



On anger, shock, fear, and trauma: therapeutic jurisprudence as a response to dignity denials in public policy



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ABSTRACT

This article asserts that when policymaking processes, outcomes, and implementations stoke fear, anxiety, and trauma, they often lead to denials of human dignity. It cited as prime examples the recent actions of America's current federal government concerning immigration and health care. As a response, I urge that therapeutic jurisprudence should inform both the processes of policymaking and the design of public policy, trained on whether human dignity, psychological health, and well-being are advanced or diminished. I also discuss three methodologies that will help to guide those who want to engage legislation in a TJ-informed manner. Although achieving this fundamental shift will not be easy, we have the raw analytical and intellectual tools to move wisely in this direction.

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1. Introduction

Soon after the 2016 American presidential election, Pankaj Mishra, a leading Indian writer and public intellectual, penned a long-form piece for *The Guardian* newspaper, opining that global society has entered an “age of anger, with authoritarian leaders manipulating the cynicism and discontent of furious majorities” (Mishra, 2016). He further wrote about the tug between viewing human interactions through economic versus emotional lenses:

...(A) mechanistic and materialist way of conceiving human actions has become entrenched, in part because economics has become the predominant means of understanding the world. A view that took shape in the 19th century – that there is “no other nexus between man and man than naked self-interest” – has become orthodoxy once again in an intellectual climate that views the market as the ideal form of human interaction and venerates technological progress and the growth of GDP. All of this is part of the rigid contemporary belief that what counts is only what can be counted and that what cannot be counted – subjective emotions – therefore does not (Mishra, 2016).

Mishra's book advancing his age of anger theme (Mishra, 2017) was already in the works when the American election results were becoming clear. In fact, he completed the manuscript on the very day that U.S. voters were heading to the polls; he considered Donald Trump's victory as merely underscoring his thesis.

The themes raised by Mishra dovetail with the work of Naomi Klein, whose 2007 book invoking the term “shock doctrine” posited that radical free-market ideologues have exploited crises and disasters to support private profit (Klein, 2007). Three interrelated policy tenets – “privatization, government deregulation and deep cuts to social spending” – have informed these efforts (Klein, 2007, p. 10). In 2017, she expounded upon the underlying patterns:

...(T)he power of private wealth over the political sphere, the global imposition of neoliberalism, often using racism and fear of the “other” as a potent tool, the damaging impacts of corporate free trade, and the deep hold that climate change denial has taken on the right side of the political spectrum. (Klein, 2017, pp. 1-2).

Drawing upon these themes, this article posits that fear, anxiety, and trauma are often the by-products of public policies stoked by anger and designed to shock. When policymaking processes, outcomes, and implementations fuel these negative emotions, they often constitute denials of human dignity. It will cite as prime examples the recent actions of America's current federal government concerning immigration and health care. As a response, I urge that therapeutic jurisprudence can and should inform both the processes of policymaking and the design of public policy, trained on whether human dignity, psychological health, and well-being are advanced or diminished in these contexts. I also discuss three methodologies that will help to guide those who want to engage legislation in a TJ-informed manner. Although achieving this fundamental shift will not be easy, we have the raw analytical and intellectual tools to move wisely in this direction.

In terms of articulating the intersection of TJ with legislative processes and outcomes, we can start by appealing to David Wexler's

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“wine” and “bottles” analogy for describing TJ’s role in shaping the law. Wexler suggests that we “think of TJ professional practices and techniques as ‘liquid’ or ‘wine,’ and...think of the governing legal rules and legal procedures—the pertinent legal landscape—as ‘bottles’” (Wexler, 2014, p. 464). In other words, the “wine” of the law is how lawyers and other legal stakeholders do their work. The “bottles” of the law are legal rules defining rights, obligations, and relationships, as well as procedural structures and rules for deliberating upon legal matters.

Drawing from Wexler, the “wine” of legislation is how policy operatives engage the legislative process. These stakeholders may include elected and appointed public officials, agencies and institutions, interest groups, and citizen advocates. The “bottles” of legislation include proposed bills, enacted statutes and their implementation, along with procedural rules governing the legislative process. Both the wine and bottles of legislation are relevant to the forthcoming discussion.

Before proceeding, it should be noted that this article focuses on American policymaking processes and outcomes. Nevertheless, I hope that the themes raised within will render it useful to those in other countries. I also hope that it will inspire further research and commentary about all policymaking modalities from a TJ-informed perspective, but especially legislation, which has been an underserved topic in the TJ literature.

2. Anger, shock, fear, and trauma

Recent developments in American immigration and health care law¹ are providing a wealth of stories about how anger, shock, fear, and trauma relate to law and policy. The stories are coming mainly by way of the mainstream media. The use of journalistic accounts here is intentional; this reportage captures raw emotions in the midst of federal deportation orders and proposed health care law repeals that may escape the drier prose of legal pleadings and bill filings. These stories capture how law can operate in a profoundly anti-therapeutic manner, replete with fear and trauma experienced by the most vulnerable among us, thus constituting severe denials of human dignity.

2.1. Immigration policy

In March 2018, *Time* magazine ran a cover feature on how “America’s immigration policy is splitting families and spreading fear” (Edwards, 2018, p. 34). Built around stories of deportation orders prompted by the Trump Administration’s crackdown on undocumented residents, the article detailed how enforcement efforts were now extending beyond the Obama Administration’s focus on “violent offenders and recent border crossers” (Edwards, 2018, p. 36). As a result, families who have been together for many years are being broken up, with undocumented members (often a parent) being deported, and those legally in the U.S. remaining. Here is a typical story:

Just before 7:30 one Friday morning last March, Alejandro said goodbye to his wife Maria and his two small daughters and headed off to work. ...Four blocks from his home near Bakersfield, Calif., two unmarked vehicles, a white Honda and a green Mazda pickup truck, pulled up behind him at a stop sign. Plain-clothes Immigration and Customs Enforcement (ICE) agents spilled out.

...Alejandro dialed Maria from his cell phone and told her what was happening. ...She said later that she knew it wouldn’t matter that Alejandro had no criminal record, not even a speeding ticket. ...Since

2006, when Alejandro overstayed his visa, he had been considered a “fugitive alien,” in ICE parlance, and therefore subject to immediate deportation to Mexico.

...A few days later, he was given an ankle bracelet and allowed to return home to say goodbye. He was gone by the end of spring—before his eldest, Isabella, began talking, before Estefania took her first steps, before Maria gave birth this winter to their third baby girl.

The *Detroit Free Press* reported that on Martin Luther King Day, 2018, Jorge Garcia, age 39, was deported to Mexico, twenty years after being brought to the U.S. as a young boy by a family member who was undocumented (Warikoo, 2018):

His arms wrapped around his wife and two teenage children, Jorge Garcia’s eyes welled up Monday morning as he looked into their eyes one last time near the entrance to the airport security gate at Detroit Metro Airport.

His wife, Cindy Garcia, cried out while his daughter, Soleil, 15, sobbed into Garcia’s shoulder as they hugged. Two U.S. immigration agents kept a close watch nearby.

...Garcia had been facing an order of removal from immigration courts since 2009, but under the previous administration, he had been given stays of removal. But because of the Trump administration’s immigration crackdown, Garcia was ordered in November to return to Mexico. His supporters say he has no criminal record — not even a traffic ticket — and pays taxes every year (Warikoo, 2018).

The *Washington Post* reported that in the summer of 2017, Liliana Cruz Mendez, age 30, was deported to her native El Salvador, twelve years after fleeing “a neighborhood man who had harassed her in San Salvador” (Sacchetti, 2017). She eventually married and gave birth to two children, settling down in northern Virginia. Although immigration officials were aware of her undocumented status, they permitted her to remain in the U.S., subject to annual check-in appointments. At her May 2017 appointment, however, she was taken into custody.

Her family, helped by attorneys, tried to free her. Her ten-year-old son wrote letters pleading with officials not to deport her. These efforts were all for naught; Cruz Mendez was deported the next month. Eventually she and her husband made the difficult decision that their two children should join her in El Salvador, despite concerns for everyone’s safety. Her husband remains in the United States.

2.1.1. Policy priorities and TJ

Angry anti-immigrant rhetoric fueled policy debates over undocumented persons throughout the 2016 American presidential campaign. This dynamic would become an early and prominent focus of the Trump Administration. In the words of conservative columnist Jennifer Rubin, “(t)here is no issue that has so dominated President Trump’s presidency and disfigured the GOP than obsessive, unhinged fear-mongering about illegal immigrants” (Rubin, 2017).

As the individual examples cited above attest, this focus has led to policy implementations instilling fear, anxiety, and trauma in those legally vulnerable for deportation and their families, with especially damaging effects on the mental and physical health of children (Edwards, 2018; Khazan, 2017; Rivera, 2017; Zayas & Heffron, 2016; Gordon, 2017). Children of deportees who remain in the U.S. suffer greatly from forced separations from parents. As *Time* magazine reported, “Every year, tens of thousands of American kids see at least one parent deported, according to the Urban Institute. It’s an experience that, studies show, pushes families into poverty and leads to higher rates of PTSD and struggles at school” (Edwards, 2018, p. 36). Scholarly assessments

¹ I preface this section with what may be a fatal admission for some readers: I am not an authority in either immigration or health law. My usual focus is employment law and policy. Nevertheless, my grounding in therapeutic jurisprudence deeply informs this commentary. Moreover, as an American citizen I have watched immigration and health care become focal points for domestic policy debates in very disturbing ways that critically inform the thesis of this article.

of the health impacts of deportation are supporting these accounts and observations (Arbona et al., 2010; Zayas, Aguilar-Gaxiola, Yoon, & Rey, 2015; Zayas & Heffron, 2016).

To be sure, immigration law must take into account many policy considerations in addition to the emotional impacts of deportation orders. They include, among others, public safety, national security, economics, the labor market, and fairness and consistency in immigration legal determinations. Furthermore, current geopolitical realities would make it difficult for a nation such as the U.S. to simply open its borders, absent any controls and screens for those who wish to stay temporarily or permanently.

All of these immigration policy considerations fit comfortably within a TJ framework. After all, there is nothing therapeutic about immigration laws and practices that threaten a nation's safety and security, excessively burden a nation's economic resources, or undermine a nation's labor market. In addition, the heart-wrenching emotions triggered by immigration policies and deportation proceedings should centrally inform the design and implementation of this legal framework.

2.1.2. *Echoes of Harriet Beecher Stowe*

The events discussed here are reminiscent of another chapter of American history, namely, the treatment of slaves. It was storytelling in the form of Harriet Beecher Stowe's novel *Uncle Tom's Cabin* that brought to the attention of a wider American public the horrific, frequent, but legally-enabled practice of separating members of slave families at sales and auctions (Stowe, 1852). Over a century prior to "trauma" and "post-traumatic stress disorder" entering our vocabulary, slave families were broken up for commercial purposes, often with children being separated from their parents. These scenes played out prominently in *Uncle Tom's Cabin*. Those with vested interests did not want this to become well-known; in a nineteenth century version of alleging "fake news," Southern defenders of slavery tried to deny the truths that informed Stowe's novel (Eschner, 2017).

Granted, the stories of families separated by deportation proceedings and those separated by slave sales may not be completely analogous as narrative forms. Deportations are by government orders, while slave sales were private transactions. Those being deported have presumably violated the law by being or remaining in the country, while slaves were in the country legally, albeit in a status of abusive servitude.

However, at a human level, the deportation and slave sale narratives carry strong similarities. Both being separated from one's family via deportation and being sold away from one's family in a state of slavery are profoundly disorienting, frightening, and traumatizing shock events. Both events cause searing emotional pain for the families and close friends of those separated. Both involve decisions to marginalize the human sufferings of vulnerable human beings, often fueled by racism and a regard for them as being "the other." And both types of proceedings are conducted under the color of law.

2.2. *Health care policy*

Health care comprises a second policy focus illustrating major themes of this article. One of the signature pieces of Donald Trump's presidential campaign was a pledge to repeal the [Patient Protection and Affordable Care Act \(2010\)](#), popularly known as the Affordable Care Act (ACA) or Obamacare. The ACA has been widely considered to be one of the defining legacies of Barack Obama's presidency. The main overall policy objective of the ACA was to reduce the number of uninsured individuals. According to a January 2017 assessment by a non-partisan news site, it has been accomplishing that purpose:

Today, roughly 28 million Americans are uninsured, down from 41.3 million in 2013, due in large part to the Affordable Care Act, with its expansion of Medicaid, the creation of online health insurance marketplaces, the ability of young people to stay on their parents'

coverage through age 26, and the mandates that everyone purchase a health insurance plan (Jacobson, 2017).

Nevertheless, throughout 2017, President Trump and Republican Congressional leaders engaged in repeated attempts to repeal all or significant parts of the ACA. They were unsuccessful, often by the slimmest of vote margins in Congress. However, deliberations over these proposals caused considerable fear, anxiety, and stress across the country, experienced by those who feared loss of health insurance coverage.

2.2.1. *Projected impacts of repeal upon health insurance coverage*

Campaign pledges and legislative efforts to repeal the ACA have prompted analyses projecting the likely impacts on the number of uninsured. For example, a December 2016 Kaiser Family Foundation study (Claxton, Cox, Damico, Levitt, & Pollitz, 2016) analyzed the potential effects of repealing the ACA on those with pre-existing health conditions:

The Affordable Care Act guarantees access to health insurance in the individual market and ends other underwriting practices that left many people with pre-existing conditions uninsured or with limited coverage before the law. As discussions get underway to repeal and replace the ACA, this analysis quantifies the number of adults who would be at risk of being denied if they were to seek coverage in the individual market under pre-ACA rules. What types of protections are preserved for people with pre-existing conditions will be a key element in the debate over repealing and replacing the ACA.

We estimate that at least 52 million non-elderly adult Americans (27% of those under the age of 65) have a health condition that would leave them uninsurable under medical underwriting practices used in the vast majority of state individual markets prior to the ACA. Results vary from state-to-state, with rates ranging around 22 – 23% in some Northern and Western states to 33% or more in some southern states (Claxton et al., 2016).

In July 2017, the bipartisan Congressional Budget Office and the Joint Committee on Taxation projected the likely effects of a bill that proposed repealing major provisions of the ACA ([Congressional Budget Office, 2017](#)). They concluded that the repeal would result in a \$479 million reduction in the federal deficit over a ten-year period, while impacting individuals in the following ways:

- The number of people who are uninsured would increase by 17 million in 2018, compared with the number under current law. That number would increase to 27 million in 2020, after the elimination of the ACA's expansion of eligibility for Medicaid and the elimination of subsidies for insurance purchased through the marketplaces established by the ACA, and then to 32 million in 2026.
- Average premiums in the nongroup market (for individual policies purchased through the marketplaces or directly from insurers) would increase by roughly 25%—relative to projections under current law—in 2018. The increase would reach about 50% in 2020, and premiums would about double by 2026 ([Congressional Budget Office, 2017](#)).

2.2.2. *Human impacts of repeal attempts*

Although the ACA repeal attempts repeatedly failed during 2017 and early 2018, the Congressional deliberations over them were sources of public anxiety across the nation (Eschner, 2017; Goodnough & Abelson, 2017), as exemplified in this story:

Fran Cannon Slayton, a children's book author with brain cancer, has summoned a hopeful energy since her diagnosis last year. But she is near despair about the resurfaced Republican plan to repeal and replace the Affordable Care Act, which the White

House and Republicans are pushing for a vote as soon as this week.

...Her chief concern is the amendment to the Republican bill that would allow states to opt out of several requirements, including what some say is the crux of the current health law: the ban on insurance companies charging higher premiums to people, like Ms. Slayton, with pre-existing medical conditions.

The complex amendment to the bill has stunned Ms. Slayton and other Americans with cancer, heart disease, diabetes and other illnesses who rely on the law's protections...(Goodnough & Abelson, 2017).

Media headlines repeatedly and consistently told the story of Americans who feared losing their health insurance, in liberal "blue" states and conservative "red" states alike:

- Alabama – "Fear of losing insurance 'devastated' Alabama families: 'Everyone knows someone on CHIP'" (Samuels, 2018);
- California – "Health care poll: Californians fear losing coverage in Obamacare reform" (Seipel, 2017);
- Idaho – "Disabled Idahoans fear loss of federal assistance if ACHA becomes law" (Stephens & Smith, 2017);
- Illinois – "In swing districts, voters vent over health care, fear Trump" (Barrow & Burnett, 2017);
- Indiana – "Trump supporters in the heartland fear being left behind by GOP health plan" (Glenza, 2017);
- Kentucky – "In McConnell's Own State, Fear and Confusion Over Health Care Bill" (Stolberg, 2017);
- Maine – "Fear Over Losing Health Care Coverage Causing Spike in Anxiety Cases" (Wight, 2017).

Fear and anxiety were buttressed by the decisions of the Republican Congressional leadership to bypass the normal legislative practice of holding public hearings on the repeal bills, thus putting them on a fast track toward full votes in the Senate or House of Representatives (Kaplan & Pear, 2017; Sarlin & Caldwell, 2017). Typical was this news report about one of the repeal proposals:

The Senate is closing in on a health care bill that could affect coverage for tens of millions of Americans and overhaul an industry that makes up one-sixth of the economy.

Only one problem: Almost no one knows what's in it.

...In a striking break from how Congress normally crafts legislation, including Obamacare, the Senate is conducting its negotiations behind closed doors.

...The opaque process makes it impossible to evaluate whether there are any significant changes coming to health care. There are no hearings with health experts, industry leaders, and patient advocacy groups to weigh in where the public can watch their testimony or where Democrats can offer amendments (Sarlin & Caldwell, 2017).

2.2.3. Health care policymaking processes and outcomes

At this writing, attempts to repeal all or major parts of the ACA have failed. However, these legislative outcomes have not been able to prevent widespread fear and anxiety over the possible loss of health insurance coverage for millions of Americans. The legislative processes employed for these repeal efforts, featuring repeated attempts over a

short period of time, a lack of public hearings, and expedited proceedings, constituted *ipso facto* shock events, even if the ultimate outcomes preserved the status quo. Those with limited or no incomes, pre-existing health conditions, or major ongoing health care expenses had special reason to be alarmed at the speed and lack of legislative due process driving these deliberations, much less the possible results. In short, these legislative deliberations have been deeply anti-therapeutic for those likely to be impacted by the proposed repeals.

Of course, any proposed legislation that gives or takes away health care benefits or subsidies is likely to have significant meaning to directly affected stakeholders. Furthermore, deliberations on any such legislation should assess its impacts on the economy and the overall structure of the health care delivery system. A TJ-informed analysis of health care policy can and should take these considerations into account. After all, there is nothing therapeutic about health care legislation that threatens the sustainability of a health care delivery system. There is widespread consensus that the Affordable Care Act, despite extending health insurance coverage to millions, is in need of fixes. The legislative deliberations we have witnessed, however, have unnecessarily instilled deep fear and anxiety in people whose health insurance coverage has been hanging in the balance. This observation holds true without even getting into the larger question of how a nation as wealthy as the United States has been unable to develop an affordable health care delivery system for all.

2.3. Precursors and big frames

The current political and policy messaging concerning immigration policy and health care is best understood against a broader historical backdrop. Mishra's age of anger (2017) and Klein's shock doctrine (2007) theories, and the actions and proceedings concerning American immigration and health care policy discussed above, are of twenty-first century vintage. However, their seeds were planted firmly in the final decades of the twentieth century. Two astute observers – Bertram Gross (1982) and Jane Jacobs (2004) – were among those who foresaw and understood these shifts.

In the early 1980s, social scientist Bertram Gross identified an emerging force in American political culture, "a slow and powerful drift toward greater concentration of power and wealth in a repressive Big Business-Big Government partnership" (Gross, 1982, xi). He coined the phrase "friendly fascism" in order to "distinguish this possible future from the patently vicious corporatism of classic fascism in the past of Germany, Italy and Japan" (Gross, 1982). His disturbing vision of a probable future was shaped by "a new despotism creeping slowly across America," leading to economic unrest, a poisoning of the environment, and "a subversion of our constitution" at home, along with increasing economic, intelligence, and military interventions abroad (Gross, 1982, p. 1). He went on to identify the group of people who were consolidating power in America:

I see at present members of the Establishment or people on its fringes who, in the name of Americanism, betray the interests of most Americans by fomenting militarism, applauding rat-race individualism, protecting undeserved privilege, or stirring up nationalistic and ethnic hatreds (Gross, 1982, p. 1).

The surface geniality of Ronald Reagan served as Gross's face of friendly fascism. Today, that geniality has given way to the persona of Donald Trump, thus embodying the anger and shock events described by Mishra and Klein, including the immigration and health care matters discussed above. These emotions were defining qualities of the 2016 American presidential campaign, and they have not abated since then.

In her final book, the late Jane Jacobs (2004) – a brilliantly iconoclastic observer of urban and contemporary life – expressed fears that we are entering a new "Dark Age," marked by a sharp decline in core

societal institutions and values. Here were the key markers behind her thesis:

- Family and community – Consumption, consumerism, debt, and wealth supplanting family and community welfare;
- Higher education – Higher education becoming a tool for credentialing instead of a process for learning;
- Science – Denigration of hard science, along with the elevation of economics as the primary science shaping public policy;
- Government – Ending the notion of government for the common good, replaced by government acting on behalf of powerful interests; and,
- Ethics – Breakdown of ethics in learned professions.

Jacobs's book was generally greeted with respectful acknowledgments of her concerns, along with nods to her preeminent reputation and overall body of work. It was not, however, widely received as an urgent clarion call. But it turns out that she was merely a decade ahead of her time. Her analysis is now spot on, having anticipated major characteristics of our current milieu with clairvoyant accuracy.

3. Therapeutic jurisprudence and human dignity

Part 1 argues that concern and even alarm over an age of anger, shock doctrine, friendly fascism, and a new Dark Age are sufficient to cause us to revisit policymaking processes and outcomes that result in denials of dignity. In this part, I urge that TJ be embraced as a central part of the solution. Such an approach will be met with objections, and perhaps even derision and ridicule. But it is time for us to be unapologetically and responsibly bold in advocating for laws, legal systems, and legal institutions that advance a more humane society. This change must include, obviously, our policymaking processes and outcomes.

One of TJ's enduring postulates has been that it does not claim to be the exclusive frame for examining law, legal process, and legal institutions. I have ascribed the motivation behind this position to be one of genuine modesty, or perhaps a hesitancy to claim a position of primacy for TJ that we nevertheless know is the correct one. In any event, I increasingly wonder if we are undercutting our influence by sounding so diplomatic about TJ's merits as the main framing perspective on law and public policy.

In 2000, Michael Perlin acknowledged that "(t)he idea of the law as a healing agent might sound bizarre to many," especially in view of common public impressions of the legal system and lawyers (Perlin, 2000, p. 407). However, he urged that TJ could help the law serve that very purpose, explaining that "(t)herapeutic jurisprudence recognizes that substantive rules, legal procedures and lawyers' roles may have either therapeutic or anti-therapeutic consequences and questions whether such rules, procedures and roles can or should be reshaped so as to enhance their therapeutic potential, while preserving due process principles" (Perlin, 2000, p. 408). He went on to note that TJ "has expanded far beyond its mental disability law roots into such areas as jury reform, workers' compensation, domestic violence, and labor arbitration" (Perlin, 2000, footnotes omitted).

Some eighteen years later, these observations about TJ continue to hold true. Furthermore, there is nothing in a broad-based TJ perspective that excludes considerations of due process, individual rights, economic efficiency, or other legal and policy values, goals, and objectives. In fact, any TJ-informed determination that ignores other important legal and policy considerations risks being flawed and incomplete.

Accordingly, there is a very plausible case for making TJ the predominant framework for analyzing law and policy. What follows are clusters of ideas to help focus our thinking in this realm, especially the linkages between TJ and conceptualizations of human dignity and between TJ and important branches of psychology.

3.1. Conceptualizing dignity

Dignity is frequently invoked in modern discussions of human rights, but most attempts at a definition are understandably general. For example, the *New Oxford American Dictionary* defines dignity as "the state of quality of being worthy of honor or respect" (Jewell & Abate, 2001, p. 477). Conflict resolution expert Donna Hicks defines dignity as "an internal state of peace that comes with the recognition and acceptance of the value and vulnerability of all living things" (Hicks, 2013, p. 1). Political scientist Michael Zuckert identifies "the constituents of human dignity" as being "free, equal, rights bearing, capable of morality, and uniquely valuable or worthy" (Zuckert, 2007, p. 45).

Identifying a distinctively American notion or definition of dignity is even more challenging. In a 2009 article on dignity and U.S. employment law, I attempted to trace the roots of dignity in American jurisprudence (Yamada, 2009). I started with philosopher John Locke and the values of the Enlightenment, proceeded to the formulation of the U.S. Constitution, and then examined the late nineteenth century emergence of privacy as an American tort law concept. This led me to suggesting an early, conventional understanding of dignity – one that predated the use of the very term – with three major tenets as its frame:

First, dignity is grounded in an inherent right to be free of harm to one's person or property. Second, the government can be both a violator and protector of individual dignity. Third, unchecked power can lead to abuses of power (Yamada, 2009, 540).

Reckoning with the horrors of the Second World War would place human dignity expressly into our vocabulary of human rights. The post-war adoption of the Universal Declaration of Human Rights embraced dignity as a framing value, starting with the Preamble, which states that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (Universal Declaration, 1948). During the ensuing decades, the relationship between dignity and the law would take on new normative dimensions to supplement the traditional view:

First, the law should encompass certain "positive" rights or obligations, to be effectuated by the state and perhaps by private actors. Second, the law should recognize that private actors, as well as the government, could engage in abuses of power against individuals. Third, the law should protect individuals against serious infringements upon their dignity motivated by bias due to intrinsic characteristics such as race or sex (Yamada, 2009, p. 544).

3.2. Imagining the big picture: a society grounded in dignity

In addition to focusing on dignity through a legal and political lens, it may be useful for us to consider dignity against the larger inquiry of the kind of world we want to live in as an everyday experience. Several voices may help us to imagine the broader vision of that society.

Evelin Lindner is a physician and psychologist who founded the Human Dignity and Humiliation Studies, a global, transdisciplinary, non profit network of scholars, practitioners, artists, activists, and students who are committed to advancing human dignity and reducing the experience of humiliation in society (Lindner, 2017, pp. xxix-xxx). A self-styled global citizen who writes, lectures, and engages in dialogues around the world, Lindner urges us to start with the principle of equal dignity for all:

I have coined the term *egalization* to match the word globalization and at the same time differentiate it from terms such as equality or equity. ...The term egalization is short for equal dignity for all. It does not claim that everybody should become equal and that there should be no differences between people. Equal dignity can coexist with

functional hierarchy as long as it regards all participants as equal in dignity; it cannot coexist, though, with a hierarchy that defines some people as lesser beings and others as higher beings (Lindner, 2017, p. 366).

Similarly, Robert Fuller, a physicist, human rights advocate, and former Oberlin College president, has been calling for the building of a “dignitarian” society that embraces individual dignity (Fuller, 2006). Fuller believes that the main obstacle to creating a dignitarian society is the ongoing presence of “rankism,” which he defines as “abuses of power associated with rank” (Fuller, 2006, p. 7). Rankism may be grounded in demographic constructs such as race, sex, or age, as well as general hierarchies in “schools, businesses, health care organizations, religious institutions, the military, and government bureaucracies” (Fuller, 2006, pp. 6–7). Fuller asserts that reducing rankism and unnecessary hierarchy will help to create a society that values human dignity.

Two other writers share visions of a society consistent with an embrace of human dignity. Bertram Gross, discussed in Section 2.2 above for his assessment of political and economic forces that were creating a form of “friendly fascism” in America (Gross, 1982), also identified a secondary movement grounded in community and service:

The other is a slower and less powerful tendency for individuals and groups to seek greater participation in decisions affecting themselves and others. This trend goes beyond mere reaction to authoritarianism. It transcends the activities of progressive groups or movements and their use of formal democratic machinery. It is nourished by establishment promises – too often rendered false – of more human rights, civil rights and civil liberties. It is embodied in larger values of community, sharing, cooperation, service to others and basic morality as contrasted with crass materialism and dog-eat-dog competition. It affects power relations in the household, workplace, community, school, church, synagogue, and even the labyrinths of private and public bureaucracies (Gross, 1982, pp. xi–xii).

For a slightly more impressionistic view, I appeal to the work of John Ohliger, a pioneering adult educator who co-founded a small, community-based think tank in Madison, Wisconsin called Basic Choices in the mid-1970s and spent much of his life engaging in a spirited critique of conventional, institutional adult learning programs. He shared a vision of society that ran counter to the technocratic, materialistic forces that were garnering power (Ohliger, 1982):

My picture is of a future where we live more relaxed and more modest lives with an abundance of unmeasurable and infinitely available non-material (or better, trans-material) resources. All the travail and pressure we’re going through right now may be paving the way for that future. This future could be one where we will have a choice of “goodies”; not ones requiring scarce energy, minerals, or dollars; or ones permitting some people to get rich while others go hungry, but choices that we create with our own hearts and heads and hands among people we know and care for (Ohliger, 1982).

Ohliger’s vision, which preceded the advent of the digital age by roughly a decade, sounds positively Luddite compared to the wired and gadgeted world that many of us live in today. Nevertheless, his core vision of a less materialistic society where we lead “more relaxed and modest lives” is enormously appealing.

Of course, there are limits to how law and public policy may shape a society committed to affirming human dignity. The state of having one’s dignity, and the act of conferring dignity upon another, require human interactions that go far beyond legal mandates. However, it is also the case that our laws reflect our core values as a society, and to that extent our legal and policymaking systems can play their respective roles in advancing dignity and reducing denials of the same.

3.3. Taking psychology seriously

Assuming that TJ should frame a public policy agenda grounded in human dignity, a brief inquiry as to its underlying disciplinary base is appropriate. Among the academic and professional disciplines that can inform this TJ perspective, psychology figures most prominently. At least eight branches of psychology are very relevant to a TJ-informed focus on legislation:

1. Forensic Psychology – Forensic psychology examines “the application of psychological knowledge and principles to legal issues” (Reber, Allen, & Reber, 2009, p. 306). Among legal scholars, lawyers, and judges, it is the branch most frequently invoked, especially in the criminal justice context. It is of critical importance in understanding on-the-ground applications of evidentiary rules and litigation processes.

2. and 3. Clinical Psychology and Abnormal Psychology – Clinical psychology is “concerned with aberrant, maladaptive or abnormal human behaviour” and the “vast umbrella of clinical practices,” including “diagnosis, evaluation, classification, treatment, prevention and research” (Reber et al., 2009, p. 135). Abnormal psychology is the “branch of psychology concerned with abnormal behaviour” (Reber et al., 2009, p. 4). If the therapeutic and anti-therapeutic properties of public policy are to be properly grasped, then clinical psychology and abnormal psychology are central to that inquiry, especially concerning how legislation may impact mental health and mental health treatment.

4. Developmental Psychology – Developmental psychology is “the field of psychology concerned with the lifelong process of change” (Reber et al., 2009, p. 212). An understanding of developmental psychology can shed light on how social and economic policy may affect our health and well-being from prenatal stages to death.

5. Social Psychology – Social psychology “concentrates on any and all aspects of human behaviour that involve persons and their relationships with other persons, groups, social institutions and society as a whole” (Reber et al., 2009, p. 751). This branch helps us to understand how public policy potentially impacts individual interactions with the rest of society.

6. Industrial/Organizational Psychology – Industrial/organizational psychology is a “branch of applied psychology covering organizational, military, economic and personnel psychology” (Reber et al., 2009, p. 379). It provides us with insights that pertain to workplace regulation and to the creation, oversight, and evaluation of organizations generally.

7. Positive Psychology – Positive psychology is an “approach to clinical, social and personality issues that emphasizes mental health and well-being rather than pathology” (Reber et al., 2009, p. 598). It can provide us with important benchmarks for examining how public policy may support psychological health.

8. Relational Psychology – Relational psychology posits that relationships form the main basis of our psychological development (Robb, 2006, ix). Psychiatrist Jean Baker Miller helped to create a foundation for understanding relational theory and the creation of growth-fostering relationships, starting with the premise “that each person becomes a more developed and more active individual only as s/he is more fully related to others” (Miller, 1986). Any examination of someone’s overall psychological state should be guided by two questions. First, “What kinds of relationships lead to the psychological development of the people in them?” (Miller, 1986) Second, “[W]hat kinds of relationships diminish or destroy people, lead to trouble, and lead to what is eventually called ‘pathology’?” (Miller, 1986) With these points in mind, relational psychology insights can be used to examine how legislation may contribute to healthy or unhealthy human relationships.

4. TJ-compatible Methodologies

If we assume the desirability of a TJ frame on policymaking, then how do we go about applying TJ in terms of legislative research, analysis, drafting, and advocacy? Three methodologies are offered as potential ways in which to do this work:

4.1. Intellectual activism

My preferred approach for engaging in law reform activities is captured in the concept of intellectual activism, which I define as:

...both a philosophy and a methodology for engaging in scholarship relevant to real-world problems, putting the resulting prescriptions into action, and learning from the results of implementation. In the legal context, intellectual activism involves conducting and publishing original research and analysis, and then applying that work to reforming the law, legal systems, and the legal profession.

The process starts with a foundational writing, usually a traditional law review article. This writing harnesses the requisite source materials, engages in legal and policy analysis, and offers a prescriptive proposal for change. In turn, it serves as the basis for a variety of applied writings, such as proposed legislation and regulations, appellate and amicus briefs, policy papers, op-ed pieces, blog posts, and multimedia presentations, as well as other forms of public education and advocacy. The process is ongoing, creating a cycle of scholarship, action, and evaluation (Yamada, 2016, p. 129).

In the context of intellectual activism and legislative research, formulation, and advocacy, I have offered a two-part process grounded in TJ perspectives for investigating “the underlying realities that may support proposed legislation” (Yamada, 2018). Part one “involves researching the psychological, social, economic and political conditions that inform our understanding of the problem or situation.” (Yamada, 2018) Part two “examines the state of the law relevant to the given policy issue(s),” (Yamada, 2018) with an eye towards assessing whether a legislative response is appropriate. This cluster of TJ-focused questions should strongly inform both parts:

- How do current laws encourage or discourage psychologically healthy processes for, and outcomes in, relevant law-related disputes, transactions, and events? What does this assessment tell us about the potential therapeutic advantages of new legislation?
- What are the policy objectives for the proposed legislation? To what extent are psychological health and well-being important objectives for the measure under consideration? How do we balance the focus on therapeutic versus anti-therapeutic processes and outcomes against more traditional concepts of rights and economic interests? TJ’s founders have urged upon us that TJ should not be the sole lens for how we examine the law, but what weight should it carry?
- How do we weigh comparative stakeholder interests in therapeutic, psychologically healthy legal processes and outcomes? Is this a zero-sum calculation or a potential “win-win” assessment? Is it possible to even articulate an overall societal interest in psychological well-being that overrides individual interests, or are we always making choices in defining rights and allocating resources – even in the purportedly idealized world of TJ?
- How do we apportion psychologically healthy outcomes among parties to legal disputes where one party has clearly acted wrongfully and the other has been the victim? What elements of moral judgement should enter the picture? This is an especially difficult calculus in criminal justice and interpersonal abuse situations. After all, TJ has been receptive to the interests of both victims and perpetrators, without imposing a legal or policy hierarchy among them. Legislation, however, often compels making such choices.
- In terms of legislative content, does the TJ-related problem or issue require a comprehensive solution, or might an incremental measure be of value? Along those lines, is it more or less therapeutic to draft an incremental measure with stronger chances of becoming law than a comprehensive measure that may meet greater opposition? (Yamada, 2018)

The legal and social action elements comprise the remaining, significant components of this suggested methodology, which I discuss at length in other writings (Yamada, 2016; Yamada, 2018). In the policy context, this may include drafting and supporting the proposed legislation, doing media outreach, forming advocacy partnerships with individuals and organizations, and engaging in public education and social media activities. It also includes periodic evaluation, creating a recurring cycle of research, analysis, action, and assessment.

4.2. Law and emotion

The emerging field of Law and Emotion is yielding insights that are very relevant to TJ. As described by [Bandes & Blumenthal, 2012](#):

The field of law and emotion draws from a range of disciplines in the sciences, social sciences, and humanities to shed light on the emotions that pervade the legal system. It utilizes insights from these disciplines to illuminate and assess the implicit and explicit assumptions about emotion that are found in every area of law. By reevaluating legal doctrine and policy in light of these insights, law and emotion scholarship contributes to a more informed, realistic, and effective framework for refining legal doctrine and reforming legal institutions ([Bandes and Blumenthal \(2012\)](#), p. 162).

Another leading law and emotion scholar, [Maroney, 2006](#), p. 126), has identified six analytical approaches to examining “emotion and legal analysis,” at least three of which are pertinent to TJ and legislation: First, an “(e)motion-centered approach” analyzes “how a particular emotion is, could be, or should be reflected in law” ([Maroney, 2006](#)). Next, an “(e)motion phenomenon approach” describes “a mechanism by which emotion is experienced, processed, or expressed, and analyze how that emotion-driven phenomenon is, could be, or should be reflected in law” ([Maroney, 2006](#)). Finally a “(l)egal doctrine approach” analyzes “how emotion is, could be, or should be reflected in a particular area of legal doctrine or type of legal determination” ([Maroney, 2006](#)).

[Bandes and Blumenthal \(2012\)](#) have noted the obvious linkages between law and emotion and legislative actors, processes, and outcomes. However, they found that legislative perspectives are underexplored within this nascent field. They suggested two potential paths for future inquiries: First, looking at the impact of emotion on “decision making by legislators,” and second, examining the “the relationship between emotion and legislation” ([Bandes and Blumenthal \(2012\)](#), p. 175).

Perhaps others are taking heed. In 2012, Amy Campbell set out a ten-step “TJ framing process” for “addressing the role of emotions in health policymaking” ([Campbell, 2012](#), p. 693). In doing so, she simultaneously filled some of the legislative void in Law and Emotion scholarship, helped to link the TJ and Law and Emotion communities, and enhanced the presence of legislative process perspectives in the TJ literature. Furthermore, her model can be easily applied to other areas of law and policy.

Designed as an ordered sequence of inquiries, Campbell’s model begins by identifying the policy problem and its emotional components, and the role of policy in addressing them. It then presents a series of questions concerning the advisability of policy action, framed through both a TJ lens and other policy perspectives, such as economics and individual rights, while weighing potential costs and benefits. If a legislative solution is deemed appropriate, then action steps and evaluation complete the process.

4.3. New haven school

The New Haven School of Jurisprudence, originated by Myres McDougal (law) and Harold Lasswell (political science and social psychology), “adapts the analytical methods of the social sciences to the

prescriptive purposes of the law” (Reisman, Wiessner, & Willard, 2007, pp. 575–76). As an analytical framework, “it seeks to develop tools to bring about changes in public and civic order that will make them more closely approximate the goals of human dignity which it postulates” (Reisman et al., 2007, p. 576). Wiessner explains that the New Haven School “addresses problems in society and works at finding solutions them,” through a “disciplined sequence” of five interdisciplinary tasks:

- (1) [to identify] the parameters of the social ill or problem the law has to address;
- (2) to review the conflicting interests or claims;
- (3) to analyse the past legal responses in light of the factors that produced them;
- (4) to predict future such decisions; and
- (5) to assess the past legal responses, invent alternatives and recommend solutions better in line with a good order, a preferred order we term a ‘public order of human dignity.’ (Wiessner, 2010, p. 48)

The New Haven School’s conceptualization of dignity embraces eight elements: “power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude” (Reisman et al., 2007, p. 576). Although it is commonly associated with international law and policy, its adherents emphasize that it can be “used to understand and shape law in all contexts.” (Reisman et al., 2007). They further add that it “can be especially empowering for individuals not associated with the state,” acting either “directly or through the mediation of groups” (Reisman et al., 2007).

4.4. Differences and commonalities

Each framework discussed above offers its own intonation. Intellectual activism adopts a social activist view of law reform, with its methodology emphasizing actions after the foundational research and analysis are completed. Campbell’s law and emotion framework for policymaking has a distinctly “wonkish” voice, grounded in the best practice of carefully proceeding through decisional steps. The New Haven School presents as a more academic, analytical tool that nevertheless offers very practical applications, with perspectives honed in the international policy sphere.

Nevertheless, the commonalities among these frames are much stronger than their differences. They implicitly incorporate Wexler’s model of both therapeutic design and therapeutic application of law, in this context related to both legislative processes and legislative outcomes. They embrace the application of interdisciplinary insights toward advancing human dignity as a desired outcome in law and policy making. They all include law reform as a prescriptive step after careful, interdisciplinary analysis reveals the inadequacy of existing doctrine. Their emphases largely complement rather than conflict with each other.

The New Haven School makes explicit what intellectual activism and Campbell’s model suggest implicitly, namely, that each framework offers a policymaking methodology accessible to those who are not formal state actors. In other words, outsiders can get involved in this realm, too, even when their status puts them in an underdog role. Given TJ’s current level of influence in the halls of policymaking, such frameworks (and their messages) are useful. Putting it in everyday parlance, it is fair to say that TJ scholars and practitioners “couldn’t go wrong” by applying any or a mix of these models to their own work of legislative analysis, drafting, and advocacy.

4.5. Needing further development: TJ-informed legislative due process

The three methodologies described above focus on how policy operatives may engage the legislative process and the analytical processes of designing legislation. In addition, as the foregoing discussion of efforts to repeal the Affordable Care Act suggests, there remains a need for TJ-informed norms for legislative processes. When individual stakeholders

are directly affected by the proposed creation or repeal of rights, privileges, obligations, and benefits conferred by legislation, then deliberations should be shaped by due process considerations of the right to be heard and of ensuring fairness and transparency, while respecting needs for efficiency and resolution. This helps to ensure that legislative processes are therapeutic, thorough, and participatory, rather than anti-therapeutic, superficial, and exclusionary.

5. Mainstreaming a TJ legislative perspective

This article has presented an argument and framing concepts for applying TJ principles to legislative processes and outcomes. Having come this far, we can now address the challenge of how to mainstream a TJ-informed perspective on legislation and policymaking. The first consideration is how to do so within the TJ community itself. The second consideration is how to take that message beyond our community.

5.1. Building the TJ community

The success of efforts to infuse policymaking with a TJ perspective will depend in large part upon the overall ability of the therapeutic jurisprudence community to establish itself more prominently in modern legal thought. From the time David Wexler and Bruce Winick co-founded TJ in 1987, this community of scholars, judges, and practitioners has grown as an informal, global network, increasingly linked by electronic communications, social media, scholarly projects, and periodic conferences and workshops.

Despite this ongoing activity and engagement, however, it is also clear that TJ has yet to join other theoretical schools as a mainstream presence in the legal academy or legal profession, much less other academic or professional disciplines. At this writing, the TJ community is big in heart but modest in number. Initial membership in the International Society for Therapeutic Jurisprudence (discussed below) is in the low hundreds, and the total number of individuals associated with TJ through social media signups is somewhere in the low thousands. TJ, and psychological perspectives on the law generally, remain somewhat in the shadows of popular theoretical frameworks such as legal realism, law and society, law and economics, and various branches of critical legal studies.

Furthermore, the TJ community has lacked a cohesive gathering spot, physical or virtual, that would allow people to more tangibly identify with TJ and to create events, activities, and initiatives under an organizational umbrella. In recent years, the need for a more formal institutional affiliation point became apparent. In 2015, a small group of individuals started to engage in serious planning and discussion to form such an organization.

In July 2017, several dozen law faculty, practicing attorneys, judges, students, and other scholars and practitioners from around the world met in Prague, Czech Republic, to launch the International Society for Therapeutic Jurisprudence (ISTJ), a non-profit, learned organization dedicated to the advancement of TJ. The occasion for this event was the International Congress on Law and Mental Health, a biennial event that has hosted a dedicated stream of TJ-related panels for over a decade. At this meeting, we shared the mission of the new organization:

...Therapeutic jurisprudence (TJ) is an interdisciplinary field of philosophy and practice that examines the therapeutic and anti-therapeutic properties of laws and public policies, legal and dispute resolution systems, and legal institutions. TJ values psychologically healthy outcomes in legal disputes and transactions, without claiming exclusivity in terms of policy objectives. The [ISTJ] shall advance these overall purposes by supporting legal and interdisciplinary scholarship; identifying and promoting best professional and judicial practices; sponsoring conferences, workshops, and seminars; engaging in continuing professional education and public education activities; and hosting and participating in print, electronic,

social media platforms (International Society for Therapeutic Jurisprudence, 2017).

The ISTJ launched its website and began accepting members in January 2018. At the same time, ISTJ board members and others began organizing subject-matter interest groups and geographically based chapters. As the first board chairperson of the ISTJ, I am becoming very familiar with the promise of, and challenges facing, this new organization. The promise lies in building a school of thought and practice that merits greater impact on our legal and policy infrastructures. The challenges include transforming a community that has existed as something of a cottage industry into a more organized, influential voice for change, without undermining the positive relationships and camaraderie that have been among its characteristic qualities.

Those who are interested in policymaking have the additional task of encouraging a stronger focus on legislative processes within the TJ community. Statutory law obviously comprises much of the legal subject matter that scholars, practitioners, and judges work with on a regular basis. However, policymaking processes and the creation of legislation have been somewhat neglected topics within the TJ community, with notable exceptions such as Amy Campbell's work (Campbell, 2012). Until we can build larger cohort of scholars and practitioners examining policymaking from a TJ perspective, we face an even greater challenge in bringing that perspective into legislatures, executive offices, think tanks, bar associations, and other relevant institutional stakeholders.

5.2. Messaging beyond the TJ community

Infusing TJ-informed perspectives into the mainstream of legislative drafting and advocacy is not simply a matter of building the TJ community itself, especially in the United States. In addition, it requires going well beyond our circle. After all, America's contemporary political, economic, and social culture enables shock events, trauma-inducing mistreatment, and other dignity denials to take place under the color of law. Very anti-therapeutic forces are exerting considerable influence over the formulation and implementation of law and public policy.

Linguistics professor George Lakoff states that “moral worldviews, visions, values, principles, frames, and language all come together in political arguments” (Lakoff, 2006, p. 119). Lakoff, who has gained prominence for his theories about how public policy issues are discussed in the United States, further explains that “(f)rames are the mental structures that allow human beings to understand reality—and sometimes to create what we take to be reality” (Lakoff, 2006, p. 25). These frames “facilitate our most basic interactions with the world—they structure our ideas and concepts, they shape the way we reason, and they even impact how we perceive and how we act” (Lakoff, 2006).

In 2009, I drew upon Lakoff's work and acknowledged that “we must work on crafting messages that persuade the general public,” adding that “(t)erms such as therapeutic jurisprudence...understandably do not resonate with the general public, so we need to translate these ideas into messages that reach people in legislatures, courts, administrative agencies, union halls, board rooms, and the media” (Yamada, 2009, p. 568–69). This messaging work should become a priority for the TJ community, especially for those of us who want TJ to be more influential in the rough-and-tumble worlds of legislation and politics. It will require learning more about how to change minds at a time when facts and reason, the lawyer's normal tools of persuasion, often seem to be of limited utility amid America's current civic and political discourse.

6. Conclusion

This article began with the assertion that public policy processes and outcomes can inflict fear, anxiety, and trauma upon stakeholders, and in the process constitute dignity denials and cause deeply anti-therapeutic impacts. It then posited that embracing therapeutic jurisprudence and a vision of a society grounded in human dignity should be among the

chief responses to anti-therapeutic policymaking. Additionally, it suggested three compatible frameworks for engaging the legislative process in a TJ-informed mode. Finally, it considered the challenges of infusing the realms of legislation and politics with a TJ perspective.

To be sure, we have our work cut out for us. With Lakoff's observations in mind, we start with the understanding that most Americans do not perceive legislative processes and statutory law through a therapeutic or anti-therapeutic lens. If we want human dignity, psychological health, and individual and collective well-being to serve as prime drivers of legislative processes and outcomes, then we will have to grow our influence and message on a scale that greatly exceeds the current reach of the relatively small TJ community, especially that in the U.S. Our only real choice is to devote plenty of energy, intelligence, and heart to the matter.

Declaration of interest

The author is chairperson of the board of trustees of the International Society for Therapeutic Jurisprudence (a non-profit organization), and a member of the board of directors of Human Dignity and Humiliation Studies (a non-profit organization), both of which are discussed in this article.

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