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

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

MICHAEL L. PERLIN*

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INTRODUCTION¹

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1. See generally, Michael L. Perlin, “*There Are No Trials Inside the Gates of Eden*”: *Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence*, in COERCIVE CARE: RIGHTS, LAW AND POLICY 193 (Bernadette McSherry & Ian Freckelton eds., 2013).

One of the most important developments in the past two decades in the way that criminal defendants with mental disabilities are treated in the criminal process has been the creation and the expansion of mental health courts, one kind of “problem-solving court.”² There are now, according to the Council of State Governments’ Justice Center, over 300 such courts in operation in the United States,³ some dealing solely with misdemeanors,⁴ some solely with non-violent offenders,⁵ and some with no such restrictions.⁶ There is a wide range of dispositional alternatives available to judges in these cases,⁷ and an even wider range of judicial attitudes.⁸ And the entire concept of “mental health courts” is certainly not without controversy.⁹

There is no question, however, that these courts offer a new approach – perhaps a *radically* new approach – to the problems at hand. They become even more significant because of their articulated focus on dignity,¹⁰ as well as their embrace of therapeutic jurisprudence, their focus on procedural justice, and their use of the

2. See, e.g., Greg Berman & Aubrey Fox, *The Future of Problem-Solving Justice: An International Perspective*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 3 (2010); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL’Y, 125, 127 (2001).

3. See JUSTICE CENTER: THE COUNSEL FOR STATE GOVERNMENTS, <http://www.consensusproject.org/programs?q=mental+health+court&submit=Go> (last visited Oct. 15, 2013).

4. See, e.g., Ursula Castellano, *Courting Compliance: Case Managers as “Double Agents” in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484, 490 (2011).

5. See, e.g., Julie Grachek, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1495 (2006).

6. See, e.g., E. Leah Johnston, *Theorizing Mental Health Courts*, 89 WASH. L. REV. 519, 521 (2012).

7. See, e.g., Henry J. Steadman et al., *From Referral to Disposition: Case Processing in Seven Mental Health Courts*, 23 BEHAV. SCI. & L. 215, 220 (2005).

8. See, e.g., Michael S. King, *Should Problem-Solving Courts Be Solution-Focused Courts?*, 80 REV. JUR. U.P.R. 1005 (2011).

9. See, e.g., Tammy Seltzer, *A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illness*, 11 PSYCHOL. PUB. POL’Y & L. 570, 576 (2005).

10. See Ginger Lerner Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577, 593 (2010) (explaining dignity in the context of mental health courts); see generally, *infra* text accompanying notes 79–120.

principles of restorative justice.¹¹ 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.¹² 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.¹³ Until this is remediated, 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 atten-

11. See Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 LAW & PSYCHIATRY 457, 457–58 (2001) (discussing therapeutic jurisprudence in this context); Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 201–02 (2012) (on procedural justice); MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW 88–96 (2013) (on restorative justice). On the relationship between these three approaches, see *id.* at 96–98; Michael L. Perlin, *Considering the “Alternative Jurisprudences” as a Tool of Social Change to Reduce Humiliation and Uphold Dignity*, (2012), <http://www.humiliationstudies.org/documents/PerlinNY12AlternativeJurisprudences.pdf> (paper presented to the 20th annual conference of the Human Dignity and Humiliation Studies Network).

12. See Perlin, *supra* note 1, at 195, 204, 208, 210.

13. For a consideration of the many obstacles faced by such courts, see Kevin Daly, Chrysanti Leon & Margaret Mahoney, *Delaware Mental Health Courts’ Process Evaluation: Progressive Treatment and Systematic Obstacles*, available at http://papers.ssrn.com/soL3/papers.cfm?abstract_id=1584835, http://papers.ssrn.com/soL3/papers.cfm?abstract_id=1584835 (last accessed Oct. 15, 2013; see, e.g., Michael L. Perlin, “Baby, Look Inside Your Mirror”: The Legal Profession’s Willful and Sanist Blindness to Lawyers with Mental Disabilities, 69 U. PITT. L. REV. 589, 606 (2008) (discussing the “culture of blame” in a different mental disability law context and how bar committees on ethics deal with lawyers with mental disabilities); see generally, Neil R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 60 & n.258 (1997).

tion must, I believe, be considered seriously: the quality of counsel available to persons in mental health courts, and the question of whether the individual at risk is competent to engage in mental health court proceedings. These are both discussed extensively below.

Much of the recent debate on mental health courts has focused either on empirical studies of recidivism or on theorization.¹⁴ These entire discussions, while important and helpful, bypass the critical issue that is at the heart of this paper: do such courts provide additional dignity to the criminal justice process or do they detract from that? Until we re-focus our sights on this issue, much of the discourse on this topic remains wholly irrelevant.

In Part I of this paper, I will first discuss the underpinnings of therapeutic jurisprudence. I will next, in Part II, look at the structure of mental health courts, and will then raise the two concerns about such courts that are, I believe, of particular relevance to which I just alluded: questions of adequacy of counsel and the competency of defendants to voluntarily participate in such court proceedings. In Part III, I will then consider the role of dignity in this process, and look to ways that therapeutic jurisprudence can promote dignity in this context.

The title of this paper comes, in part from Bob Dylan's song, *Drifter's Escape*,¹⁵ a song that combines revengeful elements of the Old Testament with "a taste of Old West frontier justice."¹⁶ The beginning of the song eerily tracks the circumstances of so many defendants who eventually come before mental health courts:

"Oh, help me in my weakness"
I heard the drifter say
As they carried him from the courtroom
And were taking him away
"My trip hasn't been a pleasant one
And my time it isn't long

14. See, e.g., Richard Wiener et al., *A Testable Theory of Problem Solving Courts: Past Empirical and Legal Failures*, 33 INT'L J. L. & PSYCHIATRY 417 (2010).

15. BOB DYLAN, *DRIFTER'S ESCAPE* (Columbia 1967).

16. See OLIVER TRAGER, *KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA* 164 (2004).

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 involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence pre-

17. DYLAN, *supra* note 15.

18. For those interested, I have seen Dylan sing this song only twice: On May 10, 2003, at the Atlantic City (NJ) Hilton, and on August 9, 2003, in Holmdel, NJ. He has not played it since November 27, 2005; *see* <http://www.bobdylan.com/us/songs/drifters-escape> (last accessed, Jan. 22, 2013).

19. Perlin, *supra* note 1, at 196.

20. *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008); 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2D-3, at 534-41 (2d ed. 1998). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 32-33 (1992).

sents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.²¹ The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.²² There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: “the law’s use of ‘mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns.’”²³ As I have written elsewhere, “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”²⁴

Therapeutic jurisprudence “asks us to look at law as it actually impacts people’s lives,”²⁵ and focuses on the law’s influence on emotional life and psychological well-being.²⁶ It suggests that

21. See Michael L. Perlin, “*His Brain Has Been Mismanaged with Great Skill*”: *How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?*, 42 AKRON L. REV. 885, 912 (2009). See Kate Diesfeld & Ian Freckelton, *Mental Health Law and Therapeutic Jurisprudence*, in DISPUTES AND DILEMMAS IN HEALTH LAW 91 (Ian Freckelton & Kerry Anne Peterson eds., 2006) for a transnational perspective.

22. Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683 (2003); Michael L. Perlin, “*And My Best Friend, My Doctor/ Won’t Even Say What It Is I’ve Got*”: *The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735 (2005) (Perlin, *Best Friend*); Michael L. Perlin, “*Everybody Is Making Love/Or Else Expecting Rain*”: *Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 WASH. U. L. REV. 481 (2008) (Perlin, *Expecting Rain*).

23. David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993).

24. Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000) (Perlin, *Healing*); Michael L. Perlin, “*Where the Winds Hit Heavy on the Borderline*”: *Mental Disability Law, Theory and Practice*, “*Us*” and “*Them*,” 31 LOY. L. REV. 775, 782 (1998).

25. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing With Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

26. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Daniel P. Stolle, David B. Wexler & Bruce J. Winick eds., 2000) (hereinafter STOLLE).

“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.”²⁷ 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.”²⁸

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.²⁹ 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.”³⁰ 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.³¹ These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations. In its aim to use the law to empower individuals, enhance rights, and promote well-being, therapeutic jurisprudence has been described as “...a sea-change in ethical thinking about the role of law...a movement towards a more distinctly relational approach to

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).

28. Claire B. Steinberger, *Persistence and Change In The Life Of The Law: Can Therapeutic Jurisprudence Make A Difference?* 27 *LAW & PSYCHOL. REV.* 55, 65 (2003). See also Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 *PSYCHOL. PUB. POL’Y & L.* 193 (1995) (for the most thoughtful, sympathetic critique of TJ).

29. Michael L. Perlin, “*Things Have Changed*”: *Looking at Non-institutional Mental Disability Law Through the Sanism Filter*, 46 *N.Y.L. SCH. L. REV.* 535 (2002–03).

30. Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 *T. JEFFERSON L. REV.* 575, 582 (2008).

31. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within The Comprehensive Law Movement*, in *STOLLE ET AL.*, *supra* note 26, at 365.

the practice of law...which emphasises psychological wellness over adversarial triumphalism.”³² That is, therapeutic jurisprudence supports an ethic of care.³³

One of the central principles of therapeutic jurisprudence is a commitment to dignity. Prof. Amy Ronner describes the “three Vs”: voice, validation and voluntariness,³⁴ arguing:

What ‘the three Vs’ commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement 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

32. Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329–30 (2001).

33. See, e.g., Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006); David B. Wexler, *Not Such a Party Pooper: An Attempt to Accommodate (Many of) Professor Quinn’s Concerns about Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Brookbanks, *supra* note 32; Gregory Baker, *Do You Hear the Knocking at the Door? A “Therapeutic” Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006).

34. Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 Touro L. REV. 601, 627 (2008).

35. Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94–95 (2002); see generally, AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE (2010).

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).

37. Problem-solving courts grew out of an interdisciplinary approach to address the underlying problem, not just the symptoms, of substance abuse, domestic violence, child abuse, mental illness, and certain kinds of criminality. See generally, Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1060 (2003). For overviews, see Michael Dorf & Jeffrey Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003); Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897 (2003). Included in this array are mental health courts, drug courts, domestic violence courts, juvenile justice courts, sex offense courts, community courts, truancy courts, veteran’s courts, and homeless courts. For a full list, see Deborah Chase & Peggy Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 210 n.8 (2009). For a critical reading on the ways that such courts “redefine” criminal justice, see James L. Nolan, *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2004). For a critical reading of the impact on child welfare cases, see Jane Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 113 (2010). For a consideration of an evidence-based model in one state, see Melissa Aubin, *The District of Oregon Reentry Court: An Evidence-Based*

an attempt “to improve justice by considering the therapeutic and anti-therapeutic consequences that ‘flow from substantive rules, legal procedures, or the behavior of legal actors.’”³⁸ They are designed to deal holistically³⁹ with people arrested (usually, but not exclusively, for nonviolent misdemeanors)⁴⁰ when mental illness

Model, 27 FED. SENT’G. REP. 39 (2009). I have recently considered veterans courts from a TJ perspective in Michael L. Perlin, “*John Brown Went Off to War*”: *Considering Veterans’ Courts as Problem-Solving Courts*, 37 NOVA L. REV. (2014).

38. Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 J. AM. ACAD. PSYCHIATRY L. 431, 431 (2002); see also, Randal Fritzer, *How One Misdemeanor Mental Health Court Incorporates Therapeutic Jurisprudence, Preventive Law, and Restorative Justice*, in MANAGEMENT AND ADMINISTRATION OF CORRECTIONAL HEALTH CARE: POLICY, PRACTICE, ADMINISTRATION 14-1, 14-3 (Jacqueline Moore ed., 2003) (“the fundamental principle underlying therapeutic jurisprudence is the selection of options that promote health and are consistent with the values of the legal system”). This is not a phenomenon limited to the United States. See, e.g., RICHARD D. SCHNEIDER, HY BLOOM & MARK HEEREMA, *MENTAL HEALTH COURTS: DECRIMINALIZING THE MENTALLY III* (2007); Sarah Ryan & Darius Whelan, *Diversion of Offenders with Mental Disorders: Mental Health Courts*, 1 WEB J. CURR. LEG. ISSUES (2012), available at <http://webjcli.ncl.ac.uk/2012/issue1/ryan1.html><http://webjcli.ncl.ac.uk/2012/issue1/ryan1.html> (Ireland); James Duffy, *Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution: If Two Is Company, Is Three a Crowd?*, 35 MELB. U. L. REV. 394, 395 (2011).

39. See Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 112 (2007).

40. Although, historically, most mental health courts typically heard only cases of *nonviolent* offenders, see Grachek, *supra* note 5, at 1495, or only misdemeanor cases, see Castellano, *supra* note 4, at 490, some traditionally heard felony cases as well, see Talesh, *supra* note 39, at 112. The trend is towards the expansion of predicate case jurisdiction to include felonies, including violent felonies, see Johnston, *supra* note 6, at 521. See, e.g., Andrew Wasicek, *Mental Illness and Crime: Envisioning a Public Health Strategy and Reimagining Mental Health Courts*, 48 CRIM. L. BULL. 106, 135 (2012):

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 persons from post-Jones v. U.S., 463 U.S. 354 (1983) approving stringent statutory measures governing releases of persons found not guilty by reason of insan-

rather than criminality appears to be the precipitating reason for the behavior in question.⁴¹ The mental health court judge⁴² seeks to divert the individual from the criminal court in exchange for an agreement to participate in community treatment,⁴³ and to “help participants avoid future criminal court involvement.”⁴⁴

ity era, see 4 PERLIN, *supra* note 20, § 9B-2.3, at 290–98 (2d ed. 2002)]— but should still be held blameless.

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 Pettila 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. Odegaard, *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).

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).

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) (on the necessity of diversion); John Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 306 (2010) (discussing mental health courts’ “palpable results”). On the question of whether this diversion is swifter than traditional court processing, see Allison Redlich et al., *Is Diversion Swift: Comparing Mental Health Court and Traditional Criminal Justice Processing*, 39 CRIM. JUST. & BEHAV. 420 (2012) (although diversion may not be swifter, that may be less important than the fact of diversion itself).

44. Kirk Kimber, *Mental Health Courts – Idaho’s Best Kept Secret*, 45 IDAHO L. REV. 249, 270 (2008); see also, Brenda Desmond & Paul Lenz, *Men-*

Mental health courts are premised on team approaches;⁴⁵ representatives from justice and treatment agencies assist the judge in screening offenders to determine whether they would present a risk of violence if released to the community, in devising appropriate treatment plans, and in supervising and monitoring the individual's performance in treatment.⁴⁶ The mental health court judge functions as part of a mental health team that decides whether the individual has treatment needs and can be safely released to the community.⁴⁷ The team formulates a treatment plan, and a court-employed case manager and court monitor track the individual's participation in the treatment program, and submit periodic reports to the judge concerning his or her progress. Participants are required to report to the court periodically so that the judge can monitor treatment compliance, and additional status review hearings are held on an as-needed basis.⁴⁸

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

tal Health Courts: An Effective Way of Treating Offenders with Serious Mental Illness, 34 MENTAL & PHYSICAL DISABILITY L. REP. 525, 526 (2010). On the creation of juvenile mental health courts, see Daniel M. Filler & Austin Smith, *The New Rehabilitation*, 91 IOWA L. REV. 951, 971 n.105 (2006).

45. See e.g., Lurigio & Snowden, *supra* note 41, at 210; Marlee E. Moore & Virginia A. Hiday, *Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity Between Mental Health Court and Traditional Court Participants*, 30 LAW & HUM. BEHAV. 659, 660 (2006).

46. Winick, *supra* note 36, at 125–26. On the role of jail as a potential sanction in the cases of non-compliant defendants, see Allison Redlich et al., *Patterns and Practice in Mental Health Courts: A National Survey*, 30 LAW & HUM. BEHAV. 347, 355–56 (2006).

47. On the often-conflicting roles of case managers in mental health courts, see Castellano, *supra* note 4, at 490–91.

48. Stefan & Winick, *supra* note 36, at 520–21.

49. Winick, *supra* note 36, at 126 (citing Carrie Petrucci, *Respect as a Component in the Judge-Defendant Interaction in a Specialized Domestic Violence Court that Utilizes Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 263 (2002)). On the “collateral institutional authority of the judge” in mental health courts, see Eric J. Miller, *The Therapeutic Effects of Managerial Re-entry Courts*, 30 FED. SENT’G REP. 127, 128 (2008). On the way that judgmental descriptive language can adversely affect the work of such courts in civil cases, see

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; and 7) a review process that is meaningful.⁵⁴ It is essential that such courts be free of the “pretextual dishonesty”⁵⁵ that is so often the hallmark of judicial proceedings in cases of individuals with mental disabilities.⁵⁶

Ian Freckelton, *Distractors and Distressors in Involuntary Status Decision-Making*, 12 *PSYCHIATRY, PSYCHOL. & L.* 88 (2005).

50. Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 *PSYCHOL. PUB. POL'Y & L.* 587 (2005).

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).

52. Patricia C. McManus, *A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 *SETON HALL L. REV.* 591, 598 (2006).

53. *Developments in the Law —The Law of Mental Illness: Mental Health Courts and the Trend Toward a Rehabilitative Justice System*, 121 *HARV. L. REV.* 1168, 1177 (2008).

54. Randal B. Fritzler, *10 Key Components of a Criminal Mental Health Court*, reprinted in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 118 (Bruce J. Winick & David B. Wexler eds., 2003), and Fritzler, *supra* note 38, at 14–18 (“The [mental health court] must avoid contributing negative stigma to its clients”). See also Georgia Lee Sims, *The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System*, 62 *VAND. L. REV.* 1053, 1079 (2009).

55. I define “pretextuality” as the ways in which courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest

Some defense attorneys fear that problem-solving courts, in general, “arm twist ... [their clients] into diversion with a condition of entry being that they take a plea, and/or that the effective treatment is raised above the least restrictive treatment.”⁵⁷ By way of example, Cait Clarke and James Neuhard raise this potential dilemma:

For example, a defense attorney may devote less attention to the desires of the defendant, focusing more on the goals of the ‘team’ (including the defense attorney, prosecutor, judge, and probation officer). An illustration of this would be where the ‘team’ decides the defendant requires in-custody treatment, although the defendant has previously told the defense attorney that she does not want to participate in an in-custody treatment program.⁵⁸

Skeptics argue that MHCs are too dependent on the aura of the charismatic judge.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.⁶⁰ Basically, it tells us

(and frequently meretricious) decision-making. See, e.g., Michael L. Perlin, “Simplify You, Classify You”: *Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 621 (2009).

56. See, e.g., Ian Freckelton, *Mental Health Review Tribunal Decision-making: A Therapeutic Jurisprudence Lens*, 10 PSYCHIATRY, PSYCHOL. & L. 44, 59 (2003) (citing Michael L. Perlin, *THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL* (2000)); Michael L. Perlin, *Preface to INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT* xxxiii (Kate Diesfeld & Ian Freckelton eds., 2003); Ian Freckelton, *Ideological Divarication in Civil Commitment Decision-making*, 10 PSYCHIATRY, PSYCHOL. & L. 390, 395 (2003).

57. Cait Clarke & James Neuhard, “*From Day One*”: *Who’s in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 29 (2004).

58. Clarke & Neuhard, *supra* note 57, at 29 n.49.

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).

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).

that defendants before Judge Lerner-Wren report a higher score on a dignity scale (and a lower score on a perceived coercion scale)⁶¹ than any group of criminal defendants who have ever been studied.⁶² In short, the actual, real life experiences of the litigants in cases before Judge Lerner-Wren demonstrate that one MHC *can* be a non-coercive, dignified experience that provides procedural justice and therapeutic jurisprudence to those before it.⁶³

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 PERLIN, *supra* note 11, at 99–108.

62. See Norman G. Poythress et al., *Perceived Coercion and Procedural Justice in the Broward Mental Health Court*, 25 INT’L J.L. & PSYCHIATRY 517 (2002). Judge Wren discusses her judicial philosophy in Wren, *supra* note 10. On how levels of emotional intelligence correlate with judicial success in problem-solving courts, see James Duffy, *Problem-Solving Courts, Therapeutic Jurisprudence and the Constitution*, 35 MELB. U. L. REV. 394 (2011); Michael King, *Restorative Justice, Therapeutic Jurisprudence, and the Rise of the Emotionally Intelligent Justice*, 35 MELB. L. REV. 1096 (2008). On the role of restorative justice, see generally PERLIN, *supra* note 11, at 88–96, in problem-solving courts, see Megan Stephens, *Lessons from the Front Lines in Canada’s Restorative Justice Experiment: The Experience of Sentencing Judges*, 33 QUEEN’S L.J. 19, 63–64 (2007).

63. See Judith Kaye, *Lecture 81* ST. JOHN’S L. REV. 743, 748 (2007) (“[M]ental health courts, which . . . divert defendants from jail to treatment, reconnect them, where possible, with family and friends who care whether they live or die, . . . restore their greatest loss—their sense of human dignity”) (author former Chief Judge of New York Court of Appeals); Hafemeister, Garner & Bath, *supra* note 11, at 201–02 (“[P]rocedural justice is a key to the success of mental health courts”). For a less sanguine attitude (based on a visit to a mental health court in Washington, D.C.), see Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO L.J. 1587, 1613–14 (2012) (“[A]ctual therapeutic or other effects of this engagement remain uncertain”). On the important related issue of the impact of such courts on racial and ethnic minorities, see Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT’L BLACK L.J. 27, 46–47 (2009) (research by National Center for State Courts reveals that African-Americans and Latinos show more support for practices and procedures promoted by problem-solving courts than

Two Concerns

I do have two concerns that have not been the focus of much scholarly attention. It is these two concerns that temper my full enthusiasm for mental health courts, especially in the context of the issues I focus on in this paper, but I believe that they can be remediated: the lack of concern paid to the question of *competency* in the mental health court process,⁶⁴ and the lack of concern paid to the question of the quality of *counsel* made available to individuals in the mental health court process.

Dr. Steven Erickson and his colleagues point out what should be obvious: Given the impaired cognition that accompanies many mental disorders, “there is little evidence to suggest that mental health courts ensure that prospective candidates are competent to accept [the] plea bargains [into which many enter], as required by constitutional law.”⁶⁵ Allison Redlich similarly worries 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.”⁶⁶ 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

do whites). On the impact of such courts on immigrants, see Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308 (2008).

64. See generally, Kathleen Stafford & Dustin Wygant, *The Role of Competency to Stand Trial in Mental Health Courts*, 23 BEHAV. SCI. & L. 245 (2005) (over three-quarters of potential mental health court defendants in one Ohio court were found to be incompetent).

65. Steven Erickson et al., *Variations in Mental Health Courts: Challenges, Opportunities, and a Call for Caution*, 42 COMM. MENTAL HEALTH J. 335, 339 (2006); see also Stacey M. Faraci, *Slip Slidin’ Away? Will Our Nation’s Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPIAC L. REV. 811, 828–29 (2004) (“[O]ne of the first orders of business is to determine whether the individual is competent . . . ‘[E]ven among those deemed competent to stand trial, serious questions may be raised about the ability of persons to truly understand the choices being presented and the consequences of those choices’”), quoting John S. Goldkamp & Cheryl Irons-Guynn, Bureau of Justice Assistance, *U.S. Dep’t of Justice, Emerging Judicial Strategies For the Mentally Ill in the Criminal Caseload: Mental Health Courts in Fort Lauderdale, Seattle, San Bernardino, and Anchorage* xi (Apr. 2000), available at <http://www.ncjrs.org/pdffiles/bja/182504.pdf>.

66. Allison Redlich, *Voluntary, But Knowing and Intelligent?*, 11 PSYCHOL. PUB. POL’Y & L. 605, 616 (2005).

process and that a minority of defendants had “impairments in legal competence”;⁶⁷ 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.”⁶⁸ Clearly, “a thorough evaluation of the offender’s mental competence . . . is essential” in the mental health court process.⁶⁹ Judge Michael Finkle and several colleagues have recommended that “competency courts” be created as subspecialty courts *within* mental health courts to “improve the competency process and reduce the unnecessary time that mentally ill persons spend in jail,”⁷⁰ but there are no signs that this recommendation is being acted upon.

What about counsel? I have written often about the scandalous lack of effective counsel made available to persons with mental disabilities in the civil commitment and criminal justice processes.⁷¹ What is the quality of counsel available to litigants in mental health courts?

67. Allison Redlich et al., *Enrollment in Mental Health Courts: Voluntariness, Knowingness, and Adjudicative Incompetence*, 34 LAW & HUM. BEHAV. 91, 91 (2010).

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

[I]ndividuals 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.

69. Christin E. Keele, *Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System*, 71 UMKC L. REV. 193, 202 (2002).

70. Michael J. Finkle et al., *Competency Courts: A Creative Solution for Restoring Competency to the Competency Process*, 27 BEHAV. SCI. & L. 767 (2009). However, with the exception of one student note, see Nicholas Rosinia, *How ‘Reasonable’ Has Become Unreasonable: A Proposal for Rewriting the Lasting Legacy of Jackson v. Indiana*, 89 WASH. U. L. REV. 673, 693 n.115 (2012), this suggestion has heretofore gone unnoticed in the legal literature.

71. See Michael L. Perlin, “*I Might Need a Good Lawyer, Could Be Your Funeral, My Trial*”: A Global Perspective on the Right to Counsel in Civil Commitment Cases, and Its Implications for Clinical Legal Education, 28

Dr. Steven Erickson and his colleagues have expressed concern “as to whether defendants in mental health courts receive adequate representation by their attorneys.”⁷² Terry Carney characterizes the assumption that adequate counsel will be present at hearings to guarantee liberty values as a “false hope.”⁷³ Henry Dlugacz and Christopher Wimmer summarize the salient issues:

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.,

WASH. U. J. L. & SOC’L POL’Y 241, 241 (2008) (“If there has been any constant in modern mental disability law in its thirty-five-year history, it is the near-universal reality that counsel assigned to represent individuals at involuntary civil commitment cases is likely to be ineffective”); Michael L. Perlin, “*The Executioner’s Face Is Always Well-Hidden*”: *The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 207–08 (1996) (“Nearly twenty years ago, when surveying the availability of counsel to mentally disabled litigants, President Carter’s Commission on Mental Health noted the frequently substandard level of representation made available to mentally disabled criminal defendants. Nothing that has happened in the past two decades has been a palliative for this problem”). See generally, MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE CRIMINAL JUSTICE SYSTEM 123–38 (2013).

72. Erickson et al., *supra* note 65, at 340.

73. Terry Carney, *The Mental Health Service Crisis of Neoliberalism - An Antipodean Perspective*, 31 INT’L J. L. & PSYCHIATRY 101, 111 (2008). See also Terry Carney, *Best Interests or Legal Rectitude? Australian Mental Health Tribunal Stakeholder & Case Flow Implications* (paper presented at Irish Mental Health Commission Conference ‘Mental Health Act 2001-Promoting Best Interest,’ Dublin, November 2009), manuscript at 33 (“The issue of legal advocacy before [mental health tribunals] is a vexed one.”) (paper on file with author). See also Perlin, *supra* note 37 (discussing this same issue in the context of veterans courts).

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 mental health court.”⁷⁷ It is essential that counsel has “a back-

74. Henry A. Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 331, 353–54 (2011). On the need for lawyers taking a TJ approach to view their clients “holistically,” see King, *supra* note 63, at 1122.

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

76. *Id.* at 516. See also Winick, *supra* note 36; Stefan & Winick, *supra* note 36, at 510–11, 520 (comments by Professor Winick).

77. David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, 17 ST. THOMAS L. REV. 743, 750 (2005). See Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve*, 17 ST. THOMAS L. REV. 781, 807 (2005) (discussing the role of therapeutic jurisprudence in clinical legal education). I consider dialogues that defense lawyers might have with their clients in incompetency status or insanity defense cases in Michael L. Perlin, “*Too Stubborn To Ever Be Governed By Enforced Insanity*”: *Some Therapeutic Jurisprudence Dilemmas in the Representation of Criminal Defendants in Incompetency and Insanity Cases*, 33 INT’L J. L. & PSYCHIATRY 475 (2010). On the parallel set of issues raised in the context of drug courts, compare David B. Wexler, 17 ST. THOMAS L. REV. 743, 750 (2005), see Clarke & Neuhard, *supra* note 57, at 29 (considering a parallel set of issues in drug courts) (“In addition to concerns about net-widening, some defense attorneys fear that these courts and the defense attorneys who practice in them are forcing their clients into the drug courts, arm twisting them into diversion with a condition of entry being that they take a plea, and/or that the effective treatment is raised above the least restrictive treatment”); see generally,

ground in mental health issues and in communicating with individuals who may be in crisis.”⁷⁸

ON DIGNITY⁷⁹

Introduction

Dignity is at the core of therapeutic jurisprudence,⁸⁰ and it also is the key underpinning of mental health courts.⁸¹ 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.⁸² Treating people with dignity and respect makes them more likely to view procedures as fair and the motives

Mae C. Quinn, *Whose Team Am I on Anyway: Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2001). For an overview of drug courts, see also Peggy Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717 (2008). For a recent article by sitting trial judges contrasting mental health courts and drug courts, see Anne Harper & Michael J. Finkle, *Mental Health Courts*, 51 JUDGES' J. 4 (2012). For a critique of juvenile drug courts, see Jason Rayne, *An Exposition of the Effectiveness of and the Challenges Plaguing Maine's Juvenile Drug Treatment Court Program*, 62 ME. L. REV. 649 (2010). For a consideration of family drug courts, see Janet York et al., *Family Drug Treatment Courts and Social Determinants of Health*, 50 FAM. CT. REV. 137 (2012). On the question as to whether drug courts should be operated as civil rather than criminal courts, see Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, U. CHI. LEGAL F. 299 (2010).

78. Wexler, *supra* note 77, at 750.

79. See generally, Perlin, *supra* note 11, at 99–108 & 217–39; Michael L. Perlin, *Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES 191 (Bruce Arrigo & Heather Bersot, eds., 2013).

80. See Christina A. Zawisza & Adela Beckerman, *Two Heads Are Better Than One: The Case-Based Rationale for Dual Disciplinary Teaching in Child Advocacy Clinics*, 7 FLA. COASTAL L. REV. 631 (2006); David C. Yamada, *Human Dignity and American Employment Law*, 43 U. RICH. L. REV. 523 (2009).

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

82. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 415 (2009).

behind law enforcement's actions as well meaning.⁸³ What individuals want most "is a process that allows them to participate, seeks to merit their trust, and treats them with dignity and respect."⁸⁴ All concepts of human rights have their basis in some understanding of human dignity.⁸⁵ Dignity has been characterized as one of "those very great political values that defines our constitutional morality."⁸⁶

The legal process upholds human dignity by allowing the litigant—including the criminal defendant—to tell his own story.⁸⁷ A notion of individual dignity, "generally articulated through concepts of autonomy, respect, equality, and freedom from undue government interference, was at the heart of a jurisprudential and moral outlook that resulted in the reform, not only of criminal procedure, but of the various institutions more or less directly linked with the criminal justice system, including juvenile courts, prisons, and mental institutions."⁸⁸ Fair process norms such as the right to counsel "operate as substantive and procedural restraints on state power to ensure that the individual suspect is treated with dignity and respect."⁸⁹ Dignity concepts are expansive; a Canadian Supreme Court case has declared that disenfranchisement of incarcerated persons violated their dignity interests.⁹⁰ By way of example,

83. Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1474 (2009).

84. Luther Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 HARV. NEGOT. L. REV. 377, 393 (2007).

85. *Buddhism and Human Dignity*, SGI QUARTERLY, (July 2000) available at <http://www.sgi.org/buddhism/buddhist-concepts/buddhism-and-human-dignity.html>.

86. William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47, 71 (Michael J. Meyer & William A. Parent eds., 1992).

87. Katherine Kruse, *The Human Dignity of Clients*, 93 CORNELL L. REV. 1343, 1353 (2008).

88. Eric Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1569 n.463 (2004).

89. Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200 (1983).

90. *Sauvé v. Canada*, [2002] 3 S.C.R. 519, discussed in Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 464 (2010).

“the moral dignity of the criminal process would be frustrated if grossly incompetent defendants were permitted to plead guilty.”⁹¹ One of the critical functions of counsel is to “protect the dignity and autonomy of a person on trial.”⁹² Perhaps counterintuitively to much of the lay public, dignity may trump “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

91. Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 593 (1995).

92. *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting). See also, e.g., Philip Halpern, *Government Intrusion into the Attorney-Client Relationship: An Interest Analysis of Rights and Remedies*, 32 BUFF. L. REV. 127, 172 (1983) (“The right to counsel embraces two separate interests: reliable and fair determinations in criminal proceedings, and treatment of defendants with dignity and respect regardless of the effect on the outcome of criminal proceedings.”).

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.

96. See *supra* note 55. See generally, Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 18 (1999) (footnotes omitted):

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 accor-

to control, modern mental disability law.⁹⁷ A careful examination of mental disability law reveals that judges are often pretextual because of their own “instrumental, functional, normative and philosophical” dissatisfaction with non-sanist constitutional decisions that grant a measure of dignity to persons with mental disabilities.⁹⁸

I believe that therapeutic jurisprudence is the best tool available to us to infuse the legal process with needed dignity.⁹⁹ The expanded use of dignity-providing mental health courts would allow for diversion of more of this cohort of defendants out of the criminal court process (and ultimately, out of destructive correctional facilities) into alternative placements where it is more likely they will be treated with at least a modicum of dignity.¹⁰⁰

dance 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.

Id. at 18.

97. 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 on the Rights of Persons with Disabilities*, 44 *GEO. WASH. INT’L L. REV.* 1, 31 (2012).

98. Michael L. Perlin, “*Life Is In Mirrors, Death Disappears*”: *Giving Life to Atkins*, 33 *N.M. L. REV.* 315, 344 (2003) (quoting, in part, Michael L. Perlin, “*There’s No Success Like Failure/and Failure’s No Success at All*” *Exposing the Pretextuality of Kansas v. Hendricks*, 92 *NW. U. L. REV.* 1247, 1258 (1997)).

99. Keri K. Gould & Michael L. Perlin, “*Johnny’s in the Basement/Mixing Up His Medicine*”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 *SEATTLE U. L. REV.* 339, 354 n.93 (2000) (“Therapeutic jurisprudence may also lend dignity to the voice of persons subordinated even by those who profess to represent the powerless.”); Perlin, *supra* note 11, at 217–39.

100. “The purpose of the mental health court is to insure that mentally ill people are treated with dignity and provided with the opportunity for treatment while at the same time protecting the public’s safety” and “preventing criminalization of the mentally ill.” *See Faraci, supra* note 65, at 824.

The arbitrary limitation in some mental health courts cutting off eligibility either for persons who are charged with committing felonies or crimes of “violence”¹⁰¹ self-evidently greatly limits the cohort of individuals who can be diverted to such courts.¹⁰² Absent any empirical justification for these limitations – and none has been offered¹⁰³ – 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

101. See Grachek, *supra* note 5, at 1495; Castellano, *supra* note 4, at 490. Misdemeanors are accepted by 87% of mental health courts responding to a recent survey; 77% of such courts accept non-violent felonies, and over one-third of the courts accept violent felonies. Raines & Laws, *supra* note 42, at 630.

102. One rarely-discussed but powerfully-important issue is that of “clutchability,” a consideration of “when the state has legitimate hold or power over an individual.” On the concept of “clutchability” in general in criminal law, see, e.g., Joel Feinberg, *Crime, Clutchability, and Individuated Treatment*, in *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 252 (1970). On the concept in this context of mental health courts, see Chelsea Davis, *With the Best of Intentions*, 3 MENTAL HEALTH L. & POL’Y J. 101 (2013).

103. The rationale appears to be purely political: “Violent offenders have traditionally been excluded from mental health courts because of *public outcry* to the heinous nature of their crimes vis-a-vis the public’s empathetic perception of mentally ill, nonviolent offenders.” Jared Hodges & Brett Williams, *Courts*, 28 GA. ST. U. L. REV. 293, 303 (2011) (emphasis added). Of course, not all felonies are remotely “heinous.” See *infra* notes 106–11 accompanying text.

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

105. See, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971); Conor Clark & Austin Sarat, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 389 (2008).

106. *Addington v. Texas*, 441 U.S. 418 (1979) (burden of proof in civil commitment case at least “clear and convincing evidence”).

107. *Jones v. United States*, 463 U.S. 354 (1983) (constitutionally acceptable to provide insanity acquittees with fewer procedural due process protections in a retention hearing than civil committees).

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 while Jones was arrested and thus brought into the criminal justice system.¹¹⁰ Notwithstanding the fact that Jones was charged with a felony (attempted petit larceny [shoplifting]), it makes no sense to suggest that this was the sort of “heinous” crime that would automatically disallow diversion to a mental health court.¹¹¹

Scholars and practitioners who have written about mental health courts frequently stress the need for “creativity” in the use of such courts as a tool for enhancing the decision to divert a defendant from traditional criminal court.¹¹² In such courts, judges must seek to craft “creative judicial responses to offending conduct that address the root causes of that conduct in the hope that, in the end, the prevalence of such conduct will subside.”¹¹³ An expansion of these courts will best serve the population under consideration in this work. Consider here the thoughts of Gerald Nora, an Illinois state’s attorney:

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

109. *Jones*, 463 U.S. at 359.

110. I discuss the implications of this in Perlin, *supra* note 96, at 30 n.158.

111. *Id.* at 29–30 (“Untrammelled discretion vested in police officers leads to inexplicable disjunctions in mental disability law developments.”).

112. See, e.g., Clarke & Neuhard, *supra* note 77, at 781 (on how “creative” advocacy can achieve diversion or alternatives to incarceration in this context); Sandra F. Cannon & Joseph Krake, *Mental Health Diversion Alternatives to Jail: Thirteen Pilot Programs Funded by ODMH in April 2000: Where Are They Now and What Have We Learned?*, 32 *CAP. U. L. REV.* 1021, 1027 (2004) (“Diversion programs that pool resources from different systems—mental health, substance abuse and criminal justice—and those that utilize creative strategies to approach housing and other treatment issues will undoubtedly fare the best”).

113. Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 *CASE W. RES. L. REV.* 305, 315 (2009).

The bottom line is that mental health courts are heroic efforts to bring some justice to a severely underserved population. It is society's failure, not the criminal justice system's failure, if these courts continue to be the brightest candles in the darkness we have imposed upon the mentally ill. We are prosecuting the mentally ill as criminals. And many mental health workers are prevented from doing their jobs unless they are partnered with lawyers, probation officers, and court orders. And our preferred patients are those who commit crimes. We let the law-abiding suffer alone.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."¹¹⁵ The expansion of mental health courts — following the models of Judge Wren,¹¹⁶ Judge Matthew D'Emic,¹¹⁷ Judge Michael Finkle,¹¹⁸ and others¹¹⁹ — is a major component in the prescription of dignity for this population, and, importantly, as a way to minimize sanism.¹²⁰

114. Gerald Nora, *Prosecutor as "Nurse Ratched"? Misusing Criminal Justice as Alternative Medicine*, 22 CRIM. JUST. 18, 22 (Fall 2007).

115. *Id.*

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

117. See Matthew J. D'Emic, *The Promise of Mental Health Courts*, 22 CRIM. JUST. 24 (Fall 2007).

118. See Anne Harper & Michael J. Finkle, *Mental Health Courts*, 51 JUDGES' J. 4 (Spring 2012).

119. E.g., Judge Stephanie Rhoades of Alaska; see Shauhin Talesh, *Mental Health Court Judges as Dynamic Risk Managers: A New Conceptualization of the Role of Judges*, 57 DEPAUL L. REV. 93, 115 (2007) (discussing Judge Rhoades).

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.

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.¹²¹ The promotion and creation of such courts are consistent with TJ’s aims and aspirations,¹²² especially where litigants are given the “voice” that TJ demands.¹²³ They are grounded¹²⁴ and rooted¹²⁵ in TJ; they reflect TJ “theory in practice.”¹²⁶ Although both of these

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 Jelena Popovic, *Court Process and Therapeutic Jurisprudence: Have We Thrown the Baby out with the Bathwater?*, http://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf (last visited Oct. 15, 2013). *But see* Johnston, *supra* note 6, at 521 (arguing thoughtfully that therapeutic jurisprudence is not an adequate basis upon which to support mental health courts). I disagree with Prof. Johnston because I believe she fails to acknowledge the due process underpinnings of TJ theory (*see id.* at 533) (“Therapeutic jurisprudence offers no opinion—in general or in specific instances—as to whether therapeutic considerations should be valued more heavily than autonomy, fairness, accuracy, consistency, perceived legitimacy of the criminal justice system, public safety, or a host of other values”). I believe this is simply not so. See Michael L. Perlin, *“Justice’s Beautiful Face”: Bob Sadoff and the Redemptive Promise of Therapeutic Jurisprudence*, 40 *J. PSYCHIATRY & L.* 265, 267 (2012) (quoting Perlin, *Healing*, *supra* note 24, at 412 (“An inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.”)).

122. See Leroy Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 *SEATTLE L. REV.* 373, 446–47 (2000).

123. Nicola Ferencz & James McGuire, *Mental Health Review Tribunals in the UK: Applying a Therapeutic Jurisprudence Perspective*, 37 *COURT REV.* 48, 51 (2000).

124. James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 *AM. CRIM. L. REV.* 1541, 1541 (2003).

125. Wasicek, *supra* note 40, at 126; John Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 *LOY. L. REV.* 279, 280–81 (2010).

126. Michael Codben & Ron Albers, *Beyond the Squabble: Putting the Tenderloin Community Justice Center in Context*, 7 *HASTINGS RACE & POVERTY L. J.* 53, 56 (2010).

issues — counsel and competence — are extraordinarily critical ones, I do not believe there is any evidence that mental health courts cannot be redirected to confront them and to craft creative solutions to the problems raised.

Mental health courts offer a new way of considering the linkage between mental disability and the criminal justice process. These courts are not without controversy, but the research appears to reveal, in general, a robust relationship between the operation of 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.