ETHICAL DILEMMAS, FORENSIC PSYCHOLOGY, AND THERAPEUTIC JURISPRUDENCE

Ida Dickie*

Broadly speaking, the legal system and forensic psychology have in common the management of criminal behavior. However, one of the immense difficulties that psychologists face when trying to work within the legal system is that historically, the legal system has not been conducive to promoting therapeutic change of criminal behavior.1 Some argue that an irreconcilable conflict exists between therapeutic and forensic psychological roles in civil contexts.2 This position also exists within the criminal contexts and promotes the idea that effective psychological assessment and intervention cannot occur within the legal system.3 However, with the relatively recent emergence of the legal theory of Therapeutic Jurisprudence (TJ),4 which articulates how the legal system can act as an agent of therapeutic change, a collaborative relationship between psychology and law can exist.

The question now becomes: How can forensic psychologists and the legal system work together to contribute simultaneously to the advancement and well-being of the offender, the community, and society? This Article explores how the

* Ida Dickie, Ph.D., Director of Forensic/Correctional Psychology Emphasis Area, Spalding University. Correspondence can be addressed to idickie@spalding.edu.

Therapeutic Jurisprudence Model (TJ Model) may reconcile traditional clinical and forensic psychological roles. Before discussing how the TJ model can assist with such reconciliation, two basic assumptions must be accepted.

First, forensic psychologists and the law have a common goal: the prevention and management of criminal behavior. Many of psychologists’ ethical dilemmas in forensic settings stem from the belief that psychology and the law do not have a common goal. Furthermore, for forensic psychologists and the law to truly work together towards the shared goal of prevention and management of criminal behavior, the legal system has to produce an environment that is conducive to therapeutic efforts. TJ may provide such an environment.

TJ is defined as the study of the legal system’s role as a “therapeutic agent.” Therapeutic is defined as promoting the advancement and well-being of the offender, the community, and society. This does not change the focus of TJ, which is the law, but it allows for movement away from the traditional adversarial nature of the legal system, providing a framework that allows the law to take into account human needs and the


emotional well-being of offenders.\textsuperscript{9} Slobogin defines TJ as “the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects.”\textsuperscript{10}

Therefore, the second assumption that must be accepted is that the legal system can indeed function as a therapeutic agent of change. Critical reviews of the TJ Model have suggested that the legal system is not capable of operating as a therapeutic agent or within a therapeutic framework because it is impossible to overlook the punitive ideology, power imbalance, and violence embedded in the law.\textsuperscript{11} Brakel argues that TJ is being characterized as a panacea for the “all-too-real ills of the adversarial system.”\textsuperscript{12} He also argues that TJ fails to recognize that “[m]odern mental health law was conceived when courts and commentators recognized that psychiatrists and other mental health professionals often promised society—and the legal system—far more than they were able to deliver.”\textsuperscript{13} Although there is limited empirical work examining the basic premise that the legal system can indeed function as therapeutic agent, this Article embraces the assumption that the law can be applied in a therapeutic way. Despite being predicated upon a punitive model, the law can operate therapeutically to minimize the inevitable anti-therapeutic impacts and facilitate ethical standards of psychological practice.

Principles of ethically sound psychological conduct have been articulated to include: 1) beneficence—acceptance of responsibility to do good;\textsuperscript{14} 2) non-malfeasance—acceptance of a need to do no harm;\textsuperscript{15} 3) autonomy—respect for others’ freedom

\begin{footnotes}
\footnotetext[9]{Andrea Kupfer Schneider, The Intersection of Therapeutic Jurisprudence, Preventive Law, and Alternative Dispute Resolution, 5 PSYCHOL. PUB. POL’Y & L. 1084, 1086-87 (1999).}
\footnotetext[10]{Slobogin, supra note 8, at 196.}
\footnotetext[12]{Samuel J. Brakel, Searching for the Therapy in Therapeutic Jurisprudence, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 467 (2007).}
\footnotetext[13]{Id. at 469.}
\footnotetext[14]{Elizabeth Reynolds Welfel & Karen Strohm Kitchener, Introduction to the Special Section: Ethics Education—An Agenda for the ’90s, 23 PROF. PSYCHOL.: RES. & PRAC. 179, 180 (1992).}
\footnotetext[15]{Id.}
\end{footnotes}
of thought and action; 16 4) justice—basing actions on fairness between individuals; 17 5) fidelity—trustworthiness to commitments; 18 and 6) respect for a person's rights, dignity, competence, responsibility, and integrity. 19 These ethical principles are difficult to apply within the legal system as it currently operates. 20 Therefore, a broader interpretation of these principles is needed, with particular attention to effective treatment principles within forensic settings, most notably the responsivity principle. 21

For example, the aforementioned ethical principles may need to be conceptualized within a collectivistic model, in legal settings where the individual, the victim, and the community are considered inseparable as clients. Why does it have to be unethical to consider the needs of the victim as well as the offender when treating the offender? It is possible that the offender requires a different therapeutic approach, such that if the needs of the victim are not considered during therapy, the offender's treatment will be ineffective.

Similarly, a commitment to beneficence and non-malfeasance within the forensic setting may require a collectivist approach because harm may be more likely if the offender, the victim, and the community are not considered together. The victim's concerns of not being harmed in the future can only be addressed by offering assistance to the offender, which ultimately benefits the community at large, including the victim. Helping the offender manage his or her risk level so that he or

16. Id.
17. Id.
18. Id.
she is not likely to harm others does not have to be considered undesirable. In fact, not assisting the offender in managing his or her risk level, for example by imposing jail time rather than treatment, harms the offender and the community at large.

If psychologists are going to use the collectivist model in conceptualizing the treatment of criminal behavior, the question that needs to be asked is: Are there modifications that need to be made to traditional clinical principles to allow psychologists to practice effectively within legal settings? This question can only be addressed if the legal system is committed to upholding psychological ethical principles.

The TJ Model “calls for an increased psychological sensitivity in the attorney/client relationship, [and] an awareness of some basic principles and techniques of psychology . . . .”22 This means that lawyers will utilize “motivational interviewing”23 skills and consider all aspects of the offenders’ lives when devising defense or prosecution strategies. This allows for the balancing of the rights of the offenders and public safety.24

The underlying principles of TJ are: 1) psychological well-being is increased, decreased, or neutrally effected by the way law is implemented; 2) the law should capitalize on people’s entry into the legal system to promote a pro-social lifestyle; 3) the law can be a multi-disciplinary endeavor in which psychology and law cooperate to enhance well-being; and 4) the law weighs community protection (justice principles) against individual needs (therapeutic principles).25 These underlying principles promote a collectivistic approach to ethical dilemmas within the legal system.

The Ethical Code proposed by the TJ Model suggests: 1) “the offender must be treated with procedural fairness;”26 2) “the

23. Id. at 614.
24. See Slobogin, supra note 8, at 216. For more information on how clinical concepts are being introduced into legal training, see Winick & Wexler, supra note 22.
26. Bill Glasser, Therapeutic Jurisprudence: An Ethical Paradigm for
amount and type of treatment is governed” equally “by the seriousness of offense . . . [and] the need for treatment;” 27 3) “[i]nfringements on an offender’s legal rights must be mini[m]ized,” 28 or the “least restrictive alternative” principle; 29 and 4) “non-malficence.” 30 The TJ Model allows for a more therapeutic approach to managing criminal behavior in which all invested parties, including psychologists, lawyers, and correctional officers can balance the rights of the offenders against public safety. 31 The TJ Model promotes an environment where collaboration between the law, psychiatry, community mental health, and psychology can assist offenders in determining how to live their lives differently. The TJ Ethical Code can be subsumed into the larger ethical code under which psychologists practice, thus helping to resolve some of the ethical dilemmas that psychologists face while working within the legal setting. The TJ Model offers psychologists a way to respect offenders’ self-determination and autonomy, even when it must be reduced, and suggests that such reductions can have important therapeutic value. 32

Although a debate exists regarding whether the legal system can indeed be therapeutic, 33 the broader implications of the TJ Model are that forensic psychologists may be able to practice within a legal system that respects an interdisciplinary and

---

27. Id.
28. Id. at 152 (explaining that “the guiding rule is that of non-malficence; minimally restrictive treatment/punishment interventions are used because unnecessary punishment is intrinsically unethical.”).
29. Id. (advocating that “if two punishments, one harsher than the other, are equally as effective in deterring a crime, then the less harsh one is to be used”).
30. Id.
31. See Slobogin, supra note 8, at 216.
32. Id.; see also Robert F. Schopp, Therapeutic Jurisprudence and Conflicts Among Values in Mental Health Law, 11 BEHAV. SCI & L. 31, 41-42 (1993) (arguing that under some circumstances, the state may be able to infringe on a person’s independence to give him or her the capacity to make autonomous choices; however, in cases where individuals do not pose a violent threat, peoples’ autonomy should take priority over improving their well-being to maintain his or her status as sovereign and a person’s ability “to define his own life and embrace various aspects of well-being as his well-being”).
33. See, e.g., Brakel, supra note 12, at 458-59; Arrigo, supra note 11, at 23.
psychologically oriented approach to the management of criminal behavior. Further research is required to determine if indeed the TJ Model embraces a rehabilitative approach to criminal behavior and assists with managing the ethical dilemmas faced by forensic psychologists. However, the TJ paradigm appears to concern itself with the client's needs and emotional well-being, as well as the offender’s rights, which ultimately encourages adherence to ethical standards and resolution of forensic and clinical psychology roles.