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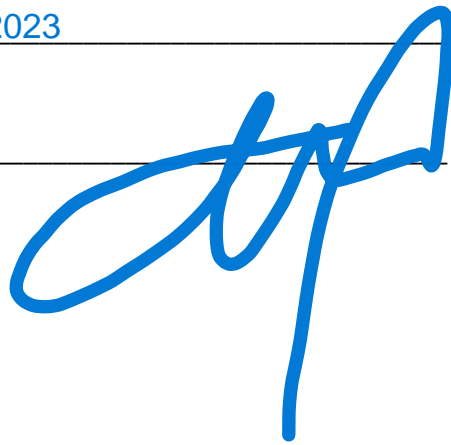
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**TRANSFORMING FORECLOSURE PROCEDURES:
The Power of Procedural and Therapeutic Justice**

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Introduction

The foreclosure process, a challenging and often emotionally charged legal journey, finds itself at the crossroads of financial hardship and the intricate workings of our legal system. As homes hang in the balance, the human toll of this process cannot be overlooked. This discussion article advocates for a transformative integration of Procedural Justice (PJ) and Therapeutic Justice (TJ) principles within foreclosure proceedings, recognizing the need for a profound shift in approach.

Understanding the 2008 foreclosure crisis and the 2020 Covid-19 pandemic are essential in this discussion article because each acted as an unexpected exogenous supply shock to the global financial, labor, and housing markets. These crises underscored the vulnerabilities in existing foreclosure procedures, revealing the inadequacies of traditional approaches rooted primarily in legal formalities. As communities and individuals grappled with economic strain, the flaws in the system became glaringly evident, demanding a reevaluation of how we navigate the complexities of foreclosure.

The synergy of Procedural Justice as the foundational framework and Therapeutic Justice as the transformative agent promises a revolutionary path forward to a better and harmonious legal system. Procedural Justice, with its pillars of fairness, neutrality, voice, and respect, lays the groundwork for a legal process that not only adheres to the rule of law but prioritizes the human experience within the legal system. On this foundation, Therapeutic Justice brings a holistic and empathetic lens, acknowledging the emotional and psychological dimensions intertwined with legal matters. By addressing the root causes of foreclosure and providing rehabilitative support,

this integration aims not only to resolve legal disputes but to heal families and foster sustainable homeownership.

In Part I, this discussion article delves into the nuanced interplay between PJ and TJ, examining their distinct contributions and how their amalgamation can bring about a paradigm shift in foreclosure procedures. It explores the potential of enhanced cooperation, rehabilitative support, and a human-centered legal system in creating powerful, long-lasting outcomes for individuals facing the daunting prospect of losing their homes.

For historical context, Part II outlines traditional home ownership dynamics and the evolution of the mortgage market, paving the way for an in-depth analysis of the 2008 subprime mortgage crisis. This section outlines its occurrence, causes, consequences, and current-day challenges that exacerbate housing insecurity.

Part III reflects on the foreclosure crisis and the lessons learned, emphasizing the necessity of implementing Procedural Justice (PJ) and Therapeutic Jurisprudence (TJ) for a fair, transparent, and human-centered legal system while discussing the practicalities of implementation.

Lastly, in Part IV, the discussion article summarizes the argument for the need to implement a TJ framework and concludes, aiming to pave the way for a foreclosure process that not only upholds the principles of justice but genuinely serves as a lifeline for those in distress.

I. The Nuanced interplay of PJ and TJ

The relationship between procedural justice (PJ) and therapeutic jurisprudence (TJ) is one of mutual support and integration.¹ Both PJ and TJ share common goals related to the well-being of individuals affected by the legal system, and they can complement each other in court proceedings.²

In David Wexler's article, *Guiding Court Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence*, the relationship between PJ and TJ is likened to a synergistic partnership where these two approaches work together while maintaining their distinct characteristics.³

To help better understand this interaction, we can use the metaphor of a well-coordinated symphony, with each approach playing its unique instrument to create harmonious legal proceedings.

Procedural Justice (PJ): The Foundation of the Symphony

PJ can be portrayed as the foundational element of a symphony.⁴ It represents the fundamental principles of fairness, respect, and voice in legal proceedings.⁵ PJ ensures that individuals involved in the legal system are treated with dignity and have the opportunity to express themselves.⁶ Within the PJ framework "... a system is procedurally just if it produces accurate results at a reasonable cost while ensuring meaningful participation rights for those with business

¹ See generally David B. Wexler, *Guiding Court Conversation Along Pathways Conducive to Rehabilitation: Integrating Procedural Justice and Therapeutic Jurisprudence*, Arizona Legal Studies, Discussion Paper No. 15-33 (2016)

² *Id.*

³ *Id.*

⁴ See generally David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship between Procedural Justice and Therapeutic Jurisprudence*, Arizona Legal Studies, Discussion Paper No. 08-11 (2008)

⁵ *Id.*

⁶ *Id.*

before the courts”.⁷ It emphasizes the importance of satisfaction with the legal process and compliance with court orders.⁸

PJ is like the steady rhythm of a drumbeat in the symphony, providing a consistent and reliable foundation for the entire performance. It sets the tone and ensures that everyone in the orchestra is in sync.

Therapeutic Jurisprudence (TJ): The Orchestra of Insights

TJ, on the other hand, can be depicted as the orchestra of insights and practices borrowed from psychology, criminology, and social work.⁹ It seeks to enhance well-being, rehabilitation, and compliance by integrating findings from these disciplines into the legal system.¹⁰ TJ goes beyond the basics of PJ and delves into the psychological and behavioral aspects of individuals involved in legal proceedings.¹¹

TJ is like a diverse orchestra with various instruments representing different disciplines. Each instrument (psychology, criminology, social work) contributes unique melodies and harmonies to enrich the overall symphony.

Integration and Harmony: Making Beautiful Music Together

Wexler further emphasizes that TJ fully embraces PJ and views it as a crucial tool in the TJ toolkit.¹² While PJ provides the essential framework of fairness and respect, TJ complements it by incorporating psychological insights, such as relapse prevention planning and health

⁷ Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633 (2017)

⁸ *Id.*

⁹ See generally David B. Wexler, *Wine & Bottles: A Metaphor & A Methodology for Mainstreaming TJ*, Arizona Legal Studies, Discussion Paper No. 15-05 (2015)

¹⁰ *Id.*

¹¹ Wexler, *supra* Note 4

¹² Wexler, *supra* Note 1

psychology, into the legal process.¹³ TJ uses these insights to guide judicial interactions and interventions.¹⁴

To complete this metaphor, in the symphony, a skillful conductor is able to combine the steady drumbeat of PJ with the melodies and multidisciplinary insights of TJ.

While PJ serves as the foundation and is essential in all legal proceedings, TJ stands out as a groundbreaking approach that maximizes the PJ framework by adding a layer of psychological understanding.¹⁵ The result is a harmonious blend of procedural justice and therapeutic elements that resonate with the participants in the legal system.¹⁶

In the context of foreclosure proceedings, PJ would be a fundamental component of court proceedings, for ensuring a fair and transparent process in loan servicing.¹⁷ This means that homeowners are provided clear information about their options, and the decision-making process of loan servicers are transparent and aligned with the interests of both investors and homeowners effectively giving each party a “voice”.¹⁸

TJ on the other hand, focuses on multidisciplinary insights which include the psychological and social dimensions of legal matters.¹⁹ TJ gives the PJ “voice” purpose and direction; TJ would advocate for a holistic approach to support homeowners facing financial difficulties. This could include mandatory financial counseling, mental health resources, and alternative arrangements to shield homeowners from the negative impacts of foreclosure. By addressing the root causes and providing rehabilitative support, TJ could contribute to a more sustainable and humane resolution to foreclosure cases.²⁰

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See generally David B. Wexler, Michael S. King, *Promoting Societal and Juridical Receptivity to Rehabilitation: The Role of Therapeutic Jurisprudence*, Arizona Legal Studies, Discussion Paper No. 10-46 (2011)

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

To provide a more comprehensive discussion on how the implementation of PJ and TJ principles could influence the decision-making processes of loan servicers, provide better support to homeowners, and consider the broader social impact of foreclosure procedures, its necessary to discuss one of the main drivers that contributed to mass foreclosures in the United States and ultimately the world; the 2008 financial crisis and subsequent events. Understanding the crisis will help accentuate the shifts that are needed, specifically how PJ and TJ could have potentially altered the trajectory of this global financial downturn.

II. The housing market and foreclosure crisis

A. *Traditional Homeownership Dynamics*

Traditionally, a homeowner's pursuit of a real estate loan involved direct interaction with a local bank, establishing a direct relationship.²¹ The bank issued the loan, and in return, the borrower signed a promissory note, providing the bank with a mortgage interest in the house as collateral.²² In cases of payment default, the lender could initiate foreclosure, either reclaiming the property to recover the loan value or exploring alternatives through negotiations.²³

Foreclosure, a legal process in real estate, comes into play when a borrower cannot meet mortgage obligations, resulting in the lender taking possession of the property to recover the outstanding loan balance.²⁴

B. *Evolution of the Mortgage Market*

In the beginning, before issuing a mortgage loan, lenders traditionally conducted meticulous cost-benefit analyses unique to each potential homeowner, considering their individual financial

²¹ See generally Lydia Nussbaum, ADR, Dynamic (In)Justice, and Achieving Access: A Foreclosure Crisis Case Study, 88 Fordham L. REV. 2337 (2020).

²² *Id.*

²³ Recognizing the severity of this process, alternatives have been developed to avoid foreclosure such as restructuring loans or adjusting payment schedules to allow for continued homeowner residence, thereby mitigating losses for lenders and shielding homeowners from the fallout of foreclosure. *supra* note 21

²⁴ “Under Nevada law, a foreclosure is a remedy for breach of a promissory note secured by a deed of trust. Nev. Rev. St. § 40.430.” Bank of New York for Certificateholders of CWALT, Inc. v. Southern Highlands Community Association. “ United States District Court, D. Nevada. September 7, 2018 329 F.Supp.3d 1208

situations, property market values, and loan specifics.²⁵ However, the landscape changed with the emergence of a post-secondary mortgage market, which was driven by the securitization of mortgage-backed securities.²⁶ Essentially, once a mortgage loan was approved by a lender, typically a local bank, the bank instead of waiting for the term of the loan to expire, which on average is 20 to 30 years, the bank would sell the mortgage rights in the financial markets, a process known as securitization.²⁷ Securitization also introduced a third-party agent, the loan servicer, creating a disjointed system where investors couldn't directly communicate with homeowners.²⁸

This new framework promoted the issuance of risky subprime mortgages to unqualified borrowers, which in turn created a housing bubble.²⁹ In simple terms, given that the banks had less skin in the game as securitization effectively mitigated their direct risk of a borrower defaulting on their loan, mortgage loans were given indiscriminately to unqualified borrowers.³⁰

Through time a substantial number of total outstanding mortgages had been issued to borrowers who had bad credit and were more likely to default. However, driven by the high return yields

²⁵ Nussbaum, *supra* note 21

²⁶ Eric A. Zacks & Dustin A. Zacks, A Standing Question: Mortgages, Assignment, and Foreclosure, 40 J. CORP. L. 705 (2015).

²⁷ With securitization, lenders could sell the loan to investment banks. These banks created and marketed to investors a variety of products derived from mortgage-backed securities. Now, instead of having to purchase an entire mortgage-backed security, investors could choose to buy derivatives, or slices, of the bond based on how much risk the investors wanted to assume. *See infra* Note 78

²⁸ Before securitization became commonplace, it was much more likely for a mortgage to be serviced by the same entity that had originated the loan. This simple approach ensured that lenders knew immediately if a homeowner was having payment problems and could take action to mitigate possible losses. A fair bit of this kind of "portfolio servicing" still takes place, but as the residential real estate market shifted from an originate-to-hold model to an originate-to-distribute model, an industry of independent third-party entities emerged to service the loans on behalf of the securitization trusts. These trusts, as a requirement for their tax-preferred status, were supposed to be passive, with the management of individual loans left to the servicer. These servicing arrangements are now commonplace in the industry: In fact, the system has matured rapidly and experienced considerable consolidation over the past twenty years. *See infra* note 70

²⁹ Zacks, *supra* note 26

³⁰ *See generally* Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719 (2011).

and apparent risk mitigation brought by securitization, financial institutions and regulators ignored numerous red flags until the imminent market collapse came to fruition.³¹

C. The 2008 Financial Crisis and Persistent Impact

The subprime mortgage crisis occurred from 2008 to 2010 after the collapse of the U.S. housing market.³² As housing prices declined, many homeowners found themselves with mortgages exceeding the value of their homes. When the housing bubble burst, many borrowers were unable to pay back their loans, leading to a surge in foreclosures.³³

In this scenario, in the years leading up to the collapse, when a loan became delinquent, loan servicers, in theory, should have conducted individualized cost-benefit analysis to minimize the investors' losses.³⁴ In practice, however, they were incentivized to foreclose and relied on automated practices, which lacked transparency, causing unnecessary foreclosures misaligned with investors' interests.³⁵ The dramatic increase in foreclosures snowballed and caused many financial institutions to collapse.³⁶

³¹ *Id.*

³² See generally Michael Collins, Carly Urban, *The effects of a foreclosure moratorium on loan repayment behaviors*, 68 *Regional Science and Urban Economics*, 73-83 (2018)

³³ Zacks, *supra* note 26

³⁴ *Id.*

³⁵ Loan servicers prefer foreclosure for two main reasons. The first involves the automated way in which loan servicers conduct business. The transactional part of loan servicing, sending out billing statements and collecting payments, is an automated process that can be done at minimal cost and with minimal human intervention. The problem is that even managing defaulted loans is highly automated so that the cost benefit analysis once conducted by a loan agent at the savings and loan is replaced by computer software. The loan servicer enters a code indicating that a loan is delinquent, and the computer automatically selects a previously approved attorney, generates and uploads the documents required for filing the foreclosure, and forwards them to the attorney. Once the property is foreclosed and liquidated, the servicer automatically bills the investor entity for the cost of the foreclosure. As a result of automation, loan servicing companies have few people on the payroll with the requisite knowledge and skills to conduct loss mitigation or non-retention analysis for an individual borrower's loan. Secondly, loan servicers rely on foreclosure instead of other loss mitigation tactics because of the loan servicing industry's business model. Loan servicers make their profit by maximizing the fees earned from managing the loan and minimizing associated costs, hence automation. See *infra* Note 70

³⁶ Collins, Urban, *supra* note 32

The peak of this crisis around the late 2000s exacerbated the already existing housing challenges in the United States, with over 2.8 million properties facing foreclosure filings in 2009.³⁷ Homeowners suffered significant financial losses, and communities were deeply affected, highlighting systemic issues within the mortgage market.³⁸

While Wall Street and the stock market recovered by 2010, the impact on the housing market and the middle and lower classes persisted. Nearly a decade later, in 2017, 4.4 million homeowners owed more on their homes than they were worth, indicating the enduring repercussions of the crisis.³⁹

Fast forward to March 2020, the onset of the COVID-19 pandemic intensified housing challenges, leading to widespread unemployment and increased housing insecurity.⁴⁰ By 2020, the Census Bureau reported a significant number of individuals with little to no confidence in their ability to make mortgage payments, reflecting the broader economic downturn's impact on housing.⁴¹

Recognizing the threat of housing loss during the pandemic, Government interventions, such as the CARES Act, established eviction and foreclosure moratoriums. Specifically, CARES Act established an eviction moratorium for homeowners and established a foreclosure moratorium and forbearance opportunities for residential housing funded through federally backed loans.⁴²

The moratoriums also extended to unfinished foreclosures already in progress before the CARES Act was codified into law.⁴³ The Act also forced mortgage servicers to accept the forbearance of

³⁷ Sydney Borrello et al., *Improving Outreach to Individuals at Risk of Eviction and Foreclosure in Massachusetts*, Cape Town Project Center (2020)

³⁸ Nussbaum, *supra* note 21

³⁹ Borrello, *supra* note 37

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See generally* Morgan E. Mumford, Eviction Moratoria following COVID-19 and Its Effects on Landlords, Renters, and the Economy, 26 N.C. BANK. INST. 61 (2022)

⁴³ The CARES Act legislation prevented the foreclosures of mortgages backed by the government-sponsored mortgage companies Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and the Government Mortgage Association (Ginnie Mac). *See supra* Note 42

delinquent payments. However, these measures had limitations. While they alleviated anxiety and depression risks for some, they exacerbated economic dysfunction, particularly in the housing market.⁴⁴ Those who did not pay their mortgages or rent during the foreclosure and eviction grace period would still face financial and legal liabilities, once the moratorium ended.⁴⁵

It comes as no surprise that during the moratorium period, the number of foreclosure cases being filed dramatically decreased.⁴⁶ However, in 2022 and during the first quarter of 2023, there has been a trend of increase in foreclosure cases which suggests that the effects of the moratorium has started to fade.⁴⁷ This predicament presents an opportunity to learn from past mistakes and implement thoughtful reform to lending policies, and in particular to the legal system under which these frameworks operate in.

III. Enhancing Justice in Foreclosure Proceedings – The Role of PJ and TJ

The relationship between homeownership and societal outcomes

The intricate relationship between homeownership and broader societal outcomes is a complex tapestry woven with economic and psychological threads. This discussion emphasizes the significant impact of homeownership on social economics and psychological health and underscores the imperative of alternatives to foreclosure. Moreover, the implementation of PJ and TJ emerges as a crucial lens through which to navigate the challenges posed by the foreclosure crisis.⁴⁸

⁴⁴ These measures profoundly impacted the housing market, as the CARES Act covered 70% of all single-family mortgages, with over 4.2 million homeowners taking advantage of forbearance. Unfortunately, the government did not consider the impact on the greater economy that would result once these eviction protections were eventually lifted. These Protections did not absolve tenants or homeowners of their legal responsibilities. *See supra* Note 40

⁴⁵ Mumford, *supra* note 42

⁴⁶ In 2022, there were 164,581 foreclosure filings. This number increased to 185,580 in the first half of 2023, showcasing a continued upward trend.

⁴⁷ ATTOM, a leading curator of land, property, and real estate data, today released on April 19 2023 its Q1 2023 U.S. Foreclosure Activity Report, which shows a total of 95,712 U.S. properties with a foreclosure filings during the first quarter of 2023, up 6 percent from the previous quarter and up 22 percent from a year ago. The report also shows a total of 36,617 U.S. properties with foreclosure filings in March 2023, up 20 percent from the previous month and up 10 percent from a year ago — the 23rd consecutive month with a year-over-year increase in U.S. foreclosure data.

⁴⁸ Courtney E. Boen et al., *The Buffering Effect of State Eviction and Foreclosure Policies for Mental Health during the COVID-19 Pandemic in the United States*, *Journal of Health and Social Behavior*, 20 (2023)

Understanding the Psychological Impacts of Homeownership

Psychological well-being can significantly influence a person's decision-making during foreclosure proceedings. Understanding these impacts allows legal professionals to tailor their approach, considering the emotional state of individuals and promoting informed and constructive decision-making.

Furthermore, studies show that homeownership is often intertwined with a sense of identity and belonging within a community.⁴⁹ Recognizing the psychological aspects ensures that legal interventions consider the broader impact on community and societal well-being, working toward more sustainable and positive outcomes.⁵⁰

In this respect early research has suggested a positive correlation between homeownership and positive emotions, such as life satisfaction.⁵¹ Owning a home was viewed as a milestone, contributing to higher self-esteem and overall life satisfaction.⁵² Recent studies delve deeper in to this correlation, revealing that the positive psychological impacts of homeownership are more pronounced when individuals perceive control over their living environment and financial stability.⁵³ Furthermore, homeownership is associated with a heightened sense of control over one's living environment compared to renting.⁵⁴

Conversely, there is a growing body of research documenting the negative psychological consequences of mortgage delinquency and foreclosure. These negative impacts include psychological distress, anxiety, stress, hopelessness, and depression.⁵⁵ Recent evidence highlights that the negative psychological consequences are more pronounced in low

⁴⁹ See generally Sydney Borrello et al., *Improving Outreach to Individuals at Risk of Eviction and Foreclosure in Massachusetts*, Cape Town Project Center (2020)

⁵⁰ *Id.*

⁵¹ See generally William M. Rohe, Mark Lindblad, *Reexamining the Social Benefits of Homeownership after the Housing Crisis*, Joint Center for Housing Studies, Harvard University, (2013)

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

socioeconomic status (SES) and minority communities.⁵⁶ Foreclosure in these areas tends to have longer-lasting effects, with homes left vacant for extended periods, contributing to wealth disparities, increased crime, and further exacerbation of mental health disparities.⁵⁷

By acknowledging and addressing the psychological consequences brought by homeownership, legal systems can work toward preventing further harm to individuals and communities, promoting long-term well-being.⁵⁸

Implementing PJ and TJ: Catalysts for Transformative Foreclosure Proceedings

The foreclosure crisis, both in 2008 and potentially in the aftermath of the COVID-19 fallout, when viewed without the implementation of PJ and TJ, exposes a system that lacks transparency, individualization, and consideration for the broader social impact.

While the legal system served as a lifeline during the 2008 crisis, challenges arose due to the volume of cases and documentation problems.⁵⁹

In nonjudicial foreclosure jurisdictions, the legal system faces the challenge of lacking regulatory oversight.⁶⁰ On the other hand, in judicial foreclosure jurisdictions, the challenge remains how to manage the volume and complexities of foreclosure cases when they are handled through automated filing mechanisms.⁶¹ During the 2008 crisis these automated mechanisms proved to be problematic and raised concerns about potential procedural violations jeopardizing the fairness of foreclosure proceedings during that time.⁶²

⁵⁶ See generally Jason N. Houle, *Mental health in the foreclosure crisis*, *Social Science & Medicine*, 118 (2014)

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Per Blacks Law dictionary, nonjudicial foreclosure. (1916) is defined as follows, 1. See power-of-sale foreclosure. 2. A foreclosure method that does not require court involvement. Power-of-sale foreclosure, (1946) A foreclosure process by which, according to the mortgage instrument and a state statute, the mortgaged property is sold at a nonjudicial public sale by a public official, the mortgagee, or a trustee, without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure. Power-of-sale foreclosure is authorized and used in more than half the states. Also termed nonjudicial foreclosure; statutory foreclosure.

⁶¹ Per Blacks Law dictionary “judicial foreclosure. (1839) A costly and time-consuming foreclosure method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as the filing of a complaint, service of process, notice, and a hearing. -Judicial foreclosure is available in all jurisdictions and is the exclusive or most common method of foreclosure in at least 20 states.”

⁶² Collins, Urban, *supra* note 32

It's evident that PJ, while essential, needs enhancement to make up for its shortcomings. Integrating TJ principles into a PJ framework becomes instrumental for a nuanced and holistic approach.⁶³

In this respect, by leveraging the PJ framework TJ becomes a powerful tool for individualized assessments in foreclosure proceedings. On its own, PJ ensures homeowners have a fair chance to comprehend proceedings, explore alternatives, voice concerns, and negotiate with transparency. Basic communication channels, such as initial interviews, become crucial in understanding the nuances of each foreclosure case.⁶⁴

However, PJ alone falls short in addressing underlying issues contributing to foreclosure. TJ introduces psychological insights to comprehend mental health, addiction, or community dynamics affecting homeowners.⁶⁵ By engaging defendants with prospective compliance, TJ principles anchor commitment to new courses of conduct. This holistic approach creates a more empathetic legal process, offering rehabilitative support in challenging situations.⁶⁶

As Wexler suggests, to truly make the most of the PJ and TJ interactions, in hopes of avoiding a repeat incident, when courts engage with defendants about prospective compliance of a court order and is asked to address it, the person may become more “anchored” in his or her commitment to the new course of conduct.⁶⁷ Applying TJ principles to foreclosure proceedings can help create a more empathetic and holistic approach to a challenging legal process.⁶⁸

Wexler's insights into therapeutic jurisprudence, although often focused on criminal justice, offer valuable lessons for foreclosure proceedings. Community engagement, early intervention, and

⁶³ Pamela Foohey, *A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy*, 60 B.C. L. REV. 2297 (2019).

⁶⁴ Wexler, *supra* Note 4

⁶⁵ *Id.*

⁶⁶ Wexler, *supra* Note 1

⁶⁷ *Id.*

⁶⁸ See generally David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence “Code” of Proposed Criminal Processes and Practices*, Arizona Legal Studies, Discussion Paper No. 10-46 (2014)

empathetic legal representation align with TJ principles. In the context of foreclosure procedures, TJ can be applied through various strategies:⁶⁹

1. Early Intervention and Communication

Following the TJ framework principles, the legal system should encourage early intervention by providing resources and information to homeowners facing foreclosure.⁷⁰ Ensure clear and open communication between lenders, loan servicers, homeowners, and their legal representatives to explore alternatives to foreclosure.⁷¹

2. Empathetic Legal Representation

Attorneys representing homeowners can adopt an empathetic approach, understanding the emotional toll foreclosure can have on families.⁷² Lawyers can educate clients about their legal rights and explore options such as loan modification, refinancing, or mediation to resolve disputes with lenders.⁷³

3. Mediation and Negotiation

Mediation is not compulsory in many jurisdictions.⁷⁴ However, the legal system should promote and utilize mediation as a means to facilitate negotiations between homeowners and lenders. A mediator can help both parties reach mutually agreeable solutions.⁷⁵ Mediation can encourage lenders to consider loan modifications, interest rate reductions, or extended repayment plans as alternatives to foreclosure.⁷⁶

⁶⁹ *Id.*

⁷⁰ See generally Lydia Nussbaum, *ADR's Place in Foreclosure: Remediating the Flaws of a Securitized Housing Market*, 34 *CARDOZO L. REV.* 1889 (2013).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Timothy A. Froehle, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements are Necessary to Prevent Further Loss to Homeowners*, 96 *IOWA L. REV.* 1719 (2011).

⁷⁴ See generally Robert Rubinson, *Of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 *Cardozo Journal of Conflict Resolution* 837 (2016)

⁷⁵ *Id.*

⁷⁶ *Id.*

4. *Psychological Impact Assessment*

Courts should recognize the psychological impact of foreclosure on homeowners, including stress, anxiety, and depression.⁷⁷ Overwhelmed by the fear of potential homelessness takes a toll on mental well-being of individuals navigating through the legal system.⁷⁸ Foreclosure often results in financial hardship, as families are at risk of losing their primary assets and may struggle to secure alternative housing.⁷⁹ Courts can consider how these circumstances affect the emotional well-being of homeowners when making decisions, aiming for outcomes that minimize distress.⁸⁰

5. *Community Resources*

A TJ principle that is often used is community engagement in legal processes. Courts can connect homeowners facing foreclosure with community resources, including housing counselors, financial advisors, and social services. This approach would ensure that homeowners are aware of available assistance programs and support networks.

6. *Alternative Dispute Resolution (ADR)*

The legal system should aim to promote the use of ADR methods, such as arbitration or settlement conferences, to resolve foreclosure disputes outside of traditional courtroom settings.⁸¹ In non-judicial foreclosure jurisdictions strengthening consumer rights through policy

⁷⁷ Jason N. Houle, *Mental health in the foreclosure crisis*, *Social Science & Medicine*, 118 (2014)

⁷⁸ For example, from personal experience working in the Puerto Rico Law School Clinic for the Prevention of Foreclosure it seems commonplace that once the defendant has been served with a court order notifying them of the foreclosure by the bank they are overcome by the anxiety from the uncertainty and unknown of the proceedings. Often this can lead to defendants being unable to promptly respond to court orders due to being overcome by what I can describe as “foreclosure paralysis”.

⁷⁹ Houle, *supra* note 77

⁸⁰ In this respect I want to highlight that the legal system has recognized the psychological impact of foreclosure in some jurisdictions which has paved the way for TJ friendly legislation. Particularly, in Puerto Rico, the incidence of “foreclosure paralysis” – a term I use to describe the behavior of individuals overwhelmed by the prospect of losing their home - is so prevalent that Puerto Rico’s “Ley para la Mediación Compulsoria y Preservación de Tu Hogar”, Ley 184-2012, the law states that even if the defendant does not timely respond to the first court order, a follow up court citation needs to be issued, and any sentencing is made after the defendant has been given the chance to engage in mediation talks with the lender. This is a very TJ friendly approach as legislators, in recognition of the emotional burden and impact to mental health brought by the prospect of losing your home, built in buffers in the legislation to allow for enough time to reach a comprehensive individualized solution.

⁸¹ Nussbaum, *supra* note 70

and legislation can require ADR in the context of foreclosure which can provide a less adversarial and more collaborative environment.⁸²

These ADR processes could provide procedural infrastructure where there previously was none; for example, mediation offers a structured process, overseen by a neutral third party, for negotiating parties who might not otherwise be successful if left to their own devices.⁸³

7. Education and Informed Decision-Making

The legal system should educate homeowners about the foreclosure process, legal rights, and responsibilities.⁸⁴ This would encourage informed decision-making by providing homeowners with comprehensive information about their options.⁸⁵

8. Judicial Review with Compassion

When foreclosure cases reach the court, judges can apply TJ principles by considering not only legal aspects but also the broader context, including the homeowner's circumstances.⁸⁶

The legal system should be able to encourage judges to inquire about alternatives to foreclosure and explore creative solutions that prioritize housing stability.

9. Follow-Up and Support

Post-foreclosure proceedings, offering support and resources would help homeowners transition to new housing arrangements and ensures negotiated agreements are upheld.

When the Legal system prioritizes on preventing homelessness by exploring ways to keep homeowners in their homes it advocates for the best interests of children and families who may be affected by foreclosure and the risk homelessness.⁸⁷

⁸² Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 *Case W. Res. L. REV.* 305 (2009).

⁸³ Wexler, *supra* Note 4

⁸⁴ Jacqueline Nolan-Haley, *Foreword: Achieving Access to Justice Through ADR: Fact or Fiction?*, 88 *Fordham L. Rev.* 6 (2020)

⁸⁵ *Id.*

⁸⁶ Brescia, *supra* note 82

⁸⁷ *Id.*

IV. Conclusion: Navigating Toward a Transformed Foreclosure Landscape

In navigating the intricate relationship between homeownership and societal outcomes, the integration of PJ and TJ emerges as a transformative paradigm for foreclosure proceedings.⁸⁸ This amalgamation ensures a human-centered legal system where each homeowner is considered as an individual with distinct needs and challenges.⁸⁹

PJ sets the foundation for fairness and transparency, while TJ introduces psychological insights to comprehend the holistic impacts of foreclosure.⁹⁰ Through community engagement, early intervention, and empathetic legal representation, the legal system can mitigate the social and emotional costs of foreclosure.⁹¹

By prioritizing alternatives to foreclosure, incorporating psychological assessments, and providing comprehensive support, PJ and TJ principles collectively reorient incentives for loan servicers.⁹² The result is a legal framework that not only seeks fair and just outcomes in foreclosure proceedings but also addresses the broader societal impacts, breaking the cycle of financial distress and fostering positive outcomes for individuals and communities alike.⁹³

The Way Forward: PJ, TJ, and Comprehensive Reform

The importance of integrating PJ and TJ into foreclosure proceedings becomes particularly evident as we anticipate potential challenges following the COVID-19-related moratoriums.⁹⁴ By learning from past experiences and incorporating insights from these frameworks, the legal system can undergo a transformation.⁹⁵ It can become a helping hand for homeowners facing foreclosure, navigating issues with fairness, transparency, and consideration for the well-being of individuals and communities.⁹⁶

⁸⁸ Wexler, *supra* note 1

⁸⁹ Wexler, *supra* note 4

⁹⁰ *Id.*

⁹¹ Froehle, *supra* note 30

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Supra* note 47

⁹⁵ Froehle, *supra* note 30

⁹⁶ Nussbaum, *supra* note 21

As we navigate the complexities of the foreclosure landscape, comprehensive reform is imperative. This involves proactive measures that incorporate PJ and TJ principles into the fabric of foreclosure procedures. By doing so, we can move away from reactive, crisis-driven responses and embrace a more anticipatory and compassionate approach.⁹⁷

This holistic transformation will not only serve the immediate legal needs of homeowners but will also contribute to the long-term well-being of communities, mitigating economic, psychological, and social impacts associated with foreclosure crises.⁹⁸ The lessons from history underscore that the time for such a transformation is now, and the integration of PJ and TJ is the compass guiding us toward a more just, transparent, and empathetic foreclosure process.

⁹⁷ Borrello, *supra* note 37

⁹⁸ *Id.*