

LONG MAY YOU RUN: DRUG COURTS IN THE TWENTY-FIRST CENTURY

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Drug treatment courts offer a revolutionary approach to solving the endemic social and public health issue of drug addiction and should be adopted wholeheartedly. The main arguments in favor of the drug treatment model are threefold. First, drug treatment courts are a recalibration of the power dynamic and a greater assertion of judicial independence. Second, a collaborative approach that tailors the sentencing and treatment process to the needs of the individual offender is better public policy. A mandatory uniform model of sentencing is inconsistent with both societal and individual needs. The methodology of drug treatment courts results in more informed and tailored decisions regarding sentencing and incorporates mental health and public health

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This paper is dedicated to the memory of Justice Paul Bentley for all of his work both inside and outside the courtroom in the cause of justice for all.

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considerations in the sentencing process. Third, the traditional theoretical model of an adversarial court is inconsistent with historical practice.

The purpose of this paper is to advocate for the expansion of drug courts while exposing the limitations of these problem-solving courts. Another goal is to offer lessons from traditional court alternatives to help shape policy solutions for drug courts in the 21st century.

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I. Introduction

The region of Peel is located in the central west region of Ontario, Canada and has a population of almost 1.3 million people.¹ The region of Peel has one of the busiest courthouses in Canada.² In 2014, a 22-year-old Indo-Canadian was signing bail for her older sister, a 26-year-old university graduate. The older sister was charged with Possession of Heroin and Failing to Attend Court. After being approved as a bondsman (surety) for bail supervision, the younger sister broke down and started crying to the judicial magistrate saying, “What can I do? “My older sister is addicted to heroin. Where can I go?” Her experience is not an isolated one.³

On March 8, 2007, the Right Honorable Beverly McLachlin, Chief Justice of the Supreme Court of Canada, presented a speech entitled “The Challenges We Face.” Chief Justice McLachlin referred to former Prime Minister Elliot Trudeau’s vision of building a “just society.” The key feature of Prime Minister’s Trudeau’s vision of the “just society” was the promulgation of a Canadian constitution known as the *Charter of Rights and Freedoms*. The speech focused on the public’s expectation of justice in various court settings.⁴

Chief Justice McLachlin recounted the following anecdote: a police chief from a downtown Toronto precinct was sitting next to the Chief Justice at a formal dinner. The police chief said the biggest problem the police faced was mental illness. Every night the jails in his precinct would fill up with minor offenders or people who had created a nuisance. Such people were not “true criminals” or “evil wrongdoers” in conventional criminal law parlance. Rather, they were involved with the law due to their addictions and mental health. Chief Justice McLachlin proceeded to describe a new awareness of addiction by noting:

¹ STATISTICS CANADA, PEEL, ONTARIO (CODE3521) AND CANADA (CODE 01) (TABLE) CENSUS PROFILE, (2012), <http://www12.statcan.gc.ca/census-recensement/2011/dp-pd/prof/details/page.cfm>

² Roger Belgrave, *Ontario announces massive expansion plan for Brampton courthouse*, BRAMPTON GUARDIAN, (Jan. 5, 2015), <http://www.bramptonguardian.com/news-story/5243312-ontario-announces-massive-expansion-plan-for-brampton-courthouse>.

³ The author is a judicial magistrate, Justice of the Peace in Peel Region. The anecdote recounts a real experience. For privacy purposes, the woman’s name has not been identified. All of the issues, facts, conclusions and opinions are those of the author as a private student and are in no way an institutional or public endorsement.

⁴ See Speech Transcript: The Empire Club of Canada Addresses (Mar 8, 2007), <http://speeches.empireclub.org/62973/data>.

Today, a growing awareness of the extent and nature of mental illness and addiction is helping sensitize the public and those involved in the justice system. This sensitization and knowledge is leading to new, more appropriate responses to the problem. One response has been the development of specialized courts – such as mental health courts and drug courts. Mental health courts have opened in Ontario. These courts can do much to alleviate the problem. Other problem-solving courts within the Ontario Court of Justice include drug treatment courts and *Gladue* courts, the latter dealing with aboriginal offenders. The point is this: in a variety of ways, throughout Canada we are adapting our criminal law court procedures to better meet the realities of endemic social problems and better serve the public.”⁵

Drug addiction is a serious social and public health issue, which can become a criminal law issue when drug offenders become entangled with the law.⁶ The criminal justice system has a limited ability to address endemic social and public health issues. Drug treatment courts offer a policy solution to the younger sister’s concerns.⁷

The purpose of this paper is to advocate for the expansion of drug courts while exposing the limitations of these problem-solving courts. Another goal is to offer lessons from traditional court alternatives to help shape policy solutions to the social problem of drug addiction.

The roadmap in pursuit of the goal consists of five parts. Part I examines the adversarial model of adjudication from a theoretical and empirical perspective. One of the critiques of drug treatment courts is that judges lose the imprimatur of neutrality. The empirical analysis looks at a number of venues involving misdemeanor courts and recent developments where prosecutors became regulators and obliterate the separation of powers model. The purpose of Part I is to establish that the

⁵ *Id.*

⁶ See Nora D. Volkow & Kenneth R. Warren, *Drug Addiction: The Neurobiology of Behavior Gone Awry*, in THE ASAM PRINCIPLES OF ADDICTION 3, 60 (Richard K. Ries, David A. Fiellin, Shannon C. Miller & Richard Saitz eds., 5th ed. 2014).

⁷ Manisha Krishnan, *How Drug Treatment Court Rescued Her From the Streets*, TORONTO STAR, Apr. 27, 2015, at 1 (“[D]rug treatment court gives drug users who are non-violent offenders an alternative to incarceration. It operates on the principle of harm reduction.”).

adversarial model is just that, a model that does not correspond to the on the ground realities of how most courts operate. Part I also sets out how courts both in England and America have historically implemented policy through the use of masters and judges.

Part II examines some of the operating principles of problem-solving courts. Problem-solving courts are the practical applications of some theoretical aspects of restorative justice. Although both restorative justice and problem solving courts share some common features, they are distinct creatures. Drug treatment courts are a subset of the problem-solving movement. Part II also examines the historical outgrowth of drug treatment courts in the United States; the outgrowth was due in large part due to the war on drugs, mass incarceration, and the imposition of mandatory minimum sentences.

Part III identifies some of the common critiques of drug treatment courts and problem solving courts, including the role of courts as neutral arbiters, due process concerns, a widening effect, sociological critiques, and empirical attacks that drug courts do not reduce recidivism.

Part IV examines the development of drug treatment courts both in America and other common law jurisdictions. Part IV also briefly touches on why people use certain drugs and medical therapies. Finally, case law consisting of two Supreme Court of Canada decisions and one Ontario Superior Court of Justice are examined to extrapolate certain legal principles involving a public health model of addiction and the implicit endorsement of problem solving jurisprudence at both a Superior Court level and the Supreme Court of Canada.

Part V provides policy recommendations and conclusions.

A. PART I: THE ADVERSARIAL SYSTEM

The adversarial system refers to systems of adjudication in Anglo-American legal systems that share a constellation of features. These features include sharply defined roles for the litigants and the judge. Two parties through their legal representatives argue a case before a neutral and passive judicial officer. The judge bases her decision only upon the evidence presented to her and has neither staff nor resources to conduct independent inquiries. What is not presented, the judge or jury cannot consider.⁸

⁸ Malcolm Feeley, *The Adversary System*, 2 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM: STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW 753 (1987).

The goal of the advocate is to win by presenting the client's case in the best possible light. The underlying assumption is that truth is more likely to emerge as a result of vigorous conflict between partisan representatives.⁹

Some liken the adversarial system to a free market economy where judges are more likely to make the best choices if they have benefit of fiercely competitive salespersons that extol the virtues of their products and raise concerns about their opponents' products. A judicial officer thus makes the best decision after hearing the arguments of partisan advocates.¹⁰

In common law systems, adversarial modes can also be compared with mediation. A mediation system assumes the role of a third-party facilitator named a mediator; the mediator's job is to actively encourage the disputing parties to reconcile. The mediator's *raison d'être* is to act as a middle woman in order to persuade each opposing party to see the other side, to find common ground and seek a resolution satisfactory to both sides.¹¹

In American criminal law, a defendant faces two agents of the state, a prosecutor and the judge. The entire weight and power of the state is thrown against the individual.¹²

To ameliorate this power imbalance, Anglo-American systems have developed a number of substantive and procedural safeguards. Those include: (1) the presumption of innocence; (2) right to confront witnesses; (3) right to compulsory process against a witness (subpoena); (4) right to silence and; (5) right to a standard of proof beyond a reasonable doubt.¹³

One of the critiques of the adversarial system is it places too much responsibility or power in the hands of individual participants, who may have private motivations (power, ambition, success). Further, this system risks determination of cases based on the luck, skill and resources of contestants versus the merits of the case.¹⁴

Even more significant, if resources are unevenly distributed between parties (as is often true of criminal cases), differential resource

⁹ *Id.*

¹⁰ *Id.* at 753-754.

¹¹ *Id.*

¹² *Id.* at 756.

¹³ *Id.*

¹⁴ *Id.* at 757.

structures will determine outcomes, as opposed to legal merit.¹⁵ To combat this phenomenon, the jurisprudential development of procedural and substantive criminal law rules relating to right to counsel and pre-trial discovery (disclosure), attempts to recalibrate the structural imbalance between the state and the individual.¹⁶

A number of criticisms of the adversarial system remain valid. In such a complex and protean system of law, the process is often the punishment. Adversarial trial systems have become elaborate and complex. Very few people are able or willing to take advantage of a trial and thus very few cases end up being tried.¹⁷ The vast majority of cases are resolved by way of guilty pleas. Only 4 to 5 percent of all misdemeanor cases end up with a trial while only 10 to 15 percent of all felonies are adjudicated at trial.¹⁸

In December 1976, the Vera Institute published a study entitled *Felony Arrests: Their Prosecution and Disposition in New York's City's Courts*. The purpose of the monograph was to provide an accurate picture of felony arrests and the underlying patterns of arrest in New York City in 1971.¹⁹

In its analysis, the Institute also addressed some broader questions surrounding the criminal justice process. Those questions relate to: (1) how courts make decisions and in what contexts; (2) an examination of the underlying culture within which criminal law is decided; and (3) a prophetic look into future models of adjudication.²⁰

In the foreword, Professor Feely noted, "that if researchers ask the right questions and concern themselves with the general underlying factors and processes, a study of a single setting can yield insights of a general nature." Whether those broad insights relate to structures, form, function, underlying behavioral trends or external circumstances are

¹⁵ *Id.*

¹⁶ *Id.* at 758.

¹⁷ There are a multitude of reasons why this may occur: defendants cannot afford good representation, the reward is not worth the risk given a lengthy sentence, the caseload of practitioners (both defense and prosecutorial) mandate pleading out a majority of cases thus turning a judge into more of a mediator.

¹⁸ *Id.* at 760; see also Barkow, A., & Barkow, R.E., (Eds.) *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct*: New York: New York University Press (2011).

¹⁹ VERA INSTITUTE OF JUSTICE, *FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS* (Longman Inc. 1981).

²⁰ *Id.* at 2.

questions the Report answers directly and indirectly.²¹

Although the Vera Report is historically dated, Professor Issa Kohler-Hausmann prepared an updated study of the same misdemeanor courts in 2010. Her conclusions point to insights of a general nature that supplement the observations made forty years earlier. Those insights are cited for three reasons. First, the misdemeanor courts in New York City do not represent an adversarial model. Secondly, the process of bringing people to court may not just be punitive but may reveal broader sociological patterns. Finally, a number of the charges in the misdemeanor courts including simple marijuana offences.

Misdemeanors make up the bulk of criminal cases.²² Misdemeanor justice including processing, deciding and punishing is one of the “dominant components” of criminal justice and its operations represent both an underappreciated and understudied method of social control. The number of misdemeanor arrests is rising.²³ Professor Kohler-Hausmann’s two-year field study of New York City misdemeanor courts revealed that the large majority of cases result in no findings of guilt or punishment. In essence, the process is the punishment.²⁴

Kohler-Hausmann concluded that the process of criminal justice operates to control and regulate a significant segment of the population through the three techniques of marking, procedural hassle and mandated performance. Marking is defined as the “generation, maintenance, and regular use of official records about a person’s contacts for critical decisions.” Prosecutors utilize the consequences of marking in critical decisions including plea discussions. Marking “frequently produces signals of temporary duration often by design and consent of the parties.” Guilt may not be the end goal of marking; rather, it is a means of constructing a temporal record of a person’s conduct. Simple marijuana arrests and prosecutions illustrate the point. Marijuana arrests jumped from approximately 8,000 in 1994 to 56,000 in 2010. However, since 2004, between 45-59% of all marijuana charges were adjourned in contemplation of dismissal.²⁵

²¹ *Id.*

²² Issa Kohler-Hausmann, *Misdemeanor Justice: Control without Conviction*, 119AM. J. OF SOC. 351, 352 (Sept., 2013) .

²³ *Id.*, 351.

²⁴ *Id.* at 351-357 (distinguishing misdemeanor study from felony imprisonment research and noting Feeley’s contributions).

²⁵ *Id.* at 353-57, 367.

Procedural hassle refers to the “delaying, engaging and compelling” process of having an accused person conform to the institutional and organizational demands of both state actors and the court. It also includes defendants’ economic and non-economic opportunity costs of attending numerous non-trial court appearances. Trials constitute less than 0.5% of all cases; in 2010, out of 250,000 case filings, approximately 500 were set for trial. The time spent in coming to court is considered part of the costs of performance.²⁶

The third penal technique is called performance. It refers to the requirement that an accused person perform some duty, assigned task or therapeutic undertaking. Such conditions are not part of any guilty plea or bail process but simply part of the “process” of overcoming the hurdle of getting the charge dismissed. The conditions may not even have any societal or individual benefit but are simply the cost of being charged and having the charge dismissed.²⁷

The detailed sociological, statistical and criminological analyses by Kohler-Hausmann reveal three broad patterns. First, misdemeanor justice in New York City is not about efficiency and costs. Over 50% of all misdemeanor cases were resolved by dismissals in various forms. Kohler-Hausmann notes, “One of the most striking things about misdemeanor courts is that so much paperwork, personnel effort and resources go into delivering no criminal conviction or punishment.” By costs, one needs to particularize the investigative costs by the police, the prosecutorial and judicial costs of running very busy non-trial courts, and both the economic and non-economic opportunity costs borne by defendants.²⁸

The second pattern the study reveals is that the criminal courts are not operating according to the traditional model of criminal law where a judicial body assigns punishment based on judicial findings of guilt. Over half of all cases are dismissed and there are very few actual trials. The funnel analogy creates structures of plea courts. Nor do the courts fit the traditional adversarial model. Function and process dictate this form of assembly line justice.²⁹

²⁶ *Id.* at 374-80, n. 26.

²⁷ *Id.* at 381-85 (quoting Foucault in summarizing that “performance places individuals in a field of surveillances [and] situates them in a network of writings” creating information about the individual’s status and instruments to normalize behavior).

²⁸ *Id.* at 363-4, Fig. 3.

²⁹ *Id.* at 358.

Finally, the Vera Institute's findings from misdemeanor justice in 1970 and the broader timeframe in the Kohler-Hausmann study suggest that the process is still the punishment, a large percentage of cases are dismissed, and there are very few trials. Process may also now have a social regulatory function.

Why do most public policies routinely fail and some occasionally succeed? In *Street Level Bureaucracy*, Michael Lipsky suggested policy failures routinely occur because there are informational and implementation gaps between policy makers (legislators, executives and agency heads) and those providing street level service. Another reason why policies often fail is the manner in which service providers misapply wide swaths of discretion. The reasons for policy failures may provide some policy guidance to those managing drug treatment courts.³⁰

Generally speaking, courts cannot affect significant social policy because they lack the ability to: (1) evaluate policy issues; (2) analyze the costs and benefits of alternative policy choices; (3) set guidelines for determining the right policies; and (4) implement their decisions.³¹

The consensus of policy implementation and impact research suggests policies fail because policy makers, both elected and appointed, are neither powerful nor sufficiently attentive to the long-term process of policy execution. In the judicial arena, "judicial policy making fails because courts lack the capacity to diagnose social problems and oversee the complex process of implementation." Pressman and Wildavsky declared an axiom of public policy by stating, "Declaration of policies cannot be separated from implementation . . . Implementation is an extension of policy formulation and thus has to be factored in the *design* of the programs at the outset."³²

In *Judicial Policy-making and the Modern State*, Malcolm Feeley and Edward Rubin examined one forum in which American trial courts were successful as policy makers; that arena was Federal prison and correctional reform. The courts' rulings resulted in significant change and were widely accepted.³³

³⁰ Malcolm Feeley, *Implementing Court Orders in the United States: Judges as Executives*, in JUDICIAL REVIEW AND BUREAUCRATIC IMPACT 21 (Marc Hertogh & Simon Halliday eds., Cambridge University Press 2004).

³¹ *Id.* at 222.

³² *Id.*

³³ *Id.* at 223.

In the late 1960's and early 1970's, American courts responded to complaints of prison conditions in traditional legal terms. These traditional responses included categorizing abuses as violations of due process, failures to provide access to courts or violations of freedom of speech and resulted in an expansion of basic expression of rights to prisoners. However, this rights-based approach did not address the fundamental structural and systemic brutality of the Plantation Model prisons. Plantation Model prisons were those that viewed "a prisoner as a slave of the state and expected prisons to be run at no cost."³⁴

In *Holt v. Sarver*, the Federal District Court addressed prison conditions in Arkansas. The decision was issued in 1969. *Holt* was precedent setting for two reasons. First, it was America's first substantive and procedural judicial reform to systems-wide prison conditions at the Federal level. Secondly, the facts in the case highlighted some of the antediluvian features of the prison plantation model. The prison was structured on the plantation model and was run as a self-sufficient profit generating enterprise. There were no civilian guards and the most brutal inmates ran the prison by providing no services for the inmates. Prison life was a Hobbesian narrative where existence was short, nasty and brutish. Corruption, torture and sadism were a way of life. Its Tucker Prisoner Farm was famous for the 'Tucker telephone', an apparatus used to administer electric shocks to prisoners' genitals.³⁵

It is significant to note that the Federal Courts "abandoned" their traditional role and remedies only when faced with the structural and systemic horrors of the Plantation Model. Courts set out to tackle the 'totality of conditions' in three ways. First, the Eighth Amendment's prohibition against cruel and unusual punishment was not viewed narrowly as doctrine, but broadly as a delegation of authority justifying detailed intervention and a multifunctional role. Secondly, each Federal court expanded its vision and capacity. The court incorporated the defendant prisons into the policy making process by requiring the prisons to respond to detailed plans for reform through general orders. Finally, the court acquired special masters. The masters extended the court's capacities to manage the new duties and assisted correctional officials in implementing reform.³⁶

³⁴ *Id.*

³⁵ *Id.* at 229-239; *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969).

³⁶ Feeley, *supra* note 30 at 224.

Feeley looked at prison reform cases in Arkansas, Texas, Georgia and California. Policy was created in a “spiraling and sprawling process” between judges whose rulings outlined general policies and institutions that responded to the rulings. When the institutional reply was non-responsive, the court become immersed and took on more of an executive role.³⁷

Notwithstanding different jurisdictions, judicial philosophy and circumstances, all of the judges approached their tasks with caution. This incremental approach was similar to entering a swimming pool where, “it was if they entered a pool at the shallow end but were drawn step by step into the deeper parts.” However, once in the deep end, judges found the confidence and competence to manage structural reform.³⁸

Without financial resources or power of the sword, courts were able to become successful policy makers by embracing a policy making function and eventually becoming administrators. Courts also developed executive capabilities through the use of special masters. These special masters extended the judicial capacity to recognize difficulties, devise solutions and oversee compliance.³⁹

The importance of masters in the prison reform cases cannot be overstated. Since the fifteenth century, English judges have appointed special masters, auditors, examiners and commissioners to act on the court’s behalf. In the late 19th Century, federal judges appointed special masters to serve as receivers in insolvency matters. These bankruptcy matters often involved receivers protecting railroads against creditors, renegotiating contracts, preventing piecemeal sale of properties or helping businesses become solvent.⁴⁰

In the 1960’s and 1970’s, the court system often used special masters to enforce and implement judicial orders in school desegregation cases. It is noteworthy that special masters were only appointed when school boards would not or could not design desegregation plans to comply with court orders.⁴¹

In the prison cases, courts adapted their form to suit the function of addressing complex institutional reform by using executive instruments (masters) to implement the court’s orders. In so doing, the courts

³⁷ *Id.* at 224, 229-35.

³⁸ *Id.* at 225.

³⁹ *Id.* at 225-6.

⁴⁰ *Id.* at 227.

⁴¹ *Id.*

expanded their ability to gather information, manage complex “polycentric” issues, institutions and, through special masters, devote sufficient time and resources to those cases. Such a change was revolutionary in relation to the traditional view of a passive, reactive judiciary in the traditional adversary model.⁴²

Many executive authorities including the President, mayors, governors and heads of agencies employ special assistants to focus on important policy objectives. In the prison cases, the masters’ roles were protean and multifaceted; “activities were determined by the nature of the problem, degree of resistance, parties’ abilities to react and implement reforms, individual personalities and personal chemistry.”⁴³

As a result of the appointment, the special masters were able to greatly enhance the court’s ability to keep on top of issues and shape policy development. The court was able to have a full time “agent” on the ground who could gather facts, informally communicate and quickly assimilate information, which, in turn, allowed the court to act quickly and decisively. In terms of implementation, masters were able to translate broad goals into detailed plans. Such a result was especially critical when there existed institutional or personnel obstacles, and the special masters could use their subjective expertise to overcome said hurdles.⁴⁴

The traditional definition of adjudication sets out a narrow function for courts based on the traditional adversarial paradigm. The prison cases reveal the traditional model to be inaccurate and one in which function dictates form rather than the converse. While reasonable people may disagree about the results, what is beyond dispute is that courts “dramatically expanded their repertoire in dealing with complex structural reform.” This expansion was established in the judicial process.⁴⁵

Public law scholars have traditionally examined the validity and effectiveness of judicial regulation regarding accountability, institutional competence and procedural reliability to regulate. A new player has arisen on the institutional stage in terms of regulation. That new player is the prosecutor. As Rachel Barkow observed, we “live in an age where prosecutors are a significant source of corporate regulation.”⁴⁶

⁴² *Id.* at 224.

⁴³ *Id.* at 243.

⁴⁴ *Id.* at 248.

⁴⁵ *Id.*

⁴⁶ Barkow, *supra* note 18, at p. 177.

Prosecutors have taken on an adjudicative function. Four factors have been relevant in this recent trend. First, there are many criminal laws, which are broadly written. An individual's conduct may lead to a multitude of charges for the same offence. This gives the prosecution great discretion at the charging stage and bargaining leverage when negotiating with the accused. Second, mandatory minimum sentences and sentencing guidelines have restricted a court's sentencing discretion. Third, prosecutors may offer significant discounts for cooperating with the authorities and accepting responsibility. Prosecutors do not offer the same leniency when an accused chooses to have a trial or decides to plead guilty close to the trial date. Finally, such broad discretion, even to an outsider, appears somewhat coercive and is not subject to judicial or legislative review.⁴⁷

As a result of these factors, more than 95% of convictions result from guilty pleas. For the vast majority of accused persons, trials are simply too costly in the criminal justice system.⁴⁸

Corporate monitors including former prosecutors and criminal investigators played a critical role in the fight against organized crime's influence in labor unions. One of the monitors' principal objectives was to ensure free, fair and transparent elections in the tainted unions. Unions were required to pay the costs of the internal investigations. The Department of Justice was thus able to minimize public costs and expand the investigative field to a larger number of cases and pursue systemic reform.⁴⁹

The first civil suit was filed in 1980 and twenty more have been filed since then. Success has been mixed. Successful monitors were those that were proactive, aggressive and organizational change agents. Jacobs and Goldstock conclude there is some uncertainty as to what worked in the investigation and regulation of corrupt unions⁵⁰

An analysis of the prison cases, new prosecutorial functions and misdemeanor justice in New York City in 1970 and 2010 (Vera and Hausmann studies) suggest four patterns. First, through the use of special masters, courts have historically exercised executive functions. Second, process is not only the punishment. Process now also has an investigative

⁴⁷ *Id.*, Barkow cites the example of threatening defendants with enhanced penalties if they choose to have a trial.

⁴⁸ *Id.* at 178-9.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

and ethical component. Prosecutors may also demand “supraethical” and “supralegal” conduct; “supraethical” and “supralegal” refer to more than base legal and ethical standards. Such developments reveal a divergence from a pure adversarial system in the context of white-collar prosecutions; theoretically, I argue that if the adversarial system is expansive enough to cover white-collar prosecutions, then the same flexibility can be applied to drug offenders.⁵¹

B. PART II: PRINCIPLES OF PROBLEM SOLVING COURTS

Problem-solving principles are a related theoretical cousin to restorative justice. Both restorative justice scholars and problem-solving scholars share some common perspectives. Both see significant failures in the adversarial criminal justice system. Additionally, both restorative justice and problem solving analysts seek to resolve disputes within broader social and factual contexts using a wider range of sources with the goal of holistically analyzing conflict. The ultimate goal of both is to address the underlying social problems through some form of individual betterment and restoring harmony to both offenders and the community at large.⁵²

Since 1990, problem-solving courts have been part of a movement known as the Comprehensive Law Movement.⁵³ The underlying impetus for the movements was social dissatisfaction with law, lawyers and the legal system; this includes unhappiness among lawyers and judges with their work and associated stress, and clients’ unhappiness with lawyers and the broader legal system.⁵⁴

Professor Bruce Winnick cites two common characteristics among the various movements including: (1) a desire to optimize human comfort in legal matters, be it psychological functioning, harmony, health,

⁵¹ Feeley, *supra* note 30 at 756.

⁵² JAMES L. NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 31-33 (2009)

⁵³ Susan Daicoff, *Growing Pains: The Integration vs. Specialization Question for Therapeutic Jurisprudence and Other Comprehensive Law Approaches* 30 T. JEFFERSON L. REV. 551, 553 (2008) (Daicoff refers to various movements including preventive law, therapeutic jurisprudence, procedural justice, holistic justice, restorative justice, transformative mediation, collaborative law, creative problem solving and problem solving courts – including mental health courts, drug treatment courts, unified family courts and other specialized interdisciplinary regimes).

⁵⁴ *Id.*

reconciliation or growth; and (2) an identification of individual values, beliefs, morals, ethics, needs, resources, goals, relationships, communal integration and one's psychological state of mind. The key focus is away from a strict legal rights approach.⁵⁵

The diversity of problem-solving paradigms is reflected in normative assumptions and goals. For example, the goal of rehabilitation within a drug treatment court may differ from a domestic violence court. While drug courts aim to help offenders obtain counseling with the fundamental goal of helping offenders become part of a law-abiding community, domestic violence courts emphasize punishment and victim safety. While the former addresses rehabilitation, the latter focuses on accountability and public safety.⁵⁶

Notwithstanding different goals, according to R. Wolf, there are six operating principles that all problem-solving courts share. Those are: 1) Enhanced Information, 2) Community Engagement, 3) Collaboration, 4) Individualized Justice, 5) Accountability, and 6) Outcomes.⁵⁷

1. Enhanced Information

In a traditional courtroom, the focus is on the defendant and what happens inside the courtroom. In conventional courts, neither the judges nor court staff have detailed knowledge of a person's underlying problems, such as mental illness, drug addiction, or family dysfunction.⁵⁸

Another feature of problem solving courts (PSC) is the goal of informed decision-making. Generally speaking, courts are reactive institutions and provide decisions and reasons based on the materials in front of the court. PSCs look to turn that notion on its head and provide the court with as much information about the offender as possible. That evidence may include psychosocial information about offenders and data about the impact of crimes on particular neighborhoods. Expansive information is the goal for all the crucial players in the criminal justice system including the judges, prosecutors and defense attorneys. Problem solving advocates argue that all of the above noted players should have as much information as possible, including psychosocial information about offenders, crime rates in affected neighborhoods (judges) and

⁵⁵ *Id.* at 554-55.

⁵⁶ ROBERT V. WOLF, CENTER FOR COURT INNOVATION, PRINCIPLES OF PROBLEM-SOLVING JUSTICE 2 (2007)

⁵⁷ *Id.* at 2-4.

⁵⁸ *Id.* at 2.

pharmacological foundations of addiction (defense bar). PSCs seek to provide as much background information to various players as possible.⁵⁹

One of the essential characteristics of a problem-solving program is a thorough intake report. The purpose of the report is to gather a comprehensive social history, including education, physical health, mental illness, social support, vocational and community support. A judge can then use the enhanced information to tailor an individualized sentence. A more enhanced form of social history enables the parties to make better decisions.⁶⁰

2. *Community Engagement*

In a traditional structure, courts have sought to remain detached and aloof from the communities they serve; courts maintain an arms-length relationship with the communities they serve. The importance placed on impartiality required courts to remain distant from the community at large. Some problem-solving courts, especially community treatment courts, have revised that notion and led the criminal justice system in prioritizing and solving local community problems in the justice system.⁶¹

Some of the court led initiatives have included questionnaires, community gatherings, focus groups and public education through the media. In Kalamazoo, Michigan, prosecutors administered a door-to-door survey asking residents to identify quality of life issues. The survey identified juvenile loitering to be a concern and helped develop a community prosecution program.⁶²

There are benefits to such an approach. By finding a role for the public, the community is engaged. Once engaged in the system, it can be tailored to better serve various community goals. This has happened, for instance, where private community groups started overseeing offenders performing community service, thus saving scarce public funds.⁶³

However, the dangers of community involvement are significant. The risks include criminalizing and creating processes for non-criminal

⁵⁹ *Good Courts*, *supra* note 11, at 5-7. Such an inquisitorial approach is not without its risks. What about the offender who confesses to an uninvestigated and unsolved assault? Is that information admissible and if so, then what about a chilling effect?

⁶⁰ Wolf, *supra* note 56, at 3.

⁶¹ *Id.* at 4-5.

⁶² *Id.* at 5-6.

⁶³ *Id.*

behavior and widening the net. Net widening refers to the unintended consequences that occur when reforms aimed at reducing levels of punishment do the opposite by expanding the class of people who are punished.

3. Collaboration

Courts are at the center of a complex hub of factual, legal, institutional, social and communal webs. The police investigate the facts and make arrests; prosecutors and defense attorneys argue the facts and law; defense attorneys ensure due process and individual rights are protected while prosecutors focus on community safety concerns. Probation and parole authorities implement court orders involving probation and parole. However, notwithstanding the interconnectedness, courts in a traditional setting are reactive institutions that focus on retrospective facts. This means that courts determine guilty by looking back in time to facts that focus on the what, where, when and why something happened. Courts do not have a significant say in where and how a particular punishment is to take place, nor do they measure the results of the punishment imposed.⁶⁵

Problem-solving courts take advantage of their centrality in terms of structure and location in the community and try to use their prestige, visibility and reputation for neutrality outside the justice system to start a collaborative process. The purpose is to bring together justice partners and stakeholders to improve inter-agency communication, built trust between citizens and their government and provide a space for new responses to old problems. The enhanced expertise and additional resources of numerous partners allows for new options for punishment.⁶⁶

Problem-solving courts are proactive institutions that welcome new players to the courtrooms. Such courts reach out to neighborhoods to educate community groups and find new ways for citizens to get involved in the judicial process. Within the social work arena, courts seek to integrate drug treatment providers, mental health workers, vocational specialists and victim/witness communities into one frame. The purpose of such consolidation is to give courts the widest options for non-custodial sentences. As Berman notes, "By mandating offenders to receive drug treatment or mental health counseling or job training or community service, problem solving courts seek to reduce the reliance on

⁶⁵ *Id.*

⁶⁶ *Id.*

incarceration, probation and dispositions that allow offenders to leave court with no sanction whatsoever for criminal behavior”.⁶⁷

4. *Individualized Justice*

Problem-solving courts try to address two elements of individualized justice. First, problem-solving courts try to move away from “assembly line justice” and a “one size fits all” approach to criminal justice.⁶⁸ The goal is to link people to specific community based servicers and tailor the punishment to the underlying problems that eventually manifested themselves in criminal behavior. The goal is to reduce the use of incarceration, which is seen as both expensive and ineffective especially for low-level and non-violent offenders.⁶⁹

A tailored approach to justice seeks to disentangle a busy criminal docket and calibrate judicial resources to match the needs of an individual case. It is a reflection of a notion that one size does not fit all approach to criminal justice.⁷⁰

5. *Accountability*

In terms of accountability, problem-solving judges make considerable use of judicial monitoring to ensure that offenders are complying with court orders. Such a hands-on approach includes all the parties monitoring an individual offender weekly or biweekly to ensure compliance. Requiring regular court appearances by offenders reinforces the importance of compliance with court orders and sends a broader message to other systemic figures (lawyers, police, probation, social service workers) and the public that courts “mean business”.⁷¹

By requiring offenders to check in regularly with the judge, clerk, or local partners, problem-solving courts can ensure that sanctions—even diversion programs and alternatives to incarceration—have real teeth because there is continuous supervision. Dade County, Florida, for example, launched a judicial monitoring program that requires participants on probation to come back to court regularly to report on their

⁶⁷ JOHN FEINBLATT & SARAH GLAZER, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 5-6 (2005).

⁶⁸ *Id.*, Natasha Bakht, *Problem Solving Courts as Agents of Change* (2005) 50 *Crim. L. Q.* 225

⁶⁹ *Id.*

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 6.

progress in treatment.⁷²

6. Outcomes

Courts have customarily measured their effectiveness by studying process: How many cases are handled per day, week, and month? What is the average time between arrest and arraignment? How quickly do cases move through the system? What is the clearance rate? How extensive is the backlog?⁷³

Finally, in focusing on outcomes, problem-solving courts determine success not by how many cases are handled but rather by looking at the qualitative nature of the outcomes. What effects do the case outcomes have on victims and offenders? What numbers of offenders are rearrested? Such a results-oriented approach is less concerned with efficiency and case processing times and more concerned with quality of outcomes and has a broader definition of success.⁷⁴

Problem-solving initiatives are concerned about process, but ask additional questions. Often these questions are rooted in research and the knowledge of experts outside the courtroom. Drug courts are simply a subset of various problem-solving models. Drug courts try to determine what participant demographics are associated with program success. The answers can help drug courts establish appropriate eligibility criteria and also hone their programs to better address participants' needs and thereby produce better outcomes. The active and ongoing collection and analysis of data—measuring outcomes and process, costs and benefits—are crucial tools for evaluating the effectiveness of operations and encouraging continuous improvement. Public dissemination of this information can be a valuable symbol of public accountability.⁷⁵

Expansive information is the goal for all the crucial players in the criminal justice system including judges, prosecutors and defense attorneys. All of the noted players should have as much information as possible including psychosocial information about offenders, crime rates in affected neighborhoods (judges) and pharmacological foundations of addiction (defense bar)? PSCs provide as much background information to various players.⁷⁶

⁷² *Wolf, supra* note 56, at 8.

⁷³ *Id.*

⁷⁴ *Id.* at 6-7; *Good Courts, supra* note 11 at 6-7, 33.

⁷⁵ *Id.* at 8-9.

⁷⁶ *Id.* at 6. Such an inquisitorial approach is not without its risks. What about the

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C. PART III: CRITICISMS OF DRUG TREATMENT COURTS

There are eight general critiques of drug treatment courts. The first is that the court loses its neutral impartial status that it otherwise accords in the traditional adversarial system. The second critique relates to due process concerns. The first due process concern is that DTCs force people into treatment against their will, thus undermining a basic tenet of mental health law, namely, that a court cannot compel a person to take medication or force treatment. Another due process concern is that DTCs undermine the traditional role of defense attorneys. The third critique is that drug treatment courts may widen the net of people who are dragged into the criminal justice system. A fourth critique is that such courts are not effective. The fifth, sixth, seventh, and eighth critiques have to do with issues regarding recidivism, cost, sanctions, and treatment.

1. *Court Loses Its Neutral Status*

In 2007, John A. Bozza critically analyzed the growth of problem solving courts, including mental health courts and drug treatment courts. One of his critiques of drug treatment courts was the virtual elimination

offender who confesses to an uninvestigated and unsolved assault? Is that information admissible and if so, then what about a chilling effect?

⁷⁷ *Id.*

⁷⁸ *Id.* at 6-7.

of a judge as a neutral adjudicator in favor of direct involvement in the supervision of offenders.⁷⁹ Certain characteristics of drug treatment courts that separate them from conventional courts are (1) the direct involvement by a judicial officer in the monitoring and evaluation of offender performance; (2) a concerted effort to make treatment strategies available to offenders in order to help “solve their problem behavior”; and (3) a system of reward and punishment to motivate rule compliant behavior.⁸⁰

A criticism of the problem-solving approach has been reliance on procedures that vary with due process models and traditional principles of the adversary system. Judges, prosecutors and defense counsel shed their traditional roles in pursuit of a collaborative approach. Bozza argued that judges compromise their neutrality when they see themselves as therapists. A judge’s proactive and direct involvement in a change process of a criminal defendant raises questions about the judicial officer’s neutrality and detachment. As Bozza notes, “When the judge becomes a member of the treatment team, he is no longer interested in what is just but rather what works.” However, the question does not need to be framed in such a dichotomous, exclusive way. Rhetorically, one may reply by asking can a judge not do something that both works and is just?⁸¹

A second rejoinder to the adversarial critique is that certain courts do not operate according to a classic model. The misdemeanor studies by Feeley, the Vera Institute and Kohler-Hausmann reveal that the vast majority of cases were either resolved or withdrawn.⁸²

The final reply to the adversarial criticism is that other institutions are collapsing the separation of powers model and act like the executive, legislative and judicial branch prior to any judicial findings of guilt. If this *modus operandi* is being used with respect to while collar crime, then why can’t a non-traditional approach apply to those suffering from drug addiction?⁸³

John Bozza recognized that drug treatment courts reduce recidivism, but proposed that greater enforcement and improvement by probation services are the answer. Bozza concluded that the positive results from drug treatment courts are attributable to judges playing the

⁷⁹ John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts* 17 WIDENER L.J. 97, 113-4 (2007).

⁸⁰ *Id.*

⁸¹ *Id.*, 113-14.

⁸² See *supra.*, p.22, note 101.

⁸³ See *supra.*, p.20.

role of a more authoritative probation officer. Bozza argues that a better-funded probation office could just as easily perform this function. After all, a probation officer can force people to treatment without obliterating the separation of powers.”⁸⁴

However, Bozza’s historical omission of the phenomenon of mass incarceration and mandatory minimum sentences is significant in relation to the practical and theoretical backgrounds for how problem-solving courts evolved in America. To ignore the historical background is to ignore the cause of the cause–effect relationship between why such courts developed. The omission undermines Bozza’s policy recommendations.⁸⁵

In order to qualify for participation in a drug treatment program, an accused person may give up certain due process rights (for example, right to a trial by jury) in order to comply with special rules in a treatment court. As part of therapeutic justice, courts are attacked as “do-gooders” that lack effectiveness and operate contrary to the retributive model of western jurisprudence.⁸⁶ Bozza observed that: (1) drug treatment courts are attractive because they are an alternative to the “McJustice” approach to adjudication; (2) such courts avoided a “soft on crime” critique since the drug courts are perceived as holding offenders accountable by compelling treatment. Bozza states that the drug treatment programs were “phenomenally oversold, wasteful and unsophisticated effort to apply behavior modification that is politically and socially acceptable.”⁸⁷

Bozza argued that another weakness of drug treatment courts was the lack of detailed follow-up and data compilation to determine what works and what does not. Specifically, the essence of therapeutic jurisprudence and the problem-solving model is the availability of “treatment” for “bio psychosocial” causes of dysfunctional behavior. While “treatment” implies use of measures intended to address the underlying causes of abnormal conduct, little attention is paid to exact modalities of treatment. Evaluations of drug treatment courts pay no attention to the type of treatment options that are successful; the evaluations are more concerned with overall performance. Similarly,

⁸⁴ Bozza, *supra* note 79, at p. 122, Bozza is almost contemptuous of the judicial role in a drug treatment court. He says, “It is hard to conceive of any business sector entity completely ignoring the obvious efficiencies of utilizing currently available resources in favor of creating an entirely new organization where there was no practical or theoretical need to do so.”

⁸⁵ *Id.*

⁸⁶ *Id.* at 101.

⁸⁷ *Id.* at 102.

there are no defined treatment strategies associated with the drug courts; while the drug court literature refers to treatment there is no distinction between types of treatment. The overall concern is access to treatment with little attention to the nature and quality of the change strategy.⁸⁸

2. *Due Process Concerns*

Tamar M. Meekins argued that the problem-solving model creates a number of problems for criminal defendants and raises a number of potential ethical concerns interference by judges and treatment officials with the attorney's role as zealous representative of the client's interests.⁸⁹

Specialty courts range in subject matter from drug courts to community and domestic violence courts. These courts have revised the structure and process of cases and the administration of justice to focus on outcomes rather than due process. The outcomes relate to goal-oriented policies relating to a reduction in recidivism and an increase in the number of defendants who successfully receive treatment.⁹⁰

There are two types of specialty drug treatment courts. These are pre-adjudication and post-adjudication models. The pre-adjudication model offers admission before a trial or a diversion option and the defendant does some up front work by attending treatment. The defendant is not required to waive any due process rights or enter a guilty plea. If a defendant is not successful in treatment, she can elect to have a trial in the traditional court stream. The prosecution objections to this model relate to the burdens that increase over time with contacting witnesses, scheduling officer time and reconstructing the case. Prosecutors argue that if a defendant is unsuccessful in treatment, then the accused benefits from the delay due to the weakness of the prosecutor's case that occurs with the passage of time.⁹¹

In a post-adjudication model, a person pleads guilty to an offence and then waives certain pre-trial rights (right to speedy trial, preliminary hearing or jury) in order to be eligible for the treatment stream. Sentencing is deferred until the defendant completes the treatment program. If she successfully completes treatment, the case may be withdrawn or the offender may be placed on probation in lieu of a custodial sentence. If the

⁸⁸ *Id.* at 107.

⁸⁹ Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 77 (2007).

⁹⁰ *Id.* at 77, 83.

⁹¹ *Id.* at 87-88.

defendant is unsuccessful, she is sentenced in the normal manner.⁹²

A post-adjudicative model is more problematic for the defense side. Meekins argues that post-adjudicative courts are coercive as the defendant may view this as the only avenue to release from custody; the decision may be less motivated by the desire for help than the wish to get out of jail.⁹³

The “coercion” critique of drug treatment courts is that they force people into treatment against their will. This process undermines a basic tenet of mental health law, namely, that a court cannot compel a person to take medication or force treatment. Advocates of problem solving courts argue that coercion is necessary to motivate people into treatment. The critical moments in the process are entry to and exit from the specialty court. Against the possibility of a lengthy jail term, a decision to enter a treatment program may be viewed as forced. However, as Timothy Casey concluded, “the nature of plea bargaining is inherently coercive and because of administrative concerns, courts maintain a lesser degree of coercion with the nature of agreements made by criminal defendants.”⁹⁴

According to Meekins, a scale of increasingly severe sanctions is utilized to ensure compliance, with the ultimate sanction being incarceration. Courts use increasingly harsh sanctions depending on the offender’s violations. The list of sanctions may include an order that the defendant meet with a case manager to be reoriented to the rules of the program. A further sanction for a violation may include assignment to individual or group therapy or an order to watch court proceedings. Further authorizations may include community service, restitution, tightening of conditions or at worst, a period of custody. This stepladder approach is seen as coercive and important since the list of sanctions is automatic and non-negotiable.

Meekins notes there is little room to challenge the basis of a sanction; this weakens the role of a lawyer as an advocate.⁹⁵ What is more concerning is that the interim measures used to secure compliance may not have any relevance to the treatment program. At the top of the sanctions pyramid, defendants may be sent to jail for brief periods of time.

⁹² *Id.* at 88.

⁹³ *Id.*

⁹⁴ Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Court and the Impending Crisis of Legitimacy*, 57 S.M.U. L. REV., 1459, 1498-9 (2004) [hereinafter “*Good Intentions Are Not Enough*”].

⁹⁵ Meekins, *supra* note 89, at p. 90-91.

However, there is no treatment benefit to incarceration.⁹⁶

Meekins' second criticism of drug treatment courts was the traditional lawyer-client relationship is undermined because the team approach adopted by all the players in the criminal justice field impairs a lawyer's ability to be a vigorous advocate for her client. One consequence of a collaborative design may be the abandonment of a strict adversarial approach by the defense. Specialty court advocates expect that attorneys will adapt their roles to acclimate the principles and approach of the specialty court. However, each court has its own practices and guidelines. As of 2007, the National Legal Aid and Defender Association (NLADA) established "Ten Tenets of Fair and Effective Problem-Solving Courts" providing a defense outlook for the implementation and operation of problem solving courts.⁹⁷

Professor Eric Lane raised the question of whether problem solving courts can develop without damaging due process protections of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the corresponding equivalents in the state constitutions. With respect to the "coercive" nature of the plea process in specialty courts, Lane notes, "Any lawyer may push a defendant, even too hard in a particular direction. A client can later challenge that effort as ineffective assistance of counsel . . . What is of concern here, though, is not the pressure commonly applied by a defense counsel to secure a plea . . . but the avowed 'teamwork' overlay on that pressure. This raises the more fundamental question of defense counsel's independence."⁹⁸

⁹⁶ Casey, *supra* note 94, at p. 1499.

⁹⁷ Meekins, *supra* note 89, at 90-1. The relevant NLADA tenets include: 1) Qualified Members of indigent defense bar should have the opportunity to meaningfully participate in the design and eligibility criteria of drug treatment courts; 2) PSCs should afford resource parity between defense and prosecution; 3) the accused's decision to enter the program must be voluntary; 4) the accused should not be required to plead guilty before entering the program; 5) the accused should have the right to withdraw from the PSC without any prejudice; 6) a policy protecting the accused's right against self-incrimination must be protected; 7) treatment programs should be the least restrictive to achieve agreed upon goals; and 8) nothing in policies or procedures should compromise counsel's ethical obligation to advocate for her client. NAT'L LEGAL AID & DEF. ASS'N (NLADA), AM. COUNCIL OF CHIEF DEFS. (ACCD), *Ten Tenets of Fair and Effective Problem Solving Courts*, <http://www.nlada.org/DMS/Documents/1019501190.93/Ten%20Tenets-Final%20ACCD%20version.doc> (last visited Mar. 4, 2016).

⁹⁸ Lane, *supra* note 106.

With respect to ethical obligations, “counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.”⁹⁹ If a collaborative approach requires counsel to shepherd her client into the problem-solving process regardless of the facts underlying the charges, then such an approach would be unethical. However, such allegiances and efforts are not so rigidly cast; rather, the collaborative approach represents a common understanding of how to resolve certain types of cases once the defense has explored the role of examining and advising on the merits of the charge and possible defenses. I would add that the same ethical due diligence requirement regarding facts and the law apply to the prosecution. In a setting in which the defense, prosecutor and judge are all “regulars” insofar as all criminal justice actors work together daily in the same courtroom, all the actors develop shared goals, attitudes and rules of practice that allow the process and participants to work cohesively. Therefore, this “shared” approach is not unique to problem solving courts.¹⁰⁰

The collaborative approach used in drug treatment courts also raises questions regarding the role of the judge. Specifically, in a colloquium entitled “What is a Traditional Judge Anyway, Problem Solving in the State Courts”, Judge Kluger concluded by stating, “If we are going to apply that kind of pressure, isn’t it better that the pressure is in a life-changing direction?”¹⁰¹

Judge Kluger’s conclusion results in a further inquiry that connects to the role of a drug court judge. Every judicial officer has an obligation to ensure that a guilty plea is the result of an intelligent and knowing waiver; i.e., that the defendant is waiving their right to a trial, is aware of the underlying facts in support of a guilty plea and aware of the consequences of a plea including a finding of guilt.¹⁰²

In a drug treatment court, does a judge’s perception that the treatment option may be a benefit undermine the judicial obligation to ensure the plea is a voluntary and informed choice or alternatively, that the defendant did commit the offense. The answer to this question involves an examination of fundamental principles of criminal law. In a state court, a plea can only be accepted “after the trial court fully and fairly apprised [the defendant] of its consequences and ascertained by

⁹⁹ *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984)).

¹⁰⁰ *Id.* at 966.

¹⁰¹ *Id.*

¹⁰² *Id.*

appropriate questioning that he had in fact committed the crimes to which he was pleading and that the plea was freely and voluntarily made.”¹⁰³

The United States Supreme Court noted the foundational nature of a plea inquiry when it said:

That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment [or to lesser charges]. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so — hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than admission of past conduct; it is the defendant’s consent that judgment of conviction may be entered without a trial — a waiver of his right to trial before a jury or judge. Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts with sufficient awareness of the relevant circumstances and likely consequences.¹⁰⁴

Professor Lane asks whether the commitment to treatment for drug addiction may result in a court being blind to the possibility that a defendant did not commit the crime. While Lane concludes that it is possible that a court may rush to treatment but notes that such “commitment to a treatment alternative for addicted defendants does not disqualify judges from accepting pleas.” In my opinion, such a rush is simply unacceptable. What must always be remembered is that drug treatment courts are still courts and not complying with a judicial obligation to ensure due process requirements in guilty pleas result in miscarriages of justice. The failure is twofold. First, as a question of law, an innocent person is convicted of a crime for which she is legally and factually innocent. The second miscarriage is that the innocent party is then sentenced to follow a treatment regimen that may be fairly

¹⁰³ *Id.* at 964, 966-67.

¹⁰⁴ *Id.* at 964, (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970) (citations omitted)).

intrusive.¹⁰⁵

3. *Widening The Net*

The third critique regarding drug treatment courts is that they may widen the net of people who are dragged into the criminal justice system. Net widening is the phenomena of “Unintended consequences that occur when reforms aimed at reducing levels of punishment do the opposite by expanding the class of people who are punished.”¹⁰⁶

An example of unintended consequences that have led to net widening relate to marijuana decriminalization.¹⁰⁷ If simple marijuana possession becomes a regulatory or non-criminal offence, the pressure on a police officer is lessened. Some studies have consistently found that this lesser burden does not result in a corresponding decrease in number of charges but rather an increase in the number of arrests.¹⁰⁸ If drug courts impose greater punishment on those in the drug court stream versus those only receiving probation, a large-scale expansion of drugs courts will congruently increase the amount of punishment rather than reduce the amount imposed.¹⁰⁹

Drug treatment courts incorporate both a compulsory and rehabilitative approach. This duality makes it especially important that drug courts avoid the dangers inherent in each policy. While drug courts offer a better opportunity for a “therapeutic intervention” and greater agreement from offenders in contrast to more conventional criminal processes, there is also a higher risk of more intrusive supervision and incarceration. That risk is even more acute with low level offenders. Mark Kleiman’s evocative phrase “outpatient incarceration” defines both the hopes and fears of the competing tensions.¹¹⁰

There has been a dispute over whether specialty courts have effectively reduced the number of people who are incarcerated. Some scholars have credited drug courts with helping to “bend the curve of incarceration downwards.” An intermediate argument is that drug courts

¹⁰⁵ *Id.* at 967.

¹⁰⁶ Eric L. Sevigny, Harold A. Pollack & Peter Reuter, *Can Drug Courts Help to Reduce Prison Populations?*, 647 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 190, 205 (May 2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 192. see MARK A.R. LEMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND PUNISHMENT (2009).

have had a “low ceiling of possible impact” on correction demographics. At the opposite end, some advocates claim that drug courts may ultimately serve not as an alternative but an *adjunct* to incarceration.¹¹¹

There are four elements to the argument that drug courts have not diminished but supplemented custodial populations. The first component relates to resources. Resource limitation has curtailed the ability of drug courts to reach all offenders; the demand for services simply exceeds resources and capacity.¹¹² In 2004, over half (52 percent) of adult drug courts could not accept eligible clients due to resource limitations. In 2008, four in five (80 percent) state drug court coordinators revealed that inadequate funding was the primary obstacle to further expansion.¹¹³

From 1996 to 2008, the number of national drug court participants grew exponentially from 26,465 to 116,300. However, drug court participants only make up a small number of drug abusing prisoners entering prisons and jails. In 2005, there were 55,365 adult drug court enrollees in contrast to 1.47 million arrestees (about 27 at-risk arrestees per drug court slot).¹¹⁴

The second component relates to the eligibility criteria for participants in drug courts. Those criteria include both legal and clinical factors and are based on two principal foundations. Those foundations relate to (1) federal funding necessities and (2) local demands and political realities.¹¹⁵

By way of example, a federal statutory requirement under the Drug Court Discretionary Grant Program excludes offenders with a current or prior violent offense. Such an exclusionary requirement can be potentially quite expansive since a large number of drug courts receive federal funding. One study found that 78 percent of active drug courts in 1996 had received federal funding.¹¹⁶

National surveys of drug courts report that courts restrict access “based on type of charge, criminal history, severity of addiction, prior history, compliance, motivation, mental disorders, medical illnesses and citizenship status.”¹¹⁷

¹¹¹ *Id.* at 193, emphasis added.

¹¹² *Id.* at 194.

¹¹³ *Id.* at 192, 194.

¹¹⁴ *Id.* at 194.

¹¹⁵ *Id.* at 194-5.

¹¹⁶ *Id.* at 195, (Franco 2010; Government Accountability Office 2005; Saum and Hiller 2008), (General Accounting Office 1997).

¹¹⁷ *Id.*

In 2005, of the 1.47 million arrests involving those at risk of drug abuse or dependence, only 109,291 or 7.5 percent were eligible for drug court.¹¹⁸ In 2010, 74 percent of the nonviolent probation community in Florida who tested positive for drugs did not qualify for the state's expansion of drug courts as they had technical violations.¹¹⁹

The third strand of the argument relates to the causal relationship between the "diversionary nature" of the programs and the success rate of the enrollees. Some research suggests these courts have a high failure rate.¹²⁰

A 2003 analysis of eleven drug courts in New York State revealed a 50 percent failure rate covering a three-year period. The consequences of program failure were both institutional and personal. Institutionally, the justice system lost any comparative savings *vis a vis* incarceration costs. Personally, failed candidates often served an equal if not longer custodial sentence than those sentenced thru a "conventional" stream.¹²¹

In May 2013, Eric Sevigny, Harold Pollock and Peter Reuter provided a systemic, national level assessment of drug court outcomes in America. The authors identified a number of patterns and conclusions about drug courts. First, the typical recently-incarcerated, at-risk offender faced considerable obstacles to drug court entry.¹²²

Many factors limit overall enrollment. These include judicial personnel who are averse to a more minute proactive approach to offender supervision than is normally the case. There may also be larger more complex institutional and systemic forces at play such as the integration of social service and criminal justice agencies. As well, drug court supporters create restrictive criteria in order to seek positive outcomes in program reviews. Finally, drug courts require greater upfront funding than conventional probationary techniques.¹²³

Drug courts, in terms of form, function, structure, and operation have only minimal potential to reduce the carceral pool. This is partly due to eligibility requirements; for example, only 11 to 17% of recently imprisoned drug addicted or drug abusing offenders had a better than a

¹¹⁸ *Id.*

¹¹⁹ *Id.*, Office of Program Analysis and Government Accountability, 2010.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*, at 190, 200, 205, 206.

¹²³ *Id.*, at 205-06.

50/50 chance of being eligible for drug court.¹²⁴

In addition to eligibility criteria, Sevigny, Pollack and Reuteer conclude that restrictive sentencing regimens (including “mandatory minimums, sentencing guidelines, three-strike laws, zero-tolerance drug zone firearm sentence enhancements, and similar statutory prohibitions”) have prevented three in ten at-risk offenders from even accessing drug courts. Indirectly, the limitations of offender failure and limited capacity also affected diversion away from an incarceratory stream.¹²⁵

A key policy conclusion is that expanding entry could markedly increase the reach of drug courts and thus help reduce the number of incarcerated. Although drug court advocates hope for high levels of success through the imposition of strict eligibility criteria, a relaxation of the entry requirements may lead to higher failure rates. However, if drug courts are to achieve their maximum promise in reducing prison populations, there must be a readiness to try broadening eligibility requirements for people that are currently barred.¹²⁶

This could be achieved in various ways and to different degrees. Drug courts can safely enroll many drug-involved violent offenders without undue public safety risks. Applying a gap principle in determining whether the underlying violent offences are dated can both address public safety concerns and expand potential enrollees. Additionally, one may also look at older drug involved offenders and assess the risk of future violent offences.¹²⁷

Drug courts developed in part due to overcrowded prisons and jails; the genesis of such overcrowding was a group of punitive drug policies. Drug courts expand boundaries of conventional criminal justice by conjunctively defining drug use as a criminal, medical and behavioral problem that could be conducive to court monitored therapeutic interventions and criminal sanctions.¹²⁸

There has been a small but growing body of literature that looks at approaches, which incorporate rehabilitative and punitive designs from a sociological perspective.¹²⁹

¹²⁴ *Id.*, at 206.

¹²⁵ *Id.*

¹²⁶ *Id.*, at 206, 208-09.

¹²⁷ Sevigny, Pollack & Reuter, *supra* note 106, at 206-07.

¹²⁸ Rebecca Tiger, *Drug Courts and the Logic of Coerced Treatment*, 26 SOC. FORUM 1, 171-72 (2011).

¹²⁹ *Id.*, at 172.

The sociologist, Carl May, has posited that the radicalization of addiction has been only partially successful and that “Clinical constructions of addiction still engage a set of moral questions.” May states that addiction can only be known through symptoms and medical theories can only explain vulnerabilities such as how one becomes an addict or the physiological effects of drugs when one takes them. According to May, medical theories cannot do much to cure an addict.¹³⁰

Drug courts have blossomed in an area when scientific theories about the effects on the brain dominate but in which the addict’s manifestations are seen through a behavioral prism of drug use. Essentially, the model is a behavioral approach rather than a medical approach. Such a behavioral focus leaves a gulf of opportunity for the criminal justice system (with its focus on behavior) to insert a role in a person’s recovery.¹³¹

Sociologists Conrad and Schneider have argued that one of the “ideological benefits” of categorizing behavior is that it can help decriminalize a behavior. When social control is executed on a behavior considered as a medical rather than a wrongful one, punitive sanctions decrease. The deviant is not thought of as being “bad” or a “wrongdoer” but rather someone who is “sick” and in need of medical help.¹³²

In amplifying the argument, Conrad theorized that the medical process never happens categorically but incrementally in several stages. The first level, known as conceptual medicalization, involves defining a problem in medical terms but does not require a doctor to be involved in diagnosis or treatment. At the second and third levels (respectively the institutional and interactional) there is an increased role for physicians incrementally as legitimatizing experts and then direct providers of the specific intervention.¹³³

The broad goals of drug courts such as reflected in abstinence, improved family relations and job stability concurrently lead to greater legal oversight. Such an increase of oversight is a direct consequence of a model that fuses rehabilitation and punishment.¹³⁴

Tiger argues that this broader role is inherent in a system that combines contradictory approaches (therapeutic, medical and criminal) to

¹³⁰ *Id.*, at 178.

¹³¹ *Id.*, at 179.

¹³² *Id.*, at 178.

¹³³ *Id.*, at 179.

¹³⁴ *Id.*, at 175.

substance abuse and does so in a very powerful an institution, the criminal justice system.¹³⁵

In light of the racial disparities inherent in the criminal justice system, the articulated concerns have particular salience for minority populations. Arrests for drug offenses remain highly concentrated in urban African American and Hispanic communities beset with high poverty rates and other forms of concentrated disadvantage. With incarceration rates for drug offenses even more disparate than those for other crimes, the success or failure of drug courts has important implications for these populations and neighborhoods.¹³⁶

On the issue of net widening, at present Sevigny, Pollock and Reuter suggest that could be a concern if drug courts are expanded to scale. At the moment, expansion does not appear to be the case. In terms of and intrusiveness into people's lives, the net is undoubtedly wider. However, the goal is a therapeutic result and to minimize incarceration for drug addicts and those who are dependent on drugs.

4. Effectiveness

The fourth critique of drug courts is that they are not effective in reducing crime.

This section will consider four studies: an analysis of the Baltimore Drug Treatment Court (BDTC) in 1994, the Sentencing Project in 2009, the Mitchell, Wilson meta-analyses in 2011, and the March 2013 Report from International Journal of Offender Therapy.

The Baltimore City Drug Treatment Court (BCDTC) was formed in 1994. This was in large part due to a Bar Association report that estimated nearly 85% of all crimes in Baltimore were drug related. The BCDT was similar in style and substance to other drug courts offering either post adjudication or diversion types of process. The findings revealed that the BCDTC program reduced offending among addicted chronic offenders. During a two-year follow-up, 66% of drug court subjects and 81% of non-drug court offenders were arrested. In addition, the number of new arrests was 30% lower for drug court participants than those in the conventional stream.¹³⁸

The authors concluded by finding that the BCDTC established a credible threat of future punishment and that sanctions were more likely

¹³⁵ *Id.*, at 172.

¹³⁶ *Id.*, at 180-181.

¹³⁸ *Id.* at 175-76, 189.

to be utilized for non-compliance in the drug treatment cohort. Although cognitive function from long-term drug use was impaired for certain people, the parties appeared to understand the consequences of failure and sanctions.¹³⁹

In the BCDTC, treatment was important in reducing recidivism. Drug court subjects who participated in ten or more consecutive days of drug treatment were much less likely to reoffend than were both untreated drug court subjects and control subjects.¹⁴⁰

As of 2003, most studies evaluating drug courts were small-scale assessments involving offenders in local courts. Evaluations found that involvement in drug courts results in fewer rearrests and reconvictions. Comparison studies involving drug court participants against conventional criminal courts generally reported more favorable outcomes for drug court participants. Although the research up to 2003 generally concluded that drug courts were effective, exactly why and for whom remained largely unknown.¹⁴¹

The Sentencing Project is a national non-profit agency engaged in research and advocacy on criminal justice issues. In April 2009, the Project conducted a research survey on drug courts. The aim of the survey was to outline general findings on the workings and efficacy of drug courts nationwide and highlight potential concerns where research is required.¹⁴²

5. *Recidivism*

According to the 2009 Project calculations, alumni of drug courts were less likely to be rearrested than individuals processed through customary court methods. Evaluations found that involvement in drug courts results in fewer arrests and reconvictions.¹⁴³

¹³⁹ *Id.*, at 189.

¹⁴⁰ *Id.*, at 190.

¹⁴¹ *Id.*, at 174-75.

¹⁴² RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT DRUG COURTS: A REVIEW OF THE EVIDENCE 1 (2009) (noting the endemic problems in conducting multi-jurisdictional surveys “because drug courts are designed and operated at the local level, there are fundamental differences that make cross-jurisdictional comparisons difficult.”).

¹⁴³ *Id.*, 4, 5, 4, 9, 52, 6, 2, 28. Specifically, a breakdown of research findings from 76 drug courts found a 10% reduction in re-arrest, with pre-adjudication courts facing a 13% decline in re-arrest. An analysis of 30 drug court appraisals found an average 13% decline in the rate of reconvictions for a new offense. A meta-analysis of 57 studies estimated that participation in a drug court program would produce an 8% decline in crime relative

Drug courts essentially reduce re-arrest rates relative to simple probation or incarceration but there is particular reason to be vigilant when deciphering these results. Some studies show slight or no effect from drug court participation and it can be difficult to specify which components of the program or the research design may be contributing to these results.¹⁴⁴

6. Cost Savings

Calculations of the net costs and benefits of drug courts nationally generally find that drug courts save taxpayer dollars compared to simple probation and/or imprisonment, mainly due to reductions in detentions, case processing, jail occupancy and victimization costs. Notwithstanding that all persons diverted to drug court would necessarily have been jailed, for those individuals who are incarcerated, the average annual cost is estimated to be \$23,000 per inmate, while the average annual cost of drug court participation is estimated to be \$4,300 per person.¹⁴⁵ A number of key appraisals have described the following facts:

- In 2005, the Government Accountability Office found that seven drug courts had net benefits of between \$1,000 and \$15,000 per participant due to reduced recidivism and avoided costs to potential victims.¹⁴⁶

to no treatment. A Government Accountability Office report found that 13 of 17 courts reporting on post-program recidivism measured reductions between 4 and 25 percentage points in rearrests and reconvictions. An evaluation of drug courts in Florida and Missouri, which tracked drug court participant progress for 24 months, found a noticeably lower re-arrest rate for drug court graduates relative to the comparison group: 12% vs. 40% in Florida and 45% vs. 65% in Missouri. These represent a reduction in re-arrest rates of 70% and 31%, respectively. Six drug courts in New York State averaged a 29% reduction in re-arrest measured over 3 years following participants' initial arrest. Recent research suggests that these reductions in re-arrest extend beyond the first few years following treatment. An evaluation of the Multnomah County, Oregon drug court found a 24% reduction in drug arrests for participants thirteen years after initial entry into the program. These represent a reduction in re-arrest rates of 70% and 31%, respectively. Six drug courts in New York State averaged a 29% reduction in re- respectively. Six drug courts in New York State averaged a 29% reduction in re-arrest measured over 3 years following participants' initial arrest. Recent research suggests that these reductions in re-arrest extend beyond the first few years following treatment. An evaluation of the Multnomah County, Oregon drug court found a 24% reduction in drug arrests for participants thirteen years after initial entry into the program.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.* at 7.

- Evaluations of 11 drug courts in Oregon, Washington, Kentucky and Missouri found substantial cost savings.¹⁴⁷
- A study of five drug courts in Washington found \$1.74 in benefits for every dollar invested in drug courts. This benefit results from reduced court costs were associated with a decline in recidivism.¹⁴⁸
- A study in St. Louis found that the initial cost of drug courts (\$7,800 per graduate) exceeded that of someone completing simple probation (\$6,300 per person), but two years after the completion of the program, drug court graduates were realizing a net savings of \$2,600 per person resulting from lower jail costs, reduced crime victimization, and healthcare costs.¹⁴⁹

7. Sanctions

The statistics on sanctions present a mixed image. Any consideration of the role of sanctions in a drug court environment provides important insight into intermediate steps that drug court administrators may take to avoid future re-arrest.¹⁵⁰

Developing a flexible, graduated sanction program is a crucial contributor to a successful drug court program, because “even those who are eventually successful in drug court tend first to relapse, warrant, and violate other program rules.” Thus, the sanction process should be seen as an opportunity to adjust treatment to limit subsequent relapse, rather than the first step on the path to an eventual termination of drug court participation and a likely sentence to custody.¹⁵¹

8. Treatment

Due to the various types of programs, few assessments have provided data on how the methods of treatment offenders receive impact their rates of success. Some criminologists argue that for those with serious drug addiction problems, drug courts may not be efficacious. For

¹⁴⁷ *Id.*, The Oregon drug court was estimated to save \$3,500 per participant due to reduced recidivism and incarceration. Six drug courts in Washington saved an average of \$6,800 per participant based on reduced re-arrests and victimization costs.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 12.

¹⁵¹ *Id.* at 12, 14.

such people, more intensive and long-term inpatient committal would be a better policy option. In drug courts, someone who has repeatedly relapsed will be subject to dismissal and prosecution. The Vera Institute of Justice has been concerned that a punitive approach to sanctions has resulted in people spending more time in jail than would otherwise have been the case. It is also critical to separate failures of drug treatment due to an individual's reticence to complete treatment from those resulting from persons who were simply placed in a program that was inappropriate for their needs.¹⁵²

In April 2009, the Sentencing Project concluded that although drug courts were achieving important benefits, more research was required in terms of which practices were successful and which were not. Another concern going forward was that drug courts could be increasing the number of those arrested for drug crimes instead of decreasing the number of incarcerated people. The research on this issue had not been established. The Project suggested, "Increased and uniformed tracking of participants' criminal history may answer some concerns about the net widening effects of drug courts." Finally, the Sentencing Project recommended further research on monitoring re-arrest and conviction rates of both graduates and dropouts both within and outside drug court programs.¹⁵³

A 2011 research study group systematically analyzed quasi-experimental and experimental evaluations of how effective drug treatment programs reduce offending behavior. The criteria for inclusion were that: (1) the evaluation examine a drug treatment program; (2) the evaluation involved a comparison group that was processed through the traditional means of either probation or incarceration; (3) the programs measured criminal behavior for a period of time from the start of the drug program; and (4) enough information was obtained to calculate the effects of compliance.¹⁵⁴

The meta-analysis found 370 potentially eligible studies; 181 were eligible for systematic review and 154 evaluations were selected for the analyses. The authors arrived at three conclusions. First, drug courts are effective in reducing recidivism. A second conclusion related to

¹⁵² *Id.* at 14-16.

¹⁵³ *Id.* at 19.

¹⁵⁴ Omjarrh Mitchell, David B. Wilson, Amy Eggers & Doris L. MacKenzie, *Assessing the effectiveness of drug courts on recidivism: A meta-analytic review of traditional and non-traditional drug courts*, 40 J. OF CRIM. JUST. 60, 60-62 (2011).

whether the positive outcomes observed were long term or short-term results. There were two underlying issues. First, whether there was a suppressing effect while people were under court supervision and second, whether the reductions in recidivism could continue for as long as three years after the drug program.¹⁵⁵ The resulting data from the studies supported the conclusion that the positive effects on reducing recidivism were not limited to short-term suppressing measures. Instead, the positive results appeared to last up to three years after people entered the drug court.¹⁵⁶ Finally, drug court participants had lower rates of recidivism than non-participants. However, the size of the effect varied by the specific type of drug court. Overall, for adult drug courts, the effect of participation was equivalent to a reduction in general crime recidivism from 50 percent to 38 percent and drug recidivism from 50 percent to around 37 percent.¹⁵⁷

On October 12, 2010, Congressional Research Service issued a report entitled “Drug Courts: Background, Effectiveness, and Policy Issues for Congress.” The summary reported that as of July 2009, there were 2,361 drug courts in operation across the country. The summary noted difficulties in gathering data because:

Variations in how drug courts determine eligibility, provide substance-abuse treatment, supervise participants, and enforce compliance reflect the adaptability of the drug court model, but also complicate program evaluations, comparisons, and cost-benefit analyses. Nevertheless, research suggests that drug courts reduce substance abuse and recidivism among participants compared to nonparticipants, and are a viable intervention for reducing drug demand among substance-abusing offenders.¹⁵⁸

The variations in the types of drug courts, disparities in the data collected, varied methods used to evaluate drug courts, and limited follow-up of participants are among the data limitations and knowledge

¹⁵⁵ *Id.* at 66.

¹⁵⁶ *Id.* at 67.

¹⁵⁷ *Id.* at 69.

¹⁵⁸ CELINDA FRANCO, CONGRESSIONAL RESEARCH SERVICE, *Summary to DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS* (Oct. 12, 2010).

gaps that complicate efforts to quantify the effectiveness of the programs. Nonetheless, many researchers believe that drug courts represent one of the more promising strategies for intervening with drug-abusing offenders, and that these programs “outperform virtually all other strategies that have been attempted for drug offenders.” For example, research indicates that many drug-abusing offenders do not respond to incarceration and that more than half fail to comply with drug testing and treatment conditions of probation, with most returning to drug use within the first 6 to 12 months after release from prison. Studies suggest that drug court programs are more successful in retaining participants in drug treatment programs.¹⁵⁹

A clear theme from the above noted studies is that generally speaking, drug courts are effective at reducing recidivism. However, one obstacle in the research is determining whether these specialty courts are equally effective for all subgroups.

In March 2013, Julian Somers, Stefanie Rezanoff and Akm Moniruzzaman conducted a Canadian study investigating the comparative effectiveness of a DTC among subgroups defined by ethnicity, gender, prior offending and the presence of a co-occurring mental disorder. The results indicate greater reductions in recidivism among Aboriginal participants and no differences in recidivism associated with the presence or absence of co-occurring mental disorders or the number of prior convictions. The effectiveness of DTCs with unique subgroups may be connected to their compositions and inclusion of expertise specific to the needs of the participants.¹⁶⁰

Some of the research on the efficacy of DTCs among subgroups of offenders suggests the specific motivations and strength of commitment were good signals for adherence to program requirements and program success.¹⁶¹

Little was known in the Canadian context about how effective drug courts were or the relationship between outcomes and individual traits of offenders. There has been a shallow base of knowledge on how to adapt the U.S. model to other countries based on either difference in underlying legislation (i.e., mandatory minimums, habitual offender laws,

¹⁵⁹ *Id.* at 12.

¹⁶⁰ Julian M. Somers, Stefanie N. Rezanoff & Akm Moniruzzaman, *Comparative Analysis of Recidivism Outcomes Following Drug Treatment Court in Vancouver, Canada*, 20 INT’L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 1, (2013).

¹⁶¹ *Id.* at 2.

enhanced sentencing regimes) or case matrix (subjective differences in offenders such as ethnicity or gender).¹⁶²

The target of the study was the Vancouver Drug Treatment Court (DTCV). The Vancouver program includes a significantly larger proportion of females and members of racial or ethnic minorities, specifically Aboriginals vis-a-vis the broader offender population. Data was provided through the British Columbia Inter-Ministry Research Initiative and used linked data from 1997 to 2010. Recidivism was defined as any convicted offense and all participants were assessed 12 months following involvement with the DTCV.¹⁶³

Out of 659 participants, 259 were excluded from the study. As one would expect, recidivism was significantly connected to program status with “graduates” showing lower rates of recidivism. In addition, there was a direct correlation between length of time in the program and lower recidivism rates regardless of graduation. People with no offences in the one- or two-year period prior to enrollment were also significantly less likely to reoffend.¹⁶⁴

The results indicated that impact on re-offense differed significantly between subgroups of participants. Logistic regression analysis revealed superior outcomes among females as well as Aboriginal participants versus whites and males. The results suggest improvement of responding to needs of parties who had historically exhibited poorer outcomes. Also, recidivist outcomes were similar regardless of whether the parties had co-occurring mental disorders in addition to substance abuse issues.¹⁶⁵

The Aboriginal community comprises less than 5% of the population in British Columbia but 17% of the offender population in the DTCV. The high demographic representation in the drug court is probably due to several interrelated factors including composition of the population in the catchment area of the court (Vancouver’s Downtown Eastside), the social marginalization of Aboriginal peoples and the uneven distribution of drug related problems between ethnic groups. In light of these external factors, the finding of significantly higher outcomes among Aboriginal DTCV participants was extraordinary. One of the factors leading to the higher outcome is the familiarity of the DTCV team with Aboriginal

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 3, 5.

¹⁶⁴ *Id.* at 6, 10.

¹⁶⁵ *Id.* at 11.

offenders along with the inclusion of a dedicated Aboriginal liaison. The Report notes that program retention has been an issue among members of ethnic minorities.¹⁶⁶

D. PART IV: DRUG TREATMENT COURTS INSIDE AND OUTSIDE AMERICA

Taken to the fullest extent and as broadly as proponents imagine, drug treatment courts represent a paradigm shift from a punitive orientation to an ameliorative focus. The core of the debate about these types of courts changed from questioning their existence to wholesale implementation. To the rapid change, the critics' acquiescence may not have meant acceptance.¹⁶⁷

The following elements identify the multitude of drug treatment courts in America. There has not been a fixed, cookie cutter approach. The initial model in Miami was modified based on developments elsewhere. The foundation of the courts lay in the underlying values and a philosophical outlook plus the central role assigned to the judge. The model includes a mixture of values with a decided bent towards treatment and restoration. The growth of these types of courts was due to the impact of drug enforcement during the 1980s (the "War on Drugs"), overcrowded jails, and availability of federal funding.¹⁶⁸

The therapeutic activities occur within the "theater in the square" of the courtroom with the judge as the lead actress, director and producer. The drug court has established a new working relationship between the criminal court and public health spheres, treatment and social services that modify the criminal process to the needs of treatment and a medical understanding of addiction. The development of this new working relationship involving all court players (defense, prosecutor, treatment teams, probation, court pretrial services) resulted from the following three institutional failures.¹⁶⁹

The first failure was that the normal adjudication system did address the changing drug problem with its vast caseload except to exacerbate conditions and consume resources. Until the creation of drug treatment courts, the chances of an offender being identified as a serious drug user and placed in treatment was poor. Such a rare possibility

¹⁶⁶ *Id.* at 12.

¹⁶⁷ *Id.* at 926, 928.

¹⁶⁸ *Id.* at 929-30, 942-43.

¹⁶⁹ *Id.* at 930-31.

depended on conviction and being sentenced to probation. For decades, drug treatment was available as condition for diversion for less serious offences but did not show significant impact. From a judicial perspective, a court typically “referred” the person out to probation. Such an order was usually made at the sentencing phase based on the recommendation of probation and there was no judicial oversight.¹⁷⁰

The second failing occurred with the “non-relevance” of probation. There was a failure of probation to meaningfully identify risks and offer treatment. In addition, probation services failed in locating and managing drug treatment clients. Due to the unimaginable caseload (sometimes up to several hundred people per probation officer), drug treatment became a low priority. Equally important, the huge caseloads were a direct result of how the “War on Drugs” cascaded the justice system. In addition, the focus shifted from rehabilitation to punitive enforcement. A lack of resources also meant a focus on fee recovery such that locating and case managing drug treatment for addiction probationers was not only a low priority in terms of policy but also a practical impossibility.¹⁷¹

Finally, the unimportance of the treatment of both the public and private treatment communities to deal with the criminal justice population created an institutional void.¹⁷²

The three institutional failures along with the historical context of the drug wars of the 80’s and 90’s led to the creation of drug courts. There are eight structural dimensions to drug treatment courts:

- **TARGET PROBLEM** – All drug courts share an emphasis on helping substance abusing offenders with the idea that by addressing drug problems, recidivism will decline. However, the courts may differ in the problems they target.¹⁷³
- **TARGET POPULATION** – The second element of a drug court relates to the nature of the target population that has been defined for the particular treatment court. Given that some version of a substance abuse/crime problem has motivated a jurisdiction to consider the drug court approach, a second key issue is the chosen target

¹⁷⁰ *Id.* at 931-32.

¹⁷¹ *Id.* at 932-33.

¹⁷² *Id.* at 931.

¹⁷³ *Id.* at 937.

population. It is at this point that the aims may be inherently contradictory. While a court would want to be successful, if the most at need and dire group is excluded then the goal of minimizing the punitive effects of incarceration will have been severely undermined. The degree of difficulty associated with a chosen target population is an important dimension that differentiates drug courts from one another.¹⁷⁴

- **SCREENING – REACHING the TARGET** – Given clearly defined target populations, drug court approaches will differ in the capacities and mechanisms used to reach or enroll those populations. Some jurisdictions may successfully screen in (reach) nearly all the persons intended while others may rule out or otherwise miss large portions of those they intended to process and treat. How courts vary on this dimension is critically important in any meaningful evaluation of impact, if the aim is to enroll and treat a specific target population.¹⁷⁵
- **MODIFICATION/ADAPTION of COURT PROCESSING and PROCEDURES** Drug courts have a common feature of modifying operating procedures to address various treatment orientations. The degree of variation for various actors, stage of processing at which intervention occurs and formal arrangements or procedures vary across jurisdictions.¹⁷⁶
- **STRUCTURE of CONTENT and TREATMENT** – All drug courts offer treatment but vary considerably in timing, nature, supplemental and ancillary services (acupuncture, health services, educational, vocational, social services (ESL)) they provide and for how long. As well, whether publicly or privately funded, costs and methods of funding may vary.¹⁷⁷
- **RESPONSE TO PERFORMANCE IN TREATMENT AND PARTICIPANT ACCOUNTABILITY** – Courts will differ in ways to create incentives for positive

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 937-38.

¹⁷⁶ *Id.* at 938.

¹⁷⁷ *Id.*

participation and disincentives. Some courts are very “sanction” or punishment oriented and others not as much. How will the court respond to relapses?¹⁷⁸

- PRODUCTIVITY OF DTC – Productivity measures include volume of cases handled, nature of cases, handled, nature of court workload with dispositions, degree of difficulty with problems of participants in drug court process, use and costs of resources oriented with operation and rate of graduation plus drug use and reoffending.¹⁷⁹
- EXTENT OF SYSTEM WIDE SUPPORT – All these specialty courts have in common some system of support among non-criminal justice actors and the treatment community. The nature and depth of this support among other important system actors and branches of government is likely to have an important influence on effectiveness of drug treatment and may vary and influence outcomes.¹⁸⁰

One of remarkable aspects of the initial drug court movement was that it developed and functioned without the assistance and benefit of federal funding. First courts were established because of the emergence of a small network of committed officials, judges, administrators, treatment providers, prosecutors and defenders who shared their experiences and newfound expertise; these officials traveled to one another’s courts at their own expense to observe or provide assistance.¹⁸¹

Mr. Goldkamp wrote *The Drug Court Response: Issues and Implication For Justice Change* around 1999. The impact at the time was hard to determine. However, Goldkamp concluded that drug courts have broken ice for court systems to handle non-traditional methods of adjudication by departing from traditional courtroom methods and adopting a less adversarial style. The courts developed a powerful “helping” orientation counterbalancing the punitive responses to drug addiction and drug offenders. Finally, these specialty courts had utilized interdisciplinary subjects drawing on such fields as medicine, social work, sociology and criminology. The courts had sought broader connections

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 939.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 948.

by integrating community services into judicial process in a way that fused health and social services while maintaining criminal court boundaries.¹⁸²

In 2004, Justice Judith S. Kaye, Chief Judge of the State of New York and of the Court of Appeals, wrote a seminal article entitled “Delivering Justice Today: A Problem Solving Approach”. The article was an overall endorsement of the problem-solving approach.¹⁸³

The developments of community courts including drug courts were attempts to stop the cycle of drugs, crime and addicted offenders. Justice Kaye noted that problem solving justice and problem solving courts do more than process cases. Adjudicating cases is not the same as resolving cases. The function of the courts is to dispense justice and not just get through the day’s calendar.¹⁸⁴

In looking to the future, Judge Kaye predicted the problem-solving approach held promise for three reasons. First, there ought to be careful planning amongst the usual courtroom participants such as prosecutors, defense attorneys and a broad spectrum of social service agencies and community groups known as “stakeholders”. Second, an assigned judge ensures continuity from court date to court date and judicial expertise in relevant specialized court. Third, problem solving requires close judicial monitoring to ensure proper compliance and informed case management. For example, regular appearances in a drug treatment court send a message of accountability to both the defendants and other players in the criminal justice system.¹⁸⁵

Justice Kaye’s asserted two further propositions. First, problem-solving courts are courts that strive to provide due process, engage in neutral fact-finding, and dispense fair and impartial justice. Justice Kaye also pointed to a cautionary tale; problem-solving courts have to ensure that the process does not become the punishment.¹⁸⁶

1. International Experimentation: Global Drug Treatment Courts

Since 2004, drug treatment models and principles have been exported to a number of common law jurisdictions including Canada and

¹⁸² *Id.* at 950.

¹⁸³ Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 *YALE POL’Y AND LAW REV.* 125, 127 (2004).

¹⁸⁴ *Id.* at 128.

¹⁸⁵ *Id.* at 130.

¹⁸⁶ *Id.* at 131.

England. A brief primer on the relationship between law and culture from a comparative analysis is necessary before assessing what was borrowed and remodeled in two English speaking common law jurisdictions. In terms of “conceptualizing syntheses,” it makes more sense to think of legal transplants along a continuum rather than wholesale-unedited adoption.¹⁸⁷

Comparing the American experience in drug treatment courts to commonwealth countries is quite attractive since Canada and the United States trace their legal traditions to the English justice system. Although the principal focus of his analysis was a comparison of the exclusionary rule in criminal procedure,¹⁸⁸ James Stribopolous wrote:

For comparative purposes, Canada is unlike any other Commonwealth nation. Canada and the United States share close geographic proximity, similar cultures, and a common language. Both nations have ethnically diverse populations forged from immigrant citizens who predominately reside in concentrated urban areas. Both nations have prospered throughout the post-war era and share similar levels of economic development. Although differences definitely exist, it is arguable that no two nations share so many similarities.¹⁸⁹

What is critical to an examination of what has been borrowed and reframed from the United States is the notion of accent. Nolan Jr. states that, “Just as the distinctive accents of a shared language often indicate very profound cultural and regional differences, so the varying accents of legal initiatives- such as problem-solving courts- within a shared common law tradition reflect significant political, cultural and historical differences.” After conducting a critique of Marx, Durkheim and Foucault, David Garland underscores the central importance of culture in a society’s criminal law and punishment regime. According to Garland, law is grounded on “wider patterns of knowing, feeling, and acting and depends on these social roots and supports for its continued legitimacy and operation.” A penal culture “will always have its roots in the broader

¹⁸⁷ Nolan Jr., *supra* note 52, at 26-27.

¹⁸⁸ James Stribopoulos, *Lessons from the Pupil: A Canadian Solution to the American Exclusionary Rule*, B.C. Int’l & Comp. L. Rev. 77, 81.

¹⁸⁹ *Id.* at 82.

context of prevailing (or recently prevailing) social attitudes and traditions.”¹⁹⁰

To what extent is law influential on culture? Some scholars who are sensitive to the influence of law and culture recognize the bilateral nature of the relationship; law shapes culture just as it is shaped by culture. What happens when a new legal program with embedded cultural norms is transferred from one country to another? The international development of problem solving courts suggests a fluid and evolving role where there is a transfer of a legal program from one society to another and the following process of adapting programs to fit local cultures.¹⁹¹

An examination of the international expansion of problem solving courts yields insights on cultural differences and concomitant social change. Regarding the former, since law is a product of culture, adaptations signify cultural distinctions. Thus, a legal program such as a community court in the U.K., though directly borrowed from the United States, looks very different in Liverpool than in New York City. The nature and extent of differences provide insight into the cultural contexts within which the programs are situated. However, the adjustments made to the program are not the end of the story. The programs themselves also affect the change in the legal culture to which they have been transferred; the alteration may be quite subtle and not easily detectable, but it is change to which any comparativist should pay attention.¹⁹²

The key question regarding importation is the following: If a legal product, such as a problem-solving court (including a drug treatment court) is developed in a uniquely American context, is it not intrinsically American to the core? Is it possible to fully extricate the culturally determinative qualities of American problem solving courts – such as their distinctively therapeutic tendencies when the programs are transported to other countries?¹⁹³

2. *Anglo-American Alternatives – England, USA and Canada*

England further transplanted variations of American judicial innovation. English practitioners see themselves as adapting American model to suit their needs. English version of PSCs assumed two distinct

¹⁹⁰ *Id.* at 31.

¹⁹¹ *Id.* at 38.

¹⁹² *Id.* at 40.

¹⁹³ *Id.* at 42.

structural and cultural qualities: (1) the use of lay magistrates and (2) better funded probation services. Such important structural foundations reflect cultural differences.

In America, the drug treatment court was a bottom-up grass roots movement; in England, legal reform involving problem-solving courts happened in a more hierarchical, top down manner. Similarly, drug treatment magistrates did not impose short, sharp incarceral sentences unlike American judges. In the United Kingdom there was no ongoing monitoring of clients.¹⁹⁴

There were cultural differences in how the courts respond to offenders. In America, judges are more emotive and dramatic. In England, methadone maintenance was a staple of treatment programs reflecting a harm reduction approach. With respect to heroin, the harm reduction model has been accepted in the United Kingdom versus an abstinence regime in the United States. As well, in the United Kingdom, the central role of the medical doctor is readily observable. Treatment in an English drug treatment model has a more medical and therapeutic orientation.¹⁹⁵

In conclusion, the problem-solving approaches and therapeutic justice in the drug treatment courts in England and America were different in form and function based on individual judicial cultures regarding demeanor, structural power relations amongst actors (magistrates versus judges; magistrates vis a vis probation authorities), underlying medical structures and approaches to mental health.¹⁹⁶

The final comparative analysis involves Canada. Canadian courts have acknowledged both the British influence and British accents in how drug courts developed. As in many realms, Canadian drug treatment courts are a hybrid between England and the United States. In Canada, drug treatment courts were the product of an American legal innovation. Courts received significant funding from provincial and federal governments. Although, England resisted therapeutic jurisprudence principles, Canada adopted them. Judge Van de Veen of the Tsu Tina Nation in British Columbia articulated the principles of therapeutic jurisprudence by noting:

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 59.

¹⁹⁶ *Id.* at 71-75.

The Drug Court endeavors to practice “therapeutic jurisprudence.” Therapeutic jurisprudence acknowledges that, regardless of the outcome of litigation, the litigation process may be therapeutic or anti-therapeutic. The role of the judge is pivotal to the achievement of therapeutic outcomes through a drug court.¹⁹⁷

In glaring contrast to England, Canadian courts have embraced therapeutic jurisprudence. Therapeutic jurisprudence greatly informs both the theory and practice of problem-solving courts. Justice Paul Bentley recognized the relevance of therapeutic jurisprudence early in Canada’s efforts to create problem-solving courts and founded the Toronto Drug Court started in 1998. In 2008, Justice Bentley, observed that with more serious offenders, the Toronto Drug Court employed a harm reduction model and endorsed the prescription of methadone. Regarding treatment, Ontario officials prefer the terms “education” and “intervention” to “treatment.”¹⁹⁸

Justice Bentley was not the only judge to recognize and endorse therapeutic jurisprudence. In their book, *In Mental Health Courts: Decriminalizing the Mentally Ill*, Justice Richard Schneider, Dr. Hy Bloom and Mark Hareema, identify therapeutic jurisprudence as the theory that has animated and has formed the recent phenomenon of problem-solving courts within North America. All three authors go further and argue that a philosophical orientation to a therapeutic outcome is a necessary precondition for a legal or mental health professional to work in a Canadian mental health court.¹⁹⁹

On the issue of incarceration, Dawn Moore sets out how euphemizing the language of jail can trigger due process concerns and ethical treatment of clients in drug treatment courts. Moore highlights how punitive practices are given therapeutic names in American drug courts thus sanitizing what is ultimately a retributive and punitive act. The notion of punishment is translated into a therapeutic goal of motivation. However, as she notes, “increasing surveillance and the possibility of

¹⁹⁷ *Id.* at 78-82, 87.

¹⁹⁸ *Id.* at 78-79, 89 (quoting Justice Bentley on the importation of an American idea, i.e., a drug treatment court and its legal cultural adoption in Canada: “We want to use what you’ve [U.S.] done well, ignore what you haven’t done so well and adapt the model [to] our local use I think we can use the ideas that you have to suit our own local communities.”).

¹⁹⁹ *Id.* at 89.

arrest and incarceration are ultimately decidedly punitive.”²⁰⁰

In the American drug treatment court, there are a wide variety of sanctions available to judges in judicial toolbox. The range includes: Judicial admonishment; Increased court attendances; Counseling; Performing community services hours; Revocation of bail. (In the case of bail, offenders are remanded for a period not exceeding five days).²⁰¹

Moore notes incarceration is sometimes referred to as a “therapeutic remand.” Community service orders are given far more frequently than “therapeutic remands.” In contrast, a Canadian Drug Treatment judge was disinclined to impose a sanction involving incarceration. N. Bakht and Justice Bentley observed, “that it is very rare for sanctions to be used in Canadian drug treatment courts. When they are used, it is usually after an offender has been in the drug treatment program for a long time, and upon the advice of the treatment providers.” This type of judicial restraint is not unusual in Canadian problem solving courts as compared to their American counterparts.²⁰²

In Canada, one finds a warm embrace of therapeutic jurisprudence in conjunction with a willingness to reflect critically on therapeutic processes of problem solving courts. One also sees a disposition to function within clear limits of judicial behavior. One aspect that explains the restraint evident in Canadian courts is the clear sense that Canadian judges, like their English counterparts, defer to other branches of the government, in particular to the legislative branch. As in England, problem-solving courts initiated in Canada devolved in a more Top down manner than the grassroots movement seen in the U.S.A. Though local initiatives have sometimes played a role in these courts, problem-solving courts have largely been initiated at the provincial or federal level from the top down.²⁰³

3. *Principles Of Addiction Medicine*

Drug addiction manifests itself as a compulsive drive to take a drug despite serious adverse consequences. Historically, such conduct has been viewed as a bad choice voluntarily made by an addicted person. Such a definition based was based on voluntariness and morality – both

²⁰⁰ Dawn Moore, *Translating Justice and Therapy: The Drug Treatment Court Networks*, 47 BRITISH J. OF CRIMINOLOGY, 42, 44 (2007).

²⁰¹ *Id.*, at 95.

²⁰² *Id.*

²⁰³ *Id.* at 96.

elements created a lingering stigma of addiction as a moral failing.²⁰⁴

Recently, addiction researchers have gathered evidence suggesting chronic drug abuse changes the brain in profound ways causing behavioral disruptions seen in addicted individuals. Such changes are long lasting and can even last for years after abstinence; this is what makes addiction a chronic and relapsing disease. New knowledge about the effects that drugs have on the human brain and the “modulatory role of genetic, developmental and environmental factors” should bring about medical and scientific changes in approaches to the prevention and treatment of addiction.²⁰⁵

Both legal (i.e., alcohol, nicotine) and illegal drugs (e.g., cocaine, methamphetamines, heroin, marijuana) along with psychotherapeutics can be abused for various subjective reasons including: (1) experiencing pleasure; (2) altering one’s mental state; (3) improving performance; and (4) self-medicating a mental disorder.²⁰⁶

Doctors Nora Volkow and Kenneth Warren say it is important to note the difference between a state of addiction and a state of dependence. Physical dependence results in withdrawal symptoms when drugs, alcohol or heroin are discontinued; however, the adaptations that are responsible for those effects are different from those that underlie addiction.²⁰⁷

Because this distinction has often led to confusion, the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) has done away with categories of substance abuse and dependence. Instead, the DSM-5 uses the category of “addiction and related disorder.” Such a change in classification will include substance use disorders with the concomitant drug identified with its own class and gravity. This change will better capture the “dimensionality” of the disease along with the complex neural and behavioral impairments that afflict addicted persons.²⁰⁸

A growing body of imaging data provides important insights that help explain the aberrant behavioral signs that characterize addiction. The results suggest that addicted individuals suffer from a progressive, structural and functional disruption in brain regions that underlie normal processes of motivation, reward and inhibition. Such evidence provides a

²⁰⁴ Volkow, *supra* note 6, at 3.

²⁰⁵ *Id.*

²⁰⁶ *Id.*; see also JACK KATZ, *SEDUCTIONS OF CRIME* 8-9 (1988).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

compelling foundation for the argument that drug addiction is a disease of the brain and that abnormal conduct (e.g., cocaine addiction or acute alcohol intoxication) are the result of dysfunctional brain tissue just as cardiac insufficiency is a form of heart disease or abnormal blood circulation is because of a heart attack.²⁰⁹

4. *Canadian Caselaw*

An examination of two Canadian cases illustrates how courts have approached the issue of addiction as a public health issue and addiction within certain ethnic communities.

In *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, the Supreme Court of Canada ordered the federal government to allow a safe injection facility (Insite) to operate with appropriate safeguards. The importance of this decision is the court's endorsement of a public health approach to drug addiction based on the trial record.²¹⁰

Chief Justice McLachlin speaking on behalf of a unanimous majority set out the following facts. In the author's opinion, those detailed facts which were relevant to provide the reader with a picture of what life is like on the streets for drug addicts. In the early 1990's, intravenous drug use had reached crisis levels in Vancouver's downtown east side (DTES). The DTES is home to among the poorest and most vulnerable people in Canada. The population of the East side includes 460 intravenous drug users, half of the IV drug addicts in Vancouver. There were a number of reasons for the concentration including the existence of single occupancy hotel rooms, the deinstitutionalization of the mentally ill, cumulative effects of drug enforcement and availability of street level drugs.²¹¹

The drug users in DTES had diverse origins but some common themes emerged including histories of early and serious drug use and mental illness. Many were addicted to heroin for years and had been in and out of treatment programs. Many suffered from alcoholism; some were street level sex workers. As the Court noted, what was clear is that these were not recreational drug users but addicts for whom drug use is

²⁰⁹ *Id.*

²¹⁰ *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, 193 (Can.).

²¹¹ *Id.* at 144.

both “an effect and cause of life that is a struggle on a day to day basis”.²¹²

A survey in 2008 of 1000 drug users was presented to the federal Minister of Health. Some of the facts included:

- Those surveyed had on average been injecting drugs for 15 years;
- the majority inject heroin (51%) while 32% inject cocaine;
- 87% are infected with Hepatitis C while 17% were HIV positive;
- 80% had been imprisoned;
- 18% were Aboriginal;
- 38% were involved in the sex trade;
- 21% were methadone users; and
- 59% reported overdosing at least once.²¹³

The Court’s summary of a drug user’s daily existence was chillingly frightening. Among the dangers:

Addicts share needles, inject hurriedly in alleyways and dissolve heroin in dirty puddle water before injecting it in their veins. In these back alleys, users who overdose are alone and far from medical help. Shared needles transmit HIV and hepatitis C. Unsanitary conditions result in infections. Missing a vein in the rush to inject can mean the development of abscesses. Not taking adequate time to prepare can result in mistakes in measuring proper amounts of substances of the substance being injected. It is not uncommon for injection drug users to develop dangerous infections or endocarditis. These dangers are exacerbated by the fact that drug users are a historically marginalized population that has been difficult to bring within the reach of health care providers.²¹⁴

After years of research, planning and intergovernmental cooperation, a proposal for a supervised injection was submitted to the

²¹² *Id.* at 144-45.

²¹³ *Id.* at 145-46.

²¹⁴ *Id.* at 151-52.

Health Canada branch of the Federal government in March 2003. Federal permission was required to seek a health exemption from the criminal prohibitions against possession or trafficking of controlled substances under the *Controlled Drug and Substances Act (CDSA)*. Insite, North America's first government sanctioned safe injection facility began operating in September 2003.²¹⁵

Although politically controversial, supervised injection sites have been used in 70 cities in Europe and in Sydney, Australia with success to address public health issues associated with injectable drug use.²¹⁶ The sites were evidence that "health authorities are increasingly recognizing that health care for injection drug users cannot amount to a stark choice between abstinence and forgoing health services". The Supreme Court of Canada explicitly said, "Successful treatment requires acknowledgment of the difficulties of reaching a marginalized population with complex, mental, physical and emotional health issues."²¹⁷

Insite was a strictly regulated health facility and the product of cooperative federalism; it was a model of public health policy and set out how local, provincial and federal governments can work together to solve a public health crisis. The Vancouver police supported Insite as did the city and provincial governments.²¹⁸

The Federal Minister of Health granted a health exemption from criminal prosecution in 2005 and 2006. However, the Minister refused to grant an exemption in 2008. Both staff employed by and addicts using Insite sought redress in court by arguing their constitutional right to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms* was violated. The trial judge granted Insite a constitutional exemption allowing it to operate free from federal drug laws.²¹⁹

The Supreme Court of Canada explicitly upheld the trial judge's findings of fact where he recognized competing approaches to dealing with addiction. The trial judge made the following findings of fact:

- Addiction is an illness with one of the primary symptoms being a continuing need or craving to consume the underlying substance;
- Illegal drugs such as heroin or cocaine, which are

²¹⁵ *Id.* at 152, 154.

²¹⁶ *Id.* at 148-9.

²¹⁷ *Id.*

²¹⁸ *Id.* at 156.

²¹⁹ *Id.* at 137-38.

introduced into the bloodstream, do not by themselves cause HIV or Hepatitis C. Rather, it is the ancillary use with unsanitary equipment and unhygienic techniques that permit the spread of the infections, illnesses and diseases from person to person;

- The risk of morbidity and mortality is “ameliorated” by injection in the presence of health professionals.²²⁰

On the root causes of addiction, Justice Pitfield, the trial judge concluded that the addicts’ situation in DTES was due to a complicated combination of personal, genetic, governmental, sociological and familial problems. The judge determined that there were local, governmental and legal factors including the inability of municipal, provincial, federal and non-governmental institutions to provide meaningful support to drug addicts. While not causing the problem, the legal inadequacies exacerbated the problem. The judge also considered the failure of the criminal law in preventing the distribution of illegal drugs given the prevalence of addiction in DTES.²²¹

The Supreme Court also recognized that since the opening of INSITE, there had been

- A reduction of open air injection use;
- No evidence of drug loitering, dealing or petty crime in the area around INSITE;
- The Chinese Business Association reported reductions in crime in the Chinese business district around the clean needle site;
- The rate of crime in DTES had remained stable;
- The overall cost/benefit analysis was positive.²²²

At the Supreme Court, the federal government argued that any negative health risks drug addicts may suffer were not due to the underlying criminal prohibitions but due to individual choice. The Court deconstructed the argument into three constituent elements.²²³

Factually, personal choice not the law is the cause of death and disease that Insite prevented. The Court noted the government’s position contradicted the uncontested factual findings of the trial judge, namely that addiction was an illness (the trial judge adopted the definition

²²⁰ *Id.* at 154.

²²¹ *Id.*

²²² *Id.* at 154-55.

²²³ *Id.* at 176.

provided by the Canadian Society of Addiction Medicine). More problematically for the government, the federal government conceded that issue at trial.²²⁴

The second piece of the “choice” argument was a moral one. The Court very succinctly noted:

It suffices to say that whether a law limits a Charter right is simply a matter of purpose and effect of the law that is challenged, not whether the law is right or wrong. The morality of the activity was irrelevant at the initial stage of determining whether the law engages as right.²²⁵

Finally, the government argued the decision to allow supervised injection was a policy question immune from both Court and constitutional review. The Court once again noted that was not a relevant inquiry in assessing the first step in constitutional issues. The place for such arguments was at the s. 1 stage of justification if a *Charter* breach had been established. However, the court acknowledged that the issue of drug use and addiction was a complex issue raising social, political, scientific and moral responses. As a principle of public policy, the Supreme Court noted it was for the relevant governments and not the Court, to make criminal and health policy. However, when policy is translated into law or state action, then those laws and actions are subject to both constitutional and judicial review.²²⁶

The Supreme Court of Canada’s decision in *Insite* was an important decision on the intersection of criminal law and public health policy. Obviously, the Court recited the facts beyond dispute at the trial level. However, in my opinion, the emphasis the Court placed on those facts and the almost scientifically precise and terrifying narrative of life on streets in downtown east Vancouver is something that is simply unforgettable. The *Insite* decision provides drug treatment courts in Canada with some judicial autonomy to operate a drug treatment court based on public health principles. The final observation is that the Court’s unanimous 9-0 decision underscores the definitive nature of the decision.

²²⁴ *Id.* at 176-77.

²²⁵ *Id.* at 177.

²²⁶ *Id.* at 177-78.

The final decision that will be analyzed is *R. v. Bhangal*, 2010 ONSC 4950.²²⁷ The Superior Court of Justice in Brampton serves Peel Region. Peel has a population of almost 1.3 million people.²²⁸ In *Bhangal*, Justice Durno recounted the growing problem of “doda” within the Punjabi community in Peel and accepted the following facts based on expert testimony from a medical doctor named Dr. Black and a social worker who both work in the region:

- Doda is made by crushing poppy seeds and husks or pods into a powder;
- The owner of a meat market, sold opium three times to undercover officers. Bhangal pleaded guilty to one count of trafficking in opium and one of possession of crushed opium poppy pod for the purpose of trafficking;
- Because this was the first doda sentencing in the region, the Public Prosecution Service (PPSC) called three witnesses and filed additional evidence regarding doda, seeking some “guidance” regarding the appropriate range of sentence for doda offences, notwithstanding the joint submission;
- The powder contains morphine and codeine, both opiates, controlled substances. Dr. Black regarded opiates as the most potent analgesic medication used to treat pain. Opium is the least potent of the opiates being made up of about 10% morphine. The use of doda has become an epidemic in Peel region. The powder contains morphine and codeine, both controlled substances under the *Controlled Drugs and Substances Act*. Doda is similar to heroin and is highly addictive;
- There is no cure for doda addicts who remain addicted for life. Dr. Black estimated an 80-90% relapse rate for those he treated;
- Dr. Black testified that when doda is first consumed the person feels uplifted; it helps them to feel better. While initially it will keep a user awake, after repeated use that effect no longer occurs. If too high a dose is taken, it can make the user sleepy.

²²⁷ *R. v. Bhangal*, 2010 ONSC 4950 (Can.).

²²⁸ *Statistics Canada*, *supra* note 1.

- Dr. Black said that unlike many heroin addicts, who have criminal records, 98% of doda addicts keep their jobs and have no criminal records. However, he has seen a large economic effect from doda use with families separating because of the husband's use and financial problems because all their money is being used to buy doda. Dr. Black estimated that an addict would use 1 to 2 bags a day costing from \$20.00 to \$40.00 daily;
- The users were typically male, of East Indian background (Punjabi) and mostly 20 to 30 years of age with children and spouses. Unlike some other drugs, it does not lead to violent behavior or regularly lead to other criminality;
- The addiction to doda has resulted in lost employment, overall deterioration in health, financial problems, sexual intimacy and family disunity; there has been a disturbing trend involving an increase in addiction among high school students (ages 16-18).²²⁹

As part of the sentencing decision, the Superior Court looked at the physical effects of doda and why people consume the drug. The decision utilized a public health prism through expert evidence called by the Prosecutor. From a public health perspective, the Prosecutor called evidence about the individual and communal consequences of doda addiction.

II. CONCLUSIONS

Drug treatment courts enable judges to use their discretion and tailor sentences to the individual needs of offenders. Such a change results in greater judicial power in fashioning sentences for people who have addictions and related disorders. This collaborative approach uses advances in science and addiction medicine to craft decisions based on public health and medical research and as such is consistent with a public health approach. Just as the *Insite* case recognizes addiction as a public health issue, drug courts also apply a scientific approach.

Any newly created drug court must remember two fundamental historical and institutional realities. First, drug treatment courts began in American as a response to the War on Drugs with ancillary mandatory minimum sentences, mass incarceration, habitual offender laws and penal

²²⁹ *Bhangal, supra* note 297, p. 13-22.

enhancements. There was an institutional failure of courts, probation and the treatment community to deal with flood of incarceration. The genesis of how drug courts in America evolved cannot be lost in their design and implementation.

Second, the institutional design of drug courts in America was a grassroots movement born more out of necessity rather than any explicit legislative directive. I believe that drug courts aim to reduce the harshness of mass incarceration and the adoption of a public health approach in criminal law. Even though drug courts aim to shape policy in a less punitive manner, criminal law is still a blunt instrument to shape individual social policy. Intervention is simply preferable to incarceration. The purpose of this paper is to both advocate for the expansion of drug courts while exposing the limitations of these problem-solving courts. The historical realities of mass incarceration, the non-relevance of probation in treating drug offenders suggests an incremental approach stepladder approach to incarceration. A rush to incarceration undermines the very foundation of these courts. Drug courts were a response to the War on Drugs. While this paper has tried to articulate the criticisms of these courts, the overall research suggests such courts are cost effective and reduce recidivism. The exact reduction rate is not uniform due in part to various factors. The March, 2013 Sommers study suggest cultural liaisons who are sensitive to the subjective background of the offenders may be an important factor in the treatment process. The fundamental keys to any policy success are design and implementation.

To that end, the eligibility criteria for drug courts should not be too rigid. If the criteria are too restrictive, then while the results may be positive, the most in need will be left in custody.

If drug treatment courts exclude people with prior criminal records, great care should be taken to ensure that someone at least had an access to a therapeutic approach. What if drug courts were not available? Otherwise, there is a real risk that a criminal record can have a multiplier effect. In addition, if the criteria to access a program are so restrictive, this undermines the rationale of the exercise, namely not to incarcerate and prevent a life of criminality. While the criteria should not undermine the purpose of a drug court, it needs to be equally recognized that a state has the prerogative to choose the criteria in the design and implementation of these courts. This is not to say that there are some people that should not be in drug court but rather it is the state that will set the contours of such courts.

Any theoretical arguments that such courts do not fit within an adversarial model ignore the various ways in which the adversarial model has been just that, a model. The use of masters in England and the United States suggest that judges have performed executive functions in various court settings. The importance of prosecutors in white-collar prosecutions suggests the adversarial paradigm is flexible enough to enable prosecutors to effect change prior to any finding of guilt.

Finally, one should expect failures in the rehabilitation process. The key is to establish why people fail. Are there any external factors such as community support? Drug courts bridge the gap between public health and public order. A mandatory uniform model of sentencing is inconsistent with individual needs. Recent research in addiction medicine and modification of the Diagnostic and Statistical Manual of Mental Disorders suggests a move towards function over form in order to capture the “dimensionality” of addiction and the structural neural and behavioral impairments.