Positive Criminology

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6 Synergizing therapeutic jurisprudence and positive criminology

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How does the criminal process affect the psychological wellbeing of defendants? Which decisions, behaviors, and outcomes within the process enhance their wellbeing, and which are those that jeopardize it? Those are some of the questions that therapeutic jurisprudence (TJ), a field of inquiry that studies the law's impact on psychological wellbeing, presents. Adjunct to TJ is positive criminology (PC), a newly defined school encompassing diverse criminological models and theories that identify positive factors that may help offenders rehabilitate. Looking at the same criminal justice process PC presents distinct, yet similar questions: What are the rehabilitative programs that can best enhance defendants' growth and desistance from crime? What does research tell us about the links between different positive experiences and offenders' rehabilitation?

The goal of this chapter is to outline the interconnections between TJ and PC and to explore what each one of these sibling perspectives can give to and take from the other (see also Wexler, 2013). We argue that PC may be seen as a vineyard from which TJ can borrow therapeutic techniques ('wine') that may be used by legal actors. Concurrently, PC can learn from TJ about TJ-friendly and unfriendly legal structures, or 'bottles' – structures in which PC practices can thrive or be stifled. On a more abstract level, we argue that TJ and PC share a similar ideological framework. While TJ applies to legal practices and rules and PC relates to criminological research and practices, both approaches highlight the therapeutic effects of some elements in order to increase their use, while identifying the anti-therapeutic effects of others, aiming to minimize their use.

In the first section we provide a brief overview of TJ and its fields of interest. The following section presents PC and its scope of research. In the next section we examine the convergence between TJ and PC, as well as their disparities. We then explore synergies for the future, in particular the ways TJ can contribute to the development of PC and vice versa. The proposed synergy is demonstrated graphically. In the next section, 'synergistic speculation,' we provide a concrete example relating to a current project. The final section summarizes and proposes future directions for research.

Therapeutic jurisprudence

Therapeutic jurisprudence is a "field of inquiry" (Wexler, 1995, p. 228) presenting a "therapeutic lens" through which to look at existing laws, legal processes, and legal actors. It signifies the fact that, whether deliberately or not, legal rules, actors, and procedures carry therapeutic and anti-therapeutic results for the people involved. Considering law's significant impact on people's wellbeing, TJ is dedicated to identifying the specific therapeutic and anti-therapeutic effects of various legal practices. Within limits set by due process and other values cherished by the justice system, TJ promotes more use of therapeutic legal practices and less use of anti-therapeutic practices. Originating in mental health law, TJ has been applied to a broad range of legal topics including criminal, family, tort, and labor law.

A significant portion of the TJ literature is within the field of criminal law, which is the subject of this chapter. Therapeutic jurisprudence scholarship has identified many anti-therapeutic elements within the laws, procedures, and practices of criminal law, but has also highlighted some therapeutic ones.

Considering the impact of the criminal justice system on offenders, the TJ literature has often been critical of the criminal process, the modus operandi of legal professionals and judges, and the substantive and procedural criminal law itself leading to destructive outcomes. Dedicated to the search for more therapeutic practices, TJ has promoted the use of 'solution focused' courts such as drug courts and mental health courts that encourage offenders' active responsibility-taking and shared decision-making toward the resolution of the underlying cause of their criminal behavior (King, 2009). Therapeutic judicial behavior such as expressions of affect, praise, empathy, and active listening is considered by TJ literature to contribute to the success of solution-focused courts in helping offenders rehabilitate and desist from crime (Mitchell et al., 2012; Portillo et al., 2013; Winick, 2002). In addition to efforts to divert offenders from incarceration, TJ scholars encourage therapeutic behavior by prison personnel (Birgden, 2004), defense attorneys (Wexler, 2008) and prosecutors (Wexler, 2011b). Furthermore, TJ literature has identified and promoted the use of evidence-based rehabilitative programs that are strength-based and 'optimistic' in nature (Ward & Brown, 2004).

TJ has also addressed the way criminal law affects the wellbeing of victims, although to a much lesser extent. For instance, it has been suggested that in order to enhance victims' sense of wellbeing and empowerment throughout the criminal process following their victimization, victims should be given a "voice, not a veto" (Winick, 2011, p. 8). Indeed legal reforms providing crime victims with rights of protection, participation, and provision of services have addressed many of the anti-therapeutic effects of the western adversarial legal system. TJ has joined the literature criticizing the current situation, in which victims who want to have their voice heard are still exposed to harsh cross-examinations and often experience anti-therapeutic outcomes of the criminal justice process (Erez, Ibarra, & Downs, 2011). Indeed, very recently, TJ has clearly 'turned the corner' in terms of fully embracing victims within its focus (Diesen, 2012; Erez et al., 2011; Wexler & Jones, 2013).

TJ writing, then, has applied both to legal structures, such as statutes and regulations affecting substantive and procedural law; and practices and techniques used by legal professionals and those working with offenders and victims. More recently this division has been described as TJ's interest in 'bottles' – legal structures – and 'liquid,' or wine, representing practices and techniques (Wexler, 2014). On the descriptive level, TJ identifies therapeutic and anti-therapeutic practices and techniques, or 'liquids.' It has also been innovative in identifying provisions, or 'bottles,' that are either 'TJ-friendly,' 'TJ-unfriendly,' and even to some dubbed 'TJ-fair weather friends' (Wexler, 2005). On the normative level, TJ is committed to enhancing the use of therapeutic 'liquid' as much as possible and to promoting legal reforms that, within due process and justice limits, maximize the portion of 'TJ friendly' bottles within the legal system.

Positive criminology

Positive criminology is a new conceptual perspective of criminology encompassing theories and models that focus on positive experiences, traits, and influences that distance people from deviance and crime (Ronel & Elisha, 2011). In contrast with most traditional criminological research that has typically focused on the 'negative' forces that lead to deviance and crime, positive criminology seeks to develop and gather knowledge regarding the 'positive' forces that encourage people to desist from crime or discourage them from turning to criminal behavior in the first place. Similarly, while existing literature in the field of positive community behavior such as voluntary work has focused on its contribution to the community as a whole and on the volunteers themselves, PC looks at the impact of voluntary work (and, more broadly, on perceived altruism) on youth at risk (Ronel, Haski-Leventhal, Ben-David, & York, 2009) or offenders (Ronel, Frid, & Timor, 2013). In other words, PC goes against the focus of much of the research which highlights 'goodness' in relation to normative people and 'badness' in relation to law-breakers, offering an alternative research agenda that focuses on goodness in the lives of offenders, victims, and those at risk of become either. Positive criminology does not create new theory but unites, under a single conceptual framework, existing positive and strength-based approaches. Having been developed by practicing clinical criminologists, however, PC also directs new research projects to examine whether and in what circumstances positive experiences prevent crime and promote offenders' wellbeing (see, for instance, Ronel et al., 2013). Two central characteristics of the theories and approaches PC adopts are being strengths-based and future-oriented. Therefore, PC focuses on approaches that emphasize people's internal resources rather than on those that highlight their pathologies; and those that look for future (desistance) solutions rather than those that delve on past (problematic) behaviors (Ronel et al., 2013).

One relevant strand of the literature that PC highlights is one regarding traumatic growth, resilience, and the experience of hardships as an opportunity rather than an obstacle (Ronel & Elisha, 2011). Another research direction relates to the therapeutic impact of exposure to goodness and altruism as reflected in, for instance, voluntary work (Ronel, 2006; Ronel et al., 2009). Voluntary work is also therapeutic for those who engage in it, providing them with a sense of achievement, self-worth, and discipline (Burnett & Maruna, 2006).

Positive criminology has been interested in strength-based formal interventions, such as the Good Lives Model (GLM) (Ward, 2002; see also Birgden, 2002) developed originally as a rehabilitative framework for sexual offenders, as well as in informal positive elements such as family and community support and their effect on the rehabilitation process of offenders (Elisha, Idisis, & Ronel, 2013). On the theoretical level, Natti Ronel, the 'founding father' of PC, has proposed a phenomenology of criminal behavior that goes beyond the specifics of the causes, context, and contents of different crimes (Ronel, 2013). This phenomenology, called the 'criminal spin,' describes the behaviors, cognitions, and emotions that characterize the escalation of criminal behaviors. Without external intervention, the criminal spin might lead to chronic criminal behavior. Among the characteristics of the criminal spin presented by Ronel (2013, p. 338) are the two conscious motives that drive the wheel forward: The first is the 'I must' motive, supported by a sense of an existential threat or necessity to act in a certain way and by enhanced self-centeredness. The second is the 'I can' motive, meaning a self-perception of legitimacy and ability to commit the criminal act. Positive criminology highlights the difference between coercive interventions, such as incarceration and electronic monitoring, that eliminate the ability of offenders to hurt others (the 'I can' element of the criminal spin, Ronel, 2013), and positive elements such as family support and formal strength-based interventions, that, through the provision of alternatives and reduction of self-centeredness, address the 'I must' element of the criminal spin (Elisha et al., 2013; Ronel, 2013).

Links and dialogue between TJ and PC

Both PC and TJ have a dual conceptual structure, involving a descriptive and a normative layer. In the descriptive layer, TJ observes legal actors, rules, and structures and identifies their therapeutic and anti-therapeutic potential for all those involved in legal processes. PC identifies existing theories, studies, and approaches that promote the positive growth of offenders. The sibling approaches are related in their normative layers as well: PC promotes the use of positive experiences in rehabilitation programs of offenders (inside and outside of prison) and their victims; TJ promotes problem-solving, future-oriented legal practices to make legal interventions more therapeutic for stakeholders. Both approaches prioritize models that prevent further crime, incarceration, and their negative outcomes for all involved.

The two approaches also generally focus on offenders, although they have a shared interest in victims' wellbeing as well. Perhaps because both perspectives

developed from offender-related subjects (mental health law for TJ and offender rehabilitation programs for PC), they both have left victims behind, to some extent. Still, TJ regards the enhancement of victims' wellbeing as a central goal of criminal law, as demonstrated in its embracement of restorative justice and victim's rights reforms, to the extent that these developments actually enhance the wellbeing of victims, and attention to victims is now – finally – firmly established (Diesen, 2012; Erez et al., 2011; Wexler & Jones, 2013). The PC literature is more recent and less developed, but it has already suggested that there is room for 'positive victimology,' a sub-category of victimology that, like PC, focuses on positive components in the context of victims' healing from crime (Ronel & Toren, 2012).

Another shared theme is the focus on problem-solving. PC emphasizes that removing the 'I can' motive" of the criminal spin, as law enforcement does in forcible interventions, is insufficient (Ronel, 2013). More is needed to actually break the 'criminal spin' generating criminal continued behaviors, such as spirituality and the recruitment of support people to strengthen offenders' sense of belonging and present alternatives to their criminal behavior. Similarly, TJ promotes problem-solving approaches and in particular solution-focused judicial behavior. In solution-focused courts, offenders take center stage in resolving problems. An admission of inappropriate behavior is often a precondition for the process to take place, eliminating the need to delve into the past and enabling the prosecutor, defense attorney, and judge to collaborate toward a future-oriented rehabilitation plan that minimizes the 'revolving door' phenomena with measurable indicators for follow-up.

More broadly, both research agendas are based on the same utilitarian philosophy that measures the success of reactions to crime according to the societal and personal benefits they deliver, rather than by merely the level of 'just deserts' they convey. Positive criminologists are dedicated to promote rehabilitative goals and their work is relevant within the rehabilitative objective of criminal law. TJ is dedicated to add an additional goal to criminal law, that of stakeholders' wellbeing, to the extent that this goal is feasible under existing criminal law principles (Dancig-Rosenberg & Gal, 2013).

At the same time the two differ both in their respective overall goals and in their target populations: PC's overall goal is to reduce recidivism rates and increase desistance from crime and incarceration among offenders. Its target population is mostly criminals, or, put more positively, people who have engaged in criminal conduct.

TJ, on the other hand, is aimed at enhancing the wellbeing of all those affected by legal rules, processes, and actors, be they offenders, victims, civil litigants, or others. The intersection of the two approaches is mostly in the criminal sphere and with a focus on offenders – and, increasingly, on victims. PC focuses on criminology research and practices while TJ focuses on law and legal structures.

TJ and PC relate to the roles of different players in the adversarial game. TJ's scope is wide, addressing the full range of the legal actors: lawyers, judges,

parole officers, corrections professionals. The way these players play their parts in the process is measured through a therapeutic lens, and TJ proposes changes and amplification in their roles so that their interactions with the stakeholders bring about greater therapeutic results and less anti-therapeutic ones. PC is more limited in its target population among professionals. It addresses mostly the work of those whose job is therapeutic by definition, such as clinical criminologists, social workers, psychologists, psychiatrists, and other rehabilitative agents working with known or potential offenders, and promotes greater use of strength-based and future-oriented approaches in their work. The mission, therefore, of PC is somewhat easier. It does not propose to assign a new, therapeutic goal to the legal system, as does TJ; it only asserts that positive experiences are at least as powerful, if not more, than negative experiences, in motivating people to desist from crime.

Synergizing TJ and PC

Synergizing PC and TJ is about synergizing law and criminology, for PC is deeply positioned within the criminology field (although it strives to broaden its horizons) and TJ is rooted in law (despite its efforts to expand its stated goals). But TJ is interested not only in the analysis of legal structures, sometimes called 'landscapes' or 'bottles'; it is similarly interested in the way law is practiced – the techniques, or 'wine' that is poured into the legal bottles (Wexler, 2014). In the search for more therapeutic practices, TJ often looks at criminology (as well as psychology and social work) for guidance. Within criminology, PC has plenty to offer TJ. Accordingly, the 'getting' part of the synergy from the perspective of TJ is about making use of knowledge collected and identified by PC to make the practices of legal players more therapeutic, as TJ prescribes. Put differently, it's about making PC a fruitful 'vineyard' of insights from which TJ can draw.

For instance, findings regarding the importance of acceptance relationships for the rehabilitation of imprisoned sex offenders (Elisha et al., 2013) can be incorporated by TJ and adopted in problem-solving and other courts, so that the courts encourage family members to express their commitment to the wellbeing of the accused as well as their expectations regarding the accused's need for rehabilitation. Or, the use of Vipassana, found to enhance trust and a sense of belonging among prisoners (Ronel et al., 2013), can be added as a possible treatment program available for offenders in solution-focused courts and other courts, outside the prison environment.

Enjoying a broad theoretical framework, however, TJ can draw ideas from the PC vineyard and extend their application beyond the context of mental health professionals working with offenders toward the modus operandi of defense attorneys, judges, and prosecutors as well. Consider for example the rehabilitative benefits for offenders of being exposed to perceived altruism and to the work of volunteers (Ronel et al., 2009). Although the findings were based on the work of service providers for youth, they can be utilized for the work of judges in solution-focused courts working extra-hours; defense attorneys representing clients pro-bono (a matter to which we will return in the next section); and prosecutors voluntarily working toward finding solutions for their clients in solution-focused courts.

Even more broadly, one can think of ways that components identified by PC can be adapted to influence the normative call of TJ to reform legal structures themselves ('bottles') so that they become more 'TJ-friendly.' For instance, considering the important role played by supportive family members in offenders' desistance from crime (Elisha et al., 2013), TJ proponents might promote a legislative change (if such were necessary to accomplish the goal) to structure the participation of relatives within the legal process, similar to their involvement in Family Group Conferences.

Concurrently, TJ has a lot of 'giving' to offer PC as part of the proposed synergy between the sibling approaches. TJ relies on other behavioral science sources to make the work of legal actors more therapeutic, and PC can similarly incorporate some of the insights it has gathered. For instance, lawyers versed in TJ might counsel their clients about how they might convert a current crisis (e.g., an arrest and legal charge) into an opportunity to change their life (Wexler, 2008, p. 21). Such lawyers can help clients '"marshal hope," an important ingredient in positive change (Wexler, 2008, p. 24), and can indicate in concrete ways how the lawyer might "believe" in the client and the client's progress (Wexler, 2008, p. 181). The relevant literature similarly focuses on the importance of solution-focused courts noting offender strengths, praising law-abiding behavior, condemning acts but not the actors (Wexler, 2001), and engaging in judicial behavior that should increase an offender's 'readiness for rehabilitation' (Wexler, 2006). All these practices can be easily adopted by PC and positioned under its conceptual framework, expanding its scope beyond the work of clinical criminologists.

In other words, in expanding the use of PC findings beyond clinical work with offenders, TJ is both 'getting' from and 'giving' to PC. TJ 'receives' from PC's fertile vineyard important insights from the work of clinical criminologists and other rehabilitative professionals that promote offenders' overall wellbeing and desistance from crime, to pour into TJ friendly bottles. And TJ is happy to 'give' PC its own insights and practices used by legal professionals, to the point that it may consider 'positive lawyering,' 'positive judging' and so forth.

In addition, TJ can provide PC a valuable oversight of the criminal procedure 'bottles' and their level of 'friendliness' toward PC 'liquids' (Wexler, 2014), thus assisting PC researchers to focus their resources on approaches that can easily be implemented in existing legal structures. For instance, strength-based, positive rehabilitative programs such as the GLM can be more easily used during incarceration than during pre-trial confinement (Wexler, 2014).

As Figure 6.1 demonstrates, the proposed synergy between the two approaches can be visualized as a matrix constructed along the intersection of two axes, representing TJ and PC. The TJ axis moves from the 'bottles' end (referring to existing legal landscape) to the 'wine' end (practices used within the legal landscape). The PC axis moves along a continuum from a 'Descriptive

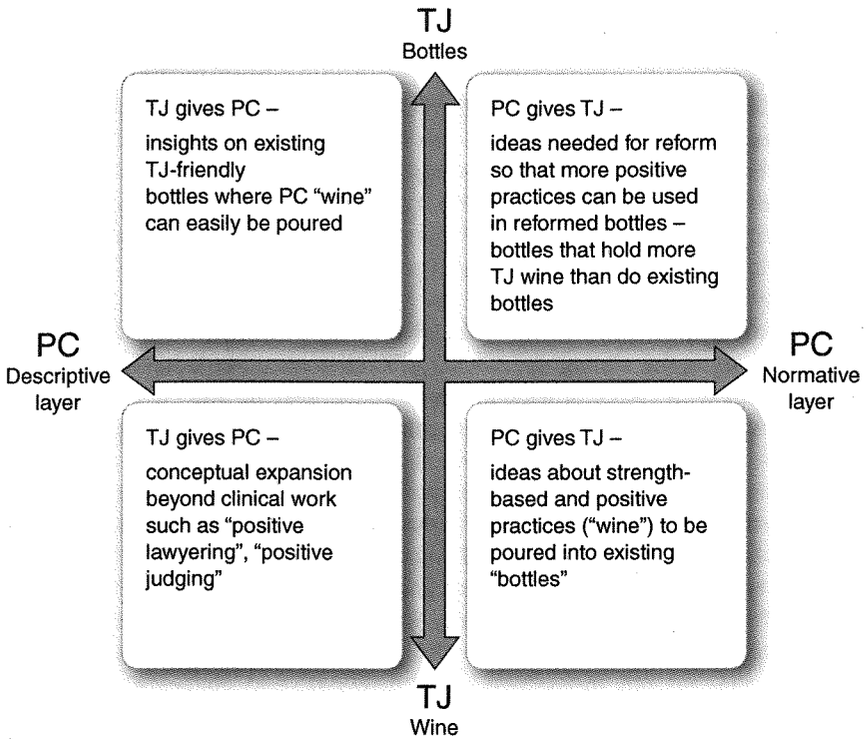

Figure 6.1 Synergizing therapeutic jurisprudence and positive criminology.

Layer' (identifying what's already 'out there') to a 'Normative Layer' (identifying what should be reformed). The interconnections between these two axes provide four windows that identify the 'giving' and the 'getting' dynamics between the two sibling perspectives.

Starting from the upper left window and moving clockwise, the TJ's perspective on existing legal landscapes can 'give' the descriptive layer of PC insights on TJ-friendly bottles, so that PC scholars can focus their energies on where positive practices are most likely to be welcomed. Next, PC's descriptive project can easily contribute ideas to TJ normative scholarship on where legal reform of existing 'bottles' is most needed. For instance, if restorative justice, an alternative approach to retributive justice that comfortably sits within the PC perspective, is found to reduce recidivism rates among perpetrators of serious violent crimes (Sherman & Strang, 2007), then TJ scholars might consider the propriety of promoting a legal reform that mainstreams its use as the default option for all admitting offenders – a discussion that would raise the issue whether other justice values and goals would support or oppose such a legislative change. Moving on to the bottom right window, PC is also a generous

'giver' to TJ in its normative efforts, contributing ideas about strength-based and positive practices that can be used in criminal processes within existing legal landscapes. Finally, TJ scholarship on therapeutic practices of defense attorneys, prosecutors, and judges contributes to the conceptual expansion of PC work beyond clinical work of criminologists and other rehabilitative professionals.

Synergistic speculation: a concrete example

A few years ago, one of us (DBW) published a short essay about lawyer-assistance-program (LAP) lawyers: lawyers themselves in long-term recovery for drug and alcohol addiction as well as lawyers coping with mental health issues (Wexler, 2011a). In LAP programs, these lawyers 'give back' by assisting lawyers new to the program and in the throes of addiction and early recovery.

The essay noted, however, that the LAP lawyers in longer-term recovery had displayed an admirable resilience and that they have "a special strength and skill to offer," and "that special strength and skill can also be of assistance to a great many people caught up in the criminal justice and mental health systems" (Wexler, 2011a, p. 65). These lawyers, if they disclose their own histories, will have added credibility with courts and clients. And, whether they disclose that personal history or not, they will have a good understanding of addiction, alcoholism, mental illness; will understand matters of family dynamics, triggers and coping mechanisms, and attempts at deception; they will have knowledge about treatments, programs, services, and much more. By bringing TJ into their practices, these lawyers will be fulfilling the 12th step of 12-step programs, to 'practice these principles in all of our affairs.'

The earlier essay proposed, therefore, that LAP lawyers think through the possibility of using their special strengths by practicing a bit of TJ – perhaps in some capacity in drug treatment court, mental health courts, mental health civil commitment proceedings, and the like.

The article generated interest among some lawyers and we are currently interested in working with some LAP-type lawyers in implementing the idea. And here is where the synergy with PC can be most helpful. In PC terms, the project can be conceptualized as capitalizing on traumatic growth and resilience. And although the TJ literature itself has traditionally noted the professional satisfaction and even the beneficial health effects of practicing TJ (e.g., Chase & Hora, 2000), the PC literature adds many new dimensions (see also Grant, 2013).

For example, if we work with the preliminary findings of Ronel's (2006) article of the impact of volunteers on at-risk youths, we might wish to implement the project with the following factors in mind:

- Volunteering is beneficial to the volunteers themselves.
- Volunteering is also beneficial to the recipients of the clients of the volunteered service – especially when the clients have generally seen the world as composed of 'takers,' not of genuine givers.

- When recipients have meaningful contact with volunteers, the recipients develop a better feeling even about the organization as a whole, including the compensated workers.
- Recipients may be sufficiently moved so that they themselves eventually express an interest in volunteering, thereby serving as mentors and in essence generating a 'virtuous cycle.'

In the context of LAP lawyers somehow associating with a Public Defender office to perform some role with clients considering or participating in a drug treatment court, a mental health court, or a civil commitment setting, the above tentative findings might suggest implementation measures in which the clients, the LAP lawyers, and the Public Defender office might best prosper.[1] For example,

1 To the extent feasible, LAP lawyers should consider offering their services on a volunteer basis.
2 They should, in appropriate circumstances and in an appropriate manner, let their volunteer status be known to the clients.
3 Lawyers should talk with successful clients about the possibility of the clients serving later as volunteers – of joining groups that in fact already exist in some jurisdictions, such as drug court 'alumni' groups, or 'mentor moms' or 'mentor parents' in some dependency drug courts (where parents are threatened not with criminal proceedings but instead with the loss of their children and their parental rights).

(Winick & Wexler, 2003, p. 41)

This example of synergistic speculation is the preliminary rich result of merely thinking about the two fields – TJ and PC – together and in the context of a single project. Our hope is that this sort of thinking will soon occur broadly and routinely, thereby enriching both fields – and their stakeholders.

Summary

This chapter has considered the interconnections between two conceptual perspectives or 'research agendas,' therapeutic jurisprudence (TJ) and positive criminology (PC). Recognizing their shared underlying utilitarian philosophy as well as their focus on practices that promote rehabilitation and reintegration, the article has identified what each of these perspectives can give to and get from the other.

Because these two sibling approaches share a normative goal to increase the use of evidence-based positive, future-oriented rehabilitative practices by those working with offenders (and to some extent, victims), the synergy between them is helpful not only on the theoretical level, but also in changing professional practices and legal structures.

To analyze the interconnections between PC and TJ, we used four variables: bottles – wine (or structures–practices) and descriptive – normative. Once we placed these four variables on two perpendicular trajectories we found that PC gives TJ helpful tools in their joint effort to induce change both on the structural level (reforming legal landscape) and the professional level (enhancing strength-based practices). TJ, on the other hand, is a potential contributor to the descriptive layer of PC, offering to widen its scope beyond clinical criminology and at the same time assisting in fine-tuning its targets so that academic efforts can concentrate on areas where positive practices are most likely to be actually accepted.

These mutual 'giving' and 'getting' dynamics create a joint research agenda for both approaches. TJ scholars may experiment with PC insights, using them within the legal process and examining their potential benefits in rehabilitating offenders and promoting their wellbeing. They can also explore whether certain PC-adopted practices are systemically used in some legal systems while not in others, and whether or not there is a need for legal reform to enable their universal use. PC scholars may want to explore how their practices can be used by non-criminology professionals such as lawyers and judges. Such research projects may be conducted jointly, promoting a robust partnership between the criminal strand of therapeutic jurisprudence scholarship and the younger research agenda or positive criminology.

Note

1 We thank an anonymous reviewer's comment that one should worry about low-quality voluntary representation as well as other lawyers conceiving this voluntary work as unfair competition. These concerns should undoubtedly be considered when testing such a project.

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