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JUST WHAT MADE DRUG COURTS SUCCESSFUL?

*Judge Kevin S. Burke*

# Just What Made Drug Courts Successful?

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In the early 1970s, the United States saw a wave of new laws imposing dramatically harsher penalties for drug convictions.<sup>1</sup> Court systems already inundated with serious offenses were flooded with drug cases as arrests for drug-related crimes in the United States jumped from 322,000 in 1970 to more than 1.3 million in 1998.<sup>2</sup> Recidivism rates were horrible.<sup>3</sup> Those recidivism rates contributed to giving the United States the highest incarceration rate in the world.<sup>4</sup>

In response to the influx of drug cases, New York City created specialized “narcotics courts” to help manage the growing caseload.<sup>5</sup> New York City’s narcotics courts became known as “N Parts” and functioned as “specialized case management courts designed to handle a high volume of drug cases in a traditional manner.”<sup>6</sup> The “N Parts,” however, had no

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1. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1460 (1999-2000) (indicating the passing of laws that dramatically increased penalties for drug convictions in the mid-1970s); see Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 4 (2004), available at <http://ssrn.com/abstract=711983>.

2. William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT’G REP. 179, 180 (2001-2002).

3. See, e.g., Thomas H. Cohen & Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2002*, iii, 13 (2006) (comparing re-arrest records of felony defendants in 1992 and 2002); Patrick A. Langan & David J. Levin, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1994*, 1, 1 (2002) (comparing re-arrest records of inmates released in 1983 and 1994).

4. ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (8th ed. 2009), available at [http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th\\_41.pdf](http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wpp1-8th_41.pdf).

5. Hoffman, *supra* note 1, at 1460; see also Casey, *supra* note 1, at 4.

6. Hoffman, *supra* note 1, at 1460-61.

additional treatment component for drug offenders.<sup>7</sup>

The country's first treatment-based drug court was established in 1989 in Miami-Dade County, Florida.<sup>8</sup> Judge Herbert M. Klein, along with the Dade County Attorney, Janet Reno, and a number of other officials, including Hillary Clinton's brother who was then a public defender, designed the court to introduce supervised drug treatment into the criminal justice system.<sup>9</sup>

Recognizing the need for treatment and believing the first drug courts to be successful, officials around the country began establishing treatment-based drug courts to deal with offenders through individualized treatment and monitoring programs.<sup>10</sup> As United States Attorney General, Janet Reno became a champion of drug courts and paved the way for an influx of federal funds to plan and start the effort. There are currently more than 1600 drug courts operating in fifty states,<sup>11</sup> as well as in the District of Columbia, Puerto Rico, Guam, and a number of Native American Tribal Courts.<sup>12</sup>

Drug courts around the country operate in different ways and achieve a wide variety of outcomes. If there is any singular description of these drug courts, it is that each operates according to its own unique protocol. They have their own local legal culture. However, the theory behind their operation is largely the same: drug courts use the criminal justice system to treat drug addiction through judicially monitored treatment rather than mere incarceration or probation.<sup>13</sup> Judges supervise the defendants in a more intense fashion than traditional courts and develop interpersonal relationships with defendants that would rarely occur in a more traditional court. The National Drug Court Institute describes drug courts as follows: "Drug courts represent the coordinated efforts of the judiciary, prosecution, defense bar, probation, law enforcement, mental health, social service, and treatment communities to actively and forcefully intervene and break the cycle of substance abuse, addiction, and crime."<sup>14</sup>

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7. *Id.*

8. RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, *Drug Courts: A Review of the Evidence* 1 (2009), available at [http://www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf).

9. *Id.*

10. *See id.*

11. *Id.*

12. OFFICE OF JUSTICE PROGRAMS: DRUG COURTS, LOOKING AT A DECADE OF DRUG COURTS (1999), available at <http://www1.spa.america.edu/justice/documents/2049.pdf>.

13. *Id.* at 1.

14. C. WEST HUDDLESTON, III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUGS COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 1 (2004), available at <http://www.ndci.org/sites/default/files/nadcp/PC>

In most instances, drug courts accept defendants who have been charged with drug possession or another non-violent offense and who either tested positive for drugs or had a known substance abuse problem at the time of their arrest.<sup>15</sup> Many drug courts exclude defendants with current or prior violent offenses.<sup>16</sup> Persons "who are currently facing charges for a drug offense may be denied entry into the drug court because of a past, wholly unrelated offense."<sup>17</sup> Also, those drug courts that receive federal funding through the Bureau of Justice Assistance are required to accept only defendants who meet certain criteria.<sup>18</sup>

Drug courts generally operate under one of two models: deferred prosecution programs or post-adjudication programs.<sup>19</sup> Deferred prosecution programs divert certain eligible defendants to the drug-court system before they plead to a charge.<sup>20</sup> Post-adjudication programs, on the other hand, require a defendant to first plead guilty to the charge before making treatment options available.<sup>21</sup> The drug court then defers or suspends the defendant's sentence while he or she participates in a drug-court program.<sup>22</sup> If the defendant successfully completes the program, the sentence may be waived and the offense may even be expunged.<sup>23</sup> Defendants who fail to complete drug-court programs usually must return to the traditional criminal court for disposition of their criminal case.<sup>24</sup>

Most drug courts in the United States require that participants remain drug-free and without arrests for a period of time, usually ranging from six months to one year, in order to complete the program.<sup>25</sup> The progress of individual participants is monitored by judges, who interact frequently with participants, as well as by clinical staff.<sup>26</sup> Participants who miss hearings or

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PI.1.2004.pdf.

15. KING & PASQUARELLA, *supra* note 8, at 3.

16. *Id.* The Bureau of Justice Assistance has published ten key components of drug courts. DRUG COURT STANDARDS COMM., U.S. DEP'T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997), available at <http://www.ndci.org/sites/default/files/ndci/KeyComponents.pdf>.

17. KING & PASQUARELLA, *supra* note 8, at 4.

18. *Id.* at 3.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 4.

26. *Id.* Many surveys of drug court participants find that personal interactions with the judge play an important role in successful treatment. See John S. Goldkamp et al., *An Honest Chance: Perspectives on Drug Courts, Findings from Drug Court Participant Focus*

fail drug tests may be sanctioned through more frequent hearings or drug tests, admonishments in open court, or even jail time.<sup>27</sup>

Participants may be required to obtain a GED, hold a job, make child-support and drug-court fee payments, and have a sponsor in the community.<sup>28</sup> Some courts also require participants to complete community-service hours.<sup>29</sup> These additional requirements may serve to re-establish a participant's ties to a community, which can then serve as a support network and as an incentive to maintain sobriety.

### I. DRUG COURTS TODAY

Today, the National Association of Drug Court Professionals aims to establish a sustainable drug-court program in each of the United States' 3143 counties.<sup>30</sup> Its goal is to take drug courts to scale in order to "transform communities nationwide by fostering systemic change in the way addicted persons are treated in the adult, juvenile, and family justice systems."<sup>31</sup> While the goal is noble, it is clear that even if achieved, there is a decent prospect that the result will be 3143 drug courts that act in different ways.

The U.S. Department of Justice has published what it calls the "key components" of successful drug courts.<sup>32</sup> According to advocates, the key components are not to serve as a rigid list of procedures or regulations, but rather as an example of what the "best practices" to strive for are,<sup>33</sup> even though each court will attempt to accomplish its task through different means.

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*Groups in Brooklyn, Las Vegas, Miami, Portland, San Bernardino, and Seattle*, 14 FED. SENT'G REP. 369 (2002); see also Michael Rempel, et al., *Drug Courts: An Effective Treatment Alternative*, 19 CRIM. JUS. 34 (2004) ("What sets drug courts apart from older court-mandated treatment approaches is intensive judicial involvement: ongoing collaboration among a judge, clinical staff, and otherwise adversarial attorneys to promote each participant's recovery; and close judicial supervision through regular court appearances, in-court interaction, rewards, and sanctions.").

27. See KING & PASQUARELLA, *supra* note 8, at 4.

28. OFFICE OF JUSTICE PROGRAMS, *supra* note 12, at 2.

29. *Id.*

30. C. WEST HUDDLESTON, III, Letter from the CEO, <http://www.nadcp.org/node/333> (last visited Oct. 13, 2009).

31. ADDICTION TECH. TRANSFER CTR. NETWORK, WHO AM I? CAN YOU IDENTIFY THE FOLLOWING KEY STAKEHOLDER ORGANIZATIONS IN THE ADDICTIONS TREATMENT AND RECOVERY FIELD?, [http://www.attcnetwork.org/aboutus/Docs/Stakeholders\\_Who\\_Am\\_I.ppt](http://www.attcnetwork.org/aboutus/Docs/Stakeholders_Who_Am_I.ppt).

32. See U.S. DEP'T OF JUSTICE, DRUG COURTS PROGRAM OFFICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997), available at <http://www.ndci.org/sites/default/ndci/KeyComponents.pdf>.

33. *Id.* at 3.

There are ten key components. First, drug courts are encouraged to “integrate alcohol and other drug treatment services with justice system case processing.”<sup>34</sup> The purpose of this component is to have the justice system persuade or compel addicts to participate in treatment options because “a person coerced to enter treatment by the criminal justice system is likely to do as well as one who volunteers.”<sup>35</sup> Even outside of the criminal justice system, many people are coerced into treatment. Spouses threaten each other with divorce, employers threaten discharge if an employee does not go to treatment, and parents cart their children off to treatment kicking and screaming. Coercion begins the road to recovery for a number of people.

Second, the prosecution and defense counsel are urged to promote public safety and protect due-process rights by using a non-adversarial approach.<sup>36</sup> This component envisions a prosecutor and defense counsel working as a team in order to screen cases for potential participants, and “encourage” defendants to enter the drug-court programs.<sup>37</sup> Perhaps more than any other of the ten key components, this approach raises concerns, which will be discussed in greater depth later in this article.

Third, drug courts are encouraged to identify and place eligible participants in the drug-court program early and promptly.<sup>38</sup> Action taken promptly after arrest is designed to take advantage of the shock of arrest felt by the defendant and to increase public confidence in the system.<sup>39</sup> People have gone to treatment and continue to do so as part of probation even when there is no drug court. Many drug courts, however, emphasize the speed in which defendants are placed in treatment as a goal of the court. Since chemical dependency is a chronic progressive disease, presumably the quicker the intervention, the better the outcome.

Fourth, drug courts are to provide access to a continuum of alcohol, drug and other treatment and rehabilitation services.<sup>40</sup> For the drug court to be effective, the system must consider problems that co-occur with drug addiction, including mental illness, homelessness, unemployment, and other health problems.<sup>41</sup>

Because the drugs themselves may not be the only factor feeding the defendant’s addiction, the treatment options must be able to treat the entire

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34. *Id.* at 9.

35. *Id.*

36. *Id.* at 11.

37. *See id.*

38. *Id.* at 13.

39. *Id.*

40. *Id.* at 15.

41. *Id.*

patient, rather than simply the physical manifestation of the illness that resulted in arrest for breaking the law.<sup>42</sup>

The degree of serious mental health issues many drug-court defendants have is illustrated in a study of the defendants in the Hennepin County, Minnesota, drug court conducted by Doctors Hildi Hagedorn and Mark L. Willenbring.<sup>43</sup> In their study, sixty drug-court defendants completed a demographic interview, the Beck Depression and Anxiety Inventories, and an examination of their medical quality of life.<sup>44</sup> The study found that serious mental illness was common among the participants; the most common of which was post-traumatic stress disorder.<sup>45</sup> Most of the individuals interviewed had not previously been identified as requiring psychiatric treatment. The study suggests that more frequent and thorough screening for psychiatric illness is necessary in drug courts to provide participants with all the tools needed to fight their addictions.<sup>46</sup>

Fifth, the key components encourage frequent alcohol and drug tests to monitor a participant's abstinence.<sup>47</sup> Testing programs are the only objective and efficient way to monitor a participant's progress and their compliance with the program.<sup>48</sup> Testing usually occurs frequently at first and may taper off as the participant progresses, but additional testing may be ordered if a participant fails a test or refuses to take a test.<sup>49</sup> Some but not all drug courts require the defendant to pay for the drug testing.

Sixth, a coordinated strategy is suggested to define court responses to a participant's compliance.<sup>50</sup> Traditional criminal courts use negative consequences as the singular motivator. "Obey my order or I'll revoke your probation and send you to prison." Drug courts reward cooperation through methods such as praise from the bench, reduced supervision, dismissal or reduction of criminal charges, and graduation.<sup>51</sup> If a participant does not comply, for example by failing a drug test, they are not immediately kicked out of the program and sent back into the general criminal justice docket, but they may be reprimanded through admonishments in open court,

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42. See *id.* (arguing that unless treated, these co-occurring problems will prevent a participant's success and will compromise adherences to the program).

43. Hildi Hagedorn & Mark L. Willenbring, *Psychiatric Illness Among Drug Court Probationers*, 29 AM. J. OF DRUG AND ALCOHOL ABUSE 775, 775-76 (2003), available at <http://www.informaworld.com/content~db=all~content=a7136144682>.

44. *Id.* at 775.

45. *Id.* at 776.

46. See DRUG COURT STANDARDS COMM., *supra* note 16.

47. *Id.* at 21.

48. *Id.*

49. *Id.* at 21-22.

50. *Id.* at 23.

51. *Id.* at 24.

increased testing, fines, mandatory community service, and escalating periods of jail confinement.<sup>52</sup> To their credit, drug court judges recognize that relapse is part of the disease of chemical dependency.<sup>53</sup>

Seventh, the key components recognize that “[o]ngoing judicial interaction with each drug court participant is essential.”<sup>54</sup> The idea is that a relationship with the court increases the likelihood the participant will remain in treatment and increases the chances of success.<sup>55</sup> Having a powerful authority figure such as a judge care about you can be a huge motivation to change. But caring takes an investment of passion and time. Unless there is a demonstrable decrease in recidivism, the requirement of a continued and ongoing relationship with the judge raises questions of how to best use the judicial resources of the court. That time investment has led to the demise of many drug courts. Despite the time commitment by judges and the experience that some drug courts ceased because of that commitment, there are strong proponents for using court hearings in all types of courts to motivate offender behavior change.<sup>56</sup>

Eighth, the key components encourage monitoring and evaluation to measure the effectiveness of the program.<sup>57</sup> The only way for a drug court to be effective is to monitor the progress of participants and adapt the program to ensure the most people will remain in treatment.<sup>58</sup> Not every idea that has been tried in drug courts has worked; some ideas worked in one court and were a miserable failure in another. But to their credit, all of the drug courts embraced evaluation and change to a far greater degree than traditional criminal courts.

Ninth, interdisciplinary education is encouraged in order to promote effective planning, implementation, and operations.<sup>59</sup> Educating the attorneys involved in drug courts in the areas of psychology and addiction help develop an understanding of the values, goals, and operating procedures of the treatment process.<sup>60</sup> Similarly, educating the treatment providers about the criminal justice system helps them understand the

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52. *Id.* at 24-25.

53. *Id.* at 23.

54. *Id.* at 27.

55. *Id.*

56. Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L. J. 1307, 1314-15 (2007), reprinted in THE PEW CENTER ON THE STATES, *ARMING THE COURTS WITH RESEARCH: 10 EVIDENCE-BASED SENTENCING INITIATIVES TO CONTROL CRIME AND REDUCE COSTS* 5 (2009).

57. DRUG COURT STANDARDS COMM., *supra* note 16, at 5.

58. *Id.*

59. *Id.*

60. *Id.*



procedures involved.<sup>61</sup> Given the dominance of chemical dependency and mental health issues among defendants, it is almost bewildering why the criminal justice system as a whole, let alone drug courts, have not been more sophisticated in their understanding of the need for collaboration. For drug courts to be effective, they need to create a collaborative mentality between the courts and the treatment providers.

Tenth, drug-court programs are designed to forge partnerships among the courts, public agencies, and community-based organizations to generate local support and enhance effectiveness.<sup>62</sup> Developing coalitions with community organizations, criminal justice agencies, and treatment providers creates greater access to services for participants and informs the community about drug court processes.<sup>63</sup>

There is one major aspect missing from the Department of Justice's key components. Nowhere in the key components are the court or court officials encouraged to talk with the participant about what he or she wants. The defense counsel is supposed to encourage the offender's participation,<sup>64</sup> but the participant is not necessarily encouraged to participate in the planning or implementation of his own treatment program. The court and attorneys decide what to do with the participant, and the participant is expected to obey a treatment program that is thrust upon him or her. Giving the participant the opportunity to be heard and to participate in the process—a key factor in the effectiveness of the early drug courts—regrettably has been lost in many drug courts. That failure to embrace the importance of voice and participation can create the perception of procedural unfairness, where the participant may feel that no one is listening to him. The adversarial system may not be perfect, but when the system works at its best it ensures a voice to the people.

## II. CRITIQUES OF DRUG COURTS

### A. Drug Courts Fail to Reduce Costs

A multitude of studies examining the effectiveness and efficiency of drug courts have been conducted over the last twenty years. Several have suggested that drug courts are effective when it comes to reducing recidivism and saving money.<sup>65</sup> For example, in 2005 the Government

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61. *Id.* at 6.

62. *Id.* at 5.

63. *Id.*

64. *Id.* at 4.

65. *Id.* at 5. King and Pasquarella note:

Evaluations of the net costs and benefits of drug courts nationwide generally find that drug courts save taxpayer dollars compared to simple probation and/or

Accountability Office found that drug-court participants had lower recidivism rates than comparison group members.<sup>66</sup> Recidivism rates among drug-court participants have been reported at 5% to 28%, and at less than 4% for drug-court graduates.<sup>67</sup> The Drug Court Clearinghouse and Technical Assistance Project boasts that of the more than 100,000 drug-dependent offenders who have entered drug court programs, more than 70% are either still enrolled or have graduated the program.<sup>68</sup> According to the National Association of Drug Court Professionals, "for every dollar invested in drug court, nearly ten dollars are saved by corrections."<sup>69</sup> However, given the diversity of the protocols of many drug courts, there are few, if any, studies that have been able to identify why they work.

Drug courts are not without skeptics. Some drug-court supporters have an almost evangelical passion for, and commitment to, the drug-court system, which make some people uncomfortable. Critics of drug courts argue that the impact of drug courts on prison populations may not be as positive as claimed, especially when jail time imposed as a sanction exceeds jail time that would have been imposed in traditional criminal court.<sup>70</sup>

Drug courts are designed to incentivize compliance with the program and to disincentive failures. If the penalty for failure is no worse than what would have happened had the offender not participated, there is no real incentive to take the program seriously and to strive for graduation. As a result, the critics argue, many drug-court participants are convicted of non-violent offenses and would not have been sentenced to long prison stays if they had not been a part of the drug-court program.<sup>71</sup>

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incarceration, primarily due to reductions in arrests, case processing, jail occupancy and victimization costs. While not all persons diverted to drug court would have otherwise been sentenced to prison, 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.

KING & PASQUARELLA, *supra* note 8, at 8.

66. U.S. GOV'T ACCOUNTABILITY OFFICE REPORT TO CONG. COMM., GAO-05-219 ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 2 (2005), available at <http://www.gao.gov/new.items/d05219.pdf>.

67. *Id.* at 2. In another study, ten of eleven drug courts reviewed showed reduced criminal recidivism. Eric L. Jensen & Clayton Mosher, *Adult Drug Courts: Emergence, Growth, Outcome Evaluations, and the Need for a Continuum of Care*, 42 IDAHO L. REV. 443, 463 (2006).

68. OFFICE OF JUSTICE PROGRAMS, *supra* note 12, at 1.

69. Missouri Association of Drug Court Professionals, *What is a Drug Court?*, <http://www.modrugcourts.org/showpage.php?page=2> (last visited Oct. 5, 2009).

70. OFFICE OF JUSTICE PROGRAMS, *supra* note 12, at 6.

71. KING & PASQUARELLA, *supra* note 8, at 16.

In their critique of drug courts, Ryan S. King and Jill Pasquarella of the Sentencing Project further note that "there is a growing concern that instead of providing an alternative sentencing route for arrestees, drug courts actually increase the number of people arrested on drug charges."<sup>72</sup> They suggest that law enforcement officials make more arrests of low-level offenders because drug courts allow for additional judges to deal with low-level drug offenders.<sup>73</sup>

Former Denver District Court Judge William G. Meyer and Colorado Governor A. William Ritter, on the other hand, call accusations that drug courts "net widen" and increase the prison population "fallacious."<sup>74</sup> They note that "[t]he research on almost one hundred drug courts fails to establish any pattern where the drug courts are actually sending more people to prison than a traditional sentencing program."<sup>75</sup>

#### B. Drug Courts Fail to Treat Serious Drug Use

Another common critique of drug courts is that they fail to treat serious drug addiction. The Drug Court Clearinghouse points out that "[m]ost drug court participants have been using drugs for many, many years; many are polydrug users. Most have never been exposed to treatment previously although a large portion have already served jail or prison time for drug related offenses."<sup>76</sup> The National Drug Court Institute boasts that in treating these participants, drug courts provide "closer, more comprehensive supervision and much more frequent drug testing and monitoring during the program than other forms of community supervision."<sup>77</sup>

Drug courts have opened new avenues for accessing chemical dependency treatment, but budget constraints frequently limit the treatment options. For example, criminologists Faith Lutze and Jacqueline van Wormer argue that drug courts may not provide effective treatment for participants with serious drug-addiction problems.<sup>78</sup> They suggest that for seriously addicted individuals, long-term inpatient treatment would be a more effective strategy.<sup>79</sup> The issue of the type of treatment available

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72. *Id.* at 17.

73. *Id.*

74. Meyer & Ritter, *supra* note 2, at 180.

75. *Id.*

76. OFFICE OF JUSTICE PROGRAMS, *supra* note 12, at 2.

77. HUDDLESTON ET AL., *supra* note 14, at 1.

78. Faith E. Lutze & Jacqueline van Wormer, *The Nexus Between Drug and Alcohol Treatment Program Integrity and Drug Court Effectiveness*, 18 CRIM. JUST. POL'Y REV. 226, 226-45 (2007).

79. KING & PASQUARELLA, *supra* note 8, at 13; cf. Josh Bowers, *Contraindicated*

becomes even more critical because drug-court defendants all too often suffer not just from chemical dependency but from major mental illnesses as well.

Critics note that defendants with serious histories of drug use are often excluded from drug-court participation due to their criminal records.<sup>80</sup> As a result, drug courts in many cases do not have the opportunity to work with the most seriously addicted offenders.<sup>81</sup> Even so, drug courts at least leave open the option of helping those with serious addiction problems, whereas a pure incarceration model leaves no such opportunity, and can actually exacerbate addiction among inmates.

### C. Drug Courts Exacerbate Racial Disparities in the Prison System

Critics of drug courts further argue that drug courts serve to exacerbate the problem of racial disparities in the prison system. Marquette Law School Professor Michael O'Hear argues that "the war on drugs, and particularly the special intensity with which it has been waged against open-air drug dealing and crack cocaine, has fueled a massive and demographically disproportionate increase in the number of black males held in the nation's prisons."<sup>82</sup> O'Hear suggests that the drug courts exacerbate rather than ameliorate the problem because evidence shows that white drug offenders are more likely than African-American offenders to benefit from the "pathway out" of the traditional criminal justice system provided by drug courts.<sup>83</sup>

O'Hear suggests four reasons why drug courts may exacerbate racial disparities in the prison system: First, because a defendant must be arrested in order to participate in a drug-court program, the drug courts do not improve racial disparities in arrest patterns.<sup>84</sup> In fact, the argument was that drug courts create an incentive to make arrests. Second, the eligibility requirements tend to "screen out the prison-bound," thus disadvantaging African-American offenders.<sup>85</sup> Third, drug-court programs have a high failure rate, and African-Americans are more likely to fail than whites.<sup>86</sup>

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*Drug Courts*, 55 UCLA L. REV. 783, 831 (2008).

80. See KING & PASQUARELLA, *supra* note 8, at 15 ("The GAO reports that three-quarters of courts nationwide admit repeat offenders and 16% admit offenders with a history of violent crime.").

81. *Id.*

82. Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 477 (2009).

83. *Id.*

84. *Id.* at 479.

85. *Id.*

86. *Id.* at 480. In some drug courts, African Americans are as many as thirty percentage points more likely to fail than whites. *Id.*

Finally, participants who fail to complete drug-court programs may be subject to even longer sentences than they would have faced had they not entered the drug-court program.<sup>87</sup> The fear that drug courts might exacerbate the problem of over-incarceration of chemically dependent people is not an unreasonable concern. One study found that drug court dropouts were sentenced to prison terms two to five times longer than those whose cases were processed entirely in traditional criminal court.<sup>88</sup>

O'Hear argues that drug courts are unlikely to affect the stigma placed on African-American communities as a result of drug-related arrests.<sup>89</sup> In fact, O'Hear notes that problems of stigma may be exacerbated by "a drug court culture that relies heavily on public shaming rituals."<sup>90</sup> In the final analysis, perhaps what critics such as O'Hear fail to fully account for is the fact that drug courts simply are not capable of creating system-wide criminal justice reform. The purpose of the early drug courts was to get treatment for as many addicts as possible, no matter their race. The alternative of not having any drug courts creates an even bleaker alternative for those with addiction problems. Any reasoned and objective analysis of drug courts will not conclude that they are perfect, but when good becomes the enemy of perfect, the result will not be positive.

#### D. Drug Courts Violate Defendants' Due Process Rights

The role of the adversary system in the context of drug courts is hotly debated. Among the most vocal critics are public defenders, private defense counsel and advocates for sentencing reform; the very people one might have expected to be ardent supporters of the effort. As reflected in the key

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87. *Id.* at 460.

88. KING & PASQUARELLA, *supra* note 8, at 18.

89. O'Hear, *supra* note 82, at 486. O'Hear concludes:

No court-based diversion program is likely to make a large dent in the racial disparities that plague our criminal justice system. Major improvements will have to come from legislative reforms (eliminate mandatory minimums, selectively decriminalize drug offenses) and changes in police practices (end racial profiling, reduce relative enforcement intensity against crack and open-air drug offenses). Unfortunately, such reforms do not seem politically viable at present. Court-based diversions may be the best we can do.

*Id.* at 498.

O'Hear suggests a shift from treatment-based drug courts to courts that focus on restorative justice in order to "foster more positive attitudes within minority communities towards the legal system, contributing to more constructive citizen-police interactions and enhancing the sense of obligation among community members to obey the law." *Id.* at 499.

90. *Id.* at 486; see also Terance D. Miethe et al., *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522, 536-37 (2000).

components, many of drug courts' most ardent supporters argue that the courts cannot operate with a traditional criminal courts' adversarial system. Critics of drug courts suggest that by asking prosecutors to identify defendants who would benefit from drug-court programs and to assist in the defendants' recovery, drug courts interfere with the adversarial process.<sup>91</sup>

The war on drugs created many casualties of war. Racial profiling of minorities occurred in some instances. By requiring a guilty plea before treatment is offered, some drug courts put the victims of racial profiling in between the proverbial rock and a hard place. They force the victims to choose to either litigate their legitimate constitutional rights or avail themselves of needed treatment. Critics question whether defendants can knowingly and voluntarily consent to drug-court programs "without duress or coercion," whether court officials avoid bias and conflicts of interest, and whether a stigma occurs when a defendant decides to participate in the drug court program or to go forward in the traditional criminal court system.<sup>92</sup> Furthermore, there is concern that drug courts may violate the equal protection rights of certain defendants, since many drug-court programs are not available statewide.<sup>93</sup>

The Bureau of Justice Assistance argues that drug courts are consistent with the adversarial process.<sup>94</sup> In its publication *Defining Drug Courts: The Key Components*, the Bureau states that "[u]sing a nonadversarial approach, prosecution and defense counsel promote public safety while

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91. Trent Oram & Kara Gleckler, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471, 472-73 (2006) (suggesting that drug courts could be improved by better safeguarding drug court participants' procedural due process, equal protection, and privacy rights); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1575 (2004) ("Adopting the drug court compromise as a way of combating the effects of drug legislation is a deeply problematic means of stanching the flow of low-level offenders into our criminal justice system. It works, if at all, by redirecting offenders into a treatment system that may pose significant, perhaps increased, hardships on offenders."); cf. Susan P. Weinstein, *Ethical Considerations for Prosecutors in Drug Courts*, 15 CRIM. JUST. 26, 27 (2000) (arguing that "there is no ethical inconsistency between the prosecutorial function in traditional courts and drug courts").

92. Oram & Glecker, *supra* note 91, at 486-87.

93. *Id.* at 480.

94. DRUG COURTS STANDARDS COMM., *supra* note 16, at 11 ("The responsibility of the prosecuting attorney is to protect the public's safety by ensuring that each candidate is appropriate for the program and complies with all drug court requirements. The responsibility of the defense counsel is to protect the participant's due process rights while encouraging full participation. Both the prosecuting attorney and the defense counsel play important roles in the court's coordinated strategy for responding to noncompliance.").

protecting participants' due process rights."<sup>95</sup> The Bureau suggests that prosecutors and defense counsel should work together to design policies and procedures that safeguard the due process rights of drug court participants.<sup>96</sup> As an aspiration of the legal profession, it is impossible to argue that the goal is not noble even if there is a practical problem of implementation. The problem with this aspiration is that it may not be easy to protect a defendant's due process rights if the prosecutor and defense counsel are working together outside of the adversarial process. Professor David Wexler argues that the defense counsel cannot operate solely as a member of the team, but must be permitted to confer with his client about what goes on in the pre-hearing conferences and make arguments on behalf of the client where appropriate.<sup>97</sup>

One of the main aspects of due process is the opportunity to be heard in court. If the prosecution and defense are working together to get the defendant into treatment, his or her right to be heard in court may be stripped from him. An opportunity for one's lawyer to speak eloquently is important, but it is not always a satisfactory replacement for the ability to speak for oneself. Judge John Parnham, retired, states that pre-hearing conferences' ability to develop strategies for the participant would be hampered if the participant were present;<sup>98</sup> however if the judge and attorneys decide beforehand what is going to happen to the defendant, the defendant has completely lost his or her chance to be heard. There are legitimate fiduciary-duty concerns by having defense counsel working and sharing information with the prosecution.

### III. IF THE DRUG COURTS ARE SO DIFFERENT, WHAT MAKES DRUG COURTS SUCCESSFUL?

Despite even the most valiant attempt to adhere to the key components, there were and remain differences among the drug courts in this country. How one gets into a drug court varies, as do the services available. Yet most of the initial drug courts were very successful, and many remain so today. The key to understanding why that is may well lie in understanding procedural fairness.

Professor Tom Tyler has called procedural fairness the most powerful explanatory concept for why people obey rules that restrict their behavior in ways they would otherwise find unacceptable. Procedural fairness is one

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95. *Id.*

96. *Id.*

97. *See generally* BUREAU OF JUSTICE ASSISTANCE DRUG, COURT CLEARING HOUSE, FREQUENTLY ASKED QUESTIONS SERIES (2009).

98. *Id.*

explanation why drug courts which are so different are effective.<sup>99</sup> And the failure to maintain an abiding commitment to procedural fairness may also be the best explanation for why some drug courts became less effective over time.

Former Congresswoman Barbara Jordan once said, “[w]hat the people want is an America as good as its promise.”<sup>100</sup> That is what the people want of courts: courts that are as good as their promise; fair, efficient, and effective. Virtually all of the initial evaluations of drug courts reported that they were effective, and most reported that they were efficient, particularly if the definition of efficient was cost effective. Few, if any, of the evaluations addressed whether or not they were procedurally fair. Fairness should be one of the driving forces of all courts, but particularly those that portray that they are problem-solving courts.

Professor Tyler wrote:

A goal of the courts is to handle people’s problems in ways that lead them to accept and be willing to abide by the decisions made by the courts. The effectiveness of the courts in managing social conflicts depends upon their ability to issue decisions that are authoritative, i.e., that shape the conduct of the parties that come before them. Courts want that deference to continue over time, with people adhering to court judgments long after their case, so that the parties are not continually bringing the issues back into the courts for re-litigation. Finally, the courts want to retain and even enhance public trust and confidence in the courts, judges, and the law. Such public trust is the key to maintaining the legitimacy of the legal system.<sup>101</sup>

Procedural fairness does not suggest that people are happy if they lose. No drug-court defendants want to be in drug court—they “volunteered” to get into drug court by being arrested, and as a result from the inception of the prosecution they lost at some level. No one likes to lose, but litigants recognize that they cannot always win. They accept losing more willingly if the procedure used is fair. Change in human behavior or creating the motivation to successfully deal with chemical dependency does not come easily. It comes easier if there is an atmosphere of hope and support. Likewise, success comes easier in courtrooms where there is a sustained commitment to procedural fairness.

The essential elements of procedural fairness are voice, neutrality, respect, and trustworthy authorities. These elements of fairness dominate

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99. Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. (SPECIAL ISSUE ON PROCEDURAL FAIRNESS) 4, 4 (2007).

100. Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The Best Strategy for Preserving Judicial Independence*, 41 CT. REV. 4, 7 (2004).

101. Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26 (2007).



people's reaction to the legal system across ethnic groups, across income and educational levels, and across genders.

The element of voice refers to the fact that when people come to court, they want the opportunity to tell their story and explain their views to a judge who listens carefully. Voice in a drug-court setting is the embodiment of a courtroom that promotes conversation. Voice is not simply the technical decision of a defendant to make important decisions such as how to plead. Voice is the ability of a person to express their concerns, even if from a technical legal point of view the concern is not particularly relevant. Voice is also delivering the implied promise that the judge will in fact listen carefully.

In the early drug courts there were few, if any, available protocols. Judges, lawyers, probation officers and treatment providers appeared in court, listened to what was said and then the judge made a decision. Over time the concept that "we" need to preconference the defendant's court appearance became more prevalent. The judge and others would meet and decide what to do with the defendant before the defendant appeared. A non-adversarial approach with everyone working toward the common goal was, after all, one of the key components. The logic seems at first blush unassailable. Preparation is good. A lot of the second, third, and fourth generation drug-court judges were new to the drug-court experience and less comfortable with improvisation. The preconference meeting helps those judges.

Although the logic seems sound, without care it can create a major impediment. The danger of pre-conferencing before the judge hears from the defendant is that it can lead to early hypothesis generation, where a judge may then go on the bench thinking that the case is the same as a hundred other cases he has heard or thinking about what the decision in the preconference was, and then only look for the information that confirms the early hypothesis. Early hypothesis generation is not peculiar to drug courts. It can happen in any courtroom, but may be more likely where there is an over commitment to the idea that the adversarial system is inappropriate.

In drug cases, frequently the outcome is driven by the constitutionality of the search. Since criminal court defendants are represented by attorneys, their ability to express themselves vocally during court proceedings is frequently limited. Drug courts, on the other hand, provided a unique opportunity for defendants to have a forum to express themselves. For people who self-medicate pain through drugs or are hopeless, the judge can be an important person who cares about them and offers hope. The early drug courts were successful in part because they put an emphasis on voice.

The element of neutrality refers to the fact that people are more likely to accept a court decision when they feel they have been treated equally and fairly. One of the ways courts can show this is by clearly explaining the

reasons for a decision and by emphasizing the importance of facts. Litigants respond more positively to court decisions when the importance of facts is emphasized and the reasons for a decision have been clearly explained. Neutrality is important to the judiciary. Neutrality is critical if courts are to be perceived as legitimate. But neutrality can mask that a judge cares. A good judge understands that you can both care and be neutral. A good judge understands that you can be neutral and engaged.

The element of respect refers to the fact that people react positively when they feel they are treated with politeness, dignity, and respect. This can be done through explaining how things work and what a party must do. Perhaps because of volume many criminal courts have ended up depersonalizing the defendant. There is a theater aspect of drug courts. Defendants see others who have succeeded and presumably can be motivated by their support. But respect is even more critical if the courtroom is going to be a semi-support group. Respect in a drug-court setting is a place where there is no threatening, lecturing, blaming, or shaming of defendants.

The final element of procedural fairness is a trustworthy authority. This element deals with the perception a person has of the official presiding over the case. People look for actions to indicate they can trust the character and sincerity of those in authority. They also look for signs that the judge is sincerely concerned with the person's needs. If the actions or body language of the judge conveys a message different from what the judge is saying, the person will not trust the judge and will be less likely to accept the outcome.

Too often, courts have not viewed themselves from the customers' perspective. Indeed, the word "customer" sometimes actually offends some judges, prosecutors, and public defenders. But the word frames an important self-analysis courts must undertake. What do the court customers look for from their courts? What do the defendants in a drug court look for from the drug court? What happens when the defendant in a drug court is not effectively listened to? Is the defendant satisfied simply with the favorable outcome?

A goal of the judicial system is to handle problems that lead litigants to accept and abide by decisions and retain and even enhance their trust and confidence in the justice system. Factors that could matter include outcome favorability: Did I win? Outcome fairness: Did I get what I deserve? Procedural fairness: Was my case handled with fair procedures?

The current emphasis of many courts and commentators on procedural fairness develops from research showing that how disputes are handled has an important influence upon people's evaluation of their experience in the

court system.<sup>102</sup> Procedural fairness is important because it encourages decision acceptance and it leads to positive views about the legal system. Those are precisely the goals that are integral for the success of a drug court.

Early social-science research on procedural fairness focused upon the theory that respectful and dignified treatment of defendants would lead to the perception that the judge is a trustworthy authority and foster a belief in unbiased decision-making by the judge. Other early procedural-justice research focused upon the importance of a judge providing explanations for the decision. Research showed that explanations to a litigant fosters a sense of legitimacy and results in higher compliance with court orders.

Although the academic research on procedural fairness is robust, there is little evidence that the early pioneers of drug courts consciously practiced that academic research as applied science in a courtroom. But, those early pioneers of drug courts were probably intuitively effective at running courtrooms that embodied the concepts. Not all judges and attorneys are as intuitive, and effective courtroom management has not always occurred in crowded criminal courts.

Because of their training, judges and lawyers focus on the fairness of case outcomes instead of the process.<sup>103</sup> As the chart below illustrates,

#### Attorneys



#### Public

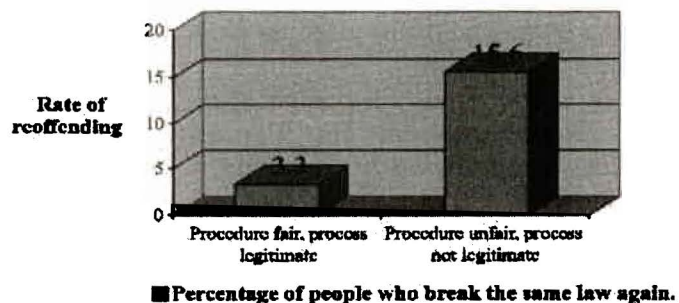


102. Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809 (1994); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003). See generally Tom R. Tyler, *The Quality of Dispute Resolution Procedures and Outcomes: Measurement Problems and Possibilities*, 66 DENV. U. L. REV. 419 (1989).

103. See DAVID B. ROTTMAN, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 25 (Judicial Council of California/Administrative Office of the Courts 2005), available at [http://www.courtinfo.ca.gov/Reference/documents/4\\_37pubtrust1.pdf](http://www.courtinfo.ca.gov/Reference/documents/4_37pubtrust1.pdf).

judges and lawyers focus on the importance of case outcomes as the measure of "success" of the justice system far more than the public or litigants do.<sup>104</sup> The chart above compares the relative importance of significant factors on overall court approval.

The impact procedural fairness has is not momentary. Research has shown that procedural fairness influences a person's acceptance of the decision over time.<sup>105</sup> For example, there was a study done in Australia on a re-integrative shaming experiment in which researchers examined how 900 adults charged with drunk driving felt about the procedures they encountered, and then tracked their acceptance of the decision and their re-offense rate years down the road.<sup>106</sup> Following a decision, the defendants were asked if the procedures were fair and the law legitimate.<sup>107</sup> The researchers then looked at re-offense rates three and four years down the line.<sup>108</sup> The study found that fairness of the legal procedure was related to the legitimacy of the legal system.<sup>109</sup> Where the defendant believed the procedure was fair and the process was legitimate, the re-arrest rate for the same crime was 3.3%.<sup>110</sup> Where the defendant believed the procedure was unfair and the process not legitimate, the re-arrest rate was 15.6%.<sup>111</sup>



This Australian study shows that achieving procedural fairness creates greater compliance with court orders. The study dealt with a defendant

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104. *See id.*

105. *Id.* at 553.

106. *Id.* at 557-58.

107. *Id.*

108. *Id.*

109. *Id.* at 565.

110. *Id.*

111. *Id.*

population that is similar to a drug court, at least if you view alcohol abuse as similar to drug use. Unlike those in drug courts, however, these defendants were not all ordered to treatment, nor did they have the type of judicial supervision that a drug-court defendant has. But it makes sense that if the party feels the process was fair, even if the party loses, the party is more likely to accept and comply with the result. If people feel the procedures are not fair, then they are less likely to accept the result and are more likely to question the legitimacy of the legal system. It seems elementary then that judges should seek at all costs to achieve procedural fairness in their courtrooms.

#### IV. CONCLUSION

The proper role of a judge has been a troubling aspect of drug courts for many. There is a perception among some that drug court judges hug the defendants and interact with defendants in inappropriate ways. Neutrality is important for judges, but if applied improperly it can mask that the judge cares. Neutrality requires judges to be transparent and open about how decisions were made, to give an explanation in terms understandable by a layperson, and to frequently cite to relevant statutes, rules or court policies. Many of the judges who engaged in the early generation of drug courts were quite transparent and open in how decisions were made and they gave explanations to the defendants as opposed to their lawyers. Their orders were understandable to defendants.

Respect in a courtroom is also important because subtle clues about people in a courthouse are important. The early drug courts took defendant's concerns seriously. Early drug-court judges made clear that they had heard the needs and concerns of the people and explained why those concerns could or could not be accommodated in a legal setting. Courtesy, politeness, and respect for people were important aspects of the drug courts. People come to court about issues that are important to them irrespective of whether they have a strong legal case. Giving people information about their rights and telling them how to complain to higher authorities were important parts of early drug courts.

There may come a day when there are 3143 drug courts in our country. More likely there will be a difficult effort to bring many of the existing drug courts to scale in order to permit them to survive. These are difficult budget times for state courts and corrections agencies. Some good drug courts may not make it. But, regardless of whether you are an optimist, pessimist, or somewhere in the middle, voice, respect, neutrality, and trust must be seen as key components of a successful drug court. Voice, respect, neutrality and trust, indeed, must be seen as the key component of all courts.