judy Nixon, *Governing Neighbors: Anti-*

United States, local authorities started "nuisance abatement programs" to combat problem behavior.[2] In Belgium, the local authorities have the power to issue a "Municipal Administrative Fine" to nuisance neighbors.[3]

In the Netherlands, the local authorities are entitled to issue closure orders, which result in the closure of a home and the homelessness of the "neighbor from hell" (hereafter: "perpetrator").[4] Moreover, Dutch landlords have the power to obtain an eviction order from the housing court if a perpetrator causes serious nuisance to his victims. After obtaining this eviction order, the landlord is entitled to remove the anti-social tenant from the premises.

The subject of tackling housing-related anti-social behavior has grown in importance in the light of recent developments in the Netherlands. In Amsterdam the housing associations (the landlords that provide public/social housing), the local authority and the police have agreed on the multi-agency "Harassment Approach" ("Treiteraanpak"): a perpetrator who harasses his neighbors, will be harassed by the authorities. They will unleash all their powers from private and public law on the perpetrator.

According to the burgomaster of Amsterdam, a perpetrator has to stop bothering his victims or has to leave the town.[5] In August 2013, the Harassment Approach "celebrated" its first success. A family that had caused serious trouble for over thirteen years had to leave their home after the housing associ-

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social Behavior Orders and New Forms of Regulating Conduct in the UK, 43 URB. STUD. 939 (2006).

[2] *See* ELI B. SILVERMAN, NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING 135-37 (1999); William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y, 447, 448-50 (1995); Terance J. Rephann, *Rental Housing and Crime: The Role of Property Ownership and Management*, 43 ANNALS REGIONAL SCI. 435, 435-51 (2009).

[3] *See* Tom Meeuws, *Toegegeven: er is Overlast in Antwerpen* [Anti-social behavior exists in Antwerp], *in* MARK COOLS ET AL., OVERLAST EN DE MAATSCHAPPELIJKE AANPAK ERVAN [The tackling of anti-social behavior in society] (2008); ELKE DEVROE, A SWELLING CULTURE OF CONTROL? DE GENESE EN TOEPASSING VAN DE WET OP DE GEMEENTELIJKE ADMINISTRATIEVE SANCTIES IN BELGIË [A Swelling Culture of Control? The Rise and Application of the Municipal Administrative Fines in Belgium] (2012).

[4] *See* MICHEL VOLS, WOONOVERLAST EN HET RECHT OP PRIVÉLEVEN: DE AANPAK VAN OVERLASTVEROORZAKERS IN NEDERLAND, ENGELAND, WALES EN BELGIË [Housing Related Anti-social Behavior and the Right to Respect for Private Life: The Tackling of Anti-social behavior in the Netherlands, England, Wales and Belgium] (2013); Jan G. Brouwer & Jon E. Schilder, *Woonoverlast en de Persoonlijke Levenssfeer: Naar een Balans Tussen Bescherming en Beperking* [Housing Related Anti-social Behavior and the Right to Respect for Private Life: Towards a Balance Between Protection and Restriction], 36 NJCM-BULL. 307, 307-24 (2011) (Neth.).

[5] *See* CITY OF AMSTERDAM, ACTIEPLAN: DE TREITERAANPAK [Action Plan Harassment Approach] (2013).

ation obtained (with the support of the burgomaster and police) an eviction order from the housing court.[6]

This family is only one of many perpetrators that face homelessness because of causing a nuisance. In the Netherlands, housing associations request approximately 1500 eviction orders from the courts because of serious housing related anti-social behavior every year.[7] In all these cases, a neighbor's problem behavior seriously harms a victim's well-being. Recent research by the Dutch Central Statistical Office ("CBS") found that 6% of the 72,000 respondents were suffering constantly from serious anti-social behavior from their neighbors and 13% said they occasionally experienced a nuisance.[8]

In the Netherlands, questions have arisen concerning the lawfulness of the instrument of expulsion (as the result of an eviction or closure order) in tackling housing related anti-social behavior.[9] Strangely enough, the huge financial impact on (public) housing agencies and local authorities—the costs of a house expulsion are estimated at 60,000 Euros[10]—in relation to the problem-solving capability of an "eviction oriented approach," has never been the subject of a serious debate. This lack of debate is even more surprising, when we consider that most of the time, perpetrators, (and victims) are simultaneously dealing with various other problems: e.g., substance abuse, (mental) health problems, lack of social skills, family issues, unemployment and poverty.[11]

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[6] *See* Hof's-Amsterdam 8 augustus 2013, Case No. ECLI:NL:RBAMS:2013:4935, *available at* www.rechtspraak.nl (last visited Apr. 1, 2014) (Rochdale/Defendants) (Neth.).

[7] See *Huisuitzettingen 2012*, AEDES.NL, http://www.aedes.nl/binaries/downloads/schuldhulpverlening/huisuitzettingen-2012/20130319-huisuitzetting-2012.pdf (last visited Apr. 1, 2014).

[8] *See Alle huishoudens, overlast door directe buren*, CENTRAAL BUREAU VOOR DE STATISTIEK, http://www.cbs.nl (last visited Apr. 1, 2014).

[9] *See* Brouwer & Schilder, *supra* note 4. *Cf.* DAVID COWAN, HOUSING LAW AND POLICY (2011); John Flint & Hal Pawson, *Social Landlords and the Regulation of Conduct in Urban Spaces in the United Kingdom*, 9 CRIMINOLOGY & CRIM. JUST. 415, 415-35 (2009); Caroline Hunter, Judy Nixon & Michele Slatter, *Neighbors Behaving Badly: Anti-social Behavior, Property Rights and Exclusion in England and Australia*, 5 MACQUARIE L.J. 149, 149-76 (2005); Jan Luba, *Eviction by the Magistrates: the New Closure Orders*, 13 LANDLORD & TENANT REV. 171, 171-73 (2009).

[10] *See* ROB BOGMAN & FRANK VAN SUMMEREN, PREVENTIEVE WOONBEGELEIDING: EVALUATIE VAN DE PILOT WOONBEGELEIDINGSPROJECT [Preventative Supervised Housing: Evaluation of the Pilot Supervised Housing] 5-7 (2010).

[11] *See* Maureen Crane & Anthony M. Warnes, *Evictions and Prolonged Homelessness*, 15 HOUSING STUD. 757, 757-73 (2000); Caroline Hunter & Judy Nixon, *Taking the Blame and Losing the Home: Women and Anti-social Behavior*, 23 J. SOC. WELFARE & FAM. L. 395, 395-410 (2001); Igor van Laere et al., *Evaluation of the Signalling and Referral System for Households at Risk of Eviction in Amsterdam*, 17 HEALTH & SOC. CARE COMMUNITY 1, 1-8 (2008); Igor van Laere et al., *Preventing Evictions as a Potential Public Health Intervention: Characteristics and Social Medical Risk Factors of Households at Risk in Amsterdam*, 37 SCANDINAVIAN J. PUB. HEALTH 697, 701-03 (2009) [hereinafter Laere et al., *Preventing Evictions*]; Gert Schout &

Making a perpetrator homeless does not solve the underlying causes of anti-social behavior. An eviction does not have any therapeutic effect for the perpetrators or for his victims. At a macroeconomic level, evicting families is a waste of money and time. For that reason, I address in this paper the following question: could Dutch housing law be applied in a more solution-oriented way? Is it possible to apply private law in a more therapeutic way in order to combat anti-social behavior and its underlying causes at an early stage? Is it possible to reduce the number of evictions and reserve the instrument of expulsion for exceptional cases in which therapy and dialogue are no longer a solution?

This Article tries to answer these questions by analyzing Dutch housing (landlord-tenant) law with the help of findings of therapeutic jurisprudence (hereafter: "TJ") and research on problem-solving justice. The analysis and the recommendations may be of use for other jurisdictions that evict tenants exhibiting housing-related anti-social behavior, such as Australia,[12] Belgium,[13] Canada,[14] China,[15] Finland,[16] Germany,[17] the Republic of Ireland,[18] the United Kingdom,[19] and the United States of America.[20]

This Article is divided into four parts. The first part gives a brief introduction of TJ and problem-solving justice in the United States. The second part will examine Dutch housing law and the current eviction oriented approach. The third part contains a TJ analysis of the Dutch way of dealing with housing-

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Gideon de Jong, *Leren van Huisontruimingen* [Lessons from Evictions], 20 J. SOC. INTERVENTION: THEORY & PRAC. 21, 23 (2011).

[12] *See* Hunter, Nixon & Slatter, *supra* note 9.

[13] *See* WONEN AAN DE ONDERKANT [Living at the bottom of the housing market] 337 (Pascal de Decker, Luc Goossens & Isabelle Pannecoucke eds., 2005).

[14] *See* LINDA LAPOINTE, ANALYSIS OF EVICTIONS UNDER THE TENANT PROTECTION ACT IN THE CITY OF TORONTO: THE NON-PROFIT HOUSING SECTOR 4 (2004).

[15] *See* Yung Yua, *On the Anti-social Behavior Control in Hong Kong's Public Housing*, 26 HOUSING STUD. 701, 701-22 (2011).

[16] *See* David P. Varady & Harry Schulman, *Social Disorders in the Early Stages of Public Housing Decline: A Helsinki Case Study*, 22 HOUSING STUD. 313, 313-32 (2007).

[17] *See* Martin Häublien, *BGB § 569 Auβerordentliche fristlose Kündigung aus wichtigem Grund*, *in* 6 MÜNCHENER KOMMENTAR ZUM BGB vol. 3, ch. 5 (2012).

[18] *See* Michelle Norris & Cathal O'Connell, *Local Authority Housing Management Reform in the Republic of Ireland: Progress to Date—Impediments to Future Progress*, 2 EUR. J. HOUSING POL'Y 245, 257-60 (2002).

[19] See HOUSING, URBAN GOVERNANCE AND ANTI-SOCIAL BEHAVIOR (John Flint ed., 2006); David J. Hughes, *The Use of the Possessory and Other Powers of Local Authority Landlords as Means of Social Control, Its Legitimacy and Some Other Problems*, 29 ANGLO-AM. L. REV. 167, 167-201 (2000).

[20] *See* Gerald Lebovits & Daniel J. Curtin, Jr., *Nuisance Holdovers in New York*, 33 N.Y. REAL PROP. L.J. 68, 68-77 (2005); Nicole Strand, *Restructuring Public Housing: an Examination of the Strict Interpretation of the "One Strike and You're Out" Policy*, 24 HAMLINE J. PUB. L. & POL'Y 111, 111-46 (2002).

related anti-social behavior. The fourth part offers suggestions for adjusting the eviction approach and establishing a problem-solving way to tackle anti-social behavior.

II. Therapeutic Jurisprudence and Problem-Solving Justice

Therapeutic jurisprudence sees the law as "a therapeutic agent."[21] This means that the law is a social force that can have "therapeutic or antitherapeutic consequences."[22] TJ proposes, "the exploration of ways in which, consistent with principles of justice, the knowledge, theories, and insights of mental health law and related disciplines can help *shape* the development of the law."[23] It uses "social science to study the extent to which a legal rule or practice promotes the psychological or physical wellbeing of the people it affects."[24]

TJ provides the theoretical foundation for problem-solving courts and solution-oriented approaches.[25] Problem-solving courts are "specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services."[26] According to Winick and Wexler, "judges performing in a problem-solving capacity, dealing as they do with human problems, need to understand some principles of psychology, the science of human behavior," just as "judges dealing with antitrust cases need to understand basic principles of economics, and judges dealing with patent cases need to understand basic principles of engineering."[27]

Courts involved in problem-solving justice are characterized by "active judicial involvement and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress."[28] They use "their authority to forge new responses to chronic social, human and legal problems—including problems like family dysfunction, addiction, delinquency and domestic violence—that have proven resistant to conventional solutions."[29] Problem-solving courts are not focused on just settling a

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[21] Law in a Therapeutic Key xvii (David B. Wexler & Bruce J. Winick eds., 1996); Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice 6 (David B. Wexler ed. 2008) [hereinafter Rehabilitating Lawyers].

[22] Judging in a Therapeutic Key 7 (Bruce J. Winick & David B. Wexler eds., 2003).

[23] Law in a Therapeutic Key, *supra* note 21, at xvii.

[24] Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 Psychol. Pub. Pol'y & L. 193, 196 (1995).

[25] Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 Fordham Urb. L.J. 1055, 1062 (2002).

[26] Judging in a Therapeutic Key, *supra* note 22, at 3.

[27] *Id.* at 7.

[28] *Id.* at 5.

[29] Greg Berman & John Feinblatt, *Problem-solving Courts: A Brief Primers*, *in* Judging in a Therapeutic Key, *supra* note 22, at 73.

case, but on "achieving a variety of tangible outcomes associated with avoiding reoccurrence of the problem."[30] A number of jurisdictions (e.g., the United States and Australia) have good experiences with establishing problem-solving courts and implementing problem-solving techniques in mainstream courts.[31] The Netherlands does not have ample experience with problem-solving courts, but the Dutch Council for the Judiciary ("Raad voor de Rechtspraak") declared itself openly in favor of solution-focused justice.[32]

Although TJ and problem-solving justice approaches are used to analyze nearly every area of law, it seems that it has not been applied to housing law extensively.[33] The aim of this Article is to fill this existing knowledge gap and to determine whether TJ and problem-solving justice approaches can be useful in analyzing and applying housing law. However, before a comprehensive TJ-analysis of the Dutch approach towards housing related anti-social behavior can be made, it is necessary to have a better understanding of the Dutch housing law system.

III. Dutch Housing Law and Housing Related Anti-Social Behavior

In 2012 the Dutch housing stock consisted of nearly 7.5 million homes.[34] Compared with other European countries and the United States of America, the Netherlands has a high percentage of rented housing. Almost 56% of the

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[30] Judging in a Therapeutic Key, *supra* note 22, at 5.

[31] *See* John Fleinblatt & Greg Berman, Good Courts: The Case for Problem-Solving Justice 23 (2005).

[32] *See* Raad van de Rechtspraak, Visie op de rechtspraak [View on the Administration of Justice] 30 (Frans van Dijk et al., eds., 2010). *Cf.* Suzan Verberk, Probleemoplossend Strafrecht en het Ideaal van Responsieve Rechtspraak [Problem-solving Criminal Law and the Ideal of Responsive Administration of Justice] (2011); Stijn Franken, *Probleemoplossende Rechtspraak als Alternatief voor Strafrechtelijke Repressie* [Problem-solving Justice as Alternative for Repression in Criminal Law], 34 Recht der Derkelijkheid 66, 70-71 (2013).

[33] The importance of housing to successful reintegration of ex-offenders that return from prison is acknowledged in TJ literature. *See* Tamar M. Meekins, *You* Can *Teach Old Defenders New Tricks: Sentencing Lessons From Specialty Courts*, *in* Rehabilitating Lawyers, *supra* note 21, at 143, 144. Furthermore, eviction and TJ have been linked in Australia. According to the president of the Victorian Civil and Administrative Tribunal, "Self-represented tenants are still evicted by justice institutions following therapeutic jurisprudence approaches. But the way it is done is intended to be dignified and humane. That might involve giving advice about emergency housing assistance. Hence the significance, in therapeutic terms, of the tribunal's recent initiative of making a social assistance data base available on the desktop computer of all members." Kevin Bell, Victorian Civil & Admin. Tribunal, One VCAT: President's Review of VCAT 82 (2009).

[34] *See Woningvoorraad naar bewoning; regio 2008-2012*, Centraal Bureau voor de Statistiek (Mar. 4, 2014), http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLNL&PA=81293NED&D1=a&D2=0&D3=a&HD=140407-1102&HDR=T&STB=G1,G2.

homes were owner-occupied and 44% were rented from housing associations and private landlords.[35] The housing associations especially are powerful players in the rental market. In 2010, the housing associations owned 2.3 million homes (31% of the total housing stock and 74% of all the rental homes).[36]

Since 1993, the housing associations have been considered private enterprises; however, they are still obliged to provide affordable housing to the public and are highly regulated by government. The Government Regulation on the Social Housing Sector ("Besluit Beheer Sociale-Huursector," hereafter: "BBSH") prescribes the conditions under which a landlord is considered a housing association.[37] The BBSH obliges the housing associations to provide housing to people with a relatively low annual income (up to _ 34.229 in 2013) and vulnerable persons like elderly and/or handicapped people.[38] Moreover, BBSH Article 12(a) compels housing associations to improve the quality of life in the neighborhoods where they are active.[39] Because of this last obligation, housing associations work together with local authorities to tackle housing related anti-social behavior. Amsterdam's Harassment Approach (mentioned above) is just one of many examples of such a public-private partnership.[40]

A. Dutch Housing Law, as Written

According to Dutch housing law, a tenant is not allowed to be involved in housing-related, anti-social behavior.[41] Most of the time, the landlord and tenant include provisions in a written tenancy agreement ("huurovereenkomst") that prohibits the tenant from causing nuisance to other people while using the premises. Because freedom of contract is one of the foundations of Dutch private law, the landlord and tenant enjoy extensive freedom to include provisions in the tenancy agreement. However, according to Article 13 of Book 3 (3:13)

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[35] *See Woningvoorraad naar eigendom*, CENTRAAL BUREAU VOOR DE STATISTIEK (Mar. 4, 2014), http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLNL&PA=71446NED&D1=0-2,4-5&D2=0,5-16&D3=a&HD=140407-1104&HDR=T,G2&STB=G1.

[36] *See Eén op de drie woningen eigendom van woningcorporatie*, CENTRAAL BUREAU VOOR DE STATISTIEK (Dec. 5, 2011), http://www.cbs.nl/nl-NL/menu/themas/bouwen-wonen/publicaties/artikelen/archief/2011/2011-3520-wm.htm.

[37] *See Besluit Beheer Sociale-Huursector*, RIJKSOVERHEID, *available at* http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2005/07/01/besluit-beheer-sociale-huursector-bbsh.html (last visited Apr. 12, 2014).

[38] *Id.*

[39] *Id.*

[40] *Cf.* Kevin J. Brown, *The Developing Habitus of the Anti-Social Behavior Practitioner: From Expansion in Years of Plenty to Surviving the Age of Austerity*, 40 J.L. & SOC'Y 375, 396-400 (2013).

[41] A.M. KLOOSTERMAN ET AL., HOOFDLIJNEN IN HET HUURRECHT: MET VRAGEN EN ANTWOORDEN (2008); H. HIELKEMA, BURENOVERLAST. REMEDIES TEGEN DE OVERLASTGEVENDE HUURDER (2d rev. 2012).

of the Dutch Civil Code ("DCC"), a tenancy agreement may not violate public order or public morals.[42]

Furthermore, some statutory provisions prohibit the tenant from acting in an anti-social manner. First, DCC Article 7:213 obliges the tenant to use the dwelling as a "prudent tenant."[43] For instance, this means that the tenant may not cause nuisance to his neighbors or use the home as a place to deal drugs. Second, DCC Article 7:214 compels the tenant to use the dwelling for housing and not for commercial purposes, such as growing cannabis or breeding dogs.[44] Third, DCC Article 7:217 obliges the tenant to repair the premises if necessary.[45] Fourth, DCC Article 7:219 holds the tenant responsible for the acts of others, if they cause nuisance in and around the premises.[46]

If the tenant is involved in housing-related, anti-social behavior, the landlord is entitled to annul the tenancy agreement. However, DCC Article 7:231 provides comprehensive judicial protection to the tenant against the loss of his home.[47] A tenancy agreement can only be annulled by a housing court ("kantonrechter"), except in the case where the local authority issues a closure order and closes the premises because of drug dealing or a serious violation of public order.[48]

According to DCC Article 6:265 and case law of the Dutch Supreme Court, the housing court must annul the tenancy agreement if the landlord proves that the tenant has breached the tenancy agreement or violated the aforementioned statutory obligations.[49] However, the tenant is allowed to defend himself: he can raise the defense that the anti-social behavior was not serious enough to annul the tenancy agreement; or that the annulment has serious and disproportional consequences for him and his family members. If a tenant raises such a defense, the court is entitled to reject the request of the landlord to annul the tenancy agreement. In the event that the landlord proves that the tenant acted in an anti-social manner and a defense of the tenant is dismissed, the court will annul the tenancy agreement and issue an eviction order. After issuing such an order, the tenant will be granted a period—generally two weeks—to vacate the premises. If the tenant remains at the property after this

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[42] Burgerlijk Wetboek [BW] [Civil Code] art. 3:13 (Neth.).

[43] *Id.* art. 7:213.

[44] *Id.* art. 7.214.

[45] *Id.* art. 7.217.

[46] *Id.* art. 7.219.

[47] *Id.* art. 7.231.

[48] *See* Brouwer & Schilder, *supra* note 4; Michel Vols & Suzanne D. van Wijk, *Wet Victor en de Proportionaliteitstoets uit Artikel 8 EVRM* [Extrajudicial Termination of a Tenancy Agreement and the Proportionality Requirement of Article 8 ECHR], 20 WR TIJDSCHRIFT VOOR HUURRECHT 128 (2011).

[49] *See* HR 22 Oktober 1999, NJ 1999, 197 (De Bruin/Meiling) (Neth.).

given period expires, the landlord is allowed to evict the tenant with the assistance of the police.

Under certain circumstances, the housing association does not execute the eviction order but applies a "last chance policy" ("laatste-kansbeleid").[50] In that case, the housing association offers the perpetrator a new place to stay, on condition that the perpetrator signs a "last chance tenancy agreement" with additional, specific clauses about (the prevention of) anti-social behavior.[51] The perpetrator must refrain from certain types of behavior or must act in certain way; e.g., he must take an anger management course.[52] If the perpetrator fails to comply with the new tenancy agreement, the housing association is entitled to obtain an eviction order from the housing court.[53]

B. Dutch Housing Law in Action

In daily life, three levels of housing-related, anti-social behavior may be distinguished. In a figurative sense, these three levels constitute a pyramid.[54] The first level–the foundation of the pyramid–consists of nuisance incidents that have a relatively low impact on the victims. In the majority of all such cases, the neighbors are able to reach a solution together or with a little help from mediators, police officers, or housing association staff.

The second level–the center of the pyramid–consists of anti-social behavior cases, in which the victims are seriously affected by the behavior of the perpetrator. Unfortunately, the neighbors are not able to reach a solution because, for example, the perpetrator is not willing (or able) to speak to the victims or housing association staff. In this type of case, a more serious intervention by an authority such as the housing court is needed. However, the housing association will not request an eviction order because the anti-social behavior is not serious enough to justify the loss of the perpetrator's home. For that reason, the housing associations start obtaining as much evidence of the nuisance as possible in order to obtain an eviction order. Nevertheless, this can take months and even years. For example, in the aforementioned case about

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[50] See Sten-Åke Stenberg et al., *Locked Out in Europe: A Comparative Analysis of Evictions Due to Rent Arrears in Germany, the Netherlands and Sweden*, 5 EUR. J. HOMELESSNESS 39 (2011).

[51] *Id.*

[52] *Id.*

[53] *See id.*; *Cf.* Jill Morgan, *Family Intervention Tenancies: the De(marginalization) of Social Tenants*, 32 J. SOC. WELFARE & FAM. L. 37, 37-46 (2010).

[54] *See* Michel Vols, *Dwing Veroorzakers van Burengerucht Hun Gedrag te Veranderen* [Oblige Nuisance Neighbors to Improve Their Behavior], TROUW (July 15, 2013, 5:27 PM), http://www.trouw.nl/tr/nl/4492/Nederland/article/detail/3476131/2013/07/15/Dwing-veroorzakers-van-burengerucht-hun-gedrag-te-veranderen.dhtml.

the Harassment Approach, a troubled family was able to cause serious nuisance for thirteen years.[55]

The third level–the top of the pyramid–consists of incidents that end up in housing courts. In these cases, the housing association considers the anti-social behavior serious enough to request an eviction order. The eviction procedure at housing courts has been insufficiently studied and no systemic data has been collected in the Netherlands.[56] Nevertheless, Aedes, the umbrella organization of the Dutch housing associations, has published some rudimentary data on requested eviction orders. According to Aedes, the housing associations lodged 23,700 requests for eviction orders in 2012.[57] The majority of these requests (more than 90%) are based on arrears of rent.[58] In almost 1400 cases, the request for an eviction order was the result of housing related anti-social behavior.[59]

Because of the lack of detailed data, I analyzed all of the available case law from 2000 to 2012 concerning eviction orders and housing-related, anti-social behavior, which was published on the website of the Dutch judiciary and in the relevant housing law reviews.[60] In total, I found and analyzed 244 cases. In the majority of cases, (90%), the landlord requesting the eviction order was a housing association. From the data in Table 1, it is apparent that the landlords are relatively successful in convincing the housing court to grant eviction orders: in 69% of all the cases the housing court granted the eviction order. What is interesting in this data is that housing courts seem to be harsh towards perpetrators involved in drug-related, anti-social behavior. The courts seem to be less strict if the housing association is only able to prove that the perpetrator caused noise nuisance.

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[55] *See* Hof's-Amsterdam 8 Augustus 2013, Case No. ECLI:NL:RBAMS:2013:4935, *available at* www.rechtspraak.nl (last visited Mar. 27, 2014) (Rochdale/Defendants) (Neth.).

[56] *See* Laere et al., *Preventing Evictions*, *supra* note 11; Stenberg et al., *supra* note 50.

[57] *See Huisuitzettingen 2012*, *supra* note 7.

[58] *Id.*

[59] *Id.* The number of cases where anti-social behavior plays a role is probably higher, because in a number of cases about anti-social behavior the housing association has the option to obtain an eviction order because of rent arrears without mentioning the anti-social behavior. *Cf.* Hunter, Nixon & Slatter, *supra* note 9, at 165.

[60] *See generally* DE RECHTSPRAAK, HOGE RAAD DER NEDERLANDEN, http://www.rechtspraak.nl (last visited Apr. 1, 2014); *Kort Geding* (source is a journal that publishes case law—on file with the author); *WR Tijdschrift voor Huurrecht* (source is a journal that publishes case law—on file with the author). Together, these three sources are used to collect all available case law regarding eviction of anti-social neighbors in the Netherlands.

TABLE 1[61]

TYPE OF ANTI-SOCIAL BEHAVIOR	TOTAL CASES	COURT REJECTS EVICTION ORDER	COURT GRANTS EVICTION ORDER	PERCENTAGE OF ORDERS GRANTED
Combination (noise, drugs nuisance & violent behavior)	66	16	50	75%
Only drugs nuisance	105	30	75	71%
Only violent behavior	27	8	19	70%
Only noise nuisance	25	12	13	52%
Other types	21	10	11	52%
Total	244	76	168	69%

IV. THERAPEUTIC JURISPRUDENCE ANALYSIS

In the Netherlands, the majority of housing-related, anti-social behavior cases do not end up in housing court. Most of the time, this lack of court intervention makes sense because perpetrators and victims come to a solution together. However, in a significant number of cases intervention by the housing association or housing court is necessary to eradicate the nuisance. If the case eventually ends up in the housing court, the perpetrator will likely be evicted. In this paragraph, I will perform a TJ analysis of the eviction-oriented approach towards housing-related, anti-social behavior.

A. Anti-Therapeutic Consequences on the Perpetrator

Firstly, the court procedure and the threat of eviction have several anti-therapeutic consequences, which are likely to aggravate the problems the perpetrator causes and the problem behavior in which he is involved. If a housing association seeking an eviction order takes a perpetrator to the housing court, both the procedure and the threat of eviction can be a traumatizing, intimidating experience for the perpetrator and his family. The threat of losing one's home causes considerable stress, unhappiness, and seriously disrupts the lives of all of the family members.[62]

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[61] *See generally* sources cited *supra* note 60.

[62] *See* SARAH NETTLETON ET AL., JOSEPH ROWNTREE FOUND., THE SOCIAL CONSEQUENCES OF MORTGAGE REPOSSESSION FOR PARENTS AND THEIR CHILDREN (1999); SHELTER, EVICTION OF CHILDREN AND FAMILIES: THE IMPACT AND THE ALTERNATIVES 3-4 (2009); Sarah Nettleton, *Losing a Home Through Mortgage Repossession: the Views of Children*, 15 CHILD. & SOC'Y 82, 82-94 (2001); Schout & De Jong, *supra* note 11, at 29; Stenberg et al., *supra* note 50, at 41.

Secondly, the procedure used to eradicate the anti-social behavior will take a long time; because, obtaining an eviction order at an early stage is not an option. Research shows that during this period of time the relationship between the perpetrator and housing association staff deteriorates.[63] The perpetrator becomes upset because of the "meddlesome behavior" and "threatening attitude" of the housing association staff.[64] The staff members become annoyed with the perpetrator because the anti-social behavior does not stop and they cannot help the victims.[65] As a result, the staff begins collecting as much evidence as possible to obtain an eviction order and encourage the victims to do the same. Obviously, this strategy focuses on escalation and is not beneficial for the relationship between the victim and the perpetrator.

Thirdly, targeting anti-social behavior by eviction fails to deal with the underlying causes of the problematic behavior; and, essentially serves as a pathway to homelessness. A home provides shelter—one of the basic human needs. Moreover, most people derive psycho-social benefits from having a home. Their home is a haven, a site of autonomy, which provides them with social status.[66] If the housing association executes an eviction order, the perpetrator and his family members will lose their home and the psycho-social benefits. For this reason, research unsurprisingly shows that eviction and homelessness have several negative consequences,[67] which will not aid in finding a solution for the problems of the perpetrator. Lee and Schreck found that "homeless people are victimized disproportionately often, both in an absolute sense and compared to their domiciled counterparts."[68] Other research demonstrates that the stress resulting from the uncertainty of not knowing when one will have permanent housing can also be characterized as anti-therapeutic.[69] Furthermore, the perpetrator and his family will be isolated from their support network and the children's education will be disrupted.[70] Because homelessness will deepen the problems of the perpetrator and his family, the eviction

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[63] Schout & De Jong, *supra* note 11, at 29.

[64] *Id.*

[65] *See* Schout & De Jong, *supra* note 11, at 28-30.

[66] *See* Ade Kearns et al., *#Beyond Four Walls#. The Psycho-social Benefits of Home: Evidence from West Central Scotland*, 15 HOUSING STUD. 387, 387-400 (2000).

[67] *See, e.g.*, *id.* at 388 ("[S]tress and stress-related illnesses are associated with insecure home ownership."); *see* also Barett A. Lee & Christopher J. Schreck, *Danger on the Streets: Marginality and Victimization Among Homeless People*, 48 AM. BEHAV. SCIENTIST 1055, 1056 (2005) (detailing various challenges homeless people face as described in the research); *see also* SHELTER, *supra* note 62, at 9 (noting that "eviction and housing problems . . . can have a detrimental affect on adults' physical and mental health . . . .").

[68] Lee & Schreck, *supra* note 67, at 1074.

[69] *See* SHELTER, *supra* note 62, at 7.

[70] *See id.* at 7-9; Laere et al., *Preventing Evictions*, *supra* note 11; Anita Palepu et al., *Quality of Life Themes in Canadian Adults and Street Youth Who are Homeless or Hard-to-house: a*

will probably transform the housing-related, anti-social behavior into more serious anti-social behavior on the street.

Obviously, in a number of cases the "last chance policy" and "last chance tenancy agreements" will mitigate the anti-therapeutic effects of the eviction for the perpetrator. In fact, these second chance instruments can have therapeutic effects for the perpetrator and his family. However, these instruments are not used in every case; and, if they are applied, the situation has already escalated and the housing court has granted an eviction order. It would be beneficial to both the perpetrators and the victims to use these kinds of instruments at an earlier stage.

Fourthly, an evicted perpetrator will not be eligible for housing provided by housing associations for a period of up to five years. The housing association will blacklist the tenant and share the tenant's record with other housing associations. For example, a perpetrator who grew hemp in his home was blacklisted for two years.[71] Thus, in some cases, an eviction order causes prolonged homelessness for both the perpetrator and his family.[72]

Fifthly, from a legal point of view, the eviction leads to an interference with the perpetrator's right to respect for private life and home. This right is codified in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[73] Over and over again, the European Court of Human Rights (hereafter "European Court") has qualified the loss of one's home as a "most extreme form of interference with the right to respect for the home."[74] Although the eviction does not always have to result in a violation of Article 8 of the ECHR, the European Court requires that the method of correcting housing related anti-social behavior be in accordance with the principles of proportionality and subsidiarity.[75] Because eviction fails to deal with the underlying causes of the anti-social behavior, it is questionable whether an eviction-oriented approach is in accordance with these principles.[76]

Multi-site Focus Group Study, 10 HEALTH & QUALITY LIFE OUTCOMES 1, 1-11 (2012), *available at* http://www.hqlo.com/content/10/1/93.

[71] Hof's-Groningen 18 April 2013, Case No. ECLI:NL:RBNNE:2013:BZ7896, *available at* www.rechtspraak.nl (last visited Apr. 1, 2014) (Nijestee/Defendants) (Neth.).

[72] *Cf.* Hunter, Nixon & Slatter, *supra* note 9, at 169.

[73] EUR. CT. HUM. RTS., EUROPEAN CONVENTION ON HUMAN RIGHTS: AS AMENDED BY PROTOCOLS NOS. 11 AND 14, SUPPLEMENTED BY PROTOCOLS NOS. 1, 4, 6, 7, 12 AND 13, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, at art. 8 (2010).

[74] Buckland v. United Kingdom, App. No. 40060/08, Eur. Ct. H.R. (2012) (Fourth Section); McCann v. United Kingdom, No. 19009/04, Eur. Ct. H.R. (2008) (Fourth Section); *Cf.* Vols & Van Wijk, *supra* note 48; Sarah Nield & Nicolas Hopkins, *Human Rights and Mortgage Repossession: Beyond Property Law Using Article 8*, 33 LEGAL STUDIES 431 (2012).

[75] EUR. CT. HUM. RTS., *supra* note 73.

[76] *See* VOLS, *supra* note 4.

B. Anti-Therapeutic Consequences for the Victims

The majority of all cases concerning serious anti-social behavior do not end up in a housing court because the nuisance does not justify the homelessness of the perpetrator. This can be characterized as a positive effect for the perpetrators. However, the lack of action against serious anti-social behavior has detrimental effects on the victims. If the housing association manages to obtain an eviction order from the court, the eviction of the perpetrator may have therapeutic effects on the victims. Nevertheless, this "feeling of relief" will probably not compensate for the years the victims had to deal with chronic and serious anti-social behavior. Regardless of the eviction of the perpetrator, the lack of (early) intervention has serious anti-therapeutic consequences for the victim.

Firstly, experiencing anti-social behavior can have serious effects on the mental and physical well-being of the victims.[77] A neighbor's noise is a valid predictor of poor mental health and vitality and can cause depression, anxiety, nausea, fears, liability, sleeping disorders, decreased appetite and stress symptoms such as increased blood pressure and cardiovascular disease.[78] Researchers found an increased health risk of cardiovascular disease in people who reported chronically serious housing related anti-social behavior.[79] The victims were also found to have an increased risk of depression.[80] Children suffering from the stress caused by the nuisance of anti-social behavior have an increased chance of illness in the respiratory system.[81] Nuisance causes stress and has direct effects on human performance. Noise nuisance, especially speech noise, has a negative effect on perceptual and cognitive tasks.[82] Moreover, anti-social behavior can have serious effects on sleep.[83] Noise nuisance causes delayed sleep onset, nocturnal awakenings, sleep stage changes, arousals and body

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[77] *See* CAROLINE HOOIJDONK, AREA ENVIRONMENT AND HEALTH IN THE NETHERLANDS (2009); Gerrit Breeuwsma, *Verlos Mij van des Menschen Overlast* [Deliver me from the oppression of man], 27 JUSTITIËLE VERKENNINGEN 10, 10-24 (2001); *see generally* Jane Donoghue, *Reflections on Risk, Anti-social Behavior and Vulnerable/Repeat Victims*, 53 BRIT. J. CRIMINOLOGY 805 (2013).

[78] *See* Hillary Guite et al., *The Impact of the Physical and Urban Environment on Mental Well-being*, 120 PUB. HEALTH 1117, 1117-26 (2006).

[79] *Id.*

[80] *Id.* at 1125.

[81] *See* Christian Maschke & Hildegard Niemann, *Health Effects of Annoyance Induced by Neighbor Noise*, 55 NOISE CONTROL ENGINEERING J. 348, 348-56 (2007).

[82] *See* Arend W. van Gemmert & Gerard P. van Galen, *Stress, Neuromotor Noise, and Human Performance: A Theoretical Perspective*, 23 J. EXPERIMENTAL PSYCHOL. HUM. PERCEPTION PERFORMANCE 1299, 1299-1313 (1997); James L. Szalma & Peter A. Hancock, *Noise Effects on Human Performance: A Meta-analytic Synthesis*, 137 PSYCHOL. BULL., 682, 688, 696 (2011);

[83] *See* Alain Muzet, *Environmental Noise, Sleep and Health*, 135 SLEEP MED. REV., 135, 135-42 (2007).

movements and vegetative or hormonal responses.[84] This decreases the self-perceived quality of sleep. As a consequence, noise nuisance can cause daytime fatigue, which is associated with lowered work-capacity and an increased risk of accidents.[85]

Secondly, the lack of (early) intervention will seriously disappoint the victims because they feel that nobody is helping them and the authorities are not taking notice of their problems.[86] This may result in "secondary victimization."[87] This refers to the "victimization which occurs, not as a direct result of the criminal act, but through the response of institutions and individuals to the victim."[88] As a result, the lack of action by the housing association against the anti-social behavior worsens the trauma of the victims.

Thirdly, this lack of action may result in a violation of the right to private life for the victims of anti-social behavior. In that case, the authorities are failing to fulfill the "positive obligations" stemming from the right to private life of the victim. In some cases, the European Court decided that housing related anti-social behavior did result in a "third party interference with the right to private life" and characterized the lack of action against the anti-social behavior as a violation of the rights of the victims.[89]

Fourthly, the court's refusal to issue an eviction order can have serious anti-therapeutic consequences for the victims. First of all, there is a possibility that the 'victorious' but infuriated perpetrator will take reprisals against the victims who worked together with the housing association and testified against him. There is a good chance that the anti-social behavior will become more intense because the relationship between the neighbors has been completely ruined. Furthermore, from the victims' point of view, the level of frustration and "secondary victimization" will increase. The victim will experience the 'inaction' of the housing court as another example of the unwillingness of the authorities to combat the housing-related, anti-social behavior.

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[84] *Id.*

[85] *Id.*

[86] *See* Tom de Leeuw & René van Swaaningen, *Veiligheid in Veelvoud: Beeld, Beleid en Realiteit in Rotterdams Oude Westen* [A Range of Security Issues: Images, Policy and Reality in Rotterdam-West], 6 TIJDSCHRIFT VOOR VEILIGHEID 26, 35 (2011).

[87] *See* Christian Diesen, *Therapeutic Jurisprudence and the Victim of Crime*, *in* TJOE I. OEI & MARC S. GROENHUIJSEN, PROGRESSION IN FORENSIC PSYCHIATRY: ABOUT BOUNDARIES 579, 586-89 (2012).

[88] *Social Injuries and Secondary Victimization*, VICTIMINFO.COM, http://www.victiminfo.com/#!victimization/c87c (last visited Apr. 2, 2014).

[89] *See* Mileva v. Bulgaria, App. Nos. 43449/02, 21475/04, 5 Eur. Ct. H.R. (2010) (Fifth Section); VOLS, *supra* note 4; Susan Bright & Chara Bakalis, *Anti-social Behavior: Local Authority Responsibility and the Voice of the Victim*, 62 CAMBRIDGE L. J. 305, 305-34 (2003).

C. Problem-Generating Approach Towards Housing Related Anti-Social Behavior

This TJ-oriented analysis of the way Dutch housing associations and courts deal with housing related anti-social behavior leads to the conclusion that the current approach is not beneficial to the perpetrator, his victims, or the housing association. Instead of working towards a sustainable solution, the procedure is focused on escalation of the situation and (the threat of) homelessness. An eviction-oriented approach fails to deal with the underlying causes of the anti-social behavior.

Finally yet importantly, in the current economic circumstances, an eviction-oriented way of eradicating anti-social behavior is not beneficial for the taxpayer as well. Evicting a perpetrator only displaces the problem and has a huge financial impact on the housing associations, courts, police, local authorities, shelters, health care agencies; and, of course, the perpetrators. In the Netherlands, the estimated cost of evicting and re-housing a perpetrator is assessed at _60.000.[90] In the United Kingdom, the estimated cost of a homelessness case can range from _12.000 to _97.000 (£15,000 to £83,000).[91]

The conclusion arising from the TJ analysis is similar to the conclusion that New York State Chief Judge Kaye reached in 1999 about tackling low-level crime in New York. Judge Kaye wrote about the 'traditional approach' of criminal courts towards this problem behavior: "Every legal right . . . is protected, all procedures followed, yet we aren't making a dent in the underlying problem. Not good for the parties involved. Not good for the community. Not good for the courts."[92] Because of this observation, the city of New York founded several problem-solving courts, which successfully combat low-level crime.[93] How should problem-solving elements that are demonstrably effective be incorporated into Dutch housing law in order to combat housing related anti-social behavior in a more solution-oriented way?

V. MOVING TOWARD A MORE SOLUTION-ORIENTED APPROACH TO TARGET ANTI-SOCIAL BEHAVIOR

In order to develop a more problem-solving way to tackle housing related anti-social behavior, we need to comply with three solution-oriented principles. The first principle prescribes that we should help the victims of the anti-social

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[90] *See* BOGMAN & VAN SUMMEREN, *supra* note 10, at 5-7. *Cf.* Stenberg et al., *supra* note 50, at 51.

[91] *See* SHELTER, *supra* note 62, at 8.

[92] *Making the Case for Hands-On Courts*, NEWSWEEK (Oct. 10, 1999, 8:00 PM), http://www.newsweek.com/making-case-hands-courts-168134.

[93] *Id.*

behavior at an early stage. Because of the detrimental effects of housing-related, anti-social behavior on their mental and physical well-being, victims should be taken seriously and 'secondary victimization' must be avoided. The approach should focus on early intervention to de-escalate the situation and relieve the victims.[94]

The second principle states that, if possible, eviction of the perpetrator and his family should be avoided. The landlord should work together with other authorities (e.g., the municipality, mental health agencies and the housing court) and try to avoid the most serious interference with the right to respect for private life.[95] Instead of waiting for a long period until the situation has escalated, the main approach should be focused on early (housing court) intervention with less intrusive instruments compared to eviction. Nevertheless, in a number of serious cases of housing-related, anti-social behavior, the eviction of the perpetrator is the only possible option in order to de-escalate the situation and help the victims.[96]

The third principle states that the approach should be focused on tackling the underlying causes of the problem behavior. In a large number of nuisance cases, the perpetrator deals with mental health issues, substance abuse, family problems, unemployment and poverty. Instead of making an already vulnerable perpetrator more vulnerable by making him homeless, the approach should instead try to target the root of the anti-social behavior. As far as possible, the interventions of the housing court (e.g., a behavioral order that prescribes the perpetrator from refraining from a specific anti-social act or from acting in a specific way) should focus on rehabilitation and target the underlying causes of the anti-social behavior.[97] Of course, we should remain attentive to possible violations of the perpetrator's right to private life and of the perpetrator threatened by stigmatization, marginalization and patronizing interventions of the housing associations[98] or housing courts.[99]

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[94] See Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, *in* REHABILITATING LAWYERS, *supra* note 21, at 257, 261; SHELTER, *supra* note 62, at 11-14.

[95] *Cf.* Winick, *supra* note 25, at 1060-61; Brown, *supra* note 40, at 396-400.

[96] *Cf.* Penny Gurstein & Dan Small, *From Housing to Home: Reflexive Management for those Deemed Hard to House*, 20 HOUSING STUD. 717, 726-28 (2005).

[97] *See* FLEINBLATT & BERMAN, *supra* note 31, at 34-36; Morgan, *supra* note 53.

[98] *See* ELISABETH BURNEY, MAKING PEOPLE BEHAVE: ANTI-SOCIAL BEHAVIOR, POLITICS AND POLICY 108-14 (2d ed. 2009); JANE DONOGHUE, ANTI-SOCIAL BEHAVIOR ORDERS: A CULTURE OF CONTROL? (2010); Neil Cobb, *Patronising the Mentally Disorderd? Social Landlords and the Control of 'Anti-social behavior' under the Disability Discrimination Act 1995*, 26 LEGAL STUD. 238, 238-66 (2006); Morgan, *supra* note 53.

[99] *See* Winick, *supra* note 25, at 1071-72; Nicola Padfield, *The Anti-social Behaviour Act 2003: The Ultimate Nanny-state Act?*, 9 CRIM. L. REV. 712, 712-27 (2004); VOLS, *supra* note 4.

To comply with these solution-focused principles, housing courts should incorporate a number of problem-solving justice/TJ oriented techniques into the approach towards housing related anti-social behavior.[100] Firstly, to make an effective early intervention possible, the housing association staff and housing court judges should be trained to identify substance abuse, mental health disorders, and other risk factors for a high likelihood of anti-social behavior.[101] Secondly, the housing association staff and housing court judges should apply "motivational interviewing"[102] and "behavioral contracting"[103] techniques to target the problem behavior. These techniques will motivate the perpetrator to change and have a greater sense of responsibility and accountability. Furthermore, when these techniques are implemented, the compliance rate is likely to improve and the satisfaction of people involved in the procedure increases.[104] Thirdly, housing courts should be involved at an early stage in order to make "the most of judicial authority." Housing court judges should stay "involved with each case over the long haul" and "closely supervise" compliance with court orders. Judicial monitoring is a key factor in strengthening accountability and "has been central to the success of problem-solving courts."[105] Fourthly, the courts should involve the social network of the perpetrator (e.g., his family, friends and neighbors) should be involved in the procedure. This social network plays a key role in supporting the perpetrator in his efforts to stop acting in an anti-social way and in increasing the likelihood of compliance with remedies such as housing court orders.[106]

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

[100] *See* REHABILITATING LAWYERS, *supra* note 21, at 7, 19.

[101] *See* Crane & Warnes, *supra* note 11, at 767; Pascale Thys, *Housing for People Suffering Mental Distress: an Overlooked Issue in Housing Policies*, 7 PASSERELLE 81, 83-84 (2012).

[102] Winick, *supra* note 25, at 1080-81; REHABILITATING LAWYERS, *supra* note 21, at 8, 31; Astrid Birgden, *Dealing with the Resistant Criminal Client: a Psychologically-Minded Strategy for More Effective Legal Counseling*, *in* REHABILITATING LAWYERS, *supra* note 21, at 243, 243-55.

[103] Winick, *supra* note 25, at 1084-86.

[104] *See id.* at 1077, 1084-86; Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002).

[105] FLEINBLATT & BERMAN, *supra* note 31, at 35-36.

[106] See REHABILITATING LAWYERS, *supra* note 21, at 31; David B. Wexler, *That's What Friends Are For: Mentors, LAP Lawyers, Therapeutic Jurisprudence, and Clients with Mental Illness* (Oct. 26, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=1962725. *Cf.* Liliana Sousa, *Building on Personal Networks When Intervening with Multi-problem Poor Families*, 19 J. SOC. WORK PRAC. 163, 163-79 (2005); Liliana Sousa et al., *Are Practitioners Incorporating a Strengths-focused Approach When Working with Multi-problem Poor Families?*, 17 J. COMMUNITY & APPLIED SOC. PSYCHOL. 53, 53-66 (2007).

In order to implement these solution-oriented principles and techniques in the Netherlands, we must analyze whether the Dutch legal rules and legal procedures ("the bottles") are receptive to TJ professional practices and techniques ("the wine"). If the wine cannot be poured into the bottles—cases where the legal rules are considered "TJ-unfriendly"—we must urge the legislature to revise the current legal rules and procedures.[107]

Fortunately, Dutch housing (tenancy) law and procedures are flexible and therefore relatively TJ-friendly. There is no statutory obligation to tackle housing related anti-social behavior with an eviction order. On the contrary, Dutch housing law offers several other provisions and instruments to use in a solution-oriented approach. For example, DCC Article 3:296 gives the housing association the power to request a "behavioral order" ("gedragsaanwijzing") from the housing court if the tenant does not comply with statutory or contractual obligations.[108] The housing court is entitled to issue an order that compels the tenant to carry out a specific obligatory performance, if asked for by a plaintiff.

Housing associations and their lawyers do not frequently ask for such a specific behavioral order; however, a number of examples of solution-oriented orders are available. At the request of a housing association, a housing court compelled perpetrators to give up a barking dog instead of evicting the perpetrator because of the noise nuisance.[109] Another housing court granted the request to give the anti-social son of a tenant a restraining order instead of evicting his desperate parents.[110]

Another example of a solution-oriented instrument is the aforementioned "last chance instruments," which aim to prevent homelessness by imposing behavioral rules on the perpetrators. At the same time, in order to tackle anti-social behavior in a more solution-oriented way, TJ techniques recommend that the "last chance agreement" be remodeled into an "Acceptable Behavior Agreement" that can be employed at an earlier stage than is currently the case. In order to develop a more solution-oriented approach, Dutch housing associations should start experimenting with these powers.

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[107] See David B. Wexler, *New Wine in New Bottles: the Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. (forthcoming 2014).

[108] Burgerlijk Wetboek [BW] [Civil Code] art. 3:296 (Neth.).

[109] *See* Ktr.-Utrecht 14 Maart 2008 Case No. ECLI:NL:RBUTR:2008:BC6701, *available at* www.rechtspraak.nl (last visited Apr. 1, 2014) (Mitros/Defendants) (Neth.).

[110] *See See* Ktr.-Dordrecht 25 September 2008, Case No. ECLI:NL:RBDOR:2008:BF2284, *available at* www.rechtspraak.nl (last visited Apr. 1, 2014) (Woningstichting Union/Defendants) (Neth.).

VI. Conclusion

In the Netherlands, courts use eviction orders to tackle housing related anti-social behavior. This essay has argued that this "eviction oriented approach" has detrimental and problem-generating effects for the perpetrator and his victims. The physical and mental wellbeing of the perpetrator and his family are seriously affected by the threat of homelessness. Research shows that the underlying causes of the anti-social behavior are not addressed in a problem-solving way. Moreover, eviction is a very drastic instrument, which takes away early intervention as an option. That is why the eviction-oriented approach has serious negative effects on the mental and physical wellbeing of the victims as well. Furthermore, an eviction has a huge financial impact on housing associations and local authorities.

The results of the TJ analysis support the idea that Dutch courts should adjust the current way of dealing with housing related anti-social behavior into a more problem-solving-oriented approach. Housing associations and housing courts should bear three solution-oriented principles in mind. Firstly, housing associations and housing courts should help the victims of the anti-social behavior at an early stage. Secondly, eviction of the perpetrator and his family should be avoided. Lastly, the interventions should be focused on tackling the underlying causes of the problem behavior.

These findings suggest that housing associations and housing courts should incorporate problem-solving justice/TJ oriented techniques—such as motivational interviewing, behavioral contracting and judicial monitoring—into the way they deal with housing related anti-social behavior. Fortunately, Dutch housing (tenancy) law is flexible and therefore receptive to these TJ practices and techniques.

In a significant number of other jurisdictions, eviction is the main approach as well. Further research might explore whether the housing law of other countries is receptive and suitable for a solution-oriented approach toward housing related behavior.

THE TJ MAINSTREAMING PROJECT: AN EVALUATION OF THE ISRAELI YOUTH ACT

Dana Segev*

I. INTRODUCTION

Therapeutic Jurisprudence ("TJ") is a field of inquiry that places emphasis on the therapeutic or anti-therapeutic consequences of legal rules and procedures, as well as the legal roles of criminal justice actors, such as lawyers, judges, and other professionals[1]. TJ encourages actors in the legal context to be sensitive to the therapeutic or anti-therapeutic consequences that their practice and decisions can foster.[2] Additionally, it looks at criminal law and evaluates its role in promoting readiness for rehabilitation, desistance, smoother reentry of offenders, and the psychological well-being of victims[3]. However, TJ seeks these therapeutic goals without subordinating other important values of the criminal justice system, such as due process and procedural fairness.[4] Thus, TJ advocates for the consideration of therapeutic consequences that the law might promote, without suppressing procedural justice or other legal goals

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[1] David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. (forthcoming 2014) [hereinafter Wexler, *New Wine in New Bottles*].

[2] BRUCE J. WINICK & DAVID B. WEXLER, LAW IN A THERAPEUTIC KEY xvii (1996).

[3] *See generally* David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 111 (2006) [hereinafter Wexler, *Readiness for Rehabilitation*]; David B. Wexler, *The Relevance of Therapeutic Jurisprudence and Its Literature*, 23 FED. SENT'G REP. 278 (2011) [hereinafter Wexler, *Relevance of Therapeutic Jurisprudence*].

[4] WINICK & WEXLER, *supra* note 2, at xvii.

and values.[5] By enhancing offenders' perceptions of procedural justice, the perceived legitimacy of the court increases.[6] This, in turn, enhances an individual's compliance with treatment, readiness for rehabilitation, and desistance from crime.[7] Procedural considerations are important, because unfairness in procedural settings can lead to resistance towards rehabilitation, animosity and increased offending.[8] The doctrine of TJ holds that legal rules and the manner in which they are applied can have a vast social impact. In addition, TJ suggests that scholars should study those consequences and redesign the law and its practice in court to accomplish two main goals: first, to diminish or minimize anti-therapeutic effects that the court might foster; and, second, to enhance law's therapeutic potential.[9]

Academic discourse and literature have mainly focused on legal actors, practices, and techniques used in an attempt to promote therapeutic consequences.[10] Greater attention has only recently been placed on evaluating the legal landscapes, legal rules, and procedures to see whether—and how—therapeutic results can be promoted.[11] Recent interest in mainstreaming TJ and related approaches to judging has initiated the mainstreaming project, which examines legal rules and legal procedures in various jurisdictions to see how "TJ-friendly" or "unfriendly" they may be; and, whether the legal landscape can incorporate or mainstream TJ and its techniques.[12] The mainstreaming project encourages an examination of the criminal law in various countries and states. This, in turn, "can lead to proposing a TJ "code" of proposed criminal processes"[13] which will enhance therapeutic consequences of the criminal process by incorporating TJ in its everyday practice.

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5 Wexler, *Relevance of Therapeutic Jurisprudence*, *supra* note 3, at 278.

6 Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 4 (2007); Gill McIvor, *Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts*, 9 CRIMINOLOGY & CRIM. JUST. 29, 29 (2009).

7 *See* McIvor, *supra* note 6, at 41-42; Wexler, *Readiness for Rehabilitation*, *supra* note 3, at 112-13; David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78, 78-79 (2008) [hereinafter Wexler, *Adding Color to the White Paper*], *available at* http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2Wexler.pdf

8 McIvor, *supra* note 6, at 42; Wexler, *Adding Color to the White Paper*, *supra* note 7, at 78-80; Wexler, *Readiness for Rehabilitation*, *supra* note 3, at 113-14.

9 Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1062-1063 (2002).

10 Wexler, *New Wine in New Bottles*, *supra* note 1.

11 *See, e.g.*, Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513 (2005); Wexler, *New Wine in New Bottles*, *supra* note 1.

12 Wexler, *New Wine in New Bottles*, *supra* note 1.

13 *Id.*

This Article is a product of the mainstreaming project, which will enhance the project's international reach by examining Israeli law. Specifically, this Article will evaluate the legal landscape of youth justice legislation in Israel to see whether TJ can be mainstreamed and thrive within. In doing so, this Article will rely on a recent paper by David B. Wexler, who suggested that we can conceptualize practices and techniques of TJ as a kind of "liquid" and we can look at the legal landscape as a "bottle."[14] By examining the legal rules and proceedings, we can evaluate "how much of the TJ liquid can be poured into the assorted bottles."[15] In particular, this Article looks at legislation regarding youth defendants or offenders in Israel, examines these legal rules and procedures to see how much liquid can be poured into the bottle, and whether this legal landscape is TJ friendly. Such an evaluation will teach us whether the legal landscape, as is, will allow for easy mainstreaming of TJ within youth courts. We can also learn what aspects may provide a challenge in mainstreaming TJ, as well as what changes can be made to enhance TJ potential. Before we turn to a discussion on youth justice in Israel, it will be helpful to elaborate some more on TJ and specific practices and techniques.

II. TJ Liquid: Practices and Techniques

TJ places an emphasis on the role judges play in the court process and on their interaction with offenders.[16] TJ suggests that the judge closely monitor the offender throughout the criminal justice process and develop a close relationship with the offender that can extend into the parole stage.[17] Judicial involvement generally includes the use of authority to motivate participants to accept the necessary help and services, monitor their progress and engage in follow-up hearings to monitor compliance.[18] Such involvement by judges will increase the individualistic attitude towards the offender, which can increase compliance and other therapeutic elements.[19] Judges are also encouraged to reinforce successes through encouragement and praise, while also using sanctions in cases of relapse or failure to attend treatment.[20] Yet, TJ places empha-

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[14] *Id.*

[15] *Id.*

[16] David B. Wilson, Ojmarrh Mitchell & Doris L. Mackenzie *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. Experimental Criminology 459, 460-61 (2006).

[17] Wexler, *New Wine in New Bottles*, *supra* note 1; Wilson, Mitchell & Mackenzie, *supra* note 16.

[18] Wexler, *Relevance of Therapeutic Jurisprudence*, *supra* note 3, at 278-79; Winick, *supra* note 9, at 1060.

[19] Wexler, *Adding Color to the White Paper*, *supra* note 7, at 79; Wilson, Mitchell & Mackenzie, *supra* note 16.

[20] Wilson, Mitchell & Mackenzie, *supra* note 16.

sis on criticizing the criminal act, rather than the offender,[21] which requires engaging in re-integrative shaming.[22] Such practices may strengthen a sense of hope for the offender that change is, indeed possible.[23] Therapeutic consequences could also be fostered by making appropriate positive remarks at the end of "a successful probationary period."[24] Some drug courts even undertake a small graduation ceremony to celebrate the successful completion of the program.[25] Such practice can help minimize negative labeling associated with criminal proceedings. This could further encourage a positive labeling process, whereby the individual is perceived as one that "graduated" from a program.[26] Hence, TJ does not concentrate solely on the failure of the individual. It emphasizes the individual's success and may reinstall hope in one's ability to succeed.[27] Another practice of TJ is to encourage attendance of family members.[28] It is proposed that attendance throughout the process will provide the family with the opportunity to witness the progress of the participant. The family is able to see how this progress is being recognized by the court, take part in motivating and strengthening the participant, become informed about the release conditions, and play a role in providing a network of support.[29]

Many TJ practices and techniques also involve the offender playing an active agent in the process. TJ suggests that giving the offender a voice in proposing conditions and relapse prevention planning will enhance the perception of procedural fairness.[30] Here, it is suggested that compliance with conditions will increase if the offender is asked to respond and engage in a debate regarding the likelihood of him or her adhering to the conditions, think about the chain-of-events that led to a criminal behavior, and identify high-risk situations.[31] Another technique that is often used in TJ courts is to encourage the

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[21] Wexler, *New Wine in New Bottles*, *supra* note 1.

[22] Stacey Hannem & Michael Petrunik, *Circles of Support and Accountability: A Community Justice Initiative for the Reintegration of High Risk Sex Offenders*, 10 CONTEMP. JUST. REV. 153, 160-61 (2007).

[23] Wexler, *New Wine in New Bottles*, *supra* note 1.

[24] Wexler, *Relevance of Therapeutic Jurisprudence*, *supra* note 3, at 279.

[25] Wilson, Mitchell & Mackenzie, *supra* note 16, at 460.

[26] *See generally* Shadd Maruna, *Elements of Successful Desistance Signaling*, 11 CRIMINOLOGY & PUB. POL'Y 73, 73-86 (2012); Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the "Reentry Court" Concept from a Strengths-Based Perspective*, 4 W. CRIMINOLOGY REV. 91, 91-107 (2003).

[27] Dana Segev, Enhancing the Ability of Youth Courts to Promote Desistance (2010) (unpublished dissertation) (on file with The Centre for Criminology, Oxford: University of Oxford).

[28] *See* McIvor, *supra* note 6, at 37; Wexler, *Adding Color to the White Paper*, *supra* note 7, at 78-79; Winick *supra* note 9, at 1083-84.

[29] *See* sources cited *supra* note 28.

[30] Wexler, *Adding Color to the White Paper*, *supra* note 7, at 78-79.

[31] *Id.*

offender to construct a list of proposed behavioral "do's and don'ts," which can later "form the basis of a discussion regarding appropriate probation conditions."[32] It is important to note that the discussion between the offender and the judge should be one of persuasion rather than coercion.[33] This type of attitude promotes a sense of self-determination, which improves positive behavior of the participant as well as a sense of satisfaction.[34]

Lastly, TJ encourages the judge and other legal actors, such as lawyers, to be clear in explaining the decisions and reasons for the terms of release and/or the sentencing process to the offender.[35] To increase therapeutic consequence and smoother re-entry, it is suggested that the conditions set in probation or parole will come about through a "bilateral behavioral contract rather than a unilateral judicial fiat."[36] It is also suggested that judges draft a statement that elaborates on the reasons for the sentence and respond to the defense arguments in court.[37] Such a practice runs against the traditional approach common in courts, whereby judges draft a statement elaborating why the defense arguments are weak and the prosecution's evidence is strong.[38] This, in turn, might undermine an offender's responsiveness to rehabilitative efforts.[39] Wexler suggests that judges can enhance therapeutic consequences by crafting a "letter to the loser," rather than a "letter to the winner," and remaining sensitive to the victim during the process.[40] In this sense, TJ places emphasis not only on what sentence or condition should be imposed, but also on the manner and process of the imposition.[41] For these practices and techniques to take place within a mainstream court or other aspects within the criminal justice system, such as probation or parole, there must be a legal landscape that will allow them to be incorporated and mainstreamed. In the next section, this Article discusses the legal landscape of youth justice in Israel; and, later analyzes the Youth Act—highlighting whether the legal rules and proceedings are TJ-friendly.

III. YOUTH JUSTICE IN ISRAEL

In Israel, a special court is held for youth offenders under the age of eighteen who are suspected of a criminal act. In cases where there is no youth court

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32 Wexler, *Relevance of Therapeutic Jurisprudence*, *supra* note 3, at 279.

33 Winick, *supra* note 9, at 1072.

34 *Id.*

35 Wexler, *Adding Color to the White Paper*, *supra* note 7, at 78-79; Wexler, *Relevance of Therapeutic Jurisprudence*, *supra* note 3, at 279.

36 *Id.* at 79.

37 Wexler, *New Wine in New Bottles*, *supra* note 1.

38 *Id.*

39 *Id.*

40 *Id.*

41 Wexler, *Relevance of Therapeutic Jurisprudence*, *supra* note 3, at 279.

in a particular jurisdiction or the charges are considered particularly grave, judges can act as a youth judge in a non-specialized court setting. The Israeli Youth Act[42] provides a unique policy for judges dealing with suspected youth offenders. This law first appeared in 1971 and distinguished suspected individuals or youth offenders from mature ones.[43] It has since changed due to an increasing recognition that youth offenders are a vulnerable population and require a unique approach: one that will avoid doing greater harm by criminal justice interventions. In 1991, Israel officially recognized the human rights of all children and young people under the age of 18, by signing the United Nations Convention on the Rights of the Child.[44] Among the most notable issues Israel incorporated into the Youth Act, are the rights of children to express their views freely in all matters affecting them and be provided with the opportunity to be heard in any judicial proceeding.[45]

The Youth Act also provides judges with the freedom to offer treatment to the youth offender instead of punishment an alternative to prison.[46] Namely, judges have three options when the court finds the youth defendant guilty: (1) convict the youth offender and determine a sentence; (2) assign one or more treatment plans offered within the law; or (3) release the youth with no warrant for imprisonment, treatment, or conviction.[47] The option to send a convicted youth to a treatment program was made in an attempt to divert youth offenders from prison, which, according to the spirit of the law, might breed more criminal behaviour. Furthermore, the Youth Act places much more emphasis on rehabilitative considerations: section 1A.A notes that dealing with the individual will be done while preserving their dignity and giving appropriate weight to rehabilitative considerations, their treatment, reintegration to society, and appropriate consideration of their age and level of maturity.[48] In doing so, the Youth Act further upholds the United Nations Convention on the Rights of the Child.[49] In a sense, the legal landscape in Israel provides an individual approach to punishment for youth offenders, which takes into account the particular case, while also considering an offender's needs and likelihood of reha-

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42 הנוער חוק (שפיטה, ודרכי טיפול ,ענישה), התשל"א [YOUTH LAW: JUDGMENT, PUNISHMENT AND TREATMENT] (1971) [hereinafter YOUTH LAW] (Isr.).

43 *Id.*

44 Ronit Haimoff-Ayali & Natti Ronel, *Youth Offender's Attitude Towards the Criminal Process*, *in* THE ISRAEL POLICE AND YOUTH THROUGH THE TIMES (Meir Hovav ed., 2004).

45 United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, art. 12.

46 YOUTH LAW, *supra* note 42, at § 25.

47 *Id.*

48 *Id.* at § 1A.A.

49 Haimoff-Avali & Ronel, *supra* note 44.

bilitation.[50] A general evaluation of youth law reveals many elements that seem particularly TJ friendly. Some of these TJ friendly elements directly apply TJ practices and others provide the legal landscape for various TJ practices and techniques to take place. This Article will elaborate on various elements within the Youth Act that attracted the author's attention, noting both TJ friendly elements and unfriendly ones.

IV. Defendant's Voice, Family, and Progress in Court Settings

In 2008, Israel's legislature amended the Youth Act to include section 1.B, which states that youth offenders have the opportunity to express their feelings and thoughts to the court before the court makes a decision.[51] Subsequently, those thoughts and feelings are taken into account when a decision is made (while considering their age and level of maturity).[52] Providing an opportunity to speak in court conveys a TJ friendly legal rule, and reflects an integral element of a fair judicial process.[53] Thus far, the court has not engaged in discussion with youth regarding particular conditions applied; nor has it constructed a list with the cooperation of the offender, a practice that directly reflects TJ techniques. However, Israeli youth are given a voice within the court process. An important question for consideration is: to what extent does the law-in-action engage in open and non-coercive communication with the offender regarding imprisonment, treatment, or any other thoughts he or she may have about the court process? Thus, to what extent does the rule apply in practice and convey the spirit of the law?

TJ suggests that youth offenders may lack oral competence to participate in a meaningful way.[54] This difficulty may be particularly apparent for minority groups that have difficulties with understanding and speaking Hebrew.[55] During court proceedings, anxiety and pressures might arise rendering youths particularly vulnerable and unable to engage in a manner that is coherent and complete.[56] In particular, young people are likely to provide poorly elaborated and non-specific responses, engage in poor eye contact, and shrug their shoul-

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[50] *See generally* Mojca M. Plesnièar, *The Individualization of Punishment: Sentencing in Slovenia*, 10 Eur. J. Criminology 462, 462-78 (2013).

[51] Youth Law, *supra* note 42, at § 1.B.

[52] *Id.* at § 1.B.

[53] Lorana Bartels & Kelly Richards, *Talking the Talk: Therapeutic Jurisprudence and Oral Competence*, 38 Alternative L.J. 31 (2013); Burke & Leben, *supra* note 6; Wexler, *Readiness for Rehabilitation*, *supra* note 3.

[54] Bartels & Richards, *supra* note 53.

[55] *See generally* Pamela Snow & Martine Powell, *Youth (In)justice: Oral Language Competence in Early Life and Risk for Engagement in Antisocial Behaviour in Adolescence*, *in* Trends & Issues in Crime and Criminal Justice (Austl. Inst. of Criminology, Pub. No. 435, 2012).

[56] Bartels and Richards, *supra* note 53.

ders.[57] This challenge may result in misperceptions about young people's authenticity and lead to mistaken assumptions, such as exhibition of poor motivation or expressions of apathy.[58] Arab defendants might be particularly vulnerable to such misperceptions due to negative social stereotypes, which are also apparent in sentencing discrepancies.[59] Very little research and literature provides solutions for this challenge.[60] However, some tactics that might help minimize possible negative implications have been offered. For example, it might help to ask the same question in different ways, be watchful of consistency in responses, engage in open-ended questions, and make use of diagrams and role-play.[61] Defense lawyers can also minimize anxiety and non-specific responses by encouraging young people to reflect on their circumstances, or on what they would like to say in advance. For example, lawyers could provide clients with a questionnaire that raises issues related to sentencing and mitigating factors, causing them to reflect, understand, and better prepare.[62] Lawyers could also engage in role-playing by asking questions and seeking clarifications.[63] Furthermore, lawyers could raise awareness of this difficulty to help diminish possible misperceptions or incorrect assumptions. In short, although allowing the engagement of a youth offender may be particularly TJ friendly, we should also make note of possible challenges or risks.

There are some especially TJ friendly rules in youth law. Namely, Section 1.B(E) states that when a decision is made against the youth's opinion, the decision maker or someone on their behalf will explain, in a language that will be understood by the youth, the reasons for the decisions, wherever possible.[64] This legal rule, if applied, reflects a sort of "letter to the loser," as described earlier. It helps the offender make sense of the court's decision; and, in doing so, it may also enhance a sense of procedural fairness.[65] This legal rule conveys a TJ friendly bottle that allows a "letter to the loser" technique to take place. However, this rule does not guarantee that judges use this technique or offer an explanation that criticizes the act rather than the offender. For the TJ liquid to be poured, judges need to routinely adopt this technique and be vigi-

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[57] Snow and Powell, *supra* note 55, at 3.

[58] *Id.* at 3-4.

[59] Gideon Fishman, Arye Rattner & Hagit Turjeman, *Sentencing Outcomes in a Multinational Society: When Judges, Defendants and Victims Can Be either Arabs or Jews*, 3 EUR. J. CRIMINOLOGY 69, 69-84 (2006).

[60] *See* Bartels & Richards, *supra* note 53; Snow & Powell, *supra* note 55, at 1.

[61] Snow & Powell, *supra* note 55, at 4.

[62] *See generally* Wexler, *Readiness for Rehabilitation*, *supra* note 3.

[63] Wexler, *New Wine in New Bottles*, *supra* note 1.

[64] YOUTH LAW, *supra* note 42, at § 1.B(E).

[65] Burke & Leben, *supra* note 6; Wexler, *Adding Color to the White Paper*, *supra* note 7, at 78-79; Wexler, *New Wine in New Bottles*, *supra* note 1.

lant about criticizing the act, rather than the actor, while remaining sensitive to the victim. Another example that illustrates how the youth court is particularly TJ friendly is the emphasis it places on the family attending the proceedings. According to section 10.H, families are given the chance to express their views during court proceedings.[66]

Israeli youth law also seems to favor having enough court hearings that will allow the court to see the progress of youth offenders under probation. For example, pursuant to section 10.N, the court meets every three months in cases when youth are on home arrest or probation.[67] The maximum time that judges can set for probation is nine months, with the discretion to extend the time by ninety days at a time.[68] Such practices that encourage judges to oversee the process of the youth are TJ friendly and provide an opportunity to use praise when youth succeed. If applied, this will enhance TJ within the court. Indeed, judicial involvement and acknowledgement of success will enhance participants' motivation, compliance, and hope in their ability to succeed.[69] In short, it seems that the Israeli youth court holds a legal landscape that will allow for TJ fluid to be poured, and that some practices in Israeli youth law administer TJ techniques. However, more research is needed to determine whether these practices are, in fact, applied in practice and to what extent.

V. CONDITIONAL RELEASE

Youth offenders in prison can apply for parole after serving two-thirds of their sentence, whereby they often stand before a five-member parole board.[70] In contrast, TJ advocates for a single judge that will monitor the progress of the offender over time. As Wexler noted, "conditional release authority resides in a single judge rather than a multi-member board, allowing for the possibility of developing a one-to-one relationship between the judge and the offender, thereby increasing the judge's motivational influence."[71] A five-member board is less TJ friendly. Moreover, parole for youth offenders holds a fixed minimum duration of supervision for one year. The judge can only increase the supervised period and cannot reduce or set a shorter one.[72] This kind of stiff rule is also less TJ friendly. Additionally, youths who were in prison choose to spend their parole period in an out-of-home rehabilitative facility, and if recal-

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66 YOUTH LAW, *supra* note 42, at § 10.H.

67 *Id.* at § 10.N.

68 *Id.*

69 McIvor, *supra* note 6, at 42-43; Wexler, *New Wine in New Bottles*, *supra* note 1; Wilson, Mitchell & Mackenzie, *supra* note 16, at 460-61; WINICK & WEXLER, *supra* note 2.

70 חיק העונשין, תשל"ז [Penal Code] § 9 (1977) (Isr.).

71 Wexler, *New Wine in New Bottles*, *supra* note 1.

72 YOUTH LAW, *supra* note 42, at § 38.A.

led to prison, will not have their time in a rehabilitative facility reduced from their sentence. Such practice is likely to undermine the motivation to take part in rehabilitative facilities, and thus any therapeutic consequences that might emerge.[73]

VI. Flexibility and Discretion: The Rose and its Thorn?

An analysis of Israeli Youth Law reveals a reoccurring theme where judges are provided with vast discretion to administer a more individualistic approach and set a punishment that is perceived by the judge as more appropriate to the individual youth—whether it is prison or a warrant to stay in a treatment facility.[74] Namely, judges can easily alternate between a treatment facility as a way of sentence or set a sentence for time served in prison. This is one of the most noticeable components in the Youth Act that demonstrates the immense flexibility and discretion that judges have in alternating. For example, section 25 states that a judge may hold a convicted minor in a locked facility (that is not a prison) for a duration not exceeding the maximum sentence stated for that specific offense.[75] Judges also have the power to later reverse their decision and send the youth to prison for a duration not exceeding the remaining time of the original sentence (or warrant).[76] A warrant to stay in a treatment facility could change to incarceration if the youth: does not uphold the conditions set; becomes a risk to himself or others; or is continuously damaging property.[77] Also, section 25.A states that the court can (but is not required to) schedule a future court date, in which the judge can then change the prison sentence to a closed facility sentence for a duration not exceeding the time that remains from the prison sentence.[78]

This flexibility is TJ friendly because it provides judges with a powerful tool to encourage motivation for change by always having the ability to alternate or switch between incarceration and a treatment facility. Furthermore, the law considers time spent at a treatment facility as deducted in cases of incarceration, an element that will motivate youth offenders to receive treatment.[79] As Winick noted, "motivating them through creative uses of the court's authority to accept needed services and treatment, and monitoring their progress in ways that help to ensure their success."[80] However, as Wexler noted, "a limitation

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[73] Wexler, *New Wine in New Bottles*, *supra* note 1.

[74] Geraldine Mackenzie, How Judges Sentence 41-83 (2005).

[75] Youth Law, *supra* note 42, at § 25.

[76] *Id.* at § 25.A.

[77] *Id.*

[78] *Id.*

[79] חיק העונשין, תשל"ז [Penal Code] § 8.C (1977) (Isr.); Youth Law, *supra* note 42, at § 25.A.

[80] Winick, *supra* note 9, at 1061.

on discretion is the therapeutically preferable structure."[81] It is not clear what should be the limit on discretion and in which cases flexibility might become unfriendly to TJ.

Legal guidelines that can help judges in their decisions to set a "treatment path" or an "incarceration path," or alternate between the two paths are not available. Judges usually rely on the advice of a social worker who evaluates the youth's character, behavior and the likelihood of rehabilitation. Yet, no broad guidelines exist to help direct judges to remain loyal to the "spirit" of the law. Although flexibility might, grant judges the ability to encourage an offender's motivation, it might also foster discrepancy in sentencing and variation in the manner of treatment among judges—each judge according to his or her own moral views and values.[82] In turn, this could hinder the perception of procedural fairness,[83] which would undermine youths' compliance by reducing their willingness to accept and abide by judges' decisions.[84] When analyzing the Israeli Youth Act, it seems very TJ friendly, even immensely so on certain issues. Moreover, it might be argued that this is the case partly because of the great flexibly and discretion provided to judges in the court process and in determining whether the youth will undertake a "treatment path" or an "incarceration path," which may provide motivation for change (to a lesser or greater degree). However, perceiving large-scale flexibility in this legal landscape as particularly friendly to TJ might eclipse the possible risks involved. It may also blur the thin line between structured judicial discretion—which helps mainstream TJ—and unstructured or an extremely flexible legal landscape—which undermines the ability to systematically mainstream TJ in court. Namely by unintentionally introducing prejudicial moral views of judges that will impact decisions and may pay no heed to the "spirit" of the law, resulting in great discrepancy in sentencing and variation in treatment.[85] As noted, too much flexibility might undermine TJ by hindering procedural fairness, and thus offenders' compliance and a court's legitimacy. Consequently, it might be important to draw a line where too much discretion and flexibility might become unfriendly to TJ, or set guidelines that will help judges stay loyal to the "spirit" of the law when facing a decision.

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[81] Wexler, *New Wine in New Bottles*, *supra* note 1.

[82] SUSAN EASTON & CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 36-68 (3d ed. 2012); Wexler, *New Wine in New Bottles*, *supra* note 1; Kate Stith & José A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS 104-79 (1998).

[83] R.A. Duff, *Who Must Presume Whom to be Innocent of What?* 4-8 (Univ. of Minn. Law Sch., Legal Studies Research Paper Series, Research Paper No. 12-65, 2013), *available at* SSRN: http://ssrn.com/abstract=2190593.

[84] Burke & Leben, *supra* note 6, at 6; Tom R. Tyler, *Restorative Justice and Procedural Justice: Dealing with Rule Breaking*, 62 J. SOC. ISSUES 307, 312-15 (2006).

[85] EASTON & PIPER, *supra* note 82.

Despite these challenges, the Youth Act is by-and-large TJ friendly, mainly due to its intrinsic spirit and legal rules that form an impressive TJ bottle. Yet, for therapeutic techniques to take place, the liquid needs to be poured. An examination of the Youth Act also uncovers how we can further mainstream TJ within the current legal landscape. This Article may also serve as a methodological model and encourage others to examine the law in their respective jurisdictions; and, in doing so, enrich the understanding of how to incorporate TJ thinking within the law.

VII. CONCLUSION

In Israel, the legal landscape places youth offenders in a unique population that requires a unique response by the criminal justice system; a response that will minimize possible harm caused by criminalization. The Israeli Youth Act provides legal rules that attempt to achieve this plan. An analysis of the Youth Act suggests that the legal landscape of youth justice in Israel is distinctly TJ friendly and will allow for TJ liquid to be "poured." In particular, the Youth Act demonstrates that youths are given an opportunity to voice their opinions in criminal proceedings and encourages the attendance of family members. The law also encourages judges to monitor the progress of those on probation. Furthermore, the law is constructed in a manner that provides discretion for judges to alternate between an "incarceration path" and a "treatment path" and, consequently, may encourage motivation for change among young offenders. The Israeli Youth Act also requires judges to explain to the youth why a decision was made, thereby potentially allowing for a sort of "letter to the loser." However, some possible challenges are apparent that can be seen as unfriendly to TJ. For example, some youths may have difficulty participating in a meaningful way, as suggested by TJ, due to lack of oral competence. Also, youths who are granted parole and spend time at a rehabilitative facility will not have their time spent there reduced from their sentence in case of recall, which can hinder the possible incentive to take part in a rehabilitative program. Finally, unstructured discretion granted to judges might undermine TJ by hindering procedural fairness, and thus offenders' compliance and the court's legitimacy. This Article is part of a larger mainstreaming project of TJ that aims to evaluate the legal landscape of various jurisdictions and may serve as a methodological model for others interested in assessing the law and practice of their respective jurisdictions.

Can Shame Be Therapeutic?

Luke Coyne*

I. Introduction

"I never wonder to see men wicked, but I often wonder to see them not ashamed."

Jonathan Swift[1]

"[S]hame was an emotion [he] had abandoned years earlier. Addicts know no shame. You disgrace yourself so many times you become immune to it."

John Grisham[2]

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* J.D. Candidate 2013, Phoenix School of Law. Tremendous thanks to my wife and Professor Michael Jones. Without their support and understanding, this would not have been possible.

[1] Jonathan Swift, *Thoughts on Various Subjects*, *in* 8 The Works of the Rev. Jonathan Swift, at 285, 289 (George Faulkner ed., 1746).

[2] John Grisham, The Testament 143 (1999).

"How can the intensity of this shame be understood by those who have never experienced it? How can they understand the strength of the motivations produced by the desire to escape from it?"

Didier Eribon[3]

The American judicial system abandoned the use of shame as a criminal punishment in the latter half of the 19th century.[4] The rise of the penal system and the young nation's growth experienced a decline in the use of stocks and public humiliation.[5] More recently, however, the discovery of flaws in the penal system and the failure of crime rates to change significantly,[6] caused the shaming of criminals to be taken off the shelf, dusted off, and put back to use as a viable punishment option.

This Article will look at the use of shame as punishment through a therapeutic jurisprudence comparative lens. Therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent."[7] The focus of therapeutic jurisprudence is to look below the surface of the legal system with attention placed on human factors such as emotional and psychological well-being.[8] Therapeutic jurisprudence looks at all facets of the law, all persons involved, and the effects of the legal system. Studies focus on the "therapeutic and antitherapeutic consequences of the law."[9] Law from a therapeutic jurisprudence perspective can be broken down into legal rules, procedures, and actors.[10] One goal of therapeutic jurisprudence is the deep study of these sections of law for a way to improve the mental and psychological well-being of the persons involved.[11]

The rise of therapeutic jurisprudence and the return of shame as a punishment, frames the question: Is shame therapeutic? This Article will look at shame's historical use, its modern use, judicial trends, reasoning for and against its use, data on its effectiveness, and possible areas where shame would be most effective.

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[3] DIDIER ERIBON, INSULT AND THE MAKING OF THE GAY SELF 29 (Michael Lucey trans., Duke University Press 2004) (1999).

[4] *See* Scott E. Sanders, Note, *Scarlet Letters, Bilboes and Cable TV: Are Shame Punishments Cruel and Outdated or Are They A Viable Option for American Jurisprudence?*, 37 WASHBURN L.J. 359, 365 (1998).

[5] *See id.* at 365-66.

[6] *See id.*

[7] DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996).

[8] *See* David B. Wexler, *Therapeutic Jurisprudence: An Overview*, INT'L NETWORK ON THERAPEUDIC JURISPRUDENCE (last visited Mar. 18, 2014).

[9] *Id.*

[10] *Id.*

[11] *See id.*

II. Historical Use of Shaming Punishments

Shame was a prominent part of punishment of non-capital offenses in 16th to early 19th century America and Europe.[12] The public witnessed punishments for these offenses.[13] To maximize the shame, these punishments took place at the busiest times of day to ensure the largest amount of people witnessed the punishment.[14] Depending on the offense, the convicted were either confined to public stocks, or pillories, or made to wear signs or letters proclaiming the misdeed.[15] Punishment for women who spoke out of turn or insulted their husbands or prominent community men consisted of confinement to a ducking stool. Tied to a chair on one end of a type of seesaw, the women were paraded around town, and/or "ducked" into a nearby body of water.[16] Prosecutors branded serious offenders with the letter of their crime—forever marking individuals as criminals in their community.[17] Upon seeing, say the letter "T," one could identify the branded as a thief.[18] Other serious offenses resulted in public beatings or whippings.[19] Given the community nature of the early colonies, the beatings were not the worst part of the punishment.[20] "The sting of the lash and the contortions of the stocks were surely no balm, but even worse for community members were the piercing stares of neighbors who witnessed their disgrace and with whom they would continue to live and work."[21] Early punishment by shame seemed to focus on deterring the viewing public from committing a similar offense. In these small, connected communities, the shame of one's criminal act was present long after the punishment.[22]

During the late 18th century, authorities used shame less frequently for criminal punishment. Two common reasons involved the changing populations

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[12] *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 611 (1996); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 Yale L.J. 1055, 1061 (1998); *Punishments at the Old Bailey*, Old Bailey Proc. Online, http://www.oldbaileyonline.org/static/Punishment.jsp (last visited Apr. 7, 2014).

[13] *See* Sanders, *supra* note 4, at 363.

[14] *See* Barbara Clare Morton, Note, *Bringing Skeletons Out of the Closet and into the Light—"Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 Suffolk U. L. Rev. 97, 101 (2001).

[15] *See* Sanders, *supra* note 4, at 363-64.

[16] *See id.* at 364 n.47.

[17] *Id.* at 364-5.

[18] *See id.* at 365.

[19] *See id.* at 363.

[20] *See id.*

[21] *Id.* (internal quotation marks omitted) (quoting Adam J. Hirsch, The Rise of the Penitentiary: Prisons and Punishments in Early America 34 (1992)).

[22] *See* Paul Ziel, Note, *Eighteenth Century Public Humiliation Penalties in Twenty-First Century America: The "Shameful" Return of "Scarlet Letter" Punishments in* U.S. v. Gementera, 19 BYU J. Pub. L. 499, 501 (2005).

and rise of personal liberty found in new governments.[23] Shaming punishments were effective in small, close-knit communities where the offender lived with people he depended on for survival who would witness his punishment.[24] As populations migrated to large urban centers, the effectiveness of shaming found in small communities was lost.[25] As a known, dependent member of a group, one could not hide his shame and faced possible banishment. However, in a large city, one was not dependent on the collective for his livelihood and could blend in with the masses or completely avoid them, providing cover for his criminal acts.[26] Additionally, increased transportation methods afforded criminals the option to leave the community for a new home and life without shame.[27] If a criminal is no longer dependent on those viewing his punishment, the embarrassment through the publicity of the act is lost and not an effective shaming method.

The second common reason involves the changing political landscapes of the time. The revolutions in Europe and America brought about a more enlightened view of liberty and personal equality, including equal punishments.[28] Changing views on public punishment led to rising public resistance of the practice.[29] As dependence on community waned; the idea of personal liberty began to flourish.[30] Accordingly, shaming lost effectiveness while personal liberties became a prized and effective target of punishment.[31]

The enlightenment that sparked governmental change also led to the creation of the penal system.[32] Revolutions provided an opportunity for change in the legal system and opened the door for new methods of punishment by the government.[33] Seen as "more suited to the genius of a republic,"[34] prisons were "superior to corporal punishment as a means of expressing appropriate moral condemnation."[35] Rehabilitation, rather than corporal punishment, of offenders was the goal of the new system.[36] This system of punishment oper-

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[23] *See id.* at 502.
[24] *See id.* at 501.
[25] *See id.* at 501-02.
[26] *See id.* at 502.
[27] *See id.*
[28] *See id.* at 501-02.
[29] *See generally* Sanders, *supra* note 4, at 365-66.
[30] *See* Zeil, *supra* note 22, at 501-02.
[31] *See id.* at 502.
[32] *See* Kahan, *supra* note 12, at 612.
[33] *See* Morton, *supra* note 14, at 107.
[34] *See* Sanders, *supra* note 4, at 366 (internal quotation marks omitted) (quoting HIRSCH, *supra* note 21, at 50 (quoting Governor's Message, Jan. 30, 1793, Mass. Acts & Resolves, 1792-93:694)).
[35] *See* Kahan, *supra* note 12, at 613.
[36] *See* Sanders, *supra* note 4, at 366.

ates into modern day, but as its flaws and overuse become increasingly evident, more and more legislatures and judges look to revisit shaming as an alternative.[37]

III. Modern American Judicial Use of Shaming

Several courts are now using various creative ways to punish criminals with little or no jail time by conditioning probation or reduced jail time upon completion of a shaming sanction. Professor Dan Kahan has defined four categories of shame punishments: stigmatizing publicity, literal stigmatization, self-debasement, and contrition.[38]

Stigmatizing publicity is the publication of an individual's conviction to the entire community.[39] Typical examples are local newspaper ads, paid for by the criminal, with his picture and the committed crime listed.[40] Other means of publication include the use of community accessed channels and billboards[41] to display pictures of men found guilty of soliciting prostitutes[42] or websites to display pictures of deadbeat parents.[43]

Literal stigmatization is the marking of the criminal or his property with his crime.[44] Typical punishments use sandwich boards or clothing stating the offender's violation such as "DUI Convict" or "I Write Bad Checks."[45] States will mark vehicles of drunk drivers with bumper stickers or special license plates.[46] Convicted sex offenders may have signs posted on their homes declaring their offenses.[47]

Self-debasement is the modern version of the colonial stocks.[48] One version is a public apology or admittance of one's crimes, typically occurring in front of the courthouse.[49] Another is labeling the offender during performance of another part of the sentence, such as a shirt stating "DUI Offender" while performing community service.[50]

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[37] *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1880, 1884 (1991).

[38] *See* Kahan, *supra* note 12, at 631.

[39] *See id.* at 631-32.

[40] *See* Sanders, *supra* note 4, at 368.

[41] *See* Kahan, *supra* note 12, at 632.

[42] *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 735 (1998).

[43] *See* Sanders, *supra* note 4, at 370.

[44] *See* Kahan, *supra* note 12, at 632.

[45] *See id.*

[46] *See id.*

[47] *See* Massaro, *supra* note 37, at 1888.

[48] *See* Kahan, *supra* note 12, at 633.

[49] *See* Garvey, *supra* note 42, at 736.

[50] *See* Massaro, *supra* note 37, at 1887.

Other forms of self-debasement follow the retribution theory of punishment. Creative judges have sentenced offenders to punishments tailored to the offenses. One judge ordered burglars to allow their victims to take something of like value from the burglars' homes.[51] Another ordered an offender, who caused his victim to lose an eye, to wear an eye patch whenever awake.[52] A New York judge sentenced a slumlord to house arrest—in one of his own slums.[53] Some scholars have argued these punishments do not always require the audience element typically needed to shame the offender.[54] Rather than shame the offender, these punishments morally educate offenders of the consequences of their crime.

The final category offered by Kahan is contrition and has two versions.[55] In the first, the offender publicly admits his crime and, regardless of sincerity, apologizes.[56] Examples include offender's placing of ads in the local paper confessing to his crime, or confessing his offense to an entire church congregation.[57] The second version is the "apology ritual."[58] Often used where there is a close family or social connection between the offender and victim,[59] these apologies must be sincere to the victim. Some involve physical signs of remorse such as offenders apologizing on their hands and knees while others use reparations like helping to repair the damage they have created.[60]

IV. Judicial Use and Review

A. State Use of Shaming

In light of prison overcrowding and repeat offenders, many judges turn to alternative sentencing, especially shaming.[61] The conditions range widely and are often very creative. Numerous shoplifting offenders have worn sandwich boards stating their crime in front of the store from which they stole.[62] Several jurisdictions use special license plates or bumper stickers stating the driver's

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[51] *See* Garvey, *supra* note 42, at 736.

[52] *See id.*

[53] *See id.*

[54] *See, e.g.*, *id.* at 738.

[55] *See* Kahan, *supra* note 12, at 634.

[56] *Id.*

[57] *See* Massaro, *supra* note 37, at 1888.

[58] *See* Kahan, *supra* note 12, at 634.

[59] *Id.*

[60] *Id.*

[61] *See Dr. Phil Show: Wrongful Punishment* (CBS television broadcast Aug. 10, 2007).

[62] *See* Ron Word, *Better than Jail Time? Some Judges Try Unusual Sentences*, L.A. Times (Nov. 4, 2007), http://articles.latimes.com/2007/nov/04/news/adna-sentences4.

previous drunk driving conviction.[63] A Texas drunk driver now has a picture of the fatal wreck he caused hanging in his living room.[64] The photo of a drunk driving victim, pictured in his coffin, will forever be in a Pennsylvania offender's wallet and a Florida man will spend Thanksgiving and Christmas Day in jail after driving recklessly and killing a teenager on Thanksgiving.[65] And in Ohio, Judge Cicconetti sentenced a woman to spend one night in the woods where she abandoned thirty-five kittens with no supplies, with only the clothes on her back.[66]

Judge Cicconetti is one of several judges making a name for himself by issuing alternative punishments. "I've been a judge for almost 14 years, and the most effective punishments are those that fit the crime," Judge Cicconetti says. "They teach the offenders a lesson they'll never forget."[67] His other alternative punishments include throwing a picnic for students forced to miss a field trip after the offenders vandalized the students' buses, and an animal cruelty offender was sentenced to visit schools as "Safety Pup."[68]

Some judges, like Florida Circuit Judge Schack, favor the public advertisement of the offenders' crimes. Judge Schack's typical sanctions require offenders to advertise their crimes in a local newspaper or to post warning signs on the homes of sexual offenders.[69] One woman's sentence included placing an ad in the newspaper with details of the event when she purchased drugs in front of her children.[70]

Perhaps the most popular advocate of these alternative sanctions is Judge Poe of Houston, Texas. His self-titled "Poe-etic"[71] punishments have included sandwich boards stating the offender's crime, and an 8x10 photograph of a family placed in the jail cell of the drunk driver who killed them.[72] Judge Poe

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[63] *See* OHIO REV. CODE ANN. § 4503.231 (West, Westlaw through 2013 File 59 of the 130th GA (2013-2014); *see also* Jon Nordheimer, *In-House Dispute: Drunken-Driver Bumper Sticker*, N.Y. TIMES, June 6, 1985, at A22; *see also Scarlet Bumper: Humiliating Drunk Drivers*, TIME, June 17, 1985, at 52.

[64] *See Texas Judge Orders Convicted Drunk Driver to Public Humiliation*, FOXNEWS.COM (Apr. 21, 2012), http://www.foxnews.com/us/2012/04/21/texas-judge-orders-convicted-drunk-driver-to-public-humiliation/.

[65] *See* Garvey, *supra* note 42, at 787 (Fla.); Karen Kane, *Agreement Forces Driver in Fatal Crash to Visit Grave of Her Victim*, POST-GAZETTE.COM (Sept. 24, 2003), http://old.post-gazette.com/localnews/20030924shaming0924p1.asp (Pa.).

[66] *Woman Ordered to Spend Night in Woods for Abandoning Kittens*, ABC NEWS (Nov. 23, 2005), http://abcnews.go.com/GMA/LegalCenter/story?id=1322751.

[67] *See Dr. Phil Show*, *supra* note 61.

[68] *See id.*

[69] *See* Sanders, *supra* note 4, at 368.

[70] *Id.* at 369.

[71] *See* Chuck Colson, *Poe-etic Justice*, BREAKPOINT (Dec. 26, 1997), https://www.breakpoint.org/commentaries/4755-poe-etic-justice.

[72] *See* Sanders, *supra* note 4, at 366, 367.

stated, "[O]ur founders knew that the judgment of a friend, a neighbor, or family member held far greater significance than that of the jailer or judge."[73]

Some state legislatures are also following this trend by codifying judicial discretion to impose shameful alternative sanctions.[74] In California, a judge may issue:

> [O]ther reasonable conditions, as [the sentencing judge] may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . .[75]

Ohio state legislators authorized unique license plates for DUI offenders,[76] and California allows judges the power to label DUI offenders while they perform public service.[77]

Appellate courts, like the states, have taken differing views on the use of shaming as a punishment. The California Court of Appeals did not find cruel or unusual punishment in a probation condition mandating a convicted purse-snatcher wear tap shoes whenever in public, so as not to sneak up on his victims.[78] "Merely because a condition is out of the ordinary does not make it constitutionally unreasonable. One of the advantages of probation as an alternative to confinement is that its terms can be tailored by the court to fit the individual defendant."[79] The California Court of Appeals however, later limited the use of shaming sanctions.[80]

Other appellate courts have upheld newspaper ads[81] and bumper stickers for DUI convictions.[82] One Florida appellate court stated,

> Deciding that the primary purpose of probation is rehabilitation is not the same thing as making probation free from any punitive effect. Rehabilitation and punishment are not mutu-

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[73] *Id.* (internal quotation marks omitted).

[74] *See* Jennifer Bellott, Note, *To Humiliate or Not to Humiliate: Does the Sentencing Reform Act Permit Public Shaming as a Condition of Supervised Release?*, 38 U. MEM. L. REV. 923, 924 (2008).

[75] CAL. PENAL CODE § 1203.1(j) (West 2014).

[76] *See* OHIO REV. CODE ANN. § 4503.231 (West, Westlaw through 2013 File 59 of the 130th GA (2013-2014)).

[77] *See* Massaro, *supra* note 37, at 1887.

[78] People v. McDowell, 130 Cal. Rptr. 839, 843 (Ct. App. 1976).

[79] *Id.*

[80] *See* People v. Hackler, 16 Cal. Rptr. 2d 681, 687 (Ct. App. 1993).

[81] *See* Lindsay v. State, 606 So. 2d 652, 653 (Fla. Dist. Ct. App. 1992).

[82] *See* Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986).

> ally exclusive ideas. They can co-exist in any single, particular consequence of a conviction without robbing one another of effect. In fact, it is difficult to imagine any condition of probation that does not have some punitive aspect to it.[83]

The state appellate courts are not alone in these views.

B. Federal Courts Use of Shaming

Some federal courts of appeal also follow this reasoning. One court stated, "[the] deterrent effect of punishment is heightened if it inflicts disgrace and contumely in a dramatic and spectacular manner. The arsenal of the sentencing judge should contain more than the traditional weapons of fine and imprisonment *simpliciter*."[84] The U.S. Supreme Court stated the following about the punishment of marking DUI offenders' clothing worn while performing community service, the penalty is "less embarrassing and less onerous than six months in jail."[85]

The only federal case to use a shame condition is *United States v. Gementera*.[86] Convicted of mail theft, Gementera received a sentence of two months in jail and three years of supervised release.[87] The supervised release was conditioned upon Gementera wearing or holding a large sign stating, "I stole mail. This is my punishment," in front of a post office.[88] The court explained:

> While humiliation may well be—indeed likely will be—a feature of defendant's experience in standing before a post office with such a sign, the humiliation or shame he experiences should serve the salutary purpose of bringing defendant in close touch with the real significance of the crime he has acknowledged committing. Such an experience should have a specific rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more extended term of imprisonment.[89]

The Ninth Circuit Court of Appeals applied language from the federal Sentencing Reform Act.[90] The act's guidelines require sentencing conditions: (1)

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[83] *Lindsay*, 606 So. 2d at 656.
[84] United States v. William Anderson Co., 698 F.2d 911, 913 (8th Cir. 1983).
[85] Blanton v. City of N. Las Vegas, Nev. 489 U.S. 538, 544 (1989).
[86] *See* United States v. Gementera, 379 F.3d 596 (9th Cir. 2004).
[87] *See id.* at 598.
[88] *Id.*
[89] *Id.* at 602 (citing the explanation by the district court).
[90] *Id.* at 599-601; *see also* 18 U.S.C. § 3583(d) (2008).

be reasonably related to the offense and defendant; (2) involve no greater deprivation of liberty than is reasonably necessary; and (3) are consistent with the Sentencing Commission policy statements.[91] The court held the condition was imposed "for the stated and legitimate statutory purpose of rehabilitation and, to a lesser extent, for general deterrence and for the protection of the public."[92] In comparing a lengthy prison sentence, the court stated the shaming condition "would better promote this defendant's rehabilitation and amendment of life . . . ."[93] The court further stated, "in comparison with the reality of the modern prison, we simply have no reason to conclude that the sanction before us exceeds the bounds of 'civilized standards' or other 'evolving standards of decency that mark the progress of a maturing society.'"[94] While the federal courts have joined states allowing shaming conditions, other states prohibit their use.

C. State Opposition to Shaming

Not all courts are willing to sanction the use of shaming punishments.[95] Tennessee's Supreme Court removed a condition requiring a sex offender to place a four-by-eight foot sign at his home reading: "[W]arning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware."[96] The court stated the Tennessee statute does not allow "breathtaking''departures from conventional principles of probation."[97]

Several state courts have struck down shaming sanctions as unrelated to rehabilitation. The relation of the condition to rehabilitation is a common complaint. California's Court of Appeals declined to extend the *McDowell* ruling in *People v. Hackler*.[98] Hackler was ordered to wear a t-shirt stating, "I am on felony probation for theft" whenever in public.[99] Unlike Hackler's shirt, McDowell's tap shoe condition did not label him as a purse-snatcher.[100] Rather, the court felt the punishment would "brand Hackler and expose him to public ridicule and humiliation, rather than to facilitate his rehabilitation."[101]

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[91] *See id.* at 600.

[92] *Id.* at 602.

[93] *Id.* at 607.

[94] *Id.* at 610.

[95] *See* People v. Letterlough, 655 N.E.2d 146 (N.Y. 1995).

[96] *See* State v. Burdin, 924 S.W.2d 82, 84 (Tenn. 1996).

[97] *Id.* at 86.

[98] *See* People v. Hackler, 16 Cal. Rptr. 2d 681, 686-87 (Ct. App. 1993).

[99] *See id.* at 1052.

[100] *See id.* at 1059.

[101] *Id.* at 1058.

The Kansas Court of Appeals,[102] along with the Montana[103] and Illinois[104] Supreme Courts, also ruled against the use of signs designed to shame the offender. These courts ruled that the use of shaming signs violated sentencing statutes for not meeting the goals of rehabilitation and protection of the public.[105] Erwin Chemerinsky, a law professor and constitutional scholar at the University of Southern California in Los Angeles, follows the reasoning of these courts.[106] "If legislatures want to allow shame sentencing, there should be a statutory authorization for it."[107] The lack of clear guidelines allows judges to interpret sentencing statutes. Chemerinsky noted, "That is one reason why there have not been clear standards from appellate courts on whether shame sentences are allowed."[108] Without appellate court rulings, the door will still be open for judges to issue shaming sanctions.

V. Benefits of Shaming Sanctions

Proponents of shaming sanctions state the sanctions do fit into statutory rehabilitation requirements, as well as deterrence and incapacitation theories of punishment. When compared to traditional punishments, including prison, proponents argue shaming sanctions offer a more effective alternative.

A. Incapacitation

Shaming sanctions will likely only work for certain offenders. For many violent offenses, incarceration may be the only option.[109] However, for nonviolent crimes, proponents of shaming sanctions argue shaming is more effective and cheaper than jail for incapacitating some offenders. Judge Cicconetti, a proponent and issuer of shaming sanctions, says jail is ineffective for younger offenders.[110] "It becomes a status symbol, but let that same young impressionable individual be humiliated a little bit, boy, his friends are not going to be high-fiving him."[111] While a majority of offenses require jail time, others may not. Toni M. Massaro, a Professor of Law at the University of Arizona and

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[102] State v. Schad, 206 P.3d 22, 35 (Kan. 2009).

[103] State v. Muhammad, 2002 MT 47, ¶¶ 37-38, 309 Mont. 1, 12, 43 P.3d 318, 325.

[104] People v. Meyer, 680 N.E. 2d 315, 318-19 (Ill. 1997).

[105] *See id.*

[106] *See* Kelly McMurry, *For Shame: Paying for Crime Without Serving Time, but with a Dose of Humility*, Trial, May 1997, at 12, 12-14.

[107] *Id.* at 14.

[108] *Id.*

[109] *See* Kahan, *supra* note 12, at 605.

[110] *See Dr. Phil Show*, *supra* note 61.

[111] *Id.*

opponent of shaming sanctions reasons—like jail—shame can similarly effect incapacity.[112]

> People might, for example, refuse a convicted embezzler a position that gives her access to funds. A known child molester may be denied contact with children. And a convicted drunk driver may be refused alcohol or a job that involves use of a vehicle. As such, the shaming sanctions may have a disabling effect on the offenders, and thus may claim to serve incapacitation-type ends.[113]

If shaming sanctions prevent repeat offenses, similar to prisons, their use becomes more appealing given the cost of incarceration.

In 2001, the average annual operating cost of housing per state inmate was $22,650.[114] California's cost to incarcerate an inmate was roughly $47,000 per year in 2008.[115] In New Jersey, it is cheaper to send a student to Princeton University than to house that same person in jail.[116] In comparison, shaming sanctions require a fraction of the costs of incarceration, or nothing at all, in jurisdictions that require the offender to pay administration costs. The cost incurred for a shaming sanction is usually limited to administration fees and a bumper sticker, t-shirt, or personnel to supervise a public act.[117] Considering the effectiveness of some shaming sanctions in preventing repeat offenses, proponents have a strong argument for the viability of their use. When weighing the substantially higher cost of jail, the argument for the use of these sanctions only increases.

B. Deterrence

Proponents of shaming sanctions argue using such sanctions has the same or better deterring effects than conventional punishments. No longer in close-knit colonial settlements, deterrence through shame has shifted from fear of separation from the community to a loss of privacy due to a forced display of the shaming sanction.[118] "Given the elaborate enactment of privacy laws, and

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[112] *See* Massaro, *supra* note 37, at 1900.

[113] *Id.*

[114] *See* James J. Stephan, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *State Prison Expenditures*, 2001 (June 2004), *available at* www.bjs.gov/content/pub/pdf/spe01.pdf.

[115] *See* CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, *How Much Does it Cost to Incarcerate an Inmate 2008-2009*, http://www.webcitation.org/6CxuLz4Ng.

[116] *See* Brian Resnick, *Chart:One Year of Prison Costs More Than One Year at Princeton*, THE ATLANTIC (Nov. 1, 2001), www.theatleantic.com/national/archive/2011/11/chart-one-year-of-prison-costs-more-than-one-one-year-at-priceton/247629/.

[117] *See* Kahan, *supra* note 12, at 634.

[118] *Id.* at 642.

well-established, unambiguous constitutional protection against privacy invasions, it seems probable that many would perceive intrusions into one's personal life, and resulting inability to control the distribution of private information, as sufficiently repelling to deter behavior leading to such a penalty."[119]

Take the instance of a "john" contemplating the solicitation of a prostitute. The possibility of a stranger's knowledge of his crime would not be much of a deterrent. However, the experience of looking those strangers in the eye—as each man, woman, and child passed the offender and read the sign detailing his crime—would have a significant effect on the offender. By exposing the wrongdoing to the "john's" family, co-workers, church, or Boy Scout troop the impact of punishment is magnified.[120] The publication of these shaming sanctions can serve as a deterrent to a potential offender (specific deterrence) and the public (general deterrence) as a reminder of possible punishments for these crimes.

Publicizing shaming sanctions is not necessary to have a deterring effect on previous offenders. Judge Poe imposed a shaming sanction on a child custody offender to shovel horse manure from the local police department stables for twenty hours a month, every month, for the duration of his ten-year probation.[121] The offender stated, "That's a lot of horse manure . . . . It's definitely a deterrent. I don't want to go back and do something like that again."[122]

Shaming sanctions are sometimes promoted as a harder hitting punishment and deterrent than fining an offender. The public can react negatively to fines if they are too high or low. Punishing a murderer with a high fine, in lieu of jail, makes the public feel like one can "buy his or her way out" of jail.[123] Conversely, a low fine for a polluter is merely viewed as the "cost of doing business" and not a meaningful punishment when the offender still makes a profit—and stays out of jail.[124] Additionally, victims of these crimes feel denigrated when sentences are trivial.[125] In these aspects, fines do not serve as a significant sanction and therefore do not offer significant deterrence.

Perhaps one of the strongest arguments offered against traditional punishments is their lack of effectiveness in deterring certain offenses. A study, coordinated by the Institute for Legal and Policy Studies and Center for State Policy and Leadership found incarceration alone was ineffective in deterring repeat

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119 Morton, *supra* note 14, at 123.
120 *See* Kahan, *supra* note 12, at 643.
121 *See* McMurry, *supra* note 106, at 12.
122 *Id.*
123 *See* Kahan, *supra* note 12, at 622.
124 *See id.*
125 *See id.*

DUI offenses.[126] Rather, offenders need to be evaluated for alcohol related problems with sanctions tailored accordingly.[127] Additionally, judges need to issue those sanctions over an extended period.[128] One of the report's authors, William White, reasons long-term prison sentences remove the fear, and therefore deterrence, of incarceration.[129] This view of DUI sanctions echoes studies of other offenses involving addiction.

By definition, an addict's main motivation is to achieve the next high and to continue to feed the addiction. It is illogical to believe an addict will weigh the low probability of arrest versus the desire to continually get high.[130] Jail cannot be a deterrent if the offender does not contemplate going to jail. Incarceration does not appear to be an effective deterrent even after an offender has served a jail sentence. A 1998 study found two-thirds of drug users returned to their addiction within three months of release.[131] In questioning heroin users who quit their addiction, one study reported not one adult user (and only 13% of juvenile users) cited fear of punishment as a reason they quit.[132] Without a deterring factor in incarceration, jail sentences offer a retributive punishment but do little, if anything, to prevent recurring criminal drug use.

C. Rehabilitation

While critics of shaming sanctions may disagree, judges who use these sanctions claim their purpose is to rehabilitate the offender. Judge Cicconetti stated,

> I've been a judge for almost 14 years, and the most effective punishments are those that fit the crime. They teach the offenders a lesson they'll never forget. My court is a people's court. Every day, I see 40, 50, 60 people. Every day brings a new adventure. When I first went on the bench, I saw people who would commit one offense. They might be fine for a couple of months, but [then they'd] come back again, and they

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126 See WILLIAM L. WHITE & DAVID L. GASPERIN, MANAGEMENT OF THE HIGH-RISK OFFENDER 10 (Spring 2006), *available at* cspl.uis.edu/ILLAPS/Research/documents/Recognizing_Managing_and_Containing_the_Hard_Core_Drinking_Driver.pdf.

127 *See id.*

128 *See id.*

129 *See id.*

130 *See generally* DAVE BEWLEY-TAYLOR, CHRIS HALLAM & ROB ALLEN, BECKLEY FOUND. DRUG POLICY PORGRAMME, THE INCARCERATION OF DRUG OFFENDERS: AN OVERVIEW (2009), *available at* canadianharmreduction.com/sites/default/files/Beckley%20Report%20-%20Prison%20and%20Drugs%20-%20International%20-%202009.pdf.

131 *See id.* at 12.

132 *See id.*

> would repeat and repeat and repeat. There had to be a better way.[133]

There is reason to believe an offender will suffer enough from the shame of the sanction to be scared enough to refrain from future offenses.[134] However, some critics argue these sanctions do not have that effect in our modern world.

To effectively rehabilitate, shaming sanctions generally only work when applied to offenders who care what others think of them.[135] Some have theorized the population growth and resulting anonymity defeats the rehabilitative effects of shaming sanctions since the offender would not care about strangers viewing their punishment.[136] However, even though an offender's sanction might not be viewed by those close to them, the glare from a stranger can be equally embarrassing. Anyone who has ever had the dream of showing up to school dressed only in their underwear knows the embarrassment of being exposed to the public. It is reasonable to believe that after being publicly embarrassed, certain offenders will consider their actions and the community's reaction to those actions, resulting in a change of the offender's future behavior.

Shaming sanctions do appear to have a rehabilitative effect for offenders who come face to face with their victims and are thereby sensitized by the "human consequences" of their offense.[137] By seeing the damage their actions caused in person, some offenders may realize how their actions have negatively affected others and change their behavior to prevent future harm.[138] This direct realization of consequences of one's actions is similar to parts of Alcoholics Anonymous' ("AA") twelve steps to recovery.[139] In AA, one must admit to others the exact nature of his wrong(s), be willing to admit his wrongs, and make amends to those he has harmed.[140]

Rehabilitation of an offender is inherently hard to prove. Without a glimpse into the thoughts of an offender, one can never truly know if a shaming sanction has changed his mindset or prevented future behavior. It may be difficult to truly judge one's rehabilitation, but it appears shaming sanctions have the potential to positively affect some offenders and their future choices.

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133 *See Dr. Phil Show*, *supra* note 61.

134 *See* Massaro, *supra* note 37, at 1895.

135 *See id.* at 1901-02.

136 *See* Sanders, *supra* note 4, at 365.

137 *See* Massaro, *supra* note 37, at 1895.

138 *See id.*

139 *See* GEN. SERV. OFFICE OF ALCOHOLICS ANONYMOUS, A.A. FACT FILE 5-6 (1956), *available at* www.aa.org/pdf/products/m-24_aafactfile.pdf.

140 *See id.*

D. Benefits to the Victims

Many of the shaming sanctions are imposed with the victims in mind. Typical shaming sanctions for shoplifting offenders include wearing a sign detailing their offense in front of the place of business where they shoplifted.[141] These sanctions offer the victimized businesses another deterrent for potential future shoplifters.

In Missouri, Sharon Foster, a driver attempting to get home quickly, killed a woman and her unborn twins.[142] In addition to other sanctions, the judge sentenced Sharon Foster to spend the next six years worth of holidays in prison for three to five days.[143] The victim's husband stated he wished Foster's sentence was longer but was pleased she will have to spend holidays in jail.[144] "I hope she gets the feeling when she's in there on Mother's Day and Christmases, away from her family . . . . But it's not just the holidays for us. It's every day."[145] Many shaming sanctions for these types of offenses involve the offender spending time in jail on important days like holidays and the victim's birthday.[146] In these cases, the victim's family knows that not only are they suffering on the holidays, but the offender is suffering as well. Additionally, the offender is reminded regularly of the loss their action caused.

Some shaming sanctions are imposed after consultation with the victim's family. A prosecutor in Texas requested probation conditions for an Intoxication Manslaughter offender after working with the victim's family.[147] To maintain his probation, the offender will pay his victim's funeral expenses; wear a bracelet with the victim's name; and spend holidays, as well as the victim's birthday, and date of death, in jail.[148] After speaking with the victim's family, the prosecutor stated, "[T]his is what they wanted to do . . . . This was done with their approval."[149]

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141 *See, e.g.*, Colson, *supra* note 71; *Woman Ordered to Spend Night in Woods for Abandoning Kittens*, *supra* note 66.

142 *See* Joel Currier, *Driver in Fatal Crash to Spend Holidays in Jail*, ST. LOUIS POST-DISPATCH (May 16, 2012, 12:05 AM), http://www.stltoday.com/news/local/crime-and-courts/driver-in-fatal-crash-to-spend-holidays-in-jail/article_8d4c6b05-1973-535e-96b1-ca3d3ccf5508.html.

143 *See id.*

144 *See id.*

145 *Id.* (internal quotation marks omitted).

146 *See* Melody McDonald, *Fort Worth Driver in Deadly DWI Crash Must Spend His Victim's Birthdays in Jail*, STAR-TELEGRAM (Apr. 30, 2011), http://www.star-telegram.com/2011/04/29/3038751/fort-worth-driver-in-deadly-dwi.html.

147 *See id.*

148 *See id.*

149 *Id.* (internal quotation marks omitted).

The situation was similar for a nanny convicted of hitting a child with a belt.[150] The judge gave the nanny articles on the consequences of child abuse and required her to read and discuss them in the courtroom with the victim's mother and others present.[151] The Mother, affected enough by the events, agreed to forego a jail sentence for the nanny.[152] Part of therapeutic jurisprudence is the inclusion of the victim and family in court proceedings, including sentencing.[153] By conferring with those most affected by the offender's actions, the victim and family can have a part in the proceedings rather than being mere bystanders.

VI. Negative Effects of Shaming Sanctions

While shaming sanctions are touted for their benefits, they have also been criticized by some as ineffective and by others as too excessive. Additionally, some critics argue certain requirements and conditions are needed for shaming sanctions. Finally, some argue reintergrative processes need to be added to shaming sanctions.

A. Ineffective Shaming Sanctions

Perhaps the most argued position against shaming sanctions is they simply do not work. For some offenders, the cost of "social embarrassment" is preferable to the cost of jail time.[154] Shaming sanctions are also effectively limited for offenders who do not value their reputation.[155] These offenders may not care about the social cost of a shaming sanction, since they care little about what society thinks of them. This is especially true where an offender has the means to relocate and leave the society that viewed him or her negatively.

An offender's social value can become meaningless when the offender can simply move and create a fresh social value in a new location. Such was the case in *State v. Rosenberger*,[156] where the offender was convicted of forgery

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150 *See Woman Ordered to Spend Night in Woods for Abandoning Kittens*, *supra* note 66.

151 *See id.*

152 *See id.*

153 Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, 6 Phoenix L. Rev. 1017, 1026 (2013); Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 Rev. Jur. U.P.R. 97, 98 (1998).

154 *See* Massaro, *supra* note 37, at 1888 ("One man who opted for the public apology in lieu of a prison sentence stated that the cost of the social embarrassment paled when compared to the cost of six months in prison.").

155 *See* Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 Tex. L. Rev. 2075, 2079 (2006) (remarking on his critics claiming "shaming punishments couldn't be expected to deter, for example, because most offenders don't value their reputations enough to be influenced by the threat of humiliation.").

156 State v. Rosenburger, 504 A.2d 160, 163-64 (N.J. Super. Ct. Law Div. 1985).

but "argued that his 'shame and disgrace' in being convicted was sufficient punishment."[157] The judge rejected this argument stating,

> [The defendant] had minimal roots anywhere and lived in Bound Brook for only two years prior to this offense. After being fired by AT&T he moved to California and quickly obtained a new and equally lucrative position. There is no evidence that he is now shunned socially, financially or otherwise. He still earns as much as he did at AT&T and it is probable that his new neighbors are totally unaware of his criminal conduct. So where is the shame? With whom has he been disgraced? How has he been punished? It is apparent that he simply moved his employment and residence 3,000 miles and continued his same life style without so much as a hitch.[158]

To carry weight as a punishment, the offender needs to depend heavily on a social group "for social, economic, or political support, or cannot leave the group easily."[159] Where an offender has the mobility to escape the social group's negative views, shame can lose its stigma and as a result, its effectiveness.[160]

Shaming sanctions can also lose effectiveness as a deterrent if overused.[161] When the public is bombarded by something repeatedly, the likelihood of desensitization increases. As shaming critic Toni Massaro states,

> First, if the penalty were to become a common sanction, it may produce a shaming overload, which could reduce public interest in these displays and thereby lessen the deterrence impact. This decline in public interest could prove expensive to monitor. At least three million people pass through the state and federal corrections systems each year. Approximately two thirds of the offenders who are under correctional supervision are on probation or parole, and thus have been returned to the community. If only one half of this two thirds was sentenced to shame sanctions, this still might involve one

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157 Massaro, *supra* note 37, at 1934-35.

158 *Rosenberger*, 504 A.2d at 164.

159 Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 682 (1997).

160 *See* Massaro, *supra* note 37, at 1901-02.

161 *See id.* at 1930.

> million shamings per year for the government to publish and for the public to consume.[162]

The public may become more and more disinterested in shaming events as shaming sanctions become more and more commonplace. One shoplifter performing a shaming sanction in front of a Wal-Mart might draw public attention. However, if a shaming sanction is taking place every time someone shops at Wal-Mart, individuals might become desensitized to the display, if anyone notices it at all. Without public participation in the shaming sanction, the desired effect of the sanction is lost.

B. Shaming Sanctions are too Excessive

Another popular argument against shaming sanctions is the belief that they are too excessive. Rather than reform the offender, critics feel these punishments create more harm.[163] Judge Cicconetti's well-publicized use of shaming sanctions has brought much of that criticism on him.[164] Carole McKindley-Alvarez, the divisional director of the San Francisco Youth Mental Health Program, stated the Judge's sanctions degrade, abuse, and cause more harm than good for the offender.[165]

> All of our mental health programs end up having more and more people come in with trauma at the hands of humiliation. When you do this creative type of justice, the problem is that it's just going to make the behavior show up in different ways. So, Judge Cicconetti may never see that person again, but mental health programs will see that person, other judges may see that person or, unfortunately, the morgue may see that person.[166]

These comments echo a common worry of shaming sanction critics. What if the offender loses status in his community to the point where he no longer regards himself as a part of society?

In England and colonial America, offenders could be branded with a letter for their offense.[167] This permanent marking of an individual would lead to an

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[162] *Id.* at 1930-31 (footnotes omitted).

[163] *See, e.g.*, *id.* at 1937, 1942-43.

[164] *See* sources cited *supra* notes 66-68.

[165] *See Dr. Phil Show*, *supra* note 61.

[166] *Id.*

[167] *See* Sanders, *supra* note 4, at 365-66.

increase in crime.[168] Since the offender could not rejoin society, he, or she, would be forced to join other criminals rejected by society.[169]

There is a fear that these modern shaming sanctions will have the same unintended consequences as branding.[170] It is logical to presume that once an offender loses all of his or her social status, the offender has nothing to lose by offending again. If society casts the offender away, he or she will no longer be bound by society's rules and expectations.

C. Conditions Needed for Effective Shaming

Critics of shaming sanctions argue those sanctions are not effective as currently applied. One critic, Toni Massaro, argues there are five conditions needed for effective shaming sanctions:

> First, the potential offenders must be members of an identifiable group, such as a close-knit religious or ethnic community. Second, the legal sanctions must actually compromise potential offenders' group social standing. That is, the affected group must concur with the legal decisionmaker's estimation of what is, or should be, humiliating to group members. Third, the shaming must be communicated to the group and the group must withdraw from the offender—shun her—physically, emotionally, financially, or otherwise. Fourth, the shamed person must fear withdrawal by the group. Finally, the shamed person must be afforded some means of regaining community esteem, unless the misdeed is so grave that the offender must be permanently exiled or demoted.[171]

Massaro argues current society in the United States lacks the close-knit, interdependence needed for effective shaming.[172] Additionally, the criminal justice system lacks any mode of reintegration for offenders who receive shaming sanctions.[173] Without these elements, Massaro concludes shaming sanctions will merely be a spectacle devoid of any community or deterrent benefit.[174]

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168 *See* Scheff, *supra* note 153, at 104.

169 *See id.* at 104.

170 *See* Massaro, *supra* note 37, at 1885-89.

171 *Id.* at 1883 (footnotes omitted).

172 *See id.* at 1884.

173 *See id.*

174 *See id.*

D. Shaming Sanctions Lack Reintegrative Elements

Restorative justice focuses on creating positive effects from the actions of the judicial system.[175] Accordingly, some restorative justice advocates favor reintegrative shaming sanctions over those that stigmatize.[176] John Braithwaite, an author of several works on shaming, argues for shaming where society issues disapproval of the offender without rejecting the offender as a member of society.[177] Braithwaite argues for "enough shaming to bring home the seriousness of the offense, but not so much as to humiliate and harden."[178] His thought is similar to those offered above in that an offender stigmatized excessively will withdraw from society and no longer be bound by its rules. Braithwaite, along with other restorative justice advocates, argues for community conferences as a way to incorporate reintegration with shaming sanctions.[179]

The community conference is one reintergrative means offered for shaming sanctions. Several countries use the conferences instead of traditional court proceedings.[180] African cultures use "justice under a tree" where the community dispenses justice.[181] In New Zealand, over half of all juvenile offenders have been dealt with in these conferences.[182] By doing so, New Zealand saves millions of dollars every year and recidivism rates have dropped.[183] Australia uses these conferences for both juvenile and adult offenders.[184] These conferences bring the accused, the victim, the victim's relatives, and community participants together to discuss the offense.[185] As Braithwaite states,

> For conferences to be maximally effective, two separate movements of shame should occur. First, all shame must be removed from the victim. The humiliation of degradation, betrayal and violation that has been inflicted on the victim can

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175 *See* Jan Peter Dembinski, *Restorative Justice in Vermont: Part Two*, VT. B.J., Spring 2004, at 49, 52.

176 *See id.* at 52.

177 Bernard E. Harcourt, *Placing Shame in Context: A Response to Thomas Scheff on Community Conferences and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 627, 629 (1998).

178 Suzanne M. Retzinger & Thomas J. Scheff, *Shame and Shaming in Restorative Justice*, RED FEATHER J. POSTMODERN CRIMINOLOGY, *available at* http://www.critcrim.org/redfeather/journal-pomocrim/vol-8-shaming/scheff.html (last visited Mar. 19, 2014).

179 *See id.*

180 *See id.*

181 *See* Allison Quattrocchi, *Justice Under A Tree: The Inspiration Behind A South Africa Court Building*, ARIZ. ATT'Y, Jan. 2010, at 16, 19.

182 Retzinger & Scheff, *supra* note 178.

183 *See id.*

184 *See id.*

185 *See* Harcourt, *supra* note 177, at 628.

> be relieved. This step is a key element in the victim's future well-being; it is the shame component, the feeling that the victim has that if only she had acted differently, the crime wouldn't have occurred or would have been less painful, that leads to the most intense and protracted suffering. The usual handling of crimes through courts and imprisonment does very little to relieve the victim of her suffering. Perhaps this is the main reason that many victims and much of the voting public want to visit excessive punishment on offenders, to make them suffer as their victims suffer.[186]

The goal in these conferences is for the offender to accept the shame from the victim.[187] This, Braithwaite concludes, is the first step towards the offender's rehabilitation.[188] Like other restorative justice methods, shaming sanctions may be more effective when the offender and victim are made emotionally and psychologically complete afterwards.

E. Need for Judicial Training

Perhaps the most important aspect of shaming sanctions is identifying which offenders will be beneficially affected by the sanction. Toni Massaro focuses on the criminal subculture and status position of the offender in that subculture.[189] A judge or sentencing panel must be aware of the offender's subculture and circumstances to issue a sanction that will punish by harming the offender's status.[190] Accordingly, a judge needs to be familiar with those subcultures and the effects shaming sanctions will have on the offender.

As Massaro points out, most judges, while having experience on the bench, do not have actual experience in the offender's subculture.[191] Each subculture has its own definitions of shame and as such, judges need knowledge in those subcultures to issue effective sanctions.[192] Through knowledge of subcultures and by individualizing the offender, a judge can tailor the sanction to be effective without stigmatizing. As Judge Cicconetti stated, a judge sometimes has to be a psychologist, priest, rabbi, minister, drill sergeant, or parent.[193]

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186 Retzinger & Scheff, *supra* note 178.
187 *See id.*
188 *See id.*
189 *See* Massaro, *supra* note 37, at 1923.
190 *See id.*
191 *See id.* at 1924.
192 *See id.*
193 *See Dr. Phil Show*, *supra* note 61.

VII. Are Shaming Sanctions Effective?

Judging the effectiveness of shaming sanctions is difficult due to the lack of studies. In one very limited study, 97 percent of sex offenders did not repeat their offense.[194] The judges issuing shaming sanctions produce most of the evidence of its effectiveness. In Sarasota County, Florida, Judge Titus initiated a DUI bumper sticker penalty in 1985.[195] He claims that since the program began, DUI arrests dropped one-third in the county.[196] Judge Titus believes fear of public knowledge of the offense led to the reduction.[197] Judge Cicconetti has said only two offenders who received his shaming sanctions have reoffended.[198] Another famous issuer of shaming sanctions, Judge Poe, stated, "I have no stats, but people I've imposed this type of sentence on haven't been back through the system."[199] While the anecdotal evidence is promising, independent studies are needed to assess the effectiveness of shaming sanctions.

VIII. Conclusion

Given the rising prison population causing overcrowding and government spending on incarceration, the need for other punishment alternatives is apparent. Critics may say shaming sanctions will harm some offenders, but prison sentences carry the same, if not greater, risk of harming the offender. The stigma of a prison sentence lasts far longer than a limited shaming sanction.

No one form of punishment is appropriate for all offenders. Where prison is appropriate for violent or repeat offenders, shaming sanctions may be a better option for middle-class, first time, drug, alcohol, or youth offenders. Judges will need the necessary education to identify which offenders will benefit from these sanctions.

The therapeutic jurisprudence goal of improving the emotional and psychological well-being of those involved in the judicial process can be aided by shaming sanctions. Through careful, non-stigmatizing sanctions, an offender can see the victims he has affected and how his actions have harmed those victims. The shame these victims feel can be taken on by the offender and both sides can move forward. Additionally, victims are not relegated to the sidelines of the judicial process, but rather are a part of the punishment decision making. Given these benefits, it appears that shame can indeed be therapeutic.

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194 *See* Pat Wingert, *The Return Of Shame*, Newsweek (Feb. 5, 1995, 7:00 PM), http://www.newsweek.com/return-shame-185216.

195 *See* Massaro, *supra* note 37, at 1887.

196 *See id.*

197 *See* Sanders, *supra* note 4, at 382.

198 *See Woman Ordered to Spend Night in Woods for Abandoning Kittens*, *supra* note 66.

199 *See* Sanders, *supra* note 4, at 382 (internal quotation marks omitted).

Can I Say I'm Sorry?: Examining the Potential of an Apology Privilege in Criminal Law

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I. INTRODUCTION

The issue presented is whether participants in the criminal justice system would benefit from affording criminal defendants an opportunity to offer an apology to victims early in a case.

In the American criminal justice system, before someone is charged with a crime, often before handcuffs have hit their wrists, criminal defendants are advised of their right to remain silent.[1] Soon after, the newly accused are brought before a magistrate for arraignment or initial appearance without "unnecessary delay."[2] The magistrate reads the charges, appoints counsel (if necessary), and advises the defendant (again) of his right to remain silent.[3] Upon leaving the courthouse, the accused will soon have his first meeting with defense counsel. Moments after shaking hands and exchanging names, the attorney often advises the defendant avoid speaking with anyone else about his case. As the case moves forward, time and time again, the defendant is encouraged or instructed to remain silent. For defendants who are guilty and who have harmed a victim, these repeated instructions encourage them to refrain from doing one of the most natural things in the world: apologize.[4]

In 1990, legal scholars started focusing on the psychological and emotional burden imposed on stakeholders in the American legal system.[5] This academic focus is now known as, "Therapeutic Jurisprudence."[6] The therapeutic jurisprudence perspective originated in mental health law[7] but has evolved to study the benefits of holistic approaches to various other areas of law, including criminal law.[8] A separate vector[9] with overlapping interests to therapeutic jurispru-

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Mallory v. United States, 354 U.S. 449, 451 (1957).

[3] Most states now embrace a judicial admonishment of *Miranda* rights to the freshly accused. The federal courts have codified the admonishments in the FED. R. CRIM. P. 5(d)(1).

[4] *See* Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121, 1123 (2002) (stating that, "[w]rongdoers often want to be forgiven, and concomitantly, may feel an urge to apologize.").

[5] SUSAN SWAIM DAICOFF, COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION 81 (2011)

[6] *Id.*

[7] *Id.*

[8] *Id.* at 81-82. Among the most recognizable influences of Therapeutic Jurisprudence in the American criminal justice system has been the nationwide adoption of specialty courts. *See* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002).

[9] *See* DAICOFF, *supra* note 5, at 33-34. The term "vector" is used in relation to the concept of "Comprehensive Law," which is a broad concept that includes Therapeutic Jurisprudence, Restorative Justice, and numerous other approaches to the law that take a "comprehensive, integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to the law and lawyering." *Id.*

dence is the "Restorative Justice" approach, which seeks restitution and repair for the victim, defendant, and community.[10] Restorative justice has produced tremendous benefits in the criminal justice system, including a reduced recidivism rate for participants.[11] However, an inherent flaw[12] is that restorative justice cannot begin until a disposition is entered for the criminal defendant.[13]

The therapeutic jurisprudence and restorative justice models will be examined in greater detail but this Article's broad premise is that those models effectuate a healthier criminal justice system and society. The narrower scope of this Article is whether the emotional, psychological, and societal benefits found in the restorative justice approach (particularly, the act of apology) can be applied in a present tense therapeutic jurisprudence approach (e.g., restoration taking place while the criminal case moves forward toward disposition). The proposed vessel for this process is the "apology privilege."

II. COMPREHENSIVE LAW

Professor Susan Daicoff coined the term "Comprehensive Law" in 2000 as a means of exploring and explaining the "unifying characteristics" of emerging areas of law practice, dispute resolution, and criminal justice.[14] Like a wheel with multiple spokes, these unifying concepts of comprehensive law break out into "vectors."[15] The common trait of comprehensive law to each vector is approaching the law as a "healing profession."[16]

A. Therapeutic Jurisprudence

Therapeutic Jurisprudence is the "study of the role of the law as a therapeutic agent."[17] Developed by Professors David Wexler and Bruce Winick, the therapeutic jurisprudence model builds on the foundations of law (public

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[10] *See id.* at 223.

[11] *Id.* at 231.

[12] Author's Note: The term "flaw" is not used to suggest that restorative justice is a failed concept; in fact, many participants in the restorative justice process might be unwilling to participate in a victim/offender mediation without some passage of time occurring between the crime and the restoration. The word "flaw" is used here only to identify that restorative justice does not provide the ability for participants to begin the restorative process earlier rather than later in a case.

[13] *See* DAICOFF, *supra* note 5, at 232.

[14] Susan Daicoff, *Law As A Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 3 (2006).

[15] DAICOFF, *supra* note 5, at 33-34 (The initial "vectors" were: collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation).

[16] Daicoff, *supra* note 14, at 1-4.

[17] DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996).

safety, justice, etc.) to develop a holistic approach toward justice that benefits participants in the legal process.[18] Part of this holistic approach is an analysis of "whether the law's anti-therapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values."[19] Or, as suggested by Professor Wexler:

> [T]herapeutic jurisprudence is a perspective that regards the law as a social force that produces behaviors and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times antitherapeutic consequences are produced. Therapeutic jurisprudence wants us to be aware of this and wants us to see whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.[20]

Professor Wexler advises critics that therapeutic jurisprudence does not propose that "therapeutic goals should trump other considerations."[21] Rather, therapeutic jurisprudence proposes non-traditional, humanistic approaches to the practice of law. Today, therapeutic jurisprudence has branched out into almost every area of law and been applied in real world legal settings (the most recognizable area likely being problem-solving courts).[22]

B. Therapeutic Justice in Criminal Law

Therapeutic jurisprudence's evolution from mental health to criminal law is a rather natural progression, with various overlapping concepts (e.g., the insanity defense, competency issues).[23] However, Professor Wexler argues

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[18] DENNIS STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION xv (2000) (explaining that the "psychological and emotional health of persons affected by the law and by legal actors (is) one important consideration among many.").

[19] DAICOFF, *supra* note 5, at 81 (internal quotation marks omitted) (quoting Professors Wexler and Winick). Authors Note: Any Therapeutic Jurisprudence based proposal must first clear the hurdle of ensuring that fundamental, constitutionally protected rights are not compromised. This is a critical component to this Article that will be flushed out in great detail because the concept of an "apology privilege" would go unused and wither on the vine if it did not have sufficient protections for defendants' constitutional rights.

[20] David B. Wexler, *Therapeutic Jurisprudence: An Overview*, INT'L NETWORK ON THERAPEUTIC JURISPRUDENCE, http://www.law.arizona.edu/depts/upr-intj/intj-o.html (last visited Mar. 24, 2014) (footnote omitted).

[21] WEXLER & WINICK, *supra* note 17.

[22] Authors and legal scholars have applied and examined the therapeutic justice framework in over a thousand articles and eighteen books. DAICOFF, *supra* note 5, at 81.

[23] WEXLER & WINICK, *supra* 17, at 158.

that the model should not be limited and insists that the therapeutic jurisprudence framework "promises . . . much more than merely a new twist on the topics that overlap between mental health law and criminal law."[24] Professor Wexler's forecast was correct. What was once academic theory has jumped out of the law journals and into the courts. Over the last twenty years,[25] therapeutic jurisprudence has ignited a massive expansion of problem-solving courts across America.[26] Expansion of the therapeutic justice framework in criminal law has maintained its assent as courts are increasingly incorporating victim participation into cases[27] and adopting new approaches to sentencing.[28]

C. Restorative Justice

For over thirty years, the restorative justice movement has focused on restoring victims, developing the relationship between defendants and the community, and "restoring harmony" to society.[29] Restorative justice focuses on the criminal defendant and the crime committed against the victim.[30] Restorative justice "emphasizes restitution and relationships between the offender, victim, and community instead of a top-down, hierarchal system focused on imposing punishment."[31] The bottom-up approach to addressing the harm imposed on victims (and offenders) developed out of dissatisfaction with the traditional criminal justice system.[32]

Restorative justice focuses on a healing cycle, where the victim and offender meet in person, with limited procedural rules, and a non-adversarial setting.[33] The victim tells the offender how he was harmed by the offender's actions. The offender acknowledges the harm he caused, apologizes; and seeks

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[24] *Id.*

[25] DAICOFF, *supra* note 5, at 242; David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005).

[26] DAICOFF, *supra* note 5, at 241.

[27] *See generally* THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATING IN JUSTICE: INTERNATIONAL PERSPECTIVES (Edna Erez, Michael Kilchling & Jo-Anne Wemmers eds., 2011).

[28] *See* William Edwards & Christopher Hensley, *Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 6 (2001); Michael S. King, *Geraldton Alternative Sentencing Regime: Applying Therapeutic and Holistic Jurisprudence in the Bush*, 26 CRIM. L.J. 260 (2002); John Nicholson, *When Sentencing Becomes a Walk into the Future with the Offender: The Griffiths Remand—Compulsion in Rehabilitation*, 32 CRIM. L. J. 142 (2008).

[29] DAICOFF, *supra* note 5, at 223.

[30] *Id.* at 223-25.

[31] *Id.* at 223.

[32] Lode Walgrave, *Restorative Justice and the Law: Socio-ethical and Juridical Foundations for a Systemic Approach*, *in* RESTORATIVE JUSTICE AND THE LAW 191, 191 (Lode Walgrave ed., 2002).

[33] DAICOFF, *supra* note 5, at 224-25.

forgiveness. While not required, a benefit for the healing process on both sides can come from the victim's acceptance of the apology. The offender then makes restitution to the victim, thus completing the cycle and bringing the offender back into society.[34] It is important to note that because restorative justice requires a specific victim (rather than the "community"), there are a number of crimes for which restorative justice is simply not applicable (e.g., drug possession or welfare fraud).

Restorative justice has enjoyed tremendous success and popularity; however, an inherent weakness is that initiation of restorative justice is obstructed by the need for disposition of a criminal case.[35] The defendant must be sentenced before the criminal justice system provides the victim and offender an opportunity to come together and begin the restorative justice cycle for healing.[36] Because criminal cases (especially violent offenses causing great harm) often take years to resolve, the start of a restorative justice cycle may be postponed for long periods of time. Through use of an "apology privilege," this Article explores whether a key part of the restorative process (apology for emotional and psychological healing) can begin earlier.

III. The Problem: A Lack of Opportunity for Defendants to Apologize in a Criminal Case

The problem presented is that the criminal justice system denies a holistic healing approach to allow willing defendants an opportunity to proffer an early apology to those they have victimized. As a result, apologies often arrive too late to have a meaningful impact on victims or a therapeutic value to the defendant.

A. The Limited Opportunities for Apology in Criminal Cases

In general, the objective of criminal law is to punish (under the classic retributive and utilitarian theories),[37] deter, and provide a mechanism for obtaining social control in a free society.[38] To provide a formalized structure

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[34] *Id.*

[35] Daicoff, *supra* note 5, at 229-32.

[36] *Id.* at 223-26.

[37] Matthew Haist, Comment, *Deterrence in A Sea of "Just Deserts": Are Utilitarian Goals Achievable in A World of "Limiting Retributivism"?*, 99 J. Crim. L. & Criminology 789, 794 (2009) (Haist develops a thorough analysis of retributivism philosophy, which boils down to those who commit crime "simply deserve to be punished"; and utilitarianism philosophy, which sees punishment of the guilty as a benefit to the community).

[38] *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 Geo. L.J. 949, 953 (2003) (When discussing the mechanics of deterrence in criminal law, Professors Robinson and Darley state, "If

for achieving these goals, Western civilization (particularly the American criminal justice system) has incorporated common law, developed new case law, devised statutes, and developed evidentiary rules that dictate how criminal proceedings shall commence, proceed, and conclude. This highly developed system has created a tension between apologies and administration of justice, with defendants having limited opportunities to proffer a "safe" apology (an apology that cannot be entered as evidence against the defendant at a later date).[39] Today, the only potential venues for an early "safe" apology and interaction between a victim and offender are through Alternative Dispute Resolution and plea negotiations.

1. Alternative Dispute Resolution and Mediation

"Alternative Dispute Resolution ("ADR") refers to any means of settling disputes outside of the courtroom," with the most common methods being arbitration and mediation.[40] ADR saw tremendous growth in the 1970s and 1980s as a response to a growing litigious culture and crowded dockets.[41] ADR's primary focus is in civil litigation, as a means to bring about settlement with attorneys playing the roles of "healers."[42] However, over time, ADR transitioned into criminal law, addressing both property and violent crime.[43] A benefit to ADR is that it can provide a confidential shield where statements made by parties are free from evidentiary use at a later date.[44] An offender is able to talk to a victim about the crime and apologize, and a victim has an opportunity to tell the offender how that crime has affected him. Examples of ADR and mediation in adult felony cases (particularly cases involving serious violent offenses, e.g., murder, sexual assault, aggravated assault, etc.) are sparse.[45]

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a criminal law rule is to deter violators, three prerequisites must be satisfied: The potential offender must know of the rule; he must perceive the cost of violation as greater than the perceived benefit; and he must be able and willing to bring such knowledge to bear on his conduct decision at the time of the offense.").

[39] Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1031 (1999).

[40] *Alternative Dispute Resolution*, LEGAL INFO. INST., CORNELL U. L. SCH., http://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited Mar. 23, 2014).

[41] Maggie T. Grace, Note, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Renewing Public Norms*, 34 VT. L. REV. 563, 564-65 (2010).

[42] *Id.* (attributing "healers" quote to Chief Justice Warren Burger; Warren E. Burger, *Isn't There A Better Way*, 68 A.B.A. J. 274, 275 (1982)).

[43] *Id.*

[44] JACQUELINE NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION IN A NUTSHELL 120-21 (1992) (discussing that some courts have recognized a "mediation privilege.").

[45] *See* Jack Hanna, *Mediation in Criminal Matters*, DISP. RESOL. MAG., Fall 2008, at 4, 5 (Comparing civil to criminal use of mediation in 2008, Director of the Criminal Justice Section of the American Bar Association, Jack Hanna, stated, "the impact of the ABA on mediation in criminal justice has been much less dramatic.").

2. Plea Negotiations as Mediations

Another area where "safe apologies" have found traction in criminal law is when an apology is used in conjunction with plea negotiations. In 1997, the Arizona Supreme Court approved the use of settlement conferences through adoption of Rule 17.4(a) for a two-year experimental period.[46] Following the experimental period, the court adopted the rule, which allows either the state or defense to request court participation in settlement discussions.[47] Moreover, the rule provides that "[i]f the defendant is to be present at any such settlement discussions, the victim shall also be afforded the opportunity to be present and to state his or her position with respect to a non-trial or non-jury trial settlement."[48] As governed by Arizona Rules of Evidence, Rule 410(a)(3), any statement made during a settlement conference is not admissible against a defendant.[49]

Settlement conferences can be "informal, with the judge sitting at a table with the defendant and addressing him or her by first name and beginning with a personal greeting."[50] While the settlement conference model provides a more holistic approach to the criminal case and opens the door for contact between a victim and offender, it is still not an ideal model for fostering apologies. First, the settlement conference is a plea negotiation; therefore, many events, some taking considerable time,[51] must occur before the settlement conference begins. Second, in the case of Maricopa County, victims usually do not appear for the conferences.[52] Finally, it should be recognized that the paramount goal of a plea negotiation (or settlement conference) is to settle the case. Any healing that occurs is an added bonus.

B. The Allocution

In most criminal felony cases, the time set aside for a defendant to apologize is the sentencing hearing, when the defendant offers an "allocution."[53]

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[46] Robert L. Gottsfield & Mitch Michkowski, *Settlement Conferences in Criminal Court*, ARIZ. ATT'Y, Apr. 2007, at 8, 10.

[47] ARIZ. R. CRIM. P. 17.4(a).

[48] Id.

[49] ARIZ. R. EVID. 410(a)(3).

[50] Hanna, *supra* note 45, at 5.

[51] For example, review of discovery. Any defense attorney willing to participate in a settlement conference and to recommend that a client accept a plea prior to reviewing discovery would be disregarding his ethical obligations to provide competent counsel to his client. Depending on the nature of the case, discovery may take weeks, if not months, to review and evaluate.

[52] Gottsfield & Michkowski, *supra* note 46.

[53] Author's Note: This assertion is anecdotal and made based on having numerous conversations with trial attorneys in the Maricopa County Legal Defender's Office (a public defense office for Maricopa County, Arizona). As the fifth largest county in the United States, Maricopa County

Unfortunately, the allocution model for apology is rife with constructive defect. First, consider the optics of a courtroom during sentencing. The defendant proceeds to the well of the courtroom, or lectern, to address the court. Either alone, or standing with his attorney, the defendant looks up to a judge who is perched upon the bench peering down. The defendant then makes his allocution. In front of attorneys, court staff, friends, strangers, and maybe even TV cameras, the defendant expresses sorrow and apologizes for his wrongful acts, which may entail embarrassing details.[54]

In addition to the optics of the sentencing hearing not being conducive to expressions of an apology from the defendant, there is also the barrier for using this form as a holistic healing venue. From the court's perspective, the purpose of the allocution is to focus on measuring offender recognition of harm as a mitigating or aggravating factor.[55] This is evidenced by observing that the allocution often takes the form of a "colloquy . . . between the defendant and the judge."[56] Thus, in the court's eyes, the allocution is merely a stage in the process rather than an opportunity for two sides to heal.

The allocution model is not much better for victims than it is for the defendant. Rather than active participation, victim contributions are frequently limited to submitting letters or impact statements to the court (which may, or may not, be read aloud to the offender).[57] Consider that if a defendant does offer an apology, those same details that are humiliating for the defendant, are likely humiliating for the victim.[58] If one places himself in the shoes of a victim or defendant going through this process, it becomes immediately apparent that apology at allocution is not the ideal setting to promote a healing process.[59]

A final critique of the allocution model is that everyone must wait for an apology and for the healing process to begin. Sentencing hearings often commence long after the initial harm to the victim. In fact, in some jurisdictions,

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annually has over 20,000 criminal fillings, and the Legal Defender handles thousands of cases each year. The author tried to locate statistical data regarding the percentage of felony criminal cases in which mediation or settlement conferences occurred, but no such data appears to exist. The reliability of this assertion is therefore based on the collective knowledge of many attorneys who are highly trained and experienced in processing criminal felony cases.

54 Thomas F. Liotti, *Closing the Courtroom to the Public: Whose Rights Are Violated?*, 63 BROOK. L. REV. 501, 506 (1997) (Arguing that the Sixth Amendment of the U.S. Constitution is not a right held by the general public for access to a public trial, but rather, a right held solely by the criminal defendant. Where courts have developed a quasi-common law preference for public trials, the defendant alone ultimately reserves the right of a case being open to the public.).

55 Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 99 (2004).

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

some trials start four to six years after the date of the crime.[60] This is not to suggest that cases must be resolved faster; it takes time to correctly resolve a case. Only with sufficient time can a defense attorney and prosecutor review discovery, develop their cases, negotiate a potential plea bargain, and ultimately ensure a defendant his right to a fair trial. Nevertheless, as each day passes without an apology or admission of fault, the healing process is delayed for the defendant and victim.

C. A Delayed Apology's Effect (or Lack Thereof)

Tyler Clementi was eighteen when he matriculated to Rutgers University.[61] Like many other college freshman, he moved into the campus dorms for his first year.[62] Tyler and his dorm mate, Dharun Ravi, had been living together for three weeks when on September 21, 2010, Tyler invited a date to the dorm room for a romantic encounter.[63] Believing that Tyler would be engaging in sexual relations, Ravi activated a webcam in the room, briefly watched in another dorm room, and posted comments on his Twitter account about it.[64] The following day, Tyler learned that his private romantic encounter was broadcast for all to see.[65] Tyler then hopped on a university bus that took him to a train station, he took a train to the New York subway, and then took a subway car to the George Washington Bridge, where he jumped, taking his own life.[66]

It took almost two years for prosecutors to charge, try, and convict Dharun Ravi of invasion of privacy, bias intimidation, witness tampering, and hindering arrest.[67] In the end, most of the participants walked away unsatisfied with the outcome of the case.[68] During sentencing, Judge Glenn Berman said, "I heard this jury say, 'guilty' 288 times—24 questions, 12 jurors. That's the

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[60] Robert L. Gottsfield & Marianne Alcorn, *The Capital Case Crisis in Maricopa County: What (Little) We Can Do About It*, ARIZ. ATTY., Apr. 2009, at 20, 24.

[61] Colleen Curry & Ian Shearn, *Rutgers Student Dharun Ravi Doesn't Testify as Defense Rests*, ABC NEWS (Mar. 12, 2012), http://abcnews.go.com/US/rutgers-trial-dharun-ravi-testify-defense-rests/story?id=15902484#.UJalTY6SBvc.

[62] *Id.*

[63] *Id.*

[64] Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker?currentPage=all.

[65] *Id.*

[66] *Id.*

[67] Curry & Shearn, *supra* note 61.

[68] Michael Koenigs, Candace Smith & Christina Ng, *Rutgers Trial: Dharun Ravi Sentenced to 30 Days in Jail*, ABC NEWS (May 21, 2012), http://abcnews.go.com/US/rutgers-trial-dharun-ravi-sentenced-30-days-jail/story?id=16394014#.UJawwY6SBvc.

multiplication . . . . I haven't heard you apologize once."[69] After sentencing, Ravi proffered an apology through a publicly released statement, saying,

> I accept responsibility for and regret my thoughtless, insensitive, immature, stupid, and childish choices that I made on Sept[ember] 19, 2010, and Sept[ember] 21, 2010. . . . My behavior and actions, which at no time were motivated by hate, bigotry, prejudice or desire to hurt, humiliate or embarrass anyone, were nonetheless the wrong choices and decisions. I apologize to everyone affected by those choices.[70]

Tyler's parents dismissed Mr. Ravi's apology as a "public relations piece," saying that it "was no apology at all."[71]

The existence of an apology privilege or an early apology may not have mattered for Dharun Ravi. It may be that Mr. Ravi never felt the inclination to apologize. Or, it is possible that Mr. Ravi had a sense of denial that his actions led to Tyler's death. In fact, feelings of denial and a culture of "responsibility avoidance" are not uncommon for criminal defendants.[72] While it is speculative to discuss whether Mr. Ravi would have availed himself of an apology privilege, it is not speculative to see that the court and victims felt considerable pain by not receiving a sign of sympathy from the defendant. The Ravi case illustrates how powerful an apology can be. It also illustrates how a lack of apology or failure to proffer a sincere apology can hang over the pre-trial, trial, sentencing, and post-sentencing of a criminal case.

IV. The Proposed Solution—An Apology Privilege

To encourage a more holistic approach to criminal cases where victims and defendants are inclined to begin the healing and restorative process early, this Article proposes the consideration of a narrow evidentiary tool, loosely titled the "apology privilege." Criminal cases, particularly felony criminal cases, frequently involve physical, psychological, and emotional harm to victims and defendants. Often, the first step toward healing that harm is the formality of an apology.

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[69] *Id.*

[70] *'I Apologize,' Ex-Rutgers Student Says Before Going to Jail*, N.Y. Times, May 30, 2012, at A17, *available at* http://www.nytimes.com/2012/05/30/nyregion/dharun-ravi-convicted-in-web-cam-spying-apologizes-before-going-to-jail.html?ref=dharunravi&_r=0.

[71] Christina Boyle, *Tyler Clementi's Parents Dismiss Dharun Ravi's Apology*, N.Y. Daily News (May 31, 2012, 2:38 PM), http://www.nydailynews.com/news/crime/dharun-ravi-turns-serve-30-days-rutgers-spy-case-article-1.1087527.

[72] Jonathan R. Cohen, *The Culture of Legal Denial*, 84 Neb. L. Rev. 247, 256 (2005).

A. The Value of Apologies

At some point or another, all of us will offer and receive an apology. The act of asking for and receiving forgiveness is part of basic human nature. The power and significance of an apology and reconciliation has deep roots, noted in philosophy[73] and religion.[74] Defined by Merriam-Webster, an apology can be "a formal justification (defense)" or "an admission of error or discourtesy accompanied by an expression of regret."[75] Elements of a full apology generally include "identification of the wrongful act, remorse, promise to forbear, and an offer to repair."[76] Aside from academic pontification, consider as a reader the effect that apologies have had in your own life. When committing a wrong (especially an unintended wrong), was your first instinct to express sorrow or seek forgiveness? When someone else has harmed you, have you waited for his recognition of the harm and subsequent apology? This natural exchange of harm followed by apology transpires time and time again from the smallest harms to the most significant affairs.[77]

B. The Effect of an Apology on Victims of Crime

Criminal law may effectuate justice through punishment, but incarceration (as shown in the Ravi case) is not the only thing victims yearn for. Victims look for recognition of the harm caused, and to that end, an "[a]pology is not just a social nicety. It is an important ritual, a way of showing respect and empathy for the wronged person."[78] An apology from an offender to a victim

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[73] *See* PLATO, APOLOGY (Benjamin Jowett trans., Internet Classics Archive 2009), http://classics.mit.edu/Plato/apology.html (last visited Jan. 16, 2014) (commenting on Socrates trial and his tutor's inability to apologize for corrupting the youth).

[74] *See, e.g.*, Yom Kippur (The Jewish "Day of Atonement." *Yom Kippur*, CHABAD.ORG (last visited Mar. 24, 2013)), Christianity (Jesus' Sermon on the Mount, "Blessed are the merciful, for they will be shown mercy." *Matthew* 5:7 (New International Version)), Hinduism, M.L. BOSE, A SOCIAL AND CULTURAL HISTORY OF ANCIENT INDIA 81 (rev. ed. 1998) (noting that the term "präyaścitta" means "penance" and was required for those that wished to avoid being sent to hell).

[75] *Apology Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/apology (last visited Mar. 24, 2014).

[76] O'Hara & Yarn, *supra* note 4, at 1133.

[77] For example, East Germany's 1990 apology to Israel and to Jewish men, women, and children for the Holocaust, Ferdinand Protzman, *Upheaval in the East; the East Germans Issue an Apology for Nazis' Crimes*, N.Y. TIMES, Apr. 13, 1990, at A1, *available at* http://www.nytimes.com/1990/04/13/world/upheaval-in-the-east-the-east-germans-issue-an-apology-for-nazis-crimes.html, or the 1988 apology by the United States Government to Japanese Americans for interning them during World War II. Katherine Bishop, *Day of Apology and 'Sigh of Relief'*, N.Y. TIMES (Aug. 11, 1988), http://www.nytimes.com/1988/08/11/us/day-of-apology-and-sigh-of-relief.html.

[78] Beverly Engel, *The Power of Apology*, PSYCHOL. TODAY (July 1, 2002), http://www.psychologytoday.com/articles/200208/the-power-apology.

"has the capacity to heal psychological wounds in a variety of ways."[79] Victims receiving apologies or seeing their offenders as remorseful "are more likely to find emotional restoration, to feel a re-established sense of security, to view the moral relation between the parties as back in balance, and to forgive their offenders."[80] To a crime victim, an apology can be very powerful.

C. The Effect of Apology for Criminal Defendants

For defendants, an apology may bring a number of benefits. Empirical evidence suggests that offenders offering an apology are more likely to be forgiven by their victims.[81] Receiving forgiveness can be a particularly important factor when one considers that between 2001 and 2010; nearly half of those victimized by violent crime in the United States knew their offender.[82] In some cases, (such as domestic violence involving parents with shared children) the victim and offender may have to maintain a relationship throughout their lives. An apology can help rebuild relationships, which continue long after a final court date has come and gone.

Another benefit of apologies for defendants is psychological and emotional well-being. Advocates in the restorative justice field suggest that through an apology, offenders can relieve guilt and other negative emotions that come from causing criminal harm to someone.[83] The apology process also can help dissociate oneself from one's wrongful past.[84] Additionally, defendants who apologize may open the door to a potential reduction in punishment for their crime.[85] If one accepts the notion that failing to apologize is an escalation of conflict,[86] consider the difference in behavior likely exhibited by a victim testifying at trial that has received an apology versus one that has not. The victim in receipt of an apology may present himself with a calmer demeanor, which in turn may extract less of an emotional reaction from the jury. With regard to

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[79] Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145, 147 (2007) (Ms. Penzell's discussion is specific to those that have been wrongfully convicted—providing insight into a group not traditionally thought of through the lenses of a "victim" but through loss of freedom for crimes they did not commit having been impacted as much as any other victim the criminal justice system will encounter).

[80] Margareth Etienne & Jennifer K. Robbennolt, *Apologies and Plea Bargaining*, 91 MARQ. L. REV. 295, 297 (2007).

[81] *Id.*

[82] JENNIFER L. TRUMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 235508, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2010, at 9 (2011).

[83] Etienne & Robbennolt, *supra* note 80, at 298.

[84] Bibas & Bierschbach, *supra* note 55, at 113.

[85] Monica K. Miller et al., *How Emotion Affects the Trial Process*, 92 JUDICATURE 56, 61 (2008).

[86] Cohen, *supra* note 39, at 1009-10.

case outcome, the effect of an early apology may have no greater significance than in capital cases, where a jury's detection of genuine remorse may decide whether a defendant lives or dies.[87]

D. The Value of Apologies for Other Stakeholders

Defendants and victims are not the only people affected by criminality. Defense attorneys, prosecutors, judges, court staff, and others who are immersed in the criminal justice system everyday soak up all of the horror that takes place in a criminal case. This constant exposure to crime can cause attorneys (and presumably judges and staff) to develop "compassion fatigue."[88] Over time, this fatigue can affect all aspects of a person's life, as many people are unable to separate what they see at work from how they act at home.[89]

In stark contrast to the negative effects resulting from exposure to the horrors of a criminal caseload in a traditional court, therapeutic jurisprudence court models are showing positive results. Research shows that judges extract greater job satisfaction in therapeutic jurisprudence environments, where such assignments "had a positive emotional effect o[n] them" personally.[90] If apologies do in fact work as a therapeutic agent between victim and offender, it stands to reason that just as attorneys and judges can glean negative feelings from exposure to tragic events, they can extract positive emotional reactions from seeing victims and offenders begin to heal.

E. The Value of Apologies for the Community

A final benefactor for the use of apologies in criminal law is the community. Lower rates of recidivism in crime produce a safer and healthier community. Restorative justice models support the proposition that there is a direct correlation between victim-offender apology and recidivism with data showing that offenders participating in restorative justice programs have as much as a

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[87] John H. Blume, et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1049 (2008) (writing that juries will doubt the sincerity of a defendant who only starts to apologize once he takes the witness stand. More impactful is the defendant that shows remorse early on in a case, whether it be to a police officer at initial interview, a family member, a spiritual counselor, or some other party—which presumably would include victims of the crime (e.g., family and friends of the deceased)).

[88] *See* Diane Molvig, *The Toll of Trauma*, WIS. LAW., Dec. 2011, at 4 (detailing the results of a study of Wisconsin State Public Defenders and defining "compassion fatigue" as "the cumulative physical, emotional, and psychological effects resulting from continual exposure to others' traumatic experiences.").

[89] *Id.*

[90] *See* Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 232-33 (2009).

32% lower rate of recidivism versus those offenders participating in a traditional sentencing model.[91] Additionally, research shows that when offenders participating in restorative justice do re-offend, they do so committing less serious crimes.[92] Apology is only one part of the restorative justice model, but it is an important part. Evidence collected in these studies demonstrates that offenders offering an apology in a restorative justice setting produce a lower recidivism rate, which in turn promotes a safer society.[93]

V. Institutional Barriers to Adopting an Apology Privilege

Before a defendant can use an "apology privilege," the initial hurdle of enacting the privilege must take place. This will likely be quite difficult. As characterized by Professors Bibas and Bierschbach, criminal procedure is a system built on "narrow procedural values of efficiency, accuracy, and procedural fairness."[94] To that end, many participants view the criminal court as a mechanism for results rather than a venue for healing. Exploration of a proposed apology privilege is disingenuous without affording some time to the inevitable institutional barriers that exist.

A. The Unwilling Defendant

Inscribed by America's founders and adopted in 1791, the Fifth Amendment of the United States Constitution prescribes that "No person . . . shall be compelled in any criminal case to be a witness against himself."[95] Close to 170 years later, in *Miranda v. Arizona*, the United States Supreme Court held that admonition of the right to remain silent and have counsel present is so essential to the Fifth Amendment and fair administration of justice that any statement made without a knowing waiver of those rights must be suppressed.[96] Because of *Miranda*, defendants entering the criminal justice system are told of their right to remain silent by a police officer (during arrest), the court (at an arraignment), and their attorney (during the first consultation). As if such formal requirements were not strong enough incentive to keep defendants silent, con-

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[91] Erik Luna & Barton Poulson, *Restorative Justice in Federal Sentencing: An Unexpected Benefit of* Booker*?*, 37 McGeorge L. Rev. 787, 801 (2006) (citing William Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence and Severity of Subsequent Delinquent Behavior: A Meta-Analysis*, 2003 Utah L. Rev 137 (2003)).

[92] *Id.*

[93] *See generally* Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 Ohio St. J. Crim. L. 329, 339 (2007) (citing Nugent et al., *supra* note 91, at 140, 162 ("meta-analysis of fifteen studies found up to a twenty-six percent reduction in reoffending.")).

[94] Bibas & Bierschbach, *supra* note 55, at 148.

[95] U.S. Const. amend. V.

[96] Miranda v. Arizona, 384 U.S. 436, 479 (1966).

sider that the *Miranda* rights are part of standard lexicon in American popular culture.[97] Television programming spanning multiple generations (Dragnet to Law & Order), has recited the right to remain silent repeatedly for the American public.[98] Thus, criminal defendants enter the system understanding that it is in their best interest to stay quiet, which by default means refraining from apology.

B. The Unwilling Defense Attorney

Many members of the defense bar have expressed reluctance to accept therapeutic jurisprudence models with a particularly vehement distrust of specialty courts.[99] Some defense practitioners consider therapeutic jurisprudence to be an attack on the traditional role of the defense attorney as a zealous advocate for their client.[100] Another less formularized critique is that attorneys should be hesitant to counsel a client to apologize for fear of losing the faith and trust of their client or appearing judgmental.[101] However, dismissing therapeutic jurisprudence also dismisses the potential benefits for defense counsel and more importantly, their clients.

In regards to securing the best possible outcome for a client at sentencing, consider that "[e]xperimental studies of reactions to criminal defendants have generally shown that remorseful defendants are perceived more positively and sentenced more leniently than are defendants who do not show remorse."[102]

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[97] Dickerson v. United States, 530 U.S. 428, 443 (2000) (Writing in the majority, Chief Justice Rehnquist cites the *Miranda* decision as having "become embedded in routine police practice to the point where the warnings have become part of our national culture.").

[98] *See generally* Ronald Steiner et al., *The Rise and Fall of the* Miranda *Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219 (2011).

[99] Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 79 (2007) ("I, along with several other former public defenders who now work in academia, have called for a careful review of the impractical goals, due process shortcuts, and great potential for ethical challenges that exist in specialty courts.").

[100] *See* Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 539-42 (2007) ("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.").

[101] Cohen, *supra* note 72, at 249 (Professor Cohen uses this illustration in the model of a private attorney retained in a civil case, however, the crux of the point relates to the attorney/client relationship and the potential dangers of an attorney advising their client to "discuss responsibility.").

[102] *See* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 476 (2003).

Defense attorneys may also want to consider that "[l]awyers who prohibit client confession may protect the client's freedom *vis-à-vis* the state, but they limit the client's freedom in another sense. They impose isolation on the client."[103]

C. The Unwilling Prosecutor

The fundamental duty of a prosecutor is to seek justice.[104] Nevertheless, the term "justice," is rather fluid and means different things to different people.[105] Some prosecutors measure justice by a guilty verdict ("just desserts"), or a reasonable plea agreement (rather than taking a defendant to trial and pushing for the harshest punishment).[106] Other more optimistic prosecutors may find justice even when losing a case. These prosecutors can see justice as being measured by the "fidelity" of the system, with the prosecutor simply working as an actor in trial, which if conducted fairly results in "justice" regardless of outcome.[107] No matter how a prosecutor defines justice, the process of hunting for it affirms a prosecutor's role as an agent for the state who looks out for the public interest.[108] This traditional role of justice seeker on behalf of the community often runs counter to the holistic approaches of a therapeutic jurisprudence model.

A cost of having community centered justice seekers is that prosecutors may ignore victims.[109] Sometimes prosecutors ignore victims because they do not care for the victims' opinions or feelings. Other prosecutors are simply overworked with large caseloads. Another explanation might be that some prosecutors feel that working with a victim places prosecutors at odds "with their constitutional and ethical obligations."[110] Nevertheless, for an apology

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[103] Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky*, 35 HOUS. L. REV. 327, 331 (1998).

[104] *Prosecutorial Misconduct*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 628 (2011) (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

[105] *See* Jock Schulte, *Why Are We in This Profession? New Admittees Are Mirrors of Ourselves*, MONT. LAW., May 2008, at 4 (Written generally on the subject of what justice is and how new members the legal profession; "However, the search for justice, a concept that can be different things in different situations, must ultimately motivate and guide lawyers as we practice our profession. I expect that I will continue to contemplate the meaning of justice for as long as I can think.").

[106] *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 608 (1999).

[107] *Id.*

[108] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 542 (2009).

[109] *See generally* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559 (2005).

[110] Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 240 (2008) (expounding on prosecutors, victims, and victims' rights legislation).

privilege to work, prosecutors must be willing to incorporate holistic approaches into their practice and focus on working with victims to promote healing.

A separate and admittedly more difficult potential barrier to prosecutors' widespread acceptance of an apology privilege is the possibility of a defendant making an incriminating apology and subsequently being acquitted. This quandary has already appeared in the world of civil litigation "apology laws," as critics attack "safe" apologies for lacking sincerity when conditioned with a protection of inadmissibility in court.[111] Similar to how defense attorneys might approach an apology privilege, this tool would not work for prosecutors in every case. However, there may be cases where helping victims and defendants start the healing process can run parallel to the search for justice. In those instances, prosecutors should be willing to seek out a holistic approach to their practice of law.

VI. The Proposed Change

A. The Text of an Apology Privilege

This Article proposes examination of a rule of evidence that affords defendants an opportunity to apologize to victims early in a case. While not definitive, the proposed text is: *Apologies and statements of sympathy, made to a victim, during a hearing conducted by the court, may not be used as evidence against the accused.* Breaking the privilege down into elements, the first element addresses the type of statements the defendant can make. This language is modeled after civil apology laws enacted in other states.[112]

The second element identifies the victim as the person able to receive the apology. Thus, if a defendant were to profess his apology to another person (e.g., a cellmate) the privilege would not exist—because the apology would not be offered for its intended benefit (promoting healing with the victim and offender). The third element requires court monitoring, which provides structure for the apology. Without this court-confined structure, a Pandora's Box of criminal procedure issues could potentially be unleashed in criminal procedure for defendants claiming apology privilege for incriminating statements made. Another reason for court monitoring is that courts remain a critical component to therapeutic jurisprudence models.

Finally, the rule protects the defendant from having his apology used against him at a later date. Without such a protection, no attorney wishing to

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111 Robbennolt, *supra* note 102, at 462.

112 Jeffrey S. Helmreich, *Does 'Sorry' Incriminate? Evidence, Harm and the Protection of Apology*, 21 Cornell J.L. & Pub. Pol'y 567, 568-71 (2012).

maintain his practice of law would allow his client to make an incriminating statement that could be used later at trial.

While the concept of an "apology" privilege in criminal law may be new,[113] the protection of certain privileges for defendants (both in criminal and civil court) is firmly rooted in the common law and modern rules of evidence at both the state and federal level.

B. Recognized Privileges and Evidentiary Exclusions

For courts to administer fair proceedings, eliminate expense and delay, promote the development of evidence law, and secure a just determination, federal and state courts operate under rules of evidence that dictate how a trial shall be conducted.[114] Some of the many mechanisms codified in these rules of evidence include exceptions to the admissibility of evidence and privileges. As defined by Black's Law Dictionary, a "privilege" is a "special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty."[115] The use of privilege in American jurisprudence finds its roots in common law from the English courts, with the attorney-client privilege first recognized in 1557.[116] Today, the Federal Rules of Evidence ("FRE") identify two specific areas of privilege: the common law[117] and attorney-client privileges.[118] Additionally, the FRE outline five specific categories of relevant evidence that may be excluded: subsequent remedial measures;[119] compromise offers and negotiations;[120] offers to pay medical and similar expenses;[121] pleas, plea discussions, and related statements;[122] and liability insurance.[123]

Evidentiary exclusions and privileges exist for various reasons. The rule prohibiting admission of evidence for a subsequent remedial measure is "based

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[113] Author's research has not uncovered a similar proposal for a defined and codified privilege; however, it is worth noting that Professors Bibas and Bierschbach have authored a well thought out article titled: *Integrating Remorse and Apology into Criminal Procedure*, Bibas & Bierschbach, *supra* note 55, which promotes a number of reforms to the criminal justice system that would embrace apologies by offenders to victims. Most notably, they cite the use of mediation in juvenile cases and encourage law enforcement and prosecutors to be more open to forgoing traditional criminal prosecution for offenders that show remorse and offer restitution following their capture for low-level offenses. *See generally id.*

[114] FED. R. EVID. 102.

[115] BLACK'S LAW DICTIONARY 1316 (9th ed. 2009).

[116] Robert S. Catz & Jill L. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 93 (1987).

[117] FED. R. EVID. 501.

[118] FED. R. EVID. 502.

[119] FED. R. EVID. 407.

[120] FED. R. EVID. 408.

[121] FED. R. EVID. 409.

[122] FED. R. EVID. 410.

[123] FED. R. EVID. 411.

on the public policy consideration that precautionary measures to avoid injuries are to be encouraged."[124] The rule protecting communications during plea negotiations is designed to "encourage discussion and to promote compromise."[125] The attorney-client privilege promotes effective representation through open communication between the attorney and client.[126] The common theme is that each exclusion and privilege promotes a greater good that outweighs the harm caused by excluding potentially relevant evidence. States recognize most of these listed federal privileges. In some instances, however, states have gone further than the federal rules, creating broader privileges, including so called "apology laws."

C. States With Civil "Apology Laws"

On the civil side of the law, a majority of states have enacted "apology laws" that shield civil defendants who make statements of apology to victims or plaintiffs.[127] Generally, these laws only protect statements expressing benevolence or sympathy (e.g., "I am sorry this has happened to you").[128] Statements that recognize of direct personal responsibility (e.g., "I am sorry that I have done this to you") are generally not protected.[129] The trend for enacting apology laws has picked up steam since first arriving on the scene in the late 1990s, and as of Spring 2012, a total of thirty-six states have enacted some version of an apology law for civil cases.[130] The expansion of civil apology laws across the United States demonstrates a willingness to move past traditional models of civil court that simply choose a winner and loser.

VII. CONCLUSION

The American criminal justice system should strive to do more than just focus on determinations of guilt and innocence. As evidenced by over twenty

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[124] Michael H. Graham & Robert S. Glazier, *Subsequent Remedial Measures: The Misunderstood Rule of Evidence*, FLA. B.J., Feb. 1998, at 40.

[125] Wade V. Davies, C*an We Talk? Inadvertent Admissions During Negotiations in Criminal Cases*, TENN. B.J., July 2012, at 24 (citing FED. R. EVID. 410 advisory committee's notes that "the purpose of the Rule is 'promotion of disposition of criminal cases by compromise.'").

[126] *See* Jennifer Hodgkins, Note, *Attorney Compelled to Produce Kidnapper's Maps to Location of Baby's Body: Attorney-Client Privilege Yields to Policy Interests Embodied in State Ethical Rules of Confidentiality:* Henderson v. State*, No. 72,157, slip op*., 1997 WL 742333 (Tex. Crim. App. Dec. 3, 1997) (en banc), 29 TEX. TECH L. REV. 885, 893 (1998).

[127] Helmreich, *supra* note 112.

[128] *Id.* at 577-77.

[129] *Id.*

[130] *Apology Inadmissibility Laws: Summary of State Legislation*, AM. MED. ASS'N, http://www.ama-assn.org/resources/doc/arc/apology-inadmissibility-state-laws-charts.pdf (last visited Mar. 24, 2014).

years of therapeutic jurisprudence application in courtrooms and legal proceedings, the law can do more than provide justice; it can provide a forum for tremendous good by promoting healing through holistic approaches. An apology privilege in the therapeutic jurisprudence framework is an idea that promotes a human response to human error. The privilege is not offered as a "kumbayah" or a "silver bullet" and it is not appropriate for every defendant, victim, defense attorney, prosecutor, or magistrate. The defendant and victim may have good reason to avoid the use of such a privilege. Some defendants might be unable to apologize because of built in denial mechanisms that teach them to repress painful thoughts and feelings.[131] Some victims may be too distraught, traumatized, and emotionally scarred to accept an offered apology. Nevertheless, as shown by the success of restorative justice, there are times where an apology privilege might be quite appealing to both the victim and offender.

The use of the apology privilege should by no means excuse underlying criminal acts. The proposed privilege is merely a tool. If created in its current or similar form, the apology privilege should be used only when appropriate to help people who have found themselves immersed in the tragic events that culminate in a criminal case. It should supplement, not take the place of a defendant's rights. Courts should use the apology privilege early on in criminal proceedings to promote a holistic healing approach in the criminal justice system that will foster a better society.

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[131] *See generally* Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 910-11 (2005) (citing A CONCISE ENCYCLOPEDIA OF PSYCHIATRY 116 (Denis Leigh et al. eds., 1977); *see also* AMERICAN PSYCHIATRIC GLOSSARY 57 (Jane E. Edgerton & Robert J. Campbell, III eds., 7th ed. 1994) (defining "denial" as "[a] defense mechanism, operating unconsciously, used to resolve emotional conflict and allay anxiety by disavowing thoughts, feelings, wishes, needs, or external reality factors that are consciously intolerable.") (emphasis omitted).