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# NOT SUCH A PARTY POOPER: AN ATTEMPT TO ACCOMMODATE (MANY OF) PROFESSOR QUINN'S CONCERNS ABOUT THERAPEUTIC JURISPRUDENCE CRIMINAL DEFENSE LAWYERING

DAVID B. WEXLER\*

**Abstract:** This Article responds to Professor Mae C. Quinn's critique of the author's piece, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, published in a 2005 symposium issue of the *St. Thomas Law Review*. This Reply Article suggests that Professor Quinn has badly misread or distorted the author's *St. Thomas* article. This Article takes serious issue with her characterization of the author's work, contends that the author and Professor Quinn are closer on many issues than her critique suggests, and points out areas of agreement and disagreement. Therapeutic Jurisprudence can be incorporated into the role of the criminal defense lawyer and, as a simple "add-on," it can be transformative of criminal law practice.

I have had a very interesting—but, at the same time, frustrating—dialogue with Professor Quinn. It began when she sent a draft of her article to which I am now responding. In an email message, I replied that I thought she had (unintentionally) constructed a "strawperson," and had then proceeded skillfully to tear it down. I tried to explain why what Professor Quinn thought I was saying was not actually what I said or proposed—that, despite some obvious differences, we were, in fact, much closer on many issues than she had suggested. Her response was puzzling to me. Basically, she responded, "Nope, that's not what you're saying!"

My reaction to that reminded me of an incident that happened in San Juan to my friend, Tony, who, accompanied by his mother, attended the funeral of a family friend. Arriving a bit late, not atypical for Tony, he entered during the eulogy. The priest spoke of the deceased's fine character, of what a terrific father and husband he had been, of

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how he was a hard worker, generous and simpatico. Tony's mother, a close friend of the deceased, was overcome with tears. The priest continued, "We will all be poorer for the loss of Señor Ruiz," whereupon Tony and his mother looked at each other with a blend of shock and amusement: "Señor Ruiz? Who's he? We're at the wrong funeral!"

In my view, Professor Quinn is declining an invitation to the wrong party. It is a psychological truism that we are all inclined to assimilate new information according to our preexisting perspectives.<sup>1</sup> I am sure there are several Wexlerian examples around. To me, however, this is the Quinn-tessential example of the phenomenon at work. But a reply to Professor Quinn's RSVP to the effect of "Return to Sender, Addressee Unknown" would not do much to advance the thinking about Therapeutic Jurisprudence ("TJ") criminal lawyering, something both Professor Quinn and I are interested in doing. It would be better, I think, if I go on record showing her and others that there is greater agreement between us than she has supposed, and trying to clarify areas of disagreement and areas in need of further attention.

Let me capsulize my response in the following ten points<sup>2</sup>:

1. The TJ criminal lawyer is not dismantling or "replacing"<sup>3</sup> the "traditional" (whatever we might mean by that) criminal lawyer, but

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<sup>1</sup> RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 170 (1980) (discussing the phenomenon of biased assimilation of new information).

<sup>2</sup> Professor Quinn is aware that she may be a bit annoyed by the fact that I am proposing changes but am not myself a defender. See Mac C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 590 n.250 (2007). As a matter of fact, a number of defenders have been very supportive of my *St. Thomas* article, David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005) [hereinafter Wexler, *Rehabilitative Role*]. Based on my writing in this area, I was invited to address the North Carolina Public Defenders Conference in May 2006. See David B. Wexler, Address at North Carolina Spring Public Defender Conference: Therapeutic Jurisprudence and the Expanding Professional Responsibilities of the Criminal Defense Lawyer (May 19, 2006); see also Joel Parris, *Reinforcing Reform Efforts Through Probation Progress Reports*, International Network on Therapeutic Jurisprudence, Oct. 2006, <http://www.therapeuticjurisprudence.org> (follow "Guest Column" hyperlink) (applying principles from the *St. Thomas* article). But, in any case, although the similarity of the messenger to the audience is *psychologically* a factor in whether the audience will likely accept the message, EVERETT M. ROGERS, *DIFFUSION OF INNOVATIONS* 19 (5th ed. 2003) ("[T]he transfer of ideas occurs most frequently between two individuals who are similar or homophilus."), such a fit or the absence of it should not be an important factor in intellectually *evaluating* the merits of a proposal, a proposition that underlies the place of anonymous peer review in academic journals.

<sup>3</sup> Quinn, *supra* note 2, at 579.

rather he is the "traditional" lawyer with an important "add-on" component of a TJ lens.<sup>4</sup>

2. The addition of a TJ lens to criminal law practice is both simple (in the sense of an "add-on") and, at the same time, "transformative,"<sup>5</sup> for it will encourage criminal lawyers to practice explicitly and systematically with an "ethic of care" and "psychological sensitivity."<sup>6</sup> My guess is that the transformative effect of that role change will increase client and public trust and confidence in lawyers,<sup>7</sup> as it apparently has done with courts that emphasize procedural justice and an ethic of care in their work.<sup>8</sup>

3. Some lawyers may choose to go "all the way" and "limit their criminal law practice to a concentration in Therapeutic Jurisprudence."<sup>9</sup> I regard this not necessarily as ideal,<sup>10</sup> but rather as an attractive practice option for some, and as a model worthy of demonstration projects and of serious discussion. Professor Quinn is correct<sup>11</sup> that I suggest (along the lines of the suggestions made by defenders Cait Clarke and Jim Neuhard)<sup>12</sup> thinking about how such an approach might be incorporated in public defenders' offices.<sup>13</sup>

<sup>4</sup> See Wexler, *Rehabilitative Role*, *supra* note 2, at 744 ("Mostly, interested lawyers will likely augment a traditional criminal law practice with the more holistic approach suggested by Therapeutic Jurisprudence, and the present article seeks to point interested practitioners in that direction."). A criminal lawyer interested in a TJ approach can, expressly and up-front, say to a client, "I am here for you and will represent you zealously, and I will keep you informed and will call on you to make many of the crucial decisions. I see my job as maybe involving even more than that, however—often, a criminal charge like the one you're facing can be looked at as an opportunity to think through some stuff about one's life, goals, directions, wrong turns and stuff like that. If you're interested in approaching the case that way, I can work with you to try and do some of that." *But see* Quinn, *supra* note 2, at 571 (expressing concern about a potentially "undisclosed" agenda).

<sup>5</sup> Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 629–30 (2006).

<sup>6</sup> *Id.* at 607, 609.

<sup>7</sup> See Mark H. Moore et al., *The Best Defense Is No Offense: Preventing Crime Through Effective Public Defense*, 29 N.Y.U. REV. L. & SOC. CHANGE 57, 76 (2004). See generally Marcus T. Boccaccini et al., *Development and Effects of Client Trust in Criminal Defense Attorneys: Preliminary Examination of the Congruence Model of Trust Development*, 22 BEHAV. SCI. & L. 197 (2004).

<sup>8</sup> See Roger K. Warren, *Public Trust and Procedural Justice*, 37 CT. REV. 12, 14–16 (2000).

<sup>9</sup> Wexler, *Rehabilitative Role*, *supra* note 2, at 744.

<sup>10</sup> See Quinn, *supra* note 2, at 587–89 (criticizing the TJ "all the way" paradigm).

<sup>11</sup> See *id.* at 560–61.

<sup>12</sup> See Cait Clarke & James Neuhard, "From Day One": *Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 47 (2004).

<sup>13</sup> Wexler, *Rehabilitative Role*, *supra* note 2, at 773.

4. TJ “all the way” does not at all mean that cases should not or will not be investigated for possible defenses.<sup>14</sup> For example, in discussing John McShane’s “all the way” TJ practice, I note that “referral to outside counsel is also made if the defendant has a viable defense.”<sup>15</sup> In public defenders’ offices, though some lawyers may do exclusively or primarily TJ-type work, those lawyers can investigate or work with others who will focus on defenses, and other lawyers can be available to take the case to trial if negotiations or the therapeutic path breaks down.<sup>16</sup> I do believe that all clients are entitled to have counsel exercise due diligence regarding possible defenses.

5. The possibility of zealous trial advocacy needs to be built into the legal defense structure—through a single attorney with both skills, or through cooperating attorneys in a public defenders’ or private office (for example, Mutt and Jeff, Attorneys at Law). This, as Professor Quinn correctly notes, is essential to make sure the defendant is in a strong bargaining position with the state.<sup>17</sup> Had I been more explicit about my views regarding zealous advocacy and due diligence in defense, misinterpretation might have been avoided.

6. But unlike Professor Quinn, I do not believe the “single attorney” model is required<sup>18</sup> and that all criminal lawyers must therefore be ready to act as vigorous trial attorneys. I recognize that trial skills as currently practiced by first-rate litigators are crucial (though not necessarily for all lawyers), and, thus, I did not deal directly with that topic in my earlier article.<sup>19</sup> In fact, given its relatively rare occurrence, the trial is unduly emphasized in legal education (and in the legal culture), to the exclusion of other important material and skills needed in criminal defense work (for example, plea negotiations, diversion, problem-solving courts, sentencing, restoration of rights, restorative justice, therapeutic jurisprudence, and expungement).<sup>20</sup>

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<sup>14</sup> *But see* Quinn, *supra* note 2, at 587–89 (expressing concern that TJ “all the way” leads to ineffective representation).

<sup>15</sup> Wexler, *Rehabilitative Role*, *supra* note 2, at 744.

<sup>16</sup> *See id.*

<sup>17</sup> Quinn, *supra* note 2, at 589.

<sup>18</sup> *See id.* at 577–78.

<sup>19</sup> Of course, even with litigators, a TJ lens could and should be an “add-on”—and would systematically and explicitly lead to a number of practices, such as careful debriefings, as well as to lawyers explaining upcoming procedures to clients so as to relieve stress and anxiety. *See* Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 117–18 (2000). My *St. Thomas* piece did not explore this in the criminal trial arena, and it is an area that should be attended to in future scholarship.

<sup>20</sup> *See* Adam Liptik, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1 (discussing how even expungement of records can have a continuing impact).

One serious consequence of this overemphasis on the trial is that law students who do not want a steady diet of confrontation will likely opt out of criminal law practice, even though those students might have other remarkable skills (such as interpersonal skills, cultural competence, and TJ skills) that could make them exceptional, meaningful, effective, and extremely satisfied criminal law practitioners. As I have written elsewhere, we should teach students critical thinking skills, argumentation, and effective advocacy, but should not elevate such a perspective above other crucial skills.<sup>21</sup> We should, I think, try to chip away at, rather than to perpetuate, a "culture of critique."<sup>22</sup> And, I think we owe it to the legal profession to think creatively about various ways of providing defense services, ways that will be advantageous to clients and fulfilling for the legal professionals involved. Our exploration should also be comparative, looking at how TJ might fit within a continental model or within a system of barristers and solicitors.<sup>23</sup> We need to think of "*Gideon* grown up" rather than a "stuck in the sixties" view of *Gideon* and the role of defense counsel.<sup>24</sup>

7. TJ criminal lawyers in whatever setting should, like drug court lawyers, practice with an ethic of care, psychological sensitivity, and ability to work effectively with treatment and mental health professionals.<sup>25</sup> In that sense, the ideal TJ criminal lawyer will be like the drug court lawyer. Nowhere do I suggest, however, that a TJ lawyer should serve simply as a member of an interdisciplinary team as, apparently, many drug treatment court lawyers do.<sup>26</sup> Instead, the lawyer should work to create, coordinate, and lead a team, all in service of the client. In private practice, an excellent example is Ottawa criminal lawyer Michael Crystal's Crystal Criminal Law Office.<sup>27</sup> And as I noted in my article, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, published in the *St. Thomas Law Review*: "In the [public defend-

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<sup>21</sup> Winick & Wexler, *supra* note 5, at 627.

<sup>22</sup> David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 277 (1999).

<sup>23</sup> See generally George Hampel, *Therapeutic Jurisprudence—An Australian Perspective*, 17 ST. THOMAS L. REV. 775 (2005) (discussing how TJ fits into the Australian system of solicitors and barristers).

<sup>24</sup> See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding, for the first time, that indigent defendants in criminal cases are entitled to have counsel appointed by the state).

<sup>25</sup> David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice*, 7 FLA. COASTAL L. REV. 95, 100–02 (2005).

<sup>26</sup> See Quinn, *supra* note 2, at 552 & n.67.

<sup>27</sup> See Crystal Criminal Law Office, <http://www.accidentaljurist.com> (last visited Mar. 19, 2007).

ers'] office as well as the other settings of potential TJ criminal law practice, thought needs to be given . . . to integrating other professionals—such as social workers—into the law office context.”<sup>28</sup>

8. I am very much in favor, of course, of TJ criminal lawyers looking holistically at clients and their situations. In fact, what TJ might add to holistic criminal lawyering is psychologically sensitive techniques regarding *how* to practice: *how* to reinforce client reform efforts, *how* to enhance compliance with court orders, and *how* to increase problem-solving skills (matters I discuss below). To the extent some holistic practices may be structured to include a lawyer simply as another member of an overall team,<sup>29</sup> however, I would dissent.

9. Professor Quinn notes that many good public defenders already do much of what holistic practice and TJ practice suggest.<sup>30</sup> For example, they may work to connect clients with needed treatments and services.<sup>31</sup> In cases of good client performance, the public defender may petition the court for early termination of probation.<sup>32</sup> Professor Quinn’s bottom line, it appears, is that this is all simply good lawyering,<sup>33</sup> and so it seems. Much of TJ seems to be making explicit that which some good, interpersonally sensitive judges and lawyers have long been doing. Indeed, as I have written elsewhere, others and I were doing TJ scholarship before we “knew” it—before it had a label.<sup>34</sup> But, having a definition and a conceptual scheme for thinking about all this adds considerable value to the enterprise; when we start thinking about matters explicitly and systematically with a TJ lens, we see many more potential areas of application—areas that may not occur to us when we are simply engaging in “good lawyering.”

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<sup>28</sup> Wexler, *Rehabilitative Role*, *supra* note 2, at 773. This would include involving social workers in the effort to “create a genuineness even within a strategic legal context,” something likely to help in sentencing. *Id.* at 755. These “perspective-taking” and apology approaches are, however, dismissed by Professor Quinn as inappropriate. See Quinn, *supra* note 2, at 579–83.

<sup>29</sup> See generally Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 637 (2006) (exploring the practical, professional, and ethical limitations of the holistic approach).

<sup>30</sup> Quinn, *supra* note 2, at 565 (recognizing that lawyers wear many “hats” when dealing with a given case).

<sup>31</sup> Wexler, *supra* note 25, at 107. Wouldn’t these lawyers, applauded by Professor Quinn, fall victim to her attack on TJ lawyers—that they risk stepping beyond their professional expertise? See Quinn, *supra* note 2, at 565, 574–75, 582.

<sup>32</sup> Quinn, *supra* note 2, at 575.

<sup>33</sup> *Id.*

<sup>34</sup> See David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R. 691, 691 (1999).

A powerful example came to my attention when Joel Parris, an assistant federal public defender in Tucson, prepared a Guest Column for the website of the International Network on Therapeutic Jurisprudence<sup>35</sup> entitled *Reinforcing Reform Efforts Through Probation Progress Reports*.<sup>36</sup> Parris noted his constant frustration in battling for his clients in probation revocation proceedings initiated for technical, noncriminal violations; he noted, too, how probation officers, even when not seeking revocation, sometimes file violation reports with the court, allegations that sometimes are used against the client subsequently if revocation is later sought.<sup>37</sup> Parris decided to use favorable "Probation Progress Reports" for his own purposes, and, in his Guest Column, he reproduces a fascinating pleading detailing his client's complete compliance with probation conditions and her personal success in obtaining a cosmetology license, being reunited with her child, and more.<sup>38</sup>

This report was not even filed in pursuit of early probation termination. Instead, "counsel . . . submit[ted] the . . . report as appropriate supplemental information to complete the official record of [the] matter."<sup>39</sup> Of course, as Parris notes in the Guest Column, this positive information added to the record can, in addition to reinforcing his client's reform efforts and hopefully providing additional motivation to perform well, "help counter a subsequent petition to revoke probation based on non-criminal violations such as . . . [a] reporting failure."<sup>40</sup> As such, this is surely "good lawyering." But Parris, who has long been a "good lawyer," explains that "in reading TJ literature about the importance of someone supporting or 'believing in' the offender's ability to reform," he decided to use Probation Progress Reports for his own purposes.<sup>41</sup> Of course, he might have decided to do this even without a TJ lens, but it is much more likely that such important techniques of good lawyering will flow from an explicit identity as a TJ criminal lawyer. If moving for early probation termination in appropriate cases is "something that any zealous and quality defense attorney should do,"<sup>42</sup> is filing a Probation Progress Report also something that should be routine for a zealous advocate? My point is that a good lawyer, keeping

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<sup>35</sup> See Int'l Network on Therapeutic Jurisprudence, <http://www.therapeuticjurisprudence.org> (last visited Mar. 19, 2007).

<sup>36</sup> See Parris, *supra* note 2.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> *Id.*

<sup>40</sup> See *id.*

<sup>41</sup> See Parris, *supra* note 2.

<sup>42</sup> Quinn, *supra* note 2, at 575.



abreast of TJ literature and developments, will be especially likely to use, develop, and create what we call "theory-inspired practices," a fancy-sounding term used simply to capture the acronym "TIPS."<sup>43</sup>

10. Professor Quinn seems to have problems with some of these TIPS, either because they are already employed by "good lawyers"<sup>44</sup> or because they seem inappropriate or time-consuming.<sup>45</sup> I will not worry, of course, about the "good" TIPS that are already being used. What about the ones she finds problematic? Again, there may have been some misinterpretation. For example, in terms of the involvement of family members in a client's proposed probationary plan and conditions, Professor Quinn sees the family members as "enforce[rs]."<sup>46</sup> But family awareness and involvement, with client consent, is a matter entirely different from family as "enforce[rs]." Instead, such involvement simply taps into recognized psychological compliance principles which suggest that client compliance is enhanced when family members are aware of a client's agreement to engage in or to refrain from certain behaviors; compliance is strengthened because the client does not want to let down her family members.<sup>47</sup>

Additionally, most lawyers would likely be troubled by defense lawyers requesting routine follow-up (status) hearings when a client is sentenced to probation. It is important to make clear, however, that TJ work on status hearings does not suggest that *counsel* push for such hearings; the TJ literature simply recommends to courts that, for compliance and related reasons, *the courts* should consider holding such hearings. If such hearings are in fact held, *then* the TJ criminal lawyer should approach those hearings seriously, even when all is going well with the client. Those routine hearings could then serve to reinforce reform efforts, similar to the way Parris reinforces client reform efforts even when hearings are not scheduled.<sup>48</sup>

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<sup>43</sup> Wexler, *supra* note 25, at 107. These TIPS, as I note above, might profitably be used by holistic lawyers—making these lawyers even more holistic than they are now!—and might lead to an increased dialogue between the two closely related perspectives. These "theory-inspired practices" are indeed typically inspired by psychological or social work theory and often have an empirical base. *See id.* at 107–08. The TJ community is far more interdisciplinary than Professor Quinn concedes. *See Quinn, supra* note 2, at 566.

<sup>44</sup> Quinn, *supra* note 2, at 574–75.

<sup>45</sup> *See id.* at 583–84 (discussing practical issues of time and resources with application of TJ practices); *id.* at 582–83 (discussing potential ethical problems with TJ lawyering).

<sup>46</sup> *Id.* at 556.

<sup>47</sup> *See Wexler, Rehabilitative Role, supra* note 2, at 757–58 & nn.67–73.

<sup>48</sup> *See Parris, supra* note 2.

Thus, my *St. Thomas* article suggested neither family enforcement nor defense-requested status hearings. Note, however, that a TJ lawyer, or a plain old "good lawyer" for that matter, might in some cases actually propose just those approaches. If a client is facing likely incarceration, a lawyer might well propose probation instead, and might suggest that probation should be viewed by the judge as a viable option because counsel and client have proposed certain safeguards: the court will hold periodic follow-up hearings to make sure all is going well, and counsel has secured the promise of certain family, friends, or neighbors who have stated that they have no objection to the client remaining in the community and, if informed of the conditions of the client's release, will be willing to report any misconduct.

Both techniques have in fact been used by the Crystal Criminal Law Office.<sup>49</sup> In one case, a conditional sentence, rather than incarceration, was sought, and periodic judicial supervision was offered as a possibly attractive option.<sup>50</sup> In another case, while client X was awaiting sentence, letters were prepared by the law firm and were distributed to neighbors by the client's mother, explaining that X was awaiting sentence; that if he were given a community sentence he would be released to live with his mother; that "I would have no fears for my safety or that of my family should Mr. X be released to live with his mother"; and, most important for present purposes, that "If I were provided with a copy of his sentencing conditions, I would have no hesitation in reporting Mr. X to the police if he were in violation of any of the conditions."<sup>51</sup>

Indeed, the entire area of creative probation conditions—and the lawyer/client conversations discussing them—seems to trouble Professor Quinn.<sup>52</sup> For example, she thinks it less appropriate to engage urban youths than suburban kids with questions about the chain of events that seem to have led to the crime in question.<sup>53</sup> I do not know why that should be the case.<sup>54</sup> And she seems troubled by a lawyer using a So-

<sup>49</sup> See Crystal Criminal Law Office, *supra* note 27.

<sup>50</sup> See Karine Langley, Ph.D., *The Case of Robert Piamonte: A Victory for Therapeutic Jurisprudence*, [http://www.accidentaljurist.com/featured\\_topics/display\\_e.asp?ID=10](http://www.accidentaljurist.com/featured_topics/display_e.asp?ID=10) (last visited Mar. 19, 2007).

<sup>51</sup> See Pleading by Crystal Criminal Law Office on Behalf of Client (on file with author).

<sup>52</sup> Quinn, *supra* note 2, at 581.

<sup>53</sup> *Id.* at 584–85.

<sup>54</sup> Professor Quinn suggests the limits of such an approach when dealing with an alleged gang member. *Id.* at 584 n.223. A creative TJ lawyer would not be so dismissive, how-

cratic questioning technique to draw the client out with questions such as: "When do you usually get into trouble?" "When you're alone or when you're with your friends?" "At day or at night?" and "Okay, so if you want to avoid some of these fights, what might you do?" I suggest such a dialogue as a way of engaging the client—of having the client come up with some high-risk situations and ways to avoid them, and come up with proposed conditions of probation that the client will have a stake in, will understand, and will, we all hope, comply with. I find it a respectful process; Professor Quinn finds it manipulative.<sup>55</sup>

My question to Professor Quinn would be: What is the alternative? Does the lawyer do all the thinking and talking and tell the client, "Look, if you want probation, you'd better say you won't hang with X, and that you won't go out on weekend nights." Is that less manipulative? Or does the lawyer say nothing, and have the judge unilaterally impose those conditions or, worse, simply impose an incarcerative penalty because no one has thought of or brought to the court's attention some protective measures that may make probation a viable option? In my earlier article, I purposefully put some of this in a very controversial context: a promise not to have more kids, or even an agreement to undergo a vasectomy as a possible probation condition. Professor Quinn grudgingly admits I am not supporting such a result and I am not.<sup>56</sup> My point was that some of this activity is present in lawyering (TJ lawyering and all "good" lawyering) and in the judicial mind, whether we like it or not. None of this is presented in a prescriptive way, and, in fact, I specifically open the door to dialogue:

These issues are set out as an area worthy of serious discussion. Should lawyers raise these topics? Should they not raise them but discuss them if clients bring them up? If they have a dialogue, can they do so in a way—again, an analogy to the Socratic method—that lessens the lawyer's role in suggesting these controversial procedures . . . but instead inches the client personally to think of and raise the point? Are there ethical or therapeutic distinctions between the two approaches?<sup>57</sup>

Instead of simply saying, "I'm against this stuff," I wish Professor Quinn had taken up my offer of discussion or had proposed an alterna-

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ever. See generally C.D. Placido et al., *Treatment of Gang Members Can Reduce Recidivism and Institutional Misconduct*, 30 LAW & HUM. BEHAV. 93 (2006).

<sup>55</sup> Quinn, *supra* note 2, at 581.

<sup>56</sup> See *id.* at 557; Wexler, *Rehabilitative Role*, *supra* note 2, at 765–66.

<sup>57</sup> Wexler, *Rehabilitative Role*, *supra* note 2, at 766.

tive method of dealing with these difficult issues. Indeed, her article seems generally to accuse the TJ lawyer of overreaching,<sup>58</sup> even when the TJ literature (such as on the criminal defense lawyer's use of "motivational interviewing" and the like) seems to me far more gentle and appropriate than the techniques often used by lawyers, which range from "heavy-handed" to completely "hands off," or sometimes a combination of the two.<sup>59</sup> Motivational interviewing, by contrast, suggests the professional should "affirm client strengths generously; emphasize [the] client's ultimate control of the change process and control over [behavioral] decisions . . . ; and seek explicit or implicit permission to give advice."<sup>60</sup>

In the end, I am pleased to have prepared this response. It has forced me to be more explicit about some points that were either omitted,<sup>61</sup> implicit, or—evidently—subject to misinterpretation in my original piece. Ultimately, I find this exercise and dialogue valuable, and I am hopeful that Professor Quinn does, too. This time, I hope I have convinced Professor Quinn that I am really advocating for these theories and techniques.<sup>62</sup> If not, I will scream—or cry. After all, it's my party and I'll cry if I want to!

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<sup>58</sup> See Quinn, *supra* note 2, at 581.

<sup>59</sup> See Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225, 225–26 (2002) (discussing and critiquing the "hands-off" and "heavy-handed" approaches).

<sup>60</sup> Theresa B. Moyers & Tim Martin, *Therapist Influence on Client Language During Motivational Interviewing Sessions*, 30 J. SUBSTANCE ABUSE TREATMENT 245, 249–50 (2006) (providing these suggestions in the context of clients dealing with substance abuse problems).

<sup>61</sup> See *supra* note 19 and accompanying text.

<sup>62</sup> In addition to the *St. Thomas* piece, I have recently written about TJ criminal lawyering in two other articles. See generally David B. Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 111 (2006); Wexler, *Rehabilitative Role*, *supra* note 2; Wexler, *supra* note 25.