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THERAPEUTIC JURISPRUDENCE AND THE CRIMINAL COURTS

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I. INTRODUCTION

Speaking recently at the Teaching Conference on Criminal Law and Criminal Procedure sponsored by the Association of American Law Schools, Professor George Fletcher was of the opinion that the behavioral sciences unfortunately seem to offer little to the criminal law:

[T]he elite schools in the east are still dominated by two schools of criminal law that I would call Dead School #1 [emphasizing the Model Penal Code] and Dead School #2. Dead School #2 is most clearly reflected at Yale, and that is the school of social science and the criminal law, and I think my attitude toward Dead School #2 is one more of regret than of sarcasm. I wish it *were* the case that the social sciences had something to offer us in the study of criminal law, but frankly I haven't seen anything come out in this school for a long time. [M]aybe some of you will [know of] an important article that's been published suggesting, clarifying, social science, psychoanalytic, or sociological perspectives on the criminal law. I have not seen anything in a long time, and yet the old insights of times gone by still prevail in significant quarters of the field.¹

* John D. Lyons Professor of Law and Professor of Psychology, University of Arizona. Thanks to Paul Marcus and Michael Perlin for comments on an earlier draft. Portions of this Essay are drawn or adapted from David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991) and from David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225 (1992).

1. Professor George Fletcher, A Critical Appraisal of Criminal Law and Procedure, Address at the Teaching Conference on Criminal Law and Criminal Procedure sponsored by the Association of American Law Schools (May 16-21, 1987) (audiotape available from Audio Archives International, Inc., Falls Church, Virginia). My thanks to Michael Perlin for calling my attention to these remarks. See Michael L. Perlin & Deborah A. Dorfman, *The Invisible Renaissance of Mental Disability Law Scholarship: A Case Study of Subordination* (unpublished manuscript, on file with the author).

This Essay, however, will show how the therapeutic jurisprudence perspective may enable the criminal law to profit from some of the insights that the behavioral sciences provide.

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent.² This approach suggests that the law itself can function as a therapist. Legal rules, legal procedures, and the roles of legal actors, principally lawyers and judges, may be viewed as social forces that can produce therapeutic or anti-therapeutic consequences. The prescriptive focus of therapeutic jurisprudence is that, within important limits set by principles of justice,³ the law ought to be designed to serve more effectively as a therapeutic agent. Therapeutic jurisprudence in no way suggests that therapeutic considerations should trump other concerns; they represent but one category of important considerations which include autonomy, integrity of the fact-finding process, and community safety, to name only a few. Therapeutic jurisprudence suggests that, other things being equal, the law should be restructured to better accomplish therapeutic goals. Whether those other things are equal, however, is often debatable, and therapeutic jurisprudence does not resolve that debate.

The therapeutic jurisprudence "lens" enables us to ask a series of questions regarding legal arrangements and therapeutic outcomes that likely would have gone unaddressed under other approaches. Therapeutic jurisprudence leads us to raise questions, the answers to which are empirical and normative. The key task is to determine how the law can use behavioral science information to improve therapeutic functioning without impinging upon concerns about justice. Therapeutic jurisprudence, therefore, in no way advocates coercion, paternalism, or a "therapeutic state." Of course, the approach will likely comport better with the criminal law if rehabilitation, though certainly not a legitimate reason for incarceration,⁴ is at least regarded without hostility.⁵

2. See, e.g., DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* (1990).

3. See Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law*, 11 *BEHAV. SCI. & L.* 31 (1993); David B. Wexler, *Justice, Mental Health, and Therapeutic Jurisprudence*, 40 *CLEV. ST. L. REV.* 517 (1992).

4. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 13-20 (1974).

5. *Id.*, see also Gilles Renaud, *R. v. Fuller: Time to Brush Aside the Rule Prohibiting*

Although the therapeutic jurisprudence approach grew out of mental health law scholarship, it has clear potential to trigger inquiry beyond the traditional mental health law subject matter. The therapeutic jurisprudence lens should aid in criminal law and procedure,⁶ juvenile and family law,⁷ health law,⁸ disability law,⁹ and perhaps across the legal spectrum.

Therapeutic Remands?, 35 CRIM. L.Q. 91 (1992) (discussing Canadian and British Commonwealth law regarding the appropriateness of pre-sentence remand to craft individualized sentences). On the value of rehabilitation in the penal system, see FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* (1982); TED PALMER, *THE RE-EMERGENCE OF CORRECTIONAL INTERVENTION* (1992); EDGARDO ROTMAN, *BEYOND PUNISHMENT: A NEW VIEW ON THE REHABILITATION OF CRIMINAL OFFENDERS* (1990).

6. In addition to the examples provided in the present Essay, see Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. (forthcoming 1993); David B. Wexler, *New Directions in Therapeutic Jurisprudence: Law/Mental Health Scholarship Outside the Conventional Context of Mental Health Law*, 10 N.Y.L. SCH. J. HUM. RTS. (forthcoming 1993); David B. Wexler, *Inducing Therapeutic Compliance Through the Criminal Law*, 14 LAW & PSYCHOL. REV. 43 (1990). For therapeutic jurisprudence articles in a number of different fields, see the symposium on therapeutic jurisprudence in 10 N.Y.L. SCH. J. HUM. RTS. (forthcoming 1993).

7. See Daniel W. Shuman, *Calling in the Cavalry: The Duty of the State to Rescue the Vulnerable in the United States* (1992) (unpublished manuscript, on file with the author) (discussing the advisability of recognizing a constitutional duty to rescue victims of child abuse). In addition, the issues discussed in the present Essay relating to criminal courts could be applied easily to family courts, especially regarding petitions to terminate parental rights and rehabilitation plans implemented as part of those proceedings. See, e.g., *In re D.M.B.*, 481 N.W.2d 905 (Neb. 1992) (concerning the termination of parental rights and a rehabilitation plan relating in part to sexual abuse allegations).

8. See Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 Hous. L. Rev. 15 (1991) (discussing the element of competency as it relates to the doctrine of informed consent). Professor Winick's work in mental health law regarding the therapeutic importance of patient involvement in decisionmaking can be applied to the doctor/patient relationship in general medical settings. See Bruce J. Winick, *Rethinking the Health Care Delivery Crisis: The Need for a Therapeutic Jurisprudence*, 7 J.L. & HEALTH 49 (1992-93).

9. See ROBERT A. SCOTT, *THE MAKING OF BLIND MEN: A STUDY OF ADULT SOCIALIZATION* (1969). Scott provides an interesting and important account of "how alternative approaches to rehabilitation can produce radically different socialization outcomes among blind people." *Id.* at 116. He suggests that "organizational systems that are constructed so as to discourage dependence in fact produce independent blind people; systems that foster dependency by creating accommodated environments produce blind people who cannot function outside of them." *Id.*

A promising role for therapeutic jurisprudence would be to see how the law might work psychologically to marshal motivation of persons with disabilities to function as independently as possible. Scott's discussion of blind veterans, who apparently fare far better than

Cross-pollination with criminal law and procedure is especially appropriate because many mental health law scholars are themselves "crossovers" from the criminal law and procedure field.¹⁰ Indeed, mental health law largely grew from the work of advocates and scholars who emphasized the massive deprivation of liberty inherent in civil commitment and argued that constitutional criminal procedure protections ought to be extended to the mental health system.¹¹

One apparent reason for the development of therapeutic jurisprudence is that, with the crumbling of its constitutional criminal procedure foundation, mental health law is hungry for new approaches.¹² The same can be said, a fortiori, of criminal law and procedure.

their civilian counterparts, points to two ways in which the law might influence dependence or independence: (1) through disability compensation schemes, and (2) through the philosophy underlying the provision of rehabilitative services. *Id.* at 112-14. With regard to compensation schemes, and in marked contrast to the programs for civilians, "[v]eterans with service-connected impairments are automatically granted financial benefits on the basis of the severity of the impairment and the circumstance under which it was incurred." *Id.* at 112-13. Importantly, "[n]o means test is required, nor is the amount of compensation in any other way related to income from other sources." *Id.* at 113. As to the rehabilitative services offered, Scott found that blind veterans were dealt with under a "restorative" rather than an "accommodative" approach to their blindness. *Id.* This philosophy provides the veteran with skills to maximize independent functioning. *Id.* at 113-15.

Both the compensation scheme discussion and the discussion of a "restorative" philosophy suggest promising avenues for disability law scholarship and reform. Under a therapeutic jurisprudence approach, scholarship on compensation schemes should focus at least in part on how the compensation method itself impacts therapeutically on the recipients. Terence G. Ison, *The Calculation of Periodic Payments for Permanent Disability*, 22 OSGOOD HALL L.J. 735, 740-43 (1984). Likewise, a therapeutic jurisprudence approach to disability law would suggest that the "reasonable accommodation" requirement of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101-12213 (Supp. III 1991), be read and implemented, so far as possible, as a "restorative" rather than an "accommodative" provision. That is, an employee's disability, or at least an employee's functioning, should not be regarded necessarily as static and insurmountable. Similarly, an employer's accommodation need not be conceptualized necessarily as requiring the same modification of schedule or work environment for the remainder of the employment relationship. For an analysis of the ADA, see Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13 (1992).

10. David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 28 n.4 (1992).

11. *Id.* at 28-29.

12. Daniel W. Shuman, *Overview*, 46 SMU L. REV. 323 (1992) (introducing a symposium on changes in mental disability law scholarship).

Therapeutic jurisprudence promises criminal law much more than merely a new twist on the topics that overlap between mental health law and criminal law—incompetence to stand trial and the insanity defense. To be sure, therapeutic jurisprudence has something to say about these and related issues,¹³ but the purpose of this Essay is to show the less obvious potential influence of therapeutic jurisprudence.

Substantively, this Essay will stray from core mental health law issues in order to indicate the potential reach of therapeutic jurisprudence in the criminal law area. Moreover, instead of focusing on more obvious and traditional types of law, legal scholarship, and law reform—matters such as codes, cases, and constitutional precedents—this Essay will focus on the role of the judge. The focus will demonstrate precisely how broad the conception of law is to therapeutic jurisprudence.¹⁴

This Essay will use as illustrations work that has been performed in therapeutic jurisprudence in two relevant areas: (1) sex offenders and the plea process, and (2) the conditional release process and the psychology of compliance.

13. See, e.g., MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* (forthcoming 1993) (exploring therapeutic jurisprudence questions in the insanity defense context); Keri A. Gould, *Therapeutic Jurisprudence and the Arraignment Process*, 16 INT'L J.L. PSYCH. (forthcoming 1993) (discussing the defense attorney's dilemma when requesting a competency examination); Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. (forthcoming 1993) (discussing the potential therapeutic, or antitherapeutic, impact of judicial condonation of the "pretextual" features of incompetency to stand trial hearings); Bruce J. Winick, *Competency to Be Executed: A Therapeutic Jurisprudence Perspective*, 10 BEHAV. SCI. & L. 317 (1992) (analyzing the Eighth Amendment and due process implications of the decision whether an individual is competent to be executed). See generally the symposium on therapeutic jurisprudence in 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT (forthcoming 1994).

14. See David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17 (1993).

II. SEX OFFENDERS AND THE PLEA PROCESS¹⁵

One of the most striking features of sex offenders, particularly child molesters, is their heavy "denial and minimization"¹⁶ of their behavior. Clinicians have studied and classified these "cognitive distortions,"¹⁷ which are evidenced by statements such as "nothing happened," "something happened but it wasn't my idea," or "something happened and it was my idea but it wasn't sexual."¹⁸ Moreover, mental health professionals believe that "the key issues of offender denial, motivation to change and cooperation in the process of treatment are all aspects of the offender's functioning which are just as amenable to analysis and modification as the sex offending behavior itself."¹⁹ In fact, manuals exist for the treatment of child molesters which cover such matters as "cognitive restructuring."²⁰ One approach to cognitive restructuring uses the technique of role-reversal: "the therapist role-plays being a child molester who uses the various cognitive distortions, [and] the patients are asked to take the role of a probation officer, a policeman, a family member, or anyone who might interact with a child molester, and attempt to confront the beliefs role-played by the therapist."²¹ The role-reversal process is used to lead the offenders to "rethink their own cognitions."²²

A therapeutic jurisprudence approach to the sex offense area might ask whether the law, including the rules, procedures, and roles of lawyers and judges, operates therapeutically or antitherapeutically upon sex offenders. For example, does the law in this

15. For a further discussion of therapeutic jurisprudence in this area, see Jeffrey A. Klotz, David B. Wexler, Bruce D. Sales, & Judith V. Becker, *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579 (1992).

16. Derek Perkins, *Clinical Work with Sex Offenders in Secure Settings*, in CLINICAL APPROACHES TO SEX OFFENDERS AND THEIR VICTIMS 151, 168 (Clive R. Hollin & Kevin Howells eds., 1991).

17. Nathan L. Pollock & Judith M. Hashmall, *The Excuses of Child Molesters*, 9 BEHAV. SCI. & L. 53, 54 (1991); see also Gene G. Abel et al., *Complications, Consent, and Cognitions in Sex Between Children and Adults*, 7 INT'L J.L. & PSYCHIATRY 89 (1984).

18. Pollock & Hashmall, *supra* note 17, at 57.

19. Perkins, *supra* note 16, at 152.

20. Gene G. Abel et al., *Treatment Manual for Child Molesters* (unpublished manuscript, on file with the author).

21. *Id.*

22. *Id.*

area promote cognitive restructuring? Or does it instead promote cognitive distortion, and thus perhaps contribute to psychological dysfunction and criminality? It may well be, as one British psychologist has observed, that "many aspects of the justice system are inadvertently geared towards fostering offender denial."²³ In that connection, the therapeutic jurisprudence approach applied to sex offenders produces the following suggestions.

Sex offenders usually are extremely unwilling to admit guilt, even when the state's evidence is impressive, and therefore, they often seek to plead "no contest," or *nolo contendere*.²⁴ A *nolo* plea permits the sex offender to accept the consequences of a conviction without going to trial and without admitting guilt.²⁵ Indeed, some offenders will seek to enter a so-called *Alford* plea which permits the defendant to plead guilty while at the same time *protesting his innocence*.²⁶

Courts may and often do accept such pleas, although generally they have no obligation to do so.²⁷ The acceptance of *nolo* and *Alford* pleas from sex offenders, however, may reinforce cognitive distortions and denial. This frame of mind may lead the offenders to reject offers of treatment directed at decreasing their deviant sexual arousal and increasing their nondeviant sexual arousal and social/sexual skills.²⁸ Alternatively, the mindset may undermine the potential success of such treatment even if the offender is persuaded or required to participate in it.²⁹

Moreover, judicial willingness to accept *nolo* and *Alford* pleas may make it easy, perhaps too easy, for defense attorneys to ar-

23. Perkins, *supra* note 16, at 152.

24. See, e.g., *In re Guilty Plea Cases*, 235 N.W.2d 132, 147 (Mich. 1975) (holding that a court which accepts a *nolo* plea must give justifying reasons and that the reluctance to admit a sordid crime, such as sexual assault on a child, appears to be such a reason), *cert. denied*, 429 U.S. 1108 (1977).

25. *North Carolina v. Alford*, 400 U.S. 25, 35 (1970).

26. *Id.* at 37-39; see Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1280, 1286 n.290 (1975) (discussing plea arrangements in sex offender cases); Curtis J. Shipley, Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063 (1987) (addressing the lack of uniformity in the acceptance of *Alford* pleas).

27. *Alford*, 400 U.S. at 38 n.11. An occasional case suggests that trial courts ordinarily must accept such pleas. See *United States v. Gaskins*, 485 F.2d 1046 (D.C. Cir. 1973).

28. Perkins, *supra* note 16, at 161-67 (discussing treatment techniques for sex offenders).

29. See *infra* note 45 and accompanying text.

range plea bargains acceptable to their clients. If judges were reluctant to accept pleas in sex offender cases unaccompanied by an admission of guilt, defense lawyers would need to coax more actively those clients who lack plausible defenses to admit guilt and accept the bargain. Professor Alschuler's written remarks in a somewhat different context are relevant:

It may often be a lawyer's duty to emphasize in harsh terms the force of the prosecution's evidence: "What about this fact? Is it going to go away? How the hell would you vote if you were a juror in your case?" It may sometimes be a lawyer's duty to say bluntly, "I cannot possibly beat this case. You are going to spend a long time in jail, and the only question is how long."³⁰

Thus, if jurisdictions refused to recognize *nolo* and *Alford* pleas, or if judges were reluctant to accept them in sex offender cases, the law would induce defense lawyers to engage their clients in an exercise of "cognitive restructuring," including role-reversal. For example, the defense attorney may ask the sex offender how he would vote as a juror in the case. In therapeutic jurisprudence terms, the result would be a revised legal arrangement that would restructure the role of the defense lawyer in a way that would promote therapeutic values.

The therapeutic potential of the role of the judge also could be enhanced in guilty plea cases if the court engaged in detailed questioning of the defendant about the factual basis of the plea.³¹ Specifically, the judge could address, on the record, some of the matters typically subject to cognitive distortion by sex offenders. In his classic study of guilty pleas, Donald Newman describes one metropolitan court's procedure that may be particularly pertinent for our purposes: a post-plea-of-guilty hearing in which, "[a]fter receiving a guilty plea from a defendant the court requires

30. Alschuler, *supra* note 26, at 1309.

31. See H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROB. 102, 121 (1977) (asserting that the form and extent of the inquiry is a matter left "largely to the discretion of the judge") (citation omitted). Pursuant to some select authority, judges already have an obligation to probe the factual basis of the plea. See, e.g., FED. R. CRIM. P. 11(f); STANDARDS FOR CRIMINAL JUSTICE § 14-1.6 (Am. Bar Ass'n 1986). But see *State v. Brooks*, 586 P.2d 1270 (Ariz. 1978) (upholding the guilty plea in a child molestation case despite the absence of an explicit statement by the defendant that the acts were motivated by an abnormal sexual interest in children).

the defendant to take the stand, under oath, and state that he did commit the crime and exactly how he committed it."³² Judges could buttress the effect of pleas with full admissions of guilt by means of a judicial sentencing policy particularly unsympathetic to sex offenders who stand trial and offer a defense that the jury rejected and that the judge independently found perjurious.³³

A plea procedure that encourages a sex offender to make a detailed admission of guilt should work, therefore, against denial and cognitive distortion and toward cognitive restructuring.³⁴ Moreover, should the offender vacillate and deny his guilt when in a correctional institution or community treatment program, an "adequate record with which to confront the person" may induce him again to accept responsibility,³⁵ and perhaps "to participate in in-

32. DONALD J. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 19-20 (1966); see also Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976) (contending that the bargaining process can operate in a better manner when judges take an active part); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240, 268-69 (1977) (stating that if the judge plays an active role in the plea process, the plea acceptance procedure might resemble the routine trial of uncontested cases in the Continental system).

33. See *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) (upholding sentence enhancement under the "obstruction of justice" section of the U.S. Sentencing Guidelines because of the defendant's trial perjury); *United States v. Grayson*, 438 U.S. 41 (1978) (holding that it is proper for the court when imposing sentences to consider perjury committed during the defense of a criminal case); see also *United States v. Saunders*, 973 F.2d 1354 (7th Cir. 1992) (finding that the federal sentencing guidelines sentence reduction for "acceptance of responsibility" does not unconstitutionally burden the right to trial), *cert. denied*, 113 S. Ct. 1026 (1993). For a therapeutic jurisprudence inquiry into the treatment of sex offenders under the Washington Sexually Violent Predator Statute, see Klotz et al., *supra* note 15, at 592-95; John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 700 (1992).

34. See *United States v. Miller*, 910 F.2d 1321 (6th Cir. 1990) (discouraging full acceptance of responsibility by increasing the sentence under U.S. Sentencing Guidelines for admitting other relevant conduct in an interview with a probation officer), *cert. denied*, 111 S. Ct. 980 (1991). But see *United States v. Faulkner*, 934 F.2d 190, 192-94 (9th Cir. 1991) (holding that the court cannot increase the sentence by taking into account matters dismissed or uncharged pursuant to a plea agreement); *In re D.M.B.*, 481 N.W.2d 905 (Neb. 1992) (deciding that, in a parental rights termination case, the court cannot order a parent to comply with a rehabilitation plan that relates to sexual abuse therapy when the sexual abuse charge was dismissed upon the parent's admission of neglect).

35. NEWMAN, *supra* note 32, at 222.

stitutional therapy programs"³⁶ or to participate more meaningfully in such programs.³⁷

This new therapeutic jurisprudence approach to sex offenders and the plea process is, of course, merely suggestive. Ultimately, the question whether cognitive distortions are impacted by judicial behavior in accepting a guilty plea is an empirical one. If therapeutic jurisprudence has an influence on criminal law scholarship, part of that influence will be in encouraging empirical studies.³⁸

Many of the matters seem readily testable. For instance, there are existing methods of measuring cognitive distortions of pedophiles.³⁹ Moreover, legal anthropologist Susan Philips of the University of Arizona has observed change of plea hearings and has concluded that judges do indeed have different styles of ascertaining the factual basis of a plea:

Some judges described the events that led to the defendant being charged, or had either the prosecution or defense lawyer describe them, and then asked the defendant if he agreed with the description. Other judges tried to get the defendant himself to describe those events. The latter strategy requires more involvement from the defendant and a more confessional mode of admission and met with more resistance from defendants.⁴⁰

36. *Id.*

37. A final factor which may be relevant to "cognitive restructuring through law" relates to the type of plea bargain offered a sex offender. An offender might be charged with the actual crime the state believes he committed, and might receive a sentence concession for an "on-the-nose" plea to that charge. Uviller, *supra* note 31, at 109. Alternatively, he may be charged with the actual crime, but be allowed to plead to a reduced charge. *Id.* at 108; see also NEWMAN, *supra* note 32, at 105-08, 119 (discussing lesser pleas in sex offender cases). "Charge" bargaining, rather than "sentence" bargaining, is particularly prevalent in jurisdictions in which mandatory sentencing has shifted discretion from the courts (in sentencing) to the prosecution (in charging). Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978). An interesting and generally unasked question regarding the wisdom of alternative sentencing and bargaining schemes is whether "charge" bargaining feeds into cognitive distortion more so than does "sentence" bargaining.

38. Such studies are underway at the University of Arizona. See Klotz et al., *supra* note 15, at 580.

39. See *id.* at 581 nn.7-9.

40. Susan U. Philips, *Criminal Defendant's Resistance to Confession in the Guilty Plea 4*, Paper Presented at Law and Society Association Meetings, Berkeley, California (May 31-June 3, 1990) (on file with the author). Because the law prescribes no precise formula for the factual basis inquiry even in jurisdictions where a factual basis must be found prior to entering judgment on a plea, that judges do not follow a uniform path in making the factual

Philips categorizes the judges as either "Procedure Oriented" or "Record Oriented."⁴¹ The Procedure Oriented judges emphasize the personal involvement of the defendant, while the Record Oriented judges minimize that involvement and view their role as making a neat record invulnerable to collateral or appellate attack.⁴² From wide-ranging interviews with the judges in her study, Philips concludes that the Procedure Oriented judges are politically liberal and the Record Oriented judges are politically conservative.⁴³ The irony is that, if the therapeutic jurisprudence speculation holds true upon empirical examination, the liberal judges may be performing a greater crime control function than their conservative counterparts.⁴⁴

In any event, it would be feasible to undertake a post-plea study to determine whether defendants in sex cases who, presumably through a process of random assignment, appear and plead before Procedure Oriented judges retain fewer cognitive distortions than those who plead before Record Oriented judges. Alternatively, one might study the issue of cognitive distortion through a more indirect, policy-oriented approach. That is, one might investigate whether sex case defendants pleading before Procedure Oriented

basis determination is no surprise. Compare Fed. R. CRIM. P. 11(f) ("[T]he court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.") with STANDARDS FOR CRIMINAL JUSTICE § 14-1.6(b) (Am. Bar Ass'n 1986) ("Generally, in determining the accuracy of a plea of guilty, the court may require the defendant to make a detailed statement in the defendant's own words concerning the commission of the offense to which the defendant is pleading.").

41. Philips, *supra* note 40.

42. *Id.*

43. Interview with Susan U. Philips, Professor of Anthropology, University of Arizona (Oct. 14, 1992) (discussing Professor Philips' research that will form the basis of a book, now in preparation, tentatively entitled *Ideological Diversity in Courtroom Discourse: Due Process Judicial Discretion in the Guilty Plea*).

44. The crime control function served by defendant admissions in the plea process officially was recognized when, on July 28, 1980, Attorney General Benjamin Civiletti released and published, for the first time in a single source, the U.S. Department of Justice Principles of Federal Prosecution. See JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS app. D-1 (2d ed. 1983) (publishing excerpt relating to the role of the federal prosecutor in entering into plea agreements). In determining whether to enter into a plea agreement, the government attorney was cautioned to consider all relevant factors, including "the defendant's remorse or contrition and his willingness to assume responsibility for his conduct." *Id.* at app. D-4. The commentary to the standards notes that "[t]hese are factors that bear upon the likelihood of his repetition of the conduct involved." *Id.* at app. D-6.

judges are more willing than the control group defendants to participate in therapy sessions which are later offered to them. If the results of such studies are promising, a further therapeutic jurisprudence undertaking could develop "model" colloquies for establishing the factual basis of pleas to various sex offenses and other offenses, and eventually subject those colloquies to empirical study.⁴⁵

We know, especially from therapists' reports, that denial, minimization, and cognitive distortions are particularly pronounced among sex offenders and child molesters.⁴⁶ What we do not yet seem to know is whether sex offenders are unique in their harboring of strong cognitive distortions, or whether other types of offenders—or perhaps offenders in general—are as prone to cognitive distortions.⁴⁷

Reports exist from clinicians who treat sex offenders, but reports do not exist on the extent to which offenders such as carjackers cognitively distort, claiming that "I didn't do it," "I did it but it wasn't my idea," or "I did it, and it was my idea, but I was only kidding around." If rehabilitation reclaims a legitimate role in the criminal justice system, the potential role of the judge in cognitive restructuring for purposes of corrections and rehabilitation may become important well beyond the area of sex offenders.⁴⁸

45. See Mary Kay Wheeler, Comment, *Guilty Plea Colloquies: Let the Record Show*, 45 MONT. L. REV. 295 (1984) (arguing that some form of standard guilty plea colloquy should be adopted by the courts).

46. See Klotz et al., *supra* note 15, at 581 nn.7 & 9.

47. See *Bruce v. United States*, 379 F.2d 113, 120 n.19 (D.C. Cir. 1967) (noting the tendency of criminal defendants "to deny or gloss over their involvement"); Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957); Philips, *supra* note 40.

48. See *supra* notes 4-5 and accompanying text. In *Montana v. Imlay*, 113 S. Ct. 444 (1992), the United States Supreme Court granted certiorari in a child molestation case to consider whether the Fifth Amendment self-incrimination clause bars a state from conditioning probation on the probationer's successful completion of a therapy program in which the probationer would be required to admit having committed the crime. The Court, however, later dismissed certiorari as improvidently granted, apparently because the procedural posture of the case called upon it to render an advisory opinion. See also Murray Levine & Eric Doherty, *The Fifth Amendment and Therapeutic Requirements to Admit Abuse*, 18 CRIM. JUST. & BEHAV. 98 (1991).

If rehabilitative efforts, either during imprisonment or during probation, are undertaken seriously with other types of offenders and with persons with grave substance abuse problems, the Fifth Amendment problem posed in *Imlay* is likely to arise outside the cur-

Several current issues in the general law of sentencing also may appear somewhat different if looked at through the therapeutic jurisprudence "lens." For example, would rehabilitation be advanced if sentencing courts, or sentencing guidelines, formulated sentences based upon such factors as a defendant's "acceptance of responsibility,"⁴⁹ or a defendant's "obstruction of justice" for committing perjury during his or her trial?⁵⁰ Would it be normatively appropriate to take such matters into account?⁵¹

III. THE CONDITIONAL RELEASE PROCESS AND THE PSYCHOLOGY OF COMPLIANCE

The medical profession has long known that patients often fail to comply with prescribed treatment regimens.⁵² Increasingly, the health care compliance problem has attracted the attention of psychologists interested in understanding, explaining, and improving patient compliance.⁵³ Meichenbaum and Turk present a set of principles designed to help the medical profession increase patient treatment adherence.⁵⁴

rent context of sex offense cases. The *Imlay* problem might be avoided in probation settings, however, if courts take the view that an offender's denial might properly be used in "determining whether a particular defendant is an appropriate candidate for probation in the first instance." *Gilfillen v. State*, 582 N.E.2d 821, 824 (Ind. 1991); see also *Self-Incrimination Right Conflicts with Treatment, Home Release Programs*, 4 CORRECTIONAL L. REP. 1 (1992) (discussing the Fifth Amendment issue in a broader correctional context).

49. *United States v. Valencia*, 957 F.2d 153 (5th Cir. 1992) (holding that the court must be convinced the defendant has accepted responsibility in order to reduce the sentence on this basis).

50. See *supra* note 33 and accompanying text. For an interesting state court decision regarding the impropriety of classifying trial perjury as an aggravating circumstance, see *State v. Houf*, 841 P.2d 42 (Wash. 1992).

51. The sentencing process raises many other normative and therapeutic issues. For discussion of the relationship among the defendant's actual behavior, the behavior with which the defendant has been charged, the defendant's acknowledgment of what occurred, and the sentence imposed, see NEWMAN, *supra* note 32, at 222. See also *United States v. Galloway*, 976 F.2d 414 (8th Cir.), cert. denied, 113 S. Ct. 429 (1992); Michael H. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM. L. & CRIMINOLOGY 1550 (1981).

52. DONALD MEICHENBAUM & DENNIS C. TURK, *FACILITATING TREATMENT ADHERENCE: A PRACTITIONER'S GUIDEBOOK* 21-31 (1987).

53. *Id.*

54. *Id.* at 71-229.

Their book does not discuss the legal system at all. Nonetheless, the book served as the basis for a therapeutic jurisprudence exercise in how insanity acquittee conditional release hearings might be restructured—and how the judicial role in such hearings might be altered—to enhance the probability of medication and treatment adherence of insanity acquittees eventually granted conditional release.⁵⁵ In this section, the Essay will examine the principles Meichenbaum and Turk present and suggest how criminal courts may apply these principles in the context of probationary sentencing.

A. *The Principles*

One of the most important reasons for nonadherence is the failure of the health care professional (“HCP”) to instruct the patient adequately about the treatment regimen.⁵⁶ Indeed, although physicians commonly seem not to acknowledge it, “the behavior of the HCP plays a critical role in the adherence process.”⁵⁷ Nonadherence is promoted when the HCP is distant, looks and acts busy, reads case notes during the interview, uses jargon, asks patients questions calling for “yes or no” answers, cuts off the patient, does not permit patients to tell their stories in their own words, fails to state the exact treatment regimen or states it in unclear or technical terms, adopts a moralizing, high-powered stance, and terminates the interview abruptly.⁵⁸ HCPs are advised, by contrast, to introduce themselves, avoid unexplained jargon, and elicit patient suggestions and preferences.⁵⁹

The patient’s active involvement in negotiating and designing the treatment program is of tremendous importance to adherence and favorable outcome.⁶⁰ Even giving a patient a choice over some of the more minor details can have salutary effects.⁶¹ To promote patient adherence, the HCP should linguistically cast the treat-

55. See David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18 (1991).

56. MEICHENBAUM & TURK, *supra* note 52, at 67; see also Wexler, *supra* note 55, at 24.

57. MEICHENBAUM & TURK, *supra* note 52, at 63 (emphasis omitted).

58. *Id.* at 78.

59. *Id.* at 81.

60. *Id.* at 81, 171.

61. *Id.* at 171.

ment program in a manner that capitalizes on the patient's involvement and agreement.⁶² For example, directive terminology such as, "[w]hat you are to do is . . .," should be replaced by a softer, more bilateral statement, such as, "[s]o what you have agreed to try is . . ."⁶³ Adherence will be nurtured further if the HCP has high prestige and is perceived to be competent, attentive, practical, and motivated by the best interests of the client.⁶⁴

A particularly profitable avenue of HCP questioning relates to the patient's past compliance efforts: "What kinds of things in the past have you tried that were unsuccessful? How is what you have agreed to do now different?"⁶⁵ It is also profitable for the HCP to raise mild counterarguments about the patient's prospective compliance.⁶⁶ When the HCP indicates to the patient certain obstacles and drawbacks to compliance, the patient will have an opportunity to minimize and counter the HCP's arguments, thus "fostering the patient's sense of control, commitment, and degree of hope."⁶⁷ A patient presented with mild counterarguments to compliance who nonetheless announces to a prestigious HCP his intention to comply will be "anchored" to the compliance decision by anticipated disapproval from the HCP and by anticipated self-disapproval.⁶⁸

Involving significant others, such as family members, in the treatment process is also likely to enhance patient adherence.⁶⁹ Family members aware of the treatment regimen can encourage, remind, and prod the patient, and can help the HCP assess patient compliance.⁷⁰ One suggested technique for involving significant others is for the HCP to bring in agreed-upon family members and to have the patient personally explain to them the nature of the illness and the proposed treatment.⁷¹ When an HCP has a patient explain his or her medical problem and agreed-on course of treat-

62. *Id.* at 79.

63. *Id.*

64. *Id.* at 172.

65. *Id.* at 175.

66. *Id.*

67. *Id.* at 176.

68. *Id.*

69. *Id.* at 124.

70. *Id.*

71. *Id.*

ment to family members, the active patient participation provides an opportunity to "assess her comprehension, to elicit a public commitment, and to strengthen her adherence-related attitudes."⁷²

One reason the presence of significant others enhances patient compliance is that "[p]ublic commitment leads to greater adherence than does private commitment."⁷³ In addition to the motivational power of anticipated self-disapproval and the anticipated social disapproval of the HCP, a patient who has previously made a commitment to significant others will be anchored to compliance by *their* anticipated disapproval as well.⁷⁴ Thus, "insofar as patients can be encouraged to inform one or more people (in addition to the HCP) of their intentions to follow the treatment regimen, there is an increased likelihood of adherence."⁷⁵

When negotiating a course of treatment with a patient, HCPs can profit from the behavior modification literature regarding "behavioral contracting."⁷⁶ Such "behavioral" or "contingency" contracting "capitalizes on the patient-HCP relationship by actively involving the patient in the therapeutic decision-making process and by providing incentives (rewards) for achievement of treatment objectives."⁷⁷

The relevant literature seems to suggest that behavioral contracting works best when the contract is individually tailored to the particular needs and desires of a given patient,⁷⁸ when it defines the target behavior expected of the patient with specificity,⁷⁹ when it spells out the positive and aversive consequences that will attach, respectively, to compliance and to noncompliance,⁸⁰ and when it includes the "specific dates for contract initiation, termination, and renewal."⁸¹

72. *Id.*

73. *Id.* at 174.

74. Tomi M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

75. MEICHENBAUM & TURK, *supra* note 52, at 174.

76. *Id.* at 164-73.

77. *Id.* at 164-65.

78. *Id.* at 168.

79. *Id.* at 174.

80. *Id.* at 168.

81. *Id.* at 170.

B. *The Application to Probation*

In *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*,⁸² I suggested how the psychological principles discussed above might be incorporated into insanity acquittee conditional release hearings and how we might then conduct empirical research to see if those reforms actually work to increase patient compliance with court-ordered conditional release conditions, such as the taking of antipsychotic medication.⁸³ It is not at all difficult to transfer the principles to the criminal court setting, with the objective of increasing a probationer's compliance with the conditions of supervised release.⁸⁴

In the criminal context, the relevant stages would be those culminating in a judicial proceeding at which a probationary sentence is to be imposed, whether following a trial or the acceptance of a plea agreement.⁸⁵ For example, such a hearing can actively involve the defendant in order to test the defendant's understanding of the conditions, to ensure that he or she agrees to them and, ideally, to allow the defendant some input into the design of the conditions.

The court can structure and shape the hearing so as to invoke a number of other important health care compliance principles. For example, the hearing could serve as a forum for the defendant to make a "public commitment" to comply with the probation conditions.⁸⁶ That way, the commitment would be made to a high-status judicial official and to any significant others, such as family members, whose presence at the hearing the court deemed appropriate.⁸⁷

The hearing can also provide an excellent opportunity for the court to discuss with the defendant past unsuccessful compliance efforts and the extent to which the current plan differs from any earlier, unsuccessful ones.⁸⁸ The hearing is an ideal forum for presenting the patient with "mild counterarguments" to compli-

82. Wexler, *supra* note 55.

83. *Id.* at 19, 40-41.

84. *Id.* at 19.

85. *Id.* at 20-21.

86. *Id.*

87. *Id.*

88. *Id.*

ance, enabling the patient to counter those arguments and to accordingly become "anchored" to the compliance decision.⁸⁹

As a result of matters aired at the hearing, a plan of probation resembling a behavioral contract may be approved by the court. When the agreement is approved finally, the court will have solicited the patient's commitment, perhaps both orally and in writing, and will have attended to the other important behavioral contracting principles, such as individual tailoring, specification of expected termination dates, specification of expected patient behavior and positive and aversive consequences.⁹⁰ A court is free to conceptualize and frame the conditional release as an agreement between the court and the defendant, rather than as an order.⁹¹

Indeed, because the court would shape and approve the release conditions, the court itself would function somewhat like an HCP, and the judge should, therefore, attend to the HCP behavioral factors thought to enhance patient adherence.⁹² For example, the judge could introduce himself or herself to the defendant, be attentive, avoid using jargon, and allow the defendant to tell his or her story without undue interruption.⁹³

By exploiting the psychological compliance principles, the judiciary would in essence transform the probationary process into one that is far more individually tailored to the defendant and into one that seeks the input of the would-be probationer far more than does the traditional system. Indeed, the employment of the psychological principles may also be suited to the use of the emerging "intermediate" sanctions, such as intensive probation supervision, community service, day reporting centers, and home confinement.⁹⁴ So long as the sentencing scheme permits "interchangeability," or

89. *Id.* at 32-33.

90. *Id.*

91. *Id.* at 34.

92. *Id.*

93. *Id.*

94. For a description and analysis of these and other "intermediate" sanctions, see NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* (1990); SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (James M. Burne et al. eds., 1992).

"substitutability"⁹⁵ of intermediate sanctions, so that the sentencing judge may select among them, a judge inclined to use the psychological principles noted in this Essay could allow the defendant to have substantial input into the sanction selection process.⁹⁶

Will judges be willing and able to bring these psychological principles into play in the criminal courtroom? Interestingly, psychologists Meichenbaum and Turk had similar concerns about whether HCPs would "adhere" to the recommendations set forth in their book.⁹⁷ The factors underlying HCP reluctance are likely to apply with equal force to judicial actors. HCPs are likely to voice the following reservations about using the recommended compliance principles: patients *should* take HCP advice or simply suffer the consequences of noncompliance;⁹⁸ the principles simply will not work with *their* particular patient populations;⁹⁹ the recommended procedures are too complicated and numerous;¹⁰⁰ there is simply no time in day-to-day practice to implement the procedures;¹⁰¹ the system does not support frills like adherence counseling;¹⁰² and, finally, HCPs cannot make use of the principles because most HCPs are not mental health professionals and, accordingly, have not been trained in psychological techniques of adherence.¹⁰³

95. On the issue of "interchangeability" or "substitutability" of intermediate sanctions, see the discussion and sources cited in PRINCIPLED SENTENCING 329-32 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

96. This Essay focuses on the role of the criminal court. It should be noted, however, that the psychological principles discussed in the text could also be used by prosecutors in arranging for pretrial diversion. See *id.* at 396-99 (discussing the relationship between sentencing theory and prosecutorial processes). Whether at sentencing or as a pretrial exercise of prosecutorial discretion, it is possible to arrange matters so that the offender or defendant is given the opportunity to provide input into the process and the decision. The victim, too, may be brought into the process, perhaps for fairness or for therapeutic purposes. *Id.* at 399, 402. The psychological literature on "procedural justice," tying the litigants' perceptions of fairness and compliance with legal requirements to the "voice" and other input they are given in legal proceedings, plainly can relate to the therapeutic jurisprudence approach, both with respect to offenders and to victims. For a discussion blending the two perspectives, see Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433 (1992).

97. MEICHENBAUM & TURK, *supra* note 52, at 253-57.

98. *Id.* at 257.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

Meichenbaum and Turk provide powerful counterarguments to the anticipated HCP reluctance, and those counterarguments can likewise apply to anticipated judicial reluctance. Although the procedures may seem a bit complicated initially, they will soon require less attention¹⁰⁴ and will, in the long run, improve the quality of service.¹⁰⁵ At the early stages, one can use checklists as memory prompts.¹⁰⁶ Finally, on the subject of clinical skill, "[n]o great amount of specialized training"¹⁰⁷ is required to use the recommended enhancement techniques.¹⁰⁸

Judges *should* take an interest in compliance with their orders and in better serving society. Some surely will. Moreover, today's law students are exposed to interdisciplinary insights far more than were past generations of law students. When today's students ascend to the bench, they should feel fairly comfortable integrating behavioral science into the legal system.

IV CONCLUSION

Just as the courts, at least those of tomorrow, may be persuaded to comply with the conditional release recommendations advanced above, the courts may also be convinced to conduct change of plea hearings and to otherwise behave in a manner likely to promote rehabilitation without frustrating the goals of the justice system.¹⁰⁹ Urging criminal courts to become more aware of the therapeutic and rehabilitative consequences of their behavior, however, may evoke criticisms of therapeutic jurisprudence, such as that made by Gary Melton, that "experience with the juvenile court has shown that judges make lousy social workers."¹¹⁰ Actually, I *agree* with Melton that our experience with juvenile courts of the past has shown that judges make lousy social workers. Therapeutic jurisprudence, however, teaches that judges *function* as social workers

104. *Id.* at 262.

105. *Id.* at 263-64.

106. *Id.* at 262.

107. *Id.* at 261.

108. *Id.*

109. Ted Rubin, *Now to Make the Criminal Courts More Like the Juvenile Courts*, 13 SANTA CLARA L. REV. 104 (1972).

110. Gary B. Melton, *The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence*, 16 LAW & HUM. BEHAV. 381, 386 (1992).

regardless of whether they know it or like it. Either judges will be reluctant to accept no contest pleas from sex offenders or they will not be reluctant; either judges will engage guilt-pleading defendants in a detailed colloquy regarding the crime or they will not do so; either they will expect a would-be probationer to sign a behavioral contract and to make a public commitment to comply or they will not do these things. Because judges presumably are affecting therapeutic and rehabilitative consequences anyway, a therapeutic jurisprudence approach would suggest that, while they remain fully cognizant of their obligation to dispense justice according to principles of due process of law, judges should indeed try to become less lousy in their inescapable role as social worker.