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Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics

By Omer Shapira*

I. INTRODUCTION

The Mediation process is part of the Alternative Dispute Resolution movement (“ADR”) whose modern history begins at the end of the 1970s. Therapeutic Jurisprudence (“TJ”) is a younger movement which has started to gain recognition in the 1990s. The two schools of thought share similarities, a fact which makes their study beneficial for both. This article explores some of those similarities in order to evaluate the possible contribution of TJ to mediation ethics. What is sought here is a normative reading of the mediation process with the aid of the therapeutic lens. Such reading suggests, so it is argued, behavioral guidelines for mediators and for other participants in the process such as the parties’ lawyers. In addition, a large volume of writing published in recent years has raised and discussed the concern that mediation is losing its special qualities and strengths due to its acceptance by the legal system as a method for solving legal disputes.¹ Thus another theme of the article is that TJ may help protect the uniqueness of mediation against such institutional pressures.

* Assistant Professor, The Faculty of Law, Ono Academic College.

1. See, e.g. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) ; Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in A Non-adversarial Approach to Problem Solving Mediation*, 28 FORDHAM URB. L.J. 935, 944-45 (2001).

II. THE MEDIATION PROCESS

There is no consensus among writers on one exhaustive definition for the process of mediation, and over time different styles of mediation have developed and received recognition.² These styles of mediation differ from each other in the way they describe the purpose of mediation and the role of mediators. Nevertheless, the most widespread style of mediation is “problem solving” mediation,³ whose purpose is the facilitation of voluntary, un-coerced negotiation between the parties with the aim of obtaining an agreement that resolves the conflict in whole or in part.⁴ This article focuses on the “problem solving” style of mediation, though it refers to other styles of mediation where appropriate.

III. THERAPEUTIC JURISPRUDENCE

TJ is a theory which examines how the law (legal rules and legal arrangements) and the behavior of legal agents who create and apply the law (such as judges, lawyers, police officers, etc.) affect individuals from a therapeutic perspective.⁵ TJ asks whether the effect of law is therapeutic or anti-therapeutic and enables the designers of a legal arrangement, or those who apply it, to consider those effects, with a general guideline recommending that arrangements enhancing individuals’ physical and

2. See, e.g., JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATING* 7 (Jossey-Bass 1984); *MEDIATION IN INTERNATIONAL RELATIONS: MULTIPLE APPROACHES TO CONFLICT MANAGEMENT* 7 (Jacob Berchovitch & Jeffrey Z. Rubin eds., Macmillan Press 1992); CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 15 (Jossey-Bass 1996); Robert Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition? The Mediator’s Role and Ethical Standards in Mediation*, 41 FLA. L. REV. 253, 254-55 (1989); Susan Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL’Y 7, 7 (1986); LAURENCE BOULLE & MIRYANA NESIC, *MEDIATION: PRINCIPLES PROCESS PRACTICE* 14-27 (Butterworths 2001).

3. See, e.g., Christopher Harper, Comment, *Mediator as Peacemaker: The Case for Activist Transformative-Narrative Mediation*, 2006 J. DISP. RESOL. 595, 595-96 (2006); Jonnette Watson Hamilton, *The Significance of Mediation for Legal Education*, 17 WINDSOR Y.B. ACCESS JUST. 280, 281 (1999).

4. See Kovach, *supra* note 1, for the definition suggested by Kovach:

[A] process that, by facilitating communication and understanding, assists the parties in achieving a solution that they can accept. In other words, the process is one that is focused on discovering the underlying interests of the parties and on solving a problem rather than one concentrated on obtaining a settlement based upon what the law may be or what it declares the parties’ respective rights to be.

Id. at 942. Kovach also refers to her book KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 23-25 (2000), wherein she discusses the different definitions of mediation.

5. David Wexler, *Therapeutic Jurisprudence: An Overview*, International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj> (last visited Feb. 2, 2008).

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emotional well-being ought to be preferred to arrangements which are injurious to their well-being.⁶ Thus TJ is not content with a neutral and objective description of a state of affairs⁷; it is a normative theory with a clear agenda, the promotion of individuals' psychological well-being. It should be noted however, that TJ does not argue that the therapeutic consideration is superior to other considerations such as justice and other constitutional values. It argues that therapeutic effects should be identified, brought to the attention of decision makers and weighed down along with other relevant values.⁸ TJ was applied first in the field of mental health, and along the years expanded to various areas such as family law, tort, contract law, criminal law and others. It can serve as a tool for legal reforms and social change.⁹ TJ is not unequivocal on the meaning of the positive therapeutic effect which ought to be promoted. The perception of TJ founders has been that this vagueness serves the purposes of TJ because it does not delimit the theory's application in advance.¹⁰

6. See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y. & L. 184, 188 (1997) (noting "... [T]herapeutic jurisprudence is normative in its orientation. It posits that the therapeutic domain is important and ought to be understood and somehow factored into legal decision making"); See also Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y. & L. 193, 196 (1995) (noting "[TJ is] the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects"); Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1, 11 (2006).

7. See Slobogin, *supra* note 6.

TJ can be distinguished from social science in law [the law and society and law and psychology movements], despite the reliance of both on social science research, because the latter is a technological means of answering questions posed by the law, whereas the former is a prescriptive jurisprudence that happens to rely on that technology.

Id. at 198. See Michal Alberstein, *Therapeutic Keys of Law: Reflections on Paradigmatic Shifts and the Limits and Potential of Reform Movements*, 39 ISR. L. REV. 140, 157-59, 166 (2006) (for a discussion of the similarities and differences between TJ and jurisprudential theories of law).

8. See Winick, *supra* note 6, at 191.

9. See Nathalie Des Rosiers, *Rights Are Not Enough: Therapeutic Jurisprudence Lessons for Law Reformers*, 18 TOURO L. REV. 443, 457 (2002).

10. See, e.g., David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL. PUB. POL'Y & L. 220, 221 (1995). See Slobogin, *supra* note 6, at 202-04 (for a critical analysis of this element in the definition of TJ). See Alberstein, *supra* note 7, at 161-63 (for further criticism of TJ).

IV. THERAPEUTIC JURISPRUDENCE AND MEDIATION: THE COMMON GROUND

The similarity between TJ and mediation is striking.¹¹ For a start, TJ and mediation, as part of the ADR movement, share a common background. Both developed in United States as a reaction, inter alia, to the dissatisfaction with the legal system and as an attempt to respond at least to some of the deficiencies of the adversarial legal system.¹² In addition, both theories may be understood as a reaction to the skeptical attitude towards law's rationality, neutrality, and credibility which had been advanced by legal realism, the CLS, feminism and other critical theories of law. TJ and mediation have introduced an alternative approach which argues for an opportunity to use the law and the legal system in a way which brings about positive therapeutic effects on individuals' well-being.¹³

11. See Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying The Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 159-60 (1998). There, almost a decade ago, the author wrote, "[r]emarkably, no commentator, as yet, has focused the lens of therapeutic jurisprudence on the mediation field. This is surprising, given that mediation could be described as conflict resolution in a 'therapeutic key.'" *Id.*; See also Kovach, *supra* note 1, at note 231 (referring the reader to Andrea Kupfer Schneider, *Building a Pedagogy of Problem Solving: Learning to Choose Among ADR Processes*, 5 HARV. NEGOT. L. REV. 113 (2000) who stated "[s]ome recognize a resemblance between TJ and ADR, in particular mediation"). It should be noted that some writers on mediation preceded the TJ movement and described a therapeutic mediation style in their writings. See, e.g., Silbey & Merry, *supra* note 2, at 19-25.

12. See Andrea Kupfer Schneider, *The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution*, 5 PSYCH. PUB. POL'Y. & L. 1084, 1085-87 (1999).

Mediation was established on the basis of many of the ideas in TJ . . . The avoidance of litigation and litigation stress, time, and money have all been cited as reasons to support mediation. Mediation can also provide the therapeutic benefits of real conversation between the disputants in a safe environment and allows each party to be heard. These are clear therapeutic advantages of mediation.

Id. at 1097-98; "[TJ and the comprehensive law movement] . . . emerged because of lawyers', clients', and society's deep dissatisfaction with existing models for handling legal matters" and ". . . it is clear that the approaches embodied in the comprehensive law movement are consistent with the call . . . for value-laden approaches." Daicoff, *supra* note 6, at 44 (citing Marc W. Patry, David B. Wexler, Dennis P. Stolle, & Alan J. Tomkins, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439, 440-41 (1998); See Alberstein, *supra* note 7 at 151-54 (for a discussion of the relation between TJ and ADR).

13. See Daicoff, *supra* note 6, at 42, stating:

Therapeutic jurisprudence and the comprehensive law movement may have developed in response to the lack of hope and direction that we are left with. Once we accept the major premise of legal realism and these newer schools of thought, the idea of recognizing law's potential to have a positive impact on people's lives and of creating alternative means of resolving legal problems provides hope during a time when the reliability, utility, or rationality of law and legal procedures are in question.

Id.

TJ and mediation share basic values which have therapeutic implications, such as the positive effect on the well-being of individuals. The similarity between TJ and mediation is especially evident in the case of transformative mediation and narrative mediation, the reason being that these mediation styles place the individual and his or her personal growth at the heart of the process and try to create a pleasant environment which improves the relationship between the parties.¹⁴ The connection between transformative mediation and TJ has also been recognized by Daicoff who included them both in what she termed the Comprehensive Law Movement.¹⁵ According to Daicoff:

All of the disciplines comprising the comprehensive law movement share at least two features in common: (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. These two features unify the vectors and distinguish them from more traditional approaches to law and lawyering.¹⁶

However, this article focuses on problem solving mediation, not on transformative mediation. It could be argued, therefore, in view of Daicoff's first characteristic, that problem-solving mediation is inconsistent with TJ as it is not (arguably) aimed at the maximization of the parties well-being, but rather at reaching an agreement.¹⁷ I would argue that there is no necessary contradiction between problem solving mediation and TJ, particularly if the

14. See Gary Paquin & Linda Harvey, *Therapeutic Jurisprudence, Transformative Mediation and Narrative Mediation: A Natural Connection*, 3 FLA. COASTAL L.J. 167, 167 (2002) (stating "[transformative mediation and narrative mediation are] attempts to develop a more humanizing mediation environment, geared toward improving the relationship between the parties [as compared with problem solving mediation which] has become more institutionalized and settlement-oriented, its humanizing and emotionally satisfying characteristics . . . diminished"). See also Alberstein, *supra* note 7, at 156 (stating "TJ orientation in legal practice is equivalent to transformative mediation in mediation practice. . .").

15. Daicoff includes in the comprehensive law movement collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, and transformative mediation. Daicoff, *supra* note 6, at 1-2.

16. Daicoff, *supra* note 6, at 5.

17. Daicoff argues that transformative mediation represents a more radical change in the methods to resolve disputes than the changes brought by the ADR movement and the traditional problem-solving style of mediation. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465, 468 (Dennis P. Stolle, et al. eds., 2000).

mediator adopts a facilitative style of mediation¹⁸ as opposed to an evaluative one.¹⁹ I find support for this view in Waldman's writings which describe the closeness between mediation as a field (as opposed to a particular style of mediation) and TJ.²⁰ Waldman emphasizes the therapeutic value inherent in the mediation process which can benefit the parties.²¹ For example, mediation reduces the negative psychological effects that are associated with adversarial legal proceedings and thus goes hand-in-hand with TJ which aims to enhance the psychological functioning of people.²² Mediation enhances the parties' autonomy by encouraging their active participation. When parties take an active part in the process they avoid feelings of frustration and disempowerment that characterize litigation.²³ Participants in mediations report high levels of satisfaction resulting from their involvement in shaping the mediation outcome and from a perception of the process as fair.²⁴ Mediation agreements are characterized

18. Facilitative mediation uses the principles of integrative negotiation. See Alberstein, *supra* note 7, at 155. See also David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 273-74 (1999) (discussing the connection between TJ and integrative negotiation).

19. See Leonard Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996) (for discussion of the differences between facilitative and evaluative mediation). See also Kimberlee K. Kovach & Lela P. Love, *Evaluative Mediation Is An Oxymoron*, 14 ALTERNATIVES TO HIGH COST OF LITIG. 32 (1996); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71 (1998).

20. See Waldman, *supra* note 11, at 163;

To the extent that mediation as a field continues to encourage disputant voice, participation, respect and dignity, mediation may be described as conflict resolution in a 'therapeutic key.' By focusing on disputant needs and fostering procedural justice, mediation seeks to deliver agreements that better meet disputant needs through a process that is itself designed to enhance disputant mental health.

Id. In fact Waldman goes even further and argues that "[mediation is] . . . a species of applied therapeutic jurisprudence" and "[a]t least some portion of [mediation's] . . . popularity derives from its therapeutic promise." *Id.* See also Ellen Waldman, *Therapeutic Jurisprudence/Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation: Therapeutic or Disabling?*, 5 PSYCHOL. PUB. POL'Y. & L. 1103, 1104 (1999); Waldman, *supra* note 11, at 160-63.

21. See Waldman, *Therapeutic Jurisprudence*, *supra* note 20, at 1104-06. See also Kupfer, *supra* note 12, at 1093-94:

[M]ediation could have excellent therapeutic effects for the client . . . the client has the opportunity to tell his story and to be heard in a setting that is safe and helpful for them . . . Mediation also provides the opportunity to resolve the dispute quickly and more economically. These benefits can clearly alleviate stress in clients on both sides of the dispute and allow the clients to move forward.

Id.

22. See Waldman, *Therapeutic Jurisprudence*, *supra* note 20, at 1104-05.

23. See Waldman, *Therapeutic Jurisprudence*, *supra* note 20, at 1105.

24. See Waldman, *Therapeutic Jurisprudence*, *supra* note 20, at 1105. See also Waldman, *supra* note 11 ("User satisfaction with mediation is typically 75 percent or higher, even for those

by high levels of compliance and thus reduce the likelihood for reopening the dispute and the need for future litigation, with all the emotional stress involved.²⁵ Mediation focuses on satisfying the parties' needs, not on their legal rights, and thus can respond to psychological and emotional needs instead of focusing solely on the legal aspects of the dispute.²⁶ In addition, when parties learn in mediation how to manage a dispute they might be able to handle future disputes themselves without having to resort to court again.²⁷ This educational experience may be considered a therapeutic outcome of the participation in mediation. Moreover, mediation can reduce the damage to the parties' relationship and sometimes makes it possible to rehabilitate it. This outcome, which enables the continuance of the relationship, is therapeutic.²⁸

In academic writing and in practice there is a growing recognition of the therapeutic effects of the use of mediation as a means to resolve differences. Mediation is used extensively in family disputes due to its healing potential.²⁹ Mediators in family disputes who take a therapeutic approach look for more than a mere agreement. They strive to improve the relationship between the divorcing parties, especially when the parties have children and

who fail to reach a mediated agreement. . . . There is also evidence that mediation is more satisfying to disputing parties than adjudication or arbitration." (quoting Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in *MEDIATION RESEARCH* 395-96 (Kenneth Kressel & Dean G. Pruitt & Assoc. eds., 1989)); See also Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance*, 24 *SEATTLE U. L. REV.* 499, 501 (2000) (stating that the ability to participate in a process, the feeling that one is heard, and generally being treated with fairness, respect and dignity make people experience more satisfaction).

25. See Waldman, *Therapeutic Jurisprudence*, *supra* note 20, at 1105.

26. See Waldman, *Therapeutic Jurisprudence*, *supra* note 20, at 1105-06.

27. See Philip D. Gould & Patricia H. Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 *FORDHAM URB. L.J.* 2117, 2124 (2002) ("A highly desirable therapeutic outcome is one in which the parties learn how to preserve their existing relationship while also learning how to resolve their future conflicts without repetitive judicial intervention." (quoting Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority-Majority Conflicts*, 37 *CT. REV.* 54, 56 (2000))).

28. See Gould & Murrell, *supra* note 27, at 2124.

29. See, e.g., Beth M. Erickson, *Therapeutic Mediation: A Saner Way of Disputing*, 14 *J. AM. ACAD. MATRIMONIAL LAW.* 233 (1997); see also *Model Standards of Practice for Family and Divorce Mediation*, 35 *FAM. L.Q.* 27, 28 (2001) ("[M]ediation is a valuable option for many families because it can . . . reduce the economic and emotional costs associated with the resolution of family disputes. . .").

need to be in contact in the future.³⁰ Mediation, due to its therapeutic effects, has been suggested as an appropriate process for cases of civil commitment proceedings of patients who suffer from mental illness.³¹ The common practice is that the patient is represented by a lawyer against the hospital and the health professionals who treat him, and that leads to anti-therapeutic effects and to deterioration in the patient's well-being. The adversarial representation creates an atmosphere of distrust between the patient and the medical staff and as a result the patient refuses to cooperate and does not receive the necessary treatment.³² Mediation, on the other hand, enables the lawyer to protect the client's legal rights and at the same time reduce the anti-therapeutic effects of the commitment proceedings.³³ However, it is important to note that mediation, notwithstanding its therapeutic potential, is not a panacea and has its limits. It cannot respond to all the psychological needs of the parties and in some cases the appropriate means of intervention might be psychotherapy.³⁴

V. MEDIATION ETHICS

Like other professionals, mediators are guided in their work by codes of ethics. Every profession develops its own rules of conduct. There are rules of ethics for lawyers, psychologists, accountants, and other professionals.

30. See Erickson, *supra* note 29, at 234. See also Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on their Children*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 161, 174 (Dennis P. Stolle et al. eds., 2000); Research shows that divorced couples who have participated in mediation are more likely to keep contact with their children after the divorce and be actively involved in their life. Andrew Schepard & James W. Bozzomo, *Efficiency, Therapeutic Justice, Mediation, and Evaluation: Reflections on a Survey of Unified Family Courts*, 37 FAM. L.Q. 333, 353-54 (2003) (citing Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation: Comments on Kelly's "Resolving Child Custody Disputes"* 10 VA. J. SOC. POL'Y & L. 164, 172-78 (2002)).

31. See Henry Chen, *The Mediation Approach: Representing Clients with Mental Illness in Civil Commitment Proceedings*, 19 GEO. J. LEGAL ETHICS 599 (2006).

32. See Chen, *supra* note 31, at 608-09.

33. See Chen, *supra* note 31, at 611-12. See Patricia Monroe Wisnom, *Probate Law and Mediation: A Therapeutic Perspective*, 37 ARIZ. L. REV. 1345 (1995) (for a suggestion to use mediation in the context of probate law).

There would be many therapeutic advantages to this mediation alternative [for the probate/personal representative system]. Developing a face-to-face, non-confrontational setting has direct benefits. It allows the parties to put into their own words their perspectives and problems and not rely on attorneys or piecemeal methods to communicate. Such opportunity to put forth their positions could lead to admissions or negotiation that might not happen in a more adversarial setting.

Id. at 1360.

34. See Schepard & Bozzomo, *supra* note 30, at 348.

Mediation is a relatively new practice. It is establishing itself as an independent profession³⁵ by, among other things, developing and adopting ethical rules for mediators.³⁶

There is a special need for ethical rules in mediation due to its special nature. Lack of formality, lack of procedural rules, and the absence of effective legal monitoring on the work of mediators might lead to abuse of the process.³⁷ Codes of ethics try to compensate for that lack of formality by setting some minimum expectations of mediators such as a prohibition on conflict of interests, limitation on evaluations by mediators, etc.³⁸ In fact, rules of ethics try to make mediators behave in an appropriate and

35. See Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 243-45 (2002) (for a discussion on the professionalization of mediation); David N. Hofstein, *Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?*, 14 J. AM. ACAD. OF MATRIMONIAL LAW. 267 (1997); Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, J. DISP. RESOL. 247 (2000).

36. See John Feerick, et. al. *Symposium: Standards of Professional Conduct in Alternative Dispute Resolution*, J. DISP. RESOL. 95 (1995) (discussing the need for ethical rules for mediators).

Mediators and ADR neutrals increasingly view themselves as a part of a distinct profession. Many are already associated with another profession – lawyers, psychologists, therapists, social workers – and are subject to the standards of those professions. However, there is a growing consensus that ADR raises distinctive issues of professional conduct that cannot be fully comprehended by the codes of the individual professions.

ADR is unique in being interdisciplinary and interprofessional. ADR neutrals perform in a distinctive role and not as members of their own profession. The ADR process demands adherence to policies like voluntariness, respect for party autonomy, and confidentiality, which, in turn, make special ethical demands on ADR neutrals. Thus there are compelling reasons to contemplate an interdisciplinary code of conduct that addresses the professional duties and obligations of ADR neutrals.

Id. at 95-96. There are now numerous codes of conduct for mediators. See, e.g., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) approved by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Association for Conflict Resolution available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf (last visited February 3, 2008); MISS. SUP. CT. ANNEXED MEDIATION RULES FOR CIV. LITIG. (2002) available at <http://www.mssc.state.ms.us/rules/AllRulesText.asp?IDNum=37> (last visited February 3, 2008); FLA. RULES FOR CERTIFIED AND CT. APPOINTED MEDIATORS (2000), available at http://www.flcourts.org/gen_public/adr/index.shtml (last visited February 8, 2008); CAL. RULES OF CONDUCT FOR MEDIATORS IN CT.-CONNECTED MEDIATION PROGRAMS FOR CIV. CAS. (2007), available at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10156&id=1241 (last visited February 3, 2008).

37. See Bush, *supra* note 2, at 254.

38. See Julie Macfarlane, *Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model*, 40 OSGOODE HALL L.J. 49, 55 (2002).

accountable manner,³⁹ clarify what is the standard of behavior expected of them, and specify what kind of behavior falls below that standard. In addition, rules of ethics provide the public and the parties with information as to what can be expected from mediators, promote the expertise of mediators and the reputation of the mediation process, and enhance public trust in the mediation process and in mediators as professionals.⁴⁰

Drafting a code of ethics for mediators is a complex task. On the one hand there is no consensus on the right or best mediation style and thus it is important to make the code flexible in order to cater for different styles of mediation. On the other hand, since mediator conduct affects the parties, there is a need for some degree of direction as to mediator behavior. The challenge is to create guidelines which are specific enough in order to be capable of directing the mediator but at the same time leave him some flexibility in the process.⁴¹ The reality is that codes of ethics tend to be general. The codes are drafted in an abstract language and tend not to deal with specific situations in order to achieve universal application. However, codes of ethics cannot fully deal with the diverse interactions between the mediator and the parties, and it is impossible to foresee all the dilemmas which the mediator might face.⁴² Indeed, the ethical rules adopted by leading mediation organizations in the United States have been criticized as too wide and too general, thus being of limited practical help.⁴³ The result is rules of ethics which cannot fully respond to the need for direction of mediators in performing their role.⁴⁴ In practice, therefore, mediators are left with wide discretion and without adequate guidance,⁴⁵ in a process which

39. See Boule & Nestic, *supra* note 2, at 460.

40. See, e.g., Model Standards, *supra* note 36, at 2 (“[The Model Standards of Conduct for Mediators] serve three primary goals: to guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes”).

41. See Kovach, *supra* note 4, at 190. See also Boule & Nestic, *supra* note 2, at 461.

42. See Macfarlane, *supra* note 38, at 55.

43. See Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87 (1997) (providing a critical discussion of the 1994 version of the model rules for mediators). See also Laura E. Weidner, *Model Standards of Conduct for Mediators* (2005), 21 OHIO ST. J. ON DISP. RESOL. 547 (2006) (providing an analysis of the new version of the rules).

44. See, e.g., James R. Coben, *Gollum Meet Smeagol: A Schizophrenic Ruminaton on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO J. CONFLICT RESOL. 65, 71 (2004). “Self-determination is often said to be mediation’s ‘prime directive’. Although contained in numerous ethical codes, self-determination is nowhere explicitly defined.” *Id.* Coben refers to the consequences of concepts’ ambiguity. “The foundation concepts of self-determination and neutrality are so nebulous that they were ripe for manipulation. Precisely because they exist only as mythology, the concepts are ignored.” *Id.* at 76.

45. Macfarlane, *supra* note 38, at 87.

constantly requires mediators to make decisions with ethical implications.⁴⁶ One response for this difficulty has been an attempt to analyze and define, in a clear and practical manner, the meaning of the fundamental principles of mediation. These attempts are helpful,⁴⁷ but it must be accepted that in practice some degree of ambiguity is unavoidable.⁴⁸ And this is where TJ can combine forces with mediation ethics.

VI. THE USE OF THERAPEUTIC JURISPRUDENCE AS AN AIDING TOOL FOR ETHICAL ANALYSIS IN MEDIATION

As shown above, mediation and TJ have common characteristics and compatible aims. They also share similar values. In my view, the common ground between TJ and mediation is convincingly illustrated by two fundamental values of mediation: the principle of autonomy and self-determination and the principle of fairness. Academic writers on mediation widely agree that autonomy and self-determination are central to mediation, and codes of ethics for mediators reflect that.⁴⁹ As for TJ, growth in

[C]odes of conduct . . . are neither conceptually nor structurally able to address the complex and unique moral dilemmas of practice. In the absence of an established informal culture of good practice to provide guidance for particularly challenging or unique situations, codes are merely generalized, albeit worthy, sentiments into which mediators will read their own version of moral relativism. They can do little to enhance the informal moral culture of the profession or to challenge the wisdom and professionalism of idiosyncratic individual approaches.

Id.

46. See Macfarlane, *supra* note 38, at 51, 60.

47. See, e.g., Welsh, *supra* note 1 (on self-determination); Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999) (on informed consent); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909 (1998) (on fairness).

48. See, e.g., Boule & Nestic, *supra* note 2, at 459. "All mediator standards leave issues unresolved. The unresolved issues are a product of the problematic definitions, subtle distinctions and subjective judgments which characterize the practice of mediation. While standards can reduce uncertainty as to professional competence and ethical behavior, they cannot eliminate it." *Id.*

49. See, e.g., Model Standards, *supra* note 36, Standard I; see also Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, 17 OHIO ST. J. ON DISP. RESOL. 95, 109 (2001) ("It is understood that a basic tenet of mediation is that the parties are autonomous and should have the ability to devise their own agreement"); Welsh, *supra* note 1, at 7-8, 15-20; Kimberlee K. Kovach, *Good Faith in Mediation - Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 584 (1997); John D. Feerick, *Toward Uniform Standards of Conduct For Mediators*, 38 S. TEX. L. REV. 455, 460 (1997); Donald T. Weckstein, *In Praise of Party Empowerment - and of Mediator*

personal autonomy is considered therapeutic because it contributes to individuals' development and psychological well-being.⁵⁰ The values of autonomy and self-determination are thus shared by both theories.⁵¹ Another key value of mediation is fairness, which applies both to the process of mediation and to its outcome.⁵² TJ attaches great therapeutic value to fair treatment of individuals and argues that the feeling of being treated fairly can promote individuals' psychological well-being.⁵³ Thus the value of fairness is another crossroad between mediation and TJ.⁵⁴

Can TJ guide mediators, and indeed other participants in the mediation process, on the resolution of ethical dilemmas? Would it be helpful to look at mediation through the therapeutic lens?⁵⁵ It is argued that TJ can add another value to the list of values embodied in mediation ethical rules. The additional value on the mediator's normative map would be the therapeutic

Activism, 33 WILLAMETTE L. REV. 501, 531 (1997); OMER SHAPIRA, *USE OF POWER AND INFLUENCE IN MEDIATION: PRACTICE AND APPLIED ETHICS* 169-87 (OAC Press 2007) [Hebrew].

50. See, e.g., Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707, 1755-68 (1992).

51. Kovach, *supra* note 1, at 971-72 ("One of the foundations of therapeutic jurisprudence is self-determination, that is, that an individual's own views should be honored. This perspective certainly is analogous to the basics of mediation.").

52. See Stulberg, *supra* note 47.

53. See, e.g., Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOLOGY REV. 143, 151-52 (2003); Ronner & Winick, *supra* note 24, at 501; Waldman, *supra* note 20, at 1105; Alberstein, *supra* note 7, at 149.

54. Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 184-85 (2002).

Many studies reveal that disputants care as much or more about the procedural justice offered by dispute resolution processes than about decision control. Perceptions of procedural justice influence disputants' perceptions of substantive justice, their compliance with the outcomes reached in dispute resolution processes and their perceptions of the legitimacy of the institution that provided or sponsored the dispute resolution process... The presence of four particular process elements result in heightened perceptions of procedural justice: the opportunity for disputants to express their 'voice', assurance that a third party considered what they said, and treatment that is both even-handed and dignified.

Id. See also Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 MARQ. L. REV. 753, 761-62 (2004).

55. The use of TJ for examining ethical issues and professional conduct has been suggested before. Schneider for example wrote, "[TJ provides] theory and practical advice to support the implementation of ADR". Schneider, *supra* note 12, at 1101. Glaser thought that TJ guides therapists in sex offenders' programs to treat their patients with procedural fairness which "means, at the very least, giving careful and adequate consideration to an offender's views, comments, and explanations, particularly when decisions are being made which might impact on that offender's liberty or personal rights..." Glaser, *supra* note 53, at 151. Mediation literature has also recognized the connection between TJ and ethics. See, e.g., Kovach, *supra* note 1, at 971 ("Considerations of ethics in mediation... bring forth and embrace the tenets of therapeutic jurisprudence."). See also Waldman, *supra* note 11 (using TJ in order to clarify and reframe the facilitative/evaluative debate).

value, with a message that mediators ought to exercise their discretion in a way that promotes the psychological well-being of the parties. This value is compatible with the fundamental values of autonomy and fairness. The later values are shared by both TJ and mediation, and accepted as capable of promoting psychological well-being. This does not mean that TJ and the therapeutic value can replace mediation ethics. Ethical analysis involves a balance of conflicting values and a search for the best solution in a specific set of circumstances. The solution must take account of not only autonomy, fairness and the well-being of the parties, but also considerations of neutrality, confidentiality issues, the integrity of the process, etc.

Note that the therapeutic value is not an absolute value superior to other values. TJ does not argue that the therapeutic alternative must always be preferred, and it recognizes that other values must be considered as well. Thus TJ does not dictate a therapeutic outcome but rather identifies that outcome and enables the decision maker to take it into account. Moreover, TJ does not offer a formula for the necessary balancing process required in such cases,⁵⁶ and instead adds another value which has to be weighed with the other values of mediation. Sometimes the therapeutic value will have to give way to other values. For example, it is quite possible that a party would experience feelings of satisfaction if the mediator accepted his arguments and supported it openly in the company of the other party. But clearly such behavior would infringe the principle of neutrality and in the long run could result in a loss of trust in the mediator, impasse, and continuance of the dispute in less therapeutic dispute resolution procedures such as litigation.⁵⁷ It is hypothesized, however, that in most cases the inclusion of the therapeutic value within the variety of considerations which guide mediators would help them to conduct mediations in a way which is not only ethical but also humane and sensitive to individuals' needs. In other words, TJ can help to enhance the weight of mediation's ethical values and thus become an aiding tool for the guidance of mediators.

56. See, e.g., Slobogin, *supra* note 6, at 210-12 ("The Balancing Dilemma"); Winick, *supra* note 6, at 195.

57. See Schneider, *supra* note 12, at 1099 (for a scenario in which the therapeutic effects of mediation receive less weight than other considerations). In cases of significant power imbalances between the parties, for example due to marital violence, it may be right to prefer litigation over mediation notwithstanding mediation's therapeutic effects. *Id.*

VII. AN ILLUSTRATION: APPLYING THE THERAPEUTIC VALUE TO MEDIATION DECISION MAKING⁵⁸

A. Mediator Ethics: Managing the Process

Mediators manage the process of mediation. In the past it was not uncommon for writers and mediators to describe the respective roles of the mediator and the parties in the following way: the mediator is in charge of the process; the parties control the outcome.⁵⁹ In practice it is quite impossible to make a clear-cut distinction between process and content, and mediator decisions on the process have effect on the content of mediation and its outcome as well.⁶⁰ This is unavoidable, but should not go unappreciated because such interventions raise ethical issues. More specifically, the mediator's actions, so it seems, might reduce the parties' autonomy and self-determination.⁶¹ The issue is mainly one of degree: to what extent is the mediator entitled to intervene in the content of the dispute? The answer should be extracted from the ethical principles of mediation and it is not a straightforward one. This dilemma accompanies the mediator throughout the mediation process. In order to illustrate the dilemma and to suggest guidelines for dealing with it, it would be helpful to focus on specific mediator decisions commonly taken during mediation. For example, the decision relating to the mediation agenda, that is the issues to

58. The following pages present several ethical issues, and for the purposes of this article the discussion is narrowed to an illustration of the potential benefits of a joint ethical-TJ analysis. It should be noted, however, that each of these problems deserves a much more comprehensive analysis of both its ethical and therapeutic implications in a separate article.

59. See, e.g., Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 43 n. 45 (2003). "In the late 1970s and early 1980s, authorities commonly said that the mediator controls the process and the parties control the outcome. My colleague John Lande confirms my impression that this is part of the oral history of the field". *Id.*

60. See, e.g., Trina Grillo, *The Mediation Alternative - Process Dangers for Women*, 100 YALE L.J. 1545, 1585-86 (1991).

Mediators . . . exert a great deal of power The mediator also can set the rules regarding who talks, when they may speak, and what may be said. The power of the mediator is not always openly acknowledged but is hidden beneath protestations that the process belongs to the parties. This can make the parties feel less, not more, in control of the process and its consequences for their lives. There is much room for, but little acknowledgment of, the possibility of the mediator's exhibiting partiality or imposing a hidden agenda on the parties.

Id. See generally Shapira, *supra* note 49, ch.3.

61. Riskin, *supra* note 59, at 28 ("[P]rocess decisions offer countless choices and opportunities for the development - or suppression - of self-determination").

be discussed in the process of mediation. What guidance do mediators receive from mediation ethics and can TJ contribute to it?

The common practice is that after each party presents a view of the dispute a decision is made as to the issues to be discussed next. The decision is taken in one of two ways. The mediator, as the manager of the process, may make the decision. He may tell the parties that their stories raise several issues, which he names, and the process continues with a discussion of those issues.⁶² The alternative is that the mediator, as the manager of the process, *explains* to the parties that in order to advance the process the issues to be discussed have to be identified and agreed upon. He then asks *the parties* to suggest issues for discussion and might raise other issues not mentioned by the parties for them to consider. The decision is made by the parties with the mediator's assistance.⁶³ How do mediation ethics stand on the choice between these alternatives? And which alternative results in more psychological well-being for the parties?

It is argued that the principles of autonomy and self-determination support the second alternative because the parties ought to be actively involved in decision making on matters which are relevant to them and which could affect the negotiation that follows. Since the line between procedural ("process") decisions and substantive ("content") decisions is blurred, a rich and meaningful concept of party autonomy and self-determination would involve the parties in decision making notwithstanding

62. See, e.g., Joshua R. Schwartz, *Laymen Cannot Lawyer, But is Mediation the Practice of Law?* 20 CARDOZO L. REV. 1715, 1729 (1999) ("The mediator listens attentively to spot issues for future discussion and to extract potential proposals for resolution of the different issues. After all the parties have had an opportunity to discuss their concerns, the mediator identifies the different issues and sets an agenda for further discussion of each issue"). See also Lela P. Love & James B. Boskey *Should Mediators Evaluate?: A Debate Between Lela P. Love and James B. Boskey*, 1 CARDOZO ONLINE J. CONFLICT RESOL. 1 (1999) ("[T]he mediator often sets the discussion agenda. What issues I, as mediator, elect to treat first is an evaluative process because what I am doing is very clearly saying to the parties, 'These are the things that are most important for you to resolve.'").

63. See, e.g., James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457, 475 (1996).

An effective mediator helps the parties develop the issues necessary to resolve their dispute, which may include issues that are suppressed or unacknowledged. An effective mediator assists the parties in determining what issues are amenable or not amenable to mediation and helps them frame the issues in a way that can lead to constructive discussion. An effective mediator helps the parties decide in what order the issues can most productively be addressed.

Id.

its classification as procedural or substantive.⁶⁴ Other key ethical principles support this alternative as well. The principle of informed consent requires the mediator to share with the parties, information regarding the consequences of the determination of issues by him and enable them to decide for themselves, on the basis of that information, whether they want to take part in the decision making or whether they prefer to leave the decision to him. When the mediator does not share this information with the parties, the parties' consent to the outcome of mediation is not genuine and real. The reason for that is that as a result of the mediator's behavior, consent had been given on the basis of partial information.⁶⁵ The principle of fairness in mediation demands, *inter alia*, to treat the parties with dignity and respect.⁶⁶ To respect the parties is to treat them as capable human beings, to empower them where needed, and to enable them to take decisions which affect them. Such understanding of fairness requires the participation of the parties in the decision making as to whether they should take part in determining the agenda and the issues to be discussed or to leave that decision to the mediator.⁶⁷ Similarly, the principle of mediator neutrality guides the mediator to avoid control over the choice of issues because such behavior might jeopardize his *appearance* of impartiality.⁶⁸ A choice of agenda made by the mediator is more likely to be interpreted by the parties as favoring one party or the other than is a choice made by the parties themselves or with their active involvement.⁶⁹

The latter alternative seems to gain support from TJ as well. A high level of party participation in mediation means a high level of party control over the process, and more control leads to party empowerment and growth

64. See, e.g., Model Standards, *supra* note 36. Standard I supports an active and continuing participation of the parties in decision making throughout the mediation.

A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

Id. See also Shapira, *supra* note 49, at 190.

65. See Shapira, *supra* note 49, at 222. See also Nolan-Haley, *supra* note 47, and Shapira, *supra* note 49, at ch.6 (providing a detailed discussion of informed consent in mediation).

66. See Stulberg, *supra* note 47, at 912-13. The author has borrowed this part of the definition of fairness from the legal philosopher Ronald Dworkin. The concept of fairness is complex and discussed in details by Stulberg at that article. See also Shapira, *supra* note 49, ch.7.

67. See Shapira, *supra* note 49, at 245-46.

68. See, e.g., Model Standards, *supra* note 36. Standard II.B explains "[a] mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality."

69. See Shapira, *supra* note 49, at 280.

in psychological well-being.⁷⁰ In addition, active involvement of the parties in decision making may be experienced by them as procedurally fairer and thus improve psychological well-being.⁷¹ In other words, according to TJ it is expected that a high level of party involvement in decision making would be accompanied by a high level of psychological well-being, while tight control over decision making by the mediator would result in a reduction in the parties' psychological well-being.⁷² Thus it seems that a scenario in which the parties are actively involved in the decision making process is preferred according to both TJ and mediation ethics.

Having that said, it is clear that TJ analysis is more complex than suggested above. Is freedom of choice always better, in terms of individual well-being, than lack of choice? It should be noted that decision making is not only a right but also a burden. In order to make a decision one has to collect information, consider and analyze it, and choose among alternatives. It is a process that takes time and consumes emotional energy. Moreover, one has to live with the consequences of one's actions to be accountable for one's decisions. This analysis suggests that in complex situations one might prefer to pass the burden of making a decision to another person. For example, a professional mediator may allow a mediating party to relieve oneself of the emotional stress involved with taking the decision and coping with the responsibility for its consequences. It is easier to pass the burden to another person. It is easier to accuse someone else for unfavorable consequences of a decision. In these cases honoring the individual's autonomy means respecting his wish to leave the decision in the hands of a professional. Not doing so could be anti-therapeutic.⁷³ However it is not easy to see how one can weigh the cost of acting in an autonomous way against the emotional benefit enjoyed by giving up autonomy. Thus it could be argued that the principle of psychological well-being does not unequivocally direct the mediator to refrain from determining the issues to be discussed, because insecure parties might feel distress if they are required

70. See, e.g., Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).

71. See Kimberlee K. Kovach, *The Vanishing Trial: Land Mine on the Mediation Landscape or Opportunity for Evolution: Ramifications on the Future of Mediation Practice*, 7 CARDOZO J. CONFLICT RESOL. 27, 58-59 (2005).

72. See Ronner & Winick, *supra* note 24, at 502. ("In general, people feel better about making their own decisions rather than having requirements imposed upon them by others.")

73. See Slobogin, *supra* note 6, at 201.

to define the issues of the dispute at the first stage of mediation, at a time they are in need of guidance.

This argument should not be ignored, but in my view could be reconciled with the ethics of mediation. The mediator should adopt a two stage approach. At first the mediator should take the necessary steps in order to enable the parties to be involved in decision making over “procedural” matters, such as the mediation agenda. He would do so through party empowerment, by assuring the parties that they control the process, that they have the capability to determine the issues relating to their dispute, and that he is ready to offer his assistance and guidance whenever necessary. As a second stage, if the parties want to pass decision making to the mediator, the mediator should accept that responsibility after explaining to the parties the importance of procedural decision making and its potential effects on the content of mediation. This conduct would be ethical since it reflects parties’ choice based on free will, knowledge and understanding. Therefore, the decision is an expression of the parties’ right of autonomy and self-determination and is in accordance with TJ, i.e. it enhances the parties’ psychological well-being.

B. Mediator Ethics: The Use of Pressure Tactics

The reality of mediation practice is that mediators pressure parties to change their positions, to make concessions, and to settle.⁷⁴ Mediators use pressure tactics for a variety of reasons.⁷⁵

74. See, e.g., DEBORAH KOLB & ASSOCIATES, *WHEN TALK WORKS: PROFILES OF MEDIATORS* 490 (San Francisco: Jossey-Bass, 1994) (“[Mediators . . . use pressure and other ‘robust’ tactics prominently in their work”); KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 196 (West Publishing Co., 1994) (“[M]any mediators coerce parties into a settlement, claiming to have superior understanding of the best options for resolution of the matter”); Dean G. Pruitt, *Social Conflict*, in *THE HANDBOOK OF SOCIAL PSYCHOLOGY* VOL. 2 491 (Daniel T. Gilbert et al. eds., McGraw-Hill 4th ed. 1998) (“Mediators . . . commonly press the parties to reach agreement, telling them that their positions are unrealistic, pushing for concessions, and sometimes setting deadlines”); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 *CARDOZO J. CONFLICT RESOL.* 57, 68 (2004) (“Reports of coercion, threats, strong-arming, and other abusive behaviors by mediators and attorneys suggest that the privacy of mediation has created space for behaviors that would hardly be tolerated in public courtrooms.”). See also Coben, *supra* note 44, at 65:

Let me begin by declaring my biases. First, I am a dissatisfied consumer of mediation services, having represented both employment discrimination and family law clients in mediations. The mediators’ rapid retreat to caucus, their tendency to incorrectly evaluate my clients’ cases, and their strong push for particular settlement structures while simultaneously proclaiming process neutrality, all too frequently have left me (and my clients) disappointed and disillusioned.

Id. at 65.

They have an interest in an agreement obtained by the parties because the legal system and many mediators consider an agreement to be evidence of a successful process and view a lack of agreement as a failure of both the process and the mediator.⁷⁶ Pressure tactics take many forms. A mediator can pressure the parties by aggressive evaluation, by setting a close deadline for decision making, by abusing power differences between himself and the parties, etc.⁷⁷ Pressure by mediators is incompatible with ethical mediation. First, pressure by mediators jeopardizes the parties' autonomy because its purpose is to reduce their freedom to choose between alternatives and to

75. See, e.g., Kenneth Kressel, *Mediation*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 534-35 (Morton Deutsch & Peter T. Coleman eds., Jossey-Bass 2000).

Although the practitioner literature conveys a decidedly ambivalent attitude about behaviors at the assertive end of the spectrum, it is clear that pressure tactics are commonly used, especially if the dispute involves very high levels of tension and hostility, if a mediator's own interests or values are at stake, if the mediator is under strong institutional pressure to avoid the costs of adjudication, or if the mediator wields power over the disputants (a far-from-rare occurrence in some settings, as with judicial mediators).

Id. See also Deborah Kolb & Associates, *supra* note 74, at 490 (“[M]ediators . . . inevitably bring their own agendas to any conflict in which they become involved . . . are often businesspeople whose motives and interests are not automatically congruent with those whom they assist”).

76. See Paquin & Harvey, *supra* note 14, at 168.

This somewhat coercive, ‘motivating’ behavior of mediators is encouraged because there is a tendency for courts to see mediation as a cost-effective alternative to docket overload. Under these court-influenced conditions, there is added pressure for mediators to press for settlement, since cost-effectiveness is based on settlement rates. Sometimes, the ‘human story’ of the parties is seen as not relevant. A settlement with signatures on paper is the only true goal.

Id.

77. See Schepard & Bozzomo, *supra* note 30, at 352.

Mediators can increase the numerical percentage of cases referred to it that are settled before trial by pressuring parents to reach a settlement. Mediators can do this in a number of ways, principally by becoming more evaluative and directive in their dialogue with participants, using statements like ‘the judge will not see things your way’ or ‘that’s the best offer you can ever expect to get.’ They also can pressure mediation participants to make rapid agreements by imposing tight deadlines for making decisions. These tactics will increase the percentage of cases that the mediator settles.

Id. See also Paquin & Harvey, *supra* note 14, at 167.

Mediation, the use of a neutral third party to facilitate an agreement, can run the risk of incorporating procedures that will coerce settlement, often without the legal protections that the adversarial system might offer. This is done by the mediator emphasizing the unpredictability of results from a judicial fact-finder and the great expense that litigation incurs, as the regrettable alternatives to reaching a mediated agreement. Not reaching an agreement is a sign of failure both of the mediator and the parties.

Id.

direct them towards an end preferred by the mediator.⁷⁸ Secondly, pressure tactics may affect the quality of consent given by the parties to continue their participation in the process⁷⁹ or to accept its outcome.⁸⁰ Thirdly, putting pressure on the parties is unfair. It is the opposite case of treating them with dignity and respect.⁸¹ And fourthly, by pressuring the parties, the mediator risks losing his appearance of impartiality.⁸²

78. See, e.g. Model Rules, *supra* note 36, Standard I.B (the prohibition on coercion in mediation in the Model Rules) (“A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.”). See also FLORIDA RULES FOR CERTIFIED AND COURT-APPOINTED MEDIATORS, Rule 10.310(b) (“Coercion Prohibited. A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation”); Weckstein, *supra* note 49, at 502.

The success and effectiveness of mediation is dependent upon the free choice of disputants in determining how best to resolve their conflicts. A mediator who attempts to exercise the power of Caesar interferes with this free choice and prevents party self-determination. A coerced settlement is inconsistent with a legitimate mediation process, as is any resolution that lacks voluntary and informed consent of the disputants.

Id. See also Shapira, *supra* note 49, at 189-90, 346-48 (for a detailed discussion).

79. See, e.g., Kovach, *supra* note 49, at 584 (“Coercion can also come from the mediator. For example, the mediator may not allow the participants to leave the mediation until an agreement is reached.”); see also *id.* at note 58 (“Although force was not used, in some Texas mediations which lasted until 7:00 a.m. the next morning, the parties reported that they felt that they could not leave”).

80. See Samuel J. Imperati et al., *If Freud, Jung, Rogers, and Beck were Mediators, Who Would the Parties Pick and What are the Mediator’s Obligations?*, 43 IDAHO L. REV. 643, 678 (2007)

The greatest mediator pressure is to settle for the sake of settlement, based on the assumption that settling is always better than not settling. To enhance the quality of consent of the parties, after discussing the parties’ analysis of the dispute, the mediator must respect the decision of each party not to settle if they so choose.

Id.; see also *id.* at 679 (“Mediators should obtain a confirmation of the parties’ consent to their prospective settlement agreement.”); Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. TEX. L. REV. 407, 451-52 (1997) (“Outcomes should not be coerced (there must be real consent”).

81. See Stulberg, *supra* note 47, at 913 (on the parties’ right to be treated with dignity and respect as part of mediation fairness); see also John W. Cooley, *A Classical Approach to Mediation - Part I: Classical Rhetoric and The Art of Persuasion in Mediation*, 19 DAYTON L. REV. 83, 129-30 (1993).

Mediator accountability is normally deemed satisfied if the mediator ensures a procedurally fair process, treats parties with dignity and respect, and intervenes to preclude intimidating or abusive behavior by a party. . . . The mediator should not impose his or her fairness values on the parties. . . . Use of rhetorical techniques by the mediator to mask personal prejudices or biases, or to coerce, deceptively or otherwise, adoption of a solution unwanted by, or inimical to the interests of one or more parties would be highly improper, and depending on the circumstances, unethical.

Id. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do With It?*, 79 WASH. U. L.Q. 787, 851 (2001) (“If evaluation is used too aggressively, it denies disputants the respect and dignity that are so important to perceptions of procedural justice”); J. Sue

TJ analysis supports the ethical criticism of the use of pressure tactics by mediators. First, mediator pressure is anti-therapeutic because it undermines party autonomy, while voluntary actions based on free will are associated with therapeutic effects.⁸³ When mediators push the parties to accept their view or the other party's view they reduce the range of alternatives open for their choice, and such behavior may cause stress, anger and resistance, i.e. anti-therapeutic effects. Secondly, although pressure tactics may prove to be effective in terms of the number of mediation agreements reached, the long term implications may be unstable agreements and a greater likelihood for resumption of the dispute in the future with negative effects on the parties' psychological well-being.⁸⁴ Thirdly, pressure may lead to low quality agreements which do not respond to the parties' needs.⁸⁵ And fourthly, mediator pressure may negatively affect the parties' relationship in the future and the willingness of the parties to resort to mediation again.⁸⁶ These therapeutic considerations support mediation ethics stand that use of pressure tactics by mediators ought to be reduced as much as possible.

C. The Ethics of Mediation Participants: The Case of the Parties' Lawyers

Mediation is a dispute resolution process in which a mediator assists the parties in the resolution of their differences. When the dispute involves legal aspects, especially when a lawsuit has been filed, the parties' lawyers are

Richardson, *Mediation: The Florida Legislature Grants Judicial Immunity to Court-Appointed Mediators*, 17 FLA. ST. U.L. REV. 623, 639-40 (1990).

82. See Boule & Nestic, *supra* note 2, at 456 ("The existence of pressure to reach or abstain from reaching an agreement undermines the principle of impartiality").

83. See Chen, *supra* note 31, at 610. The author quotes Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 46 (1999) ("Advocates of mediation have suggested 'that people perform more effectively and with greater motivation when they choose voluntarily to do something, and perform less well, with poor motivation and sometimes with psychological reactance, when they are coerced into doing it.'").

84. See Schepard & Bozzomo, *supra* note 30, at 352.

Rushed, pressured mediation may result in more settlements, but it also may result in settlements breaking down after parents leave the mediator's office, causing more litigation later. Statistics indicating an increased settlement rate in a mediation program might, therefore, be touted as a measure of efficiency, but therapeutic justice values suggest that an evaluation should ask why the increased settlements have occurred.

Id.

85. See ROBERT B. BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 72-73 (Jossey-Bass, 1994).

86. See Boule & Nestic, *supra* note 2, at 170.

likely to participate in the mediation sessions. What is the role of lawyers who represent clients in mediation? How does it differ from their role in a direct out-of-court negotiation with the lawyer of the other side? The argument here is that mediation ethics is a source of guidance for all participants in the mediation process, including the parties' lawyers. And continuing the theme of this article, TJ analysis of mediation may throw light not only on the proper role of mediators but also on the role of the parties' representatives.

Lawyers enjoy a high level of control over clients participating in mediation and over the mediation process itself. When parties are legally represented the lawyers' opinion on whether to go to mediation in the first place carries much weight. Later on, if the parties agree to go to mediation the lawyers are usually dominant in the selection of a mediator for the case. And during mediation lawyers may affect the process by active and sometimes dominant participation.⁸⁷ Lawyers' impact on mediation may also involve a focus on legal rights instead of on the needs and interests of the parties,⁸⁸ and direct negotiation between the lawyers instead of direct communication between the parties, with the assistance of the mediator.⁸⁹ Such dominant involvement of the parties' representatives is incompatible with mediators' and academics' view on an ethical conduct of mediation. According to this view, and in line with the principle of party self-determination, the parties ought to be in the center of the process. That means that the parties are active participants in the process and that sessions focus on the parties' needs and interests.⁹⁰ There is need for special rules of conduct for lawyers representing clients in mediation.⁹¹ Lawyers in mediation should not conduct themselves in the same way as they conduct "ordinary" direct negotiation or represent clients in court. Lawyers ought to

87. See, e.g., Kovach, *supra* note 71, at 58.

88. See, e.g., Welsh, *supra* note 1, at 26; Kovach & Love, *supra* note 19, at 94, 98-99.

89. See, e.g., Kovach, *supra* note 71, at 59.

90. See Kovach, *supra* note 71, at 58.

For years, mediators have been stressing the need that parties themselves take an active role in the process. Reasons behind this are many, and include matters such as ownership in the dispute, the need to be heard, that parties themselves know much more about the matter and possible solutions, and the notion that individuals are much more likely to comply with an agreement that they have a part in making. Many of these factors fall under the rubric of 'self-determination.'

Id.

91. See, e.g., Patricia Hughes, *Ethics in Mediation: Which Rules? Whose Rules?*, 50 UNIV. NEW BRUNSWICK L.J. 251 (2001); see also Jacqueline M. Nolan-Haley, *Propter Honoris Respectum: Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369 (1998); Nolan-Haley, *supra* note 74, at 70.

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adapt their role in mediation to the nature of the process and to its inner rules otherwise they would harm their clients.⁹²

It is argued that this conclusion is also supported by a TJ analysis. Research shows that active participation in mediation increases party satisfaction even in cases where no agreement had been reached.⁹³ Active participation is also important where the parties reach an agreement in order for the agreement to be stable and long lasting. When parties participate in the process, tell their stories and feel that the mediator actually listens to them, the parties experience procedural fairness which contributes to their feelings of satisfaction and to their commitment to the mediation outcome.⁹⁴ This analysis demonstrates the close nexus between mediation values and TJ. TJ supports extensive party autonomy and active party participation in the process. TJ analysis assigns a more modest role in mediation to the parties' lawyers.

Discussion of the proper role of lawyers in mediation can be approached from another angle. It is argued that in view of the nature of mediation, its qualities and its purpose to offer an alternative to adversarial litigation, lawyers representing clients in mediation ought to avoid the familiar adversarial approach and adopt a different standard of behavior in mediation. Such conduct would commit to a standard of fairness and good faith higher

92. See Kovach, *supra* note 1, at 943.

[T]o have an effective process, the conduct, performance, and skill set demonstrated by those who represent clients within a system must be consistent with the purposes set forth by the system. Consequently, the rules, and the conduct to be governed by those rules, must be changed if lawyers are to be suitable, capable, and competent representatives in the mediation process. . . [there is a need for distinct] ethical rules for lawyer-representatives in mediation.

Id.

93. See Kovach, *supra* note 71, at 58 (referring the reader to Guthrie & Levin, *supra* note 70).

94. See Kovach, *supra* note 71, at 58-59.

Mediation scholars have begun to consider research by social scientists which demonstrates that procedural fairness or justice is an important, perhaps the most critical, objective of any dispute resolution process. . . Particular process elements which assist in achieving procedural justice include the opportunity for disputants to express 'voice' and assurance that a third-party neutral considered what they said. As a consequence, it seems that in order to achieve a durable resolution, one with which the parties are satisfied, mediators and lawyers alike should assure that the parties take a very active role in the process.

Id.

than the standard applied to “ordinary” direct negotiation.⁹⁵ Such standard would have many aspects, one of which is the lawyers’ duty to enable active participation of the parties through direct communication with the other party and the mediator.⁹⁶

TJ analysis would guide lawyers to mitigate adversarial behavior during mediation for another reason. Adversarial conduct of lawyers may negatively affect the parties’ attitude towards the mediator, with the result of loss of trust in the mediator and anti-therapeutic effects on the parties. Mediators cannot function without the parties’ trust.⁹⁷ A suspicious attitude of the lawyer towards the mediator and the process, or even a message (direct or implied) that information is to be withheld from the mediator and

95. See Kovach, *supra* note 1, at 951-52. “[Direct negotiation involves] various methods of puffery and trickery.” *Id.* at 951. “[It allows] representatives and those who negotiate to deceive other parties.” *Id.* But see *id.* at 952.

This clearly should not be the standard in mediation, a process that is dependent upon the direct and truthful exchange of communication. . . . If mediation is viewed as nothing more than facilitated negotiation, then what is acceptable conduct in the context of direct negotiation becomes, by extension, acceptable in the facilitated negotiation. This conclusion is contrary to those qualities, attitudes, and conduct basic to the mediation paradigm. Such approaches erode the fertile ground upon which to base non-adversarial resolutions.

Id. I would suggest that another justificatory reason for a high standard of fairness and good faith in mediation is the high risk taken by mediation parties when cooperating with the mediator and the other side, disclosing information and positions, and exposing points of weakness. Adoption of a high standard of fairness and good faith in mediation would serve to protect the parties from abuse of process by other participants. Indeed, it seems that not only the parties’ lawyers but also the parties themselves ought to adopt such standard; see also Schneider, *supra* note 12, at 1100-01 (discussing a requirement of good faith from the parties); Boule & Nesic, *supra* note 2, at 176; Kovach, *supra* note 49.

96. See Kovach, *supra* note 1, at 964.

97. See, e.g., Charles J. Hunt, Jr., *Mediator Tactics: Strategies and Behaviors Utilized in Labor-Management Negotiations*, 6 APPALACHIAN J. L. 263, 279 (2007) (“A good mediator is trustworthy, helpful, friendly, intelligent, funny, knowledgeable about the substantive issues in question, and so on. The most critical trait is that the mediator be acceptable to the parties and have their trust.”); see also Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731, 745 (1984) (stating that trust is an essential element of the mediator’s work); Peter K. Yu, *Toward a Nonzero-Sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 614 (2002).

Trust is very important in the mediation process. Indeed, one of the biggest assets of a mediator is that he or she can cultivate the trust of the disputants. Once the mediator has the trust of the participants, the information environment will be transformed from adversarial to collaborative. Instead of being reluctant to divulge information, the parties will be willing to share information. They also will ‘confide in the mediator about their priorities, possible options for settlement, and their alternatives to agreement-critical information that they often do not wish to share.

Id. (quoting Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System* 20 (2d ed. 1994)).

that cooperation with him should be limited, may in the end of the day reduce the psychological well-being of the parties because the mediator would not be able to do his job and thus the likelihood of a successful mediation diminishes.⁹⁸ Clearly it is the duty of lawyers to protect the legal rights of their clients, but this can be done cautiously in a manner that does not damage the character and benefits of mediation and the well-being of the parties.⁹⁹ In sum, ethical and TJ analysis of lawyers' role in mediation suggests that lawyers ought to mitigate their adversarial approach and take steps to secure empowerment and active participation of the parties.¹⁰⁰

D. Institutional Concerns – The Definition of Success in Mediation

The definition of success in mediation has wide range implications for the practice of mediation and for the ethical conduct of mediators. What constitutes success in mediation is not a settled issue¹⁰¹ and it is interesting to note the possible contribution of TJ to that debate.

98. See Chen, *supra* note 31, at 608-09. Chen, in an article on the representation of clients with mental illness in civil commitment proceedings, describes how lawyers who adopt an adversarial approach and who are keen to protect their clients' legal rights challenge the doctors' motives and professional judgment. *Id.* The result of the lawyers' conduct is a loss of trust of their client (the patient) in the medical system and damage to the patient who is incapable of getting the medical help he needs. *Id.*

99. See Chen, *supra* note 31, at 609 (referencing Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Council Role Dilemma*, 1 PSYCHOL. PUB. POL'Y & L. 120, 120 (1995)).

100. TJ analysis had been used to call for a reform in lawyers' conduct in other areas. See, e.g., David Carson, *Therapeutic Jurisprudence and Adversarial Injustice: Questioning Limits*, 4 W. CRIMINOLOGY REV. 124 (2003) (calling for reform in the manner in which lawyers cross examine witnesses).

101. See, e.g., Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. DISP. RESOL. 105, 105-06 (1996) (explaining the differing views on success in mediation) ("Drawing on more than 500 experiences with mediation from the construction industry, this paper examines the determinants of mediation success across a wide range of dispute fact patterns, case situations, and mediator abilities and innovations."). See also Jacob Bercovitch, *Mediation Success or Failure: A Search for The Elusive Criteria*, 7 CARDOZO J. CONFLICT RESOL. 289 (2006).

[V]ery little work has focused on developing a clear understanding of what constitutes success. Too often, it seems success or failure is assumed, postulated, or defined on a case-by-case basis, and usually in an arbitrary and poorly reasoned manner. Furthermore, the indicators utilized by those attempting to define success or failure are so diverse as to be almost unworkable.

Id. at 289; Wayne D. Brazil, *Hosting Mediations as a Representative of the System of Civil Justice*, 22 OHIO ST. J. ON DISP. RESOL. 227, 275 (2007).

With modern tendency to praise economic utility it is not surprising to find that the common view of success in mediation equates success with a mediation agreement. Moreover, in a reality where the legal system sees mediation as an aid to reduce the number of lawsuits filed, this definition serves interests of the legal system.¹⁰² Another explanation for the popularity of the “agreement as success” test is its simplicity. It is easy to evaluate mediation by this test because it is clear and cheap to apply: the existence of an agreement is evidence of success— lack of agreement means failure. However such an approach comes at a cost. It creates an incentive for mediators to pressure the parties and behave unethically.¹⁰³ It has anti-therapeutic effects as well. Instead of the mediator focusing on the parties’ needs, on empowering them, on creating an atmosphere and conditions which enable them to confront their problem, the mediator becomes an

If we remain centered in our own respect-worthy values and in our own natural respect for others, and if we try to honor our most fundamental ethical instincts, we need have no fear of failure. We will have no failures. Our success rate will be 100%, because our success as mediators for court programs is not measured by settlement rates, which are far beyond our poor power to add or detract anyway, but by how much of ourselves we give to the process and by the integrity the process reflects when it is in our hands.

Id.

102. See, e.g., Patricia L. Frantz, *Habits of a Highly Effective Transformative Mediation Program*, 13 OHIO STATE J. ON DISP. RESL. 1039, 1040 (1998).

Up to this point, the design of court-connected mediation programs has reflected an emphasis on outcome, specifically the efficient handling of the ever-increasing number of cases flooding the court system and the removal of those cases from court dockets via mediated settlement.

Id.

The goals for current mediation programs are implicit in the purpose clauses of, or preambles to, mediation statutes which often make claims regarding the effectiveness of mediation. These statutes describe ‘effectiveness’ principally in terms of increased settlement rates, cost savings for courts, decreased court delays, cost savings for parties and improved party relationships. When these effectiveness claims are held up as the purpose behind the creation and funding of a mediation program, they become the de facto goals for the program, for its mediators and the parties who present disputes.

Id. at 1054.

103. See, e.g., Bush, *supra* note 2 at 261; see also Brazil, *supra* note 101, at 249-50.

Basic principles of mediation theory expose the [third] reason that it is dangerous for a mediator to drift into a misplaced sense of responsibility for whether the parties reach a settlement. An exaggerated sense of responsibility for the outcome of negotiations is deeply inconsistent with two of the animating purposes of mediation: to empower the parties and to honor and facilitate their self-determination. There is considerable risk that a mediator who feels that his primary mission is to get the case settled will make forced intrusions into the parties’ decision-making and will be tempted, in order to push the parties to change their settlement positions, to color or distort the views he expresses to them in private caucus about the merits of the matter and about what settlement terms might be offered or accepted.

Id.

interested party in the process: he wants an agreement to be obtained, and any agreement, notwithstanding its content and the parties' needs, is better than none.¹⁰⁴ It is very hard for mediators to focus on the therapeutic aspects of the process when the paramount condition for being successful (successful mediator, successful mediation) is to obtain an agreement.¹⁰⁵

Definitions of success which fail to take appropriate account of therapeutic considerations are not unique to mediation.¹⁰⁶ In the field of mediation there have been attempts to address the problem of defining a successful mediation. New styles of mediation have developed—mainly transformative mediation and narrative mediation, which focus on the process of mediation and on the personal growth of the parties rather than on the outcome of the process.¹⁰⁷ Other suggestions for evaluation of success in mediation focus on the parties' level of satisfaction from the process of mediation, from its outcome, from the mediator's performance, and from the quality of the agreement and its stability over time,¹⁰⁸ as opposed to

104. See, e.g., Bush & Folger, *supra* note 85, at 71, 105; see also Peter J. Kuriloff & Steven S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 HARV. NEGOTIATION L. REV. 35, 44 (1997) ("Agreement, however, is only a superficial indicator of a successful mediation. Even if mediation produces a settlement, the mediation process may not meet one of its central purposes— fairness. In a successful mediation, participants should experience the process, the settlement, and the implementation of the agreement as fair. . .").

105. See, e.g., Silbey & Merry, *supra* note 2, at 30 ("[T]o the extent that therapeutic mediation is anarchic, to the extent that therapeutic mediators are forced by the exigencies of some institutional umbrella to produce results competitive with some other yardstick of efficiency, and to the extent that relationships are effective rather than affective, therapists will become bargainers.")

106. See, e.g., Glaser, *supra* note 53. Glaser looks at the way sex offender treatment programs are evaluated and notes that an important factor that is missing from the evaluation is the offender's satisfaction level from the program. *Id.* at 145. This fact, he claims, is not easily reconcilable with the tendency of ethical codes to attach high significance to patients' interests. *Id.* He brings as an example, THE WORLD PSYCHIATRIC ASSOCIATION'S DECLARATION OF MADRID, Ethical Standard (3) which provides that "[t]he patient should be accepted as partner by right in the therapeutic process. The therapist-patient relationship must be based on mutual trust and respect. . ." *Id.* at 145. He also seems to argue that adopting a TJ approach may respond to this problem. *Id.* at 149-52.

107. See Bush & Folger, *supra* note 85; Paquin & Harvey, *supra* note 14; Frantz, *supra* note 102, at 1054-55, points out that in advocating transformative mediation:

Bush and Folger argue that the key problem with problem-solving mediation is mediator directiveness. The focus on the goal of efficient dispute resolution inevitably takes the mediator's focus away from the self-determined satisfaction of the parties and leads the mediator to use directive techniques. This directiveness tends to produce settlements that satisfy each party only partially or that satisfy one party at the expense of the other.

Id.

108. See Frantz, *supra* note 102, at 1068-69.

evaluation which is mainly based on savings in time and money and the number of mediations resulting in an agreement.¹⁰⁹

TJ may contribute to this debate by raising awareness of the existence of a therapeutic interest in enhancing party satisfaction from the mediation process and its outcome. The consequences of adopting such approach include insights as to training of mediators, evaluation of mediations, and the justice system policy towards mediation.

In mediators' training programs more stress should be put on the centrality of the parties, on the extensive right of choice they ought to have, and on the mediators' duties which result out of it. Getting an agreement is a legitimate aim of mediation but it should not be allowed to take precedence and become the dominant element of mediation. In the evaluation of mediations adequate evaluative tools have to be developed and used, such as questionnaires, surveys, and continuous monitoring of the outcome. Data should be sought from the parties, the mediator, and other participants in the process such as parties' representatives. This approach would reduce the inflated weight currently given to the existence of an agreement at the end of mediation. And lastly, the justice system's policy towards mediation ought to be revised so as to recognize the place that the therapeutic value has within mediation. This could be done, *inter alia*, through a redefinition of mediation success. Such shift could reduce the incentives for mediators to pressure parties to settle.

VII. CONCLUSION

This article examined the relevance of TJ for analysis of ethical problems in mediation. It sought to show that the leading principle of TJ, the principle of therapeutic value, can supplement the ethical considerations which direct mediators' and participants' conduct in mediation.¹¹⁰ The therapeutic value is not an absolute, deciding value, but an additional value that joins the fundamental values of mediation and participates in the balancing exercise, which the ethical actor in mediation is bound to do in order to perform his role. The usefulness of collaborative analysis, which includes TJ and mediation values, has been illustrated on matters that occupy both academics and mediation practitioners. The realization that

109. See Frantz, *supra* note 102, at 1067.

110. Attempts have been made to derive professional guidance from TJ in other fields as well, for example on the role of judges in problem-solving courts. See Alberstein, *supra* note 7, at 148; JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 111, 111-27 (Bruce J Winick & David B. Wexler eds., 2003); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 82-89 (2006).

actions of mediators and other participants in mediation might have both therapeutic and anti-therapeutic effects and the ability to identify those effects could lead to a better practice of mediation.

Adopting a therapeutic mindset and applying it in one's practice requires one to develop sensitivity to others and to search for ways that can enhance individuals' well-being. This requires adequate education and training.¹¹¹ Familiarity with the therapeutic orientation may help to make professionals aware of the therapeutic consequences of their conduct and offer them guidance.¹¹²

This article also utilizes TJ to reinforce the original concept of mediation as a true alternative to litigation. The original concept of mediation is based on a rich conception of party autonomy and self-determination, as opposed to the legal concept of mediation, which is tied to the court system and is characterized by a thinner conception of party autonomy. The rich conception of autonomy places the parties at the center of mediation and allocates to the mediator a relatively modest role. In performing that role the mediator focuses on assisting the parties to negotiate voluntarily, from a position of power and understanding of their own needs and the needs of the other party. In addition, the mediator enables the parties to choose the norms that are used for resolution of the dispute. TJ supports a wide conception of autonomy because it emphasizes individuals' needs and thus favors a liberal interpretation of mediation's ethical values.

It has been suggested that TJ should not be seen as alien to problem solving mediation, notwithstanding its similarity to transformative and narrative mediation. TJ and problem solving orientations are compatible where the mediator sees his role as assistance to the parties to participate actively in the process, where his aim is to help the parties to present their

111. See Gould & Murrell, *supra* note 27, at 2130-31 (suggesting a training and education program for judges in order for them to develop the necessary skills for therapeutic judging); see Lynda L. Murdoch, *Psychological Consequences of Adopting a Therapeutic Lawyering Approach: Pitfalls and Protective Strategies*, 24 SEATTLE U. L. REV. 483 (2000) (discussing the risks associated with the adoption of TJ orientation by professionals, such as loss of neutrality and overidentification).

112. See, e.g., Alberstein, *supra* note 7, at 148.

The essential task of therapeutic jurisprudence is to sensitize judges to the fact that they are therapeutic agents in the way they play their judicial roles and to develop some general principles that might improve judicial structure, function, and behavior, in a manner that allows judges to be more effective therapeutic agents.

Id. (quoting JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 105, 105 (Bruce J. Winick & David B. Wexler eds., 2003)).

view of the dispute, to understand their needs and to recognize and respect the needs of the other party, where he seeks to improve communication between the parties, to help them generate options for resolution (and offer some himself, *after* the parties exhausted their ideas), to assist the parties to negotiate voluntarily and search for an informed uncoerced outcome. Mediation that is conducted in this fashion is consistent with TJ because it enhances the psychological well-being of the parties. It treats the parties with dignity and respect, it provides them with the experience of procedural fairness, and it expands the dialogue and interaction between them. It is not the label of mediation that counts. It is the actual conduct of mediators and the other participants in the process that determine ethical conduct and therapeutic effect. Joining the forces of TJ and mediation ethics can therefore be beneficial for the parties, mediators, other participants in the process, and policy makers.