

THERAPEUTIC JURISPRUDENCE: FOUNDATIONS, EXPANSION, AND ASSESSMENT

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Abstract

Founded in 1987 by law professors David Wexler and the late Bruce Winick, therapeutic jurisprudence (or “TJ”) is a multidisciplinary school of legal theory and practice that examines the therapeutic and anti-therapeutic properties of law, policy, and legal institutions. In legal events and transactions, TJ inherently favors outcomes that advance human dignity and psychological well-being. Starting with original groundings in mental health and mental disability law, criminal law, and problem-solving courts, and with a geographic focus on the United States, TJ now embraces many aspects of law and policy and presents a strong international orientation.

This article provides a meta-level examination of the field, including its origins, core doctrinal and theoretical foundations, critical reviews, expansion into many areas of law, procedure, and legal institutions, and connections with other modalities of legal theory and practice. Furthermore, it assesses TJ’s standing and considers opportunities and challenges for the field’s expansion and growth. The intended purpose of this article is two-fold: First, to spur discussions within the TJ community about the past, present, and future of the field; and second, to provide a substantive, yet accessible introduction to TJ for those who wish to learn more about it.

Table of Contents

Introduction

- I. TJ Foundations
 - A. Origins
 - B. Early Subject Matter Development
 - 1. Core Doctrinal Bases

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- 2. Building on Core Doctrine
 - C. Core Theoretical Bases
 - 1. Therapeutic vs. Anti-Therapeutic
 - 2. Dignity
 - 3. Compassion
 - D. Responses and Critiques
 - 1. Friendly and Not-So-Friendly Reviews
 - 2. Stronger Definition and Theory
 - E. Analytical Frameworks and Methodologies
 - 1. Therapeutic Design and Application of the Law
 - 2. Legal Proceedings: Voice, Validation, and Voluntary Participation
 - 3. The Therapeutic Imperative
 - 4. Empirical and Applied Research
 - 5. Empirical Research Tools
 - 6. Legislation and Public Policy
 - 7. Criminal Law Multitasking
- II. Subject Matter Expansion and Related Frameworks
- A. Expanding TJ's Scope
 - 1. Civil Litigation and Dispute Resolution
 - 2. Education Law
 - 3. Employment and Labor Law
 - 4. Environmental Law
 - 5. Family Law
 - 6. Health Law
 - 7. Judicial Practice
 - a. Court Craft
 - b. Procedural Justice
 - c. Legal Rulings
 - 8. Legal Education, Legal Practice, and Legal Profession
 - a. Legal Education
 - b. Legal Practice and Legal Profession
 - 9. Legal Writing and Scholarship
 - 10. Legislation and Policymaking
 - 11. Military Law
 - 12. Tort Law
 - 13. Trusts and Estates Law
 - 14. Other Promising Areas
 - B. Related and Overlapping Frameworks
 - 1. Restorative Justice
 - 2. Preventive Law
 - 3. Law and Emotion
 - 4. Comprehensive Law
 - 5. Law and Spirituality
- III. Assessing TJ's Standing and Prospects for Growth

- A. TJ's Expanding Global Community
- B. TJ in the American Legal Academy: Welcome to the Valley of Tiers
- C. Diversity, Difference, and Hierarchies of Legal Stakeholders
- D. Building TJ's Influence: Points of Connection
 - 1. Legal Education
 - 2. Continuing Legal Education
 - 3. Trial Court Judiciary
 - 4. Psychology and Psychiatry

Conclusion: An Invitation

INTRODUCTION

Founded in 1987 by American law professors David Wexler and Bruce Winick,¹ therapeutic jurisprudence (TJ) is an interdisciplinary school of theory and practice that examines “the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences.”² In legal events and transactions, TJ inherently favors outcomes that advance human dignity and psychological well-being.³ Starting with original groundings in mental health and mental disability law, criminal law, and problem-solving courts, and with a geographic focus on the United States, TJ now embraces many aspects of law and policy and presents a strong international orientation.⁴ As summarized by Amy Campbell and Kathy Cerminara:⁵

Since its development within mental health law in the U.S., and application to problem-solving courts, the field has expanded its substantive and geographic scope. . . . In addition to formal applications in judging and lawyering, TJ’s application has expanded to fields such as: family law, education settings, forensic psychology, psychiatry, elder law, employment law, and military law. Moreover, we find international adopters in many lands, including Canada, France, Sweden, Australia, New Zealand, and even Pakistan.⁶

During the past three decades, TJ has grown into a global community of law school faculty, judges, attorneys, scholars and practitioners from related disciplines, and law and graduate students.⁷ They have built a considerable body of work appearing in

¹ See David B. Wexler, *Mental Health Law and the Seeds of Therapeutic Jurisprudence*, in *THE ROOTS OF MODERN PSYCHOLOGY AND LAW: A NARRATIVE HISTORY* 79 (Thomas Grisso & Stanley L. Brodsky, eds., 2018) [hereinafter *Seeds of TJ*] (stating that “TJ’s official ‘birth’ can be traced to a presentation given in October 1987”); Amy T. Campbell & Kathy Cerminara, *Foreword: A Tribute to David Wexler Through a Forward-Looking Agenda for Therapeutic Jurisprudence Editorial*, 63 *INT’L J. L. AND PSYCHIATRY* 1 (2019) [hereinafter *Foreword*] (stating that “David Wexler, in partnership with his colleague Bruce Winick, developed TJ. . .”). As the forthcoming commentary will amply illustrate, David Wexler, now at the University of Puerto Rico law school, remains very active in the TJ community. Bruce Winick continued to play a major role in the development of TJ as well, until his death in 2010.

² David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 *U. MIAMI L. REV.* 979, 981 (1991) [hereinafter *New Approach*].

³ See Michael L. Perlin, *Have You Seen Dignity? The Story of the Development of Therapeutic Jurisprudence*, 27 *NEW ZEALAND UNIVERSITIES L. REV.* 1135, 1137 (2017) [hereinafter *Have You Seen Dignity?*] (opining that that dignity “is the core of the entire therapeutic jurisprudence enterprise”); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 20 (2008) [hereinafter *Two Decades of TJ*] (observing that “therapeutic jurisprudence looks at the traditionally underappreciated area of the law’s impact on emotional life and psychological well-being”);

⁴ See generally e.g., *Therapeutic Jurisprudence: Today & Tomorrow*, 63 *INT’L J. L. AND PSYCHIATRY* 1 *et seq.* (2019) (symposium collection of articles on various aspects of TJ); *THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE* (Nigel Stobbs, Lorana Bartels & Michel Vols, eds., 2019) (multi-contributor volume on various aspects of TJ) [hereinafter *TJ METHODOLOGY AND PRACTICE*].

⁵ Campbell and Cerminara, *Foreword*, *supra* note 1, at 1.

⁶ *Id.* (citations omitted).

⁷ See *id.*; Perlin, *Have You Seen Dignity?*, *supra* note 3 at 1145-46 (noting TJ’s growth into an international and multidisciplinary enterprise); David C. Yamada, *Therapeutic Jurisprudence and the Practice of Legal Scholarship*, 41 *U. MEMPHIS L. REV.* 121, 141 (2010) [hereinafter *The Practice of Legal Scholarship*]

law reviews and journals, academic and professional books, social media, and other venues, complemented by conferences, workshops, and seminars held around the world.⁸ In 2017, this expanding network would coalesce in the creation of the International Society for Therapeutic Jurisprudence (ISTJ), a learned, non-profit organization dedicated to public education about TJ.⁹

Despite this growing array of scholarship and professional practice and an expanding global network, TJ has yet to establish itself as a mainstream presence in legal education and the legal profession in any of the regions where it currently enjoys its most concentrated followings, including North America, Oceania, Europe, and Ibero-America.¹⁰ Furthermore, awareness of TJ pales when compared with that of other schools of legal thought that became prominent during the last century, such as legal realism, law and economics, and branches of Critical Legal Studies.¹¹

With TJ's thirtieth anniversary and the launch of the ISTJ now in the rearview mirror, this is an opportune time to canvass and assess the field and to suggest future directions for scholarship and practice, drawing primarily upon the wealth of pertinent law review articles and other published materials. Thus, the plan is to proceed as follows: Part I explains TJ's foundations. This includes a short history of TJ's development, its core subject matter areas, and its theoretical roots and relationships. Part II examines TJ's expansion into many doctrinal and procedural areas of law and policy and legal institutions, as well as connections to other legal theories and frameworks. Part III assesses TJ's global presence, the challenges it faces, and opportunities for growth. The article concludes with an enthusiastic but qualified invitation to join this very engaged community of scholars, jurists, and practitioners.

(observing that a series of conference panels on TJ-related topics at the 2009 International Congress on Law and Mental Health featured “law professors, attorneys, judges, mental health providers, and graduate students”).

⁸ This collective body of work includes, *inter alia*, hundreds of law review and journal articles with TJ themes, many of which are searchable in an online database (TJ Bibliography Search Page, <https://intljtj.com/bibliography/>); a THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM blog, with an international contributor base and readership (<https://mainstreamtj.wordpress.com/>); a dedicated “TJ stream” of panels at the biennial International Congress on Law and Mental Health, hosted by the International Academy of Law and Mental Health, *see e.g.*, ABSTRACTS OF THE XXXVITH INTERNATIONAL CONGRESS ON LAW AND MENTAL HEALTH 458-516 (David N. Weisstub, ed., 2019) (hereinafter CONGRESS ABSTRACTS) (<http://ialmh.org/wp-content/uploads/2019/06/Rome-Abstract-Booklet-6.25.pdf>); and a multi-contributor volume on TJ methodology and practice, *see* TJ METHODOLOGY AND PRACTICE, *supra* note 4.

⁹ *See* David Yamada, *Launched in Prague: The International Society for Therapeutic Jurisprudence*, MINDING THE WORKPLACE (July 14, 2017) [hereinafter *Launched in Prague*], available at: <https://newworkplace.wordpress.com/2017/07/14/launched-in-prague-the-international-society-for-therapeutic-jurisprudence/>; INTERNATIONAL SOCIETY FOR THERAPEUTIC JURISPRUDENCE, available at: <https://intljtj.com>.

¹⁰ Geographical references to TJ's strongest bases of support are drawn from the experience of building the International Society for Therapeutic Jurisprudence, including the creation of regional and national chapters established as of July 2019. *See* Chapters/Interest Groups, International Society for Therapeutic Jurisprudence, at <https://www.intljtj.com/chapters-interest-groups/>.

¹¹ This statement is the author's assessment. No empirical data exists to compare TJ's following with that of other frameworks of legal theory and practice.

Before proceeding, I readily disclose that is an insider's view, with conceded biases that may accompany such close connections. I first became associated with TJ some 12 years ago, when I found that my work in employment law and policy, especially writings related to workplace bullying and abuse,¹² continuously led me to questions of psychology and mental health. This growing interest would lead to an affiliation that has deepened considerably during the past decade.¹³

As a relative newcomer to the field, for years I have perceived a strong need for a meta-level law review article that summarizes TJ's overall development, examines its current state, and considers its prospects for the future.¹⁴ The intended purpose of such a commentary would be two-fold: First, to spur discussion within the TJ community about the past, present, and future of the field; and second, to provide a substantive, yet accessible introduction to TJ for those who wish to learn more about it. Concededly, these two divergent intended audiences have given me some trepidation over striking the right balance of depth versus breadth. Nevertheless, I offer the following commentary with aspirations of encouraging greater understanding of, and interest in, TJ's promise for shaping law, policy, and legal institutions.

I. TJ FOUNDATIONS

This Part explores TJ's origins, early core subject matter development, core theoretical bases, significant critiques and reviews of the field, and emerging analytical frameworks and methodologies. This is the historical base of this young field. In fact, those who have only a passing familiarity with TJ are likely to associate it with the topics discussed here.

A. *Origins*

¹² See e.g., David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICHMOND L. REV. 523 (2009) [hereinafter *Human Dignity*]; David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPLOYEE RTS AND EMPLOYMENT POL'Y J. 475 (2004); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN L. J. 475 (2000) [hereinafter *The Phenomenon of Workplace Bullying*].

¹³ Among other things, I served as the founding board chairperson of the International Society for Therapeutic Jurisprudence from 2017-19, and I remain on the board as chair *emeritus*. My TJ-related scholarship includes David C. Yamada, *Therapeutic Jurisprudence, Intellectual Activism and Legislation*, in TJ METHODOLOGY AND PRACTICE, *supra* note 4, at 83 *et seq.* [hereinafter *TJ and Legislation*]; David C. Yamada, *On Anger, Shock, Fear, and Trauma: Therapeutic Jurisprudence as a Response to Dignity Denials in Public Policy*, 63 INT'L J. L. AND PSYCHIATRY 35 (2019); [hereinafter *On Anger, Shock, Fear, and Trauma*]; Yamada, *The Practice of Legal Scholarship*, *supra* note 7; David C. Yamada, *Employment Law as if People Mattered: Bringing Therapeutic Jurisprudence into the Workplace*, 11 FLORIDA COASTAL L. REV. 257 (2010) [hereinafter *Employment Law as if People Mattered*].

¹⁴ Recent shorter commentaries discussing the history and development of TJ include, *inter alia*, Michael L. Perlin, *Have You Seen Dignity?*, *supra* note 3; Barbara A. Babb & David B. Wexler, *Therapeutic Jurisprudence*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Gerben Bruinsma & David Weisburd, eds., 2014); David B. Wexler, *Two Decades of TJ*, *supra* note 3. Earlier assessments include, among others, Michael L. Perlin, *A Law of Healing*, 68 U. CINCINNATI L. REV. 407 (2000); David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000) [hereinafter *TJ Overview*]; Wexler & Winick, *New Approach*, *supra* note 2.

TJ's origin story is grounded in an intellectual epiphany and the fostering of a long-time academic collaboration. During the 1970s and 1980s, University of Arizona law professor David Wexler had been building a scholarly and teaching agenda around the emerging field of mental health law, including its applications to criminal procedure, juvenile rights, and civil and criminal confinement.¹⁵ Although his initial writings had adopted a "rights orientation" for mental health patients, he found himself wanting to move in a different direction, by looking at how the law "might be used as 'an agent' to promote positive 'behavioral change.'"¹⁶ Accordingly, his scholarship began to embrace themes of "'*law as therapy*' or '*therapy through law*.'" After a failed attempt at naming this area of focus for a conference audience in 1987 (let us say that the trial balloon of "Juridical Psychotherapy" did not win over his colleagues), Wexler suggested the term "therapeutic jurisprudence," and it would stick.¹⁷

Wexler's scholarship was evolving into this new mode during the creation of a friendship and collaboration with University of Miami law professor Bruce Winick, which began in 1975.¹⁸ As described in legal historian Constance Backhouse's 2016 profile and interview of Wexler:

Wexler was on sabbatical in Miami, and was assigned an office next to Winick, who was then in his first year of teaching. As luck would have it, both of them taught mental health law. It was the sort of accidental juxtapositioning that other scholars could only dream of. The two struck up a professional and social relationship that would span many decades, serving as "mutual catalysts" and "sounding boards" for TJ ideas.¹⁹

Thus began a long association that would establish Wexler and Winick as the co-founders of therapeutic jurisprudence.²⁰ During the 1990s and 2000s, this would include a series of co-authored and co-edited volumes that helped to establish TJ's intellectual core.²¹ Each would also develop his own TJ-related scholarly agenda.

Wexler's writings would focus on mental health and criminal justice, and have continued to do so since then.²² Early on, he emphasized TJ's task of identifying

¹⁵ See Constance Backhouse, *An Introduction to David Wexler, the Person Behind Therapeutic Jurisprudence*, 1 INT'L J. THERAPEUTIC JURISPRUDENCE 1, 7-9 (2016) [hereinafter *Wexler Profile*] (describing Wexler's work).

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 10.

¹⁸ Wexler, *Seeds of TJ*, *supra* note 1, at 90.

¹⁹ Backhouse, *Wexler Profile*, *supra* note 15, at 11.

²⁰ See Wexler, *Seeds of TJ*, *supra* note 1, at 90 (stating that "we were the principle co-developers of TJ, known as 'the Ws.'").

²¹ See BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003); *PRACTICING THERAPEUTIC JURISPRUDENCE* (Dennis P. Stolle, David B. Wexler & Bruce J. Winick, eds., 2000); *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* (David B. Wexler & Bruce J. Winick, eds., 1996); DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991).

²² See DAVID B. WEXLER, *Social Science Research Network*, available at: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=199142 (repository of Wexler's writings).

“relationships between legal arrangements and therapeutic outcomes,” applying disciplines such as “philosophy, psychiatry, psychology, social work, criminal justice, public health, and other fields.”²³ These research inquiries “should then usefully inform policy determinations regarding law reform.”²⁴ Wexler continues to develop TJ as an intellectual movement, including framing ways to apply its precepts.²⁵

Until his death in 2010, Winick’s writings covered a wide range of topics, including preventive law, criminal justice, mental health, legal practice, and legal education.²⁶ He would do foundational work on TJ and civil commitment, setting out a framework that addressed both legal rights and clinical needs.²⁷ Winick, too, would help to define the field of TJ in more general terms, as exemplified in an influential piece on “the jurisprudence of therapeutic jurisprudence,” discussed in greater detail below.²⁸ Together, Wexler and Winick created an initial foundation upon which others would build. As summarized by Christopher Slobogin in 1995:

Wexler’s and Winick’s articles are paradigmatic of therapeutic jurisprudence. They rely on behavioral science research and theory in making suggestions designed to enhance the therapeutic impact of substantive and procedural law and of the judges’, lawyer’s, and clinician’s roles in applying it. When relevant behavioral science data do not exist, they construct testable hypotheses that they hope will inspire empirical work.²⁹

Law professor Michael Perlin and California trial court judge Peggy Hora would soon join Wexler and Winick to form what might be called the original TJ pantheon. Perlin has produced a prodigious body of TJ-related scholarship, emphasizing mental disability law.³⁰ In 1993, he hosted the first academic conference on TJ at the New York Law School.³¹ Hora has played a pioneering role in the establishment and growth of

²³ David B. Wexler, *Putting Mental Health into Mental Health Law*, 16 L. & HUM. BEH. 27, 32 (1992).

²⁴ *Id.*

²⁵ See generally e.g., David B. Wexler, *The DNA of Therapeutic Jurisprudence*, [hereinafter *The DNA of TJ*] in TJ METHODOLOGY AND PRACTICE, *supra* note 4, at 3; David B. Wexler, *Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law*, in THERAPEUTIC JURISPRUDENCE: NEW ZEALAND PERSPECTIVES (Warren Brookbanks, ed., 2015) [hereinafter *Therapeutic Design and Application*]; David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices*, 7 ARIZONA SUMMIT L. REV. 463 (2014) [hereinafter *New Wine in Old Bottles*]; David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 33 MONASH U. L. REV. 33 (2011).

²⁶ BRUCE J. WINICK, Social Sciences Research Network, available at: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=147408 (repository of Winick’s writings).

²⁷ See BRUCE WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005).

²⁸ Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POL’Y & L. 184, 185 (1997) [hereinafter *The Jurisprudence of TJ*].

²⁹ Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193, 195 (1995) [hereinafter *Five Dilemmas*].

³⁰ See MICHAEL L. PERLIN, Social Science Research Network, available at: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=200886 (repository of Perlin’s articles).

³¹ Perlin, *Have You Seen Dignity?*, *supra* note 3, at 1142-43.

problem solving courts.³² Among her many judicial and professional posts, she served as presiding judge of a California drug treatment court from 1998 to 2005.³³ As a tribute to their contributions to the field, Hora, Perlin, Wexler, and Winick were designated honorary presidents of the International Society for Therapeutic Jurisprudence in 2017.³⁴

B. *Early Subject Matter Development*

1. Core Doctrinal Bases

In a 1991 article examining the development of therapeutic jurisprudence, Wexler and Winick suggested that TJ could prompt the next generation for law reform under a law and mental health rubric.³⁵ While acknowledging TJ's initial focus "on the core content areas of mental health law," they foresaw "applications in forensic psychiatry, health law, and a variety of allied legal fields, including criminal law, juvenile law, and family law, and probably across the entire legal gamut."³⁶ They also clarified that the therapeutic focus itself should not be exclusive, observing that considerations of economics, public safety, and basic rights also must be incorporated into legal decision making.³⁷

The doctrinal examples discussed in their 1991 article exemplified much of TJ's initial foundational base: (1) "the right to refuse treatment" in mental health contexts; (2) "the constitutionality of coercive treatment of death row inmates found incompetent to be executed"; and (3) "the need to consider new mechanisms to improve treatment of criminal defendants found incompetent to stand trial."³⁸ For each of these issues, they offered lists of TJ-focused questions designed to help answer and foster sound legal rules and rulings, supported by psychological and psychiatric research and evidence.³⁹

Along with Wexler and Winick, Robert Schopp would help to build the field's foundations in mental health law. For example, in an early article, he would explore policy tensions between the "legal protection of liberty and the therapeutic mission of the mental health system."⁴⁰ Schopp posited that early TJ work has sought a convergence of

³² See generally 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. CRIMINAL JUSTICE 7 (2011) [hereinafter *Courting New Solutions*] (providing extensive overview of problem-solving courts); Peggy Fulton Hora, William G. Schma, and John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) [hereinafter *Drug Treatment Court Movement*] (providing a TJ perspective on the drug treatment court movement).

³³ Curriculum Vitae for Peggy Hora, available at: <http://justicespeakersinstitute.com/wp-content/uploads/2015/01/Hora-cv.pdf>.

³⁴ See *ISTJ Leadership*, at <https://www.intltj.com/about/leadership/>.

³⁵ Wexler & Winick, *New Approach*, *supra* note 2, at 981.

³⁶ *Id.* at 982.

³⁷ See *id.* at 982-83.

³⁸ *Id.* at 990.

³⁹ See *id.* at 989-1001.

⁴⁰ Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law*, 11 BEHAV. SCI. & L. 31 (1993).

these two priorities by “exploring potential developments in mental health law intended to promote both liberty and therapeutic effectiveness.”⁴¹ However, he understood that, at times, “legal doctrine designed to maximize therapeutic effectiveness will do so at the expense of individual liberty, while uncompromising protection of liberty will impede effective treatment.”⁴²

Michael Perlin’s early writings would help to ground TJ in mental disability law. Among other things, he contributed the concept of “sanism” to the nomenclature of mental disability law and TJ, identifying a form of prejudice or bias akin to racism or sexism.⁴³ “Society fears, victimizes and brutalizes people with mental illness” he observed, adding that “(p)eople with mental disabilities have largely been invisible and without political power.”⁴⁴ He argued that many actors within the legal system – including legislators, judges, lawyers, and legal scholars – perpetuate sanism in the creation, application, practice, and teaching of law.⁴⁵

In terms of potential systemic responses to issues surrounding mental health and criminal justice, many TJ adherents have turned their focus to problem solving courts. As explained by Peggy Hora, problem solving courts “focus on the underlying medical and social issues and chronic behaviors of court users who often have recurring contacts with the justice system.”⁴⁶ These courts typically serve a diversionary function by facilitating alternatives to criminal sanctions – especially incarceration -- and attempting to foster rehabilitation and reduce recidivism.⁴⁷ They appear in various forms, including “adult drug treatment courts, driving while impaired courts, juvenile drug courts, mental health courts, family dependency treatment courts, domestic violence courts, community courts, unified family courts, and tribal healing-to-wellness courts.”⁴⁸

A classic example is a mental health court, defined by Winick as “a misdemeanor criminal court designed to deal with people arrested for minor offenses whose major problem is mental illness rather than criminality.”⁴⁹ Mental health courts seek to divert parties from incarceration through voluntary treatment, social services assistance, and judicial monitoring.⁵⁰ They also create a unique role for judges, by facilitating a “collaborative, interdisciplinary approach to problem solving” in the administration of

⁴¹ *Id.* at 31.

⁴² *Id.* at 31-32.

⁴³ Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 373-74 (1992). *See also* Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did,*” 10 J. CONTEMP. LEGAL ISSUES 3 (1999).

⁴⁴ Perlin, *On “Sanism,”* *supra* note 43, at 391.

⁴⁵ *See id.* at 398-406.

⁴⁶ Hora, *et al.*, *Drug Treatment Court Movement,* *supra* note 32 at 439.

⁴⁷ *See id.* at 10-16 (describing types and objectives of problem-solving courts); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts,* 30 FORDHAM URBAN L. J. 1055, 1055-61 (2003) [hereinafter *Problem Solving Courts*] (describing common functions of, and judicial role in, problem-solving courts).

⁴⁸ Hora, *Courting New Solutions,* *supra* note 32, at 7-8 (citations omitted).

⁴⁹ Winick, *Problem Solving Courts,* *supra* note 47 at 1059.

⁵⁰ *Id.* at 1059-60.

justice.⁵¹ This involves an ongoing exercise of emotional intelligence, in addition to applying analytical decision making skills.

Judge Ginger Lerner-Wren provides a personal look at this role in a recent book recounting her service as the first judge of the nation's first mental health court, founded in 1997 in Broward County, Florida.⁵² Within her first year, she began to understand “the depth of emotional pain and desperation of many of the families who came to court seeking help on behalf of loved ones who were ill.”⁵³ This informed how she would manage her judicial practice:

I understood that to humanize justice, court proceedings needed to feel welcoming and hopeful. My goal was to create a sharp contrast to how court process typically was experienced by articulating a warm welcome and by explaining the concepts and principles of psychiatric rehabilitation in simple, easy-to-understand terms, whenever possible. The mission for a court of refuge would be to leverage the law to reach a therapeutic outcome.⁵⁴

2. Building on Core Doctrine

On a global scale, much of TJ's post-foundational “growth spurt” would build upon the core subject matter developed by early TJ scholars. A quick survey of work being done demonstrates the variety of topics addressed and the appearance of new contributors to the literature. This remains TJ's intellectual hub.

Cynthia Adcock's commentary about the anti-therapeutic consequences of administering the death penalty in the U.S.⁵⁵ is an excellent and accessible example about how core conceptualizations of TJ would inform later work. Adcock, a veteran capital defense attorney and law professor, considers the mental health impacts of capital litigation and execution protocols on a wide range of legal actors, beyond the condemned prisoners.⁵⁶

Accordingly to Adcock, the impacted individuals include defense lawyers, prosecutors, witnesses, jurors, trial and appellate court judges and staff, family members of both defendants and victims, prison employees administering the death penalty, elected officials weighing requests for stays and commutations, ministers serving the prisoners, and the general public.⁵⁷ Parties closest to the executions – either by relation to the condemned or by duties to carry out the sentence – are especially prone to

⁵¹ *Id.* at 1060.

⁵² GINGER LERNER-WREN WITH REBECCA A. ECKLAND, *A COURT OF REFUGE: STORIES FROM THE BENCH OF AMERICA'S FIRST MENTAL HEALTH COURT* (2018).

⁵³ *Id.* at 13.

⁵⁴ *Id.*

⁵⁵ Cynthia F. Adcock, *The Collateral Anti-therapeutic Effects of the Death Penalty*, 11 *FLORIDA COASTAL L. REV.* 289 (2010)

⁵⁶ *See id.* at 291-92.

⁵⁷ *Id.*

experiencing significant collateral trauma, including post traumatic stress disorder.⁵⁸ These additional human costs are among the reasons to reconsider the merits of the death penalty.⁵⁹

Adcock's article embodies a lot of TJ scholarship in both substance and voice. First, it avoids taking the kind of hardline, argumentative stance sometimes found in legal academic prose. It also takes into account the interests of multiple actors and stakeholders affected by a series of legal events, emphasizing the therapeutic versus anti-therapeutic effects of those proceedings. In addition, it is grounded in the human perspectives of the legal processes it examines, rather than in strict ideology.

While commentaries on capital punishment may offer dramatic appeal, problem-solving courts have attracted the most scholarly attention among this next wave of TJ work. A sampling of topics includes rewards and sanctions in mental health courts (Virginia Barber-Rioja and Merrill Rotter),⁶⁰ the theory and practice of problem-solving courts (Ursula Castellano),⁶¹ challenges to creating successful drug treatment courts in the U.S. (Caroline Cooper),⁶² the constitutionality of problem-solving courts in Australia (James Duffy),⁶³ factors contributing toward the success of mental health courts (Michelle Edgely),⁶⁴ roles of judges in family violence courts (Michael King and Becky Batagol),⁶⁵ supporting persons with intellectual and developmental disabilities in Ontario problem-solving courts (Voula Marinos and Lisa Whittingham),⁶⁶ researching specialist criminal courts in New Zealand (Katey Thom and Stella Black),⁶⁷ and forensic psychology in problem-solving courts (Lenore Walker, David Shapiro, and Stephanie Akl).⁶⁸

An important sub-category of work on problem-solving courts addresses the legal interests of Indigenous populations. Relevant commentaries have examined wellness

⁵⁸ See *id.* at 293-318 (examining psychological impact of death penalty on specific stakeholder groups).

⁵⁹ See *id.* 318-19.

⁶⁰ Virginia Barber-Rioja & Merrill Rotter, *A Therapeutic Approach to Jurisprudence: A Differential Thinking Model of Sanctions and Rewards*, 13 INT'L J. FORENSIC MENTAL HEALTH 272 (2014).

⁶¹ Ursula Castellano, *Problem-Solving Courts: Theory and Practice*, 5 SOCIOLOGY COMPASS 957 (2011).

⁶² Caroline Cooper, *Drug Treatment Courts and Their Progeny in the U.S.: Overcoming Their Winding Trajectory to Make the Concept work for the Long Term*, 8 INT'L J. COURT ADM. 1 (2017).

⁶³ James Duffy, *Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two is Company, is Three a Crowd?*, 35 MELBOURNE U. L. REV. 394 (2011).

⁶⁴ Michelle Edgely, *Why do mental health courts work? A confluence of treatment, support & adroit judicial supervision*, 37 INT'L J. L. PSYCHIATRY 572 (2014).

⁶⁵ Michael King & Becky Batagol, *Enforcer, manager or leader? The judicial role in family violence courts*, 33 INT'L J. L. PSYCHIATRY 406 (2010).

⁶⁶ Voula Marinos & Lisa Whittingham, *The role of therapeutic jurisprudence to support persons with intellectual and developmental disabilities in the courtroom: Reflections from Ontario, Canada*, 63 INT'L J. L. AND PSYCHIATRY 18 (2019).

⁶⁷ Katey Thom & Stella Black, *Exploring Therapeutic Jurisprudence in New Zealand Specialist Criminal Courts*, in TJ METHODOLOGY AND PRACTICE, *supra* note 4, at 175-96.

⁶⁸ LENORE E. WALKER, DAVID SHAPIRO & STEPHANIE AKL, INTRODUCTION TO FORENSIC PSYCHOLOGY: CLINICAL AND SOCIAL PSYCHOLOGICAL PERSPECTIVES 2D ED. 111-120 (2020).

courts for Native American societies (Joseph Thomas Flies-Away and Carrie Garrow),⁶⁹ First Nation courts in Canada (Shelly Johnson),⁷⁰ Aboriginal Sentencing Courts in Australia (Michael King and Kate Auty),⁷¹ New Zealand specialized courts integrating Māori principles and practices (Katey Thom, Stella Black, and Rawiri Pene),⁷² and the Navajo Nation judicial system (James Zion).⁷³

Beyond the realm of problem-solving courts, an array of other subjects related to mental health, mental disability, and criminal justice have attracted scholarly attention. They include compulsory drug treatment programs in Australia (Astrid Birgden),⁷⁴ involvement of domestic violence victims in criminal sentencing (Hadar Dancig-Rosenberg and Dana Pugach),⁷⁵ interactions between police and mentally disabled persons (Michael Perlin and Alison Lynch),⁷⁶ the role of apology in criminal cases (Carrie Petrucci),⁷⁷ zealous criminal defense practice in a TJ mode (Robert Ward),⁷⁸ and evaluation of the Israeli Youth Act (Dana Segev).⁷⁹

Finally, an assortment of doctoral theses incorporating TJ themes illustrates how the field has become a focus of deeper research and analysis for graduate-level study. For example, Liz Richardson describes how her doctoral thesis evaluating mental health courts in Australia evolved into a “‘TJ’ PhD,” once she was introduced to the field at a conference during which David Wexler set out TJ’s basic theoretical framework.⁸⁰

⁶⁹ Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence+*, 2013 MICH. ST. L. REV. 403 (2013).

⁷⁰ Shelly Johnson, *Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence +*, 3 J. INDIGENOUS SOC. DEV. 1 (2014).

⁷¹ Michael S. King & Kate Auty, *Therapeutic Jurisprudence: An emerging trend in courts of summary jurisdiction*, 30 ALTERNATIVE L. J. 69 (2005).

⁷² Katey Thom, Stella Black, & Rawiri Pene, *Crafting a Culturally Competent Therapeutic Model in Drug Courts: A Case Study of Te Whare Whakapiki Wairua/The Alcohol and Other Drug Treatment Court in Aotearoa New Zealand*, [special edition, no n.] INT’L J. THERAPEUTIC JURISPRUDENCE 117 (2018).

⁷³ James W. Zion, *Navajo Therapeutic Jurisprudence*, 19 Touro L. Rev. 563 (2002).

⁷⁴ Astrid Birgden, *A Compulsory Drug Treatment Program for Offenders in Australia*, 30 T. JEFFERSON L. REV. 367 (2008).

⁷⁵ Hadar Dancig-Rosenberg & Dana Pugach, *Pain, Love, and Voice: The Role of Domestic Violence Victims in Sentencing*, 18 MICH. J. GENDER & L. 423 (2012).

⁷⁶ Michael L. Perlin & Alison J. Lynch, *“Had to Be Held Down by Big Police”: A Therapeutic Jurisprudence Perspective on Interactions Between Police and Persons with Mental Disabilities*, 43 FORDHAM URBAN L. J. 685 (2016).

⁷⁷ Carrie Petrucci, *Apology in the Criminal Justice Setting: An Update*, 7 OÑATI SOCIO-LEGAL SERIES 437 (2017).

⁷⁸ Robert Ward, *Criminal Defense Practice and Therapeutic Jurisprudence: Zealous Advocacy through Zealous Counseling: Perspectives, Plans and Policy*, in REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE 206 (David B. Wexler, ed., 2008).

⁷⁹ Dana Segev, *The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act*, 7 ARIZONA SUMMIT L. REV. 527 (2014).

⁸⁰ Liz Richardson, *Social Control Theory in Mental Health Courts: Reflections on Writing a “TJ” PhD*, in TJ METHODOLOGY AND PRACTICE, *supra* note 4, at 305-306. Her thesis is ELIZABETH RICHARDSON, ENVISIONING NEXT GENERATION MENTAL HEALTH COURTS FOR AUSTRALIA (2017) (Monash University thesis), available at:

https://bridges.monash.edu/articles/thesis/Envisioning_Next_Generation_Mental_Health_Courts_for_Australia/4541671.

Doctoral theses by Anna Kawalek (applying TJ to the work of a specialist court in England and Wales),⁸¹ Erin Mackay (examining whether TJ serves the interests of Indigenous survivors of sexual violence),⁸² Nigel Stobbs (examining TJ and adversarial justice)⁸³ and Amanda Wilson (examining TJ, criminal justice, and gender)⁸⁴ further display TJ's appeal to graduate researchers.

Of course, there is much more to the story. TJ's expansion into many other aspects of law, policy, and legal institutions, especially those crossing into civil justice issues, is key among them. Part II will examine these developments and the promise of more to come, followed by a look at overlapping and related frameworks of theory and practice. Also significant are TJ's evolution into a global community and its potential for growth and greater influence, which are focal points of Part III. However, before embarking upon these explorations, we next will consider TJ's theoretical bases (section C), responses to and critiques of TJ (section D), and theoretical frameworks and methodologies built around TJ (section E).

C. Core Theoretical Bases

1. Therapeutic vs. Anti-Therapeutic

Bruce Winick's 1997 examination of the "jurisprudence of therapeutic jurisprudence"⁸⁵ helps to set out TJ's early theoretical base. With TJ's tenth anniversary at hand, the field had matured in depth and breadth to where Winick could offer a more full-throated definition:

Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It is an interdisciplinary enterprise designed to produce scholarship that is particularly useful for law reform. Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law. Therapeutic jurisprudence builds on the

⁸¹ ANNA KAWALEK, THERAPEUTIC JURISPRUDENCE: APPLICATION TO AN ENGLAND AND WALES REVIEW COURT (2018) (Sheffield Hallam University doctoral thesis), available at: <http://shura.shu.ac.uk/24064/>.

⁸² ERIN S. MACKAY, THERAPEUTIC JURISPRUDENCE: A JUST FRAMEWORK FOR INDIGENOUS VICTIM/SURVIVORS OF SEXUAL VIOLENCE? (2013) (University of New South Wales doctoral thesis), available at: <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:11638/SOURCE01?view=true>.

⁸³ NIGEL STOBBS, MAINTAINING THERAPEUTIC JURISPRUDENCE AND THE ADVERSARIAL PARADIGM – INCOMMENSURABILITY AND THE POSSIBILITY OF A SHARED DISCIPLINARY MATRIX (2013) (Bond University doctoral thesis) [hereinafter TJ AND THE ADVERSARIAL PARADIGM], available at: https://pure.bond.edu.au/ws/portalfiles/portal/18244747/MAINSTREAMING_THERAPEUTIC_JURISPRUDENCE_AND_THE_ADVERSARIAL_PARADIGM.pdf

⁸⁴ AMANDA WILSON, THERAPEUTIC JURISPRUDENCE IN CRIMINAL JUSTICE: A GENDERED PARADIGM (2017) (University of New South Wales doctoral thesis), available at: <https://unsworks.unsw.edu.au/fapi/datastream/unsworks:46236/SOURCE02?view=true>.

⁸⁵ Winick, *The Jurisprudence of TJ*, *supra* note 28.

insight that the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence calls for the study of these consequences with the tools of the social sciences to identify them and to ascertain whether the law's antitherapeutic effects can be reduced, and its therapeutic effects enhanced, without subordinating due process and other justice values.⁸⁶

With that definition in place, Winick acknowledged TJ's ancestral ties to "movements such as the sociological jurisprudence of Roscoe Pound and the legal realism of Karl Llewellyn and others."⁸⁷ He invoked a range of social science disciplines that are relevant to TJ, including "political science, economics, anthropology, sociology, and psychology."⁸⁸ He held that this multidisciplinary perspective on the law is "normative in its orientation," in that "the therapeutic domain is important and ought to be understood and somehow factored into legal decision making."⁸⁹ He continued:

Therapeutic jurisprudence suggests that, *other things being equal*, positive therapeutic effects are desirable and should generally be a proper aim of law, and antitherapeutic effects are undesirable and should be avoided or minimized. Because this normative agenda drives therapeutic jurisprudence research, it is not the neutral, value-free mode of scholarly inquiry that law and psychology and social science in law often try to be. In this respect, therapeutic jurisprudence is more like law and economics, critical legal studies, feminist jurisprudence, and critical race theory – all of which are schools of jurisprudence that examine law with a particular normative orientation.⁹⁰

References to the law serving as a therapeutic agent and to the therapeutic and anti-therapeutic consequences of legal events trace back to TJ's very origins. In addition, two additional concepts – dignity and compassion – have entered into the heart of discussions about TJ's theoretical foundations.

2. Dignity

Michael Perlin has asserted that dignity "is the core of the entire therapeutic jurisprudence enterprise" and that we cannot "seriously write about or think about TJ without taking seriously the role of dignity in the legal process."⁹¹ We have at our

⁸⁶ *Id.* at 185.

⁸⁷ *Id.* at 186 (footnotes omitted).

⁸⁸ *Id.*

⁸⁹ *Id.* at 188.

⁹⁰ *Id.* at 188-189.

⁹¹ Perlin, *Have You Seen Dignity*, *supra* note 3 at 1137. See also Michael L. Perlin, "The Judge, He Cast His Robe Aside": *Mental Health Courts, Dignity and Due Process*, 3 MENTAL HEALTH L. & POL'Y J. 1

disposal several relevant conceptualizations of dignity to help guide our way. Robert Schopp has connected dignity with TJ using this definition:

In ordinary language, dignity refers to “[t]he quality of being worthy or honourable; true worth, excellence.” Human, as an adjective, refers to properties that are “characteristic of human kind or people...of the activities, relationships, etc. of human beings, esp. as distinct from those of lower animals.” Thus, “human dignity” is reasonably interpreted as referring to the uniquely human characteristics that render humans capable of pursuing lives that manifest the worthy and honourable exercise of those characteristics. Such lives reflect the development and exercise of defensible principles of virtue and justice that distinguish honourable human lives from dishonourable human lives and from the lives of lower animals. This interpretation is consistent with the philosophical concept of dignity as “a moral worth or status usually attributed to human persons.”⁹²

I have connected TJ and dignity in writings discussing legislation and public policy development⁹³ and American employment law.⁹⁴ Using a historical approach, I start by looking at how early understandings of dignity, even before the term was used, began shaping the law, informed by the Enlightenment and embraced by the U.S. Constitution:

First, dignity is grounded in an inherent right to be free of harm to one’s person or property. Second, the government can be both a violator and protector of individual dignity. Third, unchecked power can lead to abuses of power.⁹⁵

Next, I examine how more advanced applications of human dignity emerged during the second half of the twentieth century, reflecting the values of the Universal Declaration of Human Rights:

First, the law should encompass certain “positive” rights or obligations, to be effectuated by the state and perhaps by private actors. Second, the law should recognize that private actors, as well as the government, could engage in abuses of power against individuals. Third, the law should protect individuals against serious infringements upon their dignity motivated by bias due to intrinsic characteristics such as race or sex.⁹⁶

(2013-14) (examining role of dignity in addressing questions of adequacy of counsel and competence of defendants to participate in mental health court proceedings).

⁹² Robert F. Schopp, *Therapeutic Jurisprudence, Coercive Interventions, and Human Dignity*, 16 QUEENSLAND U. TECH. L. REV. 68, 75-76 (2016) (citations omitted).

⁹³ See Yamada, *On Anger, Shock, Fear, and Trauma*, *supra* note 13.

⁹⁴ See Yamada, *Human Dignity*, *supra* note 12.

⁹⁵ *Id.* at 540.

⁹⁶ *Id.* at 544.

In their wide-ranging survey of the role of dignity in influencing legal decision making, Doron Shultziner and Itai Rabinovici reference therapeutic jurisprudence scholarship in holding that “considerations of self-worth could and often should guide public policy and legal decisions.”⁹⁷ They also link dignity violations to the experience of humiliation,⁹⁸ another conceptual connection that resonates with TJ.⁹⁹ Ultimately, they conclude that constitutional precedents from the U.S. Supreme Court, the European Court of Human Rights, and the Supreme Court of Israel may be incorporated into a workable approach that invokes dignity to protect human rights.¹⁰⁰

3. Compassion

On compassion, Lorana Bartels and Anthony Hopkins suggest that the “existence of a compassionate motivation” draws people to TJ.¹⁰¹ They continue:

The argument we make here is that TJ is founded upon the psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it. The “other” in the context of TJ is any person upon whom the law acts or any actor within the legal process.¹⁰²

Nigel Stobbs, founder of a new Compassion Informed Law Research program, invokes the term in critiquing the Australian criminal justice system’s treatment of incarcerated individuals during the COVID-19 pandemic.¹⁰³ In doing so, he provides a similar conceptualization of compassion:

Compassion is a virtue, value or disposition to act which can be held by individuals or groups. . . . Compassion is generally defined as having two elements. First is empathy – the capacity to sense that another is suffering, and to know what it might feel like to be subjected to that kind of

⁹⁷ Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth, and Humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCHOLOGY, PUB. POL’Y & L. 105, 114 (2012) [hereinafter *A Comparative Legal-Psychological Approach*].

⁹⁸ See *id.* at 110-113.

⁹⁹ For many years, Michael Perlin and I have presented about therapeutic jurisprudence at the annual workshop of Human Dignity and Humiliation Studies (HumanDHS), a global, multidisciplinary network of educators, scholars, activists, artists, practitioners, and students devoted to advancing human dignity and reducing humiliation in society. For more about HumanDHS, see its website at HUMAN DIGNITY AND HUMILIATION STUDIES, <https://www.humiliationstudies.org>. I currently serve on the HumanDHS board of directors. For a commentary about a recent HumanDHS annual workshop, see David Yamada, *A workshop as annual ritual*, MINDING THE WORKPLACE (Dec. 13, 2019), available at: <https://newworkplace.wordpress.com/2019/12/13/a-workshop-as-annual-ritual/>.

¹⁰⁰ See generally Shultziner & Rabinovici, *A Comparative Legal-Psychological Approach A Comparative Legal-Psychological Approach*, *supra* note 97, at 117-35 (reviewing judicial decisions by the three courts).

¹⁰¹ Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality, and Therapeutic Jurisprudence*, [hereinafter *Compassion and TJ*] in TJ METHODOLOGY AND PRACTICE, *supra* note 4 at 107.

¹⁰² *Id.*

¹⁰³ Nigel Stobbs, *Compassion, the vulnerable and COVID-19*, 45 ALTERNATIVE L. J. 81 (2020).

suffering. . . . The second element of compassion is a felt need to try and alleviate that sensed suffering of others.¹⁰⁴

As an applied illustration, retired judges Jamey Hueston and Miriam Hutchins have urged the importance of compassion for the judiciary, stating that “(t)raining in the use of therapeutic and compassionate approaches will enable judges to craft healthier outcomes for those appearing before the court while cogently relieving judicial trauma.”¹⁰⁵ Anticipating potential criticisms of compassion training for judges, they add that “(e)mploying compassion can neither replace nor excuse application of the law, consideration of the facts, or due process.”¹⁰⁶ Rather, compassion training can serve as “the mark of a more expansive approach to enrich judicial decision making and impartiality.”¹⁰⁷

D. Responses and Critiques

Reviews and critiques of TJ have come from inside and outside of its circle, tending to focus on overall conceptualizations of TJ and implicitly emphasizing its original core topics of mental health and mental disability law, criminal justice, and problem solving courts.¹⁰⁸ Not surprisingly, the field has attracted its share of passionate advocates and passionate critics. While it is well beyond the scope of this article to attempt to resolve the underlying debates and points of difference, I summarize the essence of these exchanges and invite readers to delve into the cited articles and chapters to learn more about them.

1. Friendly and Not-So-Friendly Reviews

In a 1995 article that would influence the dialogue within the TJ community, Christopher Slobogin reviewed the field through the eyes of a supportive critic.¹⁰⁹ He built his review around five “dilemmas” or “conundrums” confronting TJ:

- The “identity dilemma,” asking whether TJ is “distinguishable from other jurisprudences that share its goal of using the law to improve the well-being of others”;¹¹⁰

¹⁰⁴ *Id.*

¹⁰⁵ Jamey Hueston & Miriam Hutchins, *The Power of Compassion in the Court: Healing on Both Sides of the Bench*, 54 COURT REV. 96 (2018).

¹⁰⁶ *Id.* at 99-100.

¹⁰⁷ *Id.* at 100.

¹⁰⁸ See e.g. Nigel Stobbs, *In Defence of Therapeutic Jurisprudence: Threat, Promise and Worldview*, 8 ARIZONA SUMMIT L. REV. 325, 331 (2015) [hereinafter *In Defence of TJ*] (insider critique); Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575 (2008) [hereinafter *TJ Misunderstood*] (insider critique); Dennis Roderick, Susan T. Krumholz, *Much Ado about Nothing – A Critical Examination of Therapeutic Jurisprudence*, 1 S. NEW ENG. ROUNDTABLE SYMPOSIUM L. J. 201 (2006) (outsider critique); Slobogin, *Five Dilemmas*, *supra* note – (outsider critique); Bruce A. Arrigo, *The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime*, 11 PSYCHIATRY, PSYCHOLOGY & L. 23 (2004) [hereinafter *The Ethics of TJ*] (outsider critique).

¹⁰⁹ See Slobogin, *Five Dilemmas*, *supra* note 29.

- The “definitional dilemma,” asking whether the term “therapeutic” can “be defined in a meaningful way”;¹¹¹
- The “dilemma of empirical indeterminacy,” asking whether “the vagaries of empirical research, upon which therapeutic jurisprudence heavily relies, doom its proposals”;¹¹²
- The “rule of law dilemma,” asking “how will a therapeutic jurisprudence proposal that benefits only a subgroup of those it affects be implemented?”;¹¹³ and,
- The “balancing dilemma,” asking “(w)hen and how should a therapeutic jurisprudence proposal be balanced against countervailing constitutional and social policies”?¹¹⁴

Slobogin’s review was a friendly one, concluding that TJ, “carefully planned, will help to produce a critical psychology that will force policymakers to pay more attention to the actual, rather than the assumed, impact of the law and those who implement it.”¹¹⁵ His analysis of TJ’s potential soft spots would prove to be influential. For example, Bruce Winick’s 1997 exploration of TJ jurisprudence (discussed above) was in part a response to points raised by Slobogin.¹¹⁶ Years later, Nigel Stobbs would refer to Slobogin’s article as “a watershed paper within therapeutic jurisprudence scholarship” that articulates “some of the most important jurisprudential and practical challenges that therapeutic jurisprudence faced in gaining widespread credibility among legal practitioners.”¹¹⁷

In 2008, Ian Freckelton recognized that TJ’s emerging influence and success was also attracting criticisms, which he marshaled and summarized.¹¹⁸ These negative reviews have alleged that TJ is alternately lacking in novelty,¹¹⁹ lacking in definition,¹²⁰ covertly paternalistic,¹²¹ lacking in clarity to legal decision makers,¹²² too conservative and homogeneous,¹²³ an unnecessary and redundant conceptualization,¹²⁴ intrusive upon civil liberties,¹²⁵ and ultimately full of hubris and self-referentialism.¹²⁶ In addition to

¹¹⁰ *Id.* at 193.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 219.

¹¹⁶ See generally Winick, *The Jurisprudence of TJ*, *supra* note 28, at text accompanying notes 5, 15, 22, 24, 70, 74, 75, 105, 106 (discussing and citing to Slobogin, *Five Dilemmas*, *supra* note 29).

¹¹⁷ Stobbs, *In Defence of TJ*, *supra* note 108 at 331.

¹¹⁸ See generally Freckelton, *TJ Misunderstood*, note 108 at 583-91 (categorizing and summarizing criticisms of TJ).

¹¹⁹ *Id.* at 583-84.

¹²⁰ *Id.* at 584.

¹²¹ *Id.* at 585-86.

¹²² *Id.* at 586-87.

¹²³ *Id.* at 587-88.

¹²⁴ *Id.* at 588-89.

¹²⁵ *Id.* at 589-90.

¹²⁶ *Id.* at 590-91.

responding to each of these criticisms in turn,¹²⁷ Freckelton suggested that the sharpest of them:

...emerge from a misunderstanding of the relatively modest aspirations expressed repeatedly by [TJ co-founders] Winick and Wexler that therapeutic jurisprudence scholarship should merely provide a fillip for new perspectives and analyses that place therapeutic consequences of the law and its processes on the agenda and factor them into policy formulation and decision making, as appropriate.¹²⁸

Among the criticisms of TJ examined by Freckelton, questions concerning paternalism and civil liberties have probably “dogged” TJ the most, dating back to its earlier years. To explore these a bit more, let us turn to two published dialogues involving David Wexler and Bruce Winick some 15 years ago.

The first dialogue occurred between Wexler and criminal law professor Mae Quinn. In 2005, Wexler published an article in the *St. Thomas Law Review* in which he set out parameters for a holistic type of criminal defense practice that focuses on a client’s rehabilitative interests at all stages of criminal proceedings, including pre-trial, post-trial, appeal, and release and re-entry.¹²⁹ This proposed agenda, he stated, “is intended as a warm invitation” to lawyers, judges, and other stakeholders in the criminal justice system to consider ways in which rehabilitative practices might be applied.¹³⁰

Quinn published a lengthy response to Wexler in the *Boston College Law Review*.¹³¹ She took issue with Wexler’s proposed model, positing, among other things, that it presented ethical risks of undermining an attorney’s duty to provide zealous advocacy and could impose an overly paternalistic approach to client representation.¹³² To further the dialogue, the Boston College editors invited Wexler to submit a response, which came in the form of a ten-point response, suggesting “there is greater agreement between us than [Quinn] has supposed” and endeavoring to “clarify areas of disagreement and areas in need of further attention.”¹³³ Quinn then submitted a followup response, wherein she reiterated her concerns about Wexler’s proposals and TJ generally.¹³⁴

¹²⁷ See *id.* at 583-91.

¹²⁸ *Id.* at 591 (citation omitted).

¹²⁹ David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 *ST. THOMAS L. REV.* 743, 744-45 (2005).

¹³⁰ *Id.* at 746.

¹³¹ Mae C. Quinn, *An RSVP to Professor Wexler’s Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 *B.C. L. REV.* 539 (2007) (hereinafter *RSVP*).

¹³² See *id.* at 587-91.

¹³³ David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 *B.C. L. REV.* 597, 598 (2007).

¹³⁴ Quinn, *RSVP*, *supra* note 131 at 592.

The second dialogue concerned the merits of mental health courts, conducted as a question-and-answer exchange between Winick and disability rights attorney and former law professor Susan Stefan, in a 2005 symposium issue on mental health courts in the journal *Psychology, Public Policy, and Law*.¹³⁵ Although their tone is always civil and respectful, it quickly becomes obvious that the two share little common ground on the merits of mental health courts. Winick, coming from a TJ perspective, believes that mental health courts are a pragmatic solution to the significant problem of untreated mental illness and a humane diversion from the criminal justice system.¹³⁶ Stefan strongly opposes any alternative court that segregates a marginalized minority of mostly low-income people with psychiatric disabilities from the rest of the justice system and grants judges extraordinary leeway in shaping dispositions.¹³⁷

Both the Wexler-Quinn and Winick-Stefan exchanges go much deeper than this short summary can convey. Each reflects how therapeutic jurisprudence implicates issues of individual autonomy and civil liberties in the criminal justice arena, where adversarial justice and procedural rights are built into the systems and their surrounding legal cultures. While such disagreements are not necessarily as acute (or present at all) in other areas of law that have attracted later attention from TJ scholars and practitioners (especially civil legal matters), they nevertheless illustrate some of the key ongoing tensions in core TJ doctrine and application.

2. Stronger Definition and Theory

It is fair to say that earlier work to define TJ's theoretical frame has led many affiliated scholars to be generally comfortable with the contours set by early writers such as Wexler, Winick, and Perlin. As a result, many a TJ law review article starts with an introduction to the essential TJ framework, often invoking the *therapeutic versus anti-therapeutic* verbiage as an obligatory framing preface, before moving on to the specific doctrinal, procedural, or policy discussion that forms the heart of the piece.¹³⁸ In the introductory chapter to their 2019 co-edited volume on TJ methodology and practice, Nigel Stobbs, Lorana Bartels, and Michel Vols gently chide these "generic descriptions" of TJ, characterizing them as "boilerplate" rather than theory.¹³⁹ They are among the members of a newer generation of TJ scholars who are calling upon the field to be more sharply defined and more deeply theorized.

In her 2020 article about TJ and empirical research, Anna Kawalek acknowledges "deeper-seated critiques of the TJ paradigm claiming that it is rudderless and

¹³⁵ Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOLOGY, PUB. POL'Y & L. 507 (2005).

¹³⁶ See *id.* at 510-511.

¹³⁷ See *id.* at 511-513.

¹³⁸ One of my own articles, which applies TJ to employment law, is a perfect example, containing a one-paragraph description of TJ that cites David Wexler and Michael Perlin, before going into specifics about employment law and policy. See Yamada, *Employment Law as if People Mattered*, *supra* note 13 at 258.

¹³⁹ Nigel Stobbs, Lorana Bartels & Michel Vols, *Therapeutic Jurisprudence - A Strong Community and Maturing Discipline* [hereinafter *Strong Community and Maturing Discipline*], in TJ METHODOLOGY AND PRACTICE, *supra* note 4 at 18.

undertheorized,” as well as ongoing exchanges about what TJ is and is not.¹⁴⁰ She summarizes:

These discussions question whether TJ is a theory or a practice, multitude of normative principles, lens, philosophy, method, way of thinking, a “set of procedural guidelines, protocols and techniques,” or even an adjective or community. These debates are often concluded, and insurgents tempered, by the assertion that TJ is a heuristic tool that can have all of the above-mentioned applications depending on the way that it is applied.¹⁴¹

The varying labels used to describe TJ apparently have not been sources of discomfort to many of its early adherents. This article freely uses a number of them (and others), if not interchangeably, then certainly without much concern over consistency in terminology. However, this conceptual fluidity is proving to be more problematic to TJ scholars who see a need for greater theoretical precision and development.¹⁴²

They are filling that void by injecting more structure and theory into the field, and by inviting others to do the same. These conversations can only enrich TJ’s presence as an intellectual entity. Kawalek’s article comes in the wake of the aforementioned volume co-edited by Stobbs, Bartels, and Vols – each of whom has contributed chapters discussing theoretical and methodological aspects of TJ.¹⁴³ As discussed above, Bartels joins with Anthony Hopkins in advancing compassion as a core TJ value.¹⁴⁴ Stobbs cites the usefulness of both pure theoretical as well as applied TJ research.¹⁴⁵ Vols examines different definitions of theory and explores where TJ fits into that taxonomy.¹⁴⁶ Both Stobbs and Vols respectfully question the shibboleth that TJ research must ultimately engage the work of law reform.¹⁴⁷ They and Kawalek also propose methodologies for TJ research and analysis, which are discussed in Section E below.

This work is taking TJ into deeper theoretical dives, at times developing themes from earlier TJ-related scholarship. A prime example is Nigel Stobbs’s explorations of the relationship between TJ and adversarial forms of dispute resolution, tapping into the

¹⁴⁰ Anna Kawalek, *A tool for measuring therapeutic jurisprudence values during empirical research*, 71 INT’L J. L. & PSYCHIATRY 1, 3 (2020) [hereinafter *TJ Empirical Research*].

¹⁴¹ *Id.* at 3 (citations omitted). Readers who wish to explore this conceptual debate in greater detail should consult the abundant sources cited by Kawalek in her article.

¹⁴² E.g., Nigel Stobbs, *Therapeutic Jurisprudence as Theoretical and Applied Research* [hereinafter *Theoretical and Applied Research*] in TJ METHODOLOGY AND PRACTICE, *supra* note 4 at 29-31 (opining that TJ needs a stronger theoretical base in order to grow and flourish).

¹⁴³ See TJ METHODOLOGY AND PRACTICE, *supra* note 4 at vii (table of contents listing chapter contributions by Bartels, Stobbs, and Vols, among others).

¹⁴⁴ Bartels & Hopkins, *Compassion and TJ*, *supra* note 101 at 119-22.

¹⁴⁵ Stobbs, *Theoretical and Applied Research*, *supra* note 142 at 34-43.

¹⁴⁶ Michel Vols, *Theory and Methodology of Therapeutic Jurisprudence* [hereinafter *Theory and Methodology*], in TJ METHODOLOGY AND PRACTICE, *supra* note 4 at 61-68.

¹⁴⁷ See Stobbs, *Theoretical and Applied Research*, *supra* note 142 at 41-43 (discussing whether TJ scholars have a corresponding obligation to be law reform advocates); and Vols, *Theory and Methodology*, *supra* note 146 at 68-69 (suggesting that law reform is a potential but not necessary step in TJ research).

growing commentary on adversarial versus non-adversarial justice.¹⁴⁸ Stobbs, whose previous life stops included work as a philosopher and criminal lawyer before becoming a legal academic, would devote his doctoral dissertation to this topic.¹⁴⁹ Ultimately, he concluded that “a degree of incommensurability” exists between TJ and adversarial justice, in that TJ is willing to revisit and perhaps recast the roles of judges and other legal actors in an effort to achieve therapeutic outcomes.¹⁵⁰

E. *Analytical Frameworks and Methodologies*

The evolution and critiques of TJ’s theoretical bases have led to the advancement of various frameworks for analyzing legal questions. They include explorations by a newer wave of TJ-affiliated scholars who are proposing methodologies and taxonomies for engaging in TJ research, analysis, and law reform. Here is a representative sampling of this developing body of work:

1. Therapeutic Design and Application of the Law

David Wexler has identified two broad categories for TJ inquiries, “Therapeutic Design of the Law (TDL) and Therapeutic Application of the Law (TAL).”¹⁵¹ TDL examines whether legal rules and procedures have therapeutic or anti-therapeutic properties, while TAL examines whether legal actors are practicing and applying the law in a therapeutic or anti-therapeutic manner.¹⁵² This model provides an easy TJ-framed lens on how the law, legal systems, and legal institutions operate and change.

The TDL/TAL model reflects the maturation of Wexler’s frame on basic TJ analysis. From its early days, TJ has addressed substantive law and procedure as well as the roles and behaviors of legal actors.¹⁵³ Both Wexler and Winick would invoke a “wine and bottles” analogy to illustrate this dual focus, with the “wine” being the actions of legal actors (TAL), and the “bottles” being legal and procedural rules (TDL).¹⁵⁴ The

¹⁴⁸ See Stobbs, *Theoretical and Applied Research*, *supra* note 142 at 35-38 (discussing TJ and adversarialism). For additional commentaries on TJ and its relationship to adversarial and non-adversarial justice, see e.g., Becky Batagol, *Fomenters of Strife, Gladiatorial Champions or Something Else Entirely – Lawyers and Family Dispute Resolution*, 8 QUEENSLAND U. TECH. L. & JUSTICE J. 24 (2008); David Carson, *Therapeutic Jurisprudence and Adversarial Justice: Questioning Limits*, 4 WESTERN CRIMINOLOGY REV. 124 (2003); Rachael Field & Eugene M. Hyman, *Non-Adversarial Approaches to Domestic Violence: Putting Therapeutic Jurisprudence Theory into Practice*, 26 J. JUD. ADM. 275 (2017); Arie Freiberg, *Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms*, 8 EUROPEAN J. CRIMINOLOGY 82 (2011) [hereinafter *Transcending Paradigms*]; MICHAEL KING, ARIE FREIBERG, BECKY BATAGOL, ROSS HYAMS, *NON-ADVERSARIAL JUSTICE* 2D ED. (2014).

¹⁴⁹ Stobbs, *Theoretical and Applied Research*, *supra* note 142 at 35-36. See Stobbs’s dissertation, *TJ AND THE ADVERSARIAL PARADIGM*, *supra* note 83.

¹⁵⁰ Stobbs, *Theoretical and Applied Research*, *supra* note 142 at 36-37.

¹⁵¹ Wexler, *The DNA of TJ*, *supra* note 25 at 3, 6.

¹⁵² See *id.* at 4-7 (explaining the evolution of the TDL/TAL model).

¹⁵³ See Winick, *The Jurisprudence of Therapeutic Jurisprudence*, *supra* note 28 at 86 (applying TJ principles both to “the therapeutic consequences of legal rules and procedures” and “how legal actors can apply existing law more therapeutically”).

¹⁵⁴ See *id.* (referring to “Old Wine in New Bottles”); Wexler, *New Wine in New Bottles*, *supra* note 25 (explaining wine/bottles concept). This terminology would catch on within the TJ community, leading to

TDL/TAL terminology seems more fitting for academic and professional discourse and already has started to gain currency among TJ scholars.¹⁵⁵

2. Legal Proceedings: Voice, Validation, and Voluntary Participation

TJ has long embraced the therapeutic effects of parties in legal proceedings having sufficient voice and autonomy. Amy Ronner has developed a framework for gauging parties' experiences with the legal system:

...when individuals feel that the legal system has treated them with fairness, respect, and dignity, it has a therapeutic effect: the participants in the process do not just experience greater satisfaction, but tend to be more inclined to accept responsibility for their own conduct, take charge, and reform. There are essentially three core components to such a therapeutic experience, which can be called “the three Vs”: namely, a sense of voice, validation, and voluntary participation.¹⁵⁶

In litigation, “voice” means “a chance to tell [one’s] story to a decision maker.”¹⁵⁷ “Validation” means that the tribunal genuinely considered the litigant’s story.¹⁵⁸ When parties experience both voice and validation, “they are more at peace with the outcome.”¹⁵⁹ These qualities “create a sense of voluntary participation,” in which the legal proceeding is perceived as being less coercive in nature.¹⁶⁰ By contrast, when a party is denied this experience in litigation, “it can engender a ‘learned helplessness,’ which promotes apathy, retards change, and causes individuals to basically give up.”¹⁶¹

Ronner applied her framework to a juvenile justice proceeding in a Florida case that involved an intellectually challenged, 12-year-old boy (“T.S.D.”) who was arrested for auto theft and burglary and waived his constitutional right to legal representation during a custodial interrogation that led to a confession.¹⁶² Ultimately, the appellate litigation clinic at St. Thomas University, which Ronner taught, successfully represented T.S.D. by obtaining a reversal on appeal of a trial court ruling that admitted his

countless conference and workshop colloquies invoking wine and bottles, with occasional mild discomfort expressed over the frequent imagery of flowing alcohol!

¹⁵⁵ See e.g., Stobbs, Bartels & Vols, *Strong Community and Maturing Discipline*, supra note 139 at 17 (discussing TDL/TAL model); Vols, *Theory and Methodology*, supra note 146 at 69-71 (same); Michael L. Perlin, “Changing of the Guards”: David Wexler, *Therapeutic jurisprudence, and the transformation of legal scholarship*, 63 INT’L J. L. AND PSYCHIATRY 3, 6 (2019) (same).

¹⁵⁶ Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CINCINNATI L. REV. 89, 94 (2002) (citations omitted) [hereinafter *Validation, Voice, and Voluntary Participation*].

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 94-95.

¹⁶⁰ *Id.* at 95.

¹⁶¹ *Id.* at 93-94.

¹⁶² *Id.* at 96-97.

confession.¹⁶³ The appellate court's decision, Ronner wrote, helped to restore T.S.D.'s "sense of voice, validation, and voluntary participation."¹⁶⁴

TJ scholars have cited Ronner's concept of the "three V's" approvingly.¹⁶⁵ It can be applied easily to virtually any litigation (trial or appellate), administrative, or dispute resolution setting, both civil and criminal.

3. The Therapeutic Imperative

Nigel Stobbs offers "The Therapeutic Imperative . . . as a guide or model for structuring TJ based research":¹⁶⁶

1. Study the practical, anti-therapeutic consequences of various legal rules and practices for those affected by them and consider whether those consequences can be improved in the context of any countervailing normative considerations which might outweigh those improvements. [Command]
2. Where an argument can be made that therapeutic change may be possible, in the absence of any countervailing normative considerations, we ought to make that argument. [Duty]
3. Where countervailing normative considerations are identified, do *not* invoke TJ as a method for **determining** which consideration(s) should predominate in decision-making. [Rule]¹⁶⁷

Stobbs's model is especially noteworthy for the deference it gives to "countervailing normative considerations," reinforcing TJ's traditional respect for competing policy and jurisprudential priorities. It affirms that TJ is at once an evolutionary yet traditional framework, the former for injecting therapeutic concerns into legal and policy reasoning and analysis, the latter for honoring conventions of legal and policy decision making.

4. Empirical and Applied Research

Michel Vols offers a four-step set of methodological guidelines related mainly to "empirical or applied TJ-related research":¹⁶⁸

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 111.

¹⁶⁵ See e.g., Michael L. Perlin & Alison J. Lynch, *How Teaching About Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEVADA L. J. 209, 214 (2015) (citing Ronner framework in discussing the role of dignity in defining TJ); Carol L. Zeiner, *A Therapeutic Jurisprudence Analysis of the Use of Eminent Domain to Create a Leasehold*, 2013 UTAH L. REV. 883, 889 (2013) (citing Ronner framework to illustrate voluntariness as a predominant TJ principle); Bernard P. Perlmutter, *More Therapeutic, Less Collaborative? Asserting the Psychotherapist-Patient Privilege on Behalf of Mature Minors*, 17 BARRY L. REV. 45, 63 (2011) (citing Ronner framework in stating that an adolescent child should be able to assert an evidentiary privilege in court proceedings).

¹⁶⁶ Stobbs, *Theoretical and Applied Research*, *supra* note 142 at 44.

¹⁶⁷ *Id.*

- “First, a researcher should establish what the relevant law is by conducting a doctrinal legal analysis,” while exploring its therapeutic and anti-therapeutic elements.¹⁶⁹
- “Second, the researcher should analyze how the law is applied in real life,” by consulting available research and data.¹⁷⁰
- “Third, the researcher could use the empirical-normative methods to determine how the law under review deals with conflicting arguments and interests.”¹⁷¹
- “Fourth, based on the TJ-related research, the researcher could use TJ as a normative theory, adopt a prescriptive stance and recommend changes to the law or how the law is applied.”¹⁷²

Notable is Vols’s choice of auxiliary verbs, using the more directive “should” for his first two steps, and the more permissive “could” for his remaining two steps. By indicating that application and law reform are not required elements in the methodological process, he implicitly departs from earlier conceptualizations that assume these steps as being inherent in TJ work.¹⁷³

5. Empirical Research Tools

As the discussion above makes clear,¹⁷⁴ TJ has embraced interdisciplinary perspectives and empirical research from the outset. As that discussion further indicates, the prospect of informing legal insights and law reform work through a TJ lens has attracted researchers in many different social science disciplines. In 2003, Carrie Petrucci, Bruce Winick, and David Wexler attempted to stimulate these connections by examining the “role that social science researchers can play in the development and implementation” of TJ.¹⁷⁵ They identified three possibilities:

- “[E]mpirical support or disproof of the theory itself,” i.e., “observing, documenting, and explaining how therapeutic jurisprudence operates in practice within legal forums”;¹⁷⁶
- Contributing “to the definition and measurement of what differentiates a therapeutic jurisprudence approach from other approaches,” such as

¹⁶⁸ Vols, *Theory and Methodology*, *supra* note 146 at 69.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Cf.* Winick, *The Jurisprudence of TJ*, *supra* note 28 at 185-89 (discussing law reform as a normative element of TJ).

¹⁷⁴ See Part I, Section A of this article.

¹⁷⁵ Carrie J. Petrucci, Bruce L. Winick & David B. Wexler, *Therapeutic Jurisprudence: An Invitation to Social Scientists*, in *HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS* 2D ED. 579-601 (David Carson & Ray Bull, eds., 2003).

¹⁷⁶ *Id.* at 593.

- determining whether there are “measurable differences between a lawyer using a therapeutic jurisprudence approach and one not using it”;¹⁷⁷ and,
- Developing “measurable outcomes of therapeutic jurisprudence,” including “an analysis of emotional well-being as well as legal reform as the outcome.”¹⁷⁸

Although these inquiries served as open invitations to develop new research approaches, not until 2020 would Anna Kawalek propose the first TJ-specific tool for empirical evaluation.¹⁷⁹ Building on the theoretical work of other TJ scholars, especially Stobbs, Vols, and Wexler,¹⁸⁰ Kawalek designed a study to “investigate the functioning of a problem-solving court” in Manchester, United Kingdom, framed around the research question “How can TJ empirical researchers measure interactional and behavioural styles of problem-solving court judges?”¹⁸¹ Her research involved two components. First, she used a “standard observation protocol” to observe judges in the Manchester court, for the purpose of evaluating their “judicial interactional and behavioural styles.”¹⁸² Second, she invited parties who had completed their business with the court to complete a questionnaire about how the court operated and how the judges interacted with them.¹⁸³

In her focus on judicial behavior, Kawalek took the resulting data and applied a set of four measurement scales: “empathy,” “respect,” “positive focus,” and “active listening.”¹⁸⁴ After further analysis, she recalibrated these four scales onto three new scales that more specifically tie into TJ objectives:

- “Component one: harnessing therapeutic support,” referring to whether judges emphasized and supported the parties appearing before them;¹⁸⁵
- “Component two: engaging therapeutic dialogue,” referring to the quality of communication between the judges and the parties;¹⁸⁶ and,
- “Component three: inspiring therapeutic change,” referring to whether judges “were forward-focused within their interaction, attempting to promote positive self-development and therapeutic change” in conversations with parties appearing before them.¹⁸⁷

Kawalek is at once forthright and modest about proposing this set of TJ research scales, properly characterizing her work as an “original methodological contribution to TJ,” while acknowledging it is not perfect and may be subject to criticism.¹⁸⁸ That said,

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Kawalek, *TJ Empirical Research*, *supra* note 140.

¹⁸⁰ See *id.* at 3-4.

¹⁸¹ *Id.* at 5.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 9.

¹⁸⁶ *Id.* at 10.

¹⁸⁷ *Id.* at 11.

¹⁸⁸ *Id.* at 9.

this is a significant advancement in TJ empirical research, creating a new foundation for measuring important legal interactions, processes, and outcomes, as well as prompting an important conversation about how to conduct similar studies. Kawalek's work also illustrates how a new generation of TJ-affiliated scholars is making major contributions to the field.

6. Legislation and Public Policy¹⁸⁹

I have developed a methodology for engaging in legislative scholarship, drafting, and advocacy from a TJ perspective.¹⁹⁰

In Step 1, we investigate the factual and legal realities of the public policy issue at hand, ultimately making a threshold decision on whether a legislative response is advisable and feasible. In Step 2, we craft, explain and defend the proposed legislative measure. In Step 3, we share this work with the world, including stakeholders who will hopefully support the proposed legislation. Finally, in Step 4, we evaluate our work and make revisions when necessary.¹⁹¹

This process should be infused throughout with TJ-informed inquiries, analyzing the therapeutic and anti-therapeutic consequences of current law, the potential therapeutic and anti-therapeutic impacts of new public policies, and stakeholder interests in terms of advancing human dignity and well-being.¹⁹² These factors should be considered along with "more traditional concepts of rights and economic interests."¹⁹³

This methodology was inspired by work I have been doing on researching the legal and policy implications of workplace bullying, drafting model workplace anti-bullying legislation, and advocating for this proposed statute – dubbed the Healthy Workplace Bill -- before state legislatures.¹⁹⁴ It is informed by a concept that I have called intellectual activism, a cyclical process of scholarship, social action, and evaluation.¹⁹⁵

7. Criminal Law Multitasking

¹⁸⁹ Further discussion about TJ's significant relevance to legislative and public policy development appears below, in Sections III and IV.

¹⁹⁰ See Yamada, *TJ and Legislation*, *supra* note 13. See also Yamada, *On Anger, Shock, Fear, and Trauma*, *supra* note 13.

¹⁹¹ Yamada, *TJ and Legislation*, *supra* note 13, at 86. I have applied this methodology to the work I have been doing on researching legal protections against workplace bullying, drafting model anti-bullying legislation, and advocating for this proposed statute – dubbed the Healthy Workplace Bill -- before state legislatures. See *id.* at 95-102.

¹⁹² *Id.* at 86-87.

¹⁹³ *Id.* at 87.

¹⁹⁴ See *id.* at 95-102.

¹⁹⁵ *Id.* at 84-85.

Hadar Dancig-Rosenberg and Tali Gal have proposed a framework for a theory of “criminal law multitasking,” which balances valid, though sometimes competing, criminal justice policy priorities.¹⁹⁶ The co-authors examine a “taxonomy of several different criminal justice mechanisms” that advance a multiplicity of traditional and non-traditional policy objectives: “(M)ainstream criminal process, problem-solving courts, restorative justice, therapeutic settlement conferences, and restorative sentencing juries.”¹⁹⁷ Ultimately, by developing an “integrative analysis of five justice mechanisms that differ from each other in their underlying ideologies and practice implementations,” they propose a multitasking model of procedural choices that enables policymakers to design better systems for resolution of criminal matters.¹⁹⁸

Although their framework is not presented as an expressly TJ conceptualization, both Dancig-Rosenberg and Gal are closely affiliated with the TJ community,¹⁹⁹ and their article repeatedly references the work of TJ scholars.²⁰⁰ More importantly, it serves as an excellent example of applying TJ-compatible theorizing to specific doctrinal areas of law and procedure, in ways that attempt to analyze legitimate stakeholder interests in an inclusive, rather than adversarial, manner.

II. SUBJECT MATTER EXPANSION AND RELATED FRAMEWORKS

This Part examines TJ’s expansion into areas of law beyond its foundations of mental health and mental disability law, criminal justice, and problem-solving courts, as well as its connections with compatible modalities of legal theory and practice. In terms of substantive law and procedure, this territory represents TJ’s greatest opportunities for growth.

A. *Expanding TJ’s Scope*

In order to become a fully-fledged body of theory and practice, TJ needs to expand and deepen its work in relevant categories of civil law and procedure, as well as in the realm of legal institutions. The following discussion examines such categories that have either generated foundational work from TJ scholars, judges, and practitioners, or otherwise shown considerable promise for closer attention. These assessments are based largely on the relevant academic literature. The topics are addressed in alphabetical order:

1. Civil Litigation and Dispute Resolution

¹⁹⁶ Hadar Dancig-Rosenberg & Tali Gal, *Criminal Law Multitasking*, 18 LEWIS & CLARK L. REV. 893 (2014).

¹⁹⁷ *Id.* at 896 (citation omitted).

¹⁹⁸ *Id.* at 896-98.

¹⁹⁹ Among other things, both authors are members of the global advisory council of the International Society for Therapeutic Jurisprudence. ISTJ LEADERSHIP/GLOBAL ADVISORY COUNCIL, <https://intljtj.com/about/leadership/>.

²⁰⁰ See e.g., Dancig-Rosenberg & Gal, *Criminal Law Multitasking*, *supra* note 196 at fns. 8 (citing David Wexler and Bruce Winick), 24 (citing David Wexler), 38 (citing Bruce Winick and Carrie Petrucci); 64 (citing David Wexler and Michael Jones).

Among the areas of legal procedure and process that cry out for greater attention by TJ scholars and practitioners, civil litigation and dispute resolution stands chief among them. Fortunately, scholars and practitioners from mostly outside the TJ community have been doing important work in this realm. For example, Michaela Keet, Heather Hevin, and Shawna Sparrow have written about the psychological costs of civil litigation, especially the impact on parties to lawsuits.²⁰¹ “Litigation stress” may be especially prevalent in claims involving individuals with mental or emotional vulnerabilities, claims involving severe or chronic physical pain, litigation concerning sexual assault or harassment, marital dissolution proceedings, and lawsuits alleging professional negligence or malpractice.²⁰² The stress may manifest itself in a wide variety of negative emotional and physical responses commonly associated with traumatic experiences.²⁰³

Attorney Luther Munford has characterized litigation as a tort committed by attorneys who are protected against liability.²⁰⁴ Lawyer behaviors in litigation that otherwise would be grounds for claims of defamation, “intentional interference with contract, intentional infliction of emotional distress, and sometimes even fraud” are insulated from liability by a “litigation privilege.”²⁰⁵ Attorney Thomas Geoghegan has characterized conventional employment litigation as being so rife with accusation, unpredictability, and rage that parties may grow further apart, even as they move closer to the settlement of their legal differences.²⁰⁶ Among my own brief forays into this topic, I have discussed key “trauma points” in civil litigation, whereby individuals seeking redress for harm causing severe physical or psychological injury may experience traumatization or re-traumatization during interviews, discovery, pre-trial hearings, and trials.²⁰⁷

Obviously, alternative dispute mechanisms of various types may be among the appropriate responses to the reducing the stress and anxiety of civil litigation. In addition, Jessica Steinberg has conceptualized an approach for civil problem-solving courts that would help to address difficulties that vulnerabilities often encounter in navigating the traditional civil legal system.²⁰⁸ Overall, this subject matter provides enormous potential for TJ-informed research and proposals for client-centered lawyering and reformed civil dispute resolution processes.

2. Education Law

²⁰¹ See Michaela Keet, Heather Hevin & Shawna Sparrow, *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 73 (2017).

²⁰² See *id.* at 78-83.

²⁰³ See *id.* at 83-87.

²⁰⁴ See Luther Munford, *Litigation as a Tort*, 21 GREEN BAG 2D 35 (2017).

²⁰⁵ *Id.*

²⁰⁶ THOMAS GEOGHEGAN, *THE LAW IN SHAMBLES* 26 (2005).

²⁰⁷ David C. Yamada, *Trauma Points in Civil Litigation*, in CONGRESS ABSTRACTS, *supra* note 8 at 458, available at <http://ialmh.org/wp-content/uploads/2019/06/Rome-Abstract-Booklet-6.25.pdf>.

²⁰⁸ See generally Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 NYU L. REV. 1579 (2018) (setting out a concept for civil problem-solving courts intended to address inequities that vulnerable parties may encounter in traditional civil court systems).

Education law presents much promise for applying TJ insights, especially when considering the interests of students of all ages, varying capabilities, and various socio-economic backgrounds. Of course, the interests of other stakeholders in educational systems (primary, secondary, tertiary), such as educators and parents, are relevant as well. Among other possibilities, this potential mix invites some compelling policy analyses using a TJ lens of well-being, psychological health, dignity, and compassion.

Currently there is no survey piece examining the broad range of education law issues relevant to TJ. Nevertheless, we have strong examples of scholarship applying TJ principles to specific aspects of education law and policy. They include a study of a peer mediation program to handle bullying situations at a New South Wales (Australia) primary school (Nicky McWilliam),²⁰⁹ an examination of the impact of U.S. federal law covering children with disabilities on school teachers (Richard Peterson),²¹⁰ and an analysis of U.S. federal education department policies concerning sexual assault and misconduct in colleges and universities (Carol Zeiner).²¹¹

3. Employment and Labor Law

Employment and labor law is full of potential for TJ scholarship and practice to flourish. After all, there exists an abundant multidisciplinary literature that documents the benefits of psychologically healthy workplaces and makes a strong case that organizations run with integrity and inclusion benefit employers and employees alike.²¹² TJ perspectives can inform explorations of how and when law and policy should intervene to shape better workplaces, respond to workplace misconduct, and resolve employment and labor disputes.

Applying TJ and other theories, I have posited that dignity should be the framing value for American employment law.²¹³ In addition, I have invoked TJ in advocating for the enactment of workplace anti-bullying legislation that I have authored.²¹⁴ TJ has also been cited in examining: a “dual track” system that promotes early reconciliation of

²⁰⁹ Nicky McWilliam, *A school peer mediation program as a context for exploring therapeutic jurisprudence (TJ): Can a peer mediation program inform the law?*, 33 INT’L J. L. & PSYCHIATRY 293 (2010).

²¹⁰ Richard Peterson, *Caught in the Cross-Fire: The Psychological and Emotional Impact of the Individuals with Disabilities Education Act (IDEA) upon Teachers of Children with Disabilities, A Therapeutic Jurisprudence Analysis*, 33 PACE L. REV. 878 (2013).

²¹¹ Carol L. Zeiner, *A Therapeutic Jurisprudence Analysis of Government’s Directives on Student to Student Campus Rape*, 47 J. L. & EDUC. 427 (2018).

²¹² See generally e.g., TOTAL WORKER HEALTH (Heidi L. Hudson, et al., eds, 2019); THE PSYCHOLOGICALLY HEALTHY WORKPLACE: BUILDING A WIN-WIN ENVIRONMENT FOR ORGANIZATIONS AND EMPLOYEES (Matthew J. Grawitch & David W. Ballard, eds., 2015); BULLYING AND HARASSMENT IN THE WORKPLACE: DEVELOPMENTS IN THEORY, RESEARCH AND PRACTICE, REV. EDITION (Stale Einarsen, et al., eds., 2020); COUNTERPRODUCTIVE WORK BEHAVIOR: INVESTIGATIONS OF ACTORS AND TARGETS (Suzy Fox & Paul E. Spector, eds., 2005); RANDY HODSON, DIGNITY AT WORK (2001).

²¹³ See generally Yamada, *Human Dignity*, supra note 12.

²¹⁴ See e.g., Yamada, *TJ and Legislation*, supra note 13, at 95-102 (discussing workplace anti-bullying legislation in the context of TJ).

employment discrimination claims (Marta Vides Saale),²¹⁵ use of restorative justice practices to resolve workplace bullying situations (Susan Hadley Duncan),²¹⁶ alternatives to litigation to reduce workplace bias (Jessica Fink),²¹⁷ workers' compensation (Katherine Lippel),²¹⁸ and, greater application of "therapeutic" labor arbitration practices (Roger Abrams, Frances Abrams, and Dennis Nolan).²¹⁹

4. Environmental Law

Environmental law appeals significantly to TJ's focus on therapeutic law and policy, well-being, and dignity. In recent years, Michael Perlin,²²⁰ Nabeela Siddiqui,²²¹ and Femke Wijdekop²²² have contributed articles to the *Therapeutic Jurisprudence in the Mainstream* blog discussing the promise of TJ for addressing important issues of environmental law. In addition, Carrie Boyd (writing on TJ and sentencing in environmental crimes)²²³ and Gregory Baker (writing on TJ and environmental justice)²²⁴ have contributed valuable scholarly work in this area. However, this area of law is underrepresented in TJ scholarship and practice. The growing significance of global

²¹⁵ Marta Vides Saade, *Procedural Remedies as Continuing Violation and Therapeutic Jurisprudence as Best Practice to Prevent Workplace Harassment in the United States*, in, THERAPEUTIC JURISPRUDENCE AND OVERCOMING VIOLENCE AGAINST WOMEN 147, 165-66 (Debarati Halder & K. Jaishankar, Eds., 2017).

²¹⁶ Susan Hanley Duncan, *Workplace Bullying and the Role Restorative Practices Can Play in Preventing and Addressing the Problem*, 32 INDUSTRIAL L. J. 2331 (2011) (stating "many times effectively addressing bullying will require using principles of restorative practices to uncover and repair the root causes of the problem").

²¹⁷ Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 NEW MEXICO L. REV. 333, 372 (2008).

²¹⁸ Katherine Lippel, *Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation*, 22 INT'L J. L. & PSYCHIATRY 521 (1999)

²¹⁹ Roger I. Abrams, Frances E. Abrams & Dennis R. Nolan, *Arbitral Therapy*, 46 RUTGERS L. REV. 1751, 1752 (1994) (observing that "(m)any participants in labor arbitration sense that the process may have therapeutic effects).

²²⁰ Michael Perlin, *Therapeutic Jurisprudence and Environmental Law – One Missing Link*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (April 12, 2018) (asking why TJ has "made so few inroads in the areas of environmental law and protection"), available at: <https://mainstreamtj.wordpress.com/2018/04/23/therapeutic-jurisprudence-and-environmental-law-one-missing-link/>.

²²¹ Nabeela Siddiqui, *Environmental Psychology & Therapeutic Jurisprudence: Rethinking Environmental Courts and Tribunals*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (Oct. 8, 2018) (reflecting on experiences as a law clerk at the National Green Tribunal in New Delhi, India), available at: <https://mainstreamtj.wordpress.com/2018/10/08/environmental-psychology-therapeutic-jurisprudence-rethinking-environmental-courts-and-tribunals/>.

²²² Femke Wijdekop, *Advancing Rights of Nature through Restorative Justice*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (Oct. 16, 2018) (linking restorative justice and TJ in advocating for recognition of rights of nature), available at: <https://mainstreamtj.wordpress.com/2018/10/16/advancing-rights-of-nature-through-restorative-justice/>.

²²³ See Carrie Boyd, *Expanding the Arsenal for Sentencing Environmental Crimes: Would Therapeutic Jurisprudence and Restorative Justice Work?*, 32 WILLIAM & MARY ENV. L. & POL'Y REV. 483 (2008).

²²⁴ See Gregory Baker, *Rediscovering Therapeutic Jurisprudence in Overlooked Areas of the Law – How Exposing its Presence in the Environmental Justice Movement can Legitimize the Paradigm and Make the Case For its Inclusion Into All Aspects of Legal Education and the Practice of Law*, 9 FLORIDA COASTAL L. REV. 215 (2008).

climate change makes this an especially apt connection for environmental law and policy scholars who want to explore its psychological and emotional components.

5. Family Law

TJ's early connections to family law can be traced to a 1997 article by Barbara Babb, who set out the parameters of an interdisciplinary approach toward family law that includes ecological and therapeutic jurisprudence elements.²²⁵ Babb observed that Western systems of family law were now being shaped by major societal transformations “in the areas of marriage, divorce, support, and parent-child relationships.”²²⁶ Surrounding circumstances including “child mistreatment, juvenile delinquency, family violence, substance abuse, economics, and medical or mental health issues” were now playing a role in family law cases.²²⁷ These and other dynamics pointed to the need for an interdisciplinary family law paradigm that “applies the ecology of human development perspective and notions of therapeutic jurisprudence.”²²⁸

Family law now attracts a healthy share of attention from TJ-affiliated scholars. More recently, Babb has joined with Judith Moran to propose a framework for reforming family law, citing “the unified family court, the ecology of human development, therapeutic jurisprudence, and narrative” as the four constructs undergirding their call for change.²²⁹ Additional commentaries have addressed topics such as Israeli child protection law (Tali Gal and Dahlia Schilli-Jerichower),²³⁰ theoretical perspectives on child protection (Shelley Kierstead),²³¹ caseworker roles in child mistreatment cases (Vicki Lens, Colleen Cary Katz, and Kimberly Spencer Suarez),²³² family justice courts in Singapore (Kevin Ng, Yarni Loi, Sophia Ang, and Sylvia Tan),²³³ and the Israel Family Court (Philip Marcus).²³⁴

In addition, collaborative law -- a dispute resolution modality that involves normally adversarial parties voluntarily coming to the table (literally or figuratively) for the purpose of reaching a settlement – is now a focus for TJ-informed approaches to

²²⁵ See Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 INDIANA L. J. 774 (1997).

²²⁶ *Id.* at 780.

²²⁷ *Id.*

²²⁸ *Id.* at 808.

²²⁹ BARBARA A. BABB & JUDITH D. MORAN, *CARING FOR FAMILIES IN COURT: AN ESSENTIAL APPROACH TO FAMILY JUSTICE* xiii (2019).

²³⁰ Tali Gal & Dahlia Schilli-Jerichower, *Mainstreaming Therapeutic Jurisprudence in Family Law: The Israeli Child Protection Law as a Case Study*, 55 FAMILY CT. REV. 177 (2017).

²³¹ Shelley Kierstead, *Therapeutic Jurisprudence and Child Protection*, 17 BARRY L. REV. 31 (2011) [hereinafter *TJ and Child Protection*].

²³² Vicki Lens, Colleen Cary Katz & Kimberly Spencer Suarez, *Case workers in family court: A therapeutic jurisprudence analysis*, 68 CHILDREN & YOUTH SERVICES REV. 107 (2016).

²³³ Kevin Ng, Yarni Loi, Sophia Ang, & Sylvia Tan, *Family Justice Courts – Innovations, Initiatives, and Programmes*, 30 SINGAPORE ACAD. L. J. 617 (2018).

²³⁴ Philip Marcus, *The Israel Family Court – Therapeutic jurisprudence and jurisprudential therapy from the start*, 63 INT'L J. L. & PSYCHIATRY 68 (2019).

resolving family law disputes, especially marital dissolution.²³⁵ Marsha Freeman has explained the need for this alternative tool:

Litigation has traditionally been, and in many cases remains, the default method of resolution of family law disputes, especially divorce. It has, however, come to be seen by many in the family law area as a necessary evil -- a way to reach a resolution that is legally effective, but excessively expensive in terms of time, actual cost, and, even more importantly, emotional outlay. This is especially true when children are involved. Today's parents are far more cognizant of the perils of litigious divorce, especially those cases that linger over long periods of time. Studies have demonstrated the immediate and long-term ramifications of litigated divorce, especially in so-called "high conflict" cases.²³⁶

6. Health Law

Kathy Cerminara has recently called upon TJ to embrace an approach to health law that emphasizes the interests of patients, in contrast to focusing on the interests of health care providers, insurers, and other stakeholders in health care systems.²³⁷ She states that "(b)y incorporating research from the social sciences about the impact on patients of legal rules and process, TJ can give meaning to the patient in a health care system that often seems to have forgotten that its central focus should be good outcomes for those patients."²³⁸ She gives four examples of promising points of engagement for TJ:

- Inter-professional arrangements such as the medical-legal partnership model, "which provides attorneys with opportunities to engage in preventive lawyering and potentially proactively assist in better patient health outcomes",²³⁹
- Specialized health courts to resolve legal disputes arising out of health care settings, including the possibility of handling malpractice claims;²⁴⁰
- Infusing the value of dignity into health care protocols and policy, such as ensuring that end-of-life care "is predicated on preserving the dignity of the patient as he or she fades",²⁴¹ and,
- Infusing qualities of personal trust into health law, such as ensuring that "informed consent...is the result of a process of discussion about a treatment or

²³⁵ See Marsha B. Freeman, *Collaborative Law: Recognizing the Need for a New Default Method of Family Law Resolution*, 17 BARRY L. REV. 15, 16-18 (2011) [hereinafter *Collaborative Law and Family Law*]; Marsha B. Freeman, *Love Means Always Having to Say You're Sorry: Applying the Realities of Therapeutic Jurisprudence to Family Law*, 17 UCLA WOMEN'S L. J. 215, 219-20 (2008).

²³⁶ Freeman, *Collaborative Law and Family Law*, *supra* note 235 at 15 (citations omitted).

²³⁷ See Kathy L. Cerminara, *Therapeutic jurisprudence's future in health law: Bringing the patient back into the picture*, 63 INT'L J. L. & PSYCHIATRY 56, 57-58 (2019).

²³⁸ *Id.* at 58.

²³⁹ *Id.* at 60.

²⁴⁰ *Id.* at 61.

²⁴¹ *Id.*

procedure,” rather than the mere “presentation of a pre-printed form and a request for the patient to sign it.”²⁴²

Cerminara’s promising health law agenda is joined by work from other scholars who have entered the fray. Nadav Davidovitch and Michal Alberstein have proposed a dialogue between TJ and public health, grounded in a conviction that these two fields can mutually benefit from the association.²⁴³ As described below, Amy Campbell has set out a framework for health care policymaking, using a TJ focus.²⁴⁴ Also in the policy context, I have cited America’s divisive deliberations over the future of its Affordable Care Act for inflicting fear, anxiety, and trauma on individuals whose health care coverage is threatened by repeal of the statute.²⁴⁵

7. Judicial Practice

In remarks to a conference audience in 2012, Australian magistrate Pauline Spencer proposed “[t]o dream the impossible dream” that TJ-infused practices would become the norm in mainstream courts.²⁴⁶ Indeed, in addition to its ongoing work in the area of problem-solving courts, the TJ community has long embraced the ideal of judges in other tribunals adopting and shaping therapeutic jurisprudence practices.²⁴⁷ This includes both effectuating structural reforms and implementing TJ practices at the ground level.²⁴⁸ There is welcomed evidence that TJ-informed judicial practices are starting to enter the mainstream. The latest edition of the *International Framework for Court Excellence*, published by a global consortium of organizations devoted to applying the values of “fairness, impartiality, independence, integrity, accessibility and timeliness” to judicial administration,²⁴⁹ cites approvingly to TJ and the appropriate “use of therapeutic or problem-solving approaches” for resolving legal disputes.²⁵⁰

²⁴² *Id.*

²⁴³ See Nadav Davidovitch & Michael Alberstein, *Therapeutic Jurisprudence and Public Health: A Broad Perspective on Dialogue*, 30 T. JEFFERSON L. REV. 507 (2008).

²⁴⁴ See Amy T. Campbell, *Using Therapeutic Jurisprudence to Frame the Role of Emotion in Health Policymaking*, 5 PHOENIX L. REV. 675 (2012) [hereinafter *Emotion in Health Policymaking*].

²⁴⁵ Yamada, *On Anger, Shock, Fear, and Trauma*, *supra* note 13 at 37-38.

²⁴⁶ Pauline Spencer, *To dream the impossible dream? Therapeutic jurisprudence in mainstream courts* (2012) [hereinafter *TJ in Mainstream Courts*] (text of presentation at the 2012 International Conference on Law & Society).

²⁴⁷ See generally WINICK & WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS*, *supra* note 21 (commentaries on TJ and the judiciary);

²⁴⁸ See also Spencer, *TJ in Mainstream Courts*, *supra* note 246; Michael D. Jones, *Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners*, 5 PHOENIX L. REV. 753 (2012) [hereinafter *Mainstreaming TJ into the Traditional Courts*]; Vicki Lens, *Against the Grain: Therapeutic Judging in a Traditional Family Court*, 41 L. & SOC. INQUIRY 701 (2016); Lorana Bartels, *Challenges in mainstreaming specialty courts*, TRENDS & ISSUES IN CRIME AND CRIMINAL JUSTICE (Oct. 2009).

²⁴⁹ INTERNATIONAL CONSORTIUM FOR COURT EXCELLENCE, *INTERNATIONAL FRAMEWORK FOR COURT EXCELLENCE* 3RD ED. 4 (2020), available at:

http://www.courtexcellence.com/data/assets/pdf_file/0021/51168/The-International-Framework-3E-2020-V1.pdf.

²⁵⁰ *Id.* at 28. Responding to an earlier edition of the *International Framework*, TJ experts in judicial administration advocated for the inclusion of TJ-informed practices and perspectives. See Elizabeth

Through informal networks, an ongoing “Court Craft” series of articles posted to the *Therapeutic Jurisprudence in the Mainstream* blog,²⁵¹ and a Judicial Interest Group within the International Society for Therapeutic Jurisprudence, members of the bench, retired colleagues, scholars, and practitioners have been conducting ongoing exchanges about how to advance TJ practices in judicial systems. The main focus of this work has been on trial courts, as the vast majority of judges who associate with TJ preside at the first levels.²⁵² Three aspects of this work merit elaboration: The development of positive “court craft” practices, the concept of procedural justice, and the writing of judicial rulings.

a. Court Craft

According to Magistrate Spencer, court craft encompasses topics such as judicial communication and listening skills, “processes and strategies for behavioural change,” “TJ/solution-focused/problem solving approaches,” procedural justice, and “translating the latest research from other disciplines into improved court practice.”²⁵³ In her 2012 conference remarks, she explained some of her own practices of incorporating TJ principles into her work as a magistrate in a traditional Australian trial court, presiding mainly over criminal cases.²⁵⁴ For example, her approach to sentencing may include engaging in a conversation with the defendant about their future and plans for rehabilitation, sometimes even leaving the bench to sit at the bar table across from the individual during the exchange.²⁵⁵

b. Procedural Justice

Among all legal stakeholders, judges are in the best position to ensure procedural justice in the resolution of legal disputes. Arie Freiberg describes procedural justice as “the ways in which decisions are made and their fairness,” adding that it helps to ensure accurate decisions, a perception of fairness in court proceedings, and confidence in the judicial system.²⁵⁶ The late Michael Jones, a retired Arizona state court judge, explained that procedural fairness relates directly to how judges conduct proceedings in their courtrooms and how they treat parties appearing before them.²⁵⁷ Procedural justice

Richardson, Pauline Spencer & David Wexler, *The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing*, 25 J. JUDICIAL ADM. 148 (2016).

²⁵¹ See Court Craft blog post series, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM, available at: https://mainstreamtj.wordpress.com/category/judiciary_court-craft-series/.

²⁵² This claim is based on personal knowledge of the TJ community, including, as mentioned above, service as board chair of the International Society for Therapeutic Jurisprudence.

²⁵³ *TJ Court Craft series – Coming Soon!*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (May 13, 2016), available at: <https://mainstreamtj.wordpress.com/2016/05/13/tj-court-craft-series-coming-soon/>. Although the article is unsigned, Spencer has been the editor of the blog since its creation.

²⁵⁴ See Spencer, *TJ in Mainstream Courts*, *supra* note 246 at 5-10.

²⁵⁵ *Id.* at 8.

²⁵⁶ Freiberg, *Transcending Paradigms*, *supra* note 148 at 12-13.

²⁵⁷ Jones, *Mainstreaming TJ into the Traditional Courts*, *supra* note 248 at 757-61.

strongly impacts whether parties and witnesses in litigation experience what Ronner has characterizes as voice, validation, and voluntary participation in legal matters.²⁵⁸

c. Legal Rulings

Shelley Kierstead has examined how the writing of judicial and tribunal opinions may impact parties in litigation, beyond the legal effect of the rulings themselves.²⁵⁹ Her work analyzes whether decision makers “write their decisions in a manner that respects the dignity of the parties to the dispute” and address the parties “in a compassionate manner.”²⁶⁰ Decisions written in such a way can be “less emotionally damaging” to the losing party and “elicit greater respect for the decisions and decision makers.”²⁶¹ An anti-therapeutic contrast is the judicial ruling without a supporting explanation. For example, Amy Ronner and Bruce Winick have criticized the practice of appellate courts issuing *per curiam* decisions, whereby a reviewing court simply affirms the decision of the lower court, without writing an opinion to explain its ruling.²⁶² A *per curiam* affirmance is anti-therapeutic, they reason, because it is absent any discussion of the relevant facts or the court’s reasoning, thus leaving an appellant with the invalidating impression that their arguments were not seriously considered.²⁶³

8. Legal Education, Legal Practice, and Legal Profession

a. Legal Education

One would expect law professors affiliated with TJ to be writing about legal education, and that has come to pass. First, American law professors are generating a valuable body of scholarship about TJ and legal education. Not surprisingly, clinical education and skills training gather the most attention. Representative topics include applying social work principles and techniques into clinical teaching (Susan Brooks),²⁶⁴ examining TJ applications in a child advocacy clinic (Bernard Perlmutter),²⁶⁵ connecting literature and TJ to the work of an appellate litigation clinic (Amy Ronner),²⁶⁶ cultivating

²⁵⁸ Ronner, *Validation, Voice, and Voluntary Participation*, *supra* note 156.

²⁵⁹ Shelley Kierstead, *Promoting Dignity Through Decision-Making*, [hereinafter *Promoting Dignity*], in CONGRESS ABSTRACTS, *supra* note 8 at 493. *See also* Shelley Kierstead, *TJ and Child Protection*, *supra* note 231 at 38 (discussing the therapeutic implications of judicial opinion writing in child protection cases); Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 58-62 (2000) (examining Constitutional decisions by the Supreme Court of Canada from a TJ perspective).

²⁶⁰ Kierstead, *Promoting Dignity*, *supra* note 259.

²⁶¹ *Id.*

²⁶² Amy D. Ronner and Bruce J. Winick, *Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000).

²⁶³ *Id.* at 500.

²⁶⁴ Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513 (2005).

²⁶⁵ Bernard P. Perlmutter, *George’s Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561 (2005).

²⁶⁶ Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601 (2008).

emotional intelligence in legal education (Marjorie Silver),²⁶⁷ and using TJ to teach lawyering skills (Bruce Winick).²⁶⁸

In addition, TJ-informed commentary on legal education is appearing on a global level. Pertinent examples include integrating TJ values into South African legal education (Elmarie Fourie and Enid Coetzee),²⁶⁹ discussing Indian legal education from a TJ perspective (Debarati Halder),²⁷⁰ applying TJ principles in a United Kingdom law clinic that represents refugees (James Marson, Katy Ferris, and Anna Kawalek),²⁷¹ and transforming legal education within the African continent (‘Dejo Olowu’).²⁷²

An assortment of other commentaries link TJ and legal education in different ways, including a bibliography of articles and books illustrating how TJ covers topics across the law school curriculum (David Wexler),²⁷³ a brief essay on teaching TJ in several law school courses (Michael Jones),²⁷⁴ and a short article on how teaching about TJ can support students pursuing public careers (Michael Perlin and Alison Lynch).²⁷⁵ Although there are no definitive analyses of how TJ might engage doctrinal courses and the overall law school curriculum in a more systemic way, that conversation is developing, fueled by new and forthcoming publications by Michael Perlin, David Wexler, and this author.²⁷⁶

²⁶⁷ Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOLOGY, PUB. POL’Y & L. 1173 (1999).

²⁶⁸ Bruce Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429 (2005).

²⁶⁹ Elmarie Fourie & Enid Coetzee, *The Use of a Therapeutic Jurisprudence Approach to the Teaching and Learning of Law to a New Generation of Law Students in South Africa*, 15 POTCHEFSTROOM ELEC. L. J. 11 (2012).

²⁷⁰ Debarati Halder, *Why Law Fails to be Therapeutic in Spite of Therapeutic Judicial Efforts: A Critical Analysis of Indian Legal Education from the Therapeutic Jurisprudence Perspective*, 2 UNITEDWORLD L. J. 173 (2018).

²⁷¹ James Marson, Katy Ferris & Anna Kawalek, *A Vineyard in a Law Clinic: The Practical Application of a Therapeutic Jurisprudence in a UK Law Clinic*, 2019 SINGAPORE J. LEGAL STUDIES 124 (2019).

²⁷² ‘Dejo Olowu, *Therapeutic jurisprudence: Transforming legal education and humanizing criminal justice in Africa*, 2010 DE JURE 95 (2010).

²⁷³ David B. Wexler, *Therapeutic Jurisprudence Across the Law School Curriculum*, 5 PHOENIX L. REV. 791 (2012).

²⁷⁴ See Michael D. Jones, *Teaching TJ: Therapeutic Jurisprudence for Law Students*, III SUFFOLK U. L. REV. ONLINE 25 (2015) (hereinafter *Teaching TJ*).

²⁷⁵ Michael L. Perlin & Alison J. Lynch, *How Teaching About Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability As a Case Example*, 16 NEVADA L. J. 209 (2015).

²⁷⁶ See generally Michael L. Perlin, “A Self-Ordained Professor’s Tongue”: *Therapeutic Jurisprudence in the Classroom*, INTERNATIONAL SOCIETY FOR THERAPEUTIC JURISPRUDENCE, OCCASIONAL PAPERS SERIES, No. 1 (Oct. 2020) (reporting on results of an informal survey about how professors are introducing TJ into their law school and graduate school courses), available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3704764; David B. Wexler, *A Proposal for Basic and Brief TJ Education: Promoting Academic, Ethical, and Vocational Objectives*, ARIZONA LEGAL STUDIES, DISCUSSION PAPER NO. 20-02 (January 2020), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523226 (proposing a single-session introductory TJ module, adaptable to different course types); David C. Yamada, *Teaching Therapeutic Jurisprudence* (discussing modalities for teaching TJ in law school courses and clinics and offering bibliographic

b. Legal Practice and Legal Profession

In terms of legal practice, TJ perspectives on lawyers' roles, lawyering skills, and attorney-client relationships are well represented. Topics include, for example, dealing with resistant criminal clients (Astrid Birgden),²⁷⁷ representing clients with cognitive challenges (David Boulding and Susan Brooks),²⁷⁸ understanding clients' best interests (Dale Dewhurst),²⁷⁹ traditional versus holistic attorney roles in criminal release and supervision (Martine Herzog-Evans),²⁸⁰ identifying "psycholegal soft spots" that may produce or reduce parties' anxieties and anger (David Wexler),²⁸¹ and TJ perspectives on negotiation theory and practice (Carol Zeiner).²⁸² In addition, Bruce Winick's final book, *The Reimagined Lawyer* (published posthumously), brings together his work on attorney-client relationships, preventive lawyering, legal problem-solving, litigation avoidance, and the lawyer as healer.²⁸³ Read as a whole, it represents the closest we are likely to get to a unified theory of lawyering in a TJ mode.

TJ writings on the legal profession are harder to classify in terms of subject matter and frequently overlap with other topics. Topics have included providing legal aid representation to women in India (Debarati Halder),²⁸⁴ evaluating a decade of TJ's presence in Tasmania (Michael Hill and Liz Moore),²⁸⁵ building a TJ presence in the United Kingdom (Emma Jones and Anna Kawalek),²⁸⁶ examining attitudes of the Israeli bench and bar towards TJ (Karni Perlman),²⁸⁷ and attorney assistance and wellness programs (David Wexler).²⁸⁸

recommendations for required and suggested reading) (manuscript currently under review for a symposium issue to be published by the UNIVERSITY OF BALTIMORE LAW REVIEW).

²⁷⁷ Astrid Birgden, *Dealing with the Resistant Criminal Client: A Psychologically-minded Strategy for More Effective Legal Counseling*, 38 CRIM. L. BULL. 225 (2002).

²⁷⁸ David M. Boulding & Susan L. Brooks, *Trying differently: A relationship-centered approach to representing clients with cognitive challenges*, 33 INT'L J. L. & PSYCHIATRY 448 (2010).

²⁷⁹ Dale Dewhurst, *Understanding the Legal Client's Best Interests, Lessons from Therapeutic Jurisprudence and Comprehensive Justice*, 6 PHOENIX L. REV. 963 (2013).

²⁸⁰ Martine Herzog-Evans, *Release and Supervision: Relationships and Support from Classic and Holistic Attorneys*, 1 INT'L J. THERAPEUTIC JURISPRUDENCE 23 (2016).

²⁸¹ David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317 (1998).

²⁸² Carol L. Zeiner, *Getting Deals Done: Enhancing Negotiation Theory and Practice through a Therapeutic Jurisprudence/Comprehensive Law Mindset*, 21 HARVARD NEGOT. L. REV. 279 (2016).

²⁸³ BRUCE J. WINICK (WITH SEAN BETTINGER-LOPEZ), *THE REIMAGINED LAWYER* (2019) [hereinafter *Reimagined Lawyer*].

²⁸⁴ Debarati Halder, *Free Legal Aid for Women and Therapeutic Jurisprudence: The Indian Model*, in TJ METHODOLOGY AND PRACTICE, *supra* note –, at 253-72.

²⁸⁵ MICHAEL HILL & LIZ MOORE, REFLECTIONS FROM THE "DOUBLE FIGURES" MILESTONE: A DECADE OF THERAPEUTIC JURISPRUDENCE IN TASMANIA (Dec. 2018).

²⁸⁶ Emma Jones & Anna Kawalek, *Dissolving the stiff upper lip: Opportunities and challenges for mainstreaming therapeutic jurisprudence in the United Kingdom*, 63 INT'L J. L. & PSYCHIATRY 76 (2019).

²⁸⁷ Karni Perlman, *It Takes Two for TJ: Correlation between Bench and Bar Attitudes toward Therapeutic Jurisprudence – An Israeli Perspective*, 30 T. JEFFERSON L. REV. 351 (2008).

²⁸⁸ David B. Wexler, *Lawyer-Assistance-Programs and the Practice of Therapeutic Jurisprudence*, 47 CT. REV. 64 (2011).

9. Legal Writing and Scholarship

In recent years, scholars have examined how to apply TJ principles to legal writing in different contexts. While it may be an exaggeration to suggest the emergence of a TJ “school” of legal writing, these discussions spotlight an area rich with possibilities for legal practice, scholarship, and law reform work.

a. Legal Practice

Shelley Kierstead has examined legal writing in practice contexts and asserts “that attention to the human impact of legal writing has the potential to promote civility and service in a number of ways: through dealings with both clients and ‘opposite’ parties; by influencing decision-makers’ writings; and through the impact of words on other lawyers in the course of their day-to-day legal work.”²⁸⁹ She adds that legal writing can also enhance a client’s “sense of having been treated with fairness, respect, and dignity.”²⁹⁰ David Wexler has applied a TJ lens to legal forms, examining how standardized documents to be completed by legal actors may have therapeutic or anti-therapeutic effects in terms of affecting the lives of, and shaping relationships between, parties to legal matters.²⁹¹ Wexler would dub this process of review and revision “form reform,” after being inspired by the work of law student Dax Miller, who applied TJ principles to propose revisions to the State of Florida’s marital dissolution settlement form.²⁹²

b. Legal Scholarship

As discussed above, TJ scholars have proposed methodologies for engaging in both theoretical and applied research. A healthier practice of legal scholarship can join these methodological approaches. Citing the legal academy’s prestige obsessions and the need for complementary alternatives to lengthy, heavily footnoted law review articles, I have invoked TJ to suggest changes in the culture of legal scholarship.²⁹³ Overall, our practices for scholarly work should focus on “content, meaning, and engagement” over “the pursuit of professorial fame.”²⁹⁴ Although traditional law review scholarship continues to serve a useful purpose, shorter, more accessible articles should be favored as

²⁸⁹ Shelley Kierstead, *Legal Writing, Therapeutic Jurisprudence, and Professionalism*, III SUFFOLK U. L. REV. ONLINE 29 (2015).

²⁹⁰ *Id.* at 31.

²⁹¹ David B. Wexler, *Therapeutic Jurisprudence, Legal Landscapes, and Form Reform: The Case of Diversion*, 10 FLORIDA COASTAL L. REV. 101 (2009).

²⁹² *Id.* at 101-102, discussing and citing Dax J. Miller, Project, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form “Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)”*, 10 FLORIDA COASTAL L. REV. 263 (2009).

²⁹³ See Yamada, *The Practice of Legal Scholarship*, *supra* note 7. I understand the twist of calling for complementary alternatives to long, heavily footnoted law review articles in the text of a long, heavily footnoted law review article.

²⁹⁴ *Id.* at 138.

well.²⁹⁵ In addition, we should support an inclusive environment for legal scholarship that welcomes scholars, practitioners, and students from all relevant disciplines.²⁹⁶

c. Law Reform Advocacy

As discussed above, TJ research, analysis, and scholarship often lead to law reform proposals. Toward that end, I have advanced a concept of *intellectual activism*, which “serves as both a philosophy and a methodology for engaging in scholarship relevant to real-world problems, putting the resulting prescriptions into action, and learning from the results of implementation.”²⁹⁷ In the legal context:

The process usually starts with a foundational writing, usually a traditional law review article. This writing harnesses the requisite source materials, engages in legal and policy analysis, and offers a prescriptive proposal for change. In turn, it serves as the basis for a variety of applied writings, such as a proposed legislation and regulations, appellate and amicus briefs, policy papers, op-ed pieces, blog posts, and multimedia presentations, as well as other forms of public education and advocacy. The process is ongoing, creating a cycle of scholarship, action, and evaluation.²⁹⁸

In addition, David Wexler has proposed a new form of legal advocacy writing that he calls the *amicus justitia* brief.²⁹⁹ He explains that “(j)ust as we have amicus curiae briefs to give input to appellate courts, we need a category of amicus justitia — friend of *justice* — briefs to orient and educate the legal actors capable of applying the law in a therapeutic manner.”³⁰⁰ Wexler asserts that *amicus justitia* briefs can be written to influence legal stakeholders in all settings to advance the law in a more therapeutic manner.³⁰¹

10. Legislation and Policymaking

TJ perspectives can and should inform the substance and process of legislative and administrative lawmaking in at least two ways: The first is public policy development, applying a TJ lens to existing and proposed public law, by analyzing the therapeutic or anti-therapeutic impacts of the measures in question upon policy

²⁹⁵ See *id.* at 139, 152 (discussing law review scholarship). Accord Wexler, *The DNA of TJ*, *supra* note 25 at 9 (subscribing to Yamada’s support for “general TJ writing, where pieces are often (and ideally) short, readable and directed at important practice problems”).

²⁹⁶ Yamada, *The Practice of Legal Scholarship*, *supra* note 7 at 141-42.

²⁹⁷ David C. Yamada, *Intellectual Activism and the Practice of Public Interest Law*, 25 SO. CAL. REV. L. & SOC. JUSTICE 127, 129 (2016).

²⁹⁸ *Id.* at 129.

²⁹⁹ David B. Wexler, *The Therapeutic Application of the Law & the need for ‘Amicus Justitia’ Briefs*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (blog) (2018), available at: <https://mainstreamtj.wordpress.com/2018/04/30/the-therapeutic-application-of-the-law-the-need-for-amicus-justitia-briefs/>.

³⁰⁰ *Id.*

³⁰¹ See *id.* (stating that *amicus justitia* briefs can educate courts as well as those in other domains, such as “educators, employers, police officers, and many more”).

stakeholders.³⁰² The second can be labeled “legislative due process,” examining whether policy deliberations give key stakeholders a genuine opportunity to be heard during significant decision making steps.³⁰³ Both considerations relate to Wexler’s Therapeutic Design of the Law, inquiring whether public policy formulations and the legal frameworks to deliberate upon it are therapeutic or anti-therapeutic in nature.³⁰⁴ A focus on policymaking processes further opens up a related, new line of potential TJ inquiry, namely, how public policy stakeholders engage those processes, thereby invoking Wexler’s Therapeutic Application of the Law.³⁰⁵

Although legislative and policymaking have been somewhat overlooked as areas of TJ inquiry, there are welcomed signs of change. In addition to the methodology for legislative scholarship and advocacy that I have suggested in Part I above,³⁰⁶ Amy Campbell and Siegfried Wiessner have proposed TJ-related analytical frameworks for public policy scholarship and analysis. Campbell offers a ten-step “TJ framing process” for examining the role of emotions in shaping health policy.³⁰⁷ Wiessner cites the New Haven School of Jurisprudence, a framework for applying social sciences research and the value of human dignity to the development of the law, as a useful tool for TJ-informed policy development.³⁰⁸

To illustrate how public policy can be applied in ways that either advance or undermine therapeutic goals, Caroline Cooper examines how resolutions of criminal drug cases implicate a multiplicity of collateral public policies.³⁰⁹ Stigmatization and exclusionary treatment of drug offenders occur in significant areas of policy, beyond the criminal justice system: Public housing, welfare benefits, voting rights, educational financial aid, immigration status, criminal history background checks, professional and vocational licensing, juror eligibility, family relationships, and state registries.³¹⁰ By contrast, a policy agenda that addresses the “vast intertwined network of collateral consequences imposed on drug offenders” will allow individuals to meaningfully re-integrate into the community.³¹¹

11. Military Law

³⁰² See Yamada, *Anger, Shock, Fear, and Trauma*, *supra* note 13 at 35-36.

³⁰³ *Id.* at 42.

³⁰⁴ See discussion of Wexler’s TDL and TAL framework, section I, part E(1), *supra*.

³⁰⁵ *Id.*

³⁰⁶ See Section I, part E(6), *supra*.

³⁰⁷ Campbell, *Emotion in Health Policymaking*, *supra* note 244 at 693. See also Amy T. Campbell, *A Case Study for Applying Therapeutic Jurisprudence to Policymaking: Assembling a Policy Toolbox to Achieve a Trauma-Informed Early Care and Learning System*, 63 INT’L J. L & PSYCHIATRY 45 (2019) [hereinafter *Trauma-Informed Early Care and Learning System*].

³⁰⁸ See Siegfried Wiessner, *New Haven and the Design of Laws under Therapeutic Jurisprudence*, CONGRESS ABSTRACTS, *supra* note 8 at 477 (2019). See also Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PAC. L. REV. 45 (2010) (describing the New Haven School).

³⁰⁹ Caroline S. Cooper, *Drug Courts – Just the Beginning: How To Get Other Areas of Public Policy in Sync?*, 1 INT’L J. THERAPEUTIC JURISPRUDENCE 73 (2016).

³¹⁰ See *id.* at 79-109.

³¹¹ See *id.*

The legal interests of veterans and active-duty military personnel comprise an important niche area for TJ.³¹² For example, Evan Seamone has applied TJ principles in examining how lawyers and the legal system should engage those whose alleged offenses may be associated with Post-Traumatic Stress Disorder developed as a result of exposure to combat conditions), with an emphasis on healing, recovery, and diversion from the criminal justice system.³¹³ Among other things, he has called for changes in how negative categories of military discharges render veterans ineligible for PTSD treatments, thus “creating a class of future offenders” who pose a risk to “themselves, their families, and the public collectively.”³¹⁴ In addition, TJ principles have informed examinations of veterans treatment courts, a form of problem-solving court that favors rehabilitation and treatment over incarceration where the underlying offenses may be linked to psychiatric conditions.³¹⁵

12. Tort Law

Early work by the late Daniel Shuman set a foundation for future TJ scholarship and practice in tort law.³¹⁶ He observed that, at the base level:

The insights from therapeutic jurisprudence are particularly relevant to fault based tort law. The goals of fault based tort law are compensation and deterrence. Tort judgments are intended to compensate the injured and to deter potential injurers from engaging in unsafe conduct. Thus, tort law and therapeutic jurisprudence share a common agenda, the reduction of injury and the restoration of the injured.³¹⁷

³¹² For example, TJ perspectives were well represented at a 2013 symposium on military service and PTSD held at Nova Southeastern University and in a subsequent law review symposium issue. See Kathy Cerminara & Olympia Duhart, *Wounds of War: Meeting the Needs of Active-Duty Military Personnel and Veterans with Post-Traumatic Stress Disorder*, 37 NOVA L. REV. 439 *et seq.* (2013) (previewing issue that includes contributions from TJ-associated scholars Evan Seamone and Michael Perlin).

³¹³ See Evan R. Seamone, *Dismantling America’s Largest Sleeper Cell: The Imperative to Treat, Rather than Merely Punish, Active Duty Offenders with PTSD Prior to Discharge from the Armed Forces*, 37 NOVA L. REV. 479 (2013) [hereinafter *Dismantling America’s Largest Sleeper Cell*]; Evan R. Seamone, *Veterans’ Lawyer as Counselor: Using Therapeutic Jurisprudence to Enhance Client Counseling for Combat Veterans with Post-traumatic Stress Disorder*, 202 MIL. L. REV. 185 (2009); Evan R. Seamone, *Attorneys as First-Responders: Recognizing the Destructive Nature of Post-traumatic Stress Disorder on the Combat Veteran’s Legal Decision-Making Process*, 202 MIL. L. REV. 144 (2009).

³¹⁴ Seamone, *Dismantling America’s Largest Sleeper Cell*, *supra* note 313, at 480.

³¹⁵ See Michael L. Perlin, “John Brown Went Off to War”: *Considering Veterans Treatment Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 475-77 (2013). Cf. Kristine A. Huskey, *Justice for Veterans: Does Theory Matter?*, 59 ARIZONA L. REV. 697, 729-36 (2017) (after distinguishing between TJ and restorative justice applications to veterans courts, suggests the latter is a more appropriate theoretical framework).

³¹⁶ See e.g. Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409 (1993) [hereinafter *TJ and Tort Law*]; Daniel W. Shuman, *Making the World a Better Place through Tort Law: Through the Therapeutic Looking Glass*, 10 N.Y.S. SCH. J. HUM. RTS. 739 (1993).

³¹⁷ Shuman, *TJ and Tort Law*, *supra* note 316 at 410 (citations omitted).

Shuman further recognized connections between mental health and the goals of tort law and TJ:

An exploration of the therapeutic potential of tort law suggests an examination of the relationships between mental or emotional problems and accidents. Do mental or emotional problems play a role in accident causation? If they do, ameliorating mental and emotional problems may reduce the number of accidents and consequential injuries. Thus, if tort law can encourage appropriate utilization of mental health care, if mental health care is effective in treating mental or emotional problems, and if ameliorating mental or emotional problems can reduce the number of accidents, the accident reduction goals of tort law and therapeutic jurisprudence coalesce to support the result.³¹⁸

More recently, Arno Akkermans has applied TJ to tort law by more expressly focusing on the emotional dimensions of personal injuries.³¹⁹ In a 2020 writing, he concludes:

There are many possibilities for countering personal injury victims' experience of injustice by making claims resolutions psychologically more responsive and intelligent, regardless of what kind of compensation system is involved, fault-based or no-fault. A system more responsive to the moral expectations of victims will actively acknowledge responsibility for the incurred harm and its redress, take action to promote recovery and participation, and involve sufficient personal contact, not only between the victim and the person responsible for the injury-causing event, but also with claims or case managers. ... (I)t could actually be considered quite peculiar that routines have drifted so much away from what seems to be the morally obvious thing to do.³²⁰

The work of these two authors merely hints at the enormous potential for more work on tort law and TJ. Many other topics explored in this article, including preventive law, restorative justice,³²¹ civil litigation and dispute resolution, psychological trauma, and positive psychology, also offer additional points of connection and analysis. For a more specific application of TJ to tort law, consider Camille Carey's work on how tort law can be used as civil remedy for domestic violence, citing assault, battery, intentional

³¹⁸ *Id.* at 411-12 (citations omitted).

³¹⁹ See Arno Akkermans, *Achieving Justice in Personal Injury Compensation: The Need to Address the Emotional Dimensions of Suffering a Wrong*, in UNEXPECTED CONSEQUENCES OF COMPENSATION LAW 15-37 (Prue Vines & Arno Akkermans, eds. 2020); Arno J. Akkermans, *Reforming personal injury claims settlement: paying more attention to emotional dimension promotes victim recovery*, AMSTERDAM INTERDISCIPLINARY CENTRE FOR LAW AND HEALTH, WORKING PAPER SERIES (2009).

³²⁰ Akkermans, *Achieving Justice in Personal Injury Compensation*, *supra* note 319 at 37.

³²¹ This connection has been explored in Edie Greene, "Can We Talk?" *Therapeutic Jurisprudence, Restorative Justice, and Tort Litigation*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 233-256 (Brian H. Bornstein, Robert F. Schopp, Richard K. Wiener & Steven L. Willborn, eds., 2008).

infliction of emotional distress, and other intentional tort claims as potential grounds for relief.³²² Carey invokes TJ in articulating how tort law may provide non-financial benefits to domestic violence victims.³²³

13. Trusts and Estates Law

Trusts and estates law is ideal for a TJ focus. It relates to the psychological well-being of relevant legal actors at virtually every stage of the lifespan. Practicing law in this field encompasses important skills such as client counseling, legal planning, and document drafting.³²⁴ These points are echoed in the work of Mark Glover, who has applied TJ principles to estate planning practice,³²⁵ calling TJ “an obvious framework through which to evaluate the law in an area that has so many psychological repercussions.”³²⁶ He explains:

...(T)he mere act of preparing for one’s death has clear psychological implications. But beyond the possible fear and anxiety experienced by the one confronting mortality, estate planning and the law of succession can also have negative psychological consequences for those left behind. After a loved one’s death, the family not only must deal with a profound loss but also must navigate the process of settling the precedent’s estate. If disputes arise during this process, familial conflict and the emotional and psychological issues of grieving family members can intensify. Because the law of succession and the lawyers that aid in the estate planning process interact with those dealing with these negative psychological experiences, legal scholars should explore how the law and the role of the estate-planning lawyer can be shaped to ease these anti-therapeutic effects.³²⁷

14. Other Promising Areas

Many other legal topics hold great promise for further development by TJ scholars and practitioners. They include, among others, civil rights law,³²⁸ elder law,³²⁹

³²² Camille Carey, *Domestic Violence Torts, Righting a Civil Wrong*, 62 KANSAS L. REV. 695, 696 (2014).

³²³ *Id.* at 741-45.

³²⁴ Attorney Jessica Cousineau discusses how she applies TJ principles to her practice in Jessica Cousineau, *Estate Planning from a Client-Centered Approach*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (June 15, 2015), available at: <https://mainstreamtj.wordpress.com/2015/06/15/estate-planning-from-a-client-centered-approach/>.

³²⁵ See Mark Glover, *The Solemn Moment: Expanding Therapeutic Jurisprudence Throughout Estate Planning*, III SUFFOLK U. L. REV. ONLINE 19 (2015); Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012).

³²⁶ Glover, *The Solemn Moment*, *supra* note 325 at 20.

³²⁷ *Id.* at 20-21 (citation omitted).

³²⁸ See Christina A. Zawisza, “MLK 50: Where Do We Go From Here?”: *Teaching the Memphis Civil Rights Movement through a Therapeutic Jurisprudence Lens*, 6 BELMONT L. REV. 175 (2018).

³²⁹ See WINICK, REIMAGINED LAWYER, *supra* note 282 at 48-59 (discussing elder law and preventive lawyering).

housing and landlord-tenant law,³³⁰ international human rights,³³¹ legal and professional ethics,³³² public interest law,³³³ and TJ and religious faith connections.³³⁴

B. *Related and Overlapping Frameworks*

Therapeutic jurisprudence complements and overlaps with many other legal frameworks, all of which favor multidisciplinary perspectives.³³⁵ In addition to procedural justice (discussed above in connection with Judicial Practice, Section A) and collaborative law (discussed above in connection with Family Law, Section A), several other modalities merit acknowledgment. Many individuals who ally with fields described below also associate with the TJ community.

1. Restorative Justice

The U.S. Office of Juvenile Justice and Delinquency Prevention defines restorative justice (RJ) as “a theory of justice that emphasizes repairing the harm caused by criminal behavior.”³³⁶ RJ engages the criminal justice system by “identifying and taking steps to repair harm,...involving all stakeholders, and...transforming the traditional relationship between communities and government in responding to crime.”³³⁷ The overall goal of RJ “is to bring together those most affected by the criminal act—the offender, the victim, and community members—in a nonadversarial process to encourage offender accountability and meet the needs of the victims to repair the harms resulting from the crime....”³³⁸ Popular RJ practices include, among others:

- Family group conferences in the form of “facilitated discussions that allow those most affected by a particular crime—the victim, the offender, and the family and friends of both—to discuss the impact of the crime and decide how the offender should be held accountable for it”³³⁹

³³⁰ See Michel Vols, *Neighbors from Hell: Problem-Solving and Housing Laws in The Netherlands*, 7 ARIZONA SUMMIT L. REV. 507 (2014).

³³¹ See Michael L. Perlin, “The ladder of the law has no top and no bottom”: How therapeutic jurisprudence can give life to international human rights, 37 INT’L J. L. & PSYCHIATRY 535 (2014).

³³² See Ida Dickie, *Ethical Dilemmas, Forensic Psychology, and Therapeutic Jurisprudence*, 30 T. JEFFERSON L. REV. 455 (2008).

³³³ Nathalie Des Rosiers, *Rights Are Not Enough: Therapeutic Jurisprudence Lessons For Law Reformers*, 18 TOURO L. REV. 443 (2002).

³³⁴ See Kenneth A. Sprang, *Holistic Jurisprudence: Law Shaped by People of Faith*, 74 ST. JOHN’S L. REV. 753 (2000).

³³⁵ I will avoid debating whether any or all of these initiatives can or should be classified under a given rubric, be it TJ or another label. Attempts to resolve such academic and professional turf claims usually lead to no good. The important thing is to recognize similarities and differences among these modalities.

³³⁶ DEVELOPMENT SERVICES GROUP, INC., RESTORATIVE JUSTICE 1 (Nov. 2010), available at: https://www.ojjdp.gov/mpg/litreviews/Restorative_Justice.pdf.

³³⁷ *Id.*

³³⁸ *Id.* (citation omitted).

³³⁹ *Id.* (citation omitted).

- Victim-impact panels that allow “crime victims to explain the real-world impact of crime to offenders.”³⁴⁰
- Victim-offender mediation processes that provide “victims the opportunity to meet their offenders in a safe and structured setting for dialog, negotiation, and problem solving.”³⁴¹

Restorative justice has very strong ties to TJ. It specially appeals to TJ’s discomfort with the adversarial nature of resolving legal disputes. The TJ literature is abundant with references to restorative justice. Frequently the two concepts are invoked conjunctively – referencing therapeutic jurisprudence *and* restorative justice in paired form -- as writings discussing Indian cyberstalking laws through TJ and RJ perspectives (Debarati Halder),³⁴² how TJ and RJ can impact judicial practice, legal practice, and legal education (Michael King),³⁴³ and judicial attitudes toward TJ and RJ practices in Australian children’s court (Kelly Richards, Lorana Bartels, and Jane Bolitho)³⁴⁴ illustrate. Other treatments appeal to both TJ and RJ, but distinguish them conceptually, exploring methodological differences between RJ and TJ (John Braithwaite)³⁴⁵ or distinguishing TJ and RJ in discussing South African judges (Annette Van Der Merwe).³⁴⁶ Still others endeavor to blend or harmonize TJ and RJ, for example, referring to RJ *as* TJ in discussing child victims of crime (Tali Gal and Vered Shidlo-Hezroni)³⁴⁷ or (discussing the integration of RJ and TJ in the resolution of criminal cases (Robert Schopp).³⁴⁸

Regardless of how we reconcile or distinguish TJ and RJ, the words of Howard Zehr, a pioneer in the field of restorative justice, help to explain the importance of these related modalities and their strong draw to those who seek out systemic reforms:

The Western legal system’s approach to justice has some important strengths. Yet there is also a growing acknowledgment of this system’s limits and failures. Those who have been harmed, those who have caused

³⁴⁰ *Id.* at 2.

³⁴¹ *Id.* at 3.

³⁴² Debarati Halder, *Cyber Stalking Victimization of Women: Evaluating the Effectiveness of Current Laws in India from Restorative Justice and Therapeutic Jurisprudential Perspectives*, TEMIDA 103 (December 2015).

³⁴³ Michael King, *Restorative Justice, Therapeutic Jurisprudence, and the Rise of Emotionally Intelligent Justice*, MELBOURNE U. L. REV. 1096 (2008).

³⁴⁴ Kelly Richards, Lorana Bartels & Jane Bolitho, *Children’s Court Magistrates’ Views of Restorative Justice and Therapeutic Jurisprudence Measures for Young Offenders*, 17 YOUTH JUSTICE 22 (2017).

³⁴⁵ John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULLETIN 244 (2002).

³⁴⁶ Annette Van Der Merwe, *Therapeutic jurisprudence: judicial officers and the victim’s welfare – S v. M 2007 (2) SACR 60 (W)*, 23 S. AFRICAN J. CRIM. JUSTICE 98 (2010).

³⁴⁷ Tali Gal & Vered Shidlo-Hezroni, *Restorative Justice as Therapeutic Jurisprudence: The Case of Child Victims*, in THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES 139-167 (Edna Erez, Michael Kilchling & Jo-Anne Wemmers, eds., 2011).

³⁴⁸ Robert F. Schopp, *Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 665 (1998).

harm, and community members in general often feel that the criminal justice process shaped by this legal system does not adequately meet their needs. Justice professionals – law enforcement officers, judges, lawyers, prosecutors, probation and parole officers, prison staff – frequently express a sense of frustration as well. Many feel that the criminal justice process deepens social wounds and conflicts rather than contributing to healing or peace.³⁴⁹

2. Preventive Law

In a 1997 article discussing the integration of preventive law and TJ for purposes of legal practice, Dennis Stolle, David Wexler, Bruce Winick, and Edward Dauer defined preventive law as:

“...a branch of law that endeavors to minimize the risk of litigation or to secure more certainty as to legal rights and duties.” Preventive law provides a framework in which the practicing lawyer may conduct professional activities in a manner that both minimizes his or her clients’ potential legal liability and enhances their legal opportunities. In essence, preventive law is a proactive approach to lawyering. It emphasizes the lawyer’s role as a planner and proposes the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities.³⁵⁰

TJ scholars have long recognized the strong connections between therapeutic jurisprudence and preventive law. Preventive law is a dominant theme in Bruce Winick’s final book, *The Reimagined Lawyer*.³⁵¹ In addition, the journal *Psychology, Public Policy and Law* devoted a 1999 symposium issue to TJ and preventive law, featuring articles on lawyering processes, family law, criminal law, alternative dispute resolution, and legal education.³⁵² Other obvious TJ connections to preventive law include tort law, employment law, health law, trusts and estates law, elder law, and other practice areas involving significant preventive assessments and planning.

3. Law and Emotion

The emerging field of Law and Emotion has strong conceptual connections with TJ. Susan Bandes and Jeremy Blumenthal describe the field this way:

³⁴⁹ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 6-7 (rev. ed. 2015).

³⁵⁰ Dennis P. Stolle, David B. Wexler, Bruce J. Winick & Edward A. Dauer, *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15, 16 (1997).

³⁵¹ See WINICK, *REIMAGINED LAWYER*, *supra* note 282 at 45-69 (examining preventive law approaches in private practice).

³⁵² See PSYCHOLOGY, PUBLIC POLICY, AND LAW, *Special Issue: Therapeutic Jurisprudence and Preventive Law: Transforming Legal Practice and Education* (table of contents of issue), available at: <https://psycnet.apa.org/PsycARTICLES/journal/law/5/4>.

The field of law and emotion draws from a range of disciplines in the sciences, social sciences, and humanities to shed light on the emotions that pervade the legal system. It utilizes insights from these disciplines to illuminate and assess the implicit and explicit assumptions about emotion that are found in every area of law. By reevaluating legal doctrine and policy in light of these insights, law and emotion scholarship contributes to more informed, realistic, and effective framework for refining legal doctrine and reforming legal institutions.³⁵³

There is interesting, TJ-relevant work being done in this realm. To illustrate, Shira Leiterdorf-Shkedy and Tali Gal look at how criminal prosecuting attorneys process and experience a broad range of emotions.³⁵⁴ Among other things, their study highlights “the fallacy of the depiction of the prosecutor as a rational, emotionless figure” and prompts discussions of how prosecutors can be supported in dealing with the emotionally challenging aspects of their work.³⁵⁵ Other law and emotion topics relevant to TJ include the role of emotions in health policymaking (Amy Campbell),³⁵⁶ TJ and apology, forgiveness, and reconciliation (Susan Daicoff),³⁵⁷ the impact of shame and humiliation in the law (Michael Perlin and Naomi Weinstein),³⁵⁸ and the roles of sympathy and empathy in judicial decision making (Archie Zariski)³⁵⁹

4. Comprehensive Law

Comprehensive Law is a modality developed by Susan Daicoff, encompassing multiple alternative approaches that have emerged largely as a “response to widespread dissatisfaction within the legal system and among lawyers.”³⁶⁰ Comprehensive law, according to Daicoff, is comprised of “converging main ‘vectors,’” including collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.³⁶¹ Together these approaches share “a desire to maximize the

³⁵³ Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 161, 162 (2012).

³⁵⁴ Shira Leiterdorf-Shkedy & Tali Gal, *The sensitive prosecutor: Emotional experiences of prosecutors in managing criminal proceedings*, 63 INT’L J. L. & PSYCHIATRY 8 (2019).

³⁵⁵ See *id.* at 16.

³⁵⁶ Campbell, *Emotion in Health Policymaking*, *supra* note 244 at 693.

³⁵⁷ Susan Daicoff, *Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence*, 13 PEPPERDINE DISPUTE RES. L. J. 131 (2013).

³⁵⁸ Michael L. Perlin & Naomi M. Weinstein, “*Friend to the Martyr, A Friend to the Woman of Shame*”: *Thinking About the Law, Shame and Humiliation*, 24 SO. CAL. REV. L. & SOC. JUSTICE 1 (2014-15).

³⁵⁹ Archie Zariski, *Sympathy and Empathy in Therapeutic Jurisprudence from a Psychoanalytic Perspective: From Freud to Posner and beyond*, 1 INT’L J. THERAPEUTIC JURISPRUDENCE 291 (2016).

³⁶⁰ Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement,”* 6 PEPPERDINE DISPUTE RESOLUTION L. J. 1 (2006) [hereinafter, *Comprehensive Law Movement*]. See generally SUSAN DAICOFF, *COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION* (2011) (providing an in-depth exploration of comprehensive law theory and practice). See also Dale Dewhurst, *Justice foundations for the Comprehensive Law Movement*, 33 INT’L J. L. PSYCHIATRY 463, 473 (2010) (after surveying comprehensive law theory, suggests a renaming to “Comprehensive Justice Movement”).

³⁶¹ Daicoff, *Comprehensive Law Movement*, *supra* note 360 at 1-2.

emotional, psychological, and relational wellbeing” of legal actors and “focus on more than just strict legal rights, responsibilities, duties, obligations, and entitlements.”³⁶²

5. Law and Spirituality

Several members of the TJ community, including Susan Brooks, Marjorie Silver, and Kim Wright, have been actively involved in law and spirituality initiatives.³⁶³ Much of this work is being done via the Project for Integrating Spirituality, Law and Politics (“PISLAP”), “a nationwide network of lawyers, law professors, law students, legal workers, and others who are seeking to develop a new spiritually-informed approach to law and social change.”³⁶⁴ PISLAP endorses the belief “that there exists a universal spiritual bond that transcends any religious, cultural, or social differences.”³⁶⁵

Kim Wright has developed a holistic practice modality called Integrative Law, which mixes spiritual dimensions with practical applications emphasizing alternative dispute resolution, effective client communication and counseling, and systemic approaches to legal problem solving.³⁶⁶ She devotes much of her professional practice to organizing and facilitating programs and discussion groups around the world.³⁶⁷

III. ASSESSING TJ’S STANDING AND PROSPECTS FOR GROWTH

Parts I and II of this article have examined the establishment and growth of therapeutic jurisprudence as a school of theory and practice. This Part engages in an assessment of TJ’s current state and prospects for expanding and deepening its influence.

A. *TJ’s Expanding Global Community*

By the end of the twentieth century, therapeutic jurisprudence had extended its reach well beyond its American base.³⁶⁸ Not surprisingly, the emergence of the email and internet technologies facilitated these interactions and fostered greater communication. Eventually, these ties would become more formalized, in both organizational and collaborative terms, resulting in TJ becoming a truly global community.

For many years, the TJ community’s primary international meeting ground has been the biennial International Congress on Law and Mental Health (“International

³⁶² *Id.* at 5.

³⁶³ Brooks, Silver, and Wright are members of both the ISTJ global advisory committee ([see https://intljtj.com/about/leadership/](https://intljtj.com/about/leadership/)) and the Project for Integrating Spirituality, Law and Politics. See ACTIVE PISLAP PARTICIPANTS, available at: <http://www.spiritlawpolitics.org/activepislapparticipants>.

³⁶⁴ PROJECT FOR INTEGRATING SPIRITUALITY, LAW AND POLITICS (n.d.), available at: <https://static1.squarespace.com/static/553eb164e4b0afb98a30f81a/t/5d24bd50c459de0001705764/1562688849296/PISLAP%2520Brochure%25204.21.19%2520FINAL.pdf>.

³⁶⁵ *Id.*

³⁶⁶ J. KIM WRIGHT, LAWYERS AS CHANGEMAKERS: THE GLOBAL INTEGRATIVE LAW MOVEMENT ix-xii (2016) (topics contained in table of contents).

³⁶⁷ *Id.*

³⁶⁸ See Perlin, *Have You Seen Dignity?*, *supra* note 3 at 1145 (observing how an international TJ conference in England prompted global interest in the field).

Congress”), sponsored and organized by the non-profit International Academy of Law and Mental Health (“IALMH”).³⁶⁹ The International Congress is a substantial, week-long conference that includes dozens of panel discussions each day. It typically offers the dual attraction of compelling topics and speakers and an appealing base location, with the previous five Congresses held in Berlin (2011) Amsterdam (2013), Vienna (2015), Prague (2017), and Rome (2019). In a welcomed association, the IALMH has graciously enabled the TJ network to organize a dedicated stream of TJ-related panels running throughout the conference.

Eventually it became clear to some core members of the TJ community that a more formal organizational structure would be useful, one that could consolidate these activities and support more of the same. Thus, in July 2017, several dozen faculty, practitioners, judges, and students gathered at the International Congress held in Prague to mark the formation of the International Society for Therapeutic Jurisprudence (ISTJ), a non-profit, learned association devoted to fostering the field.³⁷⁰ As of June 2020, ISTJ chapters had been created for France, Ibero-America, India, Ireland, Israel, Japan, Nepal, North America, Oceania, Puerto Rico, and the United Kingdom.³⁷¹ The ISTJ’s board of trustees includes members from Australia, Canada, India, France, the United Kingdom, and the United States.³⁷² Its global advisory council includes members from every continent.³⁷³

In addition, a separate Iberoamerican Association of Therapeutic Jurisprudence has formed, supporting TJ scholarship and practice initiatives in a Spanish-language format.³⁷⁴ It is an active organization with some 1,000 members.³⁷⁵ Among other things, it has sponsored periodic regional conferences featuring TJ research and scholarship.³⁷⁶

Two publishing events during 2019 served notice of TJ’s further maturation as a global scholarly enterprise, with broadening generational diversity and doctrinal content. One was a multi-contributor volume, *The Methodology and Practice of Therapeutic Jurisprudence*, edited by Nigel Stobbs (Australia), Lorana Bartels (Australia), and Michel

³⁶⁹ Information about the biennial Congresses may be obtained at the IALMH website, <http://ialmh.org>.

³⁷⁰ See Yamada, *Launched in Prague*, *supra* note 9.

³⁷¹ See INTERNATIONAL SOCIETY FOR THERAPEUTIC JURISPRUDENCE/CHAPTERS (as of November 2019), available at: <https://www.intltj.com/chapters-interest-groups/>.

³⁷² See ISTJ LEADERSHIP, available at: <https://intltj.com/about/leadership/>.

³⁷³ See *id.* Although national affiliations are not included in this listing, this representation is based on the author’s role, as ISTJ board chairperson, in personally inviting individuals to become part of the global advisory council.

³⁷⁴ ASOCIACIÓN IBEROAMERICANA DE JUSTICIA TERAPÉUTICA, available at: <http://justiciaterapeutica.webs.uvigo.es>. My own language limitations preclude me from engaging in a closer look at this group’s important work. However, those within the TJ community who are more closely familiar with it have reported enthusiastically about the organization’s level of activity.

³⁷⁵ See e.g., Joaquin Lopez, *News from the 3rd Iberoamerican Therapeutic Jurisprudence Congress, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM* (Sept. 15, 2016) (reporting on conference panels and programs), available at: <https://mainstreamtj.wordpress.com/2016/09/15/news-from-the-3rd-iberoamerican-therapeutic-jurisprudence-congress/>.

³⁷⁶ See *id.*

Vols (The Netherlands),³⁷⁷ all of whom have become more closely associated with the TJ community within the past decade or so. The book includes authors from Australia, France, India, The Netherlands, New Zealand, South Africa, and the U.S.³⁷⁸ Sixteen chapters variously cover TJ theory, applications and methodologies, workplace bullying legislation, compassion as an element of TJ, criminal law and procedure, mental disability law, problem-solving courts and the judiciary, and legal aid services for indigent clients.³⁷⁹

The second publishing event was a symposium issue of the peer-reviewed *International Journal of Law and Psychiatry*, honoring TJ co-founder David Wexler and edited by Amy Campbell and Kathy Cerminara, both of whom are also later generation TJ scholars.³⁸⁰ The issue includes articles by authors from Australia, Canada, Israel, Japan, the United Kingdom, and the U.S.³⁸¹ In terms of subject matter, articles cover the development of TJ scholarship, multiple perspectives on criminal justice and problem-solving courts, trauma and public policy, immigration law enforcement, health law and policy, family law, and legal education and the legal profession.³⁸²

In many instances, small groups or even pioneering individuals have been responsible for introducing TJ to their nations' legal systems and legal communities. Here are four examples, including the first three from Asian countries, a region of the world where TJ is starting to build a stronger base:

- Debarati Halder has spearheaded the formation of an Indian chapter of the ISTJ³⁸³ and become a member of the ISTJ board of trustees.³⁸⁴ She has been deeply involved in researching and advocating for the legal interests of women, including the publication of a co-edited volume on applying TJ principles to multifaceted issues of violence against women.³⁸⁵
- A group of Japanese legal scholars is building a TJ presence in their country.³⁸⁶ Among other things, Makoto Ibusuki is directing a new TJ research center at Seijo University in Tokyo and has written about applying TJ measures to the Japanese criminal justice system.³⁸⁷ At the 2019 International Congress on Law and Mental

³⁷⁷ TJ METHODOLOGY AND PRACTICE, *supra* note 4.

³⁷⁸ *See id.* at xi-xv (containing bios of all contributors).

³⁷⁹ *See id.* at vii-viii (table of contents)

³⁸⁰ Amy T. Campbell & Kathy Cerminara, eds., *Editorial*, 63 INT'L J. L. AND PSYCHIATRY 1 (2019).

³⁸¹ *See generally id.*, 63 INT'L J. L. AND PSYCHIATRY at 3 *et seq.*

³⁸² *See generally id.* at 3 *et seq.*

³⁸³ *See Chapters/Interest Groups*, available at: <https://intltj.com/chapters-interest-groups/>.

³⁸⁴ *ISTJ Leadership*, available at: <https://intltj.com/about/leadership/>.

³⁸⁵ *See THERAPEUTIC JURISPRUDENCE AND OVERCOMING VIOLENCE AGAINST WOMEN* (Debarati Halder & K. K. Jaishankar, eds., 2017).

³⁸⁶ *See* David B. Wexler, *Therapeutic Jurisprudence rising in Japan!*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (Sept. 20, 2017) (reporting on TJ program in Tokyo, with Hiroko Goto, Makoto Ibusuki, and Shinichi Ishizuka as hosts), available at: <https://mainstreamtj.wordpress.com/2017/09/20/therapeutic-jurisprudence-rising-in-japan/>.

³⁸⁷ Makoto Ibusuki, *On implementing a therapeutic jurisprudence-based criminal justice system in Japan*, 63 INT'L J. L. AND PSYCHIATRY 63 (2019).

Health, he chaired a session on the evolution of TJ-based legal reform in Japan, joined by four colleagues.³⁸⁸ Ibusuki and Hiroko Goto are co-chairs of the new Japanese chapter of the ISTJ.³⁸⁹

- Pakistani judge Muhammad Amir Munir became familiar with TJ in 2005 and has been introducing it to his nation's legal system since then.³⁹⁰ Thanks in large part to Judge Munir's ongoing efforts, practitioners in Pakistan now have access to TJ-related materials that can be applied to their practices.³⁹¹ For his ongoing commitment to the advancement of the field, the International Society for Therapeutic Jurisprudence named Judge Munir a recipient of its Peggy Hora/Michael Jones Award for Outstanding Judicial Contributions in 2019.³⁹²
- Emma Jones and Anna Kawalek are co-chairs of a new United Kingdom chapter of the ISTJ.³⁹³ In a 2019 article, they describe opportunities and challenges for mainstreaming TJ in a country where the field currently has little presence, with legal education, the legal profession, and problem-solving courts regarded as initial points of access.³⁹⁴ In June 2019, they hosted the first meeting of the new ISTJ chapter, which included six presentations.³⁹⁵

As impressive as this global assemblage may be, TJ's typical manner of international growth reflects one of its greatest liabilities in terms of prospects for expanding its numbers and gaining greater influence. Put simply, much of TJ's expansion has been at the "retail" level, through one-to-one networking, conferences, and workshops. Those who express interest in TJ are likely to get a warm reception. However, it has yet to develop a "wholesale" strategy for staking a bigger claim in the marketplace of ideas. More will be said about this challenge in Section D, below.

³⁸⁸ See *Japanese Way of Therapeutic Jurisprudence: Evolving of TJ-Based Reforms and Criticism*, in CONGRESS ABSTRACTS, *supra* note 8 at 471-73 (describing presentations by Makoto Ibusuki, Tadashi Nakamura, Hiroko Goto, Shinichi Ishizuka & Naomi Sugawara).

³⁸⁹ *Chapters/Interest Groups*, available at: <https://intljtj.com/chapters-interest-groups/>.

³⁹⁰ See Muhammad Amir Munir, *Mainstreaming Therapeutic Jurisprudence in Pakistan* (2017), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3021643.

³⁹¹ See *id.* at 34 (stating that currently "there is some baseline literature available in Pakistan to understand TJ and its local application in court room environment"). Judge Munir's other writings may be accessed via his [Social Science Research Network](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=670902) page: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=670902

³⁹² *Awards & Ovations*, available at: <https://intljtj.com/awards-ovations/>.

³⁹³ *Chapters/Interest Groups*, available at: <https://intljtj.com/chapters-interest-groups/>.

³⁹⁴ See Emma Jones & Anna Kawalek, *Dissolving the stiff upper lip: Opportunities and challenges for the mainstreaming of therapeutic jurisprudence in the United Kingdom*, 63 INT'L J. L. AND PSYCHIATRY 76, 77-82 (2019).

³⁹⁵ Emma Jones & Anna Kawalek, *Therapeutic Jurisprudence in the UK: Reflections on the first meeting of the ISTJ UK chapter*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (Sept. 21, 2019), available at: <https://mainstreamtj.wordpress.com/2019/09/21/therapeutic-jurisprudence-in-the-uk-reflections-on-the-first-meeting-of-the-istj-uk-chapter/>.

B. *TJ in the American Legal Academy: Welcome to the Valley of Tiers*³⁹⁶

Especially within in the American legal academy, efforts to advance TJ as a theoretical framework are taking place against the backdrop of what I call the “Valley of Tiers,” that metaphorical space of legal education where virtually every measure of achievement or influence is framed by conventional prestige affiliations, especially rankings of all sorts that establish pecking orders.³⁹⁷ These measures are notably significant with regard to institutional affiliations and scholarly publication venues.³⁹⁸

To begin, as a field without an elite academic affiliation as its identified place of origin and home base, therapeutic jurisprudence operates in that space and must navigate its realities. The most influential bodies of legal theory during the last century trace their strongest institutional connections to prominent American law schools. They include, for example, legal realism (Yale and Columbia),³⁹⁹ law and economics (Chicago),⁴⁰⁰ and Critical Legal Studies and its identity-based offshoots (Harvard).⁴⁰¹ Among law schools outside the elite circle, only Fordham managed to join the club briefly when, during the 1930s, faculty members became nationally prominent for their work on natural law theory and for their opposition to legal realism and the New Deal legislation.⁴⁰²

By contrast, TJ has no such roots at schools such as Yale, Columbia, Chicago, Harvard, or plucky Fordham. In fact, TJ has no institutional home base at all, and its core leaders have not attempted to designate a given law school to serve in that role.⁴⁰³ In the U.S., locations of recent TJ faculty workshops have included the law schools at Nova Southeastern University, Suffolk University, St. Thomas University (Florida), and the University of Puerto Rico. The seeds of the International Society for Therapeutic Jurisprudence were planted during a workshop lunch session at Suffolk. For several years, the Arizona Summit Law School hosted a TJ scholarship journal, edited by

³⁹⁶ For this section, I am appreciative of responses and feedback to my presentation, “Therapeutic Jurisprudence in the Valley of Tiers,” at the Therapeutic Jurisprudence Scholarly Workshop hosted by Nova Southeastern University, Shepard Broad College of Law, held in September 2019, as well as ongoing conversations with David Wexler and Michael Perlin about TJ and legal scholarship.

³⁹⁷ See generally Yamada, *The Practice of Legal Scholarship*, *supra* note 7 at 122-24 (elaborating upon the “Valley of Tiers” metaphor).

³⁹⁸ See *id.* at 126-30 (discussing law school rankings and journal prestige).

³⁹⁹ See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (2011); Michael Steven Green, *Legal Realism as Theory of Law*, 46 *WILLIAM & MARY L. REV.* 1915, 1917 (2005) (stating that the “legal realist movement flourished back in the 1920s and 30s, primarily at Yale and Columbia law schools and at Johns Hopkins’s short-lived Institute of Law”).

⁴⁰⁰ See Robin I. Mordfin & Marsha Ferziger Nagorsky, *Chicago and Law and Economics: A History*, *U. CHI. L. SCH.* (Oct. 11, 2011), available at: <https://www.law.uchicago.edu/news/chicago-and-law-and-economics-history>; Marsha Ferziger Nagorsky, *Law and Economics 2.0*, *U. CHI. L. SCH.* (Sept. 29, 2011), available at: <https://www.law.uchicago.edu/news/law-and-economics-20>.

⁴⁰¹ See William E. Nelson, *The Importance of Scholarship to Law School Excellence*, 87 *FORDHAM L. REV.* 939, 952-53 (2018) (discussing the Critical Legal Studies movement at Harvard Law School).

⁴⁰² See *id.* at 939-44. See generally Walter B. Kennedy, *A Review of Legal Realism*, 9 *FORDHAM L. REV.* 362 (1940) (critiquing legal realism).

⁴⁰³ The closest the TJ community came to establishing such an institutional base occurred during the late 2000s, by way of efforts to create a center for TJ studies at the University of Miami School of Law, where Bruce Winick held a tenured professorship. However, his death in 2010 effectively ended that initiative.

members of its law review, and aided by an editorial board of faculty members from across the country.⁴⁰⁴

In American legal academe, there may be only limited advantage, if any, in trying to market TJ as a sort of feisty, bottom-up, grassroots movement of theory and practice, with its “home” being a largely virtual one. Many a law professor, especially someone newer to the academy, may be hesitant to affiliate with a school of legal thought not instantly validated by elite connections, even if core TJ values and principles are enormously appealing. After all, even mild risk-taking is not a popular practice in academe.

On this note, I once again appeal to a story about David Wexler (in this case, a more broadly biographical one) as a further conversation prompter about TJ, academic careers, and the pursuit of conventional indicia of scholarly achievement. By any standard measure, Wexler has enjoyed an enormously successful and influential academic career, earning numerous national and international accolades and awards along the way.⁴⁰⁵ However, as TJ increasingly defined his professional focus, he made choices that likely caused other academics to react with either admiration or puzzlement. In particular, during an era when the culture of modern legal education places so much emphasis on rankings and prestige,⁴⁰⁶ TJ’s co-founder has opted to be rather indifferent towards these markers.

In 1967 Wexler began his teaching career at the University of Arizona, and in 1985 he was appointed to a chaired professorship there.⁴⁰⁷ However, he eventually decamped for a tenured position of the University of Puerto Rico’s law school.⁴⁰⁸ Many academics would consider exchanging a chaired professorship at a law school competing for national standing for a regular tenured appointment at a more modestly ranked school to be a questionable decision in terms of building a career trajectory. In his 2016 interview with legal historian Constance Backhouse, Wexler acknowledged that “(t)he move caused a lot of raised eyebrows.”⁴⁰⁹ However, while expressing gratitude for his experiences at Arizona, he shared his feelings about being in Puerto Rico:

But I feel like my work has been better here. I love living here. It energizes me, makes me feel younger, happier. I feel...more productive. I just felt better being here. I said I did it for a ‘therapeutic life.’⁴¹⁰

⁴⁰⁴ See 1 INT’L J. THERAPEUTIC JURISPRUDENCE 1 *et seq.*; *International Journal of Therapeutic Jurisprudence online now!*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM (Sept. 14, 2017), available at: <https://mainstreamtj.wordpress.com/2017/09/14/international-journal-of-therapeutic-jurisprudence-online-now/>.

⁴⁰⁵ See generally David B. Wexler, U. ARIZONA JAMES E. ROGERS COLLEGE OF LAW, available at: <https://law.arizona.edu/david-b-wexler>.

⁴⁰⁶ See Yamada, *The Practice of Legal Scholarship*, *supra* note 7 at 126-135 (2010) (discussing prestige preoccupations in American legal education, especially concerning scholarship and law review publishing).

⁴⁰⁷ David B. Wexler, U. ARIZONA JAMES E. ROGERS COLLEGE OF LAW, available at: <https://law.arizona.edu/david-b-wexler>.

⁴⁰⁸ See *id.*

⁴⁰⁹ Backhouse, *Wexler Profile*, *supra* note 15 at 19.

⁴¹⁰ *Id.*

Wexler's decision to relocate largely for quality of life reasons would parallel a distinctive change in his approach to scholarly publishing. Earlier in his career, he was no stranger to publishing conventional pieces in prestigious law journals. His early scholarly output includes full articles in the *Virginia Law Review*,⁴¹¹ *California Law Review*,⁴¹² *Minnesota Law Review*,⁴¹³ and *Georgetown Law Journal*,⁴¹⁴ among others. However, once therapeutic jurisprudence became his focus, his publication venues became more eclectic, and he began to favor shorter, essay-style writings.⁴¹⁵ For example, for many years, his brief "introduction to TJ" piece was a revised and footnoted speech published in the *Thomas M. Cooley Law Review*.⁴¹⁶ His brisk assessment of the first twenty years of TJ appeared in the *Touro Law Review*.⁴¹⁷ His first explanation of the Therapeutic Design of the Law and Therapeutic Application of the Law framework in a scholarly venue appeared in *Therapeutic Jurisprudence: New Zealand Perspectives*.⁴¹⁸

Many of Wexler's TJ-affiliated colleagues have followed suit. To illustrate, published symposia collections of TJ-related articles have appeared in a wide range of general law reviews, including the *Barry Law Review*,⁴¹⁹ *Florida Coastal Law Review*,⁴²⁰ *Queensland University of Technology Law Review*,⁴²¹ *Suffolk University Law Review*,⁴²² *St. Thomas Law Review*,⁴²³ *Seattle University Law Review*,⁴²⁴ and *Touro Law Review*.⁴²⁵ Peer-reviewed journals such as the *International Journal of Law and Psychiatry*⁴²⁶ and *Psychology, Public Policy & Law*⁴²⁷ have also been popular venues for TJ scholarship. These examples could go on and on.

⁴¹¹ David B. Wexler, *Victimology and Mental Health Law*, 66 VIRGINIA L. REV. 681 (1980).

⁴¹² David B. Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIFORNIA L. REV. 81 (1973).

⁴¹³ David B. Wexler, *Therapeutic Justice*, 57 MINNESOTA L. REV. 289 (1972).

⁴¹⁴ David B. Wexler, *Automatic Witness Immunity Statutes and the Inadvertent Frustration of Criminal Prosecutions: A Call for Congressional Action*, 55 GEORGETOWN L. J. 656 (1967).

⁴¹⁵ This shift apparently was reflective of Wexler's own growing criticisms of lengthy law review articles. Recently Wexler wrote that "(l)aw reviews actually push authors to write *longer* articles and want writing in what I would call a "bulletproof" (if not wholly unintelligible) form and language," adding that "(w)orse still, academic culture seems to support publication in such journals and to disparate other outlets. Wexler, *The DNA of TJ*, *supra* note – at 10.

⁴¹⁶ Wexler, *TJ Overview*, *supra* note 14.

⁴¹⁷ Wexler, *Two Decades of TJ*, *supra* note 3.

⁴¹⁸ Wexler, *Therapeutic Design and Application*, *supra* note 25.

⁴¹⁹ See 17 BARRY L. REV. 1 *et seq.* (2011) (symposium articles on collaborative law and TJ).

⁴²⁰ See 11 FLORIDA COASTAL L. REV. 107 *et seq.* (2010) (symposium issue articles and essays on TJ).

⁴²¹ See 16 QUEENSLAND U. TECH. L. REV. 1 *et seq.* (2016) (symposium issue articles on TJ)

⁴²² See III SUFFOLK U. L. REV. ONLINE 9 *et seq.* (2015) (symposium issue essays on TJ).

⁴²³ See 17 ST. THOMAS L. REV. 403 *et seq.* (2005) (symposium on TJ applications to clinical education and legal practice).

⁴²⁴ See 24 SEATTLE U. L. REV. 215 *et seq.* (2000) (symposium articles on TJ and appellate law).

⁴²⁵ See 18 TOURO L. REV. 435 *et seq.* (2002) (symposium issue articles on TJ).

⁴²⁶ E.g., 63 INT'L J. L. AND PSYCHIATRY 1 *et seq.* (2019) (symposium issue honoring TJ co-founder David Wexler); 33 INT'L J. L. & PSYCHIATRY 279 *et seq.* (2010) (symposium articles on TJ).

⁴²⁷ E.g., 5 PSYCHOLOGY, PUB. POL'Y & L. 795 *et seq.* (1999) (symposium on TJ and preventive law). Winick, *The Jurisprudence of TJ*, *supra* note 28; Slobogin, *Five Dilemmas*, *supra* note 29; Robert F. Schopp, *Sexual predators and the structure of the mental health system: Expanding the normative focus of therapeutic jurisprudence*, 1 PSYCHOLOGY, PUB. POL'Y & L. 161 (1995).

Indeed, in light of the overall list of publication venues referenced above, it may appear that TJ-affiliated scholars have been inattentive at times to conventional considerations of academic publishing, in stark contrast to priorities of the American legal academy generally. While perhaps true in some ways, the subject has not been ignored from within. For example, for several years, David Wexler, Michael Perlin, and I have engaged in a recurring exchange about whether we all should devote more attention to placing articles in journals deemed highly ranked, with no consensus agreement among us. Our discussions have covered the challenges of placing articles on topics that may be unfamiliar, or seem esoteric, to student law journal editors, submitted by authors with academic appointments at institutions outside the circle of prestigious U.S. law schools.⁴²⁸ We have also heard from some colleagues in other countries, who have shared that their institutions expect them to place their articles in highly ranked journals for tenure and promotion purposes.

My own position is that the realities of academic culture (or the academic marketplace, to put it more bluntly) do not permit us to disregard these issues. Overall, I believe that TJ-affiliated scholars need to be somewhat more strategic about seeking out publication venues, taking into account that some prospective readers may be prone to pre-judging the quality of their work based on where it appears.⁴²⁹ I have seen how articles breaking genuinely new ground can benefit greatly from a more prestigious placement, while writings that contribute to ongoing dialogues or to intramural discussions within a specific group may do so effectively regardless of where they appear, especially if the author has already developed a following for their work.⁴³⁰

Ultimately, it is about striking a balance. It appears that many TJ-affiliated, American law faculty are not overly caught up with issues of academic prestige. Of course, we are pleased by the so-called “good placement” of a law review article. We further recognize that traditional academic milestones can translate into advantages toward advancing our work. In addition, quite frankly, our attitudes may reflect the fact that many of us are tenured and are not necessarily looking to move on to more prestigious institutions. In any event, as I wrote about the culture and practice of legal scholarship:

⁴²⁸ Of the American law professors currently on the board of trustees of the International Society for Therapeutic Jurisprudence, their primary academic affiliations are with the New York Law School, Nova Southeastern University Shepard Broad College of Law, Suffolk University Law School, UIC John Marshall Law School, and University of Puerto Rico Law School.

⁴²⁹ See Yamada, *The Practice of Legal Scholarship*, *supra* note 7 at 131 (discussing how snap judgments are made on article quality based on perceived prestige of journal).

⁴³⁰ I have taken this path for two topics in which I have played lead roles as a scholar and law reform advocate, workplace bullying and unpaid internships. In both instances, conventionally prominent journal placements (*Georgetown Law Journal* and *Connecticut Law Review*, respectively) helped to establish initial credibility. See Yamada, *The Phenomenon of Workplace Bullying*, *supra* note 12; David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONNECTICUT L. REV. 215 (2002). On both topics, I have published subsequent articles, book chapters, and social media pieces in a wide variety of venues, with much less regard for perceived prestige considerations.

Finally, let us acknowledge that all decisions come with trade-offs. Perhaps we foreclose certain opportunities by being less devoted to the paper chase for prestige, but there are plenty of corresponding benefits as well. Academic culture can wreak havoc on one's personal value system, with external measures sometimes overcoming independent judgment and a healthy inner-directedness. A more therapeutic attitude toward scholarship teaches us to resist these external messages, or at least to pick and choose wisely among them. After all, in the Valley of Tiers, we must all work on staying grounded.⁴³¹

C. *Diversity, Difference, and Hierarchies of Legal Stakeholders*

In 2004, Carolyn Copps Hartley and Carrie Petrucci emphasized the importance of a “culturally competent approach to lawyering” in a therapeutic jurisprudence mode, adding that “culture and multiculturalism can encompass a broad range or unique characteristics among people, including race gender, age, sexual orientation, social class, ethnicity, religion, and able-ness.”⁴³² These issues of diversity and difference have only become more prominent in the law, legal profession, and larger society since then. TJ would benefit doctrinally, and as a community, by making stronger connections in this regard.

The TJ community's most distinctive diversity trait is a broadening span of nationalities represented among affiliated scholars, judges, and practitioners. However, as measured by demographic categories commonly used in the U.S., this community appears to be lacking in some forms of diversity, especially in terms of race and, quite likely, sexual minorities as well. Bruce Winick may have indirectly anticipated this state of affairs in his 1997 examination of TJ, which included reference to schools of jurisprudence associated with interest groups:

All of these schools of jurisprudence seek to advance the well-being of people whose welfare is affected by the law. Critical legal studies, feminist jurisprudence, and critical race theory seek to advance the well-being of particular groups – the politically oppressed, women, and racial minorities. Therapeutic jurisprudence, although it focuses on a more narrow aspect of well-being (the therapeutic), is not limited in its concern to particular groups. It seeks to promote the psychological and physical well-being of people generally.⁴³³

Nonetheless, TJ is very compatible with schools of legal thought that are devoted to the interests of specific groups. As Winick further noted, “(o)ne need not reject the normative goals of any of these schools to accept therapeutic jurisprudence,” adding, for

⁴³¹ Yamada, *The Practice of Legal Scholarship*, *supra* note 7 at 155.

⁴³² Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASHINGTON U. J. L. & POL'Y 133, 136 (2004).

⁴³³ Winick, *The Jurisprudence of TJ*, *supra* note 28 at 189.

example, that “(t)reating women with equality in the workplace” is consistent with both feminist and therapeutic values.⁴³⁴ Overall, TJ’s embrace of well-being, dignity, and compassion should appeal to those who are devoted to advancing the interests of people who have been disempowered or mistreated by our laws and legal systems.

These points notwithstanding, TJ has largely avoided ranking or prioritizing legal stakeholders, which may be problematic to those whose legal and policy alliances are grounded in identity-based or class-based constructs of power and oppression in society. While it is fair to hypothesize that a strong majority of individuals who ally themselves with TJ range from the left to the middle of the political spectrum and are keenly attentive to abuses of power, the field in general has not adopted express hierarchies of stakeholder interests. Thus, for example, TJ can be properly summoned in writings about protecting sexual assault victims from further traumatization (Hadar Dancig-Rosenberg),⁴³⁵ safeguarding the rights of individuals accused of being sexually violent predators (Heather Cucolo and Michael Perlin),⁴³⁶ parties’ interests in sex crime legislation (Christian Diesen and Eva Diesen),⁴³⁷ and balancing autonomy versus public safety in the noncustodial supervision of sex offenders (Astrid Birgden).⁴³⁸ The fact that each is considered a valid application of TJ theory and practice may fuel passages such as this one from Bruce Arrigo, one of the TJ’s harshest critics:

Stated briefly, therapeutic jurisprudence conceives of the public as an undifferentiated and homogenous whole, denies individual and group differences, and produces stabilising, unifying, and totalising categories of reason, sense-making, logic, and thought that dismiss uncertainty, heterogeneity, diversity, and otherness.⁴³⁹

While TJ may not always invoke the language of class, identity, and diversity, it hardly regards humanity as a homogeneous and indistinguishable mass. In fact, TJ-inspired work in areas such as problem-solving courts (which seek diversionary options to incarceration) and the legal interests of Indigenous populations surely attests to how the field recognizes and addresses difference and inequalities of resources, opportunities, power, and social status. Also, TJ has always demonstrated a willingness to embrace nuance and complexity, and it has never claimed to be the exclusive lens through which law and policy should be evaluated and made. Against this factual backdrop, Arrigo’s criticisms seem to be excessive. However, they at least suggest why TJ may not be an

⁴³⁴ *Id.*

⁴³⁵ Hadar Dancig-Rosenberg, *Sexual assault victims: Empowerment or re-victimization? The need for a therapeutic jurisprudence model*, in TRENDS AND ISSUES IN VICTIMOLOGY 150 *et seq.* (Natti Ronel, K. Jaishankar and Moshe Bensimon, eds., 2008).

⁴³⁶ Heather Ellis Cucolo & Michael L. Perlin, “*Far From the Turbulent Space*”: *Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PENN. REV. L. & SOC. CHANGE 125 (2015).

⁴³⁷ Christian Diesen & Eva F. Diesen, *Sex crime legislation: Proactive and anti-therapeutic effects*, 33 INT’L J. L. & PSYCHIATRY 329 (2010).

⁴³⁸ Astrid Birgden, *Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis*, 1 PSYCHIATRY, PSYCHOLOGY & L. 78 (2007).

⁴³⁹ Arrigo, *The Ethics of TJ*, *supra* note 108 at 37 (2004).

easy “sell” to individuals with strong identity or class affiliations and who seek the same in their professional and academic networks and communities.

D. *Building TJ’s Influence: Points of Connection*

To build its influence, the TJ community must supplement its “retail” outreach approach with a wider-reaching “wholesale” one. In fact, this article is a modest attempt to help meet that latter need, by canvassing the field in a way that is accessible to a potentially larger audience. Here are some notes designed to encourage further discussion:

1. Legal Education

Our law schools are the primary producers of lawyers and legal scholarship. Accordingly, TJ must build a stronger, more mainstreamed presence within legal education, in the realms of both teaching and scholarship. As noted above, TJ’s lack of a home base connection to elite legal academic institutions renders this a challenge.

In terms of teaching, therapeutic jurisprudence is worthy of being among the frameworks of legal thought and practice to which law students should be introduced. Michael Jones, the late Arizona judge (discussed above) who built a second career as a law professor and incorporated TJ into his teaching, asserted that TJ exposes “students to innovative perspectives that demand rigorous application of one’s knowledge and values in a creative problem-solving approach.”⁴⁴⁰ In short, awareness of TJ can fuel students’ intellectual growth and readiness for legal practice. Members of the International Society for Therapeutic Jurisprudence should play a leadership role in fostering a conversation about how to expand TJ’s presence in the law school curriculum. This dialogue should consider ways in which to make the rich body of TJ work more available to law faculty for teaching purposes.

In terms of legal scholarship, TJ adds valuable theoretical and applied insights to our understanding of law, policy, legal institutions, and related interdisciplinary practices. As evidenced above, TJ offers enormous promise and opportunity for further scholarly exploration, both theoretical and applied. TJ-affiliated scholars need to develop ways to get this field and their individual work in front of wider legal academic audiences. Again, ISTJ members should be engaging in this broader conversation and developing “wholesale” strategies that can enhance the field’s presence in the world of legal scholarship.⁴⁴¹

2. Continuing Legal Education

Continuing legal education (CLE) presents a largely untapped opportunity to expand TJ’s reach into the practicing bar. As I shared in 2015, although the content of mainstream CLE programs “is overwhelmingly weighted toward black-letter legal

⁴⁴⁰ See Jones, *Teaching TJ*, *supra* note 274 at 25.

⁴⁴¹ See discussion and references accompanying note 276.

updates and immediate implications for practice,” after several years of experiencing the realities of legal practice, many lawyers may be receptive to changing “the practice and the substance of law in ways compatible with basic TJ principles.”⁴⁴² CLE programs can be one way of encouraging those conversations within the legal profession.

Marjorie Silver’s report on a CLE conference that she organized at Touro Law Center in New York, “Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law,”⁴⁴³ offers a close look at the promise of how this form of professional education can move us beyond case summary outlines and into deeper, more reflective modes of thinking about the practice of law. The Touro conference was built around the theme of comprehensive law, including “therapeutic jurisprudence, collaborative lawyering, transformative mediation, and other approaches which aim to transform the practice of law into a humanistic and healing force rather than a confrontational and hurtful process.”⁴⁴⁴ Silver’s uncertainty over “whether there would be much interest among the practicing bar” in the conference was soon overcome “by a great deal of interest in this emerging field among practicing attorneys,” with registration (over 150 participants) exceeding that of any previous CLE program at her law school.⁴⁴⁵

An example of a more directed, niche form of continuing education comes by way of the Justice Speakers Institute, created by Peggy Hora (retired judge, discussed above in connection with her foundational work on TJ and problem solving courts), Brian McKenzie (retired judge and former president of the American Judges Association), and David Wallace (former director of the National Center for DWI Courts and expert on traffic safety).⁴⁴⁶ JSI offers seminars, workshops, and programs on a wide variety of topics concerning judicial administration and courtroom advocacy, including therapeutic jurisprudence and related topics.⁴⁴⁷ The work of JSI illustrates how members of the TJ community can be more entrepreneurial about developing continuing education opportunities for the bar and bench.

Another possibility for continuing education is online learning. For example, Michael Perlin and Heather Ellis Cucolo have co-taught an online, non-credit continuing education course on Trauma and Mental Disability Law.⁴⁴⁸ The course is presented through a TJ framework, covering “trauma-related disabilities in civil and criminal courts, the role of trauma in the legal treatment of people with mental disabilities, the

⁴⁴² David C. Yamada, *Therapeutic Jurisprudence and Continuing Legal Education* (2015) (presentation at the International Congress of Law and Mental Health, Vienna, Austria, July 13, 2015, copy of outline on file with the author).

⁴⁴³ See Marjorie A. Silver, *Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law*, 19 TOURO L. REV. 773 (2004).

⁴⁴⁴ *Id.* at 774.

⁴⁴⁵ *Id.* at 775-76.

⁴⁴⁶ See *The Founders of the Justice Speakers Institute*, JUSTICE SPEAKERS INSTITUTE, available at: <http://justicespeakersinstitute.com/the-founders-and-associates-of-jsi/>.

⁴⁴⁷ See *Our Topics of Expertise*, JUSTICE SPEAKERS INSTITUTE, available at: <http://justicespeakersinstitute.com/our-expertise/>.

⁴⁴⁸ TRAUMA AND MENTAL DISABILITY LAW, available at: <https://concept.paloaltou.edu/product/trauma-and-mental-disability-law/>.

relationship between trauma and disability reduction, and the relationship between stigma and trauma.”⁴⁴⁹

3. Trial Court Judiciary

When weighing the influence of the judiciary on the development and practice of law, appellate courts naturally receive the lion’s share of attention. They create the precedent that guides lower courts, attorneys, and litigants. Their decisions can shape human behavior and decision making. The case system of study learned by many law students is shaped around the parsing of appellate decisions.

However, from a standpoint of shaping the administration and application of justice in ways that affect everyday people who have dealings with legal systems, the trial courts have more collective influence. Lawyers, parties to litigation, jurors, and the general public have a lot more contact with trial-level courts than with appellate tribunals. Trial court judges are the rulers of their courtrooms and have great say as to how justice is carried out, how lawyers are expected to conduct themselves, and how litigants and witnesses are treated. If our legal systems are to be perceived as embracing legal stakeholders with fairness, dignity, and integrity, then it is in the trial courts where those impressions are most likely to be made.

Thus, it is to the TJ community’s advantage that most of the judges who associate with it preside at the trial court level. These judges have an intimate understanding of how the law impacts individuals on a daily basis. Many of their judicial colleagues may be receptive to some of the judicial practices and reforms being developed, practiced, and proposed within the TJ community. The ISTJ should continue to help to develop and implement approaches for expanding awareness of TJ within judicial networks.

4. Psychology and Psychiatry

TJ scholars and practitioners would benefit greatly by establishing stronger formal ties to the disciplines of psychology and psychiatry. This recommendation may seem odd, given TJ’s already warm embrace of psychological and psychiatric insights and research. However, stronger connections to these disciplines will result in better, more persuasive, evidence-based scholarship, practice, and law reform.⁴⁵⁰ Within these disciplines, two branches are especially relevant to TJ work: psychological trauma and positive psychology. Psychological trauma pertains to so much of the individual suffering that our legal systems can and should address.⁴⁵¹ Positive psychology helps to shape aspirational

⁴⁴⁹ *Id.* (“Description” tab).

⁴⁵⁰ See Yamada, *On Anger, Shock, Fear, and Trauma*, *supra* note 13 at 40 (citing eight branches of psychology relevant to TJ and public policy).

⁴⁵¹ See *id.* at 36-38 (discussing trauma inflicted by American immigration policy implementation and legislative debates over health care policy); Campbell, *Trauma-Informed Early Care and Learning System*, *supra* note 307 at 45-46 (discussing trauma prevention and mitigation concerning adverse childhood events); Lenore E. Walker, *Looking back and looking forward: Psychological and legal interventions for domestic violence*, 1 ETHICS, MEDICINE & PUB. HEALTH 19 (2015) (discussing TJ-based legal interventions and trauma treatment for domestic violence); Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-*

goals in terms of effecting therapeutic outcomes for legal events and transactions, policy design, and a psychologically healthier legal profession.⁴⁵²

CONCLUSION: AN INVITATION

Building on its original focus on mental health law, criminal justice, and problem-solving courts, therapeutic jurisprudence now applies its multidisciplinary lens to many different areas of law, policy, and practice. It has created a close-knit community with strongly shared values, while transcending strict ideologies, geographic boundaries, and rigid directives. TJ is grounded in a belief that our laws, legal systems, and legal institutions – and legal actors within them – should strive to affirm dignity and well-being, fueled by compassion and informed by insights about what makes us human. Those who find such values, understandings, and objectives for the law compelling and attractive may well find a home in this community of scholars and practitioners.

By issuing an invitation to join this community, I acknowledge a qualified element. An association with TJ is not for those who seek a fast and quick way up the slippery pole of conventional ambition. Especially in the U.S., TJ's academic base is distributed mainly among law schools and departments of universities regarded as regional, not national, institutions. TJ-associated judges preside primarily at the trial court levels and are often operating outside of the judicial mainstream. TJ-associated legal practitioners are mostly sprinkled among smaller law firms and the public interest sector, as opposed to large commercial law firms and corporations.

Those not dissuaded by this disclosure are warmly invited to join this venture. Opportunities abound in virtually every area of TJ-related inquiry for contributing ideas, research, and practices. With regard to scholarship, many theoretical, doctrinal, procedural, and institutional topics have become subjects of a TJ focus due to the efforts of a handful of people – and in some cases, lone scholars or practitioners. Accordingly, possibilities for doing original, meaningful work abound, especially outside of TJ's original focal points.

Those drawn to TJ will find that a genuine community awaits them. As Stobbs, Bartels, and Vols observe, “If you ask someone about their initial perceptions of interacting with a group of therapeutic jurisprudence (TJ) practitioners and scholars, a

Informed Lawyering, 22 CLINICAL L. REV. 359 (2016) (discussing the central characteristics of practicing trauma-informed lawyering); Meghan Gallagher & Michael L. Perlin, “*The Pain I Rise Above*”: *How International Human Rights Can Best Realize the Needs of Persons with Trauma-Related Mental Disabilities*,” 29 FLORIDA J. INT’L L. 271 (2017) (surveying international legal instruments as sources of protections for persons suffering from trauma-related disabilities).

⁴⁵² See R. Lisle Baker, *Designing a Positive Psychology Course for Lawyers*, LI SUFFOLK U. L. REV. 207 (2018) (discussing design of a positive psychology course for use by legal educators); R. Lisle Baker, *Integrating Positive Psychology into Legal Education*, 48 SOUTHWESTERN L. REV. 295 (2019) (discussing uses of positive psychology in legal education); Mirko Bagaric & James McConvill, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 DEAKIN L. REV. 1 (2005) (exploring role of positive psychology for developing and evaluating the law).

word that is very often used to describe these perceptions is ‘community.’⁴⁵³ They reference “the shared attitudes, interests, beliefs and values which tend to characterize the worldviews and the work of members of the TJ community.”⁴⁵⁴ They add that many TJ adherents “can usually point to a particular watershed moment in their careers where they observed the law unnecessarily harming people (having an anti-therapeutic effect), leading to a realization that the law itself has powerful agency.”⁴⁵⁵

Of course, shared interests and values alone do not necessarily create community. In the case of TJ, it also includes a collective commitment toward creating and maintaining a healthy and supportive academic and professional culture. Having traveled in many circles during a legal and academic career spanning some 35 years, I can attest that this community makes a sincere effort to practice its purported values, and it mostly succeeds in doing so. Dialogue is both spirited and respectful, “bashing” of others’ work is deeply discouraged, contributions of newcomers are welcomed, and there is a collective sense of building something meaningful together. Genuine friendships grow out of these ties as well. As I recently wrote:

Our association with this community helps to renew and enlighten us, not to mention sustains us when spirits flag. Despite the inevitable frustrations of working to change our laws and legal systems for the better, we are blessed to have these opportunities and to engage in work that renders our labors a genuine calling.⁴⁵⁶

On those words, I close, with hopes that this commentary, and the insights and ideas of those discussed and cited within it, will inspire others to join us and contribute to the good work being done in this compelling field of theory and practice.

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⁴⁵³ Stobbs, Bartels, & Vols, *Strong Community and Maturing Discipline*, *supra* note 139 at 15.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ Yamada, *TJ and Legislation*, *supra* note 13 at 103.