Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process

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Scholars at the University of Arizona and elsewhere are currently developing a fresh approach to mental health law. This approach, known as "therapeutic jurisprudence," studies the role of the law as a therapeutic agent.[1]

A new and highly interdisciplinary approach to the law and mental health field, therapeutic jurisprudence suggests that the law itself can be seen to function as a therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) may act as social forces that sometimes yield therapeutic or antitherapeutic consequences. Therapeutic jurisprudence seeks "to identify—and ultimately to examine empirically—relationships between legal

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1. *See generally* DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE (1990); DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (1991). Professor Winick teaches at the University of Miami Law School. The Wexler and Winick book consists of essays written explicitly from a therapeutic jurisprudence perspective and provides several concrete illustrations and applications of the approach. The Wexler book is an anthology of somewhat older pieces that, while not consciously written from a therapeutic jurisprudence perspective, can be seen as implicitly embracing—and presaging—the therapeutic jurisprudence approach.

arrangements and therapeutic outcomes."[2]

The therapeutic jurisprudence approach does not argue that therapeutic concerns should supersede other considerations, but only that empirical information from the social sciences can inform legal decision-making and should indeed be taken into account in legal decision-making.[3] Within the limits set by principles of justice, therapeutic jurisprudence suggests that the law should be designed to serve more effectively as a therapeutic agent. Naturally, then, therapeutic jurisprudence has something to say about sex offenders and the legal apparatuses that may influence their mental health or behavior.[4]

At the University of Arizona, we hope to develop a series of studies that will ultimately examine a variety of empirical issues relating to the law and plea process with respect to sex offenders.[5] These studies arise from one particular therapeutic jurisprudence application proposed by David Wexler and Bruce Winick. This Article summarizes the empirical questions raised by Wexler and Winick's theory and suggests how those questions might be empirically analyzed.

A therapeutic jurisprudence approach also raises important empirical questions regarding Washington's Sexually Violent Predators statute[6]—the focus of the other papers in this symposium. Later, in Part III, we examine some of those issues, principally: (1) whether the Washington law actually targets the least treatable sex offenders and discourages the treatment of a larger sex offender population, (2) whether the Washington law will encourage guilty defendants to deny their guilt through the plea process, ultimately causing the law to act as an antitherapeutic agent for sex offenders, and (3) whether the Washington statute also provides an incentive for

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2. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 32 (1992).

3. *See* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991) (illustrating how the therapeutic jurisprudence "lens" can generate a new set of research inquiries).

4. Therapeutic jurisprudence is concerned not only with the impact of the law on *cognitive* processes, but also on *behavioral* processes. In the context of sex offenders, the two processes are related. If offenders suffer from cognitive (thinking) distortions that deny or minimize their culpability, they probably will not be motivated to change their behavior so as to avoid reoffending.

5. These studies will assess various aspects of the plea process in the Pima County Superior Courts in Tucson, Arizona.

6. 1990 Wash. Laws ch. 3, §§ 1001-113, codified at WASH. REV. CODE §§ 71.09.010-.902 (Supp. 1990 & Supp. 1990-91). For a brief description of the law, see *infra* note 64.

guilty sex offenders to protest their innocence and proceed to trial in an effort to avoid indefinite incarceration, possibly increasing the risk of perjury and extending the period of denial through the trial and appeals process. We hope that our discussion of these issues and the therapeutic jurisprudence perspective presented in the Article will enrich the potential research agenda relating to the Washington law.

I. THE PSYCHOLOGY OF SEX OFFENDERS AND THERAPEUTIC JURISPRUDENCE

There is strong empirical evidence that sex offenders—particularly child molesters—exhibit denial and minimization[7] of their behaviors.[8] These so-called cognitive distortions[9] present a barrier to effective treatment and may themselves be a focus of therapy.[10] Therapeutic strategies such as "cognitive restructuring"[11] have been developed to treat these distortions.

Cognitive restructuring bascially involves confronting the offender with the evidence of his behaviors or engaging in role

7. Derek Perkins, *Clinical Work With Sex Offenders in Secure Settings*, *in* CLINICAL APPROACHES TO SEX OFFENDERS AND THEIR VICTIMS 151, 168 (Clive R. Hollin & Kevin Howells eds., 1991); *see also infra* note 9.

8. Sex offenders may not be the only offenders who engage in denial and minimization. Cognitive processes aimed at minimizing the psychically painful realities of deviant behaviors may be a characteristic of *all* offenders. Such cognitive processes have also been called "techniques of neutralization" and may include "denial of responsibility," "denial of injury," "denial of the victim," "condemnation of the condemners," and "appeal to higher loyalties." Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AMER. SOC. REV. 664, 666 (1956) (suggesting that these rationalizations may not only *follow* the deviant behavior, but may even *precede* it, making the deviant behavior possible).

9. Nathan L. Pollock & Judith M. Hashmall, *The Excuses of Child Molesters*, 9 BEHAV. SCI. & L. 53, 54 (1991). *See also* Gene G. Abel et al., *Complications, Consent and Cognitions in Sex Between Children and Adults*, 7 INT'L J.L. & PSYCHIATRY 89 (1984); Howard C. Stevenson et al., *Treatment of Denial in Adolescent Sex Offenders and Their Families*, 14 J. OFFENDER COUNSELING, SERVICES & REHABILITATION 37 (1990); Linda S. Grossman & James L. Cavanaugh, Jr., *Psychopathology and Denial in Alleged Sex Offenders*, 178 J. NERVOUS & MENTAL DISEASE 739 (1990); Ruth Sefarbi, *Admitters and Deniers Among Adolescent Sex Offenders and Their Families: A Preliminary Study*, 60 AM. J. ORTHOPSYCHIATRY 460 (1990); Linda S. Grossman & James L. Cavanaugh, Jr., *Do Sex Offenders Minimize Psychiatric Symptoms?*, 34 J. FORENSIC SCI. 881 (1989); David D. French, *Distortion and Lying as Defense Processes in the Adolescent Child Molester*, 14 J. OFFENDER COUNSELING, SERVICES & REHABILITATION 161 (1990). For a list of the types of distortions exhibited by child molesters, *see* Gene G. Abel et al., *The Measurement of Cognitive Distortions of Child Molesters*, 2 ANNALS OF SEX RESEARCH 135 (1989).

10. Perkins, *supra* note 7, at 152.

11. Gene G. Abel et al., Treatment Manual for Child Molesters (unpublished manuscript, on file with the authors) [hereinafter *Treatment Manual*].

reversals[12] in which the offender/patient must actively grapple with the evidence of his illicit desires or morally reprehensible behavior. Such treatment is geared toward leading the offenders to "rethink their own cognitions."[13]

A therapeutic jurisprudence approach to the sex offense area might ask whether the law, which includes the roles of laywers and judges as well as rules and procedures, has a therapeutic or antitherapeutic impact on sex offenders. Wexler and Winick[14] have specifically questioned whether the law in this area promotes cognitive restructuring or instead promotes cognitive distortion, perhaps contributing to psychological dysfunction and criminality.[15] It may well be, as Wexler and Winick note, that "many aspects of the justice system are inadvertently geared towards fostering offender denial."[16]

Applying the therapeutic jurisprudence approach to the plea process, Wexler and Winick theorize about how various aspects of the criminal plea process may, either in a therapeutic or antitherapeutic fashion, contribute to these cognitive distortions or promote cognitive restructuring.[17] This is particularly noteworthy in light of the fact that plea bargains are the dominant method for criminal adjudication.[18]

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12. When engaging in role reversal, "the therapist plays being the child-molester who uses the various . . . cognitive distortions," and "the patients are asked to take the role of a probation officer, a policeman, a family member, or anyone who might interact with a child molester, and attempt to confront the beliefs role-played by the therapist." *Treatment Manual, supra* note 11, at 39.

13. *Id.*

14. *See* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225 (1992).

15. There is some empirical evidence of a relationship between the legal process and cognitive distortions of alleged sex offenders. *See* Linda S. Grossman & James L. Cavanaugh, Jr., *Psychopathology and Denial in Alleged Sex Offenders*, 178 J. NERVOUS & MENTAL DISEASE 739, 742 (1990); Linda S. Grossman & James L. Cavanaugh, Jr., *Do Sex Offenders Minimize Psychiatric Symptoms?*, 34 J. FORENSIC SCI. 881 (1988) (concluding in both articles that patients facing no active legal charges show significantly more psychopathology than those facing legal charges; they note, however, that this result might be accounted for by sampling bias).

16. Wexler & Winick, *supra* note 14, quoting Perkins, *supra* note 7, at 152.

17. Wexler & Winick, *supra* note 14.

18. In Pima County, Arizona, from January to November of 1991, approximately 70% of all cases were disposed of through pleas. *See also* MARTIN S. GREENBERG & R. BARRY RUBACK, SOCIAL PSYCHOLOGY OF THE CRIMINAL JUSTICE SYSTEM 116 (1982) (stating that 75% to 90% of cases are disposed of through pleas, depending on the jurisdiction); HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 17-22 (1966).

II. AREAS OF POTENTIAL IMPACT

Several specific aspects of the plea process may affect cognitive distortions or promote cognitive restructuring and are the proper subject of empirical inquiry. For instance, the pleading alternatives available to a sex offender defendant (e.g., guilty pleas, not guilty pleas, and no contest pleas), the type of concessions that might be offered (e.g., relating to sentence leniency or reduced charge), and the judicial process of establishing a factual basis for a plea may all function in a therapeutic or antitherapeutic manner.

A. Pleading Alternatives

At arraignment, a criminal defendant is advised of the formal charge and is typically called upon to enter a plea.[19] Ordinarily, the accused may plead "not guilty," "guilty," or "no contest" (nolo contendere).[20] Most often, the defendant will initially plead not guilty.[21] If the defendant protests his innocence and is unwilling to face the proscribed punishment, the case usually goes to trial, and the trier of fact decides whether the defendant is guilty.[22] If the accused, however, ultimately

19. For an overview of the plea process and the judicial role in accepting pleas, *see* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 21.1 to 21.6 (2d ed. 1992).

20. This discussion excludes special pleas such as "not guilty by reason of insanity" or "guilty but mentally ill."

21. Acceptance of pleas of guilty or nolo contendere at this early stage has been criticized. State ex rel. Burnett v. Burke, 126 N.W.2d 91, 95-96 (Wis. 1964).

22. Even when a defendant refuses to plead guilty and thus goes to trial, the issues related to denial do not end. For example, in Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991), the defendant was convicted while denying guilt of child molesting. Despite these denials, the trial court required the defendant to undergo sexual abuse therapy as a condition of probation. The defendant attended the sessions, but continued to protest his innocence. His probation was therefore revoked. On review, the Supreme Court of Indiana held that because the defendant did not plead guilty and admit his guilt, it was improper to require that he admit that he was guilty of the crimes charged. *Id.* at 824. The court reasoned that "thought control" could not be imposed as a condition of probation, nor could denial of guilt be a basis for revocation. *Id.* The court did note, however, that denial might properly be used in "determining whether a particular defendant is an appropriate candidate for probation in the first instance." *Id.* The United States Supreme Court has recently granted certiorari in a similar Montana case to determine whether requiring a man convicted of fondling a child to attend a therapy program for sex offenders would force him to admit guilt in violation of his right against self-incrimination. State v. Imlay, 813 P.2d 979 (Mont. 1991), *cert. granted*, 60 U.S.L.W. 3593 (U.S. March 2, 1992) (No. 91-687). For a discussion of similar issues, *see generally* Murray Levine & Eric Doherty, *The Fifth Amendment and Therapeutic Requirements to Admit Abuse*, 18 CRIM. JUST. & BEHAV. 98 (1991).

decides to plead guilty in some form, a change of plea hearing is held.

The type of plea ultimately entered may impact a defendant's cognitive distortions. Because sex offenders are usually extremely unwilling to admit guilt, even when the state's evidence is impressive, they often seek to plead "no contest." A no contest plea permits the sex offender to accept the consequences of a conviction without trial and without admitting guilt.[23] Indeed, some sex offenders, according to Wexler and Winick, will seek to enter so-called *Alford* pleas, whereby a defendant is permitted to plead guilty while at the same time *protesting his innocence*.[24]

Acceptance of *Alford* pleas and no contest pleas may reinforce cognitive distortions and denial, thereby undermining treatment efforts.[25] On the other hand, rejecting such pleas might induce defense lawyers to encourage those clients who have no plausible defenses to plead guilty. In essence, this would engage defendants in an exercise of cognitive restructuring that includes role reversal.[26] For example, the defense

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23. For cases where sex offenders pled no contest, *see, e.g.*, State v. Dishong, 594 P.2d 84 (Ariz. 1979) (no contest plea to child molestation) and State v. Snyder, 544 P.2d 230 (Ariz. Ct. App. 1976) (no contest plea to lewd acts upon a minor child). More recently, a case capturing the public eye involved Paul Reubens, better known as "Pee Wee Herman," who pled no contest to a charge of indecent exposure. *See* James Martinez, *Pee-wee Pleads No Contest in Indecency Case*, ARIZONA DAILY STAR, Nov. 8, 1991, at A11.

24. In North Carolina v. Alford, 400 U.S. 25, 37-38 (1970), the U.S. Supreme Court recognized that a defendant may be motivated to plead guilty for reasons other than his actual guilt of the offense charged. So long as the plea is a product of free and intelligent choice and a factual basis supports the plea, the Court held that an express admission of guilt is not a constitutional prerequisite to the imposition of a criminal penalty following a conviction based upon a guilty plea. *Id.* at 37. *See* Curtis L. Shipley, Note, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA.L. REV. 1063 (1987); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1280, 1286 n.290 (1975) (discussing pleas in sex offender cases). For cases where sex offenders entered *Alford* pleas, *see, e.g.*, State v. Draper, 784 P.2d 259 (Ariz. 1989) (*Alford* plea to attempted child molestation); and State v. Fowler, 670 P.2d 1205 (Ariz. Ct. App. 1983) (*Alford* plea to sexual assault).

25. Wexler & Winick, *supra* note 14.

26. Wexler & Winick, *supra* note 14. As Alschuler noted:

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

Alschuler, *supra* note 24, at 1309.

Defense attorneys can and should give clients a realistic appraisal of the probability of conviction and the potential sentences imposed for guilty pleas in such

attorney might ask the defendant, "How would you vote if you were a juror in your case?" If research supports the hypothesis that *Alford* pleas and no contest pleas reinforce cognitive distortions and denial, perhaps judges should be reluctant to accept such pleas[27] from sex offenders on therapeutic grounds.

This proposal raises several interesting empirical questions. For instance, are different types of defendants more likely to enter a certain type of plea, and more precisely, are sex offenders more likely than other offenders to enter, or to attempt to enter, no contest or *Alford* pleas?[28] The broader question is whether *Alford* or no contest pleas actually contribute to a sex offender's cognitive distortions or treatment refusals more than ordinary guilty pleas. In other words, does accepting or denying *Alford* and no contest pleas affect the existence of cognitive distortions or the acceptance of offers of treatment?

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cases. Smith v. United States, 265 F.2d 99, 101 (D.C. Cir.), *cert. denied*, 361 U.S. 843 (1959). Counsel are given great leeway in encouraging clients without possible defenses to plead guilty. People v. Adams, 50 Crim. L. Rep. (BNA) 1334 (Colo. Ct. App. Dec. 19, 1991). Nonetheless, when advising a defendant that the evidence against him is so overwhelming that a guilty plea is his best salvation, counsel must be careful not to advise the defendant to depart from truth if need be in order to establish facts that show he is guilty. Bruce v. United States, 379 F.2d 113, 119 n.7 (D.C. Cir. 1967). The trial judge must also be cautious. *See* State v. Cain, 733 P.2d 676 (Ariz. Ct. App. 1987) ("trial judge engaged in a very questionable practice in permitting the defense attorney to lay the factual basis for the plea, when it may be in the defendant's best interest to have error introduced into the record"). *Id.* at 679. Moreover, the therapeutic impact of guilty pleas "might be further buttressed by a judicial sentencing policy particularly unsympathetic to sex offenders who stand trial and offer a defense rejected by the jury and considered perjurious by the judge." Wexler & Winick, *supra* note 14.

27. Because a criminal defendant has no absolute constitutional right to have his guilty plea accepted by the court, North Carolina v. Alford, 400 U.S. 25, 39 (1970), the court retains discretion to accept or reject such pleas. *Compare* United States v. Biscoe, 518 F.2d 95, 96 (1st Cir. 1975) (refusal of guilty plea was not abuse of discretion where evidence was weak and defendant denied crime); *and* United States v. Cepeda Penes, 577 F.2d 754, 756 (1st Cir. 1978) (no abuse of discretion in refusing nolo plea for which no factual basis was shown, "for acceptance of a nolo plea is solely a matter of grace"); *with* State v. Dillon, 748 P.2d 856, 859 (Kan. 1988) (nolo plea may not be rejected because of defendant's failure to admit facts establishing guilt, as a contrary conclusion "would virtually abolish any reason to plead nolo contendere"); *and* United States v. Gaskins, 485 F.2d 1046 (D.C. Cir. 1973) (abuse of discretion to refuse a guilty plea solely because the defendant equivocates and does not admit the alleged facts of the crime). As suggested here, however, having the defendant admit guilt might be effective in maximizing the rehabilitative effects of the prosecution. *See* 3 ABA STANDARDS FOR CRIMINAL JUSTICE 14-1.2 (2d ed. 1980).

28. Such data might be collected through archived court records or through the County Attorney's Office's data system. This data could also be collected by observing plea hearings and recording the type of plea entered and the offense charged.

Other questions address the role of the defense attorney. For example, when preparing the defendant for a trial or a plea bargain, does the defense attorney's behavior affect the offender's denial? The defense attorney may possibly engage the client in cognitive restructuring by confronting him with the damning evidence against him or by playing role reversal.[29] A researcher could measure such interactions by observing meetings between the attorney and client and then analyzing the content of their interaction. Because the defendants' contacts with others during the time period under study would be uncontrolled, these uncontrolled contacts offer a rival explanation for any finding. On the other hand, consistent causal findings in regard to defendants' cognitive distortions, treatment choices, and treatment outcomes, which differ between attorneys who do and do not engage in cognitive restructuring, would lessen the vitality of the rival hypothesis.

It might be that refusals of nolo and *Alford* pleas might lead some savvy defense attorneys not to engage their clients in cognitive restructuring. Rather, those attorneys might petition for a change of judge after identifying those judges who become infamous for either not letting the defendant off the hook with respect to admitting guilt or refusing to accept *Alford* or nolo contendere pleas. This practice would potentially bias the sample of offenders who come before any particular judge.

B. Type of Concession

The possibility of concessions in charging and sentencing play a major role in inducing defendants to enter into plea bargains. Two principal types of plea bargains include "charge" bargaining and "sentence" bargaining.[30] Sentence bargaining occurs when an offender is charged with the actual crime the state believes he committed, but receives a sentence concession for an "on-the-nose" plea of guilty to that charge.[31] Charge bargaining, on the other hand, occurs when an offender is charged with the actual crime the state believes he committed,

29. *See supra* note 26 and accompanying text.

30. Two other types of concessions include charge dismissal and avoidance of prosecution under specialized statutes. DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 97 (1966).

31. H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 109 (1977).

but is allowed to plead guilty to a reduced charge.[32] Charge bargaining, rather than sentence bargaining, is particularly prevalent in jurisdictions where mandatory sentencing has stiffened the potential penalties and shifted discretion from the courts in sentencing to the prosecution in charging.[33] Defendants in these jurisdictions seek this concession because it results in a less serious criminal record and restricts the statutory range of penalties that may be applied.[34]

Charge bargaining may feed into cognitive distortions more so than sentence bargaining. Presumably charge bargaining gives the sex offender an opportunity to avoid admitting guilt to the actual charged conduct by admitting guilt to a less serious crime.[35] For example, if someone charged with child molestation is allowed to plead guilty to assault, this allowance might feed into the offender's denial: even the state has conceded that the defendant is guilty not of the charged conduct, but of a less serious crime.[36]

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32. Uviller, *supra* note 31, at 108; *see also* NEWMAN, *supra* note 30.

33. *See* Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Kenneth Adams, *The Effect of Evidentiary Factors on Charge Reduction*, 11 J. CRIM. JUST. 525 (1983) (evidentiary strength is inversely related to prosecutorial charge concessions).

34. NEWMAN, *supra* note 30.

35. The reduced offense must bear some categorical similarity to the original charge. State v. Norris, 558 P.2d 903, 905 (Ariz. 1976); State v. McGhee, 551 P.2d 568, 571 (Ariz. Ct. App. 1976). This would be preferred from a therapeutic standpoint, so that the defendant would be forced to admit guilt of a crime that is at least related to the sexually deviant conduct. *See* People v. West, 477 P.2d 409, 420 (Cal. 1970) (adopting the ABA Standards for Criminal Justice position that requiring a reasonable relation between the crime pleaded to and the defendant's actual conduct "will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion") (citing AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 68 (1967)). Although the reduced offense must relate to the original charge, the "factual basis" must relate to the crime to which the defendant is pleading. *See infra* note 54.

36. *See, e.g.*, State v. Cain, 733 P.2d 676 (Ariz. Ct. App. 1987), where defendant, originally charged with three counts of sexual conduct with a minor, pled guilty to one count of aggravated assault. The trial court found a factual basis for the plea, but the appellate court determined that the trial court was in error because the defendant's conduct did not establish the elements of aggravated assault. The *Cain* court noted that

> [i]t behooves the *trial judge* in the acceptance of a plea of guilty to determine exactly what statute is claimed to be violated and personally make sure the factual basis obtained from the defendant is sufficient. The prosecutor certainly has the same duty and should assist the trial judge in establishing an appropriate factual basis.

Id at 679. *See also* State v. Altamirano, 803 P.2d 425 (Ariz. Ct. App. 1990) (plea agree-

The ultimate question is whether the type of concession affects cognitive distortions.[37] An empirical examination of these issues begins with an assessment of the types of bargains entered in the courts[38] in an effort to determine whether the charged offense bears any relationship to the type of concession offered.[39]

C. Establishment of the Factual Basis of the Plea

Change of plea hearings offer an opportunity for judges to accept or reject plea agreements. The judge must determine not only whether the plea is knowingly and voluntarily entered into by the defendant, but also whether a factual basis for the plea exists.[40] In Arizona, for example, a court can and must find a factual basis despite the defendant's denial of guilt[41] or plea of no contest.[42] It is particularly incumbent

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ment of defendant charged with one count of sexual abuse and one count of burglary included dismissal of sexual abuse charge).

37. Investigation of this question might be difficult if limited to a single jurisdiction, given the unlikelihood that both types of concessions would coexist with sufficient variability in any one jurisdiction. Empirical inquiry of this question might be better addressed in a cross-jurisdictional design involving the comparison of the cognitive distortions of sex offenders in a jurisdiction predominantly employing charge bargaining with those in a jurisdiction where sentence bargaining is the norm.

38. Such data would be available through archived records or through the prosecutor's office.

39. *See* Hunter A. McAllister & Norman J. Bregman, *Plea Bargaining by Prosecutors and Defense Attorneys: A Decision Theory Approach*, 71 J. APPLIED PSYCHOL. 686 (1986) (discussing the ways in which probability of conviction affects plea bargaining decisions of defense attorneys and prosecutors); Kenneth S. Bordens & John Bassett, *The Plea Bargaining Process From the Defendant's Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCHOL. 93 (1985) (analyzing the factors that may affect a defendant's decision to accept a plea bargain); Kenneth Adams, *The Effect of Evidentiary Factors on Charge Reduction*, 11 J. CRIM. JUST. 525 (1983) (examining the relationship of evidence going to strength of prosecutor's case to charge reduction).

40. "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. PROC. 11(f); *see also* Ariz. R. Crim. Proc. 17.3; Wash. Cr. R. 4.2(d).

41. The defendant could make two kinds of *express* denials: (1) defendant might make a complete denial of involvement in any act or conduct that might constitute a criminal offense, or (2) the defendant might admit he performed an act which would be criminal if accompanied by the requisite state of mind, but equivocate as to his state of mind at the time of the act. 8 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 11.07[2] (1990).

42. State v. Draper, 784 P.2d 259, 262 (Ariz. 1989) (*Alford* plea requires factual basis for crime charged); State v. Moreno, 492 P.2d 440 (Ariz. Ct. App. 1972) (factual basis for guilty plea necessary before judgment is entered); State v. Page, 564 P.2d 379, 380 (Ariz. 1977) (factual basis must support each element of crime to which defendant pleads no contest); State v. Dixon, 523 P.2d 789, 791 (Ariz. 1974) (guilty plea may be

upon the judge to determine that a factual basis for the plea exists in those instances in which a defendant denies an element of the crime.[43]

The defendant's admissions at a plea hearing are not the only evidence that may be used to establish a factual basis for the plea. The factual basis for a plea may also be established by the extended record, including the presentence report, preliminary hearing transcripts, grand jury proceedings, and other sources.[44] Some courts reason, however, that a "dialogue between the court and the person making the plea is the best method" for establishing a factual basis for the plea, especially if the dialogue occurs "in a manner that requires the accused to provide narrative responses."[45] The dialogue approach appears to have the greatest therapeutic potential because the offender could be required to give a detailed account of his offense on the record. By questioning the offender in detail about his conduct, judges could help break through offender denial.[46] In this respect, the law presents the judge with the opportunity to engage the offender in a session of cognitive restructuring. Ideally, the judge would specifically address on the record some of the matters typically subject to cognitive distortion by sex offenders.[47] The judge might even specifically attempt to engage defendants in cognitive restructuring when seeking to establish a factual basis for the plea.[48]

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accepted even though defendant does not admit guilt if court is careful to ascertain there was a factual basis); State v. Brooks, 586 P.2d 1270, 1272 (Ariz. 1978) (upholding guilty plea in child molestation case despite absence of explicit statement by defendant that acts were motivated by abnormal sexual interest in children). Other jurisdictions require no such finding. *See, e.g.*, United States v. Prince, 533 F.2d 205, 208 (5th Cir. 1976) (court need not find a factual basis for a plea of nolo contendere); State v. Steele, 620 P.2d 1026, 1028 (Wyo. 1980) (court may accept plea of nolo contendere without first satisfying itself that the defendant committed the crime).

43. State v. Reynolds, 544 P.2d 233, 237 (Ariz. Ct. App. 1976). *See also* Collins v. Superior Court, 754 P.2d 1346 (Ariz. 1988) (Constitution requires state courts to establish factual basis if defendant maintains his innocence while entering guilty plea). *See also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 21.4(f) at 939 (2d ed. 1992) ("when a pleading defendant denies the crime, the factual basis must be significantly more certain than will suffice in other circumstances") (citations omitted).

44. State v. Sodders, 633 P.2d 432, 434 (Ariz. Ct. App. 1981); State v. Freda, 590 P.2d 1376, 1378 (Ariz. 1979).

45. United States v. Fountain, 777 F.2d 351, 356 (7th Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986). *See also* State v. Schulz, 409 N.W.2d 655, 659 (S.D. 1987) ("a personal conversation between the judge and the defendant is clearly the best method").

46. Wexler & Winick, *supra* note 14.

47. Wexler & Winick, *supra* note 14.

48. An interesting study might involve the development of a "model" colloquy

Several empirical questions follow from this discussion. The broadest question is whether the process as a whole fosters acceptance of or success in treatment, or at least lessens cognitive distortions so that effective treatment becomes possible. Narrower inquiries may shed light on this broader question. For example, to what extent do judges, in establishing a factual basis for the plea, require defendants to admit guilt for the charged offenses? More specifically, do judges require defendants to describe their conduct in detail in narrative form,[49] or do judges allow defendants to simply answer "yes" or "no"[50] when questioned about whether certain acts were committed?[51] How hesitant[52] are sex offenders, as compared to

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based on principles of cognitive restructuring, followed by an experiment wherein one group of judges follows the model while another conducts business as usual. Measurement of cognitive distortion of offenders at designated times before and after the plea hearing might shed light on whether the judicial inquiry into the factual basis of the plea reduces cognitive distortions. Such "model" or "checklist" colloquies have been suggested for other reasons. *See generally* Mary Kay Wheeler, *Guilty Plea Colloquies: Let the Record Show . . .*, 45 MONT. L. REV. 295 (1984).

49. *See* Burton v. United States, 483 F.2d 1182 (9th Cir. 1973) (advocating meticulous questioning of defendant). This enterprise raises the question whether judges *should* and *will* be interested in trying to perform a therapeutic as well as a "strictly" judicial function. The argument that they *should* appears in a somewhat different context in David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18, 40 (1991) (like it or not, judicial behavior presumably has a therapeutic or anti-therapeutic impact, so courts should behave to better society). Whether judges *will* behave in a therapeutic manner is, of course, another question. Some probably will. Moreover, the students of today—who will be the judges of tomorrow—are far more accustomed to viewing the law and legal roles in an interdisciplinary manner. When they ascend to the bench, they may be inclined to consider and follow these sorts of recommendations.

50. A mere affirmative response by a defendant as to whether he committed the crime charged may be insufficient. State v. Durham, 498 P.2d 149, 151 (Ariz. 1972). *But see* State v. Newman, 504 P.2d 55 (Ariz. Ct. App. 1972); State v. Schulenberg, 503 P.2d 411, 412 (Ariz. Ct. App. 1972). *Cf.* Jones v. State, 705 S.W.2d 874, 877 (Ark. 1986) (asking defendant to merely state conclusion that there is a factual basis disapproved).

51. Such data might be gathered by observing plea hearings and categorizing the type of responses sought by judges. It may be that the type of inquiry is related not to the type of offense, but simply to judicial style and personality. That is, some judges might be more concerned with establishing a factual basis by narration than others.

52. Such hesitancy might take at least three forms: (1) outright *denial* of the facts relating to the charged conduct; (2) *concealment*, by speaking in generalities or otherwise avoiding admitting the facts; and (3) offering of *mitigations* or explanations (specific cognitive distortions) for the conduct. *See* Susan U. Philips, Criminal Defendant's Resistance to Confessions in the Guilty Plea (1990) (unpublished paper prepared for session on "Different Discourses in and around the Law II," Law and Society Association Meetings, May 31 to June 3, 1990, Berkeley, California, on file with the authors). These hesitations might be easily measured and categorized by observing offenders during plea hearings. Another question raised by the defendant's hesitation is whether and in what ways judges differentially respond to these different hesitations. For instance, do judges probe harder into the defendant's outright denial

other offenders, to freely admit the charged conduct?[53] Do judges allow defendants to avoid detailed responses when the defendants have difficulty describing their criminal actions, or do most judges inquire further as to why the defendant is having a difficult time admitting the crime given the fact that he is pleading guilty? If the factual basis for the pled charge is questionable because of charge bargaining, does the judge reject the plea or simply permit the defendant to admit to lesser conduct?[54]

Judges are not the only legal actors capable of affecting the sex offender's cognitive processes. Defense attorneys may hinder cognitive restructuring when they come to the rescue of defendants who are having difficulty admitting guilt. For example, attorneys may do this by filling in the difficult details omitted by the defendants.[55] When an attorney engages in this behavior, the judge may affect the cognitive restructuring process depending on whether the judge permits this type of assistance or insists that it be the defendant who admits to the criminal conduct.[56]

Many other questions stem from the plea bargaining process and could also be addressed by research. For example, does the number of persons in the courtroom affect a defendant's willingness to admit his guilt?[57] Also, does the gender of the judge or defendant have any influence on the defendant's

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of the facts than they do when the defendant simply offers explanations? There is some preliminary evidence that they do. *See id.*

53. There is some anecdotal evidence that sex offenders are hesitant to admit guilt at guilty plea hearings. *See, e.g.*, State v. Smullen, 571 A.2d 1305, 1306 (N.J. 1990) (noting hesitancy of defendants charged with sex offenses to elaborate on factual basis of plea); State v. Denning, 155 747 P.2d 620, 623 (Ariz. Ct. App. 1987) (in guilty plea hearing of defendant for sexual assault of 15-year-old girl, defendant denied an element of the crime and vacillated during the judge's questioning). The same, however, has been said about offenders in general. Bruce v. United States, 379 F.2d 113, 120 n.19 (D.C. Cir. 1967) (noting human tendency of defendants "to deny or gloss over their involvement"); *see supra* note 8.

54. The factual basis must relate not to the original charge being dismissed pursuant to a charge bargain, but to the crime to which the defendant is pleading. State v. Louden, 619 P.2d 758, 760 (Ariz. Ct. App. 1980); State v. Ohta, 562 P.2d 369, 370-71 (Ariz. 1977). Such a rule may be antitherapeutic.

55. Generalized admissions or statements by defense counsel may not be sufficient to establish factual basis. United States v. Tucker, 425 F.2d 624, 629 (4th Cir. 1970).

56. *See supra* note 26.

57. Larger numbers of people may make it more difficult for a defendant to admit guilt. However, those who do admit guilt in a full courtroom jump the difficult hurdle of publically admitting guilt, perhaps paving the way for successful treatment. This sort of "double-edged sword" is an interesting problem in and of itself and exemplifies a general issue in therapeutic jurisprudence.

willingness to admit guilt and give a detailed account of the offense conduct? For example, a male offender may be less likely to admit his crimes to a female judge than he would to a male judge.[58] On the other hand, those who do make admissions, despite the added difficulty, might experience a greater "breakthrough," making them better candidates for treatment success.

Willingness to admit guilt might depend on other factors, such as the defendant's age[59] and criminal history,[60] the victim's age[61] and gender,[62] and the type of behavior the defendant is alleged to have exhibited.[63] Other interesting correlations may arise as a result of interactions between or among these variables.

III. THE WASHINGTON SEXUAL PREDATOR STATUTE

Any evaluation of Washington's Sexually Violent Predators statute[64] should at least explore the potential therapeutic or antitherapeutic consequences of the law's implemen-

58. If a relationship exists, it might have interesting therapeutic implications not only for judges, but also for therapists of either gender.

59. Perhaps younger offenders are less hesitant to admit guilt than older offenders, or vice versa.

60. It might be that first time offenders are more willing to admit guilt than repeat offenders, or vice versa.

61. Offenders may become more reluctant to admit to offense conduct as the age of the victim decreases. Because sexual contact with an infant, for example, might be seen as more reprehensible and embarrassing than sexual contact with a 17-year-old, it might be more difficult for an offender to admit to the former conduct to a judge.

62. For instance, it might be more difficult for male defendants to admit to sexual contact with male victims, and perhaps even more difficult to admit such conduct to female judges.

63. For example, it may be more difficult for a defendant to describe an act of anal intercourse with a young boy than it would to describe an act of vaginal intercourse with a girl in her late teens.

64. Washington's Sexually Violent Predators statute allows the state to indefinitely commit individuals who are found to be "sexually violent predators." WASH. REV. CODE § 71.09.060 (Supp. 1990-91). A sexually violent predator is defined as any individual who has been charged or convicted of a crime of sexual violence and who has additionally suffered from a personality disorder or mental abnormality that makes him or her likely to reoffend. *Id.* § 71.09.020(1)-(4). An action to commit a sexual predator commences when a prosecuting attorney or attorney general files a petition alleging that an individual is a sexually violent predator. *Id.* § 71.09.030. The action is then brought to trial. Any individual adjudicated to be a sexually violent predator is then indefinitely committed to the state department of social and health services (DSHS) special commitment center for care and treatment. *Id.* § 71.09.060. The offender may only be released if DSHS determines he or she is no longer dangerous, or if the offender directly petitions the court for release. *Id.* § 71.09.090.

tation and take into account the empirical investigation of those consequences.

The Washington law raises a therapeutic jurisprudential issue that relates rather directly to the focus of this Article: cognitive distortions and the plea process.[65] The Washington law is triggered by a criminal conviction for a qualifying sexual offense; as a result, the prospect of indefinite commitment under the law may discourage guilty defendants from pleading guilty to potentially qualifying sexual offenses, thus sapping the legal system of a cognitive restructuring possibility.[66] Rather than plead guilty to a qualifying offense, defendants may instead choose between two additional alternatives. On the one hand, they might try to "charge bargain" to a nonqualifying offense, thus triggering the possible cognitive distortion problems discussed earlier. On the other hand, the prospect of commitment under the statute might encourage guilty defendants to proceed to trial in an effort to try to beat the qualifying sex conviction, possibly resorting to perjury. If such defendants are nonetheless convicted, the trial and their trial testimony could serve to strengthen their cognitive distortions and their resistance to therapy. Further, given the fact that they were convicted after a trial rather than after a plea of guilty, a reasonable chance exists that their convictions will be appealed. The pendency of the appellate process will provide still another disincentive to admit the commission of the

65. Still other issues exist. For example, one might ask whether attempting to deter those who offend against strangers with such long-term losses of liberty might induce those offenders to reduce predation of *strangers*, but to then focus their sexual attentions on younger *family* members. Another unfortunate result might be that some offenders would become more likely to kill their victims to decrease the chances of detection, apprehension, and identification as a sexual predator subject to the Washington law.

66. On the other hand, in certain cases prosecutors might agree, in exchange for a guilty plea to a qualifying offense, not to use the particular offense pled as a trigger for commitment under the statute. The law could then be used as an incentive for the guilty offender to plead guilty and to admit guilt to the charged offense. Absent the fear of being identified as predators, some offenders might be more inclined to seek treatment in prison in hopes of preventing future offenses that could again expose them to potential commitment under the statute. The question remains, however, whether the promise not to invoke the predator law in the event of a guilty plea (which might turn into a threat to invoke the law following a contested trial and conviction) is an undue exercise of prosecutorial power. For a law and economics analysis of the costs and benefits of plea bargaining in the context of high penalty provisions, *see* Bruce H. Kobayashi & John R. Lott, Jr., *Low-probability—High-penalty Enforcement Strategies and the Efficient Operation of the Plea-Bargaining System*, 12 INT'L REV. L. & ECON. 69 (1992).

underlying acts.[67]

The Washington Sexually Violent Predators statute raises other therapeutic jurisprudence inquiries. Does the Washington law actually target the *least* treatable sex offenders?[68] If so, the *ordinary* prison population would house a more treatable universe. The Washington law, however, may operate to encourage incarcerated sex offenders to *avoid* treatment in prison for fear of being identified as possible candidates for the special law, as Professor La Fond suggests.[69] A law that confines and attempts to treat a tiny number of perhaps untreatable persons may ultimately discourage treatment of a much larger group of more treatable persons. If that is the case, the Washington law may prove to be antitherapeutic, a result that would not occur if sex offenders were processed under the criminal code without the disincentive of indefinite incarceration provided by the Washington law.[70]

IV. CONCLUSION

The question of whether the legal procedures involved in sex offender pleas feed into cognitive distortions is complex.

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67. The disincentive is noted in State v. Imlay, 813 P.2d 979, 983 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260 (1992).

68. *See* Robert M. Wettstein, *Psychiatric Perspectives on Washington's Sexually Violent Predator Statute*, 15 U. PUGET SOUND L. REV. 597 (1992).

69. *See* John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992). Of course, this is an empirical question, and it is at least conceivable that the existence of the special law might lead offenders to *seek out* treatment in prison—in the hope that successful treatment will *lessen* the chances of being processed under the law.

> If [sex offenders] have had sex offender treatment in prison, that is something that we review and assess prior to filing. . . . In some of these cases that have been reviewed, they have not been filed because the experts have determined (psychologists, psychiatrists in the prison system) that indeed the person has benefitted from the sexual deviancy treatment, and those people we have not found enough of a basis upon which to file.

Circle of Fear (PBS television broadcast, November 12, 1991) (remarks of Jeanne Tweten, Washington Assistant Attorney General, on the mitigating aspects of treatment as a consideration in filing an action under the Washington statute).

70. The only type of offenders who are now processed as sexual offenders are repeat offenders: "Everybody that has been filed against has had a prior pattern of sexually violent offenses—in fact, that's a threshold to our filing that kind of case." *Id.* For these repeat offenders, a recidivist penalty could be applied. The prospect of a later potential recidivist penalty, however, should in no way discourage a first-time offender from seeking prison treatment. To the contrary, it should motivate first offenders to deal with their problems so as not to risk a subsequent offense—and an enhanced sentence under the recidivist law.

As indicated by the above discussion, the empirical questions are abundant and provide fertile ground for empirical inquiry. Policy decisions based on such a therapeutic jurisprudential theory would benefit from a firm foundation of empirical research. This Article demonstrates how therapeutic jurisprudence can give rise to numerous intriguing and novel questions that are readily amenable to scientific analysis.

A therapeutic jurisprudence perspective also reveals that the Washington law may have a potentially antitherapeutic impact on areas beyond the sex offender commitment statute itself. The law may affect the motivation of convicted sex offenders to seek treatment in prison, and it may affect the motivation of sex offenders to enter guilty pleas. Examining the law with a therapeutic jurisprudence lens helps to shed light on such matters. We hope our Article will encourage scholars and policy makers interested in the Washington law to explore these and related questions.