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## FORWARD

Dear Readers,

Thank you for taking the time to peruse this inaugural issue of The International Journal of Therapeutic Jurisprudence. In this issue, we have presented an eclectic mix of Therapeutic Jurisprudence articles from students, academics, and practitioners throughout six countries across the globe.

The International Journal of Therapeutic Jurisprudence was a logical progression in expanding our main journal, Arizona Summit Law Review. The mission of the International Journal of Therapeutic Jurisprudence is to publish practical material that engages and influences the legal and scientific communities. This journal seeks to supplement traditional law review articles with work from all fields. With the help of Professor David Wexler, we hope to continue our collection of TJ articles and expand our readership throughout the legal and scientific communities.

While many of the articles in this issue address several focuses in the field of TJ, we have organized this issue according to four main topics: TJ in Practice, Sentencing and Restoration through TJ, Mainstreaming TJ, and Integrating Procedural Justice with TJ. We hope this will help you find a starting place for your particular interest.

Whether you are an attorney or social scientist, student or practitioner, we hope this issue will provide you with insight as to how you can use TJ in your field to better provide therapy through law.

--Arizona Summit Law Review

# THE INTERNATIONAL JOURNAL OF THERAPEUTIC JURISPRUDENCE

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RELEASE AND SUPERVISION: RELATIONSHIPS AND SUPPORT  
FROM CLASSIC AND HOLISTIC ATTORNEYS

Martine Herzog-Evans\*

“A lawyer might well choose to practice ‘traditional’ criminal law, but infuse the practice with Therapeutic Jurisprudence concerns throughout the process” (Wexler, 2005: 745).

Attorneys’ contributions both to the desistance process and to criminal justice’s legitimacy in the sentence implementation phase have seldom been studied, particularly in non-English-speaking jurisdictions. The present study is an attempt to bridge this gap through a qualitative methodology (interviews, observation, and immersion) that focuses on attorneys and probationers. Through this study, I have found that attorneys, albeit not very knowledgeable in the desistance route and literature, do contribute to this complex process. Attorneys do this by often acting in lieu of overloaded and un-invested probation services, by actively and collaboratively contributing to their clients’ release plans, by focusing on their clients’ strengths and positives actions and attitudes, and by developing a positive working relationship with their clients. I have also found that attorneys strongly contribute to the criminal justice system’s legitimacy as they are among the main participants in a fair trial procedure. Furthermore, attorneys compel other actors to behave neutrally and respectfully, respect and care for their clients, espouse their causes, and translate and interpret their clients’ voices in court.

This research has additionally tested a holistic versus a classic dichotomy amongst lawyers, which was uncovered in a previous study about French reentry courts. However, rather than a clear-cut dichotomy, I have discovered a continuum on

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\* Professor, University of Rheims, France

which attorneys situate themselves, either in general or depending on their client or the case. I have also found that an important minority wanted to be holistic with at least with some of their clients (e.g. vulnerable, long sentences) but were not in a capacity to behave in such a way due to financial and time factors.

## I. INTRODUCTION

Desistance literature presents offenders' rehabilitation as being a long, complex, and difficult process (see Farrall et al., 2014) where social (employment, housing, family, etc.) and human (emotions, motivation, education, etc.) factors play a considerable part. Probation personnel account for a mere fraction (Farrall, 2002), essentially limited to planting a seed for future use (Farrall et al., 2014). However, in many criminal justice systems ("CJS"), probation services do not have a monopoly on offender supervision and rehabilitation support. Courts may participate in this endeavour, in particular through "good courts," such as problem-solving courts (Bermann and Feinblatt, 2005). Attorneys are present in such courts in order to present release applications to defend their clients in breach cases. They may also support many other requests (the modification of obligations, furlough applications, the conversion of a community measure for another, etc.). Unfortunately, previous research on desistance has not focused on this diversity of practitioners.

To the contrary, over the last six years, my research has focused on all French probation practitioners' knowledge and practice of desistance. In so doing, I have found that between 2009 and 2010, French probation officers had very little knowledge of desistance and what it entailed (H-Evans, 2011 and 2012), and their practice was very hands-off and unsupportive due in large part to their institutional 'prisonbation' environment (H-Evans, forthcoming). I have also studied French reentry and supervision courts (*juges de l'application*

*des peines*, “JAP”). These courts are a system that can be considered the ancestor of United States problem-solving courts (H-Evans, 2015). Using a mix of quantitative and qualitative methodologies, I found that French JAP were desistance knowledgeable and acted accordingly both during their interaction with offenders and in their rulings (H-Evans, 2014a). However, the frequency of their interactions with offenders was limited. Another study found that the third sector (which was the study’s focus) accomplished, in practice, much of the reentry and social work offered to sentenced offenders, and sentenced offenders had a much higher opinion of the third sector than of probation officers (H-Evans, 2014b). The question remained, however, whether attorneys also contributed to desistance (for a positive answer: Wexler, 2005) and how they did so.

Another literature domain is important when analyzing the roles of judicial actors. A legitimate group of justice scholars (Tyler, 2006, 2012; de Mesmeacker, 2014) have found that a series of factors account for why justiciable persons, including offenders, obey the law and comply with the CJS:

- “voice,” that is, allowing the offenders to express their points of view, which suggests that attorneys can play an active role in supporting them in doing so;
- “neutrality,” which refers both to objective (i.e. apparent impartiality) and to subjective impartiality (i.e. CJS’s actors’ inner and true impartiality) and which includes courts’ independence (van Compernelle et al., 2006). Attorneys can contribute to neutrality by acting as counter-power forces;
- fact-finding, as these practitioners can both provide proof and dispute evidence;

- care and interest in the offender's case and future, which attorneys may promote directly through their own attitudes; and
- respect for the person and for the person's "status" in which attorneys may play a part through their own attitude and by ensuring that the CJS behaves in a civil and considerate manner.

Unfortunately, no empirical study has thus far supported that findings on the legitimacy of justice are transferable to the release and supervision phase of the penal continuum (for a theory of such continuum, see H-Evans, 2015a), although there are good reasons to believe they indeed are (Digard, 2015; Hough, 2015).

Therapeutic jurisprudence, which is a legal body of literature rather than a body of empirical literature, is both a lens and a compass that aims at making good justice. Therapeutic jurisprudence deals with the emotional and mental well-being of *justiciables*—that is, in French, people in contact with the judicial system for whatever reason (Wexler and Winick, 1996). Attorneys can contribute to the well-being and therapeutic approach by encouraging the CJS to go beyond punishment and the documents contained in a file towards focusing on the human being and her or his circumstances.

When focusing on courts, I have also tested for the legitimacy and therapeutic jurisprudence components and found that they were generally present in the French court-led reentry and supervision context, but they were impaired by severe judicial lack of funding and overload (H-Evans, 2014a). Thus, the context in which French attorneys operate is rather favorable overall since fair trial principles apply (H-Evans, 2014a) and since re-entry and supervision judges are in charge of release, im-



portant supervision decisions (e.g. adding obligations), and sanctions (H-Evans and Padfield, 2015).

Most French criminal lawyers thus regularly defend their clients in French reentry courts, for release applications, for breach cases, and at important post-trial conversion procedures (H-Evans and Padfield, 2015). Custodial sentences of up to two years are systematically processed to the JAP if no bench warrant has been issued, and they are routinely transformed into community sentences or measures (“CSM”).

The aforementioned “JAP research,” showed a dichotomy between classic lawyers and holistic lawyers, which I later discovered had been suggested elsewhere (International Alliance of Holistic Lawyers: <http://www.iahl.org/>, which unfortunately dissolved in 2011). Similarly, Daicoff (2006) found that some attorneys were more oriented in an adversarial direction, whereas others were more naturally collaborative.

To the contrary, in France, very little literature has focused on attorneys, except for that of sociologist Milburn (2002) who found that one of the two main keys to criminal attorneys’ professionalism was their relational competence. Unfortunately, he did not investigate what the meaning of this relationship could be or whether attorneys were particularly good at this exercise.

Internationally, a lot of research has addressed attorneys in the PSC context. The researchers have found that lawyering in the developing PSC framework required a change in how attorneys’ work was perceived, and what it meant to win (Clarke and Neuhard, 2004). In short, they found that attorneys should become more collaborative and perhaps even adopt a social work-like (Potter, 2005) and emotional (Winick, 1999) stance—an assertion which has been contested (e.g. amongst many: Kempinen, 2011; Casey, 2004; Meekins, 2007). In France, this particular difficulty was bound to be much less pronounced as the system is not adversarial, and attorneys are used to switching from one case to another—even, at times, within the con-

text of a given case--from an adversarial stance to a much more collaborative one, depending on their client's best interest. It is indeed likely that continental Europe's legal system is best fitted for alternative and "softer" legal practices (Freiberg, 2011).

More specifically, in the context of probation and reentry, David Wexler (2005) has confirmed that a therapeutic jurisprudence approach obliges lawyers to embrace different roles and to focus on the bigger picture of their clients' rehabilitation, which implies that they should focus on the relational dimension of lawyering (Wexler, 2008 and 2011).

Focusing on attorneys, in this study, I thus endeavored to "identify the potential rehabilitative role of the attorney... through conditional or unconditional release" (Wexler, 2005: 745) in a context where due process is understood in a legitimacy of justice and therapeutic jurisprudence sense, with the idea of "maximizing desistance" (Birgden, 2015). I thus had the following goals in this study:

First, to test the hypothesis that attorneys contribute to the desistance process and how they do so;

Second, to test the hypothesis that attorneys contribute to the legitimacy of the justice process and help the CJS operate in a more therapeutic way;

Last, to further test the holistic verses classic dichotomy, which was previously discovered via practitioners' interviews in the aforementioned JAP research, by adding immersion and observation.

## II. METHODOLOGY

This study is essentially qualitative and comprises interviews, observation, and immersion. A team of fourth- and fifth-year law students from Nantes University (Marie Durant) and Reims University (Mélissa Bauser, Julie Marot, Sophie

Dehaye, Chloé Pigeot, and Noémie Rodrigues) joined me to conduct the fieldwork during the 2013 to 2014 university term. These participating students were each interning with attorneys for a several month term.

The study focused on twenty-seven attorneys working in four jurisdictions: Reims, Châlons, Troyes, and Nantes. The first three are in the northeast of France, and the fourth is on the west coast of France. Sixteen of these attorneys were males and eleven were females. Their experiences ranged from four and a half months to thirty-one years. Interestingly, three held a PhD, a parallel access avenue for attorneys in France.

Eight JAPs were also interviewed in the same areas, but their interviews will not be used for the present article. Additionally, sixteen probationers were interviewed, all of whom were males. However, we only had access to such probationers in Nantes (“N6”) and Reims (“N10”). These probationers had obtained a “semi-freedom” release or a conversion measure pronounced by a JAP, whereby they are imprisoned at night and over the weekend, and they spend their days in the community for work or treatment.

With the exception of interviews involving probationers who were serving semi-freedom measures or in detention or interviewees who refused to be recorded, semi-structured interviews were recorded and transcribed verbatim. When the interviewees refused to be recorded (nine of the twenty-seven), ample notes were taken.

Observations focused on meetings between probationers/prisoners and their attorneys in the four sites. Observations of hearings with the attorneys were added in East-of-France jurisdictions (Charleville Mezières, prison of Villenauxe), since many attorneys in the four sites operated in several jurisdictions. Thirty hearings were thus observed, dealing with ninety-one offenders and forty-three attorneys, including these who had been interviewed plus others who happened to be present in court when we were observing.

Immersion consisted of the students spending several weeks with each attorney and taking ample notes based on a common protocol, which were reviewed collectively with the students and I through emails and debriefing meetings.

For data coding, the students and I mostly converged, and we defined criteria for the three main study compasses. With regard to desistance, we used the following criteria: attorneys' understanding of how offenders desist; attorneys' level of concrete action in supporting their clients' desistance based on their interviews, their observations, and the probationers' perceptions; and the attorneys' nature and the quality of their relationships with their clients.

For the legitimacy of justice and therapeutic jurisprudence, the following elements were coded: the attorneys' contribution to the offenders' voices; the attorneys' contribution to the CJS neutrality; the attorneys' own respect and care for their clients; and the attorneys' overall goals for their clients' cases.

Lastly, lawyers were deemed holistic if they:

- tended, as much as possible, and depending on the case, to support their clients during the sentencing phase (when relevant, from the initial police investigation) and beyond their release, during the post-release supervision stage, and for offenders serving a community sentence, during their probation;
- endeavored to know their clients very well, including their personalities, their histories, their family circumstances, and, in many cases, their family members;
- actively contributed to the release plan collaboratively with their clients and families (not merely formalizing it) and

in doing so, contacted the JAP, the probation service, and various agencies; or,

- in court, presented their clients as humans beings in their overall context.

### III. RESULTS AND FINDINGS

Before we present our results, it is important to stress that this study has important limitations. First, it is qualitative and not quantitative. Secondly, it focuses on a single country. Nevertheless, with this in mind, it does shed a very interesting light on French attorneys' work in the post-sentencing phase of the penal continuum, and given the similarities between French JAP and PSC, it is important to understand what attorneys can bring to this international movement. In particular, we found: (A) that attorneys are, albeit modestly, desistance agents; (B) that attorneys are essential to the CJS's legitimacy; and (C) that many attorneys are "holistic."

#### *A. Attorneys support the desistance process*

As with the aforementioned French probation practitioners' research, attorneys' knowledge of desistance factors and processes was tested with general and open questions. We found that though their understanding of the desistance process were not as detailed as JAPs' (compare H-Evans, 2014a), they were far from ignorant, and they embraced a variety of roles and attitudes connected to desistance literature and to related fields, such as Core Correctional Practices ("CCP") (Trotter, 2015).

We found most attorneys' knowledge of desistance to be fairly good. Knowledge of desistance factors and processes (which were investigated through open questions) was strong in four attorneys, good in ten, and medium in five. Only four had weak knowledge and four others had none at all. Only one

of the twenty-seven attorneys, who was totally ignorant in terms of desistance, had a punitive discourse and yet was very humane in his relationships with his clients.

Surprisingly, thirteen of the twenty-seven had received a one-semester class in criminology, and one additional attorney had actually studied criminology for a full term in Paris. Yet, only eight had ever heard of desistance. Of these eight, one had heard of it thanks to a long-life training session, two heard of it at the university of Reims, one read about it in a special 2010 edition of a French criminal law journal (*Actualité Juridique penal*), two had read about it on the internet, and one heard of it through a discussion with a student unrelated to our research. In other words, most of what attorneys knew about the desistance process was actually derived more from their experience and regular contact with offenders than through academic education. Interestingly, holistic attorneys were not necessarily more knowledgeable than other lawyers.

When asked to define what a good sentence implementation decision was, most lawyers did not answer in terms of winning a case, but referred to the bigger picture of offenders' reinsertion (the French vernacular for desistance) and reconciliation with society—what Fergus McNeill calls 'thinking beyond interventions' (2012). "It's a decision that makes reinsertion possible--a decision that puts a positive end to a story that started out rather painfully at the initial trial. For me it's reconciliation between the sentenced person and society" (Attorney 8).

Conversely, whether attorneys actively supported the desistance process depended on where they were situated on the holistic continuum, to which we shall refer to as *infra*. The continuum is defined through factors, such as helping the offenders create a release or application plan (for conversion) that best suited their contexts and personalities; through making (in some cases repeated) calls to social services, local

agencies, probation services, or the JAP, contacting offenders' families; or interacting with them in various ways.

In the first publication pertaining to the Sheffield longitudinal study, Farrall (2002) found that the probation staff's active support was useful to the desistance process. However, in their more recent sweep, the Sheffield team found that stable desistance was achieved with a delayed effect (Farrall et al., 2014). One would expect probation staff to be the main providers of through the gate-and-release support, with reinsertion and desistance as an ultimate goal. However, in a jurisdiction such as France, probation services are overloaded, and today's probation officers are mainly lawyers (de Larminat, 2012). They tend to perceive their jobs as legal clerks who have to prepare a case, write reports, and send documents. As a result, many of them are actually unsupportive (Dindo, 2010). This context has also been caused by a merger between probation and prison services in 1999, which has led to their embracing a prison culture and to their being, unfortunately, embedded in the overly centralized, monopolistic, and corporatist (a French trait (Cavadino and Dignan, 2006)) institutional organization of prison services (H-Evans, 2013 and forthcoming a).

A key question for this research, thus, was whether attorneys would find themselves, willingly or not, doing part of the probation services' work, given the general absence of probation services' support. It was posited that a "communicating vases" principle would operate, whereby if the local probation service was more supportive, attorneys would not need to do their jobs; conversely, where it was unsupportive, they would have to be more active. For indeed, such a "communicating vases" principle between probation staff and other practitioners has been found within the third sector (H-Evans, 2014 b) and within experts' written conclusions and assessments (H-Evans, forthcoming c). Through their research focusing on French "reinforced probation," Worrall et al. (2014) found that this complementary municipality-funded program was created pre-

cisely to compensate for probation services' shortfalls. In the present study, attorneys and offenders alike confirmed our hypothesis. Offenders expected more from their attorneys when their probation officer ("PO") did not support them. For example, one probationer said that he had been better supported by his attorney than PO: "Clearly the attorney, because the probation service--it's not the same. They have so many files!" (Probationer 3). Similarly, an attorney from our study said:

With inmates who are a little lost, where we're dealing with the issue of short sentences--where access to the PO is complicated (so in reality he has not seen the PO ), if he's our client, we're rapidly contacted by his family, and it's not that we substitute for the PO, but we kind of do that sort of job. Because when the guy's told 'in order for you to be released, you need a job or an occupation of some sort and housing,' generally he looks at us and says, "Ok but what do I do now? I'm alone. I'm in jail. There's just too many of us, and I don't know who to write to." So all this work, this project elaboration, we actually do and give a hand with (Attorney 14).

Attorneys, thus, often give a hand when it is needed (particularly with offenders who lack family support). They also try to boost offenders' morale, and thus operate as "hope agents"--an essential component of desistance (Farrall et al., 2014). One attorney said, "Boost and support him, yes, else he could give up. It's difficult to hang onto a release plan sometimes" (Attorney 15).

The attorneys' hope and positive attitude also has much to do with how they try to present their clients' cases. They tend to present their positive traits, their actions, and their strengths. Here again, attorneys draw on the more positive view of offenders, as advocated by desistance literature (Burnett and



Maruna, 2006) or related fields, such as the Good Life Model (Ward and Maruna, 2007) or Core Correctional Practices (Trotter, 2015). In preparing their cases, discussions with their clients, and in presenting cases during hearings, attorneys present their clients' personal skills, positive actions, activities, what they have attempted to learn while in prison (vocational training, general education, etc.), and what they used to do that they can now draw upon--in other words, their clients' more positive self (H-Evans, 2011).

Given the enormous and unquestioned influence of psychoanalysis in France (Roudinesco, 1990), attorneys tend to present a narrative story of their clients' past stories in effort to make the judge understand where they come from and how they ended up offending. One attorney shared a significant story illustrating this point:

For instance, I have this young man--his step-mother, with whom he was living, reported him to the police because he sold cannabis at her place. There was an investigation, and after his police detention, several former warrants were executed. He found himself overnight having to serve a total of two to three years. The thing is, though, that he smoked up to fifteen joints a day. He lived secluded in his bedroom in the dark because in 2009 he'd lost his father, and in 2011 his mother hanged herself. He was sentenced because cannabis is illegal, but in reality, he smoked to try and forget that he was an orphan. It's complicated. I'm not sure he'll stop tomorrow or even that he will get treatment, but it's just to say that there's always been something in their life (Attorney 9).

Because of their understanding of their client's global context and personality, many attorneys do obtain confidence and

information that others (in particular POs) do not: “Well, the understanding of the *justiciable* person’s personality--because we attorneys discuss with the persons we defend, we thus get into questions that touch upon their personal lives and sometimes things that are very personal” (Attorney 11).

According to both desistance (King, 2013) and CCP (Trotter, 2015) literature, offenders’ agency is an essential component to the desistance path and to offender compliance (McCulloch, 2013). It requires that practitioners work with a collaborative stance. Whereas POs, who are used to a more controlling approach, have to learn this particular dimension of their job, attorneys always have to work collaboratively since they represent their client and cannot decide for them. However, the attorneys also need to make their clients’ opinions and wishes acceptable to the court. Thus, they collaboratively need to make their clients accept a polished version of the truth, and in some cases, to accept making some real changes. One attorney expressed this need, “I personally try and explain to people that, well, they’ve done something wrong and they’ll have to go to court, and that’s the way it is--that we’ll work together. Either they are stubborn or they accept working with me” (Attorney 9).

The relationships they build with their clients, even in a short space of time, along with their privileged situation (the fact that they are not CJS agents) place attorneys in a position where they can tell their clients things their clients might not want to hear, such as to stop lying, starting with themselves, and to accept some hard facts. Here are two attorneys’ stories of how they handle such situations: “I tell them [expletive]! It’s not possible! You’ve been arrested for a DUI for the fifteenth time! So I am terribly sorry, but you’ll now see the difference between justice and magic, which means I will not obtain your immediate release. It’s simply impossible!” (Attorney 12).

This chap says, “Yeah I have a release plan; it’s the sister of a guy I met in prison who might be

ready to certify he'll hire me." I tell him, "I will not support this project in front of a JAP or a prosecutor as they hear this nonsense fifteen times a week. It's not serious. I cannot go and say in court that there's your co-inmate's sister who will give you a fake promise of employment certificate. Your application will be denied" (Attorney 22).

We also saw in many hearings the attorney asking a prisoner or a probationer to calm down, to stop it, to behave, and even, quite frequently, to shut up ("*taisez vous!*"). Amusingly it often looked like judges and prosecutors expected the attorney to make their client-children behave as if the attorney was the parent and needed to control the client. Likewise, attorneys often looked embarrassed for their clients' uncontrolled public outbursts or self-incriminating slips of the tongue.

Therefore, importantly, if attorneys manage to efficiently support their clients, it is because they build a rather strong relationship with them. Professional relationships in offender supervision have become a very important theme in desistance, compliance (Digard, 2015; Raynor et al., 2014), and Risk/Needs/Responsivity (Dowden and Andrews, 2004) literatures. The last of these literature categories draws upon psychology and medicine (Horvath and Greenberg, 1994), including cognitive-behavioural therapy (Beck, 2011). In France, sociologist Milburn (2002) has explained that one of the main keys to criminal attorneys' professionalism is their relational competence.

In the present research, we found that for the vast majority of offenders (fourteen out of sixteen; one declaring it was not relevant in his case and another one that he did not know), good working relationships with their attorneys were expected and needed. "It's their job to be close to their client. As far as I'm concerned, an attorney must know his client perfectly" (Probationer 12).

We had indeed asked what they expected from their attorneys as an open question. Only six probationers declared that they expected their attorney to support them in obtaining what they wanted, i.e. release or to avoid incarceration or a harsh sentence. None of the others mentioned their case outcomes. Importantly, none seemed to expect their attorney to win their cases. To the contrary, most of them referred to relationships as “being there for them,” care, and respect.

Most attorneys and probationers declared that the relationship was, of course, of a purely professional nature, even if they ended up knowing each other quite well. The relationships did not go beyond the necessities of the case or series of cases. Offenders declared that once they were finished with their criminal careers, they would probably not want to remain in contact with their attorneys, as the attorneys would remind them of their delinquent past. In other words, the relationship was limited to the criminal career and the end of the desistance journey. One probationer expressed his feelings, “It’s better not to have any contact anymore. I hope to stop offending. My sentences are a thing of the past. When I’m released, I’ll start over and won’t owe anybody anything” (Probationer 7). Similarly attorneys knew that once they no longer heard of a client, it probably was good news: “I’d be tempted to say that if we don’t get any news it means we’ve done our job well. It’s actually great not to get any news” (Attorney 22). Several clients were quite shy about the idea that they could have a real relationship with someone like an attorney: “There’s no reason to. I’m not going to bother him!” (Probationer 2).

However, during supervision itself, attorneys are often probationers’ most consistent responsible adult figures. They see them more often than judges, prosecutors, or POs. Unlike attorneys, these other practitioners are not always available for them and can be transferred to another jurisdiction. The longer the sentence is, the higher the chances are that such changes will occur.

Attorneys are, nonetheless, aware that the relationship must remain strictly professional, for they are afraid of a form of contamination and of their privacy being invaded. Several of them told us they would refuse to have a drink with offenders after a successful trial--that they were not their "mates." This idea is also linked to their ethical duties (Ader and Damien, 2013). Overall, the relationship with their client is to be understood as being a trusting and close one, but not one that includes friendship. As one attorney put it, "I'm not referring to an amicable relationship, but to a relationship built on trust" (Attorney 11).

This professional relationship is usually explained by the necessity of being more efficient: it is by knowing the clients and their circumstances better that the attorneys do their jobs well. In order to do so, they must not lose credit with the court. They also want to protect their own credibility as a professional. As one attorney expressed, "I refuse to talk rubbish. When I disagree with a client, I tell him: 'I will plead what I want to plead.' I talk about it beforehand with the client. I won't lose credibility for a client!" (Attorney 20). For this reason, several attorneys presented their role as being an intermediary between the CJS and their clients, making both meet mid-way:

The attorneys, well, they're sort of the interface. They will make them [the probationers] understand that for things to work, you need a balance between the personal circumstances that have to be taken into consideration, but, on the other hand, there also is a need for thoroughness and stringency, and when you tell people that, they understand and they accept it (Attorney 23).

That being said, attorneys also enjoy the relationship they have with their clients and most attorneys genuinely care for their clients, and clearly their clients expect for the attorneys to

care. For example, one attorney said, “They’re always happy when we go see them in jail! It shows them that we care for them” (Attorney 17).

French attorneys are first and foremost interested in human relationships and in defending “the widow and the orphan,” as the usual saying goes—one we heard them refer to when describing why they had become attorneys. “If you’re only in for the money, you’ll necessarily be disappointed. If you’re interested in winning: same thing. If, conversely, you have humanity, you receive a thank you and you have the feeling that you’ve done your job, that’s your real success” (Attorney 25).

Clearly, our research has found that French attorneys are mostly interested in the human dimensions of their job and not in money and honors. Like the United States attorneys described in Krieger and Sheldon’s (2015) study, they are more interested in efficacy, autonomy, and humanity. It therefore is unsurprising that the interviewed attorneys have been, but for one, unanimous in finding their job satisfying; seventeen actually found it “very satisfying.”

For their part, probationers described themselves as being equally satisfied with their attorneys and the relationship they had with them. Probationers also described that their attorneys were competent, caring, and interested in their case and person. This, in their eyes, undoubtedly contributed to the legitimacy of the CJS.

### *B. Attorneys legitimize the release and supervision process*

The second main finding of this qualitative study is that attorneys do indeed contribute to CJS legitimacy and that they do this in many different ways.

First, attorneys embody fair trials and due process. Previous research on JAP (H-Evans, 2014a) and an ongoing research on a fast-track release procedure without due process, which is compared to fair trial procedures, have strikingly

showed that where attorneys are present, judges, prosecutors, and prison or probation staff behave in a radically different way. First, the time taken for each hearing (or in the absence of a hearing, commission time) is tripled. Second, CJS practitioners focus much more on the release plan and on the persons' circumstances and personality and much less on their prison behaviour or criminal past. Third, CJS personnel and authorities behave much more respectfully towards the people and their cases. In other words, when the attorneys are present, "the system" behaves decently; when they are not, the care and respect components of a legitimate justice system are not present, or not to the same degree. We observed this phenomenon even when attorneys were frankly incompetent; their mere presence made a significant difference.

Second, attorneys are also important in terms of CJS neutrality. When attorneys are absent, offenders face judges, who are inevitably perceived as being an essential part of the CJS, even if they are caring and respectful. By being present, attorneys re-establish a form of balance.

Importantly, attorneys thirdly contribute to the CJS's legitimacy by caring and respecting offenders. Quasi-unanimously, offenders want their attorneys to be nice and caring. Only two of our interviewees said they did not know how to answer our question, but none thought this was not important. They were also very sensitive to significant displays of interest and kindness, as one expressed when asked if his attorney had been kind to him, "Oh yes indeed. He would not come and pick me up when I'm released otherwise" (Probationer 11).

A true sign of this care and interest was given, in their opinion, by the regular visits that the attorneys made to the prison to see them. Fifteen of our interviewees declared that their attorney visited them often; only one of them told us he would like him to visit more often, while acknowledging he actually had enough visits. Nine of the sixteen referred to phone calls or letters they received from their attorneys, and

only one of them said he did not receive enough. The others were dismissive and said that it was not necessary to constantly be in contact. One of the probationers said that he had actually changed his attorney because his first one did not visit him regularly.

Probationers were also unanimous in expecting respect, and they deemed this particular dimension extremely important. Interestingly, when asked whether they had received the respect they needed from their attorney, most of them agreed they had: "That's for sure otherwise there'd be no trust!" (Probationer 5). "Respect is the basis, right?" (Probationer 6).

Another essential component of legitimacy of justice is the justiciable people's voices. In practice, however, offenders often cannot express their voice satisfactorily. They do not master the judicial language, even when French practitioners try to use rather ordinary French, or they are intimidated, afraid, or in no condition (mental health, substance abuse, etc.) to articulate their thoughts and needs (La Vigne and Van Rybroek, 2014). One of attorneys' main roles is thus to embody and to faithfully present their clients' perspectives, needs, contexts and personalities. In order to test this particular legitimacy component, attorneys were asked whether they agreed with the idea that they were their clients' translators in court. The vast majority of them were completely taken by the idea. In response, one attorney reminded us of the etymology of the French word for lawyer: "*Ad vocatum* means being somebody's voice" (Attorney 25). (The French word for attorney is *avocat*, which is derived from the Latin *Ad vocatum*.)

However, some of them corrected our translator metaphor and contented they were more precisely translator-interpreters. What they meant was that they needed to make their clients' truth audible to the court, and merely conveying their clients' opinions would not serve their interests well. "I think that if I am this person's translator, I am actually a very bad attorney, because I would not defend this person well by telling some-



thing as absurd as this to the judge, something that the judge cannot hear” (Attorney 7). They also meant that they needed to decode what the clients said in legal terms. “Yes, yes. That’s actually our guideline--meaning that there is more room for maneuvering compared to purely translating” (Attorney 26).

For their part, fifteen of the sixteen interviewed probationers confirmed that they expected their attorney to translate their discourse and needs to the court. However, they also said they wanted the attorneys to translate *to* them what was going on during the hearing. As one probationer said, “...because when they talk, I don’t understand anything [contempt]. I need a dictionary. Know what I mean!?” (Probationer 1).

Fourteen of the sixteen told us that their attorneys had indeed executed this particular mission well. Only one of them believed he did not need his attorney to act as a translator, as he could understand most of what was being said. Five of the probationers actually deemed this particular aspect of their attorney’s role as being the most important of all. Such was particularly the case of those who confessed their distress and anxiety levels were very high. “I want him to help me quite a lot in terms of talking, because since I’m stressed out, I find it hard to talk” (Probationer 4).

In order to best interpret their clients’ wishes and circumstances and to present an acceptable view of them, attorneys often need to coach them before trial. Both attorneys and probationers spontaneously referred to this coaching role. One probationer put it in rather amusing, yet to-the-point, terms, “We mustn’t bother the attorney. If he had planned something, we could destroy it all by saying something” (Probationer 11).

Attorneys were unanimous in explaining to their clients what was going to happen and who the authorities were, and they prepared their clients for the questions they might be asked. In particular, the attorneys warned the probationers that they would be asked about their offense, which many did not

expect and definitely resented, since they had now reached the release application phase. The attorneys also tried to temper some of their clients' over-optimistic perceptions of their cases' outcome. As one explained, "Our role is both that of counsel and of moderator. We have to temper our clients' enthusiasm, because they think just because they reach the eligibility date, bam!--we launch the application tomorrow! But that's not how it works" (Attorney 22).

In the same vein, attorneys warn their clients about patent lies and stances that would guarantee the exact opposite result to what they want. As mentioned previously, this is where most of them try to be assertive and to look for their client's best interest, even when their client has a different opinion. "We have this principle, see: 'Our client is our main enemy.' Of course he lies to us! We're his first test!" (Attorney 10).

Most of them also systematically coach their clients pertaining to how to conduct oneself in court. Several of them explained that they told their clients to dress correctly, to get rid of their piercings, not to slouch, to put their hands nonchalantly in their pockets, not to look arrogant, not to chew gum, and to turn their mobile phones off.

However, they also try to prevent their clients from appearing to be reading from a script. "It's too risky. I mean, a façade discourse--That disintegrates real fast!" (Attorney 14). They also want to ensure their clients' voices are heard, and not their own. "We do not prompt their answers. We help them formulate them, to elaborate on their answers; but they're still their answers" (Attorney 12).

We observed that many attorneys executed this mission rather well and literally carried their clients' fate on their shoulders. In many court hearings, when a client suddenly said something incriminating or made his or her case extremely worse--e.g. by blaming, in incendiary terms, his or her ex-spouse who had been the victim of his/her violence--we saw the attorneys literally shrink in their seats, holding their faces in

their hands and appearing quite devastated. They looked down as if they were personally ashamed.

But sometimes it does not work, see! Sometimes they simply cannot stop from saying what they consider to be the right thing to say as in: “Uh, let’s see--I’ll say that” and you’re under your robe and you collapse and you tell yourself, “What the hell has he come up with this time?!” (Attorney 25).

When their clients fail, they feel they have failed, too. As one expressed, “We are under pressure. If the client goes back to jail, it feels like I’m going with him” (Attorney 22). This statement reflects how deeply attorneys care for their clients.

### *C. The Holistic Lawyer Hypothesis*

Not all criminal lawyers take on sentence implementation cases. The legal field of sentence implementation is extremely complex and most universities do not teach it (H-Evans, 2014a). Consequently, attorneys who want to represent their clients in such cases need to devote time and energy to learning this discipline. As we shall see *infra*, attorneys do not earn a living from sentence implementation representation and some lawyers tend to think that it is not worth the effort. However, most of them do have at least occasional cases, as the clients they have supported during the investigation, trial, and sentencing phases expect them to keep representing them. Some attorneys have actually developed a specialty in sentence implementation as they greatly enjoy it. Our interviewees either took such cases as part of their criminal law activity, or chose to devote a great proportion of their time to such cases. All of them believed sentence implementation was part of their job. “I developed this post-sentencing part of the job because for me, it’s a little like after-sales services” (Attorney 18).

Beyond this basic “after sales” duty, we wanted to test whether some of them were holistic. However, we first wanted to uncover what they all considered to be the non-holistic bare minimum. Aside from their relational competence, according to Milburn (2002) drawing on Freidson (1970), the other main key to criminal attorneys’ professionalism is their professional expertise. Precisely, as was mentioned before, French sentence implementation law has become exceptionally complex from a technical viewpoint over the last decade or so. Unfortunately, the JAP that were interviewed in the aforementioned “JAP research,” along with the eight whom we interviewed for this particular study, complained that attorneys were a disappointment in this respect. After having observed them, we can validate these judges’ negative analysis. Nonetheless, during hearings and in preparing cases, attorneys mostly draw upon psychological, circumstantial, and other factual elements rather than on the law itself. Their expertise is their knowledge of their client, which is more relevant than their legal expertise.

Another issue is whether attorneys need to be adversarial in some cases but collaborative in others (Daicoff, 2006: 127-128). What we observed was that French attorneys were particularly good at detecting when one stance was needed rather than another. For instance, they tended to be more collaborative in release application cases (*inter alia* elaborating the best release plan or looking for the most adapted release measure) and adversarial in some of the breach cases where the proof was debatable or when they needed to fight against unacceptable obligations. We thus witnessed numerous very collaborative discussions leading to the JAP, the probationer, and his attorney determining what the best conditions for release should be. Contrarily, we also witnessed a very heated debate between a JAP and an attorney pertaining to a case where the police had needlessly searched a probationer’s workplace leading to his case being dismissed. Similarly, we witnessed debate in another case when there was reasonable doubt that the

client had been violent on an approved premises site. We asked our interviewees whether they needed to be adversarial, using the French label “severance defense,” but most attorneys strongly rejected this supposition. Most attorneys stated that they more often had to be collaborative. However, they insisted that this be distinguished from conniving, “[because you would] entrench the idea, which is a risk, that all these robes are buddies, and it is true that we know everybody” (Attorney 25).

So the adequate defense is situated somewhere in between an adversarial stance and a conniving one. It is a truly collaborative stance, whereby attorneys contribute to the big picture of the CJS, which is clear for all the attorneys: reinsertion, desistance, treatment, damages payments, etc. They think that their role is to help their clients accept responsibility, accept sanction, and to work towards a desisting future with all the CJS actors. In other words, whether holistic or classic, attorneys all look for the end result for their clients, which they deem being his or her desistance from crime and living a normal life.

We can explain why the person, ahem, did not respect his obligations. Mostly in the hearing pertaining to potential revocation, or sanction, for obligations’ violations, these hearing are linked to the difficulties... of the person’s daily life, and how he [or she] finds it hard to get organised, or to anticipate [events] (Attorney 26).

In a minority of instances, however, a presumption-of-innocence issue was clearly at stake (see H-Evans, 2014a). Attorneys knew how to revert back to their clients’ stance against the prosecutor. They also fought using attorneys’ weapons--proofs. Particularly, that is the case when the probation service affirms that a breach has taken place and the circumstances are not straightforward. As one attorney ex-

plained, "Many offenders do not have a good relationship with the probation services. Sometimes we have to produce lots of documents to justify things that counter-balance the probation service's report" (Attorney 18).

Indeed "documented-proof, documented proof, documented proof!" was a gimmick that several attorneys repeated. A great part of their job is thus to file applications, present ready-to-be-decided-upon files, and provide evidence, given the probation services' general abstention.

Beyond these basics, which most attorneys accomplish well, our main research question was whether and how many attorneys were holistic. In our previous research on JAP, and based on interviews only, we had found that only four out of thirty-two interviewed attorneys appeared to be holistic (H-Evans, 2014a). This time we found that holistic versus classic lawyers was not a clear-cut dichotomy but a continuum on which lawyers situated themselves in general. Attorneys could also oscillate depending on the type of case, or the type of offender.

Our results reflect a great variety of situations and personalities. Only three attorneys out of twenty-seven were fully holistic. However, five were quasi-holistic, which meant they tried to be holistic with most of their clients but may not have been in a position to be fully holistic in all circumstances. Six additional attorneys were situated further down on the continuum scale as "medium holistic." Another still declared he would be holistic if only he could afford it. Excluding this one, fourteen of the twenty-seven attorneys were relatively to fully holistic lawyers, i.e. more than half of our small sample.

Under the holistic blurry cut-off point, the vast majority, i.e. nine out of twenty-seven, were classic but very humane with their clients, with whom, as seen *supra*, they endeavored to create professional relationships. Importantly, only one was classic and cold, and only one other was purely classic. Contingencies, material and financial, prevented some of them

from giving all the support they thought they should give all of their clients. “Frankly if it was better paid, I would do it” (Attorney 16).

Others opposed appointed attorneys and attorneys of choice. In France, legal aid allows offenders to choose their attorney while still being supported financially by the state. Those who ask for an appointed attorney—by the bar—can also benefit from legal aid, which is exclusively based on revenues. In most cases though, offenders obtain support from an appointed and legal-aid-funded attorney. However, underpaid legal aid attorneys barely cover their costs and cannot offer the same service they would on a client-paid basis. One of them explained her stance, “We lack time. We’re paid 125 euros per case, so bear in mind that in order to be cost-effective, an attorney’s office must at least bill 150 euros per hour, so...” (Attorney 17). Importantly these 125 euros include visiting their clients in prison, meeting with them to discuss the case and prepare the release plan, drafting the release application, obtaining the documented proof, and their plea in court. In other words, 125 euros is for dozens of working hours.

Of the sixteen probationers, ten had appointed attorneys while six had an attorney of choice. We found that experience played a part in what attorneys actually accomplished. Our sample comprised a wide range of experiences--from beginners (one of them was in her first year) to more than thirty years, with a vast range of situations in between. Unsurprisingly, the vast majority of those who could choose their clients were those with the most experience. Younger criminal law attorneys could not enjoy such luxury as they had to build a clientele. Those who had several years of bar behind them tended to have a relatively even clientele (appointed, word of mouth, follow-up, or old clients). Yet this was not the sole factor. Several young attorneys had opted for a holistic practice from the very beginning, and their worry was that this earned them a

lot of clients, which then made them unable to give them all the attention and time they needed.

Levels of desistance understanding had no correlation with the attorneys having a holistic attitude. We found some instances of rather ignorant attorneys who were fully or quasi-holistic and others who were classic attorneys with a full knowledge of desistance. We also found the exact opposite.

Offenders were evenly distributed between those who said they expected attorneys to support them (six) and those who claimed they did not need or want their help (nine), while one offender said he did not know. Amongst those who answered “no,” most of them declared they wanted or expected to do things on their own and clearly expressed a need for personal agency. Two of them, a rather small number, said it should be the role of the probation service. Those who wanted their attorneys to help were clearly those who were in greater need and had no support system. Yet several of them declared that they would like their attorney to help but that they had other things to do. In other words, they would need their attorneys to support them but did not expect them to.

It was apparent to our team that offenders expected quite a lot from their attorneys because the overloaded and ‘prisonbation’ type of probation that exists in France led to an overall abstention from active release, desistance or other form of concrete support. As was said *supra*, in practice, attorneys used more concrete support where the probation service was particularly negligent.

Very often, I sent to the probation officer, prior to the hearing, all the documented proof that I have. How many times do I need to call the family to ask: “Did you send the subsistence evidence?” and they ask “The what? Nobody asked us to!” Normally it is not my job; it’s that of the probation service (Attorney 18).



In other words, in many cases, attorneys have to act holistically because the probation service does not do its job properly. Indeed, we asked offenders whether they had been better supported by their attorney or by the probation service. Seven answered that their attorney had helped them the most, some of them explaining that he or she was much more available and positive. Five answered that it was the probation service; one answered it was both; two regretted that none had been available for him. One probationer in particular noted his attorney's dominant role in helping: "Definitely the attorney. It's more his role, it's more personal, and he talks to us more often" (Probationer 1).

Not only do French probation services generally not support desistance, but they are also often perceived as being very punitive and purely controlling (which is similarly a comparison between probation officers and third sector workers (H-Evans, 2014b)). One probationer expressed the following, "[The probation service] really pushes and shoves me and stresses me out; [my attorney] supports and helps me" (Probationer 2).

Due to their intimate knowledge of their clients and of what their personal and global contexts are, attorneys know their clients better, or from a different angle than any other CJC actor. This global and personal knowledge allows many of them to present a global holistic picture of their clients in their scriptures and in court--one which gives sense of their clients' life-courses, and actions; one which places the person in his/her family life context, difficulties, and traumas; one which, in short, reveals a suffering and vulnerable humanity.

Their holistic work starts as early as possible. It goes way beyond preparing a release plan and presenting it in court. It starts in some cases several--and at times many--years before, by guiding the offender towards not only a good plan, but also to an acceptable behavior while still in jail, even if it involves

postponing the release application. One attorney shared a poignant story in this regard:

Naturally he had absolutely nothing, so I asked him to desist, and my job was to explain to him how to behave in jail in order to try and obtain something as early as possible. It's been a year now, and we still haven't filed an application, but he has increased his payment to the victim. He used to have an incident report every month, and now he has none (Attorney 18).

Our small sample of attorneys finally revealed interesting information, which was not part of our research question: three of the twenty-seven attorneys were militant attorneys in the sense that they had a strong human rights discourse. They participated in various actions supporting offenders' rights and were obviously politicized. Interestingly, only one was situated on the holistic continuum, and only at a medium level. The two others were classic and humane, but they did not actively support offenders. Further research may be needed to uncover the particular type of defense lawyer who seems to belong to a historically strong French heritage (Sur and Sur, 2013; Tonneau, 2014). Another interesting point was that these three attorneys were all located in Nantes, a city that may harbor a strong militant tradition, according to my observations during my five years at the University of Nantes, but which would have to be further investigated.

#### IV. CONCLUSION

This qualitative study focusing on French criminal law attorneys operating in the post-sentencing, release, and supervision continuum showed that attorneys' desistance knowledge is rather limited, but they do support the desistance process ac-

tively, often acting in lieu of probation services. By favouring offenders' responsibility and agency, by focusing on strengths, and by developing a professional relationship with them, they also support offender's self-efficacy.

Through this study, I have found that attorneys additionally contribute to the legitimacy of the CJS by providing a voice to *justiciables*, acting as a form of translator-interpreter, and compelling CJS personnel to behave in a more neutral and respectful way. They also directly contribute to this legitimacy by behaving themselves in a respectful and caring way. This research has also confirmed the research in the legitimacy of justice claiming that offenders expect their attorney to be kind, caring, and supportive. In other words, they mostly focus on relationships and attitudes rather than on outcomes.

We also invalidated the classic-holistic attorney dichotomy in its simplistic cut-off form. However, we did uncover a continuum ranging from purely classic to fully holistic, on which attorneys were situated at various points and on which they could navigate, depending on the case at stake. Their position on the continuum also depended on their clients' needs and circumstances. Attorneys would naturally be more supportive and active with vulnerable and isolated clients, based, to a great extent, on the quality of the work provided by the probation service. In many cases, the holistic stance of attorneys derived from the fact that they had to do part of the social work that probation officers were not in a capacity or not willing to do.

During the observation activities, we saw that attorneys are the only practitioners who present a global, narrative, and humane picture of offenders, one that can put their actions into a relatively rational yet emotional and humane context. Whereas court hearings, probation officers' reports, and other interactions tend to focus on objective facts (employment, housing, etc.), plans and projects (release plan, community plan, etc.), or potential risks (escape, compliance, reoffending, etc.), attor-

neys provide the court with other information and perspectives, such as family relationships, emotions, feelings, fears and desires. Many times, we saw tears in the eyes of these lawyers' clients as a result of what their attorneys had said, obviously hitting a raw nerve.

Such intimate knowledge of the offender's personality and circumstances can however only happen in a due process judicial context (H-Evans, 2015a), and is at risk of being crushed by an over-powerful executive 'prisonbation' context.

We found that French attorneys are vital to the post-sentencing, release, supervision, and sanction continuum. They make it more humane and more legitimate. Whether they make it more efficient would warrant another type of study. Indeed, this study was limited in its scale, of a purely qualitative nature, and it only focused on one jurisdiction with a rather specific legal system. Nevertheless, this system is close enough to the problem-solving experience (H-Evans, 2015b) to make a small contribution to the debate pertaining to the role of attorneys in such courts.

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HOW DO EVALUEES HEAR TESTIMONY? FORENSIC EXPERTS'  
VIEWS

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Psychiatric care requires attention to the patient's perception of illness and understanding of the need for treatment. In contrast, psychiatrists providing expert testimony owe their duty to the truth, whether or not the truth is helpful to the evaluatee. And yet the evaluatee is often present during psychiatric testimony. Can psychiatric testimony meet the primary aims of assisting the court in adjudication, while taking into account the evaluatee's perception of the testimony, shaping testimony as a potential form of psycho-education about illness? This paper presents findings from a survey distributed to forensic psychiatrists and psychologists in America, which addressed questions such as whether and under what conditions mental health experts engage in behavior that can be considered educational for the evaluatee, or which is oriented towards the evaluatee's treatment needs. The survey examined the extent to which experts currently take into account the evaluatee's point of view during

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evaluation and testimony, and what additional practices are considered appropriate by experts, within the scope of their role in the courtroom. When providing testimony regarding the evaluatee's mental state, diagnosis, and prognosis, mental health experts may have an opportunity to positively influence how this testimony is heard or construed by the person.

## I. INTRODUCTION

Criminal defendants are usually present during psychiatric testimony, but little is known about how they perceive courtroom discussion of their mental condition. Psychiatric care involves attention to the patient's perception of illness and his or her understanding of the need for treatment. However, as experts testifying in court proceedings, mental health professionals must address their testimony principally to the trier of fact (e.g. judge or jury) and attorneys. Due to their clinical training as treatment providers, mental health experts may knowingly or unwittingly adjust the wording of their testimony in the courtroom when in the presence of the evaluatee.

The psychiatrist practicing in a forensic arena must at times serve two masters: the law and medicine. In a forensic evaluation, the evaluatee is informed of the lack of confidentiality and the lack of a doctor-patient relationship. This, however, does not completely resolve the therapeutic concerns that a psychiatrist may have during the evaluation and that he or she is also trained to address.

Related issues have been addressed through discussion of the concept of dual agency. Dual agency refers to situations of potential conflict where, for example, a psychiatrist has both a treating role and a forensic role (e.g. when a treating psychiatrist is asked to evaluate his patient for disability benefits). (Strasburger, Gutheil, & Brodsky, 1997; West & Friedman, 2007) Although it is generally recommended that dual agency

situations be avoided (AAPL, 2005), independent examiners nonetheless may encounter situations which raise issues that resemble dual agency, when therapeutic concerns arise in the course of forensic evaluation.

Therapeutic jurisprudence calls for consideration of the law itself as a therapeutic agent. (Wexler & Winick, 1992) The potential for forensic evaluation practices to foster increased insight into illness and psycho-education via expert testimony have yet to be explored. In a treatment setting, a psychiatrist may convey information which may be valuable in the patient's future treatment. In a similar way, under very different circumstances, a forensic psychiatrist's testimony could potentially help the evaluatee to understand his illness. At other times, however, the evaluatee may perceive testimony as insulting or judgmental. This raises the question of whether mental health testimony can meet the primary aim of assisting the court in adjudication, while taking into account the evaluatee's perception of the testimony and using it as a potential form of education about mental illness.

As a first step in this line of investigation, we conducted a survey of mental health professionals who perform forensic evaluations, in order to obtain preliminary information regarding their current practices with regard to presenting information directly to and on behalf of the evaluatee, and their behavior in response to the evaluatee's presence in the courtroom during testimony.

We sought to examine psychiatric testimony from a therapeutic jurisprudence perspective and consider the ways that the courtroom may serve, perhaps indirectly, as a forum for defendants to learn about their mental illness. We thus surveyed forensic psychiatrists and psychologists regarding their views on how evaluatees hear testimony, and their practices with regard to presenting information to the evaluatee.

Our specific aims were to: obtain information regarding the extent to which mental health experts engage in behavior that

is guided by therapeutic reasoning during forensic evaluation or testimony, and obtain preliminary information regarding the circumstances in which mental health experts take therapeutic principles into account in the context of court proceedings.

## II. METHODS

Psychiatrists and psychologists at a U.S. regional forensic psychiatry meeting received an anonymous survey. This cross-sectional survey examined how forensic evaluators consider the impact of testimony on the evaluatee (e.g. criminal defendant or civil plaintiff) in legal proceedings. A self-report questionnaire was used to collect descriptive information regarding the behavior of mental health experts in the setting of legal proceedings. The survey examined the extent to which experts take into account the evaluatee's point of view during forensic evaluation and testimony, and it asked about 'therapeutic' practices that may be considered plausible by experts within the scope of their role in courtroom proceedings. Data were analyzed in Excel for descriptive statistics or in Stata SE 10 for Fisher's exact test where appropriate.

## III. RESULTS

As seen in Table 1, the bulk of the survey respondents were psychiatrists (92%) with the remainder being psychologists. Respondents had a range of years of experience in their field, with over a third (38%) having more than 15 years. Most respondents (57%) authored more than 20 forensic reports annually.

**Table 1. Study sample****n=37****%**

| <b>Profession = Psychiatrist</b>           |                | <b>34 / 37</b> | <b>92%</b>  |
|--|----------------|----------------|-------------|
| <b>Years of experience</b>                 | <b>0 - 3</b>   | <b>9</b>       | <b>24 %</b> |
|  | <b>4 - 7</b>   | <b>5</b>       | <b>14 %</b> |
|  | <b>8 - 15</b>  | <b>7</b>       | <b>19 %</b> |
|  | <b>&gt; 15</b> | <b>14</b>      | <b>38 %</b> |
| <b>Number of forensic reports per year</b> | <b>1 - 10</b>  | <b>4</b>       | <b>11 %</b> |
|  | <b>11 - 20</b> | <b>7</b>       | <b>19 %</b> |
|  | <b>&gt; 20</b> | <b>21</b>      | <b>57 %</b> |

**Table 2. Survey responses**

| Question   | n  | Never | Rarely | Occasionally | Often | Always | <i>At least some of the time</i><br>N (%) |
|--|----|-------|--------|--------------|-------|--------|---|
| Discussed clinical observations with evaluatee at interview            | 37 | 6     | 12     | 13           | 4     | 2      | 31/37<br>(84%)                            |
| Discussed legal question with evaluatee at interview                   | 36 | 11    | 9      | 12           | 4     | -      | 25/36<br>(69%)                            |
| Contacted treatment provider for other than collateral information     | 36 | 20    | 9      | 5            | 1     | 1      | 16/36<br>(44%)                            |
| Discussed written opinion with evaluatee prior to submitting           | 37 | 20    | 8      | 7            | 1     | 1      | 17/37<br>(46%)                            |
| Greeted evaluatee in court   | 35 | 16    | 6      | 5            | 6     | 2      | 19/35<br>(54%)                            |
| Discussed content with evaluatee in advance of testimony               | 37 | 29    | 2      | 4            | 2     | -      | 8/37<br>(22%)                             |
| Advised attorney that evaluatee may be distressed at hearing testimony | 37 | 19    | 8      | 9            | 1     | -      | 18/37<br>(49%)                            |
| Advised attorney that evaluatee may require assessment after hearing   | 36 | 22    | 4      | 8            | 2     | -      | 14/36<br>(39%)                            |
| Wrote in report that defendant may be suicidal after adjudication      | 37 | 27    | 6      | 4            | -     | -      | 10/37<br>(27%)                            |

Table 2 describes the respondents' replies to the survey questions. Of the participants who discussed clinical observations with the evaluatee at interview, a majority noted that they had done so as an expert retained by the Court. Some had done so as an expert retained in civil cases, by either the plaintiff or defendant, or in criminal cases, when retained by the defendant only. None had done so when retained by the prosecution.

Of the participants who discussed their impressions of the legal question being posed with the evaluatee at interview, a majority had done so when acting as an expert retained by the Court. Some had done so as an expert retained in civil cases, by plaintiff or defendant, or in criminal cases, when retained by the defendant only.

Of those participants who contacted the evaluatee's psychiatric treatment provider regarding clinical impressions (rather than only to obtain collateral information about mental health), half did so because of concerns of risk, to indicate the evaluatee's danger to self or other. Some reported doing so to convey a diagnostic impression, to recommend initiating medication treatment, or to suggest changes in existing treatment.

Participants who discussed their written opinion prior to submitting their report did so in a variety of types of evaluations, including: competence to stand trial, criminal responsibility, fitness for duty, and emotional damages. Participants reported doing so when retained by the Court or by the defense in civil cases.

Of the participants who had greeted an evaluatee in Court, many had done so as an expert retained by the Court, and some reported having done so as an expert retained in civil cases, for either plaintiff or defendant, and in criminal cases by either the defense or prosecution.

Participants who had ever discussed with the evaluatee the content of their testimony regarding a mental health condition in advance of the hearing reported having done so as an expert

retained by the Court or as an expert retained in civil cases by the defendant.

Approximately half of participants had advised the attorney that the evaluatee may be distressed at hearing the testimony. Over a third of participants had ever advised the attorney that the evaluatee may require psychiatric assessment after the hearing or adjudication (14 / 36). There was a trend suggesting that experienced experts did so more often ( $p < 0.01$ ).

Approximately one-fourth of participants had ever written in a forensic report that the defendant may be suicidal following adjudication.

Additionally, no participants responded that they had advised an attorney that it may be preferable that the evaluatee's family not attend a hearing involving their testimony. Responses did not vary according to years of experience (with exception of a trend for advising the attorney of a possible need for assessment after the hearing).

#### IV. DISCUSSION:

The present survey provides a preliminary overview of how forensic mental health professionals take into account therapeutic concerns through specific behaviors during the evaluation process and in courtroom testimony. The small sample included a broad range of experience levels among attendees at a specialty forensic conference. Results indicated that, although few participants reported always engaging in behaviors to educate or protect the evaluatee, a substantial number of participants did so some of the time. For many of the questions, participants reported engaging in the behaviors regardless of which party in the proceedings had retained them.

This pilot study examined psychiatric testimony from a therapeutic jurisprudence perspective and suggests ways that the courtroom may serve as a forum for defendants to learn about their mental illness. This would serve traditional goals of medical ethics, such as promoting a patient's autonomy. An



improved understanding of his illness by a defendant may improve his ability to engage with and benefit from further treatment. Stone (1984) asked “how the psychiatrist would square the ethical imperative of his/her healing profession with the adversarial goals of the prosecution.” (p. 215) This could be one way.

Engaging with defendants in this way would also support several recent suggestions: Walker’s that a *moral repair* is necessary if an offender is to take responsibility, acknowledge and address the harm suffered by the victim, and acknowledge the authority of the norms violated by the offender, and establishing adequate moral relationships between victims, wrongdoers and the community (Walker, 2006) ; Birgden and Perlin’s that the *dignity* of all participants be protected as a foundation of their legal, moral and social rights (Birgden & Perlin, 2009); and Candilis’s that the views of all key stakeholders be considered as part of a process of achieving a *robust professionalism framework* (Candilis, 2009). Ward and Syverson (2009) suggest that being treated respectfully and having the chance to enter into dialogue with the community and possibly with the victims could be a pathway for offenders to acknowledge the harm done to others and the norms violated by their actions.

Given that evaluators already engage in therapeutic jurisprudence practices on a case-by-case or *ad hoc* basis, as suggested by our results, additional attention would be valuable to the field in defining how, when, and why these practices are appropriate. Although evaluators must continue to strive for objectivity and guard against bias, serving the legal system as a primary aim, therapeutic jurisprudence aims remain feasible. The implications of expanding the scope of the forensic evaluator’s role to include therapeutic jurisprudence objectives more explicitly would require further exploration and discussion within the profession.

As health care professionals providing testimony regarding mental state, diagnosis and prognosis, forensic mental health experts may have an opportunity to influence how this testimony is heard or construed by the evaluatee. The results of our survey suggest that forensic mental health experts, given their clinical training as treatment providers, perform evaluations that can reflect certain therapeutic principles and attention to the well-being of the evaluatee, while continuing to serve the primary goals of the legal proceedings. This suggests that the evaluation practices and court testimony of expert witnesses may serve as an opportunity for psycho-education of the evaluatee within a Therapeutic Jurisprudence framework.

However, such an aim raises questions of dual agency. As mentioned previously, the mental health professional practicing in a forensic arena must at times serve two masters, the law and medicine. In a purely forensic evaluation, the evaluatee is informed of the lack of confidentiality and the lack of a traditional doctor-patient relationship. A concept of the 'limited physician-patient relationship' imposed by the law, such as in the case of independent medical examinations (IME) however may allow for the creation of limited scope of duty, such as *primum non nocere*, 'do no harm'. (Gold & Davidson, 2007) For example, Gold and Davidson (2007) noted that the discovery of suicidal or violent plans may trigger such a duty, even during a forensic evaluation—and this was noted in our survey responses.

Though occasionally difficult, this forensic role is more straightforward than when the psychiatrist is pushed into the roles of both evaluator and treatment provider. For example, when psychiatrists who work on non-forensic inpatient psychiatric units testify in civil commitment proceedings, they may be perceived as testifying 'against' their patients. (Eisenberg, Barnes & Gutheil, 1980) After the hearing, they may return to the unit, and attempt to treat patients who now perceive that their doctor has 'railroaded' them. Thus, the concern for a ther-

apeutic jurisprudence approach to testimony in legal proceedings is not confined to the practices of forensic experts, and may be relevant to general psychiatry as well.

Our survey results suggest that, beyond the potential for forensic evaluators to elect to intervene or engage in behaviors guided by therapeutic reasoning, psychiatrists participating as experts in a legal proceeding may at times take into account the impact of how their testimony is heard or construed by the person. Further study of the impact of these behaviors within a therapeutic jurisprudence framework is beginning to be explored. (Ng, Friedman, & Diesfeld, 2015)

Therapeutic jurisprudence includes drug and mental health courts but also other uses of the judicial system such as civil commitment proceedings. Within a therapeutic jurisprudence perspective, the law itself may be conceptualized as part of the treatment armamentarium. In this perspective, each outcome of a legal case could have either therapeutic or counter-therapeutic consequences. The process itself rather than the content or result alone may have value, according to whether evaluation is conducted with respect and with an appropriate, unbiased level of empathy. Attorneys and judges as well as psychiatrists may thus support the larger aims of the legal system by considering the effect of their actions not only on the defendant's freedom but also on the defendant's mental health status. Participants need be mindful of the effects that their statements and interactions may have in the legal context, for the longer-term mental health and treatment of the defendant.

Results from this survey in a sample of professionals may help to refine questions and problems to examine in future studies (e.g., on the impact of testimony on evaluatees who have been present during legal proceedings where their mental condition has been at issue). These findings are limited due to a small sample from a regional professional conference, and provide a first look that suggests the salience of these issues in forensic mental health experts' behaviors. Due to our focus on

specific behaviors in the survey, the thought processes, reasoning, and level of awareness of experts engaging in the behaviors were not described. A larger study gathering additional information in a larger sample of experts, possibly with evaluatee outcomes, could clarify the impact of evaluation processes and testimony behaviors on the evaluatees themselves.

The law itself, and the application of the law, can be of positive or negative therapeutic value to the defendant or patient, regardless of the type of legal question or evaluation.

Our long-term goal is to examine mental health testimony from a therapeutic jurisprudence perspective and consider the ways that the courtroom may potentially serve as a forum for evaluatees to learn about their mental illness, while continuing to meet the primary aims of assisting the court. The defendant's perception of psychiatric testimony may be clarified empirically through research on what defendants hear, how they hear it, and the effects of what they hear on their attitudes towards the mental health professions.

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DRUG COURTS—JUST THE BEGINNING: HOW TO GET OTHER  
AREAS OF PUBLIC POLICY IN SYNC?

ADDRESSING CONTINUING COLLATERAL CONSEQUENCES FOR  
DRUG OFFENDERS

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I. BACKGROUND

In 2003, I prepared an article for the Middle Eastern-Mediterranean Summer Institute on Drug Use: “Drug Courts – Just the Beginning: Getting Other Areas of Public Policy in Sync,” which highlighted five areas of public policy in the United States, unconnected to criminal justice, that imposed significant – and generally lifetime – sanctions on drug court graduates regardless of their successful completion of a drug court program and termination from criminal justice supervision. At that time, the extensive research corroborating the effectiveness of drug courts in reducing drug use, recidivism and promoting long term recovery was just beginning to be disseminated, along with scientific findings relating to the neurobiology of addiction, its effects on the brain and cognitive functioning – all confirming that drug use was a generally a symptom of a chronic disease of the brain – far more than a “behavioral” issue and/or moral failing.

Given these extensive research findings, as well as over a decade of drug court experience at the time, it was therefore discouraging, but not unexpected, that the impact of the re-

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search had not yet affected public policy and practice in sectors not directly involved with drug offending and/or treatment. Given the commonly held premise that it takes seventeen years for research to affect practice, I prepared this “update” to determine the degree to which these research findings have now “infiltrated” practice.

My intention in preparing this “Update” twelve years later was to document progress made in reducing these areas of stigma – come to be subsequently referred to as “collateral consequences” – in light of the tremendous growth of drug courts since the article was first published in 2003, both in the U.S. and abroad, the widely documented effectiveness of these programs in stemming continued drug use and crime, and the growing body of research documenting the neuro-biological and physiological aspects of the disease of addiction for which treatment has proven effective and incarceration in and of itself has been increasingly documented to be counter-effective.<sup>1</sup> My expectation, therefore, was that progress in removing stigma associated with addiction would have been significant during this past decade.

The results, however, have been the opposite.

While there has been some progress, it has been slow and spotty, and the situation in 2015 can be characterized by continued stigma – and a wide array of collateral consequences -- imposed by multiple sectors of public policy on individuals who have successfully completed drug court programs and which, in many instances, extend for their lifetime. Not only do the major areas of stigma described in the 2003 article continue but, in addition, the preparation of this “Update” has uncovered numerous additional “collateral consequences” that hadn’t

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<sup>1</sup> Roger H. Peters, *Drug Court Treatment Services*. Issues Commentary and Resource Brief. Nov. 2011.



formally surfaced in 2003 – exclusions regarding the right to adopt children, grounds for divorce, and a host of professional license requirements, for example. These are further described below.

Two very bright spots, however, are surfacing:

First, proposed reforms in the sentencing process that can directly address collateral consequences that may flow from a criminal conviction and discussed in a recent article by Margaret Colgate Love in the *Wisconsin Law Review*<sup>2</sup> May 1, 2015:

...Policy makers are beginning to understand that the goal of reintegrating criminal offenders into society is not well served by a legal system that makes them permanently ineligible for many of its benefits and opportunities and effectively marks them as social outcasts. Because courts have failed to address issues of severity and proportionality raised by punitive mandatory collateral penalties, and because legislatures have been unwilling to dial them back in any meaningful fashion, reformers have turned to the sentencing system to restore collateral consequences to an appropriate regulatory role. One such reform proposal is the American Law Institute's Model Penal Code: Sentencing (MPC), which integrates collateral consequences into a sentencing system that gives the court rather than the legislature responsibility for shaping and managing criminal punishment in particular cases. Just as the court decides what sentence it will impose within a statutory range, the court

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<sup>2</sup> Managing Collateral Consequence in the Sentencing Process, WIS. L. REV. May 1, 2015.

also decides which mandatory collateral penalties will apply and for how long. This gives sentencing courts new tools to further the rehabilitative goals of sentencing, and at the same time it enables them to avert issues of proportionality and procedural fairness that lurk in any categorical scheme. In effect, the MPC scheme converts collateral consequences from senseless punishment to reasonable case-specific regulation.<sup>3</sup>

Second, the growing body of resources and experience relating to the application of the principles of Therapeutic Jurisprudence<sup>4</sup> to all aspects of justice system policy and practice. We have long been familiar with the punitive aspects of the law and its impact on all involved—victims, witnesses, as well as defendants. Malcolm Feeley's 1979 classic, *The Process is the Punishment*,<sup>5</sup> captured the all-to-familiar theme that just being involved with the justice system is punishment in itself, regardless of the outcome. The concept of Therapeutic Jurisprudence, however introduces the therapeutic potential which the law can have as well—as a tool to promote healing and *justice* while still adhering to the constitutional and statutory framework in which our justice system functions. Drug courts and the growing emergence of other problem solving court programs are prime examples of the application of “TJ” principles which hopefully will now be “mainstreamed” to remove the many “collateral consequences” associated with drug offenses that presently permeate public policy.

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Malcolm W. Feeley, *THE PROCESS IS THE PUNISHMENT*. Russell Sage Foundation. (1979).

*Major Paradigm Shift Introduced by the Drug Court Model  
Regarding Criminal Justice System Response to Drug  
Offenders: Focus on Treatment Rather Than Punishment*

Through the establishment of “drug courts”, judges in the U.S. have been the leaders primarily responsible for initiating the major shift in criminal justice policy and practice regarding drug offenders that has taken hold during the past twenty-five years, both in the U.S. and abroad. The basic concept of the “drug court” has entailed the use of the court’s authority – and that of the judge, in particular – combined with the leverage of the criminal justice system to promote drug offenders’ participation in evidence based treatment programs, primarily community based, with the judge providing ongoing oversight of participants’ progress as well as ensuring accountability of participants as well as of service providers.

Given the chronic disease nature of addiction, a basic premise of the drug court model is the expectation that relapse may occur, requiring enhanced treatment – and not program termination or incarceration. Most drug court programs extend for twelve to eighteen months – significantly longer than the ninety day or less treatment programs that had been commonly utilized – and are designed to provide participants with the foundation for recovery through both treatment services per se as well as other services designed to reduce the risk of relapse – housing, education, jobs, etc.—and aftercare/recovery support services that can continue once a participant graduates from the drug court.

The panoply of drug court treatment and ancillary services developed in every state and territory in the U.S. as well as over 25 other countries has provided the vehicle for thousands to begin to recover from addiction, cease criminal activity and to rebuild their lives. Those who complete the “drug court” program generally receive some amelioration of the criminal

justice sanction that would otherwise have been applied – in some instances dismissal of the charge altogether, in other instances suspension of incarceration and/or reduction in the period of probation. The benefits drug courts have generated for individual defendants, their families, and the community generally have been enormous.

## II. THE DILEMMA: OTHER SECTORS OF PUBLIC POLICY NOT [YET] ADOPTING THE PARADIGM SHIFT AWAY FROM PUNISHMENT TO TREATMENT

Although an individual can complete a drug court in the U.S., have his/her charges dismissed or reduced, with a sentence of incarceration suspended, or receive some other amelioration of the *criminal justice system penalty* that would otherwise have been applied – as well as obtain a job, regain custody of his/her children and become a tax paying, law abiding citizen, he/she will still be deprived of basic rights afforded to other U.S. citizens because of the “collateral consequences” of policies imposed outside of the criminal justice system – in some instances not simply because of his/her criminal conviction but also because the conviction was for a *drug offense*.

These “collateral consequences” reflect an array of sanctions imposed by non-criminal justice sectors of public policy and practice that continue to penalize individuals who have been drug addicts in the past, despite their completion of a drug court program, the extent and duration of their recovery, and the fact that their criminal justice system involvement has been terminated. For example, individuals who have been charged/convicted of felony drug offenses will be denied (1) welfare benefits; (2) educational loans; (3) public housing<sup>6</sup>;

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<sup>6</sup> The consequences arising from a drug charge against an offender living in public housing can also extend to his/her family with whom the offender resides.

and (4) the right to vote, although some states permit restoration of voting rights under specified conditions. Employment opportunities are also greatly restricted – not simply by required disclosures of criminal convictions on application forms but also by licensure and/or security clearance requirements that exclude from consideration persons with a criminal history involving drug offenses. In addition, deportation proceedings can be instituted – even for persons with legal immigration status – based upon a drug charge, even one that was dismissed.

*Situation in 2003: Selected noncriminal justice areas of public policy and practice stigmatizing drug offenders -- and Subsequent Developments through 2014*

As noted above, when this paper was originally prepared in 2003, it focused on five areas of “stigma”, collateral consequences, imposed on drug offenders, apart from any penalties that had been applied by the *criminal justice system*:

- (A) Public Housing
- (B) Welfare Benefits
- (C) The Right To Vote
- (D) Financial Aid For Educations; and
- (E) Immigration Status

These are discussed briefly below, with particular attention to their implications for drug court participants, along with developments, if any, since 2003.

*A. Eligibility for Public Housing*

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Housing has been identified by most drug court programs as the most immediate and critical need of participants when entering the program. Some are homeless; many others live in situations in which family members or other house mates are using drugs, making efforts at abstinence extremely difficult if not impossible. Most – if not all – drug court participants also lack the resources to find appropriate housing on the open market.

Until and unless these defendants can make clean and sober living arrangements, any chance of their becoming drug free is problematic. Regardless of the quality of treatment and other services provided, a defendant who returns daily to a drug using environment will have little chance of overcoming his/her addiction. It is not a question of becoming strong enough to “just say no”; the issue is complicated by complex personal and emotional relationships and issues with which the participant is dealing as well as his/her personal safety.

Public housing resources, including those made available under the Housing Opportunity Program Extension (HOPE) Act of 1996<sup>7</sup>, would theoretically provide an ideal resource for the drug court program and participants in need of housing. The reality, however, is that current statutory provisions and widespread local policies result in public housing being unavailable to most drug court participants.

The provisions of the HOPE Act of 1996, with its “one strike, you’re out” philosophy, continues to deny drug offenders eligibility to live in public housing independently or with a family member or friend and, further, authorizes public housing authorities to evict drug offenders currently residing in public housing.

When originally enacted, the HOPE Act was deemed to be a tough anticrime measure designed to make public housing safe for law-abiding residents. However, two provisions of the

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<sup>7</sup> Public Law No. 104-120; § 110 Stat.834; 42 U.S.C. § 1437d (1)(5).

law have come to have potential detrimental consequences for persons involved with drug use or users, regardless of the success of these individuals in subsequent recovery efforts.

First, the HOPE Act requires that the lessee of any public housing unit assume an affirmative responsibility for the law-abiding behavior of all members of the lessee's household and guests.<sup>8</sup>

Second, the HOPE Act permits public housing authorities to deny admission to or evict individuals who have engaged in criminal activity, especially drug-related criminal activity, on or off public housing premises, regardless of whether they were arrested or convicted for these activities.<sup>9</sup>

Under the Act, a local public housing authority's receipt of federal funds is based, in part, on its use of a lease that clearly provides that any drug related or other serious criminal activity by a member of a household is grounds for eviction. Although, ultimately, the application of these provisions may be the decision of the local public housing administrator, the provision clearly articulates a policy which most local administrators are in a difficult position to challenge.

Similar restrictions have been reportedly introduced in some state legislatures regarding non-public housing units as well. For example, under a "Clean Sweep" agreement, the landlord of a major apartment building in the Bronx, New York, must agree to implement measures to stop illegal drug activity and improve security, which includes barring from tenancy persons who have been convicted within the last five years of a narcotics offense.<sup>10</sup> Similarly, Tennessee's "Drug Dealer Eviction Program", enacted by statute in 1997, provides that individuals can be evicted for felony drug violations occurring in rental property. If the landlord does not take action,

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<sup>8</sup> 42 U.S.C. § 1437(d)(1)(5).

<sup>9</sup> 24 C.F.R. § 966.4 (1)(2)(ii)(B).

<sup>10</sup> Press Releases. Office of New York State Attorney General Eliot Spitzer. Feb. 4, 2003.

the law permits the District Attorney's Office to proceed with eviction.<sup>11</sup> A similar bill passed the Rhode Island Senate.<sup>12</sup>

No one is arguing that the overall purposes of these statutes and policies are not meritorious. The problem, however, is that they are applied across the board, with generally no exceptions. The result for drug court participants is that they are frequently both (1) ineligible to be considered for public housing if they need it; and (2) evicted if they are already living in a public housing unit.

Families of drug court participants are treated similarly. Occasionally, one hears of a local public housing administrator who has waived the one strike eviction policy for a drug court participant through special agreement with the Court. However, this situation is the rare exception and generally only lasts as long as that particular administrator is in office. Although Housing and Urban Development (HUD) officials have indicated the one strike eviction policy is not a federal requirement but, rather a policy which local public housing authorities are free to disregard<sup>13</sup>, the reality is that the policy prevails in almost all jurisdictions.

Bills have been introduced into the U.S. House and Senate (H.R. 1999 and S. 771) to allow public housing agencies to deny or terminate housing assistance if a family member or other person in the family's control engages in any criminal activity, including drug-related crime, on or off the premises; or alcohol or other drug abuse that "threatens the health, safety or right to peaceful enjoyment of the premises" by other residents. The bills remove any discretion the housing authority may have

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<sup>11</sup> 30<sup>th</sup> Judicial District of Tennessee (Shelby County). District Attorney General's Office. Drug Dealer Eviction Program. Jackie Condrey, Investigator. Website of William L. Gibbons, District Attorney General: [www.scdag.com/ddev.htm](http://www.scdag.com/ddev.htm).

<sup>12</sup> An Act Relating to Property-Residential Landlord and Tenant Act. State of Rhode Island. General Assembly. S. 0479. 2003

<sup>13</sup> Focus Group Meeting of HUD representatives, drug court judges and others. National Association of Drug Court Professionals. January 2003.



under current law to take efforts at treatment into consideration.

Although there have been challenges to this policy, they have generally not been successful. In *Rucker v. Davis*<sup>14</sup>, however, Rucker, an Oakland, California grandmother, was evicted because of her grandson's drug conviction. The decision was upheld by the Ninth Circuit Court but overturned by the U.S. Supreme Court in 2002 on the grounds that Congress did not intend to permit the eviction of innocent tenants and judicial discretion should be exercised in applying the provisions of the statute. The facts surrounding the decision, however, are narrow and still leave substantial discretion to the housing administrator.

Several drug court judges have discussed the feasibility of developing an earmark for drug court participants in local public housing units to provide the court with a ready resource for drug court participants needing housing. One drug court judge has also suggested that drug courts develop a Memorandum of Understanding (MOU) with the local housing authority to designate the drug court as a rehabilitation program as defined in Section III of the Section 8 Tenant Based Assistance: Housing Choice Program, Title 24, Volume 4, Revised as of April 1, 2004, Code of Federal Regulations, which permits public housing authorities to continue to provide assistance if the member "...is participating in or has completed a supervised drug or alcohol rehabilitation program..."<sup>15</sup>

Apart from the proposed earmark and/or MOU, simply permitting drug court participants to apply for and/or remain in public housing units would seem to be in everyone's best inter-

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<sup>14</sup> Hill v. Davis, No. 98-16322, 98-16542. (2001).

<sup>15</sup> Title 24. Housing and Urban development. Chapter IX. Office of Assistant Secretary. Department of Housing and Urban Development. Part 982. Section 8. Tenant Based Assistance: Housing Choice Program. Subpart L. Family Obligations; Denial and Termination of Assistance. Title 24, Volume 4. Code of Federal Regulations. Revised as of Apr. 1, 2004.

ests. The participant and/or his/her family would have a drug free place to live, and the neighbors could have substantial confidence that the participant/resident was being drug tested frequently and closely supervised by the court.

*B. Entitlement to Public Welfare Benefits: Cash Assistance And/or Food Stamps, or Both*

Well over half of drug court participants are unemployed or have minimal employment when they enter the drug court and close to half lack a high school diploma or GED certificate.<sup>16</sup> Most have very limited, if any, resources and whatever resources they have available are generally inadequate to support them during the intensive treatment phases of the drug court program. Nevertheless, if they have a drug conviction on their record, either as a result of the drug court offense or for a previous conviction – which many participants have – they are ineligible to receive welfare benefits, even temporarily, unless they reside in one of the few states, more specifically described below, which have opted out in whole or in part from these provisions.

Under the provision of Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as the Temporary Assistance for Needy Families (TANF) Act, persons convicted of a state or federal felony offense involving the use or sale of drugs are prohibited *for life* from receiving cash assistance and food stamps.<sup>17</sup> This provi-

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<sup>16</sup> 2000 Drug Court Survey Report. Final Draft. OJP Drug Court Clearinghouse and Technical Assistance Project. School of Public Affairs, American University. Nov. 2001.

<sup>17</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. Law No. 104-193. For an excellent discussion of the implications of these provisions, see *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses*, prepared by Patricia Allard. The Sentencing Project. Feb. 2002.

sion applies only to drug offenses; persons who are convicted of other offenses, regardless of their seriousness, are not subject to this exclusion.

Enacted as a demonstration of the U.S.'s "war on drugs", the provision reportedly received little discussion when passed.<sup>18</sup>

The Sentencing Project and the Legal Action Center have conducted extensive studies of the application of this statute<sup>19</sup>. In 2002, the Sentencing Project reported<sup>20</sup> that, although the federal statute permits states to opt out of its provisions or to modify them, only eight states<sup>21</sup> and the District of Columbia at that time had opted out of the provisions of the law: Connecticut, Michigan, New Hampshire, New York, Ohio, Oklahoma, Oregon and Vermont. In September 2005, the state of Washington also opted out of these provisions<sup>22</sup> followed by the New Jersey legislature's lifting of the state's ban on food stamps for drug felony convicts in 2010.<sup>23</sup>

Currently, thirty-six states enforce the ban in full<sup>24</sup> or in part,<sup>25</sup> as further described below:

1. States imposing a lifetime ban

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<sup>18</sup> See *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses*, prepared by Patricia Allard, The Sentencing Project, February 2002, and her citation to 142 Cong. Record No. 109, Sec. 8498, July 23, 1996.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> PATRICIA ALLARD, *LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES*, 3 (2001).

<sup>22</sup> Senate Bill 5213 enacted effective September 1, 2005.

<sup>23</sup> NICOLE D. PORTER, *EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM*.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

In 2002, twenty-two states imposed the ban on ex-offenders for life<sup>26</sup>: Alabama, Alaska, Arizona, California, Delaware, Georgia, Idaho, Indiana, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia and Wyoming. Subsequently, California, Idaho, and Maine opted out of the ban entirely and Delaware modified the restrictions, so that, at the present, the number of states imposing the ban for life has been reduced from twenty-two to eighteen.

According to the Legal Action Center, as of December 2011, in addition to the 14 states that had opted out of the drug felon ban, twenty-six states plus the District of Columbia had modified it, leaving only ten states fully implementing the ban.<sup>27</sup> The following six states permit welfare benefits if the offender receives drug treatment: Hawaii, Kentucky, Maryland, Nevada, South Carolina, and Utah.

2. States imposing a partial ban or limiting ineligibility to specific drug offenses and/or a specified time period

An additional eleven states limit the application of the ban to specific drug offenses and/or specified time periods, as follows:<sup>28</sup>

|   |
|---|
| <p><b>Chart 1: STATES LIMITING BAN ON WELFARE BENEFITS TO EITHER SPECIFIC OFFENSES AND/OR A SPECIFIED PERIOD OF TIME FOLLOWING CONVICTION</b></p> |
|---|

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<sup>26</sup> *Id.*

<sup>27</sup> See *Opting Out of Federal Ban on Food Stamps and TANF*, prepared by the *Legal Action Center* and McCarty, Maggie, Randy Alison Aussenberg, Gene Falk, and David H. Carpenter. Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance. Rep. Congressional Research Service, 17 Sept. 2013. Web. 08 Oct. 2013.

<sup>28</sup> *Id.*

| STATE                 | COMMENTS   |
|-----------------------|--|
| <b>Arkansas</b>       | Limits the ban on welfare benefits to offenses involving the sale of drugs only  |
| <b>Colorado</b>       | Limits the ban on welfare benefits to offenses entailing the purchase of drugs with food stamps in which case persons are ineligible for food stamps only  |
| <b>Florida</b>        | Limits the ban on welfare benefits to offenses involving the sale of drugs only  |
| <b>Illinois</b>       | Limits the ban on welfare benefits to persons convicted of the sale of drugs or possession of a large quantity of drugs but still remain eligible for food stamps  |
| <b>Iowa</b>           | Imposes a partial ban  |
| <b>Louisiana</b>      | Permits eligibility after a one-year period after release from custody or conviction date  |
| <b>Massachusetts</b>  | Restricts eligibility for cash assistance to individuals incarcerated for a drug conviction during the first 12 months following their release unless the individual qualifies for a waiver under state statute (e.g., pregnancy, disability, caring for a child less than two years of age, etc.). Persons convicted of a drug offense remain eligible for food stamps. |
| <b>Minnesota</b>      | Requires persons convicted of drug offenses to submit to regular drug tests in order to receive benefits although they are not required to receive treatment   |
| <b>North Carolina</b> | Permits eligibility after six months but also requires offenders to have successfully completed a drug treatment program or be participating in one to have their eligibility restored   |
| <b>Rhode Island</b>   | Limits the ban on welfare benefits to offenses involving the sale of drugs only  |
| <b>Wisconsin</b>      | Requires persons convicted of drug offenses to submit to regular drug tests in order to receive benefits although they are not required to receive treatment   |

## 3. States imposing a specific ban on food stamps only:

| <b>Chart 2: STATES IMPOSING A SPECIFIC BAN ON FOOD STAMPS ONLY</b> |   |
|--|---|
| <b>STATE</b>   | <b>COMMENTS</b>   |
| <b>Alabama</b>   | Bans food stamps for individuals with drug felonies.  |
| <b>Alaska</b>  | Bans food stamps for individuals with drug felonies.  |
| <b>Arizona</b>   | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation. |
| <b>Arkansas</b>  | Bans food stamps only for individuals convicted of distribution, manufacture, or trafficking; the ban does not apply to drug possession.                    |
| <b>California</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>Colorado</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>Connecticut</b>   | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>Florida</b>   | Ban food stamps only for individuals convicted of distribution, manufacture, or trafficking; the ban does not apply to drug possession.                     |
| <b>Georgia</b>   | Ban food stamps for individuals with drug felonies.   |
| <b>Hawaii</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>Illinois</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |

| <b>Chart 2: STATES IMPOSING A SPECIFIC BAN ON FOOD STAMPS ONLY</b> |   |
|--|---|
| <b>STATE</b>   | <b>COMMENTS</b>   |
| <b>Idaho</b>   | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation. |
| <b>Indiana</b>   | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation. |
| <b>Kentucky</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>Louisiana</b>   | Ban on food stamps ends one year after completion of sentence/release   |
| <b>Maryland</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment   |
| <b>Massachusetts</b>   | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation  |
| <b>Minnesota</b>   | Ban on food stamps does not apply to individuals who comply with drug testing and test negative   |
| <b>Mississippi</b>   | Ban food stamps for individuals with drug felonies.   |
| <b>Montana</b>   | Ban on food stamps does not apply to individuals who comply with drug testing and test negative   |
| <b>North Dakota</b>  | Ban on food stamps only for individuals convicted of distribution, manufacture, or trafficking; the ban does not apply to drug possession.                  |
| <b>Nebraska</b>  | Ban on food stamps only for individuals convicted of distribution, manufacture, or trafficking; the ban does not apply to drug possession.                  |

| <b>Chart 2: STATES IMPOSING A SPECIFIC BAN ON FOOD STAMPS ONLY</b> |   |
|--|---|
| <b>STATE</b>   | <b>COMMENTS</b>   |
| <b>Nevada</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>North Carolina</b>  | Ban on food stamps ends six months after completion of sentence/release   |
| <b>Oregon</b>  | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation. |
| <b>South Carolina</b>  | Bans food stamps for individuals with drug felonies.  |
| <b>Tennessee</b>   | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation. |
| <b>Texas</b>   | Bans food stamps for persons convicted of sale or possession of drugs   |
| <b>Utah</b>  | Ban on food stamps does not apply to individuals in treatment or who have completed treatment.  |
| <b>Virginia</b>  | Ban on food stamps does not apply to individuals who have completed their sentence or are complying with the terms of their judgment, parole, or probation. |
| <b>West Virginia</b>   | Bans food stamps for individuals with drug felonies.  |
| <b>Wisconsin</b>   | Ban on food stamps does not apply to individuals who comply with drug testing and test negative   |
| <b>Wyoming</b>   | Bans food stamps for individuals with drug felonies.  |

4. States that do not impose a ban on welfare benefits or food stamps



| <b>Chart 3: STATES WHICH DO NOT IMPOSE A BAN ON WELFARE BENEFITS OR FOOD STAMPS</b> |                             |
|---|-----------------------------|
| <b>Delaware</b>   | <b>Ohio</b>                 |
| <b>Kansas</b>   | <b>Oklahoma</b>             |
| <b>Maine</b>  | <b>Pennsylvania</b>         |
| <b>Michigan</b>   | <b>Vermont</b>              |
| <b>New Hampshire</b>  | <b>Washington</b>           |
| <b>New Mexico</b>   | <b>District of Columbia</b> |
| <b>New York</b>   |                             |

Although the ban on welfare benefits, including food stamps, applies to all individuals convicted of a felony drug offense, special attention has recently been given to the impact of the ban on women who, although representing a minority of felons convicted of drug offenses, represent the majority of primary caregivers and welfare recipients. In 2002, the Sentencing Project estimated that 92,000 women and 135,000 children were affected by the ban in the 23 states for which they were able to compile data.<sup>29</sup>

The Sentencing Project has also noted that, when all of the states applying the ban are taken into account, these figures will undoubtedly increase substantially. They will also, of course, continue to increase sharply each year as the law continues to be applied.

### *C. Right to Vote*

The right to vote and to participate in the political process has always been considered a fundamental right in the U.S. Yet drug court participants – particularly those who have a felony conviction on their record, for either past offenses or the present drug court offense – will frequently be disenfranchised regardless of the outcome of their drug court participation.

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<sup>29</sup> *Id.*

The U.S. is reportedly the only democracy in the world in which convicted offenders who have completed their sentences can be disenfranchised for life, as is currently the situation in six states - down from twelve states in 2003.<sup>30</sup> As of 2013, it was estimated that 5.85 million Americans were not eligible to vote as a result of felony disenfranchisement laws<sup>31</sup> that apply in the District of Columbia and all states except Maine and Vermont, including thirteen percent of African American males.<sup>32</sup>

The historical roots for disenfranchising convicted felons appear to originate in medieval practices of banishing offenders from the community at a time when eligibility to vote was considered a privilege rather than a right. Ironically, these practices led to a number of individuals settling in the British colonies in the U.S. and elsewhere. Disenfranchisement provisions reportedly became incorporated into state laws in the U.S. in the late nineteenth century. Most advocates of voting rights reform have noted that not only do these laws work against the reintegration of offenders into society<sup>33</sup> but they also serve no discernable purpose.

While there are a number of reform proposals presently being considered which may result in some reforms being enacted, the basic concept of felony disenfranchisement appears to still permeate the framework of most state voting rights statutes.

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<sup>30</sup> MARCH MAUER, *DISENFRANCHISEMENT: THE MODERN-DAY VOTING RIGHTS CHALLENGE* (2002).

<sup>31</sup> FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, THE SENTENCING PROJECT (2013).

<sup>32</sup> *Supra* note 31; *Disenfranchised Florida Felons struggle to Regain Their Rights*. NEW YORK TIMES, Mar. 28, 2004; Mauer & Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*. THE SENTENCING PROJECT (2005).

<sup>33</sup> LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES. HUMAN RIGHTS WATCH 1998.

In twelve states, an individual convicted of a felony may lose his or her voting rights permanently depending on the state, nature of the crime committed, time elapsed since completion of sentence and other variables.<sup>34</sup>

In those states in which voting rights can be restored upon the request of the defendant, historically it has been the defendant's burden to ensure that these restrictions are lifted – frequently entailing an extended bureaucratic process that many defendants are not in a position to pursue. The Sentencing Project has determined, for example:

- Since 1992, 107 persons have had their voting rights restored in Mississippi, compared to a disenfranchised population of 82,202;
- Since 1992, 343 persons in Florida regained their voting rights out of a pool of 44,001;
- Between 1999 and 2005, 48,000 persons regained their voting rights throughout the country, out of an estimated pool of 613,514.<sup>35</sup>

In a few states, legislation has been enacted to shift the burden of initiating the restoration of voting rights process from the individual to a state agency, requiring information to be provided to offenders regarding their voting eligibility upon release, or directly before.<sup>36</sup>

Only two states have no restrictions on voting rights for convicted felons: Maine and Vermont.<sup>37</sup> All other states restrict, in varying degrees, the voting rights of convicted felons, even in situations in which they have completed their sentenc-

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<sup>34</sup> STATE FELON VOTING LAWS, PROCON 18 (2013).

<sup>35</sup> *Supra* note 35.

<sup>36</sup> *Supra* note 24.

<sup>37</sup> A LIFE SENTENCE: DENYING EX-FELONS THE RIGHT TO VOTE, THE CALL 4 (2002).

es,<sup>38</sup> making no exception for drug court graduates, many of whom, as noted, have felony convictions on their records, either prior to or as a result of the arrest that brought them into the drug court.<sup>39</sup>

Currently, forty-eight states and the District of Columbia do not permit prison inmates to vote.<sup>40</sup> In 2003, thirty-two states prohibited felons from voting while on parole and twenty-eight of these states also prohibited felons from voting while on probation.

Currently, however, four states restore voting rights after a term of incarceration and parole and nineteen states restore voting rights after a term of incarceration, parole and probation.<sup>41</sup> However, some of these states also require the offender to make special application for restoration of his/her voting rights and action on the applications are made on a case by case basis.<sup>42</sup> Eight states permanently disenfranchised felons unless they applied to the state governor to grant them a pardon or instituted other administrative procedure to reinstate their voting rights.<sup>43</sup> Generally a waiting period of at least five years had been required.

As of 2014, two more states (Tennessee and Iowa) in addition to the original eight are now included in this practice.<sup>44</sup> Virginia had also begun to ease restrictions on felons who have lost their right to vote. Drug offenses are being categorized with other non-violent felonies. Restoration of voting rights

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<sup>38</sup> *Id.*

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

<sup>40</sup> See, LEGISLATIVE CHANGES ON FELONY DISENFRANCHISEMENT, THE SENTENCING PROJECT (2003).

<sup>41</sup> *Supra* note 37.

<sup>42</sup> *Id.*

<sup>43</sup> *Supra* note 31.

<sup>44</sup> *Supra* note 37.

reportedly now takes only weeks or months to be processed, as opposed to years previously.<sup>45</sup>

#### *D. Eligibility for Federal and State Educational Benefits*

With over one third of adult drug court participants lacking a high school degree or GED certificate at time of program entry, most drug court programs require participants to have a high school degree or equivalent in order to complete the program.<sup>46</sup> However, most programs also strongly encourage participants to engage in post-secondary education to be able to effectively compete in the job market and to enhance personal skills that will aid them in sustaining their recovery and building drug-free lives.

##### 1. Federal Loans:

Under the Higher Education Act of 1998, all convicted drug offenders lose their eligibility for federal educational aid, either temporarily or permanently, if they have a conviction for a drug offense.<sup>47</sup> Under the provisions of the Act, one conviction for a drug possession charge will result in denial of eligibility for education funding for one year. A second drug possession conviction will extend the period for ineligibility for an additional two years, with permanent disqualification resulting from a third conviction. A conviction for the sale of a controlled substance can result in disqualification for two years,

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<sup>45</sup> M. Laris, VOTING-RIGHTS QUEST IN VA. WILL BECOME EASIER FOR EX-CONS HELD ON SERIOUS DRUG CHARGES. THE WASHINGTON POST. (Apr. 19, 2014)

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

<sup>47</sup> *Id.*

with any subsequent conviction resulting in permanent disqualification.<sup>48</sup>

These provisions apply to all federally sponsored student loans, work-study programs and Pell Grants.<sup>49</sup>

In February 2003, Congressman Barney Frank (Mass.) introduced legislation to repeal the provision (H.R. 685), which was referred to committee but no action was taken. As of 2006, according to an analysis by the Department of Education, one in every 400 students applying for federal financial aid for college is rejected because of a drug conviction.<sup>50</sup>

In 2006, the U.S. Department of Education reported that since 2000, when the drug provision was added to the Higher Education Act, 180,000 students had been denied financial aid due to a drug conviction.<sup>51</sup>

As of 2014, despite continued congressional debate and the advocacy of a coalition of over 200 health, education, criminal justice, and student groups for its repeal, the provision of the law are still in force.

## 2. State Loans:

Some – but not all – states follow the federal prohibitions regarding the implications of drug offenses on eligibility for educational loans. In twenty-two states, financial aid is denied to all or most students with drug convictions (Alabama, Alaska, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Maine, Massachusetts, Montana, New Hampshire, New

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<sup>48</sup> See Demlietner, N.V. (2002).

<sup>49</sup> *How to Create an Underclass, Or How the War on Drugs Became a War on Education*, 6 UNIV. OF IOWA JOURNAL OF GENDER, RACE & JUSTICE 61 (2002).

<sup>50</sup> Donna Leinwand, *Drug Convictions Costing Students Their Financial Aid*, USA TODAY, Oct.14, 2013 at 14.

<sup>51</sup> See Mulligan, C., Dobler, B., Wibby, K., & Borden, D. (2006).

Jersey, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and West Virginia-).

Eleven states permit the individual education institution to make the decision regarding the eligibility of an individual with a drug conviction (Arizona, Connecticut, Kansas, Maryland, Michigan, Mississippi, Nebraska, North Carolina, North Dakota, Ohio, and Virginia). For the remaining seventeen states and the District of Columbia, a drug conviction does not disqualify a student for education benefits.<sup>52</sup>

Several colleges have voluntarily enhanced available financial aid resources to fill the gap created by the federal exclusion. The Board of Managers at Swarthmore College, for example, approved a policy mandating the College to replace federal financial aid that may be denied to a student because of a drug conviction beginning in the Fall of 2003.<sup>53</sup>

The arguments for repeal of these provisions have been voiced from many sectors and for many reasons, which go beyond the focus of this article. Suffice it to say that denial of educational financial assistance to individuals who admittedly have been drug addicts but have subsequently assumed the difficult requirements of a drug court program is clearly counterproductive to the rehabilitative goals drug court programs are advancing.

#### *E. Immigration Status*

A common practice in the drug court process is for a defendant to plead guilty to a drug possession or related charge with the understanding that he/she will then be able to enter the drug court program. If successful, his/her charge would be dismissed or reduced to a misdemeanor at the time of program completion. However, if that individual is not a U.S. citizen, he/she may be subject to subsequent deportation under provi-

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<sup>52</sup> *Id.*

<sup>53</sup> *Swarthmore Phoenix*. Mar. 6, 2002.

sions of the Antiterrorism and Effective Death Penalty Act (AEDPA) enacted in 1996, on the basis of the initial plea.

The AEDPA eliminates the discretionary relief from deportation that had been previously available under Section 212(c) of the Immigration and Nationality Act. This has provided authority to the Attorney General to waive the deportability of legal permanent residents, who had committed certain crimes, including drug-related offenses. This would be contingent on their sentence being less than five years and while having lived in the U.S. for at least seven years.<sup>54</sup>

At the time of the AEDPA enactment, the INS took the position that the elimination of Section 212(c) relief was retroactive, thereby applying the AEDPA provisions to the situation of permanent residents. These permanent residents would have relied on the law and pled guilty to crimes for which they were subsequently made reportable without any legal relief.<sup>55</sup> In *In re Mauro Roldan-Santoyo*, the Board of Immigration Appeals held that a conviction, even if vacated or dismissed pursuant to a drug rehabilitation statute, was still a conviction for immigration purposes and subjected a legal permanent resident to deportation.

While subsequent court challenges to the retroactivity of the AEDPA provisions have been upheld, the prospective application of the AEDPA provisions are still valid.

Nevertheless, case law in various circuits is beginning to emerge indicating that challenges to the application of the AEDPA provisions may, in certain limited circumstances, be successful. In some instances these appear to be based on an

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<sup>54</sup> Reeves and Associates. Recent Court Decisions Rejects INS Unconstitutional Interpretation of Law and Forces Reopening of Cases (May 30, 2000).

<sup>55</sup> *In Re Mauro Roldan-Santoyo*. File A90 286-629-Boise. Board of Immigration Appeals. Executive Office for Immigration Review. U.S. Department of Justice. March 3, 1999.



interpretation of the requirements of an “aggravated felony” under INS statute and regulation.<sup>56</sup>

In August 2000, for example, the Ninth Circuit partially overruled the decision by The Board of Immigration Appeals in the *Roldan-Santoyo*, holding that an expungement or other rehabilitative relief would eliminate a conviction of simple possession of a controlled substance for deportation purposes if the conviction was a first offense.<sup>57</sup>

Similarly, in February 2002, the Third Circuit Court of Appeals in Philadelphia departed from opinions in seven other circuits and overturned a lower court ruling permitting the deportation of a Haitian citizen who was a U.S. resident on the basis of a guilty plea to possession of cocaine. In making its determination, the court found that such a conviction did not involve a finding of trading or dealing required to constitute an aggravated felony under federal law.<sup>58</sup>

In December 2006, the U.S. Supreme Court resolved the conflicting views of various federal Appellate Courts in *Lopez v. Gonzales*, holding that a first offense drug possession charge,<sup>59</sup> when considered a misdemeanor under federal law, but a felony under state law, did not constitute a “drug trafficking” aggravated felony under federal law.<sup>60</sup> This would disqualify it as a deportation eligible offense.

In other instances, challenges are being raised on the grounds of ineffective assistance of counsel in advising the defendant to plead guilty to a drug possession charge in light of the potential immigration consequences.

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<sup>56</sup> DEPORTATION AND DRUGS: THE SHABU EPIDEMIC, REEVES AND ASSOCIATES (2000).

<sup>57</sup> *Lugan-Armendariz v. INS*, No. 96-70431 (9<sup>th</sup> Cir. 2000).

<sup>58</sup> Appeals Court Strikes New Deportation Stand. Reuters News Service. February 12, 2002.

<sup>59</sup> *Id.*

<sup>60</sup> PRACTICE ADVISORY: DEFENDING IMMIGRANTS WITH PRIOR DRUG POSSESSION CONVICTIONS, IMMIGRANT DEFENSE PROJECT (2006).

Regardless of these legal challenges, however, the elimination of statutory discretion in the application of the provisions of the Immigration and Nationality Act still appears to be the prevailing law. Applied to drug court participants, it appears that the current state of immigration law strongly suggests the advisability for an otherwise drug court eligible defendant to forego drug court participation if it requires an up-front plea to a drug possession offense, which many programs do. Whether or not this situation would constitute a denial of due process apart from the other issues it presents is a matter which subsequent litigation will need to determine.

The U.S. Supreme Court 2010 decision in *Padilla v. Kentucky*<sup>61</sup> speaks directly to the obligation of counsel to inform their clients of the potential immigration consequences of pleading to drug and other related offenses, which have immigration consequences and risk of deportation. The situation is complicated by the fact that (1) the list of criminal offenses for which conviction carries potential immigration consequences is lengthy and includes some offenses which may be considered misdemeanors under various state laws and may also entail convictions for which defendants were unrepresented; and (2) a “conviction” for federal immigration law purposes can include cases referred for diversion or with deferred adjudication and not considered to have the status of a “conviction” in terms of the state court proceeding.

In April 2013, the Supreme Court’s decision in *Moncrieffe v. Holder*<sup>62</sup> appears to provide some clarification regarding the drug offenses that would subject a defendant to deportation. In *Moncrieffe*, a Jamaican citizen residing in the United States, legally with a green card, pled guilty under Georgia law, to possession of marijuana (1.3 grams) with intent to distribute. Under the provisions of the Controlled Substances Act, a drug conviction is punishable as a felony. Under the Immigration

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<sup>61</sup> *Padilla v. Kentucky*, 559 U.S. (2010).

<sup>62</sup> *Moncrieffe v. Holder*, No. 23 (5<sup>th</sup> Cir. 2013).

and Nationality Act, a noncitizen convicted of an “aggravated felony” is not only deportable but also ineligible for discretionary relief.

Pursuant to the provisions of these two statutes, the Federal Government sought to deport Moncrieffe. A Georgia court ruled that distributing marijuana without compensation constituted an “aggravated felony” subject to deportation and Moncrieffe was deported to Jamaica. The Supreme Court later ruled, however, that the “social sharing of a small amount of marijuana” by a legal immigrant does not constitute an “aggravated felony” and therefore, did not require mandatory deportation. The Court held further that, if a non-citizen’s conviction for a marijuana distribution offense failed to establish that the offense involved either compensation or more than a small amount of marijuana, the conviction did not constitute an “aggravated felony” for purposes of the Immigration and Nationality Act, thereby providing some limitation regarding the application of the Immigration & Nationality Act to drug offenders.

### III. OTHER AREAS OF PUBLIC POLICY AND PRACTICE STIGMATIZING DRUG OFFENDERS

In addition to the five areas of public policy imposing sanctions on persons who have been drug offenders that have had significant national application, numerous additional areas of public policy and practice also impose sanctions on individuals who have been drug offenders, with varying degrees of application, a few of which are discussed below.

#### *A. Employment*

##### 1. Employment applications requesting criminal history

It has not been uncommon for employment applications to request an applicant to indicate whether they have ever been

arrested. Ten states<sup>63</sup> have now enacted “Ban the Box” laws preventing the disqualification of applicants based solely on their criminal history.<sup>64</sup>

In 2010, Massachusetts limited the information potential employers could retrieve through background checks to:

- Up to ten years history for information related to felony charges, and
- Up to five years history for misdemeanor charges or pending criminal charges.<sup>65</sup>

California requires that employers take into consideration evidence of rehabilitation for offenses in addition to the age at which the offense was committed.<sup>66</sup>

Similar legislation has been enacted in several other states as well. New York, Pennsylvania, and Wisconsin, for example, have enacted legislation preventing an employer from inquiring into an applicant’s criminal history until an interview has been conducted.

## 2. Professional Licenses

Disqualification for eligibility for professional licenses based on a drug offense is generally determined by state, rather than federal law. Most professions have established licensure requirements which almost invariably include reference to the implications of a criminal conviction generally and a drug conviction in particular. The following are a few examples:

- In Connecticut and Montana the state can deny or revoke a cosmetologist, barber, or hairdresser license

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> S.B. 2583, (Mass.).

<sup>66</sup> S.B 1055, (Cal. 2010).

based on a conviction for a controlled substance offense.

- Utah has enacted a five-year bar for cosmetology, hairdresser, and barber licenses for individuals convicted of a felony controlled substance offense.
- Four states make drug offenders ineligible for nursing or health care professional licensing (Florida, Indiana, Kansas, and Pennsylvania). Additionally, fourteen states prohibit licenses for registered nursing for persons convicted of misdemeanors and felonies (Arizona, Colorado, Connecticut, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Montana, Nebraska, Nevada, and Texas).
- In twenty-two states and the District of Columbia, a misdemeanor or felony conviction results in ineligibility for cosmetology, barber, and hairdresser licenses.<sup>67</sup>
- Five states prohibit individuals with convictions for controlled substance offenses from obtaining licenses as massage therapists. (California, Pennsylvania, Rhode Island, Utah, and West Virginia). In Utah, the ineligibility is for five years for felony controlled substance offenses and ineligibility for three years for misdemeanor controlled substance offenses.

### 3. Eligibility for Specific Professional Positions

#### i. Day Care/Child Care Positions

Under federal law, background checks are required for employment of persons working with individuals under 18 years of age in positions relating to social service, health and mental health care, day care, education and rehabilitative programs.

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<sup>67</sup> *Id.*

Persons with prior drug convictions are generally ineligible for these positions.<sup>68</sup> New York imposes a five-year ban on individuals with prior controlled substance offenses from working in childcares. Louisiana statute provides that, if a daycare employee is convicted of a controlled substance offense, information surrounding the conviction can be published to the parents or guardians of child in the day care facility.

Individuals with drug convictions can also be prohibited from employment or serving as volunteers in adult day care or family day care facilities. New York State further enforces this restriction by imposing a period of five years ineligibility for drug-related felons to be employed, volunteer, operate a facility or reside in a home providing child day care.<sup>69</sup> Montana enacts a mandatory five-year prohibition on day care licenses for felony drug offenders.

#### ii. Teachers

Nineteen states plus the District of Columbia prohibit individuals with convictions for controlled substances to serve as a teacher (Georgia, Nevada, Michigan, Washington State, Pennsylvania, California, New Mexico, Illinois, Alaska, Tennessee, Arizona, Hawaii, Louisiana, Idaho, New Jersey, Connecticut, Delaware, Oregon, and Maine). In Pennsylvania, individuals with a prior conviction for controlled substances are ineligible from acting as a private tutor.

#### iii. Veterinarians

Conviction for an offense involving a controlled substance can provide grounds for revoking veterinarian licenses and accreditation of veterinary facilities.<sup>70</sup> Wisconsin, Delaware,

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<sup>68</sup> 48 CFR 337.103.71(c).

<sup>69</sup> NY CLS Soc. Serv. § 390-b(3).

<sup>70</sup> 9 CFR 161.6(e).

South Carolina, and Nebraska suspend or revoke veterinary technician licenses upon conviction of a controlled substance offense.

#### iv. Dentists

Licenses for dentists and dental hygienists can be revoked in seventeen states<sup>71</sup> if the dentist or dental hygienist is convicted of a drug offense. In eight of these states, licenses for dental hygienists can also be revoked or denied (Alabama, California, Kansas, Mississippi, Montana, South Carolina, Tennessee, Texas, Virginia).

### *B. Other Areas of Civil Rights*

#### 1. Juror Eligibility

Juror eligibility is generally determined on a state-by-state basis. Twenty-two states (Arizona, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Washington, and Wisconsin)<sup>72</sup> prohibit individuals convicted of a felony from jury service unless the conviction has been expunged or the individual's "civil rights" have otherwise been restored – requirements which, in most states, are difficult to satisfy in light of the limited availability of expungement options for drug offenders.

Six states (Alabama, Colorado, Nevada, New Jersey, New Mexico, Texas, Vermont, Virginia)<sup>73</sup> prohibit drug offenders from serving on a jury without exception.

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<sup>71</sup> *Id.*

<sup>72</sup> L. TRAVIS, *JOURNAL OF CRIMINAL JUSTICE*, 435-453.

<sup>73</sup> *Id.*

## 2. Insurance Coverage for Substance Use Treatment

Historically, there has been a lack of parity regarding insurance benefits for mental health treatment compared with treatment for physical conditions. The 1996 Mental Health Parity Act (MHPA) corrected some of these deficiencies, requiring parity between a health plan's lifetime/annual dollar limit for mental health benefits and equivalent medical/surgical benefits.<sup>74</sup> The MHPA, however, did not address other important parity issues including: limitations on mental health treatments (hospital visits and outpatient visits), required co-pays for services,<sup>75</sup> exemptions for companies of 50 or fewer employees, and exemptions for companies that opt out of offering mental health coverage altogether.<sup>76</sup>

A number of these issues have been addressed in the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) which extended MHPA parity requirements to substance use disorders<sup>77</sup> and addressed other parity issues, including required co-payments, deductibles, treatment limitations/ visits, and out-of-network benefits.

Gaps still remain, however, regarding parity in a number of areas. Currently, for example, small employers and employers that have opted out of mental health coverage in general are exempt from MHPAEA, as they were under MHPA - potentially leaving thousands of individuals in need of substance use disorder treatment benefits still uninsured. While the Affordable Care Act (ACA) provides for behavioral health services,

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<sup>74</sup> PARITY IN INSURANCE COVERAGE, NATIONAL ALLIANCE ON MENTAL ILLNESS. *Also See*, THE MENTAL HEALTH PARITY AND ADDICTION EQUITY ACT OF 2008 (MHPAEA), U.S. DEPARTMENT OF LABOR (2010).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> UNDERSTANDING DRUG ABUSE AND ADDICTION, NATIONAL INSTITUTE ON DRUG ABUSE (2008).



there are many pending issues regarding the extent to which the ACA provisions currently apply.

### 3. Family Relationships

#### i. Eligibility to Adopt/Provide Foster Care

Under federal law, individuals convicted of a drug or drug-related offense are ineligible from adopting a child or serving as a foster care guardian for five years following the conviction.<sup>79</sup> Twelve states have enacted laws adopting federal provision relating to eligibility of individuals convicted of offenses entailing controlled substances (Alabama, Alaska, Arizona, California, Indiana, Iowa, Minnesota, Missouri, North Dakota, Oklahoma, and Virginia).

#### ii. Retaining Custody of Children

Drug offenders face the possibility of losing custody of their children if convicted and sentenced to prison. When a parent is incarcerated, if there is no other family member to take care of the child, the child will be placed in foster care. Under the provisions of the Adoption and Safe Families Act (ASFA), if the child remains in foster care for 15 of the most recent 22 months, a permanency plan is required, which can entail termination of parental rights if the parent is not able to provide a permanent placement for the child.<sup>80</sup> In Pennsylvania, the court has discretion to deny custody to a parent seeking custody on the grounds of a prior drug conviction. Similarly, in Kansas, the court can consider prior drug offenses as a factor when determining custody.<sup>81</sup>

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<sup>79</sup> 42 U.S.C. 671 (a)(20)(A)(ii).

<sup>80</sup> Pub. L. No. 105-89, Sec. 103.

<sup>81</sup> Kan. Stat. Ann. § 23-3203.

### iii. Grounds for Divorce

In twenty-nine states<sup>82</sup>, conviction of a felony offense, drug related included, can be grounds for divorce.

## 4. State Registries

A number of states require offenders to register as drug offenders through a state registry. In California, individuals with prior drug offenses must register with local law enforcement authorities as an offender.<sup>83</sup> Arizona requires prior offenders to send a notice of conviction to appropriate licensing or registration boards.<sup>84</sup> Similarly, in South Carolina, individuals must send in notification of offense into licensing and registration boards.<sup>85</sup> Drug offenders in Kansas must register in the state offender registry which is available to the public and submit information relating to the offense, current name, address, professional licensing the individual holds and their photo.<sup>86</sup> In Tennessee, an individual convicted of a methamphetamine purchase, possession, production or any related offense must be registered in a public registry.<sup>87</sup>

In an attempt to reduce the impact of the collateral consequences that may be imposed under applicable state law on drug offenders, some states have implemented certificate programs that permit offenders to corroborate their rehabilitation efforts since their arrest/conviction.<sup>88</sup> New York instituted the "Certificate of Relief from Disabilities and Certificate of Good Conduct"<sup>89</sup> program for individuals with no more than two

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<sup>82</sup> *Id.*

<sup>83</sup> Cal. Penal Code § 1210.1.

<sup>84</sup> Ariz. Rev. Stat. § 13-3414.

<sup>85</sup> S.C. Code Ann. 44-53-330.

<sup>86</sup> Kan. Stat. Ann. § 22-4904.

<sup>87</sup> Tenn. Code Ann. 39-17-436.

<sup>88</sup> *Id.*

<sup>89</sup> N.Y. § 700-705.

low-level felonies that permit them to document their rehabilitation efforts. North Carolina and Ohio have similar certificate programs, with the certificate provided under North Carolina’s Certificate of Relief Act<sup>90</sup> relieving the individual from certain—but not all – of the collateral consequences” arising from his/her convictions.

#### IV. WHERE ARE WE TODAY?

While there has definitely been some progress — forward movement in some sectors — the basic approach for addressing the situation of drug offenders across public policy sectors continues to be characterized by a punitive orientation, with little acknowledgment of the disease aspect of addiction, the effectiveness of treatment for the disease, and the efforts made by thousands of drug offenders, particular drug court participants, to recover — and their success in recovery. Particularly troubling is that, in many instances, drug offenders are subject to certain “collateral consequences” because they are *drug* offenders – not simply offenders.

##### *A. Bright spots emerging*

Among the bright spots that have emerged during the past decade, in addition to those noted in the areas of “collateral consequences” discussed above, include:

- Federal efforts to reform drug sentencing policy and practice on a number of levels, including increasing judicial and prosecutorial discretion and expansion of therapeutic approaches.
- Efforts at the state level to reduce prison expansion and costs, although much of these efforts are a response to

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<sup>90</sup> H.B. 641 (N.C. 2011).

concerns relating to fiscal shortfalls rather than developing therapeutic initiatives.

- Expansion (so far only slight) of expungement and related provisions of state statutes applied to drug and related offenses.<sup>91</sup>

Ironically, the recent fiscal crises that have engulfed most state governments during the past several years — more than research findings per se — have spurred a rethinking about how the criminal justice system approaches substance abuse and the cost-effectiveness of treatment vs. incarceration alone. Hopefully this process will also stimulate examination of the complex and interrelated socio-economic, family, public health, and public safety issues that surround substance abuse and addiction.

These continuing “collateral; consequences” need to be addressed regardless of whether any resurgence of economic prosperity makes a return to traditional incarceration practices for drug offenders more feasible.

In addition, noteworthy progress has been made in lifting the ban on food stamps and TANF (welfare) benefits for individuals with drug felonies. As of 2011, 16 states plus Washington, D.C. have lifted the ban on food stamps and 14 states have lifted the ban on TANF.

Between 1997 and 2010, 23 states have also reformed their felony disenfranchisement policies as they relate to voting rights.<sup>92</sup>

The United States Supreme Court decision in *Moncreiffe* alleviates, to some degree, the penalty of deportation as a result of a drug conviction for non-citizens, holding that if a nonciti-

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<sup>91</sup> OVERVIEW OF STATE STATUTORY EXPUNGEMENT PROVISIONS POTENTIALLY RELEVANT TO DRUG COURT PARTICIPANTS, BJA DRUG COURT TECHNICAL ASSISTANCE PROJECT (2012).

<sup>92</sup> *Supra* note 24.

zen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration (money) or more than a small amount of marijuana, it is not an "aggravated felony"<sup>93</sup> for deportation purposes.

There has also been progress in developing parity in health insurance coverage for addiction/behavioral health services and services for other medical conditions although there is still much more that needs to be done.

*B. Policy-wise, however, the landscape, remains essentially unchanged*

For the most part the situation in 2014 is unchanged from what it was in 2003 in terms of the overall philosophical framework with which addiction is viewed, and the stigma and "collateral consequences" that continue to be associated with drug use and drug offenses, often treated more severely than "collateral consequences" associated with other criminal activity.

The provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Temporary Assistance for Needy Families (TANF) Act), still exclude for life cash and food stamp benefits to persons convicted of a state or federal felony offense involving the use or sale of drugs, with this provision applying only to persons convicted of drug offenses; other convicted offenders are still eligible for these benefits.

Federal law continues to suspend eligibility for federal student aid if an individual is convicted of possession or sale of illegal drugs.<sup>94</sup> Drug crimes remain the only offenses for which an individual can be denied financial aid.

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<sup>93</sup> *Supra* note 65.

<sup>94</sup> *Supra* note 43.

The Housing Opportunity Extension (HOPE) Act of 1996, with its “one strike, you’re out” philosophy, also continues to deny drug offenders the eligibility to live in public housing and evicts such offenders, and sometimes their family members, currently residing in public housing.

Drug offenses also continue to have serious immigration consequences, which include deportation, mandatory detention, ineligibility to obtain lawful residency, loss of eligibility for asylum, and can result in a temporary or permanent bar to citizenship.<sup>95</sup>

“Drug courts” continue to be a therapeutic oasis in a still largely punitive public policy milieu for persons who are/have been drug users. Without changes in other key areas of public policy, the rehabilitative goals and benefits of drug court programs can continue to be thwarted — in both the short and long term — by the failure of other key public sector areas to shift their policies and practices to meaningfully promote and support the reintegration of substance offenders into the community. Hopefully policy makers will begin to address this critical need in the years ahead to reduce these “collateral consequences”.

#### V. WHERE TO GO FROM HERE?

As noted earlier, the purpose of this article has been to highlight a number of (the many) non-criminal justice areas of public policy, which impose significant sanctions on persons who have been convicted of a drug offense in addition to the criminal justice penalties already applicable — and the slow efforts at reform. As noted, many of the “collateral consequences” cited are directed specifically at drug offenders per se, and not all individuals who commit felony offenses. All of these

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<sup>95</sup> IMMIGRATION CONSEQUENCES OF DRUG OFFENSES, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (2012).

areas of public policy not only affect what drug courts are able to accomplish but are integrally related to the ability of drug courts to achieve their goals of successful reintegration in both the short and the long term.

The issues addressed in this article have only summarily touched the surface of the widespread stigma that is attached — and continues to be attached — to substance addiction in a wide range of contexts in the U.S. Irrespective of the extent of disconnect in public policy in terms of efforts to promote recovery by the criminal justice system, on the one hand, and to stigmatize drug offenders — often singling them out from other convicted offenders — on the other hand, it is clearly time to begin to bridge the divide. Perhaps criminal justice leaders will again need to take the initiative.

Two options immediately surface:

- (1) Greater application of expungement provisions for felony drug offenses conditioned on clear indicia of defendants' continued recovery and cessation of criminal activity; and
- (2) For drug court programs, greater use of deferred prosecution and sentencing options at the front end that can provide for dismissal of the charges of drug court participants who complete the program and satisfy whatever other requirements may be applicable.

Over the longer term, however, without changes in other areas of public policy and removal of the vast intertwined network of collateral consequences imposed on drug offenders, the goals and benefits designed to be achieved through drug court programs can be thwarted by the existing barriers — e.g., “collateral consequences” — that prevent individuals who have completed drug court programs from meaningful re-integration

into the community. . The urgency for public action to tackle the situation cannot be overstated.



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RESTORING THE WEAK AND THE VICTIMIZED

Lori Carroll\*

“Rescue those being led away to death; hold back those staggering toward slaughter.” — Proverbs 24:11<sup>1</sup>

“The ultimate tragedy is not the oppression and cruelty by the bad people but the silence over that by the good people.”  
— Martin Luther King, Jr.<sup>2</sup>

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<sup>1</sup> PROVERBS 24:11.

<sup>2</sup> Martin Luther King, BEYOND VIETNAM: A TIME TO BREAK SILENCE, Riverside Church, New York, New York (Apr. 4, 1967).

## I. INTRODUCTION

Restorative justice is the healing balm that seeks to vigorously right societal wrongs.<sup>3</sup> The starting points of restorative justice include information for victims, vindication, restitution, and a safe and supportive environment in which to accomplish healing.<sup>4</sup> Restorative justice focuses on the impact the offender has on the victim, those in community with the victim, and on the community itself.<sup>5</sup>

This paper considers restoration for the weak and the victimized through a restorative justice lens within a therapeutic justice framework. Restorative justice describes a sequence of procedures that promote the recovery and healing of the injured while also allowing the offender to participate in reparation.<sup>6</sup> Therapeutic jurisprudence is the study of how the legal system affects the behaviors and mental health of the individual.<sup>7</sup> As David Wexler put it, therapeutic jurisprudence is the "study of the role of the law as a therapeutic agent."<sup>8</sup>

Is complete reentry into society and wholeness ever possible for the abuse victim? While there are no easy answers, this paper will explore restorative justice within therapeutic jurisprudence, the positive and negative aspects of restorative justice, victim empowerment, community and offender accountability, and the victims. Also included is a very brief discussion

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<sup>3</sup> Howard Zehr, *Fundamental Concepts of Restorative Justice*, Eastern Mennonite University (1997).

<sup>4</sup> *Id.* at 3.1.

<sup>5</sup> Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L. REV. 457 (Feb. 2006), citing Trisha Meili, *I Am the Central Park Jogger: A Story of Hope and Possibility*, at 457 (2003).

<sup>6</sup> ZEHR, *supra* note 3, at 3.1.2, 3.1.4.

<sup>7</sup> BLACK'S LAW DICTIONARY (9<sup>th</sup> ed. 2009).

<sup>8</sup> David B. Wexler, THERAPEUTIC JURISPRUDENCE: AN OVERVIEW, Public lecture at the Thomas Cooley Law Review Disabilities Law Symposium (Oct. 29, 1999).

on the United Kingdom's Domestic Violence, Crime and Victims Act of 2004.

## II. RESTORATIVE JUSTICE WITHIN THERAPEUTIC JURISPRUDENCE—HOW IT WORKS

The broad lens of therapeutic jurisprudence views the law as a curative agent that is capable of healing the well being of the person.<sup>9</sup> Generally,

[T]he relatively new field of "therapeutic jurisprudence" envisions the law as a potential curative agent, capable of affecting the psychological well-being of an individual. The question for therapeutic jurisprudence is not whether legal rules application of the law can promote the health and well being of those affected by the legal system . . . .<sup>10</sup>

Arising within therapeutic jurisprudence, restorative justice provides the alternative track to our current civil justice system, providing additional resources that can be creatively used to make victims safer in the long run.<sup>11</sup> Another advantage of the approach is mending the rift of all parties involved and, globally, promoting healing to the community.<sup>12</sup> The process seeks to involve all "stakeholders"—victim, offender, family members, etc.—with the aim of restoring the status quo prior to the offense.<sup>13</sup> Supporters acknowledge, however, that a perfect healing involving a reconnection to relationship is impossible,

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<sup>9</sup> Eric Luna, *The Practice of Restorative Justice: Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, UTAH L. REV. 283 (2003).

<sup>10</sup> *Id.*

<sup>11</sup> Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding*, 40 SETON HALL L. REV. 517, 522 (Oct. 14, 2014).

<sup>12</sup> *Id.* at 531.

<sup>13</sup> *Id.*

significant brokenness having happened often before the other wrongs have occurred.<sup>14</sup> An effective use of the program, therefore, lies in addressing the wrong, the venue in which it occurred, and taking steps to make sure that it does not reoccur.<sup>15</sup>

Restorative justice may be viewed as an upward, rather than lateral, leap from the traditional justice system's road of retribution, reprimand, and punishment to restorative justice's reparation, reconciliation, and transformation.<sup>16</sup> "Restorative justice proponents seek . . . holistic healing rather than the traditional justice system—one that is amenable to empathy, creativity, and long-term solutions."<sup>17</sup>

### III. THE POSITIVES AND NEGATIVES OF RESTORATIVE JUSTICE

Restorative Justice can have both a positive and a negative influence on the legal system.

#### A. *The Positives of Restorative Justice*

Restorative justice has made great inroads in the community in terms of bringing a new healing element to the legal world. John Braithwaite, a professor in the Research School of Social Sciences at the Australian National University, discusses the victim being actively involved in his or her own restorative justice experience.<sup>18</sup> Restorative justice is key to restoring

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 532.

<sup>18</sup> John Braithwaite, *Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 20 (1999).



the victim, the community, and the offender.<sup>19</sup> Braithwaite states that the lynchpin of restorative justice is restoring victim empowerment by having the victims define their own restoration.<sup>20</sup>

Emotional healing is a significant element in restoring the victim. The Ministry of Justice in Western Australia reported that ninety-five percent of victims experienced healing and satisfaction through their restorative justice conference program, particularly through conferences.<sup>21</sup> Ninety-three percent of the victims in these conferences stated they felt the offender was held accountable, ninety-six percent stated they experienced fairness during the proceedings, and ninety-six percent said they felt the offender had adequately apologized.<sup>22</sup> Victims praised the conferences for allowing them to express their feelings without being victimized.<sup>23</sup> Additionally, an analysis of restorative justice programs in Canada, Great Britain and the United States showed that between sixty-four and 100 percent of offenders completed the restoration and compensation agreements they made with their victims in an effort to restore their victims to justice.<sup>24</sup>

Further, an experiment done in Canberra, Australia, showed that victims frequently felt that symbolic reparation was far more important to them, and this included an apology from the offender with the confession acting as a securing of the victim's satisfaction and healing.<sup>25</sup> And another, perhaps startling, revelation was the proportion of victims who felt sympathetic to their offenders by the end of conferencing.<sup>26</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Assessing Optimistic & Pessimistic Accounts* (citing, *Juvenile Justice Teams: A Six Month Evaluation*. PERTH, MINISTRY OF JUSTICE (1994).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> BRAITHWAITE, *supra* note 18, at 23-24.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

And additional benefit of restorative justice is anger dissipation. Studies showed a drop in anger from sixty percent to thirty percent by the end of the Canberra conferences.<sup>27</sup> Research evidence on conferencing also showed a decline in the desire for "victim payback" toward the offender.<sup>28</sup> Victims who had been through the conferencing process also showed a decline in their fear of being re-victimized as well as a lessening of emotional turmoil over the crime.<sup>29</sup>

Yet another advantage to restorative justice comes in the victim's ability to show a deepened compassion and mercy toward the offender. Goode's study on juvenile family group conferences in South Australia cited the most common reason that victims gave for attending the conference was to try to help the perpetrator.<sup>30</sup> The desire to see an appropriate penalty administered as well as any material reparations rated behind this desire to help the victimizer.<sup>31</sup> Love seemed to carry the day between victim and victimizer, as one victim stated at the completion of a restorative justice conference: "Today I have observed and taken part in justice administered with love."<sup>32</sup>

### *B. The Pessimistic Aspects of Restorative Justice*

Victims seldom feel they enjoy a just outcome in criminal proceedings. Most crime victims are white-collar crime victims, yet they are often unaware of this. Inflated prices are one example of white-collar crime, as is domestic violence against victims who are often too terrorized to report their assailants.<sup>33</sup> Restorative justice cannot offer the overwhelming

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> BRAITHWAITE, *supra* at 25.

<sup>33</sup> *Id.* at 79.

majority of victims a solution because a large number of cases are not reported and the guilty rarely admit to their crimes.<sup>34</sup> Statistics maintain that more than ninety percent of victims will remain unaffected or untouched by restorative justice unless restorative intercessions are massively increased.<sup>35</sup> To reach even one percent of all detected and undetected crimes, the conferencing programs alone would have to be far larger than they currently are.<sup>36</sup>

Sadly, restorative justice can intensify the victim's fear of further victimization.<sup>37</sup> While going through the restorative process, a victim often realizes just who the perpetrator really is—someone with low self-esteem who is often ashamed, and far from the scary ogre the victim had imagined.<sup>38</sup> However, some offenders truly are a daunting force to be reckoned with. When the media grabs these cases, the spotlight can undermine restorative justice. One such case involved a woman at a Canberra conference who had threatened another woman with a blood-filled syringe.<sup>39</sup> The conference was poorly run and any emotional healing between victim and victimizer quickly dissipated.<sup>40</sup> The woman who had been threatened later found a syringe on her car dashboard, which she understandably thought was a threat.<sup>41</sup> The case was aired by local television, but even though it was the only case out of two thousand Canberra conferences that showed a victim's heightened anxiety and fear, this one case in the media was enough to weaken the goals of the conference.<sup>42</sup>

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<sup>34</sup> *Id.* at 79, 80.

<sup>35</sup> *Id.* at 80.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 81

<sup>38</sup> *Id.*

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 82.

Further, victim anger may be redirected by mediators who do not allow the victim to blame or to discuss the past event, instead favoring a problem solving position.<sup>43</sup> A victim who does not want to take a restorative justice approach may continue to move through the process out of guilt, when he or she would really just prefer to move on without going through a program.<sup>44</sup>

Along with this thought, the restorative justice processes are already infused with shame for both victim and perpetrator.<sup>45</sup> To force an individual to deal with terms that include "forgiveness" and "reconciliation" sometimes serves to diminish the legitimate anger and rage that the victim inevitably initially feels at the hands of the offender.<sup>46</sup>

Critics of restorative justice state that the program does not cure the offender's underlying issues, such as unemployment or poverty.<sup>47</sup> The process cannot redesign the criminal justice system because far too many elements, such as a strong welfare state, strong families, and human rights programs, must be strongly infused into the system to cure the core wrongs.<sup>48</sup>

#### IV. VICTIM EMPOWERMENT, COMMUNITY, AND OFFENDER ACCOUNTABILITY

No matter the motives, conscious or unconscious, it was my responsibility, my choice, that I was in Central Park that night. I don't feel sorry for that choice or for myself, and I don't blame myself for having made it. Though I never, ever imagined the run would have the re-

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 83.

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

<sup>47</sup> *Id.* at 91

<sup>48</sup> *Id.* at 92

sult it did, I understand why I was out there.<sup>49</sup>

-- Trisha Meili (also known as the Central Park Jogger)

#### *A. Victim Empowerment*

Restorative justice is not just a healing from the harms of others. It may also be a transforming recovery from one's destructive self, as in the case of Trisha Meili.

An assumption permeating the criminal justice system is that the victim will benefit in some way from the prosecution and punishment of the offender.<sup>50</sup> Although the five juvenile males who were thought to have attacked Trisha have been cleared of blame, at the time of the assault she did not know that they were not responsible for her injuries. Only one man was found to have assaulted Trisha, but she still needed healing. In going through the trial process she discovered that it was not the prosecution that consoled her and eased her pain, but rather the psychological and spiritual journey she embarked on to understand, at a deeper level, what had happened to her that night.<sup>51</sup> She chose a road of victim empowerment.<sup>52</sup> Trisha discovered that her wounds were far more extensive and long-standing than the injuries administered in the vicious attack by her offenders.<sup>53</sup> Instead of focusing on the many negative aspects of her attackers, her own restorative justice journey was an internal one. She learned that her negative body image had driven her to anorexia throughout her life, pushing her to

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<sup>49</sup> MILLS, *supra* note 5.

<sup>50</sup> *Id.* at 458.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

run alone in Central Park on the night she was raped.<sup>54</sup> The impact of the assault drove her to a new journey of personal restorative justice as she became aware that she was just as much in need of restoration and justice from herself as she was from her assailant.

It is not that the victim does not greatly benefit from the offender being held accountable. Mills argues that victim healing involves far more than punishing the perpetrator, and that by reforming victim roles, the victim has many more options from which to choose healing.<sup>55</sup> Incorporating restoration theories in the process has been found to both reduce the potential for victims to become victimizers and stop the victimization inheritance to future generations.<sup>56</sup>

In understanding victimization, several theories discuss what steps are necessary for the victim to heal.<sup>57</sup> The typical victims in the public view are female, and they are generally viewed as passive and incapable of controlling the circumstances that caused the crime.<sup>58</sup> This theory has been shown to be inaccurate, mainly because it does not take into account the individual personality of both victim and offender.<sup>59</sup> During the 1970s, victimology progressed into a deeper understanding of the relationship between victim and perpetrator, and the still-limited role a victim plays in convicting an offender and administering punishment.<sup>60</sup>

At current date, although victims often seek emotional and physical healing for their trauma outside the courts, the justice system is still the primary avenue for the victim to experience resolution.<sup>61</sup> So, the legal system largely defines the role of the

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 459.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 477.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 479.

<sup>61</sup> *Id.* at 482.

victim in healing and in punishment.<sup>62</sup> In taking a look at what roles are available for victims within the justice system, one must ask how these roles either hinder or add to victim empowerment and healing.<sup>63</sup>

Under the protectionist approach, the victim, especially the female victim, is still protected from blame.<sup>64</sup> Within this role, the victim must play a part in conviction and punishment.<sup>65</sup> The justice system has traditionally looked at the victim as being far too traumatized to make his or her own decisions.<sup>66</sup> This assumption about victim traumatization has led to an aggressive intervention by our justice system on behalf of the victim, even when he or she does not seek it.<sup>67</sup>

However, victims deserve far more than what our justice system has traditionally offered. They deserve not just a meaningful voice in the criminal justice system, but they also desperately need a voice for survival.<sup>68</sup> Victim inclusion in the justice process increases their likelihood of recovery and also prevents the likelihood of victimization transferring to the next era.<sup>69</sup>

### *B. Restorative Justice and Community*

The community is also a victim in the broader sense, and restoring the victim often involves restoring the community.<sup>70</sup> While restorative justice meetings have strongly promoted forgiveness for the individual, redressing an individual harm will

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 483.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Christopher D. Lee, *They all laughed at Christopher Columbus*, 30 ST. LOUIS U. PUB. L. REV. 523, 531 (2011).

not heal the community.<sup>71</sup> The peace and quality of life is often disrupted in a community after a crime, and restorative justice programs bring hope to establishing a safer community where all citizens live without fear.<sup>72</sup> This is why it is so important for the community to actively participate in the sanctioning process of the offender.<sup>73</sup> One significant responsibility the community has is to devise fresh and original sentences, rather than impose upon the victimizer the typical internment.<sup>74</sup> During the restorative process, the offender importantly pays reparations to not only the victim, but also to the community, with the end goal of owning his actions by looking through his own transforming restorative justice lens.<sup>75</sup>

### C. *Offender Accountability*

When an offender makes an effort to right harm, if only partially, he or she is saying, "I am taking responsibility, and you are not to blame."<sup>76</sup> The adversarial game of our criminal justice system teaches offenders to look only to themselves.<sup>77</sup> Traditionally, offenders are discouraged from acknowledging responsibility, and are given very little chance to act on responsibility.<sup>78</sup> If an offender can distance himself from the victim, this sometimes "neutralizes" the victimizer's actions in his own eyes, so that he may further detach from any sort of victim reparation.<sup>79</sup> Restorative justice argues for accountability over punishment. To be truly accountable, the offender

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<sup>71</sup> *Id.* at 532.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 533.

<sup>75</sup> *Id.*

<sup>76</sup> Zehr & Gohar, *The Little Book of Restorative Justice*, GOOD BOOKS (2002).

<sup>77</sup> *Id.* at 7.

<sup>78</sup> *Id.* at 14.

<sup>79</sup> *Id.*



must face his victim and understand that his actions maimed or destroyed the physical and emotional life of another.<sup>80</sup> Further, restorative justice may have a greater impact on severe offenders.

What is needed for the offender's healing? To protect the victim and the victimizer, some offenders should be under temporary restraint so the victim will be safe, physically and emotionally. The offender needs accountability that addresses the harm and encourages empathy toward the victim.<sup>81</sup> Beyond this, the ultimate goal of restorative justice is the healing and re-entry of the offender into society as a trusted member of the community.<sup>82</sup>

## V. VICTIMS

### A. *Children as Victims*

I'll show't the king and undertake to be Her advocate to the loud'st. We do not know How he may soften at the sight o' the child: The silence often of pure innocence Persuades when speaking fails.<sup>83</sup>

How does one determine signs of sexual abuse in a child? A good indication is that the victim will often show symptoms that cannot be criminally proven, but are clear indicators that the child needs help.<sup>84</sup> Christian Diesen maintains that chil-

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<sup>80</sup> *Id.* at 25.

<sup>81</sup> *Id.* at 15.

<sup>82</sup> *Id.*

<sup>83</sup> WILLIAM SHAKESPEARE, *WINTER'S TALE act 2, sc. 2.*

<sup>84</sup> Christian Diesen, *Therapeutic Jurisprudence – an Introduction from a Swedish Perspective*, SCANDINAVIAN STUDIES IN LAW, [www.scandinavianlaw.se/index.php/display](http://www.scandinavianlaw.se/index.php/display) (discussing therapeutic jurisprudence from a Swedish perspective), 14, 131-62 (2007).

dren react in diverse ways to abuse, including helplessness, secrecy, and compliant behaviors.<sup>85</sup> However, these symptoms may not be present or they may present themselves under other stressors, such as parent separation or divorce.<sup>86</sup> Here, the legal system must stay the course with these little victims, discovering which behavior is associated with which trauma.<sup>87</sup>

The trauma of a crime inflicts tremendous stress on the average adult.<sup>88</sup> How much more stressful is it for a child? Here, legal support is, again, critical.<sup>89</sup> The small victim must be strengthened in every way possible before he or she appears in court, and must be given the long-term rehabilitation tools that are vital to full recovery.<sup>90</sup> However, although the child may be heard and helped in the trial process, this does not solve all issues.

Tali Gal & Vered Shidlo-Hezroni state that the criminal adversarial process rarely benefits children, and that they can be further traumatized by the process.<sup>91</sup> Those victimized in the home suffer the most.<sup>92</sup> Because the victim is a child, his or her understanding of the legal process and procedural rules is limited.<sup>93</sup> The child's anxiety level is greater, and he or she often feels like one who has done something wrong.<sup>94</sup> When children are taken out of their natural environment of home and school and forced to the forefront of criminal proceedings,

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 145-46.

<sup>88</sup> Christian Diesen, *Therapeutic Jurisprudence and the Victim of Crime*, UNIVERSITY OF STOCKHOLM, <http://www.law.arizona.edu/depts/upr-intj/pdf/Therapeutic-Jurisprudence-and-the-Victim-of-Crime.pdf>.

<sup>89</sup> *Id.* at 592.

<sup>90</sup> *Id.* at 590.

<sup>91</sup> Gal & Shidlo-Hezroni, *Restorative Justice as Therapeutic Jurisprudence* (Location 2919, Kindle Fire Version) retrieved from Amazon.com.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2933-44.

<sup>94</sup> *Id.*

their feelings of alienation and fear from victimization are intensified.<sup>95</sup>

An additional stressor is language.<sup>96</sup> Courtroom language is unfamiliar to a young child who does not have fully developed language abilities, and this can magnify already existing anxiety.<sup>97</sup> A large number of professionals are involved in the process of helping the child, involving multiple interviews and reports from child protective services and education officials. This too can add to the juvenile's fear that he or she is the one under investigation<sup>98</sup>.

Among some of the more stressful events in the child's judicial experience are testifying in court, waiting to give testimony, fear of continued family abuse, and just being at the courthouse itself.<sup>99</sup> Having to give repeated testimony and enduring a potentially abrasive cross-examination have been linked to a higher risk of trauma for the child, the distress from this carrying over into adulthood.<sup>100</sup>

A study done in Australia showed that children who were interviewed, after a cross examination that often took hours or days, described it as "horrible," "confusing," and "upsetting," and many felt they were being told they were untruthful in their testimony.<sup>101</sup> The combination of all stressors involved may lead to a 'secondary victimization' for these children.<sup>102</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 2944.

<sup>97</sup> *Id.* at 2943.

<sup>98</sup> *Id.* at 2943-56.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Bas van Stokkom, *Victims' Needs, Well-Being, and 'Closure': Is Revenge Therapeutic?* at 4467 in *THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES*.

*B. Avoiding the negative*

Because crime victims in general have benefited greatly from the therapeutic benefits of restorative justice, therapeutic jurisprudence is calling out for the further use of restorative justice with child victims.<sup>103</sup> Although there are no studies that specifically focus on restorative justice for children, the majority of victims who have attended restorative justice conferences have shown positive outcomes.<sup>104</sup> If children are allowed to actively participate in restorative justice programs, their outcomes are significantly better than those from other restorative practices for victims that are currently used.<sup>105</sup>

Psychological support prepares victims for trial, and it is important that they obtain as much healing as they can before trial so as to be “girded up” for the trial process—especially cross-examination.<sup>106</sup> This “healing before the trial” process takes into consideration that the trial will entail yet another painful ordeal that the child must face, in addition to the pain of the crime.<sup>107</sup>

However, Diesen strongly recommends additional research in order to identify and adequately treat abuse.<sup>108</sup> This, combined with consistency in application, will allow social services to identify those cases that need police investigation prosecution.<sup>109</sup>

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<sup>103</sup> GAL & SHIDLO-HEZRONI, *supra* note 91 at 3156.

<sup>104</sup> *Id.* at 3169.

<sup>105</sup> *Id.*

<sup>106</sup> DIESEN, *supra* note 88, at 592.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 146.

<sup>109</sup> *Id.*

*C. Forgiveness as the Greater Good*

“The weak can never forgive. Forgiveness is an attribute of the strong.”<sup>110</sup>

Crucial to the healing of the wounded and their re-entry to society is compassion toward and forgiveness of the wrongdoer.

Sue Burrell, Staff Attorney for The Youth Law Center in San Francisco, California reflects on the case of Richard Thomas, a case of lost opportunities. Sixteen-year-old Thomas was convicted to a seven-year prison sentence in a California adult court for setting fire to eighteen year-old Sasha Fleischman’s clothing while she was asleep on a bus. Fleischman identifies as “agender,” someone who is neither male nor female, and Thomas was charged as an adult by the Alameda County District Attorney’s Office for the hate crimes of assault and aggravated mayhem. This horrible incident left Sasha with third-degree burns and hospitalization for several weeks. Juvenile court was not considered in the charging decision, instead, our criminal justice system’s automatic push to imprison Thomas inexorably kicked in.

Thomas’ act, though horrible, was still that of an impetuous and immature teenager. Juvenile courts are the avenues to deal with disturbing but still childish actions. The best of kids can be cruel and thoughtless on occasion, and to Richard, it may have seemed like something he did to make himself feel better by making fun of someone who was so different—a moment of foolishness for a lifetime of regret.

This case could have been a lighthouse for restorative justice between criminals and victims if our system had allowed it. Richard felt horrible about what he had done in a moment of senselessness and quickly wrote Sasha an apology letter, coupled with a public expression of shame and repentance.

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<sup>110</sup> Mahatma Gandhi, [://www.quotationspage.com/quote/2188.html](http://www.quotationspage.com/quote/2188.html) (1869-1948).

Amazingly, Sasha's family was also open to a mutual and public healing process, their objective to see restoration for both young people. Sasha's mother even went to the district attorney to request a restorative justice process, but was denied. She also gave a media statement expressing the pain they all felt for Richard and his family, strongly maintaining that it was a childish impulse that drove Richard, stating, "[a] 16-year-old's actions—however severe the results – don't have any place in the adult judicial system."

While far from perfect, the juvenile system provides accountability and individual services to offenders. They must receive full educational services, as well as individualized treatment according to each offender's particular needs, with the goal in mind of allowing the juvenile offender to grow up and move forward successfully after incarceration. Further, there is restorative justice in many juvenile courts that brings victims together with perpetrators and with those in the community who have peripherally suffered from others' actions. Bringing the perpetrator face-to-face with the victim is crucial to the victim's healing, as the victim may address the harm he or she has suffered and have a hand in the reparation. This accountability focuses on both victim and community and allows the youthful perpetrator to see the victim as another human, not a depersonalized object.

In the case of Richard Thomas, he will be housed in a juvenile facility until he turns eighteen, then he will be sent to the overcrowded California prison system, which has problems providing adequate health and mental care for inmates. Richard will then be with criminally established inmates twenty-four hours a day, a hideous prospect for someone with no record other than one youthful, albeit awful, incident. The perpetrator may become the victim in this environment. He will not have parental guidance to assist him in the learning process of exercising good judgment and responsibility. When all is said

and done, he will most likely have further contact with the criminal justice system as a repeat offender adult.

Sasha is now a college student at MIT who has the good sense to understand that what Thomas did was a senseless act, yet she says that she does not want Richard to be judged too harshly, knowing that teenagers can do crazy things. She asks, “[w]hy can’t our justice system recognize this?”<sup>111</sup>

What happens when a victim’s family wants to spare their son’s killer the death penalty?

Victims’ rights movements have been viewed as wanting to make sure the victim is seen and heard, and that justice is done toward the offender. But the Autobee family’s story is an example of mercy extended through a personal healing process. The Autobees chose to see their son’s death at the hands of Edward Montour through a therapeutic lens that would bring healing to them and their son’s murderer.

Edward Montour, a mentally ill prison inmate, killed Eric Autobee, a Colorado corrections officer, in 2002 in a prison kitchen. Montour pled guilty and was sentenced to death, but the sentence was overturned after the United States Supreme Court ruled that judges acting without juries could not impose death sentences. A trial judge overturned Montour’s conviction and allowed him to withdraw the guilty plea. A new trial was ordered and Montour stated that he would re-plead guilty if he could have a life sentence without the possibility of parole instead of the death penalty. George Brauchler, the Arapahoe County District Attorney in Colorado, refused.

Then the Autobee family came forward to plead for the life of their son’s killer. While initially supporting the death penalty, they had time to reflect after the first trial, and they realized

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<sup>111</sup> *Prison for Teen Who Lit "Agender" Youth's Skirt on Fire Thwarts Healing*, HUFFINGTON POST (Oct. 21, 2014), [http://www.huffingtonpost.com/sue-burrell/prison-for-teen-who-lit-a\\_b\\_6024344.html](http://www.huffingtonpost.com/sue-burrell/prison-for-teen-who-lit-a_b_6024344.html).

that their own healing process included pleading for life imprisonment for Montour instead of capital punishment. They implored Brauchler to relent, but he again refused and proceeded toward the death penalty, stating that Colorado victims' rights do not apply to "aggravating factors" during sentencing. He stated that the Autobees' attempt to mitigate the sentence was not within their rights,"and fought long and hard against the Autobees' desire to glean restorative justice from a tragedy.

However, Bob Autobee realized that his son, Eric, had a legacy of warmth, love, and forgiveness that could overcome their initial feelings of vengeance and violence toward Montour. They realized that living in hatred would not serve restorative justice and give them closure, but that forgiveness would, and this forgiveness included minimizing Montour's penalty.<sup>112</sup>

#### D. *Pathways to Healing*

There is probably no checklist that, once accomplished, will allow for complete healing of a victim, but Bruce J. Winick has some suggestions that may promote the process.<sup>113</sup> First, responders need to be adequately trained to immediately recognize and treat victim needs.<sup>114</sup> A recently traumatized victim may be in extreme shock and be terrified of re-victimization.<sup>115</sup> An understanding of what they have been through and empathy are crucial, rather than blame or repres-

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<sup>112</sup> Andrew Cohen, *When Victims Speak Up in Court—in Defense of the Criminals* (Jan. 28, 2014) <http://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345>.

<sup>113</sup> Bruce Winick, *Therapeutic Jurisprudence and Victims of Crime*, U. OF MIAMI SCHOOL OF L. (2008-16).

<sup>114</sup> *Id.* at 4.

<sup>115</sup> *Id.*



sion.<sup>116</sup> The victim needs to reestablish equilibrium and gain control over his or her life, and to accomplish this, everyone within the criminal justice process should be highly trained in restorative justice in order to be aware of victim needs at all stages of healing.<sup>117</sup>

Additionally, child victims had positive responses at conferences when they were made aware of their surroundings, prepared, greeted, and acknowledged at the beginning of conferences.<sup>118</sup> Respectful treatment and involvement in the decision-making processes combined with an apology by the offender were greatly beneficial, as were the skills of conference facilitators.

To further promote the victim's healing, everyone involved in the legal process should be trained in social and psychological services in order to ensure sensitivity to each victim's particular needs.<sup>119</sup> Winick states that the community is, again, key in the role of helping the victim, and he encourages the courts to have social workers "on-demand" if quick intervention is necessary.<sup>120</sup>

Learned helplessness is also a byproduct of victimization, and court proceedings should encourage victim empowerment instead of a sense of loss of control.<sup>121</sup> Courts also need to take responsibility in making sure the victim knows that he or she is not responsible for what happened and teaching victims how to keep themselves safe.<sup>122</sup>

Post-traumatic stress disorder is a real problem.<sup>123</sup> All involved in the legal and healing processes need to encourage

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> GAL & SHIDLO-HEZRONI, *supra* note 91 at 2906.

<sup>119</sup> *See* Winick, *supra* note 4.

<sup>120</sup> *Id.* at 4-5.

<sup>121</sup> *Id.* at 5.

<sup>122</sup> *Id.* at 7.

<sup>123</sup> *Id.* at 5.

victims to keep discussing their feelings about the crime.<sup>124</sup> Intake and processing forms should encourage the victim to write down these feelings.<sup>125</sup> For those who are challenged in writing due to language or literacy barriers, or hesitant about writing down what happened to them at intake, the court could design appropriate forms or have a court official fill them out.<sup>126</sup> Writing about the incident serves a dual purpose: improving legal proceedings in future cases and sharing victims' pain with others who have been assaulted to help them in their restoration process.<sup>127</sup> Police and court officials should encourage victims to tell their stories and to testify about what happened in court because these can have a healing effect.<sup>128</sup> However, the victim's fear and anxiety at the thought of facing the perpetrator in the courtroom may cause the victim to relive the trauma.<sup>129</sup> The legal system can suggest other options, such as videotaping the testimony or using closed television.<sup>130</sup>

The victim's distress level is often elevated by our legal system, which is geared to protect the rights of the accused whose liberty is at stake.<sup>131</sup> Victims' rights often go by the wayside, and the victim can view the criminal process as a humiliating experience that strips the him of dignity and discourages him from any sort of input in the defendant's charging or sentencing.<sup>132</sup> Winick stresses the fact that, although defendants' rights will sometimes predominate over those of victims, more attention should be given to the victim.<sup>133</sup> Court proce-

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 6.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 7.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

dures could prove to be a further victimization, if consideration is not shown throughout the proceedings.<sup>134</sup>

Winick further states that in looking at the psychology of procedural justice, when a victim is treated with fairness and is allowed to participate at all stages, he or she is much happier with the results of court proceedings, even if those proceedings end up with an unfavorable decision for the victim.<sup>135</sup> It would appear that a sense of “voice” and having their feelings validated are crucial to victims’ restoration.

*E. Revenge as Restorative Justice, or as Payback?*

Can revenge restore the victim? The bottom line is that although temporary relief may be had for the victim, revenge prevents healing.<sup>136</sup> The irony of therapeutic jurisprudence is that it relies on a justice system that is inherently anti-therapeutic. Retributive justice works against restorative justice.<sup>137</sup> One aims high at the healing of all parties, while the other has historically aimed at punishment, therefore, the victim’s restorative goals may not be in line with the legal system’s agenda of judgment and justice.<sup>138</sup> The amazing benefits of therapeutic jurisprudence and all its healing elements may be complete disconnected from the adversarial system’s criminal procedures.<sup>139</sup>

Western legal systems have traditionally practiced retribution as opposed to revenge.<sup>140</sup> Retribution has a set of principals and limits administered with no personal tie to the vic-

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> STOKKOM, *supra* note 102.

<sup>137</sup> *Id.* at 4444-63.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 4506.

tim.<sup>141</sup> Revenge, however, works on a personal level, and the meting out of punishment often allows the victim to take pleasure in the suffering of the perpetrator.<sup>142</sup> The pleasure intrinsic in retribution is that of justice being done. However, vengeance in our justice system is often seen as the “undoing of evil” and a way of setting the record straight.<sup>143</sup> Humanity has an instinctive switch that is flipped when we are wronged, and we reflexively experience a need to “get even.” Many consider vengeance to be at the core of our justice system, and it does appear to have a moral affect. The ennobled wronged and wounded victim stands up to assert self-respect and righteous anger against the villainy of the criminal. However, vengeance can become an obsession that can bring great harm to the one seeking revenge, as well as to others.<sup>144</sup> The crusading “revenger” may escalate the drive to pay back the offender, leading to a Shakespearean Montague and Capulet mutual retaliation where neither side gives up on the payback.<sup>145</sup>

Further, a major moral objection is that the victim takes satisfaction in forcing the perpetrator, sometimes turned victim, to suffer.<sup>146</sup> Philosopher Trudy Govier stated that this use of suffering is only a means to an end for the original victim, while actually only destroying self-respect and self-worth.<sup>147</sup> The original victim is now on the same level as the offender with no true restorative justice accomplished for either side.<sup>148</sup> Govier states that, because morality is based on our responsibility to others and an obligation to treat all humanity with re-

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 4524.

<sup>143</sup> *Id.* at 4527.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 4542.

<sup>147</sup> T. Govier, *Forgiveness and Revenge*, THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE: INTERNATIONAL PERSPECTIVES at 4533 (2002).

<sup>148</sup> *Id.*

spect, the desire for retaliation and vengeance is necessarily iniquitous.<sup>149</sup> To cultivate revenge is to cultivate evil within us, thus perpetuating further malicious action.<sup>150</sup>

In a 1983 classic study on retribution, Susan Jacoby maintained that revenge was still taboo in Western culture.<sup>151</sup> However, in our time, the revenge taboo has been considerably weakened.<sup>152</sup> Revenge feelings have seen a resurrection in politics, corporations, and the legal profession.<sup>153</sup> Emotions such as anger, resentment, and revenge have been resuscitated and given a societal stamp of approval.<sup>154</sup> The victim is a stronger voice that is no longer faceless and nameless, and the media has proclaimed the truths and needs of the injured ones.<sup>155</sup>

In line with therapeutic trends, the victim is further encouraged to voice all troubled feelings, even if these are somewhat exaggerated.<sup>156</sup> This person is now a banner for public retribution and public support because retribution is sought on his or her behalf.<sup>157</sup> Lawyers and victim advocates maintain that only the toughest penalties will show the victim that he is being taken seriously by the criminal justice system.<sup>158</sup> A failure to administer the toughest of penalties to an offender is often viewed as a devaluation of the victim and a further infliction of pain.<sup>159</sup> The focus is on blame and a de-individualization of the offender, and centers solely on victims' issues, to the point

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<sup>149</sup> *Id.* at 4542.

<sup>150</sup> *Id.*

<sup>151</sup> S. Jacoby, *The Evolution of Revenge*, THERAPEUTIC JURISPRUDENCE et. al., at 4533 (1983).

<sup>152</sup> *Is Revenge Therapeutic*, THERAPEUTIC JURISPRUDENCE et. al., at 4557.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 4557-68.

<sup>156</sup> *Id.* at 4568.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

that their hideous sufferings may be mobilized to drive the community to rage and castigatory desires.<sup>160</sup> When a victim realizes that the offender may be a vulnerable victim, the victim may feel a sense of disappointment, lending itself to pay-back.<sup>161</sup> Thus, a withdrawal from the harshest penalty toward the victimizer may feel like the cruelest of insults.<sup>162</sup>

Such zeal for reprisal manifested more acutely in the 1990s, when victims' groups embraced the more therapeutic avenues of "closure" and "healing."<sup>163</sup> The term "closure" has become the catchword for victims' rights movements and has been used extensively as justification for harsher penalties.<sup>164</sup> Franklin Zimring, a lawyer with the University of Chicago and a Director of the Center for Studies in Criminal Justice, stated that the death penalty is an example of a policy that serves victims' interests of promoting healing and justice.<sup>165</sup> Zimring states that the death penalty offers closure and is viewed as a service to the victim. It administers a positive impact with which the community may identify.<sup>166</sup> Not quite the intent of restorative justice, which seeks restoration between all parties, Zimring offers the thought that the greater the suffering visited on the offender, the more healing experienced by victim, his or her loved ones, and the community.<sup>167</sup> As Judith Kay points out, capital punishment as revenge is meted out as part of survivor therapy and relatives of the victim who oppose the death penalty did not truly love the deceased victim.<sup>168</sup> The good

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<sup>160</sup> *Id.* at 4566.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 4578.

<sup>163</sup> *Id.* at 4583.

<sup>164</sup> *Id.*

<sup>165</sup> F. E. Zimring, *The Contradictions of American Capital Punishment*, THERAPEUTIC JURISPRUDENCE et. al., at 4582 (2003).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> J. W. Kay, *Murder victims' families for reconciliation*, 230– 245 THERAPEUTIC JURISPRUDENCE et. al., at 4590 (2007)

news is that many are truly troubled by the language of revenge.<sup>169</sup> Families of victims sometimes acknowledge that capital punishment did not bring further peace or closure, but rather prolonged their grief.”<sup>170</sup>

A recent study found that victim movement is leading to the more therapeutic restorative justice approaches to healing and closure.<sup>171</sup> California’s Proposition 8 pushed to limit victims’ rights and liberties in order to restore the humanizing of criminal offenders.<sup>172</sup> The proposition encouraged a view of victim worthiness balanced against the view of a degraded criminal offender.<sup>173</sup> Revenge is clearly not the sole focus of all victims.<sup>174</sup> Many victims just want to move on and revenge does not accomplish this, it simply perpetuates the issue.<sup>175</sup>

#### VI. THROUGH THE SYSTEM: THE DOMESTIC VIOLENCE, CRIME AND VICTIMS ACT OF 2004

The move toward restorative justice within the realm of therapeutic jurisprudence is spreading throughout our world. The Domestic Violence, Crime and Victims Act of 2004 amends Part 4 of the Family Law Act (1996), the Protection from Harassment Act (1997), and the Protection from Harassment (Northern Ireland) Order of 1997.<sup>176</sup> The ultimate goal of the United Kingdom’s Domestic Violence Crime and Victims Act of 2004 is to provide assistance for loved ones of victims

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<sup>169</sup> *Supra* note 152 at 4590.

<sup>170</sup> *Id.*

<sup>171</sup> V. Barker, *The Politics of Pain* 41 (3): 619– 663 THERAPEUTIC JURISPRUDENCE et. al., at 4603 (2007).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Supra* note 152 at 4603-11.

<sup>175</sup> *Id.*

<sup>176</sup> Domestic Violence, Crime, and Victims Act, Chapter 28 (2004) <http://www.legislation.gov.uk/ukpga/2004/28>.

of homicide, while making common assault an arrestable offense.<sup>177</sup> It targets victims of crime, particularly those of domestic violence, and attempts to offer enhanced legal protection and assistance.<sup>178</sup> Among its many changes, it allows for new rules in place for trials where children are involved, permits bailiffs to use force when necessary to enter homes, and is opening the door for further reforms throughout the United Kingdom.<sup>179</sup>

Whatever mode of healing the victim chooses—confrontation of the perpetrator, attempting to restore the wrongdoer, the less effective and more harmful option of revenge, or any of the many other avenues—restorative justice is carving out a pathway for both victim and offender to pursue healing.

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*



THERAPEUTIC JURISPRUDENCE AND THE SENTENCING OF  
FAMILY VIOLENCE OFFENDERS:  
DOES THE SENTENCING 'BOTTLE' IN VICTORIA NEED TO  
CHANGE?

By Paula O'Byrne\*

This paper examines the extent to which sentencing law in Victoria, Australia, fosters the use of therapeutic jurisprudence (TJ) approaches in the sentencing of family violence offenders. The paper applies the 'wine and bottle' methodology developed by Professor David B. Wexler to evaluate the extent to which the legal rules that make up sentencing law (the 'bottle') can facilitate the application of TJ practices and techniques (the 'wine'). The paper concludes that sentencing law is, overall, a distinctly TJ friendly bottle from which much TJ wine may be poured. Therefore, rather than changing the sentencing bottle itself, the paper suggests that future efforts to maximize therapeutic outcomes in sentencing in Victoria may be best directed towards improving legal procedures and the practices of legal actors.

I. INTRODUCTION

Sentencing is the process by which a legal sanction is imposed on a person who has been found guilty of a crime.<sup>1</sup> The purposes of sentencing are various and include just punishment,

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<sup>1</sup> Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (Victorian Government Department of Justice, 2002) 30.

deterrence, rehabilitation, denunciation and community protection.<sup>2</sup> Traditionally, in applying these purposes, courts often focused on the immediate offending but not necessarily the problems underlying that offending.<sup>3</sup> The end result was often a revolving door of re-offending and growing frustration with the legal system.<sup>4</sup>

More recently there has been a change to this approach, as there is growing interest in using legal roles, procedures and laws to maximise the therapeutic effect of the law without trumping other legal objectives.<sup>5</sup> Specialist problem-solving courts, integrated court programs and judging approaches that seek to promote an ethic of care are now a common feature of Victoria's legal landscape.<sup>6</sup> This desire to find better ways of delivering justice can be explained, in part, by therapeutic jurisprudence (TJ).<sup>7</sup> There is no single definition of TJ but in broad terms it is about exploring the role of the law as a healing agent to promote people's health and well-being.<sup>8</sup> TJ says that legal rules and processes, and the behaviour of legal actors in those

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<sup>2</sup> *Sentencing Act 1991* (Vic) s 5(1) ('*Sentencing Act*').

<sup>3</sup> Julie Stewart, 'Specialist Domestic/Family Violence Courts within the Australian Context' (Issues Paper No 10, Australian Domestic and Family Violence Clearinghouse, 2005) 1.

<sup>4</sup> Jelena Popovic, 'Mainstreaming Therapeutic Jurisprudence in Victoria: Feelin' Groovy' in Greg Reinhardt and Andrew Cannon (eds), *Transforming Legal Processes in Court and Beyond* (Collection of Refereed Papers from the 3rd International Conference on Therapeutic Jurisprudence, Australian Institute of Judicial Administration, Western Australia, 7–9 June 2006) 187, 189.

<sup>5</sup> See, eg, Bruce J Winick and David B Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Court* (Carolina Academic Press, 2003); David B Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125; Pauline Spencer, 'From Alternative to the New Normal: Therapeutic Jurisprudence in the Mainstream' (2014) 39(4) *Alternative Law Journal* 222.

<sup>6</sup> Popovic, above n 4, 189–90; Pauline Spencer, 'To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts' (Paper presented at the International Conference on Law and Society, Hawaii, 5–8 June 2012).

<sup>7</sup> Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' in Marilyn McMahon and David B Wexler (eds), 'Therapeutic Jurisprudence' (2002) 20(2) *Law In Context* (Federation Press, 2003) 6.

<sup>8</sup> William G Schma, 'Judging for the New Millenium' in Winick and Wexler (eds), above n 5, 88; Wexler, above n 5, 125.

processes, can have a therapeutic or anti-therapeutic effect.<sup>9</sup> Where possible, the therapeutic effects of the law should be maximised and its anti-therapeutic effects minimised.<sup>10</sup>

Much has been written about the practices and techniques that legal actors can use to promote therapeutic outcomes.<sup>11</sup> However, the therapeutic design of legal rules has received less attention.<sup>12</sup> In recognition of this gap, there is growing interest in looking at how legal rules can be designed to promote therapeutic outcomes. Professor David B. Wexler has developed a methodology for such an evaluation based on a ‘wine and bottle’ metaphor, whereby the legal rules are the ‘bottle’ and TJ practices and techniques are the ‘wine’.<sup>13</sup> Evaluating how much wine can be poured into the bottle – that is, how much TJ practice can be applied within the law – will show whether the rules themselves need to change.<sup>14</sup>

Sentencing law is a key component of Victoria’s legal system and has a significant impact on offenders, victims and the wider community. But is it TJ friendly? Does the existing law adequately foster the use of TJ practices or could it do more? Or does it hinder the achievement of therapeutic outcomes?

This paper explores these questions in relation to sentencing law in Victoria. It particularly focuses on the extent to which the *Sentencing Act 1991* (Vic) (*‘Sentencing Act’*) fosters the use of TJ practices by the Magistrates’ Court of Victoria (*‘Magistrates’*

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<sup>9</sup> Winick and Wexler (eds), above n 5, 7; David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).

<sup>10</sup> Spencer, above n 5, 222.

<sup>11</sup> See, eg, Winick and Wexler, above n 5; Michael S King ‘Applying Therapeutic Jurisprudence from the Bench: Challenges and Opportunities’ (2003) 28(4) *Alternative Law Journal* 172; Michael S King *Solution-focused Judging Bench Book* (Australasian Institute of Judicial Administration, 2009); Michael D Jones, ‘Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners’ (2012) 5 *Phoenix Law Review* 753.

<sup>12</sup> David B Wexler, ‘New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices’ (2014) 7 *Arizona Summit Law Review* 463.

<sup>13</sup> *Ibid.*

<sup>14</sup> Spencer, above n 5, 222.

Court') when dealing with family violence offending,<sup>15</sup> as family violence is increasingly coming under the spotlight as an area with which laws and legal processes must better engage.<sup>16</sup> Part 1 of the paper outlines the scope of family violence and how it is dealt with by the Magistrates' Court. Part 2 examines the origins and meaning of TJ, the wine and bottle methodology and current TJ thinking and practices for dealing with family violence offenders. Part 3 examines the *Sentencing Act* to identify the extent to which it is TJ friendly, particularly in the context of family violence offending.

The paper concludes that sentencing law is, overall, a distinctly TJ friendly 'bottle' from which much TJ wine may be poured. The broad sentencing purposes and options in the *Sentencing Act*, the wide discretion of the court to tailor a sentence to the individual circumstances of the case, the capacity of the court to address the causative factors underlying offending, and the statutory provisions for pre-sentence reports, victim impact statements and judicial monitoring are particularly TJ friendly legal rules that enable TJ practices to be applied.

Therefore, rather than changing the sentencing bottle itself, this paper suggests that future efforts to maximise therapeutic outcomes in sentencing may be best directed towards improving legal procedures and the practices of legal actors, and it identifies some potential challenges that the Magistrates' Court may face in achieving this.

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<sup>15</sup> This paper was prepared as part of a student research placement at the Dandenong Magistrates' Court between March and June 2015. Therefore, this paper focuses on the application of sentencing law to a mainstream court setting within the Magistrates' Court. The paper concludes with observations from the placement.

<sup>16</sup> See, eg, Centre for Innovative Justice ('CIJ'), *Opportunities for Early Intervention: Bringing Perpetrators of Family Violence into View* (RMIT University, March 2015); Senate Finance and Public Administration References Committee, Parliament of Australia, *Domestic Violence in Australia: Interim Report* (Commonwealth of Australia, March 2015).

## II. FAMILY VIOLENCE

A. *The scope of family violence*

There is no single definition of family violence.<sup>17</sup> It encompasses different forms of abuse – physical, emotional, sexual, psychological and economic – and a broad range of behaviours.<sup>18</sup> It can occur within any family relationship in all parts of society.<sup>19</sup>

In Victoria, the *Family Violence Protection Act 2008* (Vic) (*FVP Act*) provides the legislative framework for court orders to protect people who have experienced family violence. For the purposes of that Act, family violence is defined as behaviour towards a family member that is physically, sexually, emotionally, psychologically or economically abusive, threatening, coercive, or controlling so as to cause that family member to fear for their own or another person's safety or wellbeing.<sup>20</sup> Such behaviours include causing physical injury, assaulting the person sexually, damaging property, depriving a family member of their liberty, or making threats to do any of these things.<sup>21</sup> The behaviour need not constitute a criminal offence to be considered family violence.<sup>22</sup> Family violence encompasses violence in a range of relationships, including intimate personal relationships, nuclear and extended family relationships and care relationships.<sup>23</sup>

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<sup>17</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence – A National Legal Response*, ALRC Final Report No 114 (2010) 188 ('*ALRC Final Report No 114*').

<sup>18</sup> *Ibid* 189; Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, February 2015) 68 ('*Not Now, Not Ever Report*').

<sup>19</sup> Victims Support Agency, *Measuring Family Violence in Victoria: Victorian Family Violence Database Volume 5: Eleven Year Trend Analysis (1999-2010)* (Victorian Government Department of Justice, 2011) 21 ('*Measuring Family Violence in Victoria Report*').

<sup>20</sup> *Family Violence Protection Act 2008* (Vic) s 5(1) ('*FVP Act*').

<sup>21</sup> *Ibid* s 5(2).

<sup>22</sup> *Ibid* s 5(3).

<sup>23</sup> *Ibid* s 8.

While family violence can affect any person, the incidence of family violence against women is significantly higher than for men. The 2012 Australian Bureau of Statistics (ABS) Personal Safety Survey identified that since the age of 15 years, one in six Australian women had experienced physical or sexual violence by a partner compared to one in 19 men,<sup>24</sup> while one in four Australian women had experienced emotional abuse compared to one in seven men.<sup>25</sup> The perpetrators of family violence against women are overwhelmingly male.<sup>26</sup>

The prevalence of family violence is alarming. In Victoria, between 1999 and 2010, the number of family violence incidents reported to Victoria Police increased by 82 per cent, from 19,597 incident reports in 1999–2000 to 35,720 incident reports in 2009–10.<sup>27</sup> This does not include family violence that often goes unreported.<sup>28</sup> The number of finalised family intervention orders also increased significantly during this period, from 15,000 to 28,000, as too did the number of affected family members in those orders, from 19,308 to 43,958.<sup>29</sup>

Perpetrators of family violence tend to use ongoing and repetitive patterns of violent behaviour, involving a range of tactics, to instil fear in and exert control over the victim.<sup>30</sup> Often

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<sup>24</sup> Australian Bureau of Statistics, 2012 *Personal Safety Surveys, Experience of Partner Violence* <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter7002012>>, as quoted in CIJ, above n 16, 14.

<sup>25</sup> Australian Bureau of Statistics, 2012 *Personal Safety Surveys, Experience of Emotional Abuse by a Partner* <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter8002012>>, as quoted in CIJ, above n 16, 14.

<sup>26</sup> *Measuring Family Violence in Victoria Report*, above n 19, 18.

<sup>27</sup> *Ibid*; this trend is attributed in part to improved police practices for investigating family violence and legislative changes introduced by the *FVP Act*, which have led to improved community confidence to report family violence incidents: *ibid* 36.

<sup>28</sup> The Australian Bureau of Statistics 2012 *Personal Safety Surveys, Actions Taken in Response to Partner Violence* <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/25AF91125718ADF1CA257C3D000D856A?open-document> found that an estimated 80% of women and 95% of men never contact the police about violence by their current intimate partner, as quoted in *Not Now, Not Ever Report*, above n 18, 74.

<sup>29</sup> *Measuring Family Violence in Victoria Report*, above n 19, 44.

<sup>30</sup> *Not Now, Not Ever Report*, above n 18, 70–1.

the victim lives with the perpetrator, adding to the victim's level of fear, trauma, and severity of physical, emotional and psychological injury.<sup>31</sup> Alcohol and substance abuse by perpetrators also increases the incidence and frequency of family violence.<sup>32</sup>

The impact of family violence is enormous.<sup>33</sup> It may cause death, injury, anxiety, depression or other long-term impacts on the victim's health and wellbeing.<sup>34</sup> It reduces the victim's freedom, dignity, autonomy and sense of self.<sup>35</sup> The health and development of children can be seriously impacted.<sup>36</sup> There is also a significant social and economic cost to the community.<sup>37</sup>

#### B. *Family Violence in the Magistrates' Court*

The Magistrates' Court is established under section 4 of the *Magistrates' Court Act 1989* (Vic). It deals with 300,000 cases annually,<sup>38</sup> which is about 90 per cent of all cases dealt with by Victorian courts each year.<sup>39</sup> The Court exercises criminal, civil, family law and intervention order jurisdictions.

Family violence behaviours come before the Magistrates' Court in two main ways:<sup>40</sup> if the act of violence is a criminal offence within the Court's jurisdiction;<sup>41</sup> and under the *FVP Act*.

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<sup>31</sup> Ibid 70; Bruce J Winick, 'The Case for a Specialised Domestic Violence Court' in Winick and Wexler (eds), above n 5, 287.

<sup>32</sup> CIJ, above n 16, 15.

<sup>33</sup> See, eg, ibid 14–7; *Not Now, Not Ever Report*, above n 18, 76–8.

<sup>34</sup> *Measuring Family Violence in Victoria Report*, above n 19, 22.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid 23.

<sup>37</sup> For example, the economic cost to Victoria of family violence in 2008–09 was estimated to be \$3.4 billion, based on costs relating to health, medical treatment, housing, lost workplace productivity, police and judicial services, and other services: ibid.

<sup>38</sup> Magistrates' Court of Victoria, *The Magistrates' Court of Victoria Annual Report 2013/14* (Magistrates' Court of Victoria, 2014) 4.

<sup>39</sup> Ibid 11.

<sup>40</sup> Family violence behaviours are also dealt with in the context of family law and child protection matters.

<sup>41</sup> The Magistrates' Court may hear and determine all summary offences, all indictable offences that may be heard and tried summarily, conduct committal hearings into indictable offences, and exercise any other jurisdiction conferred on the Court

Relevant criminal offences that may occur in family violence incidents include assault causing injury, sexual assault, threats to kill, threats to inflict serious injury, stalking and destroying or damaging property.<sup>42</sup> Like other Australian jurisdictions, family violence is not a specific offence in Victoria.<sup>43</sup>

The *FVP Act* enables the Magistrates' Court to grant a family violence intervention order (FVIO) on an interim or final basis to protect a family member from future acts of violence.<sup>44</sup> In the case of an interim FVIO, the Court does not have to find that family violence has occurred.<sup>45</sup> However, in making a final FVIO, the Court must be satisfied that the respondent has committed family violence against the affected family member and is likely to do so again.<sup>46</sup> The Court may include any conditions in an FVIO that are necessary or desirable – the safety of the family member is the paramount consideration.<sup>47</sup> Conditions of an FVIO may prohibit the respondent from committing family violence against the family member, approaching, contacting or residing with the family member, or being within a certain distance of the family member.<sup>48</sup>

Family violence matters make up a significant part of the Magistrates' Court's workload. The number of FVIOs made by the Court rose by 82.2% between 2004–05 and 2011–12, from 10,047 to 18,309.<sup>49</sup> In 2013–14, 20,152 interim FVIOs were

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with respect to a criminal proceeding by or under any Act: *Magistrates' Court Act 1989* (Vic) s 25.

<sup>42</sup> *Not Now, Not Ever Report*, above n 18, 256.

<sup>43</sup> *ALRC Final Report No 114*, above n 17, 545.

<sup>44</sup> *FVP Act* ss 53, 74, 76, 78.

<sup>45</sup> *Ibid* s 53(1)(a).

<sup>46</sup> *Ibid* s 74(1).

<sup>47</sup> *Ibid* s 80.

<sup>48</sup> *Ibid* s 81.

<sup>49</sup> Sentencing Advisory Council, *Family Violence Intervention Orders and Safety Notices: Sentencing for Contravention Monitoring Report* (Sentencing Advisory Council, 2013) 12 ('*FVIO Contravention Monitoring Report*').



made and 45,585 FVIO applications were finalised.<sup>50</sup> The Sentencing Advisory Council in Victoria attributes these increases to improved police procedure, and legislative, court and support sector reforms.<sup>51</sup> The increased use of FVIOs has resulted in a large demand for support services.<sup>52</sup>

*C. Family Violence Intervention Orders: Contraventions, Sentencing and Recidivism*

Contravention of an FVIO is a criminal offence.<sup>53</sup> Two aggravated forms of contravention are also recognised as specific offences under the *FVP Act*. These are the contravention of an FVIO intending to cause harm or fear for safety<sup>54</sup> and the persistent contravention of an FVIO.<sup>55</sup> Both aggravated contraventions carry a higher maximum penalty than that for a general contravention.<sup>56</sup>

The aggravated contravention offences were introduced in 2013 to hold recidivist family violence offenders more accountable for their behaviour and enable the courts to impose a higher maximum penalty in sentencing where the offender has shown persistent disregard for the law or the contravention is particularly harmful to the affected family member.<sup>57</sup> It is estimated there is approximately one sentenced FVIO contravention charge for every three to four FVIOs made.<sup>58</sup>

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<sup>50</sup> Magistrates' Court of Victoria, above n 38, 90.

<sup>51</sup> *FVIO Contravention Monitoring Report*, above n 49, 13.

<sup>52</sup> *Ibid* 14.

<sup>53</sup> *FVP Act* s 123(1).

<sup>54</sup> *Ibid* s 123A.

<sup>55</sup> *Ibid* s 125A.

<sup>56</sup> The maximum penalty for an aggravated contravention is five years imprisonment and/or a 600 penalty fine: *FPV Act* ss 123A(2), 125A(1). In comparison, the maximum penalty for a general contravention is two years imprisonment and/or a 240 penalty fine: *FPV Act* s 123(2).

<sup>57</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 15 November 2012, Second Reading Speech, Justice Legislation Amendment (Family Violence and Other Matters) Bill 2012 (Vic) (Robert Clark, Attorney-General).

<sup>58</sup> *FVIO Contravention Monitoring Report*, above n 49, 27.

Sentencing outcomes for FVIO contraventions have changed significantly since the introduction of the *FVP Act* in 2008.<sup>59</sup> Between 2004 and 2007 sentences for contraventions were commonly at the lower end of the sentencing hierarchy (for example, fines and adjourned undertakings).<sup>60</sup> However, there has since been a shift away from fines towards sentences that involve some form of intervention in offenders' lives – such as community orders.<sup>61</sup> This trend is inconsistent with sentencing trends across the Magistrates' Court as a whole.<sup>62</sup> Also, sentences imposed for repeat FVIO contravention have become more severe, with the use of custodial sentences increasing and fines almost halving.<sup>63</sup> The Sentencing Advisory Council suggests this is due to a greater appreciation by the Court of the seriousness of family violence offending and a greater willingness by magistrates to impose more severe sentences to denounce this behaviour and keep offenders accountable.<sup>64</sup>

Finally, according to the Sentencing Advisory Council the recidivism rate for people sentenced for a breach of an FVIO in 2004–05 was just over 20 percent.<sup>65</sup>

#### *D. Snapshot in Summary*

What does this brief snapshot tell us? Firstly, family violence encompasses a broad range of behaviours, in a wide range of relationships. Secondly, it is repetitive by nature, mainly inflicted by men against women, and causes long term harm.

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<sup>59</sup> Ibid 29.

<sup>60</sup> Ibid 1.

<sup>61</sup> Ibid 31.

<sup>62</sup> Ibid 33.

<sup>63</sup> Ibid 38.

<sup>64</sup> Ibid 50.

<sup>65</sup> Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders Final Report* (Sentencing Advisory Council, 2009) Appendix 3 (*'Sentencing Practices for FVIO Breaches Final Report'*). For the purposes of that report, recidivism was defined as repetition by the one person of proven charges of a breach of an FVIO over a two-year time frame.

Thirdly, family violence matters make up a significant part of the Magistrates' Court's workload, particularly applications for FVIOs. This poses a significant challenge for the Court and associated support and counselling services. Fourthly, while FVIOs provide some measure of protection and safety for family violence victims, they do not stop family violence from occurring. The rates of FVIO contravention and recidivism show this. One way in which the Magistrates' Court has responded to these trends is by changing its sentencing practices.

### III. THERAPEUTIC JURISPRUDENCE

#### A. *The meaning of TJ*

Therapeutic jurisprudence (TJ) is a philosophical approach to studying the impact of the law on people's health and well-being.<sup>66</sup> Its starting premise is that the law is a social force that has consequences for those affected by it.<sup>67</sup> Those consequences can be therapeutic or anti-therapeutic. TJ is a way of looking at the law to tease out its consequences and, where possible, maximise its therapeutic effects.<sup>68</sup> TJ recognises that the law must promote a range of (sometimes competing) values that may cause some harm.<sup>69</sup> The aim of TJ is to look creatively at ways of designing and applying the law to minimise that harm without trumping other legal values.<sup>70</sup>

The term TJ was first used by Professor Bruce Winick and Professor David B. Wexler in the late 1980s. Having observed that mental health laws often caused unintended harm, they suggested a more humanistic and healing approach to the law.<sup>71</sup> In

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<sup>66</sup> Wexler, above n 5, 125.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> King, *Solution-focused Judging Bench Book*, above n 11, 24.

<sup>70</sup> Winick and Wexler, above n 5, 7.

<sup>71</sup> David B Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Tuoro Law Review* 17, 21.

short, they saw the potential for 'law *as* therapy'.<sup>72</sup> This perspective resonated with academics and quickly expanded into other areas of law, including tort, criminal and family law. According to Wexler, the law consists of three interconnected parts: legal rules; legal procedures; and the roles of legal actors, particularly judges and lawyers.<sup>73</sup> Each part has an impact on people's health and well-being and is capable of being looked at from a TJ perspective.<sup>74</sup>

The use of tools and knowledge from other disciplines, particularly the behavioural sciences such as psychology and criminology, is central to TJ. TJ encourages people to look at promising developments outside the law to see how they may be brought into the law to achieve therapeutic outcomes.<sup>75</sup>

In practice, TJ has manifested itself in several ways: in the development of problem-solving courts, particularly in the area of criminal law; the rise of solution-focused judging approaches; the establishment of multidisciplinary teams and specialist services within courts; the expansion of sentencing options; and the use of judicial monitoring to enforce compliance with court orders.<sup>76</sup>

### *B. TJ practices*

As a broad law reform philosophy, TJ thinking is constantly evolving. There are no fixed rules about what works and when particular techniques should be applied.<sup>77</sup> Nevertheless, some common themes emerge from the literature about what constitutes good TJ 'practice'.

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<sup>72</sup> Ibid 22.

<sup>73</sup> Wexler, above n 5, 126.

<sup>74</sup> Ibid.

<sup>75</sup> Wexler, above n 71, 24.

<sup>76</sup> Winick and Wexler, above n 5.

<sup>77</sup> David B Wexler, 'From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part' in (2011) 37(1) *Monash University Law Review* 33.

Firstly, legal actors should be aware they function as a therapeutic agent and apply an ethic of care.<sup>78</sup> Judges should interact with offenders and conduct court proceedings in a manner that maximises therapeutic outcomes. Judges and lawyers should encourage and motivate offenders to confront their problems, engage with them in developing solutions,<sup>79</sup> treat them with dignity and respect, and give them a ‘voice’ in proceedings.<sup>80</sup> Interpersonal skills that engender trust and respect – such as active listening, conveying concern and giving positive encouragement – should be used where possible.<sup>81</sup>

Secondly, court processes should invite active participation between parties, allow for solutions-focused approaches to be applied<sup>82</sup> and be responsive to change. They should also be structured to draw on the skills and resources of different agencies. The problem-solving court is an example of this approach.

Thirdly, the offender should play an active role in solving his or her ‘problem’. This means giving the offender a ‘voice’ in court proceedings,<sup>83</sup> actively involving them in decision-making, and encouraging them to take responsibility for finding solutions to their problems, including their dysfunctional behaviour.<sup>84</sup> King offers a range of judicial techniques to help offenders become this active agent.<sup>85</sup>

Fourthly, legal rules and procedures should enable the causative factors associated with the offending to be addressed. For

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<sup>78</sup> Winick and Wexler, above n 5, 8.

<sup>79</sup> Ibid 18.

<sup>80</sup> Jones, above n 11, 759.

<sup>81</sup> Carrie J Petrucci, ‘The Judge-Defendant Interaction: Toward a Shared Respect Process’ in Winick and Wexler (eds), above n 5, 148–55.

<sup>82</sup> For example, the practices for listing cases for hearings in court can affect whether solution-focused approaches can be applied to more complex cases: Spencer, above n 6, 12.

<sup>83</sup> Dana Segev, ‘The TJ Mainstreaming Project: An Evaluation of the Israeli Youth Act’ (2014) 7 *Arizona Summit Law Review* 527, 530.

<sup>84</sup> Michael S King and Becky Batagol, ‘Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts’ (2010) 33 *International Journal of Law and Psychiatry* 406, 409.

<sup>85</sup> King, *Solution-focused Judging Bench Book*, above n 9, ch 7.

example, drug abuse has a close correlation with criminal offending and mental illness.<sup>86</sup> People affected by a mental disorder are exposed to a range of social, health and legal risk factors.<sup>87</sup> TJ says that the courts should be equipped to respond to these issues in collaboration with relevant treatment agencies and community programs.

Fifthly, in order to facilitate rehabilitation and reduce recidivism, the law should promote behavioural change. One technique is the use of rewards and sanctions to encourage and motivate offenders to engage in behavioural change, complete treatment programs and comply with orders.<sup>88</sup> Review procedures that enable the court to monitor and support an offender's progress are another.<sup>89</sup> A third technique is the use of behavioural contracts in court programs to set specific behavioural goals.<sup>90</sup>

Lastly, procedural fairness is a common theme in TJ literature.<sup>91</sup> It ties in with the notion that TJ is about the *law in action*, not simply the written law, and that the *manner* in which decisions are made affects people just as much as *what* decisions are made.<sup>92</sup> If an offender feels that he or she has been fairly and respectfully dealt with, they are more likely to accept the court's authority and decision, even if the decision is not favourable.<sup>93</sup>

### C. *TJ and Family Violence*

Good TJ practice in one area of the law may not be effective in another. The effectiveness of particular practices depends on

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<sup>86</sup> Ibid 48–9, 75.

<sup>87</sup> Ibid 86.

<sup>88</sup> Frieberg, above n 7, 14.

<sup>89</sup> Michael Salter, 'Managing Recidivism Amongst High Risk Violent Men' (Issues Paper No 23, Australian Domestic and Family Violence Clearinghouse, 2012).

<sup>90</sup> King, *Solution-focused Judging Bench Book*, above n 11, 170.

<sup>91</sup> See, eg, Frieberg, above n 7, 15–6; Winick and Wexler, 'Interpersonal Skills and the Psychology of Procedural Justice' in Winick and Wexler (eds), above n 5, pt 2 ch C.

<sup>92</sup> Wexler, above n 5, 125–26.

<sup>93</sup> King and Batagol, above n 84, 408.

the nature of the offence, the legal issues involved and other contextual matters.<sup>94</sup> For example, TJ approaches to drug offending typically focus on the underlying ‘affliction’ or addiction of the offender and have a strong rehabilitative objective.<sup>95</sup> However, in the case of family violence offending, where there are high risks of serious physical and sexual violence, approaches that promote offender accountability and victim safety are paramount.<sup>96</sup>

Despite the enormous amount of literature on family violence, there is no clear consensus about which interventions work for family violence offenders.<sup>97</sup> Although an increasing number of evaluation studies have been undertaken of specific approaches, few studies are considered to be reliable or an accurate measure of effectiveness.<sup>98</sup> The social and individual risk factors in the life of an offender also make the likely success of an approach difficult to predict.<sup>99</sup> Nevertheless, consistent themes emerge in the literature about what may work, at least for some offenders, in the right circumstances – these are perpetrator programs, specialised court intervention and judicial monitoring.

Perpetrator programs (also called men’s behaviour change programs) are commonly used to educate offenders about the consequences of their actions, help them to change their behaviour and prevent further violence.<sup>100</sup> The programs vary in

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<sup>94</sup> Randal B Fritzler and Leonore Simon, ‘Principles of an Effective Domestic Violence Court’ in Winick and Wexler (eds), above n 5, 116.

<sup>95</sup> Arie Freiberg, ‘Problem-Oriented Courts: Innovative Solutions to Intractable Problems?’ (2001) 11 *Journal of Judicial Administration* 8, 18.

<sup>96</sup> King and Batagol, above n 84, 406.

<sup>97</sup> Urbis, *Literature Review on Domestic Violence Perpetrators* (2003) <<https://www.dss.gov.au/our-responsibilities/women/publications-articles/reducing-violence/literature-review-on-domestic-violence-perpetrators>> ii.

<sup>98</sup> See, eg, *ibid* 8, 21; Australian Attorney-General’s Department, AVERT Family Violence: Collaborative Responses in the Family Law System (‘AVERT’), *Prevention Strategies: Involving and Engaging Perpetrators Paper* (Australian Attorney-General’s Department, 2010) 6.

<sup>99</sup> Salter, above n 89, 16.

<sup>100</sup> AVERT, above n 98, 5.

length, format, content and therapeutic approach, and can be voluntary or court-directed.<sup>101</sup> Evidence on the effectiveness of these programs is mixed.<sup>102</sup> A number of studies and literature reviews have found little or no improvement in the behaviour and attitudes of men who complete these programs<sup>103</sup> or in recidivism rates,<sup>104</sup> possibly due to the lack of individualised treatment offered.<sup>105</sup> Other studies suggest these programs can have a significant positive impact on offenders' behaviour.<sup>106</sup> Despite these mixed views there appears to be some consensus that perpetrator programs are more likely to be effective when delivered as part of a coordinated community response that is linked with other responses,<sup>107</sup> such as ongoing court and probation monitoring and the imposition of prompt sanctions for non-compliance.<sup>108</sup> There also appears to be a growing view that an individualised program increases the chances of program completion because it can be tailored to the needs and motivations of the offender.<sup>109</sup>

The establishment of specialised court divisions or problem-solving courts is another TJ approach that is commonly employed to deal with family violence matters. Generally these are specially convened courts set up to deal specifically with family

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<sup>101</sup> Stewart, above n 3, 1.

<sup>102</sup> CIJ, above n 16, 36; Urbis, above n 97; Andrew Day, Donna Chung, Patrick O'Leary and Ed Carson, 'Programs for Men who Perpetrate Domestic Violence: An Examination of the Issues Underlying the Effectiveness of Intervention Programs' (2009) <<http://dro.deakin.edu.au/eserv/DU:30019630/day-programsformen-post-2009.pdf>>.

<sup>103</sup> Salter, above n 89, 8.

<sup>104</sup> Urbis, above n 97, 11–4; Lesley Laing, 'Responding to Men Who Perpetrate Domestic Violence: Controversies, Interventions and Challenges' (Issues Paper No 7, Australian Domestic and Family Violence Clearinghouse, 2002) 9–22.

<sup>105</sup> Salter, above n 89, 8.

<sup>106</sup> See, eg, Liz Kelly and Nicole Westmarland, *Domestic Violence Perpetrator Programmes: Steps Towards Change. Mirabal Final Report* (London Metropolitan University and Durham University, 2015).

<sup>107</sup> Salter, above n 89, 9; CIJ, above n 16, 38.

<sup>108</sup> CIJ, above n 16, 38–9; AVERT, above n 98, 7–10.

<sup>109</sup> CIJ, above n 16, 40; Urbis, above n 97, 11.



violence matters.<sup>110</sup> The courts typically aim to make the legal process safer and more supportive for victims and address the causal factors underlying the offender's violent behaviour.<sup>111</sup> They commonly provide an integrated system for handling protection orders and criminal offences, supported by multi-disciplinary teams and good access to services,<sup>112</sup> and provide close monitoring of court orders.<sup>113</sup> Specialist staff and judiciary are critical to their success.<sup>114</sup>

The Magistrates' Court has recognised the benefits of specialised court intervention. It has a specialist Family Court Division that provides specialist staff and judiciary, multi-disciplinary teams, early intervention and an individualised approach to sentencing.<sup>115</sup> In its mainstream court, the Court has established allocated list days for family violence cases, appointed specialist registrars and applicant and respondent workers, introduced family violence specific professional development programs for magistrates, and expanded court-directed men's behaviour change programs to two additional court locations.<sup>116</sup>

The Magistrates' Court also has a Neighbourhood Justice Centre that is particularly focused on collaborative problem-solving.<sup>117</sup> Set up to be innovative and apply therapeutic and restorative justice principles in court matters,<sup>118</sup> the Centre uses a problem-solving process to find constructive solutions that will assist an offender in addressing the underlying causes of their

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<sup>110</sup> Stewart, above n 3, 4.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Freiberg, above n 95, 18.

<sup>114</sup> Stewart, above n 3, 9.

<sup>115</sup> The Family Violence Court Division is established under s 4H of the *Magistrates' Court Act 1989* (Vic).

<sup>116</sup> Magistrates' Court of Victoria, above n 38, 69; based on author's interactions with staff from the placement at the Dandenong Magistrates' Court.

<sup>117</sup> This specialist Court Division is established under s 4M of the *Magistrates' Court Act 1989* (Vic).

<sup>118</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, Second Reading Speech, Courts Legislation (Neighbourhood Justice Centre) Bill 2006 (Vic) (Rob Hulls, Attorney-General).

offending.<sup>119</sup> Used as an adjunct to court proceedings, the process brings the offender and others together to discuss problems and work out concrete, actionable outcomes that are presented to the magistrate for consideration in the sentencing process.<sup>120</sup> The problem-solving process draws on TJ practices to improve the well-being of the offender and seeks to maximise the opportunity for behavioural change at a time when the person, faced with the crisis moment of a court appearance, may be motivated to make positive life change.<sup>121</sup>

Judicial monitoring is frequently mentioned in TJ writing. This can take a minimalist approach – the court adjourns a case while the offender participates in court-directed treatment – or it can involve close and regular monitoring of offenders with or without the use of sanctions or rewards.<sup>122</sup> King and Batagol suggest that ‘judicial monitoring should, as far as possible, use practices that promote motivation for behavioural change and avoid practices that may lower such motivation’.<sup>123</sup> They propose a model of judicial monitoring that gives the offender some choice as to how they are held accountable for their behaviour, sets goals, is respectful, focuses on the violent behaviour and not the person, includes regular review hearings and uses positive reinforcement when goals are met.<sup>124</sup> In a randomised trial of intensive judicial monitoring in two specialized family violence courts, Labriola and colleagues found that judicial monitoring can have a positive impact if it is implemented frequently, consistently and without incentivising compliance.<sup>125</sup>

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<sup>119</sup> Jay Jordens and Elizabeth Richardson, ‘Collaborative Problem Solving in a Community Court Setting’ (2014) 23 *Journal of Judicial Administration* 253, 253–4.

<sup>120</sup> *Ibid* 255.

<sup>121</sup> *Ibid* 257.

<sup>122</sup> King and Batagol, above n 84, 408–9.

<sup>123</sup> *Ibid* 416.

<sup>124</sup> *Ibid* 413–16.

<sup>125</sup> See, eg, Melissa Labriola, Amanda Cissner, Robert Davis and Michael Rempel, *Testing the Efficacy of Judicial Monitoring: A Randomised Trial at the Rochester, New York Domestic Violence Courts* (Centre for Court Innovation, 2012) 39.

The Centre for Innovative Justice suggests that jurisdictions should explore opportunities for increased judicial monitoring coupled with the imposition of swift and certain sanctions for non-compliance with court orders.<sup>126</sup> The concept of ‘swift and certain sanctions’ is a feature of Hawaii’s Opportunity Probation with Enforcement, or HOPE, program. That program was established as a means of reducing probation violations by drug offenders and others at high risk of recidivism.<sup>127</sup> It involves intense supervision of offenders, the imposition of an immediate short-term prison sentence for *any* failure by the offender to comply with treatment or a court order, and increased sentences for successive contraventions.<sup>128</sup> Given the well-established approach to sentencing in Victoria that favours individualised and proportionate justice,<sup>129</sup> the introduction of non-discretionary sanctions such as those used in the HOPE program would require careful consideration. However Bartel suggests that it is an opportunity that should be explored.<sup>130</sup>

#### *D. The ‘Wine and Bottle’ Metaphor*

While TJ is closely associated with problem-solving courts, its application in a mainstream court setting is gaining interest. Professor David B. Wexler has developed a ‘wine and bottle’ methodology for assessing whether a mainstream setting is conducive to TJ (or is ‘TJ-friendly’).<sup>131</sup> It involves looking at the extent to which TJ practices – the ‘wine’ – can be applied within the governing legal rules and procedures of the court – the ‘bottle’.<sup>132</sup>

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<sup>126</sup> CIJ, above n 16, 64.

<sup>127</sup> Lorana Bartel, ‘Swift and Certain Sanctions: Is it Time for Australia to Bring Some HOPE into the Criminal Justice System?’ (2015) 39 *Criminal Law Journal* 53, 53–4.

<sup>128</sup> *Ibid* 55.

<sup>129</sup> See Part 3 of this paper.

<sup>130</sup> *Ibid* 66.

<sup>131</sup> Wexler, above n 12.

<sup>132</sup> *Ibid* 464.

If the bottle can hold a lot of TJ wine, the next step is to make roles, behaviours, practices and processes within that bottle more TJ-friendly.<sup>133</sup> On the other hand, if the bottle cannot hold much or any TJ wine, the bottle itself may need to change.<sup>134</sup> That is, the legal rules may need to be redesigned or reformed.

Wexler points to mandatory sentencing and non-discretionary parole-release dates as examples of 'TJ-unfriendly' legal rules.<sup>135</sup> The former provides no legal capacity for sentences to be tailored to meet both therapeutic and justice objectives while the latter provides no legal incentive for incarcerated offenders to do well in prison.<sup>136</sup> In contrast, legal rules that permit the court to conduct periodic reviews for monitoring compliance with sentences are considered to be TJ-friendly.<sup>137</sup>

The wine and bottle metaphor is useful because it shows that maximising the therapeutic effects of the law requires both a good bottle and good wine. A jurisdiction may have legal actors who are willing to apply the law in a therapeutic way but no bottle within which TJ practices may be applied.<sup>138</sup> Conversely, a jurisdiction may have TJ-friendly legal rules but the legal actors lack familiarity with TJ practices and techniques.<sup>139</sup> Both the wine and bottle are necessary.

#### *E. Designing a TJ-friendly Bottle*

While much has been written about TJ practices and techniques, the design features that make for a TJ-friendly bottle have received far less attention. The relative newness of the

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<sup>133</sup> Spencer, above n 5, 222.

<sup>134</sup> Ibid.

<sup>135</sup> Wexler, above n 12, 465.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> David B Wexler, 'Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law' (2014) *Therapeutic Jurisprudence Paper* 6, 3. <<http://www.civiljustice.info/tj/6>>

<sup>139</sup> Ibid.

wine/bottle methodology is one possible explanation. The wide variability in legal rules and procedures within and between jurisdictions is possibly another – what works in one jurisdiction may not work in another. In 2014 an international project to promote the mainstream use of TJ was launched.<sup>140</sup> Over time this may build up a catalogue of legal provisions and commentary that are indicative of TJ-friendly bottles. However, for the moment, the notion of what constitutes a TJ friendly bottle is imprecise.

Wexler posits some features that make for a TJ-friendly bottle. These include legal provisions that enable judicial postponement of a sentence to take account of the offender's post-offence rehabilitative efforts<sup>141</sup> or judicial reconsideration of imposed sentences to take account of post-sentence rehabilitative efforts.<sup>142</sup>

Recent analyses of specific legal landscapes also provide some clues. For example, Pauline Spencer suggests that the *Sentencing Act* is a TJ-friendly bottle because the individual circumstances of the offender can be taken into account in sentencing, it provides a range of sentencing options, it allows the experiences of victims to be considered by the court, and it provides for ongoing judicial supervision of an offender's rehabilitation.<sup>143</sup> These provisions are examined more closely in Part 3 of this paper.

Similarly, Dana Segev suggests that the Israeli Youth Act<sup>144</sup> is TJ-friendly because it gives youths the opportunity to voice their opinions in criminal proceedings, enables judges to monitor the progress of those on probation, and confers wide discretion on judges in deciding whether an offender proceeds down an 'incarceration path' or a 'treatment path'.<sup>145</sup> That Act also

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<sup>140</sup> See <<https://mainstreamtj.wordpress.com/>>.

<sup>141</sup> Wexler, above n 12, 475.

<sup>142</sup> Ibid 472.

<sup>143</sup> Spencer, above n 5, 223–4.

<sup>144</sup> *Youth Law: Judgment, Punishment and Treatment 1971* (Isr.)

<sup>145</sup> Segev, above n 83, 532–8.

requires judges to explain to the youth why a decision was made. Conversely, Segev notes that the unstructured discretion granted to judges may undermine TJ by hindering procedural fairness.<sup>146</sup>

#### IV. SENTENCING LAW IN VICTORIA

Sentencing is the process by which a legal sanction is imposed on a person who has been found guilty of a crime.<sup>147</sup> It is one of the most important functions of the courts<sup>148</sup> and one of the most difficult.<sup>149</sup> Sentencing affects the rights and liberties of the person,<sup>150</sup> protects the community from harm,<sup>151</sup> and shapes public confidence in the law.<sup>152</sup> In Victoria, sentencing is primarily governed by the *Sentencing Act* and common law. This section of the paper examines the extent to which existing sentencing law fosters the use of TJ practices and approaches, particularly practices that may 'work' for family violence offending.

##### A. *Sentencing Principles and Methodology*

In *Kable v DPP*, Mahoney ACJ said 'if justice is not individual, it is nothing'.<sup>153</sup> This notion of individualised justice is fundamental to sentencing and closely linked to the wide discretion invested in a judge to impose a sentence that is just and appropriate in all the circumstances of the case.<sup>154</sup> The judge alone

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<sup>146</sup> Ibid 538.

<sup>147</sup> Freiberg, above n 1, 30.

<sup>148</sup> Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Lawbook, 3<sup>rd</sup> ed, 2014) 1.

<sup>149</sup> Ibid 18; *Channon v The Queen* (1978) 20 ALR 1, 24 (Deane J) ('Channon').

<sup>150</sup> Freiberg, above n 148, 2.

<sup>151</sup> *McL v The Queen* [2000] HCA 46 [69] (McHugh, Gummow and Hayne JJ).

<sup>152</sup> Freiberg, above n 148, 39; *Channon* 15 (Brennan J).

<sup>153</sup> (1995) 36 NSWLR 374, 394.

<sup>154</sup> Freiberg, above n 148, 19.

is responsible for deciding the sentence to be imposed<sup>155</sup> within the limits set by the *Sentencing Act* and common law.

In Victoria, the only purposes for which a sentence can be imposed are just punishment, deterrence, rehabilitation, denunciation, community protection or any combination of these.<sup>156</sup> These purposes are relevant to family violence offending: general deterrence and denunciation are important for sending a message to the community and the offender that family violence is not tolerated;<sup>157</sup> community protection is relevant to protecting the safety and wellbeing of family violence victims and the broader community; and rehabilitation presents an opportunity to end the repetitive nature of family violence by addressing the causative factors underlying it. No single purpose is fundamental to the fixing of a sentence; it is for the judge to decide how much weight should be given to each purpose in a particular case.<sup>158</sup>

Some fundamental common law principles overarch these purposes. The first is the principal of proportionality – a sentence must be no more than what is commensurate or appropriate to the gravity of the crime.<sup>159</sup> The second principle is parsimony, which requires the court to impose the least severe sentencing option necessary to achieve the purpose(s) of the sentence.<sup>160</sup> This principle is reflected in s 5(3) of the *Sentencing Act*.<sup>161</sup> The third principle – consistency – is based on the notion of equal justice and requires that ‘like cases be treated alike and

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<sup>155</sup> *Ibid* 107.

<sup>156</sup> *Sentencing Act* s 5(1).

<sup>157</sup> *R v Cotham* [1998] VSCA 111.

<sup>158</sup> *AB v The Queen (No 2)* [2008] VSCA 39; (2008) 18 VR 391 [44]–[45].

<sup>159</sup> *Hoare v The Queen* (1989) 167 CLR 348.

<sup>160</sup> Judicial College of Victoria, *Victorian Sentencing Manual* 6.3 (last updated 10 April 2015).

<sup>161</sup> *Sentencing Act* s 5(3) states: ‘A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed’.

unlike cases treated differently'.<sup>162</sup> Totality is the final principle and this requires the total sentence imposed on an offender for different offences to be fair, just and reflective of the totality of the criminal behaviour.<sup>163</sup>

The court must also have regard to factors particular to the offence and the offender, such as the maximum penalty for the offence, current sentencing practices, the nature and gravity of the offence, the offender's previous character and culpability, the impact of the offence on the victim, and any relevant mitigating and aggravating circumstances.<sup>164</sup>

The preferred approach for applying these various purposes, principles and factors is by 'instinctive synthesis', which involves the judge identifying all the factors relevant to the sentence, examining their significance and then making a value judgment as to what is an appropriate sentence.<sup>165</sup> According to this approach, as 'there is no single, correct, objective sentence',<sup>166</sup> attributing weight to specific sentencing factors or approaching the task as a mathematical exercise is likely to lead to legal error.<sup>167</sup> While the *Sentencing Act* requires a court to depart from the instinctive synthesis approach in certain circumstances,<sup>168</sup> generally a court has wide discretion as to how it weighs all the competing factors and arrives at a final sentence.

The broad purposes for which a person may be sentenced, and the wide discretion invested in judges to arrive at an individualised sentence, are considered to be very TJ-friendly.

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<sup>162</sup> Freiberg, above n 148, 436; *Postiglione v The Queen* [1997] HCA 26; (1997) 189 CLR 295; *Sentencing Act* s 1(a) states that one of the purposes of the Act is 'to promote consistency of approach in the sentencing of offenders'.

<sup>163</sup> *Mill v The Queen* (1988) 166 CLR 59 [62]–[63] (Wilson, Deane, Dawson, Toohey and Gaudron JJ).

<sup>164</sup> *Sentencing Act* s 5(2).

<sup>165</sup> *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 [51] (McHugh J) ('*Markarian*'); *R v Williscroft* [1975] VR 292, 300.

<sup>166</sup> Freiberg, above n 148, 230.

<sup>167</sup> *The Queen v Gallagher* (1990) 45 A Crim R 147, 230 (Gleeson CJ).

<sup>168</sup> For example, a court must (if applicable) state the sentencing discount it has given for a plea of guilty: *Sentencing Act* s 6AAA.



Judges have considerable scope in deciding which sentencing purposes should prevail in an individual case and, within certain limits, think creatively about how a sentence may be formulated to maximise therapeutic outcomes. In the case of family violence offending, where the protection of the victim is generally regarded as paramount,<sup>169</sup> the *Sentencing Act* enables the court to use its authority to impose a sentence that has this as its central purpose.

However, the *Sentencing Act* does not explicitly recognise or promote the application of TJ principles in the sentencing process. While this is not essential for TJ practices to be applied in a court, arguably it would legitimise the role of TJ in sentencing law and give judicial officers the imprimatur to think creatively about how a sentence and the sentencing process may be used to achieve therapeutic outcomes. As Mack and Anieu point out, among some magistrates there is a conventional understanding of impartiality that says that judging must be unemotional and detached.<sup>170</sup> Such conventions may limit the scope for TJ-friendly judging styles. Explicit statutory recognition of the potential role of TJ in sentencing would make it clear that more engaged judicial practice is acceptable and important.

#### B. *Sentencing Hierarchy*

The parsimony principle is embodied in the sentencing hierarchy set out in s 5 of the *Sentencing Act*.<sup>171</sup> A court must consider the efficacy of each sentencing option in achieving the relevant sentencing purpose or purposes before turning to the next, more serious sentencing option.<sup>172</sup> The available sentencing options – from least to most severe – include dismissal, discharge,

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<sup>169</sup> *Sentencing Practices for FVIO Breaches Final Report*, above n 65, 135.

<sup>170</sup> Kathy Mack and, Sharyn Roach Anieu, 'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices' (2011) 37(1) *Monash University Law Review* 187, 215.

<sup>171</sup> *Sentencing Act* s 5(3)–(7).

<sup>172</sup> *Sentencing Practices for FVIO Breaches Final Report*, above n 65, 39.

adjourned undertaking, fine, community correction order, drug treatment order, detention in a designated mental health service, and imprisonment.<sup>173</sup>

A dismissal involves the judge finding the offence proven but no conviction is recorded and no penalty is imposed.<sup>174</sup> A discharge involves the recording of a conviction without conditions.<sup>175</sup> An adjourned undertaking enables the court to adjourn a proceeding and release an offender (with or without recording a conviction) subject to the offender giving an undertaking with conditions attached.<sup>176</sup> The court may impose a special condition that the offender participates in services and may require the person to appear before the court during the adjourned period.<sup>177</sup> A fine is a monetary penalty that may be imposed instead of or in addition to another sentence.<sup>178</sup> The courts also have the option of deferring sentencing for a period of up to 12 months if the offender agrees.<sup>179</sup> Sentencing may be deferred to enable the offender's capacity and prospects for rehabilitation to be assessed, to allow the offender to demonstrate that rehabilitation has taken place, to allow the offender to participate in programs aimed at addressing the underlying causes of the offending or to address the impact on the victim, or for other purposes.<sup>180</sup>

A community correction order sits in the middle of the sentencing hierarchy and it can contain both punitive and rehabilitative requirements.<sup>181</sup> Among other things, an order may include conditions that require the offender to attend treatment and rehabilitation or that involve judicial monitoring.<sup>182</sup> The wide range and combination of conditions that may be attached to an

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<sup>173</sup> *Sentencing Act* s 7(1).

<sup>174</sup> *Ibid* s 75.

<sup>175</sup> *Ibid* s 73.

<sup>176</sup> *Ibid* ss 72, 75.

<sup>177</sup> *Ibid* ss 72(2), (3) and 75(2), (3).

<sup>178</sup> *Ibid* s 49.

<sup>179</sup> *Ibid* s 83A.

<sup>180</sup> *Ibid* s 83A(1A).

<sup>181</sup> *Ibid* s 5(6), pt 3A.

<sup>182</sup> *Ibid* ss 48D, 48K.

order makes this sentencing option adaptable to a range of situations.<sup>183</sup> When deciding to attach a treatment and rehabilitation condition to an order, the court must have regard to the underlying causes of the offending and any relevant advice contained in a pre-sentence report prepared in respect of the offender.<sup>184</sup>

A court may sentence an offender to a fine, an adjourned undertaking or a community correction order, with or without recording a conviction.<sup>185</sup> In deciding whether or not to record a conviction, the court must have regard to all the circumstances of the case, including the nature of the offence, the character and past history of the offender, and the impact of a conviction on the offender's social and economic well-being.<sup>186</sup>

Imprisonment is the most severe sentence that is to be applied as a last resort.<sup>187</sup> Previously, the *Sentencing Act* enabled the courts to wholly or partially suspend a sentence of imprisonment (a 'suspended sentence') for a specified period.<sup>188</sup> If the offender committed another offence punishable by imprisonment during that period, the offender could be ordered to serve all or part of the original suspended term in prison. In 2006 the scope for using this sentence was narrowed<sup>189</sup> and the sentence itself was subsequently abolished in 2013–14, mainly in response to concerns it did not constitute just punishment and it reduced public confidence in sentencing.<sup>190</sup>

Criticisms regularly levelled at a suspended sentence are that it lacks sufficient punitive content, is misleading<sup>191</sup> and is a poor

<sup>183</sup> Freiberg, above n 148, 698.

<sup>184</sup> *Sentencing Act* s 48D(2).

<sup>185</sup> *Ibid* s 7(1).

<sup>186</sup> *Ibid* s 8(1).

<sup>187</sup> *Ibid* s 5(4); *Victorian Sentencing Manual*, above n 160, 12.1.

<sup>188</sup> *Sentencing Act* s 27, later repealed by *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic) s 11.

<sup>189</sup> *Sentencing (Suspended Sentences) Act 2006* (Vic).

<sup>190</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, Second Reading Speech, *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Bill 2015* (Vic) (Robert Clark, Attorney-General).

<sup>191</sup> Sentencing Advisory Council, *Suspended Sentences: Final Report—Part 1* (Sentencing Advisory Council, 2006) 47.

deterrent because it is widely perceived by the community to be lenient.<sup>192</sup> The contrary view is that a suspended sentence allows the seriousness of the offence to be acknowledged, it promotes the public interest in the rehabilitation of the offender, and it gives the court flexibility in sentencing an offender where no benefit would be gained from a more punitive sentence.<sup>193</sup>

Overall, the *Sentencing Act* provides a wide range of sentences, which makes for a good TJ bottle.<sup>194</sup> The courts have significant flexibility to tailor the punishment to the offence and the particular sentencing purposes sought to be achieved. There are various opportunities for the court to consider the rehabilitative prospects of the offender and underlying causes of offending, and make orders with appropriate conditions attached. At the lower end of the sentencing hierarchy, the court also has discretion as to whether or not to record a conviction.

This flexibility is important because it enables sentencing practices to be adapted as knowledge of 'what works' improves. As discussed in Part 2 of this paper, there has been a noticeable shift away from fines towards adjourned undertakings and community orders in relation to FVIO contraventions.<sup>195</sup> This shift – which has been attributed to cultural change,<sup>196</sup> the influence of TJ and better judicial understanding of family violence<sup>197</sup> – was achieved without significant changes to the sentencing hierarchy itself.

Arguably, the abolition of suspended sentences has reduced the available sentencing options for dealing with family violence offending that warrants a response at the higher end of the sentencing hierarchy.<sup>198</sup> While the community correction order is a

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<sup>192</sup> Ibid 27, 46–47.

<sup>193</sup> Ibid 40, 46.

<sup>194</sup> Spencer, above n 5, 223.

<sup>195</sup> *FVIO Contravention Monitoring Report*, above 49, 51.

<sup>196</sup> Ibid 44.

<sup>197</sup> Ibid 47–8.

<sup>198</sup> Although, as noted by the Sentencing Advisory Council, there would be few cases in which a suspended sentence would be appropriate for a breach of an FVIO: *Sentencing Practices for FVIO Breaches Final Report*, above n 65, 150.

flexible sanction, it does not carry with it ‘a powerful threat of immediate imprisonment for a term known in advance’ like a suspended sentence.<sup>199</sup> In circumstances where the sentencing purpose would be best achieved by imposing a sentence with a strong punitive element (to deter the offender from reoffending) and coercive rehabilitation requirements, a suspended sentence to which conditions can be attached may potentially be a more effective solution. However, given the community’s perception of suspended sentences, and the importance of ensuring that sentences for family violence offences adequately reflect the seriousness of such offending, any changes to sentencing options would need to be carefully considered.

### C. *Pre-sentence Reports and Victim Impact Statements*

Contextual information about the offender and victim can provide important insights into the seriousness of the offending, the rehabilitative prospects of the offender and the likely effectiveness of a sentence.<sup>200</sup> This is particularly true of family violence offending where, without the relevant background information, the impact and seriousness of the behaviour may be underestimated.<sup>201</sup>

Pre-sentence reports and victim impact statements are two means by which this information may be brought to the court’s attention. The legislative provisions for pre-sentence reports are set out in Division 1A of Part 3 of the *Sentencing Act*. A court may order a pre-sentence report before passing any sentence<sup>202</sup> however in certain circumstances the provision of a report is mandatory.<sup>203</sup> The contents of a report may include details about

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<sup>199</sup> *DPP v Edwards* [2012] VSCA 293 [123] (Warren CJ).

<sup>200</sup> *FVIO Contravention Monitoring Report*, above n 49, 38.

<sup>201</sup> *Ibid.*

<sup>202</sup> *Sentencing Act* s 8A(1).

<sup>203</sup> A court must order a pre-sentence report before making an order for a community correction order, a youth justice centre order or a youth residential centre order: *ibid* s 8A(2).

the offender's social, educational, employment and medical history, previous criminal offending, any history of substance abuse, financial circumstances, special needs, rehabilitation prospects and suitability for treatment.<sup>204</sup> Input from the offender in the preparation of the report is not mandatory nor is the offender's consent required for its preparation.<sup>205</sup> However, both the prosecution and defence may dispute the contents of a report<sup>206</sup> and the court is not compelled to follow the recommendations in a report.<sup>207</sup>

A victim impact statement is a formal statement prepared by the victim that sets out the details of the impact of the offence on the victim.<sup>208</sup> A statement may include particulars of any injury, loss or damage suffered by the victim as a direct result of the offence.<sup>209</sup> A victim has some latitude as to how they make their statement<sup>210</sup> and the court has a degree of flexibility as to how it receives a statement, subject to the principle that the court must avoid reliance on inadmissible material.<sup>211</sup> While the preparation of a statement is not mandatory, and a court must have regard to the impact of the offence on any victim in sentencing in any case,<sup>212</sup> a statement can draw attention to damage suffered by the victim that may not be immediately apparent from other information before the court. In terms of the weight that ought to be given to statements made by family violence victims, Neave JA observed in *R v Hester* that these statements should be given considerable weight.<sup>213</sup>

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<sup>204</sup> *Ibid* s 8B.

<sup>205</sup> Freiberg, above n 148, 177.

<sup>206</sup> *Sentencing Act* s 8D.

<sup>207</sup> *The Queen v Webber* (1996) 86 A Crim R 361.

<sup>208</sup> *Sentencing Act* s 8K(1).

<sup>209</sup> *Ibid* s 8L(1).

<sup>210</sup> *Ibid* s 8L(2).

<sup>211</sup> *R v Dowlan* [1998] 1 VR 123, 140 (Charles JA).

<sup>212</sup> *Sentencing Act* s 5(2)(daa).

<sup>213</sup> [2007] VSCA 298 [27].

Pre-sentence reports and victim impact statements are considered to be especially TJ-friendly. They assist the court in understanding the impact of the offender's behaviour and, therefore, in arriving at a sentence that adequately reflects the seriousness of the offence; a victim impact statement gives the victim a 'voice' in the sentencing process; and a pre-sentence report enables the court to consider and tailor a sentence to the individual circumstances of the offender. In addition, because parties may dispute the contents of these documents,<sup>214</sup> and a court may rule that a statement is inadmissible,<sup>215</sup> this safeguards against the making of spurious or unsubstantiated claims and promotes procedural fairness.

#### D. *Judicial Monitoring*

The *Sentencing Act* provides the opportunity for the court to monitor an offender's compliance with an order or rehabilitative efforts. However, judicial monitoring is only formally recognised in respect of community correction orders.<sup>216</sup> For less serious offences, the use of judicial monitoring to oversee an offender's compliance or progress relies on the court's willingness to use its deferral and adjournment powers creatively. Arguably, judicial monitoring has a role across the sentencing hierarchy and the *Sentencing Act* could specifically recognise this. As noted by King and Ford, despite the growing acceptance of TJ, some hold the view that judicial officers should not be involved in the management of offenders.<sup>217</sup> Judicial officers that are more comfortable with the adversarial and more punitive approach to crime may have difficulty in accepting and adjusting

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<sup>214</sup> See, eg, *Sentencing Act* ss 8N, 8O.

<sup>215</sup> *Ibid* s 8L(3); for example, a statement may be ruled inadmissible on grounds of hearsay, unreliability or irrelevance: *R v GP* (1997) 18 WAR 196; Freiberg, above n 148, 185.

<sup>216</sup> *Sentencing Act* s 48L.

<sup>217</sup> Michael S King and Steve Ford, 'Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The Example of the Geraldton Alternative Sentencing Regime' (2006) 1 *eLaw Journal* (Special Series) 9, 10.

to an approach that requires greater and ongoing judicial involvement.<sup>218</sup> Broader formal recognition of judicial monitoring in the *Sentencing Act* would legitimise its use and promote the concept that a judicial officer may play an active role in motivating and engaging with offenders to confront their problems.

The *Sentencing Act* also provides limited guidance about the use or potential scope of judicial monitoring. Section 48K(1) of the Act provides that a judicial monitoring condition may be attached to a community corrections order if the court is satisfied this is necessary to monitor compliance with the order. However, the section does not expressly acknowledge the potential for judicial monitoring to be used to address the underlying causes of the offending. Express legislative recognition of this broader problem-solving purpose would put this beyond doubt.

As discussed in Part 2 of the paper, the effectiveness of judicial monitoring is enhanced when coupled with the imposition of swift and certain sanctions for contraventions. Despite the wide range of sentencing options in the *Sentencing Act*, there is limited scope for the imposition of swift and certain sanctions for contraventions. The non-discretionary nature of the sanctions used in the HOPE program does not sit comfortably with the individualised approach to sentencing in Victoria; therefore despite the success of that program in other jurisdictions it may be difficult to replicate that success in the Victorian context. However, it may be possible to pilot elements of that program in a specialist court environment with legal actors that are experienced in applying less conventional approaches and techniques.

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<sup>218</sup> Ibid.



## V. CONCLUSION

The sentencing of a family violence offender is a crucial opportunity for bringing the actions of the offender under the spotlight and encouraging the offender to initiate behavioural change.<sup>219</sup> The question is whether existing sentencing law enables this to be done in a manner that may maximise the therapeutic effects of the law and minimise its anti-therapeutic effects. In particular, does the *Sentencing Act* constitute a TJ-friendly bottle from which TJ wine can be poured?

Based on the analysis in Part 3 of this research paper, the conclusion is that the *Sentencing Act* is such a bottle. The Act sets out broad sentencing purposes that the court may weigh and balance according to the nature of the offence, the circumstances of the offender and the impact of the offence on the victim and broader community. The court has wide (but not arbitrary) discretion to arrive at an individualised sentence that seeks to address the causative factors underlying offending. The *Sentencing Act* provides wide ranging and flexible sentencing options that may be adapted to a range of circumstances and there is an opportunity to include both punitive and rehabilitative elements in a sentence. The provisions for pre-sentence reports and victim impact statements are particularly TJ-friendly as they enable the history, character and rehabilitative prospects of the offender to be considered and the experiences of victims to be heard.

However, the *Sentencing Act* does not expressly recognise the application of TJ principles in sentencing and it gives only limited recognition to the role and use of judicial monitoring in sentencing. Arguably, there is scope for amending the Act to address these two issues in a manner that complements the other objectives and purposes of the Act.

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<sup>219</sup> Spencer, above n 6, 6.

Reflecting the highly political nature of sentencing law,<sup>220</sup> the *Sentencing Act* has undergone significant change in recent years: the community correction order was introduced in 2011 to replace community based orders, intensive corrections orders, combined custody and treatment orders and home detention orders;<sup>221</sup> in 2013–14 suspended sentences were abolished;<sup>222</sup> and in 2014 baseline sentences were introduced.<sup>223</sup> The effect of these legislative reforms on sentencing practices and outcomes are not yet known and warrant further research. Therefore, while there may be scope for amending the Act to expand the range of sentencing options, it is considered that future efforts to improve therapeutic outcomes would be best directed towards improving access to appropriate support services for family violence offenders and victims, expanding specialised court procedures and improving the practices of legal actors.

The Magistrates' Court has already progressed well down this path. As discussed in Part 2 of the paper, the Court has applied a range of practices and procedures that align with TJ thinking, such as specialist courts and services, fast-track listing practices, specialist magistrates and problem-solving processes.<sup>224</sup> Nevertheless, the Magistrates' Court still faces challenges. The Family Court Division operates in just two venues, only four venues provide specialist family violence services,

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<sup>220</sup> Geraldine Mackenzie, Nigel Stobbs and Jodie O'Leary, *Principles of Sentencing* (Federation Press, 2010) 41.

<sup>221</sup> *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic).

<sup>222</sup> *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

<sup>223</sup> The baseline sentencing scheme was introduced by the *Sentencing Amendment (Baseline Sentences) Act 2014* (Vic). A baseline sentence is a specified prison sentence that the Parliament of Victoria 'intends to be the median sentence for sentences imposed for that offence': *Sentencing Act* s 5A. Baseline sentences have been specified for seven indictable offences.

<sup>224</sup> Spencer, above n 6, 15.

government funding has failed to keep pace with the Court's increasing workload,<sup>225</sup> and only the Neighbourhood Justice Centre has a specific mandate to apply therapeutic principles. Significantly, for the application of TJ practices to family violence offenders, many family violence matters continue to be dealt with in a mainstream court.

As I observed during my placement at the Dandenong Magistrates' Court, this presents particular challenges to the successful implementation of TJ practices in family violence cases. For example:

- (a) The wide ranging and large volume of matters dealt within a mainstream court makes the task of tailoring judging techniques, services and processes to family violence offending more difficult. Data shows that magistrates in criminal lists must deal with matters very quickly, with around 25 per cent of matters being dealt with in less than one minute and 95 per cent of matters being dealt with in less than 15 minutes.<sup>226</sup> Such rapid processing times impose a practical constraint on the ability of magistrates to engage meaningfully with defendants.
- (b) Defendants frequently seek adjournments to delay the hearing of matters. This makes swift court intervention difficult and reduces the ability for the court to use the crisis moment of a court appearance as a mechanism for motivating an offender to make positive life change.

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<sup>225</sup> Magistrates' Court of Victoria, *The Magistrates' Court of Victoria Annual Report 2011/12* (Magistrates' Court of Victoria, 2012) 4–5.

<sup>226</sup> Mack above n 170, 210–11.

- (c) Lawyers are often engaged by defendants late in the process which reduces the scope for more holistic and engaged forms of lawyering in the lead up to court hearings.
- (d) A number of lawyers in family violence matters were observed making submissions that sought to minimise the offender's conduct. This highlights the tension between a lawyer's professional duty to achieve a favourable outcome for their client and at the same time use the opportunity of a court appearance to encourage their client to accept responsibility for their behaviour.
- (e) The difficulty for some defendants, particularly those from non-English speaking backgrounds, to fully understand and engage in court proceedings. This reduces the potential for a magistrate to engage with the defendant in a manner that may promote therapeutic outcomes.
- (f) The potential difficulties for TJ practices to be applied consistently if the sitting magistrate is not educated about the complexities of family violence or willing to engage in TJ practices.
- (g) The lack of support systems available to respondents to deal with issues that may arise from the grant of FVIO orders – such as homelessness, significant emotional stress or loss of contact with children. The lack of such services is likely to make compliance with court orders more difficult and reduce the person's capacity to seek treatment or engage in behavioural change.

Therapeutic jurisprudence presents an opportunity to apply the law in a therapeutic way. Although not perfect, existing sentencing law in Victoria provides a good legislative framework for implementing TJ practices. Therefore, the next step is to examine how legal processes and legal roles within that framework can be made more TJ-friendly. While the Magistrates' Court is well down that path, it will need to overcome a number of challenges if sentencing law is to reach its therapeutic potential.

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THE GLOBALIZATION OF THE PRIVATE PRISON INDUSTRY AND  
ITS EFFECTS ON THE MENTAL HEALTH CARE OF INMATES A  
COMPARATIVE ANALYSIS

Jontue J.G. Garofalo\*

I. INTRODUCTION

Several industries have fallen prey to globalization, and the private prison industry is not immune from this global business model. The treatment of mentally ill individuals in prisons is critical, especially because these individuals are vulnerable and often abused while incarcerated. Left untreated, their psychiatric conditions often grow worse, and they leave prison sicker than when they entered. As a society, we owe it to those who suffer from mental illness in the most dire of conditions (prison cells), to restructure the current system and find a solution to the revolving doors of the system. This paper examines the globalization of the private prison industry and its effects on mentally ill inmates. Specifically, this paper discusses what globalization means, the international privatization of the private prison industry, mental health policies, and the care of mentally inmates in these private prisons, as well as what can be done to improve the treatment of mentally ill inmates in private prisons throughout the world.

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## II. BACKGROUND

A. *Globalization -- "They paved paradise and put up a parking lot..."*<sup>1</sup>

Globalization is a fairly new theory to the world. However, throughout the past three decades it has become less of a phenomenon and more of an ingrained concept.<sup>2</sup> Globalization is the process of an international fusion that arises from the exchange of world views, products, ideas, and other aspects of culture.<sup>3</sup> The word connotes a social condition that consists of an interwoven network of global financial, political, cultural, and environmental interconnections and currents.<sup>4</sup> It is important to note that globalization brings society closer to an interdependence and integration; that is to say, that each nation will soon, and possibly already does, rely on one another to function.<sup>5</sup>

Globalization involves the implementation and multiplication of new and existing social networks and activities that cut across customary political, economic, cultural, and geographical boundaries.<sup>6</sup> Here, the privatization of the prison industry is a

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<sup>1</sup> JONI MITCHELL, *BIG YELLOW TAXI* (Reprise, 1970).

<sup>2</sup> MANFRED B. STEGER, *GLOBALIZATION: A VERY SHORT INTRODUCTION*, 8-15 (Oxford University Press, 2nd ed. 2009) ("[G]lobalization applies to a set of social processes that appear to transform the present social conditions of weakening nationality into one of globality...globalization is a movement towards greater interdependence and integration.").

<sup>3</sup> *Id.* at 14.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 14-15.

<sup>6</sup> *Id.* at 9 (explaining "[G]lobalization implies three assertions: we are slowly leaving behind the condition of modern nationality that gradually unfolded from the eighteenth century onwards, second, we are moving towards the new condition of postmodern globality; and third, we have not yet reached it. Further, the term globalization suggests a notion of development or unfolding along discernible patterns. Such unfolding may occur quickly or slowly, but it always corresponds to the idea of change, and therefore, denotes transformation.")

concept that has its roots in existing social networks and activities that cut across those boundaries. Vast, and virtually indistinguishable, shopping malls have appeared on all continents, offering consumers commodities from all regions of the world. Like these shopping malls, private prisons have emerged across the globe offering “consumers” (the criminal justice systems) the ability to devour “commodities” (inmates) from across the globe.

*B. What does it mean to be mentally ill?*

To understand mental illness, one must first understand mental health. Mental health is a state of well-being whereby individuals recognize their abilities, are able to cope with normal stresses of life, work productively and fruitfully, and make a contribution to their communities.<sup>7</sup> Mental illness refers to a wide range of mental health conditions and disorders that affect mood, thinking, and behavior.<sup>8</sup> Examples of mental illnesses include depression, anxiety disorders, schizophrenia, addictive behaviors, and psychopathological disorders.<sup>9</sup> A mental health concern becomes a mental illness when ongoing signs and symptoms cause frequent stress and affect a person’s ability to function.<sup>10</sup>

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<sup>7</sup> WORLD HEALTH ORGANIZATION, [http://www.who.int/features/factfiles/mental\\_health/en/](http://www.who.int/features/factfiles/mental_health/en/) (last visited Feb. 10, 2016).

<sup>8</sup> NATIONAL ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/Learn-More/Mental-Health-Conditions> (last visited Feb. 10, 2016).

<sup>9</sup> *Id.*

<sup>10</sup> Interview with Dr. John Garofalo, Neuropsychopharmacologist, Forensic Psychiatrist (Feb. 6, 2015).

C. *The Global Privatization of Prisons--“In this industry, the raw material is people...A rose by any other name [is] still a rose.”*<sup>11</sup>

The exchange and transport of criminal justice policies, procedures for coping with offenses and offenders, and models of penal institutions have rapidly spread across the globe, causing a wide application of the private prison industry.<sup>12</sup> Over the last three decades, for profit prison corporations such as Corrections Corporation of America, Serco, Sodexo, and G4S have greatly benefitted from the dramatic rise in incarceration and detention throughout the world.<sup>13</sup> However, as much as these companies have profited, their reputations have suffered. An Associated Press article reported that, in 2012, three horrible deaths occurred in private prisons located in Florida.<sup>14</sup> More so, a subsidiary of Corrections Corporation of America was sued 600 times in five years for the neglect and malpractice concerning mentally ill individuals.<sup>15</sup>

The for-profit prison model and motive is fundamentally at odds with the core purpose of corrections, including municipal corrections, which is to lessen offenses that land people in pen-

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<sup>11</sup> TERRY KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT (Jossey-Back, Inc., 1st ed. 1999), *alluding to* WILLIAM SHAKESPEARE, ROMEO AND JULIET (1591).

<sup>12</sup> Phillip J. Wood, *Globalization and Prison Privatization: Why Are Most of the World's For-Profit Adult Prisons to Be Found in the American South?* 1 INT'L POL. SOC. 222 (2007).

<sup>13</sup> Amy Cheung, THE SENTENCING PROJECT, *Prison Privatization and the Use of Incarceration* [http://www.sentencingproject.org/doc/publications/inc\\_prisonprivatization.pdf](http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf) (2004).

<sup>14</sup> Caroline Isaacs, *Treatment Industrial Complex: How For-Profit Prison Corporations are Undermining Efforts to Treat and Rehabilitate Prisoners for Corporate Gain*, 11 ASFC OF ARIZ. 14, 14 (2014).

<sup>15</sup> *Id.*



itentiaries, thus decreasing the number of imprisoned individuals.<sup>16</sup> Private prison organizations are fiscally dependent upon the growth of inmate populations, providing a perverse motivation not to rehabilitate and help people reenter society.<sup>17</sup> The motivating factor is an economic one; the objective is for private prison companies is to keep people in custody under some form of supervision as long as possible and at the highest per diem rate possible in order to maximize revenue.<sup>18</sup> (Money is the name of the game.) Also, cost-cutting measures that allow private prisons to be so incredibly profitable are responsible for undermining the security, accountability, and quality of life standards of the facilities.<sup>19</sup>

Numerous private-prison corporations are now advocating for the repurposing of prisons into alternative facilities, including specialized mental health centers.<sup>20</sup> This only serves to refer to prisons by another name. (“A rose by any other name would smell as sweet.”<sup>21</sup>) This trend to create specialized mental health centers comes on the heels of several private prison scandals concerning the treatment of mentally ill inmates. A system that is already ill-equipped and unable to provide proper care should not make an attempt to move into new frontiers. The promise of a more efficient penitentiary presents a glaring contrast to innumerable, well-publicized examples of private prisons devolving into institutions of violence and deterioration, run by fewer, inexperienced, undertrained, and underpaid staff.<sup>22</sup> Imprisonment not only eradicates a person’s freedom, it enters

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 15.

<sup>19</sup> EVE GOLDBERG & LINDA EVANS, *THE PRISON INDUSTRIAL COMPLEX AND THE GLOBAL ECONOMY*, 6 (PM Press, 1998).

<sup>20</sup> Isaacs, *supra* note 14, at 8.

<sup>21</sup> SHAKESPEARE, *supra* note 11.

<sup>22</sup> Michael King, *Private Prisons Seek Broader Markets*, *THE AUSTIN CHRONICLE*, Nov. 24, 2014, at 1.

the person into a world of depression that leaves an indelible impression on those who manage to survive.

Private prison companies with poor reputations concerning the care of mentally ill inmates can be found throughout the world. However, this paper will focus on the United States, Australia, Scotland, England, New Zealand, and South Africa.<sup>23</sup>

### III. THE UNITED STATES

#### A. *Private Prisons -- "The punishment is capital for those who lack in capital..."*<sup>24</sup>

In the nineteenth century, private prisons were the standard and even after states took control over correctional facilities, prison labor continued to be used for private purposes until its products were excluded from interstate commerce in the 1930s.<sup>25</sup> The twentieth century witnessed private enterprise takeover of the construction of juvenile correctional facilities and services; however, adult facilities stayed in the hands of states until the 1970s when Immigration and Naturalization Service began to hire companies to deal with illegal immigrants awaiting deportation.<sup>26</sup> For the purposes of this paper, the discussion of private prisons begins in the early 1980s.

Corrections Corporation of America ("CCA") was founded in Nashville, Tennessee by an innovative former chairman of the Republican Party, Thomas Beasley.<sup>27</sup> The creation of CCA coincided with a court order to reduce the Tennessee prison population. However, reducing the number of people incarcerated would cost the state almost \$400 million.<sup>28</sup> This is when CCA

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<sup>23</sup> THE SENTENCING PROJECT, *supra* note 13, at 4.

<sup>24</sup> MICHAEL FRANTI & SPEARHEAD, CRIME TO BE BROKE IN AMERICA (Capital Records, 1994).

<sup>25</sup> Wood, *supra* note 12, at 223.

<sup>26</sup> See *supra* text accompanying note 25.

<sup>27</sup> Wood, *supra* note 12, at 224.

<sup>28</sup> Wood, *supra* note 12, at 224.

made its move and won its first contract to operate a private adult prison.<sup>29</sup> CCA cornered the market on private prisons because it charged the state only twenty-one dollars a day for the care of an inmate.<sup>30</sup> Further, CCA touted this prison as a “work farm” that would rehabilitate offenders.<sup>31</sup> However, inside corruption and lack of rehabilitation soon came to light.

In 1986, the contract came up for renewal and county commissioners voted to stick with Corrections Corporation because many enjoyed close business ties with the company.<sup>32</sup> One county official had a pest-control contract with the firm and later went to work for CCA as a lobbyist.<sup>33</sup> Another did landscaping at the prison, and a third ran the moving company that settled the warden into his new home.<sup>34</sup> The following year, the U.S. Department of Justice published a report that warned against such conflicts of interest, although such complications were reported, officials often downplayed them.<sup>35</sup> As well as conflicts of interest, the Department of Justice noted significant staff turnover problems but made a note that the turnover rate “did not apparently affect the quality of service.” Therefore, federal officials awarded CCA a stamp of approval to continue its “good work.”<sup>36</sup>

The same year, a young woman being held at one of the private prisons operated by CCA died from an undiagnosed complication during her pregnancy.<sup>37</sup> A shift supervisor who later brought suit against the company testified that the prisoner

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<sup>29</sup> Wood, *supra* note 12, at 224.

<sup>30</sup> Wood, *supra* note 12, at 224.

<sup>31</sup> Wood, *supra* note 12, at 224.

<sup>32</sup> Eric Bates, *Private Prisons*, THE INDEPENDENT, (Jan. 5, 1998), <http://prop1.org/legal/prisons/980105.htm>.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 13.

<sup>37</sup> *Id.* at 14.

writhed in pain for at least twelve hours before prison officials permitted her to be taken to a hospital.<sup>38</sup>

Later that same year, inspectors from the British Prison Officers Association visited the prison and stated they were shocked by what they witnessed.<sup>39</sup> The inspectors reported they observed evidence of cruel and inhumane treatment, and the warden had in fact informed the same inspectors that noisy and belligerent prisoners were often gagged with tape. However, the warden put an end to that practice after an inmate almost choked to death on tape.<sup>40</sup> Further, the inspectors also observed inmates confined to warehouse-like dormitories for twenty-three hours per day.<sup>41</sup> The inspectors concluded that the private facility, demonstrated the worst conditions they had ever witnessed in terms of inmate care and supervision.<sup>42</sup>

Controversies and problems within the prison walls are not merely stories from the past. Throughout its history, CCA has experienced its fair share of problems. In 2006, government investigators found the medical care provided to immigrant detainees placed the welfare and well-being of inmates in grave danger of injury or death.<sup>43</sup> In fact, less than a year later, an inmate was found dead in the very same facility.<sup>44</sup> These deaths resulted in the ACLU filing a lawsuit, which resulted in the Obama administration's disclosure that one in ten deaths among inmates in immigration detention facilities had been omitted from a list of deaths presented to the United States Congress a year earlier.<sup>45</sup>

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<sup>38</sup> *Id.* at 15.

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Nina Bernstein, *Immigrant's Death Shows Hard Path to Prison Reform*, N.Y. TIMES, (Aug. 21, 2009) <http://www.nytimes.com/2009/08/21/nyregion/21detain.html>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Financial motivations and incentives are at the core of the privatization model.<sup>46</sup> These enticements call for companies to run these prisons in a conveyor-belt-like fashion, and in order to run smoothly, they must cut corners.<sup>47</sup> The fat is trimmed at the expense of the prison employees, the public, and, of course, the prisoners. Notwithstanding actual costs, private prison corporations receive a guaranteed payment for every prisoner.<sup>48</sup> Every penny not spent on food, medical care, or training for guards is a penny earned.

According to statistics, prison labor such as corrections officers, accounts for roughly seventy percent of all prison expenses.<sup>49</sup> Similar to most businesses seeking to cut corners, the prime way to cut expenses is to cut personnel. According to the Chief Financial Officer of CCA, "the bulk of the cost savings enjoyed by CCA is the result of lower labor costs."<sup>50</sup> The lower labor cost means that often times, private prisons are understaffed and overworked.<sup>51</sup> Additionally, CCA prefers to design and build its own prisons.<sup>52</sup> Implemented in the design of these prisons is an increase of video cameras and clustered cellblocks that are cheaper to monitor; therefore, CCA does not need to employ a large amount of personnel.<sup>53</sup> The idea of having the

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<sup>46</sup> Michael Welch & Fatiniyah Turner, *Private Corrections, Financial Infrastructure, and Transportation: The New Geo-Economy of Shipping Prisoners*, 34 SOC. JUST. 57 (2007-08) (explaining that economically strapped towns tempt jails and prison constructing by offering land, cash incentives, and cut rate deals on utilities; in return for such accommodations, towns people receive jobs and the financial benefits spread to other local businesses as well).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Isaacs, *supra* note 14, at 8.

<sup>50</sup> Bates, *supra* note 32, at 16.

<sup>51</sup> Bates, *supra* note 32, at 16.

<sup>52</sup> Bates, *supra* note 32, at 16.

<sup>53</sup> Bates, *supra* note 33, at 16 (Russell Boraas, the private prison administrator for Virginia stating, "You can afford to pay damn near anything for construction if it will get you an efficient prison.").

minimum number of officers watching the maximum number of inmates originated with Jeremy Bentham's Panopticon in the late eighteenth century, and it appears as though prisons have not progressed very far from this original model with the exception of the aid of technology.<sup>54</sup>

In 2013, CCA confirmed that an internal review revealed the Idaho state prison branch fabricated records comprising almost 5000 employee hours over a period of seven months.<sup>55</sup> A subsequent audit revealed the actual overbilling was for over 26,000 hours.<sup>56</sup> Due to such an incredible miscarriage of trust, then governor, Butch Otter ordered Idaho State Police to investigate as to whether criminal charges should be brought.<sup>57</sup> However, it came to light that Otter had been receiving almost \$20,000 in campaign contributions from employees of the company since 2003.<sup>58</sup> Therefore, the FBI had stepped in to take over the investigation, one that extended to CCA operations in other states.<sup>59</sup> In the fall of 2012, auditors of the Lake Erie Correctional Institution in Ohio, acquired by the CCA in January of the same year, deducted \$500,000 for contract violations and inadequate staffing.<sup>60</sup>

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<sup>54</sup> JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Miran Bozovic, Verso, 1995).

<sup>55</sup> Hannah Furfaro, *Corrections Corporation of America Admits Falsifying Staffing Records*, HUFFINGTON POST, Apr. 12, 2013.

<sup>56</sup> Rebecca Boone, *FBI Investigating CCA, Nashville Based Prison Operator*, THE TENNESSEAN, (Mar. 7, 2014) <http://www.tennessean.com/story/news/2014/03/07/fbi-investigating-nashville-based-private-prison-operator-cca/6169779/>.

<sup>57</sup> Rebecca Boone, *Idaho Governor Orders Police to Investigate CCA Prison*, YAHOO FINANCE, (Feb. 18, 2014) <https://uk.finance.yahoo.com/news/idaho-gov-orders-police-investigate-001909049.html>.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Chris Kirkham, *Lake Erie Prison Plagued by Violence and Drugs After Corporate Takeover*, HUFFINGTON POST, Mar. 22, 2013.

B. “Crime does pay...”<sup>61</sup>

Although the company has been under fire for its improper accounting practices, it legally generates so much revenue that it is a publicly traded company.<sup>62</sup> CCA's share price went from a dollar in 2000 to \$39.34 this year.<sup>63</sup> It is safe to say that the private prison industry has become a very lucrative and profitable business. According to journalist Matt Taibbi, Wall Street banks took notice of this inflow of money and are now some of the prison industry's biggest investors.<sup>64</sup> A financial institution, Wells Fargo, currently has around six million dollars invested in CCA.<sup>65</sup> Other major investors include Bank of America, Fidelity Investments, General Electric, and The Vanguard Group.<sup>66</sup> Several of these financial institutions compete to underwrite corrections construction with tax exempt bonds that do not require voter approval.<sup>67</sup> Titans of the defense industry are also getting in on the game as well as manufacturers of name-brand products.<sup>68</sup> For example, every year, Dial soap sells over \$100,000 of its products to New York City jails.<sup>69</sup>

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<sup>61</sup> THE OFFSPRING, HAVE YOU EVER? (Columbia Records, 1998).

<sup>62</sup> CORRECTIONS CORPORATION OF AMERICA HISTORY, <https://www.cca.com/our-history> (last visited Feb. 16, 2015).

<sup>63</sup> *Id.*

<sup>64</sup> Welch & Turner, *supra* note 46, at 57.

<sup>65</sup> Welch & Turner, *supra* note 46, at 57.

<sup>66</sup> Donald Cohen, *Captive Customers, Outsourcing Prison Services is Ruining Lives and Bilking Taxpayers*, HUFFINGTON POST, Oct. 24, 2014, [http://www.huffingtonpost.com/donald-cohen/captive-customers-outsour\\_b\\_6015312.html](http://www.huffingtonpost.com/donald-cohen/captive-customers-outsour_b_6015312.html), (“Almost every service delivered inside the prison is being outsourced to for-profit corporations. Outsourced inmate health care, food and commissary services, telephone and financial services like money transfers between families and inmates are all adding to the poor conditions in prisons and burdening inmates and their families with extra costs.”).

<sup>67</sup> John L. Campbell, *Neoliberalism's Penal and Debtor States*, 14 THEORETICAL CRIMINOLOGY 59, 59-73 (2010).

<sup>68</sup> Welch & Turner, *supra* note 46, at 57.

<sup>69</sup> Welch & Turner, *supra* note 46, at 57.

While corporate officers and investors line their pockets, the mentally ill who are housed in these private institutions are the ones left to suffer. Cutting corners to save money started to affect the mentally ill long before the privatization of the prison industry. However, this industry only serves to add to the current problem.

*C. Treatment of Mentally Ill--“In prison there is a very dangerous mentality that you have to treat everyone the same; you can't treat everyone the same no matter much they ingrain it in you.”*<sup>70</sup>

The United States can most recently trace its mental health policies back to 1946 wherein President Harry Truman signed the National Mental Health Act, which called for the establishment of a National Institute of Mental Health, and the first meeting of the National Advisory Mental Health Council was held later that year.<sup>71</sup> The Mental Health Study Act of 1955 called for "an objective, thorough, nationwide analysis and reevaluation of the human and economic problems of mental health."<sup>72</sup>

Beginning in 1955 with the extensive introduction of the first, effective antipsychotic medication, Thorazine, the stage

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<sup>70</sup> LORNA A. RHODES, *TOTAL CONFINEMENT* (University of California Press 2004).

<sup>71</sup> NATIONAL INSTITUTE OF MENTAL HEALTH (NIMH), <http://www.nih.gov/about/almanac/organization/NIMH.htm> (last visited March 5, 2014).

<sup>72</sup> *Id.*



was set for moving patients out of hospital settings and institutions.<sup>73</sup> After the enactment of Medicaid and Medicare, deinstitutionalization began to grow by leaps and bounds.<sup>74</sup> By discharging patients, the states managed to shift their fiscal responsibilities to the federal government.<sup>75</sup>

Prior to the 1960s, when federal funds for psychiatric care became available, the public psychiatric care system was almost entirely run by the states, often in partnership with local counties or cities.<sup>76</sup> However, since then, the public psychiatric care system has become a muddle of rigid programs funded by countless federal, state, and local sources.<sup>77</sup> The primary question that drives the system is not "what does the patient need?" but rather "what will federal programs pay for?"<sup>78</sup>

In 1963 President Kennedy was the first president to address Congress on the topic of mental health.<sup>79</sup> Congress listened to what President Kennedy had to say and quickly passed the Mental Retardation Facilities and Community Mental Health Centers Construction Act, both of which created a new era in federal support for mental health services.<sup>80</sup> Presidents Johnson and Carter furthered President Kennedy's message and took on the cause to support research and funding for mentally ill; however,

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<sup>73</sup> DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* (Little, Brown and Company, 2002) ("[F]or psychiatrists working on the front line it was a miracle drug. Its effectiveness was reflected in the transformation of disturbed wards and psychiatric service. Its commercial success stimulated the development of other psychotropic drugs.").

<sup>74</sup> TREATMENT ADVOCACY CENTER: *TREATMENT BEHIND BARS ANNUAL REPORT* (2014).

<sup>75</sup> *Id.*

<sup>76</sup> ROTHMAN, *supra* note 73, at 247.

<sup>77</sup> ROTHMAN, *supra* note 73, at 247.

<sup>78</sup> ROTHMAN, *supra* note 73, at 247.

<sup>79</sup> ROTHMAN, *supra* note 73, at 255.

<sup>80</sup> ROTHMAN, *supra* note 73, at 255.

interest in funding mental health eventually waned and the country witnessed the phenomenon called deinstitutionalization.<sup>81</sup>

The United States was once home to a large number of institutions whose sole purpose was to serve the mentally ill.<sup>82</sup> Deinstitutionalization, the name given to the policy of moving people with mental illnesses out of large state institutions and then shuttering part or all of those institutions, has had a great contributory effect on increased homelessness, incarceration, and acts of violence.<sup>83</sup>

Since 1960, more than ninety percent of state psychiatric hospital beds have been eliminated, many of which were located in our own backyards.<sup>84</sup> In 1955, there were 559,000 individuals with severe mental illnesses in state psychiatric hospital wards.<sup>85</sup> Today, there are less than 70,000, and the rate of psychiatric hospital closures has continued to grow.<sup>86</sup> In the 1990s, forty-four state psychiatric hospitals locked their doors, more closings than in the previous two decades combined.<sup>87</sup> Nearly half of all state psychiatric hospital beds closed between 1990 and 2000. States cut five billion dollars in mental health services funding in a three-year period (2009 to 2012).<sup>88</sup> In the same timeframe,

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<sup>81</sup> ROTHMAN, *supra* note 73, at 257.

<sup>82</sup> ROTHMAN, *supra* note 73, at 258.

<sup>83</sup> ROTHMAN, *supra* note 73, at 258; E. Fuller Torrey, *Deinstitutionalization: A Psychiatric Titanic*, [https://facultystaff.richmond.edu/~bmayer/pdf/prisons\\_newMentalAsylums.pdf](https://facultystaff.richmond.edu/~bmayer/pdf/prisons_newMentalAsylums.pdf) (1997) (“[D]einstitutionalization is the name given to the policy of moving severely mentally ill people out of large state institutions and then closing part or all of those institutions; it has been a major contributing factor to the mental illness crisis.”).

<sup>84</sup> Torrey, *supra* note 83.

<sup>85</sup> Torrey, *supra* note 83.

<sup>86</sup> Torrey, *supra* note 83.

<sup>87</sup> WORLD HEALTH ORGANIZATION, *MENTAL HEALTH ATLAS 2011*, [http://apps.who.int/iris/bitstream/10665/44697/1/9799241564359\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/44697/1/9799241564359_eng.pdf) (2011).

<sup>88</sup> *Homelessness, Incarceration, Episodes of Violence: Way of Life for almost Half of Americans with Untreated Severe Mental Illness*, MENTAL

the country eliminated at least 4,500 public psychiatric hospital beds which are almost ten percent of the total supply.<sup>89</sup>

The incredible failure to provide suitable treatment and on-going follow-up care for patients discharged from hospitals has sent many individuals with the severest forms of mental illnesses spiraling through an endless revolving door of hospital admissions and readmission to jails, and public shelters.<sup>90</sup> At any given time there are more people with schizophrenia who are homeless or confined in jails and prisons than there are in hospitals.<sup>91</sup>

According to data collected by the U.S. Department of Justice, in mid-2005 there were 2,186,230 prisoners in local jails and state and federal prisons in the United States.<sup>92</sup> Some studies suggest that approximately ten percent of prisoners have severe psychiatric disorders.<sup>93</sup> Accordingly, approximately 218,000 people with severe psychiatric disorders are incarcerated in the nation's jails and prisons at any given time.<sup>94</sup> This number is equivalent to the population of such cities as: Akron, Ohio; Madison, Wisconsin; Montgomery, Alabama; Richmond, Virginia; or Tacoma, Washington.<sup>95</sup>

The costs of such incarceration are enormous.<sup>96</sup> According to the Department of Justice, it costs American taxpayers a staggering fifteen billion dollars per year to house individuals with

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ILLNESS POLICY ORG., <http://mentalillnesspolicy.org/consequences/consequences.html> (last visit Mar. 4, 2015).

<sup>89</sup> *Id.*

<sup>90</sup> Liz Szabo, *The Cost of Not Caring: Nowhere to Go: The Financial and Human Toll for Neglecting the Mentally Ill*, USATODAY.COM, May 12, 2014, <http://www.usatoday.com/story/news/nation/2014/05/12/mental-health-system-crisis/7746535>.

<sup>91</sup> *Id.*

<sup>92</sup> MENTAL ILLNESS POLICY ORGANIZATION, <http://mentalillnesspolicy.org/consequences/consequences.html> (last visit Mar. 4, 2015).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

psychiatric disorders in jails and prisons (\$50,000 per person annually; 300,000 incarcerated individuals with mental illness).<sup>97</sup>

A recent study of American jails reported that thirty-five percent of jails admitted holding mentally ill people with no charges against them.<sup>98</sup> These individuals were being held awaiting psychiatric evaluation, the availability of a hospital bed, or transportation to a psychiatric hospital.<sup>99</sup> Imprisonments such as these are done under state laws permitting emergency detentions of individuals suspected of being mentally ill and are especially common in rural states such as Kentucky, Mississippi, Alaska, Montana, Wyoming, and New Mexico.<sup>100</sup>

This same study also found that the vast majority of United States jails do not offer suitable psychiatric services to inmates with the most severe of mental illnesses.<sup>101</sup> Further, more than one in five jails has no access to mental health services of any kind.<sup>102</sup> Corrections officers are left to cope with mentally ill inmates. However, in eighty-four percent of jails, correction officers receive either no training or less than three hours training in dealing with the special problems of people with severe mental illness.<sup>103</sup>

The current mental health system in the United States needs major improvement. Like many other countries, individuals with mental illnesses in America are stigmatized by society. More traumatizing is the fact that the mentally ill in the United States are not simply ostracized, but they are oft locked into cells and left to rot. A reopening of institutions geared specifically

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<sup>97</sup> U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH TREATMENT IN STATE PRISONS (2011).

<sup>98</sup> MENTAL ILLNESS POLICY ORGANIZATION, *supra* note 92.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Kenneth L. Appelbaum, *The Role of Correctional Officers in Multi-disciplinary Mental Health Care in Prisons*, 52 PSYCHIATRIC SERV. 10, 1343-1347 (2001).

towards mental illnesses would serve the United States well, as would public education about the differing types of mental illnesses. Perhaps, it would further serve the United States well to look upon the moral and ethical convictions that are the foundation of the country when creating laws and policies that govern mental health laws.

#### IV. AUSTRALIA

##### A. *Private Prisons -- "New boss; same as the old boss..."*<sup>104</sup>

Corrections Corporation of America is responsible for operating the first private prison in Australia.<sup>105</sup> CCA opened this first facility in Queensland, and it began operating in 1990.<sup>106</sup> Soon several other Australian states wanted to get a piece of the pie.<sup>107</sup>

Within the next decade, five of Australia's eight states had some level of privatization.<sup>108</sup> Like the facilities operated by CCA in the United States, the private prisons in Australia have experienced their fair share of scandals.<sup>109</sup> In 1996 some of the prisoners breached a security perimeter in a protest over a rumor

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<sup>104</sup> THE WHO, WON'T GET FOOLED AGAIN (Polydor/MCA 1971).

<sup>105</sup> Cody Mason, *The Sentencing Project: International Growth Trends in Prison Privatization*, [http://sentencingproject.org/doc/publications/inc\\_International%20Growth%20Trends%20in%20Prison%20Privatization.pdf](http://sentencingproject.org/doc/publications/inc_International%20Growth%20Trends%20in%20Prison%20Privatization.pdf) (Aug, 2013).

<sup>106</sup> P. Mattera et al., *Corrections Corporation of America: A Critical Look at its First Twenty Years*, Charlotte, NC: Grassroots Leadership, GRASSROOTLEADERSHIP.ORG, <http://grassrootsleadership.org/sites/default/files/uploads/CCAAnniversaryReport.pdf> (last visited Mar. 3, 2015).

<sup>107</sup> *Id.* (Important to note: for a month after the contract was awarded, CC Australia staff did not have firearms accreditation and the Government had to temporarily subcontract the work back to the state correctional services division.)

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

that guards were beating some of the prisoners.<sup>110</sup> This protest soon turned into a riot, and according to court testimony, most of the guards panicked and sealed themselves in a room, leaving the prisoners temporarily in control.<sup>111</sup>

The prison, originally built to house 135 prisoners currently houses 161, resulting in double and sometimes triple bunking inside cells.<sup>112</sup> More so, in only four years, the prison has been “locked down” seventy-five times. Reports also revealed a high level of self-harm and drug overdoses.<sup>113</sup> According to a state auditor-general's report, the Women's Correction Centre exceeded the acceptable limit for self-mutilations and attempted suicides by ninety-one percent and assaults on other prisoners by twenty percent.<sup>114</sup> The sheer fact that the prison has an “acceptable” level of such things is horrifying!

By 1997, the prison's first general manager resigned and there were calls in parliament for the government to take over the management.<sup>115</sup> The following two years were characterized by more incidents, including the death of twenty-three-year-old prisoner.<sup>116</sup> The female prisoner died as a result of "a simulated suicide that went wrong."<sup>117</sup> Shortly after being placed in a solitary cell for biting and spitting at an officer, she was found hanging by a plastic shower curtain.<sup>118</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Selma Milovanovic, *Prison Cleared Over Inmates Death*, THE AGE, (Sept. 10, 2002), <http://www.theage.com.au/articles/2002/09/09/1031115997628.html>.

<sup>113</sup> *Id.* (Averaging six incidents per week. In 1998-99 self-mutilation and prisoner-to-prisoner assaults occurred at rates of 26.5 and 35.3 percent of all inmates. This was four times higher than the state prison average of 6.2 and 8.9 percent).

<sup>114</sup> *Id.*

<sup>115</sup> Mattera et al., *supra* note 106.

<sup>116</sup> Milovanovic, *supra* note 112.

<sup>117</sup> Milovanovic, *supra* note 112.

<sup>118</sup> Milovanovic, *supra* note 112.

After four years of persistent problems, Corrections Corporation of Australia's contract for the Metropolitan Women's Correctional Centre in Victoria was terminated.<sup>119</sup> Management and ownership of the prison were taken over by the government.<sup>120</sup>

Further, analogous to the United States, the chief goal of CCA's operation of private prisons in Australia is to cut costs.<sup>121</sup> An Australian state treasurer set targets derived from the costs incurred at the three publicly run prisons and these original benchmark costs that the private sector had to improve upon have never been published, because they were deemed commercially confidential.<sup>122</sup> Another report concluded the financial performance was that "cost data provided by the department of justice does not provide a clear indication that private prisons are cheaper to run than public prisons."<sup>123</sup>

The United States branch of CCA is not the only branch that has a problem concerning financial matter, but Australia does as well. These attempts to cut costs only serve to create a poor prison environment for all inmates, especially those who suffer from mental illnesses.

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<sup>119</sup> *Officials Say Frustration with CCA Led to Contract Termination*, ASSOCIATED PRESS, Sept. 17, 1998.

<sup>120</sup> Mattera et al., *supra* note 106.

<sup>121</sup> VICTORIA. DEPT. OF PLANNING AND DEV., AN INTRO. TO THE PRISON DEV. PLAN, PROPOSED METRO. WOMEN'S PRISON, NEW PRISONS PROJECT (1995).

<sup>122</sup> *Id.*

<sup>123</sup> CORRECTIONS CORP. OF AMERICA HISTORY, <https://www.cca.com/our-history> (last visited Feb. 16, 2015) (The data in this paragraph come from a presentation by CCA Chief Financial Officer Irving E. Lingo Jr. at the Deutsche Bank Global High Yield Conference, October 8, 2003; available online at the Investor Relations section of the CCA website).

B. *Treatment of Mentally Ill -- "Hear the voices could it be they're calling out to me?"*<sup>124</sup>

The government (including state and territory government) shares responsibility for mental health policy and the facilitation of support services for Australians living with a mental illness.<sup>125</sup> The National Mental Health Strategy includes four five-year National Mental Health Plans.<sup>126</sup> Under this plan, state and territory governments have funded and provided specialist care for Australians affected by mental illness.<sup>127</sup> The program also funds social support and income support programs.<sup>128</sup>

Like most prison populations, Australian prisons are largely made up of some of the most underprivileged and stigmatized people in the community.<sup>129</sup> People from these backgrounds, with little education and a history of unemployment, as well as indigenous populations are over-represented among prisoner populations in Australia.<sup>130</sup> A recent study of Australian prisons found the prevalence of psychiatric disorders substantially higher than that in the general community.<sup>131</sup> The same study found that almost half of incoming inmates and a little over one third of sentenced inmates suffer from a mental illness.<sup>132</sup>

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<sup>124</sup> SUICIDAL TENDENCIES, HEARING VOICES (Epic 1998).

<sup>125</sup> Luke Birmingham, *Between Prison and the Community: The Revolving Door Psychiatric Patient*, 174 BRIT. J. OF PSYCHIATRY 378 (May 1999) (explaining that over the last three decades the Australian governments have worked together, via the National Mental Health Strategy, to develop mental health programs and services to better address the mental health needs of Australians).

<sup>126</sup> Tony Butler & Stephen Allnut, *Correction Health Services, Mental Illnesses Among Prisoners in New South Wales*, (Aug. 2003), <http://www.justicehealth.nsw.gov.au/about-us/publications/mental-illness-among-nsw-prisoners-2003.pdf>.

<sup>127</sup> *Id.* at 49.

<sup>128</sup> *Id.* at 50.

<sup>129</sup> *Id.* at 6.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 7.

<sup>132</sup> *Id.* at 6.



The most prevalent mental disorders found among the inmates studied were psychosis and affective disorders.<sup>133</sup> According to the DSM-V, psychotic disorders are severe mental disorders that cause abnormal thinking and perceptions.<sup>134</sup> These disorders can be tremendously disabling and are characterized by symptoms such as hallucinations, delusions, and an inability to make realistic and rational decisions. Individuals with psychosis are vulnerable to exploitation in environments that are not therapeutic, such as prisons.<sup>135</sup>

The most commonly known psychotic disorder is schizophrenia which is characterized by delusions, hallucinations, disorganized speech and behavior, and other symptoms that cause social or occupational dysfunction.<sup>136</sup> Affective disorders also referred to as a mood disorders, include depression, bipolar disorder, and anxiety disorder. Individual symptoms vary, but they typically affect mood and can range from mild to severe.<sup>137</sup> Depression is characterized by feelings of extreme sadness and hopelessness.<sup>138</sup> Bipolar disorder refers to periods of depression, and periods of mania.<sup>139</sup> There are several different types

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<sup>133</sup> *Id.* at 3.

<sup>134</sup> AM. PSYCH. ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *Highlights of Changes From DSM-IV-TR to DSM-5* (2013), <http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf> (In DSM-V, two of these five symptoms are required AND at least one symptom must be one of the first three (delusions, hallucinations, disorganized speech). Schizoaffective: Schizoaffective disorder forms a link between psychosis and mood).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (“[D]epressed mood or a loss of interest or pleasure in daily activities for more than two weeks. Mood represents a change from the person's baseline).

<sup>139</sup> *Id.* (The DSM first explains what is required for the different behavioral mood episodes: Major Depressive Episode, Manic Episode, Mixed Episode and Hypomanic Episode. It then differentiates the diagnosis according to the presence, sequence and history of those episodes).

of anxiety disorders.<sup>140</sup> All are characterized by feelings of nervousness, anxiety, and fear.<sup>141</sup>

There are many effective treatments for mental illness, but often the limited available resources are wasted on ineffective, expensive interventions and services that only reach a small proportion of those in need.<sup>142</sup> For example, the construction of psychiatric prison hospitals is not particularly cost-effective, because they are very expensive to run, have a limited capacity, are associated with low release rates, and they often leave the individual with a severe and persistent stigma.<sup>143</sup>

Access to assessment, treatment, and the referral of people with mental disorders should be a vital part of general health services available to all prisoners. At the very minimum, the mental health services provided to prisoners should be the equivalent to that offered to those in the community. In order to achieve adequate mental health care for inmates, prisons will need to institute mental health training programs for prison health workers, arrange for consistent visits from community mental health professionals, or create a program that will enable prisoners access to mental health services located outside of the prison walls.

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<sup>140</sup> *Id.* (“[A]n anxiety disorder is a serious mental illness. For people with anxiety disorders, worry and fear are constant and overwhelming, and can be crippling/Phobias).

<sup>141</sup> *Id.*

<sup>142</sup> James Ogloff, *Identifying and Accommodating the Needs of Mentally Ill People in Goals and Prisons*, 9 PSYCHIATRY, PSYCHOL, AND L. 2, Apr. 1, 2002.

<sup>143</sup> *Id.* at 13.

## V. SCOTLAND

A. *Private Prisons*

Her Majesty's Prison ("HMP"), which opened in 1999, was Scotland's first private prison.<sup>144</sup> Serco, a British private-prison company operates the prison and is currently under a twenty-five-year contract with the Scottish Prison Service.<sup>145</sup> In 2008, Sodexo, another private prison company opened, Addiewell.<sup>146</sup> Both of these prisons have been the subject of internal problems. In 2009, HMP witnessed an inmate uprising that sent a prison officer to the hospital.<sup>147</sup> In the same year, a cell was damaged by fire during a three-hour uprising.<sup>148</sup> Further, two prison officers were injured in the same prison during a January 2010 riot.<sup>149</sup>

In March 2011, the Chief Inspector of Prisons expressed concerns about the level of assaults on staff at the prison in Addiewell.<sup>150</sup> His report further indicated that Addiewell was

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<sup>144</sup> Cody Mason, *supra* note 105, at 5.

<sup>145</sup> Cody Mason, *supra* note 105, at 5.

<sup>146</sup> SODEXO, <http://uk.sodexo.com/uk/en/solutions/on-site/justice/addiewell.asp> (last visited Feb. 15, 2015).

<sup>147</sup> Janice Burns, *Angry Prisoners at Scots Jail Riot After Crackdown on Drugs*, DAILY RECORD, (Jan. 3, 2009), <http://www.dailyrecord.co.uk/news/scottish-news/angry-prisoners-at-scots-jail-riot-1112745>.

<sup>148</sup> *Addiewell Prison Erupts in Riot as 70 Inmates Set Fires and Throw Missiles*, EDINBURGH NEWS, (Jan. 3, 2009), <http://www.edinburgh-news.scotsman.com/news/addiewell-prison-erupts-in-riot-as-70-set-fires-and-throw-missiles-1-2034624>.

<sup>149</sup> *Addiewell Rioters Sentenced*, *British Broadcasting Company*, BBC NEWS, (Sept. 2, 2010), <http://www.bbc.com/news/uk-scotland-edinburgh-east-fife-11168722>.

<sup>150</sup> Jack Mathieson, *Scotland's Flagship Private Prison the Most Violent in the Country*, DAILY RECORD (Mar. 10, 2011) <http://www.dailyrecord.co.uk/news/scottish-news/scotlands-flagship-private-prison-the-most-1097103#JePYAeg8ruaIbzeI.97>.

more violent than any other jail of its size in the country.<sup>151</sup> Prison staff suffered forty-nine "minor" attacks--almost one per week--and records showed 278 "minor" prisoner-on-prisoner attacks in the same time period. Just three months later, an officer was hit with a pool cue as violence erupted again.<sup>152</sup>

Critics of these institutions assert that private prisons cut corners on staffing to maximize profits. Therefore, minimizing safety and the numbers appears to agree with these critics.<sup>153</sup> However, for now, the government has vowed to keep a close watch on Addiwell.<sup>154</sup>

*B. Treatment of Mentally Ill -- "Voices telling me what to do..."*<sup>155</sup>

In 2012, the Scottish Government's mental health division presented the Mental Health Strategy for Scotland.<sup>156</sup> The government's commitment to mental health improvement included services and recovery to ensure delivery of effective quality care and treatment for the mentally ill, their care takers, and their families.<sup>157</sup> The public health policy in Scotland has increasingly identified mental health as an integral part of the wider agenda for health.<sup>158</sup>

Scotland now imprisons more of its people than many other places in Europe.<sup>159</sup> The prison population has greatly increased over the past decade, and it is projected to reach 9,500 by

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> SILVERCHAIR, *SUICIDAL DREAM* (Murmur/Epic 1995).

<sup>156</sup> MENTAL HEALTH STRATEGY FOR SCOTLAND (August 13, 2012) available at <http://www.gov.scot/Publications/2012/08/9714>

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Cody Mason, *supra* note 105, at 6.

2020.<sup>160</sup> Individuals with mental illnesses are disproportionately represented within the Scottish prison system, and many gaps exist when it comes to mental health.<sup>161</sup> There is a lack of skilled staff and resources to provide aid and care for those who suffer from mental disorders.<sup>162</sup>

In 2008, an inspection of mental health issues in Scotland's prisons was conducted. This study found that a large proportion of prisoners have some form of mental health problem.<sup>163</sup> At least 315 prisoners--4.5% of the prison population and four times the level among the general public--were identified as having severe mental health problems.<sup>164</sup> Like Australia, the most common problems identified were schizophrenia and bipolar affective disorder.<sup>165</sup>

## VI. ENGLAND

### A. *Private Prisons*

Up until the nineteenth century, most of the prisons in London were privately operated. Independent goalers would purchase the right to run a prison at their whim.<sup>166</sup> The entire

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<sup>160</sup> Cody Mason, *supra* note 105, at 6.

<sup>161</sup> Cody Mason, *supra* note 105, at 6.

<sup>162</sup> Cody Mason, *supra* note 105, at 6.

<sup>163</sup> Carla Rodgers & John A. Baird, *Mentally Disordered Offenders in Prison—Old Problems that Still Require Attention*, 41 J. AM. ACAD. PSYCHIATRY L. 514 (2009).

<sup>164</sup> Bada M. Suresh, *Minds Imprisoned: Mental Health Care in Prison*, 10 NAT'L INST. OF MENTAL HEALTH NEURO HEALTH SCI. 50 (2011).

<sup>165</sup> *Id.* at 53.

<sup>166</sup> Llewellyn Hinks-Jones, *Privatized Prisons: A Human Marketplace*, L.A. REV OF BOOKS (Jan. 10, 2013), <http://lareviewofbooks.org/article/privatized-prisons-a-human-marketplace> (Goaler: a person in charge of a jail or of the prisoners in it).

system was profit driven and corrupt.<sup>167</sup> There are several parallels with the current private prison system.

In the modern era, the United Kingdom was the first country in all of Europe to use prisons run by the private sector.<sup>168</sup> Wolds Prison opened as the first privately managed prison in the United Kingdom in 1992, as one of a number of prisons built by the public sector but contracted to the private sector to operate under five year contracts.<sup>169</sup> Soon private prisons were established under the government's Private Finance Initiative, where contracts are awarded for the entire design, construction, management and finance of a prison with a twenty-five year contract.<sup>170</sup>

These private prisons are run under contracts that set out a system of checks and balances and regulations that must be strictly followed.<sup>171</sup> These contracts provide that payments may be withheld for poor performance and the improper treatment of inmates.<sup>172</sup> Government monitors are permanently stationed within each privately managed prison to check on conditions and to administer treatment and management of prisoners.<sup>173</sup> Further, these privately operated prisons are subject to inspection by the Chief Inspector of Prisons.<sup>174</sup> There are now fourteen prisons in England and Wales operated under contract by private companies.<sup>175</sup> Between them they have the capacity to hold

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<sup>167</sup> *Id.* at 5 (“[A]nything from bedding and food to removing irons or leaving the jail at the end of a sentence required payment.”).

<sup>168</sup> Cody Mason, *supra* note 105, at 6.

<sup>169</sup> *Ministry of Justice: Story of Prison Population 1993-2012*, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218185/story-prison-population.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218185/story-prison-population.pdf)

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *G4S Loses Wolds Prison Contract*, THE GUARDIAN (Nov. 8, 2012), <http://www.theguardian.com/society/2012/nov/08/g4s-loses-wolds-prison-contract>.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

about 13,500 prisoners, or approximately eleven percent of the entire prison population.<sup>176</sup> Current operators in the United Kingdom include G4S, Sodexo Justice Services and Serco.<sup>177</sup>

A competition is in progress to run nine prisons in England and Wales.<sup>178</sup> The first stage of the results was announced in 2012 and stated that the public sector will retain three and also take over Wolds Prison, currently run by G4S.<sup>179</sup> The other five prisons will be subject of further competition between Serco, Sodexo and a new company called MTC/Amey.<sup>180</sup> At the same time, ministers outlined plans to contract out all but core custodial functions at all public sector prisons with the aim of saving £450 million over six years.<sup>181</sup> The loss of G4S of Wolds Prison and its failure to win any new contracts was widely linked to the company's failures with its contract for the 2012 Summer Olympics in London.<sup>182</sup>

HMP Ashfield opened in 1999 and was the first private prison in the United Kingdom to house young offenders.<sup>183</sup> The prison was soon mired in controversy after repeated riots and reports of poor management.<sup>184</sup> Conditions at the prison became so bad in 2003 that the Youth Justice Board withdrew prisoners from Ashfield and threatened to recommend that the prison should be taken over by the public sector.<sup>185</sup> Conditions at the prison improved, however, and the jail remained privately managed. Buckley Hall Prison was originally opened as a privately

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<sup>176</sup> *Id.*

<sup>177</sup> About Us, Her Majesty's Prisons (2009) (formerly known as Kalyx, and prior to that UKDS)

<sup>178</sup> *G4S Loses Wolds Prison Contract*, *supra* note 172.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Youngsters Removed from Worst Prison*, BBC NEWS (May 22, 2010) [http://news.bbc.co.uk/2/hi/uk\\_news/england/2726981.stm](http://news.bbc.co.uk/2/hi/uk_news/england/2726981.stm).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

managed prison in 1994, but after a competitive tendering process in 2000, management of the prison was transferred to Her Majesty's Prison Service in Australia.<sup>186</sup>

*B. Treatment of Mentally Ill--“You taught me to be sad as you...You almost made me take it all...Let me in, I'll bury the pain”*<sup>187</sup>

The Mental Health Act of 1983 is the law that precisely sets out when an individual can be admitted, detained, and treated in a hospital against their wishes.<sup>188</sup> A person can be admitted against their will only if they are a harm to themselves or others.<sup>189</sup> No prison, or part of a prison, is considered a hospital for the purposes of this act. Therefore, it does not apply to prisons at all.<sup>190</sup> Because this act does not apply to prisons, mentally ill inmates cannot be treated against their will.<sup>191</sup> This can present problems in the treatment of severely mentally ill inmates because there are often delays in transferring such prisoners to a hospital.<sup>192</sup>

Like the other countries examined, England's prison population also has a high number of mentally ill inmates.<sup>193</sup> According to studies, psychiatric symptoms are most prevalent within the first two months of incarceration, with personality disorders and substance abuse being the most common diagnoses.<sup>194</sup> Further, learning disabilities, epilepsy, and neurotic symptoms are found more within the prison population than the

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<sup>186</sup> *Id.*

<sup>187</sup> IN FLAMES, METAPHOR (Nuclear Blast 2002).

<sup>188</sup> *Mental Health Act 1983*, available at [http://www.mentalhealthcare.org.uk/mental\\_health\\_act](http://www.mentalhealthcare.org.uk/mental_health_act).

<sup>189</sup> Derek Chiswick & Enda Dooley, *Psychiatry in Prison* (2007).

<sup>190</sup> *Mental Health Act*, *supra* note 188.

<sup>191</sup> *Mental Health Act*, *supra* note 188.

<sup>192</sup> Chiswick & Dooley, *supra* note 189.

<sup>193</sup> Chiswick & Dooley, *supra* note 189.

<sup>194</sup> Chiswick & Dooley, *supra* note 189.



general community.<sup>195</sup> Severely mentally ill inmates can sometimes be transferred to hospitals. However, individuals often go without care.<sup>196</sup> Further, there is a high rate of violence within the prisons against others and self.<sup>197</sup> More people die by suicide than from any other reason in prison, and the majority of suicides occur within the first days of detention in prisons.<sup>198</sup>

Preventing the incarceration of the mentally ill would be the best solution. However, prevention often fails and mentally ill individuals do end up in prison. Therefore, correctional systems should have protocols for their management and treatment. Treatment programs in prisons should not be second to quality to similar services in the community. Like community care, prison care should address both the immediate mental health needs of the inmate and develop adequate post-release plans.

In spite of countless efforts and initiatives to curtail the difficulty of the mentally ill in prison, their numbers continue to climb. Interconnection between agencies and better treatment approaches are necessary to stop the transfer of mental patients from hospitals to prisons.

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<sup>195</sup> Julio Florez, *Mental Patients in Prison*, 3 *WORLD PSYCHIATRY* 189 (2009).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

## VII. NEW ZEALAND

*A. Private Prisons--“Come join the murder...Come fly with black...We'll give you freedom...From the human trap...”*<sup>199</sup>

The first private prison in New Zealand opened in 2000 and was operated by the GEO group until 2005, when the New Zealand Parliament rescinded the law allowing private prisons.<sup>200</sup> However, the parliament's decision was reversed in 2009, and the British company Serco took over operation of the facility in 2011; the private prison industry continued to expand with the construction of a new 960 bed prison also operated by Serco.<sup>201</sup>

According to the Department of Corrections, these prisons must provide regular reports to the chief executive of the Department of Corrections, including details of prisoner complaints, incidents of violence self-harm involving prisoners, disciplinary proceedings taken against prisoners or staff, escapes, attempted escapes, and prisoner deaths.<sup>202</sup> Contract-managed prisons are subject to intensive oversight by monitors appointed by the chief executive and are subject to specific investigations by external legal bodies where appropriate.<sup>203</sup>

Although these private prisons are required to provide reports, institutions are not immune to improprieties. In 2015, a forty-four-year-old inmate died in Christchurch Men's Prison after three other prisoners beat him.<sup>204</sup> There have also been alle-

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<sup>199</sup> THE WHITE BUFFALO AND THE FOREST RANGERS, COME JOIN THE MURDER (Union Music Group 2013).

<sup>200</sup> Cody Mason, *supra* note 105, at 8.

<sup>201</sup> Cody Mason, *supra* note 105, at 8.

<sup>202</sup> N.Z. DEP'T OF CORR., <http://www.corrections.govt.nz/> (last visited April 25, 2016).

<sup>203</sup> *Id.*

<sup>204</sup> Blair Ensor & Myles Hume, *Homicide Probe after Christchurch Prisoner Dies Following Assault*, THE PRESS, (Mar. 13, 2015), <http://www.stuff.co.nz/the-press/news/67560636/homicide-probe-after-christchurch-prisoner-dies-following-assault>.

gations of assaults, intimidation, and sexual harassment by correctional officers.<sup>205</sup> Opponents have rallied against the private prison industry saying it is a waste of taxpayers' money and a back-stop for what they describe as National's increasingly punitive social policy.<sup>206</sup> Further, these critics have also cited cost-cutting measures as dangerous to the security of corrections officers and to the welfare of the inmates.<sup>207</sup>

*B. Treatment of Mentally Ill Inmates*

Many individuals imprisoned within New Zealand's private prisons suffer from mental illnesses that are often unaddressed.<sup>208</sup> Further, prisoners facing these issues are often denied appropriate support and care because the department of corrections does not provide therapeutic services such as counseling.<sup>209</sup> Moreover, the department of corrections harbors the idea that they have a custodial role, not a healing one.<sup>210</sup>

Most facilities have special units designed for inmates that may cause serious injury to themselves. However, prisoners housed in these units are held in isolation cells and are constantly observed to prevent self-harm.<sup>211</sup> According to regulations, the maximum stay is one week, but the Health in Justice Report revealed that some people are kept in them for months at a time.<sup>212</sup> Likewise, prisoners in these units are not allowed footwear and are clothed in a single rectangle of fabric to decrease their commit suicide capability.<sup>213</sup> The cells are small

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Mental Health Treatment and Servs. in N.Z.*, JUSTSPEAK, (Sept. 17, 2013), <http://justspeak.org.nz/mental-health-treatment-and-services-in-nz-prisons-are-inadequate/>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

and bare, with only a fixed bed and toilet. Sometimes a concrete bed or mattress is used, and a plastic container serves as a toilet.<sup>214</sup> Noise is constant, and access to the outside world is prohibited, leaving them with no fresh air and no human contact.<sup>215</sup>

Adding insult to injury, once released from prison, mentally ill inmates do not receive continuity of care upon release, which increases the possibility of recidivism.<sup>216</sup> The Department of Corrections has failed in its duty of care, failing to uphold the standards of the Corrections Act 2004 and the United Nations Minimum Standard Rules for the Treatment of Prisoners.<sup>217</sup> Drastic changes need to occur because current mental health services provided by the Department of Corrections are inadequate.

Mentally ill inmates in New Zealand would be better served by restructuring the current programs as well as an implementation of community based mental health services.

## VIII. SOUTH AFRICA

### A. *Private Prisons-- "You can't escape the master keeper..."*<sup>218</sup>

South Africa is home the second largest private prison in the world; G4S played an integral part in the design and construction of the penitentiary and has been awarded a twenty-five year contract to operate the prison on behalf of the Department of Correctional Services.<sup>219</sup>

G4S is a British multinational security services company and is currently the world's largest security company measured by revenues and has operations in around 125 countries.<sup>220</sup> The

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> OZZY OSBOURNE, *SUICIDE SOLUTION* (Jet/Epic 1980).

<sup>219</sup> Cody Mason, *supra* note 105, at 9.

<sup>220</sup> G4S, [HTTP://WWW.G4S.COM/](http://www.g4s.com/) (last visited April 25, 2016).

company was founded in 2004 by the merger of the United Kingdom-based Securicor with the Denmark-based group, 4 Falck. Like CCA, G4S is a publicly traded company with listings on the London Stock Exchange.<sup>221</sup>

Like other companies explored in this paper, G4S has also been the subject of investigations due to alleged improprieties. For three years in a row, the company was the subject of a global campaign by union workers alleging that its subsidiaries undermined employment and human rights standards.<sup>222</sup> In 2013, the British Broadcasting Corporation (“BBC”) reported allegations of prisoners being tortured at the corporation’s prison in South Africa.<sup>223</sup> The BBC cites research from the Wits Justice Project at Wits University in Johannesburg, claiming that dozens of the nearly 3,000 inmates in prison have been tortured using electroshock and forced injections.<sup>224</sup>

*B. The Treatment of Mentally Ill Inmates:*

Mental illness is very prevalent in South Africa, yet the country lacks many of the necessary resources and policies needed to execute an effective mental health strategy and the treatment of the mentally ill varies from region to region.<sup>225</sup>

Prior to 1997, mental health care in South Africa was mostly institutionalized, and little emphasis was placed on the development of curative therapies.<sup>226</sup> Due to a scarcity of resources, it was more cost effective to simply isolate mentally unstable in-

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<sup>221</sup> *Id.*

<sup>222</sup> Kate Forbes, *Shocking Abuse Claims at South Africa’s Manguang Prison*, BBC NEWS, (Oct. 28, 2013) <http://www.bbc.com/news/world-africa-24694214>.

<sup>223</sup> Rupert Neate, *Desmond Tutu Tells G4S to Stop Supplying to Israel Prisons*, THE GUARDIAN, June 4, 2014.

<sup>224</sup> *Id.*

<sup>225</sup> WORLD HEALTH ORGANIZATION, *supra* note 7.

<sup>226</sup> WORLD HEALTH ORGANIZATION, *supra* note 7.

dividuals rather than invest in effective, yet costly, care. Following the 1997 White Paper Act and the National Health Act 61 of 2003, the South African government moved to deinstitutionalize mental health care and relegate it to the primary care settings.<sup>227</sup> However, existing figures indicate the objective of deinstitutionalization and effective primary mental care has still not been fulfilled.<sup>228</sup>

The percentage of mentally ill prisoners housed in South African prisons, both private and public is unknown. To date, only one study has been conducted regarding mental health activities in the criminal justice system; the study reported that one to twenty percent of prisons have at least one prisoner per month in treatment contact with a mental health professional.<sup>229</sup> It is obvious, by the lack of data concerning the well-being and treatment of mentally ill inmates, that the current system is inadequate. The country as a whole would benefit from the implementation of new mental health strategies and policies.

## IX. CONCLUSION

The research gathered strongly indicates the globalization of the private prison industry has a very poor, if not abhorrent, effect on mentally ill inmates. The private prison industry focuses more on cutting costs than it does on the well-being of the inmates housed within the penitentiary walls. The world can no longer ignore the substantial oppression inflicted upon the mentally ill spanning the globe. If mentally ill inmates are ever expected to recover or, at the very least, live a life without the shackles of mental illness, the current system requires a drastic change.

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<sup>227</sup> WORLD HEALTH ORGANIZATION, *supra* note 7.

<sup>228</sup> WORLD HEALTH ORGANIZATION, *supra* note 7.

<sup>229</sup> WORLD HEALTH ORGANIZATION, *supra* note 7.

## A NEW CHALLENGE: AYAHUASCA & DRUG COURTS

Nikkole Parker\*

### I. INTRODUCTION

What is ayahuasca and what does it have to do with problem solving courts? This paper will answer this question by looking at the history of problem solving courts and the history of ayahuasca, then meshing the two topics together to create a new plan of action for making changes within the U.S. judicial system. Although there is no present use of ayahuasca in problem solving courts, implementation of ayahuasca's therapeutic use in drug courts may be a way of providing a more therapeutic approach to the current drug court system. Ayahuasca is a tropical vine that is native to the Amazon and is often turned into a tea and consumed during ceremonies. It has a history of use in the Amazon, where it is used for rituals for healing and divination, and today it is often used for therapeutic or religious purposes. This paper will focus on how to use this tea to better help people going through the drug court system, which, in turn, will help the criminal justice system as a whole.

The U.S. judicial system is flooded with people who are convicted of drug- and alcohol-related charges—and not just for the first time. This paper will work to solve this problem by specifically focusing on drug courts. My proposal is to use the therapeutic properties of ayahuasca to implement this substance into courts to try and make a significant difference in people's lives, so as to prevent them from becoming repeat offenders and users. Ayahuasca has been said to help people with a range of issues, from alcoholism and drug addiction to coping with intense emotional and personal issues. If this tea has a way of helping people and keeping them from reusing drugs and alcohol, then it is a method we should certainly consider

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implementing into the judicial system as an alternative way of helping people with serious drug issues and, in turn, helping reduce the number of flooded courtrooms.

## II. THERAPEUTIC JURISPRUDENCE

In order to understand where the topic of this paper first originated, we must address therapeutic jurisprudence (“TJ”). TJ is a holistic<sup>1</sup> and interdisciplinary perspective implemented into the field of law.<sup>2</sup> This theory was introduced in the 1980s by Professors David Wexler and Bruce Winick as a new, more academic approach to mental health law.<sup>3</sup> TJ focuses specifically on the law’s power over emotional life and a person’s psychological well-being.<sup>4</sup> Bruce Winick, one of the founders of TJ, has stated, “Legal rules and the way they are applied are social forces that produce inevitable, and sometimes negative, consequences for the psychological well-being of those affected.”<sup>5</sup> The concept of TJ helps to address the very important fact that the law itself, which is comprised of rules, procedures, and roles of legal actors like judges and lawyers, is actually a social force that has both therapeutic and anti-therapeutic values.<sup>6</sup>

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<sup>1</sup> Merriam Webster defines holistic as, “relating to or concerned with wholes or with complete systems rather than with the analysis of, treatment of, or dissection into parts. <http://www.merriam-webster.com/dictionary/holistic>.

<sup>2</sup> Winick & Wexler, *Therapeutic Jurisprudence*, CUTTING EDGE LAW, <http://cuttingedgelaw.com/page/therapeutic-jurisprudence> (last visited Dec. 10, 2014).

<sup>3</sup> <http://definitions.uslegal.com/t/therapeutic-jurisprudence/> (last visited Dec. 10, 2014).

<sup>4</sup> Bruce J. Winick, INTERNATIONAL NETWORK ON THERAPEUTIC JURISPRUDENCE, <http://www.law.arizona.edu/depts/upr-intj/> (last visited on Dec. 10, 2015).

<sup>5</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1062-63 (2003).

<sup>6</sup> *Supra* note 4.



TJ really attempts to reform the law and processes in the legal field in order to help promote better psychological well being for people affected by the legal system.<sup>7</sup> “TJ has been applied to almost every area of law, including mental health law, family law, employment law, health law, elder law, appellate practice, criminal law, criminal sentencing, litigation, and estate planning. It has been applied to police work and become very popular with judges.”<sup>8</sup> TJ focuses on connecting the people who are involved in the legal profession with different social-behavioral methods to help them work with participants in the judicial system. This helps to foster better outcomes, resulting in more respect for the justice system. TJ also helps to deal with underlying issues in legal disputes, offers better offender rehabilitation, and helps with overall offender well being.<sup>9</sup> In order to accomplish these goals, the TJ method pairs psychology with the behavioral sciences in order to critique legal practices, including judicial practices, in order to suggest how these practices can be reshaped to increase their therapeutic potential.<sup>10</sup>

The basic idea behind TJ is that scholars should study the consequences that the law can have on a person’s psychological well being and reshape the law in order to achieve two primary goals:<sup>11</sup> 1) minimize anti-therapeutic effects and 2) increase the law’s therapeutic potential.<sup>12</sup> TJ is part of a larger movement in the law called comprehensive law practice.<sup>13</sup>

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<sup>7</sup> SUSAN S. DAICOFF, *COMPREHENSIVE LAW PRACTICE LAW AS A HEALING PROFESSION* 49 (Carolina Academic Press 2011).

<sup>8</sup> *Id.*

<sup>9</sup> THE AUSTRALASIAN INSTITUTE OF JUDICIAL ADMINISTRATION, <http://www.aija.org.au/index.php/research/australian-therapeutic-jurisprudence-clearinghouse/the-concept-of-therapeutic-jurisprudence> (last visited Dec. 10, 2014).

<sup>10</sup> WINICK, *supra*, note 5, at 1064.

<sup>11</sup> *Id.* at 1063.

<sup>12</sup> *Id.*

<sup>13</sup> DAICOFF, *supra*, note 7, at 33.

Comprehensive law practice has roughly nine different vectors within in it.<sup>14</sup> These vectors include: holistic justice, creative problem solving, therapeutic jurisprudence, preventative law, procedural justice, restorative justice, transformative mediation, collaborative law, and problem-solving courts.<sup>15</sup> Often, these vectors have overlap, making it easier for legal professionals to implement different vectors into their work.<sup>16</sup> For this article, the focus will be on two vectors: therapeutic jurisprudence and problem solving courts. The reason for the focus on therapeutic jurisprudence is:

Therapeutic jurisprudence can be implemented on a continuum. First, therapeutic jurisprudence can be practiced by judges when interacting with the individuals involved in a particular case. Second, therapeutic jurisprudence may be practiced at the organizational level of the court by devising new procedures, information systems, and sentencing options and by establishing links to social service providers to promote therapeutic outcomes. Third, for some areas of law and court policy, the practice of therapeutic jurisprudence principles requires changes to State statutes or to court rules, policies, or procedures that apply across courts.<sup>17</sup>

Therapeutic jurisprudence and problem-solving courts have a lot of of overlap and they “both see the law as an instrument for helping people, particularly those with a variety of psycho-

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<sup>14</sup> *Id.* at 52.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 52-53.

<sup>17</sup> Rottman & Casey, THERAPEUTIC JURISPRUDENCE AND THE EMERGENCE OF PROBLEM-SOLVING COURTS 13, 14 Nat'l Inst. of Justice Journal 1999. <http://ndcrc.org/content/therapeutic-jurisprudence-and-emergence-problem-solving-courts> (last visited Dec. 10, 2015).

logical and emotional problems.”<sup>18</sup> The overlap between therapeutic jurisprudence and problem solving courts is central to the topic of this paper, and without both of these vectors, the proposed idea of adding ayahuasca into drug court programs for therapeutic purposes would never be able to come to fruition.

### III. PROBLEM SOLVING COURTS

In order to understand this paper’s purpose, we must first look at what problem-solving courts and drug courts are. Problem-solving courts aspire to provide new and different responses to criminal activity by trying to understand the behavior underlying a vast amount of criminal offenses.<sup>19</sup> Problem-solving courts, in short, were developed by judges who were looking for a practical, intuitive, and creative way of addressing the problem of the revolving door system of justice.<sup>20</sup> Problem solving courts were created because traditional judicial approaches dealing in areas such as substance abuse, domestic violence, child abuse, neglect, mental illness, and other criminal acts, were essentially failing.<sup>21</sup> Some examples of problem solving courts that are very prevalent in the justice system today are (1) drug courts, (2) mental health courts, (3) DUI<sup>22</sup> courts, and 4) family violence courts.<sup>23</sup>

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<sup>18</sup> WINICK, *supra*, note 5, at 1066.

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<http://www.lawfoundation.net.au/ljf/app/&id=084a39b598cae7e8ca25718e000ab0d5>.

<sup>20</sup> <http://www.courtinnovation.org/research/bruce-j-winick-professor-university-miami-school-law-and-school-medicine-and-david-b-wexler?url=research%2F11%2Fall&mode=11&type=all&page=2> (last visited on Dec. 10, 2015).

<sup>21</sup> WINICK, *supra*, note 5, at 1060.

<sup>22</sup> Driving Under the Influence.

<sup>23</sup> Maria Karras et al., 4 ON THE EDGE OF JUSTICE THE LEGAL NEEDS OF PEOPLE WITH A MENTAL ILLNESS IN NSW 1, 157-167 (2006), <http://www.lawfoundation.net.au/ljf/site/articleIDs/CB05FD97AAF2458CC>

As one might note from their names, these courts are specialized tribunals that have been established to deal with very specific problems,<sup>24</sup> such as social or mental health problems, substance abuse treatment, or help for family and domestic abuse problems.<sup>25</sup> An overwhelming majority of these problems stem from criminal cases, which involve drug or alcohol problems.<sup>26</sup> Overall, problem-solving courts are known more simply as “specialty courts.”<sup>27</sup> The reasoning behind considering these courts specialty courts is the fact that they deal with offenders who have chosen to engage in certain forms of behavior or share certain specific characteristics—such as drug or alcohol abuse—therefore, creating a common problem which needs to be resolved in order to lessen the chances of recidivism.<sup>28</sup>

Drug courts fall under the category of problem-solving courts. They have “a central goal to provide a safety valve for the cycle of incarceration-release-recidivism<sup>29</sup> that filled prisons with low-level drug users....”<sup>30</sup> Drug courts are used to intervene at the input end of the cycle of incarceration in order to divert the offender to get treatment before he or she goes to

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A25718E000 14293/\$file/EdgeOfJustice.pdf (last visited Dec. 10, 2014). A prime example of family violence courts are courts that have a strong emphasis on domestic violence.

<sup>24</sup> WINICK, *supra*, note 5, at 1055-56.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 99 (2007).

<sup>28</sup> *Id.*

<sup>29</sup> Recidivism is a very fundamental concept in criminal justice, and is the essential force behind this paper. “The National Institute of Justice defines recidivism as a person’s relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.” <http://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx>.

<sup>30</sup> Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417 (2009).

prison.<sup>31</sup> Drug courts, through the vessel of problem-solving courts, attempt to solve human problems that are responsible for a case being brought into the system. They endeavor to understand and address the underlying problems responsible for the actual dispute.<sup>32</sup> The concept behind drug courts and other problem-solving courts is to help the individual with the underlying problem that is entangled in his or her current case and to prevent recurring involvement in the judicial system.<sup>33</sup> These courts are successful in achieving their underlying goal because they connect the person to community resources, motivate through the court, get the person the right treatment, provide services needed, and monitor progress to help confirm overall success in the program.<sup>34</sup> It should be noted as well that drug courts—as well as other problem solving courts—do not have a specific type of treatment they use on particular offenders. Rather, the court uses different treatments depending on the person and the case.<sup>35</sup>

In order to understand drug courts more in depth, a brief history on the emergence of drug courts is essential. The very first drug court was created in Miami, Florida in 1989.<sup>36</sup> It was originally used as a response to the explosion of court case-loads and overcrowding in prisons, which was a direct result of the War on Drugs.<sup>37</sup> Due to the War on Drugs, by the end of

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<sup>31</sup> *Id.*

<sup>32</sup> With drug courts the disputes typically arise out of substance abuse issues or issues with excessive use of alcohol.

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

<sup>34</sup> *Id.* at 1061.

<sup>35</sup> BOZZA, *supra*, note 29 at 108.

<sup>36</sup> WINICK, *supra*, note 5, at 1056.

<sup>37</sup> MILLER, *supra*, note 32, at 421. The War on Drugs was formerly declared by President Richard Nixon in 1971, and this War on Drugs was made to create harsher penalties and laws on drugs, to try and curb the increase of drug use in the United States. However this “War on Drugs” had actually started years before, President Nixon just made it a formal initiative. <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron/>.

the 1980's, U.S. court systems were flooded with increased rates of arrest, conviction, and incarceration of Americans.<sup>38</sup> Initially, the drug courts were created as a means of changing and improving the impact of the War on Drugs on more vulnerable communities, which were suffering from a myriad of factors<sup>39</sup> contributing to drug addictions.<sup>40</sup> Soon after this style of drug court came into existence, there was a movement into a more therapeutic model, which competed with the more race- and class-conscious approach discussed above, and emphasized a more race- and class-neutral approach. The neutral approach focused on the individual's responsibility, rather than his or her social conditions.<sup>41</sup> Reasons to change drug courts from a race- and class-conscious approach to a more race- and class-neutral approach can be based on this simple statistic: "Between 1986 and 1991, the number of white drug offenders in state prisons increased by 110 percent, but the number of Black drug offenders rose by 465 percent."<sup>42</sup> This statistic shows two things: there was undoubtedly an issue with black individuals being arrested for drug use more often than white individuals, and, there were still a significant number of white individuals who were in prison for the same substance abuse reasons. This makes it clear that a more class- and race-neutral approach was needed.

Throughout the years, drug courts have started popping up all over the country. Many jurisdictions were confronted with the task of handling very large numbers of drug and alcohol offenders who were being shuffled through our criminal justice

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<sup>38</sup> *Id.* at 420-21.

<sup>39</sup> Some factors affecting these vulnerable communities included but were not limited to: factories closing which caused unemployment to go into a downward spiral, there was increased residential segregation, and under-policing.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 425.

<sup>42</sup> MILLER, *supra*, note 32, at 421. Citing: Kendall Thomas, *Racial Justice*, 17 NAT'L BLACK L. J. 222, 240 (2003).

system. This issue is why many jurisdictions turned to drug treatment courts to be able to cope with the amplified workload of drug- and alcohol-related offenses.<sup>43</sup> To better deal with these issues, drug courts took the approach of transforming the court proceedings into more of a diversion method, where they diverted the offender from prison time into treatment.<sup>44</sup> When a court decides to implement these programs, the main change is in the role of the judge, which changes from the person deciding guilt to a therapeutic aid. In this role, he or she must have the most concern for recommending treatment and/or rehabilitation for the offender.<sup>45</sup> This, in turn, emphasizes the ideas of self-knowledge, responsibility, and treatment of intrapersonal issues of the offenders.<sup>46</sup>

Drug courts have flourished in the United States. According to the National Institute of Justice, as of June 30, 2013, there are over 2,800 drug courts operating in the United States.<sup>47</sup> These drug courts have evolved over the years. Each year they become more advanced and allow for a variety of treatment for offenders pushing through the system.<sup>48</sup> According to the Department of Justice, drug courts utilize more than twelve different treatment tools, including acupuncture, mental health referrals, and methadone maintenance.<sup>49</sup> With these

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<sup>43</sup> The Honorable Peggy Fulton Hora et. al., *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, 449 (1999).

<sup>44</sup> MILLER, *supra*, note 32, at 422-23.

<sup>45</sup> *Id.*

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

<sup>47</sup> DRUG COURTS (2014), <http://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx>. (last visited Dec. 10, 2014).

<sup>48</sup> BOZZA, *supra*, note 29, at 109-10.

<sup>49</sup> BOZZA, *supra*, note 29, at 109-10. Methadone maintenance treatment is essentially a treatment program that involves long term prescribing of methadone (a long-acting opioid agonist prescribed for treatment of opioid dependence) as a substitute to the opioid (heroin for example) that the person is dependent upon. These programs typically provide counseling and

different treatments, it is important to remember the underlying goal of these drug courts: to create a more therapeutic zone where offenders have the freedom to participate in programs to help them become productive members of society. We want to reduce the rate of recidivism among drug and alcohol abusers.<sup>50</sup>

#### IV. TIME FOR A CHANGE

Although drug courts have aspired to be a therapeutic tool to help an individual with substance abuse problems and help curb recidivism rates and the constant flood of criminal drug cases in the court system, this is not the reality. The reality is there is a high rate of recidivism even in people who have gone through the drug court system. According to a study<sup>51</sup> prepared by John Roman, Wendy Townsend, and Avinash Singh Bhati, Ph.D., within one year of completing drug court treatment, 16.4% of participants had been arrested and charged with a serious crime.<sup>52</sup> This same study stresses that within two years, the above percentage rises to 27.5%.<sup>53</sup> In short, this study shows that one in six drug court graduates ends up being

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medical services as well. CAMH KNOWLEDGE EXCHANGE, [https://knowledgex.camh.net/amhspecialists/specialized\\_treatment/methadone\\_maintenance/Pages/default.aspx](https://knowledgex.camh.net/amhspecialists/specialized_treatment/methadone_maintenance/Pages/default.aspx) (last visited Dec. 9, 2014).

<sup>50</sup> MILLER, *supra*, note 32, at 432.

<sup>51</sup> This study was based on a sample of 2,020 graduates of drug courts from 1999 to 2000 from 95 drug courts in the U.S. These courts each: 1) received Federal funds from the National Drug Court Program Office (NDCPO) 2) were in operation for at least one year; and 3) had at the very least 40 graduates of the program. John Roman, Wendy Townsend & Avinash Singh Bhati, RECIDIVISM RATES FOR DRUG COURT GRADUATES: NATIONALLY BASED ESTIMATES, FINAL REPORT 1, <https://www.ncjrs.gov/pdffiles1/201229.pdf> (last visited on Dec. 10, 2014).

<sup>52</sup> *Id.* at 2. A serious crime for this study included any crime punishable by a sentence of one or more year.

<sup>53</sup> *Id.*



rearrested and charged after graduating from a drug court program.<sup>54</sup>

These statistics, paired with the fact that people are still choosing to participate in a lifestyle involving drugs, is alarming. According to LEAP, every nineteen seconds at least one drug arrest occurs in the United States.<sup>55</sup> The government has estimated that more than 118 million Americans have admitted to using illegal substances—forty-seven percent of the U.S. population.<sup>56</sup> As if these statistics are not disturbing enough, it is said that 23.5 million Americans are in need of some sort of substance abuse treatment, yet only one in ten actually receives the help he or she needs.<sup>57</sup> Additionally, these drug issues are starting to affect American children. About forty-eight percent of high school students in the U.S. have acknowledged using drugs.<sup>58</sup> Similarly, teens have claimed that it is easier for them to buy marijuana than it is for them to buy beer, which is regulated by the state government.<sup>59</sup>

Between the statistics on recidivism in those in drug court programs and statistics about current drug use in the United States, one can reach the conclusion that the “war on drugs” is not working in the way in which it was intended. In fact, “three out of four American voters say the “war on drugs” is a failure.”<sup>60</sup> Even law enforcement officers in the United States agree. Eighty-two percent of police chiefs and sheriffs say the “war on drugs” has not been successful in reducing drug use in this country.<sup>61</sup> Another fact proving this point is that one in one hundred adults is behind bars. The U.S. houses nearly

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<sup>54</sup> *Id.* at 2-3, 26.

<sup>55</sup> LAW ENFORCEMENT AGAINST PROHIBITION, <http://www.leap.cc/for-the-media/the-war-on-drugs-at-a-glance/> (last visited on Dec. 10, 2014).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

twenty-five percent of the world's prisoners, yet it contains less than five percent of the world's population.<sup>62</sup> These statistics are incredibly distressing and clearly reveal that the way the U.S. handles drug issues is not effective and desperately needs a change.

One issue with the drug court system that is making it difficult to curb recidivism is the fact that there really no consistency in the way drug courts operate. "[T]here are considerable differences in the nuances of their operations. Because they function as an entity of local court, subject to the limitations of local financial and human resources, and because there is little, if any, regulatory oversight, each problem-solving court has its own operational character."<sup>63</sup> Another issue is that problem-solving courts are not in the business of offering participants some unique and unusually effective form of treatment. Rather, the treatments these people are receiving are not any different than any other form of treatment offered to any person of the general public.<sup>64</sup> It is for these reasons that people may be reoffending and ending up back in the system. To these individuals, there is no specific regulation of a drug court—they are all different. There is nothing drawing the people into the treatment they are put through because of the judicial system.

As previously mentioned, drug courts were implemented into the U.S. judicial system as a way of providing a more therapeutic way of dealing with drug problems, which were and still are saturating the courts. There are great things about drug courts, such as the underlying goals. However, there are

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<sup>62</sup> *Id.*

<sup>63</sup> Bozza, *supra*, note 29, at 100.

<sup>64</sup> *Id.* at 107-08. Essentially there is nothing that is drawing the people being charged with drug offenses, to want to get better. In order to affect change new and different ideas should be considered in order to foster better participation and success among the individuals working through drug court programs.

clearly holes in the system that need to be fixed in order to achieve these original drug court goals.<sup>65</sup>

This is, by no means, a suggestion that drug court systems do not work. Rather, it is a statement that these systems are in desperate need of a change that will actually make a difference in each goal the creators of these courts originally desired. It has been said that “law is both the boundary and the catalyst for challenges to the boundary of what a society will allow individuals to change about their own consciousness.”<sup>66</sup> It is with the introduction of this statement that I suggest implementing a new and innovative form of treatment into the drug court system. This idea will push society and the judicial system to accept a form of treatment that has the ability to help individuals on many different levels and has a considerable probability of effecting change in those individuals who are struggling with substance abuse and returning to the assembly line court system. This notion of a new type of treatment may seem daunting, but if it is something that works, the benefits to the people struggling with substance abuse issues and reoffending may actually have a chance of changing this pattern of behavior that many of them deal with on a daily basis. This new idea is the use of ayahuasca in this very particular and innovative court system. Drug courts provide cosmic opportunities for new drug policies and new social norms that can, in turn, create a new and diverse community response to issues of addiction and incarceration, which may ultimately help a person struggling with substance abuse.<sup>67</sup> The use of ayahuasca would be a new and remarkable process for effecting these changes.

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<sup>65</sup> *Id.* at 100.

<sup>66</sup> Benton Brooks Bodamer, *Psychoactive Substances, Dietary Supplements, and the War on "Drugs": Law, Myth, and Tradition As the Social Control of Consciousness*, 66 OHIO ST. L.J. 1311, 1331 (2005).

<sup>67</sup> MILLER, *supra*, note 32, at 418.

## V. AYAHUASCA

What exactly is ayahuasca?<sup>68</sup> Thus far, we have briefly described ayahuasca as a substance that should be implemented into the drug court system, but have not address how it can help. This section is designed to discuss the specifics of ayahuasca, and inform you about this plant that is both interesting and advantageous for those who are willing to accept what it has to offer. This section will first look at what exactly ayahuasca is, what its background is, why people use it, what its legal status is. It will address studies about the drug or substances similar to it and how it can help in drug courts.

Ayahuasca's roots are in the jungles of the Amazon, particularly in the countries of Columbia, Brazil, Ecuador, and Peru.<sup>69</sup> Ayahuasca is a beverage, also known as caapi, yagé, natema, pindé, kahi, mihi, dápa, and bejuco de oro.<sup>70</sup> It is most commonly, however, called ayahuasca.<sup>71</sup> Ayahuasca is a Quechua<sup>72</sup> term that means "vine of the souls."<sup>73</sup> As previously

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[ah-yuh-wah-skuh]

<http://dictionary.reference.com/browse/ayahuasca> (last visited Nov. 15, 2014).

<sup>69</sup>ICEERS INTERNATIONAL CENTER FOR ETHNOBOTANICAL EDUCATION RESEARCH & SERVICE, <http://iceers.org/more-about-ayahuasca.php?lang=en#.VGMKssmGcQi> (last visited on Dec. 9, 2014).

<sup>70</sup> Richard Rudgley, THE ENCYCLOPEDIA OF PSYCHOACTIVE SUBSTANCES, <http://www.ethnopharmacology.com/ayahuasca/> (last visited Dec. 10, 2014).

<sup>71</sup> RUDGLEY, *Supra* note 79. It should be noted that in Brazil, the translation of the Quechua word into Portuguese renders a different term than it does in English. In Portuguese the translation is Hoasca, rather than ayahuasca. If you ever see either of these it should be stated that they are the same substance. DJ McKenna, JC Callaway & CS Grob, *The Scientific Investigation of Ayahuasca a Review of Past and Current Research*, 1 THE HEFFTER REV. OF PSYCHEDELIC RES., Mar. 8, 2010 at (1998), [http://www.erowid.org/chemicals/ayahuasca/ayahuasca\\_journal3.shtml](http://www.erowid.org/chemicals/ayahuasca/ayahuasca_journal3.shtml) (last visited Dec. 10, 2014).

<sup>72</sup> Quechua is an Amerind language with roughly eight million people use the language in countries such as Bolivia, Peru, Ecuador, Colombia, and

stated, ayahuasca is a tea or brew which people drink. This tea is made out of two different plants, which is often surprising to people. The first plant used is *Banisteriopsis caapi*.<sup>74</sup> This plant is “a tropical vine that contains harmine and other harmala alkaloids<sup>75</sup> in its stems.”<sup>76</sup> This is the “ayahuasca plant.” The second portion of this tea is made by another form of plant. There is not one particular plant that is used, but rather different options of plants may be combined with the actual ayahuasca plant in order to achieve the correct mind-altering

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Argentina. This language originated in the time of the Inca Empire, which was later destroyed by the Spanish in the sixteenth century. <http://www.omniglot.com/writing/quechua.htm> (last visited on Nov. 27, 2014).

<sup>73</sup> McKenna, Callaway & Grob, *The Scientific Investigation of Ayahuasca a Review of Past and Current Research*, 1 THE HEFFTER REV. OF PSYCHEDELIC RES., Mar. 8, 2010 at (1998), [http://www.erowid.org/chemicals/ayahuasca/ayahuasca\\_journal3.shtml](http://www.erowid.org/chemicals/ayahuasca/ayahuasca_journal3.shtml) (last visited Dec. 10, 2014).

<sup>74</sup> The common name for this plant is just ayahuasca, it is the main plant to the brew but the brew must be made with a combination of this plant and one of the others listed, so as to have the correct effects on the human psyche. THE VAULTS OF EROWID. (Sep. 9, 2009), <https://www.erowid.org/plants/banisteriopsis/banisteriopsis.shtml> (last visited Dec. 10, 2014).

<sup>75</sup> “Harmala alkaloids are naturally occurring Monoamine Oxidase Inhibitors which are best known for their use in combination with tryptamine source plants in ayahuasca brews.” THE VAULTS OF EROWID, (JUNE 14, 2014), <https://www.erowid.org/chemicals/harmala/harmala.shtml> (last visited Dec. 10, 2014). Just to inform you further as a reader, Monoamine Oxidase Inhibitors in a general sense are MAO inhibitors that you hear about people taking to relieve different types of mental depression. <http://medicalictionary.thefreedictionary.com/monoamine+oxidase+inhibitors> (last visited Nov. 29, 2014). This definition is a general medical one, and generally is used when discussing the Monoamine Oxidase Inhibitors (MAO inhibitors) used in depression medication, not the naturally occurring kind this paper focuses on in the use of Ayahuasca.

<sup>76</sup> THE VAULTS OF EROWID (Sep. 9, 2009) <https://www.erowid.org/plants/banisteriopsis/banisteriopsis.shtml> (last visited Dec. 10, 2014).

affects. The most popular are *Psychotria viridis* (Chacrana)<sup>77</sup> and *Diplopterys cabrerana* (Chacropanga)<sup>78</sup>. However, other plants may be mixed with the main plant as well. Some examples of other plants are tobacco and varieties of *brugmansia*<sup>79</sup> and *brunfelsia*.<sup>80</sup> The tea that is prepared from these plants is a hallucinogenic tea, which has been used by different groups of indigenous people for centuries.<sup>81</sup> The reason it is important to know that this tea is made from two different types of plants is because if each of the plants was consumed by itself, there would be no mind-altering effect on the person drinking the tea.<sup>82</sup> The purpose of drinking ayahuasca is to achieve a new

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<sup>77</sup> This plant is popular to use in the ayahuasca brew, it comes from a small tree and has little red fruit, and long leaves, this plant produces N,N-DMT. *Psychotria viridis*, THE VAULTS OF EROWID, (Sept. 9, 2009) <https://www.erowid.org/plants/psychotria/psychotria.shtml> (last visited on Dec. 10, 2015).

<sup>78</sup> This plant is also used often in ayahuasca tea brews; it is another tropical vine that produces DMT. *Diplopterys cabrerana*, THE VAULTS OF EROWID (Nov. 15, 2015) <https://www.erowid.org/plants/diplopterys/diplopterys.shtml> (last visited on Apr. 10, 2016).

<sup>79</sup> This plant is also used in the ayahuasca brew as stated above, it is a small tree which has many trumpet shaped flowers that hang on it, this plant is also used for the making of different poisons and medicines in South America, and it is less frequently used in Ayahuasca brews. *Brugmansia*, THE VAULTS OF EROWID (May 17, 2013) <https://www.erowid.org/plants/brugmansia/brugmansia.shtml> (last visited on Dec. 10, 2014).

<sup>80</sup> This is another type of plant that can be used to make ayahuasca brew as stated above, this plant is another small or medium sized tree that has some rather gorgeous flowers on it, this plant is used for other medicinal purposes in South America. *Brufelsia*, THE VAULTS OF EROWID (Sept. 9, 2009) <https://www.erowid.org/plants/brunfelsia/brunfelsia.shtml> (Last visited on Dec. 10, 2014).

<sup>81</sup> Tony Mierzwicki, *Interview with Ayahuasca Shaman*, *Darpan New Dawn Magazine*, September 2003, DARPAN, <http://www.darpan.com/interview-with-ayahuasca-shaman-darpan-new-dawn-magazine-september-2003/> (last visited Dec. 10, 2014).

<sup>82</sup> *Id.*

level of consciousness that is made possible through the tea's hallucinogenic effects.

It is also important to know a little history about the use of the plant. There is much to learn about ayahuasca and its effects, and it should be known that there is not much written information on the use of ayahuasca. The plant has been used for centuries in the Amazon where indigenous people have utilized the tea mixture for multiple purposes, including healing, curing illness, divination, witchcraft, warfare, and many more.<sup>83</sup> Since it is traditionally used by indigenous people, many of the rituals and procedures have been passed down through different shaman through apprenticeships.<sup>84</sup> However, recently, there has been some information on the history of ayahuasca that has come to light. Harmaline was first isolated from Syrian rue seeds in 1841.<sup>85</sup> The first Western record of the effects of the *B. caapi* plant was made in 1852.<sup>86</sup> This information led to Western knowledge of how the plants used in the brew work and what chemicals they contain. In 1922 and 1923, a film was created showing traditional yage ceremonies. The film was shown during the annual American Pharmaceutical Association meeting.<sup>87</sup> In the late twentieth century, many North Americans and Europeans who had traveled to South America eventually created a new "entheotourism" because

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<sup>83</sup> *More about Ayahuasca*, ICEERS INTERNATIONAL CENTER FOR ETHNOBOTANICAL EDUCATION RESEARCH & SERVICE, <http://iceers.org/more-about-ayahuasca.php?lang=en#.VGMKssmGcQi> (last visited on Dec. 9, 2014).

<sup>84</sup> Andrea Minarcek, *Adventure Guide:Peru*, NAT'L GEOGRAPHIC, at 2, <http://www.nationalgeographic.com/adventure/0603/features/peru.html> (last visited Dec. 10, 2014).

<sup>85</sup> The chemical/alkaloid which is a key component found in non DMT containing plant used in the brew that is used in combination with the DMT holding plant, to make the hallucinogenic effect of the tea possible.

<sup>86</sup> *Ayahuasca Basics*, THE VAULTS OF EROWID, (Jan 31, 2013) [http://www.erowid.org/chemicals/ayahuasca/ayahuasca\\_basics.shtml](http://www.erowid.org/chemicals/ayahuasca/ayahuasca_basics.shtml) (last visited Dec. 10, 2014).

<sup>87</sup> *Id.*

they created the industry of taking ayahuasca in a very traditional setting.<sup>88</sup> Next, in the late 1990's, South American street vendors started to sell ayahuasca on the streets of South American cities.<sup>89</sup> As previously mentioned, there is not a wealth of written history on this brew, but what is written is rather interesting. This, paired with the fact that most of the information on ayahuasca is held near and dear to the South American shamans, creates an interesting set up for use of ayahuasca and for educating ourselves on the use of this powerful tea.

In order to further understand ayahuasca and its effects, more general information is necessary. Ayahuasca is used for a multitude of reasons. The main uses for ayahuasca are for healing, religious, and spiritual purposes.<sup>90</sup> In order for ayahuasca to work, the individual must first ingest the tea.<sup>91</sup> The amount of tea varies, and increases the more you take the ayahuasca.<sup>92</sup> Like any other psychoactive substance, the effects become more intense as the dosage of ayahuasca increases.<sup>93</sup> The effects can begin anywhere between twenty and sixty minutes after initial ingestion, and different variables, such as food consumption, affect the amount of time it takes for the tea to take effect.<sup>94</sup> Generally speaking, the hallucinations and purge are present for about four to six hours, and after-effects can last anywhere from one to eight hours after consuming the tea.<sup>95</sup> The duration of the effects are not exact and many fac-

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> ICEERS INTERNATIONAL CENTER FOR ETHNOBOTANICAL EDUCATION RESEARCH & SERVICE, <http://iceers.org/more-about-ayahuasca.php?lang=en#.VGMKssmGcQi> (last visited on Dec. 9, 2014).

<sup>91</sup> *Ayahuasca basics*, THE VAULTS OF EROWID (Jan 31, 2013), [http://www.erowid.org/chemicals/ayahuasca/ayahuasca\\_basics.shtml](http://www.erowid.org/chemicals/ayahuasca/ayahuasca_basics.shtml) (last visited Dec. 10, 2014).

<sup>92</sup> MINARCEK, *supra* note 96; AYAHUASCA BASICS, *supra* note 103.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*



tors determine the length of the effects—such as metabolism and dosage, where the higher the dose, the longer the effect.<sup>96</sup> When a person is under the influence of ayahuasca, a range of different things can happen. It really is a subjective experience.<sup>97</sup> “Ayahuasca provokes a profound state of altered consciousness...allowing people to move beyond their defense mechanisms into the depths of their unconscious minds. ...”<sup>98</sup> “You can come back with images, messages, even communications...you’re learning about yourself, re-conceptualizing prior experiences. Having a profound psycho-spiritual epiphany, you’re not the same person you were before.”<sup>99</sup> These visions and distortions that a person feels and sees when on ayahuasca are very interesting. “The unconscious mind holds many things you don’t want to look at. All those self-destructive beliefs, suppressed traumatic events, [and] denied emotions.”<sup>100</sup> Ayahuasca has the ability to, quite literally, put someone through a kind of personal hell where the person is actually forced to face his or her past and/or present demons.<sup>101</sup>

When one takes ayahuasca, it is something that is meant to be very spiritual and ritualistic. It is not something you just take. There are several steps to the ayahuasca journey that are completed before the actual consumption of the tea. The rituals and the way the ayahuasca ceremony is practiced may vary from shaman to shaman and region to region. But generally, some of the rituals that are practiced are: the making of the tea, starting the ceremony at dark, the shaman facing east, a collec-

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<sup>96</sup> *Id.*

<sup>97</sup> Hoffmann, Hesselink & Barbosa, *Effects of a Psychedelic, Tropical Tea, Ayahuasca, on the Electroencephalographic (EEG) Activity of the Human Brain During a Shamanistic Ritual*, [XI] MAPS BULL. SPRING 25, 27-28 (2001), available at <http://maps.org/newsletters/v11n1/pdf/11125hof.pdf> (last visited Dec. 10, 2014).

<sup>98</sup> MINARCEK, *supra* note 96

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

tion of sacred stones and objects placed in front of the shaman who is sitting in the middle of the room, guests surrounding the shaman, each with his or her own purge bucket, and the maestro or shaman singing icaros.<sup>102</sup> These icaros call the spirits to the ceremony. The shaman then will pour and pass out the tea to each person individually.<sup>103</sup> As the ceremony progresses, the shaman continues to sing icaros and shakes a chakapas.<sup>104</sup> During the ceremony, an person may be individually blessed by the shaman, and when the ceremony ends, a candle is lit and everyone is free to discuss what just happened.<sup>105</sup>

One interesting aspect of taking ayahuasca is the concept of the purge. The purge is when a person who consumes the tea starts vomiting. One shaman stated, "What we vomit during the ceremony is the physical manifestation of dark energy and toxins being purged from the body. The more that comes out, the better."<sup>106</sup> This purging effect is part of every ceremony, and is often called "la purga".<sup>107</sup> The purge is something the shaman sees as beneficial. It is said that the vomiting is actually the plants conducting healing within a person.<sup>108</sup> It has also been said that the negative energy is purged out of one's body, which gives him or her new, positive energies flowing through the body.<sup>109</sup> Another important aspect of the ceremonies, and something that helps with the purge, is the strict diet to which

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<sup>102</sup> Icaros are songs sung by shamans, who say they have been taught these songs by plant spirits; these are used to heal and protect. THE WAY INN, <http://www.thewayinn.com/ayahuasca-ceremony-what-to-expect/> (last visited Dec. 10, 2014).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *La Purga*, TRADITIONAL PLANT MEDICINE, [http://www.traditionalplantmedicine.com/la\\_purga.html](http://www.traditionalplantmedicine.com/la_purga.html) (last visited on Dec. 10, 2014).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

participants must adhere before the ceremonies, allowing the ayahuasca to work to its fullest potential.<sup>110</sup>

When a person ingests the ayahuasca brew and the visions begin, it is due in part to the dimethyltryptamine (“DMT”) in the brew. DMT-containing plants are used in the ayahuasca to allow the visions to occur and to enhance the visions with more color and depth.<sup>111</sup> DMT is a rather interesting chemical, and, in fact, is a chemical for which our bodies and nervous system are wired.<sup>112</sup> It has also been said that DMT may be the common language between all living beings, because all living things are wired to DMT.<sup>113</sup> One of the basic features of DMT is its ability to expand awareness and better our lives.<sup>114</sup> The fact that DMT is the visionary component of ayahuasca may explain why ayahuasca has the capability of getting people back in touch with plants, animals, and Mother Nature. By using DMT and DMT-containing substances, a person is able to reach different levels of consciousness, which may, in fact, help with problems the person has to deal with.<sup>115</sup> Terrance McKenna once stated that the combination of ayahuasca and DMT is an “ultimate metaphysical reality pill.”<sup>116</sup> If the DMT in ayahuasca is the “ultimate metaphysical reality pill,” it is easy for one to understand why there may be such controversy over the use of ayahuasca and other DMT-containing substances, given that they allow for a person to find an altered state of consciousness and reflect on what he or she experience while in another realm.

One reason there has been legal controversy involving the use of ayahuasca is because DMT is one of its main compo-

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<sup>110</sup> *Id.*

<sup>111</sup> AYAHUASCA BASICS, *supra* note 103

<sup>112</sup> DMT: THE SPIRIT MOLECULE (Spectral Alchemy & Synthetic Pictures 2010).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

nents. The central legal question regarding ayahuasca use is whether it is a controlled substance under the Controlled Substances Act.<sup>117</sup> The Controlled Substances Act prohibits the unauthorized possession of drugs that the United States Government has determined to be dangerous, inappropriate without a prescription, and/or habit-forming.<sup>118</sup> Under the Controlled Substances Act, "Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15."<sup>119</sup> Under this same act Schedule I is defined as:

substances, or chemicals that are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote.<sup>120</sup>

Just to explain the differences within the schedules of drugs, here is how the Controlled Substances Act defines Schedule II drugs:

Schedule II drugs, substances, or chemicals are defined as drugs with a high potential for abuse, less abuse potential than Schedule I drugs, with use potentially leading to severe psychological

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<sup>117</sup> Controlled Substances Act, 21 U.S.C. § 812.

<sup>118</sup> *Controlled Substance Law*, HG.ORG, <http://www.hg.org/control.html> (last visited Dec. 10, 2014).

<sup>119</sup> Controlled Substance 2 C.F.R. § 182.610 (2011).

<sup>120</sup> *Drug Schedules*, U.S. DEPARTMENT OF JUSTICE, <http://www.dea.gov/druginfo/ds.shtml> (last visited Dec. 10, 2014).

or physical dependence. These drugs are also considered dangerous. Some examples of Schedule II drugs are: cocaine, methamphetamine, methadone, hydromorphone (Dilaudid), meperidine (Demerol), oxycodone (OxyContin), fentanyl, Dexedrine, Adderall, and Ritalin.<sup>121</sup>

On the other end of the spectrum from Schedules I and II drugs are Schedules IV and V, which have been deemed the lowest risk. The definition of Schedule IV is, “[ . . . ] drugs with a low potential for abuse and low risk of dependence. Some examples of Schedule IV drugs are: Xanax, Soma, Darvon, Darvocet, Valium, Ativan, Talwin, Ambien.”<sup>122</sup>

The Controlled Substances Act is what controls federal drug laws and punishments. This is important in relation to ayahuasca because of the plant components in ayahuasca that contain DMT.<sup>123</sup> Because DMT is considered a Schedule I drug, it is illegal in the United States.<sup>124</sup>

The controversial issue is that the Drug Enforcement Administration, the Food and Drug Administration, and the Federal Government have not explicitly stated that ayahuasca is illegal, nor have they categorized ayahuasca into a schedule of drugs.<sup>125</sup> So, although DMT is illegal, there is a gray area in determining whether ayahuasca as a whole is illegal. In fact, one United States Supreme Court case asked the question, “Can ayahuasca be imported, possessed, and consumed for re-

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> This substance is listed under schedule I and has a DEA number of 7435, it is not designated as a narcotic. *available at* [http://www.deadiversion.usdoj.gov/schedules/orangebook/c\\_cs\\_alpha.pdf](http://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf).

<sup>124</sup> *Id.*

<sup>125</sup> BODAMER, *supra*, note 75, at 1323.

ligious purposes in the United States under the Religious Freedom Restoration Act?”<sup>126</sup> The Court gave a unanimous opinion in this case, allowing the União do Vegetal (“UDV”)<sup>127</sup> church to use ayahuasca tea for its religious purposes and enjoining the government from criminalizing use of the tea. This opinion stated, “We conclude that the Government has not carried the burden expressly placed on it by Congress in the Religious Freedom Restoration Act, and affirm the grant of the preliminary injunction.”<sup>128</sup> This decision was based on the government’s evidence that hoasca,<sup>129</sup> or DMT, can cause “psychotic reactions, cardiac irregularities, and adverse drug interactions.”<sup>130</sup> The UDV church presented evidence in opposition:

...citing studies documenting the safety of its sacramental use of hoasca<sup>131</sup> and presenting evidence that minimized the likelihood of the health risks raised by the Government. With respect to diversion, the Government pointed to a general rise in the illicit use of hallucinogens, and cited interest in the illegal use of DMT and hoasca in particular; the UDV emphasized the thinness of any market for hoasca, the relatively small amounts of the substance imported by the church, and the absence of any diversion problem in the past.<sup>132</sup>

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<sup>126</sup> *Gonzales v. Vegetal*, 546 U.S. 418 (2006).

<sup>127</sup> *Id.* at 425.

<sup>128</sup> *Id.* at 423.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 426.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

The fact that the Supreme Court approved the use of ayahuasca in the United States for religious purposes creates even more of a gray area for the law involving ayahuasca.<sup>133</sup>

Across the world, the laws relating to ayahuasca use are rather vague as well. In many South American countries, the use of ayahuasca is legal.<sup>134</sup> In Brazil in the 1980s, for example, the Supreme Court specifically allowed for the use of ayahuasca for religious purposes.<sup>135</sup> France, in fact, is the only country that has outright prohibited the use of ayahuasca.<sup>136</sup> It should be noted that the use of ayahuasca and other DMT-containing plants is not under international control.<sup>137</sup> Ayahuasca is not found on the International Narcotics Control Board list of international controlled substances.<sup>138</sup> The use of ayahuasca and its legality is ultimately a decision for the countries' legislative bodies. There is a significant gap in the law regulating the use of ayahuasca in the United States and internationally.

Ayahuasca is a fascinating substance and it is interesting to see what effects it has on a person's mind and body. It is something that many have said has benefits to individuals, which is why this article focuses on what ayahuasca is, to see how it may work in drug courts in the United States. There are gray areas, which can lead to potential issues in trying to implement ayahuasca into the court system and into treatment

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<sup>133</sup> The U.S. Court of Appeals for the Ninth Circuit has also affirmed that the Santo Daimé Church is free to use ayahuasca for religious purposes as well. *Ayahuasca*, MULTIDISCIPLINARY ASSOCIATION FOR PSYCHEDELIC STUDIES, <http://www.maps.org/research/ayahuasca> (last visited Dec. 10, 2014).

<sup>134</sup> *Id.*

<sup>135</sup> AYAHUASCA BASICS, *supra* note 103.

<sup>136</sup> *Id.*

<sup>137</sup> *More about ayahuasca*, ICEERS INTERNATIONAL CENTER FOR ETHNOBOTANICAL EDUCATIONAL RESEARCH & SERVICE, <http://iceers.org/more-about-ayahuasca.php?lang=en#.VHwUw8kWnh8> (last visited on Dec. 9, 2014).

<sup>138</sup> *Id.*

programs. But, if it can be done, it will be beneficial to the people who struggle primarily with drug and alcohol addictions.

## VI. HOW AYAHUASCA AND DRUG COURTS SHOULD MERGE

The purpose of this paper is to demonstrate that, although drug courts in the United States do help curb recidivism and help with some substance abuse issues, there is still a genuine need for better and more innovative treatment options. Implementing ayahuasca into drug courts as a potential treatment option is an innovative method for helping substance abusers reach long term sobriety and reduce the chance of recidivism associated with drug use.<sup>139</sup> Implementing ayahuasca into drug courts does have its problems and setbacks, which will be addressed, but overall, using ayahuasca to help with drug addiction seems to be a positive choice.<sup>140</sup>

This section will first address the potential setbacks in implementing ayahuasca into drug court treatment programs. The major impending setback with ayahuasca in drug courts is the

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<sup>139</sup> Some examples of criminal activity that is associated with drug use include but are not limited to: burglary, robbery, fraud/forgery, weapons offenses, public/peace disturbance, assault, prostitution, sex offenses, and family offenses. FACT SHEET: DRUG-RELATED CRIME, BUREAU OF JUSTICE STATISTICS 2 (1994) available at <http://www.bjs.gov/content/pub/pdf/DRRC.PDF> (last visited on 12/9/14).

<sup>140</sup> In a recent study done in Canada titled, *Ayahuasca-Assisted Therapy for Addiction: Results from a Preliminary Observational Study in Canada* conducted by Gerald Thomas, Philippe Lucas, N. Rielle Capler, Kenneth W. Tupper and Gina Martin, it was stated, "The findings of this research on ayahuasca-assisted treatment for addictions, although preliminary, corroborate those of previous studies showing salutogenic effects of ceremonial ayahuasca drinking." [http://maps.org/research-archive/ayahuasca/Thomas\\_et\\_al\\_CDAR.pdf](http://maps.org/research-archive/ayahuasca/Thomas_et_al_CDAR.pdf) at 10 (last visited Dec. 9, 2014).



legal status of ayahuasca itself.<sup>141</sup> The next major issue that this proposal faces is the fact that, although some research has been completed on ayahuasca and its use for addiction treatment, there is simply not enough research and information to conclusively state that ayahuasca can help with addiction.<sup>142</sup> In fact, there is a very limited amount of research on ayahuasca and its effects. In 2012, the Multidisciplinary Association for Psychedelic Studies (“MAPS”)<sup>143</sup> funded a research study in Canada, which looked at the use of ayahuasca-assisted therapy for addiction. This study and its results were the first North American observational study of both the long-term effectiveness and safety of this form of treatment.<sup>144</sup> On an international level, MAPS has supported researchers who “have been exploring the effects of ayahuasca on brain function as well as the potential use of ayahuasca-assisted therapy as treatment for substance abuse and other disorders.”<sup>145</sup> It is clear that research on this topic is progressing, however, as stated, there is not enough substantive material to directly conclude that this substance should be used for addiction treatment. Therefore, the lack of research is one of the biggest obstacles for this specific type of treatment integration.<sup>146</sup> Another obstacle to overcome is dealing with those who are in opposition to this concept. The argument has been made that using a drug to treat substance abuse is not the best method. Another argument is that because this is a Schedule I drug, it has addictive properties. These points should be kept in mind as research

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<sup>141</sup> This status has already been discussed in detail in the ayahuasca section of this paper, and therefore will only briefly be mentioned for the purpose of noting its relevance as a setback to the implementation of ayahuasca in drug courts.

<sup>142</sup> *Id.* at 10.

<sup>143</sup> MULTIDISCIPLINARY ASSOCIATION FOR PSYCHEDELIC STUDIES, <http://maps.org/research/ayahuasca> (last visited Dec. 14, 2014).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

moves forward, but from already conducted research, it seems these arguments lack merit.

Overall, there are three major obstacles to overcome in order to implement ayahuasca into drug courts: the legal status, the lack of research, and the arguments that can be made by opponents of the substance. Even with these obstacles, the movement toward this idea becoming a reality is not far-fetched. The recent Supreme Court case allowing the use of ayahuasca in the United States for limited purposes is a big step forward.<sup>147</sup>

Although there are setbacks to the possibility of adding ayahuasca to drug court treatment programs, there is a great deal of material that shows the positive effects this substance can have on a person who is using it, specifically as it relates to combating addiction/substance abuse issues. In recent research conducted in Canada, "Preliminary research [to the research conducted in their study] has shown ayahuasca has promise for alleviating some mental disorders and for providing other long-term health and social benefits among regular drinkers of the brew in ritualized and religious community contexts."<sup>148</sup> It has also been stated from past research, that "[T]he ritual use of ayahuasca does not typically produce health or psychosocial problems such as addiction. Rather ceremonial ayahuasca drinking has been correlated with lower amounts or severities of substance dependence."<sup>149</sup> To further aid the discussion on whether ayahuasca has a positive effect on treating addictions, there is a record of programs in South America that

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<sup>147</sup> *Supra* note 139

<sup>148</sup> *Id.* at 1-3. The emphasis on ritualized use of ayahuasca is important to this paper, for the fact that part of this proposal is to emphasize the use of the ayahuasca in the most authentic ways possible. Conducting the procedure to the use of ayahuasca in the way that it is conducted in the originating regions, with the use of a shaman, the proper dietary restrictions, etc. This proposal is in no way stating that this substance should be used in any way that is not authentic to its origins.

<sup>149</sup> *Id.*

specifically deal with ayahuasca as a remedy for people to overcome drug addictions.<sup>150</sup> The locations using ayahuasca as a “fundamental aspect of treatment programs” integrate ayahuasca with complementary psycho-social rehabilitation methods,<sup>151</sup> which are very similar to what is being offered as a solution in the United States.

Not only are there programs similar in concept to that of this proposal, but it has also been stated that, “[C]urrent approaches to treating addictions—especially to alcohol and cocaine—continue to be of limited success, despite decades of research.”<sup>152</sup> This information, paired with the statistics in the drug court section of this paper, demonstrates that a new call to action is necessary to help further the ultimate goals of the problem solving and drug courts—helping with substance abuse issues, reducing crime associated with drug use, and cutting down the recidivism rate amongst drug offenders.

In addition to the research that has been done on ayahuasca and how it may be able to help with addiction, it is important to understand how the people who have used ayahuasca for substance abuse help feel about their experiences. The participants in the Canadian study cited above made the following statements regarding their experiences:

With my last experience with ayahuasca, I really faced myself. Like, my fear, my anger. Which really, I think is a big part of my addictions. Like, running away from myself pretty much. And I think I overcame that in the ceremonies. That was a pretty big deal for me...I wish I was introduced to it [ayahuasca] like

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<sup>150</sup> *Id.* at 2.

<sup>151</sup> *Id.* at 2.

<sup>152</sup> *Id.*

twenty years ago. It could have saved me a lot of time and trouble.—S1 (male, age 30).<sup>153</sup>

...

Before the ceremony I was struggling with my addiction, crack cocaine, for many years. And when I went to this retreat [ayahuasca research retreat], it more or less helped me release the hurt and pain that I was carrying around and trying to bury that hurt and pain with drugs and alcohol. Ever since this retreat I've been clean and sober. So it had a major impact on my life in a positive way... —S2 (female, age 41).<sup>154</sup>

...

No cravings whatsoever for the crack cocaine or drinking, whatsoever. It's pretty strong that ayahuasca as far as removing that craving, that desire, that habit, or however you want to describe it, for me it's not even there. —S3 (male, age 56).<sup>155</sup>

All of these people had similar experiences with ayahuasca that made them realize where their substance abuse issue may have come from, and they no longer had a craving to use drugs. These testimonials are encouraging for the potential future use of ayahuasca in drug courts. Another interesting testimonial, which spoke specifically to reasons ayahuasca may be a better treatment choice for substance abuse than the average program offered, was S8's statement, which noted:

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<sup>153</sup> *Id.* at 8.

<sup>154</sup> *Id.* at 9.

<sup>155</sup> *Id.*

Other treatments [for my addiction] sort of like scraped the surface as they say. This one got deep, deep into myself, which I've never admitted to or confronted I guess you could say in the other treatments. And this was just a mind-bending experience...—S8 (male, age 55).<sup>156</sup>

This statement is another strong testament to how this substance may be used to help people to achieve the goals the drug courts have set forth.

Even though there are obstacles to overcome, there is evidence demonstrating the success of ayahuasca with substance abuse issues and being a valuable asset to drug treatment programs. With the evidence shown in this article, one can make a strong claim in favor of adding ayahuasca-assisted drug treatment programs into drug courts in America. It is clear that obstacles need to be overcome before the actual implementation of a treatment program like this, but overall, it would be a great way to achieve multiple goals at one time.

Recommendations in implementing this type of program are as follows: (1) Make sure to stay authentic to the ceremonies performed in the Amazon region, where ayahuasca originated; (2) Follow all procedures leading up to the ceremonies (e.g., adhering to the strict cleansing diet); (3) Make sure the shaman performing the ceremony has the experience and training necessary to give participants the correct experience to allow for proper healing through the use of ayahuasca's powers; (4) Perform the ceremony in a controlled environment; (5) Create a set of guidelines to ensure safety; (6) Do not force anyone to participate. Instead, offer this option only to those whom the program would benefit and let each person make his or her own decision; (7) Provide for proper training and education on this type of program for all drug court personnel; and

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<sup>156</sup> *Id.*

(8) Allow for anyone feeling uncomfortable during the program to cease participation at his or her own will.

## VII. CONCLUSION

Think back to the beginning of this article and the concept of therapeutic jurisprudence. Remember that “therapeutic jurisprudence is the ‘study of the role of the law as a therapeutic agent.’ It focuses on the law’s impact on emotional life and on psychological well-being.”<sup>157</sup> Problem solving courts, specifically drug courts, come from the same movement as TJ. These courts historically were created to provide a more therapeutic approach to dealing with drug cases, which skyrocketed due to the “war on drugs.” The high level of drug cases flooded the criminal court system, and has been an ongoing issue since the “war on drugs” was waged. Drug courts stemmed from this as a way to provide better treatment programs for people who have been through the criminal system for drug use, and to curb their recidivism. Although recidivism has decreased, due, in part, to drug courts, there is evidence demonstrating that new treatment approaches that fit within the realm of the TJ lens are needed.

One innovative way to provide a new type of treatment that fits in the TJ concept is by implementing ayahuasca. Using ayahuasca in addition to a general treatment program has the potential to affect the lives of drug users in an incredible way. We saw testimonials regarding how helpful ayahuasca can be in curbing the use of drugs. Drug courts are a wonderful way of helping people who suffer from substance abuse problems deal with the underlying issues these people are facing, causing them to make the choices they do. Drug courts help find new ways to improve people’s lives, change the habit of using

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<sup>157</sup> Bruce J. Winick, *International Network on Therapeutic Jurisprudence*, THE WILDCAT <http://www.law.arizona.edu/depts/upr-intj/> (last visited on Dec. 10, 2015).

drugs, and find a resolution. This paper has suggested a new means of achieving the goals of the drug courts in a therapeutic way by using ayahuasca as a form of treatment. There is a lot of work to be done on the legal and research side of ayahuasca, however, the future looks promising.





## THERAPEUTIC JURISPRUDENCE: A NOVEL APPROACH

Alexandra Connelly\*

“Books are the quietest and most constant of friends; they are the most accessible and wisest of counselors, and the most patient of teachers.”--Charles William Eliot<sup>1</sup>

### I. INTRODUCTION

Each civilization that has enjoyed an enduring position in history has literature as its foundation. Literature, in its most basic form, is the recordation of humankind’s accomplishments in all areas that promote societal advancement and learning. Whether the sciences, the arts, or the language of math defines any given society, literature has been the mainstay. In any civilized society, jurisprudence has played a significant role in its orderly and systematic development. Literature has provided the bridge for differing views and opinions to be shared for a common good. Rehabilitation in the criminal justice system, probably the single most important aspect of a society based upon laws, is achieved through the sharing and dissemination of values and knowledge recorded over the centuries. Book clubs provide an effective setting for learning to address and improve upon one’s past, and introspection for the individual seeking to rejoin society. Therapeutic jurisprudence is the “study of the role of the law as a therapeutic agent.”<sup>2</sup> The ther-

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\* Arizona Summit Law School, Juris Doctor (J.D.), December 2015.

<sup>1</sup> GOOD READS, <http://www.goodreads.com/quotes/769-books-are-the-quietest-and-most-constant-of-friends-they> (last visited Mar. 28, 2015).

<sup>2</sup> David B. Wexler & Bruce J. Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence*, INT’L NETWORK ON THERAPEUTIC JURIS., <http://www.law.arizona.edu/depts/upr-intj/intj-o.html>. (last visited Mar. 24, 2015).

apeutic value of the mutual sharing of literature in all its forms is evident in the decreased incidence of recidivism in the penal system.

## II. ALTERNATIVE TO INCARCERATION—CHANGING LIVES THROUGH LITERATURE

Changing Lives Through Literature (“CLTL”) began in 1991 in Lowell, Massachusetts.<sup>3</sup> University of Massachusetts Dartmouth English professor Robert Waxler, Superior Court Judge Robert Kane, and probation officer Wayne St. Pierre created CLTL because they felt there was a need within the criminal justice system to find alternatives to incarceration.<sup>4</sup> CLTL is for repeat offenders in the criminal justice system.<sup>5</sup> Additionally, the CLTL seminars or meetings are similar to college-level literature courses.<sup>6</sup> Professor Waxler believes that “prisoners are so often bright, but they have been so marginalized that they feel no one listens to them. They have no voice. In the discussions (of the literature), finally, they have a

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<sup>3</sup> Joseph Sullivan, *Changing Lives Through Literature Program Recognized for Significant Contribution to Criminal Justice Field*, UNIV. OF MASS DARTMOUTH, Sept. 30, 2014, [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=3457](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=3457).

<sup>4</sup> *Id.*

<sup>5</sup> Mike Cernovich, *Changing Lives Through Literature program recognized for significant contribution to Criminal Justice field*, CRIME AND FEDERALISM L. BLOG (Dec. 11, 2005), [http://federalism.typepad.com/crime\\_federalism/2005/12/changing\\_lives\\_.html](http://federalism.typepad.com/crime_federalism/2005/12/changing_lives_.html).

<sup>6</sup> Deborah Becker, *Literature Class Helps Young People on Probation Build New Relationships and Lives*, 90.9 WBUR BOSTON'S NPR NEWS STATION, Feb. 4, 2015, <https://www.wbur.org/2015/02/04/changing-lives-through-literature>.

voice.”<sup>7</sup> CLTL “was founded on the philosophy that literature has the power to transform men and woman’s lives. Through connections made with literary characters, individuals gain insight into their lives and behavior, while learning that they are not alone with their problems.”<sup>8</sup> Research has shown that books and poems can affect the way a reader thinks and acts.<sup>9</sup> According to Professor Waxler, it costs about \$500 to send a criminal offender through the CLTL program, compared to \$30,000 to keep that individual in jail for a year.<sup>10</sup> Two years after the program was implemented, forty men had completed the twelve-week program. They discussed books, learned different aspects of themselves, listened to their peers, and increased their ability to communicate ideas and feelings.<sup>11</sup> The members of CLTL discuss fiction, poems, and memoirs.<sup>12</sup> CLTL is not a probation substitution in place of a sentence, but an alternative sentencing program.<sup>13</sup> The judge may send criminal defendants to the program as part of their probation.<sup>14</sup>

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<sup>7</sup> John Hoey, *Changing Lives Through Literature Subject of New Book*, UNIV. OF MASS DARTMOUTH (Nov. 3, 2005), [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=477](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=477).

<sup>8</sup> *Id.*

<sup>9</sup> Elizabeth Snoboda, *The Power of Story*, AEON (Jan. 12, 2015), <http://aeon.co/magazine/psychology/once-upon-a-time-how-stories-change-hearts-and-brains/>.

<sup>10</sup> Robert Waxler, *Changing Lives Through Literature Program Receives \$100,000 From State Legislature*, UNIV. OF MASS DARTMOUTH (Aug. 17, 2006), [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=833](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=833).

<sup>11</sup> *Id.*

<sup>12</sup> Leah Price, *Read a Book, Get Out of Jail*, N.Y. TIMES, Feb. 26, 2009, at BR23.

<sup>13</sup> Maeve Hickok, *NEH Awards Changing Lives Through Literature at University of Massachusetts Dartmouth \$200,000*, UNIV. OF MASS DARTMOUTH, May 14, 2003,

Critics have argued that it is unfair for prisoners to have educational opportunities that involve college professors, judiciary staff, and guest speakers, when victims may not have the same opportunities.<sup>15</sup> Additionally, opponents have said, “books should not be transformed into punishment.”<sup>16</sup> However, according to the U.S. Bureau of Justice Statistics, 2,266,800 adults were incarcerated in federal prisons, state prisons, and county jails at the end of 2011.<sup>17</sup> There is a compelling need for alternatives to incarceration, especially for programs that can help reduce recidivism. Malcolm Young, executive director of the Sentencing Project—a group that studies prison alternatives—believes judges should be cautious when they order criminal defendants to attend CLTL because he believes those who are illiterate will not benefit, but notes that “it is not a criticism, it is a limitation.”<sup>18</sup>

The program has brought a lot of joy to judges who have utilized and witnessed the tremendous change it has had on offenders.<sup>19</sup> Judge Joseph Dever is a judge who witnessed the

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[http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=239](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=239).

<sup>14</sup> Matt Camara, *UMD's Changing Lives Through Literature Resonates Far Beyond South Coast*, SOUTHCOAST TODAY, Sep. 18, 2012, <http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20120918/EDU/209180316/-1/SPECIAL79>.

<sup>15</sup> *Reading to Earn Freedom*, OFF. OF SCHOLARLY PUBLICATION AT GEORGETOWN UNIV. BLOG (Feb. 27, 2009), <http://georgetownbooks.blogspot.com/2009/02/read-book-get-out-of-jail-free.html>.

<sup>16</sup> *Id.*

<sup>17</sup> BUREAU OF JUST. STAT., <http://www.bjs.gov/index.cfm?ty=fua&yr=2015> (last visited Mar. 6, 2015).

<sup>18</sup> William Bole, *Novel Approach to Sentencing Has Criminal Hitting the Books*, AMERICAN NEWS SERVICE, 1997, <http://www.villagelife.org/news/archives/novelapproach.html>.

<sup>19</sup> Yvonne Abraham, *A Different Read on Life*, GLOBE NEWSPAPER, May 12, 2011,

benefits to defendants who participated in CLTL.<sup>20</sup> Judge Dever stated, “inside the classroom, the divide between the law and the lawless falls away. They become a bunch of people talking about stories, people less likely to be at odds on the outside.”<sup>21</sup> CLTL was originally a rehabilitative program for only males, but in 1993, the program was extended to female prisoners.<sup>22</sup> Today, the program has grown into mixed-sex groups and juvenile criminal defendants with adults.<sup>23</sup> Meaghan, a thirty-one-year-old addict who spent ten years in the system for writing false prescriptions, was lucky enough to stand in front of Judge Dever. Judge Dever sentenced her to the book club rather than jail.<sup>24</sup> Meaghan described the book club as an escape from her daily life. She finds herself thinking about the characters in the books during the day.<sup>25</sup> The women in Meaghan’s book club were required to read a book and show up to Middlesex Community College every other Tuesday for fourteen weeks to discuss the book they were reading.<sup>26</sup> The meeting included their probation officers and often a judge.<sup>27</sup> Lyn Lowell was also able to participate in the CLTL program and she said, “the judge, probation officer, and teacher—all authority figures to us—they were all there for us: to listen to us, guide us, and direct us. It was their belief in the

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[http://www.boston.com/news/local/massachusetts/articles/2011/05/12/a\\_different\\_read\\_on\\_life/](http://www.boston.com/news/local/massachusetts/articles/2011/05/12/a_different_read_on_life/).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Hoey, *supra* note 7.

<sup>23</sup> Price, *supra* note 12.

<sup>24</sup> Abraham, *supra* note 19.

<sup>25</sup> Abraham, *supra* note 19.

<sup>26</sup> Abraham, *supra* note 19.

<sup>27</sup> Abraham, *supra* note 19.

program and us that helped me deal with a lot of shame.”<sup>28</sup> Professor Waxler says, “The stories serve as a mirror for everyone, not just offenders—the professors, the probation officers, the judge.”<sup>29</sup> He also stated that he likes to choose books that will resonate with the individuals and that “tackle” issues such as “what does it mean to be a man?”<sup>30</sup>

The program has been adopted in court systems across Massachusetts and in other states, proving to be inexpensive and delivering successful results.<sup>31</sup> Participants of “Changing Lives” reoffend half as often as those who do not participate.<sup>32</sup> In Brazoria County, Texas, between 1997 and 2008, of the 597 people who completed CLTL, only thirty-six (six percent) had their probations revoked and were sent to jail.<sup>33</sup>

The Massachusetts Foundation for the Humanities awarded program assistance to CLTL in 1994 and was funded by the State Legislature of Massachusetts so the program could be implemented into additional courts.<sup>34</sup> Senator Montigny of Massachusetts helped CLTL secure funding in the Senate and said, “lowering recidivism must be a top public safety priority, as it speaks directly to our personal safety and quality of life. Building more prison cells alone has not done enough to make our neighborhoods safer. This program and other creative initiatives, combined with tough anti-crime policies, is the key to

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<sup>28</sup> *Bibliotherapy: Literature as Rehabilitation*, ON PURPOSE BLOG (Aug. 24, 2008), <https://onpurposeumd.wordpress.com/author/onpurposeumd/>.

<sup>29</sup> Price, *supra* note 12.

<sup>30</sup> Camara, *supra* note 14.

<sup>31</sup> Abraham, *supra* note 19.

<sup>32</sup> Abraham, *supra* note 19.

<sup>33</sup> Robin Bates, *Fighting Crime Through The Classics*, BETTER LIVING THROUGH BEOWULF, Aug. 2, 2010, <http://www.betterlivingthroughbeowulf.com/fighting-crime-through-the-classics/>.

<sup>34</sup> Sullivan, *supra* note 3.

a safer society.”<sup>35</sup> Representative Cabral of New Bedford believes, “nearly ever inmate in Massachusetts prisons will eventually be released back into our communities. This program, Changing Lives Through Literature, reduces violent and criminal behavior. This not only helps inmates and their families; it eventually helps us all.”<sup>36</sup>

In 2003, the National Endowment for the Humanities awarded CLTL \$200,000 to develop an interactive website and create a CD that makes the program accessible to judges, probation officers, educators, and students across the world.<sup>37</sup> Professor Waxler believes that the website will foster the creation of new programs and bring awareness to other states about the therapeutic and beneficial results of CLTL on the criminal justice system and society.<sup>38</sup> CLTL is currently being utilized in Connecticut, New York, Maine, Rhode Island, Kansas, Texas, and Arizona.<sup>39</sup>

Professor Waxler received the John R. Manson Carl—Robinson Award on September 30, 2014.<sup>40</sup> This award is presented to an individual in New England that has made a significant contribution in the Criminal Justice field.<sup>41</sup> Nationally, over 4,500 offenders have participated in CLTL. Independent studies have shown that since the implementation of CLTL,

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<sup>35</sup> John Hoey, *Changing Lives Through Literature Included in State Budget*, UNIV. OF MASS. DARTMOUTH, Sept. 12, 2005, [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=453](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=453).

<sup>36</sup> *Id.*

<sup>37</sup> John Hoey, *Changing Lives Through Literatures Programs Receives \$20,000 Grant from Coolidge Family Fund of The Boston Foundation*, UNIV. OF MASS DARTMOUTH, Mar. 19 2007, [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=1287](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=1287).

<sup>38</sup> Hickok, *supra* note 13.

<sup>39</sup> Sullivan, *supra* note 3.

<sup>40</sup> Sullivan, *supra* note 3.

<sup>41</sup> Sullivan, *supra* note 3.

there has been a dramatic reduction in recidivism rates and decreased violent behavior.<sup>42</sup> Studies have demonstrated that CLTL reduces recidivism rates by as much as half.<sup>43</sup> National publications such as *The Humanist* and the *National Catholic Reporter* have praised CLTL for the positive impact the program is having on society.<sup>44</sup> Professor Waxler said, "Changing Lives Through Literature Program is a wonderful testimony to the power of literature to change lives. Over the years, CLTL has saved the Commonwealth millions of dollars by keeping people out of jail and helping to make people into productive citizens and taxpayers."<sup>45</sup>

### III. GINA'S TEAM

Sue Ellen Allen is a speaker, an educator, an activist, and the author of *The Slumber Party From Hell*, a memoir of life in prison. She was sentenced to Perryville Prison in 2002 for business fraud while battling cancer.<sup>46</sup> There, she met Gina Panetta, a twenty-five year old who would forever impact Allen's life.<sup>47</sup> Although Panetta was less than half Allen's age, they spent six "emotional, enlightening, intense months" together as roommates at Perryville.<sup>48</sup> Panetta became Allen's roommate and caregiver while Allen was receiving chemother-

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<sup>42</sup> Robert Lamontagne, *University of Mass Dartmouth's Robert Waxler Brings Secret of Rehabilitations to Boston Book Festival*, UNIV. OF MASS DARTMOUTH, Oct. 27, 2012, [http://www1.umassd.edu/communications/articles/showarticles.cfm?a\\_key=3057](http://www1.umassd.edu/communications/articles/showarticles.cfm?a_key=3057).

<sup>43</sup> Waxler, *supra* note 10.

<sup>44</sup> Hoey, *supra* note 7.

<sup>45</sup> Waxler, *supra* note 10.

<sup>46</sup> SUE ELLEN ALLEN, *THE SLUMBER PARTY FROM HELL* 5-6 (2010).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



apy treatments.<sup>49</sup> They shared a mutual love for writing and talked about writing a book together one day.<sup>50</sup>

Four months after Panetta and Allen met, Panetta collapsed and was taken to the nurse.<sup>51</sup> Day after day, Panetta weakened.<sup>52</sup> Panetta told medical that she felt like she was swallowing glass, that her gums were bleeding, and that her head hurt so badly that she felt as if it was going to explode.<sup>53</sup> Panetta also lost fifteen pounds and turned from tan to gray.<sup>54</sup> Panetta's condition continued to worsen and the prison finally took her to the hospital.<sup>55</sup> Doctors told Panetta's parents, "[her] white blood cell count was 300,000 and her red blood cell count was zero."<sup>56</sup> (The average range for a white blood cell count is 4,300 to 10,800 cells per micro liter per cubic millimeter. The average range for red blood cell count is 4.2 to 6.9 million per micro liter per cubic millimeter.)<sup>57</sup> Panetta was in agonizing pain because her body was shutting down.<sup>58</sup> On June 19, 2003, two months after her first collapse at Perryville Prison, Panetta died of an undiagnosed acute myeloid leukemia.<sup>59</sup> Panetta had become like a daughter to Allen, and after her passing, Allen was determined to make a difference in the criminal justice system.

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<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 15.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 16.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

## IV. ATHENA INTERNATIONAL

Athena International is a nonprofit organization founded in 1982, by Martha Mayhood Mertz, that seeks to develop, support, and honor women leaders.<sup>60</sup> Mertz wanted to create a program that would inspire women to reach their full potential. She was convinced, “if women’s strengths and contributions as leaders were publicly acknowledged, they could no longer be dismissed.”<sup>61</sup> Athena International is now a global movement, strengthening women worldwide to reach their best potential.<sup>62</sup> As Mertz noted in a leadership conference:

[T]hink about Rosa Parks, who from authenticity of her core, refused once again, to go to the back of the bus. Consider Mother Theresa who expressed her leadership by the touch of her hand, by the healing of her voice, by the power of her presence—always giving hope. These are but two examples, albeit great examples, of women’s ways of leading that have changed the world.<sup>63</sup>

The Athena Leadership Model consists of eight principles of enlightened leadership: Live Authentically, Lean Constantly, Advocate Fiercely, Act Courageously, Foster Collaboration, Build Relationships, Give Back, Celebrate.<sup>64</sup> Mertz believes that these personal traits, accompanied with strong traditional leadership such as taking risks, assertiveness, and hard work, prepare women to be successful leaders in their community

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<sup>60</sup> ATHENA INTERNATIONAL, <http://www.athenainternational.org/history.aspx> (last visited Mar. 30, 2015).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

and help make a difference, not only in their lives, but in others' lives as well.<sup>65</sup>

#### V. IMPLEMENTATION INTO PERRYVILLE PRISON

After Panetta's passing, Sue Ellen Allen became inspired to make a difference in the prison system. She had witnessed a young life taken too soon and felt that she was meant to meet Gina. One of Sue Ellen's mottos is, "Been there. Done that. Now, how can I help?"<sup>66</sup> Allen learned that fifty percent of all inmates have less than an eighth grade education and one in twenty-eight children in America have a parent in prison.<sup>67</sup> As a University of Texas at Austin graduate, Allen was an educator and learned how to use her experience in prison to make a difference.<sup>68</sup> Upon Allen's release six years ago, she cofounded Gina's Team with Panetta's parents.<sup>69</sup> Based on the CLTL program, almost twenty years ago Gina's Team gained approval for Book Club at Perryville to be composed of the graduates from the Athena classes.<sup>70</sup> The program's purpose was to provide education to the incarcerated and continuing educational experiences for those who are reintegrating into the community upon release from prison.<sup>71</sup> Book Club is currently held once a month, but only on particular yards.<sup>72</sup> Once the book has been discussed on the yard, the books are passed to one of the other

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<sup>65</sup> *Id.*

<sup>66</sup> SUE ELLEN ALLEN, <http://www.sueellenallen.com/home.html> (last visited Apr. 10, 2015).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> GINA'S TEAM, <http://www.ginasteam.org/about.html> (last visited Apr. 10, 2015).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

three yards for their club.<sup>73</sup> Gina's Team provides a facilitator for each meeting from community volunteers.<sup>74</sup> The books the women read for Book Club are generously donated from Jessica's Operation Orange, Dog-Eared Pages, Penguin Books, and volunteers.<sup>75</sup> Allen reached out to Martha Mertz and asked if she could help implement the Athena Program behind prison walls.<sup>76</sup> In 2011, they began their mission to educate inmates and teach them to become leaders and make a difference.<sup>77</sup> Athena currently holds its program three times a year at Perryville, and the program is composed of a six-week course based on the Eight Principles of Leadership.<sup>78</sup> There are regular guest speakers who speak to the women on a variety of subjects to inspire and motivate them, such as "Olympic Gold Medalist Misty Hyman, Arizona legislators Cecil Ash and Kyrsten Sinema, playwrights Linda and John King, award winning business owner Rochelle Balach, international songwriter Raúl Monreal, and author and founder of the international Athena Award, Martha Mertz."<sup>79</sup> The Athena program graduated its tenth class in August of 2014 and started its eleventh class in September of the same year.<sup>80</sup> To date, there have been 460 graduates. Two hundred and twenty-three graduates have been released, and, of those, only eight have returned—a five percent recidivism rate. The state and federal recidivism rate is sixty percent.<sup>81</sup> Allen believes, "education, not incarceration, is the cheapest form of crime prevention."<sup>82</sup>

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

The women at Perryville believe the Athena program has helped them become better people.<sup>83</sup> It has taught them the importance of being a leader and standing up for what is right.<sup>84</sup> Athena's guest speakers have encouraged the women to work hard and get their lives on the right track.<sup>85</sup>

#### VI. EDUCATIONAL PROGRAMS WILL LEAD TO EMPLOYMENT

During a visit to the Perryville book club on February 10, 2015, four of the ten women stated that they were avid readers prior to joining the club at Perryville.<sup>86</sup> Many of the women said that if they did not know a word in the book they were reading, they would look it up in the dictionary. As a result, they felt that their vocabulary had grown tremendously.<sup>87</sup>

During another meeting on March 9, 2015, "Jersey" stated that she had been inspired to become an editor.<sup>88</sup> She told the group that she catches mistakes all the time while reading.<sup>89</sup> Jersey and her friend Amanda, who was a part of the club that evening, said they both enjoyed reading epic fantasy novels.<sup>90</sup> They even began discussing writing a book together and having it published when they were released.<sup>91</sup> Jersey noted that she had two empty journals and even though she had not written in them, she decided to do so after deciding to become an editor.<sup>92</sup> The women were all thinking about what they would do after Perryville and discussed how reading has motivated

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<sup>83</sup> Interview with Perryville Prisoners, in Phx., Ariz. (Feb.10, 2015).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Interview with Perryville Prisoners, in Phx., Ariz. (Mar. 9, 2015).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

them to secure stable jobs.<sup>93</sup> The prison walls broke down within an hour and the women had twinkles in their eyes as they discussed their futures.

Education is one of three components most frequently cited as a key to reducing recidivism.<sup>94</sup> For example, Angel, who is incarcerated at Perryville, has received two Associate degrees while serving her twelve-year sentence.<sup>95</sup> Lynda, also incarcerated at Perryville, received a scholarship to take classes through the Black Stone program and received her paralegal degree.<sup>96</sup> Substance abuse treatment and employment services are the other two components.<sup>97</sup> Lise McKean, Ph.D., and Charles Ransford worked for the Center for Impact Research and discussed current strategies for reducing recidivism.<sup>98</sup> They believed that if educational programs were more accessible to those incarcerated—potentially by increased capacity in the classrooms and fewer enrollment restrictions—recidivism would be reduced substantially.<sup>99</sup> Researchers claimed, “given the low levels of educational attainment among prisoners, the need for educational and vocational programs is high. However, access and availability are limited. Increasing enrollment in these programs would improve the employability of participants upon release.”<sup>100</sup>

Education gives released inmates a sense of accomplishment and self-efficacy.<sup>101</sup> Nyda, a student of CLTL, described

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<sup>93</sup> *Id.*

<sup>94</sup> Lise McKean & Charles Ransford, *Current Strategies for Reducing Recidivism*, CENTER FOR IMPACT RES., (Aug. 2004).

<sup>95</sup> Interview, *supra* note 83.

<sup>96</sup> Interview, *supra* note 83.

<sup>97</sup> McKean & Ransford, *supra* note 94, at 4.

<sup>98</sup> McKean & Ransford, *supra* note 94.

<sup>99</sup> McKean & Ransford, *supra* note 94, at 6.

<sup>100</sup> McKean & Ransford, *supra* note 94, at 6.

<sup>101</sup> Lou Marano, *Analysis: Prison Education Cuts Recidivism*, UPI, September 10, 2003.

her experience after reading *To Kill a Mockingbird* as a discussion about the overall theme of justice and not each student's individual crime.<sup>102</sup> Nyda reflected on what she would do with her life in the future. Instead of continuing to break the law, she considered pursuing a career in a profession that would make a difference in people's lives because of what CLTL has done for her.<sup>103</sup>

## VII. READING PROMOTES CREATIVE ACTIVITIES

A majority of the women who are a part of Book Club at Perryville now play instruments because of being a part of the Athena program and Gina's Team.<sup>104</sup> In addition, the women enjoy working in the kitchen and baking dessert for the volunteers.<sup>105</sup> The women find comfort in knitting while discussing the books they are reading.<sup>106</sup> The arts have the ability to draw people together, no matter what age or social dynamic.<sup>107</sup>

*How a Book Club is Helping to Keep Ex-Offenders from Going Back to Jail*, by the Washington Post's Robert Samuels talks about three former District of Columbia inmates, Robert Barksdale (twenty-five), Phil Mosby (twenty-six), and Juan Peterson (twenty-four), who spoke to students in an English class at Eastern High School.<sup>108</sup> Mr. Barksdale tells the class-

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<sup>102</sup> Elizabeth Mehren, *For These Female Offenders, It's Read or Do Time*, L.A. TIMES, Jan. 11, 2001, <http://articles.latimes.com/2001/jan/11/news/mn-11048>.

<sup>103</sup> *Id.*

<sup>104</sup> Interview, *supra* note 83.

<sup>105</sup> Interview, *supra* note 83.

<sup>106</sup> Interview, *supra* note 83.

<sup>107</sup> *The Pen Really Is Mightier Than The Sword*, SOC. CAP. BLOG (May 29, 2008), <https://socialcapital.wordpress.com/2008/05/29/the-pen-really-is-mightier-than-the-sword/>.

<sup>108</sup> Robert Samuels, *How a Book Club is Helping to Keep Ex-Offenders from Going Back to Jail*, THE WASH. POST, Feb. 25, 2015, <http://www.washingtonpost.com/local/how-a-book-club-brought-inmates->

room full of high school students that he never seated where they are because he “chose the streets over school” when he was their age.<sup>109</sup> Mr. Barksdale was arrested and convicted of armed robbery at the age of sixteen and met Mr. Mosby and Mr. Peterson in the District of Columbia jail.<sup>110</sup> All three were teenagers and charged as adults for their violent crimes.<sup>111</sup> “Juveniles tried as adults are thirty-four percent more likely than youth tried as juveniles to return to prison, according to a 2007 report from the Centers for Disease Control and Prevention.”<sup>112</sup> However, while incarcerated, they found solace in a book club where they would recite poems that they had written and read memories.<sup>113</sup> Because of being a part of a book club while in jail, they enjoy leading writing workshops with different schools around the community.<sup>114</sup>

The book club these three young men were a part of while in jail is “Free Minds.” Free Minds is a nonprofit founded by two former journalists, Kelli Taylor and Tara Liber, thirteen years ago.<sup>115</sup> Ms. Taylor had become pen pals with a young man on death row and this interaction lead to Taylor and Liber recognizing young man’s love for reading and became inspired to extend support programs to inmates when they were released.<sup>116</sup> According to Free Minds, 940 juveniles have passed through the book club.<sup>117</sup> Initially, Barksdale decided to join

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together-even-on-the-outside/2015/02/25/0468c8ca-a277-11e4-903f-9f2faf7cd9fe\_story.html.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> FREE MINDS BOOK CLUB & WRITING WORKSHOP, <http://freemindsbookclub.org> (last visited: Mar. 13, 2015).



so he could spend time in a room with windows.<sup>118</sup> He wrote a short poem that was profane, but his leaders commended him for his work and Barksdale was encouraged and became passionate about writing poetry ever since.<sup>119</sup> Mosby shared with the class of students, “you have to keep on a mask in prison to survive, so people don’t mess with you. But then, Free Minds, it started feeling like a brotherhood.”<sup>120</sup> Barksdale elaborated, “writing opened up a passion in me. That’s what you need to get through. I began to read books, I wrote poetry, got my vocational certificate because life is not a game. Nobody is playing out there.”<sup>121</sup> He concluded his class seminar, “when I was in prison, I always dreamed about talking in front of school. Now I’ve finally done it. I’m going to make a difference.”<sup>122</sup>

#### VIII. BOOK CLUB OFFERS A CATHARTIC RELEASE

As Book Club provides for the exchange of ideas and information from both the individual and group perspective, it also provides a forum to address individual disputes in a group setting. The group interaction serves to buffer the differing opinions and personal views that a one on one interaction dynamic is lacking. For example, if two individuals are discussing opposite positions it is more likely that they may become antagonistic towards each other without the shared input of the group, which serves to support both sides of the exchange in a communal environment. The Babemba tribe of South Africa illustrates the benefits of a communal exchange of perceptions and ideas in how the tribe deals with those individuals who do

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<sup>118</sup> Samuels, *supra* note 108.

<sup>119</sup> Samuels, *supra* note 108.

<sup>120</sup> Samuels, *supra* note 108.

<sup>121</sup> Samuels, *supra* note 108.

<sup>122</sup> Samuels, *supra* note 108.

not conform to the tribal norms.<sup>123</sup> When an individual in the tribe is accused of violating the societal values of tribal life, they are placed in the center of the village where all of the other village members gather and encircle the accused.<sup>124</sup> Each tribal member then speaks directly to the accused, one at a time, reciting all of his positive attributes, such as good deeds, kindness to others, and the benefits the individual has brought to the tribe in the past.<sup>125</sup> This “cleansing” may last for several days, at the end of which a celebration is held welcoming the accused back into the tribe’s good graces.<sup>126</sup>

Discussing literary pieces embraces reflection of their own lives, gains insight into their behavior and how their behavior has affected others, and teaches the individuals to be responsible for their actions.<sup>127</sup> In the *Proceeding of the National Academy of Sciences*, University of Southern California neuroscientist, Mary Immordino-Yang, told her subjects different true stories and their brains revealed that they were identifying with the characters and the stories on an instinctive level.<sup>128</sup> Studies report that social emotions such as compassion are necessary for the development of interpersonal relationships and moral behavior.<sup>129</sup> Empathy is another social emotion that researchers assert is important for relationships and their ac-

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<sup>123</sup> *In Other Words*, THE LOVEART BLOG (Feb. 22, 2009), <https://theloveartblog.wordpress.com/2009/03/01/in-other-words/>.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> William E. Kraham, *Literature Group for Offenders*, GREEN MOUNTAIN BARRISTER BLOG (Mar. 2, 2009), <http://greenmountainbarrister.blogspot.com/2009/03/literature-group-for-offenders.html>.

<sup>128</sup> Mary Helen Immordino-Yang, Andrea McColl, Hanna Damasio, & Antonio Damasio, *Neural Correlates of Admiration and Compassion*, 106 PNAS 8021, 8023 (2009).

<sup>129</sup> *Id.*

tions.<sup>130</sup> Empathy is defined as “feeling with another person.”<sup>131</sup> However, some offenders may not be able to feel empathy or have a difficult time identifying with that emotion because of their past and may have been to no fault of their own. It has been suggested that the use of fictional novels in a book club would help those who do not have the ability to feel empathy because it could influence them in a way that is different from identifying with a character.<sup>132</sup>

In the Perryville Book Club on February 10, 2015, there was a discussion about *The Diary of Anne Frank*. The women compared Anne’s living conditions to their living conditions in prison.<sup>133</sup> They discussed the families living in the house could not get up when they wanted because the wooden floor would make too much noise, whereas in prison they can stand up and not be afraid of being caught.<sup>134</sup> The women also discussed how they are not afraid for their safety or their lives, whereas Anne and her family lived in constant fear.<sup>135</sup> Additionally, the women at Perryville are able to have visitors and see their loved ones, whereas Anne could not leave the basement where she was hiding or see those she cared for.<sup>136</sup> Finally, the Book Club members talked about how prison will eventually end for them and how Anne did not know when and if she would see the light of day again.<sup>137</sup>

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<sup>130</sup> *Research Bulletin: Difference in Empathy*, THE PSYCHOLOGY ON-FICTION, (Aug. 21, 2008), <http://www.onfiction.ca/2008/08/research-bulletin-differences-in.html>.

<sup>131</sup> *Id.*

<sup>132</sup> Jean Trounstein & Robert P. Waxler, *FINDING A VOICE: THE PRACTICE OF CHANGING LIVES THROUGH LITERATURE* (University of Michigan Press, 2005).

<sup>133</sup> Interview, *supra* note 83.

<sup>134</sup> Interview, *supra* note 83.

<sup>135</sup> Interview, *supra* note 83.

<sup>136</sup> Interview, *supra* note 83.

<sup>137</sup> Interview, *supra* note 83.

Professor Waxler, in an interview, was asked to describe a student of CLTL that exemplified what CLTL stands for. He responded:

I recall a man, call him Anthony, coming into the seminar room one night after we had read Hemingway's *The Old Man and the Sea*. Anthony told us he had been walking down Union Street in New Bedford, anxious and depressed, wrestling with his addiction, not wanting to return to drugs. He came to the corner near his old neighborhood, ready to make the turn. But he stopped, thinking about Santiago, the Old Man, and the battle he fought in the throes of his pain and suffering. It was as if Anthony heard the voice of Santiago at that moment. "I thought if Santiago could endure what he did," Anthony said, "then I could walk down Union Street, one more day, rather than make that turn into the neighborhood."<sup>138</sup>

Esteban Velez, facing imprisonment for drug possession and breaking and entering, had a similar experience to Anthony.<sup>139</sup> Velez read Jack London's *Sea Wolf* and recognized similarities between the character Wolf Larsen, a merciless ship captain and himself, "I started to see myself in him, and I didn't like what I saw."<sup>140</sup>

The women who are members of Book Club at Perryville find a tremendous amount of therapeutic attributes while reading. For example, being engrossed in their books helps the

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<sup>138</sup> *Fifteen Years of Changing Lives Through Literature*, MASS HUMANITIES (2006), <http://masshumanities.org/about/news/f06-fycltl/>.

<sup>139</sup> Bole, *supra* note 18.

<sup>140</sup> Bole, *supra* note 18.

women escape the loudness in the bays and helps them find inner peace, where they can reflect quietly to themselves.<sup>141</sup> Judy, a Gina's Team member, finds that reading allows them to feel emotions that they have not felt in a while because prison makes them "compartmentalize" their emotions.<sup>142</sup> For Lynda, being in a group setting with the Book Club volunteers gives her the feeling of normalcy and calms her.<sup>143</sup> All of the women shared a mutual feeling with Lynda and added that seeing and speaking to the volunteers reminds them that there is an end to their prison sentence.<sup>144</sup>

Multnomah County's jail, located in Oregon, offers their inmates a book club where they discuss literature and life.<sup>145</sup> Carol Cook, a former library worker, decided to implement and lead a book club at the jail about six years ago.<sup>146</sup> Ms. Cook noticed there was a compelling need to start this program when she tutored inmates for their GED through Mt. Hood Community College.<sup>147</sup> Other programs at the jail such as alcoholic anonymous classes, Bible study, and others come with rules and when they leave the class, they are overwhelmed with a sense of guilt.<sup>148</sup> Most of the inmates' days consist of going to court or spending time behind bars and are constant reminders of their failures.<sup>149</sup> However, individuals who are a part of Ms.

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<sup>141</sup> Interview, *supra* note 83.

<sup>142</sup> Interview, *supra* note 83.

<sup>143</sup> Interview, *supra* note 83.

<sup>144</sup> Interview, *supra* note 83.

<sup>145</sup> Kelly House, *Inmate Book Club at Inverness Jail Offers Participants Release from Reality Behind Bars*, THE OREGONIAN BLOG (Feb. 12, 2014, 8:00 AM), [http://www.oregonlive.com/portland/index.ssf/2014/02/inmate\\_book\\_club\\_at\\_inverness.html](http://www.oregonlive.com/portland/index.ssf/2014/02/inmate_book_club_at_inverness.html).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Cook's book club believe it is the only program that strives for self-fulfillment among the inmates.<sup>150</sup> The book club members assert that the program has helped them raise their reading levels, broaden their vocabularies, and motivate them to write.<sup>151</sup> Ms. Cook passes out handouts to the members before each meeting.<sup>152</sup> The printouts discuss "life on the outside," for example they may have literature about Black History Month, the history of Valentine's Day, and the Chinese New Year.<sup>153</sup> Ms. Cook believes it is a part of the therapeutic process that they not only discuss the book they are reading, but that they discuss their families' histories and their plans for life after jail.<sup>154</sup>

Ms. Cook chooses books that teach "perseverance against extreme odds," for example *Of Mice and Men*, *The Hunger Games*, *12 Years a Slave*, and *Brave New World*.<sup>155</sup> She says, "they love Steinbeck because he spoke for the underdog. I want them to read literature that they can relate to, to show them that other people have it hard, too. It's not just you."<sup>156</sup> Rory Gaines is one of the inmates who attends book club every week.<sup>157</sup> Gaines read Justice Sonia Sotomayor's memoir and was able to relate to her upbringing because they both experienced childhood poverty and had alcoholic parents.<sup>158</sup>

Sara Bauer has been a volunteer for Gina's Team for many years and has witnessed the therapeutic attributes Book Club has had on the women of Perryville Prison. Ms. Bauer says, "I deliver the books and arrange the discussion questions, but mostly I sit and listen as the women in orange make their

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

own personal connections to the fictional characters. The ghosts of their pasts are stirred. They feel inclined to share the horrible things that happened to them, and they regret how they feel. The women at Book Club teach me patience, compassion, and the beauty of female friendship. I never felt like the mentor at prison; I am the naïve mentee.”<sup>159</sup>

#### IX. LIMITS BY PRISON, AFFECTING THEIR RIGHTS?

According to Perryville Prison staff, the inmates are allowed to have ten books at a time. Judy, one of the women who is incarcerated at Perryville and a Gina’s Team member, was sent five books from her family. However, the officer caught Judy having more than ten books and took them away. Subsequently, Judy asked the officer what he was going to do with them and he replied, “throw them away.” She asked him if he could put them in the library for the other women to read and he said, “no, because you’ll read them.” Rather than throwing the excess books away, the officer could have donated them to another yard for other women to read.

“Books Behind Bars” distributes books out to prisons across the county and Perryville is the only prison that has stopped accepting “Books Behind Bars” shipments.<sup>160</sup> The prison claims it is because they will not accept books that come in a brown paper bag and they have to be accompanied by an invoice.<sup>161</sup> Donated books are dropped off at the prison, the books will go to one yard and whoever is on duty will choose

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<sup>159</sup> Sara Dobie Bauer, *How Books Sent Me to Prison and Changed My Life*, SARA DOBIE BAUER BLOG (Mar. 2, 2015), <https://plus.google.com/+SaraDobieBauer/posts/TNUjjQJJVq7>.

<sup>160</sup> Interview with Jeanne Robinson, Gina’s Team Volunteer, Phx., Ariz. (Mar. 2, 2015).

<sup>161</sup> *Id.*

which books to keep and the rest, if any at all, will go to the other yards.<sup>162</sup>

The following is a letter written by one of the women incarcerated at Perryville prison to a Gina's Team volunteer: "We are looking for the last three vampire books by J.R. Ward. Can you see if you can find: *Lover Reborn*, *At Last*, and *The King*? Our librarian took out all of the fantasy, vampire, werewolves, and graphic sexual content--even though complex lets in certain books, he is censoring them."<sup>163</sup> This concept begs the question: Is the content-based rejection of reading material by prison officials an unconstitutional violation of the First Amendment free speech rights of both the prisoners and the publishers of the reading materials?

"[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."<sup>164</sup> There are several, varied ways in which the federal courts have handled approaches to this issue.<sup>165</sup> Prisoners are afforded constitutional rights such as the right to receive information.<sup>166</sup> However, there are restrictions on their constitutional rights because they are not given the same freedoms as individuals who are not incarcerated.<sup>167</sup> Some courts has maintained a strict hands-off approach when matters pertain to censorship of prisoner mail such as only requiring the censorship of prisoner

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<sup>162</sup> *Id.*

<sup>163</sup> Letter from Perryville Prisoner to Gina's Team Volunteer (Mar. 13, 2015) (on file with author).

<sup>164</sup> *Pell v. Procunier*, 417 U.S. 817,822 (1974).

<sup>165</sup> Megan M. McDonald, *Thornburgh v. Abbott: Slamming The Prison Gates on Constitutional Rights*, 17 PEPP. L. REV. 1011, 1012 (1990).

<sup>166</sup> Samantha Halpern, *First Amendment Rights For Publishers and the Distribution of Unsolicited Magazines to Inmates*, 33 PACE L. REV. 795, 796 (2013).

<sup>167</sup> *Id.*



mail being supported by a “rational prison system.”<sup>168</sup> Other courts have required a compelling state interest to justify censorship of prisoner mail.<sup>169</sup> The other inconsistent approach used to determine prisoners a complaint pertaining to their constitutional rights is by applying more moderate “reasonableness” standards.<sup>170</sup> *Procunier v. Martinez* came before the Supreme Court challenging the issue pertaining to prisoners’ First Amendment rights when correctional officers would censor the prisoners’ mail.<sup>171</sup> The Court placed the burden on prison officials to demonstrate that the censorship regulation furthered at least one of the substantial government interests of security, order, or rehabilitation.<sup>172</sup> If a prison official deems a publication offensive, an inmate can be denied the delivery of the novel or publication.<sup>173</sup>

A class action lawsuit brought by prisoner, Ronald Banks, against Jeffrey Beard, the Secretary of the Pennsylvania Department of Corrections, was argued in front of the United States Supreme Court in March 2006.<sup>174</sup> Ronald Banks and other inmates were allowed access to religious newspapers, legal periodicals, and Bibles, but they were not allowed access to any non-secular “newspapers, magazines, or personal photographs.”<sup>175</sup> All individuals incarcerated at the Pennsylvania Prison were initially placed on the most restrictive level and

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<sup>168</sup> McDonald, *supra* note 165, at 1014.

<sup>169</sup> McDonald, *supra* note 165, at 1014.

<sup>170</sup> McDonald, *supra* note 165, at 1014.

<sup>171</sup> *Procunier v. Martinez*, 416 U.S. 396, 397 (1974).

<sup>172</sup> *Id.* at 399.

<sup>173</sup> McDonald, *supra* note 165, at 1041.

<sup>174</sup> Stanley Wu, *Persona Non Grata in The Court: The Disappearance of Prisoners’ First Amendment Constitutional Rights in Beard v. Banks*, 28 WHITTIER L. REV. 981, 988 (2007).

<sup>175</sup> *Beard v. Banks*, 126 S. Ct. 2572, 2576 (2006).

were deprived access to those items upon arrival.<sup>176</sup> However, if the inmate's behavior improved, they were transferred to other units where they would have access to a limited number of newspapers and magazines.<sup>177</sup> The ruling was prisoners did not possess the constitutional "right to receive, the right to read and freedom of inquiry, [and] freedom of thought."<sup>178</sup> The Supreme Court relied on the Pennsylvania Prison Secretary's belief that the deprivation was necessary "to motivate better behavior on the part of [these] particularly difficult prisoners, by providing them with an incentive."<sup>179</sup> Justice Stevens expressed concern that the prison policy "comes perilously close to a state-sponsored effort at mind control."<sup>180</sup> Justice Stevens further noted, "the State may not 'invade the sphere of intellect and spirit which is the purpose of the First Amendment....'"<sup>181</sup> He continued, "in this case, the complete prohibition on secular, non-legal newspapers, newsletters, and magazines prevents prisoners from 'receiving suitable access to social, political, esthetic, moral, and other ideas' which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment."<sup>182</sup> Justice Stevens noted that there needs to give less deference to prison officials, to ensure that rehabilitation would not be used to justify all limitations on prison's rights.<sup>183</sup>

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<sup>176</sup> Anna C. Burns, *Beard v. Banks: Restricted Reading, Rehabilitation, and Prisoner's First Amendment Rights*, 15 J. L. & POL'Y 1225, 1227 (2007).

<sup>177</sup> *Beard*, 126 S. Ct. 257, 2576-77 (2006).

<sup>178</sup> Burns, *supra* note 176.

<sup>179</sup> Burns, *supra* note 176.

<sup>180</sup> Wu, *supra* note 174.

<sup>181</sup> Wu, *supra* note 174.

<sup>182</sup> Wu, *supra* note 174.

<sup>183</sup> Burns, *supra* note 176.

## X. A THERAPEUTIC AND REHABILITATIVE TESTAMENT

Christina Rock, a beautiful, blue-eyed and sandy-blond-haired, thirty-three-year-old woman was sentenced to five and a half years in Perryville Prison for forgery and a dangerous drug violation.<sup>184</sup> Christina was born in Cleveland, Ohio and moved to Las Vegas, Nevada in 1986, where she became a stripper.<sup>185</sup> As a result of her profession and living in a city where most individuals' lifestyle is about money, sex, and drugs, she inevitably found herself associated with the wrong people and she became pregnant when she was only eighteen years old.<sup>186</sup>

On April 9, 2010, Christina became an inmate at Perryville Prison.<sup>187</sup> Christina tried to find work programs at the prison that would keep her occupied.<sup>188</sup> She worked at Hickman's Egg Ranch from 2012 to 2014, she took computer tech classes, and she was a groundskeeper. However, there were only two programs that kept Christina grounded while at Perryville--Athena and Gina's Team.<sup>189</sup> Christina said that it is a privilege and an honor to become a member of both of the programs. Specifically Gina's Team was an honor because prisoners are not allowed to have any disciplinary tickets while they are incarcerated, and it is a three month wait to become an official member.<sup>190</sup> Christina expressed her personal belief that the prison makes it so prisoners cannot succeed, and because of this, it is even more of an accomplishment to be able to be a part of program.<sup>191</sup> She believes that the Athena program gave

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<sup>184</sup> Telephone Interview with Christina Rock (Mar. 18, 2015).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

her the strength to grow spirituality, the motivation to want to live a better life after incarceration, and the drive to ensure she will better herself while in prison and after her release.<sup>192</sup> Christina said that during her five and a half year sentence, that she witnessed women coming in and out of the prison system, some of the women seven or more times.<sup>193</sup> This “revolving door” was something she did not want to become accustomed to and she knew that by bettering herself through the Athena program and Gina’s Team, she would receive the “tools” that were necessary so she would not reoffend again.<sup>194</sup>

Books kept Christina and her fellow Gina’s Team members “grounded” while incarcerated. Novels were their way of escaping the cruel realities of prison.<sup>195</sup> It was not always about the books, however; Christina said Book Club allowed the women to be whoever they wanted to be and allowed their minds to break down the prison walls and think creatively.<sup>196</sup> Some of Christina’s favorite books she read while serving her sentence were: *The Five People You Meet in Heaven* by Mitch Albom, *The Diary of Anne Frank*, and *The Christmas Box* by Richard Paul Evens.<sup>197</sup> Currently, Christina’s bother is incarcerated and she is fiercely advocating for both the Athena program and Book Club to be implemented in the prison where he is incarcerated.<sup>198</sup>

Today, Christina lives in Las Vegas, works from Monday to Friday, from 7:30 a.m. to 3:30 p.m. selling car parts to dealerships, and she has a nine o’clock curfew seven days a week.<sup>199</sup> She also works for traffic control when there are

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

large conventions in town.<sup>200</sup> In addition, Christina has her own business project with Body by Vi, a weight loss challenge program.<sup>201</sup> Even though she works fourteen-hour days, Christina still finds the time to read and believes in continual growth.<sup>202</sup> Christina owes \$300 before her parole term is finished in July.<sup>203</sup> However, she said she would work twice as hard with the jobs she has now and is determined to do so.<sup>204</sup> Christina said, “I would not be where I am right now without Athena and Gina’s Team. They built me to succeed.”<sup>205</sup>

## XI. CONCLUSION

As Professor Waxler said, “offenders often commit criminal acts because they operate from a value system that gives priority to emotions and primal instinct, rather than to reason and critical thinking. We need to challenge that single-minded value system by using novels and short stories that unfold the complexity and diversity of character and human consciousness.”<sup>206</sup>

The following quote, while universally applicable, is most appropriate in the restrictive environment of a prison setting: “Reading gives us someplace to go when we have to stay where we are.” – Mason Cooley.<sup>207</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Richard Katzev, *Read a Book- Change Your Life*, MARKS IN THE MARGIN BLOG (Mar. 2, 2009, 7:02 AM), <http://marksinthemargin.blogspot.com/2009/03/read-book-change-your-life.html>.

<sup>207</sup> GOOD READS, *supra* note 1.



SYMPATHY AND EMPATHY IN THERAPEUTIC JURISPRUDENCE  
FROM A PSYCHOANALYTIC PERSPECTIVE: FROM FREUD TO  
POSNER AND BEYOND

Archie Zariski\*

I. INTRODUCTION

This article seeks to answer two questions: “What is the place of sympathy and empathy in therapeutic jurisprudence from a Freudian psychoanalytic perspective?” and “What techniques of psychoanalysis may be useful when sympathy or empathy are experienced as part of the practice of therapeutic jurisprudence?” In offering answers to these questions, this article contributes to the project to “mainstream” Therapeutic Jurisprudence<sup>1</sup> through providing a normative foundation<sup>2</sup> for judging practices that are associated with application of the principles of Therapeutic Jurisprudence.

For several years, I have explored the impact on legal thought and practice of “the affective turn” in the human and social sciences. In particular, I have considered the role of sympathy and empathy as appropriate behaviours for legal actors including judges.<sup>3</sup> My research has revealed divergence of thought concerning both the nature of sympathy and empathy

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<sup>1</sup> Michael D. Jones, *Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners*, 5 PHX. L. REV. 753 (2012).

<sup>2</sup> David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463 (2014).

<sup>3</sup> See, e.g., Archie Zariski, *Senti alteram partem: Rights, Interests, Passions, and Emotions in Judicial Mediation*, 4 J. ARB. & MED. 1 (2014) (Can.).

and their roles in legal activities. Previously, I reached the conclusion that we should prefer the older understanding of sympathy as “fellow feeling” without any necessary added element of care or concern for the other with whom we sympathize. As a corollary, I suggested that empathy primarily should be understood as a cognitive achievement of understanding the thinking and motivation of others without necessarily appreciating their emotional state. Partly due to the findings of contemporary neuroscience, I am now ready to give up that attempt at definitional distinction. Scientists now believe that they have identified discrete pathways in the brain corresponding to “affective empathy” and “cognitive empathy.”<sup>4</sup> Since those terms appear to describe what I have called “sympathy” and “empathy,” I am now willing to adopt them in hopes of avoiding any misunderstanding due to terminology. There appears to be continuing debate over whether “affective empathy” is necessarily accompanied by care and concern. I will adopt the position here that it does not, and we can call such a distinct caring response “sympathy” or “compassion” in accordance with common usage. Thus, the title of this article could also be “Affective and Cognitive Empathy in Therapy and Jurisprudence.”

Many debates, doubts, and questions persist concerning the role of both forms of empathy in legal interactions as well as other disciplines and environments.<sup>5</sup> These issues are especially

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<sup>4</sup> Simone G. Shamay-Tsoory, *The Neural Bases for Empathy*, 17 NEUROSCIENTIST 18 (2011); Christine L. Cox, *The Balance Between Feeling and Knowing: Affective and Cognitive Empathy Are Reflected in the Brain's Intrinsic Functional Dynamics*, 7 SCAN 727 (2012).

<sup>5</sup> See, e.g., Elisa Aaltola, *Varieties of Empathy and Moral Agency*, 33 TOPOI 243 (2014); Jody Collins, *Mentorship: The Road to Empathy*, 20 RESTORATIVE TIMES 4 (2014); Debra Gilin, et al., *When to Use Your Head and When to Use Your Heart: The Differential Value of Perspective-Taking Versus Empathy in Competitive Interactions*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 3 (2013); Damon Krohn, *The Three Fallacies: Evaluating Three Problematic Trends in Clinical Practice*, 41 CLINICAL SOC. WORK J. 192 (2013);



salient for those who advocate therapeutic jurisprudence. Concern for the mental impact of legal actions on those who are acted upon is central to a therapeutic approach to law. Dealing with such impacts requires an appreciation of the thoughts and emotions of others and hence suggests the potential role of empathy in filling that need. To put it simply, “What is the therapeutic value of cognitive and affective empathy in legal decision making and related actions?”

In this article, I have tried to bring a Freudian perspective to bear on the question of the proper role of empathy in therapeutic jurisprudence. Such an endeavour entails an investigation of Freud’s conception of therapy and technique, and the development of Freudian thought after him. We also profitably review how psychoanalytic theory and technique have been received in legal thought. This exploration may help to shed some light on the relation of empathy, therapy, and legal action.

I am not trained in psychoanalysis, so my understanding of Freudian principles and therapeutic practices is limited and incomplete. Nevertheless, I have a deep appreciation for Freud and his work. If the views expressed in this article appear to be inconsistent with, or critical of, Freud’s ideas that is not intended and should be ascribed to my misunderstanding or confusion. I remain convinced that we can still learn much from Freud and that the depth of his thinking may result in new insights, even in today’s society.

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Rebecca K. Lee, *Judging judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145 (2013); John Michael, *Towards a Consensus about the Role of Empathy in Interpersonal Understanding*, 33 TOPOI 157 (2014); Samuel Moyn, *Empathy in History, Empathizing with Humanity*, 45 HIST. & THEORY 397 (2006); Matthew Ratcliffe, *Phenomenology as a Form of Empathy*, 55 INQUIRY: INTERDISC. J. PHIL. 473 (2012); Jan Slaby, *Empathy’s Blind Spot*, 17 MED. HEALTH CARE & PHIL. 249 (2014).

## II. FREUD, SYMPATHY AND EMPATHY

Freud's apparent ambivalence over the role of the emotions in the psyche, as well as his cautiousness about the use of sympathy and empathy in psychoanalysis, are documented and debated. There is no doubt that Freud acknowledged the motivational importance of emotions (or "drives") for human action but he seems to have declined to allocate them an important role in most thought processes. This view might have to be tempered if one reads *Beyond the Pleasure Principle*<sup>6</sup> as an attempt to place the emotions of love and hate at the center of human life in perpetual tension with death. Likewise, reading Freud's statements on technique that assigns value to empathy and sympathy at appropriate junctures in therapy. Indeed, in *Analysis Terminable and Interminable*<sup>7</sup> these two themes intertwine. I will expand on these observations.

Although Freud referred to them as "instincts" or "drives," I believe such influences on the psyche clearly have a strong emotional component. *Beyond the Pleasure Principle* contrasts the desire for destruction of life with its cares and a countervailing creative motivation oriented to the production of human happiness. These two forces may be considered as hate and love respectively. Significantly, Freud draws parallels between such emotions and natural forces, one of which produces a lifeless state (entropy; Freud referred to the concept as "inertia"), and the other, which leads to the proliferation of ever more complex lifeforms (evolution; Freud's terminology was "Eros"). In my reading, hatred (allied with the destructive force) thus tends to assimilate and erase difference culminating in the coalescence of the world and the subject who ends everything through death.

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<sup>6</sup> Sigmund Freud, *BEYOND THE PLEASURE PRINCIPLE AND OTHER WRITINGS* (J. Reddick, Trans.) (2003).

<sup>7</sup> Sigmund Freud, *ANALYSIS TERMINABLE AND INTERMINABLE*. In Joseph Sandler (Ed.), *ON FREUD'S "ANALYSIS TERMINABLE AND INTERMINABLE"* (1987).

Conversely, love (Eros) tends to invigorate others in their unique subjectivities oriented to a fecund future. Freud instanced the conjugation of simple cells as one example of the force, which stimulates the life and growth of unique organisms. For me, a striking consequence of this understanding of Freud is that death as entropy and life as evolution implies a tension and dialectic between the thought processes of synthesis considered as assimilation and analysis viewed as differentiation. I will return to this point.

Freud undoubtedly had several reasons for his reticence in giving sympathy and empathy a place within psychoanalytic practice. The very word “empathy” (originating as “*emfühlung*” in German<sup>8</sup>) was new in the early twentieth century and its exact meaning disputed amongst scholars.<sup>9</sup> Even then it was vying with the classical term “sympathy” for a place in science and philosophy. Perhaps Freud considered that entering into these debates was a diversion from his main goal of developing and promoting analysis as a therapeutic technique. But central to that goal was establishing the role and figure of the analyst as an effective and trustworthy helping professional. Moral probity and ethical conduct were essential elements of this new professional persona. To the extent that emotional interactions with patients through the exercise of sympathy or empathy might tend to undermine the objective and professional stance of an analyst, they were to be avoided. Nevertheless, it seems clear that Freud acknowledged the value of a certain kind of empathy

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<sup>8</sup> Gustav Jahoda, *Theodor Lipps and the Shift from ‘Sympathy’ to ‘Empathy’* *Empathy*, 41 J. HIST. BEHAV. SCI. 151 (2005); Laura Hyatt Edwards, *A Brief Conceptual History of Einfühlung: 18<sup>th</sup> Century Germany to Post-World War II U.S. Psychology*, 16 HIST. PSYCHOL. 269 (2013); George W. Pigman, *Freud and the History of Empathy*, 76 INT. J. PSYCHO-ANALYSIS 237 (1995).

<sup>9</sup> Susan Lanzoni, *Sympathy in Mind (1876-1900)*, 70 J. HIST. IDEAS 265 (2009); Christiane Montag, et al., *Theodor Lipps and the Concept of Empathy: 1851-1914*, 165 AM. J. PSYCHIATRY 1261 (2008).

in creating a productive and trusting relationship between analyst and patient, and this was to be accompanied by a beneficent interest in the analyst and which has shades of meaning related to sympathy as care or compassion.<sup>10</sup> It also seems clear that the therapeutic processes of transference and counter-transference require a certain amount of emotional understanding and resonance between therapist and patient.<sup>11</sup> In summary, it appears that Freud was alive to the therapeutic value of sympathy and empathy but felt it prudent not to over emphasize them for fear of conducting improper treatment and unprofessional behavior by analysts.

In my reading, Freud brought together some of the foregoing trains of thought in *Analysis Terminable and Interminable* although they are not made explicitly. Analysis is interminable because it reflects the never-ending struggle between life and death and love and hate. It may be terminable in some situations in which a partial victory over illness allows a patient to return to a relatively normal life. The power of analysis does not lie in empathy or sympathy but rather in the ability to help dissolve the unhealthy associations and assimilations that hate stimulates in the psyche and to allow love to grow for oneself and unique others. However, empathy, in both its cognitive and emotional forms, may be valuable to the analyst and the patient in reaching that therapeutic goal via the phenomena of transference and counter-transference. To the extent that empathy represents an assimilation of patient and therapist it must always be subservient to thoughtful analysis, which helps to restore healthy differentiation and individuation between them. The therapeutic process may be seen as a journey through emotions, which tend to

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<sup>10</sup> Sigmund Freud, *Recommendations to Physicians Practising Psycho-Analysis*. In Robert Langs (Ed.), CLASSICS IN PSYCHO-ANALYTIC TECHNIQUE (Rev. Ed.) 391 (1912, 1990).

<sup>11</sup> Sigmund Freud, *The Dynamics of Transference*. In Robert Langs (Ed.), CLASSICS IN PSYCHO-ANALYTIC TECHNIQUE (Rev. Ed.) 3 (1912, 1990).

synthesize a personal world cut off from real communication with others towards a more open world in which analytical thought reveals the marvellous differences amongst us all.

### III. FREUDIAN THOUGHT

Melanie Klein extended Freud's examination of the formative influences of childhood into the earliest months of life.<sup>12</sup> Her research and writing also amplified the role of emotion in shaping thought and behavior.<sup>13</sup> According to Klein, the earliest emotions felt by a baby and the responses their expression generate in the mother or other carers help to fundamentally shape an individual's relations with others. This is known as the object relations theory of mental development involving transference processes based on infant experiences.<sup>14</sup> Arising out of Kleinian thought, it is not hard to imagine the emotions of horror, fear, and hate that a newborn must feel when thrust from the womb and the responding emotions of delight, relief, and love that ideally its parents exhibit. It is these two poles of feeling that a person must integrate in order to progress towards self-realization and mature independence. Such a vision of mental development reinforces a view of the ambivalence of emotions recognized by Freud and echoes his description of an eternal contest between Eros and Thanatos.

Wilfred Bion deepened and extended Klein's vision of neonatal mental development, in particular the role of emotions in

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<sup>12</sup> Melanie Klein, *ENVY AND GRATITUDE AND OTHER WORKS 1946-1963*. Vol. III in Roger Money-Kyrle (Ed.), *THE WRITINGS OF MELANIE KLEIN* (Vols. I-IV).

<sup>13</sup> Richard Rusbridger, *Affects in Melanie Klein*, 93 *INT. J. PSYCHOANALYSIS* 139 (2012).

<sup>14</sup> Melanie Klein, *The Origins of Transference*. In Robert Langs (Ed.), *CLASSICS IN PSYCHO-ANALYTIC TECHNIQUE* (Rev. Ed.) 9 (1951, 1990).

that process.<sup>15</sup> Bion postulated that thinking is an outcome of more basic mental processes beginning with perception of stimulus leading to simple object identification motivated and constituted by emotion.<sup>16</sup> Early concepts therefore have an emotional element that forms an essential aspect of reality experienced as mental objects. According to Bion, concepts with their emotional components are joined in ideas, and thinking arises in order to make sense of ideas. Through a special form of empathy between child and carer, which Bion called “reverie” the child is enabled to develop the capacity to think using emotionally tuned ideas. Thought eventually becomes expressible in nonverbal and verbal communication capable of deliberately influencing the child’s external conditions.

These developments of Freudian thought have great significance for the role of sympathy and empathy in therapy. They point to the deep role of emotions in all thought processes as observed in linkages between perceptions, emotions, and emerging mental objects. The object thus develops identity through a kind of synthesis of stimulus, perception, emotion, and recognition. To understand human thought one must acknowledge all of these elements, and to engage in therapy one must be able to separate them. A therapeutic approach to interventions of all kinds with human beings would likely benefit from both forms of empathy – affective and cognitive. These empathic abilities enable one person both to feel the emotional underpinning of the ideas and to understand the thinking processes of another.

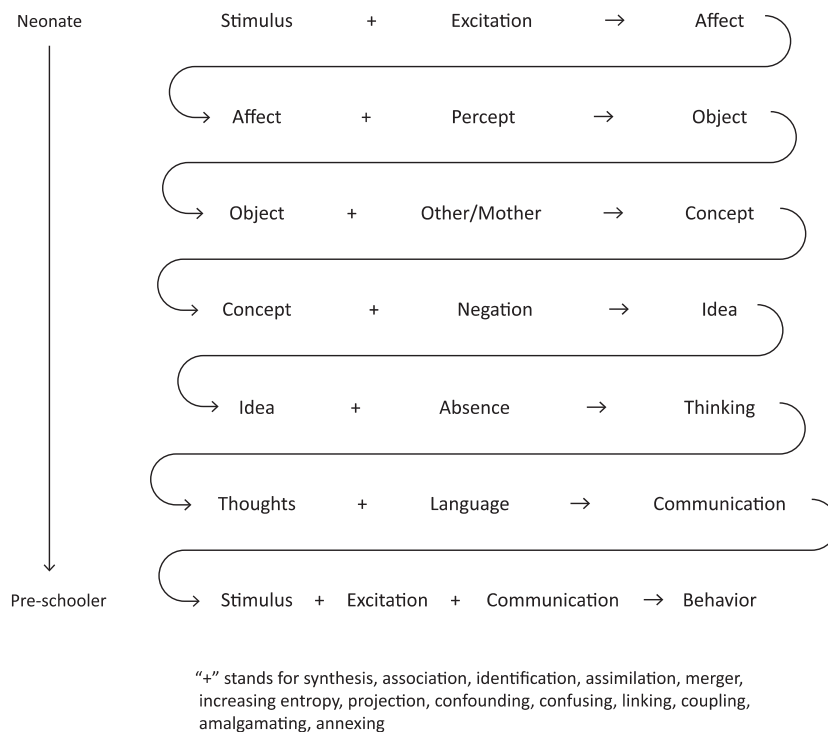
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<sup>15</sup> Wilfred Bion, *LEARNING FROM EXPERIENCE* (1962); *ELEMENTS OF PSYCHO-ANALYSIS* (1963). See also, Daria Colombo, *Book Review: LA VIOLENZA DELLE EMOZIONI: BION E LA PSICOANALISI POSTBIONIANA (THE VIOLENCE OF EMOTIONS: BION AND POST-BIONIAN PSYCHOANALYSIS)*, 61 J. AM. PSYCHOANALYTIC ASSOC. 640 (2013); Lawrence J. Brown, *Book Review of BION AND BEING: PASSION AND THE CREATIVE MIND* by Annie Reiner, 95 INT. J. PSYCHOANALYSIS 1045 (2014).

<sup>16</sup> Wilfred Bion, *A Theory of Thinking*, 43 INT. J. PSYCHO-ANALYSIS 306 (1962).

I have tried to visualize the foregoing ideas in the diagram below. It emphasizes the role of synthesis as a mental operation, with a wide variety of connotations, in the development of human thought.

*Figure 1 -- Human Development of Thought and Thinking*



In addition to illuminating the processes involved in the development of human thought, this line of Freudian investigation has another important legacy: the recognition that our first thoughts remain deep within us and are capable of shaping and coloring our thinking and behavior for life. These insights are supported by contemporary neuroscience, which has found an

affective component in all normal human thought. Thus, psychoanalytical theory and practice in the Freudian tradition reminds interveners in the justice system of the importance of acknowledging the role of emotion in human behavior and responding to it wisely and carefully.

#### IV. JEROME FRANK AND PSYCHOANALYTIC JURISPRUDENCE

Jerome Frank, an American jurist who underwent psychoanalysis himself, was one of the first to apply Freudian thought to law. Freud's conception of the psyche as a dynamic interplay between id, ego, and superego appeared to support the American Legal Realist interpretation of judging as a highly subjective and indeterminate activity. Frank extended this analysis by asserting that society's faith in law was nothing more than a search for certainty in legal rules functioning as the social super ego.<sup>17</sup> To the extent that id and ego also vie for attention and satisfaction the super ego, nor its alter ego, law, could provide deterministic solutions to social and personal problems.

Frank's writing reminds us of the tendency of individuals to displace their deepest needs and hopes onto social institutions and official actors. Processes such as that of identification and transference may occur outside of a therapeutic encounter and may be triggered by traumatic or stressful encounters with authority. Judges should be aware of this possibility, as they are seen as the face of justice and law. For some people coming before the law, judges may be assimilated to emanations or exemplifications of the super ego with its attendant threats and demands on the psyche. Such phenomena distorts the necessary realization that the individual is being called upon to answer by society, and not an inner voice. In these circumstances, judges and other officials must attempt to question and correct the mental operation of synthesis, which assimilates the world to the

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<sup>17</sup> Jerome Frank, *LAW AND THE MODERN MIND* (1930).



self. A person facing the law must acknowledge otherness, which allows responsibility to others to grow.

#### V. RICHARD POSNER AND CONTEMPORARY JURISPRUDENCE

Legal scholars have taken note of the “affective turn” in the human and social sciences. Their examination of the role of emotions in law and legal processes has included significant attention to sympathy and empathy as mediators of human connection and understanding. One of the notable results of this work is *The Passions of Law*,<sup>18</sup> a collection of essays edited by Susan Bandes. Many of the contributions not only focus on the impact of emotions on the content of laws but also consider how emotions are involved in decision-making processes such as judging.

Judge Richard Posner’s essay in that volume makes two important points about sympathy and empathy.<sup>19</sup> First, he asserts that a capacity for sympathy, in the sense of caring or compassion, is essential in arriving at just results. He notes that if this were not the case computers applying formal logic devoid of any affective influence might as well judge us. Posner strongly doubts whether many decisions arrived at in that way would be considered just and fair. The inescapable discretionary elements present in most law seem to require an affective connection with those judged in order for justice to be done.

Posner’s second point has more to do with empathy in its cognitive sense. He suggests that the natural inclination of a good judge is to have some sympathy for those before the court, as described above, but that in some cases this may interfere with reaching a just result. From an economic standpoint and having in mind the effect of precedent, Posner also calls on a

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<sup>18</sup> THE PASSIONS OF LAW (Susan A. Bandes ed., 2001).

<sup>19</sup> Richard A. Posner, *Emotion Versus Emotionalism in Law*. In Susan A. Bandes, (Ed.), THE PASSIONS OF LAW 309 (2001).

judge to imaginatively weight the consequences of a decision beyond the instant case. This judicial activity can be described as empathizing with absent others who may be impacted by the result. For Posner, the wise judge balances the pull of proximal sympathy and distal empathy to arrive at a result, which can be justified as best meeting the needs of all concerned.

In the United States, the practice of judges empathizing became a public issue triggered by appointments to the Supreme Court.<sup>20</sup> One side of that debate agreed with Posner that a capacity for empathy was not only an appropriate, but it was also a necessary qualification for high judicial office. The other side saw empathy as leading to an unjustified dilution of the strict rule of law. This debate seems to echo Jerome Frank's juxtaposition of those who see law as a bastion of logic and certainty in a confusing world with others who welcome the flexible and adaptable nature of law as best suited to accomplishing justice.

Other legal scholars have examined different aspects of the relation of empathy to judging, including empathy's effect on accurate fact-finding,<sup>21</sup> the influence of empathy on subjective experiences of procedural justice,<sup>22</sup> the possibility of "vicarious

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<sup>20</sup> Lee, *supra* note 5; Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629 (2011); Mary Anne Franks, *Lies, Damned Lies, and Judicial Empathy*, 51 WASHBURN L. J. 61 (2011); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944 (2012).

<sup>21</sup> Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997); Jill D. Weinberg & Laura Beth B. Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313 (2012); Julia J. A. Shaw & Hillary J. Shaw, *From Fact to Feeling: An Explication of the Mimetic Relation Between Law and Emotion*, 35 LIVERPOOL L. REV. 43 (2014).

<sup>22</sup> Steve Leben, *An Expectation of Empathy*, 51 WASHBURN L. J. 49 (2011).

trauma” in judges arising through emotional connection with litigants,<sup>23</sup> and “empathy fatigue” leading to a dulling of the judicial capacity for empathy.<sup>24</sup>

Taken together, current legal thought on sympathy and empathy seems to have more to do with how it influences substantive law and the interests of justice in a broad sense, or on the impact it has on judicial officers than it does with possible effects on litigants. It is only in the area of procedural justice research that the human connection in court has been explored from the standpoint of those facing the law. This article attempts to extend that thinking about the impact of sympathy and empathy specifically from a therapeutic perspective. For therapeutic jurisprudence, a key question must be, “what is the therapeutic value in sympathy and empathy?”

#### VI. THE THERAPEUTIC STANCE IN PSYCHOANALYSIS AND JURISPRUDENCE

Before proceeding to answer the question, “What is the therapeutic value in sympathy and empathy?” it is necessary to clarify some assumptions, which this article makes about the legal context in which it is asked. They are:

- The question is asked from the standpoint of a judge facing civil litigants, or criminal defendants.
- The judge may have relatively brief exposure to those parties, or it may extend over substantial time with multiple interactions as occurs in various forms of special courts.

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<sup>23</sup> Helen Baillet, Munro, et al., *Second-Hand Emotion? Exploring the Contagion and Impact of Trauma and Distress in the Asylum Law Context*, 40 J. L. & Soc. 509 (2013).

<sup>24</sup> Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways*, 27 U.C. DAVIS L. REV. 255 (1994).

- The judge is not trained in, and not expected to use, the psychoanalytic techniques of interpretation or suggestion. However, the judge is aware of, and tries to use, an approach to the parties that is informed by psychoanalytic principles rather than other possible psychotherapeutic practices.
- The parties have not been formally diagnosed with mental illness, although addiction and some abnormal behavior may be present.
- The minimum therapeutic criterion is that the mental health of the parties should not be adversely affected. Improvement of their mental health is welcome but not expected.

We can now try to link up the threads explored above with these assumptions in mind. First, let us consider sympathy in its meaning of care or concern for the other. Freud's position seems to be that human connection must be established with a patient from the beginning in order for psychoanalysis to proceed. However, for Freud, such initial connection should be unemotional on the part of the therapist and diffuse in the sense of lacking a defined goal of ameliorative action at that stage. His understanding of the therapist's proper approach to a new patient might be better described as requiring "benign interest" in the patient rather than sympathy for them. Such an orientation seems appropriate for a judge who wishes to practice therapeutic jurisprudence following psychoanalytic principles.

A judge who seeks to act benignly towards those attending court demonstrates their desire not to inflict unnecessary mental suffering. The results of application of the law may indeed cause emotional reactions in litigants and defendants, but a therapeutically oriented judge takes care not to add to those unavoidable consequences by thoughtless or disrespectful treatment of those affected. To this extent, such a judge attempts to relate to litigants simply as other equal human beings regardless of

their characterization by the law. Similarly, the judge who takes an interest in those before the court demonstrates an awareness of their uniqueness and human dignity. Being interested in people as individual human beings shows that they are not being treated merely as another case to be disposed of or just another in a long line of similar unfortunate people. The Freudian understanding of sympathy as a starting point for therapy is therefore relevant and useful for those who wish to practice therapeutic jurisprudence. Note however, that there is no strong emotional element or interpersonal connection involved in the practice of benign interest by a judge. It is an independent demonstration of an attitude and approach adopted by the judge regardless of the response of litigants. However, when we consider the exercise of empathy in court we must go further in the analysis of the emotional interaction between the judge and those facing justice.

Psychoanalytic practice focuses on emotions most prominently in the phenomena of transference and countertransference. Transference involves the transposition of a patient's thoughts and feelings about, or treatment of, people or events in their life onto the person of the analyst. Countertransference is the emotionally charged response of the therapist to the transference and other influence of the patient. For transference to be experienced, the therapist must be capable of affective empathy. For it to be recognized as such the psychoanalyst requires cognitive empathy. In order to manage their countertransference impulses a therapist must have insight into their own psychic makeup and processes.

Freud acknowledged that transference and countertransference may occur outside psychoanalysis and there is no reason to doubt that they may be part of the encounter between litigant and judge. As Frank noted, a judge may come to play the part of a father figure, or a projection of a person's super ego as part of a transference process that occurs during a court appearance. In psychoanalysis, such identification may have positive results

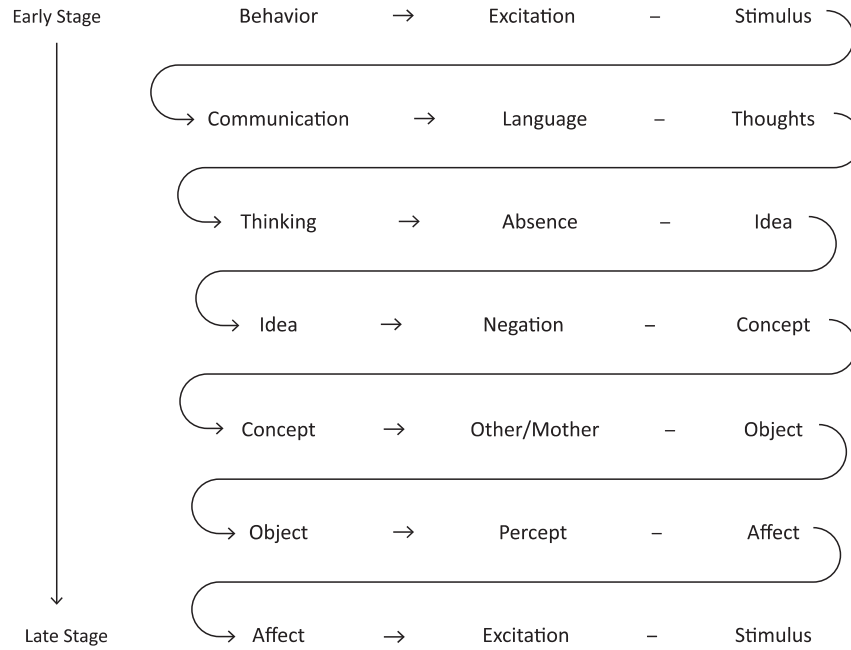
through proper implementation of the techniques of interpretation and suggestion. However, we have assumed that these therapeutic interventions are not available to, or appropriate for, a judicial officer. How can a judge preserve a therapeutic approach when faced with transference phenomena in court?

In my view, the answer lies in a component of cognitive empathy, which facilitates understanding of the thoughts, emotions, and behavior of others--the primary technique of analysis. Freudian therapeutic practice analysis is the mental interrogation by the analyst of apparently disjointed and sometimes irrational ideas of the patient from which the analyst generates interpretations capable of prompting rethinking by the patient of problematic aspects of their life. Analysis thus comprises questioning of associations, identifications, projections, and other psychic processes in the patient to illuminate inconsistencies, unrealities, and absurdities, which have resulted. Interpretation is the expression of the results of analysis, informed by knowledge of typical psychic patterns, for encouraging the patient's conscious and realistic reflections on their problems. Although a judge will not progress to the point of offering interpretations, I believe that he or she can still take the first step of analysis in a restricted but therapeutic way.

This brings us back to Bion. His work highlighted the role of linking and association in the creation of mental objects, concepts, and ideas underpinned by a pervasive emotional component. Meaning for human beings can be described as the result of processes of synthesis of experience and evaluation mediated by affect. Sometimes we derive faulty or inappropriate meanings of objects, events, and people we encounter. If this becomes a persistent and overriding feature of a person's psychical life, we may consider them mentally ill. Errors and misjudgments, which arise through such processes, may be considered synthetic defects in thought. One way of trying to rectify such mistakes is through analysis in which faulty or mistaken links

and connections are questioned, challenged, and possibly broken. Thus, analytic technique provides a corrective for synthetic mistakes. When working with a person with a recognized illness, the psychoanalyst can build upon this mental dissection of thought to provide interpretations and suggestions, which may help the patient understand and overcome systemic mental problems. However, I suggest that the initial step of identifying and questioning faulty mental connections using analytic techniques may also be therapeutic itself, both for the ill and for the healthy. At the very least, such an analytical stance toward another person should help to avoid encouraging or sustaining synthetic mistakes in their thought. Figure 2 attempts to illustrate the effect of analysis according to these psychoanalytic principles.

*Figure 2--Psychoanalysis Applied to Human Thought and Behavior*



“-” stands for analysis, distinguishing, differentiating, decoupling, disaggregating, disassociating, individuating, deconstructing, de-linking

The question remains how a judge may put into practice analysis as described above for therapeutic purposes. A range of situations can be identified in which analysis may be useful. At one pole is the brief encounter with a person facing court merely for procedural purposes and at the other are more lengthy interactions such as hearings and full trials with delivery of judgment. In certain special courts, interactions between a judge and an individual include many exchanges over several months or even years. When such interactions become more lengthy, and judicial knowledge of the individual facing court becomes richer



and deeper, there is increased opportunity to apply psychoanalytic principles. A short appearance on the other hand offers little scope for analysis of the type suggested here.

However, even in a brief encounter between judge and litigant the analytic technique may be employed. Lacking much background knowledge of the individual, a judge is here confined to certain “generic” steps, which may nevertheless have a therapeutic effect because of their analytic quality. Lacking little, if any, input from the party before the court a judge may nevertheless try to bring home the reality of the situation through careful description. Using direct communication to the party a judge should first provide an introduction by name, position, and role, to all relevant people present beginning with themselves. The judge will then describe the specific purpose of the event avoiding technical language on the one hand or slang on the other. Metaphoric terms should be avoided and straightforward literalness encouraged. The judge may end by questioning the party whether they have understood, and rephrasing or clarifying as necessary. The goal of a judge in this situation is to attempt to provide an explanation of the legal event and the actors involved, which is unambiguous and not open to the party’s idiosyncratic interpretation as part of a transference process. Questioning the party about his or her understanding may reveal associations or confusions that can be corrected. This technique may help a litigant to avoid fantasizing the situation and to confront mistaken or inappropriate associations they may hold. In this way, a deliberately analytical approach can have at least a prophylactic effect on parties whose experience in court is likely traumatic and possibly productive of disordered thought. In all cases the possibility of adverse mental reactions arising from the dissonance created in the mind of the party through such interventions must be weighed and considered.

Multiple encounters with a party will provide a judge with additional observations of a person’s communication and behav-

ior and more opportunities to apply analytic techniques. Inappropriate choice of words, emotional tone, and unexpected actions may all reveal that a litigant is having difficulty coping with their legal situation in a realistic way. Gentle probing by a judge faced with such behavior may help to reveal transference phenomena, which may be of two types: either resulting from the immediate court appearance or from genetic experiences in the party's past. In the first type of transference, the party may misconstrue the judicial role or confuse the judge with some other authoritative person. In the second, the court experience is associated with troubling events in the party's past, which are logically unconnected to the jurisprudential situation. Keeping in mind the limits on judicial competence and responsibility, both forms of transference may be answered by an informative analysis of the legal situation designed to demonstrate its reality and uniqueness. Unshakeable transference of the second kind may alert the judge to a party's need for mental health assistance.

Repetitive behavior over several appearances before a judge can also signal that a party is facing mental problems. In some cases this represents a reliving of experiences, which have become confused with the current situation. This may be described as an inappropriate chronological synthesis of past and present. Here, the judge may find the analytic technique of providing an accurate chronology to be valuable. A detailed description by a judge of the steps and actions, which have been taken in a legal proceeding, may help a litigant to better understand and deal with the current realities facing them.

Psychoanalysts also recognize the value of empathy in "non-transference" relations between therapist and patient. This describes interactions between the professional and patient, who is unaffected at least temporarily by confusion or mistaken association. In these situations, a psychoanalyst may recognize important events in the life of the other with appropriate emotion-

ally laden expression. For instance, achievements and bereavements may be met with congratulations and condolences. Such interaction promotes trust building between therapist and patient and may do the same for judges and parties who are better known to them.

The therapeutic stance in jurisprudence finds support in psychoanalytic principles. The practice of psychoanalysis involves abilities and techniques that may be usefully employed by judges. Chief among these are the ability to recognize and to respond effectively to distortions of thought, which confuse fantasy and reality with past and present. The primary techniques of distinguishing analysis and exposure of such distortions can be used by judges to help litigants face the reality of their legal circumstances and to avoid stimulating or exacerbating any mental problems the parties may have. Judges who are attuned to parties' mental states and who wish to act with care and compassion towards them already employ such techniques. This article provides a theoretical background for those intuitive practices.

## VII. CONCLUSION

What can therapeutic jurisprudence-oriented judges learn from Freudian psychoanalysis about the therapeutic value of sympathy and empathy? This article has attempted to answer this question first by looking at meanings of sympathy and empathy, particularly as they implicate emotions, and then has examined them as elements of psychoanalytic practice.

It was found that sympathy is best understood as a benign interest in the other, which helps to create the conditions for a successful therapeutic interaction. Empathy was seen to comprise two distinct processes--one involving affective co-experience and the other primarily cognitive understanding of another person. Affective empathy is useful to the psychoanalyst as part of the transference phenomenon in which the patient transposes past or present mental conflicts into the therapeutic encounter.

Such empathy allows the therapist to experience some of the emotional turmoil of the patient, who needs to be dealt with in treatment. It was concluded that judges are ill-situated and ill-equipped to engage in affective empathy with persons facing court except in certain unique situations, and such practice is therefore not recommended.

However, cognitive empathy is considered a valuable technique for both psychoanalysts and judges. The role of this form of interpersonal understanding in therapy was examined through considering analysis as its primary feature. Following Kleinian thought as extended by Bion it was found that objects, concepts, ideas, and therefore all meaning and understanding, are composites with an emotional component. We have called the mental process through which such composites are formed "synthesis." Synthesis is also the process, which enables transference phenomena by facilitating the confusion or confounding of times, places, and people. Synthesis may lie at the heart of Freud's conception of the death instinct, which seeks oblivion in the fusion of all of differentiated reality.

We have called the process of decomposition, recognition, and elucidation of the fused elements in thought "analysis." Thus, analysis may function as a corrective for disordered or defective thinking involving faulty or abnormal synthesis. In this conception, analysis may be identified with Freud's life instinct, or Eros, which seeks variety, complexity, and differentiation. Since there is a perpetual dialectic in human life between synthesis as a totalizing process and analysis as tending to infinitude, we can agree with Freud that although psychoanalysis may at times reach a provisional termination it is in truth interminable.

Several analytic procedures were suggested as appropriate for judges, stopping short of interpretation as understood in psychoanalysis. We may thus conclude that sympathy and empathy, as described in this article, have therapeutic value from the

perspective of Freudian psychoanalysis and that judges dedicated to therapeutic jurisprudence may employ them in court, within wise limits.



MAINSTREAMING THERAPEUTIC JURISPRUDENCE IN  
CRIMINAL COURTS WITH A FOCUS ON BEHAVIORAL  
CONTRACTING, PREVENTION PLANNING, & REINFORCING  
LAW-ABIDING BEHAVIOR.

Douglas B. Johnson\*

I. INTRODUCTION

A number of new conceptions have emerged as to the role of an attorney or judge in the legal system.<sup>1</sup> Interestingly enough, most of these emerging theories seem to have one thing in common—a humanistic character geared toward improving one’s well-being.<sup>2</sup> Law Professor Susan Daicoff terms these conceptions as “vectors” of the “comprehensive law movement,” which include therapeutic jurisprudence, an emerging model going beyond an individual’s rights or interests to their human and emotional well-being.<sup>3</sup> This author will explore the emerging theory of therapeutic jurisprudence, provide the reader with a more comprehensive view of the law’s role, and suggest that lawyers and judges who facilitate therapeutic jurisprudence into behavioral contracting, prevention planning, and reinforcing law-abiding behavior can maximize the law’s potential.

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<sup>1</sup> Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law Clinical Education: Transforming the Criminal Law Clinic*, in Papers presented at the UCLA/IALS Conference on “enriching clinical education” 13 CLINICAL L. REV. 605, 607 (2006). (Discussing therapeutic jurisprudence insights and techniques with a focus on criminal law competencies and training future lawyers).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

Therapeutic Jurisprudence (“TJ”) “is the study of the role of the law as a therapeutic agent.”<sup>4</sup> Therapeutic Jurisprudence focuses on the role of legal actors, such as judges and lawyers, and how their actions may create therapeutic and anti-therapeutic consequences when dealing with aspects of the law and the legal process.<sup>5</sup> Lawyers and judges use TJ with the understanding that words and actions may produce therapeutic or anti-therapeutic effects.<sup>6</sup> “It is in the interest of all, that the therapeutic effects be maximized, or that at least that anti-therapeutic effects be minimized, whenever possible.”<sup>7</sup> Therapeutic Jurisprudence affords attention to the traditionally undervalued aspects of emotional and psychological well-being of individuals that the law impacts.<sup>8</sup> The behavioral sciences have informed TJ in relation to change and motivation.<sup>9</sup> Ther-

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<sup>4</sup> DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE*, xvii (David Wexler ed., Carolina Academic Press 1st ed. 1996). (a comprehensive collection of articles from various authors discussing therapeutic jurisprudence as a helpful resource for judges willing to consider therapeutic consequences to judicial actions).

<sup>5</sup> *Id.*

<sup>6</sup> Michael D. Jones, *Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions for Judges and Practitioners*, 5 PHX. L. REV. 753, 757 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102375](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102375) (discussing the challenge of “mainstreaming” TJ practices and techniques developed in problem-solving courts into general courts).

<sup>7</sup> *Id.*

<sup>8</sup> DAVID B. WEXLER & MICHAEL S. KING, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, in CAROLINE S. COOPER & ANTONIO LOMBA, *COURT-SUPERVISED TREATMENT ALTERNATIVES TO INCARCERATION FOR DRUG-DEPENDENT OFFENDERS: THE DRUG POLICY AGENDA*, 21,22 (discussing the role of therapeutic jurisprudence in promoting societal rehabilitation with a concentration on drug treatment courts and other TJ friendly landscapes).

<sup>9</sup> Pauline Spencer, *To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts*, INT’L. CONF. ON LAW AND SOCIETY, 22



apeutic Jurisprudence invites the use of insights from multiple disciplines; including psychology, criminology, and social work, and uses these insights in order to achieve therapeutic gains, such as rehabilitation, and compliance with the law.<sup>10</sup> Therapeutic Jurisprudence does not strive to place therapeutic values above others, such as due process, but it urges legal actors to be aware of the law's impact on people's lives, promoting therapeutic and rehabilitative outcomes.<sup>11</sup> Therapeutic Jurisprudence principles have a broad application to many aspects of the law.<sup>12</sup> However, this perspective will focus on mainstreaming TJ principles and techniques into criminal courts. By implementing TJ and effectively "adding another layer" to the legal process, criminal lawyers and judges can not only increase the benefits of the judicial system, but can extend those benefits to society at large. This part seeks to provide an overview of TJ and how behavioral contracts, prevention planning, and reinforcing law-abiding behavior are essential components in successfully mainstreaming TJ principles and techniques into criminal courts.

Mainstreaming is a term used to explain the use of TJ problem-solving techniques in regular courts. Mainstreaming has been characterized as "readily available products and services

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(2012), *available at*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2083370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2083370) (Magistrate Pauline Spencer analyzes solution focused approaches of therapeutic jurisprudence in various court setting and discusses those setting and the resources involved).

<sup>10</sup> David B. Wexler, *The International and Interdisciplinary Project to Mainstream Therapeutic Jurisprudence (TJ) in Criminal Courts: An Update, a Law School Component, and an Invitation*, ALASKA JOURNAL OF DISPUTE RESOLUTION (2014 Forthcoming), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2399914](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399914) (The essay describes "Integrating the Healing Approach to Criminal Law," an effort to apply TJ principles into the ordinary criminal and juvenile law systems).

<sup>11</sup> DAVID B. WEXLER, AND MICHAEL S. KING, *supra* note 8 at 22:21-24.

<sup>12</sup> WEXLER & WINICK, *supra* note 4 at xvii:6-9.

appealing to the general public.<sup>13</sup> Furthermore, “mainstream” in this context is also synonymous with the current general usage of the word.<sup>14</sup> This author suggests that lawyers and judges who amalgamate TJ into behavioral contracting, prevention planning, and reinforcing law-abiding behavior will essentially mainstream the principles and techniques employed by TJ to the general public in all criminal courts, not just the traditional problem-solving or drug treatment courts. This expansion of TJ into all criminal courts will provide the law with a superior sweeping effect to impact the social wellbeing of society.

The concept of TJ was cofounded by Professors David B. Wexler of the University of Arizona James E. Rogers College of Law and University of Puerto Rico School of Law, and Bruce J. Winick of the University of Miami School of Law.<sup>15</sup> Therapeutic Jurisprudence is “a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications.”<sup>16</sup> Therapeutic Jurisprudence focuses on how the law impacts not only a defendant’s psychological and emotional well being, but all of those involved in

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<sup>13</sup> *Mainstreaming*, [thelawdictionary.org, http://thelawdictionary.org/mainstream/](http://thelawdictionary.org/mainstream/) (last visited June 12, 2015).

<sup>14</sup> *Mainstream*, Princeton WordNet-The Free Dictionary, <http://wordnetweb.princeton.edu>, (last visited June 12, 2015)..

<sup>15</sup> Wikipedia, *Therapeutic Jurisprudence*, [http://en.wikipedia.org/wiki/Therapeutic\\_jurisprudence](http://en.wikipedia.org/wiki/Therapeutic_jurisprudence); (last visited June 12, 2015); See also WEXLER & WINICK, *supra* note 4; See also David B. Wexler, *The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 691-705 (1999).

<sup>16</sup> Ian Freckelton, *Therapeutic Jurisprudence at the Conference of the International Association of Law & Mental Health in Padua, Italy: Therapeutic Jurisprudence Misunderstood and Misrepresented: The price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 576 (2008) (discussing therapeutic jurisprudence as a facilitator of consciousness and awareness to outcomes; and illuminating therapeutic dimensions of the law by asking questions about the real effects).

the judicial process.<sup>17</sup> When utilizing TJ, it is important to recognize that therapeutic goals do not trump others.<sup>18</sup> Furthermore, as Professor Wexler explained, “[TJ] is a perspective that regards the law as a social force that produces behaviors and consequences.”<sup>19</sup> Therapeutic Jurisprudence highlights the reality of how participants in the legal system create consequences and the emotional effects and physical wellbeing of a range of persons.<sup>20</sup> Professor Winick contends, “TJ proposes to analyze the consequences of the legal process in such a way as to re-shape the law and maximize its therapeutic potential.”<sup>21</sup> Therefore, TJ is the study of “the law in action” and the therapeutic and anti-therapeutic consequences produced by the parties involved in the judicial system.<sup>22</sup>

In the beginning, Wexler and Winick discussed the “TJ approach” in mental health law.<sup>23</sup> Soon thereafter, TJ principles and techniques were discussed in the context of criminal law.<sup>24</sup>

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<sup>17</sup> DAVID B. WEXLER, *REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE* 3.(Carolina Academic Press 2008).

<sup>18</sup> David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 134 (citing DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* xvii (David B. Wexler & Bruce J.ed., Carolina Academic Press 1st ed. 1996) & Bruce J. Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* xvii (articulating how therapeutic jurisprudence developed out of mental health law).

<sup>19</sup> Wexler, *supra* note 10, at 3.

<sup>20</sup> Ian Freckelton, *supra* note 9, at 576.

<sup>21</sup> BRUCE J. WINICK, *A Therapeutic Jurisprudence Model for Civil Commitment*, in *INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT* 23, 25-26 (Kate Diesfeld & Ian Freckelton eds., 2003).

<sup>22</sup> David B. Wexler, *supra* note 10, at 4.

<sup>23</sup> DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE*, ix (Carolina Academic Press 1991) (discussing collaborative research between mental health professionals and lawyers).

<sup>24</sup> Wikipedia, *supra* note 8.

Initially, in the criminal law context, TJ was applied in problem solving and drug courts because these courts were designed in a "TJ friendly" manner.<sup>25</sup> Problem-solving courts represented a new direction for the judiciary seeking to not only resolve the case, but also the underlying problem that created it.<sup>26</sup> Consequently, today, TJ principles and techniques apply to a variety of criminal court settings.<sup>27</sup> Judges in general courts have begun to apply these TJ or problem-solving techniques in order to apply a public health approach to social and behavioral problems.<sup>28</sup> Nevertheless, a range of former problem-solving court judges find it difficult to transition from a problem-solving specialty court, where they found TJ techniques or problem-solving skills useful and effective, back to a regular court calendar, which does not effectively apply the TJ "lens" to everyday judging.<sup>29</sup> Judges do not simply forget valuable tools and techniques that have worked so well in problem-solving courts, but the difficulties these judges confront, which may hinder their ability to employ TJ, include other judges who, for the most part, are traditionalists and resist change.<sup>30</sup> Attorneys may also prove difficult to judges attempting to "mainstream" TJ principles and techniques because attorneys who do not practice in problem-solving courts may find the "team approach" employed by TJ judges, as a waste of time or an encroachment of a lawyer's traditional role as a pure advocate instead of a "change agent."<sup>31</sup> Although

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<sup>25</sup> Wexler, *supra* note 10, at 3.

<sup>26</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1056 (2003) (discussing problem-solving courts as a response to nonviolent drug offenders recidivism rates and continued addictive behavior).

<sup>27</sup> *See generally*, Wexler, *supra* note 10.

<sup>28</sup> Winick, *supra* note 19.

<sup>29</sup> Jones, *supra* note 6.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

various practitioners throughout the legal community have concerns about TJ, this author joins Professors Wexler and Winick in the “therapeutic justice movement.” This article acknowledges the “TJ criminal defense lawyer” and suggests that attorneys and judges incorporate the TJ “lens” into three particular categories of criminal law: behavioral contracts, prevention planning, and reinforcing law-abiding behavior. This incorporation will maximize the therapeutic potential of the law and effectively mainstream TJ practices and techniques into “ordinary” criminal courts.<sup>32</sup>

## II. INCORPORATING THE TJ “LENS” INTO BEHAVIORAL CONTRACTING GIVES THE DEFENDANTS A STAKE IN THE GAME.

Behavioral contracting requires judges and lawyers to play a special role in the judicial process and incorporate certain techniques to facilitate an individual’s motivation and compliance with a given program.<sup>33</sup> “The likelihood of compliance is increased if a court encourages a [defendant] to enter into a behavioral contract and make a public commitment to comply.”<sup>34</sup> For instance, Judge Tom Grove employs the practice

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<sup>32</sup> Winick, *supra* note 19.

<sup>33</sup> Bruce J. Winick, *Special Theme: Preventive Outpatient Commitment for Persons with Serious Mental Illness: Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 Psych. Pub. Pol. and L. 107, 125 (2003) (the article analyzes therapeutic jurisprudence and legal considerations to outpatient commitment and proposes alternatives such as: wider availability of community treatment, outreach, case management services, assertive community treatment, police and mental health court diversion programs, and creative uses of advanced directive instruments, and behavioral contracting).

<sup>34</sup> David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991) (analyzing therapeutic jurisprudence -- the extent to which legal actors produce therapeutic and at other times anti-

and technique of having the defendant approach the bench to sign a behavioral contract, providing the defendant with a sense of participation in the process and the importance of the conditions contained in the behavioral contract.<sup>35</sup> Behavioral contracting will help cure the “revolving door effect in which drug offenders typically resume their drug-abusing behavior after release from prison.”<sup>36</sup> Professor Winick explains behavioral contracting by analogizing it to a bet, and in doing so, illuminates the inducement of the defendant to succeed in accomplishing a variety of very useful social objectives:

Several years ago I tried to teach my two older children the game of poker. Poker is a game of skill, although luck plays an undeniable role. I fancied myself somewhat of a master of the game, going back to my boyhood days in Brooklyn. But my children were suburban kids who had not yet learned to play. I described the rules and we played for a while but they seemed to be slow learners, even though they are bright and had expressed an interest in learning. Then I suggested we play for money--pennies actually, but this new twist in the game had an interesting effect. With a stake in the game, they learned much more quickly. This episode made me think about several things--dares, and challenges, and bets, and motivation. Now, in my youth, a dare was enough to induce at least

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therapeutic consequence -- as a new research tool for mental health law and other areas of law).

<sup>35</sup> David B. Wexler, *From Theory to Practice and Back Again in Therapeutic Jurisprudence: Now Comes the Hard Part*, 37 MONASH U. L. REV. 33 (2011) (discussing therapeutic jurisprudence beyond theory and in practice).

<sup>36</sup> WINICK, *supra* note 19.

some otherwise rational people to attempt some very risky feats of foolishness. Not in my neighborhood, however. We were too sophisticated. But a bet--that was different. "I'll bet you a dollar you can't climb the fence." This challenge, coupled with the dollar reward, provided the added incentive that a mere dare to perform this death-defying act could not. And, unlike the dare, once accepted there was no backing out. After all, backing out at that point would cost a dollar as well as the loss of face that failing to meet a publicly accepted challenge would bring. Oh, how powerful is the combined incentive to succeed/disincentive to fail of the bet in which the contingency is in the control of the bettor. And oh how seductive a motivator it is to induce attempted performance that would not otherwise seriously be considered.<sup>37</sup>

Also like a bet, a behavioral contract provides the defendant with "a stake in the game," incentivizing the appropriate behavior.<sup>38</sup> Using a bet as a metaphor to a behavioral contract can provide insight into the incentives and disincentives, just as using a student as a metaphor for a defendant can help explain the appropriate replacement behaviors. Defendants, like troubled students, need to eliminate problematic behavior and build positive relationships. In behavioral contracting, contractors describe a student's negative behavior and focus on the behavior they want the student to extinguish. Instead, the focus should be to reward a student for behavior that the contractors *do* want to see because punishment only makes a behavior dis-

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

appear temporarily<sup>39</sup> (emphasis added). The replacement behavior has just as much weight as the behavior sought to be eliminated.<sup>40</sup> It is also important for contractors to follow through when a consequence is set to occur for a behavior.<sup>41</sup> This should be done with both positive and negative consequences.<sup>42</sup> Following through with consequences will ensure that the student does not receive the “pay-off” for a behavior prematurely.<sup>43</sup> Even school conflict resolution, which may have implications for the understanding of development of legal processes, can be provided with insights by utilizing the therapeutic jurisprudence “lens” to optimally configure programs for development and adoption.<sup>44</sup>

Research suggests that behavioral contracting works best when the contracts are specifically tailored to the particular

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<sup>39</sup> Jerry Webster, *Behavior Contracts to Support Good Behavior* (2015)), <http://specialed.about.com/od/behavioremotional/a/Behavior-Contracts-To-Support-Good-Behavior.htm> (discussing behavioral contracting in an academic or student concentrated setting with a focus on positive intervention).

<sup>40</sup> *Id.*

<sup>41</sup> DEP'T OF EXCEPTIONAL STUDENT EDUC., ESCAMBIA CNTY. SCH. DIST., *Addressing Student Behavior: A Positive Approach, Conducting Functional Behavioral Assessments and Developing Positive Behavior Intervention Plans*, <http://www.escambia.k12.fl.us/pbis/rtib/Behavior%20Intervention%20Guide-9.13.pdf> (the article acts as a guide to conducting behavioral assessments and developing positive intervention plans).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Nicky J. 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). Available at <http://ssrn.com/abstract=1694577> (the paper explores a study of student peer mediation as an alternative to managing destructive conflict drawing on therapeutic jurisprudence).



needs and desires of the individual.<sup>45</sup> Individualizing a behavioral contract defines the target behavior with specificity, clearly lists the constructive and aversive consequences, and unambiguously indicates the relevant dates to the contract.<sup>46</sup> “The act of composing and signing a contract is a small but potentially important ritual signifying the client's commitment to the proposed change.”<sup>47</sup> Courts have discretion to construct conditional releases as agreements between the court and the defendant, rather than as an order, further incentivizing the defendant's compliance by giving him or her a “stake in the game.”<sup>48</sup>

For instance, mainstreaming TJ in criminal law through behavioral contracting was illustrated by therapeutic jurisprudence implemented by criminal defense attorney, John McShane, in the “jailhouse intervention case” of Dallas, Tex-

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<sup>45</sup> DONALD MEICHENBAUM & DENNIS C. TURK, FACILITATING TREATMENT ADHERENCE A PRACTITIONERS GUIDEBOOK, 168 (Springer, 1st ed., 1987) (Discussing behavioral contracting and prompted David B. Wexler to publish Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process, 27 CRIM. L. BULL. 18 (1991)).

<sup>46</sup> David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, pincite (1993), available at <http://scholarship.law.wm.edu/wmlr/vol35/iss1/10> (this essay proposes, contrary to the opinion of Professor George Fletcher that the behavioral sciences seem to offer little to the criminal law setting, that therapeutic jurisprudence perspectives will allow criminal law to profit from insights that the behavioral sciences provide).

<sup>47</sup> U.S. DEP'T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (SAMHSA), BRIEF INTERVENTIONS AND BRIEF THERAPIES FOR SUBSTANCE ABUSE, TIP 34 (1999) (the publication introduces counselors and therapists to brief intervention and brief therapy for mental disorders and substance abuse problems. Furthermore, the article presents practical methods and case scenarios for implementing shorter forms of treatment for a range of populations and problems).

<sup>48</sup>Wexler, *supra* note 34.

as.<sup>49</sup> In this case, the family of the criminal defendant hired defense attorney John McShane, to intervene and use his TJ practices and techniques in order to convince the defendant to go to treatment, and persuade the judge to release the defendant on a conditional bond.<sup>50</sup> McShane, who limits his practice to therapeutic jurisprudence, advised the defendant that “the family hired [McShane] to represent [the defendant] in a therapeutic context, but only on the condition that ‘street bail’ [was] off the table.”<sup>51</sup> McShane explained “street bail” as a bond releasing the defendant on his own recognizance, as opposed to going to treatment.<sup>52</sup> The conditional bond in this case illustrates a behavioral contract.<sup>53</sup> The contract included the following: 1) the defendant agreed to no street bond<sup>54</sup> and 2) a promise to remain in the treatment program until successful completion at risk of being disqualified from the program and in noncompliance of the “bond” and subject to arrest.<sup>55</sup> In this particular case, McShane’s execution of preventive law and TJ practices and techniques did not prove easy. McShane retained a psychiatrist, a highly credible expert, board certified in both psychiatry and addictive medicine, to complete an evaluation of the defendant.<sup>56</sup> The evaluation concluded with a dual diagnosis—acute cocaine addiction and clinical depression—and the defendant’s best interest was to receive treatment at a center outside of the court’s jurisdiction.<sup>57</sup> Accomplishing this

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<sup>49</sup> David B. Wexler, *Introductory Symposium Essays: Therapeutic Jurisprudence and family-Friendly Criminal Law Practice*, 17 BARRY L. REV. 7, 10 (2011).

<sup>50</sup> Wexler, *supra* note 37; *See also* Wexler, *supra* note 10, at 194.

<sup>51</sup> Wexler, *supra* note 10, at 194.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 195.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Wexler, *supra* note 10, at 194.

<sup>57</sup> *Id.*

feat was met with resistance; as the prosecutor in the case argued that the defendant could receive treatment in state and that the defendant may reoffend. The court was also generally reluctant to use an out-of-state treatment facility.<sup>58</sup> However, with the help of multi-disciplinary resources composed of various professionals in other fields, McShane convinced the judge to release the defendant on conditional bond and to allow the defendant to attend the bettersuited out-of-state treatment facility.<sup>59</sup> The TJ prevention planning practice and techniques employed by McShane proved to be successful as the defendant successfully completed treatment. The prosecutor then agreed to dismiss the arson charge, and further allowed the defendant to plead down to a deferred adjudication of possession of cocaine.<sup>60</sup>

Ultimately, McShane, utilizing behavioral contracting and TJ practices and techniques, provided therapeutic consequences for the defendant, rather than anti-therapeutic consequences, as the defendant is now reunited with his family, holding a good job, and, more importantly—sober.<sup>61</sup> Behavioral contracting, as seen in this particular illustration, proves to help cure the “revolving door effect in which drug offenders typically resume their drug-abusing behavior after release from prison.”<sup>62</sup>

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<sup>58</sup> *Id.* at 196.

<sup>59</sup> *Id.* at 197

<sup>60</sup> *Id.* at 197-98

<sup>61</sup> Wexler, *supra* note 10, at 198

<sup>62</sup> *See* Wexler, *supra* note 10; Wexler *supra* note 19.

III. INTEGRATING THERAPEUTIC JURISPRUDENCE INTO  
PREVENTION PLANNING FACILITATES —AN EXPANSION OF THE  
POTENTIAL OF THE LAW

For quite some time, there have been concerns regarding prevention planning, also known as preventative law, and its place in the legal field. Some have suggested that “the rehabilitative efforts so far had no appreciable effect on recidivism.”<sup>63</sup> However, incorporating TJ principles and techniques to the prevention-planning prong of the rehabilitative efforts of judges and lawyers can advance the potential of the law. Encouraging offenders to think through the causal chain of events that led to criminality will assist in the avoidance of these high-risk situations.<sup>64</sup> The process of encouraging individuals to analyze how the offense came about “will enable an offender to resolve two things: (1) high risk situations for criminality or juvenile delinquency; and (2) how to avoid high risk situations and their respective coping mechanisms.”<sup>65</sup> Applying TJ, suggests more than acquiescence to a prevention plan, i.e., the Socratic method, instead, it will allow individuals to undergo a “cognitive self-change, an ability to stop and think in advance of the consequences, and to anticipate high risk situations, and to learn to avoid and cope.”<sup>66</sup> This change will be furthered by the idea that the offender, on their own, but will be able to use logic and reasoning to foresee high-risk situations. This allows for not only allowing the potential of the law to extend beyond the offense at hand, but also into the individual’s everyday life.<sup>67</sup>

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<sup>63</sup> ROBERT MARTINSON, WHAT WORKS? QUESTIONS AND ANSWERS ABOUT PRISON REFORM, THE PUBLIC INTEREST, 25 (1974) (stating that after assessing various prison reforms the rehabilitative efforts examined by Martinson suggested that rehabilitation did not work).

<sup>64</sup> Wexler, *supra* note 18, at 133.

<sup>65</sup> *Id.* at 134

<sup>66</sup> *See*, Wexler, *supra* note 10; Wexler, *supra* note 11.

<sup>67</sup> *See*, Wexler, *supra* note 10; Wexler, *supra* note 11.

A. *The TJ “Lens” In Application to Prevention Planning*

*United States v. Riggs*, is a case in which criminal defense lawyers or judges are likely to encounter depicts the possibilities of downward departure in sentencing and client wellbeing based on behavioral contracting.<sup>68</sup> In *Riggs*, a pat-down frisk revealed the presence of a .22 revolver in the defendant’s jacket.<sup>69</sup> Riggs had previously been convicted on drug charges and possession of a short-barrel shotgun. The sentence was suspended and Riggs completed three years of probation.<sup>70</sup> Riggs suffered from paranoid schizophrenia, and if not medication, he experienced paranoia and auditory hallucinations.<sup>71</sup> At the time of arrest, Riggs, who was not on his medication, was under the impression that he was an undercover officer and that people were out to hurt him.<sup>72</sup> For duration of approximately twenty months, the time from arrest to sentencing, Riggs’ condition improved based on two specific factors. First, Riggs’ mother reminded him to take his medication. Second, Riggs’ physician administered intramuscular antipsychotic injections that slowly released into his system, allowing Riggs to be medicated for up to a month, even if he forgot to take his oral medication.<sup>73</sup>

In *Riggs*, the prevention planning treatment, although unsuccessful in persuading a majority of the court for a downward departure in sentencing, the plan allowed Riggs to provide answers to the court and himself on the two important questions in prevention planning: (1) the high-risk situations for criminality or juvenile delinquency; and (2) how can the high-risk situations be avoided, and their separate coping

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<sup>68</sup> *United States v. Riggs*, 370 F.3d 382, pincite (4th Cir. 2004).

<sup>69</sup> *Id.* at 383

<sup>70</sup> *Id.* at 383-84.

<sup>71</sup> *Id.* at 384

<sup>72</sup> *Id.*

<sup>73</sup> *Riggs*, 370 F.3d at 384.

mechanisms. Riggs' high-risk situations occurred when he was not taking his medication.<sup>74</sup> Additionally, Riggs could have avoided these high-risk situations by taking his medication as prescribed, and by allowing his physician to implement intramuscular antipsychotic injections.<sup>75</sup> Courts do have the ability to consider "any treatment the defendant is receiving or will receive while under sentence, and the likelihood that such treatment will prevent the defendant from committing further crimes."<sup>76</sup>

Another example of prevention planning can be found in the case of John X, where the TJ-oriented law office of attorney Michael Crystal took a creative and successful approach at persuading the court, in lieu of incarceration, to administer a conditional sentence.<sup>77</sup> Client John X was found guilty of: (1) assault with a weapon, namely a bear repellent contrary to section 267(a) of the Criminal Code of Canada; (2) possession of a weapon for a purpose dangerous to the public peace, namely bear repellent; (3) possession of a weapon for a purpose dangerous to the public peace, namely a flare gun; (4) failure to stop at the scene of an accident; (5) possession of incendiary materials for the purpose of committing an offense; (6) breaking and entering; and (7) arson.<sup>78</sup> Dr. Karine Langley, coordinator of therapeutic projects at Michael Crystal's Criminal Law Office, filed an affidavit with the court, explaining to the judge that if John X were granted conditional release, he would be living with his mother. To further persuade the judge to issue a conditional sentence, letters were disseminated to members of the community, who responded, reflecting: (1) "[they] would

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 388 (Duncan, J., dissenting); See also *United States v. Atkins*, 116 F.3d 1566, 1572 (D.C. Cir. 1997) (Henderson, J., dissenting).

<sup>77</sup> Wexler, *supra* note 37, at 8; See also Wexler, *supra* note 10.

<sup>78</sup> Wexler, *supra* note 10, at 186.

have no fears for [their] safety or that of [their] family, should [John X] be released to live with his mother, and (2) if [they] were provided with a copy of [John X's] sentencing conditions, [they] would have no hesitation in reporting [John X] to the police if he were in violation of any of the conditions."<sup>79</sup> This set of circumstances is not only innovative, but an effective example of employing TJ practices and techniques into prevention planning in the criminal law context.<sup>80</sup>

By employing the TJ "lens" into prevention planning, attorneys and judges are able to increase the potential of the law in a practical way. As in the case of John X, who was released to live with his mother, the community was keeping a watchful eye, assisting in preventing high-risk situations and recidivism.<sup>81</sup> Additionally, in the case of *Riggs*, the mother demonstrated prevention planning as she constantly reminded the defendant to take his medication and his physician's intramuscular injections. Both aspects of the prevention planning for John X allowed for added protection, helped reduce high-risk situations, and allowed the defendant to cope with these situations as they arose.<sup>82</sup>

*B. Reinforcing Law-Abiding Behavior in a Therapeutic Manner Will Extend the Law Beyond the Court Room.*

Therapeutic Jurisprudence relates to reinforcing law-abiding behavior by advocating a manner in which courts, lawyers, and judges, can increase compliance with behavioral contracts, like conditional releases or probationary terms, in order to extend the "arm" of the law beyond the courtroom.<sup>83</sup> Thera-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Riggs*, 370 F.3d 382; See also Wexler, *supra* note 10, at 11-14.

<sup>83</sup> David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and*

peutic Jurisprudence literature suggests ways in which attorneys and judges alike can incorporate a reinforcement of law-abiding behavior into the offender in a therapeutic manner.<sup>84</sup> These suggestions include: (1) encouraging the offender's family and friends to be present at sentencing in order to learn of the imposed conditions and help reinforce those conditions; (2) holding follow-up hearings in order to not only monitor the compliance of the offender, but also to acknowledge the success, leading to a reinforcement of appropriate or law-abiding behavior; and (3) making appropriate, positive remarks at successful completion of the condition.<sup>85</sup> "If [courts] follow the TJ advice of generating a more sensitive letter to the offender, the stage may be set for a more positive long term outcome."<sup>86</sup> Therapeutic Jurisprudence has focused on the delivery of judicial remarks, elucidating that a careful crafting of statements, and even the role of the attorney in explaining decisions and reasons, can be restorative to the offender.<sup>87</sup>

Central Illinois criminal defense attorney Brendan Bukalski, harnesses TJ by focusing on the client's underlying issues in order to prevent high-risk situations from reoccurring which ultimately leads to a reduction in recidivism.<sup>88</sup> Bukalski, while attempting to reshape the law and provide his clients with the

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*Practices*, 7 ARIZ. SUMMIT L. REV. 463, 468 (2014); See generally Wexler, *supra* note 10.

<sup>84</sup> David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463, 468 (2014) (the article analyzes therapeutic jurisprudence techniques and practices in a criminal law context).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*; See generally Wexler, *supra* note 10.

<sup>88</sup> Telephone Interview with Brendan Bukalski, Partner, Johnson Law Group (March 15, 2015) (Brendan Bukalski has experience ranging from the Livingston County State's Attorney's Office, Assistant State's Attorney, to a criminal defense trial attorney).



maximum therapeutic potential, classifies his case progression into three main categories.<sup>89</sup> First, he focuses on the underlying issues that led the client to offend in the first place.<sup>90</sup> By addressing these underlying issues, the client is able to get his or her life back on track, and avoid high-risk situations that may lead to reoffending.<sup>91</sup> Secondly, Bukalski shifts the focus to reinforcing law-abiding behavior, especially while the client's case is being considered.<sup>92</sup> This is done after the client has met with a mental health specialist or other members of a multidisciplinary team and together, come to an understanding of how or why the client is in the current situation. The intermediary period from offending, until the case is adjudicated, is crucial to the success of not only the current case, but also the client's success. This is because the client is in a weak state of mind and needs all of the encouragement and hope possible from his or her change agent, the attorney.<sup>93</sup> Finally, Bukalski categorizes the final stage in his case progression as the reentry stage. Here, the client no longer needs the services of a TJ criminal defense attorney and can successfully reenter society as an active and rehabilitated citizen.<sup>94</sup> Bukalski has provided his services to many clients. However, two examples in particular illustrate how adding the TJ "lens" to a criminal defense practice can successfully accomplish prevention planning and reinforce law-abiding behavior.<sup>95</sup>

For instance, client X, an educated nurse, who had a prior retail theft charge, reoffended by committing retail theft a year later. Because of the prior retail theft, her offense was classi-

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Telephone Interview with Brendan Bukalski, Partner, Johnson Law Group (March 15, 2015).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

fied as a felony.<sup>96</sup> Over the course of about a year, this same client committed yet another retail theft. TJ attorney Mr. Bukalski realized there was no rhyme or reason to her stealing, especially since the majority of the items were incidental items of low value<sup>97</sup> and came to the conclusion that there was something going on—an underlying issue causing the client to reoffend.<sup>98</sup> Attorney Bukalski coordinated with a mental health specialist to determine if there were underlying issues or triggers that could have been causing her to commit the crimes.<sup>99</sup> The mental health specialist completed an evaluation of the client and determined that she was committing these retail thefts because of an underlying mental health issue.<sup>100</sup> By educating the client as to why she was committing these offenses and coordinating with a multi-disciplinary team for several months to address the underlying issues, Bukalski not only actively assisted the client with changing and improving her life, but he also compiled a case for the judge that explained why the client had been hauled into court and what was done to correct the problem.<sup>101</sup> These TJ tactics assisted in persuading the judge to impose a more lenient or therapeutic sentence.<sup>102</sup>

Additionally, client Y, similar to the previous illustration, committed a retail theft crime, and while out on bond, reoffended by committing yet another retail theft, classifying the second offense as a felony.<sup>103</sup> Bukalski, having been familiar with this pattern of behavior, knew something was

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<sup>96</sup> *Id.*

<sup>97</sup> Telephone Interview with Brendan Bukalski, Partner, Johnson Law Group (March 15, 2015).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Telephone Interview with Brendan Bukalski, Partner, Johnson Law Group (March 15, 2015).

<sup>103</sup> *Id.*

wrong.<sup>104</sup> The client did have a prior criminal history, but had not reoffended for approximately twenty years prior to the two retail theft charges.<sup>105</sup> Over the past twenty years, the client had not had any run-ins with the law and was pursuing her bachelor's degree, hoping to make a career in social services.<sup>106</sup> After investigating the client's past history, it was determined that her prior offenses were drug-related, and she subsequently pursued a drug treatment program that was ultimately very successful, as she was clean and sober and had not used drugs since starting treatment.<sup>107</sup> By being proactive and employing the TJ "lens," Bukalski was able to see the need for a mental health assessment, which ultimately determined that the most recent offenses, the two retail theft charges, were a result of a failing marriage. As such, instead of resorting to drugs as she had in the past, the client relied on retail theft to cope with the stress from her failing marriage.<sup>108</sup> This client was unique, as most individuals who were addicted to drugs at some point in their life resort to using drugs again when they experience stress or a new trigger emerges.<sup>109</sup> However, this client, instead of resorting to using drugs, was self-medicating by way of retail theft.<sup>110</sup> By employing the TJ "lens" into prevention planning and reinforcing law-abiding behavior, Bukalski was able to make this story have a happy ending, as the client successfully completed her bachelor's degree, enrolled in a master's program, and, most importantly, persuaded the court to issue a sentence of non-incarceration.<sup>111</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> Telephone Interview with Brendan Bukalski, Partner, Johnson Law Group (March 15, 2015).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

## IV. CONCLUSION

Attorneys and judges who incorporate the TJ “lens” into the daily work of the courts can maximize the therapeutic potential of the law and expand the law into everyday life.<sup>112</sup> The traditional TJ approach, as applied in problem-solving courts, limits its sweeping effect to touch and concern many individuals dealing with drug, alcohol, and mental health problems.<sup>113</sup> Problem-solving courts exclude large numbers of individuals because of eligibility requirements and limits on capacity.<sup>114</sup> As some general courts may seem unattractive to TJ methods unless and until the law itself is reformed, legal actors, in promoting TJ practices, will open the “eyes” of the law, advocate, and implement change in the legal system.<sup>115</sup> The constant struggle between the balance of disposing of high volume calendars in an efficient manner and the need to provide individualized justice dealing with the underlying issues of the crime poses risks to fully integrating TJ into the general court system.<sup>116</sup> However, a solution-focused approach, performed skillfully, takes no longer than a traditional hearing.<sup>117</sup> Thus, the need to promote TJ practices and techniques is even more important in order for judges and lawyers to obtain the skills

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<sup>112</sup> See generally, Wexler, *supra* note 10; Wexler, *supra* note 11; Winick, *supra* note 19.

<sup>113</sup> David B. Wexler, *Wine & Bottles: A Metaphor & Methodology for Mainstreaming TJ*, THERAPEUTIC JURISPRUDENCE IN THE MAINSTREAM BLOG (June 15, 2015), available at <https://mainstreamtj.wordpress.com/2014/07/29/wine-bottles-a-metaphor-a-methodology-for-mainstreaming-tj-by-david-wexler/#more-111> (the article includes works regarding mainstreaming therapeutic jurisprudence in the “ordinary” legal system with a focus on criminal law, using wine and bottles as a metaphor for delivering TJ techniques and methods).

<sup>114</sup> *Id.*

<sup>115</sup> See generally, Wexler, *supra* note 95.

<sup>116</sup> Spencer, *supra* note 9.

<sup>117</sup> *Id.*

necessary to focus on solution-based approaches. It is a challenge to shift from the traditional ad hoc version of TJ to the more comprehensive fully integrated approach, but much is being done in a range of jurisdictions to facilitate this implementation.<sup>118</sup> Reform is a long-term process and requires legal actors to continue professional development in order to integrate the evidence-based practices and evaluations.<sup>119</sup> TJ-friendly courts in the “ordinary” system may spark interests and efforts by the general public to enhance the therapeutic potential of the law and the process of procedural fairness, thereby creating a more satisfying environment for all those involved in the legal community.<sup>120</sup>

Professor Tyler, a leading writer on the elements and necessity of procedural fairness, explains that there are four basic public expectations of the legal system: (1) having voice, (2) neutrality of the judge, (3) respectful treatment, and (4) trustworthy authorities.<sup>121</sup> The single most important source of dissatisfaction in the general public with the legal system is its perception of unfair and unequal treatment.<sup>122</sup> Legal actors can

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See generally, Wexler, *supra* note 95.

<sup>121</sup> Jones, *supra* note 6.

<sup>122</sup> Kevin Burke & Steve Leben, *A White Paper of the American Judges Association the Voice of the Judiciary (R): Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REVIEW 4, pincite (2007), available at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2BurkeLeben.pdf> (Judges Burke and Leben discuss the essential element of procedural fairness in the public’s perception of the legal system and further analyze the concept of fairness in its application to compliance with court processes and orders. According to David B. Wexler, the work is “a handy, brief, crisp, readable, and immensely practical” White Paper. David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence*, 44 COURT REVIEW 78, pincite (2008),) available at <http://ssrn.com/abstract=1131768>. <http://ssrn.com/abstract=1131768>.

alleviate this disadvantageous evaluation of the legal system by paying critical attention to key elements of procedural fairness and transparency.<sup>123</sup> Judges and attorneys who have used TJ practices and techniques, such as active listening, team building, and an emphasis on procedural justice, may employ these skills in mainstream courts.<sup>124</sup> Furthermore, judges and lawyers alike should not disregard the techniques and procedures that made the problem-solving courts so successful.<sup>125</sup> By using examples derived from various conceptual frameworks, such as the case of *Riggs* or attorney Michael Crystal's client, John X, legal actors can improve upon the practical and logistical issues hindering TJ's integration into "ordinary" courts.<sup>126</sup> Because behavioral contracting, prevention planning, and reinforcing law-abiding behavior overlap and join most other legal processes of which attorneys and judges concentrate their skills, applying TJ techniques and practices into these specific categories will essentially "mainstream" the therapeutic benefits into the "ordinary" system. In advocating for improvements in the many arenas of the legal system, this author proposes that legal actors extend TJ practices and methods into the "ordinary" system, effectuating a more humanistic approach to the law, thereby maximizing its potential.

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<sup>123</sup> *Id.*

<sup>124</sup> Jones, *supra* note 6.

<sup>125</sup> *Id.*

<sup>126</sup> Wexler, *supra* note 35.

TJ OR TM? A THERAPEUTIC JURISPRUDENCE APPROACH TO  
NATIVE AMERICAN TRADEMARK REGISTRATIONS

H. Patrick Harwood\*

I. INTRODUCTION

When the United States Patent and Trademark Office recently cancelled the Washington Redskins trademark registrations, the action flooded sports media with commentary on the name, from those who call it outright racist to those who steadfastly defend it.<sup>1</sup> In court, this trademark dispute presented many issues ranging from purely economic to fundamental constitutional rights.<sup>2</sup> This article takes a different approach by analyzing Native American trademark registrations under a therapeutic jurisprudence lens. This article contends that a therapeutic jurisprudence approach could provide the courts with more tools to heal the social concerns underlying trademark registration lawsuits associated with Native Americans.

First, this article conjectures that both the plaintiffs and defendants in Redskins lawsuit are looking for a more therapeutic process than the face of the law provides. It then discusses social science data on Native American trademarks, and it provides a normative rule that the courts and legislature could use to frame registration decisions on this matter. Finally, the arti-

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\* Mr. Harwood wrote this paper as a second-year student at Arizona Summit Law School.

<sup>1</sup>See, e.g., Dan Steinberg et al., *Where People Stand On the Redskins' Name*, WASH. POST (Aug. 20, 2014), <http://www.washingtonpost.com/wp-srv/special/sports/redskins-name-opinions/>.

<sup>2</sup>Complaint of Plaintiff, Pro-Football, Inc. v. Blackhorse, (No. 1:14-cv-01043-GBL-IDD), (E.D. VA. Aug. 14, 2014), 2014 WL 4719977 at 11; Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439 (E.D.Va. 2015).

cle suggests ways in which judicial opinions might be able to adopt that normative rule through their interpretations of the Lanham Act.

## II. BACKGROUND

### A. *History of the Washington Redskins trademark dispute*

In September of 1993, *Harjo v. Pro-Football* began when several Native American petitioners filed a claim with the Trademark Trial and Appeal Board (“TTAB”) to cancel the Washington Redskins trademarks.<sup>3</sup> The petitioners requested the cancellation on the ground that the trademarks violated the Lanham Act, which forbids registration of trademarks that “may disparage” persons.<sup>4</sup> The TTAB held for the petitioners, but through a number of appeals, the federal courts ultimately vacated that decision and dismissed the case on the doctrine of laches.<sup>5</sup> Essentially, the court held that since the football team had been using its trademarks since 1967, and more than eight years passed since the youngest petitioner had reached the age of majority, it was inequitable to allow the petitioners to bring this suit.<sup>6</sup> However, during the appeals process, a younger group of petitioners filed a nearly identical complaint in *Blackhorse v. Pro-Football*.<sup>7</sup> The petitioners used largely the same record as in *Harjo* to support their claim in this case, and the TTAB again cancelled all six of the Washington Redskins

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<sup>3</sup> *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705 (Trademark Tr. & App. Bd. Apr. 2, 1999) rev'd, 284 F. Supp. 2d 96 (D.D.C. 2003). The legal name of the Washington Redskins is Pro-Football, Inc., hereinafter “Pro-Football.”

<sup>4</sup> 15 U.S.C.A. § 1052 (West).

<sup>5</sup> *Pro Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009), Cert. Denied *Harjo v. Pro-Football, Inc.*, 558 U.S. 1025, 130 S. Ct. 631, 175 L. Ed. 2d 480 (2009).

<sup>6</sup> *Id.*

<sup>7</sup> *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (Trademark Tr. & App. Bd.), 2014 WL 2757516.



trademarks because they “may disparage.”<sup>8</sup> In June 2015, the district court affirmed this decision on appeal.<sup>9</sup> However, the case is still unresolved at this time because the team further appealed the decision to the Fourth Circuit, and, in an unrelated case, the Federal Circuit recently ruled the relevant section of the Lanham Act is an unconstitutional limitation on free speech.<sup>10</sup>

*B. What is this dispute really about? The potential for a more therapeutic approach*

While, on their faces, *Harjo* and *Blackhorse* are about the registration of six trademarks, in reality, the disputing parties may seek to resolve broader issues in these cases. The Native American petitioners hope that cancelling the disputed trademarks will persuade the team to change its name, but the action will not inevitably do so.<sup>11</sup> In fact, Pro-Football may still have the ability to protect its merchandised logos and color schemes under copyright infringement laws,<sup>12</sup> and Daniel Snyder, owner of the team, has vowed never to change the name of the team.<sup>13</sup> Additionally, the trademark registration issue is mini-

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<sup>8</sup> *Id.*

<sup>9</sup> Pro-Football, Inc. v. Blackhorse, 112 F.Supp.3d 439 (E.D.Va. 2015).

<sup>10</sup> Opening Brief of Plaintiff-Appellant, Pro-Football, Inc. v. Blackhorse, (No. 2015-1874), (4<sup>th</sup> Cir. Oct. 30, 2015). *In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015) (holding that it was an unconstitutional limitation of free speech for the USPTO to deny an Asian-American rock music group trademark registration of the name “The Slants.”)

<sup>11</sup> Theresa Vargas, *U.S. Patent Office Cancels Redskins Trademark Registration, Says Name is Disparaging*, WASH. POST (June 18, 2014), [http://www.washingtonpost.com/local/us-patent-office-cancels-redskins-trademark-registration-says-name-is-disparaging/2014/06/18/e7737bb8-f6ee-11e3-8aa9-dad2ec039789\\_story.html](http://www.washingtonpost.com/local/us-patent-office-cancels-redskins-trademark-registration-says-name-is-disparaging/2014/06/18/e7737bb8-f6ee-11e3-8aa9-dad2ec039789_story.html).

<sup>12</sup> See 17 U.S.C.A. § 102 (West) (granting copyright protection to graphic and pictorial works).

<sup>13</sup> *Daniel Snyder Says Redskins Will Never Change Name*, USA TODAY (May 10, 2013),

mal because the TTAB clearly recognized that it does not have jurisdiction to prevent the use of the Redskins trademark.<sup>14</sup> The registration only gives Pro-Football certain advantages and the ability to sue in federal court if another company begins using its brand.<sup>15</sup> Regardless of the outcome, Pro-Football may still be able to prevent others from using its brand through trademark use lawsuits.<sup>16</sup> Finally, even if the de-registration of the trademark does prevent Pro-Football from recovering against others who use the Washington Redskins brand name, that may only increase the use of the name by third parties.<sup>17</sup> Thus, if the Native American petitioners prevail in this lawsuit, it is unclear what they will gain from the cancellation of the trademarks alone.

The Native American petitioners clearly want their case to influence Pro-Football to stop using the name "Redskins," but could they really want something more?<sup>18</sup> Are they really

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<http://www.usatoday.com/story/sports/nfl/redskins/2013/05/09/washington-redskins-daniel-snyder/2148127/>.

<sup>14</sup> *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (Trademark Tr. & App. Bd.), 2014 WL 2757516, citing *In re Franklin Press, Inc.*, 597 F.2d 270, 201 USPQ 662, 664 (CCPA 1979).

<sup>15</sup> 15 U.S.C.A. § 1121 (a) (granting federal courts jurisdiction to registered trademark lawsuits without requiring diversity and amount in controversy); 15 U.S.C. § 1057(b) (making trademark registration prima facie evidence of its ownership); 15 U.S.C. § 1115(a) (making a trademark registration prima facie evidence of its validity).

<sup>16</sup> *Corporate Counsel's Guide to Trademark Law* § 2:6 (explaining that use of a mark creates common law rights within the geographic area of its use). *But see In re Tam*, 808 F.3d 1321, 1339 (Fed. Cir. 2015) (reasoning that that local common law rights to trademark may be largely illusory).

<sup>17</sup> André Douglas Pond Cummings, *Progress Realized?: The Continuing American Indian Mascot Quandary*, 18 Marq. SPORTS L. REV. 309, 324 (2008) ("[I]f the term loses trademark protection and could be legally used by anyone, there could be a greater proliferation of the term as enterprising merchandisers could begin selling 'Redskins' paraphernalia.").

<sup>18</sup> See Erik Stegman and Victoria Phillips, *MISSING THE POINT. THE REAL IMPACT OF NATIVE MASCOTS AND TEAM NAMES ON AMERICAN INDIAN AND ALASKA NATIVE YOUTH*, Center for American Progress (July 2014)

looking for an avenue to show the world that Native American mascots are disparaging in a broader context than trademark law?<sup>19</sup> Could it be that they hope to show that Native American racial slurs are contrary to public policy?<sup>20</sup> Are they hoping that the law can help heal some of the public's damaging stereotypical thinking about Native Americans?<sup>21</sup>

On the other side, it may be hard to see what Pro-Football is after in this case as well. Some studies show that Pro-Football would suffer minimal financial loss if its trademarks registrations are cancelled or even if it changed its team name altogether.<sup>22</sup> So, what is causing Pro-Football to ardently defend its trademark registrations in the midst of public objections for over twenty-three years?<sup>23</sup> Could its concerns be about more than the financial impact of losing its registra-

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at 1-3 (Stating that the Redskins case debates several issues but fails to examine the real issue of the damaging effects that Native American mascots have on children and adults).

<sup>19</sup> *Id.* at 7-19 (summarizing ongoing political efforts to stop schools and sporting teams from using Native American mascots and imagery).

<sup>20</sup> *Id.* at 7, 18 (showing examples of how Native American mascots have encouraged students to use damaging stereotypes).

<sup>21</sup> *Id.*

<sup>22</sup> Michele M. Riley & Duke J. Schaeffer, *Hail to the... Redskins? How the TTAB's Cancellation of a Historic Mark Impacts Brand Value and the NFL*, STOUT RISIUS ROSS (Fall 2014), <http://www.srr.com/article/hail-the%E2%80%A6-redskins-how-ttab%E2%80%99s-cancellation-historic-mark-impacts-brand-value-and-nfl>.

<sup>23</sup> See, e.g., John Woodrow Cox & Mark Maske, *Civil Rights Group Closely Allied With the NFL Calls for the Redskins to Change Its Name*, WASH. POST (Jan. 19, 2014), [http://www.washingtonpost.com/local/civil-rights-group-closely-allied-with-the-nfl-calls-for-the-redskins-to-change-its-name/2015/01/18/d8c692ce-9cfe-11e4-bcfb-059ec7a93ddc\\_story.html](http://www.washingtonpost.com/local/civil-rights-group-closely-allied-with-the-nfl-calls-for-the-redskins-to-change-its-name/2015/01/18/d8c692ce-9cfe-11e4-bcfb-059ec7a93ddc_story.html) (describing some of the civil rights groups that take objection to the name "Redskins").

tions?<sup>24</sup> Is its defense and resistance to a name change at all related to its history and tradition with the team name?<sup>25</sup>

These questions and ambiguities show broader psychological issues at play in these cases, and perhaps the disputing parties and general public would see a more meaningful outcome if the courts analyzed the issues under a more therapeutic lens than solely under typical adversarial win-lose jurisprudence. Particularly, applications of therapeutic jurisprudence may be well suited to best frame the judicial opinions in the Washington Redskins trademark dispute and other disputes like it.

*C. Therapeutic jurisprudence and its context in this analysis*

Therapeutic jurisprudence looks at how “the law itself can be seen to function as a kind of therapist or therapeutic agent.”<sup>26</sup> It grew out of mental health law research in the late 1980s,<sup>27</sup> and it has expanded across numerous fields of law ever since.<sup>28</sup> While therapeutic jurisprudence uses tools of the social sciences to empirically examine laws and legal procedures, it goes further than mental health law by providing a normative orientation to suggest how the law “ought” to improve.<sup>29</sup> In this context, the “law” could be legal rules, administrative rules, legal procedures, or the roles of legal actors

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<sup>24</sup> See Complaint of Plaintiff, *supra* note 2, at 20 (alluding to the history and tradition in the team name).

<sup>25</sup> *Id.*

<sup>26</sup> Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH. PUB. POL. AND L. 184, 185 (1997).

<sup>27</sup> See DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (Carolina Academic Press 1990); ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1991).

<sup>28</sup> Winick, *supra* note 26, at 201. See also, SUSAN SWAIM DAICOFF, COMPREHENSIVE LAW PRACTICE, LAW AS A HEALING PROFESSION (Carolina Academic Press 2011), 81-86.

<sup>29</sup> Winick, *supra* note 26, at 190.

(which are primarily lawyers and judges, but could also refer to others).<sup>30</sup> For example, one author used a therapeutic jurisprudence lens to argue that a former military “don’t ask, don’t tell” policy was anti-therapeutic because it effectively required gays in the military to deceive their higher ranking officers about their off-duty involvements, and this led them to emotional isolation.<sup>31</sup> Similarly, another author used therapeutic jurisprudence to argue that confidentiality provisions in the Americans with Disabilities Act are anti-therapeutic because they prevent employers and coworkers from accommodating an employee’s disabilities.<sup>32</sup> Through a lens of therapeutic jurisprudence, scholars have been able to more accurately identify therapeutic or anti-therapeutic issues in mental health law, correctional law, tort law, contracts, administrative rulings, and numerous other legal conflicts.<sup>33</sup>

Therapeutic jurisprudence scholars have not precisely defined what is meant by “therapeutic.”<sup>34</sup> Taking a broad definition, “therapeutic could simply mean beneficial, whereas counter- or anti-therapeutic could mean harmful.”<sup>35</sup> While the progenitor of therapeutic jurisprudence cautions against more restrictive definitions at the risk of “eclips[ing] the issues that may be subject to research,”<sup>36</sup> he also acknowledges value in preserving a more distinct identity of therapeutic jurisprudence.

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<sup>30</sup> David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCH. PUB. POL. AND L. 220, 225 (1995).

<sup>31</sup> Kay Kavanagh, *Don’t Ask Don’t Tell: Deception Required, Disclosure Denied*, 1 PSYCH. PUB. POL. AND L. 142 (1995).

<sup>32</sup> Rose Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation; Therapeutic Jurisprudence and the Confidentiality Provisions of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89 (1994).

<sup>33</sup> ESSAYS IN THERAPEUTIC JURISPRUDENCE, *supra* note 27; LAW IN A THERAPEUTIC KEY, (David B. Wexler & Bruce J. Winick eds., 1996).

<sup>34</sup> Wexler, *supra* note 30, at 221-22.

<sup>35</sup> Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 Psych. Pub. Pol. and L. 193, 196 (1995).

<sup>36</sup> Wexler, *supra* note 30, at 221.

Therefore, in the context of this article, “therapeutic” is narrowly focused “on mental health and psychological aspects of health.”<sup>37</sup> Particularly, this article examines emotional, attitudinal, and mental health issues directly related to trademarks, but it does not go into broader issues, such as a societal need for the constitutional protections of speech and property, which arguably may also be “therapeutic” issues contemplated in the Redskins trademark dispute.

As an additional caveat to this therapeutic jurisprudence analysis and any analysis similar to it, a given law or legal process may be therapeutic for one particular person, but anti-therapeutic to another.<sup>38</sup> For example, scholars have used therapeutic jurisprudence to show how a fault-based tort system can heal some injured parties’ sense of equity by requiring the defendant to provide compensation, but it could also lead to an anti-therapeutic revenge mentality in other injured parties.<sup>39</sup> Logically speaking, a normative rule proposed through a therapeutic jurisprudence analysis should apply to those for whom it is therapeutic but not to those for whom it is not.<sup>40</sup> However, when courts are dealing with a legal rule that affects a large number of people, such as the Washington Redskins trademark registration, it would be impossible and non-judicial for the courts to issue a separate order for every interested party that treats them individually and differently.<sup>41</sup> This problem has not previously barred a macro-analytic analysis from the realm of therapeutic jurisprudence, and, in fact, the macro-analytic

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<sup>37</sup> *Id.* at 223.

<sup>38</sup> Slobogin, *supra* note 35, at 209.

<sup>39</sup> Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, in *LAW IN A THERAPEUTIC KEY*, (David B. Wexler & Bruce J. Winick eds., 1996) at 433-465.

<sup>40</sup> Slobogin, *supra* note 35, at 209.

<sup>41</sup> See Black’s Law Dictionary (10th ed. 2014) (the definition for “Stare Decisis” demonstrates that it would be non-judicial for a court to treat people differently because “...a court must follow earlier judicial decisions when the same points arise again in litigation...”).

approach has greatly expanded over the last decade.<sup>42</sup> As in the “don’t ask, don’t tell” application of therapeutic jurisprudence mentioned above, a law can be argued anti-therapeutic overall because it does more harm than good.<sup>43</sup> Therefore, while this article discusses empirical data relevant to trademark registration and suggests ways to assess that data for an overall more therapeutic outcome, those suggestions are not meant to provide a panacea for everyone.

Finally, one may ask if the TTAB or district court appeals process is really a proper forum for a therapeutic jurisprudence approach. Some people may argue that trademark registration should be primarily governed by economics or business considerations rather than therapy and mental health.<sup>44</sup> Furthermore, in an adversarial court system, the court can only respond to the issues presented by either side, not extraneous psychological data presented, so it may be hard to see where this approach fits in.<sup>45</sup> However, scholars in therapeutic jurisprudence remind that “the goal of therapeutic jurisprudence is to pinpoint the therapeutic impact of legal rules, not to require that therapeutic values trump other values.”<sup>46</sup> Therefore, the purpose of the therapeutic jurisprudence analysis in this article is not to urge the courts to abandon traditional procedures or trump all disputed issues with psychological considerations, but this therapeutic jurisprudence analysis merely gives the court additional tools with which to subtly make its opinions

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<sup>42</sup> Wexler, *supra* note 30, at 220.

<sup>43</sup> Kavanagh, *supra* note 31.

<sup>44</sup> See 1 Callmann on Unfair Comp., Tr. & Mono. § 1:9 (4th Ed.) (explaining that the purpose of trademark law is “to protect the competitive position of the enterprise”).

<sup>45</sup> See Sol Gothard, *Therapeutic Jurisprudence in the Appellate Arena—A Louisiana Jurist’s Response*, 24 SEATTLE U.L. REV. 335, 337 (2000) (summarizing that the court must refrain from issuing advisory opinions and only rule on actual “cases and controversies” rather than hypothetical facts when approaching therapeutic jurisprudence).

<sup>46</sup> Slobogin, *supra* note 35, at 209.

and decisions more meaningful to those who will have to live with them.

### III. THERAPEUTIC AND ANTI-THERAPEUTIC DATA ON TRADEMARKS WITH NATIVE AMERICAN ASSOCIATIONS

As a first step to applying a therapeutic jurisprudence approach to trademark registration, this article examines the social science data behind trademarks with Native American associations. Since there is little research specifically regarding trademarks on the issue, the article broadens the inquiry to the therapeutic and anti-therapeutic effects of all Native American sporting team names, mascots, and imagery.

#### A. *Anti-therapeutic effects of Native American sporting team names, mascots, and imagery*

##### 1. When perceived as hostile or discriminatory

Negative stereotypes psychologically damage those they offend.<sup>47</sup> Depression, aggressive behavior, low self-esteem, substance abuse, and suicide are just a few of the increased outcomes observed in individuals who have perceived discrimination against them.<sup>48</sup> Indeed, numerous studies show how stereotypical images negatively influence mental health.<sup>49</sup> The news is replete with personal accounts of Native Americans who perceive discrimination in Native American team names

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<sup>47</sup> MICHAEL A. FRIEDMAN, THE HARMFUL PSYCHOLOGICAL EFFECTS OF THE WASHINGTON FOOTBALL MASCOT, (commissioned by the Oneida Indian Nation) at 15-18.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 9.



and mascots.<sup>50</sup> In fact, the petitioners presented nineteen letters objecting to the name “Redskins” in *Blackhorse*, many of which echoed the troubling imagery that many Native Americans associate with the name.<sup>51</sup> For example, one letter stated:

The name “Redskins” is very offensive to me and shows little human interest or taste. I am a Comanche Indian from Oklahoma. Indians are having enough trouble trying to erase misconceptions about themselves without having to be hit in the face with it every day in the form of a football team or baseball team. If you think you are preserving our culture or your history, then may I suggest a change? To live up to your name, your team would field only two men to the opponents eleven. Your player’s wives would be required to face the men of the opposing team. After having lost every game in good faith, you would be required to remain in RFK stadium’s end zone for the rest of your life living off what the other teams had left you.<sup>52</sup>

Another stated:

The term “redskins” is out of a period when there was a bounty on the heads of Indians and they were scalped. Eighty cents for a man’s skin, 60 cents for a woman’s skin and 20 cents for a child’s skin. It is a period in our history that every American should be ashamed of and

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<sup>50</sup> See, e.g., Cox & Maske, *supra* note 23.

<sup>51</sup> *Blackhorse v. Pro-Football, Inc.* 111 U.S.P.Q.2d 1080 (Trademark Tr. & App. Bd.), 2014 WL 2757516 at 22.

<sup>52</sup> *Id.*

the continued use of such a derogatory and offensive term is an abomination.<sup>53</sup>

Particularly with regard to names like “Redskins,” many social science professionals find that Native American team names are not perceived as neutral and agree to the damaging impact of the name. For example, in *Harjo*, Arlene Hirschfelder, an educator and consultant in the field of Native American studies, testified that “Native Americans are portrayed in educational curricula, children's literature and toys, in a stereotypical manner, primarily as savages who are a ‘violent, war-like, provocative’ people.”<sup>54</sup> She concluded that such stereotyping has a negative effect on the self-esteem of Native American children.<sup>55</sup> Additionally, social scientist Stephanie Fryberg testified before Congress, stating “research finds that American Indian mascots have negative psychological consequences for American Indians...and negative effects on race relations in the U.S.”<sup>56</sup> Particularly, she claims “[t]he term ‘redskins’ is the most vile and offensive term used to describe Native Americans”<sup>57</sup>

## 2. When perceived as neutral or honorable

While it may be easy to see how negatively perceived team names and mascots lead to anti-therapeutic consequences, many people may not see how team names and mascots that appear neutral or attempt to honor Native Americans are in fact

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<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Stolen Identities: The Impact of Racist Stereotypes on Indigenous People: Hearing before the US S. Comm. On Indian Affairs*, 112<sup>th</sup> Cong. 1<sup>st</sup> Sess. (May 5, 2011) (Statement of Stephanie Fryberg).

<sup>57</sup> *Id.*

damaging.<sup>58</sup> However, numerous empirical studies evidence that seemingly neutral team names, mascots, and images can have anti-therapeutic effects on both Native Americans and non-Native Americans.

First, in a four-part study led by Stephanie Fryberg, researchers tested psychological consequences of common Native American images on Native American high school and college students living on reservations.<sup>59</sup> Through a series of tests, the researchers exposed the students to images of either the Cleveland Indians mascot (Chief Wahoo, a fictitious red-faced caricature of an Indian), Walt Disney's version of Pocahontas, The University of Illinois mascot (Chief Illiniwek, who was depicted as a European American dressed up as an Indian), the Haskell Indian Nations University mascot (Haskell Indian, who was depicted as a traditional Indian), a series of text designed to generate a stereotypically negative response, or a control condition (no exposure at all).<sup>60</sup> After students were exposed to one of these images, they performed either an association test where they wrote down the first words that came to mind, or they were asked to rank how much they agreed with certain statements about themselves or their communities.<sup>61</sup> Not surprisingly, the results showed students had more positive word association reactions to Native American images than to the text designed to elicit a negative response.<sup>62</sup> However, exposure to all of the Native American images led students to report lower feelings of self-esteem, community worth, and expectations of possible selves than the control group. The

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<sup>58</sup> One of the claims used by Pro-Football is that the name "Redskins" honors Native Americans. See Complaint of Plaintiff, *supra* note 2, at 24-25.

<sup>59</sup> Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED SOC. PSYCHOL. 208 (2008).

<sup>60</sup> *Id.* at 211-215.

<sup>61</sup> *Id.* at 212-215.

<sup>62</sup> *Id.*

researchers concluded that all fictitious Native American images are damaging, regardless of how traditional or benign the images may seem.<sup>63</sup> They conjectured this is because the traditional and fictitious images inhibit the students' ability to realize their own "positive and contemporary selves."<sup>64</sup>

In another study led by Dr. Scott Freng, researchers tested whether the Cleveland Indians mascot, Chief Wahoo, would lead a group of predominantly European Americans to make negative stereotype associations with Native Americans.<sup>65</sup> The researchers exposed participants to either an image of Chief Wahoo, the Pittsburgh Pirates mascot (a pirate), or the New York Yankees emblem (having no human image at all).<sup>66</sup> The participants were then asked to perform lexigraphy tests as quickly as possible.<sup>67</sup> Researchers found that when participants were primed with the Chief Wahoo images, they more quickly completed lexigraphy associated with unpleasant words ("savages, primitive, dirty, drunk, lazy, and suspicious") than when primed with the pirate or Yankees emblem.<sup>68</sup> Further, participants made the fastest association to pleasant words ("generous, noble, faithful, nature, proud, and artistic") when primed with the Yankees emblem, but there was no statistically significant association between pleasant words and exposures to either Chief Wahoo or the pirate.<sup>69</sup> This led the researchers to conclude that the Chief Wahoo mascot does not activate honor toward Native American people, but it may instead activate negative stereotypes.<sup>70</sup>

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<sup>63</sup> *Id.* at 216.

<sup>64</sup> *Id.*

<sup>65</sup> Freng & Willis-Esqueda, *A Question of Honor: Chief Wahoo and American Indian Stereotype Activation Among a University Based Sample*, 151 J. SOC. PSYCHOL. 577 (2011).

<sup>66</sup> *Id.* at 581-82.

<sup>67</sup> *Id.* at 580.

<sup>68</sup> *Id.* at 584, 591.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* 586-87.

In still another study, researchers measured college students' tendency to stereotype other racial groups after their exposure to Native American mascots.<sup>71</sup> Specifically, they gave college students at the University of Illinois a folder decorated with either stickers of Chief Illiniwek, an "I" icon used to market the University of Illinois athletics, or a control (no decoration).<sup>72</sup> Inside the folder, the students were asked to fill out a survey asking how much they agree with certain negative Asian American stereotypes.<sup>73</sup> The researchers found that students who were exposed to the Native American mascot more readily agreed with the negative Asian American stereotypes than students who were exposed to the "I" logo or the control condition.<sup>74</sup> To further validate these results, the researchers conducted a follow-up experiment at the College of New Jersey, with students who were unfamiliar with the Chief Illiniwek mascot or any controversy surrounding it.<sup>75</sup> They asked the students to read either a passage about the history of the Chief Illiniwek mascot (and how it honors Native American craftsmanship) or a control passage about the University of Illinois Arts program.<sup>76</sup> The students then filled out a similar survey, asking how much they agree with certain negative Asian American stereotypes.<sup>77</sup> Again, the results of the survey showed that exposure to even the mere passage about the Native American mascot increased the student's tendency to agree with negative Asian American stereotypes.<sup>78</sup> The researchers concluded that even mascots intending to respect and honor

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<sup>71</sup> Chu Kim-Prieto et al., *Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group*, 40 J. APPLIED SOCIAL PSYCH. 3, 534 (2010).

<sup>72</sup> *Id.* at 540.

<sup>73</sup> *Id.* at 539-540.

<sup>74</sup> *Id.* at 541.

<sup>75</sup> *Id.* at 542-43.

<sup>76</sup> *Id.* at 543-44, 552-53.

<sup>77</sup> *Id.* at 544.

<sup>78</sup> *Id.* at 544.

Native Americans could lead to heightened stereotyping of racial minorities.<sup>79</sup>

Further, another study measured whether Native American and majority culture college students are affected differently by exposure to the University of North Dakota "Fighting Sioux" mascot.<sup>80</sup> The researchers had students of both groups watch two slideshow presentations of the Fighting Sioux mascot, with the first slideshow being neutral mascot images and the second being controversial images.<sup>81</sup> After each slideshow, the researchers had the students fill out psychological surveys to measure their mental distress.<sup>82</sup> The results showed that the neutral slideshow did not correlate with increased mental distress in the majority culture students, but it did in the Native American students.<sup>83</sup> Further, the controversial images correlated with increased mental distress in both groups of students.<sup>84</sup> Thus, the researchers concluded that racist name or logo depictions are likely to negatively affect the psychological state of all students, and not everyone will neutrally experience seemingly non-controversial Native American names and logos.<sup>85</sup>

Finally, in another study, researchers assessed whether Caucasian college students have implicit negative biases towards Native American mascots' names.<sup>86</sup> The researchers

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<sup>79</sup> *Id.* at 546-47.

<sup>80</sup> Angela R. LaRocque et al., *Indian Sports Nicknames/Logos: Affective Difference Between American Indian and Non-Indian College Students*, AMERICAN INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH, Vol. 18 No. 2 (2011) at 1.

<sup>81</sup> *Id.* at 5-6.

<sup>82</sup> *Id.* at 4-5.

<sup>83</sup> *Id.* at 8-10.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 10.

<sup>86</sup> John Chaney et al., *Do American Indian Mascots = American Indian People? Examining Implicit Bias Towards American Indian People and American Indian Mascots*, AMERICAN INDIAN AND ALASKA NATIVE MENTAL HEALTH RESEARCH, Vol. 18 No. 1 (2011) at 42.

used a proven word association system that measures response time under different sorting tasks.<sup>87</sup> The results showed that Caucasian students do have an implicit tendency to associate unpleasant adjectives with Native American mascot and tribal names (“Chiefs, Redskins, Indians, Warriors, Braves, Fighting Sioux”), more so than with Caucasian mascots and European nationalities (“Celtics, Mountaineers, Pirates, Vikings, Rebels, Fighting Irish”).<sup>88</sup> The researchers conducted a second part to this study to further assess whether this implicit bias translates into the students making negative stereotypical assumptions about Native Americans.<sup>89</sup> In this second part, the researchers asked the Caucasian students to make assumptions about how much Native American students would enjoy answering certain categories of academic or non-academic questions.<sup>90</sup> The results showed a significant correlation between the implicit bias and an assumption that Native Americans would enjoy non-academic questions over academic questions.<sup>91</sup> The researchers concluded that it would be hard to defend a claim that Native American mascots honor Native Americans when they elicit negative biases on an implicit level, and students with these implicit biases are more likely to make negative stereotypical assumptions about Native Americans.<sup>92</sup> The researchers further asserted that while many non-Native Americans may believe they are honoring Native American culture when using its imagery, they are actually “selectively identifying with inauthentic pseudo-Indian imagery.”<sup>93</sup>

In addition to the empirical evidence, many professional opinions suggest that Native American mascots can have nega-

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<sup>87</sup> *Id.* at 47-48.

<sup>88</sup> *Id.* at 47-49.

<sup>89</sup> *Id.* at 50.

<sup>90</sup> *Id.* at 50-53.

<sup>91</sup> *Id.* at 54.

<sup>92</sup> *Id.* at 54-55.

<sup>93</sup> *Id.* at 56.

tive stereotype associations, regardless of whether they are overtly racist or stereotypical. Several of these opinions were presented in the *Harjo* case. For example, social science expert Dr. Teresa LaFromboise expressed her opinion that the name "Redskins" communicates that "Indian people are ferocious, strong, war-like, brave."<sup>94</sup> Though not all the adjectives may be negative, she claimed this stereotyping "objectifies" and "dehumanizes" the individual, which "can lead to serious psychological disturbance such as depression, low self-esteem."<sup>95</sup>

Moreover, the American Psychological Association issued a resolution calling for "the immediate retirement of American Indian mascots, symbols, images, and personalities by schools, colleges, universities, athletic teams, and organizations."<sup>96</sup> The resolution concludes that the mascots create hostile learning environments for Native Americans, harm Native Americans' self-esteem, perpetuate stereotypes across all racial groups, and lead to a number of other anti-therapeutic mental and psychological consequences for all people. The Society of Indian Psychologists came to a similar finding in another resolution.<sup>97</sup> These resolutions show that the social science community finds damaging effects in Native American mascots and images, regardless of how neutral they may seem.

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<sup>94</sup> *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705 (Trademark Tr. & App. Bd. Apr. 2, 1999), 1999 WL 37590723 at 23.

<sup>95</sup> *Id.*

<sup>96</sup> AMERICAN PSYCHOLOGICAL ASS'N., APA RESOLUTION RECOMMENDING THE IMMEDIATE RETIREMENT OF AMERICAN INDIAN MASCOTS, SYMBOLS, IMAGES, AND PERSONALITIES BY SCHOOLS, COLLEGES, UNIVERSITIES, ATHLETIC TEAMS, AND ORGANIZATIONS (Oct. 18, 2005), available at <http://www.apa.org/news/press/releases/2005/10/mascots.aspx>. See also, AMERICAN PSYCHOLOGICAL ASS'N., JUSTIFICATION STATEMENT, available at <http://www.apa.org/pi/oema/resources/policy/mascots-justif.pdf>.

<sup>97</sup> SOC'Y OF INDIAN PSYCHOLOGISTS OF THE AMERICAS, STATEMENT SUPPORTING THE RETIRING OF ALL INDIAN MASCOTS (Jan. 27, 1999), available at <http://www.aics.org/mascot/society.html>.



*B. Therapeutic benefits of keeping Native American sporting team names*

Pro-Football's complaint in *Blackhorse* implies at least two reasons why the Redskins trademark may have direct benefits on emotional, attitudinal, and mental health.<sup>98</sup> One reason is that the name "Redskins" honors Native Americans, and the other is that the name has an association with the football team that elicits a positive psychological response.<sup>99</sup> Psychological data related to each of these claims is discussed below.

1. Claims about how the names honor Native Americans do not show therapeutic value from a normative perspective

Pro-Football argues that the name "Redskins" is not disparaging because the name honors and promotes Native Americans, and many "Native Americans recognize the goodwill and positive attributes that accompany the team name."<sup>100</sup> Particularly, Pro-Football claims that the name is a tribute to Native American players and coaches and characterizes the Native American culture as "noble and powerful."<sup>101</sup> Several Native Americans seem to concur that the name is honorable and that it maintains the Native American identity in the "footprint in American culture."<sup>102</sup> These claims may seem to suggest that Native American team names and mascots could promote therapeutic benefits to Native Americans such as feelings of identi-

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<sup>98</sup> Complaint of Plaintiff, *supra* note 2.

<sup>99</sup> *Id.* at 20, 24.

<sup>100</sup> *Id.* at 24

<sup>101</sup> *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (Trademark Tr. & App. Bd.), 2014 WL 2757516 at 24.

<sup>102</sup> *Id.*

ty, belonging, pride, and encouragement. However, the empirical evidence discussed above does not support these benefits from a normative perspective.<sup>103</sup> Granted, each of the studies cited above based conclusions on statistical means and standard deviations, and they certainly do not prove that a given Native American mascot can never provide any therapeutic value to any single Native American.<sup>104</sup> The evidence does show, however, that when taking a normative, macro-analytic approach to therapeutic jurisprudence, Native American mascots do not have an overall therapeutic value.<sup>105</sup>

## 2. The need to protect personhood in existing names

Even though the Native American trademarks and mascots are anti-therapeutic, there may be therapeutic benefits to maintaining existing trademark registrations. Pro-football and many Washington Redskins fans may perceive the name “Redskins” to be more associated with the football team than the Native American groups it references. For example, Pro-Football made the following claim in its complaint in *Blackhorse*:

[T]he name “Redskins,” when used in association with professional football—as it has been for over eighty years—denotes only the team and connotes the history and tradition of the Club. As such, it embodies positive attributes, such as strength, sportsmanship, and physical prowess, and evokes emotional reactions asso-

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<sup>103</sup> See *supra*, Part III.a (discussing empirical studies that show how even Native American mascots with positive connotations increase tendencies to negatively stereotype, and how even neutral Native American images decrease self-identity in Native American students).

<sup>104</sup> *Id.*

<sup>105</sup> See *supra*, Part II (discussing a macro-analytic approach to therapeutic jurisprudence).

ciated with the competition and entertainment provided by professional football.<sup>106</sup>

Pro-Football further explains that fans share in the personhood of the team's trademarks, as it states, "[y]ear after year, merchandise bearing the Redskins Marks has been purchased by consumers in large quantities, indicating that many members of the consuming public desire to associate themselves with the Washington Redskins."<sup>107</sup>

Closely related to this claim, some scholars have argued that a personhood theory of property is a reason to recognize intellectual property, such as trademarks.<sup>108</sup> This personhood theory suggests that people actualize themselves through certain articles of property, and a loss of certain property, such as a wedding ring, would cause a person pain that cannot be monetarily replaced.<sup>109</sup> While the therapeutic benefits to respecting the personhood of property may not be widely cited for trademarks, it has been evidenced in contexts such as the loss of a house to eminent domain.<sup>110</sup> Given that most team owners and proprietors put substantial work and personal investment into building their brand names, a trademark cancellation could cause them anti-therapeutic resistance and resentment of those effectuating the cancellation. Daniel Snyder's adamant battle to protect the Redskins trademarks is a prime example.<sup>111</sup> On the other hand, maintaining a trademark al-

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<sup>106</sup> Complaint of Plaintiff, *supra* note 2, at 20 (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988).

<sup>109</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

<sup>110</sup> See Carol L. Zeiner, *Kelo Through the Lens of Therapeutic Jurisprudence*, 6 PHOENIX L. REV. 857 (2013).

<sup>111</sup> USA TODAY, *supra* note 13.

lows its interest holders to build positive emotions such as pride, satisfaction, and goodwill in their brand.<sup>112</sup>

In addition to trademark owners' personhood in their brands, sporting team owners and fans typically establish strong personhood in their teams in general.<sup>113</sup> Therefore, perhaps a greater therapeutic benefit to keeping existing Native American sporting team names arises from their aid in maintaining the public's association with the team. In fact, one of the main public purposes for recognizing a trademark system is that trademarks allow the public to easily identify the source and quality of a product or service.<sup>114</sup> Thus, a team's existing trademarks impress the team's history and tradition onto the public and help build identification with the team. For example, when Washington Redskins fans see or hear the name "Redskins," they likely bask in the glory of winning three Superbowls, the legends of iconic players like Slingin' Sammy Baugh, and historic plays like John Riggins's forty-three yard run over the Miami Dolphins in Super Bowl XVII.<sup>115</sup> If Pro-Football stopped using the name "Redskins," many Washington football fans would have less association to this history and

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<sup>112</sup> See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985) (explaining that one of the reasons to recognize trademarks is to allow companies to establish goodwill in their brands with consumers).

<sup>113</sup> Beth Jacobson, *The Social Psychology of the Creation of a Sports Fan: A theoretical Review of the Literature*, ONLINE J. SPORTS PSYCH., Vol. 5 Iss. 2, (June 2013); Eric Simons, *The Psychology of Why Sports Fans See Their Teams as Extensions of Themselves*, WASH. Post (Jan. 30, 2015), [http://www.washingtonpost.com/opinions/the-psychology-of-why-sports-fans-see-their-teams-as-extensions-of-themselves/2015/01/30/521e0464-a816-11e4-a06b-9df2002b86a0\\_story.html](http://www.washingtonpost.com/opinions/the-psychology-of-why-sports-fans-see-their-teams-as-extensions-of-themselves/2015/01/30/521e0464-a816-11e4-a06b-9df2002b86a0_story.html).

<sup>114</sup> *Park 'N Fly, Inc.*, 469 U.S. at 198 ("The Lanham Act provides national protection of trademarks in order to secure ... protect the ability of consumers to distinguish among competing producers.").

<sup>115</sup> See GREATEST MOMENTS IN REDSKINS HISTORY (Washington Redskins 2007).

the team in general.<sup>116</sup> This association is important because several empirical studies demonstrate that when people identify with a sports team, it gives them a sense of community and better overall psychological well-being.<sup>117</sup> Therefore, there is a therapeutic benefit to keeping existing team names.

Furthering this claim, in studies by Daniel Wann and colleagues, researchers surveyed college students on their level of identification with their university basketball team and their levels of self-esteem and depression.<sup>118</sup> The surveys showed a positive correlation between the level of identification and self-esteem and a negative correlation between identification and depression.<sup>119</sup> A similar survey found the same negative correlation between team identification and feelings of alienation.<sup>120</sup> Researchers later tested whether these correlations were due to a causal link or other factors (for example, those with high self-esteem may be more likely to participate in local sports, and that could give rise to the correlation).<sup>121</sup> To do this, they similarly surveyed the same group of college students at two points in time, three months apart. While this was not an entirely definitive method, the researchers better supported a causal link by using a cross correlational statistical method in these two surveys.<sup>122</sup> The researchers concluded that identification with a local team likely increases psychological health.<sup>123</sup>

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<sup>116</sup> Beth Jacobson, *supra* note 113 at 7 (explaining how factors such as team name, logo, colors, and fight song could contribute to the sports fan identity).

<sup>117</sup> See, e.g., Daniel L. Wann, *Examining the Potential Causal Relationship Between Sport Team Identification and Psychological Well-being*, J. Sport Behavior, Vol. 29, No. 1 (Mar. 2006) at 79.

<sup>118</sup> *Id.* at 81.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 83

<sup>122</sup> *Id.* at 83-87.

<sup>123</sup> *Id.* at 88.

In another study, researchers used similar methods to evaluate whether a sports fan identity increases students' perception of trustworthiness in others.<sup>124</sup> This perception is an indicator of social well-being, and again, researchers found a positive correlation.<sup>125</sup> These studies demonstrate a therapeutic benefit to maintaining the existing identities that sporting fans have created in their teams.

IV. HOW THE LANHAM ACT COULD BE INTERPRETED TO BEST INTEGRATE THERAPEUTIC JURISPRUDENCE INTO TRADEMARK REGISTRATION CASES SUCH AS *BLACKHORSE*

The data above suggests that the law should steer teams away from using Native American names and mascots associated with Native American culture, but where existing teams have been using a name or mascot for many years, the law should be careful not to upset the personhood of the existing fan base. This normative rule could help the law provide therapeutic value to all parties involved in Native American trademark disputes. In this context, the law could refer to either future statute revisions or judicial interpretations of existing statutes to the extent those interpretations fall within the judicial process.<sup>126</sup> A few examples of how judges might be able to incorporate the therapeutic jurisprudence approach are discussed below. These perspectives are not meant to entirely replace existing case law or subvert due process, but rather to

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<sup>124</sup> Daniel L. Wann & Joshua Polk, *The Positive Relationship Between Sport Team Identification and Belief in the Trustworthiness of Others*, 9 N. AM. J. PSYCH. 251 (2007).

<sup>125</sup> *Id.*

<sup>126</sup> Wexler, *supra* note 30, at 225.

merely suggest tools to help frame inquiries and address parties' arguments in proceedings and opinions.<sup>127</sup>

A. Define "disparaging" by assessing actual therapeutic effects rather than relying on subjective dictionary definitions.

The main Lanham Act statute under consideration in *Blackhorse* reads:

No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it--  
(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may *disparage* or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.<sup>128</sup>

Pro-Football argued, and the TTAB agreed, that there is much room for interpretation in what "disparage" means, and there is little precedent or legislative history to define it.<sup>129</sup> The TTAB articulated that, as a ground for cancelling a trademark, the term "disparage" is distinct from the other grounds in the statute, such as "immoral, deceptive, or scandalous."<sup>130</sup> It further concluded that dictionary definitions should guide the

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<sup>127</sup> See Slobogin, *supra* note 35, at 209 ("the goal of therapeutic jurisprudence is to pinpoint the therapeutic impact of legal rules, not to require that therapeutic values trump other values.").

<sup>128</sup> 15 U.S.C.A. § 1052 (West) (emphasis added).

<sup>129</sup> Complaint of Plaintiff, *supra* note 2, at 14-15; *Harjo v. Pro-Football Inc.*, 50 U.S.P.Q.2d 1705 (Trademark Tr. & App. Bd. 1999), 1999 WL 375907 at 35.

<sup>130</sup> *Harjo*, 50 U.S.P.Q.2d 1705, 1999 WL 375907 at 35.

meaning, and the word relates to how the “matter may be perceived” over any intent of how it was used.<sup>131</sup>

The courts may have trouble applying dictionary terms to define “disparage” and focusing this definition on how a group perceives a disputed trademark because this approach creates a subjective dictionary battle rather than getting to the real issue of whether the name or mascot is causing damaging psychological consequences.<sup>132</sup> Instead, since there is little precedent to define “disparage,” the court could revise its interpretation to focus on actual psychological effects of a trademark when dealing with Native American trademark matters. This may help both sides and the general public better recognize and accept those effects. Perhaps this would encourage owners to voluntarily mitigate the impact of their mascots and names when the cancellation proceeding cannot effect that change. In other words, the courts could try to shift trademark owners’ mentality from “I am right, our mascot does not dishonor anyone,” to “Our mascot is causing psychological damage that I hope to mitigate, but I also want to protect therapeutic value in the personhood of our team.”

For example in *Harjo* and *Blackhorse*, if the court defined “disparage” as the trademark having actual negative psychological effects, then the court might have looked at the therapeutic benefits of maintaining the trademark registrations compared to the anti-therapeutic effects of the trademark registration. In these cases, six trademarks were in dispute; two contained Native American imagery, and the others only contained word references to the “Redskins” name.<sup>133</sup> The court may have been able to balance the interests of both sides by cancelling the two trademarks that are associated with Native Ameri-

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<sup>131</sup> *Harjo*, 50 U.S.P.Q.2d 1705, 1999 WL 375907 at 36-37, citing *In re Hines*, 31 USPQ2d 1685, 1688 (Trademark Tr. & App. Bd. 1994).

<sup>132</sup> *See Id.* (discussing various dictionary words for the term disparaging); *id.* at 27 (discussing varying dictionary definitions of “Redskin”).

<sup>133</sup> *Id.* at 1-2.



can imagery, as they have a strong anti-therapeutic association with Native Americans. However, the court might look with less scrutiny on the trademarks with just word association to the Redskins name, as these trademarks are arguably associated more with the public's therapeutic identity in the football team rather than Native American culture when used in the context of professional football. Perhaps this approach would give either side a stronger sense of being heard, and that would encourage both sides to give more deference to the court's opinion and the interests of the other side.<sup>134</sup>

Although tenuous, this approach may provide overall more therapeutic value than declaring a winner and loser in the dispute. This approach may even encourage Pro-Football to voluntarily move away from using Native American imagery, which the trademark cancellation cannot do alone.<sup>135</sup> Indeed, several college teams with Native American mascots have proved that it is possible to change mascots and keep the team name or switch to a similar-sounding team name.<sup>136</sup>

*B. Move away from a "substantial composite" to a normative approach*

Also in *Harjo*, when defining "disparage," the TTAB found that the "views of a substantial composite" of the referenced group are what matters.<sup>137</sup> The TTAB distinguished this from

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<sup>134</sup> See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DePaul L. Rev. 661, 664 (2007) (describing the opportunity to be heard as one of the main factors in giving people a sense of fairness in judicial proceedings, and it ultimately encourages their deference to legal opinions).

<sup>135</sup> *Supra*, Part II.b.

<sup>136</sup> *List of Schools That Changed Native American Nicknames*, USA TODAY (Sep. 24, 2013, 1:14 pm EDT), <http://www.usatoday.com/story/sports/2013/09/12/native-american-mascot-changes-ncaa/2804337/>.

<sup>137</sup> *Harjo*, 50 U.S.P.Q.2d 1705, 1999 WL 375907 at 36-37.

prior cases that dealt with disparagement in a corporate context, holding that the term refers to how the trademark would be viewed by “a reasonable person of ordinary sensibilities.”<sup>138</sup> The “substantial composite” interpretation led to considerable challenges on the statistics and numbers behind those who support the name “Redskins,” rather than allowing the court to assess its therapeutic and anti-therapeutic effects on the general population.<sup>139</sup> The data presented in Part III of this article shows that Native American mascots are likely to actuate anti-therapeutic effects on the general population.<sup>140</sup> Similarly, while the personhood in the trademarks in question may only apply to the owners and fans of a defending team, all people of the general population tend to establish personhood in the teams they support.<sup>141</sup> Therefore, if the court were to focus on a normative approach, it may be able to avoid unnecessary disputes about the percentages that subjectively support a trademark, and the court would be better positioned to accept arguments on empirical data about the trademark’s actual psychological effects. This would allow the court to adopt a therapeutic rule for the general population.

*C. Stay away from the potential “at the time of registration” burden of evidence dispute*

The Lanham Act states that a trademark may be cancelled “at any time if . . . its registration was obtained . . . contrary to the provisions” that bar disparaging trademarks.<sup>142</sup> In *Black-*

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<sup>138</sup> *Greyhound Corp. v. Both Worlds Inc.*, 6 U.S.P.Q.2d (BNA) 1635, 1639 (Trademark Tr. & App. Bd. 1988).

<sup>139</sup> Complaint of Plaintiff, *supra* note 2, at 17; *Blackhorse v. Pro-Football, Inc.*, 111 U.S.P.Q.2d 1080 (Trademark Tr. & App. Bd.), 2014 WL 2757516 at 28.

<sup>140</sup> *Supra*, Part III.a.2

<sup>141</sup> *Supra*, Part III.b.2

<sup>142</sup> 15 U.S.C.A. § 1064 (West).

*horse*, one dissenting judge opined that this means a trademark can be cancelled “only if it should not have issued in the first place.”<sup>143</sup> This interpretation means that petitioners for cancellation have the burden to prove that a trademark was disparaging when it was registered instead of proving that it is disparaging today.<sup>144</sup> The courts should be careful to avoid falling into disputes on this burden of proof because if a trademark is anti-therapeutic today then that is the current social concern the court needs to mitigate. Also, if a trademark is psychologically damaging today, it would likely have been psychologically damaging at the time of registration. The empirical evidence in Part III describes human reactions and emotions that are likely constant over time.<sup>145</sup> Although the public did not have sufficient analytic methods to comprehend all the damages of all Native American trademarks at the time they were registered, the anti-therapeutic consequences still may have been present.

The majority in *Blackhorse* may have been on track in recognizing this concern as it used a 1993 resolution by the National Conference of American Indians to find that the term “Redskins” was disparaging at the time each of the trademarks was registered, even though all the registrations occurred well before 1993.<sup>146</sup> By avoiding this debate, the court may be able to better focus on providing a therapeutic outcome to the current social concerns of Native American trademark registrations.

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<sup>143</sup> *Blackhorse*, 111 U.S.P.Q.2d, 2014 WL 2757516 at 35 (Judge Bergsman dissenting opinion, citing *Consorzio Del Prosciutto Di Parma v. Parma Sausage Products, Inc.*, 23 U.S.P.Q.2d 1894 (Trademark Tr. & App. Bd. 1992)).

<sup>144</sup> *Id.*

<sup>145</sup> *Supra*, Part III.

<sup>146</sup> *Blackhorse*, 111 U.S.P.Q.2d, 2014 WL 2757516 at 10.

## V. CONCLUSION

While the suggestions provided above for incorporating therapeutic jurisprudence into Native American trademark lawsuits may be tenuous, legal actors who must make decisions on this issue could adopt the underlying normative rule presented in this article. That is, the law should steer teams away from using names and mascots associated with Native American culture, but where existing teams have been using a name or mascot for many years, the law should be careful not to upset the personhood of the existing fan base. While this rule may not outweigh the economic or constitutional claims of every case, legal actors may be able to heal psychological wounds in the general public by using this therapeutic jurisprudence approach to frame their thinking on the matter.

GUIDING COURT CONVERSATION ALONG PATHWAYS  
CONDUCTIVE TO REHABILITATION: INTEGRATING  
PROCEDURAL JUSTICE AND THERAPEUTIC JURISPRUDENCE

David B. Wexler\*

In a recent article, Kimberly Kaiser and Kristy Holtfreter, of Arizona State University's School of Criminology and Criminal Justice, use procedural justice ("PJ") and therapeutic jurisprudence ("TJ") to present an integrated theory of specialized court programs (such as drug treatment courts, mental health courts, veterans, reentry, and domestic violence courts).<sup>1</sup> Their article is likely to make many contributions to the overall field, and surely they will kindle interest in the very relationship between TJ and PJ. The conceptual connection between the two is the principal focus of this essay—and, as we will see in the next few sentences, my task is in this respect an exceedingly simple one.

The authors properly note that, in TJ, "the emphasis is on understanding the impact and consequences of the law, legal process, and legal actors on the well-being of persons affected by the law,"<sup>2</sup> and that a primary goal of TJ "is to apply and incorporate insights and findings from the psychology, criminology, and social work literature to the legal system."<sup>3</sup>

TJ, in other words, looks to those other disciplines for nourishment and growth. They are the "vineyards" from which we

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<sup>1</sup> Kimberly A. Kaiser & Kristy Holtfreter, *An Integrated Theory of Specialized Court Programs : Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation*, Criminal Justice and Behavior (October 8, 2015).

<sup>2</sup> Id.

<sup>3</sup> Id.

produce the TJ practices and techniques—the “wine”—used by judges, lawyers, and other legal actors<sup>4</sup>.

And lo and behold, one such major body of psychological knowledge is the field of procedural justice, obviously important to TJ because it “teaches that people appearing in court experience greater satisfaction and comply more willingly with court orders when they are given a sense of voice and validation and treated with dignity and respect.”<sup>5</sup> Of course, TJ fully embraces PJ, and regards it as a major tool in the TJ toolkit. But, as with the other vineyards, TJ is merely a pleased and hopefully creative consumer, not in any way its architect.

Given the importance and significance of PJ, it is little wonder that its use by TJ has received major support, as evidenced by much written in the 2003 anthology by Bruce Winick and myself, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*.<sup>6</sup> Kaiser and Holtfreter are also properly taken with PJ, so much so that they attribute a good bulk of the successful results of specialized court programs to its likely impact. To the extent TJ is independently responsible for favorable results reached, those authors seem, at this analytical stage, to regard (but also to reduce?) TJ to the following important principles traditionally associated with and compatible with TJ: “(1) ongoing judicial intervention, (2) close monitoring of and immediate response to behavior, (3) the integration of treatment services with judicial case processing, (4) multidisciplinary involvement, and (5) collaboration with community-based and government organizations.”<sup>7</sup>

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<sup>4</sup> David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices*, 7 ARIZ. SUMMIT L. REV. 463 (2014), available online at <http://ssrn.com/abstract=2065454>

<sup>5</sup> *Id.* (citing Bruce J. Winick & David B. Wexler, *Drug Treatment Court: Therapeutic Jurisprudence Applied*, 18 *Touro Law Review* 479 (2001)).

<sup>6</sup> Kindle edition also available digitally through Amazon.com .

<sup>7</sup> *Id.*, citing Bruce J. Winick & David B. Wexler , *supra* note 6.

The point I wish to make here is this: These just-mentioned TJ principles are indeed important, but somewhere along the way, the authors may have inadvertently downplayed the previously quoted overarching goal of TJ: to “apply and incorporate insights and findings from the psychology, criminology, and social work literature to the legal system.” If we *are* to shoehorn those insights and their application into the authors’ framework, they would presumably fit, a bit clumsily, within the category of “ongoing judicial intervention,” and, in their Figure 1, in the “Components of TJ” box labeled “Supportive Interactions between Judges and Defendants”, which should then accordingly house the raw ingredients of PJ and, indeed, of *all* TJ vineyards.

What *are* those insights and findings from the other disciplines? Well, that list is fortunately a growing one, evolving as our knowledge of human behavior advances. Procedural justice is of course one of them. But here is what I noted in a recent essay prepared as the Foreword to a book, edited by Professor Warren Brookbanks, *Therapeutic Jurisprudence: New Zealand Perspectives*:

Developments in areas of psychology—such as the elements of procedural justice, such as the reinforcement of desistance from crime, such as the techniques of relapse prevention planning, such as the principles of health psychology used to promote compliance with medical (or judicial) orders—can be brought into the legal realm and used as the new wine of TJ. Those advances are really the “vineyards” of the new wine.<sup>8</sup>

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<sup>8</sup> 2015. The chapter, *Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law*, is easily accessed online at SSRN at : <http://ssrn.com/abstract=2564613>

To explain their possible relevance in the current context, let me begin by quoting from a PJ evaluation instrument noted by the authors:

1. At court today, did you have enough opportunity to tell the judge what you think he or she needed to hear about your personal and legal situation? (“voice”)
2. At court today, did the judge seem genuinely interested in you as a person?
3. At court today, did the judge treat you respectfully?
4. At court today, did the judge treat you fairly?
5. Are you satisfied with how the judge treated you and dealt with your case today?

For all we know, a participant may have given very high PJ marks to a court which proceeded along these lines: “Ms. Smith, I want to make sure you fully understand what we are doing in court today, and please raise your hand if you need for me or for someone else to speak up or to clarify anything. And when it is your turn to speak, please take your time, and don’t be nervous. I am here to make sure we have all the important information and that we have taken into account all the factors you regard as important.”

A court guided by PJ principles might indeed have come up with a respectful statement mirroring the above. But now let us look at some of the factors that psychological insights—beyond procedural justice concerns-- have given us about relapse prevention planning and health care compliance, and see how *those* factors might alter or guide the conversation: these principles have to do with “rewinding” a situation to see what went wrong, in hopes of avoiding a repeat incident; they also tie into a psychological finding that if one is presented with a mild counter-argument about prospective compliance and is asked to address it, the person may become more “anchored” in his or her commitment to the new course of conduct. Additionally, they relate to the fact that a commitment to do something or to refrain from



doing something may result in greater compliance if a friend or family member is aware of the commitment. Finally, they relate to how compliance is enhanced by respectfully asking the participant to summarize his or her understanding of the nature of the commitment:

“Ms. Smith, I’d like you to tell me about when you’ve gotten into this situation (eg, DWI) in the past. Were you alone or with others? Which other people? People your own age or older people? Was it daytime or nighttime? In your neighborhood or elsewhere? Now, Ms. Smith, this is an important point, so please think carefully about it: What do you propose to do to avoid getting into this situation in the future? Here is my concern: This didn’t work last time. Why do you think that will work for you now when it didn’t work for you a year ago? Are there changed circumstances? If so, what are they? What is different now? Okay, now, when you were in court last time, you mentioned that you would like your Aunt Sylvia to be in court with you next time. Is she here today? Can you please tell her, slowly and clearly, so she will easily understand and remember, what you’ve now promised to do so that this behavior won’t happen again?”

In conclusion, a few points are worth making here:

First, we hope that the immediately above conversation could and would occur with a very decent dose of PJ. But it is *also* guided by factors *above and beyond* the basic PJ concerns of voice, validation, and respectful treatment. Perhaps the court participant would rate it lower on PJ than the first conversation was rated, but how significant should that be, especially if a PJ threshold is met or exceeded and if this path proves better for long-term compliance and rehabilitation?

Second, this suggests that while PJ is of great importance, there are *other* practices and techniques—captured by TJ—that are crucially important for judges to employ, and thus TJ should

surely be integrated in court proceedings (specialized or otherwise). This is a dynamic area and requires ongoing attention to developments in psychology, criminology, and social work and to their integration into the legal system.

Third, it may be that in some cases *these* types of TJ-guided judicial conversations may have been responsible for court successes, rather than simple unadorned PJ statements, on the one hand, or, on the other hand, “structural” TJ factors, such as collaboration with community services and the like.

In any case, PJ is so basic that it ought to be part of all courts at all times, and this has been recognized in the US by the American Judges Association and its important White Paper on Procedural Fairness.<sup>9</sup>

But, as the authors recognize, TJ is also important. I am pleased to be working at the moment with some Australian colleagues to propose an important role for TJ in an international document relating to court excellence.<sup>10</sup> PJ is already a standard component of that document, and I am fortunate to have read the thought-provoking Kaiser/Holtfreter article at this very moment, and to have been stimulated and intellectually engaged to revisit --and indeed to refine -- my take on the important relationship between PJ and TJ.<sup>11</sup>

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<sup>9</sup> Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4 (2008), available online at <http://aja.ncsc.dni.us/courtrv/cr44-1/CR44-1-2.pdf>

<sup>10</sup> See *International Consortium for Court Excellence*, <http://www.courtexcellence.com/>

<sup>11</sup> David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence*, 44 COURT REV. 78 (2008), available online at <http://ssrn.com/abstract=1131768>

## PROCEDURAL JUSTICE AND OFFICER-INVOLVED-SHOOTINGS

Kimberly Hewes\*

### I. INTRODUCTION.

“Hands Up! Don’t Shoot!” “No Justice, No Peace!” “Black Lives Matter!” These are the chants that have haunted society over the past year beginning with an officer-involved-shooting in Ferguson, Missouri and the death of Michael Brown<sup>1</sup> on August 9, 2014. They have continued throughout the entire nation, even as recently as July 19, 2015 in Cincinnati, Ohio.<sup>2</sup> Society has slammed the “racial card” on the table time and time again, declaring anarchy in the midst of the rising of officer-involved-shootings and the African American community. However, what is not seen are the various investigations and review processes involved in officer-involved-shootings. Society fails to grasp what officers have to deal with, professionally as well as personally, in the aftermath of a shooting—a shooting when they believed their life, or another’s life was in danger and they had

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<sup>1</sup> On August 4, 2014, Ferguson Police Officer Darren Wilson was involved in an altercation wherein Michael Brown was fatally injured. Officer Wilson was subsequently cleared by a grand jury in Missouri of any criminal charges. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES, (November 24, 2012), <http://nyti.ms/1yNsywu>.

<sup>2</sup> On July 19, 2015, University of Cincinnati Police Officer Ray Tensing stopped Samuel Dubose for not having a front license plate. Officer Tensing fatally shot Samuel Dubose in the head. Officer Tensing was indicted by a grand jury on the charge of murder. Richard Perez-Pena, *University of Cincinnati Officer Indicted In Fatal Shooting of Driver*, N.Y. TIMES, (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html>

no alternative but to discharge their firearm. Procedural justice can play a part in preventing a shooting or prevent anarchy from rising in the aftershock.

## II. THERAPEUTIC JURISPRUDENCE.

David Wexler and Bruce Winick define therapeutic jurisprudence as “the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects.”<sup>3</sup> To put it simply, it is about placing the law or legal role players, for the purposes of this paper law enforcement officers, in the position of a therapist to the individuals they come into contact with throughout their daily routine.

In many ways *how* someone is treated will have a direct impact on the views or perceptions held by the community. This will also allow the individual to feel as though they have more control over their own punishment, leaving the end result in their own hands rather than in the hands of someone they do not know or possibly trust.

One of the downfalls of therapeutic jurisprudence is placing a person into a forced intervention when they are not ready. Forcing treatment onto an individual only places a band-aid over the problem rather than resolving or rehabilitating the individual. The individual may be able to fool the game-players, such as the court staff or judge, making them believe they have been rehabilitated. However, once the individual is no longer being monitored or have “graduated” from a problem solving court it may be easier for the individual to slip back into their old ways of life.

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<sup>3</sup> DAVID B. WEXLER & BRUCE J. WINICK, EDS., *LAW IN A THERAPEUTIC KEY XVII* (Carolina Academic Press, 1996) in part quoting CHRISTOPHER SLOBOGAN, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHO. PUB. POL. & L. 193.

Therapeutic jurisprudence also includes looking through a therapeutic “lens” when analyzing a situation. A lens would allow a court to take a unique approach by examining improved alternative resolutions. This is seen most often in problem solving courts such as DUI Court, Drug Courts or Mental Health Courts wherein the focus of these courts is rehabilitating an individual. One way to place the lens of therapeutic jurisprudence is through procedural justice, by viewing a situation in order to improve communication and prevent possible riots and uprisings in the community.

### III. PROCEDURAL JUSTICE.

Procedural justice or procedural fairness describes the idea that *how* individuals perceive the judicial system, or in the terms of this paper, whether individuals perceive their contact with law enforcement as being fair, is directly correlated to *how* they were treated rather than the outcome of the contact.<sup>4</sup> Ken Crane, President of Phoenix Law Enforcement Association (hereinafter PLEA), explains procedural justice “in a nutshell, be nice, be kind, be patient and be fair.”<sup>5</sup> Mr. Crane believes that “without a sense of fairness in the justice system” the community will not have faith in the judicial system.<sup>6</sup>

When the community has lost faith in the judicial system it can lead to a breakdown between the community and law enforcement. The breakdown will result in a community uprising allowing an individual to attempt to take matters into their own hands by declaring a civil war on all law enforcement. However, procedural justice is not an easy fix because it has four basic

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<sup>4</sup> SUSAN SWAIM DAICOFF, *COMPREHENSIVE LAW PRACTICE: LAW AS A HEALING PROFESSION* 113 (Carolina Academic Press, 2011).

<sup>5</sup> Interview of Kenneth Crane, President, Phoenix Law Enforcement Ass’n, (June 22, 2015).

<sup>6</sup> *Id.*

components or factors that measure how people perceive fairness: (1) Voice; (2) Participation; (3) Dignity and Respect; and (4) Trust and Explanation.<sup>7</sup>

*A. Voice.*

Voice in procedural justice is not simply being able to talk or to have some type of sound come out of their mouth but goes deeper. Rather it is about a person being afforded the opportunity to be heard while they tell their side of the story.<sup>8</sup>

When a person is able to speak or feel they are being heard, there is a greater chance the person will open up about the events that took place. This may allow for the person to remain calm and keep the tensions down allowing for a more peaceful interaction with law enforcement. In addition, the ability to be heard may prevent the person from making any sudden movements that would lead an officer to believe his life or the life of another was in jeopardy forcing an officer to use lethal force.

*B. Participation.*

Procedural justice defines participation as “a chance to be part of the decision-making process by presenting evidence and their own view of the case.”<sup>9</sup> An individual who has the opportunity to show a responding officer evidence that corroborate their side of the events will think more favorably of law enforcement.<sup>10</sup> However, this can become dangerous for an officer conducting a domestic violence investigation because the person

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<sup>7</sup> Tom Tyler, et. al., *Psychology of Procedural Justice and Cooperation* (February 14, 2013), *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE*, 4017-18 (ed. G. Bruinsma and D. Weisburd, Springer-Verlag), available at <http://ssrn.com/abstract=1907137>.

<sup>8</sup> *Id.* at 4018.

<sup>9</sup> *Id.*

<sup>10</sup> DAICOFF, *supra* note 4 at 122.

may see it as an opportunity to obtain a weapon or destroy evidence.

Domestic calls resulted in half of the officer-involved-shootings from January through May of 2015, while the other half involved officers responding to non-domestic crimes.<sup>11</sup> It appears suspects become more volatile in domestic violence situations because their emotions are heightened and as is the case in a lot of domestic matters, this is not their first contact with law enforcement and they know someone is going to jail and they will probably be the one who does. Ultimately, this will provide a person their motive to obtain a weapon rather than show the officer their evidence because they feel they will have no say in what happens. Nevertheless, *how* someone is treated from the initial contact will more than likely set the tone of the investigation. Although this may be a double edged sword by providing the person a motive, means, and opportunity to obtain a weapon, extra precautions can be taken to give a person the ability to have some say in what happens next and can only bolster the communication by the individual so they will refrain from obtaining a weapon.

### C. *Dignity and Respect.*

Dignity and respect should be natural aspects of a police officer's interactions with individuals. Procedural justice defines dignity and respect as being treated as a "human."<sup>12</sup> People want to be shown respect by officers and in the end; this can go a long way between future community interactions and law enforcement.

Giving respect to a crime suspect may be one of the harder components to apply for officers because they are responsible for enforcing the law and often times they must take a tougher

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<sup>11</sup> Kimberly Kindy, *Fatal police shootings in 2015 approaching 400 nationwide*, WASHINGTON POST.COM, (May 30, 2015).

<sup>12</sup> DAICOFF, *supra* note 4 at 121.

stance or approach while performing their duties. Nevertheless, even when dignity and respect are shown, officers can still be treated poorly for the simple fact that they wear a uniform or because they are identified as an officer. An officer should always remember, "approach creates response," meaning *how* an officer approaches a person will directly impact how that person reacts to the officer. Proper approach includes the officer's posture, tone in their voice and their mannerisms which will create the first impression the person will have regarding that particular officer or police agency. In addition, many times these actions create a lasting impression, as they may be the only interaction the person has with law enforcement. Unfortunately, the uniform is all that a person may need as their excuse for their poor reaction to being stopped by the officer. This becomes especially true if the person is stopped for what they perceive is a "silly" or "unjust" reason such as a seatbelt violation, a cracked windshield or speeding. Yet, this is why trust and explanation is even more crucial in the procedural justice process.

*D. Trust and Explanation.*

The final component in procedural justice is trust and explanation. This component is for law enforcement to display their own "concern for the welfare of the participants" as well as be able to "explain" to them the reasons behind the officer's decision.<sup>13</sup> This allows not only the person but also the community to place trust in law enforcement.

Explaining a situation or incident to those involved or to the community is crucial in maintaining the public's trust and to keep the peace between the community and police. This is true either during contact with a "suspect" in order for the suspect to be compliant with the orders being given by an officer. Yet, this is especially true after an officer-involved-shooting when information is being released to the public through the media or news

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<sup>13</sup> DAICOFF, *supra* note 4 at 121.



outlets. In Muskogee, Oklahoma, explanation to the suspect's family and the community was the key component to building a stronger bond of trust between the community and police department.<sup>14</sup> In January 2015, Officer McMillin responded to a 911 call from a Baptist Church Pastor who indicated there was a man in the parking lot with a gun.<sup>15</sup> After Officer McMillin arrived he confronted the suspect and attempted to handcuff and frisk the suspect for weapons; however, the suspect fought back and escaped Officer McMillin's grasp.<sup>16</sup> As the suspect fled, the suspect dropped what Officer McMillin perceived was a gun.<sup>17</sup> The suspect went to pick up the item, pointing it at Officer McMillin which forced Officer McMillin to discharge his gun firing five rounds at the suspect, fatally injuring the suspect.<sup>18</sup> Once the second officer arrived, he checked the suspect and located a gun under the suspect's body along with a cell phone clutched in his hand.<sup>19</sup> Rather than avoid the news media, the Muskogee Police Department's Public Information Sergeant directed the media to a credible "eyewitness" "who saw everything."<sup>20</sup> In addition, the Public Information Sergeant gave the media enough information to run their story but only enough to force the media to return for a follow-up press release once available.<sup>21</sup> Prior to the incident, the Chief of Police had developed a rapport with the African-American ministers and leaders and immediately reached out to them after the shooting to make arrangements to meet with them regarding the incident.<sup>22</sup> The Muskogee Police Department brought in trained individuals

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<sup>14</sup> *Force Science News* #277, (March 9, 2015), available at <http://www.forcescience.org/fsnews/277.html>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

who had a background in “use-of-force” to review Officer McMillin’s body camera footage “frame-by-frame” together with the medical examiner’s report and developed a presentation.<sup>23</sup> The presentation included video footage of Officer McMillin’s body camera in slow motion as well as in full speed and also contained still photographs from the video.<sup>24</sup> The presentation was initially shown to the civil leaders and was shown during a debriefing with other Muskogee Police officers; after each presentation the trained individuals were available to answer any follow-up questions that arose from the presentation.<sup>25</sup> The Muskogee Police next released the same presentation to the media along with a cover letter calling their attention to specific portions of the presentation.<sup>26</sup> Subsequently, Officer McMillin was cleared of any wrongdoing and the shooting was deemed justified.<sup>27</sup> In the end, the African-American leaders held a press conference praising the handling of the investigation as a result of the Police Department’s explanation and transparency to the civic leaders and the community.<sup>28</sup> The explanation component of procedural justice made a huge impact on preventing another potential Baltimore or Ferguson riot situation and instead encouraged the peaceful interactions maintained in Muskogee, Oklahoma.

Unfortunately, procedural justice may not always be the best practice and in some situations, when procedural justice is being used, a scene can turn deadly within a blink of an eye leaving the officer wounded, dead, or in the position to discharge their firearm. As such, procedural justice may be better served after an event has already occurred in order to prevent further discourse with the community.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

## IV. OFFICER-INVOLVED-SHOOTINGS.

Officers are expected to run to the fight, not away, and they have one of the hardest jobs in the country. Officers are held to a higher standard of professionalism, yet it is forgotten that officers are also human and are capable of making mistakes.<sup>29</sup> They are expected to be perfect in all aspects of their duties, from the beginning of their initial interactions with the community to the end of a case with the officer's testimony in court. Some officers make decisions out of anger or frustration, while other officers make decisions out of fear for their own lives or the lives of an innocent person. Nevertheless, officers are also forced to make split-second decisions based on their hours of police training together with a quick assessment upon their arrival on-scene. This was recently seen in Louisville when an officer was forced to make a "split-second decision" to either be attacked by a drunk man wielding a flagpole or shoot the man and possibly kill him.<sup>30</sup> Dr. William Lewinski from the Force Science Institute, Ltd., a renowned expert and instructor on officer-involved-shootings, states that police work is like a baseball game in that a "batter can't wait for a ball to cross home

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<sup>29</sup> J. Michael McGuinness, *Law Enforcement Use of Force: Safe and Effective Policing Requires Retention of the Reasonable Belief Standard*, THE CHAMPION, May 2015, at 30.

<sup>30</sup> Peter Holley, *Video Shows Kentucky Police Officer Killing Man Wielding a Flagpole*, THE WASH. POST, June 14, 2015, <http://www.washingtonpost.com/news/morning-mix/wp/2015/06/14/new-video-shows-kentucky-police-officer-killing-flagpole-wielding-man/>.

plate before deciding whether that's something to swing at...officers have to make a prediction based on cues."<sup>31</sup>

Society expects officers to have enough time to arrive on a scene, assess that scene, decipher a potential threat within a few split-seconds and be able to "talk" a suspect wielding a weapon out of shooting, stabbing, or harming someone else.<sup>32</sup> Ronald Davis, a former police chief, believes most shootings are preventable if only the officers would "stop chasing down suspects hopping fences and landing on top of someone with a gun."<sup>33</sup> How is it that a former police chief would believe that officers should not chase down a suspect? Anyone would have to ask then, that if the police do not do it, then who will? Most law enforcement officers are trained to do just that, to capture a potentially dangerous suspect in order to "protect and serve" their community. Yet this would prove to be extremely difficult when a police chief or former police chief believes that officers should not chase armed suspects in order to prevent a potential dangerous situation from arising that may result in the suspect being fatally injured. In addition, reporting news anchors made comments on live television networks, such as CNN, that attacking the Dallas Police Department was "very courageous and brave, if not crazy as well, to open fire on the police headquarters, and now you have this scene, this standoff."<sup>34</sup> It is this very thought process that will lead officers to either be quick in pulling the trigger in any given situation or they will hesitate to shoot in justified situations leaving them to pay the ultimate sacrifice in the line of duty.

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<sup>31</sup> Matt Apuzzo, *Training Officers to Shoot First, and He Will Answer Questions Later*, N.Y. TIMES, Aug. 1, 2015, <http://www.nytimes.com/2015/08/02/us/training-officers-to-shoot-first-and-he-will-answer-questions-later.html>.

<sup>32</sup> McGuinness, *supra* note 29.

<sup>33</sup> Kindy, *supra* note 11.

<sup>34</sup> Ryan Gajewski, *CNN Anchor Calls Dallas Attack "Brave,"* THE HOLLYWOOD REPORTER, (June 13, 2015), <http://www.hollywoodreporter.com/news/cnn-anchor-calls-dallas-attack-802366>.

In 2015 there were over three hundred and fifty (350) officer-involved-shootings resulting in fatalities.<sup>35</sup> Half of these shootings involved a white suspect and the other half involved minorities.<sup>36</sup> In addition, there have been at least sixty-three (63) officers killed from January through May of 2015.<sup>37</sup> Officers respond to various calls but there is not a single call that is ever just a “routine call”.<sup>38</sup> A seemingly non-violent call can become violent and fatal within a “blink of an eye.”<sup>39</sup> More than eighty percent (80%) of suspects killed during an officer-involved-shooting were armed with some type of weapon.<sup>40</sup>

Society has a misconceived notion that officers should be able to shoot a weapon out of a suspect’s hand or shoot a suspect in the leg to “stop” the threat. What is troubling is that highly trained military snipers are not able to do so; contrary to what Hollywood puts in movies. When Marine snipers are trained they are put through a grueling two-month program consisting of drills in marksmanship, observation, and stalking tactics.<sup>41</sup> In addition, snipers work in teams of two at all times consisting of the sniper and a spotter.<sup>42</sup> Snipers will take an offensive approach by setting up in a particular position for hours before a specific target arrives and will continue to wait for their target to cross their sights in order to take that fatal shot. Whereas many officers are responding to scenes alone and officers are more than often reactionary to a situation and must take a defensive position to return fire.<sup>43</sup> Although officers do not go

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<sup>35</sup> Kindy, *supra* note 11.

<sup>36</sup> Kindy, *supra* note 11.

<sup>37</sup> Kindy, *supra* note 11.

<sup>38</sup> Crane, *supra* note 5.

<sup>39</sup> Crane, *supra* note 5.

<sup>40</sup> Kindy, *supra* note 11.

<sup>41</sup> Robert Valdes, *How Military Snipers Work*, <http://science.howstuffworks.com/sniper1.htm> (last visited July 12, 2015).

<sup>42</sup> *Id.*

<sup>43</sup> Crane, *supra* note 5.

through military training they are trained through a police academy. In Arizona, officers attend the Arizona Law Enforcement Academy for at least eighteen weeks and will then conduct follow-up training with an individual law enforcement agency.<sup>44</sup> Unfortunately, the “Hollywood Syndrome”, as discussed below, will always remain a thought in the back of someone’s mind when they hear of an officer-involved-shooting.

#### V. HOLLYWOOD SYNDROME VERSUS REALITY.

The “Hollywood Syndrome” and the media play a major role in the perception of officer-involved-shootings. Yet the media serves as the first line of communication to the community immediately following a shooting and will set the tone that will circulate among society.

##### A. *Hollywood Syndrome.*

The “Hollywood Syndrome” places an unrealistic perception on the community that all officers are either superheroes and can leap tall buildings or they are all snipers and can shoot a moving target in the leg or hand in order to disarm a suspect. Many movies and television shows that have come out of Hollywood involving police departments will almost always involve some type of shootout with the villain of the show. Movies like *Die Hard* starring Bruce Willis, *S.W.A.T.* starring Jeremy Renner and Collin Farrell and the unforgettable *Dirty Harry* starring Clint Eastwood and the television shows such as: *SWAT*, *24*, *Law and Order: Special Victim’s Unit* and *Chicago P.D.* all are riddled with police myths. These movies and television shows merely skim the surface of the actual number that have come out of Hollywood.

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<sup>44</sup> ARIZ. DEP’T OF PUB. SAFETY, [www.azdps.gov/Careers/Officers/Questions/#48](http://www.azdps.gov/Careers/Officers/Questions/#48) (last visited on July 12, 2015).

However, even though they are fictional movies and television shows, the community develops a false sense of what police officers are capable of doing. Some of the myths brought about through the “Hollywood Syndrome” include: (1) “never running out of bullets;” (2) “being able to shoot guns/knives out of people’s hands;” (3) “that hitting the bad guy with one bullet is enough to stop the fight;” (4) “getting shot with a handgun will knock you down/knock you six feet back/knock you through a wall;” and (5) “officers have the capability to defy the laws of physics and defy the limits of human performance.”<sup>45</sup>

Unfortunately, the real world does not work in this same manner. An officer only has the ability to shoot the number of bullets they can carry in the magazine attached to their service weapon. Two of the most common standard issued service weapons for law enforcement officers are a Glock 19 and Glock 22.<sup>46</sup> A Glock 19 has the ability to have a clip or magazine capacity up to thirty-three rounds of ammunition; however, the standard magazine holds fifteen rounds of ammunition.<sup>47</sup> A Glock 22 can carry up to twenty-two rounds of ammunition with the standard magazine holding up to fifteen rounds of ammunition.<sup>48</sup> Obviously, if the officer carries a different weapon such as a rifle or shotgun, they will have a different, usually smaller amount of ammunition. Nonetheless, an officer is limited, depending on the type of service weapon carried, to the number of bullets they are able to shoot. Television and movies fail to show what happens after an officer is involved in a shooting such as the investigations and reviews that take place.

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<sup>45</sup> Crane, *supra* note 5.

<sup>46</sup> Bob Owens, *Why the Police Shouldn't Use Glockes*, L.A. TIMES, May 7, 2015, <http://www.latimes.com/opinion/op-ed/la-oe-owens-glock-accidents-20150508-story.html>.

<sup>47</sup> GLOCK, <https://us.glock.com/products/model/g19>, (last visited July 6, 2015).

<sup>48</sup> *Id.*

*B. Reality and the Cases That Impact Investigations.*

There are several precedent cases that have impacted what is involved in an investigation into excessive force or officer-involved shootings. These cases have had a direct impact on the investigative process of both administrative and criminal matters.

1. *Garrity Rights.*

*Garrity v. New Jersey*<sup>49</sup> is one of the most influential cases having the most impact on an administrative investigation. In *Garrity*, several New Jersey officers were being investigated for allegedly fixing tickets.<sup>50</sup> During the investigation the officers were questioned regarding the allegations, yet, prior to questioning, the officers were “warned,” “if he refused to answer he would be subject to removal from office.”<sup>51</sup> The officers answered the questions and the statements were subsequently used to convict the officers in their criminal cases.<sup>52</sup> The officers appealed on the basis that their statements were coerced because they were forced to answer the questions or face termination from their employment.<sup>53</sup> The Court was faced with weighing a suspect’s choice to exercise their right to “refuse to answer” questions versus losing their employment.<sup>54</sup> The Court held that “[p]olicemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights.”<sup>55</sup> The Court further held “a public officer making a confession under such circumstances does not waive the constitutional privilege

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<sup>49</sup> *Garrity v. New Jersey*, 385 U.S. 493 (1967).

<sup>50</sup> *Id.* at 494, 617.

<sup>51</sup> *Id.* at 494, 617.

<sup>52</sup> *Id.* at 495, 617.

<sup>53</sup> *Id.* at 495, 617-618.

<sup>54</sup> *Id.* at 499, 620.

<sup>55</sup> *Id.* at 500, 620.



against self-incrimination if he properly preserves his objections.”<sup>56</sup>

Based on *Garrity*, when an officer is questioned during the administrative investigation, anything the officer states cannot be provided to the criminal investigators to be used against him. *Garrity* is a controlling, if not the controlling, case that directly impact all investigations. Similar language is contained within the Phoenix Police Department’s Operations Order that the Professional Standards Bureau (hereinafter PSB) will submit their reports directly to the officer’s assistant chief as well as the Use of Force Board chairperson, regarding an officer-involved-shooting, and they are not share the information obtained with the criminal investigators, if any exist.<sup>57</sup> These provisions can also be seen in the Chandler Police Department Orders wherein the Professional Standards Section (hereinafter PSS) is not permitted to share their investigation information with the criminal investigators.<sup>58</sup> Specifically Chandler Police Department puts in their orders that the PSS conducts a simultaneous administrative investigation and “**WILL NOT** share information” with the Criminal Investigations Bureau for the criminal investigation.<sup>59</sup> Most, if not all, of the law enforcement agencies are consistent in that they all contain language that the administrative investigation being conducted is not to be shared with the criminal investigations unit. The reason is that officers are compelled to participate in an administrative investigation by giving details of the alleged misconduct. The Court in *Garrity* was attempting to prevent the double-edged sword because if the officer refuses an

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<sup>56</sup> *Id.* at 500, 620.

<sup>57</sup> Phoenix Police Dep’t Operations Orders, Section 1.5, Use of Force, revised June 2013, page 20 [hereinafter PPD OO].

<sup>58</sup> Chandler Police Dep’t General Orders, E-01.300, Use of Force: Investigation Use of Force Incidents, effective January 23, 2009, page 6 [hereinafter CPD Orders].

<sup>59</sup> CPD Orders at 6.

interview in the administrative investigation, they will be terminated, but if they provide an interview then the statement would be used against them to charge them criminally. However, the *Garrity* holding was expanded only one year later in *Gardner v. Broderick*.<sup>60</sup>

## 2. In *Gardner* We Trust.

In *Gardner*, an officer was terminated from his employment with the New York Police Department when he refused to sign a waiver of immunity and provide testimony in a grand jury proceeding.<sup>61</sup> The officer's testimony was going to be directly related to questions regarding his job performances while on-duty pertaining to bribery and corruption.<sup>62</sup> The officer was subsequently terminated from his job on the sole basis of his refusal to sign a waiver of immunity.<sup>63</sup> The Court held that the officer was terminated for refusing to "waive a constitutional right" and for refusing to "waive the immunity to which he would be entitled if he was ever required to testify despite his constitutional privilege."<sup>64</sup> The Court ruled the "protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings if statements were obtained under threat of removal from office and that it extends to all, whether they are policemen or members of our body politic."<sup>65</sup> The Court further held that police officers are "directly, immediately, and entirely responsible to the city or state...[and] owes his entire loyalty to it...the policeman is either responsible to the state or to no one."<sup>66</sup>

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<sup>60</sup> *Gardner v. Broderick*, 392 U.S. 273 (1968).

<sup>61</sup> *Id.* at 274-75.

<sup>62</sup> *Id.* at 274.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 273.

<sup>65</sup> *Id.* at 277.

<sup>66</sup> *Id.* at 277-78.

*Gardner* forces that separate investigations be kept separate and that although the criminal investigation may provide their information to the internal or administrative investigation, the administrative/internal investigations are prohibited from sharing their information with the criminal investigation. By doing so, *Gardner* affords officers the same constitutional rights and privileges as all other individuals. However, this is no truer than when an officer is being investigated for excessive use of force.

### 3. No Force is Greater Than *Graham*.

When making a determination as to whether an officer used the appropriate level of force, investigators examine the matter under an “objective reasonableness” of a fellow officer who would be or was on-scene at the time of the incident. The investigators use the *Graham* Test under *Graham v. Connor*.<sup>67</sup>

Mr. Graham was a diabetic suffering from problems arising from his sugar levels.<sup>68</sup> However, after observing Mr. Graham entering and exiting a store, Officer Connor initiated a stop on the vehicle Mr. Graham was riding in.<sup>69</sup> At some point after the stop, Officer Connor handcuffed Mr. Graham, shoved him against the hood of his friend’s vehicle and at one point Mr. Graham was thrown against a patrol vehicle.<sup>70</sup> Unfortunately, it was later determined that Mr. Graham had done nothing wrong and was driven home by an officer and released.<sup>71</sup> Mr. Graham brought suit against Officer Connor for excessive force and the injuries he allegedly sustained during the altercation.<sup>72</sup>

The Court held, under an excessive force complaint, one must first identify the constitutional rights have been infringed

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<sup>67</sup> *Graham v. Connor*, 490 U.S. 386, 388 (1989).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 388-89.

<sup>70</sup> *Id.* at 389.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 390.

upon.<sup>73</sup> The Court further opined the claims for excessive force while the officer is making a “seizure” are to be analyzed under the “Fourth Amendment’s ‘objective reasonableness standard’” and not under a “substantial due process standard.”<sup>74</sup> The Court balances the intrusion of a person’s Fourth Amendment rights against the government’s interests in order to determine reasonableness of the intrusion of a person’s constitutional rights.<sup>75</sup> In *Graham* the Court held that Fourth Amendment jurisprudence has “recognized that the right to make an arrest or investigatory stop necessarily carries with it the **right to use some degree of physical coercion or threat thereof to effect it.**”<sup>76</sup> The Court further detailed that particular factors must be considered and each matter must be viewed on a case-by-case basis that includes: “severity of the crime... whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>77</sup> However, one of the key rulings to come out of *Graham* is that “reasonableness” with respect to “use of force must be judged from the perspective of a **reasonable officer on-scene**, rather than with the 20/20 vision of hindsight... not every push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates the Fourth Amendment.”<sup>78</sup> The Court reasoned that in order to determine whether a case is reasonable that the Court must allow “for the fact that **police officers are often forced to make split-second judgments** – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation.”<sup>79</sup>

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<sup>73</sup> *Id.* at 394.

<sup>74</sup> *Id.* at 388.

<sup>75</sup> *Id.* at 396.

<sup>76</sup> *Id.* at 396 (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 396-97.

<sup>79</sup> *Id.* (emphasis added).

The *Graham* decision can be seen intermingled in some of the policies and procedures involving officer shootings. For example, the Baltimore Police Department Use of Force Review Board reviews the reports from an “objectively reasonableness” standard.<sup>80</sup> However, in San Jose, not only do the officers investigate a shooting thoroughly but once the reports are submitted to the District Attorney’s Office for review for any criminal charges, the District Attorney looks to see if “reasonable force is that level of force which is appropriate when analyzed from the perspective of a reasonable officer.”<sup>81</sup> This would then lead to the question of what is “reasonable” from the perspective of an officer.

#### 4. Stop and Frisk in *Terry*.

In 1968, the Court made a determination in *Terry v. Ohio* regarding what a “reasonable officer” may conclude when viewing the totality of the circumstances.<sup>82</sup> In *Terry*, a Cleveland Police Department Detective, Detective McFadden, observed Mr. Terry and Mr. Chilton passing back and forth looking into a store window numerous times, and with each passing they would stop and talk to each other.<sup>83</sup> The detective suspected the two men were “casing a job.”<sup>84</sup> Detective McFadden followed the two men and contacted the now three men down the road wherein he patted down the outside of the three men’s clothing and removed two weapons from two of the men.<sup>85</sup> The men were subsequently charged and the defense attorneys moved to

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<sup>80</sup> Baltimore Police Dep’t, Gen. Order G-10, effective July 3, 2014, page 3 [hereinafter BPD GO].

<sup>81</sup> San Jose Police Dep’t, Duty Manual, Security Procedures Redacted Pursuant to Ca. Gov’t Code § 6254(f), Line/Operations Procedures, L 2602, <http://www.sjpd.org/Records/DutyManual.asp> (last visited July 12, 2015).

<sup>82</sup> *Terry v. Ohio*, 392 U.S. 1, 1 (1968).

<sup>83</sup> *Id.* at 6.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 6-7.

suppress the weapons.<sup>86</sup> The trial court denied the motion based on the totality of the circumstances and “that the officer for his own protection had the right to pat down their outer clothing having reasonable cause to believe that they might be armed.”<sup>87</sup> The Supreme Court held it would be “clearly unreasonable to deny to the officer the power to take necessary measures to determine” and to “neutralize the threat of physical harm.”<sup>88</sup> However, this does not give an officer a free for all in conducting searching without warrants. The Court held the search must be “strictly tied to and justified by . . . the circumstances the officer is investigating or the events leading up to the contact.”<sup>89</sup>

In *Terry*, the Court opined the search must be “something less than a ‘full search’” and set forth a two-prong test that all agencies have implemented: (1) the officer must reasonably “believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime,” and (2) the officer “reasonably concludes ‘criminal activity’ may be afoot.”<sup>90</sup> The Court reasoned an officer is “entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing...to discover weapons which might be used to assault him.”<sup>91</sup> However, one of the most important holdings that can be taken from *Terry* is that “officers are not required to take unnecessary risks in the performance of their duties.”<sup>92</sup>

A police officer will say that one of their prime goals everyday, when they go to work, is to be able to return home safely at the end of their shift. *Terry* is a key tool officers have in order to try to get ahead of a potential dangerous situation that can go

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.* at 24.

<sup>89</sup> *Id.* at 18-19.

<sup>90</sup> *Id.* at 26-27.

<sup>91</sup> *Id.* at 30-31.

<sup>92</sup> *Id.* at 23.

from bad to worse within seconds. There is no such thing as a “routine call” and every situation is a dangerous one. As Ken Crane said, each call for service is like a “snowflake,” each is different.<sup>93</sup> Officers deal with different people, different emotions, different situations and different temperaments. For example, Flagstaff Police Officer Tyler Stewart was conducting a follow-up interview regarding a domestic violence incident and had the suspect step outside to speak with him. Officer Stewart noticed the suspect’s hands were in his pockets and informed the suspect he was going to pat him down for his own safety, the conversation never became confrontational or aggressive.<sup>94</sup> However, when Officer Stewart went to pat the suspect’s right jacket pocket, the suspect pulled out a gun and began firing several rounds, striking and ultimately killing the officer before the suspect took the officer’s service weapon and killed himself.<sup>95</sup> This is one example of why the *Terry* ruling is a crucial tool for officers and perhaps may help to prevent officer-involved-shootings.

## VI. A GLIMPSE OF REALITY.

Many police agencies have a set of policies that govern or direct each law enforcement agency on the investigation process for use of force allegations. This includes which department investigates allegations of potential criminal charges and which department investigates the administrative matters.

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<sup>93</sup> Crane, *supra* note 5.

<sup>94</sup> THE HUFFINGTON POST, *24-Year-Old Arizona Police Officer, Suspect Killed in Shootout*, (December 28, 2014 updated February 27, 2015), [http://www.huffingtonpost.com/2014/12/28/tyler-j-stewart-arizona-police\\_n\\_6386658.html](http://www.huffingtonpost.com/2014/12/28/tyler-j-stewart-arizona-police_n_6386658.html).

<sup>95</sup> *Id.*

A. *Phoenix Police Department.*

Phoenix Law Enforcement Association, also known as P.L.E.A., has been instrumental in attempting to change legislation with regards to protecting officers after they have been involved in an officer-involved-shootings. Ken Crane, an Executive Board member of P.L.E.A., has been a member of P.L.E.A. for approximately twenty-one years.<sup>96</sup> According to Mr. Crane, "P.L.E.A. exists to represent and advocate on behalf of Phoenix Police officers" with the city with regards to "wages, benefits, and working conditions."<sup>97</sup> Mr. Crane has been involved as a P.L.E.A. representative in "several dozens" of officer-involved shootings "over the past several years."<sup>98</sup> Although Mr. Crane has never had to "pull the trigger" while on-duty in his twenty-six year career span, he has experienced some "close calls."<sup>99</sup>

Officers are trained while in the academy on what to do when they have been involved in a shooting while on-duty, however, every shooting is unique. Ken Crane describes each shooting as a "snowflake" and although they can be extremely similar, there will always be minor differences that will set them apart and "make them unique in its own way."<sup>100</sup> There is no such thing as a "routine call" for an officer. Rather any call that an officer has responded to hundreds of times in the past "can go from 0-100 miles per hour in an instant" and the officer can be in a "fight for their lives."<sup>101</sup>

When a Phoenix officer is involved in a shooting their firearm is taken for an evaluation by a police lab wherein the lab will make a determination as to whether the weapon was functioning properly at the time of the firing.<sup>102</sup> Officers are then

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<sup>96</sup> Crane, *supra* note 5.

<sup>97</sup> Crane, *supra* note 5.

<sup>98</sup> Crane, *supra* note 5.

<sup>99</sup> Crane, *supra* note 5.

<sup>100</sup> Crane, *supra* note 5.

<sup>101</sup> Crane, *supra* note 5.

<sup>102</sup> Crane, *supra* note 5.



given three days to “decompress;” and during this time they are required to meet with a psychologist to undergo an evaluation to determine whether they are fit to return to duty.<sup>103</sup> In addition, the Phoenix Police Department requires the officers, involved in a shooting, to participate in shooting drills with their same service-weapon prior to being cleared to return to duty.<sup>104</sup>

Officers undergo several different interviews, briefings, hearings and reviews simultaneously. Some of these interviews and hearings happen within a few hours, a few days to a few months from the date of the shooting. Immediately after a shooting, most criminal investigators will interview the officer involved on-scene and will typically have the officer conduct a “walk-thru” with the investigator. A “walk-thru” is when the officer involved takes the detective through the scene while describing in detail the events that took place leading up to the shooting and the events that took place immediately following the shooting. This is the first of many interviews. In Phoenix, an officer is “required to see a psychologist” prior to returning to full-duty.<sup>105</sup> In addition, the Phoenix officer will submit to a “post shooting debrief” which will typically occur within seven to ten days.<sup>106</sup> During the briefing, all of the personnel involved with the shooting will meet with the department’s Critical Incident Stress Management team (hereinafter “CISM”) to discuss the incident wherein the CISM team moderates the sessions in a “confidential setting.”<sup>107</sup>

The amount of counseling received after a traumatic incident, including an officer-involved-shooting, is determined on a case-by-case basis. In addition, if an officer’s “supervisor notices performance issues” linked to an incident, the officer can

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<sup>103</sup> PPD OO, *supra* note 57 at 23.

<sup>104</sup> PPD OO, *supra* note 57 at 24.

<sup>105</sup> PPD OO, *supra* note 57 at 23.

<sup>106</sup> Crane, *supra* note 5.

<sup>107</sup> Crane, *supra* note 5.

be “directed to see a counselor.”<sup>108</sup> The CISM will also reach out to an officer who has been exposed to a traumatic incident.<sup>109</sup> Unfortunately, counseling carries a stigma or paints a “Scarlett Letter A” on the officer, therefore officers tend to believe counseling is for the weak. However, when an officer does not receive the counseling they need, they will typically turn to drugs or alcohol to self-medicate and in some situations officers will go as far as to take their own lives. In 2012, Phoenix Police Officer Craig Tiger was involved in an officer-involved-shooting resulting in the death of a suspect.<sup>110</sup> Officer Tiger’s mental state quickly spiraled out of control leaving Officer Tiger to suffer from post-traumatic stress disorder (hereinafter PTSD) and forced him to turn to alcohol in order to dull the pain.<sup>111</sup> Officer Tiger attended the mandatory counseling as well as the standard three days administrative leave and was “rubber-stamped” as fit to return to duty.<sup>112</sup> Officer Tiger suffered from depression and on the first year anniversary of the shooting, and attempted to take his own life. However, he was stopped short when he was arrested for suspicion of driving under the influence.<sup>113</sup> Officer Tiger was candid regarding his suicidal tendencies and began an in-patient treatment program where he would be formally diagnosed with PTSD.<sup>114</sup> However, this did not end Officer Tiger’s troubles, since Officer Tiger now faced termination after a twelve-year law enforcement career with Phoenix Police, and he would later be unsuccessful in pleading with the Chief of Police

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<sup>108</sup> Crane, *supra* note 5.

<sup>109</sup> Crane, *supra* note 5.

<sup>110</sup> Megan Cassidy, *Suicide of Ex-Phoenix Officer Spurs PTSD Talks*, THE REPUBLIC, (November 14, 2014) <http://www.azcentral.com/story/news/local/phoenix/2014/11/14/former-phoenix-officer-suicide-spurs-ptsd-talks/19027773/>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

to keep his job.<sup>115</sup> Fourteen months later, former Officer Tiger would make another attempt to take his life, this time he would be successful on the weekend of November 8, 2014.<sup>116</sup> According to Mr. Crane, some officers “return to work too soon either because they think they are ready when they really aren’t or they may feel pressured by their chain of command to come back or feel like they are letting their co-workers down by leaving them short staffed.”<sup>117</sup> Unfortunately, Officer Tiger’s story is one of many suffered by many agencies.

*B. Austin Police Department*

The Austin Police Department in Austin, Texas employs over two thousand sworn officers as of 2012.<sup>118</sup> Austin Police Department’s review process is located within their Policy Manual and categorizes each incident involving any use of force by law enforcement.<sup>119</sup>

All shootings including those involving officers are categorized as Level I and all Level 1 incidents involve at least four different processes an officer must endure after he or she has been involved in a shooting. The Special Investigations Unit (hereinafter “SIU”) and the Internal Affairs Unit (hereinafter “IA”) conduct simultaneous investigations with respect to criminal misconduct and policy violations.<sup>120</sup> Supervisors review the information provided in order to determine if there was a

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Crane, *supra* note 5.

<sup>118</sup> UNIF. CRIME REPORTS, FED. BUREAU OF INVESTIGATION, [https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/78tabledatadecpdf/table-78-state-cuts/table\\_78\\_full\\_time\\_law\\_enforcement\\_employees\\_texas\\_by\\_city\\_2012.xls](https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/78tabledatadecpdf/table-78-state-cuts/table_78_full_time_law_enforcement_employees_texas_by_city_2012.xls) (last visited July 20, 2015).

<sup>119</sup> Austin Police Dep’t, Policy Manual, Policy 211, (August 14, 2011), Policy 2.11.3.2 Policy Violation. [hereinafter APD PM].

<sup>120</sup> APD PM, Policy 211.2.1 Level 1 Force Incidents and In-Custody Deaths.

violation in the police department's policies or if the officer broke the law. If the supervisor determines there is "credible evidence" to believe an officer violated a policy or broke the law then a full-blown investigation will be conducted by the SIU and IA.<sup>121</sup> The officer involved and the supervisor will author supplemental reports and all of the officers will participate in a debriefing.<sup>122</sup> The SIU will take command of the shooting scene and will send their reports and inquiry packets to IA within forty-five days.<sup>123</sup> Subsequently, IA will author a report based on their own investigation together with the reports obtained by SIU and forwards their report through the chain of command.<sup>124</sup> Each level of command has an opportunity to review the reports, document their review and forward their reviews with the reports to the next level of command within four working days.<sup>125</sup>

The Force Review Board (hereinafter "FRB") reviews all reports, reviews and conducts an administrative review of all Level I matters.<sup>126</sup> The FRB will "convene" within thirty days of receipt of the IA reports to make a determination relating to training, tactics, and policy violations and will make a recommendation to the Chief of Police.<sup>127</sup> The FRB does not make a determination relating to any potential criminal charges and does not have the ability to terminate officers who may be out of policy. Rather the FRB only makes a recommendation to the Chief of Police who will then make the final determination.

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<sup>121</sup> APD PM, Policy 211.3, Violations of Law or Policy.

<sup>122</sup> APD PM, Policy 211.4.1 Employee Reporting Guidelines For All Force Level Incidents.

<sup>123</sup> APD PM, Policy 211.6.2, Special Investigations Unit (SIU) Responsibilities in Level 1 And In-Custody Death Incidents.

<sup>124</sup> APD PM, Policy 211.6.4, Chain-of-Command Review Responsibilities in Level 1 And In-Custody Death Incidents.

<sup>125</sup> *Id.*

<sup>126</sup> APD PM, Policy 212, Force Review Board.

<sup>127</sup> APD PM, Policy 212.3.1, Inquiry Packet Preparation.

The review process by the chain of command appears flawed on its face. Each level of command reviews the findings or recommendations of the level prior. As a result, the supervisory chain can be influenced by the prior level or may not review the reports objectively because they may not have sufficient time to review the reports or they may be too busy. In addition, the supervisors do not conduct any follow-up investigation or interviews and are not able to hold a hearing to question witnesses and complainants, which gave rise to the investigation in the first place.

*C. Baltimore Police Department*

As of 2012, there were almost three thousand sworn officers in Baltimore, Maryland.<sup>128</sup> Baltimore is now known as to be the home of the Baltimore Riots of 2015, which were sparked after the death of Freddie Grey. Baltimore is the second highest rated in the nation for police presence, yet Baltimore police appeared out numbered during the riots.<sup>129</sup> Although Freddie Grey's case did not involve a shooting death, it still encompasses a death involving alleged police misconduct. It would appear that regardless of whether a firearm was discharged or not, the investigation process would be similar, if not the same, procedure and would entail various investigations being conducted simultaneously. Three reports are authored within ninety days of an alleged use of force matter and there are two initial departments that conduct the investigations: (1) Force Investigation Team (hereinafter FIT) and (2) Homicide Section.<sup>130</sup>

FIT will "impartially" investigate the tactics used by the officer or officers involved leading up to, during and immediately after the use of force.<sup>131</sup> FIT will also assist the Homicide Section in the criminal investigation, however, the investigation

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<sup>128</sup> *See, supra* note 118.

<sup>129</sup> *See, supra* note 118.

<sup>130</sup> BPD GO, *supra* note 80 at 1-2.

<sup>131</sup> BPD GO, *supra* note 80 at 1-2.

conducted by FIT as well as the Homicide Section are kept confidential.<sup>132</sup>

Basic information relating to the incident is reported to various chain-of-commands including the Police Commissioner, Deputy Commissioner, Internal Affairs, Homicide Section and the Media Relations Section within twenty-four hours.<sup>133</sup> A preliminary briefing is conducted within seventy-two hours and a criminal investigation report is sent to the State's Attorney's Office within ninety days.<sup>134</sup> Yet it is the State's Attorney's Office that makes a final decision as to any potential criminal charges and findings.<sup>135</sup> An administrative decision is given within ninety days of the State Attorney's Office rendering their decision.<sup>136</sup>

Baltimore's official procedures following a shooting are similar to that of Phoenix Police Department's policies. However, in Baltimore, the officer is placed or assigned to administrative duties until they are cleared to return to duty.<sup>137</sup> Similar to Phoenix Police Department, the Baltimore officer must attend a debriefing and/or counseling with a "department approved psychologist" as well as complete a series of tactical tests at the Training Academy prior to returning to full duty.<sup>138</sup>

Finally, the Use of Force Review Board (hereinafter "UFRB") evaluates the tactics deployed leading up to, during, and after the incident and makes recommendations as to police policy changes, whether the use of force was appropriate, and if the force used was "objectively reasonable."<sup>139</sup> The UFRB

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<sup>132</sup> BPD GO, *supra* note 80 at 3.

<sup>133</sup> BPD GO, *supra* note 80 at 4.

<sup>134</sup> BPD GO, *supra* note 80 at 4.

<sup>135</sup> BPD GO, *supra* note 80 at 4.

<sup>136</sup> BPD GO, *supra* note 80 at 4.

<sup>137</sup> BPD GO, *supra* note 80 at 6.

<sup>138</sup> BPD GO, *supra* note 80 at 6.

<sup>139</sup> BPD GO, *supra* note 80 General Order G-24, page 1.

will hold a hearing within thirty days and make findings and recommendations to the Police Commissioner.<sup>140</sup> The Police Commissioner can approve the findings of the UFRB or he can send it off to the Civilian Review Board, yet, the Civilian Review Board may also make findings and recommendations pertaining to tactics and policies to the Police Commissioner.<sup>141</sup> In the end, just like that of Phoenix Police Department, the final decision does not rest with the boards at all but rather with the Police Commissioner or Chief of Police, of whom can throw all of the reports out of the window and do what he or she wants to do.

*D. Ferguson Police Department*

Ferguson, Missouri has slightly over fifty sworn officers within the Ferguson Police Department.<sup>142</sup> Due to the low number of officers, this could be the reason why the General Orders are not as detailed with relation to officer-involved-shootings. As of July 1, 2015, Ferguson established a Citizen Review Board (hereinafter CRB) comprised of nine civilian members who are not elected officials or in law enforcement.<sup>143</sup> The CRB is given the power and responsibility to: 1) investigate all civilian complaints against Ferguson officers; 2) review results from any “complaint investigation” and mediations; 3) conduct reviews and publish statistics relating to “crime, racial profiling and complaint statistics;” 4) review policy and training procedures; and 5) make disciplinary as well as policy recommendations to the Chief of Police and City Council.<sup>144</sup>

Unfortunately, since the CRB will not have any law enforcement personnel as a member of the team, this may only backfire

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<sup>140</sup> BPD GO, *supra* note 80 General Order G-24, page 2.

<sup>141</sup> BPD GO, *supra* note 80 General Order G-24, page 3.

<sup>142</sup> CITY OF FERGUSON POLICE DEP'T, <http://www.fergusoncity.com/93/Bureau-of-Administration> (last visited July 31, 2015).

<sup>143</sup> FERGUSON CITY, (last visited July 31, 2015), <http://www.fergusoncity.com/93/Bureau-of-Administration> (last visited July 31, 2015).

<sup>144</sup> *Id.*

rather than help the Ferguson community. The CRB will have a greater chance of stirring up the animosity between the community and officers because the CRB will not be able to review a case from the perspective of an “objectively reasonable” officer. A contradictory recommendation or finding may only boost the mistrust and further drive the wedge between them. This may be particularly dangerous thanks to the “Hollywood Syndrome” that most civilians suffer from because what the CRB may view as being unjustified may be deemed justified by law enforcement. The community will only further blame the police for a bad investigation into the allegations, although the Ferguson Police Department has policies and procedures in place pertaining to the investigation process.<sup>145</sup>

Ferguson Police General Orders authorize the use of lethal force in “defense of human life” inclusive of the officer’s own life or “in defense of any person in imminent danger of physical injury.”<sup>146</sup> The Bureau of Investigation is responsible for investigating the circumstances surrounding an officer-involved-shooting.<sup>147</sup> Although, the officer involved does not author an original report in the criminal investigation, this does not prohibit the officer from being forced, under *Garrity*, to submit to an administrative investigation with the Professional Standards Office.<sup>148</sup> Similarly to the Austin Police Department, the use of force reports are sent through the chain of command up to the Chief of Police. Like most, if not all agencies, there are multiple investigations happening simultaneously.

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<sup>145</sup> Ferguson Police Dep’t, Gen. Orders, Gen. Order 410.00, (July 6, 2010), [hereinafter FPD GO] Order 410.05(D), Procedures to be Followed When a Firearm is Discharged (Gunshot Wound Inflicted).

<sup>146</sup> *Id.* at Order 410.05(A)

<sup>147</sup> *Id.* at Order 410.05(D).

<sup>148</sup> *Id.* at Order 410.05(D).



Finally, Ferguson is no different than most other agencies, in that the final decision rests with the Chief of Police with regards to termination.<sup>149</sup> All of the Boards can make recommendations but none will override the power of the Chief of Police.

## VII. CONCLUSION.

Each law enforcement agency has different policies and procedures with regards to the handling of officer shootings. Some agencies have too many investigations going on and the reports go through several hands before they reach the destination of the Chief of Police or Police Commissioner. Procedural Justice will not assist with the prevention of shootings, however, it can assist with the aftermath. Communication is one of the most vital tools the police can utilize today. Especially since the news reports an incident within a few minutes of it occurring. Communication through the media is a skill that most agencies have not been able to master, yet it is better to get out in front of the news story rather than being behind the story attempting to clean up the false information that was leaked out or told to the news media. In addition, establishing a rapport with the community's leaders prior to an incident occurring is crucial to keeping the peace with the community. This will also allow the police to set the tone for the injured person's family as well as heal the community's ill-placed mistrust in the police. All agencies should actively listen to the concerns of the community and properly address those concerns by providing that information through personnel who have a background in use-of-force matters. A page can be taken from the Muskogee Police Department's playbook on how to handle the aftermath of an officer-involved-shooting and procedural justice will assist with that aftermath.

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<sup>149</sup> *Id.* at Order 410.07(E).



LEGAL BEAGLES, A SILENT MINORITY:  
THERAPEUTIC EFFECTS OF FACILITY DOGS IN THE  
COURTROOM

Lorie Gerkey\*

I. INTRODUCTION

Ellie<sup>1</sup>, Molly<sup>2</sup>, Rosie<sup>3</sup>, and Jeeter<sup>4</sup> are just a few of the hard-working staff members that are seen around the country's courthouses. Although they do not speak a word or make a sound, these working dogs silently provide emotional support to fearful witnesses while they testify. Facility dogs, as they are called, are being used in courtrooms to assist reluctant witnesses. This form of therapeutic jurisprudence is proving to be an enhancement of the psychological wellbeing of victims and witnesses.

This article will examine the emotional and psychological effects of testifying in court and how facility dogs are being used to combat these effects. To start, this article will give a brief overview of therapeutic jurisprudence. Then, it will outline the emotional stress some witnesses, particularly children, can face when testifying in court. Next, it will review past strategies

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<sup>1</sup>Casey McNerthney, *Dogs Give Prosecutors a Hand in Difficult Cases*, SEATTLEPI (Sept. 2, 2007, 10:00 PM), <http://www.seattlepi.com/local/article/Dogs-give-prosecutors-a-hand-in-difficult-cases-1248466.php>).

<sup>2</sup> *Courthouse Dogs*, <http://courthousedogs.com/> (last visited Dec. 1 2014).

<sup>3</sup> William Glaberson, *By Helping a Girl Testify at a Rape Trial*, N.Y. TIMES (last visited Dec. 1, 2014), <http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?pagewanted=all>.

<sup>4</sup> *Supra* note 1.

courts have used to minimize stress in children who were testifying. Then, it will discuss the use of facility dogs and how this practice can minimize the traumatic effects of testifying in children. Next, this article will give legal foundation for the use of facility dogs in the courtroom, along with an outline of some of the constitutional arguments against their use, and it will offer a variety of options to reduce the possible prejudice with the jury. Finally, this article will present some “best practices” for courtrooms when considering the use of facility dogs to support apprehensive victims.

## II. THERAPEUTIC JURISPRUDENCE DEFINED

Therapeutic Jurisprudence “focuses on the law's impact on emotional life and psychological well-being.”<sup>5</sup> In 1987, the term “Therapeutic Jurisprudence” was coined by Professor David Wexler<sup>6</sup> and Professor Bruce Winick<sup>7</sup> when they suggested “the need for a new perspective” in how the current legal process and options are viewed.<sup>8</sup> Legal practices either produce “therapeutic or anti-therapeutic consequences for the individuals involved.”<sup>9</sup> Therapeutic Jurisprudence focuses on

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<sup>5</sup> David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000)

(citing Wexler & Winick, *Law in Therapeutic Key: Developments in Therapeutic Jurisprudence* xvii (1996)), available at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html#> (last visited Nov. 2, 2014).

<sup>6</sup> *Id.*

<sup>7</sup> Bruce J. Winick, <http://www.law.miami.edu/faculty-administration/in-memoriam/bruce-winick.php?op=1> (last visited Nov. 2, 2014).

<sup>8</sup> *Therapeutic Jurisprudence*, WIKIPEDIA (Nov. 6, 2014), [http://en.wikipedia.org/wiki/Therapeutic\\_jurisprudence](http://en.wikipedia.org/wiki/Therapeutic_jurisprudence).

<sup>9</sup> *Id.*

“humanizing the law and concerning itself with the human, emotional, psychological side of law and the legal process.”<sup>10</sup>

Therapeutic Jurisprudence recognizes that the law and its processes create consequences that are either therapeutic or non-therapeutic, and both consequences have lingering effects for those who are involved.<sup>11</sup> Recognizing these polar effects, Therapeutic Jurisprudence asks practitioners to make conscious efforts to apply the law and its processes in a more therapeutic manner while ensuring that other core values of the law, justice, and due process, are fully respected.<sup>12</sup> In doing so, they will provide a “richer way” of looking at the law and allow creative curative solutions that may have “previously gone unnoticed.”<sup>13</sup> Therapeutic Jurisprudence “regards the law as a social force that produces behaviors and consequences.”<sup>14</sup> The law will serve to promote justice and protect victims when “the law is a therapeutic agent,” “positive therapeutic outcomes are important judicial goals.” and “the design and operation of the courts can influence therapeutic outcomes.”<sup>15</sup>

### III. EMOTIONAL STRESS FOR CHILD WITNESSES

All individuals, including crime victims, have a constitutional right to access the courts.<sup>16</sup> The Crime Victims’

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<sup>10</sup> Wexler, *supra* note 5.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Debra Muller- Harris, *Animal Violence Court: A Therapeutic Jurisprudence Based Model Problem*, 17 LEWIS L. REV. 313, 316 (2011) (citing Natl. Council of Juv. et al., *Juvenile Drug Courts: Strategies in Practice*, <http://www.ncjrs.gov/txtfiles1/bja/197866.txt>).

<sup>16</sup> Brief for Nat’l Crime Victim Law Institute & Courthouse Dogs, *State v Dye*, 178 Wash. 2d 541 (2013) (No. 87929–0). (See, e.g., Chappell, 340 F.3d at 1282).

Rights Act,<sup>17</sup> affords crime victims the rights ... “to be treated with fairness . . . respect . . . dignity and privacy.”<sup>18</sup> This includes the right “[t]o be reasonably protected from the accused”<sup>19</sup> and to be present at any public criminal proceedings where the defendant has the right to be present.<sup>20</sup>

While the courts afford rights to victims, “courts can be hazardous to the psychological safety of crime victims” or witnesses, especially children, when providing those constitutional rights.<sup>21</sup> “Children who have been impacted by sexual assaults or violent offenses, either as victims or witnesses, have experienced emotional trauma that is especially difficult for them to mentally process given their tender years.”<sup>22</sup>

Typically, children are reluctant to disclose this type of emotional injury, even under the best circumstances.<sup>23</sup> But when they do reveal the ordeal, it is usually to a family member or counselor they trust and with whom they feel safe.<sup>24</sup> In order to avoid re-traumatizing children when they re-tell their stories, “trauma-informed, experienced therapist(s)” advocate that sensitivity to timing and pacing is essential.<sup>25</sup>

Unfortunately, during trial, children may have to relive their traumatic experiences. They may have to tell their story

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<sup>17</sup> 18 U.S.C. § 3771 (2009).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> David A. Crenshaw, *Trauma Sensitive Courts*, COURTHOUSE DOGS (Nov. 2, 2014), [http://www.courthousedogs.com/legal\\_trauma\\_sensitive.html](http://www.courthousedogs.com/legal_trauma_sensitive.html).

<sup>22</sup> David A. Crenshaw, *Guidelines for Attorneys and Judges to Recognize and Respond to Trauma Stress Reactions*, COURTHOUSE DOGS (Nov. 2, 2014), [http://www.courthousedogs.com/legal\\_child\\_witnesses.html](http://www.courthousedogs.com/legal_child_witnesses.html).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

...in a courtroom full of strangers, with an authority figure in a black robe looking down at them, having the defendant just a few feet away, staring at them, answering questions from a prosecutor trying to extract this information from them in excruciating detail, and a defense attorney challenging their veracity and hoping to confuse them....Needless to say these are hardly the conditions that foster complete and accurate testimony.<sup>26</sup>

Testifying in court under these circumstances could “create long lasting psychological damage to the child or even “re-traumatize the child.”<sup>27</sup>

Judith Herman,<sup>28</sup> a child trauma authority stated, “Indeed, if one set out intentionally to design a system for provoking symptoms of posttraumatic disorder, it might look very much like a court of law.”<sup>29</sup> According to the United States Department of Justice:

Too often in the past, the criminal justice system has not paid sufficient attention to the needs and welfare of child victims and witnesses, causing serious consequences. Contact with the system aggravated the trauma that the child had already experienced, making it more difficult for the child to participate in the investigation and

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Judith Lewis Herman, <http://www.goodtherapy.org/famous-psychologists/judith-herman.html#> (last visited Nov. 2, 2014).

<sup>29</sup> Crenshaw, *supra* note 22.

prosecution of the case and ultimately, making it more difficult to prosecute the case.<sup>30</sup>

Research has consistently noted that facing the defendant is the cause of distress most often cited by child witnesses.<sup>31</sup> In fact, “lab studies have found that children’s responsiveness declines when they are questioned in a courtroom environment.”<sup>32</sup> For example, a study in 1993 by Saywitz<sup>33</sup> and Nathanson,<sup>34</sup> examined the effect courtrooms can have on children’s testimony, specifically their recollection of events.<sup>35</sup> The study took thirty-four eight to ten year olds<sup>36</sup> and had them participate in an “event involving body-touch play between an

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<sup>30</sup> Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. REV. 171, (2009),

[https://www.animallaw.info/sites/default/files/lralvol15\\_2\\_p171.pdf](https://www.animallaw.info/sites/default/files/lralvol15_2_p171.pdf) (last visited Nov. 4, 2014) (citing Heather L. Cartwright, *Including Victims in the American Criminal Justice Process*, [http://www.unafei.or.jp/english/pdf/PDF\\_rms/no56/56-16.pdf](http://www.unafei.or.jp/english/pdf/PDF_rms/no56/56-16.pdf) (last visited Apr. 11, 2009).

<sup>31</sup> Jeffery C Sandler, *Alternative Methods of Child Testimony*, 21-Bartol-4803.qxd (last visited Dec. 5, 2014) (citing Cashmore, 2002; Goodman et al., 1992; Spencer & Flin, 1990).

<sup>32</sup> Thomas D. Lyon, *How Did You Feel*, LAW HUMAN BEHAVIOR (Oct. 2012), doi:10.1037/h0093986 (citing Hill PE, Hill SM. *Videotaping Children’s Testimony*, MICH. L. REV. 1986–1987; 85:809–833, Saywitz K, Nathanson R. *Children’s Testimony and their Perceptions of Stress*, CHILD ABUSE AND NEGLECT (1993), 17:613–<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3982717/#R23>) (last visited Dec. 2, 2014).

<sup>33</sup> Karen J. Saywitz, UCLA, [http://people.healthsciences.ucla.edu/institution/personnel?personnel\\_id=46360](http://people.healthsciences.ucla.edu/institution/personnel?personnel_id=46360) (last visited Dec. 5, 2014).

<sup>34</sup> Rebecca Nathanson, UNLV, <http://education.unlv.edu/ephe/faculty/nathanson/> (last visited Dec. 5, 2014).

<sup>35</sup> Saywitz & Nathanson, *Children’s Testimony and Their Perceptions of Stress*, CHILD ABUSE & NEGLECT Vol. 17. 613-622 (1993).

<sup>36</sup> *Supra* note 1.



unfamiliar adult male and small groups of children.”<sup>37</sup> Two weeks later, the same interviewer spoke with half of the children in a courtroom and the other half in their schoolroom.<sup>38</sup> The interviewer asked the children to recall details of the activity they participated in two weeks earlier. They found that “children questioned at court showed impaired memory performance when compared with agetates questioned at school.”<sup>39</sup> The researchers concluded, “we have a responsibility to create an environment that maximizes the completeness and accuracy of children’s testimony and minimize the stress placed on children in the process.”<sup>40</sup>

#### IV. PAST STRATEGIES TO MINIMIZE STRESS TO CHILD WITNESSES

Throughout the 1980s and 1990s there was a flurry of innovative ideas on how to protect and minimize trauma to children who had to testify in court.<sup>41</sup> Common strategies were used to “shield” the witness from his or her alleged perpetrator.<sup>42</sup>

The term "shielding procedure" encompasses a number of methods by which child witnesses may avoid direct contact with the defendant while testifying.<sup>43</sup> The child’s testimony could be videotaped outside of the courtroom or transmitted

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<sup>37</sup> *Supra* note 3.

<sup>38</sup> *Supra* note 1.

<sup>39</sup> *Supra* note 7.

<sup>40</sup> *Supra* note 9.

<sup>41</sup> Dorothy F. Marsil, *Child Witness Policy*, LAW AND CONTEMPORARY PROBLEMS 65, 209-241 (2002), <http://scholarship.law.duke.edu/lcp/vol65/iss1/8> (last visited Nov. 4, 2014).

<sup>42</sup> Katherine W. Grearson, *Proposed Uniform Child Witness Testimony Act*, 45 B.C. L. REV. 467, 468 (2004).

<sup>43</sup> *Id.*

through a closed-circuit television (“CCTV”) into the courtroom.<sup>44</sup> A screen could even be placed between the victim-witness and the accused.<sup>45</sup> However, these strategies have raised issues of constitutionality, specifically, the defendant’s right to confront witnesses.<sup>46</sup>

The use of a screen placed in front of the witness while on the stand was discussed in *Coy v. Iowa*.<sup>47</sup> Here, the defendant claimed that his constitutional right under the Confrontation Clause was violated. Justice Scalia, who delivered the opinion of the six to two ruling, emphasized that the Confrontation Clause provides a defendant the right to confront his or her accuser at trial.<sup>48</sup> His opinion went on to state that lack of “face to face” confrontation will “be allowed only when necessary to further an important public policy”.<sup>49</sup>

In another case, *Maryland v. Craig*, the Supreme Court again ruled on the constitutionality of using alternative methods for child testimony.<sup>50</sup> In this case, the Court determined that the use of CCTV for the child victim’s testimony “did not violate the defendant’s right to confrontation.”<sup>51</sup> However, the Court held that “before one-way CCTV could be used to shield child victims from direct confrontation with defendants, it must be shown that the child will suffer trauma ‘beyond *de minimus*,’

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<sup>44</sup> Marianne Dellinger, *Using Dogs for Emotional Support of Testifying Victims of Crime*, 15 ANIMAL L. REV. 171 (2009), [https://www.animallaw.info/sites/default/files/lralvol15\\_2\\_p171.pdf](https://www.animallaw.info/sites/default/files/lralvol15_2_p171.pdf) (last visited Dec.5, 2014).

<sup>45</sup> Jeffery C Sandler, *Alternative Methods of Child Testimony* (2005), 21-Bartol-4803.qxd (last visited Dec. 5, 2014).

<sup>46</sup> *Supra* note 41.

<sup>47</sup> *Coy v. Iowa*, 487 U.S. 1012 (1988).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Maryland v. Craig*, 497 U.S. 836 (1990).

<sup>51</sup> Casey Holder, *All Dogs Go to Court*, 50 HOUS. L. REV. 1155, 1162 (2013).

and further, that this trauma is caused by fear of the defendant and not by a generalized fear of the courtroom itself.”<sup>52</sup>

The Supreme Court of Florida has also discussed this important issue in *Glendening v. State*.<sup>53</sup> The court ruled that a three-and-a-half-year-old child’s videotaped testimony against her father, the sexual abuser, being shown to the jury did not violate the defendant’s constitutional rights. The court found that the defendant was allowed to conduct full cross-examination of the witness and observe the given testimony through a two-way mirror.<sup>54</sup> The state’s supreme court agreed with the trial court in determining the child would suffer at least moderate “emotional and mental harm had the child been forced to testify in court.”<sup>55</sup>

In a most recent Supreme Court decision, *Crawford v. Washington*,<sup>56</sup> the Court “fundamentally reinterpreted the federal [C]onstitution’s Confrontation Clause.”<sup>57</sup> The Court held that “[t]estimonial statements of witnesses absent from trial [can be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”<sup>58</sup> Testimonial “hearsay” is excluded unless the declarant testifies at trial.<sup>59</sup>

These cases demonstrate that:

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<sup>52</sup> Debra Whitcomb, *Legal Interventions for Child Victims*, 2 JOURNAL OF TRAUMATIC STRESS, 149, 154-155 (2003), [http://www.nctsn.org/nctsn\\_assets/Articles/64.pdf](http://www.nctsn.org/nctsn_assets/Articles/64.pdf) (last visited Nov. 2, 2014).

<sup>53</sup> *Glendening v. State*, 536 So. 2d 212 (Fla. 1988).

<sup>54</sup> *Id.* at 213 (Fla. 1988).

<sup>55</sup> *Id.* at 216.

<sup>56</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>57</sup> *Courthouse Dogs Promote Justice for Children and Defendants*, COURTHOUSE DOGS, [http://courthousedogs.com/legal\\_overview.html](http://courthousedogs.com/legal_overview.html) (last visited Nov. 8, 2014).

<sup>58</sup> *Supra* note 56, at 59.

<sup>59</sup> *Supra* note 57.

A child witness may testify by alternative methods where—by clear and convincing evidence—an adequate showing has been made of the child witness's vulnerability to severe mental and emotional harm, or where the court makes a specific finding of a substantial likelihood that the child witness and sex-abuse victim would suffer at least moderate emotional or mental harm if required to testify in open court.<sup>60</sup>

V. FACILITY DOGS CAN MINIMIZE THE TRAUMATIC EFFECTS OF TESTIFYING.

So what happens now? A child witness is faced with testifying against her perpetrator in court. What can the courts do to minimize the expected trauma? Well, allowing a dog to accompany the witness during testimony<sup>61</sup> is certainly one welcome step in the direction of making the court system more sensitive to its traumatic effects.<sup>62</sup> These dogs “are present during various stages of criminal justice proceedings are among the most recent efforts to assist victims in obtaining meaningful access to justice and exercising their rights, while minimizing the secondary harm that frequently accompanies participation in the justice system.”<sup>63</sup>

Currently, the preferred term for a dog of this stature is “facility dog”.<sup>64</sup> A facility dog is a graduate from an assistance

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<sup>60</sup> *Supra* note 32.

<sup>61</sup> John Ensminger, *Recent Cases on the Use of Facility Dogs By Witnesses While Testifying*, MICH. ST. L. REV., <https://www.animallaw.info/article/recent-cases-use-facility-dogs-witnesses-while-testifying> (last visited Dec. 5, 2014).

<sup>62</sup> *Supra* note 22.

<sup>63</sup> *Supra* note 16.

<sup>64</sup> *Id.*

dog organization that is accredited by Assistance Dogs International (“ADI”).<sup>65</sup> Facility dogs “specialize in assisting individuals with physical, psychological, or emotional trauma due to criminal conduct.”<sup>66</sup> They “provide calm and comfort to the vulnerable child witness when testifying”.<sup>67</sup> Undoubtedly, “the presence of a courthouse dog, because of its temperament and extensive training, can . . . soothe and calm children and anchor them back to safety after exposure to traumatic stress.”<sup>68</sup>

The use of facility dogs promotes “justice with compassion,”<sup>69</sup> a premise of Therapeutic Jurisprudence. Researchers have found “that animals are particularly encouraging for children suffering from stress or trauma.”<sup>70</sup> As one source reports:

Dr. Gail Melson, professor emeritus of developmental studies at Purdue University . . . found that with only five minutes of contact with an unfamiliar dog, 76 percent of children studied between the ages of 7 and 15 believed that a dog knew how they felt. Another 84 percent indicated they would confide secrets to a dog.<sup>71</sup>

Having a trained dog will “enable a child witness to speak without added stress or tension.”<sup>72</sup> A facility dog in the courtroom can ease the child’s fears and stress, “resulting in

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<sup>65</sup> *Help Children Feel Safe*, COURTHOUSE DOGS, <http://www.courthousedogs.com/index.html> (last visited Nov. 5, 2014).

<sup>66</sup> *Id.*

<sup>67</sup> *Supra* note 22.

<sup>68</sup> *Supra* note 23.

<sup>69</sup> *Supra* note 2.

<sup>70</sup> *Supra* note 53.

<sup>71</sup> Phillips & McQuarrie, *Therapy Animals Supporting Kids Program Manual*, AM. HUMANE ASS’N., <http://www.americanhumane.org/assets/pdfs/interaction/hab-task-manualpdf.pdf>.

<sup>72</sup> *Supra* note 53.

more efficient and accurate testimony and less trauma to the child.”<sup>73</sup> The goal of any testimony is “[t]o obtain the information effectively, efficiently and thoroughly.”<sup>74</sup>

VI. “SERVICE DOGS,” “THERAPY DOGS,” AND “FACILITY DOGS”, WHAT IS THE DIFFERENCE?

In recent years, “the use of dogs in the courtroom has expanded rapidly in the United States and is now spreading worldwide, as a mechanism for calming and supporting individuals involved in courtroom proceedings.”<sup>75</sup> As of September 24, 2014, there were seventy facility dogs in twenty-five states in the United States and three other countries using courthouse facility dogs by governmental agencies and nonprofit organizations.<sup>76</sup> With the expanded use of dogs in the courtroom to minimize trauma in witnesses, the need for a clear understanding of the differences between terms becomes critical.<sup>77</sup>

Although facility dogs provide a “service” to the witness, they are different than service animals as defined by the Americans with Disabilities Act (“ADA”).<sup>78</sup> A service animal is defined as:

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<sup>73</sup> *Id.* at 118015.

<sup>74</sup> *Id.*

<sup>75</sup> James C. Ha, *Scientific Research Confirms that the Presence of Dogs Reduce Stress in Humans*, COURTHOUSE

DOGS, [http://courthousedogs.com/legal\\_stress.html](http://courthousedogs.com/legal_stress.html) (last visited Sept. 14, 2014).

<sup>76</sup> *Where Facility Dogs are working*, COURTHOUSE DOGS, [http://courthousedogs.com/settings\\_where.html](http://courthousedogs.com/settings_where.html) (last visited Nov. 14, 2014).

<sup>77</sup> *Legal support for the use of a Facility Dog to Assist Testifying Crime Victims and Witnesses*, COURTHOUSE DOGS, [http://www.courthousedogs.com/legal\\_support.html](http://www.courthousedogs.com/legal_support.html) (last visited Nov. 6, 2014).

<sup>78</sup> 28 C.F.R. § 36.104 (2011).

... any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability...The work or tasks performed by a service animal must be directly related to the individual's disability.<sup>79</sup>

Facility dogs are not being used to support the witness because of a documented disability, but are providing support to the witness to minimize the possible trauma associated with testifying. Because of this, a facility dog does not qualify as a service animal under the ADA.<sup>80</sup>

Therapy animals are not legally defined by federal law and “they do not fall under the regulations provided by the ADA.”<sup>81</sup> Therapy dogs are family pets that are trained and registered or certified through therapy organizations.<sup>82</sup> Therapy dogs are used to support therapy and rehabilitation. The dogs and their therapists operate in a variety of healthcare and educational settings to provide support through speech, occupational, or physical therapy. Such “[a]ctivities involving therapy animals are usually classified as AAA (Animal Assisted Activities) or AAT (Animal Assisted Therapy).”<sup>83</sup> The animals are used to “assist the therapist in an informal manner without explicitly

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Joann Turnbull, *Therapy and Service Animals*, [http://blog.seattlepi.com/deltasociety/2010/02/22/therapy-and-service-animals--do-you-know-the-difference/?from=blog\\_last3](http://blog.seattlepi.com/deltasociety/2010/02/22/therapy-and-service-animals--do-you-know-the-difference/?from=blog_last3) (last visited Nov. 14, 2014).

<sup>82</sup> *What is a Therapy animal*, DOGSAVER, <http://www.dgosaver.org/dreamworkers/whatisdwdog.html> (last visited Nov. 14, 2014).

<sup>83</sup> *Id.*

trying to help a person cope with a particular . . . situation.”<sup>84</sup> Although the facility dog does work with a variety of individuals, the dog in the courtroom is not being used to support therapy or rehabilitation. Therefore, using the term “therapy dogs” to identify courtroom dogs would be inappropriate.

According to the standards set by Assistance Dogs International,<sup>85</sup> a dog that works with a professional handler to serve multiple individuals is termed a “facility dog.”<sup>86</sup> A facility dog is trained “to comfort and nurture a victim-witness in varying degrees.”<sup>87</sup> These dogs “are graduates of assistance dog organizations and are handled by professional facilitators.”<sup>88</sup> They go through approximately two years of training from an accredited service dog organization.<sup>89</sup> During this time, they are trained in basic obedience and skill tasks, and they must “maintain a calm manner and good social behavior in a variety of environments.”<sup>90</sup> A facility dog in the legal system will have

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<sup>84</sup> Grimm, Abigayle L., *An Examination of Why Permitting Therapy Dogs to Assist Child-Victims when Testifying During Criminal Trials Should Not be Permitted*, 16 GENDER RACE & JUST. 263 (2013) (citing Rebecca J. Huss *Why Context Matters: Defining Service Animals under Federal Law*, 37 PEPP. L. REV. 4 (2010), <http://digitalcommons.pepperdine.edu/plr/vol37/iss4/1> (last visited Dec. 7, 2014).

<sup>85</sup> Assistance Dogs Int'l, <http://www.assistancedogsinternational.org/>.

<sup>86</sup> *Legal Support for the use of a Facility Dog to Assist Testifying Crime Victims and Witnesses*, COURTHOUSE DOGS, [http://www.courthousedogs.com/legal\\_support.html](http://www.courthousedogs.com/legal_support.html) (last visited Nov. 6, 2014).

<sup>87</sup> Grimm, Abigayle L., *An Examination of Why Permitting Therapy Dogs to Assist Child-Victims when Testifying During Criminal Trials Should Not be Permitted*, 16 GENDER RACE & JUST. 263, (2013).

<sup>88</sup> *Supra* note 16.

<sup>89</sup> *Best Practices for the Use of Facility Dogs in the Legal System*, COURTHOUSE DOGS, [http://courthousedog.com/startg\\_best\\_practices.html](http://courthousedog.com/startg_best_practices.html), (last visited Nov. 15, 2014).

<sup>90</sup> *ADI minimum Standards and Ethics*, ASSISTANCE DOGS INTERNATIONAL, <http://www.assistancedogsinternational>.



a handler that is a working professional in the justice field, such as a victim advocate, forensic interviewer, or assistant prosecutor.<sup>91</sup> The term “facility dog” is “the preferred term for a dog accompanying a witness during testimony.”<sup>92</sup>

## VII. CASE LAW IMPACTING THE USE OF FACILITY DOGS

As with alternative methods used for child-witness testimony, defendants have raised the constitutional objections to facility dogs. “Court facility dogs incite objections based on undue prejudice before the jury, increase perceived credibility of the witness, and distraction in the courtroom.”<sup>93</sup> There have been various rulings determining whether the use of facility dogs was proper. This summary includes the constitutional arguments made by the defendant, the courts holding, and the efforts made by the court to minimize jury prejudice.

### A. *People of California v. Spence*

One case that discussed the use of facility dogs is *California v. Spence*.<sup>94</sup> In *Spence*, “a jury convicted James Spence [the defendant] of two counts of sexual offenses against a child 10 years old or younger (his housemate's daughter).”<sup>95</sup> The defendant “was sentenced to a total term of 55 years to life.”<sup>96</sup>

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org/standards/assistance-dogs/standards-for-dogs/training-standards-for-facility-dogs/ (last visited Nov. 15, 2014).

<sup>91</sup>*Supra* note 86.

<sup>92</sup>*Supra* note 63.

<sup>93</sup>*Supra* note 53.

<sup>94</sup> *People v. Spence*, 151 Cal. Rptr. 3d 374 (2012) (review denied) (2013).

<sup>95</sup> *The People v. James Edward Spence*, ANIMAL LEGAL & HISTORICAL CENTER, <https://www.animallaw.info/case/people-v-spence> (last visited Dec. 5, 2014).

<sup>96</sup> *Id.*

On appeal, Spence “argue[d] the court erred by allowing a therapy dog or support canine to be present at the child's feet while she testified, and contend[d] this was ‘overkill’ with the additional support person present on the witness stand.”<sup>97</sup> Spence, claimed the procedures “interfered with his due process rights to a fair trial and confrontation of witnesses.”<sup>98</sup> He argued that labeling the victim as someone who “required the support not only of a ‘victim advocate,’ but also a therapy dog,”<sup>99</sup> unduly prejudiced the jury and that “a furry friend in the court will cast the witness in even a more sympathetic light.”<sup>100</sup>

When deciding the issue, the court referred to the discretion granted to it under Evidence Code section 765,<sup>101</sup> to control court proceedings in the search for truth, and it commented that there would be no prejudice in allowing the therapy dog to be present in the courtroom.<sup>102</sup> The Court of Appeals affirmed the trial court’s holding.<sup>103</sup> Efforts made by the court to minimize jury prejudice were that “[the] jury [was] cautioned, [the] trial court took care to ensure [the] dog mainly [was] unnoticeable, and [the] trial judge stated that improper activity of therapy dog would result in its removal from courtroom.”<sup>104</sup>

*B. State of Washington v. Dye*

In *Washington v. Dye*, the “[d]efendant was convicted in the Superior Court, King County, . . . of residential burglary.<sup>105</sup> The victim “was an adult man with significant developmental

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Supra* note 94.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Supra* note 63.

<sup>105</sup> *State v. Dye*, 309 P.3d 1192, 1192 (2013).

disabilities.”<sup>106</sup> The trial court allowed the victim-witness to be accompanied by a “comfort dog” named Ellie while testifying.<sup>107</sup> On appeal, the defendant argued “that [the dog’s] presence violated his right to due process and a fair trial.”<sup>108</sup> He further argued that “[d]ue to the unique relationship that exists between canines and humans, a witness bringing a support dog to the stand violates a defendant’s right to a fair trial by creating prejudice that cannot be cured by a jury instruction.”<sup>109</sup> Additionally, he argued that a dog “compromises a jury’s ability to determine the honesty and accuracy of that witness, and undermines the presumption of innocence by bolstering a witness’s image as a vulnerable victim in need of protection and sympathy.”<sup>110</sup>

The Supreme Court of Washington found, however, that the “defendant failed to establish his fair trial rights were violated or that jury instructions largely mitigated prejudicial effect,”<sup>111</sup> and it therefore affirmed the trial court holding.<sup>112</sup> The efforts made by the trial court minimized the jury prejudice; the jury was instructed not to consider the dog’s presence,<sup>113</sup> and it was stated, if the dog “played with the victim or growled at defendant, [the] trial court could have removed her from courtroom.”<sup>114</sup>

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<sup>106</sup> *State v. Dye*, ANIMAL LEGAL & HISTORICAL CENTER, <https://www.animallaw.info/case/state-v-dye-0> (last visited Dec. 6, 2014).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Supra* note at 92.

<sup>110</sup> *Id.*

<sup>111</sup> *Supra* note 63.

<sup>112</sup> *Supra* note 105.

<sup>113</sup> *Supra* note 16.

<sup>114</sup> *Supra* note 63.

C. *People of New York v. Tohom*

In *New York v. Tohom*, the “defendant was convicted in the County Court, Dutchess County, of predatory sexual assault against a child and endangering the welfare of a child.”<sup>115</sup> He was sentenced to twenty-five years to life.<sup>116</sup> The prosecution “sought, [and were granted] to allow ‘Rose,’ a Golden Retriever therapy assistance animal, or ‘comfort dog,’ to accompany [the witness] on the witness stand while she testified.”<sup>117</sup> The defendant opposed the use of the therapy dog, stating that “Rose's presence would ‘clearly prejudice the jury against’ him.”<sup>118</sup> He maintained the jury would be more “sympathetic” to the witness should she be allowed to be accompanied by the dog.<sup>119</sup>

The Defendant appealed his conviction, arguing that “Rose's presence during [the victim's] testimony deprived him of a fair trial and violated his right to confront and cross-examine witnesses against him.”<sup>120</sup> He also argued that there was no statutory authority allowing the use of a “therapy assistant animal” for when a trial witness testifies.<sup>121</sup>

For the appellate court, this issue of allowing a facility dog at trial was one of first impression,<sup>122</sup> and it found that “Executive Law § 642-a<sup>123</sup> applie[d] in this case.”<sup>124</sup> The court also found the “defendant failed to show the comfort-therapy

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<sup>115</sup> *People v. Tohom*, 109 A.D.3d 253 (App. Div. 2013) (appeal denied) 22 N.Y.3d 1203 (2014).

<sup>116</sup> *People v. Tohom*, ANIMAL LEGAL & HISTORICAL CENTER, <https://www.animallaw.info/case/people-v-tohom> (last visited Dec. 5, 2014).

<sup>117</sup> *Id.*

<sup>118</sup> *Tohom*, 109 A.D. 3d at 256.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Supra* note 115.

<sup>124</sup> *Tohom*, 109 A.D. 3d at 268.

dog impaired his right to a fair trial, or compromised his right of confrontation and cross-examination”.<sup>125</sup> The Court stated that “although the dog may have engendered some sympathy for the victim in the minds of the jurors, there was no indication that such sympathy was significantly greater than the normal human response to a child’s testimony about her sexual abuse at by an adult.”<sup>126</sup> The court upheld the trial court’s holdings.<sup>127</sup> The efforts made by the court that minimized the jury prejudice were its jury instructions and making the dog’s presence in courtroom unobtrusive.<sup>128</sup>

*D. Connecticut v Devon*

In *Connecticut v. Devon*, the defendant was convicted of “multiple counts of sexual abuse against his three minor children.”<sup>129</sup> The defendant was the father of three children—ages six, eight, and ten.<sup>130</sup> The defendant was convicted and sentenced to forty years in prison.<sup>131</sup>

On appeal, the defendant argued, among other things, that “the court improperly permitted the State to use a dog to comfort one of the victims while she testified.”<sup>132</sup> The defendant claimed his rights to a fair trial and confrontation were violated.<sup>133</sup> However, during trial, he “specifically told the trial court that he was not making a confrontation clause claim

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<sup>125</sup> *Supra* note 63.

<sup>126</sup> *Supra* note 124.

<sup>127</sup> *Tohom*, 109 A.D. 3d at 253.

<sup>128</sup> *Supra* note 63.

<sup>129</sup> *State v. Devon D.*, 90 A.3d 383 (Conn. App. Ct. 2014).

<sup>130</sup> *Id.* at 387-388.

<sup>131</sup> *Id.* at 389.

<sup>132</sup> *Id.* at 398.

<sup>133</sup> *Id.* at 406.

related to the dog issue.”<sup>134</sup> Thus the trial court considered] that claim waived.<sup>135</sup>

However, the appellate court found the trial court overstepped its discretion by allowing the dog to accompany the youngest witness while on the stand.<sup>136</sup> The court stated “although the court has the inherent discretion to allow the use of comfort tools, under the facts of this case, the court abused its discretion because there was no proper prior showing that [the witness] needed the presence of the dog when she testified.”<sup>137</sup> The appellate court reversed and remanded.<sup>138</sup> The trial court made efforts to minimize the prejudice by providing caution to the jury, however the “appellate court did not discuss issue of instructions because [the] showing of necessity was not established before [the] dog’s presence [was] allowed.”<sup>139</sup>

*E. State of Washington v. Moore*

In *Washington v. Moore*, the defendant was convicted of “second degree assault [and] domestic violence for choking his wife during an argument.”<sup>140</sup> In his appeal, he argued, among other things, “the trial court erred when it allowed a witness to testify with a service dog.”<sup>141</sup> The defendant also posited that “his confrontation and due process rights were violated by the dog's presence.”<sup>142</sup>

As his argument about the use of the therapy dog was initiated on appeal rather than during his trial, the appellate court

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 400.

<sup>138</sup> *Id.*

<sup>139</sup> *Supra* note 63.

<sup>140</sup> *State v. Moore*, 181 Wash. App. 1010, 1011 (review denied) 335 P.3d 941 (Wash. 2014).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1013.

would not review the claim unless it was found on the record to be a “constitutional error.”<sup>143</sup> The court found “there [was] no evidence in the record that the dog’s presence made the witness appear traumatized or victimized, and thereby violat[ing] [the defendant’s] due process rights.”<sup>144</sup> The Court of Appeals of Washington, rejected the defendant’s argument and affirmed the trial court’s holding.<sup>145</sup>

*F. People of California v. Chenault*

In *California v. Chenault*, the defendant “was convicted on 13 counts of lewd acts on a child under 14 years of age, and sentenced to 75 years to life in prison.”<sup>146</sup> On appeal, the defendant argued that by “allowing the support dog to be present during the testimony of [the] two child witnesses...the trial court abused its discretion”<sup>147</sup> He also contended that “the presence of the dog was inherently prejudicial and violated his federal constitutional rights to a fair trial and to confront the witnesses against him.”<sup>148</sup> The defendant continued to argue the “onesided deployment of a universally beloved animal distracts the jury from a dispassionate review of the evidence and unfairly bolsters the prosecution’s case by aligning witnesses with a powerful symbol of trustworthiness and vouching for their credibility as victims.”<sup>149</sup>

The appellate court disagreed with the defendant’s assertion that the jury would consider the witness “more credible” when accompanied by a support dog “than if the witness [was] not

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1013, citing *State v. Dye*, 309 P.3d 1192 (2013).

<sup>145</sup> *Id.*

<sup>146</sup> *People v. Chenault*, 175 Cal. Rptr. 3d 1 (2014), (review denied) (2014).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

accompanied by a support dog.”<sup>150</sup> The court went on to state there is no “significant [difference] from the presence of a support person . . . and concluded a case-specific finding that an individual witness *needs* the presence of a support dog is not required by the federal Constitution.”<sup>151</sup>

The court further held “the presence of a support dog for a witness is not inherently prejudicial; [the] court properly exercised its discretion when it determined that two victims could have a support dog present during their testimony; and any error by trial court in allowing support dog to be present was harmless error.”<sup>152</sup> The trial court made efforts to minimize jury prejudice by bringing the dog in and out without the jury present, keeping the dog as inconspicuous as possible,<sup>153</sup> and instructed the jury to “disregard the dog’s presence and decide the case solely on the evidence presented.”<sup>154</sup>

As these cases demonstrate, the constitutional claims of defendants when the prosecution uses facility dogs during trial are similar. Due process, the Confrontation Clause, and fair trial claims seem to be the most prevalent. And although, as in all cases, the courts find on the individual facts of each case, these constitutional claims against the use of facility dogs has continued to be unfounded.

#### VIII. WHAT CAN BE DONE TO COUNTER THE OBJECTIONS?

What can prosecutors and courts do to minimize the defenses’ objections to the use of facility dogs? Below is a chart outlining the possible objections and the responses to those objections:<sup>155</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *People v. Chenault*, 175 Cal. Rptr. 3d 1(Cal. Ct. App. (2014).

<sup>153</sup> *Supra* note 63.

<sup>154</sup> *See* *Chenault*, 175 Cal. Rptr. 3d at 12.

<sup>155</sup> *Supra* note 73.



| Potential Objection  | Potential Response  |
|--|---|
| 1. The presence of the therapy animal and handler on the witness stand will be prejudicial.  | The prosecutor should take steps to conceal as best as possible the therapy animal and move the handler as far from the witness stand as possible, but still allow leash control and a visual of the animal to ensure the animal's safety. Just as children in many states are allowed to have a comfort item (such as a doll or blanket) or a support person with them during testimony, the therapy animal fulfills both roles and is less suggestible than a concerned adult.                                |
| 2. The presence of the therapy animal and handler in the witness stand conveys that the child is fragile and needs protection from the defendant, which conveys a negative image of the defendant. | This is not a valid objection and does not reach the legal level of "extreme prejudice" or "overly prejudicial." The demeanor of the witness, whether strong or fragile during testimony, is not an objectionable factor since all witnesses react differently when testifying. Therapy animals help to calm children; thus, the child will provide more efficient and accurate testimony during questioning. This could actually help protect a defendant from inaccurate testimony (Mathews & Saywitz, 1992). |
| 3. It's just inappropriate to have an animal in the courtroom.   | More courts are allowing therapy animals outside the courtroom (to comfort witnesses, family members, etc.) and inside the courtroom to aid in testimony. Contact American Humane to obtain a list of courts that allow therapy animals.  |

| Potential Objection   | Potential Response   |
|---|--|
| 4. The defendant or other court observers are allergic to the therapy animal.   | Depending on the size of the courtroom, usually the therapy animal will sit at the feet of the child witness and any allergic reaction will be minimized. Generally, an allergic reaction requires touching the animal and touching one's hands to one's face or eyes.   |
| 5. The dog will interfere with the defendant's constitutional rights (fair trial, confront, cross-examine, jury prejudice) <sup>156</sup> | If possible use a neutral title for the dog, like facility dog. Ask the Judge to give jury instructions that caution drawing of any inferences to the dog's presence. Take steps to ensure the dog is mainly unnoticeable and unobtrusive. Use a dog that has been properly trained as a facility dog. Ask the Judge to give instruction that the dog will be removed if there is any display of inappropriate behavior from the dog. <sup>157</sup> |

## IX. CONCLUSION

There are many judicial practices that promote justice in a therapeutic manner. However, using facility dogs in the courtroom to assist and comfort children as they testify is a judicial practice that is rapidly growing. "Participating in [a] courtroom or other legal proceeding . . . is arguably one of the most stressful events that most people [can] experience."<sup>158</sup> Now imagine you are a child required to testify in court against

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<sup>157</sup> Brittany Milkowski, *The Dog Days of Justice*, COURTHOUSE DOGS, [http://courthousedogs.com/legal\\_minimizing\\_prejudice.html](http://courthousedogs.com/legal_minimizing_prejudice.html), (last visited Dec. 5, 2014).

<sup>158</sup> *Supra* note 77.

your abuser. How comforting would it be for you to have the support and warm nuzzle of a specially trained facility dog to sit by your side while you recite the traumatic event you are called to recount? “It is clear that the presence of an appropriately . . . trained dog can significantly reduce the anxiety associated with these experiences, thereby improving the efficiency and quality of the legal process.”<sup>159</sup> Many child witnesses have been afforded the support of these legal beagles, these silent minorities, while bringing the criminal defendant to justice.

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<sup>159</sup> *Id.*

