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INAUGURAL ISSUE: COMPREHENSIVE LAW AND THERAPEUTIC JURISPRUDENCE

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FOREWORD

AN UNSHACKLED LAW REVIEW AND ITS GROUND-BREAKING ANNUAL ISSUE ON THERAPEUTIC JURISPRUDENCE AND COMPREHENSIVE LAW

David B. Wexler*

It is an honor and a pleasure to write the Foreword to the first annual issue of the *Phoenix Law Review* on Therapeutic Jurisprudence (“TJ”) and Comprehensive Law, the latter term covering several vectors, such as TJ, preventive law, problem-solving courts, restorative justice, and other perspectives and practices seeking to humanize the law and its administration. The Phoenix School of Law (“PhoenixLaw”), despite its youth—or, I argue, perhaps *because* of its youth—is already a leader in the comprehensive law movement. At PhoenixLaw, seasoned trial judge-turned professor Michael Jones regularly offers a comprehensive law class. Further, Professor Susan Daicoff, who actually coined the term “comprehensive law,”¹ and authored an excellent text on the subject,² is a 2012 spring-term visiting professor, from sister school Florida Coastal School of Law.

Professor Daicoff asserts—and far be it for me to quibble—that TJ is the academic heart of the comprehensive law movement.³ Therapeutic jurisprudence, after all, is now a reasonably mature interdisciplinary field of inquiry that uses several simple conceptual frameworks to look at the law in a richer way.⁴ Those frameworks have allowed for TJ to become influential in practice as well as in theory,⁵ and have facilitated thinking and promoted further devel-

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¹ Susan Daicoff, *Afterword* to PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465, 467 (Dennis Stolle, et al. eds., 2000). Interestingly, there is now a proposal afoot to change the term comprehensive law to “integrative law” so as to point out the similarity of a more holistic law practice to the analogous trend of “integrative medicine.”

² SUSAN SWAIM DAICOFF, COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION (2011).

³ *Id.* at 84 (“TJ is probably the most visible and prolific vector, at least in academic and judicial circles.”).

⁴ David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 MONASH U.L. REV. 33, 33-34 (2011).

⁵ *Id.* at 36.

opment in important ways—allowing for change and reform that is much more than merely the standard kind of pragmatic incrementalism.⁶

Indeed, in an important recent article Professor David Yamada penned a scathing critique of much of contemporary legal scholarship and of the role of student-edited law reviews (and of the pernicious U.S. News and World Report law school rankings) in promoting writing that is largely jargoned, exhaustingly wordy, and far removed from the profession and from real-world socio-legal problems and solutions.⁷ In the process, Professor Yamada gave high marks to *TJ scholarship*, which he noted has been exceptionally refreshing in its brevity, readability, and applicability to practical issues.⁸ In fact, Professor Yamada proposed the *TJ genre* as a model for legal scholarship generally.⁹

The newness of PhoenixLaw and its law review allows for the creation of a culture of legal education and scholarship not shackled by law school conventions that are now subject to serious—even brutal—attack from so many quarters. Instead, the school and the review can build an educational and scholarly enterprise by starting fresh—with a clean slate—and by asking and responding to the truly meaningful and appropriate questions: What is important? What is interesting? What is lacking? There is absolutely no need blindly to follow what other schools and journals are doing.

The choice to focus on TJ and comprehensive law—in the law school and in the law review—is a refreshing case in point. This initial issue focusing on TJ and comprehensive law is illustrative of how a sensible, useful, high-quality journal can be produced in the face of what could be considered a series of editorial ‘no-nos’ elsewhere in the law review world: a bibliography of TJ writings in areas of the curriculum not conventionally thought of in TJ terms; an article in an audio-visual context by a Swiss law professor on a most novel topic of TJ; an article by a seasoned trial judge drawing on his TJ-related experience; an article by a faculty member affiliated with a department outside the law school subjected to a process of peer-review by the *Phoenix Law Review* so as to count as a scholarly publication (a status ordinarily not conferred on articles published in student-edited law reviews)—and more.

⁶ ARIE FREIBERG, RG MYERS MEMORIAL LECTURE: PSYCHIATRY, PSYCHOLOGY AND NON-ADVERSARIAL JUSTICE: FROM INTEGRATION TO TRANSFORMATION 5-7 (Monash University Research Paper No. 2010/18, 2010).

⁷ David C. Yamada, *Therapeutic Jurisprudence and the Practice of Legal Scholarship*, 41 U. MEM. L. REV. 121 (2010).

⁸ *Id.* at 138; see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2196 n.20 (1993) (in the midst of damning criticism of most law and legal writing, Judge Edwards nonetheless cited approvingly to therapeutic jurisprudence work, describing it as “practical interdisciplinary scholarship”).

⁹ Yamada, *supra* note 7, *passim*.

These pieces, individually and collectively, will represent a rich, important, practical, and high-level contribution to the law review literature. Additionally, none of the authors had to worry about the “Oh, we don’t do that!”, or “I’ll have to check if we do that” response from the editorial board. “A bibliography? A *bibliography*? No, we only publish articles, certainly not bibliographies. Maybe you should consider a library journal, but not *our* law review.” “An article on audio-visual *what*? We really only do real law. And did you say it is authored by a *Swiss* law professor? I don’t think our readers will be interested. We are an American law review.” “We like your article, but you say you can only publish with us if we send the piece out for peer-review? What’s that? Oh, no we don’t do that. Our law review has autonomy and we make our own publication decisions.” “We respect judges, but our articles are written by law professors or sometimes by appellate judges. Trial judges aren’t really writers, and some don’t even know about the *Bluebook*.”

You get my point. And as to that last point—so long as the review is on the bold path of setting refreshing and sensible criteria, and of accepting good work from some who are not affiliated with law departments, I wonder if the Editors would sleep on a proposal allowing for non-Bluebook citation styles (e.g., APA or Chicago Manual) for interdisciplinary submissions from departments other than law. In any event, now is not the time for sleeping: I welcome all to some stimulating reading in the pages that follow.

USING THERAPEUTIC JURISPRUDENCE TO FRAME THE ROLE OF
EMOTION IN HEALTH POLICYMAKING*

Amy T. Campbell**

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* Pursuant to *Phoenix Law Review’s* policy regarding submissions by authors with a primary affiliation other than law, this article has been subjected to a process of peer review.

** Assistant Professor, Center for Bioethics and Humanities, SUNY Upstate Medical University and Syracuse University College of Law (courtesy) (Syracuse, NY). I would like to thank participants in the panel session on the theme of emotion’s role in law at the 13th Annual Meeting of the Association for the Study of Law, Culture & the Humanities in Providence, Rhode Island for helpful feedback during presentation of the themes outlined in this article. I also thank Nick Moore and Robert Webb for excellent research assistance. Special thanks, as always, to David Wexler for his support of my on-going work in the field of therapeutic jurisprudence.

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I. INTRODUCTION

Therapeutic jurisprudence (“TJ”) is growing in prominence as a reappraisal of law and the legal process. It seeks to reframe law by offering a prism through which it can be viewed as a healing agent, to enhance the positive consequences of legal intervention, or at least to mitigate its more harmful effects.¹ The aim of this article is twofold: (1) to briefly outline the evolution of therapeutic jurisprudence, and discuss the prominence of evidence-based/evidence-informed healthcare policymaking; and, more specifically, (2) to use a TJ-informed framework to investigate the role of *emotion* (as evidence, or impact on evidence) in the development, implementation, and evaluation of health policy. The intent is not to identify the right policy in any given case; rather, it is to utilize framing questions to better understand how emotion impacts policy and policymaking with an eye toward enhancing therapeutic consequences.

Part II provides a background on the evolution of therapeutic jurisprudence in the law and discusses differing conceptions of health policymaking as either a linear or a more complex process, suggesting the latter could benefit from TJ’s re-visioning influence. Part III goes into more detail about how emotions are raised by and also have an impact on health policymaking. Specific case examples are given to illustrate the myriad of ways emotions are triggered in this process. Part IV lays out a TJ-informed framework that could help channel emotions in health policymaking in therapeutic ways. The framework (i.e., framing questions) is applied to each of the case studies to enhance understanding of how TJ might inform this process to the benefit of the policymaking experience as well as resulting policies. In this way, TJ offers a means to systematically address emotional consequences. The article concludes with lessons learned through this framing process and recommends next steps to test the value of TJ to frame the role of emotion in health policymaking.

¹ See generally Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184 (1997).

II. BACKGROUND

A. *Therapeutic Jurisprudence in Brief*

TJ offers a new perspective on law and lawyering—a therapeutic lens through which to view the law,² fleshing out the therapeutic and anti-therapeutic consequences of our laws and law-making processes. It asks that lawmakers consider these consequences, and search for ways to enhance therapeutic outcomes, or at the very least, lessen or mitigate the anti-therapeutic ones.³ If considered from an ethics perspective, one could say TJ has a utilitarian flavor to maximize good consequences over bad ones. Inasmuch as it is a contextual endeavor that looks to relationships affected by the law,⁴ it could also be said to promote an ethic of care asking that actors in the process tend to those relationships in therapeutic ways.⁵

Given its illumination of psychological consequences, TJ unsurprisingly emerged first in mental health law.⁶ Earliest developers recognized flaws in the law's treatment of persons with mental health disorders and sought a more therapeutic relationship between lawyer and client.⁷ As it evolved, however, it quickly became attractive to other areas more intensely *personal* in the law,

² *Id.* at 200-201, 206.

³ *Id.* at 185.

⁴ Susan Daicoff, *Law as a Healing Agent: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 9 (2006). See generally Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811 (1999) [hereinafter *Making Law Therapeutic*].

⁵ Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328 (2001) (applying an ethic of care to therapeutic jurisprudence as richer framework than consequentialist vision).

⁶ See, e.g., ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds., 1991); THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); David B. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 770-772 (1993); David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 228-231 (1995). See generally Symposium, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 623 (1993).

⁷ See sources cited *supra* note 6; see also Michael L. Perlin, *The Jurisprudence of the Insanity Defense*, in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 59-75 (David B. Wexler & Bruce J. Winick eds., 1997); Michael L. Perlin, *Therapeutic Jurisprudence and Outpatient Commitment Law: Kendra's Law as Case Study*, 9 PSYCHOL. PUB. POL'Y & L. 183 (2003); Bruce J. Winick, *A Therapeutic Jurisprudence Approach to Dealing with Coercion in the Mental Health System*, 15 PSYCHIATRY, PSYCHOL. & L. 25 (2008); Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999).

e.g., family,⁸ trust and estates,⁹ and elder law.¹⁰ In turn, it became a considered approach to lawyering beyond substantive areas of the law, blending with relationship-centered lawyering and preventive law to endorse a set of skills that would enhance the experience of the law for the client and the legal actor.¹¹ Today, we see TJ applied to a range of substantive areas perhaps inconceivable when first developed, such as military law,¹² bankruptcy law,¹³ and worker's compensation law.¹⁴

What has TJ to offer the law and legal process? Some question whether a positivist approach to law ignores the context within which law occurs and how that context may—and likely does—influence the law. Inasmuch as context matters, TJ offers a new framework to approach how we describe, develop, and interact within the law. And inasmuch as relationships can affect law's experience and even effectiveness, an approach such as TJ that seeks to enhance relationships is seen as holding merit. Calling forth the *counsel* vision of the lawyer, TJ in its more practical iterations equips legal actors with tools to be more effective counselors within their own practices by taking a preventive approach to client relations.¹⁵ The goal is not lawyer-as-psychologist; rather, what is sought is a lawyer who can use psychological insights to be a more effective advocate and representative of the law.¹⁶

Thus, TJ has found a home in many facets of the law, including law-making in a traditional sense. But what of larger policymaking endeavors? Specifically, consider health policy, a natural basis for consideration of therapeutic

⁸ See, e.g., Stephen J. Anderer & David J. Glass, *A Therapeutic Jurisprudence and Preventive Law Approach to Family Law*, in PRACTICING THERAPEUTIC JURISPRUDENCE 207-234 (Dennis P. Stolle et al. eds., 2000).

⁹ See, e.g., Patricia M. Wisnom, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345 (1995).

¹⁰ See, e.g., Dennis P. Stolle, *Professional Responsibility in Elder Law: A Synthesis of Preventive Law and Therapeutic Jurisprudence*, 14 BEHAV. SCI. & L. 459 (1996).

¹¹ See Diacoff, *supra* note 4; 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, 19 (1997).

¹² Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 188-190 (2009).

¹³ See generally Michael L. Stines, *Must We Bankrupt the Spirit Also?: The Benefits of Incorporating Therapeutic Jurisprudence into Law School Bankruptcy Assistance Programs*, 17 ST. THOMAS L. REV. 855 (2005).

¹⁴ See generally Katherine Lippel, *Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation Systems*, 22 INT'L J.L. & PSYCHIATRY 521 (1999).

¹⁵ Diacoff, *supra* note 4; *Making Law Therapeutic*, *supra* note 4; *supra* note 11, at 15; Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL L.J. 189 (2002).

¹⁶ Amy T. Campbell, *Therapeutic Jurisprudence: A Framework for Evidence-Informed Health Care Policymaking*, 33 INT'L J.L. & PSYCHIATRY 281, 288 (2010).

consequences: would health policymaking not benefit from being seen through a therapeutic lens? First, it is critical to reflect on the traditional and emerging prisms through which we envision health policymaking.

B. Envisioning the Health Policymaking Process and the Use/Impact of Evidence

Health policymaking within the United States, let alone around the world, is a complex undertaking. Others have explained how it is made and evaluated;¹⁷ the area of interest for purposes of this article, however, is the use of evidence in this process. Historically, a linear model has been applied to the policymaking process wherein evidence is plugged into the policymaking and implementing process to reach a desired goal, with the process occurring in a stepwise fashion—a rationalist vision.¹⁸ The benefit of such model is the ease of evaluating the effectiveness of a given policy towards reaching the desired end-goal. It also allows for ready use of scientific evidence wherein supporting evidence can be conveniently plugged in during the policy development process to effectuate the desired goal.¹⁹ In countries around the globe we have seen such evidence-based policymaking trumpeted.²⁰

¹⁷ See generally THOMAS BODENHEIMER & KEVIN GRUMBACH, UNDERSTANDING HEALTH POLICY (5th ed. 2008); BEAUFORT B. LONGEST, HEALTH POLICYMAKING IN THE UNITED STATES (5th ed. 2010).

¹⁸ Harold D. Lasswell, *The Policy Orientation*, in THE POLICY SCIENCES: RECENT DEVELOPMENTS IN SCOPE AND METHODS 3-15 (Daniel Lerner & Harold D. Lasswell eds., 1951); SANDRA NUTLEY & JEFF WEBB, *Evidence and the Policy Process*, in WHAT WORKS? EVIDENCE-BASED POLICY AND PRACTICE IN PUBLIC SERVICES 25-27 (Huw T.O. Davies et al. eds., 2000) [hereinafter *Evidence and the Policy Process*].

¹⁹ *Evidence and the Policy Process*, supra note 18.

²⁰ See, e.g., GARY BANKS, EVIDENCE-BASED POLICY MAKING (2009), http://www.pc.gov.au/_data/assets/pdf_file/0003/85836/20090204-evidence-based-policy.pdf (providing an example from Australia); WORLD HEALTH ORG., PROMOTING HEALTH AND EQUITY: EVIDENCE, POLICY AND ACTION (2009), <http://www.wpro.who.int/publications/docs/PromotingHealthEquitysmallV3.pdf> (providing an example for the Pacific region); EPPI CENTRE, <http://eppi.ioe.ac.uk/cms/> (last visited Apr. 18, 2012) (providing an example from the United Kingdom and promoting systematic reviews in non-clinical health issues, education, and social care); *Evidence Based Policy Making*, DEP'T ENVTL. FOOD & RURAL AFF. (Sept. 21, 2006), <http://archive.defra.gov.uk/corporate/policy/evidence/> (providing another example from developing countries and providing an overview of evidence policy-making); *Evidence-Informed Policy Network*, WORLD HEALTH ORG., <http://www.who.int/rpc/evipnet/en/> (last visited Apr. 18, 2012) (providing an example from developing countries and encouraging policy-makers in low and middle-income countries to use evidence generated by research).

Some increasingly question the linear evidence-use policymaking model²¹—and related uncritical heralding of the value of evidence in health policymaking²²—and have sought other policymaking visions²³ and uses of evidence.²⁴ Policy development and implementation does not occur in a vacuum or a laboratory. In reality, policy is affected by a range of factors beyond scientific evidence, such as politics, religious values, economics, relationships, and timing.²⁵ The list of factors is as long as the interested party is ready to intervene when her interests are affected. Might considering this range of factors and being open to the realities in which policy is based help the long-run effectiveness of actual and developing policies?

This complexity of policymaking has begun to be more fully fleshed out. Shelley Bowen and Anthony Zwi, for example, have offered a model of policymaking that moves policy development through stages, recognizing the myriad of influences at each stage and the back-and-forth (versus stepwise) nature of much of what goes on within this process.²⁶ Too, our understanding of evidence has moved beyond the purely scientific to a range of values and experiences we may count toward how we develop, implement, and evaluate policy.²⁷ Examples of other sorts of evidence, noted above, include political

²¹ See Campbell, *supra* note 16, at 286 (providing further discussion). See generally Rebecca Sutton, *The Policy Process: An Overview* (Overseas Development Inst., Working Paper No. 118, 1999), <http://www.odi.org.uk/resources/docs/2535.pdf>.

²² See generally Nick Black, *Evidence Based Policy: Proceed with Care*, 323 *BMJ* 275 (2001); Ian Sanderson, *Is It 'What Works' That Matters? Evaluation and Evidence-Based Policy-Making*, 18 *RESEARCH PAPERS IN EDUCATION* 331 (2003).

²³ Shelley Bowen & Anthony B. Zwi, *Pathways to "Evidence-Informed" Policy and Practice: A Framework for Action*, 2 *PLoS. MED.* e166, 0600 (2005); see Peter Davis & Philippa Howden-Chapman, *Translating Research Findings into Health Policy*, 43 *SOC. SCI. MED.* 865 (1996) (providing a discussion of the researcher role in enhancing evidence use in a complex policy system); Stephen R. Hanney et al., *The Utilisation of Health Research in Policy-Making: Concepts, Examples and Methods of Assessment*, 1 *HEALTH RES. POL'Y & SYSTEMS* 2 (2003).

²⁴ J.A. Muir Gray, *Evidence Based Policy Making*, 329 *BMJ* 988 (2004); Ian Sanderson, *Intelligent Policy Making for a Complex World: Pragmatism, Evidence and Learning*, 57 *POL. STUD.* 699 (2009); Inger B. Scheel et al., *The Unbearable Lightness of Healthcare Policy Making: A Description of a Process Aimed at Giving It Some Weight*, 57 *J. EPIDEMIOLOGY & CMTY. HEALTH* 483 (2003); Carol H. Weiss, *The Many Meanings of Research Utilization*, *PUB. ADMIN. REV.*, Sept.-Oct. 1979, at 426-431.

²⁵ CAROL H. WEISS, WHAT KIND OF EVIDENCE IN EVIDENCE-BASED POLICY? 286-290 (2001), <http://www.cemcentre.org/attachments/ebe/P284-291%20carol%20Weiss.pdf>; see also Gray, *supra* note 24; Carol H. Weiss et al., *The Fairy Godmother and Her Warts: Making the Dream of Evidence-Based Policy Come True*, 29 *AM. J. EVAL.* 29, 31-34 (2008).

²⁶ Bowen & Zwi, *supra* note 23, at Fig. 1.

²⁷ See Campbell, *supra* note 16, at 286-287; see also Nikola Biller-Andorno et al., *Evidence-Based Medicine as an Instrument for Rational Health Policy*, 10 *HEALTH CARE ANALYSIS* 261 (2002) (arguing against over-reliance (exclusive) on economic and scientific research evidence in health policymaking, and endorsing explicit address of social values and patient preferences);

philosophy, economics, ethics, and religious values. And yet, whether a rational, evidence-based or complex vision of the policymaking process is applied, less explored are the specifically emotional aspects of this process—at a broader policymaking level or simply as a type of evidence to consider—aspects to which this article now turns.

III. EMOTION IN HEALTH POLICYMAKING

Emotions may drive policy, through manipulation by advocates to control the news cycle and to command policymaking attention.²⁸ Too, however, emotions may be by-products of health policy initiatives, intended or not. Unintended consequences can frustrate the short and long-term policy goals; intended emotional responses are often manipulated when advancing one's cause (be it to pass or to bury a certain policy). Rather than speak in generalities, however, case examples would help illustrate these dynamics. A few examples follow; many more could be offered, including from international sources. The goal here is not to be all encompassing but to highlight the different ways emotions are triggered by, used in, impacted by, or impact on health policy.

A. Case Examples

1. Emotion Generally: Health Care Reform—Malpractice Reform

With health reform at the forefront of the news cycle in the United States lately, there are any number of emotional appeals from which to draw: consider, for example, the debate around medical malpractice reform (tort reform). For years, physicians and others have decried a malpractice system that they see as unfairly impinging on their expertise²⁹ and negatively impacting the physician-patient relationship.³⁰ Backers of malpractice reform claim that liability fears drive defensive medicine, which in turn costs the health care system

Mark J. Dobrow et al., *Evidence-Based Health Policy: Context and Utilization*, 58 SOC. SCI. & MED. 207 (offering a conceptual framework for context-based evidence-based decision-making).

²⁸ The media uses emotion to frame a story, as do policy advocates. Narrative plays a powerful role in policymaking, which joins data and the story. My focus, however, is on the aggregate emotions from these narratives that weave their own story, one of policymaking-as-emotion.

²⁹ Catherine T. Struve, *Improving the Medical Malpractice Litigation Process*, HEALTH AFFAIRS, July 2004, at 33.

³⁰ Michelle M. Mello et al., *Caring for Patients in a Malpractice Crisis: Physician Satisfaction and Quality of Care*, HEALTH AFF., July-Aug. 2004, at 42-43 (study of negative effects of tort liability system on relationships with patients among physicians in Pennsylvania, noting perceptions matter); see also Kristin E. Schleiter, *Difficult Patient-Physician Relationships and the Risk of Medical Malpractice Litigation*, 11 VIRTUAL MENTOR: AM. MED. ASS'N J. ETHICS 242 (2009) (discusses how malpractice rates fueled by impaired patient-physician relationships).

billions of dollars each year.³¹ A Massachusetts study found that eighty-three percent of physicians practiced defensive medicine and that in this environment, thirty-eight percent of physicians limited providing high risk services and procedures while twenty-eight percent reduced the number of high-risk patients seen.³² For purposes of this discussion, however, consider also the emotional appeals: the current system negatively impacts physician relationships with patients and limits patients' access to care.³³ Physician perception—based in reality or not—of litigation risks and insurance costs are causing them to leave specialty areas or particular states altogether because of the broken system.³⁴ Faced with the status quo, the patient experiences a lesser standard of care, pays more, and may not even be able to find a needed doctor. Patients should be afraid and angry with this; besides, who wants to side with a bunch of greedy trial lawyers?

An alternative view may counter that the costs are much lower than described.³⁵ This reliance on data, however, only goes so far in the face of emotion. And so we see different emotional appeals: during a White House-convened briefing with key leaders on healthcare reform, Senator Durbin (D-IL), in dramatic fashion, told the story of one woman grievously injured during a medical procedure.³⁶ Would a capped (i.e., too small) award be sufficient for her pain and suffering? Clearly, both sides are not without their narrative to seize the emotional impact prize.

³¹ AM. MED. ASS'N, THE CASE FOR MEDICAL LIABILITY REFORM (2009), www.ama-assn.org/ama1/pub/upload/mm/-1/case-for-mlr.pdf; cf. TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1-14 (2005); CONG. BUDGET OFFICE, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE 1 (2004) ("malpractice costs account for less than 2 percent of that [health care] spending") [hereinafter LIMITING TORT LIABILITY]. See generally Letter from Douglas W. Elmendorf, Dir. Cong. Budget Office, to Hon. Orrin G. Hatch, U.S. Sen. (Oct. 9, 2009) (analysis of tort reform proposals).

³² MASS. MED. SOC'Y, INVESTIGATION OF DEFENSIVE MEDICINE IN MASSACHUSETTS 3, 5 (2008), http://www.massmed.org/AM/Template.cfm?Section=Advocacy_and_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23557.

³³ AM. MED. ASS'N, MEDICAL LIABILITY REFORM—NOW! 3 (2012), <http://www.ama-assn.org/resources/doc/arc/mlr-now.pdf>.

³⁴ *Id.* at 4.

³⁵ LIMITING TORT LIABILITY, *supra* note 31; U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 5-6, 9-10 (2003), <http://www.gao.gov/new.items/d03836.pdf> (noting the rise in malpractice premiums, but concluding that research attributing the rise to defense medicine practices (due to fear of litigation) and malpractice lawsuits are unreliable; instead, the rise was attributed to changing insurance market conditions).

³⁶ Sen. Dick Durbin on Medical Malpractice Reform at White House Health Summit, WASH. POST, Feb. 25, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/25/AR2010022504290.html> (publishing the transcript from Sen. Durbin).

2. Emotion of a Tragic Event and Policy Response: Virginia Tech Shootings

Another way emotions are raised, and manipulated, in policy is when a tragic event occurs and policymakers demand a policy response on behalf of the public so the event will never happen again. One need only look at all the named laws to see how this occurs (e.g., Kendra's Law³⁷, Megan's Law³⁸, Timothy's Law³⁹). In April 2007, a tragedy of wide impact occurred at Virginia Tech University when a shooting rampage on campus left thirty-three individuals dead, with many more physically and emotionally impacted.⁴⁰ The immediate impulse was two-fold: why are persons with serious mental disorders walking the streets, and why can they access guns? Going further, why can mentally healthy people not carry guns in more places?

Virginia, perhaps not unsurprisingly, used the emotion of the day and ensuing weeks and months to pass gun legislation.⁴¹ States and campuses around the country focused on their own gun control laws, appealing to fear by advocating that more guns be allowed on campuses⁴² (or not)—the same emotions driving opposite sides of the argument—or at the very least calling for more rigorous background checks of persons with mental illness.⁴³ Fear, it seems, is a very powerful emotion and can do funny things to how we see the evidence.

An interesting thing happened in Virginia however, giving a bit of hope to how fear might be channeled into enhanced dialogue and an attitude of thoughtful, multi-stakeholder-informed policy change. Virginia moved along the emotion continuum from the immediate fear response to that of a more therapeutic

³⁷ N.Y. MENTAL HYG. LAW § 9.60 (McKinney 2010).

³⁸ N.J. STAT. ANN. § 2C:7-1 to 7-23 (West, Westlaw through 2012 legislation); 42 PA. CONS. STAT. § 9791 (2010).

³⁹ N.Y. INS. LAW § 3231 (McKinney 2010).

⁴⁰ Christine Hauser & Anahad O'Connor, *Virginia Tech Shooting Leaves 33 Dead*, N.Y. TIMES, Apr. 16, 2007, <http://www.nytimes.com/2007/04/16/us/16cnd-shooting.html>.

⁴¹ Va. Exec. Order No. 50, Apr. 30, 2007, [http://www.lva.virginia.gov/public/EO/eo50\(2007\).pdf](http://www.lva.virginia.gov/public/EO/eo50(2007).pdf).

⁴² See generally Lisa Kocian, *Arming Police on Campus*, BAY LEDGER NEWS ZONE (Apr. 30, 2008), http://www.blz.com/news/2008/05/01/Arming_police_campus_5254.html; Brigid Schulte, *Students Aim for Gun Rights on Campus*, WASH. POST, Feb. 15, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/14/AR2009021401668.html>.

⁴³ Rich Daly, *People with Mental Illness Target of New Gun Law*, PSYCHIATRIC NEWS No., Feb. 2008, at 1; Michael Luo, *Mental Health and Guns: Do Background Checks Do Enough?*, N.Y. TIMES, Apr. 19, 2007, <http://www.nytimes.com/2007/04/19/us/19weapons.html>; Chuck Todd & Ali Weinberg, *Slipping Through the Cracks, One Background Check at a Time*, MSNBC.COM, Jan. 18, 2011, http://www.msnbc.msn.com/id/41131860/ns/politics-more_politics/t/slipping-through-cracks-one-background-check-time/; see JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH, STATES MAY ALTER POLICIES ON BACKGROUND CHECKS FOR GUN PURCHASES (2007), <http://bazelon.org.gravitatehosting.com/LinkClick.aspx?fileticket=iTPdjaurtqs%3d&tabid=250> (discussing concerns about the trend).

bent, looking at those who are falling through the cracks. Safety, in part, energized initial responses—e.g., legislation reforming civil commitment laws for persons with serious mental health disorders, altering the commitment standard from “imminent risk” to “substantial likelihood.”⁴⁴ However, after its first wave of policy responses, Virginia acted again in 2009, after dialogue through a statewide, court-led process which included a range of stakeholders. In amending its advance care planning statutes, Virginia lawmakers created a mechanism allowing persons with mental health disorders to plan, in advance and through dialogue with physicians and loved ones, what sort of mental health care they would or would not want in the event of a crisis, and even more important, how such crisis might be averted.⁴⁵ The evidence base is growing on the potential positive impact of psychiatric advance directives.⁴⁶ Thus, Virginia connected emotion to policy action in what appears to be a positive fashion. An important follow-up is the awarding of a grant to a leading member of the statewide commission to enhance implementation of the act’s provisions and to study their effectiveness.⁴⁷ The power of fear it seems can be channeled in interesting—and therapeutic—ways.

⁴⁴ VA. CODE ANN. § 37.2-817C (LEXIS through 2012 Legis. Sess.); BRUCE J. COHEN ET AL., UNDERSTANDING AND APPLYING VIRGINIA’S NEW STATUTORY CIVIL COMMITMENT CRITERIA, 1-4, 7-8 (2008), <http://www.dbhds.virginia.gov/OMH-MHReform/080603Criteria.pdf>; Aaron Levin, *Virginia’s Commitment Law Raises Many Questions*, 43 PSYCHIATRIC NEWS 21 (2008).

⁴⁵ VA. CODE ANN. § 54.1-2983 to 2996 (LEXIS through 2012 Legis. Sess.) (“Health Care Decisions Act”). The changes are discussed in Nathan A. Kottkamp et al., *Law Revised to Enhance Health Care Decision-Making*, VA. LAWYERS WEEKLY, June 2009, <http://www.vsb.org/site/members/vlw-advance-directives-article-june-2009/>.

⁴⁶ See Mimi M. Kim, et al., *Understanding the Personal and Clinical Utility of Psychiatric Advance Directives: A Qualitative Perspective*, 70 PSYCHIATRY 19 (2007); *Making the Most of Psychiatric Advance Directives*, 24 HARV. MENTAL HEALTH LETTER 1 (2007) (discussing benefits of PADs and how to make them more effective); A.M. Scheyett et al., *Psychiatric Advance Directives: A Tool for Consumer Empowerment and Recovery*, 31 PSYCH. REHABILITATION J. 70 (2007); Jeffrey W. Swanson et al., *Facilitated Psychiatric Advance Directives: A Randomized Trial of an Intervention to Foster Advance Treatment Planning Among Persons with Severe Mental Illness*, 163 AMER. J. PSYCH. 1943 (2006); Jeffrey W. Swanson et al., *Psychiatric Advance Directives and Reduction of Coercive Crisis Interventions*, 17 J. MENT. HEALTH 255 (2008); Marvin S. Swartz et al., *Psychiatric Advance Directives: Practical, Legal, and Ethical Issues*, 4 J. FORENSIC PSYCHOL. PRAC. 97, 99 (2004) (discussing the potential barriers to their use, how to address those barriers, and discussing issues to address for more effective use of PADs). See generally NAT’L RESOURCE CENTER ON PSYCHIATRIC ADVANCE DIRECTIVES, <http://www.nrc-pad.org/> (last visited Apr. 18, 2012).

⁴⁷ *Law School Receives Grant to Study Health Law Changes*, VA. LAW (Dec. 8, 2009), http://www.law.virginia.edu/html/news/2009_fall/health_grant.htm.

3. Emotion of a Public Health ‘Crisis’: New York State’s Vaccine Mandate

Another time when emotions come to the fore is when there are cries of an epidemic. Consider recent experiences with the H1N1 influenza and the range of regulatory responses—and use of media to trumpet those responses—to a pandemic that was seen as targeting younger populations and pregnant women.⁴⁸ Emotionalism here does not lessen the very real threat of pandemic influenza strains such as H1N1 or the need for sensible precautions building on years of public health evidence.⁴⁹ The concern, rather, is that emotional appeals lessen clarity around the public health impact and needed response. New York State’s (“NYS”) experience with a vaccine mandate for health care workers is an excellent case in point.

In August 2009, at the height of fears that a flu pandemic could overwhelm the health system, not to mention take many lives, the NYS Department of Health (“DOH”) passed an emergency regulation mandating that most health care workers and volunteers be vaccinated for seasonal and H1N1 influenza.⁵⁰ The *or else*, you can imagine, raised fear in affected health care workers’ minds. Would a nurse who did not want to get an H1N1 vaccine because of safety concerns⁵¹ lose her job if she declined the vaccination? This fear then turned to anger that the administration would rush through a regulation affecting individual liberty without public comment or traditional regulatory processes.⁵²

The NYS DOH responded to emotion with an appeal to ethics: “Knowing that our privileged access to the new vaccine is earned not by our personal risk factors but by the special trust society places in us, then how can we as health care workers maintain that our cooperation in protecting the most vulnerable

⁴⁸ *Doctors: Parents Should Heed Warnings on H1N1 and Children*, FOXNEWS.COM (Oct. 13, 2009), <http://www.foxnews.com/story/0,2933,564928,00.html>; Rita Rubin, *Pregnant Women Bare Arms for H1N1 Vaccine*, USA TODAY (Sept. 21, 2009), http://www.usatoday.com/news/health/2009-09-21-swine-h1n1-pregnant_N.htm; Tom Watkins, *Study: H1N1 Virus More Severely Affects Pregnant Women*, CNN HEALTH.COM (July 28, 2009), <http://www.cnn.com/2009/HEALTH/07/28/swine.flu.pregnant/index.html>.

⁴⁹ For example, the importance of vaccines has been extensively studied and promoted. See generally *Strategies for the ‘Decade of Vaccines’*, 30 HEALTH AFF., June 2011; *Basics and Common Questions: Why Immunize?*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vaccines/vac-gen/why.htm> (last visited Apr. 18, 2012).

⁵⁰ N.Y. COMP. CODES R. & REGS. tit. 10, § 66-3.2 (2009). For additional information on New York’s efforts and more generally, see KATHLEEN S. SWENDIMAN, CONG. RESEARCH SERV., RS21414, MANDATORY VACCINATIONS: PRECEDENT AND CURRENT LAWS (2011).

⁵¹ *GBS a Side Effect of H1N1 Vaccine?*, CBS NEWS (Nov. 21, 2009), <http://www.cbsnews.com/stories/2009/11/20/earlyshow/health/main5723397.shtml>.

⁵² Anemona Hartocollis & Sewell Chan, *Albany Judge Blocks Vaccination Rule*, N.Y. TIMES, Oct. 17, 2009, at A17, available at <http://www.nytimes.com/2009/10/17/nyregion/17vaccine.html>.

members of society is nevertheless optional?”⁵³ Not unsurprisingly, many healthcare workers had their own spin on ethics: a vision of individual liberty⁵⁴ that should not force them to be vaccinated with a rushed vaccine.⁵⁵ Too, where was the sense of solidarity, prominent in other countries, which would support healthcare workers with more safety procedures and training and take care of any injured workers?⁵⁶ Rather, it seemed professional obligations were called on without consideration of the consequences to healthcare workers or the obligations of the system in caring for affected workers. Further, the policymaking process itself—through rushed emergency regulation rather than public deliberation—left out key voices in the discussion, understandably upsetting to those most affected.

In this case, fear of a pandemic was matched by anger among healthcare workers over their treatment, the latter—perhaps as H1N1 fears quieted down as the fall of 2009 wore on—gaining particular traction in the media.⁵⁷ A powerful argument was made against a mandate and in favor of voluntary inoculation, powerful enough to have a State court temporarily suspend the regulation for full consideration of its merits.⁵⁸ Interestingly, a week later the government backed off of the mandate, suspending it due to H1N1 vaccine supply issues.⁵⁹

⁵³ Press Release from Richard F. Daines, N.Y. State Health Comm’r, to health care workers (Sept. 24, 2009), available at http://www.health.ny.gov/press/releases/2009/2009-09-24_health_care_worker_vaccine_daines_oped.htm (telling health care workers that mandatory flu-vaccine is in their best interest).

⁵⁴ *Dutchess County Nurse Sues to Block Mandatory Flu Vaccine*, SYRACUSE.COM (Oct. 10, 2009), http://www.syracuse.com/news/index.ssf/2009/10/dutchess_county_nurse_sues_to.html (quoting Barbara Crane, president of the National Federation of Nurses, “We’re against our civil liberties being stepped on”).

⁵⁵ Paul Harasim, *No Rush for H1N1 Vaccine*, LAS VEGAS REVIEW-JOURNAL (Oct. 13, 2009), <http://www.lvrj.com/news/no-rush-for-h1n1-vaccine-64067397.html>.

⁵⁶ See generally CANADIAN PROGRAM OF RES. ON ETHICS IN A PANDEMIC, <http://www.canprep.ca/> (last visited Apr. 18, 2012) (information on Canada’s effort around pandemic preparedness and ethics); *The New York State Mandate*, UPSTATE MED. UNIV. CENTER FOR BIOETHICS AND HUMANITIES: BIOETHICS IN BRIEF (Jan. 2010), http://www.upstate.edu/bioethics/bnb_1_10_web.pdf.

⁵⁷ Cara Matthews, *N.Y. Health Care Workers Protest Mandatory H1N1 Flu Shots*, USA TODAY (Sept. 29, 2009), http://www.usatoday.com/news/health/2009-09-29-swine-flu-mandatory_N.htm; *Health Workers Protest Flu Vaccine Mandate*, CBS NEWS (Oct. 4, 2009), <http://www.cbsnews.com/stories/2009/10/04/eveningnews/main5362636.shtml>.

⁵⁸ Anemona Hartocollis & Sewell Chan, *Albany Judge Blocks Vaccination Rule*, N.Y. TIMES, Oct. 17, 2009, at A17, available at <http://www.nytimes.com/2009/10/17/nyregion/17vaccine.html>.

⁵⁹ Press Release, Office of Governor David A. Paterson, Governor David A. Paterson Announces Suspension of Flu Shot Mandate for Health Care Employees Due to Shortage of Vaccine (Oct. 22, 2009); see also Letter from Richard F. Daines, N.Y. Comm’r of Health, to Adm’r, Suspension of Flu Vaccine Mandate for Health Care Workers, (August 2009), available at http://www.health.ny.gov/diseases/communicable/influenza/seasonal/providers/2009-10-23_suspension_of_mandatory_influenza_immunization.htm.

True rationale or not, it appeared that emotional response to a mandated action won the day. One might wonder what would have happened had evidence more clearly shown healthcare worker vaccination is effective⁶⁰ and/or if the H1N1 had truly reached crisis levels.⁶¹

4. Emotion of Spiraling Costs: Obesity Regulation by States

Finally, consider a different sort of public health emergency: what are we to do with the large number of overweight and obese children and adults in our country who strain our health care system in current and potentially dramatic future ways? Numerous reports offer a snapshot on the current situation: in 2006, almost 73% of U.S. adults were overweight or obese,⁶² and spending on adult obesity was \$1,429 more per person versus a normal weight individual (a 41.5% difference).⁶³ Given the myriad of obesity's health consequences, e.g., type 2 diabetes, hypertension, coronary artery disease, and certain cancers,⁶⁴ not surprisingly its growth has led to a growth in healthcare costs. As of 2008, obesity cost the United States as much as \$147 billion per year in health-related

⁶⁰ Akiko C. Kimura et al., *The Effectiveness of Vaccine Day and Educational Interventions on Influenza Vaccine Coverage Among Health Care Workers at Long-Term Care Facilities*, 97 AM. J. PUB. HEALTH 684, 689 (2007); James A. Wilde et al., *Effectiveness of Influenza Vaccine in Health Care Professionals: A Randomized Trial*, 281 JAMA 911-12 (1999).

⁶¹ For an interesting discussion of how data could help inform a less emotional process, see Steven Black et al., *Importance of Background Rates of Disease in Assessment of Vaccine Safety During Mass Immunization with Pandemic H1N1 Influenza Vaccines*, 374 LANCET 2115 (2009).

⁶² NAT'L CTR. FOR HEALTH STATISTICS, PREVALENCE OF OVERWEIGHT, OBESITY AND EXTREME OBESITY AMONG ADULTS: UNITED STATES, TRENDS 1976-80 THROUGH 2005-2006 (2008), http://www.cdc.gov/nchs/data/hestat/overweight/overweight_adult.pdf (sharing results from 2005-06 National Health and Nutrition Examination Survey (NHANES)); see Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999-2008*, 303(3) JAMA 235 (2010), <http://jama.ama-assn.org/content/303/3/235.full.pdf+html>; Cynthia L. Ogden et al., *Prevalence of Overweight and Obesity in the United States, 1999-2004*, 295 JAMA 1549, Table 4 (2006) (as of 2004, 71% of adults were overweight or obese, evidencing similar trend lines as the NHANES survey); *Defining Overweight and Obesity*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/obesity/defining.html> (last updated June 21, 2010) (a BMI of 25-29.9 is considered overweight; 30+ is considered obese).

⁶³ Eric A. Finkelstein et al., *Annual Spending Attributable to Obesity: Payer- And Service-Specific Estimates*, 28 HEALTH AFF. w822, w826 and Exhibit 1 (2009).

⁶⁴ NAT'L HEART LUNG & BLOOD INST., NAT'L INSTS. OF HEALTH, THE EVIDENCE REPORT: CLINICAL GUIDELINES ON THE IDENTIFICATION, EVALUATION, AND TREATMENT OF OVERWEIGHT AND OBESITY IN ADULTS NO. 98-4083 (1998) available at <http://www.ncbi.nlm.nih.gov/books/n/obesity/pdf/>; U.S. DEPT. OF HEALTH & HUMAN SVCS., PREVENTION MAKES COMMON "CENTS" (2003), <http://aspe.hhs.gov/health/prevention/prevention.pdf>.

spending, or 9.1% of healthcare expenditures,⁶⁵ with projected spending in excess of \$300 billion by 2018.⁶⁶

This has not gone unnoticed by employers: it has been estimated that obesity costs each large company in the United States (1000+ full-time employees) \$285,000/year (medical and absenteeism costs).⁶⁷ Another report tallies the costs to employers in the billions, in direct health insurance expenditures but also in indirect costs such as sick leave, absenteeism, and lower worker productivity.⁶⁸ With obesity's impact felt by state government coffers around the nation, many are looking for ways to limit this cost outlay. For many years, companies have incentivized covered individuals to lose weight through sponsored health club memberships and other weight loss programs.⁶⁹ States are increasingly entering the fray as well, considering sin taxes—taxes on certain foods or drinks, akin to taxes on tobacco and alcohol.⁷⁰ Anxiety over cost overruns in an already economically perilous time has some states looking for solutions beyond this approach.

⁶⁵ Finkelstein et al., *supra* note 63, at w828.

⁶⁶ Nanci Hellmich, *Rising Obesity Will Cost U.S. Health Care \$344 Billion a Year*, USA TODAY, Nov. 17, 2009, http://www.usatoday.com/news/health/weightloss/2009-11-17-future-obesity-costs_N.htm.

⁶⁷ Eric Finkelstein et al., *The Costs of Obesity Among Full-Time Employees*, 20 AM. J. HEALTH PROMOTION 45 (2005).

⁶⁸ U.S. DEPT. OF HEALTH & HUMAN SVCS., *supra* note 64; J.G. Trogdon et al., *Indirect Costs of Obesity: A Review of the Current Literature*, 9 OBESITY REV. 489 (2008).

⁶⁹ U.S. DEPT. OF HEALTH & HUMAN SVCS., *supra* note 64; Larry Hand, *Employer Health Incentives*, HARV. PUB. HEALTH REV., Winter 2009, <http://www.hsph.harvard.edu/news/hphr/winter-2009/winter09healthincentives.html>; Laura Linnan et al., *Results of the 2004 National Worksite Health Promotion Survey*, 98 AM. J. PUB. HEALTH 1503 (2008). For specific insurer programs, see, e.g., *Fit ChoicesSM by Medica*, MEDICA, <http://member.medica.com/C9/FitHealth/default.aspx> (last visited Apr. 18, 2012); *Rewards*, BLUE CAL., <https://www.blueshieldca.com/bsc/hlr/home.jhtml> (last visited Apr. 18, 2012). For a discussion of benefits of these programs at the work site, see Ron Z. Goetzel & Ronald J. Ozminkowski, *The Health and Costs Benefits of Work Site Health-Promotion Programs*, 29 ANN. REV. PUB. HEALTH 303 (2008); Alison Harding, *Company Wellness Programs Improve Health, Cut Costs*, CNN (Sept. 1, 2009), <http://www.cnn.com/2009/HEALTH/09/01/hcif.healthy.living/>. *But cf.* Eric A. Finkelstein et al., *A Longitudinal Study on the Relationship between Weight Loss, Medical Expenditures, and Absenteeism among Overweight Employees in the WAY to Health Study*, 51 J. OCCUP. & ENVTL. MED. 1367 (2009) (limited data to support quick return on investment from weight loss programs, but may be other benefits from programs). For a different corporate approach, see Stephanie Volkoff Green, *Whole Foods to Employees: Lose Weight*, MOTHER JONES (Jan. 28, 2010, 4:30 PM), <http://motherjones.com/blue-marble/2010/01/whole-foods-employees-lose-weight> (discussing how BMI level, among other things, may impact level of in-store discount employees receive).

⁷⁰ Jonathan Gruber, *Taxing Sin to Modify Behavior and Raise Revenue*, EXPERT VOICES, Apr. 2010, http://www.nihcm.org/pdf/ExpertVoices_Gruber_April2010.pdf; Barbara Kiviat, *Tax and Sip. Legislators are Floating Soda Taxes to Raise Revenue and Fight Obesity. But Most of the Time, Their Proposals Fall Flat*, TIME, July 12, 2010, at 51-52.

Recently, Alabama became the first state to impose a surcharge on overweight state workers covered by the state's insurance plan who did not lose weight, choosing a weight-based penalty over a more traditional approach of rewarding desired behavior change (e.g., paying gym membership costs).⁷¹ Starting January 1, 2010, overweight Alabama state workers had one year to try to lose weight or face an additional \$25/month surcharge.⁷² Building on its current approach with workers who smoke, Alabama hopes new surcharges will incentivize workers to join a weight loss program or take other steps to lose weight. The upshot: the state (hopefully) saves money, has less worker absenteeism, and has workers who (hopefully) lead healthier lives.

North Carolina became the second state to use a surcharge approach, tying financial incentives to its state insurance health plan through a Comprehensive Wellness Initiative.⁷³ Armed with evidence of high obesity rates in the state and the impact of such on overall healthcare costs,⁷⁴ effective July 1, 2011, the default plan for North Carolina state workers is a 70/30 plan; only those workers who do not smoke and have a BMI under 40 or participate in a weight management program (or have a medical exemption) may enter an 80/20 plan.⁷⁵ Interestingly, their dependents must also qualify.⁷⁶ As of July 1, 2012, the BMI cut-off will lower to 35. The federal government, too, has gotten in on the act, supporting the approach through the recent healthcare reform legislation.⁷⁷ This reform includes an exemption that would raise the cap (from 20% to 30%, and possibly 50%) allowing insurers more latitude to set differential rates for enrollees based on behaviors, e.g., maintaining a healthy weight.⁷⁸

⁷¹ ALA. CODE §§ 36-29-1 to -22 (Westlaw through 2012 legislation).

⁷² STATE OF ALA., WELLNESS PREMIUM DISCOUNT PROGRAM (2010), <http://www.alseib.org/PDF/SEHIP/SEHIPWellnessPremiumDiscount.pdf>; *see also*, ALA. CODE §§ 36-29-1 to -22 (Westlaw through 2012 legislation); *Alabama Workers to Pay for Extra Pounds*, MSNBC.COM (Aug. 21, 2008, 7:36 PM), <http://www.msnbc.msn.com/id/26337794/>.

⁷³ *See generally State Health Plan's Wellness Initiative*, MISSION HOSP., <http://www.missionhospitals.org/statehealthplanswellnessinitiative>. Note this initiative was subsequently repealed in 2011, shortly before the new BMI provisions were to become effective. 2011 N.C. Sess. Laws 2011-85 (S.B. 323).

⁷⁴ N.C. INST. OF MED., PREVENTION FOR THE HEALTH OF NORTH CAROLINA: PREVENTION ACTION PLAN (2009).

⁷⁵ 2009 N.C. Sess. Laws 2009-16 (S.B. 287).

⁷⁶ *Id.*

⁷⁷ Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010).

⁷⁸ *Id.* at § 2705. For a discussion of this issue, see Mercedes Varasteh Dordeski et al., *An Ounce of Prevention Saves a Pound of Cure: A Summary of PPACA's Wellness and Prevention Reforms*, 6 ABA HEALTH ESOURCE No. 9 (2010), http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/Dordeski.html.

While an evolving concept and approach, the evidence to support the use of financial incentives is mixed.⁷⁹ There is, however, a body of evidence showing negative effects of stigma on overweight individuals,⁸⁰ such negative consequences include psychological impacts, e.g., depression, lower self-esteem, and body dissatisfaction.⁸¹ Of note, chronic stress may in fact exacerbate negative physical effects.⁸²

With policy action here, we see two sides of the ‘emotion’ coin. On the one hand, there exists a socially constructed vision of obesity that places blame on individuals who are seen as lacking personal responsibility⁸³ versus obese individuals being seen as victims of a social and environmental context that impacts behavior, e.g., a lack of access to healthy foods. Attached to that vision are the emotions of disgust, pity, or anger: “Not only is weight stigma viewed as a beneficial incentive for weight loss, but it is also assumed that the condition of obesity is under personal control, implying that the social influence of weight stigma will be sufficient to produce change.”⁸⁴ And so the public at large seeks to use stigma and accompanying shame to motivate the desired response, where policy is a tool in this process.

On the other hand, the focus could be on the concerns of individuals affected by these policies, who may need to alter behaviors for health reasons but who may also face genetic and biological—as well as social and environmental—causes creating a much more complex picture than a single policy incentive could address.⁸⁵ In fact, studies show that most individuals lose no

⁷⁹ See Eric A. Finkelstein et al., *A Pilot Study Testing the Effect of Different Levels of Financial Incentives on Weight Loss Among Overweight Employees*, 49 J. OCCUP. ENVIRON. MED. 981 (2007) (small financial incentives may have some short-term benefits); Robert W. Jeffery et al., *Use of Personal Trainers and Financial Incentives to Increase Exercise in a Behavioral Weight-Loss Program*, 66 J. CONSULTING & CLIN. PSYCHOL. 777 (1998) (combining personal trainers and financial incentives has most benefit but did not improve long-term weight loss); Kevin G. Volpp et al., *Financial Incentive Based Approaches for Weight Loss: A Randomized Trial*, 300 JAMA 2631, 2636 (2008) (positive findings, but use of behavioral economics approach suggests that desired changes may be more difficult to maintain long-term, with a need for more relative cost-effectiveness data for a variety of weight loss approaches).

⁸⁰ Rebecca M. Puhl & Kelly D. Brownell, *Confronting and Coping with Weight Stigma: An Investigation of Overweight and Obese Adults*, 14 OBESITY 1803 (2006) [hereinafter Puhl 2006]; Rebecca M. Puhl & Chelsea A. Heuer, *The Stigma of Obesity: A Review and Update*, 17 OBESITY 941 (2009) [hereinafter Puhl 2009].

⁸¹ Puhl 2009, *supra* note 80, at 953-54. See also Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1023 (2010) (references omitted) [hereinafter Puhl 2010].

⁸² Puhl 2010, *supra* note 81, at 1023.

⁸³ *Id.* at 1024.

⁸⁴ *Id.* at 1020 (references omitted).

⁸⁵ *Id.* at 1024 (“[L]arger-scale efforts are needed. To address obesity commensurate to its impact, a coordinated and well-funded response is critical.”). Additionally, other authors have

more than 10% of body weight and that gaining back weight is a common phenomenon.⁸⁶ In this instance, there are similar emotions as among those challenging obesity—e.g., disgust, pity, and frustration—but now directed inward by targeted individuals. Ironically, but perhaps unsurprisingly, obese individuals faced with such difficult barriers,⁸⁷ marginalization,⁸⁸ and experiencing such natural emotional responses, react to policy responses that increase stigma in a way that may lead to more disordered eating.⁸⁹

Thus, utilizing emotions in this instance can have many unintended emotional consequences, potentially negating the policy's effectiveness. In public health policy, emotions and behavioral responses are often complex and there is difficulty with maintaining a desired state. The search for an individual cause and singular solution in these cases may fail to accomplish desired goals. Alternatively, these solutions may reach desired goals, but through a process that may cause alarming side effects, e.g., more stigma and depression. Considering this example and those that precede it—where emotion plays a variety of roles in policymaking—is there a way to channel emotions so that they are recognized, respected, and supported in therapeutic ways to enhance policy's effectiveness? This article suggests that TJ may play such a framing role.

IV. USING TJ TO FRAME EMOTION IN POLICYMAKING

A. Utilizing a TJ Framework (*Framing Questions*)

As noted earlier, TJ offers a new prism through which to view the law wherein we focus on the law's psychological impacts. In this fashion, we are encouraged to enhance therapeutic consequences and mitigate anti-therapeutic ones. This consequentialist vision, and psychological focus, suggest a potential prism through which to view the emotional side of health policymaking—a broader application of law with particular relevance for consideration of how

provided an interesting discussion of weight bias legislation. See Jennifer L. Pomeranz & Lawrence O. Gostin, *Improving Laws and Legal Authorities for Obesity Prevention and Control*, 37 J. L., MED., & ETHICS 52 (2009) (regarding how laws regulating obesity have positive and negative consequences); Jennifer L. Pomeranz et al., *Innovative Legal Approaches to Address Obesity*, 87 MILBANK Q. 185 (2009); Puhl 2009, *supra* note 80.

⁸⁶ Puhl 2010, *supra* note 81, at 1021. For a review of weight loss maintenance strategies, see Robert W. Jeffery et al., *Long-Term Maintenance of Weight Loss: Current Status*, 19 HEALTH PSYCHOL. 5 (2000).

⁸⁷ For an interesting review of barriers in health, employment, and education settings and within relationships, see Puhl 2009, *supra* note 80.

⁸⁸ Jennifer L. Pomeranz, *A Historical Analysis of Public Health Law, the Law, and Stigmatized Social Groups: The Need for Both Obesity and Weight Bias Legislation*, 16 OBESITY S93 (2008) (discussing a history of stigmatization of "socially undesirable groups" via law); Puhl 2010, *supra* note 81.

⁸⁹ Puhl 2009, *supra* note 80, at 955-56; Puhl 2006, *supra* note 80, at 1811.

emotions impact, and are impacted by, policy and policymaking. TJ, however, offers more than simply a new perspective. Its partnership with preventive lawyering offers a pragmatic and systematic approach to consideration of consequences proactively and prospectively, with wide stakeholder input and relationship-centered dialogue.⁹⁰

In the law context, we have a process for identifying psycholegal soft spots⁹¹ where legal actors and clients can consider potential psychological ramifications of legal decisions and seek to promote positive, or at least mitigate negative, effects. In moving beyond the individual legal context, how might this apply at a broader policy level? An earlier work suggests a potential framework,⁹² rather than a cookbook with specific rules. The proffered framework envisions a question-generating exercise through which to proactively identify “psycho-policy soft spots”⁹³ in an effort to, on balance, end up with a more therapeutic outcome than not. This earlier conceptual work contemplated the use of TJ to frame a more systematic and proactive consideration of the therapeutic (i.e., health) consequences of health policymaking and health policies (i.e., policy as an intervention⁹⁴). The discussion herein applies the framework (set of framing questions) to a more specific scenario: the role of emotion as having an influence on and as being impacted by policymaking, and emotion’s potential role as evidence. Table 1 lays out the general process envisioned, building on earlier work but reformatted to fit the specific purpose herein; emotion-focused areas are highlighted with italics.⁹⁵ This article’s case examples that dwell on the emotional aspects of policymaking are ripe for application of this framework.

⁹⁰ Stolle et al., *supra* note 11; *Making Law Therapeutic*, *supra* note 4.

⁹¹ David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in *PRACTICING THERAPEUTIC JURISPRUDENCE* 45, 48 (Dennis P. Stolle et al. eds., 2000).

⁹² Campbell, *supra* note 16, at 289-291 and fig. 1.

⁹³ *Id.* at 289.

⁹⁴ *Id.* at 281.

⁹⁵ Applied herein, I use a table format (similar to a rational or evidence-based model) for convenience; recognizing, however, the cyclical and complex nature of the context within which this TJ-informed vision exists.

TABLE 1
TJ FRAMING PROCESS: ADDRESSING THE ROLE OF EMOTIONS IN
HEALTH POLICYMAKING⁹⁶

TJ-Informed Question	<i>Emotional</i> Consequences Viewed through TJ Prism	Proceed On?
What is the problem?	Define problem. Consider emotional nature of such.	Yes
Is the problem influenced by (or an influence on) emotions <i>or</i> is it informed by emotions as <i>evidence</i> (focus on stakeholder emotional reactions)?	Stakeholder by stakeholder reactions. (*Note if use of evidence to sway opinion or if emotions = <i>evidence</i>)	Yes
Can policy address the problem in psychological health-promoting ways?	Consider if a problem to address by policy.	Yes
What are the therapeutic consequences of policy action?	Consider policy options through therapeutic lens.	Yes
Does policymaking or implementation create psycho-policy soft spots, e.g., what are potential anti-therapeutic consequences? [Gets to: Should policy address problem?]	Consider potential anti-therapeutic consequences of proposed options.	Yes
Do positives sufficiently outweigh negatives (or are so preferred) to justify policy?	Look to values (therapeutic) trying to promote.	Maybe
Can we adequately address anti-therapeutic consequences?	Consider how (<i>mitigate negative emotions</i>).	Maybe
Do other values trump therapeutic considerations (so proceed with preferred policy solution notwithstanding therapeutic consequences)?	Look to other critical values (e.g., justice, individual liberty, economics).	Maybe
Action: *Act with policy solution. *Act but tweak policy solution. *Don't act (yet).	State each.	Yes
Evaluation	*For whatever <i>action</i> (including no change at this time), evaluate consequences, including psychological ones (e.g., account for anxiety, fear, anger, confusion, satisfaction). See how to channel emotions therapeutically.	Cycle

B. TJ Framing of Case Examples

1. Malpractice Reform

Turning to the first example, recall the emotions raised by the malpractice reform debate in reaction to issues real and perceived. A great many emotions

⁹⁶ Adapted from Amy T. Campbell, *Therapeutic Jurisprudence: A Framework for Evidence-Informed Health Care Policymaking*, 33 INT'L J.L. & PSYCH. 281, fig. 1 (2010). Reproduced (with slight amendment) with permission of PERGAMON via Copyright Clearance Center (permission granted Nov. 2011).

are triggered, including: anger at intrusion in the medical sphere of authority and the physician-patient relationship, anger at mistakes, fear about mistakes, anxiety over malpractice suits, frustration with malpractice costs, and frustration with defensive medicine and spiraling costs. These are expected emotions, and at times their arousal is an intended consequence of policymaking. How might a TJ-influenced framework channel these emotions in therapeutic ways?⁹⁷

2. Virginia Tech Shootings

And what of policy-by-tragic-event? Emotions in Virginia understandably first centered on fear, i.e., fear of whom else with access to guns might lurk on school grounds. The fear turned to anger as more facts came to light about the number of contacts the shooter had with mental health authorities.⁹⁸ This fear and anger spread to campuses and communities nationwide and was only further inflamed by other events, such as in Binghamton, New York in April 2009;⁹⁹ at Ft. Hood, Texas in November 2009;¹⁰⁰ and in Tucson, Arizona in January 2011.¹⁰¹ Media accounts of violence by persons with mental health disorders further fanned the flames. In this environment, is it any wonder that policies often slant towards the coercive, punitive, or public safety expanding rather than slanting towards promotion of individual liberty or mental health? Less considered are the negative consequences of the resulting policies, and whether they best address the emotional needs of the targeted group and the public at large in an evidence-based way. Virginia's policy response followed a continuum of emotions, which could be considered through a TJ frame.¹⁰²

⁹⁷ See Appendix, Table A1 (providing a full framing process). Given the size of the tables and space limitations, the table accompanying this part, as well as the following two parts, may be found in the Appendix. Readers are encouraged to go there for a fuller picture of the process envisioned. Note, however, the tables provide a snapshot of the process for rendering transparent and addressing emotions in health policymaking; they are not intended to provide a full discussion of what such a process would entail.

⁹⁸ VIRGINIA TECH REVIEW PANEL, *MASS SHOOTINGS AT VIRGINIA TECH: ADDENDUM TO THE REPORT OF THE REVIEW PANEL*, 1-5 (2009), <http://www.governor.virginia.gov/tempcontent/techPanelReport-docs/FullReport.pdf>.

⁹⁹ Robert D. McFadden, *Upstate Gunman Kills 13 at Citizenship Class*, N.Y. TIMES, Apr. 4, 2009, at A1, available at <http://www.nytimes.com/2009/04/04/nyregion/04hostage.html>.

¹⁰⁰ *Gunman Kills 12, Wounds 31 at Fort Hood*, MSNBC.COM (Nov. 5, 2009, 10:48 PM), http://www.msnbc.msn.com/id/33678801/ns/us_news-crime_and_courts/.

¹⁰¹ Shailagh Murray & Sari Horwitz, *Rep. Gabrielle Giffords Shot in Tucson Rampage; Federal Judge Killed*, WASH. POST, Jan. 9, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010802422.html>. Of note, early discussion of this shooting focused on the negative emotional nature in our political debates. See Liz Halloran, *'Vitriol' Cited as Possible Factor in Arizona Tragedy*, NPR (Jan. 8, 2011), <http://www.npr.org/2011/01/10/132764367/congresswoman-shot-in-arizona>.

¹⁰² See Appendix, Table A2 (providing a full framing process).

3. New York State's Vaccine Mandate

Next, consider our public health system and emergency preparedness efforts. When we find ourselves a bit flat-footed in the area of preventive planning, it is not surprising that emotions may drive responses to a seeming pandemic. In NYS, this led to emergency regulation that raised fear, anxiety, and anger much more than it seemed to assure the public of ready availability to safe and adequately staffed health systems. If a TJ frame had been applied during the summer before the emergency regulation came to be, perhaps NYS leaders in partnership with key stakeholders could have fostered the more positive emotions (and results) envisioned.¹⁰³

4. Obesity Regulation by States

And finally, what about when states preemptively act to control costs via behavioral interventions with financial teeth? Do behavioral economics help generate effective regulation? Are the consequences of using behavioral techniques considered for their emotional side effects? It is too early to determine the impact in Alabama and North Carolina, but literature suggests that efforts increasing weight stigma—intentionally or not—may result in psychological and potentially physical harm to individuals. There is a fine line between encouraging healthy behaviors and penalizing individuals for being obese, especially when there may be inadequate resources for obese individuals to effectively change and sustain that change. So what might a policymaker in Alabama or North Carolina add to the evidence collection process in their respective evaluation processes of the policies' effects? Consider potential TJ framing questions.

¹⁰³ See Appendix, Table A3 (providing a full framing process).

TABLE 2
OBESITY INSURANCE PLAN SURCHARGES (“FAT TAX”) / TJ AND
EMOTIONS FRAMEWORK

TJ-Informed Question	<i>Emotional Consequences Viewed through TJ Prism</i>	Proceed On?
What is the problem?	<ul style="list-style-type: none"> *Health and financial costs of obesity -To patients, insurers, employers *Weight stigma, weight bias 	Yes
Is the problem influenced by (or an influence on) emotions or is it informed by emotions as <i>evidence</i> (focus on stakeholder emotional reactions)?	<p>Targeted individuals – Look for evidence of:</p> <ul style="list-style-type: none"> *Depression, lowered self-esteem; more disordered eating; *Anger at bias against them; anger at intrusion on individual liberties; *Anxiety over own health care issues; anxiety over paying more; and *Frustration at inability to maintain weight goals. <p>State Plans/Policymakers (“PM”) – Look for evidence of:</p> <ul style="list-style-type: none"> *Anxiety at rising health care costs from obese state workers. <p>Public – Look for evidence of:</p> <ul style="list-style-type: none"> *Anger at people who lack individual responsibility (weight bias); anger if sin taxes applied too broadly (e.g., soda); and *Fear of rising health care costs; fear that state plan surcharge approach will be adopted by all health insurance plans. 	Yes
Can policy address the problem in psychological health-promoting ways?	<ul style="list-style-type: none"> *Decrease anxiety over costs (including to health) via promotion of prevention programs. -Utilize behavioral economics to inform approach. *Decrease anger among public by doing something to address issue (and potentially lessen premiums for healthy workers). *Decrease anxiety of targeted individuals by encouraging weight loss program participation or other interventions. *Decrease targeted individual anxiety if ‘carrot’ over ‘stick’ approach, and evidence behind chosen approach (or evidence-gathering process). *Decrease targeted individual anger if include in decision-making process. 	Yes

What are the therapeutic consequences of policy action?	<p>1. Additional surcharge if no weight loss: Motivate positive behavioral change among targeted individuals to be healthier; more satisfaction among targeted individuals if lose weight/ enhance health; less anxiety among state plans/PM/public if steps to lower overall plan costs; less anger among public if see individuals take proactive steps to change.</p> <p>2. Kept in basic plan (higher cost-sharing) if no weight loss/ maintenance: See #1.</p> <p>3. No plan surcharge but other incentive for weight loss prevention (here, 'status quo'): Decrease targeted individual anxiety and anger because 'carrot' over 'stick'; less anger among targeted, already vulnerable populations (e.g., racial, ethnic minorities); less stigma; more satisfaction among all plan members if program incentives (e.g., gym membership fee reductions) widely available.</p>	Yes
Does policymaking or implementation create psychopolicy soft spots, e.g., what are potential anti-therapeutic consequences?	<p>May, e.g.:</p> <p>1. Additional surcharge: Anger (treated differentially when not entirely under individual control; limited data to show if works; stigmatizes); fear (of greater costs; of bias against; of health woes); depression, harm to self-esteem, trigger more disordered eating.</p> <p>2. Keep in basic plan: See #1.</p> <p>3. Status quo: Health costs to individuals; anxiety not lessened among public/PM if costs stay high or go up.</p>	Yes
Do positives sufficiently outweigh negatives (or are so preferred) to justify policy?	<p>Values-based decision, e.g., do we emphasize individual behaviors vs. societal issues; do we focus on financial over psychological costs?</p> <p>*How define <i>harm</i> and where focus efforts to do no harm? What is the harm in surcharge, on whom/how?</p>	Maybe
Can we adequately address anti-therapeutic consequences?	<p>1. If surcharge: Ensure that phased in and not focus so much on raw weight numbers, but rather on participation in efforts to lose weight; make incentive sufficient but not overly burdensome; track effectiveness (and psychological impacts); tie-in anti-stigma education (and potentially legislation).</p> <p>2. If keep in basic plan: See #1.</p> <p>3. If status quo: Track changes and effectiveness; tie-in anti-stigma education (and potentially legislation).</p>	Maybe
Do other values trump therapeutic considerations (so proceed with preferred policy solution notwithstanding therapeutic consequences)?	<p>E.g.,</p> <p>*Justice: Is our primary concern allocating limited resources most efficiently and targeting cost centers for change (but can we act in ways that do not unduly stigmatize)?</p> <p>*Justice: Is our primary concern not creating differential plans based on weight (discriminatory/bias) (but can we act in ways that help incentivize healthy behaviors)?</p> <p>*Public health concerns: Are we more concerned about long-term public health ramifications of overweight and obesity, justifying imposing certain costs now in effort to save costs later (but can we balance benefits and burdens of approach fairly)?</p> <p>*Financial concerns: Does economics trump other ethical concerns (but can we acknowledge in a meaningful way the emotions tied to economics)?</p>	Maybe

Action: *Act with policy solution. *Act but tweak policy solution. *Don't act (yet).	*Enact surcharge. *Enact surcharge coupled with sufficient access to healthy options and anti-stigma messaging (or with smaller pool to collect evidence on effects of policy). *Public deliberation first; insufficient evidence on therapeutic (and other) costs of surcharge approach at this time.	Yes
Evaluation	*For whatever <i>action</i> (including no change at this time), evaluate consequences, including psychological ones (e.g., account for anxiety, fear, anger, confusion, satisfaction). See how to channel therapeutically.	Cycle

C. *Summing Up the TJ Table Exercise*

The preceding case examples with accompanying tables illustrate how a TJ-informed framing and questioning process might work. Information contained therein is not meant to be exhaustive, but to provide a model for question-generating and evidence-gathering processes—an approach to better frame the role of emotion in policymaking and systematize consideration of emotional consequences. Ideally such a process would take place before policy development and during policy implementation, but it may also have value post-hoc for policy analysis. Key to this is brainstorming the pros and cons of potential emotional consequences triggered by various alternatives and collecting psychological data on chosen approaches. Only then will the true emotional toll of health policies be uncovered. Positive emotional outcomes are not the only values, but they are *a* value and one worth spotlighting.

V. CONCLUSION

A. *Lessons Learned—A New Vision*

So where does this leave us? It seems no matter how hard one tries to be rational or evidence-based in health policymaking, emotions come into play. This occurs during the policymaking and policy implementation processes. Too often, however, emotions are either ignored—especially when *counting* costs of policies—or are used to inflame the populace to spur change. The latter is not necessarily a bad thing; yet, such efforts should be made more transparent and measured for their positive and negative therapeutic consequences.

It would seem that TJ, as a framing construct, has a role to play. TJ is inherently focused on therapeutic consequences, especially psychological ones. It encourages legal actors to be mindful of the therapeutic effects of their actions and seeks to—on balance—promote therapeutic over anti-therapeutic ends. At the very least, in parlance familiar to the medical world, legal actors should seek to do no harm (or be clear in defining and mitigating harm).

This article would suggest that this approach has much to offer in an emotion-laden health policymaking endeavor. By using the TJ framework, and having policymakers and all key stakeholders ask the TJ-informed questions to build a TJ-informed evidence base, the role of emotion in the policymaking process can be clarified. The intent is not to develop a new vision for policymaking; rather, it is to reframe what is currently done and to place emphasis on therapeutic consequences and systematically investigate how emotions have an impact on, and are impacted by, the process—both positively and negatively.

B. Next Steps

What is needed now is a fleshing out of how the process would flow in real-time and a visualization of the TJ-framing table approach in a more iterative format. An investigation of international initiatives may assist in such efforts, as TJ-related efforts have blossomed internationally,¹⁰⁴ as have evidence-based policymaking approaches.¹⁰⁵ The tables suggest the sort of questions to ask to generate the necessary evidence. This should be discussed with policymakers to ensure its real-world application and then tested to begin the critical evidence-gathering process. In so doing, one should begin to see that emotions truly do ‘count’ and force policy actors to increase the transparency of potential emotional consequences, intentional or not.

A TJ framework for health policymaking recognizes that emotions are real and should be transparently acknowledged but also that appeals to emotion without substance or consideration of negative consequences threaten the *health* of our policies. As the evidence base is built, it would be interesting to study emotion’s impact on healthcare policymaking and how TJ-framing questions may reframe the process in emotional and other evidentiary (e.g., cost) terms. Ultimately, if we can channel emotions to more constructive ends by bringing them out into the open—if we can listen to emotional concerns and act on, to the extent possible, opportunities to lessen negative emotions—we may arrive at policy that achieves desired goals in a therapeutic, less politicized, and more unifying fashion.

¹⁰⁴ See INT’L NETWORK ON THERAPEUTIC JURISPRUDENCE, <http://www.law.arizona.edu/depts/upr-intj/> (last visited Apr. 18, 2012) (highlights international scope, including through a helpful bibliography).

¹⁰⁵ See generally sources cited *supra* note 20.

VI. APPENDIX

A. Table A1: Malpractice Reform / TJ and Emotions Framework

TJ-Informed Question	Emotional Consequences Viewed through TJ Prism	Proceed On?
What is the problem?	*Malpractice insurance costs (pushing some physicians (“drs”) from regions, specialties). *Defensive medicine and increased health care costs. *Patient (“pt”) injuries (mistakes, negligence).	Yes
Is the problem influenced by (or an influence on) emotions or is it informed by emotions as <i>evidence</i> (focus on stakeholder emotional reactions)?	Drs – Look for evidence of: *Anxiety from perceived threat of suit. *Behavior change because of fears. *Anger over intrusion in physician decision-making. Pt – Look for evidence of: *Fear of potential injury and harm; fear of limited access to drs. Pt/ Policymaker/Public – Look for evidence of: *Anxiety over rising health care costs.	Yes
Can policy address the problem in psychological health-promoting ways?	*Decrease (perception of) anxiety among drs over lawsuits. *Enhance dr-pt trust. *Confront emotions generated by cost (e.g., defensive medicine) concerns.	Yes
What are the therapeutic consequences of policy action?	1. Cap on awards: Decreased dr anxiety; greater ability to estimate costs (and control); fewer <i>unnecessary</i> lawsuits; less defensive medicine. 2. No cap: Ability of patients to get recompense they feel adequately meets needs. Pt satisfaction.	Yes
Does policymaking or implementation create psycho-policy soft spots, e.g., what are potential anti-therapeutic consequences?	May, e.g.: 1. Cap on awards: Fear (sufficient to cover pt costs from tragic outcomes?). 2. No cap: Anxiety (among drs); fear (among pts, at loss of specialists in some areas); frustration (continued defensive medicine/costs of).	Yes
Do positives sufficiently outweigh negatives (or are so preferred) to justify policy?	Values-based decision, e.g., what weight do we put on dr anxiety and anger vs. how pts feel about system? *How do we define ‘harm’ of current system and where can we focus efforts to ‘do no harm’?	Maybe
Can we adequately address anti-therapeutic consequences?	1. If cap: Cap but allow for process for additional compensation for severe harms. Develop better system to track reasons behind and costs of defensive medicine. 2. If no cap: Alter lawsuit incentive system to rationalize when suits are brought and how.	Maybe
Do other values trump therapeutic considerations (so proceed with preferred policy solution notwithstanding therapeutic consequences)?	E.g., *Economic costs related to caps or no caps. *Justice, e.g., prefer to keep burden with drs over <i>vulnerable</i> pts (but could still consider how to make less litigious; allow for more mistake disclosure and healing avoiding dr vs. pt).	Maybe

Action: *Act with policy solution. *Act but tweak policy solution. *Don't act (yet)	*Cap awards. *Cap with appeals process and better data collection. Or propose cap but then public deliberation process to refine. *Public deliberation first; insufficient evidence on costs of action at this time.	Yes
Evaluation	*For whatever <i>action</i> (including no change at this time), evaluate consequences, including psychological ones (e.g., account for anxiety, fear, anger, satisfaction). See how to channel emotions therapeutically.	Cycle

B. Table A2: Guns, Violence, and Mental Health / TJ and Emotions Framework

TJ-Informed Question	<i>Emotional Consequences Viewed through TJ Prism</i>	Proceed On?
What is the problem?	*Violence on campus (and communities). *Access to guns. *Inadequate care (control?) of persons with serious mental illness.	Yes
Is the problem influenced by (or influence on) emotions <i>or</i> is it informed by emotions as <i>evidence</i> (focus on stakeholder emotional reactions)?	Campus students, faculty, staff – Look for evidence of: *Fear of those with mental health (“MH”) issues. *Anger if known ‘person of interest’ on campus Person with serious mental illness (“PSMI”) – Look for evidence of: *Anxiety because may increase stigma on campuses (and perhaps not welcome?). *Anger at loss of own individual liberties (e.g., gun control, coercive commitment). Policymakers/Public – Look for evidence of: *How to protect public safety while being sensitive to individual rights and interests?	Yes
Can policy address the problem in psychological health-promoting ways?	*Decrease fear on campuses through more focus on safety and coercive measures. *Decrease anxiety of PSMI with better access to community resources.	Yes
What are the therapeutic consequences of policy action?	1. Gun control: Less anxiety because feel harder for persons with history of mental illness to get guns; feel more safe with armed campus security and/or if concealed weapons ok (for self). 2. Easier civil commitment: Less fear because feel easier to admit PSMI to MH facilities when concerns of violence; less anxiety among families because feel can get care needed for loved one. 3. MH advance care planning: Less anxiety among public and PSMI where enhanced community-based services head off crises; enhance PSMI sense of self-control if allowed to be part of advance care planning.	Yes

Does policymaking or implementation create psychopolicy soft spots, e.g., what are potential anti-therapeutic consequences?	May, e.g.: 1. Gun control: Anxiety (if more weapons on campus (e.g., concealed guns, armed security); anger (among PSMI for climate of fear directed at them). 2. Easier civil commitment: Anxiety (among PSMI because more stigma on campus, in communities); anger (among PSMI because perceived loss of liberties). 3. MH advance care planning: Frustration (if feel pendulum swing too far towards rights of PSMI); anger and fear (if feel PSMI decision-making seen as trumping doctor and family role in decision-making).	Yes
Do positives sufficiently outweigh negatives (or are so preferred) to justify policy?	Values-based decision, e.g., what weight do we put on public anxiety vs. fears and concerns of PSMI? *How do we define 'harm' in current climate and with proposed solutions, and where do we focus efforts to 'do no harm'?	Maybe
Can we adequately address anti-therapeutic consequences?	1. If gun control: Make it harder for PSMI and system involvement to have access to guns (but not just for having a diagnosis); control concealed weapons on campuses to limit fears of who has access and when. 2. If easier civil commitment: Alter civil commitment standards with education about how to prevent a crisis and tie in anti-stigma activities around MH issues. Include adequate appeals processes for PSMI voice. 3. If MH advance care planning: Enhance community services while also creating process for PSMI to decide in advance what sorts of treatment would want in future if decompensate; include process where can commit over objection (to lessen family and public anxiety).	Maybe
Do other values trump therapeutic considerations (so proceed with preferred policy solution notwithstanding therapeutic consequences)?	E.g., *Justice, e.g., prefer to look to individual needs and rights of PSMI (but could also use education and wider/deeper dialogue to enhance public understanding to mitigate their concerns).	Maybe
Action: *Act with policy solution. *Act but tweak policy solution. *Don't act (yet)	For MH advance care planning option – *Pass amendments to existing advance care planning law explicitly to address mental health advance planning. *Pass amendments, but also address civil commitment issues within same package of MH reforms to address crisis concerns should they arise (and unplanned for). *Public deliberation first; insufficient evidence on therapeutic (and other) costs of action at this time.	Yes
Evaluation	*For whatever <i>action</i> (including no change at this time), evaluate consequences, including psychological ones (e.g., account for anxiety, fear, anger, satisfaction). See how to channel emotions therapeutically.	Cycle

C. Table A3: NYS Influenza Vaccine Mandate / TJ and Emotions Framework

TJ-Informed Question	Emotional Consequences Viewed through TJ Prism	Proceed On?
What is the problem?	<p>*Potential overwhelming of health care system, including hospitals emergency rooms if H1N1 pandemic.</p> <p>*Potential health care worker (“HCW”) absenteeism.</p> <p>*Patient (“pt”) well-being.</p>	Yes
Is the problem influenced by (or an influence on) emotions or is it informed by emotions as <i>evidence</i> (focus on stakeholder emotional reactions)?	<p>HCW – Look for evidence of:</p> <p>*Fear of unsafe vaccine, of losing job if not comply.</p> <p>*Anger at intrusion on individual liberties.</p> <p>Health care institutions – Look for evidence of:</p> <p>*Confusion over what do if not comply.</p> <p>*Anxiety over flood of pts and potential HCW absenteeism.</p> <p>*Fear of union/HCW backlash; fear of pt lawsuits if sickened by staff.</p> <p>Pt/Public – Look for evidence of:</p> <p>*Fear of safety within hospital; fear of vaccine safety.</p> <p>*Anger if inadequate hospital resources to address flood of pts; anger if limited access to vaccine b/c supply used on HCWs.</p> <p>Policymaker – Look for evidence of:</p> <p>*How protect public safety while being sensitive to individual rights and interests?</p>	Yes
Can policy address the problem in psychological health-promoting ways?	<p>*Decrease fear among public with HCW mandate.</p> <p>*Decrease anger among HCWs if voluntary approach (carrots) over mandate (sticks).</p> <p>*Decrease anger with public process of decision-making.</p> <p>*Decrease fear with guarantees of support for any HCWs who are harmed.</p>	Yes
What are the therapeutic consequences of policy action?	<ol style="list-style-type: none"> 1. Mandate: Less anxiety among public because perceive less risk from HCWs; less anxiety among hospital admin of HCW absenteeism; more satisfaction among some HCWs who believe in vaccine. 2. No Mandate: Less fear over vaccine safety (because need not get); less anger because individual decision allowed; less anger among public if more available vaccine supply. 	Yes
Does policymaking or implementation create psycho-policy soft spots, e.g., what are potential anti-therapeutic consequences?	<p>May, e.g.:</p> <ol style="list-style-type: none"> 1. Mandate: Anger (take away individual liberties; mandate action without adequate attention to potential risks and how will support if harmed; mandate without public debate); fear (of vaccine safety; of losing job). Confusion (if truly are transmission risks). 2. No mandate: Fear (if HCWs not getting vaccine, is it not safe for me (pt)?; will HCW absenteeism negatively impact public health preparedness); anger (put HCW interests before pt best interests). 	Yes

Do positives sufficiently outweigh negatives (or are so preferred) to justify policy?	Values-based decision, e.g., what weight do we put on public anxiety and pt well-being versus concerns of HCWs? *How define 'harm' and where focus efforts to 'do no harm'? What is the harm in mandate—to whom/how?	Maybe
Can we adequately address anti-therapeutic consequences?	<ol style="list-style-type: none"> 1. If mandate: Ensure that HCWs will be supported in event of harm from vaccine; involve union leaders in discussions. 2. If no mandate: Focus on education of HCW and public about vaccine and continue safety testing and tracking to build evidence-base for future situations. 	Maybe
Do other values trump therapeutic considerations (so proceed with preferred policy solution notwithstanding therapeutic consequences)?	<p>E.g.,</p> <ul style="list-style-type: none"> *Professional autonomy, e.g., place rights of individuals not to receive vaccine above other interests in certain cases (but could also collaborate with HCW unions to promote vaccination). *Public health preparedness, e.g., prefer coercive power of state in pandemic over individual rights argument (but could also consider a public vs. emergency regulation process). *Employer right to impose certain mandates on HCWs, e.g., influenza just another required shot for protection of pt health like any other (but could also use education to explain vaccine safety and mitigate fears). 	Maybe
<p>Action:</p> <ul style="list-style-type: none"> *Act with policy solution. *Act but tweak policy solution. *Don't act (yet). 	<ul style="list-style-type: none"> *Mandate. *Mandate, but set aside resources for HCW support if harmed; more education. *Public deliberation first; insufficient evidence on therapeutic (and other) costs of mandatory action at this time. 	Yes
Evaluation	*For whatever <i>action</i> (including no change at this time), evaluate consequences, including psychological ones (e.g., account for anxiety, fear, anger, satisfaction). See how to channel emotions therapeutically.	Cycle

MULTISENSORY LAW AND THERAPEUTIC JURISPRUDENCE: HOW
FAMILY MEDIATORS CAN BETTER COMMUNICATE WITH THEIR CLIENTS

Colette R. Brunshawig*

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I. BACKGROUND

A. *Family Mediation as a Practical Application of Expert-Lay Communication*

I would like to introduce family mediation as a practical application of expert-lay communication. What does this mean? According to Rainer Bromme and Riklef Rambow, experts are “persons . . . who need to cope with complex professional tasks [Personen . . . die komplexe berufliche Anforderungen bewältigen].”¹ They therefore need to gain “both theoretical (science-based and taught) knowledge and practical experience [sowohl theoretisches (wissenschaftsbasiertes und akademisch vermitteltes) Wissen als auch praktische Erfahrungen].”²

Since mediators are lawyers, psychologists, or members of other professional groups—for example, social workers—the aforementioned features apply to them. Laypersons, however, “may be persons affected by the kind of problems with which experts are concerned, but they lack both the training and the institutional framework conditions to solve such problems on their own, nor do they aspire to do so [Personen, die zwar von den Problemen betroffen sind, für die die Experten zuständig sind, denen aber die Ausbildung und die institutionellen Rahmenbedingungen für eine eigenständige Problemlösung fehlen, und die diese auch gar nicht anstreben].”³

As a rule, the parties to a family mediation are laypersons with respect to the legal and psychological aspects of their conflict issues. Normally, laypersons do not want to become experts. Instead, they would like to be understood by the expert as well as understand the expert.⁴ This also holds true for the parties to a family mediation.

According to Bromme and Rambow, the purpose of expert-lay communication is to enable laypersons to make informed decisions.⁵ I shall explore this fundamental point in further detail below.

¹ Rainer Bromme & Riklef Rambow, *Experten-Laien-Kommunikation als Gegenstand der Expertiseforschung*, in *PSYCHOLOGIE* 2000 541, 542 (Rainer K. Silbereisen & Matthias Reitzle eds., 2001) (citations omitted), http://www.psyl.uni-muenster.de/imperia/md/content/psychologie_institut_3/ae_bromme/pdf/veroeffentlichung/2001/93broram01exp-lai.pdf.

² *Id.*

³ *Id.* This article is also addressed to the German-speaking legal community. For this reason, I have included the original German version of the text. Since the German-speaking legal community especially might be unfamiliar with multisensory law and therapeutic jurisprudence, I have taken the liberty of extensively quoting the relevant literature.

⁴ *Id.*

⁵ *See id.* at 542, 544.

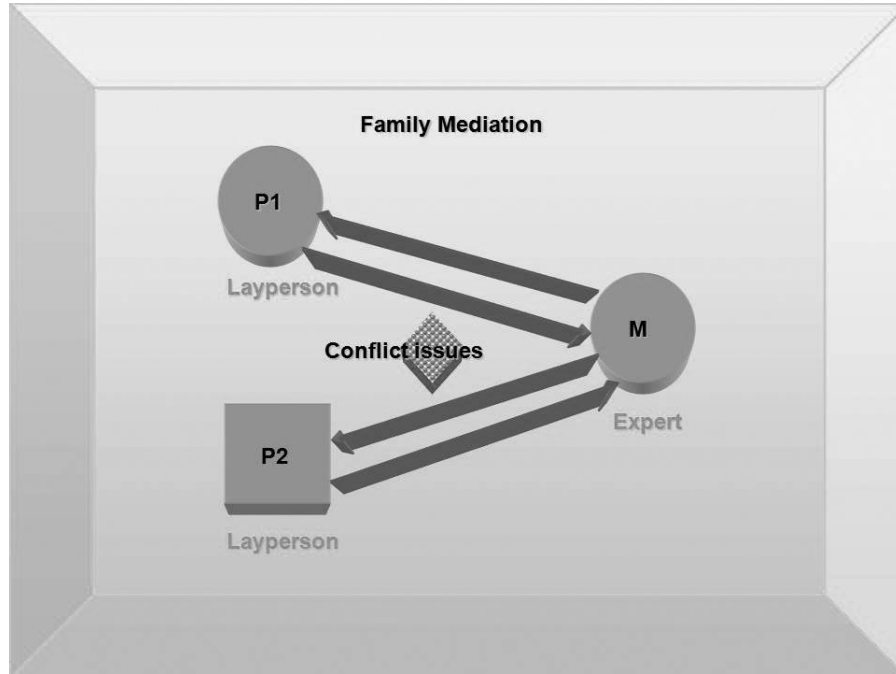


Fig. 1. Family Mediation as Expert-Lay Communication

B. Family Mediation: An Interdisciplinary Field

Family mediation is an interdisciplinary field that draws particularly on insights from law and psychology. Family mediation adopts knowledge from family law, the law of civil procedure, therapeutic jurisprudence, and multisensory law.⁶ Both therapeutic jurisprudence and multisensory law, or at least some branches of the latter, play an important role in Anglo-American jurisdictions. The insights from psychology stem, for instance, from the psychology of emotion, communication, motivation, and problem solving.⁷

⁶ See LEO MONTADA & ELISABETH KALS, *MEDIATION: EIN LEHRBUCH AUF PSYCHOLOGISCHER GRUNDLAGE* 4-5, 38-43 (2d ed. 2007) (discussing family mediation as an interdisciplinary field). I will explain ‘therapeutic jurisprudence’ and ‘multisensory law’ later. *See infra* Part IV.

⁷ See Stephen J. Anderer & David J. Glass, *A Therapeutic Jurisprudence and Preventive Law Approach to Family Law*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 207, 207-14 (Dennis P. Stolle et al. eds., 2000).

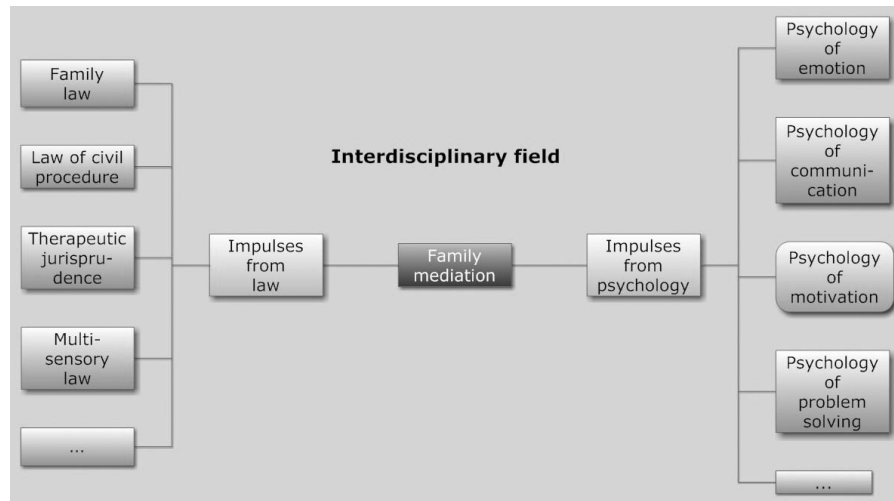


Fig. 2. Family Mediation: An Interdisciplinary Field

II. FAMILY MEDIATION: KNOWLEDGE GAPS, DIFFICULTIES, AND A CONTRADICTION

A. Family Mediation as Expert-Lay Communication: Knowledge Gaps and Difficulties

Regarding expert-lay communication, there are knowledge gaps in mediation and thus also in family mediation.

Particularly in legal linguistics and legal theory, there is a debate on whether the law is comprehensible to laypersons and, indeed, to legal experts.⁸

⁸ E.g., Gérard Cornu, *Compréhension ou incompréhension du droit? Sombre verdict*, in VOL. 1, DIE SPRACHE DES RECHTS 63, 63-68 (Kent D. Lerch ed., 2004), http://edoc.bbaw.de/volltexte/2011/1858/pdf/063_Cornu_Comprehension_ou_incomprehension_du_droit.pdf; see also Spiros Simitis, *Verständlichkeit des Rechts: Illusion oder konkrete Utopie? Notizen zu einer end-, aber nicht sinnlosen Kontroverse*, in VOL. 1, DIE SPRACHE DES RECHTS 393, 393-403 (Kent D. Lerch ed., 2004), http://edoc.bbaw.de/volltexte/2011/1879/pdf/393_Simitis_Verstaendlichkeit_des_Rechts.pdf (discussing the comprehensibility of economic regulations). See generally Ursula Christmann, *Verstehens- und Verständlichkeitsmessung: Methodische Ansätze in der Anwendungsforschung*, in VOL. 1, DIE SPRACHE DES RECHTS 33, 33-62 (Kent D. Lerch ed., 2004), http://edoc.bbaw.de/volltexte/2011/1857/pdf/033_Christmann_Verstehens_und_Verstaendlichkeitsmessung.pdf (discussing the research on the factors associated with the intelligibility of a text); Silvia Hansen-Schirra & Stella Neumann, *Linguistische Verständlichmachung in der Juristischen Realität*, in VOL. 1, DIE SPRACHE DES RECHTS 167, 167-84 (Kent D. Lerch ed., 2004), http://edoc.bbaw.de/volltexte/2011/1864/pdf/167_Hansen_Schirra_und_Neumann_Linguistische_Verst.pdf (reviewing the comprehensibility of laws from a linguistic perspective); Kent D. Lerch, *Recht verstehen: Eine Vorbemerkung*, in VOL. 1, DIE SPRACHE DES RECHTS XV (Kent D. Lerch ed., 2004), http://edoc.bbaw.de/volltexte/2011/1890/pdf/XV_Lerch_Recht_verstehen._Eine_

This discourse on the comprehensibility of law also concerns questions about expert-lay communication in the legal context. As I shall argue below, multisensory law and therapeutic jurisprudence are concerned with the comprehensibility of the law and endeavor to establish its comprehensibility by means other than the written word alone.

Expert-lay communication is also the subject of research in educational psychology and cognitive psychology. As mentioned, one case in point is Bromme and Rambow's paper *Expert-Lay Communication as a Subject Matter of Expertise Research [Experten-Laien-Kommunikation als Gegenstand der Expertenforschung]*.⁹

Put simply, the difficulty with expert-lay communication usually consists of the gaps in both knowledge and experience between experts and laypersons. The latter as a rule lack professional knowledge and experience or, if such knowledge and experience exist, usually it is either incomplete or the understanding thereof is incorrect.¹⁰ This can imply that laypersons have difficulties in understanding expert statements.¹¹

In family mediation the difficulty with expert-lay communication stems from the mediator's expert knowledge—mainly in law, psychology, and mediation. Normally, the lay parties to a mediation only possess limited knowledge, or, if they have more extensive knowledge, such knowledge is sometimes inaccurate. Such a constellation might entail that the parties either do not fully understand or else misunderstand their mediator's statements. For instance, parties might be unable to clearly distinguish between postnuptial alimony (German: *nachehelicher Unterhalt*), the old-age provision (German: *Altersvorsorge*), and the division or allocation of matrimonial property (German: *güterrechtliche Auseinandersetzung*).¹² In the course of the mediation process, they might constantly confuse these issues.

Potentially, these communication difficulties cause emotional stress or intensify the stress that the matrimonial conflict has already caused.¹³ Further,

Vorbemerkung.pdf (discussing the historical advances in reliability and comprehensibility of the law).

⁹ See generally Rainer Bromme & Riklef Rambow, *Experten-Laien-Kommunikation als Gegenstand der Expertiseforschung*, in *PSYCHOLOGIE 2000 supra* note 1, at 541-50 (discussing expert-lay communication).

¹⁰ See *id.* at 543-44.

¹¹ See, e.g., Stephan Breidenbach, *Vermittlung von Recht im Konflikt*, in *GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM INTERNATIONALEN VERFAHRENSRECHT UND ZUR SCHIEDSGERICHTSBARKEIT* 83, 83-84 (Brigit Bachmann et al. eds., 2005), <http://www.knowledgetools.de/download/Vermittlung-von-Recht-im-Konflikt.pdf>.

¹² As I am a Swiss lawyer, I provide German translations of these technical terms for the benefit of German-speaking family mediators and lawyers.

¹³ See, e.g., Pauline H. Tesler, *Collaborative Law: What It Is and Why Lawyers Need to Know About It*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION*

such confusion might even trigger physical stress, such as severe headaches, raised blood pressure, chest pains, and so forth.¹⁴

B. Comprehension Difficulties and the Principle of Knowledgeability

The parties' potential or existing difficulties in understanding legal or legally relevant contents contradict one of the five principles of mediation:¹⁵ the knowledgeability of the parties, which states that they possess appropriate information, which thereby allows them to make informed decisions.¹⁶

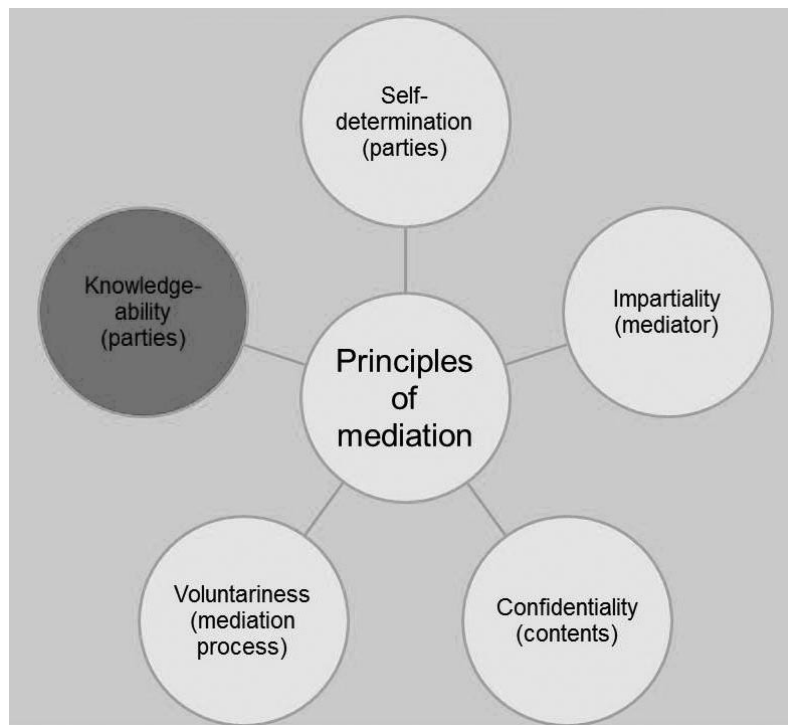


Fig. 3. The Five Principles of Mediation

187, 190 & nn.10-11 (Dennis P. Stolle et al. eds., 2000) (discussing the stress caused by a divorce).

¹⁴ See, e.g., GEORGE S. EVERLY, JR. & JEFFREY M. LATING, *A CLINICAL GUIDE TO THE TREATMENT OF THE HUMAN STRESS RESPONSE* 7-14, 63-77 (2d ed. 2002) (regarding the stress response, stressors, and physiological effects of stress).

¹⁵ See CAROLINE BONO-HÖRLER, *FAMILIENMEDIATION IM BEREICHE VON EHETRENNUNG UND EHESCHIEDUNG* 64-71 (1999) (discussing the five principles of mediation); see also ISAAK MEIER, *SCHWEIZERISCHES ZIVILPROZESSRECHT: EINE KRITISCHE DARSTELLUNG AUS DER SICHT VON PRAXIS UND LEHRE* 585-86 (2010) (discussing the five principles of mediation).

¹⁶ See BONO-HÖRLER, *supra* note 15, at 67.

With respect to this principle, Isaak Meier observes:

In mediation, the parties self-responsibly decide how to resolve their conflict—the mediator only supports them in this process. Only an informed person can make self-determined decisions. The principle of informed consent or knowledgeability ensures that the parties only waive legal positions in favor of a self-responsible agreement, provided that they know the legal and factual situation. [In der Mediation entscheiden die Parteien selbstverantwortlich über die Konfliktlösung—der Mediator unterstützt sie darin bloss. Selbstbestimmte Entscheidungen können aber nur von einer informierten Person getroffen werden. Das Prinzip der Informiertheit garantiert, dass die Parteien nur in Kenntnis der Rechts und Tatsachenlage auf Rechtspositionen zugunsten einer eigenverantwortlichen Vereinbarung verzichten].¹⁷

III. KEY QUESTIONS

Given the problems I have just raised, several key questions need to be addressed: (1) How could multisensory law and therapeutic jurisprudence contribute to filling the knowledge gaps between experts and laypersons in family mediation, as well as those gaps concerning communication in family mediation itself?; (2) Which solutions do multisensory law and therapeutic jurisprudence offer to reducing the parties' comprehension difficulties and emotional stress?; and (3) Do these approaches contribute to safeguarding the principle of informed consent or knowledgeability? This article focuses primarily on the second question.

The second question involves various subquestions: (1) Which multisensory law and therapeutic jurisprudence approaches to reducing client comprehension difficulties and emotional stress are already used in family mediation?; and (2) Which approaches could family mediation adopt from multisensory law and therapeutic jurisprudence to reduce such comprehension difficulties and emotional stress? To answer these questions, two related preliminary questions need to be considered: what are multisensory law and therapeutic jurisprudence?

¹⁷ MEIER, *supra* note 15, at 586.

IV. MULTISENSORY LAW AND THERAPEUTIC JURISPRUDENCE:
A ROUGH OUTLINE

A. *Multisensory Law*

I have already clarified the term ‘multisensory law’ in my article *Multisensory Law and Legal Informatics*.¹⁸ However, this article might not be readily accessible to an international audience. The online version was published in a German-language, password-protected environment. In what follows, I shall therefore reiterate the main points of my original argument, as well as my comments on the subject matter and cognitive interest of multisensory law. For the sake of readability, I shall not indicate every quote but, instead, I refer the reader to my article.

1. Multisensory Law: A Preliminary Definition

Understanding the term *multisensory law* requires clarifying the adjective *multisensory*, the noun *law*, and how these terms are related.¹⁹

For the purpose of this article, *law* is understood in a broad sense. It encompasses the sources of law in a wide sense (including verbal sources of law in a strict sense, state legal practice in a strict sense, customary law, and jurisprudence—that is, legal research and education), legal practice (comprising state legal practice in a wide sense and private legal practice), the contents of justice, legal and legally relevant facts, the contents of popular legal culture, and further legally relevant contents.²⁰

As regards the adjective *multisensory*, the psychology of perception, learning psychology, and the neurosciences distinguish between *stimuli* and their perception. Thus, multisensory implies that human beings are affected by two or more different external or internal stimuli. These stimuli are different because they address various human sensory systems, such as the visual sensory system, the auditory sensory system, or indeed both, and so forth. Moreover, these stimuli coincide in space and time. Regarding the effect of these stimuli on human perception, two or more perceptive systems are constantly and simultaneously active.²¹

¹⁸ Colette R. Brunschwig, *Multisensory Law and Legal Informatics: A Comparison on How These Legal Disciplines Relate to Visual Law*, in STRUKTURIERUNG DER JURISTISCHEN SEMANTIK 573, 581 (Anton Geist et al. eds., 2011), <http://www.rwi.uzh.ch/oe/zrf/abtrv/brunschwig/BrunschwigCRMultisensoryLawandLegalInformatics.pdf>.

¹⁹ *Id.* at 581.

²⁰ *Id.* at 590-91.

²¹ See *id.* at 581-83; RAINER GUSKI, WAHRNEHMUNG: EINE EINFÜHRUNG IN DIE PSYCHOLOGIE DER MENSCHLICHEN INFORMATIONSAUFNAHME 173-76 (2d rev. ed. 2000); Tommy Raij & Veikko Jousmäki, *MEG Studies of Cross-Modal Integration and Plasticity*, in THE HANDBOOK OF MUL-

Multisensory stimuli also occur in the context of family mediation—for example, a discussion between a mediator and his or her clients. In this case, for all actors the stimuli are at least audiovisual, if not also tactile-kinesthetic—that is, stimuli involving touch and movement. Sender and addressees can hear, see, and perhaps also feel such stimuli; moreover, these coincide in space and time. If two or more sensorily different stimuli are at work, then the actors' or parties' various sensory perception systems are involved. This also applies to the actors—the parties and the mediator—in family mediation.

The adjective *multisensory* modifies the noun *law*. Multisensory tells us what kind of law is at stake—namely, a law that is *multi*-sensory with all its implications.

2. Multisensory Law: Subject Matter and Cognitive Interest

What is the subject matter of multisensory law? Put simply, this emerging legal discipline focuses on the sensory phenomena of the law, be they visual (unisensory), audiovisual, or tactile-kinesthetic (multisensory). More specifically, multisensory law mainly deals with the law as a uni- and multisensory phenomenon within and outside the legal context.²² I shall explain the relevance of this point to family mediation below.²³

It is helpful to formulate the cognitive interest of multisensory law in terms of various key questions. Lionel Bently, for instance, asks: “How does law sense? . . . How does law constitute our notions of the senses? How does law control or regulate our senses? How does law use our senses? Which senses does law use?”²⁴

Against this background, what about the relationship between multisensory law and family mediation? Considering this relationship involves focusing on the sensory phenomena in this special area and asking how family mediators and the parties concerned use their senses, or could use, them for effective communication, that is, to achieve mutual comprehension and reduce stress. Following Bently's cue, we thus need to ask how does family mediation *sense* or rather how could it *sense*?

TISENSORY PROCESSES 515, 515 (Gemma A. Calvert et al. eds., 2004); Bernd Weidenmann, *Multicodierung und Multimodalität im Lernprozess*, in INFORMATION UND LERNEN MIT MULTIMEDIA UND INTERNET 45, 47 (Ludwig J. Issing & Paul Klimsa eds., 3d rev. ed. 2002).

²² Brunshwig, *supra* note 18, at 592-99.

²³ See discussion *infra* Part VI.B.2.

²⁴ Lionel Bently, *Introduction to LAW AND THE SENSES: SENSATIONAL JURISPRUDENCE* 1, 2 (Lionel Bently & Leo Flynn eds., 1996) (citations omitted).

B. *Therapeutic Jurisprudence*

1. Therapeutic Jurisprudence: A Preliminary Definition

Understanding the term therapeutic jurisprudence requires clarifying the adjective *therapeutic*, the noun *jurisprudence*, and how these terms are related.

According to Merriam-Webster's Online Dictionary of American English, "jurisprudence" means "the science or philosophy of law," "a system or body of law," and "the course of court decisions."²⁵ As far as I know, neither Bruce Winick nor David Wexler, the two co-founders of therapeutic jurisprudence, explicitly circumscribe the term jurisprudence. Instead, their notion of its subject matter appears to be broad, involving all the different components of law.²⁶

Merriam-Webster's Online Dictionary gives the following definitions of the adjective *therapeutic*: "relating to the treatment of disease or disorders by remedial agents or methods" or "providing or assisting in a cure."²⁷ Further, the dictionary entry mentions the following synonyms: "curative," "healing," and "restorative."²⁸ Among other terms, Winick uses the noun "psychological health."²⁹ He also uses "psychological health" and "healing and wellness."³⁰ Wexler talks about "psychological well-being."³¹ From these terms I infer that the adjective *therapeutic* can, among other meanings, be understood as causing or promoting healing, psychological health, or psychological well-being. I would even go as far as to talk about *therapeutic* as promoting cognitive, emotional, and physical well-being.³²

²⁵ *Jurisprudence*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/jurisprudence> (last visited Apr. 19, 2012).

²⁶ 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, 19 (1997); David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45, 45-47 (Dennis P. Stolle et al. eds., 2000); David B. Wexler, *TJ and Criminal Law Practice*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 3, 3-10 (David B. Wexler ed., 2008) [hereinafter *TJ and Criminal Law Practice*]; Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL 341, 341-42 (Marjorie A. Silver ed., 2007); Bruce J. Winick, *Therapeutic Jurisprudence: Enhancing the Relationship Between Law and Psychology*, in LAW AND PSYCHOLOGY 30, 32-36 (Current Legal Issues Vol. 9, Belinda Brooks-Gordon & Michael Freeman eds., 2006) [hereinafter *Therapeutic Jurisprudence*]; *infra* notes 29-31 and accompanying text.

²⁷ *Therapeutic*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/therapeutic> (last visited Apr. 19, 2012).

²⁸ *Id.*

²⁹ *Therapeutic Jurisprudence*, *supra* note 26, at 33.

³⁰ *Id.*

³¹ *TJ and Criminal Law Practice*, *supra* note 26, at 3.

³² MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE 22, 31-32 (2009).

The adjective *therapeutic* modifies the noun *jurisprudence*. Thus, therapeutic tells us what kind of jurisprudence or law is at stake—namely, a jurisprudence or law that is therapeutic with all its implications.

2. Therapeutic Jurisprudence: Subject Matter and Cognitive Interest

What is the subject matter of therapeutic jurisprudence? In answering this question, Winick also comments on the aims of therapeutic jurisprudence:

Therapeutic jurisprudence is an interdisciplinary approach to legal scholarship and law reform that sees law itself as a therapeutic agent. The basic insight of therapeutic jurisprudence is that legal rules, legal practices, and the way legal actors (such as judges, lawyers, governmental officials, police officers, and expert witnesses testifying in court) play their roles impose consequences on the mental health and emotional wellbeing of those affected. Therapeutic jurisprudence calls for the study of these consequences with the tools of behavioural sciences. The aim is to better understand law and how it applies, and reshape it to minimize its anti-therapeutic effects and maximize its therapeutic potential. Therapeutic jurisprudence is interdisciplinary in that it brings insights from psychology and the social sciences to bear on legal questions, and it is empirical in that it calls for the testing of hypotheses concerning how the law functions and can be improved.³³

With respect to the cognitive interest of therapeutic jurisprudence, one of its key questions—which I am deducing from the subject matter of therapeutic jurisprudence—is how cognitive, emotional, and physical well-being can or could be promoted in the legal and legally relevant context.

What about therapeutic jurisprudence and family mediation? Relating these two fields would imply that family mediation approaches the law as a *therapeutic agent*. Such a view would consider the therapeutic or antitherapeutic effects of the law. This, I hasten to add, is by no means a majority view. Furthermore, family mediation would maximize the therapeutic potential of the law and minimize its antitherapeutic potential. Thus, one of the key questions of family mediation would be how to promote the cognitive, emotional, and physical well-being of both the parties and the mediator.

So far, I have roughly outlined multisensory law and therapeutic jurisprudence. In what follows, I shall focus on how multisensory law and therapeutic jurisprudence might help reduce the parties' comprehension difficulties and

³³ *Therapeutic Jurisprudence*, *supra* note 26, at 32 (emphasis removed).

their emotional stress in family mediation. In doing so, I need to distinguish between approaches already applied in family mediation and approaches that are or would be new to family mediation and that could be adopted there. In considering approaches already applied in family mediation, I would like to raise your awareness of such approaches. Should you already be a practicing mediator or intend to become one, I encourage you to use these approaches both consciously and critically.

V. COMMON MULTISENSORY LAW AND THERAPEUTIC JURISPRUDENCE
APPROACHES TO FAMILY MEDIATION

A. *Common Multisensory Law Approaches to Family Mediation*

Multisensory law has various branches: those most important to family mediation include visual law, audiovisual law, and tactile-kinesthetic law.³⁴ These branches matter because they help us explore and better conceptualize the visual, audiovisual, and tactile-kinesthetic phenomena occurring in family mediation.

1. Legal Visualizations in Family Mediation

Visual law primarily refers to the law as a visual phenomenon within and outside the legal context. Such phenomena also occur in family mediation. As a rule, family mediation takes place in the legal context. Since the visual phenomena in family mediation convey legal or legally relevant contents, I term them *legal visualizations*. Two principal kinds of legal visualizations occur in family mediation: material and immaterial (mental) legal visualizations.

a. *Examples of material legal visualizations*

Material legal visualizations cover legal, psychological, and mediation-specific issues. Psychological and mediation-specific issues are legally relevant because they often tend to have an impact on the legal solution envisaged by the parties. Legal visualizations with legal contents can be further subcategorized according to the respective branches of law: family law, the law of civil procedure, mediation law, and so forth.

For instance, information graphics visually representing the ordinary marital property regime (German: ordentlicher Güterstand) are legal visualizations with legal contents. In Switzerland, the sharing of the property acquired during marriage (German: Errungenschaftsbeteiligung) constitutes this marital prop-

³⁴ See Brunshwig, *supra* note 18, at 641.

erty regime.³⁵ A Swiss text book on family law provides an information graphic visually representing the sharing of the property acquired during marriage.³⁶ *Do You Know the Law? [Kennst du das Recht?]*, a visual law book for children and adolescents, contains a legal visualization that both illustrates and explains how a patchwork family came into being.³⁷ Should a conflict arise between the former wife and the remarried former husband, a family mediator could show this legal visualization to the children from the father's first and second marriages, since they might be affected by the conflict between their biological parents.

Legal visualizations can also include psychological contents; Guy Bodenmann has developed a verbo-visual model based on stress theory to explain the possible causes of divorce.³⁸

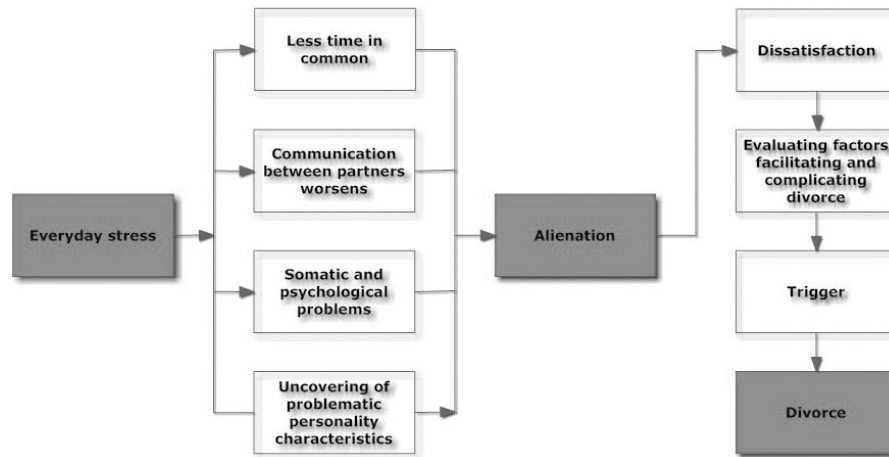


Fig. 4. Divorce Model from Stress Theory

Family mediators could use this legal visualization to explain which factors have potentially contributed to the existing conflict and therefore to the possibly imminent divorce. Recently, the Sidney Mediation Partnership published

³⁵ SCHWEIZERISCHES ZIVILGESETZBYCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] SR 210, art. 196 (Switz.), available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>; see THOMAS SUTTER-SOMM & FELIX KOBEL, FAMILIENRECHT 70, 70 nn.304-95, 70 n.431 (2009) (regarding the sharing of the property acquired during marriage).

³⁶ See SUTTER-SOMM & KOBEL, *supra* note 35, at, 70 n.304 (regarding legal visualization).

³⁷ See CAROLINE WALSER KESSEL, KENNST DU DAS RECHT? EIN SACHBUCH FÜR KINDER UND JUGENDLICHE MIT ILLUSTRATIONEN UND FALLBEISPIELEN 224 (2011).

³⁸ See GUY BODENMANN, VERHALTENSTHERAPIE MIT PAAREN 36 Fig. 9 (2002).

two self-help books for children on separation and divorce.³⁹ These narrative books also contain legal visualizations that deal with the psycho-legal issues involved.⁴⁰ Should the clients talk about the causes of their children's visiting difficulties, the family mediator could show them a picture representing the "emotional bridge."⁴¹ With respect to this "bridge," Joachim Schreiner observes:

The expression "**emotional bridge**" symbolizes the **parental relationship** (before and after the separation) from the mother's, the father's, and the child's perspective. The emotional bridge virtually constitutes a synthesis of these three different perspectives. To cross the emotional bridge means walking from the mother to the father and backwards on visiting days.

The following remarks are oriented toward the metaphor of a **suspension bridge that needs to be crossed** (spanning two mountains on which two cottages in which the parents live are represented).

. . . The requirements for successful contact with the other parent (symbolized by the child crossing the bridge) can be described as follows:

- The stronger and securer the bridge, the easier it becomes for the child to cross (moving from one parent to the other on visiting days).
- The more stable and quieter the bridge, the more easily the child can develop and take its own position and cross the bridge calmly (attenuation of loyalty conflicts; development of autonomy).

[Der Ausdruck „**emotionale Brücke**“ steht sinnbildlich für die **elterliche Beziehung** (vor und nach der Trennung) aus der Sicht von Mutter, Vater und Kind. Die emotionale Brücke ist quasi eine Synthese aus diesen drei verschiedenen Blickwinkeln. Die emotionale Brücke überqueren heisst, an den Besuchstagen von der Mutter zum Vater und umgekehrt zu gehen.

³⁹ *Sidney Mediation Publications*, SIDNEY MEDIATION PARTNERSHIP, <http://www.sydneymediation.com.au/books-sydney-mediation.php> (last visited Apr. 19, 2012).

⁴⁰ *See id.*

⁴¹ *See* Joachim Schreiner, *Anhang Ausgewählte psychologische Aspekte im Zusammenhang mit Trennung und Scheidung*, in VOL. 2, SCHEIDUNG 782, 855 n.215 (Ingeborg Schwenzer ed., 2d ed. 2010).

Die folgenden Ausführungen orientieren sich an der Metapher einer zu **überquerenden Hängebrücke** (zwischen zwei Bergen, auf denen zwei Hütten abgebildet sind, in denen die Eltern wohnen).

. . . Bedingungen für erfolgreiche Kontakte zum anderen Elternteil (in der Symbolik die Überquerung der Brücke) können wie folgt umschrieben werden:

- Je stärker und sicherer die Brücke, desto leichter fällt dem Kind deren Überquerung (Wechsel von einem Elternteil zum anderen an den Besuchstagen).
- Je stabiler und ruhiger die Brücke, desto eher kann das Kind eine eigene Position entwickeln und einnehmen und in Ruhe die Brücke überqueren (Milderung von Loyalitätskonflikten; Autonomieentwicklung).⁴²

In my research, I have found legal visualizations of mediation specific contents, such as visually designed forms.⁴³ Gary Friedman and Jack Himmelstein have designed legal visualizations to illustrate and explain how a family mediator could proceed to better understand the parties and to facilitate mutual understanding.⁴⁴ Moreover, I have also found a visualization comparing mediation with arbitration.⁴⁵

b. Examples of mental legal visualizations

Probably, the mental legal visualizations used by family mediation could also be divided into subcategories, but since I have not found many such visualizations, I dispense with categorization. Instead, I would like to consider three examples of such visualizations: ideas of justice, verbal images, and the miracle question.

On ideas of justice, Leo Montada and Elisabeth Kals note:

Our sense of justice is based on our persuasions about justice. They are not congruent with legal rights. This can be illustrated by divorce conflicts. In legally dealing with divorce conflicts, basically only claims to assets, maintenance, and benefits are relevant. Only these are justiciable. To a large

⁴² *Id.* at 854-56, 854 nn.215-16 (citations omitted).

⁴³ See JUTTA HOHMANN & DORIS MORAWE, PRAXIS DER FAMILIENMEDIATION: TYPISCHE PROBLEME MIT FALLBEISPIELEN UND FORMULAREN BEI TRENNUNG UND SCHEIDUNG 233-45 (2001).

⁴⁴ GARY J. FRIEDMAN & JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 108-13, 108 & figs. 6.3-7 (2009).

⁴⁵ See ESTHER HAAS & TONI WIRZ, MEDIATION: KONFLIKTE LÖSEN IM DIALOG 55 (3d rev. ed. 2011).

extent, 'verified jurisdiction' largely schematizes the claims that can be asserted. In many cases, such ruling schemata do not do justice to the sense of justice of the parties and their points of view. The psychological situation of many divorce conflicts is much more complicated. What has to be analyzed?

Previous relations of exchange. Psychologically, the parties make up the balance of their previous relations of exchange. They base their claims on these subjective balances. Whether such claims are made explicit, is another question. These claims are assessed by the counterparty. To be able to adequately accomplish this in mediation, one must consider the psychology of justice in close relationships, because presumably a close personal relationship existed prior to separation and divorce.

[Rechtsgefühle basieren auf Gerechtigkeitsüberzeugungen. Sie sind nicht mit Rechtsansprüchen deckungsgleich. Dies lässt sich an Scheidungskonflikten illustrieren. In der rechtlichen Behandlung von Scheidungskonflikten sind im Wesentlichen nur Vermögens-, Unterhalts- und Versorgungsansprüche relevant. Nur diese sind justiziabel. Was an Ansprüchen geltend gemacht werden kann, ist in ‚gesicherter Rechtssprechung‘ weitgehend schematisiert. Diese juristischen Urteilsschemata werden den Rechtsgefühlen der Parteien und ihren Sichtweisen in vielen Fällen nicht gerecht. Die psychologische Situation vieler Scheidungskonflikte ist viel komplizierter. Was muss analysiert werden?

Bisherige Austauschbeziehungen. Psychologisch werden von den Parteien die bisherigen Austauschbeziehungen zwischen den Parteien bilanziert. Auf der Basis dieser subjektiven Bilanzen werden Forderungen gestellt. Ob sie explizit erhoben werden, ist eine andere Frage. Erhobene Forderungen werden von der Gegenpartei bewertet. Um dies in der Mediation angemessen leisten zu können, muss man sich mit der Psychologie der Gerechtigkeit in nahen Beziehungen befassen, denn vor der Trennung und Scheidung hat wohl meist einmal eine nahe Beziehung bestanden.]⁴⁶

⁴⁶ MONTADA & KALS, *supra* note 6, at 131 (translation by Dr. Mark Kyburz).

Family mediators also use mental images or rather mental legal visualizations evoked by verbal images. For instance, Jutta Hohmann and Doris Morawe recommend such visualizations:

Metaphors constitute an instrument of indirect communication, and their purpose is to trigger search processes for solving the conflict within the conflict couples. They allow pictorial understanding and provide orientation through “going on the balcony” and affording a distanced view on their own story.

A metaphor is about transferring a situation to an image or a figurative locution. Metaphors are instruments of analog communication and serve to convey a message to the addressee. The mediator tells the parties a story, a fairy tale, a simile, or an anecdote depicting the essential elements of the couple’s conflict situation. In doing so, the mediator either makes up such an account or takes one from literature. However, he or she can also use images and metaphors contributed to the mediation process by the parties.

The persons and events occurring in the metaphor should correspond to the persons and situation of the conflict couple. . . . The conscious use of metaphors or figurative language helps relax the parties and releases their creativity and problem-solving energies.

[Metaphern sind ein Instrument indirekter Kommunikation und haben die Aufgabe, Suchprozesse zur Konfliktlösung in den Konfliktpaaren auszulösen. Sie ermöglichen bildhaftes Verstehen und verschaffen Orientierung durch den „Gang auf den Balkon“ und den distanzierten Blick auf die eigene Geschichte.

Bei einer Metapher handelt es sich um die Übertragung eines Sachverhaltes in ein Bild oder eine bildliche Redewendung. Metaphern sind Instrumente analoger Kommunikation und dienen dazu, dem Adressaten eine Botschaft zu übermitteln. Der Mediator erzählt den Medianten eine Geschichte, ein Märchen, ein Gleichnis oder eine Anekdote, die die wesentlichen Elemente der Konfliktsituation des Paares abbildet. Hierbei kann es sich um eine Geschichte handeln, die sich der Mediator ausdenkt oder der Literatur entnimmt. Er kann aber auch die Bilder und Metaphern

nutzen, die die Medianten selbst in den Mediationsprozess einbringen.

Personen und Ereignisse in der Metapher sollten den Personen und der Situation des Konfliktpaares entsprechen. . . . Bewusster Einsatz von Metaphern entkrampft und setzt bei den Medianten Kreativität und Lösungsenergie frei.]⁴⁷

Some family mediators also ask the parties the *miracle question*. On this kind of question, Peter Liatowitsch observes:

A classic element of systemic therapy comes about in the following way: “Imagine you go to bed tonight, . . . and sleep And while you are sleeping, a miracle happens, and the problem you described to me has disappeared. How would you (more systemically speaking, your wife, your supervisor, your friends, etc.) notice or realize this?” Now this cast one’s counterpart into a mental state into which he or she is thrown after the solution (in which he or she had almost stopped believing, which is why a miracle is necessary!) has been found. This “simulates” the sense of well-being and opens up new resources, which in turn facilitates the envisioning of solutions that make possible such a desirable change.

[Ein Klassiker aus der systemischen Therapie kommt etwa in der folgenden Art daher: „Stellen Sie sich vor, Sie gehen heute abend [sic], . . . zu Bett und schlafen Und während Sie schlafen geschieht ein Wunder und das Problem, das Sie mir schilderten, ist verschwunden. Woran würden Sie (systemischer noch: Ihre Frau, Ihr Chef, Ihre Freunde etc.) das merken?“ Hier wird das Gegenüber in denjenigen Zustand versetzt, in welchem es sich nach Eintritt der Lösung (an die es selbst fast nicht mehr glaubt, deshalb ist das Wunder nötig!) versetzt. Das Gefühl des Wohlbefindens, das Öffnen neuer Ressourcen, all das wird „simuliert“ und dadurch der Blick auf Lösungen, die eine solche erstrebenswerte Veränderung möglich machen, erleichtert] ⁴⁸

⁴⁷ HOHMANN & MORAWE, *supra* note 43, at 200 (citations omitted); *see also* GUNTER SCHLICKUM & EVA WEILER, *PRAXISBUCH MEDIATION: FALLDOKUMENTATIONEN UND METHODIK ZUR KONFLIKTLÖSUNG* 37-38 (1st ed. 2008).

⁴⁸ Peter Liatowitsch, *Anhang Mediation*, in VOL. 2, *SCHIEDUNG* 719, 761 n.91 (Ingeborg Schwenzer ed., 2d ed. 2010) (citations omitted).

I would add that the sense of well-being is not only simulated but also *stimulated*. Thus, mediators could suitably employ legal visualizations when asking parties about their visions and utopian dreams.⁴⁹

c. Comment

While preparing this article, I limited myself to consulting merely a few relevant publications. I would, however, like to comment on the visualizations that caught my attention.

Apparently, there are not many legal visualizations with legal contents—and ones with psychological and mediation-specific contents are even more scarce. As far as I can see, these visualizations ordinarily address experts, but rarely the parties themselves—despite Stephan Breidenbach's appeal for using visualizations in expert-lay communication, particularly in mediation.⁵⁰ As a non-mediator, I would ask whether and, if applicable, which legal visualizations family mediators actually use or rather would use with lay parties so that they better understand the legal, psychological, and mediation-specific contents involved, and as a result experience less emotional and/or physical stress.

It would be important for mediators to account for the legal visualizations they use. This would help them keep distinct the subject-specific areas of a case at hand. The legal visualizations discussed here might provide initial orientation.

That aside, there might exist legal visualizations in family mediation to which all three or at least two content-specific criteria apply. Such a legal visualization could be one with legal and mediation-specific contents or a legal visualization depicting legal, psychological, and mediation-specific contents. Such mixed legal visualizations bear the risk of being overloaded with information, which might overwhelm the parties and therefore adversely affect their well-being.

Other criteria for categorizing legal visualizations in family mediation might include their target audience and functions.

2. Legal Audiovisualizations in Family Mediation

a. Examples of legal audiovisualizations in family mediation

We can tentatively subdivide the legal audiovisualizations occurring in family mediation similarly to legal visualizations, according to their legal, psychological, and mediation-specific contents—except that to my knowledge there are no immaterial or mental legal audiovisualizations. For example, *Fam-*

⁴⁹ *See id.*

⁵⁰ *See* Breidenbach, *supra* note 11.

ily Law Disk 2: *Preparing Your Client for a Court-Ordered Custody Mediation* seems to be a DVD whose contents are predominantly legal.⁵¹

One example of a legal audiovisualization with psychological contents is *Don't Divorce the Children*, a film about the emotional effects of separation and divorce on children.⁵² In this film, children tell their stories about the effects of their parents' divorce on them.⁵³ According to Florentine Films Sherman Pictures, the film's producers, "this film has become mandatory viewing in court-ordered divorce workshops in a dozen states."⁵⁴ However, legal and mediation-specific topics are covered only marginally.

Family Mediation [Familienmediation] is a two-part training video devoted mainly to mediation-specific contents.⁵⁵ On the basis of a concrete divorce case, the first part demonstrates how a typical family mediation proceeds.⁵⁶ With the aid of this case, Lis Ripke, a family lawyer and family mediation expert, explains and comments on the five phases of mediation.⁵⁷ The second part of the video provides relevant background information: the earlier impulses for developing the family mediation procedure, statements of the founding fathers of divorce mediation in the United States, post-mediation experiences of divorced couples, and so forth.⁵⁸

Electronic family mediation, or e-family mediation, also produces legal audiovisualizations. Such mediation is undertaken in the form of online-video conferences.⁵⁹ Given the context from which these kind of audiovisualizations emerge, they might cover legal, psychological, and mediation-specific contents.

b. Comment

I would like to comment on the aforementioned legal audiovisualizations and on other legal audiovisualizations in family mediation. Given the growing significance of the new media in the legal context, it is difficult to assess how

⁵¹ See DVD: Family Law Disk 2: Preparing Your Client for a Court-Ordered Custody Mediation or Evaluation (Diana Mercer 2009) (on file with author).

⁵² *Don't Divorce the Children*, FLORENTINE FILMS, <http://www.florentinefilms.com/sherman/films/dont-divorce-the-children> (last visited Apr. 19, 2012); DON'T DIVORCE THE CHILDREN (Filmworks 1990). See generally JENNIFER M. LEWIS & WILLIAM A. H. SAMMONS, DON'T DIVORCE YOUR CHILDREN: CHILDREN AND THEIR PARENTS TALK ABOUT DIVORCE (1999) (discussing both legal and psychological topics).

⁵³ *Don't Divorce the Children*, *supra* note 52; DON'T DIVORCE THE CHILDREN, *supra* note 52.

⁵⁴ *Don't Divorce the Children*, *supra* note 52; DON'T DIVORCE THE CHILDREN, *supra* note 52.

⁵⁵ Videotape: Trainingsvideo Familienmediation (Verlag C.H. Beck 1999) (on file with author).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See, e.g., ETHAN M. KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 135-62 (2001).

many such visualizations exist. In the Karlsruhe Virtual Catalogue,⁶⁰ I ran searches using the keywords ‘family mediation’ and ‘DVD’ or ‘video.’ It is not useful at this juncture to discuss the hits in any detail. Instead, I encourage readers to conduct the searches themselves. Using the same keywords to search Amazon⁶¹ and YouTube,⁶² I found many more results.

Given the vast amount of legal audiovisualizations available online, it is not possible to watch them all. Hence, I cannot conclusively determine whether these audiovisual legal phenomena lend themselves well to content-based categorization (legal, psychological, mediation-specific, or mixed). Other subdivision criteria include the *target audiences* of such legal audiovisualizations: laypersons—conflict parties or potential conflict parties of a family mediation—and experts—practicing or future mediators. A second type of subdivision would be the *media* used for disseminating legal audiovisualizations: video, DVD, the Internet. A third type divides them by their *functions*: information, persuasion, instruction, and so forth.

To date, scholars have neither critically analyzed nor evaluated such legal audiovisualizations. Such analysis or evaluation could be undertaken, for example, to assess whether such films render legal, psychological, and mediation-specific topics more intelligible, and thereby contribute to reducing the emotional stress of the parties. More specifically, we might ask what role the visual, audio, or sound elements of such films play in reaching those goals.

As e-mediation is still a rather new phenomenon, I do not know whether e-family mediation using video conferences is much practiced. If it is, then we need to consider whether such a virtual form of family mediation meets the standards of therapeutic jurisprudence. In other words, does it or would it help promote both the parties’ and the mediator’s well-being or is it at risk of producing antitherapeutic effects?⁶³ Peter Adler claims that further research needs to be conducted on the emotional, cognitive, and physical impact of the different sensory modalities in e-mediation, such as seeing, hearing, smelling, and so forth.⁶⁴

⁶⁰ See *Karlsruhe Virtual Catalog*, KARLSRUHER INSTITUT FÜR TECHNOLOGIE, <http://www.ubka.uni-karlsruhe.de/kvk.html> (last updated Feb. 4, 2012).

⁶¹ AMAZON, <http://www.amazon.com> (last visited Apr. 19, 2012).

⁶² YOUTUBE, <http://youtube.com> (last visited Apr. 19, 2012).

⁶³ See, e.g., Peter Adler, *eMediation—Können wir die MediatorIn einsparen?*, in WIRTSCHAFTSMEDIATION ZWISCHEN THEORIE UND PRAXIS 21, 22 (Schriften zur Rechtspolitik Vol. 24, Michael Gruber et al. eds., 2005), <http://www.peteradler.at/ueberpa/docs/AdlerSalzburg2005.pdf>.

⁶⁴ See *id.* at 25, 28.

3. Legal Tactile-Kinesthetics in Family Mediation

a. Examples of legal tactile-kinesthetics in family mediation

Tactile-kinesthetics are an aspect of family mediation literature that adopts a psychological perspective. Commentators here consider the non- and paraverbal aspects of communication in the family mediation context. Thus, Montada and Kals observe: “Profound analysis is called for in almost all cases. Besides, verbal communication, it is necessary to give particularly close attention to nonverbal communication (facial expression, gesture, physical appearance, but also proxemics such as behaviour in space, and so forth) and paraverbal communication (for instance, pitch, volume, speaking rate, pauses). [In fast allen Fällen ist eine Tiefenanalyse des Geschehens notwendig. Dazu ist es notwendig, neben der verbalen Kommunikation vor allem die nonverbale Kommunikation (Mimik, Gestik, körperliches Erscheinungsbild, aber auch Proxemik als Verhalten im Raum etc.) und paraverbale Kommunikation (z.B. Tonhöhe, Lautstärke, Sprechgeschwindigkeit, Pausensetzung) zu beachten].”⁶⁵

The authors become even more specific:

Establishing rapport means that the communication partners (for example, the party to the conflict and the mediator) establish “good contact.” This can occur verbally, non-, and paraverbally. . . . Establishing rapport non- and paraverbally is also called “pacing.” This involves mirroring one’s counterpart’s posture. One tunes into the breathing rhythm, speaking rate, pitch, and so forth of one’s opposite number

[Die Aufnahme von Rapport bedeutet, dass die Kommunikationspartner (z.B. Konfliktpartei und Mediator) miteinander einen „guten Kontakt“ herstellen. Dies kann auf verbaler, non- und paraverbaler Ebene geschehen. . . . Eine Rapportaufnahme) [sic] auf non- und paraverbaler Ebene wird auch „Pacing“ [sic] genannt (Gleichschritt herstellen). Dabei wird beispielsweise die körperliche Haltung des anderen gespiegelt. Man stellt sich auf den Atemrhythmus, die Sprechgeschwindigkeit, die Tonhöhe etc. des anderen ein]⁶⁶

Accordingly, the mediator can invite the parties to role play a scenario. Here, Montada and Kals note: “Role play can afford insight into one’s own communication, and escalation patterns respectively. During role playing, the

⁶⁵ MONTADA & KALS, *supra* note 6, at 197-98.

⁶⁶ *Id.* at 210 (citations omitted).

conflict parties first take their own position and then their conflict partner's [Einsicht in die eigenen Kommunikations- bzw. Eskalationsmuster kann durch ein Rollenspiel vermittelt werden, bei dem die Konfliktparteien zunächst ihre eigene Position und anschliessend die Position des jeweiligen Konfliktpartners vertreten]."⁶⁷

Furthermore: "[M]ediation work corresponds to the image of a Russian doll (babushka). Here, smaller babushkas are placed inside another or others: basically, the entire mediation process corresponds . . . to this scheme of analysis and solution. All important problems are analyzed following the same basic structure. [[E]ntspricht die Mediationsarbeit dem Bild einer russischen Puppe (Babuschka), bei der in einer grossen Puppenhülle kleinere, aber formidentische Puppen geschachtelt sind: Der Gesamtprozess der Mediationsarbeit entspricht—mit kleineren Abweichungen und Ergänzungen—im Wesentlichen auch diesem Analyse- und Lösungsschema. Nach dem gleichen Grundschema werden zudem alle wichtigen Probleme analysiert.]"⁶⁸ To explain their work, mediators can place the babushka in the hands of the parties so that they experience his or her content in a tactile-kinesthetic way.

b. Comment

To my knowledge, only a few legal tactile-kinesthetics exist in family mediation, which does not, however, rule out the existence of other such phenomena. Given the small amount of data, I dispense with categorization. Crucially, we should note that such non- and paraverbal phenomena also occur in family mediation.

B. Common Therapeutic Jurisprudence Approaches to Family Mediation

I would like to give two examples of common therapeutic jurisprudence approaches to family mediation. Since both have been widely discussed in the relevant therapeutic jurisprudence literature, there is no need for further comment here.

1. Considering Emotions

In mediation and particularly in family mediation, great importance is attached to emotions, especially to those of the parties. Thus, Meier asserts: "Emotional expressions are not only allowed, but, as a matter of fact, particularly desirable, because they often initially open up a way to the true back-

⁶⁷ *Id.* at 208.

⁶⁸ *Id.* at 217 (citations omitted).

grounds of the legal dispute. [Emotionale Äusserungen sind nicht nur erlaubt, sondern sogar besonders erwünscht, weil sie oft erst den Weg zu den wahren Hintergründen des Rechtsstreits öffnen.]”⁶⁹

Here we might also refer to the work of Mills on therapeutic jurisprudence:

In general, the legal profession has resisted even the suggestion that emotion should play a role in the practice of law, especially in the interaction between lawyers and clients. While no one would probably deny that lawyers are actors in the legal dramas they produce, we are trained to believe that the advocate’s job is to gather facts and to develop a reasoned strategy that will win a client’s case. Distance and detachment remain the guiding principles of an effective practice.

Because of my sympathies to a more therapeutic approach, and my own experience as a therapist, I learned in my legal practice to rely on psychological skills to improve my effectiveness as a lawyer. What I found was that when I ignored the emotional dimensions of a case, I was not only less effective, but in some cases, incompetent.⁷⁰

In order to render communication with clients more effective, Mills suggests that the lawyer, and therefore also the family mediator, account for this aspect of lawyering:

What makes you melt into tears? What makes you angry? If a client disapproves, or asks many questions, or is needy—how do these responses affect you? How do your responses reflect your childhood experiences? Who in your family tends to be impatient? Who in your family takes a long time to tell a story? How do you generally react when someone reminds you of that person?

Ultimately, you should learn how to enter an interaction and to temper your emotional responses to your clients. If your client needs you to be strong, be strength. If your client needs to see you as vulnerable, reveal your vulnerabilities.⁷¹

⁶⁹ MEIER, *supra* note 15, at 587 n.1080; *see also* MONTADA & KALS, *supra* note 6, at 144-68 (regarding the role of emotions in mediation).

⁷⁰ Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 419, 421 (Dennis P. Stolle et al. eds., 2000).

⁷¹ *Id.* at 444.

In sum, therapeutic jurisprudence focuses on both the emotions of the parties and on those of the lawyer—specifically as the family mediator.

2. Verbal Communication Techniques

Mediation manuals and the legal discourse—particularly that of the law of civil procedure—advise (family) mediators to apply particular verbal communication techniques, such as active listening. The same applies to the discourse of therapeutic jurisprudence. The point of such techniques is to better understand the client or the parties not only cognitively but also emotionally.

Winick observes:

Attorneys need to be able to develop techniques for putting the client at ease so that he or she can feel comfortable in expressing emotion. When the client holds on to strong feelings and does not express them, as will be the case when those feelings are repressed or denied, decision-making is inevitably distorted. Being able to express one's emotions has the salutary effect of freeing the individual to think more clearly

A number of approaches by the attorney may be helpful in facilitating the client's willingness to express emotions to the attorney. Lawyers need to learn how to be good listeners. To do so, attorneys need to understand that a lawyer-client counseling session is a dialogue, not a speech. To have a true dialogue, attorneys need to stop speaking at some point and allow the room to become silent, thereby encouraging the client to speak. . . . Attorneys need to convey to their clients that they genuinely wish to listen to them and that they are eager to hear and understand their problems. In listening to their clients, attorneys need to be attentive, nonjudgmental, and sympathetic. The attorney should validate the feelings expressed by the client, making appropriate verbal and nonverbal responses that express interest, caring, warmth, and sympathy.⁷²

⁷² 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*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 327, 340 (Dennis P. Stolle et al. eds., 2000) (citations omitted); *see also* DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 41-63 (3d rev. ed. 2011) (regarding active listening).

VI. NEW MULTISENSORY LAW AND THERAPEUTIC JURISPRUDENCE
APPROACHES TO FAMILY MEDIATION

Now that we have looked at various approaches common to family mediation, multisensory law, and therapeutic jurisprudence, I would like to continue with a few reflections on approaches within multisensory law and therapeutic jurisprudence that are new to family mediation, and which it could fruitfully adopt.

A. *Common Aim as a Basis*

Multisensory law and therapeutic jurisprudence have one aim in common: they both aspire to reduce the stress of the legal actors and of those persons affected by the law, such as the parties to a family mediation.

Multisensory law attempts to reach this aim by developing non-verbocentric (non-verbal) approaches that complement verbal legal or legally relevant communication. These approaches help legal actors and laypersons better cope with the flood of legal information and the complexity of law.⁷³ In doing so, multisensory law observes two key principles of good design: “less is more”⁷⁴ and “keep it not too simple”; the design should be appropriate to the needs of the target audience.⁷⁵ I will return to these points later.

Therapeutic jurisprudence aims to reduce stress by considering people’s well-being and by seeking to avoid antitherapeutic effects. Related to the context of family law, Stephen Anderer and David Glass raise questions that might serve multisensory law and therapeutic jurisprudence as a compass: “‘How does that make you feel?’ A lawyer . . . would probably say that the question should be, ‘Do you think that’s fair?’ A therapeutic jurisprudence approach would entail asking both of these questions in determining whether the legal system is constructed in the best fashion.”⁷⁶ The how-does-that-make-you-feel question could also be varied as “How *would* that make you feel?,” or “How *did* that make you feel?”

In outlining the integrated approaches of multisensory law and therapeutic jurisprudence below, I shall observe these principles and questions with respect to family mediation.

⁷³ See Brunshwig, *supra* note 18, at 573-81.

⁷⁴ E.g., RALPH E. WILEMAN, VISUAL COMMUNICATING 83-86 (1993); see, e.g., Corina Ciripitca, *Principles of Clean Web Design*, DESIGNMODO (Sept. 30, 2011), <http://designmodo.com/principles-clean-web-design>; Dieter Rams: *Ten Principles for Good Design*, VITSOE, <http://www.vitsoe.com/en/gb/about/dieterams/gooddesign> (last visited Apr. 19, 2012).

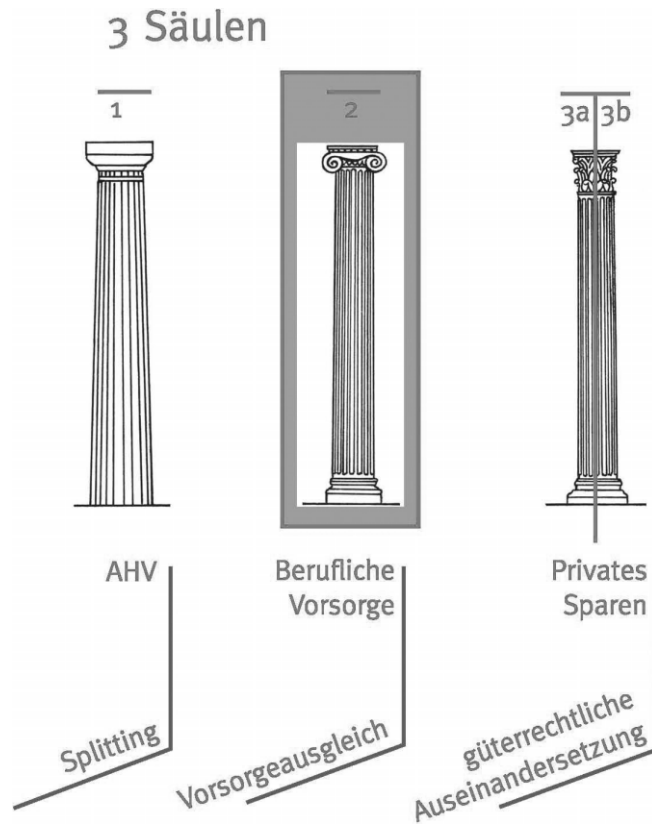
⁷⁵ E.g., WILEMAN, *supra* note 74, at 82. Wileman’s suggestion refers only to visual communication. *Id.* As far as I can see, his suggestion could also be applied to audiovisual and tactile-kinesthetic legal communication.

⁷⁶ Anderer & Glass, *supra* note 7, at 208.

B. New Integrated Multisensory Law and Therapeutic Jurisprudence Approaches to Family Mediation

1. Therapeutic Legal Visualizations

In Switzerland, “social insurance is based on the so-called three pillar system, a threefold system of public, occupational and private insurance.”⁷⁷ Put simply, this system refers to old-age provision. The Canton of St. Gallen in Switzerland provides the following legal visualization of old-age provision (the corresponding English terms are given in *Fig. 6*):



*Fig. 5. First Legal Visualization of Old-Age Provision*⁷⁸

⁷⁷ *Purpose of Old-Age and Survivors' Insurance*, FED. SOC. INS. OFF., <http://www.bsv.admin.ch/themen/ahv/00011/01259/index.html?lang=en> (last modified Feb. 11, 2010).

⁷⁸ *3 Säulen*, GERICHTE DES KANTONS ST.GALLEN, http://www.gerichte.sg.ch/home/dienstleistungen/nuetzliche_infromationen/mitteilungen_zum_familienrecht/tafeln_zum_familienrecht/

This legal visualization might be considered too simple to illustrate and explain legal issues concerning old-age provision in family mediation dealing with divorce. Below, I have tried to create a legal visualization that is slightly more complex but nevertheless not too overloaded:

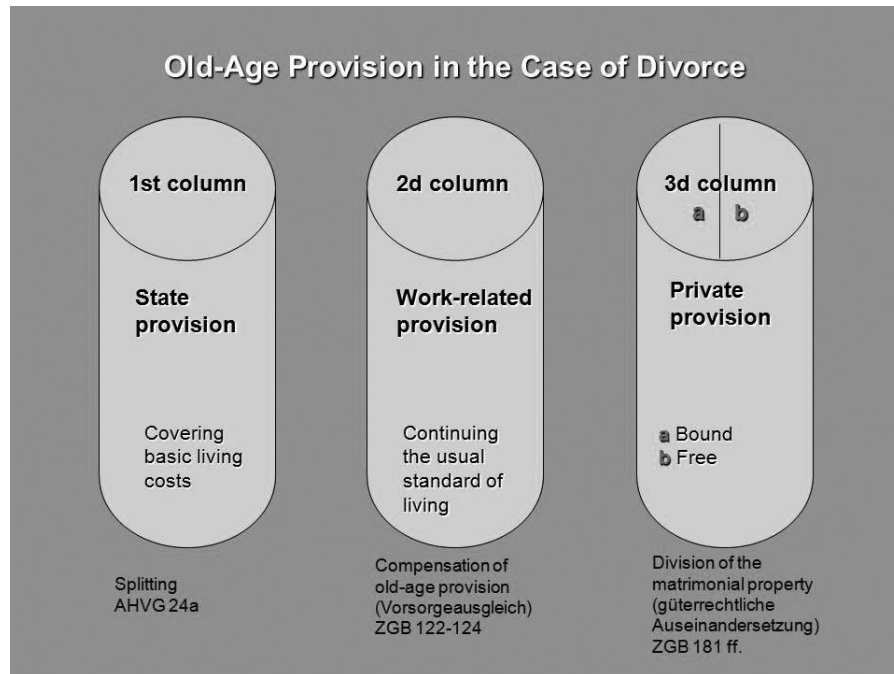


Fig. 6. Second Legal Visualization of Old-Age Provision

According to Meier, “the parties have to be informed about their rights and duties even if this complicates or impedes the efforts undertaken to reach agreement. How and when the parties should be informed about the legal situation in the mediator’s practice or whether it is enough to refer them to external legal counseling (by a lawyer) is the subject of controversy. [[hat] die Information über Recht und Pflichten der Parteien selbst dann zu erfolgen, wenn dies die Einigung in einer Mediation erschwert oder gar verhindert. Wie und wann die Aufklärung über die Rechtslage in der Praxis erfolgen soll und ob ein Verweis an eine externe (anwaltliche) Rechtsberatung genügt, ist umstritten.]”⁷⁹

[_jcr_content/Par/downloadlist/DownloadListPar/download_3.ocFile/Vorsorgeausgleich.pdf](#) (last visited Apr. 19, 2012) (depicting the concept of the “old-age provision” in Switzerland).

⁷⁹ MEIER, *supra* note 15, at 586 n.1078.

Combining Meier's observation with a classic therapeutic jurisprudence question, "How would that make you feel?," would enable a family mediator to ask his or her clients the following questions: "Would it feel okay (for you) if I visualize the old-age provision in case you divorced? Now this visual information might intensify your conflict, but I am nevertheless obliged to inform you. Or would you feel better if I gave you the same information only verbally (orally)?"

2. Therapeutic Legal Audiovisualizations

In a talk given in Zurich, Switzerland on May 12, 2009, Winick suggested that parties leaning toward fighting their divorce (German: *Kampfscheidung*) could—or should—be encouraged to watch the feature film *The War of the Roses*.⁸⁰ The family mediator could lend the parties the DVD to watch this movie at home. I agree with Winick that *The War of the Roses* has great potential for deterring the parties from fighting their divorce. Thus, a legal audiovisualization from *outside* the legal context—*The War of the Roses* is a product of contemporary audiovisual mass culture—would become relevant *within* the legal context. According to Richard Sherwin, there is "two-way traffic between law and popular culture," which "may be managed in either direction for a broad range of strategic purposes."⁸¹ Apart from audiovisual and visual legal evidence and argumentation—purposes that are especially common in Anglo-Saxon jurisdiction—a further strategic purpose would thus be *therapeutic*.

Another DVD, *Kids & Divorce*, "examines the emotional and legal aftermath of divorce, seeking to find out: What's best for the kids?"⁸² The family mediator could also lend this DVD to parties with children, so as to promote the latter's well-being despite the divorce.

3. Therapeutic Legal Tactile-Kinesthetics

a. Exercises for family mediators

As regards to physical exercises for lawyers and therefore also for family mediators, Leonard Riskin observes:

⁸⁰ THE WAR OF THE ROSES (Twentieth Century Fox Film Corp. 1989).

⁸¹ RICHARD K. SHERWIN, VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE: ARABESQUES AND ENTANGLEMENTS 57 (2011); see also Richard K. Sherwin, *Imagining Law as Film (Representation without Reference)*, in LAW AND THE HUMANITIES: AN INTRODUCTION 241, 246 (Austin Sarat, Matthew Anderson & Catherine O. Frank eds., 2010) [hereinafter *Imagining Law as Film*] (regarding the two-way traffic between law and popular culture).

⁸² DVD: *Kids & Divorce: For Better or Worse* (Twin City Public Television 2006) (text taken from the back cover of the DVD).

Many lawyers who wish “to practice law as a healthy, healing profession, one that the lawyer finds fulfilling and rewarding and that is beneficial and therapeutic for the client” could face at least two problems. The first is the dominance of a narrow mindset . . . that governs much of legal education and many aspects of law practice. The second is the natural tendency of the human mind . . . to get distracted and to focus excessively on the self. These problems combine to make it difficult for many lawyers to be sufficiently “present”—mentally and emotionally—with their clients, their counterparts, and themselves, to practice law in the ways envisioned in this book.⁸³

Given this problem, Riskin suggests what he calls mindfulness among other strategies. I would like to quote him on this term: “Mindfulness, as I use the term, means being aware, moment-to-moment, without judgement and without commentary, of whatever passes through the sense organs and the mind—sounds, sights, bodily sensations, odors, thoughts, judgments, images, emotions. One develops the ability to be mindful through ‘formal’ practices, such as meditation and mindful yoga”⁸⁴

Pursuant to his view, Riskin develops exercises aimed at lawyers, such as breathing exercises and body-awareness exercises. He provides detailed guidance through these exercises⁸⁵ to promote well-being among lawyers and family mediators.⁸⁶ “Mindfulness,” he further observes, “can enable the lawyer to deal better with stress and to develop a calm state of mind that will foster the ability to think clearly.”⁸⁷

Besides breathing exercises, Amiram Elwork suggests muscle relaxation to help lawyers cope successfully with stressful situations.⁸⁸ In *How Brain Science*

⁸³ Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in THE AFFECTIVE ASSISTANCE OF COUNSEL 447, 447 (Marjorie A. Silver ed., 2007) (citations omitted).

⁸⁴ *Id.* at 448–49. See generally Tom Fisher, *Who’s Minding the Mediator? Mindfulness in Mediation*, 5 ADVANCED DISP. RESOL. BULLETIN 165 (2003), available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1223&context=adr> (regarding mindfulness in mediation); SCOTT L. ROGERS, MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL (2009) (regarding mindfulness for law students); SCOTT L. ROGERS, THE SIX-MINUTE SOLUTION: A MINDFULNESS PRIMER FOR LAWYERS (2009) (regarding mindfulness for lawyers).

⁸⁵ See Riskin, *supra* note 83, at 455–58; see also Rhonda V. Magee, *Educating Lawyers to Meditate*, 79 UMKC L. REV. 535, 536 n.2 (2011) (regarding breathing exercises).

⁸⁶ See Riskin, *supra* note 83, at 449.

⁸⁷ *Id.*

⁸⁸ AMIRAM ELWORK, STRESS MANAGEMENT FOR LAWYERS: HOW TO INCREASE PERSONAL & PROFESSIONAL SATISFACTION IN THE LAW 91 (3d ed. 2007).

Can Make You a Better Lawyer, David Sousa suggests that lawyers and family mediators should walk around the room to make better decisions.⁸⁹

b. Exercises for mediation parties

From literature and possibly from personal experience, we know that clients suffer from emotional turmoil during separation and divorce.⁹⁰ Strong feelings of “fear, anger, guilt, grief, shame, and remorse”⁹¹ can block and paralyze clients, negatively affecting their dialog ability and absorbing capacity. In such difficult circumstances, clients need first aid from their mediator.

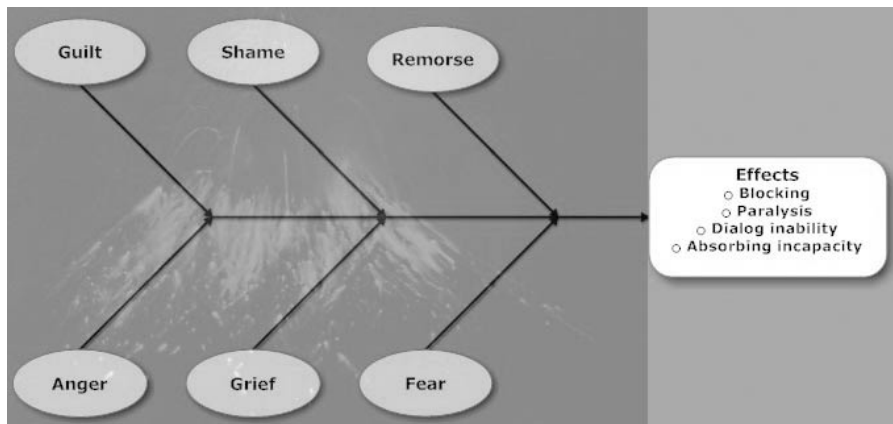


Fig. 7. Clients' Emotional Turmoil and Its Effects During Separation and Divorce⁹²

Considering the clients' emotional turmoil, I would first like to describe two exercises that Yvonne Maurer developed, and then refer to Sousa's book *How Brain Science Can Make You a Better Lawyer*. Maurer's exercises are used within the framework of body-centered psychotherapy (couple therapy). They would be suitable for parties undergoing family mediation who are experiencing great difficulty reaching an agreement.

⁸⁹ DAVID A. SOUSA, *HOW BRAIN SCIENCE CAN MAKE YOU A BETTER LAWYER* 42-43 (2009).

⁹⁰ See ANDREA BÜCHLER & ROLF VETTERLI, *EHE, PARTNERSCHAFT, KINDER: EINE EINFÜHRUNG IN DAS FAMILIENRECHT DER SCHWEIZ* 98-99 (2001); Tesler, *supra* note 13, at 197.

⁹¹ Tesler, *supra* note 13, at 190.

⁹² Fig. 7 consists of two images. I acknowledge the Volcano Hazards Team, U.S. Geological Survey as the source of the volcano picture; see *Photo Information*, USGS, http://volcanoes.usgs.gov/Images/Jpg/Tungurahua/19991102_Tung_caption.html (last modified Feb. 2, 2012). According to the USGS (Michael J. Randall), this picture is in public domain. With the help of the program SmartDraw®, I have created a cause-and-effect visualization. I have embedded the volcano picture in this visualization.

Standing vis-à-vis, spouses place the palms of their hands against those of their partner. Simultaneously, they push their hands against one another while providing the resistance required to meet their counterpart's pressure, becoming pusher and pushee. They do this exercise with all the difficult feelings that they have regarding their partner—anger, frustration, and so forth. Each tries to push the other against the wall. The purpose of this exercise is to show that they are unable to make progress in reaching a possible agreement if they behave this way.⁹³

A family mediator could invite the parties to do this exercise to suggest that mediation epitomizes quite the contrary, namely, linking arms metaphorically and literally. According to Maurer, this is another couple therapy exercise with partners linking arms and walking toward a common aim.⁹⁴

Tom Fisher proposes “short meditative exercises” for “mindless clients.”⁹⁵ In *How Brain Science Can Make You a Better Lawyer*, Sousa suggests that lawyers seek to meet the needs of jurors or judges with strong kinesthetic preferences.⁹⁶ This suggestion could also apply to family mediation. If clients feel the need to walk around a room to make better decisions, the mediator should encourage them to do so.

c. Comment

Maurer's exercises would require the parties' consent. Not all parties respond well to such exercises, perhaps on account of their psychophysical condition, or because they do not feel like touching the spouse with whom he or she has a conflict-laden relationship. Moreover, these exercises need to be time limited.⁹⁷ If the mediator is not a psychologist, he or she must inform the parties that he or she does not claim to be a therapist.⁹⁸ Despite the still prevailing taboo against using psychological methods in legal practice,⁹⁹ therapeutic jurisprudence adopts many *verbal* methods from psychology. Even

⁹³ See YVONNE MAURER, *Von der Psychotherapie zur Körperzentrierten Psychotherapie*, in *KÖRPERZENTRIERTE PSYCHOTHERAPIE IM DIALOG: GRUNDLAGEN, ANWENDUNGEN, INTEGRATION, DER IKP-ANSATZ VON YVONNE MAURER*, at 3, 4-5 (Alfred Künzler et al. eds., 2010); ROSMARIE ZIMMERLI, *Körperzentrierte Erfahrungsübungen im Überblick*, in *KÖRPERZENTRIERTE PSYCHOTHERAPIE IM DIALOG: GRUNDLAGEN, ANWENDUNGEN, INTEGRATION, DER IKP-ANSATZ VON YVONNE MAURER* at 77, 83 (Alfred Künzler et al. eds., 2010).

⁹⁴ I wish to thank Dr. Yvonne Maurer for making this point.

⁹⁵ Fisher, *supra* note 84, at 165, 169.

⁹⁶ See SOUSA, *supra* note 89, at 42-43, 47.

⁹⁷ I wish to thank Dr. Yvonne Maurer for making this point.

⁹⁸ See Evan R. Seamone, *The Veterans' Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Posttraumatic Stress Disorder*, 202 MIL. L. REV. 185, 192-95 (2009) (discussing how lawyers can delimit themselves against the role of therapists).

⁹⁹ See *id.*

mindfulness exercises for lawyers or mediators indirectly “help ‘heal’ the client.”¹⁰⁰ Why should therapeutic jurisprudence thus not also borrow *nonverbal* methods suited to directly fostering client well-being? In therapeutic jurisprudence lawyering, Evan Seamone suggests enhanced legal counseling techniques for combat veterans suffering from posttraumatic stress disorder (“PTSD”): “Although many psychology licensing statutes permit an attorney to use advanced clinical interventions, this article recommends a more conservative approach. Attorney interventions to address the byproducts of PTSD in the course of legal representation should be limited to relaxation techniques and specialized CBT [cognitive behavior therapy] worksheets to counteract distorted thoughts.”¹⁰¹

According to Seamone,

At the most general level, relaxation techniques include a variety of physical exercises ranging from meditation to yoga. Relaxation and meditation exercises are valued for clearing a client’s mind and bringing the client into the moment, so he has the enhanced ability to focus on the matters at hand. In the context of PTSD, some exercises significantly improve cognitive functioning. Exercises that increase breathing can undo the body’s natural response to anxiety, which is to seize-up and prevent the flow of oxygen to the brain.¹⁰²

Seamone provides detailed guidance on how a lawyer could apply progressive muscle relaxation and breathing exercises.¹⁰³ A lawyer might feel reluctant to guide his or her client through such exercises. Instead, he or she could “use audio recordings to supplement legal counseling. Attorneys who have these recordings loaded on an iPod or MP3 player can simply ask the client to take a short break with an exercise when needed.”¹⁰⁴

In agreement with Seamone, I posit that family and criminal lawyers can use what I call *therapeutic multisensory legal counseling skills*.¹⁰⁵ Clients suffering from PTSD or forensic stress,¹⁰⁶ or even other forms of stress and

¹⁰⁰ Riskin, *supra* note 83, at 449; *see also* Magee, *supra* note 85, at 557-58.

¹⁰¹ Seamone, *supra* note 98, at 228.

¹⁰² *Id.* at 228-29; *see, e.g.*, Magee, *supra* note 85, at 541 (regarding the value of mindfulness meditation for reducing anxiety).

¹⁰³ *See* Seamone, *supra* note 98, at 228-32, 253-57.

¹⁰⁴ *See id.* at 230.

¹⁰⁵ *See* Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Posttraumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 MIL. L. REV. 144, 161-62 (2009).

¹⁰⁶ *See* Frank Th. Petermann, *Zivilprozess und psychische Belastung: Über die Berücksichtigung des Faktors der psychischen Belastung eines Zivilprozesses für Klient und Anwalt*, 4

related disorders, might benefit from such techniques. Even judges could use therapeutic multisensory judging skills when they realize that a party is overwhelmed by proceedings, provided that there is a legal basis for doing so.

VII. RESULTS, CONCLUSIONS, AND OUTLOOK

A. Results

This article has answered the following key question: how can family mediators better communicate with their clients? More specifically, which common and new approaches do multisensory law and therapeutic jurisprudence offer family mediation to reduce comprehension difficulties and emotional stress on the client side?

Hopefully, I have shown that multisensory law and therapeutic jurisprudence have great potential for achieving both objectives, and thus are capable of promoting clients' emotional, mental, and physical well-being. By promoting client well-being, the two fields also contribute to fostering family mediator and lawyer well-being.

B. Conclusions

I would warmly recommend that legal research, legal education, legal practice, and family mediation in particular adopt these insights. For this to happen, institutions teaching law and family mediation need to intensify and expand their established *curricula*. It is necessary to teach therapeutic jurisprudence, multisensory law, and their integrated potential. Not only family mediation, but also other areas of the law might benefit from this kind of *integrated* curriculum. Further, I encourage legal scholars to research the benefits of such an approach for lawyering and judging.

Therapeutic jurisprudence is already being taught at many law schools.¹⁰⁷ Since it is an emerging field, some academic institutions only offer courses on certain areas of multisensory law. Regarding visual law, one important area was recently taught at the Department of Law, University of Basel, Switzerland. Basel law students were taught how to analyze and evaluate certain kinds of legal visualizations (schemata/charts) and how to produce such legal visual-

SCHWEIZERISCHE ZEITSCHRIFT FÜR ZIVILPROZESS- UND ZWANGSVOLLSTRECKUNGSRECHT [Swiss Journal of Civil Procedure and Law Enforcement] 443, 444-46 (2004) (regarding forensic stress); Seamone, *supra* note 105, at 162-65 (regarding forensic stress disorder).

¹⁰⁷ E.g., *Courses and Law School Groups on Therapeutic Jurisprudence*, U. ARIZ., <http://www.law.arizona.edu/depts/upr-intj/intj-c.html> (last visited Apr. 19, 2012).

izations.¹⁰⁸ Regina Austin runs a course on visual legal advocacy.¹⁰⁹ Neal Feigenson and Christina Spiesel teach visual persuasion in the law.¹¹⁰ Richard Sherwin offers a course with the same title.¹¹¹ So far, courses which could be subsumed under tactile-kinesthetic law run under other designations like meditation for lawyers, mindfulness for lawyers, and contemplative practices for lawyers.¹¹² Rhonda Magee also uses the term “contemplative law.”¹¹³

Nevertheless, it seems that all these largely nonverbal approaches and movements lack an all-embracing disciplinary roof. I suggest that multisensory law could constitute such a roof. Many as yet *isolated* approaches and movements should come together and form a *critical mass*. This mass has a better chance of being acknowledged and recognized by the members of the core legal disciplines. These are, of course, highly debatable suggestions. Would scholars of visual law and audiovisual law be inclined to join, for instance, the mindfulness-for-lawyers movement? Would members of the contemplative law movement join the scientific community on visual law and audiovisual law? Although I have a vision of such developments, I doubt that they will come to pass in the near future. Suffice to say that scholars tend to adhere to familiar concepts and terms. Furthermore, the scientific community must have already accepted these terms to a certain degree for them to spread. Looking into the Anglo-American scientific community from an external vantage point, I wonder whether the term *comprehensive law* might be precise enough to designate the legal and legally relevant phenomena and problems at stake.¹¹⁴ Even the term *multisensory law* has its drawbacks.¹¹⁵ But as I have shown, multisensory law implies much more than *just* the senses. Due to the shortcom-

¹⁰⁸ See Colette R. Brunschwig, *Producing, Analyzing, and Evaluating Legal Visualizations: A Pioneering Course at the Department of Law, University of Basel, Switzerland, Multisensory Law*, BECK-COMMUNITY (Jan. 29, 2012), <http://community.beck.de/gruppen/forum/producing-analyzing-and-evaluating-legal-visualizations-a-pioneering-course-at-the-department-of-law-unive>.

¹⁰⁹ See Regina Austin, U. PA. L. SCH., <http://www.law.upenn.edu/cf/faculty/raustin/> (last visited Apr. 19, 2012).

¹¹⁰ See Christina O. Spiesel, YALE L. SCH., <http://www.law.yale.edu/faculty/CSpiesel.htm> (last visited Apr. 19, 2012); *Faculty Experts*, QUINNIAC U. SCH. L., <http://law.quinnipiac.edu/x353.xml> (last visited Apr. 19, 2012).

¹¹¹ See Richard K. Sherwin, N.Y.L. SCH., http://www.nyls.edu/faculty/faculty_profiles/richard_k_sherwin (last visited Apr. 19, 2012).

¹¹² See, e.g., Magee, *supra* note 85, at 536, 547, 588-90; *Past Events*, CENTER FOR CONTEMPLATIVE MIND SOC'Y <http://www.contemplativemind.org/programs/law/pastevents.html> (last visited Apr. 19, 2012); *Resources*, MINDFUL LAWYER CONF., <http://www.mindfullawyerconference.org/resources.htm> (last visited Apr. 19, 2012).

¹¹³ Magee, *supra* note 85, at 536 & n.6.

¹¹⁴ See, e.g., SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY, STRENGTHS AND WEAKNESSES 169-201 (2004) (regarding comprehensive law).

¹¹⁵ See KING ET AL., *supra* note 32, at 31-34 (discussing criticism of therapeutic jurisprudence).

ings of language, we are called upon to look for the best possible (terminological) answers.

C. Outlook

1. Open Questions

One open question concerns which other approaches within multisensory law and therapeutic jurisprudence might reduce comprehension difficulties and emotional stress, not only in the field of family mediation but also in lawyering and judging. Another question is whether these various approaches should be absorbed by legal psychology and therapeutic jurisprudence. To my mind, however, these fields would not have the required epistemological resources to deal with *all* the unisensory (visual) and multisensory (audiovisual, tactile-kinesthetic, and even gustatory-olfactory) phenomena at hand. Therefore, I suggest a cooperation between these two fields so that they can cross-fertilize each other.

The answers given in this article entail further questions, which go beyond the scope of family mediation. How can we enhance client expressivity and lawyerly communication skills by integrating therapeutic visual, audiovisual, tactile-kinesthetic, and, therefore, multisensory communication skills? How could lawyers learn such integrated therapeutic multisensory skills? How could clients be professionally guided to express themselves in a therapeutically multisensory way? Which ethical standards and legislation are required to protect both the interest of lawyers and the needs of clients?

What research should be done as regards this integrated approach? What would an integrated multisensory-therapeutic syllabus look like? What would motivate professional organizations and academic institutions to offer special training for lawyers? Would this be a task for the International Academy of Law and Mental Health,¹¹⁶ the Center for Contemplative Mind in Society,¹¹⁷ or even the International Bar Association?¹¹⁸

¹¹⁶ *About the Academy*, INT'L ACAD. L. & MENTAL HEALTH, <http://www.ialmh.org/template.cgi> (last visited Apr. 19, 2012).

¹¹⁷ *The Law Program*, CENTER FOR CONTEMPLATIVE MIND SOC'Y, <http://www.contemplativemind.org/programs/law> (last visited Apr. 19, 2012).

¹¹⁸ INT'L B. ASS'N, <http://www.ibanet.org> (last visited Apr. 19, 2012).

2. Expert-Lay Communication: A Perennial Phenomenon and a Problem to Be Solved

The legal visualizations I work with include the Illustrated Manuscripts of the Saxon Mirror dating from the fourteenth century.¹¹⁹

The following miniature (*Fig. 8*) shows a party holding his hand before his mouth. So far, the man has been obliged to remain silent because he is represented by another speaking on his behalf. The latter is an early form of a lawyer. The judge invites the silent party to open his mouth to assert whether or not he agrees with the lawyer's account on his behalf.¹²⁰



Fig. 8. Illustrated Manuscript of the Saxon Mirror (Wolfenbüttel), Folio 24 Verso¹²¹

¹¹⁹ See *Bilddatenbank*, UNIVERSITÄT ZÜRICH, <http://www.rwi.uzh.ch/oe/zrf/abtrv/bilddatenbank.html> (last visited Apr. 19, 2012). I am responsible for the content management of this legal image database (German: "Rechtsbilddatenbank."). *Id.*

¹²⁰ See EIKE VON REPGOW, *SACHSENSPIEGEL: DIE WOLFENBÜTTELER BILDERHANDSCHRIFT COD. GUELF. 3.1 AUG. 2, TEXTBAND 153* (Ruth Schmidt-Wiegand ed., 1993).

¹²¹ *SACHSENSPIEGEL ONLINE*, <http://www.sachsenspiegel-online.de/cms/meteor/jbrowser/index.jsp?id=78> (last visited Apr. 19, 2012).

This communicative situation in court constitutes an early form of expert-lay communication. Legal history, and particularly legal iconography, suggest that jurisprudence and legal practice are subject to continuous change and development.¹²² Hence, jurisprudence and legal practice might advance the law by striving to find solutions to the perennial problem of expert-lay communication in family mediation, lawyering, and judging. Consequently, it seems appropriate to endorse Hans Theodor Froehlich's classic observation "that the knowledge of legal history is needed for the understanding of modern law and, therefore, for reform."¹²³

3. New Multisensory Paradigm

Multisensory law, therapeutic jurisprudence, and other legal disciplines need to tackle such reform in the knowledge of a new *sensory* or rather *multisensory paradigm*. David Howes explains this paradigm and the historical background of paradigms it rests on as follows:

In the 1960s and 1970s linguistics was the name of the game as widespread in the theories of de Saussure and Wittgenstein led to culture itself being conceptualized as a language or text. In the 1980s "the society of the image" became a catchphrase and the focus of many academics shifted to the study of visual imagery and its role in the communication of cultural values. In reaction to the seemingly disembodied nature of much contemporary scholarship, the notions of embodiment and materiality were put forward as paradigms for cultural analysis in the 1990s. Here cultural dimensions of corporeal experiences and physical infrastructures (objects, architectures, environments) were explored in order to provide a more full-bodied understanding of social life.

The rise of sensory studies at the turn of the twenty-first century draws on each of these prior developments or "turns" but also critiques them by questioning the verbocentrism of the linguistic model, the ocularcentrism of the visual culture model, and the holism of both the corporeal and material culture models—in which bodies and objects are often treated simply as physical wholes and not as bundles of interconnected experiences and properties. Sensory studies

¹²² See, e.g., MARCEL SENN, RECHTSGESCHICHTE: EIN KULTURHISTORISCHER GRUNDRIS 2-3 (4th rev. ed. 2007).

¹²³ Hans Theodor Froehlich, *Legal History and the American Law School*, 7 AM. L. SCH. REV. 739, 744 (1933).

approaches themselves emphasize the dynamic, relational (intersensory—or multimodal, multimedia) and often conflicted nature of our everyday engagement with the sensuous world.¹²⁴

In the legal context, the verbocentric paradigm still prevails. It implies that legal actors, whether they are legal scholars or practitioners, equate the law with written or spoken verbal language. Thus, the German-speaking legal theorists Bernd Rütters, Christian Fischer and Axel Birk claim, “[n]o law exists outside language [[e]s gibt kein Recht ausserhalb der Sprache].”¹²⁵ These authors are representative of the majority of legal actors. Röhl, a German-speaking legal theorist and sociologist, even goes as far as to suggest that “[t]he law does not need any images [[d]as Recht braucht keine Bilder].”¹²⁶ Apart from a few exceptions (e.g., evidence and elements of a legal norm), he assumes that there is no need for visualization in the legal context.¹²⁷

Despite the prevailing verbocentrism, or what I would call iconoclasm, within legal discourse, a minority of legal scholars have begun to explore the law as a visual and audiovisual phenomenon and to criticize the verbocentric legal paradigm.¹²⁸ In the eyes of these scholars, a paradigm shift toward legal visualization and audiovisualization is taking place.¹²⁹ For instance, Richard Sherwin talks about “the visual life of law,”¹³⁰ that law “is lived cinematically,”¹³¹ and that “law lives like an image.”¹³² Some scholars even suggest

¹²⁴ David Howes, *Charting the Sensorial Revolution*, 1 SENSES & SOC’Y 113, 114-15 (2006) (book reviews).

¹²⁵ BERND RÜTTERS, CHRISTIAN FISCHER & AXEL BIRK, RECHTSTHEORIE MIT JURISTISCHER METHODENLEHRE 99 n.150 (2011); see also VOLKER BOEHME-NESSLER, UNSCHARFES RECHT: ÜBERLEGUNGEN ZUR RELATIVIERUNG DES RECHTS IN DER DIGITALISIERTEN WELT 271-72 (2008) [hereinafter UNSCHARFES RECHT]; VOLKER BOEHME-NESSLER, PICTORIAL LAW: MODERN LAW AND THE POWER OF PICTURES 90 (2011) [hereinafter PICTORIAL LAW]; NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT xi, 30 (2009). These scholars discuss that law is language.

¹²⁶ Klaus F. Röhl, *Visuelle Rechtskommunikation – gestern, heute, morgen, in WORT—BILD—ZEICHEN, BEITRÄGE ZUR SEMIOTIK IM RECHT* 127, 141 (Heino Speer ed., 2012).

¹²⁷ See *id.* at 142.

¹²⁸ See Bernhard Grossfeld, *Zeichen und Bilder im Recht*, 30 NEUE JURISTISCHE WOCHENSCHRIFT 1911, 1915 (1994); UNSCHARFES RECHT, *supra* note 125, at 277-28; PICTORIAL LAW, *supra* note 125, at 106-07. These scholars criticize the verbocentric legal paradigm.

¹²⁹ See, e.g., UNSCHARFES RECHT, *supra* note 125, at 287-97; PICTORIAL LAW, *supra* note 125, at 101, 115-17.

¹³⁰ SHERWIN, *supra* note 81, at 5.

¹³¹ *Imagining Law as Film*, *supra* note 81, at 245.

¹³² SHERWIN, *supra* note 81, at 49.

that an “iconic turn,”¹³³ a “pictorial turn,”¹³⁴ or a “visual turn”¹³⁵ is occurring or will soon occur in the legal context. For instance, the website—now hosted by the New York Law School Law Review—for the Visualizing Law in the Digital Age Conference held in October 2001, states:

Law has entered the visual digital age. How truth and justice are represented and assessed in court (and out) increasingly depend on what electronic screens display.

Decision makers these days watch documentaries of tort victims living damaged lives in the wake of accidents that may be digitally re-enacted at trial. Police surveillance and private security cameras show drug deals, robberies, and all manner of wrongdoing. Amateur videos, perhaps fortuitously shot from a handy cell phone, capture police misconduct that may contradict an officer’s written report. Trial summations incorporate visual evidence and multi-media montages that spur unconscious visual associations charged with powerful, judgment-shaping emotions.

Clearly, law’s shift to the visual is not simply a matter of surface rhetoric or style. At stake is a paradigm change in the way legal meanings are constructed, disseminated, and construed.¹³⁶

As has become clear, Howes’s above reflections on a new sensory or rather multisensory paradigm strongly contradict both the current verbocentrism and the ocularocentrism of the legal discourse. Therefore, I would ask whether his ideas could or rather should be adopted in the legal context. I would say, “Yes, indeed.”

This paper, I hope, has paved a way for how this could and should be done. Overcoming the prevailing verbocentrism and ocularocentrism will by no means be a simple task. I also hope that the present “evocations of [legal]

¹³³ Bettina Mielke & Christian Wolf, *Visualisierungsformate im Recht*, in *EFFIZIENZ VON E-LÖSUNGEN IN STAAT UND GESELLSCHAFT, AKTUELLE FRAGEN DER RECHTSINFORMATIK 618* (Erich Schweighofer et al. eds., 2005).

¹³⁴ Bernard J. Hibbitts, *The Re-Vision of Law: The Pictorial Turn in American Legal Culture*, *Papers*, U. PITT. SCH. L. (Feb. 1996), <http://faculty.law.pitt.edu/hibbitts/pictor.htm> (last visited Apr. 22, 2012); see also PICTORIAL LAW, *supra* note 125, at 51; SHERWIN, *supra* note 81, at 30, 53, 120.

¹³⁵ FEIGENSON & SPIESEL, *supra* note 125, at 13, 15; SHERWIN, *supra* note 81, at 11, 187.

¹³⁶ *Visualizing Law in the Digital Age*, N.Y.L. SCH. L. REV., <http://www.nylslawreview.com/visualizing-law-in-the-digital-age/> (last visited Apr. 22, 2012).

multisensoriality”¹³⁷ will not be “completely marginalized by the dominant [verbocentric] and visualist [legal] discourse.”¹³⁸

Bernard Hibbits, an American legal historian and specialist in law and technology, observes:

In the twelfth and thirteenth centuries, the immediate European progenitors of our culture turned increasingly to writing to help preserve information and customary lore that had been primarily perpetuated and celebrated in sound, gesture, touch, smell, and taste. Once this corpus was inscribed, and thus removed from its original multisensory context, it slowly but indubitably became the creature of the medium [that is, written text] that claimed to sustain it.¹³⁹

Referring to the history of civil or continental law, Louis Carlen observes, “law is meant to address the senses, and to be manifest to them [Das Recht sollte in die Sinne gehen, sinnenfällig sein].”¹⁴⁰ I would agree and add that modern law could or rather should be manifest to *all* our senses. It might even be both interesting and fruitful to compare old and new law, since both are *multisensory*. But this will be *cura posterior* (English: a later concern).

¹³⁷ CONSTANCE CLASSEN, *THE COLOUR OF ANGELS: COSMOLOGY, GENDER AND THE AESTHETIC IMAGINATION* 132 (1998). Classen’s observations refer to surrealism. *Id.* Given their poignance, I take the liberty of transferring them to the legal context.

¹³⁸ *Id.* at 130. Classen’s observations refer to futurism. *Id.* Here, too, I transfer them to the legal context.

¹³⁹ Bernard J. Hibbits, “*Coming to Our Senses*”: *Communication and Legal Expression in Performance Cultures*, 41 *EMORY L.J.* 873, 875 (1992).

¹⁴⁰ LOUIS CARLEN (ED.), *SINNENFÄLLIGES RECHT, AUFSÄTZE ZUR RECHTSARCHÄOLOGIE UND RECHTLICHEN VOLKSKUNDE XVI* (1995).

BOOK REVIEW

KENNST DU DAS RECHT? EIN SACHBUCH FÜR KINDER UND JUGENDLICHE [DO YOU KNOW THE LAW? A SPECIALIZED BOOK FOR CHILDREN AND ADOLESCENTS]. BY CAROLINE WALSER KESSEL. BERN: EDITIONS WEBLAW, 2011. 350 PAGES. CHF 54.00 [\$59.64].

Reviewed by Colette R. Brunschwig*

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I. *DO YOU KNOW THE LAW?*

Legal problems and questions may spontaneously arise in everyday life. Therefore, would you have not wished that you were enlightened about important legal and legally relevant contents¹ at a young age? Or would you now like to give your own children, or children you know, a book that gently introduces them to the law? Following is a review of a reading and picture book that introduces children to the law, both in an informative and entertaining way, and thereby better prepares children and adolescents for their present and future lives.

Dr. Caroline Walser Kessel, a practicing lawyer in Zurich, Switzerland, and a lecturer at the University of St. Gallen in Switzerland, has written and published such a book. It familiarizes children and adolescents with the law. *Kennst du das Recht? [Do You Know the Law?]*² offers an age-appropriate introduction to everyday legal matters, such as how children and adolescents should deal with their parents' divorce, and how they should conduct themselves in a police interview when suspected of possessing or using drugs.

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¹ In the following, the adjective 'legal' also encompasses the words 'legally relevant.'

² CAROLINE WALSER KESSEL, *KENNST DU DAS RECHT? [DO YOU KNOW THE LAW?]* (2011).

II. WHAT IS *DO YOU KNOW THE LAW?* ABOUT?

The book is organized into nine chapters: (1) What Is Justice, Fairness? How Is It Enforced?; (2) Law, Rule, Contract; (3) My Personality and Its Legal Protection; (4) Possession and Property—Mine and Yours; (5) Tort Law—If Damages Arise; (6) Penal Law: What Is Forbidden and Why? On the Purpose and Types of Punishment for Children, Adolescents, and Adults; (7) Family and the Law; (8) Contract Law: I Do Business; and (9) Mercy before Justice? This outline may not reflect the entire Swiss legal system; rather, it strives to meet the learning and information needs of children and adolescents.

Some children and adolescents dream about entering the legal profession as a judge, lawyer, or juvenile public prosecutor. Dr. Kessel's interviews with a judge,³ a lawyer,⁴ a client,⁵ and a juvenile public prosecutor⁶ provide these young dreamers with their first concrete insights into these fascinating legal professions. Furthermore, readers learn that it is not legally permissible to use a mobile phone to film school lessons and then post the video online because doing so breaches the filmed teacher's personality rights.⁷ The same applies to photographing two fellow pupils who are secretly cuddling, and then posting these intimate pictures on Facebook without prior consent from those depicted.⁸ What are the legal consequences of one pupil hurting a peer while playing soccer in the schoolyard?⁹ Or take the case of a fourteen-year-old deliberately smashing a window with a stone: is the boy liable for the resulting damages?¹⁰ This book covers many such vital legal questions occurring in the lives of children and adolescents.

This book primarily intersects with legal psychology¹¹ and visual law, an emerging field and branch of multisensory law. The book provides many legal visualizations in color that explain and illustrate legal issues. Additionally, the author encourages children and adolescents to draw their own legal visualizations, like the physical and mental elements of a particular offense such as fraud.¹² Moreover, the book's pedagogical design for use in the classroom relates the book to legal pedagogy. Written predominantly from the perspective of children and adolescents, the book's language almost converges with

³ *Id.* at 53-56.

⁴ *Id.* at 56-58.

⁵ *Id.* at 58-60.

⁶ *Id.* at 188-94.

⁷ *Id.* at 109.

⁸ *Id.* at 111.

⁹ *Id.* at 131-33.

¹⁰ *Id.* at 133.

¹¹ *Id.* at 23-30 (explaining what justice and fairness mean within the law).

¹² *Id.* at 216.

theirs. The references and index of illustrations reflect these three subject-specific directions.¹³

How does *Do You Know the Law?* distinguish itself from other Swiss legal training books? One distinctive feature is that it also addresses children who are approximately the age of seven. No other currently available book targets this age group. One can therefore ask whether certain parts of the book might or should be used on the elementary level (for instance, within the scope of interdisciplinary subjects in the Canton of Zurich?). Or would it be necessary to update the curricula accordingly? This is the first legal training book, at least in Switzerland, that in one book makes forays into legal history, discusses fairness, and provides legal visualizations drawn by children. The book reaches far beyond the Swiss legal system, making it interesting for children and adolescents growing up in other legal systems.

III. CHERRIES TO PICK AND CHOOSE

The author covers legal topics relevant to children and adolescents. In doing so, she repeatedly asks them questions and gives them assignments. For example, the author asks: “If you were allowed to decree ten articles of a statute that seem absolutely important to you, then how would they read?”¹⁴ It is helpful that Dr. Kessel invites her readers to raise questions or offer comments at her website.¹⁵ By directly addressing her target audience, she strikes the right chord and this carries weight: “You are holding a book in your hands with the title *Do You Know the Law?* Thus, it deals with legal, that is, juridical content. How come?”¹⁶ The book’s layout, which includes A4-format, neatly arranged text and pictures, and reader-friendly typeface, font, color, and size, might also appeal to its addressees. The pages do not appear congested. The law images painted or drawn by children are particularly original; for instance, the drawing of a sports accident by a sixth-grader¹⁷ and other drawings of legal facts¹⁸ exhibit originality.

Do You Know the Law? will probably be translated into French, Italian, and English. The English version should be adapted to the Anglo-American law. It might make sense to modify the French and Italian versions accordingly, particularly modifying the choice of images, because the legal historical

¹³ *Id.* at 299-318.

¹⁴ *Id.* at 73.

¹⁵ Caroline Walser Kessel, *Willkommen [Welcome], KENNST DU DAS RECHT? [DO YOU KNOW THE LAW?]* (July 6, 2011 9:22 PM), www.kennst-du-das-recht.ch.

¹⁶ KESSEL, *supra* note 2, at 19.

¹⁷ *Id.* at 27.

¹⁸ *Id.* at 147-48.

images chiefly stem from the German-speaking world. For now, we look forward to picking and choosing the French, Italian, and English legal cherries.

IV. DESIDERATA FOR THE FUTURE

From the perspective of developmental and cognitive psychology, one may ask to what extent children are capable of understanding legal content. In her earlier essay, *Visualisierungen von Rechtsnormen durch Kinder* [*Visualization of Legal Norms through Children*], and in cooperation with historian Maria Crespo, the author offered an intense discussion of this controversial issue.¹⁹ Dr. Kessel's new publication invites us to further pursue this question and to seek more far-reaching answers. Is there a danger that the nature and depth of her inquiry in *Do You Know the Law?* might overwhelm an elementary school child? For instance, "[s]o-called 'intellectual' property is perhaps better known under the English term 'Copy Right.' We also speak of 'copyrights.' The point is that the author of a work—a writer, composer, or painter—has a special relationship with his or her work. It is his or her intellectual property, his or her creation."²⁰

Such passages call for adapting stretches of this otherwise intriguing publication to the cognitive abilities of children. Revision of this kind would result in an image-based law book solely and especially designed for children. The age-appropriate "law stories"²¹ could be supplemented with further stories.

Based on the book's many virtues, the author might even consider developing, in cooperation with her publisher, a playful approach to the law. In doing so, she would be following an established tradition in the field of legal history: in the early sixteenth century, the humanist Thomas Murner devised a juridical card game for law students on the *Instutiones* (legal textbook for beginners) of Justinianus (Roman Emperor and Legislator).²² More recently, C. H. Beck Publishers has taken up this ludic tradition and created "Play-Beck," a legal card game for law students that contains legal questions.²³ Sonja Reichel's "Jura-Quartett 'strafbar'" follows a similar playful direction.²⁴ One might con-

¹⁹ See Caroline Walser Kessel & Maria Crespo, *Visualisierung von Rechtsnormen durch Kinder—Darstellung ihres Fairness—und Gerechtigkeitssinns* [*Visualization of Norms by Children Representation of Your Fairness and Commonly Held Sense*], JUSLETTER, Aug. 2009, http://www.fairplay-study.ch/images/stories/doc/fairplay/Artikel_Jusletter_24_Aug_2009.pdf.

²⁰ KESSEL, *supra* note 2, at 123.

²¹ *Id.* at 159-62.

²² See Andreas von Arnould, *Präludium: Recht und Spiel* [*Prelude: Law and Game*], in RECHT UND SPIELREGELN 1, 6 (2003). The author albeit created the game for law students. *Id.*

²³ *Play—Beck*, BECK—SHOP.DE, <http://www.beck-shop.de/Theimer-Play-Beck/productview.aspx?product=6425> (last visited Apr. 19, 2012).

²⁴ See Jochen Leffers, *Mord und Totschlag à la carte* [*Murder and Manslaughter*], SPIEGEL ONLINE (May 25, 2005), <http://www.spiegel.de/unispiegel/wunderbar/0,1518,355755,00.html>

sider whether *Do You Know the Law?* could serve as a basis for such a card game, albeit an instructive law game for children and adolescents.

We do not only learn the law visually, in the form of written texts and images, or audiovisually, as written or spoken language, moving or static images, sounds, and so forth.²⁵ In the university context, especially in the Anglo-Saxon world, legal scholars and teachers are experimenting with introducing role-play in order to give students a tactile-kinesthetic or multisensory understanding of legal content.²⁶ It would be worth considering whether certain examples in *Do You Know the Law?* could be turned into legal role-play for children and adolescents. Particularly, the drawings that visualize different scenes of a legal situation would lend themselves to such use (nota bene, we can look forward to the textual and visual instructions for such role-play).

Some legal scholars will perhaps criticize this book's occasional lack of accuracy. I encourage Dr. Kessel to debate with her critics how to better design legal information for children and adolescents. Such a discussion seems called for because legal experts might doubt the shortfall of appropriate scholarly documentation with footnotes. In response, I would argue that given its target audience, the book does not take the stage with academic aspirations. Those who wish to verify the information provided may do so with the help of the copious references and index of illustrations.²⁷

V. YOU WILL KNOW THE LAW BETTER

I warmly recommend purchasing this extraordinary and unique book of legal images for children and adolescents, be it for private or educational purposes. Even non-lawyer adults will benefit from it, and thus they will become better acquainted with certain aspects of the law. Should lawyers pick up this book, they may enjoy it simply on account of its remarkable content.

(article about the 32-card game, which includes a sample of the cards (viewed by clicking on the picture)).

²⁵ See Colette R. Brunshwig, *Multisensory Law and Legal Informatics—A Comparison of How These Legal Disciplines Relate to Visual Law*, JUSLETTER—IT, Feb. 2011.

²⁶ See Anne Scully-Hill et al., *Beyond Role Playing: Using Drama in Legal Education*, 60 J. LEGAL EDUC. 147, 147-56 (2010).

²⁷ KESSEL, *supra* note 2, at 299-318.

MAINSTREAMING THERAPEUTIC JURISPRUDENCE INTO THE TRADITIONAL
COURTS: SUGGESTIONS FOR JUDGES AND PRACTITIONERS

Hon. Michael D. Jones (Ret.)*

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I. INTRODUCTION

Therapeutic jurisprudence (“TJ”) has moved into the traditional courtroom, into the non-problem-solving courts. The next challenge for TJ is to mainstream those TJ practice techniques developed in problem-solving courts throughout the court system. Judges who have learned innovative and effective problem-solving court techniques have matured, and through judicial rotations, many have moved on to serve on calendars that do not traditionally require problem-solving court techniques.¹ They have carried their ‘TJ toolkits’² with them, and they cannot forget those techniques and procedures that made their

* Retired Judge of the Arizona Superior Court, and Associate Professor of Law, Phoenix School of Law. I am deeply indebted to Professor David B. Wexler for his suggestion to write this article, his amazing scholarship in this area, his support, and his friendship. I also owe a great debt of gratitude to Judge Ian Dearden, Queensland District Court, Beenleigh, Australia, and Magistrate Maxine Baldwin, Magistrates Court, Gympie, Australia, for the idea that TJ could be *mainstreamed*, from their presentations on incorporating and implementing TJ into mainstream courts in Australia. Magistrate Maxine Baldwin, Address at the International Academy of Law and Mental Health 32nd Congress (July 18, 2011); Judge Ian Dearden, Address at the International Academy of Law and Mental Health 32nd Congress (July 18, 2011).

¹ William G. Schma, *Judging for the New Millennium*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 87 (Bruce J. Winick & David B. Wexler eds., 2003).

² See PAMELA M. CASEY ET AL., *PROBLEM-SOLVING JUSTICE TOOLKIT 1-4* (2007), http://www.ncsconline.org/D_Research/Documents/ProbSolvJustTool.pdf.

problem-solving court experiences such a success.³ This article contains practical tips, suggestions, and practice pointers for TJ and non-TJ judges and practitioners from the perspective of a TJ judge assigned to a traditional court calendar.

The rapid expansion of problem-solving courts throughout the United States and Canada is an endorsement and recognition of the effectiveness of TJ inspired techniques. Since the establishment of the first drug court in Miami in 1989,⁴ the concept has spread to more than 2559 drug courts in the United States.⁵ The varieties and forms that the modern drug court has taken reflect the complexities of the problems they address: adult drug court, DWI court, family drug court, federal re-entry drug court, juvenile drug court, state re-entry drug court, tribal Healing to Wellness court, Back on TRAC (Treatment, Responsibility, Accountability on Campus), and the newest—Veterans Treatment Court.⁶ In addition to drug courts, there are problem-solving courts created to address the over-representation of people with mental illness in the criminal justice system and jails (mental health courts), the growing problem of domestic violence (DV courts), compulsive gambling (gambling court), and truancy (juvenile truancy court).⁷ Canadian problem-solving courts include drug treatment, mental health, aboriginal, and domestic violence courts.⁸ Problem-solving courts have made their appearance internationally with the creation of such courts in Australia, Brazil, England, Ireland, New Zealand, and Scotland.⁹

Professors Bruce Winick and David Wexler noted the evolution of problem-solving courts and judges moving from the problem-solving calendar back to a traditional court calendar:

The new problem solving courts have served to raise the consciousness of many judges concerning their therapeutic role, and many former problem solving court judges, upon being transferred back to courts of general jurisdiction, have taken

³ *Id.*

⁴ Michael S. King, *Judging, Judicial Values and Judicial Conduct in Problem-Solving Courts, Indigenous Sentencing Courts, and Mainstream Courts*, 19 J. JUD. ADMIN. 133, 135 (2010), <http://sites.thomsonreuters.com.au/journals/files/2010/09/Article-King-2010-19-JJA-133.pdf>.

⁵ Figure current as of February 2012. See *id.*; *Types of Drug Courts*, NADCP, <http://www.nadcp.org/learn/what-are-drug-courts/types-drug-courts> (last visited Apr. 18, 2012).

⁶ *Types of Drug Courts*, *supra* note 5.

⁷ *Problem-Solving Courts*, NADCP, <http://www.nadcp.org/learn/what-are-drug-courts/types-drug-courts/problem-solving-courts> (last visited Apr. 18, 2012).

⁸ SUSAN GOLDBERG, NAT'L JUDICIAL INST., *JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH* 6 (2005).

⁹ King, *supra* note 4.

with them the tools and sensitivities they have acquired in those newer courts. Indeed, the proliferation of different problem solving courts, and the development of various “hybrid” models [e.g., juvenile drug courts, dependency drug courts, domestic violence courts, mental health courts], suggests to us that the problem solving court movement may actually be a transitional stage in the creation of an overall judicial system attuned to problem solving, to therapeutic jurisprudence, and to judging with an ethic of care.¹⁰

Judge Michael King devotes an entire chapter in his *Solution-Focused Judging Bench Book* to a solution-focused approach to judging in mainstream courts.¹¹ Judge King suggests that judges apply certain techniques of solution-focused judging outside the problem-solving court:

Indeed, the underlying philosophy of solution-focused judging—therapeutic jurisprudence—can be applied in judging in any context. Arguably, some aspects of a therapeutic jurisprudence approach to judging should be applied in any court context. Thus, factors also emphasised as important by procedural justice—giving parties’ voice, validation and respect—are important elements of day-to-day judging.¹²

Judges who serve in problem-solving courts have found these philosophical considerations important in formulating and developing their own courtroom skills. These problem-solving court skills, or TJ techniques, are equally useful and effective in a non-problem-solving court. In fact, many former problem-solving court judges find it difficult to transition from a problem-solving specialty court back onto a regular calendar. One does not forget the most valuable tools and techniques that worked so well in a problem-solving court, and it may be frustrating to allow those skills to fall into disuse.

The difficulties that a TJ judge will face include peer judges who are traditionalists, resistant to change, and who are invested with the procedures and techniques suited to the adversarial-only style popular in the last century. The attorneys who appear in courts other than the problem-solving courts will also resist attempts by a TJ judge to implement a team approach. Attorneys may view these attempts to be a waste of their time, or an encroachment upon their

¹⁰ Bruce J. Winick & David B. Wexler, *Introduction* to William G. Schma, *Judging for the New Millennium*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS*, *supra* note 1.

¹¹ See MICHAEL S. KING, *SOLUTION-FOCUSED JUDGING BENCH BOOK* 183–97 (2009), <http://www.aija.org.au/Solution%20Focused%20BB/SFJ%20BB.pdf>.

¹² *Id.* at 184.

traditional role as pure advocate. Peer judges and attorneys in the traditional courts have little tolerance for judges who take the time to engage in active listening or to engage with litigants and victims and their families.

Former problem-solving court judges—such as the author—can contribute to the study of TJ and its practical applications through an understanding and sharing of effective TJ techniques. Such techniques may be just as effective in non-specific traditional courts as in the problem-solving courts.¹³ Perhaps the most important technique is that of improved communication skills.¹⁴ For instance, it is important to abandon a paternalistic listening and speaking style in the courtroom and adopt a manner that communicates respect to the litigants and attorneys; this encourages people to feel comfortable speaking in court, giving voice to defendants, victims, and their families. In all criminal sentencing hearings, the judge can engage in active listening to aid the court in setting fines, restitution, and terms of probation. The unique concepts of the team-approach and review-type hearings can be modified and utilized successfully in traditional court proceedings.

After many years as a problem-solving judge, and then a special assignment appellate judge, nine years ago I found myself first on a traditional civil trial calendar and then a traditional felony criminal trial calendar. I sought every opportunity to use my problem-solving skills. On both calendars, the attorneys' first reactions to any judicial suggestion of a team approach, creative problem-solving, or the use of active listening were incredulity and opposition. Attorneys frequently objected when the judge—without a jury present—engaged in candid and direct communication with the parties—always with counsel present. However, at the end of five years, my civil calendar was a model of efficiency with counsel requesting early conferences with the court and parties present to address possible settlements—the attorneys wanted me to engage their clients. My experience on a felony criminal assignment—the last four years before my retirement—was similar in that I devoted a great deal of my time to successful settlement conferences for other judges. Defense counsel with 'difficult' clients and prosecutors with difficult¹⁵ or fragile victims or victim's families requested transfer or settlement conferences in my court. I attribute this to my continued use of TJ problem-solving techniques—primarily the

¹³ See Peggy Fulton Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 CHAPMAN J. CRIM. JUST. 7, 7-8 (2011).

¹⁴ See NICOLE L. WATERS ET AL., NAT'L CTR. FOR STATE COURTS, MENTAL HEALTH COURT CULTURE: LEAVING YOUR HAT AT THE DOOR 6-7 (2009), <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/spcts&CISOPTR=209>.

¹⁵ 'Difficult' usually meant persons with mental illnesses or personality issues. 'Difficult' always meant that it was difficult for the attorney to communicate with the person in the case.

communication skills discussed in this article. This article is not an exhaustive list of the possible and useful TJ or problem-solving techniques,¹⁶ it consists of those techniques that worked particularly well for me during my last years on the bench. These are the techniques and tips that I recommend to other judges and attorneys: observance of the elements of procedural justice, generous use of active listening, gentle use of confrontation, creating and emphasizing of the team approach, and the use of review hearings.

Let us be clear that a judge or attorney uses TJ techniques not to provide therapy to attorneys, participants, or for the audience. A lawyer or judge uses TJ techniques with the understanding that his or her words and actions may be perceived as, or may produce, therapeutic or anti-therapeutic effects. It is in the interest of all that the therapeutic effects be maximized, or that at least that anti-therapeutic effects be minimized, whenever possible.

II. PROCEDURAL JUSTICE

Procedural justice was explained by Dean Arie Freiberg:¹⁷

Procedural (or natural) justice refers to the ways in which decisions are made and their fairness. Procedural justice is regarded as important not only as a means of ensuring that decisions are accurate, but also by attempting to ensure that participants feel that the dispute process has been fair and open; engendering more confidence in the operation of the justice system. Therapeutic jurisprudence regards the principles of procedural fairness in the work of all agencies involved in the criminal justice system as important, not only the courts. Perceptions of unfair or unequal treatment are a major contributor to dissatisfaction with the operation of a legal system.¹⁸

¹⁶ See, e.g., INT'L NETWORK ON THERAPEUTIC JURISPRUDENCE, <http://www.therapeuticjurisprudence.org> (last visited Apr. 18, 2012); PROCEDURAL FAIRNESS, <http://www.proceduralfairness.org> (last visited Apr. 18, 2012); *Therapeutic Jurisprudence*, FACEBOOK, <http://www.facebook.com/TherapeuticJurisprudence> (last visited Apr. 18, 2012). The author strongly recommends these websites and Prof. David Wexler, TJ bibliography, published annually by the PHOENIX LAW REVIEW, and found in this volume at 5 PHOENIX L. REV. (forthcoming May 2012).

¹⁷ Arie Freiberg is the Dean of the Faculty of Law, Monash University, Australia. *Professor Arie Freiberg*, MONASH U. L., <http://www.law.monash.edu.au/staff/afreiberg.html> (last visited Apr. 18, 2012).

¹⁸ ARIE FREIBERG, POST-ADVERSARIAL AND POST-INQUISITORIAL JUSTICE: TRANSCENDING TRADITIONAL PENOLOGICAL PARADIGMS 12-13 (Monash University Research Paper No. 2010/17, 2010) (citations omitted), <http://ssrn.com/abstract=1609468> (follow One-Click Download button).

Professor Tom Tyler is a leading writer on the necessity and elements of “procedural fairness” in all court proceedings.¹⁹ He explains that there are four basic public expectations of the courts and its judges: (1) having ‘voice’ (speaking in court and being heard by the decision-maker); (2) neutrality of the judge (an unbiased judge who makes decisions based upon the consistent application of legal principles); (3) respectful treatment (individuals are treated with respect and afforded dignity); and (4) trustworthy authorities (the authorities are caring individuals who are sincerely trying to help the litigants).²⁰

It is important for the judge at the beginning of a court proceeding—such as a hearing or trial—to set a tone of mutual respect within the confines of the case. That is, the judge must demand respect for the court, counsel, litigants, and the litigants’ families and friends in the audience. The judge should explain the proceeding and set guidelines or establish procedures for the order in which the hearing will proceed.²¹ The judge should also establish an atmosphere in which counsel, litigants, and audience feel some comfort. That is to say, most people are nervous, fearful, and not accustomed to appearing in court. It is important for the judge to encourage those people by demonstrating his or her willingness to listen and consider what they have to say. Needless to say some courtroom proceedings are challenging, such as when the court conducts a sentencing hearing, and present in the courtroom are family members and friends representing the defendant and the victim, who may also be members of rival gangs. Other difficult situations include cases where a family member is accused of a crime, such as assault or molestation, by another family member. This results in a fractured or warring family, frequently requiring additional security by the court and close monitoring by the judge and the court staff to ensure the safety of all of those persons present—including the court staff and counsel. Clear ground rules and expectations of appropriate conduct—with threats of sanctions for inappropriate conduct—may be necessary.

These important ground rules can be achieved by simple introductory comments:

The Judge: Good morning everyone, please be seated. This morning we’re hearing the case of/sentencing of *State v. Danny Rosovich*. Did I pronounce your name correctly, Mr. Rosovich? Counsel, will you announce your appearances for the record, please?

¹⁹ Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 6 (2007), <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf>.

²⁰ *Id.* at 6.

²¹ *Id.* at 18 (“At the start of the docket, [the judge should] explain the ground rules for what will happen.”).

. . .
The Judge: Thank you. I remember this case from the trial/guilty plea proceeding, and I have read the presentence investigation report prepared by our probation department and the sentencing memoranda submitted by counsel. Today I expect you to help me better understand this case and all of the people involved, including the defendant, the victim(s), and their families.

I will not tolerate any person laughing, interrupting, or criticizing another while they are speaking in this courtroom. If anyone violates this rule they will be removed from the courtroom. I expect everyone to be quiet and respectful whenever another person or attorney is speaking, with the expectation that everyone else will be quiet and respectful when you or your friend or family member speaks.

I'm anxious to hear constructive recommendations from all of you.

First, could I hear from counsel, please?²²

The judge should interrupt immediately if anyone criticizes, interrupts, or laughs at another person or participant. If the judge fails to interrupt, then counsel should request that the court admonish the person for his or her behavior. Letting rude or ill behavior continue, encourages it, legitimizes it, and devalues the person speaking.²³

Some judges, because of personal preferences or lack of exposure to TJ and problem-solving courts, require—and will likely appreciate—prompting by counsel. Judges and court staff appreciate a ‘heads-up’ on cases involving difficult victims, defendants or their families. It is always appropriate for counsel to warn the court in advance of potentially dangerous courtroom situations, and suggestions to the court from counsel that the court address courtroom protocol are usually welcomed by judges. Counsel can also suggest to the court that a victim or defendant may require support personnel or additional time because of nervousness or fears.

Many times it is difficult to give voice to a victim or defendant who is afraid or nervous to speak in court. Of course, victims and defendants have a right to be silent, or to speak through others, such as their attorneys, but at times they feel most comfortable putting their thoughts and recommendations in writing to be read by others in the courtroom. To truly give voice to victims

²² These sample dialogues are loosely based upon hearings I conducted in my own courtroom and are not attributable to a particular case.

²³ Parents will certainly relate.

and defendants, the court should acknowledge that the judge has read and considered those comments:

The Judge: Thank you Mr. Rosovich for your written comments. I've read your letter and was impressed with your success on probation several years ago.

I also understand that over the years in your attempts to battle your substance-abuse addictions, you completed several outpatient programs successfully; you maintained a responsible and well-paying job for many years, supporting your wife and children throughout all the difficult times that you faced.

The judge should explain basic courtroom protocols and procedures to allow the victim—along with any family members—and the defendant—and his or her family members or friends—to address the court:

The Judge: I'm anxious to hear from everyone today who wishes to address the court. First, I will hear from the attorneys. Secondly, I will hear from the victim and the victim's family. Thirdly, I will hear from the defendant and the defendant's family and friends. Finally, I will ask the attorneys if they have any concluding comments.

When it is your turn to speak please come forward to the podium, right here with the microphone sticking up, and tell us your full name. I will ask you to speak clearly so that everyone can hear you and so that our court reporter, or court recording system, can properly record your statement. Let us know if you need any help or have questions.

Frequently, non-attorney speakers in court need and appreciate some prompting. People freeze in court; victims, defendants, and their families forget what they had intended to say when faced with a large crowded courtroom and the person who has harmed a loved one—or whom a loved one has harmed. Either the judge or counsel may gently prompt:

Thank you for being here today. What do you want the court to know and understand; what do you want the Defendant or the victim to hear today in court?

The court should encourage and facilitate apologies; honor and acknowledge those who give apologies—and note the difficulty in admitting that one is wrong. The court may have the opportunity to thank those who accept an apology graciously:

Mr. B (Victim): Judge, before you came out this morning, Tim's (the Defendant) whole family came over and sat with us, and told my wife and me how sorry they were that he was involved in the robbery of our home. Tim's dad said that they were upset that they had failed to notice that he was using drugs again and hanging around with that bad crowd. If only they had paid more attention, he said. Tim's parents told me about his struggle with drugs, and the many times that they had taken him to rehab. My wife and I were so impressed; we sat and prayed with them, and cried with them.

We don't blame Tim's family. We understand why Tim robbed our house. We don't want Tim to go to prison. But we don't want you to release him and allow him to go back to drugs. I guess we want you to do 'tough love.' We want you to put him on probation, or parole or whatever, and require him to do some kind of drug treatment program that will actually work this time. And we want you to make it clear to him that if he doesn't stay clean, he will go to jail. Could you do that for us, please?

The Judge: Yes, Mr. B, I think I can. First, let me thank you and your wife for being here, and for your graciousness and kindness in accepting Tim's and Tim's family's apology. Let me also thank you for your constructive ideas and suggestions for a probation plan that could work for Tim. I can order a suspended sentence, or probation. That means so long as Tim complies with the conditions of his probation he will not need to go to jail; however, if he violates a term of probation, his probation could be revoked and he will face prison or jail.

More importantly, I can order that Tim complete a rigorous drug treatment program and submit to random drug testing while he's on probation.

Counsel, could I please hear from you regarding the suggestions of Mr. B for terms of probation in this case? Are there additional suggestions that you would like the court to consider?

III. ACTIVE LISTENING

The judge's role is that of facilitator and active participant in those hearings where the judge is the finder of fact or the ultimate sentencing authority.²⁴ Passivity does not work when the judge needs information that is not forthcoming from counsel, the litigants, or the witnesses. A very effective means of drawing out important information is to use active listening techniques. Active listening is not playing dumb or patronizing the speaker—such techniques will be doomed to fail.²⁵

Active listening is listening to another person's statement—for instance, the details of an automobile accident—while indicating attentiveness and interest. Then, as soon as the speaker finishes, the listener recites back to the speaker the content of what was said. For example, "I understand you were in a car crash, and it happened without any warning or wrongdoing on your part. You were so severely injured that you were taken to the hospital by ambulance, and you suffered a terrible concussion."²⁶ Active listening is conversation to refine the meaning and details of the speaker's original communication, with the goal of improving the listener's understanding of what was said.²⁷

Active listening demonstrates that the listener is hearing the content of what the speaker says. It demonstrates to the speaker that he or she is effectively communicating, and the listener cares enough to hear it. It allows for the speaker to correct any misstatements or misimpressions and to clarify matters not fully understood by the listener. Active listening demonstrates mutual respect, and its use facilitates effective communication between people. Frequently in court, people are surprised that an attorney or judge is actually listening; they appreciate it, and become more open, honest, and responsive to questions. People who use active listening regularly find that they are able to read and understand the overt—and sometimes the hidden—emotions of the speakers.²⁸

Active listening is particularly useful to the court when the judge is required to make findings of fact without a jury. It can also be used, however, during *voir dire* in jury selection proceedings. In those situations where a prospective juror expresses a biased opinion, it is helpful for the judge to para-

²⁴ See Dr. Andrew Cannon, *Finding the Facts: The Judge Should Lead the Search Party*, 37 MONASH U. L. REV. 120, 126-29 (2011), available at <http://aija.org.au/NAJ%202010/Papers/Cannon.pdf>.

²⁵ GOLDBERG, *supra* note 8, at 13.

²⁶ SUSAN SWAIM DAICOFF, *COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION* 64 (2011).

²⁷ *Id.*

²⁸ *Id.*

phrase the juror's extreme language in a manner that illustrates the importance of fairness to all parties:

The Judge: Ms. C's son was convicted of a crime, and she is concerned that she cannot be fair to the prosecution, but her complaint is that she feels another jury was not fair to her son—she understands the extreme importance of fairness to both sides. Is there anyone on our jury panel who believes that they cannot be fair to *both* sides in this trial?

In another case, at the pretrial stage, the defense attorney moves for a continuance of the trial date and the victim strongly objects:

The Victim: Your Honor—I object. This case has been dragging on for more than four years! We've had a trial, an appeal, and now I have to go through another trial again. The defendant has had three different attorneys; I've had two different prosecutors, and you're the third judge who has heard this case. When is this going to end? I don't think it's ever going to end! I've lost a job, my family, and I don't think I can take this anymore.

The Judge: I understand that this has been a long and painful process for you. I can hear the frustration in your voice and see it in your face. You have been incredibly patient with our justice system. You understand why the appellate court reversed the conviction and sent this case back for a new trial. I know the last thing that you want is for us to make a mistake that would warrant a third trial in this case.

In criminal or civil settlement conferences, active listening is useful in communicating to all parties that the judge and the other parties understand each other's positions. It is particularly beneficial when it is used to enumerate the pros and cons of a settlement:

The Plaintiff: I need enough money to help me rebuild my house. Anything less is worthless. I lose. But . . .

The Defendant: You're just as responsible for the fire as my people are. And . . .

The Judge: Please don't interrupt. I want to understand exactly what you need to settle this case. I want to hear from each of you in turn without interruptions, and I want to understand clearly, so I may need to ask a few questions.

Mr. Plaintiff, I know you wish to rebuild your house. I understand that you feel that Mr. Defendant's employees are

chiefly responsible for the fire that destroyed your home. Please explain to us, in detail, why you need the amount that you're requesting.

. . .

The Judge: Thank you, Mr. Plaintiff. The major cost in rebuilding for you will be the costs of labor, and you do not wish to use the services of the Defendant's construction company, though that will increase the costs to you.

Have you considered the costs of not settling this case, including the attorneys' fees, witness fees, the cost of your time, and all the possible costs of an appeal?

The Plaintiff: The principle of making him pay for my losses is important to me.

The Judge: I understand why you brought this case and why you have prosecuted it this far. You're interested in justice, but there are costs associated with securing justice in our court system that I know that you understand because you have a good attorney advising you in this case.

During many court proceedings, one or more parties may express their frustration with the length of time that it takes to complete a court case or to have a trial. Judges can use these statements to not only sympathize with the speakers, but to educate them about the legal process and to encourage a settlement of the case that will bring some finality to all parties:

The Defendant: I object to postponing the trial any further. I've been sitting here rotting in jail while the attorneys work on other cases. When will this end?

The Judge: I know that you would like to get this over with as quickly as possible. And, it's frustrating to you even more because you're in jail waiting for your trial. But, I also understand that you want your attorney to be as prepared as possible, and to be ready for your trial.

The waiting, and the stress while waiting, is a difficult thing for many of the people that I see in my courtroom. I would encourage you and the attorneys to consider a plea agreement in this case that would bring some finality to everyone—that is an end to this case today. When there is a plea agreement there is no need for a postponement or continuance, no need for a trial, no need for an appeal. The case ends. Why don't we take a break before I consider postponing the

trial and give everyone an opportunity to think about a possible plea agreement?

A. *Active Listening With Victims of Crimes*

There are many opportunities to use active listening with victims of crimes. The use of active listening may serve to release pent-up emotion and tension in constructive ways. Active listening can be used to educate the victims about criminal laws and processes including the intricacies of probation, parole, and prison versus jail sentences.

Victim's Family: Judge, we have a video that we would like to play for you that contains pictures of our son Tommy's life. Tommy wrote the music that is playing in the background. These pictures show what an important part of our family Tommy was, and they show just a few of his accomplishments in college and in the Navy. May we show that to you?

The Judge: Of course. Tommy's life, his accomplishments, and his role in your family are important.

. . .

The Judge: Thank you for the video that has helped me to know Tommy better as a person and a member of your family. It's very comforting to know that before his death, Tommy was much loved, and that he lived such a rich life. What a tragedy that someone with such promise lost his life too soon.

The court can also use active listening to involve the victim, or the victim's family, in crafting a sentence that will better serve the defendant and the community.

Victim: I want him to serve the maximum sentence, your Honor. He needs to pay for what he did to me and my family. It's only fair.

The Judge: I'm glad that you're here today and that you care about the sentence that the court will impose. Are you requesting a maximum sentence out of a concern that this defendant will commit a similar crime against another innocent person, such as yourself?

Victim: That's right. I want him in jail for as long as possible, so that he doesn't hurt someone else.

The Judge: I understand. You want to protect society from this defendant. Very commendable.

Does it matter to you whether the defendant is in jail or in prison? Or whether he's supervised on probation or house arrest? Should we discuss which of these will better protect you and society?

Victim: I'm not sure.

The Judge: Do you understand that I can order a *longer* supervised probationary term than a jail or prison sentence? And, that as a condition of probation I could require house arrest, enrollment in a drug treatment program, regular employment, and regular restitution payments to you?

Victim: I didn't know about that. So, he would have to work, go to treatment, and stay at home the rest of the time? Who watches him? How do we know that he will obey?

The Judge: It's too bad this was not explained to you before, but we have time to make sure we understand it now. Yes, probation may include terms and conditions that a Defendant agrees to follow, otherwise probation may be revoked and the Defendant sent to prison. Those terms could include employment, treatment, and house arrest. I will order probation officers to monitor the Defendant's compliance.

Can you think of other terms of the sentence that you think I should order?

Victim: When will he pay my medical bills?

The Judge: Good point. I can order payment for restitution as part of the conditions of probation. We can discuss how much the Defendant can pay towards your bills each month.

Now, before I enter orders in this case, are there other terms or conditions of probation that may be appropriate? I will also hear from counsel their recommendations, and finally from the Defendant as to whether he agrees.

B. Active Listening With Defendants and Their Families

Active listening is useful to address the fears of defendants and their families. Primarily, defendants and their families are afraid that the court will not take time to understand and know the defendant as a person. Many are fearful that they and their loved ones will be judged as a bad person. Many are desperate in their hope that a judge will hear them.

Mother: I know my son did wrong. He knows better. We taught him better. He's not a bad person; please don't think that he's bad just because he has done stupid things.

The Judge: I understand that good people can make mistakes. I don't think that your son is a bad person.

I see good people in this courtroom every day who are here because they have used poor judgment; they have made mistakes.

Active listening can be very helpful to the court in evaluating and determining the sentence or possible conditions of probation. The court can engage the defendant and his family and friends in constructive conversation about the length and nature of the defendant's drug, alcohol, or mental health problem. The Court can inquire about the nature of treatments and programs that the defendant has previously completed and solicit opinions why those treatments did not work. The judge can also solicit opinions and recommendations²⁹ for future programs that might work.

Defendant: I know that all I need is a good drug program where I can learn to be clean.

The Judge: Well, excellent. The first step in recovery is acknowledging your problem. So, tell me about your previous treatments and programs. What worked best for you?

Defendant: The support, and knowing that I wasn't alone; that other people had beat this thing. That they were living with their drug addiction and it wasn't ruining their lives, like it was mine.

The Judge: Support is important. Why did you stop going to treatment, then?

Defendant: It was a hassle. I lost my car, and the bus line ran at weird times. Lots of reasons.

The Judge: If your probation officer orders it, are you willing to complete a more rigorous drug program, such as a residential program where you will get twenty-four-hour-a-day support?

Frequently, admitting the underlying problem, illness, or addiction is difficult for defendants.

²⁹ Judge Michael King has expressed serious concern about the judge over-stepping his or her role in recommending a specific therapy. In many U.S. jurisdictions, however, individuals will not receive the level of service that they may require unless higher levels of service are required and directed or ordered by the court. The judge should base these orders on recommendations from the appropriate professional, but it is useful to begin such dialogues with the defendant.

The Judge: I can't help noticing that each of the times that you were arrested for assaulting your wife, you were using drugs.

Defendant: I used the drugs because I feel so bad, so depressed, all the time. But I worked, I earned a living, and I supported my kids.

The Judge: So, you functioned well as long as you had the drugs to numb the depression? Are you willing to speak with your probation officer about your depression?

Defendant: Okay. I actually think counseling might help.

The Judge: I will request that your probation officer investigate that option and do whatever screening may be appropriate.

Focus the Defendant (or his family) on the future:

Defendant: I just want to get this over with. I hate her (ex-wife who reported Defendant to police for a probation violation).

The Judge: I know that you want to get this over with, so let's discuss your plans to succeed on probation after your release from jail later today.

Active listening and some gentle confrontation³⁰ facilitate a constructive conversation between the important parties, which include a young defendant's parents or other significant family members. Those family members may effectively monitor a defendant's terms of release conditions³¹ or terms of probation:

Mother: Please just give my daughter another chance. Alcoholism is a disease.

The Judge: I understand you want things to be as they were before this crime occurred, and you want your daughter not to go to jail. More importantly, I understand that alcoholism is a serious addiction. What can you and the rest of your family do to help your daughter stay sober?

³⁰ See *infra* Part IV.

³¹ See David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78, 78-79 (2008), <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2Wexler.pdf> (recommending inclusion of family members of the defendant in discussions about the terms of a pretrial release). Such a measure will likely enhance the parents' or family's involvement in compliance with those terms of release. See *id.*

Mother: We'll be there for her—every moment. We'll make sure she doesn't drive a car, or drink.

The Judge: Will you take her car keys away from her? Will you call her probation officer if she takes a drink?

Mother: I will do whatever it takes.

The Judge: What kind of alcohol treatment program will work for your daughter?

Mother: She's been in several, and she goes to AA.

The Judge: I understand that she has tried many times to stay sober. But, has she completed an in-patient program? Would you support her in a residential treatment program?

IV. GENTLE USE OF CONFRONTATION

A general observation about confrontation is that it frequently does not work well unless it is gently done, and the person confronted is able and willing to understand the sometimes subtle point being made. Gentle confrontation works when the person confronted trusts the person who is speaking. Confrontation works best when the 'trusted speaker' does not place the person to be confronted in a position where he or she perceives an unfair attack. The judicial role is well-suited to fit the position of the trust role.

Confrontation can be motivational: "You haven't been successful at drug rehab so far, why is this time different?"³² "How can I be sure that you will take your medications?" "What type of counseling do you think will work, since you haven't been successful in other programs?" Or, "If I release you from jail, what's your plan to find a job when you're released from jail?"³³

Confrontation is most effective in settlement conferences to address factual conflicts, fallacies, and false hopes or expectations by the parties (or the attorneys). As the neutral party, the judge can easily make the point that a party's claim, defense, or monetary expectation is not reasonable or credible.

In a recent criminal settlement conference,³⁴ the judge effectively used confrontation to convince a defendant that his defense was not entirely credible. Jim Smith³⁵ appeared with his attorney and the prosecutor for a scheduled settlement conference. Smith was a nice looking, well-dressed young man—pos-

³² See *id.* at 79.

³³ *Id.* Professor Wexler recommends including the defendant in "relapse prevention planning" to review the chain of events and circumstances that previously led to criminal behavior and to solicit suggestions on how such situations may be avoided in the future. *Id.*

³⁴ In Arizona, judges regularly conduct criminal settlement conferences. ARIZ. R. CRIM. P. 17.4(a). The judge who conducts such settlement conferences is not the judge who will conduct the trial, unless the parties consent. *Id.*

³⁵ This is not the Defendant's true name.

sibly a con man, but in a charming, inoffensive way—who was charged with Indecent Exposure with minors present;³⁶ he had mooned the crowd while dancing to street musicians on Mill Avenue in Tempe, Arizona. Smith's attorney interrupted the judge's preliminary remarks about the recording of settlement conferences to explain that his client was not interested in any form of plea bargain because he believed he had a complete defense to the crime: Smith had *accidentally* exposed himself to minors, and so there was no intent to commit the crime. Smith's attorney further explained that he wanted the prosecutor and judge to explain the crime charged, and he would appreciate opinions on the sufficiency of the prosecutor's case and the defense.

The judge suggested that perhaps the best way to proceed to evaluate the case would be for everyone to imagine that they were an average juror sitting in the jury box hearing the case for the first time: first, the prosecutor would call the parents of the children who observed the Defendant dancing with his pants and underwear around his ankles, and buttocks and genitals exposed. Then, the Defendant would have the opportunity to testify and explain 'the accident.' The judge asked for clarification about how the pants accidentally fell down, and the Defendant explained that he was surprised that they just fell.

At that point, the judge reminded everyone that it was likely that half of the jurors would be male. They would be asking themselves, "How many times, in my life, have my pants fallen down around my ankles—with no warning?" The judge asked everyone if they agreed that this would be a likely question and a serious concern of the jurors. Even the Defendant agreed it would be. The judge then suggested to the attorneys and the Defendant that the jurors—at least the male jurors—would ask themselves not only, "How many times, in my life, have my pants fallen down around my ankles—with no warning?" but also, "And my *underwear* fell down, too!!" The judge suggested that jurors would likely conclude from their personal experiences that one usually has some warning of a 'wardrobe malfunction'³⁷ or clothing failure.

The judge asked the defendant and his counsel if they had considered facts or arguments that would address these likely jury concerns. The defendant responded that, "I didn't plan to do it, I just got so wrapped up in the music—it just happened." At that point, the judge gently suggested that a spur-of-the-moment act that is not planned is still different from an accident. The judge asked the defense attorney to explain the legal difference between accidents and volitional acts. Counsel also explained that the jury would make the ultimate determination about whether an accident had occurred; however, it was

³⁶ A class 6 felony under Arizona law. ARIZ. REV. STAT. ANN. §13-1402(c) (Westlaw through 2012 Legis. Sess.).

³⁷ *Jackson Apologizes for Super Bowl Exposure*, CNN (Feb. 2, 2004), http://articles.cnn.com/2004-02-02/us/superbowl.jackson_1_half-time-show-mtv-damita-jo?_s=PM:US.

likely—given the factual issue—that the prosecutor would ask the Defendant on cross-examination if he had previously exposed himself in public, and been previously convicted of Indecent Exposure (which he had).³⁸ The Defendant understood and readily agreed. The case was resolved with a probation stipulation in a plea agreement approved the same day.

V. CREATING AND EMPHASIZING A TEAM WHERE NONE PREVIOUSLY EXISTED

The TJ judge can teach attorneys, even in adversarial proceedings in a traditional court, the benefits of working as a team, rather than at cross purposes. There is much to be accomplished: the court can delegate tasks to the attorneys, such as agreeing upon the language in an order—for discovery, a protective order, etc.—the limits on depositions, and time limits on testimony, arguments, and *voir dire* questions. Attorneys will appreciate the freedoms, the control, and the trust implicit in the court's delegation of authority.

Dr. Andrew Cannon³⁹ argues persuasively that judicial officers “should lead the search party” in identifying and resolving pretrial discovery abuses in civil cases, which he explains “are common enough to have a name: ‘deep pocketing’ your opponent, that is making the pretrial path so tortuous and expensive that the opponent cannot afford to make the journey.”⁴⁰ The judicial officer can require counsel to agree to reasonable presumptive limits on the numbers of interrogatories, depositions, or examinations.

The TJ judge coordinates activity and possesses a “disentrenching capacity” that Professor Michael C. Dorf describes as, “[t]he ability to declare some course of conduct unlawful, even where a court does not have a solution ready at hand, enables courts to force other actors to address their problems immediately.”⁴¹ Such a court “can impose a ‘penalty default,’ a state of affairs so unpalatable to all parties that they have no choice but to hammer out some solution.”⁴² The judge is in a unique position because

³⁸ Although a misdemeanor under ARIZ. REV. STAT. ANN. §13-1402(c) (Westlaw through 2012 Legis. Sess.), the conviction might be relevant to prove absence of mistake or an aberrant sexual propensity under ARIZ. R. EVID. 404(b) or (c).

³⁹ Dr. Andrew Cannon is the Deputy Chief Magistrate and Senior Mining Warden for South Australia and Adjunct Professor of Law at Muenster University, Germany, and Flinders University, South Australia. *Andrew Cannon*, FLINDERS U., <http://www.flinders.edu.au/ehl/law/staff/andrew-cannon.cfm> (last visited Apr. 18, 2012).

⁴⁰ Cannon, *supra* note 24, at 126.

⁴¹ Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 946 (2003).

⁴² *Id.*

unlike other actors in the legal system, courts are perceived as neutral parties that lack a direct stake in the outcome of litigation or substitutes for litigation. Neutrality, or at least the perception of it, permits courts to function as honest brokers when problem solving becomes a matter of negotiation. In addition, the courts' perceived neutrality, when combined with such quasi-mystical symbols of judicial power as the robe and gavel, lends prestige to the courts, thereby enabling courts to command respect where other actors might not.⁴³

The judge is in a perfect position of authority to serve as a "dynamic risk manager."⁴⁴ He or she can challenge the attorneys to work together to design individual solutions to underlying mental health, domestic violence, or substance abuse issues, to name but a few. The judge can also lead the attorneys to collaborate with specialist professionals who may interview, test, or design treatment plans that minimize risk factors or the likelihood of recidivism for parties in the case. Upon attorneys' failure to agree on a complete settlement, the judge can suggest evaluations or tests that might affect a future settlement or the presentation of evidence. Examples include criminal cases where the competency or insanity of the defendant is not an issue, but the judge can still refer the parties to neurological and/or psychiatric specialists to develop a plan to treat the defendant's underlying mental health issues. The judge can then incorporate the mental health plan into the terms of probation. The judge can also schedule review hearings to facilitate progress reports toward the goals established, and dispense rewards and sanctions.

VI. REVIEW HEARINGS

Review hearings in court cases are not a new or revolutionary concept. Review hearings are, by their nature, opportunities for the court to review the efficacy of prior orders, such as discovery, injunctions, temporary support, or terms and conditions of probation. A TJ judge may use a review hearing as a means of relapse prevention, and to "encourage and praise participants where appropriate; to note the achievement of any of the participants' goals or significant progress towards the attainment of those goals; [and] to reinforce the participants' self-efficacy."⁴⁵ Most probation revocation proceedings are fundamentally a *review* of the defendant's progress. Review hearings are held in the problem-solving courts to administer rewards or sanctions when a defen-

⁴³ *Id.* at 945.

⁴⁴ Shauhin Taleh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 119-20 (2007).

⁴⁵ KING, *supra* note 11, at 190.

dant has achieved or failed to achieve goals set as part of the court's 'contract' with the defendant. What is new and exciting is Judge King's notion that review hearings can be held in a criminal court *before* formal probation/parole revocation proceedings are initiated—or, that review hearings may be useful to review compliance with pre-trial and post-trial orders in both criminal and civil cases.⁴⁶

Review hearings are quite an effective tool in collecting funds owed to the court or to individuals, such as support arrearages, fines or restitution. In cases where child and/or spousal support is owed, a party can request a hearing in most courts by submitting a petition for order to show cause as to why the person in arrears should not be held in contempt of court. Or, where a person has a history of willfully failing to pay support,⁴⁷ the court can schedule regular, periodic review hearings, with the threat of a contempt order and incarceration to compel compliance with the court orders.

The Maricopa County Superior Court established a 'Restitution Court' to increase compliance with the court's restitution orders in criminal cases; the process functions in a way similar to support arrearage contempt hearings.⁴⁸ On a party or victim's request, or on its own motion, the court schedules a hearing to review the payment history of a person owing restitution. At the hearing the judge will hear reasons why the person owing restitution has not paid or is delinquent in his or her payments, and impose or threaten sanctions or modify the payments to reasonable amounts.

Review hearings are effective when probationary terms are about to expire and the probationer has not completed all the terms and conditions of probation. Formal revocation of probation is time consuming, expensive, and unnecessary when the court could schedule a review hearing before the period of probation expires to address non-compliance with probation terms. For example, in drug cases, the probationer is frequently ordered to complete a drug education or counseling program, or a substance abuse screening and/or urinalysis testing. Alternatively, defendants are ordered to complete community service hours, or to pay fines or restitution. Many times, short probation periods merely need to be extended, or probationers need additional time to fully comply with the court's orders:

The Judge: Good morning counsel and Mr. Arras. It appears that Mr. Arras only has 60 days remaining on his term of probation, but that there appears to be a substance abuse screen-

⁴⁶ I include 'Family Court' cases within the term civil.

⁴⁷ Frequently referred to as a 'scofflaw.'

⁴⁸ Judge Roland Steinle, of the Maricopa County Superior Court, initiated this new type of problem-solving court in Arizona.

ing and some community service hours that remain to be completed?

Counsel: My client had a stroke in February of this year, and it left him debilitated. We do have a certificate of completion of a drug screening (hands certificate to probation officer); however, there has been no treatment required. I think treatment was obviated by the fact that he had this stroke that was related to his drug usage. But, he has not completed any hours of community service.

Mr. Arras: I'm willing to do the community service. My rehab center has offered to let me volunteer a couple of hours each week, you know, doing things like cleaning up the tables, and things like that.

The Judge: That seems very appropriate; giving back to the rehab center that has helped you.

Mr. Arras: I'm happy to do that.

Counsel: Your Honor, I'm not sure that my client will be able to complete 100 hours of community service within the 60 days remaining on his probation, is there a way we can extend that?

. . . .

The Judge: I will accept the parties' stipulation to extend probation in this case for an additional 120 days from this date. So ordered.

In traditional courts, there is no court *hearing* to end probation terms when they are completed. Traditionally, there is a handoff from the judge to the probation office and the defendant, with no further court involvement, except when probation must be revoked. A regularly scheduled court hearing could assist the probation officer in impressing the seriousness of probation and the need to fulfill the terms of probation. Such review hearings could be set half-way through and near the end of a term of probation. A review midway through the probationary term could serve as a wake-up call to those people who fail to take their responsibilities seriously.

Some probationers need additional motivation from a judge. For example, if they fail to comply with all terms and conditions of probation, then formal revocation proceedings, including the possibility of jail or prison, will follow. A brief review hearing can address these issues:

The Judge: This is the time for a review hearing, and it appears that the restitution order in your case, Ms. Rodriguez, was \$2,208.00. Is that right?

Probation Officer: Ms. Rodriguez has a job with the state, but has made exactly zero payments toward her restitution since she was placed on probation. She hasn't even asked for an extension or provided any explanations for her non-payments.

Ms. Rodriguez: I can make a payment today.

The Judge: Good. And, when can you make another payment?

...

The Judge: I will set a review hearing in six months' time, and if you make regular payments for the next six months, I will delete all of the clerk's late charges on your account. If you don't make regular payments, I could find you in contempt of court and put you in jail until you make a payment, do you understand?

VII. CONCLUSIONS

The next challenge for the TJ judge is to mainstream TJ practice techniques developed in problem-solving courts throughout the court system. Judges who have learned innovative and effective TJ practices and problem-solving court techniques, such as emphasis on the elements of procedural justice, active listening, confrontation, team building and the effective use of review hearings, may readily use those techniques in the mainstream courts. TJ judges cannot and should not forget those techniques and procedures that made their problem-solving court experiences such a success.

ELEVATING THERAPEUTIC JURISPRUDENCE: STRUCTURAL SUGGESTIONS
FOR PROMOTING A THERAPEUTIC JURISPRUDENCE PERSPECTIVE
IN THE APPELLATE COURTS

David B. Wexler*

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I. Introduction

Therapeutic jurisprudence (“TJ”) has moved rather quickly from theory to practice,¹ especially with respect to the role of the judiciary.² In fact, more than a decade ago, the journal *Court Review*, the official Journal of the American Judges’ Association, devoted an entire issue to the topic of therapeutic jurisprudence.³ There, it was noted that the bulk of “therapeutic jurisprudence analysis focuses on the trial context,” and that “[s]urprisingly very little has been written about therapeutic jurisprudence in appeals.”⁴

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¹ David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 MONASH L. REV. 33, 33, 36 (2011).

² SUSAN GOLDBERG, NAT’L JUD. INST., JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH (2005); JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce Winick & David B. Wexler eds., 2003); MICHAEL S. KING, SOLUTION FOCUSED JUDGING JUDICIAL BENCH BOOK (2009), available at <http://www.aija.org.au/SolutionFocusedBB/SFJBB.pdf>.

³ William Schma, *Judging for the New Millenium*, Spring 2000, at 4-7.

⁴ Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, Spring 2000, at 64.

But the issue noted, too, that TJ should have a prominent place in the appellate arena.⁵ After all, “[b]ecause appellate courts are final decision makers that not infrequently share their reasoning, they are able to ‘minimize damage’ and engender therapeutic consequences.”⁶ Accordingly, to begin to remedy the situation, in that very issue of *Court Review*, Professor Amy Ronner wrote an essay, *Therapeutic Jurisprudence on Appeal*,⁷ emphasizing how appellate courts, in their opinions, can, in sensitively expressing reasons for their rulings, serve a therapeutic function.⁸ And, although dealing with an original jurisdiction case in the Supreme Court of Canada focusing on group relations between Québec and the rest of Canada, Professor Nathalie Des Rosiers’ article *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*⁹ in essence launched a branch of TJ scholarship relating to therapeutic jurisprudence in the appellate courts.¹⁰

For our purposes, Des Rosiers’ work suggests two avenues for TJ that can easily transcend majority-minority relations and can apply to appellate decision-making in general.¹¹ First, Des Rosiers makes the very important and meaningful point that, in their use of language, appellate courts should not want to think only about “how the winner feels but also how the loser does.”¹² So as to minimize destructive effects for the losing party, Des Rosiers suggests the best way for a court to couch its opinion is in a “letter to the loser.”¹³

Secondly, Des Rosiers applauds the doctrinal product of the Canadian Supreme Court case, which established simply a “duty to negotiate”¹⁴ in the event a clear majority eventually emerges on the question of Québec separation:

[T]he “duty to negotiate” can be seen as a brilliant, process-oriented response to the quandary. Not that it solves anything. Nothing could. But it allows for the debate to continue without shutting up one participant. Québec’s wishes may require

⁵ See *id.* at 65.

⁶ *Id.* at 64.

⁷ Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, Spring 2000.

⁸ See *id.*

⁹ Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, Spring 2000.

¹⁰ Symposium, *Therapeutic Jurisprudence: Issues, Analysis, and Applications*, 24 SEATTLE U. L. REV. 217 (2000) (focusing on TJ in the appellate courts).

¹¹ Des Rosiers, *supra* note 9, at 54.

¹² *Id.* at 56.

¹³ *Id.*

¹⁴ *Id.* at 62.

constitutional accommodation, and the rest of Canada would have, at least, the obligation to listen and respond.¹⁵

More broadly, Des Rosiers suggests an approach whereby “an inventory of process-driven solutions ought to be offered to courts.”¹⁶ Des Rosiers notes, too, that perhaps “lawyering will have to be done differently” and “the implications for lawyers of a judicial therapeutic approach will have to be examined further.”¹⁷

For TJ purposes, the notion of process-oriented solutions seems most important and sensible. Indeed, process-oriented or not, there are clearly some legal doctrines that are likely to serve therapeutic ends far more than others¹⁸—a point to be addressed below.

The *Court Review* TJ issue led to an immediate flurry of scholarly activity by academics and some judges,¹⁹ but—aside from an occasional opinion expressly acknowledging the importance of a TJ approach in appellate opinion writing²⁰—in the last decade TJ has not had an impact in the appellate sphere in any way comparable to its influence at the trial level. The present essay is designed to analyze the difficulty TJ has had in gaining an appellate foothold, and to propose some relatively simple structural suggestions for altering the situation and for easing the way for TJ to find a prominent place in the appellate arena.

II. THE PROBLEM AND SOME SUGGESTED SOLUTIONS

In my view, Des Rosiers’ assertion that for TJ to flourish in the appellate courts “lawyering will have to be done differently”²¹ is right on the money, and the lack of development of such a different type of lawyering is the reason we have not seen many obvious examples of TJ in the appellate judiciary. Rather,

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See Robyn Carroll & Normann Witzleb, ‘It’s Not Just About the Money’—Enhancing the Vindictory Effect of Private Law Remedies, 37 *MONASH L. REV.* 216 (2011); Luther T. Munford, *The Peacemaker Test: Application and Comparison*, 80 *MISS. L.J.* 639 (2010) [hereinafter *Application*]; Luther T. Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 *HARV. NEGOT. L. REV.* 377 (2007); David B. Wexler, *Lowering the Volume through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship*, 3 *FLA. COASTAL L.J.* 123 (2002).

¹⁹ See Symposium, *supra* note 10.

²⁰ See *In re Adoption of B.M.J.F.*, No. 104,008, 2010 WL 3665154, at *1 (Kan. Ct. App. Sept. 10, 2011), *rev. denied* (Nov. 8, 2010); *Winning Streak, Inc. v. Winning Streak Sports*, No. 100,725, 2010 WL 348272, at *6-7 (Kan. Ct. App. Jan. 22, 2010) (Leben, J. concurring).

²¹ Des Rosiers, *supra* note 9, at 62.

under our traditional adversary system and “argument culture,”²² where two sides battle it out with forceful briefs and where the court’s opinion typically tracks the approach, analysis, and often the language of the winning brief,²³ a judicial opinion is far more likely to constitute a *congratulatory letter to the winner*, rather than the Des Rosier-suggested *respectful letter to the loser*.²⁴ Likewise, doctrinal solutions reached by courts are likely to be drawn directly from the position of the prevailing party, and, in crafting their arguments and proposed relief, the therapeutic dimension and its subtleties may not even surface.

Accordingly, the status quo is surely to be the expected result: under the conventional system, the advocates are tasked with helping the courts by marshalling and presenting the best arguments for the respective parties. It is somewhat unrealistic to expect the courts to disregard much of the work presented to them and to craft opinions that depart stylistically in a major way from the briefs. Similarly, it is not to be expected that courts would fashion remedies dramatically different from those proposed by the parties, and it may in fact be inappropriate for them to do so.²⁵

Of course, we should not encourage lawyers to engage in lawyering whereby they no longer marshal and present the best arguments for the respective parties. Where, then, should the *different* lawyering so necessary to the TJ task come from? How can the courts be assisted in their own work by lawyers doing things somewhat differently than what would follow naturally from our conventional system?

My proposal is two-fold, one for each of Des Rosiers’ proposed paths: letter to loser opinions, and therapeutic doctrinal solutions. Regarding the first path, we should, in my view, alter somewhat and broaden the role of judicial law clerks, both the ‘recent law graduate’ type—the well-credentialed graduates who spend a year or two working for the court or for a particular judge—and the so-called ‘career clerks,’ often called Appellate Court Attorneys or Appellate Staff Attorneys—the group of law clerks, often women, who are

²² David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, *passim* (1999).

²³ Luther T. Munford, *Writing the Effective Appellate Brief*, Vol. 5, 5th Cir. App., Rep. 45, 46 (1987) (“[A]n effective brief makes it easy for the Court to write an opinion deciding the case in the client’s favor. An appellee’s brief or an appellant’s reply brief that responds thoughtfully to the issues previously raised can be particularly helpful to the Court.”); *see also* Wexler, *supra* note 22, at 264, 266. Of course, not all briefs are good, and in such cases courts are unlikely to track the language of the brief. Still, perhaps influenced by how they write opinions in the “good brief” cases, many judges develop a general opinion-writing formulaic style, again writing opinions basically addressed to the winner.

²⁴ Des Rosiers, *supra* note 9, at 56.

²⁵ *See* Mapp v. Ohio, 367 U.S. 643, 674-75 (1961).

highly qualified, experienced, and who are sometimes seeking a better work/life/family balance—a ‘saner’ (i.e., more therapeutic) career in law than is ordinarily found in typical law practice. As explained below, these court staff attorneys could be encouraged to help the courts by drafting proposed opinions more in line with the Des Rosiers’ “letter to the loser” proposal.²⁶ Moreover, if related studies of judges are any indication, the revised role is likely to add to the professional job satisfaction of the law clerks.²⁷

Regarding the crafting of doctrinal solutions, my suggestion is that what is needed is groups of lawyers, perhaps from foundation-funded public interest law firms or affiliated with law school clinics, who would troll for appropriate cases and petition to participate in such cases as *amicus curiae*. The client could be an organization formed specifically for encouraging the development of a legal system—in this case especially an appellate judiciary—more attuned to helping society by formulating therapeutically-viable rulings. Let us look at the two TJ appellate paths in turn.

A. *The Letter to the Loser*

Before we even reach the *form* and *tone* of an appellate letter, we need to face the fact that in many situations there is no letter of *any* kind: the summary per curiam affirmance (“SPCA”), a technique used for efficiency in the large number of cases, especially the many criminal appeals brought by publically-paid defense lawyers, where the clear and obvious result is a simple affirmance of the lower court.

But the fact that there may be no legal merit to a party’s claim does not, in TJ terms, support the SPCA technique. In fact, in a follow-up piece to her *Court Review* article, Professor Amy Ronner, writing with her mentor, the late Bruce Winick, railed against the SPCA on TJ and procedural justice grounds:²⁸ a SPCA says nothing at all to the losing party—or to his or her lawyer—to indicate that the party’s argument was heard and attended to. The highly anti-therapeutic result may be a perception by the party of unfairness or worse, an attitude not at all helpful in encouraging respect for the law and an acceptance, however reluctant, of the need to put the matter behind and to begin to look toward the future. The lawyer, too, will be left disheartened, embarrassed before his client, silenced by the court, or unable to convince the client that the

²⁶ Des Rosiers, *supra* note 9, at 56.

²⁷ See Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, Spring 2000, at 17.

²⁸ Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000). Consider the Kansas rule on summary affirmances, KAN. SUP. CT. R. 7.042, which mandates specifically that the “opinion will be in the following form: ‘Affirmed under Rule 7.042 [(a) (b) (c) (d) (e) and/or (f)].’”

lawyer competently presented the client's case. And the client—especially a client in a criminal case with an assigned public defender—may already doubt the level of representation provided by a defender instead of a *real* lawyer.

To establish that a litigant was given *voice*, and that the court attended to the litigant's contention (validation), Ronner and Winick urge courts to produce a *very* short written statement merely reciting the salient facts, mentioning some of the arguments, and noting the authority calling for the result reached.²⁹ In essence, they are urging a short (and most likely unpublished) *therapeutic* affirmance.

The brief opinion, which might even throw a bone to the attorney (e.g., 'Counsel has ably argued the search and seizure issue, but we are bound to follow X case, which remains good law in this jurisdiction and which goes against appellant's contention'), will give the attorney some material to use in a conversation with the client,³⁰ and should convey to the client that the court understood the arguments made by the client through counsel.

Ronner and Winick note that the type of brief written affirmances they urge "would not consume considerably more time than a [S]PCA, and could essentially be constructed from a law clerk's case summary or memorandum."³¹ It is here where I would go a simple step beyond their recommendation, and would propose that the law clerk *personally* prepare and append to the memorandum a very short proposed opinion evidencing the voice and validation points mentioned above.

Judges could prepare orientation memoranda for their clerks, along the lines of what Judge Jack Weinstein does in the Eastern District of New York, explaining, among other matters, the importance of TJ and procedural fairness concepts and how they relate to the preparation of judicial opinions.³² Examples might be provided, along the lines of some suggestions given by Ronner and Winick,³³ as well as some real-world examples. As to the latter, Judge Steve Leben, a judge of the Kansas Court of Appeals, has at least two superb illustrations, both in civil cases. Judge Leben is well-versed in TJ—in fact, he

²⁹ Ronner & Winick, *supra* note 28, at 505-07.

³⁰ DAVID B. WEXLER, REHABILITATING LAWYERS 39-40 (2008) (appellate lawyers and TJ-related conversations with their clients).

³¹ Ronner & Winick, *supra* note 28, at 506.

³² See Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 442-44 (2011). While the TJ concerns emphasized here relate to the impact on the parties, there are also obvious TJ concerns relating to how an appellate opinion treats the ruling below and the judge who made it. There is good TJ literature on this, which can be included in a memorandum to law clerks, although this particular TJ strand is something in which appellate judges themselves should be well-versed. See generally Michael S. King, *Therapeutic Jurisprudence, Leadership, and the Role of Appeal Courts*, 30 AUSTL. B. REV. 201 (2008).

³³ Ronner & Winick, *supra* note 28, at 505-07.

is editor of *Court Review*—and is co-author with the American Judges Association President, Minnesota Judge Kevin Burke, of the Association’s impressive white paper on procedural fairness.³⁴

Judge Leben has known of Ronner’s *Court Review* essay since its publication and has twice cited it in concurring opinions—opinions where Judge Leben believed the majority reached the right result but believed the losing litigant deserved more of an explanation.³⁵ Both concurrences occur in unpublished opinions, meaning they are prepared principally for the benefit of the parties and their counsel, and there are limitations on citing them as authority.

In one of those cases, Judge Leben understood why Davis, the losing party, might not understand the court’s decision.³⁶ Apparently, Kansas interprets a rule regarding deference given to a trial judge’s findings of fact differently from the interpretation given by federal courts, even though the state and federal rules are, textually, nearly identical.³⁷ Judge Leben explained the Kansas rule and noted that “Kansas has consistently applied its own standard for decades, and we have certainly not deviated from it. Under the standard of review that we must apply, the evidence is sufficient . . . to uphold the district court’s factual findings.”³⁸ Judge Leben concludes:

The district court’s conclusions are internally consistent based on the testimony it found credible. We have reviewed the case and considered the evidence, and we have applied the well-established standard of review. As such, I am confident that we have made a proper and fair decision under the law as it stands, and we have given careful consideration to the well-crafted arguments from both sides.³⁹

The other concurrence by Judge Leben involved the application of the res judicata rule in an adoption and parental rights case in which a father, pro se, filed multiple pleadings and lengthy briefs attempting to re-gain his rights with respect to his son, now living for many years with adoptive parents.⁴⁰ To give

³⁴ Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2007) (a white paper of the American Judges Association the Voice of the Judiciary).

³⁵ See, e.g., *In re Adoption of B.M.J.F.*, No. 104,008, 2010 WL 3665154, at *1 (Kan. Ct. App. Sept. 10, 2011), *rev. denied* (Nov. 8, 2010); *Winning Streak, Inc. v. Winning Streak Sports*, No. 100,725, 2010 WL 348272, at *6-7 (Kan. Ct. App. Jan. 22, 2010), *rev. denied* (Oct. 7, 2010).

³⁶ *Winning Streak, Inc.*, 2010 WL 348272.

³⁷ *Id.*

³⁸ *Id.* at *7 (Leben, J., concurring).

³⁹ *Id.*

⁴⁰ *In re Adoption of B.M.J.F.*, 2010 WL 3665154, at *2-3.

a feel for how a respectful letter to the loser might be written, I think it is worth presenting Judge Leben's six paragraph opinion in full:

The history of N.M.'s sporadic appearances in the Kansas court system to reassert claims that he previously had abandoned suggests that he may not understand some of the overriding legal principles we must follow. I offer this concurring opinion in the hope that he may yet understand them. See Ronner, *Therapeutic Jurisprudence on Appeal*, 37 Ct. Rev. 64 (Spring 2000).

The American court system works hard to ensure that court proceedings involving children are resolved in as short a time frame as possible. We recognize that children deserve an answer to the most basic questions about their lives—like, who are my parents? Where will I live?—within a time frame that is reasonable as judged from a child's viewpoint.

The ultimate need for legal disputes to be resolved, so that people may get on with their lives and business affairs, is also the driving force behind the legal doctrine called *res judicata*. Under *res judicata*, when a dispute has been decided in a final court judgment, the same issues may not be relitigated in a later suit. That allows parties to go on about their business based on the court's final judgment without worrying that some later court action might yet revisit the same issues.

The court's opinion has correctly held that *res judicata* applies here. N.M.'s parental rights were terminated by the district court in its January 2003 ruling. N.M. appealed, but when he dismissed that appeal, the district court's ruling terminating his parental rights became a final judgment. And after that, the proposed adoptive parents proceeded with their adoption of B.M.J.F. based upon the final judgment, which terminated N.M.'s parental rights. So *res judicata* prevents further litigation over the matter.

Even if some exception to the *res judicata* rule were available—and I am not aware of one—this is exactly the sort of case in which we would be reluctant to apply it. This child has lived with the adoptive family from a few days after his birth in 2002 until now. From the time the adoption was finalized in October 2004 until N.M. filed pleadings in April 2009 seeking to reopen the case, the child's family knew that there was a final judgment terminating N.M.'s parental rights and

an order of adoption in place. When we look at this situation from the standpoint of the child, he has had only one home and one family. He and his family have a right to rely upon the finality of the 2003 ruling terminating N.M.'s parental rights, a judgment that became final when N.M. voluntarily dismissed his appeal in 2004.

N.M.'s continued interest in his biological son is understandable, perhaps even laudable. But no matter its sincerity, it is no longer an interest that Kansas law can force this 8-year-old boy's adoptive parents to respond to.⁴¹

Judge Leben's concurrences are wonderful models—whether dealing with a very short opinion that is an alternative to a summary per curiam affirmance, or a full-blown opinion on a controversial issue, such as the Québec secession example that served as a springboard for Professor Des Rosiers' article.⁴² Implementing the respectful letter to the loser technique in opinion writing would take us a long way towards improving appellate courts—and their image.

But note that Judge Leben's writing required some extra effort. His remarks did not flow easily from the written briefs. Perhaps, following Judge Leben's lead, more appellate judges will undertake the extra effort to better explain their rulings. Here is an area where law clerks—especially experienced career clerks—can perform an important function, and take the extra effort to draft proposed opinions using TJ and procedural justice insights. Many methods can be explored—whether the clerk's opinion is the original effort or, whether a judge-drafted opinion could be referred to a career clerk for suggested re-casting. Similarly, the opinion could be a proposed opinion for the court, or it could take the form of a proposed concurring opinion. If some job openings exist, or can be created, the work could be sufficiently rewarding to attract legal writing instructors who might wish to spend a sabbatical year in such a setting.⁴³ Others will have additional ideas. The important point at this stage is simply to recognize the importance of recasting appellate opinions and exploring a 'different kind of lawyering' to bring TJ to the appellate bench. Let us now proceed to the second branch of that lawyering—the proposing of legal doctrines and remedies that may serve a therapeutic function.

⁴¹ *Id.*

⁴² See Des Rosiers, *supra* note 9.

⁴³ See generally Suzanne Rabé & Stephen A. Rosenbaum, A "Sending Down" Sabbatical: The Benefits of Lawyering in the Legal Services Trenches, 60 J. LEGAL EDUC. 296 (2010).

B. *Proposing Legal Doctrines*

The second prong of Des Rosiers' proposal offered the courts an inventory of devices—such as the “duty to negotiate”—that would serve as “process-driven solutions.”⁴⁴ And I believe a doctrine need not necessarily be process-driven in order to function in a therapeutic way. In fact, inspired by Des Rosiers' work, I wrote a paper in 2002 entitled *Lowering the Volume through Legal Doctrine: A Promising Path for Therapeutic Jurisprudence Scholarship*.⁴⁵ Drawing on Des Rosiers, I remarked:

It is my thesis that therapeutic jurisprudence scholarship can contribute to the formulation of legal doctrine—process-driven solutions or otherwise—that can contribute to preserving relationships, to promoting dialogue rather than debate, and, in general, to diffusing anger, to curtailing contentiousness, and to turning down the volume so that creative problem-solving might ensue.⁴⁶

In the article I gave a number of examples—some of which worked in practice better than others—including the default rule component of *Miranda*, which specified the warnings and waivers required by the Court will apply “*unless* other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it.”⁴⁷ Such a rule was “apparently designed to take some of the sting out of [the Court's] holding and to promote continued discussion and dialogue,” rather than to create a “constitutional straightjacket.”⁴⁸

Recently there has been additional work that can be conceptualized as falling within this broad area of creating preventive and therapeutic legal doctrines. One important and interesting contribution is attorney Luther Munford's *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*.⁴⁹ In it, and in a follow-up article a few years later,⁵⁰ Munford proposes a peacemaker test against which to gauge legislation and court-created doctrine.⁵¹ He asks specific questions about proposed rules, such as whether they promote the finality of decisions and whether they help the parties reconcile and form more

⁴⁴ Des Rosiers, *supra* note 9, at 62.

⁴⁵ Wexler, *supra* note 18.

⁴⁶ *Id.* at 125.

⁴⁷ *Id.* at 128 (emphasis added) (internal quotation marks omitted).

⁴⁸ *Id.* at 127 (internal quotation marks omitted).

⁴⁹ Munford, *supra* note 18.

⁵⁰ *Application*, *supra* note 18.

⁵¹ Munford, *supra* note 18, at 379-80; *Application*, *supra* note 18, at 641.

cooperative relationships,⁵² and applies his so-called “peacemaker test” to various legal doctrines, such as the “lost value of life” and *vacatur*.⁵³

We need not go into details about the operation of the peacemaker test, nor even attempt to evaluate its conclusions, to know at least that Munford is more or less on the same wavelength as others who seek to create therapeutic/preventive legal doctrines. In his words:

[T]his Article speaks . . . to legislatures and courts who write substantive and procedural law. . . . [T]hose who make laws should craft them so that the laws help the parties resolve the disputes the laws will create [L]aws should not only create rights but should also make it as easy as possible for adversarial parties to resolve the conflicts those rights beget. . . . The law itself will then either eliminate disputes or make them easier to resolve. . . . [T]his process might be called “preventive” dispute resolution.⁵⁴

Australia has long been a leading force in therapeutic jurisprudence⁵⁵ and non-adversarial justice,⁵⁶ and, in a recent symposium issue of the *Monash University Law Review*, Robyn Carroll and Normann Witzleb wrote an on-point article about the “vindictory effect of private law remedies.”⁵⁷ They too are on the TJ doctrinal wavelength.

⁵² The components of the peacemaker test are: control over who participates in the dispute, respect for both parties, respect for the court, and finality and reconciliation. In a private communication, Munford noted that this essay’s earlier discussion of a respectful letter to the loser would, in his scheme, fall under the category of respect for the parties. He further noted that it is important for appellate courts to show respect for lower courts, including when the appellate court is reversing a court below. That observation would fall into Munford’s category of showing respect for the court. Although not a focus of the essay at hand, I have noted earlier, *see supra* notes 3-7 and accompanying text, the TJ importance and implications of appellate judges being attuned to the reaction of lower court judges and judicial officers. Such concerns form the major thrust of an important TJ article by Western Australia Magistrate Michael King. *See King, supra* note 32. Another avenue for TJ influence in the appellate courts may be in the area of appellate mediation. There is already good literature linking TJ with mediation. *See Omer Shapira, Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 *PEPP. DISP. RESOL. L.J.* 243 (2008). The next step should be to explore TJ implications regarding the growing area of appellate mediation. *See Sidney Powell, Evaluating an Appeal, in APPELLATE PRACTICE IN FEDERAL AND STATE COURTS* § 1.04 (David M. Axelrad ed., 2011) (providing information on appellate mediation in general).

⁵³ Munford, *supra* note 18, at 398, 402.

⁵⁴ *Id.* at 379 (footnote omitted).

⁵⁵ *E.g.*, KING, *supra* note 2, at 8.

⁵⁶ *See* MICHAEL KING ET. AL., *NON-ADVERSARIAL JUSTICE* (2009).

⁵⁷ Carroll & Witzleb, *supra* note 18.

III. CONCLUSION

In contrast to the letter to the loser strand of appellate court TJ, where, apart from Judge Leben's work, we have not seen obvious examples of TJ at work, the doctrinal strand—at least through the work of Munford, Carroll, and Witzleb—has shown some recent, up-to-date activity. But again, for the work to really reach the *appellate courts*, lawyering will need to be done differently. Surely some lawyers will advocate for therapeutic remedies, devices, and doctrines, but without a conscious lawyerly effort to explore, for example, whether a rule does or does not meet the peacemaker test, courts are unlikely on their own to venture into that exercise. More than a decade ago, in the *Lowering the Volume* article, I suggested the *amicus curiae* idea:

It is not clear at the moment how traditional appellate advocates can best propose these therapeutic and preventive doctrines. Of course, courts could create and shape these doctrines *on their own*, even if the doctrines are not served up to them in the briefs of the appellate advocates. Such a course of action is, however, both burdensome and a bit risky.

Perhaps issues and proposals of the type suggested here might best be presented to courts by *amicus curiae*, prepared by lawyers and scholars attached to various emerging law school centers relating to therapeutic jurisprudence, preventive law, creative problem-solving, and the like. Such centers would be ideally suited to generating legal and interdisciplinary scholarship regarding therapeutic and preventive legal doctrine, and to introducing law students to professional roles as peacemakers and creative problem-solvers.⁵⁸

I think it is time to dust off the *amicus* proposal, update it, think through its logistics, and seek to implement it. In the more-than-a-decade since the early literature on TJ and appellate courts, TJ and related perspectives have matured significantly. Academically, interest has developed in a number of law schools, including Monash Law School in Victoria, Australia, the International Network on Therapeutic Jurisprudence at the University of Puerto Rico, and the new Phoenix School of Law in Arizona, which plans to have an annual issue devoted to TJ and related comprehensive law topics. Outside of academia, groups like the Center for Court Innovation have been extremely influential in the creation of new and exciting judicial programs, many of them closely connected to TJ ideas.

⁵⁸ Wexler, *supra* note 18, at 133.

Perhaps a number of institutions—the above and many others—can join forces to think through and create one or more public interest law firms dedicated to bringing therapeutic/preventive doctrines to the appellate courts, and organizations can be formed to promote these goals and to serve as amici. We now have the raw material for creating important doctrines, but we need also to create the lawyering essential to carry the proposals to the courts. And we will need to develop methods for trolling for appropriate cases. Perhaps an organization dedicated to the promotion of peacemaking and therapeutic solutions in law could be formed, with an interdisciplinary membership of practitioners, scholars, and thoughtful citizens. Such a group could discuss the kinds of cases that could be enriched by a TJ/peacemaker input—by a new type of lawyering—and could decide in which cases a public interest law firm could propose to file a brief on behalf of the organization.⁵⁹

Some cases, like those involving psychotherapist-patient privilege, will call out for TJ amicus intervention,⁶⁰ but others—such as some of the rules discussed by Munford, Carroll, and Witzleb—may be much less obvious, and will

⁵⁹ An excellent creative suggestion—one that might be workable in a number of contexts for TJ amicus briefs—is provided in Ross E. Davies' recent working paper. Ross E. Davies, *In Search of Helpful Legal Scholarship, Part 1* (George Mason Univ. Sch. of Law, Working Paper No. 12-29, 2012), available at <http://www.law.gmu.edu/pubs/papers/12-29>. Davies suggests the submission of briefs that call a court's attention to the high-quality scholarship related to a legal issue under consideration. *Id.* In line with Davies' approach, it seems to me that, sometimes, an important TJ insight can be compactly submitted even in a short statement of interest when a TJ amicus files a motion for leave to join another organization's amicus brief. Consider my own recent statement of interest—for “professors who promote principles of therapeutic jurisprudence in mental-health cases” in a case arguing against the application of the mootness doctrine's applicability in a mental health commitment and forced treatment case:

[F]rom a therapeutic-jurisprudence perspective, a decision on the merits in a mental-health appeal gives the respondent's lawyer something to use in explaining a decision to her, and assists in showing the mental-health respondent that the arguments were heard and understood (even if not accepted by the court). *See, e.g.,* Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* 39-40 (2008). Much of the literature on this topic suggests that even if a client loses, she is likely to perceive the proceeding as fairer, and may perhaps even acquiesce in the court order, if accorded this type of procedural justice. Without an appellate opinion, even the lawyer is “silenced” and the client may feel the court did not understand or care about the client's arguments, or worse, that the lawyer did not really fight for the client.

Motion for Leave of Additional *Amicus Curiae* Organizations and Individuals to Join Mental Health America's Brief *Amicus Curiae*, In re Tiffany W., No. 113839 (Ill. Mar. 22, 2012).

⁶⁰ Consider how the psychotherapist-patient privilege case, *Jaffee v. Redmond*, 518 U.S. 1 (1996), could have been influenced had Bruce Winick, in addition to preparing a law review article proposing the Court's adoption of the privilege in federal cases, assisted in the preparation of an amicus brief containing some of his excellent therapeutic jurisprudence insights, such as the following one:

require highly capable attorneys thinking TJ, thinking peacemaker test, thinking appropriate default doctrines, thinking process-oriented solutions, and the like. Moreover, many of those cases may, on their surface, seem rather routine—not the stuff of typical amici briefs, which deal with hot-button human rights. Here, an important task is to change judicial and juridical consciousness: many so-called *ordinary* cases, when finally looked at through the important TJ/peacemaker lens, should no longer be deemed ordinary. Only with the efforts and changes noted here can we really hope to elevate TJ so that it is felt in the appellate courts.

The important question, left unanswered by this research, is whether a Supreme Court opinion on this question will significantly increase awareness of the privilege, and whether such awareness will affect patient decisionmaking concerning whether to seek therapy. A new state statutory enactment of a psychotherapist-patient privilege is unlikely to make the front pages or the evening news, while a Supreme Court decision *denying* such a privilege will.

Bruce J. Winick, *The Psychotherapist-Patient Privilege: A Therapeutic Jurisprudence View*, 50 U. MIAMI L. REV. 249, 255-56 (1996).

THERAPEUTIC JURISPRUDENCE ACROSS THE LAW SCHOOL
CURRICULUM: 2012

David B. Wexler*

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Therapeutic jurisprudence (“TJ”) has now attracted the attention of legal scholars in many different fields of law—very much above and beyond the areas of mental health law and criminal law and procedure. The growth is visible in law practice as well. The International Network on Therapeutic Jurisprudence website¹ has an extensive bibliography—with an increasing number of links to full articles—and may be searched under author, subject area, keywords, language, etc.

Below, drawing on the above-noted bibliography, we have listed a handful of representative articles under many different law school course offerings reflective of developments in the TJ field itself. The authors come from several countries—the United States, the United Kingdom, Canada, Australia, Ireland, and Israel—and from varying disciplines of law (including the judiciary), psychology, social work, criminal justice, and public health.

The list is designed to guide law faculty, law students, and lawyers who wish to consider explicitly the TJ implications of a given substantive field of law. This is a mere smattering of relevant articles, some chosen for ease of accessibility or for brevity; many of the leading articles by leading scholars are omitted in order to concentrate on new areas of inquiry—even if the pieces introducing those areas merely scratch the surface. Also, as this entire project is and will remain a work in progress, reader feedback and suggestions will be most appreciated: davidBwexler@yahoo.com.

I. A GENERAL INTRO TO TJ

1. TJ Facebook: *Therapeutic Jurisprudence*, FACEBOOK, <http://www.facebook.com/TherapeuticJurisprudence> (last visited Apr. 18, 2012).

¹ *Welcome*, INT’L NETWORK ON THERAPEUTIC JURISPRUDENCE, www.therapeuticjurisprudence.org (last visited Apr. 18, 2012).

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HAWAIIAN BURIAL RIGHTS: THE REGRETTABLE BURIAL OF A RICH
CULTURAL HISTORY BENEATH URBAN DEVELOPMENT

Todd Dickenson*

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I. INTRODUCTION

“The *iwi* is the bones of our deceased loved ones, and they are meaningful to each one of us. They’re not here to defend themselves, we are. We are responsible to *mālama* (care for) them”¹ The responsibility to care for the

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¹ *Nā Iwi Kūpuna: The Bones of Our Ancestors*, ST. HISTORIC PRESERVATION DIVISION, <http://hawaii.gov/dlnr/hpd/naiwikupuna.htm> (last visited Apr. 18, 2012) (quoting Auntie Mālia Craver). Mary Mālia Kawaiho‘ouluohā‘ao Craver (1927-2009) was a *kūpuna* and social work assistant with Queen Liliuokalani Children’s Center who used the teachings of *ho‘oponopono* to reconcile

nā iwi (remains), whether based on cultural or legal grounds, falls into the hands of living Native Hawaiians.² However, this responsibility is becoming increasingly difficult to fulfill as time goes on due to the Native Hawaiians' cultural beliefs being subordinated to continuing land development in Hawai'i.

Despite the creation of burial laws and the Hawai'i Legislature's emphasis on the "value of conserving and developing the historic and cultural property within the State for the public good," the laws are merely words on paper.³ If the State Historic Preservation Division ("SHPD") properly enforces and regulates existing burial laws, it would have a powerful impact in protecting *nā iwi* for centuries to come. However, in past instances—such as at burial sites at Honokahua, the Keeaumoku Wal-Mart, and Naue⁴—the events have personified the ineffectual enforcement of burial laws and the government's preferential treatment for developers at the expense of the Native Hawaiian culture.

It appears impossible for the Hawaiian government to properly enforce burial laws without compromising its stance in the face of wealthy mainland developers. Despite numerous opportunities, the SHPD has failed to enforce the burial laws properly in each instance. Although there are laws that protect Native Hawaiian remains, there seems to be no use for burial laws if the SHPD does not properly enforce and regulate them. If the laws and their enforcement are ineffectual, then perhaps there are other remedies available to prevent future desecration of Native Hawaiian remains. Some of these solutions are best recognized through the lens of therapeutic jurisprudence.

Therapeutic jurisprudence ("TJ") "focuses on the law's impact on emotional life and on psychological well-being."⁵ TJ states that the law and its legal proceedings have a psychological effect upon individuals and groups of people that are involved in the litigation.⁶ TJ's overall goal is to enhance thera-

fractured families and close relationships. In English terms, *ho'oponopono* meant setting things right, or to correct the wrongs that someone had committed during their life. She discussed the concept of *ho'oponopono* during the 53rd Annual U.N. Conference of Non-Government Organizations. Liza Simon, *A Lifetime of Ho'oponopono*, KA WAI OLA: THE LIVING WATER OF OHA, Nov. 2009, at 10-11.

² Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 245, 263 (Melody Kapilialoha MacKenzie ed. 1991).

³ HAW. REV. STAT. § 6E-1 (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0001.htm.

⁴ See discussion *infra* Part III.

⁵ David B. Wexler, *Therapeutic Jurisprudence: An Overview*, INT'L NETWORK ON THERAPEUTIC JURISPRUDENCE, <http://www.law.arizona.edu/depts/upr-intj/> (follow "TJ: An Overview" hyperlink) (last visited Apr. 18, 2012).

⁶ SUSAN SWAIM DAICOFF, COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION 81 (2011).

peutic consequences while attempting to reduce a law's anti-therapeutic effects.⁷

Currently in Hawai'i, the most significant problem with the state law is the cultural conflict between Native Hawaiian law and Western law. The majority of the legal community in Hawai'i embraces Western law, which has an anti-therapeutic effect upon the proper enforcement of Native Hawaiian laws. Due to Hawaii's cultural distinctiveness, the application of Western law upon Hawaiian cultural practices needs to be reversed.

This article will familiarize the reader with Native Hawaiian burial practices. In Part II, the article will briefly discuss the cultural beliefs of Native Hawaiians, and then describe the various types of burial desecrations committed during ancient and modern times. The discussion then goes into detail about current burial laws, and suggests that while the laws are a good start, they are a far cry from a definitive resolution. In Part III, the article will discuss the three events that typify the inefficiency with the enforcement and regulation of burial laws. Part IV proposes two TJ remedies to solve the problem with the burial laws. The first solution utilizes preventative law, which focuses on the interpersonal relationship between conflicting parties.⁸ The second solution is to utilize creative problem solving, which looks at educating one party about the concerns of the opposing party and empathizing with the opposing party's point of view.⁹

II. NATIVE HAWAIIAN BURIAL PRACTICES

For readers unfamiliar with the Native Hawaiian burial practices, a brief overview of the Native Hawaiian culture is necessary to understand why lax enforcement is so objectionable. Recognizing the reverence that Hawaiians have toward their ancestral remains and what Hawaiians deem to be burial desecration as compared to descriptions of the current burial laws, including the fines and penalties that occur when the laws are violated, makes clear the failure of the status quo to protect Native Hawaiian beliefs.

A. *Native Hawaiian Cultural Beliefs*

In Native Hawaiian culture, it is believed that after the *make* (death) of a loved one, his *'uhane* (spirit) sometimes remains near the *nā iwi* until he departs for *Milu* (underworld) or *Pō* (eternity).¹⁰ The spirit may linger near the

⁷ *Id.*

⁸ *See id.* at 87.

⁹ *See id.* at 125.

¹⁰ Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 2, at 246-47.

nā iwi for an indefinite period of time before it departs to the afterlife.¹¹ Due to this uncertain period of time, Hawaiians strongly believe that the bones are the essential physical material of their relatives and the spirit is the residual psyche material.¹² Although one's spirit may depart to the afterlife, the *nā iwi* was left behind as the immortal embodiment of the deceased person, which served as an everlasting tether between the *kūpuna* (ancestors) and their living Native Hawaiian descendants.¹³

Hawaiians often chose certain burial sites for symbolic purposes. For example, the western side of each of the Hawaiian Islands is considered the most desirable burial site because it symbolized the 'sunset' of one's life.¹⁴ Hawaiians also used caves, pits, cliffs, sand dunes, and caverns to bury and conceal the *nā iwi*.¹⁵ Once the *nā iwi* were placed in the ground or concealed, they became a permanent part of the Earth.¹⁶ By returning the *nā iwi* to the Earth, the ancestor's remains would impart his *mana* (spiritual energy) to the immediate area, then to the *ahupua'a*,¹⁷ and eventually across the entire island.¹⁸

B. Burial Desecration

Hawaiians believed that following death, the spirit stayed near the *nā iwi* and that desecration¹⁹ resulted in injuring the spirit as well as the living descendants of the deceased.²⁰ The primary reason for concealing *nā iwi* in ancient times, according to Samuel Manaiakalani Kamakau,²¹ was because of

¹¹ *Id.* at 247.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 248.

¹⁵ SAMUEL MANAIAKALANI KAMAKAU, KA PO'E KAHIKO: THE PEOPLE OF OLD 40 (Dorothy B. Barrère ed., Mary Kawena Puku'i, trans., 1992).

¹⁶ Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 2, at 247.

¹⁷ *Id.* An *ahupua'a* is a land division that extends from the uplands to the sea, and was given this name because the boundary was marked by a pile of stones (*ahu*) with a pig (*pua'a*) or other tribute *lain* on top of the pile as a tax to the chief. *Id.* at 305.

¹⁸ *Id.* at 247.

¹⁹ *Id.* Living Native Hawaiians have an interdependent relationship with their ancestors. The living have a duty to care for the dead, and the ancestors provide the living with knowledge and guidance. They faithfully serve their ancestors, as the ancestors served their ancestors. This continual cycle can only be accomplished through the retention of *mana*, which is lost when the bones are mistreated. Edward L. H. Kanahele, *Native Hawaiian Burial: A Native's Point of View*, J. U. HAW. COMMUNITY COLLEGES, Apr. 1990, at 75.

²⁰ Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 2, at 247.

²¹ Samuel Manaiakalani Kamakau (1815–1876) was considered to be one of the brilliant historians of the 19th century. Mike Gordon, *Samuel Kamakau*, HONOLULU ADVERTISER (July 2,

“wicked, traitorous, and desecrating chiefs.”²² These chiefs would defile the remains of their deceased rivals in order to gain the *mana* imbued in the *nā iwi*, or as a brazen demonstration that these chiefs had the power to desecrate a rival’s remains.²³

These acts of desecration were done by carving bones into fish hooks, or the use of the skull as a spittoon or a calabash²⁴ to contain discarded food.²⁵ Other forms of desecration included leaving the *nā iwi* uncovered and exposed to the sunlight, as well as setting fire to the remains.²⁶ However, the total physical destruction of the *nā iwi* was considered the ultimate act of defilement because this prevented the *‘uhane* from joining their *‘aumāku*a (ancestors) in *Pō*.²⁷

Although desecrations caused by warring and rival chiefs have disappeared in the current modern age due to the end of chiefdoms, the desecration of *nā iwi* has now been disguised under the banner of scientific research. Osteology, the study of bones, frequently looks at ancient human remains for various applications, such as genetics, diet, diseases, and warfare.²⁸ The bones provide archaeologists and anthropologists with necessary data to uncover the lifestyles of ancient human cultures.²⁹ Despite the purported benefits claimed by the scientific community, the Native Hawaiian culture has *always* rejected the desecration of burials, and “desecration in the name of any discipline, scientific pursuit, or Native Hawaiian curiosity imperils the *kūpuna* as well as their descendants.”³⁰

Hui Mālama I Nā Kūpuna ‘O Hawai‘i Nei (Group Caring for the Ancestors of Hawai‘i) is a strong proponent against the scientific study of the *iwi o nā kūpuna* (the bones of the ancestors).³¹ The group feels that the handling of

2006), <http://the.honoluluadvertiser.com/150/sesq6kamakau>. Between 1866 and 1871, Kamakau wrote over 200 historical articles pertaining to Hawaiian history and customs. *Id.* These articles were translated and published into two volumes: (1) *The Ruling Chiefs of Hawai‘i*; and (2) *Ka Po‘e Kahiko: The People of the Old*. *Id.*

²² KAMAKAU, *supra* note 15, at 38.

²³ *Id.* at 40.

²⁴ BISHOP MUSEUM, HISTORY AND TECHNOLOGY OF CALABASHES (1996), <http://www.bishopmuseum.org/research/pdfs/cnsv-calabashes.pdf> (defining a calabash as a wooden bowl carved from various woods found in Hawai‘i).

²⁵ Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 2, at 247.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Osteology*, BOOKRAGS, <http://www.bookrags.com/research/osteology-wap/> (last visited Apr. 18, 2012).

²⁹ *Id.*

³⁰ Kanahale, *supra* note 19.

³¹ Edward Halealoha Ayau, *Rooted in Native Soil*, FED. ARCHEOLOGY, Fall/Winter 1995, at 35 [hereinafter *Rooted*].

remains without prayer or protocol, and the remains being removed without the permission from descendants, amounts to desecration.³² Edward Ayau, the executive director of *Hui Mālama I Nā Kūpuna 'O Hawai'i Nei*, eloquently describes the falsehood of the benefits that osteology purports: "We wonder how an act that desecrates the dead could possibly benefit the living? . . . Osteology begins at home. Study the bones of your ancestors first, before touching ours."³³

Hawaiian people are increasingly disillusioned by the state's refusal to enforce burial laws. Veteran native rights activist Palikapu Dedman thought all the problems that plagued the event in Honokahua were over, but states that the same problems keep happening.³⁴ "[Hawaiians] are being constantly attacked by development. We are looking at where the system steps in to protect us permanently and not piecemeal us from island to island, or development to development."³⁵ This outrage is not limited to Hawaiian activists, but local residents are also infuriated that Hawaiian burial grounds are treated markedly different from the Judeo-Christian cemetery counterpart. Kaua'i resident Fred Dente expressed his frustration over *nā iwi* desecration: "I want to go and dig up cemeteries on the mainland. I want to go to Joseph Brescia's cemetery where his Mother and Father are buried and get a bulldozer and dig up that whole grave yard and see what that man says."³⁶ Alan Murakami, an attorney for the Native Hawaiian Legal Corporation, is aggravated the state cannot see that "building a home over known Native Hawaiian burials is akin to allowing home construction to occur over known graves at the Mainland's Arlington National Cemetery, or Punchbowl Cemetery, O'ahu's National Memorial Cemetery of the Pacific."³⁷

Does the scientific curiosity of determining the age, growth, or development of human remains outweigh the Hawaiian cultural belief that *nā iwi* is the physical embodiment of one's ancestor? Hawaiians do not see science as the only means to determine human existence.³⁸ Instead, they see spirituality as a necessary balance to our existence.³⁹ One would assume that the SHPD would create a law preventing osteology from being conducted on Native Hawaiian

³² *Id.* at 33.

³³ *Id.*

³⁴ New Pacific Voice, *Burial Desecration at Naue*, DMZ HAW. (July 31, 2009), <http://www.dmzhawaii.org/?p=3022>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Paul C. Curtis, *Judge: Brescia Obeying Order with Construction*, GARDEN ISLAND (July 22, 2009, 12:00 AM), http://thegardenisland.com/news/local/article_b39af2ed-3919-5186-befd-ef9e6d7c8a68.html.

³⁸ *Rooted*, *supra* note 31, at 33.

³⁹ *Id.*

remains. However, the law merely sets standards for osteological analysis of human remains, and does not ban examination of Native Hawaiian remains.⁴⁰ By setting standards, rather than banning osteological analysis of Native Hawaiian remains, the law can “better protect the public’s interests.”⁴¹

C. Current Burial Laws

Even if the Native Hawaiian community has the primary responsibility to care for the *nā iwi*, the Hawai‘i State Legislature has enacted State burial laws to address the general societal belief that all human remains should be treated with care and respect.⁴² Proper treatment of human remains is one of the most important societal values that cuts through the differences in race, gender, or religious orientation.⁴³ However, despite the legislature’s intent to support the importance of Native Hawaiian burial grounds, it is still blatantly apparent that the State and County governments have—and still do—favor land development⁴⁴ at the Native Hawaiian culture’s expense.⁴⁵

Although preserving the historical and cultural sites of Hawai‘i has great societal value, in these harsh economic times, it appears that any generated revenue is a worthwhile compromise for sacrificing a valued historical treasure. The Hawai‘i Legislature states that preserving cultural sites is of substantial importance, but this importance becomes subordinated or disregarded whenever development promises to generate significant revenue to the state.⁴⁶ There is nothing wrong with the way that the current law is structured, but a law without enforcement has little meaning.

1. Historic Preservation

The purpose of creating a historic preservation program in Hawai‘i was to conserve the valuable historic and cultural heritage sites of the state.⁴⁷ Further-

⁴⁰ HAW. CODE R. § 13-283-1(b) (LexisNexis 2002) (“This rule establishes standards for osteological analysis of human skeletal remains, when analysis is done to determine ethnicity of skeletal remains, to ensure the quality of burial analysis and thereby to better protect the public’s interests.”).

⁴¹ *Id.*

⁴² Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 2, at 245-46.

⁴³ *See id.* at 246.

⁴⁴ *Land Development*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/land-development.html> (last visited Apr. 18, 2012) (defining land development as “the conversion of raw land into construction ready housing, commercial, or industrial building sites.”).

⁴⁵ Kanahale, *supra* note 19, at 77.

⁴⁶ *See* HAW. REV. STAT. § 6E-1 (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0001.htm.

⁴⁷ *Id.*

more, the state became aware that the “rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage.”⁴⁸ By identifying these concerns, the state amended Hawai‘i Revised Statute Chapter 6E (“H.R.S. § 6E”).⁴⁹ One of the noteworthy amendments to H.R.S. § 6E was the establishment of hefty penalties linked to burial desecration.⁵⁰ The law provides that it is unlawful for any person, either natural or corporate, to directly or indirectly damage a burial site and that person can be fined \$500 to \$10,000.⁵¹ These damages are calculated on a daily basis, with each day of non-compliance constituting a separate offense.⁵² Additionally, these penalties are not exclusive because violators might also be found to have committed an offense against public order.⁵³

Another important amendment to the statutes was the creation and duties of Island Burial Councils (“IBC”). The IBC’s membership consists of representatives from each geographic region of an Island⁵⁴ (“regional representatives”) and representatives of development and property owner interests.⁵⁵ The regional representatives consist of members of the Hawaiian community who have a degree of familiarity with the “culture, history, burial beliefs, customs and practices of Native Hawaiians.”⁵⁶ While the SHPD is given the authority to determine the preservation and relocation of inadvertent Native Hawaiian burial sites,⁵⁷ the IBC has authority over previously identified Native Hawaiian burial sites.⁵⁸ The duties of the IBC include making decisions to preserve the remains in the place they were exhumed or relocate them to another area.⁵⁹

⁴⁸ *Id.*

⁴⁹ HAW. REV. STAT. ch. 6E (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-.htm.

⁵⁰ *Id.* §§ 6E-11, 11.5, 11.6.

⁵¹ *Id.* §§ 6E-11, 11.5.

⁵² *Id.* § 6E-11.5.

⁵³ See discussion *infra* Part II.C.3.

⁵⁴ § 6E-43.5(b). Geographic region refers towns, counties, or areas of the 5 designations for each Island Burial Council: (1) Hawai‘i: Kohala, Kona, Ka‘u, Puna, Hilo, and Hamakua; (2) Maui/Lāna‘i: Lahaina, Wailuku, and Makawao; (3) Moloka‘i: West Moloka‘i, Central Moloka‘i, East Moloka‘i, and Kalawao; (4) O‘ahu: Wai‘anae, Ewa, Kona, Ko‘olaupoko, Ko‘olauloa, and Wailua; and (5) Kaua‘i/Ni‘ihau: Waimea, Koloa, Lihue, Kawaihau, Hanalei, and Na Pali. *Id.*

⁵⁵ *Id.* § 6E-43.5(b).

⁵⁶ *Id.*

⁵⁷ HAW. CODE R. § 13-300-2 (LexisNexis 2012) An inadvertent Native Hawaiian burial site means the unanticipated finding of human skeletal remains and any burial goods resulting from unintentional disturbance, erosion, or other ground disturbing activity.

⁵⁸ HAW. REV. STAT. § 6E-43.5(f)(1) (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0043_0005.htm.

⁵⁹ *Id.* § 6E-43.5(f)(1).

They also have the authority to make recommendations that relate to any Native Hawaiian burial site, whether previously known or inadvertent.⁶⁰

For inadvertent burials, the developer needs to immediately cease any construction that could damage the remains until the discovery is reported to: (1) the SHPD, (2) state medical examiner, and (3) police department.⁶¹ A mitigation plan is created by the developer that needs to be approved by the SHPD, in which both parties reach an agreement whether to preserve in place or remove the remains.⁶² If removal is agreed upon, the remains will be removed by a qualified archaeologist, and the construction can resume once the archaeologist exhumes all the burial remains.⁶³ The SHPD then determines the location where the *nā iwi* will be re-buried by consulting with that Island's Burial Council, the property owner, the Native Hawaiian community, and the *nā iwi* lineal descendants.⁶⁴

The amendments made to H.R.S. § 6E regarding penalties and creation of IBCs was the first step in identifying the continuing problem—unchecked land development in Hawai'i could destroy the last culturally significant sites. Significant monetary fines were established to act as a deterrent to individuals and corporations alike. Representatives of the Hawaiian community could now make their voices heard by becoming a member of the IBC. These additions to H.R.S. § 6E helped to strengthen all Hawaiian burial laws and pave the way for the creation of new burial laws.

2. Administrative Rules

Although most of the provisions in Title 13 of the Hawai'i Administrative Rules (“H.A.R. § 13-300”) are identical to H.R.S. § 6E, H.A.R.; § 13-300, however, provides important additions that are not found within § 6E.⁶⁵ Although the section is similar to H.R.S. § 6E-43.5, H.A.R § 13-300-24 exclusively authorizes the IBC to take any other appropriate actions, and that “nothing in this section shall be construed to limit the authority of the council as to matters provided in H.R.S. § 6E.”⁶⁶

⁶⁰ *Id.* § 6E-43.5(f)(3).

⁶¹ *Id.* § 6E-43.6(a).

⁶² *Id.* § 6E-43.6.

⁶³ *Id.* § 6E-43.6(c)(3).

⁶⁴ *Id.* § 6E-43.6(f).

⁶⁵ For example, both HAW. REV. STAT. § 6E-43.5 (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0043_0005.htm and HAW. CODE R. § 13-300-24 (LexisNexis 2012) detail the duties and responsibilities of the IBCs.

⁶⁶ HAW. REV. STAT. § 6E-43.5(b) (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0043_0005.htm; HAW. CODE R. § 13-300-24(h) (LexisNexis 2012).

There is also a more comprehensive procedure for the proper treatment of previously identified burial sites.⁶⁷ A burial site is identified if a person or entity provides a written or oral testimony that either (a) the IBC recommends that the SHPD recognize the site; or (b) the burial site is already recognized by the SHPD.⁶⁸ However, a burial site can also be considered “previously identified” if the site is discovered during an archaeological inventory survey.⁶⁹ If the remains discovered during the survey are Native Hawaiian,⁷⁰ then the IBC has the authority to determine the burial treatment.⁷¹ If the remains are non-Native Hawaiian, however, the SHPD has the authority to determine the burial treatment.⁷² The procedures take into consideration the high level of reverence that Native Hawaiians have toward the *nā iwi* by stating that all physical examinations of the bones be conducted in a respectful manner, and that “[a]ny intrusive or destructive examination method . . . is prohibited” except by written approval granted by the SHPD.⁷³

The next step requires the landowner to submit a burial treatment plan⁷⁴ to preserve the *nā iwi* in place or relocate it to another area.⁷⁵ If the decision is to preserve in place, short-term measures are utilized to immediately protect the burial sites, such as fencing, buffers, and site restoration.⁷⁶ Additionally, long-term measures are put in place to manage and protect burial sites, such as buffers, landscaping, and access to remains for lineal or cultural descendants.⁷⁷ After the council makes the determination to preserve in place, the landowner

⁶⁷ HAW. REV. STAT. § 6E-43.5(f)(1) (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0043_0005.htm; HAW. CODE R. § 13-300-31 (LexisNexis 2012).

⁶⁸ HAW. CODE R. § 13-300-31 (LexisNexis 2012).

⁶⁹ *Id.* § 13-300-2 (“‘Archaeological inventory survey’ means the process of identifying and documenting historic properties and burial sites in a delineated area, gathering sufficient information to evaluate the significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by the department.”).

⁷⁰ *Id.* § 13-300-32(b)-(c) (outlining that an archaeologist may be authorized by the SHPD to physically examine the human skeletal remains in order to determine the ethnicity, as long as the physical examination consists only of the observation of metric, non-metric, or relevant traits needed to suggest ethnicity.).

⁷¹ *Id.* § 13-300-33.

⁷² *Id.* § 13-300-34.

⁷³ *Id.* § 13-300-32. Even photography of the *nā iwi* is prohibited unless written consent is obtained from the controlling Island Burial Council or the SHPD. *Id.*

⁷⁴ *Id.* § 13-300-2 (“‘Burial treatment plan’ means a plan that meets all necessary requirements as set forth in this chapter and which proposes treatment of burial sites, including preservation in place or relocation, submitted to the department or council, whichever is appropriate, for a determination.”).

⁷⁵ *Id.* § 13-300-33(b)(3)(A)-(B).

⁷⁶ *Id.* § 13-300-24(b)(3).

⁷⁷ *Id.*

must create a burial site component of a preservation plan⁷⁸ and any recommendations relating to burial site treatment.⁷⁹

If the IBC decides to relocate the Hawaiian remains, certain requirements need to then be met.⁸⁰ Of particular note, the following must be included: (1) the reasons to relocate; (2) the method used to disinter the remains; (3) the location in which the remains are to be held prior to reburial; (4) the location of the new burial site; and (5) short term and long term measures to protect the reburial site.⁸¹ After the IBC makes the determination to relocate, the landowner must create a burial site component of the archaeological data recovery plan⁸² and provide any recommendations relating to the burial site treatment.⁸³ If the burial treatment plan is denied, the landowner must submit another burial treatment plan.⁸⁴ While the landowner is responsible to create the treatment plan, the IBC has the authority to approve or deny the burial treatment plan.⁸⁵ Construction cannot resume until a burial treatment plan has been approved and the measures to protect the remains have been fulfilled.⁸⁶

Even if it appears that H.A.R. § 13-300 is nothing more than a revised version of H.R.S. § 6E, H.A.R. § 13-300 greatly broadens the powers of the IBCs. The entire process of the proper treatment of previously identified burial sites (both Hawaiian and non-Hawaiian) is broken down into concise steps. The administrative rule provides a landowner with a comprehensive guide on what is required in a burial treatment plan and the powers that the IBC have in relation to the burial treatment plan.

3. Offenses Against Public Order

Under Hawai'i Revised Statute Chapter 711-1107(2), (H.R.S. § 711) the statute defines desecration: “[D]efacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensi-

⁷⁸ *Id.* § 13-300-2 (“‘Preservation plan’ means the form of mitigation that sets forth appropriate treatment of historic properties, burial sites, or human skeletal remains which are to be preserved in place.”).

⁷⁹ *Id.* § 13-300-38(e).

⁸⁰ *Id.* § 13-300-33(b)(3)(B).

⁸¹ *Id.*

⁸² *Id.* § 13-300-2 (“‘Archaeological data recovery plan’ means the form of mitigation that archaeologically records or recovers or both, a reasonable and adequate amount of information as determined by the department [T]his plan includes the disinterment of human skeletal remains and any burial goods and may involve the recording of a reasonable amount of information from the burial site if specifically authorized by the council or department, whichever is applicable, following a determination to relocate the contents of the burial site.”).

⁸³ *Id.* § 13-00-38(f).

⁸⁴ *Id.* § 13-300-38(c)(1).

⁸⁵ *Id.* § 13-300-38(c)(2).

⁸⁶ *Id.* § 13-300-39(b)-(c).

bilities of persons likely to observe or discover the defendant's action."⁸⁷ The penalty for committing an act of desecration is a misdemeanor with up to one year imprisonment, a fine of \$10,000, or both.⁸⁸ The legislative intent behind this punishment was twofold: (1) prior financial penalties for desecration were an insufficient deterrent; and (2) at a minimum, equate damage to a burial place with damage to a historical monument.⁸⁹

Although the legislature had a benevolent intent in creating these heightened penalties, they are still insufficient because they fail to address the parties most likely to commit desecration. Local residents and landowners are already aware of the importance that Hawaiians place on their ancestors. It is usually developers from the mainland with deep pockets that commit acts of desecration, either due to ignorance of Native Hawaiian beliefs, or simple economic disregard; a \$10,000 penalty is a small impediment to the construction of a multi-million dollar development.⁹⁰ Despite the evolution and increase in Native Hawaiian burial laws in Hawai'i, the current laws are still not enough to slow down the pace of land development. The laws could have a stronger impact if the SHPD properly enforces and regulates them, but a law without enforcement has little meaning.

III. THE BURIAL LAWS LAID TO REST WHILE THE NĀ IWI ARE BEING EXHUMED

The burial site disturbances at Honokahua, the Keeaumoku Wal-Mart, and Naue were three of the most publicized events in Hawai'i due to the high number of remains found at the sites and the public outcry of the treatment of the *nā iwi*. In no way are these three events the only instances of Native Hawaiian burial desecration. It would be difficult to name all of the instances of burial desecration because the desecration continues to this day. Although people should mourn the remains that have been lost, they should also move forward with the understanding that it is possible to prevent these tragedies from reoccurring in the future.

⁸⁷ HAW. REV. STAT. § 711-1107(2) (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0711/HRS_0711-1107.htm.

⁸⁸ *Id.* § 711-1107(3).

⁸⁹ *Id.* § 711-1107 cmt.

⁹⁰ *Id.* § 711-1107(3); see also discussion *infra* Part III.A-C.

A. *Honokahua, Maui*

In late 1987, the Ritz-Carlton began construction of its hotel resort at Honokahua, Maui.⁹¹ The proposed hotel site stood upon an ancient Hawaiian burial ground, and during construction over 1,100 Hawaiian remains were exhumed.⁹² The initial negotiations between the Ritz-Carlton and the Native Hawaiian community did not conclude well. It did not appear as though a mutual compromise could be reached due to the outrage of the Native Hawaiian community.

However, just when no resolution was in sight, the unexpected occurred: the Ritz-Carlton, a worldwide luxury hotel company, decided to move the initial hotel site and to re-inter the remains from the site they exhumed from.⁹³ Furthermore, the Ritz-Carlton devoted 13.6 acres as the Honokahua Preservation Site.⁹⁴ To this day, the Ritz-Carlton holds weekly complimentary tours to educate tourists on the cultural significance of Native Hawaiian burial sites.⁹⁵ The actions of the Ritz-Carlton at Honokahua are unprecedented because few mainland developers take the time to truly understand the Hawaiian culture. Here, the hotel has taken up their responsibility as stewards of the land—to *mālama ka 'aina* (care for the land), respect the ancestors of the Native Hawaiians, and provide its guests with the knowledge and history of the Hawaiian culture.⁹⁶ For Native Hawaiians, this episode caused a resurgence of cultural responsibility to protect and care for the *nā iwi*.⁹⁷ Further, the Native Hawaiian community did not want another massive burial site disturbance to happen again.⁹⁸ In 1988, the Hawai'i Legislature amended Act 265 of H.R.S § 6-E by creating provisions that involved the discovery of historic Native Hawaiian burial sites.⁹⁹

⁹¹ Dana Naone Hall, *Sovereign Ground*, in *THE VALUE OF HAWAII: KNOWING THE PAST, SHAPING THE FUTURE* 195, 195 (Craig Howes & Jon Osorio eds., 2010).

⁹² *Id.*

⁹³ *The Hawaiian Ways*, CELEBRATION ARTS (Apr. 10, 2009), <http://www.celebrationofthearts.org/hawaiianways.html>.

⁹⁴ *Id.* (“A 13.6 acre parcel of the land between Honokahua Bay and the Ritz-Carlton, the Honokahua Preservation Site is the resting place of more than 2,000 [*nā iwi*] . . .”).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Edward Halealoha Ayau, *Native Hawaiian Burial Rights*, in *NATIVE HAWAIIAN RIGHTS HANDBOOK*, *supra* note 2, at 245.

⁹⁸ Hall, *supra* note 91.

⁹⁹ See HAW. REV. STAT. § 6E-3 (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0003.htm.

B. *Honolulu, O'ahu*

The second major burial desecration occurred in January 2003. After construction began on the Keeaumoku Wal-Mart, six burial sites were unearthed.¹⁰⁰ The controversy surrounding this burial desecration involved both the inefficient SHPD Hawaiian burial laws as well as the mistreatment of the *nā iwi*.

For all construction projects on private land, an archaeological survey is required.¹⁰¹ In this instance, SHPD told Wal-Mart that there had already been a pre-construction survey.¹⁰² Furthermore, SHPD concluded that the property was urbanized for so long that it was unlikely any remains would be found.¹⁰³ Then, the unlikely happened—as construction on the Wal-Mart continued, burial sites and human remains were unearthed.¹⁰⁴ *Hui Mālama I Nā Kūpuna 'O Hawai'i Nei*¹⁰⁵ member Edward Ayau stated that if the state had required an archaeological survey, the *iwi* “would have been identified up front before plans were made for development.”¹⁰⁶ If an archaeological survey had been conducted, Wal-Mart would not have been allowed to continue its construction after the remains were discovered.¹⁰⁷

Despite finding a total of forty-two sets of *nā iwi* since construction began in 2002, the construction of the Wal-Mart continued unimpeded until July of 2004.¹⁰⁸ With the discovery of two more sets of *nā iwi*, construction was halted pending further investigation.¹⁰⁹ The investigation concerned Wal-Mart's contract archaeologist violating state burial laws by removing the two sets of *nā iwi* before notifying the SHPD and O'ahu Police Department.¹¹⁰ The archaeologist eventually notified SHPD about the remains—two days after removing them.¹¹¹ When asked about the removal, the archaeologist stated the two sets of remains found belonged to another group of remains previously

¹⁰⁰ Sally Apgar, *State Probes Alleged Desecration of Hawaiian Bones*, STAR BULL. (Mar. 9, 2005), <http://archives.starbulletin.com/2005/03/09/news/story5.html>.

¹⁰¹ See HAW. CODE R. §§ 13-300-1 to -39 (LexisNexis 2012).

¹⁰² James Gosner, *Bones to Stay on Wal-Mart Site*, HONOLULU ADVERTISER (Mar. 26, 2004), <http://the.honoluluadvertiser.com/article/2004/Mar/26/ln/ln12a.html>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Rooted, *supra* note 31, at 31, 33. (The Group Caring for the Ancestors of Hawai'i feel that the handling of remains without prayer or protocol and the remains being removed without the permission from descendants amounts to desecration).

¹⁰⁶ Gosner, *supra* note 102.

¹⁰⁷ *Id.*

¹⁰⁸ James Gosner, *Another Burial Find Halts Work at Wal-Mart Site*, HONOLULU ADVERTISER (Mar. 24, 2004), <http://the.honoluluadvertiser.com/article/2004/Jul/24/ln/ln03a.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

discovered.¹¹² He also stated he could not contact the SHPD about the finding because it was a Saturday.¹¹³

In 2005, state officials renewed the investigation, attempting to discover whether the Wal-Mart funded archaeologist desecrated the unearthed *iwi*.¹¹⁴ When state officials arrived to take possession of the *iwi* in order to re-inter them to another site, they discovered “numerous skulls and bones were glued back together, and some skulls had marking from permanent-ink pens.”¹¹⁵ However, an even more disturbing element was revealed when the Wal-Mart archaeologists stated they had asked permission from SHPD staff members to re-glue skull fragments, and the historic preservation staff granted most of these requests.¹¹⁶ Instead of finding Wal-Mart guilty of criminal wrongdoing or civil violations for desecration of the *nā iwi*, SHPD felt the archaeologists merely overstepped the bounds of the state’s permission by gluing more skulls and bones than authorized.¹¹⁷ Paulette Kalekini, one of the descendants of a set of *iwi*, clearly articulated her frustration: “[I]f the state does not follow through [with the violations], then the laws mean nothing, especially to Native Hawaiians.”¹¹⁸

Despite the success and precedent set forth at Honokahua, it appears that the events at the Keeaumoku Wal-Mart were a drastic step in the wrong direction. Unfortunately, this tragic event would set into motion the continued trend where the state would favor the mainland developer over its native people and their cultural practices.

C. *Naue, Kaua‘i*

One would think that in light of the tragedies that occurred at Honokahua, Wal-Mart, and elsewhere, the state would have taken steps to ensure these acts of desecration could not happen again. However, the events surrounding the Naue burial debacle indeed show that the state’s pro-development agenda has no place for Native Hawaiian burial grounds.

In 2001, Joseph Brescia, the CEO of Architectural Glass and Aluminum,¹¹⁹ began constructing a large, single-family, luxury home over more than thirty

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Apgar, *supra* note 100.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *History*, AGA, http://www.aga-ca.com/abt_history.html (last visited Apr. 18, 2012) (AGA provides support to owners, architects, and contractors in the completion of “significant monumental projects” and has full service offices in Alameda, Irvine, Sacramento, and Honolulu);

ancient Hawaiian burial sites.¹²⁰ In order to comply with the IBC's decision of leaving the *iwi* in place, Brescia—without any permission from the council, or SHPD—instructed his workers to cap the burial sites with concrete.¹²¹ However, this atrocity was *not* the most repugnant event to take place; the State's response legitimized Brescia's actions.

SHPD/ Kaua'i District Archaeologist Nancy McMahon stated that the cement caps over the burial sites qualified as preservation in place.¹²² The Fifth Circuit¹²³ agreed to this definition, and allowed Brescia's home construction to proceed because the *iwi* had already been capped and the foundation had already been poured.¹²⁴ Despite Judge Watanabe stating that Brescia was never authorized to alter the graves by building in the first place, she did not issue a cease and desist order on further construction.¹²⁵ However, Judge Watanabe warned Brescia that the IBC could make any number of recommendations on his burial plan, and his continual construction was at his own peril.¹²⁶ Further attempts to litigate and stop Brescia's construction was ignored, even though there *still is no approved state burial treatment plan* for the property.¹²⁷ Judge Watanabe stated she cannot enforce any cease and desist orders or temporary restraining orders unless Brescia destroys, alters, disturbs, or denies any access to burial sites.¹²⁸ With construction concluding at the end of 2009, and no lineal descendants ever recognized, the house was built without any further impediments by the Hawaiian community.¹²⁹

In what has been deemed a “powerful symbol of the bitter battle between development and cultural preservation in Hawaii,”¹³⁰ the Native Hawaiian community stands alone. On one side of the battle is the Native Hawaiians, and on the other side is the Hawai'i Deputy Attorney General, SHPD, and Joseph

Joseph Brescia, BLOOMBERG BUSINESSWEEK (Apr. 8, 2012, 12:21 AM), <http://investing.businessweek.com/research/stocks/private/person.asp?personId=5964441>.

¹²⁰ New Pacific Voice, *supra* note 34.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Hawaiian Circuit courts share concurrent jurisdiction with District Courts in civil non-jury cases in which the amounts in controversy are between \$10,000 and \$25,000. The Fifth Circuit refers to all courts located on the island of Kaua'i. HAWAII STATE JUDICIARY, http://www.courts.state.hi.us/courts/circuit/circuit_courts.html (last visited Apr. 18, 2012).

¹²⁴ New Pacific Voice, *supra* note 34.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Curtis, *supra* note 37.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Joan Conrow, *Cut to the Bones: The State's Handling of Burial Sites Comes Under Fire*, HONOLULU WEEKLY (Apr. 7, 2010), <http://honoluluweekly.com/cover/2010/04/cut-to-the-bones>.

Brescia.¹³¹ With his state-backed support, nothing can stand in the way of a wealthy mainlander building atop *nā iwi*. Even when Kaua‘i Police Chief Darryl Perry attempted to send Brescia’s construction crew away because they were violating state burial laws, the State attorney general’s office overruled Perry’s order.¹³² The office further asserted that Brescia’s building permit nullified any elements of desecration.¹³³

Despite the language in H.A.R. § 711-1107(b),¹³⁴ it appears that encasing *nā iwi* in concrete slabs does not outrage the sensibilities of those people observing Brescia’s actions, especially not Native Hawaiians. Rather than focusing on her duty to preserve historical burial sites, SHPD/Kaua‘i District Archaeologist Nancy McMahan fully supported Brescia in finishing construction on his home: “[Brescia] spent so much money already; he spent millions of dollars on the property.”¹³⁵ In these harsh economic times, Hawai‘i state officials seem to focus on the following equation: increased development leads to increased property values, and that equals increased tax money in state coffers.¹³⁶ Nowhere in the equation do State officials factor in the importance of Native Hawaiian cultural tradition or the sensibilities of their electorate.

Strengthening burial laws following the Honokahua ordeal appears to have weakened the voice of the Native Hawaiian community. With SHPD failing to enforce the burial laws or regulate development, the laws mean nothing—especially to Native Hawaiians.¹³⁷ If the State burial laws are an ineffective tool to prevent burial desecration, is there a way to ensure events like Honokahua, the Keeaumoku Wal-Mart, and Naue never happen again? The solution may lie in the application of TJ, with its overall goal of reducing the law’s anti-therapeutic effect while enhancing the therapeutic consequences.¹³⁸

IV. MAKING SURE PAST EVENTS¹³⁹ NEVER HAPPEN AGAIN

There are two remedies available to solve the problem with Hawaii’s burial laws. The first solution focuses on preventative law, which looks at the inter-

¹³¹ *See id.*

¹³² New Pacific Voice, *supra* note 34.

¹³³ *Id.*

¹³⁴ Defining burial site desecration as intentionally “defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant’s action,” tying it indelibly to community standards. HAW. REV. STAT. § 711-1107(2) (2011), available at http://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HR0711/HR0711-1107.htm.

¹³⁵ New Pacific Voice, *supra* note 34.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ DAICOFF, *supra* note 6.

¹³⁹ *See supra* Part III.A-C.

personal relationship between the conflicting parties.¹⁴⁰ The second solution focuses on creative problem solving, where the parties are educated about their respective concerns and empathize with each other's point of view.¹⁴¹

A. *Education/Public Awareness*

“We need to continually educate our children that are coming forth, that caring for the ancestors is their responsibility. They need to be taken care of because they deserve it, and for no other reason.”¹⁴² The late Ms. Kapaka-Arboleda's statement is quite prophetic. Ms. Kapaka-Arboleda's message should not be limited only to children, but used to educate every person that wants to live or work in Hawai'i that it is a shared responsibility to preserve the *nā iwi*. People moving to Hawai'i should make themselves aware of all the unique cultural practices native to the islands. One of the remedies necessary to solve the deliberate desecration to ancient Hawaiian burials is through educating all parties directly involved in the dispute. Generally, the parties would not only include the developer, but also the SHPD archaeologists, and judges overseeing the dispute.

Preventative law anticipates disputes before they arise, and establishes pre-emptive measures to prevent future litigation or legal problems.¹⁴³ Preventative law also focuses on the interpersonal relationship between conflicting parties.¹⁴⁴ These relationships endure long after the problem passes, and “a solution that irreparably ruptures the bond may lead to future legal problems and thus be really no solution at all.”¹⁴⁵ Preventative law also uses two techniques to spot problems that might arise in the future: (1) the rewind technique and (2) the fast-forward technique.¹⁴⁶ The rewind technique examines past and current legal disputes to gain insight into how to prevent similar lawsuits from arising.¹⁴⁷ The fast-forward technique looks into potential problems, and assesses what preventative measures can be enacted now to avoid those problems in the future.¹⁴⁸

¹⁴⁰ DAICOFF, *supra* note 6, at 87.

¹⁴¹ *Id.* at 125 (“Creative problem solving refers to a broad approach to lawyering and legal problems that takes into account a wide variety of non-legal issues and concerns and then seeks creative, win-win solutions to otherwise win-lose scenarios.”).

¹⁴² *Nā Iwi Kūpuna*, *supra* note 1.

¹⁴³ DAICOFF, *supra* note 6, at 87.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 88-90.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

1. Developers

One important aspect that anyone from the mainland United States needs to know before coming to Hawai'i is that Hawai'i is culturally unique from other states. Mainland developers wanting to construct homes, buildings, or other structures in Hawai'i need to dispel the mindset that the Hawaiian culture is ancillary to profit making. These developers need to educate themselves in all aspects of the Hawaiian culture, not merely superficial profit making ventures—e.g., surfing, luaus, and hula.

This education should occur even before breaking ground on acquired property, because the majority of problems dealing with desecration involve an inadequate archaeological survey. The State should require, as a prerequisite to any mainland resident/developer obtaining a piece of property in Hawai'i, testing which broadly covers Native Hawaiian culture, land, and history. The State currently has a procedure that reviews and considers permits based on the well-being of the Hawai'i community.¹⁴⁹ Due to this pre-established permit requirement, implementing a mandatory test as a precursor to acquiring a permit would not be too burdensome for the mainland resident/developer.

This proposition is ideal because it would force developers to learn about the cultural and burial practices of the Native Hawaiian community. With this newly acquired knowledge, developers would now be able to understand the hostility that Native Hawaiians have shown when the *nā iwi* have been mistreated. Knowledge about the reverence Native Hawaiians have toward their ancestors and remains converges with a person's intrinsic nature to show the proper respect and treatment of human remains.

2. Archaeologists

An archaeologist should already understand, through their anthropological background, that human societies vary greatly from one another. One of the reoccurring issues leading to desecration is the result of developers hiring culturally inept archeologists to conduct archaeological surveys.¹⁵⁰ As archaeologists, these individuals should be held to a higher degree of responsibility when it comes to desecration; it is presumed that they know no two populations are culturally identical to each other. Archaeologists need to be fully aware of the culture, history, customs, practices, and beliefs of the area/state/country of an indigenous people.

¹⁴⁹ See DEPT. LAND & NAT. RESOURCES, FORMS, <http://hawaii.gov/dlnr/land/forms-1> (last visited Apr. 18, 2012).

¹⁵⁰ Cf. *Standards of Research Performance*, RPA, <http://www.rpanet.org/displaycommon.cfm?an=1&subarticlenbr=4> (last visited Apr. 18, 2012).

As a prerequisite to graduating with any degree at the University of Hawai‘i, all students must take a Hawaiian Studies course.¹⁵¹ Similarly, there should be a prerequisite created for practicing archaeologists to take such a course in order to become a *qualified* Hawai‘i archaeologist. Archaeologists already need to take courses that focus on various indigenous cultures; it should only be logical that they have a familiarity in the indigenous population of the region in which they wish to practice. This additional prerequisite would ensure only those archaeologists who have passed a Hawaiian Studies course would be able to practice in Hawai‘i, and only these archaeologists would be able to work on any land development occurring on the Hawaiian Islands. Mainland developers would no longer be able to contract for the cheapest archaeologist—they would be limited to hiring a qualified archaeologist knowledgeable in Hawaiian culture.

3. Attorneys and Judges

During his term as Chief Justice of the Hawai‘i Supreme Court, William S. Richardson established a precedent that certain Westernized views of the law—beach access, shoreline boundaries, and water rights—were not appropriate.¹⁵² Rather, he found that Hawaiian principles predating western contact were operative.¹⁵³ Chief Justice Richardson saw the need for changing this viewpoint in the law because prior decisions were made by judges who had little connection to Hawai‘i, had little awareness of Hawaii’s culture and operative law, and made decisions based upon the standard Western Anglo-Saxon view of the law.¹⁵⁴

Chief Justice Richardson’s view of operative Hawaiian law should be expanded to include burial rights. There is no reason why Native Hawaiian burial practices should not be included with the already well-established precedents of water rights, beach access, and shoreline boundaries. Hawaiians established cultural and legal views in all of these areas prior to Western contact. Therefore, Westernized views are not appropriate and should not be applied to these issues.

Western law often clashes with Native Hawaiian cultural traditions. This constant conflict creates an anti-therapeutic application to the state law. The State’s laws are often created from a Western point of view that completely ignores Native Hawaiian cultural traditions. Although there are a few laws that

¹⁵¹ See UNIV. OF HAW., UNDERGRADUATE GENERAL EDUCATION REQUIREMENTS FOR STUDENTS ENTERING FALL 2011, 27 (2011), <http://www.catalog.hawaii.edu/pdf/025-030genEdCore11.pdf>.

¹⁵² Ivan M. Liu-Kwan, *A Beloved Teacher Whose Vision Had No Boundaries*, 33 U. HAW. L. REV. 39, 40-41 (2010).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

protect these cultural sites, these laws are immediately subordinated to mainland urban development interests. For the Hawaiian community, this creates an overall feeling of mistrust and a lack of confidence in the State's enforcement of its own laws. Those who wish to practice law in Hawai'i should know that some Westernized law concepts have no place in Hawai'i. Requiring attorneys and judges to take mandatory continuing legal education classes that detail the laws of Hawai'i before Western contact would help prevent inadequate decisions/rulings.

Preventative law anticipates disputes before they arise as well as creating preemptive measures to prevent future legal problems.¹⁵⁵ The preventative law solution would be simple enough to implement amongst all the above-mentioned parties.¹⁵⁶ Mandatory tests to obtain a building permit, classes to become licensed Hawaiian archaeologists, and required CLEs for licensed Hawaiian attorneys and judges would require transplants from the mainland to learn about Native Hawaiian cultural practices and beliefs. Before these people conduct any type of project that involves land development in Hawai'i, they would already be fully aware of the cultural sensitivity of Native Hawaiian burial remains. Land developers, archaeologists, attorneys, and judges would be able to comprehend the Native Hawaiian's reverence for the *nā iwi* as an innate human trait to show respect toward human remains.

B. *Mediation Between the State and Burial Councils*

Another reason burial desecrations continue to occur is because IBCs possess inadequate legal knowledge. Although each IBC member is a "member of the Hawaiian community" and "[p]ossess[es] an understanding of Hawaiian culture, history, customs, practices, and in particular, beliefs and practices relating to the care and protection of Native Hawaiian burial sites and ancestral remains," most members do not have a legal background.¹⁵⁷ These are advocates who serve the council without compensation¹⁵⁸ in order to ensure the

¹⁵⁵ DAICOFF, *supra* note 6.

¹⁵⁶ *See supra* Part IV.A-C.

¹⁵⁷ HAW. CODE R. §13-300-22(b)(2) (LexisNexis 2012). *See generally* Henry Curtis, *Hawaii Supreme Court Reverses ICA on Burials*, TRANSFORMING HAW. (Feb. 14, 2011), <http://transforminghawaii.blogspot.com/2011/02/hawaii-supreme-court-reverses-ica-on.html> (On O'ahu, IBC (OIBC) member Hinaleimoana K.K.W. Falemei is the Director of Culture at Halau Lokahi Public Charter School. Also, OIBC member Aaron D Mahi is the former director of the Royal Hawaiian Band. OIBC member Cy M. Bridges is the President of the Native Hawaiian Hospitality Association.).

¹⁵⁸ HAW. REV. STAT. § 6E-43.5(c) (2011), *available at* http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0006E/HRS_0006E-0043_0005.htm (the council members shall serve without compensation, but shall be reimbursed for necessary expenses incurred during the performance of their duties).

preservation of the *nā iwi*. Due to their unfamiliarity with the applicable burial laws, however, council members cannot fully execute their functions as advocates for the Hawaiian community.¹⁵⁹

Creative problem solving stresses the flexibility of framing one problem in multiple ways and selecting the best method(s) amongst the array of possible solutions.¹⁶⁰ The flexibility arises from processes that not only rely upon the traditional analytical approach, but also non-traditional processes derived from sociology, psychology, and economics, as well as other fields of study.¹⁶¹ This altruistic approach avoids the simplistic “silver bullet” solution, which gives people the illusion that the problem is immediately solved from one remedy.¹⁶² Creative problem solving develops numerous solutions based on what is learned about the problem rather than relying upon what has been habitually done in the past to temporarily solve the problem.¹⁶³ The method avoids scenarios where one party succeeds and another loses, which usually causes the problem to be temporarily quelled rather than being permanently resolved.¹⁶⁴ The purpose of creative problem solving is to create permanent solutions in which both parties benefit, as well as developing a greater sense of empathy towards the other party.¹⁶⁵

Currently, there is an overall feeling of mistrust from the IBC toward the state attorney general’s office and the SHPD. This mistrust was greatly exacerbated by the event that occurred at Naue, where both Deputy Attorney General Vince Kanemoto and SHPD Deputy Director Nancy McMahon had “incorrectly advised the council that construction would proceed *regardless* of their determination.”¹⁶⁶ This legal advice appears to be in direct contrast with H.A.R. § 13-300-24(h) which states, “the council shall be authorized to take any other appropriate actions in furtherance of this chapter. Nothing will be construed to limit the authority of the council as to matters provided in chapter 6E, H.R.S.”¹⁶⁷ Furthermore, both Kanemoto and McMahon “erroneously informed the council that they had no power other than to recommend only one of two choices: (1) preserve in place or (2) relocate remains.”¹⁶⁸ Thus, the

¹⁵⁹ See HAW. CODE R. §13-300-24 (LexisNexis 2012).

¹⁶⁰ See generally *Creative Problem Solving*, CAL.W. SCH. L., http://cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/home.asp (last visited Apr. 18, 2012).

¹⁶¹ *Id.*

¹⁶² DAICOFF, *supra* note 6, at 125.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 126.

¹⁶⁶ New Pacific Voice, *supra* note 34.

¹⁶⁷ HAW. CODE R. §13-300-24 (LexisNexis 2012).

¹⁶⁸ New Pacific Voice, *supra* note 34.

council was not fully aware of all their options or their inherent authority in dealing with the burial site. This led some IBC members to believe that both the attorney general and the SHPD were not working in the IBC's best interests, but rather in the interests of the land developer. Whether or not this belief is true, this idea caused a breakdown in communication between the IBC and the State.

On first impression, one might think that both the Deputy Attorney General and SHPD Deputy Director had either accidentally misinformed the council of their rights, or were not aware of H.A.R. § 13-300-24(h). However, during the hearing for a preliminary injunction to stop construction on Brescia's house, both Kanemoto and McMahon cited to H.A.R. § 13-300-24(h), and stated they told the burial council about all its rights.¹⁶⁹ This communication breakdown is more than just a mere mistake because it seems to be a frequent occurrence designed to keep IBCs from having any decision-making powers; powers that are exemplified in the burial laws!

One of the solutions proposed is to create a mutual exchange of information between the IBC and the attorney general and SHPD. This remedy is essential to solving the inadequate legal knowledge possessed by the IBC. Most members of the burial councils are everyday Hawaiian citizens who have no idea what additional rights the law provides to them as an IBC member. IBC members rely in good faith upon the professional legal advice given to them by people in positions to be fully knowledgeable about burial laws. Council members have very little reason to second-guess what a professional tells them about the law, and lack the resources to independently make such determinations. Rather than exploiting this ignorance, the attorney general and the SHPD should collaborate and strengthen its ties to the IBC. For creative problem solving to function, a permanent solution where both parties benefit is needed. Currently, the IBC is ineffectual in preventing burial desecration because the Attorney General and SHPD generally side with land developers. Only the State seems to benefit from the proceeds of land development, while the Native Hawaiians and IBC members grow steadily more mistrustful of their state representatives and burial laws. To help repair this fractured relationship, both the Attorney General and the SHPD need to develop a greater sense of empathy toward the IBCs. The Attorney General and SHPD can provide the IBC with accurate legal advice and correct legal interpretations of the law, and the IBC can provide the Attorney General and SHPD with information regarding the Hawaiian culture. There can be no more instances where the Attorney General and SHPD make a mere *mistake* in legal advice given to the IBC.

¹⁶⁹ *Id.*

This mutual exchange of information would help cure the deficiency of information that both parties have. IBC members are given their position through their knowledge of Hawaiian culture, not through their knowledge of burial laws. The Native Hawaiian IBC members must share their wisdom about the Hawaiian culture and burial customs to the Attorney General and SHPD. Both the Attorney General and SHPD have vast knowledge of the burial laws and should assist the IBC members in becoming adept with their duties and rights under the law. This relationship would be much more functional if both parties worked for the benefit of preserving Native Hawaiian burial sites instead having one party favoring the preservation of the *nā iwi* while the other party favors monetary benefit.

V. CONCLUSION

Hawaii's burial and preservation laws were originally intended to preserve and protect important cultural sites such as Native Hawaiian burial grounds. These laws have been ineffectively enforced, however, resulting in the perpetual burial wrongs that continually resurface every few years in Hawai'i.¹⁷⁰ Although the legislative intent of the burial laws is cultural protection, these laws are frequently subordinated when wealthy land developers decide that following these laws are not in their best interests.

If these burial laws are being circumvented to benefit a few wealthy individuals, the disastrous effect undermining the protection of Native Hawaiian burials will continue. After the atrocities that occurred at Honokahua and Keeaumoku Wal-Mart, the Hawaiian community whole-heartedly believed that the laws enacted would prevent the construction of Joseph Brescia's house on top of a burial ground. However, they were once again disappointed by the ineffectual enforcement of the burial laws. Education would benefit all parties: mainland developers would benefit from being forced to take a mandatory test as a prerequisite to obtaining a land or building permit, and attorneys, archaeologists, and judges would learn from CLEs before applying for a position in Hawai'i. This education would provide the mainlander with an understanding of the culture, history, customs, practices, and beliefs relating to Native Hawaiian burial sites. By appealing to a person's sense of empathy, this excellent preventative tool would deter individuals from performing acts deemed disrespectful or which might desecrate the *nā iwi*. Hawaiians are not asking for much, they are only asking for their ancestors to be treated like any Western remains are to be treated—with care and respect.

Individuals with legal expertise and knowledge must fully and accurately state the authority granted to the IBC and other important provisions of the

¹⁷⁰ See *supra* Part IV.

relevant law. Furthermore, Native Hawaiian members of the IBC must share their wisdom about their culture and burial customs to the state-government parties. This exchange of information places both parties on equal footing and provides a sense of collaboration in reaching a conclusion that follows the legislative intent of the burial laws—to protect and preserve Native Hawaiian burial sites.

Hawai'i needs to have a state division, archaeologists, attorneys, judges, and attorney generals who are willing to enforce the law without weighing the economic benefits against Hawaiian cultural beliefs. Unfortunately, past burial disturbances¹⁷¹ show that current laws are not effective without enforcement. Although there is nothing wrong with the burial laws themselves, SHPD has not properly enforced or regulated them during any of these events. Based upon the history of non-enforcement, there is little doubt that the laws will not be properly enforced in the near future. Despite the exclusivity of Hawaiian burial rights to Hawai'i, this is *not* merely a Native Hawaiian issue. The preservation and protection of cultural and historical burial mounds has the unique societal value that allows current and future generations to have a brief glimpse into the window of the past. Hotels, retail stores, and multi-million dollar homes will be built and re-built until the end of time, but once all the historical sites have been desecrated that window to the past will be shut forever.

¹⁷¹ See *supra* Part IV.

