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THERAPEUTIC JURISPRUDENCE AND THE
DRUG TREATMENT COURT MOVEMENT:
REVOLUTIONIZING THE CRIMINAL JUSTICE
SYSTEM'S RESPONSE TO DRUG ABUSE
AND CRIME IN AMERICA

*The Honorable Peggy Fulton Hora**
*The Honorable William G. Schma***
*John T.A. Rosenthal****

The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.

—Thomas Jefferson¹

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** Circuit Judge, Kalamazoo, Michigan. Judge Schma was the first judge in the United States to preside over a drug treatment court for women. He has participated in each training conference of the National Association of Drug Court Professionals and recently presented a paper on Therapeutic Jurisprudence and Drug Treatment Courts for the Puerto Rican Foundation for Mental Health.

*** A.B. University of California, Berkeley 1988; J.D. Candidate Notre Dame Law School 1999. The author dedicates this article in loving memory of his mother, Susan Rae Rosenthal (1942–1994), who never let those in need go without the help they required, and his grandfather, Sam Rosenthal (1916–1998), who always saw the best in people. The author further wishes to express his appreciation to his aunt, Julia Levinson, for her constant encouragement; his brother, Chris Rosenthal, for his patience; his father, Dr. Joel W. Rosenthal, for his wisdom and support; and to Judge Hora and Judge Schma for allowing him to be a part of this important work.

1 OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE NATIONAL DRUG CONTROL STRATEGY*: 1997, 3 (1997) [hereinafter *THE NATIONAL DRUG CONTROL STRATEGY*]. See *Thomas Jefferson on Politics & Government* (visited Nov. 6, 1998) <<http://etext.virginia.edu/jefferson/quotations/>>.

I. INTRODUCTION

This Article is a grassroots contribution to the legal developments in therapeutic jurisprudence and Drug Treatment Courts (DTCs) from two judge-practitioners. The purpose for writing this Article is to dip into the "therapeutic jurisprudence well" and use this emerging field as an analytic tool to examine DTCs. In so doing, we propose to establish therapeutic jurisprudence as the DTC movement's jurisprudential foundation. We hope this concept promotes additional interest in DTCs while introducing a new and unique dimension to the present therapeutic jurisprudence literature and debate. The comments and views presented in this Article are addressed to judges, legislators, attorneys, and community leaders who may or may not be familiar with either therapeutic jurisprudence or DTCs. We suggest that the concepts and ideas contained in this Article offer new tools and methods for dealing with the problems of crime and drug use—problems that have been ineffectively addressed by current laws and jurisprudential methodologies.

Presently, therapeutic jurisprudence scholars, with the exception of those who attended the First International Conference on Therapeutic Jurisprudence in June 1998, appear to be generally unaware of the existence, breadth, and importance of the DTC movement in this country. To date, therapeutic jurisprudence literature and debate have been confined almost exclusively to academic circles.² In the meantime, the DTC movement has run its course almost entirely de-

2 This is changing even as this article is being written. "[T]herapeutic Jurisprudence has struck a responsive chord with certain members of the judiciary." David B. Wexler, *Some Thoughts and Observations on the Teaching of Therapeutic Jurisprudence*, 35 REVISTA DE DERECHO PUERTORRIQUENO 273, 277 (1996). The theme for the annual meeting of the National Association of Women Judges' conference in September 1997 was "Therapeutic Justice." The Annual Institute on Law, Psychiatry & Psychology conference held in November 1998 included a panel discussion on the efficacy of DTCs chaired by judges and various other DTC team members.

The idea behind the growing movement of "therapeutic jurisprudence" is that since the experience of coming before our courts is having therapeutic consequences for defendants, [victims, and other participants,] our courts should capitalize on the moment when a person is brought before us and use it as a starting point for improving the defendant's lifestyle. Mental health professionals are teaching judges of the potential for improving the psychological and/or physical well-being of defendants. By doing so, our citizens are protected from further criminal acts of those persons.

Hon. Judge Sheila M. Murphy, *Therapeutic Jurisprudence: Its Time Has Come*, TRIAL JUDGES NEWS, Winter 1997/1998, at 3. See also Judge William Schma, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, JUDGES J., Summer 1997, at 81 (book review).

void of contributions from academia.³ We feel practitioners of the law have a vital and fundamental role to play in the shaping and application of therapeutic jurisprudence to legal questions. Equally as important, though, is the role of academia in analyzing, discussing, and debating the various aspects of the DTC movement. Remarkably, these two significant developments in the law have been growing and evolving on parallel courses, yet independently of one another.

Part I of this Article gives the reader a brief introduction to our topic and thesis. Part II provides an explanation of therapeutic jurisprudence and discusses the history and literature on this subject. Part III describes the DTC movement in depth. This portion of the Article examines the societal, law enforcement, and legal problems that led to the DTC movement, looks at the basic principles and components of a DTC, and describes the inner workings of five operational DTCS. Throughout this section, we will point out how DTCS presently and unknowingly apply therapeutic jurisprudence principles to the problems of drug and alcohol addicted defendants to encourage treatment seeking behavior and reduce crime. After discussing five different DTCS, we will review some of the significant achievements the burgeoning DTC movement has amassed in a relatively short period of time. Finally, the last portion of this section discusses some of the problems and concerns confronting DTCS, followed by recommendations for DTCS that utilize a therapeutic jurisprudence line of reasoning.

Throughout this Article, we mean to identify the potential for synergism between these legal concepts and to suggest that each can deeply enrich and support the other. We hope the article and its analysis cultivate a deeper understanding of the DTC movement and encourage a wider application of therapeutic jurisprudence analysis to thinking about legal systems and practices. Our goal is to encourage

3 In a recent article by Professor Franklin Zimring, the author called for the examination of what he termed "the jurisprudence of compulsory drug treatment in the criminal justice system." Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809, 810 (1993). He concluded "that compulsion in drug treatment should not be categorically excluded from the sanctioning system . . ." *Id.* at 810. Although academia has not paid much attention to the DTC concept, the discussion of drug courts in academic circles has come up in the past. See Richard L. Kassis, Note, *Drug Rehabilitation: Is A Drug Court The Answer?*, 3 PAC. L.J. 595 (1972) (providing a discussion of California's early legislative attempts to establish a drug court system). For up-to-date information on California Drug Courts see *California Drug Court Project* (visited Sept. 12, 1998) <<http://www.courtinfo.ca.gov/aoc/drugcourts/about.htm>>. See also Judicial Branch of California, Court News, *Judges Take to Heart Their Challenging Drug Court Role* (visited Sept. 12, 1998) <<http://www.courtinfo.ca.gov/courtnews/06960796/htm>>.

scholars, practitioners, and legislators to reevaluate the ways in which the present criminal justice system handles substance abuse and drug-related crime in light of these new ideas.

II. THERAPEUTIC⁴ JURISPRUDENCE⁵

A. *A History and Literature Review of Therapeutic Jurisprudence*

As a legal theory, therapeutic jurisprudence is still relatively new. Professor David Wexler first used the term in 1987 in a paper delivered to the National Institute of Mental Health.⁶ After this introduction, the concept of therapeutic jurisprudence began to appear frequently in law literature in the early 1990s. Legal scholars first focused its use in the area of mental health law.⁷ Professor Wexler and Professor Bruce Winick, cofounder of the therapeutic jurisprudence concept, in a seminal article on the subject, noted that the field of mental health law had developed based on a constitutional foundation that emphasized protection of the personal rights of mental health patients.⁸ The authors posited, however, that this foundation was deteriorating, and that the vigor which had originally infused mental health law appeared diminished. They argued that a new perspective was required to renew academic interest in the field. They identified this new perspective as therapeutic jurisprudence and described it as the study of the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences for individuals involved in the legal process.⁹ Professor Christopher Slobogin refined the definition of

4 "[O]f or relating to the treatment of disease or disorders by remedial agents or methods: . . . providing or assisting in a cure: CURATIVE, MEDICINAL" WEBSTER'S COLLEGIATE DICTIONARY 1223 (10th ed. 1994).

5 "The philosophy of law, or the science which treats of the principles of positive law and legal relations. . . . Jurisprudence is more a formal than a material science." BLACK'S LAW DICTIONARY 854-55 (6th ed. 1990).

6 See David B. Wexler, *Putting Mental Health into Mental Health: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27-28 (1992).

7 See David B. Wexler, *Reflections on the Scope of Therapeutic Jurisprudence*, 1 PSYCHOL., PUB. POL'Y & L. 220, 224 (1996), reprinted in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 811, 815 (David B. Wexler & Bruce J. Winick eds., 1996) [hereinafter LAW IN A THERAPEUTIC KEY].

8 See David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991). Since this article, Professors Wexler and Winick have published or edited several volumes on Therapeutic Jurisprudence, the most comprehensive being *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*. See *supra* note 7.

9 See Wexler & Winick, *supra* note 8, at 981.

therapeutic jurisprudence as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."¹⁰

From this narrow start in mental health law, the legal scholarship surrounding therapeutic jurisprudence exploded in a short period of time. More than seventy authors have "now contributed to the growing body of therapeutic jurisprudence literature."¹¹ "Therapeutic Jurisprudence thus has emerged as an interdisciplinary scholarly approach for examining . . . a wide spectrum of legal subjects."¹² Scholars and educators have applied the concepts of therapeutic jurisprudence to many areas other than mental health law, including corrections,¹³ domestic violence,¹⁴ health care,¹⁵ tort reform,¹⁶ contract law,¹⁷ and the criminal court system.¹⁸ Most recently, therapeutic jurisprudence scholars have branched out into the legal areas of homelessness,¹⁹ preventative law,²⁰ comparative law,²¹ and family law.²²

10 Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y & L. 193, 196 (1995), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 7, at 767. This definition has come to be accepted by most scholars writing on the topic of Therapeutic Jurisprudence. See Wexler, *supra* note 7, at 223-24, reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 7, at 815 ("The definition by Slobogin best captures . . . the appropriate scope [of therapeutic jurisprudence] . . .") (citations omitted)).

11 LAW IN A THERAPEUTIC KEY, *supra* note 7, at xviii.

12 Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL., PUB. POL'Y & L. 184, 201 (1997), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 7, at 663.

13 See Fred Cohen & Joel A. Dvoskin, *Therapeutic Jurisprudence and Corrections: A Glimpse*, 10 N.Y.L. SCH. J. HUM. RTS. 777 (1993).

14 See Leonore M. J. Simon, *A Therapeutic Jurisprudence Approach to the Legal Processing of Domestic Violence Cases*, 1 PSYCHOL., PUB. POL'Y & L. 43 (1995), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 7, at 243.

15 See Bruce J. Winick, *Rethinking the Health Care Delivery Crises: The Need for a Therapeutic Jurisprudence*, 7 J.L. & HEALTH 49 (1993), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 7, at 379.

16 See Grant H. Morris, *Requiring Sound Judgments of Unsound Minds: Tort Liability and the Limits of Therapeutic Jurisprudence*, 47 SMU L. REV. 1837 (1994); Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39 (1994); Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409 (1992).

17 See Jeffery L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445 (1994).

18 See Keri A. Gould, *Turning Rat and Doing Time for Uncharged, Dismissed, or Acquitted Crimes: Do the Federal Sentencing Guidelines Promote Respect for the Law?*, 10 N.Y.L. SCH. J. HUM. RTS. 835 (1993); David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279 (1993).

19 See Melonie Abbott, *Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269 (1997).

Therapeutic jurisprudence has even taken on an international flavor, as scholars from around the world discover and investigate the seemingly limitless potential of this new theme in the law.²³

B. Therapeutic Jurisprudence: What It Is, and What It Is Not

"Therapeutic jurisprudence is the study of the role of law as a therapeutic agent."²⁴ It suggests that society should utilize the theories, philosophies, and findings of various disciplines and fields of study to "help shape the development of the law."²⁵ Fundamentally, therapeutic jurisprudence focuses on the "sociopsychological ways"²⁶ in which laws and legal processes affect individuals involved in our legal system. By examining the effects of the law in this fashion, therapeutic jurisprudence can illuminate how laws and legal processes may in fact support or undermine the public policy reasons for instituting those laws and legal processes.

20 See Dennis Stolle et al., *Integrating Preventative Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventative Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997).

21 See David B. Wexler, *Therapeutic Jurisprudence in a Comparative Law Context*, 15 BEHAV. SCI. & L. 263 (1997).

22 See Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997).

23 See David Carson & David B. Wexler, *New Approaches to Mental Health Law: Will the U.K. Follow the U.S. Lead, Again?*, 1 J. SOC. WELFARE & FAM. HEALTH L. 79 (1994). The University of Puerto Rico Law School has begun the International Network on Therapeutic Jurisprudence as well as creating the Therapeutic Jurisprudence Forum as a regular feature in the University of Puerto Rico Law Review. See also Wexler, *supra* note 2. The First International Conference on Therapeutic Jurisprudence reflects the prominence of this new legal theory in the international legal world. The Conference, sponsored by the International Network on Therapeutic Jurisprudence at the University of Puerto Rico and the Institute on Law, Psychiatry and Psychology at the University of Miami Law School, took place July 8-11, 1998, at the University of Southampton, Winchester, England. The key themes of the conference were as follows: rights of victims and witnesses in legal proceedings, legal reform, community-based mental health law, confidentiality, and preventative lawyering. A special conference was held that addressed only the issue of diverting mentally disordered persons out of the criminal justice system and into the mental health services system. See UNIVERSITY OF SOUTHAMPTON, THERAPEUTIC JURISPRUDENCE: THE FIRST INTERNATIONAL CONFERENCE ON THERAPEUTIC JURISPRUDENCE (1998).

24 Winick, *supra* note 12, at 185, *reprinted in* LAW IN A THERAPEUTIC KEY, *supra* note 7, at 646.

25 *Id.*

26 Wexler, *supra* note 2, at 814.

Proponents of therapeutic jurisprudence do not "suggest that therapeutic considerations should trump other considerations."²⁷ In fact, in many situations, other societal values should override therapeutic ones.²⁸ For instance, we as a society place a high value on freedom of the press. So, although a public figure's emotional and psychological state may be adversely affected by seeing bad things about herself in print, we, as a society, have determined that the value of a free press outweighs its potential detrimental psychological effect on any given individual. Therapeutic jurisprudence only suggests that the psychological and mental health aspects of a law or legal process should be examined to inform us of its potential for success in achieving its proposed goal.

Instead of being viewed as the dominant perspective, therapeutic jurisprudence is offered as a tool for gaining a new and distinct perspective on questions regarding the law and its applications. Therapeutic jurisprudence analysis will generally reveal important and previously unrecognized considerations on legal issues. Inevitably, these issues should be placed into a comprehensive legal equation to balance them with or against the other meaningful and pertinent legal and social values that drive the enactment and enforcement of laws. As previously stated, "[T]herapeutic jurisprudence does not resolve conflicts among competing values. Rather, it seeks information needed to promote certain goals and to inform the normative dispute regarding the legitimacy or priority of competing values."²⁹

Whether one accepts or rejects the answer, the therapeutic jurisprudence question must be asked because lawyers, judges, and the law itself all function therapeutically or antitherapeutically irrespective of whether the laws and legal actors take these consequences into account.³⁰ By examining the law through "the therapeutic jurisprudence lens,"³¹ we can identify the potential effects of proposed legal arrangements on therapeutic outcomes. The results of that examination should then inform and shape policies and procedures in the law and the legal process. Therapeutic jurisprudence allows, in fact requires, legislators, judges, and practitioners to make legal policy determinations based on empirical studies and not on uninformed hunches.

27 LAW IN A THERAPEUTIC KEY, *supra* note 7, at xvii.

28 See Wexler & Winick, *supra* note 8, at 982.

29 David B. Wexler & Robert F. Schopp, *Therapeutic Jurisprudence: A New Approach to Mental Health Law*, in HANDBOOK OF PSYCHOLOGY & LAW 361, 373 (Dorothy S. Kagehiro & William S. Laufer eds., 1992).

30 See LAW IN A THERAPEUTIC KEY, *supra* note 7, at xvii.

31 *Id.*

Therapeutic jurisprudence relies on the social sciences to guide its analysis of the law and, therefore, represents a departure from traditional legal jurisprudence. In essence, it "can be seen as one of a number of heirs to the legal realism movement . . ."³² Traditional jurisprudence has been described as "formalistic," "logical," and "mechanical,"³³ and placed great emphasis on the process of finding the "right" law or legal principal and applying it to the current problem. "This meant the *consequences* of a legal decision were irrelevant; all that was important was that the law was being applied correctly."³⁴

This method is not entirely satisfactory or practical, as explained in the famous passage written by Oliver Wendell Holmes (a passage frequently cited by therapeutic jurisprudence scholars):

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.³⁵

Roscoe Pound refined this concept and developed the notion of "sociological jurisprudence,"³⁶ arguing that the law must look to the relationship between itself and the social effects it creates. This perspective represents a preview of the arguments of today's therapeutic jurisprudence scholars. "If we think of 'therapeutic effects' as one form of 'social effects,' the relevance of Pound's views for therapeutic jurisprudence becomes clear."³⁷

More recently, Edward Rubin has explored an emerging field of legal scholarship known as "New Public Law."³⁸ He distinguishes between the "Old Concept of Law," in which the law was viewed as the special arena of the judiciary which declared and applied it, and the "New Concept of Law," in which the primary lawmakers are not judges

32 David Finkelman & Thomas Grisso, *Therapeutic Jurisprudence: From Idea to Application*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 244 (1994).

33 Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

34 Finkelman & Grisso, *supra* note 32, at 244.

35 OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., 1963).

36 ROSCOE POUND, *OUTLINE OF LECTURES ON JURISPRUDENCE* (5th ed. 1943). See Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489, 512-13 (1912) (asking for the "study of actual social effects of legal institutions and legal doctrines").

37 Finkelman & Grisso, *supra* note 32, at 245.

38 See Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792 (1991).

but administrators and legislators.³⁹ For this group, as distinguished from judges, the law represents an instrumentality to achieve specific social goals.⁴⁰ Therapeutic jurisprudence is compatible with this point of view because it is outcome-oriented, looking to the effects produced by the legal system and inquiring into their causes. "Like law and economics, therapeutic jurisprudence is essentially a consequentialist approach to law."⁴¹

This focus on consequences, on empirically verifiable results based on various social sciences, sets therapeutic jurisprudence apart from other jurisprudential philosophies.⁴² Not only does therapeutic jurisprudence suggest that existing laws be examined for their actual effects as compared to their desired effects, it also proposes that we look to other social sciences before enacting a law to see the answers these other fields have reached for attaining the results it purports to achieve.

Of course, "the . . . [greatest] challenge is to try to measure the therapeutic effect of a given rule [or law]."⁴³ In the legal realm, social science methods may be particularly difficult to apply since certain legal values and principles, for example, equal protection or due process, may be at odds with various scientific requirements.⁴⁴ Yet, the

39 See David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 18 (1993).

40 See *id.*

41 Winick, *supra* note 12, at 190, *reprinted in* LAW IN A THERAPEUTIC KEY, *supra* note 7, at 651.

42 See Slobogin, *supra* note 10, at 204, *reprinted in* LAW IN A THERAPEUTIC KEY, *supra* note 7, at 775-76 ("Therapeutic jurisprudence relies on social science theory and research . . . to answer this question. Indeed, [therapeutic jurisprudence] *must* rely on such theory and research because . . . that reliance is a prime aspect of its uniqueness as a jurisprudence."); see also Winick, *supra* note 15, at 657 ("Therapeutic jurisprudence depends upon the ability to measure the therapeutic effect of a legal rule or practice.").

43 Slobogin, *supra* note 10, at 204, *reprinted in* LAW IN A THERAPEUTIC KEY, *supra* note 7, at 775.

44 See *id.* at 776. Slobogin noted:

Unfortunately, the inherent conservatism of the law (in many ways a good thing) is a scientist's nightmare, because it significantly inhibits randomization. Furthermore, because the types of manipulation necessary to test legal assumptions often involve doing something (or refraining from doing something) to *people*, they may run up against ethical or constitutional (i.e. equal protection) prohibitions.

Id. Winick made a similar observation:

The best type of research is the "true experiment," with random assignment of identical populations to an experimental and a control group in order to isolate the variable under investigation. Experimentation in the legal sys-

existence of incompatibilities between pure scientific methods and certain values enshrined in our legal system should not prevent the legal community from searching to find those areas of the law that are compatible with the ethical and legal application of scientific experimentation.⁴⁵

C. Putting the Therapeutic Jurisprudence Theory into Practice

Despite the volume of scholarly material and apparent interest in the application of therapeutic jurisprudence to laws and legal procedures, no area of the law has recognized and taken up this new legal perspective and put it into action. This present situation, however, will soon change once the DTC movement understands the nature of therapeutic jurisprudence. Although born without the advantage of therapeutic jurisprudence analysis, the DTC movement represents a significant step in the evolution of therapeutic jurisprudence—the evolutionary step from theory to application. Through the introduction of drug treatment principles to addicted criminal defendants, and now juveniles and participants in family court, DTCs unknowingly apply the concepts of therapeutic jurisprudence every day in hundreds of courtrooms across America. Once DTCs realize this, they can use therapeutic jurisprudence principles to enhance existing procedures, to make a greater impact on the lives of drug-addicted and alcoholic criminal defendants, and to increase the safety of communities across America.

III. DRUG TREATMENT COURTS: THE APPLICATION OF THERAPEUTIC JURISPRUDENCE IN A CRIMINAL LAW CONTEXT

DTCs are a recent phenomena within our criminal justice system. The emergence of these new courts reflects the growing recognition on the part of judges, prosecutors, and defense counsel that the traditional criminal justice methods of incarceration, probation, or super-

tem, however, can only rarely employ true randomization. Constitutional and ethical restrictions in performing experimentation with human subjects render social science research of this kind less than perfect science. An inherent problem with therapeutic jurisprudence's reliance on social science data, therefore, will mean that the conclusions of therapeutic jurisprudence work will be "subject to all the vagaries that afflict social science itself."

Winick, *supra* note 12, at 195–96, *reprinted in* LAW IN A THERAPEUTIC KEY, *supra* note 7, at 657 (quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL., PUB. POL'Y & L. 207 (1995)) (citations omitted).

45 Scientific experimentation with DTCs has already been accomplished. See *infra* Part III.H.9 (discussing the results of a RAND study using scientific experimentation in analyzing the efficacy of a DTC in Maricopa County, Arizona).

vised parole have not stemmed the tide of drug use among criminals and drug-related crimes in America. Criminal justice practitioners have come to realize "that incarceration alone does little to break the cycle of drugs and crime"⁴⁶ and "that prison is a scarce resource, best used for individuals who are genuine threats to public safety."⁴⁷ Faced with the task of processing the large number of drug offenders engulfed by our criminal justice system, many jurisdictions have turned to the concept of a "Drug Treatment Court" in order to cope more effectively with the increased workload due to alcohol and other drug abuse-related cases.

With their focus of effort aimed squarely at preventing the collapse of local court systems under the weight of drug cases, few early DTC practitioners worried about the jurisprudential theory behind the DTC movement. DTCs seemed to work, and the absence of analysis or debate coming from the "ivory towers" of academia about the efficacy of drug treatment in a criminal justice setting did not much matter. However, as DTCs spread across the country and the variation among DTCs grew, individuals in the legal community began to question and hypothesize about the legal and jurisprudential foundations of this new criminal justice concept. What legal theory could provide DTCs with the requisite formula so that the orientation, structure, and procedures of new and extant DTCs could provide court-ordered, effective treatment programs for their participants? Therapeutic jurisprudence provides the fundamental answer to these questions.

46 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PUB. NO. NJC-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS 1 (1993) [hereinafter SPECIAL DRUG COURTS]. "Fully 60% of police chiefs believe that police and other law enforcement agencies have been *unsuccessful* in reducing the drug problem in the United States." PETER D. HART RESEARCH ASSOCIATES, POLICE FOUNDATION & DRUG STRATEGIES, DRUGS AND CRIME ACROSS AMERICA: POLICE CHIEFS SPEAK OUT 3 (1996). "Specifically, [police chiefs] regard punishment alone as an inadequate way to deal with the problem [of drug abuse]." *Id.* at 4.

47 JOHN S. GOLDKAMP, U.S. DEP'T OF JUSTICE, JUSTICE AND TREATMENT INNOVATIONS: THE DRUG COURT MOVEMENT—A WORKING PAPER OF THE FIRST NATIONAL DRUG COURT CONFERENCE, DECEMBER 1993, 8 (1994). For an innovative look at drugs, crime, and violence in America, see FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA (1997). This book proposes that despite the conventional wisdom, drugs may not be the core or even a substantial cause of homicides in America. "There is . . . a problem with inferring that all . . . systemic homicides would disappear if the illicit market in drugs that generated them were abolished." *Id.* at 142.

A. *Drug Treatment Courts: Common Terminology and Definitions*

One of the keys to grasping how and why therapeutic jurisprudence can work so effectively in analyzing and improving the DTC setting is understanding the legal and medical treatment terminology that DTCs use in the pursuit of treatment, justice, and public safety. This section defines several important DTC and drug treatment terms.

1. *Addict*. Defined in numerous ways, a drug "addict" is an individual whose compulsive use of drugs continues despite the physical, psychological, and/or social harm which the user encounters through continued drug use.⁴⁸ The drug addict will generally exhibit behavior patterns which involve (1) a "[p]reoccupation with the acquisition of a drug," (2) compulsive "use of a particular drug . . . [despite] the presence of untoward consequences," and (3) relapse "in which there is a voluntary return to drug . . . use."⁴⁹ DTCs did not originally attempt to treat addicts of all types, such as alcoholics, but concentrated their efforts on cases involving illicit drug use by adults. However, "second-generation" DTCs are now addressing the problems of alcoholics and other types of addicts through treatment-oriented judicial processes. Despite this trend of expanding the access to court-supervised treatment, DTCs still generally adjudicate adult, illicit drug cases based on certain court and/or legislatively prescribed criteria.⁵⁰ The criteria for admission to a DTC program vary from court to court, but most courts presently focus on the inability of the individual to stop abusing and/or using illicit drugs without the criminal justice system's involvement.⁵¹

48 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-133652, *DURGS, CRIMES, AND THE JUSTICE SYSTEM* 21 (1992) [hereinafter *DRUGS, CRIME, AND THE JUSTICE SYSTEM*]. This very definition suggests that the traditional jurisprudence of deterrence will not work well with regard to drug addicted defendants.

49 Norman S. Miller et al., *The Relationship of Addiction, Tolerance, and Dependence to Alcohol and Drugs: A Neurochemical Approach*, 4 J. OF SUBSTANCE ABUSE TREATMENT 197, 199 (1987). Other treatment regimes define an addict based on the presence of the following elements: (1) overwhelming need of the drug; (2) self-deception and denial; (3) periodic abstinence; (4) addict's self-image as an addict. See LEWIS YABLONSKY, *THE THERAPEUTIC COMMUNITY* 3-5 (1989). All definitions of an addict include the elements of compulsive use of a drug and relapse.

50 See generally GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, *DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS* (1997) (discussing the operation of DTCs around the country) [hereinafter *DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS*].

51 See *id.*

2. *Addiction*.⁵² The term "addiction," like the words "drug" and "addict," does not have a universally accepted definition. "Attempts at a unified theory of addiction have long been frustrated. Part of the problem is the definition: There has been, and there remains, substantial disagreement among experts as to what constitutes an adequate definition of addiction."⁵³ Since "[a]ddiction is largely a descriptive term . . . that various disciplines have different criteria for establishing . . . and defining,"⁵⁴ a precise definition for "addiction" remains elusive.

Despite this problem, the American Society of Addiction Medicine (ASAM) has defined "addiction" as a "disease process characterized by the continued use of a specific psychoactive substance despite physical, psychological or social harm."⁵⁵ Additionally, "drug addiction may be defined by three major behavioral characteristics: (a) preoccupation with the acquisition of . . . a drug, (b) compulsive use, and (c) relapse. . . . Pervasive to the three requisites is the phenomena of 'loss of control.'"⁵⁶ For purposes of this Article, understanding this definition will provide the reader with a general idea about the meaning of "addiction" as recognized by most DTCs.

3. *Drug*. To understand the DTC concept fully, one must first understand how DTCs define the term "drug." A "drug" can be defined broadly as a pleasure producing chemical which activates or imitates chemical pathways in the brain associated with feelings of well-being, pleasure, and euphoria.⁵⁷ This broad definition could include not only illegal narcotics, but also substances like alcohol, nicotine, and prescription medications. For the purposes of most DTCs, however, a "drug" is a controlled substance that is illegal to possess and/or use according to the appropriate jurisdictional laws. Cocaine, heroin, methamphetamine, and marijuana can all be considered "drugs" under this definition, as well as the less popular illicit chemical substances like PCP and LSD. Certain DTCs may deem alcohol a drug when its use or abuse, in conjunction with other activities, such as

52 "'Addiction,' declares Brookhaven's [Dr. Nora] Volkow, 'is a disorder of the brain no different from other forms of mental illness.'" J. Madeleine Nash, *Addicted*, TIME, May 5, 1997, at 68, 70.

53 Roy A. Wise, *The Neurobiology of Craving: Implications for the Understanding and Treatment of Addiction*, 2 J. OF ABNORMAL PSYCHOL. 118, 118 (1988).

54 Miller et al., *supra* note 49, at 197.

55 E. M. Steindler, *Addiction Terminology*, in PRINCIPLES OF ADDICTION MEDICINE ch.2 at 1 (Norman S. Miller et al. eds., 1994).

56 Miller et al., *supra* note 49, at 199.

57 See INSTITUTE FOR BEHAVIORAL HEALTHCARE, SUBSTANCE ABUSE, CONTEMPORARY APPROACHES TO TREATMENT, WORKSHOP SYLLABUS 3 (S. Alex Stalcup ed., 1996).

driving a motor vehicle or operating heavy machinery, is proscribed by law. The physical and psychological effects these drugs have on humans may vary, but the abuse of any of the pleasure producing chemicals can result in some form of addiction.

4. *Drug Court.* Drug Treatment Courts make up one of the two types of courts which fall under the generic category of "drug courts." The other type of court which can be classified as a "drug court" is an Expedited Drug Case Management Court (EDCM). Although both types of drug courts share a common origin, they confront the problem of increased drug case loads in courts with different methods and distinct, and sometimes opposing, goals.

EDCMs try to more efficiently process drug offense cases by consolidating a particular court system's drug docket, concentrating drug case expertise in a single court, and reducing time to disposition for drug cases.⁵⁸ Generally, EDCMs contain the following essential elements: (1) clear guidelines for plea offers to facilitate early resolution; (2) consistent dates for plea negotiations, trials, and motions; and (3) bypassing of the grand jury process, where appropriate, through use of information or defendant waiver.⁵⁹ EDCMs still utilize traditional methods for adjudicating drug offenses, including the adversarial relationship between prosecutor and defense attorney, judge as detached referee, and incarceration and supervision as the consequence of an offense. EDCMs do not emphasize treatment and recovery and do not try to solve the underlying problem of many, if not all, drug cases—the drug addiction of the accused.

Unlike the philosophy of EDCMs, the DTC concept focuses not only on fixing the immediate concern of court congestion; it also attempts to ascertain and attack the real foundation of the drug offender's problem—drug addiction. Despite the differences between jurisdictions, a "DTC" can be loosely defined as follows:

[A] court with the responsibility of handling cases involving . . . [non-violent] drug-using offenders through an intensive supervision and treatment program. Drug Court programs bring the full weight of all intervenors (e.g., the judge, probation officers, correctional and law enforcement personnel, prosecutors, defense counsel, treatment specialists and other social service personnel) to bear, forcing the offender to deal with his or her substance abuse problem or suffer consequences.⁶⁰

58 See SPECIAL DRUG COURTS, *supra* note 46, at 4.

59 See *id.* at 6.

60 THE NATIONAL ASS'N OF DRUG COURT PROFESSIONALS & THE OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE, COMMUNITY POLICING AND

The use of this definition of a "DTC" is a recognition of the basic premise "that drug possession and use is not simply a law enforcement/criminal justice problem but a public health problem with deep roots in society."⁶¹ In recognizing the physical and mental health components of this problem, DTCs attempt to combine the traditional processes of our criminal justice system with those of the drug treatment community to create judicially initiated treatment solutions for a certain class of drug offenders. This synthesis of therapeutic treatment and the judicial process stand at the core of the DTC concept.

DTCs come in as many styles as there are jurisdictions utilizing this method of handling drug offenders in the criminal justice system.⁶² However, most DTCs appear to contain certain essential elements: (1) intervention is immediate; (2) the adjudication process is nonadversarial in nature; (3) the judge takes a hands-on approach to the defendant's treatment program; (4) the treatment program contains clearly defined rules and structured goals for the participants; and (5) the concept of the DTC team—that is judge, prosecutor, defense counsel, treatment provider, and corrections personnel—is important. The needs, problems, and resources of the local community dictate the methods and means of the various working DTCs, but the goal remains consistent—drug treatment for addicted drug offenders instead of incarceration and/or probation.

Although initially developed to deal with the explosion in drug cases involving adult use of illicit drugs, second-generation DTCs have begun to address the substance abuse and addiction issues of other portions of our society. Some DTCs now provide programs directed specifically at alcoholics,⁶³ while other jurisdictions have created juvenile and family DTCs to address the substance abuse problems of

DRUG COURTS/COMMUNITY COURTS: WORKING TOGETHER WITHIN A UNIFIED COURT SYSTEM, app. B, at vii (1998).

61 CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TREATMENT IMPROVEMENT PROTOCOL SERIES NO. 23, TREATMENT DRUG COURTS: INTEGRATING SUBSTANCE ABUSE TREATMENT WITH LEGAL CASE PROCESSING 1 (1996) [hereinafter TREATMENT DRUG COURTS].

62 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50, at 101–28.

63 See Elaine Gray, *'He Saved My Life': Drug That Controls Drinking Leads Offenders out of Alcoholic Haze*, ENTERPRISE-RECORD, February 11, 1997, at A1 (discussing the successes of the city of Chico's DTC in helping drug and alcohol dependent defendants); G. Larry Mays et al., *New Mexico Creates a DWI Drug Court*, 81 JUDICATURE 122 (1997).

juveniles and other family members.⁶⁴ All of these DTC permutations contain the core goal of successful drug treatment as a means of breaking the cycle of drug addiction, domestic problems, and crime.

5. *Polydrug Dependence*. The term is defined as concomitant use of two or more psychoactive substances in quantities and with frequencies that cause the individual significant physiological, psychological, and/or sociological distress or impairment.⁶⁵

6. *Relapse*. "Relapse" is the "[r]ecurrence of psychoactive substance-dependence behavior in an individual who has previously achieved and maintained abstinence for a significant period of time."⁶⁶ Essentially, it is a situation in which the drug user voluntarily "return[s] to drug and alcohol use, or regardless of conscious resolve and apparent commitment to abstain, the addict inexplicably returns to the use of alcohol or drugs."⁶⁷ It should be noted that relapse is the "rule, and not the exception, . . . and there are periods of abstinence intermingled with prolonged abnormal drug use."⁶⁸ In terms of successful treatment, relapse must not be viewed as the failure of treatment, but as an inevitable stumbling block on the road to abstinence.

B. A History of Drug Treatment Courts

The history of the DTC concept is relatively brief. The first DTC was established in Miami, Florida, in the summer of 1989 by an "ad-

64 See OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROGRAM, U.S. DEP'T OF JUSTICE, JUVENILE AND FAMILY DRUG COURTS: AN OVERVIEW (1998).

[M]any juvenile court practitioners have found the conventional approach to [juvenile justice] to be ineffective when applied to the problems of juvenile substance-abusing offenders. During the past several years, a number of jurisdictions have looked to the experiences of adult drug courts to determine how juvenile courts might adapt to deal with the increasing population of substance abusing juveniles more effectively.

Id. at 1. See also DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, *Juvenile Drug Courts*, JUV. & FAM. JUST. TODAY, Winter 1997, at 12, for a discussion about the goals, methods, and challenges of juvenile DTCs. See discussion *infra* Part III.F.5.

65 See Steindler, *supra* note 55, at 2.

66 *Id.*

67 Miller et al., *supra* note 49, at 199.

68 *Id.* Recent work in the field of addiction has increasingly indicated that the chemical substance dopamine, a neurotransmitter in the brain, plays a major role in the addiction process. In addition, learning and memory may add to the addictive process. See generally Nash, *supra* note 52, at 68. The following web sites contain extensive information on addiction and drug abuse: <<http://www.macad.org>> (visited Oct. 22, 1998); <<http://www.nida.nih.gov>> (visited Oct. 22, 1998); <<http://www.drugcourt.org>> (visited Oct. 22, 1998).

ministrative order from the [then]-Chief Judge [Honorable Gerald Weatherington] of Florida's eleventh judicial circuit."⁶⁹ Then-Associate Chief Judge Herbert Klein, who coordinated and directed the design and creation of the Miami Drug Court, explained the reason underlying the court's establishment: "Putting more and more offenders on probation just perpetuates the problem. The same people are picked up again and again until they end up in the state penitentiary and take up space that should be used for violent offenders. The Drug Court tackles the problem head-on."⁷⁰

Since the creation of this first DTC in Miami, jurisdictions across the country have begun to embrace the DTC concept. Beginning with one DTC in 1989, by "1996, over 125 drug courts were operating in 45 States and more than 100 jurisdictions, and 24 were being developed."⁷¹ According to a more recent 1997 survey, approximately 325 drug court programs are being planned for or are currently operating in 48 states nationwide.⁷² Also operating "drug court" programs are Native American Tribal Courts, the District of Columbia, Guam, Puerto Rico, and one federal jurisdiction.⁷³ Eleven states have enacted legislation which relates to the planning and funding of drug courts⁷⁴ in addition to Title V of the Violent Crime Control and Law Enforce-

69 PETER FINN & ANDREA K. NEWLYN, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-142412, MIAMI'S "DRUG COURT": A DIFFERENT APPROACH 3 (1993).

70 DRUG STRATEGIES, CUTTING CRIME: DRUG COURTS IN ACTION 6 (1997) [hereinafter CUTTING CRIME]; see also John R. Schwartz & Linda P. Schwartz, *The Drug Court: A New Strategy for Drug Use Prevention*, 25 OBSTETRICS & GYNECOLOGY CLINICS OF NORTH AMERICA 255 (1998).

The concept of Drug Treatment Court is relatively new and is an innovative response by local communities to deal with the escalation of criminal activity associated with substance abuse. The frequency of repeat offenses by drug users, the overcrowding of jail space, and a diminishing sense of community well-being contributed to the impetus to look for a new approach by the criminal justice system—the creation of Drug Treatment Courts.

Id. at 255. For a comprehensive expose on alternative sentencing see *Developments in the Law—Alternative Sentencing*, 111 HARV. L. REV. 1863 (1998) [hereinafter *Alternative Sentencing*].

71 TREATMENT DRUG COURTS, *supra* note 61, at 2. For the most up-to-date information on drug treatment courts, see the Drug Court Clearinghouse and Technical Assistance Project's website at <<http://www.american.edu/justice>>.

72 See DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, DRUG COURT ACTIVITY: SUMMARY INFORMATION 1 (May 1997) [hereinafter DRUG COURT ACTIVITY: SUMMARY INFORMATION].

73 See *id.*

74 See *id.*; see also, e.g., North Carolina Drug Treatment Court Act of 1995, c. 507, s. 21.6(a) (codified at N.C. GEN. STAT. §§ 7A-790–801 (1997)).

ment Act of 1994,⁷⁵ which specifically allocated federal moneys for drug court support.⁷⁶

The enthusiastic reception of the DTC concept can be attributed to a variety of factors found therein, including more effective case load management, reduced systemic costs and jail crowding, and decreased rates of recidivism among DTC participants. As early DTCs began to demonstrate their effectiveness, conferences were held⁷⁷ and professional associations formed⁷⁸ which allowed more and more people within the criminal justice system to gain access to important DTC information. The successes of various DTCs, coupled with the growth of conferences and professional organizations, helped the proponents of DTCs generate state and federal support for the concept. Recent federal legislation and the formation of the Office of Drug Court Programs within the Department of Justice all point to the incredibly powerful message of success which early DTCs have promulgated.⁷⁹

Although still in their infancy, the experience and statistics from several of the DTCs which have existed for some years indicate that DTCs produce positive results. Indicative of the types of results possible from DTCs are those achieved by the Miami Drug Court:

From 1989 to 1993, Miami's drug court placed over 4,500 offenders into court-supervised treatment. By 1993, two-thirds had remained in treatment (1,270) or graduated (1,700). Among graduates, the rearrest rate one year later was less than 3 percent, compared to 30 percent for similar drug offenders who did not go through drug court.⁸⁰

The expanding number of DTCs which have been in existence for several years has allowed the criminal justice community to begin to examine and analyze the data on participants to determine the validity of the concept.

1. The Beginning of Change

The genesis of the DTC movement developed in response to the increasingly severe "war on drugs" crime policies enacted in the 1980s,

75 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§13701-14223 and in scattered sections of the United States Code (1994)).

76 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50, at 4.

77 See *infra* Part III.G.

78 See *infra* Part III.G.

79 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50, at 4, 5 n.4.

80 CUTTING CRIME, *supra* note 70, at 6.

coupled with the resulting explosion of drug-related cases that subsequently flooded the courts.⁸¹ The drug policies of the mid-1980s trace their roots to the large influx of cocaine, both powder and the base form known as "crack," this country experienced during the decade.⁸² The "war on drugs"⁸³ policies legislated and implemented at the federal level in the mid-1980s expanded laws concerning illegal drugs and increased the penalties for drug offenses. These laws also established mandatory minimum sentences for certain drug offenses in an effort to staunch the flow of drugs and curtail their use.⁸⁴ The 1984

81 See SPECIAL DRUG COURTS, *supra* note 46, at 1; see also Zimring, *supra* note 3, at 809 ("The 1980's witnessed the most rapid expansion in the rate of imprisonment in the United States in memory. The growth in imprisonment for all offenses was unprecedented but the expansion in punishments for drug offenses was particularly large.") (citations omitted).

82 For a discussion on drug trafficking in the 80s, see generally DRUGS, CRIME, AND THE JUSTICE SYSTEM, *supra* note 48. See also DOUGLAS S. LIPTON, U.S. DEP'T OF JUSTICE, THE EFFECTIVENESS OF TREATMENT FOR DRUG ABUSERS UNDER CRIMINAL SUPERVISION 3 (1995) ("With the advent of crack use in the mid-1980's, the already strong relationship between drugs and crime heightened. Cocaine use doubled in most cities and tripled in some, while the use of other drugs (notably heroin and PCP) declined or remained stable.").

83 Although this term caught the attention and imagination of the public in the 1980s, it represents a misunderstanding and mischaracterization of the problem of drug abuse in this country.

The metaphor of a "war on drugs" is misleading. Wars are expected to end. Addressing drug abuse is a continuous challenge; the moment we believe ourselves to be victorious and free to relax our resolve, drug abuse will rise again. Furthermore, the United States does not wage war on its citizens, many of whom are the victims of drug abuse. These individuals must be helped, not defeated. It is the suppliers of illegal drugs, both foreign and domestic, who must be thwarted.

THE NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 5. "The 'war on drugs' in our country in many ways has become a war on our own people." Hon. James P. Gray, *California Courts Commentary: Drugs and the Law* (visited Sept. 12, 1998) <<http://calyx.com/~schaffer/MISC/comment.html>>.

84 But see JONATHAN P. CAULKINS ET AL., DRUG POLICY RESEARCH CTR., RAND, MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OF THE TAXPAYERS' MONEY (1997) [hereinafter MANDATORY MINIMUM DRUG SENTENCES] (setting forth the proposition that according to economic analysis, mandatory minimum drug sentences are significantly less effective than treatment for reducing cocaine consumption); *Long Drug Sentences Called Waste of Money*, S.F. CHRON., Nov. 25, 1997 at A5 (quoting William Brownsberger, a Massachusetts' assistant attorney general as stating that "[m]andatory sentencing laws are wasting prison resources on nonviolent, low-level offenders and reducing resources available to lock up violent offenders"). The study's findings seem to indicate that incarceration for these individuals was proving prohibitively expensive and that "it would be far more cost-effective to shift the emphasis to old-fashioned enforcement techniques and traditional sentences." *Id.* "Measures aimed at getting tough on drug users, such as mandatory minimum sen-

tencing, increased jail time and intensive probation and parole, have proved ineffective in rehabilitating drug users because they ignore the fact that drug addiction cannot be eliminated without effective treatment." Hon. William D. Hunter, *Drug Treatment Courts: An Innovative Approach to the Drug Problem in Louisiana*, 44 LA. BAR J. 418, 419 (1997). For an introduction to the economic analysis of the enforcement of drug laws see Simon Rottenberg, *The Clandestine Distribution of Heroin, Its Discovery and Suppression*, 76 J. POL. ECON. 78 (1968), reprinted in MICRO-ECONOMICS: SELECTED READINGS 655 (Edwin Mansfield ed., 1979). Law enforcement personnel and academics are not the only groups who see the present drug enforcement methods as ineffective. In recent years, judges have increasingly expressed their dissatisfaction with the way the criminal justice system handles certain categories of drug offenders. In a speech given at Benjamin N. Cardozo School of Law in April 1993, Senior U.S. District Court Judge Jack Weinstein declared that he was withdrawing his "name . . . [from] the wheel for drug cases . . . [because] I simply cannot sentence another impoverished person whose destruction has no discernible effect on the drug trade." Gould, *supra* note 18, at 846 n.40 (quoting Judge Weinstein), reprinted in LAW IN A THERAPEUTIC KEY, *supra* note 7, at 179-80 n.40. Other judges have followed:

By May 1993, 50 senior federal judges, including Jack B. Weinstein and Whitman Knapp of New York, have exercised their prerogative and refused to hear drug cases. . . . Federal District Judge Stanley Marshall remarked, "I've always been considered a fairly harsh sentencer, but it is killing me that I am sending so many low-level offenders away for all this time."

. . . .

. . . . Judge Spencer Williams, one of the senior federal judges who no longer heard drug cases said, "We have more persons in prison per thousand than any other country in the world. . . . We're building prisons faster than we're building classrooms. And still the crime rates are up. The whole thing doesn't seem to be very effective."

Judicial Revolt (visited Sept. 12, 1998) <<http://www.famm.org/history9.html>>. Not only federal judges, but also state court judges have expressed their disapproval with the harsh sentences for some drug crimes required by mandatory minimum sentencing guidelines. See *People v. Perez*, 599 N.Y.S.2d 269, 270-71 (1993) (Carro, J., concurring) (discussing the downward modification to the defendant's sentence in the interests of justice).

In considering this sentencing issue I cannot help but question whether the hemorrhag[ing] of taxpayer funds used to warehouse thousands of low-level drug users and sellers for long periods of time in our dangerously overcrowded prisons, at a cost of \$35,000 per year per inmate in addition to the capital expenditure of \$180,000 per prison cell, could not be productively and humanely directed toward prevention, through education, and treatment of drug addiction. The increasingly unavoidable conclusion that with the passage of time is becoming more widely recognized and articulated by respected representatives of our criminal justice system, is that the primary method currently utilized to deal with the drug epidemic, essentially an effort to eliminate the availability of drugs on the streets, while increasing inordinately the length of prison terms for low-level drug offenders, has failed.

Id. (citations omitted). Hon. James P. Gray "publicly set forth [his] conclusions that what we are doing through the Criminal Justice System to combat drug use and abuse in our society, and all of the crime and misery that accompany them, is not working."

Comprehensive Crime Control Act,⁸⁵ the 1986 Anti-Drug Abuse Act,⁸⁶ and the 1988 Anti-Drug Abuse Act,⁸⁷ all expanded and increased federal penalties for drug trafficking and use. State legislatures followed suit by enacting similar laws that required mandatory minimum sentences with increased penalties for drug offenses.⁸⁸

As law enforcement officials implemented the new drug laws, a wave of drug cases pushed into state and federal courts. The numbers of arrested drug offenders processed by our criminal justice system demonstrated this.⁸⁹ Drug arrests nationally increased 134% between 1980 and 1989, while during the same period the total number of arrests increased by only 37%.⁹⁰ In 1985, approximately 647,411 people were arrested on drug-related offenses, and by 1991 this number had increased to more than one million.⁹¹ The 1991 figure on arrests for drug offenses, over one million, represents a 56% increase over the number arrested in 1982.⁹² Between 1985 and 1994, arrests for

Gray, *supra* note 83. *But cf.* Symposium, *The Sentencing Controversy: Punishment and Policy in the War on Drugs*, 40 VILL. L. REV. 301 (1995) (discussing the deleterious effects of mandatory minimum sentences on society). The current law enforcement methods of dealing with drug offenders have even brought such controversial figures as philanthropist George Soros into the fray. He helped establish the Center on Crime, Communities and Culture, a policy research institution that will investigate issues such as "alternative, non-custodial sentences" for drug addicts. William Shawcross, *Turning Dollars into Change*, TIME, Sept. 1, 1997, at 48, 54.

85 Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended at 18 U.S.C. and in scattered sections of the United States Code (1994)). The Controlled Substances Registrant Protection Act of 1984 also increased the penalties for crimes involving controlled substances. *See* Controlled Substances Registrant Protection Act of 1984, Pub. L. No. 98-305, 98 Stat. 221 (1984) (codified as amended in 18 U.S.C. §§ 802, 2118, and 28 U.S.C. 522 (1994)).

86 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in 21 U.S.C. and in scattered sections of the United States Code (1994)).

87 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4312 (1988) (codified as amended at 21 U.S.C. and in scattered sections of the United States Code (1994)).

88 *See* MANDATORY MINIMUM DRUG SENTENCES, *supra* note 84, at 16-18; *see also* *Alternative Sentencing*, *supra* note 70, at 1880-82. "In my view, we've got things upside down," says Dr. David Lewis, director of the Center for Alcohol and Addiction Studies at Brown University School of Medicine. "By relying so heavily on a criminalized approach, we've only added to the stigma of drug abuse and prevented high-quality medical care." Nash, *supra* note 52, at 76.

89 *See* Zimring, *supra* note 3, at 809 ("By 1991, more persons were in California prisons for drug crimes than were in prisons for all crimes in 1979.").

90 *See* SPECIAL DRUG COURTS, *supra* note 46, at 1.

91 *See* CUTTING CRIME, *supra* note 70, at 6; *see also* DRUGS, CRIME, AND THE JUSTICE SYSTEM, *supra* note 48, at 158.

92 *See* FINN & NEWLYN, *supra* note 69, at 2.

drug offenses as a percentage of total arrests increased from 6.8% to 9.2%.⁹³

These arrest numbers actually understate the magnitude of the problems drug offenders pose to federal and state court systems.

Arrest disposition data from these cities [Los Angeles, Manhattan, San Diego, and Washington, D.C.] for 1982 and 1987 show that while the number of felony arrests increased dramatically, the proportion of arrested defendants convicted and sent to prison increased even more rapidly. Specifically, the prosecutors in all four jurisdictions responded to heavy drug case loads by indicting a higher fraction of arrested felony drug offenders in 1987 than in 1982. . . . The end result was that while felony drug arrests increased by 136 percent from 1982 to 1987, the number of imprisonments increased 317 percent.⁹⁴

In 1994, "[d]rug traffickers (19%) and drug possessors (12.5%) together made up 31.4% of felons convicted in State courts . . .,"⁹⁵ while over half of federal prisoners and almost 25% of all state prisoners were categorized as drug offenders.⁹⁶ This dramatic increase in convicted drug offenders "accounts for nearly three quarters of the total growth in federal prison inmates since 1980."⁹⁷ According to a recent, comprehensive study done by the National Center on Addiction and Substance Abuse at Columbia University (CASA), "[f]or 80 percent of inmates, substance abuse and addiction has shaped their lives and criminal histories"⁹⁸

The increase in arrested, incarcerated, and supervised drug offenders due to law enforcement policies also exposed the criminal justice system to an expansive tide of recidivism by these offenders. In

93 See DRUGS AND CRIME CLEARINGHOUSE, OFFICE OF NATIONAL DRUG CONTROL POLICY, PUB. NO. NCJ-160043, FACT SHEET: DRUG DATA SUMMARY 2 (July 1996) [hereinafter *Drug Data Summary*].

94 BARBARA BOLAND & KERRY MURPHY HEALEY, U.S. DEP'T OF JUSTICE, PROSECUTORIAL RESPONSE TO HEAVY DRUG CASELOADS: COMPREHENSIVE PROBLEM-REDUCTION STRATEGIES 1 (1993).

95 PATRICK A. LANAGAN & JODI M. BROWN, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ-163391, FELONY SENTENCES IN STATE COURTS, 1994, 1 (Jan. 1997).

96 See THE NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 18.

97 *Id.*

98 THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 6 (1998) [hereinafter *BEHIND BARS*]. "Substance abuse is tightly associated with recidivism." *Id.* at 7. This just bears out the proposition that untreated substance abusers will not stop their addictive behavior due to incarceration, parole, or probation. "Only 25 percent of federal inmates with no prior conviction have histories or regular drug use, but 52 percent of those with two prior convictions and 71 percent of those with five or more have histories of regular drug use." *Id.*

some instances "[a]t least half of drug offenders sentenced to probation in state courts are rearrested for felony offenses within three years; a third are arrested for new drug offenses."⁹⁹ Although data suggests that drug offenders are no more likely than other types of offenders to recidivate,¹⁰⁰ the increase in the number of drug offenders as a percentage of total offenders means that courts will necessarily spend more time and resources handling drug cases involving offenders who recidivate.

Studies show that only looking at the recidivism rate of drug offenders who are rearrested for drug crimes does not tell the entire drug abuse story. Although only "[t]wenty-five percent of drug offenders return to prison within three years of release, compared to 40 percent of all parolees, . . . 51 percent of parolees who abuse drugs, regardless of their offense,"¹⁰¹ end up back in prison. In support of these statistics, several studies indicate that a variety of cases and offenses confronting the courts today have drug-related roots. The National Institute of Justice Drug Use Forecasting (DUF) program data collected in 1995 showed that of males arrestees in twenty-three cities, "the percentage testing positive for any drug ranged from 51 percent to 83 percent Female arrestees ranged from 41 percent to 84 percent."¹⁰² In the same DUF report, "10 percent of [male arrestees and] . . . 14 percent [of female arrestees] stated that they were in need of drugs . . . at the time of their alleged offense."¹⁰³ The more recent 1997 Annual Report on Adult and Juvenile Arrestees shows no dramatic overall change in these trends. The Office of Justice Programs' statistics point out that in 1989 "30% of jail inmates . . . reported that

99 CUTTING CRIME, *supra* note 70, at 2.

100 See DRUGS, CRIME, AND THE JUSTICE SYSTEM, *supra* note 48, at 203.

101 CUTTING CRIME, *supra* note 70, at 2.

102 THE NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 18.

103 NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, 1995 DRUG USE FORECASTING: ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES 9 (1996) [hereinafter DUF 1995]. New statistics on drug use show little change over previous years. Although there has been variation among cities, overall use by arrestees stayed about the same as previous years. See ARRESTEE DRUG ABUSE MONITORING PROGRAM, NATIONAL INSTITUTE OF JUSTICE, 1997 ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES (1998) (formerly known as DRUG USE FORECASTING: ANNUAL REPORT ON ADULT AND JUVENILE ARRESTEES) [hereinafter ADAM]. The DUF/ADAM format has now been successfully used in England, and the study indicates that drug use among arrestees in the two countries is comparable. See *England Pilots DUF/ADAM Program* (visited Sept. 9, 1998) <<http://www.cesar.umd.edu/prod/csrfax/fax7/cfax-v7.htm>>.

they had used one or more drugs daily in the month before the offense."¹⁰⁴

The criminal statistics collected by various states in large urban centers confirm the link between nondrug arrests and the influence of drugs. "[I]n Manhattan, 77 percent of men arrested for drug offenses in 1995 tested positive for illegal drugs, but so did 54 percent of men arrested for violent crimes, and 72 percent of men arrested for property crimes."¹⁰⁵ In Miami, a study of 573 substance abusers "found that in a 1-year period they committed 6,000 robberies and assaults, . . . 900 auto thefts, 25,000 acts of shoplifting, and 46,000 other larcenies or frauds."¹⁰⁶ Despite the fact that many of these studies do not prove that drug use was the causal link in the commission of nondrug offense crimes,¹⁰⁷ the correlation between drug use and crime shows how inexorably intertwined the two are in our society.¹⁰⁸

C. Drug Treatment Courts: A New Approach to Breaking the Cycle of Drugs and Crime

The flood of drug offenders and drug-related cases into the nation's courts appeared on the verge of bringing the court system to its knees by the late 1980s. State court systems began to address the almost paralyzing influx of drug cases by developing specific methods for dealing with the drug offender cases. In an attempt to stem the tide, courts began consolidating and expediting drug offender cases within our standard criminal justice system. As previously discussed,

104 DRUGS, CRIME, AND THE JUSTICE SYSTEM, *supra* note 48, at 196. "Nearly a third of 1989 jail inmates convicted of property offenses reported they were under the influence of drugs or drugs and alcohol at the time of offenses. Almost 1 of 4 said the motive of their property offenses was to get money to buy drugs." *Id.* at 7.

105 CUTTING CRIME, *supra* note 70, at 2.

106 FINN & NEWLYN, *supra* note 69, at 13. "[H]igh-rate addict-felons . . . each commit 40 to 60 robberies a year, 70 to 100 burglaries a year, and many violent offenses, as well as conduct[ing] more than 4,000 drug transactions a year . . ." LIPTON, *supra* note 82, at 53.

107 But see Mitchell S. Rosenthal, *The Logic of Legalization: A Matter of Perspective*, in SEARCHING FOR ALTERNATIVES: DRUG CONTROL POLICY IN THE UNITED STATES 226 (Melvyn B. Krauss & Edward P. Lazear eds., 1991). "[Treatment professionals] have observed . . . that the criminal involvement of most drug abusers is less the result of drug laws or drug prices than a common manifestation of their disordered behavior. Drug abusers do not commit crimes *in order to* use drugs so much as they commit crimes *because* they use drugs." *Id.* at 227.

108 "Substance abuse and crime are joined at the hip. . . ." BEHIND BARS, *supra* note 98, at 27. In a recent study in Memphis, Tennessee, 94% of the perpetrators and 43% of victims were using alcohol or other drugs immediately prior to incidents of domestic violence. See *Study Finds Cocaine and Alcohol Use Among Domestic Violence Partners* (visited Sept. 25, 1998) <<http://www.cesar.umd.edu/prod/csrfax/fax6/cfax-v6.htm>>.

this method of consolidation developed into two general models for processing drug offense cases, both labeled drug courts—the Expedited Drug Case Method and the Drug Treatment Court. The term “Expedited Drug Case Management” applies to those courts that still focus on standard means of punishment and probation or parole for drug offenders. EDCM courts emphasize case management and quick disposition of drug cases to eliminate or cope with the increases in drug cases.

As an alternative to merely attempting to speed up the judicial process, some jurisdictions have taken a different approach. Instead of working on the symptoms of the increase in drug offenses (i.e., crowding of local court dockets), these courts looked for some method of curing the underlying problems of drug crimes—drug use and addiction. Now identified as “Drug Treatment Courts,” this system of court-prompted and supervised treatment for drug offenders aims at correcting the addictive behavior of the drug offenders who enter the courts. DTCs function under the basic “understanding that substance abuse is a chronic, progressive, relapsing disorder *that can be successfully treated*.”¹⁰⁹ Through the cooperation of local law enforcement, community drug treatment facilities, and the court system, certain categories of drug offenders are given the opportunity to overcome their addiction. By eliminating a significant cause of the drug offenders’ behavior, drug addiction, it is believed that DTCs can and will reduce docket loads by decreasing recidivism and possibly the number of drug-related arrests in general.

DTCs view drug offenders through a different lens than the standard court system. In approaching the problem of drug offenders from a therapeutic, medicinal perspective, substance abuse is seen not so much as a moral failure, but as a condition requiring therapeutic remedies.¹¹⁰ As opposed to using the traditional criminal justice paradigm, in which drug abuse is understood as a willful choice made by

109 TREATMENT DRUG COURTS, *supra* note 61, at 1. “Given what is known about the many social, medical, and legal consequences of drug abuse, effective drug abuse treatment should, at a minimum, be integrated with criminal justice, social, and medical services” Executive Office of the President, Office of National Drug Control Policy, *Treatment Protocol Effectiveness Study* (visited Feb. 27, 1998) <<http://www.whitehousedrugpolicy.gov/treat/trmtprot.html>> [hereinafter *Treatment Protocol Effectiveness Study*].

110 See Office of National Drug Control Policy, *Treatment* (visited Feb. 27, 1998) <<http://www.whitehousedrugpolicy.gov/treat/treat.html>>. “Chronic, hardcore drug use is a disease, and anyone suffering from a disease needs treatment.” *Id.* See also *Nightline: It’s Not a War Against Drugs, It’s a War Against a Disease* (ABC television broadcast, Mar. 18, 1998) (transcript on file with authors) [hereinafter *Nightline*]. “[D]rug addiction is like many other chronic diseases, no more mysterious, no less serious

an offender capable of choosing between right and wrong, DTCs shift the paradigm in order to treat drug abuse as a "biopsychosocial disease."¹¹¹ The term "biopsychosocial" indicates the belief that "biological, psychological, and social factors are deeply woven into the development of addiction."¹¹² Numerous studies support the idea that drug addiction is a "multidimensional" disease and not necessarily a matter of criminal behavior.¹¹³ When the criminal justice system views substance abuse as a condition requiring a therapeutic response, DTCs seem the most appropriate way within the criminal justice system to handle a drug offender's addiction. Through a therapeutic, treatment-based approach to the problem of drug abuse, DTCs attack the biopsychosocial cause of repeated drug use and addiction.

Unlike the therapeutic, biopsychosocial view of drug abuse, traditional criminal jurisprudence methods do not take into account the cases of a drug addicted defendant's behavior when adjudicating drug cases.¹¹⁴ Although many recent statistics show a decline in certain areas of drug-related crimes, no significant drop in the consumption of

than heart disease, asthma, diabetes or hypertension, and no more likely to select as its victim poor people or racial minorities." *Id.*

111 TREATMENT DRUG COURTS, *supra* note 61, at 8.

112 *Id.* For an excellent discussion of the biopsychosocial disease model of addiction see John Wallace, *Theory of 12-Step-Oriented Treatment*, in TREATING SUBSTANCE ABUSE, 13, 15-19 (Fredrick Rogers et al. eds., 1996). This model of addiction has also been defined as including a fourth component, spiritualism. See *infra* note 361 and accompanying text for an example of a juvenile court attempt to address spiritualism in juvenile offenders.

113 Wallace, *supra* note 112, at 15. This philosophy is best summed up by the phrase: "Using is a choice; addiction is not a choice." Viewed from a biopsychosocial standpoint, "[i]t is crucial for addicts . . . to realize that although they are not at fault for their disease, they are responsible for their recovery." John Steinberg, *Medical Strategy: Interventions*, in ADDICTION INTERVENTION: STRATEGIES TO MOTIVATE TREATMENT-SEEKING BEHAVIOR 21, 23 (Robert K. White & Deborah G. Wright eds., 1998) [hereinafter ADDICTION INTERVENTION]. The "position taken . . . by 12-Step theorists and clinicians is that because of genetic and together biological etiological factors, addicted people are not responsible for having developed an addictive disease, but they most certainly are responsible for dealing with the illness once they know they have it." Wallace, *supra* note 112, at 31.

114 Recognition that traditional methods of drug enforcement and criminal penalties have not stopped drug traffickers has taken on an international facet. The United Nation's new drug czar, Pino Arlacchi, views demand reduction through treatment as one of the essential components to decreasing the international supply of narcotics. Mr. Arlacchi, the architect of Italy's successful fight against the Italian Mafia in the 1980's, stated that he desires the following:

[He] wants drug-consuming countries, including the U.S., to commit themselves to reducing demand for narcotics. To do that, he suggests, it will be necessary to break down some of the walls between drug-enforcement agen-

drugs like cocaine and heroin has taken place in a decade.¹¹⁵ A Rand Corporation study estimated "that chronic users account for two-thirds of the U.S. demand for cocaine"¹¹⁶ and that twenty percent of the cocaine users consume two-thirds of the cocaine available in the country. Statistics about heroin use reflect the same sort of trends. These trends indicate that despite increased penalties and mandatory sentences, criminal behavior and one-time thrill seeking do not accurately reflect why drug use persists in a significant portion of our society. Addiction, and not a predisposition to criminal behavior, would explain why a large group of core drug users persevere in their behavior despite tougher criminal sanctions.

cies and the proponents of rehabilitation; a combination of both approaches, he feels, is necessary.

The \$5 billion cost of . . . [Mr. Arlacchi's] program over the next 10 Years . . . could come from funds that national governments are already budgeting for drug suppression. . . . [S]ince narcotics addiction costs the U.S. an estimated \$76 billion a year, it looks like an attractive investment.

William Dowell, *Man with a Grand Plan: Pino Arlacchi, the U.N.'s New Drug Boss, Has Ambitious Ideas for Winning the War in 10 Years*, TIME, June 15, 1998, at 40.

115 See THE NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 9-22. In fact, recent studies describe a rise in the use of drugs like heroin over the last several years. This rise may be the unintended result of the increased enforcement policies of the 1980s. The economics of the illicit drug would seem to indicate that higher enforcement means a corresponding increase in the per unit value, that is the purity, of the drugs being imported. The higher the purity of the drug, the lower the amount required to be shipped to attain the same income, the fewer shipments necessary to derive the same revenue, the less likely the chance of the shipment being discovered. The advances in the technology of illicit drug manufacturing may also have played a role in the increase in the purity of street heroin. The increased purity of the drug means that heroin users no longer need needles to get the drug into their system. The absence of needles and the ability to snort heroin like cocaine seems to have dramatically reduced the stigma and fear associated with the drug in previous generations. Recent media coverage of several young, prominent actors as well as stories of over-doses of college kids are anecdotal evidence of the rise of heroin use in a segment of our society once seen as relatively immune from the use of this drug. One study observed:

Purity [of heroin] is high everywhere except the South. . . . Heroin's high purity and low price has driven new demand and drawn some former addicts back to use.

....

Last winter, many treatment providers reported a fairly even split between clients who inhaled and clients who injected heroin This may show that inhalation is a transition phase that switches to injection after a few years of use.

OFFICE OF NATIONAL DRUG CONTROL POLICY, PULSE CHECK: NATIONAL TRENDS IN DRUG ABUSE 5 (Spring 1996).

116 THE NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 11.

Studies about the use of drugs also suggest that some drug offenders use drugs in an attempt to self-medicate themselves for a psychiatric disorder.¹¹⁷ Individuals with mental illnesses are 2.7 times more likely to have substance abuse problems than individuals in the general populace without forms of mental illness.¹¹⁸ Mirroring that statistic, individuals with substance abuse problems, particularly problems with drugs other than alcohol, demonstrate almost a five-fold greater incidence of mental illness than the rest of the population.¹¹⁹ Experiences in a variety of cities bear these relationships out. The DTC program in Portland, Oregon estimates that "25-30 percent [of their defendants] have mental health problems."¹²⁰ These same phenomena appear to take place in cases of alcoholism. One 1990 study found that some 65% of female alcoholics and 44% of male alcoholics had a second diagnosis of some sort of mental disorder.¹²¹ Given the prevalence of this phenomenon, traditional courts seem especially ill-equipped to effectively address the needs of these types of addicted defendants in a way that will increase the safety of the community.

Polydrug users present another particularly difficult problem for the criminal justice system. A polydrug user uses one type of drug, that is, heroin, to modify the negative physical effects of another drug, like methamphetamine or cocaine.¹²² Since the methamphetamine may cause the user days of sleeplessness, the heroin is used to either mitigate this effect and/or to produce a less dramatic post-

117 See DRUGS, CRIMES AND THE JUSTICE SYSTEM, *supra* note 48, at 21.

118 See David McDuff & Todd I. Muneses, *Mental Health Strategy: Addiction Interventions for the Dually Diagnosed*, in ADDICTION INTERVENTION, *supra* note 113, at 37.

119 See *id.*

120 SPECIAL DRUG COURTS, *supra* note 46, at 10.

121 For women, major depression occurred in 19% of the alcoholics (almost four times the rate for men); phobic disorders in 31% (twice the rate for men); and panic disorder in 7% (3.5 times the rate for men). According to this study polydrug use for women was also higher; some 31% of women with an alcohol diagnosis had drug abuse or drug dependence as a co-occurring abuse problem. See PRACTICAL APPROACHES IN THE TREATMENT OF WOMEN WHO ABUSE ALCOHOL AND OTHER DRUGS, DEP'T OF HEALTH AND HUM. SERV. NO. (SMA) 94-3006 (1994).

122 See Steindler, *supra* note 55, at 2 (defining polydrug dependence as "[c]oncomitant use of two or more psychoactive substances in quantities and with frequencies that cause the individual significant physiological, psychological and/or sociological distress or impairment"). In a 1996 study in Memphis, Tennessee, 43% of the men arrested in incidents of domestic violence tested positive for alcohol and cocaine. See Videotape: Drug Use and Domestic Violence (Daniel Brokoff, M.D., Ph.D., NIJ Research In Progress, NCJ163056, Sept. 1996) (on file with author); Drugs, Alcohol, and Domestic Violence in Memphis, National Institute of Justice Research Preview (1997).

methamphetamine "crash." Thus, the use of one illicit drug may create the physical and psychological need to use another drug, a behavioral pattern which seems to have little to do with criminality.

Traditional methods of jurisprudence appear particularly ill-suited for dealing effectively with single substance addiction or addiction derived from an effort to self-medicate or from polydrug abuse. Many practitioners within our present criminal justice system have pointed out that "traditional punitive approaches . . . [have] made few inroads into the problems of the drug-involved criminal case load."¹²³ If addiction is a biopsychosocial problem which endures in the face of punishment, then no amount of jail time, probation, fines, or other types of traditional criminal justice sanctions will prevent the addict from repeating drug abuse behavior. When approached from a therapeutic, biopsychosocial perspective instead of the traditional criminal justice perspectives, several of the previously mentioned statistics concerning drug abuse in our nation's populace begin to make sense.¹²⁴ Addicted drug users will not respond to incarceration or loosely supervised parole or probation because these actions do not address the drug user's addiction. If the criminal justice system puts an addict on probation without treating the addiction, the addict will probably violate probation because the court or the criminal justice system has not effectively addressed his or her medical condition.

[M]any features of the [traditional] court system actually contribute to . . . [drug] abuse instead of curbing it: Traditional defense counsel functions and court procedures often reinforce the offender's denial of . . . [a drug] problem. . . . Moreover, the criminal justice system is often an unwitting enabler of continu[ed] drug use because few immediate consequences for continued . . . [drug] use are imposed.¹²⁵

Given the biopsychosocial nature of drug addiction, "[t]he traditional adversarial system of justice, designed to solve legal disputes, is ineffective at addressing . . . [drug] abuse."¹²⁶

With substantial numbers of arrestees involved with drugs, it is tempting to claim a victory when the drug use rate for a category of arrestees dips by a few percentage points. But these small successes do not change the overarching truth: drug use characterizes a sub-

123 GOLDKAMP, *supra* note 47, at 8.

124 See DRUGS, CRIME, AND THE JUSTICE SYSTEM, *supra* note 48, at 21, 25.

125 DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 6, (1997) [hereinafter DEFINING DRUG COURTS]. "Enabling is defined in the context of addictive disease as any behavior which enables the disease to continue in its active form." Steinberg, *supra* note 113, at 25.

126 DEFINING DRUG COURTS, *supra* note 125, at 6.

stantial number of persons entering the criminal justice system. Failure to acknowledge this truth exacerbates the cycle of drugs and crime and exacts an increasingly high price from our society. It must not escape our attention that the criminal justice system may represent the best opportunity these individuals will ever have to confront and overcome their drug use . . . behavior.¹²⁷

But this opportunity to intervene and break the cycle of drugs and crime requires something other than the traditional criminal justice methods that have thus far proved costly and ineffective. DTCs represent just the kind of new, therapeutically based system which is capable of addressing the root cause of drug-related crimes.

*D. Orientation, Structure, and Procedures in Drug Treatment Courts*¹²⁸

1. Orientation

By treating addiction as a biopsychosocial issue, DTCs force those who work with the standard criminal justice system to alter their orientation away from the traditional role of the court. DTCs shift the paradigm of the court system; therefore judges, prosecutors, and defense counsel must change their outlook and conduct to allow DTCs to function effectively. As enunciated by the attendees at the First National Drug Court Conference, "[a] drug court will require different roles and perspectives than found in typical courtrooms."¹²⁹ "[D]rug court programs see the court, and specifically the judge, as filling a role that goes beyond that of adjudication."¹³⁰ DTCs require their participants to see the process as therapeutic and treatment-oriented instead of punitive in nature. Utilizing a therapeutic jurisprudential approach, "drug courts use sanctions [for treatment noncompliance]

¹²⁷ DUF 1995, *supra* note 103, at 10.

¹²⁸ All of the following discussion can be seen as a therapeutic jurisprudential response to drug addiction and crime on the part of DTCs. The end goal of any DTC is to assist a person in learning how to abstain from drug use. Instead of relying on the courts as an end in itself, which punishes offenders found guilty, DTCs see the court as a means to an end—breaking a person's reliance on drugs. To achieve this, DTCs incorporate drug treatment methods in the court process. Thus, DTCs apply a therapeutic jurisprudential philosophy by using social science methodologies to help resolve problems created by laws and legal processes to produce positive therapeutic outcomes for addicted defendants. The orientation, structure and process of DTCs substantially mirror the treatment methods used by Therapeutic Communities treating substance abusers. See YABLONSKY, *supra* note 49, at 9–48.

¹²⁹ GOLDKAMP, *supra* note 47, at 10.

¹³⁰ TREATMENT DRUG COURTS, *supra* note 61, at 1.

not to simply punish inappropriate behavior but to augment the treatment process."¹³¹

The DTC process uses a collaborative effort among criminal justice system participants who traditionally see each other as adversaries in a process mediated by a detached, neutral referee. "Drug courts promote recovery through a coordinated response to offenders dependent on . . . drugs. Realization of these goals requires a team approach, including cooperation and collaboration of the judges, prosecutors, defense counsel, probation authorities, other corrections personnel[,] . . . an array of local service providers, and the greater community."¹³²

DTCs exist as "a marriage between communities that have been traditionally at odds and foreign to each other—treatment communities, court communities, prosecutors, defense attorneys."¹³³ The drug offender becomes a client of the court, and judge, prosecutor, and defense counsel must shed their traditional roles and take on roles that will facilitate an offender's recovery from the disease of addiction. "[T]he team's focus is on the participant's recovery and law-abiding behavior—not on the merits of the pending case."¹³⁴ As summarized by one defense counsel, "You realize that doing the best thing for your client means getting the best life outcome, not simply the best legal result."¹³⁵ DTC proceedings focus on the treatment needs of the offender and not the legal formalism of traditional courts.

In shifting the main focus of the court from legal to therapeutic, DTCs apply different solutions to the problems of the drug offender than do traditional courts. DTCs recognize that "relapse" to drug use is an expected and accepted part of a drug offender's treatment process. "Allowance for relapse episodes and a willingness to give defendants a chance to reform"¹³⁶ represents the unknowing application of therapeutic jurisprudence in the DTC setting. Instead of immediately revoking a drug offender's probation and putting him or her in jail for a positive urinalysis,¹³⁷ a DTC will utilize a form of "smart punish-

131 GENERAL GOVERNMENT DIVISION, U.S. GOVERNMENT ACCOUNTING OFFICE, DRUG COURTS: INFORMATION ON A NEW APPROACH TO ADDRESS DRUG-RELATED CRIME 23 (May 1995) [hereinafter A NEW APPROACH TO ADDRESS DRUG-RELATED CRIME].

132 DEFINING DRUG COURTS, *supra* note 125, at 9.

133 CUTTING CRIME, *supra* note 70, at 21.

134 DEFINING DRUG COURTS, *supra* note 125, at 11.

135 CUTTING CRIME, *supra* note 70, at 11.

136 SPECIAL DRUG COURTS, *supra* note 46, at 6. See *supra* notes 48–56 and accompanying text.

137 In the past, drug diversion programs viewed positive urinalysis tests as an indication of the lack of willingness on the part of the participant to get serious about his or her treatment. The judge and probation officer would experience a sense of be-

ment." Smart punishment by DTCs means "the imposition of the minimum amount of punishment necessary to achieve the twin sentencing goals of reduced criminality and drug usage."¹³⁸ Smart punishment is not really punishment at all, but a therapeutic response to the realistic behavior of drug offenders in the grip of addiction. The type of sanctions given by a DTC to a drug offender serves to underscore the therapeutic perspective and goal of the DTC concept. A DTC's therapeutic orientation compels the court and its participants to pursue and utilize relationships, methods, and ideas which will reinforce and support the goal of getting the individual to stop using drugs.

2. Structure

Although DTCs function using a different jurisprudential model than more traditional courts, they still operate within the framework of the larger, extant criminal justice system. DTCs should be viewed as a new but integral part of the existing system. Drug cases may not always start out in a DTC, but may be transferred to a DTC from the docket of a traditional court within the jurisdiction. In the same manner, a drug offender who fails to make DTC-mandated progress may ultimately end up having her case tried in a traditional court. In some DTCs, defendants themselves "are allowed to withdraw [from the DTC program] and return to the standard adjudication route"¹³⁹ if they desire to do so.

This overlapping responsibility between traditional courts and DTCs serves to emphasize the idea that the DTCs attempt to use effective therapeutic adjudication methods to relieve the strain placed on traditional courts by certain types of drug cases. "[T]he theory of the drug court is that caseload pressure should be relieved from other court functions, and resources be saved as a result of an efficient and

trayal by the defendant who, by his or her continued use, was seen as rejecting the gift of treatment. One dirty test often resulted in the imposition of extended jail or prison time.

138 JUDGE JEFFREY S. TAUBER, CALIFORNIA CENTER FOR JUDICIAL EDUCATION AND RESEARCH, *DRUG COURTS: A JUDICIAL MANUAL* 9 (1994). The use of smart punishment demonstrates how DTCs use the same sort of treatment philosophy found in therapeutic communities. Therapeutic community residents "submit to a system that implements rewards for improvement in behavior and punishment for inappropriate behavior." SUSANNA NEMES ET AL, NATIONAL EVALUATION DATA AND TECHNICAL ASSISTANCE CENTER, *THE DISTRICT OF COLUMBIA TREATMENT INITIATIVE (DCI) 1* (1998). See *Treatment Protocol Effectiveness Study*, *supra* note 109.

139 SPECIAL DRUG COURTS, *supra* note 46, at 6.

effective treatment approach.”¹⁴⁰ To be truly successful in attaining this goal, DTCs cannot operate in a vacuum; they must remain connected to a given jurisdiction’s traditional courts.

However, the connection between DTCs and traditional courts does not and should not affect the internal structure of the DTC, which is grounded in a different jurisprudential theory, therapeutic jurisprudence. Unlike more traditional courts, DTCs usually handle *only* cases involving defendants screened for the drug treatment program. The idea of a DTC handling only drug cases also applies to those jurisdictions that use DTC sessions. DTC sessions are required due to a jurisdiction’s lower volume of drug cases. These court sessions, generally held only once a week for an entire day, allow the court to function both as a DTC and a traditional court without compromising the therapeutic effects of the DTC.

In most jurisdictions, DTCs do not adjudicate other types of criminal cases, nor do they handle civil cases of any sort. This important feature allows a jurisdiction’s DTC to concentrate its efforts on administering the treatment program in a hands-on manner. Those jurisdictions that do not have the caseload to support a full-time DTC have created DTCs that hold court less frequently. In Kalamazoo, Michigan, the DTC holds court every Friday, but reverts to a traditional court setting the rest of the week. This setup allows the court to administer and supervise treatment of addicts without devoting unnecessary assets to this method of adjudication. The common denominator among all of these variations of DTCs is the practice of only adjudicating DTC cases when the DTC is in session.

In accordance with their therapeutic focus, DTCs may operate as a single entity, a “unified drug court.” In a unified drug court, “only one” means that only *one* court with one judge adjudicates and monitors all the cases screened and all the offenders admitted to the treatment program. This important component of the DTC concept provides the court with structural accountability, both to the agencies and personnel administering the court and treatment program, and to the offender in treatment. “In a *structurally accountable system*, participating agencies share program responsibilities and are accountable to each other for program effectiveness, with each participant directly linked to, dependent on, and responsible to the others.”¹⁴¹ Following this theme of structural accountability, the DTC “judge and court personnel [including the prosecutor and defense counsel] are [usually]

140 GOLDRAMP, *supra* note 47, at 30.

141 TAUBER, *supra* note 138, at 20.

assigned for at least a one-year term"¹⁴² to provide both the court and the defendant with continuity and accountability throughout the treatment process.

The personnel assignment process underscores the structural accountability of the DTC. Structural accountability means that DTC personnel and their respective agencies take responsibility for the success or failure of an offender to complete the treatment program. The DTC builds this accountability into the structure of the treatment process because the DTC is solely responsible for the defendant and the program. In utilizing a therapeutic approach to adjudicating certain drug-offense crimes, "[t]he court process actually becomes part of the treatment."¹⁴³ "By the structure it provides—by establishing a separate [but connected] . . . specialized court," DTCs lead offenders "through the treatment process."¹⁴⁴

Through providing a single DTC, the system does not force defendants to shuttle from courtroom to courtroom and defense counsel to defense counsel over a period of months, attending hearing after hearing. Under the DTC system, the defendant confronts a single judge and DTC team who become intimately familiar with the defendant and her drug and other problems. This DTC team will hold the defendant accountable for her actions during the course of treatment and reinforce one another in actions taken to ensure that the defendant stays in treatment whenever possible and appropriate. DTCs abandon the traditional adjudication process which may slowly wind its way from arraignment to preliminary hearing, pretrial hearing, and trial, and involve many judges, defense counsel, and prosecutors. This traditional structure conflicts with the therapeutic foundation of the DTC, and as stated previously, may actually reinforce or facilitate addictive behavior.

As compared to traditional court structure, DTCs recognize that immediacy is a key component of the treatment process. To reinforce this effect, the structure of a DTC places the offender quickly before a single judge and DTC team because an arrest "creates an immediate crisis [for the substance abuser] and can force substance abusing behavior into the open, making denial difficult."¹⁴⁵ In a DTC—through regular court appearances before the same judge, rigorous case management, and treatment—addicts are forced to confront their denial of substance abuse, accept their addiction problem, and embrace the

142 *Id.* at 3.

143 GOLDKAMP, *supra* note 47, at 11.

144 *Id.* at 6.

145 DEFINING DRUG COURTS, *supra* note 125, at 13.

recovery process. "In a drug [treatment] court, the treatment experience begins in the courtroom."¹⁴⁶

3. Procedures

The DTC structure of a single unified drug court supports and enhances the effectiveness of the procedures which the court utilizes to engage the offender in her own treatment. In recognizing and addressing the compulsive behavior of the drug-addicted defendant, DTCs use procedures designed specifically to interrupt the offender's addictive behavior. "The court process actually becomes part of the treatment,"¹⁴⁷ and DTC procedures reflect that therapeutic ideal. DTC procedures try to ensure that the court does not miss the "critical window of opportunity for intervening and introducing the value of . . . [drug] treatment [into the defendant's life]."¹⁴⁸

In contrast to the traditional court system, which may or may not adjudicate a drug offender's case for months after the original arrest, DTCs place the defendant into the program immediately. In some instances, the defendant may find herself inside a DTC within two days of her release from jail after the original arrest. The first DTC appearance by the defendant happens quickly and "[t]reatment . . . begin[s] as soon as possible following the first drug court appearance, even the same day."¹⁴⁹ In Miami, the DTC "transports the defendant by van directly from the court to the treatment program to begin treatment."¹⁵⁰ The Oakland F.I.R.S.T. programs require that defendants granted diversion "go directly to the Probation department (a

146 *Id.* at 15.

147 GOLDKAMP, *supra* note 47, at 11.

148 DEFINING DRUG COURTS, *supra* note 125, at 13. Intervention represents the most critical aspect in this entire DTC process. "The reality is that chemically dependent people will not seek treatment unless confronted in some way with the problems caused by their . . . drug use. They are motivated to choose recovery over worsening problems because of the actions of an intervening person or circumstance." Deborah G. Wright, *Introduction to ADDICTION INTERVENTION*, *supra* note 113, at 4. Like therapeutic communities, DTCs have a "voluntary" admissions process. The term voluntary in therapeutic communities and DTCs means "[t]here has to be some commitment to become drug-free, even though [a person's] motivation may be fueled by other considerations." YABLONSKY, *supra* note 49, at 9.

149 SPECIAL DRUG COURTS, *supra* note 46, at 6. According to addiction specialists, "[t]he intervention process is driven by a time imperative. . . . [T]he disease of chemical dependence possesses several significant qualities that make it imperative or critical . . . to intervene [in the addiction] as early as possible." Wright, *supra* note 148, at 8.

150 TAUBER, *supra* note 138, at 5.

five-minute walk) for an immediate Diversion orientation session.”¹⁵¹ In Hayward, California, treatment providers attend every DTC session and enroll new DTC participants on the spot. All of these DTC procedures are calculated to take advantage of the fact that a “drug addict is most vulnerable to successful intervention when he or she is in crisis (i.e., immediately after initial arrest and incarceration).”¹⁵²

In addition to the DTC procedures which place a defendant quickly into treatment, DTCs design the courtroom process itself to reinforce the defendant’s treatment. The court may set up its daily calendar so that “first-time participants appearing in Drug Court . . . are the last items on the session calendar. This gives them an opportunity to see the entire program in action, and know exactly what awaits them if they become a participant.”¹⁵³ The DTC may handle program graduates first in order to impart a sense of hope to the new and continuing program participants who may experience hopelessness at the beginning of the process. The court may then devote the next portion of the calendar to defendants who enter the court in custody. This procedure is designed to convey to all DTC participants the serious nature of the court and the gravity of the defendant’s situation. This demonstrates that a violation of DTC rules may not get a defendant ejected from the program, but the court may use jail time as a form of “smart punishment” to get the defendant to conform to treatment protocol.¹⁵⁴ Those DTCs that do not have treatment facilities in their jails recognize that incarceration represents a break in treatment for the individual. However, the shock of incarceration may serve to break down the person’s denial of her addiction.¹⁵⁵ Fi-

151 JUDGE JEFFREY S. TAUBER, *THE IMPORTANCE OF IMMEDIATE AND INTENSIVE INTERVENTION IN A COURT-ORDERED DRUG REHABILITATION PROGRAM: AN EVALUATION OF THE F.I.R.S.T. DIVERSION PROJECT AFTER TWO YEARS* 4 (1993).

152 TAUBER, *supra* note 138, at 4.

153 Judge Jack Lehman, *The Movement Towards Therapeutic Jurisprudence: An Inside Look at the Origin and Operation of America’s First Drug Courts*, NJC ALUMNI, Spring 1995, at 13, 18. “[G]roups are of great value in the recovery process.” YABLONSKY, *supra* note 49, at 10.

154 See Wright, *supra* note 148, at 11 (“The impact of an intervention is its ability to create and present the ‘crisis’ in the addicted person’s life to a point where the person chooses treatment. If the person chooses not to . . . [conform] to treatment, then there are usually some significant consequences . . .”).

155 See *id.* at 9 (“Denial is a psychological process that serves to keep the chemically dependent person out of touch with reality. It is one of the most difficult aspects of treatment for . . . drug dependence.”). Many of the DTC procedures reflects an understanding of addiction treatment very similar in substance to the Twelve Steps treatment protocol espoused by Narcotics Anonymous:

The Twelve Steps of Narcotics Anonymous.

nally, the court handles the cases involving new defendants who wish to enter the DTC program. All of these procedures are founded on the therapeutic ideal that every aspect of a DTC can and does have a powerful impact on the success of the defendant in treatment.

A DTC's treatment program coordinates treatment procedures with court supervision to try to prevent the defendant from slipping back into drug abuse behavior. Generally, the treatment program involves three to four phases that include detoxification, stabilization, aftercare, and/or educational counseling. Throughout the treatment program, the DTC judge will require the offender to submit frequent, or in some courts, daily urine samples. The results go directly to the DTC judge, either by reports from the treatment provider or on-the-spot testing. The offender may make weekly or biweekly mandatory appearances before the DTC judge, who holds the offender publicly accountable for the results of the test and the treatment progress, whether they are positive or negative.

A DTC will apply "smart punishment" to an offender for continued drug use. The procedures of the treatment program reflect the premise that the DTC utilizes the coercive power of the court to en-

-
1. We admitted that we were powerless over our addiction, that our lives had become unmanageable.
 2. We came to believe that a Power greater than ourselves could restore us to sanity.
 3. We made a decision to turn our will and our lives over to the care of God *as we understood Him*.
 4. We made a searching and fearless moral inventory of ourselves.
 5. We admitted to God, to ourselves, and to another human being the exact nature of our wrongs.
 6. We were entirely ready to have God remove all these defects of character.
 7. We humbly asked Him to remove all these defects of character.
 8. We made a list of all persons we had harmed, and became willing to make amends to them all.
 9. We made direct amends to such people wherever possible, except when to do so would injure them or others.
 10. We continued to take personal inventory and when we were wrong promptly admitted it.
 11. We sought through prayer and meditation to improve our conscious contact with God *as we understood Him*, praying only for knowledge of His will for us and the power to carry that out.
 12. Having had a spiritual awakening as a result of these steps, we tried to carry this message to addicts, and to practice these principles in all our affairs.

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courage the addicted offender to succeed in completing the treatment program.

E. Unconventional Roles

The orientation, structure, and procedural portions of the DTC cannot maximize the successful treatment of addicts without the essential element of collaboration among the court's primary players.

A drug [treatment] court requires a special collaborative effort among judges, prosecutors, defense attorneys, and related criminal justice agencies along with treatment providers and other social services and community organizations. This collaborative effort is based on local needs and targeted population being served and may differ considerably among drug courts. Specifically, drug courts create new and different roles for [judges,] prosecutors and defense attorneys.¹⁵⁶

"Drug courts transform the roles of both criminal justice practitioners and . . . [drug] treatment providers."¹⁵⁷ DTCs transform these roles because the therapeutic nature of the court cannot work without this transformation. The metamorphosis of these roles allows the goal of the court to become primarily therapeutic while remaining a legal institution.

1. The DTC Judge

The DTC judge stands at the heart of this collaborative environment. In keeping with the therapeutic nature of the DTC concept, "[t]he judge is the central figure in a team effort that focuses on sobriety and accountability as the primary goals."¹⁵⁸ "The judge is the leader of the drug court team, linking participants to . . . [drug] treatment and to the criminal justice system."¹⁵⁹ However, the DTC judge cannot rely on traditional methodology to effectively carry out the judicial role demanded in a DTC.¹⁶⁰ DTCs "require judges to step beyond their traditionally independent and objective arbiter roles and develop new expertise,"¹⁶¹ understanding the disease model of addic-

156 A NEW APPROACH TO ADDRESS DRUG-RELATED CRIME, *supra* note 131, at 15.

157 DEFINING DRUG COURTS, *supra* note 125, at 7.

158 *Id.*

159 *Id.* at 27.

160 At a National Association of Drug Court Professional's conference, one judge described it in this fashion, "Drug Court judges get to color outside the lines." Remarks by unidentified participant at NADCP 3d Annual Training Conference (May 15, 1997).

161 DEFINING DRUG COURTS, *supra* note 125, at 27.

tion and drug abuse behavior patterns. This expansion of expertise comprises a necessary part of the DTC judge's repertoire because "[t]he structure of the . . . [drug treatment courts requires] early and frequent judicial intervention."¹⁶² Without knowledge about addiction and the effects of drugs, the DTC judge can not purposely intervene and apply the "smart punishment" necessary to keep the offender on the path to recovery.

The fact that only one judge will deal with the offender's case through frequent, mandatory court appearances allows the judge and offender to develop "an ongoing, working relationship."¹⁶³ This one-on-one relationship tends to facilitate honesty through familiarity and permits the DTC judge to become "a powerful motivator for the offender's rehabilitation."¹⁶⁴ The judge, using the power and authority of the court, provides the addict with the incentive to stay in treatment, while the treatment provider concentrates on the treatment process itself. Without judicial leadership involving active monitoring of an offender's recovery, a DTC would not work. "Rather than moralize about an addict's character flaws, the judge must assume, according to [Judge] Tauber, 'the role of confessor, task master, cheerleader, and mentor.'"¹⁶⁵

2. The DTC Prosecutor

Like the DTC judge, the DTC prosecutor must wear the new mantle of therapeutic team member. The prosecutor's role in a DTC represents a significant departure from the traditional prosecutor's job as the detached, objective enforcer of the law. Many prosecutors recognize that "the public safety- and punishment-oriented goals of the prosecution are not naturally compatible with drug treatment perspectives."¹⁶⁶ However, even with a shift to a therapeutic perspective, the prosecutor still enforces public safety through the DTC. The DTC prosecutor screens new drug-related cases with an eye towards whether "each candidate is appropriate for the program"¹⁶⁷ and not whether the case is winnable in court. Prosecutor and defense counsel may "jointly determine initial eligibility"¹⁶⁸ based on mutually developed criteria which have been approved by the entire treatment

162 *Id.*

163 TAUBER, *supra* note 138, at 14.

164 *Id.*

165 Fred Setterberg, *Drug Court*, CALIFORNIA LAWYER, May 1994, at 58, 62.

166 GOLDKAMP, *supra* note 47, at 7.

167 DEFINING DRUG COURTS, *supra* note 125, at 11.

168 TAUBER, *supra* note 138, at 29.

team. Instead of each side attempting to bolster its case for or against the offender, the prosecutor and defense attorney approach a case with the defendant's recovery as the goal. Through DTC procedures, the prosecutor can ensure that the offender does not have a history of violence and will not pose an unacceptable safety risk to the public during the duration of the treatment program. Moreover, since DTCs reduce recidivism, the DTC process facilitates and increases the ability of the prosecutor to protect the public from present and future criminal conduct, both drug use and drug-related crime.

The therapeutic approach taken by DTCs also requires that the prosecutor not file additional charges against the offender when the offender provides "a positive drug test or open court admission of drug possession or use."¹⁶⁹ Since "drug courts recognize that [addicts] have a tendency to relapse,"¹⁷⁰ the DTC prosecutor views the offender's behavior as an expected and normal part of the treatment process. Yet, through the collaborative nature of the DTC process, the prosecutor participates in shaping the response to "positive drug tests and other instances of noncompliance."¹⁷¹ In assisting the court in the smart punishment-shaping function, the DTC prosecutor can still carry out her public safety role by "ensuring that each candidate . . . complies with all drug court requirements."¹⁷² Finally, the DTC prosecutor has constant input "regarding the participant's continued enrollment in the [treatment] program based on performance in treatment rather than on legal aspects of the case."¹⁷³

169 DEFINING DRUG COURTS, *supra* note 125, at 11. Hayward's DTC contract contains the following provision:

[S]tatements made by me to any probation officer or drug program worker (including the Drug Treatment Court Coordinator) regarding the specific offense with which I am charged will not be used against me in any action or proceeding while participating in the drug treatment court. . . . [S]uch statements, while confidential, may be used against . . . [the participant if he or she] attempt[s] to commit perjury at a later date.

Drug Treatment Court Contract, San Leandro Hayward Drug Treatment Municipal Court (1998). See also CAL. PENAL CODE § 1000.1 (c) (West 1997) ("No statement, or any information procured therefrom, made by the defendant to any probation officer or drug treatment worker, that is made during the course of any investigation conducted by the probation department or treatment program pursuant to subdivision (b), and prior to the reporting of the probation department's findings and recommendations to the court, shall be admissible in any action or proceeding brought subsequent to the investigation.").

170 DEFINING DRUG COURTS, *supra* note 125, at 23.

171 *Id.* at 11.

172 *Id.*

173 *Id.* at 12.

Rather than risking public safety, a prosecutor can and does enhance public safety through a DTC and the DTC process. By understanding the nature of addiction and treatment, a prosecutor comes to realize that the therapeutic jurisprudence approach taken by a DTC reflects nothing more than the realization that the court process itself can and does impact the behavior of a defendant. The DTC concept allows the prosecutor to capitalize on this fact and stop the revolving door scenario which drug offenders play out daily in the present traditional court process.

3. Defense Counsel

Like the DTC prosecutor, the DTC defense attorney must also put aside her adversarial mindset and engage in the collaborative efforts of the treatment team. During the screening process, the DTC defense counsel reviews the defendant's criminal history with the prosecutor and evaluates whether or not individuals meet treatment program requirements. Defense counsel ensures that prior to entering into the treatment program, the defendant understands the nature of her legal rights, the requirements of the program, and the possible legal consequences should the defendant fail to complete the program.

In stark contrast to the traditional role of a defense counsel to minimize a client's exposure to criminal sanctions, the DTC defense attorney tries to ensure that the addicted defendant stays in the treatment program until graduation. Actions by defense counsel may include, after full disclosure to the client, foregoing legal defense tactics such as motions to suppress evidence, which might delay the process or prevent the defendant from accepting responsibility for her drug use. These actions may also include counseling a defendant to disclose continued drug use (relapse) in order to foster honesty and reduce the barriers to effective drug treatment. In most instances "[t]he defense attorney (literally and figuratively) takes a step back, rarely getting between the judge and the offender."¹⁷⁴ In accepting the therapeutic concept of the DTC, defense counsel views success as a drug-free client who is less likely to recidivate than the "business as usual" client. "Although the defender will still identify cases in which charges should be dropped for lack of probable cause, his or her role in the drug [treatment] court becomes much more treatment oriented, designed primarily to assist the defendant (or offender) through the various difficulties that might be experienced along the

174 TAUBER, *supra* note 138, at 17.

way.”¹⁷⁵ With the consent of the defendant, the DTC goal becomes recovery from addiction and not the exercise of the full panoply of the defendant’s rights.

4. Treatment Providers

DTCs connect treatment providers with a portion of our society which may need the most help with addiction, yet generally has the least access to that help. However, under the DTC concept, “[t]reatment providers . . . no longer serve exclusively as the gatekeepers to treatment, as they have been accustomed to doing. Courts will decide who will be sent to treatment and when treatment can be terminated for poor performance.”¹⁷⁶ Since drug treatment drives DTCs, however, treatment providers play an integral role in the DTC process. “A treatment program representative’s daily presence in the court can provide the drug court judge important and valuable information upon which to base supervision and disposition decisions. . . . Some[, if not all,] drug courts give great weight to the recommendations of the treatment program representative when making case decisions.”¹⁷⁷ “[T]reatment providers keep the court informed of each participant’s progress so that rewards and sanctions can be provided.”¹⁷⁸ The expertise and advice of treatment providers enable the DTC to use the coercive power of the court in an effective, therapeutic manner. Just their presence in the court as part of the DTC staff represents a significant departure from the traditional court system in which only officers of the court had any input in the adjudication process.

*F. Drug Treatment Courts in Action*¹⁷⁹

Although most DTCs function under the same basic ideals and contain very similar components, the needs of the community shape

¹⁷⁵ GOLDKAMP, *supra* note 47, at 15.

¹⁷⁶ *Id.* at 7.

¹⁷⁷ SPECIAL DRUG COURTS, *supra* note 46, at 10.

¹⁷⁸ DEFINING DRUG COURTS, *supra* note 125, at 7.

¹⁷⁹ For an up-to-date discussion of the operation of Drug Treatment Courts throughout the country, see CAROLINE S. COOPER, AMERICAN UNIVERSITY, 1997 DRUG COURT SURVEY REPORT: EXECUTIVE SUMMARY (1997) [hereinafter 1997 DRUG COURT SURVEY REPORT]. See also Michael L. Pendergast & Thomas H. Maugh II, *Drug Courts: Diversion that Works*, THE JUDGES’ J., Summer 1995, at 10 (discussing the Miami, Oakland, and Portland DTCs); COUNTYWIDE CRIMINAL JUSTICE COORDINATION COMMITTEE, COUNTY OF LOS ANGELES, DRUG COURTS IN LOS ANGELES: PRELIMINARY DATA 1994-96 (1996) (discussing the DTC experiences in Los Angeles County) [hereinafter DRUG COURTS IN LOS ANGELES].

the final composition and efforts of a given DTC. Each community faces different drug problems and different addict populations. For these reasons, DTCs are not a mirror image of one another, but vary from jurisdiction to jurisdiction. The emphasis on successfully lowering drug use and recidivism stand as the benchmarks for local DTCs, not adherence to some predetermined design. Perhaps more than any other influence which may shape DTCs, a jurisdiction's political realities and local legal culture determine what kind of programs the court will embrace. The following examples of operating DTCs reflect the diverse patterns the DTC concept assumes throughout the country.

1. The Miami Drug Court in Dade County, Florida

As previously noted, the Miami Drug Court is the first of its kind in the country. Started in the summer of 1989, the Miami Drug Court was a response to "the paralyzing effect that drug offenses were having on the Dade County court system."¹⁸⁰ After much study, associate chief judge of the eleventh circuit, Judge Herbert M. Klein, "concluded that the answer lay not in finding better ways of handling more and more offenders in the criminal justice system, but in 'determining how to solve the problem of larger numbers of people on drugs.'"¹⁸¹ The answer was treatment for certain drug offenders to control their addiction to drugs and continued criminal behavior.

Miami's Drug Court "places defendants in the Diversion and Treatment Program,"¹⁸² which provides a certain type of drug offender with treatment, counseling, acupuncture, educational programs, and vocational services.¹⁸³ Although program administrators "acknowledge that the . . . [program] is much more complex—and initially more costly—than prosecution,"¹⁸⁴ successful completion of the program results in a defendant who will not repeatedly enter and exit the criminal justice system at significant costs to the court system. The innovation that made the Miami Drug Court so different from previous diversionary models was that a single court oversaw the treatment program. With Miami's single drug court system,

Arrestees and program participants find they can not manipulate the court system in the way they anticipate or may have done in the past. They cannot ask the public defender to get them off on a

180 FINN & NEWLYN, *supra* note 69, at 10.

181 *Id.* at 10–11.

182 *Id.* at 3.

183 *See id.* at 2.

184 *Id.*

technicality, lie to the probation officer, or get away with feigning innocence to the judge.¹⁸⁵

The structure of the single drug court system promotes accountability on the part of the defendant and the court in trying to combat the defendant's addiction.

In order to participate in the Miami Drug Court's treatment program, a defendant must first meet certain eligibility criteria. "[T]he defendant must be charged with possessing or purchasing drugs, and the State Attorney must agree to diversion. Defendants who have a history of violent crime, have been arrested for trafficking, or have more than two previous non-drug felony convictions are ineligible."¹⁸⁶

The eligibility criteria reflect both the public safety concerns of the State Attorney's Office and the court's general desire to make treatment available to as many addicted users as possible. Once limited to "first time offenders,"¹⁸⁷ the program now admits arrestees no matter how many times they have been charged with or convicted of possession.¹⁸⁸ Arrestees charged with marijuana possession remain the one exception to this set of criteria; they are deemed ineligible.

The treatment program contains three phases which a defendant must successfully complete to graduate. Phase I, labeled "detoxification," entails stopping drug use and ending physical dependence on the drug if required. The treatment processes used to attain these two preliminary goals are several. First, the court transfers the assigned defendants to the main treatment provider for intake processing, which involves psychosocial assessments and the creation of an individual treatment plan.¹⁸⁹ Then begins the defendant's routine of supplying the court with a daily urine sample, court appearances for treatment updates, and voluntary acupuncture sessions to relieve the defendant's drug cravings.¹⁹⁰ Phase I generally lasts twelve to fourteen days, but the duration of this phase may vary with the defendant's progress.¹⁹¹ Defendants "who realize they cannot control their craving can ask to be removed temporarily from the program and incarcerated for 2 weeks to take advantage of the jail's . . . treatment beds reserved specifically for use by the Drug Court."¹⁹² Before completing the detoxification phase, the defendants must attend twelve sessions

185 *Id.* at 4.

186 *Id.* at 3.

187 *Id.*

188 *See id.*

189 *See id.* at 5.

190 *See id.*

191 *See id.*

192 *Id.* at 7.

with a primary drug treatment counselor "and achieve at least 7 consecutive clean urine results before they can move to Phase II."¹⁹³ However, in following the DTC therapeutic approach, the treatment counselor can recommend that a defendant move on to the next phase even if the defendant does not meet the requisite formal requirements.¹⁹⁴ The DTC judge also looks at the defendant's entire performance before making a decision about the defendant's advancement to the next phase of treatment.¹⁹⁵

Phase II, stabilization, begins when the judge "believes . . . [the defendant has] shown enough progress to function successfully in a less structured treatment environment."¹⁹⁶ During Phase II, defendants continue to pursue drug abstinence by going to group and individual counseling sessions.¹⁹⁷ In many instances, the defendant may continue to attend acupuncture sessions on a voluntary basis to mitigate the defendant's craving for drugs.¹⁹⁸ In Phase II, as in every phase of treatment, the defendant may select the makeup of her treatment regime as long as the required urine tests remain clean of drugs and she attends all of her counseling sessions.¹⁹⁹ Phase II nominally lasts fourteen to sixteen weeks, although the defendant may remain in this phase as long as one year if she is not able to consistently sustain a drug-free lifestyle.²⁰⁰ The therapeutic and collaborative structure of the court may require that the judge and the treatment staff recycle a defendant from Phase II back through Phase I if the individual is having difficulty staying off of drugs.²⁰¹

Once a defendant has completed Phase II, she moves into the "aftercare" stage, Phase III. During this phase of treatment, the emphasis on a defendant's living free of drugs continues, but with a new twist—academic and occupational preparation for a new type of life style.²⁰² The defendant now attends one of the two Miami-Dade county community college campus settings for literacy classes, GED classes, and possibly community college courses.²⁰³ The defendant still provides the court with urine samples every thirty to sixty days, but

193 *Id.*

194 *See id.*

195 *See id.*

196 *Id.*

197 *See id.*

198 *See id.* at 7–8.

199 *See id.* at 8.

200 *See id.*

201 *See id.*

202 *See id.*

203 *See id.*

this portion of the treatment program encourages the defendant to maintain sobriety on her own.²⁰⁴ "If a . . . [defendant's] urine samples start to come back positive, . . . the counselor may increase the number of individual and group sessions and require more frequent urine testing. The counselor may also request an immediate court appearance."²⁰⁵ Phase III lasts approximately thirty-six weeks, although as in the other phases, the court may require a defendant to cycle through Phase III again or recycle through Phase II if significant relapses of drug use have occurred.²⁰⁶ Upon satisfactory completion of the program, the defendant makes a final appearance before the court at which time the drug court judge discharges the defendant from the program and the prosecutor then dismisses the charges.²⁰⁷

Twelve months later, the court seals the arrest record of any client with no previous felony conviction who has not been rearrested and has paid the program fee. First time offenders can then legally report on any job application that they have never been arrested. However, police and fire departments can examine the record if the client ever applies for a job in public safety.²⁰⁸

Very rarely does the Miami Drug Court judge remove a defendant from the treatment program.²⁰⁹ If removal of a defendant from the program does occur, whether due to a rearrest for drugs or because the judge believes the defendant can not stop using drugs, the drug court sends the case to another court for disposition and possible incarceration.²¹⁰

The number of participants and the decreased rate of recidivism for program graduates underscores the success of the Miami Drug Court in getting addicts off of drugs. Program administrators estimate that between June 1989 and March 1993, approximately 4500 defendants entered the drug court program.²¹¹ This number represents about 20% of the arrestees charged with drug-related crimes.²¹² As of June 1993, approximately 60% of all defendants diverted to drug

204 *See id.*

205 *Id.* at 9.

206 *See id.*

207 *See id.*

208 *Id.*

209 *See id.* at 10.

210 *See id.*

211 *See id.* at 12; *see also* DRUG COURT ACTIVITY: SUMMARY INFORMATION, *supra* note 72, at 3 (placing this number at 11,600 total participants enrolled since 1989).

212 *See* FINN & NEWLYN, *supra* note 69, at 13.

court have graduated or are still undergoing treatment.²¹³ In a recent report on drug court activity around the nation, Miami's Drug Court recidivism rates were as follows: 9.7% rearrested and convicted twelve months after graduation, 13.2% after eighteen months, and 24% five years after graduation.²¹⁴ These numbers compare very favorably with the general drug arrest recidivism rate in Miami, which program administrators estimate at up to 60%.²¹⁵

2. Baltimore City, Maryland's Substance Abuse Treatment and Education Program (S.T.E.P.) and Drug Treatment Court²¹⁶

The Baltimore City DTC, labeled S.T.E.P., began in the city's district court on March 2, 1994.²¹⁷ This DTC began with the release of a 1990 report by a special committee of the Bar Association of Baltimore City, chaired by former Judge George Russell, Jr., which described the incredible impact of drugs on the Baltimore criminal justice system.²¹⁸ Similar to Miami, the amount of drug-related criminal cases entering the Baltimore criminal justice system was on the verge of overwhelming and degrading the capability of the local courts to operate effectively. Statistics indicated that by 1990, over 50% of felony prosecutions in Baltimore City were for drug offenses, a substantial increase over the 35% registered in 1986.²¹⁹ Baltimore's statistics also indicated that 80–95% of the felony prosecutions had drugs at their core and that 55% of the city's murders were drug-related.²²⁰ In addition, 80% of the state's prison population had a history of drug use, while 80–90% of the those people on probation had a history of drug or alcohol abuse, and 41% of the city's probationers who violated their probation did so to commit drug-related offenses.²²¹ One of the more shocking revelations in the report dealt

213 See *id.*; see also DRUG COURT ACTIVITY: SUMMARY INFORMATION, *supra* note 72, at 3 (estimating the program's retention rate to be 73%).

214 See DRUG COURT ACTIVITY: SUMMARY INFORMATION, *supra* note 72, at 6.

215 See FINN & NEWLYN, *supra* note 69, at 13.

216 See generally William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467 (1996) (describing S.T.E.P., its history, and providing alternate jurisprudential theories for DTCs).

217 See *id.* at 479.

218 See generally THE BAR ASS'N OF BALTIMORE CITY, THE DRUG CRISIS AND UNDERFUNDING OF THE JUSTICE SYSTEM IN BALTIMORE CITY, REPORT OF THE RUSSELL COMMITTEE (1990) [hereinafter RUSSELL REPORT]; see also McColl, *supra* note 216 (providing additional information about the Russell Committee and S.T.E.P.).

219 See RUSSELL REPORT, *supra* note 218, at 14.

220 See *id.* at 3.

221 See *id.* at 3, 18–19.

with the funds expended on incarceration versus education in Baltimore. It was "noted that the cost of incarceration at the City Jail is \$35 a day per inmate, \$23 more per day than the daily cost per student in the Baltimore City School system."²²²

The report concluded the following:

The appalling fact is that because the system fails through lack of resources or resolve to effectively treat the problem of drug abuse when the offender first encounters the system, the same individuals return over and over again. To simply house these offenders at great expense, is a short sighted and ultimately a prohibitively expensive and self-defeating approach to the problem. To perpetuate an underfunded, ineffective, hurried and, on occasion, unfair criminal justice system for which those subject to the system have no respect, is little better than having no system at all.²²³

In addition to other recommendations, the report advocated that the city look seriously at the concept of DTCs and treatment programs as potential solutions to some of the court system's drug-related adjudication problems.²²⁴ "Whether one employs a cost benefit analysis or just good sense, effective drug abuse treatment is the only answer to reducing drug-related criminal cases."²²⁵

A follow-up report by the Russell Committee in 1992 found that despite the implementation of certain expedited case management techniques for drug cases, "[t]he State must recognize that incarceration without treatment is fiscally irresponsible and not an adequate solution for drug related crime."²²⁶ The committee's report proposed establishing special drug courts and expanding treatment programs to deal with the massive inflow of first-time drug offenders who have entered Baltimore's criminal justice system.²²⁷

The Baltimore City DTC program began Phase One of its operations on March 2, 1994, and added Phases Two and Three on October 19, 1995, and March 6, 1996, respectively.²²⁸ Phase One of the Baltimore City DTC project involves drug offenders at the district court level, while Phases Two and Three focus on offenders at the circuit

²²² *Id.* at 26.

²²³ *Id.* at 6 (footnote omitted).

²²⁴ *See id.* at 46-47.

²²⁵ *Id.* at 46.

²²⁶ THE BAR ASS'N OF BALTIMORE CITY, THE DRUG CRISIS AND UNDERFUNDING OF THE JUSTICE SYSTEM IN BALTIMORE CITY, SUPPLEMENTAL REPORT OF THE RUSSELL COMMITTEE 28 (1992) [hereinafter SUPPLEMENTAL RUSSELL REPORT].

²²⁷ *See id.* at 27.

²²⁸ *See* McColl, *supra* note 216, at 479.

court level.²²⁹ Despite the difference in their entry points into the DTC system, all offenders have access to the same treatment programs.²³⁰ Some changes have taken place since the inception of the three phases described above, and the following description of the S.T.E.P. system reflects the current program.

Like other DTC programs, the Baltimore program only accepts drug offenders who have been screened and meet the program's eligibility criteria.²³¹ The program's referral process can occur in one of four ways: (1) Pretrial Detainee Referral Process, (2) Pretrial Non-Detainee Referral Process, (3) Courtroom Population Referral Process, or (4) Violation of Probation Referral Process.²³² The Pretrial Detainee Referral Process requires the State's Attorneys Office (SAO) Quality Case Review Team to screen detainees who are committed to the Baltimore City Detention Center (BCDC) for S.T.E.P. eligibility within two days of commitment.²³³ The SAO retains the right to "disqualify any individual who may otherwise be eligible; however, the reasons shall be noted" ²³⁴ Within four days after commitment, the SAO and the Office of the Public Defender (OPD) hold a conference to discuss possible S.T.E.P. cases.²³⁵ Within five days of commitment, the OPD subsequently takes the offers to the selected defendants, explains the terms of the agreement to the offenders, and confirms their acceptance of the terms of the program.²³⁶ The OPD then forwards acceptances and rejections to the SAO, which in turn forwards the charging documents to the SAO drug court unit for docketing on the DTC calendar.²³⁷ Within six days of the commitment, the Assessment Unit (ASU) conducts an assessment of the defendant utilizing the Addiction Severity Index (ASI) and the Psychopathy Checklist Revised (PCLR) to determine the individual's motivation for treatment and behavioral patterns associated with criminality.²³⁸

The Pretrial Non-Detainee Referral Process applies to those persons "who have posted bail or who are released on personal recognizance and who are under the supervision of PTS [Pretrial Services]

229 *See id.*

230 *See id.*

231 *See* S.T.E.P.—DRUG COURT PROCEDURES MANUAL: STEP UP AND OUT, SUBSTANCE ABUSE TREATMENT AND EDUCATION MANUAL, BALTIMORE, MD. §§ 2–3 [hereinafter S.T.E.P. MANUAL].

232 *See id.* § 3.

233 *See id.* § 3.

234 *Id.*

235 *See id.*

236 *See id.*

237 *See id.*

238 *See id.* §§ 3, 4.

...²³⁹ These defendants will be screened by case managers and, if eligible, must sign a Drug Treatment Court Orientation and Interest Notice form and be interviewed by the OPD.²⁴⁰ PTS case managers then forward all screening forms to the S.T.E.P. program coordinator and the SAO, and the SAO selects defendants for the program and passes those names on to the ASU within three days.²⁴¹

The Courtroom Population Referral Process demonstrates the need for DTCs to remain under the umbrella of the traditional court system. In this variation of the S.T.E.P. DTC process, a S.T.E.P. referral can be made from a scheduled trial on the initiation of the state, the defense, or the court.²⁴² Recommended defendants proceed to the SAO drug court unit and complete the requisite screening forms for the program.²⁴³ The SAO forwards the results to the court, and if the defendant is eligible, the SAO provides the defendant with an assessment appointment and a date for the S.T.E.P. hearing.²⁴⁴

The last type of entry point for S.T.E.P. participation is the Violation of Probation Referral Process. In this process, either the court, the state, the defense, or the probation officer can recommend the transfer of the defendant from probation to S.T.E.P.²⁴⁵ The SAO must still screen the defendant and obtain an assessment from the ASU.²⁴⁶ The transferring court will conduct the violation hearing but will refer the case to the S.T.E.P. court for disposition.²⁴⁷ "All defendants who enter the program pursuant to referral at a VOP [violation of probation] hearing will execute a VOP Consent to Transfer Probation Form [T]he transferring judge shall also execute a Transfer of Probation Order."²⁴⁸

Once the initial referral process is complete, the defendant enters the program through one of three tracks. The "three-track" entry method employed by the Baltimore DTC program differentiates the city's program from other DTC programs around the country. The three-track system consists of a Probation track, a Probation Before Judgment (PBJ) track, and a Violation of Probation (VOP) track, each of which focuses on different types of drug offenders entering the

239 *Id.* § 3.

240 *See id.*

241 *See id.*

242 *See id.*

243 *See id.*

244 *See id.*

245 *See id.*

246 *See id.*

247 *See id.*

248 *Id.*

criminal justice system.²⁴⁹ The Probation track represents a post plea adjudication model which requires the defendant to enter a guilty plea and sign and execute a S.T.E.P. agreement. "Compliance with the S.T.E.P. agreement and the individualized case management plan . . . become[s] a special condition of probation."²⁵⁰ When the defendant successfully completes the program, the court terminates the individual's probation.²⁵¹ The second track of the system allows the DTC to give an individual probation before judgment. In order to enter and complete the program, the PBJ defendant must enter a guilty plea, sign the S.T.E.P. agreement, and uphold the conditions of the agreement.²⁵² When the defendant successfully completes the program, the DTC will cancel the defendant's probation.²⁵³ The third track is the VOP track. Under the VOP track, the defendant's case must first be referred to the DTC when the defendant has been found in violation of her probation.²⁵⁴ Whatever track the defendant takes, once the DTC has the case, the DTC judge sentences the defendant and places her on probation, which includes signing and executing the S.T.E.P. contract.²⁵⁵

The S.T.E.P. program's components and treatment strategies all reflect the therapeutic jurisprudential nature of the court. The program requires the defendant to attend Narcotics Anonymous meetings daily until entrance into treatment, see the treatment provider five days a week once treatment begins, report to the case manager twice weekly, provide urine samples twice weekly, and appear in court at least twice monthly for progress reports.²⁵⁶ The DTC holds judicial progress reports every two to six weeks in open court to check on the defendant's treatment progress.²⁵⁷ At these judicial progress hearings, the court may hand out sanctions or incentives depending on the defendant's failures or progress toward attaining treatment objectives.²⁵⁸ DTC sanctions "demonstrate that there are immediate and swift consequences" for not following treatment protocol, which range from verbal admonishments to incarceration.²⁵⁹ However, because

249 *See id.* § 5.

250 *Id.*

251 *See id.*

252 *See id.*

253 *See id.*

254 *See id.*

255 *See id.*

256 *See id.* § 6.

257 *See id.*

258 *See id.*

259 *Id.*

the system acknowledges the relapse aspect of addiction, a defendant's treatment failures do not result in probation violations and the filing of additional charges.

As in the Miami treatment program, the defendant goes through various stages of outpatient treatment, which may entail daily sessions depending on the addiction level of the individual.²⁶⁰ The defendant attends treatment sessions with one of four licensed private treatment providers, all of whom "abide by basic written treatment protocol[s]."²⁶¹ The program does provide for acupuncture treatment when necessary, and the DTC can order the defendant into this course of treatment.²⁶² One aspect of the S.T.E.P. court which makes it relatively unique among DTCs is the court's recognition and acceptance into the program of those individuals with the dual diagnosis of substance abuse and a major psychiatric disorder.²⁶³

The Baltimore DTC program has experienced retention and recidivism rates which mirror the successes of the Miami Drug Court. As of May 15, 1997, the circuit and district DTC programs had enrolled 297 and 1334 individuals with retention rates of 93% and 52%, respectively, and had evidenced low recidivism, which included a 14% rearrest rate and a 3% conviction rate for treatment graduates since the program's inception.²⁶⁴

3. Oakland, California's F.I.R.S.T. Diversion Drug Court

Oakland's Fast, Intensive, Report, Supervision, and Treatment Diversion (F.I.R.S.T.) program started on January 2, 1991.²⁶⁵ The impetus for this program came from a judicial Substance Abuse committee cochaired by Judge Peggy Hora and Judge Jeffrey Tauber, the latter of whom presided over one of Oakland's Diversion courts.²⁶⁶ Prior to the initiation of F.I.R.S.T., Judge Tauber presided over a traditional court in which one-third of the defendants granted a hearing for diversion eligibility never reported for their initial court appearance.²⁶⁷ Of those defendants who did appear and who met the eligibility requirements and were admitted to the diversion program, three-quarters would fail out of the program.²⁶⁸ Through the cooperation

260 *See id.*

261 *Id.* § 7.

262 *See id.*

263 *See id.*

264 *See* DRUG COURT ACTIVITY: SUMMARY INFORMATION, *supra* note 72, at 1.

265 *See* TAUBER, *supra* note 151, at 1.

266 *See id.*

267 *See id.*

268 *See id.*

of the Oakland-Piedmont-Emeryville Municipal Court, the Alameda County Probation Department, the Alameda County Public Defender's Office, and the Alameda County District Attorney's Office, Judge Tauber created the F.I.R.S.T. program to provide increased accountability, structure, and effectiveness to Oakland's drug diversion program.²⁶⁹ As in other DTCs, this program combines the power of the court with the therapeutic principles of addiction treatment to help people out of the repetitive cycle of drug use, crime, and incarceration. F.I.R.S.T. uses a unique system of contract-based tasks and incentives to encourage individuals to stay in and finish the treatment program.²⁷⁰

Phase I of the F.I.R.S.T. program encompasses the diversion placement process. Oakland's F.I.R.S.T. diversion program is based on statutorily mandated diversion for eligible defendants.²⁷¹ The diversion process begins during arraignment, within two days of a drug defendant's release from custody.²⁷² Before the arraignment proceedings, the District Attorney's Office (DAO) puts together a packet of information which contains a declaration of eligibility, a police report, and the individual's county and state criminal histories.²⁷³ The DAO determines the defendant's statutory eligibility at the time of arraignment, and if the defendant is eligible, the presiding judge requests a release without bail and that a diversion report be sent to the drug court for a diversion referral and plea hearing the next day.²⁷⁴ During the afternoon of the next day at a diversion referral hearing in the drug court, the Public Defender's Office interviews the defendant about representation and the Pretrial Service personnel interview the defendant for a diversion and release from custody recommendation.²⁷⁵ An individual must be released from custody in order to receive a grant of diversion.²⁷⁶ The following day, a probation officer reviews the defendant's diversion and release report and makes a recommendation about diversion for the defendant.²⁷⁷ Finally, the District Attorney, the Public Defender, and the drug court judge review

269 See *id.*

270 See *infra* text accompanying notes 282, 289 for a description of the contract system.

271 See generally CAL. PENAL CODE §§ 1000-1000.4 (West Supp. 1998) (stating criteria for diversion program in the state); CAL. PENAL CODE. § 1000.5 (West Supp. 1998) (recognizing drug treatment courts).

272 See TAUBER, *supra* note 151, at 4.

273 See *id.* at 8.

274 See *id.*

275 See *id.*

276 See *id.*

277 See *id.*

the probation officer's recommendation, and the judge makes a decision about diversion for the particular defendant.²⁷⁸

Phase II of the program involves a ten week supervision and evaluation period during which the defendant must complete a court-prescribed set of twenty-two separate tasks set forth in the Diversion Contract.²⁷⁹ Upon receiving the grant of diversion, the defendant must report to a court-appointed probation officer for an initial group orientation.²⁸⁰ During the first orientation session, the defendant's probation officer describes the rules and regulations of the F.I.R.S.T. Drug Diversion Contract which the defendant must sign in order to enter the program.²⁸¹ The Contract sets out the twenty-two required tasks, which are as follows:

- a single assessment interview and five group probation sessions with the court-appointed probation officer (6 points);
- attendance at four drug education classes and one AIDS education class (5 points);
- taking three urine tests with negative results (3 points);
- registering with and participating in a community counseling program over the course of the diversion program (7 points);
- making at least one payment toward the \$220 diversion program fee (1 point).²⁸²

During the ten weeks, the drug court holds frequent progress report hearings to review the defendant's performance in Phase II and evaluates compliance with the Phase II Diversion Contract.²⁸³ At the final hearing, the court can graduate a defendant to Phase III and may grant incentives to divertees who have successfully completed the twenty-two tasks.²⁸⁴ Diversion incentives include up to a nine month reduction in the twenty-four month diversion program and as much as a \$100 reduction in the diversion program fee.²⁸⁵ For divertees who have not performed their portion of the Contract satisfactorily, the court may do any of the following: give the divertee a five week extension to complete Phase II; recycle the divertee through Phase II with a five week progress report and possible jail time as smart punishment;

278 *See id.*

279 *See id.* at 9.

280 *See id.*

281 *See id.*

282 *See id.*

283 *See id.*

284 *See id.*

285 *See id.*

or assign the divertee to more individualized probation to take care of special problems like mental disorders.²⁸⁶

Phase III involves the final supervision and treatment period.²⁸⁷ During this three-month period, the court requires the divertee to complete twenty-four tasks under a Phase III contract.²⁸⁸ The Phase III contract is composed of the following tasks:

- attending eight group probation sessions (8 points);
- meeting with the probation officer twice on an individual basis (2 points);
- taking four urine tests with negative results (4 points);
- participating in community counseling for eight weeks (8 points);
- making two diversion fee payments (2 points).²⁸⁹

The court conducts a Phase III progress report hearing to review the divertee's performance. At the end of the three month time frame, divertees who have successfully fulfilled their contract requirements may graduate and have the charges dismissed²⁹⁰ or have the case continued for a standard three month period for a further court progress report.²⁹¹ Divertees who have performed inadequately may be required to recycle through Phase III with a five week progress report that may include jail time, or they may be terminated from the diversion program and have their criminal proceedings reinstated.

Without a doubt, the Alameda County Probation department in Oakland plays a critical part in the success of this program.²⁹² Both prosecutors and judges within the Oakland DTC recognize that without the day-to-day workings of the probation department, the F.I.R.S.T. program would not be the resounding success it has become over the past few years.²⁹³

F.I.R.S.T.'s participation, retention, and recidivism rates appear to mirror the successes of other DTCs. As of May 15, 1997, the Oakland Municipal and Superior Courts had 5,564 and 1,879 participants enrolled, respectively, with corresponding program retention rates of

286 *See id.*

287 *See id.* at 10.

288 *See id.*

289 *See id.*

290 *See* CAL. PENAL CODE §§ 1000-1000.5 (West Supp. 1998).

291 *See* TAUBER, *supra* note 151, at 10.

292 *See* Videotape: Drug Treatment Courts: The Prosecution Perspective (Continuing Legal Education Programs and Publications, The Rutter Group, 1994) (on file with author) [hereinafter *The Prosecution Perspective*].

293 *See generally* Setterberg, *supra* note 165, at 58; *see also* *The Prosecution Perspective*, *supra* note 292.

50% and 84%.²⁹⁴ The Oakland Municipal Court experienced a 50% drop in recidivism for divertees going through the program.²⁹⁵

4. Kalamazoo, Michigan's S.A.D.P. for Female Offenders²⁹⁶

The Kalamazoo Substance Abuse Diversion Program (S.A.D.P.) for Female Offenders "grew out of a two-part seminar on sentencing felony drug offenders sponsored by the Michigan Judicial Institute

294 See DRUG COURT ACTIVITY: SUMMARY INFORMATION, *supra* note 72, at 3.

295 See *id.* at 6.

296 One ought to consider the evidence of the increase in female drug-related arrests and imprisonment.

In recent years, women, particularly women arrested on drug charges, have constituted the fastest growing population within the criminal justice system. From 1982 to 1991, the number of women arrested for drug offenses, including possession, manufacturing, and sale, increased by 89 percent.

....

.... In 1987, 87 percent of State correctional institutions for women reported that 40 percent or more their inmates needed treatment for drug problems at time of intake. By all indications, few drug-abusing women offenders actually receive treatment, either in custody or in the community, and little information is available on how programs for women offenders determine needs, plan treatment, and perform services.

....

... [G]iven the nature of drug dependence, which in the case of severe, long-term use—characteristic of many women offenders—tends to be a chronic, relapsing condition, a single treatment episode is rarely sufficient to produce more than limited short-term benefits. Therefore, . . . more programs [are] needed . . . that provide continuing support for women . . .

JEAN WELLISCH ET AL., U.S. DEP'T OF JUSTICE, DRUG-ABUSING WOMEN OFFENDERS: RESULTS OF NATIONAL SURVEY 1-6 (1994) (citations omitted). For an in-depth discussion of the problems and potential solutions for the sentencing of pregnant substance abusers, see Peggy Hora & Barrie Becker, *Judicial Considerations When Sentencing Pregnant Substance Users*, THE JUDGES' J., Spring 1996, at 3.

In 1994, 64,400 women were serving sentences in Federal and state prisons, five times the number incarcerated in 1980. This increase is due largely to drug offenses and to crimes committed to support addiction, like theft and prostitution.

.... In state prisons, the number of women drug offenders jumped by more than 400 percent between 1986 and 1991. Incarceration increased even more dramatically for black women drug offenders, jumping 828 percent during the same period.

DRUG STRATEGIES, KEEPING SCORE: WHAT WE ARE GETTING FOR OUR FEDERAL DRUG CONTROL DOLLARS 10 (1996) [hereinafter KEEPING SCORE]. See *Alternatives to Incarceration*, *supra* note 70, at 1921-44. "The 'male standard' of incarceration fails female offenders by ignoring the ways in which female offenders' life circumstances, as well as the nature of their crimes, differ from those of male offenders." *Id.* at 1922 (citations omitted).

(MJI) in 1991.”²⁹⁷ Although initially directed towards “non-violent male and female offenders,”²⁹⁸ the program was reduced in scope to include only female drug offenders.²⁹⁹ The S.A.D.P. represents the culmination of “a legislative attempt to reduce jail and prison overcrowding through the use of community alternatives.”³⁰⁰ In 1988, Michigan enacted the Michigan Community Correction Act³⁰¹ to create a mechanism for developing methods of dealing with offenders by means other than incarceration.³⁰² Although deemed a “demonstration project,” the S.A.D.P. has been in operation since 1992 and has amassed a positive record of success.

The program targets substance abusing women who have been charged with “nonviolent felony offenses”³⁰³ and women probationers who are facing probation violations arising out of substance abuse, diverting them from jail and prison into treatment programs.³⁰⁴ Divertees are required to engage in substance abuse treatment while attending biweekly DTC sessions.³⁰⁵ Participants in the program must submit to regular drug testing and report biweekly to the S.A.D.P. coordinator or case manager.³⁰⁶ They must also participate in either Alcoholics Anonymous or Narcotics Anonymous twelve-step meetings. “Upon successful completion of treatment and other program components, and remaining drug and arrest free for one year, participants have an opportunity to have pending charges dismissed.”³⁰⁷

The referral process can take one of three routes: diversion referrals, probation referrals, or bail bond screener referrals. Diversion referrals can take place at either the pretrial stage or the preliminary

297 Michael G. Cianfarano, *Kalamazoo County's Diversion Program for Female Offenders*, COLLEAGUE, Oct. 1992, at 15.

298 *Id.*

299 In January of 1997, the S.A.D.P. received a grant from the U.S. Department of Justice to expand the court to include male offenders. KALAMAZOO COUNTY SUBSTANCE ABUSE DIVERSION PROGRAM: POLICIES AND PROCEDURES 1 (1998). In 1998, the county started a juvenile DTC program. The adult programs remain gender-specific because the issues that men and women face through their addiction experiences are so distinct. The characteristics and procedures of the program for women described in this section generally apply to those for men and juveniles as well.

300 Cianfarano, *supra* note 297, at 16.

301 *See id.*

302 *See id.*

303 KALAMAZOO COUNTY SUBSTANCE ABUSE DIVERSION PROGRAM FOR WOMEN OFFENDERS, POLICIES AND PROCEDURES 1 (1995) [hereinafter KALAMAZOO COUNTY SUBSTANCE ABUSE DIVERSION PROGRAM].

304 *See id.*

305 *See id.*

306 *See id.*

307 *Id.*

examination stage. At both stages, referrals "divert individuals from continued prosecution on the involved offense."³⁰⁸ The pretrial stage referral process begins when the Office of Prosecuting Attorney (OPA) evaluates warrant requests and identifies an offender who meets the eligibility requirements.³⁰⁹ In an interesting and imaginative policy decision, the Prosecuting Attorney for Kalamazoo County issued a directive to assistant prosecutors that when reviewing any warrant request, they must assume the defendant will qualify for S.A.D.P.; the burden is on the assistant to justify rejection from S.A.D.P. and referral to traditional prosecution. If a candidate qualifies, the OPA staff informs the S.A.D.P. coordinator who schedules a substance abuse screening session.³¹⁰ If the candidate meets the screening criteria, she is arraigned before the S.A.D.P. judge rather than in a traditional court.³¹¹ The S.A.D.P. judge is cross-assigned by the State Court Administrative Office (SCAO) and is authorized to act as either a district or circuit court judge in all S.A.D.P. proceedings.³¹² At the arraignment, the S.A.D.P. judge "makes participation in the diversion program a condition of bond . . . [and] offenders [must] waive their right to an attorney and their right to a speedy trial"³¹³ as long as they remain in the program.³¹⁴ After arraignment, the treatment provider

308 *Id.* at 3.

309 *See id.*

310 *See id.*

311 *See id.* at 4.

312 *See id.* at 5.

313 Cianfarano, *supra* note 297, at 18.

314 *See* MICH. CT. R. 6.106(D). This subrule expands the conditions that may be attached to pretrial release, including many of which are useful for controlling addictive behavior.

- (D) Conditional Release. If the court determines that the release described in subrule (C) will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate including

...

- (2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

...

- (b) not use alcohol or illicitly use any controlled substance;
- (c) participate in a substance abuse testing or monitoring program;
- (d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

conducts a complete assessment "within 24 hours"³¹⁵ and then makes a treatment referral.

Occasionally, the OPA may not identify the candidate until the preliminary examination, and if so, the assistant prosecutor will explain the possibility of participation in the S.A.D.P. to the offender and her attorney, if she is represented.³¹⁶ If the candidate agrees to enter the program, didate agrees to enter the program, she "will be required to waive her right to preliminary examination within 12 days of the arraignment, and the preliminary examination will be adjourned for a period of two weeks."³¹⁷ The candidate must contact the coordinator "within 24 hours [for screening] following the original preliminary examination date."³¹⁸ Once the coordinator completes the screening process, the OPA's office is notified that the candidate is accepted into the program and the candidate is diverted, followed by an appropriate treatment referral.

The probation referral process screens female probationers who have "violated terms"³¹⁹ of their probation. Instead of going through the probation violation hearing, the probationer is presented with an opportunity to take part in the S.A.D.P.³²⁰ After the probation agent identifies the offender as a potential candidate, the coordinator conducts an initial assessment. If the assessment reveals a substance abuse

(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

...

(g) comply with a specified curfew;

(h) continue to seek employment;

(i) continue or begin educational program;

(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

...

(l) not enter specified premises or areas . . . ;

...

(n) comply with any other condition, . . . reasonably necessary to ensure the defendant's appearance as required and the safety of the public.

Id.

315 KALAMAZOO COUNTY SUBSTANCE ABUSE DIVERSION PROGRAM, *supra* note 303, at 5.

316 *See id.* at 6.

317 *Id.*

318 *Id.*

319 *Id.*

320 *See id.*

problem, the candidate enters an appropriate drug treatment program.

The bail bond/screener referral process identifies females who meet the program's admission criteria from among the jail population. An interview with the candidate is conducted to examine her substance abuse history and willingness to enter S.A.D.P. Supplied with this background information, the coordinator conducts a substance abuse assessment.³²¹ Once the coordinator determines the candidate's eligibility, the OPA's consent for the individual's participation in the program is obtained.

The S.A.D.P. treatment includes four treatment modalities depending on the candidate's needs: a day treatment track, an intensive outpatient program, an outpatient program, and a residential program.³²² The day treatment tract involves four, five-hour sessions per week, which include group therapy and individual therapy conducted by a female therapist. Intensive outpatient therapy lasts six to eight weeks and encompasses three-hour sessions, four days per week. The outpatient treatment program lasts ten to twelve weeks and requires candidates to take part in a one-hour group therapy session each week as well as three individual sessions; one at the beginning, middle, and end of the treatment program. Participants are enrolled in the program if the treatment provider and the court determine this is necessary, and a funding source can be identified.

The participant must attend court sessions on Friday afternoons.³²³ Prior to each court appearance, the coordinator discusses the participant's progress with the treatment provider, the APA assigned to the court, and the judge.³²⁴ Armed with this information, the judge reviews the progress of each participant in the courtroom, recognizing successes, suggesting improvements, and implementing sanctions if appropriate.³²⁵ Available sanctions and monitoring mechanisms include intensified treatment, electronic tether, incarceration, increased urine drops, community service, day reporting, or increased twelve-step meetings.³²⁶

Participants who successfully complete the first, or treatment, phase are acknowledged in court and enter Phase II of the program.³²⁷ The court will not require Phase II participants who are em-

321 *See id.* at 7.

322 *See id.* at 10.

323 *See id.* at 13.

324 *See id.* at 12.

325 *See id.*

326 *See id.* at 15-16.

327 *See id.* at 17.

played or in school full-time to attend court sessions.³²⁸ In Phase II, the client must report monthly to the coordinator, submit negative urinalysis tests for at least one year on a random basis, and continue both counseling and twelve-step participation. If a Phase II participant experiences relapse or does not comply with other program requirements, she will be returned to Phase I of the program.³²⁹ Clients who repeatedly fail treatment options or program conditions may be terminated from the program upon the agreement of the judge, OPA, coordinator, and treatment provider.³³⁰ If discharged due to lack of success, the former participant returns to the traditional prosecution track.

The retention and recidivism statistics for the program are dramatic. As of July 1988, only 10% of the program's graduates had been arrested on new offenses.³³¹ The program also evidences a 55% retention rate,³³² retention in treatment being one of the most important elements of successful recovery from addiction.³³³ To date twenty-nine of the thirty-three pregnant women enrolled in the program have delivered drug-free babies.³³⁴ In its first five years, the program saved the taxpayers close to \$3 million based upon savings in attorney fees, incarceration, foster care, and medical expenses.³³⁵ In the life of the program, only eleven percent of enrolled participants have been discharged from the program because they were arrested on new offenses.³³⁶

5. Escambia County, Florida Juvenile Drug Court Treatment Program³³⁷

The Escambia Juvenile Drug Court (JDC) began operations in April 1996.³³⁸ In order to establish the JDC, the First Judicial Circuit of Florida procured a grant from the Department of Justice, in addi-

328 See *id.*

329 See *id.*

330 See *id.*

331 Statistics compiled by authors using information on file with the Kalamazoo DTC.

332 *Id.*

333 See *infra* notes 470-74 and accompanying text.

334 See *supra* note 331.

335 See *id.*

336 See *id.*

337 "Drug use is rising dramatically among the nation's youth after a decade of decline . . . Few young people see great risk in using drugs." KEEPING SCORE, *supra* note 296, at 5.

338 See ESCAMBIA COUNTY, JUVENILE DRUG COURT PROGRAM 1 (1996) [hereinafter JUVENILE DRUG COURT PROGRAM].

tion to other funding to cover program costs.³³⁹ The initial scope of the funding was to create a DTC program which would “provide treatment for 40 juvenile offenders.”³⁴⁰ The JDC program encompasses a twelve-month treatment regime, which utilizes a three-phase approach to the problem of juvenile substance abuse.³⁴¹ Not only does the JDC program include substance abuse treatment, it also emphasizes the juvenile offender’s “vocational, educational and spiritual”³⁴² needs. As in other DTC’s, the judge in JDC “supervises and reinforces treatment . . . [through] positive and negative incentives to encourage [the juvenile’s] compliance.”³⁴³ These incentives can be in the form of sanctions such as an increase in the number of court appearances, increased frequency of urinalysis tests, and others.³⁴⁴ “[T]he judge establishes a rehabilitative relationship with the juvenile offender. . . . [T]he courtroom becomes a therapeutic environment supporting the recovering offender and motivating the reluctant.”³⁴⁵

The preliminary screening of the juvenile offender takes place within twenty-four hours of her intake by the Department of Juvenile Justice.³⁴⁶ Although the “primary purpose of the screening is to detect major problems related to substance abuse,”³⁴⁷ it reflects the JDC’s understanding that a juvenile substance abuser on the street will not stop abusing drugs between her arrest and first court appearance. Those nondetained juveniles, once recommended for the program by the SAO, are assigned to the JDC within three weeks. The SAO refers detained juveniles to the JDC Case Coordinator within forty-eight hours of detention. Both of these procedures support the therapeutic understanding of drug addiction and the knowledge that the arrest, in and of itself, will not stop addictive behavior. Getting an addict quickly into a treatment regime is what helps prevent drug intake and the criminal offenses which generally accompany drug use.

Like other DTC’s, the court procedures are designed to reinforce the treatment program. What sets the JDC apart from other DTCs is its focus on the family and social facets of juvenile addiction and drug

339 *See id.*

340 *Id.*

341 *See id.*

342 *Id.*

343 *Id.*

344 *See id.*

345 *Id.*

346 *See id.* The rapid screening process represents an understanding of the nature of drug addiction and a therapeutic procedural response. This process is a key component of a successful DTC.

347 *Id.*

abuse. The JDC recognizes that "[m]any youth and their families, especially those involved in the juvenile justice system, may have psychiatric, psychological, social, economic, and medical problems that complicate recovery."³⁴⁸ In order to combat these problems, the JDC retains two Family Intervention Specialists who "are responsible for working with the juvenile offender and their families."³⁴⁹ These specialists work to improve the juvenile addict's home environment and identify the potential problems associated with the juvenile offender's peers, school, and parental work structure.³⁵⁰ "The goal is to empower parents with the skills and resources needed to independently address the difficulties that arise and to empower youths to cope with family, peer, school and neighborhood problems."³⁵¹

The Adolescent Day Treatment (A.D.T.) program run by the Lakeview Center, Inc.,³⁵² consists of a three-phase treatment program designed to teach the participants the skills necessary to cope with and overcome their addiction. Phase I lasts approximately two months and aims to establish patient "abstinence from all mood altering substances, including alcohol and cannabis."³⁵³ Program treatment methods include group therapy four times a week, twice weekly urinalysis testing done randomly at treatment sessions, and attendance at scheduled JDC hearings.³⁵⁴ Phase II treatment continues with the group therapy sessions three times a week, in addition to the regular urinalysis tests and JDC appearances.³⁵⁵ Phase III reduces the level of group therapy to twice weekly while continuing with all other program activities.³⁵⁶ Throughout the entire treatment process, family therapy groups "are integrated in to the phased treatment plan . . . [to] address ways in which the family can support or undermine the juvenile's involvement in treatment."³⁵⁷ To successfully complete the treatment program, participants must remain in the program for at least one year, remain substance free for a specified period of time,

348 *Id.* at 3.

349 *Id.*

350 *See id.*

351 *Id.*

352 Lakeview Center, Inc. is a drug treatment provider licensed by the state Department of Health and Rehabilitative Services. *See id.* at 2.

353 DRUG AND ALCOHOL ADOLESCENT DAY TREATMENT (A.D.T.) DRUG COURT PROGRAM MANUAL 2 (1996) [hereinafter A.D.T.].

354 *See id.* at 2-3.

355 *See id.* at 3-4.

356 *See id.* at 4-6.

357 JUVENILE DRUG COURT PROGRAM, *supra* note 338, at 2.

and develop their own plan for continuing their recovery and preventing relapse.³⁵⁸

In essence, the JDC provides "early intervention and serves as a meaningful alternative to incarceration"³⁵⁹ for juvenile drug offenders who can participate in the community at large with little risk of committing a violent offense. Through JDC appearances and court-monitored treatment, the juvenile offender is taught the "self-management skills needed to maintain abstinence."³⁶⁰ Preliminary results suggest the JDC concept works. So far, fourteen juveniles have graduated, twenty-four remain involved in the treatment program, and fourteen have been terminated from the program.³⁶¹ Of the fourteen graduates of the JDC, only one has been rearrested on a domestic violence charge.³⁶²

G. DTC Accomplishments

Since the inception of the first DTC in Miami, DTCs across the country have recorded substantial success in retaining participants in treatment programs, reducing recidivism rates, and saving criminal justice system resources. American University's Office of Justice Programs Drug Court Clearinghouse estimates that some 45,000 individuals have enrolled in Drug Court treatment programs, and of these 31,500 have either graduated or are current participants.³⁶³ Based on these figures, the national participation and retention rate in Drug Court treatment programs stands at approximately 70%.

The reductions in recidivism and jail time produced by DTCs can significantly impact the fiscal outlook of a jurisdiction. Primarily, DTCs save money by reducing the number of individuals who require

358 See A.D.T., *supra* note 353, at 6.

359 JUVENILE DRUG COURT PROGRAM, *supra* note 338, at 2.

360 *Id.*

361 Fax from Robin Wright, Senior Deputy Court Administrator, First Judicial Circuit, Florida to John T.A. Rosenthal, law clerk for the Hon. Judge Peggy Hora (Sept. 30, 1997) [hereinafter Wright fax] (on file with authors). Cook County Juvenile Court Judge Michael Stuttley may be using the most innovative and controversial form of therapeutic jurisprudence in his juvenile court. Judge Stuttley sentences some juvenile offenders to community service at local churches in the hopes that the setting will have a positive influence on these offenders. Participating churches must promise not to proselytize the youths involved. See Meg McSherry Breslin, *Troubled Youth Get Spiritual Help*, CHI. TRIB., Sept. 13, 1998, at C1 § 2. For youths involved in substance abuse, this appears to follow the biopsychosocial model of addiction treatment that includes spiritual problems as the fourth element. See *supra* text accompanying note 342.

362 See Wright fax, *supra* note 361. This equates to a 7.14% rearrest rate.

363 See DRUG COURT ACTIVITY: SUMMARY INFORMATION, *supra* note 72, at 1.

jail space for extended periods of time. "In Washington, D.C. a year of drug court cost[s] \$1,800 to \$4,400 per participant. This compares to at least \$20,000 per year to jail the defendant."³⁶⁴ "In Oakland, California, the 1,200 offenders entering drug court annually spend approximately 35 percent fewer days in custody, freeing up jail space"³⁶⁵ for violent offenders. "Conservatively speaking, almost \$3,000,000 in savings to Alameda County law enforcement agencies alone can be directly attributed to [Oakland's] F.I.R.S.T. Diversion Program."³⁶⁶

The story does not end just with savings in the criminal justice system; DTCs produce results in other areas as well. According to the OJP Drug Court Clearinghouse, "[s]ince 1989, more than 200 . . . [non-drug exposed infants] have been born to women enrolled in drug courts."³⁶⁷ Although it is difficult to calculate the medical and health care savings produced by the work of DTCs in the area of prenatal costs, various sources estimate that babies born prematurely due to poor maternal health can require care which costs between \$2,500 to \$5,000 per day.³⁶⁸ These figures indicate that the community derives substantial health care cost savings from appropriate prenatal care and babies born drug free to drug free mothers. Other studies indicate that "for every dollar spent on treatment, about \$7 . . . [is] saved, mainly in reduction of criminal activity and in the hospitalizations for health problems."³⁶⁹ Although these studies used various methods of analysis and evaluation, they all indicate that DTCs generally save both the criminal justice system and the community money in a variety of positive ways.

In response to the upward spiral in interest in DTCs around the country, several conferences and professional organizations have developed to provide interested jurisdictions with DTC information and assistance. On the national level, the establishment of the National Association of Drug Court Professionals (NADCP) stands out as a singularly important development in the furtherance of the DTC concept. The mission statement of the NADCP states: "NADCP seeks to reduce substance abuse, crime and recidivism by promoting and advocating for the establishment and funding of drug courts and providing for the collection and dissemination of information, technical assist-

364 CUTTING CRIME, *supra* note 70, at 20.

365 *Id.*

366 TAUBER, *supra* note 151, at 24.

367 CUTTING CRIME, *supra* note 70, at 20.

368 See Bernard Gavzer, *Can They Beat the Odds?*, PARADE MAGAZINE, S.F. CHRON., July 27, 1997, at 4.

369 TREATMENT DRUG COURTS, *supra* note 61, at 44 (citing CALDATA study).

ance and mutual support to association members.”³⁷⁰ Founded in May 1994,³⁷¹ the NADCP has sponsored four annual conventions which allow various DTC practitioners to come together to share and examine their collective DTC experiences.³⁷² As people within the criminal justice system become aware of the DTC concept, interest in NADCP conferences has expanded accordingly. From an initial conference attended by “620 delegates from 45 states”³⁷³ in January 1995, over 1,400 individuals representing jurisdictions across the country attended the third annual NADCP conference in 1997.³⁷⁴ By the 1998 NADCP annual conference, the number of conference attendees exceeded 2,500.³⁷⁵ The NADCP also created and assists in running the Mentor Drug Court Network, which potential DTC practitioners and community leaders the opportunity to experience the operations of existing DTCs and thereby to gain an insight into the workings and benefits of the DTC concept.³⁷⁶ In addition to the standard mentor courts, there are now mentor courts specifically designed to incorporate the concepts of community policing into drug treatment courts.³⁷⁷ With a membership of some 2,000 individuals and over 120 organizations, the NADCP is fast becoming a focal point for the national DTC movement.³⁷⁸

Recently, the NADCP announced the formation of the Congress of State Drug Court Associations.³⁷⁹ Through a grant from the Office of National Drug Control Policy and the Department of Justice, the congress will meet annually to make policy recommendations to the NADCP Board on DTC issues, in addition to serving as a repository of “materials on state drug court organizations and activities. Model state legislation and uniform codes, as well as state organizational by-

370 Fax from Marc Pearce, Chief of Staff, National Association of Drug Court Professionals, to John T.A. Rosenthal, law clerk for the Hon. Judge Peggy Hora (Aug. 7, 1997) [hereinafter Pearce fax] (on file with authors).

371 See TAUBER, *supra* note 138, at app. D.

372 See generally NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS 3RD ANNUAL TRAINING CONFERENCE, UPDATE (1997) [hereinafter UPDATE].

373 Lehman, *supra* note 153, at 14.

374 See UPDATE, *supra* note 372, at 3.

375 NADCP NEWS 6 (Fall 1998).

376 See generally NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, THE NADCP MENTOR DRUG COURT NETWORK: A REGIONAL APPROACH TO TECHNICAL ASSISTANCE.

377 The Hayward DTC is one of the eight DTCs of this type.

378 See Pearce fax, *supra* note 370.

379 See Congress of State Drug Court Info (visited Nov. 3, 1998) <<http://www.drugcourt.org/csdca.cfm>>.

laws and other documents, will be accessed through the congress.”³⁸⁰ The staff of the congress will also provide technical assistance to state organizations regarding drafting of model legislation and developing a statewide plan for procuring funds to support DTCs.³⁸¹

Other national agencies have been established to help local DTCs become operational. The Drug Courts Program Office of the Office of Justice Programs, United States Department of Justice, aids burgeoning DTCs by providing “grants to support drug court planning efforts . . . [and by giving] technical assistance and training”³⁸² to DTCs. The Drug Courts Program Office presents planning grants, implementation grants, and improvement and enhancement grants to DTCs in an effort to support the DTC concept nationwide.³⁸³ In conjunction with the other national efforts to further enhance the effectiveness of DTCs, the Office of Justice Programs established the Drug Court Clearinghouse and Technical Assistance Project (DCCTAP) on October 1, 1995.³⁸⁴ Under the direction of American University, DCCTAP collects and analyzes DTC data from around the country. DCCTAP also provides technical assistance “to jurisdictions currently implementing drug court programs as well as those which are considering the development or expansion of such programs.”³⁸⁵

The NADCP has also received a grant from the Drug Courts Program Office to create the National Drug Court Institute.³⁸⁶ The institute will provide research on DTC policies and training for DTC personnel around the country.³⁸⁷ All of these national organizations work to develop a better understanding and improvement of the DTC process.

At the regional level, a variety of DTC related organizations have come into existence to help coordinate and facilitate the expansion and effectiveness of DTCs. In California, the California Association of

380 *Id.*

381 *See id.*

382 DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DRUG COURT GRANT PROGRAM FISCAL YEAR 1996: PROGRAM GUIDELINES AND APPLICATION KIT 5 (1996) [hereinafter DRUG COURT GRANT PROGRAM FISCAL YEAR 1996].

383 *See id.* *See generally* OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, DRUG COURT GRANT PROGRAM.

384 DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, FACT SHEET (May 1996).

385 *Id.* at 1.

386 *See Drug Court Initiative* (C-SPAN-2 television broadcast, Dec. 10, 1997) (on file with authors and available through Purdue University Public Affairs Video Archives).

387 *See id.*

Drug Court Professionals (CADCP)³⁸⁸ and the Bay Area Regional Drug Court Network (BARDCN)³⁸⁹ work to establish effective DTC programs throughout California and the Bay Area, respectively. "Dedicated to the establishment of effective Drug Court Programs in the State of California,"³⁹⁰ CADCP promotes DTCs in California. In addition to providing members with up-to-date legislative information relating to DTCs in California and nationally,³⁹¹ CADCP sponsors DTC workshops at California judicial training programs. A relative newcomer to the DTC organizational scene, BARDCN was formed to foster networking, to enhance treatment information, and to coordinate comprehensive DTC programs throughout the DTCs in ten greater Bay Area counties.³⁹² These two DTC organizations represent just a few of the many associations nationwide that support and improve DTCs in their effort to reduce drug addiction and crime in communities across the country.

H. Establishing DTCs: Questions, Concerns, Problems, and Possible Solutions

As the DTC concept continues to expand across the country, communities confront the daunting task of establishing a strong and effective DTC in their jurisdictions. Several key questions must be answered for a DTC to operate efficiently while promoting and safeguarding the community values it is entrusted to enforce. At the First National Drug Court Conference held in December 1993, conferees began to address certain core elements that were deemed essential to the creation of any DTC.³⁹³ It was determined that a detailed planning process lay at the heart of all successful DTCs. "The drug court is really the result of a special collaborative effort, a team approach: first, among criminal justice actors, and, second, between criminal justice actors and treatment providers as well as other social service and com-

388 See Letter from Judge Jeffrey Tauber, Municipal Court, Oakland-Piedmont-Emerlyville Judicial District, to Friends and Colleagues (March 24, 1994) [hereinafter Tauber letter] (on file with authors). For up-to-date information on CADCP, see <<http://www.cadcp.org>> (visited Sept. 9, 1998).

389 See Letter from Judge Harlan G. Grossman, Contra Costa County, Bay Judicial District to Colleagues (May 6, 1997) (on file with BARDCN).

390 Tauber letter, *supra* note 388.

391 See CALIFORNIA ASSOCIATION OF DRUG COURT PROFESSIONALS, NEWSLETTER 1 (Nov. 13, 1996).

392 See Letters from Judge Harlan G. Grossman, Contra Costa County, Bay Judicial District to Colleagues (May 3 & May 6, 1997) (on file with BARDCN).

393 See GOLDKAMP, *supra* note 47, at 6.

munity organizations.”³⁹⁴ “Comprehensive and inclusive planning is critical.”³⁹⁵ It is through the planning process that community officials ensure that the structure, procedures, and goals of the DTC reflect the needs and desires of the local community. Without consensus about the public policy goals of the DTC, the venture is doomed to failure.

1. Eligibility: Who’s in, Who’s out, and Why

The most vexing question confronting those trying to establish a DTC is the question of eligibility. Eligibility requirements should reflect a policy determination by community officials about which population of drug offenders has the best chance for recovery and represents the least risk to public safety. “Defining the target population—identifying and agreeing upon acceptable eligibility criteria—is a critical policy issue that will have important implications for the operation and effectiveness of the drug court.”³⁹⁶ A more inclusive eligibility criteria means that a greater number of individuals may be eligible to enter the program, and they may require more treatment providers at an increased expense to the community. To answer the eligibility question, those planning a DTC must look at the number and type of drug crimes and drug criminals which presently confront the local criminal justice system. An investigation of these numbers will show how inclusive eligibility criteria can be without compromising the integrity of DTCs and their ability to perform their function. Ultimately, the eligibility criteria must answer “two fundamental threshold questions, one about the extent of a potential participant’s drug involvement and one about the relative risk that a potential participant would pose to public safety.”³⁹⁷

Several of the existing DTCs demonstrate how local public policy shapes the eligibility criteria of DTCs while simultaneously answering the two threshold questions. The Help Through Acupuncture Rehabilitation and Treatment (H.A.R.T.) program in Queens, New York, prohibits individuals with prior felony convictions or a history of violence from participating in the program; it also requires that the indi-

394 *Id.* at 7.

395 *DEFINING DRUG COURTS*, *supra* note 125, at 7.

396 *GOLDKAMP*, *supra* note 47, at 17. Studies of drug usage in several major urban areas indicate that the types of drugs used varies significantly from city to city. See K. JACK RILEY, U.S. DEP’T OF JUSTICE, *CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES* (1997). Therefore, participants in the planning process must take account of this in determining the size and makeup of potential DTC participants.

397 *Id.*

viduals be charged for a lesser felony—drug sale or possession—and that the individual be at least eighteen years old and a substance abuser.³⁹⁸ These criteria express the community's desire "to reduce recidivism and to preserve scarce prison resources for violent felony offenders."³⁹⁹

Other DTC programs demonstrate different community policy determinations. The eligibility requirements for the Portland, Oregon Sanctions-Treatment-Opportunity-Progress (S.T.O.P.) program allow defendants charged with drug possession to enter the program if they have no other felony or Class A misdemeanor cases pending or charged, have no warrants from other jurisdictions, have not been charged with "driving under the influence" in the same charging instrument, and have not participated in, or are presently participating in, S.T.O.P. program.⁴⁰⁰ "In addition, there must be no evidence of significant and substantial drug dealing. The criteria is deliberately vague because it is designed to allow a broad spectrum of people with drug problems and with criminal justice problems to enter into supervised drug treatment."⁴⁰¹ The criteria from these and other existing DTCs evidence a desire on the part of DTCs to provide court mandated treatment options, but only to those individuals whom the community deems an acceptable public safety risk.

2. Structural and Procedural Issues

As with eligibility criteria, the structure and procedures of a DTC and its treatment programs should reflect the public policy decisions upon which the court is founded and the resources the community is prepared to devote to the project. The length of the treatment program, the frequency of hearings, the monitoring of the participants, and the types of treatment modalities are all questions which require answers before a DTC can open its doors. The answers to these questions will determine how the DTC carries out its program.

"According to the Drug Court Resource Center, in most drug courts, treatment is designed to usually last at least 1 year."⁴⁰² However, the amount of time a person spends in the treatment program depends on her compliance with treatment protocol. Many DTCs

398 See CRIMINAL PROSECUTION DIVISION, AMERICAN PROSECUTORS RESEARCH INSTITUTE, DIVERSION TO TREATMENT 13-15 [hereinafter DIVERSION TO TREATMENT].

399 *Id.* at 13.

400 See *id.* at 72.

401 *Id.*

402 GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE, DRUG COURTS: INFORMATION ON A NEW APPROACH TO ADDRESS DRUG-RELATED CRIME 17 (1995).

utilize incentives and/or sanctions that increase or decrease the duration of an individual's treatment program to encourage adherence to treatment and court rules. In keeping with the therapeutic ideal, DTCs recognize relapse as part of the treatment process.

"Relapse" (sometimes called "backsliding") is common. Indeed, many substance abusing individuals relapse and return to treatment several times before achieving abstinence from alcohol or [other] drugs for any appreciable duration. But the fact that relapse is common does not mean that it is ignored. On the contrary, one of the functions of the judge in an integrated program is to take appropriate action to reinforce the treatment program.⁴⁰³

DTCs generally have criteria which call for the court to "recycle" individuals back through a particular treatment phase during a relapse rather than terminate them from the program. This procedure may extend the length of time a person remains in the treatment program and load the program with too many people. When deciding about program length, a DTC must account for both the sanction/incentive and recycling aspects of its treatment program so that the program is not overwhelmed with a larger-than-anticipated number of participants.

The frequency of an individual's court appearances and status hearings relates directly to the question of program incentives, sanctions, and termination. Court appearances and status hearings give the DTC direct feedback about an individual's progress through treatment. While a DTC may initially preschedule an individual's court dates, a person's treatment failures or successes can cause the DTC judge to increase or decrease the number of court-prescribed appearances. This use of court appearances as a monitoring device for a person's treatment progress has caused most DTCs to experience increases in failures to appear among court treatment recipients.⁴⁰⁴ Because this increase can and should be anticipated, a DTC can implement strategies to combat this phenomenon. These strategies

403 TREATMENT DRUG COURTS, *supra* note 61, at 25-26. Others have noted the dangers of relapse:

Relapse prevention is an important component of treatment programming, and is the subject of ongoing research. The greatest risk of relapse after leaving treatment occurs during the first 90 days, at a time when clients are exposed to drug-related stimuli, without the support of a structured program to help resolve their conflicts.

Carl G. Leukefeld & Frank M. Tims, *Introduction to COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE* 3 (Carl G. Leukefeld & Frank M. Tims eds., 1988) (citation omitted).

404 See GOLDKAMP, *supra* note 47, at 26-27.

may include behavior contracts signed by participants, giving a written copy of the programs incentives and sanctions to participants, issuing bench warrants, or imposing jail time. DTCs may also have a cooperative agreement with their local police agency to give priority to executing bench warrants for DTC participants. However, all of these actions should support the goal of the program, which is to get the participant through treatment successfully.

Despite the perception that court-mandated drug treatment is somehow "soft" on criminals, the length of drug treatment programs normally exceed the potential jail time for a drug possession offense. Defense lawyers and civil libertarians have both expressed grave reservations about instituting a system of drug treatment which requires extended participation and frequent intrusions into a person's privacy via urinalysis.

The ability or inability of a person to adjust to treatment requirements often reflects the severity of the individual's addiction. Whether or not a DTC can properly treat the individual's addiction depends on the types of treatment modalities the DTC can offer. A DTC may need to assign a person to residential treatment if the person cannot maintain a drug-free lifestyle without constant supervision. Among the majority of DTCs, outpatient treatment consisting of individual and group therapy sessions, frequent drug tests, and court appearances provide adequate supervision for program participants.⁴⁰⁵ However, as discussed earlier, jail time for an individual's treatment noncompliance should remain an option available to the DTC judge. Preferably, the person should spend his or her jail time in a facility that can provide in-custody drug treatment services.⁴⁰⁶

The type of people who can participate in the DTC program should drive the forms of treatment available to DTC participants. "Ideally, the treatment regimen for drug court participants should be client- and not program-driven; participants with different drug abuse . . . problems may require different solutions."⁴⁰⁷ Outpatient or in-residence counseling in conjunction with regular drug testing is the most widely utilized treatment modality for DTCs around the country.⁴⁰⁸ However, various DTCs have experimented with and imple-

405 The Hayward Drug Treatment Court's DTC Contract contains an express provision to that effect, stating in paragraph 10: "I understand that a failure to appear for a court date or any other breach of this agreement will result in an immediate bench warrant."

406 See DEFINING DRUG COURTS, *supra* note 125, at 25.

407 GOLDKAMP, *supra* note 47, at 22.

408 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50, at 10.

mented treatment programs which involve both acupuncture⁴⁰⁹ and the use of chemicals⁴¹⁰ to control the participant's craving for a given drug. In all DTCs, clients are introduced to the twelve-step recovery process of AA and NA and encouraged to attend regular meetings.

3. Resources: Tackling the Budget Bear

At the heart of the many concerns mentioned above stands the problem of finances. "Funding is almost always the most difficult aspect of starting a new program."⁴¹¹ DTCs cost money and local governments are often loath to spend funds on programs which are new and may provide no immediately tangible results. Thus, the issue of funding places a difficult obstacle in front of the organization and implementation of a DTC. A jurisdiction must resolve the issue of funding before the DTC can decide how to structure itself and its treatment program. Whether or not a DTC can extend the proper kind of treatment to all those potentially eligible for the program depends on how the DTC derives its financial support. Despite the fact that DTC programs cost less per person than the cost to jail that individual for an equivalent amount of time, DTC programs generally do not derive the direct financial benefit of these savings. Since most of the individuals who come before a DTC do not have the ability to pay for their treatment, fees charged by DTCs for program participation tend to be nominal and do not cover the cost of the program.⁴¹²

To overcome the fiscal austerity of their environments, DTCs have responded to the shortfall in funds in a variety of creative ways. The Clark County DTC in Las Vegas, Nevada, received funds that the county generated by running a driving school for "driving while intoxicated" and reckless driving offenders.⁴¹³ Through this method of funding, the county set aside "approximately \$300,000 . . . for the Drug Court project."⁴¹⁴ Several DTCs have been subsidized through funds generated by other actors within their local criminal justice system. The DTCs in Austin, Texas and Portland, Oregon, secured asset

409 See *supra* text accompanying notes 198 and 262.

410 One example of this is Butte County DTC's use of Naltrexone Hydrochloride (ReVia™) to help prevent relapse for DTC participants who abuse alcohol. See ReVia™ PROJECT PROTOCOL; J. R. Volpicelli et al., *Naltrexone in the Treatment of Alcohol Dependence*, 49 ARCHIVES OF GEN. PSYCHIATRY 876 (1992).

411 Lehman, *supra* note 153, at 17.

412 See DRUG COURTS: OVERVIEW OF GROWTH CHARACTERISTICS AND RESULTS, *supra* note 50, at 48; 1997 DRUG COURT SURVEY REPORT, *supra* note 179, at 25.

413 Lehman, *supra* note 153, at 17.

414 *Id.*

forfeiture funds from the local prosecutor's office.⁴¹⁵ Six other DTCs obtained asset forfeiture money from the police departments in their jurisdiction.⁴¹⁶ All of these creative and unique methods of funding DTCs demonstrate not only that funds are available, but also that the authorities in these localities recognize the importance of DTCs in solving the drug abuse and cycle of crime problem.

In addition to local funds, the majority of the recent funding for DTCs has come from the federal government. Of the \$125 million spent on DTCs since 1989, over \$80 million has come from the federal government.⁴¹⁷ Prior to 1993 and the establishment of a grant program by the Department of Justice, and the enactment of the 1994 Violent Crime Act, many DTCs received federal funds through the Edward Byrne Memorial State and Local Law Enforcement Assistance and Correctional Options Grants programs under the administration of the Bureau of Justice Affairs.⁴¹⁸ Other federal agencies such as the Department of Health and Human Services and the State Justice Institute also provided block grant moneys for DTCs.⁴¹⁹

Federal funding of the DTC movement continues at an ever increasing pace. Title V of the 1994 Violent Crime Act authorized \$1 billion to be distributed to drug court programs during the six years between 1995 and 2000.⁴²⁰ "Of the \$57 million appropriated by Congress, . . . [the Drug Court Program Office], as of March 31, 1997, had awarded about \$33 million in grants to over 150 jurisdictions to fund drug court programs."⁴²¹ The Drug Court Program Office (DCPO) can present to jurisdictions one of three types of grants: (1) planning grants, (2) implementation grants, or (3) enhancement grants.⁴²²

Planning grants are for those jurisdictions that are interested in establishing drug court programs and are in the early planning stage for that effort. In fiscal year 1995, a jurisdiction could receive up to \$35,000 for a planning grant. For fiscal years 1996 and 1997, the maximum award was \$20,000 per jurisdiction.

Implementation grants are for those jurisdictions that have already made a commitment to develop a drug court program and have already identified the target population to be served and the case

415 See 1997 DRUG COURT SURVEY REPORT, *supra* note 179, at 24.

416 See *id.*

417 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50, at 38.

418 See *id.* at 39-40 (citations omitted).

419 See *id.* at 40.

420 See *id.* at 41.

421 *Id.* at 42.

422 See *id.*

processing procedures that will be used. The maximum award for implementation grants was \$1 million for fiscal year 1995 and \$400,000 for fiscal years 1996 and 1997.

Enhancement grants are for jurisdictions with established drug court programs to improve or enhance existing services. The maximum award for enhancement grants was \$1 million in fiscal year 1995 and \$300,000 for fiscal years 1996 and 1997.⁴²³

Through innovative funding programs and assistance from the federal government, local communities can and do overcome the daunting fiscal prospects of running a DTC. The moneys to support a DTC can be generated once the decisionmakers and leaders within a given community understand the important and crucial part DTCs can play in breaking the cycle of drug abuse and crime.⁴²⁴

4. Problems with Timing

The problem of when the DTC adjudication process should begin remains a point of contention between many DTC advocates. The two models of DTC adjudication timing—preadjudicative (diversion or deferred prosecution) and postadjudicative (deferred sentencing or entry of judgment)—offer both advantages and disadvantages to the efficacy of DTCs. The preadjudication DTC approach normally requires that “shortly after being charged, defendants waive their right to a speedy trial and enter a treatment program. Defendants who fail to complete the program have their charges [reinstated and] adjudicated.”⁴²⁵ The preadjudicative model appears more consistent with the therapeutic orientation of the DTC concept. Since getting the addicted defendant into treatment is the ultimate goal of the process, the preadjudicative process seems most likely to facilitate quick entry into treatment by the defendant. The preadjudicative DTC system presents a more attractive incentive for the defendant and de-

423 *Id.* at 42–43.

424 Although not a readily accepted solution for the problems of funding, some critics of our present treatment funding programs have alluded to doing away with all funding of drug interdiction programs in foreign countries and using the money to run drug treatment programs. See *Urban Drug Problem Solutions* (C-SPAN-2 television broadcast, Nov. 6, 1997) (on file with the authors and available from Purdue University Public Affairs Video Archives). At present, of the \$15.2 billion budget given to Nation Drug Control Office, only 34% goes to demand reduction, and of that only \$75 million was requested for Drug Courts in general. See THE NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 63–64. Compare this amount to the estimated \$76 billion that drug addiction costs the United States each year. See *supra* note 114. Since 1981, the United States has spent in excess of \$100 billion on the war against drugs. See Michael Kramer, *Clinton's Drug Policy Is a Bust*, TIME, Dec. 20, 1993, at 35.

425 CUTTING CRIME, *supra* note 70, at 11.

fense counsel because it postpones prosecution and does not require the defendant to plead guilty before getting into treatment. Even prosecutors may find this form of DTC adjudicative process advantageous. "Prosecutors know that most of these [types of] offenders will be released to probation if convicted. With the drug court, monitoring is much more strict [than probation], and there is a good chance the participant will stop abusing drugs and never return to court."⁴²⁶ In addition, the possibility that program failure could result in the prosecution of the case provides the defendant with added incentive to stay in the program. The preadjudicative model may also be used in programs that admit probationers and parolees with a diversion from substance abuse-related violations that would otherwise be filed.

Imposing preadjudicative treatment does present some serious legal concerns. Otherwise enthusiastic proponents of drug and alcohol treatment may be "hesitant to order evaluation and treatment before sentencing because of a perceived conflict with traditional legal notions, such as the constitutional right to reasonable bail, the presumption of innocence, double jeopardy, and unreasonable search and seizure."⁴²⁷ The United States Supreme Court, lower federal courts, and various state legislatures, however, have dealt with these issues and found that preadjudicative detention regimes do not necessarily infringe upon an individual's rights.⁴²⁸

This model does carry some other significant logistical and procedural disadvantages. Due to the deferred status of the case, prosecutors may have a more difficult time prosecuting the case should the defendant fail to complete the treatment program. Evidence for the

426 *Id.*

427 G. Michael Witte & L. Mark Bailey, *Pre-Adjudication Intervention in Alcohol-Related Cases*, THE JUDGES' J., Summer 1998, at 32, 33.

428 See U.S. CONST. amend. VIII (containing no language about pretrial detention and excessive bail); *United States v. Salerno*, 481 U.S. 739, 746 (1987) (holding that pretrial detention under the Bail Reform Act was regulatory, not penal in nature; thus the Double Jeopardy clause was not implicated: "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment"); *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (stating that the presumption of innocence is an important ideal "[b]ut it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun"); *Oliver v. United States*, 682 A.2d 186, 190 (D.C. 1996) (holding that mandatory urinalysis was not necessarily an unreasonable search and seizure, and that the government's interest "is compelling . . . to protect the public from criminal activity and to ensure the arrestee's appearance in court, while allowing the arrestee to remain free from detention pending trial"); *People v. Beal*, 70 Cal. Rptr. 2d 80 (Ct. of App. 1997) (holding that imposing an alcohol-absent condition as a condition of probation is within the discretion of a trial court); see also *supra* note 314 and accompanying text.

case may become stale or lost and witnesses or defendants may disappear. All of these occurrences work to hamper the ability of the prosecutor to try the case if the defendant should drop from the treatment program. Due to the potentially long delay between the time of arrest and the actual prosecution, the prosecution of the case may lose some of its deterrent effect on the defendant. When the time lapse between admittance into the program and the defendant failing out of the program becomes too great, the case may never be tried because more serious prosecution cases will take precedence over a two-year-old charge.⁴²⁹ This model may even create an antitherapeutic effect if the process does not require the defendant to admit to her addiction.

The postadjudicative model involves adjudicating the case and finding the offender guilty or requiring the offender to enter a plea of guilty before allowing the individual to begin the treatment program.⁴³⁰ The prosecutor's office defers the defendant's sentence and incarceration until the offender either successfully completes the treatment program or the court terminates her from the program for lack of progress. "The plea allows the case to be removed from the prosecutor's docket while treatment is pursued; evidence, witness testimony, and open case files need not be preserved over time."⁴³¹ The court generally retains the ability to execute the sentence should the offender fail the treatment program for any reason. The plea model also affords the prosecutor the opportunity to shape participation requirements on an individual basis and mandate drug treatment participation as a condition of probation. This model provides the offender with greater incentives to remain in and complete the treatment program. Additionally, this model may have great therapeutic impact. Since the defendant must publicly admit to drug use, the court pro-

429 See The Prosecution Perspective, *supra* note 292. But see Memorandum from Judge William G. Schma to John Ferry, SCAO; Thomas Ginster, Governor's Office; Darnell Jackson, ODCP (Oct. 2, 1998) (indicating that of the 103 men and women who have been discharged from the program for failure to complete treatment, 89 pled guilty to the original crimes, 10 pled *nolo contendere*, 2 had the crimes dismissed by the prosecution, 1 was found not guilty, and 1 has an outstanding bench warrant) (on file with the authors).

430 Although a "no contest" plea is usually available with the permission of the court under California law, post-plea diversion requires a plea of guilty. "A defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to Section 1000.3 [failure and termination of diversion]" CAL. PENAL CODE § 1000.1(d) (West 1997). "There are six kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court: . . . *Nolo contendere*, subject to the approval of the court." CAL. PENAL CODE § 1016 (West 1997).

431 CUTTING CRIME, *supra* note 70, at 11.

ceedings may force the offender to accept her addiction and may help her overcome denial, one of the hallmarks of drug abuse and addiction.

However, the postadjudicative model does present some problems. The adjudication process is more involved and extensive and requires a greater initial amount of time in court. It may also be antitherapeutic because postadjudication DTCs which require guilty pleas often meet with resistance.⁴³² Defense attorneys and public defenders are "reluctant to advise clients to plead guilty, since it may be more onerous to go through a year of drug court than to serve a few months on probation."⁴³³ The postadjudication DTC requirement that an offender plead guilty may cause individuals who might otherwise have entered the program not to because they are not sure they can complete the treatment.⁴³⁴ A defendant may also risk waiving certain defenses to charges, as well as the right to a trial. Thus, the postadjudicative process may not fit as well into the therapeutic ideal of DTCs as the preadjudicative model. The postadjudicative process centers itself more around the legal function of trying a case rather than the therapeutic ideal of providing quick access to drug treatment for those in need of treatment.

5. DTCs and the Concerns of the Prosecution

In our criminal justice system, prosecutors are entrusted with the difficult job of ensuring that the laws enacted to promote public safety are carried out in a professional and ethical manner. In an era when any public policy perceived as being politically "soft" on crime is derided and criticized, many prosecutors may see participation in DTCs as politically untenable or inconsistent with their duty to protect the public from criminals. In spite of this public perception, prosecutors need to understand that statistics indicate that proper treatment programs increase, not decrease, public safety. Therefore, DTCs are valuable law enforcement tools for breaking the drug and crime cycle in communities.

Not only did the previously mentioned Miami study demonstrate the increased probability that untreated addicts will commit a large

432 Interview with Andrea P. Taylor, Staff Attorney, Federal Defender Program, Chicago, Illinois (Sept. 13, 1998). Concerns about the relinquishment of defendant rights under the post-adjudicative model were the topic of discussion at the recent American Bar Association, Criminal Justice Section, panel. Panel discussion at the American Bar Association, Criminal Justice Section, *The War On Drugs: Where Are We Now?*, Toronto, Canada (Aug. 3, 1998).

433 CUTTING CRIME, *supra* note 70, at 11.

434 See The Prosecution Perspective, *supra* note 292.

number of crimes, but the exhaustive California Drug and Alcohol Treatment Assessment (CALDATA) study supported the public safety benefits of drug treatment programs.⁴³⁵ "The [CALDATA] study reported a significant reduction in offenders' criminal activity during and after treatment (-20%) and especially in drug sales (-61%) and the use of a weapon or physical force (-71%)."⁴³⁶ "If an addict is placed on probation for a less serious offense and does not receive treatment, it is almost certain that the addict will continue to commit crimes, representing a missed opportunity for prosecutors to intervene and prevent further crime."⁴³⁷

Prosecutors' worries about DTC participants impinging upon public safety by committing violent crimes during treatment are unfounded based on the most recent studies. "[O]nly three percent of violent offenders in state prison were under the influence of cocaine or crack alone when they committed their crime, and only one percent were under the influence of heroine alone."⁴³⁸ These kind of statistics hold true at the federal level as well.⁴³⁹ Of far more relevance in terms of public safety is the level of alcohol abuse associated with violent crimes. "One-fifth (21 percent) of state prison inmates incarcerated for violent crimes were under the influence of alcohol—and no other substance—when they committed their crime."⁴⁴⁰ Armed with these statistics, prosecutors should come to the realization that DTC participants do not pose an unreasonable threat to public

435 See DEAN R. GERNSTEIN ET AL., HEALTH AND WELFARE AGENCY, STATE OF CALIFORNIA, EVALUATING RECOVERY SERVICES: THE CALIFORNIA DRUG AND ALCOHOL TREATMENT ASSESSMENT (CALDATA) iv-vi, 61-82 (1994) [hereinafter CALDATA]. But see UNITED STATES GENERAL ACCOUNTING OFFICE, DRUG ABUSE: RESEARCH SHOWS TREATMENT IS EFFECTIVE, BUT BENEFITS MAY BE OVERSTATED (1998).

436 CRIMINAL PROSECUTION DIVISION, AMERICAN PROSECUTORS RESEARCH INSTITUTE, A PROSECUTOR'S GUIDE TO TREATMENT 3 [hereinafter A PROSECUTOR'S GUIDE TO TREATMENT] (citing the CALDATA study). See also W. Clinton Terry III, *Prosecutors and the Evaluation of Dedicated Drug Treatment Courts*, PROSECUTOR, Mar./Apr., 1997, at 32.

437 A PROSECUTOR'S GUIDE TO TREATMENT, *supra* note 436, at 16. Recent studies show that merely incarcerating addicts does little to improve public safety. "'We're not protecting public safety because we aren't treating the problem [of addiction], and we're supporting the illegal drug market because we are just sending customers back.'" Gary Fields, *Study Links Drugs to 80% of Incarcerations*, USA TODAY, Jan. 9, 1998, at A2 (quoting Joseph Califano Jr., President of the National Center on Addiction and Substance Abuse at Columbia University).

438 BEHIND BARS, *supra* note 98, at 9.

439 See *id.*

440 *Id.* See also *id.* at 8 ("Alcohol is more closely associated with crimes of violence than any other drug. Alcohol is a bigger culprit in connection with murder, rape, assault and child and spouse abuse than any illegal drug.").

safety while they are undergoing treatment. If public safety and reduction in drug use stand at the center of the prosecutor's job, then treatment programs are in no way inconsistent with the fulfillment of that task.

Some prosecutors worry that DTC sentencing of a defendant to a treatment program lets the defendant "get away" without accounting for his or her crime. This derivative of the soft on crime idea appears groundless when one compares the length and rigor of traditional incarceration and probation sentences and the length and requirements of DTC-mandated treatment programs. Recent statistics show that a person convicted of a drug possession offense is just as likely to get probation as jail time and that median length of jail sentence for a drug possession offense is three months, while probation time is twenty-four months. Considering the fact that most DTC treatment programs last at least one year, not including recycle periods for relapse, the time commitment for treatment may not be much less than probation and probably will be greater than that of incarceration. In addition, most DTC treatment programs require far more court appearances and court-mandated activities than standard probation. "Appropriate treatment programs impose a strict and arduous regime not found in today's jails or prisons."⁴⁴¹ Prosecutors should view "[t]reatment . . . [as] far more difficult than incarceration, as it involves altering negative behavior."⁴⁴² Proper and effective "[t]reatment aggressively forces the offender to become accountable and take responsibility for . . . her actions"⁴⁴³ and is more likely to result in a productive citizen than the sentencing of an addict to a term of probation.

As a corollary to the concerns about public safety, many prosecutors worry that implementing a DTC will somehow jeopardize their ability to successfully prosecute any individuals for drug offenses in general, and in particular, those who fail the DTC treatment programs. Based on the process used to establish DTCs, these prosecution fears appear unfounded. The planning phase of a DTC serves to ensure that the court targets drug users whom the prosecutor's office has identified as posing an acceptable public safety risk.⁴⁴⁴ By playing

441 A PROSECUTOR'S GUIDE TO TREATMENT, *supra* note 436, at 16. "Alternative programs [like DTCs] . . . [c]an be far tougher than prison because they require the offender to participate effectively in such activities as community service, [and] substance abuse treatment" Martin L. Reisig, *Rediscovering Rehabilitation: Drug Courts, Community Corrections and Restorative Justice*, MICH. BAR J., Feb. 1998, at 172.

442 A PROSECUTOR'S GUIDE TO TREATMENT, *supra* note 436, at 5.

443 *Id.*

444 See DEFINING DRUG COURTS, *supra* note 125, at 8.

an essential part in the determination of the eligibility requirements for individuals to participate in a DTC, the prosecutor's office can direct the DTC process at a particular drug offender population; generally this means that individuals who have a previous history of violence are ineligible. As described previously, once the DTC admits an individual into a treatment program, only the judge can terminate the individual from the program. However, once the DTC judge terminates treatment due to the individual's failure to make progress, nothing about a DTC's rules and procedures prohibit the court from reinstating the pending charges or revoking probation and executing a sentence. Besides helping determine eligibility criteria and program termination criteria, the prosecutor's office may require that the defendant/offender "sign a statement of guilt to the charges. This statement enables the prosecutor to commence prosecution on the original charges, in the event the offender does not comply with program conditions."⁴⁴⁵ Both preadjudication and postadjudication DTC procedures can be constructed to ensure the prosecution of drug crimes. It should be pointed out that individuals with criminal records containing a history of violent crimes have already been excluded from the DTC process. Therefore, the existence of a DTC in no way prevents the prosecutor from persuing anyone charged with a drug offense in a postplea, reduces only slightly the effectiveness of prosecuting preplea defendants, and does not decrease public safety.

Although the existence of a DTC in and of itself may not prevent a prosecutor from bringing drug charges, prosecution complications can arise when a DTC engages in an practice labeled "net widening." Net widening occurs when a DTC begins to process cases and include individuals in treatment programs who do not really belong in the program. In such instances prosecutors ask the question, "Is the drug court bringing drug treatment to bear on a population for whom such intervention might not be appropriate or for whom the most appropriate disposition would be provided by the processing in criminal court?"⁴⁴⁶ Serious questions have been raised regarding this issue in connection with the Miami DTC. A 1993 expansion of the existing DTC program may have allowed "burglars and robbers to get reduced sentences and drug treatment."⁴⁴⁷ One Florida state attorney said, "There are people in Drug Court who should be in jail or prison. And

445 DIVERSION TO TREATMENT, *supra* note 398, at 8.

446 GOLDKAMP, *supra* note 47, at 26.

447 Jeff Leen & Don Van Natta Jr., *Drug Court Favored by Felons*, MIAMI HERALD, Aug. 29, 1994 at 6A.

that makes us very, very nervous.”⁴⁴⁸ At the time these concerns were raised, the DTC prosecutor expressed the opinion that “It’s [a DTC] like a rubber band that is being stretched and stretched and stretched, . . . [a]nd, very soon, it may snap.”⁴⁴⁹ Seminole County, Florida, Circuit Judge O. H. Eaton, Jr., expressed the net widening problem best: “The Drug Court works—if you use it right, . . . [w]hen you use that court as a dumping ground, you will end up having a lower success rate and people will use it to get out of jail or to avoid prison.”⁴⁵⁰ To combat the problem of net widening, all the members of the DTC team must remain vigilant.

Due to the questions and concerns pointed out here, prosecutors schooled in the traditional jurisprudential theories of retribution, deterrence, rehabilitation, and incapacitation may have grave misgivings about the philosophical and moral underpinnings of DTCs. Since therapeutic jurisprudence is a relatively new theory of jurisprudence and has not been rigorously applied to the DTC concept prior to this Article, most prosecutors have viewed DTCs through the lenses of inappropriate jurisprudential theories. DTCs are not exclusively about rehabilitation because statistics previously cited show that proper treatment programs have important and essential deterrent and incapacitation components.

Prosecutors should understand that therapeutic jurisprudence in no way “trumps” other considerations which stand as the foundation of other parts of our criminal justice system. What prosecutors should realize is that in a DTC setting, therapeutic jurisprudence helps to ensure that DTC actors recognize that the orientation, structure, and procedures of a court can negatively or positively affect how an individual responds to court-sanctioned treatment. Negative responses, like using drugs while on probation or parole, obviously go against the purported public policy. DTCs put in place programs which directly address such negative defendant responses. Thus, the concept of therapeutic jurisprudence utilized by DTCs serves to reinforce a prosecutor’s arsenal of public safety weapons by creating an environment conducive to successful drug treatment and acceptance of responsibility for an individual’s drug abuse behavior.

448 *Id.*

449 *Id.*

450 *Id.*

6. The Concerns of the Defense: Protecting the Client⁴⁵¹

Foremost in the mind of any defense counsel is the desire to ensure that the criminal justice system does not trample on the rights of the client. With this in mind, the DTC concept presents defense counsel, either public defender or private attorney, with several seemingly difficult and unsettling choices. "Critics worry that defendants who participate surrender too many rights."⁴⁵² Chief among defense attorneys' concerns is the general DTC requirement that the defendant must waive certain legal rights in order to gain entrance into the treatment program. It should be immediately noted that participation in DTCs is voluntary. No jurisdiction requires a defendant to enter a DTC program. Although a requirement in some DTCs, the waiver of certain rights is not a new concept to the criminal justice system. Courts routinely demand that a defendant waive her Fourth Amendment right against searches and seizures as a condition of probation.⁴⁵³ In the preadjudication DTC context, the court may direct that a defendant waive the right to a speedy trial, but only so the individual can participate in treatment.⁴⁵⁴ In the hybrid plea approach, in between preadjudication and postadjudication the defendant may be required to waive her right to a jury trial.⁴⁵⁵ Yet these obligatory DTC waivers are no more onerous, and may actually be less imposing, than those required of other criminal defendants.

The collaborative nature of the DTC process may erode and completely extinguish the defense attorney's fear of leaving her client without legal protection from the state. In instituting a DTC, defense attorneys are generally direct participants in the development and im-

451 See generally Videotape: Drug Treatment Courts: The Defense Perspective (Continuing Legal Education Programs and Publications, The Rutter Group (1994)) [hereinafter Defense Perspective Video]. For another look at the problems and concerns of defense attorneys operating in DTCs, see 1997 DRUG COURT SURVEY REPORT, *supra* note 179, at 34-36 app. D.

452 Chuck Squatriglia, *Dispensing Compassion: Richmond Drug Court Mixes Justice and Mercy*, WEST COUNTY TIMES, May 28, 1997 at A1.

453 See Order Granting Revocable Release In The Community (Court Probation), Municipal Court For The San Leandro-Hayward Judicial District, County of Alameda, State Of California. "SEARCH—Submit your person, place of residence, or any vehicle, including all property therein, under your control, to search at any time, day or night, by any peace officer with or without a search warrant with or without probable cause." *Id.*

454 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50, at 23.

455 See *id.*

plementation process.⁴⁵⁶ Therefore, the public defender's office can actively shape the criteria for the types of cases and defendants that it finds appropriate for the DTC. Whatever form the DTC takes, the "defender will still identify cases in which charges should be dropped for lack of probable cause"⁴⁵⁷ or other problems.

However, this collaboration does not necessarily diminish the chance that DTC "dumping" may take place. This dumping involves the prosecutor's office using the DTC "program to 'dump' bad cases that would otherwise have been difficult to sustain on the basis of admissible evidence."⁴⁵⁸ Dumping, like net widening, represents a misuse of the DTC process, and the DTC team must ensure that such actions do not take place. Through the screening process, the defense counsel can independently review each case and determine if there are any serious proof problems, as well as deciding who stands the best chance of treatment success and which defendant really needs the program.

Some defense counsel also worry that for a defendant to enter a DTC treatment program, the burden of proof shifts from the prosecution to the defense; the defendant must establish her addiction and need for treatment before being eligible for treatment. Although a valid concern, the DTC defendant's burden can be analogized to the same burden which the defense counsel has when claiming an insanity defense, self-defense, or any other affirmative defense. In fact, unlike the defense requirements in an insanity or self-defense claim, the defendant in a DTC generally undergoes an objective drug test and assessment,⁴⁵⁹ and the DTC never requires a defendant to "prove" her need for treatment in a judicial sense. If the defendant meets the eligibility criteria, including the drug screening test, she can volunteer to participate in the DTC.

Another part of the DTC process which tends to disturb defense attorneys is that DTC requirements may prove more onerous than the equivalent traditional court sanctions for the same offense. DTCs

456 See DEFINING DRUG COURTS, *supra* note 125, at 11-12; TREATMENT DRUG COURTS, *supra* note 61, at 11.

457 GOLDKAMP, *supra* note 47, at 15.

458 *Id.* at 14.

459 Most DTCs require potential participants to undergo a screening process that includes taking the Addiction Severity Index (ASI) or the Wisconsin Uniform Substance Abuse Screening Battery. Both tests assess the level of an individual's substance abuse problem. Treatment Improvement Protocol 7 (TIP 7) contains the 5th edition of the ASI in addition to other diagnostic instruments for assessing substance abuse. TIPs may be acquired by contacting the National Clearing House for Alcohol and Drug Information at (800) 729-6686.

generally obligate a defendant to make more frequent court appearances and force the defendant to undertake forms of treatment which place more burdens on the defendant than normal probation. Defense attorneys view these DTC hurdles as significant disincentives for their clients that may cause their clients to fail the treatment regime and have the original charges or sentence reinstated. Much of this unfounded apprehension comes from lack of understanding about DTCs and the concept of therapeutic jurisprudence. The significant requirements of a DTC reflect the court's understanding that drug addiction is a disease and that intense court supervision provides the incentive for the defendant to stay in the program. Moreover, treatment regimes are not punishment, but the restructuring of the defendant's lifestyle. These lifestyle changes provide the defendant with the very best chance of avoiding any further contact with the criminal justice system. Studies show that the length of time an individual remains in a treatment program is correlated to the likelihood of treatment success.⁴⁶⁰ Therefore, the DTC procedures, which may appear exhaustive and prohibitive, in fact work to ensure that the defendant successfully completes treatment and does not fail out of the program and end up in jail or prison. The defense counsel should view the DTC process as the best method for "ending the cycle of drugs and crime [which] is in the best interest[s] of the client."⁴⁶¹ Before treatment was available to criminal defendants through DTCs, defense counsel's job was to minimize harm through reduction in incarceration. With DTCs, defense counsels' job evolves into a total improvement of the lives of their clients.

The DTC process need not be viewed negatively by defense attorneys. The DTC merely affords those with the disease of addiction a chance to break that cycle of drug abuse and crime that traps them in a proverbial revolving door. Seen from this perspective, the attorney should conclude that given the choice of getting off this time only to come back again, and getting meaningful treatment so a client may never return to court, a DTC is the defense attorney's best option for any drug-addicted client. Of course, such conclusions require a therapeutic jurisprudence perspective by the attorneys to more completely represent their clients.

460 See George De Leon, *Legal Pressure in Therapeutic Communities*, in NATIONAL INSTITUTE ON DRUG ABUSE, *COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE* 160, 169 (Carl G. Leukefeld & Frank M. Tims eds., 1988).

461 CUTTING CRIME, *supra* note 70, at 11.

7. Concerns of the DTC Judge

Despite the fact that the DTC judge plays such a large part in the entire DTC process and represents the power of the court, tensions between the treatment providers and the DTC judge may erode the judge's ability to maintain control of a given case. Because DTC participants may have more frequent contact with treatment providers than the DTC judge, the judge may lack the requisite information to withdraw court support from a treatment program, modify an individual's program, or terminate someone's participation in the program. This problem requires a two-pronged solution consisting of (1) judicial oversight of treatment providers and treatment programs and (2) accurate, readily available information about an individual's "treatment progress status."⁴⁶²

Judicial involvement is a cornerstone of the DTC process. The cooperative and collaborative nature of the relationship between the DTC judge and treatment providers is an essential component of the judge's oversight role. Without this kind of relationship, the DTC judge can easily lose control of the treatment process. As with net widening, the Miami DTC has experienced the problem of ineffective judicial oversight of treatment providers and treatment programs.

For two years, state prosecutors . . . quietly conducted a criminal investigation of Drug Court. They looked into allegations that some court-approved halfway house operators stole money from Drug Court defendants and put them in substandard housing.

Although prosecutors did not have enough evidence to bring charges, they concluded that "prostitution and narcotics trafficking" took place at the halfway houses.⁴⁶³

This chain of events in Miami may be an anomaly, but it represents a clear and ever present threat to the DTC concept. While a majority of the treatment process takes place outside of the courthouse, this situation does not relieve the judge of the responsibility of ensuring that the drug court participants receive proper treatment. One remedy may be to create an in-house treatment provider in the jurisdiction.⁴⁶⁴

The second prong of the solution to implementing judicial control of the DTC process involves information management. The DTC

462 GOLDKAMP, *supra* note 47, at 14.

463 Leen & Van Natta, *supra* note 447, at 6A.

464 The Maricopa FTDO program changed from a privately contracted treatment provider to an in-house counselor to save costs, but this idea could also improve on the ability of the DTC judge to gain access to information about the treatment regime. See Elizabeth P. Deschenes et al., *Drug Court or Probation? An Experimental Evaluation of Maricopa County's Drug Court*, 18 JUST. Sys. J. 55, 72 n.39 (1995).

judge who does not have up-to-date information about a participant's treatment progress cannot apply the proper smart punishment or rewards which the DTC process requires. The introduction of computers into the courtroom seems to provide the solution to the problem of accurate, timely information. Computer networking systems coupled with software specifically designed for DTCs give the judge and all the DTC participants near real-time information about a participant's treatment progress. Although existing software may be utilized, some jurisdictions have experienced problems sharing data between departments that have different software.⁴⁶⁵ Fortunately, this problem can and has been cured through new software.

Being at the center of the process, the DTC judge must attempt to overcome these administrative and supervisory problems in a manner that does not affect the quality of justice or treatment within her court—no simple task in an era of shrinking budgets and expanding dockets. But despite these problems,⁴⁶⁶ judges still find DTCs a more effective method of dealing with certain classes of drug abusers in our criminal justice system. In many instances, judges who previously suffered from “burnout” from the apparent futility of dealing with addicted criminal defendants by traditional methods of adjudication have found themselves rejuvenated as DTC judges. In the words of one DTC judge, “Just do it.”⁴⁶⁷

465 See DRUG COURTS IN LOS ANGELES, *supra* note 179, at 6–7. Some DTCs have solved this problem through the development of new software. See DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, DRUG COURT MONITORING, EVALUATION, AND MANAGEMENT INFORMATION SYSTEMS (1998).

466 For an in-depth review of judicially encountered DTC problems and their solutions, see 1997 DRUG COURT SURVEY REPORT, *supra* note 179, app. B.

467 *Id.* This may be another example of Therapeutic Jurisprudence at work. Obviously, the adjudicatory process has an impact on judges as well as defendants. By allowing judges to see and take part in the successful results of their efforts, DTC provided judges with positive feedback rather than the almost exclusively negative results they normally see in their courts. A project to look at the potential healing effects of the law is being set up by the John E. Fetzer Institute, a non-profit organization based in Kalamazoo, Michigan. “It's the concept of lawyers reexamining their roots to get back to their roots as healers. . . . When someone comes into an attorney's office, that lawyer needs to look at his [or her] responsibility in terms of what he or she can do in terms of really finding a healing solution.” Melanie Brown, *Healing and the Law' Gets a Boost from Local Law Firm*, OAKLAND COUNTY LEGAL NEWS, July 31, 1998 at § 2 (quoting Michael Gergely, institute trustee and project director).

8. Concerns of Treatment Providers: Does Coerced Treatment Work?

The question of whether coerced treatment provides an individual with the proper incentives to successfully complete a treatment program stands as a traditional point of concern with treatment providers. Through the years, many experts in the drug treatment field have questioned the effectiveness of legally coerced treatment due to a belief that individuals must enter a program voluntarily in order to have the requisite state of mind for recovery.⁴⁶⁸ "Critics contend that coerced treatment . . . is unlikely to be successful if the defendant did not freely choose to participate."⁴⁶⁹ Recent studies and findings by several researchers and treatment specialists serve to dispel and debunk this notion.⁴⁷⁰ "There is little evidence for differential outcomes between . . . [court] referred clients and . . . [non-court] referred clients. Significant post-treatment improvements in criminality, drug use, and employment occur for both groups and are directly related to time spent in treatment."⁴⁷¹ "Furthermore, treatment has been proven to be more effective if the client stays with it for more than 90 days, so the 'coercion' actually improves the substance abusers' chances of overcoming their addiction."⁴⁷²

468 For a brief history of why so many individuals in the area of prison-based treatment held this belief to be true, see LIPTON, *supra* note 82, at 13-18.

469 TREATMENT DRUG COURTS, *supra* note 61, at 58. See *supra* note 148 and accompanying text.

470 See generally Douglas M. Anglin & Yih-ing Hser, *Legal Coercion and Drug Abuse Treatment: Research Findings and Social Policy Implications*, in HANDBOOK OF DRUG CONTROL IN THE UNITED STATES (James A. Inciardi ed., 1990); Mary-Lynn Brecht et al., *Treatment Effectiveness for Legally Coerced Versus Voluntary Methadone Maintenance Clients*, 19 AM. J. OF DRUG & ALCOHOL ABUSE 89 (1993); Wendy Chavkin, *Mandatory Treatment for Drug Use During Pregnancy*, 266 J. OF THE AM. MED. ASS'N 1556 (1991); Carl G. Leukinfeld & Frank M. Tims, *Compulsory Treatment for Drug Abuse*, 25 INT'L J. OF THE ADDICTIONS 621 (1990); COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE (Carl G. Leukefeld & Frank M. Tims eds., 1988) (discussing various recent studies about the efficacy of compulsory treatment in the criminal justice setting) [hereinafter COMPULSORY TREATMENT OF DRUG ABUSE]; Sally Satel, *For Addicts, Force is the Best Medicine*, WALL ST. J., Jan. 6, 1998, at A18.

471 De Leon, *supra* note 460, at 167-68. See M. Douglas Anglin, *The Efficacy of Civil Commitment in Treating Narcotic Addiction*, in COMPULSORY TREATMENT OF DRUG ABUSE, *supra* note 470, at 31 ("How an individual is exposed to treatment seems irrelevant. What is important is that the narcotics addict must be brought into an environment where intervention can occur over time.").

472 TREATMENT DRUG COURTS, *supra* note 61, at 58.

What DTCs provide to the drug abuser is a legal incentive to stay in drug treatment.⁴⁷³ This unique aspect of DTCs also happens to be its underlying strength in terms of successful drug treatment outcomes. Study after study has shown conclusively that "[a]s time in therapeutic community treatment increases, recidivism declines significantly."⁴⁷⁴ In addition to the legal incentives the DTC places on the drug abuser, DTCs emphasize the one-on-one relationship between the judge and the participant. This type of relationship is entirely in keeping with proven therapeutic treatment processes. "The efficacy of legal referral procedures in yielding positive treatment outcomes is also related to the fidelity of their implementation. Legally referred clients who do not perceive consistency or uniformity in the legal process may not feel pressed to comply with treatment demands."⁴⁷⁵ By structuring a DTC to render consistency through its court personnel, procedures, and practices, the DTC actively and purposefully comports with drug treatment methods.

Even after treatment providers are convinced of the effectiveness of legally coerced treatment, some still have reservations based on the belief that the DTC, not the treatment provider, will decide on the modality of treatment. These treatment providers see the inherent conflicts involved when activities with different values, such as drug treatment and criminal justice, attempt to combine forces to address societal problems.⁴⁷⁶ However, DTCs represent a new kind of court, one which uses therapeutic jurisprudential methods to address criminal justice problems with medical underpinnings. The procedures and practices of most DTCs demonstrate that the treatment community's beliefs concerning the incompatibility of drug treatment and the criminal justice system are unfounded.

473 In some cases "fear of prison probably facilitate[s] . . . abstinence" in individuals, and the DTC sanctions process promotes a drug-free life style in those individuals. James F. Maddux, *Clinical Experience with Civil Commitment*, in COMPULSORY TREATMENT OF DRUG ABUSE, *supra* note 470, at 47. "The success of [DTCs] . . . is built on the fact that the post-arrest period can provide a particularly good opportunity for interventions that will break the drug-crime cycle." TREATMENT DRUG COURTS, *supra* note 61, at 1.

474 LIPTON, *supra* note 82, at 26-27. "Considerable research demonstrates a direct relationship between retention and posttreatment outcomes." De Leon, *supra* note 460, at 165.

475 De Leon, *supra* note 460, at 171.

476 See TREATMENT DRUG COURTS, *supra* note 61, at 7. ("Significant differences in philosophies, activities, and structure of the [therapeutic and criminal justice] . . . systems pose a challenge to collaboration, as do the differences in goals, values, and approaches to specific problems.").

Several aspects of the DTC concept bear out the fact that DTCs are compatible with current drug treatment ideals. First, DTCs recognize that drug addiction is a disease which can be successfully treated through various treatment regimes. Second, DTCs acknowledge that relapse cannot be viewed as a failure of treatment, but as part of the treatment process.⁴⁷⁷ Given this understanding, the DTC prosecutor will generally not bring new charges when a participant has a positive urinalysis test or when the person admits in court that she has used drugs since starting treatment.⁴⁷⁸ It is the role of the DTC judge, utilizing graduated sanctions, to provide therapeutic incentives for treatment adherence to DTC participants. The very fact that DTCs do not see prison as the most effective method of dealing with drug addiction demonstrates the new court's comprehension of the problem. The variety of drug treatment programs used by DTCs reflects this fundamental concept. DTC practitioners understand that "[f]rom the perspective of substance abuse treatment, a 'one size fits all' approach does not represent optimal practice."⁴⁷⁹ Treatment services "should be available to meet the needs of each participant,"⁴⁸⁰ and treatment providers are part of the therapeutic team which shapes those DTC services.

Given the foundation of the DTC movement, treatment providers should view DTCs as an opportunity to reach a segment of the addicted population that was formerly unreachable.⁴⁸¹ With up-front involvement in the formulation of DTC policies and practices,⁴⁸² treatment providers represent an integral part of a system dedicated to breaking the drug-crime cycle.

477 See *supra* Part III; see also TREATMENT DRUG COURTS, *supra* note 61, at 26.

478 See Defense Perspective Video, *supra* note 451.

479 GOLDKAMP, *supra* note 47, at 22.

480 DEFINING DRUG COURTS, *supra* note 125, at 17.

481 See LIPTON, *supra* note 82, at 18 ("A survey conducted in 1992 revealed that only 28 percent of the Nation's jails offer drug abuse treatment, and only 19 percent funded drug treatment programs."); see also <<http://www.casacolumbia.org/pubs/jan98/summary.htm>> ("Treatment is currently available for less than 10 percent of Federal inmates who have serious drug habits. . . . State officials estimate that 70 to 85 percent of inmates need some level of substance abuse treatment. But in 1996, only 13 percent of state inmates were in any such treatment."). By putting non-violent drug offenders in DTCs instead of prison, treatment providers have access to an under-served addict population.

482 See generally TREATMENT DRUG COURTS, *supra* note 61, at 11-29 (discussing the DTC planning process and outlining the participation of treatment providers in creating a DTC).

9. Empirical Evidence: A Problem With the DTC Statistics?

The claim of reduced recidivism rates for substance abuse offenders is a central theme in the operation of existing DTCs.⁴⁸³ DTCs and DTC-related organizations have all promulgated or published volumes of statistical material supporting the proposition that DTCs reduce drug use and crime. Many, if not all, of the initial DTC reports of success were based upon surveys and methods which used quasi-experimentation instead of true scientific experimentation; therefore, the results of the studies were suspect.

In an effort to correct the methodological and resulting statistical problems associated with these studies, the National Institute of Justice, in cooperation with the Office of Justice Programs Drug Court Office, engaged the RAND Corporation to conduct a study of a DTC.⁴⁸⁴ Maricopa County, Arizona, was selected as the site for this study. After conducting a pilot study of drug offenders in the county's criminal probation system for one year, RAND began its test of the county's new DTC in 1992.⁴⁸⁵

Modeled on the F.I.R.S.T. program in Oakland, California, the Maricopa County First Time Drug Offender (FTDO) program departs from other existing DTCs in several significant ways. The FTDO program functions as a postadjudicative, probation enhancement program in contrast to a diversion system.⁴⁸⁶ The program's criteria allows only first time felony drug offenders to participate in the DTC, although eligible participants can have prior felony convictions for nondrug offenses.⁴⁸⁷ Like F.I.R.S.T., the FTDO program requires the offender to sign a contract that sets down the terms of the program and the points a participant must acquire to advance to the next phase of treatment.⁴⁸⁸ The RAND experiment was an attempt to compare the efficacy of Maricopa FTDO DTC model at reducing recidi-

483 See DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, *supra* note 50 at 5; TREATMENT DRUG COURTS, *supra* note 61, at 3.

484 See ELIZABETH PIPER DESCHENES ET AL., RAND, AN EXPERIMENTAL EVALUATION OF DRUG TESTING AND TREATMENT INTERVENTION FOR PROBATIONERS IN MARICOPA COUNTY, ARIZONA, xix, 128 (1996).

485 This was only one of two experiments that RAND conducted concurrently for Maricopa County concerning drug abuse and the criminal justice system. The other study was an evaluation of the impact of urinalysis testing on drug offenders. See *id.* at 20.

486 See Deschenes et al., *supra* note 464, at 57.

487 See DESCHENES ET AL., *supra* note 484, at 23, 26. The program described in this section is the program that existed at the time of the study. The County has made changes to the program after the completion of this study. See *id.* at 23 nn.14-15.

488 See *id.* at 24.

vism with three different types of probation tracks. Each of the probation tracks involves a different level of probationer drug testing and probationer contact with the county's probation department.⁴⁸⁹ What set the RAND experiment apart from the data collection performed by other DTCs was the use of random selection to place each of the participants in one of the three probation tracks or the DTC.⁴⁹⁰ Thus, the test groups contained truly comparable sets of individuals, unlike the quasi-experiments from which other DTCs had derived their data.⁴⁹¹

The results of this experiment were less than resounding in terms of the effectiveness of the DTC to reduce substance abuse, as measured by positive urinalysis tests, and on the time to first arrest of participants in the program when compared to the three probation tracks.⁴⁹² However, the study did indicate that the DTC affected the offender and the criminal justice system in several positive ways.

The most significant impacts of the drug court program were a reduced time spent on probation (and more time spent free) and a lower proportion of offenders who were sentenced to prison as a result of a new arrest. . . . Those in drug court also had fewer drug-related technical violations on average than those on standard probation, but the number of participants with at least one violation was not significantly lower. . . . A smaller proportion of offenders in the drug court program had a technical violation for not showing up in or absconding, perhaps because they knew they faced a bench warrant for failure to appear in court.⁴⁹³

In summation, the RAND study found that the DTC did have a "significant impact on the proportion of probationers who were referred to, participate in, and successfully complete a treatment program."⁴⁹⁴

Otherwise, the difference in treatment participation levels does not appear to have translated into meaningful reductions in drug use or recidivism, but, with the exception of marijuana use, these outcomes have not worsened either. Thus, drug court, which may not

489 See *id.* at 20. Track 1 required no drug testing. Track 2 had monthly drug testing requirement. Track 3 scheduled bi-weekly drug testing. See *id.* at 29.

490 See *id.* at 29-33, 132.

491 See *id.* at 132.

492 See *id.* at 133.

493 *Id.* at 133.

494 *Id.* at 134. In fact, the study found that 90% of the DTC participants "actively participated in the drug and counseling" while only "38 percent of [the] individuals on routine probation" attended these types of programs. Deschenes et al., *supra* note 464, at 64.

cost more than standard probation, may yield outcomes at least as favorable in most respects.⁴⁹⁵

Given these initial findings, the RAND experiment seemed to indicate that DTCs may not attain the incredible reductions in recidivism that DTC proponents have been touting for the last few years. The study does not, however, accurately reflect the entire DTC picture. Since half the existing DTCs follow a preadjudication model, the findings of the Maricopa study may not represent the results obtainable by such DTCs. The FTDO program, unlike many other DTCS, specifically excluded more serious or chronic drug offenders from participation, and the drug treatment regime appears to have been much less intense than other DTCs. Still, the report and study represent a positive and exciting step toward the accurate scientific study of DTCs.

Since the preliminary findings of the RAND study, subsequent studies, by RAND and others, continue to support the idea that DTCs do in fact reduce recidivism and thus crime. A three year follow-up study conducted by RAND of the Maricopa DTC found that the rate of recidivism among DTC participants was over ten percent lower than individuals in other tracks.⁴⁹⁶ A follow-up report on Broward County's DTC found that despite an original finding of no reduction in recidivism by DTC program graduates, "significantly lower rearrest rates for graduates" proved to be true one year later.⁴⁹⁷

The findings of various studies about the efficacy of DTCs can be summarized as follows: (1) "[d]rug courts are able to engage and retain felony offenders in programmatic and treatment services";⁴⁹⁸ (2) drug courts serve a population in need to treatment;⁴⁹⁹ (3) data indicates drug courts provide more comprehensive and closer supervision of the drug-using offender than other forms of community supervision;⁵⁰⁰ (4) DTC participation lowers drug use and criminal behavior;⁵⁰¹ (5) DTCs reduce criminal behavior after participants graduate, but few studies have tracked recidivism longer than one year;⁵⁰² (6) DTCs produce cost savings;⁵⁰³ and (7) DTCs have al-

495 DESCHENES ET AL., *supra* note 484, at 134.

496 See Fax from Susan Turner, RAND, to John T.A. Rosenthal (Sept. 21, 1998) (on file with authors); see also STEPHEN BELENKO, NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 9 (1998).

497 BELENKO, *supra* note 496, at 10.

498 *Id.* at 20.

499 See *id.* at 23.

500 *Id.*

501 See *id.* at 35.

502 See *id.*

lowed the legal and drug treatment communities to come together to effectively treat substance abuse offenders in the criminal justice system.⁵⁰⁴

These studies do suggest that much more needs to be done in terms of retrieving and examining data on DTCs. The number of postprogram studies on offender outcomes remains small, and only two studies thus far have used experimental methodologies with random assignment of offenders.⁵⁰⁵ Therefore, although DTC studies continue to support the idea that drug treatment works to reduce recidivism and crime, the DTC community needs to strive to ensure that more studies using scientifically valid methodologies are undertaken. Only through the study of the long-term effects of DTC participants can DTC proponents lay claim to a system that reduces drug use and crime and their attendant societal and human costs.

10. The General Community and DTCs : Will We Be Safe and How Much Will It Cost?

A great number of Americans are concerned with crime, drug-related crime in particular. "In a 1995 nationwide survey by Peter Hart research Associates, 4 in 10 Americans said they changed the way they lived because of the threat of drugs in their communities. Two in three said the drug problem was worse than it was five years earlier."⁵⁰⁶ The results of this survey and others indicate the great concern of this country's citizens about the increasing problems of drug use in communities across the nation.⁵⁰⁷ Yet, despite the feelings of apprehension and fear which drug crimes and drug-related crimes produce in the citizens of various communities, most people believe that the reduction of drug abuse should be the main focus of effort, not simply more jail time for addicts.⁵⁰⁸ However, along with the sen-

503 See *id.* at 17-18.

504 See *id.*

505 See *id.* at 35-38.

506 CUTTING CRIME, *supra* note 70, at 3.

507 See KEEPING SCORE, *supra* note 296, at 10 (1996); Lauren Neergaard, *Study: Treatment Best for Addicts*, ASSOCIATED PRESS, March 17, 1998 (stating that although the number has dropped, 53% of Americans favor increased spending on drug treatment). But see *Nightline* *supra* note 110 (claiming that only 19% of those polled give drug treatment strong support).

508 See KEEPING SCORE, *supra* note 296, at 3, 10. "[T]he public remains substantially more pragmatic and less ideological than the politicians about the nation's drug problems. Polls show Americans strongly favor a balanced approach, which includes law enforcement, treatment and prevention, and focuses anti-drug spending in their communities rather than overseas." *Id.* at 3.

timent of treatment instead of jail time, many communities worry about the cost of such programs. In an era of fiscal austerity and belt-tightening, most communities believe they do not have the monetary wherewithal to implement drug treatment programs.

Although the community fears about safety and cost appeal to peoples' intuition, recent studies have shown these fears to be categorically false.⁵⁰⁹ Not only do treatment programs work at reducing addiction and its attendant crime, treatment programs actually save money.⁵¹⁰ Possibly the most comprehensive recent study addressing the efficacy of drug treatment was the California Drug and Alcohol Treatment Assessment report.⁵¹¹ In a two year study of the effects of treatment on drug abusers, the CALDATA report produced some astounding findings.

Substance abusers treated in the California public treatment system in 1991 reduced their criminal activity and health care utilization during and in the year subsequent to treatment by amount worth well over \$1.4 billion. About \$209 million was spent providing this treatment, for a ratio of benefits to costs of 7 to 1.⁵¹²

509 One example of such a study was done in 1992 in Minnesota.

[The study] found that providing treatment for drug abusers saved the state \$39 million in one year because of reduced hospitalizations, detoxifications and arrests. These savings, which begin as soon as the addict enters treatment, offset 80 percent of the program costs. Providing treatment to all addicts in the United States would save more than \$150 billion in social costs over the next 15 years, according to a 1994 RAND Corporation study, while requiring just \$21 billion in treatment costs.

Id. at 28 (citations omitted). Some estimate the national costs of drug abuse at \$70 billion per year. See *Drug Court Initiative*, *supra* note 386. Other sources state that the "economic cost to society from alcohol and drug abuse was an estimated \$246 billion in 1992." The National Institute on Drug Abuse & The National Institute on Alcohol Abuse and Alcohol, *The Economic Costs of Alcohol and Drug Abuse in the United States 1992* (visited Oct. 22, 1998) <[http://www.nida.nih.gov/Economic Costs/chapter1.html](http://www.nida.nih.gov/Economic%20Costs/chapter1.html)>. See also Fredrick Rotgers et al., *Introduction to TREATING SUBSTANCE ABUSE 1* (Fredrick Rotgers et al. eds., 1996) (stating psychoactive substance abuse disorders cost the U.S. between \$150 and \$200 billion annually).

510 Although the focus of this section is on the fiscal aspects of drug treatment, there may be an even more important component of the cost equation that receives little if any attention—the cost in human lives. "The costs [of drug abuse] are measured not only in dollars but also in lives. Some 40,000 Americans die of direct and indirect effects of drug abuse each year." *KEEPING SCORE*, *supra* note 296, at 25.

511 See generally CALDATA, *supra* note 435. "[CALDATA] . . . is at the leading edge of a new wave of research into the effectiveness, costs, and benefits of recovery services for substance abuse." *Id.* at 1.

512 *Id.* at 89.

Foremost in terms of the costs of drug abuse to taxpaying citizens is the cost of the crimes committed by drug abusers. "Crime related costs comprised \$2.4 billion (or 70 percent) of the costs to tax paying citizens (summing police protection, adjudication, corrections, victim losses, and theft losses together)."⁵¹³ Upon completion and discharge from treatment, patients reduced their criminal activity and therefore the costs to the taxpayer. This improvement led to "a 42 percent drop in the costs of crime (from \$2.4 billion in the year before treatment to \$1.4 billion in the year following treatment)."⁵¹⁴ The clear implication is that treatment reduces crime and improves the safety of the communities in which the patient lived, used drugs, and committed crimes prior to treatment.

Reduction in crime and its subsequent cost savings are not the only positive effects of treatment of drug abuse in a community. Health care expenditures, although a lesser part of the total costs of drug abuse to a community, were reduced "from \$3,227 before treatment to \$2,469 after treatment."⁵¹⁵ The ultimate conclusion of this study was that "appropriate alcohol and drug abuse treatment works . . . [and] [t]reatment is a good investment!"⁵¹⁶ Drug abuse treatment, rather than inhibiting safety, increases public safety by helping to eliminate the impetus behind the crime—drug abuse. Through this reduction in crime, the community reaps the double reward of reduced crime costs and reduced health care costs.

Along with the reduction in crime and health care costs, DTCs cut down on incarceration costs. As noted earlier, by using a DTC concept, participants spend less time in jail and prison and more time in treatment.⁵¹⁷ Generally, treatment at an outpatient facility costs

513 *Id.* at 64.

514 *Id.* at 71.

515 *Id.* at 90. The estimated costs of allowing drug abusers to go untreated is staggering. One study indicated that "[t]he health costs of leaving drug addiction untreated exceed \$3 billion a year" KEEPING SCORE, *supra* note 296, at 25. The incredible expense incurred by the community through medical treatment provided to individuals battling addictions is staggering. This expenditure of scarce resources occurs due to the sheer number of people who arrive in hospitals as the result of drugs. "Addictive illness is involved in as much as 40 percent of the emergency room visits, 30 percent of hospital admissions, and 25 percent of physician office visits." Steinberg, *supra* note 113, at 21.

516 Letter from Dr. Andrew M. Mecca, Director, California Dep't of Alcohol and Drug Programs (Aug. 1994), in CALDATA, *supra* note 435.

517 See *supra* text accompanying notes 365–66.

less than the twenty to twenty-five thousand dollars a year it costs to house people in prison for a year.⁵¹⁸

All of these savings add up to an incredible incentive for the public to invest in DTCS. As demonstrated by the statistics of operational DTCS and drug abuse studies, treatment is the most effective and least costly method of reducing drug-related crime while not compromising safety. In fact, given that DTCS treatment actually reduces crime, DTCS may offer the public a safer environment to live in than the existing adjudication process.

IV. CONCLUSION

The problem of drugs and crime continues to plague our society despite a decade of increased law enforcement and harsher mandatory sentences for drug offenders. In poll after poll, Americans reiterate their belief that drug abuse is a serious national problem which has not really gotten better despite increased spending on drug enforcement and prisons.⁵¹⁹ As a society, wisely or unwittingly, our response has been to use the criminal justice system as the primary means of dealing with this problem. Unfortunately, the courts have, until recently, been ill-equipped to deal with the problem of drug-addicted defendants, a group of defendants that has overwhelmed the court system.

The Drug Treatment Court movement is a direct response to this potentially crippling situation in our courts and communities. By understanding that drug addiction should be considered a treatable disease,⁵²⁰ judges sitting in DTCS apply a more appropriate and effective solution for the problem—judicially supervised drug treatment for a problem that is and should be recognized as largely medical in nature.

518 The annual cost of housing low-level drug offenders with no history of violence in the federal prison system alone "exceeds \$1.2 billion a year based on an annual average per prisoner cost of \$25,000." KEEPING SCORE, *supra* note 296, at 12. See also Neergaard, *supra* note 507 ("Jailing a drug addict costs \$25,900 per year. A year of traditional outpatient drug treatment costs \$1,800 . . .").

519 See *Nightline*, *supra* note 110.

520 See *id.* One doctor observed:

An analogy here is to lung cancer. People gave themselves lung cancer if they got lung cancer from smoking, but once they have it, we treat it as lung cancer. The same is true with drug addiction. Prolonged drug use changes the brain in fundamental and long-lasting ways and we know that those brain changes actually are the core, the essence of the compulsion that characterizes all addictions, you know, the compulsion to use drugs. And that makes it, at its essence, a brain disease.

Id. (quoting Dr. Alan Leshner, National Institute on Drug Addiction).

The DTC provides access to necessary drug treatment to a portion of the population that is in the most need of treatment, yet is the least likely to receive it. DTCs combine judicial and therapeutic methods to deal with drug-addicted offenders in the courts in order to improve public safety—the legitimate goal of our criminal justice system.⁵²¹ As mentioned previously in this Article, study after study demonstrates that drug treatment causes a “decrease in crime.”⁵²² The DTC channels individuals in need of treatment into a drug treatment environment and exerts the coercive power of the court to keep people in treatment. Drug treatment studies demonstrate that the longer a person stays in treatment, the more likely she is to abstain from drug use.⁵²³ In an effort to maximize the potential for a drug-addicted offender’s recovery, DTCs use therapeutic jurisprudence in their internal structure, processes, and procedures to support the treatment regime of the offenders in their program.

Without being conscious of its use, DTCs have been applying therapeutic jurisprudence to the problems of addicted criminal defendants. By adopting and integrating the methodologies of the drug treatment community in a judicial setting, DTCs actively incorporate a therapeutic jurisprudential outlook into their daily routine. The DTC movement should recognize this heretofore silent adoption and begin to engage therapeutic jurisprudence scholars in a dialogue to explore the DTC concept and assist in the refinement and improvement of the movement. For therapeutic jurisprudence scholars, DTCs represent the first consistent use of therapeutic jurisprudence in our criminal justice system. The unique fashion in which DTCs cope with the problems of drug abuse and crime in our justice system offers therapeutic jurisprudence scholars a new and promising road upon which to venture. The success of DTCs and their subsequent rapid spread through the country prove that therapeutic jurisprudence can work when applied to legal problems with demonstrable physiological and psychological underpinnings.

521 See Robert Davis, *Treatment ‘Absolutely Changes’ Addiction*, USA TODAY, Sept. 1, 1998, at D1 (“Drug treatment programs do help abusers quit, reducing crime in the process Drug treatment reduced moneymaking crimes like burglary, fraud, larceny and prostitution by as much as 38% . . .”).

522 *Nightline*, *supra* note 110. See also Neergaard, *supra* note 507 (showing that drug treatment can cut crime by 80%).

523 See *supra* Part III.

Now that these two powerful concepts have been cast together,⁵²⁴ both DTC movement proponents and therapeutic jurisprudence scholars need to expand on what is already a successful method of dealing with one of the most serious and potentially catastrophic social and legal problems in our society—drug addiction.

524 In May 1997, Judges Hora and Schma and Professors Wexler and Winick presented a panel on therapeutic jurisprudence and DTCs at the NADCP's training conference in Los Angeles.

