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## Justice in America: Diverting the Mentally III

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## JUSTICE IN AMERICA: DIVERTING THE MENTALLY ILL

*Matthew J. D’Emic*\*

### INTRODUCTION

It has been a rough year for the criminal justice system in America. Racially charged confrontations in various jurisdictions have caused citizens to question both the substantive and procedural fairness of our justice system. Calls for reform of the grand jury process, court transparency, and other facets of the criminal justice system sound far and wide. Protestations of “no justice, no peace”—an accusation of systemic injustice—echo across the country.<sup>1</sup>

Legal scholars decry the shortcomings of judges and judging. One claims “misjudging is more common, more systematic, and more harmful than the legal system has fully realized.”<sup>2</sup> Yet another presumes “judges generally are prone to error because of . . . informational, cognitive, and attitudinal blinders,” concluding, “I do not think that the vast majority of trial judges are good . . . .”<sup>3</sup>

In fact, no less a personage than presidential candidate Hillary Clinton recently stated in an interview:

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<sup>1</sup> See, e.g., Mary Bowerman, *‘I Am a Man’ to ‘I Am Michael Brown’: A Closer Look at Protest Slogans*, USA TODAY (Dec. 9, 2014), <http://www.usatoday.com/story/news/nation-now/2014/12/09/i-cant-breathe-protest-slogans-black-lives-matter/20135515/> [<http://perma.cc/WG4K-EDAZ>].

<sup>2</sup> Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 421 (2007).

<sup>3</sup> Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 522 (2007).

I believe we need to end the era of mass incarceration. If you compare arrest records in, you know, in charging crimes, in sentencing for crimes, you compare African-American men to white men, it is as unfortunately clear as it could be, that there is a bias in favor of white men.<sup>4</sup>

So there it is. A bad year for the reputation of the justice system in general and judges in particular. Whether one agrees with it or not (and it is nothing new), or agrees with it in part, judges and the justice system cannot lose the trust of the citizenry without dire consequences. Trust is key to the effectiveness of the third, non-political branch of government.

Against this backdrop of mistrust I would like to present to the reader the history and future of a quiet evolution in the justice system—one which I believe bolsters trust in the justice system: the mental health court.

## I. PROBLEM-SOLVING COURTS

As the criticisms cited above demonstrate, there is great concern in this country about the state of criminal justice. Critical rhetoric notwithstanding, thoughtful answers are needed to pressing questions. One such answer came with the establishment of problem-solving courts, which emerged in the 1990s and are still flourishing.<sup>5</sup> Proven strategies in courts offering alternatives to prison have been shown to reduce recidivism and afford a second (or more) chance to the young, those with addictions and those with mental illness, while protecting the public. These strategies effect a welcome shift in the achievement of justice in a society questioning the cost of confinement and the disproportionate representation of minorities in jails and prisons.

The idea that the criminal justice system offers certain offenders a chance to stay out of jail stems from the concept of “therapeutic jurisprudence,” a phrase coined by Professors Bruce Winnick and David Wexler.<sup>6</sup> Therapeutic jurisprudence, exercised in problem-solving courts, proposes that judges use their authority for the physical and emotional benefit of the accused as well as society.<sup>7</sup> Put another way, rather than resolving cases quickly without regard to long-term outcomes, problem-solving courts grapple with difficult societal problems and seek to connect criminal defendants to therapeutic interventions like drug treatment and

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<sup>4</sup> *Keepin’ it Real with Rev. Al Sharpton* (Radio One, Inc. Aug. 6, 2015).

<sup>5</sup> Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES (Apr. 26, 2005), <http://www.nytimes.com/2005/04/26/nyregion/in-problemsolving-court-judges-turn-therapist.html>.

<sup>6</sup> Bruce J. Winnick & David B. Wexler, *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 7 (2003).

<sup>7</sup> See Eaton & Kaufman, *supra* note 6.

mental health treatment in an attempt to ensure that the defendant will not return to criminal behavior.<sup>8</sup> It is an approach to adjudication that takes into consideration the complex social, economic, and psychological factors that may cause people to be in conflict with the law.<sup>9</sup> It then attempts to address those factors in fashioning a just determination of the case.<sup>10</sup> In this way, all involved—judge, prosecutor, defense attorney, and service provider—look to reduce the likelihood of future criminal behavior.<sup>11</sup>

This concept led to the creation of the first drug treatment court in Florida in 1989<sup>12</sup> and the first mental health court in Broward County, Florida in 1997.<sup>13</sup> The first drug court in New York State was created in Brooklyn in 1996,<sup>14</sup> and the first mental health court in New York State, which will be discussed in detail in the next section of this article, was created in Brooklyn in 2002.<sup>15</sup>

Of course, this approach has its critics, and criticism is essential to a fair vetting of any new idea. Problem-solving courts have been attacked for jettisoning defendants' due process rights, undermining judicial independence, and radically altering established principles of fair process and judicial impartiality.<sup>16</sup> These negative judgments are muted, however, by the acknowledgment that "[n]o one seriously disputes the worthiness of the goal to restore people to mental health by correcting the way they think and behave, or help them overcome destructive addictions and bad habits by teaching them to lead more productive lives."<sup>17</sup>

As problem-solving courts have evolved, much of this criticism has dissipated. These courts are, for the most part, viewed as a welcome enhancement to the traditional role of the courts. As Professor Wexler put

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<sup>8</sup> See Ken Haldenstein, *Integrative Law: Law as a Healing Profession*, 40 WESTCHESTER B.J. 35, 39 (2015).

<sup>9</sup> See Arthur J. Lurgio & Jessica Snowden, *Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196, 198-99 (2009).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 200-02.

<sup>12</sup> *Id.* at 200.

<sup>13</sup> *Id.* at 202.

<sup>14</sup> *Brooklyn Treatment Court*, CTR. FOR COURT INNOVATION, <http://www.courtinnovation.org/project/brooklyn-treatment-court> [<http://perma.cc/WA4J-UWQ7>].

<sup>15</sup> KELLY O'KEEFE, CTR. FOR COURT INNOVATION, *THE BROOKLYN MENTAL HEALTH COURT EVALUATION: PLANNING, IMPLEMENTATION, COURTROOM DYNAMICS, AND PARTICIPANT OUTCOMES* iii (2006), <http://www.courtinnovation.org/sites/default/files/BMHCevaluation.pdf> [<http://perma.cc/D6EJ-M5EB>].

<sup>16</sup> ARTHUR G. CHRISTEAN, *THERAPEUTIC JURISPRUDENCE: EMBRACING A TAINTED IDEAL*, SUTHERLAND INSTITUTE (Jan. 2002), <http://psychrights.org/articles/TherapeuticJurisprudenceTaintedIdeal.htm> [<http://perma.cc/HE22-UA94>].

<sup>17</sup> *Id.*

it: “Therapeutic jurisprudence looks not merely at the law on the books, but rather the law in action—how the law manifests itself in law offices, client behavior, and courtrooms around the world. The underlying concern is how legal systems actually function and affect people.”<sup>18</sup>

## II. MENTAL HEALTH COURTS

Since the Brooklyn Mental Health Court’s inception, more than 300 mental health courts have been established in this country,<sup>19</sup> and the concept has spread to other common law countries.<sup>20</sup>

Mental health courts are an idea whose time has come. It is estimated that almost 20% of persons in our jails and prisons suffer from a serious mental illness such as schizophrenia, bipolar disorder, major depression, and schizoaffective disorder.<sup>21</sup> It is clear, then, that the intersection of mental health and criminal justice is a busy one. Just resolution of cases involving persons suffering from mental illness requires new, non-traditional approaches to prevent further recycling of these individuals through criminal justice and greater damage to them as individuals, to their families, and to society.

So it is that mental health courts attempt to achieve improved psychiatric and social stability for offenders while also improving public safety by linking offenders with treatment. In this way, mental health courts work with mental health agencies, families, housing providers, and others to help an offender suffering from a mental illness to lead a productive, crime-free life in the community.<sup>22</sup>

While the look and feel of mental health courts varies, most share a number of characteristics. The Council of State Governments Justice Center has defined what it calls “essential elements” of mental health courts, such as: a specialized court docket, which displays a problem-solving approach to the processing of cases in lieu of more traditional judicial models; judicially supervised, community-based treatment plans for each participating defendant, which a team of professional court staff design and implement; regular court status hearings at which the treatment plan is

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<sup>18</sup> David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 20 (2008).

<sup>19</sup> *Mental Health Courts*, COUNCIL OF STATE GOV’TS JUSTICE CTR. (2015), <https://csgjusticecenter.org/mental-health-court-project/> [https://perma.cc/6M2K-2NHM].

<sup>20</sup> See, e.g., Michele Peterson-Badali et al., *Mental Health in the Context of Canada’s Youth Justice System*, 19 *CAN. CRIM. L. REV.* 5, 17 (2015).

<sup>21</sup> See Lurgio & Snowden, *supra* note 10, at 198.

<sup>22</sup> See generally Carol Fidler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 *PSYCHOL. PUB. POL’Y & L.* 587 (2005).

reviewed for appropriateness, incentives are offered or sanctions imposed depending on the progress of the participant; and specific criteria defining the court mandate and requirements for completion.<sup>23</sup>

### III. THE BROOKLYN MENTAL HEALTH COURT

These “essential elements” are broadly stated so as to allow localities to fashion mental health courts to fit a jurisdiction’s needs and political realities. For example, while most mental health courts handle only misdemeanors, some allow non-violent felons, and fewer still accept persons accused of violent felonies.<sup>24</sup> At this point, it is fitting to go from the general to the specific and describe the operation of the Brooklyn Mental Health Court, as previously mentioned, the first in the state.

The Brooklyn court officially started operation in October 2002 as a joint project of the New York State Unified Court System, the New York Office of Mental Health, and the Center for Court Innovation.<sup>25</sup> In the planning stages, all stakeholders were invited to participate in order to assure the court’s processes would be fair.<sup>26</sup> A consensus was reached and put in place.<sup>27</sup> Since the first day, the process has remained very much the same.

The first step of the process is referral. A defendant may be referred to the mental health court by any judge, prosecutor, or defense attorney in Kings County.<sup>28</sup> If both the district attorney and defense attorney agree to the referral of the defendant to the Brooklyn Mental Health Court, the second step is evaluation.<sup>29</sup> At this point, a consulting psychiatrist and social worker on the court staff evaluate the accused.<sup>30</sup> Both a psychiatric report and psycho-social report are prepared and given to the attorneys and the judge.<sup>31</sup> They are also used as part of the referral package sent to treatment providers.<sup>32</sup>

If the experts agree that the defendant meets the criteria for the court—

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<sup>23</sup> See MICHAEL THOMPSON ET AL., COUNCIL OF STATE GOV’TS JUSTICE CTR., IMPROVING RESPONSES TO PEOPLE WITH MENTAL ILLNESSES: THE ESSENTIAL ELEMENTS OF A MENTAL HEALTH COURT (2007), [https://www.bja.gov/Publications/mhc\\_essential\\_elements.pdf](https://www.bja.gov/Publications/mhc_essential_elements.pdf) [<https://perma.cc/4Z8U-3Q27>].

<sup>24</sup> See Lurgio & Snowden, *supra* note 10, at 206.

<sup>25</sup> *Mental Health Courts*, N.Y. STATE UNIFIED COURT SYS., [https://www.nycourts.gov/courts/problem\\_solving/mh/home.shtml](https://www.nycourts.gov/courts/problem_solving/mh/home.shtml) [<https://perma.cc/5D9X-ALZ2>].

<sup>26</sup> See O’KEEFE, *supra* note 16, at 6.

<sup>27</sup> See *id.* at 8-11.

<sup>28</sup> See *id.* at 15.

<sup>29</sup> See *id.* at 20.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

that is, he or she suffers from a serious and persistent mental illness with some connection to the criminal behavior<sup>33</sup>—the defendant moves to the third step. The court’s clinical director formulates a treatment plan while the defense attorney and prosecutor negotiate a plea agreement. The final step is the entry of the guilty plea and commencement of treatment. A conditional plea is entered with two outcomes: jail for failure to comply with treatment and, in most cases, dismissal for success.<sup>34</sup> Sentencing is deferred while the defendant is in treatment.<sup>35</sup>

One illustrative case I presided over involved a middle-aged man who, after suffering a heart attack and undergoing surgery, suddenly and uncharacteristically became romantically obsessed with his cardiologist.<sup>36</sup> He began stalking her and was arrested. He had no prior psychiatric history, but, because of the circumstances of the crime, was referred to the court. Both prosecution and defense agreed to evaluations, and the court’s psychiatrist, in that process, discovered that the man, in addition to his obsession with the doctor, had developed paranoid and delusional beliefs, such as believing that his milk and his blood contained “mad cow” disease. He was diagnosed with Paranoid Delusional Disorder and Erotomania. The psychiatrist’s report predicted that without intervention, he was very unlikely to seek treatment, and that his symptoms would continue to worsen and could potentially lead to dangerous behavior.

With that dire warning as a backdrop, the defendant pled guilty and started treatment—which included medication. For the first few months, the defendant fixated on his delusions, offering to submit proof to the court at every appearance. After a while, however, the medication effectively alleviated his paranoid suspicions. About one year later he expressed embarrassment over his situation. He graduated from the court four years ago, returned to his family, and continued working with no further legal problems. If the psychiatrist’s warning of future dangerousness without treatment was accurate, clearly the individual, his family, and the public were better served by treatment than by jail.

Another case in my court involved a young woman charged with serious assault and diagnosed with schizophrenia. Hospitalized twenty-five times since the age of eighteen, she suffers from hallucinations. Like many mental health court participants, she does not use drugs. At this point, after

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<sup>33</sup> *Id.* at 8.

<sup>34</sup> *See id.* at 1.

<sup>35</sup> *See id.*

<sup>36</sup> In describing this case and the others that follow, I am drawing on my personal recollection from presiding over them. Because the Mental Health Court’s practice is to seal cases when defendants complete their treatment mandates successfully, details of these cases are confidential and only on file with the author.

evaluation, she entered her plea and commenced treatment with her outcome hopeful but uncertain. Another of my cases involved a middle-aged man who attacked his father. His first psychotic break occurred at age twenty-one, more than twenty years ago. Diagnosed with bipolar disorder with psychotic features, he also entered his plea and started treatment, telling the court he wanted to change his life. Unlike the young woman just mentioned, this defendant has a co-occurring substance abuse disorder, requiring treatment for alcohol abuse. Again, his will be a long, but hopefully, successful road to recovery.

There are many more stories of individual human beings who have passed through the mental health court in the past thirteen years—all poignant. An early study of the Brooklyn Mental Health Court documented improvements by participants in several outcome measures,<sup>37</sup> and a more recent study found participants significantly less likely to re-offend than those in traditional courts.<sup>38</sup>

#### CONCLUSION

This article began with a recount of the loss of trust in some aspects of our court system. I am hopeful that thoughtful innovations like problem-solving courts in general and mental health courts in particular serve to bolster trust. I have overseen over 1,000 criminally accused participants in the Brooklyn Mental Health Court, and 718 have successfully completed its mandate. Before mental health courts, those individuals had only two choices: trial or plea. Now, treatment as an alternative to incarceration with a dismissal upon completion offers a third, fairer, and more just choice.

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<sup>37</sup> O'KEEFE, *supra* note 16, at 50-55.

<sup>38</sup> SHELLI B. ROSSMAN ET AL., URBAN INST., CRIMINAL JUSTICE INTERVENTIONS FOR OFFENDERS WITH MENTAL ILLNESS: EVALUATIONS OF MENTAL HEALTH COURTS IN BRONX AND BROOKLYN, NEW YORK 118 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238264.pdf> [<http://perma.cc/6TXZ-2CSQ>].