

### An Ethnographic Analysis of Specialty Courts with an Emphasis on the Judge's Role

It's well known that in the past few decades, there has been a mass incarceration of American citizens. In 2013 there were a total of 1,516,879 people in State and Federal Prisons. Of that impressive sum, 32 percent were arrested on charges relating directly to drugs, distribution, possession, etc. and an even larger number, 63 percent met the DSM-IV criteria for drug abuse (Behind Bars). These statistics are disturbing and warrant concern not only because they involve such large sums but because they carry with them lasting consequences. Studies conducted on felons who re-enter the community have shown the lasting damage and stigma they carry into their new lives. According to one estimate, there are currently over 12 million ex-felons in the United States, representing roughly 8% of the working age population (Uggen, Thompson, and Manza). Of those recently released, nearly two thirds will be charged with new crimes and over 40% will return to prison within three years (Durose). This "revolving door" for those who have been incarcerated is one of the largest failings of our judicial system.

One of the most effective measures in reducing recidivism has been the development of specialty courts. The first division of specialty courts established were drug courts which have been present in steadily increasing numbers across the United States since 1989. Created in an effort to help addicts who are repeatedly picked up on petty possession charges, the courts have resulted in a wave of similar specialized courts and changed the way our justice system handles certain defendants. Specialty courts are a unique sector of our Justice system because unlike other courts they truly strive for rehabilitation. They are designed to facilitate a participant's progress through recovery by mitigating the sometimes adversarial feel of a

traditional courtroom. “Recidivism rates decrease dramatically for those who successfully graduate from drug courts; studies indicate that there is a 38% to 50% drop in recidivism over three years”. (Mitchell).

Of course, most offenders who have been charged with drug crimes are not admitted into specialty courts for a variety of reasons; failure to meet the specific requirements that their local court has set, failure to complete paperwork on time, not being properly informed of their options, etc. There is an enormous population of offenders who are addicted to/abuse drugs or alcohol and are processed through the traditional courtroom. When sentencing these offenders, traditional courtroom judges must navigate a difficult terrain and attempt to reduce the likelihood of recidivism within the confines of a non-therapeutic setting. Though it may seem counterintuitive to consider recidivism at sentencing, it is a factor in judges’ decisions. A NCIC survey found that “state chief justices believed that the most important sentencing reform objective facing the state courts was to improve public safety and reduce recidivism through expanded use of evidence-based practices and programs”(Warren). How do judges think through such decisions? The NCIC report was based off of a survey and so offers little qualitative nuance or explanation as to why judges responded the way that they did.

Our judicial system has essentially split itself into two camps; diversion courtrooms, which are openly therapeutic, and traditional courtrooms which struggle to achieve the same aim; preventing the offender from reoffending, within an environment that has far less tools to do so. Drug courts were the first specialty courts established and are now essentially ubiquitous throughout the country. Thus, the techniques that they use and the manner in which they operate has served as a template for every division of diversion court subsequently established.

According to the National Drug Court Resource Center there are 1,518 adult drug courts that operate in the United States. Comparatively there are only a little over 300 mental health courts nationwide, mental health courts sprung up as all diversion courts did in the shadow of drug courts. They follow the same essential procedural guidelines and in many ways are held to the same expectations that the public has for drug courts', that is they must operate cheaply, only serve nonviolent offenders and ideally they should cure people. Drug courts caught the public's imagination because they offered to solve the social problem of addiction and reduce crime in doing so while mental health courts have never enjoyed the same amount of attention. While recidivism rates do decrease for graduates of both drug and mental health courts the national average rate of graduation from these specialty court programs hovers slightly under 50%. Though research has attempted to answer which factors contribute to the graduation rate of a court one of the elements often overlooked is the multifaceted nature of a defendant's illness. Many of the people admitted to drug court have co-occurring mental health problems and vice versa, the study of one Michigan mental health court found that "Although 60% were identified as having a 'current substance abuse', other evidence shows that as many as 79% were substance involved" (Michigan). National data shows that over half of the men and women under judicial supervision suffer from mental illness and that their access to treatment is limited at best.

Comorbidity of addiction and mental illness in specialty court defendants presents an enormous challenge to the legal system. When a defendant presents with both mental illness and addiction placing them in the correct diversion program can be difficult. Though mental health and drug courts share many guiding principles their aims, and the attitudes of the

professional teams associated with them are often fundamentally different. In my observation mental health courts are more likely to have staff that initiate personal conversations with the defendant and who possess a seemingly endless well of patience. The culture of the court is more likely to lean towards harm reduction than the absolute abstinence that drug courts necessitate. Ultimately, both courts population of defendants overlaps a great deal and each could stand to learn from the other.

### **Literature Review**

The research question I seek to answer has been informed by literature concerning therapeutic jurisprudence within drug/mental health courts and the process of judicial decision making. However, I seek to answer a unique question. Previous works in the field of therapeutic jurisprudence in specialty courts have involved analyzing whether specific elements of a court, such as the use of incentives or properly targeting the right population, are facilitating or inhibiting the mental wellbeing of offenders. Similarly objective studies of judges have rarely been undertaken at all and much of the literature on judicial decision making is produced by judges themselves. My study seeks to analyze how judges in mental health and drug specialty court conduct a courtroom through the lens of therapeutic jurisprudence and how they interact with defendants throughout the process.

#### *Drug Courts and Therapeutic Jurisprudence*

The term Therapeutic Jurisprudence was first used by Professor David Wexler in a paper delivered to the National Institute of Mental Health in 1987. It has come to be defined as “the study of the role of the law as a therapeutic agent”. In general, it focuses on the law’s impact on the emotional and psychological well being of offenders. The goal of therapeutic jurisprudence

is to shift the focus of judicial proceedings from punitive to rehabilitative. Originally, therapeutic jurisprudence was conceived as an approach applicable only to mental health law, but Wexler and Winick soon extended the field to encompass family courts, drug courts, and many other diversion courts.

Specialty court such as drug court developed alongside the theory of therapeutic jurisprudence and the two were a natural fit, with therapeutic jurisprudence quickly becoming the backbone of specialty courts. Undoubtedly, part of the appeal of therapeutic jurisprudence was its relative conservatism; as with any successful American innovation, it was small and worked within the existing system without overturning or undermining it. “Therapeutic jurisprudence suggests that, other things being equal, the law should be restructured to better accomplish therapeutic goals” (Wexler). Therapeutic jurisprudence essentially aims to determine in which ways the law can use behavioral and/or social science ideas and research to improve the process of rehabilitation. That is not to imply that therapeutic jurisprudence aims for a “therapeutic state;” treatment in the sense of therapy is not necessarily the goal when considering judicial proceedings from a courtroom lens, simply to support rehabilitation to the best of the Law’s ability without undermining existing processes.

The linking of therapeutic jurisprudence to specialized courts has in some ways limited its effectiveness. By tethering itself to a reform movement that was designed to separate itself from the general judicial process, therapeutic jurisprudence has become a somewhat niche concept so that when applied to a novel population or legal problem, the most logical conclusion one can draw is that in order to best mete out therapeutic jurisprudence, a new

specialized court equipped to facilitate said novel population or legal problem should be established.

Rottman addresses this limitation in a paper analyzing therapeutic jurisprudence in respect to Specialized and Traditional Courts; “A concentration on special court forums can be justified only if there is the prospect of a long term payoff for the general trial courts to which the forums belong.” (Rottman) Such an outcome has been suggested in an article by Deborah Chase and Peggy Hora in which they observed that drug Court judges experienced less stress than Family Court Judges; “many of the factors related to job stress are not as commonly observed in drug court judges.”(Deborah) They also postulated that there was potential for special court judges to apply techniques learned within the specialized courts to traditional courtrooms if they were to return to a normal docket. However, Rottman seems to doubt that this outcome is assured and goes on to address the gap between therapeutic jurisprudence and the traditional courtroom by defining three levels of therapeutic jurisprudence which can be practiced inside and outside the courtroom, the first being a judge’s interaction with a defendant, the second is a court that “incorporates new procedures, disposition option, information systems and connections to providers of social and other services (perhaps but not necessarily, though a special court forum)” while the third level involves changing laws and the procedures that apply across all courts.

The third level of therapeutic jurisprudence as defined by Rottman is a concept worth studying. In what ways can we learn from existing specialized courts and change the overarching governing of our courts so that all benefit?

Drug courts are undoubtedly responding to a very real and serious issue; America's prisons have quickly become the largest warehouse of drug addicted and otherwise mentally ill people in the United States. "In 2004 53% of persons in state prison were identified with a drug dependence or abuse problem, but only 15% were receiving professional treatment." As the number of drug courts continues to grow, empathetic treatment is being made available to an increasing number of offenders who otherwise may not have received any sort of intervention. Yet it is simplistic to be satisfied with helping a small portion of the offending population; the tenants of therapeutic justice have larger applicability and could be better put to use helping defendants suffering from comorbid conditions.

### ***Mental Health Courts Niche***

Mental health courts are rooted in the principles of therapeutic jurisprudence. They emerged out of the tradition of drug courts, run by similar principles and hoping to achieve the same goals, a reduction in recidivism for their target population. "In linking defendants with mental illness to treatment alternatives, many mental health courts see themselves as practicing "therapeutic jurisprudence" (Lurigio et al., 2001; Lerner-Wren, 2001; Wexler & Winnick, 1996)" (Next Through the Revolving Door). Mental health courts aim to reduce the "revolving door" of the mentally ill through the legal system. Because of the unique challenges that they face, mentally ill defendants are at a higher risk of recidivism, "Forty-nine percent of federal prisoners with mental illnesses have three or more prior probations, incarcerations or arrests, compared to 28 percent without mental illnesses". (Ditton, 1999). Diverting nonviolent misdemeanor and felony defendants into a specialty court gives them a better chance of escaping this cycle.

Research has shown that the mentally ill are disproportionately represented in all aspects of the criminal justice system. "People with mental illnesses are overrepresented in probation and parole populations at estimated rates ranging from two to four times the general population" (Prins and Draper, 2009). In addition to being on parole in higher numbers a 2006 study by the Bureau of Justice Statistics found that the mentally ill, "represented 56% of State prisoners, 45% of Federal prisoners, and 64% of jail inmates."

As a compounding problem traditional correctional facilities are often unable to provide adequate treatment for the mentally ill individuals they care for, they are constrained by budgets and local resources. As such a minority of mentally ill defendants housed in such institutions receive treatment of any kind. "State prisoners who had a mental health problem (34%) had the highest rate of mental health treatment since admission, followed by Federal prisoners (24%) and local jail inmates (17%)" (James). This pervasive lack of action regarding mentally ill inmates has resulted in a relentless cycle of arrest and needlessly expended tax dollars. "With four times as many mentally ill in our prisons opposed to institutions, the main point for all of us to consider is that these people who are in prison are not receiving the kind of treatment they would need in order to remedy the disabilities that have brought them to that situation." (Mental Health Court Culture).

### ***Comorbidity in Defendants***

The original aim of specialty courts was to serve a population of defendants who were in desperate need of counseling instead of prison. From the beginning one of the crucial aspects of running a successful diversion court was to correctly identify the court's target population.



Traditionally this meant repeat nonviolent offenders, but as more specialized courts emerged their target audience became more clearly and narrowly defined.

This proliferation of specialty courts in the wake of drug court's success lead to the separation of addicted offenders and mentally ill offenders in theory at least if not in practice. In truth, "Mental illness and substance abuse have a symbiotic relationship: people with substance abuse disorders are more likely to develop mental illness and people with mental illness are more likely to develop a substance abuse disorder" (Peters & Hills, 1997; Massaro & Pepper, 1994). Our understanding of comorbidity and the best ways to treat it has evolved greatly over the last few years. Traditionally patients with comorbid disorders were asked to first treat their drug addiction or to otherwise prioritize one mental health need over another. "Most programs treat co-occurring disorders sequentially, which means that patients must complete one form of treatment before engaging in another. There is a good deal of evidence that suggests that sequential treatment has proven ineffective for people with co-occurring disorders." (James).

As we have come to better understand the needs of those suffering comorbid disorders the medical community has shifted towards recommending "integrated" treatment programs which address both the addiction and mental health problems the patient is dealing with. "In recent years, "integrated" treatment services for co-occurring disorders that address both substance abuse and mental health simultaneously in a continuous and comprehensive fashion have been developed, evaluated, and found to be more effective than nonintegrated programs." (James). Just as the medical community has re-evaluated how best to care for comorbid patients so too much the criminal justice system. By working towards offering

integrated treatment in addition to separate resources we may better reduce the “revolving door” of mentally ill offenders.

### *A Judge's Role*

Interestingly most of the literature concerning how judges think in court emphasized the importance of narrative storytelling. In a way this is an intuitive truth, as “Constructing Reality in the Courtroom” states, “the storytelling perspective provides a systematic way of thinking about the connections among diverse elements of trials.” (Bennett, 5). Such a seemingly simple declaration is interesting, considering that a study by Wistrich, Guthrie and Rachlinski conducted in 2005 found that in certain cases such as ones involving a plaintiff with prior criminal convictions or conversations protected by attorney-client privilege, judges were unable to disregard inadmissible evidence unless said evidence involved an inadmissible search or confession. Essentially, judges were forming narratives in their mind that were not always based solely off the evidence presented at trial. Such a leap of intuition seems to lie in a grey area in specialty courts. When a participant’s behavior and personal presentation are factors in their treatment, where the line between legal judgement and personal judgement can be drawn is murky.

Two significant minds, Dworkin and Posner, have delineated separate camps of thought on the decision making process for judges. Dworkin was a prolific scholar and contributed many ideas to legal philosophy but one of his most influential ideas, and the one with which I am primarily concerned, was that when deciding constitutional cases, judges should draw on a personal sense of morality. “The moral reading proposes that we all- judges, lawyers, citizens- interpret and apply these abstract clauses on the understanding that they invoke moral principles about

political decency and justice” (Freedom, 2) Dworkin was careful to paint this process as a nuanced one, believing that it was a judge’s duty to consider existing legal material and construct a narrative of how best they coalesced. In doing so, Dworkin reasoned, they must also engage in moral reasoning so that their final conclusion reconciles all that they have considered in the best possible way, centered on the idea that they will advance a morally correct society. Dworkin defended this theory throughout a series of Harvard Law Review articles but stated it most clearly in his book “Justice for Hedgehogs”, in which he defends the idea that morality is provable rather than malleable, “The idea is that we are not entitled to think our moral convictions true unless they are required by pure reason or produced by something in the world.”(Dworkin, 115) He goes on to call this "the Gibraltar of all mental blocks", arguing strenuously that we must get over it, presumably so that we may then understand the benefit of wrestling frankly with morality in judicial decision making.

Dworkin applied this idea primarily to Constitutional law, and it has been widely critiqued in that context. But it has not been analyzed in regards to specialized courts or traditional courtrooms on a small scale. Typically, Dworkin used examples of higher courts in his arguments, referring to lower court judges briefly and without much elaboration. Such an oversight warrants the question; do judges in drug court and traditional courts actively engage in this type of moral reasoning? If so, how does it affect outcomes from a therapeutic justice perspective? If they do not engage in this practice, ought they to? All of these questions merit further study.

In contrast to Dworkin, moral based judgement legal scholar Eric Posner held that value laden judicial decisions cannot be pronounced right or wrong.

“The idea that there is a moral order accessible to human intelligence and neither time-bound nor local, an order that furnishes objective criteria for praising or condemning the beliefs and behavior of individuals and the design and operation of legal institutions echoes down the corridors of Western intellectual history...Unfortunately the generative idea itself, and the literatures in philosophy and law that elaborate and apply it, are spurious (Posner, 3).

Posner defends this position primarily on the grounds that morality is relative and that because of this simple truth, “moral” judgements- that is judgements made with an attempt to be moral- cannot ever be determined to be objectively true. In “The Problems of Jurisprudence,” Posner defines moral realism as “The idea that there are correct answers to all or most moral questions” (Problems, 201) and immediately after asserts that, “in a heterogeneous society this is likely to seem even less plausible than a belief that there are right answers to even the most difficult legal questions.”(Problems, 201).

As Posner elaborated upon his theory over the years, his main objections to Dworkins work were articulated as an overwhelming distaste for the idea of granting judges the power to impose their own moral judgements upon case law. It is of course quite easy to understand this position, and if it were to emerge from my observations that Dworkin’s theory of morality was in practice in either traditional or specialty courts, then Posner’s ideas take on a new urgency. Posner wrote and thought as an academic, with his theory’s centering around pedantic definitions and like Dworkin, he rarely sought out research or practical applications of his ideas. Observing courts with these two theories directly in mind allows for the unique opportunity to see how they intersect and interact with each other. If morality does come into play in judicial

decision making at a lower level, is it consistent as Dworkin might believe, or wildly misplaced and unwarranted as Posner holds? Such distinctions would likely be particularly evident in drug courts where there is more extemporaneous speaking on the judge's part and a longer discussion of the rulings.

Judges have a unique and crucial role within drug courts; as in other courts they preside over the courtroom proceedings, however unlike regular courts, judges in drug court meet regularly with participants and review cases and apply disciplinary sanctions as well as incentives. By necessity, judges see clients fairly regularly and so they develop a strong rapport, taking a personal interest in their lives. Judges are well aware of the critical role that they play in the treatment process, and the National Drug Court Institute has created the "Drug Court Judicial Benchbook" composed of writings of drug court judges. This serves as an informal instruction manual for judges considering creating their own drug courts; it outlines how to set up a court and some common problems that judges might encounter. Most importantly it illustrates how judges perceive their duties within the court; "A judge is a judge and is always a judge even in drug court. Neither judicial independence nor judicial discretion are diminished by being a drug court judge." (49).

Whatever their opinions on the matter may be, judges have been shown to impact the effectiveness of drug courts. A study based on a survey of drug court participants' views found that "50% of all respondents indicated that the opportunity to talk over their progress and problems with a judge was very important, 27% felt it was somewhat important, while 12% cited this program element as not important. When asked if they would have been able to complete the program if they had appeared before different judges rather than the same judge,

73 percent indicated that they would not have completed the program" (Cooper). More empirical studies of judge's influence have had mixed findings. "A GAO report in 2005 noted that the demeanor and conduct of the judge did not predict a participant's success or failure" (King). However, a series of studies have found that judges have an effect when examined by type of client; higher risk participants experience a benefit from more intense judicial involvement while lower risk participants did not benefit in the same way, "over 80 percent of participants with a prior drug treatment history graduated from the program when there were assigned to bi-weekly hearings, compared to less than 20 percent of those assigned to as-needed hearings." (Douglas B. Marlowe).

In addition, judges serving multiple rotations on the court had better results in terms of reductions in rearrests. A study by the National Institute of Justice found that "Participants who saw one or two judges only were far less likely to be terminated early and less likely to miss treatment sessions." (National Institute of Justice). It seems that when it comes to affecting treatment outcomes, the judge's power may ultimately lie in the minds of the client. Another survey of drug court participants found that "While appearing before the judge can be daunting, particularly for those called up on an infraction, most participants acknowledged that the judge was fair, sympathetic, and supportive, and that having to appear before the judge helped them stick to their treatment plan." (Donald). While there is a plethora of information about how drug court participants perceive their interactions with judges, there are only procedural accounts of judges' interpretations of the proceedings and precious little qualitative personal analysis.

## **Methods**

### *Ethnographic Case Selection*

The first drug court was founded in Miami-Dade County Florida in 1989. Soon after, a plethora of other drug courts would spring up across the nation until they were present in every state. Though each of these courts is subject to the authority of the county in which they are located, all are set up under nationally agreed upon standards of practice. These standards are distributed by the National Drug Court Institute, an organization-wide collaboration between the National Association of Drug Court Professionals, the National Center for DWI courts and Justice for Vets.

I chose to observe courts directly rather than the inpatient facilities that defendants stayed in or those within the program but currently incarcerated because I wanted to see how the legal system treated those with an addiction in a broad sense. Specialty courts are designed to observe and foster a defendant's progress through treatment and in my study, I was primarily concerned with how defendants were ushered through this process. My observations took into consideration who was offered or denied advancement to the next stage of diversion court, how many sanctions were issued and even how the judge spoke to the defendant. Thus, direct observation of the court best served my research.

I observed two drug\mental health courts so that I would have a fuller picture of how these courts operated and would be able to draw conclusions from a wider sample of the northeastern area. Both courts have produced high graduation rates and scored well in various annual evaluations. This is partially why I chose them, as it seems that they are particularly good example of how a successful drug court is run. In addition both had a mental health court in the same count so that observations of mental health courts wouldn't be complicated by

geographical difference. Overall, I spent about 50 hours observing drug courts, with 30 hours spent in the Manhattan drug court and 20 spent in the Allegheny drug court; and approximately 15 hours observing the Manhattan mental health court as well as 10 in the Allegheny mental health court.

My time within the Allegheny and Manhattan drug courts allowed me to see a pattern in the way that the judges spoke to defendants and how the defendant's reactions affected the judge's ruling on their case. The diversion courts are designed to allow the judge's discretion that is they understand that in cases where the aim is rehabilitation and treatment of an addict there must be leeway. In both Manhattan and Allegheny drug courts; there is an official protocol for when and how a judge can sanction a defendant. The first violation is supposed to generate a verbal warning, the second a slightly more serious sanction such as writing a paper, or in the case of one man, observing the court for a full day. It is not until the third offense that serious repercussions would occur and at every stage the judge is allowed to customize the sanctions or treatment plan if they feel that it would better serve the client or the court. Various studies have attempted to quantify the effect of a judge on the recidivism rates of those who pass through diversion courts. In particular, a study based on a survey of drug court participants' views found that, "50% of all respondents indicated that the opportunity to talk over their progress and problems with a judge was very important."(Cooper). From my own observations, the judge engaged in a personal relationship with many of the participants who appeared before them though the personality and conduct of the judges varied across courtrooms.

### *Ethnographic Observation*



My ethnographic work revolved primarily around observation. My information was recorded primarily through notes to accommodate standard court procedure and when requested, names were changed to pseudonyms to preserve anonymity. I tried to record every detail possible to assure that my observations were as comprehensive as they could be.

The courtroom is for the most part a boring place. The vast majority of the time, people are simply being given a later appearance date which means they spend only about five to ten minutes before the judge. While this allows the observer to get a very clear picture of the normal procedures of court, it also means that for the most part you see the same sequence of events repeated over and over again. The rare occasion that someone is actually being remanded or sentenced grants the opportunity to see what happens when the process is tested; forced to expend more energy than usual. This is the best time to observe the thought process behind the decisions the court makes because they are forced to elaborate upon them in a way they wouldn't otherwise. Unfortunately, I was only able to observe a few of such illuminating moments and I believe that in order to establish a reliable pattern or draw a significant conclusion from my observations more time and research would be necessary.

### *Ethnography*

Judges are trained to act impartially at all times, and yet diversion courts necessitate that they make character judgements of the defendants before them. A blatant attempt at emotional manipulation must be addressed and good behavior must be rewarded. Thus, judges must struggle to reconcile their personal judgements of defendants with their understanding of the treatment process, a process which by no means has clear guidelines. The personality and conduct of the judge's varied across courtrooms but overall the judges in drug court were less

consistent in their rulings and more likely to react emotionally to a defendant's case than the judge in mental health court. I believe that such interactions warrant further analysis and would be more fully understood if such analysis included how judges contextualized them in their own words.

In my observation of the Manhattan drug court, I saw a defendant who, when asking the judge for leniency, made a reference to the judge's family. The exchange began commonly enough with the man expressing remorse for violating the terms of treatment that he had agreed to and apologizing profusely, at this point the judge seemed to be on his side and was sympathetic until the man mentioned the judge's brother, saying "You told me I'm just like your brother. You said that to me. Did you give up on your brother? I know I messed up but would you give up on your own brother?" The judge was clearly shocked by this and quickly became very emotional, after speaking for a moment rather disjointedly about felony statutes he said, "We all pay the price. I'm aware of the issues with mental health but not everyone who has mental health problems responds by living this way... Would I give up on my brother? You've got the answer. I know it's not about my personal life or my personal politics. We are a system and if I've made a legal mistake I will be judged on the legal issues."

This exchange in particular illustrated how mercurial the sentencing in drug courts can be; in this case the judge expressed understanding that the man had other mental health issues but when provoked with a reference to his own family, he asserted that these issues were not his primary concern. It was the man's drug use and violation of his diversion court agreement that was in question, not the validity of his illness. Throughout this rather tense confrontation the judge emphasized the necessity of personal responsibility, telling the defendant several times,

“You’re a grown man” and in the end he decided to remand the man. Was this a judgement influenced at least partially by morals as in the Dworkin model of judicial decisions, or a justified punishment of manipulation with therapeutic results in mind? Unfortunately, in my preliminary observations I was unable to speak directly with judges and garner their opinion on what such interactions signified.

I observed a similar pattern of interactions in the Allegheny drug court where the judge seemed to base much of his decisions off of a series of questions that he asked the defendant off the record. When attempting to decide whether to levy a sanction or not he would ask the defendants five questions, “what is your addiction?”, “how long have you had this addiction?”, “have you ever received treatment for this addiction?”, “do you have any skills?”, “do you have any children?”. Each response often prompted a joke or a small comment, though this habit seems to just be an aspect of the judge’s personality. He was overly jocular and similar to the judge in the Manhattan drug court occasionally had emotional responses to defendants.

In one instance the judge seemed to particularly dislike a defendant. When this man’s case was heard the judge became visibly angry and verbally aggressive when it was revealed that the defendant had violated the terms of probation that this judge had set for him. When the court reporter reminded the judge of the terms of probation that he set for the defendant he trailed off mid-sentence and seemed surprised that he had levied so much probation. He then asked the defendant his standard series of questions though this time he seems to be openly hostile, modifying the first one to “Do you have any skills besides breaking and entering?”. After going through the usual list of questions the judge scolded the defendant personally, “You have to stop doing this, do you understand me? You have to stop doing this. The fact that there isn’t

someone out there trying to tar and feather you is crazy". Such behavior though on the more extreme side was not unusual for the judge, often he would interact with the defendants on a personal level in a positive way, joking about tattoos or certain details of their charges.

In comparison the mental health court judges differed enormously in tone. The court operated in the same manner as all diversion courts in the structural sense. Procedurally there were some small differences, in the Manhattan court the officer didn't read out names before cases. The largest difference between the Manhattan courts was the personality of the judge who was far more consistent in his praise than I have seen in other courtrooms. He always noted when family shows up and probed people lightly about their life in general outside of the court. He also gave more comprehensive and slowly paced explanations of the legal minutia than had been offered in drug court.

With each defendant who came before him the judge asked them how they are doing and in most cases he complimented them either on some aspect of their report or a tidbit that came up during casual conversation. He also asked them several questions not directly related to their case, clearly trying to gain an understanding of their mental state and any stressors they may be experiencing. If they offered a specific example he offered detailed suggestions on how to alleviate the external pressure. In general he spent far more time interacting with the defendants than either of the two judges had and asked them more qualitative questions.

Similarly the Allegheny mental health court had a far more relaxed atmosphere than the Allegheny drug court. The judge seemed more willing to initiate long talks with the clients he saw and all of the employees of the court interacted directly with the defendants in a respectful way. Perhaps the most interesting departure from the drug court in Allegheny was the tradition

of giving out gift cards at random intervals. Every so often a clerk's phone would ring while a defendant was having their case looked over, the sound of dogs barking out a familiar tune signified that whoever was before the judge got a gift card. It seemed an odd tradition at first glance but the defendants seemed to genuinely really enjoy the levity it lent the situation. Many of the cases that appeared before the mental health courts I observed were also struggling with addiction issues. When defendants with addiction and co-occurring mental health issues step into a courtroom if they wish to enter a diversion court and receive treatment they must choose which court they or their attorneys feel will best suit their needs. This decision affects not only which judge they will have to contend with but also the treatment that they will be offered, many inpatient facilities for drug addicts do not offer therapy or any sort of psychiatric treatment beyond twelve step groups, and of course both courts are limited to the resources available in their county's. The complaint that I heard most often from defendants within drug court was the lack of support for their mental health issues. Drug courts were established to curb an epidemic of petty crime and unnecessarily long convictions, but in their original incarnation they failed to anticipate the mental health needs of the defendants who would pass through their doors. Instead they saw the defendants simply as addicts and though that is not nearly as stigmatized a term today as it once was it still carries limitations with it, and certain expectations such as an eventual cure. This is the overwhelming distinction between the two courts as I came to know them, mental health court sought to treat those in its care not to cure them, a goal which is explicitly at the heart of the institution of drug courts. The unfortunate reality is that an enormous amount of the defendants who qualify for drug court also have other mental illnesses and failure to

address these needs is likely contributing to the low rate of graduation from drug courts. It's a distressingly simple concept, the judicial label placed upon them fails to address their needs as so they fail, yet it occurs again and again as those in treatment for addiction are denied adequate mental health care and drop out of the program entirely. It is clear that the distinction that the courts draw between defendants with addictions and those with other forms of mental illness maintains an arbitrary separation between types of mentally ill defendants, which inhibits their ability to successfully receive treatment.

### **Implications**

The war on drugs has only increased the highly inflated number of Americans in prison. Specialty courts have succeeded in somewhat reducing recidivism for successful graduates; however they have resulted in a highly fragmented judicial system and are not without systematic problems. As Rottman put forth in his paper, isolated courts do not benefit the system as a whole. Further studies of judges in treatment and traditional courts is warranted, from which we may gain a better understanding of the mechanisms at work when one is operating under therapeutic jurisprudence explicitly as compared to traditional justice. By analyzing judges own words and their actions, we can see where they struggle with such concepts and perhaps better prepare future judges to work within these courts from a therapeutic jurisprudence understanding of legal practice. At the very least much needed insight into the thematic and practical differences between judges from these two very different environments will be gained.

On a larger scale the problem of fragmented justice must be addressed, why is the idea of offering treatment to defendants relegated to specialized courts? One of the ideas Rottman

explored was the transfer of ideals from therapeutic courts to traditional courts when judges rotated between the two. The barriers between these separate arms of our justice system need to be broken down through comprehensive training for judges. Specialized education could begin to help all judges utilize some of the techniques that have had success in specialty courts.

Currently there is no mandated continuing education program for specialty court judges. Resources exist and accreditation procedures differ across states but the field needs to begin moving toward a comprehensive certification program. I would argue that the current distribution of resources amongst drug and mental health courts is unnecessary at best and at worst harmful to the treatment of both categories of defendant. The differences between judges in drug and mental health court as pointed out in this paper are at least partially influenced by different workplace cultures in regards to defendants. Meaning that since the aims of drug and mental health courts are different so is the attitude with which they approach clients. The emphasis of harm reduction found in mental health courts is in my opinion a more compassionate and realistic treatment option than the group therapy and sporadic individualized counseling often given in drug court.

Given the extraordinary number of defendants who suffer from comorbidity of drug and mental health issues I propose that merging drug and mental health courts to create a system of comorbid specialty courts would better serve the defendants and increase graduation rate from the courts. Under 15 courts of this nature currently exist in the U.S, expanding their numbers would greatly benefit the criminal justice system. During my observations of drug court the most ardent complaint from participants was that their mental health needs were not being addressed. Similarly many of the participants in mental health court had a difficult time coping

with their addictions. Even if genuine unification of mental health and drug courts or an expansion of explicitly comorbid courts is impossible expanding and formalizing a training system for judges that explored both areas would greatly benefit everyone involved in specialty courts.

Technically drug abuse is classified as a mental illness in the DSM IV, and with good reason it is a multifaceted disorder that requires holistic treatment specialized to address each individual's needs. Obtaining this type of treatment in a criminal justice setting, even a specialty court is of course very difficult. However if we begin to train judges in specialty courts to deal with both addiction and mental illness there is nothing to be lost and meaningful treatment for a great deal of sick people to be gained.



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