"Drug Treatment Courts in the 21st Century: Improving the Criminal Justice System's Response to Drug Offenses"

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"DRUG TREATMENT COURTS IN THE 21ST CENTURY: IMPROVING THE CRIMINAL JUSTICE SYSTEM'S RESPONSE TO DRUG OFFENSES"

The Honorable Peggy Fulton Hora* & Theodore Stalcup**

ABSTRACT

The article demonstrates that the traditional criminal justice system’s response to drug offenses – arrest, trial and incarceration and re-arrest, re-trial and re-incarceration of 70% of offenders within three years – wastes vast economic and human resources. Drug treatment courts, on the other hand, have proven to be strong alternatives to incarceration as well as effective mechanisms for dealing with America’s drug problem. The article addresses criticism of drug treatment courts, including resistance to the disease model of addiction, disputes over efficacy of treatment, legal issues related to purported coercion of treatment, concern over unbridled judicial discretion and ethical issues of collaboration between prosecution and defense. Recommendations for improving and continuing the success of drug treatment courts also are provided.

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I. INTRODUCTION

Almost no one minds when an inexpensive trinket breaks, wears out or rapidly requires replacement. But when something costs hundreds of thousands of dollars, greater assurance is needed that it serves its intended purpose and will continue to do so over a lengthy period of time. The traditional criminal justice system consumes vast economic and human resources in the processing of drug abusers and yet, historically, it has been willing to arrest, adjudicate and incarcerate drug abusers without regard to the recidivism of this population. Seven in ten convicted drug offenders re-offends within three years of release from incarceration.¹ Resources expended on re-arresting, re-trying and re-incarcerating drug abusers on similar charges again and again over the years is a waste. Happily, the public as
well as innovative members of the criminal justice system have come to see that this exercise in futility is no longer desirable or necessary.

A. The Traditional Criminal Justice System and America’s Drug Problem

The number of persons incarcerated in federal, state and local correctional facilities across the nation has risen dramatically in the last twenty-five years. As of 2005 more than 2.1 million Americans were incarcerated, 4.1 million Americans were on probation and over 700,000 were on parole. In all, nearly seven million people are under the control of the criminal justice system. (If they were a U.S. State, the population would be larger than 37 existing states in the U.S.)

Of these seven million or so people, 80% of adults incarcerated for felonies could be categorized in one or more of the following ways:

1. were regular alcohol or other drug abusers;

2. had been convicted of an alcohol or other drug violation;

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2 Robert Walker & TK Logan, Treating Substance Abuse Clients with Co-Occurring Intimate Partner Violence, IV, 3 OFFENDER SUBSTANCE ABUSE REPORT (May/June 2004)


4 Id.

5 Harrison, Supra note 1

6 Glaze, Supra note 2

7 (statistics for those incarcerated for misdemeanors were not available, perhaps due to State differences in sentencing.)
3. were under the influence of alcohol or other drugs at the time of their crime;
4. committed a crime to support their use; or,
5. exhibited one or more element(s) of any of these categories.⁸

Additionally, 29% of state prisoners and 25% of federal prisoners have committed violent offenses, including homicides and sexual assaults, while under the influence of drugs.⁹ Subsequent to release, these same offenders continue to use drugs other than alcohol.¹⁰ When alcohol is added to the mix, published studies suggest that as many as 86% of homicide offenders, 37% of assault offenders, 60% of sexual offenders, up to 57% of men and 27% of women involved in marital violence and 13% of child abusers were drinking alcohol at the time of the offense.¹¹

Incarceration does little to change substance use patterns. Subsequent to release, ex-offenders continue to use alcohol or other drugs at alarming rates. In 2004, 19.1 million Americans, nearly eight percent of the total population, were users of an illicit drug. However among persons on probation, the rate was over 26%.¹²

As already mentioned research shows that 70% of all drug offenders re-offend within three years of release from incarceration; compared to 50% of offenders generally.¹³

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⁹ Harrison, Supra note 1
¹⁰ Harrison, Supra note 1
¹¹ Nat’l Inst. on Alcohol Abuse & Alcoholism, ALCOHOL ALERT No. 38 (October 1997)
¹³ Robert Walker & TK Logan, Treating Substance Abuse Clients with Co-Occurring Intimate Partner Violence, IV, 3 OFFENDER SUBSTANCE ABUSE REPORT (May/June 2004)
Roughly 49% of those on probation for drug offenses are rearrested within three years and a third of those re-arrests are for a specific drug offense.\textsuperscript{14}

The costs associated with alcohol- or other drug-abusing offenders are staggering. The United States federal government is now spending upwards of $12.6 billion per year on drug control, including police protection, the judiciary, corrections and related costs.\textsuperscript{15} In 2003, alcohol and other drugs were responsible for roughly 628,000 emergency room visits in the United States.\textsuperscript{16} Moreover, the total impact on society of alcohol and other drug use is estimated to have cost the United States in excess of $180 billion in 2002, a 5.34% increase over the prior decade.\textsuperscript{17} Using United States Census data,\textsuperscript{18} this figure represents a burden of $642 for every resident of the country during 2002.

Striking disparities exist across ethnic lines between rates of drug use and rates of incarceration for drug-related crimes. Despite the fact that 75% of regular drug users are white, 17% Latino and eight percent African American, of those incarcerated on drug charges, 43% are African American, 25% Latino and 25% white.\textsuperscript{19}

The impact of substance abuse on women and families also is profound. The number of women incarcerated continues to rise at a rate one third higher than that of men\textsuperscript{20} and women are more likely than men to have engaged in the use of an illicit drug in the month

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\textsuperscript{14} Id.
\textsuperscript{15} ONDCP, Nat’l Drug Control Strategy: FY 2005 Budget Summary, (March 2004)
\textsuperscript{19} Harrison, Supra note 1
\textsuperscript{20} Harrison, Supra note 1
\end{flushright}
prior to their arrest.\textsuperscript{21} Between 1993 and 1998, nearly three out of four victims who suffered violence by an intimate partner, such as a spouse, boyfriend or girlfriend, reported that alcohol or other drug use had been a factor.\textsuperscript{22} More than half of men in treatment for alcohol dependence or abuse have also inflicted violence on their intimate partners.\textsuperscript{23} Nearly one third of women report being victims of domestic violence and over 1,400 are killed by their partners each year, an average of three women each day.\textsuperscript{24}

The cost of intimate partner violence exceeds $5.8 billion each year, with $4.1 billion in direct medical costs and mental health services.\textsuperscript{25} Intimate partner violence also leaves a legacy. Children who witness domestic violence are more likely themselves to become users of alcohol and other drugs; experience educational, mental health and behavioral problems; and perpetuate a generational tradition of violence by becoming perpetrators themselves.\textsuperscript{26}

With such sobering statistics, the important question to ask is how the criminal justice system handles this troubled population. Historically, the problem of substance abuse has been addressed by the criminal justice system with a combination of punishment and indifference. In 1997, only ten percent of drug abusers were given treatment while they were incarcerated, a fall from 25% just six years earlier.\textsuperscript{27} The numbers are only slightly better when other resources such as self-help programs, typically voluntary 12-step attendance, are

\begin{footnotes}
\item[21] Harrison, \textit{Supra} note 1
\item[22] Violence by Intimates Analysis of Data on Crimes by Current or Former Spouses, Boyfriends and Girlfriends, \textit{Supra} note 19
\item[26] David A. Wolfe et al., \textit{Strategies to Address Violence in the Lives of High Risk Youth}, in \textit{Ending the Cycle of Violence: Community Responses to Children of Battered Women}. (E. Peled et al., eds., 1995)
\end{footnotes}
included as options in the custody setting.\textsuperscript{28} Intervention while in custody can be effective when it incorporates not only drug treatment during physical detention but also a transitional program for re-entry into society that integrates an aftercare component.\textsuperscript{29} Prisoners receiving comprehensive treatment, transitional care and after care have recidivism rates half that of untreated control groups.\textsuperscript{30} However, treatment in custody without the structured follow up offered by the successful programs is only marginally effective.\textsuperscript{31} For those on probation, in states other than Arizona and California where the voters have mandated it for some defendants, only 17% of drug abusers receive treatment once sentenced.\textsuperscript{32}

Because addiction is a disease that most medical professionals agree cannot be overcome by self-will alone,\textsuperscript{33} merely incarcerating substance abusers or placing them on probation without treatment fails to treat the disease and invites the inevitability of recidivism. Perversely, lengthy incarceration is not only the most expensive response to drug crimes but also the option most likely to result in recidivism.\textsuperscript{34} While there are multiple, sometimes conflicting, theories of punishment in our criminal justice system—retribution, deterrence, rehabilitation and incapacitation—it is naive to believe that merely incarcerating a substance abuser, that is, physically incapacitating them, will lead to recovery from addiction or cessation of alcohol or other drug use. Although prisons and jails, ostensibly,

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\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{See} for example the State of Delaware Dep’t of corrections “KEY-Crest” program, at http://www.state.de.us/correct/Programs/treatmentprograms.shtml, (last visited August 15, 2006).
\textsuperscript{30} \textit{Id.}
\textsuperscript{34} \textsc{Patrick Langan Ph.D & David Levin Ph.D, Office of Justice Programs, U.S. Dep’t of Justice, Recidivism of Prisoners Released in 1994}. (June, 2002). \textit{Available at} http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf (last visited September 30, 2006)
\end{flushleft}
have procedures in place to prevent drugs from entering facilities, they are still readily available behind bars.\textsuperscript{35} As a result, drug use may continue while an addict is in physical custody despite the best efforts of law enforcement to prevent it.

The correctional system consumes billions of dollars annually\textsuperscript{36} with few positive results.\textsuperscript{37, 38, 39, 40} In California for example, the state spends $900 million annually to incarcerate parole violators.\textsuperscript{41} Although three quarters of California inmates have alcohol or other drug problems, only six percent receive treatment while in custody and a positive drug test is often the sole reason these inmates are returned to prison while paroled.\textsuperscript{42} Because of these overwhelming statistics, multiple jurisdictions across the nation have instituted problem-solving courts, specifically drug treatment courts, as a pragmatic yet innovative way to address the root cause of many recidivistic offenses: addictive disease.

B. Drug Treatment Courts and America’s Drug Problem

In 1989, the first adult drug treatment court was established in Dade County, Miami, Florida.\textsuperscript{43} Since then, the number of drug courts has grown steadily. As of 2005, there were 1,756 operational drug treatment courts in the United States and 160 jurisdictions actively

\textsuperscript{35} Chase Riveland, \textit{Prison Management Trends 1975-2025, 26 CRIME & JUST. 163, 185-186 (1999)}
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Fox Butterfield, \textit{Study Calls California Parole System a $1 Billion Failure}, N.Y. TIMES, November 14, 2003, at A14
\textsuperscript{42} Id.
involved in the process of planning such a court.\textsuperscript{44, 45} Drug treatment courts enable the criminal justice system to more effectively tackle the problem of addiction and the issues presented by substance abusers. Drug treatment courts are organized around a set of unifying principals called the “Key Components.”\textsuperscript{46} These principals of drug treatment courts integrate the need to address addictive disease with the traditional criminal justice system using a non-adversarial approach.\textsuperscript{47} Participants are identified early in the criminal court process,\textsuperscript{48} placed quickly into a treatment program\textsuperscript{49} and are monitored frequently by the court and by the treatment provider, with drug tests.\textsuperscript{50} Drug treatment courts may use a pre- or post-adjudication model. Pre-plea drug courts operate as diversion programs in which the defendant is given the opportunity to participate without entering a plea of guilty or going through the trial process. The end result of successful participation is dismissal of the criminal charges. Post-plea courts require a finding of guilt, often by way of a guilty plea. In this model of the drug treatment court, the program is imposed as a condition of probation and any sentence is suspended pending completion of the program.

Drug treatment court participants routinely interact directly with the judge\textsuperscript{51} and other members of the drug court team\textsuperscript{52} rather than speaking exclusively through counsel as in traditional court proceedings. The drug treatment court team is comprised of the judge,

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\item[\textsuperscript{44}] C. West Huddleston M.D., J.D., et al., \textit{Painting the Current Picture: A Nat’l Report Card on Drug Courts and Other Problem Solving Court Programs in the United States}, Bureau of Justice Assistance, 1 Nat’l Drug Court Institute 2, 2 7 (May 2005). (Note that these figures may be different for fiscal year 2006 as funds from all DOJ programs were diverted to Hurricane Katrina relief.)
\item[\textsuperscript{45}] Id.
\item[\textsuperscript{47}] Id. at Component 2.
\item[\textsuperscript{48}] \textsc{Key Components}, \textit{Supra} note 48, at Component 3.
\item[\textsuperscript{49}] \textsc{Key Components}, \textit{Supra} note 48, at Component 4.
\item[\textsuperscript{50}] \textsc{Key Components}, \textit{Supra} note 48, at Component 5
\item[\textsuperscript{51}] \textsc{Key Components}, \textit{Supra} note 48, at Component 7.
\item[\textsuperscript{52}] \textsc{Key Components}, \textit{Supra} note 48, at Component 6.
\end{itemize}
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defense counsel, the prosecutor and treatment providers as well as community corrections depending on whether the court is of the pre- or post-plea type. Some courts have team members who are social workers, case managers, mental health specialists, employment development specialists or other helping professionals. In some jurisdictions, community policing representatives and concerned members of the public are also present as part of the team. Each member of the team works cooperatively with the drug treatment court participant to reduce their propensity to commit further crimes by treating their addictive disease. The focus of team members is returning drug treatment court participants to productive, sober membership in society. The primary goal of the drug treatment court is finding solutions that will be “mutually beneficial to the defendant, the larger community, and...[to the] victims.”

This article will address and rebut the criticisms of drug treatment courts and the assumptions their authors rely on in formulating their arguments. It is not enough to merely reject the arguments of critics. It is also necessary to address their concerns and make recommendations based on those concerns for the improvement of drug treatment courts. In doing so, it is hoped that an open discourse will allay critics’ fears and contribute to the dialectic on the now proven and innovative therapeutic alternative to incarceration: the drug treatment courts. Part II of the article addresses critics’ concerns about the disease model of addiction and the effectiveness of treatment for substance abusers, especially in a drug court setting. The subject of whether treatment may, or should, be coerced is the topic of some articles that express a dislike for drug treatment courts. Part III of the article will discuss the

53 Id.
54 Id.
55 Id.
legal issues surrounding the right to refuse treatment and the distinctions between cases where this issue has traditionally arisen and treatment in the drug court context; while concern over the potential for unchecked judicial discretion and the variety of safeguards in place to protect drug treatment court participants is discussed in Part IV. Ethical issues are the focus of some criticism about drug treatment courts. Reconciling the requirement of diligent advocacy on the part of counsel with the role of the defense in drug treatment courts and, likewise, the prosecutor’s duty to promote public safety, even in a non-adversarial context focused on a therapeutic goal, is the topic of Part V. The economic concerns and whether drug treatment courts represent an adequate return on investment is discussed in Part VI. Part VII provides future recommendations, such as standardization and accreditation, for the continuing success of drug treatment courts. Lastly, Part VIII concludes that drug treatment courts are a strong alternative to incarceration as well as an effective mechanism in dealing with America’s drug problem.

II. THE DISEASE MODEL OF ADDICTION AND TREATMENT EFFICACY

The widely accepted and evidence-based disease model of drug addiction is attacked by a few with the claim that drug addiction is not a disease; these critics see drug addiction as a poor moral choice made by an addict. Some “neo-retributionists”\textsuperscript{57} such as Morris Hoffman, a District Court judge in Denver, Colorado\textsuperscript{58} have argued that drug treatment courts rest on the critical assumptions that drugs are an epidemic about which something has to be done,\textsuperscript{59} and that drug addiction is a disease that can be successfully treated.\textsuperscript{60} In

\textsuperscript{57} Hon. Morris B. Hoffman, Community Courts and Community Justice: commentary: A Neo-retributionist Concurs with Professor Nolan, 40 AM. CRIM. L. REV. 1567

\textsuperscript{58} Hon. Morris B. Hoffman, Commentary: The Drug Court Scandal, 78 N.C. L. REV 1437, 1464 (2000).

\textsuperscript{59} Id. at 1464.

\textsuperscript{60}
support of the claim that the disease model lacks scientific credibility, Judge Hoffmann cites as an authority himself.\textsuperscript{61} Other judicial bodies, the Supreme Court of the United States being one, however disagree with this moralistic view and have for decades considered addiction to be a disease. As Justice Stewart wrote for the majority opinion in \textit{Robinson v. California},\textsuperscript{62} wherein the court found it unconstitutional to criminalize the status of addiction, “it is apparently an illness which may be contracted innocently or involuntarily.”\textsuperscript{63} Justice Douglas, in his concurrence in \textit{Robinson}, wrote that it amounts to “cruel and unusual punishment” under the Eighth Amendment to treat as a criminal a person who is a drug addict.\textsuperscript{64}

Critics have contended that addiction is not a disease because there is no identifiable disease mechanism.\textsuperscript{65} This argument is decades out of date; a diagnosis of “dependence” or “addiction” has been included in the Diagnostic and Statistical Manual of Mental Disorders (DSM), since the Third Edition in 1980 and had been classified as a disease by the American Medical Association since 1965. While a definition is not determinative, it is illuminating and one definition can be found in the DSM-IV-TR\textsuperscript{®}: “[a] maladaptive pattern of substance abuse, leading to clinically significant impairment or distress…occurring at any time in the same 12-month period.”\textsuperscript{66} In order to diagnose substance dependence, a “pattern” of at least three manifestations of the disease must be present.\textsuperscript{67} These manifestations are defined as: tolerance;

\textsuperscript{60} \textit{Id.} at 1465.
\textsuperscript{61} Hon. Morris B. Hoffman, \textit{Therapeutic Jurisprudence, Neo-rehabilitation and the New Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous}, 29 FORDHAM URB. L.J. 2063
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.} at 668
\textsuperscript{65} Hoffman, \textit{Supra} note 60 at 1470
\textsuperscript{66} \textit{DIAGNOSTIC \\& STATISTICAL MANUAL OF MENTAL DISORDERS\textsuperscript{®} TEXT REVISION}, 191-295 (4th Ed. 2000) [Hereinafter DSM-IV-TR]
\textsuperscript{67} \textit{Id.}
withdrawal;
larger consumed amounts or a longer periods of substance use;
unsuccessful attempts to reduce use;
the amount of time given to obtaining, using and recovering from the effect of a
substance;
reduced social, occupational and/or recreational activities; or
continued use despite physical or psychological problems.\textsuperscript{68} The most modern view
of addiction is that it is a disease of the pleasure-producing chemistry of the brain.\textsuperscript{69} As one
author described the current science, “drug dependence is less a failure of will than a
miscarriage of brain chemistry.”\textsuperscript{70}

Addiction begins with substance use that leads to the occasional loss of control over
that substance and a gradual exposure to increasingly adverse consequences.\textsuperscript{71} With the
continued use of alcohol, other drugs or both, the disease progresses to more frequent and
profound loss of control, development of tolerance caused by adaptive changes in the brain,
craving or drug hunger and denial.\textsuperscript{72} Use of the word “denial” in the treatment of addiction
refers not to the lay meaning of the word, but instead to a medical term indicating distorted
and irrational thinking focused on obtaining and using the drug.\textsuperscript{73} A diagnosis of addiction
signifies that the individual is unable to control the use of substances in the face of adverse

\textsuperscript{68} Celia C. Lo Ph.D. et al., \textit{Drugs and Prisoners: Treatment Needs on Entering Prison}, 26 AM. J. DRUG
\textsuperscript{70} Geoffrey Cowley, \textit{New Ways to Stay Clean}, NEWSWEEK February 12, 2001, at 44
\textsuperscript{71} Nora D. Volkow M.D., et al., \textit{The Neural Basis of Addiction: A Pathology of Motivation and Choice}, 162 AM.
J. PSYCHIATRY 1403 (2005)
\textsuperscript{72} N.S. Miller, et al., \textit{The relationship of addiction, tolerance, and dependence to alcohol and drugs: a
neurochemical approach}, 4 J. SUBST. ABUSE TREAT. 197 (1987)
\textsuperscript{73} B.C. Wallace, \textit{Psychological and environmental determinants of relapse in crack cocaine smokers}. 6 J.
SUBST. ABUSE TREAT. 95 (1989)
consequences, including penal and judicial consequences, caused by a pattern of irrational behaviors driven by tolerance, craving and denial.

All substance users are unique; combination of predisposing factors coupled with social factors can lead to an individual’s diagnosis of addiction. There are three major risk factors that predispose an individual for the disease of addiction: genetics, childhood trauma and mental illness, including learning disabilities. Compounding the preexisting factors, the circumstances of first use and the properties of the drug or drugs used are predictive of further use. Finally, the presence of an enabling system, which protects the user from the consequences of drug-using behavior, is also predictive of uncontrolled drug use. For instance, if two different people were to experiment with drugs, both making the same poor choice, the one who uses a drug for the first time and has an extremely pleasurable experience will be more likely to continue to use that drug in the future as compared to a person who has a neutral or negative experience with the same drug.74 Additionally, women and girls “become addicted to alcohol, nicotine and illegal and prescription drugs at lower levels of use and in shorter periods of time…[and] suffer more severe brain damage from alcohol and drugs like Ecstasy….”75 While pre-disposing factors, known collectively as the “Bio-Psycho-Social Model,” does not cause addictive disease, the presence of one or more of these factors in an individual’s history increases the propensity of that person to use alcohol and other drugs in a manner that results in the loss of control over their behavior, making the person more likely to have contact with the criminal justice system.

74 McLellan, Supra note 35, at 1690.
75 WOMEN UNDER THE INFLUENCE, viii (Johns Hopkins U. Press, Nat’l Center on Addiction and Substance Abuse, at Columbia Univ. eds. 2006)
Most critics of drug treatment courts concede that individuals who abuse drugs exist, however they believe that the disease model of addiction and drug treatment courts in particular, fail to recognize the real factors that lead to addiction. They claim social, cultural and economic forces are the actual culprits that lead to addiction, however that assertion is only partially correct. Drug treatment courts employing a bio-psycho-social model are by definition alert to contributory factors; they recognize and target a variety of the environmental and societal influences that contribute to addiction. Specifically, drug treatment courts address social, cultural and economic factors by offering ancillary services that often include education, job training and placement, domestic relationship counseling, parenting classes, anger management and literacy programs. These programs work in conjunction with addiction treatment to mitigate the social pressures that can factor into substance abuse.

Scholars not familiar with the recent decades of medical and pharmaceutical advancements argue addiction is not a disease because there is no effective treatment. There is overwhelming evidence that drug treatment is effective, but even were it not, this argument is specious because there are any number of diseases for which there are no known or effective treatments. These include common afflictions like the ubiquitous cold or more severe conditions such as Alzheimer’s, Huntington’s and Parkinson’s disease. AIDS might not have been classified as a disease until decades after its discovery because although treatments can now extend the lives of those infected, the disease cannot be “cured.”

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76 Hoffman, Supra note 60, at 1471.
77 Hoffman, Supra note 60, at 1471
78 Hoffman, Supra note 60, at 1471
79 Hoffman, Supra note 60, at 1471
80 KEY COMPONENTS, Supra note 48, at Component 10
81 Huddleston, Supra note 46, at 2
82 Hoffman, Supra note 60, at 1470
Likewise, although addictive disease cannot be “cured” at this juncture, treatment models utilizing theories from several disciplines have shown remarkable potential in helping substance abusers manage their disease and have been incorporated with success into the drug treatment court model. Such scientifically designed models include cognitive-behavioral therapy, motivational enhancement, contingency management, and “hybrid” models that combine aspects of several models, such as the Matrix Model and the CIM model. These treatment modalities have been proven to be effective. The goal of treatment programs employed by the drug treatment court is to provide participants with the skills to maintain control over their behavior, thus becoming law abiding and to sustain sobriety, eliminating the need to commit collateral crimes to sustain their supply of the drug.

Oftentimes, the effectiveness of treatment for a chronic illness relies on compliance with a treatment regimen. Generally, drug abusers who work to overcome their disease and comply with the regimen of education, counseling and medication needed for recovery will have more favorable outcomes; success rates decline significantly when factors, such as low socioeconomic status, co-occurring mental health disorders and lack of family and social support block the road to recovery. Persons with other chronic illnesses such as hypertension, adult-onset diabetes or asthma, all of which can be considered “lifestyle diseases” like addiction, have the same difficulties adhering to treatment regimens, as those

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83 Aaron T. Beck, et al., Cognitive Therapy of Substance Abuse (1993)
84 William Miller & Stephen Rollnick, Motivational Interviewing: Preparing People to Change Addictive Behavior (1991)
88 McLellan, Supra note 35, at 1693.
89 McLellan, Supra note 35, at 1693.
90 McLellan, Supra note 35, at 1693.
affecting alcohol or other drug addicted persons.91 Studies have shown that, although effective treatment exists, only 60% of adults with Type I diabetes adhere to their medication schedule and treatment regime and 70% of adults with hypertension fail to follow prescribed regimens although failure to do so may be fatal.92 Similar statistics are present for persons with asthma and hypertension, who must also be re-treated within a year at the same rate of re-treatment of people with substance abuse disorders.93 The success rate of treating chronic illnesses, including substance dependence, is negatively impacted when there is not compliance with treatment protocols and maintenance regimens. Substance dependence, similar to other chronic illnesses, should not escape classification as a disease because outcomes are altered when one person adheres to a treatment regiment and another person does not.

A. The Role of Genetics

While people vary greatly with respect to their propensity for addictive disease, studies of twins demonstrate empirically that there is a genetic component to addiction that makes some individuals more vulnerable to becoming addicts than others.94 For example, research shows the sons of alcohol-dependent fathers inherit more tolerance to the effects of alcohol than the sons of non-alcohol-dependent fathers.95 Additionally, persons often found in select demographic groups like some Chinese or male Israelis, who have the inherited presence of an aldehyde dehydrogenase genotype, experience an “involuntary skin flushing” response to alcohol administration.96 Alcoholism has long been associated with Native

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91 McLellan, Supra note 35, at 1693.
92 McLellan, Supra note 35, at 1693.
93 McLellan, Supra note 35, at 1691.
94 McLellan, Supra note 35, at 1691.
95 McLellan, Supra note 35, at 1690.
96 McLellan, Supra note 35, at 1690-91.
Americans, both stereotypically and empirically. One study compared Finnish natives to Southwestern Native Americans, the Finnish being a control group not subject to the stresses of Native American life and located a shared genetic susceptibility to alcoholism. All of these examples demonstrate the disparate effects that certain addictive substances will have on different individuals under different circumstances.

For the span of recorded human experience it has been understood that intoxicants made people behave oddly and that some people used intoxicants to excess. What has not been understood however is why one person or group reacts differently to the same substances. Changes in technology have made it possible to demonstrate genetic reasons for these differences. Genetic inheritance in substance dependence is significant in that, like all of us, defendants are unable to select their families and DNA. Genetic inheritance may be a factor that causes certain people to get in trouble with alcohol or other drugs and thus bring them under scrutiny by the criminal justice system.

In several recent studies of twins published in the field of addiction medicine, higher rates of substance dependence were found among twins than among non-twin siblings and higher rates among monozygotic (identical or maternal twins) than among dizygotic (fraternal) twins. In addition, published heritability studies indicate an empirically demonstrable genetic contribution to substance dependence in that the descendants of alcoholics or addicts are prone to addiction themselves. Young teens who experiment with alcohol may experience different effects depending on whether there is a genetic history of addictive disease. More than half of teens from alcoholic families do not experience

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97 Marta Radel, M.D., PhD, et al., *Haplotype-based localization of an alcohol dependence gene to the 5q34 gaminobutyric acid type A gene cluster*, 62 ARCH. GEN. PSYCHIATRY 47, (2005)
intoxication at low levels that affect other teens without the genetic background. The genetically susceptible teens therefore tend to drink more to achieve the same desired level of inebriation.\textsuperscript{100} This behavior can be observed in both genders and the “…[d]aughters of alcoholics tend to have a greater physiological tolerance for alcohol, increasing their risk of heavy drinking and the development of subsequent alcohol problems.”\textsuperscript{101}

Going deeper into the foundations of addiction and complementing the survey research, molecular geneticists have shown in recent studies that inheritance of the M2 muscarinic acetylcholine receptor predisposes humans to alcoholism, drug dependence and depression.\textsuperscript{102} The researchers conducted DNA analysis of 2,310 people from 262 biological families including at least three members suffering from addictive disease. Some individuals in the families were both addicts and diagnosed as having major depressive disorder. Both addicts and depressed addicts had distinguishable similarities in their DNA in a region on chromosome seven. Individuals who were both addicted and depressed were the most likely to have the chromosomal marking.\textsuperscript{103}

Looking closer at the specific region of the number seven chromosome, the researchers isolated the CHRM2 gene. This gene has been identified as relevant to attention, learning, memory and cognition. The research found the gene was strongly associated with alcoholism and depression. The correlation between presence of the gene and the disorders was strongest in those with both alcoholism and depression, suggesting the gene increases

\textsuperscript{100} Mark A. Schuckit M.D., et al., \textit{Performance of a Self-Report Measure of the Level of Response to Alcohol in 12- to 13-Year-Old Adolescents}, 67 J. STUD. ALCOHOL. 452 (2005)
\textsuperscript{103} Id
risk for developing both diseases. The results were subsequently confirmed in a case-controlled study at Yale University.

Studies on mice with a key brain receptor blocked, a receptor keyed to cannabinoid molecules found not only in marijuana but naturally occurring in the brain, show a genetic basis for susceptibility to acquiring an addiction. Mice with the cannabinoid receptor present in their genetic code preferred drinking alcohol when offered either alcohol or water and also, regardless of what they were offered, preferred the cage where alcohol was available. When the molecular receptor was blocked, the mice drank less alcohol and stopped preferring the cage with alcohol. Switching a section of genetic code around to modify addictive behavior indicates a strong causal connection between heredity and the predisposition to addictive disease. Men are not mice but by combining statistical and empirical studies of human behavior with research involving the genetic manipulation and dissection of animals, a formidable case is made for a link between the propensity for addiction and ancestry

B. Childhood Abuse

Children who grow up in chaotic homes where alcohol and other drugs are abused and where they experience abuse and neglect are more likely to have problems when adults. More than one in five high school girls report having experienced sexual or physical abuse and are twice as likely to smoke, drink alcohol or use illicit drugs as those who were not abused.

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104 Id.
105 Xingguang Luo M.D., Ph.D. et al., *CHRM2 gene predisposes to alcohol dependence, drug dependence and affective disorders: results from an extended case–control structured association study*, 14 HUM. MOL. GENET. 2421 (2005)
106 Panayotis K. Thanos Ph.D., et al., *Ethanol self-administration and ethanol conditioned place preference are reduced in mice lacking cannabinoid CB1 receptors*, 164 BEHAVIOURAL BRAIN RESEARCH 206 (2005)
107 Id.
Childhood sexual abuse is even more devastating. More than twice as many girls as boys in treatment report prior sexual abuse and more than twice as many girls with a history of abuse begin using alcohol before the age of 11 than girls who were not abused.108

C. Co-Occurring Mental Health Issues

“Co-occurring mental health and substance abuse disorders are common. More than half, 52%, of the people surveyed who had ever been diagnosed with alcohol abuse or dependence had also experienced a mental disorder at some time in their lives. An even larger proportion, 59%, of people with a history of other drug abuse or dependence also had experienced a mental disorder. Mental health problems often predate substance abuse problems by 4 to 6 years; alcohol or other drugs may be used as a form of self-medication to alleviate the symptoms of the mental disorder. In some cases, substance abuse precedes the development of mental health problems. For instance, anxiety and depression may be brought on as a response to stressors from broken relationships, lost employment and other situations directly related to a drug-using lifestyle.”109

D. The Nature of Addictive Drugs

One myth asserted by drug treatment court critics is that addiction is not a disease because of the many people who have used drugs without becoming addicted. In support of this assertion some, such as Judge Hoffman, cite the fact that many people use marijuana daily without becoming addicted.110 Of course, it could be argued that daily use of an intoxicant is demonstrative of addictive behavior but this point is ignored. Judge Hoffman writes that, “most people exposed to even the most allegedly addictive of substances do not

108 Id.
110 Hoffman, Supra note 60, at 1471
develop dependencies.” This claim is difficult to respond to because that article offers no citation for the proposition and declines to quantify the level of exposure or list the addictive substances to which he is referring.

The substance used by the defendant, alcohol, marijuana, methamphetamine, heroin, cocaine or any other drug, may contribute to the progression and severity of addictive disease. Some drugs are more potent than others. Compared to heroin, cocaine, nicotine and alcohol, marijuana has a relatively lower propensity to be addictive to users. High potency drugs, such as methamphetamine, cocaine and heroin, tend to promote the rapid acquisition of tolerance. Tolerance to a drug forces the user to escalate the dose to maintain the drug’s effect. Symptoms of withdrawal may occur if the amount used is less than the tolerance level. Therefore it may be reasonably inferred that the potency of a given drug predicts the risk of developing physical dependence.

The route by which a substance user administers a drug is also of import in evaluating the effects. The use of methamphetamine by nasal insufflation, known colloquially as “snorting,” for example, may lead to addiction slowly because of the rate at which the drug enters the body and the amount of the drug entering the defendant’s system at any one time. Compare this to the intravenous, injected use of methamphetamine that leads to physical dependence within six to eight weeks after first IV use because the route of administration is far more efficient. Intravenous use, like inhalation or smoking a drug, produces an immediate, intense euphoria called a “rush” that prompts the user to try to recapture the euphoric feeling with subsequent uses. Although injection is the most rapid route to

111 Hoffman, Supra note 60, at 1471.
113 Miller, Supra note 86
addiction, smoking the drug is a common course by which many defendants will have become addicted. Although less effective than injection, many people are needle averse and so the offer of a pipe or drug-laced cigarette is more palatable than the proffer of a needle-tipped syringe and tourniquet.

There has been extensive research on the neurochemical, neuroendocrine and cellular changes observed during substance dependence.114 In addition to any other physical effects that might be unique to a particular drug, addictive drugs have a specific effect on the brain structure involved in control of motivation and learned behaviors.115 When the areas of the brain responsible for decision-making and weighing consequences in terms of pleasure and punishment are impaired or damaged, the brain becomes more stimulus-driven; addicts no longer considers the consequences of their actions but instead responds almost instinctively to the drive to remain stimulated and artificially rewarded.116

The area of the brain involved in many of the actions of addictive drugs is the ventral tegmental area connecting the limbic cortex through the midbrain to the nucleus accumbens.117 This area of the brain is typically associated with cue-induced craving which occurs when addicts are in the “presence of people, places or things that they have previously associated with their drug taking.”118 Brain-imaging studies have shown that cue-induced craving is accompanied by heightened activity in the forebrain, the anterior cingulated and

114 McLellan, Supra note 35, at 1670.
115 McLellan, Supra note 35, at 1670.
117 Id.
the prefrontal cortex, all of which are key brain areas for mood and memory. Remarkably, addicted persons who are no longer using drugs can experience a demonstrable neurological reaction when encountering a person, place or thing connected to their previous drug usage for years after last use. Imaging studies have likewise demonstrated that mentioning an addict’s preferred drug in conversation produces an abnormal reaction in the frontal and prefrontal cortex, the executive, decision-making part of the human brain, a reaction that is not present during a neutrally themed conversation.

Drugs like alcohol, opiates, cocaine and nicotine have marked effects on the dopamine system. Both the ventral tegmental region and the dopamine system have been connected to feelings of euphoria, a sense of wellbeing and contentment. Addictive substances such as cocaine, opiates and methamphetamine have been shown to produce stimulation of the reward circuitry of the brain far in excess of what naturally pleasurable activity would produce, leading to an urgent and intense desire to continue drug usage. This process, in which drug produced pleasure overrides natural sources of reward, like food, sex and parenting, has been shown to result in physical changes to brain structure which may help in explaining the unnatural behaviors of addicted defendants. Studies have also shown that, depending on the dose administered, the frequency of use and the chronicity of the condition, even after a drug abuser remains abstinent from addictive substances for a period of time, permanent pathophysiologic changes in the reward circuitry, the baseline levels of many neurotransmitters and the stress response system may persist; in one study, for

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119 Id.
120 Goldstein, Supra note 119, at 1643
121 Goldstein, Supra note 119, at 1643
122 Goldstein, Supra note 119, at 1643
123 McLellan, Supra note 35
124 Goldstein, Supra note 119, at 1647
125 Goldstein, Supra note 119, at 1642
ten years after sobriety. Contrary to the criticisms of authors, one being Judge Hoffman, these medical findings support the disease model of addiction by illustrating the direct link between genetic variables, pathophysiology and substance dependence. There can be no reasonable doubt that addiction is a brain disease with observable symptoms and courses of treatment, just like any other disease.

Some authors incorrectly believe that in relying on the disease model of addiction, and specifically the role of genetics and other predisposing factors, drug treatment courts deny that drug abusers are exercising a choice to use drugs. This is supposedly problematic because this denial occurs in a criminal justice context wherein people can be terminated from the program for failing to control their behavior. Critics believe this is an inconsistency in ideology and argue that part of the underlying foundation of drug treatment courts is that drug abuse is involuntary. This assertion is incorrect in two respects. First, regardless of whether or not a drug treatment court subscribes to the disease model of addiction, drug treatment courts do not consider defendants to be without volition. Secondly, while initial drug use may be a choice, subsequent addiction to those drugs is not. Such factors as behavioral control or willpower may play a powerful role at the onset of drug use and drug court participants will differ as to the extent of the control they have over

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126 Goldstein, Supra note 119, at 1642
127 Leshner, Supra note 71
128 Hoffman, Supra note 60, at 1471.
129 Hoffman, Supra note 60, at 1475.
130 Hoffman, Supra note 60, at 1475.
their addictions.\textsuperscript{133} Personal responsibility and choice work in conjunction with, and not to the exclusion of, genetic and cultural factors.\textsuperscript{134}

By discounting the disease model of addiction, critics have discarded decades of scientific evidence regarding the nature of drug addiction. The disease model of addiction is an empirically verifiable and evidence-based way of looking at substance dependence. There are many factors in addition to the first choice to use alcohol or other drugs that contribute to addiction including genetics, socio-economics, the age at which the drug was first used and family and social relationships. These factors should be considered together when determining and exploring the function addictive disease has played in a defendant’s behavior and in crafting a judicial response.

\section*{III. THE ROLE OF COERCION}

According to Merriam-Webster, to coerce is to “restrain or dominate by force; to compel to an act or choice; to bring about by force or threat.”\textsuperscript{135} In the drug treatment court context, it is more accurately descriptive to say that a judge ‘offers’ or ‘suggests’ the treatment option rather than ‘coerces’ its selection. The drug court judge is offering the defendant a choice between two penal consequences whereas historically the only options were incarceration, placement on probation or both. As outlined above, these options without treatment are largely ineffective while the less onerous option, drug treatment court, offers a program wherein the individual has the opportunity for rehabilitation and often the possibility of avoiding a conviction through diversion or expungement.

Plea bargaining, requiring the defendant to waive many of their rights in exchange for conviction on a lesser charge and a diminished punishment, is the status quo for the

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\textsuperscript{133} McLellan, \textit{Supra} note 35, at 1690-91.
\textsuperscript{134} McLellan, \textit{Supra} note 35, at 1690-91.
\textsuperscript{135} Merriam-Webster OnLine Dictionary, at \url{http://merriam-webster.com/}.
\end{flushleft}
overwhelming majority of criminal drug defendants in the United States.\textsuperscript{136} The drug treatment court model, asking the defendant to waive some of their rights in exchange for the opportunity to receive treatment and possibly to avoid a criminal conviction, should be embraced as a natural extension of the plea bargaining process.

A. Coerced Versus “Voluntary” Treatment

It is argued by detractors that the treatment proffered by drug courts is forced and that courts should not be in the business of coercing medical treatment on people accused or convicted of crimes.\textsuperscript{137} The implication is that by offering defendants a “favorable sentence”\textsuperscript{138} in exchange for their agreeing to enter the drug treatment court program, their right to refuse treatment has somehow been violated. Contrary to this assertion, drug treatment courts are voluntary programs that do not raise the issue of the right to refuse treatment.\textsuperscript{139} In many models, after a potential participant is arrested, eligibility is made at the time of charging. In a drug treatment court context, an arrest is viewed as an “opportunity for intervention.”\textsuperscript{140} Initially, the defendant is offered the choice of whether to participate in the drug treatment program or to receive traditional case processing, whether or not that commonly includes incarceration.\textsuperscript{141} In some models, post-conviction defendants are referred after sentencing to the drug treatment court for supervised probation. In any case, a full explanation is given to the offender by defense counsel or, if the person is unrepresented, by a court coordinator. The explanation must include a description of the program and the


\textsuperscript{137} Id.

\textsuperscript{138} Id.

\textsuperscript{139} Development in Law: Alternatives to Incarceration, 111 Harv. L. Rev. 1898, 1914 (1998)

\textsuperscript{140} Hon. Peggy F. Hora, \textit{A Dozen Years of Drug Treatment Courts: Uncovering our Theoretical Foundation and the Construction of a Mainstream Paradigm}, 37 Substance Use & Misuse 1473 (2002).

\textsuperscript{141} Id.
consequences that may result from each possible choice. This represents both an opportunity for the defense to practice advocacy and to ensure the client understands the rights being extended or waived.

Although defendants are often hoping to avoid incarceration when they voluntarily enroll in drug treatment court programs, they must be, and are, informed that when a participant violates the drug treatment court contract set forth either as terms of probation or diversion, short terms of confinement, sometimes called “smart punishment,” may be imposed as part of the program. Some programs allow participants to choose between jail time and a community work alternative program when there has been a breach of the drug treatment court contract.

If the defendant chooses the drug treatment program alternative, he or she may still, at any point in the process, decide to leave the program and enter the traditional criminal justice case processing system, with all the attendant rights, remedies, burdens and consequences of that system.

The treatment option provided by drug treatment courts is synonymous with the practice of plea-bargaining. Nationally over 95% of drug offenses are settled with a plea bargain, less than one in twenty is adjudicated by trial. Every day in courts across the nation, defendants waive certain constitutional rights in order to receive a more favorable outcome such as a reduced sentence and/or charge. In a plea bargaining situation,
defendants who receive probation may be required to waive their right to be free from unreasonable search and seizure under the Fourth Amendment of the U.S. Constitution\textsuperscript{149} by accepting what is known as a “search clause” which may include their person, personal affects, automobile and home. Defendants also relinquish the right to a speedy trial guaranteed by the Sixth Amendment.\textsuperscript{150} Similarly, drug court participants surrender various rights when agreeing to enter drug treatment court but also gain the benefits that go along with successful treatment.

Because many defendants brought under the authority of the criminal justice system for substance abuse related offenses also have co-occurring mental health disorders,\textsuperscript{151} the issue of coerced psychiatric treatment ought to be addressed to preserve the rights of participants.\textsuperscript{152} Many defendants will have had their mental illness mistaken for recalcitrance or non-compliance during earlier interactions with the criminal justice system. Treatment for these defendants must address the underlying disorders or risk certain failure.\textsuperscript{153} Many persons who become addicted to some drugs began their use of those drugs in an attempt to self-medicate their underlying mental health disorder.\textsuperscript{154} Treatment which serves only to remove what, for them, has been a functional, if illegal, method of psychiatric symptom management will leave them with the problems that began their drug use in the first place.

\begin{footnotesize}
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\item[149] Griffin v. Wis., 483 U.S. 868 (1987)
\item[150] U.S. CONST. Amend. VI
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The Supreme Court in *Sell v. United States*, most recent of the *Cruzan* line of cases defining the limitations of State control over medical decisions, held that defendants may be forcibly medicated. In *Sell* the issue was an attempt to reduce the dangerous propensities of the defendant through forced medication; while this was disallowed, the court did suggest that such a coerced pharmaceutical regime is permissible where it serves an “important” government interest. The forcible medication must be necessary to further that important interest and must be medically appropriate. The level of coercion employed in a drug treatment court context does not rise to the level of forced, in-custody, medication found in cases like *Sell*. Because defendants with co-occurring mental health disorders may have been self-medicating with illegal substances, they may be amenable to the substitution of more effective, legal, psychotropic medication as an aspect of their treatment plan.

Like any criminal defendant, drug treatment court participants unable to give informed and knowledgeable consent because of mental disability would not be able to enroll in court ordered treatment because competency “must be established as a matter of fairness to the defendant before any other procedures can take place.” Ultimately, the decision to participate in a drug treatment court program is, and must be, an intelligent, informed and voluntary one made by persons able to meet the legal standards of competency.

Finally, although a defendant’s participation in a pre-plea drug court is based on an informed decision to accept treatment, they retain the right to subsequently refuse treatment and withdraw from the program at any time and face resumption of traditional criminal proceedings during which their drug treatment court participation cannot be used.

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155 *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990)
157 *Id.* at 182
adversely.\textsuperscript{159} Instead of forcible receipt of medication, participants in drug treatment courts can elect to leave the program and have their case tried in a traditional court with all of their constitutional rights reinstated.\textsuperscript{160} Post-plea participants are also able to leave the program, although they may have to accept any conviction and its subsequent penal consequences based on whatever plea was entered prior to beginning the program.\textsuperscript{161}

B. A Hobson’s Choice?

The “Hobson’s Choice” is another focus of drug treatment court detractors. Critics claim defendants are given such a choice when they are asked to choose between two undesirable alternatives: treatment or incarceration.\textsuperscript{162} “Hobson’s Choice” is an allegorical reference to the option of choosing between taking what is offered, despite its undesirability, or taking nothing at all. Unlike the offering of the original Hobson,\textsuperscript{163} defendants offered drug treatment court placement are given a true choice between therapeutic court enrollment and regular case processing.

People with addictions have the right to make their own decisions except when their choices interfere with the rights of others or the law.\textsuperscript{164} In \textit{McKune v. Lile}, the United States Supreme Court upheld a treatment program, the Sexual Abuse Treatment Program (SATP), offered by the Kansas Department of Corrections for incarcerated sexual abuse offenders. The SATP required participants to disclose all prior instances of sexual abuse that they had

\begin{itemize}
\item Hora, Supra note 45, at 470
\item Carlson, Supra note 149, at 548.
\item C. WES HUDDLESTON M.D., J.D. & HON. JEFFERY TAUBER, NAT’L DRUG COURT INST., DEVELOPMENT AND IMPLEMENTATION OF DRUG COURT SYSTEMS, Monograph series 2 (1999)
\item Hoffman, Supra note 60, at 1477.
\item The origin of the aphorism “a Hobson’s choice” is said to be in the name of one Thomas Hobson (ca. 1544-1630), at Cambridge, England, who kept a livery stable and required every customer to take either the horse nearest the stable door or to take no horse, at all. , at http://en.wikipedia.org/wiki/Hobson's_choice
\item Jackie Massaro MSW, TECHNICAL ASSISTANCE & POLICY ANALYSIS CENTER FOR JAIL DIVERSION (TAPA), CENTER FOR MENTAL HEALTH SERVICES, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., OVERVIEW OF THE MENTAL HEALTH SERVICE SYSTEM FOR CRIMINAL JUSTICE PROFESSIONALS ( 2005)
\end{itemize}
committed. The Court discussed the voluntariness of participation in the treatment program and the alternatives to non-participation such as staying in less comfortable conditions. SATP was geared toward protecting the public health and reducing recidivism. A refusal to participate in the program meant that the inmate would suffer a significant reduction in visitation rights, earnings, work opportunities, the ability to send money to family, purchase items in the prison canteen, access to personal television and the denial of other sundry privileges. The inmate would also be moved to a maximum-security unit, ostensibly a more restrictive, and thus less desirable, environment. The Court held that the incentives that were provided to those in need of treatment were not an unconstitutional compulsion. Thus the Supreme Court recognizes that offering treatment is within the state’s police powers, even when the consequences of foregoing that choice are quite onerous. Because the sanctions in drug courts are notably less severe than those imposed by SATP, by inference they do not rise to an unconstitutional level of compulsion let alone a Hobson’s Choice.

C. Treatment Components

1. Compulsory Treatment in General

States are allowed to create compulsory treatment programs with the possibility of penal sanctions for non-compliance. Even if some participants feel the treatment program is the only alternative to going to prison or jail, and would otherwise refuse treatment, the State has the authority to compel enrollment in a treatment program. A few states even allow

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166 Id. at 48.
167 Id. at 33
168 Id. at 30-31
169 Id.
170 Id. at 48
for the civil commitment of pregnant drug users where no criminal charges are pending.172 Because all criminal defendants must enter a plea of guilty or not guilty and accept the consequences thereof, and because no mythical third option of opting out of the system exists, the decision-making process will almost always have a certain amount of “coercion” in that penal consequences may follow.173 In a therapeutic context, the term “coercion” or “compulsory treatment” refers to an “array of strategies that shape behavior by responding to specific actions with external pressure and predictable consequences.”174 Evidence indicates that substance abusers forced, through court orders or employer mandates, to receive treatment, benefit as much as, and sometimes more than, substance abusers who “spontaneously” elect to enter treatment.175 Some “coercive” pressures involved in compulsory treatment include the specter of harsh conditions associated with incarceration, promised reductions in length of confinement or the dismissal of charges upon successful drug court completion, and the forced exposure to the beginning stages of the treatment process.176 A wide array of inducements or methods of persuasion may be used in settings other than the criminal justice system to encourage or to compel treatment when decision-making may be hindered by the problems associated with addiction.177 Pressures from an addict’s family or community to seek treatment are often present when persuading them to submit to a treatment program for their addiction.178 Although a benevolent form of coercion, it is also informed and intelligent decision-making where the individual weighs the

174 Huddleston Supra note 164, at 4.
175 Huddleston Supra note 164
177 Id. at 812.
178 Id.
benefits of successfully completing drug treatment court against the costs of going through the program and the array of unpleasant alternatives the criminal justice system has to offer.

When coercion is employed in the drug treatment court system, it does not mean forcing the defendant to receive treatment against his or her will. In this context, it is the careful leverage of judicial authority to encourage the offender to choose the most statistically probable opportunity for rehabilitation and a better life. The court could use pure compulsion and require an addict to enroll in treatment, but if the defendant is not convinced of the value of participation in that treatment they will almost certainly fail.

The drug treatment court team must take into account the resistance to treatment that the defendant may present in the early stages of recovery. Many defendants have only limited recollections of what normal everyday life feels like or how one conducts oneself in sober society. For the defendant in early recovery, the lure of a return to their customary, but socially unacceptable, patterns of behavior may be overwhelming. Their friends and associates may all use alcohol or other drugs, they may live in an environment full of drug paraphernalia and other triggering stimuli, they may be used to staying up all night and sleeping all day and some might not remember how to perform the mundane tasks like grocery shopping that most people take for granted. The court must exert its authority to encourage the defendant to tackle these challenges and must maintain that pressure in the face of inevitable setbacks.

Some behaviors exhibited by a person in early recovery may be the result of withdrawal from the drug itself. Defendants may experience not only painful physical withdrawal but also symptoms in reverse of the drug’s effects.\textsuperscript{179} Abusers of stimulants may

need weeks of rest to alleviate long-term deprivation; methamphetamine abusers may in fact sleep for three or four days consecutively when first initiating sobriety. Depressant abusers will experience stimulation and may be unable to sleep at all, requiring careful medication to allow them some rest. Heroin abusers especially will experience an extremely unpleasant resurgence in their metabolism as it returns to normal after years of suppression. Abusers who experienced feelings of euphoria and pleasure and received a “high” from their drug will suffer through an extended period of dysphoria, discomfort and a “low,” known medically as “anhedonia” describing a complete, pathological inability to experience pleasure.¹⁸⁰ Defendants with co-occurring mental illness may need to have medications to address the underlying co-occurring disorder.¹⁸¹ A medical school professor described the value of judicial leverage for these individuals by saying: “[j]udges should coerce treatment until sobriety becomes tolerable.”¹⁸²

A study cited by the National Institute of Health found that drug abuse is reduced by up to 60% with treatment.¹⁸³ Likewise, there is evidence that treatment works in the context of drug treatment courts where the rate of retention is vital to the success of a person seeking drug treatment.¹⁸⁴ Compared to traditional “voluntary”¹⁸⁵ treatment, drug treatment courts increase retention rates.¹⁸⁶ The Drug Abuse Treatment Outcome Study found that half of those who checked into an outpatient drug treatment program stayed less than three

¹⁸⁰ Id. at 613.
¹⁸¹ Id. at 616.
¹⁸² John Chappel, M.D., Professor of Medicine, University of Nevada, at Reno, address, at Nat’l Judges College (undated speech).
¹⁸³ Meyer, Supra note 134
¹⁸⁵ (Treatment in which the individual decides without the intervention of the court system to enter the program.)
¹⁸⁶ Belenko, Supra note 187, at 19-20
months. However, studies show that 60% of those who participate in outpatient drug treatment as part of a drug treatment court program are still in treatment after one year. Moreover, the longer a participant is in treatment, the lower the recidivism rate. Overall, addicts referred to treatment by the criminal justice system are more likely to complete treatment, and less likely to leave against medical advice, than those patients who are not mandated to treatment. It may be inferred that employing the authority of the drug treatment court to extend time in treatment, is a positive factor for increases in program retention and reduction of recidivism.

Given the existing methods used to encourage defendants to make particular decisions, in the criminal justice system and in society-at-large, to initiate treatment, drug treatment courts are not only a legally permissible but an effective option for reducing criminal behavior and achieving sobriety and a productive life for the defendant.

2. Urine Testing

Testing urine for indicia of alcohol and other drugs use has been upheld by courts as a valid condition of drug diversion programs. Urine testing has not been limited to drug treatment programs but is also employed in the penal system, in educational settings like high school and college athletics and in government and private sector hiring programs. In a treatment context, frequent urine testing is used “to monitor a participant’s alcohol or other drug use, not for purpose of ‘catching’ the client in non-compliance, but to measure treatment

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188 Belenko, *Supra* note 187, at 19
189 Belenko, *Supra* note 187, at 20
191 Id.
effectiveness and make adjustments in the treatment plan in a timely fashion."\textsuperscript{193} Moreover, urine testing is therapeutic in the sense that it provides motivation for the individual to stay free from alcohol and other drugs by creating an incentive to continue with good behavior. Frequent testing promotes candor and honesty between the participant and the entire treatment team, including the judge.\textsuperscript{194}

If voluntarily agreed to, urine testing is a valid condition of probation or diversion not unlike the ubiquitous search clauses common in traditional criminal case processing. One of the criticisms of drug testing\textsuperscript{195} has been that drug testing violates an individual’s right to be free from unreasonable searches and seizures under the Constitution.\textsuperscript{196} Testing, and thus under the fourth amendment searching, the urine of \textit{unsuspecting} individuals without probable cause violates the Fourth Amendment.\textsuperscript{197} A program that tested pregnant women without their consent or knowledge and referred positive tests to law enforcement was held in \textit{Ferguson v. City of Charleston} to be an unconstitutional intrusion into protected rights.\textsuperscript{198} However this line of argument does not apply to the drug treatment court context; the key distinction being that drug court participants knowingly agree to be drug tested. Additionally, all drug treatment court team members stipulate ahead of time that results of the tests will not be used against the participant either to file a new case or to prosecute the current case in the event the participant elects to leave the program.\textsuperscript{199} A disputed drug test result may be challenged by the participant by requesting a retest or providing an explanation for a false positive. Defendants may produce evidence to challenge the scientific accuracy of

\textsuperscript{193} Hora, \textit{Supra} note 143, at 1476
\textsuperscript{194} Hora, \textit{Supra} note 143, at 1476
\textsuperscript{195} Ferguson v. City of Charleston, 532 U.S. 67 (2001)
\textsuperscript{196} U.S. CONST. amend. IV.
\textsuperscript{197} Ferguson v. City of Charleston, \textit{Supra} note 197
\textsuperscript{198} Ferguson v. City of Charleston, \textit{Supra} note 197
\textsuperscript{199} KEY COMPONENTS, \textit{Supra} note 48, at Component 2
the results, assert their rights to confront and cross examine government witnesses regarding any chain of custody issues or call expert witnesses with regard to the testing mechanisms.\textsuperscript{200} The benefits of urine testing outweigh any criticisms and there is certainly no legal bar to using them. Urine testing as part of a drug treatment court contract does not violate the rights of the participant and is an effective form of monitoring throughout the drug treatment process.

3. Counseling

Counseling is a key aspect of the drug treatment and the court process. This important component of the program helps participants resolve underlying issues that may be contributing to their addiction and hindering recovery.\textsuperscript{201} The concern exists that participants must choose between therapy and jail time. However, treatment is only one component of drug treatment court in a set of valid options the state may offer to criminal defendants.\textsuperscript{202} Drug treatment is similar to other interventions that are routinely imposed in plea-bargaining situations for similar types of criminal offenses. For example, in California when a defendant is convicted of a domestic violence charge, they are required to participate in a mandatory, 52-session domestic violence intervention program.\textsuperscript{203} Failure to participate in the mandatory counseling may be charged as a probation violation just like the violation of

\begin{footnotes}
\footnotetext{200}{Freeman-Wilson \textit{Supra} note 176, at 35}
\footnotetext{201}{CENTER FOR SUBSTANCE ABUSE TREATMENT, SUBSTANCE ABUSE TREATMENT FOR PERSONS WITH CO-OCCURRING DISORDERS. TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES 42. DHHS Publ’n No. (SMA) 05-3922 (2005) \textit{Available at} http://www.ncbi.nlm.nih.gov/books/bv.fcgi?rid=hstat5.chapter.74073 (last visited September 6, 2006)}
\footnotetext{202}{CENTER FOR SUBSTANCE ABUSE TREATMENT, SUBSTANCE ABUSE TREATMENT FOR ADULTS IN THE CRIMINAL JUSTICE SYSTEM. TREATMENT IMPROVEMENT PROTOCOL (TIP) SERIES 44. DHHS Publ’n No. (SMA) 05-4056 (2005) \textit{Available at} http://www.ncbi.nlm.nih.gov/books/bv.fcgi?rid=hstat5.chapter.80017 (last visited September 6, 2006)}
\footnotetext{203}{CAL. PENAL CODE § 1203.097 (Deering’s 2006).}
\end{footnotes}
any other condition and could subject the defendant to incarceration. A similar burden is placed on a fundamental Constitutional right, that of familial integrity, by the rule mandating that any motion for custody or visitation with a minor, or changing a previous order for custody or visitation will automatically result in assignment to mediation with a family court services worker who will encourage conciliation. The counsel for parties may be prohibited from attending this session as well. Drug treatment is but one legal scenario in which a person in court may find him- or herself ordered into counseling and there is no legal bar in doing so.

4. Residential Treatment

Residential treatment facilities are far less onerous than incarceration and rarely required of drug treatment court participants given the cost savings realized in an outpatient setting. During residential stays, similar to outpatient treatment, participants are required to participate in counseling sessions. Also similar to out-patient treatment, residential patients will be given medical treatment designed to mitigate the physical pain of withdrawal along with other medications to blunt the compulsion and craving that create pressure to return to drug use. The key difference lies in the fact that the participant in residential treatment actually lives in the facility for a time. This valuable treatment option is not for every participant and is most helpful for those who live in a cue rich environment that induces craving.

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204 See e.g. 18 USCS § 3563(a)(4) (West, 2004) (for a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)] by a defendant convicted of such an offense for the first time that the defendant attend a public, private or private nonprofit offender rehabilitation program that has been approved by the court.)
205 CAL. CIV. CODE § 4607 (Deering’s 2006).
206 CAL. CIV. CODE § 4607(d) (Deering’s 2006).
208 Id.
Research has shown that for years after the cessation of use even the sight of the drug can set off a neurochemical chain reaction in the recovering person which may lead to relapse.\textsuperscript{209, 210} For some drug treatment court defendants, placement into their habitual environments, rich in the sights and sounds and experiences with which they associate drug use, is a reliable path to failure of the treatment program. Residential treatment, which focuses on transitioning the defendant from a using lifestyle to a sober one, provides relapse prevention and prepares the resident for handling the results of cueing. It is a less onerous judicial imposition than placing them into situations where they are likely to fail and then be punished for that failure. Residential treatment is permissible as a valid exercise of the state police power\textsuperscript{211} and may serve as a critical solution to participants in need of more closely supervised care.

5. Twelve Step Meetings

One of the more controversial components of many, if not most, drug treatment courts is the requirement that participants attend 12-step meetings. Critics are in error when claiming that Alcoholics Anonymous (AA) is an inextricable component of drug treatment courts. While AA and other twelve step programs may be incorporated into drug treatment courts as part of the treatment plan, there is no requirement in the “Key Components,” which define drug treatment courts, that this be so.\textsuperscript{212}

The most prominent 12-step groups are based on a belief in the existence of some “higher power.”\textsuperscript{213} In AA, the eleventh step involves “prayer and meditation to improve

\textsuperscript{210} Id.
\textsuperscript{211} People v. Elmore, 272 Cal.App.2d 864(App. 4 Dist. 1969), see also Robinson v. California, Supra note 172.
\textsuperscript{212} KEY COMPONENTS, Supra note 48
\textsuperscript{213} TWELVE STEPS OF ALCOHOLICS ANONYMOUS, Steps 2, 3, 5, 7.
conscious contact with God as we understand God.”

“God” may be considered any “higher power” and is not necessarily the figure from the Judeo-Christian pantheon. The references to a “higher power” may prove problematic for the non-religious drug court participant. As some feel that since the concept of a “higher power” may have Constitutional implications, it would be improper for a drug treatment court to offer such alternatives; mandating attendance at a “faith-based” program has been found to run afoul of the First Amendment’s establishment clause. However not all 12-step programs are faith-based; there is a long history of secular or non-faith based, alternative self-help groups such as SMART Recovery, Moderation Management, LifeRing Secular Recovery, Secular Organization for Sobriety or Women for Sobriety. The Federal courts have held that when participants are given the option of attending secular, self-help programs there is no violation of the First Amendment establishment clause. As a result, the requirement to attend support group meetings does not create an unconstitutional condition for participation in drug treatment court programs.

It has been claimed that there is no evidence that 12-step programs work. Despite some methodological flaws, outcome studies have found that AA members report greater abstinence than nonmembers and that the longer the duration of the AA membership, the

214 Id. at Step 11.
greater the length of sobriety.\textsuperscript{218} On the downside, waiting for people to intervene on their own behalf leads to more deaths despite the improved outcomes among those who seek help.\textsuperscript{219}

6. Abstinence

Abstinence from alcohol and other drugs is both a key element of treatment and an ultimate goal of any treatment program. Therefore, although the state may legalize some types of behavior, the courts still have the fairly broad authority to limit that same behavior in certain circumstances. For example, although alcohol use by adults is legal, courts routinely prohibit convicted drunk drivers from drinking during the period of their probation and may even prohibit alcohol use by someone who was arrested for another drug charge.\textsuperscript{220} It has become standard procedure in drug treatment court contracts that an explicit ‘no alcohol’ clause be included. Furthermore, since the illicit drugs are, by definition, illegal, the court will impose the condition that participants abstain from any drug use. However since relapse is a common occurrence during the addiction recovery process, participants are not usually expelled from the program upon a single finding of drug use.\textsuperscript{221}

D. Drug Treatment Court Components

1. Short Jail Terms

Brief periods of incarceration for non-compliance with the terms of the treatment program are an integral part of drug treatment courts. The sanctions usually involve one or

\textsuperscript{218} Christine Le, et al., \textit{Alcoholics Anonymous and the Counseling Profession: Philosophies in Conflict}, 2 J. OF COUNSELING & DEVELOPMENT 603 (1995).
\textsuperscript{220} See People v. Beal, 60 Cal. App. 4th 84, 87 (1997), (drug case dealing with a prohibition against all alcohol consumption.) See also People v. Smith, 145 Cal. App. 3d 1032 (ruling prohibits the individual from visiting a bar.)
\textsuperscript{221} Hora, \textit{Supra} note 45, at 509.
two days and no more than one week of jail time.\textsuperscript{222} “Smart punishment,” as the short jail stays are sometimes called,\textsuperscript{223} is primarily criticized because of concerns about the possibility of due process violations. When the drug court team determines that a remedial period of incarceration is necessary to facilitate recovery, there is usually no formal hearing.\textsuperscript{224} A formal adversarial hearing is not required because the drug treatment court team has agreed in advance to the availability of this sanction and the client has knowingly and voluntarily consented to this process upon enrollment in the program. A hearing may be granted, however if specifically requested by the participant or defense attorney. In any court setting, constitutional principles are foremost and the outcome goals of drug courts never trump a defendant’s fundamental constitutional rights.\textsuperscript{225} It is the defendant and never the court that exercises the right to waive constitutional safeguards and such waiver must be voluntary, knowing and intelligent.\textsuperscript{226} Additionally, participants are forewarned of the consequences for failing to comply with the terms of the program and advised that the punishments may include short jail stays.\textsuperscript{227} Only after being advised of the terms can a defendant voluntarily and knowingly consent to such conditions and become a drug court participant.

2. Frequent Court Appearances

Frequent appearances before the same judge are a crucial component of drug treatment court.\textsuperscript{228} A survey conducted by the Drug Court Clearinghouse at American University, found that “eighty percent of participants...would not have remained if they did

\textsuperscript{222} Carlson, \textit{Supra} note 149, at 547.
\textsuperscript{223} Tauber, \textit{Supra} note 147
\textsuperscript{225} \textit{Id.}
\textsuperscript{226} \textit{Brady v. United States}, 397 U.S. 742, 748 (1970)
\textsuperscript{227} Carlson, \textit{Supra} note 149, at 547.
\textsuperscript{228} \textit{KEY COMPONENTS, Supra} note 48, at Component 7.
not appear before a judge as part of the process.”229 Involving the same bench officer in each of the defendant’s appearances lessens the chance that inconsistent rulings and ignorance of a particular defendant’s circumstances will interfere with the treatment program. The Criminal Justice Research Institute reported that drug treatment court participants hailed close supervision and encouragement by judges as one of the top three factors that led to their success in drug court programs.230

The direct involvement of the bench officer may be one of the reasons that drug treatment court programs are more successful than other methods employed by the criminal justice system in dealing with addicts. One study of high risk drug addicts, those with previous treatment failures or mental disorders, found that 80% of participants who had frequent mandatory contact with the judge successfully graduated from the program. A comparison group that saw the judge only when requested by the treatment provider (much like California’s Proposition 36 program), suffered from a completion rate of only 20%.231

3. Public Policy Considerations

One symptom of drug abuse and addiction is the denial that the drug abuse and addiction exists.232 This state of denial is more than mere refusal to accept reality as it is, but is instead a pathological inability to do so. Defendants in the grasp of drug addiction are unable to see the magnitude of their problem.233 Nevertheless, 85% of drug court participants will later acknowledge that they entered the program in order to treat their drug

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problem. In addition, even individuals who have been “coerced” acknowledge their sickness and are grateful to their treatment providers.

Some overly simplistic arguments are made that drug treatment courts are inappropriate from a policy standpoint because the criminal law is not a means to an end, but rather the end itself and should not be used for other social goals. This argument borders on the inexplicable as criminal law exists for the sole purpose of advancing social ends. Criminal law does not spring *ex nihilo* from some abstract desire to have courthouses, judges and trials. Criminal courts seek the social goals of punishment, rehabilitation and the maintenance of peace, safety and order for the community. Drug treatment courts are no different in this regard. Drug treatment courts specifically and problem-solving courts generally, seek to achieve tangible outcomes for victims, offenders and society. These goals include reduced recidivism, reduced stays in foster care for children, reduced criminal justice costs, increased sobriety for addicts and healthier, safer, communities.

Lastly, drug treatment courts make excellent sense from a policy standpoint because they are successful at turning addicts into drug-free, productive citizens. The White House has endorsed drug courts as an important part of our national drug control policy. President George W. Bush has touted drug courts as “…effective and cost-efficient tools that enable non-violent drug offenders to enter into drug treatment programs rather than prison” and that as a result “…individuals are abstaining from continued drug use and crime is being

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[236] Hoffman, *Supra* note 60, at 1478
[237] Zimring, *Supra* note 178, at 810-11
reduced.” In 2002, the President’s budget included $50 million to support local drug courts and additional funding for the National Drug Court Institute and in February 2005 the White House proposed increased funding for drug courts by $30 million. In announcing the President’s proposal, National Drug Policy Director John Walters called drug courts “the place where miracles happen” and the “most significant criminal justice initiative in the last 20 years.” “[D]rug courts,” according to Director Walters, “work to cut down on the cycle of crime and self-destruction.” Given the success of drug treatment courts in rehabilitating substance abusers and reducing criminal behavior, expansion of drug courts, rather than their reduction, is sound public policy.

The involvement of the Federal Government, Tribal Governments, at least three Federal Courts and the legislatures of all 50 states and two U.S. territories, in providing funding and statutory guidelines to drug treatment courts and problem-solving courts in general, refutes the argument that drug treatment courts represent a violation of the separation of powers doctrine. If legislatures wanted to exercise their check on the powers of drug courts, they would only have to throttle the courts at the funding stage. Instead, drug courts have increased from the lone Miami court in 1989 to over 1,600 operational drug courts in May of 2005 with another 478 drug courts in the planning stages. Legislatures

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240 Id.
242 Id. (FY 2006 was not finalized, at the time of Publ’n but was expected to be diminished as DOJ crime prevention funds were diverted to Hurricane Katrina relief.)
245 Huddleston, Supra note 46 at 15-16
246 Huddleston, Supra note 46 at 3
have funded an additional 937 problem-solving courts that address issues other than adult criminal substance abuse (e.g., domestic violence, mental health and juvenile dependency and delinquency) for a total legislative approval of 2,558 operational courts.\textsuperscript{247} Finally, contrary to any appearances of unrestrained legislative exuberance, it is clear that the legislature is keeping the size of drug courts in balance with demand precisely through their appropriation and spending powers. The average court is operating at a healthy 87\% of capacity and 72\% of drug courts cite funding as the limiting factor in expanding that capacity.\textsuperscript{248} The legislatures of the States, Territories and the Federal government seem to have struck a careful balance and, thus, in no way do drug treatment courts usurp the domains of the other branches and if they were to encroach on reserved powers, the legislatures would have but to reach for their budgeting pens.

Drug treatment courts are but one option available for the treatment of the drug-abusing offender; however models other than drug treatment courts have been tried and found lacking. The first option for drug abusers is the voluntary initiation of abstinence. While a very few offenders may be able to “just say no” and experience a spontaneous recovery, for most it will require more than will power and platitudes to address their addiction.\textsuperscript{249} When faced with the option of maintaining the status quo or making a drastic change in lifestyle, choice of associates, behaviors and routines, many people find the status quo, no matter how currently painful, more familiar and comfortable.

\begin{footnotes}
\footnote{Huddleston, Supra note 46 at 10}
\footnote{Huddleston, Supra note 46 at 8}
\footnote{See McLellan, Supra note 35.}
\end{footnotes}
An alternative option is programs like the voter-approved Substance Abuse and Crime Prevention Act of 2000, known colloquially as “Proposition 36,” in California. In the procrustean, rather arbitrary, setting of Proposition 36 programs, the court plays an inactive role and instead asks the addict to overcome the incredible forces of addiction, medical and social, with little outside help. This program offers a powerful incentive: the dismissal of criminal charges upon successful completion of the treatment program; however few have been able to complete the task. Of non-violent drug offenders sent to community-based treatment programs under Proposition 36, one in three does not even bother to show up. Of the 66% who do show up, only one in three will complete treatment. Proposition 36 is ineffective in combating addiction in those substance abusing offenders who manage to arrive at their intake appointments. Although some offenders have been able to complete treatment while participating in the Proposition 36 programs, re-arrest rates are actually 48% higher for Proposition 36 “graduates” than the rates for offenders left in the traditional criminal justice system. Proponents of the Proposition 36 program argue that exposure to treatment alone constitutes a positive outcome. Exposure to treatment may be desirable but without more it is unsatisfying as an “outcome.”

Proposition 36 provides little oversight as to the quality or quantity of treatment which the offender receives, requiring only that the program be certified. Certification

250 CAL. PENAL CODE § 1210.1 (Deering’s 2006). (Proposition 36 was passed in 2000 and implemented in July 2001 illustrating the will of the voters that those arrested for non-violent drug offenses be given treatment rather than incarceration.)
252 Id.
253 Finding better ways to handle drug offenders, SAN JOSE MERCURY NEWS, July 22, 2005 (editorial)
254 Cicero A. Estrella, Drug treatment grads more likely to reoffend. Rearrest rate 48% higher than for those put in jail, study finds, S.F. CHRONICLE, November 26, 2004, at B1
carries only vague requirements that do not include a standard of efficacy. Actual sanctions, including short bursts of incarceration, a standard drug treatment court response, are specifically forbidden by Proposition 36 that instead employs “strikes” that are without actual consequence until three of them accrue. When an offender commits the third “strike,” they are then sentenced under the regular penal scheme that will often not include further treatment.

Proposition 36 has saved California money in terms of prison costs, but judging by the tiny number of defendants who complete the program, this represents a tacit decriminalization of drug offenses: California saves money because Proposition 36 puts drug offenders back on the street without treatment or, in the alternative, punishment. Perhaps this stealth legalization of illicit drugs explains the rabid defense of the law by pro-drug organizations such as the “Drug Policy Alliance” that have opposed every attempt to modify proposition 36 into the proven drug treatment court model.

The Proposition 36 protocol is both more restrictive, and less discretionary, than the drug treatment courts in that many drug treatment court participants are given more than three chances, based on the nature of the violation, to “get it” before they are terminated. While Proposition 36 ties the judges’ hands and mandates termination after three violations, a drug treatment court judge preserves the option of retaining someone who may not yet be clean and sober but who seems engaged in the program and making adequate, albeit imperfect, progress. Although this discretion can be abused, such as in the case of the
drug treatment court participant who remained in the program for five years,\textsuperscript{262} standardization and accreditation of drug treatment court programs avoids this and other opportunities for abuse.

In-custody treatment is another traditional option offered to a few drug-abusing offenders. However, hundreds of studies have revealed very small reductions in recidivism for offenders participating in prison rehabilitation programs unless aftercare, in a controlled environment such as clean and sober living, is also provided. The State of Delaware’s KEY-Crest program, for example, maintains parolees in transitional housing for months after the ends of their prison stays.\textsuperscript{263} In-custody treatment is also among the most expensive of options available for substance abuse treatment with incarceration alone costing as much as $35,212 annually per offender.\textsuperscript{264} The slight reduction in recidivism from in-custody treatment combined with aftercare is a costly, inadequate and incomplete solution to the problem of addiction in substance abusing offenders unless the gravity of their current crime warrants incarceration.\textsuperscript{265}

The campaign of one critic, Judge Hoffman, against drug courts ironically provides the best demonstration of what occurs in the absence of drug treatment court programs. In 2002 the Denver drug treatment court, among the nation’s oldest, was dismantled. A mere three years after the Denver presiding judge, with the urging of Judge Hoffman, disbanded the drug court and spread drug cases amongst all bench officers,\textsuperscript{266} many of Judge Hoffman’s

\textsuperscript{262} Philip Bean, \textit{Drug Courts, the Judge, and the Rehabilitative Ideal, in Drug Courts in Theory and in Practice}, (James L. Nolan, Jr., ed., 2002). (Note that Bean attributes this phrase to other sources but then neglects to cite them.)
\textsuperscript{263} Marlowe \textit{Supra} note 39, at 4. \textit{See also} State of Delaware Dep’t of corrections “KEY-Crest” program, at http://www.state.de.us/correct/Programs/treatmentprograms.shtml (last visited August 15, 2006).
\textsuperscript{264} \textit{Finding better ways to handle drug offenders}, \textit{The Mercury News}, July 22, 2005 previously cited fn 145
\textsuperscript{265} \textit{Id.}
\textsuperscript{266} Christopher N. Osher, \textit{Drug court may stage comeback Critics say the city's heralded single-judge program no longer exists, leading to crowded jails and delayed treatment}, \textit{Denver Post}, November 13, 2005 at A01
predictions have become a reality but the irony is that negative results came from the

*elimination* of the Denver drug court, not its continuance.

The rationales for ending the drug treatment court were those that Judge Hoffman created in his articles: “flooding the jails with addicts;” the risk that judicial discretion would be abused; and, the costs of implementing and maintaining the drug treatment court program.267 Three years after the demise of drug court, Denver now has defendants “stacking up” in jail awaiting adjudication of their cases. Under the drug court system cases were assigned in an average of 72 hours whereas absent a drug court, defendants now sit in a jail cell, at taxpayer expense, for 45 to 90 days.268 More drug defendants are going to state prison than they were during drug court despite a Colorado law that makes probation the preferred resolution of drug cases.269

Judge Hoffman made the claim that drug treatment courts decriminalize drugs by judicial fiat.270 However, in Denver the number of drug cases in total has plummeted. Instead of greater charges and more trials, Denver is putting people back out on the street without so much as a slap on the wrist. Ironically, it is the enforcement arm of the criminal justice system that has been the most voracious in calling for the return of the Denver drug court. It is the Denver police chief and District Attorney who lament the demise of the system that Judge Hoffman helped destroy.271

**IV. JUDICIAL DISCRETION**

The charge that drug treatment courts deny participants the right to refuse treatment is discussed above but there are also critics arguing that drug court participants are at risk of

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267 Hoffman *Supra* note 53  
268 Hoffman *Supra* note 53  
269 Hoffman *Supra* note 53  
270 Hoffman *Supra* note 53, at 1568  
271 Osher, *Supra* note 269
being harmed by unchecked judicial discretion. One author, in a moment of unrestrained hyperbole, wrote “[Working therapeutically] cheapens the judicial office, placing the judge at the level of a ringmaster in a judicial circus.”

This view is not shared, however, by the highest policy-making body of judges in the United States, the Conference of Chief Justices (CCJ). In a resolution that passed without a dissenting vote in 2000 and that was reaffirmed in 2004, the CCJ and the Conference of State Court Administrators (COSCA) recognized that traditional case processing did not adequately address complex social issues like substance abuse. “Well-functioning drug courts represent the best practice of these principles and methods,” according to CCJ and COSCA.

Other critics have expressed concerns over ethical issues and professional responsibility rules and whether they conflict with the collaborative nature of the relationship between the defense counsel and prosecution in drug treatment courts.

Hands-on involvement by the judge is an essential element of drug treatment courts. Judges actively supervise and coordinate treatment, improving oversight and using judicial authority to encourage compliance with the dictates of the treatment program. The role of the detached and neutral arbiter is only part of taking the lead role in the drug treatment court team. This role involves awarding incentives and imposing sanctions on participants as they continue on the path to law-abiding and productive sobriety.

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272 Bean, Supra note 265
275 KEY COMPONENTS, Supra note 48, at Component 7.
276 KEY COMPONENTS, Supra note 48
277 KEY COMPONENTS, Supra note 48
frequently before the judge for status reports, the exact frequency of which depends on the participant’s stage in the program and their compliance with conditions. More than three-fourths of participants cite the judge’s supervision as instrumental to their continuing progress in the program.

One easily countered claim of drug treatment court critics is that state prisons are being filled with drug treatment court participants because of the judge’s ability to impose incarceration as a sanction. In fact, in a majority of jurisdictions, a defendant will only be sent to state prison if sentenced to a year or more in custody. Flooding the prisons with inmates is simply not an issue in the vast majority of drug treatment courts because incarceration is usually no more than a few days when applied by the drug court judge as a sanction. Moreover, although the judge tends to be the final arbiter concerning issues involving the participants, he or she may receive input from the entire treatment team, including the participant. In some instances, such as a relapse episode of alcohol or other drug use, a participant may have already self-disclosed the problem to the treatment provider, probation officer and/or court coordinator. The participant may present their own sanction recommendation such as jail time or increased attendance at drug counseling or self-help meetings. Drug court judges report that when participants suggest their own

278 KEY COMPONENTS, Supra note 48
279 2000 DRUG COURT SURVEY, Supra note 238, at 12; See also An Honest Chance: Perspectives on Drug Courts, Supra note 237.
280 Hoffman, Supra note 60, at 1439.
281 Tauber, Supra note 147
282 But see Meyer, Supra note 134, at 30-31 (describing “shock incarceration” in Denver Courts as involving initial sentences to the Colorado Dep’t of Corrections for a term of years. The sentence is then reconsidered in 120 days. Los Angeles County provides for up to 6 months in County Jail prior to entering the treatment program.)
283 Hora, Supra note 143, at 1476.
284 Hora, Supra note 143, at 1476.
285 Hora, Supra note 143, at 1476.
“punishment,” they are more likely to comply and not feel coerced by the judge or the criminal justice system.\textsuperscript{286}

Short periods of incarceration help to improve performance in treatment and are instrumental to the success of drug treatment courts.\textsuperscript{287} In fact, while individuals are in the program, drug use is markedly reduced.\textsuperscript{288} Studies based on urine test results reveal that on average only ten percent of drug court participants test positive for drug use in the first eight to ten months in the program\textsuperscript{289} as opposed to their counterparts in probation department-managed programs who tested positive 31% of the time.\textsuperscript{290} The ability of the judge to impose short jail sentences for non-compliance with the program (i.e., positive drug tests) motivates the participant to avoid drug use while receiving treatment for the underlying issues that contribute to their addiction. It is not unlike diet programs that require participants to be weighed once a week. A person thinks twice before eating a donut when they know they have to face a scale on Saturday. Likewise, urine testing abets an addicted person in staying on course in treatment, recovery and abstinence.

The regular and immediate delivery of sanctions and incentives is vital to the effectiveness of any program.\textsuperscript{291} This type of immediate response is impossible in probation-based systems because it may take weeks to discover the infraction, give notice of it, schedule a hearing on it and sanction the defendant if found in violation.\textsuperscript{292} In contrast, and

\begin{footnotes}
\footnoteref{Hora}
\footnoteref{Marlowe}
\footnoteref{Belenko}
\footnoteref{Marlowe}
\footnoteref{Greg Berman}
\end{footnotes}
in keeping with drug court Key Components, drug treatment court participants appear on a
scheduled basis before the judge, as often as once a week and are given urine tests
regularly. The judge and the rest of the treatment team are usually informed of the test
results prior to each appearance and then are able to discuss any infraction with the
participant. Thus, the judge may impose a suitable sanction “on the spot.” The timing is
critical because studies show that the best predictor of whether there will be behavior change
in response to sanctions is the immediacy of those sanctions. In studies, substance abusers
choose heavy future punishment over smaller immediate punishment because it is common
among this population to discount future consequences. Smaller, immediate sanctions
give better results than distant, heavier, potential sanctions. Drug treatment courts are in a
truly unique position to leverage compliance with the program largely due to the immediacy
of the sanctions and the constant opportunity for incentives during the program.

Any program that imposes months or years of incarceration for a relapse during
treatment is misguided in its approach and would not be working within the established
methodology of drug courts. Longer periods of incarceration are inconsistent with the goals
intended by the imposition of sanctions. Although to the casual observer jail time would
seem to be the strongest sanction in the judicial arsenal, defendants may not agree with that
perception. In one study, 6 to 24% of inmates preferred one year of jail to residency in a

\begin{footnotes}
\item Impulsivity and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence, 39
\item CRIMINOLOGY 1, 3 (2000))
\item KEY COMPONENTS, Supra note 48, at Components 5 and 7.
\item KEY COMPONENTS, Supra note 48, at Component 8
\item James G. Murphy, et al., Delayed Reward and Cost Discounting, 51 PSYCHOLOGICAL RECORD, 571 (2001).
\item Id.
\item Marlowe, Supra note 39, at 6.
\end{footnotes}
halfway house (6.7%); probation (12.4%); or day fines (24%). Those with more connection to their communities, ties like employment, domicile or children, chose alternatives to jail.298

When an individual is given a sanction without the ability to demonstrate behavior modification, the sanction has little effect on changing their behavior to the desired norm.299 As discussed above, most jails do not provide in-custody treatment as an option and what is provided is inadequate. Consequently, a drug treatment court that imposes excessive jail time would be ineffective because the participant would be absent from treatment and would therefore not have an opportunity to address the behavior for which they are being punished. In addition, drug treatment courts recognize that “structure without support feels punitive and support without structure is enabling.”300 Therefore, measured responses and incentives, are awarded to participants to encourage program compliance.301 These incentives range from small prizes such as movie tickets, baseball game passes or certificates of program completion to praise and encouragement from the bench.302 Research on graduated rewards demonstrates participants receiving graduated reinforcement achieved greater mean levels of abstinence than participants receiving fixed reinforcement.303

The amount of discretion held by drug treatment court judges concerns some because it may open the door to inconsistency in judgments.304 One frequent criticism is that drug treatment courts will encounter many of the same problems as early juvenile courts with

299 Id., Wood at 6-7.
300 Hora, Supra note 143, at 1476.
301 Id.
302 Id.
304 Hoffman, Supra note 60, at 1479.
regard to the imposition of punishment without the traditional due process protections of the
criminal justice system.\textsuperscript{305} The deterioration of the Juvenile courts was perhaps best
demonstrated in the Supreme Court case of \textit{In re Gault}\textsuperscript{306} wherein a juvenile suspect was
convicted and incarcerated for allegedly making lewd phone calls, without the benefit of
counsel, confrontation, and the right against self incrimination or even the support available
from his parents. The Supreme Court in overruling the Arizona courts looked to their earlier
decision in \textit{Kent v. United States}\textsuperscript{307} involving the waiver of juvenile jurisdiction without due
process. The Court found that “there is no place in the American system of law for reaching
a result of such tremendous consequences without ceremony, without hearing, without
effective assistance of counsel, without a statement of reasons.”\textsuperscript{308} Examining drug treatment
courts in light of the litany of errors in \textit{Gault} and \textit{Kent}, it can be seen that there has been the
assiduous development of safeguards to avoid repetition of the old abuses in a new context.

Drug Court Key Components\textsuperscript{309} require the assistance of counsel, hearings for
placement in and removal from the program, hearings for sanctions resulting from program
violations, the opportunity for appeal, the opportunity to reject treatment and enroll in
traditional case processing and all of the notice requirements attendant to modern criminal
cases. Each safeguard put in place to avoid a denial of due process works effectively to
protect participants from judicial or procedural missteps. However, potential for abuses of
judicial discretion is not unique to drug treatment courts. Many of the criticisms leveled at
drug treatment court judges could be directed with equal accuracy at any other member of the

\textsuperscript{306} \textit{In re Gault}, 387 U.S. 1 (1967)
\textsuperscript{307} \textit{Kent v. United States}, 383 U.S. 541 (1966)
\textsuperscript{308} \textit{Id.} at 544
\textsuperscript{309} \textit{KEY COMPONENTS}, Supra note 48
bench. A trial judge is a powerful position in both the legal process and in society at large. The same oversight that works to hold other judges in check operates with equal efficacy to constrain drug treatment court judges. If an individual drug court judge were to abuse his or her discretion, it would be no different from judicial misconduct in any other post-*Gault* case, with its appropriate reporting mechanisms to judicial oversight bodies and sanctions for the member of the bench.

One of the first considerations in monitoring the role of judicial discretion is the tenet that drug treatment courts are not punitive in nature. On the contrary, drug treatment courts focus on attacking the root of the problem, addiction, through treatment compliance and program retention.\textsuperscript{310} Drug treatment courts were created in response to the failure of the traditional penal system to rehabilitate drug-abusing offenders.\textsuperscript{311} As part of the drug treatment court program, judges are required to become facile with the elements of substance abuse and addiction.\textsuperscript{312} Appropriate education provides them with the knowledge that addiction is a medical and not merely a moral or behavioral issue and that incarceration is not a solution for a medical problem. With this understanding, judicial officers are less inclined to act in a morally judgmental way or abuse their discretion.\textsuperscript{313}

The claim that drug court judges are inappropriately acting as “amateur psychologists”\textsuperscript{314} is specious. All judges gain a measure of expertise in the subject matter of the cases coming before them and drug treatment court judges are no different in that regard.

\textsuperscript{310} Carlson, *Supra* note 149, at 547.
\textsuperscript{312} KEY COMPONENTS, *Supra* note 48, at Component 7.
\textsuperscript{313} Melli, *Supra* note 308, at 384.
\textsuperscript{314} Hoffman, *Supra* note 60, at 1479.
Although drug treatment court judges gain expertise in issues relating to drug addiction, they do not have responsibility for the formulation of each participant’s treatment program; that is left to treatment professionals. Instead, the judge acts as the lead member of a team, which includes treatment providers, and takes an active role in supervising the participant’s progress. One treatment team member will be a clinician who has more extensive training in addiction and who provides the formal therapy in the form of psychological substance abuse counseling. Therefore, judges are not in any real sense acting as psychologists, amateur or otherwise, but are acting instead as the team captain and boundary spanner. Moreover, through drug treatment courts, physicians and judges have begun a whole new dialogue about alcohol and other drug addiction. Physician’s Leadership on National Drug Policy, based at Brown University, has joined with the American Judges Association and developed an interdisciplinary curriculum for the joint training of judges and physicians. At a session in Pennsylvania sixteen local physicians and psychologists joined with criminal and family law judges for specialized training. In addition, judges and law professors conversant with drug treatment courts and therapeutic jurisprudence presented, for the first time, a panel at the 2000 annual meeting of the American Society of Addiction Medicine. The California Society of Addiction Medicine specifically endorses drug treatment courts because they “…blend Public Health and Public Safety perspectives – treatment and

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315 KEY COMPONENTS, supra note 48, at Component 7.
316 KEY COMPONENTS, supra note 48, at Component 10.
317 KEY COMPONENTS, supra note 48 at Component 7.
318 “Individuals who can work across systems to facilitate communication and coordinate policies or services are referred to as ‘boundary spanners’.” Massaro, Jackie, MSW, Overview of the Mental Health Service System for Criminal Justice Professionals, Technical Assistance and Policy Analysis Center for Jail Diversion (TAPA), Center for Mental Health Services, SAMHSA (March 2005), at 35
319 Carlson, supra note 149, at 548.
320 Carlson, supra note 149
321 Carlson, supra note 149
322 Carlson, supra note 149
monitoring – as exemplified by the therapeutic jurisprudence model guiding our Drug Courts.”

One medical school professor, an M.D., joins judicial faculty members in three National Judicial College courses on basic substance abuse issues, a mental health course and another addressing co-occurring mental and substance abuse disorders. This type of collaboration between the legal and medical communities is essential to the team-oriented approach to the adjudication of drug-related offenses taken by drug treatment courts across the nation.

Professional peer review is another important safeguard put in place to protect drug court participants from indiscretion by court officers and treatment program staff. The National Association of Drug Court Professionals is the premiere drug court-related association and is a strong force in both the legal community and amongst drug court proponents. It has developed a booklet on ethical consideration for judge and attorneys in drug courts and has offered workshops on ethical issues at many of its trainings.

In the event a judge does abuse her discretion, the powerful drug court community is poised to speak in protest, as is her local judicial misconduct organization. Pressure from the drug court community could potentially result in the judge being removed from a drug treatment court assignment. The commission on judicial performance or other judicial oversight body of each State serves to check any abuses as well. As with any other judicial

323 CALIFORNIA SOCIETY OF ADDICTION MEDICINE, SPIER INTIATIVE ON METHAMPHETAMINE at http://www.csam-asam.org/pdf/misc/Meth_Summary.pdf (last visited October 2, 2006)
324 (The Nat’l Judicial College is located on the campus of the University of Nevada, Reno. A full course offering may be found at http://www.judges.org)
325 See generally: www.nadcp.org and www.ndci.org
328 Id.
action, those taken in drug treatment court cases are subject to commission review. If judges abuse discretion they may be disciplined or, in extreme cases, removed from the bench. Unchecked abuses of discretion are not a problem with drug courts but rather a problem to be addressed to state judicial discipline boards such as happened in a recent case when a judge allowed a drug treatment court defendant to escape through her chambers to avoid being served with an arrest warrant.\textsuperscript{329} Another judge, although not in a drug court, was disciplined for imposing conditions of probation that required an addicted woman defendant to be implanted with a contraceptive device.\textsuperscript{330} Where discipline is weak in state oversight bodies it will be weak for all judges and where strong, drug treatment court judges will be subject to the same stringent oversight as any other judge.

Appellate courts have exercised their oversight on drug court judges as well. In one case, a judge refused entry to entire classes of defendants, undocumented aliens.\textsuperscript{331} He was reversed by the appellate court and exclusion of aliens was no longer allowed. The exercise of supervisory authority of the appellate courts is indistinguishable from the oversight process to which all judges are beholden; a trial court judge that acts beyond the scope of her authority is rewarded with uproar and increased scrutiny\textsuperscript{332} whether in a drug treatment court or not.

The team nature of drug treatment courts is often helpful as well in preventing judicial missteps. Both treatment providers and counsel, both for the people and for the defendant, have varying perspectives regarding the participant’s situation. In circumstances

\begin{thebibliography}{99}
\bibitem{Broadman1998} Broadman v. Commission on Judicial Performance, 18 Cal. 4th 1079 (1998)
\bibitem{Robbins2005} Mary Alice Robbins, \textit{Lawyers Allege Judge Steps on Individuals’ Rights}, TEXAS LAWYER, November 4, 2005
\end{thebibliography}
where the judge takes a more punitive posture, the treatment providers and defense counsel are able to remind the judge of the nature of the disease and the objective of the program.\textsuperscript{333} Where the judge appears too lenient, prosecutors assigned to drug court cases are duty-bound to voice their concerns that justice is not being done and the public is going unprotected. Where a judge continues to impose inappropriate sanctions, the attorneys always retain the option to appeal or move to disqualify the judge from hearing drug treatment court cases.

Excessive sanctions imposed upon a drug treatment court participant and denial of entry into a drug treatment court program can also be appealed.\textsuperscript{334} If a person is not technically eligible because they fail to meet the statutory requirements, they will be denied entry into the program.\textsuperscript{335} Even at that juncture, a defendant could request a hearing to challenge their ineligibility and have the judge make the ultimate decision. The individual is then able to appeal that decision in the same fashion as the undocumented alien denied entry into the drug court program was able to successfully challenge his placement decision in \textit{People v. Cisneros} discussed above.\textsuperscript{336, 337} As in all of American jurisprudence, a healthy and vigorous appellate process is essential in protecting against judicial abuses.

Another potential issue surrounding judicial discretion rests in the determination of what constitutes unsuccessful performance in the program. Certainly, urine tests indicating drug use or “dirty tests” are common at the outset.\textsuperscript{338} However, what may classify as grounds for removal varies from program to program and may vary within a specific

\begin{footnotes}
333 Freeman-Wilson, \textit{Supra} note 330
335 (This is not always a matter for the judge given that in some jurisdictions, the prosecution makes the determination of the eligibility for DTC.) \textit{see} Freeman-Wilson \textit{Supra} note 329
336 \textit{People v. Cisneros}, \textit{Supra} note 334
337 \textit{People v. Sturiale}, \textit{Supra} note 337
338 Hora, \textit{Supra} note 45, at 482-83.
\end{footnotes}
There are no set standards of how to respond when a participant fails to meet the conditions of the drug court program. In some jurisdictions a participant may be removed from a drug treatment court program if they are arrested for new charges, especially charges that are not drug-related; in others, removal for new arrests only apply to cases with allegations of violence. Alternatively, the team may feel that the participant is working hard in the program and allow him or her to stay. In the course of treatment, other issues may be brought to light, such as co-occurring mental health problems that require other concurrent forms of treatment and referral to additional resource providers.

Often, repeated non-compliance with the provisions of a treatment plan may trigger a mental health assessment. Many drug treatment court participants suffer from co-occurring mental health problems such as severe depression, post-traumatic stress disorder, bipolar disorder or schizophrenia. Research shows that three quarters of inmates with a mental illness are also substance abusers. Removal from the program for behavior caused by a mental illness would be unfair and an inappropriate response to the treatable condition that has contributed to the participant’s entanglement with the criminal justice system. As a result, mental health issues should be assessed for throughout the treatment process. The lack of pre-established, hard-line rules that define the standards for “failure” in drug treatment courts keeps the door open for judicial discretion and the tailoring of different judicial responses to the demographics and needs of each individual and jurisdiction.

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340 Carlson, Supra note 149, at 547.
341 Carlson, Supra note 149, at 547.
342 Linda Teplin & Karen Abram, Co-Occurring Disorders among Mentally Ill Jail Detainees: Implications for Public Policy, 10 AM. PSYCHOLOGIST 1036, also “Serious Mental Illness and Its Co-Occurrence with Substance Use Disorders, 2002” Substance Abuse and Mental Health Services Administration (SAMSHA) DHHS Pub. No. (SMA) 04-3905 (2004)
In certain situations, understandably, terminated participants may feel they have been unfairly treated by the program and deprived of important legal opportunities. Nevertheless, the safeguards discussed above have been implemented and are effective. The collaborative nature of drug treatment courts bring all members of the treatment team together in order to ensure that each participant’s specific treatment needs are being met. The defense attorney, the prosecution, community corrections and the treatment providers advocate for the participant. Oftentimes, this collaborative advocacy protects the participants from withdrawing from the program as the drug treatment court team anticipates potential problems. All of the team members become intimately familiar with the participants’ individual issues and, using their expertise, advance a participant’s likelihood to succeed in the program. This individualized information allows each team member to make a knowledgeable, thoughtful decision when choosing whether to advocate for the retention or termination of a participant from the program, a decision ultimately resting with the drug court judge.

Removal from the drug court program is not always the end of the road. In pre-plea programs, the individual retains full trial rights and is scheduled for the entry of a plea in a different courtroom at the time they are terminated. Because a person cannot be allowed to commit perjury, a former participant will be prevented from denying drug usage due to admissions made in drug treatment court. Conversely, the prosecution is prevented from using those admissions to prosecute the original case.\textsuperscript{343} The case starts over from where it left off: after arraignment. However, given that the individual has now been exposed to treatment, the individual may refer back to this experience in order to gather the strength or experience helpful in completion of a future program.

\textsuperscript{343} Key Components, Supra note 48, at Component 2.
Unfortunately, the overwhelming majority of drug courts follow the post-plea model, a program more complicated than pre-plea and potentially more onerous for a defendant. In a post-adjudication situation, the participant has already been found guilty of the charge. As a result, certain Constitutional rights, such as the right to a trial, have been waived or exhausted and if the participant then fails out of the program, the pending sentence will, most likely, be imposed. However, the participant may retain this right in some jurisdictions where there is a provision in place allowing the participant to withdraw the plea and proceed with the case in the traditional fashion otherwise, the participant has very few legal options. Due process rights, the same rights preserved by all defendants who accept a plea bargain agreement, are still afforded to a participant even absent the formal trial process. In post-adjudication programs, participants are on probation, where successful completion of the treatment program serves as one condition of the probation. Due process requires a participant is to be provided with a hearing before probation is terminated. There is a loss of timeliness in post-plea programs because while the treatment may ultimately be similar, there is a longer gap in between the arrest and the treatment and thus one of the Key Components of effective drug treatment, requiring prompt placement into treatment, is abrogated.

Drug treatment courts, like all court settings, employ a variety of standards in order to ensure the process will flow smoothly. Judges must be given some leeway to structure the program in a way that works for the jurisdiction, conforms to local legal culture and allows for the individuality of each participant. The ultimate goals of drug treatment courts are

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344 Hora, Supra note 45, at 516.
345 Hora, Supra note 45
346 Hora, Supra note 45
347 Gagnon v. Scarpelli, 411 U.S. 778 (1973)
348 KEY COMPONENTS, Supra note 48, at Component 3.
recovery for the defendant and reduced crime in the community. Therefore, judges need to be in the best position to facilitate the process to those ends. Drug treatment courts are real courts; the defendants face very real consequences, including criminal records and incarceration, and are entitled to the same protections as defendants in more traditional courtrooms. For this reason, drug treatment courts must act fairly to each participant involved in the process.

The defendant’s belief in the fairness of the process is important. The effect that perceived unfairness has on behavior is of greater importance than previously realized. Reactions to perceived unfairness include “punishing” the “unfair” system by ignoring mandates or deliberate misbehavior, even if such actions are detrimental to the participant.349

Although standards may be flexible, the drug court team must have a plan in place for handling different situations that may arise, especially with persons who have co-occurring substance abuse and mental health disorders. It is undisputed that an undiagnosed mental health problem can affect the course of substance abuse treatment and outcomes for a drug treatment court participant. Likewise, a substance abuse problem can affect the efficacy of mental health treatment. Both conditions can mask the other and exacerbate the severity of the other illness. Both illnesses must be addressed and treatment of them should be concurrent.350 Even if planning does tend to limit judicial discretion, it also serves to limit overstepping and allows participants to be treated fairly throughout the process.

Concerns over judicial discretion may be, to some extent, warranted but such discretion is critical to the success of drug treatment court programs. Safeguards are in place

to prevent judges, including drug treatment court judges, from imposing excessive punishments and acting arbitrarily.\textsuperscript{351} Drug treatment court judges learn that drug addiction is not a moral failing, but a medical condition that requires clinical treatment. This knowledge helps the drug treatment court judge strike an appropriate balance between sanction and reward and helps revisit that balance as the addict resumes a more normal profile of responses. Key safeguards such as peer review and collaboration between defense counsel, prosecution, community corrections and treatment providers are also in place to hinder any judicial overreaching. Moreover, hearings and other due process considerations are provided to those who fail to perform well in the program.

\textbf{V. ETHICAL ISSUES OF COLLABORATION BETWEEN PROSECUTION AND DEFENSE}

Drug treatment courts are founded on a non-adversarial, collaborative approach that is focused on the participant’s recovery rather than the minutia of the pending case.\textsuperscript{352} This is critical because drug addiction remains a unique and pervasive problem that cannot be adequately addressed by traditional case processing.\textsuperscript{353} The adversarial nature of traditional criminal courts may be a roadblock to open communication and thus a hindrance to the goal of recovery.\textsuperscript{354} As a result, the adversarial process is suspended in drug treatment courts in order to focus solely on the participant’s recovery and law-abiding behavior.\textsuperscript{355} Alternatively it may be stated that “collaborative undertakings can have a meaningful impact because they can facilitate the process of arriving at a mutually beneficial and effective resolution,

\textsuperscript{352} \textit{KEY COMPONENTS}, Supra note 48, at 2.
\textsuperscript{353} Lamparello, \textit{Supra} note 235, at 335.
\textsuperscript{354} Lamparello, \textit{Supra} note 235, at 356.
\textsuperscript{355} Hora, \textit{Supra} note 143, at 1474.
allowing the parties to collaboratively probe an issue in an in-depth, incisive manner.”

This collaborative framework is therefore essential to a participant’s successful recovery from alcohol or other drug addiction.

The emergence of the drug treatment court movement has led to a redefinition of the traditional view of lawyering. Appropriate advocacy and the twin duties of competence and diligence that require each attorney to do all they can to advance their clients interests within the given legal framework, can be achieved in a drug treatment court context. Although Canons of Ethics for judges, and rules of professional responsibility for attorneys, are both built on the foundation of an adversarial system, at first blush they may appear to be in conflict with drug treatment court practices; but there is no need to blur the ethical parameters of a lawyer’s role in advancing the best interest of the client.

In drug treatment courts, practices of the criminal court system that would otherwise hinder recovery are suspended and replaced with less traditional roles for the defense and prosecution. For defense counsel, the drug treatment court process may be viewed as more cumbersome for the defendant. For example, the defendant may be required to spend, initially at least, more time in jail, attend court more frequently, and will be asked to examine and address the root causes for their drug addiction. Additionally, in order to be effective, the prosecution must perform less punitively and more constructively, a stance viewed by

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357 Simon, *Supra* note 58, at 1599.
358 The phrase “Zealous Advocacy,” often cited as a “duty” by defense counsel, does not appear in any of the ABA Model Rules, 2002 version. It is instead relegated to the preamble, in section 8, and comment 1 of Rule 1.3. The phrase does not take the prominence it had in the 1983 Model Code, Canon 7 that required zealous advocacy within the bounds of the law. The expected performance of attorneys under ABA Model Rule 1.3, 2002 is “reasonable diligence.”
359 Simon, *Supra* note 58, at 1599.
360 *KEY COMPONENTS, Supra* note 48, at Component 2.
361 Quinn, *Supra* note 277, at 63
some as appearing “soft on crime.” On the surface, these goals may raise some ethical questions. However, a closer look will show that the duties inherent to both defense counsel and the prosecution may successfully be carried out in a drug treatment court context.

One concern repeatedly voiced by drug treatment court detractors is the softening of the traditional focus on an adversarial relationship between the prosecution and defense. In using a problem-solving approach, drug treatment courts do not purport to “trump” traditional and respected doctrines such as due process, equal protection and judicial independence, which may conflict with therapeutic considerations. On the contrary, the approach suggests a way in which the adversarial process might be “reinvigorated or supplemented” by new psychological and sociological insight. The defining principals of the drug treatment court movement are explicit in their adherence to the necessity of due process even when traditional roles are altered. The adversarial system is one of the most treasured components of the American criminal justice system and our best effort to ensure that people are treated fairly. Crimes motivated by the defendant’s addictive disease however, as discussed above in reference to the latest research on the neurobiology of addiction, may have different motivations than those of crimes around which traditional case handling was designed. As long as society continues to approve the arrest of people who are substance abusers, and we do not, in this article, attempt to discuss legalization, decriminalization or so-called medical uses of illicit drugs, a revised system of adjudication will be required to address their needs.

363 Quinn, Supra note 277
365 Id.
366 KEY COMPONENTS, Supra note 48, at Component 2.
367 KEY COMPONENTS, Supra note 48, at Component 2.
One important role of the prosecutor is taking the legal steps necessary to protect and promote public safety. This is particularly true with respect to substance abuse because it places community members at risk and jeopardizes public safety. As previously discussed, incarceration has proven ineffective in decreasing recidivism among alcohol and other drug users whereas drug treatment courts are proving to be significantly more successful. Given this set of facts, continuing to pursue incarceration as a complete solution for drug-addicted offenders, despite the low success rates, actually decreases public safety. Reducing recidivism by providing effective drug treatment for offenders is a logical and successful strategy and, since we are decades away from “treatment on demand,” drug treatment courts are the most effective strategy we have.

Prosecutors in drug treatment court settings must redefine what it means to “win” a case. Putting the defendant in jail only to have them return again and again to the criminal justice system protects public safety only during those periods of time when prisoners are incarcerated. Providing treatment for the offender costs less money and will remove many from an endless cycle of involvement with the courts, thus resulting in a more lasting public benefit. When the criminal court process results in a sober and productive return to society for the offender, the prosecutor should consider that a positive outcome or “win.” Because the adversarial system hinders the treatment process by obstructing communication and encouraging denial, pure iterations of the adversarial system fail to effectively promote public safety.

Drug treatment courts are also proper forums for the primary responsibility of the defense attorney: ensuring the protection of their clients’ rights. One task of the defense attorney: ensuring the protection of their clients’ rights. One task of the defense

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368 DRUG & CRIME FACTS, supra note 38
369 Lamparello, supra note 235, at 356.
counsel is to inform the client of all rights and available options in order for the client to make an informed decision. Knowledge imparted by defense counsel allows the client to exercise whichever option is believed to be best given the specific situation. In much the same way as the competent defense attorney must advise their client of the risks and benefits of accepting any plea, savvy defense counsel will familiarize themselves with at least the fundamentals of addiction, substance abuse treatment and the options afforded by the drug treatment court in their jurisdiction. Defense attorneys who complain that they cannot adequately advise clients because of their own ignorance of the programs being offered in exchange for pleas have to educate themselves, a requirement no different than that imposed by any new court assignment, such as defending domestic violence defendants instead of armed robbery defendants.

Once a client is in a drug treatment program, concerns change from those found in traditional court settings to a broader goal. In traditional courts, the main goal of the defense counsel is to reduce the amount of time the client spends incarcerated or to “beat” the charges. Although there is a possibility that drug court participants will spend more time in jail than they would have in the traditional court setting, individual participants may spend less time in jail over the course of their lives by becoming sober and not committing new crimes because of their addiction. This requires defense counsel to have a broader lens through which to view the “criminal lifetime” of their client. Traditional recovery lore has it that there are but three outcomes for addicts: as inmates in prisons or institutions, by dying or

370 Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 422. (2001)
371 Quinn, *Supra* note 277, at 55.
373 Hora, *Supra* note 45, at 516.
participating in treatment to become clean and sober. In order to decrease the overall amount of time spent incarcerated and to avoid the worst, fatal outcomes, defendants would fare better by receiving treatment for their addiction at the beginning of their criminal careers.

A. Attorney Ethics under the American Bar Association Standards

  1. Defense Counsel

Client representation in drug treatment courts is entirely consistent with the rules of professional responsibility. The American Bar Association Model Rules of Professional Conduct state that “[a] lawyer shall provide competent representation to a client…[which] requires the legal knowledge, skill, thoroughness…necessary for the representation.”\(^{374}\) In a drug treatment court context, “competence to represent a client who may be eligible for a drug court program requires that the attorney be familiar with the program.”\(^{375}\) The attorney is required to know the type of treatment programs available, the eligibility requirements, the potential sanctions and incentives that may be imposed and the circumstances surrounding their imposition.\(^{376}\) The defense attorney must also be familiar with those situations that may lead to termination from the drug treatment court and the confidentiality waivers and restrictions placed on the government’s use of the information obtained in drug court.\(^{377}\)

The collaboration between defense counsel and prosecution enhances, rather than hinders, the role of defense counsel in providing competent representation. Defense counsel works collaboratively with the prosecution to find solutions that assure the participant’s continued path to recovery. Working hand-in-hand with the prosecution, other team members and the judge to provide the client with an opportunity to fight addiction and

\(^{374}\) MODEL RULES OF PROF’L CONDUCT, RULE 1.1 (2002) [hereinafter MODEL RULES].

\(^{375}\) Freeman-Wilson, Supra note 176, at 10

\(^{376}\) Freeman-Wilson, Supra note 176, at 10

\(^{377}\) Freeman-Wilson, Supra note 176, at 10
address their legal problems, requires competence, diligence and skill. This type of collaborative effort honors the ethical duty of defense counsel to provide competent legal services and, overwhelmingly, increases job satisfaction.378

Some traditionalist defense attorneys have complained about being placed in a collaborative role.379 They argue that prosecutors still retain charging authority and may elect to send less worthy cases to drug courts instead of dismissing them, in the hope that the defendants will plea bargain in exchange for treatment.380 This argument fails since in no way do drug courts deprive defense attorneys of the methods that they have traditionally employed to dissuade the prosecution from bringing weak or flawed cases. Likewise, extensive studies of drug defendants in Arizona and California found no evidence to suggest that district attorneys were increasing the severity of charges to keep them in the traditional criminal justice system, except for defendants with prior criminal histories or who were arrested with large amounts of illegal drugs.381 Even in those cases with more severe charging decisions, there were times that charges were reduced on the initiative of the prosecution to enable a previously ineligible defendant to become a candidate for a treatment program.382

Defense attorneys representing a drug-addicted client must still perform the duties of their position: they must look at the facts of the case, evaluate the applicable law and may still counsel that client to reject the plea agreement and proceed to trial.383 Properly conducted, the preliminary groundwork provided by diligent defense counsel can actually

378 NATL. ASSOC. LEGAL AID & DEFENDER ASSOC., INDIGENT DEFENSE, December 1997 at 8
379 Quinn, Supra note 277, at 57
380 Quinn, Supra note 277, at 57
381 Riley, Supra note 139
382 Riley, Supra note 139
383 Reisig, Supra note 277
improve the outcomes for drug treatment court clients.\textsuperscript{384} The complaints of defense attorneys that clients might find treatment, and probationary release on their own recognizance, more palatable than incarceration while awaiting trial\textsuperscript{385} fails to differentiate drug treatment courts from the identical allure of traditional plea bargaining. When defense attorneys believe charges to be without merit, their display of readiness to proceed to trial will quickly discourage prosecutors from squandering limited resources on those marginal cases. Likewise the approbation of the judiciary is a strong disincentive for prosecutors and serves to check any lack of diligence in filtering out those cases not worthy of trial.

Defense attorneys have raised some legitimate concerns about the presence of counsel in drug court proceedings, concerns that may be assuaged by using a two-part solution. If the concern regards hearings at which defense counsel is not present,\textsuperscript{386} then the defense bar should strive for strict adherence to the ABA Model Code of Judicial Conduct\textsuperscript{387} and protest that such hearings represent improper \textit{ex parte} communication. To avoid the appearance of improper procedure, it is in the best interests of both the parties and the ethical duty of the bench officer to ensure that even the \textit{appearance} of impropriety is avoided.\textsuperscript{388}

Concerns that defense attorneys provide only cursory representation at some stages of the drug treatment court process, such as by “checking in” on hearings between other tasks,\textsuperscript{389} may be alleviated by changing the customs of the local defense bar, by more careful scheduling of status hearings so that the clients of a given attorney are all heard on the same calendar and by strict compliance with notice requirements. Where the defense bar is alert

\textsuperscript{384} Reisig, \textit{Supra} note 277
\textsuperscript{385} Reisig, \textit{Supra} note 277
\textsuperscript{386} Quinn, \textit{Supra} note 277
\textsuperscript{387} ABA Model Code of Judicial Conduct, CANON 3B(7) (“A judge shall accord to every person who has a legal interest in a proceeding or that person’s lawyer, the right to be heard according to law.”)
\textsuperscript{388} ABA Model Code of Judicial Conduct, CANON 2 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”)
\textsuperscript{389} Quinn, \textit{Supra} note 277, at 64.
and vocal in ensuring that procedures are not merely rubber-stamped, the system will better reflect their concerns and ideals.\footnote{Clarke, Supra note 373, at 457.}

Model Rule 2.1 states that when rendering advice, a lawyer may discuss moral, social and political considerations that may be relevant to the client’s situation.\footnote{MODEL RULES 2.1} Under ABA Model Rule 1.4, “a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”\footnote{MODEL RULES 1.4} Moreover, ABA Standard of Criminal Justice 4-5.1 directs that “Defense counsel should not intentionally understate or overstate the risks, hazards or prospects of the case to exert undue influence on the accused's decision as to his or her plea.”\footnote{Freeman-Wilson, Supra note 176, at 11 (citing ABA STANDARDS OF CRIMINAL JUSTICE 4-5.1)} This information must be imparted so that a client is completely informed in a manner that allows for genuine choice.\footnote{Freeman-Wilson, Supra note 176}

Although each attorney may have a different style when communicating with a client, some criteria are critical to ensuring the opportunity for a genuine choice. For example, clients who do not speak English must be afforded an interpreter and forms should be read to clients who are illiterate or to those who cannot read English well. Defense counsel must be aware of the cognitive limitations of their client and alert to possible impairments due to alcohol or other drug use when giving explanations. Explanations should be clear and should contain specific examples of potential consequences; both positive like sobriety and the possible sealing of records, and negative such as “smart” punishments and termination from the program.\footnote{Id.}
Encouraging a client to participate in a program even though the attorney knows it may, or may not, initially result in more jail time, or require more effort from the client, does not usurp the ethical duties owed to the client as long as all of the information needed to make a genuine choice is provided.\textsuperscript{396} Presenting the client with an opportunity to lead a clean and sober life gives the client the chance of an improved legal outcome not only in the present case but enhances prospects for life in the future.

In contrast to traditional courts, where the defense counsel withdraws after sentencing, the role of the defense counsel in a drug treatment court setting continues when the client enters the drug treatment program.\textsuperscript{397} A diligent defense attorney will remain involved throughout the process, should attend team meetings in drug treatment courts and advocate for the client at those hearings where violations of the program are discussed.\textsuperscript{398} In drug courts where the participation of the defense counsel has been historically minimized, the defense bar must agitate and press for inclusion. This continuing involvement with the defendant may require some novel thinking for the attorney.\textsuperscript{399} The defense attorney must become a good listener, be ready to practice conciliation and be adept at managing all of the information flowing from various players in the drug court process.\textsuperscript{400} The extension of the attorney-client relationship is crucial to providing effective representation and achieving a successful outcome resulting in recovery. This model of the problem-solving defense

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\textsuperscript{396} \textit{Contra} Reisig \textit{Supra} note 277
\textsuperscript{397} Freeman-Wilson, \textit{Supra} note 176, at 13.
\textsuperscript{398} \textit{Id}.
\textsuperscript{399} \textit{Id}.
\textsuperscript{400} OFFICE OF THE PUBLIC DEFENDER, MARIN COUNTY CA, PROBLEM SOLVING COURTS AND INFORMATION MANAGEMENT: ARE WE SLEEPING WITH THE ENEMY?, available at http://www.co.marin.ca.us/PD/Main/CADEF01B.cfm (last visited August 15, 2006).}

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attorney is not novel, but rather was the practice for many members of the defense bar long
before either therapeutic jurisprudence or problem-solving courts were institutionalized.401

Post-adjudication programs present somewhat different challenges for the defense
attorney. As in any plea bargain agreement, the protections afforded by the trial process are
waived. Some jurisdictions will seal the record, or enter a judgment of nolle prosequi, which
formally abandons the prosecution, for those defendants who successfully complete
treatment. Counsel and the defendant must always be aware, however, that failure in a post-
plea drug court program results in execution of any suspended sentence. Contrast this to pre-
plea, diversionary programs where the failure of the defendant to comply with treatment
results in the opportunity for a trial. Therefore, defense counsel and the defendant must
analyze all the facts, applicable law and possible defenses and consider the option, and
potential outcome, of a trial before deciding whether to enter a post-plea program.402 The
incentives for defense cooperation with a post-plea drug court are not as attractive as those in
a pre-plea situation but still offer a better alternative than traditional case processing and
placing the client in the revolving door of recidivism. Either the pre- or post-adjudication
type of drug treatment court does not conflict with the duty of diligent representation, nor
advocacy, and does not “trump” other important considerations.403

Defense attorneys who are willing to participate in the drug treatment court process
are overwhelmingly satisfied with the process.404 Ninety-seven percent of defense counsel in
one survey, the only survey available but with a sample size of 48, reported that they were
glad that their jurisdictions offered the option of a drug court and unanimously agreed that

401 Clarke, Supra note 373, at 405.
402 Reisig, Supra note 277, at 221.
403 Hora, Supra note 143, at 1474.
404 NATL. ASSOC. LEGAL AID & DEFENDER ASSOC., INDIGENT DEFENSE, Supra note 381
their clients were as well off in drug court as they would have been had the cases been adjudicated in the traditional manner. Tellingly, nearly 70% of defense attorneys questioned felt that drug treatment courts did not require them to abandon their traditional adversarial duties and 90% reported more job satisfaction when participating in the drug treatment court programs than when assigned to traditional case handling. Although the data are somewhat limited, they demonstrate the reality that when defense counsel is willing to participate, drug treatment court is a positive experience for them and their clients.

2. Prosecution

Participation in drug treatment court is consistent with a prosecutor’s ethical obligations as well. First and foremost, a prosecutor is charged with protection of the public safety. This duty is met by participation in drug treatment court because the prosecutor works to rehabilitate the defendant and thus make the community safe from continued lawlessness by that person. As a member of the drug treatment court team, the prosecutor is in a unique position to assess the participant’s progress in the program and make recommendation that serve the goals of the community. If the participant is having difficulties complying and failing to make sufficient progress towards rehabilitation, the prosecution can advocate for an alternative strategy. The prosecutor may also advance the goal of community safety by recommending that a participant be terminated from the program which would subject the defendant to their previously suspended sentence or allow the defendant to be brought to trial, when it is clear that the client is not amenable to further interventions.

405 NATL. ASSOC. LEGAL AID & DEFENDER ASSOC., INDIGENT DEFENSE, Supra note 381
406 NATL. ASSOC. LEGAL AID & DEFENDER ASSOC., INDIGENT DEFENSE, Supra note 381
408 KEY COMPONENTS, Supra note 48, at Component 2.
One concern of defense attorneys is that defendants may end up in drug court unnecessarily because community pressure to arrest drug offenders results in substandard practices by law enforcement.\(^{409}\) However, ethical obligations serve as a prosecutorial check to limit this type of abuse.\(^{410}\) For example, Model Rule 3.8 states that a “prosecutor in a criminal case shall…refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”\(^{411}\) Prosecutors have a duty to use their own discretion and dismiss weaker cases.\(^{412}\) This obligation is met by the prosecutor working in conjunction with defense counsel to discuss the case, determine eligibility for drug treatment court and to sort out strengths and weaknesses before proceeding.

More importantly, even though the prosecutor is but one member of the team, the prosecution in many jurisdictions is also the gatekeeper to the program and has discretion to determine who is permitted to participate. The prosecutor determines the defendant’s eligibility for a program even in courts where the prosecution is not actively and personally involved throughout the treatment phase.\(^{413}\) Any reservations about a defendant’s entry into the program will be considered by the prosecution before admission to the program. A prosecutor’s ethical obligation to prosecute crime and keep the community safe is not being compromised by collaborating with defense counsel in determining appropriate resolutions for individual defendants provided the disposition serves those ends.

In a pre-plea drug treatment court program, the prosecution may be concerned about the passage of time and the ability to prosecute a case in which evidence and the memories of

\(^{409}\) Cf. Quinn, Supra note 277
\(^{410}\) MODEL RULES 3.8
\(^{411}\) Id.
\(^{413}\) (In the Hayward, CA and Reno NV drug treatment courts, for example, there is no prosecutor that is assigned to the Drug Treatment Court but the district attorney’s office still makes the determination of whether the participant is eligible and gives recommendation to the arraigning judge or agrees to drug treatment court supervision of probation.)
witnesses have gone “stale.” Realistically though, major high-profile cases involving serious crimes or violence are not eligible for drug treatment court programs and no evidence exists to suggest that the availability of the drug treatment court option has changed this practice.\footnote{414} Furthermore, given some defense counsel’s practice of exhausting continuances and stretching out the pre-trial process, prosecutors routinely try cases quite some time after the crime occurred.

VI. RETURN ON INVESTMENT AND OTHER ECONOMIC CONCERNS

An important subject to address is the huge financial burden that is borne by society caused by the ill effects of drug abuse.\footnote{415} The traditional criminal justice approach in dealing with alcohol and other drug addiction is costly to the taxpayer. Incarceration of drug-using offenders costs between $20,000 and $50,000 per person per year depending on the jurisdiction.\footnote{416} The cell used to hold that drug-using offender can cost a state more than $110,000 to construct.\footnote{417} Contrast these figures to the costs of drug treatment which can range from $2,500 for low-intensity community based treatment to $12,000 for high-intensity outpatient treatment by a team of addiction medicine physicians and nurses.\footnote{418} Even residential treatment, required only in rare cases, is less costly than incarcerating the offender.\footnote{419}

\footnote{414} Riley, Supra note 139, at 106. \footnote{415} Office of Nat’l Drug Control Policy, Executive Office of the President, The Economic Costs of Drug Abuse in the United States 1992-1998, 5 (2001). \footnote{416} Facts on Drug Courts, Nat’l Association of Drug Court Professionals (2001). \footnote{417} Id. \footnote{418} Id. \footnote{419} Longshore, Supra note 261
The defendant is not the sole beneficiary of the drug treatment court process. A recent California study estimated that drug courts saved taxpayers $90 million annually. Additionally, the community experiences a reduction in crime with an estimated monetary value of as much as $24,000 per drug court participant due to reduced future court costs and victim impact costs. This value may actually underestimate the financial benefit to society because it does not take into account the ability of the newly sober drug treatment court graduate to work, effectively parent, pay taxes, participate in commerce and perhaps lead a healthier lifestyle that results in savings of future medical costs including the costs of substance-exposed infants. A study of addicted California Medicaid recipients, conducted by the Kaiser Permanente Foundation, found that addicts who underwent outpatient drug treatment reduced their overall medical costs by a third and the costs were truly reduced, not merely shifted from one area of care to another.

In the first year following graduation from drug treatment court, roughly 85% of offenders, measured nationally, will have no re-arrests. Two years after leaving the drug treatment court program, nearly 73% of graduates will not have been re-arrested. The causes of recidivism amongst drug using populations are difficult to determine for a number of reasons. Substance abusers are individuals and will have different arrays of factors that have lead to their involvement with drugs. Individual drugs have different effects on the public health.

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421 U.S. GOV’T ACCOUNTABILITY OFF., ADULT DRUG COURTS REPORT TO CONGRESSIONAL COMMITTEES, 73 (Feb. 2005)
422 Id. at 74.
425 Id. at 30.
human body; some make alterations to brain chemistry at a molecular level while others may be addictive because of their ability to produce extreme sensations of pleasure.

Similarly making comparisons between drug courts is difficult; they are as different as the populations they serve and may have different criteria for eligibility.\footnote{Id. at 7} For example, the larger the population a drug court serves, the more graduates will re-offend.\footnote{Id.} This result can only partially be ascribed to the variations in drug court practice. A large part of any disparity may derive from the fact that large drug courts tend to serve urban populations who have lengthier histories of criminal behavior and substance abuse.\footnote{Id.} This stands in marked contrast to the accusations of detractors that drug courts are successful because they “cherry pick” only the most promising clientele. When looking at smaller sample sizes, at individual drug courts or at the drug courts within a jurisdiction, drug treatment courts tend to have markedly improved recidivism rates as compared to traditional criminal adjudication in the same jurisdiction.\footnote{Belenko, \textit{Supra} note 187}

With their substantial cost savings, described by one study as seven dollars saved for each dollar spent on treatment\footnote{California Dep’t of Alcohol and Drug Programs, \textit{California Drug and Alcohol Treatment Assessment} (CALDATA), 1991-1993. (Nat’l Opinion Research Center, at the Univ. of Chicago & Lewin-VHI, Inc. ICPSR ed. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, 2004).} and high success rates, demonstrated by much lower recidivism, drug treatment courts offer a win-win solution that cannot be ignored.

\textbf{VII. FUTURE DIRECTIONS AND RECOMMENDATIONS}

Even the most successful program can be improved and drug courts are no exception. First and foremost is the need for additional funding. The best programs are unable to work without adequate financial support for treatment programs, education, judges, attorneys and
staff. Federal, state and county governments should exploit the effective rehabilitation and cost efficacy of drug treatment courts by stabilizing funding for these courts. Drug treatment courts should not have to raise their own funds to stay open. Judges who are responsible for the creation, funding and administration of the court may become unacceptably, although understandably, possessive. The drug treatment court component of a criminal justice system should be a regular budget item like any other.

Secondly, although the number of drug treatment courts is growing across the country, exceeding 1600 nationally,\textsuperscript{431} the majority of jurisdictions do not currently provide alcohol or other drug-addicted offenders with this option. In addition, except for driving while impaired (DWI)\textsuperscript{432} and serial inebriate courts,\textsuperscript{433} many problem-solving courts fail to include those crimes primarily related to alcohol, or to include alcoholics, in their program despite the fact that alcohol is perennially the number one drug problem in the United States with annual costs of nearly 180 billion dollars.\textsuperscript{434} This leaves a substantial segment of the addicted population free to continue clogging the criminal justice system, and creating a menace to safe society, by driving under the influence and committing other alcohol-related offenses. These crimes endanger the safety of all Americans.\textsuperscript{435}

The third recommendation involves an increase in joint interdisciplinary education as required by Key Component number nine.\textsuperscript{436} This allows all members of the team to attend a common forum and receive the education necessary to pursue effective participant recovery. Attorneys, judges, community corrections, court managers and treatment providers should all

\begin{footnotes}
\item [431] Huddleston, Supra note 46, at 1.
\item [432] Huddleston, Supra note 46
\item [433] Huddleston, Supra note 46
\item [435] Harrison, Supra note 1
\item [436] KEY COMPONENTS Supra note 48
\end{footnotes}
be given the opportunity to learn from one another’s experience. Participants should be taught from the same materials and given a common vocabulary, a practice that helps prevent future miscommunication. Commonality of experience fosters trust among the members and strengthens the entire team. Distance learning tools and basic primers based on drug treatment court roles should be developed so that the education of new team members can be less dependent on geography and more time efficient. For cash-strapped jurisdictions, on-line or satellite distance learning is more cost effective than sending the whole team to an out-of-town training. We should be implementing new, inexpensive, off-the-shelf technologies, such as podcasts discussing up-to-date research and practices, or chat rooms to discuss sticking points.

Changes must occur in the area of mandatory minimum sentencing and allow judges to exercise their discretion in sentencing. Many of the obstacles to establishing drug treatment courts and critiques about post-plea programs occur in jurisdictions with mandatory minimums. Defense attorneys in particular express concern that they are “walking a tight rope without a net”\textsuperscript{437} when they recommend a client enter a plea in order to take part in a drug treatment court program. In jurisdictions with mandatory minimum sentencing rules, clients who fail out of the drug treatment program are immediately subject to years of incarceration\textsuperscript{438} without the benefit of a trial. The risk of this happening however has been greatly reduced by Supreme Court cases such as \textit{United States v. Booker}\textsuperscript{439} which rendered the Federal sentencing guidelines advisory as opposed to mandatory and State actions like the recent reform of New York’s harsh “Rockefeller” drug sentencing laws.\textsuperscript{440}

\textsuperscript{437} \textit{See generally} Quinn, \textit{Supra} note 277.
\textsuperscript{438} Quinn, \textit{Supra} note 277
\textsuperscript{439} \textit{United States v. Booker}, 543 U.S. 220 (2005)
Judges should be taught to use addiction as a reason to depart from mandatory minimums. If the legislature lacks the political courage to alter mandatory minimum sentencing laws in any given state, those having the power of initiative could change the law through the ballot box, a strategy that has been quite successful in places such as California and Arizona. If all else fails, the solution would be to change post-plea drug treatment court programs to pre-plea diversion models. In this situation, clients failing out of the program would still have the full range of due process protections and the opportunity to go to trial or enter into a plea bargain that could include treatment as a condition of probation.

Some reforms that have been suggested such as the publication of the available sanctions, thus constraining excessive creativity by the judiciary, are already in practice in some drug courts. Matching participants with the best possible treatment program is already incorporated into the drug court model but as critics legitimately point out, there is often a paucity of available programs within a specific jurisdiction. By reducing the necessity for correctional placement, it may be hoped that newly available resources are directed towards amelioration of the root causes of criminality, one of which is the limited number of treatment slots available.

Some in the drug treatment court community have already stated that there must be rigorous, national performance standards and firm guidelines for drug court practice. Measures such as accreditation criteria can ensure that individual drug court programs are

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442 KEY COMPONENTS, Supra note 48
443 Miller, Supra note 444
meeting appropriate standards of professionalism.\textsuperscript{445} An excellent first step is the performance benchmarks established in the Ten Key Components.\textsuperscript{446} Some jurisdictions that assert they have a drug court show no fidelity to the model and tend to confuse not only the critics but also the evaluators. Peppering studies of drug court efficacy with results from courts that do not adhere to standardized practices makes evaluation difficult at best and provides ammunition to critics who can then point to a given “drug court” and say that here is one that does not work and so disproves the model. Standardization and certification would yield improvement on two fronts: to demonstrate the efficacy of drug courts and therefore bolster the credibility of drug courts in the broader community and to ensure the eligible defendants are being appropriately served in a culturally competent manner. The drug treatment court community should not dismiss criticisms as unfounded or completely without merit. The response of the drug court movement must be an increased acceptance of standards and guidelines. The buoyant and somewhat evangelical phase of the movement must be gracefully retired and replaced with a willingness to continually seek improvement while always paying close attention to due process and traditions of ethical jurisprudence.

\textbf{VIII. CONCLUSION}

Concerns are always raised when a program alters the traditional components of the criminal justice system. But, rather than adhere blindly to tradition, especially when it is shown to be ineffective, court systems should strive to improve results, even though that may require some flexibility. Organizations such as the The Conference of Chief Justices have clearly placed its imprimatur on drug treatment courts. The judiciary of the 50 states should take note of their leadership and support problem-solving courts. The National Center for

\textsuperscript{445} Id.

\textsuperscript{446} \textsc{Key Components}, \textit{Supra} note 48
State Courts has published the trial court performance standards and measurement system, a “best practices” guideline that may improve procedures for not only drug courts but also for handling traditional criminal cases using a problem-solving lens.\textsuperscript{447} In mid-2006, the National Institute of Corrections, a division of the United States Department of Justice, published “Getting it Right,”\textsuperscript{448} a primer on collaborative problem solving for criminal justice that sets forth a model for criminal court judges and staff to incorporate problem-solving modalities into their existing practice.

The entrenched conservatism of the legal community is a difficult hurdle to clear. Drug treatment courts are an excellent example of developing a successful deviation from established practice. A review of the literature on drug courts reveals that there is a substantial and profound disconnection between the realities of the criminal justice system and the perceptions of that system by authors who themselves have never participated in a drug treatment court or who criticize from the security of the ivory tower of academia. Again and again the drug treatment court is described as abrogating or ignoring the classical adversarial conflict between the prosecution and defense. The drug treatment court judge is derided as presiding over a circus while “traditional” judges are portrayed as neutral and austere. The realities of the criminal justice system bear very little resemblance to the picture painted by some authors. Most cases, over 95% nationally and over 99% in some jurisdictions, are closed by plea bargain, not trial. Judges preside over calendars that resemble not circuses of jugglers and clowns but rather reflect the mayhem of the Roman circus. The average large jurisdiction criminal case is resolved in a crowded courtroom, full


of the rumble of voices, the constant entrance and departure of attorneys and the ceaseless movements of bailiffs and prisoners. A judge hearing minor drug possession cases might see forty or fifty defendants before noon, five days a week, every week. The judge is often reduced to the status of a functionary because of the mandatory guidelines for bail, sentencing and acceptance of pleas that have been imposed by the legislature and negotiated by the attorneys. Some court systems have functionally dispensed with due process, the right to counsel and the presumption of innocence entirely. Drug treatment courts do not seek to modify the fabled and pristine criminal justice systems of theoretical practice; that system is working perfectly. The system that real clients experience is far from the antiseptic abstraction and it is this dysfunctional system that drove the innovators of the drug court movement. Drug courts were created by sitting criminal court judges overwhelmed, and somewhat appalled, by the real world they saw before them each day. The distance between abstract conceptualizations of the criminal justice system and the reality can be effectively bridged by law school clinical programs. As suggested by the National Center on State Courts Futures Project, law schools can use clinical practice to produce attorneys already versed in the lexicon of therapeutic jurisprudence and problem-solving lawyering; even those students who do not pursue careers in criminal law may find aspects of the new disciplines to be relevant and applicable to their practice.

Critics and advocates of drug treatment courts should always keep in mind that no court is a panacea for every societal ill. The legislature cannot pass a set of laws to correct

449 NATL. ASSOC. LEGAL AID & DEFENDER ASSOC., EVALUATION OF THE PUBLIC DEFENDER OFFICE: CLARK COUNTY, NEVADA (March 2003)
452Wexler, Supra note 453, at 767 (discussing the application of therapeutic jurisprudence to appellate practice.)
every problem, the executive cannot issue a silver bullet order to right every imbalance and no single judicial program will work in isolation. If society truly wishes to ameliorate the impact of alcohol and other drugs, and the peripheral ripples that substance abuse creates, then drug treatment courts should be one aspect of an integrated approach to reducing crime. Some problems that contribute to substance abuse are beyond the reach of any one branch of government. A drug treatment court cannot, for example, eliminate poverty in a community. On the other hand, a drug treatment court can mandate that participants obtain a GED while also clearing the way for entry into the job market without the social stigma of a felony conviction thus providing a pathway out of poverty. A drug treatment court cannot make every person a model parent, but the court can ensure that one of the major causes of poor parenting has been reduced or eliminated; good parenting pays dividends unavailable to courts that rely on incarceration. A drug treatment court cannot prevent the manufacture or importation of illegal drugs but a reduction in demand means that the increase in risk created by supply side interdiction will be more effective in making drug trafficking unappealing as a business. When viewed as one front in an integrative approach, drug treatment courts are an invaluable and effective tool with which society can address the previously intractable.

Not only do drug treatment courts introduce new concepts and practices to the legal community, they do so while protecting the defendant’s procedural and substantive rights. The right to refuse treatment is intact because drug treatment court participation is voluntary in nature. Participants are not forced to leap blindly but are instead given the option of the traditional and time-honored criminal justice system or seeking treatment for their addiction. Although judges may be given significant discretion as the head of the drug treatment court team, there are adequate safeguards in place to prevent abuses of power and deviations from
therapeutic practice. Attorneys practicing in drug treatment courts are able to broaden the options available to their clients while offering improved safety and economy to the community. As long as drug treatment courts are adequately funded they will continue to serve the ultimate goals of the criminal justice system by taking in intransigent and recidivistic offenders and returning productive and sober members of society.