university of groningen

University Medical Center Groningen

University of Groningen

Current Issues in Therapeutic Jurisprudence

Wexler, D.B.; Perlin, M.L.; Vols, Michel; Spencer, M.; Stobbs, N.

Published in:
Queensland University of Technology Law Review

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2016

Link to publication in University of Groningen/UMCG research database

Citation for published version (APA):
Wexler, D. B., Perlin, M. L., Vols, M., Spencer, M., & Stobbs, N. (2016). Current Issues in Therapeutic Jurisprudence. Queensland University of Technology Law Review, 16(3), 1-129.

Copyright
Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

Take-down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): http://www.rug.nl/research/portal. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Download date: 11-02-2018

Queensland University of Technology

QUT Law Review

Special Issue

Current Issues in Therapeutic Jurisprudence

Volume 16 Number 3 2016

Queensland University of Technology

QUT Law Review

Volume 16 – Number 3 – 2016

Special Issue: Current Issues in Therapeutic Jurisprudence

SPECIAL EDITION EDITORS

Professor David B Wexler	Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico in San Juan, Puerto Rico, and Distinguished Emeritus Research Professor of Law, Rogers College of Law, Tucson, Arizona.
Professor Michael L Perlin	Professor Emeritus of Law; founding director, International Mental Disability Law Reform Project; co-founder, Mental Disability Law and Policy Associates, New York Law School.
Professor Michel Vols	Professor of Law, Centre for Public Order, Anti-Social Behaviour and Security, Faculty of Law, University of Groningen.
Pauline Spencer	Magistrate with the Magistrates' Court of Victoria.
Dr Nigel Stobbs	Senior Lecturer, Faculty of Law, QUT.

QUT LAW REVIEW EDITORS (2016)

General Editor	Professor Stephen Corones, Faculty of Law, QUT
Deputy Editor	Dr Anna Huggins, Faculty of Law, QUT
Copy Editors	Stephanie Jowett, Faculty of Law, QUT
	Ilana Bolingford, Faculty of Law, QUT

EDITORIAL BOARD MEMBERS (2016)

Professor Stephen Corones

Professor John Scott

Professor Ben Mathews

Dr Rowena Maguire

Associate Professor William Dixon

Dr Nigel Stobbs

Associate Professor Tina Cockburn

Dr Fiona McDonald

Dr Anna Huggins

JOURNAL MANAGER

Ilana Bolingford Faculty of Law, QUT

COPYRIGHT NOTICE

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

This issue may be cited as (2016) 16 (3) *QUT Law Review*

December 2016 – Published by Faculty of Law, Queensland University of Technology

Faculty of Law
2 George Street
Brisbane
Queensland 4000
Australia

Table of Contents

Editorial

Special Issue: Current Issues in Therapeutic Jurisprudence

Book Reviews

QUT Law Review ISSN: Online- 2201-7275
Volume 16, Issue 3, pp. 1-3. DOI:10.5204/qutlr.v16i3.692

GUEST EDITORIAL: CURRENT ISSUES IN THERAPEUTIC JURISPRUDENCE

DAVID B WEXLER, MICHAEL L PERLIN, MICHEL VOLS, PAULINE SPENCER AND NIGEL STOBBS*

On behalf of the guest editors of this special issue, leading scholars and practitioners in the therapeutic jurisprudence ('TJ') field in Australia, Europe, and the US, we congratulate QUT and the authors for a valuable contribution to the increasingly influential presence of TJ on the international stage.

TJ had its genesis in the early 1990s as a new interdisciplinary approach to mental health law in the US, but has expanded remarkably in scope, reach and influence since then. TJ sees law as a social force which inevitably gives rise to unintended consequences, which may be either beneficial or harmful (what we have come to identify as therapeutic or anti-therapeutic consequences). These consequences flow from the operation of substantive rules, legal procedures, or from the behaviour of legal actors (such as lawyers and judges). It is in this sense that we conceive of the role of the law as a 'therapeutic agent'. TJ researchers and practitioners typically make use of social science methods and data to study the extent to which a legal rule or practice affects the psychological well-being of the people it affects, and then explore ways in which anti-therapeutic consequences can be reduced, and therapeutic consequences enhanced, without breaching due process requirements. The jurisdiction with which TJ was most often associated in its earlier days tended to the that of the drug courts (in which the drug court team assists drug addicted offenders to break out of their cycle of offending by facilitating and supervising treatment programs as part of the court process itself) and the other so-called problem solving courts (more commonly referred to as 'solution focussed courts' in Australia).

But there is a growing and increasing focus on mainstreaming TJ principles and practices into all those legal institutions and jurisdictions where it can make a difference. A natural complement to this mainstreaming agenda has been the significant internationalisation of the TJ movement, as evidenced by the many international conferences dedicated to TJ themes

* David B Wexler JD (New York University), BA (Harpur College, State University of New York at Binghamton), Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico in San Juan, Puerto Rico, and Distinguished Emeritus Research Professor of Law, Rogers College of Law, Tucson, Arizona.; Michael L Perlin AB (Rutgers University), JD (Columbia University School of Law), LLD (honorary) (John Jay College of Criminal Justice), Professor Emeritus of Law; founding director, International Mental Disability Law Reform Project; co-founder, Mental Disability Law and Policy Associates, New York Law School; Michel Vols LLB (University of Groningen), LLM (Hons) (University of Groningen), PhD (University of Groningen), Professor of Law, Centre for Public Order, Anti-Social Behaviour and Security, Faculty of Law, University of Groningen; Pauline Spencer BCom (University of Queensland), LLB (University of Queensland), MA (University of Melbourne); Nigel Stobbs BA (University of Queensland), PGrad Dip Ed (University of Southern Queensland), MA(Phil) (University of Queensland), LLB (Hons) Queensland University of Technology, PhD (Bond University), Senior Lecturer, Crime and Justice Research Centre, Faculty of Law, Queensland University of Technology.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

and most recently, by the launching at the Arizona Summit School of Law in Phoenix, of the *International Journal of Therapeutic Jurisprudence.*[1]

In July 2017, the editors of this special issue, along with many other international TJ scholars will be convening in Prague to launch another major initiative – the *International Society of Therapeutic Jurisprudence*. This society will provide a formal, legal structure to what for three decades has been a growing, stimulating, but highly informal and amorphous movement. Among other things, the Society will seek to consolidate and assist with the coordination of the increasing number of TJ projects and endeavours worldwide. We hope it will provide some advisors and contributors to the international journal, for example, and that it will disseminate information through the recently established 'TJ in the Mainstream Blog' – a practice focussed blog edited by Victorian magistrate Pauline Spencer and boasting an 18-nation advisory group.[2]

In order for the mainstreaming process to succeed, we need to examine the governing 'legal landscapes' (legal rules and legal procedures) in mainstream courts and institutions to determine how 'TJ ready' or 'TJ friendly' they are. To that end, we began to conceptualise the principles of TJ judging in particular as a kind of 'liquid' and the operative legal structures into which we might introduce them as 'bottles'. By analysing the nature and malleability of the relevant legal landscape (the bottles) we can then make judgements about how much TJ 'liquid' can credibly and realistically be poured into them. Much work is now being done both within the US and international jurisdictions in relation to creating processes of best practice for maximising the use of TJ judging principles.

An essential future challenge will be to increase the coordination with important TJ activities occurring beyond the English-speaking world. There is, for example, a highly important and active Iberoamerican TJ association busily working in Spain, Portugal and Latin America. In fact, original TJ scholarship is now being conducted in 14 different languages.

In this special issue, we commend to you, scholarship across a diverse range of TJ related topics. Melbourne barrister and TJ scholar *Ian Freckelton* has previously conducted research into coronial processes from the perspectives of both therapeutic jurisprudence and restorative justice to identify the potential for maximising the therapeutic and public health benefits of the investigative functions of coroners' courts and minimising their counter-therapeutic potential. In his contribution to this special issue, he notes that the need to address potential counter-therapeutic deficits in the experiences of parties other than family members as and what may be done to recognise and minimise any such deficit.

Lorana Bartels from the University of Canberra, reports on research she recently conducted in relation to Hawaii's *Opportunity with Probation Enforcement* ('HOPE') program, through the lens of therapeutic jurisprudence. HOPE is a community supervision program for drug addicted offenders currently subject to community based probation orders, whose chronic history of drug abuse and offending place them at high risk of recidivism.

[1] Arizona Summit Law School, *International Journal of Therapeutic Jurisprudence* (2015) Arizona Summit Law Review <https://www.azsummitlaw.edu/sites/default/files/tjasls_files/Brochure%20for%20IJTJ.pdf>.

[2] Pauline Spencer, 'Home' on *Therapeutic Jurisprudence in the Mainstream* (2016) <https://mainstreamtj.wordpress.com/>.

Suzanna Fay-Ramirez from the University of Queensland reports on the results of an 18-month study of a Washington State Family Treatment Court, one of a growing number of problem solving courts utilising principles of therapeutic jurisprudence and restorative justice, which cater for parents with current child protection cases and co-occurring addiction to drugs and/or alcohol. Her study examines how the court manages the potentially harmful stigma of clients being labelled as 'bad parent', 'addict' and 'offender', in interactions between the courtroom treatment team and court clients. She suggests that lessons learned from Family Treatment Court provide important consideration for mainstreaming therapeutic practice into the courtroom and the examination of interactions between court clients and courtroom personnel demonstrate how to translate stigma management from theory into practice.

Robert F Schopp, currently the Robert J Kutak Professor of Law at the University of Nebraska, points out that legal rules and procedures generally affect a variety of individual and societal interests and values. In exploring the most justified approach to defining and pursuing individual and public well-being, he suggests human dignity as one value relevant to the most justified application of police power and parens patriae interventions to individuals with mental illness.

Charlotte Glab from Milner Lawyers surveys some successful therapy-based initiatives for treating child sex offenders in Australia and internationally and considers what may constitute a best practice model based on therapeutic jurisprudence principles. She suggests a lack of understanding of the rehabilitative potential of current programs has led to an over-emphasis on punishment and denunciation as a sentencing purpose in Queensland to the detriment of rehabilitation. Her paper examines the more widespread success of initiatives in jurisdictions such as Canada, Germany and also considers then relevance of definitional and practical distinctions between those offenders who are opportunistic or remorseless (and for whom treatment is unlikely to be effective) and those who experience significant distress at their actions, wo self-identify as paedophiles but who are often unable to access effective preventative assistance due to stigma in the wider community.

Michael Perlin Professor Emeritus from New York Law School, draws on his experiences of years in trial courts and appellate courts as well as from decades of teaching and of writing books and articles about the relationship between mental disability and the criminal trial process, to offer a fascinating overview of his scholarship on the negative impact which society's views on mental disability have had on the criminal justice system. In this paper he explores how 'sanism' and 'pretextuality' have influenced the behaviour of actors within the system (including judges, jurors, prosecutors, witnesses, and defence lawyers) to create an environment of significant therapeutic deficit for defendants with a mental disability. He also proposes a potential remedy, based on a pre-requisite requirement that lawyers representing criminal defendants with mental disabilities understand the meanings and contexts of *sanism* and *pretextuality.*

Shelley Kolstad from the Queensland University of Technology reviews the book 'Sexuality, Disability, And the Law: Beyond the Last Frontier?' by Michael L Perlin and Alison J Lynch. The book includes a discussion of the alignment between the advocacy of the sexual rights of those with mental disabilities and central principles of therapeutic jurisprudence book – namely, 'dignity, voice, validation and voluntariness.'

QUT Law Review
Volume 16, Issue 3, pp. 4-29.
ISSN: Online- 2201-7275
DOI:10.5204/qutlr.v16i3.696

MINIMISING THE COUNTER-THERAPEUTIC EFFECTS OF CORONIAL INVESTIGATIONS: IN SEARCH OF BALANCE

IAN FRECKELTON QC*

The entire legal profession – lawyers, judges, law teachers – has become so mesmerised with the stimulation of the courtroom contest that we tend to forget that we ought to be healers – healers of conflicts.[1]

For more than a decade, analyses of coronial processes inspired by both therapeutic jurisprudence and restorative justice have identified the potential for maximising the therapeutic and public health benefits of the investigative functions of coroners' courts and minimising their counter-therapeutic potential. The focus of both scholarly literature and law reform proposals has been upon addressing deficits in respect of the role of families in coronial investigations and especially coroners' inquests. This has been a constructive contribution and has improved sensitivity to the risk that family members will be disenfranchised and alienated at a highly vulnerable time after they have been bereaved. This article chronicles the development in awareness of such issues. However, the potential for adverse effects on parties other than family members has been inadequately recognised in the literature, save for empirical studies conducted in 2011 for the Coronial Council of Victoria and another study published in 2014 in New Zealand. This article seeks to redress that imbalance. It argues that it is appropriate also to have regard to such potential in endeavouring to provide an approach to the work of coroners that is influenced by the sensibilities of therapeutic jurisprudence and seeks to reduce, so far as possible, counter-therapeutic outcomes for all parties, while at the same time prioritising accurate and robust fact-finding and formulation of constructive recommendations to avoid avoidable deaths. It calls for further empirical research on the impact of coroners' investigations on all affected parties and argues in favour of extension of improved funding to enable approaches to be informed by therapeutic jurisprudence and in particular to enhance eligibility for the counselling services attached to coroners' courts.

I INTRODUCTION

For over a decade it has been observed that the inquisitorial nature of coroners' investigations into sudden, unnatural and unexpected deaths and their interface with matters of high emotion creates the potential for them to be therapeutic but also counter-therapeutic in their impact upon

*Ian Freckelton QC, Barrister, Crockett Chambers, Melbourne; Professorial Fellow of Law and Psychiatry, University of Melbourne; Adjunct Professor of Law and Forensic Medicine, Monash University; I.Freckelton@vicbar.com.au. The author acknowledges the helpful feedback and suggestions on an earlier draft of this article by former Deputy State Coroner of NSW, Hugh Dillon, South Australian State Coroner Mark Johns, Tasmanian Coroner Olivia McTaggart, Victorian State Coroner Sara Hinchey, Western Australian State Coroner Ros Fogliani, Professor David Wexler of the University of Arizona, Professors Warren Brookbanks and Kate Diesfeld of Auckland University of Technology, Associate Professor David Ranson of Monash University, and Dr Jennifer Moore of Otago University and Dr Patricia Molloy. However, all views expressed and errors and omissions are those of the author alone. In addition, no inference should be drawn that any of the arguments mounted or issues canvassed arise from cases in which the author has been involved as counsel.

[1] Warren E Burger, 'The State of Justice' (1984) *American Bar Association Journal* 62, 66.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

interested parties, especially relatives of the deceased.[2] On many occasions, courts have recognised and lamented the pressures under which family members labour when they find themselves bereft or at odds in the aftermath of a death.[3] As long ago as 1969 Kübler-Ross identified a sequence of five stages of grief: denial, anger, bargaining, depression and acceptance.[4] Her analysis has not been without its critics, though, who have argued that while such a model is seductive, it is incapable of capturing the complexity, diversity and idiosyncratic quality of the grieving experience. Many have argued too that models based upon the idea of stages are simplistic and reductionist – they do not address adequately the multiplicity of physical, psychological, social and spiritual needs experienced by the bereaved.[5] Significantly, later in life,[6] Kübler-Ross qualified her analysis by accepting that the terminology of stages, which implies progression, is not appropriate for all persons who have been bereaved. However, a lasting contribution of the work of Kübler-Ross is the awareness she has generated of the different emotions that often emerge after the death of a loved one and the risk that anger and aggrievement can stand in the way of the acquisition of acceptance of the fact of a death, the development of perspective and the acquisition of resolution and closure. What follows for the coronial jurisdiction is that all involved need to practise in a way that is trauma-informed so as to reduce the potential for adverse consequences of investigations and hearings and so as to build an environment within coroners' courts that is best calculated to secure identification of collaborative options for enhanced and safer work practice.[7]

A number of important points need to be made in the coronial context about grief and about the potential for coronial practice to be meaningfully trauma-informed. Firstly, at the very heart of understanding people's reactions after a death is the fact that death is a differentiated experience – both in terms of the circumstances of death and how people diversely connected with the death react to it. Moreover, the grief of one person and how it is expressed can interact conflictually with or exacerbate the grief of another. Secondly, grief in the context of the deaths dealt with by coroners has particular characteristics. It is compounded by trauma and potentially by stigma, shame and confusion that can disenfranchise the griever and complicate the bereavement experience.[8] It has been observed that the trauma of an unexpected death 'poses specific and daunting challenges which do not necessarily follow a non-traumatic death.'[9] The manner and cause of sudden and unexpected deaths can weigh heavily on the grieving process and impact upon a range of other dynamics which are affecting people's lives

[2] See generally J Kim Wright (ed), *Lawyers as Peacemakers: Practicing Holistic, Problem-Solving Law* (American Bar Association, 2010) 277.

[3] See, for eg, in respect of issues relating to disputes about bodily remains *Joseph v Dunn* [2007] WASC 238 [24] (Heenan J); *Keller v Keller* [2007] VSC 118 (Hargrave J); *Leeburn v Derndorfer* (2004) 14 VR 100 [10] (Byrne J).

[4] Elizabeth Kübler-Ross, *On Death and Dying* (Routledge, 1969).

[5] For a useful synthesis of the critiques, see Christopher Hall, "Beyond Kübler-Ross: Recent Developments in Our Understanding of Grief and Bereavement" (2011) *InPsych* <https://www.psychology.org.au/publications/inpsych/2011/december/hall/>.

[6] Elizabeth Kübler-Ross, *On Grief and Grieving: Finding the Meaning of Grief Through the Five Stages of Loss* (Simon & Schuster, 2005).

[7] See Melanie Randall and Lori Haskell, 'Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping' (2013) *The Dalhousie Law Journal* 501.

[8] See Belinda Carpenter, Gordon Tait and Carol Quadrelli, 'The Body in Grief: Death Investigations, Objections to Autopsy, and the Religious and Cultural "Other"' (2014) 5 *Religion* 165; Kenneth J Doka (ed), *Disenfranchised Grief: New Directions, Challenges and Strategies for Practice* (Research Press, 2002); Jeffrey Kaufman, *The Shame of Death, Grief and Trauma* (Routledge, 2011).

[9] See LM Redmond, 'Sudden Violent Death' in Kenneth J Doka (ed), *Living with Grief: After Sudden Loss: Suicide, Homicide, Accident, Heart Attack, Stroke* (Taylor & Francis, 2014); John Drayton, 'Organ Retention and Bereavement: Family Counselling and the Ethics of Consultation' (2011) 5(3) *Ethics and Social Welfare* 227.

and their relationships. Experience of death is always contextual, like most aspects of life.[10] In addition, what occurs after a death, including how it is investigated and portrayed, can impact upon the grief process, potentially either distorting it or bringing it to resolution.

Coronial investigations and, in particular, inquests constitute a significant opportunity to reflect upon therapeutic jurisprudence in action – to search for a workable rapprochement between rigour of investigation, accuracy of fact-finding and maximisation of positive outcomes from the litigation process, on the one hand, and minimisation of counter-therapeutic consequences on the other hand. They constitute a complex meeting point between the often conflicting and raw perspectives on the part of different parties, the risk that grief will be compounded, the need to enable a coroner's court to make sound findings of fact about circumstances and causes of death, and the aspiration to have a coroner's court make informed recommendations directed toward minimising the potential for future avoidable adverse events. This means that the potential for coronial processes to exacerbate feelings of distress and anger (including to the point of pathology) arising from a death are significant. Put another way, coroners' processes, if they are poorly managed, not only can generate secondary trauma but can be pathogenic.

Until the present, writing about therapeutic jurisprudence and coroners' investigations has focused almost exclusively upon the adverse consequences that can ensue from investigations that are not 'emotionally intelligent' and attuned to the wellbeing of family members. The deficit in such analyses has been a failure to acknowledge adequately that deaths and allegations or insinuations of culpability in deaths can have adverse consequences for a variety of persons beyond those who are part of the family unit of the deceased. This article identifies the development of therapeutic jurisprudence perspectives in the context of coroners' investigations and explores the phenomenon of harm caused by curial processes in the coronial context, incorporating analysis of an empirical study conducted in 2011 for the Coronial Council of Victoria, and a New Zealand study, which focused on interviews with organisations affected by the coronial jurisdiction. It reflects on the potential for coronial processes to do damage to the reputation, career and emotional wellbeing of non-family members, as well as family members. It makes initial suggestions about approaches and specific measures which can be utilised in order to achieve a fair balance which maintains the confidence of all in the coronial process. It argues in favour of extension of funding to enable coroners' courts to operate not just as inquisitorial courts seeking out the truth but as therapeutic justice courts, including providing counselling support to all parties affected by coronial investigations.

II THERAPEUTIC JUSTICE INSIGHTS INTO CORONIAL PROCESSES

Therapeutic jurisprudence ('TJ') and restorative justice ('RJ') are all about balance: balance between achieving justice and reducing the potential for harm caused by the legal process; balance in recognising and dealing with potentially destructive emotions; and balance between persons who may have diametrically or apparently irreconcilable perspectives. TJ and RJ have postulated that management of the emotions of those involved in legal disputation is fundamental to its resolution.[11] Each has identified that procedural justice ('PJ'), in particular,

[10] See Robert T Hale and Mila Ruiz Tecala, *Grief and Loss Identifying and Proving Damages in Wrongful Death Cases* (Trial Guides, 2009). See also Christina Staudt and J Harold Ellens (eds), *Our Changing Journey to the End: Reshaping Death, Dying and Grief in America* (Praeger, 2013).

[11] See David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David B Wexler and Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991), David B Wexler, 'Applying the Law Therapeutically' (1996) 5 *Applied and Preventive Psychology* 179; Marilyn McMahon and David Wexler, 'Therapeutic Jurisprudence: Developments in Australia and New Zealand'

enables incorporation of insights and findings from disciplines such as psychology and criminology to refresh thinking about how legal proceedings are conducted and to enhance the respect for law and legal processes, which in turn has the potential to enhance quality of decision-making.[12]

Drawing on notions of emotional intelligence, for instance, King has argued in favour of the need for courts to be alert to emotional dynamics within litigation and endeavour to deal with 'underlying issues'.[13] Tait and Carpenter,[14] in the coronial context, have rightly contended that management of subjectivity is fundamental to dealing with grieving families and that it is a responsibility of coroners to deal sensitively with the emotional wellbeing of family members.

Sudden, unexpected or unnatural deaths are particularly traumatic for survivors,[15] both for those who are family members and others. Within coroners' courts such emotions include bereavement grief,[16] survivor guilt,[17] post-traumatic shame,[18] anxiety and depression. It has been argued that it should not simply be assumed that encouraging survivors to recount a trauma to which they have been exposed, and which did not result in their own death, will be salutary; mandated ventilation of such matters in a court, or in many other contexts, can be noxious, triggering a range of re-experiencing, somatic consequences, psychotic episodes and even suicidality for the person involved,[19] never mind for those who are the subject of their narration. Particular and complex issues exist for members of a family whose relative has

(2003) 20(2) *Law in Context* 1 in Marilyn McMahon and David Wexler (eds), *Therapeutic Jurisprudence* (The Federation Press, 2003).

[12] See, for eg, David B Wexler, 'Guiding Court Conversation along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence' (2015) DP No 15–33: *Arizona Legal Studies* <http://www.civiljustice.info/cgi/viewcontent.cgi?article=1007&context=tj>.

[13] Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32(3) *Melbourne University Law Review* 1096.

[14] Gordon Tait and Belinda Carpenter, 'Suicide and the Therapeutic Coroner: Inquests, Governance and the Grieving Family' (2013) 2(3) *International Journal for Crime, Justice and Social Democracy* 92.

[15] See, for eg, Ruth Davidhizar, 'Helping Survivors Cope with Sudden Death' (1993) 11(4) *Health Care Supervisor* 41.

[16] For a history of the study of grief from the influential essay by Freud on mourning and melancholia in 1917 until the present see: Leeat Granek, 'Grief as Pathology: The Evolution of Grief Theory in Psychology from Freud to the Present' (2010) 13(1) *History of Psychology* 46. Pathological grief can take the form of 'Persistent Complex Bereavement Disorder' (PCBD) within the meaning of DSM-5 (American Psychiatric Association, *Diagnostic Manual of Mental Disorders* (APA, 5th ed, 2013) 789–792), whose prevalence is approximately 2.4–4.8%. See in relation to its overlap with and the risk of misdiagnosis by reference to depression or post-traumatic stress disorder Richard A Bryant, 'Is Pathological Grief Lasting More than 12 Months Grief or Depression?' (2013) 26(1) *Current Opinion in Psychiatry* 41; Andreas Maercker and John Lalor, 'Diagnostic and Clinical Considerations in Prolonged Grief Disorder' (2012) 14(2) *Dialogues in Clinical Neuroscience* 167. The diagnosis remains controversial: see, for eg, Jerome C Wakefield, 'Should Prolonged Grief be Reclassified as a Mental Disorder in DSM-5?: Reconsidering the Empirical and Conceptual Arguments for Complicated Grief Disorder' (2012) 200(6) *Journal of Nervous and Mental Disease* 499; Margaret Stroebe et al, 'On the Classification and Diagnosis of Pathological Grief' (2000) 20(1) *Clinical Psychology Review* 57. For a psychoanalytic perspective, see Hugo Bleichmar, 'Rethinking Pathological Mourning: Multiple Types and Therapeutic Approaches' (2010) 79(1) *Psychoanalytic Quarterly* 71.

[17] Sadie P Hutson, Joanne M Hall and Frankie L Pack, 'Survivor Guilt: Analysing the Concept and its Contexts' (2015) 38(1) *Advances in Nursing Science* 20. For an analysis of how survivor guilt can influence the development of eating disorders, see Michael Friedman, 'Survivor Guilt in the Pathogenesis of Anorexia Nervosa' (1985) 48(1) *Psychiatry* 25.

[18] See, for eg, Johnn P Wilson, Boris Drozdek and Silvana Turkovic, 'Posttraumatic Shame and Guilt' (2006) 7(2) *Trauma Violence Abuse* 122.

[19] See Rachel Rosenblum, 'Postponing Trauma: The Dangers of Telling' (2009) 90(6) *International Journal of Psychoanalysis* 1319.

committed suicide,[20] or is believed to have done so, as well as for persons who have been the victims of homicide or have died in socially uncomfortable circumstances such as auto-erotic asphyxia. An example in the suicide context is the impact of the content of a suicide note on the reactions of survivors; blame and guilt have been found to play primary roles in grief reactions in such a situation.[21] Manifestly, how the contents of a note are explored in the course of a coronial inquest (if there is one at all) and the extent to which they are made available for public reporting by the media would have ramifications in this regard.

Practical dilemmas can also be posed in relation to deaths where the family of the deceased is fragmented geographically or emotionally. This has the potential to be manifested in what is often described by courts as 'unseemly disputation' about the person to whom the body should be released, who should have the right of disposition of the body, whether the body should be buried or cremated, and who should have access to the remains.[22]

In 2003, Biddle concluded that the inquest process has the potential to affect the resolution of grief in at least two adverse ways – by exacerbating common grief reactions associated with the death of a family member such as shame, guilt and anger, and by interfering with necessary grief processes, such as arriving at a meaningful and acceptable account of the death. [23] The study concentrated upon suicide deaths and identified from qualitative interviews that particular trauma was caused by the judicial atmosphere of inquests, media activity associated with them, what was perceived as invasion of the deceased person's privacy and the experience of giving evidence. Biddle also identified exposure to graphic evidence about the death, delays in inquests, confiscated suicide notes dealing with personal matters, and a failure by inquests to provide adequate explanations of deaths and to deal with blame as having been reported as distressing by members of the family of persons who had committed suicide. Biddle called for greater clarity in coronial processes for dealing with relatives of deceased persons throughout coronial investigations.

A decade later, Wertheimer developed Biddle's work and emphasised the toxic effects of delays in coronial investigations and a feeling that grief has to be suspended unnaturally until the conclusion of the inquest process, noting also that anticipation of the inquest can leave 'survivors' feeling extremely apprehensive, particularly if they are to be called as witnesses.[24] She found from interviews that if family members are not given the opportunity at an inquest to tell their story as they see it, for instance, because of the application of the rules of relevance, they can feel shut out and that this can compound grief. In addition, she identified that 'open verdicts' can cause confusion and that media reporting, especially if it is selective or in any way incorrect, is a cause of particular concern for family members.[25] Wertheimer emphasised

[20] See Julie Cerel, John R Jordan and Paul R Duberstein, 'The Impact of Suicide on the Family' (2008) 29(1) *Crisis* 38.
[21] Kjell Rudestam and Paul Agnelli, 'The Effect of the Content of Suicide Notes on Grief Reactions' (1987) 43(2) *Journal of Clinical Psychology* 211.
[22] See Ian Freckelton, 'Release by Coroners of the Bodies of Deceased Persons' (2017) 24 *Journal of Law and Medicine* (forthcoming).
[23] Lucy Biddle, 'Public Hazards or Private Tragedies: An Exploratory Study of the Effect of Coroners' Procedures on Those Bereaved by Suicide' (2003) 56 *Social Science and Medicine* 1033; see also Daniel Harwood et al, 'The Grief Experiences and Needs of Bereaved Relatives and Friends of Older People Dying Through Suicide: A Descriptive and Case-Control Study' (2002) 72 *Journal of Affective Disorders* 185.
[24] Alison Wertheimer, *A Special Scar: The Experiences of People Bereaved by Suicide* (Routledge, 2013) 81.
[25] See too Alison Chapple, Sue Ziebland and Keith Hawton, 'A Proper Fitting Explanation? Suicide Bereavement and the Grieving Family' (2013) 3 *International Journal for Crime, Justice and Social Democracy* 92.

that 'to some survivors the inquest feels like a trial where both they and the person who died are under judgment.'[26]

To a similar effect, as part of the review of Victoria's 1985 coronial legislation, Myndscape Consulting, which undertook interviews with stakeholders in the coronial process, identified the adverse effects of families' lack of understanding about the roles, functions and processes of the coroner and their ability to engage in the coronial process.[27] It emphasised the need for improvements in the frequency of communication from a coroner's court regarding the progress in the investigation, reasons for any delays and the likely timeframes for completion of the investigation. It also found a need to improve the experience of family members attending inquests through better preparation of them in terms of what to expect, as well as increasing their awareness of the right to be legally represented.

In 2007, the argument was advanced that family members could be disadvantaged by delays in inquest outcomes, exclusion from the process, inability for meaningful participation, and ineffective communication with them by court staff during investigations and even at the stage of inquest findings.[28] In the same year, Took and Johnstone contended that therapeutic principles such as party participation in the coronial process, collaboration, timely provision of information to the parties and problem-solving could be incorporated into the work of coroners' courts.[29] At the Coroners' Society Conference of the same year, Johnstone, then the Victorian State Coroner, urged adding 'the human dimension' to the work of coroners, including enhancing information provision processes to family members, allocation of a case manager for each case, minimising case delays, adherence to sensitive communications from coroners' offices, early intervention processes for families, and using less formal processes at inquests.[30]

In 2008 in an important paper Michael King, who had been a coroner in Geraldton in Western Australia, advanced a series of proposals for enhancing the therapeutic potential of coroners' investigations.[31] He argued for a dual track system for coronial matters to implement a problem-solving approach. His proposal was that cases in a 'general track' should not be accorded intensive case management but, instead, processes such as counselling and other support services, restorative justice conferences and the opportunity for family members and others intimately involved with a death being given the opportunity to provide statements about the effects of a death and to express any grievances. He recommended a second track, 'the complex track', which would involve intensive case management by a multidisciplinary team chaired by the coroner:

> Members of the team would include a psychologist or counsellor based at the coroner's court, coroner's assistant or counsel assisting the coroner, family members assisting the coroner, family members representing the family (if they so wish), other parties with a direct interest

[26] Ibid 80.
[27] Myndscape Consulting, *Review of the Coroner's Act 1985: Final Report* (March 2006).
[28] See Ian Freckelton, 'Death Investigation, the Coroner and Therapeutic Jurisprudence' (2007) 15 *Journal of Law and Medicine* 242; see also Ian Freckelton and David Ranson, *Death Investigation and the Coroner's Inquest* (Oxford University Press, 2007).
[29] G Took and Graeme Johnstone, Therapeutic Jurisprudence and the Coroner's Office (unpublished paper, State Coroner's Office, Melbourne, Victoria, May 2007).
[30] Graeme Johnstone, 'Adding the Human Dimension: The Future and a Therapeutic Approach to the Independent Work of the Coroner' (Paper presented at the Asia-Pacific Coroners Society Conference, Hobart, November/December 2007).
[31] Michael S King, 'Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model' (2008) 16 *Journal of Law and Medicine* 442.

> in the investigation (such as those who may be subject to an adverse finding), lawyers acting for the parties and any other professionals who may assist in the case management process in the particular case.[32]

He argued too that mediation should play a role in the coroner's court. He urged the relevance of restorative justice concepts with family members being viewed as 'victims' so that the family and the 'perpetrator' could be offered the option of 'meeting in a safe, non-adversarial environment of listening to other people's experience of how the situation may have affected them, of telling their own story and expressing their own feelings about the situation that may well have affected them deeply on different levels of their life, and, where possible, of reaching an agreement as to any remedial measures to be taken.'[33] He argued for the possibility of a restorative justice conference to be held after the coroner has made a finding to offer the person who may have played an instrumental role in the death the opportunity of explaining how the coroner's recommendations relating to public health or safety are being or have been implemented. He raised too, the option of family members making a statement about the impact of the death upon them, either orally or in writing. For the most part, King's proposals have not (yet) been implemented in Australia, although it is becoming increasingly common for family members to make the kind of formal statement envisaged by him.

A study conducted by Sweeney Research shortly prior to the introduction of the 2008 *Coroners Act* in Victoria[34] emphasised the significance of the emotional impact of deaths of family members upon those related to them and the sensitivity of family members to being treated as 'just another case'. The report emphasised the importance of communication from the Coroners Court and made the point that not enough information can be frustrating for people and that too much information can be painful for them – there is a need for balance, as well as compassion.[35] The appointment of a case manager was recommended.[36]

In 2015 in an extensive chapter in Warren Brookbanks' collection on therapeutic jurisprudence in New Zealand, Jennifer Moore emphasised the counter-therapeutic effects of delay and made a number of fresh points.[37] She identified the importance reported by her interviews with participants in the coronial process of parties being enabled to respond in advance to matters upon which coroners proposed to make adverse comments. She emphasised the sensitivities attaching to the taking and retention of samples and body parts, and the fact that very private matters can make their way into the public domain through media coverage of coroners' inquests. In addition, she drew attention to the advantages of post-investigation communication with family members, identifying that enhancement of the human dimension to coronial inquests by provision to families of:

- '"Voice", specifically the opportunity to make statements;
- The opportunity to decide whether the deceased's name, or "deceased", should be used in the coroner's findings;
- Prompt and sensitive communication about all coronial processes and their rights;

[32] Ibid 446.
[33] Ibid 452.
[34] Sweeney Research, 'Families' Information Needs and Experiences of the Victorian Coronial System' (Report, Victorian Department of Justice, 2008).
[35] Ibid 11, 18.
[36] Ibid 38.
[37] Jennifer Moore, 'The Impact of Therapeutic Jurisprudence on the New Zealand Coronial Jurisdiction' in Warren J Brookbanks (ed), *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, 2015) 179–222.

- A case manager;
- Less formal processes at inquest;
- Coronial inquiries that take a sensitive approach to evidence that may be distressing to bereaved families.'[38]

Most recently, in 2016 Tait, Carpenter, Quadrelli and Barnes – the New South Wales (and former Queensland) State Coroner – undertook a survey of coroners, forensic pathologists, coronial nurses, police officers working in the coronial area and coronial counsellors.[39] The authors argued that inherent in the coroner's processes is the need to engage with intense emotions and that an ethic of care should be incorporated into what they called 'the normative theory of the coroner's court'. They contended that such a step 'would require coroners to be better trained in this aspect of their role, and recognition by the higher courts and perhaps in legislation of the importance of this factor.'[40] The challenge arising from their analysis is to define what constitutes the ethic of care and determining to whom it extends and how it can be operationalised in the processes of a coronial investigation.

III LAW REFORM PERSPECTIVES

Three Australasian reports in the modern era have recommended reforms to coronial law and practice based upon a range of identified deficits, including how coronial procedures have impacted upon family members.

The 2000 report of the New Zealand Law Commission emphasised a perception that in the coronial system inadequate regard was being paid to the cultural values and beliefs of communities, particularly of the Maori community.[41] Another issue raised was the need for improved communication by coroners' courts with family members so that accurate information was imparted within suitable and prompt timeframes and so that the deceased, including body parts, was returned to the family as quickly as possible.[42] Recommendations were made concerning changes to the law to enable objections to autopsy,[43] as well as extension of the possibility for the family of the deceased to view and touch the deceased prior to the post-mortem examination.[44]

The 2006 report of the Law Reform Committee of the Victorian Parliament (which led to the *Coroners Act 2008* (Vic)) received extensive criticism of the adverse impact of coronial processes, principally on family members.[45] The Committee identified significant levels of under-reporting of deaths to coroners and made recommendations to broaden the net of deaths

[38] Ibid 207–208.
[39] Gordon Tait et al, 'Decision-Making in a Death Investigation: Emotion, Families and the Coroner' (2016) 23 *Journal of Law and Medicine* 571.
[40] Ibid 581. Trabsky and Baron have invoked the idea of "intimate citizenship" to highlight the potential for secondary traumatisation of all personnel who work in the coronial jurisdiction and to argue for further steps to be taken to support their wellbeing: Marc Trabsky and Paula Baron, 'Negotiating Grief and Trauma in the Coronial Jurisdiction' (2016) 23 *Journal of Law and Medicine* 582.
[41] New Zealand Law Commission, *Coroners*, Report No 62 (2000) <http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC%20R62.pdf>.
[42] Ibid [237].
[43] Ibid [265].
[44] Ibid [274].
[45] Law Reform Committee, Parliament of Victoria, *Coroners Act 1985* (2006) <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/coroners_act/final_report.pdf>.

which should be reported, especially focussing upon deaths in hospitals and nursing homes.[46] The Committee summarised accounts it had received about 'unacceptable delays in police investigations'[47] and also in the length of coronial investigations generally.[48]

The Committee found that families involved in the coronial process could be deeply affected by its procedures and investigations.[49] In particular, it noted that 'one of the main difficulties for families was the lack of resolution from the inquest findings. A major task for families is constructing a 'last chapter' for the person who died.'[50] It made a series of recommendations for improving the provision of information to families, explanations of the coronial process, rights of the family to object to autopsy, retention of records and evidence, and access to such information.[51]

The Committee recommended that coroners be given a degree of discretion to recognise significant relationships other than the hierarchically prescribed list of senior next-of-kin.[52] It observed that such a change would accommodate the cultural practices and spiritual beliefs of sections of the community. It recommended too, that wherever practicable the coroner permit members of the immediate family of the deceased to view and touch the body of the deceased.[53] The Committee identified a disenfranchising effect for family members when, as often occurs, they are unable to afford skilled legal representation for inquests and recommended the development of a self-help kit as well as investigation of the feasibility of provision of legal advice and assistance for families affected by a coronial inquest.[54] It also urged the use of imaging options to reduce autopsies where feasible, in part because of the distress such procedures can cause for family members.[55]

In 2012, the Law Reform Commission of Western Australia generated a report on coronial practice.[56] It too identified dissatisfaction with 'lengthy delays in completion of coronial cases'[57] and the need for enhancement of the Coronial Counselling Service.[58] It urged improvements in communication by the court to family members[59] and the enabling of family members more readily to view and touch deceased persons.[60] The Commission also argued for it to be mandatory within legislation for the coroner to have to consider concerns raised by a family member or another person with a sufficient interest in relation to the type of a post-mortem examination to be conducted.

What emerges from the law reform reports over the period 2000–2012 is a consciousness of a number of factors that can have adverse outcomes for family members. The reports particularly

[46] Ibid 48, 114.
[47] Ibid 200.
[48] Ibid 469–472.
[49] See too Hugh Dillon and Marie Hadley, *The Australasian Coroner's Manual* (Federation Press 2015) 32–58**.**
[50] Ibid 424.
[51] Ibid 468.
[52] Ibid 445.
[53] Ibid 453.
[54] For a useful analysis of this issue, see Frances Gibson, 'Legal Aid for Inquests' (2008) 15 *Journal of Law and Medicine* 587.
[55] Ibid 507.
[56] Law Reform Commission of Western Australia, *Review of Coronial Practice in Western Australia: Final Report*, No 100 (2012) <http://www.lrc.justice.wa.gov.au/_files/P100-FR.pdf>.
[57] Ibid 14.
[58] Ibid 114.
[59] Ibid 120.
[60] Ibid 135.

identify cultural sensibilities and deficits in communication by the courts with family members, the toxic effects of delays, as well as the potential for processes to exclude relatives of the deceased, thereby compounding trauma. While the language employed by the law reform bodies is not explicitly that of therapeutic jurisprudence, an important aspiration of each report is to reduce the distress, confusion and alienation from the coronial process of family members. Another feature that the reports share is that the consequences of the coronial process for other interested parties, such as those instrumentally involved in the death, are not the subject of any significant acknowledgment or treatment. In this regard, they are consistent with general commentary, including explicitly therapeutic jurisprudence commentary, on the subject.

IV EMPIRICAL KNOWLEDGE ABOUT EXPERIENCE OF THE CORONIAL PROCESS BY NON-FAMILY MEMBERS

A 2011 qualitative research report was undertaken for the Coronial Council of Victoria by Sweeney Research to 'engage with those who have experienced the coronial system as part of their employment and gain insight to inform the development of approaches which adopt a therapeutic framework in the coronial system'.[61] Twenty interactive journals and 19 in-depth interviews were conducted with stakeholders:

Table 1- Interviews with Stakeholders

Role/Employment Type	**Interviews**	**Journals**
Emergency Services	1	1
Medical	7	6
Mental Health	3	-
Police	2	8
Social Services	6	5
Total	**19**	**20**

The report relates to one jurisdiction only and involved only a limited number of persons. However, its findings were striking. The authors observed that a number of factors had a clear impact upon respondents' experiences with the coronial jurisdiction including that:

> Respondents whose role in relation to the deceased was 'hands-on' felt a great deal of responsibility to them. Often times they had developed a relationship with the deceased and were experiencing emotions of grief and loss at the time of death which were exacerbated by their involvement in the inquest. For many, the questioning at coronial inquests was seen as accusatory in nature. As a result, any sense of guilt, self-doubt or anxiety they may have already had were intensified.[62]

They identified too, that inquests that arose from matters taking place in smaller communities were perceived to attract additional pressures. Those who were unused to the forensic environment and therefore what to expect experienced particular levels of anxiety: 'These

[61] Sweeney Research, 'A Qualitative Research Report for the Coronial Council of Victoria' (Report, 2011); The Coronial Council of Victoria was established by s 109 of the *Coroners Act 2008* (Vic) to 'provide advice, and make recommendations, to the Attorney-General either (a) of its own motion; or (b) at the request of the Attorney-General. Such advice and recommendations must be in respect of (a) issues of importance to the coronial system in Victoria; (b) matters relating to the preventative role played by the Coroners Court; (c) the way in which the coronial system engages with families and respects the cultural diversity of families; (d) any other matters relating to the coronial system that are referred to the Council by the Attorney-General.' (s 110(2)).

[62] Sweeney Research, above n 61, 8.

respondents said they were ill-prepared in terms of what to expect on the day of inquest, something they now see as having contributed to their overall feelings of apprehension.'[63]

While police officers, those in emergency medicine, and mental health professionals viewed death as an unfortunate but unavoidable part of their work, for others the death of a client of patient was a significant and memorable event: 'It was considered 'out of the ordinary' and had a long lasting impact on them. …when they were questioned as part of an investigation they were not responding solely as a professional but also as a person mourning the death of someone close to them. Following the death, they believed they experienced emotions of grief and loss just as the family did.'[64]

The Sweeney Report found that the respondents expected to receive the findings of a coroner as soon as they were handed down and that this was not always the case was a cause of great frustration: they 'felt that their expectations should be managed more effectively in order to improve the overall experience and minimise their anxiety'.[65] They identified that becoming aware of the findings would have enabled them to move forward after the death more quickly.

A number of respondents lamented their uncertainty as to what to include in their statements and reports but others were:

> aggravated by what they saw as professional and personal attacks during cross-examination. They felt that had they known what to expect they could have felt more prepared to deal with it. Respondents felt that the cross examination focused on 'pointing fingers' rather than uncovering the truth and bred a culture of blame which in some cases prevented them from providing accurate information to the best of their ability. Respondents were surprised and disappointed by what they described as the 'adversarial' nature of the investigation. … This form of questioning, when combined with the respondents' anxiety, pressure and stress during an inquest, amplified the existing feelings of guilt and self-doubt. … Even those who with the benefit of reassurance had presumed the process was going to implicate them; that their role was almost to exonerate themselves rather than giving a testimony.[66]

Respondents identified that the presence of the surviving family members at the inquest added to the pressure they already felt and this was especially so when the family was believed to harbour anger and frustration regarding the death:

> In cases where the family chose to represent themselves respondents said they felt unable to be as honest as they would have liked to for fear of upsetting the family. Even in cases where a barrister was appointed by the family the professional felt the questioning became more accusatory than investigative under the assumption the lawyers was trying to address the family's need for blame someone for the death. Respondents were concerned that this style of questioning and even visibility of the family per se got in the way of discovering the truth. The witnesses would be less honest and lawyers more accusatory.[67]

Most respondents said that they particularly valued support but were unaware that the Victorian court offered counselling to witnesses, believing the facility to be directed toward the surviving

[63] Ibid 8.
[64] Ibid 9.
[65] Ibid 10.
[66] Ibid 11.
[67] Ibid 12.

family. The more personal involvement the respondent had had with the deceased, the higher the level of stress they reported from coronial investigations:

> These emotions often had negative impacts on respondents' personal and professional lives. Those who were a step removed felt concern, but not personal anguish. Many respondents reported severe anxiety leading up to an inquest. They felt that anxiety was debilitating to a certain extent because it adversely affected their ability to present the information to the best of their ability. Some respondents felt a long term emotional impact following their coronial experience. They spoke about having to take stress leave from work and feeling depressed. One respondent drew a comparison to the emotional impact of having been involved in a series of traumatic incidents. Another said that she was composing her letter of resignation from her job while on the stand during the inquest.[68]

Respondents reported that they wanted a clearer understanding of how the coronial system works in order to be better prepared to present the information they had to the coroner, what to expect and what coroners would want to know from them so as to provide helpful assistance. Almost all respondents 'mentioned how long a coronial investigation takes from the time of the client or patient's death to the findings being handed down and the negative impact that this extended timing' had for them in terms of obtaining personal and professional closure, and also for others in terms of preventing unnecessary deaths, with recommendations for change being delivered too late to avoid other deaths in comparable circumstances.[69]

In 2014, Moore and Henaghan reported on interviews they undertook with 15 New Zealand coroners, 100 senior personnel from 79 organisations and eight interested parties, as well as questionnaires completed by 42 representatives of organisations.[70] The focus of the study was upon the exercise of recommendatory powers by coroners. A range of frustrations was also expressed by interviewees and those who completed the questionnaire about whether recommendations were evidence-based, logistically or economically viable, sufficiently clear or fair. A complaint ventilated by one organisation (Pharmac) was that it had not been notified or given an opportunity to comment on two occasions to have input before recommendations/adverse comments were made.[71]

V IMPACT OF DEATHS ON NON-FAMILY MEMBERS

A death that occurs in circumstances that give rise to allegations or suspicions of impropriety generates ripples of distress that can radiate out in a variety of ways which are experienced as damaging and distressing. For family members, if they are excluded in substance or alienated from the coronial process by lack of information or deprivation of a meaningful voice, this can compound a sense of loss and distress. In addition, if they perceive that the death of their loved one was 'the fault' of another person or institution, or that any taint surrounds the removal of organs or retention of tissue, this can exacerbate their feelings of loss. Such a perception is also likely to generate anger and a retributive desire to denounce and 'expose' what they regard as the culpability of the other party,[72] so that that person or entity becomes the subject of a public and adverse finding, or at least critical comment by a coroner. Sometimes, this is framed as an

[68] Ibid 18.
[69] Ibid 24.
[70] Jennifer Moore and Mark Henaghan, 'New Zealand Coroners' Recommendations, 2007–2012', (Report by the Legal Issues Centre, Faculty of Law, University of Otago, 2014).
[71] Moore and Henaghan, above n 70, 234–236.
[72] For a discussion of ethical handling of angry clients, see Robin Wellford Slocum, 'The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger' (2009) 92(3) *Marquette Law Review* 481.

altruistic wish to protect others from negligence, poor practice or indifference to persons' wellbeing, but at base there is often a deep wellspring of anger motivating their stance and a desire for that to be ventilated publicly to name and shame the malefactor.

An outcome can be a strongly expressed desire for an open inquest to be convened so that such matters can be canvassed and so that those suspected of wrongdoing can be held to account under cross-examination. However, it is not unusual for such requests to be declined, amongst other things, if a coroner forms the view that an inquest would 'provide a forum for publicising baseless but damaging allegations against individuals or institutions.'[73] In addition, resourcing and logistical exigencies mean that only a small number of reportable deaths can result in a formal inquest. When the convening of an inquest is declined, this can result in conspiracy theories, feelings of exclusion, a perception that the death is regarded by the coroner as not mattering, and the generation of appellate litigation.[74] Dealing with these emotions and the extent to which blame can be levelled in findings, or inferred from them, is an important challenge for coroners who are minded to optimise pro-therapeutic outcomes from inquests and coronial processes, and to minimise outcomes that are counter-therapeutic.

A fundamental issue is how the desire of a percentage of family members for retributive blaming should be dealt with by coroners. At the extreme, it is argued that coroners should not engage at all in allocation of culpability in respect of deaths: 'It is not his/her task to attribute or hint at blame.'[75] Whether this is realistic or even helpful in terms of the coroner's obligation to set the public record straight about what occurred in the lead-up to a death is questionable. The decision to which reference is often made in this context is that of Lord Lane in *R v South London Coroner, Ex parte Thompson*[76] where the Chief Justice said:

> Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial ... The function of an inquest is to seek out and record as many of the facts concerning the death as [the] public interest requires.

This passage was cited without demur by Toohey J in *Annetts v McCann*.[77] The Norris Report in Victoria put the issue similarly:

> In future the function of an inquest should be simply to seek out and record as many of the facts concerning the death as public interest requires, without deducing from those facts any determination of blame. The findings of the coroner or jury should in terms be findings of fact only. To quote the Brodrick Committee again:- 'In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the

[73] *State Coroner's Guidelines 2013* (Qld), Chapter 9, 8 <http://www.courts.qld.gov.au/__data/assets/pdf_file/0013/206140/osc-state-coroners-guidelines-chapter-9.pdf>.
[74] See, for eg, *Chol v White* [2016] VSC 561; *Helmer v State Coroner of Victoria* [2011] VSC 25; *Conway v Jerram* [2010] NSWSC 371; *Gentner v Barnes* [2009] QDC 307; *Chiotelis v Coate* [2009] VSC 256; *Domaszewicz v The State Coroner* [2004]; *Rouf v Johnstone* [1999] VSC 396; *Clancy v West* [1995] VICSC 207; [1996] 2 VR 647.
[75] See *Perre v Chivell* [2000] SASC 279 [54].
[76] (1982) 126 SJ 625.
[77] (1990) 170 CLR 596 [12].

> death; there is a difference between a form of proceedings which affords to others the opportunity to judge an issue and one which appears to judge the issue itself.[78]

Callinan J in the important decision in *Keown v Khan*[79]concluded that findings of 'moral responsibility or some other form of blame' are precluded: 'the proceeding is inquisitorial; the conclusion would be more indeterminate than a conclusion about legal responsibility; and there would be no prospect of a trial at which the person blamed might ultimately be vindicated by an acquittal.'[80]

A constraint upon findings that take an explicit form of criticism is found in a common, albeit varying form, in coronial legislation. In many statutes there are specific inhibitions on the wording and content of findings that can be made by coroners, regardless of the wishes of parties. For instance, section 25(3) of the *Coroners Act 2003* (SA) precludes coroners from making 'any finding, or suggestion, of criminal or civil liability'. Likewise under section 45(5) of the *Coroners Act 2003* (Qld) a coroner is prohibited from including in their findings any statement that a person is or may be guilty of an offence or 'civilly liable for something.'[81] In New Zealand it is prescribed that the role of the coroner is not to determine civil, criminal or disciplinary liability.[82] In jurisdictions such as New South Wales, Victoria, Tasmania and the Northern Territory it is simply provided there can be no finding by a coroner that a person is or may be guilty of a criminal offence.[83] This constitutes a level of restriction in terms of the framing of findings but also thereby on the focus of inquests. Amongst other things, it plays a role in avoiding inquests functioning as a preliminary form of either criminal or civil litigation.[84]

However, it leaves a level of uncertainty over the extent to which, in a real sense, coroners can or should make findings which are tantamount to civil or criminal findings in terms of identifying breaches of duties of care or commission of errors. As a matter of law and practice, a measure of latitude exists in this regard by reason of the fact that findings as to the circumstances and manner of death, placed within their context are delivered in narrative form in both Australia and New Zealand. As the Brodrick Committee in the United Kingdom put it: 'In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceedings which affords to others the opportunity to judge an issue and one which appears to judge the issue itself.'[85]

The preclusions on the usage of civil or criminal liability of their nature, are limited in extent – they prevent the usage of language which is unmistakably that of criminal or civil fault or the

[78] JG Norris, 'The Coroners Act 1958: A General Review' (Discussion Paper, State of Victoria, 1981) [153].
[79] [1999] 1 VR 69, 76.
[80] Ibid.
[81] Section 25(5) of the *Coroners Act 1996* (WA) is to a similar effect.
[82] *Coroners Act 2006* (NZ) s 57(1).
[83] *Coroners Act 2009* (NSW) s 81(3); *Coroners Act 2008* (Vic) s 69(1); *Coroners Act 1995* (Tas) s 28(4); *Coroners Act* (NT) s 34(3).
[84] The role played by the two early inquests into the death of Azaria Chamberlain remains controversial, given their facilitation of the prosecution of Lindy and Michael Chamberlain. See *Coroner Gavin's findings in the second inquest into the death of Azaria Chamberlain* (February 1982) <http://law2.umkc.edu/faculty/projects/ftrials/chamberlain/galvinfindings.html>; Ken Crispin, *The Crown Versus Chamberlain, 1980–1987* (Albatross Books, 1987); John Bryson, *Evil Angels* (Penguin, 1986).
[85] Committee on Death Certification and Coroners (Brodrick Committee), *Repor*t, HO 375, 1971.

application of criminal or civil law in respect of liability issues arising from facts found.[86] They do not inhibit a coroner from making findings which of their nature determine that a person failed to discharge their responsibilities in accordance with their obligations or even that they failed to take steps that were reasonably open to them to protect safety and risk to life.[87] These can be highly significant findings in terms of clarifying the circumstances of death and laying a foundation for coroners' recommendations. They can also cause a Director of Public Prosecutions to consider the laying of charges, whether or not a coroner formally urges such a course, or a party to commence legal proceedings (usually a dependency claim or an action for psychiatric injury, both founded on allegations of a breach of a duty of care) against another party to the coronial proceedings. It is such findings to which family members often aspire, and for which they argue, when permitted, if they feel that a death has been caused when it should not have been – either maliciously or by reason of indifference, incompetence or carelessness.

The fear of such accusations and the media coverage that surrounds proceedings, as well as the delivery of findings, can be potent indeed. For professionals, those in public life or those in organisations that may be the subject of criticism, as well as for those who are psychologically vulnerable, sensitivity about adverse findings can generate considerable anxiety and distress. All can also suffer a variety of deleterious consequences, including notoriety that is likely to inhibit career progression, ongoing employment or re-engagement.

At an emotional level too, the inquest process can come at a considerable toll for those other than family members. Being the instrument of a death, such as by the discharge of a firearm, even in the course of duty and for good reason, undertaking an operative or resuscitative procedure without success, driving a conveyance that caused death, locating a person who has hanged or otherwise killed himself or herself, or being the innocent mechanism by which a person commits suicide, is often highly damaging psychologically. Many persons in such a situation become preoccupied with memories of the deceased (such as train drivers seeing the face of a person lying on railway tracks immediately before their death), feelings of guilt, whether or not well-founded, as well as the question of whether they could have done more or better to prevent the person's death. Often such questions are not amenable to an easy answer and a loss of perspective can occur with deleterious consequences in terms of equilibrium. Depression, and even suicidality, can ensue. At a lesser level, there can be erosion of confidence which imperils the person's ongoing viability in the role that they were playing at the time of their involvement in the person's death. It is common, for instance, for police who have discharged their firearm in the context of a fatal shooting to cease to be able to continue in an operational role in a police force – rather 'retreating' into roles such as communications, search and rescue, animal handling or intelligence. Similarly, health care professions such as surgeons, emergency physicians, anaesthetists, obstetricians, general practitioners, and midwives (to name but some) who are involved in a death that becomes the subject of a coronial investigation can lose the capacity to be decisive in evaluations and thereby the capacity to respond adequately to emergencies and procedural exigencies – this can deprive them of the ability to continue in their ordinary environment. When such outcomes eventuate, the community, as well as the individual can be the loser – in the sense of being deprived of a valuable resource. There can be deterrence of persons entering specialist areas of medicine, or performing public service such as volunteering as firefighters or paramedics in rural areas, or functioning in particular units within police forces or prisons.

[86] See *Perre v Chivell* [2000] SASC 279 [56].
[87] For the need for there to be such a nexus see, for eg, *Harmsworth v State Coroner* [1989] VR 989.

Another toll that inquests can take is upon the community's confidence in professions, departments and state entities. To erode such confidence without adequate warrant by permitting sensationalist allegations of ineptitude, mala fides or indifference to people's wellbeing can give rise to unhealthy paranoia and suspicion within the community. It can derogate from trust in instruments of the state, for instance, which largely function well in spite of the fact that improvements in culture, training and performance may need to be made. Trust in such entities can be important in times of crisis or when public co-operation with such entities is needed in the interest of community safety.

To make such observations, which are far from profound, highlights the fact that to speak of 'victims' and 'perpetrators', as King has done in advocating for the introduction of restorative justice processes into coroners' courts,[88] is unhelpfully reductionist and misplaced. Just as there are no winners and losers in coronial investigations, at least technically, so too is it important not to ignore (or be insensitive to) the consequences of investigations, including inquest proceedings, for any category of party because of the inherently emotive nature of what is transacted and the many forms of vulnerability that are present. To privilege proceedings in favour of one category of party, family members, risks tilting the balance that should obtain and imperilling the confidence that should exist in the even-handedness and fairness of the coronial process. What follows is that a role for therapeutic jurisprudence in coroners' investigations should be to sensitise not just to the emotional ramifications of investigations for family members and their particular needs, but to the sensibilities, vulnerabilities and reputations of all parties, in which the community may have an important investment. Inevitably, while some of these considerations will exist in all investigations, and in particular inquests, they will vary depending on the particular persons and entities involved.

An important dynamic in modern inquests is the intense scrutiny that can accompany them. There is nothing new in identifying the level of press, television and radio coverage that high profile inquests can engender.[89] As long ago as 1998 the Canberra journalist, Jack Waterford contended that:

> A coronial inquest is particularly focused around publicity. There is a very good argument that publicity is its primary function, and the one which secures its survival at a time when the need for the inquest, either as a vehicle for committal or trial, or even as a source of making formal recommendations to authorities arising out of a death or a fire, is under question in various jurisdictions.[90]

More latterly, the 2016 *Tasmanian Coronial Practice Handbook* has delineated a modern perspective on how many coroners' courts attempt to work constructively with the media:

> The media play an important role in coronial proceedings, conveying the coroner's findings into the public arena. It is through media reports that most people become aware of coronial findings and therefore, it is through the media that inquests and findings can make their most significant impact on the public. One of the coroners' most important roles is to protect the public, and therefore the coroners' office works with the media so that the public is made

[88] Michael S King, 'Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model' (2008) 16 *Journal of Law and Medicine* 442, 451.
[89] See, for eg, Jack Waterford, 'The Media and Inquests' in Hugh Selby (ed) *The Inquest Handbook* (Federation Press, 1998) 52–64.
[90] Ibid 52; see also Evan Whitton, 'A View from the Bleachers' in Hugh Selby (ed), *The Aftermath of Death* (Federation Press, 1992), 244–264, especially 249.

> aware of coroners' comments, warnings and recommendations, and their knowledge and wellbeing are increased.
>
> The media can also play an important role for families. If the families and friends of a deceased person feel that the death of their loved one could have been avoided, the public naming of any authorities that may have contributed to the death can have a positive emotional effect. People feel that their voice has been heard and this can help them to cope. The death of a loved one is a tragic event and the knowledge that others have been saved this pain can be a comfort in difficult times.[91]

In 2016, a new phenomenon emerged. An unparalleled level of scrutiny was imposed upon the 2014 decision of Victorian Coroner White in relation to the death of Phoebe Handsjuk.[92] The Coroner concluded that the deceased entered a garbage chute in a zolpidem- and alcohol-induced sleep-walking-like state, or while deeply confused and disorientated, without awareness of the dangers in her behaviour.[93] Other theories about how her death came to pass have been mooted. What distinguished the inquest was the publication of a six-part podcast, *Phoebe's Fall,* produced by a Fairfax-employed team, Richard Baker, Michael Bachelard and Nick McKenzie.[94] The podcasts were accompanied by high profile ongoing coverage and controversy suggesting that the decision of the Coroner was in error and that changes to the law to enable coroners' findings to be appealed more readily were required.[95] In short, the aftermath of the inquest was a campaign in the media for a revisiting of the outcome of the inquest decision and for reforms to the law.

While the naming of authorities that may have contributed to a death may be experienced as just and salutary by family members, there is another side to the coin which should not be forgotten – it may be experienced as devastating by individuals employed by or working within the authorities.

There have also been high profile examples of persons who have 'springboarded' from deaths and the publicity that has resulted from them to mount high profile campaigns in relation to social issues related to deaths. For instance, in Canada, John Lewis wrote *Beware the Grieving Warrior.*[96] It followed Ontario's Deputy Chief Coroner ordering an inquest into the death of two children due to post-operative complications resulting in deaths in a Hamilton Hospital. The book is co-written by the father of one of the two children, Claire, and recounts the obstacles encountered in seeking adverse findings in respect of the circumstances of the two deaths. The open and sincere aspirations of Mr Lewis were summarised in the foreword to the book:

> A child's death raises unimaginable stresses and horribly real feelings of guilt and responsibility for the surviving parents, not to mention the indescribable sense of loss. A

[91] Tasmanian Coronial Practice Handbook (2016), 42 <http://www.magistratescourt.tas.gov.au/about_us/coroners/coronial_practice_handbook>.
[92] *Finding in Relation to the Death of Phoebe Handsjuk* [2014] Victorian Coroners Court (10 December 2014) <http://www.coronerscourt.vic.gov.au/resources/0b4a4ed8-7170-493b-bac2-6927ff528b64/phoebehandsjuk_460510%286%29.pdf>.
[93] Ibid [354].
[94] The Age/SMH, *Phoebe's Fall* <http://www.smh.com.au/interactive/2016/phoebesfall/index.html; https://itunes.apple.com/au/podcast/phoebes-fall/id1155393027?mt=2>.
[95] See, for eg, Richard Baker and Michael Bachelard, 'Phoebe's Fall Prompts Rethink on Appeals from Inquests' *Sydney Morning Herald* (online), 6 October 2016 <http://www.smh.com.au/national/investigations/phoebes-fall-prompts-rethink-on-appeal-rights-for-inquests-20161006-grw6jy.html>.
[96] Larry Hicock and John Lewis, *Beware the Grieving Warrior: A Child's Preventable Death – A Struggle for Truth, Healing and Change* (ECW Press, 2004).

> preventable death such as Claire's increases those feelings exponentially. And if a preventable death is combined with an unwillingness by the health care providers involved to take responsibility for their actions, it leaves in its wake an anger of unspeakable magnitude. Anger can create change; anger can also destroy and obstruct any hope of change. My advocacy was born out of anger, hurt, and loss. To that end, *Beware the Grieving Warrior* carries my hopes for change.[97]

Another example of recent inquests that have given rise to a high profile campaign for change was the pair of inquests into the death of Luke Batty (by murder) and his father, Greg Anderson (by suicide, utilising police: 'suicide by cop'). They were accompanied by a nationwide campaign, which incorporated prominent action through social media, starting during the inquests for thoroughgoing reform to legal and other responses to domestic violence. Rosie Batty, who later became Australian of the Year, released her autobiography on the day the State Coroner handed down his findings into Luke's death.[98]

A further example of an inquest that became enmeshed with a campaign was the death of 15-year-old Tyler Cassidy, who was shot dead by police at a skate park in Northcote in inner-city Melbourne. Shortly after the conclusion of the inquest,[99] Tyler's mother, Shani Cassidy, lodged a communication with the United Nations Human Rights Committee asserting that Australia had breached its human rights obligation by allowing police to assist the coroner to investigate her son's death and thereby failing to have an independent and effective investigation into his death.[100]

An additional modern element of the coronial inquest is the social media coverage that can emanate from (and even during) inquest proceedings and which in turn can provide a fillip for orthodox media coverage of proceedings or issues arising from inquests. Guidance No 25, *Coroners and the Media,*[101] issued by the Chief Coroner of England and Wales in 2016 specifically adverts to the role of journalists texting and tweeting coverage of coroners' inquests, observing that such live-based communications have the potential to facilitate fair and accurate reporting of proceedings. This is a straightforward acknowledgment of the reality of modern means of reporting, as well as consumption of information within the contemporary community. However, it raises the issue of what coroners' courts need to do to ensure that their proceedings are, and are perceived to be, a dignified search for truth, rather than a vehicle for media exposes which frequently will focus upon blame and fault-finding.

It has become increasingly common for bereaved relatives and those supporting them or representing them to engage in commentary in the media in the course of inquests about evidence that has been given and for highly professional campaigns from those with a particular interest in a category of death (such as police-involvement deaths, prison deaths, domestic violence deaths, or deaths in immigration detention) to be run arising from and utilising the

---

[97] Ibid 9.

[98] Rosie Batty, *A Mother's Story* (Harper Collins, 2015); *Inquest into the Death of Luke Batty* [2015] Coroners Court of Victoria (28 September 2015) <http://www.coronerscourt.vic.gov.au/home/coroners+written+findings/findings+085514+luke+geoffrey+batt>.

[99] *Inquest into the Death of Tyler Cassidy* [2011] Coroners Court of Victoria (23 November 2011) <http://www.coronerscourt.vic.gov.au/home/coroners+written+findings/findings++inquest+into+the+death+of+tyler+cassidy>.

[100] See Human Rights Law Centre, *Individual Communication Lodged by Shani Cassidy* (2015) <http://hrlc.org.au/wp-content/uploads/2015/03/Clean-version-of-backgrounder-document-provided-by-HRLC-for-updating.pdf>.

[101] Guidance No 25, *Coroners and the Media* (30 September 2016) <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/guidance-no-25-coroners-and-the-media.pdf>.

evidence given in an inquest. This generates its own dynamics. At the most banal level, it ratchets up the pressure for those giving evidence in an inquest, especially if they anticipate being the subject of hostile cross-examination. In this respect, it has the potential to inhibit or impair the investigative processes of an inquest. In addition, the reality is that if the media coverage is sensationalist and/or lacks balance, it can generate antagonism in the workplace or the general community at a level which is both emotionally distressing and vocationally problematic. There are no rights for those the subject of such publicity to procure their own publicity in reply. In some instances, soliciting such publicity may be inappropriate or run the risk of being misinterpreted, including by a coroner. The result is that the one-sided publicity can generate perceptions of fault which ultimately may not be corroborated by findings. However, the publicity itself may have its own noxious effect, be enduring and be more prominent in the media than the coverage of actual findings and recommendations made by a coroner. These observations made, there are only limited measures that can be taken by coroners' courts to inhibit media coverage that lacks balance.

VI THE QUEST FOR BALANCE

Coroners' investigations of death inevitably take place in a highly charged emotional atmosphere in the aftermath of a death that by definition of its being 'reportable' has been sudden, violent, unnatural or unexpected. [102] This means that the investigation of its very nature is surrounded and influenced by a maelstrom of conflicting emotions, including grief, distress, anger, survivor (and other forms of) guilt, and confusion.[103] Notwithstanding the existence of such emotions, and the likelihood that those experiencing them will have different needs and objectives from the coronial process, there is the potential for the role of the coroner to have therapeutic outcomes – for instance, to shed light on and assist understanding about previously unclear circumstances of a death, and to enable resolution for family members and others, even to generate emotional catharsis as a result of their coming to terms with those things which had been preventing closure for their grief. At its best, the coronial process can facilitate understanding of the circumstances of a death, forgiveness for error or fault, and adoption of better and safer processes with the potential to avoid deaths occurring in comparable circumstances – something positive can emerge from tragedy.[104]

---

[102] *Coroners Act 1997* (ACT) s 77; *Coroners Act 2009* (NSW) s 6; *Coroners Act* (NT) s 12; *Coroners Act 2003* (Qld) s 8; *Coroners Act 2003* (SA) s 3; *Coroners Act 1995* (Tas) s 3; *Coroners Act 2008* (Vic) s 8; *Coroners Act 1996* (WA) s 3.

[103] See, for eg, George Gort, 'Pathological Grief: Causes, Recognition, and Treatment' (1984) 30 *Canadian Family Physician* 914.

[104] For a contemporary analysis of the role that coroners' recommendations play in enhancing public health and safety, see Jennifer Moore, *Coroners' Recommendations and the Promise of Saved Lives* (Edward Elgar, Cheltenham, 2016). See also Graeme Johnstone, 'An Avenue for Death and Injury Prevention' in Hugh Selby (ed) *The Aftermath of Death* (Federation Press, 1992); Lyndal Bugeja and David B Ranson, 'Coroners' Recommendations: A Lost Opportunity' (2005) 13(2) *Journal of Law and Medicine* 173; David M Studdert and Stephen M Cordner, 'Impact of Coronial Investigations on Manner and Cause of Death Determinations in Australia, 2000–2007' (2010) 192(8) *Medical Journal of Australia* 444; Lyndal Bugeja et al, 'Application of a Public Health Framework to Examine the Characteristics of Coroners' Recommendations for Injury Prevention' (2012) 18(5) *Injury Prevention* 326; Jennifer Moore, 'Coroners' Recommendations about Healthcare-Related Deaths as a Potential Tool for Improving Patient Safety and Quality of Care' (2014) 127 *New Zealand Medical Journal* 35; Elena Mok, 'Harnessing the Full Potential of Coroners' Recommendations' (2014) 45 *Victoria University of Wellington Law Review* 321; Georgina Sutherland, Celia Kemp and David M Studdert, 'Mandatory Responses to Public Health and Safety Recommendations Issued by Coroners: A Content Analysis' (2016) 40(5) *Australian and New Zealand Journal of Public Heath* 451.

However, a significant number of forms of feedback have demonstrated that family members can be deleteriously affected by coronial investigations and inquest processes, amongst other things, because these will involve some element of re-living of the death and the circumstances surrounding it and giving rise to it. In addition, inevitably there will be some element of delay which can be experienced as oppressive and which can retard the grieving process. Further, however well-informed family members may be about coronial investigations, they are likely to find aspects of an inquest confronting and distressing. Personal health issues may become public, difficult intra-familial dynamics may be exposed, uncomfortable aspects of the behaviour of the deceased may come to light. Many comparable considerations apply to persons who have had some form of instrumental involvement or exposure to the death, prior to its occurring or immediately afterwards.

A major contribution made by therapeutic jurisprudence over the past decade and a half has been to highlight ways in which family members are at risk of being adversely affected by the way in which coroners' investigations are undertaken in the immediate aftermath of a death, during the process of investigation leading up to an inquest, and then during an inquest itself up to and including when findings are delivered and recommendations made by coroners. It has become apparent that disenfranchisement from the process by inadequate communication from a court, by excessive inhibitions on providing information to a court, by lack of legal representation, and by delays and erroneous or unclear findings are experienced as toxic by many family members. Similarly, a failure to respect cultural and religious sensibilities and a propensity to prioritise throughput and resolution of cases over acknowledgment of the sensitive and individual circumstances of a death can arrest and distort grief, giving a fillip to anger and a propensity to make accusations and allegations, some of which may be based more in suspicion than in fact.[105] Such experiences can disillusion family members, causing them to doubt the authenticity of the coroner's role and the rigour, thoroughness and independence of a coronial inquiry.

For others affected by coronial investigations, a risk is that the improved sensitisation to the needs and wishes of family members will be perceived as tilting the coronial process in favour of families and without proper acknowledgment that coronial processes and the aftermath of reportable deaths can be adverse in their effects for others as well. If inquests are permitted to function as adjuncts or media opportunities for social justice campaigns, collateral harm of many kinds can be done and a perception generated that the coronial process is more receptive to concerns for the wellbeing of family members than it is for that of other interested parties.

An important question from the issues outlined above is how a coroner's court should resolve the competing interests of family members and those of others. While it is correct to describe coroners' inquests as inquisitorial, rather than adversarial, the reality is that in many inquests the interests of parties may be polarised. The question arises in a variety of contexts, some major, some minor. A constructive yardstick for guidance in locating such balance is by reference to the roles of a coroner,[106] namely:

[105] A tension, of course, exists between coronial efficiency that emphasises throughput and comprehensive investigation which, necessarily, takes longer and gives rise to counter-therapeutic delays. Resourcing for coroners' courts can impact upon the capacity to deal with this tension.

[106] Moore, above n 38, 196, interestingly identifies coroners in the sample she interviewed as describing themselves diversely, including as 'manager of evidence', 'watch dog', 'social geographer', 'independent investigator', 'judicial officer with an investigative role', 'story teller', 'fact finder', 'expert in death', and 'advocate for the family of the deceased.'

- To make findings as to identity, place, time, manner and cause of death;
- To clarify the public record about such matters and thereby to allay unreasonable rumours or suspicion; and
- To make recommendations about the avoidance of avoidable deaths.[107]

Given the subject matter of inquests, it is inevitable that some measure of distress will be caused to parties, family members and others, by a rigorous investigative process which prioritises discharge of the statutory role to determine the facts fearlessly and without favour and to explore whether there are feasible ways to avoid comparable, avoidable deaths. This is a necessary incident of the adjudicative process of the coroner's inquest from which all involved should not shrink: the public interest in integrity of fact-finding and the role of coroners in respect of public health and safety must take precedence over consequential distress to parties and witnesses. The challenge for coroners' courts seeking to implement the tenets of therapeutic jurisprudence is to maximise the potential, consistent with securing soundly based findings and constructive recommendations, for high quality coroners' investigations and, in particular, inquests, and to minimise the potential for them to generate counter-therapeutic consequences for parties – to cause foreseeable and avoidable harm.

A crucial aspect of an inquest, which is most likely to achieve such outcomes, is delineation at an early juncture of its parameters and a statement that the focus of an inquest is not upon attribution of blame but upon identification of lessons to be learned. This can be done at a directions or pre-inquest hearing set down prior to the start of the hearing when an investigation is well advanced.[108] It is important that at such a hearing the parties have a proper opportunity to identify the issues with which they contend the inquest should grapple. After hearing submissions, ideally, a coroner will make clear rulings about what will be within and outside the scope of the inquest and clarify the ongoing purpose of the investigative responsibilities of the coroner in the case. Such rulings have the potential to reduce misunderstandings as to the trajectory of an inquest, as well as unhelpful acrimony and adversarialism during an inquest generated by accusatoriness and defensiveness on the part of parties.

They can also reduce the potential for prolongation of an inquest and distraction into matters which may be collateral or even tangential to the issues into which the inquest needs to inquire. This is not to suggest that there should be rigid adherence to such parameters because necessarily an investigation is a fluid process that needs to retain flexibility; the parameters may need to be amended in the course of an inquest as a result of new information that has come to light. However, a process of submissions and ruling about inquest parameters, as well as explication of the purposes of the inquest process, optimises the chances of avoiding cross-examination or final submissions which are directed toward accusations or contentions that will not assist the coroner because they are outside the designated scope of the inquest.

[107] See Brodrick Committee, above n 86; see too *Morris v Dublin City Coroner* [2000] 3 IR 603; *R v Coroner for North Humberside; ex parte Jamieson* [1995] QB 1; JG Norris, *The Coroner's Act 1958: A General Review* (State of Victoria, 1985), 72. See too the Magistrates Court of Tasmania, *Tasmanian Coronial Practice Handbook* (2016), 9 <http://www.magistratescourt.tas.gov.au/about_us/coroners/coronial_practice_handbook> where the purposes and objectives of the coroner's court are usefully identified as to: "identify deceased persons; find out how and why a person died; establish the cause and origin of fires and explosion; learn from experience to help prevent similar deaths occurring; improve our systems of public health and safety; further the administration of justice; allay suspicions and fears; hold public agencies to account for deaths in the State's custody or care; such as police, prisons and health services; investigate in public where appropriate; reinforce the rule of law in democratic societies; and provide quality assurance in the death investigation process."

[108] See J Abernethy et al, *Waller's Coronial Law and Practice in New South Wales*, (Lexis Nexis Butterworths, 4th ed, 2010) 149 (and following) in relation to case management.

Thereafter, a challenge for the presiding coroner is to require substantive adherence to the designated scope of the inquest, in face of attempts to extend, alter and adjust the scope when the grounds for doing so are not made out.

A related issue relates to the extent to which coroners should scrutinise *all* of the circumstances of a death or how a death occurred.[109] The spotlight of a coroner's investigation is apt to identify a range of conduct, only some of which is strictly relevant to what caused a death. A distinction exists not just between foreground and background matters,[110] or causal and non-causal factors. The discriminating yardstick should be that which is logically relevant to findings that a coroner is obliged to make. This means that investigation and the findings that are its outcome should be conducted in a circumscribed way that avoids collateral or merely contextualising matters. An advantage of such an approach is that it avoids ventilation of extraneous facts which have the potential to cause distressing and, ultimately, irrelevant focus upon matters that have no potential properly to be the subject of findings.

As identified above, an increasing focus of inquests is the making of recommendations and comments by coroners. The inference can readily be drawn that such recommendations and comments needed to be made because of deficits in conduct engaged in by entities that were, or at least were given the opportunity to be, interested parties before the inquest. This may or may not be correct but it highlights the need for inquest reasons to be clearly expressed, including when the inquest simply furnishes the opportunity to proffer recommendations or make comments directed toward enhancing public health or safety. In addition, there is much to be said where there is the potential for such a step to be taken by a coroner for a formal opportunity to be provided to affected parties to have input into whether recommendations or comments should be made, and, if so, how they should be framed. Therapeutic jurisprudence has highlighted the counter-productive aspects of the use of coercion or engagement in paternalism.[111] When this is done by the making of recommendations or comments with little or no notice of the intention by a coroner to do so, it tends to create a sense of grievance and thereby reduce the likelihood of constructive responsiveness. When there are such practices, which may be perceived by parties, as punitive or overtly critical, it also tends to militate against an atmosphere in which apologies and concessions will be made. Pointedly, Moore found that 'All of the seventy nine organisations interviewed also reported that they would prefer increased communication, consultation and collaboration with the CSNZ and coroners.'[112] This led her to argue that: '… enhanced consultation and communication between the Coroner's Court and all parties would be therapeutic.' [113]

Generally, it will not be constructive for an inquest to devote time and energy to allocating individual blame in the narrative findings at the conclusion of an inquest. One of the reasons, once again, for such an approach not being helpful is that of its nature it is alienating and

[109] Coroners make findings under s 67(1)(c) of the *Coroners Act 2008* (Vic) about "the circumstances in which the death occurred"; under s 52(1)(c) of the *Coroners Act 1997* (ACT) about "any relevant circumstances concerning the death"; under s 34(1)(v) of the *Coroners Act* (NT) and s 81(1)(c) of the *Coroners Act 2009* (NSW) about "the manner of a death"; under s 45(2)(b) of the *Coroners Act 2003* (Qld), s 28(1)(b) of the *Coroners Act 1995* (Tas) and s 25(1)(b) of the *Coroners Act 1996* (WA) about how the person died"; and under s 11(1) of the *Coroners Act 2003* (SA) and s 57 of the *Coroners Act 2006* (NZ) about the circumstances of the death.
[110] See *Keown v Khan* [1998] VSC 297; [1998] VICSC 83; [1999] 1 VR 69, 76 (Callinan J).
[111] See, for eg, Bruce J Winick, 'On Autonomy: Legal and Psychological Perspectives' (1992) 37 *Villanova Law Review* 1705, 1756; see also Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2nd ed, 2006); cf Frederik Schauer, *Coercion and the Law* (Harvard University Press, 2015).
[112] Moore, above n 38, 205.
[113] Ibid.

thereby reduces the likelihood of institution of remedial and prophylactic measures identified by a coroner as being necessary or at least worthwhile. Occasions where there is potential homicidality or significant personal and culpable contribution to a death will be exceptions. However, for the most part, personal deficiencies in the discharge of responsibility occur within an institutional and systemic context that tends to be a more fruitful focus of investigation and analysis. The health sector has grappled with this for some time in its development of root cause analyses for adverse events.[114] If the aim of the coronial process is conceptualised as risk reduction and behaviour change,[115] there is much to be said for the focus to be on issues other than individual blameworthiness. As Tinkner and Tyler have put it, 'research consistently demonstrates that socializing supportive values and encouraging favourable attitudes not only motivates compliance with the law but promotes voluntary and willing cooperation with legal authorities.'[116]

At a more specific level, a wish articulated by some family members is that the deceased person be portrayed in some pictorial or similar way in the course of proceedings so that the fact that the inquest is about their death is unequivocally clear and present throughout proceedings. In an ordinary adversarial case, no such representation would be permitted but in coroners' courts, on occasions, a photograph of the deceased has been permitted to be placed in the courtroom. There are several options in this regard. In the *Inquest into the Death of Luke Batty*[117] the wish of Luke's mother, Rosie Batty, was that his picture be placed in front of the coroner looking out to the court. Judge Gray, the Victorian State Coroner, permitted Luke's picture to remain for the duration of the inquest in front of the witness box with the result that all asking questions and looking at a witness would see the picture of the deceased. Another option would have been the placement of such a picture in the area of the court opposite the witness box where the attention it garnered would not have been so constant or dramatic. A further option is for a family member to be permitted to hold such a picture when giving evidence and to show it to the coroner in the course of speaking. The issue is how the court can find a compromise between acknowledging that the inquest is about the death of a particular deceased person, who lived a unique and valuable life that perhaps should not have ended as it did, preserving the dignity and objectivity of the process, and avoiding the balance of the inquiry appearing to tip too far in the direction desired by family members who have a particular perspective on how they wish a deceased person to be remembered.

A related wish expressed by some family members has also been to present a video tribute to the deceased in the course of inquest proceedings. Generally, this has not been permitted by coroners on the basis that it would change the nature of proceedings in a way which does not comport with the objectives of a coronial inquest. The problematic analogy in this regard is the drift of the coroner's proceeding from a fact-finding exercise into a memorial or tribute to the deceased.

---

[114] See, for eg, Health Victoria, *Root Cause Analysis (RCA) Statements and Reports* (2015) <https://www2.health.vic.gov.au/hospitals-and-health-services/quality-safety-service/clinical-risk-management/investigation-of-incidents/rca-statements-and-reports>.

[115] For instance, a purpose of the *Coroners Act 2008* (Vic) is prescribed by s 1(c) to be 'to contribute to the reduction of the number of preventable deaths and fires through the findings of the investigation of deaths and fires, and the making of recommendations, by coroners.'

[116] Rick Tinkner and Tom R Tyler, 'Legal Socialization: Coercion Versus Consent in an Era of Mistrust' (2016) 12 *Annual Review of Law and Social Science* 417.

[117] *Inquest into the Death of Luke Batty* [2015] Coroners Court of Victoria (28 September 2015) <http://www.coronerscourt.vic.gov.au/resources/07cc4038-33f8-4e08-83b5-fd87bd386ccc/lukegeoffreybatty_085514.pdf>.

A variant on the visual options referred to above is the wish expressed, and from time to time permitted by coroners, that a close relative of the deceased inform the coroner from the witness box about the background and personality of the deceased and communicate to the court the effect that the death has had upon his or her family. The conceptual genesis of such an aspiration is victim impact statements in the criminal context which both alert the sentencing judge to the effect of criminal conduct upon victims (which is both a reality check and can be relevant to the sentence imposed) and provide family members with a voice in the course of proceedings. Insofar as relatives of the deceased may have information to provide which is pertinent to the fact-finding task of the coroner, their evidence is wholly unexceptionable and has the potential to be therapeutic. However, again, the risk if they are given complete latitude as to what they say and how they say it is that the witness box can be utilised to express particular grievances which may be publicised by the media but which may not advance the task which by statute the coroner is obliged to undertake. The process of uttering aggrievements, traversing matters of evidence in the form of commentary, or ventilating distress may be cathartic and therapeutic for the family member/s but it may be seriously and irremediably damaging for others, as well as unhelpful for the court. In addition, it may redirect the proceedings into a level of emotionality that is not consistent with a dignified, calm or balanced exploration of the factual and policy issues surrounding a death.

In each of these instances, there can be a tension between being respectful and sensitive toward the memory of the deceased and the wishes of grieving relatives, on the one hand, and, on the other hand, adding fuel to an already complex campaign being conducted through the media which seeks to blame individuals or institutions for the death of the person the subject of the inquest. The challenge for the coroner's court is to facilitate the centrality of the deceased person to the inquest process and to enable some measure of latitude for relatives if it has the potential to be therapeutic for them, while maintaining the dignity and integrity of proceedings and avoiding unduly counter-therapeutic consequences for others who may have played some role in the person's death. An option in this regard is the development of a practice whereby counsel assisting an inquest reviews statements to be made by family members to try to avoid difficulties in advance, and the clear stipulation by a presiding coroner that a family member should not trespass into identified proscribed areas and that if they do this may require the recalling of witnesses and result in the family member being cross-examined about new issues that they raise.

A related issue is that there is the potential for it to be constructive and even therapeutic for persons other than family members to articulate the impact that a death has had upon them and the steps that have been taken as a consequence by them and others associated with them as a result of a death. For a court to enable such matters to be said can play a role in defusing unhelpful tensions that can exist in coroners' proceedings and even in enabling rapprochement between interested parties.

This overlaps with the relationship between coroners' proceedings and the involvement of the media. As identified above, coverage of inquest proceedings, as well as findings and recommendations and any responses to them, is fundamental to the efficacy of inquest outcomes. For this reason, some coroners' courts employ the services of a media liaison professional. On occasions, a website for a particular inquest has been generated by a court to

enable public access to what is taking place.[118] However, it is important that securing media coverage does not become an end in itself and that proceedings are not distorted by the desire for a particular kind of coverage to be generated. That is an issue for the parties, but if coroners permit their own courts to have overmuch familiarity with the media or if they have personal contact with its representatives (as some in Australia have done), again there is a risk that perceptions of coronial even-handedness will be eroded and respect for the jurisdiction will be compromised.

Given the interest of the media in the course of an inquest, especially where parties fan such interest by background briefings and 'tip-offs' about evidence which may be particularly reportable, there are particular sensitivities about release of both exhibits and parties' submissions. This is a further area in which there may be conflict between what aggrieved parties may wish and what is both best for the integrity of the inquest and what is fairest for the parties who may be the subject of the aggrievement. A compromise in terms of access was arrived at, for instance, in the Lindt Café Inquest where Michael Barnes, the New South Wales State Coroner, ruled after hearing argument, that the parties' submissions not be published until two clear days after the handing down of findings.[119] A consequence of such a ruling is that the likely focus of media reporting is upon the actual decision of the coroner, rather than upon the arguments and contentions of the parties, although these will be available for scrutiny and ongoing evaluation in accordance with ordinary principles of open justice. There is much to be said for such an approach.

Many coroners' courts make available grief counselling services for family members of deceased persons the subject of report to coroners. Such services are often not funded as extensively as necessary and the need for them is often in excess of the services that budget constraints permit. However, for changes to be made in this regard, it would be constructive, and in keeping with the therapeutic role of coroners' courts, for such services' ambit to be extended so that they could offer assistance to all who have the potential to be affected by coronial investigations. This would recognise the reality that coronial investigations, including inquests, have the potential to exacerbate pathological responses in all of those who have been affected by deaths the subject of investigation by coroners. The risks in this regard include family members but extend well beyond them. Further research into the benefits experienced from the receipt of such services would generate an empirical basis for enhanced funding for them on cost-benefit health grounds.

VII SUMMARY

This article has focused on trauma-informed coronial practice.[120] Its prime contention is that there is a need in the coronial context to service the needs of all participants to investigations by coroners in a humane and empathic way, which provides information, and endeavours to arrive at understanding about what has been responsible (factually and medically) for the

[118] See, for eg, in the Lindt Café inquest between 2015 and 2017: *Inquest into the Deaths Arising from the Lindt Café Siege* (7 October 2016) <http://www.lindtinquest.justice.nsw.gov.au>.

[119] Lindt Café Inquest, *Ruling Re Submission Timetable and Access Restrictions* (7 October 2016) <http://www.lindtinquest.justice.nsw.gov.au/Documents/Ruling-re-siege-segment-submissions-7-Sept-2016.pdf>. The ruling was pursuant to s 74(1)(b) of the *Coroners Act 2009* (NSW).

[120] See Sarah Katz and Deeya Haldar, 'The Pedagogy of Trauma-Informed Lawyering' (2016) 22 *Clinical Law Review* 359, who argue that trauma-informed practice occurs when lawyers put the trauma experiences of clients at the centre of their practice and adjust their practice approach in accordance with the trauma-caused needs of clients. They argue too that trauma-informed practice encompasses legal practitioners employing modes of self-care to counter-balance the effects their clients' trauma experiences may have on practitioners.

occurrence of deaths. The striking findings of the 2011 Sweeney report emphasise that for the most part this should avoid imposition of blame in findings, recommendations and comments because ultimately this is the domain of anger, blame and retribution – issues more appropriately dealt with in criminal and civil litigation. Rather, coroners' investigations have the potential to do something different, something more emotionally sophisticated and something authentically therapeutic because they do not involve winners and losers in adversarial contests. They can enable closure of grief and a perception that a constructive outcome has been extracted from tragedy by creating the conditions for healing and resolution, by identifying ways to reduce the likelihood of future deaths, and by laying the groundwork for apologies and shared sadness, rather than accusation and antagonism.

The argument of this article is that to accomplish such outcomes, more must be done than to extend sympathy, forensic flexibility and latitude to one party in coronial inquests, family members. It requires the creation of a culture of sensitivity to the hurtful sequelae of sudden, unexpected and unnatural fatalities, recognising the distress and potential damage that can be done by coroner's investigations to many persons who are affected by such deaths.

The article has chronicled and welcomed the contribution of therapeutic jurisprudence to recognising that, in spite of the therapeutic potential of inquisitorial coroners' courts, family members too often have been adversely affected by coronial procedures that have been experienced as insensitive, process driven, legalistic or opaque.

However, it has proceeded to argue that a balanced approach to coroners' investigations informed by principles of therapeutic jurisprudence should acknowledge that persons other than family members of a deceased person have the potential also to be deleteriously affected in important ways. Those the subject of negative publicity, or findings, recommendations or comments that impute instrumentality or culpability in respect of deaths the subject of coronial investigation can be affected psychologically, vocationally and reputationally in ways which are not easily remediated. Their interests should be incorporated in the complex admixture of considerations that impact upon how investigations, inquests and courts' counselling services are constructed, triaged and dispensed. This can be facilitated by measures such as clarification of the parameters of inquests at an early juncture, reduction of stress-inducing delays, incorporation of third parties in processes of information receipt during investigations, and creation, where possible, of a non-blaming environment that enables the making of concessions and apologies, without the fear of retributive consequences within and beyond the coronial framework. On occasions, such an environment may draw upon processes and options of non-adversarial justice when dealing with dilemmas driven by emotions predictably resultant from the trauma of unexpected death.

There is a need for improved sensitivity to the plight of family members as they participate in coronial processes, especially in a context in which media coverage of inquests on occasion is evolving into public campaigns. So too is there a need for balance so that the reality and the perception can be that the interests of all participants in the coronial process are incorporated in the dispensing of justice and the minimisation of counter-therapeutic consequences from coroners' investigations. Further empirical research into the needs of parties, both family members and others, would provide an evidence-based opportunity for recalibration of coronial approaches and, potentially, a strong ground for enhanced funding for coroners' counselling services so that they can be provided comprehensively to those who suffer in the aftermath of reportable deaths.

QUT Law Review
Volume 16, Issue 3, pp. 30-49.
ISSN: Online- 2201-7275
DOI: 10.5204/qutlr.v16i3.678

LOOKING AT HAWAII'S OPPORTUNITY WITH PROBATION ENFORCEMENT (HOPE) PROGRAM THROUGH A THERAPEUTIC JURISPRUDENCE LENS

LORANA BARTELS*

This article examines Hawaii's Opportunity with Probation Enforcement (HOPE) program through the lens of therapeutic jurisprudence (TJ). The article presents an overview of TJ and solution-focused courts, followed by an overview of HOPE, including findings from four evaluations. It then provides a detailed description of recent observations of HOPE in practice, with particular focus on the warning hearing, sanctions for non-compliance, early termination for good behaviour, and the intersections between TJ, HOPE and procedural justice. The article concludes by arguing that there are a number of misunderstandings about HOPE and that it is best understood when viewed through a TJ lens.

I INTRODUCTION

The Hawaii's Opportunity with Probation Enforcement ('HOPE') program is an intensive supervision program that was conceived of by Judge Steven S Alm in 2004, which he then developed with Probation Section Administrator Cheryl Inouye.[1] Since then, the program has been positively evaluated. It (as discussed below) has also received extensive media attention, including articles in the *New York Times*[2] and *Wall Street Journal*.[3] In addition, it has received a number of awards. For example, the John F Kennedy School of Government at Harvard University included HOPE as one of the 25 programs in its 2013 Innovations in American Government Award competition.[4] The program has been replicated across the United States ('US'), where it is currently operating in 160 jurisdictions. It should be noted that Alm recently retired from judicial office to take on a new role, based in Washington DC, as a legal consultant to the states, US Department of Justice and Congress on the implementation of HOPE.[5] It is

* Lorana Bartels (BA, LLB, LLM (University of NSW), PhD (University of Tasmania), GDLP (College of Law) GCTE (University of Canberra)), Associate Professor and Head, School of Law and Justice, University of Canberra; Honorary Associate Professor, University of Tasmania. Email: lorana.bartels@canberra.edu.au. I am indebted to Steven Alm and Dr Anthony Hopkins for their comments on an earlier version of this article.

[1] See Steven Alm, 'HOPE Probation and the New Drug Court: A Powerful Combination' (2015) 99 *Minnesota Law Review* 1665; Institute for Behavior and Health (IBH), *State of the Art of HOPE Probation* (2015).

[2] Jeffrey Rosen, 'Prisoners of Parole', *New York Times Magazine* (online), 8 January 2010 <http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html>.

[3] Mark Schoofs, 'Scared Straight...by Probation', *Wall Street Journal* (online), 24 July 2008 <http://www.wsj.com/articles/SB121685255149978873>.

[4] The program also received the American Judicature Society's Special Merit Citation Award in 2007 and the Outstanding Criminal Justice Program Award from the National Criminal Justice Association in 2014, while Judge Alm received the McGovern Award from the Institute of Behavioral Health (IBH) for the most promising drug policy idea of the year in 2009 and was named Hawaii Jurist of the Year by Chief Justice Mark Recktenwald in 2010: see Lorana Bartels, 'Swift and Certain Sanctions: Is It time For Australia To Bring Some HOPE into the Criminal Justice System?' (2015) 39 *Criminal Law Journal* 53.

[5] Chad Blair, 'Judge Steve Alm Is Taking His Message Of 'HOPE' To DC', *Honolulu Civil Beat*, 2 September 2016 <http://www.civilbeat.org/2016/09/hawaiis-steve-alm-is-taking-his-message-of-hope-to-dc>.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

anticipated that the program in Hawaii will continue as before, with the new judicial officer in charge of the court having received extensive training from Alm before he left the bench.

The model has also sparked interest in Australia, due in part to a visit by Judge Alm in August 2015. This prompted the then Northern Territory Attorney-General to commit to a pilot program modelled on HOPE.[6] The final report of the National Ice Taskforce, released in December 2015, recommended that:

> The Commonwealth Government should work with at least one state or territory government to pilot a Swift and Certain Sanctions programme for ice offenders on probation, drawing on lessons learned from implementing these models in the United States, including the Hawaii Opportunity Probation with Enforcement Project trial in Hawaii.[7]

In response, the Council of Australian Governments agreed that the Northern Territory will 'pilot the Swift, Certain and Fair Sanctions model and share the results with other jurisdictions'[8]. In addition, the Australian Capital Territory Government has established a working group to consider, *inter alia*, the feasibility of adopting a 'swift, certain but fair program', with specific reference to HOPE.[9]

In March 2016, the Victorian Royal Commission into Family Violence handed down its report, which included the recommendation that '[t]he Sentencing Advisory Council report on the desirability of and methods for accommodating "swift and certain justice" approaches to family violence offenders in Victoria's sentencing regime [within 12 months]'.[10] The Victorian Government accepted all of the Royal Commission's recommendations and, in September 2016, the Victorian Attorney-General asked the Sentencing Advisory Council to 'provide him with advice on the desirability of, and methods for accommodating, "swift and certain" approaches to family violence offenders within Victoria's sentencing regime'.[11]

HOPE is currently undertaking a pilot program with family violence offenders, but most of its focus has been on offenders with substance abuse issues. In fact, Webster[12] recently described HOPE as an 'alternative drug court model'. Fisher[13] has also discussed HOPE in the context of drug courts, with a focus on aspects of HOPE that she suggested should be incorporated into

---

[6] Katherine Gregory, 'NT Attorney-General Calls For US HOPE Program of Swift and Certain Sanctions to Deter "Knuckleheads" From Reoffending', *ABC News* (online), 17 August 2015 <http://www.abc.net.au/news/2015-08-17/john-elferink-calls-for-us-hope-program-to-deter-offenders/6703492>.

[7] National Ice Taskforce, *Final Report of the National Ice Taskforce* (Commonwealth of Australia, 2015) xiii (Recommendation 30).

[8] Council of Australian Governments, *National Ice Action Strategy* (Commonwealth of Australia, 2015) 25.

[9] The author is a member of this working group.

[10] Royal Commission into Family Violence, *Report and Recommendations* (State of Victoria, 2016) Recommendation 83.

[11] Victorian Sentencing Advisory Council, 'Latest News: Council Receives Terms of Reference for Swift and Certain Approaches to Family Violence Sentencing' (Media Release, 12 September 2016) <https://www.sentencingcouncil.vic.gov.au/news-media/news/council-receives-terms-reference-swift-and-certain-approaches-family-violence>. Although the Royal Commission's recommendation and reference to the Sentencing Advisory Council did not explicitly mention HOPE, it is clear from the Royal Commission's report and informal discussion with the Chair of the Council that HOPE will be considered as part of this research.

[12] Molly Webster, 'Alternative Courts and Drug Treatment: Finding A Rehabilitative Solution for Addicts in a Retributive System' (2015) 84 *Fordham Law Review* 855, 858.

[13] Caitlinrose Fisher, 'Note: Treating the Disease or Punishing the Criminal?: Effectively Using Drug Court Sanctions To Treat Substance Use Disorder and Decrease Criminal Conduct' (2014) 99 *Minnesota Law Review* 747, 760.

drug court processes. There was no discussion, however, on the ways in which HOPE itself adopts features of drug courts or solution-focused courts more generally.

To date, most of the discussion on HOPE has been on its swift, certain and fair sanctions, and the effectiveness of deterrence as a crime prevention tool.[14] However, there has been minimal consideration of HOPE through the lens of therapeutic jurisprudence ('TJ'), or examination of its operation as a solution-focused court. This is particularly surprising, given that Judge Alm was also in charge of the adult drug court in Hawaii's First Circuit from March 2011 to September 2014 (ie, after he established HOPE, but clearly demonstrating his understanding of and commitment to TJ and solution-focused courts). Interestingly, Judge Alm has stated his 'belief that drug courts provide the very best program that the judiciary has to offer in terms of supervision: better than probation-as-usual and better than HOPE Probation'.[15] As will be seen, however, HOPE has the potential to reach far more participants than drug courts.

This article seeks to fill this gap in the literature. First, it will present a brief introduction to TJ and solution-focused courts. It will then provide an overview of how HOPE works, followed by some key evaluation findings. The article then draws on recent court observations and discussions[16] to present a detailed insight into HOPE's operation, with particular attention to the role of Judge Alm in supporting participants' success on HOPE. The article will conclude with some comments on this program, when viewed through a TJ lens.

II TJ AND SOLUTION-FOCUSED COURTS

The concept of TJ 'focuses attention on the…law's considerable impact on emotional life and psychological well-being' and sees the law as 'a social force that can produce therapeutic or anti-therapeutic consequences'.[17] This approach 'directs the judge's attention beyond the specific dispute before the court and toward the needs and circumstances of the individuals involved in the dispute'.[18] In addition, it 'tries to …look carefully at promising literature from psychology, psychiatry, clinical behavioral sciences, criminology and social work to see whether those insights can be incorporated or brought into the legal system'.[19] As Stobbs[20] has observed, there are an increasing number of specialist criminal courts – variously known as problem-solving, problem-oriented or solution-focused courts[21] – that make use of TJ practices. Generally speaking, they seek to facilitate and support participants to act as

[14] See, eg, Angela Hawken and Mark Kleiman, *Managing Drug-Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (National Institute of Justice, 2009); Daniel Nagin, 'Deterrence in the Twenty-first Century' (2013) 42 *Crime and Justice* 199; Cecelia Klingele, 'What Are We Hoping For? Defining Purpose in Deterrence-Based Correctional Programs' (2015) 99 *Minnesota Law Review* 101. See also Bartels, above n 4.

[15] Alm, above n 1, 1688.

[16] This research has approval from the Human Research Ethics Committee of the University of Canberra (HREC15-264).

[17] Bruce Winick and David Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press, 2003) 7.

[18] David Rottman and Pamela Casey, 'Therapeutic Jurisprudence and the Emergence of Problem-solving Courts' (1999) 240 *National Institute of Justice Journal* 12, 14.

[19] David Wexler, 'Therapeutic Jurisprudence: An Overview' (2000) 17 *Thomas M Cooley Law Review* 125, 127.

[20] Nigel Stobbs, *Mainstreaming Therapeutic Jurisprudences and the Adversarial Paradigm – Incommensurability and the Possibility of a Shared Disciplinary Matrix* (Unpublished PhD Thesis, Bond University, 2013) 2.

[21] For discussion of the implications of different terminologies, see Michael King, *Solution-Focused Judging Bench-book* (Australasian Institute of Judicial Administration, 2009) 3-5.

autonomous change agents in their lives, by helping them deal with the issues that cause them to offend, in order to reduce the likelihood of re-offending. According to Blagg,[22] these courts act as a 'hub' to connect various 'spokes' – such as drug and alcohol treatment agencies, community-based corrections, probation services and domestic violence agencies – forming a holistic and integrated approach. Although there are differences in how these courts operate, they usually have the following features:

- *case outcomes*—working on tangible outcomes for defendants, victims and society;
- *system change*—seeking to re-engineer how government systems respond to problems, such as drug and alcohol dependence and mental illness;
- *judicial monitoring*—active use of judicial authority to solve problems and change defendants' behaviour;
- *collaboration*—engaging government and non-government partners (eg social service providers and community groups) to reduce the risks of re-offending; and
- *non-traditional roles*—for example, altering aspects of the adversarial court process, as well as ensuring defendants play an active role in the process.[23]

A key aspect of such courts is the rapport the judge establishes with program participants. Indeed, Winick and Wexler suggested that forming a meaningful close personal relationship between drug court participants and the judicial officer is 'more important than the substance of therapies and sanctions', because it creates an 'ethic of care'.[24] This is confirmed by the recent finding that NSW Drug Court participants who formed a closer bond with the judicial officer had lower rates of substance use. This led the authors to conclude that the judge 'appears to be crucial to the … rehabilitation process. The formation of strong interpersonal bonds that appears to underpin this effect is consistent with the therapeutic jurisprudential principles upon which drug courts are based'.[25]

A number of aspects of HOPE point to its solution-focused nature. For example, it involves a non-adversarial and collaborative approach, with monthly meetings between the judicial officer, probation supervisors, and the researchers from the Hawaii Attorney General's Office. Court staff and defence counsel also have frequent communication with local drug treatment providers. In addition, most of the government funding allocated to the program is dedicated to drug treatment. The program also employs judicial authority to help change defendants' behaviour, while defendants are encouraged to speak directly to the court. To date, however, there has been little focus on these aspects of the HOPE program. Instead, the emphasis – both by proponents and critics – has been on its deterrence aspects, namely, the swift, certain and fair sanctions imposed for breaches. This and other features of HOPE will be explained below.

---

[22] Harry Blagg, *Problem-oriented Courts* (Law Reform Commission of Western Australia, 2008).

[23] See Lorana Bartels, 'Challenges in Mainstreaming Specialty Courts' (Trends and Issues in Crime and Criminal Justice No 383, Australian Institute of Criminology, 2009), citing Greg Berman and John Feinblatt, 'Problem-solving Courts: A Brief Primer' (2001) 23 *Law and Policy* 23 125; Arie Freiberg, 'Problem-oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11 *Journal of Judicial Administration* 8; Jelena Popovic, 'Court Processes and Therapeutic Jurisprudence: Have We Thrown the Baby Out with the Bathwater?' (2006) 1 *eLaw Journal (Special Series)* 60; Michael King et al, *Non-Adversarial Justice* (Federation Press, 1st ed, 2009). See also King, above n 21, Chapter 1.

[24] Winick and Wexler, above n 17, 17. See also Brian MacKenzie, 'The Judge Is the Key Component: The Importance of Procedural Fairness in Drug Treatment Courts' (2016) 52 *Court Review* 8.

[25] Craig Jones and Richard Kemp, 'The Strength of the Participant-Judge Relationship Predicts Better Drug Court Outcomes' (2014) 21 *Psychiatry, Psychology and Law* 165, 165.

III WHAT IS HOPE?

One of the principal evaluators of HOPE, Angela Hawken, has described the program as follows:

> [it] relies on swift and certain, but modest, sanctions to improve compliance. The probationers are warned in open court that if they violate probation rules they will immediately go to jail. During this warning hearing, probationers are assigned a color. Probationers are required to call a hotline each weekday morning to hear whether their color is being called for a random drug test that day. Random drug testing occurs at least six times a month for the probationer's first two months in the program (testing frequency is reduced in response to good performance). If probationers test positive, they are arrested immediately. If they fail to appear for the test or violate other terms of probation, an arrest warrant is issued immediately. Violators are sentenced to a short jail term, typically a few days. Repeat offenders are ordered into drug treatment.[26]

It should be noted that although HOPE participants may be ordered into drug treatment, they can also request it themselves.[27] Another crucial aspect is that, unlike in drug courts, participants are only brought back to court in the event of breach. As a result, this model is suitable for supervising large numbers of participants, with a single judge able to supervise around 2000 participants in the program concurrently.

A *The Warning Hearing*

On their first day in the program, the judge gives a 'warning hearing' in open court. This functions as an induction ceremony, with the judge addressing each participant individually and emphasising that he (or she) – and everyone else in the courtroom – is keen to see them succeed on the program.[28] The way the program works is explained in detail and participants are given ample opportunity to clarify any issues. The judge explains that he or she cannot control the participant's actions, but can control his or her own actions, and that participants can accordingly count on a sanction for *every* violation. Expectations for the program are made clear, with the judge explaining the four sanctions currently in operation.

Judge Alm[29] has stressed the importance of the warning hearing in the defendants' success, adding:

> I have had many defendants later tell me that that was the first time that anyone told them that they wanted them to be successful. It also helps to set a positive tone for the warning hearing, which is after all their first day in HOPE Probation, and the start of my relationship with each defendant.

---

[26] Angela Hawken, 'Lessons from a Field Experiment Involving Involuntary Subjects 3,000 Miles Away' (2012) 8 *Journal of Experimental Criminology* 227, 228. See also Hawken and Kleiman, above n 14; Bartels, above n 4; Lorana Bartels, 'Swift and Certain Sanctions: Does Australia Have Room for HOPE?', *The Conversation* (online), 17 June 2015 <https://theconversation.com/swift-and-certain-sanctions-does-australia-have-room-for-hope-40158>.

[27] See Bartels, above n 4, for discussion.

[28] IBH, above n 1, 4, 13. A sample warning hearing (as it was then delivered) is available in Hawken and Kleiman, above n 14, 56–58.

[29] Email from Steven Alm to Lorana Bartels, 6 January 2015, cited in Bartels, above n 4, 54.

Warning hearings are conducted in groups of up to 10–12 participants. According to observations by Hawken and Kleiman,[30] 83 per cent of warning hearings took less than 15 minutes. Judge Alm has advised that providing the warning in groups 'makes efficient use of court time. Second, it sends the message to all of the probationers that they are being treated just like their fellow probationers. They are not being singled out and can expect to get consistent treatment in the future'.[31]

B *Consequences of Non-Compliance*

A key – and much discussed – feature of this model is that the consequences of non-compliance are laid out clearly in advance. The following forms of conduct are treated as a violation:

- admitting to drug or where relevant, alcohol use;
- testing positive to drug use; and
- missing a drug test or appointment with a probation officer.

If participants are required to undertake substance abuse treatment, failure to participate satisfactorily will also be treated as a violation. Sex and domestic violence offenders are also required to satisfactorily participate in treatment and sex offenders are not to have contact with their victims.

Where a violation is alleged (for example, for participants who have returned a positive urine test), the judge asks them whether they waive their right to test the evidence. Alternatively, participants have the legal right to contest the motion alleging a breach. In such circumstances, witnesses (for example, a drug tester or probation officer) are called and cross-examined and the judge determines if the prosecution has made out its case. In nearly every case, however, participants do acknowledge they have violated the terms and conditions of their probation and waive their right to test the evidence. This is perhaps unsurprising, given that there is clear evidence of their misconduct (eg, a positive drug test). According to Judge Alm, there were around 30 contested hearings between HOPE's inception and 2015. Furthermore,

> In the thousands of other hearings, the probationers have taken responsibility for their behavior, admitting to the violation of probation and proceeding to sentencing. This has been true even if the probationers will be sent to prison. They know that at that point they have had multiple chances and that it was their own behavior and choices that led to that result.[32]

The sanctions model adopted indicates there is less concern about ongoing drug use than participants' willingness to take responsibility for their actions. The rationale for this is as follows:

> Although every violation of HOPE Probation has a consequence, sanctions are less severe when the offenders take responsibility for their actions. In this way, HOPE Probationers are encouraged to be honest about their behaviors, including, in particular, substance use behaviors.[33]

[30] Hawken and Kleiman, above n 14.
[31] Email from Steven Alm to Lorana Bartels, 6 January 2015, cited in Bartels, above n 4, 54. See also Hawken and Kleiman, above n 14, 36–37.
[32] IBH, above n 1, 14.
[33] Ibid 48.

As set out in the *State of the Art of HOPE Probation* manual compiled in 2015 by Judge Alm, Cheryl Inouye and others, [34] the following sanctions are currently in operation:

- *cell-block sanction* (ie, a few hours in a cell at the court-house): this sanction applies where the participant misses an appointment or drug test, but promptly turns him/herself in and tests negative. It can be deferred to a short time later, to enable participants to make appropriate work and/or childcare arrangements;
- *2-day jail sanctions*: this applies where a participant returns (i) a positive drug test, but admits to use or (ii) misses a drug test or appointment, but turns him/herself in, tests positive and admits use;[35]
- *15-day jail sanctions*: these are imposed in circumstances where the participant misses a probation appointment or drug test and delays reporting (on the basis that it is assumed that they used drugs and are waiting for them to clear out of their system). This sanction also applies where the participant returns a positive drug test (which is subsequently confirmed by further testing), but denies use or fails to provide a urine sample within 30 minutes of attending the testing clinic (which is assumed to be evidence of denial about drug use). The first time this occurs, participants may be permitted to serve this period on five consecutive weekends if they are in regular employment; and
- *30-day jail sanctions* apply where the participant absconds or tampers with the drug-testing procedure.

The sharp escalation in the severity of the response is designed to encourage participants 'to be honest about their behaviors, including, in particular, substance use behaviors'.[36] Again, the judge makes this clear in the warning hearing. It should be noted that the program initially involved increased sentence length for subsequent positive drug tests,[37] but this has now been modified. Accordingly, participants will receive the same response for their first positive (admitted) test as for all subsequent such tests.[38] However, where there are multiple instances of ongoing substance abuse, the probation officer and judge will use this as an opportunity to review the participant's need for and/or level of drug treatment. Importantly, repeatedly returning a positive drug test and/or failing to complete drug treatment does *not* result in the participant being terminated from the program or being sentenced to prison for the entire sentence (which may be 10 or even 20 years long). On the other hand, repeatedly absconding from probation will result in a prison sentence.

On the face of it, the emphasis is clearly on deterrence and the consequences of violation. In practice, however, a more TJ-oriented picture emerges and there is a significant focus on supporting participants through the process of living drug- and crime-free lives.

---

[34] Ibid 48–50.

[35] It should be noted that, as the HOPE court only sits from Tuesday to Friday, participants who test positive on Thursday or Friday will be held in custody until the following Tuesday (ie, five or four days respectively, rather than two calendar days for those who test positive on a Monday, Tuesday or Wednesday). This is made clear in the warning hearing.

[36] IBH, above n 1, 48.

[37] See Hawken and Kleiman, above n 14; Angela Hawken et al, *HOPE II: A Follow-up to Hawaii's HOPE Evaluation* (National Institute of Justice, 2016).

[38] IBH, above n 1. An experienced former drug court judge criticised this aspect for its failure to distinguish between 'someone who has been in treatment a week and uses gets the same punishment as someone who has been clean for 6 months'. Nevertheless, she suggested that the program 'does deserve a place on the spectrum–just not instead of drug courts'. Alm would doubtless concur: see text accompanying fn 15.

C *Early Termination*

The possibility of *early termination* was not initially a feature of the program, but now functions as a strong incentive for '[m]any probationers [who] can visualize being fully compliant for two years, enabling them to stick to the terms and conditions of probation and subsequently be released early'.[39] As the judge explains in the warning hearing, probation in Hawaii usually runs for four years. However, if participants can go for two years without any violations (other than cell-block sanctions, which are ignored for this purpose), then they can apply to have their probation terminated. This is not only beneficial to the individual, but has system benefits, as it reduces caseloads and gives probation officers 'more time to work with probationers who are having problems and are in most need of probation supervision'.[40] At present, this approach is not available to sex offenders, due to their longer treatment requirements, but they are able to request early termination upon successful completion of their sex offender treatment. By 2015, more than 100 early terminations had been granted 'and not a single one has been arrested since'.[41] While early termination of probation is available on probation-as-usual, it is rarely used. Although the reasons for this are not clear, this may be because HOPE probationers are more carefully monitored, and so those who are performing well are more easily identified by the defence and/or probation officers.

IV EVALUATIONS OF HOPE

There have been four evaluations of HOPE released and this section presents the key findings from those evaluations.[42]

A *Integrated Community Sanctions Units ('ICSU') Evaluation*

The ICSU evaluation examined a pilot stage of HOPE involving adults supervised by the ICSU, a specialised unit dealing primarily with high-risk offenders on probation. The study examined outcomes for 940 HOPE participants and 77 controls subject to standard probation. Although both groups were intended to be comparable in terms of risk factors, in practice, higher-risk offenders (as measured by a higher baseline level of drug use and missed appointments) were assigned to HOPE. Table 1 sets out the key findings for participants' positive drug tests and missed probation appointments over the three months before the program started and after three months on the program. This indicates significant decreases for HOPE participants, compared with increases for the control groups. After six months, far fewer HOPE participants returned positive drug tests (4% vs 19%) or missed an appointment (1% vs 8%).

Table 1: ICSU evaluation findings – three months before and after program commencement

	HOPE (n=940)	Control (n=77)
Positive drug tests	53% > 9% 82% *decrease*	22% > 33% 50% *increase*
Missed probation appointments	14% > 4% 71% *decrease*	9% > 11% 22% *increase*

[39] IBH, above n 1, 57. See also Hawken et al, above n 37, 41–43.
[40] IBH, above n 1.
[41] Ibid; Alm, above n 1, 1682.
[42] For more detail, see Hawken and Kleiman, above n 14; Bartels, above n 4; Hawken et al, above n 37.

Over the 12 months on HOPE, 61 per cent of participants did not return a single positive drug test, while 20 per cent only returned one positive urine sample. In addition, 70 per cent of participants did not miss a single drug test and 16 per cent missed one appointment. Combining these violations indicated that 52 per cent of participants had no violations and 26 per cent had one or two violations. Furthermore, the proportion of participants who violated their conditions got progressively smaller, suggesting that the experience of short prison sentences can be an effective deterrent in certain circumstances.[43]

The ICSU evaluation also examined revocations and incarceration. This indicated that HOPE participants had a much lower probation revocation rate than the control group (9% vs 31%) and were sentenced to only 37 per cent of the prison time of the control group.

B *RCT Evaluation*

A further evaluation of HOPE was funded by the National Institute of Justice ('NIJ') and the Smith Richardson Foundation, and was also conducted by Hawken and Kleiman.[44] By the time of this evaluation, HOPE was being used for about one-sixth of the Honolulu probation population.

Two-thirds (n=330) were randomly assigned to HOPE and the remainder (the control group, n=163) were placed on probation as usual. After 12 months, participants in the HOPE program, when compared with the control group, spent 48 per cent fewer days in prison (138 vs 267 days). They were also:

- 55 per cent less likely to be arrested for a new crime;
- 53 per cent less likely to have their probation revoked;
- 72 per cent less likely to test positive for illegal drugs; and
- 61 per cent less likely to miss appointments with their probation officers.

C *Process Evaluation*

Hawken and Kleiman[45] also conducted a process evaluation after HOPE had been in operation for over four years. They found that the program was implemented largely as intended and sanctions were delivered swiftly and with certainty. In addition, probation staff, probationers and defence lawyers were enthusiastic about the program. Prosecutors and court employees, by contrast, were less pleased with the program, with court staff reporting increased workloads. Hawken and Kleiman commended the economical use of treatment, noting that the program can therefore handle a large number of clients with limited treatment resources, while delivering intensive treatment to those who need it.

Over 60 per cent of surveyed HOPE probationers felt positively about the program, ranging from 62 per cent for those who had been imprisoned for violations to 76 per cent of ICSU participants (where probation officers had lower caseloads). Surveys also found that participants 'consistently identified the [HOPE] process as fair'.[46] Finally, anonymous surveys conducted with 167 HOPE participants in the community found that 96 per cent responded affirmatively to the question 'Does the regular random drug testing help you avoid drug use?',

[43] See Bartels, above n 4.
[44] Hawken and Kleiman, above n 14.
[45] Ibid.
[46] Ibid 38.

while nearly 90 per cent of participants surveyed in prison (that is, those who had been sanctioned for violating their probation, who might be assumed to be less enthusiastic about it) agreed that the program was helpful in reducing drug use and improved their lives in other ways (for example, family relationships).

D *Long-term Evaluation*

In April 2016, Hawken and others released the long-awaited findings of a further evaluation of HOPE participants.[47] This study followed up the original participants from the ICSU evaluation for 10 years and the participants from the RCT evaluation for over six years (76 months). This study included both data on offenders' performance and probation officers' perceptions.

Although the methodological limitations (including small sample size) of the ICSU follow-up were acknowledged, this study found that HOPE participants had an average of 0.2 new charges after 10 years, compared with an average of 0.8 new charges for the control group. For the RCT groups, the control group had an average of 1.1 charges at follow-up, compared with 0.9 new charges for HOPE participants; the control group was also more likely to have multiple charges (29% vs 21%). In addition, HOPE participants were less than half as likely to have a new drug charge (0.12 vs 0.27) or be returned to prison (13% vs 27%).

The findings of this evaluation led Hawken et al to observe that:

> (1) the better outcomes in HOPE versus [probation as usual] persist to a large degree in some measures, (2) modest sanctions can be effective in a HOPE probation program, and (3) fidelity of implementation can decline once implementation is routine.[48]

V OBSERVATIONS OF HOPE IN PRACTICE

This section draws on my observations of HOPE in January 2016, together with discussions with Judge Alm, court staff, probation officers, drug testing staff, drug treatment providers, defence counsel[49] and a former graduate of the program. These observations demonstrate the extent to which HOPE implements the key concepts of drug courts and solution-focused courts more generally, especially the integral role of the judicial officer. As Burke and Hueston have noted, the 'positive impact that one caring judge can have upon defendants under his or her supervision is remarkable'.[50]

King has explained that 'in solution-focused judging, the judicial officer deliberately seeks to promote two-way communication, a dialogue helpful to both judicial officer and participant'.[51] Overall, I observed over 80 matters in my two days in court and found that Judge Alm consistently demonstrated the kind of judicial communication that is seen as a hallmark of solution-focused courts.[52] In particular, King noted that problem-solving judicial officers commonly praise participants for good performance in relation to some aspect of their

[47] Hawken et al, above n 37.
[48] Ibid 67.
[49] The prosecutor generally assigned to HOPE was on sick leave during my visit.
[50] Jamey Hueston and Kevin Burke, 'Exporting Drug Court Concepts to Traditional Courts: A Roadmap to an Effective Therapeutic Court' (2016) 52 *Court Review* 44, 47.
[51] King, above n 21, 121.
[52] See, eg, ibid, Chapters 5 and 6.

program.[53] There was a very high frequency of remarks such as 'Good work!', 'I'm impressed!', 'Wow, you're doing a really good job!', 'What awesome work', 'You can do this!', and 'I think you're going to go great on this'.

King also pointed to '[i]ndividualised consideration [a]s a hallmark of therapeutic judging in problem-solving courts. The judicial officer takes a keen interest in each participant'.[54] The effort Judge Alm made to develop a personal rapport with each participant emerged clearly.[55] For example, he asked them where they lived and chatted about aspects of their lives (such as favourite sports teams or comments about what they were wearing). There was a genuine interest in and concern for the participants' well-being, including questions about their housing situation, medication, and mental health. In one warning hearing, a participant (who had been led in from custody with two other men) appeared to be transgender. Before proceeding, Judge Alm asked the participant how she would like to be addressed, and called her 'Miss' thereafter, in accordance with her stated preference, although the official record noted her status as male.

In addition, Judge Alm showed an awareness of practical matters impacting on participants' lives. For example, if participants had missed appointments with their probation officer, he asked how they kept track of events (eg, 'so, how are you going to remember that? Do you put it in your phone or in a calendar, or what?'). If they didn't have a good routine, he handed them a pocket diary and had a short discussion about how to get into better habits with keeping records. I observed one participant with brain trauma, to which he attributed missing his appointment. When provided with this information, Judge Alm engaged in detailed discussion about how he could improve managing events in his schedule. Another participant had arrived at court to find that the friend who was going to give him a lift to a drug treatment clinic was not there. The judge explained the bus route he would need to take, telling him, 'it's disappointing when we rely on people and they let us down, but you're here now, so we'll give you a map and two bus tickets, so you can get yourself there and back again. Ok, well, I wish you the best'.

As further evidence of Judge Alm's close relationship with participants in the program, I noticed when I walked with him to lunch near the courthouse that a number of people standing in and near the court precinct greeted him enthusiastically. He responded to each one in a friendly way and confirmed to me that they were HOPE participants. The same thing happened when we visited the Salvation Army drug treatment facility – residents greeted him in the halls and waved to him as we walked past. I was struck by the genuine warmth with which they said 'hi Judge, how's it going?', and the equally warm nature of his engagement with them. The Chief Executive Officer of another drug treatment facility in Hawaii likewise noted recently that when her clients 'see Judge Alm walk through the door, their eyes light up and they all have the same look of pride and accomplishment, each saying, "Look at me, judge. I did it. I'm not going back to jail."'[56]

Judge Alm also workshopped strategies to help participants stay on track. Some examples of this included him asking participants: 'what are you going to do if you run into your old buddies? I would strongly urge you to say "hi guys, bye guys", and just go on your way,

[53] Ibid 179.
[54] Ibid 37.
[55] This approach reflects the strategies proposed by King for developing a rapport with participants: ibid 157–158.
[56] See Abby Paredes, as cited in Blair, above n 5.

because I am pretty sure you can't stay clean if you're around people who are using'. Another common theme was to remind participants, 'remember, it's people, places, things and situations that trigger a relapse, so what's the plan for dealing with them?'[57] or 'so, you're going to get that surfboard and get out in the waves next time you feel that urge to use, huh?'.

Judge Alm showed me a sample of the file notes[58] he kept on each participant, and he used these to refer to past experiences (eg 'last time I saw you, we agreed that you were going to check out the outpatient clinic. So, what happened then?'). This approach is particularly important, given the large number of participants in the program. It also helped to contribute to the sense of rapport Alm developed with participants, even when they failed to abide by the program's rules (eg, 'you're a nice guy, but this is the fourth time we're going through this. I'm kind of getting of sick of seeing you here and I bet you're sick of seeing me, too').

I met with a former HOPE participant during my visit to Hawaii, who credited the program with saving his life. He said: 'before HOPE, I had low self-esteem, but Judge Alm taught me to believe in myself. He believed in me, so I could too'.[59] Significantly, he had been a drug user for several decades prior to participating in HOPE and had served many prison sentences. By the time I spoke to him, he had not used drugs for four years, was completing an undergraduate degree and investigating options for graduate study. He told me:

> [The judge] is like your parent.[60] It's like how I tried to raise my child. He taught me about consequences and rewards…Without HOPE, I think I'd still be using drugs. The monitoring, the calling. Probation had to come first, before family, work, study. I just got my life in order…I don't have any criticism. I think it's a great program. He's really encouraging. I never got praise like this in my life. He makes it really easy for us to get into that mode of success...HOPE is the best…He makes you want to change your behaviour.

Other former HOPE participants have expressed similar sentiments:[61]

> In the beginning it's rough. Every addict, every alcoholic comes with the intention of beating the system. That's just the way we're wired, yeah? And as soon as you get over that, they find out that this program is here to save your life. And it does. It saves your life. I see a person that I'm supposed to have been all this time. Yeah. I see a whole new man. So I'm just gonna keep doing what I'm doing, and, uh, I put 110% behind HOPE program.
>
> They have faith in you. They not only make it harder for you to use because of the hotline but HOPE Probation also gives you a chance to want to get a life. It's the best program in the world. This program is designed to help anybody who wants to help themself [sic]... It saved my life'.
>
> If you cannot love yourself, then the program, or your probation officer, or the judge will love you until you can love yourself. I started to experience that. I really felt that...HOPE helped me. It helped me change. Become more honest. Keep me in check.

It should be noted that although I had read these statements prior to seeing HOPE in action, I found it hard to reconcile them with the literature on the swiftness and certainty of the

[57] See King, above n 21, 167–169, for discussion of goal-setting.
[58] See King, ibid, 140 in relation to judicial officers referring to information from previous court appearances, and the use of file notes to aid with this, 159.
[59] See King, ibid, 164–166, for discussion of how courts can help promote participants' self-efficacy.
[60] See also Paredes, as cited in Blair, above n 5, who described Judge Alm's positive impact on her clients as his 'daddy effect'.
[61] Alm, above n 1, 1674.

sanctions. My observations of HOPE, by contrast, served to highlight its caring nature, and the participants' comments therefore make more sense in this light.

The three features of HOPE discussed above will now be considered in more detail.

A *The Warning Hearing*

At the beginning of the warning hearing, the judge addressed each participant individually and confirmed the pronunciation of their name (eg, 'Good morning Mr X. Is that how you say it?'). He also asked participants how they travelled around Hawaii, and demonstrated an impressive knowledge of the area, commenting on local factors, such as bus routes, real estate prices, landmarks and so on. If participants were unfamiliar with the area, he handed them a map and explained the best way to get around (eg, 'that's right nearby, you can just walk here. You know the car dealership on the corner of X Street? You just turn right there, go a few blocks').

In addition, he asked each participant in turn when they had last used drugs or alcohol and their preferred drug(s) of choice. He then told them that they would be drug tested immediately after the hearing. Statements about recent drug use were delivered without any judgement (eg,'just tell your probation officer what you told me, that you used two days ago, and what you used'), while one participant's statement that she had been sober for 18 days was met with 'good for you!'. If participants are honest about their recent drug use, they are not arrested that day (ie, their first day in the program) if they test positive. As Judge Alm explained to me, this is only fair, as they would not have realised they would be tested on arriving at court. In addition, on probation-as-usual (which many HOPE participants would have experienced previously), there is typically no incarceration sanction for a positive drug test. However, HOPE participants who test positive are not allowed to drive home from the courthouse if they brought their car.

One participant I observed admitted he had smoked marijuana the night before and had medical documentation to support him continuing to do so. Somewhat to my surprise, the judge was unfazed, noting simply, 'maybe you have an old sporting injury or something. Well, if your doctor sends me a letter saying that's the best thing for you, if it helps you, then we'll say that's ok'. In the meantime, he explained that the drug testers would get a baseline level of his use levels, and future tests would be measured against that.

Participants are explicitly told in the warning hearing that everyone wants them to succeed on probation (for example, 'we're trying to help you succeed', 'we just want you to be successful with this'.)[62] They are also encouraged to take responsibility for their actions. This was evidenced by statements such as: 'if you want to succeed on this, you can!' It should be noted that research indicates that positive expectations by someone in authority (eg, teachers, employers) can promote improved performance in those about whom such attitudes are held (eg, students, employees).[63] Other statements in this context included: 'we all screw up some times, but the more honest you are about that, the better', and 'You guys are adults. Think through your choices'. As Schoofs has observed, 'in court, Judge Alm seems less the law-and-order hard-liner than the basketball coach he once was, giving his probationers pep talks'.[64] For example, I observed him telling new participants:

[62] King, above n 21, 132, has suggested that using 'we' can promote a sense of collaboration and the sense that participants are supported by the court team.
[63] Ibid 163.
[64] Schoofs, above n 3. King, ibid, 30, described the role of solution-focused judges as a 'coach', while mainstream courts seem them as the 'arbiter'.

> Look, I get that this is hard. You might run into your old buddies and start using. You might think 'hey, I've screwed up, I'd better stay away', but that's the worst thing you can do, because then I have to send police officers out looking for you. I would much rather they were patrolling my neighborhood or your neighborhood than serving warrants. If you screw up, but admit it, it's two days [behind bars]. Then you're straight back into the program, you can get back to work with your probation officer on dealing with your issues. If you go on the run and you're wasting our time and not taking responsibility, then its 30 days. If you do it more than once, it might even mean longer, or the whole term of the sentence, which could be five years, 10 years, even longer.

The judge sometimes also added words to the effect of 'some of you may have done probation before and think you know how this works, but this program is different'. In addition, he referred to the research on HOPE, eg 'we've had people look at this program, and what we know is that people who do HOPE, they reoffend less often and they spend less time in prison. We think that's good for everyone'.

The mood in court was warm and friendly, with the occasional joke.[65] Judge Alm paused in his delivery if participants had a question, and encouraged them with comments such as 'good question, Mr Smith', 'I'm glad you asked that, Maria', and 'did anyone else want to check something?'. He also made a point of thanking others, for example, if a family member had driven the participant to court. One participant also held up his hand to speak, stating: 'I just wanted to thank you, thank you for giving me the chance to do this'.

B *Consequences of Non-compliance*

During my time in court, I witnessed several examples of each of the four sanctions currently in operation. When issuing a cell-block sanction, Judge Alm typically said words to the following effect:

> I see that you were late, but you called your probation officer, you came in as soon as you could, and you tested negative. You made a good choice, because you showed us that you weren't using, it was just that your boss wanted you to work late [or your car wasn't working, the bus didn't come etc]. Good job!

Where the participant has returned a positive drug test, the judge presented it as a (relatively) positive event if s/he admitted to use, with comments to the following effect: 'Ok, I can see you used, but you did the right thing. You owned up to it straight away. I get that this is hard, and we all screw up from time to time, but the main thing is that you handled it responsibly', or 'I'm not happy that you used, but you handled it well. Good for you'. If relevant, Judge Alm added a comment such as:

> Wow, you sure handled this differently from last time. Remember, last time, you said you hadn't used and maybe thought it would come back from the lab negative [or we had to go and serve that warrant on you], but this time you just admitted it straight away. Well done!

This model provides encouragement not only for those individuals before the court, but also reaffirms to others in the courtroom that how they deal with relapses is regarded as far more important than the fact of the relapse itself. In particular, statements such as 'it's really hard to quit, we get that' acknowledge that relapse is 'a natural part of the process'.[66]

---

[65] See King, above n 21, 132, for discussion of the use of humour to lighten spirits and place a situation into a more human perspective.

[66] King, ibid, 154, 160.

Some of the comments I observed in the context of 15-day sanctions being imposed (ie, where the participant returned a positive drug test and this was then confirmed by laboratory analysis, but the participant had denied use) were: 'look, you're not 18 anymore, you can be honest with yourself' and 'it's magical thinking, that the test is somehow going to turn negative on the way to the lab. If you know you've used, then it's best to own up to that'.

I observed one case where a participant asked for some time in the community to help his partner do some renovations around the house, adding 'I know I owe you guys [some time in custody]. I would be very grateful if you could give me 48 hours to sort out some things. I want to show you I can make adult decisions'. I expected the judge to grant this, but he instead ordered the time to be served immediately, explaining:

> Look, I understand you want to help out at home, but I'm worried you're going to have one last blast – that's human nature. I'm not going to undo all that's happened. I know you're not happy with me about this, but sometimes we don't get what we want. We get what we need.

I also witnessed a number of cases where participants had absconded. In such circumstances, Judge Alm reiterated: 'you can do this, but you've gotta not run when you mess up'. Other comments in such cases included: 'you're trying to run your own show. That is unacceptable', 'I'm a big believer in second chances. But I'm also a believer in accountability', 'I'm not perfect, you're not perfect, but when you run away, you're kind of saying you aren't a good candidate for community supervision', and 'my trust level is down here'. In one instance, Judge Alm told a participant, 'we had to see your handsome face on Hawaii's Most Wanted!' (a program run by Crimestoppers, which features images in the media of people who have absconded from court, including HOPE probationers). The participant hung his head and responded with 'sorry about that. I promise I won't run away again'. In another case, Judge Alm asked, 'what's with the running away?', to which the participant responded, 'I just lost it'. He explained that he had a wife and three children, including a new baby. His wife spoke up from the back of the courtroom, provoking laughter. The judge took this in and said, 'look, we will keep working with people, if you just admit what you've done. Do I have your word you won't run again?'

Judge Alm continued to treat participants with respect even in cases involving repeated absconding. As he advised me, he does not generally 'give up' on HOPE participants (ie, discontinue them from the program) and send them to prison for a multi-year sentence, just because they continue to use drugs, but rather for their failure to take responsibility for their actions, principally by continuing to abscond. One participant had absconded repeatedly and already served several 30-day terms as a consequence. The matter was listed as a motion to revoke probation. The participant made a heartfelt plea to the judge ('If you can just give me another chance, I will come out a better person'). However, the judge explained clearly that they had already been through this, he had warned him on the previous occasion that any further absconding (as opposed to positive drug tests) would result in the participant being required to serve the 'open term' (that is, the full term of the sentence), and so he had no choice but to proceed with that. Accordingly, he ordered the term of 10 years to be put into effect. Again, this was done without fuss: 'It doesn't mean you're a bad guy, but you keep running away. You know that I said last time that if you ran away again, you'd go to prison. When I tell someone something, I follow through with it. Best of luck in the future'. Over the morning recess, the public defender told me he was surprised about this outcome, but acknowledged that the participant had had ample warning on previous occasions.

In another case I observed, a participant begged to be 'given one more chance', adding, 'I will do right by you'. She had been released from custody to attend a treatment clinic, but had instead absconded and used drugs. She cried in court and told the judge that her children were being minded interstate. In spite of this, the judge remained firm. He reiterated that she had made a 'bad choice' by not attending the treatment clinic and that her children would not benefit from her actions. He accordingly ordered her to serve six months in custody, which was presumably the length of the prison sentence which she had originally received.

Judge Alm was also implacable in another case involving a woman in tears, albeit with the opposite result. In that case, the participant begged Judge Alm to 'just give me the open term' (ie, she wanted to serve the full prison sentence for her offences). He observed: 'you're a good talker. We have been through this before', acknowledging that five bench warrants had been issued and 'your probation officer wants to give up on you'. Nevertheless, he decided not to order her to serve the full sentence, and instead relisted the matter for three weeks hence. She was therefore only required to serve the intervening period in custody, and he exhorted her to use this time to reflect on her ongoing substance abuse issues. It might be inferred that Judge Alm considered that requiring this participant to serve the full sentence would be a less effective means of getting her to engage with her ongoing substance abuse issues than continuing to engage her in the program, in spite of her apparent difficulties with it. This and other examples I observed also demonstrate Judge Alm's understanding of research that shows treatment is more effective in the community than in the artificial custody environment.

C *Early Termination*

The potential for participants' probation to be terminated early is not a common feature of the mainstream justice system, but is a very tangible form of one aspect of solution-focused courts, namely, rewards. The behavioural research suggests that change is most consistent when positive behaviour is rewarded.[67] When I visited, Judge Alm indicated that he was granting three or four early terminations a week, and I observed two such cases. As with drug court graduations,[68] there is something of a celebratory note to such events, although Judge Alm conceded the potential to formalise this process and make it more of a special event. Nevertheless, the congratulatory tone was clear to everyone in the courtroom. In one of the early terminations I observed, the judge made a point of reading out some comments from the participant's probation officer, in the following way:

> I just want to tell you what your probation officer said about you. She said you were a model client, compliant, cooperative, and taking responsibility for your past mistakes. This is great! You should really feel good about this! I have to congratulate you. You have done really well!

Interestingly, the other case involved a participant whose early performance on the program had been fairly poor, including several instances of absconding. As Judge Alm noted, 'you really turned things around. You ran away a few times, but then you tried a few things. You're overcoming the challenges in your life'. He commended the participant on his excellent performance at college ('So, you're still maintaining that 4 point GPA? That's great!') and they discussed his plans for the future. The participant explained that, other than studying, he was mostly a home dad. As he joked, his life was now about doing the dishes, doing his study, and

[67] See Hueston and Burke, above n 50.
[68] King, above n 21, 159, 181–182.

getting his kids ready for school (to which Judge Alm responded 'you're being a great role model for your son, you know'). He then said:

> I want to say thank you for this opportunity. It's really changed my life, my outlook on life. My whole way of being. I lived with the philosophy of hiding what I really felt. It's been an amazing two years. It's helped me build my self-esteem and confidence. And I now want to help other people.

D *TJ, Procedural Justice and HOPE*

Tyler's work on procedural justice and judicial legitimacy indicates that compliance with the law increases when people trust the legitimacy of the institutions that enforce the law.[69] Although there has been little explicit consideration of HOPE through a TJ lens, the nexus with procedural justice has been examined in relation to both TJ and HOPE. For example, Kaiser and Holtfreter recently observed that TJ 'places such a strong emphasis on how legal actors can directly influence rehabilitation of offenders that it seems a natural companion to procedural justice and judicial legitimacy'.[70] Alm, in turn, has stated: 'I believe HOPE is procedural justice in action. In HOPE, we strive to be clear, transparent and predictable. Probationers are treated like adults'.[71] He has also asserted that:

> We are also convinced that one of the chief reasons HOPE works as well as it does, is that the probationers feel they are being treated fairly... the rules are being enforced consistently and proportionately, and probationers are thus more likely to buy into the program.[72]

In her recent commentary on HOPE, Klingele considered the issue of procedural justice in some detail.[73] In particular, she questioned this aspect of HOPE, noting that:

> [w]hile HOPE administrators may speak respectfully and impose the same punishment on everyone, if they offer probationers no meaningful opportunity to explain the reasons for their violations—to hear from probationers about the ways in which their life challenges may be affecting their ability to comply with the mountain of conditions to which they are subject—they are unlikely to retain legitimacy in the eyes of those subject to sanction.[74]

Later, she asserted that '[w]hen the only questions relevant to the court are whether a violation occurred and what amount of custody should be imposed as a result, probationers lose the ability to tell their story and have it meaningfully considered by the judge'.[75] This argument is valid, but it appears that Klingele may not have observed HOPE in practice, because

---

[69] See, eg, Tom Tyler, *Why People Obey The Law* (Princeton University Press, 2006).

[70] Kimberly Kaiser and Kristy Holtfreter, 'An Integrated Theory of Specialized Court Programs: Using Procedural Justice and Therapeutic Jurisprudence to Promote Offender Compliance and Rehabilitation' (2016) 43 *Criminal Justice and Behavior* 45, 48. See also Gill McIvor, 'Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts' (2009) 9 *Criminology and Criminal Justice* 29; King, above n 21, 28–30; Hueston and Burke, above n 50; David Wexler, 'Guiding Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence' (2016) 1 *International Journal of Therapeutic Jurisprudence* 367.

[71] Alm, above n 1, 1681.

[72] Email from Steven Alm to Lorana Bartels, 6 January 2015, cited in Bartels, above n 4, 59.

[73] Klingele, above n 14, 126–130.

[74] Ibid 128. It is beyond the scope of the present article to address Klingele's observations on HOPE and desistance (at 118-121, 126, 133) in detail, but these should also be viewed in the context of the observations of and comments about HOPE set out above. In relation to Klingele's comments about motivational interviewing (at 132), it should be noted that this is a feature of all probation in Hawaii (ie, both probation as usual and HOPE): see Bartels, above n 4, for discussion.

[75] Klingele, above n 14, 130.

participants *are* provided with significant opportunity to speak in court and explain what happened. In fact, Alm has explained that in order for HOPE to work, '[j]udges must first be willing to engage with the probationers in court. Talk to them. Listen to them. Let them know the judge cares about them'.[76] He added: '[i]f a judge is not willing to continually engage with and encourage and talk to the probationers about their thinking, their choices, and the resulting consequences, this is not the right program for that judge'.[77]

In one case I observed, the participant explained his recent drug use in the following way: 'I feel ashamed of myself. I go to work every day, then one day, out of nowhere, it's holidays…I guess it's more about me building sober support. I am trying, Your Honor'. The judge responded: 'This is hard. I know'. He acknowledged the participant's wife and child in the courtroom, and reminded the participant that 'they want you in their life, but they want you sober'. [78] The prosecution opposed the judge's proposed ruling that the participant be given credit for time served, instead calling for the six-month prison sentence to be put into effect. However, the judge did not grant this, telling the participant: 'I listened to the way you're handling it'.[79]

In another instance, a participant explained that he had tried a particular drug rehabilitation program previously and didn't like its approach. The judge then engaged in a discussion about his substance abuse patterns, which programs he had tried previously, which ones he liked or disliked and why, and made his ruling on the basis of this information.

One participant I witnessed in court, who had returned a positive drug test and secured a place in an outpatient drug clinic, freely acknowledged his issues: 'I'm willing to turn myself in. I tell you the truth. I have a drug problem and I'm fighting my addiction every day. I accept my wrongdoing'. Another participant volunteered 'I am an alcoholic' and acknowledged he needed treatment. A discussion then ensued between the participant, the public defender and the judge about what treatment services were available and what would be best in the circumstances. Yet another participant admitted his violation, telling the judge: 'It is what it is. I've got no excuse'.

Klingele has suggested that, '[i]n its best form, [compliance] indicates that a probationer is taking responsibility for his past wrongs and present conduct'.[80] My observations would seem to be examples of this. However, she also suggested that compliance can be because the participant 'has been cowed into submission, [or] is temporarily and superficially acquiescent'.[81] My observations in court – including the warning hearing, which 'identifies the probationer as a morally responsible agent'[82] and the dialogue between participants and the judge – did not appear to point to this. The IBH has also suggested that:

> While HOPE often serves as an external motivator initially ('I don't want to go to jail'), many offenders later experience the rewards of a clean and sober lifestyle, thereby impacting their values and intrinsic motivation. For example, they now find rewards in being good role models

[76] Alm, above n 1, 1676. See generally Hueston and Burke, above n 50, 45.
[77] Alm, above n 1, 1677. See also King, above n 21, Chapter 6.
[78] King, above n 21, 132, has suggested that using 'we' can promote a sense of collaboration and the sense that participants are supported by the court team.
[79] For discussion of judicial listening skills in this context, see King, above n 21.
[80] Klingele, above n 14, 126.
[81] Ibid.
[82] Hawken and Kleiman, above n 14, 36.

> for their children, having stable employment and money in their pockets, and having long-term, meaningful relationships.[83]

In this context, further research is required on participants' perspectives and their reasons for complying (or failing to comply) with HOPE, and the implications of this for long-term desistance.

Klingele also stated that 'HOPE does not accommodate the mentally ill'.[84] By contrast, the *State of the Art of HOPE Probation* manual asserts that the program facilitates participants' referral to mental health treatment and improves their compliance because they understand HOPE's 'clear and fair rules'.[85] Furthermore, it suggested that this model works 'works well for offenders with serious mental illness because it is not based on the offenders agreeing that they have an illness and need treatment but instead insists on compliance with treatment as a condition of their release'.[86]According to Judge Alm, defence lawyers involved with HOPE believe it is very effective with their clients in this context. Further research on this aspect of HOPE would also be beneficial.

VI CONCLUSION

The HOPE program has won significant acclaim across the US and the model is now starting to be adopted in Australia. The evaluation results have been described as 'spectacular'[87] and 'dramatic',[88] while Hawken et al recently observed:

> More than a decade since the launch of HOPE, the 'Alm Effect' that we see is less the widespread adoption of the particular design of HOPE in Hawaii but rather the growing willingness to consider bold innovations to address nagging failures in corrections.[89]

Proponents have touted its swift, certain and fair sanctions model and cited it as evidence of the effectiveness of deterrence.[90] On the other hand, critics such as Cullen, Manchak and Duriez have derided its apparent adherence to a model they perceive as ineffective, and for failing to consider the factors relevant to offending.[91]

This article has sought to add to our understanding of HOPE, and how and why it works, by examining it through a TJ lens. It emerges from my research, however, that there are a number of misconceptions about what HOPE is – and what it is not. In fact, Alm has indicated that

---

[83] IBH, above n 1, 10.
[84] Klingele, above n 14, 125.
[85] IBH, above n 1, 64.
[86] Ibid.
[87] Mark Kleiman, 'Substituting Effective Community Supervision for Incarceration' (2015) 99 *Minnesota Law Review* 1621, 1627.
[88] Klingele, above n 14, 113.
[89] Hawken et al, above n 37, 71.
[90] See eg Hawken and Kleiman, above n 14; Mark Kleiman, Beau Kilmer and Daniel Fisher, 'Response to Stephanie Duriez, Francis Cullen and Sarah Manchak, 'Theory and Evidence on the Swift-Certain-Fair Approach to Enforcing Conditions of Community Supervision' (2014) 78 *Federal Probation* 71.
[91] See Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism* (Minnesota Legal Studies Research Paper 13-51 (2013); Stephanie Duriez, Francis Cullen and Sarah Manchak, 'Is Project HOPE Creating a False Sense of Hope? A Case Study in Correctional Popularity' (2014) 78 *Federal Probation* 57; Francis Cullen, Sarah Manchak, and Stephanie Duriez, 'Before Adopting Project HOPE, Read the Warning Label: A Rejoinder to Kleiman, Kilmer and Fisher's Comment' 78 *Federal Probation* 75.

proponents' emphasis on the effectiveness of the deterrence model underpinning the program has (perhaps inadvertently) served to obscure its focus on rehabilitation.

My observations indicate that there is significant reason to feel hopeful about this program. Specifically, it exhibits many features of solution-focused courts and adopts most of the key components of drug courts.[92] In addition, Alm displayed the qualities the National Drug Court Institute[93] described as the necessary skills for a drug court judge: he is a leader, communicator, educator, community collaborator and institution builder. Cullen, Manchak and Duriez have expressed their concern about HOPE's popularity and urged policy-makers and judicial officers to 'read the warning label'.[94] However, this article argues that any such label should also make it clear that 'this product is solution-focused and contains therapeutic jurisprudence'.

VII ADDENDUM

A special issue of *Criminology & Public Policy* entitled 'HOPE Collection' was published as this article was going to press. This included the findings of a randomised controlled trial evaluation of a program closely based on HOPE in four sites in the US. This much-anticipated study indicated that the HOPE approach was no more effective than standard probation in terms of reduced recidivism.[95] In addition, the special issue included commentary from Alm,[96] Kleiman,[97] Hawken[98] and Cullen et al.[99] The full implications of these findings and analyses remain to be seen, but they do not detract from the observations in this article. In particular, only one of the papers[100] made any reference to therapeutic jurisprudence.

[92] See Douglas Marlowe and William Meyer (eds), *The Drug Court Judicial Benchbook* (National Drug Court Institute, 2011) 217.
[93] Ibid 48.
[94] Kleiman, Kilmer and Fisher, above n 90.
[95] Pamela Lattimore et al, 'Outcome Findings from the HOPE Demonstration Field Experiment: Is Swift, Certain, and Fair an Effective Supervision Strategy?' (2016) 15 *Criminology and Public Policy* 1103.
[96] Steven Alm, 'HOPE Probation: Fair Sanctions, Evidence-Based Principles, and Therapeutic Alliances' ' (2016) 15 *Criminology and Public Policy* 1195.
[97] Mark Kleiman, 'Swift–Certain–Fair: What Do We Know Now, and What Do We Need to Know?' (2016) 15 *Criminology and Public Policy* 1185.
[98] Angela Hawken, 'All Implementation Is Local' (2016) 15 *Criminology and Public Policy* 1229.
[99] Francis Cullen, Travis Pratt and Jillian Turanovic, 'It's Hopeless: Beyond Zero-Tolerance Supervision' (2016) 15 *Criminology and Public Policy* 1215.
[100] James Oleson, 'HOPE Springs Eternal: New Evaluations of Correctional Deterrence' (2016) 15 *Criminology and Public Policy* 1163.

QUT Law Review ISSN: Online- 2201-7275
Volume 16, Issue 3, pp. 50-67. DOI:10.5204/qutlr.v16i3.669

THERAPEUTIC PRACTICE THROUGH RESTORATIVE JUSTICE: MANAGING STIGMA IN FAMILY TREATMENT COURT

SUZANNA FAY-RAMIREZ*

Family Treatment Court manages parents with current child protection cases and co-occurring addiction to drugs and/or alcohol and is an example of a growing number of problem centred courts that utilise the principles of therapeutic jurisprudence and restorative justice to process cases. An 18-month study of a Washington State Family Treatment Court reveals that the potential harmful stigma of 'bad parent', 'addict' and 'offender' are managed through interactions between the courtroom treatment team and court clients. Findings show how court interactions and practice bring restorative justice into the mainstream court system by managing the stigma associated with justice system supervision. Lessons learned from Family Treatment Court provide important consideration for mainstreaming therapeutic and restorative practice into the courtroom and the examination of interactions between court clients and courtroom personnel demonstrate how to translate stigma management from theory into practice.

I INTRODUCTION

The last twenty years of legal and criminological research has been dominated by recognising a punitive trend in court adjudication, sentencing, and incarceration across multiple aspects of the criminal and civil justice system.[1] The War on Drugs has been an influential factor in increased incarceration rates and punitive sentencing policies[2], but it is the stigma associated with justice system processing, after sentencing has been served, or judicial supervision has been completed that might have the biggest impact on the wellbeing and behaviour of offenders or court clients.[3] For parents in the child protection[4] system, multiple stigmas of 'bad parent', 'deviant' and often 'addict' must be managed as they navigate family reunification.[5]

Therapeutic jurisprudence ('TJ') is the study of how systems of justice influence behavioural outcomes and emotional wellbeing. When court clients have positive interactions with the courtroom workgroup, it instils trust and fairness in the legal system, and clients are more likely

* Suzanna Fay-Ramirez PhD (University of Washington); Lecturer, The University of Queensland, School of Social Science.

[1] See Barry Feld, 'The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions between Rhetoric and Reality' (1990) 36(4) *Crime & Delinquency* 443; Katherine Beckett and Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (Sage Publications, 2004).

[2] See generally Beckett and Sasson, above n 1.

[3] See generally John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989); Harold Garfinkle, 'Conditions of Successful Degradation Ceremonies' (1057) 61(5) *The American Journal of Sociology* 420.

[4] In the USA, where the data for this research was taken, the term 'child dependency' is used for matters of child abuse and neglect cases. In this paper, I adopt the more common Australian term 'child protection cases' for the Australian readership.

[5] Suzanna Fay-Ramirez, 'Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms Over Time' (2015) 40(1) *Law and Social Inquiry* 205–236.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

to comply with the law and the direction of the court.[6] This means that courtroom interactions can have a potential therapeutic effect (positive) or anti therapeutic effect (negative) where positive interactions increase compliance and more favourable long term outcomes[7]. Evaluations of drug courts that are utilizing the therapeutic approach suggest that these outcomes include longer periods of drug and alcohol sobriety, lower reoffending rates, as well as increased family stability in child protection cases.[8] Despite this success, the translation of the theoretical concept of stigma management to courtroom practice is under studied and remains abstract. This study seeks to expand the understanding of stigma management in the courtroom, its usefulness as a therapeutic tool, and potential for maximising beneficial courtroom outcomes.

Understanding the use and importance of stigma in courtroom settings has become a dominant aspect of Restorative Justice in theory and in practice.[9] The theory of Restorative Justice focuses on repairing the harm caused by criminal or deviant behaviour.[10] The process of Restorative Justice involves a range of stakeholders who cooperatively meet to discuss the harm caused and how it can be repaired and prevented in the future.[11] Restorative approaches are consistent with the therapeutic approach because they both emphasise the use of the legal system to heal criminal behaviour, victimisation and prevent future offending. While restorative practices are a tool that can be used to manage stigma, much of the evidence that documents how stigma management is implemented is based on diversionary justice programs that occur outside of the regular courtroom environment.[12] This study seeks to examine how a particular court designed to use restorative practices as a therapeutic approach is able to manage the multiple stigma that child protection clients face as they are processed by the court.

Analysis is based on an in-depth case study of a Family Treatment Drug Court ('FTC') in Washington State USA, an example of a drug dependency court. Observations of open and closed court sessions over a period of 18 months are used to examine how the FTC manages stigma associated with FTC clients such as 'bad parent', 'addict', and in some cases, 'offender'. This examination will highlight the tools used by the courtroom to illicit compliance with court orders by attempting to manage stigma and therefore is an attempt to translate stigma management from theory into practice.

Australia, one of the early adopters of problem solving courts, continues to implement problem solving practices, restorative processes, and therapeutic ideals as a way to deal with growing concerns of drug and alcohol abuse and rising crime rates.[13] Evaluations of the Australian and

---

[6] David Wexler and Bruce Winick, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996); Tom Tyler, *Why People Obey the Law* (Princeton University Press, 2006).
[7] See generally Tyler, above n 6.
[8] Rebecca Tiger, *Judging Addicts: Drug Courts and Coercion in the Justice Syste*m (New York University Press, 2013); Robert Wolf, 'Fixing Families: The Story of the Manhattan Family Treatment Court' (2000) 2 *Journal for the Centre of Families, Children and the Courts* 5; Ginger Wren, 'Mental Health Courts: Serving Justice and Promoting Recovery' (2010) 19 *Annals of Health Law* 577.
[9] See Braithwaite, above n 3.
[10] Ibid.
[11] John Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38(2) *Criminal Law Bulletin* 244.
[12] See Robert Yazzie and James Zion, 'The Punitive Necessity of Waiver' in Jeffery Fagan and Franklin E Zimring (eds), *The Changing Boarder of Juvenile Justice* (University of Chicago Press, 2000). See also Nathan Harris and Jamie Burton, 'Rehabilitation in America: The Philosophy and Methods from Past to Present' in Ido Weijers and Anthony Duff (eds), *Punishing Juveniles: Principles and Critique* (Hart Publishing, 2002) 67–90.
[13] Ari Freiberg, '*Australian Drug Courts*' (2000) 40 *Criminal Law Journal* 1; Toni Makkai, 'The Emergence of Drug Treatment Courts in Australia' (2002) 37(12-13) *Substance Use & Misuse* 1567.

American experience of these problem-solving courts suggest that they reduce recidivism for criminal offenders[14] and reunify families in the child protection system.[15] Though these courts are not without criticism,[16] evidence that highlights the positive outcomes of these therapeutic approaches may indicate increasing uptake of the problem solving method in Australia and around the world. Australia recently implemented a FTC in the State of Victoria in order to manage parents with active child protection cases and co-occurring drug and alcohol addiction issues. The increasing attention to these courts underscore the need for an evidence based understanding of how these courts operate and contribute to a legal movement that seeks to do no harm and recognise the therapeutic potential of the law.

A *Stigma and Justice System Involvement*

The idea that stigma is harmful in perpetuating the behaviour it represents has long been important to the study of deviance.[17] Early labelling theorists[18] suggested that once a negative label is applied to an individual in reaction to their behaviour, it becomes part of the individual's identity. When that label persists, the negative behaviour becomes more likely. While TJ and restorative justice are not strictly labelling theories or approaches, the concept of stigmatisation and the labelling process is linked to the goals and values of the therapeutic and restorative approach. Braithwaite's[19] conceptualisation of stigma is directly related to *how* someone experiences justice and *how* the concept of stigma is used to process individuals in the justice system via their interactions with the courtroom workgroup.

Public labeling of individuals as 'criminals' or 'offenders' by way of interacting with the justice system has documented links to negative long terms outcomes particularly for the most vulnerable offenders as they re-enter society after judicial supervision or incarceration has ended.[20] Individuals labelled as offenders have difficulty finding jobs, stable housing, making and maintaining contact with their families as the stigmatisation of their justice system involvement becomes difficult to shed.[21] Early social scientists[22] have argued that the process of the justice system itself is the mechanism where those deviant labels are applied; the traditional court system publicly stigmatises and degrades offenders without offering the support or tools to make amends for their behaviour or opportunity to re-enter society as anything other than a deviant.[23] Therefore, the court system itself and the way it is experienced become integral not only to the potential therapeutic benefit of justice system processing, but longer term behavioural outcomes also.

---

[14] Ojmarrh Mitchell et al, 'Assessing the Effectiveness of Drug Coutts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts' (2012) 40 *Journal of Criminal Justice* 60.
[15] Fay-Ramirez, above n 5.
[16] See Makkai, above n 13.
[17] See generally, Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, 1963). See also Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice Hall, 1963); Edwin Lemert, *Social Pathology* (McGraw Hill, 1951).
[18] Ibid.
[19] Braithwaite, above n 3.
[20] Garfinkle, above n 3.
[21] Devah Pager, 'The Mark of a Criminal Record' (2003) 108(5) *American Journal of Sociology* 937. See also Rocio Alvarez and Maria Loureiro, 'Stigma, Ex-convicts and Labour Markets' (2012) 13(4) *German Economic Review* 470.
[22] Ibid 13.
[23] Garfinkle, above n 3; John Braithwaite and Stephen Mugford, 'Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders' (1994) 34(2) *British Journal of Criminology* 139.

Restorative and therapeutic approaches to justice are becoming increasingly popular in justice system practice and rhetoric,[24] but there is much debate about the realistic definitions of stigma, the labelling process, and what this would look like in practice.[25] Despite this debate, problem solving courts continue to emerge as an innovative court model. This trend is in part driven by increasing recognition that individuals that come through the criminal, juvenile and civil (family) court system often have co-occurring issues such as mental health or addiction issues that need to be addressed in order to motivate behavioural change. Problem solving courts utilise TJ as an orientation to courtroom interactions and decisions[26] and extensive research shows that these courtrooms have better long-term outcomes for their clients than their traditional courtroom counterparts.[27] The extent to which these courtrooms are able to manage stigma is currently undocumented but it is also the place where we might expect to see stigma management in action.

B *The Therapeutic Approach*

TJ has been academically defined as a way to understand 'the extent to which the legal rule or practice promotes the psychological and physical wellbeing of the people it affects'.[28] As such, TJ is a tool for understanding how applications of the legal system influence individuals and case outcomes. Traditional legal applications are seen as formal and mechanical, and therefore indifferent to how applying the law might have consequences for those that are subject to it.[29] Therapeutic practices aim to apply the law while keeping in mind the potential consequences of how that law is applied. This could involve a broad range of different practices, but often include taking into account the context and individual circumstance of the behaviour, offering support for treatment of addiction and mental health issues, and more frequent supervision by court personnel. Existing research documents the informal nature of the therapeutic courtroom,[30] its goal to help the individual rather than deal exclusively with the offence committed, and an orientation to punishment that is less punitive but in proportion to the deviant behaviour. These distinctions place a premium on the interactions that take place in the courtroom and can be used to examine and understand how stigma management can be translated from theory to practice.

Therapeutic courts like drug courts, mental health courts, and family treatment courts have experienced significant successes in securing better outcomes for court clients in comparison to their traditional courtroom counterparts. For example, a study of a Baltimore City Drug Court found that recidivism was significantly reduced because of client participation in court hearings and increased social control surrounding each case, as well as increased perceptions

[24] See Tiger, above n 8. See also Harris and Burton, above n 12.
[25] Allison Morris, 'Shame, Guilt and Remorse: Experiences from Family Group Conferences in New Zealand' in Ido Weijers and Anthony Duff (eds), *Punishing Juveniles: Principles and Critique* (Hart Publishing, 2002). See also, Thomas Scheff, 'A New Durkheim' (1990) 96(3) *The American Journal of Sociology* 741, and Gabriele Taylor, 'Guilt, Shame and Shaming' in Ido Weijers and Anthony Duff (eds), *Punishing Juveniles: Principles and Critique* (Hart Publishing, 2002) 179–92.
[26] Fay-Ramirez, above n 5.
[27] See Mitchell Downey and John Roman, *A Bayesian Meta-Analysis of Drug Court Cost-Effectiveness* (Crime Policy Institute, 2010); Sarah Picard-Fritsche et al, *The Bronx Family Treatment Court 2005–2010: Impact on Family Court Outcomes and Participant Experiences and Perceptions* (Centre for Court Innovation, 2011).
[28] Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder (1995) *Psychology, Public Policy and Law* 193, 196.
[29] Peggy Fulton Hora, William Schma and John Rosenthal, 'Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America' (1999) *Notre Dame Law Review* 74.
[30] Ibid 5.

of fairness and legitimacy of the court. Similar results have been found across a range of problem solving court evaluations.[31]

Fay-Ramirez, Baar and Soloman suggest that problem solving courts run the risk of not being able to maintain the overall therapeutic aims of TJ given the complex nature of cases and the resources and supervision needed to manage court clients and their complex needs.[32] However, the advantages to the therapeutic approach are undeniable.[33] Stigma management may be part of why problem solving courts enjoy success but very little empirical work has been done to understand how this is accomplished.

C *Restorative Justice as a Therapeutic Tool*

Recent shifts in the profession of law emphasise the potential for applications of law to have a healing effect. [34] This legal movement includes a range of different lenses, processes, and tools that recognise the legal impact on the emotional, psychological and physical wellbeing of all individuals when they experience the law and the justice system.[35] These may include TJ, Restorative Justice, procedural justice, and collaborative processes more generally.[36] These approaches to law and its implementation share a number of commonalities that all align with the general aim of TJ; to do no harm and offer therapeutic benefit where appropriate. Therefore, the theoretical lens used here suggests that problem solving courts are utilising tools, practices and values central to the restorative justice process which work towards recognising the potentially therapeutic effects of the law.

Criminologist Braithwaite[37] highlights the commonalities between TJ generally and the process of restorative justice. He argues that both TJ and RJ share the recognition that individual experiences of the legal system positively and negatively influence individual wellbeing. Australian scholar Michael King[38] reiterates this commonality between RJ and TJ and further asserts, 'therapeutic jurisprudence would regard the restoration sought by restorative justice as therapeutic'[39]. Therefore, restorative justice and its underlying principles are one example of a therapeutic tool.

The labelling process and the consequences of stigma that are the focus of this research most closely align with the work on Reintegrative Shaming Theory,[40] and the process of restoration implemented most widely as Restorative Justice.[41] The problem solving method that drug

---

[31] See Wolf, above n 8, 2; Beth Green et al, 'How Effective are Family Drug Treatment Courts? Outcomes from a Four-Site National Study' (2007) 12 *Child Maltreatment* 43; Denise Gottfredson and Lyn Exuma, 'The Baltimore City Drug Treatment Court: One Year Results from a Randomized Study' (2002) 39(3) *Journal of Research in Crime and Delinquency* 337.

[32] Fay-Ramirez, above n 5; Carl Baar and Freda Solomon, 'The Role of the Courts: The Two Faces of Justice' (2000) 15(3) *Court Manager* 19.

[33] Ojmarrh Mitchell et al, 'Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts' (2012) 40 *Journal of Criminal Justice* 60.

[34] Ibid.

[35] Braithwaite, above n 11.

[36] Susan Daicoff, 'Law as a Healing Profession: The "Comprehensive Law Movement"' (New York Law School Clinical Research Institute Research Paper Series 05/06 No 12, 2004).

[37] Braithwaite, above n 11.

[38] Michael King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (Faculty of Law, Monash University Research Paper No 2009/11, 2009).

[39] Ibid 1115.

[40] Braithwaite, above n 3, 1.

[41] Daicoff, above n 36.

courts are generally based on, utilise elements of the restorative process and are thus linked to the recognition that experience of the law at the very least does not exacerbate the deviance or criminal behaviour by applying damaging stigma that provide little incentive for offenders to change their behaviour.

The ability to avoid stigmatisation and reintegrate offenders rather than isolate them as outsiders is the basis for Braithwaite's[42] Reintegrative Shaming Theory ('RST'); a theory of crime and social control. According to Braithwaite,[43] individuals are engaged in *interdependencies*; individuals in networks that are dependent each other to achieve valued ends. *Communitarianism* is a condition of environments characterised by individuals densely enmeshed in interdependencies. According to RST, individuals in communitarian environments are more susceptible to re-integrative shaming or, the social process of expressing disapproval and eliciting remorse in an individual, which is then followed by allowing the individual back into the community of law-abiding citizens. This reintegration is accomplished by ceremonies to decertify the individual as deviant or avoid the deviant labelling process altogether. When this type of re-integrative shaming is used, crime rates are low because disapproval for deviant behaviour is not conveyed in a way that stigmatises the offender, thus preventing the opportunity to become part of an identity where the poor behaviour would be amplified or increased.[44] Thus, collaborative communities should be better able to manage and deflect damaging stigma associated with increased offending and deviance.

Restorative justice is a practical application of Braithwaite's RST and is defined as a process of dispute resolution or reconciliation that allows for community and victim participation in discussions of how deviant behaviour can be rectified though 'harm reduction'.[45] It is "a problem solving approach to crime which involves the parties themselves, and the community, in an active relationship"[46] where those personally involved (victim, offender, community) are engaged in problem solving, while keeping in mind the social context of the crime, in order to find agreement among all parties on how to rectify or repair the situation. Such agreements may include financial reparation, community service, or access to resources for offender in order to prevent future offending.[47]

Restorative justice encourages presence and participation of those who support the offender (members of the individual's interdependencies) and therefore disapproval of the offender's actions can be expressed in an environment of people who are respected and who respect the offender. According to Braithwaite,[48] this increases the likelihood of shame that is not stigmatising. Finally, agreements made during a restorative process are aimed at repairing any harm to the victim, the community, and preparing the offender for reintegration into the community without permanent stigmatisation. This process is in stark contrast to the current operation of the traditional justice system where an adversarial process is used.[49] In adversarial systems, victims and supporters of the offender have limited opportunity to engage in the

[42] Braithwaite, above n 3, 1.
[43] Ibid 10.
[44] Ibid.
[45] Gerard Palk, Hennessey Hayes, and Timothy Prenzler, 'Restorative Justice Community Conferencing: Summary of Findings from a Pilot Study' (1998) 10(2) *Current Issues in Criminal Justice* 138.
[46] Tony Marshall, 'Restorative Justice: An Overview' in Jerry Johnstone (ed), *A Restorative Justice Reader: Text, Sources, Context* (Willan, 1998) 5.
[47] Ibid 29.
[48] Braithwaite, above n 3, 1.
[49] An adversarial model is defined as a process in which the prosecutor and defense attorney argues each side of the case before a judge in order for the truth to emerge.

decision-making process about what should be done to or with the offender, even though the use of victim impact statements are becoming more mainstream in traditional criminal justices processes.[50] In addition, justice system processing is inherently stigmatising and carries no opportunity to decertify or prevent the offender from identifying with the 'criminal' label.[51]

The practice of restorative justice predates Braithwaite's RST.[52] Primary observations of restorative practice rest with indigenous tribes of the Australian Aboriginals, New Zealand Maori, and Native Americans,[53] among other indigenous societies. These societies are inherently communitarian in that they are often small tribal communities where members must rely on each other for valued community goals such as food gathering, religion, and family preservation. As such, it is inherently necessary for the deviant behaviour of individuals in these groups to be dealt with in a 'healing' or harm reduction approach.[54]

Yazzie and Zion[55] explain that even in child welfare cases where parents are accused of child abuse and neglect, restorative justice is also used. In cases such as these, rather than a judge or social worker making decisions about *the best interests of the child*, the extended family of the child will come together to address the behaviour of the parents and make arrangements for the child within the family rather than involving foster families or making the child *a ward of the state* as is common practice in modern day child protection cases. In this case, restorative justice can be used to create as little disruption to the child's immediate circumstances. Despite originating in tribal societies, restorative justice has increasingly become used as a modern day alternative to criminal justice practices, methods of dealing with wayward youth, criminal behaviour and child protection.

This study seeks to identify the way in which stigma management can be translated into practice in an example of a problem-solving court that was founded on restorative practices and influenced by the growing literature on TJ. FTC is an example of a drug court used to manage parents with child protection cases and co-occurring drug and/or alcohol addiction issues. Parents in this courtroom must contend with the potential stigma of 'bad parent', 'addict', and often 'offender' and as such provide a good setting for understanding how or whether those stigmas are managed though the therapeutic nature of the court. Previous work on this court has illustrated the restorative and therapeutic orientation to justice currently used by this courtroom.[56] This study extends that work by offering an in depth examination of the practices and interactions that are able to deflect the stigma associated with the behaviour of parents in the FTC.

[50] John Braithwaite, 'Juvenile Offending: New Theory and Practice' (Paper presented at the National Conference on Juvenile Justice, AIC Canberra, 1992).
[51] Braithwaite, above n 3, 1.
[52] Ibid.
[53] Jim Consedine, *Restorative Justice: Healing the Effects of Crime* (Ploughshares Publications, 1999); D Moore and T O'Connell, 'Family Conferencing in Wagga Wagga: A Communitarian Model of Justice' in J Alder and J Wundersitz (eds), *Family Conferencing and Juvenile Justice* (Australian Institute of Criminology, 2003); Robert Yazzie and James Zion, 'Navajo Restorative Justice: The Law Of Equality And Justice' in Jerry Johnstone (ed), *A Restorative Justice Reader: Text, Sources, Context* (Willan, 2003).
[54] Yazzie and Zion, above n 53.
[55] Ibid.
[56] Fay-Ramirez, above n 5.

D *The Problem Solving Method in Family Treatment Court*

The Washington State Family Treatment Court is a unique blend of youth, criminal, and civil matters. The FTC falls under the jurisdiction of the juvenile court, which is responsible for matters of youth delinquency (criminal) as well as child protection and welfare issues (civil). FTC court clients are adults with drug and alcohol addiction issues managed under the juvenile system because the 'victim' of these child protection cases are youth. Because of this unique blend of jurisdictions, criminal sanctions can be applied when necessary in these civil cases. The FTC has two primary aims. First, to create a permanent placement for the child in a timely manner. Second, to rehabilitate parents with drug and alcohol dependency.

Typically, parents with active child protection cases are referred by the State Department of Health to a special arm of the juvenile court that deals only with child protection issues including supervision of parents and children in or out of state care.[57] Under this process, parents have a court hearing every six months, which allows a juvenile court judge to review their progress. Parents have 18 months to demonstrate that they are able to provide suitable care for their child. A court may ask the parents to provide suitable housing, resolve drug and alcohol addiction issues, or take parenting classes. If this is not done within the 18-month timeframe, parental rights to the child can be terminated.

Parents with active child protection cases supervised by the juvenile court and who have drug and alcohol additional issues can volunteer for the FTC program. The FTC differs from the traditional court process by adopting a range of problem solving approaches in order to combat drug and alcohol dependency and work towards family reunification. First, the FTC uses and *extended treatment team* consisting of lawyers for each parent, prosecutor representing the State Department of Health, a social worker, substance abuse counsellor, a child advocate or lawyer, a court manager and judge. This team of experts monitor and make decisions about each case in FTC and provide mental health support and resources for the individual needs of each case. Second, FTC includes a *greater degree of monitoring* by the judge and treatment team. Court clients are initially expected to attend court every two weeks (every six months in the traditional court process). These hearings are public open court hearings, which include the treatment team, parents, and often children. This hearing is used to report on progress the parent is making in drug/alcohol treatment and in any other program that the FTC has deemed appropriate. Rewards and sanctions may be applied to the parent based on the progress or lack of, and concerns about the case are discussed. The purpose of frequent monitoring in FTC is to provide greater supervision of parents so problems can be raised and rectified quickly and progress is not lost.

In contrast to the traditional court process, the FTC also uses *greater involvement of all parties* in each case via 'staffing sessions' and 'wrap-around sessions' to make a decision and discuss each case. Staffing sessions are closed to the public and clients and children do not attend. These sessions are used to review all cases to appear in public review hearings that day and decide on any sanctions and rewards, changes to the client treatment plans, or placement of children in each case. Wrap around sessions take place outside of court, involve the extended treatment team, the parents, children, extended family members or any others who can provide support to the family. Concerns about progress, long-term treatment goals, including employment, housing, or any other issue can be raised and discussed at these meetings. The

[57] Typically, cases come to the attention of the State Department of Health via calls from concerned citizens, and mandatory reporters such as police, doctor, and schools.

wrap around session is designed to be supportive for the parent and child – a safe place where both can talk about progress and concerns.

II DATA & METHODS

The current study was conducted in a Washington State Family Treatment Court (FTC), a problem solving court managing parents accused of child abuse and neglect who are also battling drug and alcohol addiction issues. The data comes from observations of open and closed court hearings. Observations were collected from approximately 90 visits to court over the course of 18 months (January 2004 to June 2006), over 600 hours of observation. All scheduled court calendar days were attended (FTC is held one day a week only) which allowed me to observe all hearings before the FTC. Field notes were written in a small notebook during observations and typed within 24 hours of observation. This research had full Human Subjects Approval from the University of Washington Institutional Review Board (# EB-28278).

The aim of this study is not to evaluate the success or failure of the FTC to reunite parent with children, instead, I seek to investigate how the FTC functions in respect to its stated therapeutic and restorative aims, and I investigate how team members interact with each other, parents, and children. During observations, I sat in the public gallery of the courtroom among FTC clients, and FTC personnel. Permission for observations came from the Director of Juvenile Court Services, the FTC program manager, and the FTC judge.[58] Additionally, I attended one FTC management meeting (attended by FTC personnel only) and approximately 20 staffing sessions. Staffing sessions are used by the FTC treatment team to discuss each case that will be heard in court each day prior to the courtroom hearing. Ethnographic observational methods are particularly important for this study given that the aim of this study is to investigate how the FTC functions with specific attention to the interactions between judge, treatment team, and client.

Where possible, direct quotations are provided from field notes taken during court hearings, and staffing sessions. While field notes are not copied from official court transcripts, they provide the majority of interactions between team members and clients including descriptions that point to body language and emotion that official transcripts cannot supply. Interactions between team members and clients are often repetitive and typical in most cases, therefore making the note taking process more accurate. While not identical to official records, this method of data collection has been used in similar courtroom studies.[59]

Observational field notes and interviews were analysed using traditional ethnographic research methods. These methods consisted of reading through typed field notes and interview transcripts and coding data into themes and patterns.[60] As such, the data used for illustration in this study are representative of common, typical, and repetitive patterns in the data. Unique or uncommon interactions are otherwise noted. Typical patterns in the data, the results of this study, where easy to illuminate, therefore emphasising the validity and reliability of my findings.

---

[58] Parents (offenders) of the FTC are referred to as 'clients' by FTC personnel and therefore will be referred to as 'clients' in this paper.

[59] Stacey Lee Burns and Mark Peyrot, 'Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts' (2003) 50(3) *Social Problems* 416; Aaron Kupchick, 'Prosecuting Adolescents in Criminal Courts: Criminal or Juvenile Justice?' (2003) 50(3) *Social Problems* 439.

[60] Robert Emerson, *Contemporary Research: Perspectives and Formulations* (Waveland Press, 2001); Robert Emmerson, Rachel Fretz and Linda Shaw, *Writing Ethnographic Fieldnotes* (University of Chicago Press, 1995).

III FINDINGS

Observations and interviews show that the FTC members manage stigma via three core mechanisms. First, as each client comes before the court to review the progress of their case, the treatment team focuses first on positive events and accomplishments as well as ending the review session emphasising progress made rather than focusing on concerns or consequences for rule breaking or failure to stay sober. Second, when the treatment team does have to deal with rule breaking and decide on consequences for inappropriate behaviour, the focus of that discussion revolves around how the deviant behaviour affects the children involved with the case and what the client can learn from their mistake, rather than focusing on a purely punitive response. Third, the client is treated as a member of the FTC treatment team rather than just the subject of it. Therefore, as consequences and decision are made for each client, the client can become an integral part of the decision-making process particularly in respect to the care of their children. Each of these is discussed below.

A *Focusing on the Positive*

Analysis of observation notes show that the FTC workgroup manages stigma by focusing on positive events at both the beginning and the end of each review hearing. According to Braithwaite and Mugford,[61] in order for stigma to be effectively managed or deflected, the deviant act must be uncoupled from the individual allowing for the perception that the individual is essentially good, yet occasionally lapses into profane acts. Thus, by emphasising positive events or events that are praise worthy, FTC minimises associated stigma for clients rather than focusing on rule breaking or deviant behaviour such as lapses in sobriety.

Observations of FTC show a commonly used phrase at the beginning of client hearings. Clients are often first approached by the judge with the question 'Tell me something good', a phrase that asks the client for information on a positive event or experience. The following examples depict a commonly observed interaction between the judge and client in a review hearing:

> J: Good morning! Tell me something good (leaning forward towards the client, hands clasped together and smiling).
> C: The internship I have been working at has offered me a permanent position.
> J: That's great news! Congratulations (The judge motions for the rest of the team and those sitting in the courtroom to give the client a round of applause).
>
> In another example:
>
> J: Good Morning Sir! How are you?
> C: Taking it one day at a time…
> J: So tell me something good!
> C: I'm here and I'm sober.
> J: That is a good start. What else?
> C: I had a really good visit with my son this week. We went to the video arcade and had some ice cream. It was a really great day. One of our best visits ever I think.
> J: Sounds like you had fun. I'm glad to see that you are spending time with him. So you know we need to deal with something today… and this is?

[61] Braithwaite and Mugford, above n 23.

C: Dirty UA (Client hangs his head and does not look at the judge or other team members)
J: No, dilute UA. Which we consider dirty, but we have to get to the bottom of anyway.

In the first example, the judges' first interaction with the client is to ask the client to focus on positive events. When the client responds that they have been offered a permanent position at their workplace, not only does the judge offer praise and congratulations but motions for the rest of the courtroom to also focus on this positive event. In the second example, the client has breached program rules by having a UA (urine analysis) test that was unclear. However, rather than focusing first on this breach of program rules, the judge still begins the courtroom interaction asking the client to focus on a positive event. When their answer to tell the judge something good is brief, the judge prompts the client to go into more detail, allowing them to share a positive experience had while visiting their son, before the judge and treatment team discuss the unpleasant topic of a dilute UA.

By focusing on positive events at the beginning of each client hearing, the first interaction with the judge and treatment team is positive where the judge and team congratulates clients for accomplishing a particular goal, or the client is able to share a happy or enjoyable experience with the team. This first interaction helps to remove the individual from negative aspects about the case, such as having consequences for dirty or dilute UA. By not focusing on these negative aspects of the client's case, the client is first presented to the court as an individual who has accomplished some goal that is praiseworthy rather than an addict or bad parent, thus emphasising the positive aspects in the client rather than only the negative. Managing stigma, a core aspect of restorative justice and reintegrated shaming, by promoting the positive behaviour of court clients instead of solely focusing on negative behaviour or concerns emphasises a therapeutic goal of the court; to recognise the impact that court experiences have on the wellbeing of offenders.

Not only is the client encouraged to start each review hearing with a positive event, but when the client's immediate focus is something negative such as a concern about the progress of the case or bad behaviour, the judge redirects the client back to emphasising positive experiences.

J: Hi, Tell me something good.
C: [Sigh] I missed some meetings this week
J: Wait! [Judge interrupts the client by putting her hand in the air]. You were supposed to tell me something *good*. So let's start again. How are you?
C: I'm ok. I am working on my first 2 steps [AA or NA] with [name of counsellor]
J: And how long clean and sober?
C: 8 months tomorrow. [The judge, treatment team and the audience clap]

In this example, when the judges asks the client to 'tell me something good', the client starts to tell the court that they missed some of their meetings during the last two weeks. While missing meetings could be considered a violation of the client's court order, the judge stops the client from explaining and redirects the client back to telling the team 'something good'. This suggests that promoting the therapeutic potential of the courtroom experience is not just part of the process; it is a primary goal of the FTC.

Not only are positive events the focus of the beginning of each client's hearing, but the treatment team and judge also consistently end client hearings with praise. Positive endings of client hearings often come in the form of praise from the judge or other treatment team member

expressing how proud they are of their progress, how different they look now to when they first joined the program, or how much they look forward to giving them incentives for continued progress such as unsupervised visits with their children or moving them up a level of the program. The following are typical examples of the end of a review hearing:

> J: Is there anything else? [to team members]
> SW: Yes I just want to say how proud I am of the progress you are making. You have done everything that we have asked of you. You have come a long way and we are all really proud of you.
> C: Thank you [She is smiling]
> J: And next week you know what we have to look forward to?
> C: Ahh I'm not sure
> J: Level 2 if all goes well.
> C: Yay [she claps her hands together.] I will be good I swear.
> J: We will see you in 2 weeks.

In another example,

> J: So it's status quo for you today. Just keep doing what you have been doing. We think you are doing great.
> C: OK Thank you. [She is smiling and looking at the judge]
> PM: We are back in court in two weeks.
> J: Can I just say that I wish we had a photo of you when you first came here. You look so different. You look great! And you have come a long way very fast.

In the first example, the social worker praises the client for the progress they have made in their case. The client responds with happiness to this praise by smiling and thanking the social worker. Then the judge reveals to the client that if such progress continues, they will be elevated to level 2 of the FTC program. The client reacts excitedly, clapping their hands together and promising that they will 'be good' so that movement to level 2 is possible. In the second example, at the end of the hearing the judge remarks on the overall positive changes seen in the client since first starting the program. Ending a client's hearing is such as manner acts to deflect or manage the stigma of addiction and parental failure by having the last interaction with the courtroom personnel as positive rather than negative. This sends the client away from the court emphasising their accomplishments rather than their failures.

Courtroom hearings during the observation period usually began and ended as described above. Rarely were there hearings where the first or last interaction with the judge and treatment team did not end on a positive note. When these intentional positive interactions were absent, it was usually when the usual FTC judge was absent and another juvenile court judge had to step in. Prior research on problem solving courts indicates that the informal interactions described above are learned by judges and court actors with repeated exposure to the problem solving method and take time to adopt.[62] Thus, examples where this stigma management strategy is not used can be explained by unfamiliarity with the problem solving method.

Beginning and ending each court hearing by focusing on positive characteristics, progress, or case outcomes deflects stigma by not allowing the labels of 'bad parent', 'addict' or 'offender' to dominate courtroom interactions. This way of deflecting stigma allows a more positive label

[62] Ibid 5.

to be the first and last experience for the client and therefore minimises the dominance of potentially harmful labels. Thus, this problem solving court manages stigma and shame and promotes the potential therapeutic effect of the legal system for parents. Because the best interests of the child (victim) are the focus of these cases, these tools potentially have therapeutic effects for the victims also.

B *Program Violations are Educative Opportunities*

The second mechanism for deflecting or managing stigma is making consequences for rule breaking as educative as possible rather than punitive. Consistently, across all cases and all types of hearings, consequences for rule breaking represent(entail?) the client being able to learn from their mistake(s?) rather than only (the reception of?)strict punishment for wrongdoing. Consequences are derived primarily to educate clients about their own behaviour rather than to purely punish. In the following example, a client has tested positive for drugs while in an outpatient treatment program. In the review hearing conducted on the phone, the client is confronted with the behaviour and the consequences.

> J: Tell me where you are now. Are you on blackout?[63]
> C: I had an inspection yesterday. [Mental Health rep] really helped out. I really appreciate it.
> J: So you used and almost blew your placement [in treatment] but [Mental Health rep] helped.
> C: I had some false information. I used because I thought I was getting kicked out of the program.
> J: My understanding is that you went into panic, street mode, and stopped thinking about the consequences and your children (using a half scalding tone). You just can't do that. The team is here for you. This is what we decided to do with you, you are going to write a 10 page letter to the treatment team explaining what was going through your head when you decided to use again. We want to understand why this is happening and we want to you to understand.

In this example, the client admits to their drug use when confronted by the judge. The judge, tells them that forgetting how the consequences of that behaviour affect their children is not acceptable. However, while a lapse in sobriety is considered a serious offence, the judge asks the client to write a letter explaining the behaviour to the treatment team. Reduced contact with children, being ordered to go to an inpatient treatment center or even jail time are available for the judge to use as consequences, but the FTC treatment team chooses to react to drug relapse in a manner that maximises education. Not only is this consequence to help the team understand the client's actions, but to help the client understand why relapsed back into addiction has occurred. It also reinforces the support that the client has in the team members, be they attorney, program manager, mental health representatives, or social workers.

FTC interactions also suggest that educative consequences often focus on the client's children. The treatment team and judge will ask the client not to think about the consequences of their own behaviour as FTC program participants but as parents. In the following example, a parent who has relapsed and missed scheduled visits with their child is asked to write a letter to their child apologising for their relapse.

[63] The term blackout is used to refer to the first stage of a client's stay at an inpatient treatment center. During this period the client cannot leave the facility and the client's access to the outside world, such as having visitors, is restricted.

> J: How are you doing?
> C: Alright.
> J: So what has been going on?
> C: I was going to be discharged [from treatment program] for testing positive to cocaine and marijuana but [name of FTC mental health rep] fought really hard for me.
> J: Well, we do have to address that. What I want you to do is write a 10 page letter to your children explaining what you were thinking when you started taking drugs again. You are going to submit the letter to your attorney by next Thursday. I want to know how you explain this to your kids.
> (silence)
> C: I don't know
> J: I know it is tough and we will give you some time.
> PM: We will return for a phone hearing next Friday. Ok?
> C: Ok.

In this example, the client has relapsed back into drug use. The judge's consequence for the behaviour is for the client to write a letter to their children explaining and apologising for the behaviour. Again, this consequence serves to educate the client by redirecting the client's priorities back towards the children. This consequence highlights responsibility to children rather than just a consequence for deviant behaviour.

These educative consequences help to deflect or manage stigma by allowing the consequences of behaviour to reflect the judge and the team's view that their behaviour was deviant but also allowing the client to redeem themselves though apology or making an effort to explain why the behaviour occurred. According to Braithwaite[64] this gives the client the opportunity to experience the disproval of their actions but allows them to make reparations. The court emphasises responsibility and gives the client another chance to become sober again. Consequences such as these support an orientation to restoration, according to Braithwaite's theory of reintegrative shaming.[65] These stigma management strategies also underscore the importance of a therapeutic approach to promote interactions and experiences in the courtroom that deal with negative behaviour in a safe environment that build the rapport necessary for a restorative process to be successful.[66]

More severe penalties for rule breaking or bad behaviour are not necessarily uncommon in FTC. The threat of gaol, restricting contact with children, or other severe sanctions is also used by the FTC.[67] Observations suggest that they are not used as a first priority but a last resort. However, as FTC caseloads increase and the turnover of courtroom staff that are not acquainted with the problem solving method increase over-time, evidence suggest that the extended treatment team display increasingly punitive attitudes that shift the restorative and educative sanctions towards more punitive ones.[68] Thus, though educative responses to bad behaviour are valued by the FTC, they become difficult to maintain overtime as the FTC experiences increased pressure to process more and more cases.

[64] Braithwaite, above n 3, 1.
[65] Ibid.
[66] Ibid 3, 11, 12.
[67] See Fay-Ramirez, above n 5.
[68] Ibid.

C *Clients are Part of the Decision Making Process*

The final mechanism for managing stigma is for the team to incorporate the client into the decision making process about their own case. FTC's treatment team was intentionally designed for team decision making. Each team member represents a profession such as social worker, child advocate, or mental health worker able to weigh in on important and related aspects of each case. However, during review hearings, the parent is often included in the decision making process not only about the welfare of their own child, but decision about the progress and direction of their case.

The following example is a common scenario for parents who have made considerable progress in the FTC program. Long periods of client sobriety are at times interrupted with a relapse back into drug or alcohol consumption towards the end of the case. Becoming overwhelmed with appointments and responsibilities are a commonly cited reason for the relapse. In the following example, both parents are level 2 FTC parents and the plan is to return their 7 year old child to them later in the year. However, the mother has tested positive for alcohol in a recent UA. In court, the mother admits that alcohol was related to overwhelming daily stress.

> J: What do you think we should do about this relapse?
> C: I want to increase my UA's to 3 per week. I want to increase my face-to-face counseling sessions with [Mental health rep] and I want to redo my AA steps.
> J: Agreed. Let's start with that and see where that gets us. We just want you to get back on track.

In this example, the parents are not new to the FTC program but are well on their way to program graduation and achieving the ultimate goal of family reunification. However, relapse back into addictive behaviour has occurred for one of the parents. Instead of telling the mother what the consequence will be, the judge asks her, what they think should be done about this breach. The client suggests an increase in counselling sessions and UA's as well as reworking though steps learned at AA meetings. The judge agrees to this. By asking the client to suggest what should be done to correct her behaviour, they are able to take ownership in the proceedings. This is important for the success of restoration because the client is more likely to follow through with resolutions, or in this case, court orders.[69]

Parents are also invited to participate in decisions made for their child even though it is their parenting skills that have precipitated the case against them. In the following example a parent is again asked to participate in the decision making process with the treatment team about the welfare of the child.

> J: We need to talk to [name of son] about counselling.
> C: I know, he just does not want to go.
> Mental Health: Do you know why that is?
> C: I'm not sure if it is part of teenage rebellion and going through the transition of moving back home or that he really does not like it or enjoy it.
> J: Do you have any light to shed on this? [To child's attorney]
> Att: I had a chance to chat with [son's name] and he tells me that he is bored.
> J: What do you think [to mother]?
> C: I think he needs to do it anyway but maybe find him someone new.
> Mental Health: We could do that.

[69] Braithwaite and Mugford, above n 23.

> J: OK let's see if that gets us anywhere. But you can't let him get out of it. Being bored is not a good excuse.
> C: OK.

In this example, the FTC team discusses why one of the client's children refuses to go to counselling sessions. A mental health team member asks the client if they know why the child does not want to go. The judge refers back to the parent for suggestions, including them in the discussion on how to keep the child in counseling. When the client suggests finding a new counsellor, the judge agrees to try it. Even though the court has mandated that the child seeks counselling, when that order is violated, the treatment team includes the parent in the discussion about the child. This creates ownership in the process of managing the client's case. The treatment team actively includes the parent in the discussion. This helps to deflect the stigma of 'bad parent' because the parent becomes more active in the process. This avenue for empowerment is one that is highlighted by restorative and therapeutic approaches more generally.[70]

Parents are brought into the decision making process in another form. Wrap-around meetings take place outside of court, usually, at a location more convenient for the parent. These meetings include the treatment team, but often exclude the judge. Foster parents and any other members of support for the client are encouraged to attend. The meetings are used to talk about issues relating to the case. Disputes between biological and foster parents and problems with addiction and treatment can be discussed prior to formal orders being made in an FTC Review hearing. While these setting were not available for observation during this study and therefore cannot be analysed as to the parent's involvement, it is worth noting that these meetings are often referred to in open court and discussed. The judge will often ask how a parent's wrap around meeting went and how it helped them.

> J: So I hear you had your wrap around last week. How did that go?
> C: Yes. I think it went well. I was really able to get some things off my chest.
> J: That's good. So it was productive.
> C: Yes we talked about and now have a treatment plan.
> J: That's what I wanted to hear.

The above example is suggestive of how parents view wrap around meetings. This exchange between judge and client about a wrap-around meeting is consistent with other FTC hearings. While this example shows that the primary goal of these meetings is to formulate a treatment plan that will guide each individual case, it is implied that the client is involved in these discussions, and that they are useful to the client, again underscoring the value of empowerment as part of the problem solving method.

Client involvement in the decision making process in one of three ways that the stigma of 'addict', 'bad parent', and 'offender' are managed within the FTC program. Other mechanisms for managing stigma include making consequences educative rather than punitive, even for serious offences such as a lapse in sobriety, and beginning and ending each client review hearing in a positive tone. Stigma is managed by de-emphasising the person as a deviant individual or rule breaker, and focusing more on correcting the behaviour, helping clients to recognise progress over failures, and given them ownership in the FTC process. Including parents as part of the decision making process about their own case and the welfare of their

[70] See Braithwaite, above n 11.

children directly reintegrates them back into the family, into the role of parent, and might aid in a smoother transition out of the child protection system.

TJ in practice can take many forms, but consistent with the therapeutic literature is the emphasis on the interactions and experience of individuals in the courtroom (and the justice system in general) and the power that those interactions have to build trust and legitimacy, compliance for court orders and treatment plans, and taking account of the context and individual circumstances of the behaviour in question. Stigma becomes linked to a person's identity in the process of interacting with others. Therefore, the work that therapeutic courts are doing to pay attention to the potential consequences of legal decisions and the manner in which they are delivered is inextricably linked to stigma management. Where restorative justice practices have become very popular in diversionary court programs, the findings from this study suggest that these tools are useful in translating theory into practice in other courtrooms.

D *Limitations*

As an in depth case study, there are some limitations to these findings that should be noted here. First, findings discussed here examine the interactions of just one example of a FTC and thus the findings may not be replicated or generalisable to other FTCs or problem solving courts more broadly. Though generalisations cannot be made, the example that this study provides on how courtroom interactions can utilise restorative and therapeutic tools to manage stigma and its associated consequences contributes to the vastly theoretical discussion of stigma that dominates much of the social science research on the justice system. It is also difficult to assert whether these stigma management practices are generated from the FTC model in general or whether stigma management was a specific goal of the court's operations prior to its inception. In other words, it is unclear whether these practices are developed with the explicit intention to manage stigma or whether they developed organically from within or as a result of the therapeutic orientation of the court. Regardless, extending the knowledge on how these interactions can have an impact on the damaging stigmatisation process of the justice system is helpful for those using the therapeutic model as a base for courtroom development and evolution.

IV CONCLUSION

This 18-month qualitative case study of FTC examined the interactions between courtroom actors and court clients as well as attitudes from court personnel in order to understand the extent and nature of stigma management associated with parents of child protection cases. Evidence from observations and interviews suggest that it is possible to deflect the potentially harmful labels of 'bad parent', 'addict' and 'offender' in the FTC and that this is done in three primary ways. First, court hearings begin and end by focusing on positive achievements for court clients. Second, consequences for rule breaking or deviant behaviour, such as being unable to maintain drug and alcohol sobriety, are used as opportunities to educate the client and the FTC team about the client's behaviour. This does not mean that punishments are necessarily soft, but they are used to provide information as well as build rapport between the FTC team and the parent. Finally, the FTC manages stigma by including the parent in the decision making process about his or her case and the welfare of their children even if they do not currently have custody of them.

Though this qualitative case study cannot make predictions about the causal pathways between stigma management and FTC outcomes for parents, existing research suggests that problem

solving courts utilising a therapeutic approach like that of the FTC, have quicker time to family reunification, longer term stability of family reunification after the FTC program is complete, and longer term sobriety.[71] If these outcomes are aided by the support and rapport building interactions indicative of this FTC that utilise the restorative approach as a tool to implement TJ, then it may be that stigma management along with the other defining features of problem solving courts, are contributing to the success that empirical evaluations suggest.

The child protection system has often been characterised as failing the children it is designed to protect.[72] One of the most concerning observations of child protection cases is the likelihood of parents returning to the system after family reunification, creating a revolving door effect where parents experience judicial monitoring of their parenting repeatedly and their children are in flux between their biological parent's care and foster care. Existing research suggests that the therapeutic approach helps to ameliorate these trends in child protection cases. Stigma management may be at the heart of understating why therapeutic courts are enjoying this success. The effects of stigmatisation are also not limited to child protection cases; the mark of a criminal record has been long understood to be linked to the stigmatising nature of criminal justice process as well as the negative long-term outcomes of the re-entry process. This may suggest that utilising therapeutic tools that guide simple courtroom interactions may contribute to better outcomes for many individual who experience judicial supervision and processing.

[71] See Picard-Fritsche, above n 27, 2; Wolf, above n 8, 2; Shelli Rossman et al, *The Multi-Site Adult Drug Court Evaluation: The Impact of Drug Courts Vol 4* (Urban Institute Justice Policy Centre, 2011).

[72] Tanya Coakley, 'The Influence of Father Involvement on Child Welfare Permanency Outcomes: A Secondary Data Analysis' (2013) 35 *Children and Youth Services Review* 174; Philip Genty, 'Permanency Planning in the Context of Parental Incarceration: Legal Issues and Recommendations' (1998) 77(5) *Child Welfare* 543.

QUT Law Review ISSN: Online- 2201-7275
Volume 16, Issue 3, pp. 68-84. DOI: 10.5204/qutlr.v16i3.667

THERAPEUTIC JURISPRUDENCE, COERCIVE INTERVENTIONS, AND HUMAN DIGNITY

ROBERT F SCHOPP*

Therapeutic Jurisprudence pursues the reform of legal rules, procedures, and roles in order to promote the well-being of those affected without violating other important values embodied in law. This paper requires analysis of those relevant values and of the significance of those values for the most justified approach to defining and pursuing individual and public well-being. The analysis presented here provides a preliminary example of such an analysis that addresses human dignity as one value relevant to the most justified application of police power and parens patriae *interventions to individuals with mental illness.*

I INTRODUCTION

The police power and *parens patriae* functions of the state authorise coercive interventions into ordinarily protected individual liberties to protect the interests of the public or of the individual. The police power is the state's authority 'to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.'[1] The state applies the police power through a variety of institutions, including the criminal law and civil commitment. '*Parens Patriae'* refers to 'the state in its capacity as a provider of protection to those unable to care for themselves.'[2] An incapacitated person 'is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible.'[3] Thus, the state exercises *parens patriae* power when it provides protection to individuals who lack the ability to make reasoned decisions regarding their well-being. The state applies the police power and *parens patriae* interventions to persons who manifest psychological impairment through a variety of institutional structures.

A therapeutic jurisprudence ('TJ') approach to police power or *parens patriae* interventions would develop rules and standards designed to promote the well-being of those affected in a manner consistent with other values embodied in the relevant law including the applicable principles of justice.[4] In this respect, TJ provides a specific example of the application of social science research to law reform with the purpose to promote the well-being of those affected in a manner consistent with other relevant values. Respect for human dignity ('HD') is a value that has been identified as relevant to many areas of law, although it often lacks a clear definition and

* Robert F Schopp, PhD Psychology (North Carolina State University), JD (University of Arizona), PhD Philosophy (University of Arizona); Robert J Kutak Professor of Law, Professor of Psychology, Professor of Philosophy (University of Nebraska).

[1] Bryan A Garner (ed), *Black's Law Dictionary* (Thomson West, 10th ed, 2014) 1345 ('*Black's Law Dictionary*').

[2] Ibid 1287.

[3] Ibid 878.

[4] David Wexler and Bruce Winnick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii–xx.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

standard of application.[5]

This paper examines the interpretation and application of a relevant conception of HD to police power or *parens patriae* interventions. It considers the significance of HD for selecting alternative applications of police power or *parens patriae* intervention for specific individuals, or categories of individuals, who manifest some form and degree of psychological disorder. Part II presents hypothetical individuals who raise questions about the most justified forms of police power or *parens patriae* intervention. Part II also identifies several relevant societal values regarding each category of intervention. Part III interprets the significance of HD as a value central to the justifications of several police power interventions. Part IV interprets the significance of HD as a value central to the justification of various *parens patriae* interventions Part V concludes the analysis.

II COERCIVE INTERVENTIONS

A *Police Power Interventions*

Consider three potential subjects of police power intervention. Anders attempts to cut into a long line of people waiting to get into a theatre. He assaults a victim who refused to allow him to cut into the line. He has a history of aggression, and he has been diagnosed with antisocial personality disorder.[6] Baker assaults a person walking behind him on the sidewalk. He has been diagnosed with a delusional disorder.[7] He believes that a group of business competitors are conspiring to destroy his business, and he realises that the same person has been walking behind him for several blocks. He concludes that his competitors have hired this individual to kill him in order to eliminate him as a competitor. He suddenly turns and assaults that person in delusional self-defence. Cook assaults a person behind him in a long line of customers waiting to get into a theatre. That person repeatedly told him to move along when Cook became distracted and failed to move, allowing others to cut into line in front of him. After several others have stepped into line ahead of Cook, the person behind Cook yelled at him 'move it retard.' Cook assaults him in anger. Cook has been diagnosed with mild intellectual disability and intermittent explosive disorder.[8]

Consider four alternative applications of the police power designed to address and prevent conduct that harms or endangers others by individuals with psychological impairment. Some individuals might be subject to a criminal trial resulting in a guilty verdict and a criminal sentence. Others might be subject to a criminal trial resulting in a verdict of not guilty by reason of insanity, followed by post-acquittal commitment and treatment.[9] Some might appear before a mental health court, plead guilty, and receive a suspended sentence and monitored treatment as a condition of probation.[10] Others might be subject to civil commitment based on a determination

[5] Leslie Meltzer Henry, 'The Jurisprudence of Dignity' (2011) 160 *University of Pennsylvania Law Review* 169.
[6] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) 659 ('*DSM-5*').
[7] Ibid 90.
[8] Ibid 33–41 (mild intellectual disability), 466–69 (intermittent explosive disorder).
[9] Wayne R LaFave, *Criminal Law* (West, 5th ed, 2010) § 7.1.
[10] Allison D Redlich, 'Voluntary, But Knowing and Intelligent? Comprehension in Mental Health Courts' (2005) 11(4) *Psychology, Public Policy and Law* 605, 606.

of mental illness and dangerousness to others, leading to inpatient confinement and treatment or to mandated outpatient treatment.[11]

What justifies one of these alternatives as most appropriate for each offender? Anders has a history of violence against others. He has no substantial impairment of the psychological capacities that render him criminally responsible. The pattern of antisocial behaviour manifested by this disorder frequently continues, resulting in criminal punishment intended to incapacitate and deter.[12] The most appropriate police power intervention would ordinarily be criminal trial and punishment proportionate to the severity of his offence. Baker reveals psychotic distortion of perception and reasoning that leads him to purposefully cause injury to his victim. He fulfils the offence elements for assault, but he is not blameworthy or appropriate for criminal punishment due to his delusional fear.[13] What justifies a criminal trial generating an insanity defense, post-acquittal commitment, and appropriate treatment, or civil commitment as mentally ill and dangerous leading to treatment?[14] Cook resembles Baker in that he fulfils the offense elements for assault, and he manifests impairment that contributed to his criminal conduct. He differs, however, in that his impairment does not distort his reality recognition in a manner that would meet the requirements of an insanity defense.[15] What justifies a criminal trial and punishment proportionate to his culpability for the offense or one of the alternatives? These include trial in a mental health court, a guilty plea, and suspended sentence with treatment conditions. Alternately, he might be subject to civil commitment as mentally ill and dangerous to others, leading to treatment and behaviour management.

B *Parens Patriae Interventions*

Consider three potential subjects of *parens patriae* intervention. Davis is a competent adult who manifests no psychological disorder. He refuses surgery that has been recommended as necessary for a potentially lethal tumor in his brain. He has spent his adult life as a professor translating ancient Chinese texts, and he has been informed that the side effects of the surgery include a serious risk of impaired capacities that would prevent him from completing a translation that he pursues as the crowning achievement of his life's work. He concludes that the potential side effects would prevent him from completing his lifelong project, resulting in a wasted life. He explains, 'I would rather live fully for a shorter period than drag out a failed life.' East has an extended history of chronic schizophrenia.[16] He refuses surgery considered necessary to resolve a potentially life-ending physical illness. He refuses the surgery because the hallucinatory voice of God warns him that the surgeons are agents of Satan who conspire to send him to hell.

Fren has been seriously but not psychotically depressed throughout his life.[17] He has tried

[11] *Nebraska Mental Health Commitment Act*, Neb Rev Stat § 71-925(4) (2009). I cite Nebraska statutes as examples of similar provisions that are common in the United States. I do not claim that Nebraska statutes carry any authority beyond Nebraska.
[12] *DSM-5*, above n 6, 660–61.
[13] Model Penal Code § 211.1 (Proposed Official Draft 1962).
[14] LaFave, above n 9; Neb Rev Stat § 71-925(4) (2009). See text accompanying footnote 12.
[15] LaFave, above n 9, §§ 7.2, 7.5.
[16] *DSM-5*, above n 6, 99–105.
[17] Ibid 160–68.

various forms of treatment, and some have ameliorated his depression somewhat for short periods, but then the deep depression always returns. He attempted suicide by ingesting a potentially lethal overdose of medication. By coincidence, his cousin came by his apartment to visit, found him unconscious, and rushed him to the emergency room where his death was prevented. After physical recovery in the hospital, he was civilly committed as mentally ill and dangerous to himself.[18] After thirty days in the inpatient facility, he has a review hearing to determine whether he should be discharged, released to mandated outpatient care, or retained in inpatient care.[19] At the hearing, the clinical evidence affirms that he remains seriously depressed, but he does not experience any distortion of his abilities of reality recognition, comprehension, or reasoning. When asked why he attempted suicide, he states 'life is not worth this constant sadness. All the treatment only ameliorates my depression somewhat for a little while. Then the endless severe depression returns. Let me out of here, so I can do it right this time.'

Consider alternatives forms of *parens patriae* interventions designed to prevent a person with serious psychological impairment from harming or endangering himself actively or passively. Civil commitment applies to an individual who is mentally ill and due to his mental illness endangers himself actively or passively due to his inability to provide basic needs and safety.[20] Alternatively, a court may appoint a guardian to provide care or supervision for an individual who is unable to make responsible decisions for himself due to mental illness.[21] A guardian may provide custody and consent to care for that incapacitated person.[22] A person subject to civil commitment or determined to be incompetent to make self-regarding treatment decisions can receive treatment for his impairment to prevent harm to self.[23] Although civil commitment does not constitute a finding of incompetence, commitment statutes can include a right to refuse treatment but provide exceptions that do not require a formal finding of incompetence.[24]

What justifies *parens patriae* intervention under one or more of these alternatives for each of the individuals described? Davis has no psychological impairment and qualifies for no diagnosis of psychopathology. Therefore, he does not meet the mental illness criterion for civil commitment.[25] He retains the psychological capacities that render him competent to consent, or to refuse consent, to treatment for his physical illness according to his own priorities.[26] Thus, neither civil commitment nor incompetence and guardianship statutes apply to him because he retains essential psychological capacities, such as reality recognition, comprehension, and reasoning and the ability to apply these capacities to decision making regarding his interests, The primary concern regarding his decision requires that Davis receive accurate information regarding the probability and severity of side-effects from the treatment, as well as accurate information regarding the likely effects of refusing treatment.

East manifests psychotic distortion of reality recognition, comprehension, and reasoning. Due to

[18] Neb Rev Stat § 71-908(2) (2008).
[19] Ibid § 71-935 (2008).
[20] Ibid § 71-908(2) (2008).
[21] Ibid § 30-2601(1), 2620 (2008) Protection of Persons Under Disability and Their Property.
[22] Ibid § 30-2628(1), (3) (2008).
[23] Ibid §§ 30-2628(3) (2008), 71-959(3) (2009).
[24] Ibid § 71-959(3) (2009).
[25] Ibid § 71-907 (2009).
[26] *Cruzan v Director, Missouri Department of Health*, 497 US 261 (1989) 277–79.

this impairment, he lacks minimally adequate capacity to make responsible decisions regarding this recommended surgery or regarding his well-being generally.[27] What reasoning justifies one of the following alternatives as most appropriate for East? A finding of general incompetence and guardianship for person and property would authorise the guardian to make decisions for East, including consent for the surgery at issue.[28] Alternately, a limited finding of incompetence to make decisions regarding this surgery would authorise an appointment of a guardian limited to this matter of treatment for his physical condition.[29] Finally, East might be subject to civil commitment as he is mentally ill and dangerous to himself, due to his mental illness.[30] Treatment rendered during his commitment might restore his ability to make competent decisions regarding the surgery.

Fren manifests a serious but not psychotic depressive disorder that renders him a danger to himself, but does not distort his perception, comprehension, or reasoning similar to that manifested by East.[31] His impairment contributes to his plan to commit suicide, but it does not do so by distorting his capacities of competent decision making. Rather, it provides the motivation to conclude that continuing to live is not worth the cost of enduring his depression. What reasoning justifies one of the following alternatives? He might be subject to continued inpatient commitment as mentally ill and dangerous to himself.[32] Alternately, he might receive involuntary treatment during inpatient or outpatient commitment to prevent suicide despite his refusal to consent to treatment.[33] Finally, he might be released from commitment while dangerous to himself.

C *Relevant Police Power Values*

A TJ approach to the state's exercise of the police power would be designed to promote the well-being of those affected without violating other values embodied in law.[34] Development of such interventions requires consideration of other values addressed by various police power interventions. The state exercise of the police power is intended to protect the public from harm by reducing risk of crime by this offender and by others.[35] Police power institutions discipline state intrusion into individual liberty by requiring clear criteria and a rigorous standard of proof. These institutions address some offenders through the criminal justice process in a manner consistent with their legal guilt and moral blameworthiness.[36] Alternately, the state can apply a different institution, such as civil commitment for those who harm or endanger others due to mental illness that significantly reduces their blameworthiness, rendering them more appropriate for treatment than for punishment.[37]

Ideally, the state will pursue this police power function in a manner consistent with respect for

[27] Neb Rev Stat § 30-2601(1) (2008).
[28] Ibid §§ 30-2620, 2628(3) (2008).
[29] Ibid § 30-2620 (2008).
[30] Ibid § 71-908(2) (2009).
[31] *DSM-5*, above n 6, 160–68 (serious but not psychotic depression).
[32] Neb Rev Stat § 71-908 (2009).
[33] Ibid § 71-959(3) (2009).
[34] Wexler and Winnick, above n 4.
[35] *Black's Law Dictionary*, above n 1.
[36] *Roper v Simmons*, 543 US 551 (2005) 598–604 (O'Conner J, dissenting).
[37] Neb Rev Stat § 71-908 (1) (2009).

HD. Some United States Supreme Court opinions refer to HD in addressing the constitutionality of criminal punishment, but they provide no clear explanation regarding what constitutes HD in the context of criminal punishment or clear reasoning to support these assertions.[38]

D *Relevant Parens Patriae Values*

Values relevant to the determination whether *parens patriae* intervention is justified, and to the selection of the most justified form of such intervention include at least the following. Institutions such as civil commitment or appointment of a guardian for an incompetent individual are designed to protect the well-being of the individual who manifests impairment of capacity that renders him unable to protect his own well-being.[39] The requirements of inability to meet ordinary demands of living for civil commitment and inability to make responsible decisions for guardianship reflect respect for the unimpaired individual's right to make primarily and directly self-regarding decisions.[40] In this manner, relevant law disciplines state intrusion into individual liberty by limiting involuntary state *parens patriae* interventions to individuals with serious mental impairment that renders them unable to define and pursue their own interests by making responsible self-regarding decisions. These limitations of state authority to interfere with self-regarding decisions reflect respect for HD as the unique standing of at least minimally capable human beings to make reasoned decisions regarding the values and interests that they identify as important to the individual lives they pursue.

III POLICE POWER INTERVENTIONS AND HUMAN DIGNITY

A *Mental Disorder and HD*

Consider two questions regarding the significance of HD for the justified application of the police power to individuals with mental disorders. First, what justifies various forms of police power intervention in response to criminal conduct by persons with varied forms and severity of psychological impairment? Second, in what manner should respect for HD inform the most justified form of police power intervention for impaired individuals?

Ted Kaczinski (the 'unabomber') reportedly refused to allow his attorney to present a plausible insanity defense in a criminal trial with the potential to apply severe punishment.[41] He apparently considered the insanity defense demeaning because he thought himself to be a rebel against societal oppression. An insanity defense would insult him and undermine his efforts to resist oppression. He was apparently willing to risk capital punishment, rather than present an insanity defense. He received a sentence of life in prison.[42]

The criminal justice system provides an institution of coercive social control uniquely applicable to humans as responsible agents with the ability to direct their conduct through the application of the capacities of responsible agency, including reality recognition, comprehension, and reasoning. These uniquely human capacities enable at least minimally capable humans to direct

[38] See, eg, *Gregg v Georgia*, 428 US 153 (1976) 183–84 (plurality opinion), 239–41 (Marshall J, dissenting).
[39] *Black's Law Dictionary*, above n 1, 1287.
[40] Neb Rev Stat §§ 71-907 (2009) (civil commitment), 30-2601(1) (2008) (guardianship).
[41] Michael Mello, *The United States of America versus Theodore John Kaczinski* (Context, 1999) 139–41.
[42] Ibid 139–40.

their conduct in a manner consistent with the morally relevant reasons that justify such conduct.[43] Those who possess these capacities qualify for capacity responsibility in that they possess the capacities of responsible agency. These capacities render them appropriate subjects of praise or blame for the conduct they pursue through the exercise of these uniquely human capacities. Capacity responsibility constitutes a necessary condition to justify subjecting the individual to liability responsibility in the form of criminal punishment, with its inherent expression of condemnation for criminal conduct as culpable wrongdoing.[44]

Anders, Baker, and Cook all commit criminal assault and meet the criteria for clinical diagnoses, but we respond to them differently. The different responses reflect the variations in type and degree of impairment and the role of each individual's impairment in his assaultive conduct. These variations result in different assessments of responsibility and blameworthiness, as well as different expectations of intervention effectiveness in preventing further offenses.

Compare an incident in which a bear attacks a camper in a campground. Authorities track the bear and relocate or kill the bear based on estimate of risk, available alternatives, presence of cubs, and the state of the species as sufficient population or threatened.[45] These decisions are based on practical considerations and priorities rather than assessment of blameworthiness. In contrast, criminal law and punishment reflects the unique standing of at least minimally capable humans as responsible agents. The previously identified uniquely human abilities of capacity responsibility render unimpaired humans capable of engaging in moral reasoning and directing their conduct according to that reasoning.[46] Thus, they are appropriate subjects of liability responsibility in the form of criminal punishment with its inherent expression of condemnation when they culpably misapply these abilities.[47]

Compare Anders, Baker, and Cook regarding the most justified form of police power intervention. Arguably, Anders deserves criminal punishment for his culpable assault because his antisocial personality disorder does not include serious impairment of the capacities of responsible agency such as reality recognition, comprehension, or reasoning.[48] The pattern of criminal conduct reveals a lack of empathy or conscience. Thus, the clinical diagnosis of antisocial personality disorder does not involve impairment that precludes or mitigates culpability for criminal conduct. Furthermore, this disorder is generally a chronic condition, although it might partially remit as the individual ages.[49] Criminal punishment is proportionate to culpable wrong doing and serves the incapacitation function and possibly the deterrence function.

Baker's impairment undermines capacity responsibility. His distortion of reality recognition and reasoning renders him unable to function as a responsible individual in an institutional structure

[43] Robert F Schopp, *Competence, Condemnation, and Commitment* (APA, 2001) 150 (discussing the capacities required for retributive competence).
[44] Robert Audi (ed), *Cambridge Dictionary of Philosophy* (Cambridge, 2nd ed, 1999) 794 ('*Cambridge Dictionary of Philosophy*'); Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, 1970) 95–101.
[45] Denali National Park and Preserve, *Bear-Human Conflict Management Plan* (2009) 28–29.
[46] *Cambridge Dictionary of Philosophy*, above n 44, 794.
[47] Ibid.
[48] *DSM-5*, above n 6, 659–63.
[49] Ibid 661.

designed for those with capacity responsibility. Thus, it renders him inappropriate for liability responsibility and not deserving of the punitive treatment and expression of condemnation inherent in criminal punishment. An insanity defense and post-acquittal commitment follows a rigorous criminal trial that condemns the wrong to the victim and reaffirms the wrongfulness of such behaviour to the public.[50] However, it might delay the most appropriate treatment for the defendant. Alternately, if the insanity defense fails, Baker might serve a sentence in a correctional facility that is less likely to promote the well-being of Baker or of the public by providing effective treatment for his delusional disorder. Civil commitment is more likely to facilitate timely appropriate clinical treatment, but it lacks the explicit condemnation of the wrong to the victim.

Cook is criminally responsible but less blameworthy than Anders. He manifests impairment of the abilities of responsible agency as compared to an unimpaired individual.[51] He retains those abilities to a degree sufficient to meet a minimal standard for capacity responsibility, and therefore, for liability responsibility. Thus, Cook raises the question regarding what reasoning would render him most appropriate for one of the following interventions. Criminal conviction with less severe punishment than applied to unimpaired offenders expresses condemnation of the criminal conduct and reaffirms the standing of Cook as an at least minimally responsible agent and of the victim as one who merits protection under the law. It is not likely, however to provide timely and clinically appropriate treatment. Disposition to a mental health court that requires a guilty plea and treatment conditions of probation fulfils the expressive functions of the criminal court and facilitates treatment.[52] Thus, it has the potential to promote the well-being of the public and of the offender. Civil commitment is perhaps the most efficient alternative for providing treatment. Commitment would place Cook in a mental health facility without the delay required to complete a criminal trial. However, the lack of a criminal trial and expression of condemnation might dilute respect for the victim as one who merits protection under the law and for the offender as an at least minimally responsible person.

B *HD as Status and Demeanour*[53]

In ordinary language, dignity refers to '[t]he quality of being worthy or honourable; true worth, excellence.'[54] Human, as an adjective, refers to properties that are 'characteristic of human kind or people ... of the activities, relationships, etc. of human beings, esp. as distinct from those of lower animals.'[55] Thus, 'human dignity' is reasonably interpreted as referring to the uniquely human characteristics that render humans capable of pursuing lives that manifest the worthy and honourable exercise of those characteristics. Such lives reflect the development and exercise of defensible principles of virtue and justice that distinguish honourable human lives from dishonourable human lives and from the lives of lower animals. This interpretation is consistent

[50] Schopp, above n 43, 144–51 (discussing the relationship between retributive competence and the five types of condemnation expressed by criminal punishment).
[51] *DSM-5*, above n 6, 33–41, 466–69 (discussing the impairment in mild intellectual disability and intermittent explosive disorder).
[52] Redlich, above n 10.
[53] For a more complete analysis of HD in this context see Robert F Schopp, 'Competence for Execution, Human Dignity, and the Expressive Functions of Punishment' (2016) 52 *Criminal Law Bulletin* 273.
[54] Lesley Brown (ed), *New Shorter Oxford English Dictionary* (Oxford, 1993) 671, 671.
[55] Ibid 1276.

with the philosophical concept of dignity as 'a moral worth or status usually attributed to human persons.'[56]

Discussion of human dignity often includes Kant's account of human dignity as 'grounded in the capacity for practical rationality.'[57] Kant discusses humanity as having dignity insofar as humans are rational beings capable of morality.[58] Kant addresses the capacity to act on the basis of reason that one can will to serve 'as a universal law (for all rational beings).'[59] '[T]he dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the law he makes.'[60] This Kantian interpretation of dignity that is uniquely applicable to humans reveals roots in the uniquely human capacities such as reality recognition, comprehension, and practical reasoning that enable at least minimally competent humans to direct their conduct in a manner consistent with the morally relevant reasons that justify such conduct.[61]

Respect for HD requires recognition of the distinction between HD as status based upon the uniquely human capacities of responsible agency and HD as demeanour as a pattern of behaviour that reflects the responsible exercise of those capacities.[62] Respect for individuals with at least minimally adequate capacities of responsible agency requires that we respect their right to direct their own conduct within the limits of protected liberties and that we hold them responsible for conduct that culpably violates limits established by the criminal law.[63] Criminal punishment for culpable criminal conduct expresses condemnation of that person's demeanour as conduct that involves the culpable misuse of the uniquely human capacities. In contrast, it also expresses respect for his standing as a one who possesses the capacities of responsible agency that qualify one for HD as status. Arguably, if HD is interpreted as based entirely on capacity, with no requirement of at least minimally responsible exercise of those capacities, it is difficult to explain why those capacities provide any basis for respect for those who were born with them and thus, were not primarily responsible for having them.

Criminal punishment with an inherent expression of condemnation expresses condemnation of a category of behaviour by defining it as a criminal offence that merits punishment. Convicting a defendant of a specific instance of that conduct reaffirms that condemnation of the prohibited category, and condemns this specific conduct as a wrongful instance of that condemned category. Conviction also condemns the offender as a responsible agent who culpably committed that criminal act.[64] By expressing condemnation of the culpable criminal offender's criminal conduct, criminal punishment reaffirms the standing of the offender as one who qualifies for HD as the status of an individual who possesses the capacities of responsible agency in contrast to the bear discussed previously. However, it condemns the offender's exercise of his uniquely

[56] *Cambridge Dictionary of Philosophy*, above n 44, 234.
[57] Ibid 235.
[58] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (HJ Paton trans, Harper, 1964) 102 [77] – 104 [81].
[59] Ibid 104 [84].
[60] Ibid 107 [87].
[61] Schopp, above n 43, 150 (discussing the capacities required for retributive competence).
[62] John Kleinig and Nicholas G Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32 *Law and Philosophy* 539, 553–55.
[63] Schopp, above n 43, 197–200.
[64] Ibid 144–48.

human capacities as diluting respect for HD as demeanour in proportion to the severity of the offense and the offender's culpability.

C *Compare the Three Offenders and the 'Unabomber'*

According to this interpretation, the 'unabomber's' conviction and sentence reaffirmed his HD as status as one with capacity responsibility, but it condemned his conduct and his HD as demeanour as manifested in this conduct.[65] It appears that he understood his conduct as justified rebellion against illegitimate societal domination, so he might interpret societal condemnation as reaffirming his status as a rebel with a just cause. A successful insanity defense, in contrast, would assert that he lacked the uniquely human capacity responsibility regarding this conduct, implying that he did not qualify for full standing as one with HD as status for this conduct.[66] Thus, it appears likely that his resistance to the insanity defense revealed his recognition that a successful insanity defense would deny that he qualified for full standing as HD.

Anders resembles the unabomber insofar as his conviction and punishment reaffirm his status as a responsible agent, but it condemns his conduct as culpable wrong doing. In doing so, it denies that he merits respect for HD as demeanour regarding that conduct. Arguably, Anders is less problematic than the Unabomber in that there was no plausible concern that he lacked the capacities of responsible agency. Thus, he qualifies for HD as status and is fully accountable for the criminal conduct that undermines his HD as demeanour.

Baker's insanity defense subjects him to the criminal trial process appropriate for a person similar to Anders who is presumed to qualify for HD as status, but the insanity verdict denies that he qualifies for full standing as a responsible agent regarding this specific conduct. It withholds condemnation inherent in punishment, reflecting Baker's lesser status as one who does not qualify as a responsible agent regarding this crime. Because the insanity defense is specific to this offender and this offense, it does not represent the judgment that Baker lacks full standing as a responsible agent for all conduct or that the general category of persons with mental illness lack full standing as responsible agents. By applying the insanity verdict, the court affirms the judgement that this conduct was a criminal wrong against the victim that merits condemnation. Thus, it reaffirms the standing of the victim as one who qualifies for protection under the criminal law. Applying civil commitment, rather than a criminal trial, to Baker might provide appropriate treatment more efficiently. One important cost of foregoing the criminal trial, however, would be the failure to explicitly condemn this conduct as a crime against the victim.

Common formulations of the insanity defense excuse individuals who do not know or appreciate that their conduct is wrongful due to mental disease or defect.[67] Alternative formulations refer to the failure to know the nature and quality of the criminal conduct, or that it was wrongful, due to 'disease of the mind.'[68] Terms such as 'disease of the mind' or 'mental disease' do not identify clinical diagnostic categories. Thus, courts and expert witnesses sometimes have some difficulty in clearly communicating the application of these standards.[69]

---

[65] See above n 41–44 and accompanying text in Part IIIA.
[66] See Kleinig and Evans, above n 62; Schopp, above n 43 addressing HD as status.
[67] LaFave, above n 9 § 7.5.
[68] Ibid § 7.2.
[69] Schopp, above n 43, 44–49.

Although the lack of convergence between legal and clinical terms can result in such difficulties in communication, it might serve a positive function in avoiding one type of distortion of HD. If legal standards for the insanity defense defined standards in terms of clinical diagnostic categories, they would generate two types of distortions of HD. First, individuals who qualify for specific diagnostic categories can vary substantially in their specific form and severity of impairment, as well as in the relationships between their impairment and specific criminal conduct. Thus, applying legal standards by diagnostic category has the potential to apply identical legal verdicts and dispositions to individuals who vary substantially in criminal conduct and responsibility.

Consider, for example, Baker2 who resembles Baker in that he manifests a delusional disorder. Baker2 is a criminal drug dealer who sells illegal drugs and engages in threats and violence in order to advance his drug sales. He develops a delusional belief that some unidentified family members are stealing his drugs and profits. He is unable to identify which family members are involved, so he hides his drugs and secretly monitors family members. During this period, another drug dealer begins to sell illegal drugs in Baker2's area. Baker2 assaults that competitor in order to drive him out of the area and protect his sales. Baker2 resembles Baker in that both manifest delusional disorders, and both commit assault. They differ in criminal responsibility, however, because Baker's criminal conduct is the product of his delusional belief and the resulting fear. Baker2's criminal conduct, in contrast, is part of his ongoing criminal endeavour and unrelated to his delusional disorder. Thus, similar dispositions based on a clinical diagnostic category would address at least one of these offenders in a manner that distorted the applicable principles of justice.

In addition to addressing differently culpable offenders similarly, defining appropriate legal responses by diagnostic categories would undermine respect for the HD of all members of those categories. Many individuals with delusional disorders experience the distress and impairment produced by their delusions, but they refrain from engaging in criminal conduct. If the legal institutions were to address all individuals in specified diagnostic categories as lacking competence or responsibility, those institutions would deny that any individuals with those disorders fully qualify for HD as status. The United States Supreme Court has categorically exempted intellectually disordered offenders from capital punishment.[70] Many might agree with this exemption because they believe that no one should be eligible for capital punishment. By retaining capital punishment as constitutional for fully culpable offenders but exempting intellectually impaired persons as a category, however, the Court implicitly states that no individual in this diagnostic category qualifies as a fully responsible person, and thus, for full standing as HD.

In contrast to Baker, Cook's impairment does not meet the insanity defense standard. Ordinary criminal trial and punishment comparable to that imposed on an unimpaired offender arguably would violate standards of comparative justice because it would treat him as fully culpable, although due to his impairment, he is less culpable than an unimpaired offender who commits a similar crime.[71] Civil commitment might be likely to provide appropriate treatment in an

[70] *Atkins v Virginia*, 536 US 304 (2002).
[71] See *DSM-5*, above n 6.

efficient manner, but applying civil commitment rather than the criminal trial that would be applied to other citizens who engaged in similar conduct would deny that he qualifies for standing as a responsible agent. Thus, it would deny that he fully qualifies for HD as status. A guilty plea in a mental health court with a suspended sentence and conditions of probation involving psychological treatment would arguably be the approach most consistent with respect for HD because it would neither treat Cook as fully responsible nor as not responsible.[72] Thus, it would recognise that some individuals possess to some degree the capacities that provide the foundation for HD as status, but it would recognise that individuals can vary in the degree to which they possess those capacities, and therefore in their severity of blameworthiness for some conduct.

IV PARENS PATRIAE INTERVENTIONS AND HUMAN DIGNITY

A *HD and the Three Endangered Individuals*

Davis, East, and Fren (see Part IIB) draw attention to two questions central to the principled interpretation and application of *parens patriae* interventions in a manner that respects HD and protects well-being. First, what constitutes the most justified form of *parens patriae* interventions to each individual in the circumstances encountered in a manner consistent with respect for HD? Second, what type and severity of impairment should be relevant to selecting the most justified form of *parens patriae* intervention for impaired individuals in a manner consistent with respect for HD?

As discussed in Part IIIB, 'human dignity' is reasonably interpreted as referring to the status of those who possess the uniquely human characteristics that render humans capable of pursuing lives that manifest the worthy and honourable exercise of those characteristics. Discussion of human dignity often includes Kant's account of human dignity as 'grounded in the capacity for practical rationality.'[73] Those who possess these capacities qualify for capacity responsibility in that they possess the capacities of responsible agency. At least minimally adequate capacities of responsible agency enable one to identify and responsibly pursue the personal values, projects, and relationships of one's uniquely human life. Thus, at least minimally adequate capacity responsibility provides the basis for role responsibility regarding the development of the values, projects, and relationships that define the core of one's life.[74] Many individuals might seek to maximise the length of their lives. Some individuals, such as Davis, might define the meaning of their lives in certain projects or relationships. Insofar as Davis has pursued his translations as central to the purpose of his individual life, he might reasonably decide that completing his crowning translation has more value than maximising the duration of his life.

According to this interpretation, human dignity as status in the context of self-regarding conduct reflects the standing of those who possess the uniquely human capacities of responsible agency. These include minimally adequate capacities, such as reality recognition, comprehension, and reasoning that enable humans who qualify for capacity responsibility to define and pursue a meaningful human life through the exercise of the uniquely human capacities of practical

[72] See Redlich, above n 10.
[73] Kant, above n 58, 102 [77]–104 [81].
[74] See discussion above, page 10.

reasoning in light of the values and priorities they have identified as central to the lives they pursue. Thus, possession of these capacities provides the basis for role responsibility for the manner in which each individual exercises these capacities in the process of developing that person's life.[75]

Davis, East, and Fren each endanger themselves, but we respond to them differently due to variations in: (1) type and degree of impairment, (2) the role of that impairment in the self-endangering conduct, and (3) the manner and degree to which they are able to apply the uniquely human capacities of responsible agency to the decision at issue. Respect for HD requires responses to Davis, East, and Fren that reflect the differences in the manner and degree to which each possesses and applies the uniquely human capacities that provide the foundation for HD as status. Davis possesses the uniquely human capacities that qualify him as a competent adult with the right to make primarily and directly self-regarding decisions, including the decision to consent or refuse consent to treatment. The capacities that qualify him as competent for self-regarding decisions fulfil the requirements of capacity responsibility for the role of a self-directing person. The decision to accept, or reject, treatment falls within his role responsibility as a competent adult who defines the priorities central to his individual life.

East's severely psychotic condition impairs his comprehension and reasoning to a degree that renders him incompetent to make self-regarding decisions. These impaired capacities undermine his standing as one who qualifies for role responsibility regarding primarily and directly self-regarding decisions. Thus, he lacks full standing as a responsible agent due to the impairment of the uniquely human capacities that provide the foundation for HD. He retains some degree of these capacities, however, and he might remain competent to make reasoned decisions regarding some matters. Treatment designed to ameliorate his psychotic impairment might improve the capacities that provide the foundation for full standing as a responsible person.

Fran presents the most controversial case because he manifests a serious clinical disorder that clearly influences his decision, but the disorder is not one that involves serious distortion of reality recognition, comprehension, or reasoning. Thus, he retains the abilities that constitute capacity responsibility and provide the foundation for role responsibility regarding decisions that define the individual human life he pursues. What response to Fran is most consistent with respect for HD?

Respect for HD in the context of *parens patriae* interventions requires recognition of the previously discussed distinction between HD as status and as demeanour.[76] Respect for individuals with at least minimally adequate capacities of responsible agency requires that we respect their HD as status by respecting their right to direct their own primarily and directly self-regarding conduct within the limits of protected liberties. By exercising that right, each person defines the values and priorities central to that person's uniquely human life. Refusal to recognise the competent person's right to define and pursue that person's values and priorities denies that person's standing as an individual with the role responsibility to define and pursue an individual human life. Arguably, if an institutional structure addresses HD as based entirely on capacity, with no recognition of a right to exercise those capacities in defining and pursuing

[75] Ibid.

[76] See above n 62–63 and accompanying text in Part IIIB.

one's principles and priorities, it is difficult to justify the proposition that this institutional structure reflects respect for HD.

The capacities that qualify one as a competent adult with the authority to make self-regarding decisions include the uniquely human capacities of responsible agency, such as reality recognition, comprehension and reasoning that enable an individual to define and direct an individual human life according to the values that this person competently embraces. In the context of civil competence for person and property, these are defined as the capacity to make and communicate reasoned decisions regarding person and property.[77] The capacities of responsible agency that provide the foundation for liability responsibility in the context of criminal law and punishment converge with the capacities that provide the foundation for role responsibility as one who pursues certain values and projects as central to one's uniquely human life. Although phrased in different terms, standards for the insanity defense that address the person's ability to know or appreciate the nature, quality, and wrongfulness of his conduct converge with standards of competence in that both require at least minimally adequate capacities to recognise and reason about reality and the likely effects of one's conduct or decisions.[78] Thus, a person who possesses these capacities to an at least minimally adequate degree has the ability to define and pursue the projects and priorities that person has identified as central to the life he pursues. These capacities also render him responsible for the conduct he performs through the exercise of these capacities.

The point here is not that each individual must be competent and responsible for all functions or for none. Some individuals might manifest impairment that undermines capacity responsibility for some functions but not others. Encapsulated delusions, for example, might distort one's capacity responsibility for some matters but not for others. Recall, for example, Baker2 who manifests encapsulated delusions that distort his relationships with family members but do not preclude responsibility for his criminal conduct.[79] The point is only that a common set of capacities shared by adults who lack serious impairment provides the foundation for HD as status in the context of eligibility for police power and *parens patriae* interventions.

B *Compare Davis, East, and Fren*

Davis possesses capacity responsibility to the degree that qualifies him for role responsibility as a competent adult with the right to make primarily and directly self-regarding decisions. This provides the basis for individual liberty regarding primarily and directly self-regarding behaviour and for constraint on state intrusion into protected liberties. The combination of capacity responsibility and awareness of his preferences and principles places him in a better position than others to make decisions regarding his well-being insofar as one understands his well-being as measured by the principles and preferences he adopts as central to the individual human life he pursues. Respecting his decision to refuse treatment because completing the crowning project of his life's work is more important than maximising the duration of his life by his priorities reflects respect for his HD as status and demeanour.

[77] Neb Rev Stat § 30-2601 (1) (2008).
[78] Compare insanity standards, La Fave, above n 9.
[79] See above n 69–70 in Part IIIC, discussing Baker2 as an example of an individual with encapsulated delusions.

As interpreted here, HD as demeanour refers to the principled, honourable exercise of the capacities that render one eligible for HD as status.[80] Understood in this manner, HD as demeanour can vary in degree and consistency. An individual with at least minimally adequate capacities that provide the foundation for HD as status is competent to define and pursue his uniquely human life. Each person's responsible exercise of HD as status defines that person's HD as demeanour.

East's psychotic distortion of perception, comprehension, and reasoning renders him unable to make reasoned decisions regarding his own conduct and well-being generally and regarding the needed surgery specifically. His impaired capacity responsibility undermines his status as a competent adult who has the ability to fulfil the role responsibility to competently make his own self-regarding decisions. Thus, it undermines his right to liberty from state intrusion and provides a reasonable argument for a state obligation to apply paternalistic intervention to protect his well-being.[81] State intervention through civil commitment and treatment provides a reasonable intervention designed to promote his psychological well-being and possible recovery of his capacity responsibility. A finding of incompetence for person and appointment of a guardian promotes the ability of others to protect his well-being by providing the necessary surgery. A finding of incompetence and guardianship might be appropriate if treatment cannot restore competence. Alternately, a limited guardianship for the purpose of pursuing the needed surgery might be appropriate if he lacks competence to give or withhold consent and the physical condition requires timely surgery.[82] Although others can promote East's well-being, the paternalistic intervention renders the well-being less authentically his. That is, the results of the surgery and psychological treatment might substantially improve his physical well-being and psychological functions, but the paternalistic intervention dilutes the manner in which that well-being is authentically his, understood as the well-being that he has pursued as part of the uniquely human life he has defined as the life he lives.

Decision regarding the most justified form of intervention depends partially on the degree to which his impairment is subject to amelioration through appropriate treatment and partially on the specific state law regarding authority to provide medically necessary surgery for committed individuals without their competent consent. Surgery performed under such authority might provide an efficient path to protect his physical well-being. This intrusion into ordinarily protected liberty to decide for oneself undermines respect for HD as status, however, because it denies that he possesses the capacities of responsible agency. Thus, it renders his physical well-being less authentically his well-being. If the state intervention ameliorates his impairment to the degree that he qualifies as competent to make primarily and directly self-regarding decisions, he then possesses capacity responsibility that provides the basis for role responsibility regarding the individual human life he pursues. At that point he would become able to define and pursue the well-being that is central to the individual human life he has chosen. Thus, he would qualify for full standing as one with HD as status.

Fren manifests serious depressive disorder that leads him to endanger himself, but he does not endanger others, and he manifests no impairment of the capacities of reality recognition,

[80] See above n 62–64 and accompanying text in Part IIIB regarding HD as demeanour.
[81] See above n 20–24 and accompanying text in Part IIB regarding civil commitment and competence for person.
[82] See Neb Rev Stat § 30-2620 (2008) regarding limited guardianship.

comprehension, and reasoning that provide the basis for HD as status. Thus, he retains the capacities that qualify him as a competent adult with the authority to make primarily self-regarding decisions. He is not eligible for a finding of incompetence and guardianship because he retains the capacities necessary to make primarily and directly self-regarding decisions.[83] He is eligible for initial civil commitment because he manifests mental disorder and a demonstrated danger to himself.[84] As practical matter, the initial civil commitment is appropriate in circumstances of serious danger and lack of clear evidence regarding competence that would render him eligible for HD as status. The risk of serious harm to self justifies temporary intervention necessary to verify his competence to make self-regarding decisions. At the thirty day review, however, he presents the question whether mental disorder, such as serious but not psychotic depression that does not distort abilities of reality recognition, comprehension, and reasoning, can justify coercive intervention to prevent harm to self that does not endanger others.

Fren differs from East in a manner that is central to respect for HD. In contrast to East, Fren's psychopathology does not impair his uniquely human capacities of reality recognition, comprehension, and reasoning that are central to the process of defining one's uniquely human life. Coercive intervention to protect Fren's well-being might protect his generic well-being as generally understood by preventing suicide, but it does so by alienating his well-being from him. Coercive paternalistic interventions deny Fren's HD as standing to define and pursue his uniquely human life. Thus, such interventions might protect his generic well-being but render that well-being no longer authentically his.

V CONCLUSION

The analysis presented here provided a preliminary example of such a TJ analysis that addresses HD as one important value relevant to the most justified application of police power and *parens patriae* interventions to individuals with mental illness.

In some circumstances, decisions regarding well-being must be made in generic form. Legislative decisions, for example, often address matters of public policy in light of expected effects on the population generally. Emergency room health care providers sometimes provide emergency care for unconscious accident victims with no relevant information regarding the individual's preferences or principles. In many other contexts, however, the most defensible approaches to the pursuit of individual or public well-being require consideration of a complex set of interacting interests and values. The hypothetical individuals presented here are intended to draw attention to the importance of HD as one important value that is relevant to the most justifiable approach to the pursuit of individual and public well-being consistent with other relevant values. More generally, these examples are intended to encourage consideration of the complex set of principles that are relevant to the pursuit of the TJ project in the context of the more comprehensive set of relevant principles.

Some readers might question the interpretation of HD presented here, the significance of HD for specific legal purposes, or the relationships among HD and other relevant values. I do not suggest that this analysis is final or that it necessarily applies in the same manner to all legal

[83] Ibid § 30-2601 (1) (2008).
[84] See, eg, Ibid §§ 71-908 (2), 925(4) (2009).

systems. The most defensible interpretation of HD and of the significance of HD for various legal purposes might vary significantly across societies that vary in their values and across legal functions within societies. The primary purpose of this project is to draw attention to the importance of pursuing careful analysis of the relevant values that provide the foundation for relevant legal rules, procedures, and roles in any institutional structure. The most defensible application of TJ requires integration of concern for the well-being of those affected with the other relevant values embodied in the relevant law.

Although the analysis presented here directs attention to TJ, the central concern extends beyond this. Legal rules and procedures generally impact a variety of individual and societal interests and values. Thus, identifying the most justified interpretation and application of legal rules and procedures requires consideration of a complex set of relevant interests and values. Empirical research can provide important information regarding the likely effects of various legal rules, procedures, and roles in a variety of contexts. Assessing the relevance of that information in order to identify the most justifiable approach to the interpretation, application, or reform of the relevant law requires the integration of the value for the well-being of those affected with the more comprehensive set of values embodied in law.

QUT Law Review
Volume 16, Issue 3, pp. 85-105.
ISSN: Online- 2201-7275
DOI: 10.5204/qutlr.v16i3.681

PERPETRATORS AND PARIAHS: DEFINITIONAL AND PUNISHMENT ISSUES FOR CHILD SEX OFFENDERS, AND THERAPEUTIC ALTERNATIVES FOR THE CRIMINAL JUSTICE SYSTEM

CHARLOTTE GLAB*

A punitive approach to criminal sentencing is profoundly counterintuitive in circumstances where incarceration and criminal labelling expedites, rather than prevents, recidivism. In a bid to avoid physical contact offences some paedophiles self-manage with low-level offending, such as viewing child exploitation material. These individuals are child sex offenders who may be receptive to rehabilitation with therapeutic assistance, yet are punished in a system deficient of genuine rehabilitation methodology. Therapeutic jurisprudence approaches for paedophiles have seen great success in international jurisdictions. This article contends that it is not without merit as an alternative for Australian sentencing practices.

I INTRODUCTION

In Western society today, the most reprehensible of wrongs are those of a sexual nature, and more particularly, sexual offences against children. The proliferation of information about crime, punishment, and perpetration means that those who commit these crimes become pariahs: universally reviled and notorious within a system that is structured to punish offenders rather than strategise to prevent perpetration. While there are those offenders who are opportunistic or remorseless—some individuals who may display sociopathic traits, without empathy, and for whom treatment is ineffective—there are those who experience significant distress at their actions. These individuals identify as paedophiles.

This cohort is often unable to access effective preventative assistance due to stigma in the wider community.[1] Consequently, self-management of these urges can involve low-level offences such as viewing exploitative material as a substitute for, and protection against, physically engaging in sexual acts with a child. Those who experience paedophilic urges, but do not physically perpetrate acts of harm upon children can therefore still be found guilty of an offence, and receive a criminal

* Charlotte Glab, (BA/LLB (Hons) (University of Queensland)); Graduate Lawyer, Milner Lawyers. Please note that the views expressed by the author of this article do not necessarily represent the views of the author's employer.

[1] Luke Malone, Interview with 'Adam' (This American Life Podcast: Tarred and Feathered, 11 April 2014); Margo Kaplan, 'Pedophilia: A Disorder, Not a Crime', *The New York Times* (New York), 6 October 2014, 23; Nick Wigham, 'Experts Are Calling For Prevention Strategies For Paedophilia, So Why Is No One Listening?', *news.com.au* (online) 18 July 2015 <http://www.news.com.au/lifestyle/real-life/experts-are-calling-for-prevention-strategies-for-paedophilia-so-why-is-no-one-listening/news-story/0de393948df51aace92e6add639b13ef>.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

sanction as a result. This leads to a confusion of what it means to be a 'paedophile' and what it means to be a 'child sex offender.'[2]

This article examines the definitional and practical distinctions between the two cohorts. In order to understand the internal battle fought, the article delves into the experiences of some individuals who live with this paraphilia. Following this, the sentencing structure of the Queensland justice system is assessed as a tool of punishment and crime prevention (recidivism), contrasted with the rehabilitative ideals of therapy-based sentencing. Therapeutic jurisprudence has been workable in a number of jurisdictions, and those programs are assessed here with regard to recidivism rates and holistic community benefits. It is concluded that the viability of such programs necessitates an initial distinction between these demographics. That distinction enables a more rehabilitative and therapeutic approach to justice; imperative in improving preventative assistance, sentencing methodology, and reintegration.

II WHAT IS PAEDOPHILIA?

A *Distinguishing Between Paedophilia and Sexual Offending*

Although the term 'paedophilia' is intended to define a recognisable clinical entity or subgroup that suffer a particular combination of urges, the term has become a demonising pejorative.[3] The worst is often assume of these individuals, however contrary to popular belief, having paedophilic urges and acting upon them are not mutually inclusive. Paedophilia is literally a love, or attraction ('philia') to children ('paedo'), and perpetration of sexual offences is not a foregone conclusion. Thus 'we must counter the emotionality surrounding the topic of paedophilia in the popular media,'[4] and society more generally, in order to wholly address a problem that perplexes courts and policy-makers alike.

The aetiology of paedophilia is uncertain, however it is commonly understood to be multifactorial, comprising psychosocial and biological factors. 'Neglect, abandonment, sexual, physical, and emotional abuse can all have a strong negative impact on a child's overall development including his or her sexual development,'[5] and thus no single 'molester profile' exists: child sex offenders are unique in terms of personal characteristics, life experiences, and criminal histories[6]—just like any other individual. Significantly, little evidence exists supporting the notion that victims of paedophilia-related offences become paedophiles themselves.[7] That is to say, they will not necessarily develop the symptomology which is consistent with paedophilic disorder *because* of a

[2] Pursuing syntaxical clarity, this article is referring to adults who engage in sexual acts with children, not those under 18 who commit sexual offences.
[3] Fred S Berlin, 'Pedophilia and DSM-5: The Importance of Clearly Defining the Nature of a Pedophilic Disorder' (2014) 42 *Journal of American Academic Psychiatry Law* 404, 404.
[4] Sarah D Goode, *Understanding and Addressing Adult Sexual Attraction to Children: A Study of Paedophiles in Contemporary Society* (Routledge, 2010) 1.
[5] TC Johnson, 'Development of Sexual Behavior Problems In Childhood' in Jon A Shaw (ed), *Sexual Aggression* (American Psychiatric Association, 1999) 41; Dennis Stevens, Influences of Early Childhood Experiences on Subsequent Criminology Violent Behaviour' (1997) 6(1) *Studies on Crime and Crime Prevention* 34.
[6] Dennis Stevens, 'Pedophiles: A Case Study' (2002) 17(1) *Journal of Police and Criminal Psychology* 36, 37.
[7] Cathy Spatz-Widom, 'Child Abuse, Neglect, and Violent Criminal Behaviour' (1989) 27 *Criminology* 251, 252.

prior incident of abuse. Paedophilia is a lifelong individual condition;[8] it is not 'passed on.'

Child sexual development is a vast and complex progression; one that has not been researched thoroughly enough for the psychological community to identify certain sexual preferences formed during these years. For sexual predilections considered 'normal' this is less of a concern, but for those preferences or paraphilias that are abnormal, deviant, or potentially dangerous, knowledge of their aetiology is necessary to navigate treatment and prevention approaches. Counterintuitively, while the neuronal mechanisms underlying 'normal' sexual function *have* been widely examined, those which trigger deviant sexual behaviours – such as paedophilia – remain relatively unknown.[9] Some suggest that the character of any violent offender is a consequence of environment, culture or experience,[10] and that paedophilia can be explained as such. Others suggest that biological factors can be implicated, such as alterations in brain structure and function.[11] What is indisputable is that human sexual arousal is a 'multidimensional experience comprising physiological and psychological processes.'[12] In the interests of criminal sentencing and justice itself, one cannot assume that all paedophiles are pathological or criminal; or that all child sex offenders are paedophiles.

B *Clinical Definitions*

The technical diagnostic term 'paedophilia erotica' was first in suggested *Psychopathia Sexualis*,[13] a definitional tome that included the concepts of sadism, masochism, fetishism, necrophilia, homosexuality, heterosexuality, and paedophilia. The expansive research therein indicated that some sexual deviation was a medical, rather than merely judicial, problem.[14]

Today, western society predominantly relies on the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V) for classification of mental disorders.[15] The DSM-V refers to paedophilia as 'pedophilic disorder,'[16] and distinguishes between exclusive and non-exclusive paedophilia.[17] pedophilic disorder is designated as a subset of paraphilic disorder; one that creates 'a significant psychiatric burden and, in some cases, can make it very difficult to maintain full and consistent self-control.'[18]

The current DSM-V definition is summarised as:

1. Over a period of at least 6 months, an individual has recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger); *and*

[8] Michael Seto, 'Is Pedophilia a Sexual Orientation?' (2012) 41 *Archives of Sexual Behaviour* 231, 232.
[9] Boris Schiffer et al, 'Functional Brain Correlates of Heterosexual Paedophilia' (2008) 41 *NeuroImage* 80, 80.
[10] Stevens, above n 6, 37.
[11] Sebastian Mohnke et al, 'Brain Alterations In Paedophilia: A Critical Review' (2014) 122 *Progress in Neurobiology* 1, 4.
[12] Schiffer et al, above n 9, 80.
[13] Richard Krafft-Ebing, *Psychopathia Sexualis: eine Klinisch-Forensische Studie* (1886).
[14] Goode, above n 4, 10.
[15] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013).
[16] Ibid at 302.2 (F65.4)
[17] Where a person can be sexually aroused *only* by children, or also by elder persons, respectively.
[18] Berlin, above n 3, 406.

a. The person has acted on these sexual urges (be it physical perpetration against a child, use of exploitative material, or intense fantasising during sexual arousal); *or*
b. These sexual urges or fantasies cause marked distress or interpersonal difficulty for the person; *and*

2. The person is at least age 16 years and at least 5 years older than the child or children in the first criterion.

Though there are isolated reports of paedophilia in women[19] it is substantially more frequent in men.[20] Overall, and across a number of studies, the prevalence for paedophilia amongst men is estimated to be between 1–3.8 per cent.[21] Very little is known about undiagnosed paedophiles who have *not* sexually abused a child, which is understandable given that most studies on paedophiles are conducted on those who have also perpetrated abuse – those who are already incarcerated.[22] Attempting to learn about this sexual attraction by studying samples only of known offenders offers a distorted picture,[23] not only statistically, but within society as well.

C *Identification as a 'Paedophile'*

In a society where tales of abuse, horror, and 'evil' perpetrators are easily accessible, stories from those who suffer with this paraphilia – equally as accessible – are not highly publicised. A pervasive bias continues to demonise these individuals without understanding their experience, or being willing (or able) to empathise with them as people afflicted with a sexual attraction that they did not solicit, and do not want.

Those paedophiles who are willing to be interviewed or participate in research seek to encourage discussion and eliminate stigma. One such individual, known as David[24] paints a 'detailed and vivid picture of how it feels, as a lonely and frightened teenager, to slowly come to the horrific realisation that you yourself are a paedophile.'[25]

This is not unique. Many of those who identify as possessing the key traits of paedophilia state they feel uncomfortable discussing their attraction with family[26] even though the role of family and friends is crucial to an individual's self-acceptance.[27] For those whose family or friends continue to be a positive support network after such revelations, a law-abiding (non-offending)

---

[19] Eva W C Chow and Alberto L Choy, 'Clinical Characteristics and Treatment Response To SSRI In A Female Pedophile' (2002) 31(2) *Archives of Sexual Behaviour* 211, 213.
[20] Myriam S Denov, 'The Myth of Innocence: Sexual Scripts and the Recognition of Child Sexual Abuse By Female Perpetrators' (2003) 40(3) *Journal of Sex Research* 303, 307.
[21] See Paul Okami and Amy Goldberg, 'Personality Correlates of Pedophilia: Are They Reliable Indicators?' (1992) 29(3) *Journal of Sex Research* 297; Paul Okami, 'Sociopolitical Biases in the Contemporary Scientific Literature on Adult Human Sexual Behavior with Children and Adolescents' in Jay R Feierman (ed), *Pedophilia: Biosocial Dimensions* (Springer-Verlag, 1990).
[22] See Jehan Safitri, Rahmi Fauzia, and Qomariyatus Sholihah, 'Aeitiology of Paedophile Sufferers' (2013) 9(2) *The European Journal of Social & Behavioural Sciences* 1418.
[23] Goode, above n 4, 20; Annie Cossins, National Child Sexual Assault Reform Committee, *Alternative Models For Prosecuting Child Sex Offences In Australia* (2010).
[24] Nom de plume.
[25] Goode, above n 4, 5.
[26] Ibid 116.
[27] Ibid.

lifestyle is highly correlative.[28] When those whose attraction has become known to family or friends do not receive support – or encounter disapproval – a converse outcome is likely.[29]

Professional help is also difficult for these individuals to access, for a number of reasons. In Australia, mandatory reporting laws[30] perpetuate a fearful attitude towards these people, and make it difficult for them to not only seek help, but have help given when they ask for it. Even some who research or work within this field appear incapable of empathising with those who are sexually attracted to children, and this is not surprising:

> Common portrayals of paedophiles, which we see every day in popular culture, media, charity campaigns, educational materials and even crime and justice materials, are often simplistic, and psychologically naïve… they ask us to believe in what amounts to almost two-dimensional cardboard cut-outs, evil monsters utterly unrelated to everyday life.[31]

In one German survey of psychotherapists, more than 95 per cent of respondents acknowledged an unwillingness to work with patients diagnosed or identifying with paedophilia, for reasons including negative attitudes towards this subgroup.[32] In a 2014 survey of clinical practitioners in Finland, 65 per cent rated their skills and knowledge insufficient, while 38 per cent rated their personal attitudes incompatible with treating paedophiles.[33] Meanwhile, in a US survey of people with sexual interest in children, a large number of respondents named 'the expectation to be treated in a stigmatising way by the professional'[34] as a primary reason for their reluctance to seek help.[35]

Conducting a series on pariahs and stigma, *This American Life* journalist Luke Malone interviewed a young paedophile known as "Adam."[36] Adam's story reveals the need for such support from family, friends, and the health community.[37] He is 19 years old and self-identified as a paedophile at the age of 16. After viewing child pornography compulsively from the age of 14, he realised he was addicted and sought help from online communities. However, the guilt he experienced – even after he 'quit' viewing – manifested itself in self-loathing and suicidal thoughts.

---

[28] Ibid.
[29] Ibid.
[30] As to mandatory reporting laws, see for example *Children and Young People Act 2008* (ACT) ss 356, 357; *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27, 27A; *Care and Protection of Children Act* (NT) SS 15, 16, 26; *Child Protection Act 1999* (Qld) ss 22, 186; *Children's Protection Act 1993* (SA) ss 6, 10, 11; *Children, Young Persons and Their Families Act 1997* (TAS) ss 3, 4, 14; *Children, Youth and Families Act 1997* (VIC) ss 162, 182, 184; *Children and Community Services Act 2004* (WA) ss 124A-H; *Family Law Act 1975* (Cth) ss 4, 67ZA.
[31] Goode, above n 4, 1.
[32] M Stiels-Glenn, 'The Availability of Outpatient Psychotherapy For Paedophiles in Germany' (2010) 28(2) *Recht & Psychiatrie* 74, 75.
[33] K Alanko et al, (2015) 'Attitudes and Knowledge to Treat Potential Child Sexual Offenders Among Finnish Health Care Professionals.' *Manuscript in preparation for publication*. Referenced in Sara Jahnke, Kathleen Philipp and Juergen Hoyer, 'Stigmatizing Attitudes Towards People with Pedophilia and Their Malleability Among Psychotherapists in Training' (2015) 40 *Child Abuse & Neglect* 93, 94.
[34] Sara Jahnke, Kathleen Philipp and Juergen Hoyer, 'Stigmatizing Attitudes Towards People with Pedophilia and Their Malleability Among Psychotherapists in Training' (2015) 40 *Child Abuse & Neglect* 93, 94.
[35] Richard Kramer, 'The DSM and the Stigmatization of People Who Are Attracted to Minors' (Paper presented at the Symposium meeting of the B4U-ACT Inc., Pedophilia, Minor-Attracted Persons, and the DSM: Issues and controversies, Westminster, MD, 17 August 17 2011).
[36] Malone, above n 1.
[37] Ibid.

> I [went to] see a psychologist… I knew what I was going to say: I'm a paedophile and I'm addicted to child pornography. I saw a look of horror on her face… Immediately she went from being a nice, gentle person, to being very critical… I was being judged… I was terrified the whole time.[38]

This psychologist informed Adam and his mother that she was unwilling to treat him. Adam now runs his own online support group for those who identify as 'virtuous' paedophiles.[39]

People who identify as paedophiles work against a current of stigma, desertion, and most significantly, the common presumption that perpetration is a foregone conclusion. It is imperative that our criminal justice system, psychological community, and wider society distinguishes between involuntary desires, and voluntary actions – between 'being sexually attracted to children and acting on that attraction… a distinction often lost,'[40] and a relatively unexamined dynamic. In doing so, approaches to prevention and punishment may be more successful than current methodologies.

D *Child Sex Offenders*

Not all child sex offenders identify as having paedophilia, and not all paedophiles necessarily perpetrate against children. For those who identify as having the symptomology consistent with paedophilic disorder, perpetration is not a foregone conclusion. Effectively, 'an individual with pedophilia is not necessarily an abuser, and an individual who sexually abused a child does not necessarily have a pedophilic sexual preference.'[41] Persistent conflation of these concepts has led to confusion on this point, which has serious consequences for research, management, and sentencing methods.

The criminal justice system must begin to distinguish between the subgroups related to child sex offences in order to enable distinct jurisprudential approaches. Current methodology for perpetration prevention, sentencing, and reintegration is not as effective as it could (or should) be, which is of little benefit to potential victims or perpetrators.

As aforementioned, child sexual abuse is a legal term, while pedophilia is a medical term.[42] They cannot be used synonymously: 'when speaking of child sexual abuse and paedophilia, it is important to remember that these terms describe two potentially related, but distinct phenomena.'[43] Therefore, child sex offenders can be grouped into two categories:

---

[38] Nom de plume in Malone, above n 1.

[39] In Adam's group, any member must believe that engaging inappropriately with children is wrong. In other contexts, such support groups or individuals are labelled as 'virtuous paedophiles'. The concept involves individuals with this sexual urge learning to control it, because although they accept they have sexual attraction to children, they do not seek to offend against them.

[40] Goode, above n 4, 2.

[41] Klaus M Beier et al, 'Can Pedophiles Be Reached For Primary Prevention of Child Sexual Abuse? First Results of the Berlin Prevention Project Dunkelfeld (PPD)' (2009) 20(6) *The Journal of Forensic Psychiatry & Psychology* 851, 852.

[42] Ryan CW Hall and Richard CW Hall, 'A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues' (2007) 82(4) *Mayo Clinic Proceedings* 457, 460.

[43] Beier et al, above n 41, 852.

1) Those *without* an erotic preference for children as identified by the DSM-V, who commit sexual crimes against children.
2) Those *with* a sexual preference for children which can be designated as paedophilic disorder, who commit sexual crimes against children.

The proportion of paedophiles who perpetrate and thus dually classify is approximated at 40–50 per cent,[44] which means that at least 50 per cent of child sex offenders do not meet the criterion for paedophilic disorder. But the conflation of the two concepts results in the criminal justice system, media, and wider community referring to child sex offenders as paedophiles – which in half of the cases is not accurate. This creates difficulties for the individuals with paedophilic disorder who do not offend, and unchecked, some of these individuals go on to commit low-level offences in a bid to manage their urges. This is not to denounce an individual's sense of agency in the choices they make: the decision to commit a sexual offence (low-level or not) is a conscious one. However, if feasible mechanisms exist to aide in the prevention of initial perpetration and subsequently, recidivism, they ought to be taken advantage of. The discovery and implementation of these judicial devices necessitates a careful distinction between paedophiles, child sex offenders, and this unique third category.

III PAEDOPHILIA, CHILD SEX OFFENDERS, AND CRIMINAL SENTENCING

Within a climate of populist punitiveness, legislators have modified statutes to incorporate harsher terms of punishment.[45] In the United States, punitive measures have increased considerably, with the number of arrests for internet child sex crimes[46] tripling between the years 2000 and 2009.[47] Average sentences are lengthier for child pornography offences, meaning offenders occupy custodial spaces longer, and require longer-term supervision for probation and parole.[48] Australia has promulgated mandatory sentencing, one-strike policies,[49] and the withdrawal of alternative sentencing strategies for sex offenders.[50] Any modification of sentencing (to more community-

[44] Barry M Maletzky and Cynthia Steinhauser, 'A 25-Year Follow-Up of Cognitive/Behavioral Therapy with 7275 Sexual Offenders' (2002) 26 *Behaviour Modification* 123, 128; Michael C Seto, R. Karl Hanson and Kelly M Babchishin, 'Contact Sexual Offending By Men Arrested for Child Pornography Offenses' (2011) 23 *Sexual Abuse: A Journal of Research and Treatment,* 124.

[45] E Lotke, *Sex Offenders: Does Treatment Work?* (National Center on Institutions and Alternatives, 1996); JM Brown, PA Langan and DJ Levin, DJ *Felony Sentences In State Courts* (US Department of Justice, 1999).

[46] Generally possession or distribution of child exploitation material.

[47] J Wolak, D Finkelhor and KJ Mitchell, 'Child Pornography Possessors: Trends in Offender and Case Characteristics' (2011) 23 *Sexual Abuse: A Journal of Research and Treatment* 22, 26.

[48] J Wolak, D Finkelhor and KJ Mitchell, *Law Enforcement Responses to Online Child Sexual Exploitation Crimes: The National Online Juvenile Victimization Study, 2000 & 2006* (Crimes Against Children Research Center, 2009).

[49] *Penalties and Sentences Act 1992* (Qld) s 161E(2): An offender who is convicted of a repeat serious child sex offence is liable to, despite any other penalty imposed by the Criminal Code, imprisonment for life, which cannot be mitigated or varied under any law.

[50] Ralph Henham, 'Sentencing Sex Offenders: Some Implications of Recent Criminal Justice Policy' (1998) 37(1) *The Howard Journal* 70, 72. See also Barbara E Smith, Susan W Hillenbrand and Sharon R Goretsky, *The Probation Response To Child Sexual Abuse Offenders: How Is It Working?* (American Bar Association, 1990); Jonathan Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) 4(1/2) *Psychology, Public Policy & Law* 452.

based approaches) has been unavailable to child sex offenders, and the criminalisation of 'low-level' offences[51] is resolute.

In Queensland, under section 228D of the *Criminal Code Act 1899* (Qld),[52] it is an offence to possess child exploitation material.[53] This offence incurs a sentence of up to 14 years imprisonment. Under section 41(3) of the *Classification of Films Act 1991* (Qld),[54] it is an offence to knowingly have possession of a child abuse film,[55] incurring a sentence of up to 12 months imprisonment. Under section 14 of the *Classification of Publications Act 1991* (Qld),[56] it is an offence to knowingly possess a child abuse photograph or child abuse publication.[57] The sentence for this offence is imprisonment for 1 year.

In *R v Mara*[58] it was explained that **'**denunciation and deterrence (both general and personal) are particularly powerful considerations in sentencing for child pornography offences.'[59] Case law generally demonstrates that a sentence for possession of exploitative material will generally range from 1 to 3 years.[60] These are cases that do not include counts of more serious offences,[61] such as *distribution* of child exploitation material,[62] *production* of exploitation material,[63] or grooming a child for procurement.[64]

For cases including more serious offences along with counts of possession of exploitative material, the sentence is more severe. *R v Tahiraj*[65] involved multiple counts of serious offences with different victims. The appellant displayed no contrition, had a complete lack of remorse, and little insight into his own conduct. Initially sentenced to 12 years' imprisonment, this was appealed on the basis of relative closeness in age to the victims, 'youthful immaturity,' his family support and prospects of rehabilitation and previously clear criminal record. The appeal was allowed and his sentence reduced to 8 years' imprisonment.

---

[51] These offences involve conduct other than the direct physical perpetration of a sexual act upon a child, such as possession of child exploitation material. The creation or distribution of child exploitation material is intentional and mercenary conduct, and is not considered a mechanism of urge-control. See, eg, *Criminal Code Act 1899* (Qld) s 228D (14 years maximum penalty); *Crimes Act 1900* (NSW) s 91H (10 years maximum penalty); *Crimes Act 1958* (ACT) s 70 (10 years maximum penalty). For the purposes of this paper, the legislation will be limited to the Queensland jurisdiction, focusing on specific low-level offences.

[52] *Criminal Code Act 1899* (Qld).

[53] Maximum penalty 14 years imprisonment.

[54] *Classification of Films Act 1991* (Qld).

[55] Maximum penalty 12 months imprisonment.

[56] *Classification of Publications Act 1991* (Qld).

[57] Maximum penalty 1 year imprisonment.

[58] [2009] 209 QCA.

[59] Ibid [20]. See also: *R v Carson* [2008] QCA 268 [32]; *R v Plunkett* [2006] QCA 182 [6]; *R v Wharley* [2007] QCA 295 [17].

[60] *R v Grehan* [2010] QCA 042 (3 year sentence); *R v Lloyd* [2011] QCA 012 (3 year sentence; appealed and granted to suspended 3 year and 2 years probation); *R v Gargett-Bennett* [2010] QCA 231 (3.5 year sentence appealed and down to 3 years).

See also: *R v Waszkiewicz* [2012] QCA 22 (2 year sentence); *R v Lovi* [2012] QCA 24 (sentence of 12 months imprisonment allowed on appeal); *R v Plunkett* [2006] QCA 182 (sentence of 18 months imprisonment).

[61] 'More serious' for the purposes of this article, is any offence which involves physical perpetration, or non-personal

[62] *Criminal Code Act 1899* (Qld) s 228C.

[63] Ibid s 228B.

[64] Ibid s 218B.

[65] [2014] QCA 353.

Often, the courts dismiss appeals against excessive sentences where the appeal is made on the basis of mental health[66] or clinical diagnosis. In *R v Mara*[67] the appellant had been diagnosed with paedophilia, but was sentenced to 6 years imprisonment alongside his two fellow perpetrators, for trading and possessing child exploitation material. The assessment made by a forensic psychologist was as follows:

> He has no real insight or understanding as to why he found such abhorrent sexual images stimulating or as to why child exploitative material appeared to be his preference or why it led him to act in an illegal manner on a large number of occasions for a very long period of time. He is nevertheless "a man overwhelmed with his predicament, contrite, highly remorseful and … genuine in his stated position that he desired to and had to change."[68]

However, in that case, the sentencing judge emphasised that the internet and child pornography exploits defenseless children to 'feed the craving for personal sexual gratification of a paedophilic nature … of your cruel, unnatural and disgusting perversion.'[69] Most cases concerning s 228D[70] include reference to Justice Kennedy's judgement in *R v Jones*,[71] where his Honour stated that 'the offence of possessing child pornography cannot be characterised as a victimless crime. The children, in the end, are the victims.'[72]

Similarly, the consideration of deterrence is at the forefront of judgements for these offences. Consequently, some offenders who are cooperative, remorseful, and able to seek rehabilitative treatment are nonetheless made an example of, as in *R v Riley*:[73]

> The evil and exploitive industry of child pornography is fed by those … who download it from the internet. Others who might be similarly tempted should know they are likely to be detected, charged with a criminal offence, have a conviction recorded with all that ensues from it, be publicly shamed and risk being sentenced to a period of actual imprisonment, even if first offenders.[74]

In *R v Cook; Ex parte Director of Public Prosecutions (Cth)*[75] the Crown successfully appealed a monetary penalty, which was then substituted for both a fine and 12-month prison sentence. Overall, it appears that the courts prefer custodial sentences over non-custodial ones for offences of this nature.[76]

---

[66] *R v Craig Daniel Vantoosten* [2009] QCA 54.
[67] [2009] 209 QCA: Sentenced under s 474.19(1) of the *Criminal Code Act 1995* (Cth) – analogous to s 228D *Criminal Code Act 1899* (Qld).
[68] Ibid [16].
[69] Ibid [19].
[70] *Criminal Code Act 1899* (Qld) s 228D.
[71] (1999) 108 A Crim R 50 (Kennedy J).
[72] Ibid [9].
[73] [2007] QCA 391.
[74] Ibid [18] **(**McMurdo P, Jerrard JA and Dutney J). The sentence was set aside in this appeal, with the Court giving regard to s9(2)(a) of the *Penalties and Sentences Act 1992* (Qld).
[75] *R v Cook; Ex parte Director of Public Prosecutions (Cth)* [2004] QCA 469.
[76] See: *R v Salsone; ex parte A-G (Qld)* [2008] QCA 220, where the Attorney General appealed against sentences involving probation and community service. The appeal was allowed and offender sentenced to 15 months imprisonment.

This may be considered a deviation from rehabilitation as a sentencing objective, and contrary to section 9(2) of the *Penalties and Sentences Act 1992* (Qld) which states:

> Courts [must] have regard to the principles that (a) a sentence of imprisonment should only be imposed as the last resort and (b) that a sentence which allows the offender to stay in the community is preferable.[77]

Pursuant to this departure, the court in *R v Carlton*[78] held that the principle of imprisonment as a last resort should *not* apply to certain offences.[79] These offences include those of s 14 of the *Classification of Publications Act 1991*,[80] s 41(3) of the *Classification of Films Act 1991*,[81] and s 228D of the *Criminal Code Act 1899*.[82] This is consistent with s 9(4) of the *Penalties and Sentences Act 1992* (Qld),[83] which states that an individual convicted of any offence of a sexual nature committed in relation to a child under 16 years must serve an actual term of imprisonment. Enshrining the exceptions to rehabilitative sentencing is a reflection of a more punitive attitude, and an unwillingness to offer community-based approaches to child sex offenders.

Successful appeal cases concerning these offences contain considerable extenuating circumstances, such as judicial misdirection,[84] youth of perpetrator,[85] or other exceptional factors.[86] Remorse or guilty pleas do not seem to be mitigating factors in these cases. In *R v Sykes*[87] a sentence of 1 year and 3 months was upheld although the appellant had no prior convictions, sought counselling, and pled guilty. In *R v Davis*[88] acceptance of responsibility, remorse, cooperation with authorities, and family support were not enough to reduce a 4-year prison sentence.[89]

Despite the rhetoric that seeks to justify it, it appears the real intent of sentencing is not to be rehabilitative, but to be disciplinary, and affirm the rule that has been broken by the offender. That is not to say that such intention is without merit; the very fabric of our judicial system relies on rule abidance, and the modern accessibility of child pornography is a reasonable concern for the judiciary. Viewing child pornography is often a high frequency behaviour, and at the end of the day, those children who are exploited in order to create it, are the victims. However, we must be careful not to limit ourselves to traditional disciplinary methods when we seek to protect our most

---

[77] *R v Cameron James Reid* [2000] QCA218 [5].
[78] *R v Carlton* [2010] 2 Qd R 340 [20].
[79] Ibid s 9(13).
[80] *Classification of Publications Act 1991* (Qld) s 14.
[81] *Classification of Films Act 1991* (Qld) s 41(3).
[82] *Criminal Code Act 1899* (Qld) s 228D.
[83] *Penalties and Sentences Act 1992* (Qld).
[84] *R v Campbell* (2009) 195 A Crim R 374; [2009] QCA 128.
[85] *R v Lovi* [2012] QCA 24. A male of 16 years old. Sentenced to 1 year's imprisonment, appealed to 1 year on immediate release with 2 year good behaviour bond.
[86] *R v Verburgt* [2009] QCA 33. Here the applicant successfully had sentence reduced from 12 months to 6 months, with his Honours giving regard to his mental capacity, employment, cooperation, counseling, family support, and the singular nature of the offence, with no additional distribution made by the offender.
[87] [2009] QCA 267.
[88] [2012] QCA 324.
[89] Further example: *R v Engeln* [2014] QCA 313 (no previous convictions; good employment history; family support; limited social interaction with females; low risk of reoffending; no genuine remorse; general deterrence approach. Appeal against 3 year sentence dismissed).

vulnerable demographics in a modern age. Traditional, punitive methods are no longer proving successful in that protective endeavor, and rehabilitative alternatives might do more.

IV CHILD SEX OFFENDING AND 'PUNISHMENT'

A *The Experience of Punishment*

According to many sociologists, sentencing is no longer aimed at preventing crime.[90] By punishing the offender, the superiority of an 'us' and 'them' mentality is affirmed;[91] comparing, excluding, and homogenising.[92] Indeed, s 9(1) of the *Penalties and Sentences Act 1992* explicitly states the purposes for which a sentence may be imposed, [93] which encompass these values, including 'to make it clear that the community… denounces the sort of conduct in which the offender was involved.'[94]

Any period of incarceration can have a grave impact on the individual, both whilst in prison and for their reintegration into society. During incarceration, those labelled child sex offenders can suffer at the hands of their fellow inmates[95] and experience all the general symptoms of isolation and exclusion.[96] Post-incarceration, offenders are faced with a dearth of support to reintegrate: some variation of being jobless, friendless, homeless, without family support or psychological assistance is the experience of each individual who carries this label.[97] And the label itself may be the most damaging aspect of conviction and registration.

Society now treats child sex offending as an act by a particular species of individual, rather than as a particular type of conduct that is given a legal description. The accompanying stigma and collective antipathy turns mere judicial designation into 'negative symbol capital that cannot be

---

[90] Emile Durkheim fathered this notion.

[91] Chrysanthi Leon, *Sex Fiends, Perverts, and Paedophiles: Understanding Sex Crime Policy in America* (NYU Press, 2011) 180.

[92] Ibid 181.

[93] *Penalties and Sentences Act 1992* (Qld): s 9(1)(a) to punish the offender to an extent or in a way that is just in all the circumstances; or
(b) to provide conditions in the court's order that the court considers will help the offender to be rehabilitated; or
(c) to deter the offender or other persons from committing the same or a similar offence; or
(d) to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or
(e) to protect the Queensland community from the offender.

[94] Ibid s 9(1)(d).

[95] See AN Groth, 'Treatment of the Sexual Offender in a Correctional Institution' in J Greer and I Stuart (eds), *The Sexual Aggressors: Current Perspectives on Treatment* (Von Nostrand Reinhold, 1983) 160.
See also Don Thompson, 'Sex Offenders Are Being Killed Off in California Prisons,' *Business Insider* (online), 17 February 2015 <http://www.businessinsider.com/sex-offenders-are-being-killed-off-in-california-prisons-2015-2?IR=T>; Associated Press, 'Teacher Left Alone With Sex Offender In Prison Is Raped,' *New York Times (Online*) 19 June 2014 <http://nypost.com/2014/06/19/teacher-stabbed-assaulted-after-left-with-sex-offender-at-prison> ; Michael James 'Prison is Living Hell for Pedophiles,' *ABC News* (online), 26 August 2003 <http://abcnews.go.com/US/prison-living-hell-pedophiles/story?id=90004>.

[96] Although prison is not designed to be a genuinely relaxed experience for offenders, it ought not be a sentence to endure psychological or physical torture.

[97] RK Hanson and K Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis.* (Public Safety and Community Preparedness Canada, 2004).

shed and will, therefore, weigh on the bearer for life.'[98]

Interviews with convicted sex offenders have found that this capital—framing them as monsters—dehumanises them, robbing them of choice or normality, and undermining treatment.[99] This may contribute to the high rates of recidivism amongst child sex offenders, and to the reluctance amongst non-offending paedophiles to seek preventative help.

B *Recidivism*

Precise statistics on recidivism rates are relatively scarce[100] due to the range of assessment methods and self-reporting variables.[101] Available figures vary from 0 per cent to over 80 per cent, which indicates the difficulty in finding accurate information,[102] and Australian studies on sex offender specific recidivism are next to non-existent.[103]

However, two international studies note recidivism rates of 22–43 per cent[104] for those child sex offenders who are left untreated and unaided after incarceration. These statistics are specifically related to secondary offences of a sexual nature; secondary offences of a non-sexual nature are much more common.[105]

Those who identify as paedophiles, or who are labelled as such, are often considered to be at greater risk for sexual recidivism compared to those who do not. However a number of studies have debunked this myth,[106] and for all the fear mongering about paedophilia and crime, sexual

---

[98] Leon, above n 91, 181.

[99] Pamela Schultz, *Not Monsters: Analyzing the Stories of Child Molesters* (Rowman & Littlefield, 2005).

[100] Daniel Turner and Peer Briken, 'Child Sexual Abusers Working with Children - Characteristics and Risk Factors' (2015) 10(1) *Sexual Offender Treatment* (online).

[101] Office of the Inspector of Custodial Services, Western Australia, Recidivism Rates and the Impact of Treatment Programs (2014) 1. See also David Greenberg et al, 'Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator' (2000) 24(11) *Child Abuse & Neglect* 1485.

[102] Lita Furbey, Mark R Weinrott and Lyn Blackshaw, 'Sex Offender Recidivism: A review' (1989) 105(1) *Psychological Bulletin* 3; Robin J Wilson et al, 'Community-Based Sex Offender Management: Combining Parole Supervision And Treatment To Reduce Recidivism' (2000) 42(2) *Canadian Journal of Criminology* 177; Hanson and Morton-Bourgon, above n 97; Friedrich. Lösel and Martin Schmucker, 'The Effectiveness of Treatment For Sexual Offenders: A Comprehensive Meta-Analysis' (2005) 1(1) *Journal of Experimental Criminology* 117.

[103] Patrick Parkinson et al, 'Nonsex Offences Committed By Child Molesters: Findings From A Longitudinal Study' (2004) 48(1) *International Journal of Sex Offender Therapy and Comparative Criminology* 28; Steven W Smallbone and Richard K Wortley, 'Criminal Diversity and Paraphilic Interests Among Adult Males Convicted of Sexual Offences Against Children' (2004) 48(2) *International Journal of Offender Therapy and Comparative Criminology* 175.

[104] Heather M. Moulden et al, 'Recidivism In Pedophiles: An Investigation Using Different Diagnostic Methods' (2009) 20(5) *The Journal of Forensic Psychiatry & Psychology* 680. It has been found that anywhere between 22% to 45% of child sex offenders (identifying as paedophiles or not) reoffend after incarceration.
See also Dawn Fisher, 'Adult Sex Offenders' in Tony Morrison, Marcus Erooga and Richard Beckett (eds), *Sexual Offending Against Children: Assessment and Treatment of Male Abusers* (Routledge, 1994) 1, 14.

[105] Jason Payne, 'Recidivism In Australia: Findings and Future Research' (Research and Public Policy Series, Paper No 80, Australian Institute of Criminology, 2007) 130: Recidivism among male juvenile sexual offenders in Western Australia found that 67% recorded a new conviction after the index offence; the majority were for offences other than sex offences. See also Alfred Allan et al, 'Recidivism Among Male Juvenile Sexual Offenders in Western Australia' (2003) 10(2) *Psychiatry, Psychology and Law* 359.

[106] Moulden et al, above n 104, 697.

recidivism is lower than assumed.[107]

What is evident from the studies available, is that offenders who are not offered treatment or assistance have higher reoffending rates than those who are.[108] Careful study of paedophilia across the medical, psychological, and sociological fields suggests that treatment of the individual offender—rather than incarceration—is a 'legitimate social and correctional response:'[109]

> The child sex offender does indeed deserve special treatment. But if that treatment is to be correctional in any meaningful sense, programs of treatment must be fashioned to respond appropriately to the particular needs of this unique class of offenders. Simple incarceration is ineffectual and regressive.[110]

Research shows that across a wide range of offences, a generally punitive approach does little to prevent recidivism.[111] Remarkably, there is little to no evidence to suggest that viewing exploitative material such as child pornography has a correlation with subsequent hands-on offending. One prospective study has found that less than one per cent of 231 men who had viewed child pornography (but with no evidence of a prior physical sexual offending) had gone on to commit such a sexual offence.[112] Another study found that only one in eight non-contact offenders also perpetrated physically,[113] falling short of the idea that conventional child sex offenders and those who access imagery are synonymous groups. From a statistical standpoint, individuals with no history of physical offences against a child, but who have accessed child pornography, are part of a low-risk group: [114] the assumption that one leads to another is a misguided one. However, exposure in custodial settings to more serious sex offenders can heighten the risk of reoffending in lower-risk offenders.[115]

This, coupled with the hardships that befall those who have been convicted, generates problems for recidivism of both the sexual and non-sexual kind after incarceration. Punitive laws are

---

[107] RK Hanson and MT Bussiere, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 66 *Journal of Consulting and Clinical Psychology* 348; A Harris and R Hanson, (2004) *Sex Offender Recidivism: A Simple Question* (Ottawa Ministry of Public Safety and Emergency Preparedness Canada, 2004).

[108] Hanson and Morton-Bourgon, above n 97; Lösel and Schmucker, above n 102.

[109] Roger Wolfe and Dominic Marino, 'A Program of Behaviour Treatment for Incarcerated Pedophiles' (1975-1976) 13 *American Criminal Law Review* 69, 69.

[110] Ibid 70.

[111] Office of the Inspector of Custodial Services, above n 101, 1: over the past decade, between 40 and 45 per cent of offenders have returned to prison within two years.
See also Jane Goodman-Delahunty and Kate O'Brien, 'Parental Sexual Offending: Managing Risk Through Diversion' (Trends and Issues in Crime and Criminal Justice Series, Paper No. 482, Australian Institute of Criminology, 2014).

[112] Berlin, above n 3, 405.

[113] M Seto, RK Hanson and KM Babchishin, 'Contact Sexual Offending By Men Arrested For Child Pornography Offenses' (2011) 23 *Sexual Abuse: A Journal of Research and Treatment* 124, 127.

[114] Cecilia D'Anastasio**, '**Can Virtual Sex Prevent Pedophiles from Harming Children in Real Life?' *Broadly Online*, 14 January 2016.

[115] HC Wakeling, RE Mann and AJ Carter, 'Do Low-Risk Sexual Offenders Need Treatment?' (2003) 51(3) *The Howard Journal of Criminal Justice* 286.

confrontational, and provide no incentive for sex offenders to engage in a pro-social lifestyle after incarceration.[116]

V THERAPEUTIC JURISPRUDENCE AND CHILD SEX OFFENDING

A *Reducing Recidivism through Therapeutic Approaches to Sentencing*

Paedophiles, opportunistic child sex offenders, and child sex offenders who also suffer from paedophilic urges must be distinguished from one another if intervention is to be effective. If individuals experiencing paedophilic urges are sentenced to prison without treatment, they reoffend sooner and at a greater rate than those who have access to therapy.[117] Therapeutic interventions may provide a more effective alternative in terms of community safety and treatment for individuals.

Therapeutic jurisprudence ('TJ') is a widely researched field, with supporters asserting that the law can successfully function as a therapeutic – rather than punitive – agent.[118] It is a framework developed to study the law and its impact upon the physical and psychological wellbeing of individuals who come into contact with the justice system.[119] This includes defendants, victims or survivors, and witnesses. The theory emphasises the need for a balanced approach in sentencing for low-level sex offences, placing particular importance on the ethical treatment of individuals, which can encourage more positive outcomes post-incarceration.[120]

The justice system, as a social force affecting every member of society, has the capacity to be 'therapeutic or anti-therapeutic,'[121] and thus the prescriptive heart of TJ theory suggests that the law should be restructured if need be, to abide by inherent principles of justice.[122] In turn, this has a holistic benefit for the community and those whom the law touches.

Without knowing the complex aetiology of paedophilia, and acknowledging that offending *can* be a consequence of this condition, there is less room for an empathetic approach to sentencing[123] or

---

[116] Bruce Winick, 'A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws' in Winick, and La Fond (eds), *Protecting Society From Sexually Dangerous Offenders: Law, Justice, and Therapy* (American Psychological Association, 2003) 213. See also Astrid Birgden, 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14(1) *Psychiatry, Psychology and Law* 78, 78.

[117] Jason Peebles, 'Therapeutic Jurisprudence and the Sentencing of Sexual Offenders in Canada' (1999) 43(3) *International Journal of Offender Therapy and Comparative Criminology* 275, 280.

[118] Jeffrey Klotz et al, 'Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process' (1992) 15 *University of Puget Sound Law Review* 579, 581.

[119] Astrid Birgden, 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14(1) *Psychiatry, Psychology and Law* 78, 80.

[120] Astrid Birgden, 'Therapeutic Jurisprudence and Sex Offenders: A Psycho-Legal Approach to Protection' (2004) 16(4) *Sexual Abuse: A Journal of Research and Treatment* 351.

[121] David B. Wexler, 'Therapeutic jurisprudence and changing conceptions of legal scholarship' (1993) 11 *Behavioral Sciences and the Law* 17, 19.

[122] Peebles, above n 117, 283. See also David B Wexler, 'Therapeutic Jurisprudence and the Criminal Courts' (1993) 35 *William and Mary Law Review* 279.

[123] Kate Warner et al, 'Public Judgement on Sentencing: Final Results from the Tasmanian Jury Sentencing Study' (Trends and Issues in Crime and Criminal Justice Series, Paper No. 407, Australian Institute of Criminology, 2011)

prevention research.[124] However, there is now considerable evidence that psychological assistance can be delivered to those who suffer from paedophilia, helping them deal more effectively with their urges, and assisting them in redirecting their preferences to more appropriate partners.[125] Consequently, there is newfound support for therapeutic jurisprudence; sentencing that incorporates psychological assistance offered to those offenders who have paedophilia, and who want to make a change.

Researchers claim that sexual offenders who attend and cooperate with psychological treatment while incarcerated are less likely to reoffend than those who do not.[126] This is not an assertion that 'paedophilia' is curable; it is a hypothesis that with guidance and management assistance, an individual can control their urges. A paraphilia such as this is acknowledged as an unchanging manifestation,[127] one which causes distress to many individuals. Those who advocate TJ highlight that because of the distress and complex problems paedophiles experience, it is reasonable to assume that those who offend are more likely to be remorseful, open to rehabilitation, and willing to work hard at it than opportunistic child sex offenders.[128]

A plethora of studies demonstrate that adult sex offenders who receive treatment are less likely to reoffend when compared to those who do not.[129] One meta-analysis conducted with 11 000 sex offenders revealed that only 7.2 per cent of those who went through prevention therapy were arrested for new crimes (sexual or otherwise), contrasted with 17.5 per cent of those who went without such therapy.[130]

There are a number of studies assessing child sex offence recidivism rates after therapeutic

3. See also: Julia Davis, Kate Warner and Rebecca Bradfield, 'Interviewing the Jury: Three Case Studies from the Tasmanian Jury Sentencing Study' in Bartels L & Richards K (eds), *Qualitative Criminology: Stories from the Field* (The Hawkins Press, 2011); Karen Gelb, 'Myths and Misconceptions: Public Opinion Versus Public Judgment About Sentencing' (2009) 21(4) *Federal Sentencing Reporter* 288.

[124] Malone, above n 1, interview with Elizabeth Letourneau. See also: Elizabeth Letourneau et al, 'Effects of Sex Offender Registration and Notification on Judicial Decisions' (2010) 35(3) *Criminal Justice Review* 295; Elizabeth Letourneau, 'A Prevention-First Approach To Child Sexual Abuse', The Baltimore Sun (online), 6 August 2013 <http://www.baltimoresun.com/news/opinion/oped/bs-ed-child-sexual-abuse-20130806-story.html>.

[125] LF Lowenstein, *Paedophilia: The Sexual Abuse of Children, Its Occurrence, Diagnosis and Treatment* (Able, 1998) 19. Some researchers emphasise that many paedophiles are also attracted to those their own age, however it is not the dominant sexual preference they have.

[126] RK Hanson and MT Bussiere, above n 107, 360. See also WL Marshall et al, 'Working Positively with Sexual Offenders. Maximizing the Effectiveness of Treatment' (2005) 20 *Journal of Interpersonal Violence* 1096.

[127] KM Beier, HG Bosinski and K Loewit, *Sexualmedizin* (Elsevier Urban & Fischer, 2005).

[128] Beier et al, above n 41, 853.

[129] Furbey et al, above n 102; B Gallager, 'Ritual Abuse: A Response to Coleman' (2001) 10(2) *Child Abuse Review* 83; Hanson and Morton-Bourgon, above n 97; Lösel and Schmucker, above n 102.

[130] MA Alexander, 'Sexual Offender Treatment Efficacy Revisited' (1999) 11 *Sex Abuse* 101, 112.

See, in addition: the most recent research has consolidated this, finding substantial decreases in the recidivism rates of 'treated' offenders versus untreated: Janice Marques et al, 'Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism— Preliminary Results of a Longitudinal Study' (1994) 21(1) *Criminal Justice and Behavior* 28.

approaches,[131] with approximated recidivism rates ranging between 4–18 per cent[132] for those child sex offenders who are given assistance. There is limited concrete data due to the newness of modern treatment methods and therapy-based sentencing, but it is an assumption held by many researchers that therapy does reduce recidivism rates.[133]

Those who evaluate the limited Australian programs stress the importance of post-incarceration support and reintegration assistance, and the high success therapeutic initiatives can have in lieu of punitive measures.[134] One Western Australian parliamentary study discovered that assistance and treatment programs (such as drug or sexual offender treatment) reduce the likelihood of reoffending[135] by offering management assistance and a level of personal support (rather than demonising an individual).

By treating offenders while they remain in the community – rather than separating them from society completely – these individuals can practice making responsible choices and managing their urges in the 'real world' immediately. They will be without the detrimental prison experience, and can work on their condition while surrounded by professionals and supportive personal network.

There have been a number of successful therapy-based initiatives over the decades, in Australia and internationally.

B *Best Practice Models of Therapeutic Jurisprudence for Child Sex Offenders*

In the early 1990s, Canada's Hollow Water community created a Holistic Circle Healing Program,[136] which recognised that incarceration had more to do with 'anger, revenge, guilt and shame… rather than the healthy resolution of the victimisation we were trying to address.'[137] In light of this, the Program was a therapy initiative for sexual offenders which embraced all willing participants who fully disclosed their offences and were eager to change.

> Of the 48 cases dealt with by the Hollow Water CHCH only five have failed to enter into—and stay with—the program… these five went to gaol. Of the forty-three who completed the program only two repeated their crimes, one reoffending at an early stage, the second reoffending when the

[131] R Hanson et al, 'First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders' (2002) 14(2) *Sexual Abuse: A Journal of Research and Treatment*, 169; Heather Wood, 'Internet Pornography and Paedophilia' (2013) 27(4) *Psychoanalytic Psychotherapy* 319.

[132] Dawn Fisher, 'Adult Sex Offenders' in Tony Morrison, Marcus Erooga and Richard Beckett (eds) *Sexual Offending Against Children: Assessment and Treatment of Male Abusers* (Routledge, 1994) 1, 14. Treatment programs such as Kingston Sexual Behaviour Clinic; Northwest Treatment Clinic; and Portland Sexual Abuse Clinic.

[133] Hanson and Morton-Bourgon, above n 97; Lösel and Schmucker, above n 102.
Comprehensive treatment efficacy literature is more difficult to come by, but for lively debate over the consensus of effective treatment see: Furbey et al., above n 102; L Berliner et al, 'A Sentencing Alternative For Sex Offenders: A Study of Decision Making and Recidivism'(1995) 10 *Journal of Interpersonal Violence* 487; K Heilbrun et al, 'Sexual Offending: Linking Assessment, Intervention, and Decision-Making' (1998) 4(1/2) *Psychology, Public Policy & Law* 138.

[134] Goodman-Delahunty and O'Brien, above n 111, 8.

[135] Office of the Inspector of Custodial Services, above n 101, 21. See also K Marsh, C Fox and R Sarmah, 'Is Custody an Effective Sentencing Option For The UK? Evidence From a Meta-Analysis of Existing Studies' (2009) 56 *Probation Journal* 129.

[136] R Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Penguin Books 1996).

[137] Ibid 38.

> program was in its infancy. Since that reoffending he completed the formal healing program, and is now a valued member of the CHCH team.[138]

Highlighting Canada's more progressive approach to sentencing and offender assistance as it moves towards a more rehabilitation-focused criminal justice system, the Relapse Prevention Program at the Clarke Institute of Psychiatry in Toronto offers therapy for suspected child sex offenders, convicted child sex offenders, and individuals who seek preventative help before they offend.[139] Its basic assumption is that an individual can 'learn to recognise risk situations and exert control over potentially harmful urges.'[140] The program works by empowering these paedophiles, rather than punishing them. It has seen considerable expansion over the years and the attendance rate for group therapy often extends far beyond parole requirements.[141] Reflecting this trend, recent proposed changes to some provincial sentencing have advocated for community treatment and supervision, with probation periods instead of incarceration.[142]

The 'Stop It Now!' campaign in Ireland and the United Kingdom, which works with adult abusers and those at risk of abusing, has also seen considerable success. It encourages individuals to 'recognise their behaviour as abusive or potentially abusive and to seek help to change,'[143] without judgement or reprimand. In its first three years, over 1600 self-identified paedophiles (or child sex offenders) contacted the organisation's helplines.[144] Two primary benefits to self-help programs such as this are that they can reach a wider demographic of at-risk individuals, and are extremely low-cost forms of intervention. [145]

Charité's Institute of Sexology and Sexual Medicine in Berlin has treated paedophilic men since the mid-1990s. Some have not committed offences, but are fearful of doing so. Others have committed some kind of offence and wish to avoid further perpetration. What is most notable in both kinds of cases is the distress their condition causes these individuals, their desperation to avoid being overwhelmed by it, and their subsequent eagerness to change.[146]

The newest therapeutic initiative for such individuals has been functioning with great success in Germany. [147] The Berlin Prevention Project Dunkelfeld ('PPD')[148] was initiated as a preventative program to reach potential child abusers. Literally translating to 'dark field,' it consists of cases

---

[138] Ibid 34.
[139] Laurie Gillies et al, 'Relapse Prevention in Pedophiles: Clinical Issues and Program Development' (1992) 33(2) *Canadian Psychology* 199, 200.
[140] Ibid.
[141] Ibid 205.
[142] Peebles, above n 117, 283.
[143] Lucy Faithful Foundation (2015) *Stop It Now UK – What We Do.*
[144] J Tabachnick and E Dawson (2000). *Stop It Now! Report #5—Four Year Evaluation: Findings Reveal Success of Stop It Now! Vermont.*
[145] Michael Seto, 'Internet-Facilitated Sexual Offending' in Office of Justice Programs, *Sex Offender Management Assessment and Planning Initiative* (US Department of Justice, 2013) 77, 83.
[146] Beier et al, above n 41, 853.
[147] Prevention Project Dunkelfeld, *Do You Like Children in Ways You Shouldn't?* (2015) The Prevention Network <https://www.dont-offend.org>; KM Beier, 'The German Dunkelfeld project: a Pilot Study to Prevent Child Sexual Abuse and the Use of Child Abusive Images.' (2015) 12(2) *Journal of Sexual Medicine* 529.
[148] The project has full approval of the Charite´ Ethics Committee and is conducted in accordance with Germany's Federal Data Protection Law and Privacy Acts.

that have not been officially reported. PPD is based on cognitive-behavioural therapy, a method that has been proven successful with convicted child sex offenders.[149]

Most importantly, the program works with the belief that a paedophile is not blamable 'for the existence of his sexual preference but rather for its behavioral consequences.'[150] It is a given that life-long self-control is necessary, and different management options are offered to participants in order to find the right tools for each individual.[151] Additionally emphasised is that this preventative therapy is proactive child protection rather than 'perpetrator assistance,' a common misunderstanding from the general public. By being proactive in the prevention of child sex crimes (rather than punitive after the fact), PPD is able to protect potential victims before they are harmed. The eligibility of participants varies from men who have not offended, but fear they might; men who have offended but are unknown to the justice system (embodying the concept of 'dark field'); to men with a criminal record who do not want to reoffend. The willingness of these participants is motivated by personal moral concerns, rather than pressure from the justice system.[152]

Remarkably, interest from potential participants came from not only Germany, but also Austria, Switzerland, and England. This indicates an apparent lack of facilities elsewhere, which is not surprising given that there is plenty of literature on prevention of abuse for children, parents, and the community, but very little for the potential offenders themselves.[153] More importantly, however, the international interest and willingness to travel also represent an impressive motivation to change, which is the inherent requirement for most TJ programs, and for the following reform recommendations. The primary benefits to self-help programs such as this is that they can reach a wider demographic of at-risk individuals, and are extreme forms of intervention.

One needn't look far from home to find other examples of such programs. For example, under the *Pre-Trial Diversion of Offenders Regulation 2005*[154] New South Wales commenced a TJ program called Cedar Cottage, an initiative for intrafamilial offenders. Multiple evaluations of Cedar Cottage have found that programs like this are a workable alternative solution for low-level sex offenders.[155] It focused on diversionary measures in order to break the 'costly and ineffective cycles of arrest, incarceration, release, and re-arrest that has often characterised the criminal justice system's response.'[156] One evaluation established that the Cedar Cottage program effectively reduced sexual recidivism rates by 52 per cent.[157] More findings indicated that, compared with

---

[149] WL Marshall, 'Appraising Treatment Outcome with Sexual Offenders' in WL Marshall, YM Fernandez, LE Marshall, & GA Serran (eds) *Sexual Offender Treatment* (Wiley, 2006) 255.

[150] Beier et al, above n 41, 856.

For discussion on self-responsibility see: Robert Langevin and Reuben Lang, 'Psychological Treatment of Paedophiles' (1985) 3(4) *Behavioral Sciences* & *The Law* 403, 415.

[151] Sexological tools (the help of an adult sexual partner) and medicinal options such as anti-androgens are offered to participants. No method is compulsory.

[152] Beier et al, above n 41, 852.

[153] Michelle Elliot, 'Child Sexual Abuse Prevention: What Offenders Tell Us' (1995) 19(5) *Child Abuse & Neglect,* 579, 588.

[154] *Pre-Trial Diversion of Offenders Regulation 2005 (*NSW).

[155] Goodman-Delahunty and O'Brien, above n 111, 8.

[156] Patricia A Griffin et al, *The Sequential Intercept Model and Criminal Justice: Promoting Community Alternatives for Individuals with Serious Mental Illness* (Oxford University Press, 2015) 165.

[157] L Butler, J Goodman-Delahunty and R Lulham, 'Effectivness of Pre-Trial Community-Based Diversion In Reducing Reoffending By Adult Intrafamilial Child Sex Offenders' (2010) 39 *Criminal Justice and Behaviour* 493.

standard criminal prosecution and incarceration, treatment under the program reduced recidivism rates in low-risk offenders by 67 per cent, 'whereas low-risk parental offenders who underwent standard criminal prosecution reoffended faster and at a higher rate.'[158] Although policy changes implemented in 2012 lead to the discontinuation of the program, Cedar Cottage offers a sample of the therapeutic sentencing that is possible for Australia.

Researchers have found that relapse prevention does not end with short-term treatment:[159] individual therapy sessions are imperative for independent progress and self-control. Some individuals also find group therapy to be a non-judgemental, safe space to work through their progress. Many members of treatment programs feel a need to continue to meet with a support group even after initial treatment and the learning of basic control strategies.[160] Sex offender treatment that uses this model was developed from the Alcoholics Anonymous approach, which has a focus on accountability and comes from the perspective that sexual deviation can be a compulsion to be managed.[161]

The number one factor for the success of these programs is 'responsivity' of participants. Not all offenders are the same in terms of their level of motivation to change,[162] and only those who are motivated are good candidates. Some argue that when those with paedophilia are offered therapy as an alternative to imprisonment, it is a kind of 'quasi-coercion'[163] by the courts.[164] However, many offenders offered such alternatives remark that they are aware of their right to refuse treatment,[165] and it is ultimately their own decision, fuelled by a desire to change.

VI CONCLUSION

The holistic costs of child sexual abuse are significant. Congruently, the benefits derived from appropriate and effective treatment of child sex offenders are considerable.[166] It is undisputable that certain crimes necessitate removal from society, and that individuals who show no remorse for their actions, and no inclination to change, cannot be reached using a therapeutic approach. However, imprisonment is costly and ineffective, and does little to uphold the human rights of both perpetrators and victims alike. Better long-term risk minimisation can be achieved by a therapeutic approach to the sentencing of low-level child sex offenders.

---

[158] Goodman-Delahunty and O'Brien, above n 110, 6.

[159] W Pithers, J Marques, C Gibal, and G Marian, 'Relapse Prevention with Sexual Aggressives: A Self-Control Model of Treatment and Maintenance of Change' in Greer and Stuart (eds) *The Sexual Aggressor: Current Perspective On Treatment* (Van Nostrand Reinhold, 1983) 214, 223.

[160] Gillies et al, above n 139, 202.

Often, disclosing to a group of those who have experienced similar distress or perpetrated similar actions offers a sense of relief. See also: Pithers et al, above n 159.

[161] Leon, above n 91, 91.

[162] Office of the Inspector of Custodial Services, above n 101, 22.

[163] Quasi-coercion being that offenders will feel pressured into accepting treatment out of fear of serving a lengthy prison sentence, rather than due to any desire to rehabilitate.

[164] Frédéric Gilbert and Farah Focquaert, 'Rethinking responsibility in offenders with acquired paedophilia: Punishment or treatment?' (2015) 38 *International Journal of Law and Psychiatry* 51, 57.

[165] Ibid.

[166] Martin Shanahan and Ron Donato, 'Counting the cost: Estimating the economic benefit of pedophile treatment programs' (2001) 25(4) *Child Abuse & Neglect* 541, 541.

Effective treatment and management of child sex offenders can reduce costs of initial incarceration, re-incarceration, and victim assistance. Recent studies of community-based sentencing demonstrated that offenders recidivated significantly less after performing community service, or participating in a designated therapeutic program, compared with imprisonment.[167] The upfront cost of such community-based treatment is less than the cost of custodial sentencing,[168] meaning that the system maximises return on its initial outlay for treatment resources.

The viability of such approaches requires emphasis being placed on victim benefit rather than fairness to the offender, and rightly so: turning to child exploitation material is a crime, and a just punishment is necessary. But punishment without purpose is not beneficial; the principle advantage of implementing paedophile and sex offender treatment programs is the subsequent reduction in recidivism rates,[169] while benefit to any potential victim lies in the complete prevention of any offence, prior to its perpetration. Deterrence of initial engagement can only serve to reduce demand for exploitative material,[170] reduce the likelihood of contact offences, and directly mitigate some instances of child sex abuse.

However, the trend toward populist punitiveness[171] undermines the capacity of the Australian criminal justice system to affect 'thoughtful and customised adjudication strategies at the court level and beyond,'[172] unlike its Nordic and Canadian counterparts. Queensland has seen a re-emergence of punitive sanctions,[173] overlooking the legislation[174] which places emphasis upon rehabilitation[175] and remorse.[176] Therapy-based programs have been limited or shut down entirely, which indicates their subordinate status: they are contrary to the long-standing, traditional objectives of punishment, retribution, and incapacitation.[177]

Any assumption that we can have a completely risk-free society is naïve. However, outdated laws should not prevail in the face of alternatives, particularly where those intransigent policies are ineffective. Whether therapeutic jurisprudence in this context is the perfect answer remains to be seen, however, it is clear that current approaches are not sufficient. It is necessary to foster a more

---

[167] Hilde Wermink et al, 'Comparing the effects of community service and short-term imprisonment on recidivism: a matched samples approach' (2010) 6 *Journal of Experimental Psychology* 325.
[168] Ibid.
[169] Shanahan and Donato, above n 166, 543.
[170] JJ Prescott, 'Child Pornography and Community Notification: How an Attempt to Reduce Crime Can Achieve the Opposite' 2011) 24(2) *Federal Sentencing Reporter* 93, 96: The expected criminal sanction the only way to reduce demand for child pornography. If the law is able to isolate child pornography producers and distributors from consumers who no longer need it, the incentive is removed.
[171] Birgden, above n 120, 351. For further discussion on populist punitiveness see Simon, above n 50, 452; William Edwards and Christopher Hensley, 'Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process' (2001) 45(6) *International Journal of Offender Therapy and Comparative Criminology* 646.
[172] Edwards and Hensley, above n 171, 646.
[173] Birgden, above n 120, 78. See also D Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001); JQ La Fond, *Preventing Sexual Violence: How Society Should Cope with Sex Offenders* (American Psychological Association, 2005).
[174] *Penalties and Sentences Act 1992* (Qld) s 9(7).
[175] Ibid s 9(7)(c) the prospects of rehabilitation including the availability of any medical or psychiatric treatment to cause the offender to behave in a way acceptable to the community.
[176]Ibid s 9(7)(e) any remorse or lack of remorse of the offender.
[177] Edwards and Hensley, above n 171, 646.

supportive mentality toward those who are desperate to manage these urges and implement mechanisms to assist those who are desperate not to reoffend. Such changes have the potential to bridge the gulf in understanding between those who have paedophilic tendencies and those who want to protect society's most vulnerable people (sometimes one in the same). Without this, the conflation of terms will continue, perpetuating the current confusion and limiting prevention of paedophilia-related child sexual abuse.

QUT Law Review ISSN: Online- 2201-7275
Volume 16, Issue 3, pp. 106-126. DOI: 10.5204/qutlr.v16i3.689

"INFINITY GOES UP ON TRIAL": SANISM, PRETEXTUALITY, AND THE REPRESENTATION OF DEFENDANTS WITH MENTAL DISABILITIES

MICHAEL L PERLIN*

I INTRODUCTION

I begin by sharing a bit about my past. Before I became a professor, I spent 13 years as a lawyer representing persons with mental disabilities, including three years in which my focus was primarily on such individuals charged with crime. In this role, when I was Deputy Public Defender in Mercer County (Trenton) NJ, I represented several hundred individuals at the maximum security hospital for the criminally insane in New Jersey, both in individual cases, and in a class action[1] that implemented the then-recent US Supreme Court case of *Jackson v Indiana*,[2] that had declared unconstitutional state policy that allowed for the indefinite commitment of pre-trial detainees in maximum security forensic facilities if it were unlikely he would regain his capacity to stand trial in the 'foreseeable future.'[3]

I continued to represent this population for a decade in my later positions as Director of the NJ Division of Mental Health Advocacy and Special Counsel to the NJ Public Advocate. Also, as a Public Defender, I represented at trial many defendants who were incompetent to stand trial, and others who, although competent, pled not guilty by reason of insanity.[4] Finally, during the time that I directed the Federal Litigation Clinic at New York Law School, I filed a brief on behalf of appellant in *Ake v Oklahoma*,[5] on the right of an indigent defendant to an independent psychiatrist to aid in the presentation of an insanity defence.[6] I have appeared in courts at every level from police court to the US Supreme Court, in the latter 'second-seating' *Strickland v Washington.*[7] I raise all this not to offer a short form of my biography, but to underscore that this article draws on my experiences of years in trial courts and appellate courts as well as from decades of teaching

* Michael L Perlin AB (Rutgers University), JD (Columbia University School of Law), LLD (honorary) (John Jay College of Criminal Justice), Professor Emeritus of Law; founding director, International Mental Disability Law Reform Project; co-founder, New York Law School Mental Disability Law and Policy Associates.

[1] *Dixon v Cahill*, No L30977/y-71 PW (NJ Super Ct Law Div 1973), reprinted in Michael L Perlin and Heather Ellis Cucolo, *Mental Disability Law: Civil and Criminal* (Lexis Nexis, 3rd ed, 2016) § 19-8, 19-86 - 19-88, and discussed in Michael L Perlin, 'For the Misdemeanor Outlaw': The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities' (2000) 52 *Alabama Law Review* 193, 206–07.

[2] 406 US 715 (1972).

[3] Ibid 738.

[4] See eg, Michael L Perlin, 'Mental Patient Advocacy by a Public Advocate' (1982) 54 *Psychiatric Quarterly* 169.

[5] 470 US 68 (1986) (finding such a right).

[6] Brief filed on behalf of amicus Committee on the Fundamental Rights and Equality of Ex-Patients (FREE)).

[7] 466 US 668 (1984), (establishing effectiveness of counsel standard in criminal cases; conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result). In this context, the term 'second-seating' is used to describe the person who sits at counsel table with – but does not argue – the case in question.

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

and of writing books and articles about the relationship between mental disability and the criminal trial process.[8] And it was those experiences that have formed my opinions and my thoughts about how society's views of mental disability have poisoned the criminal justice system, all leading directly to this paper, that will mostly be about what I call 'sanism' and what I call 'pretextuality'. The paper will also consider how these factors drive the behaviour of judges, jurors, prosecutors, witnesses, and defence lawyers, whenever a person with a mental disability is charged with crime, and about a potential remedy that might help eradicate this poison.

It is essential that lawyers representing criminal defendants with mental disabilities understand the meanings and contexts of *sanism* and *pretextuality*[9] and to show how these two factors infect all aspects of the criminal process, and offer some thoughts as to how they may be remediated.[10] I believe – and I have been doing this work for over 40 years – that an understanding of these two factors is absolutely essential to any understanding of how our criminal justice system works in the context of this population, and how it is essential that criminal defence lawyers be in the front lines of those seeking to eradicate the contamination of these poisons from our system.[11]

I need to add: this is not all that is on the table. I believe that, in order to have any idea about why our criminal justice system treats persons with mental disabilities the way it does, we also need to understand the meaning of '*heuristics'* and the meaning of (false) *'ordinary common sense.'*[12] I believe that, if we do not come to grips with all of these factors, we are doomed to flail our arms, swear colourfully and otherwise be stymied in our abilities to truly provide the most meaningful representation for our clients that we can. In this article, I will then add some thoughts on these two additional factors and why they need to be considered hand-in-glove with the rest of what I'm explaining. I conclude by discussing the school of thought known as *therapeutic jurisprudence* ('TJ'),[13] and why – even though it has been criticised fairly severely by some criminal defence lawyers[14] – I believe that it is the *only* way that we can strip the sanist and pretextual façade from

[8] See, eg, Michael L Perlin, *The Jurisprudence of the Insanity Defense* (Carolina Academic Press, 1995); Michael L Perlin, *Mental Disability and the Death Penalty: the Shame of the States* (Rowman and Littlefield, 2013); Michael L Perlin, *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law* (Routledge, 2013); Michael L Perlin and Heather Ellis Cucolo, *Shaming the Constitution: the Detrimental Results of Sexualyl Violent Predator Legislation* (Temple University Press, 2017, forthcoming).

[9] See infra text accompanying notes 38–68. The word 'sanism' was, to the best of the author's knowledge, coined by Dr Morton Birnbaum. See also Morton Birnbaum, 'The Right to Treatment: Some Comments on its Development, in Medical, Moral and Legal Issues in Health Care' in Frank J Ayd (ed), *Medical, Moral and Legal Issues in Mental Health Care* (Williams and Wilkins, 1974) 97, 106-07; *Koe v Califano* 573 F 2d 761, 764 n12 (2d Cir 1978). The word 'pretextuality,' in this context, was, to the best of the author's knowledge, in his article Michael L Perlin, 'Morality and Pretextuality, Psychiatry and Law: Of Ordinary Common Sense, Heuristic Reasoning, and Cognitive Dissonance' (1991) 19 *The Bulletin of the American Academy of Psychiatry and the Law* 131.

[10] See, eg, Michael L Perlin, 'Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It did' (1999) 10 *Journal of Contemporary Legal Issues* 3; Michael L Perlin, 'Pretexts and Mental Disability Law: The Case of Competency' (1993) 47 *University of Miami Law Review* 625.

[11] Although the author is most familiar with the system in the US, his work 'on the ground' in other nations – including Australia and New Zealand (and on all continents) – has made it clear to him that these observations are universal.

[12] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 3–20.

[13] See infra test accompanying notes 114–127; see generally, in this context, Perlin, *A Prescription for Dignity*, above n 8.

[14] See Mae C Quinn, 'An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar. Unable to Join You (Already (Somewhat Similarly) Engaged' (2007) 48 *Boston College Law Review* 539.

the criminal justice system and provide the best possible representation for criminal defendants with mental disabilities.

My title comes, in part, from Nobel Prize-winner Bob Dylan's brilliant song, *Visions of Johanna*, as part of the verse that begins with these lines:

> Inside the museums, infinity goes up on trial
> Voices echo this is what salvation must be like after a while.[15]

This song, 'an undisputed masterpiece,'[16] is about, in part, nightmares and hallucinations.[17] Our courtrooms – where contemporaneous understandings of mental illness and its relationship to criminal behaviour are ignored, and where we repeat myths and shibboleths from the early 19th century[18] – are, in fact, museums of the past. There is no place for nuance; rather, the 'infinite' permutations that exist when people with mental disabilities commit inexplicable otherwise-criminal acts is utterly ignored.

Writing some years ago about neonaticide cases, I said we 'impose a dyadic straightjacket on neonaticidal defendants. They are either crazy or they are evil.'[19] So it is with all defendants with mental disabilities in the criminal process. Like 'infinity' in Dylan's lyric, our entire criminal justice system 'goes up on trial.'

II ATTITUDES[20]

To a great extent, my interest in sanism and pretextuality began at two separate points in time, both in the 1970s, many years before I had heard of or thought of either word. As a 'rookie' Public Defender in Trenton, New Jersey, I often filed motions to suppress evidence on behalf of my clients in criminal cases, arguing that the police behaviour in seizing contraband (usually small amounts of 'street drugs') violated the Fourth Amendment's ban on 'unreasonable searches and seizures.'[21] In almost all of these cases, the arresting officer's testimony was basically the same: he would testify that, when my client saw him coming, my client made a 'furtive gesture,' and then reached into his pocket, took out a glassine envelope (filled with the illegal drug), and threw it on the ground, blurting out, 'That's heroin [or whatever], and it's mine.' My client — not surprisingly — told a different story: that the policeman approached him, stuck his hands into my client's pockets, pulled out the glassine envelope, and then placed my client under arrest.[22]

---

[15] Bob Dylan, *Visions of Johanna* (1966) <http://www.bobdylan.com/us/songs/visions-johanna>.
[16] Oliver Trager, *Keys to the Rain: The Definitive Bob Dylan Encyclopedia* (Billboard Books, 2004) 654.
[17] Robert Shelton, *No Direction Home: The Life and Music of Bob Dylan* (Hal Leonard, 1997) 213.
[18] See eg, Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (Little Brown & Co, 1838).
[19] Michael L Perlin, 'She Breaks Just Like a Little Girl: Neonaticide, The Insanity Defense, and the Irrelevance of Ordinary Common Sense' (2003) 10 *William and Mary Journal of Women and the Law* 1, 27.
[20] I self-consciously begin with this auto-biographical information as I think it creates the mise en scene that is necessary for this article to make sense to those unfamiliar with the underlying issues.
[21] This body of law, in the US, flows from the US Supreme Court decision in *Mapp v Ohio*, 367 US 643 (1961), mandating the suppression of illegally-seized evidence.
[22] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 6.

I had no doubt that my client was telling the truth. I suspected that the judge and the prosecutor had the same intuition. Yet, in such 'dropsy' cases, the judge invariably found the police officer to be more credible and would thus rule that the search came within the 'plain view' exception of search and seizure law, upholding the search. It was no surprise to me years later when I read Myron Orfield's article (studying 'dropsy' cases in Chicago), reporting that eighty-six per cent of judges, public defenders and prosecutors questioned (including seventy-seven per cent of judges) believed that police officers fabricate evidence in ca se reports at least 'some of the time,' and that a staggering ninety-two per cent (including ninety-one per cent of judges) believe that police officers lie in court to avoid suppression of evidence at least 'some of the time.[23] Although I did not know it at the time, this was my first introduction to pretextuality in law.

My second introduction followed soon after, and involved questions of mental disability law. Again, as the 'rookie' Public Defender, I was assigned to represent individuals at the Vroom Building, New Jersey's maximum security facility for the 'criminally insane,' on their applications for writs of habeas corpus (the reason I came to file the class action so as to implement *Jackson v Indiana*). The cases were — to be charitable — charades. The attorney-general asked the hospital doctor two questions: was the patient mentally ill, and did he need treatment? The answers always were 'yes,' and the writs were denied.[24]

Some years later, after I became Director of New Jersey's Division of Mental Health Advocacy, I read a story in the *New York Times* magazine section that summarised for me many of the frustrations of my job.[25] The article dealt with an ex-patient, Gerald Kerrigan, who wandered the streets of the Upper West Side of Manhattan. Kerrigan never threatened or harmed anybody, but he was described as 'different,' 'off,' 'not right,' somehow. It made other residents of that neighbourhood — traditionally home to one of the nation's most liberal voting blocs — nervous to have him in the vicinity, and the story focused on the response of a community block association to his presence. The story hinted darkly that the social 'experimentation' of deinstitutionalisation was somehow the villain. Soon after that, I read an excerpt from Elizabeth Ashley's autobiography in *New York* magazine (a magazine read by many of those same Upper West Siders). Ashley — a prominent (and not unimportantly) strikingly attractive actress — told of her institutionalisation in one of New York City's most esteemed private psychiatric hospitals and of her subsequent release from that hospital to live with the equally-prominent actor George Peppard, and to co-star with Robert Redford on Broadway in *Barefoot in the Park.*[26] Ashley was praised for her courage. Kerrigan was emblematic of a major 'social problem.' Both were persons who had been diagnosed with mental illness. Both of their mental illnesses were serious enough to require hospitalisation. Both were subsequently released. Yet their stories are presented — and read — in entirely different ways.[27]

[23] Myron W Orfield, 'Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts' (1992) 63 *University of Colorado Law Review* 75, 100–107, discussed in this context in Perlin, *Pretexts and Mental Disability Law*, above n 10, 627.
[24] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 7.
[25] Ibid 8.
[26] Ibid.
[27] Ibid.

Gerald Kerrigan's story reflected to many the 'failures of deinstitutionalisation' and demonstrated why the application of civil libertarian concepts to the involuntary civil commitment process was a failure. Elizabeth Ashley's story reflected the fortitude of a talented and gritty woman who had the courage to 'come out' and share her battle with mental illness. No one discussed Gerald Kerrigan's autonomy values (or the quality of life in the institution from which he was released). No one (in discussing Ashley's case) characterised George Peppard's condo as a 'deinstitutionalisation facility' or labelled starring in a Broadway smash as participation in an 'aftercare program.' Ashley was beautiful, talented and wealthy. And thus she was different. Kerrigan was 'different,' but in a troubling way. But the connection between Kerrigan and Ashley was never made. [28]

Again, at about the same time, I read a short article by Morton Birnbaum[29] in which he discussed what he called 'sanism,' how 'sanism' was like racism, sexism and other stereotyping 'isms,' and, mostly, how 'sanism'— part of our social 'pathology of oppression' controlled mental disability law policy.[30]

I remember, about forty years ago, the moment when I read Birnbaum's essay, and how, immediately, something simply 'clicked.' At that point in time, I had already represented this population for several years, and I had grown accustomed to asides, snickers, and comments from judges, to 'eyerolling' from my adversaries, to running monologue commentaries by bailiffs and court clerks (all about my clients' 'oddness'). But I had never before consciously identified what Birnbaum had been writing about: that this was all sanist behaviour on the part of the other participants in the mental disability law system.[31] From that moment on, I began to think about mental disability law in different ways. I had already tried to come to grips with its pretexts (the charade of the Vroom Building hearings in the era before *Jackson v Indiana*, the comments of the prosecutor if I were to raise an issue of my client's competency to stand trial or criminal responsibility, the *voir dire* responses from jurors when I sought to question them about their attitudes towards criminal defendants with mental disabilities.[32] But this explanation began to flesh out the picture in ways that, finally, enabled me to make sense of what was going on around me.

And, once I left practice and started teaching and writing more, I started writing about sanism and pretextuality, and how these two factors — again, hand in glove with heuristics[33] and 'ordinary

[28] See Michael L Perlin, 'The Deinstitutionalization Myths: Old Wine in New Bottles' in Karl Menninger and Heather Watts (eds), *Conference Report: The Second National Conference on the Legal Rights of the Mentally Disabled* (Kansas Bar Association, 1979) 20.

[29] Morton Birnbaum, 'The Right to Treatment: Some Comments on its Development' Frank J Ayd (ed), *Medical, Moral and Legal Issues in Health Care* (Williams and Wilkins, 1974) 97, 106–07.

[30] Ibid 107.

[31] Perlin, 'Half-Wracked Prejudice Leaped Forth', above n 10, 9.

[32] In the American system, prior to trial, judges (in some jurisdictions, this is done by the lawyers themselves) question jurors to determine if there are reasons they should be challenged for cause or via what are called 'preemptory challenges' in which lawyers are allowed to challenge a specific number of jurors (often without having to state reasons). See eg Nancy S Marder and Valerie P Hans, 'Introduction to Juries and Lay Participation: American Perspectives and Global Trends' (2015) 90 *Chicago-Kent Law Review* 789.

[33] By way of example, the vividness heuristic is the cognitive-simplifying device through which a 'single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.' Michael L Perlin, '"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment' (1997) 82 *Iowa Law Review* 1375, 1417.

common sense'[34] — controlled the practice (and the jurisprudence) of mental disability law, specifically in cases involving criminal law and procedure.[35] I have looked at these issues in the context of competency, of insanity, of trial practice, of sentencing, of sex offender law, and of the death penalty.[36] It is always the same: we cannot begin to understand *why* our law has developed as it has until we come to grips with the pernicious power of these two factors.

These factors cause us to make, and to reinforce, biased and irrational judgments, and doom us to repeat the errors that we continue to make in the way we deal with questions that relate to the representation of criminal defendants with mental disabilities. They also diminish the likelihood that we will treat this population with the level of dignity that the law (and authentic common sense) should demand.[37]

III SANISM

Sanism infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable.[38] It is based predominantly upon stereotype, myth, superstition, and deindividualisation,[39] and reflects the assumptions that are made by the legal system about persons with mental disabilities — who they are, how they got that way, what makes them different, what there is about them that lets society treat them differently, and whether their condition is

[34] '"[O]rdinary common sense" is a "prereflective attitude" exemplified by the attitude of "What I know is 'self-evident'"; it is "what everybody knows."' Keri K Gould and Michael L Perlin, '"Johnny's in the Basement/Mixing Up His Medicine": Therapeutic Jurisprudence and Clinical Teaching' (2000) 24 *Seattle University Law Review* 339, 357.

[35] I continue to do this. See eg, Michael L Perlin, 'God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2016) *American Criminal Law Review* (forthcoming); Michael L Perlin, 'Your Corrupt Ways Had Finally Made You Blind': Prosecutorial Misconduct and the Use of 'Ethnic Adjustments' in Death Penalty Cases of Defendants with Intellectual Disabilities' (2016) 65 *American University Law Review* 1437; Michael L Perlin, 'Merchants and Thieves, Hungry for Power': Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities' (2016) 73 *Washington and Lee Law Review* 1501;Michael L Perlin and Alison J Lynch, 'In the Wasteland of Your Mind: Criminology, Scientific Discoveries and the Criminal Process' (2016) 4 *Virginia Journal of Criminal Law* 304.

[36] See generally, Perlin and Cucolo, 'Shaming the Constitution', above n 8; Perlin, *A Prescription for Dignity*, above n 8; Michael L Perlin, *The Hidden Prejudice: Mental Disability on Trial* (APA, 2000). I have also looked at these in the context of related civil law issues. See eg, Michael L Perlin and Alison J Lynch, *Sexuality, Disability and the Law: Beyond the Last Frontier?* (Palgrave Macmillan, 2016); Michael L Perlin, 'International Human Rights and Institutional Forensic Psychiatry: The Core Issues' in Birgit Völlm and Norbert Nedopil (eds), *The Use of Coercive Measures in Forensic Psychiatric Care: Legal, Ethical and Practical Challenges* (Springer, 2016) 9; Michael L Perlin and Naomi Weinstein, 'Friend to the Martyr, a Friend to the Woman of Shame: Thinking About The Law, Shame and Humiliation' (2014) 24 *Southern California Review of Law and Social Justice* 1; Michael L Perlin, 'The Ladder of the Law Has No Top and No Bottom': How Therapeutic Jurisprudence Can Give Life to International Human Rights (2014) 37 *International Journal of Law and Psychiatry* 535.

[37] Michael L Perlin, 'A Law of Healing' (2000) 68 *University of Cincinnati Law Review* 407; see also, Michael L Perlin, 'Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity' in Bruce Arrigo and Heather Bersot (eds) in *The Routledge Handbook of International Crime and Justice Studies* (Routledge, 2013) 191.

[38] Michael L Perlin, 'Everybody Is Making Love/Or Else Expecting Rain: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia' (2008) 83 *University of Washington Law Review* 481, 486.

[39] Ibid.

immutable.[40] These assumptions — that reflect societal fears and apprehensions about mental disability,[41] persons with mental disabilities,[42] and the possibility that any individual may become mentally disabled[43]— ignore the most important question of all — why do we feel the way we do about 'these' people (quotation marks understood)?[44]

Decisionmaking in mental disability law cases is inspired by (and reflects) the same kinds of irrational, unconscious, bias-driven stereotypes[45] and prejudices that are exhibited in racist, sexist, homophobic, and religiously and ethnically bigoted decisionmaking.[46] Sanist decisionmaking infects all branches of mental disability law – especially as it relates to questions of criminal law and criminal procedure – and distorts mental disability law jurisprudence.[47] Paradoxically, while sanist decisions are frequently justified as being therapeutically based, sanism customarily results in anti-therapeutic outcomes.[48]

Significantly, we tend to ignore, subordinate, or trivialise behavioural research in this area, especially when acknowledging that such research would be cognitively dissonant with our intuitive (albeit empirically flawed) views. 'Sensational media portrayals of mental illness' exacerbate the underlying tensions. We believe that '[m]ental illness can be easily identified by lay persons and matches up closely to popular media depictions.' It is commonly assumed that persons with mental illness cannot be trusted. Common stereotypes about people with mental illness include the beliefs that they are invariably dangerous, unreliable, lazy, responsible for their illness or otherwise blameworthy, faking or exaggerating their condition, or childlike and in need of supervision or care.

Think about the sanist myths that dominate our legal system:

---

[40] See eg, Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990); Sander Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (Cornell University Press, 1985).

[41] In US law, the phrase 'mental disability' generally includes both mental illness (psychosocial disability) and intellectual disability.

[42] See H Archibald Kaiser, 'The Convention on the Rights of Persons with Disabilities: Beginning to Examine the Implications for Canadian Lawyers' Professional Responsibilities' (2012) 20 *Health Law Review* 26.

[43] See Michael L Perlin, 'Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization' (1991) 28 *Houston Law Review* 63, 108 (on society's fears of persons with mental disabilities), 93 (see n.174 ('[W]hile race and sex are immutable, we all can become mentally ill, homeless, or both. Perhaps this illuminates the level of virulence we experience here') (emphasis in original). Sex is immutable?

[44] See eg, Marchell Goins, Kyneitres Good and Cori Harley, 'Perceiving Others as Different: A Discussion on the Stigmatization of the Mentally Ill' (2010) 19 *Annals of Health Law* 441. On how sanism is more pernicious than other stigmas, see Matthew Large and Christopher J Ryan, 'Sanism, Stigma and the Belief in Dangerousness' (2012) 46 *Australian and New Zealand Journal of Psychiatry* 1099.

[45] See eg, Wim De Neys et al, 'Biased but in Doubt: Conflict and Decision Confidence' (2011) 6 *Plos One* 1. On disability stereotypes in general, see Bradley A Areheart, 'Disability Trouble' (2011) 29 *Yale Law and Policy Review* 47.

[46] See Perlin, 'On Sanism' (1992) 46 *SMU Law Review* 373, 373–77.

[47] On the ways that judges conceptualize mental disability professionals in forensic testimonial contexts, see Douglas Mossman, '"Hired Guns," "Whores," and "Prostitutes": Case Law References to Clinicians of Ill Repute' (1999) 27 *Journal of the American Academy of Psychiatry and Law* 414.

[48] See eg, David B Wexler, 'Justice, Mental Health, and Therapeutic Jurisprudence, (1992) 40 *Cleveland State Law Review* 517; David B Wexler (ed), *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990).

1. Mentally ill individuals are 'different,' and, perhaps, less than human. They are erratic, deviant, morally weak, sexually uncontrollable, emotionally unstable, superstitious, lazy, ignorant and demonstrate a primitive morality. They lack the capacity to show love or affection. They smell different from 'normal' individuals, and are somehow worth less.

2. Most mentally ill individuals are dangerous and frightening. They are invariably more dangerous than non-mentally ill persons, and such dangerousness is easily and accurately identified by experts. At best, people with mental disabilities are simple and content, like children. Either parens patriae or police power supply a rationale for the institutionalisation of all such individuals.

3. Mentally ill individuals are presumptively incompetent to participate in 'normal' activities, to make autonomous decisions about their lives (especially in areas involving medical care), and to participate in the political arena.

4. If a person in treatment for mental illness declines to take prescribed antipsychotic medication, that decision is an excellent predictor of (1) future dangerousness, and (2) need for involuntary institutionalisation.

5. Mental illness can easily be identified by lay persons and matches up closely to popular media depictions. It comports with our common sense notion of crazy behaviour.

6. It is, and should be, socially acceptable to use pejorative labels to describe and single out people who are mentally ill; this singling out is not problematic in the way that the use of pejorative labels to describe women, blacks, Jews or gays and lesbians might be.

7. Mentally ill individuals should be segregated in large, distant institutions because their presence threatens the economic and social stability of residential communities.

8. The mentally disabled person charged with crime is presumptively the most dangerous potential offender, as well as the most morally repugnant one. The insanity defence is used frequently and improperly as a way for such individuals to beat the rap; insanity tests are so lenient that virtually any mentally ill offender gets a free ticket through which to evade criminal and personal responsibility. The insanity defence should be considered only when the mentally ill person demonstrates objective evidence of mental illness.

9. Mentally disabled individuals simply don't try hard enough. They give in too easily to their basest instincts, and do not exercise appropriate self-restraint.

10. If 'do-gooder,' activist attorneys had not meddled in the lives of people with mental disabilities, such individuals would be where they belong (in institutions), and all of us would be better off. In fact, there's no reason for courts to involve themselves in all mental disability cases.[49]

[49] Michael L Perlin, '"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, Us and Them' (1998) 31 *Loyola of Los Angeles Law Review* 775, 786–87.

Social science research confirms that mental illness is 'one of the most – if not the most – stigmatised of social conditions.'[50] Historically, individuals with psycho-social disabilities 'have been among the most excluded members of society... Research firmly establishes that people with mental disabilities are subjected to greater prejudice than are people with physical disabilities.'[51] One might optimistically expect, though, that this gloomy picture should be subject to change because of a renewed interest in the integration of social science and law, and greater public awareness of defendants with mental disabilities…One might also expect that litigation and legislation in these areas would draw on social science data in attempting to answer such questions as the actual impact that deinstitutionalisation has had on homelessness, or whether experts can knowledgeably testify about criminal responsibility in so-called 'volitional prong' insanity cases.[52]

And yet, any attempt to place mental disability law jurisprudence in context results in confrontation with a discordant reality: social science is rarely a coherent influence on mental disability law doctrine.[53] Rather, the legal system selectively — teleologically — either accepts or rejects social science data depending on whether or not the use of that data meets the *a priori* needs of the legal system. In other words, social science data is privileged when it supports the conclusion the fact finder wishes to reach, but it is subordinated when it questions such a conclusion.[54]

As discussed above, these ends are sanist. Further, judges are not immune from sanism. '[E]mbedded in the cultural presuppositions that engulf us all,'[55] judges reflect and project the conventional morality of the community; judicial decisions in all areas of civil and criminal mental disability law continue to reflect and perpetuate sanist stereotypes,[56] a global error that is most critical in criminal law and procedure cases. Judges' refusals to consider the meaning and realities of mental illness cause them to act in what appears, at first blush, to be contradictory and inconsistent ways. Teleologically, they privilege evidence of mental illness (where that privileging

[50] Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act* (APA, 2001) 4–5.

[51] Michael E Waterstone and Michael Ashley Stein, 'Disabling Prejudice' (2008) 102 *Northwestern University Law Review* 1351, 1363–64.

[52] See, eg, Norman Finkel, 'The Insanity Defense: A Comparison of Verdict Schemas' (1991) 15 *Law and Human Behavior* 533, 535; Richard Rogers, 'APA's Position on the Insanity Defense: Empiricism Versus Emotionalism' (1987) 42 *American Psychologist* 840; Richard Rogers, 'Assessment of Criminal Responsibility: Empirical Advances and Unanswered Questions' (1987) 17 *Journal of Psychiatry and the Law* 73.

[53] See eg, Michael L Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence' (1989–90) 40 *Case Western Reserve Law Review* 599, 658, n 256 (federal legislators ignored empirical evidence about the insanity defense in the debate leading to the passage of the Insanity Defense Reform Act of 1984).

[54] Michael L Perlin, 'Baby, Look inside Your Mirror': The Legal Profession's Willful and Sanist Blindness to Lawyers with Mental Disabilities (2008) 69 *University of Pittsburgh Law Review* 589, 599–600. See eg, John Q La Fond and Mary L Durham, *Back to the Asylum: The Future of Mental Health Law and Policy in the United States* (Oxford University Press, 1992) 156: 'Neoconservative insanity defense and civil commitment reforms value psychiatric expertise when it contributes to the social control function of law and disparage it when it does not. In the criminal justice system, psychiatrists are now viewed skeptically as accomplices of defense lawyers who get criminals "off the hook" of responsibility. In the commitment system, however, they are more confidently seen as therapeutic helpers who get patients "on the hook" of treatment and control. The result will be increased institutionalization of the mentally ill and greater use of psychiatrists and other mental health professionals as powerful agents of social control.'

[55] Anthony D'Amato, 'Harmful Speech and the Culture of Indeterminacy' (1991) 32 *William and Mary Law Review* 329, 332.

[56] See Perlin, above n 406, 400–404.

serves what they perceive as a socially-beneficial value) or subordinate it (where that subordination serves what they perceive as a similar value).[57]

Judges are not the only sanist actors. Lawyers, legislators, jurors, and witnesses (both lay and expert) all exhibit sanist traits and characteristics.[58] Until system 'players' confront the ways that sanist biases (selectively incorporating or mis-incorporating social science data) inspire such pretextual decision-making, mental disability jurisprudence will remain incoherent.[59]

IV PRETEXTUALITY

Sanist attitudes lead to pretextual decisions. 'Pretextuality' means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (and frequently meretricious) decision-making, specifically where witnesses, especially expert witnesses, show a high propensity to purposely distort their testimony in order to achieve desired ends.[60] This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying. [61]

Pretextual devices such as condoning perjured testimony, distorting appellate readings of trial testimony, subordinating statistically significant social science data, and enacting purportedly prophylactic civil rights laws that have little or no 'real world' impact dominate the mental disability law landscape.[62] Judges in mental disability law cases often take relevant literature out of context,[63] misconstrue the data or evidence being offered,[64] and/or read such data selectively,[65] and/or inconsistently.[66] Other times, courts choose to flatly reject this data or ignore its existence.[67] In other circumstances, courts simply 'rewrite' factual records so as to avoid having to deal with social science data that is cognitively dissonant with their view of how the world 'ought to be.'[68]

---

[57] See La Fond and Durham, above n 54, 156.
[58] Michael L Perlin and Keri K Gould, 'Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines' (1995) 22 *American Journal of Criminal Law* 431, 443.
[59] See Perlin, above n 53, 599–600.
[60] See eg, ibid 602.
[61] See Michael L Perlin, '"Through the Wild Cathedral Evening": Barriers, Attitudes, Participatory Democracy, Professor tenBroek, and the Rights of Persons with Mental Disabilities' (2008) 13 *Texas Journal on Civil Liberties and Civil Right*s 413, 416–17.
[62] Michael L Perlin, '"There's No Success like Failure/and Failure's No Success at All": Exposing the Pretextuality of Kansas v. Hendricks' (1998) 92 *Northwestern University Law Review* 1247, 1257.
[63] David Faigman, 'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation (1991) 139 *University of Pennsylvania Law Review* 541, 577.
[64] Ibid 581.
[65] J Alexander Tanford, 'The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology' (1990) 66 *Indiana Law Journal* 137, 153–54.
[66] See, eg, Thomas Hafemeister and Gary Melton, 'The Impact of Social Science Research on the Judiciary' in Gary Melton (ed) *Reforming the Law: Impact of Child Development Research* (Guilford Press, 1987) 27.
[67] See, eg, *Barefoot v Estelle*, 463 US 880, 897–902 (1983), discussed in this context in Perlin and Cucolo, 'Shaming the Consitution', above n 8.
[68] The classic example is Chief Justice Burger's opinion for the court in *Parham v JR*, 442 US 584, 605–10 (1979) (approving more relaxed involuntary civil commitment procedures for juveniles than for adults). See, eg, Gail Perry and Gary Melton, 'Precedential Value of Judicial Notice of Social Facts: Parham as an Example' (1984) 22 *Journal of Family Law* 633 (critiquing Parham).

V HEURISTICS

Heuristics is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks,[69] the use of which frequently leads to distorted and systematically erroneous decisions,[70] and causes decision-makers to 'ignore or misuse items of rationally useful information.'[71] One single vivid, memorable case overwhelms mountains of abstract, colourless data upon which rational choices should be made.[72] Empirical studies reveal jurors' susceptibility to the use of these devices.[73] Similarly, legal scholars are notoriously slow to understand the way that the use of these devices affects the way individuals think.[74] The use of heuristics 'allows us to wilfully blind ourselves to the 'grey areas' of human behaviour,'[75] and predispose 'people to beliefs that accord with, or are heavily influenced by, their prior experiences.'[76]

Experts are similarly susceptible to heuristic biases,[77] specifically the seductive allure of simplifying cognitive devices in their thinking; further, they frequently employ such heuristic gambits as the vividness effect or attribution theory in their testimony.[78] Also, biases are more likely to be *negative*; individuals retain and process negative information as opposed to positive information.[79] Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[80]

By way of example, the vividness heuristic is 'a cognitive-simplifying device through which a 'single vivid, memorable case overwhelms mountains of abstract, colourless data upon which rational choices should be made.'[81] Through the 'availability' heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it. Through the 'typification' heuristic, we characterise a current experience via reference to past stereotypic behaviour; through the 'attribution' heuristic, we interpret a wide variety of additional information to reinforce pre-

---

[69] See Michael L Perlin, 'Psychodynamics and the Insanity Defense: Ordinary Common Sense and Heuristic Reasoning' (1990) 69 *Nebraska Law Review* 3, 12–17.

[70] See Michael J Saks and Robert F Kidd, 'Human Information Processing and Adjudication: Trial by Heuristics' (1980-81) 15 *Law and Society Review* 123.

[71] John S Carroll and John W Payne, 'The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology' in John S Carroll and John W Payne (eds) *Cognition and Social Behavior* (Psychology Press, 1976) 13, 21.

[72] David Rosenhan, 'Psychological Realities and Judicial Policy' (1984) 19 *Stanford Law Review* 10, 13.

[73] Jonathan Koehler and Daniel Shaviro, 'Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods' (1990) 75 *Cornell Law Review* 247, 264–65.

[74] Thomas Tomlinson, 'Pattern-Based Memory and the Writing Used to Refresh' (1995) 73 *Texas Law Review* 1461, 1461–62.

[75] Perlin, above n 19, 27.

[76] Russell Covey, 'Criminal Madness: Cultural Iconography and Insanity' (2009) 61 *Stanford Law Review* 1375, 1381.

[77] See Oren Perez, 'Can Experts Be Trusted and What Can Be Done About It? Insights from the Biases and Heuristics Literature' in Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Bloomsbury, 2015).

[78] Perlin, 'Pretexts and Mental Disability Law', above n 10, 602–03: Michael L Perlin, 'They Keep It All Hid': The Ghettoization of Mental Disability Law and its Implications for Legal Education (2010) 54 *Saint Louis University Law Journal* 857, 874–75.

[79] Kenneth D Chestek, 'Of Reptiles and Velcro: The Brain's 'Negative Bias' and Persuasion' (2015) 15 *Nevada Law Journal* 605.

[80] Perlin, 'Pretexts and Mental Disability Law', above n 10, 602–03: Perlin, above n 78, 874–75.

[81] See Perlin, above n 33, 1417.

existing stereotypes. Through the 'hindsight bias,' we exaggerate how easily we could have predicted an event beforehand. Through the 'outcome bias,' we base our evaluation of a decision on our evaluation of an outcome.[82] Through the 'representative heuristic,' we extrapolate overconfidently based upon a small sample size of which they happen to be aware.[83] Through the heuristic of 'confirmation bias,' people tend to favour 'information that confirms their theory over disconfirming information.'[84]

It is impossible to understand the thrall in which the media portrayal of criminal defendants has captured the public without understanding the pernicious power of these cognitive-simplifying heuristics.

VI 'ORDINARY COMMON SENSE'

'Ordinary common sense' ('OCS') is a 'powerful unconscious animator of legal decision making.' It is a psychological construct that reflects the level of the disparity between perception and reality that regularly pervades the judiciary in deciding cases involving individuals with mental disabilities .[85] OCS is self-referential and non-reflective: 'I see it that way, therefore everyone sees it that way; I see it that way, therefore that's the way it is.'[86] It is supported by our reliance on a series of heuristics-cognitive-simplifying devices that distort our abilities to rationally consider information.[87]

The positions frequently taken by former Chief Justice Rehnquist, Justice Scalia and Justice Thomas in criminal procedure cases best highlight the power of OCS as an unconscious animator of legal decision-making.[88] Such positions frequently demonstrate a total lack of awareness of the underlying psychological issues and focus on such superficial issues as whether a putatively mentally disabled criminal defendant bears a 'normal appearance.' [89]

These are not the first jurists to exhibit this sort of closed-mindedness. Trial judges will typically say, 'he (the defendant) doesn't look sick to me,' or, even more revealingly, 'he is as healthy as

[82] Michael L Perlin, 'The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence' (1994) 8 *Notre Dame Journal of Law, Ethics and Public Policy* 239, 256; see also n 86 of this article (citing research sources).

[83] See, eg, Amos Tversky and Daniel Kahneman, 'Belief in the Law of Small Numbers' (1971) 76 *Psychological Bulletin* 105 , as discussed in Michael L Perlin, '"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?' (2009) 42 *Akron Law Review* 885, 898, n 89.

[84] Alafair S Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science (2006) 47 *William and Mary Law Review* 1587, 1594, as discussed in Covey, above n 76, 1381, n 22.

[85] Michael L Perlin, 'Wisdom Is Thrown into Jail': Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness' (2013) 17 *Michigan State University Journal of Medicine and Law* 343, 365, n 127.

[86] Perlin, above n 18, 8.

[87] Michael L Perlin, '"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems' (2009) 25 *Georgia State University Law Review* 607, 622.

[88] Perlin, above n 19, 25.

[89] Perlin, above n 78, 1418. See, eg, *State Farm Fire & Cas Ltd v Wicka*, 474 NW 2d 324, 327 (Minn, 1991), (stating that both law and society are always more skeptical about a putatively mentally ill person who has a 'normal appearance' or 'doesn't look sick').

you or me.'[90] In short, advocates of OCS believe that simply by using their OCS, jurists can determine whether defendants conform to 'popular images of "craziness."'[91] If they do not, the notion of a handicapping mental disability condition is flatly, and unthinkingly, rejected.[92] Such views – reflecting a false OCS – are made even more pernicious by the fact that we 'believe most easily what [we] most fear and most desire.'[93] Thus, OCS presupposes two 'self-evident' truths: 'First, everyone knows how to assess an individual's behaviour. Second, everyone knows when to blame someone for doing wrong.'[94]

Reliance on OCS is one of the keys to an understanding of why and how, by way of example, insanity defence jurisprudence has developed.[95] Not only is it prereflexive and self-evident, it is also susceptible to precisely the type of idiosyncratic, reactive decision making that has traditionally typified insanity defence legislation and litigation. Paradoxically, the insanity defence is necessary precisely because it rebuts 'common-sense everyday inferences about the meaning of conduct.'[96]

Empirical investigations corroborate the inappropriate application of OCS to insanity defence decision-making. Judges 'unconsciously express public feelings…reflect[ing] community attitudes and biases because they are "close" to the community.'[97] Virtually no members of the public can actually articulate what the substantive insanity defence test is. The public is seriously misinformed about both the 'extensiveness and consequences' of an insanity defence plea.[98] And, the public explicitly and consistently rejects any such defence substantively broader than the 'wild beast' test.[99]

Elsewhere, in discussing the insanity defence, I have stated,

> Not only [are our insanity defence attitudes] 'prereflexive' and 'self-evident,' it is susceptible to precisely the type of idiosyncratic, reactive decisionmaking that has traditionally typified insanity defence legislation and litigation. It also ignores our rich, cultural, heterogenic fabric that makes futile any attempt to establish a unitary level of OCS to govern decisionmaking in an area where

[90] Perlin, above n 33, 147. By way of example, the trial judge in the US must seek a competency evaluation if s/he believes there is a 'bona fide' question as to the defendant's incompetency. See eg, Perlin, above n 85, 358–59. Cases are collected in Perlin and Cucolo, above n 1, § 13-1.2.2.

[91] Perlin, 'Pretexts and Mental Disability Law', above n 10, a24.

[92] Ibid.

[93] Thomas D Barton, 'Violence and the Collapse of Imagination' (1996) 81 *Iowa Law Review* 1249, 1249 (book review of Wendy Kaminer, *It's All the Rage: Crime and Culture* (Basic Books, 1995)).

[94] Michael L Perlin, 'Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes' (1996) 24 *Bulletin of the American Academy of Psychiatry and the Law* 5, 16–17.

[95] See generally, Perlin, *The Jurisprudence of the Insanity Defense*, above n 8.

[96] Benjamin Sendor, 'Crime as Communication: An Interpretative Theory of the Insanity Defense and the Mental Elements of Crime' (1986) 74 *Georgetown Law Journal* 1371, 1372. On the need for the retention of the insanity defense, see Perlin, 'God Said to Abraham/Kill Me a Son', above n 35.

[97] Perlin, above n 33, 1420.

[98] Valerie Hans and Dan Slater, '"Plain Crazy": Lay Definitions for Legal Insanity' (1984) 7 *International Journal of Law and Psychiatry* 105, 105–06.

[99] Caton F Roberts et al, 'Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense' (1987) 11 *Law and Human Behavior* 207, 226.

> we have traditionally been willing to base substantive criminal law doctrine on medieval conceptions of sin, redemption, and religiosity.[100]

VII AS APPLIED IN THE CRIMINAL JUSTICE SYSTEM

This example of the relationship between OCS and the insanity defence is just the tip of the iceberg. I have previously considered just about *every* aspect of the criminal trial and appellate process from these perspectives, and in each instance, my conclusions are the same: these factors dominate and contaminate the way the criminal trial system works, and it is absolutely essential that those representing criminal defendants 'get this' so as to seek to revere and remediate this behaviour. Here are some illustrative examples.

Sanism infects incompetency-to-stand-trial jurisprudence in at least four critical ways: (1) courts resolutely adhere to the conviction that defendants regularly malinger and feign incompetency; (2) courts stubbornly refuse to understand the distinction between incompetency to stand trial and insanity, even though the two statuses involve different concepts, different standards, and different points on the 'time line'; (3) courts misunderstand the relationship between incompetency and subsequent commitment, and fail to consider the lack of a necessary connection between post-determination institutionalisation and appropriate treatment; and (4) courts regularly accept patently inadequate expert testimony in incompetency to stand trial case.[101]

Consider sanism's impact on jurors in insanity cases: Juror attitudes consistently reflect 'sanist' thinking;[102] in insanity cases, jurors demonstrate what I have characterised as 'irrational brutality, prejudice, hostility, and hatred toward insanity pleaders.'[103] Think of some of the sanist myths upon which jurors rely:

- reliance on a fixed vision of popular, concrete, visual images of craziness;
- an obsessive fear of feigned mental states;
- a presumed absolute linkage between mental illness and dangerousness;
- sanctioning of the death penalty in the case of mentally retarded defendants, some defendants who are 'substantially mentally impaired,' or defendants who have been found guilty but mentally ill ('GBMI');
- the incessant confusion and conflation of substantive mental status tests; and
- the regularity of sanist appeals by prosecutors in insanity defence summations, arguing that insanity defences are easily faked, that insanity acquittees are often immediately released, and that expert witnesses are readily duped.[104]

Also consider how pretextuality relates to the insanity defence:

> (T)he fear that defendants will fake the insanity defence to escape punishment continues to paralyze the legal system in spite of an impressive array of empirical evidence that reveals (1) the

[100] Perlin, 'Pretexts and Mental Disability Law', above n 10, 29.
[101] Perlin, above n 1, 235–36.
[102] Perlin, above n 82, 257.
[103] Perlin, *The Jurisprudence of the Insanity Defense*, above n 8, 317.
[104] Perlin, above n 33, 1422; Perlin, above n 53, 648–51.

> minuscule number of such cases, (2) the ease with which trained clinicians are usually able to catch malingering in such cases, (3) the inverse greater likelihood that defendants, even at grave peril to their life, will be more likely to try to convince examiners that they're not crazy, (4) the high risk in pleading the insanity defence (leading to statistically significant greater prison terms meted out to unsuccessful insanity pleaders), and (5) that most successful insanity pleaders remain in maximum security facilities for a far greater length of time than they would have had they been convicted on the underlying criminal indictment. In short, pretextuality dominates insanity defence decisionmaking. The inability of judges to disregard public opinion and inquire into whether defendants have had fair trials is both the root and the cause of pretextuality in insanity defence jurisprudence.[105]

Sentencing decisions are often pretextual. One example: In the case of a chronically depressed, compulsive gambler under threats of violence to pay off his debts (apparently from organised crime figures), the Sixth Circuit justified its rejection of a downward departure on the grounds that the defendant could have 'just said no.' The court moralised: 'He had the option of reporting the threats he received to the authorities, of course, but he chose instead to engage in serious violations of the law.'[106]

And decision-making at the penalty phase of a death penalty trial bespeaks both sanism and pretextuality.[107] Consider, for one notorious example, the improper use of mental disorders as an aggravating factor at the punishment phase; is there any example more vivid than Dr James Grigson's typical performance as an example of pretextual testimony?[108] Elsewhere, I have said this about sanism and the death penalty:

> Sanism in the death penalty decision-making process mirrors sanism in the context of insanity defence decision-making. Such decision-making is often irrational, rejecting empiricism, science, psychology, and philosophy, and substituting in its place myth, stereotype, bias, and distortion. It resists educational correction, demands punishment regardless of responsibility, and reifies medievalist concepts based on fixed and absolute notions of good and evil and of right and wrong.[109]

And all of this must be contextualised with what we know about how heuristics and OCS similarly contaminate these areas of practice. False OCS drives insanity defence practice; the vividness heuristic leads to death penalty decisions and to incompetency determinations. One example: Research reveals that, in determining the likely future dangerousness of defendants found incompetent to stand trial, and thus in need of institutionalisation, 'expert' evaluations frequently

---

[105] Perlin, above n 33, 1423.

[106] *United States v Hamilton*, 949 F2d 190, 193 (6th Cir 1991). See generally, Michael L Perlin, 'I Expected It to Happen/I Knew He'd Lost Control': The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5' (2015) *Utah Law Review* 881, 906–07 (discussing Hamilton in this context).

[107] Perlin and Cucolo, *Shaming the Constitution*, above n 8.

[108] Michael L Perlin, 'Therapeutic Jurisprudence: Understanding the Sanist and Pretextual Bases of Mental Disability Law' (1994) 20 *New England Journal of Criminal and Civil Confinement* 369, 379–80. The author discusses the 'scandalous' story of Dr Grigson in, inter alia, Perlin, above n 35, 1440, 1447–48. Dr Grigson was known universally in the US as 'Dr Death.' See, eg, Ron Rosenbaum, *Travels with Dr Death and Other Unusual Investigations*, (Penguin Books, 1st ed, 1991) 206, (profiling Dr Grigson and referring to him as 'the legendary forensic psychiatrist known as "Dr. Death"').

[109] Michael L Perlin, 'The Executioner's Face Is Always Well-Hidden: The Role of Counsel and the Courts in Determining Who Dies' (1996) 41 *New York Law School Law Review* 201, 227.

rely not on the examiners' experience or knowledge but on the facts of the act upon which the defendant was originally indicted (a blunder that, of course, ignores the fact that an incompetent defendant may be factually innocent of the underlying charge).[110] Also, the valid and reliable evidence informs us of discrepancies between the criteria actually employed by the examiners, such as seriousness of the crime, and the criteria that the examiners reported as informing their decisions, such as presence of impaired or delusional thinking.[111]

I have written often about the impact of these factors on the representation of persons with mental disabilities. Thirty years ago, in a survey of the role of counsel in cases involving individuals with mental disabilities, Dr Robert L Sadoff and I observed:

> Traditional, sporadically-appointed counsel … were unwilling to pursue necessary investigations, lacked … expertise in mental health problems, and suffered from 'rolelessness', stemming from near total capitulation to experts, hazily defined concepts of success/failure, inability to generate professional or personal interest in the patient's dilemma, and lack of a clear definition of the proper advocacy function. As a result, counsel … functioned 'as no more than a clerk, ratifying the events that transpired, rather than influencing them.' [112]

The availability of adequate and effective counsel to represent this population – both in criminal and civil matters – is largely illusory; in many jurisdictions, the level of representation remains almost uniformly substandard, and, even within the same jurisdiction, the provision of counsel can be 'wildly inconsistent.'[113] Without the presence of effective counsel, substantive mental disability law reform recommendations may turn into 'an empty shell.' Representation of mentally disabled individuals falls far short of even the most minimal model of 'client-centred counselling.' What is worse, few courts even seem to notice.[114]

In short, we cannot begin to understand what happens in court in cases involving criminal defendants with mental disabilities until we confront these poisons. I turn next to what I believe is the only potential path to redemption.

VIII THERAPEUTIC JURISPRUDENCE[115]

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence ('TJ').[116] Therapeutic jurisprudence

[110] Perlin, 'Pretexts and Mental Disability Law', above n 10, 663.

[111] Ibid 663–64.

[112] Michael L Perlin and Robert L Sadoff, 'Ethical Issues in the Representation of Individuals in the Commitment Process' (1982) 45 *Law and Contemporary Problems* 161, 164.

[113] Michael L Perlin, '"You Have Discussed Lepers and Crooks": Sanism in Clinical Teaching' (2003) 9 *Clinical Law Review* 683, 690.

[114] Ibid.

[115] This section is generally adapted from Michael L Perlin, 'Yonder Stands Your Orphan with His Gun': The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes' (2013) 46 *Texas Tech Law Review* 301 (2013); Michael L Perlin and Alison J Lynch, 'All His Sexless Patients': Persons with Mental Disabilities and the Competence to Have Sex (2014) 89 *Washington Law Review* 257, and Perlin and Lynch, above n 35. Further, it distills the author's work over the past two decades, beginning with Michael L Perlin, What is Therapeutic Jurisprudence? (1993) 10 *New York Law School Journal of Human Rights* 623.

[116] See, eg, David B Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Carolina Academic Press, 1990); David B Wexler and Bruce J Winick, *Law in a Therapeutic Key: Recent Developments in Therapeutic*

recognises that the law – potentially a therapeutic agent – can have therapeutic or anti-therapeutic consequences for individuals involved in both the civil and criminal justice systems.[117] It asks this question: can or should legal rules, procedures, and lawyer roles be reshaped to enhance their therapeutic potential while, at the same time not subordinating principles of due process?[118] From the outset, one of the creators of this field of scholarship/theory has been clear: 'the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."'[119] 'An inquiry into therapeutic outcomes does not mean that therapeutic concerns trump' civil rights and civil liberties.'[120]

Therapeutic jurisprudence utilises socio-psychological insights into the law and its applications,[121] and is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[122] TJ has thus been described as '…a sea-change in ethical thinking about the role of law…a movement towards a more distinctly relational approach to the practice of law…which emphasises psychological wellness over adversarial triumphalism'.[123] That is, therapeutic jurisprudence supports an ethic of care.[124]Therapeutic jurisprudence and its practitioners place great importance on the principle of a commitment to dignity.[125] Professor Amy Ronner describes the 'three Vs': voice, validation and voluntariness,[126] arguing:

Jurisprudence (North Carolina Academic Press, 1996); Bruce J Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* (Carolina Academic Press, 2005); David B Wexler, 'Two Decades of Therapeutic Jurisprudence' (2008) 24 *Touro Law Review* 17; Perlin and Cucolo, above n 1, § 2–6.

[117] See Perlin, above n 83, 912; Kate Diesfeld and Ian Freckelton, 'Mental Health Law and Therapeutic Jurisprudence' in Ian Freckelton and Kate Peterson (eds) *Disputes and Dilemmas in Health Law* 91 (Federation Press, 2006) 91 (for a transnational perspective).

[118] Perlin, *The Hidden Prejudice*, above n 36; Perlin, above n 113.

[119] David B Wexler, 'Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship' (1993) 11 *Behavioral Sciences and the Law* 17, 21. See also, eg, David Wexler, 'Applying the Law Therapeutically' (1996) 5 *Applied and Preventative Psychology* 179.

[120] Perlin, *The Hidden Prejudice*, above n 36, 412; Perlin, above n 49, 782.

[121] Ian Freckelton, 'Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence' (2008) 30 *Thomas Jefferson Law Review* 575, 582.

[122] Susan Daicoff, 'The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement' in Daniel P Stolle, David B Wexler and Bruce J Winick (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession*' (Carolina Academic Press, 2006) 365. On the relationship between therapeutic jurisprudence, procedural justice and restorative justice, see generally, Perlin, *A Prescription for Dignity*, above n 8.

[123] Warren Brookbanks, Therapeutic Jurisprudence: Conceiving an Ethical Framework (2001) 8 *Journal of Law and Medicine* 328, 329–30.

[124]See eg, Bruce J Winick and David B Wexler, 'The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic (2006) 13 *Clinical Law Review* 605, 605–07; David B Wexler, Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn's Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering (2007) 48 *Boston College Law Review* 597, 599; Brookbanks, above n 123. The use of the phrase dates to Carol Gilligan, *In a Different Voice* (Harvard University Press, 1982).

[125] See Bruce J Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* (Carolina Academic Press, 2005) 161. See generally, Perlin, *A Prescription for Dignity*, above n 8; Michael L Perlin, 'There Are No Trials Inside the Gates of Eden': Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence' in Bernadette McSherry and Ian Freckelton (eds) *Coercive Care: Law and Policy* (Routledge, 2013) 193.

[126] Amy D Ronner, 'The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome' (2008) 24 *Touro Law Review* 601, 627. On the importance of 'voice,' see also, Freckelton, above n 121, 588.

> What 'the three Vs' commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behaviour in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [127]

A *The Significance of Dignity*[128]

It is also necessary to focus more closely on TJ's commitment to *dignity*, and to consider the meaning of *dignity* in the legal process.[129] Treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement's actions as well-meaning.[130] What individuals want most 'is a process that allows them to participate, seeks to merit their trust, and treats them with dignity and respect.'[131] The right to dignity is memorialised in many state constitutions,[132] in multiple international human rights documents,[133] and in judicial opinions.[134]

It is important to note that, in several landmark decisions, the US Supreme Court has struck down both criminal and civil statutes that humiliate and shame.[135] With these cases, the Court has acknowledged the importance of the role of dignity.[136] Elsewhere, the Court has specifically recognised the shame that can result when dignity is not present. In *Indiana v Edwards*, the Court held that 'a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defence without the assistance of counsel.'[137] The Court stated that 'to the contrary, given that defendant's uncertain mental state, the spectacle that could well

---

[127] Amy D Ronner, Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles' (2002) 71 *University of Cincinnati Law Review* 89, 94–95; See generally, Amy D Ronner, *Law, Literature and Therapeutic Jurisprudence* (Carolina Academic Press, 2010).

[128] This section is partially adapted from. Perlin and Lynch, above n 36, 147–49.

[129] See generally, Perlin, *A Prescription for Dignity*, above n 8.

[130] See eg, Tamar Birckhead, 'Toward a Theory of Procedural Justice for Juveniles' (2009) 57 *Buffalo Law Review* 1147.

[131] Luther T Munford, 'The Peacemaker Test: Designing Legal Rights To Reduce Legal Warfare' (2007) 12 *Harvard Negotiation Law Review* 377.

[132] See John D Castiglione, 'Human Dignity under the Fourth Amendment' (2008) 4 *Wisconsin Law Review* 655.

[133] See Astrid Birgden and Michael L Perlin, 'Where the Home in the Valley Meets the Damp Dirty Prison': A Human Rights Perspective on Therapeutic Jurisprudence and the Role of Forensic Psychologists in Correctional Settings' (2009) 14 *Aggression & Violent Behavior* 256.

[134] See Erin Daly, 'Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right' (2011) 37 *Ohio Northern University Law Review* 381.

[135] Perlin and Weinstein, above n 36, 16–19.

[136] See, eg, *Lawrence v Texas*, 539 US 558, 578–79 (2003).

[137] *Indiana v Edwards*, 554 US 164, 176 (2008) (citing *McKaskle v Wiggins*, 465 US 168, 176–77 (1984) (finding a pro se defendant's Sixth Amendment right to conduct his own defense was not violated by unsolicited participation of standby counsel)).

result from his self-representation at trial is at least as likely to prove humiliating as ennobling.'[138] So, what is the value of TJ in this context? I have argued in the past that it can be used as a 'redemptive tool in efforts to combat sanism, as a means of strip[ping] bare the law's sanist façade.'[139] The founders of therapeutic jurisprudence – David Wexler and Bruce Winick – have written about how the current insanity acquittee retention system and the entire incompetency system violate basic TJ tenets.[140] Let me consider these issues in more depth solely from the perspective of the insanity defence to make my points more clearly.

I have been critical (and remain critical) of the ways that insanity acquittee release/ recommitment hearings have been conducted (on issues ranging from the lack of adequate counsel to the perfunctory ways judges treat these matters to the sanism and pretextuality reflected in the positions of prosecutors in their efforts to oppose lessening of restraints or changes of conditions of confinement or release).[141] On the question of whether the defence is consonant with TJ principles, I draw on the words of my hero, the late Judge David Bazelon: 'By declaring a small number not responsible, we emphasize the responsibility of others,'[142] concluding that 'the existence of the defence gives coherence to the entire fabric of criminal sentencing.'[143] By punishing nonresponsible defendants, 'we diminish all the rationales of punishment of the others whom we believe to be responsible for their crimes.'[144]

Indeed, in *Clark v Arizona*, [145] holding that a state's insanity test that was couched solely in terms of capacity to tell whether an act is right or wrong did not violate due process,[146] the Supreme Court came perilously close to condoning the punishment of such nonresponsible defendants. In criticising that decision, I have said:

> Almost 25 years ago, Judge David Bazelon, writing in the *American Psychologist*, argued that the courts should 'open the courthouse doors' to mental health professionals, warning that they should 'never hand over the keys.'[147] They may now not be slammed shut, but it is fair to say that after *Clark*, Judge Bazelon's dreams have now been, for the foreseeable future, dashed.[148]

---

[138] *Indiana v Edwards*, 554 US 164, 176 (2008). See Perlin and Cucolo, above n 1, §2-6.3.2 (The Supreme Court's focus on dignity and the perceptions of justice are, perhaps, its first implicit endorsement of important principles of therapeutic jurisprudence in a criminal procedure context); see generally, Perlin and Weinstein, above n 135, 11–18. See also, *Helen L v DiDario*, 46 F3d 325, 335 (3d Cir 1995), cert den, 516 US 813 (1995): '[t]he [Americans with Disabilities Act] is intended to ensure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner that shunts them aside, hides, and ignores them.'

[139] Perlin, above n 34, 591, quoting, in part, Perlin, above n 36, *The Hidden Prejudice*, 301.

[140] David B Wexler, 'Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process', in David B Wexler & Bruce J Winick (eds), *Essays in Therapeutic Jurisprudence* (Carolina Academic Press, 1991) 199; Bruce Winick, 'Ambiguities in the Legal Meaning and Significance of Mental Illness' in Bruce J Winick (ed) *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Carolina Academic Press, 1997) 93.

[141] See eg, Perlin, above n 1, 236; see generally, Perlin, above n 33.

[142] Perlin, above n 36, *The Hidden Prejudice*, 293, quoting David L Bazelon, *Questioning Authority: Justice and the Criminal Law* (Knopf, 1988) 2.

[143] Perlin, above n 36, *The Hidden Prejudice*, 293.

[144] Ibid 293–94.

[145] 548 US 735 (2006).

[146] Ibid 742.

[147] David Bazelon, 'Veils, Values, and Social Responsibility' (1982) 37 *American Psychologist* 115.

[148] Perlin and Cucolo, above n 1, §14-1.2.8.

In an article about the role of counsel in insanity and incompetency cases, I listed multiple issues that, from a TJ perspective, needed additional focus. Consider this list:

- If a defendant is, in fact, incompetent to stand trial, that means that he does not have sufficient present ability to consult with his lawyer with a reasonable degree of 'rational understanding' and or a 'rational as well as factual understanding of the proceedings against him;' how can TJ principles be invoked in such a case?
- If a defendant is initially found to be incompetent to stand trial, will the lawyer act as most lawyers and consider him to be *de facto* incompetent for the entire proceeding (as a significant percentage of lawyers do act for *any* client who is institutionalised)?
- If a defendant is found to be incompetent to stand trial, will the lawyer assume that he is also guilty of the underlying criminal charge?
- What are the issues that a lawyer must consider in addition to the client's mental state in assessing whether or not to invoke an incompetency determination?
- What are the TJ implications for a case in which the incompetency status is not raised by the defendant, but, rather, by the prosecutor or the judge?
- Are there times when TJ principles might mandate not raising the incompetency status (for example, in a case in which the maximum sentence to which the defendant is exposed is six months in a county workhouse but is in a jurisdiction in which defendants who are incompetent to stand trial are regularly housed in maximum security forensic facilities for far longer periods of time than the maximum to which they could be sentenced)?
- What are the TJ implications of counselling a defendant to plead or not to plead the insanity defence?
- Can a defendant who pleads NGRI ever, truly, take responsibility?
- Does the fact that the insanity-pleading defendant must concede that he committed the *actus reus* distort the ongoing lawyer-client relationship?
- To what extent do the ample bodies of case law construing the ineffectiveness assistance of counsel standard established by the US Supreme Court in *Strickland v Washington*[149] even consider the implications of TJ lawyering?
- To what extent does the pervasiveness of sanism make it obligatory for lawyers in such cases to educate jurors about both sanism and why sanism may be driving their decisionmaking, and to what extent should lawyers in such cases embark on this educational process using TJ principles?[150]

I believe that TJ requires a robust and expansive insanity defence,[151] and demands a reconsideration of the policies that punish defendants for raising the defence, that reject testimony as to the causal relation between mental disability and the commission of otherwise-criminal acts, and that incarcerate 'successful' insanity pleaders in maximum security forensic institutions for

[149] 466 US 668, 689 (1984) ('whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result').

[150] Michael L Perlin, 'Too Stubborn To Ever Be Governed By Enforced Insanity': Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases' (2010) *33 International Journal of Law & Psychiatry* 475, 477–78.

[151] See Perlin, *The Jurisprudence of the Insanity Defense*, above n 8, 417, 419–37, discussing how therapeutic jurisprudence can be employed to 'make the incoherent [insanity defense] coherent.'

far longer than the maximum sentence for the underlying crime, often (in the US, at least) a trivial one.[152] I am convinced, after spending over 40 years representing and working closely with persons with serious mental disabilities in the criminal justice system, it is the only way that we can begin to eradicate the poison of sanism that contaminates our criminal justice system.

IX CONCLUSION

Nothing in this paper should be much of a surprise, especially to veteran criminal defence lawyers. Or even to those who may not be *that* veteran. My son has been a PD for six years (first in Trenton, now in Brooklyn). When we discuss his cases, the judges, the DAs, the court personnel, all is deadeningly familiar to me. I have been thinking about these issues for over 40 years now, and am hoping that these observations and suggestions will be of some help to those who care about these issues.

Visions of Johanna – from which I drew the start of my title – 'teeter[s] on the brink of lucidity.'[153] Many of the court proceedings in which I was involved in my career representing this population teetered on that exact brink. I am again hoping that, as our clients, like 'infinity,' 'go up on trial,' we can help provide some of what Dylan sought in the next line of the verse: what 'salvation must be like after a while.'

[152] TJ is also, in my view, the best and only option for changing the culture that condones the brutal treatment of mentally ill defendants in prison settings. See Perlin, 'God Said to Abraham/Kill Me a Son', above n 35.
[153] Trager, above n 16, 654.

QUT Law Review
Volume 16, Issue 3, pp. 127-129.
ISSN: Online- 2201-7275
DOI: 10.5204/qutlr.v16i3.691

BOOK REVIEW – SEXUALITY, DISABILITY, AND THE LAW: BEYOND THE LAST FRONTIER?

Michael L Perlin and Alison J Lynch; Palgrave Macmillan, 2016; 209 pages; $79.95, ISBN: 978-1-137-48108-5

SHELLEY KOLSTAD*

Crisp white yachts moored upon a blue sea, verdant green mangroves framing Trinity Inlet in the distance; the sublime vision greeting me each time I glanced away from '*Sexuality, Disability, and the Law: Beyond the Last Frontier?*'[1] to reflect. Squally tropical breezes insisted on playing havoc with the menu, sending the salt shaker skidding across the harbour-side café table at which I was seated, drinking coffee. To reflect means to think carefully and deeply, and I found myself compelled to stop reading and think about the issues raised in this book often. In some ways I felt it was the least I could do. Paradise was my fortunate reality and a kind of Hell was otherwise being exposed on the pages of the text before me. 'Professor Perlin, you are an agent of the devil!' Is there a more hostile environment on Earth than that of the anxious, fearful mind? My own reaction did not include 'praying for [Perlin's] soul,' upon becoming cognisant of what this book was asking me to consider. But I realise now that even thinking, 'it's none of my business, is it?' although honestly well intentioned, might actually be a morally lazy synonym for 'not my problem,' or even worse: 'I don't care.'

Authors Perlin and Lynch are aware that asking questions about the rights to sexual freedom of individuals with mental disabilities, is bound to almost never be met with enthusiastic responses, free from caveats. While understanding that many will find the book confronting, they are admirably resolute and unwavering in their commitment to advocate for 'this cohort of marginalized, misunderstood, trivialised citizens.' Written in an authoritative, yet conversational tone, the academic narrative is interspersed with stories and anecdotes gathered from 40 years of experience. Much of that experience has been in weathering criticism, denouncement and even anger, for daring to pursue the topic. The first two chapters of the book are, perhaps, unsurprisingly then, devoted to exploring and exposing the pervasive factors that adversely affect and influence the way we think about people with mental disabilities. Sanism, pretextuality, heuristics and 'ordinary common sense,' dominate the discussion to such an extent, they argue, that a conceptual sense of the legal rights, especially the legal sexuality rights, of those with mental disabilities is difficult to reach. Sanism is perhaps the most insidious of these cognitive defaults, because it alone has survived, where other forms of prejudice, such as racism and sexism, are popularly banished as socially repugnant.

* Shelley Kolstad, BBus (University of Queensland), current LLB student (Queensland University of Technology).

[1] Michael L Perlin and Alison J Lynch, *Sexuality, Disability and the Law: Beyond the Last Frontier?* (Palgrave Macmillan, 2016).

This work is licensed under a Creative Commons Attribution 4.0 Licence. As an open access journal, articles are free to use with proper attribution in educational and other non-commercial settings.

Whatever you or I think, (or even want to think), about the sexual lives of others, the law is the prism through which the authors seek to vindicate the rights of the mentally disabled. The third chapter begins with an examination of the constitutional and statutory rights, including a discussion on the case law, to sexual interaction in the United States of America. The ratification by that country of international Human Rights law, specifically, '*The Convention on the Rights of Persons with Disabilities'* both crystallises and catalyses, in the author's opinion, the recognition of a claim for and protection of, the rights of the 'world's largest minority.' A brief comparative discussion on rights, through the lens of culture and history through to extant laws, serves to uncover and in a way, globally unify this hidden, largely ignored, minority.[2] The authors expressly reject the opinion that incompetence to make decisions concerning matters of intimacy ought to be presumed. Instead, the focus of the remainder of chapter three is on elucidating broad factors and questions to consider in the assessment of competence. 'Competence to have sex,' is an inquiry so plagued by policies rendered incoherent by—'our sanist and pretextual use of heuristic reasoning and false "ordinary common sense,"' that the response 'it's just too difficult' has become, perhaps, axiomatic. In summary, allowing personal bias to obscure an inquiry, is simply not good enough, say Perlin and Lynch.

Issues that dominate the social policy discourse are the subject of the fourth chapter. Any social reform agenda must recognise and contend with certain fears. The fear of adverse publicity, the fear of failure and the fear or risk of coercion and litigation. There is the potential for a disconnect to occur between what is literally meant by 'sex' and the views of what 'the public says' despite what 'the law says.' Deeply personal matters of sexual preferences and avoiding creating gender biased or discriminatory policies are highlighted as are matters of reproduction and abortion. Side-effects of medication that affect sexual function ought to be able to be discussed freely and as a distinct issue, rather than the current practice of focussing on how side-effects impact upon medication compliance generally. Other social policy issues include sex education and sex surrogacy. A 'Model Policy Concerning Sexual Relations among Long-Term Psychiatric Inpatients,'[3] developed by Perlin and two of his colleagues, provides a template 'that incorporates both hospital administration concerns about liability and the necessity of maintaining patient autonomy.' Perlin and Lynch caution: 'pretending that patients do not want to engage in sexual activity, or that it does not already happen even with prohibitions against it, is not good policy making.'

The authors recognise that the struggle to have the sexual rights of the mentally disabled recognised, is better understood in the broader historical context of gender, society and sexuality. In chapter five, the authors trace the beginnings of sexual repression in society from the Greek city states; for instance, Plato 'relegated sexual desire' because he said that 'copulation lowered a man to the frenzied passions characteristic of beasts.'[4] Religious doctrine carried on the tradition of frowning upon sexual activity, condoning it only inside of marriage. Sex was seen as the province of the procreative, young heterosexual couple, a view still reflected in today's society. Interestingly, earlier in the book, Perlin describes the epiphany-like moment that began his long career in seeking to substantiate and advocate for the sexual rights of the mentally disabled. In 1979 on a routine visit to discuss a class action settlement at

[2] Perlin and Lynch, above n 1, 39, quoting R Kayess and P French, 'Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities' (2008) 8 *Human Rights Law Review* 1–34.
[3] D Mossman, ML Perlin and DA Dorfman, 'Sex On The Wards: Conundra For Clinicians' (1997) 25 *Journal of the American Academy of Psychiatry and Law* 441,460.
[4] Perlin and Lynch, above n 1, 129, quoting MS Tepper, 'Sexuality and Disability: The Missing Discourse of Pleasure' (2000) 18 *Sexuality and Disability* 283–290.

a psychiatric hospital in New Jersey, he witnessed a young resident couple kissing. Such scenes he realised, 'thunderstruck,' were conspicuous by their absence. Many years later, he still wonders if he would have had a similar reaction if the couple had not presented as young and attractive, being unaffected as they were by the then common ravages of tardive dyskinesia.

The final chapter is a discussion of the clear alignment between the advocacy of the sexual rights of those with mental disabilities and the central principles of therapeutic jurisprudence: 'voice, validation and voluntariness.' This form of lawyering is 'part of a growing comprehensive movement in the law toward establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively and respectfully.' Therapeutic jurisprudence is also committed to providing dignity, a concept the authors maintain is of central importance to the argument of permitting those with mental disabilities their sexual autonomy.

The opinions, fears and concerns of parents with disabled children, children of disabled elderly parents and professional staff charged with the care of the mentally disabled, are not given an active voice in Perlin and Lynch's book. The authors make clear that this is because, until now, the voices of the mentally disabled have been largely silent. That is not to say the authors ignore the difficult policy terrain that must be confronted. Rather, the objective of this book is on vindicating the rights of the mentally disabled and advocating for their cause. This book is also a broader appeal to all to recognise and effect a change in attitude so that the burden of decision making is shouldered by society and not delegated to take place in a purely medico-legal context. In order to do this, many will have to confront their own, often unconscious, prejudice in order to demand the changes so passionately advocated for in this book.

Queensland University of Technology

QUT Law Review

Volume 16 Number 3 2016

Special Issue – **Current Issues in Therapeutic Jurisprudence**

Editorial

Articles