

Theory into Practice: Case Studies of the Pilot Scottish Drug Courts

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July 2008

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Declaration

I declare that

- (a) this thesis has been composed by myself, and
- (b) that the work in this thesis is my own work, and
- (c) that this work has not been submitted for any other degree or professional qualification

Signed.....

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Date..... 21st July 2008

July 2008

Acknowledgements

The Economic and Social Research Council provided funding for my MSc and PhD under their '1+3' scheme. This support is gratefully acknowledged.

The last three and a half years have been by turns challenging, exhausting, exhilarating, difficult, enjoyable and rewarding. I have a lot of people to thank for helping me to get to this stage.

Firstly, to all my friends who have helped me with welcome distractions - coffee, alcohol, football and more. And also for understanding when I often had to say no. Similarly to Alice and Andy, for also understanding when I had to work. To Gary, for offering welcome advice and perspective. To Daniel, Mum and Dad, for their encouragement and belief.

Most of all, though, my thanks are to three people. To Viv and Lesley, for their patience, perseverance, encouragement and suggestions. I know it has been hard work at times – thank you both. And to Katie, my wife, for everything.

Abstract

In recent years a number of criminologists have attempted to develop broad-ranging accounts that encapsulate the central changes that have taken place in contemporary crime control in Western industrialised countries. Sharing the starting point of an account of the end of a previous era characterised by an emphasis on the rehabilitation of offenders, these theorists diverge both in terms of the important trends they highlight in the present, and with respect to how they try to explain these trends. Such accounts have, though, been criticised collectively by other criminologists who have questioned their scope, and have emphasised the cultural specificity of responses to crime.

Drug courts, originating in the United States in the late 1980s, are a policy initiative focused on attempting to treat the drug use of prolific offenders. Two pilot drug courts were introduced into Scotland during the first term of the newly established Scottish parliament. The research that forms the basis of my thesis comprises case studies of these drug courts, with my findings speaking to the criminological debates just mentioned.

These case studies consist of a combination of observations of the drug courts in operation, interviews with the actors involved in them, and an analysis of documents both used by drug court staff and produced to present the drug courts to external audiences. Crucial to my interpretation of the data emerging from this research has been an analysis I undertook of relevant trends in policy in Scotland immediately before and after the introduction of the drug courts.

Despite their transatlantic origin, the understanding of the Scottish drug courts that emerges through my findings is of programmes deeply bound up in their specific cultural and policy context. An important aspect of this is the way in which the drug court staff shape their practice in relation to their understanding of this context.

Driven by a focus on tackling criminogenic drug use in order to address re-offending, the drug courts witness considerable changes to the practices of the professionals working within them, changes that challenge their professional ethics and values.

The findings from my research lend support to those who have argued for the importance of understanding crime control in relation to its local context, and to those who have questioned the notion of the Americanisation of British crime control policy. Further, the particular way in which offenders are conceptualised and responded to within these programmes, runs counter to some of the central assumptions shared by the broader accounts of our penal present.

Chapter 1: Introduction

In a Scottish courtroom, situated in a busy sheriff court building, an offender¹ is called to appear by the sheriff clerk. He stands up in the public gallery, walks onto the floor of the courtroom itself and takes his place, seated, in the dock. His defence lawyer also walks forward, standing at the side of a large table that occupies the centre of the courtroom. The defence lawyer remains standing and addresses the sheriff, who is sitting, slightly elevated above the rest of the courtroom.

Defence Lawyer: This was adjourned for drug court reports. The reports show that he has developed a different attitude. Mr Duffy [the offender] is clearly sick and tired of his previous lifestyle.

Sheriff: [addressing offender] How old are you?

Offender: I am thirty-eight

Sheriff: You think you can do this?

Offender: I will be honest with you– I don't know. I am going to try my best. I heard a boy say earlier 'I am not strong'. Well, I am not strong with drugs.

Sheriff: Do you enjoy your life?

Offender: No

Sheriff: There are people in your situation who do well. I am prepared to put you on an order. You turn up, you respect the staff. People that try to be fly, we will deal with. It does not really matter what I do, this order is all about what you do for yourself.

Offender: I see this as a good opportunity. (Sheriff Wallace)²

At a later date in the same courtroom, a different offender is similarly called to appear by the sheriff clerk and also takes his place in the dock. Again his defence lawyer begins the proceedings, standing to address the sheriff:

¹ Throughout this thesis I have used the term 'offender' to refer to those individuals sentenced to drug court orders. The drug court staff used two different terms most frequently in this respect, 'offender' or 'client'. Which term members of staff used depended on whether they were, respectively, from the legal part of the courts or from one of two Drug Court Supervision and Treatment Teams. I use 'offender' in order to signify the centrality of legal concerns, aims and staff within the drug courts. This will be substantiated in this thesis.

² The name refers to the name of the sitting sheriff.

Defence Lawyer: I think it would be fair to say that this is perhaps not the greatest report.

Sheriff: No, it is not.

Defence Lawyer: In terms of the positive³ for cocaine, he has admitted that. With regard to the positive for opiates, Mr McPherson [the offender] says that he has not taken heroin. He has, though, taken painkillers, which he believes have resulted in the positive.

Sheriff: This is review number seven. He is well aware of what to take and what not to take.

Defence Lawyer: He is now back living with his family. He has left the Church Hostel project [accommodation]. I would contend that there are still positive signs in the report. Mr McPherson is testing positive far less often than he was previously. He has had relapses, but he is honest about these.

Sheriff: [addressing offender] Mr McPherson. I do not know how many times we have been through this. You have taken cocaine. Why?

Offender: It was a moment of madness. I was not enjoying the Church Hostel project. I would not call it 'independent living'.

Sheriff: You have tested positive for opiates. You say that this is due to painkillers? What is your situation at home?

Offender: Things are going better. I am nearly drug free.

Sheriff: Tell me about the benzodiazepines?

Offender: They stay in your system for a long time. I don't really take them that much.

Sheriff: We had a long discussion about your situation at the pre-review this morning. This order is an alternative to a custodial sentence. I am not going to let you pass this review. I need to see negatives, particularly with cocaine. Do you want to stay on this order or do you want to go to jail? You have three weeks. (Sheriff Palmer)

A number of features of these two courtroom interactions might appear strange in terms of what one might expect to observe in a Scottish courtroom. Rather than a conventional trial, with the defence lawyer and procurator fiscal taking centre stage, here these interactions are dominated by the sheriffs speaking directly to the offenders. The content of the dialogue is also unusual, especially the types of

³ 'Positive' here refers to a drug test that has indicated the *presence* of illegal drugs.

subjects the sheriffs question the offenders about. In the first interaction, for instance, the sheriff asks the offender whether he enjoys his life. The response of the offenders would also appear unusual. In the first interaction the offender describes a sentence handed down by the court as a 'good opportunity'. In the second interaction the dialogue is dominated by a discussion of the offender's drug use, and his explanations for this. The sheriff asks the offender a number of questions in this respect, including questions about the offender's home circumstances.

Both of these courtroom interactions took place within what is called a 'drug court'. Currently two such drug courts are in operation in Scotland. The introduction of drug courts into Scotland was a relatively recent occurrence, with these programmes having originated in the United States.

A drug court, sometimes also referred to as a 'drug treatment court', is in essence a judicially supervised drug treatment programme (NADCP, 1997). Drug courts vary considerably with respect to a variety of features, such as their entry criteria, the duration of the programme for any offender sentenced to a drug court order, the types of treatment interventions used and so forth. However, what is central to all such drug courts, and constitutes one of their distinguishing features, is having offenders who are on drug court orders regularly appear in the courtroom and speak directly to the sitting judge as an important aspect of a multi-agency delivered drug treatment programme (NADCP, 1997). The central aim of such drug courts is to address an offender's drug use in order to impact upon, and hopefully eliminate, the perceived reason underlying their offending behaviour.

The first drug court, sometimes referred to as the 'Miami model', was established in Dade County, Florida, in 1989 (Clinton Terry III, 1999b). This drug court, which was set up on the initiative of members of the local judiciary (Goldkamp, 1999), has become a model which has been adopted by, and adapted to, a variety of jurisdictions. Every single state in the United States now has at least one such drug

court (CFCI, 2007). Further, drug courts have also constituted the inspiration and model for the setting up of a number of other 'specialist', or 'problem solving' courts. Examples in this respect include domestic violence courts and community courts (Mirchandani, 2005). As well as having been adopted across the United States, drug courts and other types of specialist courts have also spread to a variety of different countries across the globe, including Australia, Brazil, Jamaica and Norway.

The first drug court in Scotland was established in November 2001, with a second court following in August 2002 (NDCM, 2003, Scottish Executive, 2003). Both of these drug courts were introduced into Scotland on a pilot basis, in order to determine how they would function in this country. The duration of both pilots has been extended, with the two drug courts currently set to run until 2009. It is these two Scottish pilot drug courts that constitute the focus of my thesis.

My initial decision to study these Scottish drug courts was not driven by an interest in drug courts *per se*. I had a long-standing interest in debates concerning the role and influence of therapy in society, both in the sense of the role and prestige of the therapeutic professions, but also in the broader sense of the way in which concepts and ideas deriving from various therapeutic approaches, such as psychoanalysis or humanistic psychology, have come to have a broader social purchase. Examples of works in this tradition have included Berger's sociological account of psychoanalysis (1965), Lasch's study of the United States *Culture of Narcissism* (1997) and Hewit's analysis of the concept of self-esteem (1998). The link between this literature and drug courts was provided by Nolan (1998, 2001). For Nolan, the drug courts can be seen to constitute the institutionalisation within the United States' criminal justice system of the 'therapeutic ethos', a term he uses to refer to a range of concepts and ideas which are prominent in United States' culture and which have their origins in therapeutic approaches.

When noting that drug courts had been introduced into Scotland, it was with the intention of engaging with this wider 'therapy and society' literature that I began to formulate my intention to study these programmes. Thus, in terms of the study itself, my research design and data collection were strongly influenced by three prior theoretical interests. Firstly Nolan's own work, secondly the broader 'therapy and society' literature and finally what is known as 'Therapeutic Jurisprudence'. The latter is a normative approach to the law that I had initially become acquainted with through Nolan's work. Therapeutic Jurisprudence focuses upon the law's purported therapeutic and non-therapeutic consequences, and has been associated by a number of commentators with the United States drug courts (Hora et al., 1999).

However, when undertaking the analysis of the data resulting from my case studies of the two pilot Scottish drug courts I found that these prior theoretical interests served little to illuminate my data. Similarly, the data did not give me a basis upon which I could contribute to these wider theoretical debates. Thus, my expectations concerning the theme of my thesis, and the type of theoretical debates I would be engaging with, proved unfounded and I had to approach my data afresh. This undoubtedly made for a more interesting study, as I had to question the preconceptions with which I had begun my research.

The understanding of the Scottish drug courts that emerged from my study was enabled by an analysis I conducted of recent trends in areas of Scottish policy related to these programmes. In other words, in order to understand these programmes, the particular form that they have taken and practices they have adopted, I needed to understand local trends, developments and concerns. Thus, despite the fact that these programmes have been imported across the Atlantic, the particular nature of these programmes cannot simply be understood in terms of these origins.

This finding from my research lends support to those authors who have argued that the notion of the 'Americanisation' of British crime control policy, meaning by this

that Britain has been directly imitating developments in the United States, is a considerable over-simplification of what has been taking place in recent years (Jones and Newburn, 2007). Further, in debates concerning the cultural specificity of such crime control policies, my thesis lends support to those who have argued for the importance of the shaping influence of local cultural and political factors.

The two pilot drug courts were introduced against a background of considerable change in Scotland. This was the case both in broad terms, with respect to the constitutional relationship between Scotland and the rest of the United Kingdom, and more narrowly with respect to the criminal justice process itself (Keating, 2005a, Mooney and Scott, 2005). Devolved government was introduced into Scotland in 1999, having been a manifesto commitment by the New Labour government elected in 1997. The devolved settlement entailed a considerable distribution of powers between the Westminster and newly established Holyrood parliaments (Keating, 2005b). The first election to the new Scottish parliament, conducted in 1999, resulted in a coalition government being formed between the Scottish Labour Party and the Scottish Liberal Democrats, this contrasting with the situation in Westminster where New Labour had sole control.

The years following New Labour's election in 1997, and devolution in 1999, have witnessed significant innovation and change with respect to the criminal justice process⁴ in Scotland. Traditionally Scotland has been regarded as having a 'welfarist' criminal justice culture, serving to distinguish it from trends in such other countries as England and the United States, for example (Duff and Hutton, 1999, Moore and Whyte, 1998). Central to this welfarist culture is a stress on the attempt to rehabilitate offenders as a primary aim of the criminal justice process. Questions have been raised, however, as to the extent to which Scotland has maintained this distinctive culture post-devolution, given the considerable changes

⁴ 'Process' is used here rather than 'system' as it is generally recognised that Scotland has a range of agencies involved in different stages of the criminal justice process, without these agencies actually forming a unified system with, for instance, shared aims and objectives.

that have taken place within the criminal justice process (Croall, 2005, 2006, McAra, 2002, 2005).

My thesis constitutes an analysis of the results of a study of the two pilot Scottish drug courts against this background of change. I will argue that the central trend in terms of the areas of criminal justice policy I have analysed in this thesis has been a managerialist drive to reduce re-offending. It has been this managerialist drive, rather than any noticeable punitive turn, that has done most to erode Scotland's distinctive criminal justice culture.

The adoption of the drug courts can be understood in these terms, an instance of the broader trend of re-conceptualising the 'drugs problem' as a re-offending problem, and the internal practices of these programmes reflect this. Within the courts, legal aims and legal professionals, specifically the sheriffs, take centre place. This legal focus presents the non-legal professionals working within these programmes with having to adopt aims and practices that either erode, or run contrary to, the values and ethics attached to their professions.

My thesis also contributes to a wider criminological debate concerning the nature and function of 'rehabilitative' programmes in the present. Attempts by criminologists to map and explain the dominant developments in crime control in recent years have been marked by a considerable lack of consensus. The highlighting of two central trends, though, can be regarded as constituting a prominent feature of these debates. On the one hand what is focused upon is the emergence, or coming to prominence, of a range of approaches and responses to crime that are based on the notion of offenders as being essentially like 'us', when 'us' is understood to be the rational, calculating consumers that inhabit 'neo-liberal' societies. To give a couple of illustrative instances in this respect, Garland (2001: 200) cites the prominence of situational crime prevention, whilst Hannah-Moffat (1999, 2005) discusses the various ways in which prisoners are treated as consumers

of programmes that facilitate their self governance. On the other hand, and contrasting markedly, a range of responses and approaches are also focused upon which are predicated on the view of offenders as being irredeemably other, as alien and threatening. In this respect, again to offer a couple of examples, Bauman (2000) argues that imprisonment is now used simply to exclude certain populations, whilst Pratt (2000) contends that recent years have witnessed the return of ostentatious public punishments.

A number of accounts, such as Garland's *The Culture of Control* (2001) in which he discusses what he terms 'criminologies of the self' and 'criminologies of the other', or Rose's (2000) analysis of 'circuits of inclusion' and 'circuits of exclusion', develop a framework which highlights and includes both of these broad trends. In contrast, other authors tend to focus on one or the other. Those authors influenced by Foucault's later writings on governmentality, tend to focus on the former. A range of authors have also focused on 'punitive' trends (Bottoms, 1994, Downes and Morgan, 2002).

All these authors acknowledge the continued existence, and even expansion in the use of, 'rehabilitative' programmes in penal systems today. However, it is contended that the function and form of such programmes has changed to reflect current social and political realities. Thus, for instance, Feeley and Simon (1994) argue that rehabilitative programmes today actually undertake no rehabilitation as such, but rather supervise and manage a low-risk offender population in the community. Other theorists have argued that rehabilitative programmes have internalised a 'neo-liberal' discourse. Thus, authors such O'Malley (2004, 1992) and Rose (1990, 1992, 1998, 1999, 2000, 1996) argue that such programmes treat offenders as autonomous consumers, being offered the opportunity to 'responsibilise' themselves.

My study of the Scottish drug courts presents cases that do not fit neatly into any of these broader accounts. Specifically, the drug courts present a more complex, and in

fact theoretically contradictory, picture of actual penal practice. This is not simply to state that reality is more complex than theory, which is true but relatively banal. Rather, the form and practices of the drug courts, and the specific external factors that shape them, serve to question some of the assumptions underlying the arguments concerning the penal present, and specifically the way in which rehabilitative programmes operate on the boundary between those that are like, and not like, ourselves.

The research upon which my thesis is based comprises two central components. Firstly, case studies have been undertaken of the two existing Scottish drug courts. These case studies comprise three research methods: interviews with the main parties, or 'actors', involved in both courts; observation of courtroom reviews and pre-reviews; and an analysis of some of the documents used in the day to day running of the courts. These three central data sources have been supplemented from a variety of other sources, such as a public lecture given by one of the drug court sheriffs, and an information video produced about the Northern drug court. Further, for the purpose of comparison, observations have been conducted in standard sheriff courtrooms and a team leader of a DTTO scheme in an area without a drug court has been interviewed. Through these different sources an account of the practices, knowledges, professions and processes that comprise the two drug courts has been developed.

Secondly, an analysis of developments in three key areas of policy in Scotland linked to the drug courts has been undertaken. Firstly, developments with respect to community sentences for adults have been explored. Secondly, changes to the profession of criminal justice social work have been considered. Finally, developments in drugs policy, specifically in drugs policy linked to the criminal justice system, have been analysed. This policy analysis has been crucial to my interpretation of the data arising from the case studies of the two Scottish drug courts. Having introduced the general nature of my study, I will now discuss how this thesis itself has been structured.

The second chapter, following this one, comprises a review of the literature relevant to my study of the two pilot Scottish drug courts. Three main bodies of literature have been covered here. Firstly, a range of broad criminological accounts of the present are discussed, with a particular focus on how they interpret the function and form that rehabilitative programmes take today. Certain puzzles, gaps and questions will be raised concerning this literature, particularly with respect to the nature of the criminal subject that is regarded as being at the heart of present penal practices. Following this, a debate that has emerged in response to these accounts is turned to, as the question of the scope of criminological explanation is considered. Lastly, literature relating to the history and, more centrally, the criminological interpretation, of drug courts will also be analysed in this chapter.

Chapter three consists of my discussion of the methodology of my research. Here the rationale for the decisions I have taken with respect to my study of the two Scottish pilot drug courts will be discussed. The way in which the focus of my study changed, as I found the theoretical ideas with which I began my research little fitting the reality of these programmes, will be discussed in further detail.

Following this methodology chapter, chapter four presents my analysis of policy developments relevant to the drug courts in Scotland. Three areas will be focused upon here, namely: developments in adult community sentences, changes to the profession of criminal justice social work and, lastly, developments in drugs policy particularly with respect to the criminal justice process. Common themes and trends will be teased out across these three areas of policy, the most prominent of these being the drive to address re-offending. The various new programmes and relationships that have been introduced between agencies to this end will be discussed. The particular stress placed on the 'drugs-crime nexus' in this respect will also be highlighted, with the drug courts being introduced amidst a raft of other policy developments. The themes identified through this policy analysis are also central to my understanding of data collected from my case studies of the two drug courts.

These findings from the cases studies will be present in chapters six, seven, eight and nine. Chapter five serves to introduce and prepare for this section. Here an overview is given of basic information concerning the two drug courts. Thus, for instance, the types of orders available to the drug court sheriffs, the nature of the treatment interventions used and the range of basic components of drug court orders, such as the reviews and pre-reviews, are described. A number of these events and processes will be the subject of analysis in chapters six, seven, eight and nine. However, this chapter will save the flow of this analysis from being cluttered with such basic descriptive information.

The four findings chapters have been structured in relation to the important divisions, relationships and practices identified through my analysis of my data. Central to my understanding of the Scottish pilot courts has been the divisions and relationships between the three staff groupings that are central to the two courts, namely the legal staff, health staff and social work staff. The relationship between these different groups of staff, their practices, the knowledges associated with each of these and their differing professional power vis-à-vis each other are all central to my account of the nature of these programmes.

Chapter six, the first of my four finding chapters, focuses primarily on one aspect of the legal side of the two courts. In this chapter the extent to which traditional legal concerns, roles and practices remain central to these two programmes will be described, analysed and explained. This chapter will serve to highlight the extent to which the sheriffs constitute the dominant figures within the courts, and the centrality also of legal aims within these programmes, particularly the addressing of the 'revolving door' of re-offending. This chapter will also analyse the importance of local cultural factors in shaping the particular nature of the roles that legal staff perform in the drug court courtrooms, during an exploration of the collective hostility of the drug court staff to certain practices of their United States colleagues.

In contrast, chapter seven focuses on the converse of this, the various adaptations and changes that the legal professionals have made within these new institutions. The introduction of the drug court concept into Scotland, and its being put into practice, entails considerable departures for the legal staff from their traditional roles. In this respect, the role of the sheriffs will be particularly focused upon, as the various ways in which they have expanded their legitimate area of expertise and practice is analysed. Whilst legal professionals dominate the courts, however, the situation with respect to the knowledges associated with the different professions is more complex than this, and this will be considered in detail.

An almost exclusive focus on the courtroom interactions has been a feature of many theoretically informed studies of drug courts. In chapter eight, I will address this lacuna, for example with respect to how non-legal staff respond to the new roles adopted by legal staff. In this chapter the roles, practices and knowledges associated with health and social work staff within the Drug Court Supervision and Treatment Teams will be analysed. The ways in which these professions have had their area of expertise and practices changed and threatened within the drug courts will be explored.

Chapter nine turns the focus onto how the offenders are conceptualised and responded to within the context of the nexus of knowledges, relationships and practices that have been depicted in the preceding three chapters. In particular, focus will be placed on two frameworks that are central to the practices of the two courts. Thus, on the one hand, a framework of choice and self-responsibility and, on the other hand, a framework of disease and dependency will be depicted. These two contradictory frameworks shape the way in which the drug courts responded to offenders, and this will be reflected upon. How this relates to the wider criminological debates concerning rehabilitative programmes will be considered further here.

Finally, a concluding section will draw together and discuss the wider significance of the central findings emerging from my research. Having outlined this overall structure, I now turn to the first of these chapters, reviewing the literature central to my thesis.

Chapter 2: Drug Courts - Origins and Interpretations

A debate that has exercised a number of prominent criminologists in recent years has concerned the scope of criminological interpretation and explanation. On the one hand a range of important accounts have emerged which, either in their authors hands or in the hands of those that have found inspiration in their work, have been used to attempt to understand trends and developments in crime control across industrialised democracies. On the other hand, and partially in response to such broad ranging accounts, assertions have been made as to the essentially local and culturally specific nature of the practice of punishment. For writers who have taken the latter position, broad ranging theories fail to take account of how intimately bound up with specifically national societal, cultural and political circumstances crime control is. Few of the thinkers on either side of this debate would, however, argue that this is a question of either/or. Rather, this is more an issue of emphasis, of positioning on a continuum.

The understanding that I have come to develop of the Scottish drug courts through the course of my research is closer to the pole of cultural specificity. However, this is not to say that I have found the broader ranging criminological literature irrelevant to my study. Rather my account emerged through an analysis that engaged with this broader literature as well as with the context into which the drug courts were introduced. And through this account, which is bound up with the Scottish context, I raise some questions with respect to one of the central assumptions of this broader criminological literature.

This chapter is divided into four sections. The first two sections review the wider criminological debates just referred to. Initially three criminological accounts of the present will be outlined, with particular focus being placed on how they account for

'rehabilitative' programmes⁵, the form such programmes take and the functions that they perform. Here Feeley and Simon's account of what they term the 'New Penology' (1992) will be discussed, along with Garland's *The Culture of Control* (2001) and, finally, the work of Rose (2000). These three perspectives have been hugely influential in the discipline of criminology in recent years, and have constituted important reference points in the development of my thesis. The second section will then turn to consider the debate between these broader accounts and those writers who have stressed the cultural specificity of crime control. In this section the work of Jones and Newburn (2007), who have situated their analysis of policy transfer between the United States and the United Kingdom within the context of these debates will also be considered.

The third and fourth sections of this chapter focus specifically on drug courts. Section three constitutes an account of the origins and spread of these programmes within the country in which they emerged, the United States. In the fourth section I will survey the various ways in which these United States drug courts have been interpreted and debated, paying particular attention to accounts relating these programmes to the criminological issues highlighted in the first section of this chapter. Finally, a discussion section will draw together the various themes and issues raised and will look forward to the findings from my own research.

Mapping the Present

The last couple of decades have witnessed considerable debate across academia concerning the extent to which recent social, political and economic trends require us to talk of a new era or epoch as having begun. The ongoing debate over which term or terms best encapsulate these developments, for instance 'high modernity' (Giddens, 1991) or 'post-modernity' (Lyotard, 1984) 'post-fordism' (Harvey, 1990),

⁵ In the following discussion, unless otherwise specified, the term 'rehabilitative programmes' will be used as a short hand way to refer to community based programmes linked to the criminal justice system that have as a central aim, whether ostensible or actual, the changing of offenders.

or the 'risk society' (Beck, 1992), is rooted in various theorists arguments regarding the most salient dimensions of such changes and their depth and scope. The discipline of criminology has certainly not stood outside these various debates. Rather, in talking of what Garland refers to as 'penality', 'the network of laws, processes, discourses and institutions' which make up the penal realm (1990: 10), criminologists have both attempted to assess the impact on their field of study of, and contribute to, these wider debates.

Attempting to characterise the main themes which have emerged from these debates within criminology would be an unenviable task because, to quote Garland, in discussions concerning penality in recent decades 'specifying what has happened is almost as controversial as explaining why it has happened' (2001: 6). At least in part this lack of consensus would appear to be due to the contradictory nature of the penal realm itself where, for instance, the 'spread of community types of correction...goes hand in hand with an inexorable increase in the prison population' (Rose, 2000: 184). Whilst amongst most criminologists it is accepted that significant changes have indeed taken place in the last couple of decades, there is little consensus as to what the most important developments have been or why they have taken place.

What is common to these accounts of contemporary crime control, however, is a narrative of the precipitous decline of a previous era – what Feeley and Simon have referred to as the 'Old Penology' and what Garland terms the 'Penal-Welfare' period. It is generally agreed that the 'zenith' of this approach to crime was in the decades following the Second World War and by 1970 penal-welfarism was 'the established policy framework in both Britain and America' (Garland, 2001: 34). Central to penal-welfarism is the concept of rehabilitation (Garland, 2001: 35, McAra, 2002).

Rehabilitation is predicated on the belief that the causes of crime can be discovered in the character of the individual offender and that it is both possible and legitimate for the state to intervene to attempt to change this character. During the penal

welfare period it was no longer an assumption within the penal system that the offender was a free, rational actor as it had been during the nineteenth century. Rather, the existence of these qualities became questions which were to be investigated, 'to ascertain the nature of the responsibility of the accused' (Feeley and Simon, 1994: 173). Further, it was accepted that a number of offenders would fall 'outwith' the category of the free rational actor. In undertaking such investigations a key role was accorded to experts and professionals, particularly those working outside the penal system. Thus psychologists, social workers, child welfare officers and others came to play a central part in the state's relationship with any given offender. Resultantly, legal knowledge was no longer accorded a monopolistic role in determining the sanctions such offenders faced (Garland, 1987: 26, 29). Further, any sanctions imposed were not to be tied, at least solely, to the nature of the offence that had been committed. Rather, sanctions were to be individualised and directed towards the character of the offender: 'seeking to address the very fabric of the offender's person in a manner that need not be embarrassed by liberal considerations of individual freedom and privacy' (105). In this respect the duration of any such sanctions was often indeterminate, according a primary place to the discretion of the aforementioned experts and professionals. Feeley and Simon regard this discretion as being at the heart of the penal welfare period (1995: 162-163). More broadly, the penal-welfare period projected an image of a paternalistic, benevolent state, engaging in a positive attempt to reform the individual offender through a mutually beneficial relationship (Garland, 1987: 91). The addressing of the needs of the offender, and achieving their reintegration into society, was regarded as synonymous with the process of addressing their propensity to offend. Allen summarises this two-sided approach well, characterising the 'rehabilitative ideal' as:

the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behaviour of convicted offenders, so as to strengthen the social defence against unwarranted behaviour, but also to contribute to the welfare and satisfaction of offenders (Allen, 1981: 2)

So what has come to replace the rehabilitative ideal? For Feeley and Simon, the first

of the three accounts I shall consider here, what has emerged is a new configuration of the penal realm, which they term the 'New Penology'.

The New Penology

Feeley and Simon have advanced their 'New Penology' thesis in a variety of works during the last decade and a half (Feeley and Simon, 1992, 1994, 1995, Simon, 1993, 1997). Here my focus is on the initial formulation of their thesis, rather than the subsequent qualifications that they have attached to this. Whilst not claiming that the New Penology is 'hegemonic' (Feeley and Simon, 1992: 451), and whilst recognizing that other developments, particularly the re-emergence of punitive policies, are apparent, these authors claim to have identified the most important and far reaching trends in the penal system today (1994: 190). Feeley and Simon's focus is on the way in which various actuarial technologies have been imported into, and utilised within, the criminal justice system, along with the practices that follow from this. Central to this trend is the attempt to objectively identify and measure potential 'risks'. For instance, this could involve establishing those characteristics that are associated with re-offending amongst sex offenders or identifying particular times and locations associated with high rates of offending. Responses are then developed which attempt to monitor, minimise and manage such risks. For Feeley and Simon the New Penology is a post-rehabilitative approach as it no longer has as its central aim the treatment and transformation of individuals (1995: 148). As Simon puts this, here drawing on the theoretical vocabulary of Foucault, the aim is no longer normalization (Simon, 1993: 13). Instead the New Penology takes the form of the attempt to manage risk at the level of populations (Feeley and Simon, 1992: 452). A lowering of expectations is witnessed here, as the attempt to 'defeat' crime is abandoned.

An example of a couple of phenomena that Feeley and Simon regard as embodying this logic will serve to make their argument clearer, namely incapacitation and drug-courier profiles. Incapacitation, in the form of imprisonment, does not attempt either

to change offenders or the social context. Rather high 'risk factors', for instance sexual or violent offenders, are simply managed by being taken out of circulation (1994: 174). In drug courier profiling, combinations of abstract risk factors- country of origin, race, sex and age - result in an intervention, for instance a body search at an airport. Again, in Feeley and Simon's account, the focus is not on individuals but on populations and the management of risk (177).

This change in focus away from the transformation of the individual, is reflected most obviously in penal language, the internal language of criminal justice agencies. This language, Feeley and Simon contend, has increasingly come to be characterised by an actuarial vocabulary (1992: 454). Concomitant with this focus on populations is a change in the way in which the penal system approaches and discusses the individual criminal, the subject. In essence, the authors claim, the New Penology has no subject (452). As Castel put this, in a paper echoing a number of these themes:

[w]hat the new preventative policies primarily address is no longer individuals but factors, statistical correlations of heterogeneous elements. They deconstruct the concrete subject of intentions and reconstruct a combination of factors liable to produce risk (Castel, 1991: 288).

Whilst Feeley and Simon recognize that new rehabilitative programmes continue to be instigated in the present, they argue that these have a different function today than they did during the penal-welfare period. Focusing on the example of community drug-testing programmes, and citing Allen (1981), they comment that such 'programs lack a foundation in today's social and economic realities' (Feeley and Simon, 1992: 464). Further, Feeley and Simon 'question whether these innovations will embrace the long-term perspective of earlier successful treatment programs' (464). Rather, the authors perceive so-called rehabilitative programmes in the present era as operating in effect to manage low-risk populations in the community. Little or no rehabilitation actually takes place. What is witnessed is 'managing costs and controlling dangerous populations rather than social or personal transformation'

(465). There are both echoes and contrasts here with the interpretation that Garland advances in his *The Culture of Control* (2001).

The Culture of Control

The central contention that Garland makes in this work is that the coming of 'late modernity', the term he uses to refer to the social, political and economic changes being experienced by industrial democracies, has presented a threat to one of the founding myths of the sovereign state, its promise to provide security 'within its territorial boundaries' (109). This is called into question by the 'normality' of high crime rates in western societies, particularly in the United States and the United Kingdom, and by the widespread recognition of the limitations of the criminal justice system in confronting this (109). In responding to this dilemma, Garland claims governments are pulled into two contradictory directions.

On the one hand, there are a range of strategies which Garland terms 'denial', political responses that symbolically reassert the state's ability to provide law and order and articulate popular outrage at the problem of crime. These strategies, which Garland links to neo-conservative political ideas, have been discussed by other theorists under a variety of different terms, and without sharing Garland's broader framework. Bottoms (1994), for instance, notes the rise of what he terms 'popular punitiveness'; Cavadino and Dignan (2006) similar refer to the ascendancy of a 'law and order ideology'; Bauman of strategies of 'exclusion' (2000). Four aspects of Garland's account of these strategies of denial can be distinguished. Firstly, these strategies are associated with, and imply, a particular view of the offender that Garland terms 'criminologies of the other'. As Garland puts this:

In this inflammatory rhetoric, and in the real policies that flow from it, offenders are treated as a different species of threatening, violent individuals for whom one can have no sympathy and for whom, there is no effective help (Garland, 2001: 136)

Secondly, there is precisely this ‘inflammatory rhetoric’, a particular use of language by politicians in relation to the criminal justice system. As Garland interprets this, politicians in this respect are both attempting to respond to and articulate popular fear and outrage concerning crime. Offenders are characterised as alien others and criminal justice policies are presented as necessarily tough or harsh measures, which meet the threat that they pose and/or will give them what they deserve. The third and fourth aspects distinguished here concern the actual form that these strategies of denial take. As well as shaping the rhetoric and symbolism surrounding criminal justice, Garland argues that denial is also embodied in ‘real policies’. Implicit in criminologies of the other is the view that an appropriate response to such alien, evil individuals is to expel them from our communities, ‘excluding’ them in Bauman’s terms:

The excluded are unfit to be free agents, *quod erat demonstrandum*. Horrid things would follow were they let loose. They would bring all sorts of disasters upon themselves as much as on all others. (2000: 207)

The central response focused upon by Garland in this respect is imprisonment, but imprisonment that takes a very specific form. Today the primary purpose of incarcerating offenders is simply exclusion, with little or no concern given to preparing the individual for (re-)inclusion into society. However, Garland argues, denial is also embodied in other areas of the criminal justice system, for instance in policing strategies and community sentences. With respect to the latter, both the rhetoric and the practice of such sentences are regarded by Garland as having changed, with punitive trends coming to the fore. To take one example, which can be taken as an illustration of Garland’s claims in this respect, Bottoms *et al* note that in England and Wales:

there has been a tendency to deliberately emphasise the punitive character of community penalties, a rhetorical

approach that culminated in the renaming of community orders to incorporate the word 'punishment' (2004: 5-6)

On the other hand, and contrasting with these strategies of denial, there are 'adaptive' responses. Adaptive responses are those which attempt to face and cope with the reality of high crime rates whilst acknowledging the limitations of government action (Garland, 2001: 110). Using a concept from psychoanalysis, Garland argues that adaptive responses are those that take account of the 'reality principle', in other words those that face the world as it is. These adaptive strategies, which Garland links with the neo-liberal impetus for a minimal role for the state and for the avoidance of the unnecessary waste of resources, have at their heart the recognition of the reality of high crime rates and the acknowledgement of the limitations of the criminal justice system. Rather than attempting to reassert state sovereignty, adaptive strategies are concerned with adjusting the criminal justice system so it can better cope with the unprecedented pressures of the present, whilst attempting to incorporate the view that the state cannot be the sole guarantor of security. Garland associates such strategies with the administrators involved in the running of the criminal justice system's various agencies, who are relatively shielded from the pressures that politicians face (111).

As with the association of criminologies of the other with strategies of denial, Garland contends that an affinity can be identified between strategies of adaptation and certain styles of criminological thinking. Garland terms these styles of thought either 'criminologies of the self', or 'criminologies of everyday life'. What these criminologies share is a view of crime as a relatively normal feature of everyday life. Further, the criminal subject is not regarded as possessing any special motivation that marks them out from any of the other rational, autonomous consumers that inhabit late modern society (129). In these approaches, the focus is placed on the situations and opportunities that are associated with criminal behaviour, rather than on the characteristics of the criminal. Lastly, crime control is not identified with the state, but is spread across a range of different actors and institutions throughout society.

Adaptive strategies include various attempts to reorganise the criminal justice system in order to render it more professional, efficient and cost effective. Examples in this respect include the use of information technology, drawing upon management practices from the private sector, lowering expectations as to what can be realistically achieved and attempting to encourage non-state actors to take responsibility for the fight against crime.

As Zedner notes, in her perceptive critical response to Garland's work, the impression derived from reading the first two-thirds of *The Culture of Control* is that penal welfare institutions for the most part closed in the 1970s and their staff were paid off (Zedner, 2002: 355). However, in the final chapters of his book Garland notes that 'the correctionalist apparatus associated with penal-welfarism is, for the most part, still in place' (Garland, 2001: 169), and that, '[I]n fact the 1990s saw a quite significant increase in the numbers of treatment programmes provided to offenders in the community and in prisons' (170). Such developments are surprising to Garland because, Zedner contends, they would not appear to fit with his broader account.

In discussing such rehabilitative programmes, Garland interprets them in similar terms to those that Feeley and Simon have used in their account of the New Penology (1992). Thus he argues that such programmes now prioritise the control of offenders, perceived as 'risks', and the protection of the public (Garland, 2001: 175). However, unlike Feeley and Simon, Garland contends that the goal of transformation has not been entirely abandoned but, rather, narrowed and stripped of any idealism. Broadly, in Garland's view, rehabilitation understood in terms of a concern for the welfare of the offender, in other words the rehabilitative ideal, is outmoded. 'Rehabilitation' is now simply an attempt to reduce re-offending, targeted at precisely these 'criminogenic' factors, the potentially malleable elements of the offender's psychology, behaviour, social relations and 'needs', which are directly associated with offending. Rehabilitation is merely one means of potentially reducing risk to the public, one option that may or may not be cost effective:

It is now one aim amongst others, delivered as a specialist provision, and no longer accompanied by any great amount of idealism or expectation. (176)

This very brief account that Garland gives of rehabilitation, one page of his *Culture of Control*, is not fully integrated into the wider analysis he has developed in this work. For instance, there is little sense of how these rehabilitative programmes fit into the dichotomy he has developed between ‘criminologies of the self’ and ‘criminologies of the other’. As Garland himself argues these criminological perspectives exclude the traditional penal-welfarist view of the offender that was central to previous rehabilitative programmes:

The excluded middle ground between the two poles is, precisely, the once dominant welfarist criminology that depicted the offender as disadvantaged or poorly socialised and made it the state’s responsibility, in social as well as penal policy, to take positive steps of a remedial kind (137)

If this middle ground is absent, then how precisely do such programmes approach and treat those offenders that they do work with? What form does rehabilitation take when:

[o]ffenders must be deemed to be free, to be rational, to be exercising choice, because that is how we must conceive of our selves. ‘Crime is a decision not a disease’ is the new conventional wisdom. (198)

The third and final perspective considered here, that derived from applying Foucault’s writings on governmentality to the attempt to understand the present, has more to say in this respect.

Governmentality

In recent years Foucault’s latter writings on governmentality have become

particularly influential in criminology, and indeed in the social sciences more generally. In this literature the focus is on strategies of government, but without government being synonymous with the state. 'Liberalism' is a key concept in this literature, but with this term not being understood in a specifically economic sense, but 'as a mode of governing at a distance' (Clarke et al., 2007). Through this literature an alternative way of interpreting the dismantling of the welfare state that has taken place since the 1970s has emerged. 'Advanced liberalism' or 'neo-liberalism' is understood not as an absence of government but as a specific style of government:

A whole range of new technologies – 'technologies of freedom' – have been invented that seek to govern 'at a distance' through, not in spite of, the autonomous choices of relatively independent entities (Rose, 2000: 324)

In advanced liberal society, activated, consuming and entrepreneurial citizens are expected to take responsibility for their insurance, security and so forth, in alliance with various commercial entities. In this context the state exercises 'only limited powers of its own, steering and regulating rather than rowing and providing' (323-324). To use the vocabulary of this approach, other non-state actors are 'responsibilised'.

Rose has been a key figure amongst those who have applied this perspective to the attempt to understand crime control policies in the present (2000). Like Garland, Rose argues that a bifurcation can be seen in criminal justice strategies. Firstly there are those strategies that he terms 'strategies of inclusion' and, secondly, there are those that he terms 'strategies of exclusion'.

For my present purposes, the most important aspect of these circuits of inclusion that Rose discusses is the process which Garland (1996) has analysed under the term 'responsibilisation'. This process involves the state as a facilitator, encouraging

other agents, individuals, communities and companies, to take responsibility for their own security, thus echoing the wider process of governing in advanced liberal society. The reverse side of this process are those individuals and groups who cannot or will not accept responsibility.

So, who are the excluded in advanced liberal societies? Rose argues that they are what he terms 'the 'usual suspects' the poor, the welfare recipients, the petty criminals' (Rose, 1998: 189). Further, they are not simply excluded but are subject to certain strategies of control, 'circuits of exclusion'. What is of central interest here, in terms of the workings and philosophy of drug courts, are those strategies that attempt the ethical reconstruction of the excluded, that try to reattach individuals to circuits of inclusion.

In Rose's account, rather than older welfarist technologies simply being removed, in certain areas they have been replaced with those that accord with the dominant neo-liberal rationalities. An example is the difference between jobseeker's allowance and unemployment benefit. The former envisions the jobseeker as active, responsible and self-governing, rejecting the connotations of dependency that are regarded as attaching to the latter. In other words the former can be seen to attempt the ethical reconstruction or 'responsibilisation' of the individual.

Rose applies this argument to rehabilitative programmes. He contends that such programmes conceptualise the problems faced by individuals as 'problems in the way such persons conduct themselves and their existence' (334). Through responsibilisation, offenders are to be active, self-governing subjects. This is not simply the goal of such programmes. The 'imperative of activity and the presupposition of an ethic of choice, is central not only to the rationale of policy but also to the reformatory technology to which it is linked' (334). Thus, choice is central to the actual practice of such programmes, with individuals being 'given the opportunity' to engage in such a process of responsibilisation. This is, according to

Rose, not a 'normalising' process. In fact '[s]ubjects are to do the work on themselves, not in the name of conformity, but to make them free' (374). Thus subjects capable of being 'governed through freedom' are ethically reconstructed.

However, the converse of this process is the existence of those populations that are beyond all attempts at 'ethical reconstruction'. For these 'harsh measures are entirely appropriate. Three strikes and you are out: citizenship becomes conditional on conduct' (2000: 202). As with Garland and Bauman, in this respect Rose perceives the prison, with no reformatory role, coming to the centre of the stage in crime control.

A noticeable feature shared by these various accounts of the penal present is the nature of the offender that is explicit or implicit in the trends they focus upon. In Feeley and Simon's account the subject is absent from the New Penology, replaced by a focus on the correlation and calculation of various risk factors. In contrast, running through the other literature reviewed here is a bifurcated account of penalty. On the one hand there are strategies that treat offenders like us, when 'we' are the rational, calculating consumers of neo-liberal society. On the other hand, strategies that exclude, generally in the form of imprisonment, treat and conceptualise offenders as evil, as other. Lacking from these accounts is what Garland referred to as 'middle ground', a space previously occupied by the penal welfare view of the offender as disadvantaged or poorly socialised (Garland, 2001: 137). It is this dichotomy, and this absence, that will be questioned in the chapters that follow as I develop my account of the Scottish drug courts. Having outlined these three attempts to map the penal present, I will now turn to the debates that have taken place in response to such accounts, with other authors stressing the cultural specificity of crime control.

The General and the Particular

The three accounts discussed in the previous section are all grounded in wider

narratives concerning the social, political and economic trends shaping industrialised democracies. As Karstedt comments:

The emergence of 'actuarial justice' has been linked to neo-liberal politics and the specific characteristics of modern 'risk societies'...[whilst] the convergence of crime control policies [has been linked] to an overarching 'culture of control' in postmodern risk societies (2002: 118)

Further, such broad theorising links into a context where the inter-national transfer and exchange of criminal justice policies is an important feature of the penal landscape:

New strategies of crime prevention, procedures of dealing with offences, offenders and victims, models of institutions and interventions for juvenile and adult offenders rapidly spread around the globe, and knowledge is shared among the 'epistemic communities' of criminologists, and criminal justice and policing experts and practitioners. (113)

For scholars attempting to comprehend developments taking place within their own jurisdictions, such theories as those surveyed in the previous section have provided important frameworks, or resources, to draw upon. Not infrequently, researchers have striven to identify new instances and examples of such broader trends within their locality:

The development of risk and 'risk society' themes in current social theory has been associated in criminology with a widespread effort to identify more and more examples of risk-based justice, in more and more countries. In addition to the USA and the UK, risk has been identified as a technique in the criminal justice systems of many countries including Canada, Australia, New Zealand, France, Germany and Italy (O'Malley, 2002: 205-206)

This is not say, though, that the authors of such theories intended for them to be used in this way. Rather, whilst these authors have attempted to develop accounts that make sense of the broad dynamics in the penal realm, this does not mean that they ignore issues of cultural variance (Jones and Newburn, 2007: 7). Indeed, Rose, writing with two of the other most prominent thinkers in the governmentality tradition, has criticized the way in which his and his colleagues approach has been used by other researchers. In such work there has been a tendency to use 'neo-liberalism' or 'advanced liberalism' as 'a more or less constant master category that can be used both to understand and to explain all manner of political programs' (Rose et al., 2006). This ignores the specificity of such programmes and 'readily lends itself to a kind of cookie-cutter typification or explanation, a tendency to identify any programme with neo-liberal elements as essentially neo-liberal' (97-98). In other words the neo-liberal nature of the present is stated, certain features of a given programme are identified which accord with this, then the essentially neo-liberal nature of said programme is identified.

Further, Garland himself has argued that such theorising as his own, needs to be engaged in an 'ongoing dialectic' with small scale case study empirical research (Garland, 2001: vii, McAra, 2005: 278). However, despite such qualifications, these broad ranging theories have been met by a critical response from authors who have stressed how penalty is bound up with specific cultural localities.

As Jones and Newburn note a 'substantial body of recent writing on this matter suggests that crime control and penal policy continue to be strongly influenced by national, and sub-national, political institutions, cultures and historical traditions (2007: 3). Wide-ranging accounts of the present, it is argued, fail to take account of cultural variation (McAra, 2005: 278). Karstedt has particularly argued this point with respect to the transfer of criminal justice policies:

even if the distance of travel is much shorter and the exporting and importing countries share at least some

dominant characteristics of western culture, the distinct institutional and political cultures decisively shape the process of adoption and implementation (2002: 113)

Melossi is often identified as the author exemplifying the position of stressing crime control's cultural specificity. In his article 'The Cultural Embeddedness of Social Control' (2001) he draws a parallel between social control and language. In strict terms, translation between any two languages, or cultures, is not possible. Any term finds its meaning only within the web of meanings and relationships within which it exists. To draw a parallel with a comment Marx made, whether an object with four legs is considered a throne or a chair is not determined by its inner essence, but by the social relationships within which it is placed (Jakubowski, 1990: xiv). For Melossi, this also applies to 'penal and criminal policies':

Punishment is deeply embedded in the national/cultural specificity of the environment which produces it (Melossi, 2001: 407)

Melossi substantiates his argument in this respect through exploring the different rates of imprisonment in Italy and the United States. Being careful to avoid any accusations of cultural determinism, Melossi identifies a variety of different factors that would help to explain the variations and parallels he identifies between the two nations. As he states 'for the case of Italy, I have found evidence of the impact on imprisonment of economic change...of crime and especially serious crime, homicide...and of migratory movements (415). However, Melossi also contends that the particular cultural traditions of the United States and Italy have also served to shape their imprisonment rates. Specifically, Melossi focuses on the way in which:

there has traditionally been, in the Italian cultural tradition, a sort of 'soft' authoritarianism linked to low levels of penal repression, which is the opposite of a democratic rhetoric in North America which goes together with very high levels of penal repression (413).

Melossi argues that this difference can in part be explained through the two countries particular religious traditions, Italian Catholicism and United States Protestantism. These function as 'cultural toolboxes' within these two societies, constituting 'one of the ways in which human beings and especially their intellectual and political elites, [in] responding to change, select motives within available repertoires' (418).

It is within the context of these debates that Jones and Newburn have situated their recent study, *Policy Transfer and Criminal Justice* (2007). In this work the authors explore the notion of the 'Americanization' of British crime control policy. By this term, which is associated with the field of cultural studies (Jones and Newburn, 2002: 177), what is referred to is the fact that recent years have witnessed the introduction into the United Kingdom of a range of new criminal justice policies which appear to have been transferred wholesale from the United States. Jones and Newburn focus on three examples in this respect, zero tolerance policing, the use of private contractors in the prison sector, and 'three-strikes' mandatory sentencing. Broadly, however, they find little evidence of hard policy transfer in these cases, 'in terms of large-scale importation of policy goals, content and instruments' (2007: 147). Rather, what has been transferred across the Atlantic in these instances has been 'rhetoric and symbolism', although these in themselves are important (154). The wider conclusions that Jones and Newburn draw from these three case studies is that any simplistic notion of Americanization needs to be seriously qualified, and that caution needs to be exercised with regard to explanations of penal change in terms of the results of global economic change:

The complex changes that are emerging within criminal justice systems cannot be explained by straightforward reference to the global march of neo-liberal reform, nor to simple notions of emulation and transfer (154)

The authors argue, though, that whilst the instances they have studied have proved more complex in practice, there have in fact been a number of instances of the direct emulation of policy ideas from the United States to the United Kingdom, including

‘the gradual emergence and spread of drug courts’ (150-151).

With respect to the Scottish drug courts it will be contended in the chapters that follow that, as with the policies studied by Jones and Newburn, the actual findings from my case studies of these programmes, even given the transfer of hard policy, similarly serve to question any simple notion of Americanisation. The picture of the Scottish drug courts that emerges is of programmes shaped in important ways by the specific political and cultural context. This is not, though, to reject as irrelevant the wider criminological frameworks discussed earlier. Certain insights from these analyses do chime with the findings from my research. Further, consideration of my findings also raises certain questions regarding the shared assumptions underlying these accounts. Having outlined these wider criminological debates that my thesis engages with, I now turn to consider the drug courts themselves, initially focusing on their origins.

Born in the USA

In essence a drug court is a judicially supervised treatment programme. Whilst eligibility criteria, amongst other features, differ considerably amongst existing drug courts, all drug courts target offenders whose offending is associated with their pattern of drug use. It is hoped that through treatment of this drug use, the cause of offending will be addressed. Instead of simply sentencing offenders to treatment, drug courts use the authority of the courtroom, and the judge in particular, as part of this very treatment. The importance of this use of the courtroom is reflected in the very name given to these programmes, drug *courts*.

The first drug court was established in Dade County, Miami, in 1989. The key actors in this innovation were prominent members of the local judiciary working on their own initiative and responding to what they perceived as a crisis faced by local courts in terms of drug related crime (Clinton Terry III, 1999b). Whilst an approach for federal funding for the first proposed drug court was made, this was rebuffed by

'then [Republican] drug czar William Bennett' (Goldkamp, 1999: 23).

From these relatively meagre beginnings, the Dade County drug court has come to serve as a model for the establishment of drug courts across the United States. Every single state now has at least one such drug court. One important feature of this spread has been that, as with the founding of the first drug court itself, prominent local criminal justice professionals, particularly judges, have often played a key role in instigating the adoption of such courts in their jurisdiction (Clinton Terry III, 1999a). Further, many of the criminal justice staff involved in drug courts have become enthusiastic advocates for the concept of drug courts. Links at various levels often exist between staff at individual courts, and organisations such as the National Association of Drug Court Professionals and the National Drug Court Institute, actively attempt to facilitate such contacts. These organisations also act to disseminate 'best practice' amongst drug court staff, and encourage staff to campaign on behalf of drug courts, for instance lobbying politicians at key moments in order to secure further or increased funding. Commenting on the relationship between United States drug court staff and the programme they work within Bean, for instance, has observed that 'Drug court workers believe in their crusade, for a crusade it certainly is' (2002: 128). Indeed both Bean and Nolan (2001) have spoken of the spread of drug courts in terms of a 'movement'.

Currently there are some 1,800 drug courts either in existence or in the planning stages across the United States (NADCP, 2007). It has been estimated that as of the 8th September 2003, a total of over 300,000 adults, and some 12,500 juveniles, had been enrolled in drug courts (ibid). Further, the model for the drug court programme has served as an inspiration for the development of a range of other courts, such as community courts and domestic violence courts (CFCI, 2007). Collectively these courts are referred to as 'problem-solving' or 'specialist' courts. The drug court model has also been adopted internationally, as indeed have other problem-solving courts, with drug courts having been established in Australia, Brazil, Canada, Ireland and Norway amongst many other countries. Whilst it is important not to overstate

the relative significance of such trends, it is undoubtedly the case that drug courts now constitute an important feature of the contemporary United States penal landscape. Yet this development may well have appeared unlikely when considered at the time of the establishment of the first drug court in 1989: 'it is difficult to appreciate how dramatically the proposed drug court in Miami cut against the grain of national drug and crime policy at the time and departed from accepted norms within the judiciary in the United States' (Goldkamp, 1999: 23). In order to understand the context that surrounded the subject of drugs in the late 1980s in the United States, it is necessary to make some brief comments concerning the politicisation of crime control in this country.

The move from crime being a relatively bipartisan subject, in political terms, which was largely delegated to criminal justice professionals, to an important, and sometimes central, political topic of debate is often dated to the presidential contest between Goldwater and Johnson in the mid 1960s (Garland, 2001: 97). The politicisation of crime control took place in the United States in conjunction with the rise to prominence of what is known as the 'New Right', a political movement that was initially linked to the Goldwater presidential campaign itself. In the penal sphere, the New Right is associated with a renewed stress on retributive responses to crime. In this political rhetoric crime is to be addressed by pushing up the level of punishment, giving criminals what they 'deserve'. Part of the realignment of the Democratic Party in the 1980s and 1990s in the wake of electoral defeat, paralleled by the Labour Party in the United Kingdom, was an attempt to match the New Right's reputation for 'toughness' on crime (Tonry, 2003). As noted previously, the ascendancy of such views has been termed the rise of 'populist punitiveness' (Bottoms, 1994) or of a 'law and order ideology' (Cavadino and Dignan, 2006: 50). Under the presidency of Ronald Regan, the focus of this harsh rhetoric was directed at a particular 'menace', with Regan declaring a 'War on Drugs'. In this rhetoric, drugs, those who use them, and those who were involved in their distribution and supply, were characterised as an evil 'other'. Such terminology, and associated policies, have been continued by Regan's successors, both Republican and Democrat

(54). Indeed, in the very same year that the Miami drug court was being established, George Bush senior stated in his first televised address to the nation that '[a]ll of us agree that the gravest domestic threat facing our nation today is drugs', and followed this by calling for 'an assault on every front', and that United States citizens should 'face this evil as a nation united' (Bertram et al., 1996: 114)⁶.

Whilst the relationship between such rhetoric and actual developments in the penal sphere is under-researched (Matthews, 2005: 193), the bellicose declarations by politicians have been made against a massive increase in the use of incarceration in the United States. From an already large 744,208 (313 per 100,000 population) in 1986- large that is in proportionate to any other western industrialised country- the prison population in the United States had expanded to some 2,033,331 (701 per 100,000) by 2002 (Cavadino and Dignan, 2006: 44). To give some indication of the role of drugs in this increase, in 1995, 60 per cent of federal prisoners and 23 per cent of state inmates were drug offenders (54). Considering these trends, the approach of drug courts, attempting to treat drug using offenders and thus diverting them from custody, would appear to have sprouted from relatively barren ground. Having traced this history of the emergence of drug courts, I will now turn to look at how these programmes have in fact been interpreted by those writers who have attempted to grapple with their nature.

Understanding Drug Courts

The vast majority of the published literature on drug courts has focused on the question of effectiveness – whether or not drug courts work in addressing re-offending (Clinton Terry III, 1999a). In this respect, many evaluative studies of drug courts have been positive (Belenko, 1998). However, criticisms have been raised concerning the robustness of these studies. For instance, very few evaluations have followed up on offenders after they have completed drug court orders. Those that

⁶ This reference was initially brought to my attention by Jones and Newburn (2007: 10).

have done, have tended to only do so on a short-term basis. Therefore, there is little information on the medium to long-term impact of drug courts. Further, most such studies 'do not include groups against which one can measure the relative success of drug treatment courts' (Turner, 2002: 1493, Hoffman, 2002: 77). In other words such studies provide no information as to whether drug courts are more effective than other interventions, or indeed than doing nothing. Thus the issue of effectiveness is still the subject of considerable debate.

A second area of discussion and dispute has been with respect to the jurisprudential basis of drug courts. In this respect, much attention has been given to what is termed 'Therapeutic Jurisprudence'. Therapeutic Jurisprudence can be described as a normative frame for looking at legal processes, rules and roles. At its heart is the contention that

the law itself can be seen to function as a kind of therapist or therapeutic agent. Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or anti-therapeutic consequences (Wexler and Winick, 1996: xvii).

Therapeutic Jurisprudence was initially introduced in a paper delivered in 1987 by Wexler. In the subsequent two decades Wexler, often with his collaborator Winick, has been a prolific and passionate advocate for this theory. These two authors were rapidly joined by many others and by 1991, for example, two edited volumes on the topic had already appeared (588). A number of authors have contended that drug courts can be seen to accord with the central principles of Therapeutic Jurisprudence. Whilst the essentially pragmatic origin of drug courts is recognised in these articles, the process and practices of these courts are regarded as actualising these principles unconsciously (Hora et al., 1999, Hora, 2002, Hoffman, 2002, Rosenthal, 2002). Less frequently, drug courts have also be linked to what is termed 'restorative justice' (Turner, 2002).

In contrast to this literature, which tends to take a positive view of these programmes, drug courts have been the subject of critique from more conventional jurisprudential standpoints (Meld Shell, 2002). In this respect it has been argued that drug courts result in the erosion of due process (Boldt, 2002), break down the traditional separation of powers central to the United States government, and have led to considerable net widening (Hoffman, 2002).

More ethnomethodological studies of drug courts have considered such issues as the extent to which offenders have to display a 'recovering self' in order to progress through the drug court programme (Burns and Peyot, 2003), or have examined the ways in which drug courts successfully get offenders morally invested in their goals (Steen, 2002).

Three authors have produced theoretically informed studies that are germane to the criminological debates discussed earlier in this chapter. These three studies will be considered in turn in this section. Nolan's cultural sociological analysis of drug courts, which relates them to wider changes in United States government and society, will be examined. Following this, consideration will be given to Malkin's work, which related drug courts to the governmentality and risk literature. Initially, however, a perspective on drug courts offered by Bean will be discussed.

Forward to the Past?

Bean is one observer who has been particularly impressed by the emergence of drug courts. In a paper published in 2002 he declared that there 'is little doubt that drug court has provided the most important idea in criminal justice for a decade' (2002: 249). Bean goes on to explore the underlying approach of drug courts, asking 'to what extent [they] mark a return to the rehabilitative ideal of a generation ago' (235-236). As with those accounts outlined previously, Bean recognises that faith in rehabilitation was seriously undermined in the 1970s. However, he argues that drug courts can in fact be regarded as the revival of the rehabilitative ideal. In this respect

he notes such features of the drug court model as its embrace of the view of the drug user as suffering from a disease, a disease which the drug court can intervene to treat, and the discretion and flexibility accorded to the judge.

Bean's contention that the penal system is witnessing a revival of rehabilitation can be supported in certain respects. Firstly, it has been argued that the story of penal-welfarism's decline has, in fact, been considerably overstated. To a degree at least, rehabilitation has never in fact gone away. In her perceptive critical response to Garland's *The Culture of Control*, Zedner notes that Garland, breaking one of his own methodological rules (Garland, 2001: 22-23), tends to confuse talk with action when it comes to his analysis of the decline of penal-welfarism:

behind the academic refutation and the official rejection, penal practice carried on much as before. Probation and community service, both penal orders whose purpose is primarily rehabilitative, thrived and even increased in proportionate use in the 'post rehabilitative' period (Zedner, 2002: 346)

A further support for Bean's contention is that recent years have also witnessed a renewed interest in rehabilitative programmes both within academia, and within certain areas of the criminal justice system. In what has come to be referred to as the 'what works debate' (McGuire, 1995: 4), attention has been focused on trying to identify what is effective in reducing re-offending. In this debate, attention has been re-focused on rehabilitative programs, with Martinson's view (1974) that 'nothing works' now being regarded as incorrect.

Central to the 'what works' debate has been the writing of a small number of psychologists working in North America. In his 2004 Presidential Address to the American Society of Criminology, Cullen identified twelve such individuals 'Who Saved Rehabilitation'. Cullen argues that:

A small number of scholars, most often initially alone or in dyads, had created a loosely coupled network that was responsible for fighting back the ideas that offenders were beyond redemption and that corrections was a uniformly and inherently bankrupt enterprise (Cullen, 2005)

Two key figures in this respect are Andrews and Bonta, who have put forward their arguments in such works as *The Psychology of Criminal Conduct* (2003). The title of this work is important in indicating the orientation of the various authors who have been central to the 'what works' literature. Running through this literature is a critique of criminological approaches that are influenced by sociological theories. For Andrews and Bonta, the concerns of such sociological approaches have not been confirmed by meta-analyses of studies of what is effective in addressing re-offending. Rather, these authors argue, Cognitive-behavioural approaches have been established as being central to 'what works'. McGuire echoes this contention in the following quotation:

Amongst the range of intervention methods included in the meta-analysis, those which emerge as the most promising outcomes are based on the 'cognitive-behavioural' approach (McGuire, 1995: 16)

The 'what works' debate has had considerable impact in certain areas of the criminal justice process, particularly in Canada, England and Wales, Scotland and the United States. Muncie, for instance, comments regarding youth justice that over 'the past decade youth justice discourse has become dominated by the holy grail of the 'pragmatic solution'' (Muncie, 2002: 27).

However, Bean's account of the revival of rehabilitation in the United States in the form of drug courts raises a number of issues. Whilst Zedner does criticise Garland for overstating his account of the demise of penal-welfarism, she does acknowledge the broad thrust of his case. Rehabilitation, she states, today faces 'a markedly less benign political environment' (346). Whilst Zedner highlights the emergence of new

rehabilitative programs such as restorative justice, she notes that these depart from the approaches common until the 1970s:

Entirely in accordance with the emphasis on personal responsibility and individual rationality so central to neo-liberal philosophy, restorative justice may plausibly be seen as an attempt to revive rehabilitation for a new political era (356).

In other words rehabilitative programmes, and particularly new rehabilitative programmes, are regarded as taking a form and function that accord with the political imperatives of the present. This involves a departure from approaches that ‘rendered the offender the subject of psycho-social intervention’ (356). Further, Zedner does not dissent from Garland’s view that the social, cultural and political supports for the penal-welfarism of the 1970s have been undermined. This could be taken further if we accept Allen’s account of *The Decline of the Rehabilitative Ideal* (1981). Allen contends that two factors are necessary for the existence of a viable rehabilitative philosophy in any given society. Firstly, an establishment that is able to articulate and defend a set of values as being of universal applicability, a vision of good behaviour or norm in Foucault’s sense (11). Such values underpin ‘the goals of treatment’ (12). Secondly, confidence must exist in the efficacy of existing social and political institutions (18). Allen substantiates this contention by showing that such conditions can be recognised as being met in two societies that had strong rehabilitative philosophies influencing the penal systems, namely antebellum America and Communist China (12-18). In sharp contrast, Allen, writing at the end of the 1970s, argued such conditions are absent in contemporary United States’ society. It would be difficult to argue that these two conditions are any nearer being met in the United States today.

With respect to the ‘what works’ debate, it needs to be stressed that this approach does not actually have any commitment to rehabilitation *per se*. It is, rather, that current research suggests that certain ‘rehabilitative’ programmes are the most

effective method in terms of reducing re-offending. If, for instance, integrating public shaming into a rehabilitative programme was found to make the programme more effective with regard to reducing re-offending, such as requiring those undertaking community service to wear recognizable uniforms, the 'what works' perspective would provide no grounds upon which to critique such a practice. Further, whilst advocates of drug courts often stress their efficacy when presenting the program to external audiences (Nolan, 2001), the emergence of drug courts would appear to be qualitatively different from the interventions produced by the 'what works' debate. Firstly, rather than resulting from an academic re-appraisal of empirical findings, drug courts emerged as a pragmatic frontline attempt to try something different. Secondly, crucial to the spread of drug courts in the United States has been the enthusiasm and advocacy of local criminal justice personnel. In contrast, the 'what works' debate has tended to result in relatively centralised, 'top-down' changes that have sometimes been experienced negatively by criminal justice staff. For instance, the dissemination of risk-assessment tools through the penal system has often been experienced as undermining penal staff's discretion and autonomy. Thus, whilst drug courts undoubtedly accord with many of the features of the rehabilitative programs of a previous generation, the simple statement that they constitute a re-emergence of the rehabilitative ideal, raises a number of puzzling questions. In order to explore this further, we turn to an alternative, cultural explanation for the emergence of drug courts.

Culture, Therapy and Disease

Nolan's analysis of drug courts comes from a cultural sociology perspective outwith criminology, and is situated within a broader argument concerning state legitimisation. In developing his analysis Nolan draws upon the work of Beetham, who contends that:

legitimate power has been based on three features: *validity* (the way in which state actions are sanctioned by written law), *justifications* (the cultural symbols that justify these laws), and *consent* (the manner in which subordinates

demonstrate their adherence to authority) (Nolan, 1998: 23).

Nolan's concern is with the second of these three features, focusing on the claim that legitimate power has to be justified as well as being valid. Legitimate power, from this perspective, must have a deep relationship with the dominant cultural symbols in any given society. In Nolan's formulation 'legitimacy...refers to the cultural ideas and value systems that undergird the practical functions of the state' (26).

Nolan's argument is that 'the cultural ideas and value systems' which the United States' state has historically drawn upon – Civic Republicanism, Lockean Liberalism and Protestantism- have lost their social purchase. The United States' state has experienced a crisis of legitimacy, evidenced, Nolan contends, in declining participation in elections and in responses to political surveys, which reveal historically high sentiments of distrust and distance from the federal government (40-45). Nolan's argument is that, in response to this crisis of legitimacy, the United States' state has come increasingly to draw upon a new cultural resource – what he refers to as 'the therapeutic ethos'.

In discussing this 'therapeutic ethos', Nolan relates his study to a considerable body of literature that has emerged in the United States and the United Kingdom since the 1960s. In this tradition it has been contended that practitioners of therapy and counselling have come to play an increasingly prominent role in these countries, and, perhaps more importantly, a widespread adoption of the language and ideas deriving from therapeutic and counselling approaches throughout Anglo-Saxon society has been witnessed (For example Bellah et al., 1985, Berger, 1965, Lasch, 1997, Hoff-Sommers and Satel, 2005). Broadly, the therapeutic ethos is regarded by Nolan as a way of understanding the self, and the relationship between the self and a wider human reality, which has permeated through Anglo-American culture to the extent that elements of it have become 'common sense' for significant sections of the population.

In his work, Nolan has highlighted five elements of the therapeutic ethos. The first of these is the 'emancipated self'. The therapeutic ethos, Nolan argues, is focused on the self and encourages individuals to seek their moral compass from within, a view of the self was most systematically articulated by what has been termed 'humanist psychology', in the works of authors such as Abraham Maslow (1968), Carl Rogers (1951) and Viktor Frankl (1992). The second element of the therapeutic ethos that Nolan points to is what he terms the 'emotivist ethic'. In this respect Nolan draws attention to the way in which an increasing stress on feelings has come to prominence in United States culture. The third aspect of the therapeutic ethos that Nolan focuses on is the rise of what he terms 'a new priestly class'. Broadly, Nolan charts the rise, both in numerical terms and in terms of social prestige, of what may be termed collectively the 'therapeutic professions' – psychologists, psychiatrists, counsellors and others whose work often focuses on interpreting and trying to change the emotional dimension of the self. The fourth element Nolan discusses is what he terms the 'pathologisation of human behaviour', or what is often referred to within medical sociology as 'medicalisation' (Zola, 1972, Fitzpatrick, 2001). What is meant by these terms is the way in which, it is contended, medical categories are increasingly being extended or developed to encompass an expanding range of human behaviour. The last feature that Nolan considers is a rise in people willing to consider themselves as victims, interpreting their present difficulties in life as resulting from causes out with their own control. This, of course, links to the just-discussed pathologisation of human behaviour. For Nolan, in attempting to overcome a crisis of legitimacy, the United States government is increasingly drawing upon this cultural form.

This development is not simply a matter of a change in the vocabulary of policy presentation. Rather, Nolan contends, a 'therapeutic state' has emerged, with a therapeutic relationship having come into existence between the citizenry and the state. Nolan's argument is that it is within the context of this broader process that the emergence of drug courts needs to be situated. For Nolan, drug courts can be regarded as the institutionalisation of this therapeutic ethos within the United States'

criminal justice system. In making this contention, particular stress is placed by Nolan on the centrality of a disease framework within drug courts (See Nolan, 2002b), with drug use being understood as a disease that causes criminal behaviour, and on the prominence of a therapeutic vocabulary in the discourse of these courts, both in the courtrooms themselves as well as between staff members. In developing this argument Nolan emphasises the coercive nature of these programmes, raising many of the criticisms that have previously been directed at rehabilitative programmes (Committee, 1971, Szasz, 1963). Nolan's work is interesting and suggestive. However he fails to bring into focus those aspects of drug courts that are central to those accounts offered by those writers who have related drug courts to neo-liberalism.

Neo-liberalism, Coercion and Freedom

In a recent paper, Toby Seddon has highlighted what he regards as the wider criminological significance of coerced drug treatment (Seddon, 2007). Relating his analysis to the literature on governmentality, Seddon notes that the idea of freedom has become central to debates concerning the nature of government and politics in the present. Seddon argues that coerced drug treatment goes to the heart of many of the debates, and problems, relating to the conception of freedom that is central to neo-liberalism. In making this contention he draws on an article by Gerda Reith (2004).

In this suggestive article, Reith focuses on how discourses of addiction have taken an increasingly prominent role in contemporary society. She argues that the addict has been brought to the foreground as the 'other' of neo-liberal discourses of freedom, autonomy and choice. As the discourse of freedom has become dominant, so to, Reith contends, have discourses of addiction. For Reith, addiction is 'disordered consumption', the undermining of the self that is central to neo-liberalism, through the actual practice, consumption, that in neo-liberal discourse is supposed to validate this self. She goes on to note that the

[n]otion of addiction turns the sovereign consumer on its head, transforming freedom into determinism and desire into need...Whereas the consumer chooses to act, addicts are forced to (286)

For Reith one of the central tasks accorded to the individual in the present is to monitor and guard their freedom (296). Having failed to do this, the addict 'activates the 'hidden despotism' (Valverde, 1998) of liberal society, whereby those deemed not to possess the attributes required for freedom are subjected to various forms of intervention and discipline' (297). Thus, following Valverde, and echoing other authors such as Dean (1999), Reith contends that for those who fail to nurture their freedom neo-liberal government displays its authoritarian side. Government through freedom is revealed as conditional, with sovereign and disciplinary practices coming to the fore for those who do not consume responsibly. The interventions subsequently undertaken are focused on the aim of trying to restore the individuals in question to the status of 'consumers who are 'capable of bearing the burdens of liberty'' (297).

Seddon appears to depart here from Reith in that he emphasises the continuity between neo-liberal practices of government and coerced treatment. In this respect he refers to the work of both Garland (2001) and Rose (2000). Here Seddon highlights the two similar dichotomies that Garland and Rose have developed in attempting to capture the nature of crime control in the present. As I have discussed previously, Garland on the one hand discusses what he calls a 'criminology of the self', through which offenders are conceptualised and responded to as if they are rational consumers just like 'ourselves'. This is equated by Seddon with Rose's delineation of 'circuits of inclusion' (2007: 280). However, the converse of this is that those offenders who either refuse the 'offer' of treatment, or who are unable or unwilling to comply with the demands of treatment after they have entered it, move into the other side of Garland and Rose's dichotomies. In this respect the offender is subject to a 'criminology of the other', or placed within 'circuits of exclusion'. Thus the offender who fails, one way or another, to comply with the demands of coerced

drug treatment, to take the opportunity presented to him or her, is faced with almost inevitable incarceration.

In an article provocatively entitled 'The End of Welfare As We Know It: What Happens When The Judge Is In Charge?' (2005), Malkin presents an analysis of drug courts which, drawing on the field of writers inspired by Foucault who have focused on issues of risk, neo-liberalism and governmentality, accords with Seddon's interpretation of coerced treatment. As with other writers working in this tradition, Malkin emphasizes that recent decades have witnessed the decline of universal welfare policies in the United States, the 'liberal idea of a social welfare packages available for all citizens during periods of crisis or need' (366). In contrast, and here echoing Feeley and Simon, Malkin argues that the current 'neo-liberal state manages risk through a network of experts whose job is to analyze and predict where and how it will emerge' (366). Thus, while 'centralized social programs recede, the government expands its control through concepts such as alcohol (Valverde, 1998), crime (Simon, 1997) and community (Rose, 1996) where each becomes a symbol to determine high-risk 'populations' in need of regulation' (366). Malkin regards problem-solving courts, and drug courts specifically, as embodying this latter strategy, determining a high-risk population for intervention:

Courts replace older models of social welfare and recategorize individuals with specific problems, previously thought to derive from social problems and whose resolution was part of the social contract, into a high-risk category to be managed. These reforms highlight the end of the previous social contract between state and citizen. (368).

Thus for Malkin the last couple of decades in the United States have witnessed the emergence and consolidation of 'neo-liberalism', a mode of government that emphasizes the free market and a minimal role for the state. For Malkin, the neo-liberal state requires self-governing, rational subjects:

The democratic state needs to ensure it has citizens whose behavior and practices coincide with its goals. In a neo-liberal model, this requires self-governing individuals who remain active, empowered and participatory as the state recedes (370)

Drug courts constitute one solution to the problem of dealing with a particular population that fails to govern itself. In this respect, the interventions of the drug courts are aimed at enabling or re-establishing actors capable of playing the game and participating 'in the new neo-liberal state' (363). Malkin contends that, reflecting the focus on creating 'active, empowered and participatory' citizens, running through the drug courts themselves is a discourse of 'self-responsibility and individual choice'. Through undertaking the programme itself, offenders have to exercise their agency, making choices and taking responsibility, in other words actualizing their ethical reconstruction or resposibilization. Indeed, this appeal to drug court participants' agency explains a puzzle for Malkin – why the individuals sentenced to drug court orders appear to so enthusiastically embrace the idea of drug courts:

the court works within a discourse of self-responsibility and individual choice, starting in the courtroom, where the judge and lawyers constantly remind defendants that they have a choice to make. This message is echoed in counselling and treatment programs (380)

Discussion

The three assessments of the United States drug courts I have surveyed in the previous section provide markedly different pictures of these programmes. In Bean's analysis, the drug courts are understood as constituting the revival of the 'rehabilitative ideal', an ethos that was central to the penal systems of Western democracies until at least the 1970s. In this account drug courts would constitute a marked anomaly for the broader criminological literature, a popular new programme apparently grounded in a previous era. Further, this would also present the existence

within these programmes of the penal-welfare 'middle ground'- a view of the offender that is neither an alien threatening other, nor a rational choosing consumer. Malkin and Nolan provide more detailed accounts of the internal operation of these programmes than Bean does, with Malkin and Nolan's accounts directly contradicting each other.

For Malkin, the drug courts articulate with broader neo-liberal and 'risk society' trends in the United States. Focusing on managing a specific population that refuse to manage themselves, in her account these programmes conceptualise and respond to offenders in terms of a framework of individual choice and self-responsibility. This echoes Garland's notion of the criminology of the self, and Rose's argument regarding the ethical reconstruction of the excluded. In Malkin's interpretation the way in which offenders are responded to exemplifies neo-liberal conceptualisations of the self. In contrast, Nolan's account focuses upon a view of the offenders as medicalised, as vulnerable. Here, rather than according agency to the offenders sentenced to drug court orders, these offenders are conceptualised as lacking full control of their actions. Driven by their illness, their drug addiction, they are incapable of fully exercising choice.

Both Malkin and Nolan's accounts are lively and suggestive. However, there is something of the 'cookie-cutter', to use Rose *et al's* term, about both of their studies. In both cases they approach the drug courts from a prior theoretical standpoint and cite evidence that accords with this wider theory. However, there is a sense in which this prior theoretical focus is inhibiting their engagement with the full complexity of these programmes. Neither author engages in any detail with the phenomenon discussed by the other, thus leading to very different accounts resulting from studies of the same programmes in the same country.

My purpose, though, is not to arbitrate between these accounts of the United States drug courts, but to develop an understanding of Scottish drug courts. As has been

emphasised, it has been through considering the Scottish drug courts within their particular context that I developed my own account. To anticipate these findings somewhat, the picture of the Scottish drug courts that emerges echoes aspects of *both* Malkin and Nolan's work. The Scottish drug courts are constituted by very specific relationships between different professions and knowledges- relationships that will be analysed in the chapters that follow. Within this context, it is the presence of a framework of choice and self-responsibility *alongside* a framework of disease that is particularly notable.

In the fourth chapter I will present my findings from my analysis of the policy context within which the drug courts were introduced. Initially, however, in the following chapter I will discuss the methodology from my study of the two pilot Scottish drug courts. This will outline how I began my research with something of a 'cookie cutter' approach, drawing on Nolan's work, and how I came to reject this approach.

Chapter 3: Methodology

The thesis that I have produced from my study of the pilot Scottish drug courts is a considerable departure from the type of work that I anticipated writing when I began the process of planning my research. Specifically, the nature of the wider theoretical debates I have engaged with, and the way in which I undertook my data analysis, differed markedly from my expectations. In essence, there was something of what has been referred to in the previous chapter as the ‘cookie cutter’ or *a priori* in my initial approach to my study. In other words, I was looking for evidence for specific prior theories that were of interest to me, rather than attempting to grasp my data, as far as this is possible, in its own terms. That I was able to recognise that my initial approach was unproductive and that I subsequently changed tack has, I believe, been of considerable benefit to my work. The resulting picture that has emerged of the two drug courts- cookie cutters placed to one side- is less neat, more complex and even contradictory. It is also though, I hope, an ethnographically and intellectually richer work and a closer representation of my actual data.

In this chapter I will discuss the various decisions I have taken with respect to planning and undertaking my research into the Scottish drugs courts, the findings from which constitute the basis of my thesis. The structure of this chapter is a logical chronology, covering the various stages in the research process from design to writing up. In the initial section on research design, the theoretical ideas and preconceptions with which I began my research will be discussed. Following this, the decisions I made with respect to what data I intended to collect, and by what methods, will be turned to. After considering the ethical issues raised by my research, the issue of research access, and some difficulties encountered in this respect, will be discussed. I will then outline what data was actually collected, before turning to the data analysis stage, where my thesis changed direction considerably. Finally, the writing up of the thesis will be discussed.

This structure is used here for the purpose of exposition. In actuality, the research

did not proceed precisely in this linear manner. There was, in fact, considerable overlap between a number of these stages in the research process, for instance between data collection and data analysis. Further, as in this case, the latter stages often influenced the earlier. Thus the results from my initial data analysis helped to provide new topics, for instance, to ask about in interviews. Attempting to reflect this, though, in the structure of this methodology chapter would result in a confusing picture for the reader.

All research has certain strengths and weaknesses, and my own research is no different in this respect (Blaikie, 2003: 20-21). Whilst, of course, every attempt has been made to limit the latter, it is important to be aware of those that remain and I have attempted to be reflexive regarding this in this chapter.

Research Design

My initial decision to study the Scottish drug courts had not been taken as a result of any particular interest in these actual programmes themselves but, rather, by an interest in wider theoretical debates to which they had been linked. Sociological studies of 'therapy' have a considerable history. Sociologists have, on the one hand, explored the role, prestige and quantitative increase in what can be termed the 'therapeutic professions', counsellors, psychologists and so forth. On the other hand, sociologists have explored the social role, and spread, of ideas and concepts originally deriving from therapeutic theories, such as repression, self-esteem, the importance of childhood experiences or the medicalisation of various realms of human experience and behaviour. In Britain, Halmos wrote *The Faith of the Counsellors* (1966) in the mid 1960s, whilst in the same decade writers such as Philip Rieff were charting the *Triumph of the Therapeutic* (1966) in the United States. In 1998, Nolan published *The Therapeutic State* (1998), his lively account of the way in which, he contended, various branches of the United States' government had begun to draw upon what he terms 'the therapeutic ethos' as they attempt to re-engage with an alienated populace. By the term 'therapeutic ethos' Nolan referred to



a range of ideas and concepts that he regarded as being prominent in United States culture, such as an emphasis on the emotional life of the self, that had their origins in therapeutic approaches, particularly what is termed ‘humanistic psychology’, that had come to prominence during the 1960s. Nolan contended that this therapeutic ethos was providing both a legitimating narrative for the activities of government, and was shaping the actual practices of branches of the state. Thus, to give one instance he cites in *The Therapeutic State* (1998), schools in the United States increasingly stress their pupils’ emotional well-being and self-esteem, and employ various professionals such as counsellors and child psychologists. It is within this context that Nolan argues that the United States drug courts need to be interpreted. These drug courts can be regarded as constituting the institutionalisation of the therapeutic ethos within the United States’ criminal justice system.

I was attempting to develop an empirical study in the United Kingdom that would link into the wider ‘therapy and society’ literature, when I became aware that drug courts had been introduced into Scotland. Having read Nolan’s *The Therapeutic State*, this appeared a good opportunity to undertake a piece of research that would allow me to engage with this broader theoretical literature that I was interested in. In beginning this study, I had a strong sociological background, but was less aware of the debates that had been central to criminology in recent years.

Thus, in developing my research design, I had very clear ideas concerning the data that I wanted to collect, and definite expectations regarding what that data would tell me. In designing my research, I found the work of four authors to be particularly useful, namely Blaikie (2003), Layder (1998), Punch (1999, 2000) and Yin (1993, 1994). In broad terms, I designed my research as case studies of the two currently existing pilot drug courts in Scotland –the Northern drug court and the Southern drug court. As Bechhofer and Paterson (2000) observe, the term ‘case study’ is often used in an inconsistent manner by researchers. In this respect, I adopt the definition offered by Yin, which is worth quoting in full. In Yin’s terms, a case study:

- Investigates a contemporary phenomenon within its real-life context, especially when
- the boundaries between phenomena and context are not clearly evident [...]
- copes with technically distinctive situations in which there will be many more variables of interest than data points, and as a result
- relies on multiple sources of evidence, with the data needing to emerge in a triangulating fashion, and as a result
- benefits from the prior development of theoretical propositions to guide data collection and analysis (1994: 13).

Case studies are often regarded as being synonymous with a three-way combination of interviewing, observation and documentary analysis. Whilst these were the primary data collection methods used in my study, it should be recognised that this does not necessarily follow: 'One could even do a valid and high-quality case study without leaving the library and the telephone' (Yin, 1994: 11). The decision on what data collection methods to use should follow from the identification of the type of data required by the study.

Aside from the methodological texts mentioned earlier, three literatures were most prominent in terms of influencing my decisions regarding the data I wanted to collect, namely Nolan's work (1998, 2001, 2002a, 2002b), the therapy and society literature (For example: Bellah et al., 1985, Berger, 1965, Gross, 1978) and writings about 'Therapeutic Jurisprudence' (For example: Casey and Rottman, 2000, Finkelman and Grisso, 1996, Hora, 2002, Winick, 1996). Therapeutic jurisprudence is a normative lens for examining the law, focusing on the law's actual and potential therapeutic and non-therapeutic effects, which has been linked by a number of authors to drug courts and which I had initially come into contact with through Nolan's work.

Broadly, my aim in studying the Scottish drug courts was to describe and explain their philosophy or approach, meaning by this the way in which offenders, their offending and their drug use, were conceptualized and responded to within these programmes. Following from this, in designing the research, I wanted to explore how the staff working in the drug courts discussed these issues, as well as exploring the concepts and assumptions that were both explicit and implicit within the practices of these programmes, and in the way in which they were presented to external audiences. At this point, I was not intending on interviewing any of the offenders sentenced to drug court orders, as it was the views of the staff that were of interest to me.

In designing the research I was expecting that the approach of the two Scottish drug courts could be interpreted in terms of the theoretical literatures that I was interested in. This was in the sense, to give three examples, that I expected therapeutic professionals to be playing a dominant role within these courts, that concepts and ideas derived from therapeutic approaches, such as the importance of raising the self-esteem of offenders, would be prominent in how those sentenced to drug court orders were treated and understood, and that a 'disease understanding' of drug use would dominate the two courts.

Data Collection Methods

With respect to the subjects that I intended to explore, the classic case study combination of interviews, observations and documentary analysis appeared to be appropriate to my research. Interviews with members of staff at the drug courts would give me access to their perspectives on the drug court's practices and procedures, and their view of the rationale underlying these. Observing important events in the offenders' progress through a drug court order, specifically the reviews and pre-reviews, would allow me direct access to the actual practices of the court, and enable me to compare and contrast these with the views of the staff. Finally, analyzing the documents used in the two courts, and produced to present these

programmes to external audiences, would, respectively, give me access to an authoritative internal narrative(s) about the two courts, and access to the way in which, it is intended, these drug courts were to appear to external audiences.

Interviews

There are many different ways of dividing interviews into different types. However, 'the main dimensions of this variation are the degree of structure in the interview, how deep the interview tries to go, and the degree to which the interview is standardised across different respondents and situations' (Punch, 1999: 175). One of the perceived benefits of the unstructured, qualitative type of interview is a flexibility which enables the interviewer 'to accommodate questioning to what you [the interviewer] are learning and to what the interviewee's know [which] keeps the results fresh and interesting' (Rubin and Rubin, 1995: 14). I wanted, as far as possible, to retain this openness, allowing myself to respond and follow up new topics that arose during the course of the interviews with the drug court's staff. However, from my prior reading and theoretical interests I also had a range of topics that I wanted to ensure were discussed. For these contrasting reasons, I decided to use a semi-structured approach. In using the term 'semi-structured' I follow the account of such interviews offered by Bryman, where he notes that '[q]uestions may not follow on exactly in the way outlined on the schedule. Questions that are not included in the guide may be asked as the interviewer picks up on things said by interviewees (2001: 314). Although I identified a number of such topics in advance, in designing the interview schedules I included a number of open questions, encouraging interviewees to frame subjects in their own terms and to raise topics that they perceived as being of importance.

In terms of who to interview, I wanted to ensure that coverage was achieved with respect to members of staff from all the professions central to the working of the two drug courts. Thus, I intended to interview the sheriffs working in the courts along with members of the various professions who constitute the two Drug Court

Supervision and Treatment Teams. In this respect I wanted to ensure the inclusion of criminal justice social workers, nurses and addiction workers along with their respective managerial staff.

Observations

With respect to observations, a number of questions had to be addressed in advance of commencing the research, including what to observe, how long to observe for, the degree to which the observations were to be structured and the role I would adopt during the course of the observations.

In terms of what to observe, decisions were influenced by my theoretical interests, my knowledge of the Scottish drug courts and the principle put forward by Yin that such decisions within a case study should not be ‘idiosyncratic’ as researchers will want to compare their findings with previous research’ (Yin, 1994: 25). A particular feature of previous research into drug courts, including Nolan’s work that had initially kindled my interest in these programmes, has been a focus on the courtroom interactions, particularly with respect to the dialogue between the judge and offender within the reviews of drug court orders. To a lesser extent, undoubtedly due to the fact that such events are not generally held in public, the pre-review meetings between drug courts staff that precede the courtroom reviews have also been a focus of interest. Thus, my intention was to observe the courtroom reviews and, if possible, the pre-review meetings.

A further question with respect to ‘what’ concerns what to observe within the courtroom itself. As Foster puts it, ‘It is obviously impossible to record everything that happens in a particular situation’ (1996: 84). It was anticipated that the drug courts would be busy, with a number of offenders, defence lawyers and court staff present. With just one researcher- myself- I decided to focus purely on the official public interactions in the courtroom that commence when the sheriff entered and concluded when the sheriff left. These interactions take place principally between

the sheriff, the defence lawyer and the offender.

In terms of when, the drug courts did not appear to an informed outsider to change significantly or at least in a predictable way throughout the year. To take a contrasting example which will help explain what is meant here, if observing a school, depending on what one was interested in, one would have to be aware of the cycle of terms and holidays throughout the year and how these impact on the social relations and activities within the school. Unlike this example, the drug courts do not seem to have any similar predictable cycle. For this reason, aside from being aware of those periods when the usual drug court sheriffs were on holiday, there did not seem to be any particular reason for choosing any one time of the year over another for the observation. Thus the date for the beginning of the observations of the drug court courtrooms could be decided upon for purely practical reasons.

The next issue to consider was how long to observe for. The principle guiding my decision was to observe the drug courts' courtrooms for long enough to cover a number of instances of the standard range of events that take place during the course of a drug court order. Thus a number of instances of the assessment stage of a drug court order, of the sentencing of an individual to an order, of the sheriff praising and rewarding offenders who are doing well on orders and so forth. In other words, instances of all of the anticipatable events on drug court orders. Further, with three sheriffs sitting across the two drug courts, I decided to make sure that this coverage was achieved with respect to all of the drug court sheriffs currently sitting. It was initially decided to observe the Northern courtroom for a period of two months, attending every time this drug court was sitting during this period, then to take stock of the data gathered. With respect to the Southern drug court, only one sheriff regularly sits in this courtroom, and therefore I intended on observing proportionately less reviews.

With respect to the pre-reviews, my intention was identical as with the observation of

the reviews, in that I wanted to obtain coverage of enough pre-reviews to have observed the types of discussions which take place when offenders are doing well on a drug court order, when they are performing poorly, when an order is coming to an end and so forth.

As with interviews, structure is also an important consideration in conducting observations. Indeed, it is often presented as *the* central issue for this method of data collection (Foster, 1996). My observations were designed as being semi-structured. Whilst I wanted to be open to what was taking place in the courtroom, and to try to capture what was being said verbatim, I had decided to focus on certain interactions and, through my prior reading, I was sensitised to the occurrence of certain events, or concepts, such as a 'disease' understanding of drug use and offending. Thus, whilst I did not have a fixed schedule, with predefined concepts I was checking for, my observations could not be said to be unstructured.

The role that I intended to take during the observations, whether covert or known and, linked to this, whether visible or not, are the final issues with respect to observation that will be considered in this section. Some researchers have been so concerned about the possibility of the observer influencing the situation that they are observing that they have rejected any form of observation that involves a visible or known role for the researcher. Thus Webb *et al*, in their famous work *Unobtrusive Methods*, argued that '[n]o matter how well integrated an observer becomes, we feel he is still an element with potential to bias the production of the critical data substantially' (Webb, 2000: 114). These authors even suggest hiding under a bed in order to observe two-person communication (132-133). Most researchers have, though, taken a less extreme position than this and have been guided by more practical and ethical considerations. My intention in terms of observing the drug court courtrooms was to be visible, and not to hide the fact that I was a researcher. At the same time, however, I was not intending on announcing my presence when entering the courtroom, as to do so would be disruptive, and most likely unwelcome. Thus, whilst I expected that some of those present in the courtroom would be aware

of my presence, and of who I was, it was also likely that there would be a number who might not.

Documents

Finally, in terms of designing my research, I intended on analysing a number of the internal documents both produced and used by the drug court staff in the course of their work. Further, I also intended on exploring the way in which the drug courts were presented to external audiences. Newspaper and magazine articles, videos and public lectures appeared likely sources at this stage.

Before considering the process of negotiating access for the data identified, and outlining the nature of the data that was actually collected, I will now turn to the issue of research ethics, which I needed to address before the study began.

Research Ethics

In this section, I will cover both the ethical issues that arose during the planning and during the conducting of my research, rather than returning to this later in this chapter. A researcher should, of course, be reflexive about the ethical basis of their study. In undertaking my study of the Scottish drug courts I adhered to the comprehensive ethical guidelines published by the Social Research Association (2003). In designing the research, certain ethical issues were anticipated as having the potential to arise. One drug court offender commented regarding the courtroom reviews that they are 'Embarrassing. It's alright if it's just you, like it used to be, but now it's an open court, I don't like it at all (Scottish Executive, 2003: 62). The process of moving through a drug court order, undertaking counselling, appearing in the courtroom for reviews and so forth, involves the opening up and discussion of various areas of the offenders' private lives. As far as possible I have avoided including such information, except where this was felt necessary for the purpose of my argument. More generally in all such instances, as with all other data, this data

has been rendered anonymous. Names, locations and, in certain instances, the sex of individuals have been changed. Where other data has been included that would appear to have the potential of identifying individuals, for instance a reference to an offenders place of work, this has also been changed.

The disclosure or the observation of illegal activities was also regarded as a potential ethical issue given the subject matter of my research. It was decided at the outset of the research that such activities would only be disclosed to the police if the activities observed involved the potential or actual harm of children. No such incidents presented themselves to me in the course of my research. Further, no other unanticipated ethical dilemmas were raised during the course of my research.

In order to conduct my research I had to obtain ethical clearance from the ethics committee of the school I have been based in at the University of Edinburgh during the undertaking of my thesis, the School of Social and Political Studies. In addition to this I also received ethical clearance from an ethics committee at the North Town social work department, as well as from an ethics committee from the substance abuse charity at which I interviewed two members of their staff.

Research Access

Interviews with the legal staff from both courtrooms, including the drug court sheriffs, were relatively straightforward to arrange. For the Northern drug court, a phone call to the drug court co-ordinator served to facilitate such access. In the case of the Southern drug court, a letter to the Sheriff Principal for the area received a positive response. Negotiating access for interviews for members of the Drug Court Supervision and Treatment Teams, the non-legal staff employed in the drug courts, was a more convoluted process. Initial formal requests were turned down, and it was only relatively late in the research, and through a senior personal contact, that such interviews were obtained. It was also later in my research that I decided that I would also like to incorporate the perspective of offenders on drug court orders regarding

these programmes. As I came to question my prior theoretical interests, my rationale for focusing purely on the drug court staff receded. Intending on developing a holistic as possible account of the two programmes, it now appeared important to attempt to include the perspective of the offenders on drug court orders.

I initially attempted to secure such access to interview offenders on drug court orders via the Drug Court Supervision and Treatment Teams. However, this did not prove to be possible. I therefore approached all of the non-government agencies that the drug courts refer offenders on orders to, in the hope that they could facilitate interviews for me. The response of these organisations was interesting in itself, as the vast majority of them informed me that any such access would have to be arranged via the drug courts themselves. This could be seen to indicate a certain erosion of independence on the part of these agencies, which had accepted their treatment services being linked to, and funded by, the criminal justice process. Two organisations did, however, respond positively to my request. Unfortunately in one case the two individuals on drug court orders who had been in contact with their services had broken contact shortly before my request. A number of attempts to try to arrange interviews with these individuals were unsuccessful. In the case of the other organisation that responded positively, I was able to secure an interview with one offender on a drug court order.

Conducting observations of the courtroom reviews were straightforward as both drug courts courtrooms are open to members of the public. Whilst I was questioned regarding who I was and what I was doing in the courtroom on a number of occasions by courtroom staff, my right to be there was never questioned. I was also able to obtain access to a number of pre-reviews, facilitated by the sheriffs I had interviewed. The pre-reviews are held *in camera*, and my observation of these was agreed on the basis that I did not take any contemporaneous notes, or discuss the details of any individual offenders' cases.

Research access was not an issue, unsurprisingly, with respect to the documents produced to present the drug courts to external audiences. In terms of the internal documents used by drug court staff, I received a number of these through my contacts with members of the two Drug Court Supervision and Treatment Teams.

Data Collected

Table 1: Summary of Data Collected

Interviewees ⁷	21 individuals;
Observations	148 reviews; 5 pre-reviews; a comparative observation of other sheriff courts for three weeks;
Documents and other sources	Drug court manuals for each court; assessment forms; a public lecture; Scottish Executive-funded video; various newspaper and magazine interviews with drug court staff.

Interviews

In terms of interviews, all three of the drug court judges sitting at the two drug courts at the time of the study were interviewed. The drug court co-ordinator at the Northern drug court was also interviewed, as was the team leader at the Southern court. Members of staff from each of the three professions that constitute the Drug Court Supervision and Treatment Teams were also interviewed. Four social workers, three addiction workers and two nurses were interviewed. Managerial staff for these respective professions were also interviewed, including two senior nurses and one senior social worker (who had managerial responsibility for addiction workers). On

⁷ I use the term 'interviewees' here as a number of individuals were interviewed on more than one occasion.

a number of instances, for example with the sheriffs, the same individual was interviewed on more than one occasion. Two members of staff at a non-government agency to which one of the drug courts referred offenders were also interviewed. One offender currently on a drug court order was also interviewed. Finally, for the purposes of comparison, an interview was also conducted with the team leader of a DTTO scheme in an area of Scotland where there was no drug court based. All interviews were recorded on tape and transcribed as soon as possible after the interview had finished. On one occasion, the tape recorder broke during an interview with one of the sheriffs. I took contemporaneous notes during the interview, which were then added to from memory on the train journey back to my office.

Observations

With the courtroom reviews, during the initial two-month observation period a total of 103 reviews in the Northern drug court were observed. After the conclusion of these two months, a quantitative summary was made of the different types of events that had been observed. I decided that at this point that a comprehensive coverage of the range of events that take place on a drug court order had been achieved, this being for both sheriffs then sitting in this court.

In terms of the Southern drug court, only one sheriff regularly sits in this court, and therefore it was decided to observe proportionally less reviews. In total 45 reviews were observed in this courtroom. A quantitative summary of the observations was then made, and a comparison was undertaken with respect to the observation of the Northern drug court, in terms of the types of events observed. From considering this data, I decided that the range of anticipated events had also been covered.

During the observations I attempted to take verbatim notes of the proceedings. It was rarely possible to achieve full coverage of everything said in the courtrooms. Background noise, with other people holding conversations whilst the proceedings were taking place, poor acoustics, strong accents and the sheer difficulty of writing at

the same pace that people speak meant that some details were inevitably lost.

Table 2: Stage Reached in DTTO

	Northern	Southern	Total
1 st review	3	2	5
2 nd review	2	0	2
3 rd review	2	1	3
4 th review	2	0	2
5 th review	4	0	4
6 th review	1	0	1
7 th review	1	0	1
8 th review	2	0	2
9 th review	1	0	1
10 th review	0	0	0
11 th review	1	0	1
12 th review	0	0	0
13 th review	1	0	1
Unclear – Early	2	2	4
Unclear – Middle	1	3	4
Unclear – Late	11	6	17
Order ending	7	1	8
Post Order	0	2	2
Not mentioned	39	13	52
Total	80	30	110

However, in the course of 148 reviews that I observed, I managed to capture both the

nature of the regular interactions in the courtroom, including the roles taken by all of the important actors, and the ethnographic detail that conveys these interactions particular flavour. I read over my observation notes on the train journeys back to my office from the two courts after each sitting, adding anything I could from memory. There was no indication during the research that the dates I had selected for the observation coincided with an atypical period for either of the drug courts.

For those offenders on drug court orders at the time of my research at the Northern and Southern drug courts, table 2 summarises the stage that the orders had reached at the time of observation. Whilst the two sheriffs in the Northern drug court frequently made reference to the actual number of the review, this was not the case with the sheriff sitting in the Southern drug court. However, in both courtrooms it was often possible to discern from the discussion what general stage the order had reached. ‘Post Order’ refers to the practice of the Southern drug court sheriff, who would sometimes defer sentence on offenders in order that she could ‘keep an eye’ on the offender after the order had come to its conclusion. On eight occasions I observed drug court orders coming to an end, either ‘naturally’, when the duration of the order had elapsed, or through the actions of the sheriffs, bringing an order to a premature end either for positive or negative reasons. The offenders appearing in the drug court during my observations were overwhelmingly male, with only 8% of offenders appearing in the two pilot drug courts during the period of observation being female.

Table 3: Offenders Appearing by Sex

	Male	Female	Total
Northern	98	5	103
Southern	39	6	45
Total	137	11	148

In terms of the role I took on as a researcher during this observation, no attempt was made to adopt a fully covert role. I sat in the public gallery of both courtrooms with a clipboard and pen, and did not hide the fact that I was taking copious notes.

However, the drug courts sittings are public and open to any one to view. Because the proceedings were public, I did not feel that if I had decided to conduct covert research in this context any ethical issues would have ruled this out. In this respect, I did not announce my presence in the courtrooms (indeed doing so would have been disruptive and unwelcome) and many of the actors in the courtroom would have been unaware or uncertain (uninterested?) regarding my presence. I also found myself, initially unconsciously, attempting to minimise my presence in the courtrooms. My intention here was to create as small an effect on the proceedings as possible in order to observe what would normally take place within the drug courts courtrooms. As Foster comments: 'Researchers who are conducting their work openly adopt a number of techniques to become unobtrusive in the setting and minimise reactivity. They often pay attention to their own physical position in the setting' (1996: 70).

Indeed, without consciously reflecting on this, I had done precisely this. In the courtrooms, I sat at the back of the public galleries, as far away as possible from anyone else that was in these areas. The offenders always sat as near as possible to the exits out of the courtrooms as they could without sitting next to other offenders whom they did not know. Interestingly, as well as this positioning of myself in the public galleries, I also found myself adopting a tactic mentioned by King, an author whose work I had not read at this stage. King mentions that during research with infants 'I avoided eye contact; if you do not look you will not be seen' (cited in Burgess, 1984). Similarly, I avoided eye contact with others in the courtroom and also remained relatively still, making myself as inconspicuous as I could.

So, how did the other people in the courtroom view me? I have only a limited amount of evidence in this respect, which I will discuss now; it perhaps is worth noting, though, that for the majority of people present in the courtroom, I was probably of no interest whatsoever. On three occasions during the period I was observing, I was asked who I was by the courtroom security staff. On one of these occasions, I was asked if I was a journalist. On all three occasions, the answer that I was a student seemed to satisfy their curiosity, and I was asked no further questions.

On only one occasion did an offender in the public gallery address me. On this occasion they were the only offender being called during that sitting. He turned to me and asked 'what are you up for?' obviously making the assumption that I was in the same situation as himself. On being told by me that I was a student he expressed vague amusement then turned away. Indeed, being male, thin, white and in my late twenties, characteristics shared with most drug court offenders, it was understandable why this offender made this assumption. The two further pieces of evidence I have in this respect relate to the drug court sheriffs. During an interview with Sheriff Wallace, I mentioned an incident that had occurred the day before in the courtroom where he had been presiding. He responded by saying 'oh, were you there?', indicating that he had not been aware of my presence at that time. Conversely, at the end of the first ever sitting I had been present at in the Southern drug court, I was surprised to be addressed by the sheriff from the bench at the end of the sitting. Sheriff Palmer asked me who I was. After I informed her that I was a student from the University of Edinburgh interested in drug courts she told me to 'spread the good news about the drug courts'. I had assumed that she had been unaware of my presence in the courtroom.

So what does this add up to? Perhaps all that can be concluded is that my research role did not fit into either a simple covert/overt or visible/invisible dichotomy. Rather I was constituted as something different to those present in the courtrooms at different times, and my status for certain people changed as the research progressed. Thus, for instance, whilst Sheriff Wallace had been unaware of my presence on that occasion mentioned, on a couple of subsequent occasions, it was clear that he knew I was in the courtroom.

A total of five pre-reviews were observed, three of these being in the Northern drug court and two in the Southern drug court. One aspect of the agreement to gain access to observe these was that I would not take any notes, and would not discuss the details of any individual offender's case. After the sittings, though, I wrote up from memory the main features of the *process* of these pre-reviews, focusing on such

aspects as who spoke, when, to whom, how often, who instigated interactions, whether the interactions were formal or informal and so forth, avoiding any details relating to the individual offenders.

Documents

In terms of the documents internal to the two drug courts that were obtained for this study, the most important have been the two drug court manuals. These documents constitute guidelines, information, advice and prescriptions for the staff working in these two programmes. In addition, data has also been collected from a variety of other media. In 2002 a video was produced by the Scottish Executive entitled *Drug Courts in Scotland* (Scottish Executive, 2002a), which focused on the introduction of the Northern drug court. *Drug Courts in Scotland* has both an informational and promotional purpose. Primarily consisting of 'direct to camera' interviews with staff working in the Northern drug court, this video has also been fully transcribed and analysed. I also attended and took notes at a public lecture on the subject of the Scottish drug courts given by one of the drug court sheriffs. Interviews given by those working in the drug courts, primarily the sheriffs, to various newspapers and other publications have also been collected and analysed.

Data Analysis

All data that were collected during the study were word processed before being imported into the NVivo qualitative data analysis software package. NVivo was then utilised to help facilitate the analysis of this data. An exception to this was with respect to the analysis of policy documents, the findings from which are discussed in the following chapter. An initial attempt to analyse these policy documents with the help of NVivo led to focusing too much on the detail of these documents, rather than drawing out the broader themes.

Data analysis was begun as soon as possible in the study, immediately after the first

data had been collected. The theoretical interests that had influenced my decision to study the Scottish drug courts guided my initial data analysis. Specifically, I tried to operationalise Nolan's work and the Therapeutic Jurisprudence literature, and use the concepts and practices identified as important in those literatures to interrogate my data. The attempt to operationalise these literatures proved difficult in the first instance. Nolan's work and the Therapeutic Jurisprudence literature are interesting and lively but tend to be relatively unsystematic, and are often suggestive but somewhat vague in their use of concepts and in their presentation of their findings. To give one example in this respect, the proponents of Therapeutic Jurisprudence refuses to define what is meant by 'therapy', preferring to operate with a 'common sense' understanding. However, I persevered and tried to identify what appeared to be the central concepts and ideas used by these various authors, then used these to analyse my data. I then wrote up my findings. In neither case, however, did my findings in this respect prove particularly illuminating, either of the drug courts I was studying, or the literature I was using. In both cases there was evidence of the types of practices and concepts that Nolan and the therapeutic jurisprudence literature had highlight with respect to the United States drug courts. However, these were often only occasional occurrences, or only certain aspects of the programmes I was researching. Using these prior theoretical elements in this way did not help me to understand what my data as a whole was telling me about the Scottish drug courts. My analysis at this point was saying little more than 'the drug courts are a bit like this, and a bit not like this', failing to provide a picture of the Scottish drug courts in their own terms.

Thus I had to re-approach my data, and produce an understanding grounded as far as possible in this actual data. Crucial to facilitating such an analysis was my decision at this stage to conduct a study of developments in Scottish policy in the years immediately prior to, and following, the introduction of the Scottish pilot drug courts. This was contrasted with, and complemented by, a range of broad criminological attempts to map the present. Developing an analysis in terms of these two poles, the local context and wider criminological accounts of the present, proved

fecund. The understanding of the drug courts that emerged from this analysis is, then, both grounded in my data and in the local political and cultural context, whilst engaging with these broader frameworks. The picture of the Scottish drug courts that emerges in my findings, which will be presented in the following chapters, is more complex, messy and nuanced than that which was emerging from my initial analysis. Rather than a single set of linked ideas and concepts structuring the practices and approaches of these programmes, the Scottish drug courts are constituted by a complex, and at times contradictory, relationship between professions, knowledges and practices, within the context of programmes geared towards specific legal aims. Further, the particular relationships within the two programmes are deeply bound up with specific national cultural and political trends, concerns and developments.

Writing Up

The final title for my thesis emerged late in my study, as my theoretical focus changed:

Theory into practice: case studies of the pilot Scottish drug courts

The first part of this title refers to the topic of the study. My thesis explored how a particular criminal justice idea, or policy, found its practical expression in a specific context. This part of the thesis title can also be said to refer to my own intellectual journey through my study, away from prior theory towards understanding actual practice. The second part of the title geographically locates the study, as well as giving an indication of the nature of the actual research itself.

In writing and structuring my thesis, I have adopted what Yin terms the 'Linear Analytic' approach (Yin, 1994). In this approach rather than, for instance, reporting the findings from each of the two case studies individually, a thematic approach has been adopted, with the structure of the thesis being shaped by the themes that proved

to be most important across the two drug courts.

The structure of the findings chapters, then, reflects the important divisions and concepts emergent in my data. In this respect, the interactions between the three main professional groupings within the drug courts, the legal staff, health staff and social work staff, with their attendant knowledges and practices proved central to my understanding of the programmes. The final findings chapter turns to focus on how the offenders sentenced to drug court orders are conceptualised and responded to within the two drug courts.

Before turning to the presentation of my findings from my analysis of the internal relations, knowledges and practices of the two pilot Scottish drug courts, I will initially present my analysis of the policy context within which these programmes were introduced. Thus the following chapter constitutes a study of prominent trends and themes in Scottish policy in areas of relevance to the two drug courts. These trends and themes are crucial to understanding the practice of the drug courts themselves.

Chapter 4: The Scottish Drug Courts in Context

The pilot of the first drug court in Scotland commenced in late 2001, with the second, and indeed only other currently existing court, established the following year. These two drug courts were introduced soon after the opening of the new Scottish parliament, which had seen the Scottish Labour Party form the first devolved government in coalition with the Scottish Liberal Democrats.

The introduction of devolved government in 1999, which had been a manifesto pledge by the New Labour at the 1997 general election, resulted in a significant redistribution of powers between the Westminster and Holyrood parliaments. Whilst eleven key areas were reserved for Westminster, 'including employment, social security, trade and industry', all powers that were not so explicitly reserved, devolved to the Holyrood parliament. This included a number of important spheres of government, including 'health, education, housing, social work and law' (Poole and Mooney, 2005: 30). This division of powers is complicated by a variety of other factors, such as the financial settlement between Westminster and Holyrood and the so called 'Sewell Convention' (See Keating, 2005a). However, the '[p]owers devolved to Scotland are very extensive compared with most devolved or even federal systems, with the notable absence of fiscal autonomy' (Keating, 2005b: 455).

In this chapter I will analyse the relevant trends in policy in Scotland in relation to the introduction of the two pilot drug courts. These pilot courts constitute a new relationship between different agencies in the Scottish criminal justice process with respect to the supervision and management of certain community sentences. Broader trends in community sentences in Scotland have, therefore, been focused upon in this analysis in order to understand how these courts relate to this wider context. In Scotland, criminal justice social workers play a key role in the operation of community sentences and, indeed, are important actors within the drug courts themselves. For these reasons, developments in this profession have also been considered. Lastly, drug courts constitute one attempt to address the perceived

'drugs problem' via the criminal justice process. Thus, trends in drugs policy in Scotland have also been analysed. It needs to be emphasised that this division between these three areas of policy is purely for the purpose of analysis. In actuality these three strands constitute different aspects of an interrelated and overlapping policy field.

The organisation of this chapter reflects this analytical division. Firstly, developments in community sentences in relation to adult offenders will be outlined. In this section some other important new sentencing options, such as Anti Social Behaviour Orders (ASBOs), will also be touched upon. Secondly, and more briefly, criminal justice social work will be considered. Thirdly, policy trends in relation to drugs will be discussed, specifically drugs policy that is linked to the criminal justice process. Community sentences that focus on tackling substance misuse will be covered in the third rather than the first of these sections.

A final section will discuss the broad themes identified in these areas of policy and their relationship to the drug courts. The policy analysis will set a context that will help to illuminate the findings from my analysis of the actual practice of the two pilot drug courts, which will be presented in the following chapters.

In terms of the time period covered in this analysis, the years immediately preceding the introduction of the drug courts and the years immediately following their introduction, when my study of the two courts was undertaken, have been covered. The election of New Labour in 1997 has been taken as a loose starting point of this period and the end of the year 2005, by which time the primary research had been finished, as the end point. However, where significant developments have been identified that preceded this period, such as the introduction of national standards and objectives for criminal justice social work, these have also been referred to.

Community Sentences

In 1988, whilst giving the Kenneth Younger Memorial Lecture to the Howard League for Penal Reform (Scotland), the then Conservative Secretary for State Malcolm Rifkind made the following comments:

There will always be those who commit serious or violent crimes and who pose a threat to society which requires them to be confined for significant periods. Nevertheless there are many good reasons for wishing to ensure that, as a society, we use prisons as sparingly as possible. While the use of imprisonment may be inescapable when dealing with violent offenders and those who commit the most serious crimes, we must question to what extent short sentences of imprisonment and periods of custody for fine default are an appropriate means of dealing with offenders and there is no single answer to that. Prisons are both expensive to build and to run and do not provide the ideal environment in which to teach an offender to live a normal and law-abiding life, to work at a job or to maintain a family. (Scottish Executive, 2004b)

Here Rifkind expresses a number of linked attitudes regarding the use of community sentences. For certain offenders, particularly those who have committed offences involving violence, imprisonment in order to protect the public is necessary. Imprisonment, though, is presented as being both expensive and as achieving little in terms of 'teaching' offenders to return to a 'law-abiding' lifestyle. In contrast, community based sentences are held up as possessing this potential as well as, implicitly, being less expensive than imprisonment. This set of attitudes, including a bifurcation between certain offenders who require to be locked up, particularly with respect to considerations of public safety, and the rest, a focus on the efficiency of sentences with respect to re-offending and a highlighting of the cost of sentences, constitute leitmotifs in policy discourse in Scotland during the period under analysis here.

In 1997, the year that saw New Labour elected to Westminster, some 150,450 offenders had charges against them proved in Scottish courts. Of these, the vast

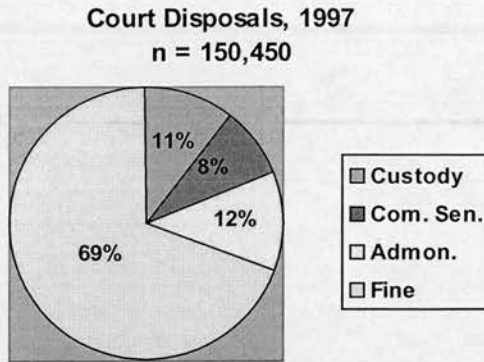


Chart 1: Court Disposals 1997

majority, over two thirds, received a fine. 16,207, or 11%, received custodial sentences. 8% in total received community sentences, with this figure being relatively evenly split between the two available community sentences, 6,814 receiving probation and 5,707 community service (Scottish Executive, 1999). These statistics are taken from the document *Costs, Sentencing Profiles and the Scottish Criminal Justice System 1997*, this being the second year in which this document had been published. The very publication of this document, directed towards criminal justice staff and particularly judges and sheriffs, constituted one indication of the importance being placed on the financial implications of sentencing decisions. In this document the costs of the three most expensive sentences are made clear (6 months prison being £13,085; a probation order £1,570 and community service order £1,400), whilst regional disparities in the use of different types of sentences are also highlighted. These, then, are clearly factors that the Scottish Office/ Scottish Executive would like sentencers to reflect on when reaching their decisions.

One measure that had been devised by the Conservatives in Scotland in an attempt to reduce prison numbers was what is called Supervised Attendance Orders (SAOs). Provisions for these were made in 1990, and the piloting of these orders began in 1992. SAOs constitute an alternative to a custodial sentence for those offenders who default on payment of a fine. Instead of custody the defaulter is required to complete a period of activity defined by the social work department. A significant proportion

of those entering custody in Scotland do so at least in part due to the defaulting on such fine payments:

In 1999, for example, 49 per cent of all female and 41 per cent of all male sentenced receptions into penal institutions in Scotland were as a consequence of fine default (Scottish Executive, 2001c)

Thus, SAOs can be seen to focus on an area of the criminal justice process in Scotland that result in a significant number of offenders who have committed relatively 'minor' offences ending up in custody.

The raft of measures contained in the *Crime and Disorder Act 1998*, the first significant criminal justice legislation introduced by New Labour at Westminster following their election in 1997, have been interpreted by a number of commentators as having a 'populist' and 'punitive' tone (Downes and Morgan, 2002). Included amongst the measures in this bill (which introduced further sentencing options in Scotland) were Antisocial Behavior Orders (ASBOs) and Sex Offender Orders (SOO). The former is not strictly a community sentence, operating in fact under civil law. However these orders have often been interpreted as indicative of a particularly punitive strand in New Labour's policy, and therefore their use in Scotland is considered to an extent in this analysis. ASBOs are essentially focused on using the law to attempt to deal with uncivil behavior, technically defined as 'behaviour which causes or is likely to cause harassment, alarm or distress to one or more people who are not in the same household as the perpetrator' (Home Office, 2007). ASBOs are court-enforced orders that set out restrictions on the behavior that individuals can engage in. The breaking of an ASBO can result in a custodial sentence.

The same year that New Labour introduced the *Crime and Disorder Act 1998* at Westminster witnessed the piloting of Restriction of Liberty Orders (RLOs) in Scotland, provision for which had been made under the Conservatives in 1995

(Scottish Office, 1999a). Such orders are intended as direct alternatives either to custody or to high tariff community sentences, with offenders restricted to, and/or from, defined places for up to two years. These orders are monitored by means of electronic tagging. The use of electronic tagging has been interpreted as constituting a punitive development in community sentences. Garland, for instance, has put forward this view, arguing that amongst a raft of other recent criminal justice developments they can be argued to constitute 'a 'barely sublimated punitiveness' (Garland, 2001: 133). However, the Scottish Executive funded evaluation of RLOs suggests that in roughly 40% of cases these orders were being used as a direct alternative to custody (Scottish Executive, 2000c). Thus, their relative 'harshness' should be judged in these specific terms. Further the majority of offenders interviewed for this evaluation expressed positive views concerning the orders, albeit this was in comparison to what they believed was the direct alternative of a custodial sentence. However, a small minority of offenders did express more negative views of the orders, and the interviews with offenders generally took place at an early stage of the order, before many of the difficulties offenders tended to experience with these orders had manifested themselves. The decision to roll out these orders across Scotland was, though, actually described in terms that emphasized addressing re-offending, rather than any punitive intention:

The Restriction of Liberty Order complements the range of community disposals already available to the courts. It limits the opportunity for repeat offences, offering stability to those trying to break the lifestyle which may have contributed to the crime in the first place.

Electronic monitoring can be used for a range of different offenders and in some cases, can provide offenders with a starting point for breaking the chaotic lifestyles which can so often lead to the cycle of crime. (Jim Wallace, Justice Minister, 30th April 2002)⁸

⁸ Unless otherwise indicated, direct quotations from Scottish ministers in this chapter are taken from the news section of the Scottish Executive's website, www.scotland.gov.uk/News/News-Today.

Further research into RLOs in Scotland is needed. However their punitive nature should not be assumed without exploring their actual use, as well as the perspective of those subject to such orders.

In 1999, just before the first election to the new Holyrood parliament, the policy document *A Safer Scotland* (1999a) was published by the Scottish Office. This document outlined the incumbent Scottish Labour Party's approach to criminal justice, noted what it regarded as its achievements since 1997 and set out its proposals for the future. In the forward written by Donald Dewar, the Secretary of State, the government's approach to crime is described as being based on 'four key principles'. The first of these emphasized the government's focus on protecting the public. The second highlighted the wider social causes of crime, although care was taken in this respect to emphasize that this does not in any sense remove individual responsibility. The third of these principles stresses *efficiency*, specifically in relation to the use of community sentences:

Third, when crime is detected, offenders need to be brought to justice promptly and to be dealt with effectively. This we are doing through a range of actions on efficiency in the criminal justice system and by developing new penalties for the courts to use.

The fourth and final principle gives priority to fairness in the criminal justice process, here with respect to victims and witnesses. The first chapter of *A Safer Scotland* itself is given over to the discussion of measures introduced by the government with the aim of protecting of the public, and here ASBOs and SOOs are listed. The third chapter, which is entitled 'dealing effectively with offenders', covers community sentences. 'Effectively' in this context encompasses the issue of public safety. However, with respect to community sentences the stress is placed on efficiency in terms of reducing re-offending. As with Rifkind's comments cited at the beginning of this section, prison is presented as being reserved for violent and other serious offenders, whilst community sentences are targeted at other offenders:

Community based sentences have a significant role to play within the criminal justice system. For those offenders convicted of serious or violent crimes or multiple repeat offending a custodial sentence may be the only option. However, the Government believe the use of non-custodial community penalties, such as community service and probation, and associated specialised programmes designed to address offending behaviour provides a credible alternative to imprisonment in which both the judiciary and the public can have confidence (Scottish Office, 1999a).

Although not evident in this passage, care is taken throughout this document to couch attempts to address the perceived causes of crime, and to tackle re-offending, in 'robust' language. Thus, the causes of crime are being 'attacked' in the foreword. Or to take another instance of this type of language from a different document, a consultation document on community sentences that predates, and is referred to in *A Safer Scotland*, is entitled '*Community Sentences – The Tough Option*' (1998).

In *A Safer Scotland*, SAOs and RLOs, both originating with the previous Conservative government, are highlighted as actions the government has taken in trying to develop effective community sentences, along with Drug Treatment and Testing Orders (DTTOs), which will be discussed in the third section of this chapter. Looking forwards, the government announced the formation of a multi-agency initiative, entitled 'Getting Better Results', to work on 'the development of agreed criteria of effectiveness for all forms of supervision of offenders in the community and a system to accredit specialised offender programmes' (Scottish Office, 1999a).

The 1999 elections results found the Scottish Labour Party unable to achieve an overall majority in the Holyrood parliament, and a coalition government was formed between Scottish Labour and the Scottish Liberal Democrats. The latter constituted the junior party within this coalition. However, in the formation of the cabinet, the Scottish Liberal Democrats were allocated the Justice Ministry, with the party's then leader, Jim Wallace, assuming the role of Justice Minister. In their manifesto for the

1999 election, the Liberal Democrats had focused on attempting to tackle the perceived root causes of crime:

The best way to fight crime is to tackle its root problems in the community and to concentrate on prevention and detection. (Scottish Liberal Democrats, 1999)

Further, of the four areas that are highlighted under the heading 'Fighting Crime', the fourth focuses on drugs:

Deal with addiction at its roots. We will set up a Scottish Parliamentary Commission to devise a strategy for drug, alcohol, tobacco and solvent abuse. We will make Drug Action Teams more effective, ensure that more treatment facilities are available and increase resources for alcohol counselling services. We will take tough action against drug dealers and press for greater UK resources to stop drugs coming into Britain. We will root drugs out of prisons and provide better drug counselling for prisoners. We will tackle the cycle of drug dependency and crime by developing sentences outside prison which include adequate drug treatment programmes (Scottish Liberal Democrats, 1999) [emphasis in original].

This focus, which in some respects was shared by the Scottish Labour Party, was carried into office when the first period of coalition government from 1999 to 2003 was to witness a raft of measures aimed at addressing 'the cycle of drug dependency and crime', which will be explored later in this chapter.

Aside from this area of considerable activity, however, there were no new community sentences introduced during the first parliament. Rather, existing piloted community sentences were 'rolled out' across the country. 1999 saw funding provided for the extension of SAO nationwide and 2002 the rolling out of RLOs. 2001 saw the Scottish Executive publish a white paper, *Making Scotland Safer*, which gave an overview of the coalition government's perceived achievements at the

mid-point of the parliament as well as its future plans. With respect to community sentences, aside from programmes relating to drugs, the central developments highlighted in this document concerned RLOs and SAOs. Again the aim of developing effective sentences to address re-offending, balanced by a concern for public safety, is a dominant theme:

When crime does take place, it is essential that the offenders are caught and given an effective sentence – one which will protect the public and reduce the risk of re-offending. Different approaches are needed to different types of crime and different types of offender (Scottish Executive, 2001b).

In late 2002, in welcoming statistics that showed a rise in the use of community sentences in 2001/2002, deputy justice minister Hugh Henry commented that:

These figures are very encouraging and reflect the increased credibility community disposals now enjoy with the courts. The Executive has put considerable effort in recent years into the development of community disposals for use by the courts and this has been backed by a very significant increase in the levels of resources made available – an increase of 52% over 3 years. (12th December 2002)

In 2003, some 130,606 offenders had charges proved against them in Scottish courts.

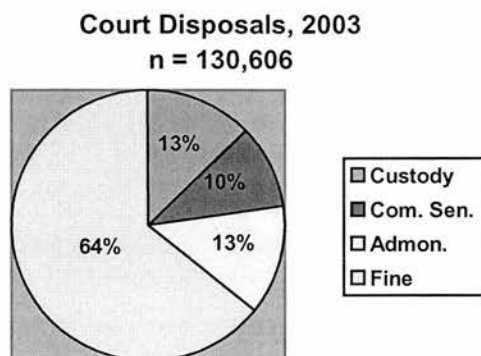


Chart 2: Court Disposals 2003

Of these 13%, or 16,607, received custodial sentences. Thus by the end of the first parliament slightly more individuals were being sentenced to custody both relatively and absolutely than when New Labour was elected in 1997 or, indeed when the 'Lib/Lab' coalition government came to power in 1999 (16,091). However, the use of community sentences had also increased since 1997. This increase has been due to a considerable rise in the use of probation. In 2003 some 8,530 (7%) individuals were sentenced to probation, with 4,584 (4%) sentenced to community service. Indeed, between 1997 and 2003 there had been an absolute fall in the use of community service, more than offset by an absolute and relative increase in the use of probation. This increase in custody and community sentences has been largely at the expense of the use of the fine, with proportionate use declining from 69% in 1997 to 64% in 2003. Probation and community service remained the dominant community sentences, despite the various new disposals that have been discussed in this chapter. Over 900 RLOs were used in 2003, and 600 DTTOs (discussed below), significant and growing numbers, but relatively small in relation to the total number of offenders who received sentences from Scottish courts. By 2003 SAOs were being used quite frequently, with some 3000 SAOs being imposed on roughly 2700 individuals during 2003/2004. A further 1,340 cases were diverted from prosecution, a measure also discussed further below. (Scottish Executive, 2005b, Scottish Executive, 2005c).

Thus, the use of community sentences, particularly probation, increased significantly during the course of the first Holyrood parliament. However, admissions to prison have remained consistently high. Because of this, the use of the most serious disposals available to the Scottish courts, imprisonment and community sentences considered together, have actually increased absolutely between 1997 and 2003 despite an overall fall in the numbers of offenders with charges proved against them by the Scottish courts. The emphasis by the Scottish Executive on the use of community sentences can be seen here to have been effective, but not in the sense intended. The hoped for reduction in the rate of imprisonment has not resulted. This overall increase in the use of the most serious disposals available to the Scottish

courts could be argued to constitute an overall punitive trend. However, this has not been due, for example, to the introduction of specifically punitive measures by the Scottish Executive, or due to punitive directions issued by politicians to the judiciary. A high imprisonment rate has long been a feature of the criminal justice process in Scotland. In attempting to reduce this through encouraging the use of community sentences the Scottish Executive has had the unintended effect of increasing the overall use of the most serious disposals open to the Scottish courts.

The 2003 election witnessed a change in tone in the discourses surrounding criminal justice, particularly from the Scottish Labour Party, and this was to continue into the new Holyrood parliament (Croall, 2006: 192-193). The notion of 'Antisocial Behaviour', which previously rose to political prominence in England, became a focus for the Scottish Labour Party at this point, arguably as an attempt to appeal to purported 'populist punitive' sentiments held by the electorate. The 'social issue' of a culture of antisocial behaviour, composed of such activities as public drinking, petty vandalism, public rowdiness and so forth, was focused upon both by the Scottish Labour Party and by the media. In this framing individuals engaged in such behaviour were depicted as alien others, standing outside of our 'law-abiding' communities. The use of the term 'ned' (which was originally an acronym for Non-Educated Delinquent) was significant in this respect, a derogatory term adopted by prominent Scottish Labour politicians. This term had become a short-hand slang, used to condemn sections of Scotland's poor, particularly the young, much in the same way as words such as 'chav' and 'hoodie' have recently been used in England. The Scottish Labour Party's manifesto commitments included a pledge to extend ASBOs to the over 12s, with these having previously been reserved for those over 16 (Scottish Labour Party, 2003).

The 2003 election saw the Lab/Lib coalition returned to government, albeit with a slightly reduced majority. In the new cabinet, Scottish Labour took the justice brief, with Cathy Jamieson installed as Justice Minister. The Scottish Labour Party maintained its campaign against Antisocial Behaviour into office, with a raft of

initiatives, proposals and legislation in this respect. Particularly significant in this area was the *Antisocial Behaviour etc (Scotland) Act 2004*. This Act introduced a number of measures target at the 'problem' of antisocial behaviour. These included:

- ASBOs being extended to those over the age of 12 (previously they had been restricted to those over 16)
- Powers being allocated to the police to define designated areas whereby they would have the power to disperse groups of two or more individuals
- The police also being given the power to seal up premises (residential or non-residential) for up to three months 'if they have good reason to believe that a person has been involved in antisocial behaviour on the premises within the last three months'
- Local authorities were empowered to apply noise controls to specific areas for up to twenty-four hours a day, seven days a week (Scottish Executive, 2004a).

A populist tone can be observed in certain areas of policy documents published around this period. *Supporting Safer, Stronger Communities* (Scottish Executive, 2004d) set out the coalition government's plans for criminal justice in the second parliament. In the opening chapter, 'protecting communities and preventing crime', a range of measures are outlined under a series of headings beginning with the word 'Tougher': 'Tougher on serious organised crime', 'Tougher on Sex Crime', 'Tougher on Kerb Crawling', 'Tougher on Hate Crime', 'Tougher on Violent and Knife Crime', 'Tougher on Crime against Business'. To take another instance, Cathy Jamieson's forward to a consultation paper on re-offending adopts a populist tone, proclaiming that 'The confidence of ordinary families in our criminal justice system is too low. Our communities cry out to be better served and to be listened to' (Scottish Executive, 2004c).

The vocabulary used here echoes that deployed by prominent New Labour politicians in the United Kingdom's parliament at Westminster, both during opposition and whilst in office. Focusing on New Labour at a national level, Tonry highlights its

‘determination always and on all issues to be seen as tough on crime (2003: 12).

This was embodied in the sound-bite devised by Tony Blair whilst New Labour was in opposition, ‘tough on crime, tough on the causes of crime’, which was notable for managing to squeeze two uses of the word ‘tough’ into one sentence (Downes and Morgan, 2002: 86). However, a distinction must be maintained between rhetoric and practice.

Turning to actual policy developments in the sphere of community sentences in Scotland, and a number of important changes can be identified in the second parliament. Most of these developments cannot, though, be characterised as populist or punitive in the way in which the measures relating to antisocial behaviour can. Indeed the major focus of the document *Supporting Safer, Stronger Communities* is on addressing re-offending, as Cathy Jamieson states in the forward to this document:

This ambitious and wide-ranging programme is united by a common purpose – to reduce reoffending. I am determined that Scotland tackles the cycle of repeat offending which accounts for so much of the misery caused by crime. This is not to say we will not continue to strengthen our efforts to prevent crime and offending. We will. But we cannot afford to go on with our police, courts, prisons and above all our communities burdened by so much repeat offending. Those who offend and offend again must be challenged to end their offending behaviour and return to a law-abiding lifestyle (Scottish Executive, 2004d).

Much of this document is, in fact, focused on measures which aim to change the way in which criminal justice agencies work, both with respect to their internal organisation and in terms of how they relate to other criminal justice agencies and to the wider community, rather than on introducing new types of sentences. The aim of these various measures is to attempt to ensure an overall more effective and co-ordinated drive to address re-offending.

One significant development with relevance to community sentences was the setting up of the Risk Management Authority, which was established under the *Criminal Justice (Scotland) Act 2003*. Although specifically set up to help manage this risk of serious sexual and violent offences, the Risk Management Authority has the more general functions of researching and establishing best practice and accreditation with respect to the risk assessment of offenders in the Scottish criminal justice process. Its establishment and role can be seen as an important instance of the influence of discourse of risk and public safety in relation to criminal justice in Scotland, the developments characterised as the New Penology by Feeley and Simon (1994), whereby the expert judgement and discretion of criminal justice professionals can be seen to be displaced by the use of 'objective' risk-assessment tools. One new order has been introduced in relation to the setting up of the Risk Management Authority, the Order for Lifelong Restriction (OLR). If an offender meets certain criteria after the undertaking of a Risk Assessment Order, which constitutes a 90-day adjournment of a case to assess the risk an individual would pose to the public if remaining at liberty, then an OLR is automatically triggered. These individuals are then subject to a Risk Management Plan for the rest of their life. These OLR were available to the High Court from 2006.

Two other developments in the field of community sentences in the second parliament are notable here. Firstly, and following from the establishment of the drug courts themselves, two other specialist courts were piloted during this period. Two youth courts were introduced, one beginning its pilot in Hamilton in June 2003 and one in Airdrie in June 2004 and a Domestic Abuse Court Pilot was set up in Glasgow in October 2004. The use of these three different types of specialist courts, is highlighted by the Scottish Executive as a particularly innovative feature of its policies:

We are at the forefront of piloting the use of specialist courts to address particular categories of offending that damage communities – or where the circumstances of the offender are a major factor in his or her offending behavior. (Scottish

Secondly, the 218 centre was established in Glasgow in August 2003, with funding from the Scottish Executive and run by Turning Point, a voluntary organisation active in various areas of social care, in conjunction with the National Health Service. This project aims to attempt to divert female offenders from custody, amid concerns that had been expressed regarding the rapid increase in the use of custodial sentences for female offenders in recent years, and with respect to a cluster of suicides at Corton Vale prison. The average daily female prison population rose between 1997 and 2005 by some 77%, although this was to a relatively low absolute figure of 334 (BBC, 2006). In welcoming the range of measures contained in the *A Better Way* report, which announced the establishment of the 218 centre, Deputy Justice Minister Richard Simpson commented that:

Whilst imprisonment will remain the right option for those who commit serious crimes, the report found that most women in prison pose little or no threat to the public. This is why we must have the right community disposals available to those who need them so that the courts can choose suitable programmes to help these women rather than believing the only option is to send them to prison. These will be tough disposals but they must also ensure that these women address their offending behaviour. (28th February 2002)

Here a number of themes that have reoccurred during this analysis of developments in community sentence in Scotland can be identified: imprisonment for serious offenders; a focus on public safety; community sentences for those who do not pose a serious risk to the public; a focus on community sentences that are effective in reducing re-offending; and a desire to present community sentences as not being a 'soft option'.

In 2005 some 128,400 individuals had charges proved against them in Scottish courts. Of these 15,967 received a custodial sentence, some 12%. However some

16,481 (13%) offenders received community sentences, thus exceeding the total that received custodial sentences. This was the second year in succession that the total

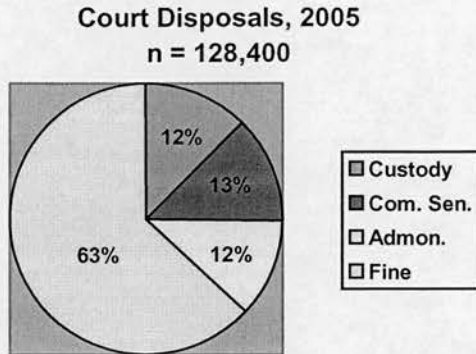


Chart 3: Court Disposals 2005

number of community sentences exceeded the total number of custodial sentences. However, over 80% of custodial sentences were for less than six months, with the average length of custodial sentence being just seven months. The significant majority of community sentences took the form of probation (over 9,000), with community service accounting for 5,300. 1,200 community sentences took the form of RLOs and 800 DTTOs (Scottish Executive, 2007).

It is notable here that since they have become available to the courts in 1999, relatively few ASBOs have been sought and granted in Scotland:

Between April 1999 and March 2005, ASBO applications in Scotland totaled 854. During the same period a total of 559 ASBOs were granted (including those initially granted on an interim basis). (Scottish Executive, 2005e)

The rate at which ASBOs have been sought and granted has increased during this period, although the absolute numbers have remained small. In 2004/2005, 205 ASBOs were granted, a rate of 9.2 orders per 100,000 households. This compares with a higher rate in England and Wales, of some 12.3. It is also notable that a

Scottish Executive document published in November 2005, proclaiming the government's actions against antisocial behaviour, was unable to report the use of any parenting orders, a measure that has also been regarded as punitive by some commentators (Scottish Executive, 2005d). In the Scottish Executive funded study into the use of ASBOs, *Use of Antisocial Behaviour Orders in Scotland* (Scottish Executive, 2005e), one reason suggested for their low usage has been the lack of support for ASBOs amongst courts and legal professionals.

The dominance of short-term prison sentences would again suggest that the Scottish Executive's emphasis on the use of community sentences for offenders who do not constitute a significant risk to public safety has not been entirely successful. The fact that despite this high rate of short-term sentences, and the relatively static numbers of admissions to custody per annum, the use of community sentences has actually increased raises the possibility of unintended net widening.

Certain recurring themes are evident with respect to community sentences in the period analysed in this section. Support for the use of community sentences in relation to certain types of offenders has been consistently proclaimed, with continuity observable in this respect from the comments of Malcolm Rifkind through New Labour's election and the two Lib/Lab coalition governments. A bifurcation strategy has been declared, with sexual or violent offenders, and more broadly, those regarded as constituting a risk to the public, marked out for custodial sentences. In contrast, the primary theme surrounding community sentences themselves have been the aim of tackling re-offending, with a relatively atheoretical and managerial approach to how this is achieved. There has been little evidence of any reassertion of faith in rehabilitation understood in any broader 'welfarist' sense. The prominence of the 'what works' literature in Scottish policy is particularly significant in this respect. To give one instance, the annex of the *National Objectives and Standards for Social Work in the Criminal Justice System* incorporated a discussion of this literature, which was included as the basis for subsequent criminal justice social work practice (McNeill and Whyte, 2007: 4-6). The issues of cost and efficiency

have been constants in this respect, with community sentences regarded as potentially positive on both counts vis-à-vis custody.

The initial period after New Labour's election and during the first parliament witnessed a degree of innovation with respect to introducing new community sentences. DTTOs and RLOs were introduced and SAOs rolled out. The first parliament also, as I will detail below, saw a particular focus on developing community sentences that were directed at attempting to break the purported link between drugs and crime.

The rolling out of RLOs, and the raft of measures introduced in the *Antisocial Behaviour (Scotland) Act 2004* would suggest a punitive turn in policy at the beginning of the second parliament (Croall, 2006). Indeed a desire to ensure that community sentences are not perceived as 'soft options' is evident throughout the period analysed, and particularly associated with Scottish Labour politicians, echoing Tony Blair's 'Tough on the causes of crime' rhetoric. RLOs have been utilised to a significant extent by Scottish courts, although constituting less than 10% of community penalties by 2005. However, further investigation is necessary into the use of RLOs, and how those on their receiving end perceive them, rather than simply assuming their punitive nature. ASBOs and other related measures have not actually had a significant uptake in Scottish courts, thus suggesting that a proclamation of a broader punitive turn in policy, whilst undoubtedly evident, needs careful qualification with a distinction made between rhetoric and legislation on the one hand, and reality/practice on the other.

The introduction of alternatives to custody continued into the second parliament with such initiatives as the 218 project in Glasgow and the introduction of new specialist courts. However, the impetus in policy rhetoric towards the development of more efficient community sentences and their use for non-serious offenders has only partially been reflected in the sentencing decisions of Scottish courts. The use of

community sentences has increased both relatively and absolutely over this period. However, the absolute number of those sent to custody each year has remained relatively stable throughout this period at around the 16,000 mark each year.

During the second parliament, an increased focus on the way in which the criminal justice process works and the ways in which its component agencies are functioning was evident. An important theme in the changes instigated in this respect has been an increased focus on the issue of risk and public protection, and the attempt to objectify such judgements. This is evident, for instance, in the establishment of the Risk Management Authority. Having set the context of the broad developments in community sentences in Scotland during this period, developments in Criminal Justice Social Work are now turned to.

Criminal Justice Social Work

Criminal justice social workers play a key role in Scotland in relation to community sentences, undertaking a similar range of responsibilities as those performed by probation officers in countries such as England and the United States. Criminal justice social workers are allocated the role of 'advising', 'assisting' and 'guiding' offenders who are undertaking community sentences, amongst the other functions which they fulfil (Mackay, 2003: 107). Arguably the most significant change to criminal justice social work since the profession's establishment in 1968, came in 1991. That year witnessed the introduction of the *National Objectives and Standards for Social Work in the Criminal Justice System*. One part of this reorganisation of criminal justice social work was the provision of '100% funding' directly from central government, where previously funding had been provided out of local authority budgets. This, together with the outlining of agreed standards and objectives, was an attempt by the Scottish Office to achieve a more proficient, professional, efficient and consistent criminal justice social work service across Scotland. It also increased central control and accountability (Moore and Whyte, 1998: 13), and arguably the stress on certain objectives entailed an orientation away

from the traditional welfarist priorities of the profession. Specifically, the *National Objectives and Standards* placed particular emphasis on the priority of addressing re-offending.

Criminal justice social work was established by the *Social Work (Scotland) Act of 1968*, replacing probation officers and establishing the profession as part of generic social work services. Together with the Children's Hearing System and the range of rehabilitative programmes offered in Scottish prisons, criminal justice social work has been perceived to embody the 'welfarist' orientation that has characterised Scotland's 'distinctive criminal justice culture' (Duff and Hutton, 1999: 1, Croall, 2005, McAra, 2002). This welfarist ethos, which includes a concern for the welfare of offenders and a belief in both the potential and worth of attempting to rehabilitate them, has continued to shape the practice and rhetoric of Scottish criminal justice long after the crisis that beset such ideas and practices in many other western industrialised countries in the 1970s (Garland, 2001). The particular stress placed on re-offending in the *National Objectives and Standards* can be seen to displace this more holistic concern for the offender. Thus a general concern for the needs of the offender characteristic of earlier generic social work, is superseded by a narrower focus on those 'needs' that are regarded as 'criminogenic', in other words directly associated with offending (Mackay, 2003). The result of these changes has been an attempt to ensure that work with the offender becomes focused on the goal of reducing re-offending.

That the introduction of the *National Objectives and Standards* would appear to have had an actual impact on practice is suggested by the results of a study published in 1998 into their effects. For instance with respect to Throughcare, a disjunction between social worker's focus on re-offending and ex-prisoner's focus on what they perceived as their needs was highlighted:

Whilst offending behaviour was the issue most often identified as being significant by social workers, ex-prisoners

were thought most likely to attach importance to accommodation and employment (Scottish Executive, 1998a)

Or, to take another example, with respect to probation it was found that:

The introduction of 100 per cent funding and the National Standards appears to have succeeded in large measure in focusing probation practice upon tackling offending behaviour and in this way has increased the effectiveness of probation supervision. (Scottish Executive, 1998b)

As discussed above with respect to the broad field of community sentences, this focus on re-offending has continued, and if anything increased, since devolution.

Another notable trend since devolution has been an increased emphasis on the professionalisation of the risk assessments undertaken by criminal justice social workers. Indeed, as McNeill and Whyte comment, the very use of the term 'risk assessment'

now brings with it an expectation that best practice in report writing should involve the use of standardised tools, incorporated routinely into the exercise of SER [Social Enquiry Report] writing to assist the development of evidence-based action plans (2007: 80).

The formation of the Risk Management Authority has been significant in this respect. However, its establishment had been foreshadowed by earlier developments. For instance, in *A Safer Scotland* (Scottish Office, 1999a) the piloting of a framework for the undertaking of such risk assessments was discussed:

A framework for risk assessment has been developed to assist criminal justice social workers help to make informed judgements about the levels of risk individual offenders may pose. The framework is being used to provide risk

assessments to courts, to assist in deciding how best to deal with an offender, and to help manage the supervision of offenders in the community.

A final feature that will be discussed here has been the various moves to reorganise the structure of criminal justice social worker services, and the attempt to ensure that they work more closely with other agencies, particularly the Scottish Prison Service.

Moves to reorganise the structure of criminal justice social work services were mooted in *The Tough Option* (Scottish Office, 1999a). Criminal justice social work, then arranged in 32 local social work services, was described as being 'disaggregated' and lacking 'economies of scale'. In response to this consultation it was announced that from April 2002 the 32 services would be reorganised into 14 groupings (Scottish Executive, 2001b). This reorganisation was proclaimed as facilitating a focus on the efficient reduction in re-offending:

It also opens the way for the service to place a renewed emphasis on effectiveness and the reduction of re-offending which is underpinned by the "What Works" agenda, being pursued in Scotland under the Getting Best Results banner.

However, a further consultation was launched by the Scottish Executive in 2004, entitled *re:duce re:habilitate re:form A Consultation on Reducing Reoffending in Scotland* (Scottish Executive, 2004c). Here the Scottish Executive was clearly moving towards the establishment of a 'corrections agency' that would encompass both criminal justice social work and the Scottish prisons service. However, the emphasis was also on the cultivation of partnerships between criminal justice agencies and non-criminal justice agencies:

It is important that criminal justice agencies work in partnership with other key agencies such as health, housing, education and employment providers to achieve this.

This was a theme that was also stressed in the white paper *Supporting Safer, Stronger Communities* (Scottish Executive, 2004d) published in the same year:

If we are to improve public safety through significantly reducing reoffending rates it is critically important that:

- Criminal justice agencies work in partnership with other key agencies such as health, housing, education and employment organisations which support offenders

Whilst the Scottish Executive dropped plans for such a unified corrections agency, following an overwhelmingly negative response to this suggestion in its consultation (Scottish Executive, 2004c), further reorganisation was announced in 2005 with the formation of Community Justice Authorities. The stated purpose of these Community Justice Authorities is to attempt to make different agencies, include criminal justice social work, collaborate to tackle re-offending in a more efficient manner. These authorities will be responsible for the distribution of criminal justice social work funding and for monitoring and evaluation partnerships between agencies in addressing re-offending. The actual instigation and operation of these agencies falls out with the time period focused upon in this analysis, although the moves towards their formation are significant in themselves.

A number of key themes emerge with respect to the recent history of criminal justice social work in Scotland. A focus on re-offending has become increasingly central to this profession, echoing the increasing emphasis on addressing re-offending in general policy in relation to community sentences. The attempt to render more professional and consistent the way in which criminal justice social workers make decisions regarding risk has also been an important development. Finally, the reorganisation of the structure of the profession has also been notable. Particularly important has been the attempt to ensure that criminal justice social work enters into partnerships with other agencies, both inside and outside the criminal justice process, in attempting to reduce re-offending. Having outlined these developments, I now

turn to the final area of policy considered in this analysis, drugs policy.

Drugs Policy

New Labour's drug strategy was launched in 1998 with the publication of the document *Tackling Drugs to Build a Better Britain*, which set out the perceived nature of the problem and a ten year plan detailing government objectives, actions and partnerships to address the issue (Home Office, 1998). This document built heavily on the strategy outlined by the previous Conservative administration, most recently in their 1995 white paper, *Tackling Drugs Together*. *Tackling Drugs Together* also set out a broad strategy for confronting the problem of drugs which cut across government departments and included education, prevention, enforcement and treatment. Drug Action Teams, multi-agency partnerships responsible for coordinating action against drugs at a local level were set up at this point, and have remained a central focus for New Labour's drug strategy. The Scottish Office published its own response to *Tackling Drugs to Build a Better Britain* in 1999, entitled *Tackling Drugs in Scotland* (Scottish Office, 1999b). *Tackling Drugs in Scotland* was firmly situated within the wider framework outlined in *Tackling Drugs to Build a Better Britain*. In the latter document four key aims were outlined, with specific measurable objectives being identified in each instance:

- Young People - To Help Young People Resist Drug Misuse in Order to Achieve Their Full Potential in Society
- Communities - To Protect our Communities from Drug-Related Anti-Social and Criminal Behaviour
- Treatment - To Enable People With Drug Problems to Overcome them and Live Healthy and Crime-free Lives
- Availability - To Stifle the Availability of Illegal Drugs on our Streets (Home Office, 1998)

These aims form a central focus for the Scottish Office's response. Four key principles are identified as underlying the Scottish Office's attempts to meet these

aims:

Inclusion Drug misuse occurs throughout society, but flourishes where individuals and communities feel marginalised from society and life choices are limited as a result of disadvantage. Deprivation is not the sole cause of drug misuse, but it is an important contributor. Tackling Scotland's drug problem has to be integrated with tackling social exclusion.

Partnership Co-ordinated and collective work on drug misuse achieves far more than independent and fragmented activity. The strategy recognises the benefits of partnership and encourages involvement at every level of implementation through suitable mechanisms and unifying action.

Understanding Scotland needs to base its anti-drugs work on well targeted and accurate research and information, which drives policies and programmes.

Accountability This strategy is clear about what results are required, and who should be charged with achieving them through a process of evaluation. The accountability structures are not ends but means to make a strong impact on Scotland's drug problem (Scottish Office, 1999b) [emphasis in original].

Although present in the UK document, the Scottish document gives greater prominence to the government's inclusion policies here in attempting to address the problem of substance misuse. The second of the principles identified, partnership, is particularly stressed in the Scottish document, with a separate chapter given over to the various agencies that will have to work together in order to achieve the government's aims. The linkage between drugs and crime, whilst not absent from this document, is not given as great prominence as in the UK strategy, where a focus on the drugs-crime link is particularly central. Indeed where enforcement is discussed in *Tackling Drugs in Scotland* this is primarily discussed in relation to drug use in and of itself, rather than as a means to tackle drug related offending. However one of Scotland's action priorities under the 'communities' aim is stated as being to '[c]ontinue [the] development of alternatives to custody through measures - like Drug Treatment and Testing Orders - which provide access to assessment,

information, and appropriate treatment programmes to stabilise drug use and reduce offending behaviour' (Scottish Office, 1999b).

Drug Treatment and Testing Orders (DTTOs) constituted one of two new programmes introduced between New Labour's election and the setting up of the Holyrood parliament that attempt to use the criminal justice system to move offenders into treatment. Provision for these was made in the *Crime and Disorder Act 1998*. DTTO's are clearly based on the United States drug courts although 'nowhere is there any public recognition that this is so' (Bean, 2004: 114). DTTOs constitute a 'voluntary' alternative to custody for drug users where the user is perceived to have a pattern of drug use directly linked to a pattern of offending. Regular drug testing and judicial supervision are central features of the orders, which can last from six months to three years. Unlike Drug Courts, though, with DTTOs there are no pre-court reviews, dedicated judge or dedicated courtroom and there is far less interaction and integration between the judge and those who provide treatment interventions. However, DTTOs require different agencies that work with drug users, from criminal justice, social work and health backgrounds, to integrate their practices to a far greater extent than had previously been the case in the United Kingdom. DTTOs were initially introduced in Scotland in 1999, with a pilot being launched in Glasgow, and a further pilot being launched in Fife in 2000 (Scottish Executive, 2002b). Their eventual roll-out across Scotland was a slow process, not being completed until 2005. It is notable that the decision to further roll-out DTTOs was taken in Scotland in 2001, before the final results of the evaluation of the pilot had been established and published in 2002. The political requirement to be 'seen to be doing something' would appear here to be in conflict with the attempt to establish objectively 'what works'.

A second development that was specific to Scotland was the piloting in 1997 of 100% funded diversion from prosecution schemes, whereby individuals charged with an offence are referred to social work or another appropriate agency rather than the prosecution continuing. Initially, these schemes had no specific target groups of

offenders, other than the criteria that there should be no public interest in proceeding with prosecution. However, after evaluation four specific target groups were identified:

- Accused with mental health difficulties or learning disabilities
- *Drug and alcohol misusing accused*
- Female accused
- Young (16 and 17 year old) [emphasis added] (Scottish Executive, 2000a)

This, of course, introduced a further area whereby drug users could be ‘encouraged’ to enter treatment through their contact with the criminal justice system in Scotland.

As noted earlier, 1999 saw the first elections to the newly established Scottish parliament. The first three years of coalition government witnessed a particular focus on exploring and attempting to develop solutions to the drugs-crime nexus. The focus on this issue was shared by the Scottish Liberal Democrats, as evidenced by the quotation from their 1999 election manifesto cited earlier in this chapter, and by the Scottish Labour Party, echoing New Labour’s prioritising of this issue at a national level (Yates, 2002: 122, Huggins, 2007: 260).

Shortly after the formation of the new coalition government, a piloting of the Arrestee Drug Abuse Monitoring (ADAM) methodology was undertaken. The ADAM methodology originated in, and is widely used across, the United States and constitutes an approach to trying to objectively establish the relationship between drug use and crime through the interviewing and drug testing of arrestees. The results of this survey, undertaken in Strathclyde and Fife found a higher prevalence of opiate use in samples of offenders than that discovered by the use of the ADAM methodology anywhere in the United States (Scottish Executive, 2000d).

Along similar lines, a Scottish Executive-funded retrospective study was undertaken of a sample of those arrested under Strathclyde's Spotlight initiative, which had run from October 1998 until March 1999 and had constituted a high profile 'clamp-down' on drug dealing and possession. As the police themselves undertook this study, access was available to offenders' criminal histories rather than, as in other similar studies, being dependant on voluntary admission of previous criminal activities. The resultant report *The Criminal Histories of 372 Suspected Drug Offenders*, published at the beginning of 2001, explored the various non-drugs crimes committed by the sample of offenders who had been arrested for drug offences. It was against this background of a willingness by the Scottish Executive to fund direct research to attempt to quantify the link between drugs and crime in the opening years of the first parliament that proposals for drug court pilots were to emerge.

The first important development in this respect that I have been able to identify was a report on alternative ways of dealing with drug using offenders submitted to the Scottish Executive by the Convention of Scottish Local Authorities (COSLA) in December 1999. This report noted that the setting up of a drug court in Scotland would be feasible within existing legislation (Scottish Executive, 2001a). This was followed in April 2000 by a four-day visit by the then deputy Justice Minister Angus MacKay to the United States, to explore responses to drug using offenders broadly, but specifically to experience the working of drug courts first hand. After visiting the Queens County, New York, drug court he commented:

The Drugs Court I've seen today has impressive credentials in reducing crime and reducing drug misuse. Early research here shows the courts have some success in preventing re-offending.

Our legal systems are different and we would have to carefully consider how the best elements could fit into the Scottish legal system. But it's certainly an option we shall be exploring further. (17th April 2000)

This visit was followed up in late May/June 2000 by the sending of a COSLA researcher to a conference in the United States organised by drug court professionals. Following these exploratory visits, a working group was set up in early 2001 in order to plan for the introduction of a pilot drug court in Glasgow. After an further exploratory visit by one member of the working group to the Toronto drug court in Canada, the working group published its final report in May 2001 (Scottish Executive, 2001d). The Glasgow drug court was established in October 2001, with a second pilot court established in Fife the following year.

A number of other developments took place during this period when the two drug courts were being investigated and planned by the Scottish Executive. The year 2000 saw the publication of the coalition's strategy document on drugs, the *Drugs Action Plan* (Scottish Executive, 2000b). This essentially stated the new coalition government's commitment to the *Tackling Drugs in Scotland* strategy, which had been published the previous year. Again partnership between different agencies in tackling this problem is a key theme of this document, with the third of three sections opening with the statement that:

Partnership is at the heart of both the strategy and the arrangements for implementation. A partnership of all the organisations dealing with drug misuse in Scotland in which each plays to its strengths, knows what contribution is expected, and commits to implementation through joint working (Scottish Executive, 2000b).

The *Making Scotland Safer* White Paper, published in 2001, displayed the Scottish Executive's focus at this period on the drugs-crime nexus with respect to reducing re-offending. The second chapter, entitled 'effective sentences', begins with a concentration on developing effective responses to drug users. Significantly, revealing how central the link between drugs and crime has become to the Scottish Executive's thinking, the majority of offenders are cast as problem drug users:

During the 1990s drug-related crime became a major issue for the criminal justice system. Research confirms that the majority of individuals who offend are problem drug users. It has also been established that many offenders become involved in crime, especially in acquisitive crime, to fund their addiction. Criminal justice agencies have responded by adapting existing disposals to deal with the problems posed by drug misusers, but the scale of the problem has led us to conclude that new disposals are also required which specifically tackle the problem of drug-related crime (Scottish Executive, 2001b).

As noted previously, 2001 saw a further rolling out of DTTOs across Scotland, although full coverage was not achieved until 2005; whilst the 'Know the Score' drugs campaign was also undertaken during this year. The latter was a multi-agency campaign run from May through to September 2001, which aimed at enforcement against drug users, and 'raising awareness of the harmful and complex nature of drug use' (Scottish Executive, 2002c). The multi-agency nature of the campaign was seen as 'reflecting the multi-agency approach under-pinning the Scottish strategy for drug misuse' (ibid).

During 2001 a number of Drug Action Teams began to establish 'arrest referral' schemes in Scotland. Arrest referral schemes constitute an intervention targeted at arrestees where it is suspected that their offence may be drug related. The arrestee is offered advice, assessment and, where appropriate, a referral to treatment services by a trained worker. Unlike diversion from prosecution, DTTOs or entrance into the drug court, there is no formal linkage between such schemes and the actual legal process. However, 'there may be scope to reach local agreement on how participation in Arrest Referral can be used to inform decisions by the Procurator Fiscal on disposals' (Scottish Executive, 2002c). In 2002 the Scottish Executive signalled its support for the development of further arrest referral schemes with the publication of a guide for other Drug Action Teams contemplating setting up a scheme, *Arrest Referral: A Guide To Principles and Practice*.

One other significant development took place with respect to criminal justice drug policy during the first parliament and this had a different focus to that of understanding and tackling the purported linkage between drugs and crime. In 2000 the Scottish Drugs Enforcement Agency was formally established. This agency was directed at tackling serious organised crime, particularly surrounding the importation and distribution of drugs. Policy rhetoric surrounding this agency took a notably 'tough' tone. Deputy Justice Minister Angus MacKay, in welcoming its establishment commented that '[w]e can and must remove the drug menace and those who thrive on it - but we can only do it together' (1st June 2000).

However, it is notable that a certain robustness of tone also surrounded political announcements of the various schemes intended to move drug users into treatment through interventions in the criminal justice process. For instance, when commenting on the roll-out of DTTOs, Justice Minister Jim Wallace observed that '[w]hile these Orders are an alternative to custodial sentences, they are certainly not a soft option for offenders. Sanctions can be imposed for non-compliance' (1st June 2000). A concern that drug-treatment focused community sentences should not be regarded as being soft on crime was also evident with respect to the drug courts. The following comments were made in 2002 on the publication of the six-month evaluation report on the Glasgow drug court:

The drug court is by no means a soft option. Those referred to the drug court undergo a rigorous programme of drug testing and treatment and can be referred back to the courts for sentencing if they break the terms of their order (Deputy Justice Minister Richard Simpson, 14th May 2002)

And, suggesting either a certain cutting and pasting in the Scottish Executive's media and communications department or the use of a crib sheet, the following identical comments were made on the six month evaluation of the Fife drug court:

The drug court is by no means a soft option. Those referred to

the drug court undergo a rigorous programme of drug testing and treatment and can be referred back to the courts for sentencing if they break the terms of their order. (Justice Minister Cathy Jamieson, 6th August 2003)

As noted earlier, the 2003 election saw the return to government of the Lib/Lab coalition government, although this time with a Scottish Labour politician as justice minister. The first two and a half years of the parliament saw less innovation in terms of new programmes or orders to tackle drug related re-offending. One exception in this respect was the publication of *Bail and Remand: The Scottish Executive Action Plan* (Scottish Executive, 2005a). This document, published in September 2005 and at the very end of the period being covered in this analysis, contained plans to include drug treatment and testing as a condition of bail.

Most of the other actions taken in the second parliament constituted an extension, or development of schemes already discussed. For instance in 2005 DTTOs were finally rolled out across the rest of Scotland and in 2006 the drug court pilots were extended. However, the linkage between drugs and crime clearly remained an important issue for the Scottish Executive during this period. *Supporting Safer, Stronger Communities* (Scottish Executive, 2004d) set out the government's plan for the reform of criminal justice in the second parliament. One chapter out of five in this document is given over entirely to the topic of drugs. And again the theme of re-offending is associated with drug use:

To reduce reoffending we must tackle the drug addiction that is so often associated with repeat offending. Drug addiction sits at the heart of many offenders' lives. If we are to improve public safety, our drug strategy must encompass enforcement, education and treatment and rehabilitation. If we are to reduce drug-related reoffending our criminal justice services must assess and manage the addiction problem consistently and appropriately all along the offender pathway, from arrest through sentence, to release.

Taking an overview of the period covered in this section it can be seen that routes into treatment have indeed been gradually introduced 'all along the offender pathway': diversion from prosecution, arrest referral from custody, treatment and testing as a condition of bail, DTTOs (whether undertaken in one of the two drug courts or in a standard sheriff court), and programmes to encourage offenders in prison to enter treatment. Whilst the numbers involved at each stage by the end of the period considered here are relatively small for each individual intervention, for instance 800 DTTOs in 2005, considered collectively a considerable effort has been made to attempt to develop criminal justice solutions to the drug problem. However, these have focused not on enforcement but on coercing, encouraging and cajoling offenders into treatment programmes in order to address re-offending.

The first term of the new Scottish parliament witnessed considerable effort with a focus on the drugs-crime nexus, this priority being shared by both coalition partners. The drug court model was, therefore, introduced to a Scottish context at a point when the Scottish Executive was actively looking for new programmes in this respect. A central theme that has run through drugs policy in this period has been a concern for the way in which government bodies, and non-government bodies, work together in relation to the drugs-crime problem. A focus on encouraging different agencies to work together, whether termed partnership, multi-agency or joined-up government has been a prominent feature. Drug Action Teams, DTTOs and drug courts can all be seen as actualisations of this impetus. All of them achieve this linkage through a focus on re-offending and under a criminal justice impetus. Having considered drugs policy during this period this chapter will conclude with some overall reflections on the wider directions in policy and their relationship to the two pilot drug courts.

Discussion

A noticeable feature of community sentences in Scotland in the time span covered in this chapter has been the robust language of their presentation in policy documents and political rhetoric. Specifically, care has been taken to ensure that community

sentences are not presented as a 'soft option' for convicted offenders, with terms such as 'tough', 'hard' and 'attacking' being frequently deployed. How specific policies will be interpreted and presented by the media, and understood by the wider populace, have clearly been an important concern throughout this period for the successive incumbents in the Scottish Office/ Scottish Executive. However, this does not equate to the 'inflammatory rhetoric' discussed by Garland in his account of strategies of denial (2001). With respect to community sentences, here not including ASBOs, there has been no evidence of the portrayal of offenders as 'alien' others. Nor has there been evidence of particularly punitive developments in terms of the actual programmes themselves. Community sentences in Scotland have not, for instance, been renamed to incorporate the word 'punishment', or, to take another example, there have been no shaming elements introduced into such sentences.

What has been noticeable is the importance of considerations of 'risk' and public protection, at least at the level of policy rhetoric, in the division of offenders between those who are, and those who are not, suitable for community sentences. According with the New Penology, high-risk offenders, particularly those guilty of sexual or violent offending, are allocated to custody whilst low-risk offenders are earmarked for community sentences. That the evaluation of such risks has been largely removed from the judgement of criminal justice staff, particularly criminal justice social workers, also accords with Feeley and Simon's argument (1992, 1994). However, and here departing from the New Penology, there is little sense of community sentences in Scotland being used simply to manage low-risk offenders outside prison.

What has in fact has been central to developments in community sentences in recent years is the search for 'effective' programmes, effective that is in terms of reducing re-offending. In other words the rise of an atheoretical, managerialist attempt to identify such programmes can be noted. This has in fact been a unifying theme across the three areas of policy analysed in this chapter- community sentences, criminal justice social work and drug's policy. That this focus on re-offending has

been unaccompanied by any apparent expressions of faith in rehabilitation in any broader sense, at least at the level of policy discourse, would accord with Garland's brief discussion of the function and role of rehabilitative programmes in his *The Culture of Control* (2001).

Drugs policy has increasingly come to be shaped by this impetus, because drug use, or more specifically heroin, cocaine and crack cocaine use, has been framed as the key criminogenic factor behind a vast amount of acquisitive offending. The 'drugs-crime nexus' came into focus during the first Scottish parliament, indicated by the funding of direct research by the Scottish Executive to attempt to quantify this relationship, including the piloting of the ADAM methodology. Over the course of the two Lib/Lab coalitions, new policies have been introduced as routes into treatment have been established at every stage of the criminal justice process.

A feature of these policy innovations aiming at addressing the link between drugs and crime, and of the wider policies attempt to reduce re-offending more generally, has been the belief that a central feature of what is effective is the coordination and integration of the work of various criminal justice, and non-criminal justice, agencies. This accords with the centrality that the notion of joined-up government as panacea has played with respect to New Labour's policies in the United Kingdom Parliament during this period (Clark, 2002). The attempt to achieve joined-up government in the sphere of drug policy in Scotland has been driven by criminal justice priorities. Commenting on New Labour's crime control policies more generally, Solomon *et al* have noted that a central assumption underlying these has been that 'the effective management of crime requires the various criminal justice agencies to expand into areas of policy not historically considered part of their remit' (2007). This broader development has given rise to concerns about the apparent 'criminalisation of social policy':

Social issues such as homelessness, poverty, unemployment and drugs are prioritised on the policy agenda because they

are seen to cause crime and disorder, rather than as important public issues in themselves (Duke, 2006: 413-414)

Focusing on DTTOs, and from a reading of policy in this area, Barton has argued that the integration of 'criminal justice' and 'health' agencies within these programmes leads to the displacement of the traditional concerns and practices of the latter by the former (Barton and Quinn, 2000). However, how such trends in policy actually play out in practice does not seem to have been sufficiently explored.

The pilot Scottish drug courts accord with, embody and even in some respects extend the trends emphasised in this section. The decision to pilot these courts has a strong instrumental and pragmatic component to it. At one level, at least, adopting drug courts is another experiment in trying to establish 'what works', whilst being seen to be 'doing something'.

In my review of literature a distinction was developed between the 'what works' literature and the emergence of drug courts in the United States. However, the emergence of these programmes in the United States on the one hand, and their transfer to Scotland on the other, are two separate developments. The former constitutes a grassroots innovation, originating under the initiative of prominent members of the local judiciary, with similar figures playing a key role in their spread across the United States. In contrast the latter development, the piloting of Scottish drug courts, has been a 'top down' initiative instigated by the Scottish Executive. Thus in terms of the rationale for their introduction, and in terms of who the main actor was in instigating the process of adoption, there are in fact considerable parallels between the introduction of the drug courts and other recent developments in Scotland that are linked to the 'what works' literature.

The multi-agency nature of the drug court model also constitutes a central aspect of its attraction, bringing together agencies that have traditionally worked relatively

separately within one institutional space. That the pilot courts draw these agencies together under a criminal justice heading and with the central aim of reducing re-offending neatly accords with other developments in Scotland in recent years, both in relation to drugs policy and across the field of criminal justice.

The pilot courts also target a relatively low-risk population, at least in the sense of the key category for the Scottish Executive, the threat of sexual or violent offending. However, as with other community sentences, care has been taken to ensure that drug courts are not perceived as a 'soft option' for such offenders.

There is considerable accord between the analysis of the pilot drug courts and the relevant policy context that has been developed in this chapter, and the account that Garland gives of the role and function of rehabilitative programmes in *The Culture of Control* (2001). However, Garland's account says little about the actual practice of such rehabilitative programmes, the knowledge they draw upon and the way in which offenders going through such programmes are conceptualised and responded to.

In the following chapters an answer to these questions will be developed as I present my analysis of the actual practice of the two pilot Scottish drug courts. Initially, however, a short chapter will give an overview of the main features of these two courts, thus avoiding having to intersperse my analysis with such information.

Chapter 5: The Scottish Drug Courts

Before turning to present the findings from my analysis of the cases studies of the two pilot Scottish drug courts, it is necessary to present an overview of the staffing, structure and procedures of these programmes. This will serve to introduce these two drug courts, whilst avoiding the need to interrupt the narrative of my analysis with explanations regarding these various features of, and basic information about, them. The information in this chapter is primarily derived from two documents, these being the Southern Drug Court Manual (*SDCM*) and the Northern Drug Court Manual (*NDCM*). These manuals are produced for the drug court staff themselves, and outline guidelines, legal information and procedures for the running of the two drug courts. Where appropriate, this information has been supplemented by details from Scottish Executive funded evaluations of the two courts (Scottish Executive, 2002d, 2003, 2006).

Location and Legislation

At the time of writing, two pilot drug courts have been introduced into Scotland. The first of these, the Northern drug court, was established in November 2001 (*NDCM*, 2003). The Northern drug court is based in a dedicated courtroom in the North Town Sheriff Court. This large sheriff court, reputed the busiest court of its kind in the whole of Europe, is situated in the centre of North Town, Scotland's largest city. The second Scottish drug court, the Southern drug court, was established in the Southern area in August 2002 (Scottish Executive, 2003: 2). It is peripatetic, moving between two locations during any one-week, although it is primarily located at the Central sheriff court (two days each week), whilst also operating for one day a week in Smallburgh. Due to this movement, no dedicated courtroom has been allocated to the Southern court. Both drug courts have had the duration of their pilot periods extended twice, with the most recent extension for both programmes due to end in 2009.

The rationale behind the location of the two pilot drug courts is to have one based in a major urban conurbation, this being the Northern drug court, and one based in a non-urban centre, this being the Southern drug court (SDCM, 2003: 1). In the later case, 'non-urban' means outwith a large city, as the Southern drug court actually moves between two 'small' towns, both having populations of roughly 45,000 people. The reasoning for piloting in these different locations is to establish how well these drug courts operate in such contrasting areas of Scotland.

The Scottish Executive initially established a working group in early 2001 to develop proposals for a single pilot drug court, this being what was to become the Northern drug court. The specific remit given to the working group was to 'make proposals...on a model, *within existing legislation* of a drug court and on the arrangements for its operation and establishment in North Town Sheriff Court by the Autumn of 2001'[emphasis added] (Scottish Executive, 2001d: 1). Indeed, reflecting this stipulation, no legislation preceded the establishment of either of the two pilot courts.

However, the absence of the type of sanctions available to drug courts in other jurisdictions, such as the United States, during the course of orders was noted by the working group and legislation to this end was suggested in their final report (Scottish Executive, 2001d: 5). This has subsequently been acted upon. In the *SDCM* it is stated that the 'Criminal Justice (Scotland) Act 2003 gives the Drug Court additional sanctions it can apply to breaches of its Drug Court Orders' (SDCM, 2003: 8). Thus, under this Act the courts were accorded new powers, these being termed 'interim sanctions'. Importantly, these interim sanctions can be applied without the drug court order itself being revoked. The interim sanctions give the drug court sheriffs the powers to impose a punishment of between 1 and 28 days in prison, up to a maximum of 28 days during the course of a single drug court order, and community sentence of between 1 and 40 hours, up to a maximum of 40 hours during a single drug court order.

Staffing and Structure

Both of the drug courts have a dedicated Drug Court Supervision and Treatment Team. These teams are responsible 'for assessment, supervision, treatment and testing' of offenders on drug court orders (SDCM, 2003: 23). Three primary elements are identified in the two drug court manuals as constituting the basis of these teams, namely:

- Criminal Justice Social Workers
- Specialist Addiction Workers
- Medical Officers, nurses and administrative staff.

Numerically, three professions constitute the core of the Drug Court Supervision and Treatment Teams. The numbers of staff working at the two courts has fluctuated during the course of the pilots, with difficulties having been experienced in filling certain posts. Therefore the following figures should be taken as indicative, as they refer to the staffing levels at the point at which the two drug court manuals that I analysed were written (2003). In the SDCM, 8 criminal justice social workers are identified, along with 6 addiction workers and a total of ten nurses. However, the nurses are at various grades and, therefore, this number encompasses some staff who are in managerial roles. 7 nurses are identified as being at Grade E, the least senior grade (SDCM, 2003: 25). In the NDCM, 8 criminal justice social workers are identified, along with 8 addiction workers and 7 nurses. In addition to these staff, both courts also have a dedicated physician or senior medical officer, various managerial staff for each of the professions, as well as administrative staff.

In the case of both drug courts, the Drug Court and Supervision and Treatment Teams are based in premises close to the actual sheriff court building. In the case of the Southern drug court, this is near the sheriff court that is used most frequently by the programme. In undertaking their various roles, assessing, supervising, treating and testing, the Drug Court Supervision and Treatment Team, utilise 'other contracted service providers as appropriate and as approved by the Court' (NDCM,

2003). These include a range of voluntary and charitable agencies, which provide services such as individual and group counselling for substance users.

In the case of any individual offender being assessed for, or sentenced to, a drug court order a case group is formed from the Drug Court Supervision and Treatment Team. This case group constitutes one criminal justice social worker, one addiction worker and one nurse. This case group then produces an assessment report for the offender in question who has been referred to either of the drug courts. Further, when an offender is actually on an order, this same case group is responsible for presenting a report to the court before each occasion the offender appears for review. In *The Report of the Working Group*, reports and assessments submitted to the court are intended to be 'corporate... reflecting the views of the Drug Court Treatment and Supervision Team' and should 'reflect the joint views of all the agencies involved' (Scottish Executive, 2001d: 19) Whilst the intention is for the majority of decisions to be reached by consensus, the criminal justice social worker is to take the lead role in developing 'the case plan address[ing] omissions and any differences of view' (28). It is the criminal justice social worker, therefore, who collates the report after receiving submissions from their fellow members of the case group.

The Southern drug court has one dedicated sheriff, with another sheriff acting as back up (SDCM, 2003: 1). The Northern drug court has two dedicated sheriffs, each sitting on alternate weeks (NDCM, 2003). At the time of my observation, the Northern drug court was at the later stage of a handover process between the two original drug court sheriffs who had been working in the court since the beginning of the pilot, and the two sheriffs who had recently assumed this role. Amongst other dedicated staff, the Northern drug court has a Sheriff Clerk and court officer, whilst the post of Procurator Fiscal is held on three-month rotation. The Southern drug court also has a dedicated Sheriff Clerk. Whilst in the early stages of the pilot the Southern drug court also had a dedicated Procurator Fiscal, after the incumbent left the post, they were not replaced.

Target Group of Offenders for the Drug Court

Detailed criteria are outlined in both drug court manuals for the group of offenders targeted by the courts. Whilst the wording is slightly different in each case, in essence the target group of offenders is identical. Offenders are in general to be aged 21 years or older, although exceptions to this are possible. However, in the case of younger offenders 'the court would require to be convinced that appropriate treatment was accessible and that the young person was sufficiently mature and well motivated' (SDCM, 2003: 4). The drug courts are described as being equally applicable to both men and women. Stress is placed on the necessity for there to be 'an established pattern of drugs misuse and an established pattern of offending with a direct relationship between the two' (4). In the *SDCM* it is stated that for the offender to be eligible for a drug court order, the offender must be prosecuted under summary procedure. The *NDCM* does not specify this restriction, stating that referrals from both solemn and summary procedure will be accepted. No offence categories are explicitly excluded in either case, although the drug courts are presented as being appropriate to 'a high tariff targeting of cases that would otherwise merit a custodial sentence' (4). Those suffering from mental illness are excluded from both pilot drug courts.

In practice the Southern drug court has been willing to accept a lower age group of offenders than the Northern drug court. The Southern drug court was designed to deal with 'an annual caseload of 150 to 180 new offenders on order' (1), whilst in the case of the Northern drug court it 'was anticipated that the Drug Court might deal with around 300 referrals and impose around 200 Drug Court Orders per annum' (Scottish Executive, 2002d: 3). In both cases actual operating numbers have been considerably lower than this.

Referral to the Drug Court

In the case of the Southern drug court, social work staff sift 'all cases in court to identify those who might be suitable for assessment for the Drug Court' (SDCM,

2003: 5). Procurator fiscal, police or defence agents may also flag cases as potentially suitable. After a plea or finding of guilt, the offender's potential suitability for the Drug Court will be brought to the sheriff's attention. In cases where the sheriff agrees, an assessment period lasting up to four weeks is then undertaken. After the completion of the assessment period, the offender will again appear in front of the original sheriff. If the reports are positive, and the sheriff agrees, the Drug Court will hear the case and decide on sentence (5-7). The Northern drug court outlines a slightly more convoluted referral procedure (NDCM, 2003). In the case of the Northern drug court, a greater degree of stress is placed on the role that the police will play in identifying potentially suitable offenders from custody. The rest of the referral procedure is substantially identical for both drug courts.

The numbers of offenders taking part in the Southern drug court was considerably boosted at the beginning of the pilot by the direct transfer of all DTOs then running in the local area to the drug court. This transfer did not take place in the case of the Northern drug court.

Assessment for Suitability

The standard duration for the assessment period for both courts is for four weeks. During this period the assembled case group will prepare a Social Enquiry Report and a Drug Court Report. The latter comprises 'a Drug Assessment Report, Drug Treatment Action Plan where appropriate, and – with the offender's consent – incorporate[s] a drugs test and its result' (SDCM, 2003: 6). The assessment period has the obvious purpose of investigating the offender's previous experiences with treatment, their pattern of drug use and the relationship between their drug use and their offending. However, the assessment period is also identified as having the purpose of testing the offender's commitment to the order, establishing if they will regularly attend appointments. During the assessment period the offender will have at least one meeting with each of the three members of their designated case group.

Types of Orders Used

The drug courts have the same sentencing powers as any other sheriff courts in Scotland. Four treatment orders are available to the two courts:

- Drug Treatment and Testing Orders
- Probation Orders with a condition of Drug Treatment
- Concurrent DTTO and conditional Probation Orders
- Deferred Sentences, though this is likely to be used only rarely for treatment purposes. (SDCM, 2003: 3)

From 1 May 2002, the drug court sheriffs, as for all sheriffs in Scotland, were able to make a Restriction of Liberty Order concurrently with a DTTO and/or with a Probation order. In a section in the *NDCM* outlining guidelines for criminal justice social workers during the assessment stage of the order, information regarding the perceived differences between DTTOs and Probation orders are stated. DTTOs are described as high tariff, 'demanding and invasive', focusing on drug treatment as the primary means of reducing offending. Enhanced probation orders are described as being suitable for drug users in the early stages of their drug using career, where offenders are younger, and where, whilst 'drug needs are identified', there are also 'other factors associated with offending which would not be addressed primarily through a treatment-based approach' (NDCM, 2003).

It is stated in the *NDCM* that:

The staple diet of the Drug Court will be the Drug Treatment and Testing Order and the probation order.

And, in practice, the most commonly used order in both drug courts are DTTOs. Whilst DTTOs can last for between six months and three years, a norm for the length of drug court order has been established across the two drug court pilots, this being for eighteen months.

Pre-Reviews

'Pre-reviews', or 'pre-court reviews', is the name that is given to the meeting that takes place before the offender on a drug court order attends for their regular appearance in court, this being the 'review'. These pre-review meetings take place in private, and without the presence of the offender whose case is being discussed. In both drug courts the pre-reviews take place on the morning of the day that the offender will be appearing in court for their review, and take place within the sheriff court itself. In the Northern drug court they are held within the courtroom, whilst in the Southern drug court they take place within the sitting sheriff's chambers. It is expected that the case group, via the criminal justice social worker, will provide a report on the progress of the offender to court before these meetings are held.

In attendance at the pre-review are the drug court sheriff, who chairs the meeting, a social worker, an addiction worker, a senior medical officer, or deputy, and the clerk of court. The procurator fiscal has the right to attend these meetings, but did not exercise this right in either court. Similarly, the defence agent of the offender appearing also has the right to attend this meeting to represent their client's interests. In the Southern drug court they did so regularly, whilst in the Northern drug court, in contrast, it was rare for a defence agent to do so.

The pre-review meetings are described in the *NDCM* as allowing an opportunity for the drug court sheriff 'to meet with members of the Supervision and Treatment Team to discuss details of treatment, test results, home circumstances, and family or health issues affecting the offender' (NDCM, 2003). The sensitivity and privacy of such details of treatment and so forth is given as one of the key reasons for not holding these meetings in an open court.

In the information provided for sheriffs working in the drug courts, it is noted with respect to the pre-reviews that:

Unlike the position in normal criminal procedure, each Drug Court Sheriff will preside over a team, which will contribute to the sentencing process in a manner which is unprecedented in this country but is commonplace in those jurisdictions where these Courts operate (NDCM, 2003).

However, it is also noted that:

It should be borne in mind, however, that the ultimate decision in any case will be made by the Sheriff.

It is emphasised in both drug court manuals that the sheriff makes no actual decisions concerning the progress that an offender has made on an order and what actions they are going to take, until after they have heard representation from the defence agent in an open court in the presence of the offender themselves.

Reviews and Sanctions

The pre-review precedes the review itself, which is held within an open courtroom. In both drug courts sittings begin at 2pm and normally a number of reviews will be held in any one sitting. In the case of DTTOs, these reviews are held monthly, whilst in the case of Probation orders they can be held more frequently. Reviews are described as providing 'regular oversight by the court of the response of the offender to the treatment order' (SDCM, 2003: 7). The offender is expected to attend these reviews, with the exception of when an offender has been performing well on an order for a considerable period of time. In such circumstances, at the sheriff's discretion, the review can be held in the offender's absence. Conversely, if the offender is not performing adequately on an order, one course of action open to the drug court sheriffs is to increase the frequency of reviews.

During the reviews themselves, any offender appearing is represented by a defence agent, as is the case in a standard sheriff court. However, a 'pivotal part of the

review is the direct dialogue between bench [the sheriff] and offender' (7). In other words, the sheriff will address the offender within the courtroom, talking to them directly rather than via their defence agent. Representing the case group from the Drug Court Supervision and Treatment Team, a criminal justice social worker is expected to attend the review hearings, and address the court as required.

Depending on how the offender is progressing on an order, the sheriff has a number of ways in which they can express their approval or disapproval of the offender's efforts since the previous review. These can range from verbal expressions of praise or censure to increasing or decreasing the frequency of reviews. In cases where it has been established that the offender is in breach of an order, the drug court sheriff has the normal powers of sanction possessed by a sheriff court. These sanctions include fines of up to £1000, and, in the case of a probation order, the imposition of a period of community service of up to 240 hours. In both cases these powers of sanction can be imposed without the drug court order coming to an end (NDCM, 2003). These standard powers of sanction are supplemented by the interim sanctions, discussed above, which were introduced under the *Criminal Justice (Scotland) Act 2003*. If an offender fails to attend a review hearing, the drug court has the power to issue a warrant for apprehension.

Regular Testing

A further central feature of the drug court is the regular drug testing of offenders as a key feature of the drug court orders. The Scottish drug courts use dipstick analysis of a sample of the offender's urine in this respect. Dipstick analysis is regarded as being rapid and relatively inexpensive in comparison to other types of testing available. However it is not the most robust testing method. For this reason, dipstick analysis can be supplemented by laboratory analysis, for instance when an offender contests a specific test result. The purpose of the testing is to 'ascertain whether the offender 'has any drug in his [sic] body' during the treatment and testing period' (SDCM, 2003: 50). The standard frequency of drug testing is specified in the *NDCM*

as follows: one test undertaken during the assessment period; two tests undertaken each week during the first month of a drug court order; one test taken a week between months two and five of an order; one test taken per fortnight reducing to one test taken per month from the six months stage onwards. This frequency of testing is to be supplemented by one random drug test a month. However, it is stated that this frequency of drug testing is 'unless otherwise required by the sheriff'.

The *SDCM* is less prescriptive with regard to drug testing, merely stating that at 'the onset of an Order testing will be carried out twice weekly' (2003: 54), with further varying of this frequency being at the 'discretion of the court'. The results of drug tests, with interpretation, are conveyed to the court via the report collated by the criminal justice social worker and through the pre-reviews. 'Interpretation' is stressed as:

Test results need to be interpreted in the wider context of the offender's response to treatment, and should not be the overriding factor on which the treatment process would be determined (NDCM, 2003).

Prescribing

A further central aspect of the treatment approach used in the two drug courts is the prescription of substitute drugs. As stated in the *NDCM*, the major offender group targeted by the drug courts is anticipated to be drug-using offenders who are injecting heroin:

The known pattern of drug-misuse in North Town suggests an overwhelming number of offenders being considered for Drug Court Orders will misuse opiates, especially heroin, and will do so by the intra-venous route (NDCM, 2003).

Due to this, and its perceived effectiveness for such drug users, the prescription of methadone constitutes a central activity of the medical component of the Drug Court

Supervision and Treatment Team. Alternatives, including an abstinence programme, or the use of other substitutes such as buprenorphine, are also offered. A Tolerance Testing procedure is outlined in the *SDCM*, which is used to establish the appropriate dosage of methadone.

Other Treatment Activities

As well as the prescription of substitute drugs, a range of other treatment interventions are also undertaken by the staff of the Drug Court Supervision and Treatment Teams. In the case of the *NDCM*, issue-based counselling is specified as one of the central treatment interventions undertaken by the addiction workers. A central focus of such counselling is relapse prevention, with the addiction worker expected to be

alert for, and to anticipate, the signs of relapse; to identify the cues for relapse (people, situations, emotions) and build strategies to avoid or deal with these cues; and to use social learning from previous experiences, to help the person learn how relapse is likely to occur, and to maximise use of helping services in these circumstances (NDCM, 2003).

In the *NDCM* it is suggested that in the first twelve weeks of an order the offender will have between three and five one-hour counselling sessions a week, subsequently dropping to two hours a week.

As well as individual issue-based counselling, group work is also undertaken by the court staff. The group work programme is described as having three central components. *Behaviour modification*, whereby the group discuss problems and identify effective solutions; *information/learning*, where individuals are identified as needing to acquire useful information either about themselves or about developing skills; and *developing activities and constructive use of time* whereby individuals are shown constructive ways that they can fill their time. On three days a week during

the first twenty-four weeks of an order, 'intensive' group work is to be undertaken. Following this, group work is undertaken 'as appropriate'. In the *SDCM*, no such specification of the frequency of issue-based counselling or group work is offered. Aside from this difference, the nature of these treatment interventions outlined in the two manuals is identical.

Breaches of Orders

Enhanced Probation Orders (EPOs) and DTTOs are statutory orders, and breach proceedings are raised 'in terms of the Criminal Procedure (Sc) Act 1995' (NDCM, 2003). Unusually, in the drug courts the sheriff can 'invite' breach proceedings, which is normally the preserve of the supervising social worker. A conviction for a subsequent offence constitutes an automatic breach of an EPO but does not constitute a breach of a DTTO. In both manuals clear guidelines are set out as to the circumstances where it would be expected that breach proceedings would be instigated. For instance, three unauthorised failures to attend for drug testing will lead to breach proceedings, unless the drug court sheriff gives advice to the contrary.

It is stressed in both drug court manuals that the instigation of breach proceedings is not necessarily to be done with the intention of revoking an order:

The institution of breach proceedings should not necessarily be seen as leading to termination of the order. They can also have a therapeutic function, in encouraging an offender to re-engage in treatment (NDCM, 2003).

Further, the instigation of breach proceedings does not lead to the suspension of the order, or of any treatment activities that are part of the order.

Having outlined these central features of the staffing, structure and procedures of the two drug courts, in the following chapters I will present my analysis of the actual

form and practice of these programmes, based on case study data from both drug courts. In the next chapter, one aspect of the legal side of the drug courts is focused upon. Here, the extent to which the legal side of the drug courts retain continuities with the practices and concerns of conventional sheriff courts is explored and explained.

Chapter 6: Legal Continuity

This chapter will focus on one aspect of the legal side of the two drug courts. In their own eyes the staff working in the legal side of the Scottish drug courts, and particularly the sheriffs, perform a difficult balancing act. On the one hand they are adapting to working within these programmes whilst, on the other, they are attempting to retain their authority and traditional legal concerns. This chapter will focus on the latter side of this equation. Further, the way in which the sheriffs conceptualise the purpose of the drug courts, and therefore why they are willing to make the adaptations that they do in order to work within this context, will be analysed.

In structuring this chapter, the role of the sheriffs will be considered, followed by the defence lawyers working in the courts and the linked issue of adversarial justice. Finally, the importance of the attitudes held by the drug courts' staff in restricting the degree of change in the legal side of the courts will be discussed. Initially, though, I will show how any such analysis needs to extend itself beyond the staff themselves to consider the use of space, time and other aspects of the organisation of the courtrooms themselves. These constitute a crucial component of the legal side of the two drug courts.

The Courtroom

In developing this analysis, Carlen's seminal study of the London magistrates courts, *Magistrate's Justice* (1976), as well as some general insights from the French philosopher, Lefebvre, will be drawn upon. It will be argued that the space of the courtrooms constitutes an important 'actor' in the interactions in the two drug courts, and needs to be incorporated into any such analysis of these programmes.

Lefebvre's *Production of Space* (1991), since its translation into English in the mid-1990s, has had a considerable influence on cultural geography and related

disciplines. Broadly, Lefebvre contended in this work that space should not simply be thought of as an abstract empty container of social relations. Rejecting Kant's view of time and space as ahistorical prerequisites of human sensory experience (Elden, 2004: 185), Lefebvre contended that the experience of both are in fact historically shaped. For Lefebvre, it is necessary to understand space as something that is itself produced. By the term production, Lefebvre intended both a material and mental process, thus implying knowledge as well as material objects (ibid).

Consider the example of walking into a church. For Lefebvre, the cavernous space inside is not simply empty, but intimately bound up with certain types of knowledge. Further, this space is both created by and intimately linked with specific practices. Such a space will, as it were, tell one how to behave within it. It is difficult to subvert or resist such practices without being aware of doing so.

In this section I will consider the space of the drug court's courtrooms in the light of this broad insight from Lefebvre. For the purposes of this analysis of the space, time and organisation of the courtrooms, the Northern drug court has been focused upon. Whilst important differences between the two Scottish drug courts do exist, and will be discussed at later points in this thesis, in terms of this specific issue the conclusions derived from one courtroom are equally applicable to the other.

The Northern drug court constitutes one dedicated courtroom in North Town sheriff court building, the most frequently used court building of its type in Europe. The sheriff court building is situated just outside the centre of the city, on the banks of a large river. Within the sheriff court itself, the drug court is located on the lower floor of the building. In order to enter the sheriff court, unless possessing a security pass, all visitors must pass through a metal detector, with all bags being thoroughly checked. To access the drug court itself it is then necessary to go down one flight of stairs, entering a long corridor. On one side of this corridor are a series of waiting rooms; on the other side are the entrances to the various courtrooms, including the

entrance to the dedicated drug court courtroom. The corridor itself is patrolled by a number of security guards. On most occasions during my observation, these guards were relatively *laissez faire* in attitude, largely ignoring what was taking place around them. At other times, though, they asserted their authority, demanding that everyone move into the waiting rooms rather than stand in the corridor.

The dedicated courtroom, within which the drug court itself takes place, is not particularly imposing. The ceiling is flat and relatively low. The room has no windows. The drug court sheriff enters the courtroom through the door directly to the right of the bench, as observed from the public gallery. Offenders that are brought from custody enter through a locked door situated at the rear of the court. The acoustics in the courtroom were poor and, situated as an observer in the public gallery, it was often difficult for me to discern what was being said. The most important point to make here is that the room, which was being used for the drug court, had previously been a standard sheriff courtroom and no alterations, aside from a small sign on the door, had been made to the layout and organisation of this space in appropriating it for use as a drug court. In order to explore this layout and organisation further I will turn to the work of Pat Carlen.

Carlen's classic study of the magistrates' courts was undertaken in London in the early 1970s (Carlen, 1976). Whilst there are, of course, significant differences between contemporary Scottish sheriff courts and the English magistrates' courts of three decades ago, a number of Carlen's insights still resonate. Specifically, Carlen expertly analysed how the space of the magistrate's court is used to give material form to authority, power, 'superordination and subordination' (19).

Carlen notes how within the courtroom the magistrate's 'bench', the place where the magistrate sits during the proceedings, is elevated above the rest of the courtroom. Carlen argues that this serves to symbolise and, indeed, helps to actualise the dominant position of the magistrate within the proceedings: 'In the courtroom spatial

dominance is achieved by structural elevation, and the magistrate sits raised up from the rest of the court' (21). Further, this elevation also places the magistrate above the interactions between the crown prosecutor and defence lawyer, thus symbolising the magistrate's dispassionate attitude towards these proceedings (Jackson, 1995: 424). In the Scottish drug courts the sheriff is also placed in this elevated position above all other personnel in the courtroom. During the proceedings I observed, the offenders themselves sat, except for those periods when they were in 'dialogue' with the sheriff, at which point they had to stand. Even when standing, though, the sheriff, himself or herself sitting, looked down upon them.

In contrast to the magistrate, Carlen notes that the defendant in the magistrate's court is placed in the dock. She observes that 'the rails surrounding it [the dock] are symbolic of the defendant's captive state' (Carlen, 1976: 21). Similarly during each review in the drug court the offender takes their place within such a dock. This dock also has a rail around it, giving a similar impression of enclosure. During my observation of the pre-reviews in the Northern drug court, which actually take place in this courtroom as well, I sat in this dock. On two occasions my location in the dock was the subject of humorous comment by one of the staff taking part in the pre-review: 'what have you done?'. The implication is clear though; the dock is a space associated with guilt and wrongdoing.

Carlen also highlights the distance that separates the dock from the bench. She notes that of 'all the main protagonists the defendant is the one who is placed furthest away from the magistrate', and 'such distances are certainly greater than those usually, and voluntarily, chosen for the disclosure of intimate details of sexual habits, personal relationships and financial affairs' (23). Again this distancing is echoed in the drug court. Of all persons present in the courtroom, excluding those sitting in the public gallery, the offender is at the greatest distance from the sheriff. Apparently this is not the case in all courtrooms in Scotland where reviews of DTTOs are being heard. In some courtrooms the offender is allowed to sit at the table alongside the defence layer and procurator fiscal, rather than in the dock whilst their review is taking

place.⁹

Before moving on here, it is worth noting a significant difference between the magistrates' courts and the drug courts in respect of the discussion of 'intimate details'. The courtroom reviews, where the offender is present, are preceded in the morning by the pre-reviews that are held *in camera* and without the presence of the offender. The intention is that at these pre-review meetings more sensitive information regarding the offender can be discussed without bringing such information into an open court. However, during my observations of the two Scottish drug courts the sheriff-offender dialogue certainly touched on a number of topics that could be considered personal in nature. In addition to the structuring of space, a number of other aspects of the organisation of the courtroom served to symbolise and actualise power, control and authority. Time is an important issue in this respect.

In the magistrates' courts observed by Carlen, the police effectively controlled the time dimension of the court. It was they who set the cases in sequence, deciding which should go first and which last. Their own short-term interests largely governed the decisions that they made in this respect. For instance a judgement would be made as to whether a certain magistrate would be able to finish a certain number of cases within a certain time period, thus allowing for the court staff to have an early lunch. In the Scottish drug courts, as one sheriff put this, 'the court just happens'. In other words, the sequencing of cases in the courtroom does not appear to follow any specific rhyme or reason.

On each day the drug court sits, the court is scheduled to begin at 2pm. However, never once during the period of my observation did the court actually begin at this

⁹ During an informal discussion with a lawyer who was representing an offender appearing in the drug court I was told that this was the practice in Kilmarnock Sheriff Court. As such reviews are held *in camera*, I have been unable to verify this.

time. As Carlen comments, '[i]n the management of social occasions, time, like place, always belongs to somebody or some group' (25). In the case of the drug courts, it is always the arrival of the sheriff that commences the sitting of the court, and it was always the delay in the arrival of the sheriff that caused the court to begin late. Often this was only fifteen minutes or so, although on a couple of occasions the delay was over an hour. As Carlen comments, 'for the majority of the defendants, the court experience is characterised by long periods of waiting, unpunctuated by any official explanations about the cause of delays' (27). This again echoes the reality of the drug courts. As an observer I waited with the offenders on drug court orders for the court to begin, either sitting at the back of the court or in the corridor or waiting room outside. No member of the drug court's staff ever explained to the offenders the cause of any delays that took place.

The drug courts have also retained the traditional styles of dress used in sheriff courts. Thus the defence lawyers, clerk and procurator fiscal all wear the traditional gown, whilst the sheriffs don both wig and gown. In a recent Home Office funded consultation on courtroom dress undertaken in England and Wales amongst those who worked in courts, respondents, who were overwhelmingly in favour of the retention of wigs and gowns, explained what they regarded the purposes and effects of such apparel as being (Home Office, 2004). Such dress was regarded as lending the proceedings solemnity, dignity and formality. Specifically, the wig and gown emphasised the impartiality and authority of the judge, whilst lending them an 'intimidating' air. This concern for giving judges an intimidating air has, of course, a long history. As Hay notes in his analysis of the nature of a courtroom in Staffordshire in the eighteenth century:

In the courtroom the judge's every action was governed by the importance of spectacle....scarlet robes lined with ermine and full-bottomed wigs in the seventeenth century style, which evoked scorn from Hogarth but awe from ordinary man' (1977: 27)

Interestingly, when courts were being used for different purposes, other than for a conventional trial, it was suggested by the respondents to the Home Office survey that alternative types of clothing would be more appropriate:

Simplicity of dress is more desirable in family hearings, to make them more conciliatory (2004: 20)

In marked contrast to the apparel of the staff in the drug court courtroom, the offenders appearing in the drug court almost invariably dressed informally. Generally they wore trainers, jeans and a jacket, often with a baseball cap or other item of headwear. The latter often became the focus of assertions of control by courtroom security staff, as the offenders were ordered to remove these.

In addition to retaining the uniform of a standard sheriff court, the drug courts also retain many of the traditional forms of address one would encounter in a sheriff court. Defence lawyers, for instance, refer to the sheriff as 'Milady', or 'your honour', as do the offenders. The offenders are referred to by their surname, prefaced by 'Mr'. Indeed one sheriff expressed anger whilst I was interviewing her as to the fact that an offender had used the first name of a member of staff within the courtroom:

Sheriff: He [the offender] came forth and said 'Can I just explain.' Of course he is using the term 'John' which I would like to slap him for.

Kerrin: [laughs]

Sheriff: But that is they way they all talk, they call all their solicitors by their first name. They call their team [the case group formed from the Drug Court Supervision and Treatment Team] by their first name. (Sheriff Palmer)

The drug courts' courtrooms also retain the rituals of the sheriff court, which further serve to emphasise the authority and power of the sheriffs. As Carlen notes with respect to the magistrate, '[h]is entrance to the courtroom is both staged and heralded

(31). As mentioned above, in the drug court the sheriffs enter from a door at the rear of the court as viewed from the public gallery, which is their sole preserve. Their entrance is proclaimed by the clerk who shouts 'all rise'. Everyone in the court is expected to rise to stand until the sheriff is seated. This ritual is repeated at the end of the session, with everyone in court standing until the sheriff has exited through this door.

These various ritualistic and symbolic articulations of power and authority are also accompanied by more direct expressions of control. For instance the sheriffs would demand that offenders who were not standing or sitting at the appropriate moment should do so:

Sheriff: [addressing offender] Sit down Mr Wood [offender was standing up] (Sheriff Palmer¹⁰)

It was rare indeed for the sheriffs to dress up such 'requests' with a 'please'. Similarly, again echoing Carlen (31), offenders were told by the sheriff, or by other court staff, to stop talking, to remove their hats, or not to embrace in the public gallery.

Before I make some concluding comments to this section it needs to be observed that this attempt to create a controlled, ritualised space articulating authority is not something that is simply adhered to by the offenders attending the courtroom. Rather official attempts to control and organise this space were subverted or resisted in a number of ways. In general terms such occurrences were observable in all of the sheriff court buildings I visited during my period of research. Offenders would walk through the corridors of these court buildings clearly displaying their lack of respect for their surroundings, much like a teenage checkout assistant with a bored expression. Thus, they would swagger through the courts' corridors, often in groups,

¹⁰ The name here refers to the name of the sheriff sitting.

sometimes with ipods or walkmans on, loudly greeting friends and acquaintances, not an apparently uncommon occurrence. The waiting room opposite the entrance to the drug court itself would become something of a 'common room' for the offenders in the minutes leading up to the commencement of the drug court, with jokes and gossip being shared. Voices would be lowered or conversations stop when someone in uniform walked past or looked in.¹¹

Subversive behaviour was also observable in other respects. Rather than sitting in the public gallery of the drug court courtroom itself, the offenders would frequently wait outside to be called, in the corridor or waiting room with friends, thus slowing down the operation of the court. On other occasions humour was used. For instance, after a sitting had been delayed for an hour, one offender called from the public gallery 'all rise', causing everyone, police and court officials included, to jump to their feet.

The important point to take from this section is that in setting up the drug courts the standard practices of a normal sheriff courtroom e.g. the rituals, dress and organisation of time and of space have essentially been retained. Thus the 'space' of the drug court courtroom, situated within a sheriff court, is not empty, but filled with expectations, authority and power. This is not to say that it is not possible to attempt to do something different within this space, as will be explored in the following chapter. However, this context needs to be remembered whilst the drug court innovations, such as the sheriff-offender dialogue, are being explored. This is also the case with respect to the pre-reviews, which in the Northern drug court take place within the courtroom itself. The pre-reviews, which involve the sheriff consulting with staff regarding their sentencing decisions, occur in a space associated with the authority and power of the sheriff. And it is to the sheriffs themselves that I will now

¹¹ The response to myself varied in this respect concerning how I was dressed. Of a similar age, sex and build as the majority of offenders (late twenties, thin, male and white) I was largely ignored by them when dressed informally. On the occasions when I was dressed more formally, such as when I was interviewing a sheriff after one of the drug court sittings, I was the object of suspicious glances.

turn.

The Sheriffs

In interviews, the drug court sheriffs were clearly concerned about 'authority', both in the sense of the authority attached to their own position and in terms of that attached to the courts. A central aspect of the concept of a drug court is the attempt to use this very judicial authority for different ends. However, a number of the practices associated with the drug courts also present dangers. For example, and these will be analysed in the following chapter, having the sheriff speak directly, and more personally, to the offender, 'turning a blind eye' to a certain degree of minor offending in the early stages of an order and accepting a degree of 'relapse' into drug use. These departures for the accepted judicial norm, all present risks to the authority of the sheriff and the court. Indeed here one sheriff recounts his view that introducing humour in to the drug court courtroom could have significant disruptive effects:

Sheriff: I mean, I see it. When I even make a joke, or something happens which is genuinely funny and we all have a laugh. Then keeping the court in order after that can sometimes be difficult. People start gathering and talking. And in our small courts its just intolerable. I then have to say 'right. Shut up. This is a court, it is not a cinema.' People are otherwise, I seen them. Guys with arms around their girlfriends. Having the odd snog [kiss].

Kerrin: [laughs]

Sheriff: [mock loud voice] 'What the heck do you think you are doing? This is a criminal court.' So it is a question of balance...All judges are the same. Sheriff Oliver, Richard Oliver. Is probably the least formal of the drug court sheriffs. In that he genuinely is a funny man. And has people rolling about the aisles at times. But then, on the other hand, he is sitting up there with his wig on and gown on his back. (Sheriff Palmer)

Here one aspect of the balancing act that these sheriffs perform is highlighted, and the continued concern regarding order and authority is clear. Referring back to the

previous section, the wearing of wig and gown is offset against the use of humour.

In interview the sheriffs were keen to assert that their authority was unchanged:

Sheriff: And you don't lose your authority. It is still there. You saw the way I talked to them today when I had to.

Kerrin: Yes

Sheriff: I laid it down. If they are rude in court, cheeky, I will sort them out. Put them down in the cells. (Sheriff Palmer)

And this focus was observable in the courtroom as well. Here Sheriff Wallace addresses an offender who had broken contact with the drug court for a number of weeks:

Sheriff: [addressing offender] It is a privilege to be on a Drug Treatment and Testing Order. You have been disrespectful to the court. I am going to keep you on the order. However I am going to impose an Interim Sanction. You are going to spend twenty-eight days in jail.

Here the failure to maintain contact is interpreted as being 'disrespectful'; the court, and the sheriff, should be treated with respect.

Members of the Drug Court Supervision and Treatment Teams could also find themselves the subject of such assertions of authority. Here one member of staff discusses an incident that occurred soon after the instigation of one of the pilot courts where the sheriff actually threatened to jail a criminal justice social worker:

Mark: But I remember, very early on in the drug court. And this hasn't changed, actually. I think this has an impact on us still...[the sheriff] started to give an offender a really hard time for something that wasn't even that offender [the sheriff had mixed two offenders up]. And I got up [to challenge the

sheriff], and she [the sheriff] slated me.

Kerrin: [laughs]

Mark: Threatened to jail me!

Kerrin: [laughs]

Mark: for speaking up. And, unfortunately other social workers were there. And I don't think...they have ever challenged her in court since.

Kerrin: Right [laughs]

Mark: So, unfortunately she will be left with that in court, because they [drug court staff] are a bit 'this is what happens' (Mark Paterson, Social Work)

More generally, though, this threat of incarceration was directed at the offenders:

Sheriff: [addressing offender] We had a long discussion about your situation at the pre-review this morning. This order is an alternative to a custodial sentence. I am not going to let you pass this review. I need to see negatives, particularly with cocaine. Do you want to stay on this order or do you want to go to jail? You have three weeks. (Sheriff Sutherland)

This emphasis on authority was also linked to the sheriffs' desire to portray the drug court as a 'tough' option. In interviewing the drug court sheriffs, and other legal staff, it was clear that they were very conscious of the way in which responses to crime also constitute a form of communication to a variety of audiences. In other words they were aware of the high degree of interest in crime control, its politically contentious nature and the way such responses could be read. One sheriff, for example, referred to an imaginary newspaper headline, which, she believed, would grace the front of the tabloid press if the Scottish sheriffs adopted the practice widespread in United States drug courts of judges hugging offenders:

'Sheriff Palmer hugs big bruising tearaway in the dock'
(Sheriff Palmer)

The sheriffs also made reference to a number of recent high profile and contentious

cases when, they believed, members of the judiciary had been unfairly singled out for criticism by the press.

Within this context it was clear that the danger of the drug court being regarded as a 'soft' response to crime was an important consideration, as stated in the *NDCM* itself:

The Drug Court is at its most basic a court of criminal jurisdiction with the same powers as any other Sheriff court. It is not meant to be and cannot be allowed to become or to be regarded as some kind of soft option (NDCM, 2003).

In presenting the orders as tough, the sheriffs often emphasised the schedule of appointments that the offenders had to meet whilst they were on a drug court order:

they have got this disciplined regime, they have had no discipline in their puff ['breath' meaning life]. All of a sudden they have got to provide urine tests...they have got to attend this that and the next thing, with social workers, addiction workers, co-workers. (Sheriff Wallace)

Indeed, in the *Drug Courts in Scotland* (Scottish Executive, 2002a) video one sheriff argued that, in contrast to the drug courts, prison was in fact the 'soft option':

For many of the people who appear in the drug court, prison, it is the easy option. They can do prison standing on their heads...Now, they could go to prison, and they could come out again in a few weeks time and go back to their drugs, having had square meals, roof over their heads, and not really having bothered with what happens to them, because prison, as I say, might provide them with the best accommodation they have had for many months (Sheriff Oliver)

This message concerning the nature of the drug court order was also directly

conveyed to offenders appearing in the courtroom. Here Sheriff Wallace addresses an offender who is just about to be placed on an order:

Sheriff: [addressing offender] A Drug Treatment and Testing Order is not a soft option. There are people here in court today who have benefited greatly from being on the order.

Other aspects of sheriffs' approaches and outlooks are also worth considering.

Firstly, the sheriffs continue to refer to the 'offenders' who are on drug court orders as 'offenders'. This contrasts with, for instance, using terms such as 'client' or, less frequently, 'participant' which were used by the members of the Drug Court Supervision and Treatment Teams. The term 'offender' has particular implications for sheriffs' characterisation of their relationship with those coming before them. 'Offender' focuses on the fact that the individual has been convicted of a crime and, indeed, generalises this to their self – in other words they are 'someone who offends'. And it was clear that the continued use of the term 'offender' was a conscious one by the sheriffs:

I would refer to them as offenders, not clients. They are not clients. They are court users. The term offender retains that separation from the judge. The term client suggests the provision of a service. This is not the case (Sheriff Sutherland)

This usage contrasted with the majority of other staff working in the drug courts.

One of the addiction workers commented on how the use of the term 'offenders' by the legal side of the court jarred:

But I come from a social care, social work background. And that doesn't fit very well with me, to label someone as an offender. So if I am actually doing pieces of work for the court, I will actually use the person's name. And I would say within the team we tend to call people clients. Rather than offenders. But, as I say, the criminal justice expect us almost

to use the term offender. Because that is what they are working with. They are offenders, people who are convicted offenders. It just doesn't feel right to me [laughs] (Rebecca Miller, Addiction Worker)

This deployment of the term 'offender' links to the general focus of the sheriffs on reducing re-offending and ensuring community safety- both during the order, and as a measure of success for the order. The stated aim of the two pilot Scottish drug courts is as follows:

- to reduce the level of drug related offending behaviour.
- to reduce or eliminate offender's dependence on or propensity to misuse drugs (NDCM, 2003).

The placing of offending above drug use is significant here. Later in this same document in a section reproducing the material given directly to offenders who are considering whether to 'consent' to being placed on such an order *this order is reversed*, thus apparently suggesting to the offender that the primary aim of the drug court is to reduce drug use. The sheriffs also frequently highlighted the impact of the drug courts on re-offending during interviews:

I must never forget the fact these people are not committing offences, and from the public interest that is what it is all about. (Sheriff Wallace)

Indeed when specifically asked about what would constitute success for the drug court one sheriff replied:

Oh. That is difficult to say at the moment. Because we are still operating only on, what?, 110, 120 people. Per year. And I suppose, in real terms, that is, not a drop in the ocean, but it is a small number. Ideally, the prosecutors when they are asked, they will say that in statistical terms, it doesn't

make a great dip, in the statistics. But when you talk to the police, they will say, oh yeah, there is a serious reduction in petty shoplifting. In car thefts. In stealing from lock fast places. And the police will genuinely tell you that. (Sheriff Palmer)

In other words for this sheriff, success for the drug court constituted a measurable impact on the level of offending in the local community.

A key term that the sheriffs used to articulate their conceptualisation of the problem that the drug courts had been introduced to address was 'the revolving door'. This term functioned as a short hand way of referring to the perceived pattern of offending and custody that characterises offenders dealt with by the drug courts. In this pattern of behaviour, frequent acquisitive offending leads to relatively short spells in custody. However, no sooner are the offenders released from prison than they begin to commit the same types of offences, and so the cycle continues:

So you are really looking at, you are looking at, mostly, the sort of revolving door offender who has spent half his life in the jail. A lot of it for fairly petty stuff, the shoplifting, that type of thing. But never-the-less, somebody who is in and out of jail all the time and has got into the vicious circle. (Sheriff Sutherland)

For the sheriffs, these short spells in custody did nothing to address the underlying pattern of offending:

over the past few years, not only me but a number of my colleagues have become more and more...depressed basically about the numbers of drug addicts that we were dealing with, over the last ten years I would say. (Sheriff Palmer)

The sheriffs described the drug courts in essentially pragmatic terms, as attempts to do something:

We decided that something needed to be done to stop this. If we could treat them rather than use the traditional methods, we thought that it might be worth having a go. (Sheriff Oliver)

The sheriffs' criticisms of the traditional 'short spells in custody' response to drug using offenders are, then, *pragmatic* and not *moral*. What was done before was not wrong, it just did nothing to tackle the problem of re-offending.

This pragmatic attitude extended to the role and practices the sheriffs had to adopt in order to try to make a success out of the programmes. This was clear with respect to Sheriff Palmer's response to her colleague's principled criticisms of the drug courts:

I do get the odd email, which is from one of my colleagues who are being very principled. 'How can we deal with people that we know are offending? Who we know are taking illicit drugs, which is contrary to law, and ignore it?'. It's...a principled attitude. Which is, in practice, unanswerable. But we have to do it. Otherwise we would just be filling the prisons, you know.

Thus Sheriff Palmer has no answer to such principled concerns, other than to state that 'we have to do it'. Although the above quotation might suggest to the contrary, 'justice' was a concern for the drug court sheriffs, particular when considering whether or not to place an offender on an order. By 'justice' what is meant here is the consideration that there must be some kind of balance between the original offence the offender had committed and the response from the criminal justice system. It is stated in the *NDCM* that:

The highly invasive nature of the treatment orders, the level of oversight and supervision and the degree of effort and commitment required from an offender suggest a high tariff targeting of cases that would otherwise merit a custodial sentence (NDCM, 2003).

Thus, the decision to place an offender on a drug court order is not solely about identifying a relationship between drug use and offending, and establishing that the former is susceptible to treatment. Rather, the notion is that there still needs to be some degree of accord between the crime and the 'punishment'. This concern was clear when interviewing sheriffs regarding more serious offences:

if the offences were a bit more serious, I would certainly have a view as to whether a DTTO is the right thing, whether it was in the public interest. Someone who has broken into a house...and assaulted an elderly person. Or a woman, or someone vulnerable. I may feel that the public interest can only be best served by a custodial sentence. (Sheriff Wallace)

Indeed, Sheriff Sutherland went beyond this, noting her hesitancy in placing offenders on orders when the offence itself was not drug related:

The offence has to be drug related. For example take a driving crime, which is not drug related. Why should that offender be sentenced to a DTTO? The sentence needs to be related to the crime. Therefore, for the drug court, the crime itself needs to be drug related.

Thus, in her view, there has to be a direct relationship between the actual offence the individual is appearing on, and the use of drugs.

In making the transition to working within the drug court, then, two concerns which preoccupied these sheriffs were the maintenance of their, and the court's, authority and presenting the drug court to various audiences, including offenders, the media and the wider public, as a programme that was an appropriately tough response to crime. Linked to these concerns was the sheriff's focus upon offending and community safety both during the drug court orders and as the ultimate goal of these orders. The way in which the sheriffs prioritise the reduction in re-offending, whilst

balancing this with issues of risk to the public, chimes with the wider themes in my analysis of developments in policy in Scotland recent years. However, this is not the whole story of the Scottish drug courts, as will be shown in the chapters that follow this.

The continuities highlighted in this chapter are not focused upon in order to downplay the changes that the legal side of the court has undergone; rather it is to show that this is a complex, careful balancing act as the legal staff enter into relationships with health and social work in order to ‘have a go’ with respect to drug courts. Having considered one side of this balancing act with respect to the sheriffs, it is to the role of the lawyers within the courtroom that I will now turn.

Lawyers and Adversarial Justice

In a standard sheriff court, the defence lawyer’s role is to represent the rights and interests of their client, in what is an adversarial setting. It would be expected that in such a court the defence lawyer would play a prominent role. Indeed during a prolonged period of observation I undertook in a variety of different courtrooms in Scottish sheriff courts, for purposes of comparison with the drug courts, defence lawyers were consistently important actors. Turning to the Scottish drug courts and, in the *NDCM* it is stated that the lawyer’s role within the courtroom will be identical to that within a normal sheriff court:

The solicitor will represent the interests of his/her client at the Review Court. The legitimate role of the Solicitor does not change in the Drug Court and includes that of advocacy, representing the interests of their client and safeguarding their rights (NDCM, 2003).

However, it is also expected that whilst the role of the lawyer will be identical, they will be less prominent in the courtroom interactions:

It is likely, however, that the majority of the Review Hearing will be taken up with direct dialogue between Sheriff and offender rather than between Sheriff and Solicitor. (NDCM, 2003)

So, what can be said regarding the role of lawyers within the two Scottish drug courts? During my period of observation of the courtrooms the defence lawyer spoke during virtually every review¹² at which they were present. This usually took place at the beginning of a review, with any interaction between the sheriff and offender following the sheriff-lawyer encounter.

When the offender was already on a drug court order, the lawyer would begin by offering his or her own evaluation of how well the offender had been performing since the previous review had been held. Here are one lawyer's opening remarks in this respect:

[addressing sheriff]: This is Mr Farrow's eighth review. I would describe the report as excellent.

Generally, after these opening remarks the lawyer would highlight specific instances of positive developments. This was the case even if the lawyer admitted that the overall period had been negative:

[addressing sheriff]: Mr Wade has not exactly covered himself in glory in this report. There are two positive things. He has entered the Church Hostel project and no new offending has come to light.

Conversely, if the offender had progressed well since the last review, the lawyer would suggest or request some form of reward to recognise this:

¹² I have used the term 'review' here for simplicity, although it should be noted that some individuals appearing in the drug court had not yet been placed on orders.

[addressing sheriff]: This is a fairly positive report for Mr Porter [the offender]. There are a couple of minor problems. Mr Porter has missed some appointments. He has explained that this has been due to childcare problems and issues with public transport. There has been no further offending. Overall the report is very favourable. There is a suggestion in the report of reducing testing [drug testing], which I would support.

On a number of occasions, though, there was little in a positive sense that the lawyer could point to in relation to the offender's actions. In such circumstances the lawyer would focus on offering mitigation in relation to what had taken place:

[addressing sheriff]: His [the offender's] partner is a heavy drug user. There have been a number of problems that have arisen in this respect. Despite this he has been turning up regularly. He has been trying to break up with his partner but has found this difficult. It is expected that things will be getting back to normal soon.

Here the continued drug use is ascribed to the influence of a significant other. At other times when the sheriff was clearly considering imposing a form of punishment, the lawyer would offer a plea for leniency. In this instance an offender's order is being ended early due to a lack of progress. His lawyer spoke as follows:

[addressing sheriff]: The order has not achieved what it set out to do. Mr McShane's [the offender's] drug use is less, though, and there has not been any offending. My submission is that there should be a punishment element but that there should not be a custodial sentence.

The defence lawyers would also speak at the assessment stage, when the offender was being considered for placement on a drug court order. In observing the drug courts there was a couple of occasions where sheriffs clearly had reservations regarding the placement of specific individuals on drug court orders. In all such instances of this type that occurred during the period of my observation, the defence

lawyer argued in favour of the offender being placed on a drug court order. For instance, on this occasion the offender had pled guilty to a violent assault, which involved repeatedly stamping on the victims head. Whilst this was not formally a category for automatic exclusion, normally offenders who had committed offences involving violence were regarded with considerable caution in both the drug courts. In part this was because heroin, the overwhelming drug of choice for the offenders sentenced to drug court orders, is not considered as being 'pharmacologically' linked to violence. In part this also related to considerations of public protection and to what Rose has referred to as 'risk-thinking': 'bringing possible future undesired events into present calculations... making their avoidance the central object of decision-making processes' (2000: 198). Offenders convicted of violent offences could, of course, commit similar offences whilst under the supervision of the drug court staff. On this occasion, though, the defence lawyer managed to successfully persuade the sheriff to place the offender on a drug court order. This is an extract from this exchange:

Sheriff: I am not minded at the moment to impose a Drug Treatment and Testing Order. I am perhaps minded to impose a community service order.

Lawyer: Mr Price [the offender] is aware of the terms of the Drug Treatment and Testing Order report. Time has passed on. The difficulties that are there he has recognised. He realises that he cannot go on the way he is. He has had discussions regarding ways to fill his time. Mr Price appreciates that this assault is a serious matter. It has been part of his downward spiral on heroin. (Sheriff Sutherland)

And to quote another example, here the offender has failed to attend a number of appointments during the assessment period:

Sheriff: There seems to be a number of problems with this.

Lawyer: There have been problems with his [the offender's] time keeping. I have spoken to him about this. Could I suggest deferring this until next weeks hearing in order to see if there is an improvement in this respect?

Sheriff: That, though, is the reason why they are given a four-

week period for assessment – to see if they are committed. Serious questions are raised if an individual is not able to keep appointments during the assessment period. I have serious reservations about this. However I will continue this until Monday. If, though, he is unable to keep his appointment on Friday, there will be no chance. (Sheriff Barnes)

In other words, from my observations there was no evidence at this stage of proceedings of defence lawyers either making or accepting a suggestion that their client was unsuitable for an order.

From these various examples it can be concluded that the lawyers working within the drug courts continue to perform the function of representing the rights and interests of their client. These lawyers attempt to achieve a preferable sentence for their clients at the assessment stage, with this here being interpreted as placement on a drug court order. They attempt to reduce the onerous nature of this order itself, asking for rewards when the offender is doing well. They present their clients' cases and offer pleas of mitigation and leniency when their clients have performed poorly.

One of the concerns that critics of United States drug courts have expressed relates to the extent to which drug courts relegate or erode considerations of due process (see, for example, Boldt, 2002, Nolan, 2001). In this respect such criticisms echo many of the concerns that were raised with respect to earlier rehabilitative programmes, particularly in the 1970s (Garland, 2001, Committee, 1971). In terms of the interactions within the courtroom itself the lawyers in the two Scottish courts are very much playing their traditional role of representing their clients' immediate interests, without any apparent consideration of whether these may coincide with any purported 'higher interest' of tackling their clients' drug use. Thus in respect of the Scottish courts, such concerns would appear unwarranted, because the adversarial nature of the courtroom interaction, at least in terms of the defence lawyer's role, has been retained. This is not to say that the lawyer's role is unaltered, and that critical

concerns cannot be raised with respect to certain other aspects of their practice within the drug courts overall, as shall be discussed in the following chapter. Having considered the role of the lawyers in the courtroom, I will now turn to focus on one important barrier to changes in the legal side of the courts. In this respect the drug court staffs' attitudes to the courtroom practices of their United States colleagues will be explored.

Barriers to Change

In analysing the two drug courts, certain attitudes and beliefs were identifiable which collectively constitute an important factor in explaining the particular shape the legal side of the court has taken. These attitudes and beliefs were shared by all the legal staff and, indeed, by the majority of non-legal staff. Such attitudes are important because the practices of the two drug courts are, in some important respects, left relatively open. A considerable degree of discretion is available to certain staff members, particularly the sheriffs, as to how they interpret their role within this context.

In interviewing the drug court's staff, a common attitude towards the United States drug courts became clear. Specifically, all staff members wanted to distance the Scottish courts from certain practices of the United States drug courts. Crucially for us here, the specific aspects of the United States courts that the staff wanted to distance the Scottish courts from were changes to the legal side of the court. One particular practice that seemed to epitomise this attitude was the idea of United States judges hugging offenders, sometimes referred to as 'hug a thug' by the Scottish drug court staff. This phrase occurred on a number of occasions during interviews with staff at both Scottish courts. On every such occasion it was used as a focus to disparage the United States drug courts' practices and to distance the Scottish drug courts from this. Here are two instances from interviews with members of staff from the legal side of the court:

Kerrin: in a lot of United States drug courts, as you will know, successful participation in the program is sometimes rewarded with small gifts or they might have a graduation ceremony at the end
Sheriff: yeah, that's right
Kerrin: when they finish the program
Sheriff: Hug a thug and all that sort of thing! [laughs] (Sheriff Wallace)

Kerrin: I was just wondering if you felt that there were any characteristics that a drug court sheriff needs, or should have?
Chris: I think, have to be a people person. But I don't really mean that as such. I think an ability. I am trying to think of how to frame this. Because I don't mean [pause] you have got to be the kind of person that wants to keep giving hugs to accused

Kerrin: yeah
Chris: [laughs] which is what the Americans seem to do. (Chris Ramage, Legal)¹³

Whilst hugging an offender was a particular focus of comments, the perceived informality of the United States drug courts, the ways in which offenders were rewarded and the ways in which offenders were punished were all similarly raised. Such practices were the subject of humour, 'bizarre anecdote' and distaste from the staff of the two Scottish drug courts:

Chris: I just can't see any criminal court in Scotland ever deciding that it is a good idea to hand out a drug court teddy bear [laughs]
Kerrin: [laughs]
Chris: And they literally do have drug court teddy bears in some courts in the States! Or tickets to a ball game. Which would here translate to tickets to watch a cup final game. It just would not work here. (Chris Ramage, Legal)

Thus the Scottish staff were keen to distance their work from that of their United

¹³ In order to maintain anonymity, in cases where there is only one staff member with a particular job title, I have only identified the broad staff grouping to which their post belongs.

States counterparts precisely in terms of some of the changes that United States drug courts had brought to the legal side of such courts. Why was this the case? When asked directly about this attitude towards these practices of the United States courts, the drug court staff focused on three factors. Firstly, the staff perceived the general culture of Scotland to be different from the United States. Because of this perceived cultural difference, the media and public opinion would be hostile to these aspects of the United States drug courts:

I mean our, culturally we are quite reserved (Chris Ramage, Legal)

Different culture. I wouldn't be comfortable with giving out sweeties, McDonalds vouchers, teddy bears and things like that to people. I think there is more, it almost, it kind of goes against the Scottish culture. (Sheriff Wallace)

Kerrin: I know in the United States they do certain other practices in court, things like the graduation ceremonies,

Mark: yeah

Kerrin: applause in court and small gifts. I was wondering, why you don't do that here and whether it would be a good thing?

Mark: It is Scotland [laughs]. (Mark Paterson)

These responses echo the concern I discussed above with ensuring that the drug court is not perceived as a 'soft' response to offenders. One of the sheriffs linked the way in which the drug courts rewarded offenders who had been doing well to the way in which children are raised in Scotland. This was, again, contrasted with the United States:

In this country when you bring up a child it is more important how you behave, and set standards and let them know what is expected of them. And you reward in other ways, other than just throwing money at a situation. And giving out presents and gifts...the parent, that does that, is taking the easy option rather than necessarily the better option. (Sheriff Wallace)

The drug court staff appeared to regard Scotland as having a more formal, less demonstrative culture than the United States, and argued that the drug court concept needed to be fitted within this different context. In their view, adopting wholesale the courts practices in the United State's would jar with cultural sensibilities, leading to a negative view of the Scottish drug courts as 'touchy-feely', to use one sheriff's term, amongst the media and the Scottish population. What is of importance is that the drug court staff collectively shared this view of their cultural context and thus mediate this context as they shaped their practices accordingly.

More narrowly, a second factor raised by drug court staff was a perception of Scottish judicial culture. The mores, practices, attitudes and traditions surrounding Scottish courts were regarded as being inimical to these United States practices. Here we quote a number of drug courts staff to this end:

in a court we are particularly reserved and very rule bound. So, just general, atmosphere of the court, and the fact that there is a formal court setting probably, keeps everything within very strict bounds. (Chris Ramage, Legal)

Susan: I think it differs just, mainly, in culture. And the practice of the way we do things. But then a general Scottish criminal court would probably differ vastly from the way Dade County [the first drug court was established in Dade County, Florida] deals with offenders committing similar crimes. The court just has to fit in within the general framework and culture of the country it is established in. So, the big difference will just be one of culture. Our Judge will be quite formal, reserved, up on the bench with a wig and a gown. And other judges, from what you pick up at the American conference, prefer to take their wig off, go into the body of the court with a microphone and walk around and talk to people.

Kerrin: Sure.

Susan: And clearly one thing is clearly not going to work when it is transplanted into an alien culture or system. (Susan Taylor, Social Work)

I suppose. It is the conservative with a small 'c' of the Scottish courts. We think that the authority of the courts, still must be there. We sit with wigs and gowns, as you see. And that is because it is a criminal court and we have, in some cases, to punish people. Therefore to reduce it to a stage where with some people you will be hugging them and giving lollipops and ball game tickets. And with others you will be sending them off to prison for serious periods. It just doesn't gel with us. You know. In fairness, I don't know how it works in practice. I have not been in any US courts. I have [though] spoken with many of my colleges in the United States. Again largely curious about how it happens. (Sheriff Palmer)

This concern for judicial culture was a particularly important for the sheriffs. For the drug court sheriffs, their fellow sheriffs constituted an important part of the audience for their actions in the drug court. Here, for instance, Sheriff Palmer notes that some of the departures from their traditional role have been met with criticism:

I do get the odd email, which is from one of my colleagues who are being very principled. 'How can we deal with people that we know are offending? Who we know are taking illicit drugs, which is contrary to law, and ignore it?'

And again:

And some of my colleagues find that very, very weird. And very difficult. They think it is an attack on the, how can I put it? On the authority and dignity of the court. But there is no way that you can carry on a matter like the drug court unless you are prepared to be part of it.

Lastly, some staff made clear that they also were personally opposed to those practices, finding them either distasteful or ridiculous. This was not necessarily the case with all staff, though, with some arguing that the sheriffs could alter the ways in which they praised and rewarded offenders who had been making progress on an order. Whilst they did not advocate the wholesale adopting of practice in the United

States, they did feel that the current ways in which the sheriffs responded to offenders, particularly when they were doing well, were not ideal:

She is not as good with the 'well done'. You know. She may talk about hug a thug, but she will never do it [laughs] (Mark Paterson, Social Work)

Discussion

From the perspective of the sheriffs, the drug courts constitute a pragmatic solution to a specific problem- that of the 'revolving door' between periods of acquisitive offending and short spells in custody for a specific community of offenders.

Reducing or eliminating this behaviour is the key goal of these programmes, with the achievement of control of the offender's drug use being the means to this end. This pragmatic attitude on the part of the sheriffs towards the drug courts is extended to the practices and roles that they are required to adopt in order to create functioning drug courts. However, the sheriffs balance this with their concern for public protection and authority.

Making the transition to working within the drug courts raises a variety of threats to this very authority. The various continuities analysed in this chapter can, in part, be seen to buttress and reassert this authority in a new setting. The maintenance of similar spatial practices, rituals and the use of time as in other sheriff courts, serves to both symbolise and actualise this continuity of authority. The sheriffs' legal powers are also a key element of their authority, both vis-à-vis the offenders and, indeed, vis-à-vis the other staff working in the courts. Indeed, whilst the threat of custody was regularly raised with respect to offenders, as has been shown it had also been raised with respect to at least one member of staff.

The sheriffs were also clearly concerned about how the drug courts were presented to external audiences. Specifically, they did not want the drug courts to be viewed as

'soft', 'touchy feely' programmes, for a specific community of offenders. The perception of their United States colleague's practices, which were shared by all staff interviewed, linked into this, as considerable care was taken to distance the Scottish courts from the types of programmes where 'thugs would be hugged'.

The agency exercised by the drug court staff, particularly the sheriffs, in shaping the courtroom interactions, is an important example and mechanism through which the practice of the Scottish drug courts takes on its specific form. This is not, though, to claim that the staff act in this respect in a vacuum. Rather through their interpretation of the cultural context, their understanding of the sensibilities and mores of Scottish society and the Scottish penal system in which they work, they serve to mediate this context as they, and it, shapes their actions. As Melossi comments, these are 'choices within cultural vocabularies' (2001: 418).

Whilst such practices as hugging offenders were viewed as beyond the pale, the Scottish drug courts do require considerable changes to the roles and practices of the legal staff. These changes also involve a different relationship between the professions working within the courts and the knowledges traditionally associated with them. As shall be explored in the following three chapters, these changes take place within a context of unequal degrees of professional power.

Chapter 7: Legal Adaptation

In this chapter I will consider the various ways in which the legal element of the two pilot Scottish drug courts departs from standard sheriff courts. Although in the previous chapter the continuities between the drug courts and standard sheriff courts have been stressed, the discontinuities are also marked. Central to these discontinuities is an attempt to use the authority of the court, and specifically that of the sheriff, for considerably different ends. In this respect, the drug court sheriffs use their authority to attempt to maintain drug users in treatment in order that the purported cause of their offending, their drug use, can be addressed. Due to the crucial role of the sheriffs within the drug courts, the analysis in this chapter will focus at some length on their role. An almost exclusive focus on the courtroom has, though, been a feature of many theoretically informed studies of drug courts. I will address this balance in the following chapter, which brings the social work and health staff into focus.

The sheriffs working in the drug courts have considerable discretion as to how precisely they actualise the role of a 'drug court sheriff': how they interact with offenders, how they conduct pre-reviews, the extent to which they allow their sentencing decisions to be shaped by the members of the Drug Court Supervision and Treatment Team and so forth. In observing the two courtrooms, clear differences were apparent in the ways in which the different sheriffs working in the drug courts realised this role. However, in their interaction with offenders, the centrality of what one social worker referred to as 'the carrot and the stick' in all sheriffs approaches was evident.

An analysis of the interactions in the courtroom provides important insights into the relationship between professional knowledge and professional power within these programmes. The drug courts, particularly in the figure of the sheriffs, witness the partial decoupling of professional power from professional knowledge. Within the legal dimension of the drug court, and *within specific boundaries*, a mixture of

concepts and ideas deriving from health, social work and what might be termed 'general treatment ideas' displaces legal knowledge.

This mixture of ideas, though, is not the 'humanistic psychology', the psychological view of the self articulated by the likes of Maslow and Rogers, which Nolan has associated with the United States drug courts. Nor are these ideas derived from the 'new behaviour and cognitive techniques for personal reformation', such as Brief Therapy and Cognitive Behavioural Therapy (Rose, 1999: 269). The latter do indeed play an important role in the drug courts, in terms of the addiction workers' interventions with offenders. However the non-legal knowledge that comes to prominence in the courtroom is what can be termed the basic 'common sense' of the drug treatment field. These ideas, such as conceptualising the return of drug users to drug use during a treatment episode as being like a 'relapse' into a disease, or the belief that the individual drug user is not fully in control of their behaviour when addicted, derive from a kind of borderland between medicine and therapy, biology and psychology. This echoes Valverde's comments regarding the frontline treatment of alcohol use (Valverde, 1998: 11).

However, the important role of these ideas does not lead to the empowering of non-legal professionals. Rather, the drug courts see the sheriffs expanding their sphere of practice beyond specific legal concerns whilst retaining their legally derived authority- one of the themes of the previous chapter. This expansion is not unproblematic, however. As shall be shown in this chapter and the following one, this expansion is partially welcomed, partially resisted and partially blocked.

This chapter is divided into four sections. The first of these analyses how the sheriffs' role in the drug court is conceptualised and discussed by the sheriffs themselves, by other drug court staff and in various documents and media. Following this, the actual practice of the sheriffs within the courtroom will be considered. The third section will reflect back on the previous two. Here I will

focus again on the various views of the sheriffs' role, and the practices of the sheriffs within the courtrooms. However, in this section these perceptions and practices will be situated within the nexus of different professions and knowledges that the drug courts bring together. The final section will move this analysis away from the sheriffs to consider other developments in the legal dimension of the courts. Here the role of the lawyers and procurator fiscal will be examined.

Perceptions of the Drug Court Sheriff's Role

One of the central innovative features of the Scottish drug courts, and indeed central to the very concept of drug courts, is that the interactions that take place within the courtroom itself are conceived of as constituting an important part of the running of a drug-treatment programme. Thus, rather than drug using offenders being sentenced to institutions or external agencies for treatment for their drug use, with this taking place separately from the court, offenders actually appear on a regular basis within the courtroom itself as an obligatory part of a drug court order. These appearances, termed 'reviews', are characterised by a further innovation of the drug court. Rather than speaking via the offender's defence lawyer, the sheriffs talk directly to the offenders themselves.

In the *NDCM*, the purpose of these reviews is described as being to 'allow the Sheriff to retain overall responsibility for and an over-view of Orders made' (*NDCM*, 2003). In other words the reviews are conceptualised as both signifying and actualising the sheriff's overall control of the orders, whilst allowing the sheriff's to monitor directly what is taking place. This monitoring function is stressed:

They [the reviews] provide an opportunity to examine the results of drug tests and to monitor levels of co-operation with treatment requirements, issues of compliance and any difficulties, tensions or problems that might affect progress on the order. (*NDCM*, 2003).

As well as outlining the overall purpose of the reviews, the drug court manual also outlines the purpose of the sheriff-offender dialogue:

This is aimed at encouraging offenders to accept personal responsibility and accountability for their actions and to be honest with the Court...Direct dialogue also allows the sheriff to act as a motivator (as well as a sanctioner, as appropriate) in encouraging the offender and recognising their achievements. The longer a person can be sustained in treatment, the greater the chances of success, and the sheriff plays an important role in encouraging people to continue in their treatment programmes (NDCM, 2003).

Here a number of quite different purposes are outlined. The dialogue is to encourage offenders to recognise that they are the authors of their own actions, and, where required, they will have to explain to the sheriff why they have behaved in the way that they have. The sheriff is described specifically as taking on the role of motivating the offender to succeed on the order. This involves giving encouragement and praise as appropriate. However, this is to be balanced with the role of 'sanctioner', punishing the offender who has not been doing well.

Turning to the sheriffs' own views, all of them noted in interview that the role they play in the drug court reviews, and specifically the sheriff-offender dialogue, is a marked departure from their previous experience of sheriffing:

I gathered a fair bit of experience before I became a full time sheriff. But really, that was conventional sheriffing, as opposed to this, this is really quite different, the approach. And, so, I didn't have much experience. (Sheriff Wallace)

The offenders appearing in the courtroom shared this view. Here one offender makes these comments regarding the drug court sheriff in front of whom he has been appearing:

Kerrin: And had you appeared before other Sheriffs before?
Offender: Aye, aye. I have appeared in front of other sheriffs before.
Kerrin: How did that compare, the way she was [the drug court sheriff]?
Offender: No, it doesn't compare to the way she was. She's really good, yeah.
Kerrin: Yeah
Offender: She believes in giving people chances.
Kerrin: Yeah. And did you not find that with other sheriffs?
Offender: No, no. The other sheriffs just always give you fines, or community service.

Sheriff Palmer described this difference between her traditional role and the role she performs in the drug court as being 'enormous'. Further, she observes that the sheriffs who took on this role were given no formal training:

the Scottish Executive came along eventually and said 'would any of us be interested in the drug court pilot'. Which is being proposed a year or two after. But, I have to say, we had no training

Thus the sheriffs had to forge this role largely for themselves. It was clear, though, that for the sheriffs who assumed the role after the beginning of the first pilot, the opportunity was taken to observe their predecessors in action:

I have watched Richard Oliver, the North Town Sheriff Oliver [amused tone] a real Northerner, he speaks their vernacular to them. (Sheriff Palmer)

The sheriffs were clear to emphasise ownership of these orders - the orders were *their* orders, and they remain in control:

it is a team effort. I am the boss, obviously, I am in charge, and it is still a criminal court...But, it is a complete effort, on the part of doctors, nurses social workers, addiction workers,

police, prosecutors everybody is involved. (Sheriff Wallace)

Beyond this, Sheriff Sutherland echoes the *NDCM* in stressing the most important aspect of her role in the drug court as being that of motivating the offender appearing in front of her:

I think you have, primarily got to be a motivator. If I was to put it into one word, that is what it would be...You are assessing what is going to work here. Are you going to give someone a bollocking? Are you going to go in read the riot act and say 'no nonsense'? Are you going to go in and encourage? Are you going to go in and be actually sympathetic, and say 'you are doing as well as you can and we will be patient and wait'?

The sheriffs clearly believe that their words have this motivational effect. Here Sheriff Palmer reflects on watching someone progress on an order:

When you see them getting over that. A few urgings from me. Producing regular samples and negative tests. That is so encouraging

Here Sheriff Palmer's 'few urgings' are accorded an important causal role in the offender's progress on the order. Again echoing the drug court manuals, in interviews the sheriffs also raised the themes of responsibility and accountability. The sheriff-offender dialogue is regarded as giving the offender responsibility and holding them to account. Here Sheriff Wallace compares the drug court in this respect to a conventional sheriff court:

Because, very rarely, if you have been looking at other courts, do they [the offenders] get the chance to speak. It is the lawyers that do the speaking, but the lawyers don't participate greatly here. I let them [the offenders] speak and hear what they have got to say, and try to engender that in them. And for me to give them respect, and give them

responsibility.

And Sheriff Palmer emphasises holding the offenders to account, speaking to them reasonably and asking them to explain their actions:

I particularly think it is important to talk to them [the offenders] reasonably, to find out why things happen. 'Why did you do this?' They explain to me what was behind it: 'Oh I didn't go there because I had to take my Granny to hospital'.

Holding regular reviews with offenders, and speaking to them directly, entails that the sheriffs come to know at least some of the offenders who are appearing in front of them. Whilst being interviewed the sheriffs evidenced this by discussing certain individuals who were on drug court orders at considerable length:

He [the offender on a drug court order] is an intelligent guy. A very good musician. I have been talking to him on a very serious basis for the last year about getting his abilities to the fore. He has told me all about his being at college, how his last set of compositions...was lost, because of his addiction, which he took up the music course at college before. He was doing well in there. So I got really involved...I said, you know, 'this is something you need to follow up'. And I kept pushing him. And asking for details. 'Why is this lost? Who have you spoken to? Tell them of my interest and that I want them to find it.' Otherwise the work he has put in has been wasted. And throughout, I talked to him about his estranged wife and his children. And his mother. And he knows that I know all the details. (Sheriff Palmer)

Indeed, the sheriffs deliberately cultivated a relationship with the offenders. They regarded this as being part of what the role of a successful drug court sheriff required:

I think you have to be able to engage with people at their

level. Talk to them in their language...I think you have to get it across to people that are appearing in front of you that you understand the issues that they have. I think you have to get across to them that you have sympathy with their predicament, with their situation. (Sheriff Wallace)

Emphasising this lack of formality, Sheriff Wallace discusses how he might speak to offenders about their favourite football team:

So I just chuck it in-to them. So, if their favourite team is Celtic and they are not doing so well, I will kid them on about that.

All the sheriffs stated that they believed that having an authority figure like themselves talking directly to an offender, and thus treating them with respect, was in and of itself beneficial for them:

They have never had anyone, an authority figure or a father figure talking to them in a reasonable way. All they have had before is being barked at, told that there are idiots or they are scum, and they deserve to be in jail. (Sheriff Palmer)

However, and reflecting the sheriff's concern for issues of authority, Sheriff Wallace was clear that there were limits to this:

Just talk to them at that level, but by the same token don't lose the dignity and respect of the court. There is always a level they should not go beyond, they should not try to take advantage of that, they think you are their best pal; I am not their best pal. I am trying to help them.

Another aspect of developing a relationship that was mentioned was expressing understanding, or even 'compassion' as Sheriff Sutherland put this, with respect to the circumstances that the offenders find themselves in:

I think that you have to get across to people that are appearing in front of you that you understand the issues that they have. I think you have to get across to them that you have sympathy with their predicament, with their situation. And that you will give them some degree of latitude and accommodation. (Sheriff Wallace)

Primarily this gaining of personal knowledge, and development of a relationship, is in order to establish what will successfully motivate the offender:

You are trying to get their confidence, and you are trying to get into a situation where as motivator, what you do and say will have an effect...I think, for the majority of them, it matters to them what the sheriff thinks, about them. Which is why I sometimes start by saying, 'I am really disappointed, at this report'. And, if you have got the psychology right, and if you have assessed the person the right way, then you get an immediate response to that...You would not say 'I am disappointed' to the cocky one who comes in, you would say 'I am not having this'. (Sheriff Sutherland)

Thus the relationship allows them to know what approach to adopt, what will produce an effect. However the aim of motivation also set the limit to this relationship:

That relationship is, as far as the sheriff is concerned, as motivator. It goes without saying that it is entirely an arms-length professional relationship. (Sheriff Sutherland)

Further, the sheriffs recognised that whilst they could be running a treatment order this month, and be speaking relatively informally to a particular offender, they might be sending them to custody for a prolonged period the following month:

never forgetting that you are there, a judge in a criminal court. And you have to sentence people to, up to five years in jail. And I have had to do that, of course. (Sheriff Palmer)

The other staff working in the drug court also highlighted a range of aspects of the sheriff's role. This section here is not comprehensive in this respect, as other features will be covered in section three of this chapter, which considers the way in which legal knowledge is displaced, as well as in the following chapter, which foregrounds the health and social work sides of the court. What is offered here is a general outline of the view of other staff of the sheriff's role.

For one social worker, a central aspect of the sheriff's role is essentially communicative, ensuring the drug court orders have an appropriate external image:

Well the sheriff's role is here is to protect the community, and to make sure this is a ...credible order. (Susan Taylor)

Here this social worker highlights the sheriff's role in deciding at what point the offender constitutes too significant a risk to the public to remain on a drug court order, and the way in which the authority of the sheriff plays to external audiences. With respect to the running of the order itself, the staff focused on the decision making of the sheriffs and on their engagement with the offenders. Two key words that the staff used in this respect were 'knowledge' and 'understanding'. The sheriffs who were working in the drug courts were seen to have developed specialist knowledge concerning drugs and addiction.

But she [the sheriff] has a lot of knowledge about drugs. Massive amount of knowledge. (Mark Paterson, Social Work)

As we shall explore further in the third section of this chapter, this perceived acquisition of knowledge involves more than just new information, but the displacement of legal knowledge by non-legal knowledge. The development of such knowledge was linked to 'understanding':

And, and I think that our sheriff does have that understanding. She is beginning to understand more. (Susan Taylor, Social Work)

Understanding in this respect has similar implications to 'knowledge', in that it implies a different way of responding to the offender.

In terms of the actual sheriff-offender dialogue, as it is termed, staff focused on the motivational aspect of this. With respect to how the sheriffs actually enact this role, a term that reoccurred in interviews with drug court staff was 'the carrot and the stick'. The way in which the sheriffs used threats and verbal chastisement on the one hand, and rewards and praise on the other, in trying to both keep in and move the offender through treatment was identified as being central to their role:

Richard: their way of doing it is to try and, it's carrot and stick, the carrot and stick...it is a bit of both. And they are good at using the carrot. When they using the carrot, they use it well. They will take off, they might have matters running alongside the order. Sentences being deferred.

Kerrin: yeah

Richard: And they will admonish them on a few of them. So they are out the picture...because they have done well. If they are doing worse, then it is a case of 'the voice gets louder' [assumes loud voice]. (Richard Murray, Social Work)

Although there is clearly a strong instrumental aspect to this, some staff emphasised that they perceived the sheriffs as genuinely caring about the offenders who came before them. The relationship was not, at least in the view of these staff, purely instrumental:

She [the sheriff] does have people's interests, definitely she has got an investment in these young people's futures. (Susan Taylor, Social Work)

Having outlined these various general comments about the sheriff's role, the next section turns to an analysis of the actual practice observed in the drug court courtrooms themselves. This analysis, resulting from a number of weeks spent observing the Northern and Southern drug courts, is structured thematically drawing on the central concepts that have emerged from this section. Thus 'monitoring', 'accountability' and 'motivation' (including the use of the 'carrot and the stick' and personal engagement) will be considered in turn.

Sheriff Practice

In analysing the actual interactions that take place within the two Scottish drug court courtrooms, many of the sociological frameworks that have most famously been applied to the study of courtroom interactions are inapt. For instance, Garfinkel's theorising of 'successful degradation ceremonies', finds little purchase on interactions that do not constitute a legal trial (Garfinkel, 1956). Rather than the ritualised public denunciation of the defendant by the judge, in the drug courts we have the sheriff attempting to engage with an individual already classified as a drug-using offender, in an attempt to encourage their positive transformation.

As noted above, both in the drug court manuals, and in the perception of staff working in the court, 'monitoring' constitutes an important aspect of the sheriff-offender dialogue. The first thing to note here is that the term 'dialogue' does not really capture the nature of this interaction. Dialogue has the connotation of a conversation between two people, or of an exchange of ideas and opinions. In actuality the 'sheriff-offender dialogue' in the two drug courts invariably took the form of the sheriff asking questions and the offender answering these questions. The offenders instigated very few interactions, and very rarely did the offender introduce a new topic into this so-called dialogue.

The sheriff's questions ranged over a wide variety of different subjects. Most prominent in this respect were the results of the offender's drug tests and the

attendance of the offender at drug court appointments. However, questions were also frequently asked about such issues as accommodation, relationships with significant others and employment. Each of the sheriffs also had their own particular subjects that they regularly raised. Sheriff Wallace, for instance, would frequently ask offenders questions relating to their age; Sheriff Sutherland would often ask the offenders about how they were filling their time. Here is a section from one review in which the offender, in the Sheriff Sutherland's opinion, was performing well:

Sheriff: [addressing offender] Mr Walford [the offender]. You are doing very well. Can I ask, though, regarding the benzodiazepines?

Offender: I have stopped taking them. I thought they would have been out of my system by now.

Sheriff: How are you dealing with your time?

Offender: I am trying to keep myself busy.

Sheriff: You are not at Church hostel [accommodation] anymore?

Offender: No

Sheriff: So you are back with your sister?

Offender: Yes

Sheriff: That is working out well?

Offender: Aye

Sheriff: I would still like to see negatives on the benzodiazepines. Also, go along to the Support You [voluntary organisation]. However, this is a very good report. I am not going to do anything that interferes with your order because you are doing so well. (Sheriff Sutherland)

This illustrates the 'question and answer' form that most of the sheriff-offender interactions within reviews take, and the way in which the sheriff remains in control during this. In this instance Sheriff Sutherland asks about a range of different subjects, including an example of her concern for how offenders fill their time. The offender simply answers the sheriff's questions. Can this, then be described as 'monitoring', in the sense that here the sheriff is gathering information concerning the individual? It needs to be remembered that in between reviews members of the drug court team are meeting with the offenders on a regular basis, conducting drug tests, group and individual counselling sessions, supervision meetings and so on.

Such basic information as the offender's accommodation situation would already be known by the Drug Court Supervision and Treatment Team and, if this was an issue of concern, would have been discussed at the pre-review on the morning of the day that the review itself is being held. In other words, at the point of the review in the courtroom, the sheriff would already know the answer to the vast majority of the questions that they are asking the offender. This is perhaps best revealed when a question provides an unexpected answer:

Sheriff: Yes. [addressing offender] Mr Reid [the offender].
Are you happy with this? This is good, this is really good.
You must feel better?
Offender: All right.
Sheriff: Just all right? You are doing well. We are going to
reduce your testing from every two weeks to monthly. Have
you got a job?
Offender: No
Sheriff: No? [Sheriff seemed surprised]
Offender: I phoned up about a job today. I have not heard
back yet. (Sheriff Wallace)

It was clear when observing this interaction that Sheriff Wallace was expecting a positive answer regarding his question about employment. In other words he thought he already knew the answer, namely that the offender had acquired employment, and was surprised to find otherwise. The general purpose of such questions, then, is to try and display to the offender the fact that the sheriff knows who the offender is, and knows what has been taking place in their life. Monitoring, in the sense of the actual gathering of information is, therefore, not actually a central purpose of the review itself; however the *display* of the sheriff's interest in the offender, his or her knowledge about who they are, and the fact that they, the drug court sheriffs, were located as a central node in a network of surveillance, is important. The sheriffs were keen to convey to the offender that monitoring was taking place, and that the information flowed to them:

Sheriff: [addressing offender] Yes. Well done. There is this
one positive for Temazepam?
Offender: Yes. I took it once, and I got caught.

Sheriff: Yes, I find out about everything. I hear that you are going to see your mother in Cambridge? (Sheriff Wallace)

As the sheriff says here, 'I find out about everything'.

This image of the sheriff as constituting a central node in a network of surveillance links into the second function of these reviews, the holding of offenders to account. A recurrent feature of the sheriff-offender dialogue was the sheriff asking the offender to explain negative aspects of their performance on the drug court order during the period that had elapsed since the previous review. The particular form that this took differed in some respects between the sheriffs. Sheriff Palmer tended to focus on specific instances of non-compliance, particularly with respect to the offender's attendance at appointments. Thus, she would focus on occasions when the offender had failed to attend an appointment with the nurse, criminal justice social worker or addiction worker and ask the offender to account for these. The following review is characteristic:

Sheriff: [addressing offender] Right Mr Devan [the offender]. Your attendance has been better. One unacceptable non-attendance. What was that about?

Defence Lawyer: As Mr Devan said, he was working.

Sheriff: But he did not telephone. Why not?

Offender: I was working

Sheriff: [asks those sitting in the public gallery to be quiet] You need to stop this interfering with the order. Did you go to your appointment today?

Offender: I did not have an appointment sheet [this response was checked by Sheriff Palmer with the social worker present and was accepted]

Sheriff: There was a test on the 15th of December that was positive for opiates. What happened?

Offender: I don't know why it came up positive.

Sheriff: For next time I want full attendance and no excuses. You can do this. You are not offending. You are seeing Doctor Warner on the 5th of January (Sheriff Palmer)

The checking of the offender's explanations with the Drug Court Supervision and Treatment Team was also characteristic of Sheriff Palmer's practice. Whilst the other sheriffs did not accord as much importance to individual missed appointments, all frequently raised the issue of positive drug tests and asked the offender to account for these. Here is another instance:

Sheriff: [addressing offender] Now, Mr Ward. You had a bad relapse on the last occasion I saw you. I am pleased to see that you have got yourself back on the rails. There are still these occasional positive results, though. What is happening?

Offender: I feel I am under a bit of pressure

Sheriff: You have, though, made a huge change. Look at how far you have come. (Sheriff Sutherland)

This focus by the sheriffs on drug test result will constitute one of the topics of the following section. From this analysis it is clear that accountability was an important issue in these interactions. However, the sheriff's final comments bring us into what constituted the central aspect of the sheriff-offender interaction as observed in the Scottish drug courts, namely the question of motivation.

As noted above, some of the staff from the Drug Court Supervision and Treatment Teams referred to the sheriffs as using 'the carrot and the stick' in terms of motivating the offenders. In other words the sheriffs were seen to use positive reinforcement of good performance on an order and sanctioning of poor performance. During the observation period, perceived signs of success on a drug court order were met with a positive response by the sheriffs. A variety of strategies were used to indicate such approval. In general, few reviews brought forth either instances of offenders who had gone completely 'off the rails' or who had entirely transformed their lives in a positive sense. Generally most offenders had done 'a bit bad' or 'a bit good'. In responding to the latter situation, most frequently the sheriff would offer verbal praise, with offenders being told directly that what they had done was impressive. Four more tangible forms of reward were also observed. In some

cases these were directly applied, in other cases they were promised as future rewards if the offenders continued to do well. Firstly, when placing an offender on a drug court order, a sheriff can also defer sentence on a number of other offences. This acts as a potential reward and, of course, a potential threat, to the offender. In this instance Sheriff Sutherland emphasises the former aspect of this practice:

Sheriff: [addressing offender] The point [of the order] is to help you with your drug addiction, and to protect Glasgow from your offending. I am going to defer sentence on the other offences. This will act as a reward, a carrot in front of you. (Sheriff Sutherland)

It is notable here that the sheriff actually refers to this as a carrot, dangling in front of the offender. And, at a later stage in another offender's order, we can see this working in practice:

Sheriff: [addressing offender] Things are looking up. I will see you one more time. As I have said in the past, I try to get rid of stuff. I will get rid of two of the custody matters against you. (Sheriff Palmer)

Here this is explicitly identified as a reward for the offender's actions. A second way in which the sheriffs rewarded the progress of offenders was through the reduction in the frequency of drug testing. Here Sheriff Wallace gives an offender such a 'pat on the back':

Sheriff: [addressing offender] This is a very good report. Are you happy with the way things are going?
Offender: Aye [inaudible]
Sheriff: I will reduce testing. This is a pat on the back for you. Keep up the good work.

Thirdly, the time between reviews can be increased, so that offenders have to appear in the drug court less frequently:

Sheriff: [addressing offender] I am going to continue this for longer [i.e. increasing the time between the offender's reviews]. This is a tribute to how well you are doing (Sheriff Wallace)

Lastly, on a couple of occasions offenders were intending to go on holiday. Whether they would be allowed to do so or not also served as an effective carrot. Here Sheriff Wallace uses the potential blocking of such a holiday as a threat:

Sheriff: [addressing offender] So where are you going on holiday?

Offender: Spain

Sheriff: Do you think you can stay on this order?

Offender: Aye

Sheriff: You were put on this order for your benefit and for the benefit of the community. I want to see something better. You need to make good judgements...If you are not doing well this will jeopardise your chances of going on a family holiday.

Having discussed the way in which the drug court rewards the behaviour of offenders, we now turn to the converse of this. During the observation period, when offenders were performing poorly the sheriffs would generally respond negatively to this. In this section we will focus at situations where threats of punishment were made or actual sanctions imposed for unacceptable behaviour.

On a number of occasions offenders had, to a greater or lesser extent, been performing badly on their orders. Most commonly this was met with expressions of anger and frustration by the sitting sheriff:

Sheriff: [addressing offender] Mr Campbell [the offender]. Another hopeless month. You have lost your script?

Offender: I have got it back again

Sheriff: Three failures to attend. Reasons?

Defence Lawyer: The reasons are contained in the report. He misread his timetable

Sheriff: That is not acceptable. 6th January, failed to attend. No reason given. Failed to attend the nurse because he overslept? Hopeless. (Sheriff Palmer)

As mentioned in the previous chapter, the sheriffs were also given to issuing threats of future punishment. Sometimes these would be non-specific:

Sheriff: [addressing offender] What I am going to do, I am going to continue this. But don't bother coming back if there are any positives for heroin or cocaine. You had better run away.

Offender: Yes. Thanks. (Sheriff Wallace).

When specific threats were made, these almost invariably related to imprisonment:

Sheriff: [addressing offender] You have been in jail for three months. That is equivalent to a six-month custodial sentence. Now it is in your hands. If you offend again you will go to for a very long time. That is the last thing that I want to do to a 19-year-old boy.' (Sheriff Palmer)

In actuality most of the punishments that were imposed during the observation period were simply the opposite of the rewards discussed previously. Thus suggestions of decreased drug testing were rejected or offenders were told to report to the court more frequently than the initial order specified. Here, for example, is Sheriff Sutherland informing an offender that they will be seen more frequently due to continued drug use:

Sheriff: [addressing offender] I am going to see you again [before the normal review period]. I want to see a considerable change in your attitude. And I want to see negatives for cocaine

Although the Scottish drug courts had no statutory basis, being introduced as pilots,

one specific piece of legislation was brought in to allow the drug court sheriffs to have an equivalent power to their United States counterparts. This was the interim sanctions, introduced under the *Criminal Justice (Scotland) Act 2003*. This legislation allows the drug court sheriffs to impose short periods of custody or community service on offenders on drug court orders without actually breaching the order itself. On only one occasion during the period I was observing the two courtrooms were these interim sanctions actually used. On this occasion an offender who had absconded from the order before later handing himself into custody, is given the maximum of twenty-eight days in prison:

Sheriff: [addressing offender] What do you think you are playing at?

Offender: I had got my girlfriend pregnant. There were a lot of difficulties in my life at the time.

Sheriff: This is not good enough. I appreciate the difficulties you have faced, but this is not good enough. You have become a pest to society, a drug addict. We gave you the opportunity to heal yourself. It is a privilege to be on a Drug Treatment and Testing Order. You have been disrespectful to the court. I am going to keep you on the order. However I am going to impose an Interim Sanction. You are going to spend twenty-eight days in jail. (Sheriff Wallace)

It is notable that sheriffs did not exclusively apply punitive responses to negative performance on an order. Although far less frequently, the sheriffs did sometimes encourage offenders who were struggling, for instance reminding them of the progress that they had already made:

Sheriff: [addressing offender] How are you filling your days?

Offender: Not very well. I am visiting my parents. Using the computer in the local library.

Sheriff: You are a different person from when you started on this order. You do recognise this?

Offender: I feel more vulnerable. I have lost my coping mechanism. (Sheriff Sutherland)

In exploring the perceptions of the sheriff's role in the drug court, I noted how the sheriffs described themselves as developing a relationship with the offender. For the sheriffs it was important to know enough about the offender so they could judge what would work in attempting to motivate them, whilst they also stated that without such a relationship, what they did say would have little effect. To what extent were such attempts at developing a relationship observable?

It was noted above that the sheriffs often asked questions that implied personal knowledge of offenders. A question such as 'how is your new house', or 'how is your brother doing' clearly conveyed to the offender the idea that this sheriff knew who they were, in this case that they had a brother or had just moved home, and took an interest in them. Less frequently, some of the sheriffs would also make direct declarations of knowledge. Here, for instance, Sheriff Palmer speaks to an offender who has been assessed for placement on a DTTO:

Sheriff: [addressing offender] Mr McKenzie. I remember you. You were previously on a Drug Treatment and Testing Order. It did not work at the time. The report says that you are more suitable now.

On a few occasions, two of the sheriffs would also explicitly state their empathy regarding the difficulties that the offenders were facing. Here one offender was finding counselling particularly difficult, due to the issues it was raising for them:

Defence Lawyer: [addressing sheriff] I have spoken to him about absences over the last few appointments. It [the counselling] was becoming difficult for Mr Bowley [the offender]. He has been in contact by letter. He still wants to work with Mr Smith.

Sheriff: [addressing offender] Mr Bowley. I understand these things. (Sheriff Palmer)

At other times the sheriffs appeared to convey this same message less directly. Here

Sheriff Wallace is talking to an offender who has just begun her order:

Sheriff: [addressing offender] Mrs Rae, how are you doing?
Offender: I am doing ok. I am trying.
Sheriff: This is hard, isn't it?
Offender: It is harder than jail.
Sheriff: But jail will not help you. What is your age?
Offender: Forty.
Sheriff: You are old enough to know better. (Sheriff Wallace)

The sheriff here communicates that in being on a drug court order, the offender is attempting something that he regards as difficult.

As noted previously, the particular way in which the sheriffs conducted the interaction with the offender was, within given parameters, largely down to their own discretion. In the previous chapter I outlined how issues of formality, ritual, symbolism and so forth were bound up with the authority of the sheriff and the courtroom. The extent to which the sheriffs were willing to depart from such rituals and formality varied considerably. Sheriff Palmer, for instance, tended to be the most formal of the drug court sheriffs observed. In contrast Sheriff Sutherland and Sheriff Wallace were more willing to engage on a 'personal' level.

During the reviews Sheriff Sutherland and Sheriff Wallace would often ask offenders open, informal questions. These gave the offender the opportunity to speak generally about themselves, rather than furnishing specific pieces of information. This served to give these reviews a slightly less inquisitorial air. Here for example Sheriff Wallace is dealing with an offender who had a particularly difficult month:

Sheriff [addressing offender]: How are you Mr Foster [the offender]?
Offender: Ok. I have had a bit of a bad patch. I was attending at Target [voluntary organisation]. The decision

had been that I was to attend every Monday, as well as any other day that I could manage along. I have missed a couple of appointments, but I had hospital appointments on these days. Apart from that, the only difficulty I have had are the benzos. It was my birthday recently. I had a visit from an old friend, a blast from the past. One thing led to another.

The open question allows the offender to raise the issues that they regard as being important with respect to their order. This interaction is, though, still within the confines of the sheriff asking questions and the offender furnishing answers. A similar example, here is Sheriff Sutherland's opening question to an offender on their fifth review:

Sheriff: [addressing lawyer] This is a fairly good report.
[addressing offender] Mr Sharkey, please stand up. This is your 5th review. How do you think it is going?

Sheriff Palmer did not tend to ask such open questions, rather asking more closed focused questions regarding specific information. In a further contrast with the practice of Sheriff Palmer, Sheriff Sutherland and Sheriff Wallace had a tendency to personalise their comments about offenders. Thus, when placing an offender on an order, Sheriff Wallace would often comment that 'I wish you all the best'. Sheriff Sutherland would occasionally make comments regarding her view of the offender, particularly when they had been doing well:

Sheriff: [addressing offender] This is an excellent report. I have a great deal of respect for you. You have demonstrated considerable strength of character. Did you find the course you have been on interesting?

Offender: Yes. It was interesting to see how heroin works on your body, what it does.

Sheriff: I will certainly consider reducing testing with you if you are coming back with similar results in future. I am delighted.

Notice how Sheriff Sutherland here refers to her own responses, 'respect' and 'delight', rather than offering more impersonal praise. During the observed reviews one of the sheriffs, Sheriff Wallace, occasionally took the level of informality in the drug court further than any of the other observed sheriffs. This was the case in two respects. Firstly, whilst all of the sheriffs tended to avoid complex or technical legal language when speaking to the offenders, Sheriff Wallace would use slang words as well, and used metaphors from football. For instance here Sheriff Wallace is talking to an offender who is doing particularly badly on an order:

Sheriff: [addressing offender] This is a huge disappointment to me. You are slipping. You had come a long way. Latterly things are slipping. You live in a nice area

Offender: I don't want to lose it.

Sheriff: But you could lose it. We are into extra time and penalties here.

And here he warns an offender who has just been placed on a drug court order what happens to those who mess about, or are 'fly':

Sheriff: [addressing offender] There are people in your situation who do well. I am prepared to put you on an order. You turn up, you respect the staff. People that try to be fly, we will deal with. It does not really matter what I do, this order is all about what you do for yourself.

Sheriff Wallace also introduced humour into his dialogues with offenders. Here, for example, he is speaking to a young man who had not been doing particularly well:

Sheriff: [addressing offender] Is that a Barcelona top under your jacket?

Offender: Aye

Sheriff: Do you only support the good teams?

Offender: Aye, Celtic

Sheriff: [humorous] That is the wrong thing to say in this court! [laughter from various people in the courtroom] I am going to continue this case till June 16th. I would like to see

you back here, and to have a bit of cheek from you.

Indeed, when the offender returned for his next review, Sheriff Wallace was willing to accept a degree of 'cheek' that might have been expected to have led to a spell in custody for the offender:

Sheriff: [addressing offender] I will put you on for the 21st of July. Do not come in here again looking like that [offender had appeared to be intoxicated]. And do not spend money on a cap like that! [laughter in public gallery]

Offender: It is better than yours [laughter in the public gallery]

Sheriff: You are lucky that I am in a good mood. I will see you on the 21st July. I will look forward to it.

Offender: Not as much as I will [said whilst walking out of court]. (Sheriff Wallace)

Thus, through the use of slang and humour, Sheriff Wallace also seemed to be trying to engage with the offenders who came before him, attempting to foster a relationship with them.

Monitoring, then, within the context of the drug court courtroom is largely symbolic, constituting the display of the sheriff's knowledge of the offender, rather than the actual gathering of information. These interactions also served to symbolise the sheriff's continued control of the order. In terms of the actual content of the sheriff-offender interactions, the holding of the offender to account and attempting to motivate them were central features.

The sheriffs used a number of different strategies to try to motivate the offenders, with the emphasis on the use of the 'carrot and the stick' as some staff members referred to this. However, the sheriffs also made a variety of attempts to engage with the offenders, displaying their knowledge of them and, to a certain extent, expressing understanding.

A recent study of the practices of Scottish sentencers has argued that sheriffs tend to deliberately distance themselves from those that appear before them. This serves in part as a device to allow sheriffs to 'live with' their decisions, as it was easier to send someone to prison when they are 'othered', conceptualised as 'not like us' (Tombs and Jagger, 2006: 10). Linked to this, the authors argue, is a refusal by sheriffs to empathise with offenders (11).

In their departure from their traditional roles, the drug court sheriffs do move some distance away from this refusal to empathise. The drug court sheriffs, at times, would have an empathetic demeanour in the courtroom. As I have shown in the previous chapter the sheriffs were still concerned to preserve their authority, and much of the formality and symbolism of the courtroom remains. However, within these limits, the sheriffs were attempting to play a markedly different role. Within the context of the running of an order, they are no longer acting as sentencers. Rather, they are monitoring, motivating and holding to account. This necessitates a different type of relationship with the offender. However, the sheriffs were clear that they knew where to draw the line in this respect. They might be 'rooting' for the offender, but they would not hesitate to wield the 'stick':

The difficulty for a sheriff is, I would be undoubtedly disappointed, professionally, and disappointed for the offender, if after all that, and after all the effort on everybody's part, it is a failure, and I have to sentence him to a lengthy custodial sentence. But you see also, the problem is, that my duty to the public interest, is a strong one. And there comes a point where, as much as you would like to try to help this person get on to it, you have got to say 'no'. He is re-offending, the public interest is not working, and in the public interest maybe what is required is a lengthy custodial sentence. And if it blows all the things that he has got in the community, and has worked towards in the community, that is too bad. (Sheriff Sutherland)

Having analysed some general features of the sheriff-offender dialogue, and noted how the sheriffs attempt to balance the competing features of this role, I will now

turn to consider these interactions in terms of the relationships between the three groups of staff working in the drug court, the legal, health and social work staff, and the knowledges associated with each.

Professional Knowledge and Professional Power

This section will be divided into three parts, considering in turn different aspects of the way in which the practice of the sheriffs in the drug court can be seen to relate to the other professions and the knowledges associated with these professions. It needs to be emphasised that this analysis foregrounds the role of the sheriff. In the following chapter the social work and health sides of the court will be similarly brought into focus.

In the previous section it was noted that with respect to the reviews the sheriffs' function was, in part, described as 'monitoring'. In actuality within the context of the review itself little monitoring was shown to take place. However, within the drug court overall, the sheriffs certainly do perform this function. Indeed, the sheriffs monitor both the offenders' progress on the drug court order and the work of the Drug Court Supervision and Treatment Teams. Specifically, the sheriffs receive regular reports concerning the work of the Drug Court Supervision and Treatment Teams, collated by the criminal justice social workers, detailing the performance of the offenders on the drug court orders. These encompass such information as attendance at appointments, results of drug tests undertaken and engagement with counsellors. Pre-review meetings are also held on the morning of the day that an offender will be appearing in either of the Scottish drug courts courtrooms. Pre-reviews are held *in camera*, this being in order to allow for the discussion of information of 'a highly personal nature, which it would not be appropriate to discuss in open court, but which [is]...pertinent to the consideration of progress, or relapse on the order and to the most appropriate reaction in the circumstance' (NDCM, 2003). The pre-review is specifically described as constituting an opportunity for the sheriff to be informed about the way in which the offender is performing in relation

to the social work and health sides of the order:

These [pre-reviews] are a unique feature of the Drug Court and are held in private on the morning of the review hearing itself. They allow the Drug Court Sheriff to meet with members of the Supervision and Treatment Team to discuss details of treatment, test results, home circumstances, and family or health issues affecting the offender (ibid)

Together with the reports the case group furnish for the court, pre-reviews can be regarded as a bridge between the legal and non-legal sides of the court.

The review itself is also discussed in the *NDCM* in terms of the sheriff monitoring the offender's performance in the non-legal side of the court. Specifically it is the health side of the court that is stressed here: 'an opportunity to examine the results of drug tests' (ibid).

As I have shown in the previous section of this chapter, this role of monitoring the non-legal side of the court is reflected in the courtroom itself by the sheriffs displaying their awareness of the totality of the offender's performance. Hence, the sheriffs frequently raise questions about drug testing, attendance at appointments and so forth. Within this context, the sheriffs tended to focus far more frequently on the results of drug testing than anything else. General attendance at appointments was also an important issue, although less so than drug test results. In contrast to this, the extent to which offenders were 'engaging' with their addiction workers, the term used to encapsulate how well they were performing in counselling sessions, was rarely mentioned. Here, though, is one exception to this:

Sheriff: [addressing offender] This is not a great report...I am concerned that you have not been engaging with your addiction worker. He is genuine. You have got to engage with him. I take it you do not want to go back to jail?
Offender: No (Sheriff Wallace)

Thus, an important aspect of the drug court sheriff's role involves monitoring the performance of the offenders on drug court orders in areas that are traditionally outwith their expertise. However, this is not the only way in which the sheriff engages with the health and social work elements of the drug courts. Within the courtrooms of the drug courts the sheriffs can be seen to draw upon, and use, non-legal knowledge. In a number of areas this results in the temporary displacement of legal knowledge by non-legal knowledge.

In the most banal sense, the sheriffs working in the drug court have expanded their knowledge concerning illegal drugs and their effects, as one of the sheriffs made clear whilst giving a public lecture:

My main role is to deal with contraventions of the law but you can't help but get involved holistically. I have now learnt so much about the pharmacology of drugs and their effects and just how certain drugs can be used to offset the use and effects of illicit drugs

In interviews and in the observation of the courtroom the sheriffs clearly displayed this knowledge. For instance, on this following occasion taken from an interview, one drug court sheriff discusses the effects of mixing cyclizine with heroin:

There is something called cyclizine, which is an absolute horror thing to mix with drugs. Which could lead to death. I think it is basically an antiemetic, but it has an appalling effect when it is mixed with anything. (Sheriff Palmer)

However, the sheriffs' engagement with such knowledge went far further than simply repeating such information about drugs and their use. For instance, here is one sheriff displaying in the courtroom their confidence in their ability to judge what level of methadone an individual should be on at a given stage in an order:

Sheriff: [addressing offender] You are on 50mls? You are not going to be off by the end of the order. (Sheriff Palmer)

Most strikingly, however, the sheriffs also incorporated into their actual practice general ideas that derive from medical and psychological understandings of drug use and addiction. This is the case both in terms of the concept of 'relapse' and with their response to offending in the early stages of a drug court order.

'Relapse', the return to the use of illegal substances, was a frequently mentioned concept in documents and interviews with staff. In the *NDCM* drug use is specifically described as a 'chronically relapsing condition'. Further it is explicitly stated that 'relapse is anticipated as a normal part of drug recovery' (NDCM, 2003).

It is also explained in the *NDCM* that the sheriffs' attitude to such relapses will be guided by the honesty and openness the offender displays with respect to episodes of drug use, and their general progress and commitment to their drug court order. During my observation of the reviews themselves, it was clear that the sheriffs' practice was shaped by this concept of relapse. The first thing that can be noted in this respect is that the continued use of drugs by offenders in the early stages of an order, as long as generally decreasing in frequency, was both expected and accepted by the sheriffs. Here Sheriff Sutherland speaks to an offender who is just being placed on a DTTO:

Sheriff [addressing offender]: You have got a big habit. It will take time to address this. You will have blips. I understand this. As long as you are trying your hardest.

Offender: I need to do this.

Sheriff: This is a big chance for you. What we need from you is honesty. I will see positive results. I know that.

This example of the anticipation and acceptance of episodes of relapse is unambiguous. And in the following exchange, Sheriff Wallace can be seen in

practice to accept such a 'blip':

Defence Lawyer [addressing sheriff]: There is obviously slight concern over the relapse... he has admitted this. He put himself in a situation he should not have. He was over confident...

Offender: I put myself in a position that I should not have.

Sheriff: Yes, I heard the story today. You learn from these experiences.

And here is a third example, this time involving Sheriff Sutherland:

Sheriff: [addressing offender] I am not worried about this positive. Are you?

It is worthwhile stating the obvious fact that in these instances the sheriffs are discussing what, from a legal perspective, is a criminal offence- and tolerating it. In the second instance Sheriff Wallace conceptualises a situation where the offender took drugs as 'an experience' from which the offender should learn. In the third example, Sheriff Sutherland comments that she is not worried about the commission of a crime. If I was to substitute an alternative minor offence for the taking of drugs, the peculiarity of this response becomes clear. Consider, for instance, a sheriff who said they were not worried about an act of vandalism, such as the breaking of a window? Or alternatively, a sheriff who termed a shoplifting offence 'an experience' from which the offender should learn? Such responses would appear bizarre. It can be seen, therefore, that these offences, involving illegal drugs, are being understood in a noticeably different way to 'conventional' offending.

In this respect the following example, which takes place when an offender has been on an order for a considerable period of time, is interesting as it reveals why Sheriff Sutherland's response changes with respect to drug use later in the order:

Sheriff: [addressing offender] You had a bad relapse on the last occasion I saw you...You are no longer dependent on drugs. There is no excuse.

Here the implication of Sheriff Sutherland's comments is that earlier on the drug court order the offender was dependent on drugs and, therefore, had such an 'excuse', as it were, for taking them. It needs to be noted that as well as the sheriffs discussing and responding to the drug use of the offenders on orders, at times, as if they were discussing the treatment of an illness, there was also evidence in the observation that the offenders themselves conceived of the drug court's intervention in these terms. For instance, one offender welcomed the continuation of contact with the drug court after the end of a DTTO:

Sheriff [addressing offender]: If I was to bring this order to an end, I was thinking of giving you a period of probation.
Offender: I do feel that I need that. (Sheriff Sutherland)

And in the following case another offender actually rejects the possibility of having their drug testing reduced:

Sheriff [addressing offender]: How do you feel about the possibility of your testing being reduced?
Offender: I would like to keep it as it is at the moment.
(Sheriff Sutherland)

Again, if we substitute an alternative sanction the offender's response would seem peculiar. For instance, consider an individual who has been sentenced to jail responding with 'I do feel that I need that'. However, whilst such a tolerant response was observed in the early stages of an order in terms of the sheriffs' attitudes towards occasional drug use, frequent use was responded to far more negatively:

Sheriff: [addressing offender] It is not happening with heroin.
Offender: It is very frustrating.

Sheriff: Giving me few options...I am going to be honest with you. You are looking at twelve months in custody. You need to stop taking the heroin. Right? (Sheriff Wallace)

The offender's attempt to suggest a different narrative here, whereby they are struggling in a joint project with the drug courts staff to address their drug use and finding their own failure frustrating is by this stage simply ignored by the sheriff. By this point the offender's drug use simply has to cease, or custody will follow. Even in the early stages of an order, whilst 'blips' are expected, frequent use is not. Here at a third review, positive results have become a serious issue in the sheriff's eyes:

Sheriff: [addressing offender] there are positive results everywhere. What are you doing?

Offender: I had a wee relapse.

Sheriff: When was the last time you took illicit drugs?

Offender: I think it was four days ago.

Sheriff: [increasingly harsh tone] I want to see sustained results. I do not want to see results like these coming before the court.

Offender: The cocaine was not really serious. Only

Sheriff: [interrupting, harsh tone] I regard this as a serious matter. You are an excellent timekeeper. You attend all your appointments. But we have got to find a way of dealing with the heroin and cocaine. You are a bit wobbly...I am going to see you again [before the normal next review period]. I want to see a change in your attitude. And I want to see negatives for cocaine. (Sheriff Sutherland)

Thus, the sheriffs appear to be adhering to a concept of relapse in the reviews whereby occasional drug use during the early stages of an order is expected and responded to with words of encouragement or mild reproach, whilst frequent drug use, or drug use later in the order, is responded to much more severely. In other words there is a space within which non-legal knowledge displaces legal knowledge. However, this space is bounded, and becomes increasingly small and tenuous as the order progresses.

A similar picture emerges when the sheriffs' response to offending in the early stages of a drug court order is considered. If, as the very concept of the drug court would suggest, there is a *direct* relationship between drug use and offending, then it would be expected that those on drug court orders may well be continuing to offend, at least whilst in the early stages of an order when they are still, albeit occasionally, using drugs.

All of the sheriffs working in the drug courts recognised this. In part they respond to this by, to borrow a term used by one of the sheriffs during a public lecture, 'turning a blind eye' to a certain level of a certain type of offending. Sheriff Palmer here notes how she has to balance the public interest against the need to give drug users chances. Notably violent offending, or offending that involved elderly people, were areas of particular concern:

or they have offended, when it is a serious offence. As long as it doesn't involve personal injury to people, I will give them a chance. Also, targeting old people is one of my pet hates. As it is with everybody. But even in those situations I will say 'right, my duty is to those old people who are in an absolutely hellish situation because of you. I could easily jail you now. But you have not got a long record so you are going to get this chance.

Perhaps surprisingly, some staff members from Drug Court Supervision and Treatment Teams expressed concern regarding the number of chances that the sheriffs were giving to offenders, suggesting that on occasion the sheriffs were taking a more lenient approach than they themselves would have. In these instances, the views of staff was that the risk represented by the offenders outweighed the public interest of trying to address their drug use:

Richard: as a social worker you are just not going to write at any time, 'I think this guy should get jail'. You are just never, ever going to write that...I had a case where someone was just so prolific, he was well on in his order, and he had

assaulted somebody with a big sledgehammer. He had been seen with a knife, he had, four separate occasions been driving different cars while [unclear]. And I actually wrote that, I found it 'impossible to deal with the risk he represented whilst in the community'. And that is as near as a social worker will ever go to saying 'pshaw'

Kerrin: yeah

Richard: Do you know what I mean? And, nut, it still wasn't happening [the sheriff kept the offender on the order]
(Richard Murray, Social Worker)

In the following comments Sheriff Wallace discusses what happens with respect to successful orders in the drug court. Even in such cases, though, it would seem that offending is to be anticipated:

I mean these people are committing offences, umpteen every day, but they don't get caught. And all of a sudden they are on this order. They might have one, two, three, four offences in the eighteen-month period. That is usually at the beginning. Because they still need to steal, because they still need to buy. But then they get control of the addiction and they do not need to steal.

Sheriff Wallace dealt with such offending by deferring sentence on the new offences so that, as it were, they would be left hanging over the offender. They could be used as a threat to the offender or as an incentive, whereby they could be admonished if progress was made on the order. Again the sheriffs' rationale for behaving in this way was purely pragmatic:

But we have to do it. Otherwise we would just be filling the prisons, you know. The people would be coming out, the revolving door would be carrying on. (Sheriff Palmer)

From a legal perspective what the sheriffs are doing in terms of turning a blind eye to offending is unpalatable. However, it was deemed to be what was necessary to tackle re-offending.

Another instance of the sheriffs' drawing on non-legal knowledge to guide their actions concerned Sheriff Sutherland. At the assessment stage of an order Sheriff Sutherland would frequently focus on the need for offenders to be 'settled' or 'stable'. The use of this concept is important, as it has specific connotations in terms of a medical understanding of heroin use. As Trebach argues in his analysis of the famous Rolleston report on the prescription of heroin, 'stable' implies that a category of heroin users can function in their everyday life on a regular consistent dose of heroin or methadone. This runs counter the idea of 'tolerance'

which holds that some drugs, such as heroin and other powerful narcotics, are so alluring that addicts develop a virtual numbness to the relief obtained by a given dosage and are consistently asking for more, always more, never less, never achieving satisfaction or balance. (Trebach, 1982: 104).

This concept of stable is regarded as underlying the use of maintenance methadone scripts. Interestingly, in the interviews a number of the treatment staff also used this term. In the reviews, Sheriff Sutherland frequently referred to offenders being 'stable' or 'unstable'. Here, for example, she explains to one offender why she does not feel able to place him on a drug court order:

Sheriff: [addressing offender] You need to try to access support. If you can get yourself referred to an agency, and if you can get yourself placed on methadone, if that is what you want, this will go a long way to starting to stabilise you. Then we will see about putting you on a Drug Treatment and Testing Order.

In addition to drawing on various concepts and ideas from the medical and psychological treatment of drug use, the sheriffs also appeared to be occasionally drawing on concepts and ideas that accord with a 'social work perspective'. This is more difficult to evidence as it is less easy to identify concepts and ideas that could be uniquely defined in this way. What is meant here is an attempt to look beyond specific offending and drug use to the broader welfare of the individual and of the

community, in social work terms, a holistic view of the offender. The following comments made by one of the original sheriffs working in the Northern drug court are taken from the *Drug Courts in Scotland Video* (Scottish Executive, 2002a), a promotional video released by the Scottish Executive:

There are individual cases, we have one young woman who was an addict for about ten years. We had grave doubts about her ability and willingness to participate fully in the programme. But she has proved us dramatically wrong. Over the past few months her health has improved [music starts to play in the background on the video] she has re-established a relationship with her family, she is seeing her child who was in care and she has the prospect of that child returning to her, she is about to go into further education and, what may seem trivial to you or to me, she has recently run a half marathon, which for someone who six or seven months ago would have been lying about with a needle in her arm is real progress and so from that point of view, it is very satisfying. (Sheriff Barnes)

Whilst such a focus on education, contact with children and relationship with family members is by no means exclusive to social work, it constitutes a considerable departure from traditional legal concerns. However, it is worth noting that this is in the context of a video that is attempting to present a positive image of the drug courts, and the appearance of an individual narrative of success within this is not particularly surprising. More significantly, however, other staff members also spoke of the drug court sheriffs as, in some respects at least, behaving like social workers:

Mark: Talks like a social worker at times. 'Oh, are you a sheriff'! [laughs]

Kerrin: [laughs]

Mark: But I think that is a good thing. It shows she is starting to look beyond the individual, standing in the dock, and she is looking at their life and their impact on society. That kind of thing. And I think that is how it should be. (Mark Paterson, Social Work)

Further, at least one of the sheriffs did not appear to object to this designation. In response to a question at the end of a public lecture they made the comment that they didn't 'actually object to the term 'social worker''.

There is a third important respect in which the sheriffs could be seen to engage with the health and social work staff, and the knowledges and practices traditionally attached to these professions- in the expansion of their sphere of action into areas that would previously have been the preserve of these staff.

With respect to the health side of the court, the sheriffs are specifically accorded the role of determining the frequency of drug testing. The rationale for this is that the varying in this frequency can constitute a reward or a punishment for the offenders on drug court orders:

Incentives at his or her [the sheriff's] disposal range from offering verbal praise and encouragement from the bench, to reducing the levels of testing. (NDCM, 2003)

And on a number of occasions such an approach was observable within the courtroom itself:

Defence Lawyer: [addressing sheriff] There has been a problem with Mr Fletcher's [the offender's] attendance. He has had a big chat with the social worker recently about this. He has agreed to start attending all his appointments. He is continuing to do well with respect to drugs.

Sheriff: There is a suggestion in the report that the drug testing be increased to fortnightly?

Defence Lawyer: He accepts this. (Sheriff Wallace)

Note that here there is no suggestion by either the defence lawyer or the sheriff that the offender has actually been performing poorly *with respect to drugs*. Indeed, the

defence lawyer claims that the opposite is the case. There is no clear medical reason for the variation in the level of testing, and what is an intervention undertaken by medical staff becomes directly conceived of, and described as, a punishment imposed by the sheriff.

It is also notable in this respect that the sheriffs determine the length of treatment, and the point at which treatment ceases. Whilst undoubtedly the sheriffs reach such decisions in consultation with other court staff, taking on board their views through pre-court reviews and through reading reports, ultimately it is still their decision. The medical staff may view someone's treatment as progressing well, but may find that this treatment is ceased because the individual is failing on some other non-medical aspect of the drug court order.

In a number of other ways, the sheriffs appeared to be acting in spheres that would have traditionally have been the preserve of other professions *whilst* directly assuming the role of these other professions. As has been noted, the sheriffs frequently spoke with offenders about the results of their drug tests during the reviews. However, rather than restricting themselves to motivating offenders to continue to remain in treatment, the sheriffs often tried to understand why individuals were continuing to take drugs:

Sheriff: [addressing offender] Your methadone has been put up a bit?

Offender: 120 mls.

Sheriff: What is the situation with the benzos?

Offender: I am only taking them every couple of weeks.

Sheriff: So you are reducing how often you are taking them?

Offender: Yes.

Sheriff: Why are you still using them?

Offender: I still enjoy the buzz they give me.

Sheriff: I appreciate your honesty. You have good strength of character. You need to trust yourself. Try to get the benzos out of your system. Otherwise, you have done extremely well. (Sheriff Sutherland)

On this occasion Sheriff Sutherland appears to be attempting to adopt the role of an addiction worker, directly investigating the reasons for the offender's drug use and attempting to intervene to address this.

A further respect in which the sheriffs appeared to be adopting the role of addiction workers also concerned 'motivation'. Within the assessment stage the role of assessing whether an individual is motivated to try to tackle their drug use is ascribed to the addiction worker. The addiction workers use specific tools, adapted from the Cycle of Change literature. The sheriffs, of course, have ultimately to decide whether or not to place an offender on a drug court order. With respect to motivation, the sheriffs did not always appear to be willing to simply rely on the conclusions reached by the addiction workers. Rather, on occasion, the sheriffs attempted to try to discern for themselves if the offender appeared to be motivated. In order to do this, these sheriffs would directly ask the offender about their motivation. The following example comes from an offender just before they are about to be placed on an DTTO:

Sheriff: [addressing offender] The report suggests that you have reached a point where you want to change?

Offender: Yes

Sheriff: Additionally you have the positive desire to change?

Offender: Yes (Sheriff Sutherland)

And again:

Sheriff: [addressing offender] You think you can do this?

Offender: I will be honest with you – I don't know. I am going to try my best. I heard a boy say earlier 'I am not strong'. Well, I am not strong with drugs. (Sheriff Wallace)

Finally, there were a couple of occasions where Sheriff Wallace appeared to be adopting what could be described as a 'counselling role' as he discussed, and

attempted to raise, an offender's emotional mood. Here Sheriff Wallace is addressing an offender who has been doing well on their order, but had been the subject of a serious assault that had led to the loss of one of their eyes:

Sheriff: [addressing offender] I detect that you are feeling a bit down. You have done well. Anyone would feel a bit down after what has happened to you

The sheriff here makes clear that the emotional state of the offender is an object of his concern, and attempts to change this mood by offering words of comfort. To illustrate that this is not a unique instance, brought on by the particularly brutal assault to which this offender had been subject, a further example will be offered. Again this involves Sheriff Wallace. Here, an offender who was struggling on an order is addressed:

Sheriff: [addressing offender] You are looking down. Can I help?

Offender: I don't see how. I can't do it anymore...

Sheriff: You are going to have to lift yourself. Have you got anyone to talk to? You have come a long way

Here, again, we have a direct reference to the emotional state of the offender by the sheriff - 'looking down', 'lift yourself' – coupled with an offer of help in this respect. This review in its entirety was striking to observe. Sheriff Wallace was clearly displaying concern regarding the emotional mood of the offender and tried a number of approaches to establish a 'connection' with him. The review was punctuated by frequent pauses as Sheriff Wallace struggled towards this. It needs to be emphasised, though, that these exchanges were striking because they stood out from the standard interactions in the courtroom. However, they do offer a further instance of the intersection of the legal and non-legal spheres within drug courts.

In this section, and in this chapter so far, I have focused on the role of the sheriffs in

relation to the various professions and knowledges that are brought together within field of the drug court. Whilst the most significant differences from conventional sheriff courts are observable in this respect, there are other aspects of the legal side of the courts that must be explored. It is to these that I now turn.

Beyond the Sheriffs

In a traditional sheriff court, it would be expected that the interaction between the procurator fiscal and the defence lawyer would constitute a central part of the courtroom proceedings. Whilst the drug courts are, of course, not traditional sheriff courts, as has been shown in the previous sections, there are both continuities and departures. In the previous chapter the continuities between the role of the defence lawyer in a traditional sheriff court and in the drug courts were stressed. It was emphasised that the defence lawyers in the courtroom continue to play the important role of representing their client's interests within what continues to be, in certain respects, an adversarial environment. In this section, though, the other side of this will be stressed as the ways in which the legal side again adapts to the context of the drug court is analysed.

The first feature to which I will turn is the referral process to the drug court. In the case of the *NDCM* two different referral routes into the court are described, one being a fast track route, whereby offenders are referred directly into the drug court from custody, and the alternative route is also outlined for those who are found or plead guilty at a latter stage in the court process. The important point here is that in both cases the defence agent is ascribed a role in deciding whether or not an individual is regarded as suitable for the drug court. The rationale for this is outlined as follows:

The solicitor has greater knowledge of the potential candidate than any other agency involved. He/she will have a better idea whether this option is attractive so far as the candidate is concerned and whether the necessary motivation is present.

Other agencies can form an idea on the facts before them but only the solicitor knows the potential candidate on a person basis and he/she will be in a better position to form an opinion as to whether the remit would be beneficial and worthwhile or just a waste of time (NDCM, 2003).

What is important here is that the solicitor is being asked to make a judgement as to whether their client is motivated to enter into a treatment programme. In other words the solicitor is being asked to make an assessment of their client in the same terms as a member of the treatment side of the Drug Court Supervision and Treatment Team might do so. Further, if they do not think their client is adequately motivated, they are expected to avoid recommending referral to the drug court, *even if they are convinced that being referred into drug court is what their client wishes:*

Some accused may see this sentence as a way of avoiding custody and returning to drug abuse. Accordingly solicitors will come under pressure from clients to recommend a remit to the Drug Court. The onus is therefore heavy because a judgement has to be made which *may not coincide with the client's wishes*. [emphasis added] (NDCM, 2003)

In other words the solicitor is expected to adopt a different role in this instance, with this role taking precedence over representing the wishes of their client. Bearing these comments in mind, we turn here to two observations by Michael Williamson, a defence lawyer involved in the Northern drug court, made in the *Drug Courts in Scotland* video:

We work with the drug court right from the very start. Once we see someone in custody, if we believe they are a suitable candidate, then we would mention that to the police officer at whatever police station they are in custody and, thereafter, we would also speak with the procurator fiscal.

We know that person better than anyone else. We are able to say at the very outset whether or not in our opinion the drug court would be beneficial for this person and whether or not

we would just be wasting our time. We would suggest to them at that stage ‘would they consider being put forward as a possible candidate’ – emphasising to them that the decision does not rest with the defence or the police but with other agencies including the procurator fiscal. (Scottish Executive, 2002a)

Initially, it is worth emphasising the position of the individual under discussion here when they are in police custody. At this point they are accused of an offence or offences. What Williamson suggests that the defence lawyer should do in such a situation is to assess whether or not the individual would be ‘suitable’ for the drug court, and whether or not the drug court would be beneficial for them. It is instructive in this context to substitute a different disposal available to the criminal justice system instead of a drug court order. Consider if a defence lawyer was considering whether an accused individual, not yet convicted of any offence, would be ‘suitable’ for a period in custody and whether such a period would be ‘beneficial’ for them. One would surely ask if these were appropriate questions for a defence lawyer to be preoccupying himself or herself with.

It needs to be reiterated, though, that in the actual observation of the *courtroom* there was little suggestion that these non-legal considerations were actually impacting on defence lawyers’ practice. On all occasions observed, the defence lawyers argued vigorously in favour of their client being placed on a drug court order. However, in terms of the lawyers’ practice in the drug court more generally, it was clear that in operating within this context they needed to adopt a different way of understanding their client’s behaviour. This is evidenced by a couple of interesting exchanges that took place between the defence lawyer and the sheriff. Both examples are quoted here:

Defence Lawyer: [addressing sheriff] Mr Shepard [the offender] has had a bit of a wobble since the last review. I would maybe suggest that a few words from your honour would be appropriate.

Sheriff: Perhaps the alcohol you mean? In general it is a

good report (Sheriff Wallace)

Defence Lawyer: [addressing sheriff] This is Mr Turnball's [the offender's] eighth review, nine months into his order. I would describe it as moderately successful. I understand that there was a discussion this morning?

Sheriff: I would describe it as a very positive review. (Sheriff Sutherland)

Here, in both cases the defence lawyers' interpretation of events is far more negative than that of either of the sheriffs involved. It would appear that in both cases the defence lawyers concerned are relatively unfamiliar with the drug courts and the expectations that surrounded offenders enrolled in these programmes. For example, the second defence lawyer refers vaguely to the pre-review as 'a discussion this morning'. What the defence lawyers appear to have to 'get' in terms of the drug courts is the way in which within these programmes, as evidenced in earlier sections of this chapter, legal knowledge, and hence, legal expectations and judgements of behaviour have been displaced by knowledge deriving from medical and psychological understandings of drug use and addiction.

This can be discerned in the practice of lawyers who appear to be more familiar with the court. For instance, lawyers would readily use such terms as 'stable', and, evidenced here, would describe the use of drugs as a 'minor lapse':

Defence Lawyer: [addressing sheriff] This is the third review for Mr Coates [the offender]. In general it is a positive, although there has been one minor lapse. Mr Coates is very conscious of this. General view is that Mr Coates has made progress. Suggestion is made in the report that testing be dropped to once a week. (Sheriff Sutherland)

Finally, it is worth noting the role of the procurator fiscal within this context. Representing the 'general public interest' and prosecuting the case against the accused, in a typical sheriff court case the procurator fiscal would be expected to

play a prominent role.

In actuality, the dynamics of the drug court courtroom leads to the sidelining of the fiscal. On average the fiscal only spoke once in every fifteen reviews that I observed. In the majority of the cases when they did speak, this was at the very beginning or end of a drug court order, and constituted little more than the summarising of the 'facts' of the offence that the offender was convicted or accused of. However, on two other occasions the procurator fiscal did make other remarks that are worthy of comment. Here, at the beginning of an order, the procurator fiscal is asked about the possibility of placing a particular offender on a drug court order:

Sheriff: I am suggesting putting Mr Jones [the offender] on an eighteen-month order. Procurator fiscal, do you have anything to say?

Fiscal: I would point to the cost of the goods stolen and the costs of the damage done. In mitigation he did say that he was desperate. (Sheriff Sutherland)

Here the procurator fiscal initially appears to be playing their traditional role, presenting the case against the offender and adhering to the priorities of public safety, public protection and the interests of the crown. However, in the very next sentence he begins to offer mitigation for the offence itself. Here the procurator fiscal seems to be adhering to the view that 'what is of interest is placing the offender on a drug court order'. In other words, what is of interest is to have the drug user's habit treated. The procurator fiscal is willing to offer mitigating circumstances, traditionally raised by the defence lawyer, to achieve this aim, rather than pressing for a custodial sentence. This focus on getting the offender onto a drug court order is also reflected in the next example. Here the procurator fiscal responds to an individual who has changed their plea to not guilty at the assessment stage, thus removing the possibility of them being placed on a drug court order:

Fiscal: This is very disappointing, considering all the effort

that has been made with regard to Mr Magee. However, there is no opposition to bail. (Sheriff Wallace).

It would seem strange here that the fiscal would express disappointment. Here the removal of the possibility of being placed on a drug court order would appear to be the source of this disappointment. The fiscal would appear to be committed to the aim of treating the offender, and thus addressing their re-offending, interpreting this as synonymous with the aforementioned priorities of public safety, public protection and the interests of the crown.

Discussion

In this chapter my analysis has concentrated on the way in which the legal side of the court have adapted to working within the new space that the drug courts can be regarded as constituting. Specifically, focus has been placed on how the central figures of the sheriffs relate to the other broad staff categories, health staff and social work staff, together with the bodies of knowledge that have been associated with these latter professions.

The data for this study, it has to be noted, are based on a snapshot of the drug courts at one particular period in time. At this time, though, the boundaries between the different professions had become fluid in certain respects. The sheriffs, in particular, had expanded their sphere of legitimate practice beyond that which would traditionally relate to their role. Thus, for example, they could be observed attempting to gauge the motivation of those who came before them with respect to recovery from drug use. Or, to take another instance, they could be observed using drug testing as a form of punishment. Thus, within the drug courts, the sheriffs can be perceived to be expanding their role.

In contrast to this, though, the opposite process is taking place with regard to the type of knowledge deployed in the courtroom. Within this context, concepts and ideas

derived from the medical and psychological treatment of drug use, concepts and ideas that are associated with the non-legal side of the courtroom, have come to prominence. In this respect drug use and offending, at least in the early stages of the order, are responded to as unwelcome but expected aspects of the recovery from drug use. Whilst this departure is bounded, and subject to being overruled by legal knowledge, its rise is important. However, it needs to be noted that even within these boundaries, what is important is the *sheriff's* understanding, albeit shaped by the rest of the drug court staff, and their operationalising of this knowledge.

These developments cannot simply be termed 'pathologisation', the term Nolan has applied in his analysis of the United States drug courts (1998: 99) or, conversely, 'criminalisation', the concern raised about directions in drug policy by Duke (2006) and also by Barton and Quinn (2000). The latter, though, would be a closer approximation considering the centrality of legal staff and legal aims. However, what can be observed within the drug courts is a complex coexistence of contradictory knowledges within the same context, in a situation marked by important differences in professional power.

The sheriffs have maintained their authority and power that they traditionally possess within the Scottish criminal justice process despite the changes they have made to their role in making the transition to the drug courts. This maintenance has been achieved despite the way in which knowledge and professional distinctions have become, within limits, diffused or blurred. The question arises as to how the other staff groupings, social work and health, operate within this context as the sheriffs' role changes and expands. It is this question that the following chapter addresses.

Chapter 8: Social Work and Health

In the previous two chapters I have built up a picture of the legal side of the two Scottish drug courts. Within the context of these programmes, the legal staff have adapted their roles and practices considerably. However, these legal staff constitute only one, albeit central, element of the overall drug court programmes. The drug courts bring together a variety of different professions with contrasting approaches and philosophies. Indeed the very term ‘drug court’, despite emphasising the legal side of the *court*, itself actually encompasses a range of different practices undertaken at a number of different geographical locations by different staff. Whilst in terms of professional power the legal side is the dominant player overall, much of the work of the drug courts takes place at a distance from the actual courtroom interactions.

In this chapter the non-legal staff working in the two drug courts will be placed in focus. In the drug court manuals, the non-legal staff are collectively referred to as the ‘Drug Court Supervision and Treatment Team’. This team is formed out of three main staff groups, criminal justice social workers, addiction workers and nurses, together with their relevant managerial staff. In many respects, however, this team divides into two main staff groupings: on the one hand health staff, and on the other hand social work staff. I will focus on each in turn. In each case the central practices and approaches of each staff grouping will be analysed.

As with the legal side of the court, the ways in which these staff groups have adapted to, or resisted assimilation within, the drug courts will be a central concern of my analysis. In particular the relationship of the health and social work staff to the other staff groupings, and to forms of knowledge and practices traditionally considered foreign to their profession, will be highlighted. The social work staff, encompassing criminal justice social workers and addiction workers, will be analysed. Initially, however, the role of the health staff will be focused upon.

Health – Continuity

By ‘health’, one of the terms that are used by the drug court staff themselves¹⁴, what are referred to are the nurses working within the two drug courts, the doctors and their managerial staff. Highlighted in this section are those aspects of the practice and approach of health staff that distinguishes them from other professions working in the two drug courts.

Formally, in the *NDCM* and *SDCM*, the Medical and Nursing Staff are ascribed a wide-ranging role. Whilst stress is placed on interventions relating to drug use, the provision of ‘other health-related interventions relevant to the offenders on the Drug Court programme’ (NDCM, 2003) is outlined in this document.

However, in actuality two forms of drug related interventions constitute the actual day-to-day practice of the health staff. Firstly, the staff conduct regular drug tests either for those offenders on a drug court order or for those individuals in the assessment stage for placement on such an order. Secondly, the health staff undertake the prescription of methadone and the various practices associated with this, such as tolerance testing. Both of these drug related interventions are given a prominent position in the drug court manuals:

In particular, programmes based on the prescribing of substitute drugs with the objectives of stabilisation, maintenance of stability and then followed by a phased methadone post-maintenance detoxification, where appropriate, represent a key service component. (NDCM, 2003)

Aside from the actual practical activities undertaken by health staff, which of course

¹⁴ Whilst the ‘health’ staff were clearly conceptualised as constituting one grouping in the drug courts, there was actually little consistency in the terms used by other staff to refer collectively to these professions. Terms that were frequently used, aside from health itself, included ‘medical’ and ‘clinical’.

differ from those undertaken by their social work colleagues, both groups of staff also regarded themselves as being separated by their adherence to different sets of values and procedures. In part this simply reflects the fact that in undertaking prescribing the health staff have to follow the procedures and principles outlined by their local National Health Service:

Jamie: we stick to our protocols. That have been written up for us. We cannot exceed the protocols. Or, you know, go against the protocols. (Jamie Hughes, Health)

However, in the view of the members of the Drug Court Supervision and Treatment Teams working in the two courts, some differences between their outlooks were more fundamental than this. Health staff were understood to be adhering to a certain set of ethics that differed to those adhered to by social work staff and, more generally, health staff were regarded as having a different 'approach'. The terminology used by the staff in trying to capture these differences was often vague. Health staff were spoken of as coming from a 'nursing background', adhering to a 'medical model' and having a 'different value system'. One social work member of staff went furthest in specifying this difference:

Mark: the clinical team view the individual, they are not interested in what goes on in the community

Kerrin: yeah

Mark: because they will provide treatment to the individual. That is their only focus. (Mark Paterson, Social Work)

For Health staff, the health and well-being of the individual they are working with is paramount. In contrast, criminal justice social workers' focus is, to a significant extent, on the impact of that individual on the community. Health staff tended to speak about these differences in terms of issues 'risk' and 'safety':

We come from more a medical, nursing, model. And our, it is paramount safety. And we have got a lot of likes of ethical

issues, especially if somebody is using to a dangerous level.
(Simon Callen, Health)

Here, though, the danger is to the individual rather than from the individual to the community. Thus, the health staff presented their overriding concern as being the health and well-being of the individual that they are working with, and 'risk' as being anything that constituted a threat in this respect.

An important related issue is the question of what exactly the health side of the court regard as constituting 'success' for the drug courts. I will return to this issue in the next section of this chapter, where I will discuss how the health side of the court has adopted 'non-health' aims in adapting to working in the drug courts. What is of importance here is the question of 'abstinence'. In the aims stated in both drug court manuals, drug use is focused on within the context of the second of the objectives that are specified for the courts:

- [1] to reduce the level of drug related offending behaviour.
- [2] to reduce or eliminate offender's dependence on or propensity to misuse drugs (NDCM, 2003).

Later in the *NDCM* a more detailed outline is given of the aims of the prescription of substitute drugs. With respect to the use of illicit drugs it is stated that the aim of prescribing is to:

reduce levels of illicit drug use by introducing less chaotic, opportunistic patterns and working towards lower dosage levels. (NDCM, 2003)

In other words, abstinence is not set out as the goal, or how the success of the two drug courts will be measured. Abstinence is a secondary 'ideal' aim, something hoped for, but not necessarily something that is expected or regarded as realistic.

However, the non-health staff working in the Southern drug court argued that, in actuality, the health side of the court are operating with the aim of achieving abstinence:

well it is not about total abstinence, but we don't do an awful lot of harm reduction or anything like that. And we don't give anybody a maintenance script, or anything like that. It [the stated aim for the drug court] says it is not purely abstinence, but it boils down to that really. (Mark Thompson, Social Work)

In contrast health staff were somewhat vague about this. Here one health worker denies that abstinence is what they are aiming at:

Simon: Well, it is not even harm reduction. We operate what we term a 'reactive treatment'. It is not harm reduction. It is not abstinence, it is not maintenance. It is whatever the client needs.

Kerrin: ok

Simon: But the client has to be engaging with us. (Simon Callen)

However later in the same interview, 'success' is defined in terms of being illicit drug free:

Success, to me, would actually be somebody evidencing that their life has changed. That, you know, if they are still in treatment, they may be still on a prescription, but they haven't used illicit drugs for sometime.

In part this appeared to be a difference in perception of what abstinence means, with health staff not interpreting the aim of achieving complete abstinence from illicit drugs as abstinence *per se*, as the individual will still be receiving methadone on a prescription. This may appear a relatively trivial issue, but the reason I have discussed it at such length will become clear in the fourth section of this chapter.

In the previous chapter it was noted that in certain areas the legal side of the court, particularly the sheriffs, have enlarged their sphere of activity to encompass issues that would previously have been the preserve of health staff alone. Within the context of the drug courts, certain 'health' related subjects, such as the frequency of testing and the length of treatment are ultimately under the authority of the sheriffs. In other words, the most powerful legal figures in the drug courts can be regarded as expanding their recognised areas of action at the expense of health staff.

In contrast to the sheriffs, health staff are in a relatively subordinate position. For instance, with respect to the case group that is formed for any offender on a drug court order, the criminal justice social worker is the senior figure. The criminal justice social worker acts as the 'chair & convenor' in this respect (NDCM, 2003). Finally, it is worth noting that, at least formally, the legal side of the courts actually have the power of veto over *any* treatment decisions that are made within the team:

The Court is responsible for approving the treatment programmes for each individual case and has the flexibility to change these during the course of the Order, through Review Hearings (NDCM, 2003).

However, despite this lack of professional power, the health staff retain a large degree of autonomy because of the *nature of the knowledge* that is the preserve of their professions. Health knowledge retains a certain sacred quality that cannot be impinged upon by anyone who is not medically trained. Thus, for example, in the following comment one sheriff is very critical of the practices of the health staff in the drug court that they work in. However, the sheriff feels unable to challenge this. This is despite the fact that the sheriff is aware that the practice of the health staff at the other Scottish drug court differed in this respect, thus undermining the 'universality' of the knowledge that such practices were based on:

I would like to change the time, which it still takes to get people onto orders. I would still like it to be speeded up. As

I say, my doctor colleagues have told me that they are doing their best ... And their professional view is such and such. And I can't say to them 'how do your Northern colleagues get away with it?' Because it is just not done...And I have found that there is resentment, official resentment, about referral numbers in the Northern Court. [unclear] criticise Northern colleagues for effectively being gung ho. 'They are putting people on 120mls of methadone without proper testing. What are they doing? That takes several weeks.' And that is their view. That is their argument. And it is a perfectly rational outlook. I am not in a position to say 'that is nonsense'. It's their argument. (Sheriff Palmer)

Similarly, social work staff also recognised the particularly unchallengeable nature of such health knowledge whilst articulating their frustration with the practice of the health staff in the drug court in which they work. As with the sheriffs, they also stated their view that the practices of their health colleagues was not in any sense representative of a consensus in the medical professions:

Susan: in saying that, the clinical team will tell you that they have their reasons for that. And also there is the issue of risk. If people are continuing to use on top of a methadone prescription, they view that as a risk. Now whether that is only our own doctor's view, they are viewing that as a considerable risk. Another doctor may have a different view on that. But we cannot, as social workers, argue against risk.

Kerrin: yeah.

Susan: Because we are not suitably qualified to argue, or question a doctor- where risk is concerned. (Susan Taylor, Social Work)

For this reason, certain decisions, such as whether or not to suspend the prescription of methadone, remain the sole preserve of the health staff. Further, this means that in certain areas, the practices of the sheriffs themselves can come to be shaped by the decisions made by the health staff. This is the case with the prescribing policy in the Southern drug court, which is regarded by non-health staff as leading to the frequent withdrawal of prescriptions. This will be considered again in section four of this chapter. In the Northern drug court prescribing policy was not such an issue due to

the different prescribing practices of the health staff. In the Northern court these practices accorded more closely with the desires of the other drug court staff. Thus, offenders were put on a relatively high dosage of methadone rapidly, and prescriptions were not withdrawn for the 'trivial' reasons that non-health staff highlighted in the Southern court.

Here in the Southern court, though, one of the social work staff argues that the sheriff has come to focus on test results as a direct outcome of the health staff's policy:

Mark: Before she never used to mention drug tests. [unclear] she used to talk about the progress people had made in terms of general lifestyle. That and the fact that they weren't offending. And as far as test results went, she wasn't really bothered. But given that people are now giving people sanctions...by health, because of their tests, that then has the knock on effect that they are going to offend, the order is not being effective

Kerrin: right.

Mark: So she goes on about test results. But, as I say, she never used to. But, as I say, I think that is because she has to [laughs] . (Mark Paterson, Social Work)

Therefore, in this important respect the Southern drug court sheriff has moved from a perspective that the criminal justice social workers felt echoed their own, to a narrower alignment with the operating practice of the health team.

In this section I have focused on the continuation of what might be termed traditional health concerns into the drug courts. Within the context of the courts, the health staff are regarded as having retained a 'medical' focus, which translates to a concern for the health and safety of the individual, and the avoidance of risk in these terms.

Further, despite their relative degree of subordination within the court, the particular nature of the knowledge associated with health staff helps constitute an important barrier to the erosion of the boundaries surrounding their area of practice. Thus, the blurring that the drug court creates between professionals and knowledges is

curtailed in this respect. This may help to explain the generally positive view that health staff took of the pre-reviews:

Jamie: the sheriff does take on board, quite a bit of the clinical side of the review. And one of the reasons for it is obviously, you know, the likes, she has got an understanding of the issues through prescribing, and the issues of likes of using on top of a prescription.

Kerrin: yep.

Jamie: Things like that, yeah. So we are basically, well heard. (Jamie Hughes, Health)

In this section the particular outlook that characterises the health staff working in the courts has been explored, together with the way in which the type of knowledge associated with them serves to constitute a barrier, preserving a degree of autonomy for them. The following section will focus on the changes undergone by the health staff as they adapt to working in these new institutional spaces.

Health Adaptation

In the previous section, and indeed in the previous chapter, I have analysed how in a number of areas health staff have ceded autonomy over certain areas of their work, such as the frequency of drug testing and the duration of a treatment episode. This has been offset by a consideration of how the particular type of knowledge associated with the health staff constitutes a barrier against any further erosion of this autonomy. There is no need to reiterate these points here. In this section, though, I want to begin by focusing on how the stated purpose of a variety of health interventions has altered within this context. Specifically, concerns that would be considered central to the legal staff within the drug courts have been 'exported' to become explicit objectives for the health workers. This is the case with both of the main activities undertaken by health staff, namely drug testing and prescribing.

With regard to drug testing, in the *NDCM* five purposes for this procedure are

specified. Of these, the fourth purpose states that drug testing is used '[t]o increase confidence in treatment on the part of the sentencer, provider and wider community' (NDCM, 2003). As was argued in chapter six, a concern for how the drug courts are perceived by the wider community was a considerable issue for the legal side of the court. Specifically, there was a desire to ensure that the drug court orders were not regarded as a 'soft' response to crime, or as 'touchy-feely'. This links into the broader political climate, where public perception of crime control has become an important consideration. Here, one of the primary purposes of drug testing is to help assuage the concern that drug courts could be viewed as 'soft'. Thus, drug testing has a public communicative function, far removed from a focus on the health of the individual being tested.

A second respect in which legal concerns influence the purpose of drug testing was noted in the previous chapter. In the drug court manuals it is explicitly stated that the frequency of drug testing is to be utilised both to reward offenders who are performing well on orders:

Incentives at his or her [the sheriffs'] disposal range from offering verbal praise and encouragement from the bench, to *reducing the levels of testing* [emphasis added] (NDCM, 2003)

And conversely, to punish offenders whose performance has been unsatisfactory:

These [sanctions] range from expressing disappointment or dissatisfaction to *increasing the level of testing* or attendance for reviews. [emphasis added] (NDCM, 2003)

Here, in these instances an intervention carried out by health staff is explicitly used by the legal side of the court as a carrot or stick, a reward or punishment, in the same way that, for instance, a threat of custody is also deployed within the drug courts.

It is worth then discussing some aspects of how the drug courts' testing procedure is actually perceived. In both drug courts' manuals the testing procedure is specified in considerable detail. A member of the Drug Court Supervision and Treatment Team is to observe micturition to 'ensure [the] validity of [the] specimen' (SDCM, 2003). Recognising the invasive nature of this, it is stated that 'a balance has to be maintained which will preserve the dignity of the client and satisfy the worker that the specimen is valid' (ibid). To this end '[G]owns should be offered' (ibid). However, it is difficult to see how this can be reconciled with the requirement that 'direct observation of micturition must take place', and the first stage in the process: 'Ask client to remove lower clothing to the knees. Both hands should be visible' (ibid). Commenting on the testing procedure, one member of the social work staff described this as 'humiliating' for the offenders. In contrast, a member of the health staff downplayed this, before simply noting that this was what had to be done:

Most of the clients, don't mind. And the clients that do are given the option, like the male clients are given the option of a male worker. Female clients, if it is a male nurse, [unclear] test if there isn't a female nurse about. So, it's, it's the way it has been chosen. Whether [pause] it is not a nice thing for the clients, or the nurse, but that is what is stated we have to do. So we have to do it. (Jamie Hughes, Health)

With respect to prescribing, again legal concerns come to be one of the objectives of what is an intervention carried out by health staff. In the *NDCM*, six aims are specified with respect to the prescribing of substitute drugs. As noted in the previous section, abstinence was far down in this list. However, the *first* objective specified is to:

reduce the drug-related offending behaviour by substituting prescribed drug(s) for illicit preparations, where appropriate. (This removes the need to offend to secure supplies or to contravene the Misuse of Drugs Act). (NDCM, 2003)

In other words the most prominent objective specified for this health intervention is

to address re-offending. This accords with a general hierarchy of goals specified by one of the doctors working in the Northern drug court, speaking in the *Drug Courts in Scotland* video:

We have a got hierarchy of goals. Drug court first we wish him [sic], or want him, to stop offending behaviour. Next will come if he stops sharing injecting equipment. Then, of course, no injecting at all. Then, of course, you think, if at all he has to smoke, he smokes for the time being and, then gradually to reduce that then and, receive treatment for any illnesses associated with his drug taking behaviour. And finally, we wish them also to be totally abstinent. (Doctor Connor) (Scottish Executive, 2002a)

Here, a health professional identifies the ceasing of offending behaviour as the zenith of an overall hierarchy of goals. Notably, the first objective is clarified from 'wish' to 'want', strengthening the attitude of the drug courts in this respect. In contrast, the final goal, abstinence, is left as a wish.

One final point to note here is the very public way in which the results of drug tests are treated within the drug courts. The results of such drug tests were almost invariably a subject of discussion within the courtroom reviews. In almost every case, the sheriff would make either a positive or negative comment regarding these results, thus revealing- within a public context- what the actual results of these tests had been. Using medical information in this way, with the results of medical tests normally being kept confidential within the confines of the medical relationship, runs contrary to what has traditionally been regarded as a key ethic within the health professions.

It is revealing to note how this change of focus would appear to be affecting the relationship of the health professionals with the individuals they treat within the drug courts. One addiction worker claimed that due to the particular practices of the health staff, offenders were actually hiding serious medical problems from them.

Whilst this is only the view of one specific worker, it does suggest how working in the drug courts can shape the relationship that health workers have with their 'patients'. This addiction worker notes that some offenders may have developed 'ulcerated legs':

With injecting in their groin or whatever. And they [the offenders] will say 'oh, look at my leg' [showing the addiction worker their leg]. And its like 'why are you telling me? I am no a nurse.'... 'Have you showed your nurse?' 'Well, nut. I dinnie want them to know I was jagging or it will stop my script.' And it like, 'but you are going to lose your leg? And all because you don't want to show your nurse in case you get your script stopped?' (Vicki Chandler, Social Work)

In these instances, from the perspective of this staff member, potentially serious medical complaints are being shielded from health staff due to the particular practices and approaches that they observe within the drug courts. Here it is the withdrawal of scripts that is at issue, and this will be considered further in the fourth section of this chapter.

Tensions and conflicts between different staff groupings were particularly prominent within the Drug Court Supervision and Treatment Team at the Southern drug court, specifically between health and social work, in the period during which my research was undertaken. Managerial staff in this team had attempted a variety of strategies in order to attempt to overcome these difficulties. One particular strategy is of note here. Social work managers had introduced training for nursing staff and addiction workers. However, such training was not simply about explaining the procedures of the drug courts to these staff. Rather it was an attempt to challenge the values and approach of the health staff, an effort that was clearly ongoing as I conducted my research:

There is a one-month induction for the nurses. We have

started training, social work training for the nurses...We never used to do that. But we found that we were needing it simply because of those attitudes...But, I mean, the training schedule is quite good. They get a lot out of that. And begin to develop an understanding of the whole criminal justice system. But with a social work perspective. And they even, at times, begin to understand why we challenge them about losing scripts...because they can see the bigger picture. (Mark Paterson, Social Work)

The 'bigger picture' here relates to the relative balancing of risks to the health and safety of the individual, with the impact that this individual may be having on the wider community, specifically through their offending. A central aspect of a criminal justice social work perspective entails placing emphasis on the latter. This, of course, raises the question of a further consideration of what a 'social work perspective' is, and how social work staff function in Scottish drug courts. I will address this issue in the following two sections. Initially, though, a few summary comments will be offered with respect to the health side of the court.

In the preceding two sections, a picture of the health side of the two drug courts has been developed. Again, as with the legal side of the court, the way in which the health profession, and the knowledge associated with it, functions in the court is far from simple. In a number of areas health staff have found their area of practice encroached upon by the sheriffs, as the latter develop the role of 'drug court sheriffs'. Further, the very aims of health interventions are orientated towards non-health goals.

But this cannot simply be labelled 'criminalisation'. The particular knowledge associated with health staff does give them a degree of autonomy because other professions do not feel competent in challenging this, even when clearly disagreeing, because of their lack of expertise and training in such knowledge. This means that, to some extent, health staff's decisions can shape the legal side of the court. However, the replacement of health objectives by legal objectives, and the use of

health interventions to punish, or indeed reward, offenders is striking. The impetus for the piloting of the courts (the conceptualisation of the drug problem as a re-offending problem) can be seen to shape the aims and practice of non-legal professionals working within these teams. The suggestion that offenders are unwilling to present potentially serious medical conditions to health staff implies that this is having a considerable impact on the relationships between health staff and their patients. Having placed the health side of the drug courts in the foreground, and analysed how they fit within the context of these institutions, I will now turn to the final staff grouping- the social work staff.

Social Work - Division of Labour and Unity

The following two sections, foregrounding the social work component of the two drug courts, will be organised slightly differently from the analysis of the legal and health sides of the courts. Whilst there have been significant changes to the work of the professionals within this side of the court, this change has taken place within the overall 'social work' grouping. Thus, the first section will analyse the practical division of labour within the social work side of the courts together with the way in which these staff appeared to be unified by shared values, language and understandings of appropriate solutions to defined problems. The section following this will consider how social work staff perceive and interact with other staff in the drug courts, namely the health staff and legal staff. In the context of the drug courts I have used the term 'social work' to refer to the criminal justice social workers and addiction workers, together with both of their managerial staff. The broad use of this term is one that, as I shall show below, is embraced by both of these sets of staff.

In terms of practice, the criminal justice social workers have a somewhat circumscribed role. Whilst they meet regularly with offenders during the course of their participation on a drug court order, the criminal justice social workers have nothing to do with the actual treatment of offenders:

The treatment providers are the nurses and the addiction workers. (Kevin Lodge, Social Work)

[criminal justice social workers] should have absolutely nothing to do with drug treatment. (Mark Paterson, Social Work)

Therefore, whilst being part of the Drug Court Supervision and Treatment Teams, the criminal justice social workers' role is demarcated away from the actual treatment side of the courts. The central role of the criminal justice social work staff is to supervise, or monitor the offender:

generally our role is more one of, there are, case-holder responsibility, case manager, responsibility. We monitor compliance. We furnish the court with reports, normally on a monthly basis. (Richard Murray, Social Work)

To a significant degree criminal justice social workers constitute the 'supervision' part of the Drug Court Supervision and Treatment Team. Central to the criminal justice social worker's role, then, is keeping oversight of the order. Another aspect of their role is to act as the conduit for information between the legal and non-legal sides of the courts, collating reports and attending the courtrooms themselves for the reviews. In terms of their meetings with offenders, the criminal justice social workers will discuss with them how the order is progressing, asking them to explain missed appointments and so forth. The criminal justice social workers also regard themselves as performing a motivational role:

for somebody that has not done it before, it is rude awakening time. You know? So a lot of it is just trying to, just, try and encourage, just try and, sometimes the stick as well. You know what I mean. But with a view to giving them a far better chance of being able to meet the requirements of the order. (Richard Murray, Social Work)

One criminal justice social worker emphasised how this role differed from his previous experience as a social worker:

It is...a fairly difficult role I think...from a social work perspective...because it is not like any other social work job I have been involved in. (Mark Thompson, Social Work)

Indeed, one criminal justice social worker observed that he was expecting to be involved in the treatment side of the court when applying to work in one of the drug courts:

It is unlike what I imagined it would have been when I applied for the job...I had thought that, well what I now know to be Targets For Effective Change...Would be delivered by the social worker...Whereas the reality here, in this drug court, is that it is addiction workers that do that kind of line. (Richard Murray, Social Work)

In a number of respects there are parallels between the role of criminal justice social workers in the team, and that of the sheriffs within the courtroom. In both cases there is direct discussion with the offender in a context of monitoring and motivation. Significantly, addressing re-offending constituted the key measure of success for the criminal justice social workers, thus echoing the sheriffs' views. This is the case both in terms of other staff's perceptions of their work and the way in which the criminal justice social workers conceptualised this:

the differences in priorities is [between health and social work], the social work side will come from purely reducing the crime...and the criminal behaviour. (Simon Callen, Health)

I think the big differences [between health and social work] is that the social workers in this team are very committed to harm reduction, in the sort of community level...which I suppose is why they are criminal justice social work in the

first place. (Mark Paterson, Social Work)

Although Paterson's terms here, 'harm reduction' and a 'community level', are somewhat vague, when asked specifically about success he clarified this by focusing on the actual reduction of offending in the community. Thus it might be suggested that the criminal justice social workers are assimilated into the legal side of the court. In terms of their actual practice, this would be largely accurate. The role that the criminal justice social workers play within the drug courts is almost exclusively a policing role, here using this term in the sense of monitoring and surveillance. However, criminal justice social workers believed that they adhered to a set of values and approach that distinguished them from the non-social work professionals represented in the drug courts. Further, they tended to identify with the work undertaken by the addiction workers with offenders.

In terms of their practice, the drug courts can be seen in some respects to actualise the separation between criminal justice social workers adherence to social work welfarist values (including a concern for the well being of the offender) and what their work actually involves. This takes further the general trend identified in broader policy in Scotland of a narrowing of focus on re-offending. However, the idea of holding different values that distinguished them from purely legal professionals, was clearly important to the criminal justice social workers' image of themselves as a distinctive profession and this was expressed in a number of ways.

An initial important instance in this respect is the terminology used by the criminal justice social workers to refer to those individuals who are sentenced to drug court orders. Unlike the legal side of the courts, almost all the criminal justice social workers continued to refer to such individuals as 'clients'. Some members of staff suggested that perhaps they should be using the term 'offenders', but choose not to:

We are supposed to, in criminal justice, we normally, we

should be referring to them as offenders. But, I, tend to talk about them as 'my clients'...Sort of, in a report I would refer to them as an offender. But, the one to one, you know, I tend to refer to [the offenders when speaking to] other professionals as 'my clients'. (Susan Taylor, Social Work)

Language, is of course, important and the difference between using the term 'offender' and the term 'client' has important connotations for the way in which professions view the individuals they work with. Here one social worker explains what he perceives to be the implications of using this term:

the thing is, we are current criminal justice social workers, when we get somebody from court they talk about 'the offender'...And in that sort of regard, as far as the court is considered, they are 'the offender', and they are somebody who has been found guilty of an offence and therefore they are an offender. But I view that they come here as clients, to try and take advantage of, or to get benefit of the service we provide to clients. (Richard Murray, Social Work)

This use of the term 'client' is one that is shared by both of the main staff groupings in the Drug Court Supervision and Treatment Team. The division between the usage of offender with respect to the legal side of the court and the use of client by the non-legal staff is embodied in the drug court manuals themselves. Thus, for example, there is a change in the *SDCM* as to the term used to refer to those individual drug users who are participating in the drug court. In the first half of the document, which outlines the general aims, purposes and procedures of the court, particularly with respect to the courtroom, they are referred to consistently as 'offenders'. However, the beginning of a section focusing on the medical/treatment role of the Drug Court Supervision and Treatment team carries a change in this respect - individual drug users are suddenly referred to as clients: 'Potential clients will be offered an appointment timetable' (*SDCM*, 2003). Throughout the rest of this chapter, which concerns the actual work the Drug Court Supervision and Treatment Team undertake with the individual offenders, this usage continues. It is only at the beginning of the next chapter, a section outlining short summary information about the drug court,

that 'offender' comes to replace client again.

One of the criminal justice social workers did choose to use the term 'offender', and found that this brought him into conflict with his colleagues:

other workers referred to them as clients, I thought I would stick to offenders. We are within the criminal justice system...and formally they are offenders. We are treating their offending behaviour. I got into a debate with one of the workers. Who said 'That is really disempowering. They are clients'. [unclear] 'They are coming here for a service'. [unclear] 'you are the one giving them a service'. And we got into the whole debate. And I call them offenders and they call them clients. (Mark Paterson, Social Work)

This use of the term 'clients' linked more broadly to the criminal justice social work staff's perception of themselves and their work. Whilst in their practice the criminal justice social workers were engaged in the monitoring and motivating of offenders, it was clear that they believed that their general outlook distinguished them from the legal side of the court. In this respect social work staff discussed how they adhered to different 'values':

we, as social workers are working towards our, we are addressing our own value base on an ongoing basis, because that is what we are trained to do...We are trained to reflect and look at our own value base. We are also working towards a code of ethics that we work towards. (Susan Taylor, Social Work)

Further, they regarded themselves as holding a particular view of the individuals they worked with which also distinguished them from staff in other professions:

social work has got a sort of entrenched worth, in an individual. And see people as an individual. (Susan Taylor, Social Work)

They regarded themselves as viewing the individual holistically. And, whilst they were committed to reducing re-offending as the central aim of their work, one criminal justice social worker argued that if this was all that the drug courts achieved, then neither himself nor his colleagues would have continued working within them:

I think if people only stop offending and if they didn't see significant improvements in their quality of life, I don't think social workers would stay working in here. The fact is they see both generally. As soon as somebody is generally prescribed, you start to see improvements. They will offend far less than they did before. And their levels of engagement, their appearance and all the sort of anecdotal stuff, it improves drastically. That's actually, I suppose why I stayed working within this area of criminal justice, for the past six and a half years, because of that....So you can work with individuals who are initially coming in ...totally out their face on heroin...maybe offending three or four times a day, constantly being lifted by the police. By the end of the third month, they are a lot cleaner, they can engage a lot more, they turn up to appointments they begin to look toward what they want to do with their lives in the future, and things. Now, I don't think anywhere else in criminal justice you see that, massive change so quickly. And I think that is probably why we have a very committed social work team actually, because you can see the benefits very quickly...And that is why I have stayed, I suppose. (Mark Paterson, Social Work)

In other words as well as the focus on tackling re-offending, criminal justice social workers argued that they maintained a commitment to the broader welfare of the individuals with whom they worked. Whilst this broader commitment would seem to have little expression in their actual practice, these workers needed to believe that this was what the drug courts could, or did, achieve. The addiction workers were regarded as constituting important agents for change in this respect. They undertook treatment activities that in a different context might have been undertaken by criminal justice social workers themselves:

A CJS [criminal justice social] worker is working for the court, on behalf of the court with a number of clients. A

social worker in a more generic team is working with a client trying to, resolve, or help them resolve whatever problem they are dealing with, in their life. So in that way, there is sort of three strands within this team. The addiction workers are, although we still work for the court, we tend to do the more traditional 'social workie' type role. We are working with clients, and trying to work things through with the client. The supervising officer [criminal justice social worker] is supervising an order, so more working in the criminal justice mould, for the court. (Rebecca Miller, Addiction Worker)

Thus addiction workers and social workers had a practical division of labour in the court. However, this was in terms of different aspects of a traditional criminal justice social worker's role. Further, they clearly identified with each other in terms of approach:

addiction workers and social workers tend to come from the same kind of background. (Mark Thompson, Social work)

Within the courts the addiction workers undertake the one-to-one and group therapy with the offenders. The counselling approach used in the drug courts is described as being 'eclectic' in the *NDCM*. A variety of approaches appear to be utilised in this respect, many of them 'drawing upon Solution-based or Brief Therapies' (SDCM, 2003); Prochaska and DiClemente Stages of Change Model (1984) is frequently referred to, and Cognitive Behavioural Therapy (CBT) appeared central. Here, for instance, Rebecca Miller talks about her work:

The main tools, a lot of the tools we use, as addiction workers are cognitive behavioural stuff. So we are looking at changing thought patterns so that the action changes as well. So we look a lot a decision-making. We look a lot at consequences. Because drug users tend not to think beyond the immediate. 'I need to get a hit. So I need to get money to get a hit'...So we tend to tease that out quite a lot. We also use motivational interviewing quite a lot, to try, and let someone unpick things themselves. (Rebecca Miller,

The centrality of CBT is stressed here. Motivational Interviewing is also mentioned. It needs to be noted that CBT has a very specific view of the self and this will constitute one aspect of the following chapter. It has been suggested that the appropriate metaphor for its view of the individual is that of a computer, with abnormal behaviour being understood as if the individual was incorrectly programmed (McLeod, 1998: 27). All the social work staff appeared committed to the use of such therapies as central tools in attempting to overcome addiction. This shall also be explored further in the following section, where the relationship between the social work staff and the other staff groupings in the drug courts will be the focus.

Social Work in Context

In the first section of this chapter it was noted that the health staff considered themselves 'well heard' within the pre-reviews. How, then, did the social work staff view these occasions? These are described in the *NDCM* in the following terms:

Unlike the position in normal criminal procedure, each Drug Court Sheriff will preside over a team, which will contribute to the sentencing process in a manner which is unprecedented in this country but is commonplace in those jurisdictions where these Courts operate. (NDCM, 2003)

Notably, the criminal justice social workers described the pre-reviews as going to 'court'. This could be taken to simply reflect the geographical location of the pre-reviews, with these all taking place within the sheriff court buildings. However, this also conveyed a sense of them being essentially legal events.

Whilst most of the social workers and addiction workers made positive comments about the pre-reviews, all made critical comments. Such criticisms focused on two

main issues. Firstly criminal justice social workers were critical about the general focus of the pre-reviews:

there is times when you are sitting there and the only focus that Sheriff Palmer will have, on that report, is full attendance and whether somebody is negative or positive. (Susan Taylor, Social Work)

In other words, the focus tends to be on the results of drug testing and whether offenders have been regularly attending their appointments. This was clearly frustrating for social work staff:

Because it is really important that she hears, not just clinical treatment, and not just attendance, but there is a lot more...to this young person's life than, treatment. Clinical treatment. (Susan Taylor, Social Work)

The social work staff argued that what was omitted in this respect was a more holistic view of the offender's progress:

what gets disregarded is changes in attitudes, and changes in behaviour. The offending behaviour does come up, she wants to know if somebody has come to the attention of the police or not. But she fails to want to pick up on stuff that is important. Small changes are really important because they are really significant in somebody. Somebody is...building relationships with their family, and if somebody's, you know, just a different change in their clothes, demeanour, their physical health. These are all stuff that supports individuals. And sometimes she is not too happy to, to take that on board. (Susan Taylor, Social Work)

In other words, there was a perception that the sheriff was not giving appropriate consideration to the work that social work staff, and particularly the addiction workers, were undertaking with the offenders, and to a broader view of their

progress.

A second issue relates to the extent to which the pre-reviews genuinely involved consultation. In my observation of pre-reviews at both Scottish courts, the Northern drug court involved more genuine consultation between the sheriffs and other staff present than those at the Southern drug court. However, in both locations the majority of interactions were controlled and instigated by the sheriffs, and there were no occasions during my observation when staff other than the sheriffs raised important new topics. The pre-reviews began when the sheriffs arrived, much like the reviews, and no discussion of the cases took place before their arrival.

The central role the sheriffs tended to take in shaping the nature of the pre-reviews is reflected in the positive comments that the members of the Drug Court Supervision and Treatment Teams made when less experienced sheriffs were filling in for the regular drug court sheriffs. The less experienced sheriffs tended to be more consensual because of their inexperience in this role. Differences were noticed when different sheriffs were presiding at the pre-reviews, when they tended to take a contrasting approach. This can be seen to reflect negatively on the degree of input that these workers feel they actually tend to have:

Rebecca: One of the sheriffs [when filling in] actually goes round the table, he wants the opinions from each of the disciplines. And literally after he has got that he will say 'and what do the team want me to do?'

Kerrin: yeah

Rebecca: 'with this client before me this afternoon'.
(Rebecca Miller, Addiction Worker).

Thus social work staff had a far less positive view of certain aspects of the pre-reviews. Specifically they wanted the sheriff to consider the offender in more holistic terms within this context.

Interestingly, though, the social work staff were also highly critical of the sheriffs when they did attempt to behave more like social workers. One of the questions that I asked drug court staff required them to respond to a statement about the role of the judge in a United States drug court. This extract, taken from the Clark County, Nevada drug court, stated that the ‘purpose of the drug judge is to be a combination authority and father figure, a psychologist, social worker and judge’(Nolan, 1998: 93). I asked to what extent they felt the sheriff in the court they were working in approximated this description. A number of staff suggested that the sheriffs may view themselves in these terms. However, this was not actually the case:

Mark: I think she does, she tries to encourage people. I think in her head she probably is those things.

Kerrin: yeah

Mark: [pause] In reality I don't think she is though. (Mark Paterson, Social Work)

Rebecca: I think the sheriff, the sheriff here, would probably agree with that. She would see that as what her role is.

Kerrin: Yeah

Rebecca: I think people in the team would probably not agree with that. Because they would think that, the sheriff's job is to be a sheriff. The sheriff's job is to do the carrot and stick bit. (Rebecca Miller, Addiction Worker)

The social work staff gave a variety of reasons why this was the case. Firstly the limited amount of time that any individual sheriff actually spent with any one offender was commented upon. This was interpreted as leading to a limited knowledge and understanding of the offender:

Rebecca: the actual psychology bit, the work bit, all that bit, should really be with the people who are face to face and are working with the client. And the sheriff will see someone once a month, and whilst having a dedicated sheriff is a definite strength, because she does both build up a relationship and an understanding of the clients. She is not seeing them week in, week out. She is not hearing all the stuff that is going on for them. So I think to be the

psychologist and father figure, I am not sure that I would agree that is what the role should be.

Kerrin: Yeah

Rebecca: I think it should be separate from that. (Rebecca Miller, Addiction Worker)

A second reason that was advanced was simply that the sheriffs had not had adequate training to allow them to perform such a function:

Mark: I mean, it took my three years to become a social worker

Kerrin: yeah

Mark: And it has taken another seven years really to get where I am. And she has had a couple of hours a week contact with a social worker...So, yeah, she probably thinks she is all of them [a combination authority and father figure, a psychologist, social worker and judge].

Kerrin: [laughs]

Mark: And tries to be. Or draws on bits of all of them. But I think the difficulty is, it's like seeing somebody building a house, and trying to do it yourself. (Mark Paterson, Social Work)

A further reason that was given for rejecting such a role for the sheriffs related to the values that they were perceived to hold. Social worker staff regarded themselves as holding to a specific set of values that were at variance with the values held by the sheriffs:

Susan: I mean there is not very much social work values that she holds.

Kerrin: yeah

Susan: And that, again, she wouldn't be expected to. But she, I think, she has got limited insight into her own value base and how that could probably come across at times. (Susan Taylor, Social Work)

It was argued in the first section of this chapter that the exclusive knowledge related to the health side of the court acted as a barrier, at least in certain areas, to the

sheriff's expansion of their actions beyond their traditional areas of expertise. Notwithstanding this, within the drug courts a certain degree of fluidity develops in the relationship between professions and the knowledges associated with them. The type of knowledge traditionally associated with addiction workers and social workers clearly did not hold this same status as that associated with health staff. Thus social work staff had to ensure some demarcation between themselves and the sheriffs. One staff member discussed this at length, again stressing the distinction between the sheriff's values and those held by criminal justice social workers:

Susan: And sometimes you can offer her [the sheriff] some information about an individual, and then she will want more and she will want more and she will want more. And again, you are trying to protect this individual.

Kerrin: Sure.

Susan: Without giving too much information to court. But [giving] the information that the court requires. And...she is a sheriff, and she has not got the same values to interpret the information that is coming across to her [as social work staff do]. So...although she says about protecting somebody if they have got, stuff going on at home, she may say 'this as a solution' [to an offenders situation], but it is not a solution, because these people [the offenders]...their lives are far more complicated than that. And she will try and tell them 'you need to do this and that'. But it is not realistic for the people to do that. So you have got to...kind of, gauge what kind of information you give her. Because what you don't want is to give her too much, for her to use it against the person. And I am not saying she would do it in a bad way. But in a way that she is not realising that she's maybe doing that. (Susan Taylor, Social Work)

In order to attempt to somewhat restrict or qualify the sheriff's apparent straying into social work territory, the criminal justice social work staff curtail the information that the sheriffs will receive. In their account the social workers are attempting to protect the offenders from 'omnipotent moral busybodies', to use a phrase penned by C. S. Lewis that has been applied to United States drug court judges (Hora, 2002).

Having considered the relationship between the social work and legal side of the court, I now turn to a central relationship within the Drug Court Supervision and Treatment Team, that between the health staff and the social work staff. In the Southern drug court, this relationship was marked by considerable conflict, centring on one specific issue- prescribing.

The issue of prescribing was a significant source of contention in the Southern Drug Court Supervision and Treatment Team. The focus of this conflict concerned the way in which the health staff regulated the scripts and made decisions regarding their continuation or withdrawal, with these decisions being criticised by addiction workers and criminal justice social workers. Social work staff felt that the way in which scripts were withdrawn undermined the type of work that the addiction workers, and to a lesser extent the criminal justice social workers themselves, were undertaking with the offenders:

there is a huge tension surrounding the withdrawal of prescriptions. You know, we are working multi-disciplinary...the addiction workers who are working on motivational techniques. Working on pro-social ways, drawing out peoples positives, disregarding the negatives, looking, you know, and when we are asking addiction workers to go and do that kind of work with somebody, an hour a week. Engage them in a group work programme, get them stable, and if they relapse, their prescription is withdrawn and all this work has gone. This work means nothing. (Susan Taylor, Social Work)

Criminal justice social work staff who were focusing, as noted in the previous section, on reducing offending, and addiction workers, focusing on trying to address the offender's drug problems, felt that they were unable to do their jobs to the best of their abilities due to the continual withdrawal of prescriptions. Here the contrast between social worker's focus on risk at the community level (the risk to the public of the offender re-offending) came into conflict with health workers' focus on the risk to the individual's health if they were using on top of their methadone

prescription. For the social workers withdrawing this prescription had the perceived impact of forcing offenders back to offending and also of breaking their engagement with addiction workers.

It was argued by some criminal justice social workers and addiction workers that health professionals were effectively using the withdrawal of scripts as a way to punish offenders, or, as one criminal justice social worker put it, 'there is this what I would call, 'the deserved and the undeserved drug user'. As to whether or no they get a script' (Richard Murray, Social Work). This same criticism, that health staff use the withdrawal or continuation of scripts to indicate their approval or disapproval of the offender's behaviour, is also raised by another criminal justice social worker. Here he argues that the withdrawal of the script is being used as a sanction:

I just get the feeling that, that people, it's almost, whether they have worked hard enough to get a script. Or whatever. And, if they don't do what they are told, sometimes it is used as a punishment. And I didn't think it should be like that.
(Mark Thompson, Social Work)

One criminal justice social worker argued that, although he did not agree with an illness model, in comparison to how the health staff operated, he would prefer if they would actually treat their drug use as if it were an illness. By this he meant that if someone were ill, and were receiving medication, then medication would not be withdrawn from them:

Richard: Having said that, and I know it might come as a surprise coming from a social worker, almost I would like it to be treated, sometimes, as though it was an illness. Because you would not pull a script from someone who was ill.

Kerrin: Yeah

Richard: You wouldn't. (Richard Murray, Social Work)

In contrast, health staff argued that in adhering to their clinical guidelines they were

looking after the health of the offender, avoiding, for example, the threat of overdose:

it is paramount safety. And we have got a lot of likes of ethical issues, especially if somebody is using to a dangerous level. And the prescribing is, it is not, taken away. A lot of folk think it is just the script is taken away...the person is, goes through a warning stage...and, I have been involved in fatal accident enquires before. And if you, if you are prescribing methadone, which is a respiratory depressant, right, and they are using on top, the client's using on top, that guy could go into, that client could go into, a respiratory arrest. And die. Right, so, it's mainly an ethical issue. (Jamie Hughes, Health)

Commenting on the seriousness of the conflicts within the team at the Southern drug court, one senior member of staff could see no positive features of the multidisciplinary side of the drug court, by which he meant the relationship between the health and social work professionals:

Kerrin: Aside from those particular tensions, do you find, bringing together those different perspectives, has there, can you see positive aspects of it as well?

Mark: There are very positive aspects of the drug court. I can't think of any positive aspects of that aspect of it at all. (Mark Thompson, Social Work)

Discussion

In this chapter the two main staff groupings within the Drug Court Supervision and Treatment Team have been brought to the fore, the health staff and the social work staff. It is clear that this division within the court constitutes an important demarcation in terms of differences of philosophy and approach.

The introduction of the drug courts has created new institutional spaces, within which the traditional boundaries between professions and the knowledges associated

with them in the Scottish criminal justice process are called into question. In the previous chapters I have discussed how the sheriffs have maintained their professional authority whilst non-legal knowledge has come to play an important role within the court. At the same time, though, the boundaries concerning what precisely constitutes the sheriffs legitimate sphere have become blurred. This creates a potentially difficult situation for the non-legal professionals in the courtroom, who possess unequal degrees of professional authority vis-à-vis the sheriffs. In the case of health staff, the particular nature of the knowledge associated with them constitutes an important limit to this process. This is not the case with social work professionals, whose knowledge is less clearly demarcated and exclusively owned. Social work staff, attempting in their account to protect the offenders from well meaning but untrained and clumsy interference, tried to limit what information they gave to the sheriffs.

However, these barriers only go so far, and in terms of professional boundaries, the division between the sheriffs' influence and sphere of action on the one hand, and that of the health and social work professionals on the other, has clearly moved in only one direction- towards the judiciary. Further, the drug courts are clearly criminal justice institutions, which have criminal justice goals. Both criminal justice social workers and health staff have had to adapt to working in this context. In the case of the former, the policing aspect of this profession has come to the fore. In the case of the latter, reducing re-offending has become a central aim of their interventions.

However, it needs to be noted that drug courts are not homogeneous spaces, and unanimity was not evident among staff as to what precisely the courts are trying to achieve. Activities that are not simply instrumentally focused on reducing offending are undertaken, and the agency of individual members of staff should not be ignored (Cheliotis, 2006). One staff member discussed this divergence of views within the Drug Court Supervision and Treatment Team regarding success. Whilst the views of the health staff and criminal justice social workers concord with what we have been

discussing in this chapter, the work of the addiction workers suggest a more holistic practice:

I went round the team and spoke to all the different disciplines to find out their views...And the nurse said, 'our successes are the ones that are totally drug free at the end of an order'. The social work said 'our successes are the ones that aren't offending'...The addiction workers said 'our successes are the ones that are moving on in their life'. Our counsellors¹⁵ said 'our successes are the ones that will look me in the eye'. (Mark Paterson, Social Work)

In other words, whilst the overall impetus for the creation of the multi-agency drug courts is to tackle re-offending, and each member works to contribute to this, this does not mean that there is no space at all within these programmes for activities that focus on the 'welfare and satisfaction' of offenders (Allen, 1981: 2). However, for most of the drug courts staff, this is not an aim of their actual practice.

The picture of the relationships and tensions between the various professionals and knowledges that constitute the two Scottish drug courts which has been developed over the course of the last three chapters reveals the variety of influences shaping these programmes. The particular nature of the drug court model is put into practice through the cooperation, negotiation and conflict between the various professions that constitute the courts. Each of these professions has its particular approach and professional ethics. The role of these professions, and the choices that they make within the drug courts, takes place against a broader policy context that shapes these choices, with stress placed on reducing re-offending, the safety of the public and ensuring an appropriate external image for crime control policies.

My final findings chapter will now turn to consider the offenders on drug court

¹⁵ Here referring to staff working in an external counselling service whom are contracted to provide counselling services.

orders. How are these individuals conceptualised and responded to within this context? What results from bringing together these different professions and knowledges within these new programmes? Specifically, the way in which the two drug courts bring together and put into practice two apparently mutually exclusive conceptualisations of the offender, as capable of choice and responsible for their behaviour on the one hand, and as a drug user, suffering from the disease of addiction and unable to resist the lure of heroin on the other, will be explored.

Chapter 9: Freedom and its Discontents

The divergent interpretations that the United States drug courts have been subject to is exemplified in the contrast I developed between the work of Nolan (2002a) and Malkin (2005), each of whom presents a markedly different impression of these programmes. In this chapter, the features stressed by *both* of these authors will be shown to be present in the discourses, practices and knowledges that constitute the Scottish pilot drug courts. Rather than a unidirectional process whereby a disease understanding of drug use can be seen to dominate these programmes or, conversely, what Scull refers to as the ‘common sense schema’ of volition and responsibility, which he sees as central to the law, being all-pervasive, both are in fact present in the Scottish drug courts (2006). Both serve to shape the way in which offenders sentenced to drug court orders are responded to and are understood. The latter of these frameworks does, though, occupy a notably prominent position. This might suggest a considerable accord with the governmentality literature, with offenders being responsibilised or subject to a process of ethical reconstruction. However, it will be argued that the notions of choice and responsibility within these drug courts, both during the programme and in terms of the ideal outcome of the order, should not be taken at face value.

Initially, it is important to make explicit the assumption that underlies Nolan and Malkin’s work, and indeed my own in this respect. As Garland puts well in his *Punishment and Modern Society* (1990), implicit within apparently mundane penal practices is the enactment, and symbolic representation of, a number of important social relationships and social actors. Thus, within penal practices ‘there is a conception of social authority, of the (criminal) person, and of the nature of the community or social order that punishment protects and tries to re-create’ (265). How offences are responded to, the way in which offenders are, or are not, held to account and the types of punishment or treatment that they receive all signify and enact these relationships. Focusing on the issue of the (criminal) subject, Garland expands on this further:

In its routine practices – as well as in its more philosophical pronouncements – penalty projects definite notions of what it is to be a person, what kinds of persons there are, and how such persons and their subjectivities are to be understood. Through its procedures for holding individuals accountable, penalty defines the nature of normal subjectivity and the relationship which is generally assumed to hold between individual agents and their personal conduct. (268)

In this chapter the routine language and practices of the Scottish drug courts will be considered in this respect. Four main frameworks have been identified through my analysis. These are, respectively, a ‘disease’ framework, a dichotomy of ‘chaotic and stable’, a behaviourist view of the self and, finally, a view of the self as an autonomous agent capable of choice. These will be delineated in turn before a discussion section reflects on the wider implications of these findings. Two of these frameworks, the first and the last, are most prominent in the drug courts, and are central to understanding the nature of these programmes and their ‘projection’ of the criminal subject. The length of the respective sections will reflect this importance.

Disease

One of the four central ways in which the criminal subject is characterised in the language and practices of the two Scottish drug courts is within a framework of ‘disease’. In this section I will explore how this framework manifests itself within the two courts, beginning with the overall purpose of, and entry criteria into, these programmes. Following this, the attitudes of various staff members will be analysed and the practices of the two courts will be considered. Initially, though, it is worth adding a couple of qualifications.

Firstly, that there is no such thing as *the* disease model or medical model. As Johnstone has argued there are in fact different medical models which make divergent assumptions concerning the nature and cause of disease (1996). Thus the utilisation of medical concepts in the penal sphere cannot be assumed *a priori* to take

a particular form or to have particular effects. Secondly, drug addiction, the specific condition in question here, has many parallels with Valverde's discussion of alcohol in her *Diseases of the Will* (1998). Like alcohol, the subject of Valverde's study, the treatment of drug addiction is often a 'hybrid project, borrowing bits from psychiatric science, clinical practice, Christian techniques of the self, high philosophy, New Age spirituality, self-help manuals on success and enterprise, and so forth' (11). In other words drug addiction and its treatment has never been fully medicalized which, as Valverde contends, means that particular attention needs to be given to 'the creativity and eclecticism of front-line work' (11).

Turning to the Scottish drug courts, the overall concept of these programmes and the entry criteria that are used by them are the first points where evidence of a disease framework is apparent. As stated in the *NDCM*, one of the central entry criteria for the courts is that:

There must be an established pattern of drug misuse and an established pattern of offending with a direct relationship between the two. The nature of the drug misuse must be susceptible to treatment but should not primarily consist of cannabis. (NDCM, 2003)

In other words, the Scottish drug courts are set up, and the entry to the court is predicated on, the idea of drug use as being a treatable condition that has a direct relationship with offending. The latter aspect of this is worth stressing, as the drug courts are not actually interested in illegal drug use *per se*. Cannabis, for instance, is not actually tested for. This, it could be suggested, might be due to the fact that it is not generally regarded as an addictive drug. However, to take a different example, benzodiazepines, which are tested for and which are generally regarded as addictive, tend to be regarded relatively leniently. Their use is not given the priority that heroin or cocaine use is. This is essentially because the drug courts are focused on criminogenic drug use, patterns of drug use that are conceived as being the causal factor in re-offending. It is the control of criminogenic drug use that is the aim of

these programmes.

Drug using offenders who meet the entry criteria are offered the alternatives of either remaining within the conventional criminal justice system, and being sent to prison, or entering the drug court and having their drug use treated. This amounts to an attempt to coerce drug users into treatment. In terms of the standard relationship between medical authority and the entrance of an individual into treatment, there would appear to be no parallels with this type of coercion, backed by a direct threat of punishment, which is used by the drug courts. As Talcott Parsons noted in his study of the sick role, an expectation is usually placed on the sick person to try to get well and, of their own volition, to seek technically competent aid to this process (Parsons, 1954). The primary exceptions to this rule are in relation to diseases that render an individual a (perceived) significant risk to the wider community. Examples here would include the outbreak of extremely dangerous infectious diseases, for instance smallpox, and illnesses that are believed to cause the individual to become a threat to others, such as certain types of mental illness. In both such cases medical authorities can be authorised to use force to bring individuals into treatment, both for the individual's own good and for the protection of the community.

Whilst, undoubtedly, in actual medical practice there are instances of individuals being coerced into various forms of treatment, there would appear to be no direct parallels available in current medical practice of coercion as an *explicit means of sanction*. The use of coercion, though, places drug-using offenders closer to the case of an individual with a form of mental illness that causes them to become a threat to others than to the case of an individual who is entering treatment of their own free choice.¹⁶ However the fact that offenders entering either of the drug courts are not actually forced into treatment, and that they are also not accorded exemption from being held accountable for offences they have committed in relation to their 'illness',

¹⁶ This is, of course, an overly simplistic dichotomy that ignores the complex factors that influence any individual's decision to seek medical help. By 'free choice' all that is meant here is that there is no official attempt to coerce or force the individual into treatment

are important distinctions. To take another example, someone who is regarded as having committed an action that would otherwise be considered a crime (the *actus reus*) is exempted from criminal responsibility for this action, if that individual is held to be insane. Such an individual is subsequently forced to undergo what is perceived to be appropriate treatment. In contrast, within the drug courts responsibility and a degree of choice, remain present. This would appear to accord with the 'hybrid' way in which drug addiction is viewed within society. The discourses surrounding addiction in society often contain the belief that the individual who is so afflicted suffers a loss of control of their behaviour. At the same time, though, a sense of blame and condemnation attaches to 'junkies'. The very concept of the drug courts would appear to internalise- and express- elements of this hybrid perception.

During interviews I specifically asked all staff members whether they regarded drug use as being an illness. Further, for those who agreed that drug use was an illness, I also asked whether they believed that this illness explained the offending that the drug user had committed. The responses to this question might appear surprising. Of the members of the Drug Court Supervision and Team who I interviewed, including the medical staff, none were willing to unequivocally endorse the idea of drug use as an illness. The response of one addiction worker to these questions will serve to illustrate this. It is worth emphasising here that of all the professions working in the drug courts, the addiction workers engage most closely with the offenders in terms of trying to overcome their addiction:

Vicki: No, I think it is a choice.

Kerrin: Yeah.

Vicki: Personally I think it is a choice. People choose to get involved in these circumstances. They choose to take, they maybe take heroin as a one of, and its 'next thing I knew I was hooked'.

Kerrin: Right.

Vicki: And it is like, 'well, take it back'. [laughs]

Kerrin: [laughs]

Vicki: 'How many times did you use before you started

suffering from withdrawals? What was it about it that kept you going back?' (Vicki Chandler)

Here Vicki emphasises that she believes that the process of becoming a regular drug user involves a series of choices on the part of the individual. It is not a case of 'contracting' the addiction in a single instance. Further, later in the same interview Vicki made clear that even when the individual has become a regular drug user the resolution of their condition is not outwith their control. Here Vicki is discussing how in her work in the drug court she confronts offenders with the results of their offending, in this instance the impact the offending has on victims:

Vicki: It is quite interesting to hear the justifications...the way the clients sort of respond to the justifications when you challenge it. Sometimes they put themselves into a 'but I am a drug user, what am I meant to be do?'

Kerrin: Yeah

Vicki: And it is like 'ok' [laughs]

Kerrin: [laughs]

Vicki: 'try and take some control of your drug use. Because there is not a single thought to that particular offence.'

Here it is clear that Vicki, 'try and take some control of your drug use', rejects the idea that the offender is suffering from a disease that renders them incapable of controlling their actions.

In contrast to this, all members of the legal side of the court accepted directly that drug use was an illness. Here, for instance, is Sheriff Palmer:

I think that that is right. It is an illness...I mean when I see people with a serious heroin addiction which they are paying 40, 50, 60, 70 pounds per day to feed that habit and they cannot avoid it. I see it also in people who attack other people. The people who attack older people. Which I am less sympathetic to, of course. But I can see that these people are reasonable people often. Who would not do that [if they

were not addicted]. They would do it to their own grandmother because they are so desperate because of the withdrawal symptoms from heroin. I agree with that therefore. That they are ill.

This is unequivocal. However, when questioned further about the way in which they viewed this illness, the legal staff were at pains to emphasise that the illness was self-induced, and that the offender themselves was responsible, and to be blamed, for becoming ill:

You have brought this upon yourself. You are not born an addict, you are not born like that. It is not an illness like cancer. However, once someone is addicted, there are physical changes to their brain. There are chemical changes to the brain. However, we do not say this to the offenders. It would be a dangerous message to send out to them. (Sheriff Sutherland)

And Sheriff Wallace similarly apports blame:

Well, yeah, I think they got themselves into it. They created that disease for themselves. You could argue that they were vulnerable, and their choices were limited. But yeah, it is a disease but it is a self-inflicted disease. I would draw the distinction there. It is not something that has come through natural causes.

Thus, although drug use is regarded by the sheriffs as an illness, it is an illness that the offenders are responsible for having brought on themselves. Following from this, for the legal staff addiction is an illness, but it is an illness that is only contracted by certain types of people, and to which a sense of blame is attached. In terms of the actual practice of the two courts, a disease framework would appear most apparent in two areas. The first of these is in terms of the way in which the court responds to continued drug use and offending during the order, the second the prescription of methadone by the health side of the court.

With respect to the continued use of drugs and minor offending, in the early stages of a drug court order, continued drug use is both expected and accepted. Indeed, the *NDCM* states that:

Serious, well established drugs misuse is often described as a “chronically relapsing condition”. This is due both to physical dependency where the body craves the substances and reacts against its withdrawal and psychological reliance which the individual acquires upon the substance and the lifestyle and social networks which attach to drugs misuse. (NDCM, 2003)

Similarly, a ‘blind eye’ is also turned to ‘low level’ offending during the early stages of the drug court order, specifically when that offending is regarded as directly related to the drug use. In both cases the underlying assumption is that the drug user, when entering the drug court, is ill and not fully in control of their actions due to their craving for drugs. During this period, before their drug use is controlled, it is to be expected that they will continue to take drugs and commit offences to fund their drug taking.

In terms of the prescription of drugs, within the United Kingdom, the prescription of methadone is one acceptable medical intervention used in the treatment of heroin addiction. As well as its practical effects, its use symbolises the fact that in this country certain aspects of the response to heroin fall under the remit of the medical establishment. In other words, the prescription of methadone is regarded as part of medicine’s wider project of maintaining, or restoring, human health. Whether or not methadone does or does not actually achieve this purpose is not important for my argument here. What is important is that its prescription is another aspect of the drug court that accords with an ‘illness’ view of drug use and the criminal subject.

Thus a view of the drug user as ill, and in certain respects, lacking control of their behaviour, is a significant aspect of the philosophy of the two drug courts. Its

presence can be seen in the concept and entry criteria of the court, in the attitude of the legal staff, and in certain practices of the court. However, the particular concept of illness present here does not absolve the offender of blame, and nor does it remove the offender from the criminal justice system. It is also notable that whilst the notion of the drug user as being ill is certainly present in certain respects at the entry point into the two drug courts, it is not possible for an offender to remain ill, in the sense of not being in control of their behaviour, during the entire course of a drug court order. The response to the offender's drug use and offending (not the focus of considerable concern at the beginning of an order) changes as that order progresses. The individual must either become an ex-illicit drug user, or the individual becomes a simple offender, necessitating punishment. This was clear from watching the courtroom interactions. The concept of the offender as being ill, and this illness meaning that the individual cannot be held fully responsible for their actions, can obviously be an attractive 'explanation' for drug users who are being held accountable by the sheriffs. Here is one relevant exchange in the courtroom:

Sheriff: [addressing offender] Mr Barnes, there are positive results everywhere. What are you doing?

Offender: I had a wee relapse.

Sheriff: When was the last time you took illicit drugs?

Offender: I think it was four days ago.

Sheriff: [increasingly harsh tone] I want to see sustained results. I do not want to see results like these coming before the court.

Offender: The Cocaine use was not really serious. Only

Sheriff: [interrupting] I regard this as a serious matter. You are an excellent timekeeper. You attend all your appointments. But we have got to find some way of dealing with the heroin and cocaine. You are a bit wobbly. What are you going to do about your situation? Have you had any thoughts about your housing situation?

Offender: I am going to move away from the area I am living in at the moment.

Sheriff: I am going to see you again [before the normal review period]. I want to see a considerable change in your attitude. And I want to see negatives for cocaine. (Sheriff Sutherland)

In this exchange the offender attempts to position himself in a disease framework. He utilises one of the key terms, 'relapse', and adds an adjective that diminishes its importance. It is notable that in other context sheriffs will make very similar remarks, referring to a 'slight blip' or suchlike. However, in this particular context the sheriff brushes the offender's attempt aside. Being treated as ill in the drug court is a temporary status. There is no exact criteria for its duration – how many relapses are expected? For how long? The judgement of staff, including the sheriffs, is central to determining this in each case. As time passes the salience of illness diminishes, and full responsibility can return, sudden and unwelcome. As this suggests, there are other concepts of the criminal subject present in the drug court, and it is to the second of the four that will be highlighted in this chapter that I now turn.

Chaotic or Stable

The second framework identifiable in the practices of the courts overlaps to some extent with the disease framework outlined in the previous section. However, aspects of this framework were sufficiently distinct to warrant it being discussed separately. This is the dichotomy between 'chaotic' and 'stable' drug users. The notion of 'chaotic drug users' and 'stable drug users' is one that is widely used in the drug treatment and policing fields. Often, though, these terms are used in a rather loose and imprecise manner.

Within the two drug courts the term 'chaotic', and 'chaos', were used by all staff groupings in reference to the offenders they worked with. At times the offenders were themselves described as chaotic, a state that attaches to their very being. Here is a criminal justice social worker responding to a question concerning the entry criteria that the drug court uses:

we are targeting very, very chaotic drug users. Ninety-nine point nine percent being heroin addicts. (Frank Jameson)

At other times it is their lifestyle that is described in these terms. Here another criminal justice social worker discusses the impact of the withdrawal of prescriptions by health staff on the offenders:

And they lose their script, which then throws them back into a chaotic lifestyle, out offending everyday. Basically all the work you have done up to that point is thrown out the window, in the views of the social work staff. (Mark Paterson)

On occasion the term chaotic was used to identify a particular time limited pattern of behaviour:

They would tend to go to a more chaotic place where they can't comply with parts of the order. (Rebecca Miller, Addiction Worker)

As an aside here, it is worth observing that 'chaotic' was also a term that staff used to characterise female offenders *in general*. Since their inception, the overwhelming majority of offenders sentenced to orders at both drug courts have been male. In general female drug users were portrayed by the staff working in the courts as being particularly 'difficult' to work with. Here one member of the legal staff discusses why he believes that the majority of the drug courts participants are male:

Women tend not to come through the drug court. Firstly, because women tend not to be prosecuted in the sheriff court in the first instance. And secondly, even if they are prosecuted in the Sheriff court a drug court order might not be the best for them because it is so time-consuming, and so restrictive. And women tend to have a lot more problems. (Chris Ramage)

And here a criminal justice social worker uses the precise term 'chaotic' in this respect:

I don't know why...but females seem to be more chaotic. They seem to have a lot more issues going on for them, and it is really hard to maintain them in treatment. (Susan Taylor)

In articulating such views, the drug court staff accord with the findings of other research that has explored the attitudes of staff working within the criminal justice system. Such staff regularly describe female offenders as being more 'difficult' to work with (Worrall, 1990).

Moving back to the concept of 'chaotic', and it was clear that staff used this in a general, common sense way. Thus being chaotic, or having a chaotic lifestyle, meant being unpredictable, disordered and out of control. Offenders were chaotic at the point when they began, or immediately preceding, being placed on drug court orders. Chaos was also a state that could be returned to, as offenders struggled on orders. As noted earlier this term accords to a certain extent with the view of the criminal subject that emerges from the disease framework. This is the case in the sense that both present the offender beginning the drug court order as less than a fully rational agent, and not being fully in control of their behaviour. And yet, both frameworks do not absolve the offender from responsibility. However, chaotic does not have any direct implications of illness. This is not the case with the other concept in this dichotomy- stable. Before turning to this, though, it is worth noting that one member of staff took issue with the use of the term chaotic to describe the offenders. Here Sheriff Sutherland discusses the client group that the drug court works with:

They have long standing drug misuse. They are high tariff offenders. Sometimes they are referred to as 'chaotic' drug misusers. I do not agree with this. They are stealing on a daily basis and converting the stolen goods into money. They are not chaotic. I reject the term chaotic.

Here Sheriff Sutherland rejects the connotations that the term chaotic has i.e. lack of control, lack of a predictable pattern of behaviour and disorganisation. The

implication of her highlighting this pattern of offending is that such a pattern of offending is both predictable and evidence of control and planning. It is worth noting that, although being the only one who explicitly rejected the term, Sheriff Sutherland actually continued to use 'chaotic' in practice, suggesting how common its use was in the two courts. The term chaotic does not seem to have any direct practical impact in the sense that the notion of drug use as a disease could be seen to inform, for instance, the practice of accepting relapses. The exception to this is the sense that the interventions of the drug court are aimed at removing this chaos, in the attempt to achieve 'stability' for the offender.

Staff in the drug court used the term 'stable', and its derivations, frequently. Being stable constituted the opposite of being chaotic in this conceptualisation. As I discussed in the seventh chapter, whilst analysing the sheriff-offender dialogue, the term stable has particular medical connotations. Specifically, being stable is linked to the prescription of methadone. This was often reflected in the way in which staff used the term:

Kevin: For the majority of people, once they are on a methadone script, and they are stable on that script, they are not using on top

Kerrin: yeah

Kevin: then their offending will pretty much cease. (Kevin Lodge, Social Work)

In this usage, the term stable links into other medical uses of this term, such as a patient who is in a 'stable condition'. For instance in the case of cancer this means that the cancer is neither increasing nor decreasing in extent or severity. Here it means being placed on a regular methadone script that has the affect of stabilising the offender's wider behaviour.

The concept of stability also feeds directly into the practice of the two courts. As I discussed earlier, in analysing the way in which the sheriffs conduct the sheriff-

offender dialogue, the concept of stability was central to Sheriff Sutherland's evaluation of how well an offender was performing on an order. Similarly, many of the Drug Court Supervision and Treatment Team's interventions are conceptualised by the staff as being directed at achieving stability in the offender. This, again, was particularly the case with methadone:

Sheriff: [addressing offender] If you can get yourself referred to an agency, and if you can get yourself put on methadone, if that is what you want, this will go a long way to starting to stabilise you. Then we will see about putting you on a Drug Treatment and Testing Order. (Sheriff Sutherland)

However, the use by drug court personnel of this term does also extend beyond the equation with the prescription of methadone. Being stable was often used to refer more generally to the offender's lifestyle and behaviour:

So we have managed to get them along the line, we have stabilized their behaviour, and that allows them to do something else. And I think that is a huge positive. But that is one of the factors to show. But obviously, in terms of success, what we want is their offending to be reduced dramatically. (Frank Jameson, Social Work)

For the drug court staff, getting someone stable, both in and of itself and as a platform for other work, was linked to success for the drug court. However, this focus on stability raises certain questions about what success means for the offender. When achieving a state of stability is discussed, the agency in this process is generally attributed to the drug court staff or to the methadone. In both cases this means that the agency in this process is external to the offender himself or herself:

if I have got that time available, I can take on these cases [more difficult offenders] until *we* get someone stable. And then we can move them back over [emphasis added] (Susan Taylor, Social Work)

Within this dichotomy of chaotic and stable, the positive movement is from an individual who is out of control to one who is stabilised by the court, primarily through methadone. Thus with the stability of a regular methadone dose, an acceptable, controlled and predictable dependency is created. As Sheriff Barnes put this in the *Drug Courts in Scotland* video:

It may be, for example, success that we get someone on methadone and perhaps they have to stay there on methadone for the foreseeable future, if not for the rest of their life (Scottish Executive, 2002a)

Thus success is achieving control of the offender's drug use, with the nature of this control relatively unimportant. Having considered this dichotomy of chaotic and stable, the third of the four frameworks is now turned to. This is the notion of the offender that is implicit within the sheriff's interactions with offenders in the courtroom.

Behaviourism, or the Carrot and the Stick

The third of the frameworks through which the behaviour of the offender is understood and responded to is one that is implicit in the particular practices of the judiciary in the drug courts, rather than being consciously articulated. This is the view of the self that underlies the use of the 'carrot and the stick' in the sheriffs' interactions with offenders in the courtroom reviews. The approach used here has considerable parallels with B. F. Skinner's writings on Behaviour Modification, at least at a general level.

In the broadest terms, Skinner, working within the Behaviourist tradition, developed an understanding of humanity that viewed humans as complex animals. Whilst Skinner recognised the complexity of humanity he regarded this as a difference in kind and not a difference in type from other animals. The behaviour exhibited by this complex animal is produced by a combination of the present environmental

stimuli that the individual is encountering, together with the history of environmental stimuli that that individual has also encountered. In Skinner's formulation there is no place for speculation concerning the internal dispositions, the mind, of any individual man or woman. The idea of free will is also rejected. Such ideas are considered unscientific:

The scientific view is that people are members of a species shaped by evolutionary contingencies of survival whose behaviour is under the control of the environment in which they live. (Nelson-Jones, 1995: 194)

Of particular interest for this present analysis are Skinner's ideas concerning 'operant conditioning'.

In basic terms operant condition concerns the use of consequences to shape behaviour, and is predicated on the wider principles of Skinner's understanding of animals, including humanity. Following from this, combinations of rewards and punishments can be applied to attempt to mould animal or human behaviour. Famously, Skinner developed an operational conditioning chamber, a device for measuring an organism's interactions with its environment. The operant is the behaviour that the animal is exhibiting. A 'reinforcer' is a stimulus that increases the likelihood of such a behaviour re-occurring. For instance if a rat is given a sweet solution directly after a certain action, it is more likely to undertake that behaviour again. In contrast an aversive stimuli is one that decreases the likelihood of such a behaviour reoccurring. Thus if the same rat is given an electric shock directly after a certain action it is less likely to undertake that behaviour again. The removal of an aversive stimulus can also work as a reinforcer of an action, as can the removal of a reinforcer act as an aversive stimulus. Thus, in simple terms, there are four possible responses to behaviour. Behaviour, both animal and human, can therefore be shaped through the use of four stimuli:

- Positive Reinforcement, when behaviour is followed by 'something good' that increases the frequency of the behaviour.
- Negative Reinforcement, when behaviour is followed by the removal of 'something bad' that increases the frequency of the behaviour.
- Punishment, when behaviour is followed by something bad that decreases the frequency of the behaviour.
- Omission, when behaviour is followed by the removal of 'something good' that decreases the frequency of the behaviour. (Glassman, 2000: 125)

In this approach there is no attempt to treat the individual as an autonomous actor, capable of choice. Behaviour is simply the result of environmental stimuli, and the attempt to obtain desirable behaviour is achieved through discovering the correct combination of reinforcers and aversive stimulus.

This diversion into a discussion of Skinner and operational conditioning has been made because the 'carrot and stick' approach the sheriffs use in their courtroom interactions with the offenders directly accords with this. The sheriffs can be seen to be using each of the four stimuli. Within the Scottish drug courts, positive reinforcement takes the exclusive form of praise. Drug courts in other jurisdictions, such as the United States, tend to utilise a range of such 'good things' to give offenders, from drug court key rings to teddy bears, through to tickets to ball games and other relatively valuable items. However, the concern for the external image of the drug courts has curtailed such practices in the Scottish courts.

Negative reinforcement is also used, with this taking a more substantive form. The frequency of reviews can be diminished, for instance, or here the frequency of drug testing is reduced:

Sheriff [addressing offender]: I will reduce testing. This is a pat on the back for you. Keep up the good work. (Sheriff

Wallace)

Punishment in the drug courts tends to take the exact opposite to that of negative reinforcement. Thus, for instance, the frequency of reviews can be increased. One exception to this is the interim sanctions, which were introduced under the *Criminal Justice (Scotland) Act 2003* specifically to give the drug courts a more considerable form of punishment to use:

Sheriff [addressing offender]: You have been disrespectful to the court. I am going to keep you on the order. However I am going to impose an Interim Sanction. You are going to spend twenty-eight days in jail. (Sheriff Wallace)

The use of the omission intervention is more rare, as there is little ‘good’ that the drug courts can actually remove, unless the sheriff’s praise is considered in these terms. During the period I observed both courts, no instance of negative punishment occurred. However, instances of threats in this respect were observed. Offenders, who had developed plans to go on holiday with their family, were warned that the drug court’s approval was dependant on their performance on their order.

It needs to be emphasised, though, that the drug court sheriffs are not consciously following the ‘insights’ of Skinner here. In origin drug courts were essentially a practical judicial innovation that developed in the United States to attempt to meet the problem of drug-related crime. They were not a response grounded in specific theories, but a ‘front-line’ attempt by judges to try to do something different.

The Scottish sheriffs’ practices have a variety of different sources. In broad terms the sheriffs I interviewed were aware of the general practices of their United State’s colleagues- through reading relevant literature and attending conferences. Further, the Scottish drug court sheriffs clearly also had some experiences of observing their fellow Scottish drug court sheriffs in action. Lastly they brought their own

interpretations, idiosyncrasies and interests to this role.

In addition to this, it is worth emphasising that whilst the principles of operant conditioning were developed and analysed in behavioural psychology, the practice of using such systems of rewards and punishment to attempt to modify behaviour is as old as human history. Their use can be identified, for example, in workplaces, in the organisation of armies and in the family. Indeed these same strategies deployed by the drug court sheriffs are referred to by staff as the 'carrot and the stick'. This phrase, of course, relates to the training of donkeys. Whether drawing on behaviourism, or simply on 'common sense' uses of rewards and punishments, the offender in this approach is treated as little more than a bundle of behaviours that can be shaped by the appropriate deployment of 'incentives'. The approach to the offender outlined in this section contrasts sharply with the final of the four frameworks that will be discussed here. It is the most pronounced and explicit framework that can be detected in my analysis of the operation of the drug courts. This is the treating of the offenders as autonomous agents, capable of choice and responsible for their actions.

Autonomous and Capable of Choice

As with the disease framework, the idea of the offender as being capable of choice underlies the very idea of drug courts. This is the case in the very simple sense that the drug courts retain offenders within the criminal justice system. Thus, rather than the offender being forcibly sent for treatment to an institute run by medical staff, as would be the case with someone who was declared insane, the drug courts remain a part of the criminal justice system. As Scull notes the practices of the legal profession are predicated on 'a common sense schema wherein will or intention and the voluntary basis of action, assume a central place' (Scull, 2006: 213). In other words, legal discourse at its most basic treats offenders as being wilful, autonomous agents, responsible for actions that they have carried out.

Further, as Johnston observes, a full application of a medical model to crime would actually remove the need to prove that an individual had committed any offence before they are treated (Johnstone, 1996). This is not the case with the drug courts. In the case of the Scottish drug courts, the individual offender has to be in a situation where they are facing an almost inevitable custodial sentence before they are placed on a drug court order. As stated in the *NDCM*:

The highly invasive nature of the treatment orders, the level of oversight and supervision and the degree of effort and commitment required from an offender suggest a high tariff targeting of cases that would otherwise merit a custodial sentence. (*NDCM*, 2003)

Thus the offenders sentenced to drug court orders are held responsible for their crimes. The disposition that they are to receive is linked to the nature of the offences committed- in accordance with the notion of justice attached to the penal system.

As discussed in the second section of this chapter, legal staff were careful to defend this notion of responsibility and choice, even whilst they were placing the offender within a disease framework. In this case, the responsibility accorded to the offender, and the justification for the sense of blame, related to the initial involvement of the offender in the use of drugs.

This narrative appeals to offenders' agency and helps to explain why they 'buy into' into these courts (Malkin, 2005). Many of the offenders interviewed by Malkin tended also to articulate this language of choice and agency, suggesting that this notion is something that appeals to them. This was also a finding in my own research.

It is worth initially highlighting a notable exception to this attribution of responsibility. In interviews with drug court personnel, female offenders were often

denied the agency that was attributed to male offenders. All three staff groupings, legal, social work and health workers, had a tendency to regard females as passive, not fully in control of their actions. Rather, agency with respect to female offenders was consistently attributed to their partners, who were regarded as the cause of them having become involved in the use of drugs:

Generally, the majority of our female offenders, it is their partners who have got them onto heroin. (Mark Paterson, Social Work)

This depiction of the female offender's route into drugs is also contained in the *Drug Court in Scotland* video. This video begins with a series of shots of a housing estate, or estates, filmed in monochrome with plaintive music playing. The voices of two individuals, one male one female, are heard sequentially over these images. Their narratives quickly establish that they are drug users, and both appear at the end of the video talking directly to camera. It is only during the closing titles of the video that we learn that both are actors although we are told, vaguely, that their 'stories are true'. The female drug user begins the video with the following monologue:

I was going out with a guy, he was using. I really liked him and I just wanted to know what it was like. So I asked him if I could try it and he said 'alright'. And so I tried it and I really liked it, and that was the start of it. I just carried on from there. (Scottish Executive, 2002a)

Whilst this is less direct in attributing agency to the partner, the clear implication is that without this relationship, drug use may not have been such an attractive option. In denying female offenders agency the drug court's staff accord with what other studies have revealed about the way in which gender is conceptualised and responded to within the criminal justice system (Allen, 1987).

Turning to the practices of the two drug courts, the questions of offender agency and responsibility are evident in a number of other respects. The decision as to whether

or not an individual is placed on a drug court order is itself, ultimately, presented as being the choice of that individual. The voluntary and informed nature of this choice was stressed throughout the court's documents, interviews and in the observations of the courtroom itself. Here Chris Ramage discusses this:

Chris: Yeah, so at every stage they [the offender] get an explanation of what is actually involved in it

Kerrin: Yeah

Chris: so they are fully aware and cognisant of it. So that when they get to the stage of being asked 'do they consent to this order being imposed'?

Kerrin: So it is trying to achieve informed consent?

Chris: Yeah. (Legal)

Indeed one of the addiction workers presented the assessment process as essentially being an information-gathering opportunity for two parties, both for the drug courts and for the offenders. On the one hand it gave staff time to evaluate the offender's suitability for placement on an order. On the other hand, however, it was also an opportunity for the offender himself or herself to 'sample' whether the drug court is for them:

I always stress to people [offenders] that that contact, as well as being us trying to assess if someone is ready to come on an order with us, it is about the offender or the potential client getting information as well and finding out whether the order is going to be right for them. Because there is a consensual element to all the drug court orders. The offender has to consent to it, so. I think that should be informed choice. So it is a bit of a two-way street. (Rebecca Miller)

This stress on consent was evident in the courtroom itself. Before an offender is placed on an order the sheriff would read out the nature and conditions of the drug court order at considerable length. At the end of this process the offender would then sign a form to signify their consent. That this process had to be done in this particular order was clear when an offender leaned forward to sign a sheet before the

sheriff had spoken:

[The contract for the drug court order is brought forward. The offender leans forward as if to sign it]
Sheriff [addressing offender]: Don't do this [i.e. don't sign the contract. The following section is abbreviated due to length] A drug court order is more serious than a DTTO. You will be given a schedule of appointments. It is important that you attend them all. We need to get you on a script. You will need to do any homework that you are given by the drug court staff, and you will need to give regular samples to the nurse for testing. You need to attend on time. You may also have to be tolerance tested. On the day of your appearance in court, there is a meeting held in the morning. You do not attend this meeting but your solicitor does. At this meeting I get an update on your whole life. Also we need to carry out research into the drug court. However we need your consent for this. [offender signs the contract] Ok Mr McKenzie [the offender]. You are now on a Drug Treatment and Testing Order for eighteen months. If you do not commit, and if you do not make progress, you can receive a jail sentence. I am just telling you so that you know. I hope that things go well. (Sheriff Palmer)

Of course, the question arises as to whether the individual has a genuine choice when presented with the option of either accepting a drug court order or being sent to prison. The important point here, though, is that it is presented as such. One offender noted in interview how they perceived this choice as being presented to them:

Kerrin: Right. At the start, you were offered an option of being put on an order [a drug court order]? Or was it

Offender: Aye. I was offered either go on an order or go to prison.

Kerrin: Right, that was how it was presented to you?

Offender: Aye.

However this offender, who was in the early stages of such an order and was performing well at the time of interview interpreted this pressure positively:

Offender: I did feel under pressure. But at the same time it was good
Kerrin: yeah
Offender: because I am married. And I have got ten kids. You know what I mean?
Kerrin: Right.
Offender: So it was either, take this, or go to prison and no see my kids. So
Kerrin: yeah
Offender: I took this.

As well as this emphasis on consent at the beginning of the order, the drug court was also frequently presented in terms of giving the offenders a context in which they could exercise their agency. The drug court order was an opportunity or chance that the offender could either take or not. This was a theme that also emerged at the point when offenders were being placed on orders. Here Sheriff Sutherland terms the DTTO itself as an ‘opportunity’ to an offender:

Sheriff: [addressing offender] Focus on yourself. Think about this opportunity.
Offender: Thank you.

And here she describes this as a ‘chance’

Sheriff: [addressing offender] This is perhaps the biggest chance to change you will have in your life. You have got to give it your best try. Give it your best effort. There will be ups and downs. I know that.
Offender: This is the first chance I have ever had.

Notably the offender in this review also echoes the sheriff’s language, describing the drug court as being a ‘chance’ for them. This also came across during an interview with an offender:

Offender: aye, it’s a second chance.

Kerrin: and it is really up to you?

Offender: whether you take it or no. Aye.

Whilst not using this term to refer to the order as a whole, Sheriff Palmer also used the term 'chance' frequently in court. Again and again she spoke about the offender being given 'another chance'.

Similarly, although perhaps this could be described as taking this characterisation of the DTTO in a positive light a step further, Sheriff Wallace refers to the DTTO as a whole as a 'privilege':

Sheriff: [addressing offender] There are people here in court today who have benefited greatly from being on the order. You mess about whilst on the order, though, you will be taken away. The privilege will be taken away. Being on a Drug Treatment and Testing Order is a privilege.

And again:

Sheriff: [addressing offender] Mr Turnball [the offender]. Can you tell me why you should get the privilege of a Drug Treatment and Testing Order?

Such language was turned against the offender when they struggled on the order:

Sheriff: [addressing offender] You have become a pest to society, a drug addict. We gave you the opportunity to heal yourself. It is a privilege to be on a Drug Treatment and Testing Order. (Sheriff Wallace)

Here, in fact, the illness and choice frameworks encounter each other, with the latter coming to the fore. The drug court is a context in which the offender experiences the possibility of treatment. However the responsibility, particularly with respect to

failure, is accorded to them.

The notion of the offender as an agent capable of choice extends beyond the courtroom. Indeed it can also be seen to be central to the work of the addiction workers, specifically in the therapeutic approaches they utilise. The actual counselling approach adopted by the court is described as being 'eclectic' in the *NDCM*. In practice a number of approaches are explicitly referred to, in interviews, documents and the *Drug Courts in Scotland* video. These include 'Solution-based or Brief Therapies' (SDCM, 2003) which are named in the *SDCM*. Prochaska and DiClemente's Stages of Change Model is also frequently referred to, particularly in relation to the assessment process. Lastly Cognitive Behavioural Therapy (CBT) is discussed by the addiction workers as constituting the approach that is most central to their day-to-day work.

In CBT, and the other therapies mentioned, the focus is not placed on the individual's past but rather on their present ways of thinking and how these can be challenged and, rapidly, changed. Rather than treating the individual as entrapped by past experiences, or desires they are unaware of, characteristic of more psychodynamic theories, the individual is viewed as rational and autonomous, but holding irrational or mistaken beliefs and assumptions. Through CBT these beliefs and assumptions are questioned and challenged, allowing the individual to develop more rational and realistic perceptions. Central to this approach is the assumption that the individual does have agency and choice, but that mistaken cognitions are leading the individual to incorrectly process experiences and, hence, behave in a damaging way.

The centrality of a belief in the agency of the individual is stressed by one of the addiction workers:

as with all things in life, people make choices. Some people

choose to offend, some people choose not to offend. So, I think, yes, I would agree, to a point that the addiction is an illness. The choices that people make, and maybe people are forced into places, but *I strongly believe there is a point where people do make a decision. And that is what gives me something to work with.* I can look at decision-making, I can look at alternatives. [emphasis added] (Rebecca Miller)

In discussing their work the addiction workers gave examples of how they challenged perceived irrational beliefs. For instance folk myths about drugs that were common amongst offenders, such as cannabis being good for Asthma, were questioned. It needs to be noted, though, that there is a strong element of coercion and manipulation in this process, and the staff have already identified the ‘correct’ cognitions. Ultimately, as one addiction worker comments in the *Drug Courts in Scotland* video:

whereas counselling is, should be, ideally, completely non-directive, you just let the client find out for themselves what they want to do, obviously we have to be directive. We are the drug court, and we don’t want people to offend and, ideally, we don’t want them using illicit drugs. (Angela Guthrie)

This framework of choice was not absent from the work of the health staff either, or at least they way they discussed their work. In interview health staff emphasised the offender’s agency in the treatment process. This was the case at the beginning of the order, when treatment goals are identified in consultation with the offender:

once someone is put on full assessment, they then go through a more intensive assessment period with us. And from that we identify what treatment goals we hope to achieve with them...It is done in conjunction with the client obviously. [laughs] Because, the aim of it is, if we are looking at pharmacological treatment, do they want to look at methadone, do they want to look at buprenorphine? (Simon Callen, Health)

Again, though, as with the therapeutic treatment the offender undergoes, there is the proviso in this choice that only certain options are open. A similar comment could be made with respect to the identification of the end goal of the drug court order, which is again ascribed to the offender:

If the person wants to be drug free, and manages it, that is great. It is what the client dictates. We are here to enable them to move on and stop doing some behaviours. But the reality is, it is the client that will dictate. In the end, when is the time right for them to stop? (Simon Callen, Health)

Here the 'if' in the opening sentence becomes a 'when' in the final sentence, suggesting that there is, in fact, little real option.

To conclude this section, it is notable that this framework also finds expression in the public discourse surrounding the courts. In the drug court video Sheriff Richard Oliver contrasts the drug court orders with custodial sentences. In contrast to prison, in the drug court the offender is:

addressing a difficult issue in their lives, not only the abuse of drugs, but also the underlying issues whether it be homelessness, whether it be a lack of a job, whether it be family issues, which they have so far not addressed at all – they have used drugs to cover these things up. So when they take responsibility for their own lives, rather than just letting the state run their lives for them, I don't regard that as an easy option, I regard that as taking responsibility for themselves. (Scottish Executive, 2002a)

Here the drug court is presented as giving an opportunity to the offender to act responsibly, to exercise control, to no longer be dependent, either on the state or on drugs. The very fact that they are at liberty in the community rather than having their liberty taken away is an expression of this. If they fail to act responsibly though:

if someone fails to comply with an order, if someone does not do what they are told, if they stop turning up, if they don't provide the samples, then as far as we are concerned, all bets are off. (ibid)

Discussion

Running through the two Scottish drug courts, expressed within and shaping their practices and language, are four different frameworks for understanding offenders and their actions. These different frameworks do not congeal to form one single unified way of understanding and responding to offenders sentenced to drug court orders. For example, there is no single 'disease-rational hybrid' conceptualisation of the offenders on the orders. Rather these discourses operate in parallel, and often at the same time, without, however the contradictions and differences between them resulting in conflict. There was no evidence of drug court 'cognitive dissonance'. Indeed this very contradiction underlies the concept of drug courts themselves. In coercing offenders into treatment, offenders enter the drug court having made a choice, and within the 'common sense schema' of the courtroom that holds the offender as responsible for their actions. In the very same moment, though, they are also entered into a treatment programme that responds to them as suffering from a treatable condition that renders them not fully in control of their actions, as capable of suffering from relapses and driven to commit acquisitive offences.

The picture that emerges is far more complex than that presented by either Nolan's emphasis on 'pathologisation' (2002b) and the 'therapeutic ethos' or Malkin's highlighting of the accord between drug court programmes' emphasis on 'self-responsibility and individual choice' and neo-liberal discourses (Malkin, 2005). However, the latter was certainly the most prominent within the two courts, and this is worthy of further reflection – what does this framework of 'self-responsibility and individual choice' actually amount to?

At a number of stages during their passage through the drug courts the offenders are

presented with choices, opportunities to exercise their agency. 'Are they going to accept their placement on a drug court order?' 'Are they going to aim for abstinence?' 'Are they going to grasp the opportunity that the drug court order presents?' However, in actuality, decisions in these situations are predetermined or weighed in one direction. What is presented can be characterised as 'Hobson's choices', choices that are no real choices at all: do this, or go to prison.

This characterisation of these choices also accords with the nature of the therapies that are used in the courts. CBT, and similar therapies, emphasise the agency and choice of those entering therapy. However, in practice within the therapeutic situation in the drug courts, the values that are to be adopted and decisions to be made are entirely pre-determined. The offenders are to develop pro-social attitudes, their irrational and unrealistic cognitions are to be challenged and replaced.

The framework of disease is also particularly prominent in the courts, especially in the early stages of offenders' orders. Within certain unspecified limits, offending and drug use is accepted during this period as the manifestation of an underlying addiction. As the order progresses the notion of illness retreats, sometimes gradually, sometimes rapidly. In contrast the view of the offender as an active agent, capable of choice come to the fore. Paradoxically, though, this is more marked with respect to offenders who are *failing* on orders. By the end of the order the offender can no longer be ill, at least in the sense in which they entered the drug court. On the one hand, in the case of success they can be stable, having reached an acceptable dependency, or they can be drug free. In either case, control of criminogenic drug use has been achieved. On the other hand, in the case of failure, they are someone who has not taken advantage of the opportunity accorded them, a 'chancer', to adopt a term one of the sheriffs used, who has tried to play the system, and has failed.

What is central to success is to achieve the control of drug use in order to achieve a reduction in re-offending. How this control is achieved is not a central priority of the

drug courts. Whilst, ideally, abstinence would be wished for, this would, in general terms, appear unrealistic. More probable is the creation of stable, controlled dependence, with the use of methadone central here. Indeed after a public lecture one of the sheriffs was asked this very question by a member of the audience – ‘is the drug court substituting a methadone addiction for a heroin addiction?’ The sheriff answer was that this was a ‘difficult question’, and that ‘ultimately’ the court’s aim was to get people abstinent.

Despite the parallels in vocabulary, there is little accord here with the notion of ‘responsibilisation’ or ethical reconstruction, developed in the governmentality literature. Similarly, this complex meshing and parallel operation of different knowledges does not fit within Garland’s dichotomy of the criminology of the self and the criminology of the other. The nature of the criminal subject at the heart of these two programmes is far less clear-cut than suggested by the broader criminological accounts of the nature of rehabilitative programmes. Rather than being projected as either the rational free agent of neo-liberal discourse, or the alien other of punitive reaction, the offenders in the drug courts are enmeshed in a range of different frameworks. These frameworks include space for the ‘middle ground’ that is reputedly, in interpretations such as Garland’s, absent from the penal present.

It is not by becoming like us, if ‘we’ are indeed the rational, consuming subjects of neo-liberal discourse, but rather predominantly through developing an acceptable dependence, the ‘stable’ consumption of methadone, that the offender is generally accepted back into citizenship. Conversely, it is by becoming ‘responsible’, whilst apparently refusing to make the correct choices, that the drug user becomes irredeemably other. Thus, the offender who ‘refuses’ to take the opportunity offered is no longer out of control, ill. They have made their choice, and ‘all bets are off’.

Chapter 10: Conclusion

The *Scottish* Drug Courts

The central contention of this thesis has been that, rather than the United States drug court model having been imported wholesale into Scotland, in fact what has emerged in Scotland are programmes that are deeply embedded in Scottish social, cultural and political circumstances. In other words, what has emerged are *Scottish* drug courts. In order to evidence this, it is initially necessary to outline the central features of United States drug courts. In doing so, particular attention will be given to those features where differences between the Scottish and the United States' programmes are clear.

In essence a drug court is a judicially supervised drug treatment programme (NADCP, 1997), and it is the nature of this judicial supervision, and the courtroom within which it takes place, that has been identified as constituting the defining feature of the drug court model as it has emerged, and developed, in the United States (Wolf, 2002). Before discussing this further, it is worth emphasising that not all United States drug courts are identical:

there are subtle differences in various components of criminal case processing, offender eligibility requirements, treatment models, drug use testing and reporting, and availability of ancillary services (Harrison and Scarpitti, 2002)

Further, there is also little in the way of quantitative data concerning the proportion of United States drug courts that share specific features and practices. The evidence that has been relied upon in this thesis is primarily ethnographic academic and media accounts. A considerable number of such accounts have been written, though, and many of these cover a substantial number of drug courts. Discussed in what follows are those features of United States drug courts that have been consistently highlighted in these works.

As a core requirement of a drug court order undertaken in a United States drug court, an offender has to appear regularly in front of a judge. The judge enters into direct dialogue with the offender, with the judge attempting to encourage them, and coerce them, through the treatment process (Belenko, 2002). A defining feature of such proceedings, which have garnered considerable media attention, is the nature of the interaction that develops within such programmes between the judge and offender. Amongst practices that are commonly noted are the use of first names within the courtroom, particularly with respect to offenders but also with judges; courtroom staff adopting informal modes of dress; and offenders not sitting in the dock but sitting with other courtroom staff (See for example Bean, 2002, Nolan, 2001). These changes serve to both symbolise and actualise a new relationship between the judge and offender, and a new role for the judge who takes a direct interest in the offender's recovery from drug use.

In performing this role, United States drug court judges use a wide range of rewards and punishments to motivate offenders through the treatment process. Such rewards include actual material gifts, ranging through mugs, key rings, t-shirts, teddy bears, cups of coffee, 'movie tickets, baseball passes, [and]...certificates of completion from phases of the programme' (Hora, 2002: 1476). Indeed, one observer notes that a nickname given to United States drug courts has been 'doughnut courts' due to the frequency with which such items of food are given out as a small reward for offenders (Tendler, 2007).

Further, when an offender has performed particularly well on a drug court order a common practice is for the judge to lead all present in the courtroom in a round of applause (Bean, 2002). A considerable number of judges go a step beyond this, either shaking offender's hands or hugging them. For example, one study observed physical contact between judges and offenders in fourteen out of fifteen drug courts observed (Nolan, 2001).

The use of a wide range of different types of sanctions have also been noted by observers. These have included having offenders sit in the jury box, requiring offenders to write essays (Malkin, 2005) and sending offenders to spend short spells in prison, sometimes termed 'motivational jail' (Bean, 2002: 249).

The interactions between judge and offender take place within the context of a non-adversarial courtroom, where all present- including judge, prosecutor and defence lawyer- work as a single team towards addressing the offender's drug use (Harrison and Scarpitti, 2002: 1447). A particular subject of critical debate in this respect has been the role adopted by defence lawyers. Defence lawyers act in United States drug courts more like *guardian ad litem* (Steen, 2002) as they focus on the 'higher interests' of addressing their client's drug use (Boldt, 2002). Commentators have noted that the defence lawyer's role has been 'minimised' (Burns and Peyot, 2003). Indeed in the drug courts generally 'the defence lawyer remains silent' (McColl, 2002). Nolan notes that in 'many drug courts the lawyers do not even show up for the regular drug court sessions' (Nolan, 2001: 40). Further, Nolan records that in a considerable number of United States drug courts offenders are accompanied into the courtroom by their treatment provider/ counsellor rather than their defence lawyer (151). Another way in which the changes that have taken place in the courtroom are symbolised is that 'offenders' are referred to in the drug courts as 'clients' by all staff, including judges (Burns and Peyot, 2003).

Drug courts have spread across the United States through the initiative of local members of the judiciary and other penal staff (Hoffman, 2002). The passion and belief of these staff in the programmes they work within has been frequently referred to. To take one example, Bean has commented that 'there is within the drug court system a strong evangelical approach' (Bean, 2004: 122). Further, he observes that:

Drug court workers believe in their crusade, for a crusade it certainly is (128).

Entry into United States drug courts is voluntary, albeit coerced (Steen, 2002). A considerable number of such drug courts operate in effect as court diversion programmes, with offenders not having to enter a plea before beginning a drug court order. Nolan records that a 1997 Justice department survey of operational drug courts found that 30 percent were 'pre-plea' only, with an additional 33 percent including at least some offenders who had not entered any kind of plea (Nolan, 2001: 141). The average length of a drug court order in these programmes is 12 months (Hora, 2002).

A further important characteristic of United States drug courts concerns the type of treatment providers that they use for offenders. These programmes tend to have close links with local Narcotics Anonymous groups (Taxman and Bouffard, 2002: 1677). Narcotics Anonymous has a strong belief in a complete abstinence philosophy, including abstinence from alcohol, and United States drug courts have tended to share this abstinence approach (Mallender et al., 2008). Indeed the United States National Association of Drug Court Professionals in 1997 identified one of the key components of drug courts as being that 'Abstinence is monitored by frequent alcohol and other drug testing' (NADCP, 1997). Whilst addressing offending is the central aim of United States drug courts, tackling drug use is, in and of itself, also an important goal. The monitoring of offenders compliance with the drug court order via regular drug testing is another important feature of United States drug courts. In adherence to their abstinence approach, all drugs are tested for, and infractions are punished. This includes, to take one example, the use of Cannabis (Wolf, 2002).

Having given this overview of the original United States drug courts, the question arises as to the extent to which the Scottish drug courts differ from this model that inspired them? Many of the central features of the United States drug courts are indeed present in the Scottish programmes. The Northern and Southern drug courts *are* judicially monitored drug treatment programmes. Offenders whose offending is regarded as causally linked to their drug use are targeted by these programmes and offered the choice between a custodial sentence or a drug court order. Central to

such drug court orders is judicial oversight, with direct dialogue taking place between the sheriffs and offenders within the courtrooms. Regular drug testing is used as an important aspect of monitoring offender compliance.

In these ways, and others, it is clear that the Scottish drug courts are inspired by their United States predecessors. However, the Scottish drug courts also differ from the United States model in a number of important ways. The first instance which I will discuss here concerns the nature of the dialogue between the sheriffs and offenders, and the context within which this takes place.

In the Scottish drug courts there has been a careful effort to retain a number of features of traditional sheriff courts. These features serve to symbolise and actualise the relationship of 'superordination and subordination', and thus the distance, between the sheriff and offender, and the authority of the sheriff (Carlen, 1976). Thus, in the Scottish drug courts, the sheriffs are stationed on their bench, elevated above the rest of the courtroom. In contrast offenders are situated in the dock, standing when addressed, and are at a considerable distance from the sheriff. Formal courtroom attire has also been retained, with sheriffs donning both wig and gown. Such attire has traditionally been linked to giving judges an 'intimidating' air, a notion that was echoed in interviews with the sheriffs working in the Scottish drug courts. Formal modes of courtroom address have also been retained, with offender's being referred to as 'Mr' or 'Miss' '[surname]' and the sheriffs being addressed as 'Your Honour' or 'Milady'. In interview the sheriffs expressed anger at instances where offenders broke this protocol, and used informal language within the courtroom:

Of course he [the offender] is using the term 'John' [for his solicitor] which I would like to slap him for. (Sheriff Palmer)

Offenders are expected to stand in the dock when being addressed and to sit at all

other times. As in a standard sheriff courtroom, the entrance of the sheriff is staged and heralded, with everyone present in the courtroom being expected to rise. Further, in terms of the content of the dialogue between sheriffs and offenders, in the Scottish drug courts there was little evidence of the high emotional tone or use of storytelling and anecdote that has so struck observers of United States drug courts (Burns and Peyot, 2003).

Thus, the sheriffs concern to maintain their authority, and the authority of the courts more generally, is both symbolised and actualised within the courtroom. In this context a considerable distance is maintained between sheriff and offender, and the general formality of the courtroom remains. Thus, although there are departures from a standard sheriff courtroom, the differences between the courtroom interactions recounted by observers of United States drug courts, and those in the Scottish drug courts, are considerable.

The Scottish drug courts have also rejected the practice of materially rewarding offenders who are succeeding on orders. There are no Scottish drug court teddy bears or doughnuts for offenders. Indeed such practices were derided by Scottish drug court staff in interviews. Nor have the Scottish drug courts adopted the graduation ceremonies which have been much focused upon in media accounts of United States drug courts. There is no round of applause for a successful performance by an offender on a drug court order, and nor is there any physical contact between sheriffs and offenders. Indeed the very idea appeared an anathema to drug court staff. The specific practice of hugging offenders, which served to symbolise the culture of the United States drug courts to Scottish drug court staff, was dismissed with the phrase 'hug a thug'. The sheriffs continued to refer to 'offenders' as such, avoiding the use of other terms such as 'client':

I would refer to them as offenders, not clients...The term offender retains that separation from the judge. (Sheriff Sutherland)

There was also no attempt by drug court staff to present a spell in custody for offenders as anything other than a punishment for them.

The relationship between the courtroom staff also differs considerably between the United States and Scottish drug courts. Whilst at both Scottish programmes a Drug Court Supervision and Treatment Team has been instigated, these teams are constituted purely by non-courtroom staff- criminal justice social workers, nurses and addiction workers. There has been no attempt to actualise a unified team approach amongst courtroom staff- procurator fiscal, lawyers and sheriffs. Most significantly, in this respect, defence lawyers have not adopted the role of acting in their client's 'higher interest' but, rather, continue to represent their client in what remains an adversarial courtroom. In a further contrast to the United States drug courts, treatment providers are largely absent from the courtroom with only criminal justice social workers, themselves having a supervisory rather than treatment role, being present to represent the Drug Court Supervision and Treatment Team.

Moving the focus away from the courtroom, another important difference between the Scottish and United States drug courts concerns the overall aim of the programmes. In essence the aim of the Scottish drug courts is to achieve a reduction or elimination of offending via the control or elimination of *criminogenic* drug use. This contrasts with the abstinence approach of the United States drug courts. The difference in approaches is reflected in the treatment techniques that the Scottish drug courts use and the drug-testing regime utilised to monitor offender's progress. Unlike the United States drug courts links to Narcotics Anonymous and its evangelical 12-steps abstinence approach, the Scottish programmes use Cognitive Behavioural Therapy and other Brief Therapies. Further, the Scottish drug courts do not test for a range of what can be termed 'recreational drugs' such as Cannabis, whilst the use of other drugs that are tested for, but are not regarded as criminogenic, such as benzodiazepines, is treated relatively leniently. This links into the view,

expressed by some of the Scottish drug courts' staff, that achieving long term methadone maintenance, and thus non-criminogenic drug use, could be regarded as a successful outcome for a drug court order. Such an outcome would, of course, hardly be viewed as successful from the abstinence perspective of the United States drug courts.

A further contrast with the United States drug courts is that the pilot Scottish courts did not originate in the actions of grassroots penal staff. Rather they were a 'top down' initiative, moved forward by the Scottish Executive. Perhaps not unrelated to this, there is little sense of the evangelical belief in the 'cause' of drug courts amongst the Scottish drug courts' staff. This is not to contend that the majority of the professionals working in the Scottish drug courts do not believe in the efficacy of the programmes within which they work. Many staff, particularly the sheriffs, argued forcefully in favour of drug courts during interviews. However, the general attitude of the Scottish drug courts' staff was far more pragmatic, with the drug court model being perceived as something that was being given 'a go', and worthy of support, rather than as a 'cause'.

Other more procedural differences, such as the average eighteen month length of a treatment order in Scotland as opposed to twelve months in the United States, could also be discussed. However, the key differences concerning the nature of the judicial role and courtroom interactions, the team approach, origins, aim and treatment approach have been covered. There are, then, clear and important differences between the drug court model that has emerged in Scotland and the original model that developed in the United States. The question arises, though, as to whether these differences do not relate to something 'British' rather than something specifically 'Scottish'. In order to answer this question, I turn to briefly consider the two Dedicated Drug Courts¹⁷, piloted in England from 2005. I will begin with a quote from an article that appeared in *The Times* towards the end of 2007, focusing

¹⁷ This is the term officially used to refer to the drug courts introduced in England.

precisely on these two courts:

The judge wears track-suit bottoms, trainers and a collarless shirt. The offenders call him Justin and leave the court with a hug and a bagel. District Judge Justin Philip's specialist drug court for addicts caught up in a spiral of crime to pay for the remorseless demands of heroin and cocaine is anything but orthodox (Tendler, 2007).

Before commencing a discussing of the English Dedicated Drug Courts, it needs to be noted that, at least as far as I have been able to establish, there is a considerable lack of published academic research focusing on the Leeds and West London programmes. Aside from the Ministry of Justice funded *Process Report* (Mallender et al., 2008), in the main it is media accounts that are available, accounts that have focused on the practices of West London's District Judge Justin Philips, who has become something of a figurehead, and spokesperson for, drug courts in England. It is not clear the extent to which his practices are representative of all district judges and magistrates operating in the two English drug courts. However, it is evident that he has been the driving force behind the instigation and development of the West London drug court, and has a large degree of responsibility for the form that it has taken. Due to the nature of the available evidence, it is primarily Judge Philips and the West London drug court, that are the focus of the following account. The practices of this Dedicated Drug Court, particularly with respect to the role of the judge and the courtroom interactions, are directly comparable with the original United States model.

Firstly, the West London drug court does not use a conventional courtroom. Rather what had previously been the smoking room in a magistrates court was requisitioned for the use of the drug court. This room is one eighth of the size of the other courts in the building (BBC, 2007). Further, the bench is only raised three inches above the rest of the courtroom (Philips, 2006). Rather than being the furthest from the judge, as offenders are in the Scottish drug courts, offenders sit only 'inches' away from the

judge and do not sit in a conventional dock (Philips, 2006). None of the courtroom staff wear formal attire. As Judge Philips puts this:

Wearing a shirt and tie in court are alien to my concept of rehabilitation. (Philips, 2007)

Indeed Judge Philips recounts that during his time in the West London drug court:

I have worn 'T' shirts, a football shirt, and & SAA [unknown to author] sleep suit in Court. (Philips, 2006)

Both offenders and judge are addressed by their first names in the courtroom (Philips, 2007). When offenders are performing well on a drug court order, they are sometimes given small gifts- bagels being the item that is specifically mentioned in media accounts (Tendler, 2007)- as well as 'heaps of congratulations (Philips, 2006). Significantly, considering the views of Scottish drug court staff, successful offenders are hugged in the courtroom. Judge Philips describes his rationale for this practice as follows:

When footballers score goals they are hugged and kissed. Controlling a 19 year addiction is a greater goal than even Michael Owen's best. (Philips, 2006)

A practice also used in the West London drug court is the exchanging of mobile phone numbers between judge and offender. The offenders are told that they can call the judge whenever they are experiencing difficulties (BBC, 2007). Judge Philips summarises the practices of the West London Dedicated Drug Court as follows:

No dock, no standing, no 'sir', first names used, partner agencies encouraged to participate, goals set, heaps of congratulations for negative testing' (Philips, 2006).

'Graduates' of the drug court are encouraged to keep in touch, and will return to let the judge know how they are doing. Treatment providers are also present during the courtroom sittings and are encouraged to participate (Mallender et al., 2008: 19, 49, 51).

Two other aspects of the West London drug court, which contrast with the Scottish drug court but echo the United States programmes, are worth recording. Firstly, whilst abstinence is not an explicitly stated aim for the two English Dedicated Drug Courts, the West London drug court, at least, has strong links with Narcotics Anonymous. A graduate of Narcotics Anonymous regularly attends the drug court to discuss his experiences with offenders, magistrates and judges (Philips, 2007). Judge Philips describes himself as 'a great supporter of Narcotics Anonymous', and when discussing what his approach will be to an anticipated emerging problem of the use of crystal methamphetamine, observed:

My tack in the Drug Court will be abstinence based. I will use my contacts in NA to search out a sponsor for anyone on crystal (Philips, 2007)

Secondly, both the Leeds and West London drug courts originated through the activities of grassroots level penal staff. When considering introducing pilot Dedicated Drug Courts in 2005, the Ministry of Justice conducted a survey of magistrates attitudes towards such programmes, only to find that in Leeds and West London the judiciary were well on their way to introducing their own models. By self selection, then, these became the two pilot sites (Mallender et al., 2008: 6). The local judiciary who had instigated these models had been directly inspired by what was taking place in the United States. As Judge Philips comments:

In his may speech the [Lord Chief Justice]...rightly said I was following the American Drug court model- go to the web sites, see how in Ithaca the Judge hugs graduates of the programme at a PUBLIC [emphasis in original] ceremony, & see how in Florida the Judge wears jeans and trainers

(Philips, 2006).

Thus, in a number of important respects- including their origins, the judge's role, the interactions within the courtroom and the treatment approach- the transfer of the drug court model across the Atlantic has resulted in considerably different programmes being instigated in Scotland and England. The approach of the English Dedicated Drug Courts is far closer to that of the United States' model whilst the Scottish programmes, amongst other important differences, have retained considerably more distance between sheriffs and offenders. How can such differences be accounted for?

I would endorse Garland's use of the concept of 'overdetermination' with respect to the analysis of punishment, meaning by this a:

sensible recognition that a variety of causes- a variety, not infinity- enters into the making of all historical events, and that each ingredient in historical experience can be counted on to have a variety- not infinity- of functions. (Garland, 1990: 280).

With respect to the drug courts, a number of ways in which the models that have emerged in Scotland, England and the United States differ have been discussed. Instead of attempting to account for all these differences, which would involve amongst other things a discussion of the three countries historical approaches to talking substance misuse, the histories of the different professions involved in the programmes and the countries' legal traditions, one central aspect of this difference is focused upon here. This aspect is the most striking and public, this being the difference in terms of the courtroom interactions and the role of the sheriff/judge within these. For the Scottish drug court staff, these differences were epitomised by the practice of United States judges of hugging offenders in the courtroom, a practice which they disparagingly referred to as 'hug a thug' but which has been adopted in the English Dedicated Drug Courts. Here an attempt will be made to offer some

thoughtful speculation concerning this, and associated differences.

Initially the agency of penal staff need to be recognised- they are not simply the pawns of wider social and political process but also act within, and in reaction to, such processes. The judiciary, in particular, have a considerable degree of discretion within the drug courts of the three countries and the nature of the programmes is, in part, shaped by their decisions. However, such decisions are not made within a vacuum, and need to be related to the context within which they are taken.

An important aspect of this context concerns the origins of the different drug courts. Like the United States drug courts, the Leeds and West London programmes originated at a grassroots level. Members of the judiciary were directly imitating the United States model. In contrast, the driving force for the adoption of the Scottish drug courts was the Scottish Executive, which determined the model that was to be adopted. None of the sheriffs working in the Scottish programmes that I interviewed had any direct experience of United States drug courts.

However, there appears to be more to this difference than just the issue of origins. In interview the drug court staff argued that the Scottish drug courts had been introduced into a context that was culturally different from the United States. Due to this, practices that were central to United States drug courts simply would not work here:

Culturally we are quiet reserved (Chris Ramage)

However, for the drug court staff this was not a 'British' cultural context, but a Scottish one:

Kerrin: I know in the United States they do certain other practices in court, things like graduation ceremonies...applause in court and small gifts. I was

wondering why you don't do that here...

Mark: It is Scotland [laughs] (Mark Paterson) (149)

A body of literature has emerged in recent decades arguing that a more emotionally demonstrative and expressive culture has developed in the United States, bound up with a process whereby ideas and concepts that initially emerged within therapeutic approaches, such as psychoanalysis, have become common sense for large sectors of society (Moskowitz, 2001). It has been argued, somewhat polemically, by at least one author that similar trends have been discernable in the United Kingdom (Furedi, 2004). If this is accepted, and related to the ready acceptance of more emotive and expressive behaviour by members of the judiciary in public context, what could be inhibiting such developments in Scotland?

In analysing the differences between Italian and United States practices of punishment, Melossi contended that, amongst other factors, the historical legacy of both countries contrasting religious traditions needed to be taken into account. The Italian Catholic tradition is linked by Melossi to a 'soft' authoritarianism and low levels of penal repression, whilst the United States Protestantism is linked to democratic rhetoric and high levels of penal repression (Melossi, 2001: 413). If it is accepted that religious traditions can serve to continue to shape penal practices in these fundamental ways, then it can be suggested that Scottish penal practices are continuing to be shaped by the cultural legacy of its religious past.

The historical legacy of the Reformation is one that has been identified by a number of authors as still hanging heavily over Scotland, even into the early years of the twenty first century. For example, Craig's recent, and much discussed, journalistic account of the *Scots Crisis of Confidence* asserts that:

It is the beliefs of Knox and the Covenanters- albeit in a diluted form- which continue to influence the thinking of everyone living in Scotland (Craig, 2003: i).

Importantly, this heritage has been linked to an inhibition in demonstrative expressions of emotion and feeling:

The Scots are first and foremost logical people...the development of logic...is...at the expense of a mature and controlled expression of feelings and emotions (21)

Craig is cited here not to endorse her argument, but as an example of the view that Scotland's religious heritage continues to influence the culture of Scotland today, precisely in ways that are germane to my present interests.

To suggest that this religious heritage continues to shape behaviour and attitudes in the present is not to assert that the majority of the Scottish population are staunch Covenanters or that the sheriffs consciously shape their behaviour in the courtroom in reference to the teachings of Knox. Rather, following Melossi, it is to suggest here that this legacy constitutes one element in the 'cultural' toolbox of Scotland, 'one of the ways in which human beings and especially their intellectual and political elites, [in] responding to change select motives within available repertoires' (Melossi, 2001: 418). This legacy continues to shape Scottish culture in the present, influencing what are viewed as acceptable modes of behaviour and expression, particularly in highly symbolic occasions such as courtroom proceedings.

The question of the cultural specificity of crime control policies has been one that has exercised criminologists considerably in recent years. Broad scale accounts of 'late modernity' have been opposed by claims of the impossibility of translations between cultures. It is clear that even with respect to the Scottish drug courts, where direct policy transfer has occurred between two jurisdictions that are alike in many ways, particular cultural and political factors have served to produce uniquely Scottish programmes. As Newburn and Sparks put this:

it is the socio-political and cultural context in which 'transfer' occurs, or is attempted, that has the most profound effect on the eventual shape and style of the policy concerned (2004).

In this respect, my thesis lends support to the position of those who have questioned, or at least qualified, the notion of the 'Americanisation' of British crime control policy. The last decade has witnessed a number of crime control policies introduced into the United Kingdom that appear, at first glance, to constitute the direct imitation of developments in the United States. However, authors who have explored the subject of Atlantic policy transfer in greater detail have argued that such initial impressions need significant qualification. Jones and Newburn have analysed a number of such apparent instances of policy transfer, including zero tolerance policing and the use of the private sector with respect to imprisonment. In the areas that they have examined they found little evidence of hard policy transfer, meaning by this the transfer of 'policy goals, content and instruments' (2007: 147). Rather 'soft' policy transfer was more evident, meaning by this the transfer of symbolism and rhetoric. My findings have shown that even in an instance where hard policy transfer has taken place, the 'direct emulation of policy ideas' (151), the notion of Americanisation still requires considerable qualification. The direct transfer of hard policy in the case of the drug courts results in actual practice that is, to a considerable extent, shaped by the context into which it is introduced.

The Policy Context

In order to understand the Scottish drug courts, it has been necessary for me to study the important developments, trends and changes taking place in this jurisdiction. This has included recent trends in policy in Scotland. The central trend identified with respect to those areas of policy studied in this thesis, these being community sentences for adult offenders, criminal justice social work and drugs policy, has been what can be referred to as an atheoretical, managerialist drive to reduce re-offending. Often, although not exclusively, drawing upon the 'what works' literature, pragmatic

as to means, this impetus has resulted in a considerable degree of innovation with respect to criminal justice in Scotland in recent years. The drive to address re-offending is central to grasping the wider policy context within which the drug courts were introduced and is an important factor in explaining the particular configuration of knowledges and professions that I have detailed within the two courts.

The trends evident in these specific areas of Scottish criminal justice policy accord, at least at the level of policy formulation and rhetoric, with Garland's brief discussion of the role of rehabilitative programmes in his *The Culture of Control* (2001). In this work Garland highlights a narrowed focus on tackling re-offending as being key to understanding the function of rehabilitative programmes in the present.

Thus, the attempt to establish what is effective in addressing re-offending has served as the primary factor in shaping policy in the three areas surveyed in this thesis. Across these areas, a range of new objectives, structures and programmes have been introduced, all focused on this same goal. An important feature has been the perception that what is effective in addressing re-offending is having agencies cooperating and collaborating together to a far greater extent than was traditionally the case. This is apparent both in terms of the way in which criminal justice agencies cooperate with each other, and also with respect to how non-criminal justice agencies can work with, and contribute to, criminal justice aims.

The question can be posed as to how this noticeable focus on reducing re-offending relates to the broader question of the continued uniqueness of Scotland's criminal justice culture, traditionally regarded as being distinguished by its welfarist orientation. It is beyond the scope of this present study to attempt to offer a comprehensive answer in this respect. However, a narrow focus upon re-offending, and on criminogenic needs, was evident both in terms of wider policy developments and within the drug courts themselves. In contrast, there was little evidence in policy formulation and rhetoric of a concern for the 'welfare and satisfaction of the

offender', to use Allen's phrase (1981). Within the drug courts there was some evidence, particularly with respect to the practice of the addiction workers, of a more holistic focus on the offender. However, the overall picture of the two drug courts' practices accorded with this wider trend in policy. These findings would lend support to the view that, in those areas of policy surveyed, the distinctively welfarist nature of Scottish criminal justice culture is under threat. This is not, though, the result of populist punitive developments, but rather due to a narrowing or changing in what rehabilitation means in practice in Scotland today.

It needs to be emphasised that it is not being claimed here that this drive to tackle re-offending is the sole important trend evident in recent policy. The focus on re-offending in these areas of policy is balanced with a concern for the issue of risk, or public protection, particularly with respect to the risk of sexual and violent offending. The measurement of such risks is increasingly being accorded to objective risk assessment tools with the introduction of such innovations in Scotland, amongst others, as the Risk Management Authority. This foregrounding of risk, and removal or erosion of judgement from penal professionals, accords with Feeley and Simon's arguments concerning the New Penology (1992). However, beyond this there was little sense in Scotland of community sentences, criminal justice social work and drugs policy echoing the detail of Feeley and Simon's account. For instance, community sentences for adult offenders in Scotland are about more than simply managing risk in the community, although this is certainly one of their functions.

Whilst there was little evidence of punitive trends in those areas of policy linked to the drug courts, considerable concern was evident in the way in which individual policies are presented to various external audiences. An attempt to portray such policies as being robust, and tough, irrespective of their actual content, was notable. Understanding these various trends in policy was crucial to my developing my understanding of the drug courts themselves.

Professions, Knowledge and Practice

The pilot Scottish drug courts constitute the bringing together of agencies that have traditionally worked, to a large extent, separately in the pragmatic pursuit of a specific aim. The tackling of criminogenic drug use, as a means of addressing re-offending, serves as the overall aim of these programmes as well as, to a large extent, determining their practice. Social work, health and legal professions are required to work together within these two multi-agency programmes to this end. Despite this pragmatic impetus, my research has found that this multi-agency working has resulted in quite radical changes to the roles and practices of all of these staff.

A complex configuration of knowledges and professional relations results. The role that non-legal knowledge plays within the courtrooms, albeit within certain limits, is an important development in this respect. Drug use and offending is, within these limits, responded to in non-legal terms. However, this development takes place in a context that is largely dominated by the legal profession, the sheriffs, and legal goals. The sheriffs constitute the key figures within these programmes, expanding their roles beyond their traditional confines, monitoring and motivating offenders as they actualise the role of drug court sheriffs. The sheriffs adoption of this new role is balanced by a concern for the external image of the drug courts, with this being linked to their sense of their, and the courts', authority. In contrast health staff can be seen to be adopting traditional criminal justice goals, whilst the policing aspect of criminal justice social work comes to the fore.

The label of 'criminalisation' would be too simplistic here, failing to grasp the complex relationship between different knowledges and professionals. However, the concerns regarding the direction of drugs policy raised by the likes of Barton and Quinn (2000) and Duke (2006), find resonance in my results. In the form of drug courts, the drugs problem has essentially been re-conceptualised, and responded to, as a re-offending problem. This is reflected in the aims, working relationships and practices of those who work within the context of these programmes.

If it is accepted that the drugs-crime nexus is as it is currently conceived, with a significant number of heroin and cocaine users being driven into acquisitive offending, then this pattern of offending will cause significant harm to the communities in which these offenders live. Addressing this would then, in and of itself, appear a worthwhile goal. However, in becoming involved in the drug courts, legal and non-legal professions are faced with considerable threats to their professional ethics and/or values. In the case of the sheriffs, they find themselves turning a blind eye to the use of drugs and a certain degree of low level offending. However, this is balanced by the pragmatic pursuit of an aim, addressing re-offending, that has traditionally, or at least at times, constituted one of the central goals of the criminal justice process. Health professionals though, amongst other significant changes, find themselves undertaking an intervention that is explicitly conceived as a form of punishment. And, in practice, I have shown how drug testing is being used in precisely this way. In this respect, and others, health professionals are faced with taking an explicitly social control role, within the context of programmes that are not primarily aiming at the health and well-being of those who come through their doors. Criminal justice social workers find themselves taking a role that removes them from work directly focused on bringing about change in offenders. In the drug courts, the policing aspect of this profession comes to the fore. With similar programmes being introduced across the criminal justice process in Scotland, whether drug treatment and testing as a condition of bail, or the rolling out of Drug Treatment and Testing Orders, the salience of highlighting these ethical issues is clear.

Self or Other?

As well as different professions sharing the same institutional space, the drug courts also bring together markedly dissimilar knowledges, ways of understanding and responding to offenders. Two frameworks have been highlighted as being particularly central to the two drug courts in this respect, both in terms of the discourses surrounding the programmes, and in terms of shaping the actual practices of the staff. On the one hand there was a framework of choice and self-

responsibility, and on the other is a framework of disease.

With respect to the former, whilst most prominent within the two courts, its actual meaning is problematic. Rather than offenders working on themselves 'not in the name of conformity, but to make them free' (Rose, 2000: 374), the reality of manipulation, coercion and 'Hobson's choices', has been made clear.

With respect to the latter, a framework of disease was evident in a number of respects. In terms of the courtroom interactions, the notion that offenders 'relapse', and thus have episodes of expected and accepted drug use, was prominent. Further, the notion that the lure of Heroin or Cocaine overrides their volition due to their 'addiction' was also apparent. This, of course, is with the proviso that the offending is of a certain type, below a certain frequency and is only taking place during the early stages of a drug court order. As the offender progresses on a drug court order this framework's salience diminishes. It is not possible to finish a drug court order as 'ill'. This framework is essentially used instrumentally for a certain period. Treating drug use as a disease is tried, then abandoned. It has either worked, or it has not.

However, the very fact that such a framework is used in this way contradicts Garland's assertion regarding the essential dicta of our times:

'Crime is a decision, not a disease' is the new conventional wisdom. (Garland, 2001: 198)

Here Garland is referring to the view that crime control in the present is increasingly predicated on the neo-liberal view of the self— that the offender is a free, rational consumer who has committed a crime out of his or her own volition. This is contrasted with an exclusionary dynamic, whereby offenders are characterised as irredeemably evil, as 'other', requiring incarceration to protect us from them. This

binary construction would, as Garland himself has argued, appear to exclude any middle ground. One is either a citizen, and treated as such, or one is not, and treated as other.

The picture that arises, though, from an analysis of the drug courts contradicts this dichotomy. A framework of choice and self-responsibility is prominent within these programmes, according in this respect with these neo-liberal trends. For instance, the prominence of CBT in the treatment practices of the addiction workers accords with the 'what works' literature- associated with this type of view of the self. However, although theoretically contradictory, in practice the drug court also draws on a framework of disease which places the offender, at least temporarily, on such middle ground. Further, the primary aim of these programmes is not to responsabilise those offenders sentenced to drug court orders, in other words encourage them to cultivate their freedom. Rather, it is the control of criminogenic drug use that is the central aim, with this most likely to be achieved through the establishment of an acceptable dependency in the form of methadone maintenance. In contrast, the offender who fails on a drug court order exits this order as fully free (in metaphysical terms, if not in practice), having been offered an opportunity to heal themselves- something of which they have failed to take advantage.

In these cases the boundary between self and other, between citizen and non-citizen, and indeed how citizenship is itself conceived would appear far less clear cut than broader criminological attempts to map the present would suggest. How the drug courts function on the boundary between citizenship and exclusion is less coherent, less neat, less binary. A temporary, shifting middle ground in the form of this framework of disease characterises the offender as neither fully rational nor as fully other.

The pilot Scottish drug courts constitute important new experiments in the Scottish criminal justice process. The model for these drug courts originated in the United

States, and has been imported across the Atlantic. However, despite this policy transfer, my research has shown how the particular form and practices of these programmes within Scotland has been shaped by local penal staff working within, and in response to, a particular cultural and political context. The relationships between the different professions within the drug courts have also been explored in detail. Attention has been given to the central role of sheriffs, and how they have expanded and changed their practice in order to become 'drug court sheriffs'. Conversely, the changes, challenges, and ethical dilemmas that this raises for non-legal professionals have been stressed. I have explored how offenders are conceptualised, and responded to, within this context, and have highlighted how my account contrasts with wider criminological attempts to map the present.

My thesis, then, serves to support those authors who have argued that against the notion that developments in punishment can be understood solely in terms of global trends and developments. This is not to argue that such broader trends should be ignored, of course, and my thesis has explored the Scottish drug courts in relation to the work of a number of authors who have focused on such wider processes. However, as well as being an example of the global spread of penal ideas, the Scottish drug courts are also an example of the importance of continuing to pay attention to the shaping influence of local social, cultural and political contexts.

Limitations and Further Research

Certain limitations to this thesis need to be acknowledged. The issue of research access constituted a difficulty in certain respects during the undertaking of the primary research. Specifically, obtaining interviews with offenders on drug court orders was difficult to achieve. In particular, a noticeable gap in the data collected was with respect to those offenders who were not performing so well on orders. Such individuals, often having broken contact with the drug court programmes, or only intermittently attending appointments, are extremely difficult to make contact with. Their voice would have been important to hear. However, the difficulty of

obtaining the perspective of those not doing well with respect to drug programmes is a common feature in this field of research.

If possible, though, future research exploring in more depth the views of those undertaking coerced treatment who are not succeeding in such programmes, whether bail with condition of drug treatment attached, drug treatment and testing orders or diversion from custody, would close an important gap. The extent to which these individuals do, or do not, articulate a discourse of choice and agency with respect to these programmes would be revealing. Further, a qualitative study following a group of offenders through such a programme, interviewing them at regular intervals and exploring the extent to which such programmes have an impact on their view of themselves and their drug use over time would be as invaluable as it would be difficult.

Further direct empirical research into the various other multi-agency programmes and practices that have been instigated in Scotland in recent years in relation to drugs is also required. To what extent does this apparent process of the criminalisation of drug policy result in the actual dominance of legal professionals and legal goals within Drug Treatment and Testing Orders, arrest referral schemes, bail with the condition of drug testing attached or diversion from custody? To what extent does participation within such schemes lead non-legal professions to alter their practices and goals?

From a more theoretical perspective, further research into, and consideration of, how drug courts, and similar programmes, police the boundary around citizenship is also required. This is the case both with such programmes in Scotland, and in the many other jurisdictions across the globe to which they have been introduced.

Finally, this global spread has witnessed drug courts being introduced into such

countries as Australia, Brazil, Jamaica and Norway. Research exploring the extent to which drug courts in these countries have either directly imitated the United States model, or produced programmes that are particularly shaped by their own local social, cultural and political context, would also be welcome.

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