

Getting Deals Done: Enhancing Negotiation Theory and Practice Through a Therapeutic Jurisprudence/Comprehensive Law Mindset

Carol L. Zeiner*

ABSTRACT

This article explains how a therapeutic jurisprudence/comprehensive law mindset can augment negotiation theory and skill to help get deals done.

CONTENTS

I.	Introduction	280
II.	Background and Analysis	281
	A. Related Emerging Movements in Law:	
	Integrative Law and Comprehensive Law	281
	B. Comprehensive Law	283

* Professor of Law, St. Thomas University School of Law, Miami Gardens, Florida. Prior to becoming a law professor, the author was engaged in transactional practice for over 20 years, much of which involved structuring, negotiating, drafting and implementing complex business and commercial real estate transactions. (I will use the first person when referring to myself as author.) I especially thank Courtney Segota, Faculty Research Librarian at St. Thomas University School of Law for her very extensive research assistance. I thank Research Assistant David Schnobrick for his excellent work and dedication and for his thoughtful input based on his prior business experience. I thank Research Assistant Serena Collins for her work with the final touches on this project. I am particularly grateful to Professor Thomas D. Barton, a leading theorist in preventive law, creative problem solving, and therapeutic jurisprudence, and my colleague Professor Keith Rizzardi, a graduate of the Program on Negotiation and whose law practice experience included extensive negotiation. I am deeply grateful for their review and comments on earlier drafts. I thank retired judge, now Professor, Michael Jones, internationally respected practitioner and teacher of therapeutic jurisprudence and comprehensive law, recipient of the 2015 Bruce Winick International TJ Award, for his discussion of the assertions in this article. I thank Professor David Wexler, a founder of therapeutic jurisprudence, for his generous and perceptive advice. I also thank St. Thomas School of Law for a summer research stipend that enabled this project.

C. Therapeutic Jurisprudence and “Getting Deals Done.” 287

D. Preventive Law and “Getting Deals Done.” 297

E. Creative Problem Solving and “Getting Deals Done.” 302

F. Procedural Justice and “Getting Deals Done.” 305

III. Conclusion 306

I. INTRODUCTION

What does “getting a deal done” mean when used in the context of transactional negotiation? That depends on the “hat” that one is wearing. To a professional negotiator called in to negotiate a particular deal and who will move on to another as soon as this one is signed, “getting a deal done” means getting the relevant deal document, usually a contract, signed by all parties. To a commercial real estate broker who is to be paid only if the transaction closes, “getting a deal done” means helping to keep the deal on track during the contract’s executory phase, seeing it close, and actually receiving the commission. To executives in certain circumstances, “getting a deal done” means getting the deal document signed and the transaction booked on the corporate records so as to obtain bonus compensation. To many who negotiate complex transactions that will involve continuing obligations of the parties, or future dealings between them, negotiating to “get a deal done” means negotiating a contract that both sides are willing and able to perform so that the project can be completed successfully — with the anticipated added value.¹ The last interpretation is especially true of negotiators who will be engaged in implementation of the contract, executives in the vast majority of circumstances, and shareholders. Virtually all negotiation practice²

1. Notice that to each, “getting a deal done” means reaching the “pay-off” – the increase in value – as that particular participant defines it. Thus, the principals of any transaction need to define clearly what “payoff” *they*, the principals, want out of the deal. Aligning participants’ payoff with that of their principals makes infinite sense – but the devil is in the details of implementing this objective.

2. This is true even of the traditional adversarial lawyer approach to negotiation – hardly an academic theory, but a prevalent practice – that utilizes emotion in primarily manipulative, negative, combative ways. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 780 (1984); Andrew F. Amendola, *New Perspectives in Negotiation: A Therapeutic Jurisprudence Approach*, HARV. NEGOT. L. REV. (Jan. 27, 2010), <http://www.hnlr.org/2010/01/new-perspectives-in-negotiation-a-therapeutic-jurisprudence-approach/> (last visited August 16, 2015) [hereinafter Amendola, *New Perspectives*]. It likely derives from what Professor Riskin describes as the lawyer’s “standard philosophical map.” See Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29,

and negotiation theory recognize that human emotions impact negotiations. Likewise, the various disciplines comprising comprehensive law and integrative law, particularly therapeutic jurisprudence, incorporate human emotion into the theory and practice of law.³ Even though theory underlies comprehensive law, integrative law, and the studied approaches to negotiation, these three disciplines were not intended to remain in the theoretical realm. Rather, they are intended – and were developed – for practical application.

This article asserts that familiarity with the therapeutic jurisprudence/ comprehensive law mindset can enhance negotiation theory and practice in subtle but important ways that can help “get deals done,” especially when successful implementation is important. As a working title, I will sometimes use comprehensive-law-infused-negotiation to describe negotiation influenced by this mindset.

II. BACKGROUND AND ANALYSIS

A. *Related Emerging Movements in Law: Integrative Law and Comprehensive Law.*

International efforts known by a variety of names seek to modify the traditional, highly adversarial approach to lawyering through approaches that pay conscious attention to dignity and emotions. There is much cross-fertilization among these emerging movements, and therapeutic jurisprudence, discussed at Part II. C., has been highly

43–44 (1982) (noting that the philosophical map employed by most practicing attorneys revolves around two assumptions, one of which is the fundamentally adversarial nature of the parties; the emergence of a victorious party necessarily presupposes a loser. “On the lawyer’s standard philosophical mind map . . . the client’s situation is seen atomistically . . . the duty to represent the client zealously . . . discourages concern with both the opponent’s situation and the overall social effect of a given result.”). At its extreme, I refer to the highly aggressive, adversarial approach to negotiation as “Vanquish or be Vanquished,” a descriptive phrase that I coined as a junior law firm associate. I have never before seen the phrase used in print, but for over 30 years, whenever I have used this descriptor, every lawyer and business negotiator in the conversation seems to know exactly what I mean.

3. Comprehensive law scholars note that this approach differs from traditional first year law school teaching that trains students to exclude “irrelevant” concerns from their analysis, and that emotional and interpersonal dynamics of a matter are deemed irrelevant to pure legal analysis. See Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1, 5 (2006) [hereinafter Daicoff, *Healing Profession*]. This first year training constitutes what Professor Carol Gilligan has described as a shift away from an “ethic of care” that characterizes the thinking and idealism of many entering law students, especially women, towards a “rights” or “justice” orientation. See *id.* at 6 (citing CAROL GILLIGAN, IN A DIFFERENT VOICE 17-21 (1982)).

influential in all of them.⁴ Proponents of these movements assert that these approaches produce more efficacious results for clients, lawyers, and the legal systems of which they are a part.

Two of the major movements within this group are Comprehensive Law and Integrative Law. Both are umbrella terms that bring together a number of disciplines; some of the same disciplines, such as collaborative law and restorative justice, appear within both movements. Thus, it can be argued that comprehensive law and integrative law are competing labels for the same thing, with the latter being newer and bearing a name reminiscent of integrative medicine. J. Kim Wright, and Pauline Tesler, leaders in the integrative law movement note common ground with comprehensive law but likely would disagree that the two movements are identical; and, as those movements currently exist, I would agree. According to the website of The Integrative Law Institute founded by Pauline Tesler, integrative law seeks to infuse lawyers and judges with human compassion thus giving voice to clients.⁵ Although this parallels therapeutic jurisprudence and comprehensive law, J. Kim Wright, a leader in the integrative law movement, goes on to distinguish the two movements. He indicates that the purpose of comprehensive law and its components, such as therapeutic jurisprudence, is to reform law and how it is practiced,⁶ while integrative law currently seeks to enable attorneys' personal growth to produce lawyers who have "a new cultural consciousness and are leaders in social evolution."⁷ In addition, the website of the Integrative Law Institute notes that integrative law seeks to "encourage[] [lawyers] to integrate a private inner spiritual life with an outer life of values-driven professional service

4. These movements welcome the exchange of ideas. For example, the Congresses of the International Academy of Law and Mental Health, a gathering every other year of over a thousand practicing and academic doctors, lawyers, psychologists, and others, has welcomed sessions, in several languages, on many of these emerging movements within a track identified with the letters "TJ," the shortened nickname of therapeutic jurisprudence used frequently by those familiar with the discipline. This meeting encourages collaboration among the various movements, with the notions of therapeutic jurisprudence providing a unifying thread. *See, e.g., XXXIVth International Congress on Law and Mental Health*, INTERNATIONAL ACADEMY OF LAW AND MENTAL HEALTH (July 12 – 17, 2015), <http://ialmh.org/wp-content/uploads/2016/03/Vienna-2015-Program-Book-Draft-KD-2015-06-19.pdf>.

5. *See* Pauline H. Tesler, *Healing What Ails the Legal Profession*, INTEGRATIVE LAW INSTITUTE (Jan. 28, 2015), <http://integrativelawinstitute.org/2015/01/28/healing-ails-legal-profession>.

6. J. Kim Wright, *What is Integrative Law? The Emergence of a New Legal System*, MEDIATE.COM (July, 2015), <http://www.mediate.com/pfriendly.cfm?id=11480>.

7. *Id.*

. . . [to] meet the needs of clients and of the communities we all inhabit.”⁸

It is possible that at some point, the two movements will merge. They are certainly interrelated. However, in its current iteration, it seems that integrative law is more spiritually oriented, and emphasizes the personal development of the individual lawyer first, with a purpose of creating a new legal system. In contrast, comprehensive law focuses more on reforming how law is practiced, adding more humanistic approaches, and reforming the law itself, for the benefit of clients and the legal system, with a side benefit of helping lawyers be more satisfied with their careers.

This article focuses primarily on the movement currently known as comprehensive law. Nevertheless, it includes references to practices closely identified with integrative law and should be useful to proponents of both movements.

B. *Comprehensive Law.*

Comprehensive law is the umbrella title for a number of similar, yet distinct, approaches to law and lawyering that, unlike traditional law, share the common element of optimizing human well-being.⁹ These approaches do not eschew “legal rights and duties,” the characteristics that epitomize the traditional approach to law. Rather, comprehensive law *adds* human well-being as an important element of legal decision-making. “[I]f there are two ways [to] maximize [] legal rights . . . , and, if one way optimizes [] well-being and one way either doesn’t optimize or is actually destructive to [] emotional mental health, [comprehensive law says] then let’s do it in the way that optimizes human well-being.”¹⁰ Psychology and social science influence comprehensive law. It is an “integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach”¹¹ to addressing legal matters that “explicitly values interpersonal, emotional, psychological and relational concerns”¹² without giving short shrift to important legal values such as due process, justice, and protecting and advancing a client’s legal rights.¹³

8. See *supra*, note 5.

9. See Susan Daicoff, *The Comprehensive Law Movement*, 19 *TOURO L. REV.* 825, 832 (2004) [hereinafter Daicoff, *The Comprehensive Law Movement*].

10. *Id.* at 833.

11. Daicoff, *Healing Profession*, *supra* note 3, at 1.

12. See *Id.* at 7.

13. Some commentators suggest that comprehensive law shows promise for overcoming the tripartite problems in the legal profession – incivility, lawyer distress and the low public opinion of lawyers. See *id.* at 4; Howard Lesnick, *Foreword to*

Comprehensive law presently consists of at least nine disciplines, each of which is referred to as a “vector.”¹⁴ Professor Daicoff refers to five of these vectors as “lenses,”¹⁵ and to the remaining vectors, as “processes.”¹⁶ The number of disciplines within comprehensive law has expanded and is likely to continue to do so as additional humanistic approaches to law and lawyering develop. “All of the disciplines comprising the comprehensive law movement share at least two features: (1) a desire to maximize the emotional, psychological and relational wellbeing of the individuals and communities involved in each legal matter; and (2) a focus on more than just strict legal rights, responsibilities, duties, obligations and entitlements.”¹⁷ It is a “rights plus” approach to the practice of law.¹⁸ Professor Daicoff maintains that “[t]he beauty of the movement is evident not only in the features

MARJORIE SILVER, *THE AFFECTIVE ASSISTANCE OF COUNSEL, PRACTICING LAW AS A HEALING PROFESSION*, at xi – xvi (Marjorie Silver ed. 2007).

14. See Daicoff, *Healing Profession*, *supra* note 3, at 1–2, in which Daicoff lists nine vectors: (1) collaborative law, (2) creative problem solving, (3) holistic justice, (4) preventive law, (5) problem solving courts, (6) procedural justice, (7) restorative justice, (8) therapeutic jurisprudence, and (9) transformative mediation. See also Susan Daicoff, *COMPREHENSIVE LAW PRACTICE, LAW AS A HEALING PROFESSION* 34 (2011) [hereinafter, Daicoff, *COMPREHENSIVE LAW PRACTICE*] (adding a tenth vector, Therapeutically Oriented Preventive Law, but not designating it as a process or a lens).

The term “vector,” first utilized by sociology Professor Thomas Scheff and adopted by law Professor Susan Daicoff, “reflects the forward movement of the disciplines into the future and their convergence toward common goals.” Daicoff, *Healing Profession*, *supra* note 3, at 3.

15. *Id.* at 10 (citing David B. Wexler & Bruce J. Winick, *Patients, Professionals, and the Path of Therapeutic Jurisprudence: A Response to Petrila*, 10 N.Y.L. SCH. HUM. RTS., 907, 909-10 (1993), reprinted in DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 3 (1996) [hereinafter Wexler & Winick, *THERAPEUTIC KEY*]) (“The most theoretical of the vectors can be thought of as ‘lenses’ through which an attorney can view a particular legal problem.”). A lens can “help the attorney evaluate the problem as well as potential solutions.” Daicoff, *Healing Profession*, *supra* note 3, at 10. The vectors most often thought of as lenses are: therapeutic jurisprudence, preventive law, procedural justice, creative problem solving and holistic justice. *Id.* at 11 – 24. Despite their “more theoretical” underpinnings, they were developed for implementation in practice. *Id.*, *passim*.

16. *Id.* at 10. Traditional legal practice offers a number of processes: litigation, mediation, arbitration, private adjudications, private trials, negotiation and settlement. The comprehensive law movement adds additional processes to the lawyers’ toolkit.

17. *Id.* at 5 (citing Susan Daicoff, *Afterword: The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in *PRACTICING THERAPEUTIC JURISPRUDENCE* 471, (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000) [hereinafter Daicoff, *Afterword*]).

18. *Id.* at 4 & n.13 (attributing the term to Pauline H. Tesler, a co-founder of collaborative law and San Francisco attorney, now closely associated with the integrative law movement).

that unify the vectors, but also in their distinct and individual differences. They remain separate and vibrant movements of their own, while sharing common ground.”¹⁹ Moreover, they can be used together with each vector adding its particular contribution to addressing legal matters.²⁰

Therapeutic jurisprudence, as well as a number of the other vectors within comprehensive law, pre-dates comprehensive law. The rapid growth of therapeutic jurisprudence since its origins in the 1980s and its expansion into many areas of law, together with the commonalities it shares with other innovative approaches to lawyering, led scholars to recognize that something even bigger than therapeutic jurisprudence, alone, was influencing legal theory and practice. This spurred research that identified and labeled the larger movement of comprehensive law. Today, therapeutic jurisprudence is a dynamic “lens” vector within comprehensive law.²¹

It is important to re-emphasize that the various vectors of comprehensive law are not “feel good law” that substitute pop psychology for incisive legal analysis and the zealous enforcement of legal rights, duties and obligations. Rather, the various vectors of comprehensive law *add* the “rights plus” approach that is more multi-dimensional and multidisciplinary than traditional lawyering. Interdisciplinary thinking that embraces non-economic factors, including human emotion, is also present in much of the scholarship and characterizes much of the practice of more sophisticated, less adversarial, and more successful negotiation, especially when it comes to implementation.²²

19. *Id.* at 5.

20. See, e.g., DAICOFF, *COMPREHENSIVE LAW PRACTICE*, *supra* note 14, at Ch. 3 (the integration of therapeutic jurisprudence and preventive law); THOMAS D. BARTON, *PREVENTIVE LAW AND PROBLEM SOLVING: LAWYERING FOR THE FUTURE* (2009) (preventive law, problem-solving and therapeutic jurisprudence); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 *ARIZONA L. REV.* 25 (1997) (therapeutic jurisprudence and preventive law).

21. See Daicoff, *Healing Profession*, *supra* note 3, at 3.

22. See, e.g., ROGER FISHER, WILLIAM L. URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 18–19 (1992) [hereinafter Fisher, Ury & Patton, *GETTING TO YES*] (describing interest based negotiation including the emotional aspect of negotiation); ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* 3–7 (2005) [hereinafter Fisher & Shapiro, *BEYOND REASON*] (explaining the impact of emotion—both positive and negative—on negotiation, and how a foundation of positive emotion permits nonthreatening discourse); WILLIAM URY, *GETTING PAST NO: NEGOTIATING WITH DIFFICULT PEOPLE* 6–9 (1991) [hereinafter Ury, *GETTING PAST NO*] (introducing “breakthrough negotiation”); Danny Ertel, *Getting Past Yes: Negotiating as if Implementation Mattered*, *HARVARD BUSINESS REVIEW*, Nov. 2004, at 60 (contrasting the deal-maker negotiation mindset with the implementation-minded negotiator); ROBERT H. MNOOKIN, SCOTT R. PEPPIT AND

Because of this commonality, it is not surprising that a number of the lens-type vectors of comprehensive law, specifically, therapeutic jurisprudence, preventive law, creative problem solving, and procedural justice, show promise for improving understanding within negotiation theory, thereby enhancing successful negotiation, particularly of complex business and real estate transactions. What is surprising is the limited cross-fertilization of ideas that has taken place so far.

Very little in the growing body of scholarship on therapeutic jurisprudence deals specifically with negotiations,²³ and none of it

ANDREW S. TUTUMELLO, *BEYOND WINNING, NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 4 – 7 (2000) [hereinafter Mnookin, Peppit & Tutumello, *BEYOND WINNING*] (introducing problem-solving negotiations); Lakshmi Balachandra, Robert C. Bordone, Carrie Menkel-Meadow & Edward Sarath, *Improvisation and Negotiation: Expecting the Unexpected*, 21 *NEGOTIATION JOURNAL* 415 (2005) [hereinafter Balachandra et al, *Improvisation and Negotiation*] (exploring the improvisational element of negotiation, comparing and contrasting it with improvisation in the arts); Frank E.A. Sander & Robert C. Bordone, *All in the Family: Managing Business Disputes with Relatives*, Vol. 9, No. 3 *NEGOTIATION, THE NEWSLETTER OF THE HARVARD PROGRAM ON NEGOTIATION*, 9, 10-11 (Mar. 2006) (noting that business disputes among family members are laden with emotions, and suggesting means of managing the potential conflicts); STUART DIAMOND: *GETTING MORE: HOW TO NEGOTIATE TO ACHIEVE YOUR GOALS IN THE REAL WORLD*, ix – x (2010) [hereinafter, Diamond, *GETTING MORE*] (suggesting that emotional sensitivity, relationships, and valuing the other side's perceptions, no matter what they may be, are very effective in meeting one's goals in negotiation).

23. Andrew F. Amendola, *Combatting Adversarialism in Negotiation: An Evolution Towards More Therapeutic Approaches*, 4 *NUJS L. Rev.* 347 (2011) [hereinafter Amendola, *Combatting Adversarialism*]; Andrew F. Amendola, *New Perspectives*, *supra* note 2. These two articles, with the latter expanding somewhat on the earlier, appear to be the first to specifically suggest extending therapeutic jurisprudence into negotiation theory. Interestingly, they describe only collaborative law and therapeutic jurisprudence vectors. I do not believe that collaborative lawyering, a process approach currently used primarily in the context of divorce and family law, would be useful as a general approach to negotiation because of the process and underlying commitments involved. As a result, I believe it would be useful in only very limited situations and I do not discuss it in the body of this article.

Amendola introduces therapeutic jurisprudence, raises concerns and rejects complete transformation into a therapeutic jurisprudence model for negotiation. He goes on to assert that “small measured changes to current negotiation techniques could significantly affect the field in positive ways” without further elaboration. He suggests that therapeutic jurisprudence could be introduced into negotiation in law school clinics, but does not explain his reasons for that suggestion. Perhaps this article initiates that elaboration, although I do not know what Amendola had in mind.

I emphatically do *not* suggest that therapeutic jurisprudence, or for that matter, any vector of comprehensive law, *supplant* existing non-adversarial approaches to negotiation. Rather, I suggest that a therapeutic jurisprudence/comprehensive law mindset can *supplement* and inform non-adversarial approaches to negotiation enabling better results.

focuses on the negotiation of complex transactions.²⁴ Little in the extensive and constantly expanding literature on negotiation theory mentions therapeutic jurisprudence or other vectors of the comprehensive law movement,²⁵ Potential benefits are lost by the mutual exclusion in the literature. Before describing the various vectors of comprehensive law that show promise for helping negotiators of complex transactions “get deals done,” another caveat is necessary. The founders of therapeutic jurisprudence purposely left its boundaries soft and its definitions general in order to allow further thought and growth in the field and to allow its expansion into other areas of law.²⁶ The same may be true of other vectors of comprehensive law such as creative problem solving. Therefore, in addition to being brief, the descriptions in this article do not exhaust the possibilities

C. *Therapeutic Jurisprudence and “Getting Deals Done.”*

Therapeutic jurisprudence was first developed by Professors David Wexler and Bruce Winick in the 1980s. Its initial purpose was to analyze and improve the practice of mental health law so that the law itself, the processes, procedures, and their implementation,

24. Although writings on other disciplines within the comprehensive law movement more directly deal with negotiation and utilize concepts central to negotiation theory, even those writings give lesser attention to transactional negotiations. See e.g. BARTON, *supra* note 20, *passim*.

25. See Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 NEV. L.J. 365, 390 (2010) (citing Dennis P. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 5, 9-10 (Dennis P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000)) (Professor Freshman states only, “[w]hen it comes to emotion in particular, therapeutic jurisprudence teaches that we should consider the emotional outcome as one value among many, including others like economic outcomes.” Professor Freshman and his work are associated with the Integrative Law movement.)

Note: I have categorized the Amendola articles *supra* notes 2 and 23 as therapeutic jurisprudence articles, rather than negotiation articles.

26. Author’s conversation with therapeutic jurisprudence founder David Wexler at the Inauguration and Reception held at the University of Amsterdam Faculty of Law, for the 33rd International Congress on Law and Mental Health, Amsterdam, The Netherlands, July 14, 2013. Notes on file with author. Although I agree with this approach, it is not without its critics. See, e.g., Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193 (1995); Amendola, *Combating Adversarialism*, *supra* note 23, at 366; Amendola, *New Perspectives*, *supra* note 2 (which cites and adopts Slobogin’s concerns).

would more be beneficial to the well-being of patients.²⁷ Today, therapeutic jurisprudence is used in a wide and rapidly expanding spectrum of law. It is international in its scope.²⁸ The first waves of expansion were to “people-related” fields such as family law, juvenile law, trusts and estates, problem-solving courts, and criminal law. It is now extending into business-related fields.²⁹ The obvious reason for this expansion is that all law and legal processes ultimately impact people. To date, however, therapeutic jurisprudence is, for the most part, an unfamiliar term in the literature on negotiation theory and practice.³⁰

Therapeutic jurisprudence, sometimes referred to as “TJ,” is a way of thinking about and analyzing law³¹ and is a guide to formulating solutions.³² While it has a theoretical basis, it is intensely practical.³³ Much of its refinement and its development, as well as its spread to other areas of law, has been accomplished by those “in the trenches” of practice who recognized its potential.³⁴ Even many of its

27. See David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 21-22 (2008) [hereinafter Wexler, *Two Decades of TJ*]; see also BRUCE J. WINICK, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* 3 (1997) [hereinafter Winick, *TJ APPLIED*].

28. See THERAPEUTIC JURISPRUDENCE AND VICTIM PARTICIPATION IN JUSTICE, *INTERNATIONAL PERSPECTIVES IX-X* (Edna Erea, Michael Kilchling and Jo-Anne Wemmers eds., 2011); see also DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE x* (1991) [hereinafter Wexler/Winick, *ESSAYS IN TJ*] (explaining how therapeutic jurisprudence probably has application across the entire legal spectrum); see also WINICK, *TJ APPLIED*, *supra* note 27, at 12 (therapeutic jurisprudence has now been applied to correctional law, sexual orientation law, disability law, evidence law, personal injury law, labor arbitration law, commercial law, workers’ compensation law, probate law, and the legal profession).

29. See, e.g., Thomas D. Barton, Presentation at 33rd International Congress on Law and Mental Health, Amsterdam, The Netherlands, July 14 – 19, 2013, entitled *Capturing Human Consent through Collaborative Contracts*. (Copy of slides on file with the author). I have extended its use to the analysis of eminent domain projects undertaken solely for economic development in the U.S. See Carol L. Zeiner, *Kelo Through the Lens of Therapeutic Jurisprudence*, 6 *PHOENIX L. REV.* 857 (2013) (Second annual issue on therapeutic jurisprudence and comprehensive law featuring invited works of various experts).

30. But see Freshman, *supra* note 25, at 390; Amendola, *Combating Adversarialism*, *supra* note 23; and Amendola, *New Perspectives*, *supra* note 2.

31. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PSYCHOL. PUB. POL’Y & L.* 184, 185 (1997) [hereinafter Winick, *Jurisprudence of TJ*] (explaining that TJ “is the study of the role of the law as a therapeutic agent”). In this respect, it can be considered a jurisprudential philosophy.

32. See Daicoff, *Healing Profession*, *supra* note 3, at 10 (noting that the “lens” approach to TJ, as espoused by Professor Wexler, “help[s] the attorney evaluate . . . potential solutions”).

33. See Wexler/Winick, *ESSAYS IN TJ*, *supra* note 28, at x. *TJ* was developed to guide the practical application of law.

34. See Daicoff, *Healing Profession*, *supra* note 3, at 48.

theorists have extensive experience in practice.³⁵ This practicality, guided by underlying theory, makes therapeutic jurisprudence an attractive addition to negotiation theory and practice. Not only does its theory validate and reinforce theoretical work on negotiation, its mindset expands the practical tools available in negotiation to further “enlarge the pie”³⁶ for reaching agreement, while also generating the attitudes and working relationships needed for successful implementation.

Therapeutic jurisprudence “seeks to apply social science to examine law’s impact on the mental and physical health of the people it affects.”³⁷ It recognizes that legal procedures constitute social forces that, whether intended or not, often produce therapeutic [positive] or antitherapeutic [negative] consequences on the persons involved.³⁸ “It posits that positive therapeutic effects are desirable and should generally be a proper aim of law, and that antitherapeutic effects are

35. *E.g.* Susan Daicoff, Anne Bloom, Michael Perlin, Amy Ronner, retired judge Michael D. Jones, Judge Deborah Labora-White, Judge Ginger Lerner-Wren, Erna Haueter (barrister, Zurich Switzerland), Christina Zawisza, Magistrate Gregory Levine (Melbourne, Australia), Kerry Walker (Melbourne, Australia), Shira Leitersdorf (Haifa, Israel), myself, and likely many others.

36. *See* Fisher, Ury & Patton, *GETTING TO YES*, *supra* note 22, at 59, 65–70. The term is used by Fisher, Ury and Patton to mean expanding the topic areas for negotiation.

37. Winick, *TJ APPLIED*, *supra* note 27, at 3. Many sources say “mental and psychological health” rather than “mental and physical.” *See, e.g.*, Daicoff, *The Comprehensive Law Movement*, *supra* note 9, at 837 (“Therapeutic jurisprudence concentrates on the law’s impact on people’s emotional lives and psychological well-being.”); Daicoff, *Afterword*, *supra* note 17, at 471, 472 (Therapeutic jurisprudence “proposes that the practicing lawyer identify, consider, and seek to improve the psychological effects any proposed legal action or process may have on the individuals and groups involved.”); David Wexler, *Therapeutic Jurisprudence*, 20 *TOURO L. REV.* 353, 355 (2004) (“Therapeutic jurisprudence focuses on the law’s impact on psychological well-being and on emotional life.”). I believe that most would agree that the reference to “physical health” refers to the impact of psychological harms on physical health.

38. *See* Wexler/Winick, *ESSAYS IN TJ*, *supra* note 28, at 8; Winick, *TJ APPLIED*, *supra* note 27, at 3; Winick, *Jurisprudence of TJ*, *supra* note 31, at 185; *see also*, Stolle et al, *supra* note 25, at 17 (“Therapeutic jurisprudence is an interdisciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects.”) (*cited in* Amy D. Ronner & Bruce J. Winick, *Therapeutic Jurisprudence: Issues, Analysis, and Applications: Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 *SEATTLE U. L. REV.* 499, 499 (2000)) [hereinafter Ronner/Winick, PCA].

undesirable and should be avoided or minimized,”³⁹ “so long as other values, such as justice and due process can be fully respected.”⁴⁰

Therapeutic jurisprudence is interdisciplinary, and seeks to be empirical.⁴¹ Although it is related to law and psychology and social science and law,⁴² therapeutic jurisprudence, zeroes in “to examine

39. Winick, *TJ APPLIED*, *supra* note 27, at 4; *see also* Winick, *Jurisprudence of TJ*, *supra* note 31, at 188.

40. David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000). Despite its attention to therapeutic results, it is *absolutely critical* to understand that TJ does *not* place therapeutic consequences as the ultimate goal of law. It holds that:

[A]lthough in general positive therapeutic consequences should be valued and antitherapeutic consequences should be avoided, *there are other consequences that should count, and sometimes count more*. There are many instances in which a particular law or legal practice may produce antitherapeutic effects, but nonetheless may be justified by considerations of justice or by the desire to achieve various constitutional, economic, environmental or other normative goals *Therapeutic jurisprudence therefore does not suggest that therapeutic considerations should outweigh other normative values that the law may properly seek to further. It does not end the conflict when other normative values are in conflict. Rather, it calls for an awareness of [therapeutic and antitherapeutic consequences to enable] a more precise weighing of sometimes competing values.*

Winick, *TJ APPLIED*, *supra* note 27, at 4 (Emphasis added by the author).

41. *See* Wexler, *Two Decades of TJ*, *supra* note 27, at 24 (“[TJ] actively sought out other disciplines and sought to become truly interdisciplinary.”); Winick, *TJ APPLIED*, *supra* note 27, at 3; Wexler & Winick, *ESSAYS IN TJ*, *supra* note 28, at 8 (explaining that the ultimate task of TJ is to empirically examine the relationship between legal arrangements and therapeutic outcomes); Winick, *Jurisprudence of TJ*, *supra* note 31, at 185 (stating that TJ is an “interdisciplinary enterprise”); *Id.* at 196 (“The best type of research is the ‘true experiment,’ with random assignment of identical populations to an experimental and a control group to isolate the variable under investigation. Experimentation in the legal system, however, can only rarely use true randomization.”).

42. Winick, *TJ APPLIED*, *supra* note 27, at 3. However, TJ also values social science’s consequentialist practices because it suggests that we ought to study the extent to which therapeutic ends actually are furthered in practice. *See* Winick, *TJ APPLIED*, *supra* note 27, at 4; Winick, *Jurisprudence of TJ*, *supra* note 31, at 188. It also can be described as having ties to law and literature because it focuses on the impact of law on the human condition, which is often reflected in both classical and modern literature. *See generally* AMY D. RONNER, *LAW, LITERATURE AND THERAPEUTIC JURISPRUDENCE* 3–41 (2009) (describing therapeutic jurisprudence as well as its connection with other jurisprudential philosophies, particularly law and literature). Therapeutic jurisprudence is critical of some of the assumptions underlying traditional perspectives of the law and in this respect joins feminist and race theory or class analysis of the legal system. *See* Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 CT. REV. 54, 55 (2000) (citing David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL. & L. 220, 225 (1995)).

law's impact on the mental and physical health of the people it affects."⁴³ Furthermore, it is normative in that it suggests what is good and "ought to be," rather than merely observing, categorizing and reporting "what is."⁴⁴ It recommends that sensitive policy analysis of law include a systematic study of law's therapeutic or antitherapeutic effects.⁴⁵ Boiled down to its most essential element, therapeutic jurisprudence adds to legal analysis, in a formal way, the dignity and value of the individual human being.⁴⁶ Therapeutic jurisprudence frequently seeks to change the way in which lawyers and courts practice law in order to enhance therapeutic impacts and diminish the antitherapeutic. Thus, therapeutic jurisprudence is interested in both reforming the law and applying existing law more therapeutically.⁴⁷

The "three V's" of therapeutic jurisprudence, "voluntary participation," "voice," and "validation" are significant characteristics of therapeutic jurisprudence.⁴⁸ One should feel that he or she is a voluntary participant in the legal process because this feeling produces

43. Winick, TJ APPLIED, *supra* note 27, at 3.

44. *Id.* at 5; *see also* David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991) ("Legal decision making should consider not only economic factors, public safety and the protection of patients' rights; it should also take into account the therapeutic implications of a rule and its alternatives.").

45. Winick, TJ APPLIED, *supra* note 27, at 4.

46. Carol L. Zeiner, *The Fundamental Differences between Taking a Fee Simple and Creating a Leasehold via Eminent Domain*, ALI-ABA 28th Annual Eminent Domain and Land Litigation, and 6th Annual Condemnation 101: Making the Complex Simple in Eminent Domain, at 768 (2011).

Although a stated aim of the rule of law is the recognition of human dignity, it seems often to get lost in the fray of combativeness and current emphasis on efficiency. *See* Rhona K.M. Smith, *Conceiving the Lawyer as Creative Problem Solver*, 34 CAL. W. L. REV. 411 (1998), *passim*; Thomas D. Barton, *Creative Problem Solving: Purpose, Meaning, and Values*, 34 CAL. W. L. REV. 273, 274 (1998).

47. *See, e.g.*, Winick, TJ APPLIED, *supra* note 27, at 3 - 10 ; *see also* Patry, Wexler, Stolle & Tompkins, *Better Legal Counseling through Empirical Research: Identifying Psychological Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 440 (1998) (citing Wexler & Winick, THERAPEUTIC KEY, *supra* note 15, at 831).

48. *See* Michael L. Perlin, "Striking for the Guardians and Protectors of the Mind": *The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN STATE L. REV. 1159, 1186 (citing Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008), and Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda, and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002) [hereinafter Ronner, *Songs*]); *see also* Michel L. Perlin, Professor of Law, Acceptance Speech for Winick Award presented by the International Academy of Law and Mental Health at Faculty of Law – University of Amsterdam, Amsterdam, The Netherlands (July 14, 2013) (speech highlighting the three V's as enunciated by Professor Amy

outcomes that are more therapeutic⁴⁹ and that better respect the dignity of the individual. “Voice” means that the participant has had the opportunity to tell his or her story to the decision makers. “Validation” means that the participant’s voice has been genuinely listened to, heard, and taken seriously.⁵⁰

The concept of the three V’s of therapeutic jurisprudence first developed in the context of litigation. Obviously, it would be unusual for a defendant in litigation to feel that he or she is a “voluntary participant” in those proceedings in the normal understanding of those words, because the defendant did not initiate the action. Yet social science has found that some of the characteristics of voluntariness — a participant who is at peace with the outcome of the proceeding and emerges with respect for the law and legal authorities — can better be achieved through a system that treats the participant with fairness, respect and dignity.⁵¹ Together, voice and validation produce a “sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive.”⁵² As a result, the litigant is likely to be more compliant with the outcome, because the litigant feels that he or she had a respected role in the process.⁵³

When the litigation setting is replaced by a complex transactional setting, the “three V’s” remain equally important and can be attained more directly. Except in distress situations, negotiations in

Ronner in Professor Perlin’s arguments for further incorporation of therapeutic jurisprudence into human rights scholarship and practice).

Procedural justice, another vector within comprehensive law also recognizes the significance of “voluntary participation,” “voice” and “validation” of the parties to a legal proceeding or a law-related process. See Daicoff, *Healing Profession*, *supra* note 3, at 18 (describing an empirical survey by Tom Tyler finding that litigants’ perceptions of judicial processes were more dependent on these psychological factors than on whether they won or lost). Procedural Justice is discussed *infra* at Part II E.

49. See Ronner, *Songs*, *supra* note 48, at 95 (“In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.”); Ronner/Winick, *PCA*, *supra* note 38, at 505.

50. See Ronner, *Songs*, *supra* note 48, at 94.

51. See Ronner/Winick, *PCA*, *supra* note 38, at 504–05.

52. Ronner, *Songs*, *supra* note 48, at 94, *elaborated in id.* at 92–95; see also Ronner/Winick, *PCA*, *supra* note 38, at 501 (positing that a simple explanation from an appellate court for its decision—a therapeutic affirmance that explains the reasons for the court’s decision not to accept the appellant’s position, rather than a per curiam affirmance—would indicate to a defendant that his “voice” had been heard, thus providing “validation” respectful of the appellant’s dignity and personhood. This combination would give rise to a feeling of voluntary participation in the process, increasing the defendant’s likely acceptance of the result and ability to move forward from it).

53. See Ronner, *Songs*, *supra* note 48, at 94–95; see also Ronner/Winick, *PCA*, *supra* note 38, at 501–02.

complex transactions generally begin as actual voluntary undertakings. Both negotiation theory and therapeutic-jurisprudence-influenced-negotiation recommend that the parties, as differentiated from the negotiators alone, have a voice and feel that they are voluntary participants in arriving at the final agreement. I believe, however, that therapeutic jurisprudence places additional emphasis, not necessarily characteristic of classic negotiation theory, on the parties' sense of validation with two objectives in mind: first, generating both perceived and actual respect for the dignity of the parties; and second, enabling them to "buy in" more wholeheartedly to the deal, thus enhancing the likelihood of success.

Therapeutic jurisprudence is also more likely to address another problem that is present when one or both parties are entities made up of numerous constituents. While entering into negotiations may be desired, and thus voluntary, on the part of the shareholders and senior executives, the same may not be true of employees crucial to implementing the agreement and achieving the desired added value. The therapeutic jurisprudence approach would pay more conscientious attention to the business and dignitary interests of these people, as well as to the deal itself. As a result, the deal is likely to resonate more positively with these crucial constituents, rather than causing them unnecessary harm. Thus, the deal is less likely to be undone by lack of commitment, resentment or retaliation. The "three V's" of therapeutic jurisprudence correlate positively, but not precisely, with the core concerns described by Professors Fisher and Shapiro in the literature of negotiation theory.⁵⁴ Like many other experts in negotiation theory, they point out that emotions can influence negotiations either positively or negatively, either assisting or detracting from the likelihood of reaching agreement on substantive matter(s) involved,⁵⁵ and that the emotions of the negotiators and

54. See Fisher & Shapiro, *BEYOND REASON*, *supra* note 22, at 14–15.

55. See, e.g., *id.* at ix; Fisher, Ury & Patton, *Getting to Yes*, *supra* note 22, at 18–19; Ury, *GETTING PAST NO* *supra* note 22, at 6–9; Leonard L. Riskin, *Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 *NEV. L.J.* 289, 294 (2010) [hereinafter Riskin, *Further Beyond Reason*]; Diamond, *GETTING MORE*, *supra* note 22, at 14, 22, 34. Even Robert Ringer's pop culture *Winning Through Intimidation*, recognizes that emotions play a major role and seeks to harness them for one's advantage. ROBERT RINGER, *WINNING THROUGH INTIMIDATION* (1976), *passim* (Among other things, Ringer argues that negotiators use intimidation to keep certain others in the deal – in his examples, the real estate brokers – from receiving the compensation that they have earned and deserve. He recommends that one develop his own intimidation skills and be the first to intimidate to keep from being victimized.).

their principals change constantly within any given negotiation.⁵⁶ In *Beyond Reason*, Professors Fisher and Shapiro seek to teach “a strategy to generate positive emotions and to deal with negative ones. . . . [so that negotiators [n]o longer will [] be at the mercy of [their] own emotions or those of others.”⁵⁷ They point out that “it is a daunting proposition to deal directly with every emotion as it happens in oneself and others [during negotiations while at the same time focusing on each] person’s differing views on substantive issues and the process for working together.”⁵⁸ Professors Fisher and Shapiro propose that you “turn your attention to five core concerns that are responsible for many, if not most, emotions in a negotiation.”⁵⁹

The five core concerns for negotiation focus on one’s relationship with others⁶⁰ and consist of Appreciation, Affiliation, Autonomy, Status and Role.⁶¹ Fisher and Shapiro assert that the core concerns “can be used both as a lens to understand the emotional experience of each party and as a lever to stimulate positive emotions in yourself and others,”⁶² thus fostering enhanced awareness of each party’s motivations, refined insight into core concerns that may otherwise go unmet, and ultimately a better likelihood of reaching agreement.⁶³

In studying *Beyond Reason* and its explanation of Appreciation, Affiliation, and Autonomy, it is evident that these three core concerns correlate generally with therapeutic jurisprudence’s Validation.⁶⁴ Similarly, core concerns Status and Role correlate generally with therapeutic jurisprudence’s Voice and Validation, and all five core

56. See Fisher & Shapiro, *BEYOND REASON*, *supra* note 22, at 3-14.

57. *Id.* at ix.

58. *Id.* at 12.

59. *Id.* at 14. Professor Diamond has developed another studied approach to negotiation that eschews use of the structure and nomenclature inherent in the core concept approach; nevertheless, he emphasizes that the perceptions of the other side, which are colored significantly by their emotions (that frequently change, and not necessarily because of anything having to do with the negotiation), are critical. Professor Diamond points out that the emotions of the other side and their deeper motivations (*e.g.*, how choosing a course of action in important decisions of life makes one feel), rather than rational decision-making, can be critical. He urges that “[t]he emotional and psychic rewards [the other side] get[s], and the anguish, must be a part of the negotiation process.” Diamond, *GETTING MORE*, *supra* note 22, at 33-34, 28.

60. See Fisher & Shapiro, *BEYOND REASON*, *supra* note 22, at 16.

61. See *id.* at 17, tbl.3.

62. *Id.* at 18.

63. See *id.* at 18-21.

64. See *id.* at 17, tbl.3. Fisher and Shapiro elaborate further on each of these five core concerns that “are responsible for many, if not most, emotions in negotiation.” *Id.* at 14; see also *id.* at 25 (appreciation); *id.* at 52 (affiliation); *id.* at 72 (autonomy); *id.* at 94 (status); *id.* at 94 (role).

concerns correlate with the most important of therapeutic jurisprudence's three V's, Voluntary Participation.⁶⁵ While the core concerns are aimed at understanding the parties' emotions, and using them to move negotiations to a successful conclusion, therapeutic jurisprudence makes positive (therapeutic) emotional outcomes *part of the desired outcomes of the negotiation* wherever this can be accomplished without adversely impacting the underlying substantive concerns of the matter. This *does not* mean that the purpose of negotiation is to improve the emotional and corresponding physical health of the parties.⁶⁶ It does not assert that therapeutic interests should outweigh other norms. Quite to the contrary, therapeutic jurisprudence helps a negotiator remain cognizant of therapeutic interests as he or she analyzes the substantive problem and formulates possible solutions. This enables a more thorough and precise weighing of competing interests, and helps the negotiators structure a win-win that advances the emotional well-being of the parties, as well as their substantive interests, whenever such accommodation is possible.⁶⁷ The odds of achieving therapeutic solutions are increased when therapeutic jurisprudence is added to these negotiators' mindset. Thus, a therapeutic jurisprudence mindset is another tool available to negotiators as they seek to "get the deal done."⁶⁸

While I have not encountered literature importing interest-based negotiation theory into therapeutic jurisprudence, some works on interest-based negotiation theory, including one by Professor Leonard Riskin, have found a place in the broader literature of comprehensive law.⁶⁹ Professor Riskin concurs with the core concepts approach but

65. See *id.* and accompanying text.

66. See *supra* notes 10-13 and accompanying text.

67. Although this paper focuses on the interest-based approach to negotiation associated with GETTING TO YES and its progeny, I posit that other schools of thought on negotiation, for example, that espoused by Professor Diamond in Diamond, GETTING MORE, *supra* note 22, can be enhanced subtly through infusion of a therapeutic jurisprudence/comprehensive law mindset.

68. Achievement of an agreement that is more likely to be long-lasting and successfully implemented by the parties is thoroughly discussed again in the section devoted to comprehensive law's preventative law below. See discussion *infra* Part II C.

69. See Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in THE AFFECTIVE ASSISTANCE OF COUNSEL, PRACTICING LAW AS A HEALING PROFESSION 447 (Marjorie A. Silver ed., 2007) [hereinafter Riskin, *Awareness in Lawyering*]. Professor Daicoff noted in the early 2000s that Riskin's "mindfulness meditation" is one of the "comprehensive law skills that are just emerging." Daicoff, *The Comprehensive Law Movement*, *supra* note 9, at 836. Professor Daicoff's book, DAICOFF, COMPREHENSIVE LAW PRACTICE, *supra* note 14, mentions mindfulness meditation as a parallel development. See *id.* at 58. Professor Daicoff also cites to GETTING

asserts that even a negotiator well versed in interest-based negotiation and core concerns can find himself unable to employ them in some negotiations.⁷⁰ To remedy this problem, he recommends that “a negotiator can enhance his ability to employ the [core concerns techniques] through improving his awareness skills.”⁷¹ He goes on to propose “mindfulness,” which plays a strong role in integrative law, to enhance awareness. “‘Mindfulness’, means being aware, moment-to-moment, without judgment and without commentary, of whatever passes through the sense organs and the mind – sounds, sights, bodily sensations, odors, thoughts, judgments, images, emotions.”⁷² Professor Riskin recommends mindfulness as an aid to transcend the Lawyer’s Standard Philosophical Map⁷³ enabling a lawyer to think more broadly and deeply and to develop loving-kindness (e.g., respect and respectful treatment) toward himself and others.⁷⁴ Professor Clark Freshman, who is associated with the Integrative Law Institute, differentiates between internal mindfulness, that is, mindfulness with respect to oneself, and external mindfulness which he defines as “awareness of the thoughts – particularly the heightened cognitive load – and emotions of others.”⁷⁵ He “suggests ‘external mindfulness’ as a complementary skill to check when core concerns help and when other tools, including both internal and external mindfulness, may help as well as – or better than – the core concerns approach.”⁷⁶ I propose that a negotiator versed in interest-based,

TO YES as an “alternate model for problems solving” in her chapter on creative problem solving. *Id.* at 130 n.16 (citing Fisher, Ury & Patton, *GETTING TO YES*, *supra* note 22).

70. See Riskin, *Further Beyond Reason*, *supra* note 55, at 293.

71. *Id.*

72. Riskin, *Awareness in Lawyering*, *supra* note 69, at 448. Professor Riskin, as well as others such as Professor Freshman (*see supra* note 25), recommend meditation and practices derived from Buddhism to develop highly aware detachment.

73. See Leonard L. Riskin, *Mindfulness in the Law and ADR: The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1, 13 (2002). Two significant assumptions define this philosophical map: (1) that disputants are adversaries, where if one wins the other must lose, and (2) disputes may be resolved by a third party’s application of law to the facts of a given case. *Id.* at 14. Legal training, Professor Riskin posits, “requires strong development of cognitive capabilities, which is often attended by the under-cultivation of emotional faculties.” *Id.*

74. See Riskin, *Awareness in Lawyering*, *supra* note 69, at 450 – 54. “Loving-kindness” is Professor Riskin’s term, which I believe may be so radical for attorneys first exploring alternatives to the Lawyer’s Standard Philosophical Map as to scare them off. But I understand Professor Riskin’s use of the term to mean affirming respect, though I acknowledge that he, not I, is an expert theorist in mindfulness.

75. Freshman, *supra* note 25, at 366-67.

76. *Id.* at 366. He posits that “with certain individuals in certain circumstances, . . . focusing on core concerns [may not work and] may even produce less functional

core concerns negotiation theory, including one who adheres to Professor Riskin's mindfulness, or a negotiator who at times turns from core concerns to focus on Professor Freshman's external mindfulness, can further enhance his or her effectiveness by using therapeutic jurisprudence to improve negotiations and to analyze and formulate solutions that better support the well-being of the people involved in order to reach efficacious agreements that will be implemented successfully.

D. Preventive Law and "Getting Deals Done."

In contrast to therapeutic jurisprudence, the preventive law and creative problem solving vectors of comprehensive law seem at first glance to be incorporated already within formal interest-based negotiation theory and practice. Certainly, those terms, or terms seeming to have the same meanings, frequently appear in the literature of negotiation, starting with the popular *Getting to YES*⁷⁷ and its progeny,⁷⁸ and the problem solving approach to negotiation espoused by Carrie Menkel-Meadow.⁷⁹ Yet, I believe that the comprehensive law iterations of these practices put a "spin" on them that, together with therapeutic jurisprudence, produce comprehensive-law-infused-negotiation, which can further enrich their usefulness in negotiation.

Preventive law was conceived in the 1930s and emerged as an approach to law during the 1950s.⁸⁰ One way of describing classic preventive law is that it is anticipatory creative problem solving⁸¹

emotions and therefore decrease the chances of an optimal outcome." *Id.* (emphasis in the original). He goes on to say that both internal and external mindfulness may produce important insights for negotiation and improve our ability to detect deception. *Id.* at 367 (citing Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511 (2006), and Clark Freshman, *Identity, Beliefs, Emotion and Negotiation Success*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 99 (Michael L. Moffitt & Robert C. Bordone eds., 2005)).

77. Fisher, Ury & Patton, *GETTING TO YES*, *supra* note 22.

78. See, e.g., Ury, *GETTING PAST NO*, *supra* note 22; Ertel, *supra* note 22; Fisher & Shapiro, *BEYOND REASON*, *supra* note 22.

79. See discussion *infra*, Part II D; see generally Menkel-Meadow, *supra* note 2, at 794.

80. See Daicoff, *Healing Profession*, *supra* note 3 at 16.

81. Creative problem solving is discussed in more detail below. See discussion *infra*, Part II D. However, because this article is written primarily for those knowledgeable in advanced negotiation theory, it is assumed that this audience is familiar with the terms creative problem solving and problem solving as used in current negotiation theory and practice, which is also how it is used in this particular section of this article. The comprehensive law aspects of creative problem solving are discussed below at Part II D *infra*.

undertaken before a possible legal issue arises so as to solve it prospectively,⁸² either by eliminating the possibility, or by arranging how it will be resolved so that its impact is ameliorated if it occurs. “[It] asks what measures can be put in place to prevent future litigation or future legal problems.”⁸³

Preventive law was, and is typically, practiced via legal counseling on a particular matter or in periodic “check-ups” of a client’s legal vulnerabilities. It is included within comprehensive law because it spares the client the aggravation and emotional trauma of legal disputes.

Adept transactional attorneys who focus on successful implementation and achieving the desired added value in their deals usually engage in preventive law as well as creative problem solving during the course of negotiations. Thus, to some extent, they already are engaged in the practice of comprehensive law or something closely akin to it. However, I believe that preventive law itself has grown by virtue of its inclusion within the comprehensive law movement. Close and repeated association with therapeutic jurisprudence and the comprehensive law version of creative problem solving has infused preventive law with heightened attentiveness to emotional well-being and intangible dignitary interests. This added therapeutic jurisprudence/comprehensive law sensibility empowers negotiators to more consciously focus on the emotional well-being of the persons involved as they use their preventive law skills to prevent legal problems before they occur.

Danny Ertel’s *Getting Past YES: Negotiating as if Implementation Mattered*,⁸⁴ emphasizes practices that fall within classic preventive law. For example, he contrasts dealmakers’ mindsets (the signed

82. See Daicoff, *Healing Profession*, *supra* note 3, at 16. Interestingly, learning the improvisational process in negotiation, as part of one’s preparation, is in the nature of preventive law, while practicing that improvisation to deal with the unexpected during the course of dynamic negotiations seems more in the nature of problem solving. See Balachandra et al., *Improvisation and Negotiation*, *supra* note 22. The comprehensive law aspects of creative problem solving are discussed at Part II D, *infra*.

83. Daicoff, *Healing Profession*, *supra* note 3, at 16 (citing Bruce J. Winick, *The Expanding Scope of Preventive Law*, 3 FLA. COASTAL SCH. L.J. 189, 195 n. 15 (2002)).

84. Ertel, *supra* note 22. This is a particular favorite of mine, perhaps because attaining a combination of willing compliance and practicality for implementation became my focus as I learned negotiation in the trenches as a practicing lawyer, without benefit of the academic and practical literature on the topic. At this juncture, I must also state that I am most grateful for my stint as an in-house attorney for a publicly traded company, which began after I had been practicing law for a little over three years. I admit that before then, I thought that “getting the deal done” consisted of my

deal document as the finish line) with the mindset of implementation-minded negotiators who see the signed agreement as just the beginning. He points out that the latter “believe their role is to ensure that the parties involved actually realize the value they are trying to create.”⁸⁵ They pay attention “to whether the parties’ commitments are realistic, whether the stakeholders are sufficiently aligned, and whether those who must implement the deal can establish a suitable working relationship.”⁸⁶ This focus falls within classic preventive law and also addresses the people factor that is included in sophisticated negotiation theory because it considers the working relationship of those who must put the deal into operation.

Likewise, most of the five paradigmatic shifts that Ertel describes as necessary to reach an implementation mindset⁸⁷ fall within classic preventive law with a negotiation theory cognizance of establishing working relationships. Both Ertel’s Step 1, “Start with the end in mind,”⁸⁸ and the “‘benefit of hindsight’ exercise” included within Step 1 are perfect examples. His “benefit of hindsight” exercise, to be done as part of the *preparation* for negotiation, directs the negotiator to “Imagine that it is 12 months into the deal and ask yourself: 1. Is the deal working?”⁸⁹ This trains the negotiator to plan to incorporate proper indicia of success as he negotiates. Next, it asks, “2. What has gone wrong so far?”⁹⁰ Ertel writes that this requires the negotiator to consider “[w]hat have we done to put the deal back on course?”⁹¹ and “what were some early warning signs that the deal may not meet its objectives?”⁹² If I were designing this test with the comprehensive-law-infused-negotiation twist to preventive law, I would add, “What provisions could we have negotiated and drafted that would prevented the deal from going off course in the first place, and that would have engendered both sides’ genuine cooperation in keeping the deal on course? What provisions could have served as automatic, pre-agreed course correctors when things started going off

impressive stacks of drafts, the signed final contract, the boxes of due diligence documents, and the signed, recorded (if necessary) closing documents. It was not until I was an in-house attorney that I truly understood that getting a deal done meant accomplishing the client’s business objectives – meaning, successful implementation *with* the anticipated added value.

85. Ertel, *supra* note 22, at 62.

86. *Id.*

87. *Id.* at 63–68.

88. *Id.* at 63.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

course?” I would also ask how we could have dealt with possible problems at the negotiation/drafting stage to neutralize, or at least blunt, their impact. In addition, I would ask, “Were our original goals the correct ones, or is there another, possibly more workable or better end goal that we ought to be seeking as we pursue this deal?” If I were designing the exercise, I would also incorporate additional human well-being questions derived from comprehensive law. Did we demoralize and frustrate the individuals who must implement the deal by demanding success yet failing to provide them with the necessary structure and tools? Did we disrespect them by failing to inquire as to what they needed to make the deal work, or by creating unnecessary physical, process or human barriers to success? Did they receive the necessary validation to feel that they are voluntary, valued members of the team?⁹³ Or rather, were they treated as expendable “objects” that must fulfill their function, yet also, might incidentally and quite thoughtlessly get crushed under the wheels of progress? What can we do to structure the deal or its provisions so that it works for and respects the people who must make it work?

Next, as step three of his preparatory, “benefit of hindsight” exercise Ertel asks “What capabilities are necessary to accomplish our objectives?”⁹⁴ Here he looks for the necessary processes, tools, and skills needed by the implementation teams, the attitudes needed for successful implementation and finally “[w]ho has tried to block implementation, and how have we responded?”⁹⁵ Ertel has added negotiation theory’s attention to emotion in order to engender positive attitudes, and much like therapeutic jurisprudence, extended it beyond the negotiators themselves and executive management to the people who will actually implement the deal. My question three and its content would be much like Ertel’s, yet I would edit the question with comprehensive law’s twist on preventive law: “what *need* – business, dignitary, emotional, rational or irrational – likely is motivating the would-be blocker(s)? How could we have changed things to fulfill or alleviate this need so that the would-be blocker(s) would be incentivized to willingly cooperate?”

93. While asking the right questions directly of the persons involved is the most dignity-enhancing approach, sometimes that is not possible due to confidentiality concerns – the deal must be kept secret. Those who structure and negotiate the deal must then find out by other means exactly what is required for the individuals charged with implementation to achieve the objectives efficiently through means that validate their worth, rather than creating unnecessary, frustrating and demoralizing obstacles.

94. Ertel, *supra* note 22, at 63.

95. *Id.*

What the therapeutic jurisprudence/comprehensive law mindset adds is a subtle focus on the therapeutic or antitherapeutic impacts, not just in moving negotiation forward, *but in the in terms of the deal itself, the provisions of the written agreements that will be used to effectuate the deal, and the implementation process.* It therefore allows for more fine-tuning as part of the preventive law preparation for negotiations, in the negotiations themselves, and in the final design of the deal.

Ertel's article describes the actions of Tom Finn in his capacity of vice president of strategies, planning and alliances at Proctor & Gamble Pharmaceuticals.⁹⁶ Although Finn's duties technically do not begin until the deal has been negotiated by others, Finn engages in preventive action. "Finn jumps into the negotiating process to ensure that negotiators do not bargain for terms that will cause trouble down the road."⁹⁷ He wants to incorporate the firm's hard-won experience so that implementation problems can be avoided. Among other things, he believes "[i]t's important that the partners be provided [with] incentives to do the right thing"⁹⁸ as the deal goes through its life cycle. "Finn asserts that 'leaving some money on the table is OK if you realize that the most expensive deal is the one that fails.'"⁹⁹

If negotiation theory and the writings and practice of successful, experienced persons such as Danny Ertel and Tom Finn, to name just two, already incorporate classic preventive law, how can the comprehensive-law-infused-negotiation twist on preventive law enhance their work? The answer is that it sheds additional light on the human element, particularly dignitary concerns and the emotional/motivational ingredients that play an important role in establishing the strong working relationships that these leaders recognize as critical to successful projects and the resolution of unanticipated problems that can arise during the life of a deal. In addition, negotiators familiar with comprehensive-law-infused-negotiation are more likely to fashion deal terms that utilize comprehensive law's "rights plus" approach to enhance the psychological, emotional and relational well-being of all involved. Therefore, the preventive law aspects of comprehensive-law-infused negotiation provide subtle enhancements that increase the likelihood that the deals negotiated can be implemented successfully, and once implemented, yield the desired added value.

96. *See id.* at 64.

97. *Id.*

98. *Id.*

99. *Id.*

E. *Creative Problem Solving and “Getting Deals Done.”*

Like preventive law, problem solving is already an integral part of sophisticated approaches to negotiation. For example, *Getting to YES* calls for active listening to gain empathetic understanding of the other side’s point of view, regardless of whether one concurs in it.¹⁰⁰ It urges keeping the focus on the problem, separating it from the persons involved,¹⁰¹ and stresses learning the interests of the other side and identifying common interests, which then can become bases for further agreement.¹⁰² *Getting to YES* emphasizes brainstorming that actively involves both sides to invent as many options as possible.¹⁰³ Its authors point out that discovering differing interests creates opportunities for meeting one side’s needs in a way that does not conflict with meeting another side’s differing needs.¹⁰⁴ They recommend expanding the topic areas for negotiation¹⁰⁵ and point out that non-monetary interests can provide areas in which one party’s interests can be met without reducing the gain to the other party.¹⁰⁶ All of these skills are involved in classic problem solving and require that the negotiator engage in creative thinking, “on her feet.”¹⁰⁷

Likewise, Professor Carrie Menkel-Meadow’s approach, which she expressly refers to as a problem-solving model for negotiation, involves expanding the pie (including non-monetary interests of the parties in the negotiation) and brainstorming followed by refinement of possible solutions tailored to the respective parties’ needs.¹⁰⁸ Her particular focus is on ascertaining each side’s *real* underlying needs and objectives¹⁰⁹ — which can be very different and idiosyncratic for

100. See Fisher, Ury & Patton, *GETTING TO YES* *supra* note 22, at 23-24.

101. See *id.* at 44.

102. See *id.* at 40 – 52. They note that interests are often unexpressed, intangible and can often be inconsistent, while “positions” taken in bargaining tend to be explicit. *Id.* at 44. They point out that the most powerful interests are basic human needs. *Id.* at 48.

103. See Fisher, Ury & Patton, *GETTING TO YES*, *supra* note 22, at 60.

104. *Id.* at 42.

105. Referred to as “expanding the pie” to be divided between the parties. See generally *id.* at 59, 65–70.

106. See *id.* at 71 (“[A]part from a shared interest in averting joint loss, there almost always exists the possibility of joint gain . . . [that] may take the form of developing a mutually advantageous relationship, or of satisfying the interests of each side with a creative solution.”).

107. See Balachandra et al, *Improvisation and Negotiation*, *supra* note 22, *passim*.

108. Preferably with both parties engaged in the problem-solving process. See Menkel-Meadow, *supra* note 2, at 819.

109. See *id.* at 794.

each party.¹¹⁰ Knowing this, a negotiator is more likely to be able to fashion solutions that meet the needs of both sides, resulting in a satisfactory agreement rather than the unnecessary compromise that characterizes adversarial negotiation.¹¹¹

Both *Getting to YES* and Professor Menkel-Meadow's work, like all sophisticated approaches to negotiation, consider emotions to be relevant. While the authors of *Getting to YES* separate the people and their emotions from the problem, Professor Menkel-Meadow treats unhelpful behaviors (which can reflect strategies, emotions and/or needs), whether they are those of the opposing negotiator, the client, or its constituents, as one of the problems and utilizes problem solving to deal with them.¹¹²

The comprehensive law iteration of creative problem solving is directed at "problems" or "conflicts," be they disputes, issues within business management, or transactions.¹¹³ However, because it is described as "a broad approach to *lawyering* and *legal problems* that takes into account a wide variety of non-legal issues and concerns and then seeks creative, win-win solutions to otherwise win-lose scenarios,"¹¹⁴ the literature starts with legal issues and then brings in more multidimensional, multi-cause concerns and solutions.¹¹⁵ The comprehensive law infused version of creative problem solving seeks

110. See, e.g., *id.* at 771 (relating the story of two boys arguing over a piece of cake. A solution that creates two equal size slices of cake is not the most efficacious solution if one boy wants only the cake while the other wants only the icing); see also *id.* at 795-801. Professor Menkel-Meadow contrasts the problem-solving method, which seeks to find and address the parties' real needs, with that of adversarial negotiation, which operates based on the assumed needs and objectives of an opponent; these positions are assumed to be diametrically opposed to those of one's client. See *id.* at 794.

111. See *id.* at 794. Nevertheless, emotions, reluctance of the other side to reveal its needs, and the need to edit carefully one's own expressions of needs, are not ignored.

112. See *id.* ("The problem-solving conception subordinates strategies and tactics to the process of identifying possible solutions and therefore allows a broader range of outcomes to negotiation problems.")

113. A dispute is a disagreement likely to result in litigation if negotiations fail. See *id.* at 757. ("If the negotiation fails, the court will declare one party a winner, awarding money or an injunction.")

Negotiation theory from the business world also includes situations of whatever kind – disputes, business management and transactions.

114. DAICOFF, COMPREHENSIVE LAW PRACTICE, *supra* note 14, at 125 (emphasis added).

115. Professor Thomas Barton asserts that problems result from a "mismatch" of needs and the environment, and that accordingly, there are only three possible solutions: change the situation (environment) and other people involved (what he calls a "change you" solution); change oneself or one's attitudes toward the situation or other people involved (Barton's "change me" solution); or exit the situation and attempt to find a substitute (which Barton refers to as an "exit and substitute" solution). Thomas

to “conceptualiz[e] and fram[e] problems so as to permit the broadest possible array of solutions,”¹¹⁶ uses brainstorming, and expands its approach to incorporate non-legal and non-economic concerns. It involves non-adversarial collaboration – including among lawyers, who serve as part of a collaboration team that focuses on rights, goals and needs in the process, — and draws from business, psychology, economics, neuroscience and sociology, among other subjects.¹¹⁷ Like classic or comprehensive law infused preventive law, it is forward looking and planning oriented.¹¹⁸

In general, comprehensive- law-infused creative- problem- solving melds closely with negotiation theory’s approaches and therefore reinforces them from yet another perspective.¹¹⁹ What, then, are its distinctives and how can creative-problem-solving infused with comprehensive law enhance negotiation? Once again, like all comprehensive law, creative problem solving thus infused has an enhanced relational component. “It is a caring approach that seeks . . . [to] facilitate enhanced relationships among the parties”¹²⁰ and prevent future conflicts, as well as implement broad solutions that solve issues from legal and non-legal perspectives.¹²¹ It seeks to find creative solutions that address matters in ways that resolve or enhance, or at least do not worsen, the emotional and related physical well-being of the parties and their constituents with respect to the issues at hand – provided that the solution does not detract from other superseding norms, such as the substantive concerns of one’s client. This comprehensive law-infused creative problem solving, if added to a negotiator’s mindset, can help him or her arrive at functionally and

D. Barton, *Conceiving the Lawyer as Creative Problem Solver*, 34 CAL. W. L. REV. 267 (1998) (cited in Daicoff, *COMPREHENSIVE LAW PRACTICE*, *supra* note 14, at 126).

The last of these solutions corresponds to GETTING TO YES’s BATNA, Best Alternative to a Negotiated Agreement, the determination of which is to be part of a negotiator’s preparation for any negotiation.

116. Daicoff, *COMPREHENSIVE LAW PRACTICE*, *supra* note 14, at 125.

117. *See id.* at 125-6.

118. *See id.* at 125-6; *see also* discussion *supra* Part II C.

119. Among creative problem solving’s noteworthy features are: listening, and asking dumb (actually open) questions that help a negotiator understand the full implications of a problem from the other party’s perspective and help him or her later suggest solutions that meet the real needs of the other party; being a TPWRQ, The Person With the Right Question, as differentiated from lawyers’ tendency to want to be a TPWA, The Person With the Answers; and, being skilled in a problem solving model such as SOLVE (described in Daicoff, *COMPREHENSIVE LAW PRACTICE*, *supra* note 14, at 129 – 30). Among the alternatives to SOLVE, Daicoff’s book refers to the approach of GETTING TO YES. *Id.* at 130.

120. *Id.* at 125.

121. *Id.* at 127.

relationally sound agreements that increase the likelihood of successful implementation.

F. *Procedural Justice and “Getting Deals Done.”*

Procedural justice is an academic lens-type vector within comprehensive law that was influenced greatly by Professor Tom Tyler’s work.¹²² The value that procedural justice brings to negotiation theory and practice is much like that of other vectors described above, and thus it will not be discussed in detail.

Professor Daicoff explains that “procedural justice alone is not a way of practicing law . . . but it can inform all [] approaches, traditional or comprehensive, to legal practice and the administration of laws.”¹²³ Procedural justice holds “that litigation is not necessarily what people want from the law. Rather, they want a voice, and opportunity to tell their story, [and] respectful treatment by the authority figures . . .”¹²⁴ in any given matter. In litigation, procedural justice requires that those involved, particularly the defendant, consider the judicial authorities to be trustworthy.¹²⁵ A decision, if made by a third party should be explained to the parties involved.¹²⁶ Giving people a voice in the decisional process helps them “buy in” and makes them more likely to comply with the ultimate decision.¹²⁷

Professor Tyler’s empirical work considered litigation. Professor Daicoff’s writing applies procedural justice to corporate decision-making through an illustration involving revision of a corporation’s personnel policies.¹²⁸ The further extension to transactional negotiation is a natural next step because Tyler’s three factors relate so closely to the “three V’s” of therapeutic jurisprudence — voluntary participation, voice and validation. Thus, from the perspective of procedural justice, comprehensive-law-infused negotiation can help “get deals done.”

122. See Daicoff, *Healing Profession*, *supra* note 3, at 18; Daicoff, *The Comprehensive Law Movement*, *supra* note 9, at 837.

123. Daicoff, *Healing Profession*, *supra* note 3, at 20.

124. *Id.* at 18.

125. See *id.*

126. See *id.*

127. See *id.* at 19.

128. See *id.* at 19-20.

III. CONCLUSION

Although little has been written about the intersection of sophisticated negotiation theory and therapeutic jurisprudence/ comprehensive law, a therapeutic jurisprudence/comprehensive law mindset can help get deals done.

As part of the in-house legal staff of a publically traded corporation, in private practice, and in-house as lead counsel for a large public college, I learned that “getting a deal done” does not consist merely of getting all sides to sign the deal document. It means implementing the deal to accomplish the client’s objectives, *with* the anticipated added value. In the course of negotiating hundreds of deals of varying types and sizes, I learned that discovering, and figuring out ways to meet the other side’s real needs – economic, emotional, and always dignitary — greatly contribute to “getting the deal done.” It does not take any more time to listen actively and empathetically. It is highly efficient to think creatively, preventively and humanely. Fashioning an agreement that meets the dignitary and human emotional needs of the other side as well as one’s own business and dignitary goals pays huge dividends when a multi-year deal requires ongoing cooperation to be successful, especially when mid-course modifications are needed.

Academic study of therapeutic jurisprudence and comprehensive law after years of practical experience reveals further possibilities for enhancing negotiation skills. Negotiators educated in therapeutic jurisprudence and comprehensive law as well as the formal theories of negotiation can use comprehensive-law-infused-negotiation to great advantage to “get deals done.”

Various theory-based approaches to negotiation utilize non-economic interests of the parties and seek to ferret out the parties’ genuine needs, some of which can be non-economic, from among their demands. This helps parties reach agreement. The core concerns approach to emotions in negotiation asserts, among other things, that the five emotions-based core concerns can be used both as a lens to better understand the emotional experience of each party and as a lever to stimulate positive emotions in order to reach agreement.

While reinforcing all of these principles, the mindset of comprehensive-law-infused-negotiation adds a perspective that can enhance the likelihood of a mutually successful outcome. Comprehensive law, including therapeutic jurisprudence, utilizes a “rights plus” approach that adds a desire to maximize the emotional, psychological and relational wellbeing of the individuals and communities involved in each

legal matter. Thus, while most sophisticated negotiation theory has a place for noneconomic concerns and the core concerns approach utilizes emotion as a lens and as a lever, comprehensive-law-infused-negotiation goes further. It makes positive (therapeutic) emotional outcomes *part* of the desired outcomes wherever this can be accomplished without adversely impacting the underlying substantive concerns. This does not mean that the purpose of the negotiation is to improve the emotional and corresponding physical health of everyone involved in the deal. Nor does it assert that therapeutic interests should outweigh other norms, but it does encourage negotiators to remain continuously cognizant of therapeutic and antitherapeutic impacts. This enables them to more precisely weigh competing interests, and keep therapeutic goals in mind as they engage in creative problem solving and preventive law. It helps them arrive at agreements that are both substantively efficacious and therapeutic. It fosters an environment conducive to successful implementation. Such agreements are more likely to achieve the added value that was desired at the outset. They help “get the deal done.”

