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For their dedication and hard work to the publication of Volume 8

RAPE: THE FRUIT OF THE POISONOUS TREE

MeLanie Fahrbach-Staats[1]

I. INTRODUCTION:

Arizona Senate Bill 1015 proposes that if a man is convicted of sexual assault[2] and a child results, the offender, who is the biological father, has no parenting rights to the child.[3] This bill is an addition to the current law restricting contact between a child and anyone who is a registered sex offender, an individual who is convicted of murdering the other parent of that child, or an individual who has committed dangerous crimes against children.[4] The additional provision is a means of adding another layer of protection to the current statute for children who are conceived through the criminal act of sexual assault and to protect women from further victimization. The statute currently governs sole or joint legal decision-making and parenting time for a child giving the court the power to determine parental rights based on the perceived risk to a child.[5]

The passage of this bill would provide additional legal protection for women who have been victims of a sexual assault, but it would also create the unintended consequence of forcing a woman to take legal action in the case of a sexual assault in order to gain the protection the statue would provide. This additional hurdle is made more difficult due to the fact that statistically; reporting, prosecution, and incarceration of rapists are relatively nonexistent.[6]

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[1] MeLanie Fahrbach-Staats is a 2016 Juris Doctorate candidate at Arizona Summit Law School and a Staff Editor on *Arizona Summit Law Review, Volume VIII*. MeLanie served in the United States Navy, worked as a Sheriff's Deputy, and was a Sexual Assault Victim Intervention (SAVI) advocate prior to attending law school. The author would like to dedicate this article to her parents, Warren and Nelva Fahrbach, who always believed in her and knew she could do anything she set her mind to accomplish, and her husband, daughter, and family for their love and support.

[2] For the purpose of this paper, the term "sexual assault" refers to circumstances in which there has been sex without consent; it does not mean that the perpetrator has been tried and convicted in a court of law. Additionally, sexual assault and rape will be used interchangeably in this paper.

[3] S.B. 1015, 51st Leg., 2nd Reg. Sess., (Ariz. 2014).

[4] *Id.*

[5] *Id.*

[6] Kara N. Bitar, Note, *The Parental Right of Rapists*, 19 DUKE J. GENDER L. POL'Y 275 (2012).

Sexual assault is a crime of power, not sex.[7] One in six women are sexually assaulted in their lifetime.[8] A study conducted in 2000 estimated that approximately 25,000 pregnancies resulted from the sexual assault of a woman.[9] Another study conducted in 1998 found that "98% of victims never see their attacker caught, tried, or convicted."[10] In essence, a woman faces not only a decision of keeping the child, but also whether to seek legal action against her assailant. If no legal action is taken against the accused rapist, and without the protection of additional laws, the purported suspect has the same rights as any other "natural father."[11]

II. BACKGROUND

In January of 2013, a bill with the same verbiage as S.B. 1015, was introduced on the Arizona Senate floor.[12] However, that bill too was doomed to a similar fate.[13] As with the previous year, it was introduced at the beginning of the term, received its second reading the following day, and then sat in committee for six months until the committee adjourned *sine die* without the third reading, as required by the Arizona Constitution, to be voted on.[14] The 2013 version of the bill was sponsored by Senator Edward Ableser and co-sponsored by Senators Steve Farley, Kate Hobbs, Robert Meza, Steve Gallardo, and Lynne Pancrazi.[15] Senator Ableser reintroduced the bill this year, however, none of the senators who previously supported the bill have signed on to co-sponsor this version.[16] The latest bill was last introduced into the Judiciary Committee where it has remained.[17] The history of the bill shows that it has been introduced several times, however, it has yet to make it past a second reading in committee.[18] Until the bill gains additional support and is pushed by more advocates within the legislative process, it is likely to continue to remain

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[7] Samuel H. Pillsbury, Article, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845 (2002).

[8] Margot E. H. Stevens, Note, *Rape-Related Pregnancies: The Need to Create Stronger Protections for the Victim-Mother and Child*, 65 HASTINGS L.J. 865 (2014).

[9] Shawna R. Prewitt, Note, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827 (2010).

[10] *Id.*

[11] *Id.*

[12] S.B. 1258, 51st Leg., 1st Reg. Sess., (Ariz. 2013).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] The current sponsor is Edward Zachary Ableser.

[17] Arizona State Legislature website, http://www.azleg.gov//FormatDocument.asp?inDoc=/Legtext/51leg/2r/bills/sb1015o.asp&Session_ID=112 (last visited October 14, 2014).

[18] *Id.*

within committee and unlikely to be transmitted to the House for further consideration.[19] As a sexual assault victim's advocate, I see the protection offered by this bill as a crucial first step for victims who choose to become the parent of the child that results from the assault. However, there has been a decrease in support for the bill each time it is reintroduced.[20] The ostensibly diminished support of the bill, would lead me to conclude that the bill will not likely continue to be reintroduced—let alone make it through the third reading—to be voted out of committee.[21]

III. PROPONENTS

A recent study indicates that the majority of states within the United States do not have any laws in place to protect a victim who is sexually assaulted and chooses to have the child.[22] Quite the contrary, only sixteen states have any laws governing the rights of women who bear the child of her rapist.[23] Most states allow the perpetrator, despite being convicted of sexual assault, the same rights to a child as any other biological father.[24] With no laws in place to protect these women and children, these perpetrators have a say in the child's education, in medical decisions, they can obtain visitation, and may be granted joint custody.[25] The trauma the victim is subjected to can be prolonged by the access the perpetrator has to the child that is sanctioned under current statutes. Nearly one-third of women who are assaulted develop Post Traumatic Stress Disorder (PTSD).[26] This is the result of a significant trauma that physically and emotionally scars the victim.[27] When the victim of a sexual assault is required to continue to maintain contact with the perpetrator, studies have shown that the victim repetitively re-experiences the trauma.[28] The close proximity, the smell, voice, interaction, and fear are all re-experienced by the victim through the continued contact.[29] The need for protection of both the victim and the child is self-evident.

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[19] *Id.*

[20] S.B. 1015, 51st Leg., 2nd Reg. Sess., (Ariz. 2014).

[21] *Id.*

[22] Note, 98 GEO. L.J. 827 (2010).

[23] *Id.*

[24] Stevens, *supra* note 8.

[25] *Id.*

[26] Shawna R. Prewitt, *Giving Birth to a "Rapist's Child": A Discussion and Analysis of the Limited Legal Protections Afforded to Women who Become Mothers Through Rape*, 98 GEO. L.J. 827 (2010).

[27] *Id.*

[28] *Id.*

[29] *Id.*

IV. Opponents

Individuals who oppose this bill use many of the old standard arguments regarding societal norms as a base for their opposition. Their argument rests on the right of due process through the 14th Amendment of the Constitution.[30] They argue that stripping away the rights of a biological parent, despite the circumstances of conception, is a violation of the Constitutional rights of the father.[31] Further, the court requires "grave and weighty reasons" to deprive a biological father of contact with his child when he chooses to have significant involvement in the child's life.[32] Courts have held that biological fathers, who take an active role in the child's life and/or offer to financial support for the child, should have rights to that child even if the origin of the conception of the child is through rape.[33] In many states, the court also requires a woman to gain the consent of the biological father in order to put a child up for adoption, even in the circumstances of rape.[34] This gives additional leverage to the perpetrator, who may require a woman to drop charges against him for his cooperation in the decisions made regarding the child.[35] This bill would be a step toward legislating restrictions on a convicted rapist rights to any child born from their actions. Absent this type of legislation, the rights of a rapist will continue to exceed that of his victim or the resulting child.[36]

V. Conclusion

Summarily, this bill is a necessary mechanism for victims of sexual assault. While this bill would apply only to individuals convicted of rape, it is an important first step.[37] Statistics show that a woman is 75% more likely to be raped by an acquaintance rather than a stranger.[38] This makes the need for this type of legislation more important because the perpetrator is more likely to use that relationship to avoid prosecution.[39] Because society views sexual assaults as a stranger-assault scenario, where the women did not consent and was forced in some violent way, the laws are centered on this paradigm.[40] The burden

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[30] Bitar, *supra* note 6.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] S.B. 1015, 51st Leg., 2nd Reg. Sess. (Ariz. 2014).
[38] Katherine E. Wendt, Comment, *How States Reward Rape: An Agenda to Protect the Rape-Conceived Child Through the Termination of Parental Rights*, 2013 Mich. St. L. Rev. 1763 (2013).
[39] *Id.*
[40] *Id.*

falls on the victim of the assault to go through the criminal justice system to prove the offense occurred.[41] However, statistically, the percentage of rape that is reported is around 40% but only 8% of assailants are prosecuted and 4% are convicted.[42] Therefore, it is important that society not sit in judgment on victims who choose to care for and love a child who is a product of a violent assault. It is time society takes away its archaic notion of rape and embrace families who choose to be more than the circumstances that created them. It is the job of society to protect the victims of these assaults and not to let the assailants persist in the use of our own laws against their victims. This bill is a first step in that direction.

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[41] *Id.*
[42] *Id.*

Can Therapeutic Jurisprudence Provide a Normative Link Between Recent Trends in Criminal Law Theory and Criminal Justice Practices?

Louise Kennefick*

I. Introduction

The landscape of criminal justice is in flux; however, little literature exists about how recent developments correlate with current discourse in criminal law theory. The rise of movements such as restorative justice, holistic justice, and therapeutic jurisprudence ("TJ") has resulted in a shift within the criminal justice sphere.[1] Traditional punitive approaches have given way to more practical schemes, such as diversion schemes and problem-solving courts, which seek to engender empathy for individuals embroiled in the criminal justice system, and pay heed to the emotionality and vulnerability inherent in such situations.

This article focuses on therapeutic jurisprudence, in particular, a methodology that provides a lens through which we can take a more holistic approach to the law. This article argues that TJ can provide a normative link between emerging, more contextualized theories of criminal law, and the practices and techniques employed within the criminal justice system. In doing so, this article examines current criminal law theory trends which put the "real world" individual to the fore and seek to address the disconnect inherent in the traditional Kantian supposition. This article does not argue for a general overarching theory which spans the realms of criminal law and criminal justice. Instead, this article recognizes that, in order to remain relevant, criminal law theory must reflect the practices and techniques currently at play in the criminal justice system.

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[1] Susan Daicoff refers to such movements as 'vectors' of what she has coined the "Comprehensive Law Movement." Other vectors include preventative law, procedural justice, integrated law facilitative mediation, transformative mediation, collaborative law and creative problem-solving. Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in Dennis P. Stolle, David B. Wexler, & Bruce J. Winick, Practicing Therapeutic Jurisprudence (Carolina Academic Press 2000). For a discussion of the similarity between restorative justice and TJ *see* John Braithwaite, Restorative Justice and Responsive Regulation (Oxford Univ. Press 2002).

The forbearers of TJ describe it as the "study of the role of the law as a therapeutic agent."[2] The concept emerged in the late 1980s as a theory of mental health law.[3] The scope of TJ has since expanded to apply to most areas of law, and has shown particular promise within criminal justice processes and procedure. Within that remit, TJ's intention is not to replace traditional approaches to criminal justice, but to bring to light the fact that it is somewhat "anachronistic to use a system oriented around themes of retribution, punishment, deterrence, and protection to address individuals more mentally afflicted than criminally motivated."[4] Thus, the aim of a therapeutic approach to criminal justice is not to usurp conventional principles of punishment, but to operate within such a framework in order to have a more appropriate impact on the offender.[5]

The traditional principles of punishment (particularly retribution) to which TJ provides an alternative emerge from a view of the individual as a rational, self-contained entity. This approach stems from a Kantian, capacity-based philosophy which continues to dominate criminal law theory. Thus, the prevailing view of the individual within the criminal law is grounded upon his ability to reason, without consideration of his social and moral context.[6] The Kantian approach is at odds with the spirit of TJ in terms of practice and technique. But is there an alternative conception—one which shares the values of TJ and can challenge the capacity-based view of the individual on a theoretical level? In recent years, a wave of scholarship has emerged that possesses the potential to do just that.

Dynamic theses, such as Antony Duff's liberal communitarianism, Alan Norrie's dialectic blaming relation, and Nicola Lacey's socio-historical thesis have breached the boundaries of the traditional Kantian approach to blame and

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[2] DAVID B. WEXLER & BRUCE J. WINICK, LAW IN THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (Carolina Academic Press,1996).

[3] *Id.*; *see also* David B. Wexler, *Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice*, 68 REV. JUR. U.P.R., 3, 691 (1999) (a detailing the emergence of TJ); Wexler & Winick, *supra* note 2; DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE (Carolina Academic Press1991); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law, Policy Analysis and Research,* 45 U. MIAMI L. REV. 979 (1991).

[4] RICHARD D. SCHNEIDER, HY BLOOM & MARK HEEREMA, MENTAL HEALTH COURTS: DECRIMINALIZING THE MENTALLY ILL, (2007) (the latter sentiment could equally apply to those with drug and alcohol issues and other social difficulties).

[5] *Id.*

[6] This paper employs masculine pronouns when describing individuals and should be read so that the masculine connotes the feminine unless otherwise indicated.

punishment. They recognize, unlike traditional theory,[7] that the individual is innately vulnerable to the environment from which he emerges. Though acknowledging that the scholarship in question may differ in substance, this article employs the term "contextualised approach" as a means of capturing the essence which is common to all of the scholarship. The core issue with such theories, however, is that by their nature they do not tend to lend themselves to practical application. What is needed, therefore, is an appropriate mechanism whereby the spirit of such ideologies can have a tangible effect "on the ground."

The first part of this article provides an overview of the traditional approach to criminal law theory before seeking to capture the fundamental nature of the contextualised movement. In particular, this article focuses on the scholarship of Norrie and Duff to show how their theories address the moral and social disconnect within the traditional Kantian supposition. The second part examines how the capacity-based approach is reflected in the criminal justice system. This article asses the concept of TJ with the goal of establishing whether it can act as a framework within the criminal justice realm, whereby the contextualized approach to criminal law theory may be reflected in practice.

II. Criminal Law Theory: The Kantian Supposition

Notwithstanding the expansion of strict liability offenses, the capacity-based approach to responsibility has held its position within the field of criminal law theory. This is evidenced by a profusion of scholarship concerning what are regarded as the "core" crimes—including murder, rape and theft—all of which involve the element of *mens rea*. Indeed, Nicola Lacey contends that this remains the "dominant way of thinking about responsibility in contemporary British and American criminal law doctrine."[8] Furthermore, Norrie alludes to the supremacy of the capacity-based approach in his analysis of a historical account of criminal liability:

> [U]nderlying all the twists and turns of history, there is this basic sense of a new liberal mode of legitimation based upon a 'thin' conception of responsibility, on the possibility of identi-

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[7] *See* Michael S. Moore, Placing Blame: A General Theory of the Criminal Law, Oxford Univ. Press (1998) (Moore builds upon Kant's philosophy with his defence of a functional nature to criminal law, the object of that function being retribution).

[8] Nicola Lacey, *Space, Time and Function: Intersecting Principles of Responsibility across the Terrain of Criminal Justice*, 3 J. Crim. L. & Phil. 233, 236 (2007).

> fying 'factual' psychological mental states in all persons regardless of social class and status.[9]

Essentially, the capacity-based approach assumes that an individual exercises a choice when he commits a crime. To have the ability to make a choice, an individual must be responsible for his own actions, that is, he must have capacity and independence. Thus, the law may respond to his rational status by applying a logical mechanism to a set of behavioural characteristics and circumstances in order to validate the attribution of blame and the imposition of punishment. Conversely, if an individual lacks decisionmaking capacity, for example, by reason of a mental disorder, he is not responsible and therefore not guilty of a crime.

The capacity-based approach derives from Immanuel Kant's seminal theory of the abstract, universal individual existing as an entity separate from his moral context.[10] Such an individual morally relates to the rest of humanity on the basis of his capacity for reason, thus justifying the use of blame and punishment should he breach this social contract. According to Kant's philosophy, then, "[w]hen . . . I enact a penal law against myself as a criminal it is the pure juridical legislative reason . . . in me that submits myself to the penal law as a person capable of committing a crime . . . ."[11] The remainder of this section analyses a core criticism pertaining to the capacity-based approach before outlining more recent arguments of theorists envisioning a criminal legal system which takes a more contextualised approach to blame.

A deep-rooted theme of criminal law theory, even in the case of differing surface philosophies, is that criminal law is built upon a moral core, whereby criminal responsibility aligns moral responsibility with legal responsibility. However, this assumption is easily contested if the framework is expanded to include the legal individual's moral context, as demonstrated by Kant's examples of the soldier and the mother.[12] Thus, while it may be accepted that the capacity-based approach ensures a degree of equality for all those who come before the law, it also ignores the individual's "real" moral and social context. The universal application of a set of rules based on rationality may bring a

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[9] Alan Norrie, *Historical Differentiation, Moral Judgment and the Modern Criminal Law*, 1 J. CRIM. L. & PHIL. 251, 252 (2007).

[10] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (New Work: MacMillian John Ladd trans. 1965); IMMANUEL KANT, CRITIQUE OF PURE REASON (Paul Guyer & Allen W. Wood eds. trans.,1999).

[11] KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE, 100.

[12] *Id.* at 107. Kant was troubled by the fact that a mother who kills her child born outside marriage, or a soldier who kills in a duel, both commit a criminal act, but out of a sense of what their society perceives as "honour [sic]." It is their respective social contexts and their own moral perceptions which have prompted their actions, not their "juridicial [sic] legislative reasoning."

degree of certainty and order; however, it also brings with it social exclusion and moral anomaly.

Dissatisfaction with the curtailment of the accused's moral and social context within criminal law is evident in practice. The courts, for one, respond to the strict constraints of the capacity-based approach by tempering judgments with "policy arguments" on a regular basis. Norrie argues that such a practice results because judges are not entirely convinced by the traditional, capacity based approach to criminal responsibility.[13] On the one hand, it has been argued that such occurrences merely pay homage to the imperfect society we live in and the concessions we must make as a result; alternatively, it has been argued that it is simply not morally right to apply the traditional capacity-based approach in certain cases.

Another example of the expansion of the moral context in practice is the supplementation of moral information in legal categories; for example, the partial defense of provocation in Ireland employs a subjective test when the court considers the defendant's mental state.[14] Norrie describes the above practice as a "particularising [sic] supplement" to universal mental states such as intention and recklessness.[15] For Norrie, this particularizing supplement practice undermines grand theories of criminal law, such as those advanced by Kant and Hegel,[16] by supplementing them with a debate about what constitutes good and what constitutes evil: "[i]n the debate around orthodox subjectivism, the particular is there as the moral contextualisation that says that *this* intention or recklessness is good, *this* is bad."[17]

Below, this article discusses how the underlying philosophy of the Kantian approach is reflected in the criminal justice realm by the "just deserts" theory. The rise of movements like TJ, then, is testament that though the Kantian approach may be plausible in theory, it does not fulfill society's moral needs in practice. So while the traditional Kantian approach may be under threat "on the ground," let us consider the response of criminal law theory.

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[13] ALAN NORRIE, LAW AND THE BEAUTIFUL SOUL 125-26 (London: Glasshouse Press, 2005).

[14] The partial defense of provocation takes into account the character, temperament and circumstances of the accused. *See* D.P.P. v. MacEoin, [1978] I.R. 27 (Ir.); D.P.P. v. Kelly, [2000] 2 I.R. 1 (Ir).

[15] Alan Norrie, *From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer*, 65 MOD. L. REV. 538, 554 (2002).

[16] Like Kant, Hegel was concerned with the notion of a unifying theory underlying experiential contents, however, his approach was more systematic in terms of making logic and therefore consciousness the ultimate source of reality. STEPHEN HOULGATE, THE HEGEL READER (Wiley Blackwell, 1998).

[17] Norrie, *supra* note 15, at 555.

III. Criminal Law Theory: The Contextualized Approach

In terms of a theoretical reaction to the capacity-based approach's dominance, there has been a marked movement towards a more contextualised means of attributing blame. Scholars such as Norrie, Lacey, and Duff have proposed alternative frameworks which, though varied in approach, all support an expanded view of the individual within criminal law. To capture the nature of this movement, this article focuses on the hypotheses put forward by Norrie and Duff, two seminal theorists in this field.

In *Punishment, Responsibility and Justice,* Norrie argues that if the idea of fixed individual identity promulgated by the rational legal code does not capture the nature of human beings, an alternative code is required, one that is dialectic in character.[18] The dialectic approach challenges the mode of thinking inherent in the notion of the fixed character of the Kantian individual by offering a critique of "false separation," the basis of which is a means of understanding how socially-connected, relational individuals subscribe to an alternative model of legal and moral analysis.[19] Norrie builds upon an analysis that applies new methodological, historical, psychological, and ethical approaches to the liberal Kantian framework; the product of this is the idea of blame as a relational concept.[20]

It is clear, however, that Norrie does not wish to dismiss the notion of individual justice, but rather wishes to recast it in a fundamental way.[21] Therefore, his hypothesis aims not to make light of the notion of the individual, but rather to emphasize the dialectical concept that responsibility exists simultaneously both in and beyond the individual moral agent. Responsibility does not exist solely within the cognitive characteristics of an individual; that individual and the "significant others" within his community share responsibility.[22] For Norrie, while the Kantian mode of understanding responsibility (i.e. "reflecting and rationalising legal modes") is falsely separative and non-relational, the Kantian question about the nature of responsibility still requires an answer.[23] Thus, Norrie argues that the Kantian focus on the individual within criminal law is valid, even if its mode of understanding that individual is too narrow.

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[18] Alan Norrie, Punishment, Responsibility and Justice: A Relational Critique (Oxford Univ. Press, 2000).

[19] *Id*. at 12.

[20] Alan Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law (Cambridge Univ. Press, 1993); Alan Norrie, Law, Ideology and Punishment: Retrieval and Critique of the Liberal Ideal of Criminal Justice (Kluwer Academic Publishers, 1991).

[21] Norrie, *supra note* 18, at 13.

[22] *Id.* at 14.

[23] *Id.*

The dialectic model redresses this restriction by retaining responsibility as an attribute of human agency, but in a relational way.

Though Norrie is somewhat critical of the Aristotilean approach promulgated by scholars like Ashworth and Duff, it too asserts a view of the individual not alone as an autonomous entity, but as a member of a community of norms and values. Duff offers an apparent alternative to the Kantian individualist model which seeks to clarify existing *mens rea* concepts against a backdrop of advocating the legal recognition of certain morally significant distinctions.

Duff's hypothesis of criminal law is normative in nature, in that it relies upon a theory of politics, or, as he puts it, "an underlying normative conception of the state and its proper relationship to its inhabitants."[24] Consequently, his theory depends upon a liberal-communitarian view of criminal law which advances the notion of "a polity of citizens whose common life is structured by such core liberal values as autonomy, freedom, privacy, and pluralism informed by a conception of each other as fellow citizens in the shared civic enterprise."[25] So, like Norrie, Duff's individual within criminal law is concurrently a member of a moral community. A further aspect of Duff's theory is based on the ideal of punishment as a means of communication. For Duff, the purpose of the criminal process is to facilitate a conversation between the offender, the victim, and the wider community about the offender's alleged wrongdoing.[26] It is for the offender to explain his actions to the community, with the hope of encouraging repentance; if his form of explanation fails, he will be punished for his crime.[27]

Thus, despite their substantive differences, both Norrie's dialectic-blaming relation and Duff's liberal communitarianism beget a common thread of interrelatedness: a recognition that the individual is inherently connected to his social and moral context. Both methodologies stretch the Kantian paradigm by taking a more human and realistic approach to the individual, as opposed to the separate, rational entity theory that permeates formal criminal law constructs. That said, while Norrie's relational theory of blame certainly reflects the reality of the individual's position within his community, Norrie's pervading problem is that he fails to give a concrete practical example of how a relational, dialectical theory would work in a court room or within a body of legislation. Moreo-

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[24] R. A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW. 11 (Hart Publ'g, 2007).

[25] *Id.*

[26] R. A. Duff, *Law, Language and Community: Some Preconditions of Criminal Liability*, 18 OXFORD J. LEG. STUD. 2, 189 (1998); R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME AND JUSTICE 1, (1996).

[27] Adil A. Haque, *Review of R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law*, 18 L. & POLITICS BOOK REV. 423 (2008).

ver, while Duff's overall aim is indeed worthwhile, it is questionable whether he succeeds in blueprinting a system whereby the community and the individual seek to produce moral good from punishment. The core difficulty for Duff's hypothesis lies in the practicality of rationalising the institution of punishment within a communitarian context.[28]

Thus, one of the innate difficulties with such theories is that they are confined to discourse. This is understandable when we consider that, for the most part, the farther we move from the safety of a metaphysical theory of the criminal law towards the law's more tangible practices, the more problematic such theories become. But does this mean that criminal law theory is redundant? Not necessarily. Criminal law theory alone does not alone provide the language by which our discussion of the criminal law takes place,[29] but it guides, analyzes and challenges the law so that its purpose and motives are understandable to the degree to which any system of such magnitude is understandable. The point is that it cannot exist validly and usefully unless it engages with the techniques, practices, and procedures that affect the individual.[30] For if we are to isolate theory from practice, chances are something important will be lost in translation.

The next section examines how traditional Kantian theory is reflected in the criminal justice system, with the goal of establishing whether the contextualized approach to criminal law theory may be realized in practice via a framework of TJ.

IV. Therapeutic Jurisprudence: The Missing Link?

It is accepted that there is no single, overarching aim of punishment. For, as Ashworth warns, trying to construct such an aim would be vacuous, "since it gives no hint of the conflicts that arise and the priorities that need to be determined."[31] In fact, the aim of punishment consists of rationales of sentencing, namely prevention, deterrence, rehabilitation (utilitarian ideologies), incapacitation, and desert. The latter is based on a retributive theory of punishment,

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[28] Norrie argues that Duff struggles to retain successfully the notion of the autonomous individual, and ultimately fails to do so at the hands of his own, all consuming communitarian theory. Alan Norrie, Punishment, Responsibility and Justice: A Relational Critique (Oxford Univ. Press, 2000).

[29] Antony R. Duff, *Theorizing Criminal Law: A 25th Anniversary Essay*, 25 Oxford J. Le. Stud. 353, 364 (2005).

[30] Ngaire Naffine, *Moral Uncertainties of Rape and Murder: Problems at the Core of Criminal Law Theory*, Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law 232 (Bernadette McSherry, Alan Norrie & Simon Bronitt eds., Hart Publ'g, 2008).

[31] Andrew Ashworth, Sentencing and Criminal Justice 67 (Cambridge Univ. Press, 4th ed. 2005).

which arguably remains the dominant theory of punishment among both academics and policymakers in most common law jurisdictions.[32]

The retributive theory of desert connects the Kantian capacity-based approach to criminal law theory to the criminal justice system by basing distributive principles on the moral status of offenders themselves rather than on the community of potential victims.[33] Desert's fundamental difference from utilitarianism is that it looks to the past (at the crimes previously committed by the offender), rather than to the future, and justifies punishment on the basis of social advantage.[34] According to the retributivist ideal, individuals possess free will and are capable of making rational decisions, thus punishment is an end in itself, rather than a means to protect society.[35] The foundation of the retributive ideal is that the offender is receiving his "just desserts" as a result of committing an offense, and so "paying the price" for his actions. This is achieved by vindicating society for the offense committed against it, denying the offender his criminal gains on the basis of fairness, and instigating punishment proportionate to the offender and the offense.[36]

TJ is arguably to the contextualized approach to criminal theory as the retributive approach is to the Kantian capacity-based theory of criminal law. It examines the notion of TJ and how it can connect criminal law theory to the "real world," prior to considering an example of its manifestation in practice. In doing so, it shows how existing practices and techniques demonstrate that TJ is a viable means of integrating the spirit of the contextualised approach.

The concept of TJ provides a mechanism for expanding the contextualised approach to criminal law theory outlined above into the realm of criminal justice, in that it too is normative in nature. It holds that the concept of therapy is important and ought to feature within the remit of legal decisionmaking.[37] Importantly, it seeks to tackle the adverse experience of vulnerable offenders within the criminal justice system, such as being the subject of abuse, experiencing lack of meaningful treatment (if the individual has a mental disorder), and being subject to higher rates of incarceration.[38] Its particularized nature,

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[32] MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (Oxford Univ. Press, 1998).

[33] BARBARA HUDSON, JUSTICE IN THE RISK SOCIETY 27 (Sage Publications Ltd., 2003).

[34] *Id.* at 17 (maintaining that the real difficulty with theories of utilitarianism lies in ". . . the *contingency* of liberty, and of individual rights, and noting that protection of these values is contingent upon the self-interest of happiness-seeking persons being enlightened").

[35] *Id.* at 28.

[36] Fiona de Londras, *Kow Towing to the Twin Gods of Time and Money: The Guilty Plea Discount in Sentencing*, 14 IRISH CRIM. L. J. 1, 14 (2004).

[37] Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL. & L.1, 184-206 (1997).

[38] SCHNEIDER, BLOOM & HEEREMA, *supra* note 4, at 45.

too, accords with the contextualized approach, in that it regards the accused as innately connected with his social and moral circumstance:

> [T]herapeutic jurisprudence prescribes attention to the unique circumstances of each accused and recommends the use of treatment plans tailored to the individual . . . standard interventions exist only insofar as standard accused exist, which of course they do not.[39]

In terms of TJ's manifestation in practice, then, it forms the basis of several initiatives, such as mental health courts, diversion schemes, education of judges and legal professionals in a therapeutic approach, developing interpersonal skills of professionals when dealing with offenders with mental disorders, etc.[40] As *Schneider et al* put it, TJ is "a holistic and all-encompassing approach" not just in terms of how it permeates the stages of the criminal justice system,[41] but also in the sense that it dissolves the divisions that exist in the current system as between behavioral sciences, social services, and criminal law, via creating "a climate that supports inter-professional collaboration and creative problem solving."[42] Employing such a multidisciplinary approach ensures a therapeutic experience for the offender in question by means of the application of the knowledge, skills, and techniques of differing professions.[43] This methodology accords with Norrie's approach, in the sense that his dialectic-blaming relation crosses the boundaries of criminal law theory in order to appreciate the influence of such fields as history, sociology and psychology upon the law and its subjects.

TJ attempts to deal holistically with cases involving difficult socio-legal problems. It works within the criminal justice sphere by partnering treatment providers and community groups during case processing to provide follow-up and support for victims and offenders alike.[44] In this sense, it shares the values

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[39] *Id.* at 198.

[40] For a summary of practical approaches with a therapeutic jurisprudential leaning, *see* SUSAN GOLDBERG, JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH 3 (2005); Sara Ryan & Dr. Darius Whelan, *Diversion of Offenders with Mental Disorders: Mental Health Courts*, 1 WEB J. OF CURRENT LEG. ISSUES (2012).

[41] SCHNEIDER, BLOOM & HEEREMA, *supra* note 4, at 45 (as an example, ". . . from determining whether an individual should be diverted completely from the criminal justice system and placed with a mental health-care provider, to intentionally remembering some minor detail about an accused in an effort to make her feel a little more human . . .").

[42] R. G. Madden & R. H. Wayne, *Social Work and the Law: A Therapeutic Jurisprudence Perspective,* 48 SOCIAL WORK 338*,* 338-40 (2003).

[43] *Id.*

[44] Jamie Balson, *Therapeutic Jurisprudence: Facilitating Healing in Crime Victims*, PHOENIX L. REV., 6, 1017 (2013); David B. Wexler, *Therapeutic Jurisprudence Forum: The Development of Therapeutic Jurisprudence: From Theory to Practice,* 68 REV. JUR. U.P.R., 3, 691 (1999).

of the contextualized approach to criminal law theory which regards the individual as innately connected to his circumstances. TJ, however, takes the important step of getting the "significant others" in the community involved with the individual in the criminal law process, so that the innate connectivity of the parties is recognised, not just in theory, but through various practices and techniques. Indeed, such a method goes some way towards bringing into practice Duff's communicative ideal.

Though as a concept TJ enhances and makes more viable a contextualised approach to blame, TJ is not without critics.[45] A major difficulty some perceive is the ambiguous nature of the term "therapeutic," the problem being that TJ aims to encompass the "whole field" of the law, thereby overextending itself.[46] However, the fact that TJ does not seek to usurp the role of more traditional means of punishment in their entireties, goes to its flexibility as a framework, rather than suggesting that it has ambitions as a grand theory. Furthermore, the over-extension criticism may be overcome by applying TJ in a particularized manner, for example, the juncture at which individuals with mental disorders come into contact with the criminal justice system.

Critics also argue that TJ is coercive and paternalistic in nature,[47] whereby, for example, treatment becomes a lesser evil to punishment thus eliminating any real sense of "choice" for the accused.[48] However, Wexler would likely dispute such a claim on the basis that the core task of TJ is to "determine how the law can use behavioural science information to improve therapeutic functioning without impinging upon concerns about justice."[49] Indeed, Schneider et. al., who describe such a criticism as "absurd," support Wexler and state that "[i]t is twisted logic to suggest that we revert to traditional criminal justice sanctions, simply to avoid choice. If choice is capable of inducing coercion, perhaps it would be best to discard the traditional sanctions as options."[50] More recently, Ryan and Whelan suggest practical examples of how TJ may be applied so that paternalistic interference can be overcome, for example, in the

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[45] Wendy Davis, *Special Problems for Speciality Courts*, 89 A.B.A. J. 32 (2003); Christopher Slobogin*, Therapeutic Jurisprudence: Five Dilemmas to Ponder,* 1 PSYCHOL.PUB. POL'Y & L. 1, 193-219 (1995).

[46] Michael King, *Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MEL.U. L. REV. 1096 (2008).

[47] Thomas Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy,* 57 SMU L. REV. 1459 (2004); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 4, 1541-65 (2003).

[48] Casey, *supra* note 47.

[49] *See* David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280 (1993).

[50] SCHNEIDER, BLOOM & HEEREMA, *supra* note 4, at 63-64.

context of mental health courts, with the appointment of an attorney to act on the defendant's behalf at the first indication that the defendant could be eligible to participate.[51]

Indeed, one example of a more prominent technique encapsulating the contextualised approach is the problem-solving or "solution-focused" court.[52] Such courts are founded upon the principles of TJ and developed in response to the realisation that a "one size fits all" approach to criminal justice does not work in some contexts. Just like in criminal law theory, the traditional criminal justice model cannot effectively handle the complexity of certain human and social problems, and as such, initiatives have emerged that are designed to enable courts to respond more appropriately to cases in which complex social and personal issues are involved.[53]

The essence of this innovation is that rather than merely imposing a sentence or making some other disposition, the trial judge remains involved with the case and exercises some degree of oversight or supervision over the offender's progress.[54] This involvement, in turn, requires substantial collaboration with social services agencies which must also be willing to work with the offender. The principal characteristic of such a court involves using judicial authority to:

> [F]orge new responses to chronic social, human and legal problems that have proven resistant to conventional solutions. They seek to broaden the focus of legal proceedings, from simply adjudicating past facts and legal issues to an early intervention into the [behavior] of litigants.[55]

Though further empirical investigation is required, it appears from research conducted to date that problem-solving courts can achieve considerable success.[56] The idea is clearly transferable to any jurisdiction, but other agencies must be willing to cooperate, and the resources and facilities must be provided

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[51] Wexler, *supra* note 49.

[52] Michael King, *Solution-Focused Courts Bench Book*, Austl. Inst. of Judicial Admin., Inc. (2009), *available at* http://www.therapeuticjurisprudence.org.

[53] Natasha Bakht, *Problem Solving Courts as Agents of Change*, 50 CRIM. L. Q. 12-38 (2005); Sara Ryan & Dr. Darius Whelan, *Diversion of Offenders with Mental Disorders: Mental Health Courts*, 1 WEB J. OF CURRENT LEG. ISSUES (2012).

[54] THOMAS O'MALLEY, SENTENCING LAW AND PRACTICE 408 (Round Hall Ltd., 2nd ed. 2006).

[55] Crown Prosecution Services and Department of Constitutional Affairs, *Review of the effectiveness of specialist courts in other jurisdictions* (London: H.M. Stationary Office 2005).

[56] Christine M. Sarteschi, Michael G. Vaughn & Kevin Kim, *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. CRIM. JUST. 12 (2011); Emma Schwartz, *Mental Health Courts*, US NEWS AND WORLD REPORT (Feb. 7, 2008), http://www.usnews.com/news/national/articles/2008/02/07/mental-health-courts_print.html.

to ensure that offenders have every reasonable opportunity to address the problems that led to their offenses.[57] As just one example of the practice of TJ, it demonstrates that the ideals of the contextualized approach to criminal law theory may be brought to fruition "on the ground."

More recently, therapeutic-jurisprudence scholars have given significant consideration to the relationship between TJ in a broader sense,[58] and the adversarial system of law.[59] Stobbs investigated whether TJ is incommensurable with the traditional adversarial approach in the context of Thomas Kuhn's theory of scientific revolutions.[60] He asserts that while the two may be incommensurable, the notion of a "therapeutic paradigm shift in law" is conceivable if the incommensurable nature of the relationship is related to a "broader disciplinary matrix." Thus, the influence of TJ on mainstream criminal justice is likely to evolve in response to the needs and intuitions of practitioners when faced with seemingly intractable problems in the current system, as opposed to arriving as a fully fledged philosophy with a preordained set of exemplars.[61] Whether the growing influence of TJ in mainstream practice will "rub off" on the conception of the individual within the criminal law remains to be seen; watch this space.

V. Conclusion

This article has sought to provide an overview of how TJ applied to criminal justice provides the normative link between a contextualised view of the individual within criminal law theory, and the practices and techniques at play

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57 O'Malley, *supra* note 54, at 408.

58 Note that most TJ scholars would argue that it is not yet a normative theoretical framework, for example, see Wexler's useful wine and bottles analogy, where TJ practices amount to a "liquid" and the mainstream legal rules as "bottles." David. B. Wexlar, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence "Code" of Proposed Criminal Processes and Practices*, 7 Ariz. Summit L. Rev. 463.

59 Balson, *supra* note 44; Arie Freiberg, Problem-Oriented Courts: Innovative Solutions To Intractable Problems, in proceedings from the Aija Magistrates' Conference (July 20-21, 2001). Note the ongoing international project to "mainstream" TJ which forms part of the Innovating Justice platform of the Hague Institute for the Internationalisation of Law. *Integrating the Healing Approach to Criminal Law*, Hiil Innovative Justice (Nov. 4, 2013), http://www.hiil.org/insight/integrating-the-healing-approach-to-criminal-law.

60 Nigel Stobbs, Mainstreaming Therapeutic Jurisprudence and the Adversarial Paradigm—Incommensurability and the Possibility of a Shared Disciplinary Matrix (March 30, 2013) (unpublished PhD. Dissertation, Bond University) (on file with Bond University).

61 Such evolution may be seen in the changing role of the defence lawyer. For example, Dale Dewhurst argues that lawyers need to take a more comprehensive (and arguably contextualised) approach in order to properly identify their client's "actual best interests" and to provide the most appropriate legal advice, for example, by referring to the expertise of other professionals during case planning. Dale Dewhurst, *Understanding the Legal Client's Best Interests: Lessons from Therapeutic Jurisprudence and Comprehensive Justice*, 6 Phoenix L. Rev. 293 (2013

in the criminal justice system. In particular, this article highlighted contextualising criminal law theory trends that seek to address the disconnect between the individual and criminal law, as promulgated by the traditional Kantian approach to criminal responsibility. The Kantian view of the individual within the law is based on that individual's ability to reason, without consideration of his social and moral context. Though a useful construct, the universal application of a set of rules based on rationality brings with it social exclusion and moral anomaly.

In response to the traditional approach, this article identified two key contextual theses which challenge the capacity-based view of the individual on a theoretical level. This article demonstrated how Norrie's dialectic blaming relation proposes an alternative, normative code; though acknowledging the validity of the Kantian construct, that code argues for an expansion of how the law views the individual, by retaining responsibility as an attribute of human agency in a relational way. Furthermore, this article outlined how Duff's liberal communitarianism also recognises the individual's intrinsic importance within society, but only in the context of existing within a shared civic enterprise. While both Norrie and Duff's theories are worthwhile in that they seek to redress the traditional approach's narrow scope by adopting a contextual view of the individual within the criminal law, this article has argued that the theories are metaphysical in nature and, consequently, difficult to apply in practice.

A key component of this article was considering how the contextualised movement may be brought to bear in practice within the criminal justice system, which shares the traditional view of the individual through the propagation of a retributive theory of desert: this article identified TJ as a mechanism for doing so. This article argued that TJ has the potential to fill the normative gap in terms of a contextualised, relational approach within the criminal justice sphere, as that approach too aims to address the individual's isolation within the criminal justice system, though in a practical way. As such, this article has shown how a central feature of TJ is its view of the offender as innately connected with his social and moral context via problem-solving courts, offender support schemes, diversion schemes, and so on. Therefore, because TJ "strives to be a vehicle that elicits a more nuanced societal response to proscribed behaviour,"[62] it has the potential to facilitate the practical manifestation of the contextualised approach, the purpose of both being to narrow the divide between the offender and his social and moral context.

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[62] SCHNEIDER, BLOOM & HEEREMA, *supra* note 4, at 3.

Uniform Synergy: The Implications of a Federally Mandated Modifiable Disease Surveillance System Within the United States

Jurhee A. Rice

I. Introduction

"The death of one man is a tragedy; the death of millions is a statistic."[1] The Fifth and Fourteenth Amendments of the United States Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law.[2] The ability of government officials to enforce quarantines, thereby depriving United States Citizens of liberty, property, or life, is a proper exercise of congressional authority and does not violate the Fifth or Fourteenth Amendments.[3] Historically, States have been granted the authority to implement public health programs when such actions are within the scope of authorized State actions, are reasonably related to a public health concern, and the actions do not impede governmental regulations, interfere with governmental policy, or conflict with federal law.[4] Since infectious and contagious diseases directly affect the general health and welfare of the population and pose a significant risk of spreading to the human race, the regulation and containment of highly contagious diseases reasonably relates to the regulation of intrastate, interstate, and foreign commerce of which the government has constitutional and legitimate interest in protecting.[5] Because quarantines directly affect commerce, it is within the scope of congressional authority to contain infectious disease transmission through the use of regulatory quarantines under the Commerce Clause.[6] However, the lack of federal oversight in state health programs has proven ineffective in managing disease pathogenesis within the population.[7]

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[1] Kurt Tuchholsky, *Französischer Witz* Lerne lachen ohne zu weinen 147, 148 (Berlin, Ernst Rowohlt 1932) (translation by author).

[2] U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

[3] Arjun K. Jaikumar, Red *Flags in Federal Quarantine: The Questionable Constitutionality of Federal Quarantine after* NFIB v. Sebelius, 114 Colum. L. Rev. 677, 677 (2014). [hereinafter Jaikumar].

[4] *Id.* at 685.

[5] Gibbons v. Ogden, 22 U.S. 1, 20 (1824).

[6] U.S. Const. art. I. § 8, cl. 3.

[7] Jaikumar, *supra* note 4, at 686.

A. Quarantine Authority[8]

The Director has authority to issue a quarantine when deemed necessary. Generally, the director of the Center for Disease Control, Public Health Service, Department of Health and Human Services, or an authorized representative designated by the director is granted quarantine implementation authority.[9] The Director has the authority to issue an order for isolation, quarantine, surveillance, disinfection, disinfestations, and fumigation, when the director reasonably believes a person is infected with or has been exposed to a communicable disease outlined by the Public Health Services Act.[10] Furthermore, quarantine laws give the Surgeon General absolute authority to make and enforce regulations that are necessary to prevent communicable disease introduction or transmission.[11]

B. Quarantine Concerns

The impact of a federal quarantine or mandatory federal data repository creates a state burden and a restriction on individual rights. This article will first address the historical perspectives of quarantine laws in the United States, focusing on the shift in power from State authorities to Federal authorities and the impact on individual liberties. Part II will discuss the consequences associated with implementing a federally based non-static mandatory universal quarantine and detention system, addressing the impact on State sovereignty and individual rights. Part III will discuss the historical approaches used in evacuation and quarantine, providing a rationale for implementing a federally mandated health repository system. Finally, part IV will offer evidence in support of devising a federally mandated long-term, adaptable, universal public health system implemented by the states with citizen imposed noncompliance penalties.

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[8] 42 C.F.R. § 70.1 (2013) (defining that quarantine is the isolation or separation of an individual or group from the community or population when the government official reasonably believes the individual has been exposed to a quarantinable and communicable disease (but is not yet sick), in an effort to prevent the spread of disease to otherwise healthy persons. Isolation is the separation of a person, believed infected with a communicable and quarantinable disease, from those non-infected/exposed. A communicable disease is an illness caused by infectious agents transmitted directly or indirectly between humans, animals, plants, or vectors).

[9] 42 C.F.R. § 71.1 (2013).

[10] 42 C.F.R. § 71.32 (2013).

[11] 42 U.S.C § 264 (2002); *See also* United States *ex rel.* Siegel v. Shinnick, 219 F.Supp. 789, 791 (1963) (stating that to supersede the judgment of a health official there must be reliable evidence that some error occurred or that the regulation was discriminatory in nature, causing a group or individual to be treated different from those in a similar position).

II. Historical Perspective & Impact of Quarantine Laws in the United States

A. *Necessity of Quarantine Laws*

The first federal quarantine law that permitted federal authorities to assist States with quarantine implementation was enacted in 1796 after a deadly yellow fever outbreak.[12] In 1799, President Adams sought stronger federal government power in quarantine implementation and passed a bill allowing federal officials to assist States at the direction of the Secretary of the treasury.[13]

B. *Federal power within States*

The Tenth Amendment of the Constitution expressly declares that all power not granted to Congress shall be afforded to the States and citizens.[14] However, under the commerce clause, the federal government has the right to regulate commerce with foreign nations and among the states.[15] Under *Gibbons v. Ogden*, quarantine actions are a distinct part of commerce and properly regulated under the commerce authority delegated to Congress by way of the commerce clause.[16]

Despite Congress's authority to regulate commerce among the states, in 2007, the Court held Congress could not compel a state to administer a federal regulation.[17] In *Printz v. United States*, the government wanted states to implement a federal gun regulation program that required local gun brokers to perform background checks and report to federal agencies in a reasonable manner.[18] Although the state invasion was minimal, the Court held that the sovereignty of the state was more important than the regulatory aspects of the program.[19]

Similar to *Printz*, the implementation of a universal public health repository imposed upon the states to collect and assess data would inevitably infringe upon the sovereignty of the states.[20] A federally mandated program implemented within the states poses a conflict of law between the federal government's legitimate interests in regulating infectious diseases, and the sovereignty of the state. However, in *South Dakota v. Dole*, the Court held that an

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12 Law of May 27, 1796, ch. 31, § 474, 1 Stat. (1796) (repealed 1799).
13 Jaikumar, *supra* note 4, at 687.
14 U.S. Const. amend. X.
15 U.S. Const. art. I, § 8, cl. 3.
16 Gibbons, *supra* note 5, at 20,
17 Printz v. United States, 521 U.S. 898, 935 (1997).
18 *Id.* at 933-34.
19 *Id.* at 935.
20 *Id.*

incentive program that did not coerce states into accepting particular regulation, but merely offered an incentive contingent to accepting such programs, was constitutional.[21] Therefore, under *Dole*, Congress can provide a tax benefit to states accepting a federally mandated data repository program in order to incentivize participation and compliance.[22] Under the commerce clause, if states voluntarily agree to accept incentivized federal programs, the implementation is constitutional.[23]

C. Expansion of Federal Power

Despite unsuccessful efforts to pass legislation during the 1865 New York Cholera outbreak, it 1878 Congress successfully utilized its commerce clause authority to assume some control over the quarantine process of maritime activities.[24] In *Morgan Steamship Co. v. Louisiana Bd. Health,* the court held that state quarantine laws in the maritime context were related to commerce and thus directly under the authority of Congress to regulate.[25]

In 1879, Congress enacted a statute consistent with *Morgan Steamship Co*. that specifically defined diseases that were to be subject to federal quarantine regulation, including cholera, smallpox, and yellow fever.[26] It was also during that time that Congress created the National Board of Health, to regulate public health consistent with the federal quarantine regulation.[27] Significantly, Congress passed legislation during that time that allowed states to sell local quarantine stations to the Treasury Department; all states sold their quarantine stations by 1921, effectively shifting quarantine implementation power to the federal government.[28]

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[21] South Dakota v. Dole, 483, U.S. 203, 211-12 (1987).

[22] *Id.*

[23] *Id.*

[24] Jaikumar, *supra* note 4, at 689. *See also NY Cholera*, VIRTUAL N.Y.C., http://www.virtualny.cuny.edu/cholera/1866/cholera_1866_set.html (last visited Feb. 6, 2015, 7:04 PM) (describing that despite the development of the Metropolitan Board of Health, the issuance of several thousand nuisance orders to remove piled horse manure, rotting animal carcasses, and refuse, the problem of cholera persisted with over 1,137 New Yorkers succumbing to the epidemic).

[25] Jaikumar, *supra* note 4, at 688-89.

[26] *Id*. at 689.

[27] *Id.*

[28] *Id.*

III. Compulsion & Compliance: the price of lost liberty

A. *Affirmative non-compliance*

In *Jacobsen v. Massachusetts*, the defendant refused to comply with a city regulation that required mandatory smallpox vaccinations for all adults within city borders.[29] The Court applied *Gibbons* and declared that the statute was an appropriate action within the police powers of the state, noting that if federal regulation was under an enumerated power, it would properly trump the state public health regulation requiring compliance with the mandated vaccinations.[30]

Additionally, in the 1913 *Minnesota Rate Cases*, the Court maintained a steady trend towards permitting federal control over quarantine regulation within States.[31] In *Simpson v. Shepard*, the Court held that while initiating quarantine laws are undoubtedly within the realm of State power, a contagious and infectious disease that is capable of transmitting within the population and across state boundaries has a substantial effect on interstate and foreign commerce, affording Congress primary authority to regulate.[32]

B. *Passive non-compliance*

Congress passed the Patient Protection and Affordable Care Act (ACA) in 2010 with the profound mission of providing all Americans with health insurance while maintaining a private health insurance industry.[33] However, the ACA act created a compulsory mandate upon Citizens requiring the purchase of health insurance when citizens were above the poverty level and attached a penalty to all those who failed to comply.[34] The Court held that while Congress may appropriately regulate a class of economic activity under its commerce clause, it could not compel an individual to participate in an activity that was under their sole regulatory authority.[35]

In *Korematsu v. United States*, the defendant disobeyed an evacuation order mandating all persons of Japanese ancestry to evacuate the area.[36] The Court held that the power to exclude includes the power to regulate by any method necessary, including forcible measures.[37] The Court further declared

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[29] Jacobson v. Commonwealth of Mass., 197 U.S. 11, 22 (1905).
[30] *Id.* at 25-6.
[31] Jaikumar, *supra* note 4, at 693.
[32] Simpson v. Shepard, 230 U.S. 352, 405-06 (1913).
[33] Jaikumar, *supra* note 4, at 697.
[34] Nat'l Fed'n of Independ. Bus. v. Sebelius, 132 S.Ct. 2566, 2586-87 (2012).
[35] *Id.* at 2586.
[36] Korematsu v. United States, 323 U.S. 214, 216 (1944).
[37] *Id.* at 223.

that the exclusion was not based on race or hostility but, instead, it was due the fact that the United States was at war with the Japanese Empire. Therefore, security measures were necessary and undermining the decisions of public officials and military personnel would limit the ability to regulate and maintain an ordered society.[38]

In *Korematsu*, the Court held that the proper judicial test for determining whether the Government may validly deprive a person of their constitutional rights under the premise of military necessity is whether the deprivation is reasonably related to a public danger that is immediate, imminent, and impending that permission of ordinary constitutional processes is necessary in order to avert the danger.[39] Although a biological pandemic may not have the immediate threat of war and military assistance, during a state of biological threat and impending or current invasion by an infectious agent such as the recent 2014 Ebola epidemic, it is possible that military would be employed to maintain order. Similar to *Korematsu*, the Government may necessarily deprive individuals of constitutional processes in order to avoid the immediate, impending, and imminent danger of an infectious and contagious disease within the population.[40]

More recently, in *United States v. Rose*, the Court held that Congress may regulate commerce and non-economic activities related to commerce, but forbid the compulsion of commerce.[41] Although the Court offered some insight as to the distinction between economic activities, it failed to define the term compulsion within the scope of congressional authority.[42] The Court in *Nat'l Federation of Independent Bus.v.Sibelius* held that increased barriers to properly implemented federal programs and services aimed at enforcing quarantine laws with citizen-imposed penalties was a form of congressional compulsion and exceeded the government's scope of authority. .[43]

C. Individual Liberty & Due Process

The Tenth Amendment of the Constitution provides that no person shall be denied life, liberty, or property without due process.[44] However, the Tenth Amendment does not explicitly guarantee that such constitutional liberty inter-

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[38] *Id.* at 223-24.

[39] *Id.* at 235.

[40] *Id.*

[41] United States v. Rose, 714 F. 3d 362, 370-71 (2013). *See also* United States v. Roszkowski, 700 F.3d 50, 58 (2013) (holding that Congress could regulate economic activities but compulsion of economic activities would be unconstitutional).

[42] *Id.* at 370-71.

[43] Jaikumar, *supra note* 4, at 708-09.

[44] U.S. CONST. amend. X.

ests will not be violated.[45] Rather, it provides an avenue for relief and remedies when violations occur, while permitting violations in particular circumstances as long as certain processes are provided to ensure that the governmental deprivation of liberties is justified.[46] A violation of individual liberties may be appropriate under certain circumstances such as in situations of a grave public health infection that could lead to human eradication. In cases where there is grave public danger, the benefits of the government's infringingement upon the rights of a minority are justified when weighed against the purpose of the violation and the benefits to the majority.[47]

As the Court held in *United States v. Lopez*, Congress may regulate the channels of commerce, the activities of commerce, and the instrumentalities by which commerce may travel under the commerce clause authority.[48] An infectious diseases is not bound by state borders; rather, disease has the capacity to infect many individuals despite the territorial boundaries drafted by the government.[49] While an infectious disease may be local in origin, by the globalization of the economy, the nature of humanity, and the very essence of ecology, it is an interconnected and socially shared phenomenon that inevitably and substantially affects local communities, national populations, and international relations, constituting an commerce activity that Congress may appropriately regulate.[50]

Although it may be proper in certain situations to deprive a person of fundamental rights such as life, liberty, or property, the Due Process Clause of the Fifth and Fourteenth Amendments makes it illegal for any governmental official to deprive any individual of fundamental rights without due process of law.[51] Generally, due process must occur before a violation of rights, but an exception applies in emergencies requiring that immediate measures be taken for the safety of the community.[52]

Under substantive due process, courts review quarantine laws to guarantee that such procedures and regulations are administered so as to achieve the goals

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[45] *Id.*

[46] *Id.*

[47] Schulte v. Fitch, 202 N.W. 719, 722 (Minn. 1925). *See also* Compagnie Francaise De Navigation A Vapeur v. State Bd. of Health, 188 U.S. 380, 396-97 (1902) (holding that the prohibition of all persons, healthy or otherwise from a town during a quarantine order was an appropriate exercise of authority).

[48] United States v. Lopez, 514 U.S. 549, 559 (1995).

[49] *Id.*

[50] *Id.*

[51] U.S. CONST. amend. V.

[52] Gibbons, *supra* note 5, at 204-06.

and objectives of government and are reasonable in their means and goals.[53] Public health interventions that deprive individuals of fundamental rights and due process at the outset, such as pandemics, require that courts review the elements of substantive due process to decipher whether or not the government has met the burden of showing that the goals and means by which the program has been implemented provide a valid reason for depriving an individual of their constitutionally protected rights and due process.[54] In order for a deprivation of due process and the violation of some fundamental right to be held valid, the government agency or official must show: (1) the deprivation was either not a fundamental right protected under the Constitution or was deprived in relation to public health necessity; (2) the intervention was effective and demonstrably connected to the government's goal; (3) the intervention is neither over-inclusive or under-inclusive in scope; and (4) the intervention uses the least restrictive means to achieve the government's goal.[55]

D. Current Public Health Crises

Not every public health crisis will conclusively show that the government has the authority to violate fundamental rights due to the impending crisis. However, with the recent outbreak of Ebola in West Africa and the more recent outbreak of Ebola within the United States, the Due Process Doctrine and its interplay with the Government's ability to infringe on individual rights has become a highlighted debate.

On September 26, 2014 the public health laws and regulatory actions of the United States were tested when a Dallas resident, Thomas Duncan, was erroneously sent home and told to treat a fever with Tylenol despite notifying an emergency department nurse of his recent trip to an Ebola ravaged area.[56] Thomas Duncan was later confirmed to have the Ebola virus and was isolated at Texas Presbyterian Health Hospital, where he succumbed to the Ebola virus on October 8, 2014.[57] The CDC implemented immediate quarantine and isolation procedures in response to Duncan's positive Ebola tests and mandated that immediate family members remain quarantined for a period of twenty-one days despite negative laboratory tests.[58] Thomas Duncan's case exemplifies major

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[53] Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights,* 54 BUFF. L. REV. 1299, 1310 (2007).

[54] *Id.*

[55] Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970).

[56] Sydney Lupkin, *Ebola in America: Timeline of the Deadly Virus,* ABC NEWS (Oct. 24, 2014 9:03 AM), http://abcnews.go.com/Health/ebola-america-timeline/story.

[57] *Id.*

[58] Greg Botelho et al., *Hazmat Crews Clean Up, Quarantined Family Move Out Due to Ebola Case,* CNN HEALTH (Oct. 4, 2014, 4:27 AM), http://www.cnn.com/2014/10/03/health/ebola-us.

flaws in the early measures used by the United States to control incoming cases of Ebola.[59] Initially, the standard procedures employed by the United States to prevent Ebola included questioning passengers at airport screening terminals about to their exposure to the virus.[60] As Duncan's case illustrates, there is a high likelihood of a person having been exposed to Ebola and either not knowing of the exposure or failing to provide accurate information at airport checkpoints makes the airport screening method an ineffective means of achieving the Government's goal.[61]

Despite the apparent flaws associated with current methods employed by the United States to prevent the spread of Ebola within the United States, it was not until a New York City doctor tested positive for Ebola on October 23, 2014 that mandatory quarantine procedures were implemented by state government officials.[62] Although the CDC and other health agencies increased preventative methods to stop the spread of Ebola within the United States after Thomas Duncan's death, the CDC still allowed self monitoring and only required the reporting of symptoms once a fever was detected.[63] The new system of detection and reporting used by the CDC after the September death of Thomas Duncan was based on the premise of using the least restrictive means necessary for the Government to achieve the goal of preventing the spread of Ebola.[64] However, the CDC's standard allowed individuals such as the New York City physician to interact with the community while feasibly contagious with the Ebola virus.[65] As demonstrated by the New York doctor, a person infected with the virus may have a brief interlude where the person does not show symptoms but is nevertheless contagious, presenting a the tell-tale signs of the infectious Ebola virus a few hours later.[66] It is unclear whether or not a fever of over 100.4 degrees is the point at which the virus is capable transmissible to other humans or whether there is a possibility of viral transmission during the intermittent stages leading up to the fever.[67] However, it is noteworthy to suggest that the least restrictive means employed by the CDC were not reasonable,

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[59] Lupkin, *supra* note 56.

[60] *Quarantine and Isolation*, CDC CENTERS FOR DISEASE CONTROL & PREVENTION (Oct. 15, 2014), http://www.cdc.gov/quarantine/air/managing-sick-travelers/ebola-guidance-airlines.html.

[61] Goldberg, *supra* note 55, at 263-71.

[62] N.J. ADMIN. CODE § 18340 (2009).

[63] *Quarantine and Isolation*, *supra* note 60.

[64] *Id.*

[65] *Id.*

[66] Ray Sanchez & Shimon Prokupecz, *N.Y. Doctor Positive for Ebola Had No Symptoms Until Thursday, Officials Say*, CNN (Oct. 23, 2014, 11:58 PM), http://www.cnn.com/2014/10/23/health/new-york-possible-ebola-case.

[67] *Quarantine and Isolation*, *supra* note 60.

given the immediate and imminent danger to the public posed by an individual carrying the highly infectious Ebola virus.[68]

The most recent and perhaps controversial restrictions came in the aftermath of the New York City physician's Ebola quarantine and isolation. In an effort to prevent the spread of Ebola to Americans, New York City State Officials and New Jersey State Officials imposed mandatory twenty-one day quarantines against all persons who had exposure to Ebola and thus could reasonably be considered to be either a carrier of the virus or to be infected with the virus.[69] A nurse returning from a mission with Doctors Without Borders, Kaci Hickox, was the first person subjected to the New Jersey mandatory twenty-one day quarantine.[70] Despite New Jersey having the regulatory authority to impose quarantine and isolation procedures upon individuals believed to be potentially infectious to the community, the quarantine procedures used on Kaci Hickox prompted claims that New Jersey had violated her fundamentally protected constitutional rights and denied her due process.[71]

The Government's imposition of mandatory twenty-one day quarantines on all persons who have been exposed may be criticized as being over-inclusive in its scope.[72] However, as seen with the earlier strategies employed by the CDC to prevent Ebola from entering the United States, over-inclusivity is likely going to be more effective in controlling the spread of the highly contagious and infectious Ebola virus than the under-inclusive methods used by the CDC.[73] The infringement of individual rights, as argued by Hickox, presumes that the Government may not take away a person's life, liberty, or property. However, under the due process clause, the Government may infringe upon the fundamental right of life, liberty, and property as long as due process is offered.[74]

The means employed by the government in preventing the spread of the Ebola disease by enforcing a mandatory twenty-one day quarantine period appropriately meet the least restrictive means test because it does not discriminate against any one person or group but, rather, is mandated against all persons who were exposed to the virus and pose a general public health risk.[75]

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[68] Goldberg, *supra* note 55, at 263-71.

[69] *See*, *supra* note 62.

[70] Christine Sloan, *Nurse Furious Over Being Quarantined in New Jersey Over Ebola Concerns,* CBS N.Y. (Oct. 27, 2014, 11:09 PM), http://www. Newyork.cbslocal.com/2014/10/27/Cuomo-christi-nurse-quarantine.

[71] *Id.*

[72] *Nurse Who Fought Maine Ebola Quarantine Moving Out of State*-report, REUTERS (Nov. 8, 2014, 6:05 PM) http://www.reuters.com/article/2014/11/08/health-ebola-usa-maine.

[73] *Quarantine and Isolation*, *supra* note 60.

[74] *See*, *supra* note 44.

[75] Goldberg, *supra* note 55, at 263-71.

Furthermore, the mandatory quarantine allows Government to ensure that the appropriate laboratory testing procedures are utilized and that a potentially infected person is no longer a risk to the community prior to being released, which greatly reduces the chance of the virus spreading throughout the population, using the least restrictive means to meet the objective of limiting the spread of the Ebola virus.[76]

Although the current process of implementing mandatory twenty-one day quarantines does not directly afford the procedural due process guaranteed by the Constitution, there could be simple steps offered by the Government to allow such procedures and processes to be satisfied alongside the twenty-one day mandatory quarantine to allow the harmonization of both regulatory procedures. Using a specified space within a hospital for the quarantining of infectious patients permitting direct broadcasting, along with telephonic communication, would allow the quarantined individual the opportunity to have a hearing and a judicial proceeding before a court, an alternative to the current methods of due process being currently used.[77]

As clearly demonstrated by the *Hickox* case, the laws of the state where a person is to be quarantined will be the laws by which a person must abide.[78] However, when a person claims a violation of procedural due process, a judge may overrule those procedures and find that the violation of the person outweighs the implemented procedures of the State.[79]

In *Mathews v. Eldridge*, the court determined a three part analysis to determine whether procedural due process procedures violated constitutionally protected rights.[80] Under the three part *Mathews* test, procedural due process may be satisfied by showing that (1) the private interest affected by the official action is minimal; (2) there is minimal risk of an erroneous deprivation through such government procedures and the probable value of any additional procedures and safeguards is miniscule; and (3) the government's interest, including the fiscal and administrative burdens of utilizing additional or substitute procedures, is substantially high.[81]

Under the *Mathews* test, during an epidemic or the potential for a pandemic, the private interest of a quarantined individual is not minimal and must be considered when depriving a person or group of particular rights. In the

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[76] *Id.*

[77] *Goldberg, supra note* 55, at 263-71.

[78] Rachel Zimlich, *Ebola Nursing Update: Court Overrules State Officials on Mandatory Quarantine for Maine Nurse*, HEALTHCARE TRAVELER (Nov. 06, 2014), http://www.healthcaretraveler.modernmedicine.com/healthcare-traveler/news/ebola-nursing-updatecourt-overrules-state-officials-mandatory-quarantine-ma.

[79] *Id.*

[80] Mathews v. Eldridge, 424 U.S. 319, 321 (1976).

[81] *Id.*

case of quarantine, the rights of the one individual and their potential interest, although important, is outweighed by the other factors within the *Mathews* test, specifically, the minimal risk of erroneous deprivation, the Government's interest in ensuring the public is safeguarded against the spread of infectious disease, and the public interest in maintaining the safety of their community.[82] The government has a clear interest in protecting the community from the spread of an infectious agent that may cause fatalities within the population, making the isolation and quarantine procedures of a person thought to be a carrier of the infectious agent, and susceptible of spreading the disease, a reasonable and legitimate exercise of governmental authority.[83] Furthermore, the public interest in protecting their well-being will outweigh the infringement of individual rights given the particular circumstances.[84]

E. Criminal Penalization

Historically, Congress has imposed penalties upon private citizens who have failed to comply with mandatory regulations.[85] It is not unheard of for federal criminalization to occur with inactivity, such as in cases of sexual offenders failing to register with the sex offender registry.[86] There are circumstances where prosecution of a parent can occur for both an affirmative action of killing their child by an act such as stabbing, or inaction, such as starvation.[87] Similar to the duty a parent has to their child and the criminal penalty imposed for failure to fulfill that duty, an individual under a quarantine order has a duty not to spread contagious disease to the community and may receive a criminal penalty for non-compliance.

For example, as demonstrated in *United States v. Comstock*, at the end of defendant's prison sentence, the federal government determined the defendant was sexually dangerous and civilly committed him under a quasi-criminal law despite the presence of any current action.[88] The Court held that the current or past behavior did not lead to the decision; rather, the future threat of defendant and his status as a dangerous person led to the final decision.[89]

Similar to *Comstock*, a person who fails to comply with an evacuation order or whom officials reasonably believe to be a carrier of infectious disease

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[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] Corey Rayburn Yung, *The Incredible Ordinariness of Federal Penalties for Inactivity*, 2012 WIS. L. REV. 841, 842-43 (2012).

[86] *Id.* at 848.

[87] *Id.* at 845-46.

[88] United States v. Comstock, 560 U.S. 126, 148-49 (2010).

[89] *Id.* at 149.

may be deemed to pose a significant current or future danger to the population and, therefore, may be criminally charged under a quasi-criminal law based upon their status as a contagious disease infected person.[90]

An obstruction crime occurs when a federal official orders a directive and a person fails to comply.[91] In cases of quarantine, an obstruction crime could reasonably occur when an individual or a group fail to comply with a mandatory order, or to any other citizen failing to disclose the location of those in noncompliance.[92]

Although there are some concerns regarding the use of penalties under a federally implemented public health surveillance system, the ability of the government to impose penalties for non-compliance is vital to programmatic success.[93] It is hard to separate a quarantine order from the use of a disease surveillance system based on a lack of economic connection because the system itself will create an efficient way to reduce costs associated with pandemics and epidemics on a global, national, state, and local level.[94]

Additionally, a pathogen that infects a local community undoubtedly has an effect on commerce as it may spread to multiple communities, create a decline in purchases, limit travel and leisure activities, and create a burden on the healthcare industry.[95] Given the direct and indirect relationship between the surveillance system and the prospective disease transmission, it is reasonable that Congress have the authority to order quarantine regulations with the ability to impose penalties for non-compliance under its commerce clause authority.[96]

Under a strict scrutiny standard, government would likely successfully present evidence deonstrating that the scope of the governmental action, which included the safety and welfare of the majority of the population and stability of the economy, substantially outweighed the violations of individual or group fundamental rights.[97]

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[90] *Id.* at 148-49.

[91] Yung, *supra* note 85, at 860.

[92] *Id.* at 859-60.

[93] *Id.* at 870.

[94] Kathleen J. Choi, *A Journey of a Thousand Leagues: From Quarantine to International Health Regulation and Beyond,* 29 U. PA. J. INT'L L. 989, 1018 (2008) [hereinafter Choi].

[95] Gibbons, *supra* note 5, at 205.

[96] U.S. CONST. art. I § 8 cl. 3.

[97] Gibbons, *supra* note 5, at 205.

IV. Fragmentation

A. Global Health Costs: the impact of being unprepared

Global health disease and the lack universal systems create economic costs with long-term consequences.[98] The 2003 Severe Acute Respiratory Syndrome (SARS) outbreak cost nearly thirty billion dollars.[99] Furthermore, the United States spends over 500 million dollars annually on the treatment of Lyme disease.[100] The local costs associated with infectious disease outbreaks and poor containment are also catastrophic, as evidenced by the 1.1 million dollars spent by New Hampshire in 1994 in preventative regulation implemented to treat 665 people exposed to a rabid kitten.[101]

B. Coordination: the problem of authority

The current public health system utilized by the United States has many devastating effects.[102] Although the states had effectively given the federal government the power to regulate quarantine programs by 1921, the federal government allowed states to retain control of the quarantine programs.[103] Despite the lack of federal involvement in state regulation of quarantine and public health programs, the World Health Organization (WHO) and Center for Disease Control (CDC) maintain disease management systems that track national and international diseases when reported.[104] The WHO was established in 1948 and has authority to mandate a legally binding quarantine order.[105]

WHO estimates a person is infected with Tuberculosis nearly every second in the United States.[106] In 1951, two years after the creation of WHO, the international sanitary regulations were drafted and adopted in an effort to create a unified public health program with the primary mission of protecting the public against disease transmission.[107] Despite the ongoing and escalating rates of

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98 Choi, *supra* note 94, at 1020.

99 *Id.; Center for Disease Control and Prevention,* CDC, (Reporting Severe Acute Respiratory Syndrome (SARS) in Asia in 2003 and rapidly spreading, ,killing 774 people and infecting more than 8,098 people worldwide including the United States where eight people were clinically diagnosed with the virus) (last visited Nov. 8, 2014, 3:28 PM), http:www.cdc.gov/sars.

100 Choi, *supra* note 94, at 1020.

101 *Id.*

102 Jaikumar, *supra* note 4, at 693.

103 *Id.*

104 Choi, *supra* note 94, at 990.

105 *Id.* at 1004-1007.

106 *Id.* at 990.

107 David P. Fidler, *Emerging and Reemerging Infectious Diseases: Challenges for International, National, and State Law*, 31 Int'l Law. 773, 777 (1997).

diseases within the United States and around the world, it was not until the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak that administrators began discussions about a universal public health reporting system.[108] In 2005, the International Health Regulations (IHR) were implemented.[109]

The 2005 IHR greatly expanded WHO's authority, allowing it to use non-governmental sources of information for disease surveillance purposes.[110] The new IHR system required states to implement a quarantine program and mandated the reporting of diseases, allowing the tracking of suspicious symptoms and ordering of necessary quarantines.[111] Despite the IHR reporting requirements imposed upon states, many states have failed to report local disease outbreaks or have waited until the outbreak was beyond containment.[112]

Additionally, the traditional programs available for disease surveillance have consistently restricted the reportable diseases to those currently within the population with high morbidity and mortality rates, and known epidemiology.[113] For example, in 1993, the IHR received a series of outbreak reports consisting of fevers, aching muscles, dyspnea, and gastrointestinal discomfort, rapidly progressing to death.[114] While this outbreak caused national concern as the infections crossed into many of the Southwestern United States, the IHR was unable to involve itself because the symptoms did not constitute a known disease that the IHR was authorized to place under surveillance within its system.[115] Due to the 1993 Hantavirus outbreak that killed multiple people in many states, the WHO implemented changes in its surveillance system, authorizing the reporting of diseases that represented international importance.[116]

In 2006, the United States developed a national, agency specific, pandemic-influenza strategy created by Homeland Security that intended to guide all federal departments and agencies, as well as non-federal entities such as state and local governments.[117] The program was met with little support, as citizens believed the government was withholding pertinent information and stockpiling necessary vaccinations.[118]

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[108] Choi, *supra* note 94, at 990.

[109] *Id.*

[110] *Id.* at 1014.

[111] *Id.* at 1016.

[112] Fidler, *supra* note 107, at 778. *See also* Choi, *supra* note 93, at 1018.

[113] Fidler, *supra* note 107, at 779.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] STANLEY M. LEMON ET AL., ETHICAL AND LEGAL CONSIDERATIONS IN MITIGATING PANDEMIC DISEASE: WORKSHOP SUMMARY 11 (The Inst. of Med. Nat'l Acads. 2007) [hereinafter Lemon].

[118] *Id.* at 10.

There have been many attempts to restructure and create coordinating systems to adequately address the evolving infectious disease problem within the human population. Yet, there remains a distinct gap between the federal government's ability to implement a system that appropriately and consistently prompts compliance, putting the United States at a great disadvantage.[119]

The lack of coordination between the states and the federal government, coupled with the rising costs of controlling emerging and reemerging diseases, creates the need to implement a system that is capable of reducing public health surveillance costs.[120] Additionally, a public health surveillance system must enable the cooperative atmosphere to bridge the gap of communication within public health agencies that is necessary for combating emerging and reemerging diseases.[121]

V. Universal Implementation: A system of Federal Mandate and State Ordered Compliance

A. Disease outbreaks: the Reemergence Challenge

The CDC has recently defined emerging infectious diseases (EIDs) as those diseases with an infectious origin whose incidence within the human population has either recurred or increased within the past two decades or has the capacity to increase in the near future.[122] In 1995, there were twenty-nine new or previously unidentified diseases identified and twenty other diseases identified as older diseases reemerging within the population.[123] The emergence of new diseases and the reemergence of older diseases create substantial challenges to the implementation of a universal system, as it is apparent the system would indeed have to be a non-static and ever-evolving universal health surveillance system.[124]

B. Implementation prospects and barriers

There are many challenges to implementing a federally governed public health system. Global pandemics require addressing liability and ethical concerns arising out of the inevitable lockdown of transportation that would occur, which would result in a loss of supplies to the quarantined area such as a loss of medical equipment, including oxygen, medications, and medical staff.[125] An

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119 Choi, *supra* note 94, at 1020.
120 Fidler, *supra* note 107, at 781.
121 *Id.* at 782
122 *Id.* at 774.
123 *Id.* at 774-75.
124 *Id.*
125 Lemon, *supra* note 117, at 13.

effective system must address contingency plans that covers the chain of authority so that chaos and anarchy do not arise, distributing daily resources in a responsible and civilized manner.[126] One of the most troubling issues regarding the implementation of a nationally based program concerns resource shortages.[127] One acknowledged concern focuses on the fact that, during a global health crisis, the United States will lack available medication because the majority of the medications used in the country are manufactured abroad, making the implementation of quarantine with restrictions on imports and exports problematic and potentially fatal.[128]

VI. Deliberate Evolution

A. Legal considerations

The 2007 pandemic mitigation guidelines issued by the CDC have begun to bridge the gap between public health agencies.[129] While agency communication and programmatic implementation may be minimized, the bigger concern, in light of recent infectious disease outbreaks and the issues in *NFIB v. Sebelius,* is whether a federalized health surveillance system can be an evolving program while simultaneously continuing to be a binding mandate of compliance upon states and citizens.[130]

This article proposes that while *Sibelius* has created barriers to the quarantine laws, it has not created any restrictions on the implementation of quarantine and isolation procedures.[131] The *Sibelius* court held that inactivity could not be regulated under the commerce clause. However, this holding was not clearly binding and, more recently, it has been determined that Congress may indeed regulate noneconomic activity and economic activity under the commerce clause as long as it does not compel activity.[132] Although the *Rose* Court failed to clarify the term "compulsion," there is probably some form of appropriate method to require compliance when the general population is at risk.[133] However, in an effort to avoid the compulsion dilemma, this article proposes that individual non-compliance with a federal mandate may be subject to criminal penalties under obstruction of justice.[134]

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126 *Id.*

127 *Id.* at 13-14.

128 *Id.*

129 *Id.* at 19.

130 Sebelius, *supra* note 34, at 2608.

131 *Id.*

132 Rose, *supra* note 41, at 371.

133 *Id.*

134 Yung, *supra* note 85, at 859-860.

This article supports the proposition that the federal government may indeed create a public health program that is universal in its application among the United States, with a mission of creating regulations and mandating efforts to prevent the spread of infectious, emerging and reemerging, diseases of both known and unknown etiology. Because science and the field of medicine are continuously evolving, it would be impracticable to accept a static system for disease management; instead, the federal public health system must be a progressive and fluctuating system that allows for the surveillance of various pathogens.[135]

The risk of having a static system of disease management or maintaining one of the traditional public health systems is that it fails to require that states properly report abnormal symptoms within the local community and further restricts the ability of the system to respond to, and limit, the spread of disease outside of a community.[136]

B. Misuse of data: The ugly side of universal data repositories

The implementation of a non-static and progressive public health system is likely to create confusion about the appropriate reporting measures. In a public health surveillance system designed to collect queries on multiple ill defined symptoms, if states were reporting every symptom that could be associated with an outbreak, such as the 1993 Hantavirus symptoms which did not necessarily seem abnormal before death occurred, there could be many unnecessary and misused data points retained within the data monitoring programs.[137] Additionally, if numerous data points were collected, the data could be misinterpreted and a quarantine order could be ordered, impinging upon the rights of those who were in fact not ill or in need of a quarantine. Additionally, falsely ordering the quarantine would use valuable resources at the expense of the tax payer.[138]

C. Misapplication of Data: The Bad side of universal data repositories

The use of a universal repository for data, that permitted the accumulation of disease outbreak symptoms across the United States, would provide for efficiency in isolation and outbreak management.[139] However, ensuring that the data was cross-referenced and resources were allocated within an appropriate

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135 Fidler, *supra* note 107, at 797-98.

136 Choi, *supra* note 94, at 1015-17.

137 Fidler, *supra* note 107, at 779.

138 *Id.*

139 *Id.*

period would cost a tremendous amount of money.[140] The implementation costs of a progressive style program are substantial because it would continually sustain updates, create additional references, and necessitate mandatory training and education.[141] Although the short term, and potentially long-term, costs of sustaining a universal federal repository of disease pathogens within the United States would create a heavy cost burden, the long-term benefits of having such a program would outweigh any costs as the benefit of having such a program during a pandemic or epidemic would be highly beneficial.[142]

D. Functional use and purpose: The good side of universal data repositories

The federally-operated universal data repository will mitigate the effexts of the ongoing lack of coordination among the federal, state, and local governments.[143] The use of a federal data repository to track disease trends across the country with mandatory compliance will increase efficiency during times of evacuation, isolation, and quarantine.[144] Further, allowing the federal government to utilize their control to mandate compliance during a quarantine situation, through federal penalization of state and citizen non-compliance as an obstruction of justice, will ensure that states and citizens enable the government to effectively initiate a quarantine order and limit the spread of infectious diseases to the population.[145]

While the sovereignty of the states will be questioned, the states voluntarily gave up their quarantine authority when, in 1921, New York City became the last state to sell their quarantine station to the federal government in exchange for monetary compensation and federal control over quarantines.[146] It is apparent that although the federal government has afforded states the authority to implement public health programs designed to deal with infectious diseases the power to implement quarantine regulations and orders has been secured by the federal government and was voluntarily relinquished by the States since 1921.[147] Therefore, the states effectively gave up their sovereignty to the federal government in the field of quarantine regulation.[148]

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140 Choi, *supra* note 94, at 1019.

141 *Id.*

142 *Id.* at 1021.

143 *Id.*

144 *Id.* at 1019.

145 Yung, *supra* note 85, at 870.

146 Jaikumar, *supra* note 4, at 693.

147 *Id.*

148 *Id.*

Although there have been great attempts throughout history to create a public health system that affords federal, state, and local authorities the ability to work together to combat disease pathogens and outbreaks, the efforts have consistently failed.[149] However, with the recent Ebola outbreak, there is reason to readdress the situation and propose the implementation of a new system that would further collaboration between federal, local, and state authorities in the event of such an outbreak.[150]

VII. RECONSIDERATION: ADAPTING THE PUBLIC HEALTH REPOSITORY TO MEET THE NEEDS OF SCIENCE AND SOCIETY

A. Collaborarchy: Government for the people

Traditionally, there have been many attempts to create a public health disease surveillance system to track public disease at a national, local, and state level in a way that enhances collaboration and increases disease response proficiency.[151] Despite ongoing efforts to create a universal system in the United States, the arguments of State sovereignty, individual liberty, and, more recently, activity have created barriers to programmatic implementation.[152]

Although the sovereignty of the states is protected by the Constitution, the sale of state quarantine stations to the federal government in 1921 provides that, in this particular area, the states and the federal government agreed to a particular chain of authority, with the federal government maintaining the ability to order and regulate such actions.[153]

Liberty is a fundamental right; a principal rooted in the foundation of the United States and, given its importance, is afforded great consideration.[154] While both the Fifth and Fourteenth Amendments provide that the fundamental right of liberty shall not be violated without due process, there are exceptions allowing violations when the situations involve emergencies, such as an epidemic or pandemic.[155]

B. Anarchy: the Need for Sanctions During Crises

The ability of the government to impose sanctions for noncompliance with a mandatory quarantine order is a proper exercise under its commerce clause

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[149] Choi, *supra* note, 94, at 1018-19.

[150] Centers for Disease Control and Prevention & Assistant Secretary for Preparedness and Response, *Checklist for Healthcare Coalitions for Ebola Preparedness* (Draft Aug.28, 2014).

[151] Choi, *supra* note 94, at 1018.

[152] Sebelius, *supra* note 34, at 2608.

[153] Jaikumar, *supra* note 4, at 693.

[154] Greene v. Edwards, 263 S.E.2d 661, 662-63 (W. Va. 1980).

[155] Gibbons, *supra* note 5, at 205.

authority.[156] As evidenced by the *Lopez* commerce prongs, an infectious person may be an instrumentality of commerce and thus have a direct effect on interstate commerce, making enforcement of the evacuation and quarantine a proper exercise of Congress's authority.[157] However, even if the commerce relationship were questioned, the imposition of a sanction would still be a proper exercise of authority as a means of protecting the community from dangerous persons under a quasi-criminal law, or by a showing that the individual was obstructing justice by failing to comply with an official mandate.[158] Given the broad authority granted to Congress to regulate evacuations and quarantines and the traditional methods that have been used to criminalize active and passive activity, an urgent global health crisis would justify Congressional regulation in order to ensure public safety.[159]

C. Bridging the Gap: Increasing the Effectiveness of Government

The federally-created universal disease management system would bridge the gap between national, local, and state public health agencies, allowing for a centralized system of reporting complete with a uniform command center capable of accountability.[160] While a versatile universal public health repository poses the risk of erroneous data collection and the potential ordering of quarantine, the risk is minimal.[161] It is very likely that the collection of numerous disease data points will be necessary because disease symptoms vary greatly and the system will need to capture emerging disease trends as they become available.[162] Despite the prospective quantity of data anticipated, the repository's purpose will provide sufficient support for the compilation because the data will allow for mutual participation, ongoing disease collaboration, and implementation efficiency.[163] The compilation and extrapolation of data proposed by the federally-mandated, versatile universal system will enable the tracking of disease symptoms to ensure that each locality is prepared with the necessary resources, decreasing overall global health costs and increasing the likelihood to save human lives.[164]

The federal system must incorporate a process of mandatory reporting that requires reporting not only during times of increased pathogen expression, but

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156 Lopez, *supra* note 48, at 1641.
157 *Id.*
158 Yung, *supra* note 85, at 859-60.
159 *Id.* at 870.
160 Fidler, *supra* note 107, at 791-92.
161 *Id.*
162 *Id.* at 781.
163 *Id.*
164 *Id.* at 799.

also during routine pathogen exposure in the population so as to incorporate a way that will enable data collection on all potentially relevant diseases that could put the country at risk.[165] The only way a universal system will remain adaptable is by mandating states and local governments to implement systems that report continually on all health-related data, and impose criminal penalties for non-compliance to ensure that all states and localities abide by the same reporting measures.[166] The tracking of all diseases, though cumbersome and costly, will enable the federal government to better allocate resources and, if necessary, order evacuations and quarantines in a timely fashion, reducing the costs and loss of human lives.[167] The use of a collaborative system mandated by the federal government will pave the way for a reduction in disease pathogenesis, through efficient universal tracking mechanisms and timely response procedures.[168]

VIII. CONCLUSION

The ability of the federal government to impose a mandatory program upon the states is a proper exercise of its authority under the commerce clause. Where state programs have proven to be inefficient in quarantine regulation, the federal government may preempt state laws that abide by the federal laws despite public health regulation traditionally including a state police function.

Because the federal government has the authority to regulate and order quarantines, there is little concern that, during a global health crisis, the federal government would be restricted to exercise this authority. The use of a universal public health surveillance system that is adaptable to emerging disease pathogens and social change is necessary to ensure collaboration amongst federal, state, and local governments. Because the implementation of a federally-mandated, universal public health surveillance system authorizes the violation of fundamental rights and imposes sanctions for non-compliance, there are liberty and due-process concerns at all levels of implementation. The purpose of the universal program is to prevent the transmission of emerging and reemerging diseases that pose a significant threat to the human population. Thus, to enable the federal government to implement a versatile program for the surveillance of disease pathogens, there must be some method that allows the government to criminalize non-compliance and ensure proper programmatic implementation and sustainability.

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165 *Fidler, supra note 107,* at 797-98.
166 *Id.* at 798.
167 *Id.* at 799.
168 *Id.*

This article contends that the quarantine actions of the federal government are firmly within the scope of authority granted by the United States Constitution. Given the scope of authority, the federal government may properly implement a versatile mandatory universal public health data repository with imposed penalties for non-compliance. Because penalization is necessary to ensure compliance, the use of such extreme measures, irrespective of the type of non-compliance, must be undertaken to provide for proper implementation of the universal public health surveillance system at the level of the federal, state, and local governments. Impinging upon individual rights is an unfortunate consequence of federal quarantine and evacuation orders, but it is a necessary violation to ensure that the majority of the population remains healthy. Ensuring that public officials understand the rationale behind the *NFIB v. Sebelius* decision will avoid unnecessary confusion, ensuring successful programmatic implementation and limiting barriers to collaboration. The use of an adaptable disease repository is the only rational means that will allow all government officials to coordinate and collaborate towards effectively controlling disease outbreaks within the United States.

Although a million deaths would be a catastrophe, by implementing an adaptable yet federally mandated universal disease surveillance system, federal, state, and local governments may have the ability to prevent at least single, yet tragic, loss of life.

Super Women Lawyers: A Study of Character Strengths

Patricia Snyder[1]

> *I care passionately about my clients, but you know, I'm not doing brain surgery here. No one is going to die. So, you need some perspective, and when I'm feeling really down, and depressed, and just feel like I don't wanna do this any more, I go do something. It sounds corny, but I go do something nice for somebody. I perform a random act of kindness; it makes me feel better.*
>
> — Woman named to the Super Lawyers list

The field of law is often characterized as a profession in crisis; and law professors, economists, social science researchers, and psychologists alike have weighed in to describe reported troubles, measure them, and fashion remedies. Susan Daicoff, a professor at the Florida Coastal School of Law, has described a "tri-partite crisis" in the profession: lawyer dissatisfaction and mental health issues, a decline in professionalism, and a decline in public perception based upon a stereotypical "lawyer personality."[2] Whether the distress is the result of inherent personality traits, law school training, practice conditions, or all of the above, is a subject of scholarly debate.

Research is also inconclusive on the extent of lawyer unhappiness, but studies suggest that while some are thriving, a significant number of lawyers are unhappy and women lawyers may have special reasons for negative feelings about the profession. In 1999, Patrick Schiltz, then a Notre Dame law professor, reviewed a number of studies and concluded that compared to other workers, lawyers were more apt to have poor health and experience, anxiety,

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[1] This study originated as a capstone project for the author's Master of Applied Positive Psychology (MAPP) degree at the University of Pennsylvania. She acknowledges the assistance of her MAPP faculty adviser, Daniel S. Bowling III, JD, and postdoctoral fellow Margaret L. Kern, PhD. Pat Snyder, JD, MAPP, a former practicing attorney, runs a strengths-based coaching practice for attorneys called I Can Fly, LLC.

[2] Susan S. Daicoff, Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses (Am. Psychol. Ass'n 2004).

hostility and paranoia.[3] He also cited a higher divorce rate among lawyers and an increased likelihood of suicide.[4]

More recently, Nancy Levit and Douglas Linder, law professors at the University of Missouri-Kansas City, reviewing a wide range of other studies on lawyer well-being, including professor Kathleen Hull's critique of Schiltz's study, have concluded that while results are mixed, most lawyers fall "in the middle of the happiness continuum" but could be doing better.[5]

For purposes of this study, I adopted this approach. I believe a number of lawyers are dissatisfied, but there are also a number of exemplars who have found satisfaction and success in the law. To move lawyers farther along the continuum toward well being, it is worth examining both the causes of lawyer dissatisfaction and learning from these exemplars how they have found success and satisfaction.

I. WHAT CAUSES LAWYER DISSATISFACTION?

Psychologists, law professors, and social scientists have offered a range of theories on what causes lawyer unhappiness. They note particular unhappiness in large firms and cite high stress, rigid billable hour requirements, work overload, incivility, and a focus on maximizing profits among reasons for lawyer distress.[6] Some theorize that a lawyer personality and the law school experience are to blame and speculate on the impact of gender on the lawyering life.[7] Here are some details from their theories and findings.

A. The Lawyer Personality

Daicoff concludes, based on research by social scientists and traditional psychologists, that there is a distinct "lawyer personality" contributing to the distress.[8] She believes it begins in childhood in the form of scholastic achievement, leadership, and low interest in emotions, and ultimately emerges – with a draconian assist from law school – as a full-fledged lawyer-type.[9] The type she

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[3] Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYRACUSE L. REV. 335, 336 (2008).

[4] *Id.*

[5] NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (Oxford Univ. Press 2010); Kathleen E. Hull, *Cross-Examining the Myth of Lawyer's Misery*, 52 VAND. L. REV. 971 (1999).

[6] *See, e.g.*, G.C. O'Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 30 L. & PSYCHOL. REV. 23 (2006); Janet Taber et al., Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates. 40 STAN. L. REV. 1209 (1988).

[7] *See, e.g.*, Taber et al., *supra* note 5.

[8] *See* DAICOFF, *supra* note 1.

[9] *Id.*

describes is focused particularly on external rewards rather than altruism or intrinsic motivation, becomes aggressive under stress, would rather compete than provide social support to peers, is more interested in logic and justice than care for others, and carries into the practice the pessimistic thinking style that was rewarded in law school with higher grades.[10]

Daicoff's "lawyer personality" relies in part upon extensive research conducted by psychologist Larry Richard, a former trial lawyer, who administered the Meyers-Briggs Type Indicator to 3,014 practicing lawyers in 1992 and found that most lawyers (eighty-one percent of men and sixty-eight percent of women) tested as "thinkers" instead of "feelers."[11] Richard predicted that the feelers, though not in the majority, would be "swimming against the current" in a practice dominated by analytical thinking types.[12] His results might explain some degree of dissatisfaction among feelers.

However, Richard – in a later lawyer study using a different testing instrument called the Caliper Profile – acknowledges that feelers may have an advantage in the areas of mentoring, teamwork, practice group leadership, client retention, support staff relationships, and the all-important function of bringing in business, or "rainmaking."[13] When tested for "sociability," or comfort in initiating intimate connections with others, lawyers in the study had an average score of only twelve point eight percent, compared to fifty percent for the general public.[14] Rainmakers, however, scored three and a half times higher on the trait of sociability than so-called "service partners," who were otherwise excellent practitioners, but brought in less business.[15] Richard, who holds at PhD in psychology from Temple University, stated that those who scored lower in sociability were more comfortable dealing with matters of the mind than the heart.[16] Rainmakers, it seems, have heart, and the supposed ties between thinking, feeling, satisfaction, and success, like the overall degree of lawyer satisfaction, are unclear. I have explored their connection to some degree in this study.

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[10] *Id*. *See also infra* Table 3.2.

[11] Larry Richard, *How Your Personality Affects Your Practice: The Lawyer Types*, 79 A.B.A. J. 74, 76 (1993).

[12] *Id*.

[13] Larry Richard, *Herding Cats: The Lawyer Personality Revealed,* REP. TO LEGAL MGMT. (Altman Weil, Newton Square, PA), Aug. 2002.

[14] *Id*.

[15] *Id*.

[16] *Id*.

B. Law School

A number of studies correlate attending law school with student psychological distress and increased drug and alcohol abuse.[17] Those who see law school as the culprit in creating distressed lawyers have impugned the Socratic method of teaching, a heavy workload, and classroom ratios that provide little student-faculty interaction.[18] They also note that law school prompts a shift away from more altruistic community service values to materialism and from more satisfaction-producing intrinsic motivation to extrinsic motivation.[19] Since self-regulation theory teaches that intrinsic motivation and autonomy create greater interest, enjoyment, and inherent satisfaction, it makes sense that an education atmosphere that discourages it in favor of external motivators such as grades and the prospect of eventual high earnings would deplete well-being.[20]

C. Gender

Women lawyers leave the practice at a faster clip than their male counterparts, which might suggest that they are less satisfied with the practice, but studies that query their satisfaction level are inconclusive.[21] If they show up in a study as more satisfied, it could be because they tend to report more positively than men. Their satisfaction level is the subject of academic debate.[22]

No matter how they register on the satisfaction scale, it is clear that women lawyers face particular challenges in the practice. Levit and Linder conclude females leave the practice not so much from dissatisfaction with the substantive work, but from frustrations with professional development opportunities, the work environment, and particularly the challenge of juggling a law career with child rearing.[23] Their view seems to mesh with a 2000 Young Lawyers Division study conducted by the American Bar Association which showed that only one-fifth of the women lawyers surveyed reported that they were "very satisfied" with the balance between their personal and professional lives, and one-third said they doubted it was possible to successfully balance roles of wife,

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[17] *See* DAICOFF, *supra* note 1; Todd D. Peterson & Elizabeth W. Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 357 (2009).

[18] *Id.*

[19] *See* Peterson & Peterson, *supra* note 16.

[20] Kirk W. Brown & Richard M. Ryan, *Fostering Healthy Self-Regulation from With and Without: A Self-Determination Theory Perspective, in* POSITIVE PSYCHOLOGY IN PRACTICE 105 (Alex Linley & Stephen Joseph eds., 2004).

[21] *See* Hagan & Swedloff, *supra* note 2.

[22] WILLIAM DAMON, THE PATH TO PURPOSE: HOW YOUNG PEOPLE FIND THEIR CALLING IN LIFE (Free Press reprt. ed. 2009).

[23] *See* LEVIT & LINDER, *supra* note 4.

lawyer, and mother.[24] One Stanford Law School study, for example, suggested three ways in which women lawyers with children may be disadvantaged if they choose to continue practicing: (1) they may need to reduce their hours or choose employers with flexible working arrangements; (2) a reduction in hours may negatively affect their career prospects; and (3) they may experience severe psychological distress from attempting to do it all.[25]

In addition to work-life balance issues, women attorneys in large firms are seen as facing particular challenges of long hours, values conflicts, and hierarchy, bureaucracy and specialization. Further, child rearing may derail already long journeys on the partnership track.[26] A substantial part of this study addressed the ways in which successful women lawyers respond to these challenges.

D. Negative Thinking Style, Lack of Control, and Zero-Sum Games

According to positive psychologists Seligman, Verkuil, and Kang, lawyers – whether male or female – are dissatisfied for three main reasons, which can be addressed to some extent by applying positive psychology principles.[27] They are: (1) law attracts and legal analysis benefits from a pessimistic thinking style, which does not translate so well into the rest of their lives; (2) lawyers have high pressure but little latitude to make decisions; and (3) the practice at its adversarial best is a zero-sum game with a winner and loser.[28] For each of these factors, they recommended some modification in the way lawyers work.

To remedy an overly pessimistic thinking style, they suggest training lawyers in *flexible optimism* in their personal lives while maintaining *adaptive pessimism* in their legal work.[29] To address low decision-making latitude, they recommend that legal employers re-craft jobs to give associates more perceived control, and also assign them five to ten hours of work a week on the basis of personal character strengths, which would energize associates and make them more productive.[30] Finally, to overcome the zero-sum nature of the practice, they suggest extending opportunities for more cooperation within the adversary

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[24] Catherine G. O'Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 30 LAW & PSYCHOL. REV. 23 (2006).

[25] Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*. 40 STAN. L. REV. 1209 (1988).

[26] Deborah Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective,* 12 WOMEN'S RTS. L. REP. 9 (1991).

[27] Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 34 (2001).

[28] *Id.*

[29] *Id.*

[30] *Id.*

system.[31] Whether this approach is likely in an increasingly competitive, post-boom legal marketplace is open to debate. Those who see a "comprehensive law movement," where law is evolving toward a less adversarial state, would say that it is.[32]

II. Principles of Positive Psychology

The positive psychologists' analysis of lawyer distress and suggestions for improving lawyer well-being are consistent with the philosophy of a field that seeks to achieve human flourishing by building on character strengths and virtues rather than focusing on dysfunction.[33] In other words, positive psychologists focus on what makes us flourish rather than what makes us mentally ill. One way they do that is to study exemplars, or individuals who are flourishing, to understand the roots of their well-being.[34] This study of women lawyer exemplars is consistent with that approach. To better understand the recommendations of positive psychologists with respect to lawyers, it makes sense to review the history of positive psychology and understand some of the basic principles upon which those recommendations are based.

A. The Role of Character Strengths

To launch one of the earliest initiatives in the field of positive psychology, Peterson and Seligman, assisted by numerous practitioners and scholars, identified twenty-four character strengths, or positive traits, that reside within the six virtues of wisdom and knowledge, courage, humanity, justice, temperance and transcendence.[35] The undertaking sought to provide a counter-balance to the Diagnostic and Statistical Manual ("DSM"), a classification of psychological dysfunction used by traditional psychologists.[36] The most prevalent character strengths in human beings in descending order are kindness, fairness, honesty, gratitude, and judgment.[37]

To determine an individual's predominant character strengths, Peterson and Seligman developed the Values in Action Inventory of Strengths ("VIA-

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[31] *Id.*

[32] Susan S. Daicoff, *The Future of the Legal Profession*, 37 Monash U. L. Rev. 7 (2011).

[33] Martine E.P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 Am. Psychol. 5 (2000).

[34] Anne Colby & William Damon, Some Do Care: Contemporary Lives of Moral Commitment (Simon & Schuster 1994).

[35] Christopher Peterson & Martin E.P. Seligman, Character Strengths and Virtues: A Handbook and Classification (Oxford University Press 1st ed. 2004).

[36] *Id. See also infra* Table A-1, Appendix A (a complete listing of the character strengths and virtues).

[37] Nansook Park, Christopher Peterson & Martin E.P. Seligman, *Character Strengths in Fifty-Four Nations and the Fifty US States*, 1(3) J. Positive Psychol. 118 (2006).

IS"), a 240-item survey designed on a five-point Likert scale, which allows respondents to endorse ten statements for each of the twenty-four character strengths.[38] The test is administered online, and developers report adequate reliability and validity, as do others who have examined it.[39] Although there may be concerns about the makeup of the sample opting to take the online test, these concerns are outweighed by its efficiency and economy.[40] An abbreviated twenty-four-item version of the VIA-IS, known as the Brief Strengths Test ("BST"), is offered on the Authentic Happiness website of the University of Pennsylvania.[41] While the VIA-IS reveals an individual's character strengths in rank order, the BST reports each character strength according to where the individual falls relative to all other test-takers, test-takers of the same gender, age, occupation (including law), education level, and zip code.[42] More research is needed to know if the BST is fully valid,[43] but it is useful for our purposes in this study in order to maximize the sample size.

After analyzing data from a sample of adults who took the VIA-IS, Peterson and Park divided the strengths using two factors: heart versus mind and head versus other.[44] Based on their factorial analysis, they designated some as *head strengths* and others as *heart strengths*.[45] Head strengths are intellectual and self-oriented, while heart strengths are emotional and interpersonal.[46] Their diagram of the head and heart strengths can be found at Appendix B of this paper. Peterson and Park have concluded that strengths that are close together on their diagram are more compatible than those that are farther apart, and that we tend to make tradeoffs between distant strengths, such as kindness and honesty, rather than possess both.[47]

One of the heart strengths - the character strength of hope, or optimism – figures prominently in the recommendations of Seligman for addressing lawyer dissatisfaction. Its use is particularly powerful because it does not require changing a firm or an entire profession, but rather relies upon changing the

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[38] *See* PETERSON & SELIGMAN, *supra* note 34.

[39] Nansook Park, Christopher Peterson & Martin E.P. Seligman, *Strengths of Character and Well-Being*, 23(5) J. SOC. & CLINICAL PSYCHOL. 603 (2004).

[40] *See* PETERSON & SELIGMAN, *supra* note 34.

[41] *Authentic Happiness*, UNIV. OF PA., https://www.authentichappiness.sas.upenn.edu/questionnaires/brief-strengths-test (last visited Jan. 25, 2012).

[42] *Id.*

[43] Hadassah Littman-Ovadia, & Michael Steger, *Character Strengths and Well-Being Among Volunteers and Employees: Toward An Integrative Model*, 5 J. POSITIVE PSYCHOL. 419 (2010).

[44] Christopher Peterson & Nansook Park, *Clarifying and Measuring Strengths of Character*, *in* HANDBOOK OF POSITIVE PSYCHOLOGY 25 (C.R. Snyder & S.J. Lopez eds., 2009).

[45] *Id.*

[46] Nansook Park & Christopher Peterson, *Does It Matter Where We Live? The Urban Psychology of Character Strengths*, 65(6) AM. PSYCHOL. 535 (2010).

[47] *See* Peterson & Park, *supra* note 43.

thinking style of an individual lawyer. Likewise, their recommendation that lawyers use more of their strengths in the practice is particularly cogent in light of later research showing that happiness increases and depression lessens when subjects use their character strengths in a new way each day for even a week, and that the effect is mediated when use is continued beyond that period.[48]

B. Character Strengths and Positive Emotion

To understand how the use of character strengths can contribute to greater lawyer well-being and arguably to greater professional success, it is important to review how positive psychologists have associated developing our character strengths with fostering our positive emotions and how positive emotions fuel the resources that support life satisfaction and optimal functioning. As noted, our regular use of character strengths serves to increase our positive emotions. Likewise, psychologist Barbara Fredrickson has theorized, based on empirical evidence, that positive emotions broaden and build our social, intellectual, and physical resources.[49] Specifically, she credits them with expanding our scope of attention, our scope of cognition, and scope of action.[50] Through enhanced attention, they also help us build our intellectual resources, a benefit that seems relevant to good performance in the practice of law.[51]

Despite the salutary effects of positive emotion, Fredrickson and Losada acknowledge that appropriate negativity is a critical ingredient in human flourishing and have concluded that a ratio of three positive thoughts to one negative thought is the tipping point toward flourishing.[52] A fair question, which is explored but not resolved in this study, is where that tipping point may rest in the legal profession. Seligman observes that pessimism is fundamental to legal analysis and therefore adaptive professionally (though not personally). Exemplars provide examples that the practice of law is rich and diverse, with both analytical aspects warranting prudence and non-analytical aspects warranting the use of non-analytical heart strengths. Although positive psychologists have perceived a dividing line between analytical thinking styles at work and non-analytical styles at home and a need to navigate between them, it appears from these exemplars that for optimal flourishing, some navigation may also need to

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[48] Martin E.P. Seligman, Tracy Steen, Nansook Park, & Christopher Peterson, *Positive Psychology Progress: Empirical Validation of Interventions*. 60(5) AM. PSYCHOL. 410 (2005).

[49] Barbara L. Fredrickson, *What Good Are Positive Emotions?*, 2(3) REV. GEN. PSYCHOL. 300 (1998).

[50] *Id.*

[51] *Id.*

[52] Barbara L. Fredrickson & Marcial F. Losada, *Positive Affect and the Complex Dynamics of Human Flourishing*, 60(7) AM. PSYCHOL. 678 (2005).

occur at work as practitioners seek the right style in the right Losada ratio for the right situation.

C. Character Strengths, Well-being, Success, and Flow

Positive psychologists have also studied the links between particular character strengths and well-being. A study of 5,299 adults who took both the VIA-IS and the Satisfaction with Life Scale ("SWLS") correlated particular strengths with individuals' life satisfaction scores.[53] The five character strengths most highly associated with well-being, in rank order, were the heart strengths of hope, zest, gratitude, curiosity and love.[54] A second study closely replicated these findings, but indicated that love and gratitude had direct effects on life satisfaction – a fact that researchers suggested might mean that those strengths reflected a happiness mode based upon relationships that exceeded the effects of pleasure, engagement, or meaning.[55]

Positive psychologists have found that gratitude, for example, allows us to draw the maximum positive satisfaction from our circumstances and avoid the trap of hedonic adaptation, or simply getting used to the good things in life.[56] It also can help us reinterpret adversity,[57] build social bonds,[58] and inhibit negative emotions.[59]

Considering the correlations between increased use of character strengths and well-being, and what can be the likely impacts of high character strength use upon professional success. Lyubomirsky, King, and Diener, reviewing a large number of cross-sectional, longitudinal and experimental studies, have concluded that happier individuals are more likely to have fulfilling relationships, high income, and superior work performance.[60] They also found, consistent with Fredrickson's broaden-and-build theory, that positive emotions are often associated with success-oriented resources and characteristics, such as sociability, optimism, energy, originality, and altruism.[61] To the extent that

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[53] *See* Park, Peterson, & Seligman, *supra 38.*

[54] *Id.*

[55] C. Peterson et al., *Strengths of Character, Orientations to Happiness, and Life Satisfaction*, 2(3) J. POSITIVE PSYCHOL. 149 (2007).

[56] S. Lyubomirsky et al., *Pursuing Happiness: The Architecture of Sustainable Change,* 9 REV. GEN. PSYCHOL. 111 (2005).

[57] B.L. Fredrickson et al., *What Good Are Positive Emotions in Crisis? A Prospective Study of Resilience and Emotions Following the Terrorist Attacks on the United States on September 11th, 2001*, 84 J. PERS. & SOC. PSYCHOL. 365 (2003).

[58] M.E. McCullough et al., *Is Gratitude a Moral Affect?* 127 PSYCHOL. BULL. 249 (2001).

[59] M.E. McCullough, *The Grateful Disposition: A Conceptual and Empirical Typology*, 82 J. PERS. & SOC. PSYCHOL. 112 (2002).

[60] S. Lyubomirsky et al., *The Benefits of Frequent Positive Affect: Does Happiness Lead to Success?*, 131 PSYCHOL. BULL. 803 (2005).

[61] *Id.*

increased character strength use fuels well-being and success, their findings are consistent with those of the Gallup Organization, that using the Gallup strengths at work predicts increased engagement on the job and an excellent quality of life.[62] The strength-success link is also consistent with findings by Linley, Nielsen, Gillett, and Biswas-Diener that the use of character strengths supports the attainment of goals, which leads to greater satisfaction.[63]

Another way in which character strengths may come into play is in the creation of a condition called *flow*. A construct first identified and studied by psychologist Mihaly Csikszentmihalyi, flow is a state of optimal experience that we can create individually, apart from our environment, and in which we become totally absorbed.[64] Flow often arises when we confront a challenge for which we have special skills. At work, tasks that resemble a game – with built-in goals, feedback, rules, and challenges – can put us into flow.[65] It follows that the more we use our character strengths to develop our skills, the more likely we would enter the flow state. This would be true for lawyers as well, one scholar has suggested.[66]

D. Learned Optimism

One aspect of the character strength of hope is what Seligman describes as *learned optimism*, or the style of attributing bad events to "external, unstable and specific" causes as opposed to the pessimistic style that favors "internal, stable, and global" causes.[67] Seligman's research on a more hopeful explanatory style became foundational to his work in positive psychology.[68] It is not surprising, then, that research showing law students benefit from pessimism drew the attention of positive psychologists, who then recommended *flexible optimism* at home and *adaptive pessimism* at work to quell lawyer dissatisfaction.[69]

Like the ratio between positive and negative emotions, it is not clear exactly how "adaptive" the pessimism needs to be, to be effective in the prac-

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62 T. RATH & J. HARTER, WELL-BEING: THE FIVE ESSENTIAL ELEMENTS (Gallup Press 2010).

63 P.A. Linley et al., *Using Signature Strengths in Pursuit of Goals: Effects on Goal Progress, Need Satisfaction, and Well-Being, and Implications for Coaching Psychologists*, 5 INT'L COACHING PSYCHOL. REV. 6 (2010).

64 D. Bowling, Lawyers and Their Elusive Pursuit of Happiness: Does It Matter? (2012) (Paper presented to a meeting of the North Carolina Bar Foundation, Pinehurst, N.C.).

65 *Id.*

66 *Id.*

67 C. PETERSON, & M.E.P. SELIGMAN, CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION (Oxford Univ. Press 2004).

68 M.E.P. SELIGMAN, Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment (Free Press 2002).

69 M.E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 34 (2001).

tice of law. While a pessimistic thinking style is helpful in detecting everything that could go wrong with a client scenario and taking steps to protect the client, it may not be so helpful in interpreting inevitable missteps that will occur in the workplace or at home. Catherine Gage O'Grady, a professor of law at the Sandra Day O'Connor College of Law, Arizona State University, illustrates how a pessimistic explanatory style can demoralize a lawyer in a billable hours environment.[70] With success riding on the ability to bill, an associate whose billings have fallen even temporarily below expectations because of illness or conflicting family responsibility may upbraid herself, conclude she can never succeed at the firm or even in law, and decide to bail out of the practice. The same may occur when she feels pressured to adhere to team scheduling requirements that conflict with family requirements. O'Grady advocates learning an optimistic explanatory style, including disputation of unconscious assumptions, to navigate selected areas such as these.[71]

E. Does Positive Psychology Have the Answers?

This study will examine women lawyer exemplars to determine whether the principles offered by positive psychologists provide a key to achieving satisfaction and success while practicing law. Specifically, it will examine a sample of high achievers to determine their top character strengths, how frequently they use them, and in what manner, in both their professional and personal lives. I predict that they will possess a preponderance of analytical, or "head" strengths, which they use regularly in their practices, along with some "heart" strengths to navigate personal relationships.

III. METHODS

A. Use of Exemplars

To study what makes women lawyers successful, I chose exemplar methodology because, consistent with criteria described by MAPP guest lecturer William Damon, the topic of success is a multi-faceted construct that could offer a full view of a complex subject and might stimulate additional research in an area worthy of further probing. Damon is Professor of Education at Stanford University. He and Anne Colby, in a study of moral exemplars, created a framework for exemplar methodology,[72] which Damon has more recently

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[70] G.C. O'Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 30 L. & PSYCHOL. REV. 23 (2006).

[71] *Id.*

[72] A. COLBY & W. DAMON, SOME DO CARE: CONTEMPORARY LIVES OF MORAL COMMITMENT (Simon & Shuster 1992).

applied to a study of the search for purpose among young people,[73] and I feel it is useful for this analysis.

Fundamental to studying success in women lawyers, is to define what it means to be successful as a woman in the law. The question is open to debate, and reasonable minds may differ. For that reason, I relied upon a well-established nomination system with standardized criteria instead of random lay nominators to identify successful women lawyers: the Super Lawyers list.[74] This approach is consistent with other exemplar studies, which rely on third party, criteria-based awards to identify exemplars.[75] Super Lawyers includes only attorneys who could be hired by the public.[76] Therefore, it does not include those employed by client institutions, such as government agencies, corporations, or non-profits. Only lawyers who were working in firms, practicing solo, or working for legal aid societies are eligible for inclusion in its directories. Because the final published Super Lawyers list constitutes only about five percent of the lawyers in any state and Rising Stars list constitutes only two and a half percent,[77] I considered them to be exemplars in their profession and appropriate subjects to study as models of flourishing. Although this limitation excluded women attorneys employed in venues where they are reportedly more satisfied,[78] I accepted it for purposes of an exemplar study where a key purpose is to examine strengths used in navigating challenges. The challenging venue of law firm practice particularly predicted rich material.

According to its published selection process, Super Lawyers accepts nominations and identifies lawyers from various databases who appear to be outstanding, under a point-weighted system, with lawyers nominated by peers outside their firms receiving the most points at nomination.[79] Its research department then rates nominees under these twelve indicators: verdicts and settlements; transactions; representative clients; experience; honors and awards; special licenses and certifications; position within law firm; bar and or other professional activity; pro bono and community service as a lawyer; scholarly lectures and writings; education and employment background; and other out-

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[73] W. DAMON, THE PATH TO PURPOSE: HELPING OUR CHILDREN FIND THEIR CALLING IN LIFE (Free Press 2008).

[74] *Super Lawyers: Selection Process*, SUPERLAWYERS.COM, http://www.superlawyers.com/about/selection_process.html (last visited June 20, 2012).

[75] L. Walker & J. Frimer, *Moral Personality of Brave and Caring Exemplars*, 93 J. PERS. & SOC. PSYCHOL. 845 (2007).

[76] *Super Lawyers, supra* note 73.

[77] *Id.*

[78] D. Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 12 WOMEN'S RTS. L. REP. 9 (1991).

[79] *Super Lawyers, supra* note 73.

standing achievements.[80] From those ratings, lawyers receiving top points by practice area rate other nominees in their practice area.[81] Following a final credentials check, those who emerge with the highest points in four size categories based on firm size, receive Super Lawyer status.[82] A parallel process without the peer review ratings is in place to select Rising Stars from among lawyers under forty, or in practice less than ten years.[83]

Women lawyers contacted for inclusion in the study were those who appeared, from a review of Super Lawyer lists from the previous four years, to have achieved Super Lawyer or Rising Star status in their thirties or forties.[84] Because age was not indicated, it was estimated based on law school graduation dates disclosed in online curriculum vitae or other biographical information. E-mail notifications inviting participation in a study of the traits and characteristics of outstanding women lawyers went out to 142 of these women in March 2012.[85]

The purpose of the study was described as to "explore how women in their thirties and forties flourish in this demanding profession."[86] They were advised that participation in the study would require them to take the online Brief Strengths Test ("BST"), submit the results to the investigator, and, if they were willing, to participate also in a twenty to thrity minute recorded telephone interview about how they used their strengths.[87] Lawyers in their fifties who responded that they were beyond the age limit for the study test but would like to participate were included.[88] During late April, May, and early June of this year, seventeen respondents took the Brief Strengths Test.[89] Sixteen also participated in the interview.[90]

B. Brief Strengths Test

This abbreviated version of the VIA-IS was selected for this study to increase likely response in a sample stereotypically characterized by extremely busy schedules and work-life balance challenges. By choosing a testing instrument that typically takes about ten minutes to complete, the hope was that

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80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Super Lawyers: Selection Process, supra* note 73.
85 *Id.*
86 *Id.*
87 *Id.*
88 *Id.*
89 *Super Lawyers: Selection Process, supra* note 73
90 *Id.*

respondents might also agree to an interview that would enrich interpretation of the testing results.

Unlike the VIA-IS, which requires ten responses for each of the twenty-four character strengths, the BST includes only one question for each strengths.[91] Respondents rate the statement on a five-point Likert Scale, ranging from "Not applicable" to "Always."[92] For example, to test the character strength of gratitude, this question appears:

> Think of actual situations in which someone else helped or benefited you. How frequently did you show GRATITUDE or THANKFULNESS?
>
> Not applicable Never/rarely Occasionally Half the time Usually Always[93]

The BST reports the usage of each character strength according to where an individual falls relative to five different groups: all other test-takers, test-takers of the same gender, age, occupation (including law), education level, and zip code.[94] Therefore, rather than reporting results rank-ordered by score, the BST reports strengths in percentiles and by degree of strengths use ranging from "Always" to "Not applicable."[95] In other words, those ranking at the very top of a category in the use of a particular strength would show up on the BST as being in the 100th percentile, and the degree of strengths use would appear as "Always."

To determine the top strengths of each respondent, I arranged her percentile scores of each strength from the 100th percentile downward, in the category of occupation. From this ranking, I assigned each respondent at least five top strengths. In some cases, respondents fell in the same percentile for more than one strength. In all but two cases, it was still possible, using the percentile ranking system, to isolate the top five strengths. Those two respondents had an unusually large number of strengths occupying the same percentile ranking. As a result, I have reported them as having seven and eight top strengths. Table C-1, Appendix C lays out the top strengths of each respondent as calculated under this system.

I then rank-ordered these top strengths in the sample as a whole based on how many times each had appeared among the top strengths of the respondents. Table C-2, Appendix C shows this ranking.

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Super Lawyers: Selection Process, supra* note 73.

[95] *Id.*

C. *Interviews*

I conducted recorded and structured telephone interviews with sixteen respondents about their strengths used at work. First, I collected information as to their age, marital status, and professional status. Then, I asked about what accounted for their professional success, whether their top strengths as identified on the BST resonated with them as energizing and so natural that they could almost not help but exercise them; whether they used these strengths at work and if so, how frequently; and in what areas of practice they used their strengths. I also asked about their key professional challenges, any ways in which they used their strengths to overcome them, whether they had benefitted from mentors and if so, whether their strengths had played any role in attracting and maintaining mentors. Finally, on the professional side, I asked what gave their lives meaning and purpose and, where there was available time, solicited any advice they might give young women entering the profession.

In the personal realm, I also asked about their key challenges, how they used their strengths to overcome them and whether they had sought any special accommodations from employers to succeed personally or professionally. If they had, I asked what role, if any, their strengths had played in seeking those accommodations.

Then I coded the transcribed interviews for age, marital status, professional status, and years of practice and to detect trends in the following areas: factors attributed to professional success; BST-identified strengths verification; frequency of strengths use; personal and professional applications of strengths; strengths use relative to mentoring; sources of meaning and purpose in the practice; and advice to young women entering the practice.

IV. RESULTS

The following results come from strengths-testing completed by seventeen women attorney respondents, as well as recorded phone interviews with sixteen of them.

A. *Demographics*

Of the sixteen women interviewed, ten were in their forties, five in their fifties, and one in her thirties. On the home front, eleven were married, three were in domestic partnerships, one was single, and one was separated. At work, thirteen were partners in law firms, and three were solo practitioners.

The biggest demographic surprise was age. The range, from thirty-seven to fifty-eight, was higher than expected. I originally intended to study successful women attorneys in their thirties and forties in the belief that their likely immersion in balancing work and family issues would especially enrich their

interviews. Based on law school graduation dates, I expected the sample to reflect this age range almost exclusively. However, delayed entry into law school may have expanded the sample into the fifties. When women responded that they appeared to be "too old" for inclusion, I invited their participation regardless in the belief that they might offer a longer-term perspective, and the interviews bore me out. In addition, four of these women were still responsible for minor children.

As for women in their thirties, it is possible that "Rising Stars" who did not respond to the survey invitation were in fact, as predicted, thoroughly immersed in the work-life balance issues. For them, other priorities may have trumped participation. On the other hand, the older participants may have opted to participate because they had reached a point in the profession where they had not only the opportunity, but also the inclination to be more reflective.

B. Verification of Strengths

Each attorney verified during her interview that some, or all of the BST-identified strengths, resonated with her as being energizing and as a strength she could not help but exercise. Twelve of the sixteen embraced all of their identified strengths as being "just like me." Others added strengths that the BST had not detected or challenged a top strength it had found.

For example, one added the strength of creativity as one that she uses extensively, but had not been identified, and provided compelling examples of how she used creativity in her work.[96] Another noted that in addition to her identified strengths, intelligence is a top strength for her.[97] Intelligence *per se* is not included among the twenty-four character strengths, but rather is considered a talent or ability and so is not identified in the BST.[98] Still, another at first disowned bravery as a strength, but then acknowledged that she might just have trouble seeing it in herself.[99] Another stated that she was not naturally brave, but had developed that strength through her practice.[100]

C. Gratitude and Kindness: Top Strengths

The strength of gratitude, which was a top strength for ten attorneys, emerged as the most commonly occurring top strength in the sample, followed by kindness (8), social intelligence (7), zest (6), and then bravery, forgiveness,

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[96] Interview with Attorney No. 3 (May 15, 2012).

[97] Interview with Attorney No. 16 (June 6, 2012).

[98] C. PETERSON & M. E. P. SELIGMAN, Character Strengths and Virtues: A Handbook and Classification (Oxford Univ. Press 2004).

[99] Interview with Attorney No. 12 (May 22, 2012).

[100] Interview with Attorney No. 11 (May 22, 2012).

love, hope, prudence and self-control (5). The top four strengths (gratitude, kindness, social intelligence and zest) are among those termed *heart strengths* by positive psychologists.[101] Among the top ten strengths, the ratio of heart strength*s* to head strengths was seven to three.[102] All seventeen attorneys had a mixture of head and heart strengths among her top strengths. Of those, twelve attorneys had a majority of heart strengths, four had more head strengths, and one was evenly divided between heart and head.[103]

Peterson and Seligman, in their classification system for positive psychology, extensively discuss the nature of each of the twenty-four character strengths.[104] For purposes of understanding the study results, the ten top strengths of these super-achievers are briefly described in Table D-1, Appendix D, along with the BST question that was related to that particular character strength.

D. Relationships: Top Success Factor

Apart from their BST results, in response to an interview question, each of the women interviewed initially offered a spontaneous assessment of what factor or factors was most responsible for their professional success. Mirroring the preponderance of heart strengths in their BST results, positive relationships with others was the most commonly mentioned success factor, with twelve out of sixteen crediting relationships with other people, whether with clients, coworkers or other lawyers, for helping them move ahead. One of the forty-something lawyers, who chose for this question to break her career into phases, named relationships as pivotal both early and late, even though other factors had changed over time. Risk-taking and writing came earlier in her career path and persistence and leadership later on.[105]

As another interviewee said:

> [S]o much is based on relationships. You know, I got my job at the firm because a friend of mine from college worked at the firm and passed my resume on . . . . And the way I get business is because I have friendships and connections and relationships with people who have the ability to send me bus-

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[101] *See infra* Appendix B

[102] *See infra* Table C-2, Appendix C

[103] *See infra* Table C-1, Appendix C

[104] C. PETERSON & M. E. P. SELIGMAN, Character Strengths and Virtues: A Handbook and Classification (Oxford Univ. Press 2004).

[105] Interview with Attorney No. 13 (May 22, 2012).

> iness. So kind of maintaining that contact or not underestimating that is really important, I think.[106]

At the same time, the women did not discount the value of qualities associated with head strengths such as persistence or self-control in their success. Nine of sixteen named either hard work or persistence, or both, as a key to their success. Of those, six also cited relationships as a key. The coexistence of softer and more analytical qualities continued as a theme when they discussed how their various character strengths played out in various aspects of their practice.

Other factors named as contributing to success were, in descending order, legal skills, meaning, luck, intelligence, and risk-taking.

E. Strengths Used Regularly in Varied Aspects of Practice

Each woman in the sample reported that in her practice, she regularly had opportunities to use – and did use – the top strengths she identified with. Nine of the women reported that they used their top strengths daily. Each respondent provided anecdotal evidence of strengths used in one or more aspects of her practice. In three areas – client development, firm management, and deciding on the direction of their practices – they especially drew on their heart strengths. Even in the contentious area of litigation, which involves dealing with opposing counsel, presenting and cross-examining witnesses, and arguing to the court, nearly half said they found ways to use their heart strengths in their work.

Here, from their interviews, are examples of ways these women achievers use their top strengths to enhance their practices. In some cases, they will discuss a top strength that is not among the ten most often occurring in the sample. It will be a strength that the BST identified as being among their respective top strengths or one they embraced apart from the BST.

1. Business Development

It was in the area of business development that heart strengths played the largest role among women in the sample. Of the seven women who mentioned using their top strengths for business development, all relied on heart strengths.[107] A woman whose top strengths included gratitude said that it worked as a two-way street in client relations and in turn, client development.

> I think gratitude is quite mutual in my particular practice. My clients are often very happy and very grateful for the work that

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[106] Interview with Attorney No. 6 (May 21, 2012).

[107] *See infra* Table C-1, Appendix C.

> I've done for them, and I in turn am very grateful that I had the opportunity to do it.[108]

Similarly, another partner with multiple heart strengths (love, gratitude, and social intelligence) said that her relationship strengths make the difference in attracting high-end clients who are willing to pay at a partnership-level rate. As she put it:

> I think that just being able to . . . try to figure out what makes somebody tick is always a good quality. Essentially, what we're describing here is almost sales. Those qualities are helpful. They're not sufficient. But if a client has to choose between somebody who they have a connection with who also has the credentials and somebody they didn't connect with and has the credentials, I have to believe they're gonna choose the one that they connected with.[109]

The strength of zest, too, offered multiple benefits to a lawyer, who commented, "I think if people see that you love what you're doing, you're more apt to get their business. And you're more apt to be persuasive to the court, to the jury, to opposing counsel."[110]

Finally, for another, the relationship-building heart strengths of kindness, gratitude, and social intelligence paired with the head strength of creativity paid large dividends in client development. Using her creativity, she developed special women's networking activities that went beyond the standard lawyer golf outings and into arenas she personally enjoyed such as food and wine and gardening. She has also not shied away from involving clients in activities she enjoys outside the office, including sporting activities. For her, this is a way of achieving congruence between her professional and personal lives, and a dividend is client development.[111]

2. Firm Management

Eight women said they used their top strengths in their roles as managers in their law firms. In the management arena, heart strengths such as kindness, gratitude, and forgiveness predominated, though two of the women mentioned the head strengths of self-regulation and persistence as the signature strengths they applied to management. Some offered examples of heart strengths work-

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[108] Interview with Attorney No. 15 (May 29, 2012).

[109] Interview with Attorney No. 13 (May 22, 2012).

[110] Interview with Attorney No. 9 (May 22, 2012).

[111] Interview with Attorney No. 1 (May 16, 2012).

ing superbly for them as managers, while others found a need to curb them with head strengths.

For example, one woman, a firm-founding partner, said she used her strength of kindness to be aware of personal issues some employees were dealing with and express empathy. Her gratitude strength made it natural for her to thank employees daily for their hard work and award them for it financially.[112] Similarly, another partner found that the heart strength of forgiveness –both of herself and the associates she mentors – played a pivotal role for her as a manager:

> [P]eople make mistakes, and I try to not, you know, clobber them over and over again with one mistake, and try to help them learn. And I try to put my mistakes in perspective as well, and not – you know, there was a time in my life where I really would kind of go over and over and over in my head a mistake that I made, and I just realized it wasn't very productive. So I just try to come to the lessons and move on.[113]

However, one partner in a firm acknowledged that her heart strength of kindness could be a double-edged sword. Her inclination to help others sometimes got in the way of her ability to manage her workload effectively, but was a huge asset in delivering feedback to associates in a compassionate way, so they could grow.[114] Similarly, a woman in a solo practice expressed concerns that her self-identified kindness strength undercut her ability to collect from her clients. "I have developed a concern of late that my kindness causes me to have a little radar thing that says, you can take advantage of me and not pay your bills," she said, but added that she was learning "the hard way" to get much tougher using her kindness strength in that arena.[115] Another woman in the sample, also challenged by collecting from clients, said her head strength of persistence had paid off.[116]

Finally, the one partner for whom leadership surfaced as a top strength on the BST found it extremely useful in her role as a department chair in her firm when she exercised it in conjunction with her (head) strength of humility:

> I know it all comes back to leadership, because I've been in charge a long time, and though I tend to look at it through the lens of, how do I get people do to what I want them to do, in a

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[112] *Id.*

[113] Interview with Attorney No. 14 (May 25, 2012).

[114] Interview with Attorney No. 16 (June 6, 2012).

[115] Interview with Attorney No. 11 (May 22, 2012).

[116] *See supra* note 109.

> way, that they're actually willing, and anxious, to do? I always hope that I am as fast as, anyone to say, "That's a better idea than I had, and I will have to support that." Some people are in love with their own ideas when they shouldn't be, and I really want to get to the best results for everyone, all the time.[117]

3. Career Direction

Besides applying their heart strengths to spheres involving interpersonal relations, five women relied on them to steer the business direction of their firms or their choice of practice areas.

One woman, who said she used her strengths of hope or optimism, and gratitude in her role as partner within a firm to cheer the other partners along when they became discouraged about cash flow or leadership changes, said:

> I think others at times tend to focus primarily on the negative – the negatives that may be facing them. And I feel as though I'm sort of constantly bringing them along to try to look at the big picture and say, "Look, we – we have been tremendously successful. This firm has been around for many years, so you know - . . . we're going to continue to be successful."[118]

Likewise, another seasoned practitioner whose strengths include hope and kindness, said she relied on kindness to keep her own mood positive:

> (W)hen I'm feeling really down, and depressed, and just feel like I don't wanna do this anymore, I go do something. It sounds corny, but I go do something nice for somebody. I perform a random act of kindness; it makes me feel better.[119]

For some, top strengths drove the choice of practice area. A trust and estates attorney, for example, believes her kindness and social intelligence fuel success in dealing with families both in planning and at the time of a death. And her head strength of open-mindedness allows her to see all sides of an issue and plays into the nature of the work, which she describes as "so many puzzle pieces that you're trying to put together."[120] Similarly, a woman partner

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[117] Interview with Attorney No. 4 (May 15, 2012).
[118] Interview with Attorney No. 5 (May 15, 2012).
[119] Interview with Attorney No. 2 (May 15, 2012).
[120] Interview with Attorney No. 6 (May 21, 2012).

whose top strength was the capacity to love and be loved gravitated toward protecting the civil rights of individuals.[121]

For three women who moved toward practices compatible with their strengths and values, it was head strengths that facilitated that move. The trusts and estates attorney, for example, credited her strength of persistence with causing her to hold out for the right specialty coming out of law school rather than take the first offer.[122] Two women in the sample called on their strengths of bravery to leave a more secure practice within a law firm to launch solo practices more in line with their values. One credited a life coach with helping her muster her courage. The coach, she said, had accurately noticed that the firm was dousing the fire in her, not with buckets of water, but a medicine dropper.

> I think that I needed to be willing to take the risk of going out on . . . my own and . . . jump out of the cushy nest . . . . I was in a dead end, but it was a cushy dead end. So I needed to leave the comfort zone of having work provided to me by others in the firm and stick my neck out and say, I'm going to chart my own course.[123]

The other took a courageous leap from a mid-size firm into a solo practice because she was uncomfortable with the money-driven culture of the firm. "It's not a Maserati to me," she said of practicing law, adding that at the firm:

> It became, you know, the focus of how much money can we earn. How much money – what kind of cars are we driving. How big are our houses? You know what country clubs do we belong to and I basically found that distasteful.[124]

4. Litigation

Twelve of the sixteen women interviewed described themselves as lawyers, or said that litigation was part of their work. In this role, they took depositions, drafted motions and responses under deadline pressure, dealt with opposing counsel, tried to negotiate settlements and failing that, presented and cross-examined witnesses and made arguments to the court and sometimes a jury. This contentious area of practice was the only one where head strengths predominated among those mentioned by respondents. Of the eleven who men-

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[121] Interview with Attorney No. 12 (May 22, 2012).

[122] *See supra* note 121.

[123] *See supra* note 116.).

[124] Interview with Attorney No. 3 (May 15, 2012).

tioned litigation as an area where they were able to use their top character strengths, six mentioned using only head strengths, while five used a combination of head and heart strengths. The head strengths they used were bravery, creativity, self-regulation, persistence, open-mindedness, and prudence. Those who said they also used heart strengths mentioned the strengths of teamwork, kindness, forgiveness, zest, optimism, and love.

Two who mentioned only the head strength of creativity said they used it to fashion client-pleasing resolutions to disputes. As one, an attorney who defends clients in personal injury cases, offered:

> Sometimes, it might be . . . a situation where you have a personal injury case at a construction site. If we know that we're liable, I mean, we just defend on the damages and we limit the cost, and cut down discovery to focus on the real issue. So, you try to use your creative problem-solving and litigation skills to . . . get the best result to the client. And the best result may be that you concede – you know, pick the battles that you're gonna win.[125]

The other found her strength of creativity applicable to family law, where varying financial situations and family dynamics call for specially crafted solutions to domestic disputes, such as divorce and custody issues.[126]

One cited avenue for bravery was having the courage to admit a mistake made in trial. A woman who supervises a number of other attorneys acknowledged that admitting a mistake or mix-up to a client was hard and a bit risky, but in her experience, ultimately strengthened the client relationship.[127]

When bravery came up as a character strength useful in litigation, one lawyer cautioned that it was best exercised in conjunction with another of her strengths, prudence. As she pointed out:

> Some people are extraordinarily brave, but they just take an untenable position, and those untenable positions tend to play out in unfortunate ways. I think you have to take a reasonable position and then stick to it. Everyone is better off if you do that.[128]

Related to bravery in trial work came self-regulation. The need for it went beyond the discipline to thoroughly prepare for trial and entered the courtroom itself. As one experienced lawyer put it:

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[125] *See supra* note 112.
[126] *See supra* note 125.
[127] *See supra* note 114.
[128] *See supra* note 118.

> [S]ometimes I have to hold things back and not ask the question too many [times] or play a hand that I shouldn't play. And sometimes I'm required to advocate for a position. I would never overstate a position. But I may not feel as connected to my client or be as sympathetic to my client. No one can ever know that but me. I think that takes some discipline and commitment to doing that.[129]

As heavily as head strengths played in litigation, so did the heart strengths of kindness and forgiveness. One woman, self-described as a lawyer who likes to fight the good fight, talked about the importance of using those strengths to overcome the destructive anger and zealousness that can come with litigation:

> People fail to kind of separate what's productive from what's vindictive in what they're doing with their cases . . . and I think I struggle with that as much as anybody else. But I'm very conscious of it and I really work to depersonalize the process, to maintain respectful, professional relationships with my adversaries. And I think that makes me a successful lawyer because I think all of that emotional kind of stuff that comes along with litigation can really detract from . . . one's effectiveness as a lawyer.[130]

Another lawyer balanced her heart strength of zest with the head strength of prudence in trial work "because once you decide on a course of action, whatever it might be, you got to go full-on and you got to be enthused and motivated."[131] Another lawyer saw a place for kindness in her family law practice, but acknowledged that compared to her other top character strengths (zest, prudence, spirituality, and social intelligence), kindness was the most difficult to work into high conflict situations because it can be seen as a sign of weakness. Still, she said she tries to start from that place, and when kindness is accepted, the payoff is big because it benefits the clients.[132]

Still another trial lawyer believed that her strengths arsenal, which was almost evenly split between head strengths (humor and persistence), and heart strengths (gratitude, love, and social intelligence), was ideal for connecting with a jury, but discounted heart strengths "when you're more into a wonky area of law and it's just the metrics and regression analyses."[133]

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[129] *See supra* note 111.

[130] Interview with Attorney No. 7 (May 21, 2012).

[131] Interview with Attorney No. 8 (May 21, 2012).

[132] *Id.*

[133] *See supra* 110.

F. Strengths Used To Meet Other Professional Challenges

In addition to developing business, managing their firms, directing their careers, and litigating cases, these women said they called upon their top character strengths, both head and heart, to meet several other professional challenges.

1. The Only-Woman Challenge

One of the women, high on the head strength of self-regulation, talked about the need to manage herself when she was the only woman on a team or the only woman in litigation:

> I have to be able to control anger and hostility and keep things on a professional . . . level, and I think that there are circumstances where that's harder when you're the only woman in the room. I really think dealing with a team that's all women is very, very different from dealing with a team that's all men.[134]

2. The Micro-Management Challenge

Another woman, a partner, said that she had used her strengths of spirituality and prudence and held back on her strength of zest in the ongoing struggle to delegate more to associates as she advanced in the firm. She explained:

> I think that you've got to have some faith that things are going to work out all right and put that trust in someone else and know that there's something greater than us doing that . . . [The zest] kind of makes me want to keep it all, but I have to kind of step back and say that, no, this is the right thing to do. It is the prudent thing to do, too, because you can't do everything for everyone.[135]

She also credited her social intelligence with being able to read whether it was acceptable to a client to delegate the work to an associate and to know whether the associate was a good fit for a particular client and assignment.

3. The "Mistake" Challenge

Several women referenced the seriousness with which they viewed their work and their obligations to their clients, particularly with respect to some-

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[134] *See supra* note 131.
[135] *See supra* 132

times-worrisome responsibilities of litigation. No one put it better than this lawyer, whose top strengths were self-regulation and forgiveness:

> The pressure of having others dependent on you in very important matters, the ease with which one can make a mistake; there are lots of ways to screw up and ways to screw up that are not necessarily intuitive. So you have to be ever mindful.

Her conclusion was that perhaps both self-regulation in reviewing the work and self-forgiveness might need to work together to overcome this challenge. But she said she was still struggling with it.

G. Strengths To Meet The "Work-Life Balance" Challenge

The key personal challenge mentioned by the women in the sample was the elusive quest for "work-life balance." Thirteen of sixteen women interviewed were currently raising children. Two had grown children, but had raised them while practicing. Of those fifteen, fourteen said they had relied or were relying on assistance from a husband or domestic partner for child rearing. Two of those were relying on stay-at-home dads. The at-home children ranged in age from one year to seventeen, but most were school age. Even those with husbands or partners who shared in child care, reported challenges making time for children and/or friends and for themselves while practicing law. Four also had some caregiving role with elderly parents.

In their struggle to find time and energy for both the professional and personal parts of their lives, these women voiced the same concerns that commentators have regarding the difficulty in navigating a demanding law career on top of child rearing responsibilities. That is, if they choose to do both, they may decide to reduce their hours, which could interfere with career advancement, but otherwise they could experience undue stress.[136]

Contrary to my predictions, negotiating work-life balance with employers did not prove to be a major source of strengths used in this sample. Most said they were already partners or subject to across-the-board firm policies on flexible arrangements. Several commented that they had the flexibility of working from home at times as long as their billable hours were adequate, but the challenge was long work hours required for billables and unpredictable schedules. Rather, the successful women in this study navigated their work-life balance challenges by using their strengths to create and maintain a good child care support system or, as one woman called it "a village" that at one time included

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[136] Taber et al., Gender, *Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates,* 40 Stan. L. Rev. 1209, 1257-58 (1987-1988).

a nanny, a mother, godmothers, aunts, and friends.[137] While none of the women offered cure-alls for the work-life balance problem, twelve shared ways they had used their top strengths to navigate it. Four relied on heart strengths, three on head strengths, and five on a combination of both.

1. Heart Strengths

Gratitude, kindness, and social intelligence showed up as heart strengths that were pivotal to making flexible childcare arrangements with back-up plans, to care for school-age children while mom worked typically long and sometimes irregular hours.

A new mom with this cluster of strengths said she is using them as she calls on strong relationships, formed over the years, as a source of childcare when she and her husband are not available.

> You know, I have good friends, and good relationships with my family, and when I need to call in a favor, I don't feel as though I'm overstepping 'cause I feel as though I usually repay the favor. I've tried to line myself up that if anyone ever needs me, I'm there for them no matter what's going on in my life. And I don't feel bad when I have something that comes up, and I can call on a good friend, or my family.[138]

Another newcomer to the work-and-childcare scene said she relied heavily on her strength of gratitude as she negotiates sharing responsibilities for their toddler with her husband, who works full-time. The negotiation is tricky and ever changing. As a solo practitioner, she has experimented with reducing her hours and taking on more of a domestic role, which she describes as "a huge adjustment in terms of my identity and my marriage."[139]

In the same vein, another woman with two children, now grown, looked back on managing the work-life balance challenge as an exercise in love, gratitude, and teamwork, all heart strengths:

> In a long-term marriage with two children, and I have extended family and close friends . . . I think that love and teamwork are critical . . . . I show a lot of love for the people in my life and gratitude for what they do for me . . . . I don't know how you have relationships without working as a team. You know, I mean you help people, they help you.[140]

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[137] *See supra* 120.
[138] *See supra* note 112.
[139] Interview with Attorney No. 10 (May 22, 2012).
[140] *See supra* note 115.).

This same woman was quick to point out that although exercising gratitude brings her positive results; she uses it instinctively, not as a strategy.

Still another lawyer credited her heart strengths of appreciation of beauty and excellence and teamwork with her domestic partner for bringing balance to their lives while raising a school-age child. "I watch the sunset pretty much every night if I can," she said, "and drag my son out onto the porch with me for it."[141]

2. Head Strengths

Self-regulation, persistence, and humility came up from three women who relied on head strengths to navigate work-life balance issues. One, whose husband takes responsibility for a teen-ager and elderly parent, credited her self-regulation strength and her husband's for keeping their lives organized and running smoothly while she works full-time.[142]

Another, whose domestic partner shares decision-making regarding their school-age child, cited humility as a strength that makes that process work:

> [S]ome are not decisions that I would have made, but they're none I couldn't live with. You have to have humility to embrace them. You have to step up, and make the decisions that you're in charge of making. You have to work cooperatively to make decisions together, particularly when you have a child. I think that's the biggest challenge.[143]

Finally, a woman whose husband left his profession to fill a full-time parenting role at home cited persistence as the strength she has had to engage to make the new arrangement work. "I have to bring the money in," she explained, "so it doubled my determination at work because I feel much more pressure as the sole breadwinner than I did as the co-breadwinner." At home, she relies on her strength of humor to help ease the pressure that comes from their new roles, and says she has to be careful not to treat her husband as a subordinate associate in his domestic role.[144]

Similarly, another woman commented that she had to be careful about bringing ultra analytical skills into her personal relationships:

> I'm a lawyer so I take depositions and I go to trial, and I cross-examine people, and sometimes I bring those same very hardcore analytical skills to bear in my personal relationships,

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[141] *See supra* note 122.).
[142] *See supra* note 125.
[143] *See supra* note 118.
[144] *See supra* note 110.

> and it's not a good idea to try to sort of drill down into somebody's else's thought process.[145]

3. Heart and Head Strengths

A common way of navigating work-life balance issues was to engage both head and heart strengths. For example, genuine expressions of gratitude is what another woman believes allowed her to rely on the same wonderful nanny for six years while her children were small and build a strong network of friends who are there for her and the children when they need them. She added that she is quick to help her friends with their child care challenges as well, an exercise of her strength of kindness. But she said her strength of persistence also figures into her success with the balance issue and is fueled by the fact that her children are her number one priority.[146]

Similarly, another woman said she paired her heart strength of bravery with her self-identified head strength of humor when mid-career she married a man with two children.

> I mean I know a lot of people said I was crazy, but I think I just really trusted my husband. I trusted my relationships and my judgment with what I could do. And it's borne out, which has been great. It's been a real positive part of my life.[147]

She commented that as the child rearing unfolded, her trust was borne out. Her husband stepped up and took over the bulk of responsibilities out of respect for the demands of her job.

Likewise, a woman with high teamwork and self-regulation strengths said she drew on those as she and her partner parented a twelve year old:

> We have to share and share alike and recognize that everybody's commitments are equally important. And if I have a deposition and my daughter has a dress rehearsal and my partner has a big meeting or something out of town, we have to figure out . . . what's gonna give or how to make up for [it] – how to pull in outside resources.[148]

Even a woman whose husband has also taken on caregiving responsibilities as a stay-at-home dad and rated the arrangement highly ("maybe an 8.5 out of 10"), believed the arrangement was tough on the children, who are pre-teen and

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[145] *See supra* note122.).
[146] *See supra* note 109.
[147] *See supra* note 114.
[148] *See supra* note 131.

early teen, because the affluent neighborhood where they live features mostly stay-at-home moms. "There's a whole host of gender issues that go along with that," she said. "That's . . . a whole other study you could do."[149]

Another woman with a stay-at-home-dad caregiver agreed that the arrangement has its challenges. She had called upon her head strength of prudence and heart strength of spirituality to rein in a tendency to micromanage. She and her husband have also hired a cleaning lady, and agreed that when the youngest is in kindergarten, he will be freed to launch a wished-for business.[150]

Finally, even though forgiveness did not show up as a top strength on her BST, one woman said it was a combination of self-regulation and self-forgiveness that most helped her:

> We had a sentence that we used when my daughter was growing up and it's, "These things happen." And we would just say that when things were sorta running amuck – you're late, you missed the bus, you forgot your shoes, the backpack is not in the car – whatever the problem happens to be. We'd say, "Well, you know, these things happen," and that was our way of just saying, "Oh, well, you know, we'll just move on. Let it go."[151]

H. Strengths and Mentoring

Twelve of the sixteen women interviewed said they had benefitted from mentoring in their professional lives. Of the nine who said their strengths had helped them attract and/or retain mentors, most mentioned heart strengths such as social intelligence, gratitude, and zest as effective in drawing mentors. Two, though, mentioned the strength of humility, a head strength, as important to them in winning the attention of mentors. Finally, leadership, a strength Peterson considers both a head and heart strength, drew mixed reviews as one that might foster mentoring.[152]

A woman who credited her heart strengths of zest and social intelligence with attracting some influential female mentors, explained how that had worked:

> [Zest and social intelligence] helped because a lot of the mentors were sometimes even opposing counsels. They are bar association colleagues, and I get very enthusiastic about

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[149] *See supra* note 119.
[150] *See supra* note 132.
[151] *See supra* note 120.
[152] C. PETERSON, A PRIMER IN POSITIVE PSYCHOLOGY (Oxford Univ. Press 2006).

> things. And I work really hard and I think . . . a respect develops. So I think . . . that played into it, and then the social intelligence, I think just being . . . a people person, trying to bring out the best in other people, find out what's important to them. . .played into it too because I tend to develop friendships pretty quickly. I just like people, I guess, in general.[153]

Another, drawing on her strengths of kindness, gratitude, and social intelligence, was not shy about seeking out a successful lawyer/mom as a mentor when she had her first child because she noticed the woman was able to manage her time and did not "have baby puke on her shoulder." It was a helpful arrangement, she said:

> I do turn to her from time to time and say, "How do you do this?" or, "I'm losing my mind. What should –?" She's like, "Oh, you're fine," you know? And she just kinda helps me keep it in check.[154]

The head strength of humility – but not leadership – worked for two other women in attracting mentors. "Mentors don't like it when you try to take the leadership mantle away from them," she said.[155] Echoing her view was a woman who said she was able to get mentors because she was not threatening to anyone. "I show adoration pretty readily when I think somebody's really great at something," she said. "I tell them how great I really think they are."[156]

Another, though, said that as a mentor herself, she is drawn to those who already show leadership potential:

> [I]f you meet with somebody who you feel like has a lot of impediments to success, you're not going to invest a lot of time because you feel like, okay, well I could give you some stuff but that's not getting you over the hurdle. Whereas if you feel like somebody has a lot in the package already and they just need some help with some things, in some ways you're more willing to invest.[157]

Just as head versus heart orientation revealed itself in the way these women navigated challenges, so, too, was it revealed in the sources of purpose and meaning they found in their law practices.

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153 *See supra* note 132.
154 *See supra* note 112.
155 *See supra* note 118.
156 *See supra* note 125.
157 *See supra* note 115.

I. Strengths and Meaning

When asked about the key sources of meaning and purpose in their professional lives, the largest number – ten of sixteen women – mentioned client-centered activities, such as helping clients and establishing good client relationships. Of those, one also found meaning through empowerment to navigate the legal system and another found meaning in winning. Three mentioned business or management activities, such as supervising employees and bringing in business. Of those, one also found meaning in the intellectual stimulation of her practice area. Two mentioned intellectual stimulation alone as their source of meaning, and another found meaning in her bar association activities.

Some of those who found meaning in client-centered activities offered anecdotal evidence in support. A domestic relations lawyer, who attempts to resolve disputes rather than push them to litigation, told how she used tough love, compassion, empathy, and sternness to persuade an alcoholic client to get sober and regain access to her children.

"Had she not been in a collaborative case and had I not approached her in the right way . . . I don't think she would have made it," said the lawyer, who has high strengths of both forgiveness and self-regulation.[158]

Another, who represents plaintiffs in employment actions and has a strong citizenship, or teamwork, strength, felt she was part of staving off poor working conditions in this country. Because the actions sometimes went on for years, she also enjoyed the relationships she maintained with her clients over time and learning about everyday work, such as, "what it's like for people who sell ads in the yellow pages, what people do when they work at a power plant."[159]

Another, also high in the strength of love, gravitated toward social justice work but also finds meaning in creating good office relationships at her firm and in the intellectual stimulation of her practice:

> I love a really complicated issue. I love writing a beautiful brief. Although at this point, I'm so senior and so expensive that I don't do it from the beginning to the end the way that I used to. I'm now more putting the finishing flourishes on other people's work, which is its own source of enjoyment.[160]

The personal connections with clients created meaning for another, a trusts and estates attorney with high gratitude and kindness strengths:

> I think it's more about working with the specific families and clients and becoming one of their trusted advisors, more than

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[158] *See supra* note 125.
[159] *See supra* note 131.
[160] *See supra* note 110.

> it is the actual work. But it's one of the few areas of the law that you're still engrossed in someone's personal . . . needs, as opposed to their corporate needs or something like that.[161]

Similarly, a personal injury lawyer high in the strength of gratitude found meaning in "mak[ing] a difference in people's lives," developing close relationships with them and experiencing their gratitude.[162]

Making sure her employees had work also contributed to the meaning for a lawyer who found purpose in managing her own firm:

> I like to make sure . . . that everyone has got stuff to do and that the business keeps coming in. You take a certain amount of pride in what you're responsible for. You know, I can bring in a client that's keeping people employed and getting paychecks . . . . It makes me feel good that I can keep everyone busy and, hopefully, happy.[163]

Another participant, a tax lawyer high in leadership, found her work intellectually stimulating, but also found meaning in it through her belief that by making businesses more profitable, she was indirectly improving people's lives.[164]

Finding meaning in work also figured heavily into the advice these successful women said they would give to young women just entering the field.

J. Advice to Others

Fifteen of the women offered wide-ranging advice to new women lawyers. Eight of them urged them either to "get help" to ease work-life balance challenges or to "follow your passion."

Some urged staying out of the firms and going solo, while others suggested being very aware of what firms expected, setting terms they could live with, and being professional or indispensible to buy flexibility. Some recommended getting a mentor. Some advice was particularly impassioned. One, who said she used her top strength of love in forming collaborative relationships within the firm, was no-nonsense when it came to setting terms of employment that allowed for family life:

> Oh, my God. I would say that it's really important to recognize that you should be coming up with the terms that are

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[161] *See supra* note 121.
[162] *See supra* note 119.
[163] *See supra* note 112.
[164] *See supra* note 118.

> important to you. And we work really hard as attorneys, and the payoff for that should be a lot more freedom, and if it isn't, it's not worth what you have to give to it. And that's for professionally and personally. I know there a lot of people who go to work for law firms . . . where they're sort of told what they're gonna do and how they're gonna do it. That's not something I've ever done, so I think women generally tend to be sort of too agreeable. And I don't think that is as important an asset. In fact I think it can really undermine you and I think that women shouldn't be so concerned about being nice and polite. Nice and polite don't get you power.[165]

Along that line, another said she practiced her strength of love at home, but not at her current firm because she felt that the personal friendships she made at another workplace had allowed her to be taken advantage of, particularly with respect to compensation. Her sense was that the firm did not believe she would risk friendships to push for more money.[166]

Being passionate about a niche in the law also came up as a way to make the demands of practice worth it. One woman, who had once considered leaving the law, said she had practiced happily after finding a niche in trust and estates work, which utilized her top strengths of kindness, gratitude, and love.[167]

Another, for whom both gratitude and love of learning were top strengths, described finding criminal defense work as her calling, and urged others to do the same:

> My advice is . . . to try to really find a piece of the law that you love and [is] sort of intrinsically interesting because I have just found so many lawyers are really not that happy. And they put up with so much drudgery in so many ways and maybe because it is well compensated generally. Or it's just the nature of people that go down this path . . . hard working and don't look up to ask the question, "Am I really enjoying this?" I feel lucky if I have a little slice of law that I find so compelling. I mean it really was like a calling when I started to do criminal defense. But . . . I feel like I'm in the minority. So if someone was starting out, I would say, "Try to find that piece that at least . . . you have a curiosity about."[168]

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[165] *See supra* note 122.
[166] *See supra* note 114.
[167] *See supra* note 109.
[168] Interview with Attorney No. 10 (May 22, 2012).

V. Discussion

The results of the study demonstrate that as predicted, high-achieving women lawyers regularly, if not daily, exercise their top characters strengths to navigate the practice of law and overcome the challenges typically associated with women lawyers. However, contrary to predictions, their top character strengths were predominantly heart strengths, and they used them to navigate relationships in both their personal and professional lives. Their strengths used, though, were nuanced, and in many cases, especially in the workplace, these exemplars paired heart and head strengths to navigate challenges in a balanced manner.

A. Regular Character Strengths Use

All the high achievers in the sample said they used their top character strengths regularly, and most said they used them daily. Moreover, they were able to present convincing examples of how they used them in both their personal and professional lives. For that reason, I conclude that their responses were genuine and not simply to confirm with some perceived expectation.

This predicted result is not surprising. It is consistent with positive psychology research showing that the regular use of character strengths works to increase our positive emotion[169] and that positive emotions build social, intellectual, and physical resources.[170] Positive emotions also are often associated with success-oriented resources and characteristics, such as sociability, optimism, energy, originality, and altruism.[171]

However, given the "lawyer personality" model suggested by Daicoff and Richard's research showing even women lawyers are thinkers instead of feelers, the types of character strengths these women exercised were not predicted.

B. Preponderance Of Heart Strengths

Of the ten top character strengths identified by these women on the BST, seven were what Peterson and Park have identified as *heart strengths*, which are emotional and interpersonal, as opposed to *head strengths*, which are intellectual and self-oriented. I did not predict this result, but in retrospect see a number of possible explanations including (1) the study design; (2) the fact that other studies of successful practitioners, using different testing instruments, have yielded results that support this finding; and (3) the evolving nature of the practice of law.

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169 Seligman et al., *supra* note 47, at 415, 419.

170 Barbara L. Fredrickson, *What Good Are Positive Emotions,* 2 Rev. Gen. Psychol. 300 (1998).

171 Lyubomirsky et al., *supra* note 59, at 844.

In any case, the fact remains that the seventeen successful women who participated in the study possessed a predominance of heart strengths and the sixteen who were interviewed could demonstrate that specific ways in which they used those strengths to become successful. In other words, even if they are not representative of all lawyers, they have much to say about success. Below are possible explanations for the high finding of heart strengths among the women in this sample.

1. Impact of Study Design

This was an exemplar study based on a small sample of high-achieving women attorneys. As such, I did not intend to generalize it to the entire population of women lawyers. In fact, the high percentile rankings of each of the women in the study (Table C-1, Appendix C) suggest that they have scored far above other lawyers in heart strengths. It is possible that the women in the sample are higher in heart strengths than other women named to the Super Lawyer lists. It could be argued that the seventeen women who agreed to take the BST from an initial pool of 140 who were invited to do so, were motivated by the same kindness and gratitude that the BST showed them to have.

Another reason that the sample in this study may have demonstrated a preponderance of heart strengths is that strengths such as kindness and gratitude may enhance relationship skills. Having relationship skills may increase the likelihood that peers, who like them, would nominate these individuals for recognition. Also, the rating service bases selection in part on criteria that are relationship-based, e.g., maintaining a solid clientele, achieving prestigious positions within their firms, engaging in bar or other professional activities, and performing community service.

2. Other Exemplar Studies

The particular heart strengths identified in the survey, i.e., gratitude, kindness, social intelligence, zest, forgiveness, hope, and love, include three of the five character strengths (gratitude, hope, and love) most closely associated with well-being[172] and Peterson has found a positive correlation between gratitude and zest, or enthusiasm, at work. It may be that given the connections described above between positive emotion, well-being, and success factors,[173] the regular use of character strengths associated with well-being would simply increase predicted success. If that is the case, it is not surprising that women with high well-being strengths might appear on a list of high achievers.

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[172] Park et al., *supra* note 38, at 617.

[173] Lyubomirsky et al., *supra* note 59, at 844; Seligman et al., *supra* note 47, at 415; Fredrickson, *supra* note 171, at 300.

In addition, despite their divergence from Daicoff's more analytical lawyer personality and Richard's predominantly "thinker" lawyers, this exemplar sample may be more similar to the rainmakers that Richard found to test higher in the trait of "sociability" on the Caliper Profile than other lawyers who had excellent skills but were less apt to bring in new business.

Contacted for this paper, Richard, who has consulted extensively with law firms, opined that the lawyer personality has not changed since his early research, despite changes in the practice of law. However, although he is not aware of good gender data on women rainmakers, he suspects that women with high interpersonal skills would shine there. His own observations are that sophisticated women lawyers with high emotional intelligence bring their tendencies toward empathy and nurturing to the practice, but use them strategically within a large firm culture, so as not to appear soft. Within a firm, he said, they might use these strengths to "read" what topics are sensitive for a mentor and time conversations about them with that in mind. Outside the firm, with clients, they might use strengths like kindness and gratitude more freely.

As Richard put it, "If one of your strengths is having the perspective of when to use particular strengths, then choosing not to use them at times becomes a strength itself."[174]

I also shared the results of this study with Ellen Ostrow, a licensed psychologist and certified coach, who founded Lawyer Life Coach, LLC in 1998 to meet the needs of high-achieving women lawyers. She was not surprised at the heart strengths exhibited in this sample. Although she has not formally tallied results, she believes they mirror the VIA scores of many of her clients. She cautioned, though, that a large firm environment does not generally reward kindness and collaboration, and some clients seek other work environments when they become aware of their strengths. She said the one area where firms may indirectly reward lawyers for using the softer strengths is when they lead to increased business.

"Business development is all about relationships," she said, "and many women find this to be a great outlet for their 'heart' skills." Ostrow holds a PhD in psychology from the University of Rochester.[175]

Although women in this sample possessed a predominance of heart strengths, so, to a lesser degree, did successful male lawyers followed in the Terman longitudinal study[176] possess a number of heart strengths. Their peers described them as "contented, fair-minded, sincere, ambitious, competitive, confident, outgoing, sophisticated, intelligent, capable, reasonable, and self-

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174 Interview with L. Richard, Psychologist (June 27, 2012).

175 Interview with E. Ostrow, Psychologist (July 6, 2012).

176 DAICOFF, *supra* note 1.

controlled." A study of character strengths exhibited by male lawyers named to the Super Lawyers list would be an interesting subject for future research.

Likewise, studies of top Canadian lawyers, which included a study of Canada's top twenty-five women lawyers, found them to be higher in certain aspects of emotional intelligence than the general population or other lawyers. The study, conducted by Irene Taylor and Stephanie Willson, legal organizational development specialists from Toronto, employed the BarOn EQ-i(r). However, the highest emotional intelligence scores of their women exemplars were in the areas of independence, stress tolerance, and assertiveness. They also scored high on optimism. Empathy and interpersonal relationships were their lowest-scoring areas for the Canadian high achievers. Although they outdistanced other lawyers (but not the general population) in empathy, they fell below both groups in interpersonal relationship skills, and the authors targeted this as an area for professional development.

Interestingly, the women in the Canadian study were asked for their advice in managing work-life balance issues, and they urged other women to love what they do, but not to expect that they could do it all. Rather, they redefined success as including success on multiple fronts, including career, home, and family, and recommended, as did women in this study, that a supportive spouse or partner was the key to success.[177]

Similarly, Shultz and Zedick, reviewing testing instruments to determine which most likely predicted success in the practice of law, found a positive correlation between lawyer success and dispositional optimism as measured on the Revised Life Orientation Test ("LOT-R"), which measures the degree to which an individual has an overall optimistic outlook on life.[178] Specifically, their research examined twenty-six effectiveness factors for lawyers, and dispositional optimism correlated with ten of these, but most highly with speaking, networking, passion, stress management, and community service. However, they did not find positive correlations between lawyer effectiveness factors and the Emotional Recognition ("ER") test, which measures emotional intelligence using visual recognition of emotions that appear on slides of faces. They reported no significant differences in their test results based on gender or race/ethnicity.

In the study at hand, social intelligence ranked as one of the four top strengths of the high-achieving women in the sample. It should be noted that the character strength of social intelligence is different from the concept of emotional intelligence. Emotional intelligence involves using emotional infor-

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[177] Irene Taylor & Stephanie Willson, *Carpe Diem! Canada's Top 25 Women Lawyers*, LEXPERT, Sep. 2003, at 68.

[178] Marjorie M. Shultz & Sheldon Zedick, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 J. Am. B. Found. 635 (2011).

mation in reasoning, or cognitive processes, while social intelligence has to do with the ability to relate to other people through intimacy, trust, persuasion, and group work. There has been more research on the impact of emotional intelligence on daily life, including business settings, than on social intelligence, where the focus has been to distinguish it from cognitive intelligence.[179] Given the high levels of social intelligence exhibited by the women in this study, an area for further study might be to examine the link between social intelligence and client relationships and leadership abilities.

3. Evolving Nature of the Practice

Daicoff, also contacted for this paper, commented that the demographics of lawyers had changed since the 1990s, when she had determined, after reviewing forty years of empirical research on lawyers, that certain traits were typical of a "lawyer personality." Women particularly, she said, now have had the benefit of other women as role models, and are better able to use more of their softer strengths in the practice of law.[180]

Daicoff, reviewing the changing face of the post-2000 legal profession, has observed a shift away from an adversarial model and toward the non-adversarial comprehensive law movement, which "requires the lawyer to be sensitive to the client's greater good, including psychological needs, resources, goals, relationships, wellbeing, morals and values." She attributes the rise of the comprehensive law movement to a number of factors, including an increasing number of clients who cannot afford legal services, an increase in unemployment among lawyers, and backed-up court systems, but also to the increasing number of women and minority lawyers, who desire work that is consistent with their values and concerns with relationships. Certain skills she forecasts as important in the comprehensive law movement (intrapersonal, interpersonal and dispute resolution) are consistent with the heart strengths possessed by the women in this study, and underscore the importance of heart strengths in the evolving practice of law.

C. Is Strength Use Strategic?

The women in the sample used heart strengths to navigate relationships in three primary areas: (1) building and maintaining relationships with their clients; (2) managing employees; and (3) attracting and sustaining a network of caregivers, including family, friends, partners, and spouses, who could work with them to meet family responsibilities. Kindness, gratitude and social intel-

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[179] Peterson & Seligman, *supra* note 34.

[180] Interview with Susan Daicoff, Professor, Florida Coastal School of Law (July 20, 2012).

ligence proved particularly useful in these areas, though zest also figured into attracting clients and mentors.

Nonetheless, they demonstrated sensitivity to when heart strengths used was appropriate. In the high-conflict, highly analytical area of litigation, they relied more on head than heart strengths, though nearly half who applied their top strengths to litigation used head strengths in conjunction with heart strengths. Inside the firm particularly, there was some concern that being perceived as "nice and polite" or too anxious to be liked could undercut power, so heart strengths use was controlled. Also, in the area of client collections the women mentioned a need to counterbalance kindness with persistence. The ability to shift between more analytical head strengths and heart strengths came up also as women worked to shift communication styles between lawyerly cross-examination skills at work to a more conciliatory style at home. In this regard, they appeared to have mastered or at least recognized a challenge that Seligman describes when lawyers bring a pessimistic thinking style home with them.

The counterbalancing of heart and head strengths raises the interesting question of whether successful women lawyers use their strengths strategically or simply use whatever strengths they have because they cannot help but use them. Each, asked whether their strengths resonated as being so natural they could not help but use them, answered in the affirmative. One lawyer volunteered that she did not use her strength of gratitude strategically, to achieve a particular result. I did not directly ask the question of whether strength use was strategic, and that point might be an issue for further study. However, the interviews demonstrated an awareness of the impact heart strength use could have within the firm and a need to modulate strength use to reach a desired result. My conclusion from the interviews is that while the women found their strengths easy and natural to use, they were able to self-regulate their use when they did not achieve the desired results.

D. The Role of Optimism

This study did not directly address the role of an optimistic explanatory style in the practice of law. However, interviews with several women achievers affirmed Seligman's belief that adaptive pessimism, or prudence, has a useful role to play in the practice. Several women in the study cited the strength of prudence as a strength they used to temper zest or bravery in order to head off overzealous litigation and micromanagement. Seligman, Verkuil and Kang have noted that the caution and skepticism encompassed by prudence may be a virtue in the practice of law.[181]

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[181] Seligman, Verkuil & Kang, *supra* note 26.

At the same time, others, consistent with O'Grady's recommendations, showed a tendency to externalize rather than internalize interpersonal problems, using with a more positive explanatory style. One lawyer, for example, described her efforts to "depersonalize" the process and maintain respectful relationships with her adversaries.[182]

Likewise, the solution of "self-forgiveness" offered by another lawyer as the antidote to the inevitable mistakes one makes, seems consistent with an optimistic explanatory style.[183] So, too, was the mantra ("These things happen") that another attorney used with her daughter to distance herself from the inevitable at-home mishaps.[184]

In sum, the anecdotal evidence produced by this study confirms the need cited by Seligman, Verkuil and Kang for a positive explanatory style in some interpersonal aspects of the practice of law as well as in a lawyer's personal life.[185] It also confirms the value of balancing certain heart strengths with head strengths, such as prudence.

Seligman, Verkuil, and Kang recommended studying the effects of flexible optimism on lawyer productivity by setting up two groups of lawyers within a firm – one taught flexible optimism and the other, not.[186] That proposed experiment, not yet conducted at this writing, is still a worthy suggestion, particularly in light of the link found by Shultz and Zedick between lawyer success factors and dispositional optimism.[187] Additionally, it would seem worthwhile to query women lawyer exemplars further on the practical ways they employ flexible optimism in their practices and to test high-achieving women lawyers to detect explanatory style, using the Seligman Attributional Style Questionnaire.[188]

E. The Role of Well-Being

It appears both from their strengths testing and interviews that the women in the sample are likely to possess the five pillars that constitute Seligman's research-based PERMA theory of well-being. Under the PERMA theory, human flourishing rests not only on those elements that make us happy (positive emotion, meaning and engagement) but also on positive relationships and achievement for its own sake. Each element contributes to well-being, is often

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[182] *See supra* note 131.

[183] *See supra* note 111.

[184] *See supra* note 120.

[185] Seligman, Verkuil & Kang, *supra* note 26, at 43.

[186] *Id.*

[187] *See* Shultz & Zedick, *supra* note 179 at 620-661.

[188] C. Peterson et al., *The Attributional Style Questionnaire,* 6 COGNITIVE THERAPY & RES. 287 (1982).

pursued for its own sake, and can be defined and measured independently.[189] These women possess a preponderance of strengths that correlate to high well-being and that tend to produce the PERMA element of positive emotion. Anecdotally, they described engagement in their practices, as well as positive relationships particularly with clients and spouses, partners, friends, and other family members. All were able to point to some source of meaning in their practices, and their inclusion in the pool chosen for the Super Lawyer directories is evidence of achievement.

However, in an effort to make participation in the study less time-consuming and therefore encourage wider participation, I did not require that participants also take the Satisfaction With Life Scale ("SWLS"), which would have further confirmed the bi-directional nature of well-being and success described by Lyubormirsky, King, and Diener.[190] I recommend that further study of women exemplar lawyers include this testing.

F. Recommendations for the Profession

What does this study tell us about a productive path for women attorneys in the law? It provides compelling evidence that heart strengths, as well as head strengths, can have an important place in the practice of law and may predict success. It also demonstrates that achieving women lawyers with high heart strengths can use them to their advantage both personally and professionally, to build key relationships and to navigate challenges. Increasing strengths used has not only been empirically validated as a good mental health practice, but it is also a good business strategy for potentially avoiding costs such as workplace turnover or malpractice caused by alcoholism or depression and for increasing revenues through client development and retention. Based on the findings of this study, I recommend the following:

1. Identify and Develop Strengths

We know that the regular use of our top character strengths increases well-being and contributes to resilience.[191] In a profession where many are plagued by depression, anxiety, alcoholism, and ill health, it makes sense for lawyers to take the VIA-IS to determine their character strengths. Armed with those results, they should grant themselves permission, and their firms should encourage them, to use the strengths that can help become more resilient and successful, whatever those strengths may be.

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189 Martin E. P. Seligman, *Building Resilience*, HARV. BUS. REV., Apr. 2011.

190 Lyubormirsky et al., *supra* note 59.

191 Karen Reivich et al., *Master Resilience Training in the U.S. Army,* 66 AM. PSYCHOL. 25, 27 (2011).

In recommending the development of personal strengths, I am aware of Peterson and Park's observation that heart strengths such as gratitude and love tend not to co-exist with head strengths, such as perseverance and self-regulation, and that individually focused strengths, such as creativity and curiosity, tend not to co-exist with other-focused strengths like teamwork and fairness.[192] They caution that organizations need to target those strengths they want to develop in deliberate interventions for fear of creating unintended effects on other strengths.[193] One might conclude from this that in an analytically based profession, heart strengths and other-focused strengths must be sacrificed wholesale in order to develop head strengths or individually focused ones. And yet, the practice of law is intrinsically diverse, with both analytical and relationship aspects. For that reason, the successful women in this sample have demonstrated that it is both possible and advantageous to use both heart and head. It makes sense to develop heart strengths where they serve us, in identifying practice areas that benefit from them, in providing leadership within the firm, and in attracting and maintaining clients. In some cases, strengths awareness may prompt a lawyer to seek a more compatible work environment. The connection between character strengths use and goal progress found by Linley makes these workplace applications especially appropriate and worthy of further study.[194] Particularly important for firms, lawyers, law school, and law students would be additional research that reveals the configurations of character strengths possessed by outstanding practitioners of both genders by practice area, as well as character strength configurations of rainmakers and outstanding leaders within firms.

Apart from applying strengths directly to their work, lawyers would benefit from using empirically validated character strengths exercises to increase their well-being. For example, writing down three things that went well each day and why, every night for one week has been shown to increase positive mood for six months. Using a top character strength in a different way each day for one week has been shown to have the same effect, and writing a letter of gratitude to someone who has been kind, but not properly thanked, and delivering it, has boosted positive mood for a month.[195] Imagining a *best possible self* and

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[192] *See* Christopher Peterson & Nansook Park, *Character Strengths in Organizations,* 27 J. ORGANIZ. BEHAV. 1149 (2006).

[193] *Id.*

[194] *See* Linley et al., *supra* note 62.

[195] Martin Seligman et al., *Positive Psychology Progress: Empirical Validation of Interventions,* 60 AM. PSYCHOL. 410, 415 (2005).

writing down that vision has also been associated with increased positive emotion.[196]

In recommending these exercises, I am aware of challenges that exist, particularly in a large law firm environment. Peterson and Park have observed that organizations can enable – or not – the development of particular strengths, and many lawyers work in environments where heart strengths are not encouraged.[197] In fact, some firm environments may openly ridicule the development of heart strengths. Individuals in such environments especially may benefit from working with a coach. A coach can encourage strengths testing, help identify aspects of personal and professional lives that might benefit from strengths development, tailor the exercises to the client's interests, and provide accountability. Sheldon and Lyubomirsky concluded that long-term benefits from positive interventions are more likely when participants put in persistent effort and the exercises are a good fit for their personality, interests, and goals.[198] In my own experience coaching lawyers, for example, they most embrace the "three things that went well" exercise when the client sees a clear tie between the exercise and improved performance.[199] That is, when it is described not simply as a mood-lifting exercise, but as one that will help identify what is working well and why, so as to applaud – and replicate – excellence.

2. Build Resilience, MRT-Style

Not only did the women in the study report success in using their character strengths, but also positive psychologists are employing increased use of character strengths as one of four modules to build resilience in the U.S. Army's Master Resilience Training ("MRT") program.[200] Seligman has recommended that MRT can also have value in business organizations and has indicated that he "can think of no profession" that would benefit more from resilience training" than the legal profession.[201]

Women in this study possessed a number of the resilience qualities being built by MRT. Other lawyers would benefit from MRT's resilience-building tools that help examine cognitive thinking styles, manage emotions, and build

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196 Kennon M. Sheldon & Sonja Lyubomirsky, *How to Increase and Sustain Positive Emotion: The Effects of Expressing Gratitude and Visualizing Best Possible Selves*, 1(2) J. POSITIVE PSYCHOL. 75 (2006).

197 Peterson & Park, *supra* note 193, at 1152-1153.

198 Sheldon & Lyubomirsky, *supra* note 197, at 73-82.

199 *Id.* at 80.

200 Karen Reivich et al., *Master Resilience Training in the U.S. Army,* 66 AM. PSYCHOL. 25, 27 (2011).

201 Seligman, *supra* note 190.

positive relationships. As recommended by Seligman, Verkui, and Kang, attorneys would especially benefit from training to determine where positive and negative thinking styles would best serve them in their professional and personal lives, or learning how to use flexible optimism and adaptive pessimism.[202] MRT uses Reivich and Shatte's *ABC Model* of examining activating events, beliefs about those events, and consequences (emotional and behavioral) to identify thinking traps and unhelpful deep iceberg beliefs.[203] Learning to become self-aware and to self-regulate and manage emotions are also valuable parts of MRT that can be applied to lawyers.[204] Women in this study demonstrated the importance of self-regulation in many areas, e.g., litigation, dealing with clients and male attorneys, and negotiating tricky relationships with spouses, partners, and children.

Finally, the women in this study have also demonstrated the effectiveness of relationship skills in the practice of law. Relationship training much like that offered in the MRT would also likely benefit other attorneys, especially those with more thinking than feeling tendencies, to navigate relationships with clients, co-workers, family, and friends more effectively. Such training ideally would include in its curriculum the MRT components of active constructive responding based on the work of Gable, Reis, Impett, and Asher, effective ways to deliver praise, based on the work of Kamins and Dweck, and a familiarity with passive, aggressive, and assertive communication styles.[205] In addition, attorneys could emulate the relationship-building skills demonstrated by attorneys in this sample by learning to build high-quality connections at work based on respectful engagement, task enabling, and trust, and by learning to heal the corrosive connections present in some law firms. An entry point for training in high-quality connections might be in the context of client development, in which the firm might see a more direct connection between the training and potential revenue than in workplace relationships.

In recommending that attorneys high in head strengths might also benefit from training that would involve an increased use of heart strengths, such as social intelligence, gratitude, and kindness, I am encouraged by a preliminary study by Rust, Diessner, and Reade that suggests that focusing on relative char-

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202 Seligman, Verkuil & Kang, *supra* note 26, at 44.

203 KAREN REIVICH AND ANDREW SHATTE, THE RESILIENCE FACTOR: 7 KEYS TO FINDING YOUR INNER STRENGTH AND OVERCOMING LIFE'S HURDLES (Broadway Books 2002).

204 Bowling, *supra* note 65.

205 Karen Reivich et al., *Master Resilience Training in the U.S. Army,* 66 AM. PSYCHOL. 25, 27 (2011).

acter weaknesses as well as strengths does not decrease and might improve life satisfaction.[206]

Hopefully, relationship training would enhance the ability of all attorneys in a firm to attract and maintain clients. However, attorneys with a preponderance of heart strengths are in an especially strong position to use the strategies shown by women in the sample to attract and maintain clients. For that reason, firms would be well served by including them in meetings with clients early on, encouraging them to network, develop best practices for rainmaking, and serve as mentors to other attorneys in the firm as they also engage in business development.

3. Incorporate Positive Psychology Coaching

The successful women attorneys I studied also universally found meaning in their practices, which motivated them to stay in a challenging profession. Reivich and Shatte recognized finding a larger meaning as an important *reaching out* application of resilience.[207] For attorneys struggling to find meaning, a coach trained in positive psychology principles may also be valuable to help identify intrinsic rewards beyond the ultimately less satisfying extrinsic rewards of financial success, image, and popularity that may have brought them to – or been developed in – law school. One woman in the study credited a coach with supporting her through a leap to a more intrinsically rewarding environment.

Specific to law, Tim Kasser has identified three sources of intrinsic motivation: *personal growth goals*, which reflect a personal quest for self-understanding; *affiliation goals*, reflecting connection with family and friends; and *community feeling goals*, such as social activism.[208] He notes that lawyers searching for meaning have a special opportunity to influence legislative agendas that enhance intrinsic motivators, such as legislation promoting time affluence or limiting marketing that undercuts well-being. On a broader scale, lawyers can serve on community boards whose missions they are aligned with or work to influence legislation of any kind that holds special meaning for them. These are all opportunities a coach might help them identify.

Biswas-Diener and Dean also suggest that a coach trained in positive psychology can help clients explore ways to engage in the new technique of *job crafting,* in which employees re-shape their job tasks, attitudes, or relationships

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[206] Teri Rust et al., *Strengths Only or Strengths and Relative Weaknesses? A Preliminary Study,* 143 J. PSYCHOL. 465 (2009).

[207] REIVICH & SHATTE, *supra* note 204.

[208] TIM KASSER, PSYCHOLOGY AND CONSUMER CULTURE: THE STRUGGLE FOR A GOOD LIFE IN A MATERIALISTIC WORLD (Am. Psychological Ass'n. 2005)

in order to make them more meaningful.[209] I recognize that *task crafting,* which involves redesigning a job based on an employee's motives, strengths, and passions, might draw resistance from firms accustomed to more rigid, traditional work processes. Amy Wrzesnieski indicated after her course lecture to the MAPP class at the University of Pennsylvania that she was aware of no law firm that had attempted that process.[210] Other job crafting approaches include *relational crafting*, or changing the way employees collaborate with each other, and *cognitive crafting,* or changing the way employees think about their jobs or relationships with co-workers. Relational crafting and cognitive crafting might be particularly effective in meaning-making in law firms since the employee is in control to some extent of creating collaborative relationships with others and certainly in control of her own perceptions.

One might argue that the stereotypical lawyer personality would be skeptical of, and therefore resistant to, coaching. That certainly may be true for some; however, coaching based on research-based positive psychology principles may provide an effective counter to lawyer skepticism, particularly for lawyers seeking more satisfaction and success in the practice.

VI. CONCLUSION

This study suggests that contrary to previous studies showing that women lawyers as a whole are thinkers instead of feelers; successful women lawyers use a predominance of heart strengths strategically, either alone or in conjunction with more analytical head strengths to flourish in the practice of law. In this study, high achievers used heart strengths especially to navigate personal and professional relationships. At work, they used them in management roles, to foster positive relationships with clients, and at times to find meaning in particular practice areas. At home, they used their heart strengths to cultivate networks of friends, family, and nannies to care for family members. For lawyers and firms open to using a full panoply of strengths, there can be rich dividends in terms of increased professional success and personal well-being.

Based on this study, including anecdotal evidence provided by the successful women interviewed, I recommend that lawyers: (1) identify and develop their character strengths; (2) participate in resilience training, including training in cognitive thinking styles and relationship-building; and (3) receive coaching based on empirically validated positive psychology principles. I also recommend that women high in heart strengths serve as in-firm mentors in the area of business development.

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[209] ROBERT BISWAS-DIENER & BEN DEAN, POSITIVE PSYCHOLOGY COACHING: PUTTING THE SCIENCE OF HAPPINESS TO WORK FOR YOUR CLIENTS (John Wiley & Sons 2007).

[210] Interview with A. Wrzesnieski (February 4, 2012).

Also based on this study, I recommend further research in the following areas: (1) character strengths used by successful male lawyers; (2) a possible correlation between character strengths and success in particular practice areas; (3) a possible correlation between professional success as determined by the Super Lawyers rating service and the designee's Satisfaction With Life Scale (SWLS) score; and (4) a possible correlation between the character strength of social intelligence and law firm leadership and business development.

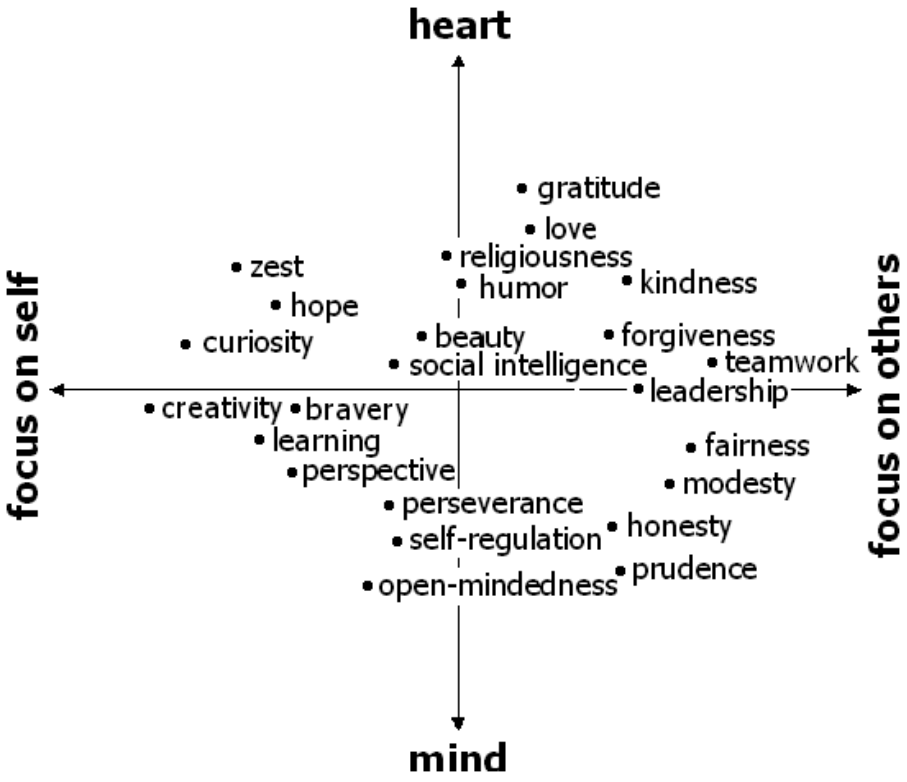
APPENDIX A

Table A-1: Character Strengths and Virtues

VIRTUES	CHARACTER STRENGTHS
Wisdom and Knowledge	Creativity, Curiosity, Open-mindedness, Love of Learning, Perspective
Courage	Bravery, Persistence, Integrity, Vitality
Humanity	Love, Kindness, Social Integrity
Justice	Citizenship, Fairness, Leadership
Temperance	Forgiveness and Mercy, Humility/ Modesty, Prudence, Self-Regulation
Transcendence	Appreciation for beauty and excellence, Gratitude, Hope, Humor, Spirituality

APPENDIX B

Peterson's (2006, p. 158) Representation of Tradeoffs Among Character Strengths



APPENDIX C

Table C-1: Attorney Strengths, Rankings, Frequency

DESIGNATION	STRENGTHS	PERCENTILE RANK BY OCCUPATION GROUP	FREQUENCY OF USE PER TEST[211]
Attorney No. 1	Kindness	100	Always
	Gratitude	100	Always
	Social Intelligence	99	Always
	Creativity	97	Always
	Fairness	94	Always
Attorney No. 2	Zest	100	Always
	Kindness	100	Always
	Gratitude	100	Always
	Humor	100	Always
	Humility	99	Always
	Self-Regulation	99	Always
	Social Intelligence	99	Always
	Hope	99	Always
Attorney No. 3	Self-Regulation	91	Usually
	Forgiveness	87	Usually
	Prudence	85	Usually
	Humility	83	Usually
	Bravery	83	Usually
Attorney No. 4	Gratitude‡	100	Always
	Leadership	97	Always
	Zest	85	Always
	Prudence	85	Always
	Bravery	83	Always
Attorney No. 5	Love of learning	100	Always
	Gratitude	100	Always
	Curiosity	99	Always
	Open-Mindedness	99	Always
	Hope	99	Always
Attorney No. 6	Gratitude	100	Always
	Kindness	100	Always
	Self-Regulation	99	Always
	Social Intelligence	99	Always
	Persistence	99	Always
	Perspective	99	Always
	Open-Mindedness	99	Always

[211] Test-takers are asked to rate their use of a described strength as Not applicable, Never/rarely Occasionally, Half the time, Usually, or Always

Table C-1: Attorney Strengths, Rankings, Frequency (continued)

DESIGNATION	STRENGTHS	PERCENTILE RANK BY OCCUPATION GROUP	FREQUENCY OF USE PER TEST
Attorney No. 7	Gratitude	100	Always
	Integrity	98	Always
	Citizenship	97	Always
	Self-Regulation	91	Usually
	Forgiveness	87	Usually
Attorney No. 8	Zest	85	Usually
	Prudence	85	Usually
	Spirituality	85	Usually
	Kindness	82	Usually
	Social Intelligence	82	Usually
Attorney No. 9	Self-Regulation	91	Usually
	Forgiveness	87	Usually
	Hope	86	Usually
	Zest	85	Usually
	Prudence	85	Usually
Attorney No. 10	Gratitude	100	Always
	Learning	100	Always
	Open-Minded	99	Always
	Persistence	99	Always
	Humility	99	
Attorney No. 11	Integrity	98	Always
	Hope	86	Usually
	Zest	85	Usually
	Bravery	83	Usually
	Humility	83	Usually
Attorney No. 12	Love	100	Always
	Beauty/Excellence	99	Always
	Social Intelligence	99	Always
	Citizenship	97	Always
	Bravery	93	Always
Attorney No. 13	Love	100	Always
	Gratitude	100	Always
	Humor	100	Always
	Social Intelligence	99	Always
	Persistence	99	Always
	Perspective	99	Always

Table C-1: Attorney Strengths, Rankings, Frequency (continued)

DESIGNATION	STRENGTHS	PERCENTILE RANK BY OCCUPATION GROUP	FREQUENCY OF USE PER TEST
Attorney No. 14	Forgiveness	87	Usually
	Hope	86	Usually
	Bravery	83	Usually
	Kindness	82	Usually
	Social Intelligence	82	Usually
Attorney No. 15	Love	100	Always
	Kindness	100	Always
	Gratitude	100	Always
	Persistence	99	Always
	Beauty/Excellence	99	Always
Attorney No. 16	Love	100	Always
	Kindness	100	Always
	Gratitude	100	Always
	Beauty/Excellence	99	Always
	Open-Minded	99	Always
Attorney No. 17	Integrity	98	Always
	Zest	85	Usually
	Prudence	85	Usually
	Love	79	Usually
	Creativity	78	Usually

Table C-2: Attorney Top Strengths

Character Strength	**Heart**	**Head**	**Top Cluster**[212]	**Attorney Source**	**Nature**
Gratitude	others		10	1,2,4,5,6,7,10,13, 15,16	Heart other
Kindness	others		8	1,2,5,6,8,14,15, 16	Heart others
Social Intelligence	self		7	1,2,6,8,12,13,14	Heart self
Zest	self		6	2,4,6,9,11,17	Heart self
Bravery		self	5	3,8,11,12,14	Head self
Forgiveness	others		5	1,3,7,9,14	Heart other
Hope	self		5	2,5,9,11,14	Heart self
Love	others		5	12,13,15,16,17	Heart others
Prudence		others	5	3,4,8,9,17	Head others
Self-control		self	5	2,3,6,7,9	Head self
Open-mindedness		self	4	5.6.10,16	Head self
Beauty/Excell	self		3	12,15,16	Heart self
Humility		others	3	2,4,11	Head others
Integrity		others	3	7,11,17	Head others
Persistence		self	3	6.13,15	Head self
Citizenship	others		2	7,12	Heart others
Creativity		self	2	1,17	Head self
Humor	others		2	2,13	Heart others
Love of learning		self	2	5, 10	Head self
Perspective		self	2	6,13	Head self
Curiosity	self		1	5	Heart self
Fairness		others	1	1	Head others
Leadership	others	others	1	4	Head/heart others
Spirituality	self		1	8	Heart self

[212] This represents the number of times each strength appeared among attorneys' top strengths, based on percentile rankings of their top five strengths. When several strengths shared the same percentile ranking, more than five strengths (up to seven) were considered to be in the top cluster of an attorney's strengths

APPENDIX D

Table D-1: Descriptions and Related BST Questions for Top Character Strengths

Character Strength	**Description**	**Brief Strengths Test Question**
Gratitude	Thankfulness in response to receiving a gift from another person or higher power. Characterized by joy, goodwill and an inclination to act accordingly (Peterson & Seligman, 2004).	Think of actual situations in which someone else helped or benefited you. How frequently did you show GRATITUDE or THANKFULNESS?
Kindness	Associated terms showing an orientation toward others, are *generosity, nurturance, care, compassion, and altruistic love* (Peterson & Seligman, 2004).	Think of your everyday life. How frequently did you show KINDNESS or GENEROSITY to others when it was possible to do so?
Social intelligence	Refers to the ability to relate emotionally to others and understand the meanings of those emotions (Peterson & Seligman, 2004).	Think of actual situations in which the motives of other people needed to be understood and responded to. How frequently did you show SOCIAL INTELLIGENCE or SOCIAL SKILLS in these situations?
Zest	A state of vitality, characterized by positive energy, enthusiasm, and vigor, both physically and psychologically (Peterson & Seligman, 2004).	Think of your everyday life. How frequently did you show ZEST or ENTHUSIASM when it was possible to do so?
Bravery	Also described as *courage* and *valor*, this strength suggests undertaking danger for a good end after reasonably assessing risks (Peterson & Seligman, 2004).	Think of actual situations in which you experienced fear or threat. How frequently did you show BRAVERY or COURAGE in these situations?
Forgiveness	Involves change toward positive emotion that occurs when mercy is shown to someone who has damaged a relationship (Peterson & Seligman, 2004).	Think of actual situations in which you had been hurt by someone else. How frequently did you show FORGIVENESS or MERCY in these situations?

Hope	Also described as optimism, future-mindedness and future orientation, this strength entails a "cognitive, emotional, and motivational stance toward the future" (Peterson & Seligman, 2004, p. 570).	Think of actual situations in which you experienced failure or a set-back. How frequently did you show HOPE or OPTIMISM in these situations?
Love	This "cognitive, emotional and behavioral stance toward others" can be manifested toward our caregivers, those who receive care from us, or in romantic relationships (Peterson & Seligman, 2004, p. 304).	Think of your everyday life. How frequently did you express your LOVE or ATTACHMENT to others (friends, family members) when it was possible to do so?
Prudence	This "cognitive orientation to the personal future" involves self-management and adherence to long-term goals (Peterson & Seligman, 2004, p. 478).	Think of actual situations in which you were tempted to do something that you might later regret. How frequently did you show PRUDENCE, DISCRETION, or CAUTION in these situations?
Self-Regulation	Also sometimes called *self-control*, this strength entails the ability to control responses so that an individual can live up to external or internalized standards or pursue goals (Peterson & Seligman, 2004).	Think of actual situations in which you experienced wishes, desires, impulses, or emotions that you wished to control. How frequently did you show SELF-CONTROL or SELF-REGULATION in these situations?

Arizona public schools: revealing the pitfalls of restraints, seclusion, and isolation rooms through progression

Clarissa Estrada Sobrino[1]

I. Introduction

In August 2013, a teacher in Arizona restrained a second grader to a chair with duct tape because the student was getting up too often.[2] In January 2011, a boy in Indiana was secluded and unmonitored in a room for hours, screaming for help; the boy attempted suicide due to the lack of aid and supervision.[3] The use of seclusion rooms and restraints in this nation is a hot topic. Arizona is one of seventeen states with no regulations or statutes governing the use of isolation and seclusion rooms in public schools for disabled students.[4] This issue is particularly important given that the use of isolation rooms and seclusion provides no therapeutic value to the children, and is counterproductive to the overall goal of reaching a positive student enrichment experience—both academically and socially.[5]

In March 2014, Arizona Representative Townsend introduced House Bill ("H.B.") 2642 during the fifty-first legislature to remedy the lack of regulations regarding isolation rooms and seclusion in March 2014.[6] While this bill is a positive remedial measure to regulating the use of isolation and seclusion rooms, its measures are inadequate to prevent misuse of such rooms, and pose grave danger to children—both developmentally and psychologically.

In order to better understand the severity of the use of isolation rooms and seclusion, this article discusses: in-depth research to demonstrate the lack of

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[1] Clarissa Estrada Sobrino is a second year law student and an April 2016 Juris Doctor candidate. She dedicates this scholastic commentary to her grandparents who are now present with the Lord. Both had always supported me in my academic endeavors, and suffered at the hands of their educators. If it were not for them, she would not be who she is or where she is in this life.

[2] Tom Harkin, *Dangerous Use of Seclusion & Restraints in Schools Remains Widespread & Difficult to Remedy: A Review of Ten Cases*, United States Senate Comm. On Health Educ., Labor & Pensions (Feb. 12, 2014) at 6, http://www.help.senate.gov/imo/media/doc/Seclusion and Restraints Final Report.pdf.

[3] *Id.*

[4] Secretary Arne Duncan, *Summary of Seclusion and Restraints, Regulations, Statutes, Policies and Guidance by State Territory*, United States Dep't of Educ., (Feb. 2010) at 18, https://www2.ed.gov/policy/seclusion/summary-by-state.pdf.

[5] Harkin, *supra* note 2, at 3.

[6] H.B. 2642, 51st Leg., 2nd Reg. Sess. (Ariz. 2014).

value the rooms provide; alternatives to seclusion, such as positive behavioral intervention; and, an overview of various state statutes governing this hotly contested issue. The legislature's guidelines, although illustrative of Arizona's progress, are unlikely to be sufficient to prevent misuse of the seclusion rooms and provide safety for children.

II. Arizona's Progression: House Bill 2642

House Bill 2642 "establishes procedures for the use of isolation or seclusion by a public school."[7] The bill specifically states that the seclusion rooms are not to be used as a form of punishment, and are solely to be used against students with individualized education programs ("IEP") or Section 504 plans.[8] The following are a few of the bill's rules: placement of a pupil in an isolation or seclusion room may occur only as long as necessary to resolve the actual risk of danger; the pupil's parent must be notified; and, the rooms must provide adequate ventilation and lighting, be free from safety hazards, and be sufficiently sized to allow a student to sit or recline.[9]

III. Overview of Various State Laws Regarding Seclusion and Isolation Rooms

"Federal regulations govern the use of seclusion and restraints in virtually every type of institution; this includes hospitals, nursing homes, and psychiatric facilities, but none apply to schools."[10] In fact, many states have been dormant when applying regulations to the use of the seclusion rooms, and the states that have such regulations produce inconsistent results in implementation and prophylactic outcomes.[11] A recent report by the United States Senate provides an overview of multiple states' seclusion and restraint practices, common challenges families face when their children are put in isolation or seclusion, and issues they face related to the legislation.[12] Five issues have been identified that frequently arise as a result of the use of seclusion and isolation rooms: (1) lack of parental notification; (2) legal hurdles; (3) proving psychological harm; (4) acquiescence by school personnel; and, (5) lack of remedies available to the parents.[13]

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Harkin, *supra* note 2, at 11.

[11] *Id.*

[12] *Id.* at 3.

[13] *Id.* at 16.

While policies and regulations vary by state, only nineteen states have meaningful legislation that addresses potential problems posed by seclusion. The legislation in these states has rendered inconsistent results as to its validity and effectiveness.[14] Notwithstanding, the legislation presents other issues involving the Individuals with Disabilities Education Act ("IDEA"), American Disabilities Act ("ADA"), and violations of Free Appropriate Public Education.

Currently, in Connecticut, teachers seclude students in concrete-walled scream rooms. The teachers provided no bases for why children were put into the "scream rooms," and custodians reported cleaning blood and urine from the room.[15] One specific incident led a mother to withdraw her child from public school and enroll her child into private school.[16] In Florida, a teacher restrained a twelve-year-old boy eighty-nine times over the course of fourteen months—the parents were never notified. As a result, the parents removed the child from public to private school, and brought a lawsuit against the public school. A court later dismissed that case for failure to prove that the school was "indifferent to the child's right to an education."[17]

In another instance, a Pennsylvania public school special education teacher abused disabled students by strapping them to chairs, pulling their hair, and secluding them without supervision for long periods of time.[18]8 School administrators took no action, despite warning. The children's parents sued the school and received a $5,000,000 settlement; however, the district court dismissed the civil claim of negligence because the parents failed to exhaust their administrative burdens and the administrator's actions did not amount to negligence. In each case, the children suffered developmental, mental, and or other disabilities.

While some of these states have regulations governing the use of seclusion rooms, states without regulations produce varying degrees of redressability. One of the primary issues with laws allowing seclusion is the lack of actual parental notification, regardless of the requirement under the law.[19] It was not until 2009 that the Department of Education began requiring school districts to report data on the usage of seclusion rooms and student restraints.[20] While this a positive reinforcement, it remains insufficient to monitor inappropriate behavior by the teachers or schools because they can withhold the data.

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[14] Harkin, *supra* note 2, at 15.

[15] *Id.*

[16] *Id.* at 17.

[17] Harkin, *supra* note 2, at 11.

[18] 8 *Id.* at 18

[19] *Id.* at 19.

[20] *Id.*

Another issue that arises from the lack of incident reporting and parental notification is that children are often incapable of fully expressing, or informing their parents of, the abuse.[21] Not only does abuse emotionally harm children, but the parents face inadequate documentation and proof to seek redress resulting from the harm the school poses. This raises yet another legal issue that plaintiffs need to deal with. For example, the parent would first have to file a due process claim with the school district, and then the case would be set for an administrative hearing.[22] Parents would have to do this prior to bringing their claims under IDEA, even if they had compelling evidence of wrongdoing.[23] Few state laws provide parents with avenues of redressability.[24]

IV. Pitfalls in the Legislation: Why Regulations Are Insufficient Protection

Although public schools are now being asked to report the use of seclusion rooms, the issue of reliability arises.[25] It is possible for schools to withhold such information and willingly fail to notify the parents.[26] Moreover, the fact that the use of seclusion is based upon an educator's discretion does not go unnoticed. What actions warrant the use of a seclusion room? Upon whose discretion does that fall? What is the repercussion if a school fails to adequately and accurately report, and how would anyone know? These are all questions that must be addressed. However, it is difficult to do so; this is precisely why legislatures should ban the use of seclusion rooms.

The Arizona Developmental Disabilities Planning Council reveals that restraints and seclusion are used excessively even when student behavior is not dangerous.[27] Arizona has no regulations regarding the use of restraints and seclusion. Although the bill could prove a remedial measure to the misuse of the seclusion rooms, cases arising from other states demonstrate constant misuse regardless of regulations.[28]

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[21] *Id.*

[22] *Id.* at 22.

[23] Harkin, *supra* note 2, at 11.

[24] Harkin, *supra* note 2 at25; Duncan, *supra* note 4.

[25] Harkin, *supra* note 2, at 25.

[26] *Id.*

[27] Arizona Developmental Disabilities Planning Council, *Restrains and Seclusion,* (Nov. 25, 2014), https://www.azdes.gov/WorkArea/DownloadAsset.aspx?id=8472. The issue of restraints and seclusion has arisen as a result of the sixty-one deaths that have occurred since 2011 as a result of children being restrained.

[28] *Id.*; Office of the Senior Practitioner, *Positive Solutions in Practice: From Seclusion to Solutions*, Issue No. 2 (2007); *see also Stop Hurting Kids: Restraint & Seclusion in BC Schools-Survey Results & Recommendations,* (Nov. 2013) (explaining the campaign to end seclusion rooms and restraints in schools and the potential violation of human rights.); *see generally* Keep-

The United States Health, Education, Labor, and Pensions committee has created various recommendations in regards to the use of isolation rooms in hopes of eliminating misuse and abuse of disabled children. First, the use of restraints should be limited to emergency situations. Second, unsupervised and unmonitored seclusion should discontinue. Third, parents should be notified upon seclusion of their children. Lastly, Congress should amend the IDEA to allow families a form of redressability in regards to the practices of the use of seclusion and restrains with their children.[29] These recommendations derive from the fact that using seclusion rooms has many negative repercussions, such as: notification; regulation; training; potential lawsuits from parents of the victimized children; claims under IDEA, and human rights violations within the Department of Education's office of Civil Rights.[30]

Because the benefits of secluding children and using restraints are minimal, it would be more effective for schools to use other positive behavioral health measures to reach the same desired result in having the child not become aggressive and maintain composure in school.

V. Developmental Impacts on Children Subject to Seclusion and Isolation

According to the Department of Human Services, disabled children are most vulnerable and disadvantaged with respect to isolation and seclusion.[31] H.B. 2642 implements safeguards for children with disabilities and IEP; however, the claim that seclusion and isolation are not to be used for punishment is contradictory. This is because "seclusion is a form of social isolation known to be associated with morbidity and mortality . . . [and] is thought to be one of the worst types of punishment."[32] Seclusion has potential to adversely affect a child's psychological and developmental health and has proven even more harmful to disabled children.[33] This is especially important given that the isolation and seclusion rooms mentioned in H.B. 2642 target disabled children and IEP.[34]

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ing All Students Safe Act (§ 2020), Tom Harkin (IA)(explaining a nationwide initiative to end the use of seclusion rooms and restraints.).

[29] Harkin, *supra* note 2, at 33.

[30] *Id.*

[31] *See supra* note 27

[32] *Id.*

[33] American Civil Liberties Union, *Alone & Afraid: Children Held in Solitary Confinement & Isolation in Juvenile Detention & Correctional Facilities*, (June 2014), https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf.

[34] *See supra* note 6.

The American Civil Liberties Union states that isolation is harmful for children because adolescence is extremely vulnerable given its transitory nature in the children's biology, cognition, emotion, and interpersonal relationships.[35] This is especially significant in the structural growth of the child's brain, namely the frontal lobe.[36] The frontal lobe is primarily responsible for cognitive processing, organizing thoughts, and actions.[37] Moreover, researchers have established that a particular area within the frontal lobe, the dorsolateral prefrontal cortex, is one of the last regions to develop, and is responsible for the ability to stop impulses and weigh consequences of actions.[38] Thus, the use of seclusion and isolation rooms proves dangerous for disabled children. Although the research is focused on children in solitary confinement within detention centers, the effects on the brain are nevertheless analogous because isolating and secluding a child is traumatic, regardless of the situation.

In addition to the psychological harm isolation and seclusion cause, isolated and secluded children are also in grave danger of suicide, physical harm (which is already prevalent given the number of deaths caused by the use of restraints and seclusion), developmental harm (due to the lack of educational programming the children receive), and lack of access to materials during the period of isolation. These vulnerabilities are compounded and exponentially increased in children with disabilities.[39]

VI. Moving from Seclusion to Positive Solutions

Provided that there are many dangers in the use of the seclusion and isolation rooms, there are alternatives to seclusion that provide positive reinforcement. The language of H.B. 2642 carefully lists the precautions that trained professionals can take when secluding a child, such as conflict prevention and de-escalation techniques.

However, isolation in itself is a form of punishment;[40] instead, the focus should be on providing therapeutic interventions.[41] Some alternatives to seclusion are therapeutic environments such as sensory rooms, comfort rooms, and active alternatives. These rooms target different senses: musical tactile walls (sound); aromatherapy (smell); vibrating mattresses (touch); and, bubble columns (sight). All of which have proven useful in adolescents for crisis man-

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35 *See supra* note 32.

36 *Id.*

37 *Id.*

38 *Id.* at 4.

39 *Id.* at 5.

40 Harkin, *supra* note 2 at 33.

41 *See supra* note 27.

agement, rendering the administration of behavior-modifying medication less frequent.[42]

Moreover, thorough assessments of the behaviors of concern (or "mindfulness techniques" to reduce potential conflicts) are valuable alternatives to seclusion that maintain dignity of the children without use of restraints.[43] This means recognition of factors that lead to outbursts, an agreement of how the children should express anger, and parental choice of intervention options.[44] Essentially, the overall goal of the positive alternatives to seclusion is to "promote self-determination [in the children], independence, productivity, and improved quality of life and learning."[45]

In addition to these positive alternatives to seclusion, children who have suffered at the hands of their educators and the public school system have other protections, including federal constitutional protections under the Fifth and Fourteenth Amendments.[46] The use of seclusion rooms also implicates human rights violations under international human rights law, which states, "the child, by reason of his physical and mental immaturity, needs special safeguards and care . . . ."[47]

VII. Conclusion

Although H.B. 2642 is a step forward in the initiative to end misuse of seclusion rooms, its efforts are insufficient. Because positive alternatives exist and will prevent the children from being subjected to further harm, those remedies should be approached for the sake of the children's developmental, psychological, and mental health. Therefore, legislatures should ban seclusion and isolation rooms.

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[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] D.B. v. Tewksbury, 545 F.Supp. 896, 905 (D. Or. 1982) (ruling that [subjecting] younger children in isolation . . . violates plaintiffs' Due Process rights under the Fourteenth Amendment.).

[47] *See supra* note 32.

In Defence of Therapeutic Jurisprudence: Threat, Promise and Worldview

Nigel Stobbs*

I. Introduction

The question as to whether the adversarial legal system continues to be relevant and that mechanism which is best able to oil the machinery of justice is ubiquitous. As such, it is the subject of a considerable body of literature.[1] To question the continued relevance and usefulness of adversarialism is to acknowledge its paradigmatic status and the fact that it has been at the defining core of our legal institutions for centuries. Without tying ourselves down to too narrow a definition or conception of the "adversarial paradigm," we can readily acknowledge that despite the multitude of rules, processes, and roles spawned within the common law legal jurisdictions,[2] the adversarial paradigm neverthe-

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[1] Some useful examples are: Michael Robert Karlberg, Beyond the Culture of Contest: From Adversarialism to Mutualism In An Age of Interdependence (2004); Lindsay Farmer et al, The Trial on Trial Volume 1: Truth and Due Process (2004); Geoffrey Davies, *Why We Must Abandon the Essential Elements of Our System,* JJA Journal of Judicial Administration 12(3) (2003); Marc Galanter & Mark Allan Edwards, *Introduction: The Path of the Law Ands*, 1997 Wm. Mitchell. L. Rev. 375 (1997); L. Handa, *Peace Paradigm: Transcending Liberal and Marxian Paradigms*, *in* International Symposium on Science, Technology and Development, New Delhi, India (1987); John Hostettler, Fighting for Justice: The History and Origins of Adversary Trial (2006).

[2] In this category I include (non-exhaustively) those jurisdictions (such as the US, England, Australia, New Zealand, Canada, Israel, India) in which the criminal and civil court system allows for the assertion of prior court decisions as having authoritative precedent value, manifesting the stare decisis principle – in contrast to civil law jurisdictions in which courts must adjudicate according only to legislation and where procedures are more inquisitorial than adversarial. Certainly there are a number of civil law jurisdictions which are experimenting, and implementing therapeutic jurisprudence inspired innovations (such as France which has a range of problem solving courts and lists) but for the purposes of this paper I want to examine the adversarial quality of the common law in a political context. A useful comparison of the structure and operation of these courts between international jurisdictions can be found in James L. Nolan Jr, *The International Problem-Solving Court Movement: A Comparative Perspective*, 37 Monash University Law Review 259 (2011). Interestingly, Nolan concludes that a comparison of the development of problem-solving courts internationally reveals an important difference between an American disposition characterised by enthusiasm, boldness and pragmatism and the contrasting penchant of the other countries toward moderation, deliberation and restraint.

less embraces a core of identifiable disciplinary principles, methods, and values.[3] If we grant that adversarialism is a paradigm, then we must also grant *ipso facto* that other legal paradigms are possible.[4] This is an important starting position on which to agree, for the purposes of this paper, given that I will argue that there is something akin to a symbiotic relationship between the adversarial legal paradigm and the liberal democratic worldview – to the extent that legal processes which are seen as sitting outside of that adversarial paradigm are sometimes seen as implied rejections of the liberal worldview.

Given the ubiquity referred to above, we ought not to be surprised that some proposed and actual reforms to adversarial practice seem to be keenly anticipated and successfully implemented. But these tend to be reforms, which are not seen as going to the heart of the legal system. They are usually based on either express or implied representations (by those implementing them) that they are intended to optimize or improve existing adversarial processes which might otherwise fail to adapt to changed social conditions, or to sit alongside those existing processes as the "junior partner."

Useful examples of this dynamic are those reforms, which are said to be "less adversarial", rather than "non-adversarial." This consigns the new or innovative process to an ontologically subordinate position, not just in terms of practice, but also in terms of underlying jurisprudence. One example of this was the decision of the Family Court of Australia to modify its approach to family law matters involving families with children, to allow judges to become far more involved in the process rather than simply adjudicating upon submissions from parents and their lawyers. This reformed court process is known as the "less adversarial trial."[5]

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[3] For a discussion of the great variety of adversarial and inquisitorial approaches in legal procedure, *see* Oscar G. Chase, *American Exceptionalism and Comparative Procedure*, 50 AM. J. COMP. L. 277 (2002).

[4] I use the term 'paradigm' here, not in the general and somewhat colloquial sense which seems to have permeated much research in the social sciences and in the humanities, but in the sense meant by the philosopher of science Thomas Kuhn. A 'Paradigm' was first described by Kuhn as '*models from which spring particular coherent traditions of scientific research*'. An emphasis on cultural factors is made more explicit when Kuhn later suggests a paradigm is '*what the members of a scientific community share*' or '*a scientific community consists of men who share a paradigm*'. The definition narrows to '*a constellation of group commitments*' and the community to '*those who share a disciplinary matrix*' or a '*shared example*' from which a member of that community derives their understanding of the field. This notion of the paradigm as an exemplar (or of a group of shared/agreed examples) is probably that which makes its way most often into broader academic discourse – we hear and read very often of practitioners pointing to something as a 'paradigm example'. THOMAS S KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

[5] The *Less Adversarial Trial Handbook* informs judges and parties how these proceedings are to progress. *Less Adversarial Trial Handbook*, FAMILY COURT OF AUSTRALIA (2009) http://www.familycourt.gov.au/wps/wcm/resources/file/eb08eb04841dff4/LATReport_100609.pdf. The

I have argued elsewhere[6] that therapeutic jurisprudence may represent something much greater than a mere "pragmatic incrementalism"[7] which motivates important, but fairly narrow, reforms to the law and how it operates. It may, itself, represent an alternative juristic paradigm[8] to the dominant adversarial system of the common law world, or (more likely) be part of some wider therapeutic or non-adversarial paradigm. If we grant, for the sake of argument, that a non-adversarial paradigm (of which therapeutic jurisprudence is a part) is possible, then the issue of adversarialism's relationship to the liberal political order becomes even more important. It may have implications for compatibility (between the liberal worldview and therapeutic jurisprudence), for commensurability (between adversarialism and therapeutic jurisprudence),[9] and for

changes are legislated in terms of being expressly 'less adversarial' in *The Family Law Act 1975* (Cth) pt VII, div. 12A (Austl.). Arguments that these 'less adversarial' ought to be expanded to the wider civil courts have been made by the Deputy Chief Justice of the Family Court of Australia. John Faulks, *A Natural Selection-The Potential and Possibility for the Development of Less Adversarial Trials by Reference to the Experience of the Family Court of Australia*, 35 UNIV. W. AUSTL. L. REV. 185 (2010).

6 Nigel Stobbs, *The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence,* 4 WASH. U. JURISPRUDENCE REV. 97 (2011).

7 A phrase first coined in this context by Freiberg. Arie Freiberg, *Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism*, 20 LAW CONTEXT 6 (2003).

8 There is a body of literature which posits 'the law' (including legal institutions, professionals, rules and processes) as conforming to some 'juristic model' which has the qualities of a Kuhnian paradigm. Vilhelm Aubert, *The Structure of Legal Thinking, in* LEGAL ESSAYS: A TRIBUTE TO FREDE CASTBERG 41 (J. Andenaes et al. eds., 1963); and also Vilhelm Aubert, *Researches in the Sociology of Law* 7 AMERICAN BEHAVIOURAL SCIENTIST 16, 18 (1963) (where he concludes that 'legal methods, legal conceptualisations and the underlying theory share an identity or internal coherence which has, indeed, remained constant over time'). *See also* Colin M. Campbell, *Legal Thought and Juristic Values*, 1 BRIT. J. LAW AND SOC'Y 13 (1974) and Stobbs, *supra* note 6.

9 I refer here to the sense of incommensurability intended by Thomas Kuhn which holds that advocates for competing paradigms cannot fully comprehend the other's perspective because they are observing elements of a literally different phenomenological and social world (which are contingent upon their worldview, training and experience) and describing them in a different professional language. *See* THOMAS S KUHN, *supra* note 4 at 103, 112, 148, 150, p.s. 174-210 (1962). This is a phenomenon with a long pedigree in linguistics. There is a body of research which suggests that certain analytical or cognitive concepts (and perhaps even some emotions) are unique to particular cultures due to the uniqueness of their language and grammatical lexicon. The argument is, in its simplest form, that where two cultures do not share a common language, it may be impossible for the members of one of them to fully share in the experienced and felt world of the other. This is part of the wider communicative context in which: 'Meaning is determined in part by: who the author was, the purpose of the communication, for whom the information was intended, the relationship between the author and the audience, the culture within which the information was generated, the degree of commonality between source and receptor'. MILDRED L LARSON, MEANING-BASED TRANSLATION: A GUIDE TO CROSS-LANGUAGE EQUIVALENCE 141 (1998). According to one major study of this phenomenon: 'The worldview implicitly held by

currency (of the adversarial system). If therapeutic jurisprudence is incommensurable with the dominant conception of the liberal democratic worldview, is it inconsistent with, or even a 'threat' to, that worldview? We should not underestimate the emotive potential of opposition to such a threat, be it perceived or actual, to create a barrier to the mainstreaming agenda of the therapeutic jurisprudence movement.

II. THERAPEUTIC JURISPRUDENCE AS PROMISE

The reception of, and reaction to, therapeutic jurisprudence in academic literature, among legal practitioners, policy makers, and legislators is overwhelmingly, but not universally, positive.[10] Given the potential benefit promised by a movement which seeks to identify and remedy the emotional and psychological harms done to people as a result of interacting with the institutions of law, an area which the law itself has traditionally ignored, this is not surprising. The practical applications and legacy of the movement are already significant, and it has attracted scholars and practitioners in significant numbers and of considerable stature.

In terms of the movement's practical success, the flagship contribution that therapeutic jurisprudence has made is arguably its influence on practice and procedure in the problem-solving courts, especially in the United States.[11]

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the author and that of the audience can call for special attention. Information from another culture assuming the value of authority structures runs the risk of appearing meaningless'. MILDRED LARSON ET AL., *Review of Frameworks for the Representation of Alternative Conceptual Orderings as Determined by Cultural and Linguistic Contexts, in* PROJECT ON INFORMATION OVERLOAD AND INFORMATION UNDERUSE (IOIU) OF THE GLOBAL LEARNING DIVISION OF THE UNITED NATIONS UNIVERSITY (1986). The authors give the following example: 'In Melanesia there is a fundamental recognition of the network of powers influencing a person. This would render information from other cultures of limited significance unless the relationship to such powers was made clear. To render information meaningful in Japanese, distinctions of social status must be rendered explicit, even though they may not be present in the original form of the information'.

[10] Hundreds of journal articles, books and other resources supporting the work of therapeutic jurisprudence scholars and practitioners are available online at the *International Network on Therapeutic Jurisprudenc*e http://www.law.arizona.edu/depts/upr-intj/. A project to mainstream therapeutic jurisprudence techniques and practices across international jurisdictions and into general trial courts can be accessed at INNOVATING JUSTICE http://www.innovatingjustice.com/innovations/integrating-the-healing-approach-to-criminal-law?view_content=intro.

[11] This is not to suggest that the drug courts could not exist without therapeutic jurisprudence and in fact, therapeutic jurisprudence arose independently and at about the same time. But the connection between the two is widely acknowledged and explored. Bruce Wininck said of the connection 'we saw problem-solving courts and therapeutic jurisprudence as having a symbiotic relationship.' Expanding on this in the same interview, Wexler said that "problem-solving courts really were developed by judges as a practical, intuitive, creative way of addressing the problem of revolving-door justice. They were largely intuitive and atheoretical, and they developed at about the same time as therapeutic jurisprudence. In contrast, therapeutic jurisprudence developed as an academic interdisciplinary perspective that is interested in what works, in a therapeutic or

Largely as a response to what Drucker refers to as "the epidemiology of mass incarceration in America,"[12] increasingly desperate court and correctional systems have advocated for an expansion in the type and number of specialist sentencing courts in most states. These courts generally do not operate with respect to offenses attracting federal jurisdiction. The number of inmates in federal prisons increased by 788% between 1980 and 2011 compared to a growth of 353% in state prisons and that state rate is now in decline. The difference in growth rates was complemented by a growth in the number of drug courts from only 1 in 1989 to nearly 3,000 by 2012. Media reports suggest that the success of the drug courts in the state jurisdictions has now motivated legislators who were once opposed to their operating philosophy to seek funding for more such courts.[13]

Apart from the significant take-up of therapeutic jurisprudence and its influence on a wide range of courts and organizations, the fact that Wexler and Winick have always contended that neither they nor the movement they have nurtured advocate for a therapeutic state makes the movement less paternalistic and less likely to attract opposition. Wexler allows that therapeutic jurisprudence does raise questions that produce answers that are both empirical and normative, but that the proper task of the legal scholar is not to "generate data," but to use data in framing recommendations and then to perhaps "suggest important and relevant lines of inquiry to social scientists."[14] In other words, the agenda is to identify possible areas for reform (and perhaps to responsibly advocate for such reform) but not to prescribe or impose them.[15] As a thera-

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rehabilitative sense, in terms of legal arrangements and therapeutic outcomes. So there's an obvious overlap and now they are really starting to pay a lot of attention to each other." *See* Interview with Bruce J. Winick, Professor, University of Miami School of Law and School of Medicine, and David B. Wexler, Professor, University of Arizona Law School, *transcript available at* http://www.courtinnovation.org/research/bruce-j-winick-professor-university-miami-school-law-and-school-medicine-and-david-b-wexler.

[12] ERNEST M DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2013).

[13] Neil King, Jr., *As Prisons Squeeze Budgets, GOP Rethinks Crime Focus,* WALL ST. J. (June 21, 2013) *available at* http://online.wsj.com/article/SB10001424127887323836504578551902602217018.html.

[14] Wexler expresses it more fully in this way: "Whether therapeutic ends should prevail is a normative question that calls for a weighing of other potentially relevant normative values as well, therapeutic jurisprudence assumes that, *other things being equal,* the law should be restructured to better accomplish therapeutic values. But whether other things are equal in a given context is often a matter of dispute. Therapeutic jurisprudence, although it seeks to illuminate the therapeutic implications of legal practices, does not resolve *this* dispute, which requires analysis of the impact of alternative practices on other relevant values. David B. Wexler, *Putting Mental Health into Mental Health Law*, 16 LAW & HUM. BEHAV. 27, 32 (1992).

[15] David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & LAW 17 (1993). David Yamada has recently written and spoken on the

peutic jurisprudence apologist, this seems to be a worthy goal expressed in measured terms.[16]

III. Therapeutic Jurisprudence as Threat

Most critiques of therapeutic jurisprudence are constructive. These have led to refinements and improvements in its conception and theoretical basis, to its methodology, and to its relationship with legal practitioners and judges. To some extent, this sort of critique sees therapeutic jurisprudence only as a threat if it remains static, inflexible, or ideological. Therapeutic jurisprudence has always been an organic phenomenon.[17]

This is especially evident in the continuing refinements of court procedures which are directly inspired by therapeutic jurisprudence principles.[18] There have been criticisms of the trend, for example, by which some courts and legislatures make too much of cherry-picked social science data and research in order to support reforms which were motivated by strong desires to make a particular legal process or rule more therapeutic. There is always a danger that

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notion of responsible advocacy for academics, acknowledging that 'scholarship and research can open ways to engage in social change initiatives' but that advancing 'the public interest' is a nebulous concept. David C. Yamada, *If It Matters, Write About It: Using Legal Scholarship to Effect Social Change* 1 Bearing Witness: A Journal of Law and Social Responsibility (2013) *available at* http://ssrn.com/abstract=2304975; Wexler,

[16] 'Apology' being used here in the dialectic sense ascribed to the process of 'apologetics.' 'Apologetics' derives from the Greek *apologia*, which described the legal process of making a systematic theoretical defence of a position by assuming and advocating the key weaknesses or faults in the position as a means to suggesting how these faults can be repaired or reconciled (such as Plato's *Apology of Socrates*). A paradigmatic example is GH Hardy A Mathematician's Apology (1940) *available at* http://archive.org/details/AMathematiciansApology in which Hardy defends the value of the study of pure mathematics as being independent of any practical value that it generates. He argues, inter alia, that the 'uselessness' of pure maths meant it could not be used to create harm (at a time when applied mathematics was being used to produce formulae for the production of nuclear weapons).

[17] There is, in fact, some interesting ontological drift in Wexler's own articulations of the nature and scope of therapeutic jurisprudence. His conception seems to expand and contract between two key identifiable parameters: 'to identify—and ultimately to examine empirically, relationships between legal arrangements and therapeutic outcomes' and to critique the 'roots of the law' and to inform calls for 'fundamental, transformative societal change'. Research and innovations clustered around the first of these parameters are easy to identify; they are prolific. Work with direct links to the broader parameter is not so common as yet, probably as a result of the dynamic I explore in this current paper. This drift and diversity is, to some extent, reflected in the general body of therapeutic jurisprudence scholarship. *Compare e.g.,* David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 Psychol. Pub. Pol'y & L. 220 (1995) *and* David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 Touro L. Rev. 17 (2008).

[18] Diana Bryant & John Faulks, *The "Helping Court" Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia*, 17 J. Judicial Admin. 93.

the desire and need for therapeutic reform can result in poor policy based on shallow analysis of interdisciplinary data. Rathus, for example, has examined the context in which the Australian legislature in 2006 introduced significant reforms to family law legislation which created a rebuttable presumption that it is in the best interests of children for their parents to have "equal shared parental responsibility" when determining custody issues.[19] The social science data on which this significant assumption was made was far more nuanced than was suggested by the amendment. The resulting policy seemed to assume that it was a "social science fact or truth" that sharing responsibilities and duties between parents after separation is in children's best interests. Unsurprisingly, the reality is far from that simple. The wider body of research showed that shared care time can be very beneficial for children within certain families, but can in fact be quite harmful for children in others.[20]

In a watershed paper within therapeutic jurisprudence scholarship, Slobogin articulated some of the most important jurisprudential and practical challenges that therapeutic jurisprudence faced in gaining widespread credibility among legal practitioners. He noted that experience with other contextual approaches to the law had been perceived as "self-referential 'pie in the sky' scholarship read by a small coterie of devoted groupies and no one else." The five "dilemmas" posed in his paper have been subsequently explored and acted upon within the movement, and the movement has become much stronger for it. Slobogin's critique was not meant to trash or to present any knockdown arguments to demonstrate that therapeutic jurisprudence was somehow untenable. Slobogin concluded that:

> The potential for TJ to support paternalistic results should be frankly recognized and not considered a bad thing; instead, therapeutic values should be carefully segregated from and balanced against other individual-centered interests and the interests of society, ideally using an identifiable analytical framework, so as to increase TJ's chances of being taken seriously.[21]

It is the critics who are not constructive that I am generally concerned with here though. The opposition by therapeutic jurisprudence's most trenchant critics,

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[19] *Family Law Act 1975* (Cth) (Austl).

[20] Rathus argues that 'there is a gap between the complex and nuanced social science research on when shared care time actually works and the 'lego-science' of the Act. Zoe Rathus, *A Call for Clarity in the Use of Social Science Research in Family Law Decision-Making*, 26 AUSTL. J FAMILY LAW 81 (2012).

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

although virtually always seeking to ground itself in the objective frameworks of constitutionality and due process, is just as frequently expressed in quite emotive terms. One such critic, Judge Morris Hoffman (writing extra-judicially) expressed the view that:

> The therapeutic jurisprudence movement is not only anti-intellectual, it is wholly ineffective. The treatment is a strange combination of Freud, Alcoholics Anonymous, and Amway, whose apparent object is not really to change behaviours so much as to change feelings. . . . In fact I suspect that it is the improved feelings of the treaters and not of the treated, that is really driving judges' infatuation with therapeutic courts. . . .[22] Judges are a bizarre amalgam of untrained psychiatrists, parental figures, storytellers, and confessors.[23]

The desire of Judge Hoffman to so starkly, and pejoratively, contrast the role of the therapeutic judge with that of the orthodox judge, hints at a range of deeply entrenched motivations. The nature of those motivations and the values and beliefs they manifest are important to understand and grapple with if we are to meaningfully respond.[24] Additionally, a deeper consideration of these views can tell us things about the wider relationship between adversarial versus non-adversarial trends in the law.

Cohen,[25] who considers the drug courts to be at "the cutting edge of therapeutic jurisprudence,"[26] fears that therapeutic jurisprudence has promised not only a doomed "panacea in the ongoing war on drugs" but that it advocates for a therapeutic state in which an explosion in the prison population will be replaced with an explosion in the patient population.[27] He acknowledges that we have a responsibility "to help drug offenders become decent citizens," that the present "system of revolving door of drugs and crime is in need of reform,"

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[22] Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063, 2069 (2001). *See also* Morris B. Hoffman, *Problem-Solving Courts And The Psycholegal Error* 160 U. PA. L. REV.129 (2011).

[23] *Id.* at 2066.

[24] I have never met Judge Hoffman, nor those I refer to in this paper as the 'trenchant' critics of therapeutic jurisprudence. I do not presume to make comment on what may, or may not, motivate them personally in their opposition or to have any familiarity with their work outside of their published commentary on therapeutic jurisprudence.

[25] Eric Cohen, Adjunct Fellow, ETHICS AND PUBLIC POLICY CENTER, (2014) http://www.eppc.org/fellows-scholars/eric-cohen/.

[26] Eric Cohen, *The Drug Court Revolution: Do We Want Theory Rather Than Justice to Become the Basis of Our Legal System?,* THE WEEKLY STANDARD, 20 (Dec. 27, 1999).

[27] *Id.* at 23.

and that there are pragmatic and sensible procedures at work in drug courts.[28] What concerns him about therapeutic jurisprudence is his belief that advocates for drug courts and therapeutic jurisprudence "see drug courts as the first step in the transformation of the courts into a wholly therapeutic enterprise" and that there is something fundamentally troubling about suggesting that a judge can be anything other than a "dispassionate, disinterested magistrate." He concludes, "this is not an outcome that a free society should welcome." This fear or belief—that allowing the therapeutic jurisprudence position that some therapeutic and interventionist functions should complement the traditional roles of judges, is somehow antithetical to a free society—seems to underpin much of the more trenchant criticism. It is not clear on the surface why that might be.

Kates, a family law practitioner at the Florida Bar, asserts that a problem with the rise of therapeutic jurisprudence has been an increase in the number of "non-legal systems" and "non-legal professionals" intruding into the courts, resulting in "the subtle denigration of long-established precepts of lawyer independence and due process." She also asserts that it is of concern that more social science research is impacting the family court system because "the field of applied psychology is overrun with political machinations, nonsensical theories and outright misrepresentations."[29] Again, the linking of criticisms relating to due process and independence seem to be closely associated, in the mind of the critic, with some very passionate and negative views of the value of social scientists informing what happens in a court.

There are critics of therapeutic jurisprudence who are less dramatic in their articulation of the perceived dangers and threats of the movement who nevertheless adopt a position of trenchant opposition based on similar beliefs in the apparent inviolability of the adversarial ethos. Larsen and Milnes[30] seem to be of the view that therapeutic jurisprudence practitioners blame adversarialism for offender recidivism,[31] that it is over-focused on "perceived shortcomings of the Australian adversarial system,"[32] and that "a judiciary that concerns itself with offenders' social and psychological problems may undermine established legal principles."[33]

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[28] *Id.*

[29] Elizabeth Kates, *Why Therapeutic Jurisprudence Must be Eliminated from Our Family Courts,* 13 DOMESTIC VIOLENCE REPORT 65 (2008).

[30] Ann-Claire Larsen & Peter Milnes, *A Cautionary Note on Therapeutic Jurisprudence for Aboriginal Offenders,* 18 MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW 1 (2011).

[31] *Id.* at 5.

[32] *Id.* at 2.

[33] *Id.* at 1.

Freckleton has produced the most often cited cautionary note relating to the ambit and aspirations of therapeutic jurisprudence.[34] In a balanced and intelligent analysis of the relationship of therapeutic jurisprudence to both its advocates and detractors, he articulates the main criticisms of the movement and responds objectively to each of them.

He discusses a paper by Brakel[35], which Freckleton labels "the most mordant critique of therapeutic jurisprudence thus far." Brakel claims that therapeutic jurisprudence "is at best redundant, needless perhaps except as a cure for self-induced blindness. More critical it has all the attributes of a *willed departure from a more direct, common sense approach to the pertinent law* [emphasis added]."[36]

Brakel's accusation that therapeutic jurisprudence goes against a "common sense" approach to law echoes a long tradition of equating adversarialism with being rational.[37] The corollary being, perhaps, that to be less adversarial is to be less rational, and that to be non-adversarial is to be non-rational (a theme unpacked a little later in this paper). He spends quite a bit of time asserting why it is that therapeutic jurisprudence breaches all sorts of traditional legal values and protections. Freckleton's response is to remind the reader that an agenda of hijacking of due process and personal liberties is not one that therapeutic jurisprudence has ever contemplated. Some of its methods and principles are certainly evident in the ethos of, and essential to the workings of such tribunals as the drug courts, but, as Freckleton concludes:

> What [Brakel] fails to acknowledge is that therapeutic jurisprudence does not offer itself as anything more than an approach to law which recognises, highlights and explores, often through sociopsychological insights, the multifarious potential for positive and negative impacts upon stakeholders. The fallacy to which Brakel subscribes is one of positivism and expectation.[38]

In this regard, Freckleton is surely right. And in that goal, the stock of therapeutic jurisprudence has continued to burgeon. But what interests me more here is the tone of the trenchant (or what Freckleton refers to as "mordant") critics and the depth of feeling and sense of grave ideological offense they

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[34] Ian Freekelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575 (2007).

[35] Samuel Jan Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455 (2007).

[36] *Id.*

[37] *Id.*

[38] Freekelton, *supra* note 34, at 589.

seem to take to therapeutic jurisprudence. Brakel says that therapeutic jurisprudence simply "lacks content," that it is just "spurious verbal assocation," that it is in "epsitemological freefall," "mystical, if not occult," and "a paen to 'holistic' law, if not whole-earth law."[39]

Despite the assurances of therapeutic jurisprudence advocates that their agenda is modest and that the existing rights and obligations of people according to law trump therapeutic considerations if there is a conflict, the intensity of the scepticism expressed by the trenchant critics is worth exploring at a deeper level not just in terms of assessing whether any particular criticism has merit (which assessment has largely already been done in the significant weight and quality of therapeutic jurisprudence literature), but also to try and understand what really informs and motivates the level of scorn in this scepticism. In the following sections I argue that we can better understand and respond to such scepticism if we consider it from the context of worldview. Particularly, the liberal democratic worldview is marked by a sense of inevitability, hubris, and fatalism.[40]

IV. The Importance and Ubiquity of Worldview

Liberalism as a political philosophy is ubiquitous in that it is the product of a strong and resilient worldview and has produced successful and iconic systems of government. I want to explore the extent to which liberalism as both political philosophy and worldview might help to contextualize, or to partly explain, the tone and depth of feeling evident in the views of the trenchant therapeutic jurisprudence critics. There is a long and organic history to the concept of the "worldview" in scholarship within the humanities and the social sciences. Common elements throughout that history have been a focus on how worldviews shape values and the emotive dimension, which accompany judgments about whether particular elements of the social and cultural environment conform to a given worldview. Non-conforming elements or events are often rejected, not just in an objective sense, but with a concomitant, negative emotional response.

French social and cultural historians of the 1970's dabbled with the concept of mentalité'[41] as a way of capturing the underlying corporate way of seeing the world that, they asserted, transcended social class and persisted for historically significant periods of time. The term "mentalité" itself can be

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[39] Brakel, *supra* note 35, at 467-468.

[40] The irony of responding to scornful comments in language which itself may appear scornful is not lost on me here. But I am intending that terms such as 'fatalism' and 'hubris' be taken in an objective way. The following sections of this paper will attempt to provide some objective context for these terms in particular.

[41] Sometimes referred to more fully as *l'historie des mentalitiès*.

traced back to the 17th Century appearance in English academic writing of the word "mentality" which seems to have originally been of narrow ambit, referring generally to a psychological state of individuals.[42] At some stage, however, the term broadened into a wider conception of a collective psychology or "ways of thinking and feeling which are peculiar to a people or a given group of people."[43] The concept as employed by these later continental scholars is broader still and, unsurprisingly perhaps, linked to the work of Enlightenment philosophers and historians who discuss the "changed mentality brought about by the Encyclopaedists."[44] As used by 20th Century social scientists,[45] the concept has a sense of inevitability[46] (in a seemingly pejorative way) in how it applies to a group of people. Le Goff describes it as "the world vision of all members of a society" and as a "mental universe which is both stereotyped and chaotic." He says that it "refers above all to a depraved[, distorted] vision of the world, a kind of surrender to the inevitability."[47] Darnton refers to it as a sort of holistic cultural history "how they construe the world, invest it with meaning and infuse it with emotion."[48] The mentalité is the representation of the world that a group has as a result of their integration of everyday events and

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[42] Harvey A. Farberman, *Mannheim, Cooley, and Mead: Toward a Social Theory of Mentality**, 11 THE SOCIOLOGICAL QUARTERLY 3 (1970).

[43] JACQUES LE GOFF *Mentalities: A History of Ambiguities,* CONSTRUCTING THE PAST: ESSAYS IN HISTORICAL METHODOLOGY 171 (David Denby trans., 1985).

[44] *Id.* at 171. The *encyclopédistes* were 18th Century French intellectuals whose writings, collated and edited by Denis Diderot and later Jean le Rond d'Alembert, were anthologised and published as *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers, par une société de gens de lettres, mis en ordre par M. Diderot de l'Académie des Sciences et Belles-Lettres de Prusse, et quant à la partie mathématique, par M. d'Alembert de l'Académie royale des Sciences de Paris, de celle de Prusse et de la Société royale de Londres* ('Encyclopedia: or a Systematic Dictionary of the Sciences, Arts, and Crafts, by a Company of Men of Letters, arranged by M. Diderot of the Academy of Sciences and *Belles-lettres* of Prussia: as to the Mathematical Portion, arranged by M. d'Alembert of the Royal Academy of Sciences of Paris, to the Academy of Sciences in Prussia and to the Royal Society of London'). Akin to what we normally think of as an encyclopedia, this 28 volume behemoth sought to condense all of human knowledge across a range of areas into a digestible and coherent whole, for a broad professional and lay readership. One of its unique features was the categorisation of material not by categories of the perceived or natural world (or of theology), but by categories of human thought and experience. In that sense it was one of the first major works to manifest the Enlightenment ethos of putting man at the centre of the universe. The world is seen as sense data ordered by human reason and all that influences that reason.

[45] The concept retains little traction in contemporary social science research apart from mention in ethnography and historiography. It does not appear to be an area that has sparked the interest of psychologists.

[46] Le Goff, *supra* note 43, at 171.

[47] He also notes the pejorative contemporary use in colloquial English in which a person may be described as being 'mental'. *Id.*

[48] ROBERT DARNTON, GREAT CAT MASSACRE: AND OTHER EPISODES IN FRENCH CULTURAL HISTORY 3 (1999).

processes into a meaningful, teleological narrative – rather than some sort of cultural identity born of momentous events such as wars, famines, revolutions, etc.

Social and cultural historians seem to have a related interest in aspects of a society which involve what their citizens assume to be either autonomous or spontaneous assessments, observations, or actions but which are products of long-ingrained systems of popular thought rather than "improvisation or reflex."[49] The search for the mentalité of an era is a process familiar to the ethnologist. It is a search for the most stable and least mobile level of a community's or society's common beliefs and values, and qualities of stability and certainty are of course highly attractive to the jurisprudence of the common law legal systems. According to Labrouse, "the social changes more slowly than the economic and the mental more slowly than the social."[50] This is an important insight when we seek to grapple with the relationship between changing economic environments and social policy which is dependent upon worldview. The feudal concept of service, for example, and its associated political mentalité characterized by a mystical conception of monarchy, based on analyses of coronations, miraculous healings, and such, in the mind of the population goes a long way to explaining the central place religion played in pre-Enlightenment communities. Seen within the theistic worldview of the European Middle Ages, the apparently wide-held belief that the plague was divine punishment seems not just reasonable, but perhaps natural or even inevitable. Do some within the law see a strict conception of due process as equally natural and inevitable on the basis of a liberal worldview? It is at least arguable.

The nature of a worldview, in the social science literature, is also often discussed by reference to the *Weltanschauung*—"the fundamental cognitive orientation of an individual or society encompassing natural philosophy, fundamental existential and normative postulates or themes, values, emotions, and ethics."[51] This can be more simply expressed as the set of experiences, beliefs, and values that affect the way an individual or community perceives reality and responds to that perception. Note that, as for the mentality concept, the *Weltanschauung* infuses the world not just with objective meaning, but also with emotion. It informs our sense of how we ought to react to things and events in the world. So we ought not be surprised that reforms or changes, which seem to

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[49] Le Goff, *supra* note 43, at 168-170 sees the morphing of feudal Europe into capitalist Europe reflected in what its citizens have seen as natural ways of relating to each other and to 'property'.

[50] *Cited in* Le Goff, *supra* note 43, at p.167 from Ernest Labrousse, *preface to* Georges Dupeux & Ernest Labrousse, Aspects de L'histoire Sociale et Politique du Loir-et-Cher, xi, 1848-1914 (1962), http://library.wur.nl/WebQuery/clc/459493 (last visited Nov 7, 2013).

[51] Gary B Palmer, Toward a Theory of Cultural Linguistics 114 (1996).

conflict with, or amend, the objective meanings we embrace as a result of a particular worldview, generate emotional as well as intellectual responses.[52] That something we disagree with should trigger an emotional as well as an intellectual reaction is probably healthy and unavoidable. But unpacking the source of that emotive response is surely just as healthy.

In the social sciences, and in fact in some jurisprudential research, complete paradigm shifts within a particular discipline are inevitably related to shifts in how a community or society goes about organizing and understanding reality. Kuhn devotes a whole chapter of his *The Structure of Scientific Revolutions* to the importance of worldview in paradigm shift.[53] He claims that, led by a new paradigm, scientists adopt new instruments to look in new places and "the historian of science may be tempted to exclaim that when paradigms change, the world itself changes with them."[54] Since scientists see the world through the lenses of their disciplines, so the argument goes, this is understandable.[55] The role of a new paradigm as the harbinger of a changed world inevitably casts the paradigm as a threat or a promise. If a changed world is seen as a threat, then we ought not be surprised if it is accompanied by fear.

V. The Liberal Democratic Worldview

If we accept that the nature and structure of our community's social institutions (such as courts) are inevitably influenced by how we corporately "see the world," then it seems uncontroversial to suggest that the common law legal system is a product of a liberal democratic worldview. Proposed and extant changes to that system which are perceived as inconsistent with the worldview from which it springs may be assumed, especially by those who criticize those changes, to be advocating for a polity which is both illiberal and undemocratic.[56] For that reason, it is worth briefly considering how "liberalism" and

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[52] In fact, arguably the greatest value and insight of therapeutic jurisprudence is that it seeks to both lay bare and engage with, in a positive way, the emotional context and effects on all of us of the legal system.

[53] Kuhn, *supra* note 4 at 111.

[54] *Id.*

[55] This is why, Kuhn suggests, the familiar demonstrations of a switch in visual gestalts prove so compelling or novel - such as that of the famous duck and the rabbit gestalt. *See File: Duck-Rabbit Illusion.jpg*, Wikimedia (June 7, 2015) http://commons.wikimedia.org/wiki/File:Duck-Rabbit_illusion.jpg

[56] Levitsky and Way discuss whether there are any 'illiberal democracies' and come to the conclusion that such societies would be better described as governed by 'competitive authoritarianism'. How much more potentially abhorrent then, would be competitively authoritarian state which was also 'illiberal' in nature? According to the Oxford English Dictionary 'illiberal' means: "opposed to liberal principles; restricting freedom of thought or behaviour: *illiberal and anti-democratic policies archaic* uncultured or unrefined. Steven Levitsky & Lucan Way, *Assessing the Quality of Democracy*, 13 Journal of Democracy 51 (2002).

"democracy" are defined in political and jurisprudential thought. These are concepts which, although they have commonalities, have separate and distinct meanings, albeit meanings which are sometimes conflated.

Political liberalism of the kind espoused by Fukuyama, with which this paper is concerned,[57] tends to be defined largely by reference to its rather lean and libertarian American manifestations. Fukuyama proposes that: "Political liberalism can be defined simply as a rule of law that recognizes certain individual rights or freedoms from government control."[58] As will be argued below, this essentially libertarian conception of political liberalism informs and influences (to a large extent) both the vigour with which adversarial principles of due process and the adjudication of competing rights are advocated and the strength of the objections and suspicions directed towards therapeutic jurisprudence. To advocate for a process, which is seen as contrary to existing due process rights, or lacking in judicial independence, detachment, and objectivity, in a sense invites claims that some of our freedoms are being eroded or eradicated.

Fukuyama insists that the fundamental rights, which are the legitimate subject of liberal concern, are the rights, which individuals have to control their own person and property, religious rights, and political rights. He provides that for this latter class of rights we can accept Lord Bryce's description as "exemption from control in matters which do not so plainly affect the welfare of the whole community as to render control necessary" (including, Fukuyama asserts, the right to freedom of the press).[59] Fukuyama rejects arguments for the inclusion of any wider conception of liberal political rights—referring to attempts to provide a statutory basis for such things as rights to employment, housing, or health care as the practices of "socialist countries to press for the recognition of second- and third-generation economic rights."[60]

According to Fukuyama, democracy is basically just the manifestation of an additional liberal right, namely "the right held universally by all citizens to have a share of political power, that is, the right of all citizens to vote and participate in politics."[61] But in determining which countries are democratic, he uses a more stringent definition and limits the definition to those nations that allow citizens (by right) to choose government at regular intervals, by means of

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[57] In the sense that the 'liberal democratic worldview' is said to inform a certain type of polity and its institutions.

[58] FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (2006).

[59] *Id.* at 43 (citing 1 JAMES BRYCE, MODERN DEMOCRACIES (2012) (Classic Reprint).

[60] *Id.* at 43. He claims that these so-called second and third-generation rights are that they are 'not clearly compatible with other rights like property or free economic exchange.'

[61] FUKUYAMA, *supra* note 58, at 43.

a secret ballot at multi-party elections.[62] He warns against a less stringent, formal definition of democracy which runs the risk of an abuse of these fundamental rights for the sake of a more substantive definition which has allowed dictators and autocrats to rule "in the name of' the people."[63] The more interesting implication of the libertarian rights-based conception of democracy is that we can have a particular nation, which is liberal or democratic yet, not both.[64] The possibility of decoupling the qualities of "liberal" and "democracy" in terms of the structure of a polity will become important later in this discussion as we consider what Fukuyama, and others, consider to be the ultimate form of political governance, the "liberal democracy." An attack on some perceived liberal right or guarantee, in a society where these two qualities are seen as politically symbiotic, implies that there is a de facto attack on democracy.

Ronald Dworkin proposes a less overtly libertarian definition of a democracy as "government according to the will of the majority expressed in reasonably frequent elections with nearly full suffrage after political debate with free speech and a free press."[65] Dworkin's definition is, of course, consistent with all sorts of liberal rights and guarantees, but does not go so far as to prescribe them or to predicate them to the extent that Fukuyama does.

It is very common, across the literature in a range of disciplines, to read discussions of the relationship between the narrower, so-called "neo-liberalism" and the functions of the state and its institutions and organs. Although neo-liberalism is used in such a wide range of academic contexts that it has a notoriously vague meaning and ambit,[66] most would agree that it revolves around the assumption that what is good for the economic well-being of a community is that the community is free to pursue its material self-interest via the operation of a minimally regulated free market and that this economic freedom is the best insurance of its social well-being (other things being equal).[67] This

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[62] *Id.* Given that there is no constitutional right to expect elections based on candidates with any party affiliation in Australia, nor any constitutional right to a secret ballot, this begs the question as to whether Australia would qualify as a democracy for the purposes of the definition.

[63] *Id.* He uses the example of the justification appealed to by Lenin and the Bolshevik party to dismantle the Russian Constituent Assembly so that purportedly less corrupt individual leaders could carry out the democratic will of the people.

[64] *Id.* Fukuyama suggests 19th Century Britain as an example of a liberal society which was not particularly democratic, that is, it enforced a number of liberal rights but the voting franchise was very limited. The Islamic republic of Iran, on the other hand, has fairly regular elections, but very few of the other liberal rights.

[65] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 347-348 (2011). .

[66] Dag Einar Thorsen, *The Neoliberal Challenge. What is Neoliberalism?*, CONTEMPORARY READINGS LAW SOCIETY JUSTICE 188–214 (2010).

[67] Ryan claims that all forms of political liberalism manifest four fundamental properties: "It is *individualist*, in that it asserts the moral primacy of the person against the claims of any social

assumption has come under some significant pressure as a result of the Global Financial Crisis of 2009 and the well-documented failure of a number of public policies based on neo-liberal postulates.[68] Many law and justice researchers and peak economic bodies[69] conclude that the subjugation of public policy to market structures and forces across a broad spectrum of portfolios leads to elevated levels of social inequality and all of the associated social problems that we know inevitably follow from such inequality (such as higher crime rates and demographic friction).[70]

It is increasingly common, however, for governments in liberal democracies to willingly intervene in markets and to regulate them, in order to both attempt to prevent dysfunction and to repair fundamental problems rather than to punish individual transgressions by corporations. This might, to some extent, be related to the phenomenon of the problem-solving courts, where judges are far more interventionist and managerial than would be the case in a mainstream court (informed by traditional liberal principles), in an attempt to resolve the causes of the offense and to identify and repair dysfunction. It is far from certain whether intervention by the state (or by its agents) cannot be tolerated, or whether such intervention necessarily foreshadows further erosion of individual liberties.[71]

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collectively: *egalitarian*, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; *universalist*, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and *meliorist* in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite identity which transcends its vast internal variety and complexity." Ryan Alan, *Liberalism*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 291-311 (Robert E. Goodin, Philip Pettit & Thomas W. Pogge eds., 2012).

[68] A thorough and accessible discussion of the causal mechanisms that explain the association between social inequality and crime, in the context of market driven public policy, can be found in: Ross L. Matsueda & Maria S. Grigoryeva, *Social Inequality, Crime, and Deviance, in* HANDBOOK OF THE SOCIAL PSYCHOLOGY OF INEQUALITY (J. D. McLeod, E. J. Lawler & M. L. Schwalbe eds., 2013).

[69] *See, e.g., An Overview of Growing Income Inequalities in OECD Countries: Main Findings,* DIVIDED WE STAND, WHY INEQUALITY KEEPS RISING (2011) *available at* http://www.oecd.org/els/soc/49499779.pdf.

[70] There is, of course, a significant body of literature in sociology and criminology which suggests that even where people make rational choices about engaging in conduct which they know to be criminal, those choices are made in the context of 'unequal power, resources and opportunities for upward mobility.' Torsen and Lie above n.36 at 51.

[71] And in fact, support for interventionist judging and therapeutic jurisprudence is increasingly coming from some quite conservative sources. It does not appear to be the case, nor am I arguing here, that a libertarian worldview entails ideological resistance per se to therapeutic jurisprudence. The fact that support for problem solving courts and alternative dockets are gaining support from conservative policy bodies, judges and legislators in some places highlights the strong possibility of a more even policy terrain in law and justice which is more resistant to ideological swings

Despite the rhetoric of freedom from state interference and coercion in liberal democratic states, the social contract empowers the state to abstract offenses committed by citizens towards other citizens as offenses against it. "Offences" or "crimes" are often legislatively defined in common law jurisdictions as acts or omissions liable to state-sanctioned and imposed punishment.[72] Extra-curial punishment and vigilantism are generally prohibited and are themselves offenses against the state.

It is one thing to view the operation of a minimally regulated free market, which informs and provides a model for public policy, as a society's best insurance of social well-being and to conclude that such a market is intrinsic to the workings of a liberal democracy. But some say that it is a mistake to think that this form of political organization is simply the result of historical trial and error or that it is just one way of achieving the best balance between the interests of the state and of the individual. Some say that the emergence of a liberal democracy is both inevitable and optimal and that, therefore, its essential institutions are inevitable as well. The stronger sense one has of the inevitability and infallibility of an institution, the more vigorously one is likely to react to perceived changes to it.

VI. The Purported Teleological Inevitability of the Liberal Worldview

There is, in fact, a powerful and pervasive narrative, which conceives of the liberal democratic state, as sitting at the apex of some teleological[73] inevita-

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between jurisdictions and between administrations. *See e.g.,* Richard A. Viguerie, *A Conservative Case for Prison Reform*, Conservative HQ (June 10, 2013) *available at* http://www.conservativehq.com/node/13765 (published by the Tea Party aligned Conservative HQ who propose that: "Right on Crime exemplifies the big-picture conservative approach to this issue. It focuses on community-based programs rather than excessive mandatory minimum sentencing policies and prison expansion. Using free-market and Christian principles, conservatives have an opportunity to put their beliefs into practice as an alternative to government-knows-best programs that are failing prisoners and the society into which they are released.").

[72] *See, e.g., Criminal Code Act 1899* (Qld) s 2 (Austl) (defining offence as 'an act or omission which renders the person doing the act or making the omission liable to punishment').

[73] Teleology being the belief those just as human behaviours is engaged in with some end in mind, so natural phenomena and objects are ingrained with some ultimate end or purpose. The telos of a thing being its natural end point (sometimes claimed to be a 'goal' in a nonanthropomorphic sense). Human societies, therefore, are imbued with a natural tendency towards political organisation, the ultimate form of which is the liberal democratic state. That is not to argue that any particular state, or any state at all, will achieve that telos, but that in ideal conditions where a political community is allowed to flourish, this will be the inevitable end point. Teleology has its origins in the natural philosophy of Plato and Aristotle. *See* Alasdair C. MacIntyre, First Principles, Final Ends and Contemporary Philosophical Issues (1990); Alisdair C. MacIntyre, The Tasks of Philosophy: Selected Essays Vol. 1,(Cambridge University Press, 2006); Andrea Falcon, *Aristotle on Causality,* The Stanford Encyclopedia of Philosophy

bility. This narrative has intimate connections to the ways in which people of the West have perceived themselves and their place in the natural world for millennia. It also has within it a clear and inseparable thread of beliefs about competition, rights, and adjudication—in other words, of beliefs about the role of adversarialism. To put this narrative in perspective, it is worth considering that a belief in conflict, competition, and punishment as being a necessary, utilitarian property of both physical and political life has an ancient and somewhat visceral origin according to a growing body of research in evolutionary psychology. According to Petersen and Sell *et al*[74]:

> As in other species, the social world of our ancestors contained individuals who were poised to exploit others if such acts were self-beneficial. This selection pressure favoured the evolution of psychological mechanisms designed to counter exploitation of one's self, family, and social group through punishment.[75]

Given that early humans operated in a small-scale social world characterised by dense social networks with inevitably high levels of interdependence, we ought not be surprised that various strategies designed to counter exploitation are likely to have been subject to selection mechanisms in similar ways to many other social and physical characteristics of people.[76] Data from across cultures evinces a high level of consistency in how people assess the seriousness and gravity of various sorts of conduct and offenses. According to the received view in evolutionary psychology, this reflects an "evolved sense of justice such

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(Edward N. Zalta ed., Winter 2012) http://plato.stanford.edu/archives/win2012/entries/aristotle-causality/.

[74] Michael Bang Petersen et al., *To Punish or Repair? Evolutionary Psychology and Lay Intuitions About Modern Criminal Justice*, 33 EVOLUTION AND HUMAN BEHAVIOR 682, 682 (2012). Others have examined empirical evidence for the hypothesis that a desire to punish those we perceive as wronging us is mitigated by a desire for restoration of relationships which we perceive as having future and continued benefit. Michael E. McCullough, Robert Kurzban & Benjamin A. Tabak, *Evolved Mechanisms for Revenge and Forgiveness*, UNDERSTANDING AND REDUCING AGGRESSION VIOLENCE, AND THEIR CONSEQUENCES 221 (2010); and that this phenomenon colours our perceptions of, and attitudes towards, criminal justice institutions: Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice,* 60 VAND. L. REV. 1633, 1633 (2007).

[75] *See also* John T. Jost & David M. Amodio, *Political Ideology as Motivated Social Cognition: Behavioral and Neuroscientific Evidence*, 36 MOTIVATION AND EMOTION 55 (2012); Ryota Kanai et al., *Political Orientations are Correlated with Brain Structure in Young Adults*, 21 CURRENT BIOLOGY 677 (2011).

[76] Eyal Aharoni & Alan J. Fridlund, *Punishment Without Reason: Isolating Retribution in Lay Punishment of Criminal Offenders.*, 18 PSYCHOL. PUB. POL'Y & L. 599 (2012).

that individuals prefer sanctions that are proportional to the seriousness of the crime."[77]

According to the recalibration theory of counter exploitation,[78] there is a counterbalancing element within this algorithm. Although the way we judge the seriousness of an offense informs the severity of our response to an exploiter/offender, our perception of how socially related we are to them (in terms of the offender's potential value as an associate) informs our opinion of whether we prefer to respond by punishing them or by "repairing."[79]

If the recalibration theory is correct, then punishment may have a very privileged place indeed in our social and political psyche. It may also form part of the explanation as to why the perception of being vulnerable to exploitation by others and the emergence of a rights discourse, as both a prophylactic and a remedy, form such a definitive part of the liberal worldview. To define interpersonal tension as something other than a problem to be "resolved" by an adjudication of the relevant personal rights of those involved in the problem may be seen as unnatural or irrational to the extent that it sits outside the recalibration theory. To refrain from punishment or to take a non-punitive approach to a perceived exploiter might seem unnatural in that it runs counter to attitudes that have been "selected." There is also evidence for this perspective, on the link between punitiveness and a sense of what is rational, in the historical evolution of the liberal nation-state itself.

In a political context, we can trace this connection at least as far back as the emergence of the Greek *polis* (city-state). By the process of "Synoecism" (literally "dwelling together in the same house"), smaller Greek communities incorporated themselves into larger political and economic commonwealths characterized by a governing oligarchy drawn from a newly emergent class of landowners.[80] This incorporation was driven primarily as a response to external threats and competition. Although fundamentally autonomous and independent, Greek city-states had to continually fight for survival. This political

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[77] John M. Darley & Thane S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 PERSONALITY & SOCIAL PSYCHOLOGY REVIEW 324 (2003).

[78] Petersom and Sel et al above n.33.

[79] M. B. Petersen, A. Sell, J. Tooby, & L. Cosmides, *Evolutionary Psychology and Criminal Justice: A Recalibration Theory of Punishment and Reconciliation*HUMAN MORALITY AND SOCIALITY: RVOLUTIONARY AND COMPARATIVE PERSPECTIVES 72–131 (H. Høgh-Olesen ed., Hampshire: Palgrave Macmillan 2010).

[80] The Greek world 'Synoecism' was the process involving a morphing of several smaller communities to form a single larger community. Sometimes the union was purely political and did not affect the pattern of settlement or the physical existence of the separate communities: this is what the Athenians supposed to have happened when they attributed a synoecism to Theseus. NICHOLAS P WHITE, INDIVIDUAL AND CONFLICT IN GREEK ETHICS (2004)(citing SIMON HORNBLOWER, ANTONY SPAWFORTH & ESTHER EIDINOW, THE OXFORD CLASSICAL DICTIONARY (2012)).

reality became an integral part of the Greek worldview. Conflict was seen as inevitable and natural, and therefore manifested in all parts of Greek culture—even into the perceptions of what manner of being the citizens were. Rational man continually struggled against brute irrationality;[81] hence the inevitable disputes between city-states were clothed in the language of conflicts between the rational and the irrational, between the moral and the immoral.[82] The significant costs paid by citizens in defense of the state were inevitable and accepted.[83] Even today, those who are perceived as risking their life in the name of the state are usually given privileged status as heroes and patriots. Those who criticize the state, and by implication its organs and institutions, are more likely to be derided as anarchists and cowards—or perhaps as "a bizarre amalgam of untrained psychiatrists, parental figures, story tellers and confessors."[84]

A teleological view of human social organization continues to resonate with contemporary political theorists. The failure of Marxism, fascism, totalitarianism, and even of constitutional monarchies over the past century or so is evidence, according to this view, not just of the inability of these political and economic systems to effectively manage and sustain a civil society in the long term, but it is also evidence that:

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[81] Plato had a particularly pessimistic view about the nature of man. Although he did not see people as innately evil or vicious, he did consider them to be corrupted and fundamentally irrational. In *The Republic* he characterises them as controlled by their base appetites and egoistic passions. These troubling characteristics are even more dangerous, he believed, given that people are generally poorly informed and shallow thinkers.

[82] Thracymachus, a key protagonist in the first book of *The Republic*, argues a worldview defined by the primacy of self-interest (*pleonexia*). Far from being a vice, this *pleonexia* (akin to the objectivism of an ancient Ayn Rand) is a natural force which shapes and gives meaning and value to human existence. According to Fissell: 'This creates an order in which the strongest thrive and the weak die off, which is the way Thrasymachus believes things *should* be according to the ways of the universe. Thrasymachus goes beyond inconsistency, descriptive observation, legalism, and amoralism.' Brenner Fissell, *Thrasymachus and the Order of Pleonexia*, 19(1) APORIA 35 (2009). Fissell notes that Thrasymachus is making a proto-Darwinian argument about the order of the cosmos and is thereby is the obvious conceptual precursor to Callicles, who asserts that: "Nature itself reveals that it's a just thing for the better man and the more capable man to have a greater share than the worse man and the less capable man" (*Gorgias* 483d). 'If one has strength and knowledge, then his *pleonexia* is legitimate. If he can somehow manage to get more than others, he is entitled to keeping it. *Pleonexia* creates its own order through competition in which there is survival of the fittest. Interestingly for the purposes of the current paper, Fissell concludes with a trite but useful statement that Thrasymachus could well be describing a "law of the jungle" that many American capitalists would likely agree with.

[83] NEIL MACGREGOR, A HISTORY OF THE WORLD IN 100 OBJECTS (2010). As were perhaps both corporal and capital punishment. It is certainly of interest that the nation which currently engages in the highest level of capital punishment is also the icon of the liberal democracy.

[84] Hoffman, *supra* note 22 at 2069. .

> What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.[85]

Such explicit claims appear startling at first blush. Is Fukumaya really suggesting that Western liberal democracy is the inevitable political manifestation of the natural social order? He certainly is. And it is a theme which is very seductive to the conservative thread in law and jurisprudence which embraces libertarian values as not only inalienable but hardwired. In fact, the very nature of a written constitution guarantees that the relationship is reciprocal: that is, that law is linked to the liberal worldview in the very coercive fabric of the Rule of Law. Rhetoric about the Rule of Law forms something of an Urtext in writings and scholarship about American social and political history, and this is particularly apparent in the apologia some legal scholars and judges produce in relation to the adversarial system. Kagan observes that:

> [t]he rhetoric of law is deeply rooted in American consciousness, and has been so embedded since the founding of the country, as captured by John Adam's oft quoted description of the American polity as a government of law, not of men.[86]

Political tradition, according to this perspective, has operated to socialize citizens with a sense that an adversarial adjudication of disputes, and prosecution of alleged offenses, backed by comprehensive government assurances and resources for the institutions of adjudication are what makes a liberal society safe to live in. It is the best mechanism we can aspire to in order to reduce stresses and tensions within a community. The state, according to Kagan, provides incentives for citizens to resort to adversarial legal weapons but does relatively little to convene or give resources to institutions that effectively channel contending parties and groups into less expensive and more efficient ways of resolving disputes. The default position of privileging adversarial processes gives the adversarial process an air of inevitability and natural authority. Yet, a deeply ingrained distrust of government power, says Kagan,

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[85] Francis Fukuyama, *The End of History?,* THE NATIONAL INTEREST, 18 (Summer 1989) *available at* http://www.wesjones.com/eoh.htm. FUKUYAMA, *supra* note 58.

[86] ROBERT A. KAGAN, AMERICAN LEGALISM: THE AMERICAN WAY OF LAW 18 (2002).

results in a fragmentation of political authority that must be held accountable via judicial review and civil suits.[87]

This is not to say, so the argument goes, that some less ideologically mature societies may not still be struggling towards the prize of liberal political stability. The so-called Arab Spring is perhaps a stark reminder that some peoples have a way to go before they can aspire to the political and economic environment that spawned the much-vaunted American exceptionalism. The utopian visions of the Western liberal democracies, held by the Arab nations (and, in previous decades, the Eastern bloc nations) who wanted to escape communist and totalitarian oppression, were somewhat naïve. They wanted political and economic emancipation but also wanted to retain a significant social welfare safety net. France, Britain, and the United States went through particularly bloody civil wars and decades of social unrest to evolve their modern political orders. But even where the desire for the liberal endpoint manifests itself in struggle, and where that struggle fails, the liberal endpoint is the best compromise between the desire for personal autonomy and for a stable community.[88]

According to Fukuyama, we have reached the zenith of human political development. That zenith, he suggests, is manifested in the values and institutions of the liberal democratic state.[89] All the other major modes of political and social organization, which have been experimented with in the course of our history, have failed, along with the worldviews that informed them. Some,

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[87] *Id.* at 108. This does sound significantly comparable to the style of administrative law and of government regulation, accountability and oversight in the liberal democracies, including Australia. The exponential growth of the tribunal system as a means of obtaining redress against public authorities is some evidence of this as in an increasing reliance on sanctions among regulatory bodies. There is quite a bit of empirical support for this in Kagan's research. He finds that regulatory authorities and public interest matters are much more likely to be collaborative in the civil law jurisdictions than in those with an adversarial system of law evolving from the Westminster system.

[88] Zizek notes the obvious in reminding us that an immature conception of a capitalist, liberal political order ignores the fact that a market inevitably produces losers. The lure of competition as a vehicle for just and equitable outcomes which provides the greatest chance for the most to flourish is seductive but inevitably results in disillusionment for some. Although it is beyond the scope of the current paper, Zizek also sees the modern liberal state as a sort of end point. He is less sanguine about this than Fukuyama however. For Zizek the sort of liberal democratic state which Fukuyama considers to be an end point in terms of being the best we can hope for, is in fact, a political and social apocalyptic end point. He claims that there are four factors which are contributing to the end of the liberal state, all of which are products of liberalism. They are: (1) The 'ecological crisis', (2) The consequences of the biogenetic revolution, (3) Resources imbalances (including raw materials, energy, food, water and intellectual property) and (4) An 'explosive growth' of social divisions and exclusions. SLAVOJ ZIZEK, LIVING IN THE END TIMES x (2011) (introduction).

[89] Fukuyama, *supra* note 58.

like fascism, totalitarianism, and communism, took a terrible toll of human suffering in order to demonstrate their failings. But the liberal state is more robust, more tolerant of deviance, and therefore more widely accepted by its citizenry. In fact, the relationships between citizens, and between citizens and property, are at the very heart of the liberal ethos. These relationships evolved as a natural extension and manifestation of the hope that a more educated and prosperous middle class placed in the power of rationality and empiricism (which Enlightenment intellectuals promised) would reconstruct our conceptions of nature—and man's place in it.[90] This manifestation of the liberal ideals of personal rights and autonomy are of course iconic within some of the foundational political documents of the 18th and 19th centuries, including the American Declaration of Independence, the United States' Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen.

Fukuyama is no theoretical outlier. He traces the intellectual heritage and genesis of the belief in the liberal state as political telos back through the political and social theories of Kant and Hegel. Kant took a teleological view of the vagaries of human history, claiming that our civilization was on a trajectory characterized by the citizenry's awareness of personal liberty, or, as Hegel put it, "[t]he History of the world is none other than the progress of the consciousness of Freedom."[91] Echoing the somewhat convergent thoughts of the mentalité' theorists who held that a worldview involves a "kind of surrender to the inevitability,"[92] Fukuyama is fatalistic about the nature of a civilization which has, in fact, fully realized its political telos. He opines that:

> The end of history will be a very sad time. The struggle for recognition, the willingness to risk one's life for a purely abstract goal, the worldwide ideological struggle that called forth daring, courage, imagination, and idealism, will be replaced by economic calculation, the endless solving of technical problems, environmental concerns, and the satisfaction of sophisticated consumer demands. In the post historical

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[90] For an interesting discussion of the relationship between the faith placed in rationality and reasoning in managing relationships and the argument that a rational approach is inexorably linked to a perspective that involves the domination of things and persons, *see* AXEL HONNETH, ENLIGHTENMENT AND RATIONALITY, 84 THE JOURNAL OF PHILOSOPHY 11, 692 (1987) *availabile at* http://www.jstor.org/stable/10.2307/2026776 (last visited Nov 7, 2013).

[91] GEORG WILHELM & FRIEDRICH HEGEL, THE PHILOSOPHY OF HISTORY 19 (J. Sibree trans, New York Dover 956).

[92] *Id.*

> period there will be neither art nor philosophy, just the perpetual care taking of the museum of human history.[93]

A recognition of the intimacy of the relationship between a conception of the liberal ideal, of the kind Fukuyama articulates, and the adversarial juristic paradigm may well play out in a fatalistic attitude towards the perennial or "wicked" problems[94] experienced by the legal and justice systems in the common law world, such as offender recidivism, rising prison populations, and the over-representation in the justice system of the poor, those with mental illnesses, and those from particular indigenous or ethnic groups.[95] Once political and social theory become grounded in some sense of the natural order of things, the institutions and processes generated by them become cloaked in the cloth of orthodoxy and inevitability and tend to be advocated for and protected with an almost fundamentalist zeal.[96] Kant's assertion that history would have a teleological defined end point, characterized by "a society in which freedom under

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[93] Fukuyama, *supra* note 85. This is a strikingly similar view to Kuhn's contrast between periods of normal science and of crisis within a field, whereby practitioners are engaged in mere puzzle solving by manipulation of exiting paradigmatic exemplars and processes, rather than being faced with problems which challenge those exemplars. Kuhn, of course, never held that the process of paradigm shift had any natural direction or end point – for him, paradigms shift based more on the sociology of the field in question rather than on the basis of any natural features of the world. WILHELM & HEGEL, *supra* note 91, at 40 (articulated with greatest clarity in the 1969 postscript).

[94] The concept of a 'wicked problem' as one which seems to resist all attempts at a solution from within the prevailing disciplinary or political orthodoxy was first ventilated in: Horst W. J. Rittel & Melvin M. Webber *Dilemmas in a General Theory of Planning* 4 POLICY SCI'S. 155 (1973).

[95] In an often cited paper addressing the relationship between wicked problems and the credibility of a discipline, by reference to critical criminology, Young observed that: "he trouble with criminology is that it cannot explain crime. And being unable to explain the phenomenon, its persistent, if diverse, suggestions as to how to tackle the problems, grind to a halt in a mire of recidivism, overcrowded prisons and failed experiments." Jock Young, *The Tasks Facing a Realist Criminology* 11 CONTEMPORARY CRISES 337, 356 (1978).

[96] Some judicial defences of the primacy of adversarial processes are strong but measured: 'Courts are courts; they are not general service providers who cater for 'clients' or 'customers' rather than litigants. And if courts describe themselves otherwise than as courts, they run the risk that their 'clients' and their 'customers' will regard them, correctly in my view, as something inferior to a court.' ANTHONY MASON, THE FUTURE OF ADVERSARIAL JUSTICE 5 (1999) http://www.aija.org.au/online/mason.rtf (paper presented at the 17th Annual AIJA Conference, Adelaide). Others are less measured: 'I chuckle at problem-solving enthusiasts who claim they are get-ting at the "causes" of the problems, while we in problem-creating courts are just dealing with the "effects." It is simply not true. One link in the causal chain does not a cause make. No teen court judge thinks he can solve the aching loneliness inherent in adolescence, even though a nice judicial pep talk might make everyone feel good for a while. Even the boldest of veterans court judges do not think they have a mandate to end war in an effort to stop war-related post-traumatic stress disorder.' Morris B. Hoffman, *Problem-Solving Courts And The Psycholegal Error* 160 U. PA. L. REV.129 (2011)

external laws is associated in the highest degree with irresistible power i.e. a perfectly just civil constitution and its universalisation, is the highest problem Nature assigns to the human race."[97] Rather ominously, but instructively for our purposes, Kant did not see rationality as the catalyst for the rise of the liberal democracy as the end point of social evolution. That role he ascribed to competition and man's essential "asocial sociability."

Kant essentially viewed human interpersonal conflict as a positive force. He claimed that it was, in fact, essential for each particular individual's self-development. He was convinced of the natural "antagonism" among men in a society, which seems to have been an almost unbroken (although of course not universal) theme in political thought since the days of the Greeks. He defined man's natural attitude as "asocial sociability," meaning "their tendency to enter into society, combined, however, with a thoroughgoing resistance that constantly threatens to sunder this society."[98] But Nature intends man to live in harmony, according to Kant, and the struggle to survive in the face of irrational aggression awakens his efforts to build a robust polity. He says that "Man wills concord; but nature better knows what is good for the species: she wills discord," and "[t]his resistance wakens all of man's powers, brings him to overcome his tendency towards laziness."[99] This striving to overcome the lazy capitulation to aggression, competition, and resistance is part of Nature's goal, Kant claims, for man to survive, flourish, and reach his natural "ends."

VII. CONCLUSION

Is this thread of deterministic and naturalistic thinking, so often reflected in the sort of teleological liberal democratic worldview espoused by Fukuyama, a useful backboard against which to highlight the emotive views of the more trenchant critics of therapeutic jurisprudence, the drug courts, and other non- or less-adversarial tribunals and processes? I believe it is.

There is little doubt, I think, that liberal democracy is probably the most robust form of human political and social organization that we have experienced because, as Fukuyama suggests, it has a wide appeal derived from a greater tolerance of deviance than other forms of social governance. As a consequence, the institutions of a liberal democracy, including its legal systems, are fairer and more equitable because of a relatively strict observance of due process as a touchstone of tolerance. The liberal democracies survive longer, perhaps, because a reasonable diversity of views and values are "permitted" to

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[97] IMMANUAL KANT, IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW, (Lewis White Beck trans., 1963) *available at* https://www.marxists.org/reference/subject/ethics/kant/universal-history.htm.

[98] IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS, 31 (Ted Humphrey trans., 1983).

[99] *Id.* at 32.

flourish. The founding of, arguably, the greatest of the liberal democracies—the United States of America—is of course deeply entrenched in historical events (both actual and mythical) that are steeped in the form and language of liberty and egalitarianism. It is unsurprising, therefore, that lawyers and judges would want to vigorously respond to reforms and procedures which they perceive as inconsistent with, or as a threat to, these values—whether they acknowledge or are consciously aware of that perception or not.

But, as I have suggested, the level and intensity of the rhetoric engaged in by some of the more trenchant critics of therapeutic jurisprudence points to something more than a simple defence of due process. It hints at a certain level of jurisprudential fundamentalism (usually identifiable by a degree of hyperbole and emotive language which would not normally be tolerated in academic literature) which, if not unmasked and called to account, has the potential to not just muddy the waters of court reform, but to derail it.

Surely there is scope within the ambit of the liberal democratic worldview for some flexibility in the nature of courts and of what it means to be a judge. Due process need not be a procedural nor ideological tyrant. The flourishing of the problem-solving courts is clear evidence of that. But a worldview which is adhered to with a sense of inevitability, hubris, and fatalism does not bode well for a positive evolution of the law as one of the key institutions of civil society.

Poet laureate Ted Hughes provides a wonderful metaphor for the dangers of hubris that accompany overconfidence in the status quo in his poem, "The Pike."[100] The carnivorous fish has no real competitors in "its world" and is therefore "stunned by its own grandeur" and is "a life subdued to its instrument." We must avoid the risk of our legal institutions (and their perceived symbiotic relationships with libertarian democracy) becoming so stunned by their own grandeur that they become institutions subdued to their own instrument and terrified of change for fear of becoming weak.

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[100] TED HUGHES: COLLECTED POEMS (Paul Keegan, ed., 2003).

When a Bill Becomes a Life: A Concentration on Why Arizona Should Pass Senate Bill 1016

Melanie Walthour*

I. Introduction

Suicide is the second leading cause of death of youth between the ages of fifteen and twenty-four and the third leading cause of death of youth between the ages of ten and fourteen.[1] Arizona Senate Bill 1016 ("SB-1016") would make it mandatory for all public school personnel to receive suicide awareness and training within twelve months of their initial hire date.[2] Suicide awareness and training will assist personnel with the proper means to save the lives of youth. According to School Health Policies and Practice Study ("SHPPS"), about 80% of states "provided technical assistance" to districts or schools on suicide prevention training.[3] About 66% of states "provided or distributed model policies, policy guidance, or other materials on suicide prevention education", and 54% of states "developed, revised, or assisted in developing model policies, policy guidance, or other materials on suicide prevention education."[4] SB-1016 will place Arizona among the majority of states that have implemented new suicide prevention education in their schools and advance current suicide prevention policies to save lives.

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[1] *Ten Leading Causes of Death by Age Group, United States-2011*, Centers for Disease Control and Prevention, http://www.cdc.gov/injury/wisqars/pdf/leading_causes_of_death_by_age_group_2011-a.pdf (last visited Nov. 7, 2014).

[2] S.B. 1016, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (held in committee).

[3] *Suicide Prevention*, Centers for Disease Control and Prevention, http://www.cdc.gov/healthyyouth/shpps/2012/factsheets/pdf/FS_SuicidePrevention_SHPPS2012.pdf (last visited Nov. 7, 2014).

[4] *Id.*

In 2013, Arizona's high school students were more likely to seriously consider, plan, and attempt suicide than the total average of high school students nationwide.[5] This bill should pass because: (1) Arizona's youth are at a higher risk in considering and attempting suicide thereby increasing Arizona's need to be proactive rather than reactive, (2) it is possible to detect warning signs of suicidal victims with proper training and respond accordingly, and (3) intervention is effective. Thus appropriate training and awareness will assist personnel with the proper means to intervene in order to help and guid students and their families to the appropriate services.

II. Background

SB-1016 proposes that all public school personnel must receive at least two hours of suicide awareness and training beginning the 2015-2016 year.[6] The training must occur within twelve months of the initial hire date, and personnel must subsequently renew their training at a minimum of every five years.[7] The training must be within the framework of existing in-serving training programs offered by both, the State Board and Department of Education.[8] The bill also proposes that the State Board of Education consult with other government entities, stakeholders, and experts that focus on suicide prevention and develop a list of approved training material to fulfill the requirements of the bill.[9] The approved material must include training on how to identify appropriate mental health services within the school and within the larger community, and the appropriate timing to refer pupils and their families, to such services.[10]

III. Increasingly, Arizona Youth Are Considering, Planning, and Attempting Suicide are exponentially increasing.

"Suicide (i.e., taking one's own life) is a serious public health problem that affects [youths]."[11] Suicide is the third leading cause of death for youth

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[5] *High School Youth Behavior Risks Survey*, Centers for Disease Control and Prevention, http://nccd.cdc.gov/youthonline/App/Results.aspx?TT=G&OUT=0&SID=HS&QID=QQ&LID=AZB&YID=2013&LID2=XX&YID2=2013&COL=&ROW1=&ROW2=&HT=QQ&LCT=&FS=S1&FR=R1&FG=G1&FSL=&FRL=&FGL=&PV=&C1=AZB2013&C2=XX2013&QP=G&DP=1&VA=CI&CS=N&SYID=&EYID=&SC=DEFAULT&SO=ASC&pf=1&TST=True (last visited Nov. 7, 2014).

[6] *Supra* note 2.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Suicide Prevention: Youth Suicide*, Centers for Disease Control and Prevention, http://www.cdc.gov/violenceprevention/pub/youth_suicide.html (last updated Jan. 9, 2014).

between the ages of ten and twenty-four.[12] In 2012, Arizona Department of Health Services reported 1070 total suicide deaths.[13] Of that total, 273 were youth between the ages of ten and twenty-four.[14] Although 273 out of 1070 may seem like a small portion, suicide deaths only make up a small portion in relation to youth who considered, planned, and attempted suicide. The percentage of high school students who strategically planned their suicide increased from 2009 to 2013.[15] In addition, one out of six high school students seriously considered attempting suicide in the past twelve months.[16] Arizona's 2013 High School Survey not only indicates that students planned and considered attempting suicide, but also shows that one out of ten students actually attempted suicide one or more times during the past twelve months.[17] Although these numbers represent recent surveys of high school students, middle school and college students are at risk as well. The bottom line is: Arizona can do more.

It is time to get ahead of this epidemic, and requiring school personnel to complete suicide awareness and prevention training is the fundamental step necessary. The Suicide Awareness Voices of Education ("SAVE") uses "education to raise awareness of suicide."[18] Requiring school personnel to complete suicide awareness and prevention training will educate school personnel on how to identify appropriate mental health services within the school and within the larger community, and how to appropriately make referrels to those services at the appropriate time.[19] Suicide is preventable. According to SAVE, there are at least eight to twenty-five attempts of suicide to one completion.[20] This fact indicates that if school personnel are educated on how to identify and prevent suicide, they have eight to twenty-five opportunities to detect warning signs, intervene, and save a life.

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[12] *Id.*

[13] *Number of Suicides by Age*, ARIZ. DEPARTMENT HEALTH SERVICES, http://www.azdhs.gov/plan/report/im/2012/3/pdf/3-6.pdf (last visited Nov. 7, 2014).

[14] *Id.*

[15] *Youth Risk Behavior Survey Results*, ARIZ. DEPARTMENT EDUC., 3, http://www.azed.gov/prevention-programs/files/2013/11/2013azbh-trend-report.pdf (last visited Nov. 7, 2014).

[16] *Id.*

[17] *Id.*

[18] *Suicide Prevention*, SUICIDE AWARENESS VOICES EDUC., http://www.save.org/index.cfm?fuseaction=home.viewPage&page_id=7049F2F1-C9C4-C392-588484F7906539D6 (last visited Nov. 7, 2014).

[19] *See supra* note 2.

[20] *Suicide Facts*, SUICIDE AWARENESS VOICES EDUC., http://www.save.org/index.cfm?fuseaction=home.viewPage&page_id=705D5DF4-055B-F1EC-3F66462866FCB4E6 (last visited Nov. 7, 2014).

IV. DETECTING SUICIDE

In 2012, Centers for Disease Control and Prevention reported that youth between the ages of fifteen and twenty-four, attempted suicide about one hundred to two hundred times before the completed attempt.[21] Furthermore, Mental Health America, the nation's oldest advocacy organization on mental health, reported that four out of five teens that attempted suicide gave clear warning signs before the attempt.[22] In other words, of the 273 suicide deaths of youth between the ages of ten and twenty-four[23] in Arizona, most of the victims made over one hundred attempts, and gave clear warning signs before those attempts were realized.[24] So, what does this mean? It means that before a child, teen, or young adult commits suicide, there are signals that he or she will display. For example, in the recent Ninth Circuit case, *Walsh v. Techachapi Unified School Dist.*, the thirteen-year-old decedent displayed signs of suicide to school personnel, family, and friends. In sixth grade, he confessed to his school counselor that he made statements about killing himself because he had recently told his family that he was homosexual.[25] In seventh grade, he told his friend that he thought about hanging himself in his closet because of the bullying he suffered when students found out he was homosexual.[26] On the day of the decedent's suicide, he sent text messages to his friends that he was going to kill himself and said goodbye.[27] In this case, the decedent displayed clear warning signs of suicide.

Similarly, the American Foundation for Suicide Prevention ("AFSP"), the leading nonprofit supporter of suicide research,[28] listed a number of warning signs to be cautious of; these include: verbal suicidal threats and statements indicating unbearable pain, reckless behavior, suicidal plans, calling family and friends to say goodbye, "[g]iving away prized possessions," and moods of "[d]epression," "[r]age," and "[l]oss of interest."[29] Anyone of these symptoms could indicate the need for help and "[t]he more warning signs, the greater the

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[21] *Suicide*, CENTERS FOR DISEASE CONTROL AND PREVENTION, 1, http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf (last visited Dec. 3, 2014).

[22] *Child and Adolescent Suicide*, MENTAL HEALTHAM., http://www.mentalhealthamerica.net/conditions/child-and-adolescent-suicide (last visited Dec. 3, 2014).

[23] *Number of Suicides by Age*, *supra* note 13.

[24] MENTAL HEALTH AM., *supra* note 22; CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 21.

[25] Walsh v. Tehachapi Unified Sch. Dist., 997 F. Supp. 2d 1071, 1073 (E.D. Cal. 2014).

[26] *Id.* at 1074.

[27] *Id.* at 1075.

[28] *Research*, AM. FOUND. FOR SUICIDE PREVENTION, http://www.afsp.org/research (last visited Nov. 8, 2014).

[29] *Suicide Warning Signs*, AM. FOUND. FOR SUICIDE PREVENTION http://www.afsp.org/preventing-suicide/suicide-warning-signs (last visited Nov. 8, 2014).

risk."[30] Likewise, in *Walsh*, the decedent not only used verbal suicide threats, but he also sent his friend a text message and told her to take care of his iPod.[31] In this case, the iPod was a valuable item to the decedent.[32] Furthermore, this case indicates how simple it is to disregard warning signals when one lacks proper training or education on how to identify them. This case should be an indicator to Arizona legislators that educating and training school personnel on how to identify symptoms can save lives.

V. Intervention is Effective

Richard Clarke, CEO of Magellan Behavior Health Services of Arizona, discussed his views to the *Arizona Capitol Times*, and stated, " '[s]tudies show that intervention will prevent approximately 65 percent of people who express a desire to commit suicide.' "[33] He added, " '[i]t means that 35 percent need a high level of service and more intensive treatment.' " This aggressive approach is the same approach Arizona's legislation should take. Although there are some preventive measures in place, SB-1016 is another measure that could target the other 35% that concerns the public and individuals such as CEO Clarke. Many states understand the role teachers and other school personnel play in preventing suicide. For example, in Washington, the state legislature passed House Bill 1338 in 2013.[34] The bill required all Washington school districts to implement a plan for how they would handle emotion and behavioral distress such as suicidal thinking.[35]

In addition, Washington's Office of Superintendent of Public Instruction website has a School Safety Center page which identifies the significant role schools play in preventing suicide.[36] The School Safety Center suggested that all schools should establish a gatekeeping program:

> Suicide prevention gatekeeping programs train those who have regular contact with young people, such as teachers, to do the following: 1) recognize behavioral patterns and other warning signs that indicate that a young person may be at risk of suicide, 2) actively intervene, usually by talking to the young person in ways that explore the level of risk without

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[30] *Id.*

[31] *See supra* note 25.

[32] *Id.*

[33] Don Harris, *Magellan Behavioral Health Services of Arizona: Working to Provide Help at Any Hou*r, Ariz. Cap. Times, Aug. 30, 2010, *available at* 2010 WLNR 27782868.

[34] *School Safety Center*, Off. Superintendent Pub. Instruction, http://www.k12.wa.us/safetycenter/YouthSuicide/SuicidePrevention.aspx (last visited Nov. 8, 2014).

[35] *Id.*

[36] *Id.*

> increasing it, and 3)ensure that young people at risk receive the necessary services.[37]

This is exactly what SB-1016 will do. Various states, namely Washington, are already implementing a gatekeeper program, and now it is Arizona's time. SB-1016 requires school personnel to receive the proper training to recognize behavioral patterns and warning signs. If school personnel had the training to identify warning signs, it is extremely likely that school personnel would be able to intervene, talk to the student at risk, and direct the student to the proper services to get help. Because youth make about one hundred to two hundred attempts to commit suicide, it is extremely likely that intervention, or gatekeeper program, could save lives.

Similarly, AFSP presented research on interventions that illustrate "the potential to reduce suicide attempts, or have actually reduced suicide."[38] The studies focused on various areas as to why people commit suicide and tested new approaches to intervention, prevention, and treatment.[39] As a result, AFSP developed programs to help professionals increase their knowledge and understanding of suicidal behavior.[40] For example, *More Than Sad: Suicide Prevention Education for Teachers and Other School Personnel*, educates school personnel how to identify warning signals to prevent teen suicide. Other programs and research AFSP performed included some form of education, proper diagnosis, medication, and proper resources. The studies demonstrated that educating professionals on detecting warning signs, educating the medical community treating depression, and follow-up interventions with suicide attempts are just a few methods that have decreased suicide rates.[41] Thus, one can safely conclude that education is a method of intervention and intervention reduces suicide rates. Because SB-1016 will educate school personnel on how to identify warning signs of suicide, SB-1016 is the proper intervention approach that even the leading nonprofit supporter in suicide research would adopt.

VI. Concerns About Intervention

Although intervention is effective and can save lives, intervention raises some concerns to parents and school personnel. Though much effort and

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[37] *Id.*

[38] *Key Research Findings*, Am. Found. for Suicide Prevention, http://www.afsp.org/preventing-suicide/key-research-findings (last visited Nov. 8, 2014).

[39] *Research*, *supra* note 28.

[40] *More Than Sad*, Am. Found. for Suicide Prevention, http://www.afsp.org/preventing-suicide/our-education-and-prevention-programs/programs-for-professionals/more-than-sad-suicide-prevention-education-for-teachers-and-other-school-personnel (last visited Nov. 8, 2014).

[41] *Key Research Findings*, *supra* note 38.

research is invested into suicide awareness and prevention, the reality is that in some cases, screening and warning signs may be false. Where there is intervention, there is the possibility of misdiagnosis. For example, a Phoenix mother expressed how school personnel recommended a drug for mental disorders for her five-year-old daughter.[42] Her daughter "complained about being nervous and sick to her stomach."[43] A doctor later diagnosed her daughter with a gastric disorder, which was common for young children.[44] The mother expressed her concern for lack of knowledge of school personnel which would have led her daughter to be on medication for a mental disorder she did not have.[45] Nevertheless, this concern is minor because SB-1016 only requires training in referral services and are not responsible for accurate diagnoses. The training educates school personnel on suicide awareness and prevention. It does not license them to make diagnoses that only trained medical personnel can render.

Another concern is the duty of care placed on school personnel once they receive the training. Because this bill will enable school personnel to identify appropriate services to direct students to, one can argue that school personnel assumes a duty of care in preventing a student from committing suicide. For example, in the case of *Eisel v. Board of Educ.*, the court imposed a duty on school counselors to use reasonable means to attempt to prevent a suicide when they are on notice of a student's intent to commit suicide.[46] Here, directing a student who demonstrates warning signs of suicide to appropriate services may indicate a type of notice of the student's intent to commit suicide. Nevertheless, the last sentence in the bill explicitly provides that:

> [T]he training required by this paragraph does not impose any specific duty of care, and a person does not have a cause of action for any loss or damage caused by any act or omission resulting from the implementation of this paragraph or resulting from any training, or lack [thereof], required by this paragraph.[47]

The language in the bill explicitly provides that the training does not impose a specific duty of care on school personnel.[48] Also, it provides that a person, such as a student's parent, does not have a cause of action for any loss or damage caused by any act or omission resulting from the implementation of

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[42] Phil Riske, *Arizona House Deals with Child Screening, Medications*, ARIZ. CAP. TIMES, Mar. 24, 2006, *available at* 2006 WLNR 27169700.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Eisel v. Board of Educ., 597 A.2d 447, 456 (Md. 1991).

[47] *See supra* note 2.

[48] *Id.*

this bill or the required training.[49] Thus, this concern for school personnel is not an issue.

VII. Conclusion

In conclusion, SB-1016 should pass because suicide is the third leading cause of death for youth between the ages of ten and twenty-four.[50] In addition, Arizona's high school students are more likely to seriously consider, plan, and attempt suicide than the average of high school students in United States.[51] Requiring school personnel to complete suicide awareness and prevention training will educate school personnel on how to identify appropriate mental health services within the school and the community and when and how to refer pupils and their families to those services.[52] Although there is no absolute guarantee that the SB-1016 will reduce the number of youth suicides in Arizona, there is no absolute guarantee that it will not be ineffective. As discussed above, statistics show that Arizona's youth attempts suicide more than the average youth nationwide.[53] Thus, where there are more attempts, there are more warnings signs; and where there are more warning signs, there are more opportunities to detect when a student needs help. SB-1016 is an opportunity for school personnel to detect those warning signs and refer students at risk to services to get the proper help. If Arizona passes this bill, it will not only become the law; this bill could also become a life.

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[49] *Id.*
[50] *Suicide Prevention: Youth Suicide*, *supra* note 11.
[51] *High School Youth Behavior Risks Survey*, *supra* note 5.
[52] *See supra* note 2.
[53] *Suicide Prevention: Youth Suicide*, *supra* note 11.