

Maintaining Change: Converging Legal and Psychological Initiatives in a Therapeutic Jurisprudence Framework

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ABSTRACT

This paper considers some detailed aspects of the application of therapeutic jurisprudence to the working of the criminal law. Its objective is to draw parallels between aspects of the practice of law when viewed 'in a therapeutic key', and the application of psychologically-based interventions to the task of changing offenders' behavior. The first section of the paper provides an overview of background evidence concerning the respective outcomes of legal punishment on the one hand, and offender rehabilitation and treatment on the other. The remainder of the paper turns attention to four specific areas of research and practice in clinical and forensic psychology that reflect some current developments in the practice of therapeutic jurisprudence, in each case illustrating the potential usage of findings in legal settings. They are: (1) Evidence concerning outcomes of psychological therapy and the importance of the 'working alliance'. (2) Processes of engagement and motivational enhancement at the start of the therapeutic encounter, with particular reference to problems that are not easily resolved. (3) Research and clinical experience concerning how therapeutic activity is planned and progress monitored, and how this can incorporate means of helping to sustain motivation. (4) Supporting the longer-term maintenance of gains through the use of relapse prevention principles.

KEYWORDS: maintaining change; motivational enhancement; problem solving; psychotherapy process; relapse prevention; risk management; therapeutic jurisprudence; working alliance.

The framework of therapeutic jurisprudence has the capacity to throw considerable light on the nature and consequences of many legal practices. Since its inception, therapeutic jurisprudence scholarship has extended its focus considerably, from initially posing a series of questions about the effects of decisions in the field of mental health law, to spheres as varied as family, disability, personal injury, as well as commercial and criminal law. A key question to be addressed when subjecting legal rules, procedures, and roles to the scrutiny of analysis informed by therapeutic jurisprudence is that of whether the resultant decisions have a net therapeutic or anti-therapeutic impact (Wexler and Winick 1991).

From the outset, therapeutic jurisprudence has also been an avowedly inter-disciplinary enterprise. The present paper is written from the standpoint of one of the disciplines with which the practice of law frequently comes into contact, that of psychology. For some time, of course, there have been numerous areas of mutual interest and common ground between lawyers and psychologists. They are focused on such issues as witness reliability and credibility, mistaken convictions, juridical decision-making, criminal responsibility,

family dysfunction, child protection, forensic risk assessment, and scientific and ethical aspects of expert testimony (Melton, Petrila, Poythress and Slobogin 1998; Roesch, Hart and Ogloff 1999). Whereas, these areas can be broadly characterised as the application of psychological research to problems arising in law, therapeutic jurisprudence affords an opportunity for a genuine fusion of ideas between two distinct and sometimes seemingly incompatible perspectives on human behavior.

OBJECTIVES

This paper will focus on aspects of the application of therapeutic jurisprudence to the working of the criminal law. What follows is in essence an extended commentary on some current discussions in the 'TJ' literature with particular reference to the criminal courts and information on research in clinical and forensic psychology. My objective is to draw further parallels among aspects of the practice of law when informed by a therapeutic perspective, developments in psychological therapy, and related interventions applied to the task of reducing offender recidivism. This is, in many ways, an auspicious time for such cross-boundary

dialogue. In the adjoining fields of psychology and criminology in recent years, there have been significant changes in terms of how criminal behavior is understood. More specifically, in light of new evidence there has been an extensive re-appraisal of how it can be managed, and in particular of the extent to which we can expect to be able to reduce the risk of its repetition by those appearing before the courts.

The paper is divided into two main sections. In the first, an overview will be given of two background sets of evidence concerning the respective outcomes of legal punishment on the one hand, and offender rehabilitation and treatment on the other. The remainder of the paper will turn attention to four specific areas of research and practice in clinical and forensic psychology that may closely reflect contemporary interests in the practice of therapeutic jurisprudence.

CRIMINAL SENTENCING AND PUNISHMENT

The process of sentencing by criminal courts is designed to serve a number of objectives, and in several respects there is a perennial tension between them. Research on the impact of different approaches to the treatment of offenders has potentially very significant implications for criminal justice services. Recent findings in this field provide strong empirical support for the application of the kinds of principles that inform therapeutic jurisprudence.

Condemnation And Retribution

In the absence of admissible defences, persons found guilty of criminal offenses can expect to be punished by the court. The use of punishment, the imposition of a penalty, remains the dominant response to citizens who break the law in almost all societies. Punishment serves a number of purposes simultaneously, including retribution, incapacitation, and deterrence. The process of sentencing offenders in courts of law is in many respects a symbolic one through which the community signals its disapproval of an offender's actions. Some legal philosophers advocate use of punishment primarily or even solely on the basis of *retribution*, which is concerned with its emblematic rather than its instrumental effects. Adoption or rejection of retributive principles is founded largely on philosophical or ideological arguments alone and makes no appeal to empirical evidence.

Restraint And Incapacitation

But the sentence of the court is more widely assumed to have effects beyond this. In many respects the functioning of criminal law is founded on the application of restraint and control; that is certainly what many citizens expect of it. The underlying principles and detailed mechanics of specific and general deterrence continue to be debated (Stafford and

Warr 1993; von Hirsch and Ashworth 1998). This, in part, drives recurrent controversies over the availability and use of the death penalty; the lengths of prison sentences; proportionate use of custodial versus community sentences; application of physically demanding regimes; and the acceptability and practicality of intermediate sanctions such as home detention, curfews, and electronic monitoring. Overall, however, the general ethos of coercion and restraint is not in itself contested. The traditional aims of courts, judges, and criminal lawyers are primarily to administer such procedures in as fair a manner as possible. "Even in an incapacitative or rehabilitative scheme of punishment, most people would find it appropriate that cases be dealt with consistently within applicable criteria and inappropriate that they be dealt with inconsistently. Fairness, not desert, is the key idea" (Tonry 1996:184).

In the exercise of this duty judicial figures are required to be remote, detached, aloof, and forbidding. Zimmerman (cited in Rottman and Casey 1999:13) depicts this as the model of the "dispassionate, disinterested magistrate". Indeed there is an historical view of sentencing as in certain respects being an "expressive ritual" entailing "denunciatory justification", the effect of which is to "signify disapproval in a particularly dramatic way" (Walker and Padfield 1996:117). Thus the core of official punishment is the expression of moral condemnation.

That may be an end in itself, linked to the concept of retribution, but it could be argued that the use of punishment is predicated on the assumption that offenders will not change unless compelled to do so. However, it is important to be clear about what can be achieved by such compulsion. Whereas offenders can be restrained and temporarily incapacitated by a variety of means, nothing in our current array of approaches to this can ensure anything more than temporary relief, if that is what it can be called, from what may be a virtually intractable pattern. The process of incapacitation does not in itself promote positive or enduring change in individuals who repeatedly break the law. In addition, use of *incapacitation models* in criminology shows it to be an extremely inefficient way of attempting to influence general rates of criminal offending (Tarling 1993). It is, therefore, important to distinguish between the law's restraining effect and its ability to bring about longer-term change in an offender's chances of involvement in further anti-social behavior.

Deterrence

Going one stage further then, it is also a declared intention that underpins the sentencing process that it should alter criminal behavior by attempting to manage its consequences. This is the core of what is called the *utilitarian* or *consequentialist* approach to crime and

punishment (Walker 1991). It is founded on the idea that legal sanctions will have a causal impact on those so dealt with.

This traditional expectation of sentencing practices - that they should deter individuals from committing crimes - is not however supported by any consistent findings either from routinely collected official criminal statistics or specially designed research studies. Several types of evidence are potentially relevant to this question (see McGuire 2002a, for review). They include: (a) studies of the relationship between imprisonment and crime rates; (b) research on the impact of capital punishment; (c) evaluations of the outcomes of enhanced and intermediate punishments ('smart sentencing'); and (d) self-report surveys concerning levels and patterns of undetected crime ('the dark figure' in criminology).

For example, in a report for the Solicitor General of Canada, and the largest study of its kind, Gendreau, Goggin, and Cullen (1999) collected data on the relationship between lengths of prison sentences and recidivism. These authors reviewed 23 studies yielding 222 comparisons of groups of offenders (a cumulative sample of 68,248) who spent more time (an average of 30 months) versus less time (an average of 17 months) in prison. The groups were similar on a series of five risk factors. Counter to deterrence doctrine, offenders who served longer sentences had slight increases in recidivism of 23 percent. There was a small positive correlation between sentence length and subsequent rates of re-conviction. Other types of evidence are similarly discouraging about the outcome effects of the deterrent approach.

Rehabilitation And Treatment

One of the most vigorously debated issues within the field of crime and justice is the question of whether there are any means by which recidivist offenders - individuals who have frequently broken the law and have been prosecuted, convicted, and penalised - can be induced to change, and their rates of re-offending reduced. Reviews of this area during the 1970s drew predominantly negative conclusions, noting that much of the research then available was of relatively poor quality. The pessimism conveyed by those reviews was sufficient to convince many practitioners, sentencers, and policy-makers that 'rehabilitation' of offenders was not possible on any regular methodical basis. This impediment notwithstanding, rehabilitation has arguably remained an important aim of sentencing (Winick 2000).

Furthermore, some encouraging findings did exist within the reviews of that period. Following the increased use of methods of systematic statistics-based research review from the 1980s onwards, a different pattern of findings could be discerned. This suggested

that interventions that effectively reduce offender recidivism are not as rare as had been supposed; indeed, that rehabilitative efforts of a variety of forms can be shown to yield significant benefits.

It has been estimated that there are now approaching 2,000 separate studies relevant to the question of whether offender recidivism can be reduced. This substantial volume of literature has been reviewed and interpreted using the technique of meta-analysis, a method of statistical integration of results from different studies (Wilson 2001). Given its complexity, this approach is not without its critics. However, although the quality of research across this field remains variable, there are now a substantial number of high-quality studies. Further, there is a considerable degree of consistency amongst their findings. As a result, a consensus has now emerged that it is possible both to assert that offender rehabilitation and treatment 'work'; and that we can identify with some confidence at least some of the features that contribute to that outcome.

There are now more than 30 meta-analytic reviews in this field, most focusing on a circumscribed sector of activity (McGuire 2002b). They include, for example, separate evaluations of interventions with adult and with juvenile offenders; reviews on specific types of offenses such as driving while intoxicated, violence against the person, or sexual assault; or comparing different types of interventions.

Various methods of working then, can achieve the previously elusive goal of reducing offender recidivism. Whilst the details of this continue to be discussed, the general result has been a move away from the therapeutic nihilism of the 1970s and 1980s. There are several collections of the findings from this work (Harland 1996; McGuire 1995, 2002b; Ross, Antonowicz and Dhaliwal 1995). The status of these findings has been endorsed by reviews commissioned by government departments, in the United States (Sherman, Gottfredson, MacKenzie, Eck, Reuter, and Bushway 1997), Canada (Motiuk and Serin 2001), the United Kingdom (Goldblatt and Lewis 1998; Vennard, Sugg and Hedderman 1997), and elsewhere.

One set of findings to have emerged from the research literature relates to what are known as structured *programs* of intervention (Andrews 2001; McGuire 2000, 2001). The types of programs which to date have yielded the most consistently positive effect sizes are those which involve some focus on the relationship between an individual's pattern of thoughts, feelings and behavior prior to committing an offense. These are known as 'cognitive-behavioral' programs (Lipsey, Chapman and Landenberger 2001; Lipton, Pearson, Cleland and Yee 2002). Correctional staff are given special training to carry out this work, which involves concerted attempts to alter the patterns found, and help individuals to develop skills that will enable

them to act differently in future situations where they may be at risk of committing a crime. Findings of this type have begun to have a significant influence on the design, delivery, monitoring and evaluation of correctional services and on criminal justice viewed in its broader sense. In recent years, government agencies in several countries have sought to anchor their criminal justice practices more firmly within such an evidence-based approach.

In a number of publications Wexler (1996, 1998, 2002) has considered aspects of the criminal law approached from a therapeutic jurisprudence perspective and, amongst numerous other issues, has explored how findings of the kind just discussed might influence the practice of criminal courts. Thus Wexler (1998) envisaged the possibility that court personnel may instigate processes of change through their manner of interaction with the defendant. On a larger scale they could both contribute to and guide the implementation of the rehabilitation process through a number of other adjustments in procedure. To do so, judges and criminal lawyers would need to familiarise themselves with the relevant research literature. Defendants would be placed in a central rather than peripheral position in court proceedings, and there would be discussion of and engagement with the process of cognitive change in offenders. After the hearing, court staff might play a part in the preparation of treatment or parole plans, the setting of monitoring conditions, or the provision of support through which agreed plans were to be implemented. These and other suggestions have been developed and amplified in subsequent publications (Wexler 2000a, 2000b, 2001, 2002; Winick 2000, 2002, in press).

Eliminative And Constructional Strategies

The disparate effects of the two types of strategies just outlined – punitive sanctions and efforts at rehabilitation, respectively – can be made comprehensible if they are viewed from the perspective of behavioral psychology. If one objective of sentencing is the reduction of criminal recidivism, a type of activity agreed to be socially undesirable, attention must turn to the consequences of legal decisions designed to bring this about. Why does official punishment appear not to have its presumed deterrent effects?

Although not focused directly on the correctional system, there is a very large behavioral psychology literature on the effectiveness of punishment as a method of inducing change that is relevant to this question. Gendreau (1996) estimated that it comprises a total of 25,000 studies over a 40-year period. The net finding from this, in a nutshell, is that punishment is only likely to be effective when certain very specific conditions are met. For it to ensure reduction of undesirable behavior, it must (a) follow that behavior

immediately; (b) be inescapable; (c) be high in intensity; and (d) be applied in a context in which there are alternative courses of action an individual can take towards a desired goal (Axelrod and Apsche 1983; Hollin 2002; Moffitt 1983; Sundel and Sundel 1993). These conditions are very unlikely to be met in the criminal justice system (McGuire 2002c; see also von Hirsch, Bottoms, Burney, and Wikström 1999). For them to be fulfilled would require changes on a scale that most citizens of liberal democratic societies would regard as unacceptable. They would, in addition, almost certainly be impracticable – and prohibitively expensive.

Behavioral psychologists have traditionally drawn a distinction between two broad strategies for altering patterns of undesirable behavior. *Eliminative strategies* are based on the expectation that a problem behavior will be suppressed by linking it to unpleasant consequences for the individual. Examples of such procedures include punishment, aversive conditioning, and response-cost. These are the equivalent, in criminal justice decisions, of deterrence-based sentences or punitive sanctions. This entails a rough and somewhat misleading parallel between everyday experience of pain or discomfort and the use of judicial punishments.

Constructional strategies are based by contrast on the proposal that reduction of socially undesirable behavior can more effectively be achieved through the building of new ‘repertoires’ of action that effectively replace it. Rather than making the immediate consequences of an act disagreeable, in a constructional system effort is directed towards increasing the frequency of behaviors that furnish alternative harm-free routes towards an objective. This can be accomplished through a number of psychotherapeutic methods and also through skills training, attitude change, education, employment, and other forms of intervention.

There is considerably more evidence supporting the efficacy of interventions based on positive reinforcement, employing constructional strategies, than on eliminative approaches. Considering this for the moment from a purely behavioral standpoint, therapeutic benefits are much more likely to be gained through the activation of procedures focused on skills development, self-management, and associated methods. These approaches can also be applied within standards that avoid the ethical and legal pitfalls of eliminative techniques (Wexler 1973; Goldiamond 1974).

BEHAVIORAL AND PERSONAL CHANGE

The availability of the literature overviewed above, and the changes in practice that are occurring in some correctional services in response to it, does not mean that all questions in this area have been answered and all problems solved. No intervention has been found, nor is

Table 1: Some key process factors in psychological therapy (based on Orlinsky, Grawe and Parks, 1994).

| Finding | Relevant Studies (frequency) | Percent of support |
|--|---|-------------------------------|
| Clarity of goals: it is important that the goals of therapy are clearly understood. This matters more from the client's perspective (clear expectations on the client's part are associated with positive outcomes). | 8 | 62 |
| More effective therapists exhibit greater skilfulness in interpersonal communication. | 36 | 68 |
| Therapeutic activity should activate cognitive and behavioral processes within the client. | 15 | 87 |
| Therapists create an ethos of co-operation rather than resistance (the latter is associated with unfavorable outcomes). | 49 | 69 |
| The actions of therapists contribute to the formation of a 'bond' or working alliance with the client. | 132 | 66 |
| Therapists show affirmation of the client as a person; that is, acceptance or 'positive regard' in the sense originally defined by Rogers (1957) from the client's perspective. | 154 | 68 |
| Engagement works better than detachment, especially as viewed from the client's perspective. | 18 | 78 |

it likely that any will be found, that uniformly influences all those with whom it is applied. Changing behavior can be difficult: there may be mishaps, obstructions, reversals; problems about engagement; questionable motivation to change; and reluctant participation in activities that can help to bring change about. These issues have begun to be explored from a therapeutic jurisprudence perspective and in the second half of this paper I wish to adduce four sets of findings from psychological and related research that are highly pertinent to them.

The first is the evidence-base concerning the process of psychological therapy and the working alliance between therapist and client. The second is centred on the process of engagement and motivational enhancement at the start of the therapeutic encounter, with particular reference to patterns of behavior that are not easily susceptible to change. The third derives from research and clinical experience concerning how therapeutic activity is planned, how client progress is monitored, and how this can incorporate processes that will help retain and sustain motivation. The fourth is focused on the longer-term maintenance of gains and the prevention of relapse; or at the very least avoidance of a total dissolution of an individual's resolve when intermediate setbacks occur.

Therapy Process And The Working Alliance

The first area to consider is the process of psychological therapy and evidence concerning the importance of the working alliance between therapist and client. Considerable attention has been devoted to the question of whether psychotherapy 'works': on its

outcomes and the relative efficacy (or otherwise) of different methods with different mental health problems or client groups (Dobson and Craig 1998; Lipsey and Wilson 1993). Less attention has been centred on the activity itself. Psychotherapy is an intricate interpersonal process, and in all approaches to it, practitioners recognise that in addition to the specifics of the methods they are employing, there are fundamental conditions that need to be established for any therapy to succeed. These essential interactional processes are widely thought to represent 'common factors' across all forms of therapy. That viewpoint has, in turn, inspired many ongoing initiatives towards 'therapy integration' (Norcross and Goldfried 1992). Whilst legal personnel are scarcely in a position to apply the specific methods of psychotherapy, it may be that components of their interactive style might be informed by aspects of the therapeutic process.

Orlinsky, Grawe and Parks (1994) have reviewed and integrated findings from a series of studies examining separate facets of this. We should bear in mind that many of the interpersonal processes and internal responses that are activated during therapy are complex, subtle, and by no means easy to assess. Research in this area thus presents formidable methodological challenges whether in experimental or naturalistic studies. Nevertheless, several patterns emerge strongly from the research. Certain key process factors have been shown to be conducive to more successful outcomes of therapy. As in most fields of research, some variables have received much more attention than others. In Table 1, portions of that evidence are summarised. Where relevant findings can

be succinctly condensed, the strength of an association is illustrated by the data shown.

Amongst the results obtained in this review, the majority that did not directly confirm the hypotheses entailed non-significant differences; very few studies obtained findings counter to the hypotheses. Indeed, of the 410 tests contributing to the information summarised in the list presented in Table 1, only seven were in the latter category. In total, Orlinsky et al. (1994) found over 1000 findings devoted to aspects of the therapeutic alliance and of the relationship between process and outcome in therapy. They found a sizeable level of consistency on a number of crucial factors, which they summarise as revolving around the "...role investment, interactive coordination, communicative contact, and affective attitude" within the therapeutic encounter (1994:360). Of the 18 variables that were studied from the perspective of therapy clients across 350 tests, 16 showed a significant association between process and outcome. Other aspects of the therapeutic alliance have been addressed by a number of psychotherapy researchers including, for example, Horvath (1994). Whilst there is variability amongst the findings reviewed, there is little doubt that the formation of a good working alliance is a valid predictor of outcome in psychotherapy.

To recapitulate, judges and criminal lawyers are not responsible for the direct delivery of therapy; they are working in the setting of a criminal court. Nevertheless, as analyses informed by TJ have shown, their approach to individual offenders can and will have therapeutic impacts. Therapy process research may be used as a foundation for further strengthening these aspects of legal practice. An example of this is the work of Petrucci (2002), who has illustrated the importance of the quality of judge-defendant interactions in the domestic violence court. In a six-month observational study she found preliminary evidence that attentive listening, clear audible communication, and respectful attitudes on the part of the judge were linked to progress on the part of defendants. Judicial demeanor that was "caring, genuine, consistent but firm" (2002:288) brought forth commensurate responses in the courtroom. These ingredients are not dissimilar to some of those highlighted in the psychotherapy process research. The use of a 'client-centered' approach has also been advocated by Winick (2000) with reference to the style of communication adopted by attorneys in conversations with their clients.

Motivational Enhancement

Persons who voluntarily seek help or who are referred to therapy services are generally assumed to be at least partially motivated to change and ostensibly, therefore, willing to participate in activities that professionals recommend. But clients who attend

mental health clinics or addictions units are by no means uniformly engaged in the proceedings on offer. Individuals may be under pressure from their doctors or from family members, but inwardly have no wish to be there. Alternatively, they may be pursuing secondary motives such as a desire to be compensated for injury. In a smaller proportion of cases, they may be driven by attention-seeking or other emotional factors.

Even in wholly voluntary settings then, motivation to participate and change is far from assured. Moreover, even when individuals are apparently motivated in general terms, this does not guarantee willingness to follow courses of action their therapists recommend (assuming the latter activity is allowed within their therapeutic orientation). That is, of course, every individual's prerogative; and all therapists are obliged to have regard for the client's autonomy. Nevertheless instances arise when the therapist's and the client's viewpoints may diverge.

The psychotherapy literature is replete with discussions of how to address these obstacles. Kanfer and Schefft (1988) have described a series of 19 strategies for engendering motivation in ambivalent clients. They include for example addressing inconsistencies in a non-threatening way; initially making small achievable demands; requiring prior commitment; drawing up contracts; recording progress; and encouraging the use of positive self-reinforcement. DeRisi and Butz (1975) have described in some detail the development and use of contracts in therapeutic work. Shelton and Levy (1981) have outlined the use of carefully defined tasks or 'behavioral assignments' as a focal activity in therapeutic endeavors. Beutler and Clarkin (1990) have highlighted the central importance of selecting the most appropriate targets of change and tailoring the most promising methods of intervention to achieving them. Goldstein (2001) provides an overview of methods for developing openness to change in therapy clients, increasing their willingness to participate, and enhancing their sense of self-efficacy.

It is essential to recognise, therefore, that all provision of help occurs within a context in which the individual's level of motivation is a function of many inter-related causes. Those problems may be heightened when the type of difficulty with which clients present is not easily susceptible to change, such as substance misuse or 'addictive behaviors'. In explicitly coercive contexts, such as the operation of the criminal law and correctional services, such difficulties are further exacerbated. The entire basis for engagement with individuals is markedly different, and such circumstances may raise acute ethical dilemmas for therapists (McGuire 1997). The issue of motivation is thus a pivotal but continually perplexing one in almost all work with offenders.

This nexus of factors was highlighted by Miller (1983) in his conceptual analysis of the balance of forces at work when a person with an alcohol problem seeks professional help. Those insights led to the development of *motivational interviewing* and associated interventions. Subsequent studies showed how the use of *brief opportunistic interventions*, incorporating motivational elements, could increase the likelihood that alcohol users, including those thought not ready to change, would return for further appointments in substance-abuse services (e.g. Brown and Miller 1993). The model's applicability has been broadened to address other substance abuse and health-related problems. The potential applicability of the approach in corrections was signalled by Garland and Dougher (1991) in work with sex offenders and subsequently extended to a wider range of populations in this field. Some writers have observed that the use of motivationally-based interventions, utilising the techniques developed by Miller and others, poses ethical dilemmas (Blackburn 2002; Withers 1995); these issues are, however, beyond the scope of the present paper.

There are now several evaluation studies of these types of interventions in various modified forms. Burke, Arkowitz and Dunn (2002) have reviewed a series of 26 controlled clinical trials of *adapted motivational interventions* (AMIs) applied to a range of problems including alcohol and other drug abuse; tobacco smoking; HIV risk behaviors; diet, exercise, and other health-related lifestyle activities; entry into psychiatric treatment; and eating disorders. Most interventions were relatively brief, lasting between one and six sessions. There is good support for the use of AMIs in the areas of alcohol problems and drug addiction (the focus of most of the experiments) and other health-related behaviors, but less support regarding some other targets. The evidence indicates, however, that the style of interaction identified within 'motivational interventions' can have a practical impact on difficulties often regarded as irremediable, some with close association to offending behavior.

Motivational Intervention With Offenders

Regrettably, to date there are no similar experimental trials of motivational interventions with offender populations: "Much of the literature consists of recommendations rather than empirical reports" (Ginsburg, Mann, Rotgers and Weekes 2002:340). There are, however, preliminary indications from case studies that motivational interviews can increase levels of engagement in treatment amongst individuals who have committed sexual offenses, and offenders with substance-abuse problems, respectively (Ginsburg et al. 2002).

The issue of engagement in structured programs designed to reduce recidivism, based on the research

findings discussed earlier in this paper, has become crucially important in correctional services, and many criminal justice staff are constantly pre-occupied with attempts to resolve this problem (McMurran 2002). This includes, amongst other proposals, a framework for promoting levels of engagement and motivation amongst offenders classified as psychopathic and alleged to be 'untreatable' (Hemphill and Hart 2002).

There remains a major, and virtually ubiquitous problem of attrition in respect of attendance in correctional programs (Bottoms 2001). For example, evaluation of structured probation programs in the United Kingdom has revealed a wide range of attendance and completion rates (Hollin, McGuire, Palmer, Bilby, Hatcher, and Holmes 2002). While a few programs have achieved completion rates approaching 80 percent, for many others the corresponding figures have been significantly lower. Self-evidently, even potentially beneficial programs can scarcely have an impact if those designated to participate in them simply fail to attend. Failing to attend a program also represents a failure to comply with the instructions of the court. The highest degree of attrition occurs prior to the program's commencement. In other words, a sizeable number of those ordered by sentencers to attend such services fail to arrive for the first session. Further losses then accrue during the program sessions themselves, predominantly during the early stages.

Quality control of correctional programs in the UK is addressed through a number of processes, the most important being that of program accreditation (Lipton, Thornton, McGuire, Porporino and Hollin 2000). An independent group of experts, the *Joint Prison-Probation Accreditation Panel* was appointed, and has issued a set of accreditation criteria which programs are required to meet. One of the criteria applied is that of *Engagement and Participation*. For any given program, it should be specified how prospective participants will be induced to take part in activities that on the surface may appear alien, or may seem coercive. In relation to this, progressively more use is being made of the model of motivational intervention.

To achieve this criterion, several programs have been specially designed to incorporate a number of 'motivational' elements (McGuire 2002c). Correctional staffs are provided with supplementary training, which is directed at developing skill in using these techniques. Motivational issues are also addressed through specific exercises that involve participants in self-appraisal of their own capacity to change.

Moving from the work of correctional staff to the direct uses that might be made of these findings by legal professionals, several possibilities can be countenanced. Birgden (2002) has illustrated the potential value of motivational interviewing techniques to criminal defense attorneys when working with clients who are

resistant, who deny responsibility for offenses, or who minimise the seriousness of their actions. Birgden furnishes examples of the kinds of interactions and modes of communication that are involved in applying these techniques.

Another proposition is that defendants entering guilty pleas in court should take the stand and provide details of their offenses (Rottman and Casey 2001). This may energise a process of cognitive restructuring. Acknowledgement of the offense in this forum may influence the offender's willingness to participate in treatment; and be helpful to treatment staff if the individual subsequently returns to tactics of denial.

A third avenue is the use of specially designed contracts drawn up by court staff and used in a manner similar to behavioral contracts in therapy. An example is the County of Alameda *Drug Treatment Court Contract* (a copy of which can be inspected on Judge Peggy Fulton Hora's website). When contracts of this type are established between correctional treatment staff and offenders, they can be immensely useful in clarifying objectives, specifying activities, and monitoring progress. Where the court is a party to, or prime instigator of such contracts, we might envisage that their usefulness would be significantly augmented.

Each of these proposals involves application of principles contained within the conceptual base and legal practice of therapeutic jurisprudence. Although the client in these instances is coerced and is in contact with formal agencies on a non-voluntary basis, there are nevertheless parallels with the therapeutic situation. In the latter, the client's motivation for seeking help is driven primarily by his or her emotional or other psychological distress. For the coerced criminal justice client, the distress of appearing in court and facing anticipated penalties may be constructively harnessed to enhance motivation and engagement, using therapeutic jurisprudence as a theoretical model linking the various initiatives just described (Rottman and Casey 2001).

Adherence

It is difficult to draw any firm temporal dividing line between the initial task of encouraging entry into therapeutic programs and the subsequent one of retaining clients in therapy beyond its opening stages. Here too there is a sizeable clinical literature concerning the issue of how therapeutic activity is planned, client progress monitored, and how this can incorporate processes that will help retain interest and sustain motivation.

Examining this in a broader context, we should remember that even where relatively straightforward medical treatment is involved, a sizeable proportion of supposedly motivated patients do not adhere to regimes prescribed by their physicians. This may apply even where the consequences of non-adherence could be

significantly detrimental to an individual's health (Goldstein 2001; Meichenbaum and Turk 1987). A remarkable example of this emerged from a study of treatment of glaucoma. Patients were advised that unless they used prescribed eye drops three times a day, they would go blind. Despite this injunction, 58% of the patients did not adhere to the medication regime (Meichenbaum and Turk 1987:22).

Evidence from the psychological therapy literature demonstrates that there are some measures that can be taken which will increase the retention of clients in therapy sessions and help to sustain motivation to change. As a general principle of course, the more appropriate the matching of participants to treatment programs, the greater the chance of beneficial outcomes (Buetler and Clarkin 1990; Shelton and Levy 1981). This has been amply demonstrated from the research on reduction of offender recidivism overviewed earlier (Andrews 2001). For behavior change programs with young offenders in residential placements, the setting of realistic targets, the use of contracts, their consistency of implementation, positive reinforcement of gains, and other features are associated with better outcomes (Hollin, Epps, Kendrick 1995). Wexler (1996) has explored how 'healthcare compliance principles' (Meichenbaum and Turk 1987) might be applied by courts to specifying and administering the conditions of supervised release. Use of clear communications, checking understanding, designing plans to meet individuals' needs, eliciting 'mild counter-arguments' against non-compliance, encouraging self-attribution of responsibility for change, the use of carefully itemised contracts with contingencies linked to progress, and other features are all associated with firmer adherence to agreed plans.

Valuable additional elements include the use of 'naturally occurring' reinforcers in the individual's environment; that is, linking adherence or behavior change to things he or she will value. Another is the establishment of support networks, particularly *significant others* amongst an individual's immediate contacts, who can help to sustain efforts and morale (Goldstein and Martens 2000). The vital importance of these has been exemplified in the use of such highly successful programs as *Aggression Replacement Training* (Goldstein, Glick, Carthan and Blancero 1994) and *Multi-Systemic Therapy* with high-risk young offenders (Borduin, Mann, Cone, and Hengeller 1995). The latter findings suggest that the greater the number of systems of support that are energised in an offender's surroundings, the greater the chance of change. In this respect, we might also consider the court as a 'significant other' in an offender's life and potentially part of such a system, rather than solely a distant authority that specifies services to be delivered by other agents of change.

Associated with this, another feature that might at first glance be considered to be anti-therapeutic is the use of legal compulsion as a framework for other forms of intervention. It is customarily assumed that for meaningful change to occur through therapeutic or training activity, it is a virtual prerequisite that participation should be on a wholly voluntary basis. That is certainly an optimum and is associated with greater treatment gains. But two sets of findings show that there are also circumstances in which a legally 'coercive' framework can be conducive to change.

Farabee, Prendergast and Anglin (1998) reported a review of 11 evaluation studies of programs for drug-abusing offenders. These programs varied in the extent of legal pressure applied, but in all of them participation was coerced to some extent. Of the 11 studies, "...five found a positive relationship between criminal justice referral and treatment outcomes, four reported no difference, and two studies reported a negative relationship" (Farabee et al. 1998:5). The authors challenged the orthodox view that the existence of external pressure implies that individuals lack any internal motivation to change. Their findings also contradict the simplistic notion that motivation simply resides *within* individuals. External sources of coercion appeared crucial in bringing individuals into treatment and in retaining them in treatment longer. It was concluded that the findings supported "...the use of the criminal justice system as an effective source of treatment referral, as well as a means for enhancing retention and compliance" (p.7). This perspective parallels very closely the core therapeutic jurisprudence principle of using the law to engage clients. The authors also dissected the inter-relations of 'intrinsic' as compared with 'extrinsic' factors in motivation, applying similar concepts to those used by Miller (1983) in his analysis of motivational balances in persons seeking help with alcohol problems. Further research on substance abuse treatment by Fiorentine, Nakashima and Anglin (1999) has, however, suggested that the key factor in instilling willingness to engage may not be so much the individual client's intrinsic level of motivation, but the perceived usefulness and helpfulness of services, and their effectiveness in providing a favorable client-counsellor relationship. "What clients 'bring' into treatment is frequently less important than what they find when they get there" (Fiorentine et al. 1999:202). The apparent value of a service may therefore override in importance the question of whether or not participation is voluntary.

A second kind of evidence emerges from unpublished work by Weisburd, Sherman and Petrosino (1990), who established a *Registry* of research literature on controlled studies of deterrence. These authors collated details of a series of 68 studies published between 1951 and 1984 involving random allocation to

different levels of criminal justice sanction. In each case, those who were punished in a supposedly more severe manner were designated the 'experimental group'. Of these studies, 43 reported no differences between experimental and control samples. Only two showed apparently better outcomes for interventions that could genuinely be construed as more punitive. In the remaining experiments, rates of recidivism, parole violation, or other similar outcomes favoured experimental over control groups. But in all the latter studies, the increased 'sanction' in fact consisted of treatment: individual counselling, participation in group treatments such as social skills training, or other forms of intervention. The only element of this that could be considered punitive was that participation was non-voluntary. The provision of treatment services within a compulsory framework was nevertheless associated with positive outcomes.

Achieving a productive balance between extrinsic and intrinsic motivational factors appears a potentially very beneficial strategy in legally sanctioned interventions. Importing such analyses into legal practice via the therapeutic jurisprudence framework affords numerous advantages, providing a conceptual basis for modified, in some cases highly innovative, forms of judicial practice.

An example is the advent of drug treatment courts, first established in Miami, Florida in 1989 and which since that time are estimated to have involved the participation of over 90,000 offenders. Munro (1997) described a number of models on which courts of this type may be based, for example where individuals attend treatment programs following arrest, with deferment of prosecution; or after conviction, with deferment of sentence. Initial evaluation of such initiatives yielded very positive results. Hora, Schma and Rosenthal (1999) provided sustained arguments for the use and dissemination of these practices. They illustrated the ways drug courts operate; the various procedures involved, including links with treatment agencies; and emerging issues such as the metamorphosis in roles of various court personnel. They also identified a number of unresolved issues including the question of eligibility and the intrusiveness of monitoring. Recently Senjo and Leip (2001) reported an evaluation of Broward County, Florida drug court program in a test of therapeutic jurisprudence theory. As a dependent variable, they used follow-up data from offenders' urinalysis tests and compared this with the types of monitoring comments made in court, alongside other variables. There was backing for the hypothesis that supportive court-monitoring comments were associated with positive behavior change in offenders, whilst adversarial comments were associated with deterioration, as judged by rates of drug-free urinalysis tests. Discussing their findings, Senjo and Leip (2001)

noted that "...therapeutic jurisprudence theory suggests that offenders may be more responsive to an orientation of a court that uses positive reinforcement rather than the traditional tools of retribution, deterrence, and punishment found in the crime control model used in regular criminal case processing" (2001:17).

Drug courts can be seen as one type of problem-solving court, a broader concept that now encompasses a wide range of legal casework, but also has possible implications on an organisational and state-legislative level. Rottman and Casey (1999) have described how courts have been pulled towards a problem-solving, proactive orientation, in which an effort is made to maximise the 'potential of the courtroom' as a location for engendering positive change in the thinking and feeling of the participants. Such practices are now the hallmark of over one thousand courts. "Examples of problem-solving courts in operation in the United States include drug courts, mental health courts, domestic violence courts, homeless courts, teen courts, tobacco courts and some forms of family courts" (Becker and Corrigan 2002:4). It may be that the procedures employed in these settings could go a stage further and make yet more focused use of problem-solving techniques. For example, the processes of developing problem awareness or problem recognition (McGuire 2002d) could be instigated by asking offenders to define some of their problems in court. The process of acquiring problem-solving skills, which is a core element in a number of offending behavior programs, could be instigated at that point. If this were to be linked to summary statements made by the judge, acting in concert with correctional staff delivering programs, the specifications of which were embodied in a written contract, such a combination could greatly increase the momentum towards cognitive and behavioural change. Innovations of this kind are wholly compatible with therapeutic jurisprudence principles, and could comfortably be combined with numerous other proposals discussed by Winick (2002 in press:6), amplifying his view that courts operating along these lines "...represent a significant new direction for the judiciary. They seek to resolve not only the judicial case, but look at the problem that produced it holistically, and actively seek to resolve it".

Relapse Prevention

So far, we have examined three sets of findings that may amplify some of the analyses that therapeutic jurisprudence has generated in scrutinising the therapeutic impact of formal proceedings in criminal law settings. These were related to the interpersonal demeanor of legal personnel and the adoption of some aspects of a therapeutic style of interaction; the employment of strategies for enhancing motivation to engage; and of additional strategies for supporting

continued participation. A fourth area of relevance is concerned with the longer-term maintenance of gains and the prevention of relapse.

Like the concept of motivational intervention, that of *relapse prevention* was initially developed within the field of substance abuse treatment (Marlatt and Gordon 1985). High-frequency, well-established, habitual behaviors are amongst the most difficult to alter, and returns to pre-treatment 'baseline' levels of functioning are relatively common. There is evidence that certain procedures can be of significant benefit in enabling individuals to sustain progress and maintain advances they have made during treatment. These include the development of skills for recognising situations in which they will be 'at risk' of returning to former patterns of behavior and for developing, practising, and implementing skills for coping in such circumstances. It is also important to equip individuals with the ability to remain in control following minor 'lapses', to ensure they do not result in major relapse. That phenomenon is sometimes (mainly with reference to addictions) called the *rule violation effect* (Wanigaratne, Wallace, Pullin, Keaney and Farmer 1990). Methods such as these, which are predominantly 'cognitive-behavioural' in their approach, have been shown to be effective in work on problems such as substance abuse (Lipton, Pearson, Cleland and Yee 2002), violent offending (Bush 1995), and sexual offending against children (Eldridge 1998).

It might be considered that the process of learning to avoid relapse is a matter for a relatively late stage of the therapeutic process, and therefore with reference to offenders might only become a priority at the point of transition from institutions to the community. Thus it may move 'center-stage' for example as part of parole decisions or formulating release plans. Prior to acquiring skills that will enable the avoidance of relapse, the offender usually needs to acknowledge the existence of various problems, develop some understanding of how these are inter-connected with each other and with his or her offending, and take responsibility for those acts. This may be a demanding and time-consuming process. An alternative may be to incorporate self-assessment of risk and the learning of skills for its avoidance or management from a much earlier stage.

Wexler (2000a), for example, has urged that procedures of this kind could be adopted, not only at the point of exit from the intervention process, but much earlier, in 'dispositional' court hearings themselves, particularly in a situation of 'probation eligibility'. Relapse prevention or risk management planning could form the basis of a proposal made to the court regarding a community rather than a custodial sentence. The participation of the defendant in producing such proposals and in anticipating the possible concerns of

the court could be an invaluable exercise in cognitive self-change.

One way of implementing this with young offenders, proposed by Wexler (2000b), could be through the medium of Youth Advisory Juries, based on the model of teen courts. Such groups, composed of some offenders and volunteers, could probe conditional release plans submitted by young offenders seeking conditional release, helping to identify risk situations, testing how realistic a plan is, anticipating problems that may arise, rehearsing possible solutions, and applying problem-solving skills throughout.

An important element of relapse prevention, in addition to awareness of and preparation for risks, is self-management through positive self-reinforcement of progress. A personal sense of achievement and empowerment contributes to further relapse prevention efforts. Whilst therapists working with clients employing relapse prevention strategies will include these facets in their plans, such an activity could also be incorporated in judicial review hearings. As the court remains a 'significant other' in the offender's life; official praise, foreshortening of supervision periods, or other rewards will have a sizeable import. This could also be realized through the use of other reinforcing events such as graduation ceremonies and re-entry courts (Wexler 2001).

Winick (2000) has developed similar ideas with reference to the activities of lawyers themselves. Integrating models from therapeutic jurisprudence, preventive law and psychology, he proposed a model of a 'therapeutically oriented preventive lawyer'. The concepts of 'emotional' and 'interpersonal' intelligence, which Winick envisions as central in this role, are close to the types of skill we encountered earlier when considering the working alliance.

In British courts, it is fairly common practice for pleas of mitigation to be entered when a person is found guilty of a criminal offense. In some cases this may include letters written by persons known to the accused, who make statements referring to his or her previous good character. Letters of this kind may carry considerable weight when the defendant has no previous convictions, probably less so if he or she has a previous criminal record, and they might be viewed rather cynically if referring to someone with many previous convictions. However, there could be circumstances in which an individual has been making genuine attempts at change where 'significant others' have witnessed and can confirm this. The circumstances of a new offense might have been that, for example, the defendant had been placed under enormous pressure and had succumbed (e.g., had been manipulated by others, or subjected to provocations or threats). Rather than viewing this as just another failure, the court could place it in context and recognise the progress made, and

consider this a lapse rather than total relapse. Wexler (2001) suggests other examples of judicial 'vision statements' that might have impact in registering the court's view that whatever their actions, offenders also have positive qualities that should not be dismissed.

Marshall, Anderson and Fernandez (1999) describe an individual with whom they worked, who over a 20-year period had committed a large number of sexual offenses (400+) against children and who could be described as a 'chronic predatory child molester'. On hearing this, the likely reaction of many people would be to see such a man entirely in terms of that label. The person described also kept diaries, recording in detail how he used his time. Marshall and his colleagues were able to examine them and chart the time he spent in planning and committing his offences, relative to all other activities, including everyday, mundane, and pro-social actions. This revealed that his total offence-related activities amounted to only 8% of his time. He spent a larger amount of it working (in a completely trouble-free way) in a residence for older adults. The authors argued against the tendency to see such a person entirely in terms of his offences. Similarly, in the administration of justice, all those involved in assessment, sentencing, and other decision-making can arrive at more composed judgements of every person as a whole.

CONCLUSION

This paper has briefly reviewed basic concepts and relevant research from several areas of clinical and forensic psychology – rehabilitation of offenders; the therapeutic alliance; motivational engagement; treatment adherence; and relapse prevention. Findings from therein continue to provide a social-science evidence base that, conveyed through the theoretical framework of therapeutic jurisprudence, may have a gradually increasing influence on legal procedures, roles, and rules with particular reference to criminal justice. Studies are beginning to appear in which hypotheses generated from the convergence of these fields are being tested in court settings (Petrucci 2002; Senjo and Leip 2001). This is a very encouraging, and I hope continuing trend.

Other recent studies have added significantly to our understanding of the happenings in individuals' lives that lead towards or away from involvement in crime. Whilst in any given case the focus of legal interest is primarily upon the criminal act, a fuller and much clearer picture emerges if we consider both criminal recidivism, and desistance from crime, as multi-faceted, dynamic processes. In an interview-based study with over 300 recidivists returning to prison following reconviction, Zamble and Quinsey (1997) were able to provide considerable insight into the interpersonal and intrapersonal events that occur in the period preceding a

new offense. Working on the other side of wall so to speak, Maruna (2001) used in-depth interviews to examine the 'personal narratives' of individuals who, however falteringly, eventually desisted from crime, progressively reconstructing their own identities in the process. Both of these studies show a complex fabric of relationships between circumstances and life events, moods and feelings, thoughts and reactions, self-appraisals and efforts to cope that evolve gradually over time. Taken together, these findings underline the need to develop a new approach to criminal conduct, not only within correctional services but also within the frameworks used by the law itself.

It seems unthinkable that the insights gained from these studies should somehow remain confined to the domain of social science when they have the capacity to illuminate offending behavior and inform legal responses to it. Were the latter to occur it might influence legal personnel both in the kinds of decisions they make and in the procedures by which they make them. By capitalising on what we now know about offender treatment and personal change, such a development could maximise the therapeutic benefit of legal decisions.

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