

REHABILITATING DRUG COURTS: ETHICS, HISTORY & PUBLIC POLICY CAPSTONE PROJECT

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Rehabilitating Drug Courts: Who Should Go?

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Abstract

Better triage would help drug courts reduce recidivism and increase judicial efficiency while not impeding due process. We believe introducing clinicians into the drug court screening process will improve that system on these three points by ensuring the right offenders enter the drug court, and that those individuals commit to the process with a fair understanding of what it will entail. This paper will focus on the experiences of addicted persons entering the criminal justice system.

Introduction

Drug court is an institution within the criminal justice system responsible for handling cases involving drug-abusing offenders. Drug courts are innovative because they provide individuals facing criminal charges for drug use and possession an opportunity to enter rehabilitative treatment in lieu of incarceration. Drug courts are “designed to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing offenders by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment, mandatory periodic drug testing, and the use of appropriate sanctions and other rehabilitation services.”¹ Since the first drug court emerged in 1989, they have been inundated with praise and reports of success. By 2010, there were drug courts in 2,549 jurisdictions nation wide, and today they continue spread throughout America. However, despite its successes, this relatively new court system has a number of flaws that threaten the integrity of drug court itself, the rights of the defendant, and the criminal justice system as a whole. In particular, the drug courts screening process by which the court admits clients is plagued by a number of disconcerting defects. This paper examines the history of drug court, the nature of its flaws, and ultimately makes recommendations as to how drug courts can mitigate these problems going forward.

Before we delve into a discussion of drug courts, it is critical for the reader to understand the historical precedents to the drug court movement. Thus, Part I of this paper is a history of the special court precursors to drug court. Part II provides a brief summary of drug policy in America followed by an analysis of the rise of the first drug court in Dade County, Florida. Part III of the paper delves into the specific screening and workflow processes that characterize drug courts; this section is particularly important because the majority of the flaws in drug court that we have identified occur during the screening process. Part IV discusses the special status of drug addicts, and concludes that addicts deserve to be treated in a special court because of the unique nature and characteristics of drug addiction. Part V uses the conclusion from Part IV to formulate a set of goals that drug courts should be able to achieve. Part VI discusses the flaws inherent in the drug court system, and provides an analysis of why these flaws in particular impede the achievement of the goals set forth in Part V. Part VII provides a list of recommendations for drug courts, and Part VIII concludes.

Special Courts

Special courts are created to meet specific needs that are unaddressed by traditional criminal courts. The notion of instituting special courts solely designed to target special populations of offenders did not originate with the drug court system. There are several special courts designed for this purpose. Two of these are the prostitution court and the

¹ “Drug Courts: Overview of Growth, Characteristics, and Results,” Government Accountability Office, 1997; at National Criminal Justice Reference Service. accessed 01 Dec. 2010. <<http://www.ncjrs.gov/spotlight/drugcourts/summary.html>>.

juvenile court, which incorporate innovations into their procedures which allow for special treatment of specific populations of defenders. Looking into the rise of these two special courts will give us an insight into how and why special courts come into being, which will in turn inform our discussion of the rise of drug courts as a special criminal court.

Because special courts give tailored attention to certain categories of defendants and use resources from the criminal justice system, it is necessary that there be compelling justifications supporting their creation. While special courts do differ from the regular court system in a number of ways, they must maintain the protection of the due process rights of the individual. Although special courts help specific categories of defendants, they must not put an additional burden on the justice system or take away the rights of the other defendants who are not admitted into special courts. Compelling justifications for the creation of a special court will not only stay within these guidelines, but they will also contribute to the justice system by meeting needs unaddressed by traditional criminal courts.

Two Special Courts

Prostitution Court

One of the first institutions to address the issue of prostitution was the Women's Court in New York City. This court was created in 1910 and its goals were "to rid the city of prostitution, to prevent the spread of venereal disease, or to rehabilitate women coming before the Court."² Since prostitution was viewed as a vice and disease-transmitter, early prostitution courts focused on suppressing the prostitution market in order to reduce these harms to society.³

Modern prostitution courts have maintained these two goals of suppressing the market and reducing societal harm, but they have also put emphasis on a third goal of rehabilitating prostitutes and reintegrating them into society. Most prostitutes do not choose prostitution because they see it as a safe and enjoyable option but rather they choose it because it is their best option or because they want to finance addictions. The prostitution court that began in Washoe County, Nevada, was created when Judge Jim Van Winkle saw a series of repeat offenders who kept returning to prostitution in order to maintain other addictions, such as drug addiction. One prostitute from Washoe County Jail, Tiffany Thomas, described prostitution as "everything from a place to stay at night, drugs, money, food, basically everything."⁴ Another prostitute, Chelsie Sutton, claimed that many prostitutes "are addicted to drugs and that's the only reason that they are [prostituting themselves] in the first place."⁵ Judge Van Winkle saw the prostitution court as a way to propel prostitutes towards safer jobs in the licit market and stop the return of prostitutes to prostitution.⁶

A central justification for prostitution courts is founded on the claim that prostitutes are a special population of defendant whose circumstances merit an approach that emphasizes social reintegration and treatment rather than an approach that merely focuses on punishment.

² Mae C. Quinn, "Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the 'Problem' of Prostitution with Specialized Criminal Courts," *Fordham Urban Law Journal* 33 (2006): 665, 666, 686, accessed October 23, 2010, { HYPERLINK "http://papers.ssrn.com/sol3/papers.cfm?abstract_id=817464" }.

³ Ibid.

⁴ Terri Russell, "Court Created for Local Prostitutes," KOLOTV.COM, KOLO TV, accessed October 23, 2010, { HYPERLINK "http://www.kolotv.com/home/headlines/80666932.html" }.

⁵ Ibid.

⁶ Ibid.

The prostitute is a special kind of defendant in that she is employed in an illicit market which does not have the employee laws and protections that jobs in the legal market do. Also, since a women's choice to enter prostitution is typically influenced by various internal and external pressures—such as her lack of viable options or her desire to finance a drug addiction—prostitution courts take this into account as they mete out treatment rather than just punishing prostitutes. Prostitution courts

[...] balance punitive and rehabilitative goals to address root problems that defendants face. Proponents of problem-solving justice focus on addressing underlying causes of crime, often in collaboration with community stakeholders, to reduce recidivism.⁷

Focus on treating the “underlying causes of crime”⁸ can then in turn accomplish the other two goals of suppressing the prostitution market and reducing harm to society. Viewing prostitutes as a special category of defendant justifies the rehabilitative treatment that is given in prostitution courts. And since the judge metes out tailored treatment rather than merely executing punishment, creating a special court for prostitutes and structuring it to meet these goals was a compelling justification for the creation of prostitution courts as a special court.

Juvenile Court

The first juvenile court began on July 1, 1899, in Chicago, Illinois. The creation of the court—and the reasoning leading up to its creation—“symbolized a new attitude towards young people in the justice system, seeing them as children in need of help rather than as criminals to be punished.”⁹ When it came into being, the juvenile court redefined “the delinquent as non-criminal”¹⁰ because it viewed children to be fundamentally different from adults in their ability to make rationally sound decisions. The justification for the creation of the juvenile court as necessary to target a specific population has been confirmed by recent research on brain development. Parts of the brain that are crucial to rational decision-making are underdeveloped in people under the age of 20. Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania affirms the motives and decisions of the early juvenile court proponents. He explains,

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an underdeveloped brain.^{11 12}

⁷ Corey Shdaimah, “Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do?” *University of Maryland Law Journal: Race, Gender & Class* 10 (2010): 90, accessed October 24, 2010, { HYPERLINK "<http://ssrn.com/abstract=1666904>" }.

⁸ *Ibid.*

⁹ Elizabeth J. Clapp, “The Chicago Juvenile Court Movement in the 1890s,” on file with the University of Leicester Centre for Urban History (1995), accessed November 22, 2010, { HYPERLINK "<http://www.globusz.com/ebooks/PathologicalLying1/juvenile.htm>" }.

¹⁰ Paul Colomy and Martin Kretzmann, “Projects and Institution Building: Judge Ben B. Lindsey and the Juvenile Court Movement,” *Social Problems* 42, no. 2 (1995): 198, accessed October 23, 2010, {HYPERLINK "<http://www.jstor.org/stable/3096901>" \t "_blank" }.

¹¹ Ruben C. Gur, Declaration of Ruben C. Gur., PhD, *Patterson v. Texas*. Petition for Writ of Certiorari to US Supreme Court, J. Gary Hart, Counsel, accessed November 22, 2010, { HYPERLINK "<http://www.abanet.org/crimjust/juvjus/supreme%20court%20petition.pdf>" }.

¹² Juvenile Justice Center, “Adolescence, Brain Development and Legal Culpability,” Juvenile Justice Center, American Bar Association, accessed November 22, 2010, { HYPERLINK "<http://www.abanet.org/crimjust/juvjus/Adolescence.pdf>" }.

Because young people have less ability to make rational decisions than adults, they are seen as less legally culpable and viewed as a special category of defendants. Because of the judge's new role in approaching the defendant as lacking the maturity of the average adult, the juvenile court's special structure and focus on rehabilitation and reintegration is justified.

As the prostitution court and the juvenile court did, special courts come into being to meet certain needs that are not being met in the traditional justice system. A history of drug policy will set the stage for an account of how drug courts came into being by examining the evolution of public opinion regarding drugs, as well as the various government responses to the problems of drug addiction and drug-related crimes.

The Origins of Drug Court

Brief History of U.S. Drug Policy

Pre-Harrison

In the United States, the criminal justice field has been battling with drugs since the first federal attempt to “control the nonmedical sale and use of opiates and cocaine”¹³ in the Harrison Narcotics Act of 1914.¹⁴ Harrison reflected the changing attitudes of the medical profession towards drugs and itself.¹⁵ With increased professionalization, doctors began to see the unregulated direct sale to the general public of patent medicines with high amounts of alcohol, morphine, and later cocaine as problematic. While some of the sellers had little or no regard to the prospect of addiction on the part of their consumers,¹⁶ others were concerned about the effect of their products. Soon addiction was seen as a public health problem, and the treatments formerly used to cure disease or lessen painful symptoms had become the enemy.¹⁷ Medicinal opiates and cocaine were easily accessible, with both laypeople and doctors balancing a drug's possible toxicity and addiction with the potential positive effects of therapeutic use such as pain relief.

Under the Harrison Narcotics Act it was decided that “some drugs [...] were simply too dangerous to be placed in the hands of the general public,”¹⁸ and “drug use without the involvement of a physician was de facto illegitimate”.¹⁹ Recreational drug use was outlawed. After the Harrison Act, states could outlaw “illegitimate” and unprescribed drug use, while the federal government gained new powers to proscribe unmonitored drug use as potentially dangerous and perhaps immoral. Addicts became instant criminals in the justice system until the 1962 *Robinson* ruling. The importance of the *Robinson* ruling will be covered shortly.

¹³ Joseph F. Spillane. “The Road to the Harrison Narcotics Act: Drugs and Their Control, 1875-1918”. In Federal Drug Control: The Evolution of Policy and Practice, ed. Jonathon Erlen & Joseph Spillane. New York: Pharmaceutical Products Press: 1

¹⁴ Harrison Narcotics Act, PL 63-223, 38 Stat. 785; amended February 24, 1919, by PL 65-254, 40 Stat: 1057, 1130.

¹⁵ Spillane, “The Road to Harrison,” 3. In 1884 cocaine was one of the drugs that expanding incorporated drug firms provided to physicians.

¹⁶ Ibid, 4.

¹⁷ Ibid, 5.

¹⁸ Spillane. “The Road to the Harrison Narcotics Act, 7.

¹⁹ Ibid, 6.

Post-Harrison

After Harrison, state government agencies often took responsibility for the addicts it drew into the criminal justice system while the federal government focused on incarcerating prominent drug distributors.²⁰ In 1931 the National Commission of Law Observance and Enforcement wrote that the Harrison Act's drug prohibition "had created sophisticated systems of manufacture and distribution that posed enormous challenges for law enforcement."²¹

Three years earlier, Stephen Porter had brought a bill before Congress to create "narcotic farms."²² These farms served as both hospitals and prisons. The idea was to provide addicts with a treatment environment whose routines would mold them into better adjusted citizens. Yet this effort towards more humane treatment failed. For the narcotics farms, pessimism and bureaucracy came to prevail. Laws became more stringent; they instituted mandatory minimums and functionally dismantled individualized sentencing.

By the 1950s illegal narcotic distribution was an organized criminal enterprise. Enforcement became harsher as the traffic increased: the number of yearly convictions under the Harrison Act had increased by more than 400% from 106 in 1915 to 4,962 in 1930.²³ Whether drug use was on the rise or law enforcement was catching a larger percentage of users was irrelevant: the criminal justice system was becoming quickly overwhelmed. Legislatures reacted by piling on penalties and arming federal narcotics agents.²⁴ In 1956, juries had the "option of the death penalty for the sale of drugs to minors."²⁵

A New World With Robinson

Drug control became a major issue for the United States again in the 1960s. At a time when the medical establishment favored the disease model of addiction, federal narcotics laws were tough on unsanctioned drug use and "would continue to ignore the medical perspective and would become even more severe than before."²⁶ These laws assumed that controlling addiction only meant controlling drug traffic, and that users and dealers all were alike and should be punished alike.

In *Robinson v. California* (1962), the Supreme Court ruled "that drug addiction was not in itself a crime."²⁷ A person could be punished for using drugs but not for being an addict. This ruling opened the door for doctors to propagate new disease models in the criminal justice system and participate in drug policy more fully than any time since the Harrison act, when doctors had participated to "reinforce their claims to professional status."²⁸ One such model was of addiction as a "biopsychosocial disease" requiring treatment rather than punishment.²⁹ A biopsychosocial disease is one which effects and is influenced by a person's biology, psychology and social interactions. Judicial support and the emergence of new models of addiction both played a major role in preparing the way for drug courts, which are able to simultaneously or subsequently treat and punish addicted offenders.

²⁰ Joseph F. Spillane. "Building a Drug Control Regime, 1919-1930," In *Federal Drug Control: The Evolution of Policy and Practice*, ed. Jonathon Erlen & Joseph Spillane. New York: Pharmaceutical Products Press: 43.

²¹ *Ibid.*, 49.

²² Caroline Acker, *Creating the American Junkie: Addiction Research in the Classic Era of Narcotic Control*. Baltimore, Maryland: Johns Hopkins University press (2002): 157-8.

²³ Spillane. "Building a Drug Control Regime," 44.

²⁴ James L. Nolan, Jr. *Reinventing Justice: The American Drug Court Movement*. Princeton University Press, 34.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*, 35.

²⁸ Spillane, "The Road to the Harrison Narcotics Act," 10.

²⁹ Hora et al, quoted in Nolan, 50.

With the *Robinson* decision, the criminal justice system was left to enforce drug laws which heaped culpability on the heads of addicts while precedent prohibited the courts from punishing addiction. Trying to stem the flood, Congress implemented programs like the Treatment Alternatives to Street Crime (TASC). TASC provided judges the option to sentence drug users to treatment rather than prison.³⁰ This system still involved the normal judicial process to punish offenders but also gave them access to treatment. It continues in parallel and in some cases instead of drug courts. As a modification of the criminal justice system to help addicts, paved the way for therapeutic justice and drug courts in years to come.

Towards a New System

While the Drug Courts Model is considered by many a legal innovation, it doesn't mark the first interaction between the justice system and the treatment system. While previous attempts date back to the early 1900s, the most important link can be traced back to 1972 with the rise of the TASC (Treatment Alternative for Street Crime) Program.³¹

The original TASC model was structured around three main goals: 1) reducing drug-related criminal activity; 2) transferring drug offenders from a penal system to therapeutic one; 3) diverting drug criminals from jails to reduce the negative effects of drug behavioral learning in prison.³² The legal theory that composed TASC stated that intervention for first time offenders was necessary to break the cycle of crime and addiction early on the system. However, the program quickly expanded to include a wider range of drug offenders in attempt to link the justice and treatment systems.³³

Upon apprehension, drug offenders who qualified for TASC were offered the option to be referred to an external treatment facility where, upon successful completion of the program, the offenders are diverted back to court that rewards them. Rewards came usually in the form of charges dismissal or shorter sentences.³⁴

While the TASC program achieved moderate popularity and is currently operating in 50 states, many critics argue that its success is limited.³⁵ It encountered many internal problems that prevented it from achieving perfect harmony when combining the therapy with justice. The biggest overarching flaw in the TASC model was its outsourcing treatment.³⁶ Since TASC program worked merely as an intermediate between the justice and treatment systems, it encountered many outsourcing-related problems.³⁷

One of the biggest problems associated with outsourcing was the down time between arresting an offender and referring them to the treatment program. This gap had negative effect on the treatment and its success. Another problem in outsourcing was the lack of communications between the offenders and members of the legal system.³⁸ Most of the communications occurred between treatment specialists and drug offenders, which displaced the judge or the legal prosecutor out of touch with the offenders. Finally, outsourcing also led

³⁰ Nolan, 36.

³¹ Doris L. MacKenzie, *What Works in Corrections: Reducing the Criminal Activities of Offenders and Delinquents*. New York: Cambridge UP, (2006): 224-225.

³² Inciardi, J. A., & McBride, D.C.(1991), *Treatment alternatives to street crime: History, experiences, and issues*.

³³ Morgan, J. (1992). *Treatment alternatives to street crime*. State ADM Reports no. 15 (June), Intergovernmental Health Policy Project. Washington, DC: George Washington University.

³⁴ Nolan, 36.

³⁵ MacKenzie, 225.

³⁶ *Ibid*, 224-225.

³⁷ Nolan, 36.

³⁸ MacKenzie, 225.

treatment officials to conceal discouraged behavior in fear out denying treatment options to offenders.

Although many inherited problems existed in the TASC program that inevitably surfaced through times, TASC managed to show that the most effective way to approach drug offenders is through a marriage between the justice and treatment systems.³⁹ TASC may or may not have elucidated clearly that attempts to address the addiction problem without inserting a therapeutic element are deemed to fail.

Miami-Dade County and Judge Herbert Klein

In the 1980s, Miami had a serious cocaine problem. Drug traffickers from South America dropped cocaine on the outskirts of the city from small prop planes in order to avoid arrest.⁴⁰ As this cheap, highly addictive drug flooded Miami's streets, the number of felony drug arrests rose dramatically. Soon, the number of cocaine offenders increased to such a degree that Miami Dade County's courts and jails became overwhelmed.⁴¹ Janet Reno, who was Dade County's prosecuting attorney in 1989, recalled searching urgently for a new strategy to deal with drug addicts.⁴² Judge Gerald T. Wetherington, the chief judge for the county in the late 1980s, explained that "it became very clear in the latter part of the 1980s that the drug problem in Dade County had become epidemic, and our efforts to deal with it [...] were fragmented."⁴³ Dade County officials recognized higher levels of cocaine use as the source of overcrowding in the criminal justice system, and they started attempting to develop solutions to the problem.

Initially, Dade County officials responded to the overcrowding by "quickly arraigning drug offenders, setting low bail bonds, and rapidly releasing those arrested."⁴⁴ However, the consequences of these initial measures proved to be unacceptable; officers began noticing offenders on the street whom they had arrested and detained hours earlier.⁴⁵ With their first attempt ending in failure, Dade County officials needed to find another practical solution to overcrowding.

In order to explore alternative responses to overcrowding, the Chief Justice of the Florida Supreme Court, Parker Lee McDonald, asked Associate Chief Judge Herbert Klein to examine the current state of Dade County's judiciary and to propose a solution that could relieve the stress on the criminal justice system.⁴⁶ Judge Klein's study involved a comprehensive examination of Dade County's criminal justice population and a comparison of existing treatment methods for drug offenders.⁴⁷ In a presentation to the Florida Supreme court in 1989, Judge Klein recommended the "development of a treatment program using predominately outpatient services which could effectively and affordably provide care for large numbers of people."⁴⁸ Judge Klein's recommendation would ultimately lead to the creation of the first drug court, which was formed in Dade County in 1989.

³⁹ Nolan, 37.

⁴⁰ Mitchell B. Mackinem, and Paul C. Higgins. *Drug Court: Constructing the Moral Identity of Drug Offenders*. Springfield, IL: C.C. Thomas (2008): 15.

⁴¹ Ibid.

⁴² Lonny Shavelson. *Hooked: Five Addicts Challenge Our Misguided Drug Rehab System*. New York: New (2001): 229

⁴³ Ibid.

⁴⁴ Mackinem, 15.

⁴⁵ Ibid.

⁴⁶ McKenna, Brian, and Michael Smith. "A Harm Reduction Approach to Depenalization of Drug Crime via Community Based Outpatient Treatment." *Psychology and Criminal Justice: International Review of Theory and Practice*. By Janos Boros, Ivan Munnich, and Marton Szegedi. Berlin: De Gruyter, 1998. 301-10; 302.

⁴⁷ Ibid.

⁴⁸ Ibid.

Judge Klein was able to conclude from his examination of existing treatment methods for drug addicts that traditional in-patient hospital treatment and long term private outpatient treatment were prohibitively expensive.⁴⁹ At the time of Judge Klein's report, there were "less than 1,500 treatment slots available for those patients who could not afford private treatment, yet the majority of the individuals who had been arrested fell into that category."⁵⁰ We do not have the data on how many individuals arrested could not afford private treatment, but we can justifiably assume that it was significantly higher than 1,500. Additionally, Klein found that "traditional legal processing would be ineffective for holding back the floodwaters of drug offenses and offenders."⁵¹ Judge Klein also discovered that drug treatment was effective, but addicts tended to drop out of treatment programs at a high rate, thus reducing the overall effectiveness of rehabilitation. Judge Klein concluded that "if drug-using offenders could be coerced to become drug treatment clients, then offenders and the city's intolerable drugs and crime problem may change."⁵² Judge Klein's report and recommendations became the foundational model for the first drug court.

The National Institute of Justice reported that in drug court's first four years from 1989-1993, approximately 4,500 offenders entered the Dade County Drug Court.⁵³ As compared to similar drug offenders who did not enter drug court, the Crime and Justice Research Institute found that drug court clients had "fewer cases dropped, lower incarceration rates, less frequent arrests, and longer median times to re-arrest."⁵⁴ Recidivism rates a year after exiting the criminal justice system were also found to be lower for drug court clients.⁵⁵ The Dade County drug court was generally perceived to be a success, and thus other courts began examining the possibility of implementing drug courts in their jurisdiction.

The decline of TASC as a practical solution to the addiction problem and the increasing number of drug offenders generated by the War on Drugs paved the way for the rise of drug courts. In 1995 there were 75 drug courts operational in the USA and by 1998 the number grew to 347. Within five years the number tripled to 1,183 existing drug courts in USA.

Currently all 50 states have working drug courts. There are currently about 120,000 people treated annually in drug courts, though this is only a small percentage of those who could qualify. There are currently more than 2,400 drug courts operating throughout the United States and the number is growing.

While the exact practices and layout of drug courts differed from one another, the main components were shared across most of them. To ensure this harmony is maintained with the growth of drug courts all over the country, the National Association of Drug Court Professionals published *Defining Drug Courts: The Key Components* in 1997. The ten components that were identified are:

- a) Drug courts integrate alcohol and other drug treatment services with justice system case processing;
- b) Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights;
- c) Eligible participants are identified early and promptly placed in the drug court program;

49 Ibid.

50 Ibid.

51 Mackinem, 15.

52 Ibid.

53 Boros, Münnich, and Szegedi, 305.

54 Ibid.

55 Ibid.

- d) Drug courts provide access to a continuum of alcohol, drug and other related treatment and rehabilitation services;
- e) Abstinence is monitored by frequent alcohol and other drug testing;
- f) A coordinated strategy governs drug court responses to participants compliance;
- g) Ongoing judicial interaction with each drug court participant is essential;
- h) Monitoring and evaluation measure the achievement of program goals and gauge effectiveness;
- i) Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations;
- j) Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness.⁵⁶

What these key components do not address is the question which most interests us: how could modifying the screening process improve drug courts' performance? What follows is an overview of how that screening process currently functions.

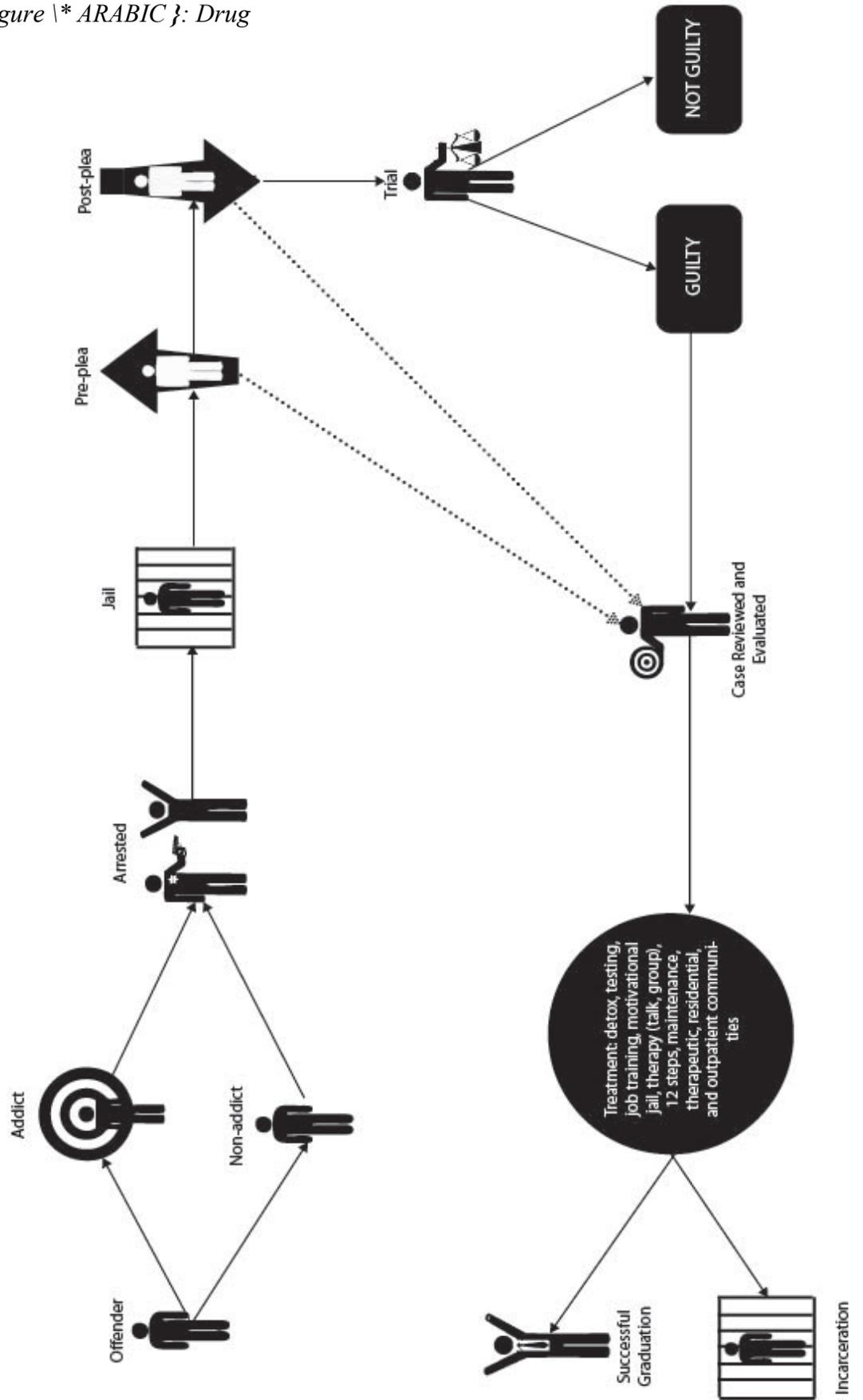
Drug Court Workflow

Drug Court Screening Process

A coherent understanding of how the drug court system screening process operates is integral to a proper analysis of drug courts as a whole. There is not one standard protocol for how drug court professionals must determine the legal and clinical eligibility of offenders for drug courts, but there do exist several documents from the U.S. Department of Justice and other national research and policy institutes that lay forth related guidelines. These long-standing expectations and principles inform the structural planning of many if not all drug courts across the country. However, it is important to emphasize that different states and counties adopt slightly distinct screening methods relative to local viewpoints and/or availability of resources. Although it is not in the scope of this paper to detail the various screening processes of every drug court in the country, it is possible to synthesize the most common procedures. What follows is a generalized screening process breakdown, produced out of a careful averaging of several customary methods, along with the above-mentioned governmental and academic guidelines (see Figure 1).

⁵⁶ Miller, Eric J. "Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism." *Ohio State Law Journal*, Vol. 65 (2004):1488.

Figure { SEQ Figure * ARABIC } : Drug Court Workflow



Step 1: Review of New Jail Admission by Prosecutors

According to the U.S. Justice's revised "Defining Drug Courts: The Key Components" document from 2004, the third key component in the drug court system is that "eligible participants are identified early and promptly placed in the drug court program."⁵⁷ In order to accomplish this goal, drug court professionals attempt to pinpoint potential drug court clients from the pool of recently arrested individuals as soon as possible. The prosecuting attorney is the primary actor charged with determining the initial eligibility of offenders and is thus considered by many to be the gatekeeper of the drug court system.⁵⁸ When reviewing the new arrest records, prosecutors consider a number of basic criteria in determining who may or may not merit the option of drug court. The largest red flag that almost certainly ensures that offenders will not be offered the path of drug court is violent crime. According to Professor Roger Peters and Elizabeth Peyton, Executive Director of Treatment Accountability for Safer Communities (TASC), drug courts automatically become ineligible for funding through the U.S. Department of Justice if they admit violent offenders.⁵⁹ Because drug courts are dependent on funding to survive, coupled with the fact that violent offenders are generally conceived of as either undeserving of or disruptive to community treatment, violent offenders are almost never considered for drug court.⁶⁰ Additionally, prosecutors tend to dismiss offenders with severe mental health disorders or infectious diseases.³ Beyond these main considerations, prosecutors gather information about the crime committed, the criminal history of the offender, and the past behavior of the offender in the criminal justice system (e.g., court appearances, bail records, etc). If an offender has committed crimes related to drug use or abuse, either currently or in the past, and has not shown signs of violence or psychosis in the context of the criminal justice system, they are generally deemed eligible for further review for drug courts.⁶¹ Less individual-centered than later steps, this initial part of the screening process is primarily meant to weed out drug offenders who are, under the general criteria, unacceptable candidates for drug court.

Step 2: First Discussion With the Offender

One of the founding features of the drug court system is that the standard actors in the criminal justice system – prosecutors, defense attorneys, and judges – must act in chorus to aid official and potential drug court clients. As part of this task, the relationship these professionals typically have with one another must be interestingly remolded to the point where traditionally adversarial or impartial individuals must work together to support drug offenders through the drug court system. In adherence to this philosophy of drug courts, the prosecuting attorney shares his/her initial screening findings with the defense attorney, sometimes working with the defense attorney to ensure that the proper population of drug offenders has made it past the first eligibility checkpoint. Defense attorneys then approach their drug-court-potential clients and explain the option of drug courts to them. At this point, defense attorneys are often required to explain to their clients that they will have to relinquish many rights upon entering drug court, fully committing themselves to specific treatment

⁵⁷ National Association of Drug Court Professionals, 5.

⁵⁸ Ibid, 22.

⁵⁹ Peters, Roger H., and Elizabeth Peyton, "Guideline for Drug Courts on Screening and Assessment." American University, Justice Programs Office (1998): 9.

⁶⁰ Hardin, Carolyn, and Jeffrey N. Kushner, "Quality Improvement for Drug Courts: Evidence-Based Practices." National Drug Court Institute (2008): 6.

⁶¹ Peters, 10.

programs. Additionally, defense attorneys explain the unique nature of the drug court environment, highlighting the fact that every actor in the drug court process exists, at least ostensibly, to help guide clients to a life that is ideally free from addiction and recidivism.⁶²

Depending on the structure of specific drug courts, this initial conversation may take place either pre-plea or post-plea. Considering the “promptly placed” language in the Key Components document, many drug courts attempt to implement a pre-plea system. The original drug court in Dade County has a pure pre-plea program, with offenders usually entering drug court within five days of their arrest. Other drug courts, especially those with more limited resources, may take longer to move offenders into treatment programs. What is most common, however, is that defense attorneys craft a combination between pre-plea/post-plea and post-adjudication programs, tailoring the sentencing agreements to each client individually. Regardless of the various mixtures of plea programs, the drug court system usually offers to dismiss or else greatly reduce the charges against offenders if they successfully graduate from drug court.⁶³ However, if drug court clients fail to complete their treatment, they generally receive termination sentences that “outstrip standard pleas.” It is the duty of the defense attorney to adequately explain this situation to potential drug court clients. Typically, once given the option to be further screened for drug court, most drug offenders decide to waive certain rights and submit to other evaluative procedures.⁶⁴

Step 3: Clinical Screening Interview

Once an offender agrees to consider the drug court option, he/she is interviewed by the prosecutor, pre-trial/post-trial services, TASC, or other drug court professionals or criminal justice staff, depending upon the resources of a particular drug court.⁶⁵ This clinical interview is not often performed by a clinician devoted specifically to diagnosing addicts and evaluating drug offenders, but generally by a member of the court system who has received specific training in “substance abuse, interviewing, and counseling” from Single State Agencies or local universities. Once members of the drug court system have been adequately trained, they often train their own staff from then on.⁶⁶ The interview with the drug offender ostensibly serves to determine 1) if he/she has a drug addiction problem 2) if he/she has the motivation or capability to benefit from treatment. The primary components the interviewer seeks to address are:

- symptoms of alcohol and drug abuse/dependence
- patterns of recent and current substance abuse
- signs and symptoms of major mental health disorders previously missed (e.g., depression, bipolar disorder, schizophrenia)
- suicide risk
- other motivational and health factors that may affect involvement in treatment¹⁰

In order to properly evaluate these components of an offender’s history and behavior, the interviewer relies on a combination of trained observation, drug tests, and standard, short, written substance abuse screening tests such as the Addiction Severity Index (ASI) or the Substance Abuse Subtle Screening Inventory (SASSI).⁶⁷ By examining the behavior and

⁶² National Association of Drug Court Professionals, 3-4.

⁶³ Frequently Asked Questions Series, “Preplea vs. Postplea Drug Courts” BJA Drug Court Clearinghouse. School of Public Affairs, American University: (2003): 1-2.

⁶⁴ Bowers, Josh, “Contraindicated Drug Courts.” Chicago 55 (2007): 8, 25-26.

⁶⁵ Bureau of Justice Assistance, “Supporting the Drug Court Process: What You Need to Know for Effective Decisionmaking and Program Evaluation.” SEARCH, The National Consortium for Justice Information and Statistics (2003): 22.

⁶⁶ Peters, 9, 16.

⁶⁷ Hardin, 57.

attitude of the offender in real time, considering the results of blood and urine samples, and calculating the results of question-based tests such as ASI or SASSI, the interviewer determines if the offender is fit to enter the drug court program. It is imperative that drug court professionals remain vigilant in the interviewing process because, as mentioned above, drug court often appears – to the majority of offenders (addicts and non-addicts) – to “hold the promise of everything [they] could want: immediate freedom and the possibility of dismissal.”⁶⁸ The incentive to “pass” the interview is thus very high for offenders trying to game the system, making the job of the interviewer of paramount importance.⁶⁹

Step 4: Second Discussion With The Offender

If an offender is considered eligible for the drug court system, the defense attorney sits down with him/her to have a final discussion about the drug court option. Meant to act as a “zealous advocate” for the offender, the defense attorney must carefully explain the pros and cons of drug court and how taking such an alternative route may benefit or harm the offender. This conversation is generally considered to be outside the expertise of typical defense attorneys, who are asked not to determine the success of a trial court, but rather “whether someone is going to succeed in treatment.”¹² As such, the defense attorney must be trained to exercise extreme caution, not presenting “overly sunny images of seemingly inevitable therapeutic success.” Because of the termination sentences that usually go along with drug court failure, the defense attorney must emphasize that an offender may potentially stay in the criminal justice system for a longer period of time if he/she chooses the treatment route and then fail the program.⁷⁰ Depending on the procedures adopted by particular drug courts, if the offender chooses the drug court option, he/she must sign away the right to a speedy trial.⁷¹ This conversation, along with the preceding steps, often takes place extremely quickly, with the justification that such expediency is conducive to successful treatment. Expounding upon the third key component of drug courts, the U.S. Department of Justice explains that

[due to the] critical window of opportunity for intervening and introducing the value of AOD treatment [...] judicial action [must be] taken promptly after arrest, [to] capitalize on the crisis nature of the arrest.⁷²

The defense attorney must carefully balance this incentive to introduce appropriate offenders into treatment as soon as possible with the effort to ensure that non-deserving or non-capable offenders take a different route through the criminal justice system.

Step 5: Final Review By Drug Court Judges/Staff

The last step in the before-treatment screening process is a final review of new drug court clients by the drug court judge and other drug court staff. How extensive this final review is varies widely across different drug courts. Some counties give the drug court judge the final say in what offenders are allowed entry into the drug court, while others, such as Montgomery County, Maryland, grant nearly full determination power to the prosecuting attorney.^{73, 74} Depending on the procedures implemented by different drug courts, at least one

⁶⁸ National Association of Criminal Defense Lawyers, "America's Problem Solving Courts: The Criminal Costs of Treatment and the Case for Reform." NACDL (2009), 31.

⁶⁹ Bowers, 12-15.

⁷⁰ Ibid, 25-26.

⁷¹ Peters, 10.

⁷² National Association of Drug Court Professionals, 5.

⁷³ Peters, 11.

⁷⁴ National Association of Criminal Defense Lawyers, 22.

of the drug court professionals will conduct a final analysis of drug court candidates, reviewing the legal specifics of their program (e.g., termination sentences, due process waivers, initial program length, etc.). Once everything is in order, eligible and willing offenders will then be officially enrolled into the drug court system. From that point forward, they are generally referred to as “clients,” and immediately begin treatment.

Disease Models and Justice

Justifications of Drug Courts as a Special Court

Constructing a central justification for drug courts as a special court is important because the justification will inform our goals for drug courts, and drive our recommendations for how best to accomplish these goals. Although many descriptive justifications were present for the creation of the first drug court in Dade County—such as lessening overcrowding in courts, promoting judicial efficiency, and reducing the occurrence of drug-related crimes—we believe the most important justification for the creation of the drug court is the special nature of the defendant. As the defendant-centered approach of the prostitution court justified its provision of rehabilitative opportunities that promoted reintegration into society, so the drug court views the recidivist addict as a special kind of defendant that merits special treatment in order to break the cycle of recidivism. Drug addicts are viewed as different from the regular defendant in that they have an altered rationality while under the influence of drugs and addiction. Similarly, the previously-discussed creation of the juvenile court to serve young defendants was due to the judgment that juvenile offenders have less rational decision-making ability than adults because their brains are less developed. While the juvenile’s limited rationality stems from lack of maturity, the recidivist addict’s altered rationality is rooted in his/her drug addiction.

In assessing what should be the goals of the drug court, it is important to clarify the approach that is and ought to be taken towards addiction in the context of the criminal justice system.

Retributive Justice and the Rational Actor Model of Addiction

The criminal justice system in the United States is based upon a retributive model of justice which seeks to punish criminal offenders largely through incarceration in an effort to deter crime, deliver sentences in accordance with desert, and reduce recidivism.⁷⁵ This system assumes that offenders are fully rational actors: the individual is always held accountable for his or her actions according to the fact that each action is willfully imposed and always takes a conscious act of the will to complete. In the context of addicted offenders, the model of justice assumes that due punishment will be a strong deterrent to drug use and abuse, and will therefore eliminate drug addiction in all those who did not weigh the punishment to be greater than the high. According to this model of addiction, the user has no excuse or good reason to continue using other than intense desires and therefore the offender is deserving of punishment. Thus, under the rational actor conception of addicts⁷⁶, drug courts would be unnecessary because the typical criminal justice solution of imprisonment and harsh punishment would be a substantial deterrent from drug use.

⁷⁵ Cavadino, M & Dignan, J. *The Penal System: An Introduction*, 2nd ed., London: Sage. 1997. p. 39.

⁷⁶ Gideon Yaffe. “Recent Work on Addiction and Responsible Agency,” *Philosophy & Public Affairs* vol. 30, no. 2, New Jersey: Princeton University Press. 2001 p. 183-194.

However, addicts are a special population of criminal delinquent in that they are crippled by a condition which is characterized by recidivism. Even if the addict is taken out of his/her environment for a time, put in prison, and forced off of use, he/she will often return to his/her habit after release.⁷⁷ Though many addicts have severe punishments meted out for them due to drug use and related crime, the harsh sentence is typically not enough to prevent recidivism and a return to habitual drug use.⁷⁸ If addiction was based on rational behavior and impulses, it should follow that the chastisement doled out to addicted offenders would be adequate to change their behavior. The fact that this is not the case merits new considerations about the nature of addiction.

Restorative Justice and The Visceral Model of Addiction

Behavioral economist George Loewenstein has a conception of addiction referred to as the visceral model of addiction. This model combines notions of visceral factors, rationality, and biopsychosocial disease to address the addict as a whole person. Under Loewenstein's model, addicts are rational except where drugs are concerned, in which case their reasoning ability is clouded by their intense neurological cravings. During these hot states, addicts react to the visceral impulses by often giving in to craving to satiate biological and psychological desires. These cravings can be set off by sociological triggers—which can lead to a full circle, chronic and unending cycle, or an “addiction.”

Addictions are chronic, unpredictable, and can consume individuals. Unless addicts can master coping mechanisms to better fight craving and the visceral reaction of addiction within their brains, they will in all likelihood relapse during treatment. This fact does not, however, discount the addict's rational capabilities (typically while sober) that indicate a desire to change and to be free from addiction and drugs. However, the intensity of cravings when they return can plague addicts, trapping them within desire, combining with different biological, psychological, and social factors converging to create a visceral reaction that is immensely difficult to overcome.

The visceral theory of addiction accounts for the behaviors commonly outlined in addiction, including loss of control and continued use despite the knowledge of negative consequences.⁷⁹ Visceral factors “result from neurochemical changes in the reward and motivation centers of the brain,”⁸⁰ and are often interpreted as cravings, urges, and intense emotional desires. Addicts thus are not simply rational but also dealing with extreme emotion which negatively affects their ability to reason rationally. Viewing addiction as a visceral reaction to the intense emotional impetuses present allows for a model that views the addict as a semi-rational actor under much emotional duress. The attention-narrowing aspect of a visceral response takes into account the temporal urge, when the addict wants nothing more than what will satiate his intense desire: this can lead to crime to fund the habit, and to protect the interests directly related.⁸¹

This model of addiction also accounts for the poor success rate of addicts even within treatment programs. Driven by craving only in short-term spurts, the addict often cannot foresee the cravings that will occur in the future, neither in their intensity nor in the

⁷⁷ Edward Preble and John J. Casey, “Taking Care of Business: The Heroin Addict's Life on the Street,” in *The American Drug Scene: An Anthology*, ed. 4, ed. James A. Inciardi and Karen McElrath (Los Angeles: Roxbury Publishing Company, 1999), 185.

⁷⁸ Preble, 185, Nolan, 44-45.

⁷⁹ American Psychiatric Association. 1994. *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV*. Washington D.C.: American Psychiatric Association. (pp. 181-183)

⁸⁰ George Loewenstein, “A Visceral Account of Addiction,” in *Getting Hooked: Rationality and Addiction*, eds. J. Elster & O.J. Skog. Cambridge University Press, 1999. 238.

⁸¹ *Ibid*, 239, 245-6.

willpower it will take her to overcome it.⁸² Treatment informed by this model must “alleviate craving [...] and [...] maintain a vivid memory of the motivational force and misery of craving for those who have quit [...]”⁸³ Under the visceral account of addiction, it is clear that incarceration will not solve the problem of addiction, because addicts are individuals whose rational decision-making capabilities are profoundly crippled by their visceral desires. As a means of deterrence, incarceration fails in the case of addicts, as it assumes addicts to be fully rational actors with the ability to coolly weigh the costs and benefits of engaging in illicit activity.

Understanding addiction as a disease which cripples addicts through visceral reactions to drug use, the just response by the criminal justice system in the instance of illegal drug use or related crime must be restorative (i.e., treatment-oriented). According to United States policy, an addict cannot be punished for his addiction,⁸⁴ but he can be treated in order to further the goals of a more peaceful society. This conception of addiction warrants a response to addicted offenders known as “Parsonian.” Under the Parsonian notion of disease, sick individuals must be aided, but with the understanding that they must do all they can to achieve full health and become a functioning member of society while receiving support.⁸⁵ This shared notion of responsibility on the part of society as well as the sick offender is fully applicable to recidivist addicts in the context of the criminal justice system.

Considering the Parsonian response to the visceral account of addiction, addicts are given responsibility while sober, to work to treat cravings and to learn how to overcome or else cope with addiction. However, treatment must not exclude or eliminate those who may relapse once, twice, or even more. Though the addict is capable of being rational, emotional and psychological craving can usurp reason and can topple even the best of intentions. The chronicity of addiction must be recognized in the high relapse rate among addicts due to cravings. As we have seen in the past, incarceration cannot perform the supportive function required by the criminal justice system to aid addicts, but proper treatment can.

When the criminal justice system views drug-addicted offenders through the lens of the visceral account of addiction, it becomes possible to better serve both addicted individuals and society. Under the duress of cravings and the temptation of addiction, the addict is likely to hurt himself because he cannot see the consequences of his actions. Likewise, myriad externalities are also present in addiction; there is a constant risk of causing harm to family members, neighborhoods, and society at large through drug use. If the disease of addiction causes drug use and related crime, then our justice system is further compelled to help cure addiction rather than to punish the user. Society would benefit from fewer addicts, tempered cravings, and a workable solution to return the sick members of our communities to full health.

The drug court system represents the criminal justice alternative that can provide merited rehabilitative justice to addicts. Because addicts are the population that requires unique justice due to their specific disease-centered disabilities, it follows that drug courts should be reserved only for recidivist addicts. With this understanding of why a special criminal justice avenue is necessary for the population of recidivist addicts, we have developed three goals for drug courts to we believe are necessary in order for the drug court system to function justly.

What follows is a summary of the three major goals of drug courts: 1) to reduce recidivism, 2) to promote judicial efficiency, and 3) to maintain due process.

⁸² Ibid, 246-7, 254-6.

⁸³ George Loewenstein, 256.

⁸⁴ *Robinson v. California*, 370 US 674 (1962). Quoted in Nolan, 35.

⁸⁵ Acker, Caroline. “Stigma or Legitimation? A Historical Examination of the Social Potentials of Addiction Disease Models,” *Journal of Psychoactive Drugs*, (1993), 195.

Goals for Drug Court

Reduce Recidivism

Recidivism Rates with Incarceration

The traditional method that the criminal justice system has adopted to treat drug offenders, addicts and non-addicts alike, has proven to be largely ineffective in reducing recidivism for addicts. Traditionally, the justice system has dealt with drug addicts by incarcerating them. One of the goals of incarceration is to serve as a deterrent for future offense, which would theoretically lead to lower recidivism rates. However, as Edward Preble and John J. Casey mention in their paper *Taking Care of Business*, incarceration might not always have the affect on drug addicts that policy makers intend: for example, “[r]espite from the arduous life they lead comes to heroin users when they go to jail [...]”⁸⁶ Thus, for many drug addicts, incarceration can simply become part of the cycle, not leading to reduced recidivism or abstinence from drug use.

Defining the Terms

The term “recidivism” can hold a number of meanings; in this paper, we define “recidivism” as encompassing both the addict’s tendency to relapse back into drug use as well as his tendency to fall back into drug-related criminal acts that would result in his return to the justice system. Recidivism rates can be measured by the time elapsed from arrest to any re-arrest.⁸⁷ If the addict’s tendency to recidivate back into drug addiction is reduced through his participation in a drug court, it follows that his tendency to return to the court on account of drug-related crimes will also be decreased. Because these two types of recidivism are interconnected, we see it as valuable to include them both under the umbrella of “recidivism.”

Reducing Internalities

Because of the drug court’s emphasis on treatment, reducing the number of addicted defendants that return to drugs is critical. Although this goal has many practical benefits, it is also important in itself. Drug courts seek, through treatment, to reduce the addicted defendant’s harm to himself. Drug use often imposes drastic costs on addicts, many of which are harmful not only to the individual but to society as a whole. For example, drug addicts are more likely than non-addicts to have occupational accidents, endangering themselves and those around them.⁸⁸ When an individual is less likely to return to his drug addiction, he is given the chance to follow pursuits that would benefit him as an individual and he is given the opportunity to be a more productive member of society.

Practical Implications for Externalities

Reduction of addiction recidivism is also crucial because of the practical results that follow from it. When recidivism is reduced, the likelihood that the defendant will recidivate to drug-related crimes is also reduced. Additionally, the lowering of recidivism for the

⁸⁶ Preble, 185.

⁸⁷ Barbara Sims, *Substance Abuse Treatment with Correctional Clients: Practical Implications for Institutional and Community Settings* (New York: Haworth, 2005), 137.

⁸⁸ “Effects of Drug Abuse.” *Drug Rehab Addiction Treatment Alcohol Rehabilitation*. accessed 15 Nov. 2010. <<http://www.usnodrugs.com/effects-of-drug-abuse.htm>>.

individual leads to an overall decrease in crime in a society. If addicts are prone to commit criminal acts either as a result of the pharmacological effects of drugs or in order to support their drug addiction, then successful rehabilitation of addicts will reduce overall crime in society. When a smaller amount of drug addicts are relapsing to drug-related crimes, there will also be fewer defendants in the overall justice system. Having a smaller amount of defendants in the criminal justice system will save money and allow the justice system to use those extra resources for other areas of need. By focusing on curing addicts of their addiction, drug courts theoretically have the ability to reduce recidivism.

Recidivism in Drug Court

One of the primary goals of drug courts should be to reduce recidivism rates more than the incarceration in the traditional criminal justice system does. Since drug courts provide addicts with personalized therapeutic jurisprudence aimed at specifically weaning them off of drug use, lower recidivism rates should be a primary focus of the drug court system.

Drug addicts, as opposed to drug users, are more likely to recidivate. Traditional incarceration has proven to be less effective in lowering recidivism rates for addicts than other kinds of sanctions. This result stems from the fact that incarceration treats a symptom of drug addiction, violence, rather than the catalyst of the violence itself; drug addiction. Drug courts work under the assumption that addicts are a special population, thus deserving a unique system of jurisprudence if they are to be successfully reintegrated into society. Additionally, as Professor Lior Gideon notes in his book *Substance Abusing Inmates*, “studies have shown that [...] drug abusing offenders [...] were about four times more likely to recidivate than their counterparts who received some sort of treatment.”⁸⁹ By sending drug addicts to treatment aimed at full rehabilitation, drug courts theoretically stand a better chance of yielding lower recidivism rates for addicts than the traditional justice system does. Thus, the structure of the drug court’s treatment program makes lower recidivism rates seem like a practical and theoretically realistic goal.

Judicial Efficiency

Judicial efficiency is the optimal goal for processing defendants through the justice system. It is measured in terms of reducing expenses, eliminating judicial congestion and minimizing the time spent between arresting an offender and getting them processed through the system. While the drug court model can theoretically achieve goals such as reduction of recidivism much better than incarceration, it can also attain maximum judicial efficiency that acts both as a strong justification for its existence and an indispensable goal for the model.

A strategy which works towards judicial efficiency for the drug court is lessening the adversarial component of the judicial process. By using a non-adversarial approach, the drug court model encourages “the prosecution and defense counsel [to] promote public safety while protecting participants’ due process rights.”⁹⁰

When the drug court unites the defense and prosecution counsels in a non-adversarial structure, it ensures that fewer expenses are taken up by adversarial exchanges; because adversarial exchanges usually require a lot of expenses represented in staff, facilities, and compensation for prosecution and defense sides. Therefore, by advocating its elimination, the drug court model should achieve optimal expenses compared to other justice models.

⁸⁹ Lior Gideon, *Substance Abusing Inmates: Experiences of Recovering Drug Addicts on Their Way Back Home* (New York: Springer, 2010), 17.

⁹⁰ The National Association of Drug Court Professionals: 5.

In addition to saving expenses, the removal of the adversarial component guarantees a speedy flow through the judicial system processes. In contrast with the criminal justice system, the drug court model ensures that minimal time is wasted in judicial bureaucracy and that the participant is placed in treatment as soon as possible. The drug court should achieve this goal by means of two strategies: 1) both sides of the case turn their focus towards getting the addict to the treatment; 2) both sides can incorporate well-trained clinicians early in the process that will ensure that eligible individuals are identified early in the process and thus offered the opportunity to participate in the drug court program at the right time. In its report in, the U.S. General Accounting Office asserted that speedy referral of addicts to the treatment program is a necessity for successful rehabilitation.⁹¹ A defense of this position occurs later in this paper.

Additionally, the drug court model, if applied properly, is likely to reduce recidivism, which in turn (on the long term) decreases the clutter in the judicial system by reducing the probability that the same offenders are going to recidivate. One of the major problems in dealing with drug offenders in the criminal justice system is the “revolving door” concept. The “revolving door” concept suggests that recidivism rates and the costs involved in treating it are very high for drug offenders who get prosecuted in the criminal justice system. The drug court model solves this problem by ensuring that the addict gets access to the appropriate treatment resources that eventually lead to abstinence and thus eliminating congestion.⁹²

The drug court model is cost effective as well as time efficient. The model succeeds at providing a formula that saves money and time on many levels: (1) at the short-term level it’s efficient as it reduces the down time between the apprehension of an offender and the judicial verdict for him; (2) it also reduces costs as the cost involved with treating a drug offender is substantially lower than the cost of imprisoning them;⁹³ (3) at the long-term level the model is cost effective as it yields major financial and judicial benefits. It is estimated that treating 1.5 million arrestees through drug court would cost more than \$13.7 billion but return benefits of about \$46 billion.⁹⁴ In addition, by reducing recidivism over the long term, the drug court model ensures that the judicial system will not be cluttered with repeat offenders.

Maintain Due Process

In the strive towards enhanced judicial efficiency, it is vital for drug courts to not disregard constitutional due process. Due process must guide the processing of defendants through the justice system. The protection of civil liberties, justice, and fairness are at the

⁹¹ United States General Accounting Office, “Report to the Committee on the Judiciary, U.S. Senate, and the Committee on the Judiciary, House of Representatives: Drug Courts: Overview of Growth, Characteristics, and Results,” United States General Accounting Office (1997): 10, accessed 28 November 2010, <http://www.gao.gov/archive/1997/gg97106.pdf>.

⁹² Tara D. Warner and John H. Kramer, “Closing the Revolving Door?: Substance Abuse Treatment as an Alternative to Traditional Sentencing for Drug-Dependent Offenders,” *Criminal Justice and Behavior* 36 (2009): 89-109, accessed 28 November 2010, <http://cjb.sagepub.com/content/36/1/89>.

⁹³ Results from the following study showed that monetary savings by drug courts ranged, on average, from almost \$3,000 to over \$12,000 per client. Doug B. Marlowe, “Recent Studies of Drug Courts and DWI Courts: Crime Reduction and Cost Savings,” *National Association of Drug Court Professionals*: 4, accessed 28 November 2010, http://www.isc.idaho.gov/dcourt/DC_Research_Update408.pdf, Washington State Institute for Public Policy, “Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates,” *State of Washington* (2006): 1-44, accessed 28 November 2010, <http://www.wsipp.wa.gov/rptfiles/06-10-1201.pdf>.

⁹⁴ Avinash Singh Bhati, John K. Roman, and Aaron Chalfin, “To Treat or Not To Treat: Evidence on the Prospects of Expanding Treatment to Drug-Involved Offenders,” *The Urban Institute: Justice Policy Center* (2008): 1-112, accessed 28 November 2010, http://www.urban.org/UploadedPDF/411645_treatment_offenders.pdf.

forefront of judicial concerns and profoundly influence judicial structure and procedures. Therefore, in drug courts, the preservation of due process is a premier objective.

Due Process: A Constitutional Right

In the American Constitution, the fifth and fourteenth amendments guarantee fairness in legislation and legal procedure. That is, the Constitution assures that the government cannot take away a person's natural rights of life, liberty, and property, without due process of law. The fifth amendment states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.⁹⁵

The due process clause of the fifth amendment ensures defendants due process of the law at the federal level. Similarly, the fourteenth amendment extends due process guarantees to states and local governments and provides an additional clause for equal protection of laws. Section 1 of the fourteenth amendment explicitly states that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁹⁶

Through selective incorporation, the fourteenth amendment prohibits states and local governments from depriving individuals of their natural rights without due process of the law. Moreover, the equal protection clause bans racial discrepancies amongst individuals in government procedure. In all, both the fifth and fourteenth amendments limit the liberty of legislators to prevent impingement of the defender's individual rights. It is incumbent upon judges and the judicial process to uphold the fifth and fourteenth amendments and ensure that the judicial system is fair and just.

Due Process: An Aspiration of Drug Court Treatment

In the treatment itself, drug courts make a conscious effort to integrate due process into standards and procedures. According to the National Association of Drug Court Professionals (NADCP), one of the key components of drug courts is the protection of a client's due process rights. The NADCP asserts that the drug courts must maintain a balance between a drug offender's civil liberties and their alternative approach. Moreover, the procedures in drug courts, according to the National Bar Association, employ this non-adversarial approach as an effective means to promote public safety through tailored drug

⁹⁵ Congress of the United States, "The Bill of Rights," The National Archives (1789): accessed 28 November 2010, http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

⁹⁶ Congress of the United States, "Constitution of the United States: Amendments 11-27," The National Archives: accessed 28 November 2010, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html.

abuse treatment for drug offenders. The procedures requirements follow the standards established by the NADCP.

Table { SEQ Table * ARABIC }: Standards by the NADCP⁹⁷

- i. The person who is subject to the proceeding and family members or others immediately concerned for the person's welfare as well as the attorney for the public should be given adequate notice and opportunity to be heard on the issues involved.
- ii. At any proceeding wherein an individual is called upon to waive any constitutional rights in a drug court, such as at entry, diversion, termination, sentencing, etc., that individual should be entitled to representation by competent counsel as provided in 2.20. Such counsel should be provided at public expense if the individual does not have adequate resources.
- iii. Clinical evaluation should be made as promptly as possible by professionally qualified persons on the basis of examination, urine tests and other professionally recognized standards. The person subject to the proceeding should be entitled to obtain and present such an evaluation at public expense if that person has inadequate resources.
- iv. The treatment ordered by the court should only be provided by professionally qualified providers and the treatment should meet professionally recognized standards.
- v. In exercising its power to order treatment, the court should consider possible alternative dispositions employing the least restrictive option that provides adequate treatment for the individual and protects public safety.
- vi. The court should review its treatment orders and the status of the individual's progress in treatment on a regular basis and modify them when a less restrictive option becomes appropriate.

The procedural requirements of the NADCP intend to provide the best protection of an offender's rights while effectively eradicating addiction. The longest continuously serving drug court Judge, the honorable Richard Livermore of the NADCP, is a leading advocate of drug court. Livermore vows that drug courts "continuously remind [him] that the constitutional mandates of due process and equal protection are not just hollow words, but apply to everything [he does]."⁹⁸ The assurance of due process and equal protection, according to Livermore, are fundamental to drug courts.

Flaws in Drug Court

Flaws in the Screening Process

In this section, we will focus on the screening process of drug courts and examine its current functioning and failings. We will observe legislative constraints, entrance criteria, net

⁹⁷ American Bar Association: Judicial Division, "Standards Relating to Trial Courts: Procedures in Drug Treatment Courts," American Bar Association (2001): 3, accessed 28 November 2010, <http://courts.delaware.gov/superior/pdf/drugctstandfinal.pdf>.

⁹⁸ Honorable Richard C. Livermore, interview by the National Drug Court Institute, National Drug Court Institute, accessed 28 November 2010, <http://ndci.org/join/we-are-drug-court/honorable-richard-c-livermore>.

widening, and the lack of clinicians that are characteristic of the screening process in drug courts. We focus primarily on screening because it is during this key first step that the drug court system determines who is and isn't allowed to receive treatment. Therefore, analyzing the screening process and its current implementation is crucial in order to make sure that drug courts are targeting the right population of drug offenders—recidivist addict.

Legislative Constraints

One of the obstacles currently preventing drug courts from achieving our stated goals is the fact that they are funding-dependant entities.⁹⁹ Because drug courts rely in large part upon grant money in order to function, they are beholden to the stipulations associated with those grants. The process of funding special courts through grant money is not inherently problematic, but if the conditions attached to the money stream disallow drug courts from focusing on the proper populations in the best manner, such conditions must be spotlighted and addressed. Currently, legislative constraints tie the hands of local drug courts, forcing them to adopt specific structural and administrative features (even against the judgment of dissenting academics, researchers, and drug court professionals)¹⁰⁰ in order to continue receiving money.¹⁰¹ By reforming the provisions associated with drug court funding, we believe that the goals of reducing recidivism, realizing judicial efficiency, and protecting due process rights can be better achieved.

As explained earlier, we endorse the notion that drug courts must target only recidivist addicts. Unfortunately, current success metrics established around graduation quotas strongly work against this goal. If drug court professionals are constantly burdened by the goal of ensuring that “x” number of clients graduate in a given period, they naturally have an incentive to fill drug courts with individuals who are more likely to succeed in treatment.¹⁰² This incentive, combined with the drive of non-addicts to “game” the justice system and circumnavigate their sentences by conning their way into the drug court system, creates a strong probability that chippers (casual, non-addicted users) will constitute a significant percentage of a drug court’s population.¹⁰³ In order to mitigate this screening issue, it is essential that the legislative constraint requirement graduation quotas be reconsidered. While realizing client graduation is clearly one of the priorities of drug court (with the understanding that graduation indicates less likelihood towards recidivism), currently the frame of reference for graduation numbers is skewed because numerous amounts of these “successful” clients are not actually addicts.¹⁰⁴ Law professor Eric Miller endorses the notion that drug courts must exclude non-addicts, but agrees that legislative constraints provide “[...]certain incentives for treatment programs to take non-addicts”¹⁰⁵

Beyond providing graduation quotas that persuade drug court professionals to admit chippers, the legislative constraints attached to funding also categorically exclude violent addicts. Currently, in almost every county, and according to the funding criteria from the U.S. Department of Justice, drug courts do not/cannot consider violent offenders as eligible clients.¹⁰⁶ The justification underpinning this refusal is based primarily on issues of community interaction and desert. Those who oppose admitting violent offenders in the drug court system believe that such individuals will interact negatively with other clients and/or do

⁹⁹ Bowers, 17.

¹⁰⁰ Anonymous. Personal interview. 30 Sept. 2010.

¹⁰¹ Miller, 1542.

¹⁰² Miller, 1542. Bowers, 17.

¹⁰³ Bowers, 14-16.

¹⁰⁴ Bowers, 37-38.

¹⁰⁵ Miller, 1542.

¹⁰⁶ Peters, 9.

not morally deserve aid due to the nature of their offense. However, according to the National Association of Criminal Defense Lawyers, individuals should not be categorically excluded from drug court based upon a violent offense. The NACDL states that many recidivist addicts commit minor acts of violence specifically due to their addiction and thus merit case-by-case review and possible inclusion in the system designed specifically to alleviate and possibly eliminate drug abuse and its negative effects.¹⁰⁷ We believe that violent offenders should be viewed on a spectrum and not in absolute terms. If drug courts exist as a way to target and aid a population that merits special treatment due to a disease rendering them less responsible for their actions, it follows that the same logic should be applied to violent offenders who commit crimes as a result of addiction. Because it has been posited that addicts do not respond to prison but often regard it as simply a natural part of the grander cycle of their habit,¹⁰⁸ it is clear that to stop violent addicts from recidivating, incarceration or prohibition are not viable alternatives. While it is obvious that lines have to be drawn somewhere, to categorically exclude violent offenders from drug court is an example of a legislative constraint that greatly prohibits drug courts from achieving their above-stated goals. According to the NACDL, “if violent individuals are excluded, they will continue through the revolving door, and once released back onto the streets may well commit another violent crime.”¹⁰⁹

Certain legislative constraints stand as overarching flaws preventing drug court professionals from properly targeting recidivist addicts as an exclusive and comprehensively selected population. We believe that although funding agencies have the prerogative to attach stipulations to grant money as they see fit, the academic and scientific research suggests that currently legal restrictions actually prevent drug courts from benefiting the criminal justice system as a whole.

Entrance Criteria

Many drug courts have strict barriers of entry that can prevent drug addicts who need rehabilitation from entering the program. These strict barriers often come in the form of prior arrests record scores, with drug courts only able to take offenders who score in a certain range. For example, in both Florida and California, in order to be eligible for drug court, a defendant must have committed a nonviolent offense, have no recent record of violence, and have only a limited history of prior convictions for drug use in order to participate in drug court.¹¹⁰ As discussed above, drug courts are generally closed to the idea of admitting violent offenders, regardless of the point score they are carrying. If one of the primary justifications for drug court is to reduce recidivism by rehabilitating addicts, these guidelines could be in tension with that goal by preventing drug addicts from receiving treatment.

Attorneys who have practiced in drug court have stated that requiring that the defendant’s prior record score be within a certain range in order for the defendant to be eligible for drug court is a serious problem with the system. For example, in Pennsylvania, a defendant with a robbery on his or her record is ineligible for drug court; the record score for a robbery is too high for the defendant to be admitted. These categorical criteria for entrance certainly weed out a portion of the addict population that drug courts were created to cater to. As Paul Goldstein notes, many drug addicts “engage in economically-oriented violent crime,

¹⁰⁷ National Association of Criminal Defense, 23-25.

¹⁰⁸ Preble, Edward, and John J. Casey., “Taking Care of Business: The Heroin Addict’s Life on the Street” *The American Drug Scene- An Anthology*, 4th. 4th ed. Los Angeles: Roxbury Publishing Company (2004): 185, 192.

¹⁰⁹ National Association of Criminal Defense Lawyers: 52.

¹¹⁰ Miller, 1557.

e. g., robbery, in order to support costly drug use.”¹¹¹ In other words, defendants who commit robbery, thus excluding them from drug court, might well have stolen in order to support an addiction. This is a defendant who belongs in drug court.

As opposed to the net widening effect, which is a result of the drug courts taking in too many offenders, the entrance criteria are in this instance too exclusive, resulting in drug courts actually not taking on enough addicts. The current entrance criteria for drug courts are flawed because they categorically prohibit drug courts from seeing a class of drug addicts, for whom the drug courts were created to treat.

Net widening

One of the primary flaws in drug court is that under the current system, drug courts contribute to a net widening effect within the criminal justice system. In his book *Visions of Social Control: Crime Punishment and Classification*, sociologist Stanley Cohen explains that net widening occurs when “there is an increase in the total number of deviants getting into the system in the first place and many of these are new deviants who would not have been processed previously.”¹¹² Net widening occurs because drug court ends up treating both drug addicts, a demographic group it was created to serve, and a large number of non-addicted offenders. With a widened net, valuable resources are wasted on a population that drug courts were not meant to serve in the first place. Additionally, a wider net not only affects drug court’s efficacy, but it also has negative impacts for the criminal justice system as a whole.

Net widening is a present and influential phenomenon in many American drug courts today. As Eric Miller states in his paper “Drug Courts and the False Promise of Judicial Interventionism,” the root cause of the net widening effect can be traced to the therapeutic jurisprudence philosophy, which seeks to channel drug offenders into rather than out of the criminal justice system.¹¹³ Cohen explains that net widening often results from “an increase in the overall intensity of intervention... [and] new agencies and services supplementing rather than replacing the original set of control mechanisms.”¹¹⁴ The drug court systems fits nicely into Cohen’s definition: drug courts require clients to participate in extensive treatment programs, and drug court itself is a new institution within the criminal justice system. Therefore, instead of diverting offenders through the criminal justice system, drug courts actually place offenders in an extended program that is therapeutic in nature.

In the context of drug courts, the net widening effect refers to the drug court taking in offenders who would otherwise escape the criminal justice system entirely. In jurisdictions where defendants can choose whether or not to enter drug court before their trial (pre plea drug courts) drug offenders often see drug court as an attractive alternative to incarceration. Thus, offenders often will choose drug court over incarceration despite the fact that drug court’s therapeutic treatment plan often requires a longer time commitment the time the defendant would have spent in jail. Additionally, drug addicts often fail to understand the commitment, will, and dedication that will ultimately be necessary to break their addiction. In drug court, “the demands that are placed on participants are far more extensive than anything they would do whether they were incarcerated or put on probation.”¹¹⁵ Consequently, because of their view that drug court is a quick way out combined with many defendants’ failure to

¹¹¹ Goldstein, Paul J., "The Drugs/Violence Nexus: A Tripartite Conceptual Framework." *Journal of Drug Issues*, v. 39 (1985), 386.

¹¹² Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification*. Polity Press, Cambridge, 1985; 44.

¹¹³ Eric Miller, 1551.

¹¹⁴ Cohen, 44.

¹¹⁵ Nolan, 51.

understand the actual demands of the treatment program, many drug addicts fail to successfully complete drug court. When an addict fails drug court, he or she is more than often incarcerated. Thus, defendants who fail drug court face jail time on top of the time they have already spent in treatment.

Many liberal social norms theorists, or penal welfarists, believe that “invasive practices, including treatment regimes, are justified so long as they are effective at inhibiting offenders’ anti-social behavior.”¹¹⁶ One might justifiably argue that these penal welfarists do not see drug courts as net widening; rather, they feel that the provision of treatment should not be viewed as a punishment because it is a rehabilitation program. Thus, the welfarists might argue that the net widening effect does not apply to drug court because the criminal justice system is actively intervening in a purely rehabilitative manner. Additionally, penal welfarists seem to believe that net widening should not apply in drug court because drug courts get people into treatment who might not otherwise have that opportunity. However, as Miller argues, penal welfarists fail “to consider issues of proportionality in replacing punishment with treatment.”¹¹⁷ While the drug court treatment program is clearly different from the traditional penalties doled out by criminal courts, treatment is nonetheless punitive; the defendant still has to attend mandatory treatment sessions, is subject to punitive sanctions for absence, and is still a part of the criminal justice system. Thus, even though the goals of drug court treatment are not primarily punitive, drug courts still cause net widening in criminal courts.

The Denver Drug Court

One of the most vocal critics of the drug court system is Judge Morris Hoffman of the Second Judicial District in Denver, Colorado. Judge Hoffman concludes that the drug court “has had a real and deleterious impact on [the] bench, both in and out of drug court itself” largely because drug courts widen the net by “stimulating a demand that will probably always outpace our capacity to deal with it.”¹¹⁸ Thus, not only does Judge Hoffman assert that net widening negatively affects the success of drug courts, but he also claims that it affects the efficacy of other courts within the criminal justice system.

Judge Hoffman notes that the net widening effect, or the popcorn effect as he calls it, has severely increased the number of defendants coming through the Denver criminal justice system as a whole. Judge Hoffman explains that the “sheer number of defendants running through the drug court mill every day is taking an enormous toll on the drug court judge, the drug court staff, sheriffs, prosecutors, and public defenders.”¹¹⁹ He also cites several examples of attorney misconduct, negligence, and irresponsibility that he claims are a result of the growing number of criminal cases on the docket. Additionally, Judge Hoffman notes that several clerical errors have occurred as a result of the growing case load, one even resulting in a defendant spending an extra 18 months in prison.¹²⁰ Given that one of the primary justifications for the creation of the original drug court in Dade County, Florida, was to reduce the overcrowding of dockets, Judge Hoffman’s analysis is particularly troubling. Additionally, Judge Hoffman explains that the likelihood that a drug court client will eventually be incarcerated is “by definition, substantially greater [in drug court] than in traditional courts because drug courts require many times the number of appearances in any

¹¹⁶ Eric Miller, 1553.

¹¹⁷ Ibid, 1510.

¹¹⁸ Judge Morris B. Hoffman, "The Drug Court Scandal", North Carolina Law Review (Chapel Hill, NC: North Carolina Law Review Association, June 2000, Vol. 78, No. 5, p. 25.

¹¹⁹ Ibid, 25.

¹²⁰ Ibid.

given case that do traditional courts. ”¹²¹ Thus, Judge Hoffman is essentially arguing that two of the primary justifications for drug court not only are ineffective, but that they actually serve to hinder the progression of individualized justice and due process; drug court’s promise of increased efficiency and smaller dockets leads to decreased proficiency, and instead of reducing jail populations drug courts actually lead to more incarcerations.

Judge Hoffman also explains the impact that the drug court’s net widening effect has had throughout the Denver criminal justice system. First of all, Judge Hoffman notes that drugs courts have had a “dramatic impact... on the general willingness of judges...to accept transfers from other judges. We have a long tradition of helping each other out when one of us has more than one matter set to begin.”¹²² Since the implementation of drug courts, the number of accepted case transfers in the Denver criminal courthouse has dipped from 80% to 50%. ¹²³ Consequently, all criminal defendants in the Denver court system are “substantially more likely”¹²⁴ than they were a few years ago to have their trials delayed because of docket overcrowding.

In their paper “Drug Courts Work,” William Meyer and A. William Ritter argue that there is little evidence to support net widening, and they specifically refute Judge Hoffman’s claim that net widening has occurred in the Denver drug court.¹²⁵ Meyer and Ritter’s primary argument is that the number of total defendants incarcerated has gone down since the inception of drug courts, and thus it is impossible for drug courts to have widened the net. However, as is explained in the previous section, higher incarceration rates are not the only, nor the primary, way that net widening can occur. Rather, net widening can occur when an institution or policy produces more people in the criminal justice system as a whole. Meyer and Ritter acknowledge that the number of offenders in the Denver criminal court system rose after the creation of drug courts, but they do not believe that drug courts had a causal relationship with the rise in offenders; they cite an 11% increase in overtime work at the Denver Police Department, the completion of a local baseball field, and improved law enforcement technology as factors that led to the rise in the number of criminal offenders.¹²⁶ However, unless Meyer and Ritter can provide evidence that external factors account for every single instance of reported criminal defendant increases that correlate with the creation of drug court, their argument does not hold. Additionally, Meyer and Ritter fail to address a major aspect of the net widening theory, which is that drug courts cause net widening by keeping existing offenders in the criminal justice system longer than they otherwise would.

Net widening, to some extent, is clearly a factor in the practice of many drug courts. By taking more defendants into the criminal justice system, net widening can both result in a violation of due process and lead to decreased efficiency in a criminal court’s operation. The central cause of net widening is the creation of a new agency, namely drug court, which has adopted a therapeutic model that keeps offenders in the criminal justice system for longer periods of time. Net widening inhibits the achievement of all the goals for drug courts that this paper has set forth. Net widening inhibits the drug court’s ability to reduce recidivism because with non-addicts in drug court, they do not receive accurate feedback on their successfulness in rehabilitating addicts and they are not able to devote all of their resources to treating the addict population that drug courts were created for. Judicial efficiency suffers because net widening brings more offenders into the criminal justice system as a whole,

¹²¹ Ibid.

¹²² Ibid, 26.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ William G. Meyer; A. William Ritter, “Drug Courts Work.” *Federal Sentencing Reporter*; Nov 2001 Feb 2002; 14, 3-4; Research Library, 179

¹²⁶ Ibid, 181.

causing a number of problems in and out of drug court that Judge Hoffmann thoroughly addresses. Net widening inhibits due process because if non-addicts are being admitted into drug court, then they are not receiving the fair, proportional punishment guaranteed to them by the fourteenth amendment.

Lack of Clinicians

As we identified in our Drug Court Screening Process section, generally, drug court systems do not bring in new professionals in order to help administrate the special court, but rather draw upon existing actors in the criminal justice system.¹²⁷ These individuals receive brief training in order to prepare them for the novel environment of the drug court system.¹²⁸ However, because the three main professionals, the judge, the prosecuting attorney, and the defense attorney most often do not have an extensive background in drug addiction and related diagnosis, they are essentially making judgments and providing aid about a subject that they do not fully understand.

Although proponents of the drug court system such as Meyer and Ritter claim that the “team members” of drug court *do* have a sufficient understanding, engaging in “cross-disciplinary training” that helps explain addiction,¹²⁹ many critics, including Pittsburgh defense attorneys, say the training is insufficient.¹³⁰ We believe that such a new system as the drug court requires new authorities, and the fact that none have been instituted denies drug courts the ability to properly reduce recidivism, and realize judicial efficiency. The main professional we believe is missing from the drug court system is a clinician. With the inclusion of a clinician in the screening process, drug courts could more effectively populate their treatment centers with willing recidivist addicts, ensuring that the target populations will receive the aid that will reduce recidivism while simultaneously achieving judicial efficiency by capturing the stream of addicted repeat offenders who continue to fill prison cells regardless of the lessons their incarceration is meant to impart.

Clinicians ought to be involved in every step of the screening process, either as an expert advisor or as a professional who directly screens potential drug court clients. In the context of drug courts, clinicians are individuals who should stand as authorities on addiction and have the skill sets to properly diagnose offenders and recommend treatment options. Currently, without the addition of an addiction specialist, the screening process is profoundly flawed. When offenders pass the initial legal checks in order to be eligible for drug court consideration, they presently meet only with the defense attorney who explains the options that drug court offers.¹³¹ Because a clinician is not available to aid the defense attorney in presenting initial options to the offender, it is difficult for the defense attorney to identify 1) signs that the offender may be faking addiction in order to move forward to the next stage of evaluation, 2) a user who might be falsely considering their ability to succeed in drug court or 3) a truly recidivist addict fully deserving of the drug court option.¹³² In the current system, nearly all offenders who pass the initial legal benchmarks choose to progress onwards to the official screening interview.¹³³

The third step in the screening process, the so-called “clinical interview” does not currently involve an input from clinicians, but rather relies primarily upon the discretion of the prosecuting attorney combined with the results of standardized substance abuse screening

¹²⁷ National Association of Criminal Defense Lawyers, 40.

¹²⁸ Peters, 16.

¹²⁹ Meyer, William G. , and A. William Ritter, "Drug Courts Work." *Federal Sentencing Reporter* (2001): 183.

¹³⁰ Anonymous. Personal interview. 30 Sept. 2010., National Association of Criminal Defense Lawyers: 31.

¹³¹ National Association of Drug Court Professionals, 3-4.

¹³² Bowers, 24-26.

¹³³ *Ibid*, 25, 26.

tests such as the Addiction Severity Index (ASI) or the Substance Abuse Subtle Screening Inventory (SASSI).¹³⁴ It is at this step that the input of a clinician is most required. Because the outcome of the clinical interview essentially represents the final say of the drug court (aside from a final group meeting that may or may not occur)¹³⁵, the professionals who conduct this interview are in essence the gatekeepers of drug court. Currently, the prosecuting attorney stands at the drug court, holding the power to either grant addicts an avenue to treatment as opposed to months (or years) in a jail cell, or allow non-addicts to enter a system that drastically reduces their punishment for committing a crime to a merely annoying series of treatment sessions. The fact that “chippers” and non-addicts sometimes enter drug court is understandable, as the prosecuting attorney and district attorney cannot always know who is and is not a real addict, or may be compelled by the pressures of meeting capacity goals.¹³⁶

Considering the fact that the populations of drug courts more often than not consists primarily of non-addicts, drug dealers, and chippers, which prevents drug courts from properly achieving the goals of reducing recidivism and achieving greater judicial efficiency, it follows that a more acute and regulated screening process needs to be implemented for drug courts to work.¹³⁷ The expertise and ostensive impartiality of clinicians can provide this regulation in the clinical interview.¹³⁸

Lastly, in the fourth step of the screening process, in which the defense attorney has a final discussion with the offender if she is deemed eligible for drug court in the clinical interview, the lack of a clinician again results in serious problems. In this step, the defense attorney is meant to act as a “zealous advocate” as a means to protect the due process rights of the defendant. As discussed earlier, the defense attorney is tasked with a role that is considered by the NACDL to be outside of its expertise. As the NACDL states, “[...]the drug court model requires counsel ‘to be a diagnostician, not of trial court success’ but ‘whether someone is going to succeed in treatment’ which ‘is simply not something that a defense attorney is trained to do’”¹³⁹ A clinician, who is an expert at advising addicted offenders, stands as a suitable replacement for – or an advisor to – the defense attorney during this step in the screening process.

The architects of drug courts have indirectly identified the need for more therapy/clinician-based practices to enter the court room, but they have placed the burden for learning these practices on individuals such as lawyers and judges, who are either already overburdened with standard legal cases, or have no inherent interest in becoming a pro-active therapist for offenders. Some believe that these problems can be solved by offering even more extensive drug-court-specific training for lawyers, and that the system must simply better educate its long-standing cast of actors to learn to adopt new roles.¹⁴⁰ More comprehensive education of the legal professionals involved in the drug court system is certainly desirable, but what seems to be the most profound solution to the screening issue, is to involve professionals who already recognize and advise addicts on a daily basis – clinicians.

The goal of ensuring that only recidivist addicts enter the drug court system also has strong implications for the design and success of treatment procedures for recidivist addicts. When non-addicts enter treatment in drug courts they necessarily skew success metrics because their rationality and agency is not inhibited by addiction. Because many non-addicts

¹³⁴ Hardin, 57.

¹³⁵ Peters, 11.

¹³⁶ Bowers, 37.

¹³⁷ Miller, 1479. Bowers, 3.

¹³⁸ Howe, Penny. Personal interview. 30 Sept. 2010.

¹³⁹ National Association of Criminal Defense Lawyers, 31.

¹⁴⁰ Ibid, 40.

today comprise the populations of drug courts, drug court treatment programs often develop sanctions and incentives based on the behavior of these individuals. According to Bowers, this erroneous treatment design results in “counter-logical reasoning and theoretical incoherence” in terms of their treatment of the addict.¹⁴¹ They are incoherent in the sense that drug courts function in a way that is inconsistent with their purported goal of “treating” addicts. Although drug courts initially espouse the disease model when dealing with clients, they take on a penal approach when the clients fail to recover from their treatments.¹⁴² For Bowers, this is a cause for concern because addicts are people “for whom the everyday negative external consequences of drug use—the social, economic, legal, and physical costs—have proven insufficient” to alter behavior.¹⁴³ To tell defendants they are not at fault for their biological condition, and then to punish them, not for the crimes they’ve committed, but for their inability to “get with the program,” not only contradicts the two statements mentioned above, but also invalidates the whole purpose of drug courts, which is to treat addiction and prevent offenders from relapsing to substance abuse. Drug court participants are terminated from the programs when they fail to attend required treatment and court sessions, remain unemployed, commit new offenses, or engage in other deviant behaviors—all which are characteristic of what happens when relapse occurs. As a result, “repeated failures will eventually result in revocation of deferred judgment or probation, and imposition of a sentence (often to a prison).”¹⁴⁴

Due Process and Tension with Judicial Efficiency

Recall that one of the chief goals of drug courts is the maintenance of constitutional due process. In the screening process, however, drug courts often fall short of this goal. As noted, due process violations emerge in legislative constraints, entrance criteria, net widening, and lack of clinicians.

However, aside from due process concerns identified in the screening process, an overarching obstacle to the adherence to due process is judicial efficiency. The second goal of judicial efficiency and the third goal of due process are often held in tension.

Although treatment clients gain numerous benefits from increased judicial efficiency in drug courts, concerns of due process and effective reduction of recidivism emerge. Ideally, judicial efficiency should not interfere with justice. Justice and notions of fairness should have a complementary relationship with judicial efficiency. Moreover, in situations in which judicial efficiency threatens justice, justice must outweigh judicial efficiency. James R. Pielemeier, Professor of Law at Hamline University School of Law, remarks that “procedural due process is not intended to promote efficiency or accommodate all possible interests. [The] Constitution recognizes higher values than speed and efficiency.”¹⁴⁵ Therefore, although justice and judicial efficiency must exist in a complementary relationship, judicial efficiency cannot exist without justice. Justice provides the foundation to legal proceedings. Accordingly, in drug courts, the preservation of justice and the maintenance of fairness is of utmost importance and trumps any ambitions of judicial efficiency.

¹⁴¹ Bowers, 37.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ A. Dannerbeck, G. Harris, P. Sundet, and K. Lloyd, “Understanding and Responding to Racial Differences in Drug Court Outcomes,” *Journal of Ethnicity in Substance Abuse* (2006): 3-4.

¹⁴⁵ J. Pielemeier. “Due process limitations on the application of collateral estoppel against nonparties to prior litigation.” *Boston University Law Review*, 63(2). Retrieved from http://www.law.hamline.edu/files/Pielemeier_Due_Proce.pdf.

However, a premier concern of contemporary drug courts is that they streamline the adjudication process by offering offenders the option of drug court at the initial hearing. Although the diversion of cases from the traditional judicial process saves time, and personal and fiscal resources, it jeopardizes the due process rights of offenders. That is, defense attorneys have clients sign off their entitlement to a speedy trial shortly after their arrest. Speed and efficiency are essential to implement treatment in drug courts; hence the sanction for violating any condition of treatment is jail without the right to a speedy trial. It is difficult to accurately convey this process and the potential consequences to prospective clients because of the unique nature of the courts. Accordingly, offenders sign into “more efficient” treatment and lose due process guarantees. Additionally, because the target population of drug courts is genuine addicts, and the medical community defines addiction as a chronic, relapsing condition, judicial efficiency clashes with the behavior of recidivist addicts. Recidivist addicts who encounter relapses in the treatment process may eventually stop treatment and go to jail. A tension grows between judicial efficiency and justice for the client.

Recommendations

Add Clinicians

In this report, we have established the need for clinicians throughout the screening process in order for drug courts to be efficient and effective in admitting and treating only recidivist addicts. In order to alleviate the net widening effect and reduce recidivism, we recommend that clinicians—professionals who understand the cycles and stages of addiction and the range of appropriate treatments needed for individual offenders—become central figures in the drug court system, and that they be actively involved in every step of the client’s progression in court. We have also mentioned that accurate screening and assessment are crucial for effective triage and placement of genuine addicts. However, effective screening cannot occur when the current system employs attorneys and judges who do not have a strong basis in diagnosis and what truly constitutes drug addiction. Thus, this role should be specified to a clinician who is a professionally trained diagnostician and can determine which offenders are most in need of treatment. We believe that the optimal approach to treating recidivist addicts is to assemble a team of clinicians who can develop a triage and placement system that can assume responsibility for meting out treatment for each individual client. This clinical staff can use a scoring criterion, and upon reviewing each offender’s status, can refer, transfer or place him or her in different treatment programs, depending on the intensity or current status of the client.

We also established that the current stakeholders in the screening process are not necessarily compelled to ensure that recidivist addicts that can be helped by treatment are the majority population in the drug court system, and do not have the clinical background to differentiate between volitional users and recidivist addicts. To rectify this situation, we recommend that clinicians be placed at the gates to the drug court system and act as expert advisors to the prosecuting attorney and defense attorney. The issue of specifically how clinicians should operate within the current drug court system and how much power they should receive is debatable. However, it is certain that at least one clinician (perhaps out of a small team) should screen every potential drug court candidate along with the prosecutor. Perhaps prosecutors might retain the authority of final decision, but they should defer to the clinician as a sort of expert witness who can properly determine if an individual is truly an addict or simply a chipper who is trying to game the system. Clinicians who are trained to identify and work with addicts can add a layer of security to the drug court system that does

not currently exist. Because the sole job of clinicians is to represent the therapy and treatment side of drug courts at the gate, they will not be as easily compelled by pressures from the greater legal world, able to focus solely on ensuring that the populations of drug courts are truly primarily recidivist addicts. Additionally, clinicians can work with the defense attorney and the defendant to discuss whether or not drug court is the best option, even if the defendant is a recidivist addict.

Raise the Arbitrary Prior Record Score Maximum

In order to make it possible for more recidivist addicts to enter drug court, a few changes should be made with regard to the exclusion of violent offenders from the drug court system. Although many addicts commit robbery in order to maintain their addiction, they are excluded from drug court because their prior record score is above the maximum record score permitted for entry to drug court. Although, to look at an extreme case, it would be absurd to admit a murderer to drug court, we recommend that the arbitrary prior record score maximum for admittance to drug court be raised. This is important because many defendants commit less-serious violent crimes under the influence of their addiction; they are the type of people that drug courts are seeking to target.

Eliminate Categorical Exclusion of Violent Offenders

Another recommendation with relation to violent, drug-addicted offenders has to do with the categorical exclusions of violent offenders. According to the National Association of Criminal Defense Lawyers, defendants should *not* be categorically excluded from special courts for committing violent crimes. Instead, they could either be viewed on a case-by-case basis or they could be evaluated based on more tailored criteria. Either way, the categorical exclusion of violent offenders prevents many addicts from obtaining the help that would benefit them in drug court.¹⁴⁶

While the institution of clinicians into the drug court system would work to ensure that only true drug addicts are admitted to the drug court, these changes to the entrance criteria for violent offenders would allow more addicts to get help within the drug court. These recommendations, paired with the expertise a clinician affords, would be beneficial in making sure that those who enter the drug court are truly recidivist addicts.

Reassess Graduation Quotas

As stated within the flaws section, the legislative constraints that place strict graduation quotas upon drug courts has helped to create an environment that too often pushes non-addicts through the system in order to meet quotas and receive federal funding. While we make no claim as to which option is best, there are two major optional shifts that we see available to the graduation quota requirement. These graduation quotas must be reformed, or eliminated in order to provide an environment that would be more amiable toward true drug addicts.

Having graduation quotas is not out of the question, because indeed if implemented in junction with a clinician they would justify the existence of drug courts by making clear the number of constituents they help. If they are reformed, they must take into account the Visceral model in which cravings will often result in chronic relapse and therefore “failure” within the system.

When graduation stipulations require that addicts must remain clean with no view to the addictive cravings that will constantly pull the addict back to use, these constraints can

¹⁴⁶ National Association of Criminal Defense Lawyers, 24.

throw the addict out of the system who needs it most. Therefore, elimination of the graduation quotas might allow for better treatment outside of timeframe constraint, which could very well be more personalized and truly give the addict the coping mechanisms necessary to deal with the visceral cravings of addiction.

Open an Ongoing Dialogue

The current legislative constraints and the existing Sentencing Commission restrictions limit the ability of the Drug Courts to serve those who truly need it most. Part of the reason behind this is that there is a lack of communication between the bodies of legislators and members of the Sentencing Commission. We recommend a dialogue that needs the input of the legislators in charge of restrictions, grants and funding, along with the participation of members of the sentencing commission, in addition to influence and contribution from drug court actors, clinicians, and experts in the field of sociology, criminology, and addiction. By setting in motion this dialogue we hope that more workable, sustainable, and totally beneficial solutions can be discovered, created, and molded into the Drug Court system. Whether through a committee or some other means, a consistent communication must be made among these groups in order to best serve society.

Judicial Efficiency and Due Process Rights' Tense Relationship

The tension between due process and judicial efficiency would still exist if our recommendations were applied. The tension is impossible to reconcile. The goal of ensuring both due process and judicial efficiency is hampered by challenges and obstacles, whether you are a grant writer or legislative stakeholder. This continued tension emphasizes the importance of outlining the goals and aligning the expectations of all actors in the system.

Judicial efficiency is harmed when we eliminate categorical exclusions. Widening the drug court net could: 1) flood the drug courts with unqualified, out of scope offenders that will be better off in the criminal justice system; 2) it can also potentially encourage authorities to make more arrests now that a more affordable method of dealing with drug offenders exists. But those caught in the modified screening process and brought to drug court belong there and should be offered the option to go into drug courts.

Inserting clinicians into the drug court model will increase the costs and length of the legal process, which will de facto comprise judicial efficiency. But with clinicians, the due process rights of the participants will be ensured: 1) the clinician can serve as both an advisor and early screening officer and can ensure that the appropriate person has access to adequate treatment; 2) the clinician may also reduce judicial discretion and confusion of roles that seem to often occur, thus ensuring the full due process rights to all offenders.

While changing entrance criteria and the screening process will ensure that only addicts are admitted into the drug courts system, judicial efficiency will be decreased because those addicts who were previously excluded may have risk factors which decrease their chance of graduating. This will make pitching the drug court model more difficult. Of course, the more addicts the drug courts handle and send to treatment, the more the state pays for treatment. Though treatment would be cheaper at twice¹⁴⁷ the price compared with incarceration, it is a relevant cost.

As we have mentioned in our recommendations, perhaps the best way to address the tension between judicial efficiency and due process is to align the goals of the drug court model with the expectations of its actors. If the grant provider understands addiction is a

¹⁴⁷ Aos, S., Miller, M., & Drake, E. (2006). Evidence-based public policy options to reduce future prison construction, criminal justice costs, and crime rates. Olympia, WA: Washington State Institute for Public Policy.

recidivist disease that requires special approaches, they can modify any stipulations for judicial efficiency. With would allow a balance between due process rights of the participant and judicial efficiency.

Conclusion

For drug courts to reduce recidivism and increase judicial efficiency while not impeding due process they must include clinicians to improve their screening processes. Clinicians will help the other professionals within the drug court system ensure the right offenders go to drug court, and that those individuals commit to the process with a fair understanding of what it will entail.

Since the Harrison Act of 1914, the federal government in the United States has sought to regulate drug use and addiction by criminalizing the non-medical use of certain substances and publicly condemning drug addiction as a moral failing. The Supreme Court's 1962 *Robinson* decision declared addiction could not be treated as a crime. In addition, by that time most doctors considered addiction a disease that warranted treatment rather than incarceration.

Even with these positive attitude shifts, drug use and abuse continued to ravage American communities. In 1989 Miami faced a virulent cocaine trade and masses of addicts filling the jails and prisons well past capacity. Judge Herbert Klein designed a new approach: a drug court. Drug courts focus on reducing addict recidivism by providing them access to case management and treatment. In return for these services, addicts waive many of their due process rights. This approach increases judicial efficiency while maintaining due process rights, in theory.

Drug courts are successful by many metrics; however, they still have significant flaws. They may encourage net widening through the arrest of non-addicted drug users who otherwise would not have been included in the criminal justice system. Those courts which receive federal funding cannot serve addicts accused of violent crimes, which deprives the court the chance to help those individuals who may be doing the most damage to their communities. Drug courts include non-addicted users accidentally and exclude needy addicts unnecessarily because non-specialists conduct the screening process.

We believe including clinicians in key steps of the screening process will help ensure that those who go to drug court are the addicts who would be most benefited by participation. Excluding non-addicted offenders would help judicial efficiency and include as many eligible addicts as possible would increase the benefit of drug courts to their communities.

We also believe that offenders accused or in some cases convicted of violent crimes, a category that includes offenses in which no violence occurred, should be considered for inclusion in drug court on a case-by-case basis, rather than categorically excluded. Raising the prior record score maximum would also help alleviate this problem. An ongoing dialogue between state sentencing commissions, Congress, and drug courts would enable this. Finally, reassessing the current graduation quotas would allow drug court judges to take the time they need to ensure the addicts in their care receive the right amount and type of treatment.

Drug courts have great potential for helping addicted offenders within our communities learn to control their addictions and reintegrate as fully engaged members of society. They grew from the extreme drug regulation of our twentieth century, an approach which led to the destructive over-crowded prisons and an overwhelmed justice system. While they have flaws which impede their ability to serve their communities, we believe they can be improved until they serve all those who need them.

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