The Drug Court Scandal
Morris B. Hoffman
COMMENTARY

THE DRUG COURT SCANDAL

MORRIS B. HOFFMAN*

In this Commentary, Judge Hoffman criticizes state and local jurisdictions for rushing to implement drug courts without seriously evaluating their effectiveness or considering their policy implications. After surveying the research on drug court effectiveness and examining the policy issues that inhere in drug courts, Judge Hoffman concludes that there is little evidence that drug courts reduce recidivism and substantial evidence that they create profound operational and institutional problems.

INTRODUCTION

I. DRUGS AND DRUG LAWS: A BRIEF HISTORY
   A. History of Drugs
   B. History of Drug Laws

II. THE RUSH TO DEVELOP DRUG COURTS

III. UNANSWERED SCIENTIFIC AND MEDICAL QUESTIONS: IS THERE A DRUG EPIDEMIC, AND IS DRUG ADDICTION A TREATABLE DISEASE?
   A. Rates of Drug Use
   B. The Disease Model of Addiction

IV. UNEXAMINED JURISPRUDENTIAL CONCERNS: WHAT IS THE PURPOSE OF DRUG COURTS?

* District Judge, Second Judicial District (Denver), State of Colorado. The views expressed here are, of course, my own and do not necessarily reflect the views of the District Court for the Second Judicial District or of any of my colleagues on that court. I want to thank Professors Albert W. Alschuler from the University of Chicago and William T. Pizzi from the University of Colorado for their encouragement. I also want to thank my law clerks, Edward A. DeCecco and Catherine A. Woods, and two student interns from the University of Denver School of Law, Andrew J. Willett and Steven J. Wienczkowski, for their help in gathering some of the medical information, history, social science, and other material on which I have relied in this Commentary. Finally, I want to thank my colleague William G. Meyer, who, with unbounded energy and enthusiasm, fathered the Denver Drug Court and presided over its first two and one-half years. Judge Meyer and I may disagree about our nation's rush into drug courts, but no one who knows him can doubt his motives or fail to be impressed with his zeal as a reformer and his skills as a judge.
V. Unexamined Effectiveness: Do Drug Courts Work? ................................................................. 1479
   A. General Methodological Issues ................................................................. 1481
      1. Selecting the Control ........................................................................ 1481
      2. Selecting the Target ......................................................................... 1483
      3. Selecting the Impact Measure ............................................................ 1484
   B. Informal Impact Surveys ......................................................................... 1489
   C. Formal Impact Studies ........................................................................... 1491
      1. 1991 American Bar Association Study .................................................. 1491
      2. 1994 Maricopa County Study ............................................................... 1493
      3. 1994 Dade County Study ................................................................... 1494
      4. 1996 Baltimore Study ........................................................................ 1494

VI. Unexamined Operational Concerns: How Do Drug Courts Really Work, and What Impacts Are They Having on the Rest of the Judicial System? ................................................................. 1499
   A. The Organization of the Denver District Court ........................................ 1499
   B. The Rush to Formation ......................................................................... 1500
   C. The Popcorn Effect ............................................................................. 1501
   D. Trying to Deal with the Popcorn Effect .................................................. 1508
   E. Exploding Prison Populations ................................................................ 1510
   F. Cookie Cutter Sentences ...................................................................... 1512
   G. Quality Concerns .................................................................................. 1515
   H. Changing Judges .................................................................................. 1517
   I. Permanent Drug Court Bureaucracy ....................................................... 1518
   J. INS ....................................................................................................... 1519

VII. Unexamined Institutional Concerns: Should Judges Be Making These Fundamental Policy Decisions, and Should Their Talents Be Wasted Implementing Them? ........................................................................... 1523
   A. Separation of Powers .......................................................................... 1523
      1. Impinging on the Legislative Function ............................................... 1525
      2. Impinging on the Executive Function ................................................. 1526
   B. Federal Intrusion .................................................................................... 1528
   C. Intra-Branch Problems ......................................................................... 1529
      1. Glorified Probation Officers ................................................................. 1529
      2. Institutionalizing a Single Judge’s Sentencing Philosophy .................. 1531
Drug courts are sweeping the country, a contagion fueled by federal grants and sparked by well-intentioned state and local trial judges frustrated by the lost war on drugs. These specialized courts are changing the criminal justice landscape in fundamental ways. They are affecting the arrest policies of officers on the street, the charging policies of prosecutors, and the very nature of the judicial function. They are changing the way judges deal with prosecutors, defense lawyers, defendants, and each other. They are increasing the already unhealthy interdependency of the judicial branch and the burgeoning cottage industry of private treatment providers. They are significantly altering the allocation of limited judicial resources. They are filling our state prisons with drug users, despite promising to do just the opposite. They are inviting comprehensive federal involvement, thereby risking comprehensive federal meddling, in the day-to-day operations of state and local courts. And they are doing all of this with nary an intellectual shot being fired.1

1. Despite the fact that hundreds of drug courts have spread to jurisdictions all over the United States and hundreds more are scheduled to spread, see infra text accompanying note 114, they have been the object of almost no serious legal scholarship. Bar journals, judicial journals, and, to a lesser extent, law reviews are filled with short articles about drug courts, usually about recently adopted drug courts and often written by the judges who founded the courts. See, e.g., Susan Gochros, Hawaii Drug Court, Ho 'Ola Hou (Renewed Life), HAW. B.J., Mar. 1998, at 32 passim; Judge Stephen L. Henriot, Drug Court in the Third District, UTAH B.J., Aug. 1997, at 35 passim; Hon. William D. Hunter, Drug Treatment Courts: An Innovative Approach to the Drug Problem in Louisiana, 44 LA. B.J. 418 passim (1997); Judith S. Kaye, Special Report: The State of the Judiciary, N.Y. St. B.J., May/June 1998, at 50 passim; Claire McCaskill, Combat Drug Court: An Innovative Approach to Dealing with Drug Abusing First Time Offenders, 66 UMKC L. REV. 493 passim (1998); Hon. Sheila M. Murphy, Drug Courts: An Effective, Efficient Weapon in the War on Drugs, 85 ILL. B.J. 474 passim (1997). Most of these articles are long on anecdote and self-congratulation, but painfully short on analysis. The one exception I came across was a refreshingly restrained and thoughtful piece written by William Keesley, who is a South Carolina Circuit Court judge. See Hon. William P. Keesley, Drug Courts, S.C. LAW., July/Aug. 1998, at 32.

The few scholarly treatments addressing drug courts are aimed at broader issues of "restorative justice" or "therapeutic jurisprudence," and their discussions of drug courts tend to be quite clipped. E.g., Hon. Peggy Fulton Hora et al., Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America, 74 NOTRE DAME L. REV. 439 passim (1999); David B. Wexler, Reflections on the Scope of Therapeutic Jurisprudence, 1 PSYCHOL. PUB. POL'Y & L. 220 passim (1995). I am aware of only four scholarly pieces discussing drug courts at length. Two of them can be described as fairly pro-drug court, though both recognize and address some of the difficult empirical and institutional issues raised in this Commentary. See James R. Brown, Note, Drug Diversion Courts: Are They
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,” and by the bureaucrats’ universal fear of being the last on the block to have the latest administrative gimmick. We have embraced the drug court panacea without asking, let alone resolving, even the most basic of questions: What is the purpose of drug courts? Do drug courts work? Are the costs of drug courts, including their costs in de-individualized justice, worth their benefits? Should the sentencing philosophy of a single drug court judge or group of drug court judges be institutionalized?

Beyond these basic questions, we have yet to examine several profound policy shifts implicit in creating drug courts: Should judges be making drug policy simply because elected officials lack the political will to do so? Do we really want to stimulate the prosecution of low-level possession and sales cases to such a great degree that we fill our state prisons with those who cannot be treated successfully? Is it an efficient use of limited judicial resources to have drug court judges serving as glorified probation officers?

These are the kinds of hard, fundamental questions that, in a less hysterical environment, careful judges, careful court administrators, and, indeed, a careful body politic would insist on examining before committing to such a serious undertaking. They are questions we all should insist on asking before a single new drug court is created or a single existing one is continued.

By this critique, I do not intend to disparage any of my colleagues around the country who are committed believers in the drug court concept. On the contrary, their energy, hard work, and enthusiasm, together with a healthy dose of federal money, is what is responsible for the drug court experiment becoming the drug court orthodoxy.

Nor do I intend to deprecate the efforts of the many drug defendants who have used the treatment opportunity provided by drug courts to turn their lives around. I have attended several drug


2. See, e.g., Hora et al., supra note 1, at 440; Wexler, supra note 1, at 220.
court graduations and am always moved by the individual success stories that abound there.

Nor do I hold myself out as any kind of drug court expert pretending to have all, or indeed any, of the answers. But I do have a few questions, and it should be troubling to us all that so few of us are asking any of these questions. The drug court emperor may indeed be wearing a fine set of clothes, but we cannot know if we refuse to look.

I. DRUGS AND DRUG LAWS: A BRIEF HISTORY

Drug courts are just the latest Band-Aid™ we have tried to apply over the deep wound of our schizophrenia about drugs. It may, therefore, be useful to take a moment to put our current thoughts about drugs and drug laws into some historical perspective.

A. History of Drugs

Humans have used drugs for tens of thousands of years, and

3. I apologize in advance for what surely must be many technical oversimplifications and misunderstandings that well-informed readers of this Commentary will no doubt detect. I recognize that this apology contains no small amount of irony, given the fact that one of the themes of this critique is that judges, who are the most general of all generalists, are ill-equipped to understand the many difficult chemical, neurological, psychiatric, cultural, and philosophical issues surrounding drug use and abuse. All I can say is that sometimes it takes a thin-icer to rescue a thin-icer, and maybe my own ineptitude at describing the ineptitude of others is the best evidence that judges simply should not be engaged in the meta-judicial exercise that is the drug court.

4. The word "drug" comes from the Anglo-Saxon word dryge, which means "dry." See THE NEW WEBSTER ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 266 (Virginia S. Thatcher ed. et al., 1971). The etymology apparently reflects that ancient drug preparations were made by drying various plants. See id. Many drug preparations continue to be made in by this method.

I use the term "drugs" in this Commentary in its broadest sense, to include all substances, natural and synthetic, legal and illegal, that produce a recognized medicinal or recreational effect when ingested. Pharmacologists typically divide drugs into twelve primary categories: antidepressants, antipsychotics, cannabis, combinations, dissociative anesthetics, hallucinogens, narcotic analgesic agonists, narcotic antagonists, nonprescription analgesics, sedative hypnotics, stimulants, and volatile inhalants. See ROBERT O'BRIEN ET AL., THE ENCYCLOPEDIA OF DRUG ABUSE xxii, xxvii (2d ed. 1992). Some of the more common drugs discussed in the remainder of this Commentary are classified as follows: Alcohol is classified as a sedative hypnotic, as are Benadryl, Librium, Valium, and barbiturates. See id. at xxv. Amphetamines, cocaine, caffeine, and nicotine are classified as stimulants. See id. at xxvi. Cannabis, because it exhibits many characteristics across several of the categories, is classified as its own category. See id. at xxiii. The so-called "opiates," which include the natural substances opium, morphine, and codeine, as well as the synthetic and semi-synthetic substances heroin, percocet, percodan, and Demerol, are classified as narcotic analgesic agonists. See id. at xxiv. The word "narcotic" refers to drugs that are central nervous system depressants. See id. at 202.
there has always been a complex overlap between medicinal, religious, and recreational uses. The earliest written record of any drug is a reference by a Sumerian writer in 5000 B.C. to the "joy plant," which historians now believe was the opium poppy. As early as 3000 B.C., the Chinese used a shrub containing ephedrine to make

"Analgesic" refers to their historical, and in some cases current, use as painkillers that do not cause loss of consciousness. See id. at 33. "Agonist" means the drugs work by reacting at a receptor site of a cell, as opposed to antagonists, which work by blocking such reactions. See id. at 13.

5. See generally DRUGS AND CIVILIZATION 19 (Sally Freeman ed., 1988) (documenting the long history of drugs throughout different cultures). Indeed, some anthropologists believe that the discovery of grain-based alcohol, particularly beer, may have played a significant role in the decision by hunter-gatherer tribes in the Old Stone Age to ensure a supply of grain by settling down in fixed villages to pursue agriculture. See id. at 20. Thus, we may owe agriculture, and therefore civilization itself, to beer.

6. This overlap is what gives drug use an important cultural dimension. How drugs have been viewed in various societies, and therefore how drug abuse has been viewed, depends very much on the particular uses approved by a given culture, as well as on the way in which a given culture views notions of addiction and free will. By this, I do not mean at all to be adopting the moral relativism of many of the modern proponents of drug legalization. On the contrary, I accept that there very well may be a fixed amount of social and economic damage done whenever an individual decides to use drugs to disengage from reality and that that damage may not be culture-dependent. The drunken textile worker rendered unconscious in eighteenth century Birmingham was worthless to his family and his factory in much the same way that the nineteenth century peyote-laden Navajo warrior was worthless to his village. The cultural differences are not so much on the debit side of the ledger as on the credit side: England in the throes of the industrial revolution placed considerably less cultural value on drunkenness than the Navajo placed on the purported ability of peyote to increase religious consciousness. I actually see our increasing intolerance of recreational drugs of any kind as a healthy sign that we are becoming enlightened, not to exaggerated dangers of drug use, but rather to the exaggerated nature of its purported benefits. See, e.g., ALETHEA HAYTER, OPIUM AND THE ROMANTIC IMAGINATION 191 (1968) (providing a fascinating examination of this idea in the context of the purported ability of opium to increase Samuel Coleridge's poetic powers). In any event, anyone who doubts that culture is a critical component of the role drugs play in a given society need only compare the ways in which alcohol and heroin are perceived in most modern Western democracies. Compare infra text accompanying notes 18-27 (discussing the history of alcohol), with infra text accompanying notes 37-42 (discussing the history of heroin).

7. See O'BRIEN ET AL., supra note 4, at ix; see also ALFRED BURGER, DRUGS AND PEOPLE: MEDICATIONS, THEIR HISTORY AND ORIGINS, AND THE WAY THEY ACT 14-15 (1986) (estimating 4000 B.C.). Opium is made by drying the juice from unripened seed pods of the oriental poppy, Papaver somniferum. See HEROIN: THE STREET NARCOTIC 19 (Fred Zackon ed., 1992) [hereinafter HEROIN]; O'BRIEN ET AL., supra note 4, at 220. In fact, the word "opium" is derived from a Greek word meaning "juice." See BURGER, supra, at 15. The dried juice becomes a brownish gum, which is then formed into bricks or cakes. The bricks or cakes then are dissolved in water to reform a sticky paste for smoking. See O'BRIEN ET AL., supra note 4, at 220. The pharmacologically active ingredient in opium is morphine. See infra note 28 and accompanying text. Opium is classified as a narcotic analgesic agonist. See supra note 4. It is either a Schedule I, II, III, or V controlled substance, depending on its particular form and quantity. See infra note 86 (listing statutory classifications of various drugs).
an intoxicating inhalant. By 2700 B.C., the Chinese were using cannabis to make tea, and they introduced it to the Indians in 2000 B.C., who were the first to dry it and smoke it.

Of course, the use of wine as an intoxicant was central to both Greek and Roman cultures. The Greeks not only drank lots of wine, they also used cannabis and opium extensively. The Roman thirst for wine was even more extreme, and Roman conquests of the eastern Mediterranean further increased the classical use of opium.

8. See O'BRIEN ET AL., supra note 4, at ix. Ephedrine is a cardiac and central nervous system stimulant. See supra note 4. Today it is produced synthetically and used to treat asthma, allergies, hypertension, and narcolepsy, generally as a bronchial dilator. See O'BRIEN ET AL., supra note 4, at 111; PHYSICIAN'S DESK REFERENCE: GENERICS 1027-29 (4th ed. 1998) [hereinafter PDR].

9. See O'BRIEN ET AL., supra note 4, at ix-x. Cannabis refers to the Indian hemp plant, Cannabis sativa. The plant's resin, flowering tops, leaves, and stem all contain its pharmacologically active ingredient, tetrahydrocannabinol (THC). See id. at 62. Cannabis is classified in its own pharmacological category, see supra note 4, because it exhibits so many different characteristics, depending on its concentrations, see O'BRIEN ET AL., supra note 4, at 63. In very high doses, it can produce psychedelic effects. See id. At lower, more common doses it exhibits some characteristics of depressants (sedation), some characteristics of narcotics (pain killing), and even some characteristics of stimulants (enhanced perception). See id. Cannabis is a Schedule I controlled substance. See infra note 86 (listing statutory classifications of various drugs).

10. Wine, of course, was central to the worship of the Greek god Dionysus and his Roman version, Bacchus. There is no doubt that alcohol was widely used, and sometimes abused, in ancient Greece, both as part of the cult of Dionysus and quite apart from it. Other drugs were also well known to the Greeks and were central to their mythology and religious practices. The residents of several Greek cities celebrated various rites of spring by drinking kykeon, which is believed to have been a grain fungus containing lysergic acid, later synthesized as LSD. See DRUGS AND CIVILIZATION, supra note 5, at 32-33. Opium also was well known to the Greeks, even in Alexander's time. Indeed, it was probably Alexander who introduced opium to the Persians and Indians, who then introduced it to the Chinese. See id. at 81. Hippocrates experimented with opium as a medicine, and prescribed it for sleeplessness, epilepsy, and dropsy. See id. at 44. Drugs and their effects on people were popular topics in Greek literature. The great Greek poetess Sappho describes the effects of opium in some of her poetry. See id. at 63, 65. Homer reports in The Odyssey that Helen of Troy gave two of Odysseus's crew members a drug, called nepenthe, which was probably a mixture of wine, opium, belladonna, and perhaps cannabis, to treat their grief over their lost commander. See HOMER, THE ODYSSEY 59-60, lines 233-52 (Robert Fitzgerald transl., 1998). Homer also devotes a famous section of The Odyssey to the drug-induced lethargy of three of Odysseus's crewmen in the land of the Lotus Eaters. In what may have been the first example of compulsory drug treatment, Odysseus recaptured his wayward crewmen, "drove them, all three wailing, to the ships, [and] tied them down under their rowing benches." Id. at 148, lines 105-06.

11. The Romans took wine drinking and wine worship to such extremes in their bacchanalia that by 100 A.D. their excesses produced the first classical laws against public drunkenness. See O'BRIEN ET AL., supra note 4, at x; infra text accompanying note 62. As Roman legions contacted drug cultures in the east, Roman opium use, primarily for medicinal purposes, became more prevalent. Indeed, Egyptian opium remedies became so popularized by Galen, the court physician to Marcus Aurelius, that such remedies were known for centuries later as "Galenicals." See DRUGS AND CIVILIZATION, supra note 5,
The Crusades in the eleventh and twelfth centuries accelerated medieval Europe's knowledge of, and appetite for, drugs. The Crusaders returned home with many Asian drug preparations, including the Persian variety of cannabis—hashish—as well as distilled alcohol.  

As the great explorer-nations of the Middle Ages began expanding Europe's contact with the Far East and Far West, drugs and drug knowledge became increasingly significant in commerce. Marco Polo returned from China with detailed instructions on the cultivation and use of opium and cannabis.  

Likewise, after discovering the Americas, Europeans returned home with coca leaves for chewing, morning glory seeds for eating, and tobacco for smoking.  

From the end of the Dark Ages through the Renaissance and the Age of Reason, European drug use in almost all forms became more and more common as advances in chemistry isolated the relevant compounds and produced cheaper and more potent forms of ancient drugs. But opium remained the king of all recreational drugs. In China, opium use was widespread by 1600. By the 1800s, opium use...
in Europe also reached epidemic proportions.\(^\text{17}\)

In America, however, our Puritan ancestors seem to have made a significant, though perhaps unconscious, cultural turn. Alcohol became the colonial recreational drug of choice, to the relative exclusion of opium. Though opium continued to be popular in Europe and Asia, it never took hold in colonial America, despite the fact that it was widely available and widely used for medicinal purposes.\(^\text{18}\)

In the colonies, people of all stations, occupations, and ages consumed alcohol freely and in large quantities.\(^\text{19}\) Though distilled alcohol had roots almost as old as opium,\(^\text{20}\) America embraced it as a kind of New World drug—clean and simple to consume, almost

Opium War on China when the Manchu rulers took steps in the 1830s to ban its importation. See DRUGS AND CIVILIZATION, supra note 5, at 82–85; HEROIN, supra note 7, at 25; O'BRIEN ET AL., supra note 4, at xiii. See generally JACK BEECHING, THE CHINESE OPIUM WARS (1975) (discussing the Opium Wars); PETER WARD FAY, THE OPIUM WAR: 1840–42 (1975) (discussing the history of opium and China's first Opium War).

17. In England in 1850, for example, it was quite common for women—especially working-class women doing textile work at home—to give opium to their children to make them sleep during the day. Several opiate elixirs were marketed specifically for this purpose, with names like “Mother Bailey's Quieting Syrup.” See O'BRIEN ET AL., supra note 4, at xiv.

18. Cheap opiates were in widespread medical use in colonial America, but there is no evidence that opium was used recreationally on any significant basis, as it had been and continued to be in Europe and China. See JOHN RUBLOWSKY, THE STONED AGE: A HISTORY OF DRUGS IN AMERICA 123 (1974). Indeed, there were probably no more than 120,000 opium addicts in the United States in 1875—when opium addiction had already reached epidemic proportions in Europe—and these addicts were for the most part unfortunate victims of Civil War field medicine. See BEECHING, supra note 16, at 178; infra text accompanying note 29. But see infra note 29 (suggesting that reports of morphine addiction of returning Civil War veterans were exaggerated greatly). Similarly, though hemp was an important colonial crop for cloth and rope, there is no evidence that marijuana was widely smoked in the colonies for recreation. See RICHARD LAWRENCE MILLER, THE CASE FOR LEGALIZING DRUGS 85 (1991).

19. See Paul Aaron & David Musto, Temperance and Prohibition in America: An Historical Overview, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 131 (Mark H. Moore & Dean R. Gerstein eds., 1981). Average annual per capita consumption by colonial Americans was several times what it is today. See STANTON PEELE, DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL 35 (1989); see also W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION 8–10 (1979) (stating that in 1770, Americans drank three and a half gallons of alcohol per year per capita; that number increased to four gallons in 1830; it fell to less than one gallon by 1920; and even in the carefree 1970s, the number was still less than two gallons). Colonial alcohol consumption was not only large, it was widespread. Though there were some cultural differences, people drank pretty much regardless of their age, sex, or class and did so everywhere they went. See RORABAUGH, supra, at 11–16, 20–21.

20. See supra text accompanying note 12.
democratic—not at all like the smoky, foreign substances used by Asian potentates and European decadents. Indeed, Puritans called alcohol the "Good Creature of God."\textsuperscript{21}

Drinking alcohol was an important part of the fabric of daily colonial life. The tavern was a significant social center, especially in New England.\textsuperscript{22} Alcoholism was not recognized as a problem, probably due in no small part to powerful Protestant notions of free will.\textsuperscript{23}

The Industrial Revolution fundamentally changed America's attitude toward alcohol. In the fifty years between 1785 and 1835, alcohol came to be viewed as acutely disruptive to the growing industrialized and increasingly urbanized work force.\textsuperscript{24} Per capita alcohol consumption plummeted, dropping to one-third its colonial levels.\textsuperscript{25} Drinking became marginalized, and the people who drank regularly tended toward overdrinking. Improved methods of distillation, which made distilled spirits significantly more potent than in colonial times, may have contributed to the pattern of fewer people drinking more.

\textsuperscript{21} This description is usually attributed to the Puritan leader Increase Mather, who wrote in 1673: "Drink is in itself a creature of God, and to be received with thankfulness." RORABAUGH, supra note 19, at 23.

\textsuperscript{22} See JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 37 (1963) (describing the role of taverns in the colonial social order).

\textsuperscript{23} See Harry Gene Levine, The Good Creature of God and the Demon Rum: Colonial American and 19th Century Ideas About Alcohol, Crime, and Accidents, in NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, RESEARCH MONOGRAPH No. 12, ALCOHOL AND DISINHIBITION: NATURE AND MEANING OF THE LINK 111, 121-22 (Robin Room & Gary Collins eds., 1983) ("Drunkenness was not so much seen as the cause of deviant social behavior—in particular crime and violence—as it was construed as a sign that an individual was willing to engage in such behavior.").

\textsuperscript{24} Peele has described this fundamental change this way: [The colonial attitude toward drinking] changed dramatically in the fifty years dating roughly from 1785 to 1835. During this period, drinking became a disruptive force for many Americans. The tight-knit community tavern disappeared, and instead the new industrialized work force and the western ranch laborer went to boisterous saloons to get drunk. Imagine as a model of nineteenth-century male drinking the Dodge City dance hall—where the only women likely to be present were prostitutes and where gunplay and fights were common. Middle- and upper-class Americans cut back their drinking drastically because it was no longer considered appropriate for an industrious life. As alcohol was eliminated from the ordinary daily routines of the middle class, when people did drink, they were more likely to go on binges where they drank all out. PEELE, supra note 19, at 36; see also RORABAUGH, supra note 19, at 167-69 (arguing that the cyclical pattern of people abstaining then bingeing was consonant not only with industrialization in general, but also with American industrial compartmentalization).

\textsuperscript{25} See PEELE, supra note 19, at 37; Aaron & Musto, supra note 19, at 136, 157, 164.
This period also saw the beginnings of the temperance movement, with its twin religious axioms: (1) alcohol is evil and therefore bad for everyone in any amount; and (2) alcohol can enslave a people against their will. Although the former has fallen out of favor, the latter formed the moral foundation for the modern disease theory of addiction and planted the seeds of a deep American social ambivalence about alcohol use and abuse.

In the meantime, science and medicine were creating new and more powerful drugs. At the turn of the eighteenth century, chemists isolated the active ingredient in opium and dubbed it "morphine." Doctors used morphine extensively during the Civil War to lessen the suffering of wounded soldiers in field hospitals, thereby producing a reported 400,000 morphine addicts. Cocaine—the principal alkaloid

26. See Gusfield, supra note 22, at 29-38 (discussing the political history of the temperance movement); infra note 70 (discussing earlier American temperance efforts). See generally John Kobler, Ardent Spirits: The Rise and Fall of Prohibition (1973) (discussing the social history of Prohibition).

27. See infra text accompanying notes 130-47.

28. A German pharmacist, F.W. Sertturner, usually is credited with the discovery of morphine. See Heroin, supra note 7, at 24; O'Brien et al., supra note 4, at xiv. He named the substance after Morpheus, the Greek god of sleep and dreams. See id. at xiv. Morphine is an extraordinarily potent painkiller, and it remains the standard against which other painkillers are measured. See Heroin, supra note 7, at 24; O'Brien et al., supra note 4, at 194; PDR, supra note 8, at 2182-94. Morphine first was synthesized in 1952. See O'Brien et al., supra note 4, at 195. It is, of course, an opiate, and, like opium and heroin, it is classified as a narcotic analgesic agonist. See supra note 4. Because pure morphine is not very soluble, it is commonly used, both medically and recreationally, in sulfate forms. See O'Brien et al., supra note 4, at 195; PDR, supra note 8, at 2182. Morphine sulfate is an odorless white crystal, or crystalline powder, and is typically used either orally or by injection (after rehydrating). See O'Brien et al., supra note 4, at 195. Morphine is a Schedule II, III, or V substance, depending on its dose. See infra note 86 (listing the statutory classifications of various drugs).

29. See O'Brien et al., supra note 4, at xiv-xv. The hypodermic needle was introduced into medicine in the early 1850s, and the remarkable painkilling effects of morphine were made even more remarkable by its injection. See David F. Musto, The American Disease: Origins of Narcotics Control 1 (3d ed. 1999). Physicians wrongly believed that morphine's addictive qualities could be avoided entirely by bypassing the digestive system. See O'Brien et al., supra note 4, at xiv-xv. Morphine therefore was injected as an emergency analgesic in field hospitals during the American Civil War and the Franco Prussian War of 1870-71. The resultant morphine dependency was so widespread that it was dubbed "the soldier's disease," id. at 1-2, and "the army disease," Heroin, supra note 7, at 28.

Despite the conventional description of these returning soldiers as "addicts," Yale psychiatrist and addiction theorist David Musto reports that there is actually little historical evidence that such soldiers were in fact morphine "addicts." See Musto, supra, at 1-2, 301 n.2. Indeed, he reports that Civil War field hospitals most commonly applied morphine topically and only rarely injected it. See id. at 301 n.2. Musto contends that our description of returning Civil War soldiers as morphine "addicts" is not supported by contemporaneous evidence. See id.
in coca leaves—was isolated in the 1850s. By 1878, cocaine was used extensively as a treatment for morphine addiction, and it quickly became a popular surgical anesthetic.

In a rather strange twist on our Puritan heritage, as the

30. See O'BRIEN ET AL., supra note 4, at 73. Cocaine is an alkaloid found in the leaves of the coca plant, Ethroxylon coca, that grows abundantly in the Andes Mountains of South America. See COCAINE: A NEW EPIDEMIC 20 (Chris-Ellyn Johanson ed., 1986) [hereinafter COCAINE]. It is classified as a stimulant. See supra note 4. The German chemist Albert Niemann first isolated and identified its active ingredient, benzoylmethylecognine, in the 1850s. See COCAINE, supra, at 53; KARCH, supra note 14, at 14–17; O'BRIEN ET AL., supra note 4, at 73. Cocaine can be ingested in a variety of ways, including the chewing of coca leaves, application to any mucous linings of the body, nasal inhalation (or "snorting"), and intravenous injection. See COCAINE, supra, at 20–27. Because cocaine loses much of its effect if taken orally, because in its powdered hydrochloride form it is not as effective as when smoked, and because the direct smoking of coca paste is extremely dangerous because of the impurities in the paste, two methods have been developed to allow for the smoking of cocaine. See id. at 26. The first, which is called "freebasing," became popular in the early 1980s and involves heating dissolved cocaine hydrochloride with ether (or lighter fluid or any other solvent) to convert the hydrochloride form to a smokeable alkaloid form. See id.; O'BRIEN ET AL., supra note 4, at 121. But because freebasing is time-consuming and dangerous, drug dealers developed a process of cooking a mixture of cocaine hydrochloride, water, and bicarbonate of soda into a crystallized and smokeable form, which is sometimes referred to as "crack." See COCAINE, supra, at 26; Jerome H. Skolnick, A Critical Look at the National Drug Control Strategy, 8 YALE L. & POL'Y REV. 75, 98 (1990). The word "crack" may have been coined to describe the crackling sound that the mixture makes during the cooking process, see Skolnick, supra, at 98, or it may refer to the way in which the pancake-shaped residue that is left after the cooking process is then cracked into smaller chips, see O'BRIEN ET AL., supra note 4, at 85. The cocaine consumed in both the freebase and crack forms is not only substantially purer than its powdered predecessor, but is also much more rapidly absorbed by being smoked, carried in just a few seconds from the lungs to the brain. See KARCH, supra note 14, at 57; O'BRIEN ET AL., supra note 4, at 85, 121. Indeed, although smoked cocaine produces blood levels comparable to injection, it appears to produce effects, and risks of toxicity, greater even than intravenous use. See KARCH, supra note 14, at 57. Crack also is substantially cheaper per "high" than powdered cocaine. See COCAINE, supra, at 27. Cocaine is a Schedule II substance. See infra note 86 (listing statutory classifications of various drugs).

31. See COCAINE, supra note 30, at 30–33; KARCH, supra note 14, at 38–40; O'BRIEN ET AL., supra note 4, at xv. Many other drug compounds were isolated in the veritable renaissance of drug science that occurred between 1750 and 1900. A liquid form of ether, dubbed "anodyne," was developed in 1730, and it became popular not only as a treatment for a variety of ailments, but also as a recreational drug thought to be non-addictive. See O'BRIEN ET AL., supra note 4, at xiv. Nitrous oxide was discovered in 1776, synthesized in 1777, and used thereafter both as an anesthetic and recreationally at "laughing gas" parties. See id. The first synthetic sedative, chloral hydrate, was developed in 1869 and was widely used recreationally, especially in potentially lethal combination with alcohol. The mixture was dubbed "knockout drops" or "Mickey Finn." See id. In 1896, mescaline was isolated as the active ingredient in peyote. People used Chloroform, which also was developed in this period, anesthetically. In fact, Queen Victoria's physicians gave it to her during childbirth, and she hailed it as "blessed, soothing, quieting and delightful beyond measure." Andrew A. Skolnick, Lessons from US History of Drug Use, 277 JAMA 1919, 1919 (1997).
temperance movement tried to push alcohol out of mainstream America, old-fashioned Yankee commercialism introduced the mainstream to opiates and to the newly developed alkaloid forms of cocaine. All manners of potions, elixirs, and other products, including perhaps the most famous, Coca-Cola, openly contained opiates or cocaine, often in quite large doses.\footnote{32}

32. See O'BRIEN ET AL., \textit{supra} note 4, at xiv. For example, Tucker’s “Asthma Specific,” a popular elixir that touted itself as a cure for asthma and other respiratory afflictions, contained 420 milligrams of cocaine per ounce. See KARCH, \textit{supra} note 14, at 106. Powdered cocaine is generally “snorted” in “lines,” and one line typically contains 50 to 75 milligrams of cocaine. See \textit{id}. So one ounce of Tucker's elixir contained five to nine times the amount of cocaine snorted in a single line. Coca-Bola, a popular cocaine-containing chewing gum sold in the late 1800s and early 1900s, contained 710 milligrams of cocaine per ounce, or the equivalent of 10 to 14 lines. See \textit{id}.

Despite the mythology surrounding Coca-Cola, it did not contain cocaine in quantities nearly as great as many of the less famous cocaine elixirs of the time. As originally produced in 1886, Coca-Cola probably contained no more than 1.5 milligrams of refined cocaine per ounce. See \textit{id}. at 102. Sometime after 1901, the company dropped refined cocaine from its formula entirely and began instead to use coca leaves that had been de-cocainized. See \textit{id}. at 28.

The widespread use of elixirs of cocaine in the late 1800s was just as popular in Europe as it was in America. One of the most popular European cocaine elixirs was a mixture of liquid cocaine and wine, and the most popular of all the European cocaine-wine products was Vin Mariani, named after its Corsican manufacturer, Angelo Mariani. See \textit{id}. at 23-29. Vin Mariani contained approximately six milligrams of cocaine per ounce, which was four times the cocaine per ounce as Coca-Cola, though still substantially less than elixirs like Tucker’s. See \textit{id}. at 27. Despite its relatively low levels, however, the effect of the cocaine in Vin Mariani and comparable cocaine-wine mixtures was greatly enhanced by the presence of alcohol. Though the effect has long been known to users and emergency room personnel, in the late 1980s researchers at Yale and in Barcelona simultaneously discovered that when alcohol is ingested with cocaine, the body metabolizes a new substance, cocaethylene, which has the same stimulant properties as cocaine, but lasts much longer. See \textit{id}. at 101. Alcohol thus has the effect of multiplying the effective dose of any cocaine with which it is taken. Some of the most famous drinkers and touters of Vin Mariani included Pope Leo XIII, Jules Verne, and Thomas Edison. See COCAINE, \textit{supra} note 30, at 56-57; O'BRIEN ET AL., \textit{supra} note 4, at xvi.

Straight cocaine also had its famous nineteenth century proponents. Sigmund Freud began experimenting with it in the early 1880s as a treatment for his patients’ and friends’ morphine addictions, and he published his famous monograph, \textit{On Coca}, in 1884. KARCH, \textit{supra} note 14, at 40; see also THE COCAINE PAPERS OF SIGMUND FREUD (Robert Byck ed. 1974) (compiling Freud's work on cocaine and suggesting that Freud considered cocaine effective for certain therapeutic treatments). There is even some indication that Freud's orders for cocaine may have stimulated the German pharmaceutical giant Merck to begin the first efforts at large-scale cocaine production. See KARCH, \textit{supra} note 14, at 85-86. Freud also may have discovered cocaine's anesthetic uses, though this discovery is usually credited to the German doctor Karl Köllner, who used drops of a cocaine solution to prevent pain during eye surgery. See \textit{id}. at 37-51. Freud probably began taking cocaine orally in 1884 to treat his own depression. See \textit{id}. at 43; O'BRIEN ET AL., \textit{supra} note 4, at xvi.

The most famous fictional cocaine user, of course, is Sherlock Holmes. Like Freud, Holmes was described to have used the drug to treat depression—the depression
By 1900, opiates and cocaine had achieved remarkably broad medicinal acceptance in America. Regular users tended to be in the middle and upper classes and tended to be white women in the Northeast and white men in the South. Widespread home use was not limited to oral consumption in the form of elixirs; the 1897 Sears, Roebuck and Company mail-order catalog, for example, offered a selection of syringe kits for intravenous morphine injections.

Despite the efforts of the temperance movement, alcohol remained the most common recreational drug in America throughout the eighteenth and nineteenth centuries. Opium, cocaine, and other drugs favored in mainstream Europe did manage to find recreational niches in America, but by the 1930s, our social opprobrium drove those drugs into the social margins.

Doctors developed heroin in the late 1800s, first as a substitute for morphine and then as a cure for morphine addiction. Americans with which he became afflicted after solving a particularly challenging case—though, unlike Freud, Holmes used cocaine intravenously. References to his use appear in several stories, most prominently in The Sign of Four. SIR ARTHUR CONAN DOYLE, THE SIGN OF FOUR (1974). David Musto delightfully discusses the connections between Freud and Holmes in his monograph. See David Musto, A Study in Cocaine, in THE COCAINE PAPERS OF SIGMUND FREUD, supra, at 357–70. Nicholas Meyer developed these ideas even further in his novel. See NICHOLAS MEYER, THE SEVEN-PER-CENT SOLUTION passim (1974).

33. See HEROIN, supra note 7, at 31.

34. See id. This widespread use of opiates and cocaine at the turn of the century does not appear to have resulted in any significant reported public health problems. See PEELE, supra note 19, at 233. This paradox of widespread use of commercial opiates and cocaine, some with extraordinarily high drug content, see supra note 32, in the absence of any evidence of widespread addiction or other public health effects, is just one example of a pattern that seems to be repeated throughout history in many different cultures. The cultural set and setting in which a drug is consumed seems to have as much or more to do with whether it will be abused than its particular chemistry or dosage. These historical examples form an important part of the argument against the disease model of addiction. See infra text accompanying notes 130–47.

35. See O'BRIEN ET AL., supra note 4, at xv.

36. See infra text accompanying notes 39, 41, 45.

37. See O'BRIEN ET AL., supra note 4, at 139. Heroin, or diacetylmorphine, can be produced from, and greatly resembles, morphine. See HEROIN, supra note 7, at 33; O'BRIEN ET AL., supra note 4, at 139. Like morphine, it is a narcotic analgesic agonist. See supra note 3. The British chemist C.R. Wright first synthesized heroin in 1874. See HEROIN, supra note 7, at 33. The German pharmaceutical company Bayer began to produce heroin in commercial quantities in 1898 as an even more powerful and purportedly non-addictive analgesic substitute for morphine. See HEROIN, supra note 7, at 33; O'BRIEN ET AL., supra note 4, at 139. The word "heroin" comes from the German word heroisch, which means "powerful" or "heroic" and presumably was meant to describe the euphoric feeling that it can produce. See id. Heroine is most commonly traded and consumed in its crystalline form and used intravenously after being dissolved in water. See id. at 139–40. Although it can also be taken orally, sniffed like cocaine, placed under
also used heroin extensively in the latter part of the 1800s, not only in traditional medical treatment, but also as a medicinal-recreational drug similar to the opium-cocaine elixirs. It sounds almost unbelievable to us today, but by 1900, as many as one million Americans regularly used heroin. Thanks in large part to a remarkably intense public and medical education effort spearheaded by President Theodore Roosevelt and his anti-narcotics advisor, Hamilton Wright, and fueled with liberal dashes of pre-World War I xenophobia, recreational and commercial opiate use—especially heroin use—was driven from the mainstream in the United States with astounding speed. By 1930, heroin use had become the quintessence of criminality, and heroin addiction was not viewed as any more significant a public health problem than murder, rape, or a host of other organically criminal behaviors. By the end of World War II, there were fewer than 50,000 heroin addicts in the United States. As with many long-forgotten drugs, the counter-culture revolutions of the 1960s reintroduced heroin to a new generation of recreational users. By 1989, there were an estimated 500,000 heroin addicts in the United States, and heroin continues to play a role in the current picture of drug abuse.

Much as the Civil War introduced Americans to morphine, World War II introduced us to amphetamines, which were regularly

the tongue, or smoked, these methods are not very efficient and, given heroin's high price, are therefore relatively rare. See id. at 140. Heroin is a Schedule I controlled substance. See infra note 86 (listing statutory classifications of various drugs).

38. See O'BRIEN ET AL., supra note 4, at xx.
39. See HEROIN, supra note 7, at 36-43.
40. See id. at 42-44.
41. See id. at 44.
42. See id. at 47.
43. The word "amphetamine" refers to a group of related organic compounds, each consisting of a phenyl ring, a methyl group, a two-carbon side chain, and an amino group. See AMPHETAMINES: DANGER IN THE FAST LANE 28 (Scott E. Lukas ed., 1992) [hereinafter AMPHETAMINES]. Amphetamines do not occur in nature; they must be synthesized. See id. at 19. They were first synthesized in 1887 in Germany, but were largely forgotten until the 1930s. See id. In 1932, the American drug company Smith, Klein & French marketed a nasal inhaler containing an amphetamine under the trade name Benzedrine, and many real and imagined medical uses for amphetamines quickly followed. See id. at 19-21. They commonly were used to treat schizophrenia, morphine addiction, codeine addiction, tobacco smoking, infantile cerebral palsy, low blood pressure, and hiccups. See id. at 21. Trade names for some popular amphetamines have now become familiar, such as Dexedrine (which is a form of amphetamine called dextroamphetamine sulfate), Methedrine (methamphetamine), and Ritalin (methylphenidate). See BURGER, supra note 7, at 157-58. Amphetamines are stimulants, see supra note 4, and are classified as either Schedule II, III, or IV substances, depending on their form, see infra note 86 (listing the statutory classification of various drugs).
included in British, American, German, and Japanese mess kits as tools to stay awake and as general energy supplements. Amphetamines quickly became popular in post-war America, both medically and recreationally. It took until the 1960s for the forces of social opprobrium, or some cynics would say the rediscovery of an allegedly much safer stimulant—cocaïne—to dampen the popularity of amphetamines and drive their use, as with heroin, to the cultural margins. Even today, however, amphetamine use does not carry with it the levels of stigma associated with heroin.

Families of tranquilizers—like Valium and Librium—began to be synthesized in the 1950s and 1960s, and they soon took their temporary places in the pantheon of popular recreational drugs. Glue sniffing appeared in the 1950s, disappeared in the 1960s, and has been coming and going ever since. Lysergic acid diethylamide (LSD) and other hallucinogens were widely used in the countercultures of the 1960s, fell quickly out of use within a decade, and pop up now and then as part of the “other drug” background noise. “Angel dust,” or phencyclidine hydrochloride (PCP), a particularly dangerous dissociative anesthetic, also became popular in the 1960s, though its use has declined steadily as users apparently became familiar with its bizarre and unpleasant side effects.

44. See AMPHETAMINES, supra note 43, at 22; O’BRIEN ET AL., supra note 4, at xix.

45. See AMPHETAMINES, supra note 43, at 21–22. Medically, amphetamines were used to treat everything from depression to obesity. See id. Interestingly, post-war Japan struggled with its own amphetamine epidemic. By 1954, two million of Japan’s 88 million people were taking amphetamines. See id. at 23; BURGER, supra note 7, at 57–58.

46. Although amphetamines remain part of the overall drug problem in the United States, they are a relatively small part, particularly among young adults. For example, in the 14-year period from 1975 through 1989, the number of high school seniors who reported ever having tried amphetamines decreased from a high in 1983 of 35.4% to 19.1% in 1989. See AMPHETAMINES, supra note 43, at 30–31.

47. See O’BRIEN ET AL., supra note 4, at xix.

48. See id.

49. LSD is a semi-synthetic hallucinogen derived from a fungus that grows on rye and other grains. See id. at 169. A Swiss chemist, Albert Hofmann, first synthesized LSD in 1943 and also was among the first clinical users, when he inadvertently ingested some of it. See id. at 169–70. LSD is a Schedule I or Schedule III controlled substance, depending on its particular form. See infra note 86 (listing the statutory classification of drugs).

50. See O’BRIEN ET AL., supra note 4, at 231. PCP was developed in 1959 as one of a new breed of analgesics called “dissociative anesthetics” because they disassociate the patient from all bodily sensations, including pain. See id. Surgeons and anesthesiologists soon discovered, however, that PCP frequently caused patients to become agitated, delusional, and irrational during recovery, and its use as a human anesthetic was discontinued. See id. at 232. It is cheap and easy to synthesize, and it became a popular street drug in the 1960s. Recreational users eventually discovered what doctors had discovered in the early 1960s, and PCP use has been steadily declining since 1979. See id. It continues to be a problem, however, because it is frequently mixed or “dusted” with
Like tranquilizers, cannabis also enjoyed a recreational renaissance during the 1960s. Today, cannabis is the most widely used illegal drug in America, outpacing all other illegal drugs combined. By dollars spent, cannabis comprises the third largest illicit drug market, behind only cocaine and heroin.

In the 1960s, as public acceptance of amphetamines began to erode, cocaine became the stimulant of choice. There was a broad public and medical belief in the early 1970s that cocaine was considerably safer than amphetamines, and there was a kernel of truth in this consensus. In the 1960s and early 1970s, cocaine was consumed almost exclusively through nasal inhalation and, by today's standards, generally involved relatively low, and therefore relatively safe, doses. All of that changed dramatically in the 1980s.

The National Institute on Drug Abuse estimates that American demand for cocaine increased four-fold in the eight years between 1974 and 1982. Cocaine-related emergencies and deaths tripled in the five years between 1976 and 1981. Many of these developments, especially those relating to increased dosages and toxicity, were the result of the introduction of two cheap, potent, and dangerous forms of smokeable cocaine—freebase and crack. The cocaine epidemic seems to have plateaued in the mid- to late-1980s, though even at current rates most experts agree that cocaine remains the most significant of the dangerous drugs.

other drugs, and the adulteration is often not disclosed. See id. PCP is a Schedule II controlled substance. See infra note 86 (listing the statutory classifications of various drugs).

52. See id.
54. See id. In fact, the low-level snorting of cocaine was described in 1973 by President Nixon's National Commission on Marijuana and Cocaine as having insignificant social costs. See id. at 58–59.
55. See id. at 60.
56. See id. It is important to keep a historical perspective on these statistics about mushrooming cocaine abuse. Even at its height in recent years, the per capita levels of cocaine abuse today are significantly less than they were at the turn of the century. See infra note 128 and accompanying text.
57. See supra note 30.
58. See KLEIMAN, supra note 51, at 287–88. Actually, there seems to have been a slight upturn in cocaine use in the early 1990s in the midst of a general and rather dramatic downturn in the use of other illegal drugs. See The War on Drugs (Continued), U.S. NEWS & WORLD REP., Dec. 30, 1991, at 21, 21 (reporting the results of the 1991 survey done by the National Institute on Drug Abuse).
59. Even ignoring lethal cocaine and alcohol mixtures, see supra note 31, deaths and injuries related to cocaine use today still exceed those of any other illegal drug. See
B. History of Drug Laws

The first law known to touch upon the issue of drugs was also the first law known to touch upon most anything—the Code of Hammurabi.\textsuperscript{60} It outlawed Babylonian “drunkenness” but not alcohol.\textsuperscript{61} Throughout pre-classical and classical eras, most civilizations seem to have recognized the social costs of overindulgence, though their legal response, like Hammurabi’s, generally was to outlaw the overindulgence but not the indulgence. Thus, for example, by 100 A.D., the excesses of the bacchanalia inspired some Roman anti-drunkenness laws, but not laws outlawing alcohol.\textsuperscript{62}

The first national attempt to ban drug use, as opposed to drug abuse, was an edict issued in 1776 by the Manchu dynasty prohibiting the use of opium in China.\textsuperscript{63} This first national drug law was spectacularly unsuccessful, doing nothing to abate the Chinese opium epidemic, despite making opium use a capital offense.\textsuperscript{64}

Interestingly, the first American drug laws also were aimed at Chinese opium users. In 1875, San Francisco banned opium houses, which were being used primarily by Chinese immigrants.\textsuperscript{65} Other jurisdictions quickly followed suit, and by 1914 dozens of state and local laws not only banned opium houses, but also banned opium smoking.\textsuperscript{66} The consumption of opium in its more occidentally accepted liquid form remained legal and widely accepted.\textsuperscript{67}

Congress first expressed a mild reaction to commercial opium and cocaine with its passage of the Federal Food and Drugs Act of 1906,\textsuperscript{68} which did not ban either substance, but merely mandated truth

---

\textsuperscript{60} See O’BRIEN ET AL., supra note 4, at x. The Code of Hammurabi was written around 1700 B.C.

\textsuperscript{61} See id.

\textsuperscript{62} See supra note 11 (discussing the first Roman laws regarding drunkenness).

\textsuperscript{63} O’BRIEN ET AL., supra note 4, at xiii.

\textsuperscript{64} See id.

\textsuperscript{65} See id. at xvi.

\textsuperscript{66} See id.

\textsuperscript{67} See id. The racial component to this difference in our legislative approach between the smoking of opium and the consumption of liquid opium has not gone unnoticed by historians and other commentators. See, e.g., MILLER, supra note 18, at 88, 196–97 nn. 20–26.

\textsuperscript{68} Federal Food and Drugs Act of 1906, ch. 3915, §§ 1–3, 34 Stat. 768 (repealed 1938). The real target of the Federal Food and Drugs Act of 1906 was not so much opium and cocaine elixirs in particular as it was food additives in general. One of the most fascinating historical characters associated with the successful drive to enact early federal food and drug legislation was Harvey Wiley, whose now discredited experiments on the purported dangers of food additives such as benzoic acid, along with the publication of
THE DRUG COURT SCANDAL

in labeling. Six years later, Congress passed the Harrison Narcotics Act, which again did not ban either substance, but imposed licensing requirements for dispensing certain drugs and taxed such dispensing.\(^69\)

The political influence of the temperance movement reached its apogee in America in 1919 with the adoption of the Eighteenth Amendment, which outlawed the sale, manufacture, import-export (but not use) of all intoxicating liquors,\(^70\) and which granted concurrent power to Congress and the states to enforce this prohibition.\(^71\) Congress accepted the constitutional invitation to adopt enforcing legislation with its passage of the National Prohibition Act, which is commonly referred to as the Volstead Act.\(^72\)

The conventional view of Prohibition as a deeply failed political and social experiment driven by extremists is exaggerated. Most historians agree that Prohibition enjoyed considerable support at its inception.\(^73\) Moreover, although national alcohol consumption did not decline during Prohibition—in fact, middle class consumption

Upton Sinclair's criticisms of the beef packing industry in *The Jungle*, did much to energize the anti-additive hysteria that flourished in the first two decades of the 1900s. See KARCH, *supra* note 14, at 106-09 (providing an intriguing discussion of Wiley's impact on the adoption of the 1906 Act). Wiley later turned his misplaced but considerable energies to Coca-Cola, although the object of his attentions, interestingly, was not cocaine, but caffeine. See *id.* at 111-14. Years of litigation followed, and the 1906 Act was eventually amended to include caffeine as an ingredient that must be disclosed by manufacturers, see Act of Aug. 23, 1912, ch. 352, 37 Stat. 416 (repealed 1938), and Coca-Cola eventually agreed to reduce the amount of caffeine in its product. See KARCH, *supra* note 14, at 113-14.

70. See U.S. CONST. amend. XVIII, § 1 (repealed 1933). The Eighteenth Amendment was ratified effective January 16, 1919. See 1 U.S.C. lxiv (1994) (reprinting the text of the amendment and providing the date of ratification). The temperance movement by no means lay dormant before its success with the Eighteenth Amendment. There was a first wave of very successful state prohibition efforts in the 1850s, led by Maine and followed quickly by a dozen other states and territories. This initial push for prohibition ran its course in the 1860s, which most historians attribute to the rising sectional conflict over slavery, but others attribute to a popular realization that state prohibition statutes simply did not work. Compare NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION 48-49 (1976) (contending that the early temperance movement was displaced by the Civil War), with JACK S. BLOCKER, JR., AMERICAN TEMPERANCE MOVEMENTS: CYCLES OF REFORM 59 (1989) (contending that the early temperance movement was displaced by its own failures).
71. See U.S. CONST. amend. XVIII, § 2 (repealed 1933).
73. See KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 9 (1994). After all, the Eighteenth Amendment not only was approved by the required two-thirds majority in both Houses, but also was ratified by 46 states. The speed of state ratification and the margins of those ratification votes suggest very broad popular support. See *id.*
increased—working class consumption declined significantly.\textsuperscript{74} Alcohol fatalities also decreased significantly.\textsuperscript{75} There is no doubt that public support for Prohibition declined precipitously during the late 1920s, but the onset of the Great Depression, during which opponents argued that a vigorous liquor industry would aid in the economic recovery, probably had more to do with repeal than any sea change in our moral attitudes about alcohol use.\textsuperscript{76}

In any event, whether an exaggeration or not, the Prohibition experiment came to be viewed by the vast majority of Americans as spectacularly and cathartically unsuccessful.\textsuperscript{77} The Eighteenth Amendment was repealed in 1933 by the Twenty-First Amendment,\textsuperscript{78} and the Prohibition experiment was dead for all time, just fourteen years after its birth. Nevertheless, the failed experiment had two profound cultural impacts on our view of drugs and drug laws.

First, it codified into a kind of national catechism the temperance idea that alcohol can be a demon that some people simply cannot control.\textsuperscript{79} This idea, though somewhat secularized and divorced from the other temperance notion that all alcohol is evil, led directly to the phenomenon of Alcoholics Anonymous (AA) in the mid-1930s. The credo of Alcoholics Anonymous—that certain people are “alcoholics” who cannot control their drinking, who can stop their uncontrolled drinking only through the support and acceptance of other alcoholics, and who cannot ever take another drink without falling back into the abyss of addiction—not only became national

\textsuperscript{74} See MERTON M. HYMAN ET AL., DRINKERS, DRINKING AND ALCOHOL-RELATED MORTALITY AND HOSPITALIZATIONS: A STATISTICAL COMPENDIUM (1980); PEELE, supra note 19, at 41. The criminalization of alcohol drove its price up and, therefore, its availability to working class people down. See PEELE, supra note 19, at 41.\textsuperscript{75} See PEELE, supra note 19, at 41.\textsuperscript{76} See id. at 42.

77. Our sense of Prohibition’s failure may have as much to do with the temperance movement’s unrealistic expectations as anything else. A radio sermon delivered on the eve of Prohibition by the renowned prohibitionist Billy Sunday was typical: “The reign of tears is over. The slums will soon be a memory. We will turn our prisons into factories and our jails into storehouses and corncribs. Men will walk upright now, women will smile and the children will laugh. Hell will be forever for rent.” KOBLER, supra note 26, at 12. With goals like these, all social experiments will fail.\textsuperscript{78} See U.S. CONST. amend. XXI. The Twenty-First Amendment was ratified effective December 5, 1933. See 1 U.S.C. lxv (1994).\textsuperscript{79} The crystallization of this axiom during Prohibition might well have been the result of the way Prohibition changed our social perceptions of drinking. “[D]rinking was not clearly differentiated from drunkenness . . . . People did not take the trouble to go to a speakeasy, present the password, and pay high prices for very poor quality alcohol simply to have a beer.” Norman E. Zinberg & Kathleen M. Fraser, The Role of the Social Setting in the Prevention and Treatment of Alcoholism, in THE DIAGNOSIS AND TREATMENT OF ALCOHOLISM 457, 468 (Jack H. Mendelson & Nancy K. Mello eds., 2d ed. 1985).
dogma, it also formed the modern basis for the disease model of addiction that has controlled our view of drugs throughout the twentieth century.80

Secondly, Prohibition reinforced the special cultural niche enjoyed by alcohol, which our Puritan ancestors first created 300 years earlier.81 Alcohol is different. Alcohol may be an addictive drug to a small, but mysteriously growing number of people labeled "alcoholics,"82 but for the vast majority of Americans it is a non-addictive, socially accepted form of relaxation that has nothing to do with all the other "bad" drugs, which are always addictive to all people in any amounts and in all settings. This cleaving of alcohol out of the drug universe not only freed us to drink without moral or legal costs, but also freed us to turn our moral and legal attention to the "bad" drugs with a zeal unmatched in the history of drug laws.83

Within an astonishingly short period of time after the end of Prohibition, states began adopting laws criminalizing the recreational use of cannabis and opiates.84 As dozens of new recreational drugs came into vogue, states just as quickly criminalized their use. Congress joined the fray with the Marijuana Tax Act of 1937,85 which

80. See infra text accompanying notes 130-47.
81. See supra text accompanying notes 18-23.
82. See infra text accompanying note 127.
83. Murchison has suggested a whole host of other subtle and not-so-subtle influences on our vision of federal criminal law exerted by Prohibition, including in the areas of entrapment, double jeopardy, takings, and perhaps most notably, search and seizure. See MURCHISON, supra note 73, at 23–153.
85. Marijuana Tax Act of 1937, ch. 553, 50 Stat. 551 (1937) (repealed 1970). Congress was much slower than state legislatures to react to the perceived drug menace of the 1930s because of profound constitutional doubts about federal police powers under the Commerce Clause. See MUSTO, supra note 29, at 296–97. Indeed, the debate over the Marijuana Tax Act of 1937 was more about the constitutional reach of Congress’s powers than the evils of marijuana. See id. at 224, 226. Its supporters decided to model the Act on the Migratory Bird Treaty Act, 16 U.S.C. §§ 703–711 (1994), which, in Missouri v. Holland, 252 U.S. 416, 435 (1920), recently had withstood constitutional attack based on
outlawed most uses of marijuana. In 1970, in what amounted to the non-alcohol version of the Volstead Act, Congress nationalized the outlawing of virtually all non-alcohol recreational drugs with its passage of the Controlled Substances Act (CSA). 86 Most state drug laws are now patterned after the CSA, not only in terms of its the federal treaty power, rather than the Commerce Clause. See MUSTO, supra note 29, at 224. Congress did not even begin to regulate the commercial production of opium poppies until 1942, with the adoption of the Opium Poppy Control Act, Pub. L. No. 77-797, ch. 720, 56 Stat. 1045 (1942) (codified at 21 U.S.C. §§ 188-188n (1964)) (repealed 1970).

86. 21 U.S.C §§ 801-971 (1994 & Supp. III 1997). The CSA divides the drug universe into five “Schedules.” Id. § 812(b). The particular Schedule in which a given drug is categorized determines the extent to which that drug may be lawfully used and, if it may be used, the extent of reporting and registration requirements, but the Schedule does not necessarily establish the severity of criminal sanctions if the drug is misused.

Schedule I substances are defined as those substances with a high potential for abuse and no accepted medical use. See id. § 812(b)(1) (1994). They include heroin, cannabis, LSD, peyote, and some specific forms of opiates and amphetamines. See id. § 812(c), Schedule I(a), (b)(10), (c)(9)-(12), (c)(17). Schedule II substances are defined as those substances with a high potential for abuse, but with a currently accepted medical use. See id. § 812(b)(2). They include various non-heroin opiates not listed in Schedule I, including cocaine and methadone. See id. § 812(c), Schedule II(a), (c)(12). Schedule III substances are defined as those substances with currently accepted medical uses and a potential for abuse less than the Schedule I or II substances. See id. § 812(b)(3). They include amphetamines, barbiturates, codeine in certain forms and limited amounts, opium in limited amounts, morphine in limited amounts, and anabolic steroids. See id. § 812(c), Schedule III(a), (d), (e). Schedule IV substances are defined as substances with a currently accepted medical use and a low potential for abuse compared to Schedule III substances. See id. § 812(b)(4). Schedule IV substances include chloral hydrate and phenobarbital. See id. § 812(c), Schedule IV(1). Schedule V substances are defined as substances with a currently accepted medical use and a low potential for abuse compared to Schedule IV substances. See id. § 812(b)(5). They include opium, morphine, and codeine, all in amounts below the minimum amounts in Schedule II, as well as atropine below certain amounts. See id. § 812(c), Schedule V(1)-(5).

The provisions of the CSA imposing criminal penalties are not organized, as one might expect, entirely by Schedule, but rather by particular acts, drugs, and quantities. So, for example, a conviction for the sale or manufacture of one kilogram (2.2 pounds) or more of any substance containing any “detectable” amount of heroin, and a conviction for sale or manufacture of 50 grams (1.74 ounces) or more of any substance that contains a cocaine base, both carry a mandatory minimum sentence of 10 years and a maximum life sentence, even though heroin is a Schedule I substance and cocaine is a Schedule II substance. See id. § 841(b)(1)(A)(i), (iii). Simple possession also is punished not by Schedule but by type and quantity. Simple possession of any controlled substance other than cocaine carries a one-year maximum, unless it is a second offense, which carries a 15-day minimum and a two-year maximum, or a third offense, which carries a 90-day minimum and a three-year maximum. See id. § 844(a). Contrast these penalties for possession (which even include possession of heroin) with the penalties for possession of cocaine. With respect to cocaine, a first offense in which the possession exceeds five grams, or a second offense in which the possession exceeds three grams, or a third offense in which the possession exceeds one gram, all carry a minimum prison sentence of five years and a maximum of 20 years. See id. This special federal treatment of cocaine and its mimicry in the states is filling our penitentiaries with drug offenders.
regulatory scheme, but also in terms of its mandatory minimum sentences.⁸⁷

Although federal and state drug laws have had little impact either on supply or demand of drugs, they have had an enormous impact on our criminal justice system and on our pocketbooks. Drug prosecutions quadrupled in the twenty years between 1968 and 1988.⁸⁸ By 1990, drug prosecutions accounted for an astounding one-third of all state felony prosecutions.⁸⁹ In 1998 alone, there were 1.5 million drug arrests in the United States, of which almost 600,000 were for simple possession of cannabis.⁹⁰ In 1997, 42% of all felony convictions in federal courts were for drug offenses.⁹¹ The combination of increased prosecution and stiffer sentencing laws, especially mandatory minimum sentences for first-time cocaine possession,⁹² culminated in an explosion in incarceration rates unmatched in our national history. As of November 1999, an astonishing 60% of all federal prisoners were being incarcerated for drug offenses, compared to a mere 16.3% in 1970.⁹³ Drugs and drug laws are the reason more people are incarcerated per capita in the United States than in any industrialized country on Earth except Russia.⁹⁴

⁸⁷. See supra note 86 (discussing the mandatory minimum sentencing of the CSA).
⁸⁹. See id.
⁹². For an overview of the mandatory sentencing provisions under the CSA, see supra note 86.
⁹⁴. In 1985, 424 out of every 100,000 U.S. adult residents were incarcerated. See U.S. Dep’t of Justice, Press Release: Probation and Parole Population Reaches Almost 3.8 Million (June 30, 1996) <http://www.ojp.usdoj.gov/bjs/pub/press/pap95.pr>. Ten years later, those incarcerations almost doubled—by 1995, 808 out of every 100,000 U.S. adult residents were incarcerated. See id. As of 1996, 5.3 million Americans, or almost three percent of the total adult population, were either incarcerated or on parole, probation, or some other form of judicial supervision. See id. As of June 1998, more people were incarcerated per capita in America than in any other industrialized country on Earth, with the possible exception of Russia, and experts anticipate we will overtake Russia in this dubious statistic in the next year or two. See Ann Gearan, Inmate Count Double 1985’s, ARIZ. REPUBLIC, Mar. 14, 1999, at A1; U.S. Dep’t of Justice, Press Release: The Nation’s Prison Population Grew by 60,000 Inmates Last Year: The Largest Increase Since 1995 (Aug. 15, 1999) <http://www.ojp.usdoj.gov/bjs/pub/press/p98.pr>.
Quite apart from increased expenditures to build prisons to house these drug users, state and federal governments are throwing massive quantities of taxpayer money at the drug problem. In 1996, the federal government spent more than $14 billion and the states contributed $33 billion to fight the war on drugs. It was in this atmosphere of increasing drug convictions, exploding penitentiary sentences for drug defendants, and a bottomless pit of state and federal expenditures that the first drug courts began to develop.

II. THE RUSH TO DEVELOP DRUG COURTS

New York City usually is credited with being the first jurisdiction to handle drug cases in a separate designated court. In the early 1970s, it created several "Narcotics Courts" to deal with the harsher drug penalties imposed by the so-called "Rockefeller Drug Laws." These early narcotics courts had no special treatment component; they were formed purely as case management devices to handle, in completely traditional ways, the anticipated increase in the number of drug cases filed under the new laws. Although they served that function in the beginning, a steady increase in non-drug felony cases forced the narcotics courts to take on more and more non-drug cases, so that by the mid-1980s, they had for all intents and purposes reverted to traditional courts.

In 1987, in response to growing concerns about the crack...
problem in New York City, the narcotics courts were renamed "N Parts" and were reconstituted in four of the five boroughs. As was the case with their narcotics court predecessors, the N Parts were specialized case management courts designed to handle a high volume of drug cases in a traditional manner, with no special treatment component.

The first treatment-based drug court began in Dade County (Miami), Florida, in June 1989. It targeted certain non-violent felony drug offenders for a one-year diversion and treatment program. Those targeted candidates who pleaded guilty generally received deferred judgments or probation, conditioned on their completion of the program. The program itself combined treatment, including traditional treatment methods such as counseling, fellowship meetings, education, and rather non-traditional (at least then) methods like acupuncture and vocational services, with intense judicial review, including frequent reviews of urinalysis results.

The New York City N Parts and the Dade County Drug Court became the two paradigms for future American drug courts. The N Part model became known as the "differentiated case management" (DCM) model, and the Dade County model became known as the "treatment-based" model. In the early years, virtually every American drug court was either DCM-based or treatment-based. It soon became clear, however, that most treatment-based courts needed to employ some case management techniques to deal with their mushrooming dockets and that by employing those techniques they could achieve disposition rates similar to those enjoyed by DCM-based courts, while still enjoying the supposed benefits of the treatment model. Early studies also suggested that the benefits of DCM-based drug courts could be achieved just as well by having traditional courts identify their drug cases and manage them on an accelerated basis, without the overhead and added bureaucracy of

99. See id. at 3-4.
100. See id.
101. See id. at 4.
102. See infra text accompanying notes 257-79 (discussing the massive net-widening experienced by the Denver Drug Court).
103. For example, the Miami and Portland drug courts, each of which are treatment-based, have case management components that enable them to handle significant active caseloads of 1200 and 600 cases, respectively. These caseloads compare favorably to the 600-case and 2300-case active caseloads being run in the New York and Milwaukee drug courts, both of which are DCM-only courts. See BELENKO & DUMANOVSKY, supra note 96, at 9-10.
separate drug courts.\textsuperscript{104}

After these patterns became clear, drug courts designed exclusively as DCM courts or exclusively as treatment-based courts fell out of fashion, and most recent drug courts are hybrids of the two models. Although the variations among drug courts are innumerable, most are generally organized as follows.

The drug court process begins before adjudication, as participants are identified as early as their first court appearances after arrest.\textsuperscript{105} Participants must meet certain eligibility guidelines—typically, they must be charged only with a drug offense and must not have any prior violent felonies.\textsuperscript{106} They are released on bond, conditioned on their participation in an outpatient drug treatment program, or at the very least on submitting to regular urinalysis testing.\textsuperscript{107} Most drug courts have multiple tracts with varying levels of treatment intervention depending on the perceived level of the defendant's addiction and prognosis for recovery. Defendants typically plead guilty in exchange for receiving either deferred judgments or probation, and in either case their continuing, successful participation in their treatment programs become a condition of the deferral or probation.

Treatment is coupled with a monitoring program consisting of frequent drug testing and appearances before the drug court judge to review the results of the tests and the defendant's general progress in

\textsuperscript{104} The early studies of drug courts were not published, except indirectly as part of a compilation of meta-studies. For a discussion of these meta-studies, see infra text accompanying notes 236–45.

\textsuperscript{105} Some drug courts are considered “post-adjudicatory,” meaning their treatment component kicks in only after a defendant is convicted. The Maricopa County (Phoenix), Arizona, Drug Court is such a post-adjudicatory program. See LAWRENCE W. SHERMAN ET AL., UNIVERSITY OF MD., NATIONAL INST. OF JUSTICE, A REPORT TO THE UNITED STATES CONGRESS: PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING 9–51 (n.d.) [hereinafter THE SHERMAN REPORT] (on file with the North Carolina Law Review).

\textsuperscript{106} Most drug courts have some eligibility standards; indeed, a few, such as the Maricopa County (Phoenix), Arizona Drug Court, are limited to first-time felons. See id. For the most part, however, eligibility standards are more lenient and are aimed at reaching harder-core users who may well have extensive felony records, usually eliminating only defendants with violent felony convictions. See infra note 181. A very few, including the Denver Drug Court before its jurisdictional change in 1997, see infra text accompanying notes 280–81, have an “all comers” philosophy.

treatment. Typically, the monitoring program proceeds in phases—beginning with weekly drug testing and court appearances every few weeks and, if the tests continue to be negative and the defendant progresses in the treatment program, ending in infrequent tests, and culminating in graduation. Most drug courts also require some good-faith effort by defendants to pay some portion of their own treatment and court costs as a condition of their graduation and as a continuing condition of their deferral or probation.

Missed drug tests, positive drug tests, or other failures of treatment are punished quickly—at the pre-adjudication stage with the temporary revocation of bond and the imposition of short jail sentences, and at the post-adjudication stage with the imposition of short jail sentences as additional conditions of the deferred judgment or probation and/or regression into a stricter monitoring phase. Eventually, convicted defendants whose drug tests are repeatedly positive, or who otherwise repeatedly fail to respond to treatment, have their deferred judgments or probationary sentences revoked and are sent to prison.108

Perhaps because it was focused on the non-traditional notion of treatment rather than on mundane notions of how to speed a lot of cases along, the Dade County experiment captured the imagination of many reform-minded trial judges and prosecutors. More importantly, it caught the eye of Congress.109 In 1994, as part of the amendments to the Omnibus Crime Control and Safe Streets Act of 1968,110 Congress authorized the Attorney General to make grants and loans to state, local, and Indian tribal governments to establish drug courts.111 The Attorney General then created the Drug Courts Program Office (DCPO), organized under the Office of Justice Programs (OJP), to administer the federal grants and loans.

From fiscal year 1995 through fiscal year 1997, the DCPO awarded in excess of $47 million in drug court grants to

---

108. The number of positive urine analyses (UAs) or other treatment failures that will be tolerated before a defendant is sentenced to prison is not typically written in stone and instead is left to the discretion of the particular drug court judge who happens to be presiding at the time. See infra text accompanying notes 310–13.

109. It did not hurt the political popularity of drug courts when the Florida Attorney General, Janet Reno, who was an enthusiastic supporter of the Dade County Drug Court, became Attorney General of the United States.


approximately 270 different jurisdictions. Its appropriation for fiscal year 1998 alone was $30 million.

The speed and breadth with which drug courts have spread since the Dade County experiment in 1989, and particularly since the large injection of federal funds began in 1995, has been truly remarkable. As of June 1, 1998, there were 430 drug courts in various stages of planning or operation. These 430 drug courts are located or are to be located in forty-eight states, the District of Columbia, Puerto Rico, Guam, several Native American tribal courts, but, interestingly, in only one federal district.

Yet, in the rush to jump on the drug court bandwagon, we have failed to consider four basic types of questions: (1) What is the purpose of drug courts? (2) Do drug courts work? (3) Even if they do work, do their benefits outweigh their costs? and (4) Are drug courts an appropriate institutional response to what is fundamentally a legislative question? Before I address each of these questions, let me touch on two critical assumptions that form the foundation of all drug courts and about which there is substantially more doubt than the drug court orthodoxy seems willing to admit.

III. UNANSWERED SCIENTIFIC AND MEDICAL QUESTIONS: IS THERE A DRUG EPIDEMIC, AND IS DRUG ADDICTION A TREATABLE DISEASE?

Drug courts are grounded on two assumptions: (1) drugs have become an epidemic about which something must be done; and (2)
drug addiction is a disease that can be treated. In fact, however, these
two assumptions are far from settled and continue to be the subject of
considerable debate among the experts. A full discussion of these
transcendental questions is beyond the scope of this Commentary, but
a brief summary may help to put the hysteria of drug courts into some
perspective.

A. Rates of Drug Use

The actual data on American drug use is, and has always been,
substantially less clear than either the political generals of the drug
wars or the advocates of legalization would have us believe. Part of
the problem is methodological—it can be extremely difficult to obtain
reliable data on this subject. For legal drugs, such as alcohol, one can
at least look at production rates and retail consumption rates to get
very broad parameters on use. More detailed demographics suffer
from the inherent unreliability of asking people about their personal
relationships with demon rum and the increasing social opprobrium
surrounding it. Statistics concerning illicit drug use are, of course,
even more elusive. There is no reliable production information to fix
the outer boundaries of potential use, nor, obviously, any retail
consumption records to assess actual use. Demographic
information is even more difficult to come by. Users of illicit drugs,
especially those who have not been ensnared by the criminal justice
system, are very difficult to identify for the very reason that their use
is a crime. The so-called “victimless” nature of drug use also makes
resort to collateral criminal data sources impossible.

The most common, and in some ways the most flawed, method of

116. By summarizing what I understand to be the general outlines of these scientific
controversies, I certainly do not mean to suggest these are issues that judges ought to be
deciding. On the contrary, one of the problems with drug courts is that they amount to a
judicial, rather than a legislative, resolution of these difficult scientific issues. See infra
text accompanying notes 329–41 (discussing the impropriety of judicial intervention into
these areas).

117. The problems with estimating cocaine production are illustrative:
The total amount of cocaine produced today is not known with any
certainty.... Virtually all cocaine production is clandestine, and production
estimates are a matter of guesswork.... The Drug Enforcement Agency’s (DEA)
production estimates for Bolivia, which were based on direct observations and measurements, illustrate how
widely divergent these figures may be. For example, the average annual yield in
the Chapare region of Bolivia is 2.7 tons of leaves per hectare, while the yield in
Yungas, the other prime Bolivian growing area, is only 1.8 tons.

KARCH, supra note 14, at 168.

118. This is in contrast to crimes such as domestic violence, where the reports by
victims of domestic violence provide sources for statistics.
gathering demographic data about drug use is to gather it from people in drug treatment programs. This method has the benefit of a relatively small and traceable control group, but it measures the habits only of those undergoing treatment, thus ignoring a whole class of users for whom use has not, at least in their own minds or in the eyes of the criminal law, become abuse.

There is also a comprehensive and powerful political overlay to the problem of drug statistics. Truth is the first casualty in any war, and it has fared no better in our war on drugs. The federal government and its therapeutic minions\(^\text{119}\) have been the sources of most of the statistics on drug use for the last sixty years; for this same period of time, these sources have had considerable political and economic interests in inflating those statistics. The literature widely supports the proposition that drug statistics have been inflated by a self-sustaining, public-private partnership interested in keeping use statistics high to justify enormous public expenditures.\(^\text{120}\) One of the political architects of our new national preoccupation with alcoholism, the late Senator Harold Hughes, expressed doubts later in

\(^{119}\) There is a veritable alphabet soup of public, quasi-public, and private organizations devoted in some fashion or other to spending taxpayers' money in pursuit of a solution to the drug problem: ACDE (American Council for Drug Education); ACAP (American Council on Alcohol Problems); AMERSA (Association for Medical Education and Research in Substance Abuse); ASAM (American Society of Addiction Medicine); CASA (Center on Addiction and Substance Abuse); CATI (Chemical Awareness and Training Institute); DAWN (Drug Abuse Warning Network); DEA (Drug Enforcement Administration); DUFFS (Drug Use Forecasting System); DCCTAP (Drug Court Clearinghouse and Technical Assistance Project); DCFO (Drug Courts Program Office); DCF (Drug Court Forecasting System); IBCA (Institute on Black Chemical Abuse); ICAPA (International Commission for the Prevention of Alcoholism and Drug Dependency); NACOA (National Association for Children of Alcoholics); NADCP (National Association of Drug Court Professionals); NAPAFASA (National Asian Pacific American Families Against Substance Abuse); NASADAD (National Association of State Alcohol and Drug Abuse Directors); NCADAI (National Clearinghouse for Alcohol and Drug Abuse Information); COSSMHO (National Coalition of Hispanic Health and Human Services Organizations); NCA (National Council on Alcoholism); NCAADD (National Council on Alcoholism and Drug Dependence, Inc.); NFP (National Family Partnership) (formerly the National Federation of Parents for Drug Free Youth); NHFADA (National Hispanic Family Against Drug Abuse); NIAAA (National Institute on Alcohol Abuse and Alcoholism); NIDA (National Institute on Drug Abuse); PRIDE (National Parents' Resource Institute for Drug Education); ONDCP (Office of National Drug Control Policy); OSAP (Office of Substance Abuse Prevention); OWI (Office of Workplace Initiatives); and YTY (Youth to Youth), to name a few.

his life about the therapeutic Frankenstein he had helped unleash, labeling it “the alcohol and drug industrial complex.”

One of the principal pathways of the political contamination of drug statistics is through the idea of “abuse.” In contrast to simple production and consumption statistics, one can manipulate sociological constructs such as “abuse” to generate statistics pretty much on order. Pre- and post-hysteria statistics on American alcohol consumption dramatically illustrate this point.

As discussed above, colonial Americans consumed several times the per capita amount of alcohol as modern Americans do. Post-World War II studies estimated that between five to six million Americans were “alcoholics,” based on projections grounded on the number of deaths caused by cirrhosis of the liver. In the late 1960s, the first modern statistics on alcohol “abuse” were generated by a series of studies conducted at the University of California at Berkeley and commissioned by the National Institute on Alcohol Abuse and Alcoholism (NIAAA). The Berkeley group estimated that there were nine to ten million “problem drinkers,” from which the NIAAA arbitrarily concluded that half, or five million, were “alcoholics,” corroborating the cirrhosis studies.

These rather modest early estimates soon exploded with a series of pronouncements from the therapeutic community about the burgeoning alcohol problem; however, none was supported by any studies. The National Council on Alcoholism—the political arm of Alcoholics Anonymous—promptly announced after the Berkeley study that there were actually ten million alcoholics in America, twice

---

121. Senator Hughes drew the following comparison: “We have, in effect, a new civilian army that has now become institutionalized. The alcohol and drug industrial complex is not as powerful as its military-industrial counterpart, but nonetheless there are some striking similarities.” CAROLYN L. WEINER, THE POLITICS OF ALCOHOLISM: BUILDING AN ARENA AROUND A SOCIAL PROBLEM 3 (1981) (quoting Senator Harold Hughes’s Address Before the North American Congress on Alcohol and Drug Problems (Dec. 13, 1974)). Thomas Szasz, Professor Emeritus of Psychiatry at the State University of New York, is one of the most articulate and virulent critics of drug disinformation, or what he calls the “scandal of drug education,” which he has described this way:

The belief that our drug regulations rest on a rational, scientific basis is one of the root causes of our drug problem. On the contrary, they rest on pseudoscience, create pseudomedical diagnoses, and employ pseudotherapeutic interventions.... Drug education is a campaign of pharmacological disinformation in the service of justifying the government’s War on Drugs.


122. See supra notes 19, 25 and accompanying text.

123. See PEELE, supra note 19, at 47.

124. See DON CAHALAN, PROBLEM DRINKERS 137 (1970); PEELE, supra note 19, at 47.
the number suggested by the NIAAA. In the 1980s, as federal funds began to flood the landscape and literally hundreds of alcohol treatment programs sprouted, the ten million figure made up by the NCA in the 1960s, even adjusted for population increase, began to look too small for the committed resources. Overnight, the estimates doubled again, as treaters tossed out wholly unsubstantiated numbers in the twenty million range.

The permanent therapeutic-industrial complex was flush with treatment dollars, and it needed people to treat. Although per capita alcohol consumption remained rather steady for thirty-five years after World War II, per capita treatment for alcoholism grew geometrically, multiplying twenty-fold in that same period of time.

Statistics on most other drugs, and the political manipulation and exaggeration of those statistics, have followed a similar pattern. For example, despite the recent hysteria about cocaine, per capita consumption of cocaine is lower in America today than it was at the turn of the twentieth century, when great numbers of Americans regularly bought cocaine-laced elixirs at their local drugstores.

There may be no area of public policy in which raw statistics—especially raw production or consumption statistics—tell so little of the story than in the area of drug use and abuse. Despite decreasing

125. See Peele, supra note 19, at 47.
126. The particular origin of these made-up figures is a fascinating example of the general phenomenon of the unreliability of drug statistics. George Douglas Talbott, a physician and recovering alcoholic who now heads his own drug and alcohol program, relates those origins:

The old figure was 10 million alcoholics. I was interested in where that figure came from and found it was thought up one night in Washington when the first alcohol support bill was presented to Congress. Senator Harold Hughes asked his staff what a good number was. They said 10 million, and that figure got frozen into literature. It is way beyond that now, and, as far as we are concerned, 22 million people have an alcohol problem related to the disease of alcoholism.

127. See Peele, supra note 19, at 49.
128. "[T]he total number of heroin and cocaine fatalities in 1912 exceeded 5000. The number is slightly more than twice that today, but our population is four times what it was then." Karch, supra note 14, at 65. Admittedly, drug fatalities are not the best measures of drug abuse trends over a long period of time because of advancing medical techniques, especially emergency room techniques. Nevertheless, other measures confirm the general notion that the cocaine and heroin problems at the turn of the century were considerably worse, and certainly substantially more common, than they are today. As discussed above, an astonishing one million Americans regularly used commercial elixirs of heroin in 1900, see supra text accompanying note 38, compared to the estimated 500,000 heroin addicts in 1989, see supra text accompanying note 42. By these measures, and adjusting for the four-fold increase in population, per capita heroin use today is one-eighth of what it was in 1900.
levels of per capita consumption, there are pockets of drug abuse in our country that everyone, with the possible exception of the most extreme libertarians and legalizationists, can agree are a significant social problem deserving of some attention. Nevertheless, the one set of statistical trends upon which nearly everyone agrees is also the most paradoxical: despite the fact that fewer of us are consuming drugs, more of us believe we are addicted to drugs. This paradox brings us to the second controversial assumption of drug courts: that drug addiction is a treatable disease.

B. The Disease Model of Addiction

A substantial controversy exists regarding the accuracy of the assumptions, on which the whole notion of a judicially enlightened approach to drugs is based, that drug addiction is a disease and that it is treatable. Scientific evidence supporting either of these assumptions is remarkably sparse.

The disease model of addiction has its roots in eighteenth century liberal metaphysics, not in science. The founder of the disease model of alcoholism, Benjamin Rush, also believed that lying, murder, and political dissent were diseases treatable by an enlightened society. Although the disease model was thrust into conventional popular wisdom by the public relations success of Alcoholics Anonymous, scientific evidence of the effectiveness of twelve-step programs has been remarkably scant. Due in part to

129. As Peele has put it, “Overall, Americans do not drink and consume narcotics or cocaine as much as they have done at peak levels in the past. Despite these data, however, more Americans—and particularly more young Americans—either declare themselves or are declared by others to be drug- or alcohol-dependent.” See PEELE, supra note 19, at 234.

130. See id. at 54. Peer-reviewed controlled studies are virtually unanimous in their conclusion that there is no evidence that Alcoholics Anonymous produces results better than clinical treatment, or indeed better than no treatment at all. See, e.g., id. at 57-58 (quoting Frederick Baekeland et al., Methods for the Treatment of Chronic Alcoholism: A Critical Appraisal, in 2 RESEARCH ADVANCES IN ALCOHOL AND DRUG PROBLEMS 306 (Robert J. Gibbons et al. eds., 1975)); see also William R. Miller & Reid K. Hester, The Effectiveness of Alcoholism Treatment: What Research Reveals, in TREATING ADDICTIVE BEHAVIORS: PROCESSES OF CHANGE 121, 135–36 (William R. Miller & Nick Heather eds., 1986) (reviewing all controlled studies of the effectiveness of alcohol treatment programs and finding only two on Alcoholics Anonymous’s effectiveness, both of which showed that members of Alcoholics Anonymous did worse in terms of arrests and binge drinking than the control group of untreated alcoholics).

The absence of evidence that twelve-step programs actually work is hardly counterintuitive. After all, it is an odd “disease,” even in our post-Freudian world, that afflicts some but not all, has no known etiology, has no meaningful diagnostic criteria, can never be cured, and can be treated only in quasi-religious meetings of like-afflicted volunteers. As for the diagnostic criteria, it is true that the American Medical Association
this nagging lack of evidence, there has been a steady stream of scientific criticisms of the disease model of addiction for the last twenty-five years. These criticisms have focused on the lack of effective treatment, the lack of any identifiable disease mechanism, and the fact that history is full of examples of cultures in which certain drugs have been widely used, yet appear to have posed no addictive threat.

Perhaps the most telling piece of evidence against the disease theory of addiction is the well-recognized fact that many people cure their addictions on their own, with no intervention at all. Ironically, this phenomenon, which the experts call "natural remission," was demonstrated convincingly by one of the most famous modern proponents of the disease theory of alcoholism, George E. Vaillant. Vaillant's 1983 study of alcoholics showed that a majority was in remission, that hardly any of the people in remission previously had received any kind of treatment, and that his own hospitalized patients' outcomes, measured two and eight years post-discharge, were no better than the outcomes of the people who were not hospitalized. The data on drug abuse is the same.

and American Psychiatric Association, no friends of the Alcohols Anonymous movement, belatedly have accepted the idea that alcoholism may be a disease, in 1956 and 1952, respectively. See 3 AMERICAN HANDBOOK OF PSYCHIATRY 370 (Silvano Arieti & Eugene B. Brody eds., 2d ed. 1974); 1 id. at 1128 (Silvano Arieti ed., 2d ed. 1974); O'BRIEN ET AL., supra note 4, at 20; PEELE, supra note 19, at 46. In subsequent editions of the Diagnostic and Statistical Manual of Mental Disorders (DSM), "alcoholism" has been broken down into "alcohol abuse" and "alcohol dependence" and framed as specific diagnoses within the more general categories of "substance abuse" and "substance dependence." E.g., AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 176-83, 195-96 (4th ed. 1994) [hereinafter DSM-IV]. But of course its allegedly objective diagnostic criteria are, as they often are in the case of complex behaviors forced into the simplifying pigeonhole of "mental disease," merely a description of symptoms. See, e.g., THOMAS S. SZASZ, THE MYTH OF MENTAL ILLNESS 12-13 (2d ed. 1974) (discussing the invention of mental illnesses that purportedly are detected through observing a person's behavior).

131. See, e.g., PEELE, supra note 19, at 1-29; WEINER, supra note 121, at 100; Stanton Peele, A Moral Vision of Addiction: How People's Values Determine Whether They Become and Remain Addicts, in VISIONS OF ADDICTION, 201-02 (Stanton Peele ed., 1988); David Robinson, The Alcohologist's Addiction: Some Implications of Having Lost Control over the Disease Concept of Alcoholism, 33 Q.J. STUD. ON ALCOHOL 1028, 1032 (1972); see also DON CALAHAN, PROBLEM DRINKERS 2 (William E. Henry & Nevitt Sanford eds., 1970) (noting that treating alcoholism as a disease improves the problem drinker's chances of not receiving jail time, but the disease theory "has not as yet made material inroads" in the approach of the medical community).

132. See Peele, supra note 131, at 219-22.
133. See id. at 227.
134. See id. at 219–22.
135. See GEORGE VAILLANT, THE NATURAL HISTORY OF ALCOHOLISM 284-94
Likewise, contrary to many of our exaggerated beliefs about the addictive power of many drugs, most people exposed to even the most allegedly addictive of substances do not develop dependencies. In one study, for example, only 15% of the people who used powdered cocaine developed dependencies, which was roughly equal to the percentage of drinkers who developed drinking problems, but less than half the addiction rate of crack users.\textsuperscript{137}

Thus, it is the rule, and not the exception, that people experiment with even the most allegedly of addictive drugs without becoming addicted and that even people whose experiments evolve into some form of abuse tend to outgrow that abuse, with or without treatment intervention.\textsuperscript{138} Still, the disease model of addiction, and even our most "enlightened" drug policies based on that model (such as drug courts), ignore this reality. By constructing our drug policies to deal with the minority of classically dysfunctional addicts and ignoring the vast majority of people who take drugs without developing destructive dependencies, we ignore the complex social, cultural, and economic forces that breed true drug abuse. More subtly, we devalue individuals' ability to control their drug use, thereby paradoxically excusing and encouraging individual loss of control. It is what Peele calls "infantilizatiz[ing] the drug-using population."\textsuperscript{139} In the end, the critics of the disease model point to an array of evidence suggesting that the particular setting in which a drug is used, including the strength of a society's or relevant social group's view of the role of free will, has as much or more to do with whether a person will find it difficult to stop using a drug as does the drug's particular chemistry.

It is true that recent advances in neurobiology are being touted by some as the long-sought biochemical foundation for the disease model of addiction.\textsuperscript{140} Some addiction theorists suspect, however,
that these neurological foundations will be as fleeting and unsatisfactory an explanation for addiction as they have been for many mental diseases, most notably depression and schizophrenia.\textsuperscript{141} Even as late as 1995, a group commissioned by the National Institute on Drug Abuse to examine the prospects of treating drug addiction pharmacologically soberly described the current state of scientific knowledge about the neurological bases of addiction as "not well characterized" and "rudimentary."\textsuperscript{142} Solomon Snyder, one of the most prominent neurobiologists doing opiate receptor and endorphin research today, has said that although there is now broad consensus about the salient properties that addictive substances all share, a "full consensus on a definition [of addiction] has yet to emerge."\textsuperscript{143}

One of the most thoughtful and balanced contributions to the debate about the nature of addiction has come not from a physician, psychiatrist, or neurobiologist, but from a philosopher, Francis Seeburger, who is actually a proponent of sorts of the disease model.\textsuperscript{144} Seeburger does not shy away from addiction's central moral conundrum—where exactly does free will end and compulsion take over?\textsuperscript{145} He sees the disease model of addiction as an enlightened reaction to what historically has been the only other alternative: the view that all drug use is simple, willful misconduct.\textsuperscript{146} Even Seeburger admits, however, that drug addiction is a strange sort of "disease" because no evidence exists establishing a "simple physical cause for

---

141. See PEELE, supra note 19, at 14–15 (discussing the fact that advances in neurochemistry had virtually no impact in treating many mental "diseases," including depression and schizophrenia).

142. DIVISION OF BIOBEHAVIORAL SCIENCES & MENTAL DISORDERS, INST. OF MEDICINE, NAT'L INST. ON DRUG ABUSE, DEVELOPMENT OF MEDICATIONS FOR THE TREATMENT OF OPIATE AND COCAINE ADDICTIONS 3 (Carolyn E. Fulco et al. eds., 1995).


145. Seeburger recognizes that "the tempting quality of addiction immediately engenders a paradox," in that addiction "is at one and the same time both unintentional and tempting." Id. at 8.

146. See id. at 68–70.
addiction” to drugs. By thinking about drug addiction as a disease, with no social, psychological, or moral component, we commit the same errors of enthusiasm that our predecessors did when they considered the word “addiction” as being synonymous with the word “evil.”

In any event, and regardless of one’s views on these difficult statistical, scientific, and philosophical issues, it is important for all of us to recognize that the twin pillars upon which the popular rush to drug courts rests—the alleged drug epidemic and our alleged ability to treat drug addiction—have beguiled the experts for decades. They are hardly as unassailably sturdy as conventional political and judicial wisdom would have us believe.

IV. UNEXAMINED JURISPRUDENTIAL CONCERNS: WHAT IS THE PURPOSE OF DRUG COURTS?

Our ambivalence about drugs is not unique to America and is not new. For as long as drugs have been used to alter people’s consciousness, they have evoked two powerful but potentially antithetical notions: drugs can help us disconnect temporarily from pain (whether physical or emotional), but too much disconnection can be damaging both to our individual potentials and to the social fabric. The resulting public policy questions—at what point does the use of a particular drug break the social contract and become punishable by the criminal law, and even then, at what point is that particular drug use so involuntary as to become a medical issue rather than a legal one—have no easy answers.

Perhaps in part because of our Puritan segregation of alcohol

147. Id. at 74. Because he recognizes the moral component of addiction and the importance of focusing on the internal power of the addict’s free will as opposed to the external power of the addictive substance, Seeburger’s views of addiction are associated closely with Alcoholics Anonymous. See id. at 69 (stating that “recovery” from alcoholism requires that addicts make a moral commitment “to be responsible, caring, ethical individuals”). Of course, Alcoholics Anonymous focuses not only on the worldly power of individual free will, but also on the ultimate power of a higher being. This religious aspect of Alcoholics Anonymous, inherited to some extent from the temperance movement, see supra text accompanying notes 26-27, is disturbing to some critics of Alcoholics Anonymous. See, e.g., PEELE, supra note 19, at 43-46. Nevertheless, whether one focuses on the secular power of free will or on its claimed theological roots may be beside the point, as long as one is still moving away from the allegedly irresistible addictive powers of a particular substance to the resistive powers of the individual user. See generally GERALD G. MAY, ADDICTION AND GRACE (1988) (providing a particularly thought-provoking discussion of the spiritual aspects of addiction).

148. See supra text accompanying notes 130-47 (discussing the disease model of addiction).
from the universe of other drugs, Americans in particular seem to be conflicted when we try to deal with these difficult issues. We have tended to react to the perceived drug crisis du jour—whether it involves opium dens in San Francisco in 1885 or crack cocaine in New York City in 1985—with the same predictable, and ultimately unsuccessful, response: make the laws stricter, put more dealers and users in jail, and attempt to reduce the supply by interdiction. These reactions, like the Manchu edict in 1776 making Chinese opium use a capital offense, have done nothing to decrease either our thirst for drugs or their availability.

What can we do with a perceived social problem of allegedly epidemic proportions, which darts so frustratingly between the medical and legal worlds and seems so entirely immune to any medical or legal solution? How can we punish drug use when our self-described experts have been telling us for so long that addiction is a disease? The disease model of addiction and the realities of the failed war on drugs are driving us to two unpalatable policy choices—either continue to fill our prisons with drug users or legalize drugs.

Out of this depressing and completely unacceptable state of affairs came the idea of the drug court. It seems to be the perfect antidote for our troubling schizophrenia. Drug courts appeal to the medical horn of the dilemma because they offer, and indeed

149. See supra text accompanying notes 18–28, 71–84 (discussing favorable Puritan views on alcohol, the temperance movement, and Prohibition).

150. The cultural impacts on addiction are felt not only at the consumption end—some societies simply do not believe that drug use destroys free will and therefore do not recognize the idea of addiction—but even at the behavioral end. That is, how individuals behave while under the influence of drugs appears to have a surprisingly important cultural component. In a fascinating survey of drinking practices of different societies around the world, Craig MacAndrew and Robert Edgerton discovered that rather than invariably becoming disinhibited, aggressive, sociable, or sexually promiscuous when drunk, drunk people behave according to fairly well-defined cultural norms, which are quite different from society to society. See CRAIG MACANDREW & ROBERT B. EDGERTON, DRUNKEN COMPORTMENT: A SOCIAL EXPLANATION 165–73 (1969).

151. See O'BRIEN ETAL., supra note 4, at xiii.

152. As I have suggested elsewhere in this Commentary, this alleged choice between irrational drug laws and complete legalization may be a false choice if the model of drug addiction as a disease is inaccurate. See supra text accompanying notes 130–47. That is, we should be entirely capable of distinguishing between sale and use, identifying those drugs that are so irresistible and destructive that their mere use should be a crime, distinguishing further between those that deserve significant jail or prison time and those that do not, and, in any event, spending more than lip-service resources on in-custody treatment programs. See infra text accompanying note 333 (discussing the need for in-custody treatment). Finally, regardless of the choices we eventually make on the issue of legalization, an overall lowering of the decibel level would be a pleasant alternative to our current political and judicial hyperventilation.
compel, treatment. But they also appeal to the legal horn of the dilemma by recognizing that drug use is still, at heart, a crime, punishable if defendants do not take advantage of their treatment opportunities.

It is tempting to view drug courts as a magic solution to the ancient dilemma about drugs. Indeed, this temptation, fueled by an enormous injection of federal money, may have much to do with the great popularity of drug courts. I submit, however, that the drug court as a public policy solution to the drug dilemma is no solution at all, but rather a conflicted, and some would say cynical, appeasement of two powerful political forces—the law enforcement community and the treatment community.

If drug use is truly uncontrollable, then refusal to take advantage of treatment is also uncontrollable. Indeed, the treatment community teaches us that recovery is a continuing process of failures and successes. Yet, to appease the law enforcement community, drug courts typically impose an arbitrary number and quality of excusable failures before the drug defendant is treated like any other criminal defendant and sentenced accordingly. 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? Do we give cancer patients three tries at chemotherapy before sending them to the penitentiary? Or, perhaps more analogously, do we give insane criminal defendants three tries at being cured before we forget about the requirement of mens rea and move them from the state hospital to the state penitentiary? I suggest that the reason most of us are against the outright legalization of all drugs is that we do not really believe, with the kind of breadth and depth required of such matters, that much, if any, drug use is really the involuntary product of a disease mechanism.

Even if we believe some drug use is involuntary, why not at least make efforts to separate those few who may really be diseased from those who simply choose to take drugs? I suspect the answer is that we recognize the complex and fundamentally intractable problem of separating voluntary from involuntary drug use. At what point does the mere desire to disengage from life’s pains by taking drugs become

153. One of the most troubling aspects of treatment-based drug courts is that their very function is to compel treatment. This is an oddly paternalistic and ham-fisted approach to take when so many in the treatment community have spent so many years teaching us that the first step toward recovery is for addicts to recognize their addictions and to decide for themselves to begin the journey toward recovery.

154. See supra text accompanying notes 105-08.
an uncontrollable compulsion? Despite all of our modern bluster about how much is known about the biological bases of addiction, the answer to this fundamental moral question is unknown, and might be unknowable. For all its weaknesses as the precursor to the disease model of addiction, at least the Alcoholics Anonymous model recognized this central moral component to addiction.

Drug courts, whatever their benefits, do not serve this function of moral screening. On the contrary, their unstated central assumption is that modern treatment modalities are so effective that if a defendant fails them three or four times, it must be the defendant's "fault," and that particular defendant therefore must be one of those "volunteer" addicts against whom the sword of the criminal law may morally swathe and not a truly "diseased" addict. We compassionate judges can then sentence that defendant to prison, smug with the knowledge that our experts, by the simple device of offering treatment a certain arbitrary number of times, can separate the diseased from the criminal.

Everyone is satisfied, except the incorrigible drug user. We satisfy the experts because they get paid for the failed treatment; we satisfy the law enforcement community because we take a hard approach to the incorrigibles; and we satisfy our own internal sense of justice by reminding ourselves that our experts have performed the Solomonic miracle of separating out the diseased unintentional drug user from the criminally intentional drug user.

But of course this whole approach is a charade. Our treatment efforts are hardly so effective that a mere three or four failures indicate some kind of intentional failing. In any event, a case can be made that if addiction is really a disease, then the most diseased defendants are precisely the defendants most likely to fail many, and perhaps even all, treatment attempts. Drug courts thus may be performing a kind of reverse moral screening—those defendants who do not respond to treatment, and therefore may be the most diseased, go to prison, while those defendants who respond well and whose use of drugs truly may have been voluntary, escape prison.

This half-crime approach to drug use also makes no sense at the crime end of the disease-crime axis. Once we have made the social decision that crack, for example, is such an addictive, dangerous drug

155. See supra text accompanying notes 140–43.
156. See supra text accompanying notes 79–80.
157. See supra text accompanying notes 144–47.
158. On the contrary, compulsory treatment efforts in the drug court context have been embarrassingly ineffective. See infra text accompanying notes 167–249.
that smoking it should be a crime, it makes little moral sense to excuse that crime for a certain number of times in order to try to treat it. We do not do that with shoplifting or with sexual assault on a child, despite the psychiatric labeling of some extreme forms of those behaviors as "diseases."\footnote{159} Instead, we have made the social choice that shoplifting and sexual assaults are behaviors that we simply will not tolerate, regardless of their etiology. Issues related to kleptomaniacal or pedophilial compulsion are left to be dealt with where they should be—at sentencing. We should treat drug crimes no differently.

By existing simply to appease two so diametric and irreconcilable sets of principles, drug courts are fundamentally unprincipled. By simultaneously treating drug use as a crime and as a disease, without coming to grips with the inherent contradictions of those two approaches, drug courts are not satisfying either the legitimate and compassionate interests of the treatment community or the legitimate and rational interests of the law enforcement community. They are, instead, simply enabling our continued national schizophrenia about drugs.

There is another philosophical problem with drug courts, related both to the doctrinal schizophrenia discussed above and to some of the institutional issues discussed below:\footnote{160} courts simply should not be in the business of forcing medical treatment on people convicted of crimes as a condition of a favorable sentence. They most certainly should not be in the business of forcing treatment on defendants who have not yet been convicted as a condition of being released on bond. Yet that is exactly what drug courts are all about.

One of the principal purposes of the judicial branch, and of all the procedural and evidentiary protections attached to that branch, is to insure that the force of the criminal law is wielded soberly. I sympathize with drug court proponents who see the filing of criminal charges as a special opportunity to "get the attention" of drug users and intervene meaningfully in their lives. Of course, it is precisely because drug defendants face the wrath of the criminal law that we may be in the best position to "get their attention" and force treatment that will benefit everyone if it is successful. But we are judges, not social workers or psychiatrists. We administer the

\footnote{159} Kleptomania is a recognized mental disorder, and its diagnostic criteria are currently set forth in DSM-IV, supra note 130, at 612–13. Pedophilia is a recognized mental disorder, and its diagnostic criteria are currently set forth in id. at 527–28.

\footnote{160} See infra text accompanying notes 327–41.
criminal law because the criminal law is its own social end. It is not, or at least ought not be, a means to other social ends.

I am well aware that in many other non-drug criminal contexts it is common for even the most reluctant judges to sprinkle some social tinkering in with our traditional judicial actions. I admit that I have succumbed to the lure of regularly imposing as conditions of felony probation such requirements as finishing high school, getting a Graduate Equivalency Diploma, getting a job, or even, alas, completing a drug treatment program. The judicial temptation to intrude into the private lives of litigants is not limited to the criminal law. Some of my colleagues order all divorcing parents with children to take parenting classes as a condition of obtaining their divorce decree, though I have not given in to that particular temptation.

I suffer no illusions that the imposition of any of these kinds of social conditions does much good, but most of us are willing to impose them because we are also sure they will do no harm. But there is real institutional harm in this kind of social tinkering. Judges have the right to exercise only those powers necessary to dispose of the cases before us. When we succumb to the very human temptation to do more—to fill the void that is so achingly apparent in so many of the dysfunctional people we see every day—we not only risk being wrong, but we risk being imperial.

The moral authority of our most cherished institutions comes from their voluntary nature: the value of advice from a priest, a teacher, or a loved one depends in large part on the fact that we are free to ignore it. But judges' pieces of "advice" are court orders, enforceable ultimately by the raw physical power of imprisonment. It is precisely because of the awesomely enforceable nature of our powers that we must be so circumspect in exercising them. It is one thing for a co-worker, family member, doctor, or clergyman to confront someone about a perceived drug problem; it is quite another thing for a judge to compel drug treatment. Drug courts not only fail to recognize this important institutional distinction, but their very purpose is to obliterate it.

161. See supra infra text accompanying notes 246-49 (discussing the Chicken Soup Approach to court reform).
162. Those confrontations can run the gamut from gentle persuasion to so-called "interventions."
163. Mark Kleiman, no foe of compulsory treatment—in fact, he emphasizes the importance of drug treatment in prisons, coupled with the carrot of parole, see infra text accompanying note 334—cogently and candidly summarizes the dilemma:
   Any drug policy beyond simple persuasion entails an attempt to make a class of people—drug users and potential drug users—better off by limiting their range of
In a jurisprudential context, these battles are part of a larger war about so-called "restorative justice," or what some commentators have called "therapeutic jurisprudence." These ideas emanate from the proposition that the judiciary can be a powerful force for social change, not just in the traditional way of applying the law in individual cases, or even by pushing the existing law to new enlightened boundaries, but by actively intervening in the day-to-day lives of litigants in an infinite variety of non-traditional ways. A full discussion of these broad and controversial ideas is beyond the scope of this Commentary. Suffice it to say that, if they are intended to free judges not only from the constraints of the separation-of-powers doctrine but even from the limits of our own expertise, they are dangerous ideas indeed. I cannot imagine a more dangerous branch than an unrestrained judiciary full of amateur psychiatrists poised to "do good" rather than to apply the law.

V. UNEXAMINED EFFECTIVENESS: DO DRUG COURTS WORK?

Perhaps the most startling thing about the drug court

---

personal choices. Being thus coerced for their own good is supposed to make them more responsible citizens and neighbors. Described so baldly, drug control is revealed for what it is: a particularly tricky piece of social engineering. Its wide acceptance among those who otherwise abhor the policies they call "social engineering" should not blind us to the fact that drug control is subject to the frailties of its kind, including a propensity for unexpected and unwanted side effects. Using coercion in a free society is not for the faint of heart.

KLEIMAN, supra note 51, at 14.

164. E.g., Hora et al., supra note 1, at 440; Wexler, supra note 1, at 220.

165. The idea behind the growing movement of "therapeutic jurisprudence" is that because the experience of coming before our courts is having therapeutic consequences for defendants, our courts should capitalize on the moment when a person is brought before us and use it as a starting point for improving the defendant's overall lifestyle. See Sheila M. Murphy, Therapeutic Jurisprudence: Its Time Has Come, TRIAL JUDGES NEWS, Winter 1997/1998, at 3, 3.

166. Actually, these ideas are attempts to repackage and revive what criminologists have described generally as "the rehabilitative ideal," in which the focus of the criminal law was to change the attitude and, ultimately, the behavior of convicted criminals. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 2–3 (1981). The rehabilitative ideal gained popularity between the World Wars and remained pre-eminent through the 1970s. See id. at 2–3. By 1980, however, as criminologists began to take a closer empirical look at the whole issue of the effectiveness of rehabilitation, many began to repudiate the rehabilitative ideal, replacing it with penal notions that put more emphasis on retribution and on the short-term protection of society than on rehabilitation. See id. at 32–59. Drug courts represent a quaint, and some would say naïve, attempt to revive long-repudiated notions that state criminal power can efficiently change the behaviors, let alone the attitudes, of individuals. See generally Boldt, supra note 1, at 1035–36 (arguing that some aspects of drug courts represent a dangerous return to the rehabilitative ideal at the expense of due process).
phenomenon is that drug courts have so quickly become fixtures of our jurisprudence in the absence of satisfying empirical evidence that they actually work. Although many studies and many kinds of studies have examined drug courts, none has demonstrated with any degree of reliability that drug courts work.

There are three kinds of drug court studies. The most common evaluate operational processes and deal with statistics like filings, drop-out rates, and other data shedding light on the actual drug court process. The second type of study is the cost-savings analysis, which aims to compare the operational and sentencing costs of drug courts to the operational and sentencing costs of traditional courts. The third, and for our purposes the most meaningful, studies have been the so-called "impact evaluations," which attempt in some fashion to assess the impact of drug courts, most often by comparing recidivism rates between some drug court population and some non-drug court population.

Impact evaluations have taken three forms: (1) informal surveys of a single drug court conducted by that drug court's personnel; (2) formal studies of a single drug court conducted by outside professionals, but commissioned by that particular drug court; and (3) formal studies of one or more drug courts conducted by outside professionals and not commissioned by the drug courts being studied, though often funded by the federal Drug Courts Program Office. The informal impact surveys done by drug court personnel typically make outlandish and unsupported claims of massive reductions in recidivism rates. The formal studies—both commissioned and non-commissioned—provide quite different and rather mixed results. Most have concluded that drug courts are effective in speeding drug cases through the system, but that drug courts have only a marginal impact, if any, in reducing recidivism.

167. See Belenko, supra note 96, at 9.
168. See id. at 11, 17.
169. See id. at 17–18. As of June 1998, there had been no completed cost-savings analyses done for any drug court. See id. at 18. Since then, there have been only two studies of which I am aware that include some cost-savings analysis—the 1999 study of the Riverside (California) drug court and the Portland County (Maine) drug court. See Michelle Shaw & Kenneth Robinson, Reports on Recent Drug Court Research, 2 NAT'L DRUG COURT INST. REV. 107, 116 (1999) (reviewing the 1999 study of the Riverside drug court, which was conducted by Dale K. Sechrest & David Schicor); id. at 119 (reviewing the 1999 study of the Portland County drug court, which was conducted by Donald F. Anspach & Andrew S. Ferguson).
171. These surveys often are called "internal impact surveys."
A. General Methodological Issues

All but a handful of drug court impact studies have been infected by various methodological defects. Any complete discussion of drug court impact studies must therefore include a discussion of these general methodological issues.

1. Selecting the Control

What we really want to know about drug court effectiveness is whether drug courts are more effective than traditional courts in handling drug cases. In the language of the scientific method, the traditional courts are the control against which drug courts should be compared to test the hypothesis that drug courts are effective. Thus, all investigators performing impact evaluations seem to agree that once they settle on some particular statistical measures of effectiveness, those measures should be applied to compare the way drug courts handle cases with the way traditional courts handle drug cases.172

This kind of comparison, however, is hampered by a serious practical problem: most drug courts, particularly those that have come into existence in the last few years, have not been adopted as pilot segments within a whole court. Instead, they have immediately taken over all drug cases in that particular court.173 As a result, it is impossible to make contemporaneous comparisons between drug courts and traditional courts because the traditional courts are no longer handling drug cases. Investigators are then forced to resort to less comparable controls.

Some studies have compared drug courts in one jurisdiction to traditional courts in other jurisdictions, but this approach risks having important differences between the jurisdictions interfere with the legitimacy of the comparison. Other studies have compared existing drug courts in one jurisdiction with the traditional courts in that same jurisdiction prior to the adoption of drug court, though this comparison risks being distorted by temporal differences between the two systems.

Once a control court is selected, one of the most difficult

172. Because drug courts handle drug cases, but traditional courts handle more than just drug cases, meaningful comparisons between the two should be limited to looking at the way traditional courts handle drug cases. Indeed, that is what all the formal studies of which I am aware have done. See infra text accompanying notes 211-44 (discussing these formal studies).

173. See BELenko & DUMANOvSKY, supra note 96, at 6-7.
challenges that any impact study faces is selecting the control population within that court. Because most treatment-based drug courts have criteria that a defendant must meet before becoming eligible for drug court, and because that screening process itself may affect the particular effectiveness measure being studied, similar screening mechanisms must be used when identifying the control group. Thus, for example, the study of the Riverside County, California, drug court used a control group composed of randomly selected drug defendants who had committed their offenses before the adoption of the drug court, but “who were identified as possible candidates for drug court had it existed.” To the extent this identification of possible candidates involved any kind of subjectivity, it is not a truly random sample, and it has the potential of affecting the study results.

Even in drug courts like Denver’s, which do not impose eligibility criteria, there is a problem with comparability. As discussed in more detail below, low-level transactions are being prosecuted as felonies in drug courts, whereas, in the past, these same transactions would have been substantially less serious matters, if prosecuted at all, in traditional courts. That is, drug courts, by the very operation of this feedback phenomenon, tend to deal with less serious drug offenses than their traditional control courts, and this difference also threatens meaningful comparisons between the two.

Post-adjudicatory drug courts present unique problems in selecting the control group. Because treatment in post-adjudicatory drug courts is by definition a condition of probation, all drug defendants in those treatment programs receive probation. The control group against which they are compared therefore typically is limited to traditional defendants who received probation, rather than all defendants. Using this control measure, however, will artificially reduce control group recidivism. Comparisons made on this basis

174. For example, screening may have some impact on recidivism. See infra text accompanying notes 190–95.
175. Belenko, supra note 96, at 29.
176. At least it did not impose eligibility criteria until February 1997, when two-time felons and illegal aliens were made ineligible for the Denver Drug Court. See infra text accompanying notes 280–81.
177. See infra text accompanying notes 261–64.
178. In addition, one must be careful not to select the control group from those defendants who were convicted, because one could expect that group to exhibit dampened measures of effectiveness—higher recidivism, for example—than the universe of all defendants.
179. See supra note 105 (discussing post-adjudicatory drug courts).
180. Probation-eligible defendants, who by definition have less significant criminal
therefore are valid only if drug court defendants who received probation would also have received probation had they been in traditional courts. That assumption is unlikely to be true because the whole thrust of most drug courts is to give probation, coupled with treatment and close supervision, to hardcore drug defendants who otherwise would be sentenced to prison.181

2. Selecting the Target

Some controversy also exists over the appropriate target group against which to compare the control and the way to identify individual defendants within that target group. Most informal studies, and even many formal studies in the early years, targeted defendants who graduated from the drug court treatment programs, rather than all defendants who entered drug courts. Presumably, this method was used because the data on graduates was retrieved easily and inexpensively. It is now well-recognized, however, that such comparisons are of little statistical value, at least as far as impact evaluations are concerned, because drug court graduates can be expected, by definition, to do significantly better than their traditional court cohorts. Instead, most evaluators now agree that the most meaningful target group against which the control group must be compared is all drug court defendants, not just drug court graduates.182

Once the target group is identified, it is important that the individuals to be studied within that group are selected randomly. Randomly selecting targets is just as important, statistically, as randomly selecting control defendants, and many impact studies have been criticized for not selecting their subjects randomly.183

records than their probation-ineligible cohorts, and who in fact have been screened in one way or another as less likely to reoffend, will as a group be less likely to reoffend.

181. As Belenko notes:

[A]lthough it is generally thought that drug courts target "first-time offenders," many drug court clients have substantial criminal histories and many years of substance abuse histories.... It is the older more "experienced" offender for whom successful treatment intervention can have the greatest impact on prison populations and generate the most substantial savings in reduced crime and criminal justice system costs.

Belenko, supra note 96, at 21.

182. See id. at 19 (stating that many of the informal drug court studies are flawed because they "compare only drug court graduates [rather than all drug court attendees] to a comparison sample, which tends to inflate the overall effect of the intervention").

183. See infra note 236 (discussing the Riverside Drug Court's failure to select its control defendants at random).
3. Selecting the Impact Measure

Once the control groups and target groups are agreed on, independent investigators typically have looked at two measures of effectiveness to reflect both the case management and treatment aspects of most drug courts. They first analyze how fast drug courts process the target drug court defendants compared to the control non-drug court defendants. They then examine how “successfully” drug courts process the target drug court defendants compared to the traditional control court.

Case-processing speed is fairly straightforward, and, as discussed in more detail below, most studies show that drug courts with DCM components significantly decrease the total time from filing to disposition. Relying on these time savings as a measure of effectiveness, however, has several significant shortfalls.

First, case-processing speed is a particularly slippery and dangerous slope for judges to step on. Eliminating the right to counsel and the right to trial might also speed things along quite nicely, and, as a practical matter, some would argue that is precisely how drug courts have achieved whatever success they have achieved in terms of speed. In any event, it should not be at all surprising that most studies have shown that systems designed specifically to speed cases along do just that, although the amount of savings attributable to speed alone may of course be illusory if treated defendants reoffend or if sloppy convictions are overturned.

Indeed, the supposed time savings simply may stem from the fact that most drug courts depend even more on plea bargains than their plea-bargain-addicted traditional court counterparts. Nothing slows down case processing like a bunch of trials, and treatment-based drug courts are designed precisely to encourage defendants to go into treatment by discouraging them from going to trial. Because drug courts by design have fewer trials than traditional courts, drug courts obviously should show a shorter case-processing average than

---

184. See infra note 216.
185. One study notes that “there is little dispute over the increased efficiency gained through the introduction of drug courts. This is not to suggest, however, that speedy case processing alone renders ‘good’ justice. Increased efficiency is more of a measure of bureaucratic operation than of justice.” Robert Granfield & Cindy Eby, An Evaluation of the Denver Drug Court: The Impact of a Treatment-Oriented Drug Offender System 10 (1997) (on file with the North Carolina Law Review).
186. See infra text accompanying notes 215-44 (discussing recidivism).
187. See infra text accompanying notes 300-07 (discussing quality concerns).
188. The Denver Drug Court does not handle any trials; rather, it transfers its trials to other divisions of the Denver District Court. See infra text accompanying notes 271-75.
Instead of lumping dispositions and trials together, a more appropriate measure of speed might be to look at these two very different processes, trials and dispositions, separately. Is the average case that goes to trial in a drug court processed more quickly than the average drug case that goes to trial in a traditional court? Is the average case that ends up in a plea bargain processed more quickly in a drug court than the average drug disposition in a traditional court? I am unaware of any drug court impact studies that address these more meaningful questions about drug court speed.

The question of drug court success, as opposed to speed, is of course even more complex. The traditional measure of drug court success has been recidivism—that is, the rates at which drug court defendants, as compared to drug defendants in traditional courts, reoffend. The impact studies have looked at two kinds of recidivism: rearrests and probation violations. Rearrest recidivism is probably the more accurate of the two. Measuring drug court success by comparing probation violation rates undervalues the effect of drug courts because drug court probationers are, at least in treatment-based models, much more closely supervised and therefore much more likely to be detected violating their probation than their traditional court cohorts. Nevertheless, even relying on traditional rearrest rates as a measure of recidivism poses some methodological challenges in the drug court context.

Arrest records can be notoriously inaccurate. As with probation violations, rearrest rates are likely to be understated for traditional drug defendants as compared to drug court defendants because the traditional system is much more likely to lose track of defendants.

189. See Granfield & Eby, supra note 185, at 11.
190. Traditional supervision in the form of reporting, as well as more intensive kinds of probation that might even include drug testing, ordinarily are done on a much less frequent basis than drug court supervision. A study done by American University in 1997 revealed that 55% of surveyed drug courts required at least two drug tests per week during the first phases of treatment, 35% required one test per week, and 10% required one test every two weeks. See Belenko, supra note 96, at 21–22. By comparison, drug testing in these same courts prior to the adoption of drug courts was considerably less frequent: 52% required monthly testing, 8% required weekly testing, 33% required random testing on an unspecified as-needed basis, and 6% required no testing at all. See id. at 22.

Quite apart from drug testing, drug courts impose significantly more demanding reporting obligations than do traditional courts. This same American University study revealed that only 8% of surveyed traditional courts required regular court appearances for those under community supervision, contrasted to the regular court appearances required in drug courts. See id. As for probation, 73% of traditional probationers meet
The lack of accuracy of traditional court records becomes an even greater problem when the traditional control court is a historical court—a court that existed five or six years ago but since then has been supplanted by a drug court.  

Of course, the value of recidivism measures depends a great deal on the length of the follow-up period. It is one thing to ask whether a drug court defendant is rearrested within six months after his drug court disposition, and quite another to ask whether he is rearrested within six years after the disposition. Because most drug courts are relatively new, most impact studies use relatively short follow-up periods. Twelve to eighteen months seems to be customary, though most experts agree that truly meaningful recidivism studies need considerably longer follow-up periods.

Most impact studies express recidivism rates as a simple

<table>
<thead>
<tr>
<th>COURT</th>
<th>AUTHOR</th>
<th>PERIOD (MONTHS)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maricopa, AZ</td>
<td>RAND</td>
<td>36</td>
</tr>
<tr>
<td>Oakland, CA</td>
<td>Tauber</td>
<td>36</td>
</tr>
<tr>
<td>Riverside, CA</td>
<td>Sechrest</td>
<td>21</td>
</tr>
<tr>
<td>Denver, CO</td>
<td>Granfield</td>
<td>12</td>
</tr>
<tr>
<td>Wilmington, DE</td>
<td>Miller</td>
<td>12</td>
</tr>
<tr>
<td>Dade, FL</td>
<td>Goldcamp</td>
<td>18</td>
</tr>
<tr>
<td>Baltimore, MD</td>
<td>Gottfredson</td>
<td>6</td>
</tr>
<tr>
<td>Multnomah, OR</td>
<td>Finigan</td>
<td>24</td>
</tr>
<tr>
<td>Travis, TX</td>
<td>Kelly</td>
<td>12</td>
</tr>
</tbody>
</table>

See id. at 29–31. Needless to say, it is important for the follow-up period of the target group to be the same as the follow-up period of the control group. The study of the Riverside Drug Court used a 21-month follow-up period for the drug court group, but used a 27-month follow-up period for the control group, with the result that control group recidivism is over-reported compared to drug court recidivism. See id. at 29. The other eight studies correctly used the same follow-up periods for both target and control.
percentage, representing the portion of subjects studied who have been arrested at least once over a set follow-up period. Even with a sensible follow-up period, this kind of recidivism measure is rather unsophisticated because it does not distinguish between the defendant who is rearrested a single time in the follow-up period from the defendant who is rearrested ten times in the follow-up period. And, of course, society benefits not only when criminals are permanently reformed, but also when their criminal activity is dispersed over time. Indeed, an important argument in favor of drug courts is that even if defendants are not being cured of their addictions in numbers justifying the costs of drug courts, frequent and comprehensive police and judicial intervention will result at least in injecting more time between defendants' criminal episodes. To reflect this social benefit, some impact studies express recidivism rates not as the simple percentage of defendants rearrested in the follow-up period, but rather as the average number of rearrests per defendant within the follow-up period.

Finally, in a perfect world, recidivism probably should be measured by subsequent convictions rather than subsequent arrests. Of course, using convictions requires a longer follow-up period, is more complicated, and is probably more expensive.

After early formal impact studies showed that drug courts were having virtually no impact in reducing recidivism, many drug court proponents suggested that other measures of drug courts' success might be more meaningful, such as future employment or future drug use. But these other, less traditional impact measures are fraught

193. See id. at 17.
194. See infra note 263.
195. Only two of the nine studies compiled by Belenko used this more sophisticated measure of recidivism: (1) Tauber's study of the Oakland Drug Court, see Belenko, supra note 96, at 31; and (2) Finigan's study of the Multnomah County (Portland), Oregon Drug Court, see id. at 33. There are even more sophisticated measures of recidivism that, for example, focus on so-called "time-at-risk" by discounting or ignoring any time in custody. As of Belenko's and Dumanovsky's meta-study in June 1998, no impact studies of treatment-based drug courts had used "time-at-risk" recidivism, although the 1991 ABA study used a time-at-risk adjustment in examining recidivism in the New York City N Parts. See infra note 216.
196. See infra text accompanying notes 211–44 (discussing those formal studies).
197. For example, a study of the Wilmington, Delaware Juvenile Drug Court used employment and school enrollment as the impact measure and found that after a one-year follow-up period, 79% of all drug court graduates were either employed, in school, or both, compared to 62% of non-graduates. See Belenko, supra note 96, at 28. Although comparing drug court graduates with drug court non-graduates is not nearly as distorting as comparing drug court graduates with all drug defendants in traditional courts, see supra text accompanying note 181, it is important to recognize that such a comparison does not
with their own methodological problems. Employment can be an elusive and misleading measure. As discussed above, most drug courts are in a different locale or in a different point in time than their traditional control courts, and geographic and temporal differences in economic conditions make it hard to gather accurate employment statistics as a measure of drug courts' success. Future drug use is also a difficult comparison to make, again because one would be comparing groups of closely monitored drug court defendants, whose drug usage, at least during their bond and probation supervision, is well documented, with traditional drug defendants, whose drug usage is substantially less well known. Moreover, because most drug use is itself a crime, studies based on drug use are in effect looking at a narrow kind of recidivism. Finally, because most control courts are no longer operating, it is either impossible or impossibly costly to measure things like employment or drug use histories. Presumably because of these issues, independent evaluators generally have resisted the call to look at non-traditional measures of drug court effectiveness, and virtually all have stuck with the two traditional measures: speed and rearrest recidivism.

Although much has been written about so-called "retention rates"—the percentage of drug defendants who complete their treatment program—this statistic is really an operational measure and not an impact measure. What matters is not whether drug court defendants complete their treatment programs, but whether the

measure drug court effectiveness; it measures only the effectiveness of the treatment programs within a given drug court. It is an operational study and not an impact study. See supra text accompanying notes 167-70 (discussing these two types of studies).

198. See supra text accompanying notes 172–73.

199. Belenko notes that gathering information about drug courts' effect on employment is difficult due to limited data, but “[a] few evaluations have gathered employment data, and these generally found that drug court participants are more likely to gain employment while participating and upon graduation.” Belenko, supra note 96, at 28.

200. See supra text accompanying notes 167–70 (discussing the difference between operational studies and impact studies). But even as an operational statistic, retention rate studies have been done so poorly that they are of little value. See Belenko, supra note 96, at 20 (noting that studies' retention rates are flawed due to “limited observation, unclear time periods, . . . [different] cut-off period[s], . . . and clients [with] varying amounts of time in the potential program”). The effects of these fundamental statistical defects are readily apparent from retention rates published regularly by the Drug Courts Program Office. These rates vary wildly, from 100% to 35%, spanning programs of vastly different, and indeed incomparable, sizes. For example, a drug court program in Wichita, Kansas with a total enrollment of four people is listed along with Dade County's (with an enrollment of 14,561) and Denver's (6011). See DRUG COURTS PROGRAM OFFICE, DRUG COURT ACTIVITY: SUMMARY INFORMATION (1998) (on file with the North Carolina Law Review).
programs are effective in breaking their drug dependence and their other criminal activity. Informal impact surveys often commit the mistake of parading glowing retention rates as evidence of success, when in fact those rates simply reflect the compulsory nature of drug court treatment and its regimen of graduated punishments designed expressly to keep defendants in treatment.

B. Informal Impact Surveys

Most new drug courts are simply too busy dealing with the enormous challenges of implementing and maintaining their courts to pay much attention to gathering meaningful impact statistics. Yet few have been able to resist the temptation to compile unrealistically optimistic statistics in some form or another. These informal impact surveys are almost always done by drug court personnel themselves or by staff in the other two institutions that form the drug court triangle—police departments and district attorneys offices. As a result, the drug court literature is full of informal, unpublished, and untested impact surveys done by people who are untrained in the scientific method, but who arguably have a vested interest in continuing drug courts. Not surprisingly, virtually all of these informal impact surveys report astounding rates of success. But their measures are almost always deeply flawed, and their methods are rarely statistically appropriate.

Informal impact studies suffer from a host of statistical defects. Many of them, and even some of the formal studies, lack sufficient data. Most drug courts are new, have short operating histories, and therefore are unable to produce impact surveys with anything but the shortest of follow-up periods. Good studies are also time-consuming, and the one resource most drug courts do not have is time. Meaningful impact studies can be expensive, and it is

201. Informal impact surveys are discussed in the next Section. See infra text accompanying notes 203–10.
202. As Belenko remarks, "Elements of the drug court model that may increase retention in treatment (such as graduated sanctions and rewards, judicial supervision[,] and acceptance of relapse) have not been studied[,] but merit further research." Belenko, supra note 96, at 20.
203. See supra text accompanying notes 191–92.
204. See infra text accompanying notes 257–84.
205. See W. Clinton Terry III, Prosecutors and the Evaluation of Dedicated Drug Treatment Courts, PROSECUTOR, Mar./Apr. 1997, at 32, 32. Formal impact studies can cost from 10% to 25% of a drug court's entire budget. See id. at 34. In a pattern that seems typical of the rush toward drug court implementation, the Denver Drug Court formal impact study originally called for an ambitious evaluation of 1500 defendants, but was cut back to a modest 100 defendants when the investigators discovered that
perfectly understandable that any judge presiding over an operating drug court will choose to spend resources on treatment instead of evaluation.

More significantly, most informal impact surveys (and indeed most formal studies) commit the mistake of comparing traditional drug defendants with drug court graduates, rather than with all drug court defendants. This mistake has a grossly distorting effect because drug court graduates, who by definition have spent many months successfully completing a treatment program, obviously will be less likely to be arrested in the follow-up period after their graduation than drug defendants who drop out of the program before graduation. The short follow-up periods typical of most informal impact surveys magnify this distortion. Studies of the Denver Drug Court dramatically illustrate both the fact and magnitude of such distortion.

Two years after the formation of the Denver Drug Court, its coordinator issued a three-page “study” reporting a colossal drop in recidivism from the control group of probationary drug defendants in traditional courts (58.3% recidivism) to the target group of drug court graduates (10.6% recidivism). The “study” was accompanied by an impressive pie chart showing a thick wedge of traditional recidivism and a thin slice of drug court recidivism. But, as discussed in more detail below, when the formal study of the Denver Drug Court was done using the proper target group of all drug court defendants, instead of just drug court graduates, the results were quite different: 58% recidivism for the drug defendants in traditional courts and 53% for the drug defendants in drug court.

The bottom line is that the informal impact surveys that have flooded and come to dominate the drug court literature have virtually no value, except perhaps as morale boosters to rally the drug court troops. Their exaggerated claims do a substantial disservice to the credibility of the drug court movement.

"automated court records were not available, nor particularly accurate." Granfield & Eby, supra note 185, at 1.

206. If the time in which the drug court graduate is in the program is counted as part of the follow-up period, then this distortion is even greater. See supra note 195 (discussing "time-at-risk" recidivism).

207. See supra text accompanying note 192 (discussing the follow-up periods).


209. See id. at 4.

210. See infra text accompanying note 237.
C. Formal Impact Studies

There also have been dozens of formal, academic studies of drug court effectiveness.211 These studies range from independent national studies covering many different jurisdictions to studies of individual drug courts commissioned by the very drug court to be studied. Most of these studies, although considerably more formal than informal surveys, are not published in peer-reviewed or other professional journals.212 Despite the dozens of formal studies, and despite congressional directives in the mid-1990s for more comprehensive and meaningful impact studies,213 only a handful have made the proper comparison between all drug court defendants—rather than only drug court graduates—and all traditional drug defendants.214 The recidivism results in that handful of studies are substantially less promising than the wild claims regularly made in informal surveys, as the following summary of those studies illustrates.

1. 1991 American Bar Association Study

The American Bar Association (ABA) sponsored the first significant independent study of drug court effectiveness and published it in 1991.215 This study examined four urban drug courts: (1) Cook County (Chicago), Illinois; (2) Milwaukee; (3) Philadelphia; and (4) Dade County (Miami), Florida. The first three are DCM-based models, and, of course, Dade County is treatment-based.

Not surprisingly, the ABA study found that the DCM-based courts achieved significant reductions in case-processing times, but no reductions in recidivism.216 The ABA study also concluded that the

---

211. See infra text accompanying notes 215–44.
212. See Belenko, supra note 96, at 8.
The Comptroller General of the United States shall study and assess the effectiveness and impact of grants authorized by part V of title I of the Omnibus Crime Control and Safe Streets Act of 1968 as added by [this subchapter] and report to Congress the results of the study on or before January 1, 1997.
Id.; see also supra text accompanying notes 110–11 (discussing this directive).
214. See supra text accompanying note 182.
215. See BARBARA E. SMITH ET AL., AMERICAN BAR ASS’N, STRATEGIES FOR COURTS TO COPE WITH THE CASELOAD PRESSURES OF DRUG CASES (1991); see also BLENKO & DUMANOVSKY, supra note 96, at 13–15 (describing and discussing this study in detail).
216. The DCM-based drug courts in Chicago, Milwaukee, and Philadelphia significantly reduced disposition times from their traditional predecessors:
savings in case-processing time could be achieved without isolating drug cases. In other words, the study found that because it is how the drug case is managed rather than where it is managed, the benefits of DCM-based drug courts can be achieved without having special drug courts, simply by identifying drug cases (or any cases, for that matter) and managing them accordingly.\footnote{217}

The most significant, and troubling, finding of the ABA study was that the Dade County treatment-based drug court was no more effective than traditional courts in reducing arrest recidivism. It found that over a one-year follow-up period drug court defendants suffered a 32\% recidivism rate compared to the 33\% recidivism rate suffered by drug defendants before implementation of the drug

<table>
<thead>
<tr>
<th>CITY</th>
<th>DISPOSITION TIME (DAYS)</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>TRADITIONAL COURT</td>
<td>DRUG COURT</td>
</tr>
<tr>
<td>Chicago</td>
<td>245</td>
<td>69</td>
<td></td>
</tr>
<tr>
<td>Milwaukee</td>
<td>253</td>
<td>117</td>
<td></td>
</tr>
<tr>
<td>Philadelphia</td>
<td>294</td>
<td>158</td>
<td></td>
</tr>
</tbody>
</table>

See BELENKO & DUMANOVSKY, supra note 96, at 13. According to a study done in 1993 by the New York Criminal Justice Agency in Manhattan, the New York City N Parts achieved similarly dramatic results, reducing disposition time by an average of 85 days, see id. at 14, but that same study concluded that the N Parts had no impact in reducing recidivism. In fact, N Part defendants suffered a 53.5\% rearrest rate during the study's two-year follow-up period, while non-N Part defendants suffered a 50.5\% rearrest rate during the same two-year period. See id. To be fair, recidivism in DCM-based courts like New York City's N Parts is inherently higher than traditional recidivism precisely because traditional defendants spend more time in custody awaiting disposition. When the New York evaluators adjusted for time-at-risk, see supra note 195, and measured number of arrests instead of simple recidivism, see supra text accompanying notes 193-95, the results were more favorable: 3.3 rearrests per year for N Part defendants, compared to 5.6 for non-N Part defendants. See BELENKO & DUMANOVSKY, supra note 96, at 14. On the other hand, it appears that the traditional control group used in this study was not limited to drug defendants and that there may have been other significant and infecting differences between the target and control groups. According to Belenko and Dumanovsky, when one adjusts for these differences, the N Parts "had little independent effect on the likelihood of rearrest." Id.

217. Many of the case management techniques employed by these three drug courts were applied to other criminal cases by their traditional counterparts for non-drug cases, with similar results:

<table>
<thead>
<tr>
<th>CITY</th>
<th>DISPOSITION TIME (DAYS)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BEFORE DCM</td>
</tr>
<tr>
<td>Chicago</td>
<td>215</td>
</tr>
<tr>
<td>Milwaukee</td>
<td>196</td>
</tr>
<tr>
<td>Philadelphia</td>
<td>211</td>
</tr>
</tbody>
</table>

See BELENKO & DUMANOVSKY, supra note 96, at 13. As Belenko and Dumanovsky put it, "[T]he ABA findings suggest that 'fast track' drug courts can yield reduced processing time for both drug and nondrug cases." Id.
The ABA study also confirmed the suspicions of many prosecutorial critics of the drug court experiment: drug courts result in more lenient sentences. In theory, neither treatment-based drug courts nor DCM-based drug courts should have any impact on the lengths of sentences that defendants eventually receive. Treatment-based drug courts should involve fewer defendants receiving jail or prison time, and the time they do receive may be dribbled out at the front end in the form of short jail stays for violating bond or probation conditions. But for drug court defendants who violate their probations and eventually are sentenced, the fact that they came through a treatment-based drug court ought to have no bearing on the length of the sentences they ultimately receive. DCM-based drug courts also should have no impact on sentencing. They are just traditional courts processing drug cases in an accelerated fashion. Yet the 1991 ABA study found that both in Cook County and Philadelphia, quicker dispositions resulted in reductions in the average length of prison sentences.

2. 1994 Maricopa County Study

The impact study of the Maricopa County (Phoenix), Arizona, drug court compared traditional court drug defendants given

218. See Granfield & Eby, supra note 185, at 11 (describing the 1991 ABA Study). These dismal results from Dade County improved in a subsequent study done in 1994. See infra text accompanying notes 224-27.

219. See BELENKO & DUMANOVSKY, supra note 96, at 13. Belenko and Dumanovsky observe:

The ABA study also concluded that more lenient sentences were associated with quicker dispositions. In Philadelphia, shorter average prison sentences were imposed more often after the introduction of the DCM system. Similarly, Chicago has an increase in the use of probation sentences and a decrease in prison sentences. Only Milwaukee showed no evidence of changes in sentencing patterns with the introduction of the speedy trial drug court. Id. This has certainly not been the experience in the Denver Drug Court, where substantially more drug defendants are going to prison and are going there for a longer period of time than before drug court. See infra text accompanying notes 292-97.

220. Although the percentage of prison sentences may go down as a result of some drug courts, the actual raw numbers of prison sentences, and even the total amount of prison time given, may well go up if drug courts stimulate large increases in case filings. See infra text accompanying notes 290-95.

221. See SMITH ET AL., supra note 215, at 4, 10-11. One explanation for more lenient drug court sentences is that judges who volunteer for drug court may just be easier drug sentencers than their traditional counterparts, though I am aware of no studies confirming such a hypothesis. If this hypothesis is true, it highlights the general concerns, articulated below, that drug courts dangerously institutionalize the sentencing philosophy of a single judge or group of judges. See infra text accompanying notes 350-53.
probation to drug court defendants over a thirty-six month follow-up period. Because the Maricopa County Drug Court is post-adjudicative, and because the control group was therefore limited to probationers, the Maricopa County study arguably understates the traditional recidivism rate. Even so, the results were moderately more encouraging than the 1991 ABA study: 43.7% traditional court recidivism versus 33.1% drug court recidivism.

3. 1994 Dade County Study

In 1994, evaluators studied the Dade County Drug Court a second time to see if they could improve on the dismal results from the 1991 ABA Study. Over an eighteen-month follow-up period, traditional recidivism was measured at 48.7%, compared to drug court recidivism measured at 33.2%. There was, however, a remarkable, and unaccounted for, difference in failure-to-report rates—with drug court defendants failing to report 52% of the time, compared to 9% for drug defendants in traditional courts. More significantly, the target groups were not randomly assigned.

4. 1996 Baltimore Study

Evaluators examined both the county and district drug courts in Baltimore, using a very short follow-up period of six months. They reported modest drops in recidivism in both courts: from 27.1% to 22.6% in district court, and from 30.4% to 26.5% in county court. The short time period used for this study significantly decreases its reliability.


In 1996, as part of the 1994 amendments to the Omnibus Crime Control and Safe Streets Act, Congress directed the Attorney General to undertake a comprehensive evaluation of the effectiveness

---

222. See supra notes 179–81.

223. See Belenko, supra note 96, at 31. The Sherman Report later characterized this reduction as statistically “non-significant.” THE SHERMAN REPORT, supra note 105, at 9–51.

224. See supra text accompanying notes 215–21.

225. See Belenko, supra note 96, at 30.

226. See THE SHERMAN REPORT, supra note 105, at 9–52.

227. See supra note 183 (discussing the problem of non-random assignment).

228. See Belenko, supra note 96, at 31.

229. See supra text accompanying note 192.

of the more than three billion dollars in federal funds annually doled out under the Act to state and local governments for crime prevention. In 1997, Lawrence W. Sherman and other authors, in collaboration with the University of Maryland, reported to Congress on the state of those evaluations. One small part of that report dealt with drug court evaluations. It pointed out that despite Congress’s command for meaningful evaluations, there had been only four drug court evaluations—the three evaluations discussed above of the Maricopa County, Dade County, and Baltimore drug courts and an uncompleted evaluation of the drug court in Washington, D.C. The report was critical of many of the methodologies used in these evaluations and characterized most of the claimed reductions in recidivism as “non-significant.” Although it summarized the existing data as “early results” that appear “hopeful,” it concluded the section on drug court evaluations by explaining that “[t]here is yet little research to examine how effective the programs are in reducing crime.”


Since the time of the Sherman Report, only six additional impact studies have been conducted. Like the previous research, the studies had quite mixed results, ranging from huge drops in recidivism rates reported out of the drug court in Riverside, California, (33% to 13%) to statistically insignificant differences reported out of the

---

231. See THE SHERMAN REPORT, supra note 105.
232. See supra text accompanying notes 222–29.
233. The report criticized the 1994 Dade County study on methodological grounds, alleging that the 1994 study failed to randomly assign groups and that the study produced significant differences in failure to report rates “between the drug court participants (55 percent) and the comparisons (9 percent).” THE SHERMAN REPORT, supra note 105, at 9–51.

As for the other two studies, the report characterized the Maricopa County numbers as “non-significant” for a reduction in rearrest recidivism, but “significant” in terms of a reduction in incarcerations, id., corroborating the hypothesis that drug courts tend to impose more lenient sentences. See supra text accompanying notes 219–21. It characterized the Baltimore study as being “quite small” and noted its results “suggest that the program may have very different impacts depending upon the court and characteristics of the offender involved.” THE SHERMAN REPORT, supra note 105, at 9–51.

234. THE SHERMAN REPORT, supra note 105, at 9–51.
235. Id.
236. But the evaluation of the Riverside Drug Court did not use random controls. The control subjects, though initially selected at random, were then screened as “possible candidates for drug court had it existed at that time.” Belenko, supra note 96, at 29; supra
drug court in Denver (58% to 53%).

In addition to evaluations of particular drug courts or groups of drug courts, the literature is becoming increasingly filled with so-called "meta-studies"—studies of drug court studies. The most significant meta-study to date is probably the one delivered to Congress in July 1997 by the United States General Accounting Office (GAO). The GAO report is based on twenty evaluations done through March 1997, covering sixteen different drug courts. After expressing several concerns about the design and scope of many of the evaluations, the GAO concluded that there was insufficient data and research to definitively determine whether drug courts were effective in reducing recidivism and drug relapse.

Text accompanying note 175. In addition, the Riverside study used a longer follow-up period for the control group than for the target group, inflating control group recidivism. See supra note 192.

See Belenko, supra note 96, at 29; Granfield & Eby, supra note 185, at 26. Granfield and Eby also examined the more sophisticated measure of average number of arrests, see supra text accompanying notes 193-95, and the results were even less promising: defendants suffered an average of 0.8 arrests in the one-year follow-up period regardless of whether they came out of regular courtrooms or out of the drug court. See Granfield & Eby, supra note 185, at 25. To be fair to the Denver Drug Court, it is, or at least was at its inception and at the time of the Granfield and Eby study, a drug court that does not screen or exclude participants, which probably goes a long way toward explaining its dismal recidivism performance. The recidivism results for all six studies are summarized in the following table:

<table>
<thead>
<tr>
<th>CITY</th>
<th>RECIDIVISM %</th>
<th>TRADITIONAL COURT</th>
<th>DRUG COURT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Denver, CO</td>
<td></td>
<td>58.0</td>
<td>53.0</td>
</tr>
<tr>
<td>2. Multnomah County, OR (Portland)</td>
<td>1.53*</td>
<td>0.59*</td>
<td></td>
</tr>
<tr>
<td>3. Oakland, CA</td>
<td>1.33*</td>
<td>0.75*</td>
<td></td>
</tr>
<tr>
<td>4. Riverside, CA</td>
<td>33.0</td>
<td></td>
<td>13.4</td>
</tr>
<tr>
<td>5. Travis County, TX (Austin)</td>
<td>41.0</td>
<td>38.0</td>
<td></td>
</tr>
<tr>
<td>6. Wilmington, DE</td>
<td>51.1</td>
<td></td>
<td>33.3</td>
</tr>
</tbody>
</table>

* Expressed not as a percentage, but rather as the average number of arrests suffered during the follow-up period. See Belenko, supra note 96, at 29-31.

The Sherman Report was one of the first such meta-studies, see THE SHERMAN REPORT, supra note 105.


The GAO study details a number of problems found in the evaluations, including concerns regarding short observation periods, flawed recidivism data, a lack of comparison groups, and different target populations and treatment services, all of which make it difficult to accurately compare different drug courts. See id. at 7-8.

241. See id.
One of the most recent meta-studies of which I am aware is Steven Belenko’s June 1998 review of thirty evaluations representing twenty-four different drug courts.242 The Belenko study is by far the most optimistic meta-study done to date.243 But even Belenko concedes that most drug court evaluators continue to target drug court graduates instead of all drug court participants, that only a few studies have tracked recidivism for more than a one-year follow-up period, and that only two of the studies used a random method of identifying target drug court defendants.244

Treatment-based drug courts have been in existence now for eleven years—more than enough time to generate reliable data on the $64,000 question of whether they work. Despite an enormous reservoir of data, enormous federal financial incentives to prove effectiveness, and an express congressional directive to undertake meaningful effectiveness studies, the evidence on drug court effectiveness remains breathtakingly weak.245

Nevertheless, court administrators and judges continue to stumble over themselves lining up for federal monies to start more and more drug courts, and federal officials cannot dole out the money fast enough. Informal internal surveys continue to claim preposterous results, and formal outside studies continue to belie those preposterous claims. Still, the drug court train rolls on,

242. See Belenko, supra note 96.
243. Belenko summarizes his conclusion this way:
   Despite the different drug court structures, jurisdictional compositions, methods used by drug courts evaluators and the limitations of some of the data, a number of consistent findings emerge from the available drug court evaluations. Drug courts have been more successful than other forms of community supervision in closely supervising drug offenders in the community. . . . Based on more limited data and to a lesser but still significant extent, drug courts reduce recidivism for participants after they leave the program. Id. at 17–18.
244. See id. at 34–36. The most recent meta-study of which I am aware is a 1999 compilation of studies funded by Correctional Counseling, Inc. (CCI), a private criminal justice research organization based in Alexandria, Virginia. See Shaw & Robinson, supra note 169, at 107–19. The CCI summary examined five drug court studies: (1) the Riverside study; (2) the Delaware study; (3) a study done on the drug courts in Escambia and Okaloosa Counties, Florida, between 1994 and 1996; (4) a study of the juvenile drug court in Salt Lake City, Utah, between 1995 and 1997; and (5) a study of the drug court in Portland, Maine, covering 1998. The three new studies suffer from the same frailties as all the other studies: they target the wrong group—graduates instead of all drug court defendants; they involve selection criteria that render the control group not random; and two of them (Salt Lake City and Portland) use unacceptably short follow-up periods.
245. As one of the most recent formal impact evaluations noted, research on recidivism rates is ambiguous and conflicting, necessitating further research. See Granfield & Eby, supra note 185, at 12.
undeterred by the utter lack of evidence of its effectiveness.

Some drug court proponents even have been emboldened by the fact that none of the studies conclusively shows that drug courts increase recidivism.\(^{246}\) This attitude is a particularly virulent strain of what I call the Chicken Soup Approach to court reform: let's change for the sake of change—or, more precisely, so we can show the world (and the electorate) that we care about what we are doing—governed only by the Hippocratic directive that we do no palpable harm.\(^{247}\) In the drug court context, the Chicken Soup Approach is completely understandable. Well-intentioned trial judges, soldiers fighting in the trenches of the drug war, see the terrible scourge that drugs have become in our society,\(^{248}\) see that the war on drugs is lost, and are desperate to find another way. They perceive the situation to be so terrible that any proposed solution is quickly embraced with virtually no critical analysis, believing that it cannot do any harm to try a different approach.\(^{249}\)

Perhaps the Chicken Soup Approach was appropriate when New York City and Dade County conducted their original experiments decades ago, but drug courts are no longer experiments. What started as pilot programs have become, in the blink of an eye, conventional judicial wisdom. We owe it to the citizens we serve, including the criminal defendants who appear before us clothed with the presumption of innocence, and, perhaps most of all, to our own traditions of quiet rationality, to resist the hysterical dash toward drug courts and to re-examine the conventional wisdom. The post-pilot burden should now be squarely on the proponents of drug courts to demonstrate their effectiveness in reducing recidivism. So far, they have failed to meet that burden, and on that basis alone we should consider abandoning the experiment.

But drug courts not only do no demonstrable good, I believe there are cogent arguments that they are inflicting serious injuries to the institution of the judiciary and to the way in which that institution relates to the other two branches of government.

---

\(^{246}\) Two commentators write, "What is clear from this data is that Drug Court offenders are not rearrested for offenses at a higher rate than drug offenders in previous courts." \(Id.\) at 25.

\(^{247}\) I am afraid much of the recent Arizona-style jury reform is a Chicken Soup kind of reform. \(See, e.g.,\) Mark Curridan, \textit{Jury Reform}, ABA \textit{L.J.}, Nov. 1995, at 72, 75–76.

\(^{248}\) \textit{But see supra} 122–30 and accompanying text (discussing the exaggeration of the drug epidemic).

\(^{249}\) \textit{See infra} text accompanying notes 254–56.
VI. UNEXAMINED OPERATIONAL CONCERNS: HOW DO DRUG COURTS REALLY WORK, AND WHAT IMPACTS ARE THEY HAVING ON THE REST OF THE JUDICIAL SYSTEM?

Having witnessed the birth and development of the Denver Drug Court firsthand, I also have witnessed firsthand a whole series of what I will loosely call operational problems. I do not know whether these problems are anything but anecdotal, because the self-generated literature in this area, as discussed above, tends not to be very soul-searching. Nevertheless, I suspect that several of these problems are so systemic in nature that they are likely to crop up, and likely have cropped up, in many jurisdictions.

A. The Organization of the Denver District Court

District courts in Colorado are the state courts of general jurisdiction. Colorado is divided into twenty-two judicial districts, and the boundaries of the City and County of Denver form the Second Judicial District, sometimes more informally called the Denver District Court. There are twenty judges on the Denver District Court. We are, by internal custom, a non-integrated court, meaning that we are divided into divisions by subject matter. We are divided into three divisions—a civil division of ten courtrooms, a criminal division of seven courtrooms (six regular criminal courtrooms plus the drug court) and a domestic division of three courtrooms. None of the twenty district court judges stays in any one division more than a few years. We have unwritten rules about the presumptive length of our rotations: three years in civil, two years in criminal, and one year in domestic. These presumptions are rebuttable, except that no judge must stay in domestic court more than one year against his will. Our chief judge makes all courtroom assignments. Drug court is not part of the rotation; it is filled on a strictly volunteer basis. As discussed in more detail below, except for its founder, who stayed two and a half years, no judge has stayed

250. I was appointed to the Denver District Court in December 1990. The Denver Drug Court began operations on July 1, 1994. I served in one criminal division from January 1995 through January 1998, and, although I have never volunteered to be the drug court judge, like most of my colleagues, I have taken many transfers of drug court trials and motions hearings.

251. See supra note 1 and text accompanying notes 203–10.

252. Juvenile and probate cases are handled in Denver by entirely separate district-level courts. See COLO. REV. STAT. ANN. §§ 13-8-101 to -126 (West 1997) (establishing the requirements for the Denver Juvenile Court); id. §§ 13-9-101 to -122 (establishing the requirements for the Denver Probate Court).

253. See infra text accompanying note 308.
in the Denver Drug Court for more than one year.

B. *The Rush to Formation*

The Denver Drug Court was approved at a single en banc meeting, during which the entire debate consumed less than thirty minutes. The "debate" consisted of the drug court proponent, Judge William G. Meyer, presenting the proposal as a sort of functional fait accompli. I do not at all fault Judge Meyer for his approach. A vast array of institutional and financial commitments needs to be in place before any drug court will work, and Judge Meyer had invested enormous amounts of time and energy putting that array into place before the idea was presented at our en banc meeting. He had met with cadres of federal officials and obtained provisional commitments for funding. He had met with our police, district attorney, and public defenders and had obtained their operational commitments.

In this atmosphere it was understandably difficult for most of us to analyze the proposal critically, for fear that any criticism would be interpreted as criticism of a very talented, hardworking, committed colleague. I am concerned that this sort of personalizing of drug courts, coupled with the Chicken Soup approach, makes it more common than not that drug courts are being adopted across the country with no meaningful discussion or debate. This rush to formation might be avoided in several ways.

We should insist that the debate occur before the proponent gathers steam with financial and operational commitments. While it is necessary that those commitments be in place before a drug court begins operations, there is absolutely no reason they need to be in place before the decision to proceed with a drug court is made. After all, it is not as if these commitments are difficult to obtain in the current environment, in which federal officials, police, and prosecutors are jumping on the drug court bandwagon in record numbers. If we put the financial and operational carts behind the decisional horse, where they belong, it will be substantially more likely that we will be able to have a quiet, rational discussion of the issues in an atmosphere free of the feeling that we will let all sorts of people and institutions down if we decide not to adopt a drug court.

We should also all do what we can to educate ourselves about drug courts and not defer our own good judgment to the views of a handful of active proponents (or active critics, for that matter). The

---

254. See supra text accompanying notes 246–49.
255. See supra text accompanying notes 109–15.
more we know about how drug courts actually work, what they do and do not do, their history, and the forces that have come together to promote them, the more discriminating we will be able to be. Armed with some different viewpoints and the kind of fierce independence we are all supposed to bring to this job, we can respect the motives and efforts of the proponents, but still challenge some of their assumptions and arguments.

We also must be prepared to resist the considerable political pressures that come together to drive the adoption of drug courts. Because drug courts are, by their very design, all things to all people, they have tremendous support from people of all political persuasions. I do not have any particularly useful advice for colleagues faced with intense political pressure to adopt drug courts, except to say that the very function of the judicial branch is to resist political pressure.

Finally, and perhaps most importantly, we must resist what I call the siren of accounting. Most state judicial districts are involved in a fierce competition for statewide funds. Many allocation schemes depend in part on easily determined measures of judicial demand—such as the number of cases filed per judge per year. Drug courts present an almost irresistible opportunity for urban courts to significantly boost their filings per judge. Chief judges, concerned about the allocation of state funds to their particular judicial districts, understandably feel the lure of this drug court accounting siren. But, of course, it is a siren we must all resist. It is not only dishonest and unseemly to adopt drug courts because they boost a system's statistics, but it is ultimately unfair to rural judicial districts, which have not historically been part of the rush to drug courts and thus will be shortchanged when it comes time to allocate statewide judicial resources.

C. The Popcorn Effect

In Denver, we grossly underestimated the enthusiasm with which our police and prosecutors would embrace the idea of the drug court. As a result, our projections of the number of drug filings in the new drug court were woefully understated. We expected that the drug court would stimulate some modest increases in the number of drug filings, but instead of modest increases, we got massive increases.

256. In Denver, one example of our submission to the temptations of accounting is the misleading manner in which our clerk's office counts the number of drug filings. See infra note 257.
Filings nearly tripled after the drug court's first full year and have remained at that many-fold level since.

There were 1047 drug cases filed in the Denver District Court in 1993, the last full year before implementation of the drug court. In 1995, the first full year of the drug court, that number jumped to 2661. The following year, drug filings increased to 3017.

This increase in drug filings was not merely a reflection of an overall increase in criminal filings. On the contrary, from the moment the drug court was created, the percentage of drug cases filed in our court has exploded. In 1993, the first full year before the drug court, drug filings represented 28.6% of all criminal filings. In 1995, the first full year after the drug court, that percentage skyrocketed to 51.5% and has remained at that high level.

It is clear that there is a significant feedback phenomenon going on between the arrest and prosecution end of the process on the one

257. Denver District Court’s Criminal Filings Statistics for 1991–98 from Miles M. Flesche, Clerk of the Denver District Court, to the Judges of the Denver District Court 1 (May 10, 1999) [hereinafter Criminal Filings Statistics for 1991–98] (on file with the North Carolina Law Review). It is important to recognize that the case filing figures from our clerk’s office are higher (up to 30%) than the figures published by the district attorney’s office and given by the district attorney’s office to other agencies studying the Denver Drug Court. Though there was initially some confusion about this difference, we now realize that the clerk’s figures include all drug arrests from the first advisement in county court, even if those cases are dismissed without ever having actually been filed in district court. This has the effect of dramatically boosting district court filings, perhaps in response to the siren of accounting discussed above. See supra text accompanying note 256. In any event, even the more conservative filing figures from the district attorney’s office reflect a more than two-fold explosion in filings between 1993 and 1995.


259. See id.

260. The following table depicts the number of criminal cases filed in the Denver District Court from 1991 through 1998, the number of drug cases filed in that same period, and the percentage of the total number of criminal cases that the number of drug cases represented:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CRIMINAL CASES</th>
<th>DRUG CASES</th>
<th>% DRUG CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>3795</td>
<td>958</td>
<td>25.2</td>
</tr>
<tr>
<td>1992</td>
<td>3790</td>
<td>1014</td>
<td>26.7</td>
</tr>
<tr>
<td>1993</td>
<td>3762</td>
<td>1047</td>
<td>27.8</td>
</tr>
<tr>
<td>1994</td>
<td>3907</td>
<td>1260</td>
<td>32.2</td>
</tr>
<tr>
<td>1995</td>
<td>5154</td>
<td>2661</td>
<td>51.6</td>
</tr>
<tr>
<td>1996</td>
<td>5814</td>
<td>3017</td>
<td>51.9</td>
</tr>
<tr>
<td>1997</td>
<td>5458</td>
<td>2825</td>
<td>51.8</td>
</tr>
<tr>
<td>1998</td>
<td>5089</td>
<td>2585</td>
<td>50.8</td>
</tr>
</tbody>
</table>

See id.

261. See id.
hand and the adjudicatory end on the other hand. The very presence of the drug court, with its significantly increased capacity for processing cases, has caused police to make arrests in, and prosecutors to file, the kinds of ten-and twenty-dollar hand-to-hand drug cases that the system simply would not have bothered with before, certainly not as felonies. It is not just a matter of intensifying existing arrest and charging policies; since the adoption of the drug court, the Denver police have engaged in an extensive, unprecedented campaign of undercover "buy-bust" operations.262

This is not at all to say that these cases are not deserving of felony prosecution, or even that efforts focused on these low-level possession cases are not paying larger social dividends in terms of cleaning up our streets.263 Nevertheless, it is clear that the mere presence of the Denver Drug Court has stimulated a demand that will probably always outpace our capacity to deal with it.

262. As the Denver District Attorney noted, "[The explosion in drug filings is] not because drug usage has increased but because law enforcement has stepped up efforts to address the community concerns." A. William Ritter, Denver Looks to Hire Drug Czar, DENV. POST, Apr. 1, 1999, at 38.

263. As mentioned earlier, drug court proponents insist that drug courts are having dramatic impacts in reducing crime, not necessarily by curing addicts, but rather by decreasing the frequency of their criminal activities. See supra text accompanying note 194. Such alleged benefits, even if real, are of course the result of making the kinds of low-level arrests that were not made before the days of drug courts; they are not the result of drug courts themselves. That is, these alleged clean-up benefits presumably would be enjoyed if we arrested all the same people who are now being funneled into drug court, but handled them traditionally. It is the fact of their arrest, and not any claimed treatment successes, that arguably accounts for these collateral benefits.

To a great extent, these claimed collateral benefits are a special version of the broader and much-popularized "broken windows" theory of crime prevention. The broken windows theory holds that visible disorder breeds crime and that by re-asserting visible order—by fixing broken windows, cleaning up trash, removing graffiti, and removing people who look like gang members or drug dealers—crime will necessarily be reduced. See James Q. Wilson & George L. Kelling, Broken Windows, ATLANTIC MONTHLY, Mar. 1982, at 29, 29–31; see also Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 VA. L. REV. 349, 367–73 (1997) (discussing the application of the theory in New York City). The broken windows theory is not without its critics. See, e.g., Albert W. Alschuler & Stephen J. Schulhofer, Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan, 1998 U. CHI. LEGAL F. 215, 215–44; Bernard E. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order Maintenance Policing New York Style, 97 MICH. L. REV. 291, 292–389 (1998); Toni Massaro, The Gang's Not Here, GREEN BAG 2D, Autumn 1998, at 25, 29–34. The broken windows theory recently may have suffered a fatal constitutional blow when the Supreme Court struck down Chicago's gang loitering ordinance in City of Chicago v. Morales, 119 S. Ct. 1849, 1852 (1999). In any event, one would think that drug courts would have generated more than anecdotal evidence supporting broken windows-style claims. I am unaware of any such evidence.
This popcorn effect—called "net widening" in some of the literature—is a well-recognized phenomenon whenever law enforcement resources are targeted at designated kinds of cases:

[A] number of 1970s-era reform efforts [have] followed this pattern: Legislatures created a low-cost case-processing mechanism with the idea of diverting some offenders from the more expensive prison system; prosecutors then used the low-cost mechanism not to reallocate existing categories of cases (as intended), but to add new cases to the system—to widen the system's net.264

The popcorn effect caused by the Denver Drug Court has had a real and deleterious impact on our bench, both in and out of the drug court itself.

The sheer number of defendants run through the drug court mill every day is taking an enormous toll on the drug court judge, the drug court staff, sheriffs, prosecutors, and public defenders. In 1997 and 1998, there were an average of ninety-one defendants on the drug court docket each day, with a high of 140 per day in January 1997 and a low of about eighty-eight per day in April 1998.265 By contrast, non-drug court felony courtrooms in Denver handle an average of eight to twelve defendants per day.266 Even our county and municipal courts do not see daily numbers anywhere approaching the numbers seen in the drug court.267

Except for its Herculean founder, no judge has been able to remain in the Denver Drug Court for more than one year, and even then it has been necessary for them to take regular and substantial breaks. The stresses on staff are just as bad. At the time of this writing, in an effort to avoid burnout by drug court judges and their staffs, our court is considering a formal rotation system of substitute

264. Stuntz, supra note 88, at 26 n.93.
266. In the Denver District Court, judges in the criminal divisions of traditional courts typically set aside one or two days each week for "docket" or "board" days. During these days, all manner of miscellaneous criminal matters are taken up—reviews of doctors' reports regarding a defendant's competence or regarding mental defenses, probation revocation hearings, pleas, trial settings, sentencings, motions hearings—pretty much everything a criminal court does other than trials. In the three years I was in the criminal division, I set aside Mondays and Fridays as my docket days, and we averaged anywhere from 40 to 60 cases on our dockets each week, which, had we spread it over the whole week, would have translated to 8 to 12 per day.
267. Denver's four county misdemeanor criminal courts handle roughly 70 cases per judge per day. See Interview with Robert L. Patterson, Presiding Judge, Denver County Court, in Denver, Colo. (May 27, 1999).
drug court judges to relieve the drug court judge at regular intervals throughout the year.

It seems to me that no judge, and no judge’s staff, should be expected to deal effectively with the kinds of numbers we are seeing. Pretending that they can will only lead to demoralized and ineffective drug courts.\(^{268}\)

One of the most daunting problems associated with the explosion of the drug court’s docket is the cumulative problem of bench warrants. As in any other criminal court, bench warrants issue when drug defendants fail to appear. Because warrants issued years before may be returned at any time, usually when a defendant is picked up on another charge, there is a constantly accumulating pool of warrants that demand the judge’s attention. In the drug court, the problem of bench warrants is greatly magnified by three factors. First, the sheer size of the dockets means more bench warrants. Second, the likelihood of a failure to appear in drug court is, by definition, substantially greater than in traditional courts because drug courts require many times the numbers of appearances in any given case than do traditional courts. Finally, drug court judges already spend so much time in court handling their massive dockets that the additional burden of bench warrants is unbearable.

In fact, the amount of time our drug court judges were devoting to bench warrants became so great that several of them decided to cap the number of returns they would see in any one day, with the result that it was not uncommon for defendants arrested on bench warrants to spend two to three weeks in jail before being brought into court.\(^{269}\) The 1999 drug court judge reversed that policy, but his defendants still spent three to five days in jail on bench warrants before he could get to them.\(^{270}\) He expressed concerns to me that unless something is done, as the backlog of outstanding bench warrants increases year after year, future drug court judges will be spending a significant amount of their time doing nothing but returns on old bench warrants.\(^{271}\)

The popcorn effect also has affected the rest of us on the Denver District Court. When the drug court was first approved, the idea was that other judges on our bench would assist in handling drug court trials when the drug court needed that assistance. But before the ink

\(^{268}\) See infra text accompanying notes 277–80, 300–07 and accompanying text.

\(^{269}\) See Interview with Joseph E. Meyer III, District Judge, in Denver, Colo. (May 18, 1999).

\(^{270}\) See id.

\(^{271}\) See id.
was dry on the drug court's formation, it became clear that the enormous number of drug filings would make it necessary for all drug trials to be tried outside of drug court. A similar, though slower developing, result has occurred with respect to motions. By the end of 1998, the lion's share of all drug court motions also were being heard outside of the drug court. Although the 1999 drug court judge was hopeful that the addition of a second magistrate would free him up to hear motions, that has not been the case.

In transferring drug court trials and motions hearings, resort is made first to other criminal courts. If no criminal courts are available, resort is made to the civil courts and then to the domestic courts. Thus, all divisions of the Denver District Court have been impacted by the drug court's inability to handle its own trials and motions.

As a result, the rest of us have less time to devote to our regular dockets, because we are doing all the drug court trials and many of the drug court motions hearings. I do not mean to suggest that we are all so overworked that we cannot occasionally devote some time to drug court matters, but the problem is a problem of institutional accountability and of sheer volume.

A drug court that neither conducts trials nor hears motions is not really a court, and a drug court that is too busy to conduct trials or hear motions should suggest to us that there is something terribly wrong with the whole arrangement. Moreover, when we consider the broad question of whether drug courts are working—especially their speed in processing cases—we artificially inflate their efficiency if we ignore the fact that the most time-consuming and inefficient aspect of any true court—the job of conducting trials—is not even being performed in the drug court. All of us could process a lot more cases a lot faster if we did not have to bother with those troubling trials.

Nor is it a matter simply of the rest of us now trying the same number of drug cases we used to try before the drug court took them from us. Again, it is a matter of the popcorn effect. Because the drug court itself has stimulated a many-fold increase in the number of drug

---

272. See id.; Interview with Gregory F. Long, Chief Deputy District Attorney, in Denver, Colo. (May 19, 1999).
273. In fact, two of the three domestic judges have volunteered to set aside one afternoon every week to do nothing but hear drug court motions. See Interview with J. Stephen Phillips, Chief District Judge, in Denver, Colo. (Jan. 27, 2000).
274. See infra text accompanying notes 328-37.
275. See supra text accompanying notes 184-88.
cases filed, there has been a corresponding increase in the number of drug trials, causing non-drug courts to try significantly more drug cases than they were trying before the adoption of the drug court.\textsuperscript{276}

The impacts of the Denver Drug Court on the rest of this bench are not limited to the inconvenience of taking transfers of drug trials or motions hearings. The drug court's inability to do its own trials and motions has had a dramatic impact on the heretofore generous willingness of judges on this bench to accept transfers from other judges. We have a long tradition of helping each other out when one of us has more than one matter set to begin on the same day, and that tradition has always cut across criminal, civil, and domestic lines. We have kept statistics on these transfers, and, prior to drug court, our chief judges have always proudly announced with regularity that the likelihood of litigants in need being able to find a transfer court hovered around 80%.\textsuperscript{277} Since the implementation of the drug court, that number has plummeted to roughly 50%.\textsuperscript{278} As a result, both civil and criminal litigants in Denver are substantially more likely than they were five years ago to have their trials continued, simply because

\textsuperscript{276} Our clerk's office did not keep track of the number of drug cases tried prior to the 1994 adoption of the drug court. But I cannot imagine that the plea bargaining rate in the drug court is so much higher than in traditional court (where it is already awfully high) that any increase in the disposition rate could overcome the doubling or tripling of cases filed.

\textsuperscript{277} See Interview with John N. McMullen, District Judge, in Denver, Colo. (Apr. 6, 1999). Judge McMullen served as our Chief Judge from August 1988 through December 1993. During that time period, he kept statistics on transfers—the total numbers of transfers sought and the total number of transfers accepted—and announced those statistics each year at our annual Term Day. Although such transfer statistics are not kept currently, they can be derived from monthly transfer records that we do keep. For purposes of transfers, our court is divided in half—north and south—and each month two courtrooms (one courtroom from each half) are designated as the transfer courts. Those courts receive all the transfer requests from all the courts in their half of the building, and then attempt to locate transfer courts, first in their half then in the other half. Each transfer court keeps a log of the transfer requests—called Case Transfer Forms—by date, requesting court, case number, type of matter (court trial, jury trial, motions hearing), anticipated length, and whether any court accepted the transfer and if so, the identity of the accepting court. The kinds of statistics mentioned earlier, see infra note 278, are derived from these monthly Case Transfer Forms.

\textsuperscript{278} For the six months between November 1, 1998 and April 30, 1999, there were a total of 226 transfer requests made formally in our court. See Transfer Request Forms for Denver District Court, Nov. 1, 1999–Mar. 31, 1999 (on file with the North Carolina Law Review). Of these 226 requests, transfer courts accepted 121, or 53.5%. Not surprisingly, of these 226 transfer requests a whopping 105, or 46.5%, came from the drug court. In a bit of surprise, however, of these 105 requests for transfers from the drug court only 46, or 43.8%, were accepted. Thus, during this six month period at least, it was less likely that a judge on our court would accept a transfer from the drug court than from a non-drug court.
the drug court cannot handle its own docket. The situation has gotten so bad that, as of mid-1999, drug cases are no longer even set for trial until the deadline for disposition passes. Then, they are simply assigned to one of the regular criminal courtrooms without waiting for a reluctant volunteer.279

These impacts on the colleagues of a drug court judge can be profound and are something that all judges should consider carefully before deciding whether to cross the drug court Rubicon.

D. Trying to Deal with the Popcorn Effect

Even after sloughing off all of its trials and most of its motions hearings, the Denver Drug Court still could not keep its head above the rising tide of filings. So other solutions were contemplated.

Two and one-half years after the drug court’s inception, Judge John Coughlin, Bill Meyer’s successor in the drug court, decided that the increased filings required a drastic cutback in the drug court’s jurisdiction. In an attempt to reduce drug court cases by 25%, Judge Coughlin decided, effective February 18, 1997, to exclude from drug court all cases in which the defendant was either a two-time felon (and, therefore, under Colorado law, ineligible for probation without the district attorney’s consent)280 or was a non-citizen against whom there was an existing hold by the Immigration and Nationalization Service (INS).281 It appears that these cutbacks reduced drug court filings by approximately 25%,282 and it also appears that these

279. See Interview with H. Jeffrey Bayless, Presiding Criminal Judge, District Court, in Denver, Colo. (Jan. 24, 2000). The new system of assigning drug court trials to criminal courtrooms should help insulate the civil and domestic divisions from the drug court’s mess, but, of course, it will only increase the stresses in the regular criminal courtrooms. Before this change, the criminal judges, just like the civil and domestic judges, retained their right to refuse to accept drug court transfers, and, as discussed in the previous footnote, all judges in all divisions became increasingly reluctant to take drug court transfers. Now, the criminal judges have no choice but to take drug court trials because they get assigned directly to them (on a rotating basis) once no disposition is reached. Of course, if criminal judges cannot conduct their newly assigned drug trials because of regular caseloads, then they can try to get a criminal, civil, or domestic court to take the transfers.

280. See COLO. REV. STAT. ANN. §§ 16-11-201(2), (4)(a)(II) (West 1998). Actually, under these statutes the district attorney may waive this so-called two-felony rule and instead consent to a probationary sentence, but only if the current offense is non-violent and none of the prior offenses was a crime of violence, manslaughter, second-degree burglary, robbery, certain kinds of theft, or a crime against children. See id. § 16-11-201(4)(a)(II).


reductions have been permanent. But the cutbacks were made only at the drug court level—by district attorneys filing the excluded cases in regular courtrooms rather than in drug court. No change was made at either the street level in terms of who was arrested or at the charging level in terms of who was prosecuted. The nets stayed wide, and 25% of the catch was thrown over to the traditional courts. So even though the drug court enjoyed a 25% reduction in filings, total drug filings continued to accelerate without any reduction, with the regular non-drug court courtrooms now bearing the brunt of 25% of the popcorn.

Moreover, trying to reach an arbitrary 25% reduction by slashing so broadly as to exclude all two-time felons and illegal aliens drastically changed the original “all-comers” philosophy of the Denver Drug Court. Every two-time felon is not an unacceptable drug court risk; indeed, before February 1997 two-time felons were regularly given drug court dispositions if they were otherwise deemed appropriate. The original concept of the Denver Drug Court as an “all-comers” court, as is the case with a handful of other ambitious drug courts, was to reach the hardcore addict who, more often than not, has been through the revolving doors of prison on many other drug or drug-driven convictions, and who is therefore quite likely to have two or more prior felony convictions. Excluding all two-time felons from drug courts in order to help achieve a 25% reduction in cases makes no more sense, and arguably makes considerably less sense given the goal of reaching hardcore addicts, than excluding people whose last names begin with letters from the first quarter of


284. See supra note 106.

285. The Denver Drug Court’s continuing realization that two-time felons are not necessarily inappropriate for drug court treatment is reflected in several unwritten policies. For example, if a single drug case involves multiple defendants, some of whom have two or more prior felonies and some of whom do not, the case remains in drug court. Similarly, there is a kind of one-way trap door feature to the new exclusion. If a two-time felon’s case accidentally slips into drug court (which can happen fairly easily at the beginning of a case when there may be uncertainty about a defendant’s record), the unwritten rule is that the case stays in drug court even after the mistake is discovered. Finally, as a practical matter, it is often the case that the drug court judge does not discover that a defendant has two or more prior felonies until after that defendant has already negotiated a disposition, has begun some pre-disposition treatment, and is appearing for approval of that disposition. When that happens, it is simply easier on all concerned to proceed with the disposition instead of sending the case to a traditional criminal court. See Interview with Joseph E. Meyer III, supra note 269.

286. See supra note 181 and accompanying text.
Although there is certainly a practical justification for excluding all purportedly illegal aliens—because they simply cannot participate in meaningful outpatient treatment while subject to INS holds— their ipso facto elimination from the drug court may have equal protection implications. At the very least, their exclusion should make us all wonder about the fairness of a system that makes these kinds of arbitrary and suspicious distinctions.

We have, in effect, a fast-track court stimulating an enormous increase in case filings, and one that is so busy it cannot accommodate 25% of its caseload or any of the trials in the other 75%. Our experience with trying to reduce the popcorn effect suggests that there is indeed a limitless supply of drug cases that police and prosecutors will tap to fill their own capacities, and that those capacities will continue to outpace the bottleneck of the drug court itself.

E. Exploding Prison Populations

One of the most disturbing aspects of the Denver Drug Court is that, despite the crucial reformist promise that drug courts will assist in reducing the numbers of people incarcerated for drug offenses, in Denver more drug defendants are being sentenced to prison than ever before, by a factor of more than two. In 1993—the last full year before the Denver Drug Court—265 drug defendants were sentenced to prison out of the entire Denver District Court, representing nearly 86% of the total number of defendants convicted of drug offenses in that court in that year. In 1995—the first full year after the Denver

288. For a discussion of People v. Antonio-Antimo, 998 P.2d 655 (Colo. Ct. App. 1999), in which the Colorado Court of Appeals struck down a Denver Drug Court sentence of an illegal alien in which the prison sentence was suspended on the condition that the defendant leave the country, see infra text accompanying notes 323–24.
289. Eliminating two-time felons and non-citizens not only changed the “all-comers” philosophy of the Denver Drug Court, but it may well have had an impact on recidivism rates. Eliminating two-time felons from drug court programs arguably decreases drug court recidivism because the hardest of the hardcore recidivists are being shuffled off to traditional courts. On the other hand, eliminating non-citizens probably increases drug court recidivism because many non-citizen drug defendants are deported.
290. See supra text accompanying notes 88–96.
291. See Office of Planning & Analysis, Colo. Dep’t of Corrections, Denver Drug Court Convictions: D.O.C. Sentenced Offenders Fiscal Years 1993 Through 1997 1 (1998) [hereinafter Sentence Study] (on file with the North Carolina Law Review). In particular, there were 309 drug convictions in the Denver District Court in fiscal year 1993 and 265 prison sentences imposed for drug convictions in that same year. Of course, the comparison between the convictions in a given year and the
Drug Court—434 defendants received prison sentences in the Denver Drug Court, representing nearly 80% of all drug convictions in the Denver Drug Court that year. In 1997, 625 drug court defendants received prison sentences, again representing roughly 80% of all drug convictions in the Denver Drug Court that year. In other words, although the percentage of drug defendants receiving prison sentences has remained remarkably constant, both before and during the drug court era, the raw numbers of drug defendants going to prison have more than doubled.

The apparent paradox of more drug defendants going to prison out of courts designed specifically to send fewer drug defendants to prison is not surprising at all. It is a direct and predictable consequence of dismal recidivism results coupled with massive net-widening. Although in theory drug courts should reduce the number of prison sentences meted out for drug offenses—both by the

prison sentences in that given year suffers from the fact that there is a delay between conviction and sentence and therefore from the fact that we are not talking about all the same defendants in any one year. Indeed, many of the prison sentences for drug offenses, and probably the lion's share of them, are not initial prison sentences, but are instead sentences imposed after deferred judgments or probationary sentences have been violated. Thus, the remarkably high and consistent percentage of prison sentences meted out each year is actually a gross measure of probation recidivism, and the fact that that percentage has stayed just as high after the implementation of the drug court is a rough confirmation of the dismal treatment results being achieved there. See supra text accompanying note 238. It is no defense to say that the Denver Drug Court routinely imposes very short (120-day) prison sentences on a large category of defendants. Although that is true, the average length of prison sentences meted out by the Denver Drug Court (54.6 months in 1995) is actually substantially greater than the average length of prison sentences meted out in Denver before the drug court (42.7 months in 1993). See OFFICE OF RESEARCH & STATISTICS, COLO. DEP'T OF PUB. SAFETY, CASE PROCESSING EVALUATION OF THE DENVER DRUG COURT 60, tbl.23 (1999) (on file with the North Carolina Law Review).

See SENTENCE STUDY, supra note 291, at 1. The numbers for fiscal year 1995 were 539 drug convictions and 434 prison sentences.

The numbers for fiscal year 1997 were 776 drug convictions and 625 prison sentences.

The effect at the county jail level appears to have been less drastic. Indeed, the director of that facility reported to me that although they do not keep statistics segregated by offense, his intuition was that the Denver Drug Court was reducing total jail time for drug defendants because it was reducing disposition time, and a significant component of jail resources are consumed by defendants awaiting trial, who cannot make their bonds. See Interview with John Simonet, Director of Corrections, City and County of Denver, in Denver, Colo. (Apr. 4, 1999). He also indicated that he believed county jail populations were being relieved because more drug defendants were going to prison, and going there more quickly. See id. The speedier deportation of drug defendants also has undoubtedly contributed to any decrease in total county jail time. See infra text accompanying note 319–22 (discussing the impact of special INS agents assigned exclusively to drug defendants in significantly reducing the delays before deportation).
successful treatment of drug defendants and at the very least by delaying the imposition of prison sentences while defendants attempt to complete treatment—this theory assumes, quite incorrectly, that treatment will be moderately successful and that drug court dollars will be used to treat defendants already in the system rather than to triple the size of the intake.

Moreover, it is precisely because drug courts are designed to get defendants into treatment quickly that they accelerate the day on which the decision is made that treatment has failed and that defendants should go to prison. Drug court defendants are monitored closely and are given a finite number of relatively closely spaced opportunities to fail. When they exhaust all their chances, they go to prison. As a result, particularly with the poor recidivism results achieved by most drug courts, drug court defendants are, by the very nature of the process, more likely to end up in prison than their traditional cohorts and are certainly more likely to end up there sooner.

Nevertheless, even if the percentage of drug court defendants sent to prison were lower than the percentage of traditional drug defendants sent to prison, popcorn effects of the magnitude suffered by Denver will overwhelm, and have overwhelmed, this difference. The simple arithmetic truth is that even massively successful treatment efforts, on a scale never reported in any reputable impact study,\textsuperscript{295} would still be dwarfed by the kind of three-fold increases in case filings suffered in the Denver Drug Court.

There is no small amount of irony in the fact that one of the most important promises of the drug court movement—to keep treatable defendants out of prison—has turned out, at least in Denver, to be one of its most abject failures. Instead of reversing the 1980s trend of more and more drug defendants filling our prisons, the Denver Drug Court is accelerating that trend. In our paternalistic effort to throw the criminal nets wider and wider in hopes of finding more treatable defendants, we have harvested a vast number of defendants we deem untreatable. Our nets are now so wide that there are more untreatable defendants going to prison than there were in the old days, when we did not pretend to be able to distinguish the treatable from the untreatable.

\textbf{F. Cookie Cutter Sentences}

Another by-product of the popcorn effect is that drug court

\textsuperscript{295} See \textit{supra} text accompanying notes 211–45.
judges simply do not have the time to impose individualized sentences. Even if they did, the very presence of a fixed array of dispositional and treatment regimens begins to drive a one—or maybe three—size(s)-fit(s)-all philosophy. The dispositional algorithm in the Denver Drug Court, at least for defendants charged with simple possession, is fairly rigid: (1) if you have two or more prior felony convictions you do not even get into drug court;\(^ {296}\) (2) if you have no prior felonies, and you were arrested with a small so-called “personal use” amount of drugs,\(^ {297}\) then you get a deferred judgment; (3) otherwise, you get probation.\(^ {298}\) This is not sentencing, it is triage.

Drug court proponents resist the charge of cookie cutter sentencing by protesting that a drug court judge has substantially more information about a defendant at sentencing than a traditional court usually has. It is true that a pre-sentence report in the Denver Drug Court has a whole host of detailed information about a defendant’s drug use garnered during the pre-adjudicative phase of treatment—including specific levels of drugs in his system at regular intervals of time, his general reaction to the treatment regimen, and an expert’s guesses about amenability to treatment—that traditional pre-sentence reports do not contain. But having detailed information is one thing; having the time and institutional inclination to use it to fashion individualized sentences is quite another. The drug court judge uses this information primarily to decide the dispositional track and treatment level in which to place the defendant. That is, this detailed individualized information is used simply to pick from a few different cookie cutters.

\(^ {296}\) See supra text accompanying notes 280–83.

\(^ {297}\) There is no written policy fixing the levels of “personal use.” In general, however, one or two rocks of crack (less than one tenth of a gram) is treated presumptively as being for personal use. See Interview with Gregory F. Long, Chief Deputy District Attorney, in Denver, Colo. (June 18, 1999). But see Interview with Andre L. Rudolph, Magistrate, in Denver, Colo. (June 22, 1999) (indicating that when Rudolph was a drug court public defender, he understood that two grams was the presumptive personal use cutoff for both crack and powdered cocaine). In any event, there is no presumptive level for other drugs; prosecutors look at all of the surrounding circumstances to determine whether the drugs were for personal use, including the method of packaging and the magnitude of the particular defendant’s drug habit. See Interview with Gregory F. Long, supra; Interview with Andre L. Rudolph, supra.

\(^ {298}\) See Gregory F. Long, Denver Drug Court: New Approaches to Old Problems, COLO. LAW., Apr. 1996, at 29, 30; Interview with Gregory F. Long, supra note 272. Actually, there is a fourth dispositional track—prison—but initial prison sentences on possession convictions are rare in the Denver Drug Court, particularly now that two-time felons are no longer eligible. See Long, supra, at 30; Interview with Gregory F. Long, supra note 272.
I do not fault drug court judges, prosecutors, or public defenders for falling into fixed sentencing algorithms. Much like traffic courts, drug courts simply do not have the time to spend on each defendant to fashion a sentence responsive to individual circumstances. Instead, we have a few pigeonholes into which we put defendants depending not on difficult issues like a defendant's character or the particular circumstances of a crime, but rather on objective and easily determined factors. In traffic court, we are forced by volume to look at easily measurable things like the defendant's driving record and how fast he was going. In drug court, we are forced by volume to look at easily measurable things like the number of prior felonies and the quantity and type of drugs used. In both kinds of courts, we then mete out sentences generally based only on those few variables and generally falling into only a few categories and ranges. The difference, of course, is that a defendant in traffic court faces modest penalties; a defendant in drug court faces a felony conviction and substantial incarceration.

This willingness to use the threat of prison as a club to induce treatment, and then to follow through on the threat when defendants dare not to respond to our enlightened treatment efforts, is one of the most tragic consequences of drug courts. In our unbridled enthusiasm to treat defendants, we focus all our energies and all our sentencing discretion on a single factor—a defendant's amenability to treatment. Then, when all the ebbs and flows of treatment are tallied up and labeled as an overall failure, which they are for a depressingly large percentage of all drug court defendants, all of the failures are lumped together and the automatic prison machine kicks into gear. Deferred sentences are revoked, suspended sentences are reinstated and diverse drug defendants, who may share nothing but a common and entirely predictable failure to respond to treatment, are sent to prison with virtually no further judicial inquiry.

It is as if our dismal treatment efforts are clearing our consciences about sending drug users to prison. There is a certain tortured logic to this sort of "equal" treatment of incorrigibles, once one adopts the flawed drug court axiom that drug abuse is fundamentally a disease and not a crime, and therefore that when we

299. Unpublished internal statistics of the Denver District Drug Court suggest that the graduation rate is somewhere near 55%. See Interview with Adam Brickner, Denver District Drug Court Coordinator, in Denver Colo. (June 25, 1999). Even if this 55% figure were accurate, one must keep in mind that it is a measure of program retention and not of ultimate success in terms of no recidivism. See supra text accompanying notes 167–70.
sentence defendants to prison we are punishing them for their failed treatment rather than for their unlawful drug use.

G. Quality Concerns

Treating drug felonies like traffic tickets not only forces us to impose cookie cutter sentences, it forces us to cut corners at every other step in the process as well. No judge, no court staff, and no set of lawyers can consistently deal with 100 defendants each day without cutting plenty of corners.300 Guilty pleas in the Denver Drug Court are taken in five to ten minutes301—half the time it takes to do traditional felony guilty pleas.302 Probation revocation proceedings suffer from the same short shrift.303 The quality of the trial and motions practice—even though all trials and most motions hearings are handled outside of drug court—is just what you would expect from lawyers facing an average of 100 cases every day.

With all due respect to its hard-working founder and his successors, and to the equally hard-working magistrates and lawyers who must practice there, the Denver Drug Court is out of control. We simply do not have the time to be the kind of deliberative and careful judicial officers—or prosecutors or defense lawyers—that all felony proceedings demand. Two examples will illustrate the point.

When I was on the criminal bench in 1997, I agreed to take a transfer of a motions hearing from the drug court. The public

---

300. Even if we make the unrealistic assumptions of a full eight-hour court day with no lunch break, no recesses, and no down time between defendants, one judge dealing with 100 defendants each day amounts to five minutes per defendant. In 1999, once the second magistrate was added, the judge's daily docket averaged 30 to 60 defendants. See Interview with Joseph E. Meyer III, supra note 269. Still, the caseload is daunting. See id.

301. See Interview with Gregory F. Long, Chief Deputy District Attorney, in Denver, Colo. (May 21, 1999). Magistrate Martinelli reports that her guilty plea advisements take 5 to 10 minutes. See Interview with Lynn E. Martinelli, Magistrate, in Denver, Colo. (June 14, 1999). Magistrate Rudolph reports that he does his in 5 minutes. See Interview with Andre L. Rudolph, supra note 297.

302. I consider myself a bit on the slow side of guilty pleas: they generally take me around 20 minutes. Some of my faster colleagues can do them in 10 minutes, but most take 10 to 15 minutes.

303. Actually, contested probation revocation hearings are so rare in the Denver Drug Court as to be almost nonexistent. There was one in the first six months of 1999, and two in all of 1998. See Interview with Joseph E. Meyer III, supra note 269. Contested probation revocation hearings are certainly not a regular occurrence in the traditional criminal courts, but they are substantially more common than in the drug court. I submit this is because the whole idea of drug courts is to impose intermediate, graduated sanctions when defendants relapse. Presumably district attorneys are offering such attractive deals in revocation proceedings that the motions to revoke simply never go to hearing.
defender and the defendant appeared promptly after I agreed to take the transfer, but the district attorney (DA-1) never showed up. After some calling around, my staff determined that DA-1 thought a different district attorney (DA-2) was handling the hearing, and vice versa. DA-2 finally showed up (an hour late), did the hearing, and requested at its conclusion that he be allowed to file post-hearing briefs—a request I granted. I set a briefing schedule, which DA-2 then missed. When he finally got around to filing his post-hearing brief (one week late), he inadvertently filed a draft, which had no caption, no case name, and no signature.

The second example is more troubling. In June 1997, a drug court defendant confessed that he violated his probation as part of an agreement in which he was to receive a four-year community corrections sentence instead of a prison sentence. But a clerical error in the minute order, repeated in the mittimus, resulted in the defendant being given a four-year prison sentence. A surprised defendant was transported to prison instead of to community corrections. He sent a letter to the drug court judge complaining about the mix-up. The overworked drug court judge treated the letter as a pro se motion for post-conviction relief and summarily denied it with a form order stating that the defendant had made identical arguments in previous letters, which of course he had not. It took an appeal and a subsequent emergency remand to get the matter straightened out. In the meantime, the defendant served more than eighteen months in prison when he should have been in community corrections. An embarrassed drug court judge (a different one than the judge who originally imposed the sentence and denied the motion for post-conviction relief) re-sentenced the defendant to probation and simultaneously declared the probation successfully completed.

I am afraid these examples are not the isolated incidents that darken even the most diligent of courtrooms. They are what we can all expect from the volumes that are generated by treating serious

305. See Order, Gendron (No. 98CA0789) (on file with the North Carolina Law Review).
felonies like traffic tickets.

H. Changing Judges

I read with bemusement an announcement in a recent federal drug court publication that drug courts work so well and drug court judges are so satisfied at the good work they are accomplishing that "[m]any of the judges who have served as a 'drug court judge' have requested an extension of their assignment." This certainly has not been the case in the Denver Drug Court.

Bill Meyer began as the first Denver Drug Court judge in July 1994, and he remained as the presiding judge through December 1996. Since then, we have had four different drug court judges in the last four years. Although one planned to stay a second year, he changed his mind and left after one year.

Precisely because the whole drug court mechanism depends so heavily on the philosophy of the particular judge who is presiding there at any time, the now annual changing of the drug court judge will cause, and has caused, its own set of difficulties. For example, Judge Meyer set many regular and frequent follow-up hearings to check on a defendant's drug use at various points in the process. His successor, John Coughlin, decided that too many such hearings were being set, so he cut them back significantly. Individual judges also have exhibited demonstrably different reactions to a defendant's positive urinalysis or other treatment violations. For example, in 1997, Judge Coughlin sentenced defendants to an average of 50% more jail time for such violations than his successor, Paul Markson, did the following year. Similarly dramatic differences have appeared at the sentencing end. For example, although Judges Coughlin and Markson sentenced roughly the same percentage of defendants to initial deferred judgments, they had markedly different practices regarding probation, community corrections, and prison. Judge Markson was twice as likely as Judge Coughlin to sentence a defendant initially to probation, half as likely to impose initial

308. See A DECADE OF DRUG COURTS, supra note 114, at 1–2.
309. See Interview with John W. Coughlin, District Judge, in Denver, Colo. (Mar. 30, 1999).
310. This 50% difference is not as dramatic as it may seem because in the case of both judges we are talking about average jail sentences of only a few days. In particular, in 1997 Judge Coughlin sentenced his non-complying defendants to an average of 3.24 days for positive drug tests and 3.55 days for other non-complying behavior, compared to Judge Markson's 1998 sentences of 2.22 days for positive drug tests and 2.25 days for other non-complying behavior. See Drug Court Statistics Sheets, supra note 265, at 1–2.
community corrections sentences and almost 10% less likely to impose initial prison sentences.\(^\text{311}\)

These are hardly surprising developments or developments unique to drug courts. All trial judges, and especially trial lawyers, are quite familiar with the panoply of subtle and not-so-subtle changes that occur whenever a courtroom changes judges. The problem with the drug court is that, because of its massive caseload, its serpentine bureaucracy, and, most importantly, its purpose to coerce treatment, a few small changes in approach can have magnified impacts.

I. Permanent Drug Court Bureaucracy

The annual rotation of drug court judges is particularly problematic when one considers that the judge and the regular three-person staff (a division clerk, a reporter, and a bailiff or law clerk) are rotating into a permanent and, at least by individual courtroom standards, rather large sixteen-person drug court staff. This permanent staff consists of two magistrates,\(^\text{312}\) one drug court coordinator, nine staff members in the drug court coordinator’s

\(^{311}\) The complete breakdown of their initial sentences is reported in the following table.

<table>
<thead>
<tr>
<th>SENTENCE</th>
<th>MARKSON 1998</th>
<th>COUGHLIN 1997</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deferred Judgments</td>
<td>505 (29.8%)</td>
<td>342 (31.2%)</td>
</tr>
<tr>
<td>Probation</td>
<td>729 (43.0)</td>
<td>264 (24.1)</td>
</tr>
<tr>
<td>Community Corrections</td>
<td>116 (6.8)</td>
<td>175 (16.0)</td>
</tr>
<tr>
<td>Prison</td>
<td>346 (20.4)</td>
<td>316 (28.8)</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>1696</strong></td>
<td><strong>1097</strong></td>
</tr>
</tbody>
</table>

\(^{312}\) The magistrates do a wide variety of drug court tasks, including initial advisements, bond settings, preliminary hearings, compliance reviews, revocation hearings (on misdemeanors), and guilty pleas. See Interview with Lynn E. Martinelli, supra note 301; Interview with Andre L. Rudolph, supra note 297. Prior to January 1, 2000, however, there was considerable uncertainty about whether the magistrates had the authority to take guilty pleas. Before that date, Rule 6(b) of the Colorado Rules for Magistrates set forth a laundry list of the powers of district court magistrates sitting in criminal cases, and those powers did not include taking guilty pleas. See COLO. R. MAGIS. 6(b). Effective January 1, 2000, that Rule was amended to authorize guilty pleas by district court magistrates with the consent of the defendant. See Memorandum from Steven V. Berson, State Court Administrator (Oct. 13, 1999) (attaching the amended Colorado Rules for Magistrates) (to be codified as COLO. R. MAGIS. 6(a)(2)(A)) (on file with the North Carolina Law Review).
office, and four permanent courtroom personnel. This permanent bureaucracy is not only permanent in the sense that it remains in place as drug court judges come and go, but also permanent in the sense that the presiding drug court judge does not have the power to hire or fire its members. The drug court magistrates and drug court coordinator are hired and fired by the chief judge. The nine permanent staff members are hired and fired by the drug court coordinator. Thus, the at-will employment powers that district judges traditionally have enjoyed regarding the hiring and firing of our staff are substantially curtailed in drug court.

Quite apart from the fact that the drug court judge cannot hire or fire permanent staff, the presence of this large permanent bureaucracy presents a very different, and substantially more complex, organizational challenge than that faced by the traditional trial judge. The size alone is a problem. The drug court judge's division clerk, who is used to presiding over a three-person staff, is suddenly confronted with being the titular head of an eighteen-person bureaucracy. The permanence of that bureaucracy, particularly in the face of an annual parade of different presiding judges and division clerks, risks creating a sort of shadow court, not answerable to the particular temporary occupant of the drug court bench and resistant to any attempts by that temporary occupant to effect changes.

To be fair, it does not appear that the Denver Drug Court has suffered from this kind of bureaucratic inertia. On the contrary, the first few drug court judges have been quite willing and able to move the bureaucracy in significant directions, so much so that the way in which the drug court worked in the first few years has varied in significant respects from year to year. Whether this flexibility will continue as the permanent staff becomes more entrenched remains to be seen.

J. INS

Most state trial judges are painfully aware of the long shadow cast on state criminal proceedings by the INS. Particularly in urban courts in the West and Southwest, a healthy percentage of criminal defendants are on what is called “INS hold,” which means that those defendants have been identified by the INS as illegal aliens, that INS

313. These figures do not include eight district attorneys, one investigator from the district attorney's office, five public defenders, one investigator from the public defender's office, and ten probation officers—all assigned exclusively to the drug court.

314. See supra text accompanying notes 308–11.
deportation proceedings against them are in progress or to be commenced, and that they are in a kind of concurrent INS custody (and, therefore, ineligible to be released on bond). The problem with the INS is that it is just barely interested enough in state criminal defendants to throw a monkey wrench into our ordinary pre- and post-trial proceedings by imposing the INS holds, but not quite interested enough to deport those defendants seasonably.

In fact, under federal law in effect when the Denver Drug Court was adopted in 1994, the INS could deport legal aliens convicted of state crimes only if their crimes met certain designated criteria. Generally, there were four categories of criminal activity defined as deportable offenses: crimes involving moral turpitude; virtually any drug convictions (except a single conviction for simple possession of thirty grams or less of marijuana); firearms offenses; and miscellaneous crimes against the state, including sabotage, espionage, treason, and sedition.

These statutory categories not only formed the boundary for the deportability of legal aliens, they also created an informal practical standard for the deportation of illegal aliens. In particular, INS officials advised our court, at an en banc meeting held when our drug court was just beginning, that in order to come up on INS radar we needed to sentence illegal alien defendants to at least five years in the penitentiary, though the sentence could be suspended. This advice explains why the various drug court cookie cutter sentences that are applied to illegal aliens invariably involve at least a suspended five-year prison sentence, when similarly situated citizens who are first-time offenders and who wash out of the drug court treatment program typically receive prison sentences of only one or two years.


316. See 8 U.S.C. § 1251(a)(2). Aliens convicted of crimes involving moral turpitude are deportable if they are convicted of a single such crime within five years after their entry (or 10 years in the case of permanent resident aliens), as long as the crime in question is punishable by at least one-year imprisonment. See id. § 1251(a)(2). In addition, aliens convicted at any time after their entry of two or more crimes involving moral turpitude are deportable, regardless of the punishment range. See id. § 1251(a)(2). The statute does not define "moral turpitude," and there is a long line of difficult cases construing this term. See, e.g., Franklin v. INS, 72 F.3d 571, 572 (8th Cir. 1995); Rodriguez-Herrera v. INS, 52 F.3d 238, 239–41 (9th Cir. 1995); Burr v. INS, 350 F.2d 87, 91 (9th Cir. 1965); United States v. Concepcion, 795 F. Supp. 1262, 1274–75 (E.D.N.Y. 1992).

317. See Interview with Andre L. Rudolph, supra note 297; see also infra text accompanying notes 320–22 (discussing these five-year sentences). In theory, of course, virtually all illegal aliens are deportable, and the deportability statute expressly includes them as a separate category of deportable aliens. See § 1251(a)(1).
The practical problem, of course, is that the INS simply does not have the resources to deport every illegal alien who comes to its attention, even when those illegal aliens come to its attention because they are convicted of state crimes. The unwritten five-year trigger gives them a rough measure of the seriousness of any given state offense. Even though deportation may not be in the cards for every illegal alien caught in state criminal proceedings, an INS hold almost always is. Consequently, an illegal alien who has no previous felonies and is charged with a non-violent offense—precisely the kind of defendant we would ordinarily release on bond—not only cannot be released on bond, but, once convicted, probably cannot be given any meaningful probationary or community corrections sentence while the INS hold is still in place. In traditional criminal courts, many illegal alien defendants languish on INS holds for months and months without being deported, thereby consuming state resources pre-conviction, and then are sentenced to prison, thereby consuming state resources post-conviction. But the INS presence in drug courts is downright Kafkaesque, not only because under federal immigration law the conviction of almost any drug offense subjects even legal aliens to deportation, but also because the INS has allocated personnel specifically to deal with non-citizens in drug court. What had been exasperating INS neglect in traditional state criminal courtrooms is now an exasperating INS presence in drug courts.

The Denver Drug Court has its own INS agents assigned specifically and exclusively to it. These agents are assigned to identify and deport illegal aliens processed in the drug court. Indeed, even after the drug court excised illegal aliens from its jurisdiction, these INS agents have continued to operate with the traditional courts in the deportation of drug defendants. To the credit of the drug court and the INS, the special attention focused on drug defendants has had a dramatic and positive influence on deportation delays. Today, illegal alien drug defendants are removed from the county jail, placed in INS custody, and deported, all within a few weeks, while other illegal alien defendants continue to languish in county jail for months before they are deported. Nevertheless, there are prices to be paid for this new-found federal efficiency.

The Denver Drug Court judges initially agreed to sentence illegal aliens convicted for first-time possession offenses to five years probation, with the condition that they “cooperate” with the INS in

318. See supra note 316 and accompanying text.
319. See supra text accompanying notes 280–83.
their own deportation.\textsuperscript{320} The drug court judges agreed that if these defendants returned to the United States and picked up a second drug charge, they would be sentenced to five years in prison.\textsuperscript{321} As more and more illegal aliens, however, were clogging up the probation paperwork—with no reason, given that their INS holds prevented them from actually complying with probation—several drug court judges decided to skip the probation phase and sentence these first-time offenders directly to the Department of Corrections for five years, suspended on the condition that they "cooperate" in their own deportation.\textsuperscript{322}

These kinds of drug court sentences for illegal aliens not only institutionalize the federal INS tail wagging the state court dog, but they also force the state court to dabble in immigration matters in which it has neither expertise nor jurisdiction. Indeed, in \textit{People v. Antonio-Antimo},\textsuperscript{323} which was an appeal of such a sentence out of the Denver Drug Court, the Colorado Court of Appeals held that state court judges have no authority to impose such conditions and that a guilty plea based on such an illegal sentence is invalid.\textsuperscript{324}

The Denver Drug Court treated citizens and non-citizens differently in other significant ways as well. For example, a non-citizen charged with a sales offense was typically offered an aggravated class-three felony, while a citizen charged with the same sales offense was typically offered either a non-aggravated class-three felony or a class-four felony.\textsuperscript{325} The very reason for this difference was to trigger the potential for certain serious federal criminal prosecution should the non-citizen be deported, but later re-enter.\textsuperscript{326}

Quite apart from the question of whether drug court judges have authority to impose \textit{ersatz} deportation as a condition of probation,
these practices of treating citizens and non-citizens differently raises many other troubling issues. Why does a non-citizen drug court defendant convicted of buying twenty dollars worth of crack get deported immediately, while the non-citizen burglar down the hall does not even come up on INS radar unless he is sentenced to five years in the penitentiary? Why must a non-citizen forger languish for months in pre-trial custody on an INS hold, while the non-citizen drug user is deported within weeks? Why must the non-citizen drug user agree to a five-year suspended sentence and agree to cooperate in his own deportation when an identically situated citizen would receive a deferred judgment or, at worst, simple probation? Most importantly, why are drug courts so willing to alter their sentencing practices simply because a defendant is charged with a federal crime, particularly when the federal government itself is not serious enough about that particular federal crime to do anything about it? I do not think it entirely out of bounds to ask ourselves whether drug courts would be so keen to cooperate with the INS if they did not depend for their lifeblood on federal funds.

VII. UNEXAMINED INSTITUTIONAL CONCERNS: SHOULD JUDGES BE MAKING THESE FUNDAMENTAL POLICY DECISIONS, AND SHOULD THEIR TALENTS BE WASTED IMPLEMENTING THEM?

There is a kind of institutional double-whammy to drug courts. On the one hand, their mere adoption trumps a whole array of deep and difficult public policy questions that judges have no business trumping. On the other hand, their implementation forces judges to engage in day-to-day work for which they are not suited.

A. Separation of Powers

There is no better measure of the institutional impropriety of drug courts than their own proponents’ expressed ideas about their purpose. The chief district attorney assigned to the Denver Drug Court put it as bluntly as anyone by explaining that the purpose of drug courts is “the cost-effective curtailment of drug abuse.”

I respectfully submit that no court’s “purpose” should be to curtail a perceived social problem, no matter how lofty the curtailers’ motives or how scurrilous the perceived problem. Our function is to ensure that the rule of law is justly enforced. The job of curtailing a particular crime, or of achieving any other particular social end, is a

327. Long, supra note 298, at 29.
legislative and executive function, not a judicial one. Only the legislative and executive branches have the imprimatur of public consensus. Judges, no matter the strength nor even the accuracy of our views about policy, have no right to make policy. Yet drug courts are the living embodiment of judge-created policy.

There is a palpable, day-to-day face to this unholy drug court alliance between the branches of government. The entire drug court milieu is constructed as a single, unified institutional response to the problem of drugs. Prosecutors, defense lawyers, and judges are meant to meld together as a kind of single public service institution designed to do what is best for drug defendants, or "clients," as they are referred to in the drug court new-speak. Indeed, it is de rigueur that drug courts cannot operate successfully without the "cooperation" of the judge, prosecutors, police, sheriffs, and defense lawyers. The very instant this "cooperation" is achieved, the protections inherent in the adversary nature of our system are put at risk.\footnote{288}

In the Denver District Court, this unholy alliance has evolved into a daily ritual, euphemistically called "staffing." At these staffing sessions, the judge, prosecutor, public defender, probation officers, and sometimes a staff person from the drug court coordinator’s office meet together in chambers to discuss all of that day’s dispositional, sentencing, and revocation hearings. The judge, after hearing from everyone, reaches a presumptive decision. Defendants are not present and the staffing meetings are not on the record. Quite apart from obvious constitutional concerns,\footnote{289} these staffing sessions symbolize what is wrong with the drug court institution: substantive decisions about a felony defendant are being made by some interbranch committee acting more like a support group than a court.

It is one thing for defendants facing a few days or weeks in county jail for drunk driving or misdemeanor domestic violence to be confronted by an alliance of prosecutors, defense lawyers, and judges unified in an effort to re-educate and treat them. But it is quite

\footnote{288}{Boldt makes this point in the context of defense counsel:  
[D]efense counsel [in the drug court] is no longer primarily responsible for giving voice to the distinct perspective of the defendant’s experience in what remains a coercive setting. Rather, defense counsel becomes part of a treatment team working with others to insure that outcomes, viewed from the perspective of the institutional players and not the individual defendant, are in the defendant’s best interests.  
Boldt, supra note 1, at 1245.}

\footnote{289}{A criminal defendant has a Sixth Amendment right to counsel at all “critical stages” of a criminal prosecution. \textit{E.g.}, Powell v. Alabama, 287 U.S. 45, 68–71 (1932).}
another thing when the defendants face felony charges that can put them in the penitentiary for decades. We may be willing to sacrifice age-old traditions of judicial independence and adversariness for the former, but should not be for the latter. If we are going to continue to treat some drug use as a felony, punishable by many years in prison, then we should treat drug cases seriously—not like parking tickets in a mill in which the judge, prosecutor, and defense lawyer spend their days together trying to push as many people through as possible.

1. Impinging on the Legislative Function

Drug courts are an attempt to answer one of the most beguiling public policy questions of our time, indeed of any time. Their very existence represents a policy determination that involuntary treatment efforts should be undertaken, at least for some defendants, before the full fury of the criminal law is unleashed. Not only does the exasperating question of drug policy contain within it a whole host of difficult scientific, legal, and cultural sub-issues, but the drug court solution raises as many public policy issues as it purports to answer. Regardless of one’s position on complex issues like the scope of the drug problem, the disease theory of addiction, or the legalization of some drugs, surely these are public policy questions that must be answered by elected lawmakers after open and vigorous public debate, not by judges operating in the cloak of pseudoscience. Rather than restraining themselves until public consensus congeals on these terribly important and difficult policy issues, many drug court proponents seem to relish their role as courageous truth merchants stepping into a void left by frightened legislators unwilling to take the tough political stands necessary to deal with this issue. I cannot imagine a more elitist, institutionally tone-deaf, or dangerous expansion of the judicial function.

There are two possible responses to this institutional criticism: Congress itself has given its legislative blessing to drug courts, and drug courts are not exercising any powers—bond with conditions, deferred judgments, or probation with conditions—that traditional courts do not already have. These responses are disingenuous.

Neither Congress nor any state legislature of which I am aware

330. Only those defendants who meet the criteria as good candidates for treatment, or in drug courts like Denver's, those fortunate enough not to be subject to arbitrary exclusions designed to cut down on case filings, qualify for drug court.
331. See supra text accompanying notes 116–66.
has altered any substantive drug laws in their rush to appropriate money for drug courts. Appropriating money to one branch so that that branch may usurp the legislative function does nothing to cure the separation-of-powers problem. It is precisely because drug courts raise such touchy public policy questions in such an ultimately ambiguous way that the legislative branch is so keen on passing the bucks, literally, to them.

Moreover, drug courts are not simply using the traditional powers of bond conditions, deferred judgment, and probation conditions. They are using these traditional judicial powers in a way that is not only non-traditional, but in fact not even judicial. The very purpose of the drug court is not to resolve criminal liability, but to use the threat of criminal liability to coerce defendants into treatment. Again, maybe this approach is entirely sensible, but it is still an approach that is fundamentally legislative. If it is such a good idea, Congress and state legislatures should redefine the crime of drug use to be use plus a failure to take advantage of a certain number and quality of treatment opportunities. They have not done so because there is no public consensus for such an approach.

2. Impinging on the Executive Function

Providing medical treatment to persons convicted of crimes, or even to persons in custody awaiting trial, is an executive function, not a judicial one. By mechanically imposing treatment conditions on all criminal defendants before they have even entered a plea, drug courts blur the fundamental distinction between the accused and the convicted, and therefore between the judicial function of determining guilt and the executive function of carrying out sentences and treating prisoners.

Courts—whose very function is to determine whether the State has met its burden of proving whether any criminal conduct has occurred—are an entirely inappropriate forum to be focusing on whether defendants have been “cured” of their addictions and whether for that reason punishment should not be imposed. We are trained as judges and lawyers to apply the rules of procedure and evidence to adversarial proceedings. The product of those proceedings should be a verdict about guilt or liability, not whether Joe Smith should be treated at Acme House or Metropolis Hospital.

This critique does not simply rest on judges being untrained in these areas or their judicial talents being wasted, though it certainly
includes these concerns;\textsuperscript{332} it is a matter of defining the judicial function. We are the third branch of government and are given sobering powers designed to protect citizens not only from one another, but also from the abuses of the other two branches. We ought not become robed therapeutic administrators just because we have convinced ourselves we are acting for the public good.

If we are truly serious about treatment, sufficient resources could and should be directed to the executive branch’s corrections facilities—at both the pre-conviction (county jail) and post-conviction (state prison) levels. That is where the push for treatment—voluntary and semi-voluntary—belongs. Mark Kleiman, whose work on “coerced abstinence” is often cited in support of the drug court notion that drug use must be detected early and punished quickly, actually focused his ideas as much on parole conditions as probation conditions.\textsuperscript{333} In other words, treatment and punishment should not be viewed as mutually exclusive weapons in the war against drugs. If we continue to believe that possession of some drugs is serious enough to warrant incarceration, then that incarceration should be imposed without further therapeutic hand-wringing, but it should be coupled with intense drug treatment programs in jail or prison and with draconian parole conditions. Parole eligibility and the threat of parole revocation can serve an important and entirely appropriate coercive role in giving inmates and parolees an incentive to take part in treatment programs after they have been found by judges to be deserving of some punishment.

I realize that prison is exactly what well-intentioned drug court proponents want drug defendants to avoid, but that just gets us back into the crime-disease soup.\textsuperscript{334} Besides, as discussed above, drug courts are very likely sending more drug users to prison than ever before.\textsuperscript{335} I also realize that there may be substance to the drug court mantra that early intervention is better than late intervention, but that proposition is not without constitutional, institutional, and common-sense limits.\textsuperscript{336}

In addition to impinging on the corrections function of the

\begin{itemize}
\item \textsuperscript{332} See infra text accompanying notes 345–48.
\item \textsuperscript{333} See KLEIMAN, supra note 51, at 146–49, 192–99.
\item \textsuperscript{334} See supra text accompanying notes 130–66.
\item \textsuperscript{335} See supra text accompanying notes 290–95.
\item \textsuperscript{336} For example, I doubt that even the most strident drug court proponents, or other “therapeutic jurisprudence” do-gooders, would favor rounding up all suspected drug addicts in the absence of proof rising to the level necessary for criminal conviction and forcing them to undergo treatment, any more than they would favor rounding up all bickering spouses and forcing them to undergo marriage counseling.
\end{itemize}
executive branch, drug courts tread on, and in large measure demolish, the traditional executive functions of the prosecutor. It is a time-honored and jealously guarded right of prosecutors to decide whether to offer a particular defendant a plea bargain and what bargain to offer.\textsuperscript{337} In drug courts, that powerful and sobering prosecutorial power is reduced to a few different sizes of cookie cutter pleas.\textsuperscript{338} The decision of whether to offer any plea bargain at all—and even the decision about what particular cookie cutter to use—is driven entirely by a few objective criteria, not by the exercise of any meaningful prosecutorial discretion.\textsuperscript{339} The very reason drug courts need prosecutors to "get on board" is that by doing so prosecutors are abdicating their prosecutorial discretion to this amorphous multi-branch thing we call "drug court."\textsuperscript{340} Even if prosecutors retain theoretical control over their power to offer dispositions, the sheer volume and pace of drug court renders that theoretical control functionally meaningless. Prosecutors are no more able to make intelligent charging and dispositional decisions in an unmanageable ocean of cases than judges are able to make intelligent dispositional and sentencing decisions.\textsuperscript{341}

\textbf{B. Federal Intrusion}

Drug courts provide the federal government with an attractive vehicle through which to interfere unduly with the traditional role of state and local governments in dealing with crime. It is not so much a

\textsuperscript{337} Prosecutorial discretion—the right of prosecutors to decide when to charge and what to charge free from judicial intervention—is a fundamental principle inherent in the doctrine of separation of powers. See, e.g., Wayte v. United States, 470 U.S. 598, 607–10 (1985) (discussing the government's power regarding who to prosecute). In Wayte, the Court stated the following:

This broad discretion [afforded the executive branch] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. 

\textit{Id.} at 607.

\textsuperscript{338} See supra text accompanying notes 296–98.

\textsuperscript{339} See supra text accompanying notes 296–99.

\textsuperscript{340} See supra text accompanying notes 327–29.

\textsuperscript{341} It is no answer to say that every prosecutor's office has internal standards that guide their formulation of plea offers in traditional courts. First, those standards are seldom ironclad. More importantly they are standards formulated by the district attorney, not imposed structurally by the way a particular court is designed. They are an institutional expression of the very prosecutorial prerogative forfeited when drug courts are formed.
case of blatant federal interference as a matter of indirect influences exerted through the lure of federal dollars. We have already seen this phenomenon at work. As a condition of obtaining federal drug court funds, newly proposed drug courts are now encouraged to meet a host of design and implementation criteria set by Department of Justice bureaucrats in Washington.

Drug courts—born in the laboratories of individual states and municipalities—have become increasingly federalized and homogenized. It is a dangerously short distance from the federal government telling us what our drug courts must look like to telling us how they should be operated.

C. Intra-Branch problems

Even as a matter within the judiciary, and ignoring the extent to which they usurp the legislative and executive functions and invite federal intrusion, drug courts present daunting institutional problems. They turn judges into glorified probation officers and institutionalize a single judge’s sentencing philosophy.

1. Glorified Probation Officers

Drug court judges spend much of their time doing things that could and should be done by probation officers. I do not mean this criticism to denigrate the efforts of probation officers or to overvalue

---

342. However, the INS situation discussed above is such a blatant example. See supra text accompanying notes 315–25.


344. This institutional criticism of drug courts meshes with broader criticisms about the federalization of state criminal law. See generally Kathleen F. Brickey, Criminal Mischief, The Federalization of American Criminal Law, 46 HASTINGS L.J. 1135, 1148–65 (1995) (discussing the impact of the federalization of drug-related crimes); Steven Chippendale, Note, More Harm Than Good, Assessing Federalization of Criminal Law, 79 MINN. L. REV. 455, 467–74 (1994) (explaining the negative impact that federalization of criminal law has on law enforcement costs). Chief Justice Rehnquist raised this issue at a speech in May 1999 before the American Law Institute:

"[M]atters that can be handled adequately by states should be left to them; matters that cannot be so handled should be undertaken by the federal government. Reasonable minds will differ on how this very general maxim applies in a particular case, but the question which it implies should at least be asked."

Chief Justice Raises Concerns on Federalization, THIRD BRANCH, June 1998, at 1, 1–2 (quoting Chief Justice Rehnquist). After citing several examples of federal legislation that encroaches upon state powers, Chief Justice Rehnquist went on to state, “[O]ne senses from the context in which they were enacted that the question of whether the states were doing an adequate job in this particular area was never seriously asked . . . .” Id. (quoting Chief Justice Rehnquist).
the efforts of judges. On the contrary, our roles have become muddled in drug court not because judges have stepped into a vacuum created by incompetent probation officers, but rather because the very purpose of drug courts is to blend the adjudicative and probationary functions.\textsuperscript{445} It is a blending that not only violates basic notions of adversariness, but one that makes no practical organizational sense.

Probation officers are trained, and in my experience most are very skilled, in performing all of the challenging probation functions that we demand of them, even though we generally refuse to give them the necessary resources. Drug courts have crowned the drug court judge as a kind of chief probation officer, one with direct probationary responsibility over thousands of defendants rather than with supervisory responsibility over dozens of other probation officers. This kind of probationary micro-management makes no organizational sense whatsoever, even ignoring the fact that the crowned chief probation officer is by definition an amateur.

I recognize that it is an article of faith central to drug courts that defendants pay more attention to a judge telling them, in a courtroom, what they must do to avoid imprisonment than they do to a probation officer telling them the same thing over the telephone or in a probation office or home visit. A related article of faith is that a hands-on approach by judges gives them a working knowledge of each defendant, which becomes invaluable in making decisions about that specific defendant. With all due respect to the drug court believers, the sheer volume of defendants pushed through the drug court mill each day—not to mention dismal recidivism benefits—belie these articles of faith.

Judges would have to be blessed with photographic memories, or egos bordering on narcissism, to believe they have a working knowledge of the thousands of defendants who appear in drug court each month. Conversely, drug defendants no doubt are keenly aware of the irony that a single drug court judge is even less able to retain a hands-on knowledge of the thousands of defendants in the system than a probation officer is able to maintain a hands-on knowledge of hundreds of defendants.

Proponents respond, correctly, that the drug court system as a whole keeps much closer track of defendants than traditional courts do.\textsuperscript{446} I submit, however, that that success has more to do with the

\textsuperscript{445} See supra text accompanying notes 332–36.

\textsuperscript{446} See, e.g., Belenko, supra note 96, at 21–22.
enormous probation resources poured into drug courts than the rather ethereal and, I must say, self-important notion that defendants pay more attention to judges than to probation officers. I suspect that if traditional courts had the probation resources of drug courts they could be just as effective in keeping track of defendants and just as ineffective in reducing recidivism.  

Even if there were an inherent value in a judge, rather than a probation officer, performing probation functions in drug court, we must all recognize that we pay an institutional price for that added value. Judges, trained in the nuances of procedure, evidence, and substantive law and allegedly appointed for their intellectual abilities as well as their sense of proportion, compassion, and justice, spend much of their day in drug court looking at urine sample results and deciding how many days of jail time to impose on the reluctant patient. Is this really the kind of work the judicial branch wants its judges doing? Is it really the kind of work most judges want to be doing?

2. Institutionalizing a Single Judge’s Sentencing Philosophy

There are many reasons we do not ordinarily organize our multi-judge criminal courts so that we have specialized burglary judges, sexual assault judges, or forgery judges, and one of the most compelling of these reasons is to avoid enshrining a single judge’s sentencing philosophy. The act of sentencing a defendant is a complex event, in which many factors are brought to bear and filtered through a particular judge’s persona. It is an intensely personal act. Not only are some judges harsher sentencers in general than others,

347. See supra text accompanying notes 211–44.
348. See supra text accompanying notes 265–71, 300–07. Belenko and Dumanovsky offer tips to administrators to attract and keep reluctant drug court judges:
Incentives for judges to preside over the special drug court may need to be created by the judicial administrators if a highly skilled volunteer judge cannot be found. This assignment may be viewed as boring and repetitive, a certain route to frustration and burnout. Therefore, it may be necessary to create incentives for judges to staff the drug court. For example, the drug court judge might be selected from among municipal, misdemeanor, or county court positions and be appointed an acting superior or circuit court judge. Or, a term on the drug court might provide a step up in seniority status for a felony trial assignment. Similar incentive issues may apply to the prosecutor’s and public defender’s offices.

BELenko & DUMANovSKY, supra note 96, at 7–8. Translation: if we cannot bribe qualified felony-level judges into acting like cogs in the drug court case-processing machine, we might as well use non-felony judges, who are already used to being cogs in a case-processing machine.

349. Other reasons include keeping judges fresh and humble.
but many judges, consciously or unconsciously, develop sentencing patterns that vary by type of crime or by sentencing alternative. Some judges treat so-called white-collar crimes much more harshly than do others, but treat drug crimes much less harshly. Some of us believe drug dealers, as opposed to drug users, should almost always go to prison; some of us recognize many drug dealers deal in order to make money to use drugs. Some of us are more enamored than others of probation or other alternatives to prison, such as community corrections. Some of us often impose short county jail sentences as conditions of probation; others seldom do.

Of course, these differences result in inconsistent sentences on an individual judge-by-judge and defendant-by-defendant basis. By continuing to give judges some meaningful sentencing discretion, most state legislatures have made the judgment that sentencing inconsistency is a price worth paying for a system that, at least in theory, has the capacity to make individual adjustments when necessary in order to achieve a just result. Within limits, one person's sentencing inconsistency is another's justice.

I believe that an important feature of the awesome sentencing power with which we are invested is to spread around the sentencing duties in multi-judge courts—either by ensuring that all judges do all kinds of cases (the integrated approach) or, in specialized courts, by ensuring that judges regularly rotate from one specialty to another. Otherwise, our gain in sentencing consistency is paid for with an unacceptable concentration of sentencing power in a single judge.

Drug courts are the worst of both of these worlds. They fix a single judge's sentencing philosophy for a long period of time, and then the entire bureaucracy must adjust to a new sentencing philosophy when the drug court judge changes. It is true that traditional courts face this same challenge whenever there is a change of judge. But the problem is exacerbated in drug courts, not only because the judges may tend to change frequently and may tend to get burnt out quickly, but more importantly because drug courts, unlike most other felony-level criminal courts, occupy an entire criminal field. For the whole period that Judge Jones sits on the Metropolis Drug Court, every criminal defendant charged with a drug crime in Metropolis faces Judge Jones and is subjected to Judge Jones's particular sentencing philosophy. This arrangement is a

350. See supra text accompanying notes 308–11.
351. See supra text accompanying notes 308–11.
352. See supra text accompanying notes 265–71, 300–07.
dangerous concentration of judicial power, and one that, in any other context, most multiple-judge courts are specifically designed to avoid.

Moreover, judicial power is, by its very nature, more sharply exercised in drug courts than in traditional courts. The purpose of drug courts is to coerce treatment, and drug court judges are the chief coercers. Their powers are not only grounded in the inherently intrusive act of forcing people to undergo certain kinds of quasi-medical treatment, but those powers are brought to bear much more frequently than in traditional courts. Drug court judges are, and are meant to be, a regular and unpleasant force in the daily lives of drug court defendants. As a consequence, the particular sentencing peccadilloes of any given judge are much more likely to express themselves in drug court than in traditional court.

CONCLUSION

We have succumbed to the lure of drug courts, to the lure of their federal dollars, to the lure of their hope, and to the lure of their popularity. Drug courts themselves have become a kind of institutional narcotic upon which the entire criminal justice system is becoming increasingly dependent. Our police and prosecutors cannot give them up because they see in them the magic promise of an end to a drug-tolerant culture, not to mention the somewhat less magical political allure of skyrocketing rates of arrest, prosecution, and imprisonment. Our treatment community cannot give them up because they see in them the magic promise of a world in which drug addiction is treated instead of punished—and the somewhat less magical economic allure of millions of treatment dollars. Judges and politicians cannot give them up because they see in them the magic promise of finally being able to reconcile these two irreconcilable views about drugs.

As with drugs themselves, however, the promises of drug courts do not measure up to their harsh reality. They are compromising deep-seated legal values, including the doctrine of separation of powers, the idea that truth is best discovered in the fires of advocacy, and the traditional role of judges as quiet, rational arbiters of the truth-finding process. In their mad rush to dispose of cases, drug courts are risking the due process rights of defendants and turning all of us—judges, staff, prosecutors, and public defenders alike—into cogs in an out-of-control case-processing machine.

And what have they delivered in exchange? Reductions in recidivism are so small that if they exist at all they are statistically
meaningless. Net-widening is so large that, even if drug courts truly were effective in reducing recidivism, more drug defendants would continue to jam our prisons than ever before.

It is time for all of us to take a much harder look at drug courts, at their awkward placement straddled among the three branches, at their true effectiveness, and at their real operational and institutional costs. It is time, especially for judges, to resist the lemming-like dash toward a society in which bedrock legal principles that have served us for generations are sacrificed for the immediate gratification of the latest political fad.

In his wonderfully balanced and insightful book, *Against Excess, Drug Policy for Results*, Mark Kleiman summarizes the extremism that has come to dominate the public policy debate about drugs:

A spirit of fanaticism is evident in much of what is now done publicly and privately to combat the menace of drug abuse: more and more extreme efforts with less and less clarity about why they are undertaken or what benefits they are expected to produce. Reporters scurry around, writing stories on the panacea-of-the-month: using the army, random drug testing, legalization, the death penalty for drug dealers, boot camps, getting tough with source countries, treatment on demand.\(^\text{353}\)

I am afraid that drug courts are the latest panacea-of-the-month, that judges are becoming the latest conscripts in the failed war on drugs, and that the fanatic popularity of drug courts does not reflect their potential value as one small tool in an attempt to cope with an extremely complex problem, but just the latest in a long history of thoughtless excesses. An observation Mark Kleiman made at the beginning of his book is particularly apropos to drug courts, and particularly to the Chicken Soup aspects of our mad dash to them: "'Fanaticism consists of redoubling your efforts when you have lost sight of your aim.'"\(^\text{354}\) We should spend less time feeding the fanaticism of drug courts and more time in an honest debate about the deep moral and social issues inherent in drug use, drug abuse, and drug control.

\(^{353}\) KLEIMAN, supra note 51, at 4–5.

\(^{354}\) Id. at 3 (quoting the American philosopher George Santayana without citing the original source of publication).