THE "TOMAHAWK" AND THE "HEALING BALM"[1]: DRUG TREATMENT COURTS IN THEORY AND PRACTICE

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There is a strong association in the United States ("U.S.") between the misuse of alcohol and other drugs and criminal offending.[2] The correlation is complex, as there are a number of "predisposing" factors that are common both to substance abuse and to criminal involvement, including poverty, unemployment, and mental illness.[3] Whatever the precise causal dynamics of these associated characteristics, the consequence of this relationship is a broad overlap between the universe of persons processed by the criminal system and those targeted by the substance abuse treatment system.[4] In a 1998 study, as many as eighty percent of inmates and others under criminal

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1. Benedikt Fischer, *Doing Good with a Vengeance: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3 CRIM. JUST.: INT'L J. POL'Y & PRAC. 227, 235 (2003). Fischer attributes this phrase to Alfred Lindesmith, a pioneer in the field of drug policy studies who was an early skeptic of using criminal coercion to facilitate the treatment of persons who misuse drugs. *See* Alfred R. Lindesmith, *Dope Fiend Mythology*, 31 J. CRIM. L. & CRIMINOLOGY 199, 207 (1940).

2. The correlation between drug abuse and criminal involvement has been noted for some time. *See* JAMES A. INCIARDI, THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY (1986); J. Scott Sanford & Bruce A. Arrigo, *Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns*, 49 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 239 (2005).

3. *See* KING COUNTY BAR ASS'N DRUG POLICY PROJECT, EFFECTIVE DRUG CONTROL: TOWARD A NEW LEGAL FRAMEWORK 93 (2005). *See also* Candido Da Agra, *The Complex Structures, Processes and Meanings of the Drug/Crime Relationship*, *in* DRUGS AND CRIME DEVIANT PATHWAYS 9 (Serge Brochu et al. eds., 2002); Karen Duke, *Out of Crime and into Treatment?: The Criminalization of Contemporary Drug Policy Since* Tackling Drugs Together, 13 DRUGS: EDUC. PREVENTION & POL'Y 409, 413 (2006).

4. *See* Steven S. Martin & James A. Inciardi, *Case Management Approaches For Criminal Justice Clients*, *in* DRUG TREATMENT AND CRIMINAL JUSTICE 81 (James A. Inciardi ed. 1993). The degree of this overlap has been intensified by the decision of state and federal lawmakers, prosecutors and law enforcement officials to target and prosecute drug possession cases. While observers like Douglas Marlowe may be correct in arguing that the overlap would exist even if possession were decriminalized, such a policy of decriminalization would be likely to have the effect of reducing substantially the number of drug-involved persons in the criminal system. *See* Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 993 (2002) [hereinafter Marlowe, *Effective Strategies*]; *See also* KING COUNTY BAR ASS'N DRUG POLICY PROJECT, *supra* note 3, at 47-49, 64.

supervision were determined to be "drug involved."[5] This means that those individuals were either under the influence of alcohol or other drugs during the commission of their offense, committed the offense to obtain drugs, committed (or were charged with committing) an alcohol or other drug-related crime, or were regular substance abusers.[6] Over half of all violent crimes, including family violence, child abuse and neglect, and property offenses, involve alcohol or other drug misuse by the offender (and sometimes the victim as well).[7] At the same time, many in treatment for substance use disorders either have pending criminal charges, have been sentenced to community supervision, have been conditionally released from prison on parole, or have served criminal sentences in the past.[8]

Given the association between substance misuse and offending, success in drug treatment appears to have a measurable impact on lowering crime rates.[9] Persons who enter into a sustained period of abstinence from (or substantially lower rates of) substance misuse tend to have reduced levels of criminal offending and fewer involvements in the criminal system.[10] These data thus suggest that interventions that effectively reduce alcohol and other drug use disorders are likely to have a beneficial impact on the incidence of crime, on rates of incarceration, and on public safety.[11]

5. *See* Douglas B. Marlowe, *Integrating Substance Abuse Treatment and Criminal Justice Supervision*, SCI. & PRAC. PERSP., Aug. 2003, at 4, 4 [hereinafter Marlowe, *Integrating Treatment and Supervision*] (citing S. BELENKO & J. PEUGH, NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, COLUMBIA UNIV., BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 5 (1998)).

6. *See id.*

7. *See id.*

8. *See id.*

9. S*ee* Marlowe, *Effective Strategies*, *supra* note 4, at 996.

10. *See* Adele Harrell & John Roman, *Reducing Drug Use and Crime Among Offenders: The Impact of Graduated Sanctions*, 31 J. DRUG ISSUES 207 (2001).

11. This claim should be placed in context. As Peter Reuter and Alex Stevens have explained:

> The most fundamental point to understand about drug policy is that there is little evidence that it can influence the number of drug users or the share of users who are dependent. There is no research showing that any of the tougher enforcement, more prevention or increased treatment has substantially reduced the number of users or addicts in a nation. There are numerous other cultural and social factors that appear to be much more important.

Peter Reuter & Alex Stevens, *Assessing UK Drug Policy From A Crime Control Perspective*, 8 CRIMINOLOGY & CRIM. JUST. 461, 474 (2008). On the other hand, Reuter and Stevens also report that "there is a great deal of evidence that, on average, treatment can help dependent drug users cut down both on the quantities of drugs they use and the volume of crime they commit, even if many treated users continue some illegal drug use and offending." *Id.* at 475.

For many years, the primary approach in the U.S. to reducing drug misuse and the criminal conduct attendant upon it has been to criminalize the unauthorized possession and distribution of controlled substances, and to rigorously enforce these prohibitions.[12] This traditional criminal punishment-based approach has proven to be ineffective.[13] More than eighty percent of drug-abusing offenders resume drug use within one year of release from prison, and well over ninety percent do so within three years.[14] Even offenders who have received drug abuse treatment while incarcerated tend to exhibit a high rate of relapse,[15] and those who receive no transitional care upon release appear to do no better than other drug abusing ex-offenders who receive no treatment while in prison.[16]

In light of these failures, a number of advocates have called for an alternative medical approach to dealing with drug addiction.[17] This approach views alcohol and other drug use disorders as diseases requiring treatment in the community rather than isolation and punishment.[18] Critics of this strategy note, however, that success in

12. One indicator of the heavy reliance in the U.S. on criminal enforcement as the primary drug control strategy is the distribution of resources in the National Drug Control Budget. In the years from 2000 to 2009, the percentage of the national budget devoted to "supply reduction" has varied from fifty-three to sixty-five percent of overall expenditures. By contrast, the percentage devoted to "treatment" has remained in a range from twenty-two to twenty-seven. *See FY 2009 Federal Drug Control Budget Released; Prevention Continues to Receive Dwindling Proportion of Funding*, CESAR FAX,(Univ. of Md. Center for Substance Abuse Research, College Park, Md.), Mar. 10, 2008, at 1.

13. While it is possible that the criminal enforcement approach may produce some general deterrence or otherwise reduce demand by pushing up the street price of drugs, there is insufficient empirical data to form a confident conclusion with respect to these assertions. *See e.g.*, Reuter & Stevens, *supra* note 11, at 469 ("There is little evidence that targeting distributors and retailers of illicit drugs for arrest leads to reductions in drug use."). On the other hand, we do have considerable data on the specific deterrence effects of this policy, and it is most unimpressive. *See infra* text accompanying notes 15-17. In contrast to the shaky case with respect to the claimed benefits in terms of deterrence produced by the criminal punishment approach, we know that the enforcement policy has imposed severe social costs relating to the disruption of families, communities and public institutions. See KING COUNTY BAR ASS'N DRUG POLICY PROJECT, *supra* note 3, at 56-59.

14. *See e.g.*, Steven Martin et al., *Three-Year Outcomes for In-Prison Therapeutic Community Treatment for Drug-Involved Offenders in Delaware: From Prison to Work Release to Aftercare*, 79 PRISON J. 294, 307, 310 (1999).

15. *See* Clive R. Hollin, *Treatment Programs for Offenders: Meta-Analysis, "What Works," and Beyond*, 22 INT'L J. L. & PSYCH. 361, 363, 366 (1999).

16. *See* Martin et al., *supra* note 14, at 306-310.

17. *See generally* Evan S. Dellon, David C. Lewis, & Camille A. Gear, *Alternatives to U.S. Drug Policy*, 17 J. PRIMARY PREVENTION 383, 383, 400-05 (1997).

18. *See* A. Thomas McLellan et al., *Drug Dependence, a Chronic Medical Illness: Implications for Treatment, Insurance, and Outcomes Evaluation*, 284 J. AM. MED. ASS'N 1689 (2000).

treatment (measured as length of time to relapse) is directly related to the length of time that clients are retained in treatment.[19] According to some research, three months of participation in drug treatment ordinarily is the minimum threshold for producing positive results, and twelve months in treatment may be the median point in the distribution of outcomes. Thus, approximately fifty percent of clients who complete twelve months of treatment maintain sobriety for an additional twelve months after completing treatment.[20] Unfortunately, attrition rates for community-based substance abuse treatment are high. Depending upon the treatment modality, drop-out rates can run as high as ninety percent during the first year of treatment, which means that most clients who are "voluntarily" in treatment leave before obtaining a clinical "dose" sufficient to produce a measurably positive outcome.[21]

Advocates of the drug court model and of many of the problem-solving court variations on that model point to the shortcomings of both the traditional criminal punishment approach and the medical alternative and argue that an integrated third way is necessary.[22] In their view, combining the coercive[23] aspects of the criminal system with the therapeutic tools in place within the community-based treatment system offers the best hope of retaining clients in treatment, thereby reducing relapse and, by extension, overall crime rates.[24] This argument for deploying the coercive

19. *See* Marlowe, *Integrating Treatment and Supervision*, *supra* note 5, at 6.

20. *See id.* The data suggest that rates of substance abuse relapse and criminal re-offending both are correlated with a client's length of stay in treatment. *See* Douglas M. Anglin and Yih-ing Hser, *Legal Coercion and Drug Abuse Treatment: Research Findings and Social Policy Implications, in* HANDBOOK OF DRUG CONTROL IN THE UNITED STATES 151 (James A. Inciardi, ed. 1990).

21. *See* Marlowe, *Integrating Treatment and Supervision*, *supra* note 5, at 6.

22. *See* Marlowe, *Effective Strategies*, *supra* note 4 at 990.

23. For an argument that coercion is an effective feature of treatment, s*ee generally* SALLY SATEL, DRUG TREATMENT: THE CASE FOR COERCION (1999). On the use of coercion in alcohol and other drug treatment more generally, *see* Douglas M. Anglin and Yih-ing Hser, *supra* note 20. Although the North American literature generally concludes that coerced treatment works, the international literature on this topic reports mixed results. *See* Alex Stevens et al., *Quasi-compulsory Treatment of Drug Dependent Offenders: An International Literature Review*, 40 SUBSTANCE USE & MISUSE 269 (2005).

24. As Peggy Hora and William Schma have put it:

> 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. . . Recent studies and findings by several researchers and

features of the criminal system to improve treatment outcomes has been widely adopted.

More than 2,000 drug courts now operate throughout the U.S. and in a number of other countries.[25] Hundreds of other problem-solving courts derived in one way or another from drug courts are also in operation.[26] A frequently asked question is whether drug courts really "work." The answer, not surprisingly, depends on how the question is framed. The data do seem to indicate that drug courts increase the retention rate of clients in treatment.[27] Given that retention in treatment consistently has been shown to correlate with successful treatment outcomes, and given that success in treatment has been correlated with reduced rates of re-offending,[28] one would expect that drug courts would also produce positive results with respect to criminal recidivism. In fact, the results in this regard generally are positive.

In a recent essay entitled, "The Verdict on Adult Drug Courts," longtime drug court watcher, Douglas Marlowe, reported on the results of five meta-analyses of adult drug treatment courts.[29] Marlowe concluded that the meta-analyses, which encompassed scores of empirical evaluations of these courts, showed that "drug courts significantly reduce crime by an average of approximately 8% to 26%, with most estimates falling around 14%."[30] Another recent report, issued by the Sentencing Project, also found support in the research data for the conclusion that drug courts produce reduced rates of either re-arrest or re-conviction relative to control groups of substance

> treatment specialists serve to dispel and debunk this notion. . . "[T]he 'coercion' actually improves the substance abusers' chances of overcoming their addiction."

Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 526 (1999) (internal citations omitted) (quoting 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, 58 (1996)).

25. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 14 (2009) [hereinafter NAT'L ASS'N OF CRIMINAL DEF. LAWYERS].

26. *See id.* For a detailed examination of drug treatment courts and other problem-solving courts outside of the U.S., *see* JAMES L. NOLAN, LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT (2009).

27. *See* Marlowe, *Integrating Treatment and Supervision*, *supra* note 5 at 7.

28. *See supra* notes 9 to 11 and accompanying text.

29. Douglas B. Marlowe, *The Verdict on Adult Drug Courts*, ADVOC., (Idaho State Bar) Sept. 2008, at 14 [hereinafter Marlowe, *The Verdict on Adult Drug Courts*].

30. *Id.*

misusing offenders processed through the traditional criminal system, although the averages reported in this study were in the eight to thirteen percent range.[31] The Sentencing Project authors warned, however, that "there is some reason to be cautious when interpreting these results."[32] The basis for their caution is interesting, and worth quoting at length:

> Some studies show little or no impact from drug court participation and it can be difficult to specify which components of the program or the research design may be contributing to these results. For example, are the evaluation models appropriately specifying relevant factors that may impact outcomes, but are external to the treatment design? Gender, age, race, socioeconomic background, criminal history, and substance abuse history have all been shown to impact treatment outcomes. Many of these variables are not accounted for in analyses of drug court effectiveness. Operationalizing drug court variables can be difficult and outcome measures may be reflecting the interaction of these variables with the treatment modality.[33]

In 2005, the Government Accountability Office (GAO) issued a report based on over two dozen well-constructed research investigations of drug courts.[34] The GAO conducted this study

31. RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 5-7 (2009). The Sentencing Project describes itself as a "national non-profit organization engaged in research and advocacy on criminal justice policy issues." *Id.* at tit. p.

32. *Id.* at 6.

33. *Id.* at 6-7.

34. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005) [hereinafter GAO, ADULT DRUG COURTS]. Previously, in 2002, the GAO had published a report in which it concluded that we "lack vital information" necessary to determine whether drug courts are effective. *See* GENERAL ACCOUNTING OFFICE, DRUG COURTS: BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS 3 (2002). *See also* GENERAL ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS (1997) (concluding that there was insufficient empirical evidence that drug treatment courts were effective in terms of reducing criminal offense recidivism or substance use relapse). In particular, the GAO pointed out that most of the studies of drug treatment courts that had been undertaken prior to 2002 used biased comparison samples, such as offenders who declined to participate in drug court or were deemed ineligible, measured the recidivism rates of drug court graduates rather than the entire experimental group of drug court participants, and generally failed to employ randomized

pursuant to a Congressional directive contained in a 2002 federal law that reauthorized the award of federal grants to localities for drug courts.[35] The GAO looked at four measures of effectiveness: criminal recidivism, substance use relapse, program completion, and costs versus benefits.[36] The authors undertook a systematic review of the available drug court research literature, resulting in their identification of 117 evaluations of adult drug courts conducted from May 1997 to January 2004. Of these identified reports, they selected the twenty-seven that met their criteria for "methodological soundness."[37]

Most of the selected evaluations used research designs in which participants in the drug court under review were compared to "an appropriate group of similar offenders who did not participate in the drug court program."[38] Five of the twenty-seven evaluations involved participants who had been randomly assigned to either a participant or a control group.[39] Most of the remaining evaluations either used contemporaneous comparison groups made up of offenders from similar, neighboring jurisdictions or historical control groups made up of defendants who had been processed by the same court just before the introduction of the drug court.[40] Because most of the selected evaluations employed "quasi-experimental comparison groups" instead of randomly assigned experimental control groups, the researchers had to confront the problem of "selection bias," which is the danger that the control group would be systematically different from the study group. Each of the selected evaluations responded to this potential threat to the validity of the research by employing design features or statistical methods to insure that the two groups were similar in relevant ways.[41]

experimental groups. *See id.; see also* Marlowe, *Integrating Treatment and Supervision*, *supra* note 5, at 8.

35. *See* Title II of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758, 1795-1799 (2002).

36. *See* GAO, ADULT DRUG COURTS, *supra* note 34, at 2.

37. *Id.* "[T]o assess recidivism and substance use relapse, we selected evaluations that used either an experimental design in which (1) eligible offenders were randomly assigned to different programs or conditions and (2) there was an acceptable level of attrition or a quasi-experimental design in which (1) all drug court program participants were compared with an appropriate group of comparable offenders who did not participate in the drug court program, and (2) appropriate statistical methods were used to adjust, or control, for group differences." *Id.* at 10.

38. *Id.* at 2.

39. *See id.*

40. *See id.* at 18.

41. *See id.* at 16-17.

An examination of other recent meta-analyses of the effect of drug court participation on criminal recidivism reveals that much of the underlying research upon which these meta-analyses rely does not employ randomly assigned experimental control groups, and a number do not base their comparisons on control groups that are reliably free from selection bias. One well-cited meta-study was based on underlying research in which only thirteen percent of the direct studies employed random control groups.[42] Moreover, this analysis employed constituent research in which fourteen percent of the comparison groups were made up of drug court "drop outs/non graduates" and thirty-two percent were comprised of offenders who were "eligible but did not participate."[43] Another cited meta-analysis is even more frank in acknowledging the limits of its empirical foundations. The authors of that study conclude that, although its findings "suggest that drug courts are effective at reducing reoffending," given the "wide variability in methodological quality" and the fact that there are "few high quality studies," "caution is warranted."[44]

The authors of the GAO study reached a series of conclusions about the effectiveness of adult drug treatment courts, based upon a systematic collection of information from the twenty-seven selected evaluations (which studied thirty-nine distinct courts).[45] Their analysis showed that most, although not all, of the programs that had collected data on criminal reoffending produced a reduction in the rate of participants' recidivism, relative to the comparison groups, "during periods of time that generally corresponded to the length of the drug court program – that is, within-program."[46] These reductions tended to hold in terms of the number of participants who were rearrested for new offenses during the program and in terms of the percentage of drug court participants who had "recidivism events."[47] Specifically, ten of the thirteen programs for which there were relevant data showed a statistically significant reduction in the percentage of the participant group that had been rearrested within-program, while ten of twelve programs with reliable data on reconviction rates showed a statistically

42. *See* JEFF LATIMER ET AL., DEP'T OF JUSTICE CAN., A META-ANALYTIC EXAMINATION OF DRUG TREATMENT COURTS: DO THEY REDUCE RECIDIVISM? 5 (2006).

43. *See id.*

44. David B. Wilson, Ojmarrh Mitchell, & Doris L. MacKenzie, *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIM. 459 (2006).

45. GAO, ADULT DRUG COURTS, *supra* note 34, at 2.

46. *Id.* at 5. Twenty-three of the thirty-nine programs studied reported recidivism data. *See id.* at 44.

47. *Id*. at 44.

significant reduction.[48] Finally, in eleven of sixteen programs that retained information about length of time to first arrest or conviction, a statistically significant improvement was demonstrable.[49]

Others who have evaluated meta-studies of offender treatment programs have observed that it is crucial to distinguish between "clinical and criminogenic outcome variables."[50] The former "refer to some dimension of personal functioning,"[51] and include drug misuse, while the latter refer to "outcomes concerned with crime, such as court appearance, self-reported offending, recidivism, and type of offense."[52] With respect to clinical outcomes, the GAO authors examined whether drug courts generally are successful in reducing substance use relapse.[53] They concluded that the evidence was "limited and mixed."[54] Only eight programs had comparative data on relapse; in some cases these data were based on drug test results, while in others they were participant self reports.[55] Four of the five programs that retained drug test results reported reductions in relapse, while most of the programs that collected data based upon self reports of drug use showed no difference in relapse rates between drug court participants and those in the control groups.[56]

The authors of the GAO study also examined the rates at which participants completed, or "graduated from," the drug court programs under review, as well as the factors associated with successful program completion.[57] They found a wide variation among the jurisdictions, ranging from a low of twenty-seven percent program completion to a high of sixty-six percent.[58] Notwithstanding this variation in completion rates, the GAO observed that participants who completed a drug court program had lower criminal recidivism rates than did those

48. *Id*. at 45, 47.

49. *See id.* at 49. The GAO authors also concluded that "limited evidence indicates that recidivism reductions endure." *Id.* at 52. In particular, they found that thirteen of seventeen programs that reported post-program recidivism rates were able to demonstrate lower rearrest rates or reconviction rates than comparison groups. *Id.* Marlowe reports that some of the studies he reviewed indicate that "the effects have been shown to last at least 3 years post-entry" and that "one study reported reductions in crime lasting an astounding 14 years." Marlowe, *The Verdict on Adult Drug Courts*, *supra* note 30, at 14.

50. Hollin, *supra* note 15, at 362.

51. *Id.*

52. *Id.* at 362-63.

53. *See* GAO ADULT DRUG COURTS, *supra* note 34, at 57.

54. *Id.* at 6.

55. *See* i*d.* at 57-59.

56. *See id*. at 60.

57. *Id.* at 62.

58. *Id*.

who dropped out.[59] Given this measurable difference, the reliance in some other studies on drop-outs as a comparison group raises special concerns.

Not surprisingly, the factor most closely associated with program completion was the participants' compliance with drug court procedures and requirements.[60] "No other program factor, such as the severity of the sanction that would be imposed if participants failed to complete the program or the manner in which judges conducted status hearings, predicted participants' program completion."[61] In light of the claim that criminal system coercion is an important therapeutic lever in successful drug courts, it is significant that the GAO evaluators were unable to confirm that program completion rates were associated with the "legal consequences of program failure."[62]

Several offender characteristics, however, were associated with successful completion of the drug court regime. Participants who had relatively fewer prior involvements in the criminal system and who were older were more likely to graduate than were other participants.[63] These findings are important, because they suggest that certain basic principles researchers have identified in the course of conducting meta-analyses of treatment programs for offenders more generally are

59. *Id.*

60. *Id.* at 64.

61. *Id.* at 62.

62. *Id.* at 67. Although several evaluations included within the GAO study did seek to measure the effects of different sanctions on graduation rates, the GAO report describes the results of these evaluations as "mixed and not directly comparable." *Id.* Thus, the Brooklyn Treatment Court generated data indicating that participants facing longer terms of incarceration in the event of program failure were more likely to complete the program, while data from the Suffolk County drug court showed no such relationship. *Id.* In his recent essay, Professor Marlowe cites to several "dismantling studies" demonstrating that "escalating sanctions and rewards" and "coercive leverage" are critical to drug court success. *See* Marlowe, *The Verdict on Adult Drug Courts*, *supra* note 29, at 14. On the other hand, the Sentencing Project's report found that many drug treatment courts "do not have a formal system under which sanctions are imposed, nor are records kept for when and why sanctions are enforced. This is problematic when attempting to evaluate the efficacy of a drug court intervention." King & Pasquarella, *supra* note 31, at 10. After reviewing the available studies, these authors concluded that

> [t]he data on sanctions presents a mixed picture. It may be that sanctions alone are not effective predictors of success, but in conjunction with other program elements can play an important role in leading to elevated retention rates. There is also some evidence suggesting that the implementation of sanctions is uneven in many courts, which might explain differential outcomes.

Id. at 12. Clearly more research of this sort is essential if the operation of these courts is to be fully understood.

63. GAO, ADULT DRUG COURTS, *supra* note 34, at 69.

likely to apply to drug courts as well. These principles, elaborated in the "what works" literature,[64] include the "risk principle," which holds that effective programs must conduct risk assessments of clients in order to match them with appropriate services, and the "responsivity principle," which holds that successful treatment design should "engag[e] offenders at a level that is consistent with their individual ability and learning style."[65] One evaluation included in the GAO study is particularly interesting in this regard. It sought to "measure the effect of motivation and readiness for treatment on program completion" and "found that those participants who were better able to recognize their problems, recognize external problems, and were ready for treatment, were more likely to complete the drug court program."[66]

In essence, the findings of the GAO study suggest that drug courts succeed in retaining participants in treatment (to the extent that they do so) not so much because of the particular elements or design features of a given program, but rather because of the characteristics of individual participants, including those characteristics that make substance users "treatment ready."[67] The authors' conclusion, "that drug court programs can be an effective means to deal with *some* offenders,"[68] recognizes this fundamental fact about the importance of

64. This literature reports on a number of meta-analytic studies that have been undertaken over the past fifteen years or so in response to the "nothing works" message that took hold in the political climate of the 1970s and 1980s, following the publication of a paper by Martinson in 1974 suggesting that prison-based rehabilitative efforts do not work. *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 25 (1974). These more recent evaluations reveal that, despite considerable variation, offender treatment efforts do generally produce "an overall positive net gain . . . when treated offender groups are compared to nontreatment groups." Hollin, *supra* note 15, at 363.

65. Hollin, *supra* note 15, at 364-65.

66. GAO, ADULT DRUG COURTS, *supra* note 34, at 69-70.

67. Some experts in the addictions field have begun to map out the stages that persons typically go through both in the process of becoming addicted to alcohol or other drugs and in recovering from those substance use disorders. In light of these insights into the progression of the disease, these experts assert that the efficaciousness of treatment may depend on how therapeutic interventions are timed; that is, success may turn in significant part on making treatment available at moments in the progression of a substance use disorder when an individual is "treatment ready." *See generally* CARLO C. DICLEMENTE, ADDICTION AND CHANGE: HOW ADDICTIONS DEVELOP AND ADDICTED PEOPLE RECOVER (2003). The fortuitous moment of criminal arrest may or may not coincide with the point in the development of the defendant's disease process at which he or she is most amenable to treatment. If such a coincidence is not present, the additional pressure of criminal system coercion may be required to retain the person in treatment; but this involuntary approach may carry other counterproductive consequences that could be avoided if a non-coercive alternative were available.

68. GAO, ADULT DRUG COURTS , *supra* note 34, at 7 (emphasis added).

tailoring therapeutic interventions to the individual needs of those with substance use disorders.[69]

These data, then, support the conclusion that some treatment courts can be *efficacious* for some participants, which is a different claim than the more ambitious conclusion that this model is *effective* generally.[70] With respect to virtually all of the outcome studies, the reports are comparative and the absolute rates of reoffending are still extremely high.[71] In addition, the positive results with respect to recidivism hold only for those participants who have completed the program; those who drop out recidivate at a rate comparable to persons in the control groups.[72]

Finally, recidivism is measured in these evaluations primarily in terms of rearrests and reconvictions. As the authors of the GAO

69. Of course, even this modest assessment of the potential for these courts to generate positive outcomes has to be tempered by an awareness of the limits of the GAO's analysis and of the data that were available. In the first place, the GAO's assessment was based upon its review of data drawn from only thirty-nine drug courts out of a universe of more than 1,000 such programs. *Id*. at 3. Moreover, the selection of these thirty-nine courts was based upon the methodological soundness of the evaluations that had produced the data, and not on their typicality or the representativeness of these programs relative to other drug treatment courts around the country. The authors acknowledged as much in observing that they had "selected the evaluations in our review according to the strength of their methodologies; therefore, our results cannot be generalized to all drug court programs or their evaluations." *Id*. A similar caution should attach to the claims of success derived from the findings of other meta-analyses, *see e.g.*, Marlowe, *The Verdict on Adult Drug Courts*, *supra* note 29, at 14, given the remarkable diversity of procedures, institutional structure, and other essential characteristics that one finds in this field. As the National Association of Criminal Defense Lawyers' recent report put it, "virtually every problem-solving court is different. Even within the same state or subdivision, the rules, the practices and the protections for the accused are *ad hoc*, and sometimes irrational." NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 25, at 8.

70. *See e.g.*, William G. Meyer & A. William Ritter, *Drug Courts Work*, 14 FED. SENT'G REP.179 (2001-02). As Douglas Marlowe has explained, "[e]fficacy refers to whether the intervention can be successful when it is properly implemented under controlled conditions, whereas effectiveness refers to whether the intervention typically is successful in actual clinical practice." Douglas B. Marlowe, *Drug Court Efficacy vs. Effectiveness*, NEWS FEATURES (Boston University School of Public Health/Join Together Project, Boston, Mass.), Sept. 29, 2004, http://www.jointogether.org/y/0,2521,574745,oo.html.

71. *See e.g.* Denise Gottfredson & M. Lyn Exum, *The Baltimore City Drug Treatment Court: One-Year Results from a Randomized Study*, 39 J. RESEARCH IN CRIME & DELINQ. 337, 350 (2002). *See also*, Denise Gottfredson, Brook W. Kearley, Stacy S. Najaka, & Carlos M. Rocha, *The Baltimore City Drug Treatment Court 3-Year Self-Report Outcome Study*, 29 EVALUATION REV. 42 (2005) (forty-nine and one-half percent of Treatment Court participants at the three-year mark report re-arrest within prior twelve months versus fifty-eight percent of control group; sixty-six percent of Baltimore City Drug Treatment Court participants had been rearrested within two years of admission, compared with a rate of eighty-one percent for defendants who had been processed through Baltimore's traditional criminal courts system; seventy-eight percent of Drug Treatment Court participants had been rearrested at the three year mark compared with eighty-eight percent of controls).

72. GAO, ADULT DRUG COURTS, *supra* note 34, at 62.

study concede, however, "[r]earrests, as well as reconvictions, do not measure all re-offending, as every offense or violation does not lead to an arrest."[73] Indeed, rearrest data can be particularly misleading because official arrest records may capture as little as one percent of the overall criminal activity of an active "street addict."[74] Other measures that can more accurately track the success of interventions include self-reports of drug use, self-reports of the intensity or rate of criminal activity ("defined as either the actual number of crimes committed over a given time period, the percentage of time involved in committing crimes, or the number of 'crime-days' per year"),[75] or "psychosocial measures of family reintegration, job skills attainment" and the like.[76] With respect to psychosocial measures, a group of experts who have been studying the performance of the Baltimore City Drug Treatment Courts reported in 2005 that "virtually no research has focused on outcomes of interest other than recidivism (such as employment, health, and social connections), and the few studies that addressed other outcomes were all plagued with problems such as small sample size, a limited follow-up period, and program implementation difficulties."[77] After collecting data at the three-year mark from a group of participants in the Baltimore Drug Treatment Courts and a randomized control group, these researchers concluded that "with the exception of welfare status, the positive effects of the drug treatment courts do not extend to the broader set of outcomes claimed by advocates," including employment status and family and social functioning.[78]

To provide some context for the GAO's modest appraisal of the efficacy of drug courts, as well as the more enthusiastic endorsements of others,[79] it may be helpful to look at a national evaluation, funded some years ago by the National Institute of Justice and conducted by the RAND Corporation (RAND), of fourteen drug treatment courts. The fourteen programs had all received

73. *Id.* at 45 n.4.

74. *See* James Swartz, *TASC – The Next 20 Years: Extending, Refining, and Assessing the Model*, *in* DRUG TREATMENT & CRIM. JUST.127, 142 (James Inciardi, ed., 1993).

75. *Id.* at 143-44.

76. Susan Turner, et al., *A Decade of Drug Treatment Court Research*, 37 SUBSTANCE USE & MISUSE 1489, 1508 (2002).

77. Gottfredson, et al., *supra* note 71, at 44.

78. *Id.* at 61.

79. *See e.g.*, C. WEST HUDDLESTON, III, ET AL., BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES 6 (2004); Marlowe, *The Verdict on Adult Drug Courts*, *supra* note 29, at 14.

implementation grant funding in the mid-1990s from the Drug Courts Program Office, which had been established with the passage of the federal Omnibus Crime Control Act.[80] The researchers at RAND reported that the functional characteristics of the drug courts under review—"the types of models implemented, eligibility requirements, court and treatment requirements, and program implementation difficulties" —were consistent with the characteristics of other drug court programs as revealed in earlier national surveys and reviews, and were "typical of drug treatment courts across the country."[81]

Given the typicality of these drug court programs, the conclusions reached by the RAND researchers are worth exploring. With respect to the adequacy of rehabilitative services, they concluded that "[a]ccess to a continuum of alcohol and drug user treatment services and other related rehabilitative services was often difficult, reflecting funding issues, as well as close coordination and information flow issues between treatment providers and other drug treatment court staff."[82] The RAND evaluators reported that frequently encountered problems included: a lack of regular and formalized communication between court personnel and treatment providers; inadequate case management resources; a lack of resources to support needed residential treatment and nursing services; ongoing tensions between the "supervision and rehabilitation objectives" of the program; and persistent pressure to process a large number of clients, which often exceeded the treatment providers' clinical capacity.[83]

A similar set of cautions about the adequacy of treatment provided in some drug courts is raised by the authors of the Sentencing Project's evaluation. These researchers point out that "drug courts may not best serve those with the most serious addictions," and argue that it is "crucial to disentangle failures of drug treatment due to an individual's reticence to complete treatment from those resulting from persons who were simply placed in a program that was inappropriate for their needs."[84]

80. Turner, et al., *supra* note 76, at 1503 (discussing grants awarded pursuant to Title V of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322).

81. *Id.* at 1504.

82. *Id.* at 1505.

83. *Id.* at 1506-07.

84. King & Pasquarella, *supra* note 31, at 14-15. It is likely that variations in outcome depend upon a variety of features found in therapeutic courts. These features could be, but generally are not currently, tailored to a whole range of characteristics that determine participants' clinical needs. For example, some studies have shown a strong correlation between gender and treatment readiness among the population of persons with drug use disorders, and one study has documented that women with mental health problems have the

The RAND report concludes that "many treatment programs utilized by drug treatment court programs may not be delivering the best treatment to clients," and that "more attention" should be given "to the type and quality of treatment services.[85] The limited access of many drug courts to residential treatment facilities and to specialized services for women, persons with co-occurring mental illnesses and others with special needs is a significant shortcoming.[86] The Sentencing Project's analysis reports a shortage of treatment slots for women, observing that women are "likely to have to wait twice as long as men for an open treatment slot."[87] In addition, many drug courts have chosen not to work with methadone maintenance programs and other treatment providers who use opiate-replacement medications, despite the fact that overwhelming evidence suggests that a segment of the client population who do not respond to other forms of treatment benefit from these kinds of pharmacological interventions.[88] Indeed, methadone maintenance treatment consistently has been demonstrated

highest level of openness to treatment. *See* J.M. Webster et al., *Gender, Mental Health, and Treatment Motivation in a Drug Court Setting*, 38 J. PSYCHOACTIVE DRUGS 441 (2006). To the extent that these women have "higher levels of problem recognition and desire for help," *Id*. at 445, it may be that less coercive interventions targeted to this group would be more productive than the approach followed now in many drug treatment courts and other problem-solving courts. In addition, research into treatment matching suggests that highly structured cognitive-behavioral therapies may work best for some clients, while insight-oriented interventions or educational approaches might be better suited to others, and that inappropriate assignments to modalities of treatment that are contraindicated may have the effect of increasing problematic behaviors and criminal recidivism. Related to this point, it is significant that the drug treatment court model assumes that most drug defendants are chemically dependent, and that their physical and/or psychological dependence drives their criminal conduct. As a consequence, the model generally includes an intensive addictions treatment component designed to help initiate and sustain a process of recovery. Recent research has raised questions about the accuracy of this picture, however, and about the universal need for intensive addiction treatment services for all the defendants assigned to drug treatment courts. Indeed, one published paper has suggested that "roughly on third of drug court clients do not have a clinically significant substance use disorder." D.S. DeMatteo et al., *Secondary Prevention Services for Clients Who Are Low Risk in Drug Court: A Conceptual Model*. 52 CRIME & DELINQ. 114, 114, 115 (2006).

85. Turner, et al., *supra* note 76, at 1513 (discussing Shelley Johnson, et al., *Drug Courts and Treatment: Lessons to be Learned from the "What Works" Literature*, 4 CORRECTIONS MGMT. Q. 70 (2000)).

86. *See* ELIZABETH A. PEYTON & ROBERT GOSSWEILER, TASC, TREATMENT SERVICES IN ADULT DRUG COURTS XV (2001), *available* at www.ncjrs.org/txfiles1/ojp/188085.txt. *See also, Drug Courts Frustrated Over Client Treatment Options*, 13 ALCOHOLISM & DRUG ABUSE WKLY. 1 (Aug. 13, 2001).

87. King & Pasquarella, *supra* note 31, at 16.

88. *See* Lauren Amato, et al., *An Overview of Systematic Reviews of the Effectiveness of Opiate Maintenance Therapies: Available Evidence to Inform Clinical Practice and Research.* 28 JOURNAL OF SUBSTANCE ABUSE TREATMENT 321 (2005); Stephen Magura, et al., *The Effectiveness of In-Jail Methadone Maintenance*, 23 J. DRUG ISSUES 75 (1993).

to reduce drug use and criminal activity among opiate addicts far more effectively than other forms of drug-free outpatient therapy.[89]

There are costs to using the criminal justice system as an adjunct to treatment, even if this approach offers some benefits to some clients in terms of retention in treatment. At least in those drug courts that require guilty pleas and that do not automatically expunge convictions upon graduation, the blending of punitive and therapeutic impulses can exact a substantial cost from participants. Even in instances where clients gain access to appropriate rehabilitative services and experience treatment successes, their long-term prognosis may depend substantially on their ability to hold a job and maintain stable family relationships. Because federal and state laws restrict people with drug convictions from public housing, prevent them from qualifying for certain occupational licenses, and impose a variety of other barriers on full community participation, and because many employers ask about convictions and make job decisions based on past

89. *See* Marlowe, *Integrating Substance and Supervision*, *supra* note 5, at 13. It is interesting to note that the aversion of drug treatment courts in the U.S. to methadone maintenance therapy is not shared universally in this country or internationally. For example, research describing a highly successful court diversion program in New South Wales not only attributes some of the success of the program to its non-coercive design, but also reports that over a fifth of the participants received methadone maintenance treatment. *See* David Reilly, John Scantleton & Peter Didcott, *Magistrates' Early Referral into Treatment (MERIT): Preliminary Findings of a 12-Month Court Diversion Trial for Drug Offenders*, 21 DRUG & ALCOHOL REV. 393, 395 (2002).

criminal records,[90] the drug conviction alone may, as one expert has put it, "condemn drug court graduates to failure."[91]

While the GAO study, the RAND study, the reports by the Sentencing Project and the National Association of Criminal Defense Attorneys, and the various meta-analyses discussed earlier provide a detailed picture of these diverse and complicated institutions, the observational work of the on-the-ground functioning of specific drug courts undertaken by other researchers provides a different but also useful snapshot. Instead of seeking to evaluate these courts on the basis of aggregated data about outcomes, such as the reoffending rates of their participants, these studies offer data and analyses of identified operational features of individual courts. Two such efforts focused particularly on the detailed interactions between drug court defendants and drug court judges are especially worth considering, because they begin to provide some important insights into why drug courts may succeed for some participants and fail others.

The first of these two observational projects is reported in an article entitled *Tough Love: Nurturing and Coercing Responsibility*

90. *See generally* Nora V. Demleitner, *Collateral Damage: No Re-Entry For Drug Offenders*, 47 VILL. L. REV. 1027, 1033-1039 (2002). A typical example is the law in Rhode Island, which provides that conviction of an enumerated felony disqualifies an individual from employment in a "nursing facility, a home nursing care provider, or a home care provider which is or is required to be licensed, registered, or certified with the department of health if that employment involves routine contact with a patient or resident without the presence of other employees. . ." R.I. GEN. LAWS §§ 23-17-34 to 37 (2001). Federal guidelines governing public housing permit public housing authorities and other federally-assisted housing providers to exclude many ex-offenders, including those convicted of drug-related offenses. *See* LEGAL ACTION CENTER, SAFE AT HOME: A REFERENCE GUIDE FOR PUBLIC HOUSING OFFICIALS ON THE FEDERAL HOUSING LAWS REGARDING ADMISSION AND EVICTION STANDARDS FOR PEOPLE WITH CRIMINAL RECORDS 5-8, http://lac.org/doc_library/lac/publications/Safe@Home.pdf. A number of public housing authorities around the country maintain a policy of refusing housing on the basis of criminal records. The housing authority for Los Angeles bars any person convicted of a "serious felony" for a period of ten years. *Id.* With respect to welfare benefits, federal law provides that individuals convicted of a drug felony shall be banned permanently from receiving food stamps or Temporary Assistance for Needy Families (TANF). *See* 21 U.S.C.A. § 862a (West 2002). The federal law does permit individual states to modify this position, and a number have opted to waive or modify the federal ban.

91. Bob Curley, *Drug Courts, Treatment Programs Seek Trust, Understanding*, NEWS FEATURES (Boston University School of Public Health/Join Together Project, Boston, Mass.), Sept. 5, 2003, http://www.jointogether.org/sa/news/features/reader/0,1854,566634,00.html. There is also some reason to believe that drug treatment courts may be "exacerbating existing racial disparities" in the system, in part because of disparities in arrest patterns, but also because eligibility criteria "tend to disqualify persons whose offenses would otherwise result in a prison sentence and those with a longer criminal history, and because participants of color may have higher failure rates than whites "due to socioeconomic disadvantage." King & Pasquarella, *supra* note 31, at 17-18 (citing Michael O'Hear, *Rethinking Drug Courts: Restorative Justice As A Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463 (2009).

and Recovery in California Drug Courts, in which sociologists Stacy Burns and Mark Peyrot set out the findings of their "naturalistic and ethnomethodological" observations of several California drug courts.[92] The researchers studied seventy-five drug court sessions and compiled "detailed field-notes of the interactions between judge and the defendant in these sessions."[93] The article includes a number of excerpts of transcribed interactions from these court sessions. Based upon these data, the researchers conclude that "drug court judges and defendants interact (and sometimes vie) to construct the defendant as either a personally responsible, rehabilitatively changed 'recovering' person, or, alternatively as a person in need of sanction."[94] Importantly, according to Burns and Peyrot, this choice involves a moral assessment rather than a straightforward adjudication of the defendants' actions and the legal significance of that conduct.[95] The judges in these courts are interested

> in what the actions reveal about the selves under consideration. [The] judges look beyond, behind, and beneath surface appearances to see if defendants are worthy of 'treatment' in drug court and if they are succeeding according to the court's terms. Drug court judges try to determine if they are dealing with persons who can be repaired and restored, or with irremediably deficient selves . . .[96]

This notion, that at least some defendants in drug treatment court are designated by the judges as morally "deficient" (perhaps, "irremediably" so), is apparent as well in the observational data reported by Terance Miethe, Hong Lu, and Erin Reese in their article *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*.[97] One lens through

92. *See* Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416 (2003). Burns and Peyrot describe their approach to this sociological investigation in the following terms: "In this study we pursued a naturalistic and ethnomethodological interest in discovering 'what local people consider meaningful [and] making their concerns accessible to readers who are unfamiliar with their social world.'" *Id*. at 420 (citations omitted).

93. *Id.* at 420.

94. *Id.* at 418.

95. *Id.* at 433.

96. *Id.*

97. *See* Terance D. Miethe, Hong Lu, & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522 (2000).

which to read this data is provided by the work of John Braithwaite, a leading figure in the development of the theory of restorative justice, on the process of "reintegrative shaming."[98] A number of writers about drug courts in particular and problem-solving courts more generally have speculated that these courts might be effective precisely because their operational features meet the theoretical description of a restorative justice undertaking. Thus, Miethe, Lu, and Reese point out that "the organizational characteristics and process of drug court are logically consistent with the dictates of reintegrative shaming,"[99] while Barry Goetz has suggested that "the popularity of drug courts continues to rest precisely on the ways in which judges and other court staff can 'moralize' about the content of deviant acts to offenders, a theme consistent with reintegrative shaming."[100]

Braithwaite's theory builds upon the work of labeling theorists to suggest that criminal court proceedings function as public ceremonies in which the offender's deviance is certified.[101] Unlike traditional criminal blaming processes, however, the reintegrative shaming approach suggested by Braithwaite links this initial certification event with an eventual termination ceremony intended to decertify that deviance and return the offender to his or her community.[102] In between these certification and decertification events, the theory calls upon designated actors within the immediate community to convey to the offender their disapproval of his or her transgressive conduct, but to do so within a developing relationship of respect and social interconnectedness.[103] Finally, the theory insists that these expressions of disapproval should be directed at the offender's conduct and not at the offender himself or herself.[104]

In the Miethe, Lu, and Reese study, the authors' hypothesis that the drug treatment court model would function well as a reintegrative shaming process was not supported by their observational

98. *See* JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 100-01 (1989).

99. Miethe et al., *supra* note 97, at 536.

100. Barry Goetz, *The Rise of Therapeutic Jurisprudence and the Decline of Reintegrative Community Policing: Braithwaite's Theory & Experiments in American Drug Control* (Jul. 31, 2008) (paper presented at the 2008 Annual Meeting of the American Sociological Association in Boston, MA), *available at* http://www.allacademic.com/meta/P240594_index.html.

101. *See* BRAITHWAITE, *supra* note 98, at 101. Burns and Peyrot link this idea to the work of Harold Garfinkel on "status degradation ceremonies." *See* Burns & Peyrot, *supra* note 92, at 432 (discussing Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1956)).

102. *See* Miethe et al., *supra* note 97, at 528.

103. *Id.*

104. *Id.*

data. Following the offenders' initial court appearance in which their deviance was certified, the

> field observations of [subsequent] court sessions revealed a clear preponderance of stigmatizing rather than reintegrative comments directed at most offenders. The individual defendant, not the act itself, was clearly the focal point of the judge's common 'tongue lashings.' These comments were usually of the type, 'Don't you know what this stuff does to your brain!', 'I'm tired of your excuses,' and 'I'm through with you.'[105]

In addition, insufficient efforts were made to reintegrate participants into the broader community. Although graduates did receive a T-shirt and key chain stating that they were "2 smart 4 drugs," the decertification ceremony was "largely symbolic and perfunctory," and the provision of ongoing transition help was limited.[106] Finally, Miethe, Lu, and Reese report that the goal of reconnecting drug court participants to their families and other social support networks was ill-served in many cases by the concrete interactions that took place in the drug court process.[107] They explain that

> the effort to increase offenders' embeddedness in social institutions and interdependencies through repeated contact with court officials, and in particular the judge, failed to produce the expected results. It is theoretically sound that requiring offenders to meet with the judge frequently and making the judge serve multiple roles of court official, social worker, and psychologist will enhance the relationship between the offender and the judge and, consequently, improve the offender's rehabilitation. In reality, our field research shows that offenders do not generally regard court officials, including the judge, as persons they highly respect. We also found only a few instances in our field observations in which the judge encouraged greater

105. *Id.* at 537.

106. *Id.* Thus, "[b]y moving from a rigid and highly structured environment to a potentially chaotic and unstable environment in a matter of weeks, it should not be surprising that drug court graduates experience[d] high rates of relapse and recidivism." *Id.*

107. *Id.*

> family interdependencies by telling family members to help the defendants 'keep up the treatment.' Hence, the effect of reintegrative shaming is necessarily reduced.[108]

Although both the rhetoric and the design features of drug courts and many other problem-solving courts suggest that they should succeed within the Braithwaite model of restorative justice, the fact that they do not consistently do so likely is due to the hydraulics of virtually all treatment/punishment hybrids, under which therapeutic impulses tend to collapse into punitive practices, and to the powerful social meanings associated with drug misuse and addiction. As the broad but ultimately unsuccessful effort to adopt rehabilitative penal practices in the middle part of the Twentieth Century (and the more particularized failures of the juvenile court movement over most of the last century) suggests, joining punitive and therapeutic functions within a single hybrid institutional structure is fraught with risks.[109] These risks derive from a number of sources, but especially from what the mid-century critics of the "rehabilitative ideal" referred to as the inherent tendency of these merged enterprises "in practical application to become debased and to serve other social ends far removed from and sometimes inconsistent with the reform of offenders."[110] The critics argued that the "natural progress of any program of coercion is one of escalation,"[111] and that a persistent "competition between rehabilitation and the punitive and deterrent purposes of penal justice . . . [in which the] rehabilitative ideal is ordinarily outmatched in the struggle"[112] helps to explain this inclination toward debasement.[113]

While a "predominant narrative" of the problem-solving court movement is that it turns on "efforts of 'integrating' and 'harmonizing' the professional approaches of justice and treatment," some observers have suggested that "[t]he ontological framework of 'crime' and

108. *See* Miethe et al., *supra* note 97, at 538.

109. *See* Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 1205, 1218–1245; 1269–1278. *See also* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT (1978).

110. ALLEN, *supra* note 109, at 49.

111. AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 25 (1971).

112. ALLEN, *supra* note 109, at 53–54.

113. The critics asserted that debasement is virtually inevitable given the "conceptual weakness" of rehabilitative punishment, and the fact that criminal justice institutions "must serve punitive, deterrent, and incapacitative ends." *Id.* at 51-53.

'disease,' applied to the problem of drug addiction, makes for fundamentally different assumptions, practices and goals."[114] Indeed, "[t]hese perspectives are not only fundamentally different," they may well be "contradictory and exclusionary in many of their assumptions and principles."[115] Thus, "the actual meaningfulness of jointly applying the figurative 'tomahawk' and the 'healing balm' . . . to the offender, in principle and practice, remains an open question."[116]

Beyond the inherent instability of rehabilitative punishment and its tendency to become debased in practice, there may be a second explanation for the less than optimal fit between the theoretical requirements of the restorative justice model on the one hand, and reports of the actual operation of particular drug courts offered in the observational studies on the other hand. This explanation is rooted in the social meanings that have become associated with the misuse of drugs and particularly with the misuse of illicit drugs. This moral vocabulary has been a feature of drug policy in the United States for many years.

The trajectory of drug policy in the U.S. was set by the passage of the Harrison Narcotics Act of 1914 (the "Harrison Act"), which first established broad-based criminal prohibitions in this field;[117] by a series of U.S. Supreme Court decisions interpreting federal law to limit the ability of physicians to treat addicts with maintenance doses of narcotics;[118] and by the aggressive drug enforcement approach of officials within the U.S. Treasury Department almost from the beginning of this legal regime.[119] At the core of this policy was an "insistence on the idea that addicts are bad characters and that addiction essentially is a police problem . . ."[120]

Troy Duster, a sociologist and historian of U.S. Drug Policy, has argued that the moral disapproval associated with narcotics use grew to be so powerful over the course of the Twentieth Century that it ultimately became totalizing, eclipsing all the other otherwise morally significant features of an individual user.[121] Although moral

114. Fischer, *supra* note 1, at 234-35.

115. *Id.* at 235.

116. *Id.*

117. *See* Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (1914) (repealed 1970).

118. *See* United States v. Doremus, 249 U.S. 86 (1919); Webb v. United States, 249 U.S. 96 (1919); United States v. Behrman, 258 U.S. 280 (1922).

119. *See generally* DAVID F. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1999).

120. EDWIN M. SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA 192 (1962).

121. TROY DUSTER, THE LEGISLATION OF MORALITY 67 (1970).

disapproval may have been directed toward narcotics misuse in the U.S. at an earlier point, it is likely that these pejorative judgments did not function as an absolute or totalizing moral characterization of users until some time after passage of the Harrison Act.[122] This intense moral disapproval was reflected in drug policies adopted following World War II and in the "War on Drugs" that began in the Nixon administration and that has persisted to the present.[123] That policy, in turn, has reinforced and sustained the social opprobrium that has marked drug use and drug users.[124]

Consistent with this picture of the pervasive moral disapproval of drug users, criminal law scholars Franklin Zimring and Gordon Hawkins have described U.S. drug policy as rooted in a "legalist" school of thought that conceives of illicit drugs as a threat "to the established order and political authority structure."[125] In this view, the inherent immorality of drug use renders "the consumption of the prohibited substance rather than any secondary consequences that might ensue" the principle harm to be addressed.[126] "The taking of drugs prohibited by the government," they suggest, "is an act of rebellion, of defiance of lawful authority that threatens the social fabric."[127]

The moral disapprobation that attends drug misuse complicates efforts to provide supportive, reintegrative treatment within the context of the criminal blaming system. This stigma has undermined the adoption of a harm minimization philosophy of the sort that informs practice in the drug treatment courts established in a number of other

122. *See id.* at 67, 91–92. "A person who exhibits this presumably obvious special kind of behavior (immoral, in this instance) is identified in a complete sense through a particular label; thus generating total identity." *Id.* at 89.

123. For a good review of this history, *see* KING COUNTY BAR ASS'N DRUG POLICY PROJECT, *supra* note 3, at 15-31.

124. James Nolan has suggested that there are "three distinct 'root metaphors' or 'legitimizing values' that have informed efforts to socially control drug use in the United States." While one perspective, the "therapeutic paradigm," views drug users or abusers not as immoral but as in need of treatment, and a second paradigm, the "utilitarian perspective," views users through either a prohibitionist or libertarian lens depending on an assessment of the relative costs and benefits involved in strictly limiting access to narcotics, the perspective that has dominated U.S. thinking is the "moral or the religious perspective." JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 15-16 (2001). From this point of view, the use of narcotics is understood to be a wrong that emanates from a bad character, poor individual decision making, or some other attribute of the user for which he or she is autonomously responsible. *Id.*

125. FRANKLIN E. ZIMRING AND GORDON HAWKINS, THE SEARCH FOR RATIONAL DRUG CONTROL 8 (1992).

126. *Id.* at 8-9.

127. *Id.* at 9.

countries.[128] As Zimring and Hawkins have put it, the moralism of the legalist school drives a conception of drug treatment "in which the participants are forced or frightened into treatment programs and threatened into abstinence during and after treatment."[129] One astute observer who has written a comparative study of drug courts in the U.S. and elsewhere has explained that "[t]he goal of most U.S. drug courts is 'total abstinence' or what some have referred to as 'demand reduction.'"[130] By contrast, in many other jurisdictions the abstinence model has given way to a harm minimization approach in which the goals of the program are defined in terms of reduced use and reduced offending.[131]

Burns and Peyrot report that the drug court judges they observed responded to defendants on the basis of a stark dichotomized choice. Some were constructed as "salvageable and rehabilitating," while others, specifically those who were having difficulty adhering to the conditions of the court's treatment and surveillance regime, were denoted as "irremediably deficient."[132] Given the totalizing moral judgments that pervasively are directed against drug users throughout American society, it is difficult even for professionals in the fields of social work and medicine to maintain an empathic and respectful stance toward clients and patients who suffer from drug use disorders.[133] To the extent that these disorders are chronic, relapsing conditions, it is inevitable that some significant number of defendants in drug court will fail to adhere—often in a serious and sustained way—to the requirements of the program. At those moments, the exercise of moral discretion required of treatment court judges is necessarily vulnerable to being corrupted by the background normative understandings of addicts and addiction that derive from the very criminal justice policies within which these courts are embedded.

The aggregate outcome data described earlier suggests that some drug treatment courts are effective for some participants under some circumstances. There is, however, considerable variation in outcomes associated with offender characteristics and local institutional practice, such that it is virtually impossible to make

128. James L. Nolan, *Harm Reduction and the American Difference: Drug Treatment and Problem Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL'Y 31 (2010).

129. *Id.* at 11-12.

130. *Id.* at 36.

131. *Id.*

132. Burns & Peyrot, *supra* note 92, at 417.

133. *See e.g.*, PAUL J. FINK AND ALLAN TASMAN, STIGMA AND MENTAL ILLNESS (1992).

confident global assertions that these enterprises generally are a success or a failure.[134] In some respects, the published studies tell a tale of two groups. Those offenders who adhere to the requirements of the treatment court regime and are able to graduate may stand a better chance of beating the odds with respect to reoffending and reinvolvement in the criminal system than do similarly situated offenders processed through the conventional system.[135] Those participants who do not succeed according to the terms imposed by a model that is rooted in the criminal prohibition of drug use and that demands abstinence as the only true measure of success face a very different set of outcomes. Offenders who are determined to be incapable of adhering to the requirements of the drug court program—the "irremediably deficient"—do not graduate and do not beat the odds.[136] Their recidivism rates and clinical course are not improved by virtue of the treatment they receive. Their fate often depends on the discretionary decision making of judges who necessarily are members of a broader community that assigns a negative totalizing moral judgment to drug misusers.

Given the procedural informality of drug courts, this discretionary judicial decision making carries the potential for real harm. The National Association of Criminal Defense Lawyers reports that "[t]he sentences in many courts are significantly higher for those who seek drug treatment and fail than for those who simply avoid drug treatment and take a plea, at the both the misdemeanor and felony level."[137] In some instances these harsher sentences are built into the process,[138] while in others they reflect an effort on the part of the drug court judge to "set an example" for other participants or are merely an expression of the fact that the judge is "offended at failure in drug court."[139]

Whatever its basis, the "high cost of failure"[140] borne by drug court participants who do not graduate is a cost that undermines the legitimacy of the overall enterprise. As Timothy Casey has explained:

> The key to understanding the potential problems with the problem-solving court model . . . lies in the moment

134. *See supra*, text accompanying notes 29 to 59.

135. *See supra*, text accompanying notes 17 to 21.

136. *See* Burns & Peyrot, *supra* note 92, at 433.

137. NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, *supra* note 25, at 29.

138. For example, "a public defender from California reported that a judge 'automatically gave any failure the maximum prison sentence.'" *Id.*

139. *Id.*

140. *Id.*

> when the defendant is deemed to fail treatment. As long as the treatment program continues, the exchange of due process rights for a treatment opportunity does not appear problematic. But when the moment of failure, or alleged failure, arrives, the process sharply reverts to an adversarial format . . . At this moment, the 'traditional' court system has been resurrected and the due process rights and protections must be replaced . . . Unfortunately, [the defendant] has already waived those rights. This moment of failure is also where the judge exercises the most discretion, and where the power is simultaneously at its greatest and most diffuse. The decision of the court that the defendant did not complete the treatment program is based not on a legal standard, but on a clinical standard, or perhaps on a subjective impression that the defendant is not putting forth sufficient effort.[141]

These "subjective impressions" bear the mark of systemic pressures that almost inevitably are placed on therapeutic practices when they are situated within coercive legal settings, and of the distortive impact that the societal stigma associated with drug misuse has on the discretionary judgments of court actors. This confluence of broad judicial discretion, official coercion, and pervasive social disapprobation is a dangerous admixture for the significant number of treatment court participants who are determined to have "failed" the regime.

In light of the wide range of outcomes experienced by different participants in drug courts, and given the understandable tendency of other commentators to concentrate on the stories of those offenders whose lives are improved by virtue of their treatment court experience, it is important as well to focus on the cases in which participants do not succeed in these settings. Further study is warranted in order to press focus on the ways in which failure is defined and life courses altered as a consequence of the legal and moral sorting accomplished by these courts. Indeed, determining what drug court failures mean both for individuals and for the system is essential if we are to take seriously the obligation to evaluate fully these undertakings.

141. Timothy Casey, *When Good Intentions are not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1483 (2004).