

PROBLEM SOLVING JUSTICE: REDUCING RECIDIVISM AND PROMOTING PUBLIC SAFETY

A WHITE PAPER

THE HONORABLE JUDGE GINGER LERNER-WREN*

One may ask the question: Why a public health law symposium to discuss the challenges and objectives of reducing recidivism and breaking arrest cycles? Why are we not simply labeling this a criminal justice symposium? The answer, of course, underscores a forensic population that is characterized by a complex set of social and public health disparities which have plagued a system, historically ill-equipped to respond to these challenges. The scholarly theory of Therapeutic Jurisprudence (“TJ”), developed by the late Professor Bruce A. Winick, University of Miami School of Law, and David Wexler, University of Arizona Rogers College of Law and University of Puerto Rico, envisioned a legal theory that represents both a field of empirical study and a highly portable legal philosophy with roots in mental health and public health law.¹ Since the first problem solving Drug Court in 1989, TJ has provided countless courts and legal actors a meaningful opportunity to re-align traditional court process with the goal of resolving vexing social problems. Through a TJ lens, problem solving courts have the potential to heal through empathic, connectivity, and targeted court orders designed to creatively seek solutions—typically in a public health context—to overcome barriers to care that often exist where fragmentation and scarcity of resources are essentially inaccessible.² Presently, TJ has been embraced by judges, lawyers, and law enforcement both in the United States and across the globe. Its popularity and evidence base are so positive and robust, it is fair to say that the emergence and dynamic growth of TJ can be reasonably described as a revolutionary innovation in public health law.³

During the past several decades, the theory of TJ has led to the ultra-rapid growth and evolution of the criminal justice system with the emergence of problem solving courts.⁴ The belief that courts could act as a therapeutic agent when legal actors—judges and lawyers—align process, behavior, and

*NSU: CJI- (Doctoral Program) Adjunct Professor

1. See David B. Wexler, Public Lecture at the Thomas Cooley Law Review Disabilities Law Symposium: International Network on Therapeutic Jurisprudence (Oct. 29, 1999), available at <http://www.law.arizona.edu/depts/upr-intj/intj-o.html#>.

2. *Id.*

3. *Id.*

4. *Id.*

take a multi-disciplinary approach to legal proceedings and decision-making through the integration of various components of public health law—mental health, substance abuse, health disparities, community based systems of care, system organization, forensic psychology, public policy, homelessness, the impact of illiteracy and educational deficits, poverty, trauma and violence, governmental benefits systems and countless regulatory schemes, principles of psychiatric and developmental rehabilitation, civil rights, human rights, ethics, and the technologies of social justice advocacy—have the ability to improve court experience and has drastically redefined jurisprudence in the United States and globally.⁵

For those of you who practice in criminal justice—which includes the juvenile justice system—or are planning to go into criminal justice, this area of the law must be understood. It represents a major legal paradigm shift where inter-disciplinary public health becomes an area where constant learning persists at a fast and furious pace. For me, it is almost impossible to recall a time when matters of mental health, substance abuse, addiction and recovery, restorative sentencing, and TJ have not played a major role in daily considerations of court process. This crosscutting analytical matrix is consistently applied and part of on-going decision making processes.

Therefore, it is with this recognition and ever evolving criminal justice system consciousness that the Nova Southeastern University (“NSU”) Shepard Broad Law Center, together with its collaborative partners, Broward Sheriff’s Office, and the Office of NSU Faculty Alumni, host this unique Public Health Law Symposium. Through this Symposium we chart the evolution of problem-solving justice, through its early history and legal pioneers, the proliferation of the diverse application of problem-solving courts and related strategies throughout the years, and the sustaining power of community collaborations. This revolutionary paradigm has raised the specter of complex social and criminal justice problem solving and law enforcement to a sophisticated art form. Recently, in my court, a municipal prosecutor was wrestling with a rather elegant, but eccentric woman who insisted on living in her urban camper in front of a major retail store. This former flight attendant was delightful, albeit stubborn, intellectually sound, and deemed psychiatrically stable. Yet, as my mental health court clinician stated, she was “A bit of a hippie throwback.” During the course of the hearing, the prosecutor insisted she was not capable of exploring what housing relief funds and other resources her city may have available to assist this woman and declared: “Judge, I am not a social worker!” My reply: “Counsel, of course you are. We all are.” A comment intended to imply

5. *See id.*

social work is noble and in my view, a core function of problem solving justice.

We all hear of the success and extraordinary outcomes problem-solving courts have enjoyed throughout the years. The needle, however, keeps moving and so do the challenges. Every state, including Florida, is struggling with how to reduce the crushing costs of incarceration, which hit its fever pitch in 2008 with the groundbreaking Pew report of mass incarceration in the United States, *One in 100: Behind Bars in America*.⁶ Since the publication of this research survey and Pew's subsequent public safety project series, all states, together with elected officials, law enforcement, major public policy research centers on all levels of government have been working to reduce this unsustainable trend and develop criminal justice strategies which are targeted, evidence-based, and public-safety focused. Strategies that will reduce those disparities driving the high costs of recidivism and restore lives.

As a matter of economic cost drivers, correctional administrators have focused on the rate of recidivism as being one of the core measures of the spiraling growth of corrections budgets.⁷ As part of this Symposium's mission and theory, we look to strengthen our community resolve, solidarity and collaborative spirit in seeking problem solving justice strategies to our legal, law enforcement, and public health community stakeholders in an effort to help promote public safety, public health and quality of life for all of Broward's citizens.

THE MEANING OF PUBLIC HEALTH LAW

Public health law and social justice defy a simple definition. For many in the legal and criminal justice arenas, these concepts or sectors may seem highly abstract and somewhat amorphous. Georgetown University Law Professor, Lawrence O. Gostin, does an excellent job of defining for us the definition and theory of Public Health law. He states:

Public health law is the study of the legal powers and duties of the state, in collaboration with its partners (e.g., health care, business, and community, the media, and academia), to assure the conditions for people to be healthy (to identify, prevent, and ameliorate risks, to health in the population), and of the limitations on the power of the state to constrain the autonomy, privacy, liberty, propriety, and

6. THE PEW CHARITABLE TRUSTS, *ONE IN 100: BEHIND BARS IN AMERICA* 2008 7, 9, 11 (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

7. See *id.* at 15.

other legally protected interests of individuals for the common good. The prime objective of public health law is to pursue the highest possible level of physical and mental health in the population, consistent with the values of social justice.⁸

For centuries, matters of public health and the criminal law remained fairly distant and distinct disciplines. Traditionally, they were only to intersect at limited and specific phases of a criminal prosecution; examples lie in certain due process considerations, including legal competency to proceed to trial and the insanity defense. Other examples exist in affirmative defenses and/or factors pertaining to sentencing mitigation, such as mental health implications and the impact of extreme trauma of domestic violence victims known as The Battered Women's Syndrome.

This psychological syndrome was first introduced in a court of law by NSU's own, Dr. Lenore Walker of the Center for Psychological Studies. Note that Dr. Walker is hailed as the mother of The Battered Women's Syndrome and theories behind the Cycle of Violence. Dr. Walker will be an invited panelist speaking on why it is significant to integrate the general understanding of the impact of unresolved trauma into problem solving court process and messaging. (Click [here](#) to download a copy of the article on The Battered Woman Syndrome: History of Domestic Violence and the Law, by Walker, Lenore E., Duros, Rachel I., & Tome, Allison).

As to the criminal justice system and corrections generally, matters of public health rested largely on matters of constitutional protections related to the delivery of medical care and treatment—within penal institutions—and standards of care.⁹ The Supreme Court of the United States established the principle that *deliberate failure* of prison authorities to respond to the medical needs of an inmate constitutes cruel and unusual punishment under the Eighth Amendment.¹⁰

COURT INNOVATION: THE EARLY HISTORY OF THERAPEUTIC JURISPRUDENCE PROBLEM SOLVING COURTS

In the late 1980s, ironically, in the State of Florida (Miami), it would be two law professors—the late Professor Bruce A. Winick and Professor David Wexler—seeking to improve and essentially ease the often traumatic

8. Lawrence O. Gostin, *A Theory and Definition of Public Health Law*, 10 J. HEALTH CARE L. & POL'Y 1, 1 (2007).

9. *See Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976).

10. *Id.* at 104–05; *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993) (establishing a theory of action based upon “deliberate indifference” under the Eighth Amendment).

mental health civil court process for individuals subject to involuntary civil commitment proceedings; they held the key to the next big idea in law reform.¹¹ TJ, an interdisciplinary and scholarly study of how legal process, procedures, and a change in behavior of legal actors—judges and lawyers—could change the court experience from one of anti-therapeutic to one of healing, was delivered in a paper to the National Institute on Mental Health in 1987.

Within two years—1989—of the establishment of the first problem solving drug court in the United States, the marriage of public health law to criminal justice was sealed. For the first time in the criminal justice sphere, a courageous prosecutor and former U.S. Attorney General, Janet Reno, and public defenders in Dade County would have a legitimate public health/legal oriented strategy to re-structure the ways traditional courts function in order to break arrest cycles. The drug court's goal was to incentivize treatment by offering dismissal of charges upon completion of court ordered and monitored drug treatment programming. TJ would also be the fuel that launched the first mental health court in the United States in 1997—a court innovation to combat the tragic trend of the criminalization of the mentally ill with its core strategy based in diversion and shifting those in need of psychiatric treatment to stabilization units in the community or community based care, depending on the psychiatric status and needs of the individual appearing in a clinically staffed court.

This effort was born here in Broward County and led by a collaborative mental health/criminal justice task force, with exceptional leadership and dedication by Circuit Judge Marc Speiser, Broward Public Defender Howard Finkelstein, Broward County Sheriff's Office, Michael Satz, Broward County State Attorney, and included many of our NAMI advocates, major community treatment providers, and local social service administrators. This dedicated group ultimately settled on a specialized and centralized court model, administrated by County Judge Ginger Lerner-Wren. The Broward Mental Health Court was a model for Federal Legislation in 2004 and stands as a fixture in the problem solving court history.¹²

Since that time, the problem solving court movement—together with therapeutic jurisprudence at its philosophical core—has sprinted across the criminal justice system, driving local communities to solve vexing social problems, including courts as varied as the diverse public health problems they seek to solve. Examples include Veteran's Courts, High Risk Domestic

11. See Wexler, *supra* note 1.

12. See Mentally Ill Offender Treatment and Crime Reduction Act, Pub. L. No. 108-414, 118 Stat. 2327 (2004).

Violence Courts, Teen Courts, Youth Courts, Juvenile Drug and Mental Health Courts, Dependency Drug Courts, Smoking Courts, Community Courts, Girl's Courts (Hawaii), and the new Gambling Court in New York.

The problem-solving justice movement spans the criminal justice spectrum and has spawned pre-booking diversionary programs, post-sentencing reentry courts, and ancillary community probation reentry services. In addition, many community-based systems of care have joined the movement with juvenile justice involved programming. The best known program, perhaps, is The Harvard Government award winning model, Wraparound Milwaukee.¹³ Moreover, ultra-creative collaborations have now breached the legal system and crossed over to the education system, with the creation of the innovative and award winning charter school, The Innovative Concept Academy¹⁴ that was spearheaded by Circuit (Juvenile) Judge, Jimmie Edwards, of Saint Louis, Missouri.

THE UNITED STATES AND FLORIDA CRIMINAL JUSTICE CHALLENGE

The groundbreaking policy report issued by the Pew Center in 2008 told the story of a nation's incarceration rate, which had surpassed that of every other country on earth.¹⁵ Data included the fact that more than two million people in America are incarcerated, and one man out of eighteen is behind bars or on some type of community corrections supervision.¹⁶ The United States is spending an estimated forty-four billion dollars on costs of incarceration—as opposed to education, social services and economic development.¹⁷ Further, all major policy research centers concur with the data—that more than two-thirds of individuals incarcerated are non-violent and impacted by a number of complex public health problems, including mental illnesses and addictive disorders, together with a broad range of chronic medical problems, including, cancer, asthma, Hepatitis C, TB, diabetes, cardiac disease, HIV/AIDS and STDs.

With regard to those individuals with a serious mental illness, Human Rights Watch in 2003 released its special report on the abuse and neglect of inmates with mental illness, titled *Ill Equipped: U.S. Prisons and*

13. See WRAPAROUND MILWAUKEE, <http://county.milwaukee.gov/WraparoundMilwaukee.htm> (last visited Nov. 4, 2013).

14. Meredith Munro, *Stopping Traffic: Keeping Kids out of the School-to-Prison Pipeline*, TRINITY COLLEGE BLOGS/WEBSITES (May 3, 2013), <http://commons.trincoll.edu/edreform/2013/05/stopping-traffic-keeping-kids-out-of-the-school-to-prison-pipeline/>.

15. THE PEW CHARITABLE TRUSTS, *supra* note 6, at 5.

16. *Id.*

17. *Id.* at 4, 32.

Offenders with Mental Illness.¹⁸ The report concluded that not only have United States prisons been long known for serving as our country's largest de facto psychiatric hospitals, but are in fact systemically neglecting the care and treatment of those with serious mental illness being held in many United States super-max prisons.¹⁹ Note, HRW attorney, Jamie Fellner, observed Broward's Mental Health Court and included the court in its *Special Report* as a specific strategic recommendation to intervene and prevent further escalation of inmates with mental illness into the prison system.²⁰

The overwhelming negative social and economic impact of incarceration on individuals, families, and communities affected by incarceration, and the ability to climb out of poverty and move up the economic mobility ladder, is deemed outside the subject matter of this particular Symposium. Yet, the exponential public health costs and implications to the state have been framed by RAND Corporation in its 2011 survey, *Understanding the Public Health Implications of Prisoner Reentry in California*.²¹ See also the Pew Center's 2010 report, *Collateral Costs: Incarceration's Effect on Upward Mobility* for additional information.²²

Although the State of Florida did not choose to participate in the 2008 Pew Center State Survey on incarceration and presented no data, Florida's Department of Corrections ("DOC") took affirmative action in 2008 to develop a coordinated system approach to prisoner reentry. This included a five year strategic plan with definitive recommendations to target the high rate of Florida's recidivism, which was reported as in excess of one-third of former offenders returning to prison within three years of their release—see the 2010 Florida Department of Corrections Prisons Reentry Advisory Council Report²³ but note that this data is not inclusive of local jails. Some basic data based on review of the Florida DOC report and related policy reports:

18. SASHA ABRAMSKY & JAMIE FELLNER, HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1 (Joseph Saunders & James Ross eds., 2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

19. *Id.* at 2–3.

20. *See id.* at 27.

21. LOIS M. DAVIS ET AL., RAND CORP., UNDERSTANDING THE PUBLIC HEALTH IMPLICATIONS OF PRISONER REENTRY IN CALIFORNIA: STATE-OF-THE-STATE REPORT 9 (2011), available at http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1165.pdf.

22. ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE PROJECT, THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf.

23. DEP'T OF CORR., STATE OF FLA., RE-ENTRY ADVISORY COUNCIL 2010 REPORT 3 (2010), available at <http://www.dc.state.fl.us/orginfo/reentry/CouncilReport2010.pdf>.

- Eighty-eight percent of all inmates in Florida will eventually be released.
- On June 30, 2010, there were 102,232 persons incarcerated in the State of Florida.
- Between 2009 and 2010, 36,463 inmates completed their sentences and released back to their communities. An estimated one-third is projected to return to prison within three years.
- On July 31, 2010, 152,182 offenders were under community control supervision.
- During 2008 and 2009, 17,023 community supervision releases were revoked due to a new offense.
- 1995 OPPAGA Report noted that “most of . . . Florida’s prison population . . . was due to re-incarceration rather than offenders entering . . . for the first time.”
- Report concludes that effective reentry is the key to reducing recidivism.
- Florida’s public health challenges mirror the national data including the need for mental health and substance abuse treatment, interventions.
- Florida’s jail and prison populations suffer from a wide range of chronic medical problems including cancer, asthma, diabetes, hepatitis B, TB, HIV/AIDS and STD’s, and cardiac disease and hypertension.
- Florida’s jails and prisons have long been documented as serving as de facto psychiatric hospitals.²⁴

The promising news is that the Florida’s Legislature has recently passed an early release bill that would allow for early release of prisoners held for non-violent offenses. The bill creates a new law that requires the DOC to develop a reentry program designed to allow non-violent offenders to have their sentences reduced through participation in intensive substance abuse treatment, general education, vocational training and executive decision making skills training. Broward Sheriff’s Office, Community

24. *Id.* at 3, 7–8.

Supervision Director, David Scharf, will be updating us on this legislation and local programmatic reentry planning objectives.

THE POWER OF THE COMMUNITY COLLABORATIVE

It is clear that Broward County and the State of Florida face severe public health system challenges to meet the promise of the new legislation. This White Paper tracks the great evolution of problem solving courts which paved the way for explosive proliferation of problem solving justice strategies through the integration of diverse public health disciplines and evidence based research and structural system advances. The origins of this revolutionary movement being here in South Florida, through the culmination of visionary and courageous leaders in the law, academia, criminal justice, law enforcement, and public health. Together, with NSU and a shared vision with a deep commitment to the advancement of quality of life and public safety for our community, it is our hope that this public health law symposium helps galvanize our legal, law enforcement, and public health leaders to meet our new challenges with the best evidence and spearhead new initiatives, to work strategically and smart to move this new legislation forward with improved public safety and public health for our entire community.