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## Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve

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# MAKING THE CASE: THERAPEUTIC JURISPRUDENCE AND PROBLEM-SOLVING PRACTICES POSITIVELY IMPACT CLIENTS, JUSTICE SYSTEMS AND COMMUNITIES THEY SERVE

CAIT CLARKE & JAMES NEUHARD<sup>1</sup>

## I. INTRODUCTION

Therapeutic Jurisprudence, which stems from the legal academy, and problem-solving lawyering, which stems from practitioners, are two fields benefiting from assimilation.<sup>2</sup> Increasingly, criminal defense advocates engage in interdisciplinary outreach, team-based advocacy, integrated service models of lawyering and creative arraignment advocacy to achieve diversion or alternatives to incarceration. The most effective sentencing work in the defender community incorporates the expertise and problem-

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1. James Neuhard is the Executive Director of the State Appellate Defender Office in Michigan. Cait Clarke is the Director of the National Defender Leadership Institute at the National Legal Aid and Defender Association in Washington, D.C. The authors would like to express their sincere appreciation for research assistance provided by Maureen James, NLADA associate attorney, and Jennifer Osborne, intern for the Defender Legal Services Division of NLADA. We are most grateful to David Wexler and Bruce Winick for not only discovering but actually reading our first joint article, *"From Day One": Who's in Control as Problem-Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11 (2004). We are so thankful that they tracked us down and invited us to participate in this important Symposium. Our hope is that this article will be the first of many collaborative efforts between practitioners/advocates who embrace whole-client representation and the founding fathers of the Therapeutic Jurisprudence movement. By uniting our perspectives, commitment and problem-solving skills, we can bring these important approaches to more equal justice advocates nationwide, which will ultimately help more individuals, families and communities thrive within and through our justice systems rather than being damaged by those systems.

2. David Wexler, one of the founding fathers of Therapeutic Jurisprudence, has written an excellent essay in this special issue exploring how the theory has moved into the world of practice for criminal defense lawyers. David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 741 (2005). As public defenders, we see that there are many ideas to embrace and develop in Professor Wexler's article that can improve the work of problem-solving, community-oriented defenders. The authors work with institutional public defense programs including assigned counsel, contract attorneys and public defenders. It will be important to think strategically to develop training and mentoring opportunities so that Therapeutic Jurisprudence theories infuse defense practices, particularly to benefit socio-economically deprived individuals and communities.

solving approaches from other professions such as mental health, social work, and criminology.<sup>3</sup> Defense practitioners and civil legal aid lawyers<sup>4</sup> who integrate other professional expertise into their advocacy work have been moving towards an expanded notion of what it means to “provide the assistance of counsel.”<sup>5</sup> Within the criminal justice context, these expanded approaches to law practice share the underlying values of using the legal process to address problems in people’s lives and reduce recidivism by helping individuals become healthy, peaceful and productive members of a community. These practices focused on providing integrated professional services to accused persons are called “problem-solving lawyering,” “holistic advocacy,” or “integrated service models.” An acceptable umbrella term for these practices is “whole client representation,” which is broader than Therapeutic Jurisprudence. Regardless of what one calls these practices, all lawyers, especially indigent defense practitioners and leaders of public defense institutions, should know about Therapeutic Jurisprudence because it is an important component of whole-client representation.<sup>6</sup>

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3. “Problem-solving lawyering” in this essay will be used as an umbrella term that includes lawyers who think and practice law in a way that is more expansive than traditional case representation. These lawyers provide integrated services to clients; they promote collaboration between civil legal aid and public defense practitioners to help clients and communities; and they rely on other professionals such as social workers, mental health experts and mitigation specialists to address accused person’s underlying problems. The theories of Therapeutic Jurisprudence and problem-solving lawyering are also closely linked to the underlying values of restorative justice. As a threshold matter, however, terms like “problem-solving” and “therapeutic” make a significant portion of the defense bar uncomfortable. There are pockets of innovative defender leaders across the country rethinking their program structures and redefining the scope of their representation towards team-based representation models. Some defenders prefer to call these wrap-around services or problem-solving approaches an “integrated services” model or “whole-client representation” model.

4. See, e.g., Penda Hair, *Louder Than Words: Lawyers, Communities and the Struggle for Justice*, (March 2001), available at [www.rockfound.org](http://www.rockfound.org) (monograph produced for the Rockefeller Foundation) (last visited Mar. 7, 2005). This report highlights several community and problem-solving lawyering approaches in the civil legal aid community. Projects include: racial diversity in Texas; client-centered lawyering for garment workers in Los Angeles; redistricting campaign in Mississippi; Los Angeles community members’ effort to secure bus service; and community lawyering as a way to deal effectively with labor disputes, land disputes. *Id.* at 17, 41, 63, 85, 105, 123.

5. U.S. CONST. amend. VI. Most defense attorneys embrace some or all of the goals of these problem-solving approaches and Therapeutic Jurisprudence because these approaches provide access to resources and professional help that normally would not be available to indigent accused persons, guilty defendants, prisoners reentering society, poor communities, and state justice systems as a whole.

6. Despite the initially jarring sound of ‘therapeutic,’ the term does remind lawyers to cling to an ethic of care and to be sensitive to disciplines and professions such as mental health, social work, and criminology. The Therapeutic Jurisprudence literature tries to suggest ways on *how* one can provide ‘whole client representation’ in many contexts including: how the law can

Various client-based practices that began as defense strategies to gain lower bonds, secure probation, or avoid the death sentence are congealing into a new philosophy of sentencing. For some programs, these expanded notions of providing ‘counsel’ are fundamentally changing the focus of some defender programs and expanding attorneys’ scope of representation. Sentencing advocates in capital cases, social worker divisions in defender programs, diversion programs, conditional bonds, and other team-based representation models (once individual efforts for select clients) have become an integral part of a growing number of defender organizations. Many programs have internal procedures designed to release clients from jail on bond or secure lower sentences. The goal is to impact the client beyond the criminal case facts and potentially increase the client’s ability to avoid future criminal conduct. From bond through sentencing, creative public defense programs are trying to effectively meet the interests and needs of those they represent. To sustain and broaden this movement, it is essential that law schools do a better job of training students in the skills that will be needed. One effective approach is through a law school criminal defense clinical program that teaches students the Therapeutic Jurisprudence and problem-solving skills that increasingly are becoming essential for quality criminal lawyering.

From the perspective of criminal defense lawyers, there are shared values between the world of Therapeutic Jurisprudence and problem-solving lawyering practices.<sup>7</sup> Similar to the values of the restorative justice

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increase compliance with release conditions; how clients can develop an appreciation of their high risk situations; and how the law can reinforce client efforts at desisting from criminal behavior. In other words, Therapeutic Jurisprudence, and its extensive and growing literature, should be an essential ingredient of the education and continuing education of whole client representation lawyers. Lawyers need, therefore, to be ‘desensitized’ to the use of the term, rather than shocked by it. The job of academics and leaders in the public defense field is to recognize the importance of the literature, which is kept more or less up to date in the Therapeutic Jurisprudence bibliography of the International Therapeutic Jurisprudence Network website: <http://www.therapeuticjurisprudence.org>, and also at the Cumulative Bibliography, at (last visited Mar. 8, 2005).

7. We write this essay from the perspective of one group of criminal justice stakeholders—that of criminal defense providers. For a more comprehensive explanation of problem-solving defense lawyering see, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001); Mark Moore, Michael Judge, Carlos Martinez, & Leonard Noisette, *The Best Defense is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57 (2004) (conveying a published collection of papers from Harvard University and BJA’s Executive Session on Public Defense, which explored the theoretical and practical impact of problem-solving lawyering, community justice initiatives, and ways that defender practitioners can impact public policymaking and law reform more effectively).

movement,<sup>8</sup> the aim is to provide resources and expertise beyond traditional legal advocacy skills in order to address a person's recurring problems such as addiction, joblessness, family crises, education needs and mental illness. Ultimately, the goal is to stabilize communities using the legal process as opposed to destabilizing communities caused by recurring social ills, increased arrests, and high incarceration rates even when crime rates are dropping.<sup>9</sup>

These approaches will spread most effectively through the ongoing education of clinicians, academicians, law students and criminal defense practitioners. To achieve the largest impact, it is important to focus on institutional defenders. These defender programs include public defender offices, conflict counsel programs and assigned counsel programs. Defender programs provide the most fertile ground for Therapeutic Jurisprudence and problem-solving or whole client representation approaches to take root inside our local, state and federal justice systems. Two primary hurdles, however, must be overcome, which are: 1) the need to change the culture inside public defense programs towards client-centered advocacy so that traditional zealous trial warriors understand the benefit of these practices to their individual clients; and 2) the need for data collection to show these approaches have a measurable impact on individuals and on a community. This article discusses a few defender offices that are now practicing client-centered representation. It explores how the mission and design of the office attempts not only to provide zealous traditional advocacy for their client's cases, but also provide programs that impact their client's lives.

What is becoming known as Therapeutic Jurisprudence or client-centered representation is new to most line-lawyers or leaders of traditional public defense programs. However, many of these practices have been incorporated into the daily practices within defender offices for decades. Strategies that secure better bonds or sentences lead many public defense programs to seek early entry into the jails and to verify client information. Efforts to learn about "beds" for their clients that were unknown to swamped probation programs have lead offices and individual defenders to

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8. Akin to community problem-solving and Therapeutic Jurisprudence theories, restorative justice involves the victim, offender and community reaching reconciliation. Often defined as the opposite of retributive justice, restorative justice defines crime as a violation of people and relationships as opposed to a violation of the state. See <http://www.websterdictionary.org/definition/Restorative%20justice> (last visited Mar. 8, 2005); Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 *FORDHAM URB. L.J.* 897 (2003).

9. Fox Butterfield, *Despite Drop in Crime, an Increase in Inmates*, N.Y. TIMES, Nov. 8, 2004, at A14.

actively participate and create alternative treatment programs. Overworked offices hire less expensive sentencing specialists or have their investigators develop “plans” for their clients at sentencing.

We will discuss one office that has been doing just this for some time and has a track record on the more traditional statistics used by policy makers to measure what they believe is the test of whether a program is working. We look at data gathered by the Michigan Department of Corrections, which tracks how many defendants are sent to prison, how many receive jail sentences, and from those who would have gone to prison, how many failed on probation. Before looking more closely at this data, it is important to consider briefly a few components of defender programs that engage in problem-solving lawyering and embrace the fundamentals of Therapeutic Jurisprudence.

#### THERAPEUTIC JURISPRUDENCE AS A PART OF PROBLEM-SOLVING DEFENDER ORGANIZATIONS

The Neighborhood Defender Service of Harlem (“NDS”), one of the first integrated service public defender programs, has a mission that makes theories of Therapeutic Jurisprudence into reality;

We are committed to eliminating crime in our community by addressing the problems that bring our clients into court in the first place. This is made possible by an innovation created by NDS—holistic team defense. We involve civil and criminal attorneys, social workers, investigators, paralegals, and college and law school interns in the aggressive defense of our clients. We are dedicated to our mission—to make our constitutional promise of justice a reality for those farthest from its reach. NDS is organized differently from traditional defender offices, which reflects its broadened role in the community it serves. Its services go beyond direct legal representation, to helping clients avoid future contact with the criminal justice system.<sup>10</sup>

Key structural factors that make NDS a highly successful public defense program that protects each client’s rights through zealous advocacy and problem-solving is its location in the Harlem community, early intervention, team defense, and civil representation and education programs offered in the community.<sup>11</sup>

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10. NDS, *Mission Statement*, at <http://www.ndsny.org/mission.htm> (providing the NDS mission statement in full) (last visited Apr. 29, 2005).

11. *Id.*

Similarly, the Georgia Justice Project provides public defense using a therapeutic model. New clients sign a contract with their defense lawyer outlining their obligations, which may include attending counseling, enrolling in a drug rehabilitation clinic or pursuing their GED.<sup>12</sup> For those clients who are incarcerated, members of the Georgia Justice Project visit them in the penitentiary and are available when they return home. The GJP provides many with jobs working at the project's New Horizons Landscaping Company. Innovative public defense practitioners hope to see problem-solving approaches like this thrive *so long as each accused person's right to zealous representation remains a fundamental tenet of what it means to provide the assistance of counsel*.<sup>13</sup>

Although this "movement" began in the academy, by linking legal practices to mental health approaches, there are an increasing number of criminal defense lawyers who conceive of their role as counsel more broadly. The Bronx Defenders, one such example, offers their clients a team of staff support that includes an attorney, investigators, a social worker, and if necessary, a civil attorney, administrative support and community developers. The Bronx Defenders "is committed to working with [its] clients, their families, and their communities to address the problems that drive many of [its] clients into the criminal justice system."<sup>14</sup>

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12. Bill Rankin, *Unusual Legal Aid Group Helps Turn Lives Around*, ATLANTA JOURNAL AND CONSTITUTION, Dec. 2, 2002, at A1; Douglas Ammar, *Georgia Justice Project Turns Lives Around Through Aggressive Defense, Holistic Relationships*, 28 CHAMPION 50 (Jan./Feb. 2004). Contracting with clients is practiced by individual defense lawyers and promoted by Therapeutic Jurisprudence experts. See Symposium, *Therapeutic Jurisprudence and Criminal Law*, 38 CRIM. L. BULL. 199 et seq. (Mar.-Apr. 2002).

13. Legitimate theories and innovative practices are always important to explore, but what really counts is whether they take hold in professional practice to improve justice for all. The approaches advocated in Therapeutic Jurisprudence, problem-solving justice, and community-oriented lawyering generally make sense to criminal defense lawyers, but most are legitimately concerned that the protections of the adversarial system will be lost if too much emphasis is placed on problem-solving rather than zealous advocacy. One of the consensus points articulated at the end of the BJA/Harvard Executive Session on Public Defense (ESPD) was that in defining the role of defenders "[z]ealous representation to individual clients is an essential base or threshold, but expanding the role is also necessary." Cait Clarke, *Introduction to The Executive Session on Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 3, 5 (2004). ESPD members defined this expanded role to include public education, holistic advocacy, and interdisciplinary outreach. *Id.*

14. The Bronx Defenders' official website provides the following information:

Created and staffed by advocates with a broad vision of public defense work, The Bronx Defenders views clients not as "cases," but as whole people: caring parents, hard workers, recent immigrants, native New Yorkers, and students with hope for the future. Our staff of attorneys, social workers, investigators, administrative support, and community developers is committed to working with our clients, their families, and their communities to address the problems that drive many of our clients into the criminal justice system - challenges like addiction, mental illness, inadequate education, lack of

On a practical level, retained criminal defense attorneys began the practice of Therapeutic Jurisprudence long ago. They aggressively used treatment for their client as grounds for obtaining favorable release conditions, getting charges dismissed or getting their client diverted out of the system. As a tactical strategy, they used it to make their client more appealing, more alert and “better looking” at trial. When necessary, this treatment often significantly mitigated the sentence. Public defender programs came to holistic sentencing along a slightly different path. Early on they began to use social workers and sentencing specialists in capital cases to ease the pressure of large caseloads and to secure better sentencing plans for their clients. With the growth of problem-solving courts,<sup>15</sup> particularly drug courts,<sup>16</sup> and increased attention to sentencing, defenders began to recognize the role effective treatment could play in helping a client’s whole life, not just in getting this client a lower sentence in one case.

Effective treatment could stop the cycle of failure and their offices could play a significant role in making these programs work far better than they ever had before. Some leaders of public defense programs realized that community connections are essential to obtaining non-legal services for their clients.<sup>17</sup> They understand that increased community involvement

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access to social support services, and severe family conflict.

The Bronx Defenders, *Welcome to the Bronx Defenders: Introducing Ourselves to the Community*, at <http://www.bronxdefenders.org/home> (last visited Mar. 14, 2005).

15. The American Council of Chief Defenders (ACCD) proposes crucial protections for both accused persons and attorneys against malpractice. For example, the “Ten Tenets” of the ACCD mandate that the accused individual’s participation in the program be voluntary, that guilty pleas not operate as prerequisites to participation in treatment court, and that the accused shall be able to withdraw from a program at any time. See National Legal Aid & Defenders Assoc., *American Council of Chief Defenders (ACCD) Ten Tenets of Fair and Effective Problem-Solving Courts*, available at <http://www.nlada.org/DMS/Documents/1001792198.75/Ten%20Tenets%20of%20Fair%20and%20Effective%20Problem%20Solving%20Courts--Final%20Version.doc> (last visited Mar. 14, 2005).

16. In 22 states at least half of the counties have drug courts in the planning or operational stages. American University School of Public Affairs, *OJP Drug Court Clearinghouse and Technical Assistance Project: Summary of Drug Court Activity by State and County* (Sept. 2, 2004), available at [http://spa.american.edu/justice/publications/us\\_drugcourts.pdf](http://spa.american.edu/justice/publications/us_drugcourts.pdf) (last visited April 29, 2005) [hereinafter *OJP*].

17. See generally Cait Clarke, *Community Defenders in the 21<sup>st</sup> Century: Building on a Tradition of Problem-Solving for Clients, Families and Needy Communities*, 49(1) CMTY. PROSECUTION JAN. 2001, at 20, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab4901.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4901.pdf) (last visited April 29, 2005) (providing a brief overview of the many innovative community defense programs nationwide). Innovative public defense leaders build relationships with an array of community leaders and program because these community resources can provide assistance to their clients beyond what a traditional public defender office can provide. Those who cultivate community relationships outside of the courts recognize how important it is to be tapped into community concerns such as racial profiling or mandatory



and leadership connections serve three purposes: 1) to access more community-based social services and other resources; 2) to educate the public about what public defenders do; and 3) to build greater 'good will' with communities to assist with political support when needed. Full-time public defenders in particular are positioned well to embrace problem-solving lawyering and therapeutic approaches.

## II. PUBLIC DEFENSE PROGRAMS ARE WELL-SITUATED TO PROVIDE PROBLEM-SOLVING SERVICES AND ENGAGE THERAPEUTIC JURISPRUDENCE

There are innovative public defense offices that hire social workers or sentencing advocates as integral team members for representing clients in need of services beyond a criminal case. These lawyers try to problem-solve on behalf of their clients in such areas such as finding substance abuse programs, mental health treatment, job counseling, and community support groups. Professor Bruce Winick, a "founding father" of Therapeutic Jurisprudence, has spelled out how defense lawyers can use advances in offender rehabilitation to design post-offense rehabilitative programs for their clients and use their progress in such programs as grounds for a better plea deal, probation, or a lighter sentence.<sup>18</sup>

Therapeutic Jurisprudence assists defense lawyers in preparing for sensitive conversations with their clients about the need for and value of participating in rehabilitative programs.<sup>19</sup> Overwhelming numbers of cases make these sensitive conversations difficult, but more importantly, defenders are generally not trained to deal with psychological resistance and denial on the part of the client. Therapeutic Jurisprudence approaches can and should be a part of any criminal justice clinics' curriculum as well as public defense training programs nationwide. Particularly with the recent Supreme Court's decision in *Wiggins*, affirming the role of mitigation specialists in capital cases, it is important to note that sentencing

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minimum sentences as well as the need to educate the community about the important role of public defense in justice systems.

18. Bruce J. Winick, *Therapeutic Jurisprudence and Preventive Law's Transformative Potential for Particular Areas of Legal Practice: Criminal Law: Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1082 (1999) ("reconceptualiz[ing] the role of the defense lawyer at plea bargaining and sentencing," exploring how "post-offense rehabilitation [should be] a ground for a downward departure under [the Federal] [S]entencing [G]uidelines" and how, when insufficient time exists to demonstrate substantial progress in rehabilitation, defense lawyers can seek – and judges can grant – deferred sentencing or postponement of a sentencing decision to enable a defendant to demonstrate rehabilitation).

19. *Id.* at 1037-38.

and mitigation trainings offered nationwide by the National Association of Sentencing Advocates ("NASA") are grounded in core principles of Therapeutic Jurisprudence.<sup>20</sup> The same applies for non-capital cases. The lead mitigation specialist in the Federal Defender program in Chicago and active NASA board member, James Tibensky, writes that in non-capital cases:

[o]ne of the ways in which a sentencing advocate differs from a traditional investigator is our emphasis on holistic and clinical interviews with problem-solving recommendations. A clinical interview uses open-ended questions that lead to more questions and to the type of information that a standard informational interview never reaches . . . . Problem-solving advocacy uses the perspective that the offense represents a problem for society, for the community, for the victim, for the court and for the defendant. The more of those constituencies that can benefit from the sentence, the better the chances that the mitigation work will succeed and the judge will follow the sentence recommendation of the defense . . . . The advocate often must explain to the court the effects of prejudice, poverty, mental illness and family influences on the client. This requires a wide range of experience and training on the part of the advocate. He or she needs to know about mental health, substance abuse, family systems, physiology, community and professional resources, interviewing techniques, persuasive writing, testifying in court, record finding and how to find the necessary experts for evaluations.<sup>21</sup>

Many sentencing advocates and leaders within the NASA have used and trained on motivational interviewing techniques for criminal defense social workers, investigators, mitigation specialists, therapists, paralegals and defense lawyers.<sup>22</sup> Institutional public defenders are perhaps the best place to ensure that whole-client representation and Therapeutic Jurisprudence principles are practiced and improved upon over time with

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20. See generally *Wiggins v. Smith*, 539 U.S. 510 (2003).

21. James Tibensky, *What a Sentencing Advocate Can Do in a Non-Capital Case*, CORNERSTONE, Fall 2004, at 11. James Tibensky, the mitigation specialist in the Federal Defender program in Chicago has been a leader in promoting motivational interviewing techniques in the sentencing advocate and public defense communities for years.

22. See Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM L. BULL. 225, (2002) (discussing how motivational interviewing explores the kinds of skills that defense lawyers need in these new roles and that clinical programs can help to teach them); see also Motivational Interviewing Network of Trainers (MINT), *Motivational Interviewing*, at <http://motivationalinterview.org> (last visited Mar. 14, 2005). See generally WILLIAM R. MILLER ET AL., *MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE FOR CHANGE* (The Guilford Press 2d ed. 2002); JAMES O. PROCHASKA ET AL., *CHANGING FOR GOOD: THE REVOLUTIONARY PROGRAM THAT EXPLAINS THE SIX STAGES OF CHANGE AND TEACHES YOU HOW TO FREE YOURSELF FROM BAD HABITS* (WILLIAM MORROW & CO. 1994).

an effective evaluation process in place. One public defense program has moved from a very traditional public defense office to an integrated services model. The Knox County Tennessee Public Defender Community Law Office ("CLO") offers zealous trial advocacy in cases ranging from misdemeanors to death penalty cases; however, an entire wing of the defender offices is dedicated to therapeutic social services that clients can voluntarily join.<sup>23</sup> The CLO provides volunteer services that are said to benefit the community and instill a sense of belonging for their clients.<sup>24</sup> In a therapeutic mode, clients have access to mental health services, behavioral health, alcohol and drug treatment, job counseling, literacy, and even life skills classes, including budgeting and parenting skills.<sup>25</sup> The CLO also provides a unique "Communications Through Art" program for youth from age 11-19 that includes watercolor, painting, pottery, and creative writing classes along with field trips to museums and live performances.<sup>26</sup> From a civil legal services approach, the CLO assists their public defense clients with issues such as employment, immigration, domestic relations, social security claims, on-the-job injuries and aid in obtaining valid identification, such as Social Security cards, drivers' licenses, or birth certificates.

Other public defense providers are perhaps unknowingly promoting Therapeutic Jurisprudence by working more closely with sentencing advocate professionals, community corrections programs, and empowering lawyers, family members and community members to become active in progressive sentencing advocacy.<sup>27</sup> Defenders who think in terms of

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23. The Knox County Public Defender Community Law Office ("CLO") has a mission of providing zealous trial representation, but also a social service mission to promote Therapeutic Jurisprudence principles to help clients and the Tennessee community they serve.

The CLO's Social Service Component is dedicated to working directly with the client to design a life skills plan of action. This plan offers clients the opportunity to address individual needs and to utilize their skills and talents to generate personal and community value. Rather than dictating a direction for the future, the CLO empowers the client to play an active role in shaping his or her own personal goals.

Knox County Public Defender Community Law Office, *Social Services: Providing a Framework to Build Upon*, at <http://www.pdknox.org/2Social.htm> (last visited Mar. 14, 2005) [*Providing a Framework*].

24. Knox County Public Defender Community Law Office, *Community Outreach: Developing a Sense of Belonging*, at <http://www.pdknox.org/3community.htm> (last visited Mar. 14, 2005).

25. *Providing a Framework*, *supra* note 23 (including information on social services provided by the Knox County Public Defender Community Law Office).

26. Knox County Public Defender Community Law Office, *Communication Through Art*, at <http://www.pdknox.org/calendar/ArtsProgram.htm> (last visited Mar. 14, 2005).

27. Therapeutic Jurisprudence and restorative justice scholarship explores attributes of a good treatment court from a more global perspective. Restorative justice explains the need for

problem-solving observe that a criminal case can provide an opportunity, with the client's permission, to address underlying problems that brought the person into the criminal courts. This mirrors the thinking of some judicial leaders of the Therapeutic Jurisprudence movement like Judge Peggy Fulton and Judge William G. Schma who explain that "[t]he idea behind Therapeutic Jurisprudence is that since the experience of coming before our courts is having therapeutic consequences for defendants, our courts should capitalize on the moment when a person is brought before us and use it as a starting point for improving the defendant's overall lifestyle."<sup>28</sup> Creative defenders and public defense leaders understand the importance of early case entry then using the post-arrest interviews and plea negotiations as opportunities to encourage clients to engage in problem-solving activities or rehabilitation.<sup>29</sup>

#### A. DEFENDERS HAVE A SPECIAL CONNECTION TO CLIENTS AND COMMUNITIES FOR THERAPEUTIC JURISPRUDENCE

Public defense programs play a critical role in advancing the problem-solving, therapeutic movement because they have special connections to their clients and the indigent communities they serve. The attorney-client privilege means that defense lawyers are uniquely situated for special communications and information-sharing opportunities. They bring an entirely different and crucial perspective to the problem-solving, Therapeutic Jurisprudence movements. Public defenders' daily work brings them into close proximity with the jails, court personnel, probation and parole, and most importantly, constant access to their clients and their families who often live in socio-economically deprived communities. Professional public defenders have experience at creatively leveraging and allocating social service resources, which generally private attorneys or

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the changes in the criminal justice system. Innovative programs that promote the community's role in case adjudication are the best place to explore the need for convergence between Therapeutic Jurisprudence, community problem-solving, and restorative justice. For example, Community Leadership for Justice, a new collaboration between The Center for Community Alternatives, The Sentencing Project, and the National Association of Sentencing Advocates (NASA), seeks to transform the framework that governs sentencing advocacy. Much like the theories of Therapeutic Jurisprudence, community problem-solving, and restorative justice, this program plans to empower family members and neighbors to become active participants in progressive sentencing advocacy.

28. The Honorable Peggy Fulton Hora & the Honorable William G. Schma, *Therapeutic Jurisprudence*, JUDICATURE, July-Aug. 1998, at 8, 9.

29. Winick, *supra* note 18, at 1049, 1059 (discussing that pretrial release and attempts to defer sentence can be valuable problem-solving opportunities and that defenders can use this time to encourage the client to engage in post-arrest rehabilitation).

contractors cannot perform on a larger scale. Thus, defenders need to be full and equal partners in any court reform effort (such as the creation of problem-solving courts) or innovative justice programs like those of Therapeutic Jurisprudence or problem-solving justice initiatives.

A cultural shift towards Therapeutic Jurisprudence and problem-solving has already occurred in one area—the spread of problem-solving or specialized courts.<sup>30</sup> Data collection and analysis has been critical in shifting cultural attitudes about these specialized courts. Drug courts now number over 1100 and mental health courts are increasing in numbers.<sup>31</sup> The data, although not conclusive for all analysts, has been generally persuasive – persuasive enough to cause a cultural shift among judges, prosecutors, a growing number of defender offices and the U.S. Department of Justice, which promotes problem-solving court development nationwide. Data has been a crucial link to the spread of these courts. The National Drug Court Institute's data collection efforts support findings that drug courts decrease recidivism, save money and provide affordable treatment.<sup>32</sup> A number of state and local studies have found that drug courts are more cost effective than conventional adjudication.<sup>33</sup> On the other hand, a 2000 study by the Vera Institute reports that the effect of drug courts on jail and prison costs are unclear. The authors suggest that a more accurate picture of bed savings would require more research into whether drug courts are enrolling offenders actually bound for jail or prison and the effect of using detention to punish noncompliant program participants. Even if the outcomes are unclear, positive signs reported from data gathered by Institutes, the academy and non-profit centers like the Center

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30. For a more thorough discussion of these emerging problem-solving court models, see generally *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winick & David B. Wexler eds., Carolina Acad. Press 2003).

31. The National Drug Court Institute ("NDCI") reports that there are "1,183 drug courts currently in operation . . . [with] 414 actively involved in the planning process in 2003 . . . and another 184 jurisdictions accepted into the . . . BJA[.]" C. WEST HUDDLETON, III ET AL., 1(1) NAT'L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 1 (National Drug Court Institute May 2004), available at <http://www.ndci.org/publications/paintingcurrentpicture.pdf> (last visited April 29, 2005). The BJA has a Mental Health Courts Program that assists states through grants and technical assistance to develop mental health courts nationally. See Bureau of Justice Assistance, *Mental Health Courts*, at <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html> (last visited Mar. 14, 2005). BJA selected the Council of State Governments (CSG), coordinator of the Consensus Project, as the technical assistance provider for the BJA Mental Health Courts Grant Program. See Criminal Justice/Mental Health Consensus Project, *BJA Mental Health Courts Program*, at <http://www.consensusproject.org/projects/BJA-MHCP/> (last visited Mar. 14, 2005).

32. Huddleton, III et al., *supra* note 31, at 2.

33. *Id.*

for Court Innovation feed the movement.

## B. WHAT IS NEEDED FOR DEFENDERS TO ENGAGE THERAPEUTIC JURISPRUDENCE AND ADOPT PROBLEM-SOLVING PRACTICES?

There are cultural barriers to an expanded notion of what it means to provide counsel in a therapeutic mode inside defender programs; and, perhaps most importantly, there is simply not enough data to show it works. Without the data, there is not enough financial or political support to expand the role of indigent defense providers to engage in creative problem-solving or therapeutic approaches that reach beyond providing a zealous defense to treating the whole client in a way that benefits the client, the system, and the community. Proponents need a strategy to use this data to educate and promote a cultural shift among all the stakeholders in a criminal justice system.<sup>34</sup> Community-oriented, problem-solving defenders, such as the Bronx Defenders, are keenly aware of the need for cultural shifts both inside a defender program and in the community, and have written about ways to shift that culture.<sup>35</sup> Educating future lawyers, judges, and lawmakers about problem-solving approaches to defense practice and Therapeutic Jurisprudence, particularly through law clinics, is also an important part of this strategy to cause a cultural shift.

Data showing reduced recidivism, lower probation, and parole failure rates, greater access to bond, shorter sentences, and less jail and prison time will be necessary to engage defenders and other stakeholders in these approaches that make sense, but are hard to execute.

Defender programs need a commitment that shifts resources away from incarceration and towards the front end to further these therapeutic approaches on behalf of their clients. Measuring success and cost-savings, therefore, is as important as implementing a broader education campaign. There is some work underway to measure outcomes for defender programs that provide holistic representation. For example, the Georgia Justice

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34. By a "cultural shift" we mean changing the knowledge, skills, attitudes and beliefs of public defense practitioners, other criminal justice stakeholders, legislators, funding agents and community leaders so that they embrace problem-solving approaches and Therapeutic Jurisprudence theories.

35. See Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123 (2004).

Changing the culture of a public defender office is nothing more than privileging the values of those who care and making them universal. It takes commitment and it takes time, but it is good for clients, and underserved communities, and even good for public defenders. Creating a client-centered public defender office can change the way you see the work, and ultimately, in some little way, perhaps the world.

*Id.* at 133.

Project reports that their,

lawyers and social workers have been using this approach for over 17 years and it works. The recidivism rate for GJP clients is 18.8% compared to a national average of over 60%. The incarceration rate for GJP clients is 7.30% compared to an average of 71.30% in a study of urban public defender offices.<sup>36</sup>

The National Legal Aid and Defender Association ("NLADA") is currently engaged in a pilot project to collect and analyze data from a holistic defender program in Atlanta, Georgia. The Holistic and Community-Oriented Defender ("HCOD") project is working with the Fulton County Conflict Defender ("FCCD") to study the impact of their publicly-licensed clinical social worker staff that works with clients on substance abuse, mental disability, and homelessness. The data collection is underway and the report will be published in 2005.<sup>37</sup> The goal of HCOD is to study whether FCCD's therapeutic services and structural approaches to indigent defense will achieve both significantly better case outcomes for clients and significant savings of public funding compared to traditional case dispositions (i.e., incarceration).

Another program, the Rhode Island Public Defender office, began a holistic community outreach program called the Defender Community Advocacy Program ("DCAP"), which focuses primarily on court intervention at the arraignment stage. The Rhode Island public defenders work with social workers, investigators, intake specialists, the office's Community Outreach Liaison and administrative support staff to provide assessments and alternatives to incarceration at the arraignment stage. The Rhode Island program has begun to see dramatic results for their clients and have begun measuring the cost savings. Data collected from March 2004 through September 2004 shows that due to reduced prison time, they believe it has saved the taxpayers over four million dollars in prison costs along with court days saved that would have been held for pre-trial hearings and violations of probation.<sup>38</sup>

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36. Georgia Justice Project, *GJP Approach*, at <http://www.gjp.org/about> (last visited Mar. 29, 2005). It is worth noting, however, they "do not take the following cases except under exceptional circumstances: drug trafficking, domestic violence, sex crimes, federal cases, child abuse, cases outside Fulton or Dekalb Counties, vehicle violations, civil cases." *Id.*

37. The HCOD report will be published on the NLADA web site at <http://www.nlada.org>. (forthcoming) (on file with authors). Dr. David Meyer, of the University of Southern California, and David Carroll, director of Research and Evaluation at NLADA will author the much-awaited HCOD report.

38. DCAP's preliminary data for this time period shows 4.4 million in prison dollars saved along with 1,027 dates in court saved. Peter Wells, Presentation at the National Legal Aid and Defender Association's Annual Conference in Wash., D.C., *Taking Public Defense to the Streets*:

It is critical to the successful integration of these ideas into traditional criminal defense practices to gather data demonstrating positive outcomes and convincing the key players that it is worth the time and energy to pursue problem-solving or Therapeutic Jurisprudence practices.

### C. DEFENDERS CAN ADOPT PROCEDURES TO IMPACT CLIENT OUTCOMES

Positive data may promote a cultural shift inside different justice sectors so that more professionals and community members favor these approaches – and eventually become advocates for increased financial and political support for implementing problem-solving practices.<sup>39</sup> For example, good defense lawyers understand the value of getting one's client out of jail as fast as possible because of the impact incarceration has on case outcomes – not to mention the social impact such as employment, family life demands, collateral consequences, and community pressures. In a 1992 study of the Nation's seventy-five most populous counties, the Bureau of Justice Statistics found that defendants who were released before trial had lower conviction rates (61%) than those who were detained (79%).<sup>40</sup> Detained convicted defendants "were more than twice as likely as released defendants to receive a state prison sentence."<sup>41</sup> Traditional defender program leaders who are aware of these statistics can restructure their office procedures to ensure that pre-trial release is a priority. It does not have to fall entirely on lawyers' shoulders either. Systems can be developed or vastly improved through working with the locals criminal justice system to ensure that accurate, client based information is gathered, by the defender office, or through other system agents and presented to magistrates, diversion programs, and pre-trial services from the day of arrest forward. Early intervention of social workers, paralegals,

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*Working with Client Communities Outside the Courtroom* (Dec. 2, 2004) (the Rhode Island Public Defender Program's Community Outreach Liaison Statistical breakdown of data is on file with author, Cait Clarke).

39. Sectors ripe for this cultural shift include public defense, prosecution, judiciary, court administration, legislators, policymakers, parole and probation, pretrial services, corrections and funding agents.

40. Brian J. Reeves & Jacob Perez, *National Pretrial Reporting Program: Pretrial Release of Felony Defendants*, 1992, BUREAU OF JUSTICE STATISTICS BULL., Nov. 1994, at 14, Table 18, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/nprp92.pdf> (last visited Mar. 30, 2005). This disparity widens in the context of felony defendants. Detained felony defendants were convicted at a rate of 70%, compared to 45% for released defendants. *Id.*

41. *Id.* at Table 19. Upon conviction, 87% of detained defendants were sentenced to incarceration while only 51% of the convicted released defendants were sentenced to incarceration. Among detained defendants, 67% were convicted and sentenced to incarceration. Only 29% of released defendants were convicted and sentenced to incarceration. *Id.* (Statistics summarized in Figure 4).



investigators, mental health experts or mitigation specialists, for example, can assist trial lawyers in getting their clients out of jail pre-trial thereby having a direct impact on the likelihood of a sentence of imprisonment. This also increases the likelihood that the client may be open to social services in a therapeutic environment.

Examples of defense practices more aligned with Therapeutic Jurisprudence values are those whose defenders are provided with the opportunity for early case entry, adequate time to meet with and counsel their clients privately, access to pre-trial services or diversion alternatives early-on, and entrée to treatment programs so they can encourage their clients to take advantage of these resources. All these defender-related factors can have a positive impact on the way accused persons are treated, (i.e., fairly and with dignity) while fostering efficiency and cost-savings for a justice system.

### III. CAN TRADITIONAL DEFENDER PROGRAMS TAKE STEPS TO IMPROVE CLIENT OUTCOMES?

The real challenge is that most public defense programs cannot become wholly integrated service providers like the Georgia Justice Project, the Neighborhood Defender Service of Harlem, the Bronx Defenders, the Community Law Office in Knox County, highlighted above, or the Washtenaw Public Defender Office, discussed below. Legitimate theories of Therapeutic Jurisprudence and innovative problem-solving practices should be explored, but what will really count is whether they take hold in professional practice to improve justice for those in need. These approaches generally make sense to criminal defense lawyers. In reality, however, overwhelming caseloads and diminishing resources to support the fundamentals of criminal defense representation make these ideas and practices unattainable for most public defense practitioners.

Problem-solving approaches and Therapeutic Jurisprudence practices demand more resources to be practiced effectively. Most line-lawyer defenders do not have the time or resources to do the basic job of representing individual clients competently from start to finish in each and every case.<sup>42</sup> There may, however, be some incremental ways that defender

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42. See generally The National Legal Aid and Defender Association, *Evaluation of the Public Defender Office: Clark County, Nevada* (March 2003) (reporting on the state of indigent defense in Las Vegas, NV) available at [http://www.nlada.org/Defender/Defender\\_Evaluation/old\\_index.html](http://www.nlada.org/Defender/Defender_Evaluation/old_index.html) (last visited Mar. 17, 2005). Though Clark County policymakers must balance other demands on the County's resources, the Constitution does not allow for justice to be rationed to the poor due to limited funding. The issues raised in this report serve to underscore the failure on the part of the state of Nevada to adhere to the *Gideon* decision. *Id.* at

programs can be set up and provide effective representation that produces: 1) better case outcomes; 2) opportunities to infuse problem-solving approaches early in each case; and 3) cost savings and efficiencies for the system.

The following section is a case study that shows positive signs of how a traditional public defender office can achieve these three goals. We are not social scientists, but the data set forth in the next section from an Ann Arbor Michigan study is quite promising for public defender leaders who are interested in these more therapeutic outcomes for clients, reduced incarceration rates and systemic efficiencies. Moreover, it provides measures that are extremely persuasive with policymakers such as lower use of prison jails and lower probation violation rates. It is persuasive because the analysis and conclusions were developed, not by the defender office, but by researchers in the Washtenaw Community Corrections Program and in the Michigan Department of Corrections.

#### IV. THE WASHTENAW COUNTY CASE STUDY

The Defender Office in Ann Arbor Michigan, the Washtenaw County Public Defender Office, illustrates how more data analysis of public defense roles can promote better results for their clients, a more efficient criminal justice system and reduce the costs to the system they serve. Washtenaw County makes the case for the practical impact of such an approach. Demonstrating lower prison commitment rates, lower use of the jail and lower probation violation rates creates support for such an approach that will reach out to policy makers across a wide spectrum of values. Further, the results in Washtenaw are not the result of a new program begun in the last few years. Over thirty years ago, the Defender Office became a full partner in the criminal justice system. They fully participated in the design of new programs systems and procedures. Their attorneys sit on the boards of local mental health centers, the local judicial council, juvenile treatment programs, shelters and drug treatment programs. There are no drug courts or even pretrial release services. Problems were

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76. Though *Gideon* vests the responsibility for funding indigent defense services with the state, the County continues to bear the brunt of providing adequate defender services until such time as the State accepts its constitutional responsibilities. *Id.*; The National Legal Aid and Defender Association, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years after Gideon* (March 2004) available at [http://www.nlada.org/Defender/Defender\\_Evaluation/la\\_evaluation](http://www.nlada.org/Defender/Defender_Evaluation/la_evaluation) (last visited Mar. 30, 2005) (describing in detail how the indigent defense system in Louisiana is in violation of the Louisiana Constitution, the U.S. Constitution, and the ABA Ten Principles of a Public Defense Delivery System adopted by the ABA in 2002).

identified, tasks delegated and efficiencies obtained within their resources. For example, within 48 hours of arrest, the client is interviewed and assessed for mental illness. Client histories are taken by community corrections and the defender office is notified of their appointment. Magistrates grant personal bonds if the accused is “scored” as likely to not receive prisoner jail time if convicted. They also know that the defender will see their client before the preliminary examination, take even more detailed client histories and file a motion for bond reduction at the preliminary examination. If denied, and the defendant remains incarcerated, they will file another motion before the trial judge.

This intense involvement by the office assures a significantly lower number of clients sitting in jail awaiting trial. It is this information that is relied upon at bond hearings, for diversion planning and in plea negotiations. Further, when bonds were thought to be creeping higher than their clients could post, the defense community appeared before the judicial council and raised their concern. This action not only reined in the bonds, but it helped establish a climate of dialogue, trust and cooperation among all the participants in the system and relieved growing tensions.

Coping with Washtenaw County’s undersized jail gives rise to another example of the impact they have by being part of the process. First, the Washtenaw County jail is the smallest per capita in Michigan. County growth and changes in the states sentencing policies designed to lower prison commitments, created pressures for innovative change. Long ago, authorities developed a broad array of processes and programs that, up to now, have successfully avoided overcrowding. The county recently released a report<sup>43</sup> calling for a larger jail. The Task Force, on which the Defender Office sat, called not only for a larger jail, but for a study on what kind of beds to add, for more treatment programs and for procedural reforms in the court processes to decrease the length of time that pretrial detainees spend in jail when they cannot make bond.

#### A. LOWER PRISON COMMITMENT RATES AND LOWER PROBATION VIOLATION RATES

From 1998 through 2002, Washtenaw County Michigan had the lowest prison commitment rate among the 13 largest Michigan counties when judges had the discretion to give a non-prison sentence. In many

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43. See generally WASHTENAW COUNTY JAIL OVERCROWDING TASK FORCE, *Final Report and Recommendations: A New Criminal Justice System*, March 31, 2004 [hereinafter WASHENTAW TASK FORCE].

cases the low prison commitment rate is off-set by higher use of local jails. However, in Washtenaw County this is not the case. In fact, it has one of the smallest jails in Michigan. Finally, perhaps to achieve these results, probation was “overused.” However, even this is not the case. Washtenaw’s probation violation rate was significantly below the state average. In 2003, Joseph DeGraff, the Community Corrections Manager for Washtenaw County, spoke to the Michigan Legislature<sup>44</sup> on the role that the Washtenaw County Public Defender Office had in keeping their counties commitment rate so far below the state average. He first acknowledged that isolating the impact of one component in the system is difficult to do. But he noted several factors that made the case that their presence and activities where the major factor that separated their county from the rest in Michigan.

First, the public defender plays a significant role in case processing in Washtenaw County. The office represents 85-87% of the felony defendants in the County. In addition, they represent significant numbers of misdemeanants, probation violators and juvenile offenders. Second, Degraff analyzed the data for measurable outcomes that made the case for the impact of the office. Michigan is a mandatory sentencing guideline state, and there are many felonies that carry mandatory sentences. Degraff isolated the data where judges have discretion to impose prison or non-prison sentences. This occurs in “straddle cell” cases and probation violations. Straddle cells are those cases that when scored under the guidelines, fall in cells that allow the judge to sentence to probation, jail, or prison. Degraff additionally found that in the thirteen mid-size counties with populations between 150,000 and 600,000, Washtenaw County had the lowest straddle cell commitment rate. In fact, it was not even close. Washtenaw was the only county below 30% on the commitment rate. More impressive was the data that Washtenaw County’s return rate for probation violators was 6% below the state average – even though they had more straddle cell “risks” out on probation.<sup>45</sup>

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44. JOSEPH DEGRAFF, *Reducing the Corrections Budget Through Effective Public Defense*, Michigan State University, INSTITUTE FOR PUBLIC POLICY AND SOCIAL RESEARCH, PUBLIC POLICY FORUM (Oct. 15, 2003) (on file with author). Joseph DeGraff is the Community Corrections Manager for Washtenaw County in Michigan.

45. MICHIGAN DEPARTMENT OF CORRECTIONS, *2002 Annual Report*, available at <http://www.state.mi.us/mdoc/jobs/pdfs/2002AnnualReport.pdf>.

PERCENTAGE OF PROBATIONER INTAKES TO PRISON CY 2001<sup>46</sup>

COUNTY	1998	1999	2000	2001
Bay	56.5	46.0	41.1	44.3
Calhoun	46.3	49.6	46.4	35.9
Genesee	50.9	56.7	54.2	43.6
Ingham	41.5	34.5	32.2	39.2
Kalamazoo	36.4	36.3	44.8	36.9
Kent	46.4	40.1	40.7	27.6
Macomb	33.7	44.0	44.9	29.7
Muskegon	64.3	62.7	63.1	38.2
Oakland	31.8	31.6	33.5	
Ottawa	35.2	33.3	34.7	
Saginaw	61.8	46.3	32.8	
Washtenaw	23.3	29.5	24.1	
Wayne	25.9	35.8	41.8	
State	39.0%	41.0%	43.0%	

The low prison commitment and return rate translated to 68 fewer annual prison commitments. Using a conservative cost of incarceration rate, this translates to over \$2,000,000 annually plus additional money returned to the county by the state for using alternative sanctions.

Other possible contributors to the low prison commitment rate, such as a higher use of the jail, need to be eliminated. However, this could only be true if Washtenaw had a larger than average jail. In fact, the Washtenaw jail is 40% smaller than the state average. It has 332 beds for a population of 334,000. It is the only jurisdiction in Michigan that has less than 1 bed per thousand of population. Since the county pays for the jail and the state pays for the prison, it would seem there would be an incentive to send inmates to the prison rather than the jail, particularly since it is so small. Finally, one would expect to see a widened net of alternative sanctions if the jail and prison commitment rates are low. However, of the 13 mid-size counties, Washtenaw ranks eighth in alternative program funding. The existence of a well-funded public defender office cannot be the sole factor contributing to these low rates of incarceration and use of alternative sanctions.

The question arises whether the existence of *any* public defender

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46. *Id.*

office or other assigned counsel system or contract private practitioner would have a similar effect. The answer is clearly “no.” Of the 13 counties compared in this study, Bay, Kent and Washtenaw had public defender offices. However, the prison commitment rates and probation violation commitment rates were significantly higher than Washtenaw’s – among the highest in the state. In fact, as noted below, while the Washtenaw office comes fairly close to meeting the American Bar Association’s *10 Principles of a Public Defense System*,<sup>47</sup> the Bay County office is woefully under-funded. Even cursory comparisons reveal important differences. The caseloads in Bay City are 4-5 times higher than in Washtenaw. There are four characteristics of the Washtenaw Public Defender office that the Community Corrections office believes supports the case for the impact of this defender office and which none of the other offices meet:

*Proximity and Presence.* The office is located adjacent to the county courts and provides attorneys for a wide array of services from Personal Protection Order’s, line-ups and probation violations to murder trials and felony sentencing and diversion programs.

*Continuity and experience.* The office has been a fixture in the County of decades. They have salary parity with the prosecutor, have career defenders and are required to attend training. The experience of the staff and office contributes to community trust and the competency of the services delivered.

*Partner in the System.* The public defender is a full and equal partner in the justice system in the County. They are represented in virtually every programming, policy or procedural committee. For example, they are represented on the community corrections advisory board, the judicial oversight committee, the domestic violence initiative, the jail overcrowding task force, the jail mental health work group, the executive sessions of the judicial counsel, the restorative justice committee, the foster care abuse and neglect board, the racial profiling committee, and the attorney appointment board. *The public defender influences policy, educates justice, and advocates for alternative dispositions.*

*Economy in the system.* The public defender creatively leverages and allocates resources and provides services not readily available from the private sector appointees or contractors. They also generate hidden efficiencies in docket management and other cooperative programs to

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47. See generally ABA, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDERS, *Ten Principles of a Public Defense Delivery System*, available at [http://www.nlada.org/Defender/Defender\\_Kit/principles](http://www.nlada.org/Defender/Defender_Kit/principles) (last visited Mar. 30, 2005).

increase efficiencies or reduce costs at no additional county expense. In the midst of a budget crisis in 1995, they looked at eliminating the defender office to use cheaper methods. They found that while the office cost more than six other similarly sized counties' defense systems, they needed to look at the impact on the entire system.

Besides a comparison of dollars, quality of services should also be taken into consideration. The office of the public defender provides a great deal of flexibility in the county's court system and offers other programs and services that a contracted attorney or firm would not, such as the extensive use of college interns.

## B. EARLY CASE ENTRY

There is one more factor that separates this office from all other public defense systems in Michigan and greatly contributes to its success: The office has worked with the local community corrections department to design a system that collects accurate information early in the process and get it to key custody decision makers. In addition, the office meets with all of their clients and the prosecutor before the day of the preliminary examination and collects even more data on the client. The information is then used at the first arraignment when bond is set through all the possible pretrial release decisions and plea discussions. Further, if the client remains in custody, at least two bond reduction motions are made – one before the preliminary examination judge and one before the trial judge. As discussed above, national statistics show that whether a client is incarcerated pretrial has a significant impact on whether he or she ultimately receives a sentence of incarceration.<sup>48</sup> Reduced incarceration rates of accused persons pretrial can mean significant cost savings.

Unlike anywhere else in the state, this information identifies every potential option for the client. Unlike data scraped together by the defendant or overworked impersonal pretrial released services or court personnel, Washtenaw's accused have the information screened and verified by professionals in the defender's office. Moreover, they have the ability to obtain additional supporting information at every step of the pretrial process. This early entry, coupled with the office's contacts throughout the system and community, produces the profound and predictable impacts noted above. This significantly benefits not only the county, but also the budgets of their county and state. Finally, if the

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48. This disparity widens in the context of felony defendants. Detained felony defendants were convicted at a rate of 70%, compared to 45% for released defendants.

defendant violates probation or bond, they meet with the community corrections department before the hearing, which develops programs in order to keep the client out of jail. They appear at the probation violation hearing and jointly present their proposal.

As a result of the above factors, the office has an even more significant impact on the local justice system. The office advocates effectively for pre-trial alternatives, such as supervised release to financial bail for non-violent offenders. These advocacy opportunities can further Therapeutic Jurisprudence opportunities resulting in better client outcomes and system savings. These pre-trial programs are typically designed for, and populated by, drug or alcohol addicted clients, many of whom cannot afford retained legal counsel.

In FY 2001-02, *only half of 200 felonies enrolled in pre-trial supervised release were ultimately convicted of a felony charge*, with charges actually dismissed for 7% of these defendants.

In FY 2001-02, *the prison commitment rate for these defendants was less than half that of all non-violent offenders county-wide*.

Since FY 1998-99, *the percentage of inmates lodged in jail for alcohol-related offenses has decreased from 11% of the total jail population to less than 7% through the use of electronic alcohol monitoring as a condition of pre-trial release*. The reduction translates to twelve fewer defendants in jail on any given day. Approximately 90% of the clients completed the average 70-day period of round-the-clock alcohol monitoring without evidence of further alcohol use. According to County Jail Reimbursement Program Data, Washtenaw County's average length of stay for OUIL three defendant's in jail is among the state's lowest, because offenders are efficiently placed into treatment programs.<sup>49</sup>

This is an office that not only provides a zealous defense on the merits of the case, but profoundly reduces incarceration and recidivism. Good defense is good business – for everyone.

### C. COLLABORATION WITH DEFENDERS AND OTHER STAKEHOLDERS

With all this, Washtenaw County leaders believe they can and must do better. The above results came about not through a new vision or commitment to drug courts. They do not have one. Rather, the above is the result of years of collaborative effort. The Jail Overcrowding Task Force Final Report of 2004 recognizes the need for a larger jail due to

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49. DEGRAFF, *supra* note 44.



county growth and truth in sentencing laws passed by the legislature.<sup>50</sup> This Overcrowding Task Force report however calls for even more reforms and a commitment to further enhance community corrections programs. County leaders want to know what kind of beds to add, how many and how they can further reduce the total need. They want to not only “resolve the questions about the jail, but the mission is to manage the system.”<sup>51</sup> The particularly good news from Washtenaw County is that collaborative efforts, good structural design and early defense involvement can have significant impacts on the clients, on the system’s efficiency and citizen support. Coalitions like the one in Washtenaw County, where public defender participation is valued, will promote more Therapeutic Jurisprudence practices and provide data that problem-solving early on in a criminal case will benefit clients, communities, and the county coffers.

#### V. ANOTHER WAY TO PROMOTE A CULTURE SHIFT AMONG PUBLIC DEFENDER LEADERS – EDUCATION

The cultural shift towards problem-solving lawyering and holistic advocacy is taking place among innovative leaders in the indigent defense community. Public defender and assigned counsel leaders are attending Executive leadership seminars in NLADA’s National Defender Leadership Institute (“NDLI”). Through trainings, networking, mentoring opportunities and publications, the NDLI promotes ideas on problem-solving lawyering and the value of strengthening an array of community connections to support indigent defense programs. NDLI messages to public defense leaders and their allies emphasize the importance of community outreach in order to provide more social service resources for indigent clients and political support.

Although NDLI faculty do not use the terminology “Therapeutic Jurisprudence,” much of the curriculum and leadership initiatives further Therapeutic Jurisprudence theories. Problem-solving on behalf of individual clients seems to be more acceptable among defense practitioners. In 2002-2004 the U.S. Department of Justice, Bureau of Justice Assistance (“BJA”), funded only one program designed for public defenders. This discretionary grant funded a public defense leadership seminar series called “Impact Leadership.” The seminars taught public defense leaders to develop innovative leadership initiatives, all of which were geared towards an expanded role for public defenders in their communities and new ways to help their individual clients. These

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50. WASHENTAW TASK FORCE, *supra* note 43.

51. *Id.*

initiatives ranged from prisoner reentry programs to problem-solving for foster children moving out of foster homes so that they did not enter the criminal justice system.

The NDLI is working on promoting a cultural shift that favors problem-solving, community-oriented representation. Funding and grass-roots support for this work is critical to its success. The cultural shift needs to take place inside defender programs as well as funding agencies and governing bodies, such as state legislators and city governments. The NDLI has trained public defense leaders on how to build coalitions with both likely and unlikely allies. These leadership-training events promote problem-solving through communications training, political outreach training, networking skills and strategic thinking about more technical assistance, research and evaluation of public defense programs.

This much-needed cultural shift inside defender programs and other justice sectors will not happen unless there is evidence that Therapeutic Jurisprudence and problem-solving lawyering is cost-effective, efficient, and creates improved justice systems. Innovative defense lawyers recognize that public defense leaders need to be more open to evaluation and data collection. We need other professionals like social scientists and academics to evaluate the impact of their representation models. With the help of academics in law schools and other schools, defenders who support problem-solving models can demonstrate the value of these integrated services and holistic practices. Academics are in good positions to help practitioners and policymakers gather data, engage in critical analyses of data, develop strategies and assist in the dissemination and education so that these innovative ideas take root.<sup>52</sup> Those interested in seeing problem-solving approaches and Therapeutic Jurisprudence become grounded in criminal proceedings and public defense practices will need to demonstrate the practical benefits. Law schools are not the only allies for public defense leaders espousing these therapeutic practices. Other parts of universities can provide invaluable expertise and can be unlikely allies of institutional public defense reform. For example, defender leader, James M. Hingeley, the Public Defender of the Charlottesville – County of

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52. See generally Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 245 (2000); David Wexler, *Therapeutic Jurisprudence and Preventative Law's Transformative Potential For Particular Areas of Legal Practice: Criminal Law: Relapse Prevention Planning Principles for Criminal Law Practice*, 5 PSYCHOL. PUB. POL'Y & LAW 1028, 1032 (1999) (suggesting a strategy for proposing client-centered – and client generated – release conditions, a process that encourages a client to think through his/her high risk situations and how to avoid them).

Albemarle Indigent Defense Commission regional office, reached out to the Engineering Department at the University of Virginia to seek assistance with mental health diversion alternatives for the public defender clients. The University's engineering department produced the report *An Analysis of Mental Health Diversion Options in the City of Charlottesville Criminal Justice System*<sup>53</sup> which was a cutting edge approach to analyzing data and practices that would further practices consistent with Therapeutic Jurisprudence theories. Leadership is about relationship-building. The more innovative public defender leaders understand the value of building relationships with likely – and unlikely allies.

#### A. LEGAL CLINICS CAN SUPPORT PROBLEM-SOLVING PUBLIC DEFENSE

Clinicians, academics and practitioners in the field need to collaborate to gain a more accurate sense of how the entire justice system works. Legal clinics could be a critical component in this effort. Clinics not only teach Therapeutic Jurisprudence theories, and train future lawyers how to engage in problem-solving for individual clients, but also how to advocate for systemic support for these approaches to practicing law. Larger systemic analysis of the impact of these innovative practices on individual cases is where clinical legal education can teach law students and other justice system players that it is not only affordable for lawyers to practice law with an expanded role, but that it is cost effective for state and local judicial systems.

Clinics provide a unique opportunity for professors and students interested in justice systems to study how different sectors impact one another as well as the political context for decision-making. These data can be used to play a different and possibly more important advocacy role. Future lawyers interested in equal justice need to be taught how to advocate before legislators, policymakers and community members who may want to cut funding or limit the role of public defense lawyers in a justice system.

Clinical legal education generally focuses on individual case representation. Few criminal clinical supervisors gather empirical data and justice system “big picture” analyses for use in teaching. Likewise, few defense lawyers who lead programs have access to real numbers showing

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53. RYAN BOULAIS, ET. AL., *An Analysis of Mental Health Diversion: Options in the City of Charlottesville Criminal Justice System*, UNIV. OF VA. SYSTEMS AND INFORMATION ENGINEERING DEPT' ed., April 23, 2004 (Corporate participants in this collaborative effort to analyze the therapeutic diversion options included: Northrop Grumman, MITRE Corp., Directed Technologies, Lockheed Martin Corp., Oracle Corp., and BAE Systems) (on file with author).

how different approaches to criminal defense practices can impact the outcome of cases either pre-trial, during trial or at disposition hearings. Clinical training for future defense lawyers, for example, could provide this information. Clinicians could not only teach about systemic operations but they could publish studies of state and local justice systems including the inefficiencies and innovations like Therapeutic Jurisprudence. Clinical legal educators could provide law students, as well as practitioners focused on individual cases, with a birds-eye view of their local criminal justice systems.

## B. THE ROLE OF CRIMINAL JUSTICE CLINICS

Criminal defense clinics present a unique opportunity for future lawyers to take a reduced caseload and learn how to practice defense the correct way. Clinics teach law students how to prepare a case fully from start to finish – from initial client interviews, investigations, developing a theory of defense, creating a trial notebook, preparing and practicing each element of a trial and then developing a sentencing plan the way it should be done. In the real world of public defense, it is universal that in state courts there are too many cases and too little time for public defense practitioners to do it this way.

It would be most beneficial if Therapeutic Jurisprudence and problem-solving lawyering could be an integral part of clinical legal education in two respects. First, train future lawyers to practice zealous advocacy and think about a broader more therapeutic role for lawyers, particularly for those who represent indigent people moving through the system. Second, teach students how to have a broader sensitivity to larger justice systems and how they can be reformed to provide better representation. The first goal is the most common approach to clinical legal education in American law clinics. The focus is on individual case representation.

The second goal is much less common. In traditional classrooms, law schools focus on reading and analyzing appellate cases. In law clinics, they focus on cases with real clients. It is more unusual in either the traditional law classroom or clinic for students to spend time analyzing larger systemic issues. It is imperative as justice systems become more complex – and more therapeutic or provide integrated services alongside social service providers – that lawyers learn how to analyze structures and data to see the efficiencies and inefficiencies of a system and the impact on their clients.

Finally, criminal justice clinics are an excellent platform to address the myriad of ethical issues that are involved with problem-solving

coalitions with communities or other criminal justice stakeholders. In the criminal justice context, criminal defense clinics allow for the opportunity to delve deeper into the lives of clients to better understand the problems that contributed to the client's criminal charges, and perhaps more importantly, what keeps them in the system, unable to break the cycle of recidivist conduct. In a therapeutic, problem-solving approach, a defense lawyer will face many ethical crossroads as she meets with a client, prepares a case from a holistic perspective, plans for bond hearings, seeks out diversion or treatment plans all the while preparing for a trial or plea negotiation. For example, how far should an attorney go in encouraging client participation in a diversion or treatment program? In a problem-solving defender context, these ethical boundaries remain largely unexplored.

Criminal defense clinics, where the defense lawyers generally have reduced caseloads, provide opportunities to thresh out the ethical issues, especially those arising for defense lawyers who practice in problem-solving courts. A starting point for this education lies within the pages of this special issue. Professor David Wexler's article explains how legal clinics can explore, with students, the ethical and related issues about how far an attorney should go in suggesting that a client engage in diversion or treatment programs.<sup>54</sup> Wexler's article poses just such questions that can be used, not only in clinic discussions but also in training programs, for defense attorneys that are offered by institutional defender offices and national associations.<sup>55</sup>

Another area where law clinics can provide a valuable role is in the effort for lawyers to build stronger connections with community leaders. For example, public defense lawyers across the county, particularly in preparation for sentencing hearings following a plea or trial conviction, are reaching out to the communities they serve to better understand the array of problems they face. Public defense leaders are engaging in dialogues with

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54. See David Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 741 (2005).

55. Several national associations provide interactive training programs for defenders, investigators, sentencing advocates and chief defenders. The following are associations that offer the best platform upon which Therapeutic Jurisprudence advocates can reach a large number of leaders in the public defense community: The National Legal Aid and Defender Association ("NLADA"), available at <http://www.nlada.org> (last visited Mar. 16, 2005); the National Association of Criminal Defense Lawyers ("NACDL"), available at <http://www.nacdl.org> (last visited Mar. 16, 2005); the National Association of Sentencing Advocates ("NASA"), available at <http://www.sentencingproject.org/nasa/> (last visited Mar. 16, 2005); and the Brennan Center for Justice at NYU School of Law (Community Oriented Defender Network or what defenders call the COD network), available at <http://www.brennancenter.org/> (last visited Mar. 16, 2005).

community members on issues beyond a traditional criminal case such as racial disparity in the criminal courts,<sup>56</sup> prisoner reentry into communities,<sup>57</sup> how to provide mental health or special education services,<sup>58</sup> and law reform efforts.<sup>59</sup> Sentencing advocates are also reaching out to communities and defense lawyers suggesting they seek a more problem-solving approach to sentencing advocacy. For example, the *Twelve Steps to Effective Sentencing Advocacy*, by The Sentencing Project,<sup>60</sup> suggests ways to prepare for sentencing from day one, seek alternatives to incarceration, to problem solve for clients when asked by clients, and consider the social implications of sentencing.<sup>61</sup> Clinics can assist in exploring these important connections from a broader systemic perspective as well as explore the ethical conundrums that arise with these expanded models of providing assistance of counsel.

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56. The Charlottesville-Albemarle Public Defense Program has a Community Advisory Board, which has sponsored several public discussions on racial discrimination and disparate treatment in the Virginia criminal justice system. See Tobey Fey, NATIONAL DEFENDER LEADERSHIP INSTITUTE, *Working With the Community, For the Community: The Citizens Advisory Committee, Charlottesville, Virginia*, available at [http://www.nlada.org/Defender/Defender\\_NDLI/Defender\\_NDLI\\_Success/Virginia](http://www.nlada.org/Defender/Defender_NDLI/Defender_NDLI_Success/Virginia) (describing the work of Jim Hingeley) (last visited Mar. 16, 2005).

57. See NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, *Mission & Organization: Making our Constitutional Promise of Justice a Reality for Those Farthest from its Reach* available at <http://www.ndsny.org/mission.htm> (last visited Mar. 16, 2005) (providing a holistic model of defense practice and a new prisoner reentry program); see also REENTRY RESOURCE NETWORK, available at <http://www.reentry.net> (last visited Mar. 16, 2005) (part of the online non-profit legal services and information portal, Probono.net, at <http://www.probono.net>).

58. The Community Law Center in Knoxville, TN is a public defender office that provides an array of social services to clients on a voluntary basis such as counseling, treatment programs, art programs and community service opportunities. See COMMUNITY LAW OFFICE OF THE PUBLIC DEFENDERS OFFICE FOR THE SIXTH JUDICIAL CIRCUIT, TN, *Community Law Office*, available at <http://www.pdknox.org/title.htm> (last visited Mar. 16, 2005).

59. Virginia Indigent Defense Commission ("VIDC") out of Richmond, VA has participated in several law reform efforts with a coalition of other stakeholders in the community. These efforts include a recent reform of eyewitness identification laws to the more reliable sequential and double blind show-up and line-ups. The Minnesota Public Defender statewide system has a full-time legislative liaison on staff with extensive political experience. The Public Defender, John Stuart, and all the chief defenders from each of the districts throughout Minnesota are experienced at rallying their defender staff and broad community support for legislative or policy reform efforts.

60. THE SENTENCING PROJECT, *Twelve Steps to Effective Sentencing Advocacy*, 1, 1-3 (1993), available at <http://www.sentencingproject.org/pdfs/2065.pdf> (last visited Mar. 16, 2005); NAT'L ASS'N OF SENTENCING ADVOCATES, CODE OF ETHICS AND PROFESSIONAL STANDARDS 1-6 (1997), available at <http://www.sentencingproject.org/nasa/pdf/CodeofEthics.pdf> (last visited Mar. 16, 2005).

61. See THE SENTENCING PROJECT, *supra* note 60.

## VI. CONCLUSION

This essay advocates that Therapeutic Jurisprudence and problem-solving lawyering will not be sustainable unless proponents cultivate and educate advocates who understand how these approaches improve the efficiency, fairness and outcomes in justice systems. Advocates, researchers and clinical legal educators need to partner in order to gather data and explain how important these approaches are impacting towards the courts, the prisons, and socio-economically deprived communities, where the right to counsel can have a real impact on improving lives. Developing the yardsticks to measure outcomes, collecting data and presenting it effectively will bring partners to the process from all parts of the system to produce a truly fundamental shift in the goals of the justice community and confidence in politicians and policymakers that this “new” approach will work – not only by defense measures but also by their measures.