

mental health court.⁵²

These new judicial models involve a collaborative, interdisciplinary approach to rehabilitation and problem solving in which the judge plays a leading role. They all involve the explicit use of judicial authority to motivate offenders to accept needed treatment services and to monitor their compliance and progress.⁵³

The judge-offender interaction is an essential ingredient in the effectiveness of these new judicial models. Not only does the judge supervise and monitor treatment and adherence, but also the judge serves as a behavioral motivator, shaping successful performance in treatment through praise and other types of positive reinforcement, and punishing lack of required participation in treatment or instances of relapse through the application of agreed-upon sanctions, ranging from sitting in the jury box for several hours to brief periods of jail detention to revocation of probation. Anecdotal reports and preliminary research suggest that there is a kind of “magic” in the judicial robe; that is, the judge’s direct participation and interaction with the offender makes an important difference in offender compliance and rehabilitation.

A new application of these special judicial models is reentry court, designed to assist offenders released from prison on parole to effect a successful reintegration into the community.⁵⁴ These courts manage the return to the community of prisoners, using the authority of the court to apply positive reinforcement and graduated sanctions, and to marshal treatment and other resources in the community designed to help the offender make a successful adjustment to community life. They combine supervision with counseling and treatment, attempting to produce both rehabilitation and the protection of public safety.

Reentry courts were first proposed by former National

⁵² See Arthur J. Lurigio et al., *Therapeutic Jurisprudence in Action: Specialized Courts for the Mentally Ill*, 84 JUDICATURE 184 (2001); Bruce J. Winick, *Outpatient Commitment: A Therapeutic Jurisprudence Analysis*, 9 PSYCHOL. PUB. POL’Y & L. 107 (2003); John S. Goldkamp & Cheryl Irons-Guynn, U.S. Dep’t of Justice, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload: Mental Health Courts in Ft. Lauderdale, Seattle, San Bernardino, and Anchorage* (2000), available at <http://www.ncjrs.org/pdffiles1/bja/182504.pdf> (last visited June 15, 2004).

⁵³ Winick, *supra* note 45, at 1067.

⁵⁴ Joan Petersilia, *When Prisoners Return to Communities: Political, Economic, and Social Consequences*, in SENTENCING & CORRECTIONS, NO. 9, at 1, 5 (Nat’l Inst. of Justice, U.S. Dep’t of Justice Nov. 2000), available at <http://www.ncjrs.org/pdffiles1/nij/184253.pdf> (last visited June 15, 2004); Terry Saunders, *Staying Home: Effective Reintegration Strategies for Parolees*, 41 JUDGE’S J. 34 (2002); see also Travis, *supra* note 36, at 5.

Institute of Justice Director Jeremy Travis⁵⁵ and were based explicitly on the drug treatment court model. As with drug treatment court, offenders who agree to participate in reentry court enter into an explicit behavioral contract.⁵⁶ The contract sets forth specific intermediate and long-term goals. Motivation to achieve the goals is facilitated through contract terms providing for agreed-upon rewards or positive reinforcers for success, or sanctions or aversive conditioners for failure. The behavioral contract harnesses a number of principles of psychology to help to bring about compliance and goal achievement, including the goal-setting effect, intrinsic motivation, commitment, cognitive dissonance, and the psychological value of choice.⁵⁷

The court closely monitors and supervises the released offender's progress in the community. This involves compliance with contract provisions, including participation in treatment, employment, and desistance from the use of drugs or alcohol. The court closely monitors whether the offender has remained law-abiding. Through the application of judicial praise or other forms of positive reinforcement, including the gradual lessening of restrictions, and graduated sanctions, including home confinement, electronic monitoring, more restrictive conditions, and ultimately revocation of parole, the reentry court judge helps the offender to achieve a successful reintegration into society, fosters his or her rehabilitation, and protects community safety. If the offender does commit another sex crime during his supervised release, he has broken his contract with the court. In most cases, the offender will be immediately returned to custody and the prosecutor will be notified.

Like the other problem-solving courts, reentry court can be seen as applying principles of therapeutic jurisprudence.⁵⁸ Therapeutic jurisprudence is an interdisciplinary approach to legal scholarship and law reform that sees legal rules and the way they are applied as

⁵⁵ See Travis, *supra* note 36.

⁵⁶ *Id.* at 9; see also JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 227-30; Bruce J. Winick, *Harnessing the Power of the Bet: Wagering with the Government as a Mechanism for Social and Individual Change*, 45 U. MIAMI L. REV. 737, 772-88, 793-97 (1991) (describing behavioral contracting or contingency management, analyzing the psychological principles on which it is based, and illustrating its application by government to achieve various social and individual goals); Winick, *supra* note 45, at 1085.

⁵⁷ Winick, *supra* note 56, at 752-72.

⁵⁸ Leonore M.J. Simon, *Proactive Judges: Solving Problems and Transforming Communities*, in THE HANDBOOK OF PSYCHOLOGY IN LEGAL CONTEXTS 449, 463 (David Carson & Ray Bull eds., 2d ed. 2003); Winick, *supra* note 45, at 1064.

social forces that produce inevitable consequences for the psychological well-being of those affected.⁵⁹ Therapeutic jurisprudence calls upon scholars to study these consequences with the tools of the behavioral sciences, and upon legislators, judges, and policymakers to reshape law in ways designed to minimize law's antitherapeutic effects, and when consistent with other legal goals, to increase law's therapeutic potential.

Problem-solving courts often use principles of therapeutic jurisprudence to enhance their functioning.⁶⁰ These principles include ongoing judicial intervention, close monitoring of and immediate response to behavior, integration of treatment services with case processing, multidisciplinary involvement, and collaboration with community-based and governmental organizations.⁶¹ These courts can be seen as taking a therapeutic jurisprudence approach to the processing of cases inasmuch as their goal is the rehabilitation of the offender, and they use the legal process and the role of the judge in particular to accomplish this goal. Through their supervision and monitoring of the offender's treatment progress, these judges themselves function as therapeutic agents.⁶² Moreover, these courts apply principles of therapeutic jurisprudence to spark motivation for treatment, to reinforce treatment success, and to increase treatment compliance.⁶³

D. How the Proposed Sex Offender Reentry Court Would Work

We propose an adaptation of the problem-solving court model for sex offenders—a sex offender reentry court. As with other problem-solving courts, these proposed courts would apply principles of therapeutic jurisprudence to motivate sex offenders to deal with their underlying problems and to monitor their compliance with and

⁵⁹ See generally LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996).

⁶⁰ CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 50; Simon, *supra* note 58, at 463-64; Winick, *supra* note 45, at 1064-66.

⁶¹ CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADMINISTRATORS, *supra* note 50.

⁶² JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 7-10; Winick, *supra* note 45, at 1065.

⁶³ Pamela Casey & David B. Rottman, *Therapeutic Jurisprudence in the Courts*, 18 BEHAV. SCI. & L. 445 (2000); Fritzier & Simon, *supra* note 51; Hora et al., *supra* note 47; Carrie J. 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); Simon, *supra* note 58; Winick, *supra* note 51; Winick, *supra* note 45; Winick & Wexler, *supra* note 47.

progress in treatment, within both the prison or psychiatric facility and the community, once they have been released. As with these other courts, the judge in reentry court would function as a member of an interdisciplinary team, in this case serving as a "reentry manager" for sex offenders.⁶⁴

The reentry process can be seen as beginning at the offender's initial sentencing. As with most criminal offenders, the overwhelming majority of sex offenders plead guilty to their charges. The plea colloquy at which such a plea is accepted can provide an important opportunity for the judge to assist the offender to accept responsibility for his offense. Because denial, minimization, and rationalization are common in sex offenders and help to perpetuate their reoffending, the sentencing judge should not accept pleas of *nolo contendere* or *Alford* pleas, both of which allow the offender to avoid acceptance of responsibility.⁶⁵ The plea colloquy can become an important opportunity for the offender to acknowledge his wrongdoing and recount the facts of his crime and the impact it had upon the victim. These discussions held in open court and on the record can help the process of breaking down the offender's cognitive distortions that may facilitate repetitive offending, paving the way for a positive cognitive restructuring in treatment.

There is an inevitable gap in time between acceptance of the plea or a verdict of guilty and the imposition of sentence, and this period can be an important one during which to spark the offender's motivation to accept treatment.⁶⁶ Courts increasingly have been recognizing post-offense rehabilitation as a ground for a reduction in sentence or a basis for probation.⁶⁷ When a thorough risk assessment concludes that the risk of reoffending appears to be low, perhaps in a case involving a first-time nonviolent sex offender, the court, in considering the setting of bail, can require the offender to accept treatment as a condition of release on bail. This condition often is applied in the context of domestic violence court,⁶⁸ and in appropriate low-risk cases, this same approach can be used by the sex offender reentry court. In cases in which the offender appears to be making

⁶⁴ Travis, *supra* note 36, at 8.

⁶⁵ David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 229 (1992).

⁶⁶ See JUDGING IN A THERAPEUTIC KEY, *supra* note 45, at 181 (discussing how judges can spark motivation for rehabilitation in a variety of contexts).

⁶⁷ Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, 5 PSYCHOL. PUB. POL'Y & L. 1034, 1036 (1999).

⁶⁸ Winick, *supra* note 51, at 34.

substantial progress in treatment, the court may consider a deferral of sentencing to permit the treatment process to proceed.⁶⁹

The offender's knowledge that the court will take his progress in treatment into account in imposing sentence and that a deferred sentence is possible can serve as powerful motivators for the offender to participate meaningfully in treatment and to gain significant benefits from it. If the defendant has been given a deferred sentence conditioned on his successful participation in treatment in the community, the court can hold periodic hearings to monitor the offender's ongoing treatment, similar to how drug treatment courts monitor treatment compliance and progress for drug offenders.⁷⁰

Assuming that the judge decides to impose a sentence involving imprisonment, the judge, in pronouncing sentence, can and should discuss future reentry with the offender. The judge can motivate the offender to accept whatever treatment might be available within the prison, noting that participation in prison treatment (or a continuation within the prison of treatment that the offender began within the community) will be taken into account positively when consideration is given to the offender's release. When authorized, the court can impose a sentence involving a period of incarceration followed by a period of community release under the court's supervision.⁷¹

The court can advise the offender that the ultimate goal is his release into the community once he has paid his debt to society and has demonstrated his ability to be law-abiding.⁷² The court can further inform the offender that, starting at that very moment, the court and offender together will begin a process of developing a plan for attaining that goal. The plan will involve treatment in prison as well as in the community, and hopefully will include the participation of the offender's family, friends, and other support networks. The court can monitor the offender's prison adjustment and participation in prison programs designed to prepare him for community release.

Under this proposal, the court would retain sentencing discretion to permit early release when appropriate. In imposing

⁶⁹ William Edwards & Christopher Hensley, *Restructuring Sex Offender Sentencing: A Therapeutic Jurisprudence Approach to the Criminal Justice Process*, 45 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 646 (2001); Winick, *supra* note 67, at 1065.

⁷⁰ Winick, *supra* note 45, at 1065; Winick & Wexler, *supra* note 47, at 480.

⁷¹ Travis, *supra* note 36, at 8.

⁷² *Id.*