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George's Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic

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GEORGE'S STORY: VOICE AND
TRANSFORMATION THROUGH THE TEACHING
AND PRACTICE OF THERAPEUTIC
JURISPRUDENCE IN A LAW SCHOOL
CHILD ADVOCACY CLINIC

BERNARD P. PERLMUTTER*

How many times do our own children, well past the age of eighteen, seek us out for advice, for money, or for a soothing word? What kind of a message do we send, as a society, if emancipation from foster care means no second chances, no room to learn from mistakes, no helping hand?

President Jimmy Carter¹

A recurrent theme in their comments was the importance of consulting with children and allowing them to share in, and contribute to, decisions that need to be made. By age ten or early teens 'children should be able to have a voice in where they are placed . . . if a kid is old enough to be transferred around like a ping-pong ball he's old enough to decide where he's happy . . . children in foster care grow up very quickly.'

Trudy Festinger²

I. INTRODUCTION: THE CLIENT INTERVIEW

On our first visit with our new client, George C.,³ at the start of the Fall 2001 semester, two students from the University of Miami School of Law's Children & Youth Law Clinic⁴ and I found a soft-spoken and shy

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1. Jimmy Carter, *Foreword* to MARTHA SHIRK & GARY STANGLER, ON THEIR OWN: WHAT HAPPENS TO KIDS WHEN THEY AGE OUT OF THE FOSTER CARE SYSTEM? viii (2004).

2. TRUDY FESTINGER, NO ONE EVER ASKED US . . . A POSTSCRIPT TO FOSTER CARE 281 (1983).

3. Client's first name and story used with his permission.

4. The Children & Youth Law Clinic is a live-client clinic established in 1995 by the law school. Supervised by two clinical instructors, the Clinic serves the legal needs of older children in the foster care system in dependency, health care, mental health, disability, independent living,

fifteen year old. He was living in a locked psychiatric hospital where he had been placed over fifteen months earlier by a social worker from the Florida Department of Children and Families (DCF). Other than his DCF social worker and his mother, each of whom had visited him in the facility only intermittently, we were his first visitors from the outside in a very long time.

It was difficult to have a quiet conversation with him in the small room loaned to us by his therapist in the program. In the recreation room just outside the therapist's office, the other teenage patients were watching a loud television and engaging in horseplay. The hospital's mental health "techs" would occasionally yell at them to quiet down when their adolescent enthusiasm got out of control, and we heard several arguments and fights just outside the door. Despite these distractions, our new client seemed eager to open up and share his life story with three strangers. He gave a chronologically accurate account of his recent history and conveyed some of his feelings of frustration about his isolation from his family and the outside world in this institution where he had spent the previous fifteen months.⁵

We came away from our first meeting with a little information about our client and a sense of what he hoped we would help him achieve. George gave each of us a drawing that he made for us during this first interview. I still have my pencil drawing in his legal file at the Clinic. It depicts a character called Dragonball Z, a fearsome super action figure from a world of television, the Internet, and card games inhabited by teenagers and preteens.⁶

education, immigration and other general civil legal matters, ensuring that they have a voice in the court proceedings, and engages in impact litigation, law reform advocacy, and community lawyering on their behalf.

5. Here is what Prabhath, the first of several law students who worked on George's case, wrote:

George presented himself as very bright and intelligent and knew his case history very well. He described his last five placements in chronological order, starting with Mr. and Mrs. B., Mr. G., Mrs. E. S., L-T (a locked residential treatment center), and the R. program (the residential treatment center where we visited him). He seemed to really like the B. family placement the best. He discussed his mother a little bit, stating he was sad when she did not come to see him. He also said he wanted to be reunited with her, but understands that she may not be ready to care for him fully. As for other family members, he also briefly mentioned he had two uncles, an Auntie R., and someone named K., but did not elaborate on whether they had been contacted about taking custodial relationship of him (his case file states his grandmother once had custody for 2 years approximately). Additionally, he mentioned several run-away incidents from foster homes, in which he sought his mother.

6. For commercial depictions of this character, see <http://www.dragonballz.com/> (last vis-

Artistic expression was George's strong suit. Appreciating his art was a way for us to establish and build rapport with our client.⁷ Our students learned at that very first interview that a child communicates differently than an adult, and that even a teenager has different ways of expressing himself.⁸ The Clinic valued the way he expressed himself in his drawing as much as his words; and during the three years that we were his attorneys, we learned much about him through his art.⁹

ited Feb. 16, 2005).

7. Using art or other forms of interaction (e.g., puppets, role play, or other experimental techniques) to communicate with child clients is, of course, widely practiced by experienced children's lawyers and law school clinicians. See, e.g., JEAN KOH PETERS, *REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS* 125 (1997) (describing the case of one child client in which "[t]he client's love of drawing and his own expression through embellishing some of the pictures and rejecting others allowed him to exchange information through a medium that was comfortable . . .").

8. See ANNE GRAFFAM WALKER, *HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE 4-5* (2d ed. 1999) (noting that adolescents ages 11-18 are not necessarily good at narrative skills; do not understand time as both a historical concept and a day-to-day concept; are confused by linguistic ambiguity; can be confused by long, complex questions; and many teens, particularly under-educated, under-parented, unattached children, have the communication skills of younger children).

9. Beyond its use of art as a technique for establishing rapport and building trust with individual clients, the Clinic has integrated artistic expression into its law reform and pedagogical missions. Therapeutic Jurisprudence has informed all of this activity. Our most significant law reform effort was a multi-year Florida Supreme Court proceeding seeking greater due process protections for foster children facing commitment to locked psychiatric facilities by the state Department of Children and Families. We relied on the principles of Therapeutic Jurisprudence to argue that affording foster children a pre-commitment hearing at which they are represented by counsel furthers their therapeutic interests and is psychologically beneficial for these children. The Florida Supreme Court agreed with and adopted this argument in the three decisions that it rendered on the due process rights of foster children facing involuntary commitment to these facilities. See *M.W. v. Davis & DCF*, 756 So. 2d 90 (Fla. 2000); see also Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So. 2d 1206 (Fla. 2001); Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So. 2d 763 (Fla. 2003).

In an effort to study the therapeutic benefits of giving voice to foster children facing involuntary civil commitment, the Clinic subsequently established the Voice Project. The project's goals are to teach law students to apply the principles of Therapeutic Jurisprudence, to give clients a voice in legal and policy decisions that affect their lives, and to study the therapeutic benefits of empowering them to speak and be heard in the legal process. Our collaborators are our law school colleague Bruce Winick, the co-founder of Therapeutic Jurisprudence, and Xavier Cortada, a lawyer and artist.

Through the Voice Project, the artist and Clinic students worked with children confined in two residential hospitals to create collaborative murals capturing the children's individual stories and concerns. The aim was to use art as a therapeutic agent giving voice to foster children in these facilities and as a vehicle to generate awareness for the community at-large. The children also worked one-on-one with law students to create individual pieces of self-expression. The first Voice Project mural, *Trapped*, created in 2002, depicts the voicelessness and despair of children locked up in these facilities.

In 2002, the Clinic and Cortada were awarded a grant from the Miami-Dade County Department of Cultural Affairs to produce a second painting portraying the more hopeful aspirations

Back in the office following this initial interview, my students, Prabhath and Ariel, and I waded through volumes of court, hospital, school, therapy, and other confidential records, and began to construct a narrative of a childhood in foster care. The harrowing narrative that the two students prepared for me recited the details of a chaotic and unstable childhood. It described a single, mentally ill mother unable to care for George, removed from her custody at the age of two due to allegations that the mother was a substance abuser, had exposed him to episodes of domestic violence in the home, refused to reveal the identity and whereabouts of his father, and subjected him to severe neglect and emotional abuse.

After a short and unhappy stay in the home of his Jamaican-American grandmother, which ended under a cloud of sexual abuse allegations, George began his long and tortuous journey through foster care, experiencing more than forty different foster care homes and other placements, at least twenty-five different school placements, ten different psychiatric diagnoses, and as many as eight different psychotropic medications prescribed to manage behaviors described in one report as “hyperactive, oppositional, poor impulse control, depression, separation anxiety.”

The records in George’s case told the story of a single child adrift in Florida’s foster care system without achieving a permanent home, separated for a seeming eternity from his mother, living in institutions at the margins of the system, desperately lonely, filled with pent-up anger at the system, and never heard from by the court.¹⁰

of these clients. During the fall 2003 semester, Clinic students, faculty, and the artist traveled to the Jackson Memorial Hospital Statewide Inpatient Psychiatric Program, a children’s psychiatric facility, where Cortada’s mural *2003 Voice Project Mural* was created and unveiled. Both the 2003 painting and its 2002 companion piece were on exhibit from March through July 2004 in the rotunda of the Florida Supreme Court. Xavier Cortada, *May it Please the Court: A Solo Exhibit by Xavier Cortada*, at <http://www.cortada.com/gallery/virtualexhibits/2004/supreme-court/may-it-please.htm> (last visited Feb. 16, 2005). The two murals, and the children’s contributions to them, appear throughout the Children & Youth Law Clinic website, at <http://www.law.miami.edu/cylc> (last visited Feb. 16, 2005). Both works will be permanently displayed at the Law School.

10. To the extent that a lawyer and client begin to “frame the story of the case” at their first meeting, our first conversation with George may have been a foreshadowing or pre-telling of many events, while other events that occurred during the next three years were not foreseeable and thus not part of the narratives told by the client (through the filter of the student’s intake memorandum) or the students (through their summary of court and other records). See, e.g., Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (story told by client more effective than lawyer’s strategy); Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law As Language*, 87 MICH. L. REV. 2459, 2482-83 (1989) Cunningham states that,

[a]s the lawyer attempts to ‘make a case’ out of the client’s lay narrative, there is indeed a transformation of ‘reality,’ but only at one level, the level of knowledge. The lawyer cannot change the client’s raw memories of the experience but can indeed must

Thus a more than three-year relationship with our client George began.¹¹ The present article describes the Clinic's work in George's case and how it exemplified some of the lawyering skills that are traditionally taught in the clinical legal education setting, particularly in live-client clinics—client interviewing and counseling, developing inter-personal skills with clients, fact-finding, motion practice, legal analysis, oral advocacy, and presentation of evidence—and the kinds of reflection or review that we used with students to evaluate their clinic performance.¹² This article surveys some of the problems faced by youth aging out of foster care, analyzes the federal and state legal framework designed to remedy these problems, and describes how our Clinic uses the insights of Therapeutic Jurisprudence and the methods of preventive law to help clients obtain independent living and support services before and after their discharge from state custody at age eighteen.

In recent years, the Therapeutic Jurisprudence and preventive law model has begun to penetrate legal education. As this article attempts to show, this model has much to offer clinical legal education and child advocacy clinics, in particular. This article describes how Therapeutic Jurisprudence and the Therapeutic Jurisprudence/preventive law model are used in the Children & Youth Law Clinic, and demonstrates their value in the context of representing one foster care client of the Clinic. Specific examples of our activity are rewound to analyze the strategies or techniques the Clinic used or, in retrospect, should have used, to address or prevent some

alter the client's knowledge of 'what happened' by reconstituting that experience into a different symbolic form.

Id.

11. See PETERS, *supra* note 7, at 77 ("As the lawyer enters the child's world, the client must get to a full-bodied understanding of the lawyer's potential place in her life. The lawyer must also get to a three-dimensional understanding of the child-in-context.").

12. ABA, *Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. OF LEGAL EDUC. & ADMIS. TO THE B. REP. 234-36 (known as the "MacCrate Report") [hereinafter MacCrate Report].(describing the range of lawyering skills and values that law school clinical programs should aspire to teach students); Assoc. of Am. Law Schools, *Report of the Committee on the Future of the In-House Legal Clinic*, 42 J. LEGAL EDUC. 511, 513 (1992)

Because the student's performance in role is the heart of the clinical experience, many clinicians recognize as an explicit goal the inculcation of methods by which the student can learn from experience. By critiquing student performance and by encouraging students to engage in self- and peer-critique, clinicians seek to provide their students with the tools to enable them to engage in analysis of their performance when they are in practice.

Id.; Anthony G. Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 J. LEGAL EDUC. 612, 616 (1984) (describing one of the roles of clinical legal education as requiring students to "work through the relationships between legal analysis, communication, and inter-personal dynamics.").

of the legal problems that occurred at different junctures in the case.¹³ In particular, the article considers how we sought to identify our client's "psycholegal soft spots,"¹⁴ how we identified or developed strategies to address those psycholegal soft spots, how we used preventive law techniques such as "legal checkups,"¹⁵ and how we evaluated the therapeutic or anti-therapeutic effects of the available strategies.

This article also examines how the attorney-client relationship with George evolved from that first meeting. Viewing the Clinic's relationship with George—from the different and sometimes conflicting perspectives of the client, student, and teacher-lawyer—as he made the uncertain, difficult and painful transition from foster care to adulthood,¹⁶ this article considers how the use of Therapeutic Jurisprudence and preventive law enriched the

13. ROBERT M. HARDAWAY, *PREVENTIVE LAW: MATERIALS ON A NON ADVERSARIAL LEGAL PROCESS* xxxvii-xli (1997) (describing the role of the preventive lawyer in working with the client to propose the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities).

14. See David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 *REV. JUR. U.P.R.* 317 (1998), reprinted in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 45, 48 (Dennis P. Stolle, et al. eds., 2000) [hereinafter *PRACTICING THERAPEUTIC JURISPRUDENCE*] (describing how certain legal procedures or legal interventions may produce or reduce anxiety, anger, hurt feelings, and other dimensions of law-related psychological well-being in clients); see also Marc W. Patry, et al., *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 *CAL. W. L. REV.* 439 (1998), reprinted in *PRACTICING THERAPEUTIC JURISPRUDENCE*, at 69 (proposing strategies for lawyers and clients to identify and discuss psycholegal soft spots) [hereinafter *Better Legal Counseling*].

15. See Dennis P. Stolle, et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 *CAL. W. L. REV.* 15, 27 (1997), reprinted in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 14, at 5, 17 (describing the legal check-up as a "structured opportunity for the client to reevaluate his or her current life situation relative to his or her goals, and to think about and plan for the immediate and distant future.") [hereinafter *Integrating Preventive Law*]; see also HARDAWAY, *supra* note 13, at 180-222 (describing "legal check-ups").

16. As illustrated *infra* §§ IV and V of this Article, from time to time there were conflicts or tensions between the views or perspectives of Clinic attorneys and interns and George. See Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 *CLIN. L. REV.* 41 (1994) (discussing student and client tensions over "theory" of the case). Discussions about the Therapeutic Jurisprudence dimensions of issues or problems often helped students to mediate or understand how to advocate for the client's wishes, even when the student was confused about or opposed to the goals sought by the client. For example, as described *infra* § IV.B, toward the end of his 15 years in state custody, just months shy of his 18th birthday, George expressed an urgent desire to be "emancipated" from foster care. George also insisted that the Clinic not seek any post-foster care aid from DCF under the Road to Independence Act, even though this would potentially cut him off from needed subsistence and medical benefits. In both cases there were significant disagreements with George about his goals and views, which we could not resolve or reconcile. Viewing these conflicts through the Therapeutic Jurisprudence lens helped to mediate these conflicts and helped the students consider ways to motivate our client to reassess his position.

students' educational experience in the Clinic, and how, in the end, this experience had a transformative effect on the client.¹⁷

This article evaluates how teaching and practicing Therapeutic Jurisprudence in a law school child advocacy clinic can accomplish the goal articulated by Therapeutic Jurisprudence scholarship, to "broaden the counseling mission, and . . . convert the practice of law into a helping and healing profession in ways that make it a much more humanitarian tool."¹⁸ By in-depth appraisal of the work done by the Clinic in one case for a single client, with a focus on the role of the child's Therapeutic Jurisprudence/preventive lawyer in doing legal checkups with the child to avoid psycholegal soft spots, this article is a descriptive case-study, similar to a medical school grand round, of the practice of Therapeutic Jurisprudence and preventive law in a child advocacy clinic, with its many frustrations and satisfactions for the teacher, clinic student, and client.¹⁹

Lastly, this article gives general recommendations on how law school child advocacy clinics can teach students to apply the principles of Therapeutic Jurisprudence and preventive law in their practice and how the practice of Therapeutic Jurisprudence in the experiential setting of a clinic gives them opportunities to reflect upon and critique their role as lawyers for children.²⁰ It also suggests ways of broadening the reach of Therapeutic

17. The last of our student interns in George's case, Chad Shimmel, made this insightful observation about the instructive role that Therapeutic Jurisprudence played in his legal training in our Clinic:

I found this week's class discussion on Therapeutic Jurisprudence to be particularly interesting and pertinent to many of the issues we deal with here at the clinic. It is pretty obvious that there can be great advantages to children and society to allow them to express themselves in court, tell their story, and to get adequate legal representation. At the same time, by allowing the child to feel as though they have a voice, and are permitted to participate in the proceedings they are involved in, the outcomes and rulings by the judges can be more easily understood by the child. I definitely feel that the concept of Therapeutic Jurisprudence has a place in the courtroom. I see nothing wrong with giving children sanctions that are intended to rehabilitate them, and to put them in a better position than before they entered the legal system. Children are often involved in the legal system due to no fault of their own, and yet it seems as though they are often treated as criminals simply because they have no family to care for them. Any system that intends to help children, rather than simply punish them, should do nothing but help the child, as well as society as a whole.

Clinic Weekly Journal, June 24, 2004 (on file with author) [hereinafter *Clinic Weekly Journal*].

18. *Integrating Preventive Law*, *supra* note 15, at 5.

19. See generally Gary Bellow & Martha Minow, *Introduction: Rita's Case and Other Law Stories*, in *LAW STORIES 1* (Gary Bellow and Martha Minow, eds., 1998) (celebrating lawyer story-telling and narrative that "reflects (a) multiple points of view; (b) textured depictions of conventional practices and institutional cultures; and (c) insights into how legal workers and those affected by the law make their choices, understand their actions, and experience the frustrations and satisfactions they entail.").

20. Clinical scholarship is replete with self-critical examinations of strategies and tactics deployed by poverty lawyers, law school clinicians and their students, the ethical role those lawyers

play in representing their clients, and the use of client narrative to explore the ethical and lawyering questions encountered in these cases. *See, e.g.*, Jane Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995); Marie Ashe, *Theoretics of Practice: The Integration of Progressive Thought and Action: The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L. J. 1017 (1992); Peter Margulies, *The Mother With Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695 (1994); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

Similarly, child advocates and children's law scholars have produced scholarship that uses client narratives to critically examine lawyer-client relationships and lawyer ethics and to elicit the client's authentic voice. *See, e.g.*, Janet A. Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews*, 64 FORDHAM L. REV. 1763, 1765 (1996)

Thus, listening to the details of the clients' concerns is a better tool for understanding the preferences of powerless clients than are the classical ethical abstractions. Post-modern scholars characterize this change in emphasis as looking to narrative rather than normative models to solve ethical questions: the client's story, rather than the structure of the lawyer's case, is the primary focus.

Id.; Emily Buss, "You're My What?": *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1753 (1993)

Out of respect for children's perspectives, I have chosen a methodology that builds my argument out of children's and their families' stories. Narrative can suggest not only a competing normative perspective but a new way of getting there. Stories can be deployed not only as a framework for constructing legal arguments, but as voices claiming unique authenticity and authority, as witnesses for a class of powerless outsiders, to mediate between the reader's concrete experience and the world of legal abstraction, and, I hope, to persuade by invoking a common store of experience and empathy.

Children's law scholars have used client narrative to construct a client empowerment model in which the lawyer rejects normative ethical standards such as client capacity to empower child clients through the lawyering process. *See, e.g.*, Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1656 (1996) (proposing "a new lawyering model that stems from an empowerment perspective on the rights of children . . . rejects capacity as an organizing principle in rights theory . . . and argues that the powerlessness of children mandates their empowerment").

Only recently has Therapeutic Jurisprudence scholarship begun to critically study the practical application of its theoretical assumptions and to use client narrative as a vehicle for this process of empirical study and self-reflection. *See, e.g.*, PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14; Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law's Transformative Potential for Particular Areas of Legal Practice: Family Law: Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach*, 5 PSYCHOL. PUB. POL'Y & L. 951 (1999) (describing application of Therapeutic Jurisprudence to child welfare representation); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89 (2002) (describing the role of Therapeutic Jurisprudence in juvenile justice proceedings); Pearl Goldman & Leslie Larkin Cooney, *Therapeutic Jurisprudence/Preventative Law and Law Teaching: Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventive Law Into the Law School Curriculum*, 5 PSYCHOL. PUB. POL'Y & L. 1123, 1136-1145 (1999) (describing the use of case examples to teach principles of Therapeutic Jurisprudence and preventive law in lawyering skills simulation courses); Keri K. Gould & Michael L. Perlin, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: "Johnny's in the Basement/Mixing up His Medicine": Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE UNIV. L. R. 339, 359-71 (2000) (describing the use of Therapeutic Jurisprudence in clinical programs that represent persons with

Jurisprudence into both clinical legal education and child advocacy.

II. THE FOSTER CARE INDEPENDENT LIVING PROGRAM: THE LEGAL FRAMEWORK

A. FROM FOSTER CARE TO ADULTHOOD THROUGH THE CHAFEE FOSTER CARE INDEPENDENT LIVING PROGRAM

The federal government has funded transitional services for youth in foster care for nearly two decades in recognition of the challenges faced by foster youth as they confront the complexities of adult responsibilities despite little preparation. Congress first enacted the Federal Independent Living Program in 1986 to assist foster youth transitioning to life independent from the child welfare system.²¹ In 1999 Congress amended the federal program through the Foster Care Independence Act of 1999, resulting in the creation of the John H. Chafee Foster Care Independence Program.²²

The Chafee Program significantly increased federal funding for transitional services for foster youth from \$70 million to \$140 million annually and expanded the types of services and age eligibility criteria for participating foster youth.²³ The purpose of the Chafee Program is "to provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency"²⁴ The increase in funding and expansion of services demonstrates Congress's unambiguous message that former foster youth need significant support, guidance and outside resources in order to have a fight-

disabilities). The present article is an attempt to weave together these clinical and Therapeutic Jurisprudence scholarship strands.

21. Pub. L. No. 99-272, 100 Stat. 294 (1986) (amending 42 U.S.C. § 677 (1986)). See Raudi P. Guinn, *Passage of the Foster Care Independence Act of 1999: A Pivotal Step on Behalf of Youth Aging Out of Foster Care and Into a Life of Poverty*, 7 GEO. J. POVERTY L. & POL'Y 403 (2000) (describing the increased funding and greater flexibility given to states by the Chafee Program to help young people make the transition from foster care to self-sufficiency); Jill K. Jensen, Note, *Fostering Interdependence: A Family-Centered Approach to Help Youth Aging Out of Foster Care*, 3 WHITTIER J. CHILD & FAM. ADVOC. 329, 332-37 (2004) (describing federal legislation relating to adolescents in foster care, with emphasis on the Foster Care Independence Act of 1999 and its relationship to the concept of permanency planning); Michelle Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. L. & POL'Y 381 (2005)..

22. John H. Chafee Foster Care Independence Program, Pub. L. No. 106-169, 113 Stat. 1822 (1999) (codified at 42 U.S.C. § 677 (2003)).

23. *Id.*

24. 42 U.S.C. § 677(a)(5) (2003).

fighting chance at a successful adulthood.²⁵

In findings associated with the creation of the Chafee Program, Congress estimated that "about 20,000 adolescents leave the Nation's foster care system each year because they have reached 18 years of age and are expected to support themselves."²⁶ However, the dim reality for many of these youth was that they were not becoming instantly independent upon turning eighteen. The Chafee Program resulted from testimony showing that within two to four years of leaving foster care, only one-half of young adults complete high school; fewer than half are employed; one-fourth have been homeless at least one night; thirty percent lack access to medical care; sixty percent of women give birth; and less than one-fifth are completely self sufficient.²⁷ According to Commissioner Williams:

Each year nearly 20,000 young people in foster care reach the age of 18 and must enter adulthood without the financial or emotional support of a family. As any of us who have raised teenagers can attest, it is a rare young person who is ready on his or her 18th birthday to be fully autonomous and economically self-sufficient. We do not expect this of our own children. And yet, this is the burden we currently place on young adults aging out of the foster care system.²⁸

25. In the House debate on the bill, Florida Congressman Mark Foley pointed out that in 1998,

Florida had 3,103 youths who were eligible for independent living programs. Although some of these kids have foster parents who stick with them and are willing to help, including giving them money out of their own pockets, many have been shuffled around so much that they do not have anyone to turn to. These foster children have barely been able to be kids, and suddenly they are forced to become instant adults. It is no wonder that many of them end up on the streets or on welfare, or as teenaged parents.

145 CONG. REC. H4961-62 (daily ed. June 25, 1999). The Chafee Program had an immediate and calculable impact on Florida's Independent Living budget for older foster youth, increasing the budget allocation from \$900,000 to over \$6.1 million. See Shana Gruskin, *State to Help Foster Kids Master Adult Life Program Gains Funds to Give Teens Cushion and Teach Skills They'll Need For Making Decisions*, SUN-SENTINEL (FT. LAUDERDALE, FL), Jan. 2, 2000, at 1B.

26. H.R. 3443, 106th Cong. § 101(a)(3) (1999).

27. *Challenges Confronting Older Children Leaving Foster Care: Hearing Before the Subcomm. on Human Resources of the House Comm. On Ways and Means*, 106th Cong. 106-26 (1999) (statement of Carol W. Williams, Assoc. Comm'r, Children's Bureau, Admin. for Children, Youth and Families) [hereinafter *Hearings on Challenges Confronting Children*].

28. *Id.* Commissioner Williams' testimony was bolstered by numerous studies examined by the GAO and reported in the literature. These studies identified 27% of males and 10% of females as having been incarcerated at least once in the 12 to 18 months following foster care. See Susan V. Mangold, Symposium, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 862-68 (2000).

Numerous reports on various nationwide studies of foster care outcomes have noted that 20% to 40% of our county's homeless population consists of former foster youth. See, e.g., J. C. Harden, *After Release From Foster Care, Many Turn to Lives on the Streets*, N.Y. TIMES, Jan. 6,

These sobering statistics are all the more profound when considered in light of the fact that states had already been receiving federal funding to assist foster youth with transitional services. Clearly, the programs as administered by the states leading up to the passage of the federal legislation were not enabling older foster youth to achieve independence as adults and were in need of reform.

By enacting the Chafee Program, Congress intended to rectify substantive deficiencies in the delivery of services and the lack of accountability of state independent living programs. In its November 1999 report to Congress, the General Accounting Office (GAO) reported its findings culled from the 1998 annual reports received from forty-five of the fifty states. The GAO noted that of those states submitting reports, only twenty-six offered tutoring to help youth graduate from high school or receive a GED, only twenty-eight states assisted with job readiness, only 18 states provided guidance with job placement, and although a majority of the states provided transitional housing arrangements to foster youth in state

1991, at A1; Jill Leovy, *Harsh Rites of Passage: Youth: Residents of the Independent Living Program Apartments Come from Foster Care and the Juvenile Justice System. Now They Must Find Their Place in Society With None of the Resources Most of Us Take for Granted*, LOS ANGELES TIMES, Oct. 11, 1993, at B1; Maia Davis, *Fostering Independence in Wards of the State: Services: Program Teaches Youths Skills They Will Need When Their Aid is Cut Off at 18. Being Alone Adds to the Challenges*, LOS ANGELES TIMES, Dec. 25, 1993, at B1; Bella English, *Aging Out: The State is Not Required to Care for Foster Children Beyond Their 18th Birthday. But That's Precisely When Many Young People Need A Helping Hand Into Adulthood*, BOSTON GLOBE, Oct. 16, 1994, at 11; Evette Soto-Maldonado, *To Be 18 Years Old and Homeless*, N.Y. TIMES, Mar. 9, 1996, at A23; Robert A. Frahm, *Living by Himself, A City Teenager Overcomes Odds*, THE HARTFORD COURANT, June 23, 1996, at A1; Barbara Vobejda, *At 18, It's Sink or Swim: For Ex-Foster Children, Transition is Difficult*, WASHINGTON POST, July 21, 1998, at A01; David Holmstrom, *The Unadoptables: What Happens to Tens of Thousands of Teens Who 'Age Out' of Foster Care Each Year?*, CHRISTIAN SCIENCE MONITOR, Nov. 4., 1998, at B1; Mary Beth Murphy, *Children Struggle When Set Free of Foster Care, Study Says*, MILWAUKEE JOURNAL SENTINEL, Dec. 7, 1998, at 1; Marijke Rowland, *Free and Alone: Ready or Not, Foster Youth Out of the System at Age 18*, THE MODESTO BEE (CA), Apr. 18, 1999, at A1; Ruth Massinga, *Aging Out of Foster Care: Before pushing Kids out of the System, Help Them be Independent*, CHRISTIAN SCIENCE MONITOR, Apr. 22, 1999, at 11.

Further, a Wisconsin study of former foster youth found that "by 12-18 months past discharge, 37 percent of the young adults had not yet completed high school, . . . [and that only] nine percent had entered college." MARK E. COURTNEY & IRVING PILIAVIN, *FOSTER YOUTH TRANSITIONS TO ADULTHOOD: OUTCOMES 12 TO 18 MONTHS AFTER LEAVING OUT-OF-HOME CARE 2* (July 1998) (revised August 1998) (on file with author). Other studies have shown that former foster youth face unemployment at rates anywhere from 25% up to 51%. *Foster Care Independent Living: Hearings Before the Subcomm. On Human Resources of the House Comm. on the Ways and Means*, 106th Cong. 22 (1999) (statement of Cynthia Fagnoni) [hereinafter *Foster Care Independent Living*]. Finally, approximately 40% percent of the former foster youth in the Wisconsin study had trouble obtaining medical care most or all of the time even though nearly half of those youth had received mental health services while in care. *Id.* (statement of Mark Courtney).

care, only a third of the states offered housing to youth after leaving the foster care system.²⁹

In making these changes, Congress recognized not only that many states were falling short in assisting older youth in preparation for adulthood, but also, more importantly, that 18-year-old foster youths were just not ready for the overwhelming responsibilities of adulthood without additional guidance, preparation, and time. As Congressman Mark Foley testified: "Fortunately for most of us we had loving and supportive . . . [sic] of family and parents to nurture, encourage, and teach us how to gradually enter adulthood. I could never imagine the feelings of fear or uncertainty that a foster care [youth] approaching his or her 18th birthday must have."³⁰

B. VIEW FROM FLORIDA: ROAD TO INDEPENDENCE OR ROAD TO HOMELESSNESS?

Florida lawmakers, like their counterparts in Congress, have for years acknowledged that "[t]he traditional foster care system often fails to meet the needs of children in the legal custody of the department."³¹ In 1994, the legislature found that the special needs of older foster care children were not being met by Department of Children and Families:

The foster care system includes a larger pool of older children who have more complicated problems and who have been in care for long periods of time and are not faring well in care. Alternate care placements for adolescents are often inadequate or inappropriate, and services are inadequate to prepare them for independent living Adolescents are often inappropriately and repeatedly placed in the foster care system, typically spend long periods in alternate care, lack a stable environment, and exhibit behavior problems such as truancy, delinquency, and physical or sexual abuse.³²

29. U.S. GENERAL ACCOUNTING OFFICE, 106TH CONG., REPORT ON FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN 7, 11 (1999). In response to some of these shortfalls, the Chafee legislation now permits states to expend up to 30% of their federal funds for room or board for youth 18 to 21 years of age, to extend services in general to youth ages 18 to 21 who have left foster care and to extend at state option Medicaid benefits for youths ages 18 to 21. See 42 U.S.C. § 677(b)(3)(A)-(B) (2002); see also 42 U.S.C. § 1396a(a)(10)(A)(ii)(XVII) (2004).

30. 145 CONG. REC. H4962 (daily ed. June 25, 1999) (statement of Rep. Mark Foley).

31. FLA. STAT. § 409.1673(1)(a)(1) (2004). See also Bernard Perlmutter, Carolyn Salisbury & Michael Stanger, *Preparing for Life After Foster Care: Florida's Independent Living Program for Foster Care Teens*, 9 FLA. B. PUB. INT. L. SEC. REP. 4, 4-5 (2000) (describing policies and practices in the Florida Independent Living program prior to the 2002 enactment of the Road to Independence Act).

32. FLA. STAT. § 409.1673(1)(a)(3)-(4), (1)(b) (2003). See also 1994 Fla. Laws ch. 94-164.

In enacting the Road to Independence Act,³³ the Florida analog to the Chafee law, the Florida legislature in 2002 relied on prior findings and on more recent reports and studies documenting the serious unmet needs of older foster youth in this state and nationally.³⁴ The Senate bill analysis quoted a key finding of a Casey Foundation report, *Shortening Children's Stays in Temporary Care*, confirming that these "youth face extremely limited futures: many perform below average academically, rely on public assistance and end up on the streets."³⁵ The House bill incorporated into its analysis the 1999 GAO study finding systemic deficiencies in the delivery of employment training, skills training and supervised practice-living opportunities to enable foster youths to "become proficient at living self-sufficiently."³⁶

Thus, the Florida legislature has long been aware of the grave problems facing these youth and the systemic deficiencies in serving their needs for housing, health care, independent living skills training, and post-secondary education.³⁷ Despite (or perhaps because of) the Road to Inde-

33. 2002 Fla. Laws ch. 19 (creating FLA. STAT. § 409.1451 (2003)).

34. See generally SHIRK & STANGLER, *supra* note 1, at 84-86 (evaluating Florida's performance in providing independent living services leading up to the Road to Independence Act, noting that the 1999 GAO study found evidence of improved outcomes for young people who received independent living services, and pointing out that "in 2002, more than half of Florida teens in foster care were receiving *no* training in independent living skills before being discharged" from care).

The Florida legislature is not the only governmental branch to acknowledge the dire circumstances facing Florida's foster children at age 18. See, e.g., *L.Y. & Melody v. Dep't of Health and Rehabilitative Servs.*, 696 So. 2d 430, 434 (Fla. Dist. Ct. App. 1997) The *Melody* opinion included a special concurrence by Judge Pariente stating:

With these budgetary cuts in mind, are the children over eighteen, regardless of how well they may or may not be doing, the next targets? This Court fears that they are, and that a large number of children are going to be cut loose with no resources other than to resort to public assistance, crime, prostitution, and other degrading acts in order to survive. Did the people who may be cutting them loose adequately fulfill their responsibility to prepare these people for independence?

Id.; see also *Ocean v. Kearney* 123 F. Supp. 2d 618 (S.D. Fla. 2000) (holding that a former foster care beneficiary stated procedural due process claim under the Fourteenth Amendment and 42 U.S.C. § 1983 against state officials by alleging that he had a property interest in continued foster care as provided by state statute, that he was entitled to benefits until age of 21, that officials provided him with plan calling for him to remain in foster care, and that officials violated juvenile court's prohibition on terminating his foster placement without court order).

35. FAMILY TO FAMILY, *Tools for Rebuilding Foster Care: Shortening Children's Stays*, available at <http://www.aecf.org/initiatives/familytofamily/tools/policieessummary.pdf>.

36. Fla. H. R. Comm. on Child and Family Security, Staff Analysis, H.B. 245 (2001).

37. In 2000, the Florida legislature amended FLA. STAT. § 409.1451(3)(a), extending eligibility for foster care status and services for young adults through age of 23, to enable them to complete their post-secondary education. See 2000 Fla. Laws ch. 13. This legislative recognition of the need to provide continuing educational and financial support for older Florida foster care youth is further demonstration of the need for continuing help from DCF in preparing these youth

pendence Act, the prospects of youths such as George worsened after 2002. The most significant change heralded by the new legislation was its elimination of a provision in Florida law that had previously allowed youth enrolled in secondary and post-secondary school to remain in state care through the age of twenty-three.³⁸

The new law replaced the previous state entitlement of extended foster care with a patchwork of cash monthly subsidies—or “scholarships”—for youth enrolled in school, along with aftercare and transitional benefits, all of which are allotted on a “funds available” basis.³⁹ Virtually from the day it was signed into law by Governor Jeb Bush, the Road to Independence Act was criticized by advocates, editorial writers, and the youth themselves for eliminating the safety net of extended foster care, and for imposing onerous eligibility requirements, which led many to re-name the law the “Road to Homelessness Act.”⁴⁰

Responding to these widespread criticisms of the Road to Independence Act, the Florida legislature passed a modest amendment to the law in 2004.⁴¹ The amendment strengthened the authority of the juvenile court to oversee the services provided to children by DCF before the termination of

for independence.

38. See, e.g., Carol Marbin Miller, *Law Hurts Older Foster Kids*, MIAMI HERALD, Jan. 20, 2003, at 3B; Carol Marbin Miller, *Catch-22: Failing Foster Kids Now Will Lose State Aid at 18*, MIAMI HERALD, Jan. 30, 2003, at 5B; Editorial, *Help Older Foster Children: New Law Dumps 18-Year-Olds Not in School*, MIAMI HERALD, Jan. 31, 2003, at 6B.

39. See FLA. STAT. § 409.1451(5)(b)(5)(c) (2004).

40. See, e.g., Carol Marbin Miller, *Advocates: Law Hurts Older Foster Kids: Most Assistance is Eliminated Unless 18-Year-Olds are in College*, MIAMI HERALD, Jan. 20, 2003, at B3; Tony Bridges, *Many Kids Find DCF Fails Them*, TALLAHASSEE DEMOCRAT, Feb. 7, 2003, at A1; Susan Gruskin & Megan O'Matz, *State to 18-Year-Olds: You're On Your Own; Advocates Worry About What Will Happen to Teens Who Are No Longer Eligible for DCF Foster Care*, SUN-SENTINEL (FT. LAUDERDALE, FL), June 4, 2003, at 1A; Megan O'Matz, *A Tough Road to Independence; Advocates Say the State Does Too Little for Foster Kids Who Reach Age 18*, SUN-SENTINEL (FT. LAUDERDALE, FL), June 25, 2003, at 1B; Sara Olkon, *Cutoff Date Approaches for Foster Kids Not in School*, MIAMI HERALD, June 25, 2003, at B9; Editorial, *Foster Teens' Lonely Road*, ST. PETERSBURG TIMES, July 4, 2003, at 16A; Editorial, *Bleak Future for Young Adults*, SUN-SENTINEL (FT. LAUDERDALE, FL), July 7, 2003, at 20A; Megan O'Matz, *All Alone, Too Soon: Some Florida Legislators Are Trying to Alter the Law That Ends Foster Care at Age 18*, *Marcel Taylor's Case Shows Why*, SUN-SENTINEL (FT. LAUDERDALE, FL), July 11, 2003, at 1A; Megan O'Matz & Shana Gruskin, *Reality Checks: Late Stipends Threaten Former Foster Children With Financial Crisis*, SUN-SENTINEL (FT. LAUDERDALE, FL), Aug. 2, 2003, at 1A; Carol Marbin Miller, *State Gets 10 Days to Prep Teen for Adulthood; The DCF Has Defied Orders to Teach a Foster Child to Live on Her Own. The Girl—Soon to be 18—And Her Child May End Up Homeless, Her Lawyer Says*, MIAMI HERALD, Oct. 10, 2003, at B3; Editorial, *No Home, No Money, No Help*, ST. PETERSBURG TIMES, Oct. 27, 2003, at 8A; ASSOCIATED PRESS, *Disabled Woman Sues Over DCF Education Plan; Lawsuit Alleges Discrimination*, TALLAHASSEE DEMOCRAT, Jan. 28, 2004, at B6 [hereinafter *Disabled Woman Sues Over DCF Education Plan*].

41. See generally 2004 Fla. Laws ch. 362, § 1.

court jurisdiction at age eighteen, and removed barriers to participation in the Road to Independence scholarship program by students with educational disabilities past age eighteen.⁴² The input and advocacy of the Clinic's clients was invaluable in this law reform effort as it gave them opportunities to tell their powerful stories to the legislature and to share their experiences with the public.⁴³

42. These amendments to the Road to Independence Act, which were drafted and advocated by the Children & Youth Law Clinic with the assistance of our clients (a collaboration that in itself evidences a Therapeutic Jurisprudence approach to systems reform advocacy), remedied at least some of the deficiencies advocates (and the youths themselves) believe have existed in the law since its inception. Among other changes, Florida Statute § 39.701(7)(a)(10) (2004), now requires that DCF file a report on the status of independent living services provided to any foster child 13 or older. The new § 39.701(6) assures that there will be a review hearing for any foster child within 90 days after his or her 17th birthday, and outlines what the court is entitled to expect from DCF in determining whether the independent living services needed by the child have been provided. Notably, in the event the court determines that DCF has not met its obligations, the court is statutorily authorized to issue a rule to show cause allowing DCF 30 days to comply or risk contempt. FLA. STAT. § 39.701(8)(c) (2004). Section 409.1451 explicitly requires that older children in foster care and young adults who exit foster care are to receive life skills activities and educational opportunities to better prepare them for self-sufficiency as adults. FLA. STAT. § 409.1451(1)(b) (2004).

The new legislation also eliminates the requirement under § 409.1451 that a Road to Independence scholarship recipient be required to maintain a 2.0 grade point average or be capable of receiving a high school diploma within two years. FLA. STAT. § 409.1451(5)(b) (2004). Thus, for example, youths who spend their childhoods in state care, and who are educationally disabled, now qualify for the financial benefits of the scholarship program (and consequently, continuing Medicaid coverage) while attending an exceptional student education program irrespective of grade point average or ability to complete high school within two years of exiting state care.

The catalyst for the latter amendment was a 42 U.S.C. § 1983 lawsuit filed in federal district court by the Clinic challenging the law's failure to provide reasonable accommodation to educationally disabled youth seeking Road to Independence scholarships, in violation of Title II of the Americans With Disabilities Act, 42 U.S.C. § 12201, *et seq.* See *Disabled Woman Sues Over DCF Education Plan*, *supra* note 40; Megan O'Matz, *Teen Sues DCF for Discrimination; 18-Year-Old Fights to Stay in Class, Keep School Stipend*, SUN-SENTINEL (FT. LAUDERDALE, FL), Jan. 27, 2004, at 1B.

While the 2004 amendments to the Road to Independence Act brought about some positive reforms, under the guise of conserving limited funds, Florida Statute § 409.1451(5)(b)(4) (2004) requires DCF to perform a funding needs assessment to determine the extent of the youth's "living and educational needs." *Id.* This requirement is already causing anxiety and hardship to a number of scholarship recipients, some of whom have learned that their Road to Independence scholarships will be reduced from \$892 per month to the minimum allotment of \$25, in many cases due to erroneous calculations of need by the Department. See, e.g., Megan O'Matz, *The Well Runs Dry; State Assessment Formula to Slice Into Aid Ex-Foster Children Receive*, SUN-SENTINEL (FT. LAUDERDALE, FL), Nov. 8, 2004, at 1B.

43. This client/community-driven legislative advocacy strategy was modeled on one pioneered by the California Youth Connection, whose website describes its mission and accomplishments, in part, as follows:

California Youth Connection is an advocacy/youth leadership organization for current and former foster youth. We are young people, who because of our experiences with the child welfare system, now work to improve foster care, to educate the public and

C. ROAD TO INDEPENDENCE ADVOCACY AND
THERAPEUTIC JURISPRUDENCE

Even though there have been modest, incremental improvements to the Road to Independence Act, which make it easier for youth to qualify for more services after they leave the foster care system, the challenge for children's advocates is how to make these services palatable to youth who have grown up in state care and become so embittered and distrustful of DCF that they rebuff offers of assistance from DCF as soon as they are able to leave the system.⁴⁴ What can Therapeutic Jurisprudence and preventive law teach us about ways to engender trust and confidence in these embittered adolescent clients toward the system that has marginalized and silenced them?⁴⁵

policy makers about our unique needs and to change the negative stereotypes many people have of us.

There are now 22 active chapters of CYC in California with over 250 members, ages 14 to 24. CYC is a youth-run organization that provides invaluable opportunities to learn leadership skills. CYC youth put on two statewide conferences per year to discuss state level legislative and local issues we want to work on; we also organize a Day at the Capitol to educate legislators about foster care issues.

* * * *

WHY CYC IS IMPORTANT:

CYC gives us a voice to speak about foster care. No one can be clearer or more articulate about how the foster care system has worked for—or against—us. When we tell our stories, people listen.

at <http://www.calyouthconn.org/fact.html> (last visited Feb. 12, 2005) (emphasis added).

44. Perhaps one reason our client did not listen to, or was turned off by, our entreaties to accept government assistance post-emancipation from foster care, as described *infra* in Part IV.D, was the way we presented his legal options and the non-legal consequences of choosing to forgo state benefits. See generally Austin Sarat & William L. F. Felstiner, Symposium, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663, 1670-81, 1688 (1989) (criticizing the way lawyers talk to their clients about the legal system, and finding that people who use legal processes tend, no matter how favorable the results of their encounter, to have a less positive view of the law than those with no direct experience). See also discussion *infra* Part V.

45. See generally FESTINGER, *supra* note 2, at 273.

Children who are in foster care want to be treated like others. But there is a difference. They are foster children and feel different because of that. "Foster" [sic] sounds like a disease," said one, whereas others spoke of a positive experience as one in which the word 'foster' was not used. 'We wanted to feel part of the society and so we didn't let on we were in foster care.' This was not an isolated incident, for nearly 58% of the respondents said that it was very or pretty true that at times they did not want to acknowledge being a foster child. Furthermore, close to 63% felt that children in foster care feel different or set apart from other young people.

Id.; see also Jill Chaifetz, *Listening to Foster Children in Accordance With the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 10 (1999)

As one leading study of the views and attitudes of youth discharged from the foster care system found, being excluded from the decision-making process was one of the most common criticisms youth leveled against the system:

The remarks and suggestions made by foster care graduates contained a recurrent theme—the importance of consultation with the young people themselves. They felt like pawns—subject to the many powers of others. They felt disregarded, that it did not matter what they wanted or had to say, because too often they were never asked. Whether it was a decision about a foster home, about changes in placement, about visiting arrangements with kin, or about their goals in life, they felt they should have been heard.⁴⁶

Therapeutic Jurisprudence gives children's lawyers a theoretical road map and interdisciplinary bearings as they navigate the counseling and advocacy process with their clients. As a field of inquiry that examines the therapeutic and anti-therapeutic effects of substantive laws, legal procedures, and legal roles, it also gives children's lawyers tools from the behavioral science research that help to promote the public policy aims of the federal law. For example, the Chafee Act requires states to facilitate connections between foster children and adult mentors, and requires states to promote youth participation and engagement in case planning. Children's lawyers should advocate that states follow these requirements of federal law, which the research demonstrates can promote the psychological and physical well-being of youth, a central goal of Therapeutic Jurisprudence.⁴⁷

It is true that more and more children are coming into the system each year, and there is not enough funding to serve them properly. However, I would suggest there is another failure, so blinding in its simplicity, so fundamental to the success of any service initiative, that it amazes me that I rarely see it mentioned in the literature of child welfare experts. What is missing is the voice of the children themselves. Children are almost always treated as passive objects by the system. The child is rarely, even when the law requires it, given any choice or explanation about what happens to her or him. More than one third of children in foster care are ten or older, and could have significant votes both in their permanency goals as well as their day-to-day lives in foster care. The fundamental lack of care and respect shown these children is a major reason so many of them will never reach their full potential as contributing members of our society. Consideration of their lack of access to decision-making about their own lives must be added to the discussion of the failures of the foster care system and how it can be improved.

Id.

46. FESTINGER, *supra* note 2, at 296.

47. 42 U.S.C. § 677(b)(3)(H), (c)(4); *see also* SHIRK & STANGLER, *supra* note 1, at 263 (noting that the Chafee Act requires states to certify that they have instituted programs designed to promote connections between foster care youth and mentors or other "dedicated" adults and require youth participation and engagement in case planning and that states are obligated to create programs and services that implement these promises that they have made to the federal govern-

Moreover, the legislation's policy goal of promoting youth participation dovetails with a central law reform goal of Therapeutic Jurisprudence in the context of representing older children in foster care: to give voice to and empower these children by consulting them and involving them in decisions that are important to them, processes that can have therapeutically beneficial consequences for them.⁴⁸

III. THE THERAPEUTIC JURISPRUDENCE AND PREVENTIVE LAW AGENDAS

In recent years the Therapeutic Jurisprudence/preventive law model of lawyering has emerged as a significant theoretical model with applications to a variety of areas of legal practice.⁴⁹ This model contemplates lawyers practicing with an "ethic of care"⁵⁰ and heightened interpersonal skills, who seek to prevent and solve legal difficulties for their clients through sensitive counseling, advance planning, creative problem solving, careful drafting, and the use of alternative dispute resolution techniques.

A. THERAPEUTIC JURISPRUDENCE

As conceived by Professors David B. Wexler and Bruce J. Winick and their collaborators, Therapeutic Jurisprudence is a field of interdisciplinary research with a law reform agenda that focuses attention on the

ment as a condition for the receipt of Chafee funding); see also FLA. DEP'T OF CHILDREN AND FAMILIES, *Chafee Foster Care Independence Program 2005-2009 Application and 2004 Progress Report*, at 11-3 (2004) (describing current DCF programs, improvement strategies underway as of April 2004, and future program initiatives with regard to providing "personal and emotional support to children aging out of foster care through mentors and the promotion of interactions with dedicated adults" and engaging youth in case planning, specifically in individual education plans, although not in permanency or independent living case plans).

48. Federle, *supra* note 20, at 1696.

Of course, this may mean that some decisions will be made by the child that the lawyer believes are wrong or ill-conceived, but then, all clients, not just those of a certain age, are capable of making and have made bad choices. Nevertheless there is value in allowing a client to speak in her own voice and to determine her own goals. This is the essence of empowerment and ethical lawyering.

49. See, e.g., PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14; *Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education*, 5 PSYCHOL. PUB. POL'Y & L. 795, 795-99 (1999); David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence to Work: The Term May Sound Academic, but it Embodies a Hands-on Approach to Solving Problems Rather Than Simply Winning Cases*, 89 A.B.A. J. 54, 54-57 (2003); see also JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003) [hereinafter JUDGING IN A THERAPEUTIC KEY] (applying approach to judging).

50. See Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1401-03 (1997).

consequences of law for the psychological functioning and emotional well-being of clients and other persons affected by the legal system.⁵¹ Therapeutic Jurisprudence uses the tools of the behavioral sciences, and sees the law and the way in which it is applied by various legal actors, including judges, attorneys, social workers, and guardians ad litem, as having inevitable consequences for the psychological well-being of clients. As Bruce Winick has written, Therapeutic Jurisprudence

suggests that these consequences should be taken into account in reforming law, when consistent with other important normative values, to make the law less anti-therapeutic and more therapeutic. It is a mental health approach to law, suggesting the need for the legal system to be sensitive to the law's impact on the psychological health of clients and others involved in the legal system, and for judges, lawyers and other actors in the legal system to perform their roles with an awareness of basic principles of psychology.⁵²

The Children & Youth Law Clinic has used this approach in its advocacy for individual clients and it has incorporated it broadly into its educational mission. We have woven classroom and clinic discussions of Therapeutic Jurisprudence scholarship into our teaching of the elements of juvenile law and practice.⁵³ We have used Therapeutic Jurisprudence and

51. See, e.g., BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW (1997); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds., 1996).

52. Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1039 (1999), reprinted in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 251-52 [hereinafter *Redefining the Role*]. The increasingly prominent role of Therapeutic Jurisprudence in legal education is, in many respects, evidence of the expanding curricular attention to the teaching of interpersonal and relationship skills in students' law school training. See, e.g., Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225 (2004).

53. See, e.g., Bernard P. Perlmutter & Carolyn S. Salisbury, "Please Let Me Be Heard": *The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution*, 25 NOVA L. REV. 725 (2001) (proposing application of principles of Therapeutic Jurisprudence to civil commitment hearings for foster children); Bruce J. Winick & Ginger Lerner Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002); Ronner, *supra* note 20; Brooks, *supra* note 20 (proposing application of Therapeutic Jurisprudence and family systems research to child welfare proceedings); Jensen, *supra* note 21, at 342-61 (proposing application of Therapeutic Jurisprudence and family systems theories to federal independent living legislation); Jan C. Costello, *Why Have Hearings for Kids if You're Not Going to Listen?: A Therapeutic Jurisprudence Approach to Mental Disability Proceedings for Minors*, 71 U. CIN. L. REV. 19 (2002) (exploring the Therapeutic Jurisprudence implications of civil commitment or other mental disability proceedings involving children); Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001) (applying principles of Therapeutic Jurisprudence to delinquency court adjudications); David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM.

preventive law techniques to teach basic lawyering skills such as client interviewing and counseling, and to aid in understanding the dynamics of lawyer-client interpersonal relations.⁵⁴ We have applied the principles of Therapeutic Jurisprudence to enforce and expand rights for foster children in juvenile and family court proceedings,⁵⁵ particularly in the context of

& MARY BILL RTS. J. 511, 574 n.322 (2004) (applying Therapeutic Jurisprudence analysis to safeguarding children's psychotherapist-patient privilege in mental health records); *see also* A. J. Stephani, Symposium, *Therapeutic Jurisprudence and Children: Introduction*, 71 U. CIN. L. REV. 13, 15 n.8 (citing to several articles evidencing "an impressive body of scholarship examining Therapeutic Jurisprudence and how the law affects our children.").

54. With our University of Miami School of Law colleague, Bruce Winick, Clinic faculty co-teach *New Directions in Lawyering: Interviewing, Counseling, and Attorney-Client Relational Skills*, a three-credit practice skills course that introduces students to Therapeutic Jurisprudence and allied new approaches to the lawyering process. As described in the course description, and discussed more fully in Bruce Winick's contribution to this symposium, *New Directions in Lawyering* explores new approaches to the lawyering role that use non-adversarial, psychologically beneficial, and humanistic ways to solve legal problems, resolve legal disputes, and prevent legal difficulties, and the skills they bring to the lawyering process. Students are introduced to Therapeutic Jurisprudence, preventive law, restorative justice, collaborative law, holistic law, creative problem solving, and a variety of newly emerging problem solving courts. Particular emphasis is placed upon exploration of ethical issues in the newly defined role. *See* Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429 (2005).

The class challenges students to develop ways of bringing increased personal satisfaction, professionalism, and lawyer well-being to law practice, and increasing creative problem solving, preventive lawyering, interpersonal relations, interviewing, counseling, and negotiation skills. Students participate in simulated interviewing and counseling exercises and write short papers exploring application of one or more of these new approaches to dealing with a particular legal problem or problems. They also prepare rewind, psycholegal soft-spot and other written exercises. *Id.*

New Directions in Lawyering culminates with supervised and graded live-client interviews by students of juveniles awaiting placement in commitment programs at the Miami-Dade County Juvenile Detention Center. The students use Therapeutic Jurisprudence/preventive law counseling techniques to help each client to prepare a "relapse prevention" plan designed to help the client avoid future problems in their commitment programs and in the juvenile justice system. *Id.* *See also* David B. Wexler, *Relapse Prevention Planning Principles for Criminal Law Practice*, 5 PSYCHOL. PUB. POL'Y & L. 1028 (1999) (describing relapse prevention planning by criminal defense lawyers with prisoners as a way of helping them gain insight into how their cognitive and behavioral processes have contributed to criminality, follow the revised reasoning process in prison, and use the relapse plan as a basis for parole and eventual reintegration into the community).

55. *See supra* note 42 (describing lawyer collaborations with and organizing of clients to achieve legislative reform of Florida's Road to Independence Act as a means of helping a client community achieve collective ends). Our Clinic's collaborations with clients in this group representation/law reform effort were not only applications of the Therapeutic Jurisprudence theory of voice and validation, but also of the "rebellious" community lawyering principles espoused by Gerald López that view alliance building between social justice lawyers and clients as a key part of the law reform advocacy enterprise. *See, e.g.*, GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (proposing a "rebellious lawyering" model of community and social justice practice, contrasted with traditional "regnant

children facing involuntary commitment to mental health facilities.⁵⁶

Our Clinic's efforts to infuse Therapeutic Jurisprudence into the many facets of our case advocacy and into our skills and doctrinal teaching, occurs as courts in Florida and in other jurisdictions⁵⁷ have recognized the perspective of Therapeutic Jurisprudence in family and juvenile court proceedings, in problem solving courts, and in civil and criminal court proceedings.⁵⁸ This convergence makes it particularly opportune and appro-

lawyering" models of public interest law practice which subordinate clients and communities); Anthony V. Alfieri, *Practicing Community*, 107 HARV. L. REV. 1747 (1994) (reviewing LÓPEZ, *supra* note 55); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992) (noting that group representation curtails the public interest lawyer's fidelity to the individual client, but enhances the lawyer's ability to help clients achieve their collective ends).

56. See, e.g., *M.W.*, 756 So. 2d 90, 108-09 (using a Therapeutic Jurisprudence perspective to suggest that the juvenile court should afford a foster child facing commitment to a locked mental health facility a "meaningful right to be heard," including a pre-commitment hearing at which the child is represented by a guardian ad litem and legal counsel); Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 804 So. 2d 1206 (Fla. 2001) (proposing a rule of juvenile procedure requiring hearings and counsel for children objecting to placement in residential treatment centers on Therapeutic Jurisprudence principles); Amendment to Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So. 2d 763 (Fla. 2003) (adopting rule of juvenile procedure requiring counsel and hearings for children objecting to placement in residential treatment centers); *S.C. v. Guardian Ad Litem*, 845 So. 2d 953 (Fla. Dist. Ct. App. 2003) (utilizing Therapeutic Jurisprudence analysis posited in Children & Youth Law Clinic's *amicus curiae* brief to uphold a foster child's right to invoke the psychotherapist-patient privilege to prevent her court-appointed guardian ad litem from gaining access to records covered by the privilege).

57. See, e.g., *In re Gault*, 387 U.S. 1, 26 (1967) (adopting a proto-Therapeutic Jurisprudence, research-based conception of the value of providing juveniles due process safeguards in the context of delinquency adjudications, noting that "recent studies . . . suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."); *In the Matter of the Mental Health of K.G.F.*, 29 P.3d 485 (Mont. 2001) (applying principles of Therapeutic Jurisprudence to civil commitment hearings); see also JUDGING IN A THERAPEUTIC KEY, *supra* note 49 (describing the newly-emerging problem solving courts, such as drug treatment courts, domestic violence courts, mental health courts, and other related approaches to problem solving judging, and showing how judges can use Therapeutic Jurisprudence not only in specialized problem solving courts, but in general civil and criminal judicial forums as well).

58. In addition to the decisions cited in *supra* note 56, in which the Children & Youth Law Clinic has relied on Therapeutic Jurisprudence principles and arguments to effectuate the reform of juvenile court procedures and rules, a number of other Florida appellate rulings have recognized that the therapeutic interests of children and families are of paramount importance in court proceedings and have implicitly or explicitly credited Therapeutic Jurisprudence for this insight. See, e.g., Amendment to Florida Rule of Juvenile Procedure, Fla. R. Juv. P. 8.100(A), 796 So. 2d 470 (Fla. 2001) (recognizing the deleterious therapeutic consequences for juveniles of video conference arraignments in delinquency proceedings); *In re Report of the Family Court Steering Committee*, 794 So. 2d 518, 519-20 (Fla. 2001) (adopting "therapeutic justice" as a primary goal of Florida's unified family court, and stressing the importance of "embracing methods of resolving disputes that do not cause additional emotional harm to the children and families who are required to interact with the judicial system.").

appropriate to apply the theoretical approaches of Therapeutic Jurisprudence in our teaching and practice missions.

David Wexler has observed that, "Therapeutic Jurisprudence scholarship recognizes the crucial importance of empirical inquiry to test the accuracy of its speculations."⁵⁹ Because of its theoretical nature, the scholarship invites study of its assumptions and their practical applications. "Law school clinics provide an experiential setting that is a natural laboratory for applying Therapeutic Jurisprudence. As a theory whose purpose is to study the impacts of law on individual well-being, Therapeutic Jurisprudence can enhance clinical practice and its educational, service, and law reform missions."⁶⁰

B. PREVENTIVE LAW

The lawyering techniques of preventive law originated years before Therapeutic Jurisprudence, conceived as a "harm-averse movement" within the legal profession that explicitly seeks to intervene in legal matters before disputes arise.⁶¹ It is a proactive approach to the legal profession, emphasizing the lawyer's role as a "planner" and proposing the "careful, private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities."⁶²

In our Clinic's experience, we have woven preventive law concepts into our teaching curriculum, and have found that they are particularly well-suited for the types of cases that our Clinic handles.⁶³ We regularly used preventive law techniques in our meetings with George. For example, we conducted regular "legal checkups" with George, usually in anticipation of the six-month judicial review hearings before the Court or the Citizen Review Panels, which addressed a range of permanency, mental health, health, and education related questions.⁶⁴ The process of conducting legal checkups in preventive law is in many ways analogous to the primary care

59. David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 269 (1999), reprinted in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 454.

60. Mary Berkheiser, *Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics*, 5 PSYCHOL. PUB. POL'Y, & L. 1147, 1171 (1999).

61. Daicoff, *supra* note 50, at 1.

62. *Integrating Preventive Law*, *supra* note 15, at 6.

63. *See id.* at 40-43 (describing ways of integrating preventive law/Therapeutic Jurisprudence methodology into courses on legal process, lawyering skills classes, and law school clinics).

64. *See* FLA. STAT. § 39.701(2) (2004) (describing the judicial review process and the role of citizen review panels in performing semi-annual statutory reviews of the status of foster children).

physician's process of conducting medical checkups with patients.⁶⁵ In our Clinic's cases, this analogy is particularly apropos, given the fact that so many of the legal needs of our clients often directly implicate the state's obligation to meet their health care needs under federal and state law.⁶⁶

Performing legal checkups in George's case had both a planning function and a therapeutic function. It gave us a structured opportunity to sit down with our client and review the progress that he, his mother, and the

65. See generally HARDAWAY, *supra* note 13, at xxxvii; see also Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 440 (1994).

66. Advocacy for foster care children with health care issues is particularly important and especially well-suited to the approach of preventive law. The health care problems of these children are far more acute and chronic than their peers who grow up in intact families, and when these children exit foster care, they often have serious difficulties accessing health care. See generally Abigail English & Kathy Grasso, *The Foster Care Independence Act of 1999: Enhancing Youth Access to Health Care*, July/August CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 217 (2000) (describing the multiple, complex physical and mental health needs of young people in foster care, the barriers to health care that they experience upon leaving care, and the expanded Medicaid options available to states under the Chafee Program for former foster care youth ages 18-21); see also 42 U.S.C. §§ 677(b)(3)(A)-(B), 1396a(a)(10)(A)(ii)(XVII) (2004).

A number of other child advocacy offices have thus focused their efforts on health care advocacy utilizing tools and instruments that enable them to conduct preventive law check-ups concerning their clients. Probably the leading exponent of this technique in Florida is the Legal Aid Society of the Orange County Bar Association, which has devised a series of standardized forms designed to help staff attorneys and *pro bono* lawyers identify and obtain services for their child clients. The program utilizes a one-page Child Progress Worksheet as a tool to track whether mandated or recommended independent living, health care, mental health, educational, counseling, developmental and other mandated or needed services have been provided by DCF for the child. Additionally, staff and *pro bono* lawyers utilize a very comprehensive 17-page Home Visit Checklist which they use to conduct a detailed survey of the child's placement, educational needs, health care needs, permanency needs, and general legal issues relating to the child's foster care status. The health care survey covers a gamut of important health care needs of clients. See Child Progress Worksheet and Home Visit Checklist (on file with author).

According to Legal Aid staff attorney Heather Morcroft, the standardized forms used by the staff and *pro bono* lawyers are an efficient method for tracking the needs of more than 650 foster care children in their case docket, including the 25% who are older teens. The forms aid the lawyers in not only their courtroom advocacy for the clients, but also in non-adversarial settings, such as case plan and school staffing conferences. Telephone Interview with Heather Morcroft, Esq., Staff Attorney, Legal Aid (September 30, 2004).

Although the Children & Youth Law Clinic has not yet developed as comprehensive and detailed a case tracking form as that developed by Legal Aid, the Community Health Rights Education Clinic at the University of Miami School of Law's Center for Public Service, which I also supervise, has created a similarly detailed intake instrument designed to gather health care information to assist clients with their unmet needs. The Center's health rights clinic is an integrated teaching, research, and community service program providing health rights education and advocacy to under-served communities in cooperation with the Schools of Nursing and Medicine. The education and training regimens include a law student-conducted health benefit eligibility interview and investigation ("health rights checkup") in consultation with supervising clinical faculty, a student-patient informational discussion of benefit eligibility and problem solving approaches to ineligibility, and direct assistance to the patient by students and faculty through self-help advising and, when appropriate, advocacy.

Department of Children and Families had made over the preceding months in achieving the goals of his court-ordered permanency case plan.⁶⁷ As he approached his eighteenth birthday, in particular, we strove to use the planning process to help our client identify the goals that he would need to meet so that he had the skills and support systems in place on his eighteenth birthday and could make a smooth transition from foster care to independence.⁶⁸ It also served a therapeutic function as it was an opportunity for him “to reevaluate his . . . current life situation relative to his . . . goals, and to think about and plan for the immediate and distant future.”⁶⁹

Working with George to plan for his future needs bore many resemblances to the process described by Dennis Stolle, et al.,⁷⁰ in the context of using the model to counsel and prepare legal documents for elder clients. The scenario portrays a couple nearing retirement who consult with an attorney to draft estate planning documents, and the Therapeutic Jurisprudence/preventive lawyer’s consideration of, not just the narrow economic and legal concerns involved in drafting the estate plan documents, but also the client’s personal goals, values, and relationships. Our approach to the permanency and independent living planning process for George, as he neared emancipation from foster care, also strove to use preventive law techniques and to be sensitive to the therapeutic implications of the plan.

Practicing Therapeutic Jurisprudence/preventive law with our teenage client as he approached his eighteenth birthday differed in some significant ways from the process described by Stolle and his co-authors with respect to estate planning for the elder clients approaching the milestone of retirement. The most obvious differences in representing a teenager in foster care as opposed to an elder client approaching retirement at the end of his professional career are the differences in age, economic and social status, cultural identity, life experience, and developmental status.⁷¹ A lawyer rep-

67. See FLA. STAT. § 39.701(7)(a), (8) (2004) (describing the scope of review by the court or the citizen review panel in assessing the status of the child in the six-month judicial review hearing, and the role of the court or panel in determining compliance by all parties with the permanency case plan).

68. See generally UNIV. OF OK., NATIONAL RESOURCE CENTER FOR YOUTH DEVELOPMENT, PERMANENCY PLANNING: CREATING LIFE-LONG CONNECTIONS—WHAT DOES IT MEAN FOR ADOLESCENTS? (2000) available at <http://www.nrcys.ou.edu> [hereinafter WHAT DOES IT MEAN FOR ADOLESCENTS?].

69. *Integrating Preventive Law*, *supra* note 15, at 17.

70. *Id.* at 11 (observing that that preventive lawyers should be able to use client counseling skills to quickly bring out information regarding the elder clients’ “age, health conditions, family structure, vocations, and avocations, all of which may prove to be critical information in drafting a document to distribute their assets in accord with their intent,” but can also “be used to alert the preventive lawyer to any potential therapeutic concerns.”).

71. See DANIEL J. BRANNEN, DEBUNKING THE YEAR 18 MYTH: RIGHTING THE WAY FOR

resenting a teenager will also need to use different modes of communication in counseling this client, as opposed to an elder client.⁷² But there are many commonalities that lawyers for elder clients and children will use in applying the creative problem solving techniques of the Therapeutic Jurisprudence/preventive law approach—at different ends of the age, cultural, racial, and social status spectrums.⁷³

Although our Therapeutic Jurisprudence/preventive law approach focused primarily on using periodic legal checkups to plan for the immediate and future needs of our client, by no means did this strategy preclude the Clinic from pursuing litigation where necessary.⁷⁴ For example, we did not hesitate, at one critically urgent juncture, to file a motion and supporting affidavit asking the juvenile court judge to hold DCF in contempt of court when the agency flouted a case plan by failing to deliver promised services according to the timetable set out in the court-approved permanency case

AMERICA'S FOSTER YOUTH—AN ADVOCACY STRATEGY 3 (Nov. 2002), available at <http://www.kidsathome.org./year18.html> (describing the economic and life circumstances unique to 18-year-olds discharged from foster care, especially in light of U.S. Census Bureau data showing that the overwhelming majority of Americans do not become economically self-sufficient until they reach their 25th birthdays); Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, 80 CHILD. WELFARE 685 (2001) (tracking the myriad difficulties experienced by youth aging out of foster care in the areas of family support, independent living, education, medical insurance coverage, employment, criminal court involvement etc.); see also Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 33-34 (2001) (exploring the role culture plays in lawyering and illustrating methods that clinical teachers can use to build cross-cultural skills); Bill Ong Hing, Symposium, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993) (explaining why the effective community lawyer must be conscious of and sensitive to the class, race, ethnicity, gender, sexual orientation, physical disability, and age of the various players in the legal environment and describing how these sensitivities can be taught in a law school clinic).

72. See WALKER, *supra* note 8, at 5. Walker observes that

[a]dults have a higher expectation of adolescents' ability to understand the convoluted language typical of court proceedings, and improbable responses to questions such as 'How many times did it happen?' . . . Adolescents are, in fact, in some ways at greater risk than young children of misjudgment, and we would do well to keep that in mind.

Id.

73. See *Integrating Preventive Law*, *supra* note 15, at 16.

Ultimately, a TJ preventive lawyer can ensure therapeutic outcomes through the careful use of preventive tools. By considering not only economic and legal priorities, but also personal goals, values, and relationships, a lawyer can create a superior package of preventive legal documents that . . . can both reduce the potential for anti-therapeutic outcomes down the road and maximize the older client's present sense of security and autonomy.

Id.

74. See Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189, 202-03 (2002) (describing the use of litigation as a preventive law strategy).

plan.⁷⁵ Rather than shunning litigation, there were occasions such as the contempt proceeding when we viewed litigation as an important preventive law tool and as a creative problem solving strategy to prevent the occurrence of even more grave problems in our client's life.

Thus, we were able to make extensive use of Therapeutic Jurisprudence/preventive law techniques in our representation of our client by engaging him in joint decision-making strategies such as permanency planning, evaluating his long-term goals and interests and how to achieve them while minimizing the risk of legal difficulties and maximizing our client's therapeutic interests and values, and, when warranted, utilizing litigation to avert more serious legal problems.

IV. THERAPEUTIC JURISPRUDENCE AND PREVENTIVE LAW APPLIED: LEGAL ADVOCACY FOR GEORGE C.

In one of the first published articles to look at the infusion of Therapeutic Jurisprudence into clinical legal education, Professor Mary Berkheiser observed that Therapeutic Jurisprudence holds great promise for clinicians in teaching problem solving, client-counseling, self-reflection, and professional responsibility.⁷⁶ Professor Berkheiser also identified a number of practical difficulties in teaching Therapeutic Jurisprudence and applying its theoretical assumptions and values in the clinical education setting. Her critique questioned whether clinicians can teach law students to be psychologically competent while also teaching substantive law and basic legal skills; whether the term "therapeutic" is too vague to be grasped by students; and whether promoting a client's therapeutic interests in the clinic

75. *See id.* at 203.

Like business and estate planning, litigation becomes an opportunity for preventive lawyering. Litigation thus is not an occasion for abandoning the preventive law process, but simply is one of a number of facts of life that must be dealt with by the preventive lawyer. These facts can be addressed in ways that minimize future problems and provide the client with an improved holistic understanding of and more creative solutions for the dispute in which he is involved.

Id.

76. *See Berkheiser, supra* note 60, at 1148. Berkheiser notes that

Law school clinics could bring to Therapeutic Jurisprudence what that field may be lacking—the ability to reach and educate future members of the bar and bench and to apply Therapeutic Jurisprudence principles in ways that can improve the lives of their clients. The precise benefits that Therapeutic Jurisprudence can offer to clinical teaching and at what costs, however, remain less clear.

Id.; *see also* Gould & Perlin, *supra* note 20, at 355 (noting that Therapeutic Jurisprudence enriches clinical teaching by improving the teaching of skills, giving clinicians a better understanding of the dynamics of clinical relationships, investigating ethical concerns and the effect on lawyering roles, and invigorating the way teachers and students question accepted legal practice).

ultimately subordinates the promotion of due process and justice values.⁷⁷

The experience of practicing and teaching the Therapeutic Jurisprudence perspective in our Clinic suggests that these techniques did not require the clinic to sacrifice other skills teaching or normative values associated with clinical legal education and the lawyering process itself. Indeed, we consistently found that we could have it both ways. By engaging in four "rewind exercises," designed to review and critique some of our activity in George's case, the balance of this article offers anecdotal case examples or vignettes of how clinical legal education, and a children's advocacy clinic, can benefit and learn from the teaching and practice of Therapeutic Jurisprudence.⁷⁸

A. FIRST REWIND EXERCISE—SETTING GOALS: REUNIFICATION, TERMINATION OF PARENTAL RIGHTS OR LONG-TERM FOSTER CARE

The judge in George's dependency foster care case had appointed our Clinic to serve as his attorney *ad litem*.⁷⁹ The court was primarily concerned that George had been languishing in foster care for far too long and that federal and state law required the court, after the passage of nearly

77. See Berkheiser, *supra* note 60, at 1167-68 (citing Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 201 (1995)).

78. See *Better Legal Counseling*, *supra* note 14 (describing the "rewind" technique as a discussion of an appellate case in which the class rewinds the situation back to the stage of drafting, and asks "what might have been done differently to avoid the legal problem presented in the case.").

79. The Clinic was appointed pursuant to Florida Statute chapter 39.4085(20) and Rule 8.217 of the Florida Rules of Juvenile Procedure, to serve as George's attorney *ad litem*. See FLA. STAT. § 39.4085(20) (2004); FLA. R. JUV. P. 8.217. In representing its clients, the Clinic follows ethical guidelines recommended by the American Bar Association. See ABA, STANDARDS OF PRAC. FOR LAWS.WHO REPRESENT CHILD. IN ABUSE AND NEGLECT CASES (1996) [hereinafter ABA STANDARDS]. The ABA STANDARDS promote a traditional role for attorneys in their representation of children, which requires the lawyer to advocate for the client's articulated wishes and legal interests within the bounds of the law. See ABA STANDARDS at A-1 (defining the term "child's attorney" as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client."); see also ANN M. HARALAMBIE, THE CHILD'S ATTORNEY: A GUIDE TO REPRESENTING CHILDREN IN CUSTODY, ADOPTION, AND CHILD PROTECTION CASES 5-14 (1993) (distinguishing the role of a child's attorney from the best interests advocacy role performed by a guardian *ad litem* or the role of the attorney for the guardian *ad litem*); Bruce A. Green & Bernardine Dohrn, *Children and the Ethical Practice of Law*, 64 FORDHAM L. REV. 1281, 1294-95 (1996). Green and Dohrn note that

[g]iven the choice, a lawyer should elect to represent the child as a lawyer, not to undertake the role of guardian *ad litem*. And, when the lawyer is assigned the role of guardian *ad litem*, the lawyer should, to the extent legally permissible, serve in the same manner as would the child's lawyer.

Id.

twelve years in state custody, to order the state to commence a termination of parental rights proceeding or reunify George with his parent.⁸⁰

The students prepared a report and memorandum for the court discussing the permanent placement options available to the court under federal and state law. Consistent with George's wishes, the Clinic advocated that the goal of the permanency case plan for the client remain long-term licensed care, with a concurrent goal of independent living, as opposed to termination of parental rights and adoption. Alternatively, we argued, the court should move forward to reunify our client with his mother.

The argument in the Clinic's memorandum essentially was that there were compelling reasons *not* to require a termination of parental rights, and that federal law permitted the court to consider a number of other alternative placement options.⁸¹ The legal argument derived from what our client had told us about his continuing attachment to his mother and his desire to maintain that relationship with her, for better or worse. It incorporated an analysis of the federal Adoption and Safe Families Act ("ASFA").⁸² ASFA allows a state agency to consider permanency options other than termination of parental rights for a child who has been in foster care for more than twelve months, or 15 out of the previous 22 months, where the state can document in the child's case plan a compelling reason not to file the termination petition, based on a finding that it would not be in the child's best interests.⁸³

The subtext to the statutory argument was a Therapeutic Jurisprudence argument, which considered the negative impact that an adversarial termination of parental rights proceeding could have on George's emotional life and well-being, particularly if it did not result in an eventual adoption (an unlikely outcome, given his age and special needs).⁸⁴

The judge listened to the student and heard from our client. It was the first time in more than ten years that George had appeared before the judge in his foster care case. It was the first time that he had *ever* had his own independent legal representative participating in the proceedings.⁸⁵ The

80. See Adoption and Safe Families Act of 1997, § 101, Pub. L. No. 105-89, 111 Stat. 2115 (amending 42 U.S.C. § 671(a) (1997)); see also FLA. STAT. § 39.806(1)(e) (2001).

81. See 42 U.S.C. § 675(5)(C) (2005).

82. See sources cited *supra* note 80.

83. 42 U.S.C. § 675(5)(E)(ii) (2005).

84. See Brooks, *supra* note 20, at 955 (noting that "[b]oth 'best interests' and permanency have come to mean an undue emphasis on adoption and adherence to a rigid time frame, neither of which fits with a truly therapeutic approach to children and families.").

85. George was unique in having court-appointed counsel to represent him in this proceeding. Most foster youth in Florida and Miami-Dade lack access to legal counsel. Only one full-

judge ruled that, "TPR [termination of parental rights] is not in the manifest best interests because the child is bonded to the mother and the child has special needs."⁸⁶

In time, we would have second thoughts about advising our client to pursue this case plan objective. As discussed below, his relationship with his mother became fractured and troubled over time because he had more contact with her in the community-based foster care setting than he did while living inside the hospital setting. And as he drifted from foster home to foster home over the next three years, he lost the ability to form attachments with adults, including parental figures.⁸⁷ Surely, other permanency options, such as open adoption or guardianship, could have been presented to our client and pursued more aggressively in court.⁸⁸

In rewinding this phase of our representation, I regret that we did not explore other permanency placement options for George that would help him form meaningful attachments to important adults in his life. Instead, George languished for three more years in foster care, until his eighteenth birthday, forging very few lasting bonds with important adults while his attachments to his mother and other family members became more tenuous and strained over time (due largely to the absence of meaningful family re-

time attorney employed by the Legal Aid Society of the Dade County Bar Association and two attorneys at the Children & Youth Law Clinic provide legal representation on a consistent basis to the more than 1500 older foster youth in District 11 (Miami-Dade and Monroe Counties). In the state of Florida there are fewer than 20 full-time children's lawyers representing more than 600,000 children living in poverty. See Mark D. Killian, *Fee Statements on the Way: Members Asked to Support 'Challenge for Children'*, FLA. B. NEWS, May 15, 2003 (quoting Florida Bar President-elect Miles McGrane), available at <http://www.flabar.org>.

86. Judge's order on file with author.

87. Perhaps this was a result of the court's inability to consider factors beyond just the best interests of the child. As Joseph Goldstein, Ana Freud, and Albert Solnit discuss in their work, family and juvenile courts need to give dispositive weight to a child's attachments to psychological parents in making custody determinations. See generally JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) (noting that the law should make the child's and not the parent's needs paramount and that permanency of relationship is the first and most important developmental need of a child). Sadly, however, our client never forged strong relationships with either his immediate family members or his psychological parents, which undoubtedly stunted his adolescent development and maturation.

88. Our students' memorandum to the court noted the available range of options under federal law, including reunification with parent, 42 U.S.C. § 671(a)(15)(C) (2005), legal guardianship with a non-relative, 42 U.S.C. § 675(7) (2005), custodial placement with a relative, 42 U.S.C. §§ 675(5)(C), 671(a)(19) (2005). In the end, these options proved to be meager, as our client's connections to his family and other "dedicated" adults became more attenuated over time, an unfortunate fact of life for many older children in foster care. See, e.g., Mangold, *supra* note 28, at 877-79 (criticizing both the Adoption and Safe Families Act and the Chafee Foster Care Independence Act for leaving gaps in permanency alternatives for older teens and recommending open adoption and guardianship as non-exclusive parenting options which need to be permitted and subsidized by federal government and states for older children in foster care).

unification efforts by DCF and his mother's inability to benefit from those token reunification efforts that the Department provided).⁸⁹ Yet, from a pedagogical standpoint, counseling the client about these issues enriched the clinical experience for our students and, I believe, enriched the relationship that the students had with our client. Repeatedly, we confronted not just legal but psychological and family issues in counseling and representing our client.

The anxiety and distress that our client experienced from being in long-term foster care, coupled with anger directed at his mother and the legal system, often challenged our Clinic interns to go beyond the narrow boundaries of the traditional lawyer-client relationship. The students confronted the human element of legal counseling and became more psychologically sensitive to his developmental needs and limitations as they counseled and advocated for our adolescent client. George exhibited many of the mood swings, impulsive actions, social immaturity, and risky behaviors typically associated with adolescence. Because he was growing up in the foster care system without any stable parental guidance or involvement, events in his life (which at times, he could neither control nor comprehend) magnified these normal developmental experiences.⁹⁰

In addition to regular court hearings related to his foster care status, George had several brushes with the juvenile justice system, which exacerbated his feelings of loss of control. He was arrested several times and detained in the Miami-Dade Juvenile Detention Center. Our visits with him at the detention center were often very difficult, as he was in a state of profound depression and confusion. The hearings in the delinquency court did not assuage his depressed and confused feelings. They often deteriorated into circus-like histrionic exhibitions on the part of George and his mother, as he witnessed and responded to her bizarre emotional lamentations to the judge and the courtroom about his worsening legal problems.

89. See SHIRK & STANGLER, *supra* note 1, at 264 (observing that many youth who age out of foster care maintain relationships with their families, and quite a few even return to them, and recommending that foster care systems must recognize the pull of family and find a way to create federal and state financial incentives for reunification and post-reunification services).

90. See, e.g., Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEV. REV. 1, 28-29 (noting the adolescent's limited future planning capacities, which continue to develop until the early twenties); see also Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 748, 754 & tbl. 4 (2000) (in a study comparing maturity of judgment in adolescents and adults, finding that twelfth-graders with mean age of 17.5 scored lower than young adults on ability to see short and long-term consequences of their actions, significantly lower on "impulse control," and significantly lower on overall measures of psychosocial maturity).

George also missed many days of school while attending hearings at the courthouse for his accumulating delinquency charges and the periodic court reviews of his foster care status. The juvenile courthouse became a second home to George, and he was one of the more familiar denizens of that building to the bailiffs and other court officials. It was a perverse and chaotic environment to grow up in. His many unhappy interactions with the different divisions of the juvenile court (dependency and delinquency) and the juvenile justice and foster care systems made him feel marginalized and powerless.⁹¹ Lacking stable parental control and guidance, feeling constantly at the mercy of an ever-changing array of foster parents, juvenile probation officers, child welfare social workers and judges, and lacking any sense of a permanent home or family, he was often overwhelmed with feelings of "learned helplessness."⁹²

Studies of adolescents growing up in foster care have shown that the typical developmental problems associated with adolescence are particularly turbulent for these children and frequently trying for their caretakers.⁹³

91. See Barbara A. Babb, *A Unified Family Court*, in *JUDGING IN A THERAPEUTIC KEY*, *supra* note 49, at 294-97 (arguing for the establishment of unified family courts that embrace Therapeutic Jurisprudence and "an ecological, holistic approach to a family's problems."); see also *In re* Report of the Family Court Steering Committee, 794 So. 2d at 519-20 (reaffirming the Florida Supreme Court's goal of implementing a "fully integrated, comprehensive approach to handling all cases involving children and families."); Claudia Wright, *Representation of Children in a Unified Family Court System in Florida*, 14 U. FLA. J.L. & PUB. POL'Y 179, 189-91 (2003) (describing the role of counsel for children subject to multiple, concurrent legal proceedings in a unified family court system).

92. See MARTIN E.P. SELIGMAN, *HELPLESS: ON DEPRESSION, DEVELOPMENT AND DEATH* xvii (1992) (discussing learned helplessness as a social psychology theory which consists of "[f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome.").

93. A recent study published by the University of Oklahoma National Resource Center for Youth Development on the problems of adolescents in foster care notes that the normal pattern of identity crisis, experimentation and rebellion associated with adolescence is particularly difficult for foster care youth:

Adolescence is a turbulent time, marked by emerging sexuality and rebelliousness. It is the time period in which one gains the skills needed to transition from childhood to adulthood. Though they no longer want to be treated as children, adolescents do not yet possess the skills needed to be an adult in our society. For adolescents in foster care, this difficult time period can become even more confusing and particularly trying for caretakers.

...

Because these young people do not have the security of their own home the opposition may be focused on service providers or foster parents – or may be internalized and expressed as risky behaviors such as drug use or promiscuity. While adolescents are rebellious with adults, they seem to be overly compliant with peers. At the same time they have a strong need to belong in a family and to be taken seriously. Without this, it is difficult for them to successfully accomplish the tasks that face them during these turbulent years. The adolescent is trying to answer four questions: 1) Who am

One of our roles as his lawyers during these difficult periods was to help him navigate through the different court proceedings and to be an anchor in times when he felt a loss of control.⁹⁴ We did so by giving him information about the various pending court cases, his legal rights, the court system, the proceedings, and what to expect in the legal process.⁹⁵ Being able to count on our Clinic as a consistent source of reliable information about his legal status allayed some of his stress and reassured him that we would always be there for him. Thus, the process of performing legal checkups and giving our client information about his court proceedings help him gain control over the stressful and disorienting feeling of being adrift in the legal system.⁹⁶

Applying the principles of Therapeutic Jurisprudence and putting them into practice also gave our students the sensitivities to help our client understand these feelings of distress and disempowerment, and motivated them to devise counseling strategies to help him overcome them.⁹⁷ The cli-

[1], 2) Where do I belong?, [3]) What can I do?, and [4]) What do I believe in? Adolescents in foster care need help to find these answers for themselves, as well as, information about their past in order to fill in the gaps about their roots/history.

WHAT DOES IT MEAN FOR ADOLESCENTS?, *supra* note 68, at 12. See also Mary Elizabeth Collins, *Transition to Adulthood for Vulnerable Youth: A Review of Research and Implications for Policy*, 2001 Soc. Sci. Rev. 271.

94. At times in the lawyer-client relationship with George, we had to stand back to make sure that he understood the boundaries of our relationship and to convey that he needed stabilizing forces in his life other than his attorney. See PETERS, *supra* note 7, at 211. Peters states that [i]t is healthy for a lawyer to remember throughout the lawyer-client relationship that he is usually a transient player in the life of the child. Keeping in mind the end of the relationship and the need for the client to move beyond a time when the lawyer's services are acutely needed helps the lawyer keep in perspective his relationships with other professionals and helps him to continue to take actions with a client that are commensurate with his transient passage through the child's world.

Id.

95. See ABA STANDARDS, *supra* note 79, at § A-3 ("The lawyer has an obligation to explain clearly, precisely, and in terms the client can understand the meaning and consequences of action."); *Id.* at § B-1(5) (child's attorney should "[c]ounsel the child about the subject matter of the litigation, the child's rights, the court system, the proceedings, the lawyer's role, and what to expect in the legal process."). See also Bruce J. Winick, Symposium, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 109-10 (2000) (describing the lawyer's role in providing information to the client about the meaning of the various stages of the litigation process and noting how giving information to the client can help to reduce the feelings of intense stress that litigants frequently experience in this process).

96. Social cognition literature places emphasis on "information control," the perception of control that results when an individual obtains information relating to a stressful situation or event. See Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46-47 (1999) (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 122 (1984)) [hereinafter *Civil Commitment Hearing*].

97. See, e.g., *Better Legal Counseling* *supra* note 14, at 69-79 (describing use of strategies to identify and overcome psycholegal soft spots in "areas where legal intervention or procedures

ent's anxiety and helplessness inevitably posed many challenges and many of our interactions with George focused on helping him build on his personal strengths and develop self-efficacy skills to learn to confront and to solve these problems.⁹⁸

Consistent with our "client-centered" approach to counseling and representation, we worked to make sure that our client had the right information to make the important decisions. We respected his individual autonomy, avoided paternalism, provided advice based on his values, sought out the potential non-legal consequences of decisions, acknowledged his feelings and recognized their importance, and fostered decision-making on his part through periodic checkups and other regular communications.⁹⁹ At each juncture in his case, we scrupulously sought his input and direction, helping him to reach the best decision about his case. We also enforced his

may not lead to a lawsuit or to legal vulnerability, but may lead to anxiety, distress, depression, hard and hurt feelings, etc."); see also Gould & Perlin, *supra* note 20, at 356 (noting that Therapeutic Jurisprudence gives the clinical law student the tools to recognize and problem-solve issues of stress in a clinical setting, which "can be a stressful place or, at best, a place filled with stressed people."). In incorporating these techniques into counseling, the Clinic, at times, also assumed a quasi-"caregiver" role with our client to help him build self-esteem and feel in control of his life. See Peter Margulies, *The Lawyer as Caregiver: Child Client's Competence in Context*, 64 *FORDHAM L. REV.* 1473, 1504 (1996) (stressing the roles of education, connection and voice in the lawyer-child client relationship but cautioning the child's lawyer to avoid assuming a surrogate parent role, which "can only stifle the client's voice and prompt the kind of overreaching which commentators who favor limitations on the lawyer's role criticize.").

98. See Shadd Maruna & Thomas P. LeBel, *Welcome Home?: Examining the "Reentry Court" Concept from a Strengths-Based Perspective*, 4 *W. CRIM. REV.* 2 (2003), available at <http://wcr.sonoma.edu/v4n1/v4n1.htm>, reprinted in *JUDGING IN A THERAPEUTIC KEY*, *supra* note 49, at 255 (explaining strength-based approaches in the context of convict re-entry into society, noting "strengths-based or restorative approaches ask not what a person's deficits are, but rather what positive contribution the person can make"); see also Michael D. Clarke, *Change-Focused Youth Work: The Critical Ingredients of Positive Behavioral Change*, 3 *J. CTR. FOR FAMILIES, CHILD. & CTS.* 59 (2001), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/V3Clark.pdf> (studying research on improving the effectiveness of the therapeutic approach in inducing positive behavioral change in adolescents).

99. For discussions of the concept of client-centered counseling, which is based on deference to client autonomy and is designed to foster client decision making, see DAVID A. BINDER, ET AL. *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH*, SECOND ED. 8-13 (2004) (describing the hallmarks of client-centered counseling and integrating client-centered counseling into the interviewing and counseling process); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* 334-38 (1990); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501 (1990). For a discussion of the therapeutic (client-centered therapy, or Rogerian) derivations of this legal counseling model, which are based on the premise that individuals can achieve full potential or self-actualization when facilitated by a helping, empathic, and nonjudgmental person, see Bruce J. Winick, *Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal With a Psycholegal Soft Spot*, 4 *PSYCHOL. PUB. POL'Y & L.* 901, 916-17 (1998) [hereinafter *Client Denial*]; see also *infra* note 136.

legal rights by striving to make sure that he was involved in all of the significant permanency and independent living planning decisions, a requirement of federal law for states that receive Chafee Program funding.¹⁰⁰

Thus, our Clinic was more than just the client's law enforcer. The Clinic was his therapeutic agent, facilitating his ability to be heard by decision-makers with regard to his permanency and independent living needs. By assuming this dual role of law enforcer and therapeutic agent, the Clinic helped give him a "voice" in the process and a feeling of "validation" from the experience of participating in that process: outcomes that have been identified as particularly important in a number of significant social psychological research studies of litigant participation in the legal process.

The empirical research on how litigants experience judicial and administrative hearings has generated an extensive body of literature on the psychology of procedural justice.¹⁰¹ The research on the psychology of

100. The federal law mandates that states involve foster care youth in a manner equal to any other community stakeholder in designing program activities. Each state must also certify that these young adults have "participated directly in designing their own program activities that help them for independent living and that the adolescents accept responsibility for living up to their part of the program." 42 U.S.C. § 677(b)(3)(H) (2005). See also *supra* notes 45, 47 and accompanying text.

The Chafee Program recognizes that young adults must play a part in determining the services needed to help them achieve self-sufficiency. In his statement to the House Committee on Ways and Means, Mark Kroner, Director of Self-Sufficiency Services for Lighthouse Youth Services in Ohio, stressed that, "[t]he teens coming through our program taught us what they needed to do and learn in order to become more self-sufficient. *Sometimes it meant letting them make dozens of crazy mistakes and foolish choices . . .*" *Foster Care Independent Living, supra* note 28 (Testimony of Mark Kroner), also available at <http://www.cwla.org/advocacy> (last visited Feb. 12, 2005) (emphasis added). These views and recommendations were for the most part seconded by the foster care youth themselves. See, e.g., Amy Clay, *Assisting a Youth in Transition*, 18 ABA CHILD L. PRAC. 65 (October 1999) (presenting a foster care graduate's view of her experiences with independent living classes and foster care); see also Abigail English & Kathi Grasso, *supra* note 66 (discussing the statement of Terry Harrak, former foster care child, during the Health Needs of Children in the Foster Care System (*Health Needs of Children in the Foster Care System Hearing on S. 1327 Before the Subcommittee on Health Care of the Senate Committee on Finance*, 103d Cong. (1999)) regarding her need for a network of support and health insurance coverage when she left state foster care); see also Cheryl Wetzstein, *Senate Panel Mulls Foster Care Reform; 'Aged Out' Youths Testify on Problems of Independent Living*, WASHINGTON TIMES, Oct. 14, 1999, at A4.

Relying on this testimony and the recommendations of the 1999 GAO Report, the Chafee Program encourages states to provide youth training in areas such as money management, health and safety, nutrition education, grocery shopping, housekeeping, parenting education, family planning, community transportation, driver's education, and interpersonal and social skills. The crucial point, captured by Senator Olympia Snowe (R-Maine), is to provide a "safe, stable, and nurturing environment" while they are "still learning these valuable life skills." 145 CONG. REC. S15, 227-01 (1999); see also Mangold, *supra* note 28.

101. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); E. Allan Lind et al.,

procedural justice suggests that people are more satisfied with and will comply more with the outcome of legal proceedings when they perceive those proceedings to be fair and are afforded an opportunity to participate in them.

The procedural justice research establishes that litigants value the process or dignitary goals of a hearing. People who feel that they have been treated fairly at a hearing, dealt with in good faith and with respect and dignity by the tribunal and other participants in the hearing, are more satisfied with the hearing than those who feel that they have been treated unfairly, with disrespect, and in bad faith. Litigants place a premium on "voice," the ability to tell their story to the judge, and "validation," the feeling that the judge or other decision-maker has listened to them and has given serious consideration to their opinions and views.

Even when the hearing outcome is negative, people treated fairly, in good faith, and with respect, experience greater satisfaction with the result and are more likely to comply with the decision rendered by the court. Moreover, they will perceive the decision of the court as less coercive than when the tribunal fails to treat them with respect and dignity. They may even feel they have voluntarily chosen the course that is handed down by the judge. These feelings of "voluntariness" rather than coercion tend to produce greater compliance with the results of the hearing and promote more positive behavioral change.

In observing how George was often treated by his caregivers and the many decision-makers who exercised dominion and control over his life both before and after our Clinic was appointed as his attorney *ad litem*, our students noted how excluding him from the process, without first giving him opportunity to heard, denied him both voice and validation. In fact, it thrust upon him decisions largely made in his absence by these professionals without any input from him.

Before our Clinic started representing George, he was routinely excluded from decision-making deliberations that took place in court and behind closed doors in administrative staffings. This exclusionary, *in absentia* process of decision-making unquestionably had negative or anti-therapeutic effects on his relationships with the many foster care case workers, probation officers, and other gatekeepers involved in the case planning and the implementation of plans governing his delinquency or

Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments, 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978).

foster care status, a not uncommon experience for foster children.¹⁰² It also clearly had a negative effect on his perception of the fairness of the legal and administrative process.

It is no wonder, then, that report after report, which the social workers, therapists, and other professionals submitted to the court, described George as displaying “oppositional and defiant behavior, depressive symptoms, including depressed mood, difficulty sleeping, and social isolation.”¹⁰³ In our class and case discussions, our students observed that many of these symptoms were understandable responses or reactions to how he was treated. George’s pervasive feeling of sadness and despair about having been given no say in the matter was, in fact, justified by the way he was treated by the adults in the many foster care homes, schools, inpatient hospitals, residential treatment centers, detention centers, and group homes where he was sent during the more than 15 years that he spent in foster care.

Indeed, the overwhelming consensus of empirical research confirms the importance of including foster children in decisions about their placements, schooling, services, treatment, and other matters to give them “ownership” of those decisions and encourage greater compliance and cooperation with the decision-makers.¹⁰⁴ The end-result of not giving George any

102. See, e.g., J. Curtis McMillen et al., *Independent-Living Services: The Views of Former Foster Youth*, FAMS. SOC’Y J. CONTEMP. HUMAN SERVS. 471 (Sept.-Oct. 1997) (reporting the views of former foster youth that most did not see their caseworkers as “helpful”); see also BINDER, *supra* note 99, at 4 (noting that clients are autonomous “owners” of their problems).

103. Report on file with author.

104. See, e.g., WHITE HOUSE TASK FORCE FOR DISADVANTAGED YOUTH, FINAL REPORT 26 (2003). The Task Force report states that

Federally funded state and community based programs should not only treat youth as recipients of services, but reach out to them as partners in program planning, design, and leadership. Youth have important talents to share and skills to learn that often fall outside of academic curricula. Many youth know will work best for them. When they feel ownership for a program, they are more likely to give commitment and energy. The experience of being listened to and respected as partners can build a young person’s self-efficacy and help develop the characteristics of responsible adult citizenship.

Id.; CASEY FAMILY SERVICES, STRENGTHENING FAMILIES & COMMUNITIES: A FRAMEWORK FOR INDEPENDENT LIVING 5 (2001) (“Each individual child needs to set his own goals for adulthood, regardless of age. The child—and his adult caretakers—needs to be optimistic that the goals he has identified can be achieved and he needs to be empowered to achieve them.”); Miriam J. Landsman et al., *Achieving Permanency for Teens: Lessons Learned From a Demonstration Project*, NATIONAL RESOURCE CENTER FOR FAMILY CENTER PRACTICE, PREVENTION REPORT 1999, at 16 (“It was critical for the youth to be a significant participant in the process from the beginning. This meeting was also used to identify additional counseling needed by the youth to understand the services or sort out his/her feelings about possible outcomes.”); FESTINGER, *supra* note 2, at 281. Festinger reports that

[s]ome felt left, and others felt left out: ‘They always had conferences and you weren’t

sense of ownership of these types of decisions was that he fell into a spiral of defiance, depression, and hopelessness. Eventually, in June 2000, this resulted in his involuntary, long-term commitment to the locked psychiatric hospital where we first met him in October 2001.

B. SECOND REWIND EXERCISE—IN THE HOSPITAL:
COMMITTED BUT NOT VOLUNTARILY

After the hearings on his permanency status, George endured a lengthy stay in the inpatient psychiatric facility where we had first met him. More than twenty months had passed before the treatment team in the program began to consider that it was time to plan for his discharge to a less restrictive foster care setting. We saw this inordinate period of confinement in the treatment program as a particularly cruel and striking example of the experience of many children in state custody.¹⁰⁵ Lacking parents who care deeply for them, they are taken into state custody, where they often suffer trauma, are diagnosed with mental health disorders, and many are warehoused and forgotten for months and years in state-run or privately-contracted treatment programs. Even the United States Supreme Court, in the widely criticized *Parham v. J.R.* decision, which held that parents or the State can commit children in their custody voluntarily to mental hospitals without a formal due process hearing, reluctantly acknowledged that the warehousing of these children in institutions was a problem.¹⁰⁶

in on it and they don't tell you what they discussed about you. . . then they write a report and you don't know what they've said.' Some felt that general statements such as 'it's in your best interest' makes you feel like a client, not a person.' A recurrent theme in their comments was the importance of consulting with children and allowing them to share in, and contribute to, decisions that need to be made.

Id.; see also Chaifetz, *supra* note 45, at 22.

There are legal and ethical violations in failing to listen to foster care children; conversely, there are many advantages to providing a youth development perspective. When a young person is heard, she learns that she can affect her environment. The foster care client's recommendations can improve her day-to-day life in foster care and should speed the permanency planning process to a positive conclusion. Lastly, a young person's input is likely to enhance her ownership of her own permanency plan, thereby increasing the likelihood of success.

Id.

105. A series of articles published in the Sun-Sentinel on November 7-10, 1999, used the phrase "throwaway kids" to describe the experiences of hundreds of Florida foster care children confined to state institutions for years at a time and the neglect that many of them suffered in these institutions. See, e.g., Staff Writer, *Throwaway Kids by the Hundreds, Troubled Florida Kids are Kept, Often Unnecessarily, in Psychiatric Centers*, SUN-SENTINEL (FT. LAUDERDALE, FL), Nov. 7, 1999, at 1A.

106. See *Parham v. J.R.*, 442 U.S. 584, 619 (1979). The *Parham* Court noted that [t]he absence of an adult who cares deeply for a child has little effect on the reliability

During the many months that he lived in the facility, George spent his days in a locked one-floor unit on the third-floor of the drab hospital building overlooking an expressway in Hialeah, an industrial and commercial suburb of Miami. The only outdoor activity for the patients in the unit consisted of basketball games played on a hot tarmac rooftop outside of the third-floor psychiatric unit. Only on rare occasions, when he reached a level that accorded him more privileges, could he exit the hospital grounds for activities associated with childhood and adolescence, such as movies or trips to the beach. His schooling in the hospital was limited to a few hours each day, in a self-contained program designed exclusively for severely emotionally disturbed students, which exacerbated his feelings of isolation from the educational mainstream inhabited by his peers outside the institution.¹⁰⁷

During our many visits to the program, clinic students and supervising faculty observed that George seemed quietly resigned to spending the rest of his childhood in this self-contained therapeutic prison, behind bars and locked doors, often brutally subjected to indignities such as the use of seclusion and physical restraint and the forced administration of psychotropic medications.¹⁰⁸ I cannot begin to describe how stifled and claustrophobic the students and I often felt as we entered the building for even a brief

of the initial admission decision, but it may have some effect on how long a child will remain in the hospital For a child without natural parents we must acknowledge the risk of being 'lost in the shuffle'.

Parham, 442 U.S. at 619. See also GARY B. MELTON ET AL., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 126-131, 157-58 (1998) (debunking the *Parham* Court's assumption that state foster care social workers can be expected to act as real parents for all of their children or that these children will come to perceive their caseworkers as surrogate parents). Beyond the question of the effect and length of hospitalization on children without natural parents, *Parham* has been more broadly criticized for positing the naive assumption that parents do not use mental hospitals as a "dumping ground" (442 U.S. at 597-98), and that the state restricts use of "its costly mental health facilities" to persons in "genuine need." *Id.* at 604-05. See also Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 826 (1988) (criticizing *Parham* as tolerating the inappropriate use of inpatient facilities, the result of "[a] combination of factors, including laissez-faire judicial policies, insurance coverage favoring inpatient treatment, the rise or corporate medicine, a mental health establishment willing to assume control over troublesome youth, and the symbolic appeal of a medical care perspective on deviance"); Perlmutter & Salisbury, *supra* note 53, at 731-37 (summarizing research on residential treatment of "troublesome" youth in the wake of *Parham*); Ira C. Lupu, *Mediating Institutions: Beyond the Public/Private Distinction: The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994) (discussing *Parham* and the mechanism for distributing decision-making authority over children).

107. Federal education law requires schools to ensure that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . ." 20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.550(b)(2); 34 C.F.R. § 104.33(a).

108. See MELTON, *supra* note 106, at 52-81 (1998) (describing the restrictiveness and intrusiveness of residential mental health treatment programs for youth).

visit. It was also obvious to us, from our conversations with George during these periodic "checkups," that he yearned to be living in a less restrictive and less intrusive setting.

Both in treatment team meetings and periodic judicial review hearings, we advocated for a shortened stay in the program and for humane treatment that respected George's dignity and legal rights as a patient.¹⁰⁹ We relied not only on legal arguments, but on concepts derived from Therapeutic Jurisprudence which gave us the vocabulary and the tools to pursue objectives that furthered both his legal and therapeutic interests.¹¹⁰ Using arguments and principles from Therapeutic Jurisprudence also taught our students valuable lessons about the role of lawyers who represent not just children in mental health facilities, but adults with mental health disabilities, and how to avoid succumbing to paternalistic attitudes and disempowering practices in representing these clients.¹¹¹

109. *Id.* at 145-47. Melton states that

[t]he ethical imperative of respect for persons is sufficient to require rigorous due process in any infringement of liberty and privacy. Even if that were not the case, however, it should come as no surprise that fair procedure has therapeutic meaning and effect. Respect for personal privacy is in itself significant in individuation and a sense of self-efficacy and control. Similarly, ensuring that children are heard increases the probability that attention will be given to their concerns . . . and that children will be psychologically invested in the treatment plan.

Id. (citations omitted).

110. See Gould & Perlin, *supra* note 20, at 355-65 (describing the uses of Therapeutic Jurisprudence in teaching students empathy, interpersonal skills, ethical analysis, and institutional critique, as well as traditional trial advocacy and legal theory skills, in the law school clinic or the externship program that provides legal representation to civil commitment patients).

111. See *Civil Commitment Hearing*, *supra* note 96 (arguing that civil commitment hearings should be restructured to enhance patients' perceptions of fairness, participation, and dignity, and describing the roles of lawyers, judges and clinicians in furthering this process); see Michael L. Perlin, "You Have Discussed Lepers and Crooks": *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003) (describing the role of clinical legal education in training law students who represent patients with mental disabilities in civil commitment proceedings to infuse Therapeutic Jurisprudence into the teaching process that allows them to discuss strategies for avoiding "sanist" behaviors and attitudes on the part of teacher, student, court personnel, other lawyers, witnesses, and the other parties to the proceedings); see Anthony v. Alfieri, *Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992) (criticizing lawyering strategies that paternalistically depict the disabled client as victim, physically dependent, incompetent, and therefore socially devalued); see also ABA STANDARDS, *supra* note 79, at § B-3 Commentary. The Commentary section reports the following:

These Standards do not accept the idea that children of certain ages are 'impaired,' 'disabled,' 'incompetent,' or lack capacity to determine their position in litigation. Further, these Standards reject the concept that any disability must be globally determined. Rather, disability is contextual, incremental, and may be intermittent. The child's ability to contribute to a determination of his or her position is functional, depending upon the particular position and the circumstances prevailing at the time the position must be determined. Therefore, a child may be able to determine some posi-

Because of the mental health law provenance of Therapeutic Jurisprudence, we saw our zealous legal advocacy for our client's legal rights as entirely compatible with the therapeutic goals of the advocacy.¹¹² In her critique of the role of Therapeutic Jurisprudence in clinical education, Professor Berkheiser cautions that a Therapeutic Jurisprudence lawyer may be tempted to settle for the goal of "treatment" as opposed to zealously advocating for the client's due process or liberty rights.¹¹³ In the context of the clinic that represents a civil commitment client, there is at least the risk that the attorney and student will compromise the client's expressed goal of being free from involuntary restraint or confinement in a facility, by not zealously advocating for the client's position. But Therapeutic Jurisprudence clearly does not argue that lawyers should compromise these important interests; nor does it countenance a paternalistic or best interests approach to the representation of their civil commitment clients.

In our client's case, we saw ourselves as zealous advocates with special sensitivity to the therapeutic interests that we were promoting. Our students met frequently with the client, conducted regular investigations of his status in the program (which included reviewing the hospital charts to monitor incidents of seclusion and restraint, and the administration of psychotropic medications), fought to make sure that he was brought to court for all hearings and that he had an opportunity to testify to the court about his need for continued commitment, cross-examined hospital and forensic experts, and argued strenuously at the hearings that DCF needed to consider less restrictive alternatives to hospitalization. While they did not pursue extraordinary remedies, such as filing a petition for a writ of habeas corpus (although, in hindsight, given the many months that passed before our client was finally released from the program, perhaps they should have), the goals of representation were to obtain the client's discharge to a less restrictive residential setting as quickly as possible and, concurrently, to minimize the level of restrictiveness and intrusiveness that George was

tions in the case but not others. Similarly, a child may be able to direct the lawyer with respect to a particular issue at one time but not at another. This Standard relies on empirical knowledge about competencies with respect to both adults and children.

Id. (citation omitted).

112. Berkheiser, *supra* note 60, at 1168 ("Although Therapeutic Jurisprudence does not favor therapeutic ends to the exclusion of others, it does seek to further those ends, if it can do so without 'subordinating due process and justice values.'").

113. *Id.* at 1169 ("For the clinician who is integrating Therapeutic Jurisprudence into his/her teaching, that conflict arises when the lawyer's role as facilitator of a disposition which promotes a client's well-being leads to a result different from that of the lawyer in her role as zealous advocate of the client's rights.").

subjected to while residing in the facility itself.¹¹⁴

Using this double-barreled strategy not only reconciled the advocacy and therapy goals of the representation. It gave us the opportunity to have case and class discussions about how to pursue both due process objectives and therapeutic objectives. In our discussions about George's case, we used the decisions that our client made and our activity as prompts for "rewind exercises" to discuss where we may have miscalculated in pursuing a particular goal or strategy and what would have been, in hindsight, a more prudent or therapeutically effective goal or course of action.¹¹⁵

Toward the end of his nearly two-year stay in the program, George was given a pass and I was given permission to take him out for lunch. A student and I took George to a Cuban-Chinese restaurant in a Hialeah strip mall, and afterwards we visited a dollar store where I bought him a watch and some art supplies. We talked about the kinds of food he liked, his experiences in foster care before being placed in the hospital, his thoughts and feelings about his mother, and his hopes and expectations for life outside of the hospital. For the first time, a personality that had been hiding from me

114. See *Civil Commitment Hearing*, *supra* note 96, at 42-43. Winick proposes that [l]awyers in commitment hearings who take the paternalistic or best interest approach serve their clients inadequately in a number of respects. They often defer to the expert witness, performing little or no cross-examination. They frequently fail even to meet with the client prior to the hearing, or to perform any investigation of the facts that are alleged to justify the client's need for hospitalization. Many fail to controvert the allegation that the patient is mentally ill. They fail to explore alternatives to hospitalization or to obtain benefits for their clients that might avoid its necessity. Some attorneys play largely a clerical role, treating their function as just being 'to look through the paperwork to make sure it is in order, and thus give the false impression that the client has had the benefit of legal representation.' These lawyers 'roll over' in the hearing, deferring to the expert and even stipulating to the hospital's allegations and waiving the client's right to testify.

Id. Subsequent to George's discharge from the residential treatment program, the Florida legislature amended the statutory framework governing court oversight of foster children committed to these centers. 2000 Fla. Laws Ch. 265, § 1 (amending FLA. STAT. § 39.407(5) (2001)). This statutory change, coupled with the Florida Supreme Court's promulgation of a rule of juvenile procedure governing the placement of children in residential treatment centers (Amendment to the Rules of Juvenile Procedure, FLA. R. JUV. P. 8.350, 842 So. 2d 763 (Fla. 2003)), significantly expanded the court's authority over DCF and the judicial remedies available to children placed by DCF in these facilities, including the right to be represented by counsel. Professor Winick's admonitions about the poor quality of legal advocacy provided for many clients in civil commitment hearings should be a cautionary tale to Florida lawyers appointed to represent the interests of children in proceedings pursuant to rule 8.350.

115. See David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, reprinted in *PRACTICING THERAPEUTIC JURISPRUDENCE*, *supra* note 14, at 65 (discussing the preventive law pedagogical "rewind" technique that gives the teacher and student the opportunity to "ask what might have been done differently to avoid the legal problem presented by the case").

at the start of our relationship began to quietly assert itself. Our attorney-client relationship was evolving into an attorney-client friendship.¹¹⁶

Shortly afterward, George was discharged from the program to a therapeutic foster group home. The transition from a life inside an institution, where he was closely monitored around the clock, to life in the community was particularly difficult. I can remember George telling me how he had learned how to cope with stress in the highly controlled institutional milieu of the program, but expressing uncertainty about whether he could cope with the stresses of foster care and school outside of an institution.

Much of our interaction after his discharge occurred in court where he was summoned to a procession of hearings. The hearings, which his mother faithfully attended even though she had little chance of ever regaining legal custody, often devolved into emotional tirades between mother and son. He was probably angry at her for abandoning him to foster care, embarrassed by her idiosyncratic behavior outside of court, and ashamed of the bizarre ways she carried on in court.

George experienced many difficulties after leaving institutional care. Once again he had multiple foster care placements and school placements and he had multiple court hearings. At the hearings, he aired his growing disenchantment with his mother's conduct and his intensifying anger at DCF. This may have provided him with a degree of emotional release, but did little to assuage his deepening resentment of his mother and his growing hatred of the system.

During his last months as a ward of the state, he pleaded with our Clinic to file a petition for emancipation so that he could be free at last from DCF dominion and control. We resisted doing so, because we knew that it would result in him being rendered ineligible for financial assistance and other benefits from DCF beyond his eighteenth birthday and because we knew that his judge would likely deny his request to "remove the disability of nonage."¹¹⁷

116. The literature on lawyer as friend has many facets and dimensions. See, e.g., Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1087 (1976) (proposing a model for lawyer-client relationships in which the lawyer as the client's legal friend and accords the client "special indulgences"); see also Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relationship*, in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 421-22 (proposing an affective model of lawyer-client relations, a psychology-based approach to lawyering in which the lawyer acknowledges and works through emotional, financial, political, or cultural differences with the client by providing the client the appropriate affective or emotional responses to address the range of emotions (anger, frustration, despair or indifference) that legal interactions typically evoke in clients).

117. See FLA. STAT. § 743.015 (2003) (describing the statutory criteria for a court order re-

Despite our admonitions, George pleaded repeatedly for a hearing on his request to be emancipated. We scheduled such a hearing approximately two months before he turned eighteen. At the hearing, our student intern elicited testimony from George about his capacity to live on his own. At the time our client was living in a foster home, attending school each day, and working after school, earning a few dollars at a small business in a local flea market where he used his artistic talent to create tattoos. He had no savings, no bank account, and no plan to return to post-secondary school after graduation. Plainly, he was not ready to support himself or live on his own.

Predictably, his dependency court judge denied the request, finding that it was not in his best interests to be prematurely emancipated from DCF custody. While he did not achieve the result that he wanted, giving George his day in court on the petition for emancipation had palpable therapeutic benefits for him. The process or dignitary value of the hearing itself was a worthy goal in and of itself, and giving him his day in court for the time being placated our client's desire to leave the foster care system that he so detested.¹¹⁸

C. THIRD REWIND EXERCISE—GRADUATION: THE CASE OF THE CAP AND GOWN

One of the most significant examples of the unique relationship that the Clinic forged with George was our advocacy to compel DCF to pay for his cap and gown and school yearbook so that he could participate with his classmates in his high school graduation ceremony.¹¹⁹ The event was laden with symbolic value and personal meaning for our client. The Clinic's involvement in this rite of passage could not be characterized as traditional legal advocacy, yet it had deep personal resonance for George. The fact that he was even eligible to receive a high school diploma was a minor miracle in view of the many disruptions in his schooling that he experienced during the period of his adolescence that we served as his attorneys.

moving the disability of nonage); *see also In re Natasha H.*, 54 Cal. Rptr. 2d 276, 280 (Cal. Ct. App. 1996) (reversing trial court order of emancipation over a foster care adolescent, holding that the teenager's "misbehavior and lack of cooperation do not justify termination of her dependency status absent extraordinary circumstances not present here that make it in her best interest to do so").

118. *See LIND & TYLER*, *supra* note 101.

119. Carol Marbin Miller, *Cash Tight for Foster Kids Near Graduation: Some Miami Foster Children Who Are Graduating From High School Have to Go Without a Cap and Gown and Yearbook Because the State Can't Pay for Them*, *MIAMI HERALD*, Nov. 18, 2003, at 1B [hereinafter *Cash Tight for Foster Kids Near Graduation*].

George's experiences in the public school system were very typical of other foster children.¹²⁰

During the three years that our Clinic represented him, George attended over a dozen different secondary schools, and was enrolled in special education classes. Reviewing his academic history over the last three years, I am struck by the extended periods of absence from school, the many days of school that he missed because of court hearings or other appointments, the multiple reports by school teachers and officials of disciplinary episodes resulting in suspension or other punishment that interrupted his classroom instruction, and the frequent changes of school placement that corresponded to his frequent changes in foster care placement. All of these turbulent experiences had predictably deleterious consequences for his ability to achieve measurable progress in school.¹²¹

Most disturbingly, my review of his school records shows repeated violations by the school district of the legal requirements of federal and state law designed to ensure stable and appropriate educational services for foster children. For example, not a single Individual Education Plan (IEP) that I reviewed contained his mother's signature attesting to her participation in the process or consenting to his placement in the special education programs recommended by the school district, as required by federal law.¹²²

120. See, e.g., Wendy Whiting Blome, *What Happens to Foster Kids: Educational Experiences of a Random Sample of Foster Care Youth and a Matched Group of Non-Foster Care Youth*, 14 CHILD. & ADOL. SOC. WORK J. 41 (1997) (longitudinal study (1980-86) comparing high school and post-high school experiences of foster care youth and a matched group of youth living with at least one parent finding: foster youth dropped out of high school at a much higher rate and were significantly less likely to have completed a GED; foster care high school graduates received significantly less financial assistance for education from their parents or guardians; foster youth reported more discipline problems in school and experienced more educational disruption due to changing schools; foster youth were significantly less likely to be in a college preparatory high school track; the adults in the lives of the foster care youth were less likely to monitor homework, etc.); see also Mason Burley & Mina Halpern, *Educational Attainment of Foster Youth: Achievement and Graduation Outcomes for Children in State Care*, available at http://www.childrensrights.org/Policy/policy_resources_youthcare_eduattainment.htm (last visited Feb. 9, 2005) (legislatively funded study reporting lower scores on state achievement tests, higher dropout rates, more frequent school placement changes, higher likelihood of repeating a grade or being enrolled in special education classes for foster care youth as compared to non-foster care youth in Washington State).

121. See, e.g., Memorandum from the School Board of Broward County, Florida, to the School Board Members (Jan. 29, 2003) (on file with author) (finding that Broward County foster children were more likely to be classified for Exceptional Student Education and eligible for Free or Reduced School Lunch; on average began school year twenty days later than non-foster care students; were more likely to be retained within grade at the end of the previous school year; and registered lower scores on standardized achievement tests when compared to non-foster care students).

122. Two federal laws govern the provision of special services for children with unique edu-

Nor was there any parental involvement in any decisions regarding psycho-educational testing or any other significant decisions concerning his receipt of a "free appropriate public education" under federal law.¹²³

These lapses are typical of the way foster children enrolled in exceptional student programs experience public school and are among the prime reasons for the disturbingly poor educational outcomes of these children as compared to their peers.¹²⁴ In George's case, the glaring absence of parental input into any of the special education decisions rendered by school officials seriously undermined the legitimacy of that process. The lack of any parental oversight also virtually guaranteed that George would suffer academic outcomes far worse than those of his peers who have parents to advocate for them in the school system.¹²⁵

Moreover, George himself was systematically excluded from this process, which certainly had the effect of devaluing him and increasing his feelings of powerlessness and marginalization.¹²⁶ Further setting him apart

ational needs: the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 (2005), *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2005), *et seq.* Under IDEA and its implementing regulations, the parent "is the individual who attends the [special education school placement] meeting and makes the decisions." 34 C.F.R. § 300.344(a)(3) (2003). *See also* 20 U.S.C. § 1415(b)(1) (2005) (parent's right to examine records); 20 U.S.C. § 1415(b)(3)(A)-(B) (2005) (right to prior written notice of educational changes); 20 U.S.C. § 1415(b)(2) (2005) (right to administrative due process hearing if parent does not consent to placement); *But cf.* 20 U.S.C. § 1417(c) (2005) (protecting the rights and privacy of parents and students). The regulations that implement IDEA similarly grant rights to the parent in school proceedings, not to the student. *See, e.g.*, 34 C.F.R. §§ 300.504-.505 (2005) (rights to notice and consent); 34 C.F.R. § 300.506 (2005) (right to hearing).

123. *See* sources cited *supra* note 122.

124. *See generally* Cynthia Godsoe, *Caught Between Two Systems: How Exceptional Children in Out-of-Home Care Are Denied Equality in Education*, 19 YALE L. & POL'Y REV. 81, 98 (2000). There is a very substantial correlation between children in out-of-home care and children at-risk for educational problems. Children in foster care have been assessed as having poorer cognitive abilities and lower levels of academic performance than their peers, often resulting in placement at below age-appropriate grade level. One study of children in kinship care found that they scored significantly under peer level in reading, math, and cognitive abilities, and that forty-one percent of the foster children had been retained at least one grade level. Other studies have found that children in long-term foster care have a substantially lower chance of performing at or above grade level than other children. *Id.* at 98-99.

125. *Id.* at 107 ("Since the special education system is premised on grassroots enforcement by parents of children's educational rights, the lack of an effective advocate can significantly frustrate the ability to receive an adequate and fair referral and subsequent provision of special education services.")

126. *See* Barbara Bennett Woodhouse, Symposium, *Speaking Truth to Power: Challenging the "Power of Parents to Control the Education of Their Own,"* 11 CORNELL J.L. & PUB. POL'Y 481, 500-01 (2002). Woodhouse asserts that

[o]ur constitutional jurisprudence has generally balanced the state's interest in educating children for citizenship against the right of the parent to control the education of his own. Missing from the equation has been a conviction that children themselves have rights—not only rights to equality but also substantive rights to an education that

from his public school peers, because he was a special education student, he was not required to take the Florida Comprehensive Assessment Test, the high-stakes test that foster children have difficulties passing. As a consequence many of these students either drop out of school or settle for substandard equivalency or special diplomas.¹²⁷ Therefore, it was a significant achievement that he even scored a chance to receive a diploma on the same stage with his classmates, and that he was able to graduate with a C+ grade point average.

Even though the bar was lowered, his graduation from high school, with a special diploma, was never assured. What was certain was that he would receive a mediocre education and be given an essentially meaningless special diploma, and, should he ever seek post-secondary schooling, he would in all likelihood be required to enroll in remedial classes to help him acquire basic academic skills that he never acquired in his years of school. Like many of his foster care peers, George had suffered benign neglect during his years in public school.¹²⁸ It is no wonder, then, that George had little interest in furthering his education after graduation.

In rewinding what our Clinic did and what we could have done for

provides them with the tools to survive and thrive and procedural rights that respect their emerging capacities by honoring their reasonable educational choices.

Id.; see also SPECIAL EDUCATION ADVOCACY UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FOR CHILDREN IN THE JUVENILE DELINQUENCY SYSTEM 3-5 (Joseph B. Tulman & Joyce A. McGee eds., 1998), available at http://www.fape.org/justice/juv_justice.htm (last visited Feb. 9, 2005) (incorporating the child into the process of developing an IEP is therapeutic and empowering for the child).

127. See Burley & Halpern, *supra* note 120 (only 59 percent of Washington state foster youth enrolled in 11th grade complete high school by the end of grade 12; the completion rate for non-foster youth in Washington is 86 percent); see also Miriam K. Freedman, Esq., *Individuals With Disabilities Education Law Report, Special Report No. 18 Testing, Grading and Granting Diplomas to Special Education Students* (LRP Pub'ns 1997) (summarizing difficulties in providing reasonable accommodations to students with disabilities in achieving success in statewide standardized testing and other graduation requirements).

128. As noted above, George's school experiences were very typical of those of his peer group in state foster care, particularly Florida foster care children, who fare even worse than others nationwide. See, e.g., School Board of Broward County, Florida, *Interagency Agreement Between the School Board of Broward County, Florida, The Florida Department of Children and Families, District 10, and ChildNet, Inc., Evaluation Report, 2003-2004*, available at http://www.broward.k12.fl.us/research_evaluation/Evaluation/DCFFinal5-5-04.pdf (last visited Feb. 9, 2005) (summarizing national foster care educational outcome research literature showing that foster children frequently move between foster homes and schools while in care, and experience a high rate of residential mobility subsequent to placement; move from one foster home to another an average of three times while in the foster care system; and estimating that it takes four to six months to recover academically from a change in school placement due to the repeated adjustment to new teachers, school, curriculum, and expectation with frequent school changes reducing the bond with teachers and peers as well as negatively impacting extracurricular activities).

our client in the school arena, two lapses on our part are clear. As was our standard practice, we routinely reviewed school records and occasionally communicated our concerns to the school officialdom about academic needs or problems, but in George's case we did not seize as many opportunities to engage in legal advocacy in this arena as was probably appropriate.¹²⁹ For example, we did not take advantage of federal laws intended to stabilize school placements for homeless students that could have minimized the school changes prompted by his frequent moves from foster home to foster home around Miami-Dade County.¹³⁰ Second, we did not aggressively pursue due process remedies that could have preserved George's right to attend school on those frequent occasions when school officials meted out disciplinary sanctions, such as short-term out-of-school suspensions, against our client for his alleged acts of misconduct in the special education classroom.¹³¹

Studies have shown that children in foster care perform below their peers in academic assessments, exhibit higher rates of behavior disorders, and are more frequently absent from school.¹³² Had we advocated to reduce the amount of time our client missed school, due to disciplinary infractions or changes in foster care placement, we could have helped to improve his educational performance and decrease his maladaptive behaviors.

129. See, e.g., Kathleen McNaught, *Education Advocacy in Child Welfare Cases: Key Issues and Roles*, 21 A.B.A. CHILD. L. PRAC. 129 (Nov. 2002) (describing advocacy in school proceedings on behalf of foster care children); Kathleen McNaught, *Education Law Primer for Child Welfare Professionals (Part One)*, 22 A.B.A. CHILD. L. PRAC. 1 (Mar. 2003) (describing key federal education laws and rights affecting children in foster care including a right to education, school records and information, children with disabilities, and school discipline); Kathleen McNaught, *Education Law Primer for Child Welfare Professionals (Part Two)*, 22 A.B.A. CHILD. L. PRAC. 17, 22-25 (Apr. 2003) (describing laws relating to education of homeless children, young children, and teenagers); Kathleen McNaught, *Creative Ways to Meet Education Needs of Children in Foster Care*, 23 A.B.A. CHILD. L. PRAC. 17 (Apr. 2004) (describing promising approaches to education advocacy for children in the foster care system); KATHLEEN MCNAUGHT, *LEARNING CURVES: EDUCATION ADVOCACY FOR CHILDREN IN FOSTER CARE* (2004).

130. See, e.g., McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431a(2)(B)(i) (2005), amended by No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1031, et seq., 115 Stat. 1425 (2001) (defining "homeless children and youths" to include "children and youth who are . . . living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement").

131. See *Goss v. Lopez*, 419 U.S. 565 (1975) (setting forth minimal due process safeguards for students suspended for ten days or less). See also *Honig v. Doe*, 484 U.S. 305 (1988) (prohibiting indefinite expulsion of a special education student if the misconduct is a manifestation of the student's disability); 20 U.S.C. § 1415(k) (2005); 34 C.F.R. §§ 300.519-.529 (2005) (requiring school to convene a "manifestation hearing" before a student with a disability is suspended for more than 10 days cumulatively in a school year).

132. See generally Godsoe, *supra* note 124, at 98.

These changes could have aided in a successful transition to employment or higher education following graduation from high school and discharge from foster care.¹³³

Despite our lack of proactive attention to George's educational needs, the assistance that we provided in making it possible for him to participate with his high school classmates in their commencement exercise was an important symbolic gesture of great meaning to him. It involved both courtroom advocacy and the use of the media to ensure that George, like his twelfth grade classmates, would have a cap and gown to wear, and could afford to pay for his school yearbook.¹³⁴

After promising our client and the other graduating seniors in the Miami-Dade foster care program that it would provide each of them \$500 in graduating expenses, the Department of Children and Families ("DCF") cruelly withdrew its offer to help them pay for these expenses. After the DCF district administrator rebuffed our attempted contact, our students and I brought the issue to the attention of George's juvenile court judge. The judge promptly ordered DCF officials to show cause why they should not be held in criminal contempt "for refusing to help foster kids participate in the pomp and circumstance of graduation."¹³⁵

The attention of the media not only prompted swift action by the court, and a quick retraction of its position by the DCF, it also brought about an outpouring of sentiment from the readers of the newspaper, who were moved by George's story (accompanied by a pensive photograph of our client appearing next to the published article). Nearly \$750 in cash gifts poured into our Clinic from the public, which we donated to the local Guardian *ad Litem* program's Voices for Children Foundation, to help other high school seniors pay for their graduation expenses.

The Miami Jackson High School commencement exercises took place

133. See, e.g., Robert H. Ayasse, *Addressing the Needs of Foster Children: The Foster Youth Social Services Program*, 17 SOCIAL WORK IN EDUC. 207 (October 1995) (reporting on an Oregon study finding that children who experienced multiple foster care placements during a school year had a lower chance of being above grade level or having opportunities to participate in extracurricular activities at school than students in more stable long-term foster care placements); see also FESTINGER, *supra* note 2, at 276 (reporting the experiences of foster children who opined that foster care shifts, when they necessitated transfers to new schools, interfered with their progress in school). In recognition of the need to attend to the educational needs of children in state care, the Florida legislature in 2004 enacted a first-of-its-kind measure that now requires systematic collaborative efforts between child welfare entities and school systems in order to facilitate more educational services for foster children. 2004 Fla. Laws ch. 356 (creating FLA. STAT. § 39.0016 (2004)).

134. See *Cash Tight for Foster Kids Near Graduation*, *supra* note 119.

135. *Id.*

in mid-June at the Miami Beach Convention Center. Not a single family member or representative from DCF attended or celebrated this event with George. Only our student intern, Chad Shimel, and the Clinic's associate director, Carolyn Salisbury, were there to mark this event with George. Our student brought his camera and took several photographs of our client in his regalia at the ceremony. In these photos, George is smiling with more pride and satisfaction than at any time in the three years that I was his attorney.

While this activity could not be described as traditional legal advocacy, our Clinic's participation in these events unquestionably boosted George's self-image by letting him see how strongly these adults in his life believed in him and were willing to celebrate with him in this authentic ritual of passing from childhood to adulthood.¹³⁶ In many ways, it was the most significant personal act or human gesture on the part of our Clinic toward George in the three years that we served as his attorney.

Graduation was also in many ways a transformative experience for him in that it bolstered his self-esteem and reinforced positive feelings about himself. Moreover, it symbolized the broadened conception of child advocacy when taught and practiced with a Therapeutic Jurisprudence perspective. This conception sees the lawyer as more than the client's law enforcer who intervenes in the child's life to advance his legal rights, but as a transformative agent who promotes the client's psychological well-being by helping him to mature, build self-efficacy, and achieve his full potential.¹³⁷

D. FOURTH REWIND EXERCISE—POSTSCRIPT TO FOSTER CARE: LEAVING THE SYSTEM

Unfortunately, as he turned age eighteen in the summer of 2004, George's growing anger and rage at the system that had deprived him of a

136. See SHIRK & STANGLER, *supra* note 1, at 259-60 (stressing the importance of facilitating a foster youth's connections to a knowledgeable and caring adult and viewing positive mentoring for foster care youth as a worthwhile strategy to help foster these connections); see also Mangold, *supra* note 28, at 876 ("For children exiting care with no committed adult caretaker, mentors could play a vital role in providing some parental support in the difficult transition from care.").

137. See *Redefining the Role*, *supra* note 52, at 287 (noting that client-centered lawyering, like 'client-centered therapy,' as conceived by psychologist Carl Rogers, is "based on the premise that individuals can achieve their full potential for self-actualization when facilitated by a relationship with a helping person who is genuine, empathic, and nonjudgmental."). Our Clinic's mission is consistent with this client-centered vision. We perceive our mission as not just to train our students to use the legal system to protect or expand their clients' rights and interests, but to teach students interpersonal skills that will help their clients develop self-sufficiency, a sense of validation, and self-efficacy.

normal childhood erupted. He wanted nothing more to do with DCF and the legal system because he regarded it as one that punishes and sanctions. As the last of his Clinic legal interns summed up this feeling in his weekly journal: "It is possible that this sense of fear and hatred for the legal system has resulted from a lack of Therapeutic Jurisprudence."¹³⁸

Against our advice, George opted to turn away from DCF and decided to forgo financial and medical benefits from the state as well as the chance to enroll in a post-secondary school program tuition-free. This decision struck our student as an emblem of the failure of his DCF experience:

The idea of judges trying to help children to understand the legal system, and allow them to participate in it to create a sense of satisfaction with the result would certainly help many of the children at the clinic. For example, George C. is a classic example of a child who has grown to despise the system that really should be helping him. From the several times that I have seen and spoken with George, it is quite apparent that he wants nothing more to do with the legal system and thinks of it only as a system that punishes and sanctions. It is possible that this sense of fear and hatred for the legal system has resulted due to a lack of Therapeutic Jurisprudence. I can't be certain as I am unfamiliar with George's entire history; however, it seems quite possible that few judges, social workers, or DCF employees and attorneys have ever listened to what he has to say. As a result, he has grown to hate many of the programs that are supposed to be helping him. In fact, he is very reluctant to take advantage of the opportunity for a free college education simply because it would be provided by those he has grown to hate. *There is certainly something wrong with this picture.*¹³⁹

In our group meetings I asked myself and the students whether George's unwillingness to heed our advice also reflected the failure of our Clinic to provide him more effective counsel. We questioned whether we had fallen short in using Therapeutic Jurisprudence and preventive lawyering to help him appreciate the benefits of the post-eighteen services available to him. We asked whether he had weighed the benefits against the risks of making an unwise choice.¹⁴⁰

138. Clinic Weekly Journal, *supra* note 17.

139. Clinic Weekly Journal, *supra* note 17 (emphasis added).

140. The Clinic's self-professed "failure" to counsel the client to make a "wise" choice with respect to his post-18 eligibility for state and federal benefits may be a natural and inevitable consequence of the client-centered counseling model that we use in our Clinic. *See supra* note 137 and accompanying text. The premise of this model is that individuals can achieve their full potential for self-actualization when facilitated by a relationship with a helping person who is genuine, empathic, and nonjudgmental. *See Client Denial, supra* note 99. *See also* Dinerstein, *supra* note 99, at 512 (noting that the core argument supporting client decision-making is that it enhances the client's individual autonomy, meaning "that a person can choose and act freely, according to her own life plan").

There were many difficulties in conveying to our client the risks that he assumed by refusing the benefits available to him under federal and state law. It would do us no good to lecture our client or to reel off a litany of statistics about imprisonment, welfare dependency, institutionalization and the other grim experiences of many of the 20,000 youths emancipated from state care each year. These appeals would surely fall on deaf ears and possibly only engender more resistance from our client.

It soon became obvious that there had to be a better way to counsel our embittered and distrustful client, on the cusp of adulthood, to overcome what we regarded as his obstinate and defiant refusals of help. We saw the need to use all of the counseling tools that we could muster to help him acknowledge the difficulties that he would face and to be willing to consider accepting some state aid as he made the difficult transition from foster care to adulthood.¹⁴¹ We would have to find a way to help him see the risks of rejecting state aid on his own terms.¹⁴²

Two weeks before George's eighteenth birthday, two students (our legal intern and social work intern) and I took him out for lunch to discuss these questions.¹⁴³ We spent nearly four hours with him, calmly discussing

141. See, e.g., *In re Natasha H.*, 54 Cal. Rptr. 2d at 279-80. The *Natasha H.* court observed that

[o]bstinacy and defiance test the patience of adults charged with the tending to the needs of minor children. Under the trial court's reasoning the more obstinate the child the greater the justification for terminating jurisdiction. We disagree. As much as the minor might wish to be rid of court supervision, as frustrating as her conduct might be to DHHS and the court, her misbehavior and lack of cooperation do not justify termination of her dependency status absent extraordinary circumstances not present here that make it in her interest not to do so.

Id. See also Kathi Grasso, *Litigating the Independent Living Case*, 18 A.B.A. CHILD. L. PRAC. 65 (July 1999) (discussing different lawyer counseling strategies unique to the representation of older foster youth).

142. See BINDER, *supra* note 99, at 7 (concluding that "when it comes to making decisions about what solutions are most likely to be satisfactory . . . as 'owners' of legal problems, clients deserve the right to determine how great a risk they are willing to run with respect to possible outcomes.").

143. The Clinic occasionally hosts MSW interns from the Florida International University School of Social Work who assist legal interns in their cases as part of their field experience practicum. Our graduate social work intern in George's case during the summer 2004 session was particularly adept at utilizing techniques from Therapeutic Jurisprudence in her work with our client, which greatly enhanced our law student's ability to establish a more effective, culturally-competent relationship with him. For example, in her first meeting with him, she gave him a pen and a drawing pad and encouraged him to sketch while they talked. She also concurred with our legal intern that George's unwillingness to consider benefits from DCF stemmed from his deeply held feelings about the way his caseworkers and other professionals in the system had excluded him and treated him with disrespect during his many years as a client of DCF, which she saw as an affront to her own developing ethical and professional values as a social worker. The complementary insights of our legal and social work interns were one of many reasons why the clini-

before and over lunch his future life plans after his emancipation from DCF care. Despite all of our entreaties and pleas, he adamantly refused to consider opting for any DCF benefits. We were disappointed that he once again said no. Where had we failed our client, I asked? What could we do or say differently to spark our client's intrinsic motivation to consider some of the benefits available to him?

In hindsight, as I rewound our final lunch conversation with our client, I considered other counseling approaches that we could have used to talk to and motivate him. Therapeutic Jurisprudence and preventive law, relying on empirical research from other disciplines such as social work and behavioral, cognitive, and social psychology, would seem to provide us the prescriptive tools and psychologically-informed strategies to more effectively counsel a client as "difficult" and recalcitrant as George.

The empirical research on intrinsic motivation, persuasion, and motivational interviewing, used by professionals in fields as varied as addictive behavior and health care compliance, and by judges in problem solving courts, would seem to offer valuable prescriptive tools to spark motivation in our client to make the right choice.¹⁴⁴ Instead of having an unstructured, meandering conversation with George, which frustrated us and engendered more resistance in our client, there were surely other persuasive, non-coercive, empathic techniques that we could have used to encourage George to elect on his own terms to enroll in post-secondary school and opt for post-foster care financial assistance from DCF.

In his article on the interpersonal skills and motivational interviewing techniques used by judges with offenders in problem solving courts, Professor Bruce Winick offers a number of research-based suggestions which could be adapted to the kind of conversation we were having with our client.¹⁴⁵ There are differences between our client, who was motivated by a desire to be free from DCF and the court, and criminal offenders who are brought to court because of alcohol, substance abuse, domestic violence,

cal experience was a pedagogically enriched by the interdisciplinary collaboration. See generally Carolyn Hopps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL'Y 133 (2004) (presenting recommendations from the social work and counseling professions for teaching cultural competency in law school); David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 REV. DER. P.R. 273, 286-87 (1996) (describing possibilities of university-wide graduate level interdisciplinary instruction in Therapeutic Jurisprudence in which law students and graduate behavioral science students participate jointly in internships and classroom discussions).

144. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1078-82 (2003) [hereinafter *Problem Solving Courts*].

145. *Id.* at 1080-82.

mental health or child abuse problems. The techniques described by Professor Winick offer a number of practical approaches to counseling and interviewing that we could have deployed in George's case perhaps more successfully than some of the methods that we used. Moreover, the techniques that he suggests could motivate George to make positive choices to avoid criminal court in the future, a particularly significant goal for someone with a history of fifteen unpleasant years as a ward of the juvenile court.

Professor Winick argues that judges in problem solving courts serve primarily as psychosocial or therapeutic agents, and thus need to understand and apply principles of psychology and behavioral sciences in interacting with the individuals who appear before them.¹⁴⁶ Many of the prescriptions that Professor Winick offers for problem solving judges, such as developing enhanced interpersonal skills, treating the client with dignity and respect, showing empathy, avoiding paternalism, being non-critical and non-judgmental, creating conditions to forge a genuine alliance with the client, and using persuasion and not coercion, could be adapted and added to the counseling repertoire of a Therapeutic Jurisprudence-oriented lawyer in motivating our stubbornly resistant client to contemplate and bring about behavioral changes in his life.¹⁴⁷

Professor Winick identifies a number of psychological mechanisms that may impede communication between the judge and the offender (or the lawyer and his client).¹⁴⁸ For example, he admonishes judges to be sensitive to issues of transference and counter-transference in their judge-offender interactions.¹⁴⁹ Transference is a concept first introduced by Freud in which the patient projects feelings that originated in prior relationships, particular family relationships, onto the therapist.¹⁵⁰ Counter-transference involves the analyst's or therapist's projection of feelings onto the patient that stem from prior relationships.¹⁵¹ Just as a judge in a problem solving

146. *Id.* at 1068.

147. *Id.* at 1067-78. See also Astrid Birgden, *Dealing With the Resistant Criminal Client: A Psychologically-Minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225 (2002) (describing a "stages of change" model of client counseling, incorporating motivational interviewing strategies for criminal defense lawyers and mental health professionals to motivate resistant clients to change patterns of behavior, derived from psychologically-based research).

148. *Problem Solving Courts*, *supra* note 144, at 1067.

149. *Problem Solving Courts*, *supra* note 144, at 1069-70.

150. *Problem Solving Courts*, *supra* note 144, at 1069-70 (referencing Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259 (1999), reprinted in PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 14, at 357).

151. *Problem Solving Courts*, *supra* note 144, at 1069-70.

court should be sensitive to the potential for transference to occur on the part of the offender, so should the judge be aware of the possibility that he will project his own negative feelings onto the offender.¹⁵²

In the frustrating lunch conversation that we had with George about his future plans, I realize now that I was not as conscious of the occurrence of this psychological phenomenon as I should have been at the time and this was a significant reason for our failure to communicate. I assumed far too much of a paternalistic tone with George, treating him more as a son or younger brother than as a client.¹⁵³ I was also too judgmental in not trusting my client to display the mature or capable judgments needed to assess what risks were worth taking and not trusting him to make his own choices based on his knowledge of the risks that they entailed.

In a sense, despite all the talk of empathy and all of the lip service that I gave to client-centeredness and client autonomy, I disregarded his values and experiences and distrusted his ability to make an informed choice, just as I might disregard my own pre-teenage son's views and choices regarding which extra-curricular program to enroll in or what summer camp to attend. This paternalistic attitude on my part, which was probably a manifestation of unacknowledged counter-transference in my interactions with him, may have produced a degree of resistance or psychological reactance on his part that I failed at the time to recognize as an obstacle to effective communication with George.¹⁵⁴

What was also missing from that last conversation with George was a well-informed concept of how to use the lawyer-client interviewing and counseling process to motivate our client to remain in school and accept some help from DCF, without putting coercive pressure on him to make choices that we were recommending (or perhaps insisting) he make.¹⁵⁵ As

152. See Mills, *supra* note 116, at 370-74 (discussing the complex dimensions, and potential dangers, of counter-transference when manifested in the lawyer-client relationship).

153. See Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches*, 18 CREIGHTON L. REV. 1369, 1379-80 (1985). Perry and Teply observe that

[f]or most legal interviewing and counseling purposes, a parent-child relationship will be unproductive. It supplies only a low level of motivation to cooperate. Furthermore, 'decisions' reached without a collaborative effort are judgments that reflect the attorney's values, which are not necessarily the same as the child's. Such decisions are less likely to be ones that the child will be satisfied with or that the child will follow in the long-run.

Id.

154. *Problem Solving Courts*, *supra* note 144, at 1070 (citing SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 13 (1981)).

155. The recent research by the MacArthur Network on Mental Health and the Law, and particularly the findings regarding coercion, supports this view. The MacArthur Network research

Bruce Winick has explained, in the context of juveniles facing involuntary civil commitment to mental health programs, research on the psychology of choice “suggests that people perform more effectively and with greater motivation when they choose voluntarily to do something, and perform less well, with poor motivation and sometimes with psychological reactance, when they are coerced into doing it.”¹⁵⁶

While it is perfectly appropriate for the attorney (or the judge in the problem solving court) to communicate to the client (or the offender) the attorney's or judge's views concerning the individual's best interests, ultimately it is best to cede that choice to the individual. In order for us to have the confidence that our client would ultimately succeed in post-secondary school and succeed as a participant in post-foster care DCF programs, we had to simply let go, let our client arrive at his own choice, and rely on his intrinsic motivation to sign himself up for school, apply for post-foster care Road to Independence Program benefits, and succeed (or fail) in these programs on his own terms.

By contrast, if he felt coerced or compelled to participate in these programs because of extrinsic motivation imposed on him by our Clinic, then it was less likely that he would internalize the program goals and succeed in the school and post-foster care programs. As the social work research on “youth engagement” shows, involving young people in the foster care system in the “creation of their own destinies” means “involving them in case planning and encouraging them to advocate for themselves.”¹⁵⁷ The attorney or social worker who facilitates this youth engagement in the case planning process can lay out the alternative choices for the client, present information to the client about the alternatives, but in the end it is only the youth himself who can then exercise choice, develop the plan, and create his own destiny.

examined the correlates and determinants of individuals' perceptions of what makes them feel coerced. The findings from the data indicated that patients in civil commitment hearings who are provided with procedural justice, who are treated with dignity and respect and accorded voice and validation in the civil commitment process, will experience the commitment that they have consented to as voluntary, rather than coerced, and as a result, will experience the psychological benefits of choice and avoid the negative benefits of coercion. *See Problem Solving Courts, supra* note 144, at 1077; *see also* Bruce J. Winick & Ken Kress, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 Psychol. Pub. Pol'y & L. 107, 112 (2003) [hereinafter *Outpatient Commitment*]; *supra* note 53 and accompanying text.

156. *See Outpatient Commitment, supra* note 155, at 112.

157. *See* SHIRK & STANGLER, *supra* note 1, at 260 (noting that in focus group surveys of former foster care youth conducted in 2001 by the Jim Casey Youth Opportunities Initiative, “many of the participants said they felt that those in charge of their lives devalued their opinions and desires and had low expectations for their success. The advice they gave was virtually unanimous: ‘Nothing about us without us.’”).

Lastly, our conversation with George did not avail itself of the persuasion theory research to prompt our client to examine his past and was unable to spark his motivation to undergo a change with regard to his future willingness to accept more schooling and DCF benefits. Winick notes that psychological research on persuasion has identified the elements of the persuasion process and deduced that "the content of [a] message, and the way it is delivered, significantly influence the likelihood of persuasion."¹⁵⁸ The research on persuasion theory has postulated that the degree of success in persuading a person is determined by the extent to which the receiver of information "is actively involved in the processing of the information presented."¹⁵⁹ As argued above, we might have been able to persuade our client to consider school and DCF had he been more actively involved in considering the different options that we presented to him.

As Winick points out, the "elaboration likelihood model" of persuasion gives the recipient of the message "the opportunity to ask questions about their options, the freedom to engage in their own processing of the information, and the freedom to reach their own decision."¹⁶⁰ This model "is similar to the motivational interviewing technique developed for use by clinicians to help . . . individuals" deal with and overcome problems of alcoholism and drug addiction.¹⁶¹ Our client's most intractable problem, in the context of our last conversation with him, was not drug addiction or alcoholism but his deep distrust of both DCF and the school system. This distrust was the product of his long childhood in the custody of DCF, which subjected him to years of institutional neglect and maltreatment, and the benign neglect that he suffered during his years in the school system. Also, had he been helped and represented by a lawyer during the many years that he suffered these indignities all alone, he might not have experienced these profound feelings of distrust.

Borrowing from the research on motivational interviewing methods used to prepare individuals to change addictive behavior, Winick suggests five interviewing techniques that problem solving courts can utilize to spark motivation in offenders.¹⁶² Each of these techniques has direct appli-

158. See *Problem Solving Courts*, *supra* note 144, at 1079, (citing DANIEL J. O'KEEFE, *PERSUASION: THEORY AND RESEARCH* 130-88 (1990)).

159. *Problem Solving Courts*, *supra* note 144, at 1079 (citing RICHARD E. PETTY & JOHN T. CACIOPPO, *COMMUNICATION AND PERSUASION: CENTRAL AND PERIPHERAL ROUTES TO ATTITUDE CHANGE* 1-60 (1986)).

160. *Problem Solving Courts*, *supra* note 144, at 1079.

161. *Problem Solving Courts*, *supra* note 144, at 1080 (citing WILLIAM R. MILLER & STEPHEN ROLLNICK, *MOTIVATIONAL INTERVIEWING: PREPARING PEOPLE TO CHANGE ADDICTIVE BEHAVIOR* 51-63 (1991)).

162. *Problem Solving Courts*, *supra* note 144, at 1080-81 (citing MILLER & ROLLNICK, at 55-

cation to the attorney-client counseling process. In working with our client to overcome this understandable, deep-rooted distrust of these institutions, first we needed to understand his feelings and perspectives without judging, criticizing or blaming.

Second, we needed to seek to develop discrepancies between his present views and his important personal goals and objectives (e.g., to explain, in a non-judgmental and non-confrontational way, that he could achieve his personal goal of using his artistic talents to support himself if he enrolled in a technical or post-secondary art school, rather than working at a flea market tattoo parlor for very little remuneration). We could create motivations for change on our client's part only when he himself perceived the discrepancy between his present plan (of rejecting DCF aid, even if it was a means to helping him become self-sufficient) and the achievement of his personal, long-term goal of being able to support himself and be free from the power and control of DCF over his life.¹⁶³

Third, we needed to avoid arguing with our client, which would be counterproductive and engender defensiveness on his part. Fourth, when we encountered resistance, we needed to "roll" with it, rather than become confrontational. This means listening to our client with empathy and providing feedback to what he was saying by introducing new information (e.g., using our social work intern's research to identify an appealing art program near his home and offering to help him enroll in that program).

Fifth, we needed to foster self-efficacy in our client.¹⁶⁴ Had the Clinic been more aware, in our conversation with George about his post-foster care options, of the innovative techniques of motivational interviewing used by clinicians and problem solving judges to motivate change in the lives of criminal offenders with addiction or alcohol problems, we might have succeeded in that final attorney-client conversation in persuading him to enroll in a school program and apply for DCF benefits.¹⁶⁵

62).

163. See *Client Denial*, *supra* note 99, at 327; see also Birgden, *supra* note 147, at tbl. 2 (raising doubt and creating "dissonance" about the appropriateness of the client's present behavior, in order to highlight the discrepancy between the client's present behavior and the client's goals, posited as counseling techniques used by lawyers and mental health professionals to motivate change in resistant clients).

164. See A. BANDURA, *SELF EFFICACY: THE EXERCISE OF CONTROL* (1997) (describing self-efficacy as self-appraisal about how well one can perform actions to deal with a situation, and as a dynamic process that increases as the individual gains new skills to manage threatening situations).

165. In rewinding what went wrong at this juncture of our representation, and what we could have done differently, in retrospect, perhaps we should have cemented the counseling process by encouraging George to enter into a form of behavioral contract with his school and DCF, in effect

George would not attempt to change unless he himself achieved the self-realization that he could reach his goal, overcome barriers and obstacles to its achievement, and succeed in effectuating positive change in his life. To motivate him to change his present life plan and to reach his goal of self-sufficiency, we needed to build on his personal strengths (e.g., his love of drawing and art), and then encourage him to use that strength to effectuate positive change in his life.¹⁶⁶

V. CODA: WHAT IS RIGHT WITH THIS PICTURE?

This leads us to a word about endings. A case study needs an end, if only as a point of decision to prompt discussion. But actually, there is no end, only breaking points and partial resolutions. A million things could happen The case study does offer a useful clue to the artifice of endings The lawyers at some point withdraw because, after all, it is the client's life. If their lens is wide, they leave this and every case with secrets, ironies, and, perhaps, a story to tell.¹⁶⁷

After three years of serving as his attorneys, striving to represent him with an ethic of care, why was it so difficult for our Clinic to convince George to accept an offer of aid from the state? Why was he so intent on

using non-coercive reinforcements, such as the promise of financial assistance based on his successful participation in a program rather than making hollow appeals to "reason" about the importance of school and financial aid from DCF to his future.

Indeed, as Bruce Winick has contended, research in behavioral, cognitive and social psychology suggests that techniques such as behavioral contracting with our client might have been stronger and more positive motivators or incentives to promote his interest in staying in school and opting for the various financial and other benefits, rather than our abstract entreaties to sign up for school so that he could be a Road to Independence client. See Bruce J. Winick, *Harnessing the Power of the Bet: Wagering With the Government As a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 793-97 (1991) (suggesting the use of preventive law through behavioral contracting with clients to facilitate drug treatment, teach job training skills to those on welfare, and reduce truancy on the part of public school students).

Unfortunately, the problem with our aborted effort to use this behavioral contract technique was that our client had spent virtually his entire childhood growing up as a "client" and never as a child and had lost all trust in the system. It is no wonder that on the day he turned eighteen, he rejected the offer of a "wager" with DCF which would guarantee him needed financial assistance. Instead, he packed his belongings in a bag and walked away from the system.

166. See *id.*, at 814-16; Birgden, *supra* note 147, at tbl. 3 (describing one of the final stages of change during which it is imperative to support the client's belief in the possibility of change and support the client in translating intention into action so that he is more likely to have a positive outcome and experience mastery); Michael D. Clark, *Change-Focused Drug Courts: Examining the Critical Ingredients of Positive Behavior Change*, NAT'L DRUG CT. INST. REV. (Winter 2001) (suggesting that interviewing techniques that promote treatment by building on the individual's strengths are important in treatment efficacy, and that the court and program staff must build trust and find effective methods to encourage the individual to participate in treatment, affording the client increased choice and autonomy).

167. Bellow & Minow, *supra* note 19, at 29.

George to accept an offer of aid from the state? Why was he so intent on leaving the system rather than taking advantage of what it could still provide him, even though his refusal meant that he might end up one day living on the streets or locked up? Why was the Clinic unable to reach George and persuade him to agree to our counsel and advice?¹⁶⁸ I thought of our student intern's observation, quoted above: "There is certainly something wrong with this picture."

George's case shows that there is much that is right with the picture. The Clinic used Therapeutic Jurisprudence to build rapport and trust with him, and it used the model effectively in advocating for his legal interests, using legal checkups to help him overcome psycholegal soft spots, and helping him to build self-efficacy. Teaching Therapeutic Jurisprudence also gave us the vocabulary to reflect on our work. At each juncture, in discussions with student interns, we evaluated our legal work through the Therapeutic Jurisprudence lens, intensively probing the therapeutic or anti-therapeutic consequences of each decision or strategy.

Of course, practicing Therapeutic Jurisprudence expanded upon and added to the traditional lawyer role of client's law enforcer, and it fostered more personal interactions with our client, which allowed us to explore the use of counseling methodologies that built upon his personal strengths and empowered him, and in the process facilitated his ability to participate as an equal in the lawyer-client relationship.¹⁶⁹ As the cap and gown story shows, the broadened focus of Therapeutic Jurisprudence in the clinical set-

168. Perhaps, notwithstanding the above-stated view that we facilitated our client's equal participation in the attorney-client relationship, it is also possible, as the Fourth Rewind Exercise shows, that the Clinic's failure here was not one of Therapeutic Jurisprudence, but a failure to regard the client as an equal or a partner with the lawyer in formulating joint goals and strategies. See Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 *BUFF. L. REV.* 71, 76-88 (1996) (arguing that the need to reconcile the interests and values of the client with those of the lawyer requires negotiation between the lawyer and the client about their joint goals and the means of pursuing them).

169. See Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1407-34 (1996) (conceiving the role of children's lawyers, above all else, as the enforcers of their client's rights, and describing the principal tasks of counsel for young children as examining and identifying the relevant legislation and case law in the particular subject area, and then determining the most effective way to enforce them without the necessity to seek guidance or involvement from the child). Cf. Federle, *supra* note 20, at 1695-96 (conceiving of the roles of interviewing and counseling as effective mechanisms for facilitating the child client's full participation in both the legal system and the attorney-client relationship and the attorney as ethically obligated to meet with the client and discover information about the client's situation, to foster communication between the lawyer and the child, to utilize whatever techniques may be necessary to accommodate the child client, to free the child from potential domination by the adult lawyer, and to empower the child in the attorney-client relationship, thus enhancing the child's ability to participate in the legal system).

ting sees the pedagogical mission as not just training students to use the legal system to protect or expand their clients' rights and interests, but also teaching students to use their interpersonal skills to help their clients develop self-sufficiency, a sense of validation, and self-efficacy.

However, perhaps this was a pyrrhic victory, because George's distrust and hatred of the system made him distrust and reject even his trusted lawyer's advice almost to the end. I cannot be too harshly self-critical, because the Clinic did give George some of the self-efficacy tools and self-sufficiency skills that I hope will serve him well in the future and help him avoid the dire outcomes that I fear.

George's story tells us that using Therapeutic Jurisprudence in a child advocacy clinic can help clients seize control of and transform their lives. It tells us that we must trust our clients to make their own choices even if we think those choices are mistakes and unwise. It tells us that, no matter what we may think of the choice that our client made, he has some if not all of the resources that he will need to avoid the bitter results experienced by so many of the 20,000 youths who each year leave foster care.

After mulling it over for a time after he turned eighteen in August, George accepted our advice. A few weeks ago, in October, he came into our office, and told us that he had enrolled in a vocational program, studying to be a chef. This qualified him to receive the monthly stipend from the Road to Independence Program. A week later, he came into the office, limping after being struck on his bicycle by a delivery truck, and announced that he was no longer interested in attending school, which of course put in jeopardy his continued eligibility for the scholarship and Medicaid. He was hungry and angry, and talked furiously about his problems with his mother, who was again using drugs, and about his struggles to find a job and a place to live. It was the kind of depressing news that I expected I would hear from him sooner or later, although perhaps not quite this soon. And yet, I know that this is not the end of George's story. While this case study ends, George's life is only beginning.¹⁷⁰

* * * *

As this case study shows, when Therapeutic Jurisprudence is integrated with preventive law, the combined approach has much to offer clinical education. We have long regarded our clinic as a laboratory for testing and studying this approach, particularly with the goal of inculcating an

170. See Spinak, *supra* note 20, at 2082 ("I keep waiting for the story to end. I forget that these are lives and the story doesn't end, just the telling.")

“ethic of care” in our students.¹⁷¹ As we view the model, we see it as a reconceptualization of the approach to skills training—focusing on client interviewing and counseling, developing inter-personal skills with clients, fact-finding, motion practice, oral advocacy, and presentation of evidence—that have traditionally been the pedagogical goals of clinical legal education.

By explicitly valuing the psychological well-being of the client, by calling for enhanced interpersonal skills, and by emphasizing the prevention of legal problems, the model adds a rich new dimension to clinical law teaching, particularly in the context of representing children. Moreover, by bringing insights from psychology and social work into our understanding of the role of counsel for children and other clients, it brings a much needed interdisciplinary perspective to clinical legal education.

I hope that other law school clinics and other child advocates see the added benefits that this broadened conception of legal education and the lawyering process can bring to their respective pedagogical and advocacy missions and will introduce these skills and values into the classroom, clinic, and courtroom.

171. Berkheiser, *supra* note 60, at 1164. This is not to say that inculcating these different values in the clinical setting is without its perils as a predictor of ultimate career satisfaction. See Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCH. PUB. POL'Y & L. 811, 811-19 (1999) (using psychological data on the personality traits of lawyers to argue that Therapeutic Jurisprudence and preventive law are particularly well suited for lawyers with certain personality traits atypical of lawyers generally, such as altruistic, humanistic, or interpersonally oriented values, which have been empirically linked to career dissatisfaction among lawyers).