

*Jumping On The Bandwagon: How Canadian Lawyers Can & Should Get Involved in the  
Emerging Trend to Implement Therapeutic Jurisprudence Practices in Canadian Courts*  
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## INTRODUCTION

It is no secret that the public is displeased with the law profession. In 2002, Canadian provincial law societies received approximately 14,000 formal complaints against Canadian lawyers, with only about 70,000 practicing in total.<sup>1</sup> Though lawyers are often liked as individuals, as a group, society tends to “maintain a collective image of lawyers as evil people.”<sup>2</sup> The problem does not only lie in this perception, however. Lawyers are often bred to lead a bifurcated life in which they suffer from a disconnect between the law and their personal lives.<sup>3</sup> High rates of alcoholism and mental illness among these professionals has resulted.<sup>4</sup> It is of little surprise that lawyer distress and dissatisfaction rates are unbelievably high.<sup>5</sup>

Aside from the internal frustration, there is a growing recognition that the traditional adversarial system, on its own, cannot effectively deal with the causes of recidivism.<sup>6</sup> Therapeutic Jurisprudence is “the use of social science to study the extent to which a legal rule or practice promotes the

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<sup>1</sup> GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* (5th ed. 2004); p. 317 note 6

<sup>2</sup> *Id.* at 633 note 45.

<sup>3</sup> Hon. William G. Schma, *Therapeutic Jurisprudence: Recognizing Law as One of the Healing Arts*, 82-JAN MIBJ 25, 26 (2003).

<sup>4</sup> *Id.* .

<sup>5</sup> David B. Wexler and Bruce J. Winick, *Foreward: Expanding the Role of the Defense Lawyer and Criminal Court Judge Through Therapeutic Jurisprudence*, THE THERAPEUTIC JURISPRUDENCE AND CRIMINAL LAW 200, 205 n.3.

<sup>6</sup> THE HONORABLE JUDGE SHERRY L. VAN DE VEEN, *Some Canadian Problem Solving Court Processes*, Canadian Bar Review (March 2004) at 1.

psychological and physical well-being of the people it affects.”<sup>7</sup> It aims in part to address the “revolving door” system that simply recycles offenders through the criminal justice system<sup>8</sup> by getting to the underlying causes of the problem. By applying the behavioral sciences to the law, Therapeutic Jurisprudence seeks to promote the well-being of *all* court actors.<sup>9</sup> Though developed and first implemented in the United States, Therapeutic Jurisprudence principles have been incorporated into legal systems across the globe. Canadian judges in particular have increasingly begun to use this model in their courtrooms.

This comment will discuss how Canadian lawyers can and likely should incorporate therapeutic jurisprudence principles into their practices. Part I explains how Therapeutic Jurisprudence relates to similar principles used historically throughout Canada. Legislative changes have already laid the foundation for therapeutic jurisprudence practices, as Part II demonstrates. Problem Solving Courts have resultantly emerged throughout the country. In going beyond these specialized courts, however, particularly into the criminal justice field, lawyers will more and more find themselves before judges who are actively implementing therapeutic jurisprudence even in general jurisdiction courtrooms. This section will suggest options for

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<sup>7</sup> Schma, *supra* note 3, at 25.

<sup>8</sup> SUSAN GOLDBERG, *Judging for the 21<sup>st</sup> Century: A Problem-Solving Approach* (2005), available at <http://www.nji.ca/Public/documents/Judgingfor21scenturyDe.pdf>. at 3.

<sup>9</sup> *Id.* at 3.

how Canadian lawyers can adapt to these changes in order to better represent their clients.

Part III of this comment will acknowledge the criticism surrounding these recent judicial approaches. It will also recognize the problems foreseen regarding lawyers specifically, but will point out how the lawyers' acceptance and embracing of this process is crucial for both their clients' success, as well as their own. Finally, Part IV will explore the need for adjustment in legal education, in order to train Canadian law students to practice therapeutic jurisprudence from the onset of their careers.

## PART I: Historical Foundation

### *A. Restorative Justice*

Restorative Justice practices in Canada have diverse theoretical, political, cultural, and historical roots.<sup>10</sup> Although this term refers to a specific model, Restorative Justice is primarily a philosophical or theoretical approach to criminal justice.<sup>11</sup> In many aspects, Therapeutic Jurisprudence principles can be traced back to indigenous and tribal justice systems which often used this approach. Restorative Justice initiatives aim to hold offenders accountable in a meaningful way while addressing the needs of victims and the larger

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<sup>10</sup> ANGELA CAMERON, *Restorative Justice: A Literature Review* (2005), available at [http://www.bcifv.org/pubs/Restorative\\_Justice\\_Lit\\_Review.pdf](http://www.bcifv.org/pubs/Restorative_Justice_Lit_Review.pdf) at 4

<sup>11</sup> *Id.* at 4.

community.<sup>12</sup> Like Therapeutic Jurisprudence, this method seeks to understand how law practices affect people. They both seek to overcome the problem of criminal offenders for the sake of healing the offender and preventing further victimization.<sup>13</sup> These models favor rehabilitation and reconciliation as important goals of the criminal justice process, rather than only focusing on retribution.

Lawyers, as well as other judicial players, can look to the Restorative Justice model for guidance in their attempt to expand the use of Therapeutic Jurisprudence throughout Canada. For example, there are several principles overlapping both models which lawyers should be aware of. One such principle, is that of *Non-Domination*.<sup>14</sup> Any attempt by a participant at a conference (such as a lawyer) to silence or dominate another participant (such as a defendant) must be countered.<sup>15</sup> Defendants must have the opportunity to speak and be heard under circumstances where they could possibly be hurt by the process.<sup>16</sup>

Another important principle is that of *Empowerment*. Although there is a degree of philosophical difference between the Restorative Justice and Therapeutic Jurisprudence stances on the principle of empowerment, this difference is not as

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<sup>12</sup> GOLDBERG, *supra* note 8, at 35.

<sup>13</sup> John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, **CRIMINAL LAW JOURNAL 244** ( ).

<sup>14</sup> Braithwaite, *supra* note 13, at 247 (listing suggestions for restorative values).

<sup>15</sup> Braithwaite, *supra* note 13, at 248.

<sup>16</sup> *Id.*

noticeable as many would assume. Both strive for stakeholder empowerment, but while Therapeutic Jurisprudence does not assume “paternalism”<sup>17</sup> since leaders argue that it “can be anti-therapeutic”<sup>18</sup>, Restorative Justice theorists have instead argued, that paternalism may sometimes actually be *more* therapeutic.<sup>19</sup> In this sense, Therapeutic Jurisprudence takes a clearer stance against paternalism, rather than leaving its significance ambiguous, as the Restorative model does.

In his article comparing Restorative Justice and Therapeutic Jurisprudence in Australia, John Braithwaite opines that both approaches share an inclination to “play the believing game.”<sup>20</sup> Though a critique game would be equally important, and will be discussed in further detail in part III of this comment, the believing game allows us to discover “yet-to-be-developed possibilities.”<sup>21</sup> This is the type of mind set a lawyer should employ in order to more successfully work within these models.

#### *B. Aboriginal Courts*

In addition to Restorative Justice, Canada can also look to the already well-established Aboriginal Courts for guidance. The Gladue Court is a Canadian problem solving court geared

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<sup>17</sup> Braithwaite, *supra* note 13, at 249 (defining “paternalism” as the notion that the “views of the expert, in particular the therapeutic professional, should not be privileged over those of citizen stakeholders”).

<sup>18</sup> Braithwaite, *supra* note 13, at 249 (citing BRUCE WINICK, THE JURISPRUDENCE OF THERAPEUTIC JURISPRUDENCE, IN LAW IN A THERAPEUTIC KEY 653 n.17 (David V. Wexler & Bruce J. Winick eds., 1996).

<sup>19</sup> Braithwaite, *supra* note 13, at 249 (the main difference here being that the therapeutic jurisprudence vision sometimes articulated for drug courts, was that of the judge becoming a “coach”)(citing note 18, David Hobler).

<sup>20</sup> *Id.* at 244 (citing David Wexler).

<sup>21</sup> Braithwaite, *supra* note 13, at 244-45.

toward Aboriginal Peoples, with an objective to facilitate the court in considering the unique circumstances of the accused.<sup>22</sup> The considering of the underlying conditions leading up to the offense in question, is also seen in Therapeutic Jurisprudence practice.

A distinguishing feature of the Gladue Court is that all people working within it, including the Prosecutors, Defense Counsel, and Judges, have the expertise and understanding of the range of programs and services available to the Aboriginal people who come before them.<sup>23</sup> Likewise, it is now very important for Canadian lawyers, as the judges have, to become aware of the various options available to defendants so that they may better represent their clients under a Therapeutic Jurisprudence framework.

## PART II: THE CANADIAN LEGAL LANDSCAPE

In recent years, countries around the globe have become more juridified.<sup>24</sup> This shift arguably gives primacy to courts and judges rather than the political branches, and has led to the greater interpretation of individual rights in

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<sup>22</sup> NATASHA BAKHT, *Problem Solving Courts as Agents of Change*, available at <http://www.nji.ca/internationalForum/Bentley.pdf>. at 19.

<sup>23</sup> *Id.*

<sup>24</sup> David M. Siegel, *Canadian Fundamental Justice and U.S. Due Process: Two Models For A Guarantee of Basic Adjudicative Fairness*, 37 GEO. WASH. INT'L L. REV. 1 (2005); See also, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004) ("Over the past few years the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in more than eight countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.").

constitutional texts.<sup>25</sup> The Canadian model views the guarantee of fundamental justice expansively.<sup>26</sup> It therefore may be in a better position to ensure that individual protections are maintained than other countries are. However, it is important that judges and lawyers get on board and support this movement, since certain structural features of the Canadian Charter of Rights and Freedoms (Charter) permit the Court to avoid this role if it so chooses.<sup>27</sup>

There is no uniform description of the Canadian model of judicial decision-making. Most agree, however, that while this system is directed at the people appearing before the court, it is also "directed to the best interests of society at large."<sup>28</sup> Following this, it makes sense for Canadian courts to employ principles of therapeutic jurisprudence, which intend to rehabilitate offenders both for their own benefit and for the community's. The increased power offered to judges in juridification, also makes Canada a prime candidate for employing such principles.

In order to ensure that the legal system maintains its objectives, it is crucial for judges, lawyers, and judicial

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<sup>25</sup> Siegel, *supra* note 24, at 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.*

<sup>28</sup> GALL, *supra* note 1, at 212 (explaining that at the very least, "Canadians would presumably agree that as a fundamental objective of the Canadian legal system, our courts must entertain a search for truth, and that that search for truth must be conducted in a manner and with the result that might, broadly speaking, be characterized as the dispensation justice," and that this includes considering the society at large).

administrators to be active players.<sup>29</sup> The process of law reform in Canada is perhaps more difficult than in other sovereign nations owing to certain constitutional restraints,<sup>30</sup> but the Canadian court has been responsive to suggestions of possible reform, regarding themselves as “ultimately responsible to society at large.”<sup>31</sup> Since 1982, the Supreme Court of Canada has strived for modification of the criminal justice system.<sup>32</sup> This decision has led to many changes, one of which has been the attempt to begin incorporating therapeutic jurisprudence.

A. *Legislative Reform as a Foundation for Change*

A significant change in Canada’s Legal Landscape, was the passing of Bill C-41, *An Act to Amend the Criminal Code (Sentencing)*, in June 1995, the Canadian Parliament’s response to concerns about the overuse of imprisonment. The Supreme Court encouraged greater use of restorative justice and referred to this legislation as “a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law.”<sup>33</sup> These new approaches aim to promote a sense of responsibility and an acknowledgment of the harm caused on the part of the offender to victims and

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<sup>29</sup> GALL, *supra* note 1, at 213.

<sup>30</sup> *Id.* at 618.

<sup>31</sup> *Id.* at 213.

<sup>32</sup> Siegel, *supra* note 24, at 7

<sup>33</sup> Workshop, *Establishing a Framework for the Use of Restorative Justice In Criminal Matters in Canada* (2005), available at [http://www.icclr.law.ubc.ca/Publications/Reports/11\\_un/DAUBNEY%202005%20final%20paper.pdf](http://www.icclr.law.ubc.ca/Publications/Reports/11_un/DAUBNEY%202005%20final%20paper.pdf) at 4; (citing *Regina v. Gladue* which interpreted these reforms “as a reaction to the overuse of prison as a sanction [that] must be given appropriate force as remedial provisions”).

the community, while asking the court to consider “all available sanctions other than imprisonment that are reasonable under the circumstances.”<sup>34</sup>

This bill has many therapeutic jurisprudence notions running through it. A general principle of the bill is that jails should be reserved for those who truly belong there, while alternatives should be made available for those who would benefit more from rehabilitation.<sup>35</sup> Several provisions within the bill used to provide avenues for the application of restorative justice principles,<sup>36</sup> are also appropriate for therapeutic jurisprudence appliance. Section 718, among other things, expresses the notion that no person ought to be deprived of his liberty if less restrictive sanctions may be appropriate.<sup>37</sup> In turn, Section 717 allows for “Alternative Measures.”<sup>38</sup>

In line with the justification trend, other sections of the *Criminal Code*, empower judges to impose certain conditions upon

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<sup>34</sup> Workshop, *supra* note 33, at 4.

<sup>35</sup> CAMERON, *supra* note 10, at 9; *See also*, VAN DE VEEN, *supra* note 6, at 20; *R. v. McDonald*, (acknowledging a principle of restraint, that imprisonment should be avoided if possible and should be reserved for the most serious offences); BAKHT, *supra* note 22, at 8 (prison is a scarce resource best used for individuals who are genuine threats to safety); VAN DE VEEN, *supra* note 6, at 11.

<sup>36</sup> CAMERON, *supra* note 10, at 9.

<sup>37</sup> VAN DE VEEN, *supra* note 6, at 11 (referring particularly to Section 718.2(d)); *See also* CAMERON, *supra* note 10, at 10 (included in these principles are: “denouncing unlawful conduct; rehabilitation of offenders; reparation of harm to the victim or community; promotion of a sense of responsibility in offenders; and acknowledgement of harm done to victims and the community”).

<sup>38</sup> CAMERON, *supra* note 10, at 10 (defining “measures” in Section 716 as “...measures other than judicial proceedings under this *Act* used to deal with a person who is eighteen years of age or over and alleged to have committed an offence;” several restrictions are placed upon the use of these measures, including that the person accepts responsibility for the act or omission that forms the basis of the offense that the person is alleged to have committed).

sentencing.<sup>39</sup> Section 742.3(2)(f), for example, acknowledges the important goal of preventing recidivism. Section 732.1(3)(h), allows the court to impose "such other reasonable conditions as the court considers desirable...for protecting society and for facilitating the offender's successful reintegration into the community."<sup>40</sup> Recent Court decisions signify that the Court has a more apparent duty to consider the availability of community treatment programs, which likely translates into a duty for the lawyers to consider such programs as well. Lawyers should also be aware that the court's failure to consider these sentencing options can constitute reversible error.<sup>41</sup>

The passing of Canadian legislation and the Supreme Court's consideration of these provisions creates a favorable legal environment for therapeutic principles to evolve in. The Court has held that these new objectives "must be consistent with therapeutic jurisprudence which emphasizes the practical impact of legal proceedings upon individuals affected by both the process and outcome of the proceedings."<sup>42</sup> Statistics have indicated that conditional sentences have had a significant

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<sup>39</sup> GOLDBERG, *supra* note 8, at 33 (this is often used by judges in order to monitor an offender's progress and compliance).

<sup>40</sup> *Id.* at 10.

<sup>41</sup> *Id.* at 33; *See R. v. Proulx*, 140 CCC (3d) 449 (SCC) at para. 90 (a landmark decisions that used conditional sentences in a therapeutic jurisprudence manner in order to meet the court's goals of reducing incarceration). *See also, R. v. Gladue.*

<sup>42</sup> VAN DE VEEN, *supra* note 6, at 98.

impact in reducing the prison population.<sup>43</sup> This was a needed improvement considering Canada's high incarceration rate compared to other industrialized countries and the scarcity of resources available for the purposes of incarceration.<sup>44</sup> While these more currently developed sentencing goals are not necessarily the primary sentencing regimes employed in Canada, it is now understood that they must be considered alongside the traditional ones that existed prior to them.<sup>45</sup>

### *B. Problem Solving Courts*

Problem Solving Courts provide an alternative option from the traditional adversarial system. In Canada, Therapeutic Jurisprudence has previously been predominantly utilized in these problem solving courts. It is quite likely, however, that the judges sitting in these special courts will carry their new judicial outlooks with them when they return to civil and criminal dockets.<sup>46</sup> In fact, it has been suggested that "the problem solving court movement may actually be a transitional

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<sup>43</sup> <sup>43</sup> Workshop, *supra* note 33, at 5 (Canadian Centre for Justice Statistics in June 2001 reported that data from the Adult Correctional Services Survey indicated that conditional sentences have had a significant impact in terms of reducing the prison population, a 13% reduction in sentenced admissions by March 31, 2001, translating to 54,000 people).

<sup>44</sup> BAKHT, *supra* note 22, at 6

<sup>45</sup> VAN DE VEEN, *supra* note 6, at 13 (emphasis added).

<sup>46</sup> BAKHT, *supra* note 22, at 30-31; VAN DE VEEN, *supra* note 6, at 92 (it is reasonable to pursue the benefits of the problem solving approach whether or not the case falls into the specific categories of cases which have currently been targeted for this new approach); David Wexler, *Therapeutic Jurisprudence: Its Not Just for Problem Solving Courts and Calendars Anymore, Trends in 2004*, at 2 (citing JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds.) (2003)) ("The new problem solving courts have served to raise the consciousness of many judges concerning their therapeutic role, and many former problem solving court judges, upon being transferred back to courts of general jurisdiction, have taken with them the tools and sensitivities they have acquired in those newer courts.")

stage in the creation of an overall judicial system attuned to problem solving, to therapeutic jurisprudence, and to judging with an ethic of care."<sup>47</sup> Due to this widespread emergence, it is now more necessary for lawyers to prepare for these courtroom adjustments which are becoming more prevalent even in courts of general jurisdiction.

The team based approach has resulted in the creation of new roles for the traditional judicial players.<sup>48</sup> Both the Defense and Crown Counsel's cooperation is a "vital part of the success of any problem solving court process,"<sup>49</sup> and these participants can therefore have a significant influence in expanding the application of therapeutic jurisprudence. Sentencing Judges have many new tools available to them but they need support from all members of the legal community. As discussed in the following section, Defense counsel can play a role in developing more creative sentencing submissions, and other policies may be instituted to encourage prosecutors to consider more restorative options.<sup>50</sup> As Justice Paul Bentley of the Ontario Court of Justice in Toronto stated, "by understanding why judges are employing a problem-solving lens to arrive at their decisions, I would anticipate that these practitioners will be more likely to

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<sup>47</sup> Wexler, *Trends in 2004*, *supra* note 46, at 2 (citing JUDGING IN A THERAPEUTIC KEY, *supra* note 46, at 6),

<sup>48</sup> BAKHT, *supra* note 22, at 9.

<sup>49</sup> VAN DE VEEN, *supra* note 6, at 100.

<sup>50</sup> Bruce P. Archiblad, *The Politics of Prosecutorial Discretion: Institutional Structures and the Tensions Between Punitive and Restorative Paradigms of Justice*, 3 CAN. CRIM. L. REV. 69, 90 (1998).

work with the judges in creating a more people-oriented system of justice.”<sup>51</sup> This statement confirms that Canadian judges expect lawyers to be prepared to function under a therapeutic jurisprudence framework.

### *C. The Role of Lawyers in Canada Generally*

A practicing Canadian lawyer, possibly also performing as a barrister and/or solicitor, has two main responsibilities. First, the lawyer must articulate and advance the best interests of his client.<sup>52</sup> In doing so, the therapeutic jurisprudence process may actually be a more effective option than more traditional practices. Following the traditional adversarial approach, lawyers aim to keep their clients out of jail. Under that model, avoiding prison is considered advancing a client’s best interest. As the United States Department of Justice has suggested, however, treatment courts now employing therapeutic jurisprudence, unlike the traditional courts, work to further an alternative “best interest” of the defendant, not to keep them out of jail, but rather, for example, to reach sobriety.<sup>53</sup> By ending the cycle of drugs and crime, these treatment courts act in the “best interest” of the client, resulting in a “total improvement” in the life of the client.<sup>54</sup> Therefore, in the

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<sup>51</sup> GOLDBERG, *supra* note 8, at 2.

<sup>52</sup> GALL, *supra* note 1, at 295-296.

<sup>53</sup> Mae C. Quinn, *Whose Team Am I On Anyway? Musings of A Public Defender About Drug Treatment*, 26 NYURLSC 37, n. 99 (2000-01).

<sup>54</sup> *Id.* at n. 143.

sense that a lawyer has the responsibility to promote their client's best interest, employing therapeutic jurisprudence should not create an ethical problem for a Canadian lawyer.<sup>55</sup>

Canadian common law acknowledges the importance of fostering confidence and trust between the lawyer and client, as is evidenced by the existence of the lawyer-client privilege, protecting communications between one another. Contrary to popular belief, there is no privilege at common law between a doctor and patients, nor a priest and his parishioners, nor between a journalist and confidential sources, signifying how greatly the relationship between lawyer and client was valued and respected.<sup>56</sup> Therapeutic Jurisprudence likewise embraces these notions of trustworthiness, and highlights the lawyer's responsibility to protect his client's interests. The main difference however, is in how these interests are considered, since what was once the lawyer's goal of getting the client off, may here no longer be considered as beneficial in advocating for a client's "best interest."

A lawyer's second main responsibility is to act at all times as an officer of the court.<sup>57</sup> This requires that the lawyer always consider the public good, protect, preserve, and

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<sup>55</sup> *Id.* at n. 87 (arguing that "Common sense suggests, and professional responsibility dictates, that before the defense bar can be expected to take on a new role, open and meaningful examination of existing legal and ethical rules pertaining to the representation of criminal defendants must occur in light of the suggested new role.").

<sup>56</sup> GALL, *supra* note 1, at 296 (acknowledging that some provinces in Canada have since created some of these other "privileges" by statute).

<sup>57</sup> *Id.* at 295-296.

respect the institutions within the legal system, and work to ensure that unfairness and injustice does not occur in a court of law.<sup>58</sup> A dilemma may often occur between the lawyer's role of placing the interests of justice and fairness first, while at the same time regarding their client's interests as vital. Therapeutic jurisprudence principles aim to reconcile this quandary. The goals of this process, such as seeking to rehabilitate offenders so that the recidivism rate decreases, in turn, benefits society as a whole.

The Attorney General in particular, and those whose authority flows from that office, play a critical part in the implementation of restorative justice, and therefore are necessary to promote therapeutic jurisprudence initiatives in Canada.<sup>59</sup> From the time the charges are laid, until the court announces its finding, "alternative measures" are in the hands of prosecutors.<sup>60</sup> It is therefore imperative that the community accept these principles and strive to make them successful so that prosecutors will feel comfortable in exercising discretion

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<sup>58</sup> GALL, *supra* note 1, at 297.

<sup>59</sup> Archiblad, *supra* note 50, at 88 ("The Young Offenders Act and the Criminal Code now speak of programs authorized by the Attorney General, of 'alternative measures for dealing with persons who have committed criminal offences' as long as, inter alia, the person who is considering whether to use the measure is satisfied that it would be 'appropriate, having regard to the needs of the person alleged to have committed the offense and of the interests of society and of the victim.'" citing Criminal Code, R.S.C. 1985, c. Y-1, s. 4 & Criminal Code s. 717.)

<sup>60</sup> *Id.* at 80 (pointing out that the prosecutor has a wide range of decisions falling within the purview of their discretionary authority, including the ability to end litigation).

in this fashion.<sup>61</sup> The key is for prosecutors to understand that they should only continue to prosecute where “the public interest is best served by a prosecution.”<sup>62</sup>

*D. How the Canadian Lawyer Can Alter Their Practice to Incorporate Therapeutic Jurisprudence*

Actions taken by legal practitioners have psychological and physical health consequences for themselves and those they impact.<sup>63</sup> It is therefore necessary for these players to actively participate in law reform. The New York-based Center for Court Innovation surveyed New York and California judges who had sat in on problem-solving, as well as general jurisdiction courts, who identified the most common barriers they observed in transferring therapeutic practices to conventional courtrooms.<sup>64</sup> Among these obstacles was “lawyer unwillingness toward or lack of education about a collaborative, Therapeutic Jurisprudence approach.”<sup>65</sup> Rather than acting as an impediment to the system, Canadian lawyers can be a part of the revolution, through education and an acceptance of the

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<sup>61</sup> *Id.* at 90(inviting defense counsel to take the initiative, pointing out that experience in many jurisdictions demonstrates success when these lawyers identify the appropriate community resources, and present prosecutors with alternatives to the plea process).

<sup>62</sup> *Id.* at 82 (the factors which are taken into account in determining when prosecution is required will vary from case to case).

<sup>63</sup> Schma, *supra* note 3, at 26.

<sup>64</sup> GOLDBERG, *supra* note 8, at 12.

<sup>65</sup> *Id.* (other concerns noted were: a lack of judicial experience or training in problem-solving justice, legal and constitutional constraints, a “traditional” judicial philosophy that views judges as a decider of cases rather than a solver of problems, institutional pressures, limited resources, and chronic under-finding).

Therapeutic Jurisprudence model. Part 4 of this comment further explores the importance of future education.

Many legal issues turn into perpetual problems because the personal issues that underlie them are not addressed.<sup>66</sup> Though a lawyer is not a therapist or social worker, they can nonetheless be quite effective as a “change agent.”<sup>67</sup> Therefore, lawyers should seek to apply an “ethic of care” in their practices, recognizing the potential of law as a both a helping and healing profession.<sup>68</sup>

Professors Bruce Winick<sup>69</sup> and David Wexler,<sup>70</sup> have reported on the growing use of the therapeutic jurisprudence perspective in criminal law practice in the United States, and how this approach might transform the role of criminal defense lawyers.<sup>71</sup> Similarly in Canada, for example, the defense counsel should focus on the rehabilitation of the client and use these new methods within the plea bargaining and sentencing processes.<sup>72</sup> Lawyers will also need to counsel their clients on the court

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<sup>66</sup> Schma, *supra* note 3, at 26 (“The most technically professional work, unraveled by unmet needs of the client is wasteful and inappropriate.”).

<sup>67</sup> David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 747 (2005); *See also*, GALL, *supra* note 1, at 661 (the lawyer has a role which might be described as that of a “social engineer”).

<sup>68</sup> Schma, *supra* note 3, at 26.

<sup>69</sup> Bruce J. Winick is Professor of Law and Professor of Psychiatry and Behavioral Sciences at the University of Miami School of Law and School of Medicine in Coral Gables, FL.. Professor Winick is co-founder of the field of social enquiry known as Therapeutic Jurisprudence.

<sup>70</sup> David B. Wexler is Lyons Professor of Law at the University of Arizona College of Law and Professor of Law at the University of Puerto Rico School of Law. Professor Wexler is co-founder of the field of social enquiry known as Therapeutic Jurisprudence.

<sup>71</sup> Wexler & Winick, *Foreword: Expanding the Role of the Defense Lawyer and Criminal Court Judge Through Therapeutic Jurisprudence*, *supra* note 5.

<sup>72</sup> BRUCE WINICK, *Redefining the Role of the Criminal Defense Lawuer in Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYPPL 1034 (1999).

encouraged option of taking responsibility for their wrongdoing so that they may begin to undergo rehabilitation.<sup>73</sup>

### 1. A Team-Based Approach

In 2005, Canada's National Judicial Institute put out a manual to promote the use of therapeutic jurisprudence by judges and to offer advice on how to best implement it in their courtrooms. In applying such an approach, judges are advised to encourage lawyers to be "both team players and vigilant to their client's best interests."<sup>74</sup> In following this alternative model, a lot of the judge's work will occur out of the courtroom, which might present a problem if it becomes too time consuming. Lawyers can therefore help facilitate the process by proposing realistic probationary plans, and by presenting all relevant information to the judge so that they can make informed decisions.<sup>75</sup> By offering information on a client's background, possibly helping to explain why the defendant engaged in the criminal behavior, the lawyer can help the judge develop a treatment program that will benefit each individual client specifically.<sup>76</sup>

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<sup>73</sup> See also JONATHAN R. COHEN, *The Culture of Legal Denial*, 84 Nebraska Law Review 247, 271-82 (2005); JONATHAN R. COHEN, *The Imporality of Denial*, 79 Tulane L. Rev. 903 (2005).

<sup>74</sup> GOLDBERG, *supra* note 8, at 26 (noting that this non-adversarial, team-based approach is easily transferable to courts of general jurisdiction and not just restricted to problem-solving courts).

<sup>75</sup> VAN DE VEEN & WEXLER, *Therapeutic Jurisprudence Sentencing Principles in a Canadian Context*, (forthcoming 2005) at 6; GOLDBERG, *supra* note 8, at 37 (to help judges make informed decisions, lawyers should offer information about such things as the defendant's criminal record, employment situation, motivation, progress in treatment, etc.).

<sup>76</sup> GOLDBERG, *supra* note 8, at 37 ( the lawyer should try to provide information such as "pre-sentence reports, psychological assessments, victim impact statements, police and parole reports, and criminal records," which "may

Aside from working as a team with the judge, the National Judicial Institute encourages lawyers to become team-players with the opposing side. Since Therapeutic Jurisprudence takes a non-adversarial approach, there is no need for the prosecutor and defense counsel to act as enemies. In this sense, they “are not sparring champions, they are members of a team with a common goal.”<sup>77</sup> This common goal is that of rehabilitating the defendant for the benefit of society.

## 2. Skills

Additionally, there are many specific skills a lawyer can acquire and draw on to help in their therapeutic jurisprudence practices. The importance of developing a trusting, respectful relationship between lawyer and client has already been addressed. Lawyers should try to encourage their clients to have a “voice.”<sup>78</sup> This will take some getting used to however, since lawyers are used to speaking on behalf of their clients. By building strong interpersonal relationships, learning to listen attentively, and striving to become what has been phrased

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help illuminate some of the causes behind criminal behavior—such as addiction, substance abuse, mental-health issues, or psychological trauma—that may well respond to or benefit from treatment.”); *Id.* at 38 (by presenting proof that, in the past, lifestyle changes such as gaining good employment or ceasing drug abuse, has correlated with a defendant’s lack of criminal activity, the lawyer can signify to the judge that the client would benefit from a more therapeutic approach and would react positively to rehabilitation).

<sup>77</sup> GOLDBERG, *supra* note 8, at 26, (citing Kaye, J.S. *Lawyering for a New Age*, FORDHAM L. REV. at 3 (1998)).

<sup>78</sup> Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, *supra* note 67, at 748 (it is also important that clients explain the situation from their own perspective without having to worry about legal issues).

as an "effective helper," lawyers can help create an atmosphere in which their clients can feel comfortable.<sup>79</sup>

Of great importance, is the lawyer's knowledge of all the possible treatment programs and options available to their client, as well as the current changes in the way courtroom proceedings are conducted under the Therapeutic Jurisprudence model.<sup>80</sup> Alternatives in plea negotiation, preliminary probation plans, and deferral of sentencing should be considered. Lawyers also have the responsibility to increase their clients' awareness of these tools since their active participation is a crucial part of the process. Defense attorneys should thus strive to resist the temptation to think for the client or propose a plan for the client to merely agree upon, and instead, work with the client in order to mutually devise a proposal.<sup>81</sup>

Another divergence from the traditional adversarial model, is the significance of the lawyer's role after sentencing. Defense counsel should recognize that there is a meaningful role to play even if all is going well.<sup>82</sup> Their job is no longer limited to when violations are alleged or when there are threats of sanctions, but rather will now include a role in review

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<sup>79</sup> *Id.*

<sup>80</sup> VAN DE VEEN, *supra* note 6, at 16.

<sup>81</sup> Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, *supra* note 67, at 759, 768 (further suggesting that at this stage a client might benefit from sitting in on a Problem Solving Court proceeding while the lawyer explains why different clients receive different dispositions).

<sup>82</sup> Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, *supra* note 67, at 762.

hearings, where presenting evidence of a client's success can not only aid in the legal process, but can help reinforce their client's desistance from criminal activity.<sup>83</sup>

Research has shown that judicial behavior can influence accountability on the part of the offender, merely because their opinions are regarded as a representation of the society's as a whole. Similarly, the manner in which a lawyer treats their client can have a drastic influence in a client's overall success., by practicing the skill of "condemning the act without condemning the person."<sup>84</sup>

### *3. Criminal Law Practice*

The Criminal Law arena specifically has of recent years been largely influenced by therapeutic jurisprudence. The entire process may be dictated by such considerations, and lawyers can benefit from understanding these alterations. In light of the fact that judges have begun to employ these practices in Canada and have written manuals to promote the expanded use of this framework, it is likely that they will expect the lawyers coming before them to act accordingly. The following sections explore the therapeutic jurisprudence interaction with different aspects of the criminal court process.

#### *Peace Bonds:*

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<sup>83</sup> *Id.* at 762, 771 (proposing that the role of the lawyer extends beyond sentencing, into such areas as corrections and integration back into the community).

<sup>84</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 16.

Peace Bonds, which function somewhat like the United States' restraining orders, require a person to "keep the peace"<sup>85</sup> and according to Section 810 of the *Criminal Code*, permit the court to impose, "such other reasonable conditions...as the court considers desirable for securing the good conduct of the defendant."<sup>86</sup> They may be applied for and issued if there is a reasonable ground of fear for personal safety, or of damage to property.<sup>87</sup> These bonds reinforce an offender's distorted thinking, however by allowing them to avoid taking full responsibility for their actions.<sup>88</sup> Judges will therefore tend to shy away from accepting these pleas since failing to take ownership for one's actions can potentially have an anti-therapeutic effect.<sup>89</sup> Lawyers should be mindful of the judges' deterrence in this respect and alternatively work with their clients to take responsibility as an initial step in their treatment.

If a peace bond is issued, however, the court also has the discretion to rule for an early termination of the Peace Bond.<sup>90</sup> A defense lawyer should resultantly suggest to judges other alternatives for Peace Bonds, and the prosecutor should now

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<sup>85</sup> Ron Jourard, Criminal Lawyer, Toronto, Ontario, *available at*, [www.criminal-lawyer.on.ca/printversion-assault-1.html](http://www.criminal-lawyer.on.ca/printversion-assault-1.html).

<sup>86</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 10 (citing *Criminal Code* section 801(3)(a)).

<sup>87</sup> Jourard, *supra* note 85 (Peace Bonds often are inappropriate as remedies for domestic assault cases).

<sup>88</sup> BAKHT, *supra* note 22, at 17 (this is also similar to the "no contest" plea offered in America).

<sup>89</sup> GOLDBERG, *supra* note 8, at 21; BAKHT, *supra* note 22, at 17.

<sup>90</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 14 ("With respect to Peace Bonds, Section 810(4.1) of the *Criminal Code* permits the court, on application of the Informant or the defendant, to vary the conditions fixed in the recognizance.").

consider different avenues since the courts will be more hesitant to grant such relief.

Probationary Plans & Relapse Prevention Plans:

As mentioned above, one of the lawyer's greatest functions in the therapeutic jurisprudence process is in its preparation of an adequate probationary plan, and or relapse prevention plan. A considerable factor in convincing the judge that a probationary plan can work, is the showing that the defendant assisted in devising the proposed plan. When considering the creation of such a plan as part of a relapse prevention program, an offender's involvement is crucial.<sup>91</sup> With a lawyer, or with other professional assistance, offenders should be asked to think through previous criminal activity and identify any high-risk situations which might have led to trouble in the past.<sup>92</sup> Plans should then include methods for avoiding or dealing with these types of situations. Such a plan is considered to be a kind of behavioral contract, creating a signed agreement that recognizes rewards and sanctions.<sup>93</sup>

These types of plans are becoming quite prevalent in Canada. For instance, Ottawa has developed a "Reasoning and

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<sup>91</sup> *Id.* at 7 ("If probation is awarded, a full blown relapse prevention program could be included as one condition of the probationary sentence."); See also GOLDBERG, *supra* note 8, at 19 (relapse prevention plans work on the assumption that "offenders can sometimes act rather impulsively," and are "geared to teaching offenders certain problem solving skills," such understanding the chain of events leading up to their behavior).

<sup>92</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 7 ; see also David Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, *CRIMINAL LAW JOURNAL* 205 ( ), 207 (noting the potential for the lawyer to serve as a healing agent during the development of this plan).

<sup>93</sup> GOLDBERG, *supra* note 8, at 19; See also, Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, *supra* note 92, at 207.

Rehabilitation" approach that is now used internationally, presuming that since the client acts as an "architect of the plan," they will be committed to it and more likely to comply with it.<sup>94</sup> As a result, lawyers should strive to become more comfortable in this role of helping a client admit to their criminal behavior, rather than mainly working towards a non-guilty verdict or keeping them out of jail.

Deferral:

Therapeutic Jurisprudence urges counsel to seek sentence deferral, if possible, so that a rehabilitation plan can be established and attempted prior to sentencing.<sup>95</sup> Just as America's Federal Rules of Criminal Procedure do not explicitly authorize a delay in sentencing at a Defendant's request,<sup>96</sup> Canada's *Criminal Code*, does not specifically provide for allowing deferral in order to test out a rehabilitation plan. Sections 721 and 722 permit deferral in cases obtaining pre-sentence reports and victim impact statements, but nothing is specifically provided for allowing deferral in this instance. It can be speculated that the Court does not want to use sentencing as a reward or punishment based on the outcome of the

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<sup>94</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 7 (indicating a full blown relapse prevention program that can be used as part of a probationary sentence).

<sup>95</sup> *Id.* at 3 (such a demonstration would prove more supportive for a defendant's case than merely a defendant's promise of better behavior).

<sup>96</sup> Winick, *supra* note 72, at 1054.

offender's rehabilitation program.<sup>97</sup> This does not change the fact, however, that the lawyer's work to delay the sentencing process can work in their client's best interest.

There remains a strong possibility that the Parliament of Canada may pass other legislation following the many therapeutic jurisprudence initiatives taken over the past several years. It will be interesting to see if they will specifically allow for sentencing deferral in order to allow for treatment. This remains a viable possibility given that the Supreme Court has previously based rulings denying such a delay on the fact that Parliament has not yet expressed such an intent.<sup>98</sup> If this should one day be implemented, the defense counsel's consent will be crucial, since once treatment has occurred, the Crown is often in a better position to determine an appropriate sentence.<sup>99</sup> A lawyer will want to assess the situation and, along with their client, be in the position to believe that success in treatment is likely.

#### Review Hearings:

To reiterate an earlier point, therapeutic jurisprudence extends the lawyer's job beyond the sentencing stage. The National Judicial Institute advises the scheduling of regular

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<sup>97</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 4 (citing *R. v. A.B.C.* (Alta. C.A.) [1991] A. J. No. 1118).

<sup>98</sup> See, e.g. *R. v. A.B.C.*; See alternatively, Wexler, *Some Reflections on Therapeutic Jurisprudence and the Practice of Criminal Law*, *supra* note 92, at 207 (sentencing courts are often willing to defer sentence to allow for the formulation of a treatment plan, or even to allow the defendant to pursue a course of rehabilitation).

<sup>99</sup> VAN DE VEEN & WEXLER, *supra* note 75, at 5.

review hearings, which invites the lawyers to present information in order to keep the judge informed of any changes in the defendant's circumstances and to allow for sanctions, or even rewards.<sup>100</sup> Such hearings also help remind defendants of their continuing accountability to the court.<sup>101</sup>

#### Diversion Projects:

Finally, the lawyer may consider the option of diversion projects, such as the Mental Health Diversion Project in Calgary. Another similar project, instituted in Lethbridge, Alberta, involves those who suffer from Fetal Alcohol Syndrome. Lawyers can benefit through knowledge of these special types of programs which attempt to help those who may be unable to appreciate the consequences of their actions, and who need treatment, rather than incarceration, for adequate deterrence.<sup>102</sup>

#### *4. Other Considerations*

Though lawyers have a primary responsibility to their clients, therapeutic jurisprudence has relevance in considering how the legal process affects other courtroom participants, such as witnesses, as well. Often, mandated processes protect child witnesses or vulnerable ones from the anti-therapeutic effects

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<sup>100</sup> GOLDBERG, *supra* note 8, at 23 (also suggesting the significance of review hearings, even when all is going well, as way to contribute to the reduction of criminal activity by offering motivation and encouragement through positive reinforcement).

<sup>101</sup> *Id.*; VAN DE VEEN, *supra* note 6, at 98.

<sup>102</sup> VAN DE VEEN, *supra* note 6, at 95.

caused by certain distressing questioning.<sup>103</sup> Rather than focusing on the mental state of certain witnesses, however, it may help to instead focus on the lawyers. In protecting the rights of their clients, lawyers often disregard the rights of the witnesses.<sup>104</sup> Victims and witnesses remain comparatively powerless.

David Carson from the University of Southampton suggests how a lawyer can shield the witness from the many possible negative consequences caused as the result of questioning. For example, the use of "double negatives" is unnecessary and will likely only cause confusion.<sup>105</sup> Moreover, lawyers can strive to make sure that the witnesses understand the proposed questions, specifically by asking only one question at a time, and by keeping these questions concise.<sup>106</sup> The legal rights of one group, shouldn't trump the legal rights of another, but the traditional court system does not strive to protect the witnesses as holder of legal rights.<sup>107</sup> Therefore, the lawyers, in aiming towards a more therapeutic role, can take it upon themselves to protect such often unrecognizable rights.

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<sup>103</sup> DAVID CARSON, *Therapeutic Jurisprudence and Adversarial Injustice: Questioning Limits*, WESTERN CRIMINOLOGY REVIEW 4(2) 124, 131 (2003).

<sup>104</sup> *Id.* at 127, 131 (e.g., lawyers "are entitled to, and sometimes must, do more than just imply that the witness is mistaken. They must suggest, if not demonstrate, that the witness is or may be lying. They must challenge, tackle, and confront the witnesses, even if they are vulnerable children, because of the effect that their evidence must have.")

<sup>105</sup> *Id.* at 128.

<sup>106</sup> *Id.* at 128-29.

<sup>107</sup> *Id.* at 131.

Likewise, it is important that lawyers use language appropriate for the given witness's age, culture, and education. This practice is crucial when dealing with their clients as well. Low literacy is a widespread problem in Canada.<sup>108</sup> In fact, only about 20% of Canadians have literacy skills sufficient enough to fully understand complex legal documents and language, and even fewer have the necessary skills to deal with the criminal justice system itself.<sup>109</sup>

To deal with this problem, lawyers may assist their clients, as well as witnesses, by becoming aware of this literacy problem and learning ways to overcome it, rather than ignoring it. Such an effort would likely benefit everyone in the long run since the low literacy problem has been linked to miscarriages of justice and has often acted as a barrier to reducing crime and recidivism.<sup>110</sup> Clients often will hide their literacy problems, but lawyers can learn to identify the mental and physical signs so that they can proceed with care. They might even suggest literacy training as a part of the client's rehabilitation, especially since many treatment programs require a fair share of reading.<sup>111</sup>

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<sup>108</sup> SUSAN GOLDBERG, *Literacy in the Courtroom* (2003), available at <http://www.nji.ca/Public/documents/LiteracyGuideEv3.pdf>. at 3.

<sup>109</sup> *Id.* at 4; see also 3 (“the Canadian justice system is characterize by complex and highly specialized language and legal documents, which poses specific challenges to those with limited literacy”)

<sup>110</sup> GOLDBERG, *Literacy in the Courtroom*, *supra* note 108, at 7.

<sup>111</sup> *Id.* at 11 (literacy training as part of rehabilitation is especially useful in programs for job skills, anger management, abuse, etc, that require a lot of reading)

### Part III: Combating Criticism

The hardest, yet extremely crucial, factor in entrenching the therapeutic jurisprudence model into everyday practice, is selling the theory to currently practicing lawyers. With the judicial community already getting on board, however, it will likely only disserve the lawyers themselves to act as barriers and shun the practice. Not only can lawyers benefit individually from practicing therapeutically, but they will be in a position to better represent their clients as well.

Still, lawyers often disapprove of what they incorrectly assume is their new role of social worker. The National Judicial Institute's manual suggests, however, that there is no new role of social worker, or therapist, but rather, that therapeutic jurisprudence only asks that those in the legal community be aware that such problems do exist, to be cognizant of the various signs and symptoms, and to consider how they might overcome the negative effects, that they themselves have on people in the court.<sup>112</sup> Judge Schma, goes a step further in combating the criticism. Though some lawyers may object to their newly recognized responsibility, he says "it is a fact that 80-90 percent of the cases in most courts present with social problems," and that this "must require minimally that

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<sup>112</sup> GOLDBERG, *supra* note 8, at 3

those who advise, guide, and supervise these persons be aware of all their needs and address them properly.”<sup>113</sup>

Still, critics feel that the Therapeutic Jurisprudence movement is encouraging activities that have long been protected against. For example, there is concern over the increase in judicial discretion that this allows for, and the possibility for judges to become too intrusive.<sup>114</sup> Others feel that therapeutic jurisprudence is too idealistic. Those actually practicing under it, however, disagree. Judge Peter Anderson, in commenting on the importance of positive reinforcement through actions such as graduation ceremonies for successful treatment, said, “You may be thinking, as I did when a colleague of mine told me about this [type of] reward, this is too hokey! It is not. I have seen men who have done state prison and women who have been selling their bodies for years glow in response to positive recognition.”<sup>115</sup>

Criticism has also erupted over the broadening role of the defense counsel specifically. Concern is evident over the lawyers’ altering responsibilities from a more traditional role to a more therapeutic one, and the change away from the typical

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<sup>113</sup> Schma, *supra* note 3, at 26 ( adding that “Many legal problems remain unresolved because the personal issues that are intertwined with them are not addressed.”).

<sup>114</sup> BAKHT, *supra* note 22, at 35.

<sup>115</sup> BAKHT, *supra* note 22, at 31 (citing Peter Anderson, “Treatment with Teeth” (2003) American Prospect Special Report. Criminal Justice Reform, at 3).

manner of handling cases and providing legal advice.<sup>116</sup> "Old ways die hard,"<sup>117</sup> but proponents say that the defense counsel's role is vital when it comes to discussing with a client whether or not to participate in treatment oriented sentencing processes.<sup>118</sup> Furthermore, if the lawyers do not join in the reform process, judicial concerns may lead to an increase in rulings based upon the judges' own personal opinions.<sup>119</sup> As of now, judges recognize the lack of coordination between the lawyers or probation authorities and that directed resources are not adequately available to the problem solving processes.<sup>120</sup> Lawyers can play a viable role in helping to change that.

Therapeutic Jurisprudence proponents do not claim that this model is a miracle worker that solves each and every problem before the courts and within society. In the restorative justice context, even some of the most zealous advocates "recognize that there are some instances where only the punitive paradigm is appropriate."<sup>121</sup> It is important to recognize, however, that "the law cannot, realistically, be regarded as the panacea of all the problems faced by contemporary society. However it represents probably the best opportunity for members

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<sup>116</sup> VAN DE VEEN, *supra* note 6, at 87 (recognizing such arguments as that the traditional role of the lawyer is to protect the client's legal position, but that now the Defense Counsel has an equally collaborative role, to be concerned about the quality of life outcome to the client).

<sup>117</sup> Archiblad, *supra* note 50, at 90.

<sup>118</sup> VAN DE VEEN, *supra* note 6, at 87.

<sup>119</sup> *Id.*

<sup>120</sup> BAKHT, *supra* note 22, at 7.

<sup>121</sup> Archiblad, *supra* note 50, at 90.

of society to collectively achieve desired social objectives.”<sup>122</sup>  
In Canada especially, now is the time, following the acknowledgment and increased support by judges, for lawyers to accept the therapeutic jurisprudence model and to integrate it within their current practices.

#### PART IV: THE FUTURE

##### A. *PREVENTATIVE LAW*

Preventative law, now commonly used in association with Therapeutic Jurisprudence practices in America, is based on the idea that avoiding legal disputes altogether is inevitably better for the client since it is less costly, less time-consuming, and less stressful than engaging in litigation.<sup>123</sup> While too vast a subject to be thoroughly considered in this comment, it remains an alternative avenue for Canadian lawyers to take. Clients are increasingly retaining lawyers to conduct preventative law assessments of their affairs in order to minimize risk exposure.<sup>124</sup> It is also seen in the criminal area, where recognizing repetitive dangerous behavior and reaching rehabilitation can take on a preventative law role. Lawyers may seek to minimize the client’s stress and anxiety, or any other

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<sup>122</sup> GALL, *supra* note 1, at 662

<sup>123</sup> Bruce J. Winick, *Using Therapeutic Jurisprudence In Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 439 (2005).

<sup>124</sup> *Id.*

foreseeable negative emotional reaction which may be caused by litigation.<sup>125</sup>

#### B. THE ROLE OF LEGAL EDUCATION

Though some suggest that effective judges will practice in a therapeutic manner regardless of what model or system they operate under, there is now concern that a traditional legal background may alone be ineffective training for judges, and therefore likely lawyers, to be capable of fulfilling these new type of roles.<sup>126</sup> Whether or not any modification will take place, remains a question. In the meantime, though, educating law students about therapeutic jurisprudence principles and how to practice them, will help promote the future use of the model, and solve much of the present problem of resistance to change. Therapeutic Jurisprudence has not adopted a single normative framework, but lawyers need guidance when it comes to implementing these principles into practice in a meaningful way.<sup>127</sup> In America, the legal profession has placed a greater focus on the teaching of core skills and values in law schools in recent years. The American Bar Association has expanded the types of instruction that law schools must require of its

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<sup>125</sup> *Id.* at 441

<sup>126</sup> BAKHT, *supra* note 22, at 33 (noticing the unprecedented nature of this problem and that when new responsibilities and the need for analytical skills and legal knowledge, effective communication, and creative thinking arise, judges may need to have different training and qualifications).

<sup>127</sup> SUSAN L. BROOKS, *Practicing (And Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques Into Legal Education*, 17 ST. THOMAS L. REV. 513 (2005) (suggesting that social work offers a normative framework that is responsive to this inquiry and that core social work elements are not only compatible with, but greatly enhance, the teaching and practice of law).

students, such as instruction on alternative methods of dispute resolution, counseling, problem-solving, etc..<sup>128</sup>

Similarly, the training of lawyers in Canada is presently the subject of much change.<sup>129</sup> Since legal education in Canada is in the process of undergoing reform, now would be an effective time to start implementing requirements for therapeutic jurisprudence training in law schools. This restructuring might prove to be more difficult in Canada, however, where the legal profession is governed by law societies. There are 14 law societies, each separately governing its own laws, rules and regulations, for member lawyers to adhere to.<sup>130</sup> Additionally, each society's board of directors have many responsibilities, including the setting of professional standards for the legal profession.<sup>131</sup> Canada could greatly benefit if all the societies agreed on the importance of setting standards in part based on therapeutic principles, and the significance of teaching such in their law schools.

#### CONCLUSION

As the saying goes, "Even if you're on the right track, you will get run over if you just sit there." Canada has begun to make great advances in its law reform and in its recognition of

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<sup>128</sup> BRUCE J. WINICK, *Using Therapeutic Jurisprudence In Teaching Lawyering Skills*, *supra* note 123.

<sup>129</sup> GALL, *supra* note 1, at 645.

<sup>130</sup> Federation of Law Societies of Canada, *The Practice of Law in Canada*, available at, <http://www.flsc.ca/en/lawSocieties/lawSocieties.asp>

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

the value of therapeutic jurisprudence. With a significant amount of judges practicing and advocating the use of therapeutic jurisprudence in their courtrooms, lawyers can not only help move the process along, but can benefit from it as well.

Finally, it has been said while describing Canada, that "one could readily argue that change is endemic to our legal system, if not a fundamental and central characteristic of that system."<sup>132</sup> In fact, it would be of no surprise if the Canadian Bar Association added such therapeutic jurisprudence responsibilities into their Code of ethics at some future point. If lawyers are willing to put their skepticism aside and make the effort to learn these principles and apply them in their practices, they will be in a position to better represent their clients. In addition, they can start to feel more satisfied with their profession, help improve its negative public image, and in the process, improve the entire legal system. There is no time like the present.

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<sup>132</sup> GALL, *supra* note 1, at 617.