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## Alternative Courts and Drug Treatment: Finding a Rehabilitative Solution for Addicts in a Retributive System

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**ALTERNATIVE COURTS  
AND DRUG TREATMENT:  
FINDING A REHABILITATIVE SOLUTION  
FOR ADDICTS IN A RETRIBUTIVE SYSTEM**

*Molly K. Webster\**

*Sentencing drug crimes and treating drug-addicted defendants often stem from contradictory theories of punishment. In the late twentieth century, courts traded rehabilitation for retributive ideals to fight the “War on Drugs.” However, beginning with the Miami-Dade Drug Court, treatment and rehabilitation have returned to the forefront of sentencing policy in traditional and alternative drug courts.*

*Jurisdictions have implemented a variety of policies designed to treat addiction as opposed to punishing it. Community courts, such as the Red Hook Community Justice Center in Brooklyn, New York, community-panel drug courts, such as the Woodbury County Community Drug Court in Iowa, and Hawaii’s Opportunity Probation with Enforcement represent efforts to address treatment within the court system. This Note argues that certain policies are more likely to benefit drug-addicted defendants than others, including procedural justice, predictable sanctions, and an increased focus on treatment. It also posits that qualitative studies measuring long-term success of drug treatment programs should be commissioned to ensure that drug courts utilize the most effective treatment policies that promote rehabilitative ideals.*

INTRODUCTION.....	857
I. A BRIEF HISTORY OF THE POLICY AND PRACTICE OF TREATING ADDICTS .....	859
A. <i>Rehabilitation and Drug Crimes: The Theories of         Punishment</i> .....	860
1. Utilitarian Theories .....	861
2. Retributive Theories.....	862

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B. <i>Formulating Policy: A Brief History of Courts' Struggles with Sentencing Addicts</i> .....	863
C. <i>The Creation of Drug Courts</i> .....	865
D. <i>The First Generation of Drug Courts and How They Work</i> .....	868
1. The Deferred Prosecution Model.....	868
2. The Post-Adjudication Model.....	869
3. Eligibility Requirements .....	869
4. The Basic Treatment Program in Traditional Drug Courts .....	870
5. Criticisms of Traditional Drug Courts .....	871
II. ALTERNATIVE DRUG TREATMENT PROGRAMS .....	872
A. <i>Red Hook Community Justice Center</i> .....	873
B. <i>Community Court with a Twist: The Woodbury County Community Drug Court</i> .....	878
C. <i>Hawaii's Opportunity Probation with Enforcement</i> .....	881
III. MEASURING SUCCESS THROUGH QUANTITATIVE AND QUALITATIVE STUDIES.....	884
A. <i>Quantitative Results of Alternative Drug Courts</i> .....	884
1. Why Use Quantitative Methods? .....	884
2. The Red Hook Community Justice Center .....	885
a. <i>Participation in Drug Treatment</i> .....	885
b. <i>Graduation Rates</i> .....	886
c. <i>Recidivism Rates</i> .....	886
d. <i>Praise and Criticism</i> .....	887
3. The Woodbury County Community Drug Court .....	888
a. <i>Graduation Rates</i> .....	889
b. <i>Recidivism Rates</i> .....	889
4. Hawaii's Opportunity Probation with Enforcement .....	890
B. <i>Qualitative Results</i> .....	891
1. Why Use Qualitative Studies? .....	891
2. RHCJC Interviews and Questionnaires.....	892
3. Perception of the WCC Court .....	892
4. Hawaii's Opportunity Probation with Enforcement Questionnaires.....	893
5. Other Qualitative Studies .....	894
IV. SUGGESTIONS FOR FUTURE POLICIES AND STUDIES .....	895
A. <i>How to Address Addiction in a Retributive System: Suggestions for Future Drug Courts</i> .....	895
1. Maintain a Trustworthy and Informal Atmosphere .....	896
2. Implement Swift and Predictable Sanctions .....	898
3. Focus on Treatment, Not Criminal Sanctions.....	899
B. <i>Quantitative and Qualitative Studies: How to Measure Drug Courts' Success</i> .....	900

## INTRODUCTION

Twenty-six years ago, the first drug court opened its doors in Miami-Dade County, Florida.<sup>1</sup> Traditional drug courts<sup>2</sup> were founded as a reaction to retributive sanctions used to fight the “War on Drugs”<sup>3</sup> and to relieve overburdened criminal courts with high drug-related caseloads.<sup>4</sup> Drug courts have received praise because they shift the focus of criminal sanctions for drug-addicted defendants from punitive to rehabilitative.<sup>5</sup>

Subsequent to the founding of drug courts, legislatures and judges across the country have created alternatives to the traditional drug court model.<sup>6</sup> These alternatives include community-based approaches,<sup>7</sup> swift sanction probation programs,<sup>8</sup> and a mix of the two. These programs have aimed to correct perceived problems<sup>9</sup> with traditional drug courts. In doing so, alternative policies have shifted the way the justice system views, treats, and sentences addicts.

Drug courts and community programs aim to divert alcoholics and addicts to an alternative system through which they receive treatment and learn how to sustain their sobriety after their interactions with the courts end.<sup>10</sup> While these programs stress the participant’s rehabilitation,<sup>11</sup> their

1. See *Drug Court History*, NAT’L ASS’N OF DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Oct. 21, 2015) [<http://perma.cc/NZ4Q-BM37>].

2. This Note distinguishes between “traditional” drug courts, such as the Miami-Dade Drug Court, discussed *infra* Part I.C–D, and “alternative” drug courts, such as community courts, community-panel drug courts, and swift-sanction programs, which are the subject of this Note and are discussed *infra* Parts II–IV.

3. President Richard Nixon first called for “an effective war” to counteract the “national and international” drug problem in an address to Congress in 1971. President Richard Nixon, Special Message to the Congress on Drug Abuse Prevention and Control (June 17, 1971), 1971 PUB. PAPERS 739. Despite this rhetoric, it should be noted that President Nixon advocated rehabilitative ideals to address the drug problem. See *id.* at 743–45 (proposing an allocation of funds “solely for the treatment and rehabilitation of drug-addicted individuals”).

4. See Sheila M. Murphy, *Drug Courts: An Effective, Efficient Weapon in the War on Drugs*, 85 ILL. B.J. 474, 475 (1997).

5. See, e.g., Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 462–68 (1999).

6. See, e.g., Dwight Vick & Jennifer Lamb Keating, *Community-Based Drug Courts: Empirical Success. Will South Dakota Follow Suit?*, 52 S.D. L. REV. 288, 296 (2007) (discussing the evolution of drug courts to include community-panel courts).

7. For example, the Red Hook Community Justice Center, see *infra* Part II.A, and the Woodbury County Community Drug Court, see *infra* Part II.B.

8. For example, Hawaii’s Opportunity Probation with Enforcement (HOPE) and Washington Intensive Supervision Program (WISP) in Hawaii and Washington, respectively. See *infra* Part II.C.

9. As discussed *infra* Part I.D.5, traditional drug courts have had difficulty defining the role of the public defender and finding an appropriate medium between punishing drug crimes and administering treatment.

10. See Murphy, *supra* note 4, at 476–77.

success is largely measured by quantitative statistics: How many of the participants have graduated<sup>12</sup> and have the programs reduced recidivism rates?<sup>13</sup> While these measurements are important, the underlying sentencing theory—rehabilitation—requires a more nuanced approach to the analysis of the programs. Treatment programs' effectiveness must also focus on the individual and how she is rehabilitated through the process, both in the short and long term.

This Note discusses the policy implications and effectiveness of alternative drug courts. Part I provides a brief history of the legal policy of treating addicts and the founding of state and federal drug courts.<sup>14</sup> Part II outlines three alternative drug court models: (i) community courts that use a holistic approach to sentencing and treatment, such as the Red Hook Community Justice Center;<sup>15</sup> (ii) community-panel courts that use community volunteers, such as the Woodbury County Community Drug Court;<sup>16</sup> and (iii) swift and certain sanction programs, such as Hawaii's Opportunity Probation with Enforcement<sup>17</sup> (HOPE). Part III examines the success of these programs both quantitatively, analyzing recidivism rates and graduation from the programs, and qualitatively, focusing on the programs' effects on individual participants.<sup>18</sup>

Finally, Part IV highlights elements of each program that will ensure addicts receive appropriate treatment.<sup>19</sup> It argues that, to further these goals, it is necessary to maintain holistic approaches to sentencing, an informal courtroom, and clear and consistent sanctions for program violations. Additionally, research must be conducted that measures qualitative data on a long-term basis to ensure that the rehabilitative policies have a lasting effect on participants' recoveries. These suggested changes, if implemented, would ensure that drug-addicted defendants receive the tools necessary to be rehabilitated.

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11. *See id.* at 477.

12. *See, e.g.*, WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 32 (2011), <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF> [<http://perma.cc/UJ47-U3EW>].

13. *See, e.g.*, MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS 83–113 (2003), <http://www.courts.state.ny.us/whatsnew/pdf/NYSAdultDrugCourtEvaluation.pdf> (measuring drug courts' success using rates of recidivism) [<http://perma.cc/75YN-HMWF>].

14. *See infra* Part I.

15. *See infra* Part II.A.

16. *See infra* Part II.B.

17. *See infra* Part II.C.

18. *See infra* Part III.

19. *See infra* Part IV.

### I. A BRIEF HISTORY OF THE POLICY AND PRACTICE OF TREATING ADDICTS

Statutes criminalizing drug use have existed throughout the twentieth century.<sup>20</sup> However, the 1960s and 1970s saw a cultural shift: drug use and drug-related arrests increased dramatically.<sup>21</sup> This “drug revolution”<sup>22</sup> led to federal legislation such as the Comprehensive Drug Abuse Prevention and Control Act of 1970<sup>23</sup> and the Rockefeller Drug Laws in 1973.<sup>24</sup> While lawmakers had previously used rehabilitation theory in formulating sentencing regimes,<sup>25</sup> the “War on Drugs” led to a shift in sentencing policy in the United States<sup>26</sup>—and with it, a changing view of the addict as criminal.<sup>27</sup>

This part examines the history of drug crimes and courts as they relate to the theories of punishment. First, this part reviews the four theories of punishment—rehabilitation, deterrence, retributivism, and incapacitation—as they relate to the definition of addiction. Second, this part tracks the criminal justice system’s struggle with understanding addiction in legal terms. Subsequently, this part discusses the formation and structure of the first drug courts. Finally, this part explores the basic model for traditional drug courts, the common eligibility requirements, and the structure of the treatment programs as a means for comparison with the alternative treatment programs that are the subject of this Note.

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20. For example, the Marihuana Tax Act of 1937 criminalized the manufacture, sale, and possession of opiates, cocaine, and the nonmedical use of marijuana. *See* Pub. L. No. 75-238, 50 Stat. 551 (1937).

21. *See* DUANE C. MCBRIDE ET AL., NAT’L INST. OF JUSTICE, THE DRUGS-CRIME WARS: PAST, PRESENT, AND FUTURE DIRECTIONS IN THEORY, POLICY, AND PROGRAM INTERVENTIONS 99 (2003), <https://www.ncjrs.gov/pdffiles1/nij/194616d.pdf> [<http://perma.cc/8PW6-6PKF>].

22. *See id.*

23. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C.).

24. The Rockefeller Drug Laws, N.Y. PENAL LAW §§ 220.00–.65 (McKinney 2013), imposed mandatory minimum prison sentences for drug-related crimes and were often criticized, even by New York State judges. *See* *People v. Stephens*, 431 N.E.2d 972, 973 (1981) (Fuchsberg, J., dissenting) (referring to the Rockefeller Drug Laws as “draconian” and “inexorable”).

25. *See* Francis T. Cullen & Paul Gendreau, *Assessing Correctional Rehabilitation: Policy, Practice, and Prospects*, 3 POLICIES, PROCESSES & DECISIONS CRIM. JUST. SYS. 109, 111 (2000) (“Since virtually the inception of the modern criminal justice system, a persistent response to the question of what to do with lawbreakers has been to *change* them into law-abiders—that is, to *rehabilitate* them.”); *infra* Part I.A.

26. *See* Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 CRIME & JUST. 299, 314 (2013) (noting that “[b]y the mid-1970s’ [sic], it had become common to ask, ‘Is rehabilitation dead?’”).

27. As some critics note, with his “War on Drugs” campaign, President Nixon “transformed the public image of the drug user into one of a dangerous and anarchic threat to American civilization,” stating “[i]n fact, [their] incarceration was for the nation’s *own good*.” Emily Dufton, *The War on Drugs: How President Nixon Tied Addiction to Crime*, THE ATLANTIC (Mar. 26, 2012), <http://www.theatlantic.com/health/archive/2012/03/the-war-on-drugs-how-president-nixon-tied-addiction-to-crime/254319/> [<http://perma.cc/A5FB-GX6H>].

A. *Rehabilitation and Drug Crimes:  
The Theories of Punishment*

Drug addicts present a quandary for the criminal justice system: How should a court punish an individual for whom criminal behavior is the result of an underlying disease?<sup>28</sup> One of the primary tenets of drug courts is to move away from the retributive ideals of the 1970s and 1980s<sup>29</sup> toward a rehabilitative goal.<sup>30</sup>

While rehabilitation has historically been a primary tenet of sentencing policy,<sup>31</sup> the eighteenth and nineteenth centuries mark the introduction of another theory of punishment that focused on punishing offenders for their wrongs—retributivism.<sup>32</sup> These two competing theories—rehabilitation and retributivism—were utilized in formulating modern drug crime policy.<sup>33</sup>

28. The American Society of Addiction Medicine, a member of the American Medical Association, defines addiction as

a primary, chronic disease of brain reward, motivation, memory and related circuitry. Dysfunction in these circuits leads to characteristic biological, psychological, social and spiritual manifestations. This is reflected in an individual pathologically pursuing reward and/or relief by substance use and other behaviors.

Addiction is characterized by inability to consistently abstain, impairment in behavioral control, craving, diminished recognition of significant problems with one's behaviors and interpersonal relationships, and a dysfunctional emotional response. Like other chronic diseases, addiction often involves cycles of relapse and remission. Without treatment or engagement in recovery activities, addiction is progressive and can result in disability or premature death.

*Definition of Addiction*, AM. SOC'Y OF ADDICTION MED., <http://www.asam.org/for-the-public/definition-of-addiction> (last visited Oct. 21, 2015) [<http://perma.cc/4EAS-QHYY>]. One working definition of recovery is “a process of change through which an individual achieves abstinence and improved health, wellness and quality of life.” *Definition of Recovery*, NAT'L COUNCIL ON ALCOHOLISM & DRUG DEPENDENCE INC., <https://ncadd.org/recovery-support/definition> (last visited Oct. 21, 2015) [<http://perma.cc/TJ9S-YTNK>].

29. See John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 932 (2000); Adam Lamparello, *Reaching Across Legal Boundaries: How Mediation Can Help the Criminal Law in Adjudicating “Crimes of Addiction”*, 16 OHIO ST. J. ON DISP. RESOL. 335, 340 (2001) (“By the 1970s, the optimism and idealism that characterized the reformation movement slowly began to evaporate, as rehabilitation experienced a series of vicious criticisms, examining both its theoretical foundations and practical efficacy.”).

30. See Martin I. Reisig, *Rediscovering Rehabilitation: Drug Courts, Community Corrections and Restorative Justice*, 1998 MICH. B.J. 172, 174, <http://www.reisigmediation.com/pdf/reisit-mbj-02.1998.pdf> (“The drug court movement represents a real effort at rehabilitation and is quickly gaining in sophistication.”) [<http://perma.cc/J4F9-Z3ZD>].

31. See Cullen & Gendreau, *supra* note 25.

32. See ARTHUR W. CAMPBELL, LAW OF SENTENCING § 1:2 (West 2014). One of the earliest examples of these theories is *lex talionis*, or “an eye for an eye.” See Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1053–59 (2012). Retributivism in its current form became a “legitimate, and even the primary, justification for punishment” in the mid-1980s in the United States. See *id.* at 1057.

33. Compare Reisig, *supra* note 30, at 172–74 (noting the use of rehabilitation in the drug court movement), with Kimberly L. Patch, *The Sentencing Reform Act: Reconsidering Rehabilitation As a Critical Consideration in Sentencing*, 39 NEW ENG. J. ON CRIM. & CIV.

### 1. Utilitarian Theories

Rehabilitation is a subset of utilitarianism, a category that also includes incapacitation and deterrence.<sup>34</sup> Utilitarian theory posits that there is a balance between improving and punishing the offender, thereby reducing recidivism and protecting the public.<sup>35</sup> The theory, advocated for by philosopher Jeremy Bentham, aims to evaluate a course of conduct by the “amount of happiness and suffering that is generated by the conduct.”<sup>36</sup> The theory is forward-looking; an individual’s past criminal acts are largely irrelevant in deciding her punishment.<sup>37</sup>

The theory of rehabilitation posits that the decision to commit a crime is not free will, but rather is determined by various sociological, psychological, and biological factors.<sup>38</sup> Rehabilitation is premised on the notion that punishment should include treatment so that the defendant is able return to society “so reformed that he will not desire or need to commit further crimes.”<sup>39</sup> Drug courts rely on rehabilitation when formulating treatment and sentencing regimes.<sup>40</sup>

In addition to rehabilitation, utilitarian theories include deterrence and incapacitation. The goal of deterrence is to prevent crime through “actual or threatened punishment.”<sup>41</sup> Deterrence may be accomplished generally, by using society’s awareness of punishment of a crime to deter others from committing future offenses,<sup>42</sup> and specifically, by deterring a specific offender from reoffending.<sup>43</sup>

CONFINEMENT 165, 182 (2013) (discussing the relationship between the Sentencing Reform Act and rehabilitation).

34. See Andrew R. Strauss, *Losing Sight of the Utilitarian Forest for the Retributivist Trees: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1557 (2002).

35. See Paul Gendreau, *Rehabilitation: What Works to Change Offenders*, in CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 1, 147–50 (Francis T. Cullen & Cheryl L. Jonson eds., 2012).

36. Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 856 (2002); see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (Batoche Books, Kitchener 2000) (1781) (ebook).

37. See Strauss, *supra* note 34, at 1557.

38. See David J. Rothman, *Correctional Theory in Crisis: America’s Changing Context*, in CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES, *supra* note 35, at 23, 25; see also Daniel S. Nagin, *Deterrence: Scaring Offenders Straight*, in CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES, *supra* note 35, at 67, 73.

39. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIM. L. § 1.5 (2d ed. 2014).

40. See Reisig, *supra* note 30.

41. John C. Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1955).

42. See CAMPBELL, *supra* note 32, § 2:2. General deterrence can be accomplished through “apparent punishment, even if without actual punishment.” Christopher, *supra* note 36, at 857.

43. Specific deterrence has received some criticism because there is little evidence of an “effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation.” Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 200–05 (2013).



Incapacitation theory states that the most effective way to ensure someone does not reoffend is to incarcerate or physically isolate her.<sup>44</sup> The theories of incapacitation and deterrence affect the treatment of addicts in the criminal justice system. For example, deterrence and incapacitation have been the underlying justifications for strict sentencing regimes implemented in connection with the War on Drugs.<sup>45</sup> Deterrence is also used as justification for swift sanction programs.<sup>46</sup> For example, advocates of HOPE theorize that the strict probation requirements and the use of swift and immediate sanctions deter probationers from violating the terms of probation or reoffending.<sup>47</sup>

## 2. Retributive Theories

The Rockefeller Drug Laws reflected another theory of punishment: retributivism.<sup>48</sup> Many hypothesized that rehabilitation was not accomplishing the goals it set out to address.<sup>49</sup> Both liberals and conservatives blamed rehabilitation for thwarting the goals of punishment.<sup>50</sup> Theorists and criminal justice actors began focusing their attention elsewhere, primarily on retributivism as a means to reduce recidivism.<sup>51</sup>

The theory of retribution structures sentencing so that individuals receive sanctions justified on the grounds that the “offenders deserve it.”<sup>52</sup>

44. See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution As an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000).

45. For example, the Rockefeller Drug Laws implemented mandatory and indeterminate prison terms based on the weight of the drug, placed restrictions on plea bargaining, and used mandatory prison sentences for repeat offenders. See *Drug Law Changes*, N.Y. ST. DIVISION CRIM. JUST. SERVS., <http://criminaljustice.ny.gov/drug-law-reform/index.html> (last visited Oct. 21, 2015) [<http://perma.cc/CDL6-PTTJ>]. These laws were seen as the logical solution to the drug epidemic. See Edward J. Maggio, *New York’s Rockefeller Drug Laws, Then and Now*, 78 N.Y. ST. B. ASS’N J. 30, 30 (2006) (“The idea behind the new laws was to deter criminals and to quarantine users, so the plague of drug addiction could be contained.”).

46. See *infra* Part II.C; *infra* note 263 and accompanying text.

47. See ANGELA HAWKEN, AM. PROB. & PAROLE ASS’N, *THE MESSAGE FROM HAWAII: HOPE FOR PROBATION* 40 (2012) (citing “[a] clearly defined behavioral contract” and “foreseeable, known consequences” as key reasons for which “the certainty of punishment . . . deters future violations” (emphasis omitted)).

48. See Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 290 (“Anchored by retributive ideals that insist on moral accountability, the once-fashionable goal of rehabilitation has been supplanted by an ideological shift that emphasizes incapacitation as a core value.”).

49. FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* 111 (2d ed. 1983) (“[I]t is the very *presence* of rehabilitative ideology and practice that is responsible for the most debasing features of American corrections . . . . [S]tate-enforced therapy will inevitably foster the abuse of offenders and result in gross inequalities in the administration of justice.”).

50. See Cullen & Gendreau, *supra* note 25, at 109 (“Rehabilitation was blamed by liberals for allowing the state to act coercively against offenders, and was blamed by conservatives for allowing the state to act leniently toward offenders.”).

51. See *id.*

52. See Strauss, *supra* note 34, at 1558 & n.46 (quoting Michael S. Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179, 182

Punishment depends on the individual and her past criminal acts; it is not concerned with society “or on the possible consequences of the infliction of punishment.”<sup>53</sup> Retributivism may refer to legalistic retributivism, which focuses on law breaking as an indicator for the appropriate punishment, or moralistic retributivism, the moral guilt that accompanies particular criminal acts, also known as “just deserts.”<sup>54</sup>

Because of these conflicting theories of punishment, courts are faced with determining how to sentence addicts. On the one hand, addicts may pose costs and dangers to society because of their addiction.<sup>55</sup> On the other hand, drug court theory “meld[s] substance abuse treatment and punishment,” combining theories of punishment looking to rehabilitate the offender while maintaining an element of retributive punishment.<sup>56</sup> These competing theories of punishment have been utilized prior to and throughout the creation of drug courts and their progeny.<sup>57</sup>

*B. Formulating Policy: A Brief History  
of Courts’ Struggles with Sentencing Addicts*

The theories discussed in the previous section serve as the basis for understanding how and why legislatures and courts have structured sentencing policy for addicts. This section examines the evolution of courts’ struggles to appropriately punish drug-addicted defendants while maintaining the desire to rehabilitate.

One of the first efforts to address the issue of sentencing addicts was the adoption of “status statutes.”<sup>58</sup> For example, California implemented a state statute that made it a criminal offense for a person to be “addicted to the use of narcotics.”<sup>59</sup> Upon review, however, the Supreme Court struck down the California statute as a violation of the Eighth and Fourteenth Amendments.<sup>60</sup> The Court likened drug addiction to being “mentally ill, or a leper, or to be afflicted with a venereal disease.”<sup>61</sup> The Court decided that

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(Ferdinand Schoeman ed., 1987)) (“For a retributivist, the moral culpability of an offender also gives society the *duty* to punish. Retributivism, in other words, is truly a theory of justice such that, if it is true, we have an obligation to set up institutions so that retribution is achieved.”).

53. See Strauss, *supra* note 34, at 1558–59.

54. See *id.* at 1559–60.

55. The National Institute of Drug Abuse estimates that the total overall costs of substance abuse in the United States exceed \$600 billion annually. *DrugFacts: Understanding Drug Abuse and Addiction*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/understanding-drug-abuse-addiction> (last visited Oct. 21, 2015) [<http://perma.cc/HP2K-ZB49>].

56. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1208 (1998).

57. See *supra* note 33 and accompanying text.

58. See, e.g., CAL. HEALTH & SAFETY CODE § 11721 (West), *repealed by* California Uniform Controlled Substances Act of 1972, ch. 1407, § 2, p. 2987 (West).

59. *Robinson v. California*, 370 U.S. 660, 660 n.1 (1962).

60. *Id.* at 667.

61. *Id.* at 666–67.

criminalizing the status of “addict,” which it likened to punishing someone for having a disease,<sup>62</sup> did not merit criminal sanctions.<sup>63</sup>

Six years after the invalidation of the California statute, the Court revisited the issue of how to treat addicts in criminal cases.<sup>64</sup> In *Powell v. Texas*,<sup>65</sup> the Court, in a fractured decision, declined to extend its reasoning in *Robinson v. California*<sup>66</sup> to include crimes that were committed because of alcoholism.<sup>67</sup> In *Powell*, the defendant—who showed clear signs of alcoholism—was convicted of public drunkenness under a Texas statute.<sup>68</sup> The defendant challenged the conviction on the grounds that it violated the Eighth Amendment.<sup>69</sup> In a lengthy opinion, Justice Marshall, writing for the plurality,<sup>70</sup> discussed the implications of alcoholism and debated whether it could be considered a disease.<sup>71</sup> The Court ultimately decided not to extend *Robinson*, distinguishing the case by reasoning that it was *Powell*’s choice to be on a public street while drunk.<sup>72</sup> The Court reasoned that the defendant was punished not for his status as an alcoholic, but for his public behavior.<sup>73</sup>

In his concurrence, Justice White opined that if it is not a crime to “have an irresistible compulsion to use narcotics,” then it cannot “be a crime to yield to such a compulsion.”<sup>74</sup> Justice White saw no difference between the statutes at issue in *Powell* and *Robinson*. However, he voted with the majority because he did not think the punishment was cruel and unusual under the Eighth Amendment.<sup>75</sup>

The dissent in *Powell* saw this case as nothing more than an extension of *Robinson*.<sup>76</sup> Justice Fortas analyzed the question of whether the defendant,

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62. *Id.*

63. *Id.*

64. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1527 (2004) (“The difference between the *Robinson* and *Powell* opinions consists in their attitude toward penal welfarism and the disease model of addiction.”).

65. 392 U.S. 514 (1968).

66. 370 U.S. 660 (1962).

67. *Powell*, 392 U.S. at 526.

68. *Id.* at 517.

69. *Id.* at 531–32.

70. The decision did not have a majority opinion. Three justices—Chief Justice Warren, Justice Black, and Justice Harlan—voted with the majority opinion written by Justice Marshall. *Id.* at 516–17. Justice White wrote a separate concurrence. *Id.* at 548 (White, J., concurring). Justices Stewart, Douglas, and Brennan joined Justice Fortas in a dissent. *Id.* at 554 (Fortas, J., dissenting).

71. *Id.* at 522 (majority opinion) (discussing how there is no agreement in the medical community on the meaning of alcoholism as a disease).

72. *Id.* at 526 (“[I]t is quite another [thing] to say that a man has a ‘compulsion’ to take a drink, but that he also retains a certain amount of ‘free will’ with which to resist.”).

73. *Id.* at 533–34.

74. *Id.* at 548 (White, J., concurring) (“Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion.”).

75. *Id.* at 553–54.

76. *Id.* at 569–70 (Fortas, J., dissenting).

who suffered from “chronic alcoholism,” should be subject to a criminal penalty when his actions were only “a compulsion symptomatic of the disease of chronic alcoholism” and not a matter of free will.<sup>77</sup> The dissent discussed the history of alcoholism in the United States, contending that, because of the nature of the disease, “[i]t is entirely clear that the jailing of chronic alcoholics is punishment” and that “there [is no] basis for claiming that [serving jail time] is therapeutic (or indeed a deterrent).”<sup>78</sup> Justice Fortas argued that the use of a criminal penalty in this case was cruel and unusual punishment under the Eighth Amendment, and thus the conviction should have been overturned.<sup>79</sup>

The Court’s analysis of Powell’s “criminal” activity highlights the complexity of sentencing alcoholics and drug addicts. While the plurality argued that addiction should not be a get-out-of-jail-free card for offenders, the four-justice dissent espoused the idea that the state should not punish people for involuntary acts resulting from a “compulsion.”<sup>80</sup> The disagreement among the justices in *Powell* represents the pull between rehabilitative and retributive values when determining drug treatment programs within the criminal justice system.<sup>81</sup>

### C. The Creation of Drug Courts

The previous section discussed the way in which courts sentenced addicts prior to the creation of drug courts. This section examines the establishment of drug courts, beginning with judge-operated programs and eventually extending into the vast network of state and federal drug courts that exists today.<sup>82</sup>

In the Anti-Drug Abuse Act of 1986, Congress tied drugs to drug traffickers and terrorists, calling for strict sentences.<sup>83</sup> These sentencing

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77. *Id.* at 558.

78. *Id.* at 564.

79. *Id.* at 570.

80. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1133 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007) (“[A]s five Justices would later make clear in *Powell*, *Robinson* also supports the principle that the state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid.”).

81. See *Edwards*, *supra* note 48, at 300 (finding that *Powell* represents a “complicated relationship between medically based, rehabilitative constructs of aberrant behavior and competing policy models that are hesitant to incorporate scientific findings into a system that emphasizes personal responsibility and just deserts as core values”).

82. For an overview of the types and locations of drug courts currently in operation across the country, see *Types of Drug Courts*, NAT’L ASS’N OF DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts/models> (last visited Oct. 21, 2015) [<http://perma.cc/34V3-WGX2>].

83. See Pub L. No. 99-570, § 2014, 100 Stat. 3207 (1986) (finding that “the increased cooperation and collaboration between narcotics traffickers and terrorist groups constitutes a serious threat to United States national security interests and to the political stability of numerous other countries, particularly in Latin America”).

parameters were echoed throughout the states<sup>84</sup> and led to an increase in the prison population as a direct result of drug arrests.<sup>85</sup> However, many of the defendants incarcerated on drug charges were nonviolent offenders.<sup>86</sup>

Some legal scholars became frustrated with the state of drug sentencing, and as a result, a movement began in the late 1970s and 1980s calling for an alternative to the existing sentencing policy.<sup>87</sup> Legal scholars believed that criminal dockets were overburdened with drug-related offenses due to the “intensification of the war on drugs in the 1980s.”<sup>88</sup>

Some judges felt “discomfort” with the restricted sentencing discretion in the existing drug laws, which left no room for treatment programs.<sup>89</sup> As an alternative, Judge Roger J. Kiley of Cook County, Illinois, devised a system where he would meet with drug-addicted defendants and probation officers from 8:00 a.m. to 10:00 a.m. in an effort to address addiction more directly.<sup>90</sup> Similarly, federal Judge Jack B. Weinstein in the Eastern District of New York implemented his own program to meet with defendants charged with drug-related crimes.<sup>91</sup>

In 1989, United States Attorney Janet Reno—then the State’s Attorney of Dade County, Florida—and Judge Stanley Goldstein established a diversionary treatment program.<sup>92</sup> Eleventh Circuit Chief Judge Herbert M. Klein was given a one year leave of absence to address the serious and “paralyzing” effect of drug offenses in Dade County.<sup>93</sup> He studied the ways

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84. The most famous example of the strict state statutes criminalizing drug use and possession is the Rockefeller Drug Laws. N.Y. PENAL LAW §§ 220.00–.65 (McKinney 2013); *see also* Maggio, *supra* note 45.

85. By the mid-1990s, drug convictions were the largest and fastest growing category in the federal prison population, accounting for 61 percent of the total, compared to 38 percent in 1986. *See* Murphy, *supra* note 4, at 475.

86. Only “21 percent of drug prisoners admitted to state prisons in 1991 had even a single incidence of criminal violence in their background.” *See id.*

87. Michael Dorf and Jeffrey Fagan postulate that one of the core reasons for the creation of drug courts was “the perception shared by the public and legal elites that the crush of drug cases led to a crisis in the courts, characterized by an ineffective system of punishment and a ‘revolving door’ that recycled offenders without reducing either their drug use or criminality.” Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1502 (2003).

88. *See id.* at 1501–02.

89. *See id.* at 1502.

90. *See* Murphy, *supra* note 4, at 475. Judge Kiley began this practice in 1976, *see id.*, more than ten years prior to the founding of the first official drug court.

91. Judge Weinstein explicitly opposed the federal sentencing guidelines that required harsh sentences for drug offenders. *See* Joseph B. Treaster, *2 Judges Decline Drug Cases, Protesting Sentencing Rules*, N.Y. TIMES (Apr. 17, 1993), <http://www.nytimes.com/1993/04/17/nyregion/2-judges-decline-drug-cases-protesting-sentencing-rules.html> [<http://perma.cc/4TJ8-S2UA>]. Because he believed that the guidelines emphasized arrests and imprisonment rather than prevention and treatment, Judge Weinstein refused to accept drug-related cases to his docket. *Id.* Similarly, Judge Robert Sweet in Manhattan argued that the sentencing guidelines for prohibiting drugs were “a mistake,” saying “[i]t’s not cutting down drug use. The best way to do this is through education and treatment.” *Id.*

92. *See* Murphy, *supra* note 4, at 475.

93. *See* 2 GERALD F. UELMEN & ALEX KREIT, *HISTORICAL ESTABLISHMENT AND DEVELOPMENT, DRUG ABUSE AND THE LAW SOURCEBOOK* § 16:1 (2003).

in which courts treated low-level drug crimes and found that most addicts were not held accountable for their crimes.<sup>94</sup> Instead, defendants were often arrested, kept in jail for twenty-four hours, and let go on bail.<sup>95</sup> The same defendants would reappear several weeks later on a new drug-related charge.<sup>96</sup> Charges would begin to pile up, costing the state or local authorities money.<sup>97</sup>

In an effort to address this cycle of reoffending, Judge Klein concluded that diverting low-level, nonviolent drug offenders to a yearlong treatment program would save the state money and could better treat their addiction.<sup>98</sup> The original Dade County Drug Court was founded with the goal of processing drug crimes in a cost-effective manner in order to reestablish a link between the offender and the community, thereby reducing recidivism rates and rehabilitating offenders.<sup>99</sup> Drug courts sought to shift the policy focus from regulating drug crimes through reducing drugs on the street to focusing on treatment of drug addiction.<sup>100</sup>

Following the initial success of the Dade County Drug Court, similar drug courts opened throughout the country.<sup>101</sup> Today, there is at least one drug court in each of the fifty states, as well as in the District of Columbia, Northern Mariana Islands, Puerto Rico, and Guam.<sup>102</sup> In addition to the originally realized general adult drug courts, many states have implemented alternatives especially suited for subsets of society—including military veterans, Native Americans, and juveniles.<sup>103</sup>

In 1997, the National Association of Drug Court Professionals, in collaboration with the Bureau of Justice Assistance at the U.S. Department

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94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See William D. McColl, Comment, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 467 (1996).

100. See *id.*

101. Ten years after the establishment of the Dade County Drug Court, 492 drug courts were operational nationwide. See *History*, NAT'L ASS'N OF DRUG CT. PROFS, <http://www.nadcp.org/learn/what-are-drug-courts/drug-court-history> (last visited Oct. 21, 2015) [<http://perma.cc/8UK8-QMEB>]. As of June 30, 2014, there were 2968 drug courts in operation throughout the country. See *How Many Drug Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR., <http://www.ndcrc.org/content/how-many-drug-courts-are-there> (last visited Oct. 21, 2015) [<http://perma.cc/D9VP-3LD6>].

102. See SHANNON M. CAREY, ET AL., NPC RESEARCH, EXPLORING THE KEY COMPONENTS OF DRUG COURTS: A COMPARATIVE STUDY OF 18 ADULT DRUG COURTS ON PRACTICES, OUTCOMES AND COSTS 1 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/223853.pdf> [<http://perma.cc/G2Z3-HMQM>].

103. In addition to adult drug court programs, Veterans Treatment Court, DWI Court, Family Dependency Treatment Court, Federal District Drug Court, Juvenile Drug Court, Reentry Court, Reentry Drug Court, Tribal Healing to Wellness Court, and Back on TRAC: Treatment, Responsibility, Accountability on Campus have been founded nationwide. See *Types of Drug Courts*, NAT'L ASSOC. OF DRUG CT. PROFS, <http://www.nadcp.org/learn/what-are-drug-courts/types-drug-courts> (last visited Oct. 21, 2015) [<http://perma.cc/7XTC-E4GU>].

of Justice, published *Defining Drug Courts: The Key Components*.<sup>104</sup> The report laid out ten key components that are necessary to consider when treating drug addiction.<sup>105</sup> These components have served as a guide to the creation of alternative drug treatment programs.<sup>106</sup>

#### D. *The First Generation of Drug Courts and How They Work*

Drug courts work to ensure that defendants are accountable to the court system while receiving drug treatment.<sup>107</sup> They rely on “mentoring and monitoring” addicts to help them in “rebuilding their lives.”<sup>108</sup> The programs combine high-level monitoring with a comprehensive treatment program: judges use rewards and punishments to “condition” defendants to be responsible for their actions.<sup>109</sup> The first drug courts used two primary models—the deferred prosecution model and the post-adjudication model.<sup>110</sup> Each of these models established eligibility requirements and followed a basic treatment model.

##### 1. The Deferred Prosecution Model

In deferred prosecution programs, also known as “pre-adjudication,” if the defendant meets the eligibility requirements, she is diverted to the drug

104. BUREAU OF JUSTICE ASSISTANCE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997), <https://www.ncjrs.gov/pdffiles1/bja/205621.pdf> [<http://perma.cc/G6CB-7FTN>].

105. The key components are:

[1] Drug Courts integrate alcohol and other drug treatment services with justice system case processing . . . . [2] Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights . . . . [3] Eligible participants are identified early and promptly placed in the drug court program . . . . [4] Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services . . . . [5] Abstinence is monitored by frequent alcohol and other drug testing . . . . [6] A coordinated strategy governs drug court responses to participants’ compliance . . . . [7] Ongoing judicial interaction with each drug court participant is essential . . . . [8] Monitoring and evaluation measure the achievement of program goals and gauge effectiveness . . . . [9] Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations . . . . [10] Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

*Id.*

106. See CYNTHIA G. LEE ET AL., NAT’L CTR. FOR ST. CTS., *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER 2* (2013), <http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/Areas%20of%20expertise/Problem%20solving%20courts/11012013-Red-Hook-Final-Report.ashx> (using the key components as a basis for formulating their own list of eleven crucial elements for the founding of the Red Hook Community Justice Center) [<http://perma.cc/RMR8-QTLP>].

107. See Dorf & Fagan, *supra* note 87, at 1502 (noting how drug courts combined “popular demand for punitive responses” to the drug problem with notions of individual responsibility and treatment).

108. Vick & Keating, *supra* note 6, at 291.

109. *Id.*

110. See Murphy, *supra* note 4, at 476.

court before pleading to a charge.<sup>111</sup> This model “capitalize[s] on the trauma of arrest” to motivate the defendant to immediately enter a treatment program.<sup>112</sup> If the defendant successfully completes the program, then her record of arrest is usually expunged.<sup>113</sup> If the defendant does not successfully complete the drug court program, however, she is prosecuted.<sup>114</sup>

There are three underlying approaches in the deferred prosecution model. First, in a “diversion” approach, the case is dismissed upon successful completion of the program.<sup>115</sup> Second, a “pre-diversion” approach requires that the individual plead guilty to the charges.<sup>116</sup> After successful completion, the plea is withdrawn or the case is dismissed.<sup>117</sup> Finally, in a “stipulated facts” approach, the defendant stipulates to the facts of her case, and the charges are dismissed upon successful completion of the program.<sup>118</sup>

## 2. The Post-Adjudication Model

In the post-adjudication model, the defendant pleads guilty to the underlying charge, and the sentence is deferred or suspended while she participates in the drug treatment program.<sup>119</sup> If she successfully completes the program, the sentence is waived and the conviction is often expunged.<sup>120</sup> This model is considered effective because the judge’s consistent monitoring throughout the course of the program gives added incentive to the individual to complete treatment.<sup>121</sup>

## 3. Eligibility Requirements

Before an addict is diverted to drug court, she must satisfy several eligibility requirements.<sup>122</sup> Eligibility for drug court programs varies depending on the jurisdiction.<sup>123</sup> Generally, courts look to the severity of the charges,<sup>124</sup> the type of charges, the defendant’s criminal history, and

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111. *See id.*

112. *See id.*

113. *See* HUDDLESTON & MARLOWE, *supra* note 12, at 24.

114. *See* Murphy, *supra* note 4, at 476.

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.* (“The post adjudication model is successful only if there is pre-trial monitoring of the defendant from the time of arrest.”).

122. *See* REMPEL ET AL., *supra* note 13, at 14.

123. *Compare id.* at 13–16 (describing New York State’s eligibility requirements), with STATE OF N.J., MANUAL FOR OPERATION OF ADULT DRUG COURTS IN NEW JERSEY 10–12 (2002), <https://www.judiciary.state.nj.us/drugcourt/dctman.pdf> (stating the eligibility requirements for New Jersey drug courts) [<http://perma.cc/JH66-3QX9>].

124. *See* REMPEL ET AL., *supra* note 13, at 14.



previous probation violations.<sup>125</sup> Additionally, the defendant must have an established alcohol or drug dependency.<sup>126</sup> Some programs require that individuals with a history of violent crimes be automatically excluded.<sup>127</sup>

Eligible defendants spend an average of twelve to eighteen months in drug treatment, during which time the defendant is randomly drug tested on a regular basis.<sup>128</sup> The judge reviews the progress of the individual, who may only graduate after continuous abstinence from drugs and alcohol.<sup>129</sup> If an individual fails a random drug test, she will be sanctioned, sometimes resulting in jail time or community service.<sup>130</sup> A defendant may be terminated from the program if the court determines that she is not benefitting from treatment or if she commits another crime while enrolled.<sup>131</sup>

#### 4. The Basic Treatment Program in Traditional Drug Courts

While the treatment program utilized by each traditional drug court varies, most models follow a similar approach to medical treatment. The Miami-Dade Drug Court provides a useful example for understanding a version of the basic approach to medical treatment.<sup>132</sup> There, each offender must complete a three-step program to graduate.<sup>133</sup> Phase I, “detoxification,” seeks to end chemical dependency on drugs.<sup>134</sup> If the individual requires detoxification, the court transfers her to an independent treatment provider, where an individualized treatment plan is created.<sup>135</sup>

During Phase II, the individual continues to attend counseling, but is no longer in residential treatment.<sup>136</sup> The individual structures her own

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125. For example, many drug courts prohibit eligibility if the defendant is charged with a violent crime. *See id.*

126. *See* RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 1 (2009), [http://www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf) [<http://perma.cc/D522-2CWG>].

127. In order to receive federal funding for drug court programs, the jurisdiction must exclude violent offenders. *See* 21st Century Department of Justice Appropriations Authorizations Act, Pub. L. No. 107-273, § 2952, 116 Stat. 1758 (2002) (codified as amended in scattered sections of 42 U.S.C.).

128. *See* HUDDLESTON & MARLOWE, *supra* note 12, at 7.

129. *See id.*

130. *See id.*

131. For example, California requires an individual’s termination from the drug court program and the reinstatement of criminal charges if

the court finds that (1) the defendant is not performing satisfactorily in the assigned program, (2) the defendant is not benefitting from education, treatment, or rehabilitation, (3) the defendant has been convicted of a crime specified . . . or (4) the defendant has engaged in criminal conduct rendering him or her unsuitable for the preguilty plea program.

5 EDWARD A. RUCKER & MARK E. OVERLAND, CALIFORNIA CRIMINAL PRACTICE: MOTIONS, JURY INSTRUCTIONS AND SENTENCING § 53:8, Weslaw (database updated Sept. 2015) (citing Cal. Penal Code §§ 1000.3–5(b)).

132. *See supra* Part I.C.

133. *See* Hora et al., *supra* note 5, at 482.

134. *See id.*

135. *See id.*

136. *See id.* at 483.

treatment program while the judge monitors her progress.<sup>137</sup> This phase lasts for about fourteen to sixteen weeks.<sup>138</sup> If the defendant regresses, the judge may send her back through Phase I.<sup>139</sup>

Finally, the individual moves to the “aftercare” stage in Phase III.<sup>140</sup> Here, the individual is introduced to “academic and occupational preparation for a new type of life style.”<sup>141</sup> The individual continues to provide the court with urine samples to be tested for drugs and is encouraged to maintain sobriety without the supervision of the court.<sup>142</sup> This phase often lasts for about thirty-six weeks and contains the same caveat as Phase II that if the individual fails or regresses at any point, she is recycled through the earlier phases.<sup>143</sup>

The individual makes one final court appearance after the completion of all three steps, at which point the charges are dismissed and the individual graduates from the program.<sup>144</sup> Twelve months after the successful completion of the entire program, the court seals all records related to the arrest.<sup>145</sup>

### 5. Criticisms of Traditional Drug Courts

Many scholars and criminal justice actors saw drug courts as the “magic solution” to America’s drug problem.<sup>146</sup> However, the newly formed courts received—and continue to receive—criticism from various vantage points.<sup>147</sup> Some criticize drug courts from a treatment perspective.<sup>148</sup> They claim that because addiction is a disease, it is impossible to determine how many times a defendant fails an element of treatment before she is terminated from the program and subjected to criminal sanctions, making the process “arbitrary.”<sup>149</sup> These critics question why the criminal justice system is involved at all in the treatment of a disease.<sup>150</sup>

A second criticism comes from defense attorneys, who find their place within the drug court system inconsistent with traditional notions of

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137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See id.* at 484.

143. *See id.*

144. *See id.* In a drug court context, “graduation” refers to a successful completion of the treatment program. *See id.* at 485.

145. *See id.* at 484.

146. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1475 (2000).

147. *See generally* Miller, *supra* note 64. For a more detailed look at criticisms of drug courts, see, for example, Goldkamp, *supra* note 29; Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 53–59 (2001).

148. *See* Hoffman, *supra* note 146, at 1475.

149. *Id.*

150. *Id.* (“If drug addiction is truly a disease that manifests itself in uncontrollable behavior until treated, why is the criminal law involved at all as a backup to failed treatment?”).

defense.<sup>151</sup> In criminal court, defense attorneys are advocates for the defendant; their job is to get their client a favorable outcome.<sup>152</sup> In drug courts, however, this role becomes more difficult with the additional treatment element in sentencing.<sup>153</sup> Some defense attorneys believe that the pressure for defendants to enroll in a treatment plan is quite strong, sometimes requiring the defendant to plead guilty when they otherwise would not have.<sup>154</sup> Additionally, the contours of due process rights a defendant waives when accepting guilty pleas conditioned on treatment are unclear, which is disconcerting to defense attorneys.<sup>155</sup>

Finally, some believe that returning to rehabilitative ideals is misguided and imprudent.<sup>156</sup> These critics posit that “the emergence of drug courts [is] a nostalgic yearning for the idealism of an earlier decade . . . that never really existed.”<sup>157</sup> They believe that the turn toward more punitive sentencing in the 1970s was for good reason and was meant to address the ineffectiveness<sup>158</sup> of a rehabilitative approach.<sup>159</sup> Critics of the drug court movement advocate for “pulling back on the reigns” so that the programs may be evaluated and modified as necessary.<sup>160</sup>

## II. ALTERNATIVE DRUG TREATMENT PROGRAMS

In an effort to address some of the criticisms set forth in the previous part, some jurisdictions have created alternative drug treatment programs.<sup>161</sup> This part addresses several models that have emerged as an alternative to traditional drug courts. First, this part discusses community

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151. See generally Quinn, *supra* note 147.

152. See Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 792 (2008).

153. See Quinn, *supra* note 147, at 59.

154. See *id.* (noting the difficult choice defense attorneys have in counseling their clients when their choice is between fighting their innocence behind bars or accepting a guilty plea).

155. See *id.* at 54–55.

156. See Goldkamp, *supra* note 29, at 926; see also Boldt, *supra* note 56, at 1217 (noting that “treatment court officials place relatively greater emphasis on rehabilitative services than do most other actors in the traditional criminal justice system”).

157. Goldkamp, *supra* note 29, at 926.

158. Francis T. Cullen articulated three widely adopted criticisms of rehabilitation as a theory of punishment that led to its decline. Cullen, *supra* note 26, at 317. First, prisons are more concerned with maintaining control than therapeutic ideals, rendering rehabilitation while incarcerated obsolete. *Id.* Second, abuse of discretion of who receives treatment and who goes to prison leads to arbitrary and even unjust decisions. *Id.* at 318. Finally, some critics believe that if treatment is coerced through the courts, it is never truly effective. *Id.* at 318–19.

159. See Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63, 76 (2002). (recognizing the “disappointing lessons, abuses, and poor track record of rehabilitation policies that preceded the shift toward the more punitive justice aims in recent decades”).

160. See Quinn, *supra* note 147, at 74.

161. See Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1573 (2003) (“They have been proposed as a new version of justice—one that makes justice swift, visible and accountable, and thereby bridges the gap between communities and courts.”).

courts, specifically, the Red Hook Community Justice Center (RHCJC) in Brooklyn, New York, which incorporates community involvement with drug treatment.<sup>162</sup> Then, this part explores community-panel courts, such as the Woodbury County Community Drug Court (“the WCC Court”) in Iowa, which replaces the role of the judge with members of the community.<sup>163</sup> Finally, this part addresses swift sanction probation programs, such as HOPE.<sup>164</sup> These three programs use different policies and procedural models to address issues surrounding sentencing and treating addicts.

#### A. Red Hook Community Justice Center

Community courts were first founded with the goal of incorporating community involvement in the criminal justice system.<sup>165</sup> They seek to ameliorate perceived problems in the criminal justice system in three ways.<sup>166</sup> First, community courts strive to bring “citizens and defendants closer in a jurisprudential process that is both therapeutic and accountable.”<sup>167</sup> The courts are often multijurisdictional, placing various aspects of the justice system—such as family court, criminal court, and drug court—under “one administrative umbrella.”<sup>168</sup> Second, the courts focus on “social and behavioral origins of the problems” experienced by their participants.<sup>169</sup> Finally, community courts bring social services to the community to which they may not have had access previously.<sup>170</sup>

The RHCJC relies, in part, on the “Broken Windows” theory.<sup>171</sup> The Broken Windows theory is “an outgrowth of deterrence theory” and promotes the idea that “the presence of minor crime and other visible conditions of disorder sends a signal to potential lawbreakers that any crimes they commit are likely to be overlooked.”<sup>172</sup> The theory argues that one way to lower crime rates is to prosecute low-level crimes.<sup>173</sup> By monitoring crimes that make a neighborhood seem “rundown,” it sends a

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162. See *infra* Part II.A.

163. See *infra* Part II.B.

164. See *infra* Part II.C.

165. See Malkin, *supra* note 161, at 1573 (noting the “explicit incorporation of the community into the judicial process as a way to improve the justice system and empower local communities”).

166. See Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 *FORDHAM URB. L.J.* 897, 898 (2003).

167. *Id.*

168. *Id.*; see also Thompson, *supra* note 159, at 64.

169. See Fagan & Malkin, *supra* note 166, at 898.

170. See *id.*

171. See LEE ET AL., *supra* note 106, at 66–67 (“In accordance with the broken windows theory, community courts typically focus on cleaning up minor ‘quality of life’ crimes . . . on the assumption that this will lead to reductions in other types of crime as well.”).

172. *Id.* at 6.

173. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, *THE ATLANTIC* (Mar. 1982), [http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single\\_page=true](http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single_page=true) (“[D]isorder and crime are usually inextricably linked, in a kind of developmental sequence.”) [<http://perma.cc/H94U-Z8TT>].

signal to the community that the police are maintaining order, which engenders “relie[f] and reasurr[ance].”<sup>174</sup> As an outgrowth of Broken Windows, RHCJC is “designed to permit the community—and the court—to regain authority over conduct that threatens the community’s safety and economic viability.”<sup>175</sup> In so doing, some community courts prosecute primarily low-level misdemeanors and violations, leaving violent and felony offenders to the purview of the traditional criminal court system.<sup>176</sup>

The RHCJC was the nation’s first multijurisdictional community court.<sup>177</sup> Prior to the RHCJC’s creation, the neighborhood of Red Hook, Brooklyn, had a predominantly poor population<sup>178</sup> and was a “hotbed of crime.”<sup>179</sup> The issues in the neighborhood, however, were not just centered around the violence, but also the deep mistrust of local law enforcement and its geographical isolation.<sup>180</sup> The RHCJC was founded following drug-related violence in Red Hook’s public housing complexes.<sup>181</sup> The community court officially opened its doors in April 2000.<sup>182</sup>

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174. *Id.* (noting that if police do not monitor low-level crimes, such as “window breaking,” then “one unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing”).

175. Thompson, *supra* note 159, at 66–67.

176. *See id.* at 66. It should be noted that the Broken Windows theory has received criticism for its focus on low-level crimes. It is argued that this method of policing disproportionately affects poor and minority individuals. *See* Steve Zeidman, *Is ‘Broken Windows’ Broken? Yes*, N.Y. DAILY NEWS (Aug. 3, 2014), <http://www.nydailynews.com/opinion/broken-windows-broken-yes-article-1.1889011> (“Data show that a relative few zip codes in majority black and Latino neighborhoods are home to more than half of the arrestees in NYC.”) [<http://perma.cc/3CHV-56TB>]; *see also* Justin Peters, *Broken Windows Policing Doesn’t Work*, SLATE (Dec. 3, 2014), [http://www.slate.com/articles/news\\_and\\_politics/crime/2014/12/broken\\_windows\\_policing\\_doesn\\_t\\_work\\_it\\_also\\_may\\_have\\_killed\\_eric\\_garner.html](http://www.slate.com/articles/news_and_politics/crime/2014/12/broken_windows_policing_doesn_t_work_it_also_may_have_killed_eric_garner.html) [<http://perma.cc/R8RQ-ZXY3>].

177. *See Red Hook Community Justice Center*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/project/red-hook-community-justice-center> (last visited Oct. 21, 2015) [<http://perma.cc/8S4D-54XK>]. One judge—currently Judge Alex Calabrese—oversees all criminal and civil cases at the RHCJC. *See* LEE ET AL., *supra* note 106, at 36. The RHCJC also houses a court attorney, a court clerk’s office, a resource coordinator, court officers, a court reporter and interpreter, personnel from the Center for Court Innovation, an alternative sanctions office, and members from various partner organizations, including the District Attorney’s office, Legal Aid defense attorneys, and police precincts. *Id.* at 36–39.

178. The median income in the neighborhood in 1990 was \$9500 per person, which was less than one-third of the median for New York City as a whole. *See* LEE ET AL., *supra* note 106, at 23. Over 30 percent of the neighborhood’s working age men were unemployed and 78 percent of children in the neighborhood were being raised by a single parent. *Id.*

179. As quoted in the 1988 Life Magazine cover story, Red Hook had frequent shootouts between rival gangs and drug dealers, and the author described the neighborhood by saying “[t]here is a shooting every night and sometimes two . . . . It’s like Dodge City.” *Id.* at 23 (quoting Edward Barnes & George Howe Colt, *Crack: Downfall of a Neighborhood*, LIFE, July 1988, at 100).

180. *See* Fagan & Malkin, *supra* note 166, at 899 (citing the neighborhood’s crisis as partly the result of “the low rating by citizens of the legitimacy of law and legal institutions”).

181. *See* LEE ET AL., *supra* note 106, at 25. Today, approximately 8000 of 11,000 residents in Red Hook live in the neighborhood’s housing projects, the Red Hook Houses. *See* Fagan & Malkin, *supra* note 166, at 914.

182. *See* LEE ET AL., *supra* note 106, at 1. The RHCJC was founded on the tenet of six distinguishing features of community courts: (i) individualized justice, (ii) expanded

RHCJC has three primary features. First, the court system utilizes deterrence as a theory of punishment, looking to ensure that there is a “certainty of meaningful punishment—including follow-up sanctions in response to a defendant’s noncompliance with the original court order.”<sup>183</sup> To accomplish this, judges require that defendants appear in court on a regular basis to demonstrate compliance with the programs.<sup>184</sup> Second, RHCJC’s founders believed that intervention targeting the root problem of an offender’s behavior is crucial to rehabilitation.<sup>185</sup> As part of this “intervention” stage, RHCJC employs drug treatment programs, social services, and other community-based programs to engender positive change in an offenders’ behavior.<sup>186</sup> Finally, RHCJC uses procedural justice to mend the distrust between people in the community and law enforcement.<sup>187</sup> The system looks to stimulate “voluntary compliance with the law by enhancing the perceived legitimacy . . . in judicial decision-making as well as the cultivation of close ties to the community.”<sup>188</sup>

RHCJC’s model allows for greater discretion when deciding whether to divert a defendant to drug treatment.<sup>189</sup> In traditional drug courts, defendants who have a violent criminal history are often not eligible for treatment.<sup>190</sup> Community courts, however, have greater discretion in determining each defendant’s sentence or treatment.<sup>191</sup> Because RHCJC diverts defendants from various backgrounds to drug treatment, the

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sentencing options, (iii) varying mandate length, (iv) offender accountability, (v) community engagement, and (iv) community impacts. *See id.* at 3–4; *see also* Malkin, *supra* note 161, at 1578 (citing four main issues on which the founders of the RHCJC relied, including social services for defendants and residents, resources for young people, participation in local community service projects, and “the court’s ability to help the community improve public safety”).

183. *See* LEE ET AL., *supra* note 106, at 4–5.

184. *See id.*

185. *See id.* at 6–7.

186. *See id.* (“By treating the underlying addiction rather than merely punishing the offender for the resulting crime, the Justice Center aims to break the cycle of recurrent criminal behavior caused by drug addiction.”). The “intervention” methods available to the court include drug treatment programs, job training, GED classes, computer labs, medical examinations, mental health counseling, and family services. *See* Alex Calabrese, “*Team Red Hook*” *Addresses Wide Range of Community Needs*, 72 N.Y. ST. B. J. 14, 14, 16 (2000).

187. *See* LEE ET AL., *supra* note 106, at 7–9.

188. *Id.* at 4–5; *see also* Fagan & Malkin, *supra* note 166, at 900 (“The creation of a court physically closer to the community, more responsive to the problems that give rise to crime, and accountable to the community to reduce crime and deliver remedial services, offers the Court a transformative role that will involve citizens in the processes of social regulation and control that are essential to crime prevention and justice.”).

189. *See* AUBREY FOX, CTR. FOR COURT INNOVATION, A TALE OF THREE CITIES: DRUGS, COURTS AND COMMUNITY JUSTICE 4–5 (2010), [http://www.courtinnovation.org/sites/default/files/Tale\\_3\\_Cities.pdf](http://www.courtinnovation.org/sites/default/files/Tale_3_Cities.pdf) (“There are a number of people . . . who wouldn’t be eligible for drug court given their criminal history.”) [<http://perma.cc/AU7Z-HRBB>].

190. *See id.* at 4.

191. *See id.* at 5.

programs are more varied than traditional drug courts in substance and length.<sup>192</sup>

Procedurally, the defendant and defense attorney consent to a clinic staff member making an assessment to determine whether she has committed the crime as a result of addiction.<sup>193</sup> Clinic staff look to identify a variety of possible symptoms, including addiction, psychological trauma, brain injury, and mental illness.<sup>194</sup> The assessment consists of extensive questioning and a urine test.<sup>195</sup> The clinic gives an individualized recommendation tailored to the defendant and her particular treatment needs.<sup>196</sup>

With this assessment in hand, the prosecutor decides whether to charge the defendant or divert her to a treatment program.<sup>197</sup> The prosecutor and judge are free to alter the suggested treatment plan at their discretion.<sup>198</sup> Once the treatment plan is formulated, the defendant may choose to plead guilty, with the agreement that upon successful completion of the program, an adjournment in contemplation of dismissal (ACD) will be entered.<sup>199</sup> The judge has the discretion in more serious cases—those that would traditionally call for incarceration—to enter a conviction, with treatment as a condition thereof.<sup>200</sup>

RHCJC works with external providers to assist with providing treatment to defendants.<sup>201</sup> Health insurance often plays a role in matching a defendant with a provider because RHCJC does not fund treatment.<sup>202</sup> During the course of the treatment, the court consistently monitors the defendant.<sup>203</sup> The clinic also ensures that the defendant fulfills other requirements of her sentence.<sup>204</sup> This monitoring stage includes consistent interaction with the clinic; staff members meet in groups to analyze the defendant's progress.<sup>205</sup>

Staff members attend weekly meetings to discuss individuals who may not be complying with the program requirements.<sup>206</sup> The group focuses on

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192. See LEE ET AL., *supra* note 106, at 94. While the RHCJC allows for varied sentences, it may also lead to “the potential for similarly situated defendants to receive dissimilar sanctions.” *Id.* at 96.

193. See *id.* at 90, 95–96.

194. See *id.*

195. See *id.*

196. See Fagan & Malkin, *supra* note 166, at 927 (“As a referral service, however, the treatment clinic functions well, catering to individual addicts and their needs.”).

197. See LEE ET AL., *supra* note 106, at 91.

198. See *id.*

199. See *id.* An ACD allows the defendant to avoid a criminal conviction and its potential collateral consequences. *Id.*

200. See *id.*

201. See *id.* at 92 n.25.

202. See *id.* at 92. While many defendants in the RHCJC have Medicaid, others who are ineligible, including undocumented immigrants, may not be able to receive certain services such as methadone treatment for heroin addiction, mental health treatment, or the diagnosis of a traumatic brain injury. *Id.*

203. See *id.* at 93.

204. See *id.*

205. See *id.*

206. See *id.* The judge, the RHCJC project director and deputy director, the clinical coordinator, the resource coordinator, the alternative sanctions coordinator, assistant District

defendants who have had attendance problems, failed a drug test, or otherwise failed to meet a sentencing requirement.<sup>207</sup> The group makes no decisions regarding the defendant's status in the program, as the policy dictates that the court hears the defendant's side of the story.<sup>208</sup>

Defendants usually attend court on the Thursday or Friday following the list meetings.<sup>209</sup> The judge meets with each defendant to discuss her status.<sup>210</sup> Beyond these formal meetings, the small size of the building provides defendants with consistent interaction with court staff.<sup>211</sup> There are no formal guidelines for sanctions if a defendant fails an aspect of the treatment program,<sup>212</sup> allowing the judge to punish the defendants on a case-by-case basis.<sup>213</sup> Typical sanctions include writing an essay on the merits of staying clean and community service.<sup>214</sup>

RHCJC provides prevention programs that target addiction before the conviction of a crime.<sup>215</sup> For example, RHCJC created the Red Hook Public Safety Corps, which utilizes AmeriCorps volunteers and local community members to assist with service projects, including painting over graffiti, cleaning parks, and tutoring.<sup>216</sup> The center also operates youth programs, including sports teams, development programs such as a youth court—where kids are taught how to mentor their peers in real world cases—and a variety of technical and artistic classes.<sup>217</sup>

RHCJC's approach has raised some concerns when compared to other drug court programs. First, RHCJC's informal atmosphere is contrary to a "traditional legal perspective."<sup>218</sup> Additionally, more consistent and strict sanctions than those utilized at RHCJC for noncompliance may provide stronger incentives for defendants to stay clean.<sup>219</sup> For example, the Misdemeanor Brooklyn Treatment Court—a traditional drug court—specifically lays out the potential jail sentences that the defendant will incur if she fails a drug test.<sup>220</sup> Conversely, RHCJC's case-by-case method may

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Attorneys, and Legal Aid defense attorneys attend these meetings, which are called "list meeting[s]." *Id.*

207. *See id.*

208. *See id.*

209. *See id.*

210. *See Malkin, supra* note 161, at 1579.

211. *See id.*

212. *See LEE ET AL., supra* note 106, at 94. This stands in stark contrast to the HOPE Program, which has clearly defined sanctions that are implemented regardless of the reason for noncompliance. *See infra* Part II.C.

213. *See LEE ET AL., supra* note 106, at 94.

214. *See id.*

215. *See FOX, supra* note 189, at 5.

216. *See id.*

217. *See id.*

218. Malkin, *supra* note 161, at 1579–80 (describing the way in which court staff share information with one another may raise "some concern that the meetings . . . allow information detrimental to [the defense lawyer's] clients' interests to be revealed to the judge").

219. *See LEE ET AL., supra* note 106, at 96; *see also supra* notes 212–14 and accompanying text.

220. *See LEE ET AL., supra* note 106, at 95.



allow for the judge to take into account “legally irrelevant factors” when sanctioning, potentially raising due process concerns.<sup>221</sup> The sentencing hearings that are required for all defendants who fail a stage in their treatment, however, may assuage due process concerns.<sup>222</sup>

*B. Community Court with a Twist:  
The Woodbury County Community Drug Court*

A second model that has emerged as a means of treating addicts within the court system is the community-panel drug court, where trained volunteers conduct hearings and render sentencing decisions.<sup>223</sup> These panels are given similar authority to judges and can administer sanctions and rewards to program participants.<sup>224</sup> A district court judge oversees the program, but defendants only appear before the judge on the panel’s recommendation.<sup>225</sup> The panel, however, usually has the ability to send an individual to jail for one to three days without seeing the judge.<sup>226</sup> Generally, a community-panel court has four to eight panels, each consisting of four to six community members, serving on a rotating basis.<sup>227</sup> The panel members come from a variety of professions,<sup>228</sup> and several are recovering addicts.<sup>229</sup>

Woodbury County Community Drug Court opened in July 1999.<sup>230</sup> After seeing the pervasive problems within their community of rampant drug use and corresponding low-level crimes, practitioners in Woodbury County approached the judiciary with the hope of founding a drug court.<sup>231</sup> However, due to a lack of available judges to assist, the committee had to

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221. *See id.* at 96 (noting that the judge may “feel a personal stake” in the defendant’s case, leading to varying sanctioning); *see also* Fagan & Malkin, *supra* note 166, at 928 (“For some, the trade-off of due process rights for treatment, implicit in the therapeutic court model, is seen as a threat to delegitimize the new Court.”).

222. *See* LEE ET AL., *supra* note 106, at 96; *see also infra* notes 441–42 and accompanying text.

223. KRISTEN WHITE ET AL., THE IOWA CONSORTIUM FOR SUBSTANCE ABUSE RESEARCH AND EVALUATION, DRUG COURT PROCESS EVALUATION REPORT 3 (2008), <http://iconsortium.subst-abuse.uiowa.edu/downloads/other/DrugCourtProcessEvaluation.pdf> [<http://perma.cc/QSN2-8LCC>].

224. *See id.*

225. *See id.* If the panel recommends that an individual receive jail time or that his status or probation be revoked, he appears before the judge to carry out the sanction. *See id.*

226. *See id.*

227. *See id.*

228. The list of professions that volunteer at community panel drug courts includes teachers, principals, small business owners, nurses, barbers, computer technicians, reporters, farmers, tattoo artists, motorcycle mechanics, and homemakers. *See id.* at 4.

229. *See id.*

230. *See* Vick & Keating, *supra* note 6, at 296. The WCC Court’s mission statement reads: “To demonstrate an innovative, comprehensive, and integrated approach to substance abuse treatment among offending juveniles and adults by coupling the coercive power of the court with substance abuse services.” Dwight Vick, *Impact of Community-Panel Juvenile Drug Court Judges in Woodbury County, Iowa*, 1 POL. BUREAUCRACY & JUST. 20, 21 (2009).

231. *See* Vick & Keating, *supra* note 6, at 295–96.

find a creative solution.<sup>232</sup> The WCC Court's goal is to be a "last stop" to rehabilitation while reducing incarceration costs and judges' caseloads.<sup>233</sup>

The WCC Court uses a model similar to traditional drug courts.<sup>234</sup> Eligible defendants are diverted to an alternative program focused on treatment in lieu of incarceration.<sup>235</sup> The decision makers are made up of a four-person panel, with district court Judge John Ackerman serving as the overseeing judge.<sup>236</sup> This model decreases the role of the judge and "places an emphasis on the relationships that are developed between the client and the panelists, which in turn creates a higher level of accountability between the client and the community."<sup>237</sup>

To be eligible for the program, an individual must have an underlying substance abuse issue as evidenced from the complaint or charging instrument in her case.<sup>238</sup> A drug court officer then administers the Substance Abuse Subtle Screening Inventory to the individual, a test used to determine whether someone has a chemical dependency.<sup>239</sup> If the individual meets the eligibility requirements, she is assigned a "home" drug court panel "based upon interest, learning style, needs and the 'style' of the panel."<sup>240</sup>

To graduate from the WCC Court, an individual must complete four phases.<sup>241</sup> First, the defendant must "stabiliz[e]."<sup>242</sup> In doing so, the participant must establish a treatment plan approved by the panel, agree to randomized drug testing, break ties with friends or family who use drugs, attend Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings, and acknowledge the need for recovery.<sup>243</sup> Second, the participant must complete the "acceptance" phase, where she must maintain the above activities, find a sponsor in her recovery, and complete community service, if necessary.<sup>244</sup> The third phase, known as "maintenance/aftercare," lasts for approximately three to six months.<sup>245</sup>

232. *See id.*

233. *See* Vick, *supra* note 230, at 33. As of 2007, the court had treated 270 clients since its inception, about 164 of which were juveniles. *See* Vick & Keating, *supra* note 6, at 297.

234. *See* Vick & Keating, *supra* note 6, at 297–98.

235. *See id.*

236. *See* WHITE ET AL., *supra* note 223, at 21.

237. Vick & Keating, *supra* note 6, at 296.

238. *See id.* at 297.

239. *See id.*; *About the SASSI Institute*, THE SASSI INST., <https://www.sassi.com/about-us/> (last visited Oct. 21, 2015) (stating that "the SASSI Institute is committed to helping people who suffer from alcohol and other drug problems and the professionals who serve them") [<http://perma.cc/TU36-LKWN>].

240. *See* Vick & Keating, *supra* note 6, at 298.

241. *See id.*

242. *See id.*

243. *See id.*; MICHAEL F. NERNEY & ROBIN WRIGHT, OJP COURT CLEARINGHOUSE & TECH. ASSISTANCE PROJECT, AM. UNIV., REVIEW OF THE WOODBURY COUNTY (SIOUX CITY, IOWA) JUVENILE COMMUNITY DRUG COURT PROGRAM WITH RECOMMENDATIONS FOR IMPROVING OPERATIONS AND ADOLESCENT TREATMENT SERVICES 5–6 (2002), <http://jpo.wrlc.org/bitstream/handle/11204/3332/1358.pdf?sequence=1> [<http://perma.cc/262A-5UUR>].

244. *See* NERNEY & WRIGHT, *supra* note 243, at 6–7.

245. *See id.* at 7.

This phase encourages participants to find employment, develop a plan for the future, and participate in a “leisure and relapse plan.”<sup>246</sup> At the completion of phase three, the participant graduates.<sup>247</sup> The final phase, entitled “recovery,” is meant to be “continuing and ongoing” after the individual graduates from the program.<sup>248</sup>

The program provides various incentives and sanctions to encourage the participants to stay clean.<sup>249</sup> Incentives include verbal praise and applause, certificates for the completion of each phase, a reduction in community service hours, phase advancement, and a reduction in court costs.<sup>250</sup> If a participant fails a drug test or another prong of treatment, sanctions range from having to make up missed appointments or assignments to increased testing, placement in detention, placement in an inpatient treatment facility, and complete termination from the program.<sup>251</sup>

The Gordon Recovery Center<sup>252</sup> provides the treatment services, and they are largely paid for by the managed care agency in Iowa.<sup>253</sup> If the program is not covered by the Iowa state agency, then Medicaid, private insurance, or family members pay for the services.<sup>254</sup>

Some have suggested that community panels have several advantages that may be preferable to recovering addicts.<sup>255</sup> First, because defendants report directly to community members, they may feel that there is an aspect of accountability that is absent in a judge-administered program.<sup>256</sup> Additionally, panel members volunteer their time to the program without pay, which may indicate to participants that panel members care about treating others, not that they are there because they are required to be.<sup>257</sup> Finally, because volunteers—including former addicts—come from all professions and positions in the community, the defendant may be more likely to listen to someone with whom they can relate.<sup>258</sup>

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246. *Id.*

247. *See id.* at 7–8. To graduate, the individual must have, at a minimum, twelve months in the program, six months sober, consistently attended at AA or NA meetings, attended group and individual sessions, completed community service, and paid any fines. *Id.*

248. *Id.*

249. *See id.* at 8–9.

250. *See id.* at 9.

251. *See id.* at 8–9.

252. The Gordon Recovery Center is part of the Jackson Recovery Centers, a privately owned chain of treatment facilities located throughout Iowa. *See About Us*, JACKSON RECOVERY CTRS., <http://www.gordonrecovery.com/aboutus.html> (last visited Oct. 21, 2015) [<http://perma.cc/PK7F-YSR4>].

253. *See* NERNEY & WRIGHT, *supra* note 243, at 10.

254. For a more detailed discussion on the interaction between insurance companies, managed care systems, and drug courts, see ROBERT V. WOLF, CTR. FOR COURT INNOVATION, DRUG TREATMENT, MANAGED CARE AND THE COURTS: FROM CONFLICT TO COLLABORATION (2004), [http://www.courtinnovation.org/pdf/managed\\_care.pdf](http://www.courtinnovation.org/pdf/managed_care.pdf) [<http://perma.cc/F6H5-7JRH>].

255. *See* WHITE ET AL., *supra* note 223, at 5 (“The presence of volunteers from the community also may provide clients with a sense that members of the community care about them and take a personal interest in their well-being.”).

256. *See id.*

257. *See id.*

258. *See id.* at 4–5.

*C. Hawaii's Opportunity Probation with Enforcement*

While some jurisdictions work toward lowering drug crimes through treatment, such as the RHCJC and the WCC Court, others use probation and swift sanction programs to target addiction. In 2004, Judge Steven Alm in Honolulu launched HOPE, targeting drug addicts through probation.<sup>259</sup> HOPE's goal is to lower recidivism rates while rehabilitating addicts by implementing "swift, predictable, and immediate sanctions" each time they violate the terms of the program.<sup>260</sup> With reports of high success rates, both Washington and California have adopted similar systems.<sup>261</sup>

Judge Alm incorporated the theory of deterrence into his probation program.<sup>262</sup> His basic theory was that "the threat of a mild punishment imposed reliably and immediately has a much greater deterrent effect than the threat of a severe punishment that is delayed and uncertain."<sup>263</sup> Judge Alm also integrated theories of behavioral economics into his program.<sup>264</sup>

Unlike other drug treatment programs, HOPE is focused on remedying the negative implications of the parole system.<sup>265</sup> Probation violations have accounted for more than half of the prison population growth since 1990.<sup>266</sup> Judges usually have broad discretion to determine the parameters of defendants' probation, including random drug testing.<sup>267</sup> Generally, however, the consequences of breaking parole occur far later than the actual violation.<sup>268</sup> Instead, Judge Alm considered it necessary to provide swift and consistent sanctions upon a violation of a term of a defendant's

259. *HOPE Probation*, HAWAII'S ST. JUDICIARY, [http://www.courts.state.hi.us/special\\_projects/hope/about\\_hope\\_probation.html](http://www.courts.state.hi.us/special_projects/hope/about_hope_probation.html) (last visited Oct. 21, 2015) [<http://perma.cc/5B6F-YV38>]. The original pilot program targeted not only those convicted of drug-related offenses, but also sex offenders and domestic violence probationers. See ANGELA HAWKEN & MARK KLEIMAN, NAT'L INST. OF JUSTICE, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE* 8 n.1 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> [<http://perma.cc/H3EN-96YU>].

260. *HOPE Probation*, *supra* note 259.

261. Some accounts predict that HOPE has reduced drug use by more than 80 percent and days behind bars by more than 50 percent. See Mark A.R. Kleiman, Jonathan P. Caulkins & Angela Hawken, *Rethinking the War on Drugs*, WALL STREET J. (Apr. 22, 2012), <http://www.wsj.com/articles/SB10001424052702303425504577353754196169014> [<http://perma.cc/F28C-NEJ4>].

262. See HAWKEN & KLEIMAN, *supra* note 259, at 7 ("Delivering relatively modest sanctions swiftly and consistently is . . . likely to be both more effective and less cruel than sporadically lowering the boom.")

263. Jeffrey Rosen, *Prisoners of Parole*, N.Y. TIMES (Jan. 8, 2010), [http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2010/01/10/magazine/10prisons-t.html?_r=2&pagewanted=all) [<http://perma.cc/3RSQ-XBAN>].

264. See *id.* In his article, Rosen reports that behavioral economists believe that "people are more sensitive to the immediate than the slightly deferred future and focus more on how likely an outcome is than how bad it is." *Id.* Therefore, probationers may be more likely to comply with immediate consequences. See *id.*

265. See HAWKEN & KLEIMAN, *supra* note 259, at 9.

266. See *id.* at 7.

267. The Hawaii Supreme Court upheld the ability to randomly drug test parolees as a condition of their release. See *State v. Morris*, 806 P.2d 407 (Haw. 1991).

268. See Hawken, *supra* note 47, at 40.

probation.<sup>269</sup> Judges give parolees a warning in open court that “any violation of probation conditions will not be tolerated.”<sup>270</sup> If a parolee violates a term of her probation, she will immediately be sentenced to jail time.<sup>271</sup>

As part of the monitoring strategy, HOPE requires that probationers call into court each weekday to determine whether they will be tested.<sup>272</sup> Each participant is assigned a color code at their initial hearing, and a different color code will be chosen for randomized testing every day.<sup>273</sup> If the probationer’s color is selected, then she must appear before her probation officer that day for a drug test.<sup>274</sup> If the probationer fails to appear, the court immediately issues a bench warrant.<sup>275</sup>

If the probationer fails the drug test, the probation officer completes a “Motion to Modify Probation” form that is immediately given to the judge.<sup>276</sup> A hearing is held in conjunction with this motion within seventy-two hours, and the probationer is confined until such time.<sup>277</sup> If the judge confirms a violation, then the probationer receives a short jail sentence, to be served in short order.<sup>278</sup> Upon the completion of the jail sentence, the probationer continues participation in HOPE, reporting to his probation officer on the day of release and subsequently on a regular basis.<sup>279</sup> If an offender continues to violate the terms of the probation, then she is often confined to an intensive substance abuse treatment service.<sup>280</sup>

Instead of the treatment approach to addiction found in the RHCJC and the WCC Court, HOPE relies on strict sanctions and immediate consequences to deter addicts from using.<sup>281</sup> In HOPE, drug treatment is only provided to participants if the probationer fails a drug test, thereby

269. *See id.*; *see also* Rosen, *supra* note 263, at 13 (“[P]eople are most likely to obey the law when they’re subject to punishments they perceive as legitimate, fair and consistent, rather than arbitrary and capricious.”).

270. *See* HAWKEN & KLEIMAN, *supra* note 259, at 13; *see also* Hawken, *supra* note 47, at 40 (noting that the central theory behind HOPE is “the commonsensical one that certainty and swiftness count for more than severity in determining the deterrent efficacy of a threatened punishment”).

271. Upon a violation, the parolee attends a hearing within seventy-two hours, when, if the violation is upheld, he is sentenced to a short jail term, which may be served on the weekend if the parolee is employed. *See* HAWKEN & KLEIMAN, *supra* note 259, at 13.

272. *See* Hawken, *supra* note 47, at 38.

273. *See id.*

274. *See id.*

275. *See id.*

276. *See id.*

277. *See supra* note 271 and accompanying text.

278. *See* Hawken, *supra* note 47, at 38.

279. *See id.*

280. In contrast to other drug treatment courts, HOPE only mandates drug treatment if the probationer is not able to stay clean on her own. *See id.* at 48. Researchers posit that this element of the program “economizes on treatment resources as probationers who are able to remain drug free on their own are not required to enter a drug treatment program.” *Id.*

281. *See* JUSTICE POLICY INST., ADDICTED TO COURTS: HOW A GROWING DEPENDENCE ON DRUG COURTS IMPACTS PEOPLE AND COMMUNITIES 11 (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted\\_to\\_courts\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/addicted_to_courts_final.pdf) [http://perma.cc/2VXT-B6EN].

only targeting those “who cannot stop using drugs on their own.”<sup>282</sup> Participants do not have to meet eligibility requirements as they would in other drug courts, accepting people with all variations of criminal histories and different levels of addiction.<sup>283</sup>

Part of the theory behind HOPE’s infrequent use of drug treatment is that not all drug abusers are addicts, and thus the expensive drug treatment programs should be saved for those who need it the most.<sup>284</sup> If a HOPE probationer fails three or four drug tests, then she may be mandated to attend a residential drug treatment program in lieu of probation revocation.<sup>285</sup> When the probationer is diverted to a residential treatment center, her success in completely abstaining from drug use becomes an additional condition for avoiding revocation of probation or a prison stay.<sup>286</sup> This “as needed” use of drug treatment may lead to cost savings and ensure that spots in residential centers are open for those who require outside assistance to stay clean.<sup>287</sup>

After the HOPE pilot program’s success in increasing probation compliance, the Hawaii legislature expanded the program, which now manages the probation of more than 1500 defendants.<sup>288</sup>

After several studies were published reporting HOPE’s success,<sup>289</sup> Washington and California modeled their own programs on HOPE’s principles and procedures.<sup>290</sup> In November 2010, Sacramento, California, started a HOPE pilot program.<sup>291</sup> In 2011, Seattle, Washington, worked with the Washington Department of Corrections to implement their own swift-sanction program, named Washington Intensive Supervision Program<sup>292</sup> (WISP). The WISP pilot program launched in February 2011, and Angela Hawken and Mark Kleiman conducted a twelve-month study of the program’s male parolees.<sup>293</sup> WISP shares the same foundational tenets of HOPE while targeting a wider range of parolees, including higher risk

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282. *See id.*

283. *See id.*

284. *See* HAWKEN & KLEIMAN, *supra* note 259, at 32–33.

285. *See id.* at 33.

286. *See id.* at 33–34.

287. *See id.* at 33.

288. *See id.* at 8. A national HOPE program was introduced into the U.S. House of Representatives on November 6, 2009. *See* H.R. REP. NO. 4055 (Nov. 6, 2009). The proposition, while never passed, aimed to “reduce drug use, crime, and recidivism” and was modeled after Hawaii’s program. *Id.*

289. *See infra* Part III.A.4.

290. *See* BERNARD WARNER ET AL., WASH. DEP’T OF CORRS., COMMUNITY CORRECTIONS PRACTICES 2012 REPORT TO THE LEGISLATURE 7 (2012).

291. *See id.*

292. *See id.*

293. For a more detailed discussion of WISP, see ANGELA HAWKEN & MARK KLEIMAN, WASHINGTON INTENSIVE SUPERVISION PROGRAM EVALUATION REPORT (2011), [http://www.seattle.gov/council/burgess/attachments/2011wisp\\_draft\\_report.pdf](http://www.seattle.gov/council/burgess/attachments/2011wisp_draft_report.pdf) [<http://perma.cc/M4SG-9YXX>].

offenders.<sup>294</sup> Additionally, several other states have discussions underway to implement a form of the HOPE program.<sup>295</sup>

### III. MEASURING SUCCESS THROUGH QUANTITATIVE AND QUALITATIVE STUDIES

Drug courts' successes are measured by quantitative and qualitative studies performed by the court's personnel, independent organizations, or scholars.<sup>296</sup> The previous section introduced three different models used in treating drug addiction.<sup>297</sup> This part discusses and analyzes the programs' successes, including a discussion of scholars' research methods used in compiling the results.

#### A. *Quantitative Results of Alternative Drug Courts*

This section reports the quantitative results of the three drug treatment programs. First, this section addresses the reason that quantitative methods are used.<sup>298</sup> Second, it recounts the quantitative results for the RHCJC, the WCC Court, and HOPE, including graduation rates and recidivism rates. Finally, this section tackles some criticisms of each program based on these results.

##### 1. Why Use Quantitative Methods?

In measuring alternative drug treatment programs' successes, researchers often utilize quantitative methods as opposed to performing detailed qualitative studies.<sup>299</sup> The reason for this is twofold. First, quantitative results are easy to measure.<sup>300</sup> Researchers need only look to the rates of graduation, recidivism, and other program statistics to determine numerical success.<sup>301</sup> Second, quantitative results enable comparison across various

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294. *See id.*

295. *See* Paul J. Larkin, Jr., *The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform*, 116 LEGAL MEMORANDUM 1, 4 n.20 (2014).

296. *See supra* notes 12–13 and accompanying text.

297. *See supra* Part II.

298. When measuring the success of drug treatment programs, researchers often use quantitative methods, such as graduation rate, recidivism rate, and other measurable factors. Part III.B discusses reasons for which quantitative measures may not be enough and how qualitative studies have been performed for other drug courts. *See infra* Part III.B.

299. *See* Holger Spamann, *Large-Sample, Quantitative Research Designs for Comparative Law?*, 57 AM. J. COMP. L. 797, 798 (2009) (advocating for the use of quantitative research in comparative law, stating that qualitative studies “shed light on the same issue from different angles”).

300. *See* Kenneth B. Nunn, *New Explorations in Culture and Crime: Definitions, Theory, Method*, 17 U. FLA. J.L. & PUB. POL'Y vii, xxi (2006) (noting how quantitative methods focus almost entirely on numerical analysis).

301. *See* RACHEL PORTER ET AL., CTR. FOR COURT INNOVATION, WHAT MAKES A COURT PROBLEM-SOLVING? UNIVERSAL PERFORMANCE INDICATORS FOR PROBLEM-SOLVING JUSTICE 1, 28 (2010), [http://www.courtinnovation.org/sites/default/files/What\\_Makes\\_A\\_Court\\_P\\_S.pdf](http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf) [<http://perma.cc/7ABQ-52J8>]. In this comprehensive study, the Center for Court Innovation utilized yes/no indicators to gather statistics on a variety of factors in problem-

types of drug courts.<sup>302</sup> Quantitative results are a straightforward way to immediately determine what aspects of a drug court are producing increased graduation and decreased recidivism rates in the short term.<sup>303</sup>

## 2. The Red Hook Community Justice Center

The RHCJC performed a comprehensive study, with the help of funding from the National Center for State Courts (NCSC), released in November 2013<sup>304</sup> (“the Report”). The Report analyzes adult criminal cases arraigned at the RHCJC between 2000 and 2009.<sup>305</sup> In the Report, the RHCJC compiled information regarding practices and recidivism rates at other traditional misdemeanor and drug courts in Kings County.<sup>306</sup> In analyzing the drug treatment program, the RHCJC found that a total of 1452 defendants were diverted to receive treatment for addiction, an average of 5 percent of the total caseload over the ten-year period.<sup>307</sup>

### a. Participation in Drug Treatment

The Report explains why individuals with certain underlying charges were diverted to treatment programs more than others.<sup>308</sup> For example, marijuana and traffic offenses receive lighter sentences in comparison to other drug or prostitution charges, thereby making the cost of the treatment program disproportionate to the severity of the offense.<sup>309</sup> The Report hypothesizes that the reason for this is that the cases “assigned to drug treatment appear[] to be related to the severity of the potential penalty for the offense as well as to the tendency for the offense to be related to drug addiction.”<sup>310</sup> Specifically, certain offenses, such as prostitution, may be committed to support a drug habit.<sup>311</sup>

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solving courts, stating that “[t]his simplification may sacrifice important detail and nuance, frequently reducing complex qualitative questions to quantitative measures.” *Id.* at 28.

302. *See* Spamann, *supra* note 299 (stating that “[p]rocessing . . . vast evidence requires quantitative methods”).

303. While quantitative results make these measurements easier on their face, qualitative studies may be necessary to determine what aspects of the programs have a lasting effect on the participants. *See infra* Part III.B.1.

304. *See generally* LEE ET AL., *supra* note 106.

305. These statistics were compiled from the New York State Division of Criminal Justice Services, the New York City Criminal Justice Agency, the Division of Technology of the New York State Unified Court System, and the RHCJC’s internal records. *See id.* at 14.

306. *See id.*

307. *See id.* at 97. The study found the following numbers and percentages of individuals were diverted depending on the underlying charge: violent/person/weapon: 113 people, or 3 percent; marijuana: thirty-eight people, or 1 percent; other drug: 795 people, or 22 percent; petit larceny: forty-five people, or 9 percent; other property charges: ninety-three people, or 3 percent; prostitution: 107 people, or 7 percent; public order: 206 people, or 4 percent; traffic: thirty-two people, or 1 percent; felonies: five people, or 6 percent; other: eighteen people, or 2 percent. *See id.*

308. *See id.*

309. *See id.*

310. *See id.*

311. *See id.*



The Report distinguishes between individuals who participated in one, two, or more mandated long-term drug treatment programs.<sup>312</sup> Fifty-two percent participated in one treatment modality, 22 percent participated in two treatment modalities, and 26 percent participated in three or more treatment modalities from 2003 to 2009.<sup>313</sup> There were a total of 722 cases over the period.<sup>314</sup>

*b. Graduation Rates*

Between 2003 and 2008, a total of 44 percent of the defendants that entered a long-term treatment program graduated.<sup>315</sup> Eighteen percent of the defendants failed the program.<sup>316</sup> Seventeen percent had the status of “closed-other,”<sup>317</sup> and 22 percent of the cases were still open after 2008.<sup>318</sup> During this period, 53 percent had a final disposition of convicted, 1 percent had an ACD entered, 34 percent were dismissed, and 12 percent had a warrant issued for violating a term of the probation.<sup>319</sup> In other words, approximately 34 percent of defendants who agreed to drug treatment successfully completed the program, having their charges dismissed.<sup>320</sup>

*c. Recidivism Rates*

RHCJC’s recidivism rates were compared with traditional courts.<sup>321</sup> The Report measures recidivism by analyzing the rearrest and reconviction rates within a one- and two-year period.<sup>322</sup> Overall, RHCJC defendants were less likely to be arrested again than comparable defendants in the Kings County Criminal Court.<sup>323</sup>

The Report also analyzes the recidivism rates of drug treatment defendants.<sup>324</sup> The Report analyzed 252 defendants from the RHCJC drug treatment program who received a drug treatment mandate and 252 defendants who had “similar cases” from the Kings County Criminal Court.<sup>325</sup> Twelve of the 252 at the Kings County Criminal Court received

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312. “Long-term” treatment programs are defined in the Report as thirty days or longer of treatment. *See id.* at 90.

313. *Id.* at 98.

314. *Id.*

315. *Id.* at 101.

316. *Id.*

317. As noted in the Report, it is unclear whether “closed-other” and “not closed” both denote a failure to complete the program. *Id.* at 100.

318. The completion rates for the six-year period are as follows: 42 percent in 2003, 49 percent in 2004, 47 percent in 2005, 48 percent in 2006, 38 percent in 2007, and 34 percent in 2008. *Id.* at 101.

319. *Id.*

320. *See id.* at 100–01. The Report notes that the low completion rate “suggests that the court may not have sufficient leverage over defendants to motivate them to fulfill the strict requirements of drug treatment programs.” *Id.* at 100.

321. *Id.* at 123.

322. *Id.*

323. *See id.*

324. *See id.* at 124.

325. *See id.*

drug treatment at the Misdemeanor Brooklyn Treatment Court.<sup>326</sup> As the Report notes, there was not a significant difference between the sample groups.<sup>327</sup> In RHCJC, 48 percent were rearrested within two years, while defendants from the Kings County Criminal Court were rearrested at a rate of 43 percent.<sup>328</sup> The Report suggests that there is no significant difference between the recidivism rates in part because the “type of drug treatment intervention used in [RHCJC]—as opposed to deterrence and legitimacy—may not be one of the primary mechanisms contributing to [its] overall effectiveness in reducing recidivism.”<sup>329</sup>

*d. Praise and Criticism*

Public officials have praised RHCJC as a key reason for the decrease in crime in the Red Hook neighborhood. For example, former Brooklyn District Attorney Charles J. Hynes credited RHCJC as the primary reason for the decrease in murders in two separate years since the court’s inception—2003 and 2006.<sup>330</sup> New York City Mayor Bill de Blasio spoke at the facility at RHCJC in 2013 when he swore in the new police commissioner, Bill Bratton.<sup>331</sup> During Bratton’s inauguration, Mayor de Blasio said that “the way to fight crime . . . is with the community.”<sup>332</sup>

Proponents and critics have pointed to several ways in which this model addresses the underlying theories of punishment and ways in which it may cause conflict. First, traditional courts may be required to implement certain sanctions as a result of a failed element of the program.<sup>333</sup> For example, public housing often has a zero-tolerance policy when it comes to drug use, so a criminal court judge may be required to evict a family from their apartment if drug use is found.<sup>334</sup> A community court judge, on the other hand, may work with the housing authorities to enable an addict to continue living in the residence so long as she is under the judge’s supervision, allowing greater discretion.<sup>335</sup>

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326. *Id.* at 124–25.

327. *Id.*

328. *Id.*

329. *Id.* at 125.

330. *See, e.g.*, Charles J. Hynes, *Community Courts Effective Says Brooklyn District Attorney*, S.F. SENTINEL, <http://www.sanfranciscosentinel.com/?p=4330> (last visited Oct. 21, 2015) [<http://perma.cc/P5XB-PZA8>].

331. *See Praising Red Hook Justice Center’s Approach to Public Safety, Mayor-Elect de Blasio Names Bratton As Police Commissioner*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/research/praising-red-hook-justice-center%E2%80%99s-approach-public-safety-mayor-elect-de-blasio-names-bratt?url=project%2Fred-hook-community-justice-center&mode=project&project=Red%20Hook%20Community%20Justice%20Center> (last visited Oct. 21, 2015) [<http://perma.cc/U9M3-RBD7>].

332. *Id.*

333. *See* Dorf & Fagan, *supra* note 87, at 1510.

334. *See* Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002) (noting the Department of Housing and Urban Development’s ability to evict public housing tenants if found with drugs).

335. *See* Dorf & Fagan, *supra* note 87, at 1509.

The judge's subjective discretion, however, has also raised concerns.<sup>336</sup> Because determinations are made on a case-by-case basis, there may be some constitutional concerns because sentencing is largely subjective.<sup>337</sup> This is due to a shift in the court actors' roles in a community court. Generally, the judge oversees an adversarial proceeding, with the prosecutor and defense counsel standing on opposing sides.<sup>338</sup> However, at RHCJC, judges act not only in their traditional role, but also as an advocate, a broker of social services, and a part of the community.<sup>339</sup> The judge in a community court may not have the requisite expertise for all potential arising conflicts.<sup>340</sup>

Additionally, long-term drug treatment programs make up a small amount of RHCJC's caseload, while utilizing a large percentage of the court's resources.<sup>341</sup> While the treatment program is catered to each individual defendant, there may not be the same incentive to stay in line with the program's mandates due to relaxed judicial supervision and lack of structure.<sup>342</sup> These concerns may represent some weaknesses within RHCJC and community justice centers, generally.

### 3. The Woodbury County Community Drug Court

The WCC Court has received attention due to its unique structure in using community volunteers as the primary means of administering drug treatment.<sup>343</sup> Several studies have tracked the program's successes and failures. First, Dwight Vick performed a multipart study, analyzing various aspects of the program.<sup>344</sup> The studies examine the program's impact on recidivism rates, look at its cost-effectiveness, and make several suggestions for how the WCC Court can improve in the future.<sup>345</sup>

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336. *See, e.g.*, Thompson, *supra* note 159, at 79.

337. *See id.*

338. *See id.*

339. *See id.* (expressing concern that "drug courts forego whatever safeguards the conventional construct offers by instructing judges to play a more active and interested role").

340. *See id.*

341. *See* LEE ET AL., *supra* note 106, at 103.

342. *See id.*

343. *See, e.g.*, Nick Hytrek, *Woodbury County Drug Court a Success, Study Says*, SIOUX CITY JOURNAL (July 16, 2005, 12:00 AM), [http://siouxcityjournal.com/news/woodbury-county-drug-court-a-success-study-says/article\\_75ee7751-3f2e-506b-8738-dbe7bd1b5e13.html](http://siouxcityjournal.com/news/woodbury-county-drug-court-a-success-study-says/article_75ee7751-3f2e-506b-8738-dbe7bd1b5e13.html) [http://perma.cc/FAX2-EVDB].

344. *See generally* Dwight Vick, *Cost-Effectiveness Analysis of Woodbury County, Iowa's Community-Panel Drug Court Program*, 1 POL. BUREAUCRACY & JUST. 44, 47 (2002); Vick, *supra* note 230; Vick & Keating, *supra* note 6.

345. *See generally* Dwight Vick, *Cost-Effectiveness Analysis of Woodbury County, Iowa's Community-Panel Drug Court Program*, 1 POL. BUREAUCRACY & JUST. 44, 47 (2002); Vick, *supra* note 230; Vick & Keating, *supra* note 6. It should be noted that Vick's studies focused primarily on analyzing the program's effect on juveniles and did not do a comprehensive study on its effect on adults. Therefore, the rates here may differ from studies of other drug courts.

Vick analyzed the court's success through two major categories: graduation and recidivism rates.<sup>346</sup> In his analysis, Vick determined that 100 percent of the clients used marijuana at least once prior to treatment, 23 percent admitted to using cocaine, 90 percent used alcohol, and slightly more than 25 percent admitted to using methamphetamines.<sup>347</sup> About two-fifths participated in the program for less than six months.<sup>348</sup> Thirty percent were involved with the program for six months to a year.<sup>349</sup> The remaining clients participated in the program for over one year.<sup>350</sup>

*a. Graduation Rates*

When analyzing the graduation rate of participants, Vick found that 60 percent of men graduated, while 63 percent of women graduated.<sup>351</sup> Clients had a harder time graduating within the first stages of the program.<sup>352</sup> Only 62.5 percent of clients successfully completed the program if their treatment plan called for graduation within the first four months.<sup>353</sup> Conversely, approximately three-fourths of participants who spent more than four months in the program successfully graduated.<sup>354</sup>

*b. Recidivism Rates*

Of the WCC Court's graduates, 44 percent did not recidivate.<sup>355</sup> However, the study notes that of the 66 percent that did recidivate in some way, many were likely to commit a drug-related crime: only 20 percent of the graduates who did recidivate committed a non-drug related, nonviolent crime.<sup>356</sup> In analyzing the recidivism rates, Vick also noted that 54 percent of marijuana users, 53 percent of alcohol users, and 50 percent of methamphetamine users recidivated.<sup>357</sup>

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346. *See generally* Vick & Keating, *supra* note 6.

347. *See id.* at 308.

348. *See id.* at 309.

349. *See id.*

350. *See id.*

351. *See id.* at 311.

352. *See id.* at 313.

353. *See id.* at 313 n.201.

354. *See id.* at 313.

355. *Id.* Here, recidivism was measured by looking at citations and convictions recorded in Woodbury County until December 31, 2004. *Id.* at 310. Vick found that 53.3 percent of graduates did not recidivate. *Id.* at 318–19. He compares this to the national average rate of recidivism in juvenile courts—30.8 percent—as opposed to a little over 46 percent here. *Id.* at 319. He distinguishes that national study because it only accounted for two years after graduation. *Id.* However, it should be noted that while this study began in 1999, the study does not distinguish between those who graduated in 1999—with five years between their graduation date and the end of the study—and those who graduated in 2004—with less than a year between their graduation date and the study's completion.

356. *See id.* at 313–14.

357. *See id.* at 314 n.207.

#### 4. Hawaii's Opportunity Probation with Enforcement

State legislatures<sup>358</sup> and federally funded researchers<sup>359</sup> have commissioned several studies to examine the effectiveness of swift-sanction probation programs. The studies analyze the programs' successes in comparison to other probation practices.<sup>360</sup> They use such indicators as number of failed drug tests, missed appointments, and other probation violations.<sup>361</sup>

As part of the procedure at HOPE, drug tests are performed both randomly and in accordance with prescheduled appointments.<sup>362</sup> According to one study, probationers tested positive over half the time during the three months prior to their probation.<sup>363</sup> In the first three months of participation, probationers had a positive drug test rate of 9 percent,<sup>364</sup> as compared with the comparison group who tested positive 33 percent of the time in the same period.<sup>365</sup> Finally, after six months, HOPE probationers tested positive at a rate of 4 percent while the comparison group tested positive at a rate of 19 percent.<sup>366</sup>

Hawken and Kleiman found that of those who tested positive once, only half tested positive a second time.<sup>367</sup> Of those with two positive tests, only half had a subsequent positive test.<sup>368</sup> The probationers who tested positive more than once were those who not only received sanctions, but who also were recommended for enrollment in a drug treatment program because they "did not desist from drug use under sanctions pressure alone."<sup>369</sup>

Hawken and Kleiman also measured the frequency with which probationers missed their appointments.<sup>370</sup> During the three months prior to enrollment, HOPE participants missed appointments with their probation officers 14 percent of the time.<sup>371</sup> During the first three months of participation in the program, HOPE probationers missed 4 percent of appointments, showing a 71 percent decrease in missed appointments.<sup>372</sup>

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358. See, e.g., WARNER ET AL., *supra* note 290.

359. See, e.g., HAWKEN & KLEIMAN, *supra* note 259.

360. Because HOPE is used as a probation measure as opposed to a comprehensive drug treatment program, results in the form of graduation and recidivism rates are not available.

361. See HAWKEN & KLEIMAN, *supra* note 259.

362. See *id.* at 17; see also *supra* note 271 and accompanying text.

363. See HAWKEN & KLEIMAN, *supra* note 259, at 17 (finding that 53 percent of drug tests in the first three months were positive). In this study, Hawken and Kleiman used a comparison group against which HOPE was compared. The group consisted of probationers who "continued on probation as usual." *Id.* at 13–14. For this group, there is no random drug testing; rather, the probationers appeared at prescheduled appointments once per month. *Id.* at 14.

364. *Id.* at 18. This represents an 83 percent decline in the positive test rate. *Id.*

365. See *id.*

366. See *id.* at 18–19.

367. See *id.* at 19.

368. See *id.*

369. See *id.* at 19–20.

370. See *id.* at 21.

371. See *id.* Comparatively, the comparison group missed appointments at a rate of 9 percent. See *id.*

372. See *id.*

Meanwhile, the comparison group had a 22 percent increase in missed appointments, missing them at a rate of 11 percent.<sup>373</sup> After the six-month mark, HOPE probationers missed their appointments at a rate of 1 percent, while the comparison group missed at a rate of 8 percent.<sup>374</sup> Hawken and Kleiman attributed the dramatic decrease in the rate of missed appointments to swift sanctions and speculated that “most probationers are highly compliant with scheduled appointments.”<sup>375</sup>

Finally, Hawken and Kleiman measured the program’s success by looking at how many participants had their probation revoked as compared to the control group. They found that 9 percent of HOPE probationers had their probation revoked due to noncompliance, compared to 31 percent of the comparison group.<sup>376</sup> Similarly, HOPE probationers spent far fewer days in jail as a result of probation violations than the comparison group.<sup>377</sup>

### B. Qualitative Results

This section discusses qualitative studies that measure participants’ perception of the treatment programs. This section examines the ethnographic data uncovered through questionnaires and interviews in RHCJC, the WCC Court, and HOPE. Then, this section addresses other qualitative studies of related drug treatment programs.

#### 1. Why Use Qualitative Studies?

Qualitative results amplify quantitative studies in analyzing drug treatment programs’ effectiveness.<sup>378</sup> They provide information “compar[ing] the perceptions of those who succeed[ed] in a drug court with those who fail[ed].”<sup>379</sup> Quantitative studies may not be sufficient because of the ways in which they are conducted. For example, in studying recidivism, it is nearly impossible to ensure that “the differences found in recidivism reflect primarily criteria and processes of selection for drug court handling rather than program effects of the drug court itself.”<sup>380</sup>

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373. *See id.*

374. *See id.* at 22.

375. *See id.*

376. *See id.* at 24.

377. HOPE probationers spent an average of 111.6 days in prison and 18.9 days in jail, while the comparison group spent an average of 303.4 days in prison and 20.1 days in jail. *See id.* at 26.

378. *See* Nunn, *supra* note 300, at xxi (“[Q]uantitative methods are based on an unquestioning view of objectivity that, while helpful for some purposes, is ineffective for interpretation and unable to access and describe the social construction of reality.”).

379. Andrew Fulkerson et al., *Understanding Success and Nonsuccess in the Drug Court*, 52 INT’L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 1297, 1300 (2012).

380. *See* Loreen Wolfer, *Graduates Speak: A Qualitative Exploration of Drug Court Graduates’ Views of the Strengths and Weaknesses of the Program*, 33 CONTEMP. DRUG PROBS. 303, 305 (2006).

## 2. RHCJC Interviews and Questionnaires

The RHCJC Report recounts ethnographers' findings from John Jay College of Criminal Justice who interviewed 100 misdemeanor offenders in the Red Hook neighborhood.<sup>381</sup> As compared to Brooklyn's downtown criminal court, offenders who were interviewed responded that Judge Calabrese and the RHCJC team were largely more lenient, were more caring, and would sentence drug offenders to drug treatment programs rather than jail.<sup>382</sup> The study, however, did not report the effectiveness of the drug treatment programs administered by RHCJC, but rather the offenders' general perception of the community court and its actors.<sup>383</sup>

## 3. Perception of the WCC Court

In addition to the quantitative results, Vick found that the use of panel members engendered mostly positive feelings among the program's participants.<sup>384</sup> The panel was able to develop "personal as well as professional" relationships with the participants.<sup>385</sup> However, Vick reported that volunteers had two major concerns when interviewed. First, there was a lack of coordination among the agencies involved in the treatment process, which may have lead to clients relapsing due to the loose structure.<sup>386</sup> Additionally, Vick described the interaction among the panel members during the meetings: that volunteers were sometimes passing notes, whispering, and talking under their breath.<sup>387</sup>

Additionally, two years after the court's inception, Michael F. Nerney and Robin Wright conducted a review of the WCC Court, also specifically analyzing its effect on adolescent treatment.<sup>388</sup> There, the researchers provided several recommendations for the future of the community panel treatment program.<sup>389</sup> First, they suggested training the treatment providers and panelists so they better understand the variety of issues that may be affecting addicts.<sup>390</sup> Second, they suggested having more positive interactions between the participants and the court's staff so as to publicly reward good behavior.<sup>391</sup>

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381. For a more detailed description of the study, see LEE ET AL., *supra* note 106, at 21–22 & app. E.

382. One survey respondent reported that "[a]bout 5 years ago, I got in trouble for some drugs, and instead of putting me in jail, [Judge Calabrese] put me in a drug program. If they bring you to 120 Schermerhorn, you're going to jail. Over there [in Red Hook], it's a lot better." *See id.* at 40.

383. *See id.*

384. *See generally* Vick, *supra* note 230.

385. *See id.* at 30.

386. *See id.*

387. *See id.*

388. NERNEY & WRIGHT, *supra* note 243.

389. *See id.* at 11–13.

390. *See id.* at 11.

391. *See id.* at 11–12.

The Iowa Consortium for Substance Abuse and Research and Evaluation also conducted a study regarding perceptions of the WCC Court.<sup>392</sup> Researchers evaluated the program by analyzing interviews with the court's staff members.<sup>393</sup> Staff members made several suggestions for improving the WCC Court, including increased commitment and consistency of panels, more incentives for completing a stage of treatment, and more funding for treatment services.<sup>394</sup> This study did not survey program participants.<sup>395</sup>

#### 4. Hawaii's Opportunity Probation with Enforcement Questionnaires

In a review of drug offenders diverted to the HOPE probation program, Hawken anonymously surveyed a sample of 167 HOPE probationers.<sup>396</sup> She interviewed probationers and others involved in the program, including prosecutors, public defense attorneys, probation officers, judges, and other court staff to determine stakeholders' perception of the program.<sup>397</sup>

Hawken found that clients had a mostly positive perception of the program regardless of how they entered the program, whether they were incarcerated, and whether they received unwanted drug treatment as a condition of a violation of probation.<sup>398</sup> In response to open-ended questions, many clients responded that the program was beneficial.<sup>399</sup> A majority of participants reported that the program was not too strict and that it was useful in reducing drug use<sup>400</sup> and improving relationships.<sup>401</sup>

Some were unsatisfied with the subjective position of the judge.<sup>402</sup> Program participants—including defendants' probation officers, prosecutors, public defenders, and even some judges—reported that the variation between judges in the severity of sanctions may be problematic.<sup>403</sup> Those who received stricter sentences as a result of a probation violation often blamed judicial bias, including ethnic bias.<sup>404</sup> However, a

392. WHITE ET AL., *supra* note 223.

393. *Id.* at 91–92.

394. *Id.* at 92.

395. For a list of the questions used in these interviews, see *id.* at 108–10.

396. See Hawken, *supra* note 47, at 43.

397. See *id.*

398. Fewer than 10 percent reported a negative perception of the program. See *id.* at 42. Of those who were incarcerated during the time of their interview, only 12 percent claimed a negative perception. *Id.* at 43. Even among those who received mandated drug treatment due to noncompliance with the probation guidelines, only 14 percent reported an unhappiness with the program. *Id.*

399. Hawken reports that one individual described the program as “strict, friendly, and fair,” while another stated, “[d]on't give up on us! It's a matter of time before it will sink in.” See *id.* at 43.

400. Participants recognized that their choice was between “the drug or jail,” and thus the daily call-in system and the randomized drug testing had a positive effect on their recovery—96 percent reported that the regular random drug testing helped avoid drug use. See *id.*

401. See *id.*

402. See *id.*

403. See *id.*

404. See *id.*



comparison of the data shows that the difference is not between offenders, but instead between judges.<sup>405</sup>

This qualitative study did not measure continued sobriety or quality of life among past participants. Hawken and Kleiman acknowledge this shortcoming, stating that the probationers were only studied while they were participating in the program.<sup>406</sup>

### 5. Other Qualitative Studies

The qualitative studies that have been performed with respect to the effectiveness of drug treatment programs have been minimal. One such study was done with participants in the Greene County Drug Court in Arkansas.<sup>407</sup> There, the study interviewed fifteen recruited participants,<sup>408</sup> including some individuals who were in county jail and others who were graduating from the program.<sup>409</sup> All questioning was done within twelve months of the program's completion.<sup>410</sup> The study mostly analyzed the varying reasons for entering drug court<sup>411</sup> and the participants' satisfaction therein.<sup>412</sup>

The study found, generally, that individuals were largely unhappy with the lack of confidentiality, that the program often only utilized counselors who specialized in alcoholism as opposed to drug addiction, that judges were largely subjective, and that individuals disliked the frequency of in-court appearances. Some individuals considered this final problem the catalyst for their "failure" in the program.<sup>413</sup> A key distinction between those who completed the program and those who did not was that those who "failed" out of the program perceived the judge as unfair.<sup>414</sup>

The study also analyzed whether the individuals were able to use the drug court program as a "chance to repair problems that their past drug abuse had caused to their family, friends, and community."<sup>415</sup> Sixty-seven percent of the graduates of the program and 57 percent of the noncompleters reported that their participation in the drug court program helped them regain the trust of their family, friends, and community.<sup>416</sup>

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405. *See id.* This perceived—albeit incorrect—bias is further evidence of why uniform sanctions may lend credibility to drug treatment programs. *See infra* notes 439–40 and accompanying text.

406. *See* Hawken, *supra* note 47, at 48 (noting that participants' "long-term drug use and criminality is an important remaining question" to measure the success of HOPE); *see infra* note 455 and accompanying text.

407. Fulkerson et al., *supra* note 379.

408. The fact that the participants were recruited may show a selection bias in the study: by selecting only those that were willing to comply with the terms of the study, it may be that the interviewees represented only a subset of drug court participants. *See id.* at 1304.

409. *See id.* at 1303.

410. *See id.*

411. Many stated that they were advised to enter the program. *Id.* at 1305.

412. All but one person was satisfied with the program. *Id.* at 1305–06.

413. *See id.* at 1306–08.

414. *See id.* at 1312.

415. *See id.* at 1308.

416. *See id.*

Some suggested awareness that their behavior made friends and family “victims” and considered the program restorative.<sup>417</sup>

The report, based on these findings, concluded that the drug court program benefited participants because they were “made accountable for their behavior and [were] required to adhere to a rigorous schedule of counseling, 12-step meetings, drug testing, meaningful employment, community service, and regular monitoring of progress by the drug court judge.”<sup>418</sup>

This qualitative study is one example of an in-depth measurement of the long-term effects of a drug treatment program and may serve as an example to future studies.<sup>419</sup>

#### IV. SUGGESTIONS FOR FUTURE POLICIES AND STUDIES

Various aspects of each alternative drug court discussed in Parts II and III have been effective, while others conflict with the rehabilitative goals of drug courts.<sup>420</sup> This part examines and suggests several policies that alternative drug courts should adopt that consider the nature of addiction, as well as incentives for defendants to get and stay clean. First, this part addresses several aspects of each of the three alternative drug courts that may be most effective going forward. Second, this part discusses the need for long-term qualitative studies to better determine which policies are most effective in rehabilitating addicts in the court system.

##### A. *How to Address Addiction in a Retributive System: Suggestions for Future Drug Courts*

While drug treatment programs will likely always have slight variations among jurisdictions, there are several aspects of drug treatment that should be implemented in every drug court. This section provides three suggestions that may lead to a deeper connection between the court system and the issue of drug addiction. First, drug courts should maintain an informal atmosphere, where a variety of court actors, health care providers, social workers, family, and other members of the community are involved in the process. Second, drug courts should adopt consistent and predictable sanctions other than jail time to be implemented in the event of program violations.<sup>421</sup> Third, regardless of the model, rehabilitative treatment—not punishment—should be the primary focus of drug courts.

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417. *See id.* at 1309.

418. *See id.* at 1313.

419. *See infra* Part IV.B.

420. *See* Boldt, *supra* note 56, at 1246 (“This conflict is brought into clearer focus when the analysis is centered on the imperfect fit between the adversary system and rehabilitative regimes.”).

421. However, unlike HOPE, incarceration should be saved for the most serious cases. Labeling a drug addict as a criminal may be counterproductive to the goal of long-term rehabilitation.

### 1. Maintain a Trustworthy and Informal Atmosphere

Procedural justice is one drug court component that adds legitimacy and leads to increased success.<sup>422</sup> Procedural justice should include not only a perceived fairness in the courtroom, but also an atmosphere that engenders trust and a holistic approach to determining an appropriate treatment program or sanction. There are several small measures that drug courts should take to strengthen procedural justice.

First, drug courts should involve a variety of actors when treating addicts. As is practiced at RHCJC,<sup>423</sup> drug courts should utilize social workers, specialists trained in drug treatment and addiction, community members, aid organizations, and others that may contribute to appropriately crafting a treatment program.

Having these individuals available will ensure two things. First, the variety of actors will guarantee that defendants understand that they have access to and support from more than the traditional court actors—the judge, prosecutor, and defense attorney—involved in the decision-making process. Because individuals often seek to identify themselves with groups,<sup>424</sup> they may act in accordance with the group's decision—i.e., the decision of the group of individuals determines the parameters of the program—even if it is against each individual's self-interest.<sup>425</sup> By intertwining the authority of the court with the community's approval, defendants may be more likely to view the decision as legitimate and be more open to compliance.<sup>426</sup>

Second, drug treatment experts should be required to help determine the appropriate treatment for a defendant. A judge, while knowledgeable in many areas, may not be an expert on the psychological aspects of addiction or on the ways in which one sanction will affect the defendant outside the courtroom—by losing her job, her home, or her family.<sup>427</sup> By having several people involved in the decision-making process, a defendant is guaranteed a treatment program that is personally crafted to her needs by an expert with the requisite knowledge. Crafting an appropriate sentence for a drug-addicted defendant cannot be one-size-fits-all. Every addict is

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422. RHCJC names procedural justice as one of the main theories upon which the court is founded. See LEE ET AL., *supra* note 106, at 7–8; see also *supra* notes 186–87 and accompanying text.

423. See *supra* note 206 and accompanying text (recounting the people who attend meetings discussing defendants' progress).

424. See LEE ET AL., *supra* note 106, at 9.

425. See *id.* For a more in depth discussion on group identity theory, see Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 642 (2004).

426. See LEE ET AL., *supra* note 106, at 9.

427. The idea that one criminal charge can result in a domino effect of other consequences is represented in the theory of holistic defense. See generally Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1067 (2004) (describing holistic defense as “encompass[ing] the various underlying issues that often lead to clients' experiences with the criminal justice system, with the aim of addressing those circumstances and preventing future criminal involvement”).

different, with varying psychological, health, and personal needs. It is crucial that this is taken into account when determining how to make—and who should make—the ultimate decisions for treatment.<sup>428</sup>

One way to accomplish this is through the program implemented by the WCC Court.<sup>429</sup> There, the court employs, in lieu of a judge, a panel of community members who make the ultimate decision on how to sentence drug court participants.<sup>430</sup> While the panel may not have professional experts, it may instill a sense of legitimacy in the defendant. A defendant may be more willing to listen to a group of four people that have been through the same process and have stayed sober than a judge who may not have had the same experience.

In addition to seeking procedural justice through the decision-making process, drug courts should maintain an informal courtroom that places the defendant on the same level—literally and figuratively—as the court actors. First, as is done at RHCJC, the judge should sit at the same level as the defendant as opposed to sitting on an elevated bench.<sup>431</sup> The defendant should receive public praise for successfully completing elements of her treatment. For example, the judge and court staff may applaud, provide verbal praise, or award offenders for particularly strong progress.<sup>432</sup>

Further, the judge should always converse directly with the defendant, ask her to tell her own story, and ask for justification if she violates a term of the treatment program.<sup>433</sup> This is particularly important in situations in which the defendant may have tested positive for drugs during a follow-up appointment or violated a term of her probation or treatment program. Instead of sanctioning an individual with no explanation allowed,<sup>434</sup> it is important to have a hearing during which individuals may defend themselves, provide explanation, or discuss with the judge a way to avoid further violations.

Allowing the offender to participate in decision making lends legitimacy to the process and encourages the addict to follow the treatment plan and rehabilitate.

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428. While the treatment programs should be formulated on a case-by-case basis, sanctions for violations thereof should be predetermined and consistent, allowing for slight variations between defendants. *See infra* notes 435–44 and accompanying text.

429. *See supra* notes 223–58 and accompanying text.

430. *See id.*

431. *See* LEE ET AL., *supra* note 106, at 8 (describing this set up as a design that is “intended to promote individual dignity”).

432. *See supra* notes 249–50 (discussing the procedures at the WCC Court for praise).

433. *See* LEE ET AL., *supra* note 106, at 8 (“[J]udges are advised to treat individuals with respect, afford all parties the opportunity to be heard, and clearly explain the rationale behind their decisions.”).

434. While HOPE has a hearing to determine whether there was an actual violation, the program does not allow for the probationer to put on a defense, *see* Hawken, *supra* note 47, at 38, while the RHCJC allows for a hearing with the possibility of presenting a defense following any violation, *see* LEE ET AL., *supra* note 106, at 93–94.

## 2. Implement Swift and Predictable Sanctions

Drug courts should utilize immediate and predictable sanctions that apply to violations of the program or parole. While a punishment may have slight variations among defendants with the same violation, it should be uniform practice to apply sanctions for all defendants who commit each particular type of violation. The sanctions should be known, immediate, and consistent in kind both among judges and among defendants. The sanctions, while predetermined and immediate, should not include incarceration.<sup>435</sup>

The sanctions should be uniform according to the type of violation, while still leaving room for slight variations among defendants based on their particular circumstances. This would result in a range of predetermined sanctions for each violation. For example, missing an appointment would always result in increased court appearances. However, the number of increased court appearances could vary among defendants depending on their particular circumstances and the reasons for which the appointment was missed.<sup>436</sup> Because of the individualized needs of each defendant, in the event of a violation, a hearing should be held to determine the nature of the violation and the appropriate sanction, according to the range already in place at the drug court. This would ensure that defendants are aware of the consequences of violations while still allowing drug courts to treat the individual needs of each defendant.

The sanctions should be uniform and swift for three reasons. First, individuals are not forward thinking and may respond more strongly to immediate consequences.<sup>437</sup> For example, the defendant who knows that she will receive a punishment several months in the future is much more likely to violate the terms of her probation than the defendant who will be given an immediate sanction.<sup>438</sup> Therefore, if the sanction is known and immediate, a defendant may be more likely to comply with the terms of the sentence or probation.

Second, uniformity among sanctions may provide more legitimacy to the drug court proceedings. If two similarly situated defendants receive different sanctions for an unexcused probation violation or different treatment plans—one receiving increased court appearances and the other termination from the program—they may not perceive the decision to be legitimate, thus threatening their treatment. For example, in the HOPE

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435. As some scholars have speculated, incarceration may never be an appropriate means of rehabilitating an addict. See Hora & Stalcup, *supra* note 152, at 724 (“[I]t is naive to believe that merely incarcerating a substance abuser, that is, physically incapacitating them, will lead to recovery from addiction or cessation of alcohol or other drug use.”). For this reason, incarceration should be used sparingly here.

436. See *infra* notes 441–42 and accompanying text; see also *supra* notes 212–14 and accompanying text (discussing the procedure at RHCJC in the event of a violation).

437. JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 49–56 (1985) (discussing how offenders are likely more impulsive, failing to take into account future consequences).

438. See *id.*

program, Hawken's studies show that one judge consistently gave harsher sanctions for probation violations.<sup>439</sup> The individual who receives the harsher sanction may blame bad luck or the judge, thus detracting from the program's effectiveness. While mandatory treatment may be effective, the offender must believe that the sentence is legitimate for the treatment to work.<sup>440</sup>

While uniformity is important in drug treatment, courts should allow for justifications and defenses by the defendant before a sanction is imposed. A hearing determining the nature of the violation and the appropriate sanction within the predetermined range should be held.<sup>441</sup> A judge should be required to explain why she is choosing one end of the predetermined range over the other.<sup>442</sup> This would help defendants not blame their sanction on a judge's supposed biases.

Finally, variation across judges and among offenders may lead to due process concerns. One criticism of drug courts has been that judges become too invested in the proceedings.<sup>443</sup> Instead of maintaining the traditional neutral role of decision maker, a drug court judge is intimately involved with the offenders, particularly in a community court model.<sup>444</sup> Without uniform sanctions, the judge's potential biases could affect one addict's sentence and future. Therefore, a consistent and predictable set of sanctions may prevent the risk of due process violations.

### 3. Focus on Treatment, Not Criminal Sanctions

The Supreme Court in *Robinson v. California* and *Powell v. Texas* raised an important question: Is addiction something that should ever be criminally punished?<sup>445</sup> Drug courts have struggled with this question as well, wondering which punishments are effective for drug-addicted defendants.<sup>446</sup> HOPE, for example, admittedly focuses solely on probation as part of the program and only turns to treatment in the most serious of circumstances.<sup>447</sup> This question becomes exceedingly difficult—and

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439. See Hawken, *supra* note 47, at 43.

440. See LEE ET AL., *supra* note 106, at 7–9.

441. See *supra* notes 422–34 and accompanying text. There are different reasons for which a person may incur a violation, which is why a hearing in front of a judge is necessary. For example, one person could have missed a drug test because they were using drugs, while another could have missed a drug test because of a family- or job-related reason. The sanctions for these two groups of people should not be the same.

442. These hearings may also lead to issues regarding judicial discretion in imposing sanctions. However, it is necessary that there be leeway between defendants in different circumstances. One solution may be to have detailed guidelines drafted at the inception of a drug court that clearly lay out when and how a defendant should be sanctioned.

443. See Trent Oram & Kara Gleckler, *An Analysis of the Constitutional Issues Implicated in Drug Courts*, 42 IDAHO L. REV. 471, 528 (2006) (discussing the drug court judge as “an active team-member,” quite different from a judge in her traditional role as a neutral party).

444. See *id.*; see also Calabrese, *supra* note 186.

445. See *supra* notes 58–81 and accompanying text.

446. See *supra* notes 82–106 and accompanying text.

447. See *supra* notes 146–60 and accompanying text.

important—when considering the number of people who are under the influence of drugs when committing a crime.<sup>448</sup> When formulating drug court policy, it is important to consider where to draw the line between addiction and mal-intentioned crime.

Some suggest that the solution is to eliminate criminal sanctions from drug treatment completely.<sup>449</sup> This suggestion should not be swept away. Designing a program where the sole focus is deterring others or punishing drug-related crimes fails to acknowledge addiction as a disease. Treatment programs should give addicts a set of tools to use in their recovery. Using solely deterrence theory by way of criminal sentencing in drug courts will not treat addiction; it will only perpetuate the consequences to addicts of continuing without such tools.

*B. Quantitative and Qualitative Studies:  
How to Measure Drug Courts' Success*

Most studies regarding the success of alternative drug courts have been measured quantitatively. The reason for this is that measuring recidivism and graduation rates is relatively easy.<sup>450</sup> Statistics can be used as a proxy for determining whether addicts have overcome their addiction without spending time and money prying into their lives post-release. However, to be in recovery<sup>451</sup> does not mean that one is cured, and the effects of drug treatment programs cannot be measured simply by checking a “yes” or “no.” Instead, other factors, including long-term progress, must be taken into account. These factors may include whether the individual has reconnected ties with the community, whether she has successfully maintained a job, and whether she has continued with a twelve-step program.<sup>452</sup>

Additionally, reoffending is not necessarily a sign that an addict has “failed” a treatment program.<sup>453</sup> Recovery is ongoing and cannot only be measured by graduation from a court-mandated treatment program or

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448. One statistic finds that 80 percent of adults incarcerated for felonies (i) were regular alcohol or drug abusers, (ii) had been convicted of an alcohol- or drug-related violation, (iii) were under the influence of alcohol or drugs during the commission of the crime, or (iv) or committed the crime to support a drug habit. *See* Hora & Stalcup, *supra* note 152, at 720.

449. *See supra* note 150 and accompanying text. Some believe that rehabilitation as a sentencing theory should be eliminated completely. According to Judge Morris Hoffman, “The scandal of America’s drug courts is that we have rushed headlong into them—driven by politics, judicial pop-psychopharmacology, fuzzy-headed notions about ‘restorative justice’ and ‘therapeutic jurisprudence’ . . .” Andrew Fulkerson, *How Much Process Is Due in the Drug Court*, 48 CRIM. LAW BULL. 653, 660 (2012).

450. *See supra* notes 299–303 and accompanying text.

451. *See supra* note 28 and accompanying text (defining recovery).

452. *See, e.g.,* Edwards, *supra* note 48, at 291 (citation omitted) (“A parolee, for example, who relapses and is arrested for possession of heroin would be classified as a recidivist when he returns to jail. To the drug counselor, however, if the addict commits no other crime but to be in possession of heroin and has demonstrated progress in other life areas during an extended period of sobriety, the ‘offense’ is consistent with the dictates of the disease, which by nature involves relapse.”).

453. For working definitions of addiction and recovery, *see supra* note 28 and accompanying text.

abstaining from crime. During recovery, a participant may relapse, but this does not erase the work she has done up until that point. If this person is arrested because of her drug use, then she will be counted as a “failure”—as someone who contributed to the recidivism rate. However, in reality, the person may not have been arrested because of a failure of the program or a policy therein, but instead because of the ongoing nature of recovery.

Quantitative studies that measure recidivism and graduation rates do not take these circumstances into account.<sup>454</sup> With these studies, the metric of success is for a short, finite period.<sup>455</sup> Without having more in-depth and long-term studies, it is impossible truly to know which policies successfully treat addicts and which conflict with rehabilitative ideals.

One low-cost solution would be to have a series of questionnaires sent to all participants—both those that graduated and those who were terminated. Programs could administer these questionnaires when each individual leaves the program and then again at yearly intervals.<sup>456</sup> To encourage completion, the questionnaires should be simple and evaluate three things. First, they should measure participants’ perception of certain aspects of their treatment. This section would include questions regarding procedural justice, the atmosphere in the courtroom, the parameters of their treatment, and whether the defendants perceived the sentence and sanction to be appropriate. It should also include a section asking participants to articulate the aspects of the treatment program they found to be most effective.

Second, the questionnaires should inquire into past participants’ current lives, including relationships with family and friends, employment, and whether they have meaningfully reintegrated into society.<sup>457</sup> Finally, the questionnaires could address the status of the individual’s recovery and whether they have maintained sobriety, relapsed, or reoffended.

In deterrence-based probation programs such as HOPE, there may be an issue with participants circumventing the system. A probationer may discover a way to change her behavior for a short length of time, just long enough to fulfill the probation requirements.<sup>458</sup> For example, HOPE is considered a successful solution to probation violations because it shows a

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454. See Thompson, *supra* note 159, at 98 (“Success will need to be measured from a number of different, and perhaps competing, vantage points.”).

455. For example, many studies stop after probation ends or are only able to measure one or two years past the graduation date for cost reasons. Hawken and Kleiman’s study on HOPE, for example, only followed up with probationers for a year after their probation terminated. See HAWKEN & KLEIMAN, *supra* note 259, at 48–49.

456. While sobriety is lifelong, the questionnaires could not realistically be distributed every year for the rest of an addict’s life. Therefore, a period of five years may accomplish the goal without being overly burdensome. These questionnaires may also raise an issue of selection bias where the only individuals to complete them would be the ones most receptive to the program. One solution may be to have the completion of the questionnaires—at least for a time—be a term of inactive probation after individuals have left the program.

457. This section of the questionnaire could be modeled after that used in the Arkansas study, discussed *supra* notes 415–17 and accompanying text.

458. HOPE requires that probationers continuously pass drug tests and attend appointments with their probation officers. It does not provide drug treatment unless the probationer continuously violates the terms of his probation. See *supra* Part II.C.



significant decrease in positive drug tests throughout the course of probation.<sup>459</sup> However, because HOPE does not incorporate twelve-step programs or teach offenders how to maintain their sobriety beyond the realm of probation, probationers may reoffend or continue using as soon as they are no longer under the purview of the criminal justice system. While probationers may view the continued threat of sanctions as a deterrent to relapsing *during* the program, once the threat of sanctions is removed, it is unclear how many will return to using drugs, regardless of whether they reoffend.<sup>460</sup> Therefore, swift sanction programs provide no evidence of how effective HOPE is at treating addicts, only evidence on how effective it is in promoting compliance with the terms of probation.<sup>461</sup>

To determine whether the programs are truly working, researchers must perform qualitative and long-term studies, tracking offenders' progress far beyond the program's completion. Requiring questionnaires after the end of probation would easily measure the quality of the drug treatment on offenders' lives without incurring significant costs. These would alert courts to policies that may or may not be effective in rehabilitating drug-addicted defendants.

#### CONCLUSION

Courts and legislatures have consistently struggled with the sentencing and treatment of drug-addicted defendants. In an attempt to solve this problem, several jurisdictions have created alternative drug courts with varying policies that are geared toward lowering crime rates while providing meaningful treatment to addicts. These include community courts, such as the Red Hook Community Justice Center, courts using community volunteers to help determine and administer a treatment plan, such as the Woodbury County Community Drug Court, and swift sanction probation programs, such as Hawaii's Opportunity Probation with Enforcement. These programs have seen success in terms of quantitative measures, but their qualitative long-term success for addicts is yet to be determined.

When treating drug-addicted offenders, the solution can never be to place a Band-Aid on a bullet hole. Because addiction is a lifelong struggle, the solution must be one that provides offenders with the tools to continue to

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459. See *supra* notes 362–66 and accompanying text.

460. Some probationers acknowledge the strength of the deterrent factors during participation in HOPE. See HAWKEN & KLEIMAN, *supra* note 259, at 38 (“Some probationers, when told by their probation officers that their testing frequency is being stepped down as a reward request that it *not* be stepped down, because they fear that less-frequent testing will increase their risk of going back to drug use.”).

461. Even proponents of the HOPE model acknowledge that the persistence of the “HOPE-effect” has not been studied. See Hawken & Kleiman, *supra* note 259, at 50. The report notes that one limitation of the study was that probationers were only examined while participating in the program, and therefore Hawken and Kleiman could not conclude “whether the effects of HOPE (e.g., reduced drug use and new arrests) continue after probationers complete their probation terms under HOPE.” *Id.* Hawken and Kleiman acknowledged the importance of this outstanding question. See *id.*

live a drug-free life beyond the purview of the court system. If the goal is truly rehabilitation, the only way to accomplish it is to ensure that the underlying reason for which an individual is committing crimes—addiction—is addressed on a therapeutic and long-lasting level.