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A NEW CHAPTER: THERAPEUTIC JURISPRUDENCE AND THE PATH TO FINANCIAL REHABILITATION IN BANKRUPTCY LAW

KARNI PERLMAN* & ITAY KRAYDEN**

Abstract

Bankruptcy laws in various countries have incorporated financial rehabilitation as a fundamental goal, driven by economic and social factors. As studies indicate, however, this goal has yet to be successfully achieved in practice. The current legal framework, as this article demonstrates by examining two different legal systems, continues to face challenges in defining financial rehabilitation and outlining clear pathways to achieving it.

The Article offers a novel approach to address these difficulties and to bridge the gap between legislative intent and practical implementation in bankruptcy proceedings oriented towards financial rehabilitation. It suggests drawing insights from the intersection of law and rehabilitation, as explored by the Therapeutic Jurisprudence ("TJ") movement and its application within problem-solving courts. It advocates for adopting core TJ principles, including viewing the judicial process as an opportunity for change, aspiring toward rehabilitative outcomes, considering the litigant holistically, recognizing conflict as multidimensional, understanding rehabilitation as an ongoing process, and emphasizing therapeutic judging and client representation with a rehabilitative focus.

The Article proposes, among other recommendations, the updating of legal rules to clarify that financial rehabilitation extends beyond a mere "fresh start" through debt discharge. Additionally, it suggests revising legal procedures to incorporate a multidisciplinary team, implementation of therapeutic adjudication, and client representation through a collaborative-therapeutic approach. Further recommendations include restructuring the legal education provided to debtors during proceedings and, where possible, promoting the establishment of specialized problem-solving courts dedicated to bankruptcy cases.

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I. INTRODUCTION

Bankruptcy law is an essential field in the economic, social, and legal systems of modern society.¹ The law governing bankruptcy proceedings is designed to address situations where individuals or business entities are unable to pay their debts when they fall due.² This study examines the legal framework for individual bankruptcy.³

Household debt in the United States has more than doubled in the past two decades, increasing from approximately eight trillion to eighteen trillion U.S. dollars since 2004. It is unsurprising that the importance of bankruptcy law is becoming increasingly significant in accordance with current economic and social trends.⁴ Scholars have observed that, for better or worse, consumer credit has become an integral part of modern culture, fundamentally shaping contemporary economic and social behaviors.⁵ For example, in recent decades, the United States experienced a massive increase in household leverage.⁶ This phenomenon was accompanied by a corresponding rise in personal bankruptcies.⁷ One in ten Americans have filed bankruptcy at some point during their adult lives.⁸

1. Jeffrey D. Sachs, *The Roadblock to a Sovereign Bankruptcy Law*, 23 CATO J. 73, 73 (2003); see also Michael J. Herbert, *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America*, 25 U. RICH. L. REV. 221, 221 (1990) (stating insightfully that “[b]ankruptcy may soon join death and taxes as an inevitable consequence of human life”).

2. *Insolvency*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“1. The condition of being unable to pay debts as they fall due or in the usual course of business. 2. The inability to pay debts as they mature.”).

3. The U.S. Bankruptcy Code, as defined below, contains several chapters that outline different types of bankruptcy. For individuals, the main options are Chapter 7 and Chapter 13, depending on the specifics of their situation. Our article focuses on *individual* bankruptcy procedures. *But see, e.g.*, Thomas Jackson & David Skeel, *Bankruptcy and Economic Recovery*, in FINANCIAL RESTRUCTURING TO SUSTAIN RECOVERY 97, 98 (Martin Neil Baily et al. eds., 2013) (regarding *corporate* bankruptcy).

4. FED. RSRV. OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2024:Q4 (2025), www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2024Q4 [perma.cc/W39A-NP8H]; Katherine Porter, *Driven by Debt: Bankruptcy and Financial Failure in American Families*, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 1, 2 (Katherine Porter ed., 2012).

5. Michael D. Sousa, *The Principle of Consumer Utility: A Contemporary Theory of the Bankruptcy Discharge*, 58 U. KAN. L. REV. 553 (2010).

6. Felipe Severino, Meta Brown & Brandi Coates, *Personal Bankruptcy Protection and Household Debt* 41 (Dartmouth Econ., Working Paper No. 2, 2014), www.aeaweb.org/conference/2015/retrieve.php?pdfid=1391&tk=8zS6taAQ [perma.cc/9WDG-ZSWL].

7. *Id.*

8. Pamela Foohey, *Bankruptcy as Social Safety Net*, CARDOZO FAC. ONLINE PUBL’NS (June 15, 2022), larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1020&context=faculty-online-pubs [perma.cc/MTS5-VDEY].

Consumer credit represents a financial mechanism through which individuals can access funds or assume financial obligations with deferred payment arrangements. This mechanism enables purchasers to acquire goods and services without immediate cash expenditure, despite often lacking sufficient funds not only at the time of transaction, but also at the scheduled time of payment. More than forty percent of American households rely on credit cards to pay their bills, leading to a vicious debt cycle.⁹

Alongside the rise of modern consumer society, which promoted the growing reliance on consumer credit, recognition emerged of the social and economic values tied to the financial rehabilitation of debtors.¹⁰ It was found that bankruptcy has a wide-reaching impact on the debtors' surrounding circles, including family and community. Consequently, the financial rehabilitation of debtors serves both social and economic purposes, aiming to restore their ability to become productive and contributing members of society.¹¹ In line with this, a new perception has emerged that the financial rehabilitation of debtors benefits both the individual and society as a whole—suggesting that bankruptcy law should extend beyond merely serving as a creditor's collection remedy.¹²

Accordingly, many countries have enacted new legislations and regulations to place special emphasis on financial rehabilitation as a key objective in bankruptcy law.¹³ The purpose of the law was to enable debtors to regain financial stability, and ensure their reintegration into the economic and social fabric.¹⁴ The legislatures' intent was to prioritize financial rehabilitation to ensure that life after bankruptcy would be free of financial hardship.¹⁵

Nonetheless, a gap has emerged between the “*law in books*,”

9. Bill Hardekopf, *This Week In Credit Card News: 40% Of Households Now Rely On Credit Cards To Pay The Bills*, FORBES (Oct. 31. 2024, 4:20 PM), www.forbes.com/sites/billhardekopf/2024/10/31/this-week-in-credit-card-news-40-of-households-now-rely-on-credit-cards-to-pay-the-bills/ [perma.cc/5JC4-26UH].

10. Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 68 (2006).

11. Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 60 (1986); see also Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 WASH. & LEE L. REV. 515, 515–17 (1991).

12. Ashley Koenen, *Schwab v. Reilly: No Objection Required*, 23 LOY. CONSUMER L. REV. 358, 360 (2011).

13. For example, Israel has gone through such bankruptcy rehabilitation-focused reform, with the enactment of the Insolvency and Financial Rehabilitation Law, 5778-2018 (2018), as amended (Isr.) [hereinafter *The Israeli Insolvency Law*], www.gov.il/BlobFolder/reports/2911/en/Insolvency-Law-1.pdf [perma.cc/R9BK-VTTZ], Israel made a significant legislative change by expressly making debtors' financial rehabilitation a key statutory goal.

14. Porter & Thorne, *supra* note 10, at 68.

15. *Id.*

i.e., the bankruptcy laws developed to align with these objectives, and the “*law in action*,” i.e., their real-life applications. In practice, courts have had to contend with the challenges of achieving the rehabilitative goal. The concept of financial rehabilitation remains underdefined, lacking both a clear legal definition and a standardized implementation framework.¹⁶ Moreover, the establishment of financial rehabilitation as a goal was not accompanied by the implementation of a sufficient framework of tools to enable the court to effectively manage bankruptcy proceedings toward this objective.¹⁷ Studies in the United States have shown that the goal of financial rehabilitation is often equated to the concept of a “fresh start,”¹⁸ and the “fresh start” term was seemingly synonymous with the objective of debt discharge.¹⁹ As studies indicate, however, the expected goal has not been fully achieved, as debt discharge alone does not constitute meaningful financial rehabilitation.²⁰

The current legal framework continues to face challenges in defining the concept of financial rehabilitation and the pathways to achieving it in a comprehensive and efficient manner. This Article proposes that financial rehabilitation can be better-understood, and its implementation by courts can be enhanced, by drawing insights from other legal domains that address rehabilitation. The Article suggest observing this legal challenge through the lens of the Therapeutic Jurisprudence (“TJ”) movement. This conceptual and practical legal movement offers valuable theoretical and applicable content regarding rehabilitation.²¹

The TJ movement regards the law as a social force that

16. *Id.*; see also Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1059 (1987).

17. Nicola Howell, *The Fresh Start Goal of the Bankruptcy Act: Giving a Temporary Reprieve or Facilitating Debtor Rehabilitation?*, 14 QUEENSLAND U. TECH. L. REV. 29, 31 (2014) (citing Karen Gross, *Demonizing Debtors: A Response to the Honsberger-Ziegel Debate*, 37 OSGOODE HALL L.J. 263, 263 (1999)); see also Porter & Thorne, *supra* note 10, at 68 n.5 (citing Howard, *supra* note 16) (comparing the terminology of “rehabilitation” with the “equally elusive term ‘fresh start’”).

18. The U.S. Bankruptcy Code was enacted after Congress created a commission to recommend the required changes to bankruptcy law. The Commission recommended, among other things, that an important function of bankruptcy law was to “rehabilitate debtors for continued and more value-productive participation, i.e., to provide a meaningful ‘fresh start.’” H.R. DOC. NO. 93-137, pt. I, at 71 (1973); see also Gary E. Sullivan, *A Fresh Start to Bankruptcy Exemptions*, 2018 BYU L. REV. 335, 344.

19. Porter & Thorne, *supra* note 10, at 68; see also Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 117 (2017).

20. Howard, *supra* note 16, at 1059.

21. DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990) [hereinafter WEXLER, THERAPEUTIC AGENT]; DAVID B. WEXLER, REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE (2008) [hereinafter WEXLER, REHABILITATING LAWYERS].

produces behaviors and consequences.²² It examines the role of law as a therapeutic agent,²³ focusing on its impact on emotional life and psychological well-being.²⁴ TJ advocates for approaches that consider emotional repercussions and aim to achieve positive, constructive, and rehabilitative outcomes, defined as therapeutic outcomes.²⁵ For this purpose, TJ analyzes and proposes improvements in three key areas: legal rules, legal procedures, and the roles of legal actors.²⁶ The TJ movement highlights the law's potential to influence positive emotional and behavioral outcomes, while also providing practical mechanisms and actionable methods to achieve this goal.²⁷

Some of the core ideas of the TJ movement provide a conceptual foundation for the operation of specialized courts in countries following Anglo-American legal systems, commonly referred to as problem-solving courts.²⁸ These courts primarily address criminal issues arising from chronic social problems, such as drug use. By adopting a collaborative and therapeutic approach,²⁹ the judicial process is designed to help the offenders, referred to as participants,³⁰ break the cycle of repeated offenses and successfully reintegrate into society as normative members.³¹ To achieve these goals, the problem-solving courts utilize, *inter alia*, therapeutic judging methods and rely on the support of a multidisciplinary professional team.³²

This Article offers a novel approach, addressing the gap between legislative intent and practical implementation concerning financial rehabilitation, by drawing on insights from TJ theory and its practical applications, especially within the framework of

22. DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* xvii (1996).

23. *Id.*

24. Michael L. Perlin, *A Law of Healing*, 68 U. CINCINNATI L. REV. 407 (2000); *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* (Dennis P. Stolle et al. eds., 2000); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 20 (2008).

25. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCH. PUB. POL'Y & L. 184, 185 (1997).

26. David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125 (2000).

27. Michael L. Perlin, "Have You Seen Dignity?": *The Story of the Development of Therapeutic Jurisprudence*, 27 N.Z. U. L. REV. 1135, 1137 (2017).

28. GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005).

29. David B. Wexler, *Robes & Rehabilitation: How Judges Can Help Offenders "Make Good"*, 38 CT. REV. 18, 20 (2001).

30. BERMAN & FEINBLATT, *supra* note 28.

31. Peggy F. Hora, *Courting New Solutions Using Problem-Solving Justice: Key Components, Guiding Principles, Strategies, Responses, Models, Approaches, Blueprints and Tool Kits*, 2 CHAP. J. CRIM. JUST. 7 (2011).

32. BRUCE J. WINICK & DAVID B. WEXLER, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (2003).

problem-solving courts.

The proposal outlined in this Article can assist decision-makers, such as legislators and the court administration, in initiating various changes in the law and procedural management. These changes aim to provide courts with appropriate practical tools for the effective and efficient management of rehabilitation-oriented bankruptcy proceedings within the current judicial system. As an alternative, the establishment of a new specialized court is proposed—one that would focus on civil law with an emphasis on rehabilitation-oriented bankruptcy proceedings.

The significance of the Article is reflected in its dual contribution. First, it advances bankruptcy law by proposing pathways that are more effective than the existing framework in fulfilling legislative intent. Second, it aligns with the vision of the TJ movement's founders and advocates by helping to mainstream TJ, expanding its development and potential application to new legal areas, including civil proceedings.

The Article dissects examples from two jurisdictions, the United States and Israel; however, its analysis and conclusions are likely applicable to other legal systems. Comparative research reveals common challenges in attaining the objective of financial rehabilitation, making its insights broadly applicable.³³

Part I of the Article will examine the existing gap between legislative goals and their actual implementation regarding financial rehabilitation in bankruptcy proceedings. Part II will present key concepts of the TJ movement, along with insights derived from its application in problem-solving courts. Additionally, it will analyze bankruptcy proceedings aimed at financial rehabilitation through this perspective. Part III will present practical proposals for essential reforms in bankruptcy procedures, designed to enhance financial rehabilitation more substantially than the existing system. Finally, the Article will conclude with a summary of its findings and recommendations.

II. BANKRUPTCY LAW AND FINANCIAL REHABILITATION: BETWEEN VISION AND REALITY

A well-functioning bankruptcy system should effectively align legal principles with tangible outcomes to ensure meaningful financial rehabilitation. This section examines the gap between bankruptcy law's rehabilitative objectives and its practical implementation, by exploring three key aspects. First, it explores the financial rehabilitation doctrine in the American and Israeli laws. Second, it critically analyzes the limitations of the "fresh start" doctrine, demonstrating that debt discharge alone does not equate to meaningful rehabilitation. Finally, it evaluates credit

33. See, e.g., Howell, *supra* note 17 (explaining Australia).

counseling and debtor education courses, arguing that while these interventions are necessary components of the rehabilitation process, they are insufficient in their current form. Through this analysis, the section highlights the systemic gaps between legislative intent and practical realities of bankruptcy's rehabilitative goals.

A. The Financial Rehabilitation Doctrine and its Legal Integration

Modern consumer culture—driven by the encouragement and extension of credit by large financial institutions, often to vulnerable groups—has led to a rise in debt repayment challenges. For example, lower-income households tend to carry relatively higher amounts of credit card debt, often accruing high interest on unpaid credit card balances.³⁴ As a result, debt distress is now seen not merely as poor payment behavior but as indicative of broader market failures and systemic issues. Many consumers rely on credit for nearly every aspects their lives, often out of necessity to cover day-to-day and unforeseen costs.³⁵ This dynamic increases the risk of falling into the “debt trap,” where individuals spend beyond their means and borrow against credit to sustain that spending, making it especially difficult for lower-income households to break free.³⁶

The bankruptcy process affects multiple parties, each experiencing distinct consequences and exerting varying degrees of influence. These include: (a) the debtors, their immediate family, and surrounding community, who bear the direct personal and social repercussions of financial distress; (b) the creditors, their families, and their associated business networks, including their employees and client relationships, who may experience various degrees of economic impact; and (c) the broader economy and society, which are impacted in different areas such as fostering responsible payment practices, mitigating harmful financial behaviors, and enhancing economic stability.³⁷

Therefore, an individual's bankruptcy involves balancing fundamental rights: the creditors' right to debt recovery and the debtors' right to a “fresh start.”³⁸ This balance is rooted in two

34. Andrea J. Boyack, *Just Consumer Financial Protection: Prevention or Cure*, 41 EMORY BANKR. DEV. J. 1, 8 (2024).

35. *Id.*

36. *Id.* at 8-9.

37. Howell, *supra* note 17, at 51.

38. See Douglas G. Baird, *Bankruptcy's Uncontested Axioms*, 108 YALE L.J. 573, 584 (1999). Thus, personal bankruptcy law operates at a complex intersection of what can be seen as competing interests: providing meaningful pathways for debtors' financial rehabilitation while maintaining creditor protections to ensure continued credit market functionality. This tension

central frameworks—economic and social.³⁹ While some scholars advocate for a strict approach mandating full debt repayment and maximizing creditor returns, others argue for broader policy objectives, including social considerations and prioritizing debtors' welfare and financial rehabilitation prospects over complete creditor recovery.⁴⁰

These phenomena, *inter alia*, created a moral justification for legislators to add the concept of debtor financial rehabilitation into bankruptcy laws.⁴¹ The U.S. Bankruptcy Reform Act of 1978, known as the Bankruptcy Code, serves as the primary federal legislation governing bankruptcy in the United States.⁴² In preparation of its enactment, Congress established a special Commission (the “Bankruptcy Commission”) to examine the Bankruptcy Code and recommend improvements.⁴³ The Bankruptcy Commission's report reinforced the prevailing view that bankruptcy should “rehabilitate debtors for continued and more value-productive participation, *i.e.*, to provide a meaningful ‘fresh start.’”⁴⁴

Despite this rhetoric, the Bankruptcy Code neither defined the rehabilitation component, nor did it specify whether a “fresh start” included equipping debtors with the knowledge and tools necessary for achieving real-world financial rehabilitation. Defining or contextualizing the rehabilitative aspect has been a focus in academic writing. Margaret Howard, for example, identified three key goals of financial rehabilitation: consumer financial education, psychological and emotional relief from financial distress, and reintegration into the credit economy.⁴⁵

While this legislative objective suggests a comprehensive approach to financial rehabilitation, in practice, the “fresh start”

reflects broader debates about the optimal design of bankruptcy frameworks, as noted by different scholars. *See, e.g.*, Michelle J. White, *Abuse or Protection*, 29 REGUL. 28 (2006); Nancy Lazar, *Striking a “Balance” in U.S. Bankruptcy Law*, 10 LOY. CONSUMER L. REV. 13, 18 (1998) (explaining the balance in U.S. bankruptcy law).

39. *See, e.g.*, Robert K. Rasmussen, *An Essay on Optimal Bankruptcy Rules and Social Justice*, 1994 U. ILL. L. REV. 1, 7 (discussing the social point of view).

40. Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 720-21 (1991) (noting how the article will “challenge the economic account and its efforts to define bankruptcy law’s ‘distinct function’ as a mechanism to ‘collectivize’ debt collection and thereby maximize economic returns to creditors as a group”).

41. Flint, *supra* note 11, at 515–17.

42. The Bankruptcy Reform Act of 1978 marked a landmark change in bankruptcy law, representing a substantial and comprehensive reform since The Bankruptcy Act of 1938 (also known as the Chandler Act), and the earlier Bankruptcy Act of 1898. *See* Frank J. Vecchione, *The Bankruptcy Reform Act of 1978*, 5 SETON HALL J. LEGIS. & PUB. POL’Y 1 (1980).

43. John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1295-96 (2018).

44. H.R. DOC. NO. 93-137, pt. 1, at 71.

45. Howard, *supra* note 16, at 1059.

has largely been realized through the bankruptcy discharge.⁴⁶ Discharge releases debtors from personal liability for specific debts and permanently restricts creditors from taking any action to collect those discharged debts.⁴⁷ It does not inherently encompass rehabilitation in its broader sense.

In Israel, a new bankruptcy law enacted in 2018 significantly changed the previous legislation by explicitly prioritizing debtors' financial rehabilitation as a core statutory goal. This was reflected in the law's title: The Insolvency and Financial Rehabilitation Law. On one hand, the law explicitly defined in section 1 that:

This Law is intended to regulate the payment of the debts of a debtor that is a natural person or a corporation, and is or might be in a state of insolvency, in order to - (1) bring about the *financial rehabilitation* of the debtor, to the extent possible; (2) increase the rates of the debt that will be paid to the creditors; (3) promote the reintegration of a debtor who is a natural person into economic life.⁴⁸

On the other hand, the law failed to define the term “financial rehabilitation,” despite its use throughout the legislation. Section 161 of the Israeli Insolvency and Financial Rehabilitation Law addresses the issuance of a “financial rehabilitation order.” According to this provision, the court is to issue a financial rehabilitation order encompassing a debt repayment plan and provisions for financial rehabilitation. Nevertheless, the Israeli bankruptcy system, which grants debt discharge with improved efficiency in the last few decades, continued to view discharge as the dominant solution presented in the legal bankruptcy process.⁴⁹

The points outlined above demonstrate that both the American and Israeli legal systems incorporated an approach that supports financial rehabilitation. Neither system, however, has managed to clearly describe what rehabilitation entails. Moreover, both rely primarily on debt discharge as the solution in bankruptcy proceedings. The next subsection clarifies that financial rehabilitation is not synonymous with debt discharge, as evidenced

46. Porter & Thorne, *supra* note 10, at 68; *see also* Byington, *supra* note 19, at 117.

47. *Process – Bankruptcy Basics*, U.S. COURTS, www.uscourts.gov/court-programs/bankruptcy/bankruptcy-basics/process-bankruptcy-basics [perma.cc/2J7P-NT2V] (last visited Feb. 13, 2025). The Bankruptcy Code established the following paths for managing individual bankruptcy proceeding and determine how individuals can settle overwhelming debt: *Chapter 7* (requiring debtors to sell non-exempt property to pay off debts); and *Chapter 13* (adjustment of debts of an individual with regular income, focused on court-ordered repayment plan to repay debts). Both chapters culminate in a discharge order that relieves the debtor of obligations to the creditors. *See* Julapa Jagtiani & Wenli Li, *Credit Access After Consumer Bankruptcy Filing: New Evidence*, 89 AM. BANKR. L.J. 327 (2015).

48. The Israeli Insolvency Law, § 1 (emphasis added).

49. Omer Kimhi et al., *Caught in a Circle of Debt-Consumer Bankruptcy Discharge and Its Aftereffects*, 98 CHI.-KENT L. REV. 417, 417-21 (2023).

by studies examining post-bankruptcy outcomes of debtors who have completed bankruptcy proceedings and received debt discharge.

B. The Failure of Fresh Start Doctrine and Why “Discharge is Not Rehabilitation”

Despite the promise of a “fresh start”, studies show that bankruptcy discharge alone does not achieve meaningful financial rehabilitation. American academic research has noted that the Bankruptcy Commission recognized that “[d]ischarge is not rehabilitation,” and thus, debtors’ financial rehabilitation requires more comprehensive rehabilitative solutions beyond mere discharge.⁵⁰ Indeed, extensive studies in both the United States and Israel have shown that bankruptcy proceedings often fail to deliver full financial rehabilitation.

Key research in the United States found that just one year post-bankruptcy, one in four debtors struggled to pay routine bills and meet basic expenses, such as housing costs, car repairs, and medical bills.⁵¹ One in three debtors reported an overall financial situation similar to or worse than that which they were in at the time of filing for bankruptcy.⁵² As a result, numerous debtors continue to experience significant post-bankruptcy difficulties in meeting fundamental household obligations, with about one in four families struggling to make mortgage or rent payments.⁵³

Studies conducted in Israel have shown similar results. Extensive research revealed that a significant proportion of debtors who received discharge in Israel between 2009 and 2018 subsequently re-entered insolvency proceedings. Despite being debt-free at the time of discharge, most of these debtors nonetheless found themselves unable to meet their financial obligations within two years of their initial discharge.⁵⁴ Other studies examining debtors’ post-bankruptcy in Israel reveal that thirty-eight percent of discharge recipients reenter the debt cycle, with sixty percent returning to enforcement and collection authorities within two years post-discharge.⁵⁵

The above data indicates that in both U.S. and Israeli

50. H.R. DOC. NO. 93-137, pt. I, at 109 (1973); see Karen Gross, *Introducing a Debtor Education Program into the U.S. Bankruptcy System: A Roadmap for Change* (July 7, 1997) (unpublished manuscript), govinfo.library.unt.edu/nbrc/report/g3a.pdf [perma.cc/B7GG-E7Z5].

51. Porter & Thorne, *supra* note 10, at 70.

52. *Id.* at 88.

53. *Id.* at 85.

54. Kimhi et al., *supra* note 49, at 417-18.

55. Moran Ofir et al., *Debtors Always Remain Debtors: An Empirical Analysis of Individual Bankruptcy Proceedings*, 22 TEL AVIV UNIV. L. REV. 433, 471 (2022).

bankruptcy systems, debt discharge alone does not create a path to meaningful financial rehabilitation. The focus on discharge as the primary goal, rather than comprehensive financial rehabilitation, has not demonstrated adequate effectiveness.

C. *Credit Counseling and Debtor Education Requirements: Necessary Yet Insufficient*

In 2005, the U.S. Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) marked an important milestone in U.S. bankruptcy law.⁵⁶ BAPCPA introduced an additional mechanism related to financial rehabilitation by mandating debtors’ completion of financial education courses as a prerequisite for filing bankruptcy, and later for discharge eligibility.⁵⁷ It was meant to be a valuable tool that enabled debtors to capitalize on the “fresh start.”⁵⁸

The implementation of financial education courses, however, has largely fallen short of achieving its intended rehabilitative objectives. Although financial education courses have the potential to contribute to debtors’ comprehensive financial rehabilitation, several limitations in the format and structure of these courses reveal their insufficiency to make a meaningful contribution toward achieving the desired financial rehabilitation.⁵⁹

Under the U.S. bankruptcy law, all individual bankruptcy filers are required to complete pre-bankruptcy credit counseling, and pre-discharge debtor education course.⁶⁰ The courses may not be provided at the same time: credit counseling must be completed before filing for bankruptcy, while the debtor education course must be completed after filing for bankruptcy and before discharge.⁶¹

The first course, credit counseling, is a mandatory prerequisite. Debtors are required to complete such counseling with an approved credit counseling agency within the 180-day period preceding the date of filing of the bankruptcy petition.⁶² Counseling sessions typically extend for approximately sixty minutes.⁶³ According to the

56. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

57. Henry G. Hobbs, Jr. & Patricia J. Stanley, *Credit Counseling and Debtor Education Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 54 U.S. ATTYS’ BULL., no. 5, Aug. 2006, at 15.

58. Porter & Thorne, *supra* note 10, at 73.

59. Michael D. Sousa, *Just Punch My Bankruptcy Ticket: A Qualitative Study of Mandatory Debtor Financial Education*, 97 MARQ. L. REV. 391 (2013).

60. Nathalie Martin & Ocean Tama y Sweet, *Mind Games: Rethinking BAPCPA’s Debtor Education Provisions*, 31 S. ILL. U. L.J. 517, 518-19 (2007).

61. See *Credit Counseling and Debtor Education Courses*, U.S. COURTS, www.uscourts.gov/court-programs/bankruptcy/credit-counseling-and-debtor-education-courses [perma.cc/LB76-CC8X] (last visited Feb. 13, 2025).

62. 11 U.S.C. § 109(h) (2006); see also Sousa, *supra* note 5, at 604.

63. See *Frequently Asked Questions (FAQs) – Credit Counseling*, U.S. TR.

U.S. Trustee, “[t]here is no required minimum duration or required average duration of the counseling sessions,”⁶⁴ and timing may vary depending on individual debtor circumstances. Credit counseling is allowed to be conducted via telephone or online.⁶⁵

The second course, commonly called “Debtor Education,” is a pre-discharge course which debtors must complete prior to obtaining a discharge of debts.⁶⁶ The U.S. Department of Justice has defined a minimal temporal requirement, stipulating that this instructional course must contain sufficient learning materials and teaching methodologies to ensure the debtor receives a minimum of two hours of instruction, irrespective of the delivery method.⁶⁷ This 120-minute duration appears to have become the practical standard among diverse course providers, thus becoming a one-shot two-hour program.⁶⁸

The 2018 Israeli Insolvency and Financial Rehabilitation Law amendment also introduced a financial education program. Subject to the discretion of the court, a debtor may be required to attend “proper financial management training.”⁶⁹ This program consists of twelve hours spread across four meetings, and program content is similar for all participants.

The analysis demonstrates that both American and Israeli legal systems have implemented financial education programs aimed at providing economic guidance to debtors to help them make better financial decisions in the future. Both systems offer relatively brief programs with limited content, delivered uniformly to all participants regardless of the unique situations that led to bankruptcy.

Differences between legal systems can also be identified. In Israel, credit counseling is not required before filing for bankruptcy, and the pre-discharge debtor education course remains discretionary, subject to court determination.

It should be noted that a U.S. Government Accountability Office (“GAO”) Report to the Congress was inconclusive regarding the efficacy of the counseling provisions,⁷⁰ and later American academic studies have been more definitive, pointing to the

PROGRAM, www.justice.gov/ust/frequently-asked-questions-faqs-credit-counseling [perma.cc/86GW-KSFW] (last visited Feb. 13, 2025).

64. *Id.*

65. *Id.*

66. 11 U.S.C. §§ 727(a)(11), 1328(g)(1); Sousa, *supra* note 59, at 397.

67. See *Instructions For Application For Approval as a Provider of a Personal Financial Management Instructional Course OMB No. 1105-0085*, U.S. DEPT OF JUST. (Dec. 29, 2022), www.justice.gov/ust/media/1070966/dl?inline=perma.cc/N2AW-MGLH.

68. Sousa, *supra* note 59, at 464.

69. The Israeli Insolvency Law, § 161(b)(5).

70. U.S. GOV'T ACCOUNTABILITY OFF. GAO-07-203, BANKRUPTCY REFORM: VALUE OF CREDIT COUNSELING REQUIREMENT IS NOT CLEAR (2007), www.gao.gov/assets/gao-07-203.pdf [perma.cc/J8Q8-ANB6].

shortcomings and failures of these courses in achieving financial rehabilitation.⁷¹ No such research has been conducted in Israel yet.

III. REFLECTING ON FINANCIAL REHABILITATION THROUGH THE LENS OF THERAPEUTIC JURISPRUDENCE

As discussed above, there is a gap between the legislative intent for financial rehabilitation and the practical failure to achieve the desired outcome. This section suggests drawing lessons from other examples where the law intersects with rehabilitation and utilizes insights from TJ.

To this end, the Article will briefly explore some key concepts of the TJ movement and the insights gained from its implementation in problem-solving courts that have embraced its approach. This exploration will include a concise review of the TJ movement's evolution, followed by a discussion of its core principles and insights. The analysis will be conducted in a way that facilitates the examination of bankruptcy proceedings through this framework.

A. *The Evolution of the TJ Movement*

In the early 1990s, Professors David Wexler and Bruce Winick published their seminal essay which provided novel ideas on collaborative research between the disciplines of law and mental health.⁷² Marking the first decade of its development, the TJ movement proposed examining legal rules, procedures, and the roles of legal actors regarding the psychological impact of law and legal processes.⁷³ The movement sought to promote the maximization of therapeutic outcomes—i.e., positive, constructive, and rehabilitative results—while reducing anti-therapeutic, discouraging, and negative effects.⁷⁴ It called for a perspective that critically examines real-world legal practices across various areas of law, raising questions about the desired state and potential pathways for achieving therapeutic outcomes, while also considering justice and other normative values within the legal system.⁷⁵

71. Sousa, *supra* note 59. This comprehensive study revealed that only 4 out of 58 participants interviewed (6.90%) reported that the mandatory education courses were beneficial in achieving the legislator's intended objectives. *Id.* at 398. The vast majority of participants did not find the courses to be helpful, and the most common phrase used to describe "both courses was that they were a 'waste of time.'" *Id.*

72. DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991).

73. WEXLER, *THERAPEUTIC AGENT*, *supra* note 21; Wexler, *supra* note 26.

74. Wexler, *supra* note 26.

75. Winick, *supra* note 25, at 185.

During its second decade, the TJ movement provided a conceptual framework and operational methods that contributed to problem-solving courts' practices.⁷⁶ These courts, established in the U.S. and later adopted by other countries, are oriented toward a rehabilitative and educational goal.⁷⁷ Problem-solving courts focus on the participant's rehabilitation, and breaking the cycle of recidivism.

A fundamental goal of the judicial proceedings in problem-solving courts is to foster the participant's return to society as a productive community member.⁷⁸ A judge, assisted by a multidisciplinary team of professionals, directs the judicial process using a collaborative-therapeutic approach.⁷⁹ This multidisciplinary team examines the participants' background and specific needs, based on which it tailors a personalized rehabilitation program, referred to as a "behavioral contract." The behavioral contract imposes obligations on the participant, while simultaneously providing multi-focal assistance aimed at addressing the offender's specific needs from a broad perspective, including areas such as education, employment, and health.⁸⁰

In its third decade of operation, the TJ movement has consolidated its position as an international movement with broad horizons in both theoretical and practical domains.⁸¹ It examines diverse branches of law and addresses a wide range of civil and criminal disputes through comparative analysis, while drawing insights from multidisciplinary research domains.⁸²

TJ advocates aim to mainstream the movement's ideas within legal systems,⁸³ proposing the integration of the movement's

76. *Problem Solving Courts*, NAT'L INST. OF JUST. (Feb. 20, 2020), web.archive.org/web/20241231233847/www.nij.ojp.gov/topics/articles/problem-solving-courts; Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055 (2003); Nigel Stobbs, *Therapeutic Jurisprudence in International and Comparative Perspective*, *OXFORD RSCH. ENCYCL. CRIMINOLOGY & CRIM. JUST.*, Sept. 28, 2020, at 1 (2020).

77. Problem-solving courts have been established across multiple jurisdictions, including Australia, Canada, England, Scotland, Israel, and others. See JAMES L. NOLAN, JR., *LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT* 6 (2011) (detailing a comprehensive review of problem-solving courts' development).

78. BERMAN & FEINBLATT, *supra* note 28.

79. Hora, *supra* note 31.

80. *Id.* at 28.

81. David C. Yamada, *Therapeutic Jurisprudence: Foundations, Expansion, and Assessment*, 75 *U. MIA. L. REV.* 660 (2021).

82. *E.g.*, Karni Perlman & Tamar Morag, *Seen and Heard: A New Look at Child Participation in Family Disputes*, 59 *FAM. CT. REV.* 508 (2021); David B. Wexler, *New Wine in New Bottles: The Need to Sketch a Therapeutic Jurisprudence 'Code' of Proposed Criminal Processes and Practices*, 7 *ARIZ. SUMMIT L. REV.* 463 (2014).

83. David B. Wexler, *Moving Forward on Mainstreaming Therapeutic Jurisprudence: An Ongoing Process to Facilitate the Therapeutic Design and Application of the Law*, in *THERAPEUTIC JURISPRUDENCE: NEW ZEALAND*

innovative principles into existing legal frameworks—metaphorically described by Professor Wexler as pouring “new wine” into “existing wine bottles.”⁸⁴

B. Therapeutic Jurisprudence Principles: A Framework for Meaningful Financial Rehabilitation

Among the principles of the TJ movement and insights from its implementation, this Article will focus on and highlight specific principles, using them as a framework to examine financial rehabilitation.

1. The Judicial Process as an Opportunity for Change and the Pursuit of Rehabilitative Outcomes

The TJ movement perceives the court and judicial process as an opportunity to assist the parties involved in legal proceedings by thoroughly addressing the conflict, finding a resolution, and preventing its recurrence.⁸⁵ The judicial process surpasses its traditional function as a source of power exercised for conflict resolution and rights enforcement. Importance is given to managing discourse that also addresses needs, interests, emotions, preservation of interpersonal relationships, and concern for the psychological well-being of those involved in the circle of conflict, which constitutes an examination of “rights and beyond.”⁸⁶ The objective is for the judicial process to produce rehabilitative, positive, and constructive emotional and behavioral outcomes.⁸⁷

When viewed through the lens of TJ, the bankruptcy process should not be perceived as one intended merely to examine a narrow legal question focused on determining eligibility for debt discharge. The judicial process is an appropriate forum to examine the circumstances underlying the behaviors leading individuals to bankruptcy, and to support the debtor in avoiding its recurrence. This can be achieved through a variety of means, including legal arrangements such as debt discharge, alongside providing the debtors with knowledge and practical tools to support future prudent financial management. At the core of managing the judicial process should lie the assumption that the purpose of the bankruptcy process extends beyond debt repayment or discharge. Rather, a broader goal should be pursued. This goal encompasses enabling debtors to regain financial stability, improve their ability

PERSPECTIVES v-xiv (Warren Brookbanks ed., 2015).

84. Wexler, *supra* note 82.

85. WINICK & WEXLER, *supra* note 32.

86. Susan Daicoff, *Law as a Healing Profession: The “Comprehensive Law Movement”*, 6 PEPP. DISP. RESOL. L.J. 1 (2006); Susan Daicoff, *The Future of the Legal Profession*, 37 MONASH U. L. REV. 7 (2011).

87. Wexler, *supra* note 26.

to meet creditors' obligations, and reintegrate effectively into proper socio-economic functioning.

According to the TJ perspective, setting this goal is both appropriate and achievable. By empowering litigants through a judicial process that balances compliance with structured support, the court can facilitate meaningful rehabilitation. Expanding the conception of bankruptcy rehabilitation and aligning judicial management with this broader purpose allows for therapeutic outcomes. Such outcomes benefit not only debtors and creditors but also society at large.

2. *The Importance of Maintaining a Holistic and Individualized View of the Litigant*

TJ advocates for a holistic approach to examining individuals, shifting focus from narrow legal questions to the broader context of disputes, including the underlying needs and motivations of the litigants.⁸⁸ This comprehensive approach appears to enable more effective conflict resolution and therapeutic outcomes.⁸⁹

It is important to note that problem-solving courts that adopted certain core ideas of TJ, now take this holistic approach in their judicial process. For example, problem-solving courts conduct a comprehensive information-gathering process about the participants in the proceedings, including references to their health status, livelihood, family situation, living conditions, and more.⁹⁰ Within this framework, a possible connection is examined between background factors (e.g., alcohol addiction), and the behavior that the judicial process seeks to prevent from recurring (e.g., use of violence).⁹¹ The examination of background conditions enables these unique courts to develop an individualized "behavioral contract," a rehabilitative program specifically designed to address the needs of the participant, while also considering the interests of the community.⁹² For instance, under the described circumstances, the behavioral contract may require mandatory participation in an alcohol treatment program at a rehabilitation center. Adapting the rehabilitation program to unique circumstances related to the case increases the chances of successful rehabilitation.⁹³

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

89. 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, 87 (2006).

90. Robert E. Gaston, *You Want to Change Behavior? Use the Drug Court Format*, NEV. FAM. L. REP., Mar. 2002, at 1.

91. Hora, *supra* note 31, at 18.

92. David B. Wexler, *Therapeutic Jurisprudence and Its Application to Criminal Justice Research and Development*, 7 IRISH PROB. J. 94 (2010).

93. Hora, *supra* note 31.

Application of TJ in this context underscores the great importance of examining the circumstances that triggered the individual's bankruptcy. The financial hardship may have been caused by various reasons, some due to irresponsible or negligent behavior by the debtors (e.g., unnecessary economic risks or reckless spending), and others due to life circumstances forced upon them (e.g., medical conditions, care for a dependent family member, drug or alcohol addiction, unfavorable loans, employment loss, or domestic or economic abuse).⁹⁴

These circumstances are fundamentally unique, each requiring a tailored response based on the debtor's needs and abilities. Therefore, adopting the therapeutic approach would lead to the conclusion that effective rehabilitation programs must be tailored to debtors' specific circumstances and underlying causes of bankruptcy. This approach would better-prepare debtors to handle similar situations in the future and help prevent recurring financial mismanagement. Focusing solely on debt discharge eligibility or offering brief, uniform rehabilitation education programs with standard financial education represents a limited view that ignores the broader context and true needs of debtors. Such an approach is unlikely to achieve genuine financial rehabilitation. In contrast, adopting a holistic view of the individual and their circumstances, supported by the mechanisms outlined below, can lead to significantly improved outcomes.

3. *Perceiving Conflict as Multi-Dimensional*

TJ views conflicts as complex, multidimensional issues that require an interdisciplinary approach in order to ensure comprehensive analysis and effective resolution.⁹⁵ The movement's founders and advocates argue that integrating knowledge and insights from social science research can improve the conflict resolution process and assist in developing qualitative and appropriate solutions.⁹⁶ As mentioned above, a multidisciplinary team is integral to the operation of problem-solving courts, assisting in the examination of participants' circumstances and needs, and subsequently, designing a behavioral contract tailored to various rehabilitation and guidance programs, as well as monitoring the participant's compliance with the contract's conditions, and more.⁹⁷

Examining bankruptcy through a TJ lens highlights a multidimensional issue that necessitates the involvement of an integrated, multidisciplinary professional team. Relying solely on legal professionals, such as appointing an attorney as court-appointed trustee for debt collection, prevents judges from seeing

94. Sousa, *supra* note 59, at 463.

95. WINICK & WEXLER, *supra* note 32, at XVII.

96. Wexler, *supra* note 26.

97. Hora, *supra* note 31, at 28.

the complete picture, and effectively, hinders quality rehabilitation outcomes. The integration of multidisciplinary professionals, particularly from fields such as social work, psychology, and economics, can provide participants with valuable professional advice during the bankruptcy process. A multidisciplinary professional team, for example, can examine the circumstances that led to financial distress, assess the debtor's coping abilities and potential support resources, and tailor specific courses aimed at financial rehabilitation. A multidisciplinary professional team can also assess rehabilitation program success while developing institutional knowledge that enables courts to handle future bankruptcy cases more efficiently and effectively.⁹⁸

4. *Perceiving the Rehabilitation Process as an Ongoing Process*

Problem-solving courts operating under TJ principles recognize that rehabilitation, which involves changing human behavioral patterns, cannot be achieved instantaneously or through isolated courtroom encounters.⁹⁹ Effective rehabilitation requires sustained time and effort, combining supportive interventions with judicial oversight. Problem-solving courts implement a multi-stage rehabilitation framework, typically spanning eighteen months.¹⁰⁰ The multidisciplinary team provides comprehensive support throughout this period, while the distinct judicial approach ensures consistent participant engagement through regular court appearances.¹⁰¹

Problem-solving courts' experience reveals that participants' progression through rehabilitation stages is nonlinear, occurring at different paces and intensities. Setbacks in meeting program requirements often necessitate systemic intervention and continuous program adaptation to address emerging challenges.¹⁰² Systemic intervention may involve sanctions or incentives to help participants return to progress toward program completion. Success can be measured through various metrics, including reduction, rather than just elimination, of undesirable behaviors.¹⁰³

98. Richard D. Hartley & Julie Marie Baldwin, *Waging War on Recidivism Among Justice-Involved Veterans: An Impact Evaluation of a Large Urban Veterans Treatment Court*, 30 CRIM. JUST. POL'Y REV. 52 (2016).

99. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-first Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 808 (2008).

100. Hora, *supra* note 31.

101. *Id.*

102. Douglas B. Marlowe, *Strategies for Administering Rewards and Sanctions*, in DRUG COURTS: A NEW APPROACH TO TREATMENT AND REHABILITATION 317, 319 (James E. Lessenger & Glade F. Roper eds., 1st ed. 2007).

103. Tali Gal & Hadar Dancig-Rosenberg, *Evaluating the Israeli Community*

Examining bankruptcy proceedings through the lens outlined above reveals that financial rehabilitation must be recognized as an ongoing process—one that requires time, information processing, sustained commitment from the debtor, and comprehensive support. The debtor’s level of cooperation or ability to meet the established payment terms may also vary during the course of the process. This view of rehabilitation as an ongoing process reveals the limitations of current bankruptcy practices, where rehabilitation tools—primarily limited to a brief debtor education near discharge—are “one shot” interventions that are offered too late in the judicial process to support meaningful financial recovery.¹⁰⁴

This shift may influence whether debtors’ personal appearance—as opposed to the mere appearance of their legal counsel—in court ought to be required at various judicial stages. It also highlights the importance of fostering debtor motivation and focusing on debtors’ readiness for rehabilitation.¹⁰⁵ Furthermore, it leads to the recognition that there may be various parameters for evaluating the success of financial rehabilitation. Finally, it emphasizes the critical roles of judges and attorneys in the process—something on which the Article elaborates below.

5. *The Therapeutic Role of Attorneys – Rehabilitating Lawyers*

According to the TJ approach, lawyers are therapeutic agents, and can play an essential role as “rehabilitating lawyers.”¹⁰⁶ Advocacy under this approach is intended to assist the client when conducting legal proceedings or taking legal action to achieve, among other things, therapeutic outcomes.¹⁰⁷

The therapeutic representation model applies to both criminal and civil proceedings.¹⁰⁸ This model diverges from the traditional view of lawyers as “gladiators” in an adversarial arena seeking to defeat opponents. Instead, it envisions attorneys as professionals who pursue their clients’ interests in a broader context, incorporating emotional well-being and interpersonal relationships into their practice.¹⁰⁹

Courts: Key Issues, Challenges and Lessons, 62 INT’L ANNALS CRIMINOLOGY 104 (2024).

104. Sousa, *supra* note 59, at 464.

105. David Wexler, *Therapeutic Jurisprudence and Readiness for Rehabilitation*, 8 FLA. COASTAL L. REV. 111 (2006).

106. WEXLER, REHABILITATING LAWYERS, *supra* note 21, at 206-07, 211, 214.

107. David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743 (2005).

108. Bruce J. Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigating*, 37 CAL. W.L. REV. 105 (2000).

109. Karni Perlman & Yael Ben-Saadon, *Lawyers’ Self-Perception and*

Lawyers are viewed as “agents of positive change” with significant influence over their clients. They are called upon to practice an “ethic of care” that encompasses genuine concern and emphasizes the attorney-client relationship.¹¹⁰ When necessary, attorneys are expected to help cultivate rehabilitative motivation in their clients, maintain knowledge of rehabilitation pathways, and provide ongoing support in meeting rehabilitative goals.¹¹¹ Moreover, through a TJ lens, bankruptcy lawyers ought to view themselves not as “debt busters,” but as trusted advisors. Their purpose extends beyond securing debt discharge, to include facilitating the debtors’ comprehensive financial rehabilitation. Lawyers should provide advice and guidance tailored to their clients’ needs, guiding them on optimal use of the legal system’s resources for rehabilitation.

In addition, a bankruptcy process can be observed as an example of a “psycho-legal soft spot,” an instance where psychological and emotional aspects of a case intersect with legal issues.¹¹² A therapeutic lawyer would do well to help identify this “psycho-legal soft spot” in their own case, thereby addressing both the legal and psychological impact of bankruptcy on their clients. For example, they should be sensitive to debtors’ emotional states, such as shame, guilt, and anxiety,¹¹³ and approach them with empathy and dignity.¹¹⁴

Therapeutic Advocacy, EUR. J. CURRENT LEGAL ISSUES, 2021, at 1; Limor Zer-Gutman & Karni Perlman, *The Hybrid Lawyer: Changes in Lawyers’ Practices in Light of Settlement-Oriented Adjudication*, 42 CIV. JUST. Q. 276 (2023).

110. Susan L. Brooks & Robert G. Madden, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice*, 78 U. P.R. L. REV. 23 (2009).

111. Wexler, *supra* note 107.

112. David B. Wexler, *Practicing Therapeutic Jurisprudence Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U. P.R. 317 (1998).

113. For instance, research has shown that debtors frequently report how feelings of shame adversely affect their self-esteem and family relationship. See Paul Ali et al., *Bankruptcy and Debtor Rehabilitation: An Australian Empirical Study*, 40 MELB. U. L. REV. 688, 727 (2017). The interconnection between bankruptcy and well-being is documented in empirical research. For instance, Addo’s comprehensive study examines the health implications of bankruptcy proceedings on adult women, providing crucial insights into the broader impacts of financial distress. See Fenaba R. Addo, *Seeking Relief: Bankruptcy and Health Outcomes of Adult Women*, 3 SSM POPULATION HEALTH 326 (2017).

114. Perlin, *supra* note 27; Michael Perlin, *Dignity and Therapeutic Jurisprudence: How We Can Best End Shame and Humiliation*, in HUMAN DIGNITY: PRACTICES, DISCOURSES AND TRANSFORMATIONS 113 (Chipamong Chowdhury et al. eds., 2020).

6. *The Therapeutic Role of the Judge: Judging in a Therapeutic Key*

TJ views judges as therapeutic agents.¹¹⁵ The way in which judicial proceedings are conducted significantly affects both the procedure itself and the probability of therapeutic success.¹¹⁶ The therapeutic judge is an active and engaged judge who humanizes the judicial process and reflects a broader perception of the judge's role as a dispute resolver.¹¹⁷ Therapeutic judging is founded on an attitude that emphasizes empathetic and respectful interpersonal communication.¹¹⁸ This judicial approach is characterized by several key elements: expressing judicial empathy, respectful treatment of litigants, active listening, a positive focus on litigants' capacity for behavioral change, and a use of language that is clear and comprehensible to the litigant.¹¹⁹

The foundations of therapeutic judging align with Tyler's research on procedural fairness.¹²⁰ According to Tyler's research, in the eyes of litigants, procedural fairness is not achieved through rigid procedural and evidentiary rules or merely by assessing the outcome of the process,¹²¹ which may be defined as rule orientation.¹²² Rather, procedural fairness emerges through the evaluation of how the process is conducted. When courts give litigants a voice, demonstrate judicial interest and empathy, ensure transparent decision-making, and maintain respectful treatment, a sense of satisfaction and legitimacy toward the process is achieved.¹²³ These elements can be defined as "relational

115. Wexler, *supra* note 26.

116. WINICK & WEXLER, *supra* note 32.

117. Karni Perlman, *The Role of the Therapeutic Judge and Its Reference to Ideas Derived from the Legal Realism School*, 26 BAR ILAN L. REV. 415 (2010); Karni Perlman, *Settlement Adjudication and Judicial Responsiveness: The Choice Between a Wide and a Narrow Model*, THE RESPONSIVE JUDGE – INTERNATIONAL PERSPECTIVES 61 (Tania Sourdin & Archie M. Zariski eds., 2018) [hereinafter Perlman, *Settlement Adjudication*].

118. Wexler, *supra* note 29.

119. SUSAN GOLDBERG, NAT'L JUD. INST., JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH 8 (2005), biblioteca.cejamerica.org/bitstream/handle/2015/2248/Judgingfor21scenturyDe.pdf?sequence=1&isAllowed=y [perma.cc/BB6M-WDKK]; SUSAN GOLDBERG, NAT'L JUD. INST., PROBLEM SOLVING IN CANADA'S COURTROOMS: A GUIDE TO THERAPEUTIC JUSTICE (2011), www.sasklawcourts.ca/wp-content/uploads/2021/06/Problem-Solving-Canada-Courtrooms.pdf [perma.cc/NUC7-JHQV].

120. E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

121. Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCH. 117 (2000); Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 29 (2008).

122. Perlman, *Settlement Adjudication*, *supra* note 117.

123. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative*

orientation.”¹²⁴

The American Judges Association endorsed the establishment of procedural fairness through interpersonal communication in a landmark white paper advocating its implementation across judicial proceedings.¹²⁵ Professor Wexler connects this approach to TJ, extending its application to aspects like judicial opinion-writing.¹²⁶

The content of therapeutic judging has been the subject of extensive research. For example, King illustrates how therapeutic judging manifests in the courtroom through solution-focused judging.¹²⁷ Sourdin and Zariski examine the role of the “responsive judge” as comprehensive conflict resolver who addresses multiple layers while facilitating holistic solutions.¹²⁸ Spencer and others have proposed practical methods for incorporating therapeutic judging into the court system with the aim of creating excellent courts and enhancing wellbeing.¹²⁹

Adopting a therapeutic judging model is particularly vital for achieving financial rehabilitation in bankruptcy proceedings. This judicial approach has proven effective in facilitating behavioral change among problem-solving court participants.¹³⁰ This judicial model can drive necessary changes in bankruptcy cases. Moreover, Tyler's research shows that perceptions of procedural fairness significantly affect parties' willingness to accept and comply with case outcomes.¹³¹ Therefore, it is possible that in bankruptcy contexts, perceptions of procedural fairness can significantly influence debtors' post-discharge behavior and commitment to financial rehabilitation.

Therapeutic judging can be implemented with different emphases throughout the ongoing process of bankruptcy. It may begin with demonstrating genuine interest in the circumstances that led to the debtor's situation, followed by encouraging adherence

Potential, 33 LAW & SOC. INQUIRY 473 (2008).

124. Perlman, *Settlement Adjudication*, *supra* note 117.

125. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4 (2008).

126. David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78 (2008).

127. MICHAEL S. KING, SOLUTION-FOCUSED JUDGING BENCH BOOK (2009).

128. Perlman, *Settlement Adjudication*, *supra* note 117, at 69-71.

129. Pauline Spencer, *From Alternative to the New Normal – Therapeutic Jurisprudence in the Mainstream*, 39 ALT. L.J. 222 (2014); Elizabeth Richardson et al., *The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Wellbeing*, 25 J. JUD. ADMIN. 148 (2016).

130. JOHN S. GOLDCAMP ET AL., U.S. DEP'T OF JUST., AN HONEST CHANCE: PERSPECTIVES ON DRUG COURTS (2002), [www.ncjrs.gov/html/bja/honestchance/\[perma.cc/X847-4GHY\]](http://www.ncjrs.gov/html/bja/honestchance/[perma.cc/X847-4GHY]).

131. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003).

to the conditions of the discharge plan and their implementation in practice. Afterwards, therapeutic judging can promote learning and gaining knowledge through enrichment courses, whether mandatory or optional for the debtors. It can be carried out through various practices, such as establishing direct dialogue with the debtor, asking open-ended questions, offering words of encouragement, and emphasizing the debtor's strengths.

7. *The Potential of a Specialized Court Employing a Collaborative-Therapeutic Approach Aimed at Rehabilitation*

TJ advocates for the management of disputes through a collaborative approach, as opposed to an adversarial one,¹³² and calls for the incorporation of interests and goals aimed at therapeutic outcomes.¹³³ Adversarial dispute management can be both ineffective and potentially harmful. This approach fosters a “culture of criticism,” often leading to unnecessary conflict, emotional harm, and a failure to adequately address the parties' specific needs.¹³⁴

Problem-solving courts that have incorporated TJ principles tend to adopt this approach. These courts were established based on the recognition that the traditional criminal justice system, and the adversarial adjudication it employs fails to adequately address the issue of recidivism and does not effectively contribute to achieving the core objectives of criminal law, such as rehabilitation.¹³⁵

Within these courts, collaboration takes place between the participants' representatives, state representatives, the judge, and the therapeutic team.¹³⁶ The shared interests of all participants in the process include rehabilitating the participants and reintegrating them into the community in a normative manner—namely, preventing recidivism. This approach aims to reduce the rate of criminal behavior that the community and society must contend with.¹³⁷

These courts also encourage the involvement of individuals from the participants' social environment during the process, recognizing their unique ability to provide a framework of support

132. For these approaches, see, for example, MICHAEL KING ET AL., NON-ADVERSARIAL JUSTICE (2d. ed. 2014); Perlman, *Settlement Adjudication*, *supra* note 117.

133. Wexler, *supra* note 26.

134. David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263 (1999).

135. Peggy F. Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

136. KING, *supra* note 127, at 16-17.

137. BERMAN & FEINBLATT, *supra* note 28.

and encouragement.¹³⁸ Effective support has been demonstrated in problem-solving courts, which have also incorporated mentors, as seen in veterans' courts. These mentors are volunteers who assist participants in coping with various challenges during the rehabilitation process, offering a supportive presence and sometimes serving as role models for success.¹³⁹

In existing courts, it appears that adopting a collaborative approach in bankruptcy proceedings can help foster rehabilitative motivation among debtors. It may also enhance their ability to comply with the discharge plan and implement lasting behavioral changes. The debtors' close social circles are often affected by their situation and the bankruptcy proceedings. Thus, this approach may involve engaging family members or other individuals from the debtors' environment who can provide support for their rehabilitation, thereby increasing their chances of success.

Alternatively, the establishment of specialized courts for managing bankruptcy proceedings is warranted based on the recognition that, even in these cases, the prevailing adversarial processes in regular courts—lacking supportive tools such as a multidisciplinary team—fail to effectively address the issue of bankruptcy recidivism.¹⁴⁰

IV. REFORMING BANKRUPTCY MANAGEMENT: A PATH TO EFFECTIVE ECONOMIC RECOVERY

Examining bankruptcy cases through the lens of TJ insights and principles underscores the need for reforms in both the legal framework and current practices to more effectively achieve financial rehabilitation. Part IV outlines several proposed reforms designed to facilitate the realization of financial rehabilitation objectives.

The first three proposals outlined below are implementable within the judicial frameworks that currently adjudicate bankruptcy cases. The fourth proposal presents an alternative: the establishment of a specialized problem-solving court dedicated to bankruptcy and financial rehabilitation matters.

A. Updating Legal Rules

This Article proposes the establishment of a clear statutory

138. Hora, *supra* note 31; KING ET AL., *supra* note 132, at 36.

139. JONATHAN LIPPMAN ET AL., STATE OF N.Y. UNIFIED CT. SYS., VETERANS TREATMENT COURT MENTOR PROGRAM HANDBOOK (2009), web.archive.org/web/20241201204835/https://nysba.org/NYSBA/Committees/Committee%20on%20Veterans/Resources/VeteransTreatmentCourtMentorProgramHandbook.pdf.

140. Porter & Thorne, *supra* note 10.

framework that explicitly prioritizes financial rehabilitation as a central goal. The law should clearly define both the underlying foundations and the scope of financial rehabilitation, ensuring it is not reduced to the mere rhetoric of a “fresh start,” which could otherwise be perceived as limited to debt discharge alone.

Legislators must enact provisions that facilitate the integration of multidisciplinary professionals into bankruptcy proceedings. The inclusion of therapeutic and financial experts has the potential to improve the efficiency of these proceedings, thereby increasing the likelihood of successful financial rehabilitation.

It is advisable to examine all rules governing bankruptcy proceedings to assess whether they facilitate or hinder rehabilitative purposes. For instance, one might consider allowing individuals who have successfully completed financial rehabilitation programs to receive more favorable credit ratings. Currently, credit ratings are heavily restricted for those who have undergone bankruptcy proceedings, imposing obstacles to accessing credit—consequently, hindering their ability to reintegrate into economic life.¹⁴¹

B. Updating Legal Procedures

The judicial process should be organized as a series of ongoing court sessions, emphasizing the personal attendance and active participation of debtors, alongside their attorneys.

As mentioned, it is recommended to integrate an interdisciplinary team of professionals into the legal process. This multidisciplinary team should assess the debtor’s background and the circumstances leading to bankruptcy, design a tailored financial rehabilitation program for the judge’s consideration, and oversee its implementation and outcomes.

Another proposal worth considering is imposing a time limit on the entire bankruptcy process. This framework should include well-defined phases. The first stage involves gathering comprehensive information about the debtors’ circumstances, including their debts, assets, and the economic hardships that led to their situation, as well as identifying key rehabilitation needs. Subsequently, a specific period should be established for debt repayment, accompanied by a rehabilitation program that provides the necessary tools to meet payment goals and fosters long-term financial stability. The underlying assumption is that setting a time limit can benefit debtors by offering clarity on the anticipated next steps. Establishing a foreseeable timeline for a fresh start can help alleviate psychological stress and enhance debtors’ commitment to the rehabilitation process.

141. Jagtiani & Li, *supra* note 47.

C. *The Role of Judges and Attorneys*

Research indicates that therapeutic judicial practices and therapeutic lawyering, when collaboratively aligned, result in more effective rehabilitation processes.¹⁴² Therefore, it is recommended to promote the adoption of the therapeutic judging model and the therapeutic representation model in bankruptcy proceedings aimed at financial rehabilitation. To achieve these goals, efforts should be made to provide the necessary knowledge and skills required for their implementation and to highlight the advantages they offer.¹⁴³

The acquisition of this knowledge and these skills can be facilitated through basic legal education in law schools, including within the framework of legal clinics,¹⁴⁴ as well as through various training programs during professional career development.¹⁴⁵ Inspired by the TJ perspective, the knowledge and skills should emphasize interpersonal communication and relational orientation.¹⁴⁶ Among other things, they should include practices that promote active listening, encourage rehabilitative motivation, and facilitate the management of legal proceedings through a collaborative approach focused on therapeutic outcomes.¹⁴⁷

D. *Debtors' Financial Education and Assessment*

Debtors' educational finance courses ought to be established as a mandatory component of bankruptcy proceedings. These courses should be provided free of charge and serve as an integral part of the bankruptcy procedures. Such courses should be tailored to the debtor's needs and circumstances, including providing knowledge and practical tools for proper financial management, personalized counseling and guidance, and addressing circumstances contributing to economic distress. Therefore, it is suggested that financial education courses be longer than existing programs, begin

142. Karni Perlman, *It Takes Two for TJ: Correlation Between Bench and Bar Attitudes Toward Therapeutic Jurisprudence—An Israeli Perspective*, 30 T. JEFFERSON L. REV. 351 (2008).

143. Michael L. Perlin & Alison J. Lynch, *How Teaching About Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEV. L.J. 209, 214 (2015).

144. Susan L. Brooks, *Practicing (and Teaching) Therapeutic Jurisprudence: Importing Social Work Principles and Techniques Into Clinical Legal Education*, 17 ST. THOMAS L. REV. 513, 513 (2005).

145. Brooks & Madden, *supra* note 110.

146. Susan L. Brooks, *Listening and Relational Lawyering*, in THE HANDBOOK OF LISTENING 361 (Debra L. Worthington & Graham D. Bodie eds., 2020).

147. See, e.g., Arie Freiberg, *Post Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms*, 8 EUR. J. CRIMINOLOGY 82 (2011) (discussing the TJ approach as a non-adversarial paradigm).

at the preliminary stages of the bankruptcy process, and continue as part of the ongoing rehabilitation process.

This Article proposes an examination of the rehabilitation process and its success beyond the point of debt discharge. This includes an ex-post analysis of the debtor's ability to reintegrate into economic and social life, including meeting financial obligations and avoiding future bankruptcy proceedings.

It is important to bring the results of case analyses to the court system's attention. Specialized bankruptcy courts should be granted the authority to review course content and recommend changes based on their experience and considerations.

E. Establishing a New Problem-Solving Court for Bankruptcy Cases

The management of bankruptcy proceedings can be improved through either reforming existing court procedures or establishing a dedicated problem-solving court for bankruptcy cases.

The establishment of such a specialized tribunal carries many advantages. First, including this tribunal as part of the problem-solving courts system would integrate it into an existing model under which different types of problem-solving courts already operate. This would eliminate the need to develop special rules for modifying the current format of bankruptcy proceedings. Second, being part of the problem-solving court system would mean alignment with the therapeutic principles described above, such as viewing the rehabilitative process as continuous and embracing the expanded judicial role. Third, such a specialized court would also incorporate built-in support mechanisms, such as the presence of a multidisciplinary team of experts, whose contribution has been discussed above. Fourth, these courts serve as collaborative platforms, organizing knowledge and coordinating with a wide range of governmental and community entities to develop rehabilitation and educational programs to which litigants are referred.¹⁴⁸ This collaboration could be beneficial in the context of this Article by shaping rehabilitation and training programs in the manner outlined. Fifth, from a long-term perspective, problem-solving courts enhance economic efficiency, as the successful rehabilitation of litigants within their framework leads to reduced system costs by breaking the cycle of recidivism and its associated consequences.¹⁴⁹ In the present case, successful economic rehabilitation is directly relevant to lowering costs associated with debtors' repeated inability to meet their financial obligations—

148. BERMAN & FEINBLATT, *supra* note 28.

149. *Drug Treatment Courts*, U.S. DEPT OF JUST. (May 2024) www.ncjrs.gov/pdffiles1/nij/238527.pdf [perma.cc/69LN-RPAH].

circumstances that often result in repeated bankruptcy proceedings.

V. CONCLUSION

Economic and social factors have driven the goal of financial rehabilitation in bankruptcy proceedings in various countries, including the United States and Israel. This objective has not been fully realized, however, revealing a gap between the *law in books* and the *law in action*.

This Article proposes drawing insights from the intersection of law and rehabilitation, as explored by the TJ movement and its application within the framework of problem-solving courts. Viewing bankruptcy proceedings through a TJ lens highlights the need to refine some of the legal provisions. Special emphasis should be placed on clarifying that financial rehabilitation extends beyond a mere "fresh start" through debt discharge.

In addition, the Article suggests revising the legal procedures. It proposes the integration of a multidisciplinary professional team into court proceedings, capable of assisting in identifying the debtor's underlying specific causes of bankruptcy, alongside other relevant information, processing it, and providing recommendations, as this would advance the achievement of the rehabilitative goal. Regarding the roles of legal actors, the role of judges ought to be reshaped to adopt a more therapeutic approach, while the representation model of attorneys should be redefined according to therapeutic lawyering principles. Providing knowledge and skills for operating within a collaborative and therapeutic approach, grounded in interpersonal orientation, will lead to the effective adoption of the role content proposed by TJ. Further recommendations include, *inter alia*, restructuring the legal education provided to debtors during proceedings. These recommendations could be more effectively implemented through the establishment of a specialized problem-solving court dedicated to handling bankruptcy matters.

The perspective presented in this Article, along with the implementation of its recommendations, would bring forth a more efficient management of bankruptcy proceedings. It would also enable fulfillment of the rehabilitative goal, which is broadly recognized as both economically advantageous and socially justified. These recommendations exemplify the importance of the TJ movement and demonstrate the potential of applying its principles across various areas of law.

