"The Judge, He Cast His Robe Aside": Mental Health Courts, Dignity and Due Process

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INTRODUCTION

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their use of the principles of restorative justice. It is time to restructure the dialogue about mental health courts and to begin to take seriously the potential ameliorative impact of such courts on the ultimate disposition of all cases involving criminal defendants with mental disabilities.

Mental health courts have come under attack from both the right and the left. Of these attacks, I believe that the only relevant one is that they may provide “false hope” to those who come before them. I believe this is so because our “culture of blame” still infects the entire criminal justice process, and that it continues to demonize persons with mental illness for their status. Until this is remedied, there can be no assurances that mental health courts—or any other such potentially-ameliorative alternative—will be ultimately “successful” (however we choose to define that term). Two issues that, however, have not been the subject of much


"My trip hasn’t been a pleasant one
And my time it isn’t long
And I still do not know
What it was that I’ve done wrong”

Well, the judge, he cast his robe aside
A tear came to his eye
“You fail to understand,” he said
“Why must you even try?”17

Certainly, many such defendants have had “trips” that were not “pleasant ones,” and often “still do not know/What it was that [they had] done wrong.” The judge, in a mental health court, does symbolically “cast his robe” aside, as his role is so radically different than it is in traditional criminal courts. But I hope, in contrast to the situation depicted in this song, that judges do encourage litigants to “[try] to understand” the court process. Because I believe it is then, and only then, that some sort of remediation is possible.18

THERAPEUTIC JURISPRUDENCE19

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).20 Initially employed in cases

17. DYLAN, supra note 15.
19. Perlin, supra note 1, at 196.
influence on emotional life and psychological well-being. It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness." By way of example, therapeutic jurisprudence "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."

In recent years, scholars have considered a vast range of topics through a therapeutic jurisprudence lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law. As Ian Freckelton has noted, "it is a tool for gaining a new and distinctive perspective utilizing sociopsychological insights into the law and its applications." It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully. These alternative approaches optimize the psychological well-being of


27. Bruce Winick, A Therapeutic Jurisprudence Model for Civil Commitment, in INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVE ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).


engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.35

The question before us is this: do mental health courts promote a vision that is consonant with the principles that Professor Ronner sketches out for us in this paragraph?

THE STRUCTURE OF MENTAL HEALTH COURTS36

Mental health courts—one form of “problem-solving courts”37—follow the legal theory of therapeutic jurisprudence, in


36. See generally, Bruce J. Winick, Outpatient Commitment: A Therapeutic Jurisprudence Analysis, 9 PSYCHOL. PUB. POL’Y & L. 107 (2003); Susan Stefan & Bruce J. Winick, A Dialogue on Mental Health Courts, 11 PSYCHOL. PUB. POL’Y & L. 507 (2005). These courts are different from and independent of traditional involuntary civil commitment courts, currently operating in many states. For a critique of such courts, see Perlin, Healing, supra note 24, at 425–26 (“[T]he overwhelming number of cases involving mental disability law issues are ‘litigated’ in pitch darkness. Involuntary civil commitment cases are routinely disposed of in minutes behind closed courtroom doors.”); Perlin, supra note 1, at 209, discussing such courts that “I have observed across the nation, in which persons with mental disabilities are regularly treated as third-class citizens by (at the best) bored or (at the worst) malevolent trial judges.” For a thoughtful reconsideration of such courts in a transnational perspective, see Terry Carney, David Tait & Fleur Beaupert, Pushing the Boundaries: Realising Rights Through Mental Health Tribunal Processes?, 30 SYDNEY L. REV. 329, 344 (2008).

rather than criminality appears to be the precipitating reason for the
behavior in question.\textsuperscript{41} The mental health court judge\textsuperscript{42} seeks to
divert the individual from the criminal court in exchange for an
agreement to participate in community treatment,\textsuperscript{43} and to “help
participants avoid future criminal court involvement.”\textsuperscript{44}

towards the expansion of predicate case jurisdiction to include felonies,
including violent felonies, see Johnston, supra note 6, at 521. See e.g., Andrew
Wasielek, Mental Illness and Crime: Envisioning a Public Health Strategy and
Mental health courts should accept violent felonies because it
is morally unsound to punish criminal behavior that is mainly
a product of mental disease.

With appropriate eligibility criteria, the new mental health court model would
encapsulate persons who are not shielded by the insanity defense — especially
statutory measures governing releases of persons found not guilty by reason of
insanity era, see 4 PERLIN, supra note 20, § 9B-2.3, at 290–98 (2d ed. 2002)—
but should still be held blameless.

\textsuperscript{41} See generally, Stefan & Winick, supra note 36, relying on, inter alia,
Fritzler, supra note 38; Arthur Lurigio et al., Therapeutic Jurisprudence in
Action: Specialized Courts for the Mentally Ill, 84 JUDICATURE 184 (2001);
John Petrla et al., Preliminary Observations from an Evaluation of the Broward
County Mental Health Court, 37 CT. REV. 14 (2002); Ian Freckelton, Mental
Health Review Tribunal Decision-making: A Therapeutic Jurisprudence Lens,
10 PSYCHIATRY, PSYCHOL. & L. 44 (2003); see also BUREAU OF JUSTICE
ASSISTANCE, MENTAL HEALTH COURTS: A PRIMER FOR POLICYMAKERS AND
PRACTITIONERS (2008). Positive and negative arguments about mental health
courts are collected in Andrea M. Odegard, Therapeutic Jurisprudence: The
Impact of Mental Health Courts on the Criminal Justice System, 83 N.D. L.
REV. 225, 250–54 (2007); see generally, Arthur J. Lurigio & Jessica Snowden,
Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and
Effectiveness of Mental Health Court, 30 JUST. SYS. J. 196 (2009).

\textsuperscript{42} Judges are the most common referral source of participants into
diversion programs (100\% of survey respondents), with mental health personnel
(93\% of survey respondents) coming in second, and attorneys (90\% of survey
respondents) coming in a close third. For those agencies that chose the “other”
category, they indicated that referrals could come from families, service
providers, law enforcement personnel, community agencies, and parole officers.
Julie B. Raines & Glenn T. Laws, Mental Health Court Survey, 45 CRIM. L.
BULL. 627, 632 (2009).

\textsuperscript{43} Marjorie A. Silver, Lawyering and Its Discontents: Reclaiming
Meaning in the Practice of Law, 19 Touro L. REV. 773, 803 (2004); see also
Talesh, supra note 39, at 110; Camille Nelson, Racializing Disability, Disabling
Race: Policing Race and Mental Status, 15 BERKELEY J. CRIM. L. 1, 2 (2010)
To serve effectively in this sort of court setting, the judge needs to develop enhanced interpersonal skills and awareness of a variety of psychological techniques that can help the judge to persuade the individual to accept treatment and motivate him or her to participate effectively in it.\(^{49}\) She must be able to build trust and manage risk.\(^{50}\) These skills include the ability to convey empathy and respect, to communicate effectively with the individual, to listen to what the individual has to say, thereby fulfilling the individual’s need for voice and validation, to earn the individual’s trust and confidence, and to engage in motivational interviewing and various other techniques designed to encourage the individual to accept treatment and comply with it.\(^{51}\)

These courts provide “nuanced” approaches,\(^{52}\) and may signal a “fundamental shift” in the criminal justice system.\(^{53}\) According to former Judge Randal Fritzler, a successful mental health court thus needs: 1) a therapeutic environment and dedicated team; 2) an environment free from stigmatizing labels; 3) opportunities for deferred sentences and diversion away from the criminal system; 4) the least restrictive alternatives; 5) decision-making that is interdependent; 6) coordinated treatment;

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51. For a thoughtful critique of mental health courts, see Johnston, supra note 6. On the role of the legislature in ensuring the success of such courts, see Sheila Moheb, Jamming the Revolving Door: Legislative Setbacks for Mental Health Court Systems in Virginia, 14 RICH. J.L. & PUB. INT. 29 (2010).


told the defense attorney that she does not want to participate in an in-custody treatment program.\textsuperscript{58}

Skeptics argue that MHCs are too dependent on the aura of the charismatic judge.\textsuperscript{59} However, we do have a database of research on the way that persons whose cases have been heard before one MHC, the one run by Judge Ginger Lerner-Wren in Ft. Lauderdale, FL and that database is spectacular.\textsuperscript{60} Basically, it tells us that defendants before Judge Lerner-Wren report a higher score on a dignity scale (and a lower score on a perceived coercion scale)\textsuperscript{61} than any group of criminal defendants who have ever been studied.\textsuperscript{62} In short, the actual, real life experiences of the litigants in cases before Judge Lerner-Wren demonstrate that one MHC can

\begin{itemize}
  \item \textsuperscript{58} Clarke & Neuhard, supra note 57, at 29 n.49.
  \item \textsuperscript{59} A caution on relying on such charisma in the context of other problem solving courts is raised in Jane Spinak, Romancing the Court, 46 Fam. Ct. Rev. 258, 269–71 (2008).
  \item \textsuperscript{60} On the difficulties generally in assessing mental health courts, see Nancy Wolff & Wendy Pogorzelski, Measuring the Effectiveness of Mental Health Courts, 11 Psychol. Pub. Pol’y & L. 539 (2005).
  \item \textsuperscript{61} On the role of therapeutic jurisprudence in dealing with coercion in the mental health court process, see Bruce Winick, A Therapeutic Jurisprudence Approach to Dealing with Coercion in the Mental Health System, 15 Psychiatry, Psychol. & L. 25 (2008). On the significance of the presence of dignity in mental health tribunals in Australia, see David Tait, The Ritual Environment of the Mental Health Tribunal Hearing: Inquiries and Reflections, 10 Psychiatry, Psychol. & L. 91 (2003). On dignitarian issues in general, see Perlins, supra note 11, at 99–108.
\end{itemize}
that "the very types of people MHCs were designed for may be the people who do not fully comprehend the purpose, requirements, and roles in the courts." Subsequent research done by Redlich and her colleagues, in fact, reveals that the majority of defendants at two mental courts lacked "nuanced information" about the trial process and that a minority of defendants had "impairments in legal competence"; the researchers concluded, however, that there were some indications that "the clients in the [mental health courts] in this study made knowing, intelligent and voluntary enrollment decisions." Clearly, "a thorough evaluation of the offender’s mental competence ... is essential" in the mental health court process. Judge Michael Finkle and several colleagues have recommended that "competency courts" be created as subspecialty courts within mental health courts to "improve the competency...

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68. Id. at 101. On the other hand, they noted:

[1] Individuals making important legal and treatment decisions should have more than a basic knowledge of procedures, requirements, and consequences, particularly given that there are sanctions for non-compliance. Thus, MHCs must now ask:

What information do we want MHC participants to have at the time of enrollment and how can we ensure that the information is meaningfully understood, particularly the complicated nuances?

Id. at 103.

It is not reasonable to expect a client to repose trust in an attorney unless she is confident that he is acting in accordance with her wishes. The client with mental illness may already doubt the attorney’s loyalty. This risk is exacerbated when the attorney is appointed by the court. The client may wonder whether the attorney has been assigned in order to zealously represent her, or instead to facilitate her processing through the legal system . . . . There are strong personal disincentives to thorough preparation, even for the committed attorney. There are also institutional pressures: The attorney who depends on the goodwill of others in the system (e.g., judges, state attorneys, or prosecutors) may pull his punches, even unwittingly, in order to retain credibility for future interactions (which he would put to use for his future clients). Judges want cases resolved.74

Some solutions have been offered. Bruce Winick has argued that “lawyers should adequately counsel their clients about the advantages and disadvantages of accepting diversion to mental health court.”75 As a result, judges and defense counsel in mental health courts should ensure that defendants receive dignity and respect, are given a sense of voice and validation, and are treated with fairness and good faith.76 Turning to the legal education clinical context, David Wexler has suggested that students might “consider the kind of dialogue a lawyer might have with a client about the pros and cons of opting into a [drug treatment court] or...


75. Stefan & Winick, supra note 36, at 523.

76. ‘d. at 516. See also Winick, supra note 36; Stefan & Winick, supra note 36, at 510–11, 520 (comments by Professor Winick).
ON DIGNITY

Introduction

Dignity is at the core of therapeutic jurisprudence, and it also is the key underpinning of mental health courts. Prof. Carol Sanger suggests that dignity means that people “possess an intrinsic worth that should be recognized and respected,” and that they should not be subjected to treatment by the state that is inconsistent with that intrinsic worth. Treating people with dignity and respect makes them more likely to view procedures as fair and the motives behind law enforcement’s actions as well meaning. What individuals want most “is a process that allows them to participate, seeks to merit their trust, and treats them with dignity and respect.” All concepts of human rights have their basis in some understanding of human dignity. Dignity has been characterized as one of “those very great political values that defines our constitutional morality.”


81. Perlin, supra note 1, at 209 (relying on, inter alia, Poythress et al., supra note 62).


“truth” as a core value of the criminal justice system.\(^93\) In short, dignity inquiries permeate the criminal justice system, especially as the concept applies to persons with mental disabilities.

Dignity must also be contextualized with what I call “sanism” and “pretextuality.” Sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause, and are reflected in, prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry.\(^94\) It permeates mental disability law, affecting all participants in the mental disability law system: litigants, fact-finders, counsel, and expert and lay witnesses. Its corrosive effects have warped mental disability law jurisprudence.\(^95\) Along with pretextuality,\(^96\) it has controlled, and continues to control, modern mental disability law.\(^97\) A careful

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\(^93\) Erik Luna & Paul G. Cassell, Mandatory Minimalism, 32 CARDOZO L. REV. 1, 52 (2010). On the application of human dignity principles to limit the scope of criminalization of victimless crimes (specifically, drug offenses), see generally, Michal Buchhandler-Raphael, Drugs, Dignity, and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization, 80 TENN. L. REV. 291 (2013).

\(^94\) Perlin, Expecting Rain supra note 22, at 506.

\(^95\) Id. at 487.

The pretexts of the forensic mental health system are reflected both in the testimony of forensic experts and in the decisions of legislators and fact-finders. Experts frequently testify in accordance with their own self-referential concepts of ‘morality’ and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional standards as prerequisites for an incompetency to stand trial finding. Often this testimony is further warped by a heuristic bias. Expert witnesses—like the rest of us—succumb to the seductive allure of simplifying cognitive devices in their thinking, and employ such heuristic gambits as the vividness effect or attribution theory in their testimony.

\(^97\) Id. at 18.

Michael L. Perlin, Promoting Social Change in Asia and the Pacific: The Need for a Disability Rights Tribunal to Give Life to the U.N. Convention
and none has been offered$^{103}$—it makes no sense to perpetuate these cut offs,$^{104}$ especially in the context of the vast discretion traditionally vested in prosecutors with regards to the charging process.$^{105}$

To a great extent, prosecutors’ decisions follow the initial judgments of police officers. But the near-boundless discretion vested in police decision-making makes this counterproductive. By way of example, consider the factual settings in the Supreme Court cases of Addington v. Texas$^{106}$ and Jones v. United States.$^{107}$ Addington, who was subjected to the involuntary civil commitment process, had originally been apprehended following an alleged “assault by threat” on his mother.$^{108}$ Jones, for whom an insanity defense plea had been entered, had originally been apprehended after he allegedly attempted to shoplift a jacket in a downtown Washington, D.C. department store.$^{109}$ Addington’s acts appear to have been more serious (and more “dangerous”) than did Jones’s; yet, for undisclosed and unarticulated extra-judicial reasons, Addington was brought into the mental health system.

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104. See Wasicek, supra note 40, at 139 (“Mental health courts should accept cases of defendants charged with] violent felonies”).


108. Addington, 441 U.S. at 420.

preferred patients are those who commit crimes. We let the law-abiding suffer alone.\footnote{114} Nora’s indictment is a powerful one: “If we persist in prosecuting mentally ill defendants in willful ignorance of their medical problems, our system will stand as an asylum whose keepers are as deluded as the inmates.”\footnote{115} The expansion of mental health courts — following the models of Judge Wren,\footnote{116} Judge Matthew D’Emic,\footnote{117} Judge Michael Finkle,\footnote{118} and others\footnote{119} — is a major component in the prescription of dignity for this population, and, importantly, as a way to minimize sanism.\footnote{120}

**CONCLUSION**

Mental health courts — when structured properly and when chaired by a judge who “buys in” to the TJ model — are perfect exemplars of the practical utility of therapeutic jurisprudence.\footnote{121}

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\footnote{114} Gerald Nora, *Prosecutor as “Nurse Ratched”? Misusing Criminal Justice as Alternative Medicine*, 22 CRIM. JUST. 18, 22 (Fall 2007).

\footnote{115} Id.

\footnote{116} See Wren, supra note 10, at 593 (explaining dignity in the context of mental health courts).

\footnote{117} See Matthew J. D’Emic, *The Promise of Mental Health Courts*, 22 CRIM. JUST. 24 (Fall 2007).


\footnote{120} See Sana Loue, *The Involuntary Civil Commitment of Mentally Ill Persons in the United States and Romania: A Comparative Analysis*, 23 J. LEGAL MED. 211, 235 n.120 (2002) (“sanist biases may be reduced through the establishment of mental health courts, with a judiciary trained to be sensitive to such issues”) (citing Elaine M. Andrews & Stephanie Rhoades, *Anchorage District Court Initiates Two New Programs: People with Disabilities Offered Alternatives in Judicial Proceeding*, 23 ALASKA BAR RAG 1 (May/June 1999)). I discuss this proposition in Perlin, *Best Friend*, supra note 22, at 748.

\footnote{121} See Kate Diesfeld & Brian McKenna, *The Therapeutic Intent of the New Zealand Mental Health Review Tribunal*, 13 PSYCHIATRY PSYCHOL. & L. 100 (2006); Kate Diesfeld & Brian McKenna, *The Unintended Impact of the Therapeutic Intentions of the New Zealand Mental Health Review Tribunal? Therapeutic Jurisprudence Perspectives*, 14 J. L. & MED. 566 (2007); see also
well-run mental health courts and enhanced dignity. I believe that
the expansion of such courts — keeping in mind the due process
foundation of therapeutic jurisprudence — is the best way to insure
dignity to persons with mental disabilities in the criminal justice
system.

In Drifter’s Escape, the judge casts aside his robe as he
presides over a case about which the defendant has no
understanding. Later in the song, Dylan tells us:

“Outside, the crowd was stirring. You could hear it
from the door.”127

Certainly, public vengeance is a key component of our criminal
justice policies as they apply to persons with mental disabilities.128

The song concludes with the drifter escaping after a bolt of
lightning strikes the courthouse.129 This is not a particularly
valuable strategy — hoping for lightning to strike — for lawyers
representing persons with mental disabilities. The expansion of
dignity-providing mental health courts is, I think, a much better
option.

127. DYLAN, supra note 15.
128. In discussing the roots of the public enmity toward the insanity
defense and insanity defense pleaders, I have noted, “By nurturing emotions of
vengeance, the punishment of criminals ‘furthers social solidarity and protects
against the terrifying anxiety that the forces of good might not triumph against
the forces of evil after all.’” Michael L. Perlin, “The Borderline Which
Separated You From Me”: The Insanity Defense, the Authoritarian Spirit, the
Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1386
(1997) (quoting Bernard Diamond, From Durham to Brawner, A Futile Journey,
1973 WASH. U. L. Q. 109, 110 (1973)).
129. DYLAN, supra note 15.