

Courting Disorder: Some Thoughts on Community Courts

Anthony C. Thompson*

INTRODUCTION

Specialized “community courts”¹ have burst onto the judicial landscape almost overnight. To many, these courts seem a logical extension of the drug courts that proliferated in the 1980s. Drug courts successfully departed from traditional court operations by narrowing their focus to the treatment of drug problems and the criminal conduct that tends to flow from addiction. Such specialized concentration both targeted the defendant’s problems and allowed professionals working in the system to develop a level of expertise that attends such focused work. But the community courts that have recently emerged are a different breed. These courts have a wide focus—perhaps too wide. They seek to address complex issues ranging from domestic violence to mental health. In the process, community courts have begun to utilize the coercive power of the judiciary in ways that raise questions about their propriety and necessity. Interestingly, these concerns have not surfaced in the literature examining community courts. Whereas drug courts have

* Professor of Clinical Law, New York University. J. D. 1985 Harvard University; B.A. 1982 Northwestern University. I am grateful to the Students and Faculty of Washington University School of Law, particularly the Black Law Students Association (BLSA) and the Clinical Education Program for inviting me to be the 2002 Martin Luther King Commemorative Speaker. I would like to thank Professors Randy Hertz, Jerry Lopez and especially Kim Taylor-Thompson for their comments on early drafts of this Article. I would also like to thank Kate Sawyer for her invaluable research assistance and Dulcie Ingleton for her administrative support. I gratefully acknowledge financial support from the Filomen D’ Agostino and Max Greenberg Research Fund at the New York University School of Law. This Article was prepared as part of Washington University School of Law’s 2001-2002 Public Interest Law Speaker Series.

1. Community courts and problem-solving courts are terms used interchangeably. *See, e.g., infra* note 3.

been analyzed and evaluated from a variety of perspectives,² a review of the articles addressing community courts reveals a particular slant: They tend to be written by drug court judges, administrators or designers, and thus are usually highly laudatory.³ In evaluating whether community courts should become a permanent part of the judicial landscape, more is needed than partisan articles that sing these courts' virtues.

What accounts for the broad receptivity to community courts? One likely explanation relates to the success of drug courts. In response to the failure of traditional courts to address the individual circumstances of each offender's life, drug courts have pursued a mission of meaningful intervention that, out of necessity, requires processes different from the familiar path of a criminal case. By utilizing multi-disciplinary approaches in their handling of individual cases and by integrating social services, health, and drug treatment with what has traditionally been the role of probation, drug courts are able to address the root causes of an individual's involvement in the criminal justice system. Drug courts have all but abandoned conventional adversarial roles in the interest of providing a more therapeutic and less contentious environment for the resolution of issues. Judges assigned to drug courts closely monitor offenders through a process of treatment and recovery.⁴ The bounded adversary

2. See, e.g., John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277 (2000); Jefferson M. Fish, *Is Our Drug Policy Effective? Are There Alternatives?*, 28 FORDHAM URB. L.J. 9 (2000); Alan I. Leshner, *Treatment Option for Drug Offenders is Consistent with Research Findings*, 72 N.Y. ST. B.J. 53 (2000); Note, *Alternatives to Incarceration for Drug Abusing Offenders*, 111 HARV. L. REV. 1898 (1998); Susan Weinstein, *Ethical Considerations for Prosecutors in Drug Courts*, 15 CRIM. JUST. 26 (2000).

3. See Greg Berman & Susan K. Knipps, *New York's Problem-Solving Courts Provide Meaningful Alternatives to Traditional Remedies*, 72 N.Y. ST. B.J. 8 (2000); Alex Calabrese, *"Team Red Hook" Addresses Wide Range of Community Needs*, 72 N.Y. ST. B.J. 14 (2000); Derek A. Denckla, *Forgiveness as a Problem Solving Tool in the Courts: A Brief Response to the Panel on Forgiveness in Criminal Law*, 27 FORDHAM URB. L.J. 1613 (2000); Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1494 (1999) [hereinafter Kaye, *Rethinking*]; Judith S. Kaye & Susan K. Knipps, *Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach*, 27 W. ST. U. L. REV. 1, 11 (1999-2000).

4. See Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 377 (1995) (citing U.S. Department of Justice: *An Analysis of Non-Violent Drug Offenders with Minimal Criminal Histories*, Crim. L. Rep. (BNA) No. 54, at 2117 (Feb. 16, 1994)).

system that is a seemingly indispensable part of the traditional court process appears out of place in this new context. With their radical innovations, drug courts have seen and documented changes in the conduct of many offenders.⁵

Despite their reported successes, drug courts have met with criticism. Some observers have expressed concern that the courts' expansion beyond the traditional public safety role has been shortsighted.⁶ They caution that the proliferation of drug courts and the attendant elimination of the adversarial process have occurred in an absence of rigorous analysis of either the appropriateness or the long term effectiveness of such courts. What should raise concern is that few observers and scholars have fully explored the increased importance of judicial discretion in these new, non-adversarial courts. In spite of these criticisms—and almost oblivious to them—drug courts have developed at a rapid pace.⁷

Riding the favorable tide created by drug courts, community courts have emerged as the latest judicial innovation. Despite their diverse substantive focuses, these new courts share some common features. First, like their drug court antecedents, community courts seek to broaden the deterrent and retributive aims of conventional legal proceedings by providing offenders with particularized services.⁸ While drug courts offer drug treatment to offenders, community courts either mandate or provide access to job training, health care, and other social services.⁹ The courts routinely have at least one component that allows interaction between sectors of the community and the court. The form of community participation ranges from presence on advisory boards and impact panels to occasional opportunities to voice concerns through town hall meetings.¹⁰

The drive to find some way to make courts more responsive to community interests has led to community courts. These courts were

5. See sources cited *infra* note 61.

6. Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 308 (1913).

7. See Goldkamp, *infra* note 22, at 923.

8. Feinblatt et al., *supra* note 2, at 282.

9. Berman & Knipps, *supra* note 3, at 8.

10. *Id.* at 9.

established as part of a larger and growing community justice movement.¹¹ The underlying premise of community courts is that those communities most often affected by the sentencing process are least likely to be consulted about or involved in the resolution of court cases.¹² A community-oriented adjudication model, at least in theory, seeks to give greater voice to communities in the exercise and implementation of justice. Premised in large part on the philosophy developed in the ground-breaking article *Broken Windows*,¹³ community courts have been promoted as both a way to enable communities to maintain control over their neighborhoods and a mechanism to imbue the judicial system with a degree of legitimacy that it had recently lost.¹⁴

The push for community courts emerged in part from the community-oriented problem-solving policing experience.¹⁵ The *Broken Windows* thesis that launched the community-policing trend maintains that local authorities' lack of attention to low income communities is linked to an increase in criminal activity in those neighborhoods.¹⁶ Thus, exercising greater "controls" over a community would lessen criminal conduct.¹⁷ These specialized community courts are thus designed to permit the community—and the court—to regain authority over conduct that threatens the

11. See, e.g., Todd R. Clear & David R. Karp, *The Community Justice Movement*, in COMMUNITY JUSTICE: AN EMERGING FIELD 9 (David R. Karp ed., 1998).

12. See *id.*

13. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

14. See, e.g., Bill Rankin, *Whites More Apt to Get Probation*, ATLANTA J. & CONST., Feb. 8, 1998, at 1A (citing the state Racial and Ethnic Bias Commission, "which found far-reaching distrust among minorities of the state's legal system"); Lori Montgomery, *One in Three Young Black Men Jailed, Paroled or on Probation*, HOUSTON CHRON., Oct. 5, 1995, at A7 (stating that disproportionate rate of arrest "[f]osters a deep distrust of the white-dominated legal system that appears to have marked them as targets").

15. See David Rottman & Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, 240 NAT'L INST. JUST. J. 12, 15 (July 1999), available at <http://www.nesc.dni.us/RESEARCH/rottman.pdf> (last visited Apr. 1, 2002); Janet Reno, Remarks to the American Association of University Women (June 19, 1999), available at <http://www.usdoj.gov/archive/ag/speeches/1999/agwomenspeech.htm> (last visited Apr. 1, 2002) ("We have funded and encouraged new community strategies—community policing, innovative crime prevention programs, community courts.").

16. See *supra* note 13.

17. Wilson & Kelling, *supra* note 13, at 29.

community's safety and economic viability. But close examination of the courts' practical operation reveals a different outcome. In effect, the judicial system has assumed authority over conduct that had previously been considered beyond its mandate by focusing its attention and attendant coercive power on minor or victimless crimes.¹⁸

Gaps between theoretical objectives and actual operation are perhaps to be expected. Close examination of the actual practices of an institution often reveal tensions related to objectives and identity that might otherwise escape notice. To help sort through these issues, this Article will use empirical and anecdotal data as well as existing literature on community courts to evaluate the effectiveness of these courts in achieving their stated objectives. In so doing, this Article does not purport to evaluate all types of community courts. Nor will it attempt to provide an in-depth analysis of all the issues that surround the history, establishment, design, and operation of community courts. Rather, this Article will identify certain representative problems that inevitably occur in these courts and will examine the extent to which the conflicts inherent in their operation prevent these courts from achieving their aims.

Part I briefly examines the history of drug courts and explores questions about their management and operation. Part II traces the progression from drug courts to the broader notion of community courts and questions the assumption that the methodology used in drug courts should be employed in other types of courts. Part III sets out an appropriate research agenda for determining whether community courts should continue to flourish.

I. DRUG COURTS: AN INNOVATIVE RESPONSE TO SKY-ROCKETING CASELOADS

The 1980s witnessed a marked increase in arrests and convictions for drug-related crimes. The War on Drugs¹⁹ exerted dramatic

18. *Contra* Bill Campbell, *Mayor Says the City's Rebirth is Owed to Holistic Approach*, ATLANTA J. & CONST., July 1, 1999, at 3JD (stating that the mayor of Atlanta supports "enforcing all the city laws, because there are no victimless crimes").

19. See <http://www.drugwarfacts.org> (last visited Apr. 30, 2002).

pressures on all facets of the criminal justice system. Between 1980 and 1998 the number of arrests nationwide increased forty percent.²⁰ Arrests for drug possession, possession for sale of controlled substances, and sales of drugs increased 168%.²¹ Many of the defendants facing drug charges in criminal court were repeat drug offenders.²² Crack cocaine coupled with the re-emergence of a strong strain of black tar heroin and other new drugs made issues leading to criminal conduct much more difficult for the courts to resolve. At the same time, state and federal law enforcement received massive budget increases and formed an array of special drug units that increased the number of street-level arrests.²³

A crisis was in the making. Courts, already overwhelmed by caseload increases as a result of other criminal justice initiatives,²⁴ could do little more than process cases. Defendants placed on probation often returned to court facing a violation of probation as a result of reverting to drug use or committing crimes to support their habits. Still others served their time only to be released with little programmatic support to prevent their return to drugs and the attention of the judicial system. The rates of recidivism offered glaring proof that the conventional approaches to criminal cases had little effect on the problems underlying drug-related crimes. The system consequently lost some of its legitimacy as the public increasingly perceived it to be no more than a revolving door.²⁵ Drug courts thus emerged as the judicial system's answer to both its own

20. See Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice System*, 63 ALB. L. REV. 833, 834 (2000).

21. *Id.*

22. See John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923 (2000).

23. See 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, 454-59 (1999); see also Joan Petersilia, *Probation and Parole*, in THE HANDBOOK OF CRIME AND PUNISHMENT 563, 579 (Michael Tonry ed., 1998) (distinguishing jurisdictions whose resources and historical commitment to rehabilitation have enabled them to "refer" individuals to existing community social service programs from those whose overall services are woefully inadequate to meet their community's needs).

24. *Id.*

25. *United States v. Balascsak*, 873 F.2d 673, 682 (3d Cir. 1989) (quoting S. REP. NO. 98-190, at 6 (1984)).

sense of ineffectiveness and the growing number of complaints that the court system needed to address the root causes of criminal behavior.

A. The Evolution of the Drug Court Model

1. The History and Rationale for Drug Courts

Despite the risk of arrest and mandatory imprisonment during the War on Drugs, drug trafficking flourished in the 1980s and 1990s.²⁶ Drug sales offered financial rewards to individuals residing in economically disadvantaged neighborhoods that far outweighed alternatives available in the legitimate economy.²⁷ To combat drug usage and distribution, law enforcement stepped up its efforts by initiating large scale drug sweeps, deploying greater numbers of officers to open air drug markets, and conducting massive arrests.²⁸ Courtrooms around the country were inundated with defendants, including both first-time offenders and recidivists.²⁹ One judge termed the War on Drugs “the greatest pressure on our court system.”³⁰ Between 1979 and 1988, “[s]tate and local arrests for drug offenses (sale, manufacture, possession) doubled, and federal arrests more than doubled.”³¹ The immense caseloads flowing from this interdiction effort had the consequence of warping the quality of justice dispensed in non-drug cases, as time and money were

26. See JOINT COMM. ON N.Y. DRUG LAW EVALUATION, THE ASS’N OF THE BAR OF THE CITY OF N.Y., *THE NATION’S TOUGHEST DRUG LAW: EVALUATING THE NEW YORK EXPERIENCE* (1977). For current nonpartisan research, see JONATHAN P. CAULKINS ET AL., *MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS?* (1997); MICHAEL TONRY, *SENTENCING MATTERS* 24, 151 (1996); and Michael W. Sheetz, Comment, *Cyberpredators: Police Internet Investigations Under Florida Statute*, 54 U. MIAMI L. REV. 405, 429 (2000).

27. Alfred Blumstein, *Prisons*, in *CRIME* 47 (James Q. Wilson ed., 1994).

28. See Doug Bandow, *War on Drugs or War on America*, 3 *STAN. L. & POL’Y REV.* 242, 242 (1991).

29. See NAT’L INSTITUTE OF JUSTICE, *SEARCHING FOR ANSWERS: ANNUAL EVALUATION REPORT ON DRUGS AND CRIME: 1992 53-56* (1993) [hereinafter *SEARCHING FOR ANSWERS*].

30. See Mary Wisniewski, *Judicial Panel Opposes Crime Bill Provision*, *CHI. DAILY L. BULL.*, July 16, 1991, at 1.

31. Candace McCoy, *From Sociological Trends of 1992 to the Criminal Courts of 2020*, 66 *S. CAL. L. REV.* 1967, 1981 (1993).

disproportionately expended in drug cases.³²

The first innovative response to the unprecedented spike in drug cases took place in Dade County, Florida. Dade County began to experiment with a drug court focusing on intensive treatment for drug addicted defendants.³³ One prosecutor called the development of the drug court an “admission that chemically addicted defendants were stretching the criminal justice system to its very limits.”³⁴ Dade County, under the leadership of then State Attorney, Janet Reno, and then State Court Director of the Office of Substance and Abuse Control, Timothy Murray,³⁵ created an entirely separate court structure that allowed the judiciary to approach the criminal conduct as a symptom of the root problem: substance abuse.³⁶

The Dade County initiative proved popular. Jurisdictions from virtually every region of the country soon followed Dade County’s lead by experimenting with some form of drug court. In 1994, Congress became involved by authorizing the Attorney General to make grants and loans to state, local, and Indian Tribal governments to establish drug courts.³⁷ Federal government involvement led to the establishment of the Drug Court Program Office.³⁸ In addition to creating oversight capacities, the federal government made funds available, which in turn prompted greater numbers of jurisdictions to attempt to create some form of drug court. Today, observers suggest that there are in excess of 425 drug courts either in operation or in the planning stage.³⁹ Although jurisdictions continue to develop courts using the label, “drug court,” these specialized courts are far from identical.

32. See *id.* at 1986.

33. See Barry Klein, *Treatment Is Often the Sentence in Dade’s ‘Drug Court’*, ST. PETERSBURG TIMES, Aug. 6, 1989, at 1A.

34. See Claire McCaskill, *COMBAT Drug Court: An Innovative Approach to Dealing With Drug Abusing First Time Offenders*, 66 U. MO. KAN. CITY L. REV. 493, 495 (1998) (Claire McCaskill was first elected Jackson County (MO) prosecutor in 1992).

35. See PETER FINN & ANDREA K. NEWLYN, U.S. DEP’T OF JUSTICE, MIAMI’S “DRUG COURT”: A DIFFERENT APPROACH 3 (1993).

36. See Goldkamp, *supra* note 22, at 941; see also FINN & NEWLYN, *supra* note 35, at 3.

37. See Morris Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1464 (2000).

38. *Id.*

39. Goldkamp, *supra* note 22, at 923.

2. Design and Management of Drug Courts

Drug courts, by definition, share certain elements. These components have developed as much in reaction against conventional court practices as in pursuit of a new model of addressing drug cases in the criminal justice system. An examination of drug courts across a wide spectrum reveals the following shared characteristics: methods for immediate intervention, hands-on involvement of judges who have the obligation to define rules of behavior for defendants and to articulate the goals of the process, and use of a team (rather than adversarial) approach.

The differences in drug court processes occur almost immediately for the defendant. In a traditional criminal court, an individual accused of a drug charge might not appear in court until days after her arrest. The designers of drug courts considered the gap between the commission of the offense and the initiation of court proceedings problematic.⁴⁰ It unnecessarily delayed intervention, allowing the offender possibly to re-offend in the interim between the arrest and her first court appearance.⁴¹ The gap in time also sent the wrong message to the accused. It signaled that the accused's treatment in court was somehow divorced from the incident that led to her arrest.⁴² To close that gap, drug courts intervene immediately, such that the accused's appearance—even on a minor offense—often occurs immediately after police processing.⁴³ The net effect is to establish from the start that the accused is in a court that has different operations and different expectations.

Different expectations extend to the professional players as well. Drug courts rely on the hands-on involvement of judges. Although

40. Goldkamp, *supra* note 22, at 945; *see also* Peggy Fulton Hora & William G. Schma, *Therapeutic Jurisprudence*, 82 *JUDICATURE* 9, 10-12 (1998).

41. Hora & Schma, *supra* note 40, at 10-12.

42. *Id.*; *see also* McCaskill, *supra* note 34, at 495.

43. *See* DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, *LOOKING AT A DECADE OF DRUG COURTS* 8 (1998) (noting that drug courts were created in 1989 as an experiment designed to reduce recidivism and to encourage treatment and rehabilitation for felony drug offenders); *see also* JOHN S. GOLDKAMP, *JUSTICE AND TREATMENT INNOVATION: THE DRUG COURT MOVEMENT: A WORKING PAPER OF THE FIRST NATIONAL DRUG CONFERENCE*, DECEMBER 1993 3-4 (1994) (discussing the early drug courts created in the 1990s, which followed the lead of the Miami court).

some would question whether the judge operates only as a neutral arbiter in the traditional lawyer-driven process, the drug court setting's effectiveness depends on her extensive involvement. She participates in the assessment of the defendant and the development of a treatment plan.⁴⁴ She also monitors the defendant's treatment by scheduling regular appearances during which the judge will review reports on the defendant's progress.⁴⁵ Much of the work of the drug court judge was once left to probation officers, with occasional review by a judge if the state alleged violation of probation conditions. Under the new model, the judge hears of the defendant's successes as well as her lapses.⁴⁶ This new role requires specialized training for judges to help them understand, for example, the cycles of drug abuse that can be expected even when an individual commits to a plan of abstinence.

Perhaps the single most defining feature of drug courts is the collaborative approach used by otherwise adversarial players. Prosecutors and defense counsel engage in non-adversarial, team-oriented roles designed to both support the judge and facilitate the progress of the defendant's treatment.⁴⁷ Instead of the adversarial contest characteristic of a traditional criminal proceeding, drug courts adopt an ethic of cooperation. Defense counsel, prosecutors, corrections personnel, and addiction treatment providers share considerable amounts of information about the defendant's amenability to treatment and progress.⁴⁸ Rather than debating factual scenarios or legal implications, the principal players work together to determine the appropriate sanctions given the defendant's circumstances.⁴⁹ In the end, the goal is to formulate an approach that

44. See Sally L. Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts*, 1 NAT'L DRUG COURT INST. REV. 43, 45 (1998).

45. *Id.*

46. James R. Brown, Note, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 85 (1997). See also Caroline S. Cooper & Joseph A. Trotter, Jr., *Recent Developments in Drug Case Management: Re-engineering the Judicial Process*, 17 JUST. SYS. J. 83, 94 (1994).

47. John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION 25 (W. Clinton Terry III ed., 1999).

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

49. *Id.*

will allow the court to redirect the defendant's behavior successfully.

Most drug courts effect this intervention into the defendant's life in either of two ways: through deferred prosecution or post-disposition models. The deferred prosecution model accepts defendants into the program who have not yet resolved the factual or legal issues in their case.⁵⁰ In exchange for the defendant's agreement to participate in the drug court process, the state holds the prosecution in abeyance with the agreement to dismiss the charges upon satisfactory completion of the process. If the defendant fails to complete the program successfully, the state will reinstate the charges and the defendant will face the full range of legal penalties. One example of this type of diversionary program is the COMBAT drug court in Kansas City, Missouri.⁵¹ This court allows defendants to appear before the drug court judge within hours of arrest and seeks to keep the defendant out of the criminal justice system.⁵²

The post-disposition model begins from a different premise. Courts that utilize this process expect defendants to enter a plea of guilty or to agree to set of stipulated facts.⁵³ The courts that adopt this model contend that a defendant needs to accept responsibility for her actions before meaningful intervention can occur. Under this model the court suspends the sentence until the defendant completes the program. One example of such a program is the Drug Treatment and Alternative to Prison (DTAP) program in New York.⁵⁴ This drug court operates as a residential treatment program that lasts up to twenty-four months.⁵⁵ DTAP originally targeted non-violent offenders arrested for B-felony drug sales who would face mandatory prison sentences if convicted.⁵⁶ The court later extended its target population to include second-time drug offenders and individuals charged with some other non-violent felonies.⁵⁷ DTAP relies on the

50. *Id.* at 1256.

51. *Id.*

52. *Id.*

53. *Id.*

54. Alexandra Marks, *Governors Seek New Way to Halt Drugs*, CHRISTIAN SCI. MONITOR, Feb. 6, 2001, at 2.

55. *Id.*

56. Belenko, *supra* note 20, at 845-46.

57. Martin I. Reising, *Prisons and Corrections: Rediscovering Rehabilitation: Drug Courts, Community Corrections and Restorative Justice*, 77 MICH. B.J. 172, 174 (1998).

coercive power of a suspended sentence to keep the individual committed to what can be a difficult period of adjustment in a residential treatment program.⁵⁸

Both the deferred prosecution and the post-disposition models have legal consequences for drug court participants. Even in the deferred prosecution model, where the defendant has less to lose, the choice may not be as simple as one might think.⁵⁹ Participants may gain the benefit of treatment and eventual dismissal of their charges, but, in exchange, they must agree to a much longer involvement with the criminal justice system. During this period of supervision, their activities are scrutinized and they can expect close supervision, whereas in the traditional proceeding, they might have faced fewer controls on their behavior. In addition to this prolonged exposure to the court, participants in this model may be reluctant to challenge the legality of their detention or arrest after a lengthy participation in the court's programs. In the post-disposition model, there are different concerns. Drug court participation is conditioned on a willingness to forego any legal challenges that the defendant might have raised regarding her arrest or the seizure of evidence.

B. Evaluating the Successes and Failures

Drug courts appear to be successful by a number of measures.⁶⁰ They have been directly linked to lower recidivism rates.⁶¹ "A 1998 evaluation that compared re-arrest rates for drug court participants with non-participants, concluded that re-arrest rates for program graduates were lower."⁶² Another apparent benefit is cost-efficiency. Drug courts have achieved net savings of \$2 million in jail costs.⁶³ The cost of incarceration far exceeds either residential or outpatient

58. Belenko, *supra* note 20, at 847.

59. Boldt, *supra* note 48, at 1255-56.

60. See Belenko, *supra* note 20, at 850 (praising drug courts for leading to comparatively reduced drug use rates and criminal activity among participants).

61. See Steven Belenko, *infra* note 64, at 30-34 (finding that three of six studies reported lower recidivism for drug court clients following termination of monitoring; two studies did not report comparative statistics); *Id.* at 33 (finding that drug court participants had lower post-program recidivism in seven of twelve studies).

62. See Belenko, *supra* note 20, at 850.

63. *Id.*

treatment, and drug courts consistently save money even after factoring in administrative costs.⁶⁴ For example, a study of the Multnomah County, Oregon drug court found that the court had saved \$2.5 million in its handling of 440 cases over a two-year period.⁶⁵

From a human cost perspective, compared to more conventional courts, drug courts have helped individuals gain greater control over their lives and their drug addictions. Prior to the advent of drug courts, judges' interactions with defendants were much more limited. In those instances where the offender continued to use drugs, the court tended to revoke probation and to incarcerate her. In contrast, the intense focus on drug addiction by professionals in the justice system and medical field through drug courts has helped increase the courts' understanding of the nature of addiction. Courts have come to expect that an individual will relapse during the process of recovery.⁶⁶ They have seen that measured responses such as a short period of incarceration followed by release back into the treatment regimen can produce better results than long-term incarceration.⁶⁷ The individual learns the consequences of her conduct and then is able to return to a path of recovery. Such depth of understanding of the pull of addiction was not evident among judges before the advent of drug courts.

The success of drug treatment court initiatives has received wide attention⁶⁸ and praise, and has led to expanded funding.⁶⁹ In the midst

64. See Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV. 10, 43 (1998).

65. *Id.*

66. See GERSTEIN & HARWOOD, *TREATING DRUG PROBLEMS, VOL. 1, A STUDY OF THE EVOLUTION, EFFECTIVENESS, AND FINANCING OF PUBLIC AND PRIVATE DRUG TREATMENT SYSTEMS* 73 (Dean R. Gerstein & Henrick J. Harwood eds., 1990); Weinstein, *supra* note 2, at 28. Any drug treatment provider will affirm that during the recovery process relapse is almost always inevitable. John Marr, *Recovery-Relapse Cycle*, Speech Presented at the National Drug Court Institute's Comprehensive Drug Court Prosecutors' Training (Sept. 1999). Relapse is defined as "a breakdown or set back in a person's attempt to change or modify behavior." G. ALAN MARLATT & JUDITH R. GORDON, *RELAPSE PREVENTION* (1985).

67. See Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 VILL. L. REV. 989, 1017-18.

68. See, e.g., Boldt, *supra* note 48 (surveying history of rehabilitative models and discussing theoretical tensions in related literature); Adele Harrell et al., U.S. Dep't of Justice, *Evaluation of the D.C. Superior Court Drug Intervention Programs*, at <http://www.ojp.usdoj.gov/nij/courdocs2000.htm> (last visited Apr. 29, 2002) (reporting decrease in drug use and

of the praise, however, there have been some fairly bitter critiques.⁷⁰ To some, the emergence of drug courts amounts to little more than a nostalgic yearning for the idealism of an earlier decade that never really existed.⁷¹ To these critics, the drug court approach smacks of misdirected, soft-on-crime treatment that failed in other settings. Indeed, a related charge is that advocates of this model forget or purposefully overlook the disappointing lessons, abuses, and poor track record of rehabilitation policies that preceded the U.S. criminal justice system's shift toward the more punitive orientation in recent decades.⁷² Of greatest concern is that under the guise of reform, drug courts may have distracted policy makers from focusing on the effects of short-sighted drug policy initiatives. By making loose reference to restorative justice, social justice, and rehabilitation, critics contend that drug court advocates may convince themselves that they are doing more than merely scratching the surface.

criminal activity among defendants who participated in comprehensive treatment program).

69. See Press Release, U.S. Dep't of Justice, *Attorney General Reno Announces Funds to Continue Successful Drug Court Program* (June 3, 1999), available at <http://www.ojp.usdoj.gov/dcpo/dcpopr63.htm> (last visited Apr. 29, 2002) (announcing that another \$14 million was awarded to 147 jurisdictions to "expand, enhance or plan drug courts to treat nonviolent, substance-abusing offenders," bringing total federal drug court grants since 1995 to over \$100 million).

70. See Hoffman, *supra* note 37, at 1485:

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.

71. See generally Boldt, *supra* note 48, at 1206-18 (discussing the various viewpoints toward rehabilitation therapy). "[T]he objection is that the drug treatment court movement not only presents difficulties for individual defendants and their attorneys, it also undermines larger efforts to develop an effective drug policy premised on a public health model." *Id.* at 1217.

72. See Boldt, *supra* note 37, at 1219-23.

C. Unresolved Issues In Drug Court Implementation

The competing claims for and against drug courts frame the debate regarding the need for specialized courts to deal with the problem of drug addiction. Some might argue that every courtroom should be equipped with the technologies developed in drug courts and should have access to a menu of service providers to help the defendant conform her behavior to the law. In making this decision, court administrators are faced with a basic trade-off: balancing the risk of watering down the effectiveness of drug courts by adopting identical procedures in every courtroom against the risk of limiting the court's reach by keeping drug courts separate. This issue will become ever more important as drug courts move from experimentation to full implementation, and from urban centers to rural jurisdictions. If the answer is to give all judges in the state the tools they need to link defendants to treatment and monitor their progress, there will be a need for an infusion of resources, intensive training and new measures of success to ensure that the quality of the drug court approach is maintained.

1. Role Differences

As stated above, two of the defining concepts of drug courts are non-adversarial proceedings and teamwork involving the judge, prosecutor, and defender⁷³ engaging in “non-traditional roles.”⁷⁴ This shift from a conventional framework to one in which prosecutors and defense counsel assume a more collaborative posture has “altered the dynamics of the courtroom, including at times, traditional features of the adversarial process.”⁷⁵ Key to accomplishing the court's therapeutic goals is a deliberate choice to mute the traditional adversarial positions of prosecutor and defense counsel, and to transform the process from lawyer-driven to judge-driven. This inversion of the traditional adversary paradigm—which ordinarily

73. See Hora et al., *supra* note 23, at 453.

74. See John Feinblatt, *Institutionalizing Innovation: The New York Drug Court Story*, 28 *FORDHAM URB. L.J.* 277, 292 n.19 (2000) (citing Greg Berman, *Problem-Solving Courts: A Brief Primer 1* (2000) (unpublished paper on file with author)).

75. *Id.*

assumes that the parties' lawyers will play an active, partisan role while the judge remains passive and neutral—tends to be accompanied by a high degree of procedural informality. The emphasis on informality typically includes a movement away from critical analysis of the evidence in the case.⁷⁶

Court observers and participants have published a wide variety of materials lauding the success of problem-solving courts and suggesting roles for the participants.⁷⁷ However, no one has offered a legal, ethical, or legislative basis for the change in role for the respective criminal justice institutional actors. The roles have simply changed. Judges are asked to convene community meetings or broker social services.⁷⁸ The teamwork requires each participant to assume a role in monitoring the progress of defendants in either drug treatment programs or some other form of treatment. Each newly formulated role carries with it a host of ethical ramifications that drug court advocates either minimize or ignore.⁷⁹

Judges traditionally operate within the constraints of ethical guidelines that cast them in the role of neutral decision-maker.⁸⁰ This neutrality has been an important feature of adjudication. The framework is familiar: two interested advocates present and debate factual and legal matters while a more detached figure assesses those arguments and reaches a decision. In theory, this detachment is designed to reduce the likelihood of decision making based on favor or bias. While such ethical protections often do not work as well in

76. See Boldt, *supra* note 48, at 1252.

77. See Goldkamp, *supra* note 47, at 25.

78. Boldt, *supra* note 48, at 1252.

79. Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALB. L. REV. 1153, 1205-06; NAT'L DRUG CT. INST., EXCERPTS FROM A TREATISE ON ETHICS AND CONFIDENTIALITY IN DRUG COURTS: FEDERAL CONFIDENTIALITY LAWS AND HOW THEY AFFECT DRUG COURT PRACTITIONERS (1999), available at <http://www.ndci.org/admin/docs/confid.doc> (last visited Apr. 1, 2002); see also The Drug Court Clearinghouse and Technical Assistance Project, *The American Univ., Practical Guide for Applying Federal Confidentiality Laws to Drug Courts Operations*, at <http://www.american.edu/justice/publications/Confed.htm> (last visited May 30, 2001); Caroline S. Cooper, Nat'l Drug Court Inst., *Issues Raised for Defense Counsel in Drug Court Representation Relevant to the ABA Canon of Ethics: Canons 2-4* (1999) (draft), available at http://www.american.edu/justice/publications/ndci_ethics.htm (last visited Apr. 1, 2002) (outline proposed best practices in light of canons of ethics).

80. See generally MODEL CODE OF JUDICIAL CONDUCT AND ETHICS (1990).

practice as in theory,⁸¹ drug courts forego whatever safeguards the conventional construct offers by instructing judges to play a more active and interested role.

Several other problems may arise with the judges' new function. The form of drug court intervention seems inherently paternalistic. The judges are armed with only limited information. They typically do not have the sort of professional or specialized training that one would expect from someone vested with the responsibility to choose and design treatment programs. Instead, they function on the belief that they can fully understand a defendant's problems sufficiently to dictate what is the best treatment. Judges may become personally invested in the success of a defendant's efforts. In the event of failure, the judge may react personally and increase punishment inappropriately. In addition, there are often class and race implications since many who pass before drug court judges are people of color. Courts simply have not addressed these problems in a comprehensive way. Instead, they have taken a few pragmatic steps. For example, drug courts tend to choose judges who exhibit balanced temperaments and some willingness to seek further education in preparation for work in drug court.⁸² Such minor adjustments are no substitute for a careful examination of the problems drug courts face. Significant safeguards are needed.

Of the judge, defense counsel, and the prosecutor, drug courts have altered the prosecutor's role the least. Prosecutors operate with a dual ethical mission: to be advocates of the state and ministers of justice.⁸³ Although working as part of a team that includes one's adversary may not typically occur in conventional prosecutions—except in instances where an accused is a cooperating witness in prosecution of another individual—the prosecutor at least has had occasion to play less adversarial roles. Thus, prosecutors may merely need to expand their roles slightly to meet the unique structure of the

81. See Steven Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions*, 72 N.Y.U. L. REV. 308, 326 (1997) ("The overall quality of justice is affected when courts are composed of judges who are there to produce certain results.").

82. See Fred Setterberg, *Drug Court*, CALIFORNIA LAW., May 1994, at 58, 62.

83. See Kenneth J. Mellili, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 693-96 (1992).

drug court.⁸⁴

Prosecutors' participation in teamwork in many instances involves making a discretionary decision to divert a case from the traditional track in criminal court and to allow a defendant to participate in one of these drug courts.⁸⁵ Even the monitoring process has a conventional counterpart: prosecutors perform similar functions when reviewing a defendant's progress on probation. These minor changes are not without cost, however. Given the often long delays between the time of arrest and the point at which a defendant may fail to complete the program, there may be an impact on the government's ability to prosecute. The case may lose some of its deterrent effect on the defendant. The case may never be tried because more serious prosecutions will take precedence over a two-year-old charge,⁸⁶ or prosecutors may be unable to prosecute because witnesses have become unavailable. Still, the role remains basically unchanged in this new context.

The defense counsel in drug courts, like the judge, confronts considerable changes from her traditional function. Traditionally, the defense counsel's role has a singular focus, the zealous representation of her client.⁸⁷ This is understood as a focused commitment to fight on behalf of the accused against the immense power of the state.⁸⁸ That fight includes marshalling facts and legal arguments to exclude evidence and working for the release of one's client from any entanglement with the court system.

The drug court places different demands on the defense counsel.⁸⁹ She works as part of a team with the government to facilitate her client's involvement with structures set up by the court.⁹⁰ She is no

84. See generally MODEL RULES OF PROF'L CONDUCT (2001).

85. See Weinstein, *supra* note 2, at 27.

86. See Hora et al., *supra* note 23, at 516-20.

87. See *supra* note 84.

88. See, e.g., Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419 (1996); Charles Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

89. Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 44 (2000).

90. See Gloria Danziger & Jeffrey A. Khun, *Drug Treatment Courts: Evolution, Evaluation and Future*, 3 J. HEALTH CARE L. & POL'Y 166, 168-69 (1999) ("[T]he concept of the drug court 'team'—judge, prosecutor, defense counsel, treatment provider and corrections

longer singularly focused on her client and solely directed by her client's wishes. Instead, her focus shifts to what is best for her client's recovery. This is by no means a small shift. Defense attorneys initially supported drug courts because they perceived that their clients had few opportunities to avoid criminal convictions.⁹¹ However, a more careful assessment of the drug court process has left many defense attorneys concerned that their clients may lose too much in the exchange, particularly in courts that permit treatment only at the post-disposition stage.⁹² In those courts, clients face the difficult choice of forgoing the presumption of innocence and the panoply of trial rights guaranteed by the Constitution in order to get help.⁹³

2. Subordinating All Issues To Treatment

Drug courts provide a genuine opportunity for those individuals who wish to take advantage of their rehabilitative services. In the process, however, drug courts subordinate all of the issues involved in a defendant's contact with the criminal justice system to treatment. The court ignores viable factual or legal issues regarding the detention or arrest of the defendant. Although treatment of the defendant's drug problems may be important to her future, addressing law enforcement improprieties often is of equal significance. Even if the drug court successfully addresses the defendant's drug problem, she may be left with the impression that being stopped illegally because of her race, ethnicity, or place of residence is unimportant to the criminal justice system. Subordination of such important issues may affect the integrity of the court system.

Despite these concerns, the drug courts' methodologies have led

personnel—is important to meeting the goals of both the criminal justice system and those of treatment providers.”).

91. See Boldt, *supra* note 48, at 1255.

92. See *Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1918 (1998) (describing the new role for these attorneys “[a]s part of the treatment ‘team,’ the defense attorney is supposed to act in accordance with his client’s best interests, even when those interests involve sanctions” and “[t]his change in perspective subverts the traditional role of defense counsel as zealous advocates for their clients’ legal rights, which requires counsel to argue in accordance with their clients’ wishes, not necessarily their best interests”).

93. See Boldt, *supra* note 48, at 1255.

to some measurable successes.⁹⁴ But choosing to utilize these strategies in a wholly different setting may present greater problems. The next section examines the progression from the drug court model to community courts and the questions raised when drug court methodologies are imported into a different context.

II. THE MOVEMENT FROM DRUG COURTS TO COMMUNITY COURTS

Like their drug court counterparts, community courts developed in response to a concern that the criminal justice system did not sufficiently engage in practices designed to solve some of society's recurring problems. The community court model recognized that the court's coercive power could be used to force individuals into some form of treatment or to ensure that individuals engage in some type of "community restitution."⁹⁵ From the start, these courts assumed a decidedly political slant.⁹⁶ They grew out of zero tolerance⁹⁷ and quality-of-life policing tactics.⁹⁸ They widened the jurisdictional net of criminal courts. The types of cases addressed in these new courts have come to include those "victimless" crimes once considered outside the jurisdiction of traditional criminal courts.⁹⁹ What had once been minor infractions or low-level misdemeanors became the principal focus of this new judicial effort.¹⁰⁰

94. See sources cited *infra* note 97.

95. Glenn M. Kaas, *Restorative Justice: A New Paradigm for the Prosecutor (A View from Hartford Community Courts)*, PROSECUTOR, Dec. 2000, at 31, 33.

96. See sources cited *infra* note 97.

97. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1168-69 (1996); 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 (1998) (using empirical data to critique New York City's quality-of-life initiative); Symposium, *Why is Crime Decreasing?*, 88 J. CRIM. L. & CRIMINOLOGY 1173 (1998); Fox Butterfield, *Rethinking the Strong Arm of the Law*, N.Y. TIMES, Apr. 4, 1999, § 4 (Week in Review), at 1 (promoting community policing as an alternative to the zero tolerance approach taken in New York City).

98. John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 813 (2000).

99. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L. J. 677, 679 (1995).

100. See *infra* note 126.

A. Climbing In Through Broken Windows

James Q. Wilson and George L. Kelling posited a theory that gave rise to a new policing movement.¹⁰¹ The “broken window” philosophy suggested a need to focus law enforcement on minor infractions.¹⁰² The authors contended that a broken window left unintended signaled a degree of neglect and apathy that inexorably led to more—and more severe—property damage.¹⁰³ They argued that disorderly conditions and behaviors flow from such neglect.¹⁰⁴ If no one addressed these problems, citizens’ fear would rise, as would the rate of serious crime, resulting in a “downward spiral of urban decay.”¹⁰⁵ The authors pointed to a solution. They noted that whenever communities in the past seemed on the verge of losing control over crime, residents and authorities in neighborhoods moved to reassert their control over both the conduct of youth and other disorderly behavior.¹⁰⁶ Minor offenses posed serious consequences for neighborhoods and communities because they inevitably led to greater lawlessness that communities could ill afford.¹⁰⁷

Anxious to test-drive his theories, Kelling worked with William Bratton, then chief of the Transit Police in New York City. They targeted the subway system as a prototype of an institution that seemed out of control in the 1980s and early 1990s.¹⁰⁸ Using Broken Windows as a theoretical framework, Bratton sent “cleaning teams”

101. See Wilson & Kelling, *supra* note 13, at 29.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See George L. Kelling, *Why Did People Stop Committing Crimes? An Essay About Criminology and Ideology*, 28 *FORDHAM URB. L.J.* 567, 575 (2000):

By the late 1980s the subway environment was out of control. Despite the virtual elimination of graffiti by 1989, conditions were so bad that citizens were abandoning the subway in droves. A quarter of a million passengers a day didn’t bother to pay their fare; extortion of money from passengers via aggressive panhandling was the rule of the day; robberies were increasing; and things were worsening fast. The “official” New York Times spin on all this was that the problem was homelessness—an interpretation supported by homeless advocacy groups and the New York City Civil Liberties Union.

into the subways with high powered hoses and police escorts.¹⁰⁹ When workers hosing down the living areas of the homeless were challenged by homeless individuals, the police moved in and made arrests.¹¹⁰ The subways appeared cleaner, people felt safer, and the homeless were less visible.¹¹¹ Crime rates decreased.¹¹² This was hailed nationally as a major success in policing and “proof” of the validity of the Broken Windows theory.¹¹³

New York City Mayor Rudolph Giuliani used the Broken Windows theory to declare war on low level offenses.¹¹⁴ This led to the design and implementation of an aggressive policing approach to quality-of-life offenses.¹¹⁵ Giuliani’s administration vigorously enforced laws against public drinking, public urination, illegal peddling, squeegee cleaning of car windshields by street-people, panhandling, prostitution, loitering, graffiti spraying, and turnstile jumping.¹¹⁶ According to Mayor Giuliani, aggressive enforcement of these laws was a necessary prerequisite to combating serious crime—such as murders and robberies—because minor disorderly offenses can lead to serious crime.¹¹⁷ The city administration utilized a zero tolerance policy, directing police to make arrests for a wide range of offenses that were not previously viewed as custodial offenses.¹¹⁸

The economic revitalization of urban centers fueled this effort.

109. George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders’ View of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1220-21 (1998).

110. *Id.*

111. *Id.*

112. *Id.*

113. John Tierney, *The Holy Terror*, N.Y. TIMES, Dec. 3, 1995, § 6 (magazine), at 60 (describing decline in crime rate and cleaner parks and subways under Giuliani and Bratton).

114. See ELI B. SILVERMAN, NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING 4, 78-80 (1999) (discussing the New York City Police Department’s “full-court press” on crime and Mayor Giuliani’s campaign against “quality of life” offenses).

115. *Id.*

116. *Id.*; see also William J. Bratton, *The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL’Y 447 (1995).

117. Rudolph W. Giuliani, *The Next Phase of Quality of Life: Creating a More Civil City* (Feb. 24, 1998), at <http://www.nyc.gov/html/rwg/html/98a/quality.html> (on file with author); see also William J. Bratton, *New Strategies for Combating Crime in New York City*, 23 FORDHAM URB. L.J. 781, 785-89 (1996); Rudolph W. Giuliani, *An Agenda to Prepare for the Next Century: 1999 State of the City Address* (Jan. 14, 1999), available at <http://www.nyc.gov/html/rwg/html/99a/stcity99.html> (last visited Apr. 29, 2002).

118. Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 251 (2000).

However, instead of creating greater tolerance for the less fortunate, the economic prosperity resulted in calls for increased arrests of the homeless as a necessary step to maintaining vital and safe business environments.¹¹⁹ Given this enforcement strategy, massive numbers of individuals with misdemeanor charges entered the court system.¹²⁰ As these homeless individuals, who often suffered from mental impairments, moved into the courts, the court system began to redirect its focus.¹²¹

1. Community Court Origins

One of the problems that the Giuliani Administration faced once it shifted its focus to low-level crimes was that the criminal court continued to view these offenses less seriously. Typically, police officers failed to appear for trial presuming the case would be dismissed, plea bargained, or that the defendant would fail to appear, and the judge would dismiss the case.¹²² By vesting authority for such cases in community courts—and making this their sole focus—the judicial and political system opened the door for police to increase the number of citations and arrests for the low-level offenses.¹²³

The Nation's first community court began in New York City.¹²⁴ The Center for Court Innovation (CCI) and the Chief Judge of the Court of Appeals, Judith Kaye, designed the new court to handle arraignments for pervasive misdemeanor crimes, such as prostitution, illegal vending, graffiti, shoplifting, and turnstile-jumping in the city's subway system.¹²⁵ Chief Judge Kaye made clear that the new court would focus on quality-of-life crimes and would implement the broken windows methodology.¹²⁶ These problem-solving courts,¹²⁷ as

119. See Jerome H. Skolnick & Abigail Caplovitz, *Guns, Drugs and Profiling: Ways to Target Guns and Minimize Racial Profiling*, 43 ARIZ. L. REV. 413 (2001).

120. *Id.*

121. Ammann, *supra* note 98, at 815.

122. *Id.* at 817.

123. See Maria Foscarinis et al., *Out of Sight, Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 154 (1999).

124. Denckla, *supra* note 3, at 1617.

125. See Julie Brienza, *Community Courts Reach Out to Put a Dent in Petty Crime*, TRIAL, Mar. 1999, at 14.

126. Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 HASTINGS L.J. 851, 858 (1997).

Kaye and CCI director John Feinblatt labeled them, would use the power and authority of the judiciary to change the behavior of litigants¹²⁸ (usually meaning defendants). In one of many speeches lauding the court, Kaye explained that:

[by] zeroing in on nonviolent quality of life offenses, the court is a working laboratory for 'broken window' theories of criminal behavior: the idea being that just as one broken window left unrepaired invites more vandalism, so other forms of social disorder left unchecked invite more crime. Above all, the Midtown Court is a collaborative effort, led by the courts, to move theory into practice.¹²⁹

2. Design and Management of Community Courts

Given the broad mandate of problem-solving courts, they unsurprisingly address a wide range of issues.¹³⁰ Problem solving courts provide extensive supervision and treatment for specifically identified minor crimes.¹³¹ In the process, these courts forge new responses to difficult problems, including domestic violence, quality-of-life crimes, child neglect, and mental illness.¹³²

Community courts differ from their traditional counterparts in several significant ways.¹³³ Some of the courts focus on specific types

127. John Feinblatt, architect of the Midtown Community Court and the Center for Court Innovation, coined this term for Court Innovation in New York. *See generally* Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK, Oct. 11, 1999, at 13 (arguing in favor of community courts and their potential). The Midtown Community Court was developed by the Center for Court Innovation, a public/private partnership that works to develop innovative court programs. *See* Center for Court Innovation, at <http://www.communityjustice.org/resources/homecci.htm> (last visited Feb. 10, 2002). For further explanation of the plan of the Midtown Community Court, *see* Midtown Community Court, at http://www.courtinnovation.org/demo_01mcc.html (last visited Feb. 10, 2002).

128. Denckla, *supra* note 3, at 1614.

129. Kaye, *supra* note 126, at 858.

130. *See* Knipps & Berman, *supra* note 3.

131. *Id.* at 8-9.

132. Feinblatt et al., *supra* note 2, at 282.

133. "Problem solving justice" is a term that describes judicial efforts to use the authority of courts not just to resolve the legal questions presented in a case, but also to address the deeper social issues that may underlie a significant portion of the caseload. Other examples of problem solving courts include Criminal Drug Treatment Courts, Family Treatment Courts, and Community Courts. *See* Kaye, *supra* note 126, at 855-62 (describing New York's Midtown

of crimes, such as domestic violence, graffiti, and prostitution.¹³⁴ Other courts take cases from specific catchment areas.¹³⁵ The latter courts handle all minor cases that occur within a particular geographical zone.

Procedural differences abound as well. Most jurisdictions do not allow trials to take place in the community court. Instead, they follow a post-disposition model. In order to gain access to the wide range of services available, defendants usually must plead guilty.¹³⁶ The treatment provided by community courts offers a number of incentives for participation. For the defendant, it limits the court's punishment options to some form of community service.¹³⁷ For the victims, it generally reduces the number of court appearances. For the prosecution and defense, it permits the quick resolution of cases that would otherwise add to already staggering caseloads. For the system itself, it is a way to mete out justice quickly and in a relatively inexpensive fashion.

Community courts adopted many of the processes employed by drug courts. For example, community courts expect the judge to assume a more active, managerial role.¹³⁸ The judge becomes an active case manager, creative administrator and team leader.¹³⁹ She fosters communication among all participants, remains sensitive to community concerns and oversees the defendant's participation in various programs.¹⁴⁰ Also, as in drug courts, the community court model utilizes a non-adversarial approach.¹⁴¹ Drawing on the rhetoric

Community Court and Family Treatment Courts); Rottman & Casey, *supra* note 15, at 13.

134. Kaye, *Rethinking*, *supra* note 3, at 1494.

135. See Midtown Community Court, *supra* note 127.

136. The judge extracts from most what we have termed a "conditional plea of guilty" with the understanding that such plea will be withdrawn and the case dismissed upon the completion of community service. Very few defendants in the Hartford Community Court elect a trial. Also, very few defendants feel the need for representation. (A public defender is available for those who qualify and apply.) See Kaas, *supra* note 95, at 31.

137. Note that the punishment is limited to community service as opposed to the potential of incarceration (at least initially).

138. See Kaas, *supra* note 95, at 31; see also Calabrese, *supra* note 3, at 16.

139. See, e.g., Greg Berman, *What is a Traditional Judge Anyway?*, 84 JUDICATURE 78, 81 (2000).

140. *Id.*

141. See Kaas, *supra* note 95, at 35; see also Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 11 (1998) ("Our less adversarial problem solving courts cast both judges and attorneys in new roles—what impact will that have on ethical rules premised on an

of the drug courts, architects of the problem-solving courts suggest that the “type” of crimes that these courts focus on are not conducive to adversarial contests.¹⁴²

Although community courts may attempt to emulate the drug court movement, there are fundamental differences between the models. Although drug courts came into existence as a reaction against the perceived mishandling of drug cases in criminal courts, they at least had a body of experience on which to draw. Everyone who had participated in the criminal court model had some sense of what did and did not work. They could identify experiences with experts in various aspects of drug use and drug culture. Moving to a different framework may have increased the court’s reliance on these experts and professionals, but it did not require creating an entirely new structure of programs and treatment regimes.

Community courts do not have the same luxury. They typically address matters that have no long-term track record of treatment and no experts,¹⁴³ such as problems facing specific geographic areas and quality-of-life crimes like graffiti and prostitution. While these offenses may be related to well-studied problems such as gang affiliation, unemployment, and even drug dependency, there is far less data than in the drug crime context for formulating approaches to addressing them.

3. What Community Do Community Courts Serve?

As indicated, declining confidence in the criminal justice system coupled with increasing fear of crime—even as crime rates across the country fell¹⁴⁴—seems to have propelled the movement toward

adversarial model? If a client’s insistence on efficient resolution conflicts with a lawyer’s notion of professional representation.”).

142. See Paul Michael Hassett, *Expanding the Role of the Courts*, N.Y. ST. B.A.J., Apr. 2001, at J5-6. Family courts struggle with their own recidivistic problem—the victim of domestic violence who obtains an order of protection which is often ineffective in resolving the underlying conflict. Family violence and drug addiction have forced the entire system of foster care and child custody into the family court arena but the adversarial process is not readily conducive to the solution of these problems. In fact, they are not easily resolvable at all when the best interests of the child provides no objective or bright-line standard of resolution.

143. There is no real history of a treatment regime to address crimes associated with poverty, like turn-style jumping and panhandling.

144. See Berman & Feinblatt, *supra* note 74, at 129.

community courts. Advocates of the community court model have hailed them as an answer to a community's feelings of separation from the justice system. However, it is worth noting that businesses have often been the driving force behind the design and establishment of these courts.¹⁴⁵ Community courts are rarely focused on the interests of low-income communities.

The Manhattan Midtown Community Court is an example of this phenomenon. It was reportedly established to address community problems in midtown New York City, particularly in Times Square.¹⁴⁶ Times Square was in transition. While it remained a popular tourist attraction due to its many restaurants and theaters, parts of it were dominated by X-rated theaters and small hotels that facilitated prostitution. In response, the Giuliani administration pushed to clean up the area and reclaim it for business and tourism.¹⁴⁷ Against this backdrop, the idea for the Manhattan Midtown Community Court developed.¹⁴⁸

The Times Square Business Community acted as the court's principal sponsor.¹⁴⁹ The court received funding from the Schubert Foundation, The New York Times Co. Foundation, the Times Square Business Improvement District, and other businesses.¹⁵⁰ Funding appeared to come from the business community for the business community, raising fundamental questions about the altruistic rhetoric behind the court's establishment.¹⁵¹ Criticism about the source of the court's funding emerged from a number of quarters, including the office of the District Attorney for New York County.¹⁵² Manhattan District Attorney Robert Morgenthau remarked: "[I]t bothers me that people who can put up money and have influence can

145. See Ammann, *supra* note 98.

146. See Jan Hoffman, *A User-Friendly Experiment in Justice*, N.Y. TIMES, Oct. 1, 1993, at B1. For a detailed study of the Midtown Community Court, see MICHELE SVIRIDOFF ET AL., DISPENSING JUSTICE LOCALLY, THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT 1-5 (1997).

147. See Goldkamp, *supra* note 47.

148. *Id.*

149. Ammann, *supra* note 98, at 816.

150. Brienza, *supra* note 125, at 14.

151. See Kurki, *supra* note 118, at 290.

152. See Brienza, *supra* note 125, at 14.

get their own court.”¹⁵³ Despite these concerns, the Manhattan Midtown Community Court opened its doors in 1993.¹⁵⁴ The principal focus, as one might expect, was to rid the area of the sorts of offenses and offenders that interfered with business and tourism.

Atlanta followed New York’s lead. Desperately looking for a way to attract visitors back to the downtown area, Atlanta officials announced the formation of a community court.¹⁵⁵ The creators of the court relied almost exclusively on the business community for support.¹⁵⁶ Atlanta’s city leaders viewed the court as a tool for making downtown more attractive to visitors and workers.¹⁵⁷ But, as in other cities, the plan’s implementation ran into significant delay.¹⁵⁸ Atlanta Mayor Bill Campbell announced the creation of a community court in 1998, but it took another two years for any funds to be appropriated.¹⁵⁹

Aside from the business interests of the financial sector, many who promote community courts hope to use them to address the problem of increasing homelessness in our communities.¹⁶⁰ To justify using courts for this purpose, proponents articulate a policy of “compassionate justice.” By providing a wide range of services, they claim to offer well-meaning intervention.¹⁶¹ Significantly, however, this approach ignores the structural and systemic causes of homelessness. Focusing on the individual and utilizing the coercive power of the criminal justice system to push that individual to get some form of assistance for specific problems can have only a limited effect in eradicating homelessness.

But what if a community court actually wanted to serve the interests of the entire community including the interests of the poor and disenfranchised? What would be necessary to make community courts more responsive to the diverse needs of a community,

153. *Id.* at 14.

154. *See* Denckla, *supra* note 3, at 1617.

155. *See* Ammann, *supra* note 98, at 815.

156. *Id.*

157. *Id.* at 817.

158. *Id.*

159. *Id.* at 816.

160. *Id.*

161. *See* Denckla, *supra* note 3, at 1616.

including the interests of these marginalized groups? At a minimum, courts would need to think broadly and creatively about including diverse community perspectives. Instead of a single mode of contact with the community in which it functions, courts might use multiple interactions, such as on-going focus groups,¹⁶² advisory boards, and peer courts.¹⁶³ By opening up the initial discussion of the court's purpose and jurisdiction and continuing an open dialogue, the court will have a better chance of embracing the goals of the community and not merely of the court's architects. Communities might thereby gain community-oriented courts, not just a court located in the community.

Another critical component of any successful community court effort is coordination with local law enforcement. This could coincide with authentic community policing efforts as opposed to mere traditional policing based in neighborhoods. True community policing requires attention to and integration of community desires as a central part of the enforcement effort.

In practice, communities typically have little involvement in making the decision to establish community courts. This oversight can limit the courts' effectiveness. While lawyers, judges and court administrators often favor new courts, residents might conclude that courts are not the mechanism of choice to address their problems. Community members may view the root causes of many of the perpetual problems in low-income areas and communities of color as far too nuanced to be addressed by means of court adjudication. In addition, court-based proceedings may alienate some members of the community who are unaccustomed to court proceedings. In traditional courts, the "providers" of legal services look much different than the "consumers" of those services. This brings with it a panoply of unique cultural problems in attempting to fashion services around life experiences. Finally, community residents may prefer to resolve issues without the threat of the criminal justice system

162. This is contrasted from those courts that have one-time focus groups or surveys that only happen as the courts are being set up.

163. David B. Wexler, Symposium, *Just Some Thinking About Delinquent Behavior: A Therapeutic Jurisprudence Approach to Relapse Prevention Planning and Youth Advisory Juries*, 69 U. MO. KAN. CITY L. REV. 93, 105 (2000).

hanging in the balance. In the absence of other alternatives, some embrace the notion of community courts because these courts bring with them a wide range of services. Given the choice, however, communities may prefer to access the services without the court structure.

III. THE FUTURE OF COMMUNITY COURTS

A. The Need for More Empirical Data

Some observers of community courts recognize a need for additional research and acquisition of empirical data to determine the ultimate effectiveness of community courts.¹⁶⁴ Information showing positive change in defendants who pass through community courts, as well as long-term recidivism data similar to that available for drug courts would lend credence to the pronouncements of community court successes. In addition, this type of information would contribute to the development of a specific training curriculum for judges and lawyers who participate in these courts.

B. The Need for Clear Role Definition

A key area for further research is how community courts should define the roles of the various participants. Simply borrowing definitions from other settings is inappropriate. Community courts have a unique mission, which may require unique role definitions. But without adequate justification for an abandonment of traditional roles community courts will never move beyond experimentation. Such unguided experimentation can damage the court and interfere with its goals.

Given the broad mandate of community courts, the judge's role seems even less certain than in drug courts. One judge described the functions as "different" from other judging, due to the expanded responsibilities.¹⁶⁵ Because the judge must actively work to solve the

164. Goldkamp, *supra* note 22, at 958.

165. Discussion Roundtable of Problem Solving Courts, 66-67 (Mar. 8, 2002) (unpublished paper on file with author) [hereinafter Discussion Roundtable].

problem that gave rise to the case, her role departs significantly from the traditional arbiter's role. Of course, drug courts furnish some precedent for greater involvement of judges in directing and overseeing a defendant's treatment. Still, the responsibility to involve the community in the court's decision making places new demands—and expectations—on the judge.

Community court judges must broaden their knowledge base beyond an understanding of the law and the legal framework within which cases will be decided. They must read more broadly and across disciplines to develop a better foundation from which to formulate methods to address recurring problems.¹⁶⁶ They may need to develop partnerships with the academic community to stay abreast of psychological, sociological, and economic theories that inform and facilitate assessment of behavior and identification of viable methods of addressing problems. This raises two difficult questions. First, are we expecting too much of judges if we charge them with resolving complex social problems through the criminal justice system? Second, if judges must engage in specialized problem solving, what training best prepares them to perform these tasks?

Judges' expanded duties also raise real concern about the appearance and influence of bias. As community court judges participate in community meetings, they are subject to influence by various constituencies. Some judges have raised concerns about the potential for making decisions based in part on community sentiment, something the judicial oath prohibits.¹⁶⁷ Indeed, the U.S. Justice Department monograph on the subject of community involvement seems to recommend somewhat limited interactions:

All but two courts created a community advisory panel during the planning period, and most of the projects held community meetings to determine priorities for the new court. Five projects held focus group discussions to better understand community member's concerns and recommendations.¹⁶⁸

166. *Id.*

167. *Id.* at 119 (Judge Morrison's comments).

168. ERIC LEE, U.S. DEP'T OF JUSTICE, COMMUNITY COURTS: AN EVOLVING MODEL 7 (2000).

If community courts are going to exist, perhaps the tension between impartiality and active involvement in cases is a tension with which we must live. However, certain minimal safeguards seem in order. First, the courts should limit judicial involvement in community meetings to those in which both the government and public defender are present, or where minutes are provided to all relevant parties. This safeguard is analogous to *ex parte* communications in traditional court proceedings, and would protect judges from allegations of improperly acting on behalf of constituencies. Courts might also require judges to consult with other members of the judiciary before making a final decision in cases involving community interests. By obtaining opinions from colleagues who have not been in contact with the community groups who are involved in the case, the judge can ensure that she is not improperly influenced by special interests in the community. Finally, judges should be required to make full disclosure to all parties about attendance at community meetings, and in no circumstances should judges have *ex parte* communications with either side regarding information acquired at any meeting. While the intermingling of judges and community groups produces both benefits and burdens that need to be more fully explored, these suggested safeguards would help foster the judicial impartiality that community courts need.

Public defenders encounter their own challenges in the court setting. Although a defender may recognize that her clients are often in need of a wide range of services, it is unclear whether the criminal justice system offers the best vehicle to intervene in their lives. Indeed, individuals would likely take advantage of these services on their own if they were packaged as comprehensively as they are in community courts.¹⁶⁹ The defender therefore becomes an active participant in—and perhaps reluctant proponent of—a process that links social services to the criminal justice system. The promise of treatment carries with it the threat of incarceration or other penalties.

In March 2000, the U.S. Department of Justice Office of Justice Programs, the Open Society Institute, and the Center for Court

169. See Calabrese, *supra* note 3, at 16.

Innovation sponsored a roundtable discussion focusing on the roles of prosecutors and defenders in “problem-solving” courts like community courts.¹⁷⁰ In contrasting defense attorneys in community courts with those in drug courts, one of the participants suggested that the choice of whether to proceed in drug treatment might be easy for a defendant.¹⁷¹ This is because drug court defenders often seek a disposition that involves drug treatment in lieu of custody.¹⁷² The informality of the process, at least initially, does not offend the notion of zealous advocacy.¹⁷³ When the forum is a community court, however, the treatment, instead of being an attractive option to incarceration, is often coerced.¹⁷⁴

In addition, when the judge has moved from impartial arbiter to an active participant and, as in a large number of these courts, works closely with drug treatment personnel, the quality of the proceedings is highly questionable. Defenders are forced into the role of negotiator rather than advocate.¹⁷⁵ Consequently, defenders and prosecutors become more dependent upon the work of other social service professionals.¹⁷⁶ This raises fundamental questions about using the criminal justice system to coerce service for crimes such as sleeping in public, sneaking onto the subway, or applying graffiti. These offenses seem to be related to economic status and employability. The appropriateness of using the criminal courts rather than simply providing job training accessibility and more comprehensive housing is questionable. The status offenses are different than drug offenses. Drug offenses have a history of success with treatment, while the crimes addressed by community courts do not. Defenders placed in the position of having to make rapid decisions about direct and collateral consequences of guilty pleas to access social services for their clients must balance the need for

170. John Feinblatt & Derek Denckla, *What Does It Mean to be a Good Lawyer: Prosecutors, Defenders, and Problem-Solving Courts*, 84 JUDICATURE 206, 206 (2001).

171. *Id.* at 210 (comments of Hon. Judy Harris Kluger and Kim Taylor-Thompson).

172. *Id.*

173. *See* Boldt, *supra* note 48, at 1254-55.

174. *Id.* at 211 (comments of Robert Weisberg and Jo-Ann Wallace).

175. *See* Feinblatt & Denckla, *supra* note 170, at 212 (referring to Cait Clarke’s comments).

176. *Id.* (referring to Elizabeth Glazer’s comments).

further investigation against the availability of the offer.

Some of the new tensions that defenders confront in these community courts can be addressed during the design phase if defenders are brought to the table early in the process and are vigilant to the myriad of potential problems. Additionally, many of the types of offenses that are addressed in these courts do not require a guilty plea for therapeutic purposes, as is often regarded as necessary in the drug court context.¹⁷⁷

If all defendants plead guilty in the court, few will question the charges brought against them. When defenders are not structurally necessary for the court to operate, they become nothing more than ornamental. In some of these community courts, the problems are resolved without the participation of defense counsel.¹⁷⁸

Prosecutors in community courts are, by design, less adversarial.¹⁷⁹ They focus on addressing community concerns about a previously identified community problem.¹⁸⁰ Some community court prosecutors view their role as collaborating with the offender in bringing about “community restitution” for the nuisance caused.¹⁸¹ The important issues are where and how a prosecutor should obtain input on what community concerns to pursue in this type of tribunal.

177. See Terence T. Gorski & John M. Kelly, Counselor’s Manual for Relapse Prevention with Chemically Dependent Criminal Offenders 5-9, Dep’t of Health & Human Services, Pub. No. 96-3115 (1996); see also Vickie Kropenska et al., U.S. Dep’t of Health & Human Services, Protecting Children in Substance-Abusing Families Dep’t of Health & Human Services, at 19 (1994); Nat’l Inst. on Drug Abuse, Principles of Drug Addiction, NIH Pub. No. 00-4180, at 14-15 (October 1999, reprinted July 2000); Kevin B. Sherin & Barry Mahoney, Treatment Drug Courts: Integrating Substance Abuse Treatment with Legal Case Processing Dep’t of Health & Human Services, Pub. No. 96-3113, at 8-9 (1996); Joel Haycock, *Speaking Truth to Power: Rights, Therapeutic Jurisprudence, and Massachusetts Mental Health Law*, 20 NEW ENG. J. CRIM. & CIV. CONFINEMENT 301, 304, 315 (1994) (cautioning that the focus on the concept of therapeutic jurisprudence in criminal cases carries the risk that individual civil rights will be ignored in favor of therapeutic concerns); Andrew J. Kleinfeld, *The Sentencing Guidelines Promote Truth and Justice*, 55 FED. PROBATION 16, 18 (1991) (“The value to society . . . of a guilty plea is much less than its value to actors within the justice system.”); Beth A. Townsend, *Defending the “Indefensible”: A Primer to Defending Allegations of Child Abuse*, 45 A.F. L. REV. 261, 269 (1998); David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence and Criminal Justice Mental Health Issues*, 16 MENTAL & PHYSICAL DISABILITY L. REP. 225, 229-30 (1992).

178. Kaas, *supra* note 95, at 34.

179. Goldkamp, *supra* note 22, at 950; Kaas, *supra* note 95, at 32.

180. Kaas, *supra* note 95, at 32.

181. *Id.*

These issues are of particular concern when the primary source of community intelligence comes from police officers. Working the same beats often lead officers to develop biases about specific types of crimes or even worse, about particular neighborhood individuals.¹⁸²

Another potential impediment for prosecutors stems from the training and culture that exists in many prosecutors' offices.¹⁸³ Community court prosecutors who work in offices that glorify trial victories will need some form of training regimen suitable for their different tour of duty.

Finally, the coercive atmosphere of the court must be addressed. In the Hartford Community Court, the judge accepts a defendant's "conditional plea of guilty" with the understanding that the plea will be withdrawn and the case dismissed upon the completion of community service.¹⁸⁴ As a result, very few defendants go to trial.¹⁸⁵ This may suggest to defendants that there is little need for representation.¹⁸⁶ If defense counsel is deemed unnecessary, then the court and the government will be represented in the process, but defendants will decide for themselves whether they should request counsel or rely on the benevolence of the prosecutor and judge in making the same type of assessment.

With all of the energy that has gone into community courts' architectural design, social service agency participation, and resource allocation, very little has been done to address training for the participants' new roles or what it means to implement such proceedings. As a result, the proceedings could devolve into an unrecognizable caricature of a courtroom, in which judges are anything but impartial, defense lawyers are virtually invisible, prosecutors are making most of the decisions about who may or may

182. See generally Anthony Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); see also Russell Eisenman, *Is there Bias in U.S. Law Enforcement?*, 20 J. SOC. POL. & ECON. STUD. 229 (1995).

183. See Feinblatt & Denckla, *supra* note 170, at 209 (referring to Elizabeth Glazer's comments).

184. Kass, *supra* note 95, at 34.

185. *Id.*

186. *Id.*

not participate in the diversionary program, and service providers are the primary information source.

C. How Do We Know What Works: Evaluating Success

The true story of the success and failures of the community court movement has yet to be written. A dispassionate approach with fair and sober empirical and anecdotal evidence will be the prelude to such a work. Success will need to be measured from a number of different, and perhaps competing, vantage points. The goal of providing adequate time to counsel clients about their options¹⁸⁷ may conflict with the pressure to move cases quickly so that a larger volume of defendants can be seen each day. The location of courts is an additional issue. If the goal of the community court movement is to serve in communities which traditionally have not been served well by the criminal justice system, then services, from transportation to drug treatment resources, must be available in those communities as well.¹⁸⁸

In addition to these unresolved issues about the structure of community courts, there is also a fundamental question about court culture. The courts, like drug courts, subordinate other issues of law to rehabilitation and treatment. The result risks individuals being denied the opportunity to challenge the conduct of law enforcement in the interaction with a defendant that leads to the community court referral. Given that most of the crimes addressed in community courts are quality-of-life or zero tolerance offenses, they may give rise to Fourth Amendment issues. Consequently, as we examine these community courts and their effectiveness, we should be sensitive to the impact of encouraging guilty pleas as a vehicle for gaining access to the resources of the court.

187. See Feinblatt & Denckla, *supra* note 170, at 213 (referring to Michele Maxian's comments).

188. *Id.* at 214 (referring to Anthony Thompson's comments).

CONCLUSION

Is the judicial branch the solution to some of our nation's most difficult problems? Critiques of community courts suggest that the mission of these courts is outside the jurisdiction of the judicial branch and lies elsewhere.¹⁸⁹ Achieving the community courts' goals requires a collaborative effort, inclusive of the community, criminal justice officials, and political entities. In the end, we may recognize that the newly created approaches and new perspectives should apply to traditional criminal courts rather than new institutions.¹⁹⁰ A more informed use of services, discretionary dismissal of some cases, and expanded provision of services to those in need may be the best solution to the shortcomings of the traditional criminal justice system.

189. Discussion Roundtable, *supra* note 165, at 82 (referring to comments of Judge Morrison).

190. *See id.* at 98 (comments of Judge Blatz) ("I would argue, to look at the traditional courts—I would argue that the good judge in a problem-solving court was the good judge in the old court. The only difference is the system did not support the old judge. It was fragmented, it was not systematic.").

