

THERAPEUTIC JURISPRUDENCE AND OFFENDER RIGHTS: A NORMATIVE STANCE IS REQUIRED

ARTICLE

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Introduction.....	43
I. A Normative Framework.....	44
A. Offender Rights	46
II. Therapeutic Jurisprudence	47
A. Is Therapeutic Jurisprudence Normative?	50
B. Therapeutic Jurisprudence is Normative but.....	51
C. Therapeutic Jurisprudence Is Not Normative Enough	53
III. Therapeutic Jurisprudence Promoting Offender Rights.....	56
Conclusion	57
References.....	58

CURRENT POLICY IN OFFENDER REHABILITATION ASSUMES THAT COMMUNITY protection can be achieved by overriding the offender’s rights. However, this article argues that community protection requires a balance between the rights of the community and those of the offender. Offenders should be able to choose whether to accept or reject rehabilitation without legal consequence (unless they are considered serious offenders at high risk of re-offending). A normative framework, assisted by therapeutic jurisprudence, would allow justice and therapeutic principles to be balanced. Therapeutic jurisprudence could define itself as a theory (a normatively neutral stance) or a philosophy (a normative stance). Therapeutic jurisprudence has been criticized for being normatively neutral as it fails to intervene when community and offender rights conflict. This article argues that therapeutic jurisprudence should describe itself as a philosophy and therefore take a normative stance, based on a human rights perspective. Such a stance would allow therapeutic jurisprudence to prescribe therapeutic law, procedures, and roles that protect offender rights.

INTRODUCTION

Most communities consider crime to be a serious social problem, and are becoming increasingly intolerant of it. Substantial public policy changes over

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the past 30 years have occurred on an international basis, resulting in reactionary and radical legislative changes for community protection, some examples are: privatization of prisons, victim impact statements, community notification laws, sentencing guidelines, electronic monitoring of offenders, and punishment in the community.¹ Such policy changes have altered the balance between punishment and welfare, or between community rights and offender rights. Rather than being considered an individual in need of support, the offender is perceived as a risk to be managed in order to safeguard community protection. Thus, public policy currently weighs toward community rights.

This emphasis on community rights is particularly evident in legislation designed to manage serious and/or high risk offenders by way of involuntary treatment, preventive detention, or extended supervision. While the seriousness of the offense is an aggravating factor at the time of sentencing, it is often conflated with the risk of re-offending. Serious offenders are those who have committed defined offenses (e.g., Schedule 1 of the *Sentencing Act 1991*,² identifies particular sexual, violent, arson, and drug-related offences as “serious offender offences”). High risk offenders are those who are assessed as having a high likelihood of re-offending, generally based on actuarial or statistical measures. Both offense seriousness and risk level are normative rather than empirical decisions, since the definitions of seriousness change over time and cut-off scores for low, moderate, and high risk cases are policy decisions based on available resources.

Complex moral, social, and legal issues arise in an offender’s rehabilitation. This article will argue that a normative stance to protect offender rights is required. First, a normative framework that considers the offender’s rights in the context of human rights will be presented. Second, this article will argue that therapeutic jurisprudence should take a normative stance regarding offender rights. Lastly, the interplay between therapeutic jurisprudence and human rights will be considered. A cautionary note is that a normative framework is merely a values-based proposition; it is neither true nor false.³

I. A NORMATIVE FRAMEWORK

Current radical shifts in policy have resulted in practitioners lacking “...any stable ideology or conceptual framework to guide their actions and shape their visions.”⁴ Therefore, a normative framework is required to assist practitioners. A normative framework conceptualizes problems, seeks solutions, and specifies

¹ See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (Oxford University Press 2001).

² *Sentencing Act 1991*, Vict. Acts No. 49 of 1991 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/consol_act/sa1991n21.

³ See Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 *PSYCHOL. PUB. POL’Y & L.* 184 (1997).

⁴ GARLAND, *supra* note 1, at 5.

values that are foundational for a particular profession.⁵ Birgden has proposed a normative framework for forensic psychologists that assume that the best interests of the community are met when the likelihood of re-offending is reduced through offender rehabilitation rather than punishment, deterrence, and/or incapacitation.⁶ Furthermore, Birgden argues that community rights and offender rights ought to be balanced by enhancing community protection through offender rehabilitation. In this balance, control *of* the offender *for the community* is imposed by managing risk, while care is provided *with* the offender *for the offender* by meeting human needs. That is, justice principles and therapeutic principles are equally balanced for community protection. In this endeavor the offender should be assisted to make informed decisions about whether to accept or reject rehabilitation.

In proposing a normative framework, Birgden argued that offender autonomy in decision-making is a core value of offender rehabilitation which addresses well-being.⁷ Schopp has described autonomy as a right, a virtue and a capacity.⁸ As a *right*, autonomy is an entitlement to self-determination (e.g., control of one's body, family, employment, privacy, and property). As a *virtue*, autonomy is a set of conditions (e.g., self-reflection, direction, reliance, and control), moral authenticity, independence and self-responsibility. As a *capacity*, autonomy is a necessary condition, because an individual who does not have capacity cannot exercise rights or develop virtues. Combined, autonomy allows the individual to exercise sovereign self-determination, develop the virtues of autonomy as a condition, and possess autonomous capacities. Autonomous individuals develop an integrated life by reviewing and shaping their projects, motives, and conduct. Autonomy may be restricted by lack of rights and capacity (e.g., poor decision-making) or by lack of rights and virtues (e.g., poor impulse control). Importantly, Winick noted that an autonomous individual will maximize individual *and* community well-being, as required by the principles of morality and justice (although he acknowledged that this is an empirically limited assertion).⁹ Whether the criminal justice system should be concerned with autonomy is a normative question, but at present it is expected that individuals should have autonomy protected, as it is a basic moral obligation.¹⁰

⁵ See Robert G. Madden & Raymie H. Wayne, *Constructing a Normative Framework for Therapeutic Jurisprudence Using Social Work Principles as a Model*, 18 *TOURO L. REV.* 487 (2002).

⁶ See Astrid Birgden, *Offender Rehabilitation: A Normative Framework for Forensic Psychologists*, 15(3) *PSYCHIATRY PSYCHOL. & L.* 1 (2008).

⁷ *Id.*

⁸ See Robert F. Schopp, *Therapeutic Jurisprudence and Conflicts among Values in Mental Health Law*, 31 *BEHAV. SCI. & L.* 31 (1993).

⁹ See Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 *VILL. L. REV.* 1705 (1992).

¹⁰ See Craig Haney, *Making Law Modern: Toward a Contextual Model of Justice*, 8 *PSYCHOL. PUB. POL'Y & L.* 3 (2002); Winick (1992), *supra* note 9.

A. Offender Rights

Autonomy is currently a neglected value in offender rehabilitation. A human rights perspective counteracts the current policy weight toward community rights. Although obvious, Ward and Birgden have stated that offenders should be provided the same rights as all human beings and should not be treated as means to an end, for example: offender rights violated in the name of community protection.¹¹ The authors have argued that offenders have the right to the two core values of freedom and well-being, in order to function as autonomous and dignified agents. *Freedom* entails non-coerced situations and autonomous decision-making. *Well-being* entails physical, social, and psychological well-being. Furthermore, offenders are simultaneously *rights-holders* who need to be supported in order to function in a dignified manner and with non-interference in personal affairs, *duty-bearers* who should be able to pursue goals as long as they do not infringe upon the rights of others, and *rights-violators* who infringe upon the rights of others when offending. If offenders are acknowledged as both human rights-holders and duty-bearers, then the “rights and duties, duties and rights: the ethical foundations of a liberal and flourishing community and a fairer and more humane criminal justice system”¹² are supported.

Even if the offender is a rights-violator, a human rights perspective would consider that his or her rights should only be curtailed in some circumstances; to be rationally justified and based on criteria such as: (1) the length of time when forfeiture occurs; (2) what kinds of rights are forfeited, and (3) to what extent the state punishes serious, high risk offenders. Curtailing freedom (through imprisonment, parole conditions, or a community based sentence) can be justified, but curtailing well-being (e.g., access to educational resources, medical care, adequate nutrition, leisure activities, healthy living conditions, employment opportunities, quality services, and choice regarding rehabilitation options) cannot be justified.¹³

In principle, a normative framework may provide weights for particular values concerning community protection, while managing the conflicts which arise between these values. In practice, however, such weights are often indeterminate and influenced by competing moral theories.¹⁴ Offender rehabilitation necessarily considers two complementary ethical positions- deontological and consequentialist.¹⁵ On the one hand, deontologists look to past conduct and state of

¹¹ See Tony Ward & Astrid Birgden, *Human Rights and Correctional Clinical Practice*, 12(6) *AGGRESSION AND VIOLENT BEHAV.* 628 (2007).

¹² *Id.* at 642.

¹³ *Id.*

¹⁴ See Ken Kress, *Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect*, in *Practice, from Theory*, 17(5) *BEHAV. SCI. & L.* 555 (1999).

¹⁵ See *id.*; Schopp, *supra* note 8; Ward & Birgden, *supra* note 11; Winick (1992), *supra* note 9; Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 *WASH. U.*

mind at the time of offending. Deontologists appeal to the dignity of human beings and argue that it is never appropriate to violate human rights, and that individuals should not be treated as a means to achieve the ends of others. Deontologists maintain that the State and individuals have a duty to recognize the inherent value and worth of rights-holders. This position appeals to principles such as fairness, equality, or just deserts. On the other hand, consequentialists look to the future and ponder how to reduce the likelihood of re-offending. Consequentialists respect the utility of human rights in appealing to both individual and community rights and believe that the ends justify the means, utilizing whichever strategy- deterrence, incapacitation, or rehabilitation. A problem with a consequential position is that it justifies punishment and suspension of human rights if a cost-benefit analysis indicates that this will result in a greater amount of the value in question. That is, if the State overrides the offender's autonomy in the name of community protection, the deontological value for autonomy (e.g., never violate human rights) is overridden by the consequentialist value for autonomy (e.g., violate human rights on a cost-benefit basis). A normative framework can balance the deontological and consequential positions, and offender rehabilitation can aim to manage risk through control (justice for the community) and meet need through care (therapy for the offender). Therapeutic jurisprudence can assist in this balance.

II. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence was developed by David Wexler and Bruce Winick with a particular concern for the psychological well-being of individuals who are in contact with the law. Therapeutic jurisprudence is a conceptual framework that embodies law as therapy and supports the law acting as a therapeutic agent.¹⁶ It can also be described as a consequentialist approach to law; it evaluates law on the basis of its therapeutic and anti-therapeutic consequences where a morally optimal action maximizes the good.¹⁷ However, Brookbanks has stated that therapeutic jurisprudence is inadequately described as consequentialist because of its ethic of care and its consistency with normative values of independence, justice, impartiality, fairness, integrity, and so on,¹⁸ while Kress

L.Q. 1205 (1998); Paul H. Robinson, *How Psychology is Changing the Punishment Theory Debate*, in 9 LAW AND PSYCHOLOGY: CURRENT LEGAL ISSUES 94 (B. Brooks-Gordon & M. Freeman eds., Oxford University Press 2006); Christopher Slobogin & M. Fondacaro, *Rethinking Deprivations of Liberty: Possible Contributions from Therapeutic and Ecological Jurisprudence*, 18(4) BEHAV. SCI. & L. 499 (2000).

¹⁶ See Winick (1997), *supra* note 3; David B. Wexler, 68 REV. JUR. UPR (1999).

¹⁷ See Kress, *supra* note 14; Winick (1997), *supra* note 3.

¹⁸ W. Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328 (2001).

has described it as a hybrid theory of consequentialist and deontological positions concerned with maximizing well-being, autonomy, and other rights¹⁹.

Relevant to offender rehabilitation, Roderick and Krumholz have argued that “if therapeutic jurisprudence is going to make a real impact on the legal order, its proponents need to decide whether it is a theory or an ideology and proceed accordingly.”²⁰ On the one hand, therapeutic jurisprudence can be defined as a legal *theory* if it explains or predicts behavior without providing an opinion on how the law ought to function. In support of this definition, Winick noted that therapeutic jurisprudence may describe the consequences of a rule (a descriptive proposition that can be empirically validated) but should not draw conclusions on the value of the rule (a normative proposition that cannot be empirically validated).²¹ On the other hand, therapeutic jurisprudence can be defined as a legal *philosophy* if it prescribes what the law ought to do. Such an ideological position is not amenable to scientific testing, but allows for participation in a value-laden debate. In these terms, Saks described therapeutic jurisprudence as theory in that it can indicate whether a particular procedure is therapeutic while philosophical theorists can adjudicate the dispute over justice and therapeutic principles.²² Kress, on his part, has noted that, while therapeutic jurisprudence is a normative enterprise, it does not need to follow any particular normative theory or take any particular stance on controversial normative issues (other than supporting therapeutic effects).²³ This article argues that therapeutic jurisprudence needs to take a value-laden stance when balancing offender and community rights, particularly in relation to offender autonomy.

From an ideological perspective, therapeutic jurisprudence promotes autonomy, not punishment,²⁴ and is generally concerned with offender rights and engaging offenders in the courtroom²⁵. However, when it comes to offender rehabilitation in corrections, therapeutic jurisprudence scholars appear to endorse a community rights approach. Endorsed risk management strategies include: (1)

¹⁹ See Kress, *supra* note 14.

²⁰ Dennis Roderick & Susan T. Krumholz, *Much Ado about Nothing? A Critical Examination of Therapeutic Jurisprudence*, 1 TRENDS & ISSUES IN SCI. EVIDENCE 201, 223 (2006).

²¹ See Winick (1997), *supra* note 3.

²² See Elyn R. Saks, *Mental Health Law: Three Scholarly Traditions*, 74 S. CAL. L. REV. 295 (2000).

²³ See Kress, *supra* note 14.

²⁴ See David B. Wexler & Bruce J. Winick, *Introduction*, in THE LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds., Carolina Academic Press 1996).

²⁵ See Astrid Birgden, *Therapeutic Jurisprudence and Sex Offenders: A Psycho-legal Approach to Protection*, 16(4) SEXUAL ABUSE: A J. OF RES. & TREATMENT 351 (2004); David B. Wexler, *Robes and Rehabilitation: How Judges can Help Offenders “Make Good”*, 38(1) COURT REVIEW 18 (2001); Bruce J. Winick, *The Judge’s Role in Encouraging Motivation to Change*, in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 181 (Bruce J. Winick & David B. Wexler eds., Carolina Academic Press 2003).

“strong encouragement” to engage in treatment, restricted access to risky situations and extended supervision for sex offenders;²⁶ (2) a “containment-focused risk management” approach for sex offenders relying on treatment, supervision (e.g., random home visits, electronic monitoring, drug testing) and polygraph testing;²⁷ (3) restructuring of sex offender notification law based on risk management assessment models,²⁸ and (4) delivering cognitive behavioral programs and relapse prevention plans for general offenders.²⁹ These strategies reflect the risk-need model of offender rehabilitation which is based on justice principles.³⁰ The goal of the risk-need model is to reduce re-offending, while not considering offender autonomy. The risk-need model concludes that in moderate and high risk offender cases community rights *always* outweigh offender rights.

An alternative model of offender rehabilitation that ought to be considered by therapeutic jurisprudence scholars is the good lives model based on therapeutic principles.³¹ The good lives model is humanistic, based on positive psychology, and is a strength-based approach to supporting offenders in meeting their human needs. Autonomy is defined by Ward as a psychological need, which is the ability to function independently as an integrated being, to form one’s own values and beliefs, and to make decisions. In contrast to the risk-need model, a personally meaningful life plan is assumed to improve quality of life which, in turn, reduces the likelihood of re-offending. Reduced re-offending through risk management is, therefore, a secondary goal. The good lives model concludes that offender rights *are likely to* outweigh community rights. Any exception needs to be morally justified as described by Ward and Birgden.³²

As previously stated, a normative framework for offender rehabilitation should enhance offender autonomy. In this endeavor, therapeutic jurisprudence is more closely aligned with the good lives model than the risk-need model as both are humanistic, concerned with offender well-being and autonomy, and based on an ethic of care (or therapeutic alliance in psychological terms). The-

²⁶ Jason E. Peebles, *Therapeutic Jurisprudence and the Sentencing of Sexual Offenders in Canada*, 43(3) INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 275 (1999).

²⁷ K. English, L. Jones & D. Patrick, *Community Containment of Sex Offenders: A Promising Approach*, in, PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 265 (Bruce J. Winick & John Q. La Fond eds., American Psychological Association 2003).

²⁸ Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 213 (Bruce J. Winick & John Q. La Fond eds., American Psychological Association 2003).

²⁹ See Wexler (2001), *supra* note 26.

³⁰ See D.A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT (3rd ed. 2003).

³¹ See Tony Ward, *Good Lives and the Rehabilitation of Offenders: Promises and Problems*, 7(5) AGGRESSION & VIOLENT BEHAV. 513 (2002); Tony Ward & Claire A. Stewart, *Criminogenic Needs and Human Needs: A Theoretical Model*, 9(2) PSYCHOL. CRIME & L. 125 (2003).

³² See Ward & Birgden (2007), *supra* note 11.

rapeutic jurisprudence combined with the good lives model can be applied to offender rehabilitation.³³

A. Is Therapeutic Jurisprudence Normative?

There appears to be differing opinions amongst scholars about whether therapeutic jurisprudence is normative. On the one hand, therapeutic jurisprudence is described as normative and, as a result, unacceptable, too mundane, and/or too radical by a variety of scholars.³⁴ On the other hand, therapeutic jurisprudence is described as neutral or indeterminate,³⁵ or even “utterly non-normative” in that it both protects autonomy (e.g., the right to refuse treatment is respected) and paternalism (e.g., the benefits of involuntary treatment outweigh refused treatment)³⁶.

Whether therapeutic jurisprudence ought to be normative (a philosophy) or not normative (a theory) is an important consideration. In La Fond’s view, it is unacceptable for therapeutic jurisprudence to accept other social values when there are severe anti-therapeutic consequences. For example, sexual offender predator laws—which purport to be civil commitment laws to provide care and treatment, but in reality are indeterminate prevention detention schemes—are so destructive to individual and community well-being that therapeutic jurisprudence “must take a normative stance and assert that the law should be repealed or substantially changed . . . assert its primacy and require change regardless of competing values.”³⁷ La Fond provides examples of anti-therapeutic consequences upon the sexual offender including a “gulag” culture, no therapeutic alliance, and depersonalized staff. In this instance, the author argues that therapeutic jurisprudence *must* develop a normative base as “it will be ironic and sad if TJ, a movement designed to improve the human condition provides assurance to policy-makers that they have, indeed, succeeded in inflicting pain and vi-

³³ See Birgden (2008) *supra* note 6; Astrid Birgden, *Therapeutic Jurisprudence and “Good Lives”: A Rehabilitation Framework for Corrections*, 37(3) AUSTRALIAN PSYCHOLOGIST 180 (2002); Astrid Birgden, *Therapeutic Jurisprudence and Responsivity: Finding the Will and the Way in Offender Rehabilitation*, 10(3) CRIME, PSYCHOL. & L. 283 (2004); Birgden (2004) *supra* note 25.

³⁴ E.g., Bruce A. Arrigo, *The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime*, 11(1) PSYCHIATRY, PSYCHOL. & L. 23 (2004); Samuel Jan Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 CRIM. & CIV. CONFINEMENT 455 (2007); Roderick & Krumholz, *supra* note 20.

³⁵ E.g., John Q. La Fond, *Can Therapeutic Jurisprudence be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375 (1999); Robert F. Schopp, *Therapeutic Jurisprudence: Integrated Enquiry and Instrumental Prescriptions*, 17(5) BEHAV. SCI. & L. 589 (1999); Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1(1) PSYCHOL. PUB. POL’Y & L. 193 (1995).

³⁶ See Saks, *supra* note 22.

³⁷ La Fond, *supra* note 35, at 378.

olence on others.”³⁸ In support of La Fond, it is argued that therapeutic jurisprudence needs to take a normative stance regarding offender rights and provide a framework for setting a limit when the law is anti-therapeutic toward offender rights.

B. Therapeutic Jurisprudence is Normative but...

Based on the argument that therapeutic jurisprudence is normative, Arrigo has identified four obstacles to the law acting as a therapeutic agent. First, therapeutic jurisprudence assumes that substantive law, legal procedures, and legal roles are legitimate (and fair).³⁹ For example, Winick stated that therapeutic jurisprudence supports the rule of law and that the law should be applied fairly, hence legal actors should only apply the law therapeutically when it is consistent with fairness.⁴⁰ However, because the law itself is normative, the general application of rules may on occasion be unfair.⁴¹ The law may impede societal reform through a “steadfast adherence to technically fair procedures applied to unfair legal rules producing unjust results.”⁴² Second, although therapeutic jurisprudence dismisses the ideology embedded in the law, its male dominated legal method of enquiry “affirms the conventional, homeostatic, and normative logic of the law . . . [because of] . . . the application of a textually specific and narratively coherent evaluative model.”⁴³ Third, therapeutic jurisprudence promotes a moral, good, and docile individual in a one-size-fits-all law. Through a social science lens, therapeutic jurisprudence assumes the beneficial and detrimental aspects of the law, without considering the views and experiences of, for example, the offender. Therapeutic jurisprudence is, therefore, limited in how it promotes autonomy, which in turn undermines its purpose. Last, therapeutic jurisprudence fosters a state of false consciousness in individuals where the disadvantaged are oppressed through legal coercion. False consciousness is the incorrect belief that the law is fair despite poor outcomes.⁴⁴ Arrigo concluded that therapeutic jurisprudence ignores the wider political and economic system and “champions the corporate industry of justice.”⁴⁵

In effect, Arrigo and Roderick and Krumholz have espoused the view of critical legal studies scholars that therapeutic jurisprudence in its normative stance

³⁸ *Id.* at 412.

³⁹ See Arrigo, *supra* note 34.

⁴⁰ See Winick (1997), *supra* note 3.

⁴¹ See Dennis R. Fox, *Psychological Jurisprudence and Radical Social Change*, 48(3) AM. PSYCHOLOGIST 234 (1993).

⁴² Arrigo, *supra* note 35, at 27.

⁴³ *Id.* at 30.

⁴⁴ See Fox, *supra* note 41.

⁴⁵ Arrigo, *supra* note 34, at 37.

is too mundane. The authors suggest that therapeutic jurisprudence should significantly challenge the legitimacy of the law through drastic, and even revolutionary, change; otherwise it undermines its purpose to serve justice, humanism, and legal reform. On the one hand, therapeutic jurisprudence would respond that it does not purport to be radical; that, instead, it seeks to maximize the overarching aims of the law without trumping it, and, as a theory, only highlights the value conflict rather than determines what should be done.⁴⁶ On the other hand, therapeutic jurisprudence would also respond that its normative stance is more aligned with law and economics, critical legal studies, feminist jurisprudence, and critical race theory than traditional law in advancing autonomy.⁴⁷ As a result, the debate becomes rather circular (including whether therapeutic jurisprudence is a theory or a philosophy).

As we have seen, therapeutic jurisprudence has been simultaneously described as too mundane and too radical. Brakel writes that he finds himself “confronted with this putatively ‘novel’ concept of Therapeutic Jurisprudence . . . touted as a near revolutionary discovery . . . [w]hat is new? [o]r if new, what is the need?”⁴⁸ But, at the same time, he finds that in mental health law “glorification of autonomy for the non-autonomous, is paramount and the treatment needs of patients come in a distant second”⁴⁹ and “may be an effort to camouflage Therapeutic Jurisprudence’s all-too-traditional civil libertarian orientation,”⁵⁰ [. . .] “dominated by anti-psychiatric notions and emotions . . . *anti-therapeutic* biases of the civil libertarians.”⁵¹ Brakel considers therapeutic jurisprudence to be weighted toward offender rights and against community rights in favoring legal values such as autonomy over therapeutic values such as medical best interests. However, therapeutic jurisprudence can serve to balance offender rights and community rights, and takes care not to trump the law. It may be that Brakel is confusing therapeutic jurisprudence with constitutional law scholarship (described by Saks⁵² as civil libertarians focused on legal doctrines that would support human rights).

Schopp has responded to concerns about therapeutic jurisprudence being mundane and/or radical.⁵³ On the one hand, therapeutic jurisprudence is mundane as the law is already addressing autonomy (unless there are good reasons not to). On the other hand, therapeutic jurisprudence is radical, because revising substantive law, legal procedures, and legal roles may violate autonomy (e.g.,

46 See Wexler & Winick, *supra* note 24.

47 See Winick (1997), *supra* note 3.

48 Brakel, *supra* note 34, at 458.

49 *Id.* at 461.

50 *Id.* at 459 n.14.

51 *Id.* at 459 n.15.

52 See Saks, *supra* note 22.

53 See Schopp (1999), *supra* note 36.

result in a therapeutic state). Winick described the first objection as an “old wine in new bottles” argument and dismisses the second objection as anti-intellectual.⁵⁴ Schopp contended that therapeutic jurisprudence needs to define its pursuit of autonomy in a way that does not violate rights and justice or appear mundane by “doing good” except when it should not. That is, therapeutic jurisprudence currently promotes law reform and social science evidence by supporting autonomy as long as it does not violate other systemic values, but it “must provide further normative arguments regarding the manner in which legal institutions ought to pursue psychological well-being when that value conflicts with other important values.”⁵⁵ For example, a normative argument will determine whether a sexual offender’s treatment should be involuntary for the serious, high risk offender.

Therapeutic jurisprudence can also result in proposals that are “thoroughly paternalistic[s].”⁵⁶ That is, if a legal principle is anti-therapeutic, it is given no weight, which then undermines the normative premise of the legal system. In considering the paternalistic nature of therapeutic jurisprudence, some critics also feel that therapeutic jurisprudence calls for a therapeutic state which would undermine individual liberty.⁵⁷ Wexler and Winick may well reject the label of paternalism and the therapeutic state in arguing that:

Although therapeutic jurisprudence suggests that law should be used to promote mental health and psychological functioning, it does not suggest that psychological and physical health is a transcending norm. It suggests that law reform should be informed by this value, but only when otherwise normatively unobjectionable. Nor does therapeutic jurisprudence endorse the paternalistic concept of the “therapeutic state” (footnote omitted) or what Wexler has criticized as “therapeutic justice.”⁵⁸ Indeed, the existing body of therapeutic jurisprudence work is anything but paternalistic . . . rather than defending government paternalism, [it] is animated by the insight that such paternalism is often antitherapeutic, and that legal protection for individual autonomy can have positive therapeutic value.⁵⁹

C. Therapeutic Jurisprudence Is Not Normative Enough

Based on the argument that therapeutic jurisprudence is normatively neutral, there is a view that therapeutic jurisprudence needs to be explicit about

54 See Winick (1997), *supra* note 3.

55 Schopp (1999), *supra* note 36, at 595.

56 Slobogin (1995), *supra* note 35, at 212.

57 See Schopp (1999), *supra* note 35.

58 Winick (1997), *supra* note 3, at 191 (citing David B. Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972)).

59 Winick (1997), *supra* note 3, at 191-92.

managing competing values.⁶⁰ Slobogin noted that the potential for therapeutic jurisprudence to support paternalism should be recognized and that therapeutic values can be identified and balanced against community and offender rights. Schopp, on his part, noted that while therapeutic jurisprudence is neutral in principle (e.g., not endorsing a value as most morally or legally justified), it is instrumentally prescriptive in that it may recommend effective methods for the implementation of whichever goals or values a legal institution might independently wish to establish or adopt. In other words, therapeutic jurisprudence would support empirical evidence of a means to an ends, but not engage in a normative argument to justify those ends. Kress suggested that competing demands could be managed if therapeutic jurisprudence articulated its moral and political stance, for example: by declaring itself a legal philosophy.⁶¹ Therapeutic jurisprudence assumes that particular conditions are indisputable psychological goods (e.g., a causal relationship is supposed between conferring autonomy and improved well-being).⁶² If therapeutic jurisprudence is clearly defined as promoting well-being, then this is a normative rather than a scientific stance (or, again, a philosophy rather than a theory). Although such a definition may only distinguish therapeutic jurisprudence in terms of emphasis rather than content, it will still avoid “putting old wine in new bottles.”⁶³

Another way to manage competing values is for therapeutic jurisprudence to clearly define and measure “therapeutic,”⁶⁴ although it is unclear whether social scientists, legal actors, legislators (or indeed defendants/offenders) should define “therapeutic” and “anti-therapeutic.”⁶⁵ Currently, the terms “therapeutic” and emotional and physical “well-being” are viewed as vague. For example, well-being can be defined as autonomy, social adjustment, psychological contentment, self-actualization and/or understanding motivation, and these conceptions may conflict.⁶⁶ Again, Brakel criticized therapeutic jurisprudence for being both too broad (it examines the health impacts of “everything”, indiscriminately focusing on substantive law, procedures, and roles) and too narrow (health is narrowly defined rather than one of a broad array of concerns).⁶⁷ Slobogin maintained that, unless defined, therapeutic jurisprudence may not distinguish itself from other legal discourses such as social science in law.⁶⁸ Roderick and Krum-

60 See La Fond (1999), *supra* note 35; Slobogin (1995), *supra* note 35.

61 See Kress, *supra* note 14.

62 See Slobogin (1995), *supra* note 35.

63 *Id.* at 204.

64 See Kress, *supra* note 14.

65 See Roderick & Krumholz, *supra* note 20; Slobogin (1995), *supra* note 35.

66 See Kress, *supra* note 14; Slobogin (1995), *supra* note 35.

67 See Brakel, *supra* note 34.

68 See Gary B. Melton, *Law, Science, and Humanity: The Normative Foundation of Social Science in Law*, 14(4) *LAW & HUM. BEHAV.* 315 (1990).

holz noted that some proponents have argued that therapeutic jurisprudence should be vaguely defined to allow empirical investigation to develop more individualized definitions; which would result in confusion and a proliferation of non-traditional modifications to the legal system. They stated that these vague definitions are ideologically based rather than conceptually or empirically based. A social science approach requires clear, operational definitions of “therapeutic” and “anti-therapeutic”; the definition of autonomy in the good lives model and assessments of perceived coercion and decision-making in offender rehabilitation may assist.

Schopp stated that a normative framework to balance conflicting values is required (providing an example of the tension in mental health law between individual liberty and therapeutic effectiveness).⁶⁹ The author argued that therapeutic jurisprudence scholarship needs to address both the empirical question about how mental health law can promote therapeutic effectiveness (as a theory) and the normative question about the parameters within which it should do so (as a philosophy). Slobogin has applied this framework to balance autonomy against therapeutic considerations in comparing individual interests (sovereignty takes precedence over well-being) and comparing individual and other interests as “the excitement of recognizing that a rule is therapeutic for some must not blind them toward its potentially negative impact on others.”⁷⁰ Saks was disappointed that “the tradition gives no guidance as to the degree of importance of therapeutic interests. And without the normative orientation, one wonders what is jurisprudential about therapeutic jurisprudence. Perhaps it is even a school of scholarship best practiced by clinicians.”⁷¹ A normative framework to balance individual and community rights regarding offender rehabilitation may avoid “self-referential ‘pie-in-the-sky’ scholarship read by a small coterie of devoted groupies and no one else . . . jurobabbable.”⁷²

Kress responded to the criticism that therapeutic jurisprudence has not provided a means of balancing individual interests and other interests by noting that normative questions are contested concepts, values such as autonomy and therapy may be incomparable, and that no other normative enterprise would be able to address this problem anyway.⁷³ In its defense, Kress stated that therapeutic jurisprudence’s analysis at least determines whether the values support the status quo or law reform, bolsters arguments for law reform with normative visions, and provides richer normative theories (which may even result in a “best theory”). Madden and Wayne responded to Kress by stating that a normative

69 See Schopp (1993), *supra* note 8.

70 Slobogin (1995), *supra* note 35, at 216.

71 Saks, *supra* note 22, at 299-300.

72 Slobogin(1995), *supra* note 35, at 218.

73 See Kress, *supra* note 14.

framework is only a set of guiding principles; it does not need to apply individual normative positions to specific situations.⁷⁴

III. THERAPEUTIC JURISPRUDENCE PROMOTING OFFENDER RIGHTS

From a therapeutic jurisprudence perspective, the law should promote offender autonomy as a human right. That is, the right of the offender to reject treatment cannot be trumped by community rights unless it can be rationally justified by the State for serious, high risk offenders. However, very little therapeutic jurisprudence literature has explicitly considered the intersection of autonomy with human rights. Regarding offender rehabilitation, it is acknowledged that the offender is entitled to treatment as long as the period of rehabilitation is not too excessive or undermines the identity of the individual.⁷⁵ Therapeutic jurisprudence and human rights values in relation to liberty, due process, the right to receive treatment and to refuse treatment, and the exercise of decision-making in civil commitment procedures have converged.⁷⁶ Applying therapeutic jurisprudence can assist forensic psychologists in actively addressing human rights in general,⁷⁷ as well as prisoners and detainees with mental disabilities in particular.⁷⁸

Therapeutic jurisprudence can serve to maximize the therapeutic effects of the law and to minimize the anti-therapeutic effects of the law. Birgden has proposed a normative framework to balance the deontological and consequential positions regarding offender rehabilitation which can be supported by therapeutic jurisprudence.⁷⁹ Rehabilitation plans should be devised, together with offenders, to match treatment intensity to the risk of re-offending and offense seriousness. While most low risk offenders do not require rehabilitation plans, a few who have committed serious offenses may require plans to manage negative community perceptions that are least intrusive of offender rights (e.g., interfamilial sex offenders). For moderate and high risk offenders, more detailed rehabilitation plans should be prepared, with social science evidence guiding the

74 Madden & Wayne, *supra* note 5.

75 See Winick (1997), *supra* note 3.

76 See Bruce J. Winick, 21 N.Y.L. SCH. J. INT'L & COMP. L. 537 (2002).

77 See Michael L. Perlin, Paper presented at the 30th International Conference of the Society of Interamerican Psychologists, Buenos Aires, Argentina: "With Faces Hidden While the Walls Were Tightening": Applying International Human Rights Standards to Forensic Psychology (June 2005); Michael L. Perlin, Keynote Address at the 26th Australian and New Zealand Association of Psychiatry, Psychology and Law, Lorne, Australia: "Your Old Road is/Rapidly Agin": International Human Rights Standards and their New Impact on Forensic Psychologists and Psychiatrists (November 2006).

78 See Astrid Birgden & Michael L. Perlin, "Tolling for the Luckless, the Abandoned and Forsaken": Therapeutic Jurisprudence and International Human Rights Law as Applied to Prisoners and Detainees by Forensic Psychologists, 13(2) LEGAL AND CRIMINOLOGICAL PSYCHOL. 231 (2008).

79 Birgden (2008), *supra* note 6.

appropriate treatment intensity for sex offenders, violent offenders, and drug-related offenders. If offenders agree to rehabilitation, a behavioral contract should detail the agreed conditions, the treatment program, and the support agencies involved (and ideally reward offender engagement by increasing community access). From a human rights perspective, offender rehabilitation should last no longer than an ordinary prison sentence (proportionality), treatment should balance offender rights and community rights utilizing a wide range of treatment options so as not to stifle the offender's rights unnecessarily (least restrictive alternative), and treatment should be of the required quality and intensity to reduce risk (right to treatment).⁸⁰ If offenders reject rehabilitation, based on an informed decision, then this decision should be respected.

The exceptions to respecting decisions to reject rehabilitation are those serious, high risk offenders who will be offered a constrained choice (accept treatment and be eventually released or reject treatment and be incapacitated). In rejecting treatment, community rights may override offender rights with incapacitation for a set period, albeit indefinite detention and other reactionary strategies are not supported. The normative framework proposed by Birgden⁸¹ determines that the majority of offenders are entitled to decide whether to accept or reject rehabilitation. Therefore, the dual goals of reduced re-offending and supported autonomy are met.

CONCLUSION

The explicit stance of a normative framework for offender rehabilitation is that community protection is enhanced by balancing community rights and offender rights (and deontological and consequential positions). Therapeutic jurisprudence can provide the framework to balance justice and therapeutic principles. However, it can only provide the framework if it takes a normative stance, particularly in relation to offender autonomy. In order to take a normative stance, therapeutic jurisprudence needs to identify itself as a legal philosophy. Taking an ideological position on policy approaches to offenders allows therapeutic jurisprudence to engage in the required value-laden debate and suggest therapeutic laws, procedures, and roles that maximize human rights in offenders.

While scholars may argue that therapeutic jurisprudence principles and community protection are likely to converge rather than conflict, it depends on what purpose offender rehabilitation serves for community protection. In this instance, it is argued that community protection is improved by balancing justice and therapeutic principles, and that the good lives model and a focus on offender rights allow that balance to occur.

⁸⁰ See Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4(2) W. CRIMINOLOGY REV. 143 (2003).

⁸¹ See Birgden (2008), *supra* note 6.

When values conflict, therapeutic jurisprudence ought to always support autonomy and only accept curtailed freedom as the least restrictive alternative in serious, high risk offenders. That is, community rights should not automatically trump offender rights.

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