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Comment

BALTIMORE CITY'S DRUG TREATMENT COURT: THEORY AND PRACTICE IN AN EMERGING FIELD

We punish, but this is a way of saying that we wish to obtain a cure.  
—Michel Foucault

INTRODUCTION

In June 1989 the Dade County, Florida, Drug Court in Miami became the first court in the nation to systematically divert drug-addicted defendants into treatment programs. Since the Miami court's inception, the drug treatment court (DTC) idea has proven to be remarkably attractive to other jurisdictions seeking to deal with exceptionally high drug caseloads and the corresponding strain on the criminal justice system's capacity to process drug cases. By creating a unique, cooperative approach to drug cases, the Miami court held out the possibility that the criminal justice system could efficiently and cost effectively process drug cases, cut recidivism, re-establish links between the community and drug-addicted offenders, and rehabilitate defendants through treatment.

The Baltimore City Drug Treatment Court began operations on March 2, 1994, and celebrated the graduation of the first defendants to complete treatment through the program on March 23, 1995. Now, after two full years of operation in the Baltimore City District Court, the DTC is becoming increasingly familiar and routine to lawyers, judges, court personnel, and even to defendants. Buoyed by the
success of the DTC in the district court, a DTC for Baltimore City’s Circuit Court system began in October 1994, and became fully operational on March 6, 1995.\textsuperscript{7}

The Baltimore City DTC is considered to be on the cutting edge in the region, but it is in fact part of the second wave of such courts established in the nation. Indeed, there are at least thirty-five DTCs operating in the United States.\textsuperscript{8} Several additional jurisdictions plan to add a DTC to their systems.\textsuperscript{9}

Despite relatively frequent and generally favorable coverage in the popular press, very little attention has been paid to the DTC phenomena from a theoretical perspective within the legal community.\textsuperscript{10} This is surprising, as drug treatment courts currently appear to be the most advanced rehabilitative setting in the American criminal justice system and, moreover, these courts are a departure from the traditional adversarial system. Certainly both issues justify more widespread discussion.

One topic particularly neglected is the theoretical implications of establishing a court focused on treatment as opposed to punishment. Interestingly, DTCs have garnered a great deal of attention from corrections systems and the medical field, in particular the alcohol and drug therapy community.\textsuperscript{11} To the extent that there is a guiding philosophy for drug treatment courts, it is primarily therapeutic or medical in nature.\textsuperscript{12}
The relative neglect of the theory underlying DTCs is explained in part by the DTC planners' heavy concentration on practical matters. The people who are creating and operating DTCs are involved in the challenging task of combining the divergent fields of medicine, law, and corrections. This effort necessarily requires a focus on operational and practical matters at the expense of intricate theoretical details.

Similarly, DTC practitioners are currently fighting both political and funding battles. As a result, they may be unable to afford the distractions of theory. Indeed, another practical reason for the lack of a guiding legal theory is that such theories have become politicized in recent years. Thus, to the extent that DTCs receive funding from government sources, they wish to be disassociated with theories that have become controversial in the last two decades. Rehabilitative theories, which at first glance seem particularly apt for DTCs, have become particularly disfavored. Thus it is very tempting for DTC proponents simply to point to graphs and statistics and to argue that, theory aside, DTCs work. Proponents also note that DTCs have gained acceptance in the therapeutic community and to some extent in the corrections community. By focusing on the "hard" data that has become available, proponents are thus tempted to leave the complex and polarizing issues of theory alone.

However, there are good reasons for exploring the theoretical implications of DTCs. Perhaps the most obvious reason is to avoid the mistakes of predecessors and to be able to show critics precisely how communities have begun to develop bodies of work that are devoted to this topic. Therefore, the lack of theory referred to here and throughout this Comment refers primarily to the lack of legal theory. See supra note 10. Nevertheless, there is room for greater discussion of DTCs in all of the concerned fields.

13. See SPECIAL DRUG COURTS, supra note 2, at 7 (explaining that successful implementation of special drug courts requires extensive pre-program planning, careful groundwork with leaders of all the major agencies involved in criminal case processing, and strong leadership); see also CAROLINE S. COOPER & JOSEPH A. TROTTER, JR., U.S. DEP'T OF JUSTICE, 1 DRUG CASE MANAGEMENT AND TREATMENT INTERVENTION STRATEGIES IN THE STATE AND LOCAL COURTS 1-2 (1994) (explaining practitioners' reactions to volume of drug cases).


15. 134 CONG. REC. H1659-64 (daily ed. Feb. 13, 1995) (statement of Rep. Mfume). In fact, funding has been a major concern for DTCs. The Baltimore City DTC is funded through two federal grants, of which 25% of the funds are matching state funds. Interview with Alan C. Woods III, supra note 7. The Baltimore City DTC has put together a funding package that will last through 1997. Id.


17. Id.

18. See supra notes 10-12 and accompanying text.
DTCs differ from such perceived failures of rehabilitative philosophy. Adding a truly coherent legal philosophy to the practical and therapeutic justifications already in place may serve to motivate proponents of DTCs and combat skepticism within the legal profession.

Finally, DTCs should be placed in a theoretical context simply for the sake of knowledge and evaluation. A rational legal theory helps to organize and frame questions raised by the existence of DTCs. Three basic questions immediately come to mind: What is a drug treatment court? What is it designed to do? How does it differ from other courts? A very short and inadequate answer is implied in the court's name. A "drug treatment court" is a court that uses coercive power over persons (addicts) involved in some form of drug use, who come into contact with the criminal justice system. It is designed to divert addicted offenders from incarceration or other punishment into drug treatment programs. It differs from other courts by focusing primarily on treatment or rehabilitation rather than punishment.

This focus on treatment rather than punishment is the crux of the DTCs, and it has spawned not only the political controversy surrounding the courts, but also their praise. Critics might ask, "If it does not punish is it a court?" and "How can such a court be 'tough' on crime?" Yet proponents would argue that this shift in focus is justified by the need for fundamental structural change in the criminal justice system's approach to drugs. Drug treatment courts represent a marked departure from the adversarial system. Judges, prosecutors, and defense attorneys cooperate as a team to find effective treatment for a defendant and to ensure that the defendant stays in treatment.

The Baltimore City DTC, along with other DTCs, represents an advanced rehabilitative option for the criminal justice system at a time when rehabilitation theory is in decline. This Comment will examine the philosophical roots of DTCs generally, focusing on how closely the current practical philosophy of DTCs compares to traditional rehabilitation theories. In fact, DTC philosophy actually may be closer to theories of "social defense"—which encompass a blend of incapacitation, deterrent, and rehabilitation theories—than to "pure" rehabilitation theory. The treatment-based arguments of Barbara Wootton espe-

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19. See Allen, supra note 16, at 1-2 (discussing the decline in the rehabilitative ideal).
20. See infra notes 34-41 and accompanying text.
21. See Special Drug Courts, supra note 2, at 3 (discussing the need for incarceration alternatives).
22. See id. at 3-4 (explaining the emphasis on treatment).
23. See id. at 5 (listing cooperation of court personnel as critical to program planning).
24. See infra notes 221-231 (discussing generally rehabilitationism and social defense).
cially anticipate and resonate with the DTC movement. In addition, this Comment will examine the DTC's relationship to and departure from the adversarial system and some of the consequences that flow from systemic restructuring of the court system. In particular the roles of the judge, the prosecution, and the defense change dramatically in a nonadversarial system. Finally, the author considers some likely scenarios for DTCs in the future.

I. **Drug Treatment Courts**

Drug treatment courts are a relatively unreported phenomenon in the legal community. A particular problem is that there is no currently agreed-upon definition of a drug treatment court. Part I of this Comment will be devoted to background in the general development of DTCs. Section A sets out basic definitions, including a definition of DTCs. Section B gives a history of the DTC movement and attempts to show how DTCs address the needs of an overburdened criminal justice system. Finally, section C traces the history of the formation of Baltimore City's DTC and details current DTC operations in the District Court of Maryland for Baltimore City.

A. **Terminology**

1. **Drug Court**.—There are two general types of drug courts. The term "Expedited Drug Case Management" Court (EDCM) refers to a court that consolidates drug cases for more efficient processing and management of cases. The term "Drug Treatment Court" refers to a court that supervises treatment for substance-abusing defendants.

2. **Expedited Drug Case Management Court**.—An EDCM is a special division of an existing trial court designed to consolidate a court system’s drug caseload, concentrate expertise in one courtroom, and reduce the time to disposition through effective case management.

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27. COOPER & TROTTER, supra note 13, at 1.
28. This Comment follows the Bureau of Justice Assistance in making a treatment/management distinction when discussing drug courts. See SPECIAL DRUG COURTS, supra note 2, at 3.
29. See infra notes 31-33 and accompanying text.
30. See infra notes 34-41 and accompanying text.
31. The name for a management-style court follows the one used by the Bureau of Justice Assistance. SPECIAL DRUG COURTS, supra note 2, at 11. Cooper and Trotter refer to management courts as "drug court divisions." COOPER & TROTTER, supra note 13, at 9.
These courts primarily have as their goal a reduction of the pending drug caseload. The primary difference between an EDCM and a DTC is that the EDCM is focused on case management, whereas the DTC is focused on treatment. Unlike DTCs, EDCMs continue to use a traditional sentencing model.

3. **Drug Treatment Court**—A DTC is a special division of an existing trial court designed to divert drug-addicted offenders from a system of penalties, such as incarceration, into a system of treatment, such as a licensed program that specializes in helping a patient cope with addiction. DTCs typically share several common characteristics. First, DTCs establish eligibility criteria to identify defendants who will be allowed to participate in the program. The eligibility criteria require the defendant to be an addict. The criteria may also include requirements that the defendant must not be a violent criminal, nor a security risk. Second, the DTC is a cooperative, nonadversarial system in which the criminal justice, correctional, and treatment systems work together to find care for defendants and to ensure that they remain in treatment. Third, the DTC system provides designated treatment slots for defendants. Finally, the DTC imposes a system of predesignated sanctions on defendants who fail to comply with treat-

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However, the terminology may imply a consolidation that could conceivably include a DTC. For example, Baltimore City has three EDCMs that are unrelated to the DTC. Id. at 4. See id. at 6 (describing the critical elements of EDCMs). I use the term drug treatment court because that is the term that Baltimore City uses to distinguish its DTC from its three EDCMs. Thomas H. Williams, Program Director, Baltimore City Drug Treatment Program, S.T.E.P. Up and Out 1 (1994). Cooper and Trotter use the term "drug court." Cooper & Trotter, supra note 13, at 19. The Bureau of Justice Assistance uses the term "Dedicated Drug Treatment Court." Special Drug Courts, supra note 2, at 10. Goldkamp uses the term "treatment drug court." John S. Goldkamp, U.S. Dep't of Justice, Justice and Treatment Innovation: The Drug Court Movement—A Working Paper of the First National Drug Court Conference, December 1993, 3 (1994). Williams, supra note 34, at 6 (listing criteria that defendants in Baltimore City have to meet in order to be eligible for the program). Id.; cf. Goldkamp, supra note 34, at 17-19 (noting that targeting of offenders is fundamental and that courts should clearly delineate the stage of drug involvement at which they seek to intervene). Note that the "disease" of addiction is best treated if the patient is immediately treated. Jeffrey Tauber, Treating Drug-Using Offenders Through Sanctions, Incentives, Corrections Today, Feb. 1994, at 30 [hereinafter Tauber, Treating Drug-Using Offenders]. Williams, supra note 34, at 6. The Office of the State Courts Administration, State Justice Institute, Florida's Treatment Based Drug Courts 7 (1993) [hereinafter Treatment Based Drug Courts]. Goldkamp, supra note 34, at 8.
ment programs.\textsuperscript{40} Sanctions, despite having punitive overtones, are not designed primarily to punish, but rather to penalize program failure and to force a defendant to return to treatment.\textsuperscript{41}

4. Drug.—For the purposes of this Comment, the term “drug” generally refers to a narcotic that is illegal to possess in the United States.\textsuperscript{42} Treatment professionals agree that the term drug may also be used to describe alcohol, nicotine, and even caffeine;\textsuperscript{43} however, it would be very unlikely for a DTC to admit a person who is addicted solely to alcohol, and certainly not to nicotine or caffeine.\textsuperscript{44} Frequently defendants admitted to a DTC are poly-addicted, meaning addicted to more than one drug including alcohol.\textsuperscript{45}

5. Addict.—This term refers to an individual whose life harmfully and overwhelmingly revolves around any drug, including alcohol.\textsuperscript{46} In the disease model of addiction, this involvement is characterized by a “loss of control” over the use of drugs.\textsuperscript{47} For the purpose of this Comment, an “addict” is a person assessed by a DTC intake unit and found to be an addict according to the intake criteria.\textsuperscript{48}

\textsuperscript{40} Jeffrey S. Tauber, A Judicial Primer on Unified Drug Courts and Court Ordered Drug Rehabilitation Programs, Address at the California Continuing Judicial Studies Program 6 (Aug. 20, 1993) [hereinafter Tauber, A Judicial Primer] (transcript available from the Bureau of Justice Statistics). Tauber explains that “smart punishment” relies on the use of progressive sanctions whose intensity increases incrementally with the number and seriousness of program failures. Id.

\textsuperscript{41} See id.

\textsuperscript{42} This definition is self-referential to the legal model. Reference to the legal model is useful precisely because DTCs are concerned with treating substance abuse in populations that abuse illegal drugs.

There are several other definitions of the term “drug.” See Hamid Ghodse, Drugs and Addictive Behaviour: A Guide to Treatment 7-8 (1989) (listing various definitions for “drug”). The definition developed by the World Health Organization is broad: “A drug is "any substance that, when taken into the living organism, may modify one or more of its functions." Id. at 7-8. From a medical perspective, a somewhat more amusing definition is, “[a] substance which, when injected into a rat, produces a scientific paper.” Id. at 7.

\textsuperscript{43} Id. at 13, 23-24.

\textsuperscript{44} Telephone interview with Deborah Hermann, supra note 6.

\textsuperscript{45} Ghodse, supra note 42, at 30-33.


\textsuperscript{47} P. Joseph Frawley, Neurobehavioral Model of Addiction: Addiction as a Primary Disease, in Visions of Addiction 25, 31 (Stanton Peele ed., 1988).

\textsuperscript{48} Typically the criteria for a determination of addiction use one of several possible standardized tests. In Baltimore, the determination of whether or not an offender is an addict is made before admission to the DTC. Baltimore City uses the Addiction Severity Index (ASI) to make the determination. Williams, supra note 34, at app. E. Most DTCs
6. **Treatment.**—Treatment is the process of removing an addict's physical and psychological dependence on a drug. Treatment is generally individualized to the level of the offender's need.\(^{49}\) Although most programs emphasize that the final result of treatment should be a substance-free lifestyle, there are exceptions to this, such as methadone maintenance.\(^{50}\) The removal of a patient from physical dependence on a drug is referred to as "detoxification" or "detox."\(^{51}\) Detoxification may require direct medical supervision in a residential setting.\(^{52}\)

7. **Defendant.**—Within the drug treatment court, a defendant is typically referred to as a "client" by public defenders and treatment personnel.\(^{53}\) Corrections personnel usually refer to a defendant as the "offender."\(^{54}\) Typically, the judge and prosecutor use the term "defendant."\(^{55}\)

B. **History and Discussion of Early Drug Treatment Courts**

Attempts to control and regulate the use of drugs in the United States are longstanding and complicated. David Musto has demonstrated that the United States has repeatedly moved through cyclical patterns of rising drug use, followed by increased public concern and enactment of prohibitionary legislation, followed by periods of relative tolerance.\(^{56}\) Interestingly, the drug court movement began at the height of the most recent popular anti-drug sentiment in the United States. In 1986, following the emergence of crack cocaine, a renewed "war on drugs" was declared by the federal government.\(^{57}\) The polit-

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\(^{49}\) See Ghodse, *supra* note 42, at 128 (discussing tailoring of treatment programs to meet the individual's needs).

\(^{50}\) Methadone maintenance programs treat heroin addicts by replacing dependence on one substance (heroin) for dependence on another (methadone). See Joyce H. Lowinson et al., *Methadone Maintenance, in Substance Abuse: A Comprehensive Textbook* 550, 559 (Joyce H. Lowinson et al. eds., 1992).


\(^{52}\) Id.

\(^{53}\) Telephone interview with Deborah Hermann, *supra* note 6.

\(^{54}\) Id.

\(^{55}\) Id.


ical, legal, and law enforcement responses were necessarily tough because they occurred under a particularly high level of media scrutiny.\textsuperscript{58}

In particular, two pieces of legislation, crafted in the election years of 1986 and 1988, created conditions that required judicial and correctional systems to begin rethinking the response to drug use. The 1986 Anti-Drug Abuse Act\textsuperscript{59} defined drug abuse as a "national security problem" and set the tone for a highly punitive response.\textsuperscript{60} The federal government increased prison sentences for the sale and possession of drugs, eliminated parole or probation for certain drug offenders, and enhanced law enforcement activities.\textsuperscript{61} Incentives were provided for the states to do likewise.\textsuperscript{62} The 1988 Anti-Drug Abuse Act\textsuperscript{63} increased the tendency toward punishment and made clear that substance abusers themselves (as opposed to the narcotics dealers) would now be targeted.\textsuperscript{64} First-time offenders convicted of possessing five grams of a substance containing cocaine, for example, crack, would be imprisoned for five to twenty years.\textsuperscript{65} At the same time, anti-crack initiatives proliferated at the state and local level.\textsuperscript{66}

The increased enforcement and sentencing efforts strained the capacity of courts and penal institutions to the breaking point.\textsuperscript{67} Even prosecutors, perhaps the most enthusiastic supporters of the drug war within the criminal justice system, reported concern about sharp, unexpected caseload increases.\textsuperscript{68} Consequently, practitioners began to explore new systematic strategies to deal with the crushing caseloads.\textsuperscript{69} Most practitioners focused on case-management techniques, evidenced by the EDCM courts.\textsuperscript{70} At the same time, correc-

\textsuperscript{58} See \textit{Belenko}, \textit{supra} note 57, at 9-21 (describing the media attention focused by the introduction of crack cocaine).


\textsuperscript{60} \textit{Id}.

\textsuperscript{61} \textit{Belenko}, \textit{supra} note 57, at 14.

\textsuperscript{62} \textit{Id}.


\textsuperscript{64} \textit{Id}.

\textsuperscript{65} \textit{Belenko}, \textit{supra} note 57, at 15.

\textsuperscript{66} \textit{Id} at 17-18.


\textsuperscript{69} \textit{Id}; \textit{Special Drug Courts, supra} note 2, at 5-4.

\textsuperscript{70} \textit{Boland & Healy, supra} note 68, at 7.
tions personnel began to experience case overload as well. 71 Although prison construction was relied on as a long-term solution, alternative sanctions came to be viewed as a desirable tool to manage offender populations in the short term. 72

Effective case management did create greater efficiency in the administration of justice in most cases. 73 However, there remained a sense in some jurisdictions that despite the new case-management techniques, the criminal justice system was not addressing the heart of the matter. 74 Merely incarcerating drug users more efficiently did little to stop the cycles of recidivism that appeared to account for a majority of crime in these jurisdictions. 75 This inadequacy was unsatisfying to reformers, and perhaps more importantly, to prosecutors and corrections officials, who repeatedly prosecute, incarcerate, and release the same drug defendants back into the community. 76

At the same time, the criminal justice profession was reevaluating drug treatment programs. 77 Studies in the late seventies and early eighties indicated that drug treatment did not work. 78 Beginning in the mid-eighties, new studies began to challenge this assumption. 79 Treatment did seem to have some value as a correctional tool. 80 First, even if entry into treatment was coerced or forced, it showed positive results. 81 In fact, positive treatment results were not dependant on the form of entry into treatment; rather, results directly correlated with the length of time in treatment. 82 Second, other studies continued to point out a clear correlation between criminality and drug use. As drug use decreased, criminality also decreased. 83

71. Id. at 7-8.
72. RUSSELL REPORT, supra note 6, at 29-30.
74. See SPECIAL DRUG COURTS, supra note 2, at 1.
75. Seeinfra text accompanying notes 95-99 for a fuller discussion of the issues that led to the creation of the DTC in Baltimore City.
76. RUSSELL REPORT, supra note 6, at 6.
78. Id. at 214.
79. Id. at 215.
80. Id. at 215-18.
81. Id.
82. Id. at 212-14.
83. Id. at 212.
These two findings had very clear implications for a criminal justice system laboring under a cycle of recidivism. If treatment reduced drug use, and reduced drug use resulted in lower criminality, then treating drug addicts who passed through the criminal justice system could reduce criminality, and not incidentally, the heavy caseload weighing down urban courts.

Courts around the nation did have experience referring defendants to treatment. However, too often, treatment was dependant upon the whim of the court and whether treatment funding was available. When treatment funding was available, resources were stretched to the breaking point and waiting lists stretched into months and even years.

Drug treatment courts addressed these problems by adopting a "systems approach," integrating elements of the criminal justice, substance abuse treatment, public health, and correctional systems. Their goal was to bring together the separate agencies to create a single system that would force defendants into treatment and keep them there. Teamwork had come to the justice system.

C. Baltimore City Drug Treatment Court

The Baltimore City Drug Treatment Court recently celebrated its second anniversary. Thus, it has been operational long enough that it is possible to begin to draw some conclusions from its experience. Because it was part of a second wave of DTCs, Baltimore had the advantage of designing a program with the lessons of other DTCs in mind. The court was nevertheless an ambitious undertaking. It is one of the largest and earliest "two-track" courts in the nation, and one with a colorful history.

1. History.—As in other cities, the public success of similar courts and, perhaps more importantly, the availability of federal appropriations under a block grant funding program precipitated the

84. GOLDKAMP, supra note 34, at 4.
86. See RUSSELL REPORT, supra note 6, at 6, 27 (discussing the overburdened treatment programs).
87. Interview with Judge Jamey Weitzman, supra note 14; see also Tauber, A Judicial Primer, supra note 40, at 13-15 (discussing "structural accountability").
88. Tauber, Treating Drug-Using Offenders, supra note 36, at 32.
89. Due to the relative youth of the DTC in Baltimore, the generalizations may not perfectly reflect a "typical" drug court.
formation of the Baltimore City Drug Treatment Court. Yet the true genesis of the DTC in Baltimore was a report, "The Drug Crisis and Underfunding of the Justice System in Baltimore City," prepared in December 1990 by a special committee of the Bar Association of Baltimore City, chaired by former Judge George L. Russell, Jr. The report of the Russell Committee (Russell Report) provided a compelling description of a legal system under siege by drug-offender prosecutions. The alarm generated by this report among decisionmakers prompted Baltimore to take advantage of increased federal funding, as well as to lobby for increased state funding.

The Russell Committee was charged with addressing "the problem of increasing drug litigation and the chronically underfunded justice system in Baltimore City." The Committee's description and analysis of Baltimore City's increase in drug prosecutions was stunning. For example, fifty percent of felony prosecutions in Baltimore City were direct drug offenses, while eighty-five to ninety-five percent of all felony prosecutions were drug-driven offenses. Fifty-five percent of all murders were drug related. Even the casual observer could recognize that the system was becoming increasingly incapable of meeting its burden.

The Committee's more compelling conclusions were based on other equally alarming facts: eighty percent of Maryland's prison population had a history of substance abuse; seventy-one percent of the population at the city jail had served time there before; forty percent of Baltimore City probationers violated their probations within a year, primarily due to drug-related offenses; eighty percent of juvenile court cases were drug related. The conclusion was inescapable: 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 prohib-

92. RUSSELL REPORT, supra note 6.
93. Id.
94. Interview with David W. Skeen, past president of the Bar Ass'n of Baltimore City, member of the Russell Committee and Drug Treatment Court Committee, in Baltimore, Md. (Mar. 6, 1995).
95. RUSSELL REPORT, supra note 6, at 5.
96. Id. at 3.
97. Id.
98. Id.
itively 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.99

The Committee made five general conclusions and twenty-three specific recommendations.100 One recommendation is particularly noteworthy: "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."101 The Committee specifically recommended the study and establishment of "special drug courts" that would divert first-time offenders into treatment.102

2. Current Operation.103—Phase one of the Baltimore City DTC began operations in district court on March 2, 1994.104 The program is called "S.T.E.P.," for Substance Abuse Treatment and Education Program.105 On October 19, 1995, phase two operations of the DTC began at the circuit court level.106 Phase three, a special program for probation violators, began on March 6, 1995, in the circuit court DTC.107 All three phases are designed to reach essentially the same population—nonviolent addicts involved in criminal activity.108 Other than point of entry into the DTC system, which is determined by the court to which a defendant reports, defendants from each phase share the same treatment and supervision facilities.109

99. Id. at 6 (emphasis added).
100. Id. at 44-54.
101. Id. at 46 (emphasis added).
102. Id. at 47. The Russell Report is not only interesting for what it said, but also for what it did not say. The report aggressively championed substance abuse treatment and rehabilitation as a solution to the drug litigation problem. Yet there was little acknowledgment that while such a scheme may indeed reduce the volume of cases, making a decision to move towards a rehabilitative system would have system-wide implications that would reorganize not only the involved court, but to a large extent every organization or agency that becomes involved with the DTC.
103. The transformation of the Baltimore City DTC from an idea in the Russell Report to an actual working court is worthy of review, particularly the necessity for cooperation and review of the motivations of the involved agencies. However, that topic deserves greater attention than is possible here.
104. Interview with Judge Jamey Weitzman, supra note 14.
105. WILLIAMS, supra note 34, at title page.
106. Interview with Alan C. Woods III, supra note 7.
107. Id.
108. See WILLIAMS, supra note 34, at 12-13 (describing the screening process); see also PATSY CARSON, BALTIMORE CITY STATE'S ATTORNEY'S OFFICE, DRUG TREATMENT COURT CIRCUIT COURT PROCESS & PROCEDURES 1 (1994) (listing criteria for program eligibility).
109. WILLIAMS, supra note 34, at 18.
Upon entry into the criminal justice system, defendants who are in jail or who are being supervised by Pre-Trial Services are screened for program eligibility. Defendants' pending cases and prior convictions are examined, and defendants are excluded from the program if their history demonstrates signs of violence, if they are likely to flee the jurisdiction, and based on their willingness to participate in the program. If the defendant passes the screening, the Public Defender's Office is notified. If the defendant is in jail, the Public Defender (PD) assigned to the case attempts to visit the defendant to explain the program. The defendant is then assessed using the Addiction Severity Index (ASI), which identifies levels of need on a zero to nine scale. Essentially, the assessment is a determination of medical eligibility for treatment. Finally, the defendant is assessed for amenability to treatment on the Psychopathy Checklist Revised (PCLR). Following assessment, the DTC assessor compiles and sends files for eligible defendants to the Public Defender's Office and the State's Attorney's Office. The attorneys assigned to the case then review the files and agree to the terms of participation for the defend-

110. See supra note 108. Disqualifying criteria include convictions for violent crimes defined in the Maryland Annotated Code for which mandatory sentences are required. Williams, supra note 34, at app. C. These criteria include violent felony convictions, domestic violence in the past 15 years, assault, battery in the past 10 years, possession with intent to distribute controlled dangerous substances and certain other serious drug charges, occurring within the last 5 years. Id. Other criteria include possession or use of a firearm in the present offense, convictions for firearms within the last 5 years, and any record of child abuse, rape, or sex offense. Id.; see also Md. Ann. Code art. 27, § 643B (1957) (listing crimes of violence for which mandatory sentences are required).

111. See supra note 108.

112. Private defense attorneys may practice before the DTC, but as a matter of practice, the defendants brought before the DTC are represented by the Public Defender's Office. Telephone interview with Deborah Hermann. supra note 6. Poverty is not required for an offender to participate in the DTC. However, the DTC will seek reimbursement for costs to the extent funds are available from the offender or an insurer. Interview with Alan C. Woods III, supra note 7.

113. Williams, supra note 34, at 9. In actual practice, the Public Defender may not be able to reach the defendant prior to trial for a variety of reasons, usually related to scheduling. The PD interfaces with the criminal justice system for the defendant, and so the PD's explanation to the defendant is absolutely critical. See infra part III for a discussion of the adversary system.

114. Williams, supra note 34, app. E. The ASI measures the following needs: medical, employment/support, alcohol, drug, legal, family/social, and psychiatric. Id. Ultimately the ASI is designed to elicit the offender's motivation for treatment. Id. at 8.


116. Williams, supra note 34, app. E. The PCLR diagnostic instrument elicits behavioral indicators associated with the criminality of the defendant. Id. at 9.
The Public Defender interviews the defendant and explains the terms and conditions of the agreement and ensures that he is committed to participating.

The Baltimore City DTC is somewhat unusual among DTCs, because entry into the DTC system is possible along two “tracks.” Defendants who have relatively minor criminal records that would not support jail time in the pending case follow a “diversion” track. Defendants who complete treatment on this track will be granted a stet by the prosecutor. Until successful completion of the program, the case is postponed procedurally. By postponing the stet, defendants technically remain on active status for trial, and thus are eligible for supervision from the Pre-Trial Release Services Division.

Defendants who are eligible for the DTC, but have more considerable criminal records that make them ineligible for a stet will be placed on a “probation track.” Defendants with relatively good records may be offered a probation before judgment (PBJ), although this has not been common. The Baltimore City Parole and Probation Unit supervises both straight probation and PBJ.

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117. Id.
118. Id.
119. Telephone interview with Deborah Hermann, Assistant State’s Attorney for Baltimore City, Baltimore City Drug Treatment Court (July 12, 1995).
120. WILLIAMS, supra note 34, at 17.
121. Telephone interview with Deborah Hermann, supra note 6. When a prosecutor stets a case, the state declines to prosecute a case, but retains the right to reopen it within one year for any reason. Md. R. 4-248 (1995). Thereafter, a stetted charge may be rescheduled for trial only by order of the court for good cause shown. Id. To be eligible for a stet, the defendant must waive his right to a speedy trial. The advantage to a stet is that a defendant will not have a conviction on his record. Telephone interview with Deborah Hermann, supra note 6. In practice, cases are rarely reopened. Id. In DTC cases, the prosecutor agrees that if treatment is successfully completed, he will not reopen the case. Id.
122. Telephone interview with Deborah Hermann, supra note 6. This practice is not well-documented, but is followed by the Baltimore DTC. Id.
123. WILLIAMS, supra note 34, at 18. The Division of Pre-Trial Detention and Services is an agency of the Department of Public Safety and Correctional Services. Md. Ann. Code art. 41, § 4-1403 (1957). This agency is tasked with following up on defendants who are released, but require supervision. For the purposes of this paper, this agency may be loosely compared to the parole and probation unit, except that it tracks and supervises defendants before their trial.
124. WILLIAMS, supra note 34, at 2, 18.
126. Telephone interview with Deborah Hermann, supra note 6. Defendants who violate the terms of their probation may be referred to the DTC, which could be considered a third track for purposes of entry. Id. However, once such defendants are admitted into the DTC, they are handled in the “probation track.” Id.
The Public Defender and the State's Attorney agree before going to court on which track the defendant will enter. They then agree on a contract to be presented to the defendant, which details the program and includes possible sanctions for treatment failure.

In court, the judge explains the program to the defendant again and offers a final chance to rescind. If the defendant accepts the program by signing the contract created by the State's Attorney and Public Defender, under normal circumstances he will go into treatment the next working day. Additionally, he will report back to the judge on a regular schedule.

Violations of the provisions of the DTC contract result in the imposition of graduated sanctions that are written into the contract. These sanctions are designed to create immediate consequences for the defendant and return him to treatment. In contrast to typical probation, violation of the DTC contract, such as missing a meeting with a supervisor, will not result in a charge of violation of probation.

(1957). The agency supervises defendants who are placed on probation after trial as well as defendants who are placed on parole after serving a sentence of incarceration. Williams, supra note 34, at 18. A loose comparison with pre-trial services supervision is useful for this Comment. Essentially the function of both agencies in the DTC context is to match DTC defendants with treatment and to track and supervise defendants through the treatment system. See text accompanying notes 119-123.

128. See Williams, supra note 34, at 9-11 (describing agreement formation and program entry).
129. See id. apps. G, H. Possible sanctions for treatment failure include more frequent urinalysis and shock incarceration. Id. Shock incarceration is usually the last step in a series of graduated sanctions designed to force a defendant into compliance with the terms of his contract. Tauber, A Judicial Primer, supra note 40, at 6. More specifically, shock incarceration is a brief period of incarceration designed to force a defendant into entering and remaining in drug treatment programs. Id. In treatment terms, shock incarceration is intended to overcome "denial," which is a symptom of the disease of alcoholism. See Richard C. Boldt, The Construction of Responsibility in the Criminal Law, 140 U. PA. L. REV. 2245, 2297 (1992) (describing the denial symptom).
130. Telephone interview with Alan C. Woods III, supra note 91.
131. Id.
132. Williams, supra note 34, at 18.
133. Id. app. H at 3.
134. Tauber, A Judicial Primer, supra note 40, at 6. Under a medical model of substance abuse treatment, relapse is considered normal for substance abusers. See Peter Finn & Andrea K. Newlyn, U.S. Dep't of Justice, Miami's "Drug Court": A Different Approach 9 (1993) (explaining that occasional lapses in sobriety are expected in the early phases of treatment). Consequently the sanctions are designed to show the defendant that relapse in the DTC has immediate and sometimes severe consequences. Tauber, A Judicial Primer, supra note 40, at 6.
135. Interview with Alan C. Woods III, supra note 7.
Various drug treatment programs provide outpatient treatment at three levels: intensive, enhanced, and standard. These treatment levels vary slightly depending on the program. Intensive treatment typically requires attendance five days a week, with some form of case management, group therapy, and individual counseling. Most DTC defendants receive this level of treatment when they first enter the program. Enhanced treatment typically involves three visits per week consisting of group and individual therapy, a job search, and lectures. Standard treatment may consist of as few as five hours per month or as many as two meetings per week, and twelve-step program participation also may be required. Each level of care may require attendance at lectures and other programs. Residential or inpatient treatment has not received funding; however, DTC has provided residential treatment on an informal basis for a few defendants. Additionally, detoxification may occur in incarceration or in an inpatient or outpatient treatment setting in the community.

II. THE PHILOSOPHY OF TREATMENT

What should society do with wrongdoers and outcasts? The entire body of criminal law developed to answer this question, yet it be devils us still. Certainly, there is some consensus that we punish those who transgress society's laws. However, this merely begs the question of what it means to cross these boundaries. Moreover, there are occasions when one clearly transgresses societal boundaries but is not deserving of punishment.

Section A of Part II is a history of the development of the laws that most affect addicts and a short discussion of the relationship between addiction and criminal law. This section will also begin to frame a discussion of the concepts of addiction and treatment, while

136. Williams, supra note 34, at 23-27 (describing in detail the programs' requirements).
137. Id.
138. Id.
139. Id.
140. Interview with Robb McFaul, supra note 115.
141. Williams, supra note 34, at 23-27.
142. Id.
143. Id.
144. Interview with Robb McFaul, supra note 115.
noting some of the inadequacies exhibited by the traditional criminal justice system in dealing with addicts.

Section B discusses both rehabilitative theory and social defense theory. The social defense theory involves a blending of incapacitation and rehabilitation that stresses the protection of society from criminal behavior. The result is a model that in large part appears to be based on a medical approach to offenders. Properly understood, this medical theory, described to its fullest extent by Barbara Wootton, abandons punishment as a goal of the penal system. Instead it emphasizes the treatment and eventual return of offenders to society upon their cure. DTCs sentence offenders to substance abuse treatment, and this may be the fullest actual use of this treatment model in practice, if not in theory.

Section C relates drug treatment courts to theory. A precursor to DTCs, the “Earn It” court of Quincy, Massachusetts, was an early attempt to create a rehabilitative legal setting that would benefit the community in practice. Similar to the “Earn It” court, the DTCs’ “systemic approach” realigns the goals of the criminal justice system with community goals. This makes the court acceptable in practice despite the decline of rehabilitative theory. This realignment generated important implications for the operation of DTCs that will be discussed in Part III.

A. Addiction and the Criminal Law

Americans have a long and fretful history of use and abuse of drugs. As David Musto pointed out, drug use is not “un-American,” but rather is peculiarly American. By 1900, the United States had as many as 250,000 addicts. Perhaps more important, scientific advances, including the development of the intravenous needle, allowed for the refinement and eventual ingestion of ever purer narcotic extracts. As the number of addicts grew, public fears also grew. The

146. See generally WOOTTON, CRIME AND PENAL POLICY, supra note 25. See also BARBARA WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION (1963), reprinted in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 164 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) [hereinafter WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION].

147. WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION, supra note 146, at 164.

148. Id. at 168-69.

149. ANDREW KLEIN, THE EARN IT STORY (1980).

150. FINN & NEWLYN, supra note 134, at 10-12. The systemic approach also has implications for use as a model in areas other than addiction.

151. MUSTO, supra note 56, at 2-3.

152. Id. at 5. See supra notes 43-48 for a definition of addicts and addiction.

153. MUSTO, supra note 56, at 3-5.
temperance movement in particular began to exert influence on popular opinion as early as the 1830s.\textsuperscript{154} Ultimately, states began to pass anti-narcotic legislation beginning in the 1860s.\textsuperscript{155}

Additionally, the use of narcotics came to be associated with feared minorities. In 1900, the use of opium was associated with immigrant Chinese and cocaine was associated with "Negroes."\textsuperscript{156} Indeed, this stereotype holds true today. In \textit{State v. Russell},\textsuperscript{157} the Minnesota Supreme Court ruled that sentencing guidelines providing for disparate sentences between crack cocaine and powdered cocaine were unconstitutional on equal protection grounds because the effect of the disparity was to discriminate against predominately black users of cocaine.\textsuperscript{158} The \textit{Russell} case illustrates the idea that crack cocaine is used primarily by inner-city African-Americans.

Moreover, the medical profession, which was responsible for a great deal of the overuse of narcotics,\textsuperscript{159} also began to pay more attention to the phenomenon of addiction.\textsuperscript{160} Fear of addicts and addiction, along with concern for the welfare of the addicts, led to legislation at the state level by the 1890s.\textsuperscript{161} Federal action was somewhat delayed but more sweeping. The Harrison Act was passed in 1914,\textsuperscript{162} the Eighteenth Amendment, was passed in 1919,\textsuperscript{163} and the Marihuana Tax Act was passed in 1937.\textsuperscript{164} Although Prohibition was repealed in 1933,\textsuperscript{165} the effect of the Nineteenth Amendment and subsequent legislation, as well as the development of criminal law, was ultimately to ban not only the sale of controlled substances, but also their possession.\textsuperscript{166}

\textsuperscript{154} STANTON PEELE, DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL 37 (1989).
\textsuperscript{155} Musto, supra note 56, at 91.
\textsuperscript{156} Id. at 5-6.
\textsuperscript{157} 477 N.W.2d 886, 888-89 (Minn. 1991).
\textsuperscript{158} Id. at 889. In a similar vein, the U.S. Supreme Court recently heard arguments in a case in which African-American defendants charged the government with selectively prosecuting them in federal court for crack cocaine offenses. United States v. Armstrong, 48 F.3d 1508 (9th Cir.), cert. granted, 116 S. Ct. 977 (1995).
\textsuperscript{159} Musto, supra note 56, at 92-94.
\textsuperscript{160} Id. at 5.
\textsuperscript{161} Id. at 91-92.
\textsuperscript{163} U.S. CONST. amend. XVIII, repealed by U.S. Const. amend. XXI, § 1. The Eighteenth Amendment prohibited the manufacture, sale, importation, and exportation of intoxicating liquors.
\textsuperscript{165} U.S. Const. amend. XXI, § 1.
\textsuperscript{166} Musto, supra note 56, at 11.
Defining drug-related crime has proven difficult over the years. However, a four-tier system proposed by Shellow clearly defines types of drug-related crime. First, certain crimes are committed as a direct result of the consumption of drugs. Second, some crimes exist solely because there is a law that prohibits drug possession. These crimes are drug-defined. Third, there are drug crimes that are committed to further the manufacture and distribution of drugs. Fourth, there are crimes that are committed by drug users to further their consumption of drugs. These crimes may include anything from burglary to drug sales to prostitution.

Addicts may be involved in all four types of crime. The last category is of particular concern to DTCs because addicts are most likely to enter the criminal justice system through the commission of crimes to further their use of drugs. As noted above, eighty percent of the Maryland prison population has a history of substance abuse. Even more alarming, a one year study of 573 Miami narcotics users showed they had committed nearly 6000 robberies and assaults, 6700 burglaries, and 46,000 larcenies and fraud offenses.

This phenomenon has long been a source of frustration for the criminal justice system. A class of people, clearly identified, are known to commit an exceptional proportion of crimes. We return to the question that begins this section, what should society do with these wrongdoers and outcasts? In California, attempts have been made to simply outlaw addicts and addiction. However, in Robinson v. California, the Supreme Court held that addict status cannot in itself be a criminal offense. The Court found that there must be some act or omission of will to subject individuals to criminal liability.

168. Id.
169. Id. at 45.
170. Id.
171. Id.
172. Id.
173. Id. at 44-45.
174. Id.
175. RUSSELL REPORT, supra note 6, at 3.
176. Boldt, supra note 129, at 2311.
178. Id. at 666-67.
179. Id. at 666.
One widely held medical model of addiction, addiction as a disease, highlights the problems facing criminal law. The medical model originated from the study of alcoholism, but now has been applied to other forms of addiction, including narcotics addiction. Although there are varying definitions of the disease, the most basic proposition, and the proposition important to DTCs, is that addiction is behavior by an individual that shows a "loss of control" in the ability to avoid or regulate the use of narcotics.

A rudimentary sketch of four traditional penal theories will serve to illustrate some of the problems encountered due to this medical model of compulsive behavior. Incapacitation is usually justified on the grounds of preventing harm to the defendant or others as a result of the defendant's possible future criminal behavior. Thus, assuming the truth of disease theory, the incapacitation of addicts still would be a desirable outcome in order to prevent harm. However, implicit in the definition of crime is that the defendant's behavior typically requires intent. Under the disease theory, the addict may not have committed a crime, either because the addict is deemed incapable of forming intent when intoxicated, or because the addict's intoxication is an involuntary act and is therefore excused. If either alternative is true, then the defendant has not committed a crime and is not eligible for incapacitation. In addition, incapacitating a blameless individual will not stop that individual from behaving under the compulsion. After the period of incapacitation is over, the individual still has the compulsion and thus the problem is not truly solved.

Likewise, approaches from a retributive standpoint emphasize the assignation of blame. Punishment is assigned because society deems it is just and deserved. Sentencing under this theory re-

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181. Fingarette, Heavy Drinking, supra note 180, at 7.
183. Id. at 440.
184. Id.
186. Nemerson, supra note 182, at 409-10.
187. Id. at 411-14.
188. Id. at 440.
190. Id.
quires that punishment be proportional to culpability. Where a defendant is blameless, punishment is not justified.

Deterrent theory provides that punishment is necessary to deter others from committing crime. If, however, an addict has a disease, in the strictest sense of the disease theory of addiction, the compulsive behavior is undeterrable. Thus, punishing an addict will not serve to deter that addict or other addicts from committing crimes.

Rehabilitation may be described as an effort to change the behavior, character, and attitude of offenders through the penal system. Classical rehabilitation theory fails because mere imprisonment or punishment are not treatments for addiction. Modified or mixed versions of rehabilitation generally emphasize some degree of criminal behavior and intent, but as with incapacitation, this conceptualization founders on the disease concept and the necessity of blame. If a person is not at fault, then reform is not necessary.

If addicts are indeed under a compulsion to take narcotics, then they are blameless for the crimes they commit. Yet the criminal justice system has repeatedly shied away from following this logic to its eventual outcome, lack of guilt. This tension has been inadequately resolved, and indeed Richard Boldt suggests that the question is unresolvable. He states that the criminal law, which is oriented towards assignment of responsibility and blame, ordinarily requires punishment of some sort. In contrast, the medical model of treat-

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191. Id.
192. Id.
194. Nemerson, supra note 182, at 434-35. Some will argue that deterrence of compulsive behavior is not necessarily an either/or proposition. Perhaps an addict’s behavior is moderately deterrible; this is clearly possible. However the argument is illustrative of a relatively narrow point: that deterrence founders if a strict definition of addiction as a disease is applicable.
195. Id.
197. Nemerson, supra note 182, at 441.
198. See supra notes 183-188 and accompanying text.
200. See, e.g., United States v. Moore, 486 F.2d 1139 (D.C. Cir.) (indicating that Congress could punish addicts for the crime of possession of narcotics, even if addicts were in fact suffering from a disease), cert. denied, 414 U.S. 980 (1973).
201. Boldt, supra note 129, at 2305.
202. It should be noted that, to some extent, each theory has developed utilitarian components to help the theory to overcome the concerns raised above. Utilitarianism, very generally, states that punishment may be imposed where the good of the punishment, whether incapacitative, retributive, deterrent or rehabilitative, outweighs the evil effects of the punishment on the individual. Accepting the disease theory, this logic essentially cre-
ment avoids assignation of blame and concentrates on relieving symptoms. A pure disease concept of addiction would require that addicts not be liable for crimes committed as a result of the disease.

B. The Therapeutic Ideal

The caricatures of rehabilitative and punitive therapy in the preceding paragraphs are meant only as the briefest illustration of the difficulty of dealing with compulsive or addictive behavior. In fact, each of these theories has, in some form, reached an accommodation for compulsive behavior. One accommodation, as suggested by the Boldt model, is for the criminal law to presume the existence of free will and responsibility. This presumption may be overcome in limited circumstances. As a practical matter, the presumption of responsibility may make a great deal of sense on utilitarian grounds. Additionally, this approach may help satisfy the concerns of skeptics of the disease theory, such as Stanton Peele and Herbert Fingarette.

Incapacitation theory, in particular, benefits from this presumption of responsibility. Clearly, individuals who are abusing drugs represent a danger to the community. By assuming the posture that addiction is not a disease, society can more easily detain such individuals. This results in the practical lessening of danger to the whole.

In contrast, rehabilitation theory has provided a more complete framework for a frontal approach to addiction. The "rehabilitative ideal" has been defined broadly as "the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfaction of offenders." Implicit in this definition is the idea that the behavior, character, and attitude of convicted offenders are malleable and can be reshaped. More important, the belief that the use

ates strict liability for addicts who are incapable of avoiding these crimes. For example, we punish because the good of punishment outweighs the evil we do to the addict. See generally Nemerson, supra note 182, at 434.

203. Boldt, supra note 129, at 2306. Presumably, this rejection of blame results from the scientific presumption that one's "choice" is predetermined by a combination of factors largely beyond human control. Id. at 2304.

204. Nemerson, supra note 182, at 414.

205. Boldt, supra note 129, at 2304-05.

206. Id.

207. Peele, supra note 154, at 3.


210. Id. at 11. Incidentally, this idea necessarily includes the ability to reshape the population at large. Thus, some of the more recent manifestations of public relations cam-
of the state’s coercive powers can effect this change is also necessary.211

Allen notes that this formulation of the rehabilitative definition leaves questions of causation untouched.212 In fact, both those who have argued that crime is a chosen expression of free will and those who argue that crime is determined either biologically, sociologically, or by a combination of both factors, have argued in favor of some aspects of rehabilitation.213 The lack of emphasis on causation is particularly important to this discussion because, unlike other penal theories, the necessity of blame is also diminished.214 Thus rehabilitative practitioners have felt free to use or to discard the concept of blame as necessary, sometimes even within the same program.215

The DTCs themselves provide an example of this dichotomy. Offender addicts are considered to have committed their crimes, at least in part, due to the disease of addiction. Regardless of the addicts’ blame, or lack of blame, for their actions, the DTC seeks to reshape the offender’s behavior from addiction and irresponsibility to non-use and accountability. Offenders are required to take charge of their lives by confronting addiction.

This process typically requires offenders to admit that they have a problem.216 In treatment terms, they overcome “denial.” This process includes making up for past wrongs, including admitting to guilt or fault for those wrongs, and perhaps providing court-ordered restitution to victims.217 However, despite an occasional reference back to the behavior that required the defendant to enter the DTC in the first place, the DTC treatment process essentially focuses on present and future behavior patterns of offenders. The process is therefore one of accountability as opposed to blame in the traditional retributive sense. In the retributive sense, blame is a means of determining the amount of punishment an offender receives. In the DTC sense, blame is a tool to change the behavior of an offender. As an offender becomes more

211. The idea that rehabilitation is an important part of state policies traces its lineage to the ancient Greeks. Id. at 4.
212. Id. at 3.
213. Id.
214. Nemerson, supra note 182, at 441.
216. See Nemerson, supra note 182, at 407-08 (describing denial).
217. Telephone interview with Deborah Hermann, supra note 119. The process of accountability, admitting guilt, or making restitution is often the first step into the DTC. Thus the admissions become a tool to get defendants to acknowledge their addiction.
self-motivated, the system may choose to re-focus away from, or even discard, constant reminders of blame.

The analogy of crime as a disease is not new to rehabilitation theory. Aristotle spoke of punishment as "a kind of cure," while nineteenth century American writings often referred to prisons as "moral hospitals." The appeal of this type of theory is relatively obvious in comparison to other formulations of penal theory. Instead of mere concern with the behavior of convicted offenders behind the walls of prison, rehabilitative theory addresses the relationship of offenders to society at large and details ways of reintegrating offenders into society. The modern dominance of the rehabilitative ideal is associated with a number of innovations in legal and court systems. For example, Francis Allen cites juvenile courts, indeterminate sentencing, systems of parole and probation, youth authorities, therapeutic programs in prison, juvenile institutions, and mental hospitals as being closely associated with the rehabilitative ideal.

Rehabilitationism places great faith in the malleability of human nature when presented with the proper opportunity and motivation to change. Thus, in a "pure" version of rehabilitation, the focus of the criminal justice system is on changing prisoners' behavior and contributing to their welfare. Indeed, the institutions mentioned above were originally designed for the benefit of the offender, subsequent criticism notwithstanding. The juvenile courts, for example, were intended to shield youthful offenders from the harshness of the criminal law. Indeterminate sentencing was designed with the idea that offenders were to be treated as individuals and that shorter sentences were appropriate for those who could be shown to be reformed.

Social defense theorists, no less than other more punitive theorists, criticized rehabilitative theory for its central focus on the criminal offender. In their view, emphasizing the offender's rehabilitation over society's safety posed unnecessary risks to society.

218. Allen, supra note 16, at 4, 92 n.11.
219. See id. at 2 (describing how rehabilitative theory concerns itself with changing offenders' behavior and contributing to their welfare and satisfaction).
220. Id. at 6.
221. Id. at 11.
222. Id. at 2.
and individuals. Therefore, in contrast to the rehabilitationists, social defense theorists chose a community-centered framework. Rather than merely releasing an offender into the community, offenders need to be "neutralized," preferably through a treatment program, but through incapacitation if necessary. Only then could appropriate treatment of the offender follow.

This reorientation of viewpoints produced a startling shift in results. Instead of worrying about the welfare of the criminal, social defense theorists worried about the danger of the criminal to society. They argued that the "dangerousness" of the criminal offender must somehow be measured, and subject to this measurement the criminal offender must be controlled through state intervention. Only after state intervention did social defense theorists begin to consider the rehabilitation of the offender.

This focus on crime prevention through the incapacitation and reform of individuals sharply contrasts the deterrence model of punishment. Deterrence, with its concept of guilt, is aimed at persuading all individuals to refrain from committing crime. The approach is concerned only with the individual offender to the extent that the offender is dissuaded from committing additional crime. Social defense theory is aimed at stopping the individual first through incapacitation and second through rehabilitation. In fact, social defense theorists do not speak about punishment at all; rather, they speak of a system of "responsibility."

Barbara Wootton represents the theoretical apogee of the social defense movement. Wootton argued that it is impossible to distinguish between diminished responsibility and "wickedness." Under her formula, the mere fact that an individual has transgressed a societal boundary shows that he did not resist untoward impulses. This

226. See CONTEMPORARY PUNISHMENT, supra note 193, at 130 (comparing conflicting goals of rehabilitation and social defense theories).
228. Id.
229. Id.
230. Id.
231. CONTEMPORARY PUNISHMENT, supra note 193, at 130.
232. Id. at 4, 93.
233. See supra notes 225-231 and accompanying text.
234. WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION, supra note 146, at 170. See generally id. at 164-74.
235. Id. at 167-68.
236. Id. at 168.
For Barbara Wootton, the more interesting question is whether the individual could have resisted the impulse. In other words, is he "responsible" for the transgression? Barbara Wootton suggested that there cannot be an answer to this question, because there is no reliable criteria to distinguish between the two categories. Wootton explained how "the step between 'he did not resist his impulse' and 'he could not resist his impulse' was one which was incapable of scientific proof. A fortiori . . . , there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses." The proper approach to a prisoner, therefore, is "treatment which experience suggests is most likely to evoke the desired response. A fortiori. Wootton thus recommended that the distinction between criminal justice and the medical system must "wither away. This approach grants extreme discretion to treatment personnel. A "sentence" is highly indeterminate and presumably dependant on the progress the offender makes in treatment.

Thus, under traditional theory, if the individual is "not responsible," then it is appropriate for the individual to be placed in an institution for treatment of the underlying lack of responsibility. However if the individual is "responsible," traditional theory then begins the process of blame and punishment. In contrast, under Wootton's formula, determining the exact nature of responsibility is impossible. If the transgression was committed, responsibility is overlooked and the question then becomes one of treatment.

As with the utilitarian view of deterrence theory, this model would not require actual guilt of an offender. A mere finding of

237. Id. at 170. The terminology on this point is somewhat difficult. Use of the word responsibility here creates confusion when "responsibility" is used in the more narrow sense of the capability to resist or not to resist the impulse to commit a crime. Barbara Wootton suggests use of the word "instrumentality" rather than "responsibility" to mean the actual physical criminal act. Id. Although awkward, no other word seems to quite capture the difference between the two concepts.
238. Id. at 170-71.
239. Id. at 169 (citation omitted).
240. Id. at 172.
241. Id. at 169.
242. Id. at 171-73.
243. Id. at 173.
244. See supra note 237 (discussing the narrow meaning of "not responsible" when considered as part of Wootton's theory).
245. Under a utilitarian view of deterrence theory, a person does not need to be actually guilty to achieve a deterrent effect. The fear of punishment, coupled with actual punishment when crime is committed, is enough to deter others from committing crime. See
dangerousness could be enough to require intervention. A system such as this might be abused for political reasons or for profit; consequently, this model has been highly criticized.

In recent years, rehabilitation theory has been heavily criticized, contributing to its decline in popularity and usefulness amongst penal theorists. As may be expected, there are numerous reasons for the decline in rehabilitative goals. In fact, the complaint that led in part to the formulation of the social defense theory—that rehabilitation was too centered on the offender and not concerned enough about the community—was certainly among the reasons for its decline. One might have expected that social defense would begin to fill the void: however, this generally has not occurred.

Many of the same problems that contributed to the decline of rehabilitation negatively impacted social defense theory as well. For example, social defense and modern expressions of rehabilitation have become highly linked to therapeutic intervention and medicine. Thus, in some measure, a decline in rehabilitative theory may be linked to a decline in the esteem in which mental therapy was held. More important, there was a serious debate, which continues today, about whether corrections officials, mental health professionals, or any other officials, actually are capable of affecting the behavior of offenders.

At the same time, concern about the performance of the criminal justice system in an era of rising crime rates brought tremendous scrutiny upon the reigning model of rehabilitation. As a result of rising crime rates and the war in Vietnam, criminal theory underwent a politicization in the 1960s that created skepticism toward indeterminate sentences. Thus, on one side, the granting of wide sentencing discretion to judges, to parole boards, and certainly to treatment personnel came to be regarded by some as subject to abuse. This "lib-
eral" critique is grounded in the belief that the power of the state must be checked. This concern with the containment of state power extends to the courts and to the discretion of the judiciary.

On the other side, "conservative" critiques are marked by the belief that either the nature of human beings is immutable and thus not capable of being rehabilitated, or that the expense of rehabilitation is too high for society. This translates into several strains of criticism. Retribution with an emphasis on punishment allows conservative theorists to express a moral code. At the most extreme end of the conservative spectrum are those that propound a "war" theory, which is characterized by repressive penalties and philosophies that encourage a view of criminals as apart from the society. This "us against them" system creates the impression that rehabilitative regimes are weak.

As we shall see, courts that have been able to align with community goals, usually by expressing a concern for restitution or safety, generate popular support. This is particularly helpful in a climate in which the retributive and war theory critiques seem to be setting the current popular political agenda. Nevertheless, it is the liberal critique that may prove to be troublesome for the drug treatment court.

The main thrust of the liberal critique is against the symbol of rehabilitationism, the indeterminate sentence. However, this sentencing practice is particularly useful because it allows offender reform programs to operate on an individual level. The value of the indeterminate sentencing may be described best in a minor debate that has taken place within the Baltimore City DTC.

256. The use of the term "liberal," as opposed to "libertarian," is meant to convey a sense that the critique is based not only in a traditional liberty interest, but also raises concerns about equality in sentencing.
257. ALLEN, supra note 16, at 67.
258. Id.
259. Id.
260. Id.
261. Id. at 62-63 (noting war theory's relation to ancient Germanic concepts of "outlawry").
262. Id. at 64. Interestingly, the drug war has moved through phases that may be considered an outgrowth of a general war theory of punishment. Thus, periods of the drug war have been characterized by an emphasis on repression through policies such as "zero tolerance." See supra notes 57-66 and accompanying text.
263. See infra text accompanying note 310.
264. See infra note 312 and accompanying text.
266. Id. at 67.
As noted above, offenders in the diversion track are given the promise of a stet upon completion of treatment and are given continual postponements in the stet docket until they complete the program.\textsuperscript{267} Concerns have been raised that this is not enough of an incentive to keep the offender in the program. In reality, offenders who are placed on the diversion track are very unlikely to face jail time.\textsuperscript{268} However, in the DTC program, failures to adhere to the DTC contract could result in sanctions as serious as shock incarceration.\textsuperscript{269} This punishment is actually more serious than the one defendants would have faced if they had not joined the program.\textsuperscript{270}

If the defendant is simply placed on the stet docket, the cases frequently become difficult to prosecute. Witnesses may move, become uncooperative, or simply begin to forget the details of the case. In contrast, defendants on the probation track have a guilty judgment against them. If they do not complete the program, their probation may be violated and they may face jail time.\textsuperscript{271} Alan Woods of the Baltimore City State's Attorney's Office illustrated the differences in offenders' behavior between the two tracks:

The probation track defendants are noticeably more cooperative than diversion track defendants. They have the sword of Damocles hanging over their heads. In contrast, we're saying to the diversion track defendants, "If you mess up we'll hang the sword of Damocles over your head in the future." Except that if we need to hang the sword, frequently we can't find either the sword or the thread.\textsuperscript{272}

To solve the problem, some members of the DTC have proposed requiring diversion track offenders to stipulate\textsuperscript{273} before the court to certain facts.\textsuperscript{274}

\textsuperscript{267} See supra note 121 and accompanying text.
\textsuperscript{268} See supra notes 119-121 and accompanying text.
\textsuperscript{269} WILLIAMS, supra note 34, at 19, app. 4 at 3; see also supra note 129 and accompanying text.
\textsuperscript{270} Interview with Alan C. Woods III, supra note 7.
\textsuperscript{271} It is possible that defendants in a probation track could serve more time in jail by opting for the DTC than if they had taken a straight probation.
\textsuperscript{272} Interview with Alan C. Woods III, supra note 7.
\textsuperscript{273} A stipulation is "[t]he name given to any agreement made by the attorneys engaged on opposite sides of a cause, (especially if in writing), regulating any matter incidental to the proceedings or trial, which falls within their jurisdiction." BLACK'S LAW DICTIONARY 984 (6th ed. abr. 1991). When a defendant stipulates to the state's version of the facts, the defendant cannot later directly contest this version of the facts and would likely be convicted if brought to trial.
\textsuperscript{274} Interview with Alan C. Woods III, supra note 7.
Effectively, this proposal would require the stet defendants to admit to guilt as a requirement for entry into the DTC. These defendants would be at risk of receiving more time in jail through the DTC process than they would normally face. This high level of discretion is what most concerns liberal critics. More precisely, liberals criticize the possibility of unrestrained, arbitrary, or discriminatory abuse of discretion. Although treatment is acknowledged as the goal, because discretion actually resides in the hands of the judicial system, which is charged with the safety of society, punishment disguised as treatment is the result. In fact, the indefiniteness itself is cited as a component of additional punishment resulting in dehumanization and depersonalization of the defendant. Additionally, the expansion of discretion is problematic to liberal critics who are concerned about the containment of state power.

The DTC response is two-fold. First, the defendant is engaged in treatment, and in the long term, time in jail may be the key to the defendant’s recovery. Particularly in relationship to the disease theory of addiction, such measures are necessary to break through the mechanism of denial and to institute a feeling of responsibility in otherwise unresponsive defendants. Second, discretion is expanded slightly, but this cuts both ways. Defendants may end up with a better deal. Also, the Baltimore City DTC limited judicial discretion in some notable ways. In particular, defendants are assessed using the Addiction Severity Index, and thus only appropriate candidates are brought before the judge. Second, although not required to do so, the judge almost always follows the recommendations of treatment providers.

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277. Id. at 26.
278. Id. at 29.
279. Id. at 46.
280. Roger H. Peters, Drug Treatment in Jails and Detention Settings, in Drug Treatment and Criminal Justice 44, 47 (James A. Inciardi ed., 1993) (“The initial period of incarceration often serves to focus an inmate’s attention on the negative consequences of substance use and can mobilize internal motivation to address long-standing life-style problems through treatment.”).
281. Id. at 46-47.
282. Interview with Alan C. Woods III, supra note 7.
283. See supra notes 114-115 and accompanying text.
284. Interview with Alan C. Woods III, supra note 7.
The liberal skeptics, however, have also shown concern about the expansion of treatment programs. To a certain extent, they are concerned that therapy is in itself punishment. Certainly past prison regimes, represented as being rehabilitative, have been shown to be highly punitive.

C. Drug Treatment Courts and Social Defense Theory

The pressure on American courts in recent years to do more for the community with fewer resources has produced a variety of court-led reforms. It is not unheard of for judges to institute innovative approaches to criminal justice in individual courtrooms. Perhaps unsurprisingly, very few of these efforts have paid particular attention to the academic theoretical debate. Nevertheless, it is surprising that several innovations have seemed to fly directly in the face of the prevailing retributive political currents. Thus, there is some precedent for the emergence of courts with a similar approach to DTCs.

Perhaps the most well-known example of this type of spontaneous, court-led reform is the "Earn-It" alternative sentencing program begun in 1975 in Quincy, Massachusetts. The Earn-It court's concept is quite simple, and today seems almost ordinary. Eligible convicted defendants are required to pay restitution to their victims. Unemployed defendants pay restitution by participating in community work programs. The most unusual part of this type of sentencing is that offenders who are unemployed are provided work directly through the court itself. Work was initially provided by private companies recruited from the community in a town hall-style meeting.

In keeping with the social defense theories proposed a few years before, this court uses both incapacitative and rehabilitative meas-
ures. On the rehabilitative side, Judge Albert L. Kramer used imaginative sentencing to attempt to convey to offenders the damage that they were causing through their actions. For example, two boys who pulled a fire alarm in school paid restitution by painting the fire house. Not only did they make up the cost of pulling the fire alarm, but they spent substantial time at the fire station, which helped them understand the cost of false alarms to the community. In the language of social defense theory, the defendants came to understand their responsibility for the crime. On the incapacitative side, they were supervised by members of the community and the court while spending substantial hours at work.

The community orientation of the program is perhaps the hallmark of a social defense-style program. Although officials are concerned with providing treatment to the offender and thereby enabling the offender to return to society, their primary focus is actually on protecting the community. This style of looking to the future relationship of the defendants to society, while at the same time attempting to protect society, is carried on in the DTCs of today.

As shown by the experience of the Earn-It court, the enormous pressure to solve "the crime problem" while keeping costs low is not new. A particularly vexing problem for court systems is created by the enormous number of criminal cases, in particular drug cases. This crush of cases creates pressure on all participants to process cases through the system. Such mass-production methods of case processing create a movement away from efforts to instill individual responsibility in the law. As a result, offender-focused rehabilitation efforts have become luxuries in actual practice.

295. See generally ALLEN, supra note 16 (on the rehabilitative ideal); id. at 66 (on incapacitation). See also supra notes 17, 25 and accompanying text.
296. KLEIN, supra note 149, at 8.
297. Id.
298. Id.
299. See generally Ancel, New Social Defense, supra note 225, at 132-39. See also supra notes 221-228 and accompanying text.
300. See Ancel, New Social Defense, supra note 225, at 138.
301. KLEIN, supra note 149, at 8.
303. Id. at 133, 138.
304. Id. at 138.
305. Id. at 136.
306. RUSSELL REPORT, supra note 6, at 9, 12.
308. Id. at 2316-17 (citing Geoffrey C. Hazard, Jr., Criminal Justice System: Overview, in 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 450, 454 (Sanford H. Kadish ed., 1983)).
The Earn-It court in Massachusetts sidestepped these very real considerations by aligning itself with the community. The court sought the approval and assistance of the community by explaining in a mass meeting precisely what goals the court was seeking, how it expected to implement the goals, and what results the court was expecting. In addition, the court successfully obtained favorable publicity that furthered the court's agenda.

The mass production of cases has led to a comprehensive debate, numerous proposed solutions, and is an explicit factor in the rise of DTCs. Currently in the political world, and even in the theoretical world, retributionist theory seems to have gained the upper hand.

But in the trenches, driven by the crushing drug caseload, many jurisdictions have turned to DTCs in an attempt to stem recidivism and slowly turn the tide of the overwhelming statistics. However, like their Earn-It counterparts a decade before, DTC reform efforts are not guided by theory. Practitioners in DTCs are guided by what they perceive to be working and they discard what does not work.

Nevertheless, there are certain underlying beliefs that inform the DTC movement. Interestingly, they are primarily medical, rather than legal. The modern catechism underlying the drug treatment court movement is simple: Statistics and long-term observation demonstrate a link between the use of drugs and crime. In particular, addiction—the compulsive, repeated use of drugs—leads to the repeated commission of crime to obtain proceeds for drugs. As the addict repeats crimes, he progresses to the use of force or intimidation. If unchecked, DTC proponents assert, the use of force will ultimately result in an act or acts of violence. The underlying source of the problem—the compulsive use of drugs—is not combated by traditional methods of criminal justice. In fact, repeated cycles of incarceration could help to teach addicts how to become more effective criminals. To break the cycle of recidivism and crime, there must be effective treatment of addicts. DTCs are premised on the belief that an effective way to get treatment for addicts is to use the power of the court to force them into treatment.

310. Id.
311. Id. at 12-17.
312. See Allen, supra note 16, at 1-31 (discussing the decline of the rehabilitative theory). But see American Friends Serv. Comm., supra note 276, at 20 (claiming that "[d]uring the last century the professed aims of criminal justice have changed from retribution to rehabilitation and preventive imprisonment").
313. Id.
314. This catechism is the author's attempt to paraphrase numerous drug treatment court ideals and principles. There is no single source that seems to grasp every portion of
This catechism of DTCs clearly displays a powerful orientation toward a social defense-style organization. The primary goal, particularly from the criminal justice system's standpoint, is the ultimate reduction of crime in the community. Hidden in the subtext of forcing defendants to undergo treatment is a high element of community supervision, particularly by the treatment agencies. Even before defendants are allowed into the drug treatment court, potentially difficult violent offenders are screened out.

Judges in treatment courts have not been reluctant to get other community members involved. In Baltimore, Judge Jamey Weitzman asked one DTC offender who was doing well in the program to give support to another offender by accompanying the second offender to Alcoholics Anonymous meetings and to church. One DTC message is that every day an offender is in treatment is a day that the offender is not committing crime on the streets.

As in the Earn-It model, DTCs also focus on the future health and well-being of the defendant. By treating the disease of addiction, the court benefits the defendant as much as the community. In fact, more than any other court, DTCs are the epitome of a therapeutic or medical approach to crime. Courts have long required offenders to receive medical treatment of one kind or another. DTCs take this notion one step further by becoming active participants in the treatment of the defendant. The explicit reliance on disease theory makes the DTC model conform even more closely to the ideals of social defense theorists. Although the concept of guilt has not vanished, the DTCs attempt to sidestep the problem of determining blame or fault through a plea-bargaining process. Thus in Baltimore

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315. See supra notes 221-228 and accompanying text for a discussion of social defense.
316. Id.
317. Williams, supra note 34, at 7.
318. See Tauber, Treating Drug-Using Offenders, supra note 36, at 29. Earn-It provides a model of alternative sentencing that similarly gets community members involved. See supra notes 289-294 and accompanying text; see also Williams, supra note 34, at 18, and Goldkamp, supra note 34, at 7-8.
319. Author's observation of Baltimore City Drug Treatment Court, Judge Jamey Weitzman presiding, in Baltimore, Md. (Mar. 7, 1995).
320. Id.
322. See supra notes 290-294 and accompanying text.
323. See supra notes 221-228 and accompanying text.
City, the question of guilt is resolved or becomes irrelevant. The question then is no longer whether the crime happened, but rather, what is compelling the crime and how do we stop it? As Barbara Wootton imagined, this question is resolved by treatment personnel.

The focus on this question is even more evident when one considers the level of integration of legal, correctional, and medical systems involved in the DTC process. While the court retains ultimate decision-making power, in all cases the sentence is some form of treatment. The judge relies on the advice of treatment personnel to decide what type and how much treatment is appropriate and even where treatment will be performed. Corrections officials ensure that treatment is carried out. This integration of three formerly diverse fields has been referred to as an "integrated systems approach." Although technical boundaries remain, the integration of medical, correctional, and legal systems is far-reaching enough that one can say the "withering away" of the distinction envisioned by Barbara Wootton has already taken place in the Baltimore City court.

The institution of graduated sanctions for offenders who are not making satisfactory progress further demonstrates the social defense model in action. Thus, within the DTC, sanctions are not punishment. They are simply "adjustments," a device by which the court teaches addicts responsibility for their actions. Judge Jamey Weitzman highlighted this tendency:

The defendants are in drug court because they are addicted to substances. Therefore, dirty urines are not unusual. The court is concerned that these defendants continue to follow program regulations and rules and attempt to strenuously

324. It is important to remember that there are two tracks. If the defendant enters though the probation track, the defendant already admitted guilt. If the defendant enters through the stet track, the question of guilt is put off indefinitely. See supra text accompanying notes 119-127.

325. See generally Wootton, Crime, Responsibility, and Prevention, supra note 146.

326. Goldkamp, supra note 34, at 7.

327. Williams, supra note 34, at 3 (referring to Baltimore's program).

328. Telephone interview with Judge Jeffrey Tauber, president of the National Association of Drug Court Professionals (Jan. 17, 1996).

329. Lady Wootton uses the phrase "withering away" in reference to the concept of responsibility. Wootton, Crime, Responsibility, and Prevention, supra note 146, at 169.


331. Id. app. H at 3. The use of the word "adjustments" rather than "sanctions" is interesting. In the context of the program, a manager makes adjustments to the supervision regimen that the offender undergoes. However, use of the word adjustments also displays the belief in the malleability of character that is at the heart of rehabilitation theory; presumably, the offender will suitably adjust to become more compliant.
address their addiction. If they continue positively, the court will work with them. However when they fail to comply with program requirements, such as missing treatment sessions, then the court will show them that there are consequences to their behavior and impose some form of increased supervision. \(^3\)

The result is a type of separation of drug use from criminality that is highly clinical in outlook. In contrast, in a strict legal sense, failure of a urinalysis test could result in a violation of probation and punishment. \(^3\)

As shown above, some DTC offenders experience greater criminal justice system involvement than the ordinary nonviolent offender in a like position. \(^3\) As in other indeterminate sentencing situations, it is a peculiar phenomenon that the time for treatment can be far longer than the jail sentence normally given. \(^3\) The probability of receiving jail time and years of court-enforced treatment could serve to mollify those who favor punishment over other competing goals.

Although the systems approach \(^3\) used by the DTC model in conjunction with the medical concept of the disease of addiction seems particularly apt for drug and alcohol addicts, the model clearly has implications beyond the DTC structure. In Michigan, for example, Washtenaw County uses the systems approach to coordinate courts with law enforcement in the area of domestic violence. \(^3\) However, one does not see a movement toward specialized courts for other types of crimes such as "environmental" or "white collar crimes" courts. Thus far, court officials have attempted the systems approach only where there seems to be some form of medical pathology, such as addiction or battered spouse syndrome. \(^3\) Given the critique of indeterminate sentencing \(^3\) and officials' justifiable concerns about releasing dangerous offenders, the medical condition and partnership with treatment authorities may provide cover for the difficult decisions officials are called upon to make. \(^3\)

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\(^3\) Interview with Judge Jamey Weitzman, supra note 14.
\(^3\) MD. ANN. CODE art. 27, § 641 (1957).
\(^3\) See supra notes 266-270 and accompanying text.
\(^3\) Id.
\(^3\) See supra text accompanying notes 326-328.
\(^3\) See id. at 946.
\(^3\) See supra notes 254-258 and accompanying text.
\(^3\) Of course, officials are also reacting to the overwhelming number of drug cases in their jurisdiction as well. See supra text accompanying notes 68-72.
To the extent that DTCs are politically savvy, the lack of theoretical input has not yet proven serious. Like the “Earn-It” court, DTCs have taken pains to keep public relations positive and to maintain community involvement. For example, in Baltimore City, the media were invited to the first graduation of DTC offenders. A steady stream of studies has been released by the DTC movement to show that the DTCs are working. The message remains simple. Almost every advocate of DTCs has a remarkably similar approach to the subject: “The old system of dealing with addicted offenders does not work (is in crisis); prevention and treatment are the only alternatives.” By worrying about community safety first, the DTC movement, like the Earn-It court, aligns itself with the community. Thus far, the specialized courts compare favorably to the old system, despite the high level of hostility toward rehabilitative goals.

There remain substantial questions about the legal system from the DTC perspective. Parts III and IV are devoted to exploring some of these concepts in the context of the DTC.

III. THE ADVERSARY SYSTEM

Many social defense theorists—having advocated the elimination of punishment in favor of treatment—question the role of traditional court systems as well. This criticism stems from the very nature of the criminal justice system. If the goal of the criminal justice system is ultimately to assign blame and punishment, it is fair to say that the system reaches those goals through the method of the adversarial system. As such, the system’s goals are to divine the truth of criminal

341. See supra notes 290-294, 301-305, 310-311 and accompanying text.
342. See supra notes 302-305 and accompanying text.
345. See Goldkamp, supra note 34, at 4; see also Tauber, Treating Drug-Using Offenders, supra note 36, at 30.
346. This concern for community safety is most clearly evidenced by the use of assessment indexes to weed out riskier defendants. See supra notes 110-117 and accompanying text; see also supra notes 302-305 and accompanying text (discussing DTCs’ community orientation).
348. See Ancel, New Social Defense, supra note 225, at 138 (discussing the need for a “humanization of criminal law and the criminal trial”).
349. For an explanation of the adversarial system, see David Luban, Lawyers and Justice 67-93 (1988).
matters and to protect defendants from the power of the state. But if the goals of social defense are protection of the community and reform through treatment of offenders, the adversarial system certainly seems to become less important, if not inappropriate.

Section A, below, provides a short overview of the adversarial system, with particular attention paid to social defense criticisms. Section B will describe the adversarial system as it operates in the drug treatment court. In particular, the changed roles of the court participants will be discussed. The role of the judge has expanded and broadened, while roles of both advocates have diminished. This Comment argues that defense lawyers face several pitfalls in defining their duty to clients. The team concept fostered by the systems approach forces defenders to walk a fine line between their legal duty to defend their clients under the adversary system and the systemic duty to help their clients by not obstructing DTC treatment.

A. A General Description of the Adversary System

The development of an adversary system of adjudication by Anglo-American jurisprudence may be fairly described as one part accident and one part tradition. As such, the system has frequently been criticized, particularly with respect to mental illness and its relationship to the law. Considering that it has survived since its inception shortly after the Norman invasion of England, it has fervent defenders as well.

David Luban states that there are three main components of interest in an adversary system of law. First is the system of rules and procedure that each member of the court must uphold. Of more importance for the purposes of this Comment is the burden on each interest or party to present his own case. Given the intricacies of the system of rules, most parties to a case are represented by lawyers,

350. Id. at 68-74.
351. Id. at 67-93.
352. See infra text accompanying note 374.
353. LUBAN, supra note 349, at 67.
355. LUBAN, supra note 349, at 67.
356. Id. at 56-57.
357. Id. at 57.
358. In Luban's characterization of the adversary system, the rules in themselves are a third component of the adversary system. Id. They are de-emphasized in this paper to better focus on the roles of the advocates and the judge whose changing roles in DTC are of particular interest.
who in turn act as partisans on behalf of their clients.\textsuperscript{359} The final important component is a neutral judge who acts as the binding referee over the parties.\textsuperscript{360} As Professor Luban notes, given the theoretical neutrality, if not the passivity, of the judge, this structure is typically characterized more by the relationships of lawyers to their clients rather than by the "structure of adjudication."\textsuperscript{361}

Numerous commentators have attempted to justify the adversarial system of adjudication both politically and legally since its inception.\textsuperscript{362} A few of the more persuasive arguments follow. First, some argue, the adversary system is a safeguard against totalitarian political systems.\textsuperscript{363} This is an interesting point, applying mainly to criminal defense.\textsuperscript{364} Underlying the argument is a sense that the safeguards put in place against the government create advantages for those in the defensive role.\textsuperscript{365} This is a striking observation because, as Luban notes, these advantages are routinely bypassed through the plea-bargaining process.\textsuperscript{366} In some commentators' views, however, the pressure to plea bargain comes because the defendants have so many advantages; prosecutors recognize that if there were no plea bargains, the criminal justice system would grind to a halt.\textsuperscript{367}

A similar point is that the system exists to protect the legal rights of defendants.\textsuperscript{368} An apt comparison would be to people playing a game.\textsuperscript{369} The rules of the game are provided to each player, who seeks to maximize his position within the rules. The game is entirely self-referential. Although there is an objective truth beyond the game, determining the winner or loser pertains only within the game. Thus, if a player does other than what is in the rules, he has stepped outside of the game and the rules may be enforced against him. In this context, the use of the adversary system is said to produce the most vigorous exercise of the rules. In comparison, others claim that the clash

\begin{footnotes}
\item[359.] Id.
\item[360.] Id.
\item[361.] Id.
\item[362.] Id. at 67.
\item[363.] Id. at 58.
\item[364.] Id. at 59.
\item[365.] Id. at 60.
\item[366.] Id.
\item[367.] Id. (referring to the opinion of John Langbein).
\item[368.] Id. at 74.
\end{footnotes}
of viewpoints is the best system for ferreting out the objective truth of a situation.\textsuperscript{370} Studies are inconclusive on this point.\textsuperscript{371}

Finally, Professor Luban's own justification along pragmatic lines is illuminating. He relies on a three part argument. One, there is no evidence that the adversary system does a worse job at determining truth than any other existing system. Two, a system of adjudication is a necessity. Three, it is the way we have always done things.\textsuperscript{372} As he asserts, any replacement necessarily carries the risk of unexpected and unwanted change, and therefore "[w]hy, then, go through the trauma of change?"\textsuperscript{373}

The answer for drug treatment court personnel and for social defense theorists is simple: There is a better system. In their opinion, the adversarial system is a game that must be played according to certain prescribed rules. Consequently, it has nothing to do with finding the truth of a question. Rather, in this model, the adversary system is about the enforcement of legal rights.\textsuperscript{374}

In the social defense model, however, it is necessary to determine causality before establishing actual responsibility.\textsuperscript{375} As has been suggested, this could be accomplished in a separate proceeding. The degree of the defendant's responsibility will then determine what level of treatment and supervision the defendant requires. Therefore, in this system, which essentially attempts to predict the future dangerousness of a defendant, legal rights are not meaningful.\textsuperscript{376} Finding the truth is what is important, and to the extent that the adversarial rules prevent the full truth of causality from being known, the system must be sacrificed.

This does not seem quite adequate. An underlying problem that proponents of community-based rehabilitation methods might point to is the nature of the adversary system. Because of the principle of partisanship, the system necessarily makes adversaries of parties who may have a greater interest in cooperating.\textsuperscript{377} To the extent that the goals of treatment are cooperative rather than competitive, the adversary system is a particularly inappropriate method to effect treatment. If the dynamic of adversariness forces a win or a loss for each side, the

\begin{thebibliography}{9}
\bibitem{370} LUBAN, \textit{supra} note 349, at 74.
\bibitem{371} Id.
\bibitem{372} Id. at 92.
\bibitem{373} Id.
\bibitem{374} Id. at 74.
\bibitem{375} WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION, \textit{supra} note 146, at 170.
\bibitem{376} Ancel, \textit{New Social Defense}, \textit{supra} note 225, at 43.
\bibitem{377} Menkel-Meadow, \textit{supra} note 369, at 759-61.
\end{thebibliography}
system itself creates the assignment of blame and punishment for the loser.

Carrie Menkel-Meadow describes this dynamic as a zero-sum game. In this model, individuals maximize gain in an individual manner. The adversary process simplifies complex issues into what appears to be a single issue: buy low, sell high. This is true even in the context of criminal negotiations. For example, a prosecutor typically starts plea negotiations with a high offer, the defense attorney goes low. Ultimately they are seeking the right "price" of the crime.

If DTCs were adversarial, the prosecutor and defense attorney would constantly be seeking to price, or to value, treatment (as opposed to punishment). This assumes that treatment is necessarily valued as a commodity at the same level by both parties and that agreement can be reached. On its face, this is not correct. Even assuming that the value a prosecutor places on treatment remains constant, the value placed on treatment by a defendant will vary as he learns more about treatment. For example, a defendant who has maintained sobriety for six months values treatment differently than a defendant who is just entering the program. It is possible to envision a series of negotiations, as defendants become more familiar with the court and treatment. However, if a defendant spends his time haggling over the value of treatment, he will not be receiving treatment and indeed may remain resistant to treatment altogether.

For the social defense theorist, the goal is to protect the community and to treat the offender. Neither goal is served by playing a zero-sum game that creates winners and losers and thus affixes blame. Blame is particularly inappropriate for those individuals who are incapacitated by disease. Rather, the answer is to treat or incapacitate defendants so that they cannot further harm the community. More plainly, this criticism stems from competing visions of what the justice

378. Id. at 787.
379. Id. at 784.
380. Id.
381. Id. at 785-87.
382. Id. at 784. Menkel-Meadow explains that "there is only one issue, price," in the adversarial process. Id.
383. Menkel-Meadow explains that the second major assumption in the adversarial process is "that both parties desire equally and exclusively the thing by which that issue is measured." Id.
384. Id.
385. See supra notes 302-305 and accompanying text.
386. See WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION, supra note 146, at 169-70 (arguing that we are incapable of telling which acts are a disease or compulsion and so all offenders should receive treatment); see also supra text accompanying note 237.
system should do; the goals of punitive systems are different from those of social defense. An adversary system may be appropriate for punishment, but given its capacity to interfere with the treatment process, it is not appropriate for treatment.

This frustration with competing goals is aptly captured in a system proposed by Warren Burger, speaking on insanity before he became Chief Justice of the United States Supreme Court:

[T]he jury would decide . . . only whether [the accused] committed the overt acts charged. . . .

If some mental disorder or illness appears to have precluded the accused from forming a criminal intent, the court alone would deal with that question . . . . The courts could employ a hearing process but not in the conventional adversary sense of "dog eat dog and the devil take the hindmost." Rather this hearing would be an occasion for psychiatrists to present as full and complete a personality profile as could be developed. . . .

From all this the trial judge would then decide the best course (a) for the protection of society, (b) for the protection of the defendant, and (c) for the rehabilitation of the defendant.

Finally, there is the question of protection against totalitarianism. This is an important question that has dogged much of the work of social defense theory. In Nazi Germany, laws reminiscent of the social defense philosophy were propagated, requiring the reform of "'responsibility based on character.'" Social defense theorists would argue that the Nazi concept of "reform" was unscientific, whereas their rehabilitation is scientifically based and humane. As Herbert Fingarette pointed out, this assertion is open to criticism: "[T]o turn the question over to the experts amounts to turning the

387. See Wootton, Crime, Responsibility, and Prevention, supra note 146, at 172; see also supra notes 221-228 and accompanying text.


389. See Ancel, Social Defense, supra note 347, at 63-67 (discussing totalitarianism and social defense). Ancel claims that "totalitarian regimes put primary emphasis on retributive and intimidating punishment." Id. at 64.

390. Silvng, supra note 247, at 141 (quoting the Charakterschuld of National Socialism). For an overview of National Socialist doctrine in the context of social defense and of the effects of Nazism on the development of social defense theory, see Ancel, Social Defense, supra note 347, at 63-72.

391. See, e.g., Wootton, Crime, Responsibility, and Prevention, supra note 146, at 171-72.
person over to the experts. . . . [This] reflects a dangerous faith in the combination of good will and claimed expertise." 392 Drug Treatment Court personnel suggest, nevertheless, that in the intervening time since the development of social defense theory and its criticism, the science of addiction treatment has greatly improved. 393

B. Baltimore City Drug Treatment Court

As shown above, altering the basic goals of the criminal justice system can have profound consequences on the structure of the system. 394 The abandonment of punishment and blame as outcomes of the system are likely to result in some rethinking, if not actual adjustment of the system. Although driven primarily by the need to manage exceptionally high caseloads, rather than ideological commitment to a particular theory such as social defense, 395 DTCs have typically found it necessary to de-emphasize the adversarial system in whole or in part. 396

This de-emphasis is partly the result of adopting a medical view of addiction. 397 By placing treatment at the center of the rehabilitative sentencing process of the court, the court finds it necessary to create a system that is cooperative. 398 Although it is possible to suggest that the medical and legal systems could be integrated within an adversarial process, it is difficult to envision a medical system that uses an adversary process to treat its patients.

Consequently, the Baltimore City DTC has essentially adopted the bifurcated procedure hinted at by Barbara Wootton 399 and Chief Justice Burger. 400 As noted above, the court essentially sidesteps the need for a lengthy inquiry into guilt through a screening process. 401 The use of plea bargaining results in defendants on the probation track, who have already admitted guilt, appearing before the court. 402 Defendants on the diversionary track are not usually required to ad-

392. FINGARETTE, THE MEANING OF CRIMINAL INSANITY, supra note 388, at 5.
393. For a variety of approaches to and studies of addiction and its treatment, see generally VISIONS OF ADDICTION (Stanton Peele ed., 1988), Alling, supra note 51, at 402-15, and Lowinson et al., supra note 50, at 550-61.
394. See supra part II.
395. See supra text accompanying note 306.
396. See supra notes 118-135 and accompanying text.
397. See supra notes 114-116 and accompanying text.
398. See, e.g., GOLDKAMP, supra note 34, at ii-vi.
399. WOOTTON, CRIME, RESPONSIBILITY, AND PREVENTION, supra note 146, at 168; see also supra notes 235-237 and accompanying text.
400. See supra note 388 and accompanying text.
401. See supra notes 110-118 and accompanying text.
402. WILLIAMS, supra note 34, at 17.
mit guilt; however, typically they have admitted to drug use and they have been diagnosed as addicts as part of the screening process.403

Until a treatment contract is signed, the offender is technically still participating in the adversary system, although members of the system are cooperating to get the offender into the program. This stage is absolutely critical. While still under the adversary system, the defender has the duty to fully inform his client of the legal risks that the client is taking by entering into the nonadversary system.404 This necessity certainly creates tensions for the defender. First, the defender’s duty to his client is to show the client precisely what the outcomes will be, both in and out of the DTC.405 Second, the defender must act as the interface between the client and the DTC.406 This position places some stress on the defender to act as an advocate for drug treatment, particularly for a defender who is involved with the DTC. Despite the tension, it would seem that at this stage, any error must be made toward the partisan duty to fully inform the client of his options.

Once the client has entered the system, the second stage of DTC begins.407 Florida’s Office of the State Courts Administrator has prepared a chart that is quite useful in showing the altered status of the court at this stage.408 After the defendant has entered into the system, only the assignment to treatment and the long process of followup remain. In Baltimore, as in all DTCs, this stage of the process is specifically nonadversarial.409

403. See supra notes 110-118 and accompanying text.
   (a) A lawyer shall keep a client reasonably informed about the status of a matter
   and promptly comply with reasonable requests for information. (b) A lawyer
   shall explain a matter to the extent reasonably necessary to permit the client to
   make informed decisions regarding the presentation.
   The Maryland rule is cited because this Comment is concerned with the Baltimore DTC. However, most jurisdictions have equivalent rules.
405. See id. This principle is stated even more clearly in the preamble to the Maryland rules: “As advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations, and explains their practical implications.” Md. Rules of Professional Conduct Preamble (1995).
406. WILLIAMS, supra note 34, at 14.
407. See supra notes 130-145 and accompanying text.
408. Treatment Based Drug Courts, supra note 38, at 6.
409. See WILLIAMS, supra note 34, at 17. Although rare, there are other examples of nonadversarial proceedings in American jurisprudence. Most notably, until 1966, when the United States Supreme Court decided In re Gault, 387 U.S. 1 (1966), the juvenile courts in the United States were nonadversarial. In Gault, the Supreme Court limited a juvenile court’s discretion after that court sentenced a juvenile to what amounted to a six-year term at a state industrial school for placing lewd telephone calls. Id. at 7-8, 30-31. The
The move to a nonadversarial system profoundly affects the roles of almost every participant in the courtroom, including defendants. Following a juvenile court example, it is possible to see a situation in which defendants are treated almost as wards of the court. More important, the roles of the advocates and the judge shift dramatically.

The prosecutor's role in the DTC has perhaps changed the least of all three participants. During the first stage, the prosecutor is active in determining which offenders are eligible for treatment. In the second stage, treatment and followup, if the offender is doing well, the prosecutor is typically passive. If the offender has missed meetings or has otherwise violated the treatment contract, the judge typically asks the prosecutor to suggest a sanction. This situation would suggest a slight return to an adversarial process. However, the dynamics of the DTC are such that at this point everyone is considered to be on the same team. Consequently, there is typically little for the prosecutor to do.

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**Table I**

<table>
<thead>
<tr>
<th>TRADITIONAL COURT</th>
<th>TREATMENT BASED DRUG (TREATMENT) COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals representing entities within the criminal justice system to achieve the goal</td>
<td>Court team working together to achieve the goal</td>
</tr>
<tr>
<td>Adversarial</td>
<td>Nonadversarial</td>
</tr>
<tr>
<td>Goal = &quot;Legal Justice&quot;</td>
<td>Goal = Restore defendant as a productive, noncriminal member of society</td>
</tr>
<tr>
<td>Court has limited role in supervision of defendant</td>
<td>Court plays integral role in monitoring defendant's progress in treatment</td>
</tr>
<tr>
<td>Treatment programs of variable lengths and intensity</td>
<td>Individualized, but intensive and structured, treatment programs</td>
</tr>
<tr>
<td>Relapse = new crime or violation of probation = enhanced sentence</td>
<td>Graduated sanctions imposed in response to noncompliance with drug court program</td>
</tr>
</tbody>
</table>

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410. Williams, supra note 34, at 8-17; Carson, supra note 108, at 1-3.
411. See Williams, supra note 34, at 18-20 (indicating State's Attorney involvement during treatment only if offender cannot be controlled in the program).
412. Telephone interview with Deborah Hermann, supra note 6. Ms. Hermann notes that on occasion some DTC judges turn to treatment or probation personnel for this function as well.
The defender's role in DTC is typically passive as well. However, this passivity conceals a difficult burden: How may a defender combine status as a full, working member of an integrated treatment team, while remaining an effective lawyer for the defendant? There does not seem to be a perfect answer to this question.

During the first stage of the DTC process, admission, the defender acts as the interface between the defendant and the DTC. During this stage the defender may ask the State's Attorney to include a particular client. The defender is also responsible for ensuring that the client fully understands the contract to be signed. In particular, there is a real need to help the client weigh the value of a small, relatively short jail term against the possibility of longer involvement with the DTC. This DTC involvement could include shock incarceration and, in the case of complete failure, imposition of a sentence for probation-track defendants or a trial and possible sentence for diversion-track defendants.

The second stage is in some ways even more difficult. Having gained informed consent during the first stage, the defender is reduced to passivity in most situations. Typically, the judge bypasses both lawyers and talks directly to the client. This can lead to complications, especially because clients can become emotional when talking about certain aspects of their lives. As with the prosecutor, the defender will revert somewhat to the adversary system if a client is in violation of a contract, and the defender will typically seek to clarify the status of the client.

Generally the defender will argue for leniency if a client is sent to shock incarceration. By definition, however, the defender is part of the systems approach team and is also responsible for treating the client. Therefore, because shock incarceration is defined as treatment, the defender has incentives to mute his dissent. Often the defender is reduced to making arguments destined to be disregarded, and there-

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413. See WILLIAMS, supra note 34, at 18-20 (calling for Public Defender involvement during treatment only if the contract is violated).
414. See id. at 8-17 (referring to defenders' various responsibilities in the initial process).
415. Id.
416. See supra notes 404-405 and accompanying text.
417. WILLIAMS, supra note 34, at app. G, app. H.
418. See supra notes 130-131 and accompanying text.
419. Author's observation of Baltimore City DTC, supra note 319.
before there is no incentive to interfere with the treatment. Consequently, the defender has shifted from partisan zeal to cooperation.\textsuperscript{420}

The role of the trial judge is changed dramatically in the DTC. Instead of being a neutral arbiter, the judge becomes the center of courtroom attention.\textsuperscript{421} The judge simultaneously must convey interest in the offender, while reinforcing desirable traits in offenders and giving sanctions for failures.\textsuperscript{422} Some of the roles the judge assumes include: "confessor, task master, cheerleader and mentor, in turn exhorting, threatening, encouraging and congratulating the participant for his or her progress or lack thereof."\textsuperscript{423} The judge does not interact with the single defendant in a vacuum. Instead, the judge plays each role in front of an audience of DTC offenders,\textsuperscript{424} each of whom learns from the judge's performance what is expected of them.

Finally, it is the judge's leadership that is most responsible for running an effective DTC unit.\textsuperscript{425} The judge is required to ensure that each piece is in place, and frequently must coordinate the medical, legal, and correctional systems.\textsuperscript{426}

The shift to a nonadversarial system has had profound effects on the roles of each member of the criminal justice system. In particular, the discretion of the court as a whole is exceedingly high. To the extent that the judge grants a portion of his discretion to treatment personnel, the nature of treatment is then tainted by the criticisms against broad judicial discretion. Treatment has been critiqued both for ineffectiveness and because it is used as a substitute for punishment.\textsuperscript{427} The granting of discretion creates a situation in which judges must police themselves. Failure to do so, coupled with the type of mass production of cases that propelled the creation of the DTC in the first place, could lead to abuses.\textsuperscript{428}

Nevertheless, liberal critics are in a difficult position as well. Particularly with respect to the narcotics issue, legalization is not a viable option. As such, addiction treatment is one alternative to the repressive measures espoused by supporters of the war theory of punish-

\begin{itemize}
  \item \textsuperscript{420} There is of course some level of cooperation in any proceeding, particularly among lawyers who repeatedly must work opposite each other. See Donald G. Gifford, A Context-Based Theory of Strategy Selection in Legal Negotiation, 46 OHIO ST. L.J. 41, 75 (1985).
  \item \textsuperscript{421} \textit{GOLDKAMP}, supra note 34, at iv, 6.
  \item \textsuperscript{422} \textit{Id.}
  \item \textsuperscript{423} Tauber, \textit{Treating Drug-Using Offenders}, supra note 36, at 29.
  \item \textsuperscript{424} \textit{Id.}
  \item \textsuperscript{425} \textit{Id.}
  \item \textsuperscript{426} \textit{Id.}
  \item \textsuperscript{427} \textit{PEELE}, supra note 154, at 221-26.
  \item \textsuperscript{428} See \textit{supra} note 409.
\end{itemize}
Careful review of social defense theory may provide philosophical input for DTCs in the coming years as well.

IV. Future Prospects for Drug Treatment Courts

The Drug Treatment Court concept has been enthusiastically embraced by many individuals and jurisdictions around the country.\(^{430}\) In December 1993 the First National Drug Court Conference was held in Miami, Florida, attracting more than 400 individuals.\(^{431}\) As a result of that meeting, the National Association of Drug Court Professionals was formed, and became operational on May 10, 1994.\(^{432}\) The Association is currently headed by an early proponent of DTCs, Judge Jeffrey Tauber of the Oakland, California, DTC.\(^{433}\) The Association's purpose is to help create interest and funding on a national level for drug treatment courts.\(^{434}\)

The working paper produced at the first conference reflected enough confidence about the strength of DTCs to refer to their proliferation as a "Drug Treatment Court Movement."\(^{435}\) DTCs also have been powerfully championed by United States Attorney General Janet Reno who, as the Dade County State's Attorney, played a role in creating the Miami DTC.\(^{436}\) Her presence as U.S. Attorney General should be heartening to DTC proponents.

Nevertheless, there are storm clouds on the horizon. Operational concerns have been raised about drug courts. In particular, the Miami DTC has been subjected to administrative review because of concerns regarding "net-widening,"\(^{437}\) a process of allowing a larger class of defendants into the program. Critics say that this process allows dangerous defendants to join the program and thus escape more serious punishment.\(^{438}\)

To date, much of the DTCs' attraction has been as an alternative to the punitive sentencing philosophy of the most recent cycle of the drug war. Criticism of mandatory sentencing and of "get tough"

\(^{429}\) See supra notes 56-83 and accompanying text.
\(^{430}\) See supra notes 3-4 and accompanying text.
\(^{431}\) Goldkamp, supra note 34, at i.
\(^{432}\) Telephone interview with Marc Pearce, Deputy Director of the National Association of Drug Court Professionals (Jan. 16, 1996).
\(^{433}\) Id.
\(^{434}\) Id.
\(^{435}\) Goldkamp, supra note 34, at i.
\(^{436}\) Id.
\(^{437}\) Jeff Leen & Don Van Natta Jr., Drug Court Favored By Felons, MIAMI HERALD, Aug. 29, 1994, at A1.
\(^{438}\) Id.
measures may be financially prudent or philosophically sound, but DTCs may have to prove positive results before legislators begin to flock to their standard. Indeed, the continuing "war on drugs" mentality demonstrates that "treatment works" has not settled into the popular mindset of criminal justice personnel, much less the voting public.

Studies have indicated some reasons for cautious optimism. A study of Judge Tauber's Oakland court found that the DTC may have dropped the "felony recidivism" rate forty-six percent while getting a number of addicts to stop taking drugs (at least in the short-term). Another benefit was a savings of $2 million in jail costs.

However, the treatment approach of DTCs is clearly at odds with the current political atmosphere. Although the Violent Crime Control and Law Enforcement Act of 1994 authorized $150 million in funding for DTCs in 1996, this funding is in jeopardy because of deficit reduction efforts. Thus, the atmosphere is running against federal funding of these programs. However, some federal funds are being allocated in block grants that would allow the state to fund DTC programs if they choose. Despite election-year rhetoric, however, DTCs are not likely to be opposed, so much as neglected.

The Baltimore City DTC is funded approximately through 1997, with several opportunities to renew or to seek new funding. The political climate in Maryland has been relatively supportive of DTCs in the past, largely because the case has been made that DTCs save money. The current governor's administration supports the DTC concept, and indeed DTC committee members hope that there will

440. Id.
444. See supra note 15.
445. Telephone interview with David W. Skeen, past president of the Bar Ass'n of Baltimore City, Member of the Russell Committee and Drug Treatment Court Committee (Jan. 17, 1996).
446. Telephone interview with Adam Gelb, senior policy advisor to the lieutenant governor of Maryland (Jan. 17, 1996).
be relatively good bipartisan legislative support for the program stemming from broad criminal justice and community-based support.\footnote{447}

In addition, the Baltimore DTC is on something of a roll. It has maintained very strict standards for entry into the program and seems unlikely to be forced into "net-widening"\footnote{448} without serious discussion of the ramifications. Although admissions to the program began slowly, the program has developed enough momentum to completely fill 1500 treatment beds by the end of the year.\footnote{449} The graduation of the first class of defendants gave the DTC a relatively high profile in the Baltimore City criminal justice system.

The Baltimore court, like other DTCs, is not a fad. If Judge Weitzman is correct, it is a model for a new form of justice, a systemic approach that coordinates all available resources to create support for individuals as they re-enter the community. The Quincy, Massachusetts, "Earn-It" Court shows that the alignment of a court with the interests of the community is possible.\footnote{450} In that jurisdiction, the court system turned to the entire community to join in the rehabilitation effort.\footnote{451}

Baltimore's systemic approach is aimed more specifically at achieving integration among the legal, medical, and correctional communities. Although the specialized courts have not yet reached beyond the courtroom in a specific way, the concept of community is very important to DTC operations. Judge Weitzman, the first Baltimore City DTC judge, inquired into many facets of offenders' lives, including employment, health, and family life.\footnote{452} In fact, as shown, the judge is familiar with each defendant in an almost parental role.

Although there is common ground and resonance between the DTCs and social defense theory,\footnote{453} current practitioners seem very reluctant to make theoretical claims. This seems to be justified on a political basis. However, as the recent rescission of funding indicates, simply being a good working program may not be enough. Indeed,

\footnote{447. For example, the Baltimore Coalition Against Substance Abuse (BCASA), a broad-based coalition of health, charitable business, professional, neighborhood, government, and religious organizations has been promoting the drug court with the public and political decisionmakers for two years. Interview with David W. SMD, supra note 94. In some cases this organization has provided financial support for nonfunded needs such as bus tokens for participants. \textit{Id.} Thus there is a strong infrastructure for the Baltimore City DTC. \textit{Id.}}

\footnote{448. See supra note 437 and accompanying text.}

\footnote{449. Interview with Robb McFaul, supra note 115.}

\footnote{450. See supra notes 288-305 and accompanying text.}

\footnote{451. \textit{Id.}}

\footnote{452. Author's observation of Baltimore City DTC, supra note 319.}

\footnote{453. See supra notes 225-264 and accompanying text.}
the rehabilitative movement has faltered on practical grounds in the past.\textsuperscript{454} Failure to show substantial concrete results may hasten the demise of DTCs. For this reason, despite the great enthusiasm of practitioners in the DTCs, excessive claims should be avoided. Indeed, it may be time for proponents to take another look at legal theory to see if it can be used to their advantage.

Finally, despite the very real funding problems, DTCs are not likely to disappear. The practical problems of court administration that drive the DTC movement remain and may actually be intensified by new aggressive criminal justice activities. Punitive sentencing and law enforcement practices aimed at the casual or addicted drug-user increase defendant populations beyond the capacity of the criminal justice system and its jail programs. The DTC in this context is, at the least, a good supervisory program for this population. In Baltimore, the focus of the DTC on the community continues to align the community interest with rehabilitative and social defense goals. As long as this alignment is maintained, the community should continue to support the DTC into its third year and beyond.

William D. McColl\textsuperscript{455}

\textsuperscript{454} Allen, \textit{supra} note 16, at 8-10.

\textsuperscript{455} B.A., University of Michigan; J.D., University of Maryland School of Law. I wish to thank the following people for their help with this Comment: Jennifer Collier, Carolyn Cooper, Maureen O'Leary, Deborah Hermann, Robb McFaul, Timothy Murray, David Skeen, Ellen Weber, Judge Jamey Weitzman, Thomas Williams, Alan Woods, and, most especially, Professor Richard Boldt. Any errors contained in the Comment are, of course, my own.