

**THERAPEUTIC JURISPRUDENCE, LEGAL LANDSCAPES, AND FORM
REFORM: THE CASE OF DIVERSION**

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I. INTRODUCTION

At the University of Puerto Rico School of Law (UPR) in the fall term of the 2008-2009 academic year, I offered, for the first time, a sentencing and corrections seminar—approached, of course, with a distinctly therapeutic jurisprudence (TJ) spin. During that term, I was also asked to review a manuscript prepared by Florida Coastal School of Law student Dax Miller. Dax Miller's paper, prepared for Professor Susan Daicoff's Comprehensive Law course and published in *The Florida Coastal Law Review*,¹ did not relate to sentencing and corrections. Rather, it critiqued, from a TJ perspective, the standard Florida divorce agreement form.² Moreover, Dax Miller proposed a rewritten form, one highly consistent with TJ principles.³ At just the time that I read Dax Miller's paper I came across, in my assigned sentencing casebook, the federal pretrial diversion form,⁴ and concluded that it too was in desperate need of *Daxing*. Suddenly, it occurred to me that Dax Miller had opened up a completely new potential branch of TJ scholarship—what might be called *Form Reform*.

With Dax Miller's own project, questions are raised about just how a newly proposed form might be implemented in practice (e.g., alongside the old form, as an additional option, or as a replacement for

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¹ See Dax J. Miller, Project, *Applying Therapeutic Jurisprudence and Preventive Law to the Divorce Process: Enhancing the Attorney-Client Relationship and the Florida Practice and Procedure Form "Marital Settlement Agreement for Dissolution of Marriage with Dependent or Minor Child(ren)"*, 10 FLA. COASTAL L. REV. 263 (2009).

² See *id.* at 264-65.

³ See *id.* at app. A.

⁴ NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 657-58 (2d ed. 2007).

it), and whether the road to reform requires the approval or at least the acquiescence of other decisionmakers—such as the Florida Legislature.⁵ Similar issues are raised regarding the pretrial diversion form, and it thus occurred to me that, in a sense, I had stumbled onto a potentially different aspect of what I have been referring to as the relevant “legal landscape,” an essential ingredient of the TJ criminal law framework I had proposed in an earlier piece.⁶ Indeed, teaching the sentencing and corrections seminar with a TJ spin led me to focus on a number of legal landscape issues, culminating with the landscape involved in federal form reform. In this brief article, I want to summarize some of those matters and then turn my attention to the diversion form.

The diversion form issue is also exciting to me because, after having devoted considerable time to TJ and the judiciary,⁷ and to TJ and criminal defense lawyering,⁸ I am finally able to look at a TJ issue concerning prosecuting attorneys. Not surprisingly, the issue of diversion readily lends itself to opening up the area of TJ and prosecutors., for here we are dealing with a prosecutor *offering* a diversion option; if a prosecutor is willing to follow that path, then presumably he or she will want that option to succeed, and employing TJ principles might well enhance the chances of success.

II. LEGAL LANDSCAPES

Let us begin, then, with the general concept of the legal

⁵ The use of the current form seems mandatory. See FLA. FAM. L.R.P. Form 12.902(f)(1) (instructing that the “form should be used when a Petition for Dissolution of Marriage with Dependent or Minor Child(ren) . . . has been filed”). An amendment that may serve well, especially as an interim measure, to permit the use of the proposed modified form by interested attorneys and parties, would be to follow the language used in Florida’s living will statute, stating that the existing form “may, BUT NEED NOT” be used. FLA. STAT. § 765.303 (2008).

⁶ David B. Wexler, *A Tripartite Framework for Incorporating Therapeutic Jurisprudence in Criminal Law Education, Research, and Practice*, 7 FLA. COASTAL L. REV. 95, 102 (2005) [hereinafter *A Tripartite Framework*].

⁷ See Bruce J. Winick & David B. Wexler, *Introduction to JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 7-9* (Bruce J. Winick & David B. Wexler eds., 2003) (explaining the positive effect TJ may have on the judiciary).

⁸ See David B. Wexler, *Introduction to REHABILITATING LAWYERS: PRINCIPLES OF THERAPEUTIC JURISPRUDENCE FOR CRIMINAL LAW PRACTICE*, at xvii (David B. Wexler ed., 2008) [hereinafter *REHABILITATING LAWYERS*] (explaining that a therapeutic jurisprudence perspective may enrich a lawyer’s practice).

landscape and consider its relevance to the area of sentencing. In an earlier article, I proposed a “tripartite framework” for thinking about the components and capacities of TJ criminal lawyering.⁹ One crucial component is knowledge of the available legal options—or the existing legal landscape.¹⁰ In my initial article on this point, I gave examples of a couple of TJ-friendly features of the federal criminal landscape, a legal terrain traditionally quite harsh, hostile, and inhospitable to explorers with TJ interests.¹¹

For example, the case of *United States v. Booker*,¹² in which the United States Supreme Court held the rigid and mechanical federal sentencing guidelines (Guidelines) to be advisory only,¹³ was surely the most important development in allowing TJ to seep into the federal system. After *Booker*, it is possible for a receptive judge, in an appropriate case, to consider sentencing dispositions other than incarceration in situations where, before *Booker*, incarceration would have been the mandated result. Another legally available option noted in my earlier article is the possibility of deferring imposition of the sentence, an attractive way of establishing a treatment plan and hoping the judge will in essence later ratify the arrangement.¹⁴ In the sentencing and corrections seminar, we looked at several other landscape issues. One more or less TJ-friendly rule—one that intersects nicely with the ability to defer the imposition of sentence—allows for

⁹ *A Tripartite Framework*, *supra* note 6, at 100.

¹⁰ *Id.*

¹¹ *See id.* at 96-100 (utilizing a representative federal criminal case to illustrate TJ principles).

¹² *United States v. Booker*, 543 U.S. 220 (2005).

¹³ *Id.* at 245.

¹⁴ *See, e.g.*, *United States v. Riggs*, 370 F.3d 382, 384 (4th Cir. 2004), (noting the district court granted a seven level downward departure and allowed the defendant to serve twelve months out of his sentence under home confinement because of the defendant’s diminished mental capacity), *vacated*, 543 U.S. 1110 (2005); *see also* *United States v. Flowers*, 983 F. Supp. 159, 173 (E.D.N.Y. 1997) (granting the defendant’s request for postponement of sentencing); Michael Crystal, *The Therapeutic Sentence: Chicken Soup for an Ailing Criminal Court*, in *REHABILITATING LAWYERS*, *supra* note 8, at 183, 184 (explaining the use of TJ during sentencing); Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer at Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventive Law Model*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION* 245, 266-71 (Dennis P. Stolle et al. eds., 2000) [hereinafter *PRACTICING THERAPEUTIC JURISPRUDENCE*] (explaining the usefulness of deferred sentencing).

the judge to take into consideration post-offense rehabilitation—or at least *extraordinary* rehabilitative efforts when making the sentencing decision.¹⁵ Far less friendly is the formalistic refusal of the federal Guidelines to consider *post-sentence* rehabilitative efforts,¹⁶ the “reasoning” being that “such efforts would only inure to the benefit of those whose convictions or sentences have been disturbed on appeal.”¹⁷ A far more sensible and therapeutic solution would be to allow, and indeed to encourage, courts to consider such conduct. For equality purposes, the appropriate comparison should not be with those who made rehabilitative efforts but did not have their original sentence reversed. Instead, it should be with those whose sentences were reversed but who, upon reconviction, warrant an *increased* sentence because of nonvindictive factors such as “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.”¹⁸ That sort of symmetry would motivate offenders, whether or not incarcerated during the pendency of their appeals, to engage in rehabilitative efforts and to refrain from behavior that could later come back to haunt them.

In any event, most appeals are unsuccessful,¹⁹ and thus offenders typically look forward not to resentencing, but rather to release upon sentence completion. In the federal system, such release will not be through parole release because discretionary parole release has been eliminated.²⁰ Instead, offenders completing incarceration serve a term of “supervised release.”²¹

The federal supervised release system constitutes a legal landscape entirely devoid of motivational strength—in no way does it reward or encourage offender reform efforts. The length of an

¹⁵ See DEMLEITNER ET AL., *supra* note 4, at 340. See also Winick, *supra* note 14, at 254-63 (explaining the consideration of postoffense rehabilitation in sentencing).

¹⁶ U.S. SENTENCING GUIDELINES MANUAL § 5K2.19 (2001).

¹⁷ David B. Wexler, *Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer*, in REHABILITATING LAWYERS, *supra* note 8, at 20, 30 n.64.

¹⁸ North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

¹⁹ James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes?: An Empirical Study of the Court of Appeal for Ontario*, 45 OSGOODE HALL L.J. 315, 342-46 (2007) (discussing the low rates of success on appeal of a judgment).

²⁰ DEMLEITNER ET AL., *supra* note 4, at 739.

²¹ See *id.* at 739-40.

offender's incarceration, the period of supervised release, and the specific conditions of supervised release are all set at the time of sentence imposition.²² Thus, there is no legal incentive to do well in prison in hopes of advancing one's release date. Nor is there any legal encouragement for offenders, during incarceration, to think through their needs and risk factors and to propose relapse prevention plans with meaningful, individually tailored conditions that might aid in transition to community life.²³ Indeed, supervised release may be so far off in the future that a current challenge to the reasonableness or constitutionality of imposed release conditions may even be dismissed on ripeness grounds.²⁴

The entire supervised release system is in desperate need of reconsideration, and TJ should be central to that process. Perhaps a parole release system operating with "constrained" discretion, rather than free-wheeling discretion, could provide a good starting point for our rethinking.²⁵

Also worthy of reconsideration is the *Reno v. Koray*²⁶ doctrine, another TJ-unfriendly feature of the federal scheme. In *Koray* the United States Supreme Court held that the defendant could not receive sentence credit for pretrial confinement other than technical, "jail" detention.²⁷ This issue arose in the sentencing and corrections seminar because two of the UPR law students, in their federal defender clinical work (in connection with another course), were representing an addicted woman who, largely for sentence credit concerns, refused to enter a pretrial residential drug rehabilitation program. Interestingly, under the governing pre-*Koray* precedent operative in the federal district court for the District of Puerto Rico, the client would have had a reasonably strong argument for sentence credit.²⁸ Canadian law also looks more

²² *Id.* at 739.

²³ See Wexler, *supra* note 17, at 41 (explaining proposals to reform the parole process).

²⁴ *United States v. Lee*, 502 F.3d 447, 450 (6th Cir. 2007).

²⁵ David B. Wexler, *Spain's JVP (Juez de Vigilancia Penitenciaria) Legal Structure as a Potential Model for a Re-Entry Court*, 7 *Contemporary Issues in Law* 1, 3-4 (2003).

²⁶ *Reno v. Koray*, 515 U.S. 50 (1995).

²⁷ *Id.* at 65.

²⁸ *Cf. United States v. Londoño-Cardona*, 759 F. Supp. 60, 63 (D.P.R. 1991) (giving credit for time spent under twenty-four-hour house arrest).

kindly, credit-wise, on non-jail pretrial rehabilitation regimes.²⁹

The landscape issues discussed thus far relate to the federal criminal justice system. Before turning to the federal diversion form, I would like to mention a state legal landscape case that appears in the sentencing casebook. Appropriately enough, the case, *State v. Curry*, relates to a diversion decision, albeit to a diversion *denial* rather than to an offer.³⁰

III. DIVERSION

Under Tennessee law, a qualified defendant may apply to the prosecutor for a two-year diversion program, thereby suspending prosecution.³¹ If granted, the diversion is subject to various conditions.³² A qualified defendant is not presumptively entitled to diversion.³³ Instead, the decision rests in the discretion of the prosecutor, who is to consider the ends of justice as well as the defendant's amenability to correction, and the defendant's criminal record, social history, and physical and mental condition.³⁴ If the prosecutor denies diversion, the denial must be in writing, explaining the reasons and relating them to the standards.³⁵ After denial the defendant may appeal to the trial court, and the applicable standard of review is abuse of discretion.³⁶

Carolyn Curry was a divorced thirty-four-year-old mother of three, an honors college graduate, a veteran of the National Guard, and an active member of her church and of many community and charitable groups.³⁷ Curry worked as an assistant city clerk and was indicted for embezzling \$27,000 from the city over a two-year period.³⁸ When her

²⁹ *R. v. Larventz*, [1999] O.A.C. 255, 255 (Can.) (“[T]he trial judge did err . . . in completely foreclosing any credit for attending . . . a residential treatment centre prior to conviction.”).

³⁰ *State v. Curry*, 988 S.W.2d 153 (Tenn. 1999).

³¹ TENN. CODE ANN. § 40-15-105(a)(1)(A) (West 2006 & Supp. 2007).

³² See § 40-15-105(2)(A)-(H) (enumerating conditions).

³³ *Curry*, 988 S.W.2d at 157.

³⁴ *Id.* (quoting *State v. Pinkham*, 955 S.W.2d 956, 959-60 (Tenn. 1997)).

³⁵ *Id.* (quoting *Pinkham*, 955 S.W.2d at 960).

³⁶ *Id.* at 157-58.

³⁷ *Id.* at 155.

³⁸ *Id.*

actions were discovered, she cooperated with authorities, proposed a restitution program, explained that she took the money for family and living expenses, and expressed regret and shame over her actions.³⁹ Armed with various reference letters, she applied to the prosecutor for pretrial diversion.⁴⁰ Denying the request, the prosecutor wrote the following:

We have carefully reviewed the application and the attached letters. . . . We have considered the defendant's past history and her conduct for two years in defrauding the City of McKenzie. This was a calculated criminal scheme that took planning and thought. It manifests a criminal intent for a long period of time and not something that happened at once. We cannot believe that it would be in the best interests of the public, the defendant, and justice to overlook a criminal scheme of this proportion and grant pre-trial diversion. . . .⁴¹

Invoking the “abuse of discretion” standard, the trial court nonetheless ruled that diversion had been improperly denied,⁴² a ruling affirmed by the Tennessee Supreme Court.⁴³ At first blush, the legal landscape created by *Curry* seems out of harmony with TJ principles. If in practice an abuse of discretion standard does not lead to giving substantial deference to a prosecutor's determination—if in practice it is applied as a rigorous standard of review—we could expect prosecutors in the future, hoping to insulate their decisions from reversal in court, to write extremely negative denial letters. Such prosecutorial practice would fly in the face of TJ suggestions.

For example, there is TJ work in the closely related area of the judicial drafting of statements of reasons in the sentencing sphere, and the role of counsel in explaining those decisions and reasons.⁴⁴ Additionally, analogous TJ literature promotes a much more upbeat linguistic approach:

³⁹ *Id.*

⁴⁰ *Id.* at 155-56.

⁴¹ *Id.*

⁴² *Id.* at 156.

⁴³ *Id.* at 160.

⁴⁴ See *A Tripartite Framework*, *supra* note 6, at 172-73, 178-79.

Even when imposing incarcerative penalties, judges have been urged to condemn the act rather than the actor and to search for and comment on any offender strengths that might be used as building blocks in shaping a future with hope. Training of judges in the drafting of statements of reasons may be especially relevant in jurisdictions—like some federal circuits—where courts are required to address directly defense sentencing arguments. How rejected defense arguments are responded to can, in TJ terms, be either helpful or devastating to defendants and their responsiveness to rehabilitative efforts. If courts follow the traditional approach of showing why the government should surely win, why the defense arguments are stretches—in other words, if they write such opinions as congratulatory “letters to the winner”—the practical results could be quite negative. But if they follow the [TJ] advice of crafting a sensitive “letter to the loser” . . . the stage may be set for a more positive long-term outcome.⁴⁵

A closer reading of *Curry*, however, suggests that the court may not be scrutinizing seriously the prosecutor’s substantive decision to deny diversion. The *Curry* court, for example, quoted with approval the written reasons of another diversion-denying prosecutor,⁴⁶ a denial that had been upheld in *Tennessee v. Pinkham*.⁴⁷ Denying diversion in a perjury and false impersonation case, the prosecutor in *Pinkham* wrote:

In making this decision to reject the defendant’s diversion application, I have considered that [the defendant] is a 50 year old man with no criminal record. I have considered his exemplary social history. I have considered that [the defendant] appears to be a leader in his community, as evidenced by the character and reference letters from lawyers, teachers, professors,

⁴⁵ David B. Wexler, *Adding Color to the White Paper: Time for a Robust Reciprocal Relationship Between Procedural Justice and Therapeutic Jurisprudence*, 44 CT. REV. 78, 79-80 (2007) [hereinafter *Adding Color to the White Paper*].

⁴⁶ *Curry*, 988 S.W.2d at 157.

⁴⁷ *State v. Pinkham*, 955 S.W.2d 956, 961 (Tenn. 1997).

ministers, doctors, et al. I have considered all of the parameters of [the defendant's] social, family, personal, educational and professional background. . . . Since [the defendant] is a highly educated person who holds a law degree, [the defendant] *knew* that his conduct was unlawful and unethical.⁴⁸

When we compare the prosecutorial language use and the results of the two cases—*Curry* and *Pinkham*—we see the emergence of a different standard of review, a standard quite similar to how some federal courts approach post-*Booker* sentencing review: an extraordinarily deferential review of the *substantive* decision (i.e., whether an imposed sentence is too high or too low), but a careful review of the *procedures* employed (i.e., whether the sentencing guideline range was properly calculated, whether the sentencing guidelines were properly treated as advisory, or whether the sentence was explained).⁴⁹

In the sentencing arena, the District of Columbia Circuit Court of Appeals in *United States v. Gardellini* interpreted *Booker* and *Gall v. United States* to require just such an approach to substantive and procedural review.⁵⁰ Furthermore, a *Gardellini*-type reading of *Curry* would, I think, give us the best diversion denial legal landscape that TJ has to offer. Why? Consider the options:

- A standard of judicial review that permits vigorous judicial scrutiny of a prosecutor's denial will induce the prosecution to write a denial in very negative terms.
- Better than that would be a rule that leaves the entire diversion decision to the prosecutor, in essence free from judicial review (except for outrageous decisions, such as those based on racial animus). Such a rule would allow a

⁴⁸ *Id.* at 959.

⁴⁹ See *Gall v. United States*, 128 S. Ct. 586, 597 (2007); *United States v. Gardellini*, 545 F.3d 1089, 1092-93 (D.C. Cir. 2008) (citing *United States v. Booker*, 543 U.S. 220, 264 (2005)).

⁵⁰ *Gardellini*, 545 F.3d at 1092-93, 1096.

prosecutor to write a TJ-appropriate denial letter. But while such a rule would *allow* for such action, it would do nothing to *nudge*⁵¹ the prosecutor to do so.

- But a rule that goes especially easy on the prosecutor's *substantive* denial decision but which holds the prosecutor's feet to the fire with regard to the *procedural* requirements—compelling the prosecutor to consider the statutorily relevant factors, forcing the prosecutor “to think about and justify his denial in terms of the applicable standards”⁵²—sets the stage for a prosecutor, even in denying diversion, to note the defendant's strength and the like.

Surely, in TJ terms, even a rule of the third type would not be wholly self-executing. But a rule requiring prosecutors to look at the good along with the bad will in at least some instances likely result in a prosecutor *granting* diversion. And even if diversion is to be denied, a prosecutor with some TJ training, and operating under a rule where the substantive denial is unlikely to be vulnerable to attack, may well decide to note the defendant's strengths and to write the denial as a respectful “letter to the loser.”⁵³ There is nothing to lose, and, in TJ terms, a respectful letter should, at the very least, not add injury to the insult of the diversion denial. In fact, looking at matters longer term, a well-drafted letter may actually plant some seeds for a positive future.⁵⁴

⁵¹ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 8 (2008) (“If private companies or public officials think that one policy produces better outcomes, they can greatly influence the outcome by choosing it as the default.”).

⁵² *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999).

⁵³ See *Adding Color to the White Paper*, *supra* note 45, at 79-80.

⁵⁴ David B. Wexler, *Robes and Rehabilitation: How Courts Can Help Offenders “Make Good,”* 38 CT. REV. 18, 23 (2001) [hereinafter *Robes and Rehabilitation*]. Later, in discussing the United States Attorneys' Manual and potential revisions to it, I suggest that the insertion in the Manual of an illustrative diversion-denying letter could nudge federal prosecutors to prepare and send TJ-appropriate letters. See *infra* note 64.

2009]

Wexler

111

IV. GRANTING DIVERSION: PRETRIAL DIVERSION AGREEMENTS AND THE LIKE

Curry deals with diversion denials.⁵⁵ In the sentencing casebook, however, the *Curry* discussion is followed by the topic of *grants* of diversion—of memoranda of understandings and pretrial diversion agreements. In fact, quoting from the *United States Attorneys' Manual* (Manual), the casebook details the eligibility criteria for federal diversion,⁵⁶ and then prints in full the Manual's pretrial diversion form.⁵⁷

When one looks at the federal form from the perspective of Dax Miller's work with the Florida divorce form, the reader will surely see here a golden opportunity for Daxing. In fact, a TJ take on the diversion process would suggest we look not only at that precise form, but look also at the overall question of communication with the defendant.⁵⁸

According to the Manual, pretrial diversion (PTD) for a period not to exceed eighteen months⁵⁹ may be offered to "eligible" persons,⁶⁰ such as a person who is not an addict and who does not have two or more felony convictions.

Apparently, when the United States Attorney is presumptively in favor of diversion for an eligible person, a letter is sent to the chief pretrial service officer "recommending" diversion and requesting a recommendation from the officer regarding the suitability of the offender.⁶¹ At the same time, a letter is sent to the offender,⁶² advising that "we have made a preliminary determination that you may be an

⁵⁵ *Curry*, 988 S.W.2d at 155.

⁵⁶ DEMLEITNER ET AL., *supra* note 4, at 739 (for example, the accused may not be an addict, nor a person with two or more prior felony convictions).

⁵⁷ *Id.* at 657-58. See *infra* app., fig.1.

⁵⁸ U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 713 [hereinafter USA Form 185—Letter to Offender], *reprinted infra* app. B.

⁵⁹ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-22-010 (1997) [hereinafter UNITED STATES ATTORNEYS' MANUAL].

⁶⁰ *Id.* § 9-22-100.

⁶¹ U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 714 (USA Form 184—Pretrial Diversion Referral Letter to Chief Pretrial Services Officer).

⁶² USA Form 185—Letter to Offender, *reprinted infra* app. B.

appropriate person to participate in the Department's Pretrial Diversion Program" and asking the offender⁶³ to respond promptly.⁶⁴ If a willing offender is deemed an appropriate candidate for diversion, the "procedures to be followed" include the preparation and signing of the above-quoted agreement.⁶⁵ The Manual notes that "[i]nnovative approaches are strongly encouraged" with regard to supervision tailored to the offender's needs.⁶⁶ Upon successful completion of the program, "[t]he U.S. Attorney will formally decline prosecution"⁶⁷

Even without tampering at all with the basic substance of the federal pretrial diversion program,⁶⁸ a robust TJ approach would recommend a series of procedural measures. But invoking those measures would raise a host of questions. For example, if a U.S. Attorney or appropriate Assistant U.S. Attorney wished to follow the TJ perspective in the hopes of enhancing the success of a proposed

⁶³ The Manual repeatedly refers to the person being offered diversion as the *offender* even though this process by definition occurs before conviction. In fact, "[i]n the majority of cases, offenders are diverted at the pre-charge stage." UNITED STATES ATTORNEYS' MANUAL § 9-22.010.

⁶⁴ See USA Form 185—Letter to Offender, *reprinted infra* app. B. See *infra* app. C for what might be a preferable letter: The proposed draft in Appendix C is an improvement, but is still logistically a bit awkward. Since the "divertee must have advice of counsel," U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 712(B)(2), the proposed form letter tries to ease the appointment process (and regards as unnecessary, at this stage, a specification of the constitutional rights to be waived). The proposed letter also tries to streamline the process of responding to the government's letter. But after discussing the matter with counsel, why does the burden return to the offender, personally, to contact the U.S. Attorneys' office? Shouldn't the offender's attorney take over communication at this point?

Of course, in cases where the defendant has been charged and where counsel has already been appointed, a logically and therapeutically preferable procedure would be for the attorney to affirmatively apply for the client's pretrial diversion. The attorney-client communication under such a procedure could track some of the TJ-suggested procedures in the analogous area of pre-sentence allocation. See generally *A Tripartite Framework*, *supra* note 6, at 173-80.

⁶⁵ UNITED STATES ATTORNEYS' MANUAL § 9-22.200 (1997); see also *infra* app. C.

⁶⁶ U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 712(E) (Pretrial Diversion).

⁶⁷ *Id.* § 712(G).

⁶⁸ But tampering is surely suggested, such as in the eligibility provision excluding addicts. See UNITED STATES ATTORNEYS' MANUAL § 9-22.100. Addiction has been an area where, on the state level, drug treatment courts and the use of TJ approaches have thrived. See generally Winick & Wexler, *Introduction* to JUDGING IN A THERAPEUTIC KEY, *supra* note 7, at 4.

2009]

Wexler

113

diversion, some questions that might arise include:

- Could the basic form be altered to bolster its therapeutic flavor and to minimize its off-putting legalistic style?
- Regardless of whether the form were altered or left intact, could it be accompanied by a cover letter that might try to capture a more upbeat and therapeutic flavor?⁶⁹
- In the District of Puerto Rico, where the dominant language of defendants is Spanish, might a cover letter be written in Spanish? If so, the letter might truly capture the therapeutic flavor, for the English form might in any event be looked at as formal, remote, legalistic, and generally inaccessible.
- When the program is satisfactorily completed—or, even more impressively, is successfully completed in a time earlier than eighteen months—can the U.S. Attorney, besides formally declining prosecution, write a supportive letter to the defendant—a bit akin to the judicial recognition that occurs during graduation from many state drug court programs?⁷⁰

Whether a TJ-inclined federal prosecutor might resort to these sorts of practices raises the question of the governing “*legal landscape*” and, in this context, of the Manual as constituting both law on the books

⁶⁹ For example, a cover letter accompanying a true offer of diversion would be far more robust than the earlier, preliminary letter. Regarding the earlier letter, see the more user-friendly version proposed *infra* app. C.

⁷⁰ See *Robes and Rehabilitation*, *supra* note 54 (“In drug treatment courts, for example, applause is common, and, in some courts, even judicial hugs are by no means a rare occurrence. . . . Some of the graduates make speeches, and all receive a ‘diploma’ from the court. In some such courts, ‘participants have asked that their arresting officer be present at their graduation.’”) (footnotes omitted).

and the law in action.⁷¹ We return, then, to the Manual, this time principally to its section on “*authority*”⁷² and “*revisions*.”⁷³

V. THE U.S. ATTORNEYS’ MANUAL AS LEGAL LANDSCAPE

Section 1-1.200 notes that:

This Manual is intended to be comprehensive. When the contents of this Manual conflict[] with earlier Department statements, except for Attorney General’s statements, the Manual will control. Should a situation arise in which a Department policy statement predating the Manual relates to a subject not addressed in the Manual, the prior statement controls, but this situation should be brought to the attention of the Executive Office for United States Attorneys,⁷⁴

Regarding revisions, the Manual distinguishes between “*policy* and “*procedures*.”⁷⁵ Policy changes require departmental review and approval, whereas changes in procedure are made by Manual staff after being referred to the staff by the Director of the Executive Office for United States Attorneys:

1-1.600 Revisions—Policy (Bluesheets)/Procedures

There are two types of revisions to the Manual: policy (bluesheets) and procedure. Policy changes are entitled bluesheets. Policy changes are submitted by the Attorney General, Deputy Attorney General, Associate Attorney General, a litigating division or the Executive Office for United States Attorneys (EOUSA). Policy changes submitted by an Assistant Attorney General for a litigating division or the Director EOUSA must be reviewed by the Attorney General’s Advisory Committee

⁷¹ TJ has always been concerned with the “law in action, [and] not simply the law on the books.” David B. Wexler, *Therapeutic Jurisprudence: An Overview*, in REHABILITATING LAWYERS, *supra* note 8, at 3, 4.

⁷² UNITED STATES ATTORNEYS’ MANUAL § 1-1.200.

⁷³ *Id.* § 1-1.600.

⁷⁴ *Id.* § 1-1.200.

⁷⁵ *Id.* § 1-1.600.

2009]

Wexler

115

(AGAC) before being incorporated into the Manual. If the AGAC objects to the proposed policy change, it will meet with the litigating division or EOUSA to resolve. Unresolved issues will be resolved by the Deputy Attorney General or Attorney General. Policy changes issued by the Attorney General, Deputy Attorney General, and Associate Attorney General are effective upon issuance. For guidance in preparing a policy change (bluesheet), contact the Manual Staff at 202-514-4633.

Procedural changes to the Manual do not require review by the Advisory Committee and can be incorporated directly into the Manual. Procedural changes should be sent to the USAM staff through the Director, EOUSA.⁷⁶

My principal inquiry, of course, is whether an individual U.S. Attorney (or Assistant U.S. Attorney) could engage in any or all of the above suggested practices, or whether a Manual change would be necessary to authorize such behavior.

Is *everything* either a policy or a procedure, or is there a residual category of administrative/communicative matters that is left to the unfettered discretion of a prosecutor?⁷⁷ Are all *forms* policy? Or are they procedures? Or something else?

To get a sense for how the Manual may operate in practice (in essence the *law in action*"), I contacted a handful of people, beginning with two federal deputy public defenders, and, then, some staff and prosecuting attorneys in the field and in Washington, D.C. This was not research as such; my conversations were merely off-the-record background inquiries, not for attribution to identified individuals, to get a sense for how some new practices would be regarded by professionals in the field.

⁷⁶ *Id.*

⁷⁷ *See id.* § 1-1.100 (noting in the opening paragraph of the Manual, with probable reference to other matters, that "[no] limitations [are] hereby placed on otherwise lawful litigative prerogatives of the Department of Justice").

I learned that, at least in the few districts in which I inquired, diversion is rarely used. When it is, the *form* agreement is always employed. Some think it is policy, or at least a mandated procedure.⁷⁸ And if it happens to be neither, it is at least *there*, readily accessible and ready to go.

With respect to letter writing, even if such were to be permitted in the discretion of the prosecutor, there seems to be a clear reluctance to go beyond matters laid out in the Manual. For instance, with regard to declining prosecution upon satisfactory completion of program requirements,⁷⁹ the writing of a supportive letter to the defendant appeared to one attorney as inappropriate: “We don’t really want to write him a reference letter. The reward is the dismissal itself.” Or, as expressed somewhat more broadly by another attorney, “in a bureaucracy, you rarely get in trouble for something you *didn’t* do, for *not* doing something.”

VI. CONCLUSION

My conclusion is that, as matters now stand, the Manual’s statement that “[i]nnovative approaches are strongly encouraged”⁸⁰ is undermined in the area of diversion by the Manual itself, at least as it is apparently perceived in practice. With its claim to be *comprehensive*⁸¹ and, in the event of conflicts with prior statements, to have Manual statements *control*,⁸² and with its specific methods for changing policies and procedures,⁸³ the Manual conveys a somewhat legalistic, formal, and even intimidating tone to an Assistant U.S. Attorney inclined to give innovation, and therefore TJ, a try.

If the Department of Justice is seriously interested in innovation, which it surely should be in light of the shameful American

⁷⁸ See *id.* § 9-22.200 (“For the procedures to be followed for pretrial diversion agreements, see the Criminal Resource Manual at 712.”).

⁷⁹ See U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 712(G) (“The U.S. Attorney will formally decline prosecution upon satisfactory completion of program requirements.”).

⁸⁰ *Id.*

⁸¹ UNITED STATES ATTORNEYS’ MANUAL § 1-1.200.

⁸² *Id.*

⁸³ *Id.* § 1-1.600.

incarceration crisis,⁸⁴ a good place to start would be in encouraging efforts in pretrial diversion. For openers, and especially in light of the drug treatment court experience,⁸⁵ the blanket exclusion of addicts should be rethought.

With regard to the existing program, efforts to infuse TJ insights into the prosecutor's role should be encouraged—either through memoranda to prosecuting attorneys or, preferably, I would think, by revisions to the Manual itself. Prosecutors should be urged to learn from recommendations for communication that have thus far been addressed to judges and defense counsel.⁸⁶ Some model letters should be prepared and included in the Manual as illustrations. These letters, when read by the defendants and reviewed by them in consultation with their own attorneys, should serve as a positive force in their rehabilitative efforts.

Once these illustrative letters are part of the Manual, they should *nudge*⁸⁷ the prosecutors in a TJ direction in their approach to diversion.⁸⁸ By revising the Manual along these lines, a type of *Form Reform*, the Department of Justice could contribute to creating a TJ-friendly legal landscape for federal diversion.⁸⁹

⁸⁴ See *Adding Color to the White Paper*, *supra* note 45, at 80-81.

⁸⁵ See *Robes and Rehabilitation*, *supra* note 54, at 21-22.

⁸⁶ *Adding Color to the White Paper*, *supra* note 45, at 80-81 (discussing different recommendations for communications). See generally REHABILITATING LAWYERS, *supra* note 8 (describing TJ and criminal defense lawyering).

⁸⁷ See THALER & SUNSTEIN, *supra* note 51, at 8.

⁸⁸ We have spoken of grants of diversion, but a letter denying diversion in a TJ appropriate way could also be prepared and inserted, and would serve as a nudge even where, unlike Tennessee, no substantive statutory standards govern diversion, and where the decision is in the prosecutor's discretion without the prospect of judicial review. Compare TENN. CODE ANN. § 40-35-313(a)(1)(A) (West 2006) ("The court may defer further proceedings against a qualified defendant and place the defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant."), with Ohio Rev. Code Ann. § 2935.36 (LexisNexis 2007) ("The prosecuting attorney may establish pre-trial diversion programs for adults who are accused of committing criminal offenses and whom the prosecuting attorney believes probably will not offend again.").

⁸⁹ Of course, prosecutors in state jurisdictions where the legal landscape may not prove an obstacle could create from scratch a TJ healthy practice, complete with appropriately styled forms and procedures. Once instituted, such a successful local

Appendix A

715 USA Form 186—Pretrial Diversion Agreement

UNITED STATES OF AMERICA

v.

Name

Street Address

City and State

File No.

Telephone No.

AGREEMENT FOR PRETRIAL DIVERSION

It appearing that you are reported to have committed an offense against the United States on or about _____ in violation of Title ____, United States Code, Section(s) _____, in that you did:

_____.

Upon accepting responsibility for your behavior and by your signature on this Agreement, it appearing, after an investigation of the offense, and your background, that the interest of the United States and your own interest and the interest of justice will be served by the

program could serve as a model in other jurisdictions and possibly even spread to the federal system.

2009]

Wexler

119

following procedure; therefore

On the authority of the Attorney General of the United States, by _____, United States Attorney for the _____ District of _____, prosecution in this District for this offense shall be deferred for the period of _____ months from this date, provided you abide by the following conditions and the requirements of this Agreement set out below.

Should you violate the conditions of this Agreement, the United States Attorney may revoke or modify any conditions of this pretrial diversion program or change the period of supervision, which shall in no case exceed eighteen months. The United States Attorney may release you from supervision at any time. The United States Attorney may at any time within the period of your supervision initiate prosecution for this offense should you violate the conditions of this Agreement. In this case [he/she] will furnish you with notice specifying the conditions of the Agreement which you have violated.

After successfully completing your diversion program and fulfilling all the terms and conditions of the Agreement, no prosecution for the offense set out on page 1 of this Agreement will be instituted in this District, and the charges against you, if any, will be dismissed.

Neither this Agreement nor any other document filed with the United States Attorney as a result of your participation in the Pretrial Diversion Program will be used against you, except for impeachment purposes, in connection with any prosecution for the above-described offense.

General Conditions of Pretrial Diversion

1. You shall not violate any law (Federal/State/Local). You shall immediately contact your pretrial diversion supervisor if arrested and/or questioned by any law enforcement officer.
2. You shall attend school or work regularly at a lawful occupation or otherwise comply with the terms of the special program described below. If you lose your job or are unable to attend school, you shall notify your pretrial diversion supervisor at once. You shall consult him/her prior to job or school changes.

3. You shall report to your supervisor as directed and keep him/her informed of your whereabouts.

4. You shall follow the program and such special conditions as may be described below.

Special Conditions

[description of special program]

I assert and certify that I am aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. I also am aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information, or in bringing a defendant to trial. I hereby request the United States Attorney for the _____ District of _____ to defer such prosecution. I agree and consent that any delay from the date of this Agreement to the date of initiation of prosecution, as provided for the terms expressed herein, shall be deemed to be a necessary delay at my request, and I waive any defense to such prosecution on the ground that such delay operated to deny my rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of months equal to the period of this agreement.

I hereby state that the above has been read and explained to me. I understand the conditions of my pretrial diversion program and agree that I will comply with them.

Name of divertee

Date

Defense Attorney

Date

2009]

Wexler

121

Chief Pretrial Services Officer Date

(or Chief Probation Officer)

USA Form 186

122

Florida Coastal Law Review

[Vol. X:nnn]

Appendix B

713 USA Form 185—Letter to Offender

Re: In the matter of: _____

Complaint No. _____

Dear _____:

The United States Attorney for the _____ District of _____ has information that you have committed an offense against the United States in violation of the Title _____, United States Code, Section(s) _____ [Description: _____]

After reviewing your case, we have made a preliminary determination that you may be an appropriate person to participate in the Department's Pretrial Diversion Program. Pretrial diversion means that this office will not presently seek conviction against you. Instead, if you qualify and are accepted, you will be placed in a pretrial diversion program under certain specified conditions described in a written agreement between you and the government for a term to be determined by this office but not to exceed eighteen months. If you satisfactorily fulfill the conditions and terms of your program, you will not be prosecuted, or, if you have already been charged, the charges against you will be dismissed. If you violate the conditions of the written agreement, you may be removed from the pretrial diversion program, in which case this office will resume prosecution.

The decision to seek acceptance into this program is one that must ultimately be made by you alone. Nevertheless, it is important that you immediately discuss this matter fully and completely with your attorney inasmuch as your participation in this program will constitute a waiver of certain rights afforded to you by the Constitution. Specifically, you must waive your right to a speedy trial and your right to have an indictment presented to a grand jury within the applicable statute of limitations. If you believe you are unable to afford an attorney, you should notify the Chief Pretrial Services Officer (or the Chief Probation Officer) so that counsel may be appointed by the court to represent you.

2009]

Wexler

123

If you desire to be further considered for the pretrial diversion program, please let us know at your earliest convenience.

Any information furnished in connection with your application for pretrial diversion will be confidential and will not be admissible as to the issue of guilt in subsequent criminal proceedings.

In order to ensure that appropriate procedures can be initiated as soon as possible, please respond promptly.

Very truly yours,

United States Attorney

Assistant United States Attorney

Appendix C

A preferable letter might read as follows:

After reviewing your case, we have made a preliminary determination that you may be an appropriate person to participate in our Pretrial Diversion Program. Those who successfully complete the program are not prosecuted, and if they have already been charged, the charges will be dismissed.

This is an important matter that you should promptly discuss with your attorney. If you cannot afford an attorney, you should immediately contact the Chief Pretrial Service Officer [or the Chief Probation Officer] at _____ (telephone number) so that counsel may be appointed to represent you.

After consultation with counsel, please let us know promptly if you would like to be further considered for the Pretrial Diversion Program. If so, you may simply sign the enclosed form that says, "I have discussed this matter with my attorney and I would like to be further considered for the Pretrial Diversion Program." The signed form should then be returned to us in the enclosed envelope.