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# INSTITUTIONALIZING INNOVATION: THE NEW YORK DRUG COURT STORY

*John Feinblatt, Greg Berman, and Aubrey Fox\**

## INTRODUCTION

It is difficult to overstate the impact that drugs have had on the American criminal justice system—and courts in particular—in recent years. The drug epidemic that began in the 1980s (and the war against drugs that continues to this day) has placed tremendous burdens on almost every part of the system.<sup>1</sup> The strain can be seen in the widespread overcrowding in correctional facilities.<sup>2</sup> It can be seen in the resources that police and prosecutors have had to dedicate to new enforcement programs.<sup>3</sup> And it can be seen in the courts which have struggled to keep pace with the resulting explosion in caseload volume.<sup>4</sup>

No state is exempt from these forces, of course, but New York offers a particularly vivid example of a court system grappling with the consequences of drugs and crime. According to New York State Chief Judge Judith S. Kaye:

[W]hile major crimes rates are heading toward record lows, filings in our criminal courts are soaring to all-time highs. And the substance of this caseload reflects some of the most daunting

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1. E.g., Gregory P. Falkin et al., *Drug Treatment in the Criminal Justice System*, 58 *FED. PROBATION* 31, 31 (1994) (describing the strains of the war on drugs on the various components of the criminal justice system).

2. E.g., Ethan G. Kalett, *Twelve Steps, You're Out (of Prison): An Evaluation of "Anonymous Programs" as Alternative Sentences*, 48 *HASTINGS L.J.* 129, 133-136 (1996) (discussing the overcrowding in jails and prisons caused by the war on drugs).

3. See W. Clinton Terry III, *Prosecutors and the Evaluation of Dedicated Drug Treatment Courts*, 31 *PROSECUTOR*, Mar.-Apr. 1997, at 32 (referring to the impact on courts and prosecutors of increased drug caseloads and suggesting the consideration of drug courts to increase the speed of drug crime enforcement).

4. Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 *NOTRE DAME L. REV.* 439, 459-62 (1999) (describing how drug arrests have outpaced other criminal arrests since 1980). See generally Colloquy, *The Drugging of the Courts: How Sick is the Patient and What is the Treatment?* 73 *JUDICATURE* 314 passim (1990).

problems facing our society today . . . . Last year, nearly half of all felony filings in this State were drug-related . . . . [D]rug abuse was the fuel driving much of the criminal justice system's revolving door.<sup>5</sup>

Statistics confirm this bleak assessment: in 1980, there were 27,000 drug arrests in New York. By 1999, that number had skyrocketed to more than 145,000—a 430% increase.<sup>6</sup> Even when a defendant is arrested for a crime that is not explicitly drug-related, drug use often played a role. According to the National Institute of Justice, eight out of every ten defendants arrested in New York City in 1998 for *all* crimes tested positive for drugs at the time of their arrest.<sup>7</sup>

While the numbers are staggering, they only hint at the true scope of the problem. The challenge that this massive influx of cases poses for courts in New York and other states is not simply how to manage dockets more efficiently. It is how to do justice in cases that almost always involve litigants with complicated problems. As Chief Judge Kaye has written:

Not surprisingly, in many of today's cases, the traditional approach yields unsatisfying results. The addict arrested for drug dealing is adjudicated, does time, then goes right back to dealing on the street . . . . Every legal right of the litigants is protected, all procedures followed, yet we aren't making a dent in the underlying problem. Not good for the parties involved. Not good for the community. Not good for the courts.<sup>8</sup>

Recognizing this reality, judges across New York have begun to rethink how courts respond to drug-related cases, testing new ways to halt the "revolving door" of drugs, crime, and jail. The most obvious sign of this experimentation has been the creation of twenty "drug treatment courts" across the state. These are specialized courtrooms that take a problem-solving approach to addiction, linking nonviolent defendants to long-term, judicially-supervised drug treatment instead of incarceration. Defendants are required to return to court frequently to report on their progress before the judge, who uses a variety of "carrots and sticks" to encourage par-

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5. Chief Judge Judith Kaye, Second Annual State of the Judiciary Address (February 8, 1999).

6. N.Y. STATE COMM'N ON DRUGS & THE COURTS, *CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO CHIEF JUDGE JUDITH S. KAYE* 10 (June 2000) [hereinafter *FISKE COMM'N REP.*].

7. *Id.* at 15.

8. Judith S. Kaye, *Making the Case for Hands-On Courts*, *NEWSWEEK*, Oct. 11, 1999, at 13.

ticipation in treatment. If defendants fail, they are subject to a range of graduated sanctions, including letters of apology, more intense treatment regimes, and, if necessary, jail. Meanwhile, success in treatment often results in the original charges against defendants being dismissed.

Though a relatively recent phenomenon, drug courts in New York and other states have demonstrated that they are capable of achieving significant results. National research suggests that drug courts have succeeded in reducing drug use and recidivism among offenders.<sup>9</sup> Further, the research indicates that the retention rates for defendants in mandated treatment are about double the rates for those who pursue treatment voluntarily.<sup>10</sup>

These two realities—the crushing increase in drug-related cases in New York courts over the past generation and the demonstrated effectiveness of drug courts in promoting sobriety among offenders—underlie Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman's recent announcement that they plan to restructure the New York State court system's response to drug-fueled crime. Among other things, their plan—the product of a six-month study by a blue ribbon panel headed by Robert Fiske, Jr.—calls for adopting drug court principles in every jurisdiction in New York, offering judicially-monitored drug treatment as an alternative to incarceration to nearly 10,000 addicted offenders annually.<sup>11</sup>

What makes this plan unique is that it is the most ambitious attempt to date to reassemble the DNA of a state court system with respect to drug-addicted offenders and litigants. In effect, Chief Judge Kaye has called for drug courts to move from their current status as isolated, boutique experiments into the mainstream of judicial operations in New York. While many states have gone out of their way to encourage the replication of drug courts, only New York has begun to ask whether it is possible for this experiment in judicial problem-solving to lead to a full-scale reform of a state

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9. Steve Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L. DRUG CT. INST. REV. 10, 43 (1998).

10. *Id.* at 66.

11. Robert Fiske is the former U.S. Attorney for the Southern District of New York and a partner with the law firm of Davis Polk & Wardwell. The 10,000 estimate is based on the number of offenders who would have been eligible for treatment under the Fiske plan in 1999. FISKE COMM'N REP., *supra* note 6, at 4; *see also* Katherine E. Finkelstein, *New York to Offer Most Addicts Treatment Instead of Jail Terms*, N.Y. TIMES, June 23, 2000 at A1 (mentioning how New York will be the first state to offer all nonviolent drug offenders the option of treatment instead of jail and discussing the program).

court system. For New York, the potential benefits of pursuing this course of action are enormous: safer communities, healthier families, substantial prison cost savings, and improved public confidence in justice. But any large-scale reform effort also comes with challenges. Institutionalizing a small-scale innovation like drug courts will require new thinking, new resources, and new ways of doing business.

This essay looks at both the opportunities and the challenges of New York State's new statewide drug treatment initiative. It outlines the possible results that this reform might achieve, including both the obvious (e.g., reduced drug use and recidivism) and the not-so-obvious (e.g., expedited permanency decisions in cases involving substance-abusing parents and reductions in the length of time that children spend in foster care). In addition, it poses some of the tough questions that must be confronted as drug courts attempt to "go to scale": To what extent do drug courts require system players—judges, prosecutors, defenders—to alter their traditional roles? How willing are they to become active problem-solvers? Can any judge be a drug court judge? Are specialized courtrooms necessary, or can the tools developed in drug courts—judicial monitoring, early assessment of offenders, links to treatment—become part of the standard judicial approach? Is it desirable—and politically feasible—to extend the drug court approach to some offenders who have committed violent offenses in the past? How about property offenders? What about the up-front investment that any large reform effort requires? Do the resources exist to assess thousands of additional defendants, place them in treatment slots, and pay for their care? Finally, how important to the success of drug courts has their small size been? Will going to scale have the ironic result of undermining drug courts' effectiveness? Will drug courts become a victim of their own success?

These are questions with profound implications not only for New York but for court reform efforts across the country. As this essay is written, New York State has embarked on the most ambitious effort to date to institutionalize drug court innovation. Given the kinds of results that drug courts have achieved, it surely will not be the last. Any effort to follow New York's lead inevitably will have to address both the possibilities and the challenges of institutionalization. But before taking a deeper look at these issues, a brief overview of the problems posed by drugs in New York, and the results that drug courts have achieved to date, is in order.

### THE PROBLEM

The rising tide of drug arrests in the last twenty years in New York has sent shock waves through the justice system. The costs of this increase can be seen in the courts, probation departments, prosecutors' offices, prisons, and jails. In 1999 alone, the court system spent \$115 million adjudicating drug cases.<sup>12</sup> The cost for the state's prison system is even steeper: close to \$650 million annually to imprison drug felons.<sup>13</sup> In addition, local corrections departments, which house pretrial detainees and offenders serving sentences of less than one year, received 21,000 drug sentences in 1999; the average cost of jail in New York City, where the majority of detainees are held, is \$68,000 per year.<sup>14</sup>

Nor are the costs confined to the criminal justice system. Drug addiction has taken a toll on the state's Family Courts as well. Of the 465,000 children who are under the court-ordered supervision of New York City's Administration for Children's Services, an estimated 70% come from families with a substance abuse problem.<sup>15</sup> Lacking the capacity to assess and treat addiction and facing enormous caseloads, most Family Court cases drag on indefinitely, leaving parents in limbo and their children in foster care. Between 1985 and 1991, the number of children in foster care in New York City nearly tripled from about 17,000 to 50,000, while the average length of stay leapt from 1.81 years in 1985 to 4.5 years by 1997.<sup>16</sup>

Beyond the costs associated with incarcerating offenders or placing children in foster care, the impact of drugs can be felt in the quality of justice delivered by New York's courts. While drug arrests are up 430% over the last twenty years, there has been only a 15% increase in the number of state judgeships.<sup>17</sup> One result of this imbalance between supply and demand has been overwhelmed courtrooms where harried judges, prosecutors, and defenders are forced to process cases as quickly as possible.

Not surprisingly, a large proportion of the drug offenders who pass through the court system without receiving meaningful treatment are rearrested quickly. Thirty-four percent of drug offenders

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12. FISKE COMM'N REP., *supra* note 6 at 11.

13. FISKE COMM'N REP., *supra* note 6, at 1, 12. A "snapshot" of the state prison system in February 2000 showed that 22,000 of the state's 71,000 inmates were imprisoned for a drug crime. FISKE COMM'N REP., *supra* note 6, at 12.

14. 1 THE N.Y. FINANCIAL PLAN, FISCAL YRS. 2000-2004 38 (2000) [hereinafter FINANCIAL PLAN].

15. FISKE COMM'N REP., *supra* note 6, at 58.

16. FINANCIAL PLAN, *supra* note 14, at 5.

17. FINANCIAL PLAN, *supra* note 14, at 10.

released from state prison in 1998 were rearrested within a year; a similar cohort of prisoners released in 1996 had a 56% recidivism rate after three years. In New York City, the two-year recidivism rate for drug felony arrestees is 50%. Finally, close to one-third of parolees had their parole revoked for committing new felonies within three years.<sup>18</sup>

### DRUG COURTS

New York's surge in caseload volume has created a window of opportunity for reformers throughout the court system. Many jurisdictions have taken advantage of this to create specialized drug treatment courts.

Drug courts are just one example of a growing trend in the world of court reform: the creation of "problem-solving courts" that seek to forge new responses to difficult problems like domestic violence, quality-of-life crime, child neglect, and mental illness. Although they address very different problems, mental health, community, domestic violence, and drug courts all share a common approach. They use the coercive authority of the courts to achieve more meaningful case outcomes.<sup>19</sup> They build new partnerships with treatment providers, community groups, and others outside of the traditional criminal justice system.<sup>20</sup> Problem-solving courts broaden the focus of legal proceedings from fact-finding and narrow legal issues to changing the future behavior of litigants (and the future well-being of communities).<sup>21</sup>

Drug courts focus exclusively on drug cases, linking substance-abusing offenders (who have voluntarily agreed to enter the program) to treatment. While there are many different drug court models (e.g., pre-plea, post-plea, and diversion), in general, if a participant successfully completes treatment, the judge will reduce the charges or dismiss the case. In drug courts, unlike most criminal courts, the judge plays an ongoing, post-plea role, requiring participants to report back regularly to court for drug testing and to appear before the bench. The judge reviews participant progress

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18. FINANCIAL PLAN, *supra* note 14, at 14.

19. Greg Berman & John Feinblatt, Problem-Solving Courts: A Brief Primer 1 (2000) (unpublished paper on file with authors) [hereinafter Berman & Feinblatt]; see also David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, NAT'L. INST. OF JUST. J., July 1999 at 12 (arguing that courts should be engaged in collaboration with local and state agencies to find opportunities to promote therapeutic outcomes for individuals (therapeutic jurisprudence)).

20. See Berman & Feinblatt, *supra* note 19, at 9.

21. Berman & Feinblatt, *supra* note 19, at 1-2.

through treatment programs, offering a set of graduated rewards and sanctions where appropriate. Eligibility for drug court participation is typically restricted to non-violent offenders with substance abuse problems. Individuals with prior violent convictions, or those believed to be involved in drug trafficking schemes, are usually ineligible.

The first drug court opened in Dade County, Miami in 1989 during the height of the crack cocaine epidemic. Since then, aided by the U.S. Department of Justice's Drug Courts Program Office (which distributed \$50 million in grants in fiscal year 2000), drug courts have grown at a phenomenal rate. Today there are more than 500 courts nationwide, including one in operation or being planned in every state.<sup>22</sup> An additional 281 are in development.<sup>23</sup> In New York, drug courts were established first in Rochester and Brooklyn in the mid-1990s, and have now grown to include twenty operating courts, with an additional twenty in the planning stages. A statewide apparatus has developed around these courts in New York, including technology to track offenders, formal research benchmarks to evaluate the courts' impacts, and an association that promulgates best practices as they emerge.

What accounts for this rapid expansion? One answer can be found in the research findings about drug courts. An emerging body of evidence credits them with keeping offenders in treatment, substantially reducing drug use and rates of re-arrest during the period of program participation, and generating large savings in avoided jail and prison costs. Though less conclusive, there is also strong evidence to suggest that drug courts reduce long-term recidivism for participants.

The most authoritative review of drug courts comes from Columbia University's National Center on Addiction and Substance Abuse, which analyzed thirty independent evaluations of twenty-four drug court programs nationwide.<sup>24</sup> Some of the most striking findings from this meta-analysis include:

*Coercion works.* Drug court participants are far more likely to successfully complete mandated substance abuse treatment than comparable participants who seek help on a voluntary basis. One-

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22. OFFICE OF JUSTICE PROGRAMS, DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIVERSITY, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (2000) (stating that forty-six states have implemented and four are planning drug courts), at <http://gurukul.ucc.american.edu/justice>.

23. *Id.*

24. Belenko, *supra* note 9, at 10.



year treatment retention rates are 60% for drug courts, compared to 10-30% among voluntary, residential treatment programs.<sup>25</sup>

*Drug use and recidivism are substantially reduced during the period of drug court participation.* Drug court program lengths vary from court to court, although most require a minimum of one year's participation. For drug court participants, substance abuse is greatly reduced during the period of program participation. A survey of thirteen drug courts found that, on average, 10% of urine tests were positive for drugs, compared to 31% for defendants in the same jurisdiction under probation supervision.<sup>26</sup> Rates of re-arrest for drug court enrollees are also quite low. In two evaluations where comparison groups were employed, in Jackson County, Missouri, and Ventura County, California, the re-arrest rates for program participants were 4% and 12% respectively, as opposed to 13% and 32% in the control groups, over a six and eight-month period.<sup>27</sup>

*Post-program benefits, while not fully conclusive, are also positive.* Drug court participants also have lower post-program re-arrest rates. Of nine drug court evaluations that used a comparison group, and included all drug court participants and not just graduates, eight found positive results.<sup>28</sup> One study conducted of the Maricopa County, Arizona drug court showed a three-year recidivism rate of 33% for program graduates and 43.7% for a comparison group.<sup>29</sup> The average number of arrests for participants in the Multnomah County, Oregon drug court after two years was 0.59, compared to 1.53 for a control group.<sup>30</sup> Less is known about post-program impacts on employment, education, and drug use. Most drug court evaluations have tracked program participants for only a short period after leaving the program. Other drug courts have not been in existence long enough to generate post-program results.<sup>31</sup>

*Drug courts save money.* Incarceration costs far more than either residential or outpatient treatment, and drug courts consistently save money even after factoring in administrative costs. The savings are particularly dramatic when other benefits, such as re-

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25. Belenko, *supra* note 9, at 29-30.

26. Belenko, *supra* note 9, at 36.

27. Belenko, *supra* note 9, at 37.

28. Belenko, *supra* note 9, at 39-41 (indicating lower re-arrest rates for drug court participants compared to others in nine studies).

29. Belenko, *supra* note 9, at 39.

30. Belenko, *supra* note 9, at 41.

31. Belenko, *supra* note 9, at 27.

duced recidivism, are factored in. A study of the Multnomah County, Oregon drug court found that the court had achieved \$2.5 million in criminal justice cost savings based on 440 participants over a two-year period.<sup>32</sup> Additional savings outside the criminal justice system—reductions in victimization, theft, public assistance, and medical claims—were estimated to be an additional \$10 million.<sup>33</sup> While no formal evaluation of drug court cost savings in New York has been performed to date, the potential for savings is enormous. In New York State, the average cost of incarceration is \$29,000 annually (and jail in New York City costs \$68,000 per inmate annually), as compared to \$5,100 for outpatient and \$18,400 for inpatient, or residential, treatment.<sup>34</sup> If implemented fully, the state's Office of Court Administration estimates that Judge Kaye's plan could result in annual government savings of \$500 million.<sup>35</sup> This includes \$130 million in savings in prison and jail costs and close to \$400 million in saved public expenditures such as reduced recidivism, public assistance, foster care, and health care costs.<sup>36</sup>

#### OPPORTUNITIES AND CHALLENGES

With an eye toward these kinds of findings, Chief Judge Kaye and Chief Administrative Judge Lippman have recommended institutionalizing the drug court approach throughout the New York State court system. This will bring assessment, treatment, and monitoring to thousands of defendants for an annual cost to the state court system of between \$20 and \$22 million.<sup>37</sup> It is fair to ask what kinds of dividends this substantial investment will pay. Drug courts have achieved remarkable results with non-violent offenders, helping them achieve sobriety and avoid further involvement in the criminal justice system. Bringing these kinds of results to as many addicted defendants as possible is a goal well worth pursuing. The potential ramifications of moving thousands of individuals from addiction and criminal behavior to sobriety and stable community life are enormous, both for communities and for families. For communities, it could mean safer streets and a measure of re-

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32. Belenko, *supra* note 9, at 34.

33. Belenko, *supra* note 9, at 34.

34. FISKE COMM'N REP., *supra* note 6, at 26.

35. The \$500 million annual figure is determined by subtracting the cost of program implementation from total projected benefits. Press Release, N.Y. State Office of Court Administration, Cost Versus Project Savings of New Court-Mandated Treatment Program (June 2000) (on file with authors).

36. *Id.*

37. FISKE COMM'N REP., *supra* note 6, at 121.

lief from drug-fueled crime and disorder. For many families, it could mean reunion with children lost to foster care. It could mean healthier families, too, with fewer "crack babies." At a recent graduation ceremony at the Rochester drug court, one program participant who had successfully completed treatment underlined the tangible, real-life benefits of the drug court model: "I had spent every day stealing for the money to buy drugs, and every free minute getting high. I got caught numerous times, but still I couldn't stop. I had no support system, and no incentive to stop. Drug court finally provided me with both."<sup>38</sup>

The potential benefits to the criminal justice system are also substantial. The most obvious are the cost savings that might be achieved by reducing both recidivism and reliance on prison. As mentioned above, the state's Office of Court Administration estimates that Judge Kaye's plan could result in \$500 million in government savings.<sup>39</sup> Reduced recidivism could also mean reduced caseloads, alleviating some of the pressure that judges, prosecutors, and defenders feel to move through dockets as quickly as possible. And limiting caseloads could lead to more meaningful case outcomes and an end to "revolving door justice." By achieving results like these, drug courts have the potential to affect not only how courts operate but how they are perceived. If drug courts do, in fact, become a permanent part of the judicial landscape in New York—and if they do continue to achieve demonstrable results—they might go a long way toward restoring the legitimacy of the court system, and helping to rebuild public confidence in judges, attorneys, and police officers.

Large scale re-engineering of the courts is not without challenges, of course. What follows are a few of the issues that reformers must face as they attempt to institutionalize drug courts in New York.

*Leadership:* To date, New York's drug courts have been created in jurisdictions where entrepreneurial judges or prosecutors have been willing to exercise political and bureaucratic leadership. Their leadership has been critical, helping win over reluctant government partners, raise funds, and build links with off-site treatment providers. How can court administrators reach beyond the cadre of initial drug court innovators to cultivate a new generation of local leaders? For New York's comprehensive drug treatment

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38. Susan K. Knipps & Greg Berman, *New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, 72 N.Y. St. B.A. J. 8, 10 (2000).

39. Finkelstein, *supra* note 11.

plan to be successful, it must reach out to new audiences in the sixty-two counties across the state, including judges, prosecutors, and defenders. Further, it must convince skeptics, agnostics, and those who are unfamiliar with drug courts to embrace reform.

In building an outreach strategy, court administrators can draw upon five years of experience in drug court replication. In that time, New York has gone from a single drug court to more than forty either in operation or in planning. The court system used several techniques to introduce new jurisdictions to the drug court approach. By making sure that results are well-documented and well-disseminated and by using existing courts as models, court administrators have been able to show system players across the state the benefits of the drug court approach. By not requiring local jurisdictions to conform to a one-size-fits-all model, they have been sensitive to local legal cultures. And by creating a statewide association of drug court professionals, they have helped legitimize drug courts, providing a vehicle for information-sharing among professionals and opportunities for the uninitiated to learn about drug courts.

*Changing Roles:* In drug courts, the traditional roles of “detached judge” and “zealous advocate” are altered in some important ways.<sup>40</sup> The judge’s role is greatly expanded: from that of a neutral fact-finder to that of a problem-solver who uses the coercive power at his or her disposal to help address an offender’s drug addiction. As judges step out of their conventional role, as they become active problem solvers, it is crucial that they be provided with a clear set of guidelines. One way to do this is to articulate and broadly disseminate the outcomes that drug courts seek to achieve. Chief Judge Kaye’s drug treatment initiative sends a loud message that the goal in adjudicating drug-related cases is not to move through court calendars as quickly as possible, but to achieve tangible results (e.g., increased sobriety, reductions in recidivism, etc.).

The role of advocates in drug courts shifts as well: from one that focuses on “winning” to one that creates case outcomes that serve the best interest of both addicted offenders and the community. For prosecutors, that might mean embracing new measures of success. As Portland, Oregon District Attorney Mike Schrunk has said, “Dismissing 1500 drug cases during the course of the year in a drug court is a better end product than 1500 convictions in a regu-

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40. See generally Greg Berman, *What is a Traditional Judge Anyway?: Problem-Solving in the State Courts*, 84 JUDICATURE 1 (2000).

lar court.”<sup>41</sup> For defenders, the issue is similar, though a mirror image—attempting to achieve the least restrictive result may not be of long-term benefit for their clients if their drug addiction remains untreated. The culture of cooperation in a drug court may also be of concern for defense lawyers, because it departs from their traditional, adversarial role.<sup>42</sup> Drug court replication efforts must honor these concerns and take pains to include both defenders and prosecutors in the planning stages of any drug court. This need for joint strategic planning represents a challenge for any large, public bureaucracy unaccustomed to reaching beyond its doors to involve outside partners.<sup>43</sup>

*Specialization:* Eighty percent of those arrested in New York City test positive for drugs at the time of their arrest.<sup>44</sup> An estimated two-thirds of state prisoners are drug users.<sup>45</sup> Drugs are clearly a system-wide issue for the courts. This raises the question: are specialized courtrooms the answer for dealing with the problem of drug addiction, or should every courtroom be equipped with the technologies developed in drug courts? In making this decision, court administrators are faced with a basic trade-off: balancing the risk of watering down the effectiveness of drug courts by adopting them in every courtroom with the risk of limiting their reach by keeping them separate. This issue will become more important as drug courts move from experimentation to full implementation, and from urban centers to rural jurisdictions. If the answer is to give all judges in the state the tools they need to link defendants to treatment and monitor their progress, there will be a need for intensive training and new measures of success to insure that the quality of the drug court approach is maintained.

A related question is whether drug courts require specialized judges. Some critics have wondered whether the majority of judges are capable of adopting a new approach to working with defendants and coordinating the work of partner agencies. Others argue that the qualities of a good drug court judge are not all that different from the qualities of a good judge. As Judge Truman Morrison

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41. *Id.* at 7.

42. See Bennett H. Brummer, *Independent, Professional Judgment: The Essence of Freedom*, 10 ST. THOMAS L. REV. 607, 611 (1998).

43. What Does It Mean To Be A Good Lawyer?: Prosecutors and Defenders in Problem-Solving Courts (John Feinblatt & Derek Denckla, eds., 2000) (unpublished paper, U.S. Dep't of Justice, March 2000) (on file with authors).

44. FISKE COMM'N REP., *supra* note 6, at 15.

45. This is according to the New York State Department of Correctional Services. FISKE COMM'N REP., *supra* note 6, at 15.

III of the District of Columbia Superior Court has said, "It strikes me that [a drug court judge] ought to be . . . someone who is open to other people's ideas, who listens, who is informed, who is impartial . . . . If we put aside the real bad people who probably shouldn't be on the bench anyway, most judges could do this job, many more than do."<sup>46</sup>

*Limits:* In seeking to extend the drug court model to new populations, the state court system will have to confront a key question: what are the limits of the drug court approach? Are there some populations of addicted offenders for whom judicially-monitored drug treatment is inappropriate? Three distinct populations of drug-addicted offenders have, for the most part, been excluded from drug courts. The first is substance abusers who have been arrested for violent offenses or who have prior violent felony convictions. There are several reasons for their exclusion, including concerns about the appropriateness of offering violent offenders an alternative to incarceration and the strict eligibility requirement imposed by federal funders explicitly limiting drug courts to non-violent drug offenders. A second group that traditionally has been excluded is low-level offenders whose crimes do not provide the criminal justice system with sufficient leverage to compel enrollment in a long-term treatment program. Finally, a third group is offenders who are not arrested for drug crimes but whose offense is driven by addiction. It is difficult to estimate how large these "missing groups" of potential drug court participants are. However, it seems clear that drug courts, as they are currently operating, are not reaching their maximum potential population.

Any attempt to add these various populations to the mix will face serious political and logistical obstacles. Including offenders with violent criminal histories is largely a question of local tolerance. Some jurisdictions will be uncomfortable with extending drug treatment to past violent offenders (e.g., someone with a ten-year-old robbery conviction or a five-year-old house burglary);<sup>47</sup> others may see the value in treating their addiction. In defining drug court eligibility, court administrators will have to balance the need to respect local preferences in each of New York's sixty-two counties with a desire to create uniformity throughout the state.

The question of what to do with misdemeanants is equally complicated. Chief Judge Kaye's plan suggests that there is a group of

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46. Berman, *supra* note 40, at 4.

47. The Kaye plan does not contemplate offering treatment to offenders whose current crime is a violent offense. FISKE COMM'N REP., *supra* note 6, at 4.

chronic misdemeanor offenders in New York City who, because of the length of their rap sheets, are potentially facing significant jail or prison terms. This is a group that might reasonably be placed in long-term treatment through a drug court. But what about the misdemeanants whose offenses do not rise to this level? This boils down to a question of what the legal marketplace will bear. It is unlikely that any defense attorney is going to allow a client arrested on a first-time shoplifting charge to accept one year of mandatory drug treatment, no matter how severe his or her addiction may be. One answer to this dilemma is suggested by the Brooklyn Treatment Court, which links first-time misdemeanants and others to a treatment readiness program that lasts for two days in an effort to encourage these offenders voluntarily to seek out long-term treatment.

Finally, reaching the third group—substance-abusing offenders who do not commit drug offenses but whose crimes are motivated by addiction—points to the need for comprehensive screening and early assessment for all offenders brought into the state courts. Building an infrastructure for achieving this will have to be part of any system-wide reform effort.

*Capacity:* Any proposal that calls for offering treatment to a large group of substance abusers must face the question of capacity: will there be sufficient treatment resources to meet the demand? Will there be enough slots for everyone? Who will perform assessments of offenders to measure their addiction? In a changing welfare and managed care landscape, who will pay for treatment? These are, at base, questions of capacity. As suggested earlier in this essay, strong evidence exists to suggest that up-front expenditure on drug treatment saves considerable money in criminal justice and avoided costs of crime down the road. For drug court reformers, then, the challenge becomes convincing other branches of government—and the public—that such an investment is a sound choice. Drug court reformers must also be creative about tapping into unconventional funding streams. For example, foster care and welfare agencies share common cause with courts in helping individuals reach sobriety. Drug courts can make strong arguments for creating new funding arrangements to reflect these shared interests.

*Size:* One argument against institutionalizing drug courts is that they will lose their unique character as they increase in number. How can drug courts retain their intimacy? How crucial is it that judges be conversant with each offender's case history and progress

through treatment? Is it possible to create truly individualized treatment plans for each and every eligible offender in the state? One tool that might help solve this problem is computer technology, which has the potential to help judges bring individualized attention to large caseloads. Many drug courts are already using computer applications to build and maintain a tremendous amount of information about drug court defendants, information that is made available to judges, advocates, and other courtroom players as each case proceeds.<sup>48</sup>

*Taking on the Critics:* Any new policy innovation is bound to attract critics, and drug courts are no exception. New York's drug treatment initiative will face criticism from system players attached to old ways of doing business; from skeptics who fear that courts may be overstepping their boundaries in attempting to address drug addiction;<sup>49</sup> from civil libertarians concerned about any threat to the due process rights of defendants;<sup>50</sup> and finally, from observers who feel that offering treatment as an alternative to incarceration is "soft on crime." While serious, these are all concerns that might reasonably be addressed through strategic planning that brings all of the relevant players (judges, prosecutors, defenders, treatment providers, community groups, and others) to the table to plot a course for local jurisdictions and through rigorous research that tracks—and disseminates—the results of this new judicial approach to drugs.<sup>51</sup>

It is also important to place the new initiative in proper context. There is no more convincing argument for change than the contrast between Judge Kaye's proposal and the reality of the current system, one that continues to recycle drug-addicted offenders with little apparent value for the courts, the public, or the offender. As Judge Kaye has written, "Some may argue that such hands-on involvement [of the courts] clashes with our branch's traditional dignity and reserve. But what's the alternative? The flood of cases

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48. CTR. FOR COURT INNOVATION & STATE JUSTICE INST., EXPERIMENTS IN TECHNOLOGY: A HANDBOOK FOR COURT ADMINISTRATORS (1997).

49. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1533 (2000); see also Eric Cohen, *The Drug Court Revolution*, 5 THE WKLY. STANDARD, Dec. 27, 1999 (questioning whether drug courts really work, and examining their impact on the judicial system), available at [http://www.weeklystandard.com/maga...ag\\_5\\_15\\_99/cohen\\_feat\\_5\\_15\\_99.html](http://www.weeklystandard.com/maga...ag_5_15_99/cohen_feat_5_15_99.html).

50. See Feinblatt & Denckla, *supra* note 43.

51. *Id.*



shows no sign of letting up. We can either bail faster or look for new ways to stem the tide."<sup>52</sup>

### CONCLUSION

Institutionalization poses a unique set of challenges to public policy reformers in any field, whether in courts, health, education, or welfare.<sup>53</sup> Creating successful demonstration projects is one thing. Implementing a new idea across a statewide system is quite another. Few public officials are willing to take on this challenge, particularly in states as large, as complex, and as diverse as New York.

With their proposal to bring the ideas pioneered in drug courts to the rest of the New York State court system, Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman are attempting just this feat. The potential implications of their reform effort are far-reaching. By placing greater emphasis on achieving meaningful case outcomes, by encouraging judges and attorneys to play new roles, and by working to solve problems rather than simply process cases, the New York drug treatment initiative seeks to change how courts work and what the public should expect of them.

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52. Kaye, *supra* note 8.

53. LISBETH B. SCHORR, COMMON PURPOSE: STRENGTHENING FAMILIES AND NEIGHBORHOODS TO REBUILD AMERICA (1997) (contending that Americans can create strong and effective public institutions to solve social problems and giving examples of welfare, education, and child protection reforms).