

THERAPEUTIC JURISPRUDENCE, COERCIVE INTERVENTIONS, AND HUMAN DIGNITY

ROBERT F SCHOPP*

Therapeutic Jurisprudence pursues the reform of legal rules, procedures, and roles in order to promote the well-being of those affected without violating other important values embodied in law. This paper requires analysis of those relevant values and of the significance of those values for the most justified approach to defining and pursuing individual and public well-being. The analysis presented here provides a preliminary example of such an analysis that addresses human dignity as one value relevant to the most justified application of police power and parens patriae interventions to individuals with mental illness.

I INTRODUCTION

The police power and *parens patriae* functions of the state authorise coercive interventions into ordinarily protected individual liberties to protect the interests of the public or of the individual. The police power is the state's authority 'to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.'¹ The state applies the police power through a variety of institutions, including the criminal law and civil commitment. '*Parens Patriae*' refers to 'the state in its capacity as a provider of protection to those unable to care for themselves.'² An incapacitated person 'is impaired by an intoxicant, by mental illness or deficiency, or by physical illness or disability to the extent that personal decision-making is impossible.'³ Thus, the state exercises *parens patriae* power when it provides protection to individuals who lack the ability to make reasoned decisions regarding their well-being. The state applies the police power and *parens patriae* interventions to persons who manifest psychological impairment through a variety of institutional structures.

A therapeutic jurisprudence ('TJ') approach to police power or *parens patriae* interventions would develop rules and standards designed to promote the well-being of those affected in a manner consistent with other values embodied in the relevant law including the applicable principles of justice.⁴ In this respect, TJ provides a specific example of the application of social science research to law reform with the purpose to promote the well-being of those affected in a manner consistent with other relevant values. Respect for human dignity ('HD') is a value that has been identified as relevant to many areas of law, although it often lacks a clear definition and

* Robert F Schopp, PhD Psychology (North Carolina State University), JD (University of Arizona), PhD Philosophy (University of Arizona); Robert J Kutak Professor of Law, Professor of Psychology, Professor of Philosophy (University of Nebraska).

¹ Bryan A Garner (ed), *Black's Law Dictionary* (Thomson West, 10th ed, 2014) 1345 ('*Black's Law Dictionary*').

² *Ibid* 1287.

³ *Ibid* 878.

⁴ David Wexler and Bruce Winnick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii-xx.



standard of application.⁵

This paper examines the interpretation and application of a relevant conception of HD to police power or *parens patriae* interventions. It considers the significance of HD for selecting alternative applications of police power or *parens patriae* intervention for specific individuals, or categories of individuals, who manifest some form and degree of psychological disorder. Part II presents hypothetical individuals who raise questions about the most justified forms of police power or *parens patriae* intervention. Part II also identifies several relevant societal values regarding each category of intervention. Part III interprets the significance of HD as a value central to the justifications of several police power interventions. Part IV interprets the significance of HD as a value central to the justification of various *parens patriae* interventions. Part V concludes the analysis.

II COERCIVE INTERVENTIONS

A *Police Power Interventions*

Consider three potential subjects of police power intervention. Anders attempts to cut into a long line of people waiting to get into a theatre. He assaults a victim who refused to allow him to cut into the line. He has a history of aggression, and he has been diagnosed with antisocial personality disorder.⁶ Baker assaults a person walking behind him on the sidewalk. He has been diagnosed with a delusional disorder.⁷ He believes that a group of business competitors are conspiring to destroy his business, and he realises that the same person has been walking behind him for several blocks. He concludes that his competitors have hired this individual to kill him in order to eliminate him as a competitor. He suddenly turns and assaults that person in delusional self-defence. Cook assaults a person behind him in a long line of customers waiting to get into a theatre. That person repeatedly told him to move along when Cook became distracted and failed to move, allowing others to cut into line in front of him. After several others have stepped into line ahead of Cook, the person behind Cook yelled at him ‘move it retard.’ Cook assaults him in anger. Cook has been diagnosed with mild intellectual disability and intermittent explosive disorder.⁸

Consider four alternative applications of the police power designed to address and prevent conduct that harms or endangers others by individuals with psychological impairment. Some individuals might be subject to a criminal trial resulting in a guilty verdict and a criminal sentence. Others might be subject to a criminal trial resulting in a verdict of not guilty by reason of insanity, followed by post-acquittal commitment and treatment.⁹ Some might appear before a mental health court, plead guilty, and receive a suspended sentence and monitored treatment as a condition of probation.¹⁰ Others might be subject to civil commitment based on a determination

⁵ Leslie Meltzer Henry, ‘The Jurisprudence of Dignity’ (2011) 160 *University of Pennsylvania Law Review* 169.

⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed, 2013) 659 (‘*DSM-5*’).

⁷ *Ibid* 90.

⁸ *Ibid* 33–41 (mild intellectual disability), 466–69 (intermittent explosive disorder).

⁹ Wayne R LaFave, *Criminal Law* (West, 5th ed, 2010) § 7.1.

¹⁰ Allison D Redlich, ‘Voluntary, But Knowing and Intelligent? Comprehension in Mental Health Courts’ (2005) 11(4) *Psychology, Public Policy and Law* 605, 606.

of mental illness and dangerousness to others, leading to inpatient confinement and treatment or to mandated outpatient treatment.¹¹

What justifies one of these alternatives as most appropriate for each offender? Anders has a history of violence against others. He has no substantial impairment of the psychological capacities that render him criminally responsible. The pattern of antisocial behaviour manifested by this disorder frequently continues, resulting in criminal punishment intended to incapacitate and deter.¹² The most appropriate police power intervention would ordinarily be criminal trial and punishment proportionate to the severity of his offence. Baker reveals psychotic distortion of perception and reasoning that leads him to purposefully cause injury to his victim. He fulfils the offence elements for assault, but he is not blameworthy or appropriate for criminal punishment due to his delusional fear.¹³ What justifies a criminal trial generating an insanity defense, post-acquittal commitment, and appropriate treatment, or civil commitment as mentally ill and dangerous leading to treatment?¹⁴ Cook resembles Baker in that he fulfils the offense elements for assault, and he manifests impairment that contributed to his criminal conduct. He differs, however, in that his impairment does not distort his reality recognition in a manner that would meet the requirements of an insanity defense.¹⁵ What justifies a criminal trial and punishment proportionate to his culpability for the offense or one of the alternatives? These include trial in a mental health court, a guilty plea, and suspended sentence with treatment conditions. Alternately, he might be subject to civil commitment as mentally ill and dangerous to others, leading to treatment and behaviour management.

B *Parens Patriae Interventions*

Consider three potential subjects of *parens patriae* intervention. Davis is a competent adult who manifests no psychological disorder. He refuses surgery that has been recommended as necessary for a potentially lethal tumor in his brain. He has spent his adult life as a professor translating ancient Chinese texts, and he has been informed that the side effects of the surgery include a serious risk of impaired capacities that would prevent him from completing a translation that he pursues as the crowning achievement of his life's work. He concludes that the potential side effects would prevent him from completing his lifelong project, resulting in a wasted life. He explains, 'I would rather live fully for a shorter period than drag out a failed life.' East has an extended history of chronic schizophrenia.¹⁶ He refuses surgery considered necessary to resolve a potentially life-ending physical illness. He refuses the surgery because the hallucinatory voice of God warns him that the surgeons are agents of Satan who conspire to send him to hell.

Fren has been seriously but not psychotically depressed throughout his life.¹⁷ He has tried

¹¹ *Nebraska Mental Health Commitment Act*, Neb Rev Stat § 71-925(4) (2009). I cite Nebraska statutes as examples of similar provisions that are common in the United States. I do not claim that Nebraska statutes carry any authority beyond Nebraska.

¹² *DSM-5*, above n 6, 660–61.

¹³ Model Penal Code § 211.1 (Proposed Official Draft 1962).

¹⁴ LaFave, above n 9; Neb Rev Stat § 71-925(4) (2009). See text accompanying footnote 12.

¹⁵ LaFave, above n 9, §§ 7.2, 7.5.

¹⁶ *DSM-5*, above n 6, 99–105.

¹⁷ *Ibid* 160–68.

various forms of treatment, and some have ameliorated his depression somewhat for short periods, but then the deep depression always returns. He attempted suicide by ingesting a potentially lethal overdose of medication. By coincidence, his cousin came by his apartment to visit, found him unconscious, and rushed him to the emergency room where his death was prevented. After physical recovery in the hospital, he was civilly committed as mentally ill and dangerous to himself.¹⁸ After thirty days in the inpatient facility, he has a review hearing to determine whether he should be discharged, released to mandated outpatient care, or retained in inpatient care.¹⁹ At the hearing, the clinical evidence affirms that he remains seriously depressed, but he does not experience any distortion of his abilities of reality recognition, comprehension, or reasoning. When asked why he attempted suicide, he states ‘life is not worth this constant sadness. All the treatment only ameliorates my depression somewhat for a little while. Then the endless severe depression returns. Let me out of here, so I can do it right this time.’

Consider alternatives forms of *parens patriae* interventions designed to prevent a person with serious psychological impairment from harming or endangering himself actively or passively. Civil commitment applies to an individual who is mentally ill and due to his mental illness endangers himself actively or passively due to his inability to provide basic needs and safety.²⁰ Alternatively, a court may appoint a guardian to provide care or supervision for an individual who is unable to make responsible decisions for himself due to mental illness.²¹ A guardian may provide custody and consent to care for that incapacitated person.²² A person subject to civil commitment or determined to be incompetent to make self-regarding treatment decisions can receive treatment for his impairment to prevent harm to self.²³ Although civil commitment does not constitute a finding of incompetence, commitment statutes can include a right to refuse treatment but provide exceptions that do not require a formal finding of incompetence.²⁴

What justifies *parens patriae* intervention under one or more of these alternatives for each of the individuals described? Davis has no psychological impairment and qualifies for no diagnosis of psychopathology. Therefore, he does not meet the mental illness criterion for civil commitment.²⁵ He retains the psychological capacities that render him competent to consent, or to refuse consent, to treatment for his physical illness according to his own priorities.²⁶ Thus, neither civil commitment nor incompetence and guardianship statutes apply to him because he retains essential psychological capacities, such as reality recognition, comprehension, and reasoning and the ability to apply these capacities to decision making regarding his interests. The primary concern regarding his decision requires that Davis receive accurate information regarding the probability and severity of side-effects from the treatment, as well as accurate information regarding the likely effects of refusing treatment.

East manifests psychotic distortion of reality recognition, comprehension, and reasoning. Due to

¹⁸ Neb Rev Stat § 71-908(2) (2008).

¹⁹ Ibid § 71-935 (2008).

²⁰ Ibid § 71-908(2) (2008).

²¹ Ibid § 30-2601(1), 2620 (2008) Protection of Persons Under Disability and Their Property.

²² Ibid § 30-2628(1), (3) (2008).

²³ Ibid §§ 30-2628(3) (2008), 71-959(3) (2009).

²⁴ Ibid § 71-959(3) (2009).

²⁵ Ibid § 71-907 (2009).

²⁶ *Cruzan v Director, Missouri Department of Health*, 497 US 261 (1989) 277–79.

this impairment, he lacks minimally adequate capacity to make responsible decisions regarding this recommended surgery or regarding his well-being generally.²⁷ What reasoning justifies one of the following alternatives as most appropriate for East? A finding of general incompetence and guardianship for person and property would authorize the guardian to make decisions for East, including consent for the surgery at issue.²⁸ Alternately, a limited finding of incompetence to make decisions regarding this surgery would authorize an appointment of a guardian limited to this matter of treatment for his physical condition.²⁹ Finally, East might be subject to civil commitment as he is mentally ill and dangerous to himself, due to his mental illness.³⁰ Treatment rendered during his commitment might restore his ability to make competent decisions regarding the surgery.

Fren manifests a serious but not psychotic depressive disorder that renders him a danger to himself, but does not distort his perception, comprehension, or reasoning similar to that manifested by East.³¹ His impairment contributes to his plan to commit suicide, but it does not do so by distorting his capacities of competent decision making. Rather, it provides the motivation to conclude that continuing to live is not worth the cost of enduring his depression. What reasoning justifies one of the following alternatives? He might be subject to continued inpatient commitment as mentally ill and dangerous to himself.³² Alternately, he might receive involuntary treatment during inpatient or outpatient commitment to prevent suicide despite his refusal to consent to treatment.³³ Finally, he might be released from commitment while dangerous to himself.

C *Relevant Police Power Values*

A TJ approach to the state's exercise of the police power would be designed to promote the well-being of those affected without violating other values embodied in law.³⁴ Development of such interventions requires consideration of other values addressed by various police power interventions. The state exercise of the police power is intended to protect the public from harm by reducing risk of crime by this offender and by others.³⁵ Police power institutions discipline state intrusion into individual liberty by requiring clear criteria and a rigorous standard of proof. These institutions address some offenders through the criminal justice process in a manner consistent with their legal guilt and moral blameworthiness.³⁶ Alternately, the state can apply a different institution, such as civil commitment for those who harm or endanger others due to mental illness that significantly reduces their blameworthiness, rendering them more appropriate for treatment than for punishment.³⁷

Ideally, the state will pursue this police power function in a manner consistent with respect for

²⁷ Neb Rev Stat § 30-2601(1) (2008).

²⁸ Ibid §§ 30-2620, 2628(3) (2008).

²⁹ Ibid § 30-2620 (2008).

³⁰ Ibid § 71-908(2) (2009).

³¹ *DSM-5*, above n 6, 160–68 (serious but not psychotic depression).

³² Neb Rev Stat § 71-908 (2009).

³³ Ibid § 71-959(3) (2009).

³⁴ Wexler and Winnick, above n 4.

³⁵ *Black's Law Dictionary*, above n 1.

³⁶ *Roper v Simmons*, 543 US 551 (2005) 598–604 (O'Connor J, dissenting).

³⁷ Neb Rev Stat § 71-908 (1) (2009).

HD. Some United States Supreme Court opinions refer to HD in addressing the constitutionality of criminal punishment, but they provide no clear explanation regarding what constitutes HD in the context of criminal punishment or clear reasoning to support these assertions.³⁸

D *Relevant Parens Patriae Values*

Values relevant to the determination whether *parens patriae* intervention is justified, and to the selection of the most justified form of such intervention include at least the following. Institutions such as civil commitment or appointment of a guardian for an incompetent individual are designed to protect the well-being of the individual who manifests impairment of capacity that renders him unable to protect his own well-being.³⁹ The requirements of inability to meet ordinary demands of living for civil commitment and inability to make responsible decisions for guardianship reflect respect for the unimpaired individual's right to make primarily and directly self-regarding decisions.⁴⁰ In this manner, relevant law disciplines state intrusion into individual liberty by limiting involuntary state *parens patriae* interventions to individuals with serious mental impairment that renders them unable to define and pursue their own interests by making responsible self-regarding decisions. These limitations of state authority to interfere with self-regarding decisions reflect respect for HD as the unique standing of at least minimally capable human beings to make reasoned decisions regarding the values and interests that they identify as important to the individual lives they pursue.

III POLICE POWER INTERVENTIONS AND HUMAN DIGNITY

A *Mental Disorder and HD*

Consider two questions regarding the significance of HD for the justified application of the police power to individuals with mental disorders. First, what justifies various forms of police power intervention in response to criminal conduct by persons with varied forms and severity of psychological impairment? Second, in what manner should respect for HD inform the most justified form of police power intervention for impaired individuals?

Ted Kaczinski (the 'unabomber') reportedly refused to allow his attorney to present a plausible insanity defense in a criminal trial with the potential to apply severe punishment.⁴¹ He apparently considered the insanity defense demeaning because he thought himself to be a rebel against societal oppression. An insanity defense would insult him and undermine his efforts to resist oppression. He was apparently willing to risk capital punishment, rather than present an insanity defense. He received a sentence of life in prison.⁴²

The criminal justice system provides an institution of coercive social control uniquely applicable to humans as responsible agents with the ability to direct their conduct through the application of the capacities of responsible agency, including reality recognition, comprehension, and reasoning. These uniquely human capacities enable at least minimally capable humans to direct

³⁸ See, eg, *Gregg v Georgia*, 428 US 153 (1976) 183–84 (plurality opinion), 239–41 (Marshall J, dissenting).

³⁹ *Black's Law Dictionary*, above n 1, 1287.

⁴⁰ Neb Rev Stat §§ 71-907 (2009) (civil commitment), 30-2601(1) (2008) (guardianship).

⁴¹ Michael Mello, *The United States of America versus Theodore John Kaczinski* (Context, 1999) 139–41.

⁴² *Ibid* 139–40.

their conduct in a manner consistent with the morally relevant reasons that justify such conduct.⁴³ Those who possess these capacities qualify for capacity responsibility in that they possess the capacities of responsible agency. These capacities render them appropriate subjects of praise or blame for the conduct they pursue through the exercise of these uniquely human capacities. Capacity responsibility constitutes a necessary condition to justify subjecting the individual to liability responsibility in the form of criminal punishment, with its inherent expression of condemnation for criminal conduct as culpable wrongdoing.⁴⁴

Anders, Baker, and Cook all commit criminal assault and meet the criteria for clinical diagnoses, but we respond to them differently. The different responses reflect the variations in type and degree of impairment and the role of each individual's impairment in his assaultive conduct. These variations result in different assessments of responsibility and blameworthiness, as well as different expectations of intervention effectiveness in preventing further offenses.

Compare an incident in which a bear attacks a camper in a campground. Authorities track the bear and relocate or kill the bear based on estimate of risk, available alternatives, presence of cubs, and the state of the species as sufficient population or threatened.⁴⁵ These decisions are based on practical considerations and priorities rather than assessment of blameworthiness. In contrast, criminal law and punishment reflects the unique standing of at least minimally capable humans as responsible agents. The previously identified uniquely human abilities of capacity responsibility render unimpaired humans capable of engaging in moral reasoning and directing their conduct according to that reasoning.⁴⁶ Thus, they are appropriate subjects of liability responsibility in the form of criminal punishment with its inherent expression of condemnation when they culpably misapply these abilities.⁴⁷

Compare Anders, Baker, and Cook regarding the most justified form of police power intervention. Arguably, Anders deserves criminal punishment for his culpable assault because his antisocial personality disorder does not include serious impairment of the capacities of responsible agency such as reality recognition, comprehension, or reasoning.⁴⁸ The pattern of criminal conduct reveals a lack of empathy or conscience. Thus, the clinical diagnosis of antisocial personality disorder does not involve impairment that precludes or mitigates culpability for criminal conduct. Furthermore, this disorder is generally a chronic condition, although it might partially remit as the individual ages.⁴⁹ Criminal punishment is proportionate to culpable wrong doing and serves the incapacitation function and possibly the deterrence function.

Baker's impairment undermines capacity responsibility. His distortion of reality recognition and reasoning renders him unable to function as a responsible individual in an institutional structure

⁴³ Robert F Schopp, *Competence, Condemnation, and Commitment* (APA, 2001) 150 (discussing the capacities required for retributive competence).

⁴⁴ Robert Audi (ed), *Cambridge Dictionary of Philosophy* (Cambridge, 2nd ed, 1999) 794 ('*Cambridge Dictionary of Philosophy*'); Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, 1970) 95–101.

⁴⁵ Denali National Park and Preserve, *Bear-Human Conflict Management Plan* (2009) 28–29.

⁴⁶ *Cambridge Dictionary of Philosophy*, above n 44, 794.

⁴⁷ *Ibid.*

⁴⁸ *DSM-5*, above n 6, 659–63.

⁴⁹ *Ibid.* 661.

designed for those with capacity responsibility. Thus, it renders him inappropriate for liability responsibility and not deserving of the punitive treatment and expression of condemnation inherent in criminal punishment. An insanity defense and post-acquittal commitment follows a rigorous criminal trial that condemns the wrong to the victim and reaffirms the wrongfulness of such behaviour to the public.⁵⁰ However, it might delay the most appropriate treatment for the defendant. Alternately, if the insanity defense fails, Baker might serve a sentence in a correctional facility that is less likely to promote the well-being of Baker or of the public by providing effective treatment for his delusional disorder. Civil commitment is more likely to facilitate timely appropriate clinical treatment, but it lacks the explicit condemnation of the wrong to the victim.

Cook is criminally responsible but less blameworthy than Anders. He manifests impairment of the abilities of responsible agency as compared to an unimpaired individual.⁵¹ He retains those abilities to a degree sufficient to meet a minimal standard for capacity responsibility, and therefore, for liability responsibility. Thus, Cook raises the question regarding what reasoning would render him most appropriate for one of the following interventions. Criminal conviction with less severe punishment than applied to unimpaired offenders expresses condemnation of the criminal conduct and reaffirms the standing of Cook as an at least minimally responsible agent and of the victim as one who merits protection under the law. It is not likely, however to provide timely and clinically appropriate treatment. Disposition to a mental health court that requires a guilty plea and treatment conditions of probation fulfils the expressive functions of the criminal court and facilitates treatment.⁵² Thus, it has the potential to promote the well-being of the public and of the offender. Civil commitment is perhaps the most efficient alternative for providing treatment. Commitment would place Cook in a mental health facility without the delay required to complete a criminal trial. However, the lack of a criminal trial and expression of condemnation might dilute respect for the victim as one who merits protection under the law and for the offender as an at least minimally responsible person.

B *HD as Status and Demeanour*⁵³

In ordinary language, dignity refers to ‘[t]he quality of being worthy or honourable; true worth, excellence.’⁵⁴ Human, as an adjective, refers to properties that are ‘characteristic of human kind or people ... of the activities, relationships, etc. of human beings, esp. as distinct from those of lower animals.’⁵⁵ Thus, ‘human dignity’ is reasonably interpreted as referring to the uniquely human characteristics that render humans capable of pursuing lives that manifest the worthy and honourable exercise of those characteristics. Such lives reflect the development and exercise of defensible principles of virtue and justice that distinguish honourable human lives from dishonourable human lives and from the lives of lower animals. This interpretation is consistent

⁵⁰ Schopp, above n 43, 144–51 (discussing the relationship between retributive competence and the five types of condemnation expressed by criminal punishment).

⁵¹ *DSM-5*, above n 6, 33–41, 466–69 (discussing the impairment in mild intellectual disability and intermittent explosive disorder).

⁵² Redlich, above n 10.

⁵³ For a more complete analysis of HD in this context see Robert F Schopp, ‘Competence for Execution, Human Dignity, and the Expressive Functions of Punishment’ (2016) 52 *Criminal Law Bulletin* 273.

⁵⁴ Lesley Brown (ed), *New Shorter Oxford English Dictionary* (Oxford, 1993) 671, 671.

⁵⁵ *Ibid* 1276.

with the philosophical concept of dignity as ‘a moral worth or status usually attributed to human persons.’⁵⁶

Discussion of human dignity often includes Kant’s account of human dignity as ‘grounded in the capacity for practical rationality.’⁵⁷ Kant discusses humanity as having dignity insofar as humans are rational beings capable of morality.⁵⁸ Kant addresses the capacity to act on the basis of reason that one can will to serve ‘as a universal law (for all rational beings).’⁵⁹ ‘[T]he dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the law he makes.’⁶⁰ This Kantian interpretation of dignity that is uniquely applicable to humans reveals roots in the uniquely human capacities such as reality recognition, comprehension, and practical reasoning that enable at least minimally competent humans to direct their conduct in a manner consistent with the morally relevant reasons that justify such conduct.⁶¹

Respect for HD requires recognition of the distinction between HD as status based upon the uniquely human capacities of responsible agency and HD as demeanour as a pattern of behaviour that reflects the responsible exercise of those capacities.⁶² Respect for individuals with at least minimally adequate capacities of responsible agency requires that we respect their right to direct their own conduct within the limits of protected liberties and that we hold them responsible for conduct that culpably violates limits established by the criminal law.⁶³ Criminal punishment for culpable criminal conduct expresses condemnation of that person’s demeanour as conduct that involves the culpable misuse of the uniquely human capacities. In contrast, it also expresses respect for his standing as a one who possesses the capacities of responsible agency that qualify one for HD as status. Arguably, if HD is interpreted as based entirely on capacity, with no requirement of at least minimally responsible exercise of those capacities, it is difficult to explain why those capacities provide any basis for respect for those who were born with them and thus, were not primarily responsible for having them.

Criminal punishment with an inherent expression of condemnation expresses condemnation of a category of behaviour by defining it as a criminal offence that merits punishment. Convicting a defendant of a specific instance of that conduct reaffirms that condemnation of the prohibited category, and condemns this specific conduct as a wrongful instance of that condemned category. Conviction also condemns the offender as a responsible agent who culpably committed that criminal act.⁶⁴ By expressing condemnation of the culpable criminal offender’s criminal conduct, criminal punishment reaffirms the standing of the offender as one who qualifies for HD as the status of an individual who possesses the capacities of responsible agency in contrast to the bear discussed previously. However, it condemns the offender’s exercise of his uniquely

⁵⁶ *Cambridge Dictionary of Philosophy*, above n 44, 234.

⁵⁷ *Ibid* 235.

⁵⁸ Immanuel Kant, *Groundwork of the Metaphysic of Morals* (HJ Paton trans, Harper, 1964) 102 [77] – 104 [81].

⁵⁹ *Ibid* 104 [84].

⁶⁰ *Ibid* 107 [87].

⁶¹ Schopp, above n 43, 150 (discussing the capacities required for retributive competence).

⁶² John Kleinig and Nicholas G Evans, ‘Human Flourishing, Human Dignity, and Human Rights’ (2013) 32 *Law and Philosophy* 539, 553–55.

⁶³ Schopp, above n 43, 197–200.

⁶⁴ *Ibid* 144–48.

human capacities as diluting respect for HD as demeanour in proportion to the severity of the offense and the offender's culpability.

C Compare the Three Offenders and the 'Unabomber'

According to this interpretation, the 'unabomber's' conviction and sentence reaffirmed his HD as status as one with capacity responsibility, but it condemned his conduct and his HD as demeanour as manifested in this conduct.⁶⁵ It appears that he understood his conduct as justified rebellion against illegitimate societal domination, so he might interpret societal condemnation as reaffirming his status as a rebel with a just cause. A successful insanity defense, in contrast, would assert that he lacked the uniquely human capacity responsibility regarding this conduct, implying that he did not qualify for full standing as one with HD as status for this conduct.⁶⁶ Thus, it appears likely that his resistance to the insanity defense revealed his recognition that a successful insanity defense would deny that he qualified for full standing as HD.

Anders resembles the unabomber insofar as his conviction and punishment reaffirm his status as a responsible agent, but it condemns his conduct as culpable wrong doing. In doing so, it denies that he merits respect for HD as demeanour regarding that conduct. Arguably, Anders is less problematic than the Unabomber in that there was no plausible concern that he lacked the capacities of responsible agency. Thus, he qualifies for HD as status and is fully accountable for the criminal conduct that undermines his HD as demeanour.

Baker's insanity defense subjects him to the criminal trial process appropriate for a person similar to Anders who is presumed to qualify for HD as status, but the insanity verdict denies that he qualifies for full standing as a responsible agent regarding this specific conduct. It withholds condemnation inherent in punishment, reflecting Baker's lesser status as one who does not qualify as a responsible agent regarding this crime. Because the insanity defense is specific to this offender and this offense, it does not represent the judgment that Baker lacks full standing as a responsible agent for all conduct or that the general category of persons with mental illness lack full standing as responsible agents. By applying the insanity verdict, the court affirms the judgement that this conduct was a criminal wrong against the victim that merits condemnation. Thus, it reaffirms the standing of the victim as one who qualifies for protection under the criminal law. Applying civil commitment, rather than a criminal trial, to Baker might provide appropriate treatment more efficiently. One important cost of foregoing the criminal trial, however, would be the failure to explicitly condemn this conduct as a crime against the victim.

Common formulations of the insanity defense excuse individuals who do not know or appreciate that their conduct is wrongful due to mental disease or defect.⁶⁷ Alternative formulations refer to the failure to know the nature and quality of the criminal conduct, or that it was wrongful, due to 'disease of the mind.'⁶⁸ Terms such as 'disease of the mind' or 'mental disease' do not identify clinical diagnostic categories. Thus, courts and expert witnesses sometimes have some difficulty in clearly communicating the application of these standards.⁶⁹

⁶⁵ See above n 41–44 and accompanying text in Part IIIA.

⁶⁶ See Kleinig and Evans, above n 62; Schopp, above n 43 addressing HD as status.

⁶⁷ LaFave, above n 9 § 7.5.

⁶⁸ Ibid § 7.2.

⁶⁹ Schopp, above n 43, 44–49.

Although the lack of convergence between legal and clinical terms can result in such difficulties in communication, it might serve a positive function in avoiding one type of distortion of HD. If legal standards for the insanity defense defined standards in terms of clinical diagnostic categories, they would generate two types of distortions of HD. First, individuals who qualify for specific diagnostic categories can vary substantially in their specific form and severity of impairment, as well as in the relationships between their impairment and specific criminal conduct. Thus, applying legal standards by diagnostic category has the potential to apply identical legal verdicts and dispositions to individuals who vary substantially in criminal conduct and responsibility.

Consider, for example, Baker² who resembles Baker in that he manifests a delusional disorder. Baker² is a criminal drug dealer who sells illegal drugs and engages in threats and violence in order to advance his drug sales. He develops a delusional belief that some unidentified family members are stealing his drugs and profits. He is unable to identify which family members are involved, so he hides his drugs and secretly monitors family members. During this period, another drug dealer begins to sell illegal drugs in Baker²'s area. Baker² assaults that competitor in order to drive him out of the area and protect his sales. Baker² resembles Baker in that both manifest delusional disorders, and both commit assault. They differ in criminal responsibility, however, because Baker's criminal conduct is the product of his delusional belief and the resulting fear. Baker²'s criminal conduct, in contrast, is part of his ongoing criminal endeavour and unrelated to his delusional disorder. Thus, similar dispositions based on a clinical diagnostic category would address at least one of these offenders in a manner that distorted the applicable principles of justice.

In addition to addressing differently culpable offenders similarly, defining appropriate legal responses by diagnostic categories would undermine respect for the HD of all members of those categories. Many individuals with delusional disorders experience the distress and impairment produced by their delusions, but they refrain from engaging in criminal conduct. If the legal institutions were to address all individuals in specified diagnostic categories as lacking competence or responsibility, those institutions would deny that any individuals with those disorders fully qualify for HD as status. The United States Supreme Court has categorically exempted intellectually disordered offenders from capital punishment.⁷⁰ Many might agree with this exemption because they believe that no one should be eligible for capital punishment. By retaining capital punishment as constitutional for fully culpable offenders but exempting intellectually impaired persons as a category, however, the Court implicitly states that no individual in this diagnostic category qualifies as a fully responsible person, and thus, for full standing as HD.

In contrast to Baker, Cook's impairment does not meet the insanity defense standard. Ordinary criminal trial and punishment comparable to that imposed on an unimpaired offender arguably would violate standards of comparative justice because it would treat him as fully culpable, although due to his impairment, he is less culpable than an unimpaired offender who commits a similar crime.⁷¹ Civil commitment might be likely to provide appropriate treatment in an

⁷⁰ *Atkins v Virginia*, 536 US 304 (2002).

⁷¹ See *DSM-5*, above n 6.

efficient manner, but applying civil commitment rather than the criminal trial that would be applied to other citizens who engaged in similar conduct would deny that he qualifies for standing as a responsible agent. Thus, it would deny that he fully qualifies for HD as status. A guilty plea in a mental health court with a suspended sentence and conditions of probation involving psychological treatment would arguably be the approach most consistent with respect for HD because it would neither treat Cook as fully responsible nor as not responsible.⁷² Thus, it would recognise that some individuals possess to some degree the capacities that provide the foundation for HD as status, but it would recognise that individuals can vary in the degree to which they possess those capacities, and therefore in their severity of blameworthiness for some conduct.

IV PARENS PATRIAE INTERVENTIONS AND HUMAN DIGNITY

A *HD and the Three Endangered Individuals*

Davis, East, and Fren (see Part IIB) draw attention to two questions central to the principled interpretation and application of *parens patriae* interventions in a manner that respects HD and protects well-being. First, what constitutes the most justified form of *parens patriae* interventions to each individual in the circumstances encountered in a manner consistent with respect for HD? Second, what type and severity of impairment should be relevant to selecting the most justified form of *parens patriae* intervention for impaired individuals in a manner consistent with respect for HD?

As discussed in Part IIIB, ‘human dignity’ is reasonably interpreted as referring to the status of those who possess the uniquely human characteristics that render humans capable of pursuing lives that manifest the worthy and honourable exercise of those characteristics. Discussion of human dignity often includes Kant’s account of human dignity as ‘grounded in the capacity for practical rationality.’⁷³ Those who possess these capacities qualify for capacity responsibility in that they possess the capacities of responsible agency. At least minimally adequate capacities of responsible agency enable one to identify and responsibly pursue the personal values, projects, and relationships of one’s uniquely human life. Thus, at least minimally adequate capacity responsibility provides the basis for role responsibility regarding the development of the values, projects, and relationships that define the core of one’s life.⁷⁴ Many individuals might seek to maximise the length of their lives. Some individuals, such as Davis, might define the meaning of their lives in certain projects or relationships. Insofar as Davis has pursued his translations as central to the purpose of his individual life, he might reasonably decide that completing his crowning translation has more value than maximising the duration of his life.

According to this interpretation, human dignity as status in the context of self-regarding conduct reflects the standing of those who possess the uniquely human capacities of responsible agency. These include minimally adequate capacities, such as reality recognition, comprehension, and reasoning that enable humans who qualify for capacity responsibility to define and pursue a meaningful human life through the exercise of the uniquely human capacities of practical

⁷² See Redlich, above n 10.

⁷³ Kant, above n 58, 102 [77]–104 [81].

⁷⁴ See discussion above, page 10.

reasoning in light of the values and priorities they have identified as central to the lives they pursue. Thus, possession of these capacities provides the basis for role responsibility for the manner in which each individual exercises these capacities in the process of developing that person's life.⁷⁵

Davis, East, and Fren each endanger themselves, but we respond to them differently due to variations in: (1) type and degree of impairment, (2) the role of that impairment in the self-endangering conduct, and (3) the manner and degree to which they are able to apply the uniquely human capacities of responsible agency to the decision at issue. Respect for HD requires responses to Davis, East, and Fren that reflect the differences in the manner and degree to which each possesses and applies the uniquely human capacities that provide the foundation for HD as status. Davis possesses the uniquely human capacities that qualify him as a competent adult with the right to make primarily and directly self-regarding decisions, including the decision to consent or refuse consent to treatment. The capacities that qualify him as competent for self-regarding decisions fulfil the requirements of capacity responsibility for the role of a self-directing person. The decision to accept, or reject, treatment falls within his role responsibility as a competent adult who defines the priorities central to his individual life.

East's severely psychotic condition impairs his comprehension and reasoning to a degree that renders him incompetent to make self-regarding decisions. These impaired capacities undermine his standing as one who qualifies for role responsibility regarding primarily and directly self-regarding decisions. Thus, he lacks full standing as a responsible agent due to the impairment of the uniquely human capacities that provide the foundation for HD. He retains some degree of these capacities, however, and he might remain competent to make reasoned decisions regarding some matters. Treatment designed to ameliorate his psychotic impairment might improve the capacities that provide the foundation for full standing as a responsible person.

Fran presents the most controversial case because he manifests a serious clinical disorder that clearly influences his decision, but the disorder is not one that involves serious distortion of reality recognition, comprehension, or reasoning. Thus, he retains the abilities that constitute capacity responsibility and provide the foundation for role responsibility regarding decisions that define the individual human life he pursues. What response to Fran is most consistent with respect for HD?

Respect for HD in the context of *parens patriae* interventions requires recognition of the previously discussed distinction between HD as status and as demeanour.⁷⁶ Respect for individuals with at least minimally adequate capacities of responsible agency requires that we respect their HD as status by respecting their right to direct their own primarily and directly self-regarding conduct within the limits of protected liberties. By exercising that right, each person defines the values and priorities central to that person's uniquely human life. Refusal to recognise the competent person's right to define and pursue that person's values and priorities denies that person's standing as an individual with the role responsibility to define and pursue an individual human life. Arguably, if an institutional structure addresses HD as based entirely on capacity, with no recognition of a right to exercise those capacities in defining and pursuing

⁷⁵ Ibid.

⁷⁶ See above n 62–63 and accompanying text in Part IIIB.

one's principles and priorities, it is difficult to justify the proposition that this institutional structure reflects respect for HD.

The capacities that qualify one as a competent adult with the authority to make self-regarding decisions include the uniquely human capacities of responsible agency, such as reality recognition, comprehension and reasoning that enable an individual to define and direct an individual human life according to the values that this person competently embraces. In the context of civil competence for person and property, these are defined as the capacity to make and communicate reasoned decisions regarding person and property.⁷⁷ The capacities of responsible agency that provide the foundation for liability responsibility in the context of criminal law and punishment converge with the capacities that provide the foundation for role responsibility as one who pursues certain values and projects as central to one's uniquely human life. Although phrased in different terms, standards for the insanity defense that address the person's ability to know or appreciate the nature, quality, and wrongfulness of his conduct converge with standards of competence in that both require at least minimally adequate capacities to recognise and reason about reality and the likely effects of one's conduct or decisions.⁷⁸ Thus, a person who possesses these capacities to an at least minimally adequate degree has the ability to define and pursue the projects and priorities that person has identified as central to the life he pursues. These capacities also render him responsible for the conduct he performs through the exercise of these capacities.

The point here is not that each individual must be competent and responsible for all functions or for none. Some individuals might manifest impairment that undermines capacity responsibility for some functions but not others. Encapsulated delusions, for example, might distort one's capacity responsibility for some matters but not for others. Recall, for example, Baker² who manifests encapsulated delusions that distort his relationships with family members but do not preclude responsibility for his criminal conduct.⁷⁹ The point is only that a common set of capacities shared by adults who lack serious impairment provides the foundation for HD as status in the context of eligibility for police power and *parens patriae* interventions.

B *Compare Davis, East, and Fren*

Davis possesses capacity responsibility to the degree that qualifies him for role responsibility as a competent adult with the right to make primarily and directly self-regarding decisions. This provides the basis for individual liberty regarding primarily and directly self-regarding behaviour and for constraint on state intrusion into protected liberties. The combination of capacity responsibility and awareness of his preferences and principles places him in a better position than others to make decisions regarding his well-being insofar as one understands his well-being as measured by the principles and preferences he adopts as central to the individual human life he pursues. Respecting his decision to refuse treatment because completing the crowning project of his life's work is more important than maximising the duration of his life by his priorities reflects respect for his HD as status and demeanour.

⁷⁷ Neb Rev Stat § 30-2601 (1) (2008).

⁷⁸ Compare insanity standards, La Fave, above n 9.

⁷⁹ See above n 69–70 in Part IIIC, discussing Baker² as an example of an individual with encapsulated delusions.

As interpreted here, HD as demeanour refers to the principled, honourable exercise of the capacities that render one eligible for HD as status.⁸⁰ Understood in this manner, HD as demeanour can vary in degree and consistency. An individual with at least minimally adequate capacities that provide the foundation for HD as status is competent to define and pursue his uniquely human life. Each person's responsible exercise of HD as status defines that person's HD as demeanour.

East's psychotic distortion of perception, comprehension, and reasoning renders him unable to make reasoned decisions regarding his own conduct and well-being generally and regarding the needed surgery specifically. His impaired capacity responsibility undermines his status as a competent adult who has the ability to fulfil the role responsibility to competently make his own self-regarding decisions. Thus, it undermines his right to liberty from state intrusion and provides a reasonable argument for a state obligation to apply paternalistic intervention to protect his well-being.⁸¹ State intervention through civil commitment and treatment provides a reasonable intervention designed to promote his psychological well-being and possible recovery of his capacity responsibility. A finding of incompetence for person and appointment of a guardian promotes the ability of others to protect his well-being by providing the necessary surgery. A finding of incompetence and guardianship might be appropriate if treatment cannot restore competence. Alternately, a limited guardianship for the purpose of pursuing the needed surgery might be appropriate if he lacks competence to give or withhold consent and the physical condition requires timely surgery.⁸² Although others can promote East's well-being, the paternalistic intervention renders the well-being less authentically his. That is, the results of the surgery and psychological treatment might substantially improve his physical well-being and psychological functions, but the paternalistic intervention dilutes the manner in which that well-being is authentically his, understood as the well-being that he has pursued as part of the uniquely human life he has defined as the life he lives.

Decision regarding the most justified form of intervention depends partially on the degree to which his impairment is subject to amelioration through appropriate treatment and partially on the specific state law regarding authority to provide medically necessary surgery for committed individuals without their competent consent. Surgery performed under such authority might provide an efficient path to protect his physical well-being. This intrusion into ordinarily protected liberty to decide for oneself undermines respect for HD as status, however, because it denies that he possesses the capacities of responsible agency. Thus, it renders his physical well-being less authentically his well-being. If the state intervention ameliorates his impairment to the degree that he qualifies as competent to make primarily and directly self-regarding decisions, he then possesses capacity responsibility that provides the basis for role responsibility regarding the individual human life he pursues. At that point he would become able to define and pursue the well-being that is central to the individual human life he has chosen. Thus, he would qualify for full standing as one with HD as status.

Fren manifests serious depressive disorder that leads him to endanger himself, but he does not endanger others, and he manifests no impairment of the capacities of reality recognition,

⁸⁰ See above n 62–64 and accompanying text in Part IIIB regarding HD as demeanour.

⁸¹ See above n 20–24 and accompanying text in Part IIB regarding civil commitment and competence for person.

⁸² See Neb Rev Stat § 30-2620 (2008) regarding limited guardianship.

comprehension, and reasoning that provide the basis for HD as status. Thus, he retains the capacities that qualify him as a competent adult with the authority to make primarily self-regarding decisions. He is not eligible for a finding of incompetence and guardianship because he retains the capacities necessary to make primarily and directly self-regarding decisions.⁸³ He is eligible for initial civil commitment because he manifests mental disorder and a demonstrated danger to himself.⁸⁴ As practical matter, the initial civil commitment is appropriate in circumstances of serious danger and lack of clear evidence regarding competence that would render him eligible for HD as status. The risk of serious harm to self justifies temporary intervention necessary to verify his competence to make self-regarding decisions. At the thirty day review, however, he presents the question whether mental disorder, such as serious but not psychotic depression that does not distort abilities of reality recognition, comprehension, and reasoning, can justify coercive intervention to prevent harm to self that does not endanger others.

Fren differs from East in a manner that is central to respect for HD. In contrast to East, Fren's psychopathology does not impair his uniquely human capacities of reality recognition, comprehension, and reasoning that are central to the process of defining one's uniquely human life. Coercive intervention to protect Fren's well-being might protect his generic well-being as generally understood by preventing suicide, but it does so by alienating his well-being from him. Coercive paternalistic interventions deny Fren's HD as standing to define and pursue his uniquely human life. Thus, such interventions might protect his generic well-being but render that well-being no longer authentically his.

V CONCLUSION

The analysis presented here provided a preliminary example of such a TJ analysis that addresses HD as one important value relevant to the most justified application of police power and *parens patriae* interventions to individuals with mental illness.

In some circumstances, decisions regarding well-being must be made in generic form. Legislative decisions, for example, often address matters of public policy in light of expected effects on the population generally. Emergency room health care providers sometimes provide emergency care for unconscious accident victims with no relevant information regarding the individual's preferences or principles. In many other contexts, however, the most defensible approaches to the pursuit of individual or public well-being require consideration of a complex set of interacting interests and values. The hypothetical individuals presented here are intended to draw attention to the importance of HD as one important value that is relevant to the most justifiable approach to the pursuit of individual and public well-being consistent with other relevant values. More generally, these examples are intended to encourage consideration of the complex set of principles that are relevant to the pursuit of the TJ project in the context of the more comprehensive set of relevant principles.

Some readers might question the interpretation of HD presented here, the significance of HD for specific legal purposes, or the relationships among HD and other relevant values. I do not suggest that this analysis is final or that it necessarily applies in the same manner to all legal

⁸³ Ibid § 30-2601 (1) (2008).

⁸⁴ See, eg, Ibid §§ 71-908 (2), 925(4) (2009).

systems. The most defensible interpretation of HD and of the significance of HD for various legal purposes might vary significantly across societies that vary in their values and across legal functions within societies. The primary purpose of this project is to draw attention to the importance of pursuing careful analysis of the relevant values that provide the foundation for relevant legal rules, procedures, and roles in any institutional structure. The most defensible application of TJ requires integration of concern for the well-being of those affected with the other relevant values embodied in the relevant law.

Although the analysis presented here directs attention to TJ, the central concern extends beyond this. Legal rules and procedures generally impact a variety of individual and societal interests and values. Thus, identifying the most justified interpretation and application of legal rules and procedures requires consideration of a complex set of relevant interests and values. Empirical research can provide important information regarding the likely effects of various legal rules, procedures, and roles in a variety of contexts. Assessing the relevance of that information in order to identify the most justifiable approach to the interpretation, application, or reform of the relevant law requires the integration of the value for the well-being of those affected with the more comprehensive set of values embodied in law.