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Drug Treatment Court: Therapeutic Jurisprudence Applied

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DRUG TREATMENT COURT: THERAPEUTIC JURISPRUDENCE APPLIED¹

Bruce J. Winick² & David B. Wexler³

Therapeutic jurisprudence is the study of law's impact on psychological well-being.⁴ It is an interdisciplinary approach to legal scholarship that has a law reform agenda. Therapeutic jurisprudence seeks to assess the therapeutic and anti-therapeutic consequences of law and how it is applied. It also seeks to affect legal change designed to increase the former and diminish the latter. It can be seen as a mental health approach to law that uses the tools of the behavioral sciences to assess law's therapeutic impact, and when consistent with other important legal values, to reshape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected.

Therapeutic jurisprudence has been described as one of the major "vectors" of a growing movement in the law "towards a common goal of a more comprehensive, humane, and

¹ Copyright © 2002 by Bruce J. Winick & David B. Wexler. This article is derived from Bruce J. Winick & David B. Wexler, *Therapeutic Jurisprudence and Drug Treatment Courts: A Symbiotic Relationship*, in PRINCIPLES OF ADDICTION MEDICINE (Allan W. Graham & Terry K. Schultz eds. 3d ed., forthcoming). Portions of this article will appear in the authors' forthcoming book, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, which will be published by Carolina Academic Press in 2003.

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⁴ LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY]; ESSAYS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds., 1991); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL'Y & L. 184 (1997). For an up-to-date bibliography of therapeutic jurisprudence work, visit the web site at <http://www.therapeuticjurisprudence.org>.

psychologically optimal way of handling legal matters.”⁵ Besides therapeutic jurisprudence, these vectors include, among others, preventive law, restorative justice, facilitative mediation, holistic law, collaborative divorce, and specialized treatment courts. These specialized courts – “problem solving courts,” as they are becoming known – include drug treatment court,⁶ domestic violence court,⁷ and mental health court.⁸

Specialized treatment courts – including drug treatment courts – are related to therapeutic jurisprudence,⁹ but they are not identical with the concept. These courts can be seen as applications of therapeutic jurisprudence. They seek to solve a variety of individual problems, using principles of therapeutic jurisprudence in their work. In fact, the conference of chief justices and the conference of state court administrators recently approved a resolution supporting “problem solving courts” and their use of principles of therapeutic jurisprudence in performing their functions.¹⁰ These principles include ongoing judicial intervention, close monitoring of and immediate response to behavior, the integration of treatment services with judicial case processing, multi disciplinary involvement, and collaboration with community-based and government organizations.

⁵ Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 465 (Dennis P. Stolle, David B. Wexler, & Bruce J. Winick, eds., 2000).

⁶ Peggy F. Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999).

⁷ Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000); Bruce J. Winick, *Applying the Law Therapeutically in Domestic Violence Cases*, 69 UMKC L. REV. 33 (2000).

⁸ See generally David B. Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT'L INST. JUST. J., Summer 1999, at 12; Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAV. SCI. & L. 445 (2000).

⁹ Hora et al., *supra* note 6.

¹⁰ Conference of Chief Justices & Conference of State Court Administrators, *Resolution In Support of Problem-Solving Courts*, 2 J. CENTER FOR FAMS., CHILD. & CTS. 2 (2000) (CCJ Resolution 22 & COSCA Resolution 4).

Drug treatment court was pioneered in the late 1980s at the same time when therapeutic jurisprudence was being developed as an interdisciplinary approach to legal scholarship and law reform. Although drug treatment court developed independently, it can be seen as taking a therapeutic jurisprudence approach to the processing of drug cases inasmuch as its goal is the rehabilitation of the offender. It uses the legal process, and the role of the judge in particular, to accomplish this goal. Drug treatment court was a response to the recognition that processing non-violent offenders charged with the possession or use of drugs through the criminal courts and sentencing them to prison did not change their addictive behavior. Instead, it led to a revolving door effect in which such offenders resumed their drug abusing behavior after release from prison. The criminal court intervention thus failed to deal effectively with the underlying problem, and in this sense could be seen as anti-therapeutic.

Instead of the traditional criminal justice approach, drug treatment court emphasizes the rehabilitation of the offender and explicitly makes the judge a member of the treatment team. Offenders accepting diversion to drug treatment court agree to remain drug-free, to participate in a prescribed course of drug treatment, to submit to periodic drug testing to monitor their compliance, and to report frequently to court for judicial supervision of their progress. Drug court judges receive special training in the nature and treatment of drug addiction, and through their supervision and monitoring of the offender's treatment progress, themselves function as therapeutic agents.

An important insight of therapeutic jurisprudence is that, how judges and other legal actors play their roles has inevitable consequences for the mental health and psychological well-being of the people with whom they interact. Because drug treatment court judges consciously view themselves as therapeutic agents in their dealings with offenders, they can be seen as playing a therapeutic jurisprudence function. Moreover, principles of therapeutic jurisprudence can help the drug treatment court judge to play this function well.

Therapeutic jurisprudence has already produced a large body of interdisciplinary scholarship that analyzes principles of psychology and the behavioral sciences and attempts to show how

they can be used in legal contexts to improve mental health.¹¹ Recent scholarship has shown how judges in specialized problem solving courts can use principles of therapeutic jurisprudence in their work.¹² Indeed, a recent symposium issue of *Court Review*, the publication of the American Judges Association, was devoted entirely to therapeutic jurisprudence and its application by the courts.¹³

An understanding of the approach of therapeutic jurisprudence and of the psychological and social work principles it uses can thus improve the functioning of drug treatment court judges. Judge-defendant interactions are central to the functioning of drug treatment court. Judges therefore need to understand how to convey empathy, how to recognize and deal with denial, and how to apply principles of behavioral psychology and motivation theory. They need to understand the psychology of procedural justice, which teaches that people appearing in court experience greater satisfaction and comply more willingly with court orders when they are given a sense of voice and validation and treated with dignity and respect.¹⁴ They need to understand how to structure court practices in ways that maximize their therapeutic potential, even in such mundane matters as the ordering of cases in the courtroom to maximize the chances that defendants who are there awaiting their turn before the judge can experience vicarious learning. Offenders accepting diversion to drug treatment court are in effect entering into a type of behavioral contract with the court, and judges therefore should understand the psychology of such behavioral contracting and how it can be used to increase motivation, compliance, and effective performance.¹⁵

¹¹ LAW IN A THERAPEUTIC KEY, *supra* note 4.

¹² Casey & Rottman, *supra* note 8; Fritzler & Simon, *supra* note 7; Winick, *supra* note 7.

¹³ *Court Review*, *Special Issue on Therapeutic Jurisprudence*, 37 CT. REV. 1 (2000).

¹⁴ Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. L. 37, 37-60 (1999).

¹⁵ David B. Wexler, *Inducing Therapeutic Compliance Through Criminal Law*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 187 (David B. Wexler & Bruce J. Winick, eds., 1991); Bruce J. Winick, *Harnessing the Power of the Bet: Wagering With the Government as a Mechanism of Social and Individual*

Drug treatment court judges also need to understand how to deal with feelings of coercion on the part of the offender.¹⁶ A degree of legal coercion is undeniably present when a drug offender is arrested and must make the difficult choice of whether to face the consequences of trial and potential punishment in the criminal court or instead accept diversion and a course of treatment supervised by the drug treatment court. However, a body of literature on the psychology of choice suggests that if the defendant experiences this choice as coerced, his or her attitude, motivation, and chances for success in the treatment program may be undermined. On the other hand, experiencing the choice as voluntarily made and non-coerced can be more conducive to success. Judges therefore should not attempt to pressure offenders to accept diversion to drug treatment court, but should remind them that the choice is entirely up to them. A body of psychological work on what makes people feel coerced suggests how the drug court judge can increase the likelihood that offenders experience a sense of voluntary choice in their decision to accept drug treatment. To accomplish this, judges should always strive to treat offenders with dignity and respect, to inspire their trust and confidence that the judge has their best interests at heart, and to provide them a full opportunity to participate, and to listen attentively to what they have to say. Judges treating drug court offenders in these ways can increase the likelihood that they will experience their choice to enter into treatment as voluntary and will internalize the treatment goal and act in ways that help to achieve it.

Although therapeutic jurisprudence can help drug treatment court judges to more effectively play their roles in the drug treatment process, it is important to recognize that therapeutic jurisprudence does not necessarily support all actions that may be regarded as pro-treatment. Nor does therapeutic jurisprudence require addiction to be characterized as a "disease."¹⁷ Even if

Change, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 219 (David B. Wexler & Bruce J. Winick, eds., 1991).

¹⁶ Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 *DENV. U. L. REV.* 1145 (1997).

¹⁷ HERBERT FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE* (1988).

viewed simply as a “problematic behavior,” therapeutic jurisprudence principles could effectively apply in a diversion program agreed to by a person charged with criminal behavior who acknowledges having a problem. In addition, therapeutic jurisprudence does not take a position on whether increased or decreased criminalization or penalty for possession of drugs is warranted. Indeed, unless there are independent justifications for criminalization, therapeutic jurisprudence would not support continued criminalization solely to provide a stick-and-carrot approach to inducing criminal defendants to accept treatment in a drug treatment court diversion program.

Therapeutic jurisprudence would also encourage investigation and dialogue regarding the role of defense counsel in drug treatment court proceedings. Drug treatment court is often administered with a “team approach,” under which the judge, prosecutor, and defense lawyer are seen as members of a team attempting to facilitate the rehabilitation of the offender. While this team approach might have therapeutic advantages, it might also have disadvantages, particularly if the offender comes to feel “sold out” by his own attorney.¹⁸ Therapeutic jurisprudence suggests that therapeutic goals not trump other important goals, and the due process right to effective counsel is one such goal. Moreover, respecting the role of counsel as advocate may even have considerable therapeutic merit.¹⁹

In summary, then, therapeutic jurisprudence can contribute much to the functioning of drug treatment courts and the latter can provide rich and fascinating laboratories from which to generate and refine therapeutic jurisprudence approaches. But the two perspectives are merely “vectors” moving in a common direction, and are not identical concepts.

¹⁸ 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 (2000-2001); Martin Reisig, *The Difficult Role of the Defense Lawyer in a Post-Adjudication Drug Treatment Court: Accommodating Therapeutic Jurisprudence and Due Process*, 38 CRIM. L. BULL. 216 (2002).

¹⁹ Reisig, *supra* note 18; Winick, *supra* note 14.

CONCLUSION

Addiction is a complex psychosocial problem that our society has not done a very good job of preventing and treating. As a result, this difficult societal problem was dumped at the doorstep of the criminal court. But the traditional response of the criminal court failed to deal effectively with the problem. Criminal court dockets swelled with drug cases, and the judicial and prison systems became revolving doors that did little more than temporarily halt the addiction cycle. In a bold initiative, Miami-Dade County established the nation's first drug treatment court to attempt a different approach. The drug treatment court has now emerged as a nationwide effort to have the courts play a special role in the rehabilitation of those with drug addiction who want to change. It is a noble undertaking, but to do it effectively, judges need to develop and improve their interpersonal, psychological, and social work skills. Therapeutic jurisprudence can help the court in this effort. And the drug treatment court can become a natural laboratory for the development and application of therapeutic jurisprudence principles and for research on what works best in the court-involved treatment process.

Therapeutic jurisprudence and the drug treatment court share a common cause: how legal rules and court practices can be designed to facilitate the rehabilitative process. We have much to offer one another. Let us join together to enlist law and the courts in the battle against addiction. Not with a punitive approach, but with a pragmatic, empirically grounded therapeutic orientation; one that promotes healing through law.

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