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INTEGRATING RESTORATIVE JUSTICE AND THERAPEUTIC JURISPRUDENCE

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I. Introduction

Thomas Scheff describes and endorses community conferences intended to develop dispositions of some criminal cases that promote individual and community interests in a manner consistent with Restorative Justice (RJ). He suggests that the research program known as Therapeutic Jurisprudence (TJ) might provide a useful structure for RJ, but he does not provide detailed discussion of the proposed integration of RJ and TJ.[1] This comment clarifies and examines some potentially interesting aspects of such an integration. Section II sketches some central features of TJ and of RJ, and section III considers potential applications of the former to the latter.

II. SOME IMPORTANT FEATURES OF TJ AND RJ

David Wexler originally proposed TJ as a research agenda intended to broaden a recurring pattern of relatively narrow discussion in mental health law scholarship.[2] Mental health law scholarship frequently consisted of debates regarding the proper balance between conflicting values for promoting individual well-being through the therapeutic enterprise and for protecting individual liberty and rights. Some argued for legal developments that promoted the therapeutic project at the expense of liberty, while others advocated stringent protection of liberty, regardless of the cost to the therapeutic agenda. The TJ program arose out of two central insights. First, one can avoid this conflict between well-being and liberty if one can redesign legal institutions such that the two values converge.[3] Second, al-

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[1] Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 95 (1998).

[2] *See* DAVID WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 3-22 (1990).

[3] Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health*

though mental health law seemed naturally amenable to interdisciplinary scholarship, work in the field was not highly interdisciplinary. TJ provides a conceptual framework that encourages scholars to draw upon psychological research in order to propose the design, interpretation, and application of law in a manner intended both to promote well-being without sacrificing other legal and political values served by the law and to generate further psychological research testing these proposals.[4] Although TJ began as a research agenda within mental health law, it has expanded into a process through which theoretically oriented scholars advance such proposals regarding many areas of law, and empirically trained colleagues subject these proposals to empirical verification, leading to additional proposals.[5]

As such, TJ reflects only a minimal normative commitment. TJ remains normatively neutral in principle, although in practice most interested scholars maintain at least a minimal commitment to well-being as a good that law should advance. TJ remains theoretically and prescriptively neutral, however, in that this commitment to well-being as a good is consistent with a wide variety of theories of law as well as with an array of prescriptions regarding the most defensible approach to any specific legal question. TJ does not attempt to resolve underlying normative issues, but it can inform normative analysis by clarifying and informing empirical premises.[6]

The community conference proposal based in RJ reveals a more substantive normative commitment in that it endorses RJ as the proper goal of the dispositional process in at least some criminal cases.[7] RJ emphasizes: reparation for the emotional

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System: Expanding the Normative Focus of Therapeutic Jurisprudence, 1 PSYCHOLOGY, PUB. POL'Y, & L. 161, 163-64 (1995).

[4] *See* DAVID B. WEXLER & BRUCE J. WINICK, ESSAYS IN THERAPEUTIC JURISPRUDENCE ix-xii (1991).

[5] *See* DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996).

[6] *See* Schopp, *supra* note 3, at 164.

[7] *See* Sinclair Dinnen, *Restorative Justice in Papua New Guinea*, 25 INT'L J. SOC. & L. 245, 254-56 (1997); Rupert Ross, *Restorative Justice: Exploring the Aboriginal Paradigm*, 59 SASKATCHEWAN L. REV. 431, 432-35 (1995); Scheff, *supra* note 1, at 95-102; Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, 46 JUV. & FAM. CT. J. 31 (1995). In principle, the RJ conference approach is applicable to other types of conflicts involving tort, property, contract, or domestic disputes. Certain aspects of the approach are more amenable to broader application than others. Those amena-

and material loss of the victim; the reintegration of the offender into the community and restoration of the tranquility of the community.[8] Methodologically, the RJ conferences directly involve the offender, the victim, and community members in meetings in which the participants negotiate a mutually acceptable reparation plan through which the offender makes reparation for the material and emotional injuries to the victim and the community and re-enters that community. The interaction at the conference emphasizes the emotional process, especially a core sequence involving the expression of shame and remorse by the offender followed by forgiveness by the victim.[9] This method suggests a number of empirical premises. This approach apparently values the community conference and the emphasis on emotion and restitution not (or not merely) as good in themselves but also as methods expected to promote recovery for the victim, reduction of recidivism, and reintegration of offenders into the community as effective members of that community.

III. APPLYING TJ TO RJ CONFERENCES

Advocates of RJ conferences sometimes endorse RJ as a superior alternative to retributive justice.[10] The commitment to RJ as the appropriate conception of justice for this purpose requires normative argument, and TJ does not directly provide normative argument. TJ might inform that analysis, however, insofar as the normative argument depends upon empirical premises addressing the likely effects of certain processes and practices on specified desirable outcomes, including for example, victim recovery, individual and community well-being, or reduced recidivism. Insofar as the normative argument suggests certain formulations of legal rules, procedures, or roles, as a means to promoting such outcomes, TJ might serve as a framework for developing a research program designed to empirically test these premises and to advance the ability to implement these

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ble to relatively broad application include, for example, the emphasis on material and emotional reparation and reintegration, as well as the involvement of the parties and the community. It may be more difficult to broadly apply shaming and the concentration of responsibility on one party.

[8] *See* Dinnen, *supra* note 7, at 254-56; Ross, *supra* note 7 at 432-35; Scheff, *supra* note 1, at 100-02; Umbreit, *supra* note 7, at 31-34.

[9] Scheff, *supra* note 1, at 100-17; Umbreit, *supra* note 7, at 35-36.

[10] *See* Dinnen, *supra* note 7, at 254-56; Umbreit, *supra* note 7, at 32-34.

changes without sacrificing other important aspects of the system.

Although proponents sometimes endorse RJ as a distinct alternative to the retributive criminal justice system, the proposals for community conferences actually seem to take the form of dispositional proceedings within the larger criminal justice system. At least some proponents agree that these conferences do not provide appropriate vehicles for fact finding or for adjudicating guilt. They advocate the conferences only for cases in which the offender is clearly responsible for the offense and in which the victim and the offender voluntarily participate.[11] The circumstances in which the offender volunteers are quite coercive, however, in that adjudication and punishment in the criminal or juvenile court provide the alternative, and the process often involves police or probation and parol officers.[12]

Thus, the conferences take place in the context of the conventional criminal justice framework, and the participants must pursue RJ in a manner that is at least minimally compatible with that system. The RJ conferences explicitly manifest some properties of the retributive system in the RJ process. Placing responsibility for the offense on the offender, rather than the victim; having the offender seek forgiveness and acceptance from the victim and the community; and the process of shaming all resemble criminal punishment and the expression of condemnation inherent in such punishment.[13] To the extent that RJ must converge with or operate within the context of the values of the criminal justice system, the TJ research program provides a useful framework because it seeks methods of pursuing preferred outcomes and processes within the bounds set by other important values of the system within which the specific procedures operate.[14]

RJ's methodological premises include empirical premises regarding the types of processes that are likely to promote RJ. Formulating and testing proposals for defining legal rules, procedures, and roles intended to promote desired outcomes without sacrificing other important values is exactly the kind of project the TJ framework encourages. RJ community conferences

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[11] *See* Scheff, *supra* note 1, at 96-99.

[12] *Id.* at 96-100; Umbreit, *supra* note 7, at 35-38.

[13] *See* JOEL FEINBERG, DOING & DESERVING 95-118 (1970).

[14] *See supra* notes 3-4 and accompanying text.

raise a series of empirical questions, including the following. Do community conferences conducted according to these proposals decrease recidivism or promote recovery by victims? What aspects of these conferences promote or undermine these objectives? Does the "core sequence" of emotional interaction produce the intended results consistently across various types of offenders, victims, crimes, or communities?[15] What types of offenders, victims, crimes, or communities might achieve RJ more effectively through other methods? Are such conferences subject to misuse by disproportionately vindictive offenders, powerful community members, or unrepentant offenders?[16]

Finally, RJ conferences and TJ must confront at least one common normative question. Whose interests count? Ideally, TJ seeks legal developments that promote the well-being of all involved without sacrificing other important values. Ideally, RJ promotes victim and community reparation in a manner that reintegrates the offender into the community. Suppose, however, that data or common experience demonstrate that experience strays from these ideals. Suppose, for example, that experience demonstrates that conferences can minimize recidivism and reintegrate offenders best by withholding condemnation from offenders and by sparing them shame in a manner that undermines victim recovery. That is, suppose that the conditions that maximize victim recovery and offender reintegration diverge because condemnation or shaming of offenders hampers their reintegration but facilitates victim recovery. If data and collective experience suggests such divergence of interests, neither RJ nor TJ can avoid a normative decision regarding which interests merit priority.

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[15] *See* Scheff, *supra* note 1, at 100-02. The sense in which this sequence qualifies as "core" is not entirely clear. The author seems to favor the RJ conferences as generally successful and to indicate that this sequence is core in the sense that it is necessary to the important process of symbolic reparation, yet he also reports that the core sequence only occurred in one of nine conferences observed and possibly following three others of the nine.

[16] *See* Dinnen, *supra* note 7, at 256-58.