
ARTICLES

THERAPEUTIC JUSTICE IN ALASKA'S COURTS

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This Article discusses the concept of therapeutic justice as it is currently progressing in the Alaska court system. The Article begins with a discussion of the origins of therapeutic justice as a theory and continues to explore therapeutic justice in Alaska in various contexts, including drug courts and mental health courts. The Article also discusses constitutional implications for therapeutic justice, such as due process and confidentiality concerns. While the Article notes that the novelty of therapeutic justice in the legal system means that more research must be done to determine its efficacy, it concludes that these innovative courts can be a cost-effective, recidivism-reducing approach to criminal justice.

I. THERAPEUTIC COURTS IN ALASKA: HISTORY, DEVELOPMENT AND PRESENT STRUCTURES

Wellness Court . . . Anchorage Felony Drug Court . . . Mental Health Court . . . Therapeutic Justice Courts. Practitioners in Alaska courts and observers of the justice system have heard these terms used frequently during the past few years but have had no compre-

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hensive source of information about what they do and why they exist. Underlying these new projects is a growing change in the justice system's response to the difficult problems presented by defendants whose substance abuse or mental disabilities appear to be related inextricably to repeated criminal behavior. Justice professionals describe this approach as "therapeutic justice." The purposes of this Article are to describe the theoretical underpinnings of this new approach, to inform practitioners about the operating and planned projects and to provide a foundation for the discussion and resolution of the legal issues created by these responses to defendants' problems.

A. The Development of Therapeutic Justice as a Concept

Both Roscoe Pound and Oliver Wendell Holmes were early proponents of the concepts that shape therapeutic jurisprudence.¹ Pound described a traditional system that was "'formalistic,' 'logical,' and 'mechanical,' and placed great emphasis on the process of finding the 'right' law or legal principal [sic] and applying it to the current problem."² He then said that the law "must look to the relationship between itself and the social effects it creates."³ Holmes is cited as a forefather of therapeutic jurisprudence for his often-quoted statement that begins, "The life of the law has not been logic," and then continues on to say that many factors other than logic go into decisions about governing.⁴

More recently, as the term "therapeutic justice" began to be used,⁵ it has been defined as "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects."⁶ Legal theorists have used "therapeutic justice" to "illuminate how laws and legal proc-

1. Hon. Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 446 (1999).

2. *Id.* (citation omitted).

3. *Id.*

4. *Id.*

5. One article attributes the creation of the term to David Wexler, Professor of Law and Professor of Psychology at the University of Arizona in Tucson, and Professor of Law and Director of the International Network on Therapeutic Jurisprudence at the University of Puerto Rico in San Juan. See John Petrila et al., *Preliminary Observations from an Evaluation of the Broward County Mental Health Court*, 37 COURT REV. 14, 19 (2001).

6. Hora et al., *supra* note 1, at 443 (quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL'Y & L. 193, 196 (1995)).

esses may in fact support or undermine the public policy reasons for instituting those laws and legal processes.”⁷ Now, laws and legal processes are beginning to be employed specifically for what are perceived as therapeutic purposes.

Lawyers, judges, and the law itself “all function therapeutically or antitherapeutically irrespective of whether the laws and legal actors take these consequences into account.”⁸ Another definition of therapeutic jurisprudence espoused by Bruce Winick focuses on “the law’s healing potential” and describes it as “a mental health approach to law . . . consistent with other important legal values” that can “re-shape law and legal processes in ways that can improve the psychological functioning and emotional well-being of those affected.”⁹ Winick argues that the therapeutic effects of new procedures apply not only to defendants or participants in therapeutic court projects, but also to the professionals creating and using the courts. He suggests that therapeutic effects occur in tort cases as well as criminal or domestic cases if the participants use the principles.¹⁰ A recent series of articles in the *Seattle University Law Review* explores the application of therapeutic justice principles in the appellate courts, with one author noting that “[a]ppellate judges are becoming more interested in alternatives to the ‘argument culture’; they are increasingly interested in enabling the parties to create solutions to complex problems in addition to declaring rights and naming winners and losers.”¹¹

The following chart clarifies the similarities and differences between therapeutic justice and two other concepts: restorative and retributive justice.

7. Hora et al., *supra* note 1, at 444.

8. *Id.* at 445 (citation omitted).

9. Q & A: *The Psychologically-minded Lawyer*, Transforming Practices, at <http://www.transformingpractices.com/qa/qa5.html> (transcript of interview with Bruce Winick, Professor of Law, University of Miami School of Law) (last visited Apr. 11, 2002).

10. *Id.* One example provided by Professor Winick is that “no-fault in the tort area . . . emphasizes compensation, but tort victims often crave other things, like apology and a process that puts the blame on the tortfeasor and relieves them (*i.e.*, the victims) from responsibility. The resolution of tort cases therefore should include some process that allows this to occur.” *Id.*

11. Shirley S. Abrahamson, *The Appeal of Therapeutic Jurisprudence*, 24 SEATTLE U. L. REV. 223, 224 (2000).

COMPARISON OF JUSTICE THEORIES

	Retributive Justice	Therapeutic Justice	Restorative Justice	Community Justice
Definition of Crime	Crime is a breach of a rule created by the sovereign. Crime should be addressed by professionals who are not connected to the victim or the offender.	Crime is a manifestation of illness of the offender's body or character. Crime should be addressed through treatment by professionals.	Crime is a disruption of community harmony and relationships. Crime should be addressed in the community by the community, the victim and the offender.	Crime is committed by people who are not invested in the community and is caused by complex social problems. Crime should be addressed in the community by a partnership between the community and criminal justice agencies.
Primary Focus	Focus on defendant.	Focus on defendant's rehabilitation, including teaching accountability.	Equal focus on offender, community and victim.	Focus on enhancing and sustaining community life as a way of preventing crime and exerting social control.
Sentencing Goals	Vindicate social values, deter defendant and others, isolate defendant from community, rehabilitate defendant if possible. Primary beneficiary is government, secondary is society and tertiary is the victim.	To correct or heal the offender, who receives most services and benefits. Society is secondary; victim benefits to the extent that offender is rehabilitated.	Repair the harm, heal victim and community, restore offender to healthy relationship with community through offender accountability, encourage community to take responsibility for responding to crime.	Similar to goals of restorative justice; however, community justice also attempts to address some of the social problems underlying crime and to involve local residents in planning and decisionmaking.
Use of Incarceration	A primary form of sanction	May be used as a sanction and to protect community (comparable to quarantine)	May be necessary to protect community; restorative justice principles should be applied within institutions	May be necessary to protect community
Measures of Success	Fairness of process; equality and proportionality of sanctions (<i>i.e.</i> , sanctions are related to seriousness of crime and similarly situated offenders receive uniform sanctions)	Regained health of offender; offender demonstrates accountability in work, family and community; low recidivism	Emotional and financial restitution for victim, restoration of community harmony, return of offender to valued role in community and low recidivism	Citizens are directly involved in setting crime-response priorities; all citizens are strongly invested in the community, and crime rates decrease.
Examples	Current criminal justice system and most youth courts	Wellness Court, drug court, mental health court, some tribal courts and some youth courts	Victim-offender mediation, circle sentencing, family group conferencing, reparative probation, citizen boards and some tribal courts	Community policing and prosecution, Navajo Peacemaker courts, community courts and some tribal courts

Compiled in part from Judge Edward J. Cashman, *Materials on Restorative Justice* (NJC Document, 1998) and NIJ *Research in Brief* No. 3 (Sept. 1999).

Therapeutic justice emphasizes the need to address the root causes of a specific offender's criminality, to treat the offender to remove the problems and to return the offender to the community as a responsible citizen. Restorative justice emphasizes repair of the relationships between the victim, community and offender.¹² Retributive justice, the model on which much of the United States' criminal justice system is based, emphasizes fairness and punishment as more important values than rehabilitation or other interests. Each model seeks to express community condemnation in order to protect public safety and deter or dissuade the specific offender and others from similar behavior in the future.¹³

B. Therapeutic Justice in Action: Drug Courts

The principles of therapeutic justice and drug courts developed independently. Drug courts grew out of efforts to respond to increasing caseloads in the 1980s that included large numbers of substance-abusing offenders.¹⁴ One group has said: "The mission of drug courts is to stop the abuse of alcohol and other drugs and related criminal activity."¹⁵ Therapeutic jurisprudence principles appeared to establish a "jurisprudential theory" that provided the answers to why and how drug treatment courts worked on a theoretical level.¹⁶

Practitioners quickly applied the same therapeutic jurisprudence concepts and the structures developed in drug courts to courts that dealt with persons with mental disabilities, family problems and domestic violence issues.¹⁷ These courts often are referred to as "prob-

12. Writers on restorative justice often emphasize its roots in or resemblance to indigenous justice systems from various cultures, including the Alaskan Indian and Eskimo cultures. See, e.g., Todd R. Clear & David R. Karp, *Toward the Ideal of Community Justice*, NIJ JOURNAL 21 (Oct. 2000) ("Sentencing circles are rooted in the traditional peacemaking rituals of both Native Canadians and Native Americans.").

13. ALASKA STAT. § 12.55.005 (Michie 2000). Alaska's sentencing statute incorporates these criteria set by the Alaska Supreme Court in *State v. Chaney*, 477 P.2d. 441 (Alaska 1970).

14. Hora et al., *supra* note 1, at 462-63.

15. THE NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 7 (Jan. 1997), available at <http://www.nadcp.org/whatis/> (last visited Feb. 25, 2002) [hereinafter NADCP].

16. Hora et al., *supra* note 1, at 449.

17. David Wexler, *Therapeutic Justice: An Overview*, available at <http://www.law.arizona.edu/upr-intj/intj-o.html> (last visited Mar. 16, 2001) ("The therapeutic jurisprudence perspective, however, now applies to other legal areas, probably all legal areas. For example, the perspective applies to mental health law, criminal law, juvenile law, and other areas. Personal injury law has also received attention." (citations omitted)).

lem-solving courts.”¹⁸ Although this Article focuses on the broader concept of therapeutic justice and its application in many arenas, much of the available literature and evaluation is associated with drug courts. The resulting predominance of drug courts in the discussion does not imply that the usefulness of therapeutic justice concepts is limited to drug courts. As the Article demonstrates, these concepts have been applied in the mental health courts in Anchorage and elsewhere, and other literature shows their application in additional contexts.

An administrative order from Chief Judge Gerald Weatherington in Miami in 1989 created what appears to have been the first drug treatment court.¹⁹ The drug court concept has been applied in the context of drug and alcohol addictions, drunk driving cases,²⁰ domestic violence and child in need of aid and family cases.²¹ Drug courts operate under the basic “understanding that substance abuse is a chronic, progressive, relapsing disorder *that can be successfully treated*.”²²

Mentally disabled offenders appearing in mental health courts that use a structure similar to that of drug courts find themselves in rather different circumstances. Mental disabilities usually are chronic, but rarely are curable in the sense that an addiction might be.²³ However, mental disabilities often can be managed with appropriate medication and structure. The hope is that the activities of the

18. *Center for Problem Solving Courts*, at <http://www.problemsolvingcourts.com/index.html> (last visited Feb. 25, 2002).

19. Hora et al., *supra* note 1, at 454-55. One source estimates that, as of May 2001, more than 600 drug treatment courts existed throughout the U.S. STEVEN BELENKO, *RESEARCH ON DRUG COURTS: A CRITICAL REVIEW* 5 (2001) [hereinafter 2001 UPDATE].

20. *E.g.*, BERNALILLO COUNTY METROPOLITAN DWI/DRUG COURT POLICY & PROCEDURE MANUAL (2000); NATIONAL DRUG COURT INSTITUTE, *DUI/DRUG COURTS: DEFINING A NATIONAL STRATEGY* (Monograph Series 1, Mar. 1999); Larry G. Sage, *An Alcohol and Other Drug Court Experiment in Nevada*, JUDGES' J. 22 (Fall 2000).

21. John Feinblatt & Derek Denckla eds., *Prosecutors, Defenders and Problem-Solving Courts*, 84 JUDICATURE 207 (2001). Courts based on therapeutic justice principles also are termed “problem-solving courts.” *Id.* at 207.

22. Hora et al., *supra* note 1, at 463 (citation omitted).

23. CRIME AND JUSTICE RESEARCH INSTITUTE, *EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE* xii (Apr. 2000) (“While a goal for substance abusers can clearly and measurably be abstinence within the time frame of the drug court treatment program, such a practical framework is not so readily available in the treatment of mental illness. Courts cannot say, ‘be cured within 12 months.’”).

mental health court will respond to “the need for appropriate treatment in an environment conducive to wellness and not punishment, as well as the continuing necessity to insure the protection of the public.”²⁴ Some studies show that substance abuse and mental health problems tend to coexist, such that individuals with a substance abuse problem are substantially more likely to have a mental health problem and vice versa.²⁵ As a commentator has recently noted, “Given the biopsychosocial nature of drug addiction, [t]he traditional adversarial system of justice, designed to solve legal disputes, is ineffective at addressing . . . [drug] abuse.”²⁶

Other specialized courts that differ from the therapeutic justice courts have been created or proposed in the past two decades. Some courts have focused on case management approaches, seeking to handle large numbers of cases or certain types of cases more effectively. For example, some courts that handle children’s cases or domestic violence cases have concluded that having all related cases—divorce, child custody, child in need of aid, protective orders and criminal cases involving one or more of the same parties—before one judge would improve the judge’s ability to make decisions about each case’s disposition.²⁷ An important difference between many of these specialized courts and the therapeutic courts discussed in this Article is that the specialized courts decide which cases are subject to the court’s authority rather than allowing the defendants to choose whether they will participate in, or “opt-in,” to the project. Even in

24. Petrila et al., *supra* note 5, at 16 (citing Administrative Order No. VI-97-I-1A, *In re Creation of a Mental Health Court Subdivision within the County Criminal Division*, 17th Cir. Ct., Broward Co., Fla. (1997)).

25. Hora et al., *supra* note 1, at 466; *see also id.* at n.121. Unfortunately, many treatment programs in Alaska are not prepared to deal with persons who have co-existing problems, so that a very large percentage of persons who might benefit from therapeutic courts are excluded. ALASKA JUDICIAL COUNCIL, FINAL REPORT OF THE ALASKA CRIMINAL JUSTICE ASSESSMENT COMMISSION 36 (May 2000) [hereinafter *CJAC Report*] (stating “77 percent of the inmates treated by DOC mental health staff have co-occurring substance abuse disorders. The shortage of mental health services, the prevalence of alcohol and drug abuse among the mentally disabled, and the shortage of dual diagnosis treatment programs has resulted in an unprecedented number of mentally disabled individuals being arrested and incarcerated.”).

26. Hora et al., *supra* note 1, at 467 (citation omitted).

27. Michael A. Town, *The Unified Family Court: Preventive, Therapeutic and Restorative Justice for America's Families*, at <http://www.preventivelawyer.org/content/essays/town.htm> (last visited Feb. 25, 2002). Another approach that some Alaska practitioners are considering would set case management parameters only for domestic violence cases and would not try to coordinate these with other types of cases in which the same family members were involved. Interview with Susanne Di Pietro, Alaska Court System (Nov. 28, 2001).

courts where the issue is not the offender's addiction or medical condition, the court's monitoring and the opportunity to look at underlying addictions or substance abuse can be valuable adjuncts to judicial sanctions.²⁸

The U.S. Department of Justice Office of Drug Court Programs requires that a drug court comply with ten "key components" before it can receive federal funding.²⁹ These ten components are (1) the integration of substance abuse treatment with justice system case processing; (2) use of a non-adversarial approach where the prosecution and defense promote public safety while protecting the right of the accused to due process; (3) early identification and prompt placement of eligible participants; (4) access to a continuum of treatment, rehabilitation, and related services; (5) frequent testing for alcohol and illicit drugs; (6) a coordinated strategy among judge, prosecution, defense and treatment providers to govern offender compliance; (7) ongoing judicial interaction with each participant; (8) monitoring and evaluation to measure achievement of program goals and gauge effectiveness; (9) continuing interdisciplinary education to promote effective planning, implementation and operation; and (10) partnerships with public agencies and community-based organizations to generate local support and enhance drug court effectiveness.

C. Therapeutic Courts: Assets and Liabilities

The benefits and costs of therapeutic courts have been extensively discussed.³⁰ Some of the discussion remains theoretical because few courts have existed long enough to perform meaningful longitudinal evaluations, and many of the evaluations that have been per-

28. Landa B. Bailey, *The Alaska Court System's Role in Providing Equal Justice in Urban and Rural Alaska with Therapeutic and Domestic Violence Courts* (July 2001) (on file with the Alaska Judicial Council). Bailey notes that

[i]n a mandatory court monitored domestic violence intervention program, all batterers should be required as a condition of bail or probation to participate in a state approved batterer intervention program that also assesses whether concurrent chemical substance treatment is appropriate Sixty percent of supervised batterers in the Pilot Probation Program for Misdemeanor Domestic Violence Offenders 'were under the effects of alcohol (or drugs) at the time of the offense for which they were being supervised.'

Id. at 8 (citations omitted).

29. RICHARD S. GEBELEIN, *THE REBIRTH OF REHABILITATION: PROMISE AND PERILS OF DRUG COURTS*, U.S. DEP'T OF JUSTICE, SENTENCING & CORRECTIONS (May 2000) at 3.

30. DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, *LOOKING AT A DECADE OF DRUG COURTS* 6 (June 1998), *available at* <http://www.usdoj.gov/dcpo/decade98.htm> (last visited Feb. 25, 2002); BELENKO, *supra* note 19, at 40-43.

formed have been limited in scope.³¹ Nevertheless, policymakers and justice system professionals have identified a wide range of benefits and concerns based on their experiences.

1. *The Views of Judges and Court Administrators.* Judges and court administrators differ strongly in their beliefs about the benefits of the therapeutic justice approach. Proponents of therapeutic justice courts believe that the therapeutic justice model has reduced recidivism and increased the chances that defendants can return to their communities as productive individuals.³² Judges are willing to see a defendant repeatedly in a structured setting for months if they believe that in the end they will not see that defendant back before them for sentencing on repeated offenses. One judge commented: “[F]or a long time, my claim to fame was that I arraigned 200 cases in one session. That’s ridiculous.”³³ New York State Chief Judge Judith S. Kaye notes: “In many of today’s cases, the traditional approach yields unsatisfying results Every legal right of the litigants is protected, all procedures followed, yet we aren’t making a dent in the underlying problem.”³⁴ Some judges see the situation as particularly troublesome for misdemeanor offenders who receive at best minimal supervision and often little or no treatment.³⁵

One of the strongest expressions of support has come from the Conference of Chief Justices (“CCJ”) and the Conference of State Court Administrators (“COSCA”). In an August 2000 joint resolution, CCJ and COSCA declared that “well-functioning drug courts represent the best practice of these [therapeutic justice] principles and methods.”³⁶ The American Bar Association (“ABA”) also has supported drug courts and therapeutic justice approaches, noting that “studies indicate that between seventy to eighty percent of all persons

31. CHAS. MICHAEL JOHNSON, IMPACT EVALUATIONS OF DRUG COURT PROGRAMS: THE COLLECTION AND MAINTENANCE OF POST-PROGRAM AND COMPARATIVE DATA ARE VITAL TO SOUND OUTCOME EVALUATIONS AND CONCLUSIONS ON THE OVERALL IMPACT OF DRUG COURT PROGRAMS 1 (May 31, 2001) (on file with the Alaska Judicial Council).

32. John Feinblatt et al., *Judicial Innovation at the Crossroads: The Future of Problem-Solving Courts*, 15 COURT MGR. 28, 32 (2000).

33. *Id.* at 31 (citing *What is a Traditional Judge Anyway?*, 84 JUDICATURE 78, 81 (Greg Berman ed., 2000)).

34. *Id.* See also Berman, *supra* note 33, at 80 (quoting the Hon. Judith Kaye as saying “[w]e get a lot of repeat business. We’re recycling the same people through the system.”).

35. *CJAC Report*, *supra* note 25, at 44-45.

36. HON. JEFFREY S. TAUBER (RET.), RATIONAL DRUG POLICY REFORM: A RESOURCE GUIDE 54 (2001).

arrested for crimes have either an alcohol or illegal drug abuse problem.”³⁷ The ABA adds that “[t]he human and political success of therapeutic justice is too great to ignore.”³⁸

Some court administrators and other judges express concerns that the therapeutic courts will be of limited benefit to a few defendants while consuming scarce resources at a rapid rate.³⁹ In the short term, the projects require extra time to (1) facilitate the frequent meetings among the professionals and court staff involved in each case, (2) hold regular hearings and (3) administer the network of services, sanctions and incentives required to make the therapeutic process work. Project funding often does not include resources to pay for the increased clerical burden on the courts or for the additional administrative time needed for judges to oversee the court’s operations.⁴⁰ Other justice system professionals are equally concerned about the lack of resources for the added work involved in each therapeutic justice project case.⁴¹

37. Proposed Standard 2.77, cmt., Procedures in Drug Treatment Courts, Standards Relating to Trial Courts (ABA Judicial Division) at 9 (adopted August 2001), available at <http://www.abanet.org> (last visited Feb. 1, 2001) [hereinafter ABA REPORT].

38. *Id.* at 10. One part of the “human” success is the increased satisfaction felt by judges and others who handle cases in therapeutic courts. See Deborah J. Chase & Peggy Fulton Hora, *The Implications of Therapeutic Jurisprudence for Judicial Satisfaction*, COURT REVIEW 12, 13 (Spring 2000). Judge Jeffrey Tauber emphasizes the personal rewards for therapeutic court personnel as one of the primary reasons for their use. The Honorable Jeffrey Tauber, Address at Fall Alaska Judicial Conference (Oct. 25, 2001).

39. California Campaign for New Drug Policies/Yes on Prop. 36, *Drug Courts Have Limited Reach*, at <http://www.drugreform.org/prop36/dc.tpl> (last visited Feb. 1, 2001) [hereinafter *Drug Courts Have Limited Reach*]. The fact sheet says “[d]espite several years of growth, today the drug court system in California reaches only a fraction of all potentially eligible drug-abusing defendants—perhaps 5%.” *Id.*

40. Funding for the Anchorage Felony Drug Court, the Wellness Court and the Court Coordinated Resources Project (“Mental Health Court”) does not cover the court’s costs in these areas. Funding often does not cover the costs of setting up the programs and does not always cover the costs of evaluation. For example, the Wellness Court funding from a Byrne Discretionary Grant awarded in 2000 to Partners for Downtown Progress (Anchorage) did not include any evaluation funds. Partners for Downtown Progress Byrne Discretionary Grant Application, Apr. 29, 2000 (on file with the Alaska Judicial Council) [hereinafter *Wellness Court Byrne Grant*]. In the Anchorage Felony Drug Court grant awarded to the Alaska Court System in 2000, all of the court’s expenses are in-kind contributions from the court system. See Alaska Court System Felony Drug Court Grant Application 2000 (on file with the Alaska Judicial Council) [hereinafter *Anchorage Felony Drug Court Grant*].

41. Hora et al., *supra* note 1, at 511.

Other concerns include worries that therapeutic courts may be coercive, may become more paternalistic and repressive than the existing system⁴² and may be “net-widening,” *i.e.*, they may impose harsher penalties or expectations on relatively less serious offenders rather than targeting more serious offenders.⁴³ Some also believe that drug courts may end up serving private interests rather than meeting the community’s needs.⁴⁴

Perhaps the most serious concern is that courts will be unable to apply therapeutic justice concepts to more than a select few defendants. In a climate where all courts struggle for resources to address their caseloads’ demands, resource-intensive therapeutic processes appear out of reach for most cases. Therapeutic courts typically serve only a fraction of potentially eligible defendants.⁴⁵ Estimates for the Anchorage Felony Drug Court suggest that, at best, it would have resources for about twenty percent of potentially eligible clients.⁴⁶ The early estimate of the number of eligible clients that could be served was cut from fifty to ten when the treatment providers gave a more detailed analysis of the cost of serving drug court participants at the level expected by the terms of the federal grant.⁴⁷ Observers looking

42. See, *e.g.*, Berman, *supra* note 33, at 85 (“One final problem is . . . that these courts are highly paternalistic.”); see also Feinblatt & Denckla, *supra* note 21, at 210 (“[T]hey pressure defendants to accept pre-ordained alternatives to incarceration. How are they making judgments about what the proper treatment modality should be for an individual?”).

43. See Feinblatt & Denckla, *supra* note 21, at 210 (“I am concerned that what we are setting up is a wider net in the guise of help or treatment for our clients.”); see also Carl Baar & Freda F. Solomon, *The Role of the Courts: The Two Faces of Justice*, 15 COURT MGR. 19, 26 (2000) (“[T]his prominent group of drug court supporters is ready to support increased penalties as a way of expanding the client base and increasing the retention rate of treatment programs—a major step beyond the original conception of drug courts as an alternative to already punitive drug laws. And given the commission’s circular definition of drug addiction, the potential for net widening seems very real.”).

44. Baar & Solomon, *supra* note 43, at 26 (“Critics [in Austin, Texas] saw the new downtown community court siphoning resources from other priority projects—and doing so in the interests of the downtown business community rather than the public.”).

45. *Drug Courts Have Limited Reach*, *supra* note 39 (“[T]he four-branch drug court [in San Diego county] processes 1.7% of all potential defendants each year.”).

46. See *Anchorage Felony Drug Court Grant*, *supra* note 40, at 10; ALASKA COURT SYSTEM, 2000 ANNUAL REPORT 5.25 (2001).

47. At the March 22, 2001 Drug Court Committee meeting, the treatment representative noted that if all drug court clients needed intensive out-patient treatment, the program would be able to serve only ten clients for the funds available. March 22, 2001 meeting notes (on file with the Alaska Judicial Council). At a later Drug Court Committee meeting, a figure of \$6,650 per client was presented. June

at similar situations in other jurisdictions believe that drug court procedures eventually may become abbreviated and perfunctory if they “go to scale” to serve a majority of the defendants with substance abuse problems.⁴⁸ Under such a system, defendants will lose the benefits of individualized attention and therapeutic justice approaches will devolve into *pro forma* applications that would be no more effective than the court procedures they replaced.⁴⁹

2. *The Views of Defendants.* One stated purpose of therapeutic justice projects is to provide defendants with the structure, resources and incentives to end their addictions or help them resolve the problems that prevent them from leading satisfying and productive lives. Some defendants in therapeutic projects participate because they share the belief that rehabilitation is possible. Other defendants may participate because they believe that the projects are a less onerous choice than incarceration.⁵⁰

Proponents of therapeutic justice cite substantial evidence that coercing treatment through structures such as drug courts may result in better outcomes.⁵¹ Evidence suggests that people in coerced or mandated treatment (as distinct from voluntary treatment) are more likely to complete the treatment. Completion of treatment is critical to significant reduction in the likelihood of relapse.⁵²

Conversely, defendants may assess the difficulties of therapeutic justice projects and decide that incarceration is preferable. They may believe that they would fail in any case and would prefer to serve time in custody and be done with it. Some do not believe that they have a problem that needs treatment or that is amenable to the treatment offered, and they may decline to participate on those

12, 2001 meeting notes (on file with the Alaska Judicial Council). By contrast, the amount for treatment was estimated at about \$60,000. Jean Sagan, *Strategy for Sustaining Anchorage Drug Court When Federal Funding Has Expired* (Alaska Court System Oct. 16, 2001) (on file with the Alaska Judicial Council).

48. Gebelein, *supra* note 29, at 5.

49. *Id.* (“As the number of clients grows, the tendency is to make do with the same amount of resources as offered for fewer clients. The usual result is deterioration of treatment quality as programs are shortened and more people are crowded into each group.”).

50. See Susan Turner et al., *Perceptions of Drug Court: How Offenders View Ease of Program Completion, Strengths and Weaknesses, and the Impact on Their Lives*, 2 NAT’L DRUG COURT INST. REV. 61, 82 (1999).

51. Sally L. Satel, *Drug Treatment: The Case for Coercion*, 3 NAT’L DRUG COURT INST. REV. 1, 5 (2000).

52. *Id.* at 4.

grounds.⁵³ Additionally, defense attorneys perceive incarceration as less damaging for some defendants than participation in programs in which the defendant can be repeatedly incarcerated for violations of program guidelines.⁵⁴

3. *The Views of Prosecutors.* Prosecutors who favor drug courts tend to believe that their role is to “represent[] the community’s interest in public order.”⁵⁵ Other prosecutors question that “broader vision”⁵⁶ and suggest instead that the goal of the criminal justice system is for prosecutors to “put bad guys in jail”⁵⁷ by winning individual cases. Supporters of the therapeutic approach suggest that prosecutors working in therapeutic courts are as zealous as those working in regular courts, but more accountable. One prosecutor noted that “unless I take a broader view of what it is to be zealous, I’ll lose an opportunity to reduce crime.”⁵⁸ Another added, “I think retribution is more moral if there are earlier opportunities in the person’s involvement with the criminal justice system to make another choice—to appeal to that person’s higher self.”⁵⁹

Some prosecutors may object to specific ways of administering therapeutic justice programs. For example, many oppose pre-plea programs that preserve defendants’ options for going back to trial. “[A]s time passes I am in a weaker position as to my case and my expenditure of resources.”⁶⁰ For this reason, many prosecutors insist on a plea from the defendant as a condition of entry into a therapeutic justice project. Other prosecutors perceive therapeutic justice’s collaborative, non-adversarial approach as incompatible with “the public safety—and punishment-oriented goals of the prosecution[.]”⁶¹

53. For example, preliminary conversations and data from Anchorage Wellness Court staff suggest that most defendants opting into the Wellness Court are older repeat offenders. Younger or first offenders do not see a need for treatment and do not have the same incentives to participate in the lengthy Wellness Court program. Nov. 7, 2001 Anchorage Wellness Court meeting notes 1 (on file with the Alaska Judicial Council). Anchorage Felony Drug Court team members mention the same phenomenon. Nov. 16, 2001 meeting notes 2 (on file with the Alaska Judicial Council).

54. Feinblatt & Denckla, *supra* note 21, at 214 (“[A] client facing a couple of weeks jail time for a conviction in a traditional court should not be facing a year in jail after failing to complete a sentence for community service or treatment.”).

55. *Id.* at 208.

56. *Id.* at 209.

57. *Id.*

58. *Id.* at 212.

59. *Id.*

60. *Id.* at 213.

61. Hora et al., *supra* note 1, at 477 (citations omitted).

They may reserve use of this approach for specific types of defendants and consider it inappropriate for others.⁶²

4. *Other Justice System Perspectives.* Departments of Corrections and the public have responded favorably to therapeutic justice projects in their current form and scope. They favor the projects' potential for reducing incarceration costs and for successfully treating addictions.⁶³ Alaska's legislature has strongly supported the concept, creating two new therapeutic justice projects by statute in 2001 and funding two existing projects.⁶⁴ The new projects will work with repeat Driving While Intoxicated ("DWI" or "DUI") defendants in the Anchorage superior court and with other offenders with alcohol-related problems in the Bethel superior court.

Many treatment providers also are supportive, although some individuals believe that the process may be too coercive and that coerced treatment does not work.⁶⁵ Thorny confidentiality issues may arise with therapeutic justice projects because the projects require agencies to share and discuss information that is otherwise protected by complex confidentiality laws and regulations. Another concern is the change in the role of treatment providers from serving "exclusively as the gatekeepers to treatment, as they have been accustomed

62. For example, because domestic violence is not an addictive disorder, some prosecutors contend that therapeutic approaches are inappropriate. See Notes on draft article by Cynthia Cooper, Alaska Deputy Attorney General for Criminal Prosecutions, Nov. 2001 (on file with the Alaska Judicial Council). However, as this article emphasizes, "therapeutic" refers to the effects of the procedures used in the court, not to characteristics of the types of cases handled in the court. Features of therapeutic justice projects such as multiple appearances before a judge and swift sanctions can be appropriately used in therapeutic projects oriented to domestic violence offenders.

63. In addition to the support for therapeutic courts by the Conference of Chief Justices and the Conference of State Court Administrators, Tauber, *supra* note 36, at 53-55, other national organizations expressing support include The National District Attorneys Association, The National Sheriffs Association and the National Association of County Organizations. Susanne Di Pietro, *Why Drug Courts* (Oct. 25, 2001) (unpublished PowerPoint slides from presentation to Judges Conference) (on file with the Alaska Judicial Council).

64. H.B. 172, 22nd Leg., 1st Sess. (Alaska 2001) (creating two new courts and providing funding for treatment of offenders in the Anchorage Wellness Court and for offenders in the Juneau court using Naltrexone).

65. Hora et al., *supra* note 1, at 526 ("[M]any experts in the drug treatment field have questioned the effectiveness of legally coerced treatment due to a belief that individuals must enter a program voluntarily in order to have the requisite state of mind for recovery." (internal citation omitted)).

to doing,” to having “[c]ourts . . . decide who will be sent to treatment and when treatment can be terminated for poor performance.”⁶⁶

D. Effectiveness of Therapeutic Courts

The concepts of therapeutic justice have come to the forefront at a time when policymakers and the public are calling for greater accountability in public expenditures. Simultaneously, academics have developed increasingly sophisticated tools and methods for evaluation. Therapeutic justice projects, with their stated purpose of stopping “the abuse of alcohol and other drugs and related criminal activity,”⁶⁷ have come under scrutiny from their inception as a result of these trends.

Although fewer than one hundred evaluations of therapeutic courts have been published in the last ten years, many are underway.⁶⁸ A number of preliminary or partial evaluations have been completed and researchers have considered the effectiveness of many of the separate components of drug courts, particularly the use of monitoring and supervision, completion of treatment programs and use of coerced treatment.⁶⁹

1. *Treatment of Addiction/Disease.* Various researchers have demonstrated that treatment, if completed, reduces recidivism.⁷⁰ Partial completion of treatment often appears to be better than no treatment in reducing recidivism, but length of time in treatment generally predicts the addict’s post-treatment success.⁷¹ Other studies have shown that some types of treatment correlate more significantly with reduced recidivism than others. Cognitive therapies that focus on objective changes in offenders’ thinking and behavior appear significantly more effective than individual counseling and other types of therapies.⁷² Treatment providers may use several approaches in a treatment plan, offering cognitive programs

66. *Id.* at 480 (quoting JOHN S. GOLDKAMP, U.S. DEP’T OF JUSTICE, JUSTICE AND TREATMENT INNOVATIONS: THE DRUG COURT MOVEMENT—A WORKING PAPER OF THE FIRST NAT’L DRUG COURT CONFERENCE, DEC. 1993 8 (1994)).

67. NADCP, *supra* note 15.

68. 2001 UPDATE, *supra* note 19, at 6-7.

69. Satel, *supra* note 51, at 34-41.

70. *Id.* at 4.

71. *Id.* at 4-5.

72. Faye S. Taxman, *Unraveling “What Works” for Offenders in Substance Abuse Treatment Services*, NAT’L DRUG CT. INST. REV., Winter 1999, at 110-11 (“Cognitive behavioral approaches consistently appear to be the most effective treatment therapy for substance abusers.”).

with individual counseling, group and family counseling, after-care and other services needed by an individual offender.⁷³

Other components of drug or therapeutic courts also have proven effective when used separately or outside the context of the therapeutic court. In a Washington, D.C. study, monitoring and closely supervising offenders on probation, by itself reduced the incidence of positive drug tests.⁷⁴ A Florida program uses intensive supervision of probationers for DWI offenders, rather than a drug court model, and has shown significant reduction in recidivism.⁷⁵

The combination of these separate effective elements into therapeutic justice courts has proven successful in many, though not all, instances. Published research shows that many drug courts have reduced recidivism during their existence.⁷⁶ However, a few projects have not been able to demonstrate that the drug court population

73. *Id.* at 126. The Wellness Court gives defendants access to cognitive therapies, including Moral Recognition Therapy (“MRT”, trademarked). *See also Wellness Court Byrne Grant*, *supra* note 40, at 8. The Alaska Department of Corrections has trained many of its staff in the understanding and use of cognitive approaches and offers programs in many of its institutions. *See* E-mail from Christy Flintoff, Alaska Department of Corrections, to Teresa Carns (Feb. 2, 2001) (outlining the use of “Cognitive Self Change” and “Choosing Change” programs by the Alaska Department of Corrections) (on file with the Alaska Judicial Council). The Anchorage Felony Drug Court specified in its grant application that offenders would have varied treatment opportunities, including family counseling and services “being provided in connection with the child protection system.” *Anchorage Felony Drug Court Grant*, *supra* note 40, at 8.

74. Adele Harrell et al., Nat’l Institute of Justice, Research in Brief, Evaluation of the D.C. Superior Court Drug Intervention Programs (Apr. 2000) (unpublished report on file with the Alaska Judicial Council). “Program participants and nonparticipants on both the sanctions and treatment dockets were significantly more likely to test drug free in the month before sentencing, and a larger proportion of their tests were negative compared to the standard docket sample.” *Id.* at 7.

75. Miami-Dade Recidivism Project, Final Narrative 3 (unpublished report on file with the Alaska Judicial Council). “Remarkably, of the 364, only 14 have been revoked [sic] . . . meaning that, at this point, only 4% have recidivated compared with about 33% of the ‘general population’ of those who have had at least one DUI.” *Id.* (citation omitted) (emphasis omitted). Memorandum from Ronald F. Taylor, Social Services Program Coordinator, to Elmer Lindstrom, CJAC Steering Committee 6 (Feb. 26, 1999) (on file with the Alaska Judicial Council) [hereinafter *ASAP Memo*] (“Dr. Araj’s research demonstrated that 75% of the DWI offenders and 52% of the non-DWI offenders did not receive a new criminal/traffic offense (2nd) within 3 years of their original ASAP referral.”).

76. 2001 UPDATE, *supra* note 19, at 28-30.

fared any better in terms of post-program recidivism rates than the control or comparison groups.⁷⁷

2. *Recidivism.* Researchers have conducted very few follow-up evaluations analyzing re-arrest rates and experiences of participants and controls in drug court programs over the months or years after completion of the program.⁷⁸ The difficulties posed by long-term evaluations include the added costs of more evaluations, the problem of finding former participants and control group subjects and the management of confidentiality issues. Since most drug court programs are relatively new, insufficient time has elapsed to make realistic follow-up evaluations possible.⁷⁹ A similar situation exists for mental health courts and other therapeutic justice projects.⁸⁰ As this Article will discuss, none of Alaska's therapeutic justice projects has been evaluated as of yet. However, the Alaska Court System has asked the Alaska Judicial Council to evaluate all five of the formalized projects discussed in this Article.⁸¹

E. Costs of Therapeutic Justice

Therapeutic justice projects are resource intensive. Even the projects that have functioned for some period of time without outside funding have managed only by using substantial time volunteered by judges, attorneys and other persons and organizations in the community. For example, both the Wellness Court and the Mental Health Court in Anchorage functioned for a number of months without grant funding or other outside support. The Mental Health Court used University of Alaska-Anchorage interns for some staff support. Other than the interns, the judges, treatment providers and attorneys involved in these projects contributed all of the time

77. 2001 UPDATE, *supra* note 19, at 33-34. Of six evaluations summarized in the table on pages 33 and 34 of the 2001 UPDATE, one showed a small difference in re-arrest rates that was not statistically significant (Tarrant County, Texas); another (Las Vegas, Nevada) showed that drug court participants were re-arrested at a significantly higher rate than the control group (26% vs. 16%). The other four evaluations in the table showed better results for the drug court participants than for the comparison groups. *Id.*

78. Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV., Summer 1998, at 7 [hereinafter 1998 *Research Review*].

79. *Id.*

80. Petrila et al., *supra* note 5, at 17 (describing the formal evaluation just getting underway for one of the better established mental health courts, the Broward County, Florida, Mental Health Court).

81. The evaluations will include the Anchorage Felony Drug Court, the Mental Health Court, the Anchorage Wellness Court, the Anchorage Felony DUI Court and the Bethel Therapeutic Justice Project.

needed to plan and bring the courts into operation. The resources needed for therapeutic justice projects include added time for judges, attorneys and clerical staff, increased treatment resources, increased monitoring and drug testing of defendants, and expenses (in most programs) for case managers and coordinators. Because these costs are often listed in a single document, such as an application for grant funds or legislative support, opponents of drug courts find it easy to suggest that they consume extraordinary resources for the number of participants.⁸²

A more realistic analysis would compare the costs for a drug court to the costs of incarcerating the same defendant for at least a year (the typical length of many drug court programs) and the costs of releasing the defendant untreated (the typical situation for most defendants).⁸³ In Alaska, the cost for an Anchorage Felony Drug Court participant is estimated at \$16,950 annually, as compared to the cost of more than \$40,000 per year for incarceration.⁸⁴ One observer suggests that because many of the defendants are repeat offenders⁸⁵ who face presumptive sentences of two years or more, the actual costs of incarceration usually would be double the \$40,000.⁸⁶ The cost of incarceration does not include any of the costs associated with investigating the crimes charged, the costs of court processing (clerical and judge time, prosecution and defense costs) or costs of pretrial incarceration or pre-sentence report preparation for felony defendants. The cost for the Anchorage Felony Drug Court does include some attorney time, but neither judge time nor clerical time for any of the participants.⁸⁷

Depending on the program, defendants bear some of the costs. The Wellness Court, for example, particularly emphasizes the need for defendants to become economically self-sufficient and pay part or

82. *Drug Courts Have Limited Reach*, *supra* note 39.

83. *CJAC Report*, *supra* note 25, at 33 n.73.

84. INTERIM STATUS REP. OF THE ALASKA CRIMINAL JUSTICE COUNCIL app. C, at 1 (2002) (on file with the Alaska Judicial Council) [hereinafter INTERIM CJC REPORT]. These figures were prepared in connection with the Criminal Justice Council's presentations to the Alaska legislature on H.B. 172 in March, 2001.

85. *Anchorage Felony Drug Court Grant*, *supra* note 40, at 4 ("The program is likely to be most attractive at the outset to persons fearing the imposition of significant jail time. This group generally has some criminal history.").

86. Memo from Larry Cohn, Judicial Council Executive Director, to the Alaska Judicial Council, Nov. 28, 2001 (on file with the Alaska Judicial Council). Mr. Cohn notes that as a private attorney in 2001, he represented a client in a drug case in which the "operation took about 3 months and cost in excess of \$20,000 for the investigation alone." *Id.*

87. *Anchorage Felony Drug Court Grant*, *supra* note 40, at Budget Pages 1-5.

most of their monitoring and treatment costs.⁸⁸ Some Wellness Court participants are supervised on an electronic monitoring program that typically costs \$12 to \$15 per day.⁸⁹ Participants also must pay the cost of Naltrexone⁹⁰ (about \$70 to \$150 per month⁹¹) and some or all of the treatment costs. In other therapeutic projects, the expectation is that most participants will be indigent and unable to pay some or all of the costs of participation.⁹² Some projects expect that Medicaid or private insurers may help with costs that are beyond the defendants' means.

These differences in practices highlight different philosophies underlying similar projects. Proponents of having defendants pay argue that even if some defendants cannot participate due to very limited resources, those defendants who can should participate. Others contend that requiring any payment unfairly limits the program to those who have the economic resources to participate.

88. Frank Dahl, *DWI Program Offers Best Solution*, ANCHORAGE DAILY NEWS, Nov. 10, 2001, at B6 ("Refreshingly, the Wellness Court program saves taxpayer dollars by mandating financial responsibility from participants through employment that covers the cost of treatment.").

89. An exhibit to a court order signed by Judge Wanamaker shows the cost of House Arrest/Electronic Monitoring to be \$14 per day. See *State v. Synette Underwood*, No. 3AN-00-8618CR, Judge's Memorandum and Order, Jan. 19, 2001, Exhibit A, Condition No. 8.

90. Naltrexone is a prescription medication that dulls the pleasurable sensations associated with alcohol use and reduces a person's craving for alcohol.

91. Telephone interview with Thea Whitehead, Partners for Downtown Progress Community Liaison (Aug. 29, 2001). The Naltrexone Treatment Order used in the Wellness Court program notes that

[t]his order should only be used in those cases where Defendant certifies that he/she has available sufficient insurance or cash to cover the anticipated \$555 to \$990 costs of this order. Further, Defendant must demonstrate that he/she has a sufficient plan for *housing social group* [sic] and *work* before the plan is approved.

Synette Underwood, 3AN-00-8618CR, Exhibit C, at 1.

92. The H.B. 172 fiscal note for treatment services anticipates 125 offenders between the Bethel and Anchorage alcohol therapeutic courts and estimates costs of \$685,400 (approximately \$5,483 per offender for treatment). The fiscal note does suggest that a substantial portion of the cost might be "self-pay." Health and Social Services fiscal note for CSHB 172 (JUD), Mar. 26, 2001.

F. The Development of Therapeutic Courts in Alaska

1. *Introduction.* Alaska Supreme Court Chief Justice Dana Fabe led off her 2001 State of the Judiciary address to the legislature with a discussion of therapeutic court projects:

There are three touchstones by which we can measure Alaska's justice system as it enters the new millennium and I would like to address them today. They are Innovation, Collaboration, and Improved Access to the Justice System The face of justice is changing in response to new challenges and needs. In the criminal law arena, traditional justice approaches have produced some disappointing results, with repeat offenders who cycle through the criminal justice system Courts nationwide have been trying new approaches.⁹³ One example is the therapeutic court model.

Chief Justice Fabe's comments suggest that the court system sees therapeutic justice projects as an important innovation among those with which it is working.

As the term "therapeutic" is used in Alaska today, it suggests an approach to justice system problems that involves structured relationships among the court, attorneys and treatment providers. The Chief Justice summarized Alaska's approach to therapeutic justice as follows:

[a]n individualized plan is developed for a defendant, which usually includes drug or alcohol testing, treatment, and such other requirements as attaining a GED, finding and maintaining a job, and making restitution. Defendants are closely monitored and must come to court often, before the same judge. That judge becomes familiar with the defendant, and imposes immediate jail-time for non-compliance with the plan's requirements, while providing positive reinforcement when a defendant lives up to the plan's expectations.⁹⁴

The following sections describe the existing and planned therapeutic justice projects in the state.⁹⁵

93. Dana Fabe, *State of Judiciary* (Feb. 28, 2001), at <http://www.state.ak.us/courts/state01.htm> (last visited April 1, 2002).

94. *Id.*

95. Each of these sections has been reviewed at least once by the judges and staff involved in these projects and by other selected reviewers statewide in November of 2001. Comments and suggestions made by the reviewers have been incorporated into the current version of the Article, as of January 2002. Readers should note that the projects change their policies and procedures to adapt to requirements set by funding agencies, changes in the law and needs and concerns of staff and participants. The information in this Article should not be used to make any final decisions about a particular case or defendant.

2. *Anchorage Mental Health Court (Court Coordinated Resources Project)*

a. *History of Treatment of the Mentally Ill in Alaska.* Pressure from a number of sources - including de-institutionalization of mentally ill persons, the rise in the homeless population, prison overcrowding and continual criminal recidivism by mentally ill persons - provided incentives for the development of a mental health court for low-level offenders in Anchorage. The court has been operating since mid-1998.

Before statehood, the territory of Alaska had no mental health services available to mentally ill persons. Individuals experiencing mental difficulties were removed from their homes by the federal government and sent to reside in an institution in Portland, Oregon.⁹⁶ At statehood, the responsibility for providing mental health services was transferred to the new state government, and the Alaska Mental Health Trust was established. The Trust received one million acres of prime land to fund development of a comprehensive integrated mental health program. Beginning at statehood, the State provided continuous and increasing mental health services to its citizens. However, in 1982 a class action suit was brought against the State by citizens who required mental health services not available in Alaska, and who objected to Alaska's management and re-designation of the trust lands.⁹⁷ The plaintiff class prevailed, and the Trust was reconstituted in 1994 with one million acres and \$200 million. Since that time, the Alaska Mental Health Trust Authority has managed the Trust to ensure the development of a comprehensive integrated mental health program for use by Trust beneficiaries.⁹⁸

As part of its comprehensive program, Alaska has a single psychiatric institution, the Alaska Psychiatric Institute ("API"), located in Anchorage. Built in the early 1960s,⁹⁹ API has followed the trend of mental institutions in the United States to downsize, shifting patients to community-based treatment services through a process known as "de-institutionalization." The movement away from institutionalizing mentally ill persons took hold in the United States in the 1960s in response to several issues. State-run mental health institutions tended to be old, expensive to operate, overcrowded and imper-

96. Alaska Mental Health Trust Authority, Trust Overview, at http://www.mhtrust.org/t_ov.html [hereinafter *Trust Overview*].

97. *State v. Weiss*, 706 P.2d 681 (Alaska 1985).

98. *Trust Overview*, *supra* note 96.

99. Press Release, Governor Tony Knowles, Gov. Knowles Bill Finances New, Improved API Facility (Feb. 15, 2001), available at <http://www.gov.state.ak.us/PRESS/01048.html>.

sonal. The majority provided custodial care but little if any treatment. To lessen operating expenses and improve patient care, state and federal officials began to develop and support programs designed to transfer responsibility for mental health care from state-run institutions to community-based facilities. They believed that community-based services could provide earlier detection and individualized care, and could minimize the use of hospitalization for less severely disabled patients.¹⁰⁰

As it progressed, the de-institutionalization movement diverted large numbers of seriously mentally ill people away from institutions and into communities. However, under-funding prevented the alternate system of community-based services from effectively filling its anticipated role. Increasing numbers of persons no longer housed in institutions eventually committed offenses directly related to the offenders' untreated mental disabilities.¹⁰¹ Without community-based outpatient services to respond to the mental health issues, most of the offenders were incarcerated, often for minor offenses for which other offenders might be released.

b. *The Mentally Ill and Disabled in Alaska's Jails and Prisons.* By 1998, American prisons and jails held 238,000 mentally ill offenders, comprising sixteen percent of state prison and jail inmates and seven percent of federal inmates.¹⁰² This percentage was higher in Alaska than in the rest of the country. According to one study, as the end of the century approached, nearly one-third of Alaska prison and jail inmates suffered from mental illness or disability. The Alaska Department of Corrections had become the State's largest institutional supplier of mental health services, serving many more mentally disabled adults than API.¹⁰³ As in the rest of the country, Alaska's mental health system experienced deinstitutionalization between 1979 and 1999. API downsized from 225

100. Gary E. Whitmer, *From Hospitals to Jail: The Fate of California's Deinstitutionalized Mentally Ill*, 50 AM. J. ORTHOPSYCHIATRY 65-75 (1980); Melissa Wining, *Mental Illness in the Justice System and the Mental Health Court* 4 (Apr. 12, 2001) (unpublished student manuscript, on file with Alaska Judicial Council) [hereinafter *Wining Paper*].

101. Goldkamp & Irons-Guynn, *supra* note 23, at 3.

102. *Id.* at 2.

103. *CJAC Report*, *supra* note 25, at 34-35 ("On a snapshot day in January of 1997, 37 percent of the 3,091 inmates (or 1,154 inmates) in Alaska's correctional institutions were Mental Health Trust beneficiaries. On that same day, the census at API was 79." (citations omitted)).

beds to seventy-nine beds.¹⁰⁴ The facility intended to continue this trend by downsizing to fifty-four beds.¹⁰⁵

c. *Development of the Anchorage Mental Health Court.* In July 1998 the state Department of Corrections, with the cooperation of the legal community, treatment providers, the Alaska Mental Health Board and the Alaska Mental Health Trust Authority, established the Jail Alternative Services Program (“JAS”) as a pilot program to provide community mental health services placement for misdemeanor inmates.¹⁰⁶ At about the same time, Judge Stephanie Rhoades and a committee of court staff, attorneys, treatment providers, corrections personnel and other individuals created the Court Coordinated Resources Project (“CRP”) to identify mentally ill persons entering the criminal justice system for misdemeanor offenses and to divert them to community-based treatment.¹⁰⁷

Offenders participating in both JAS and CRP have their court cases assigned to the mental health court project, which monitors offenders’ compliance with their specific treatment programs. Both projects accept individuals being prosecuted by either the State or municipal prosecutors’ offices and individuals who may be defended by a state public defender, the Office of Public Advocacy, municipal contract defense attorneys or private attorneys. The two district court judges [the Honorable Stephanie Rhoades and the Honorable John Lohff, who were initially assigned to preside over the mental health court] remain responsible for the project at this time.¹⁰⁸

While participants in both programs report to the mental health court, the target populations and the institutional history of the programs differ. A grant from the Alaska Mental Health Trust Authority established JAS as a three-year pilot program in the Department of Corrections. The program is intended to reach incarcerated per-

104. *Id.* at 36 n.81.

105. *Id.*; see also Community Mental Health/API Replacement Project, *Project Update*, available at <http://www.hss.state.ak.us/dmhdd/api/api2000.htm> (last visited Feb. 18, 2002).

106. Christopher M. Hamilton & Steven L. Hamilton, *Jail Alternative Service Program Evaluation 1* (2000) (on file with the Alaska Judicial Council).

107. Goldkamp & Irons-Guynn, *supra* note 23, at 48-49. Goldkamp states that both programs started in July 1998, but the executive order authorizing the Coordinated Resources Project (“CRP”) was not signed until April 1999. Ct. Admin. Order #2AN-99-02. Some form of the program operated unofficially for a period of time prior to its establishment by court order.

108. Interview with the Honorable Stephanie Rhoades, Alaska District Court, Anchorage, and Kathi Trawver, CRP Project Manager, in Anchorage, Alaska (July 26, 2001) [hereinafter *Rhoades & Trawver Interview*].

sons who have specified mental conditions (e.g., psychosis or organic brain injury). The program serves up to forty participants at any one time, with five of those slots reserved for organically-impaired individuals.¹⁰⁹ Program funds support the work of a case coordinator who identifies, coordinates and links mentally ill misdemeanor offenders with community services. This individual also monitors offenders' compliance with their conditions of release.¹¹⁰

The non-jail court-based program (CRP) initially worked with existing court resources, volunteered services of the two judges, university students, municipal and state prosecutors and defense attorneys.¹¹¹ CRP tries to reach misdemeanor offenders who have been diagnosed with, or who show indications of, any mental impairment, a broader set of criteria than that used by JAS.¹¹² Individuals may be referred to CRP whether or not they are currently in custody and whether they are first-time or repeat offenders. Any number of offenders may participate in the program at a given time.¹¹³ Virtually anyone involved with the offender (e.g., attorney, prosecutor, judge, law enforcement officer, jail staff, family member or mental health worker) may make the initial referral to the mental health court. CRP clients include mentally disturbed individuals who do not qualify for the JAS program, either because they are not incarcerated or because they do not meet the specific JAS diagnosis requirements.¹¹⁴ CRP also handles persons who qualify for JAS but who are excluded from that program for lack of space. Mental health referral services in CRP (which are provided in JAS by the case coordinator) initially were developed primarily by defense attorneys or by treatment providers in the case of offenders with existing connections to providers. Municipal prosecutors provide some monitoring services for CRP clients that are similar to but more limited than those performed by the case coordinator for JAS clients.¹¹⁵

109. Hamilton & Hamilton, *supra* note 106, at 4.

110. *Id.*

111. *Wininger Paper*, *supra* note 100, at 19.

112. CRP clients also do not need to be incarcerated, another difference between CRP and JAS. See Goldkamp & Irons-Guynn, *supra* note 23, at 50.

113. Hamilton & Hamilton, *supra* note 106, at 1-3, 6; *Rhoades & Trawver Interview*, *supra* note 108.

114. Christopher M. Hamilton & Steven L. Hamilton, Court Coordinated Resources Project 6 (2000) (unpublished report) (on file with the Alaska Judicial Council) [hereinafter *2000 CRP Report*] (“[T]o be eligible for the JAS program, an individual must have a psychotic or organic disorder as a primary diagnosis. The CRP, however, deals with a much broader range of primary diagnoses including depressive disorders, personality disorders, mood disorders, and substance abuse disorders.”).

115. Goldkamp & Irons-Guynn, *supra* note 23, at 51-53, 63.

In 2000, the Mental Health Trust Authority (“MHTA”) funded CRP to hire a project manager and case coordinator.¹¹⁶ The project manager coordinates the CRP work, including administrative duties and community outreach activities. The case coordinator coordinates treatment referrals and monitors client compliance and progress.¹¹⁷ In some ways, the addition of these positions has made CRP more similar to JAS. Because CRP continues to serve a more diverse population than JAS, and still does not limit the number of participants it serves, it continues to struggle with issues that do not affect JAS.¹¹⁸

The Anchorage Mental Health Court serves four distinct groups of mentally impaired individuals: (1) JAS participants, whose case management may be performed by the JAS case coordinator or a treatment service provider; (2) clients not receiving mental health treatment when they are referred to the court, who receive case management services from the CRP case coordinator; (3) clients receiving treatment when they are referred and who continue to be served by a case manager in a community service program; and (4) clients not receiving treatment when they are referred, but who are beyond the number able to be serviced by the CRP case coordinator and who primarily receive case management services from a defense attorney. Any of the non-JAS groups may include persons who are eligible for JAS but are not receiving JAS services for various reasons.

d. *Features of the Program.* Anchorage’s mental health court works to address the individual causes of each participant’s behavior and to provide non-jail therapeutic treatment to assist them with functioning acceptably in society. Based on the drug court model, the project uses a team approach to select defendants who can benefit from the program while not posing an undue risk to other members of society.¹¹⁹ The court refers the selected offenders to treatment programs, monitors their progress through the programs and imposes sanctions on, or offers incentives to, the participants based on their progress.¹²⁰

116. Alaska Mental Health Trust Authority, Status Report 2-3 (2001) (on file with the Alaska Judicial Council) [hereinafter *2001 CRP Report*]. These staff members were hired in January and April of 2001.

117. *Id.* at 1-3.

118. See Goldkamp & Irons-Guynn, *supra* note 23, at 49.

119. *Id.* at 58. “The Anchorage mental health court proceedings are much more informal than normal adversarial proceedings in criminal cases, and follow after the fashion of drug courts.” *Id.*

120. See *id.* at 49.

However, the program departs significantly from the drug court model. Unlike participants in drug court, not all mental health court participants follow similar treatment regimens. Participants in drug courts tend to arrive in the justice system with a similar problem, a drug addiction, while participants in mental health courts may suffer from widely different maladies and have very different treatment needs. Drug courts usually set a specified period of abstinence, attainable through a phased program, as a goal for participants. They set benchmarks along a path to successful program completion and schedule “graduation” from the program. Success in a mental health treatment program usually cannot be so clearly stated or measured.¹²¹ Because mental health court clients generally are chronically ill with little likelihood of being “cured,” the goal of the mental health court focuses less on a bright line change in participants’ behavior than on improving participants’ quality of life. Mental health court goals include improving the ability of clients to function in society, reducing the clients’ number of criminal offenses and reducing the need for institutional mental services.¹²²

A typical mental health court case begins with the referral of a defendant who either has a mental health diagnosis or who shows symptoms of a mental disability. Defendants are referred to the court by individuals such as police, magistrates, judges, attorneys, family, friends, treatment service providers and Department of Corrections staff.¹²³ In addition, the CRP project manager scrutinizes all district court arraignment lists for names of defendants familiar to the court and refers those cases to CRP.¹²⁴ Once a defendant is referred to mental health court, the court attempts to have all the defendant’s outstanding cases consolidated under the mental health court judge.

The court schedules mental health court hearings one afternoon each week. Judges assigned to the project carry a typical caseload as well as their mental health caseload. If it appears at the first hearing that a defendant may not be competent to decide whether to participate in the program, the judge (each judge has received special training in the recognition and handling of mental health problems) refers the defendant to a psychiatrist for evaluation. If necessary, the court schedules a competency hearing.¹²⁵

At the initial hearing or the first hearing following a determination of competency, the court explains the mental health court proc-

121. *See id.* at xi-xii.

122. *See CJAC Report*, *supra* note 25, at 35.

123. Goldkamp & Irons-Guynn, *supra* note 23, at 57.

124. *See Wininger Paper*, *supra* note 100, at 19. In earlier phases of the court, this work was done by student interns and volunteers.

125. *See* Goldkamp & Irons-Guynn, *supra* note 23, at 51-52.

ess to the defendant. The defendant must voluntarily opt-in, with the advice of counsel and in cooperation with the prosecutor. Opting-in generally involves entering a guilty or no contest plea and agreeing to treatment in exchange for suspended jail time. The pleas usually are Rule 11¹²⁶ negotiated pleas. Defendants may pursue pretrial motions before opting-in. Those who choose not to opt-in go to trial before a district court judge who may or may not be one of the mental health court judges. If found guilty, defendants may be referred to one of the mental health court judges for sentencing.¹²⁷

After a defendant opts-in to the mental health court, a treatment plan is developed by the JAS or CRP case coordinator, a defendant's existing treatment provider or the defense attorney, working with community mental health service providers. When the plan satisfies the mental health court judge, the defendant is sentenced. Typical sentences include three to five years of probation, with conditions that incorporate the mandated treatment plan and suspended jail time. The suspended portion of the sentence provides an incentive for completion of treatment.¹²⁸

Defendants appear regularly in court after sentencing, on a schedule specific to each case. The judge may see defendants weekly, bi-weekly, monthly or at even longer intervals, depending on the other supervision available and the participant's case plan. The case coordinator monitors the participant's treatment progress, living situation and compliance with probation conditions and reports to the court at the scheduled hearings.¹²⁹ The lack of probation supervision for misdemeanor offenders in Alaska places all of the monitoring responsibility on other parties.¹³⁰ If the participant does not have a JAS or CRP case coordinator, the court and the prosecutor receive reports directly from the treatment providers.¹³¹ Prosecutors, particularly the Anchorage municipal prosecutors, maintain some monitoring responsibility for the defendants in CRP.

A participant's treatment plan may be modified to account for incidents of non-compliance and to ensure that the participant's needs are met. For non-compliance, the judges can impose sanctions,

126. Rule 11 of the Alaska Rules of Criminal Procedure governs plea agreements in state court.

127. See Goldkamp & Irons-Guynn, *supra* note 23, at 53-54.

128. See *id.* at 54.

129. See 2001 CRP Report, *supra* note 116.

130. See CJAC Report, *supra* note 25, at 44-45.

131. Goldkamp & Irons-Guynn, *supra* note 23, at 55. "The participant is required to sign a release of information document that permits the judge and the prosecutor to receive reports about compliance with program conditions from the mental health facility and program to which the defendant has been assigned." *Id.*

ranging from counseling or admonitions by the judge, to imposition of jail time. In cases of severe repeated violations, the prosecutor may petition to revoke probation. The final step for defendants who fail to comply with their treatment plan or who choose to “opt out” of the program is revocation of probation and imposition of the suspended sentence, with credit for any jail time served while in the program.¹³²

An unusual aspect of the mental health court that distinguishes it from the typical drug court model is the fact that a defendant already in the CRP program may be arrested on a new offense and yet choose not to have the matter handled in mental health court. This may happen if a mental health court participant is arrested on an evening or weekend when the mental health court judge is not available. If the participant is facing a brief sentence, he or she may choose to plead guilty to time served or agree to a short sentence rather than wait for a mental health court hearing.¹³³ In most drug courts, substantial efforts are made to ensure that the drug court judge supervising a given participant handles all new arrests and court-related matters. Participants do not have a choice in the matter. This is part of the agreement that participants make when they enter the program.

e. *Results/evaluations.* The MHTA grants for both JAS and CRP fund independent evaluations of the programs.¹³⁴ Early results for JAS, the only program evaluated to date, are encouraging. Of 243 diagnostically eligible persons referred, fifty-four defendants participated in the program. The length of time in the program for the fifty-four clients ranged from 3 weeks to 2 years, with a mean stay of 12 months. The most common reasons for non-participation included the defendant having been sentenced, released or bailed before the opt-in hearing.¹³⁵ About three-quarters of the referrals and participants were male. Ages ranged from twenty to seventy-two, with a mean of thirty-four years. Caucasians made up a plurality of participants (39%), with significant numbers of Alaska Natives (26%), African-Americans (20%) and American Indians (11%).¹³⁶

132. *See id.* at 55.

133. Interviews with Kathi Trawver, CRP Project Manager, and Steve Williams, CRP staff member (May 7, 2001). This is also supported by Judicial Council review of data and court cases for CRP referrals and participants from 2001. *Id.*

134. *2001 CRP Report*, *supra* note 116; *see also* Hamilton & Hamilton, *supra* note 106, at 1.

135. *See* Hamilton & Hamilton, *supra* note 106.

136. *Id.* at 19.

The JAS evaluation compared participants' behavior while in the program with their behavior in the twelve months preceding their admission.¹³⁷ On average, JAS clients experienced fewer and shorter admissions to the Alaska Psychiatric Institute. Thirty-seven percent of participants had at least one admission during the program, compared with fifty percent in the preceding twelve months, and the average length of stay dropped from 12.9 days to 12.4 days.¹³⁸ They also experienced fewer arrests (1.4 arrests per participant during the program versus 3.4 during the preceding twelve months) and shorter jail stays per arrest (22.6 days versus 30.2 days).¹³⁹ Participants' housing situations markedly improved during program participation as well.¹⁴⁰

The CRP program does not yet have outcome data. Reported demographic information shows that including the fifty-four JAS participants, the mental health court saw 249 persons between July of 1998 and June of 2000. Males constituted about three-quarters of the population. Ages ranged from eighteen to eighty-six, with a mean age of thirty-eight. The CRP population had more Caucasians, over sixty percent. Seventeen percent of the CRP population were Alaska Native, eleven percent African American and eight percent American Indian.¹⁴¹ Further evaluation of JAS, as well as an evaluation of CRP, is ongoing.¹⁴²

3. Anchorage Wellness Court

a. *Development of the Anchorage Wellness Court.* Inspired in part by the success of the Anchorage mental health court¹⁴³ and in part by the success of other judges using Naltrexone to treat alcohol-addicted offenders,¹⁴⁴ Anchorage District Court Judge James Wanamaker developed the Anchorage Wellness Court. According to the Byrne Grant application for the Wellness Court, Anchorage district court judges estimated that at least two-thirds of the misdemeanor cases they handled involved repeat offenders who had

137. *Id.* at 8.

138. *Id.*

139. *See id.* at 8-14.

140. *Id.* at 2.

141. 2000 CRP Report, *supra* note 114.

142. Christopher M. Hamilton & Steven L. Hamilton, Jail Alternative Service Program Evaluation 4-5 (Nov. 2001) (prepared for State of Alaska Dept. of Corrections) (on file with the Alaska Judicial Council) [hereinafter 2001 JAS Report].

143. *Wellness Court Byrne Grant*, *supra* note 40, at 3.

144. Letter from the Honorable James N. Wanamaker, Alaska District Court, Anchorage, to Melissa Winegar [sic], Alaska Judicial Council, 1 (Dec. 24, 2001) (on file with the Alaska Judicial Council) [hereinafter *Wanamaker Letter*].

either violated their probation conditions or committed new offenses.¹⁴⁵ Up to eighty or ninety percent of these repeat offenders had drug or alcohol problems (primarily alcohol problems).¹⁴⁶

A major distinguishing feature of the Wellness Court has been the use of Naltrexone, pioneered by the Butte County, California DUI court.¹⁴⁷ The Wellness Court was made available to alcoholic offenders, primarily repeat drunk driving offenders, who were willing to make a commitment to use Naltrexone.¹⁴⁸ The Wellness Court, as initially conceived, generally required defendants to have an alcohol addiction assessment and to go to a state-approved treatment provider for treatment supplementing the use of Naltrexone. In addition, defendants agreed to comply with various conditions, such as holding a steady job or becoming economically self-sufficient, attending support groups and being monitored for substance use.

The program drew from a broad base of supporters, including local non-profit organizations, Partners for Downtown Progress, the Anchorage Downtown Partnership, the municipal prosecutor's office, court administrators, the Alaska and Anchorage Bar Associations and a diverse group of community members, including several former alcoholics.¹⁴⁹ Initially, like the mental health court, Wellness Court operated without any external funding. The program began operating in August 1999 and served twenty defendants in its first year of operation.¹⁵⁰ In 2000, Partners for Downtown Progress received a Byrne Discretionary Grant of \$150,000.¹⁵¹ The grant funds

145. *Wellness Court Byrne Grant*, *supra* note 40, at 2.

146. *Id.* The grant application notes that:

[a]lcohol consumption in Alaska is far beyond the national norms. As of 1994-95, Anchorage spent more per household on alcoholic beverages than any of the other 60 metropolitan statistical areas surveyed Alaska's apparent alcohol consumption rate is the 8th highest in the nation, and Anchorage's consumption is higher than the Alaska average.

Id. at 1 (citations omitted).

147. *Wanamaker Letter*, *supra* note 144, at 1. The Naltrexone court ordered treatment program was developed by California Superior Court Judge Darrel Stevens. *Id.*

148. See *Frequently Asked Questions About Naltrexone* (brochure provided by Assisted Recovery Centers of America, Phoenix, AZ) (on file with the Alaska Judicial Council) [hereinafter *Naltrexone Facts*]; see also John H. Krystal, M.D., et al., *Naltrexone in the Treatment of Alcohol Dependence*, 345 NEW ENG. J. MED. 1734 (2001).

149. *Wellness Court Byrne Grant*, *supra* note 40, at 3.

150. Note from the Honorable James N. Wanamaker, Alaska District Court, Anchorage, "DUI/Drug Courts: Defining a National Strategy," distributed at the Therapeutic Justice Workshop, Anchorage, Alaska (Dec. 2000) (on file with the Alaska Judicial Council).

151. *Id.*

permitted the hiring of a case coordinator, housed in the municipal attorney's office, who works with forty defendants per year, and a community liaison, who helps participants find suitable housing and community services.¹⁵² The grant also provides "grub stake" funding to help participants meet treatment expenses and purchase materials needed to run the program.¹⁵³

The Byrne Grant funding for Wellness Court expired at the end of 2001.¹⁵⁴ Partners for Downtown Progress asked the state legislature to appropriate funds to continue the program after that date and to fund a Naltrexone court in the Juneau District Court.¹⁵⁵ The legislature thus appropriated \$75,000 for expenses related to the Wellness Court and \$10,000 for the Juneau Naltrexone Court.¹⁵⁶

b. *Features of the Program.* The grant application for Byrne funding for the Wellness Court describes its target group as individuals who are trapped in a cycle of alcoholism, commission of misdemeanor offenses, time spent in jail and reoffense after release—but who have the potential to break the cycle.¹⁵⁷ This group is expected to include men and women and to reflect the ethnic diversity of Anchorage's population.¹⁵⁸ However, the Wellness Court population may contain a disproportionate number of Alaska Natives because of the migration of Alaska Natives from isolated communities to Anchorage and the susceptibility of people from small, isolated communities to the stresses of a strange city.¹⁵⁹ The Wellness Court uses many of the key components of drug courts.¹⁶⁰ These include early identification and referral of potential participants; voluntary participation by offenders; frequent appearances by participants before the same judge; timely judicial recognition for progress and sanctions for violations; emphasis on personal responsibility; treatment, including counseling and group support; and case coordination to help participants develop and successfully

152. *Id.*

153. Letter from Janet McCabe, Chair, Partners for Downtown Progress, to Representatives Eldon Mulder and Bill Williams, Alaska State House of Representatives 1 (Mar. 29, 2001) (on file with the Alaska Judicial Council).

154. *Id.*

155. *Id.* at 3; Memorandum from Rep. Norman Rokeberg to Rep. Bill Williams and Senator Pete Kelly (Mar. 29, 2001) (on file with the Alaska Judicial Council) [hereinafter *Rokeberg Memo*].

156. *Id.*

157. *Wellness Court Byrne Grant*, *supra* note 40, at 5.

158. *Id.*

159. *Id.* at 1-5.

160. *Compare* Gebelein, *supra* note 29, at 3.

complete a case plan.¹⁶¹ Other elements, notably the particular monitoring provisions and the mandated pharmacological intervention, both discussed below, distinguish the Wellness Court from other drug courts.

As with mental health court, referrals to the Wellness Court come from many sources, including prosecuting attorneys, public defenders, private defense attorneys and other judges. Most defendants referred to Wellness Court have misdemeanor DWI charges, either state or municipal. The program tries to consolidate all pending cases involving a Wellness Court participant before the Wellness Court judge and to resolve all cases under the defendant's case plan.¹⁶²

Judge Wanamaker holds Wellness Court hearings one afternoon each week. The judge, attorneys and treatment providers discuss ongoing and potential cases at a meeting held just before defendants and participants appear in court.¹⁶³ The actual court time devoted to Wellness Court hearings is brief—about three hours each week.

The typical offender accepted into Wellness Court is a repeat drunk driving offender.¹⁶⁴ The court ordinarily does not accept first-time offenders. Evidence suggests that the majority of first time offenders (especially DWI offenders) referred to the Alaska Alcohol Safety Actions Program (“ASAP”)¹⁶⁵ do not re-offend regardless of how the courts handle their cases.¹⁶⁶ Also, most first-time offenders do not face enough potential jail time to motivate them to participate in the program. Wellness Court also accepts defendants with repeat alcohol-related offenses other than DWI.

After a referral to Wellness Court, the defendant appears before the judge for an explanation of the program. If the defendant, with the advice of counsel, decides to “opt-in,” the judge requires the defendant to select a state-approved treatment provider for a substance

161. Memorandum on “Anchorage’s Wellness Court for Alcoholic Offenders,” distributed at the Therapeutic Justice Workshop (Dec. 2000) (on file with the Alaska Judicial Council) [hereinafter *Anchorage’s Wellness Court*].

162. *Wellness Court Byrne Grant*, *supra* note 40, at 11-12.

163. *Wanamaker Letter*, *supra* note 144, at 2.

164. Many repeat drunk driving offenders are charged with misdemeanors. Those defendants charged with a third or subsequent DWI offense within five years of the two previous DWI offenses were tried as felons until mid-2001. New legislation changes this “look-back” provision over the next five years until felony DWI will include all offenders with three or more DWIs over a ten-year period. H.B. 132, 22nd Leg., 1st Sess. (Alaska 2001).

165. The Alaska Alcohol Safety Actions Program (“ASAP”) provides alcohol screening and case management services for individuals who have current or pending criminal cases. Individuals may be referred to ASAP as a condition of sentencing or as a pre-conviction condition of release.

166. *ASAP Memo*, *supra* note 75, at 6.

abuse assessment and a physician for a determination regarding the appropriateness of Naltrexone.¹⁶⁷ The judge may refer some defendants for mental health evaluations or schedule them for competency hearings. Defendants accepted into the program will plead to charges and have the imposition of their sentences deferred.¹⁶⁸ Most offenders participating in the Wellness Court have municipal misdemeanor charges against them.¹⁶⁹

As with typical drug courts, defendants in Wellness Court develop case plans, with help from a case manager, one or more treatment providers and their attorneys. When the court finally accepts the defendant into the program, the judge approves the case plan and sends the defendant to the chosen treatment provider to begin implementing the plan. Treatment requirements for participants include monitoring for drug and alcohol abuse, a 120-day Naltrexone regimen and participation in Nal Group, a support group for Naltrexone users.¹⁷⁰ Each individualized treatment program may include individual and group counseling, participation in twelve-step groups such as Alcoholics Anonymous (“AA”) or Narcotics Anonymous (“NA”) and cognitive therapy.¹⁷¹

Monitoring of participants’ substance use is an important component of a therapeutic court program focusing on substance abuse. Because the body metabolizes alcohol more rapidly than it does other drugs, typical drug testing systems and schedules are inadequate to detect alcohol use.¹⁷² Wellness Court has addressed this issue through placement conditions built into case plans. Most Wellness Court participants must provide a court-approved third-party custodian, who monitors the participant’s use of Naltrexone and abstinence from alcohol. Individuals who cannot find an acceptable third-party custodian or who have relapsed or violated a plan condition, but not so seriously as to be removed from the program, may be required to stay in a Community Residential Center, a residential treatment program or go on house arrest enforced by electronic

167. *Naltrexone Facts*, *supra* note 148. Naltrexone is contraindicated for some medical conditions and for pregnant women.

168. *Wellness Court Byrne Grant*, *supra* note 40, at 8.

169. *See Wanamaker Letter*, *supra* note 144, at 2.

170. *Naltrexone Facts*, *supra* note 148. At weekly meetings, support group members discuss progress or problems from the previous week. In addition to helping with Naltrexone-specific issues, the group functions to enhance participants’ self image and to foster team spirit.

171. *Anchorage’s Wellness Court*, *supra* note 161.

172. *See* Abstinence Monitoring for the Wellness Court (Oct. 6, 2000) (on file with the Alaska Judicial Council) [hereinafter *Abstinence Monitoring*].

monitoring.¹⁷³ Another form of monitoring defendants in the Wellness Court project involves police officers. An innovative community policing program, initially designed for use with juveniles, trains uniformed patrol officers to supervise Wellness Court probationers. The police officers contact the Wellness Court defendants during random, frequent home visits. The officers can then perform alcohol assessments and otherwise monitor the status of the participants.¹⁷⁴ The Wellness Court also may use technology such as the Sobriotor to check for abstinence. This device allows remote monitoring of participants' alcohol levels over telephone lines.¹⁷⁵

Initially, the Wellness Court expected defendants to complete their programs in six months, including a ninety-day regimen of Naltrexone. The current expectation is that a participant will complete the program in eighteen months, including 120 days of Naltrexone. Judge Wanamaker has explained that research demonstrates that longer participation times reduce the incidence of relapse.¹⁷⁶ No significant side effects appear to accompany the longer period of Naltrexone use.¹⁷⁷ Shortly after the program was lengthened, the number of defendants opting-in dropped. More recently, however, defendants were again choosing to opt-in.¹⁷⁸

Because Wellness Court structures each treatment plan individually, it is difficult to generalize about the status of legal charges and the ramifications of "failing" in the program. Typically, participants who do not succeed or who opt out are either sentenced or are brought to trial on their original charges. The court encourages them to maintain their ties with the program and the Nal Group and to speak to future Wellness Court participants.

Several other Alaska judges have experimented with similar programs involving judge-supervised Naltrexone use for defendants in their courts. These include other Anchorage judges, judges in the Juneau district court and the Tok magistrate. The legislature provided \$10,000 to the National Council on Alcoholism

173. See Wellness Court Policy Meeting (Jan. 10, 2001) (comments by the Honorable James N. Wanamaker, Alaska District Court, Anchorage) (on file with Alaska Judicial Council).

174. Wellness Court Order and Conditions of Release: Monitoring by Anchorage Police Dep't (on file with the Alaska Judicial Council).

175. Sobriotor Reference Manual (on file with the Alaska Judicial Council).

176. Interview with the Honorable James N. Wanamaker, Alaska District Court, Anchorage.

177. *Id.*

178. *Id.*

and Drug Dependence to pay for treatment for Juneau defendants in Juneau's Wellness Court.¹⁷⁹

4. Anchorage Felony Drug Court

a. *Development of the Anchorage Felony Drug Court.* Alaska was one of the last states to join the drug court movement of the 1990s. The court system, supported by the State's Department of Corrections, the Department of Law, the Department of Health and Social Services and the Public Defender agency, applied for a Department of Justice Drug Court Program Office ("DCPO") planning grant in 1998.¹⁸⁰ The grant application noted that Anchorage trial courts were "burdened by a large volume of felony offenders known to have been under the influence of illegal drugs at the time of arrest, which allows for the deduction that violent and non-violent crimes are often committed in connection with drug use."¹⁸¹ The application also noted that a majority of both male and female arrestees in Anchorage tested positive for illegal drugs after arrest and that drug and alcohol-related offenses accounted for about one-third of felony filings in Anchorage.¹⁸²

Proponents believed that an Anchorage drug court could improve "recidivism rates, periods of abstinence, and financial self sufficiency" of low-level non-violent felony offenders who committed their offenses "while under the influence of or while in possession of illegal drugs or alcohol, or while addicted to drugs and alcohol where there is some nexus between the addiction and the commission of the offense."¹⁸³ These offenders usually received straight probation or probation with jail sentences of less than six months. They typically left the judicial and correctional systems without receiving attention related to their substance abuse issues.¹⁸⁴

The implementation grant application requested \$400,000 in federal funds over two years matched by \$140,000 in state funds for a felony level drug court. Originally the court planned to target all adult felony offenders or felony probation violators with appropriate

179. *Rokeberg Memo*, *supra* note 155. The Juneau project was funded with a \$10,000 capital budget appropriation in May 2001. *Id.*

180. Felony Drug Court Supporting Documents, Applicant Certification Drug Court Implementation Grant, Planning Grant No. 98-DC-VX-0038, 3 (Feb. 18, 2000) (on file with the Alaska Judicial Council) [hereinafter *Grant Support*].

181. *Anchorage Felony Drug Court Grant*, *supra* note 40, at 2.

182. *Id.*

183. *Id.* at 4.

184. *Id.* at 2.

charges,¹⁸⁵ including both alcohol and illegal drug offenses.¹⁸⁶ The program planned to require felony adjudication in each case (*i.e.*, a “post-plea/suspended sentence” program). The three-phase treatment program for a typical offender would last twelve to eighteen months. Defense counsel would identify possible participants. The state district attorney would screen referred defendants, and a qualified substance abuse treatment provider acting as case manager would assess each defendant. The judge would hold the final approval. Upon successful completion of the program, charges would be dismissed, set aside, reduced, or allowed to stand, according to terms of individual negotiations conducted at the outset of each case. The program expected to serve thirty participants during start-up and to be serving eighty active participants (assuming new funding sources came on line) by the end of its second year.¹⁸⁷

The Alaska grant application included funding for half-time attorney positions in the state district attorney and public defender agencies—a type of funding that DCPO typically did not grant. According to the judge in charge of the project, DCPO approved the grant because of the level of interest and dedication demonstrated by the participants in the grant process.¹⁸⁸ The fact that Alaska was one of the few remaining states without a drug court might also have influenced the DCPO to approve the atypical grant provision. The grant application did not include federal funding for court system, corrections or treatment resources, except a salary for a case manager.¹⁸⁹

b. *Implementation of Anchorage Felony Drug Court.* Immediately upon approval of the grant, participants raised concerns about the lack of funding for treatment and the possibility that the program might siphon treatment resources away from already struggling programs.¹⁹⁰ The Department of Corrections (“DOC”) offered to staff the case manager position with a DOC probation

185. *Grant Support*, *supra* note 180, at 3 (“Violent offenders, as defined in the former 42 U.S.C. § 37966ii and pages 44 and 93-95 of the Program Guidelines and Application Kit for the Drug Court Grant Program Fiscal Year 2000, will be excluded from the drug court programs.”).

186. *Anchorage Felony Drug Court Grant*, *supra* note 40, at 4.

187. *Id.* at 1.

188. The Honorable Stephanie Joannides, Alaska Superior Court, Anchorage, Notes From the First Meeting of the Drug Court 1 (Aug. 9, 2000) (unpublished notes, on file with the Alaska Judicial Council) [hereinafter *Drug Court Meeting*].

189. *Anchorage Felony Drug Court Grant*, *supra* note 40, Budget Detail Worksheet.

190. *Drug Court Meeting*, *supra* note 188, at 1.

officer, freeing \$60,000 to fund treatment.¹⁹¹ A “future funding” subcommittee was established to identify the program’s future funding needs and to work to secure state funding.¹⁹²

The court was scheduled to take its first defendants in October 2000, but several delays occurred. For example, the process of locating and contracting with a qualified treatment provider did not conclude until March 2001. In March 2001, the court contracted with a single non-profit treatment provider, Akeela, Inc. Due to limited funding, program expectations were scaled back from thirty participants at start-up to only ten.¹⁹³ The court and Akeela agreed that if enough qualified defendants could pay the full cost of treatment, the drug court could serve more participants.¹⁹⁴ Additional delays were caused by discussions between the district attorney and the public defender, lasting until June 21, 2001, about various provisions in the model plea agreement and by discussions that lasted nearly nine months regarding participant drug testing.

On June 21, 2001, about three years after the planning began, the Anchorage felony drug court expected to accept its first participants. However, at that day’s hearing no defendants appeared. During the following week, five defendants did opt-in. Judge Stephanie Joannides explained the program to each defendant, referred each for assessment by the treatment provider and scheduled a return date for two weeks later.¹⁹⁵ The treatment provider found one defendant diagnostically inappropriate, and the remaining defendants formally opted-in to the program.¹⁹⁶

The drug court, as implemented, closely resembles the project described in the grant application. It targets low-level felony offenders, requires a felony plea of guilty or no contest and treats defendants in a three-phase program that anticipates graduation in twelve to eighteen months. Prosecutors and defense attorneys decide eligibility,¹⁹⁷ and the treatment provider must favorably assess defendants

191. Notes from the Drug Court Committee Overview Meeting 2-4 (Jan. 29, 2001) (on file with the Alaska Judicial Council). Committee members assumed that participants would be required to reimburse the treatment provider on a sliding scale basis, but did not expect this reimbursement to cover program expenses. *Id.*

192. *Drug Court Meeting*, *supra* note 188, at Sub-Committee Assignments & Tasks.

193. Telephone Interview with Pat McBride, Program Coordinator (Mar. 4, 2002).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Anchorage Felony Drug Court Grant*, *supra* note 40, at 2 (Applicant Information). One issue that arose during planning was the question of access of defen-

before they can formally opt-in to the program.¹⁹⁸ Treatment and monitoring includes individual and group counseling, twelve-step programs, self-help activities, random drug testing,¹⁹⁹ payment based on a sliding scale and regular appearances before the drug court judge. The judge retains the option of rewarding positive behaviors with incentives and discouraging negative behaviors with sanctions as outlined in the written plea agreement signed by each participant.²⁰⁰ The drug court plea agreement provides examples of sanctions that include

[w]arnings and admonishment from the Drug court Judge in open court, [c]ommunity work service, [f]ines, [w]ritten assignments, [i]ncreased frequency of court hearings, [i]ncreased counseling sessions and monitoring, submit[ting] to progressive searches, [i]ncreased AA or NA meetings, [m]ore frequent drug testing, [d]enial of advancement to next phase, [d]emotion to an earlier phase, [i]n-patient treatment, [e]scalating periods of confinement in jail, [and t]ermination from the program.²⁰¹

Incentives described in the plea agreement range from “[e]ncouragement and praise from the bench, [and] certificates of achievement, [c]eremonies and tokens of progress” to more concrete enticements such as

advancement to the next treatment phase, [r]educed supervision, [d]ecreased frequency of court appearances, [r]educed fines or fees, [d]ismissal of criminal charges or reduction in the term of

dants with non-public defender representation to the program. Indigent Alaskan defendants not represented by the Public Defender because of various conflicts are represented by Office of Public Advocacy attorneys or, less frequently, by court-appointed attorneys. Because the public defender agency received all the defense funding for the program and all the training, access of other defendants to the program was at issue. However, two of the first four defendants accepted were represented by the Office of Public Attorneys (“OPA”). Defendants with private attorneys also are participating.

198. *Id.*

199. *Id.* at 8 (Program Design Narrative). A substantial part of the program funding pays for the random drug testing that DCPO considers an essential part of the program. In the first, most intensively supervised phase, defendants are randomly tested at least twice weekly. A positive test results in quick sanctions, ranging from admonition to jail time. *Id.* at 11.

200. MODEL ANCHORAGE DRUG COURT CRIMINAL RULE 11 PLEA AGREEMENT (Alaska Judicial Council) (on file with the Alaska Judicial Council).

201. *Id.* at 9-10.

probation, [r]educed or suspended incarceration, and [g]raduation.²⁰²

The current program also differs from the grant description in significant ways. Although the court will consider those who have committed a new felony offense, it does not plan to accept many felony probation violators or any offenders whose offense or dependence is solely alcohol-related.²⁰³ The program is also much smaller than envisioned and starts with only ten defendants, rather than thirty or more. Finally, the location, and therefore the role, of the case manager has changed. Instead of being a treatment professional on the staff of the treatment provider, the case manager's role is filled by a probation officer, funded by, and with a background in, corrections. Because the program is just beginning to accept participants, further changes in focus or procedures would not be surprising.

5. *Anchorage DUI and Bethel Therapeutic Justice Courts.* Alcohol issues, particularly drunk driving, were on the minds of Alaska's legislators during the spring of 2001, the first half of the twenty-second State Legislature. Twenty-seven bills and two resolutions were introduced during the session. Seven bills and both resolutions passed; other bills remained alive, pending the 2002 session. Two of the higher profile bills passed into law reduced the threshold blood alcohol level for driving while intoxicated from 0.10% to 0.08%²⁰⁴ and established pilot therapeutic court projects to handle repeat alcohol- and drug-related offenses.²⁰⁵

The therapeutic court law established new superior court judgeships in the Third and Fourth Judicial Districts to provide staff resources for therapeutic justice projects that would achieve "lasting sobriety of offenders, protection of society from alcohol-related and drug-related crime, prompt payment of restitution to victims of crimes, effective interaction and use of resources among criminal justice and community agencies, and long-term reduction of costs relating to arrest, trial, and incarceration."²⁰⁶ The legislature expressed its intent that these judgeships be located in the city of Anchorage (population 260,000) and the western city of Bethel (population

202. *Id.* at 10. In practice, the judge has used other incentives, including tickets to sporting events and a ride-along with a Fish and Game Officer.

203. 2001 Alaska Sess. Laws ch. 64 (creating an Anchorage DUI Court which partially responds to the need for an alcohol-related drug court).

204. 2001 Alaska Sess. Laws ch. 63.

205. *Id.* ch. 64.

206. *Id.* § 1(a).

5,500). The legislature also intended that these therapeutic courts “focus on defendants charged with multiple driving while intoxicated offenses[,] . . . serve as working models for the development of other similar courts in other areas of the state . . . [and] be adapted to fit the available local resources and cultural traditions” of their locales.²⁰⁷ The legislation prescribes detailed attributes of the drug court model to be incorporated into these courts and directs the Alaska court system, Department of Law, Public Defender Agency, Department of Corrections, Department of Health and Social Services and other agencies to cooperate to implement the pilot programs through a “mutually agreed-upon plan.”²⁰⁸ The pilot projects are to run for three years, and by July of 2005, the Alaska Judicial Council must report to the legislature about their effectiveness.²⁰⁹

In addition to requiring that these courts possess the attributes typical of the drug court model for defendants (such as emphasis on personal responsibility, frequent appearances before a designated judge and timely recognition of progress and sanctions for relapses), the legislation requires these courts to serve offenders who live in areas of the state without judges, provide for prompt payment of restitution to victims and allow community work service as restoration to the community.²¹⁰ The courts must develop a list of sanctions that the program will use if defendants violate program conditions and must give the list to all defendants who request referral to the court.²¹¹ The legislation also directs the courts to consider pharmaceutical treatment for physical alcohol or drug addiction (specifically referring to Naltrexone) and allows the court to impose house arrest and electronic monitoring on participants.²¹² The prosecutor, defense or judge may refer a defendant to the court, but the State may not consent to a referral until the prosecutor has consulted the victim (if any) of the crime.²¹³ Victims are entitled to periodic reports on the defendant’s participation and progress in the program.²¹⁴ As with the Anchorage felony drug court, defendants must plead guilty or no contest or admit to a probation violation before starting the program.²¹⁵ Defense and prosecution may join in a plea agree-

207. *Id.* § 1(b).

208. *Id.*

209. *Id.* § 1(k).

210. *Id.* § 1(d).

211. *Id.* § 1(e).

212. *Id.* § 1(d).

213. *Id.* § 1(f). Referrals may include probation violators. *Id.* § 1(g).

214. *Id.* § 1(j).

215. *Id.* § 1(g).

ment regarding the charges, and imposition of a sentence is suspended pending completion of the program.²¹⁶

The planning committee for both the Anchorage and Bethel courts includes state and local prosecutors and public defenders, court personnel, representatives of treatment providers, and the Department of Health and Social Services and the Department of Corrections.²¹⁷ The court system decided to consolidate the Anchorage superior court therapeutic court caseloads (felony drug court and repeat DWI offenders) under Judge Stephanie Joannides, who currently handles the felony drug court caseload. While the legislation specified July 1, 2001 as the commencement date for the Anchorage court,²¹⁸ the court did not begin the program until the new superior court judge became available to help handle the remainder of Judge Joannides' caseload. The court planned to start work early in December 2001, but various delays pushed the date to early 2002. The legislation specified January 2, 2002 as the beginning date for the Bethel court.²¹⁹ Delays in filling the new Bethel Superior Court position and questions about the availability of suitable treatment combined to set a new target date of spring 2002.

6. *Other Therapeutic Court Projects.* Several other groups in Alaska are considering the development of projects using a therapeutic model that includes consolidation of all related cases under one judge, judicial supervision of court-imposed conditions, a strong emphasis on treatment, monitoring to assure sobriety and a specific program of incentives and sanctions. One group is considering a family court that would use this model in Child in Need of Aid cases. The consolidation concept presents several difficult issues, including the possible combination of civil and criminal cases under one judge, which may raise due process and confidentiality problems.²²⁰ A dozen tribes have planning or implementation grants from the Department of Justice Drug Court Program Office

216. *Id.*

217. DUI Court Update 1 (Oct. 15, 2001) (unpublished letter, on file with the Alaska Judicial Council).

218. *Id.* §§ 1(b), 7.

219. *Id.* § 1(b).

220. As of January 2002, a pilot project had been proposed for the Anchorage Superior Court with a dozen families involved in Child in Need of Aid cases. The cases would be heard by Judge Joannides. The court would apparently deal only with Child in Need of Aid cases, eliminating the concerns about confidentiality and due process.

for drug courts in rural communities.²²¹ Most of the tribal drug courts are oriented toward juveniles with alcohol problems.

Some judges are considering specialty courts that resemble therapeutic courts in important ways but differ enough in other aspects that planners are not using the term “therapeutic.”²²² Several judges are developing projects that use restorative justice concepts,²²³ and the increasing number of unfamiliar terms being employed in these contexts results in confusion between these new projects and the therapeutic justice courts. One Anchorage district court judge uses a judicial supervision model with DWI defendants, but without the drug court aspects of structured plea agreements, case coordinators or managers, and phased pre-determined programs.²²⁴

221. Office of Justice Programs Drug Court Clearinghouse and Technical Assistance Project at American University: Summary of Tribal Drug Court Activity by State and County 2, Jan. 29, 2002, at <http://www.american.edu/justice/publications/tribalchart.pdf> (last visited Feb. 26, 2002). Tribes that have planning grants are Orutsarmiut Native Council (Bethel), Native Village of Barrow, Kawerak, Mt. Sanford Tribal Consortium, Organized Village of Saxman, Native Village of Kwinhagak, Organized Village of Kake, Native Village of Unalakleet, the Sitka Tribe, Chevak, Napaskiak, Kwethluk, Gambell, Chickaloon Village and Tlingit & Haida (Juneau). *Id.*

222. Members of this group of judges have emphasized that such courts would provide a process for all domestic violence cases, not allowing defendants a choice of “opting in.” These courts might consolidate all cases under one judge, provide periodic judicial supervision, emphasize batterers’ intervention programs (which are not considered treatment) and treatment programs (including treatment for substance abuse and mental health issues), and monitor participating offenders for their compliance with court conditions. However, the application of the concept to all domestic violence offenders rather than volunteer participants would change the nature of the courts. In the broader sense of therapeutic jurisprudence, this model of court management would have a therapeutic or anti-therapeutic effect (or mixture), but because of its differences from the projects that have come to be termed “therapeutic,” and because of rising objections to therapeutic courts, some would prefer that it not be termed “therapeutic.” The Honorable Peter Ashman, Alaska District Court, Anchorage, Meeting Notes, July 3, 2001, Anchorage (discussion regarding domestic violence monitoring program) (on file with the Alaska Judicial Council); *see also Domestic Violence*, ANCHORAGE DAILY NEWS, June 27, 2001, at B6 (discussing consideration of specialty courts by the City of Anchorage and the Anchorage Women’s Commission).

223. For example, two judges in smaller communities are working to develop programs that pull community members and victims into the sentencing process using “circle sentencing.” Fairness and Access Implementation Committee Meeting Summary 1, Sept. 10, 2001 (on file with the Alaska Judicial Council).

224. Interview with the Honorable Sigurd Murphy, Alaska District Court, Anchorage (Feb. 26, 2002).

II. THERAPEUTIC JURISPRUDENCE: LEGAL ISSUES

The concept of therapeutic jurisprudence generally assumes that the judicial process has a therapeutic or an anti-therapeutic effect but does not imply any particular approach to justice.²²⁵ By contrast, the therapeutic justice projects discussed in this Article describe a well-defined approach that differs significantly from that embodied in the traditional American adversarial system. Most of the legal issues that therapeutic justice approaches raise have not been resolved by the courts, although a few courts have issued opinions addressing them.²²⁶ These issues include constitutional concerns, confidentiality issues and peremptory challenges to judges, a statutory issue of particular importance to Alaska.

A. Constitutional Issues

Courts that have considered cases involving drug courts have dealt with a fairly limited range of the possible constitutional issues that could arise. The cases collected by the American University Drug Court Clearinghouse have largely addressed the questions of separation of powers and equal protection.²²⁷

1. *Separation of Powers.* Many drug court-related cases deal with the defendant's rights in plea bargaining situations and the balance of powers between the executive and judicial branches in determining who is eligible for drug court programs and who makes the final decisions on admission to them. Most of the courts deciding cases related to plea bargains appear to treat drug court agreements as any other plea bargain.

For example, the Alabama Court of Criminal Appeals decided, based on existing case law, that the defendant had a binding agreement with the district attorney that the district attorney could not subsequently repudiate.²²⁸ In a Florida case, the District Court

225. Hora et al., *supra* note 1, at 445.

226. See, e.g., State v. Filer, 771 So. 2d 700 (Ca. Ct. App. 2000); *Ex parte* Alissa Pfalzgraf, 741 So. 2d 1118 (Ala. Crim. App. 1999); State v. Upshaw, 648 So. 2d 851 (Fla. Dist. Ct. App. 1995).

227. OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIVERSITY, SELECTED OPINIONS FROM FEDERAL, STATE AND TRIBAL COURTS RELEVANT TO DRUG COURT PROGRAMS, PART II: OPINIONS (2001) (the cases discussed in this section are included in this compilation).

228. *Pfalzgraf*, 741 So. 2d at 1120. The defendant had made a plea agreement with one district attorney, who was later replaced by a newly elected district attorney. The new district attorney changed the eligibility guidelines for drug court ad-

of Appeal ruled that because the defendant successfully completed a pretrial program, the State was bound by the fact that it had offered the defendant the chance to participate in the program and was obliged to dismiss the charges.²²⁹ By the same reasoning—that the bargain involving the drug court should follow pre-existing law regarding plea agreements—the Court of Appeal of Louisiana upheld the trial court’s refusal to allow the defendant to withdraw his plea of guilty.²³⁰ The defendant in that case argued that the prosecutor unlawfully induced his guilty plea by recommending drug court contingent upon a determination in the presentence report that the defendant was eligible.²³¹ The Court of Appeal held that the defendant was in the best position to know that he had a prior felony that disqualified him from participation in drug court, and therefore the plea was not illegally obtained.²³²

The other major separation of powers issue focuses on the prosecutor’s exclusive right to decide initial eligibility for drug court admission versus the judge’s right to make the final decision about admission to the drug court. Several state courts, including those in Oklahoma and Florida, have held that separation of powers requires that prosecutors be permitted to make the first determination of admission to drug courts. Judges are not allowed to admit defendants to drug courts over the objections of prosecutors. On the other hand, Iowa and Louisiana courts have held that judges have the power to make the final decision about admission to drug court and are under no obligation to accept the prosecutor’s recommendation.²³³

2. *Due Process.* A few cases address due process issues that have arisen in drug courts. For example, a Washington case held that the defendant must have a meaningful opportunity to respond to allegations of non-compliance before being terminated from the

mission and decided that Pfalzgraf did not meet them, so he withdrew his approval of her admission to drug court. *Id.*

229. *Upshaw*, 648 So. 2d at 853. The State offered the defendant admission to the drug court, but after her completion of the program wanted to prosecute her on the original sale of cocaine charge, which would have made her ineligible to participate in the program. The court ruled that once the prosecutor had made the offer, the defendant had accepted it and the court had ratified it, the agreement “was essentially a plea bargain” and subject to the rules governing plea bargains in Florida courts. *Id.* at 851.

230. *Filer*, 771 So. 2d at 706.

231. *Id.* at 702.

232. *Id.* at 706.

233. *State v. Taylor*, 769 So. 2d 535, 538 (La. 2000).

program.²³⁴ An Oklahoma case held that the court must give written reasons for termination of a defendant.²³⁵ This opinion also held that the court must state why the program sanctions were inadequate or inappropriate for the defendant.²³⁶

3. *Equal Access to Courts (Equal Protection)*. Several courts have decided that defendants have no right to be admitted to drug courts and that they can be excluded on a variety of grounds.²³⁷ Prior felonies often are mentioned as grounds for ineligibility.²³⁸ A Florida case held that a defendant does not have a constitutional right to participate in a drug court if one had not been established in the circuit in which he was charged.²³⁹ One tribal appeals court decided that an alternative court could not provide harsher penalties for a defendant than a regular court.²⁴⁰ One author has warned that therapeutic justice projects “need to be sensitive to class and race bias, real or apparent. Unless care is taken, diversion courts may tend disproportionately to work with white and middle-class substance abusers.”²⁴¹

Several authors have discussed the question of equal access to drug courts when programs do not have enough slots to serve all of the eligible defendants, as well as the question of whether the costs of programs where defendants pay all or part of the costs prohibit indigent defendants from using them. These problems have often been addressed in the context of “going to scale”²⁴² or expanding the pro-

234. *State v. Valentine*, No. 45142-1-I 2000 Wash. App. LEXIS 866, at *1 (Wash. Ct. App. May 15, 2000).

235. *Hagar v. State*, 990 P.2d 894, 898-99 (Okla. Crim. App. 1999).

236. *Id.* at 899.

237. *See, e.g., State v. Filer*, 771 So. 2d 700 (Cal. Ct. App. 2000); *Ex parte Alissa Pfalzgraf*, 741 So. 2d 1118 (Ala. Crim. App. 1999); *State v. Upshaw*, 648 So. 2d 851 (Fla. Dist. Ct. App. 1995).

238. *State v. Turner*, 636 So. 2d 815, 817 n.2 (Fla. Dist. Ct. App. 1994).

239. *Pennington v. State*, No. 96-03750 (Fla. Ct. App. Dec. 1998), *summary available in* OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT AT AMERICAN UNIVERSITY, *SELECTED OPINIONS FROM FEDERAL, STATE AND TRIBAL COURTS RELEVANT TO DRUG COURT PROGRAMS, PART I: DECISION SUMMARIES* (2001). This case involved a physician who, because of statutory authorization, would have been able to have charges against him dismissed as a result of successful completion of a drug court program. However, no drug court program had been established in his circuit. He entered a conditional nolo plea and appealed, but the court upheld the conviction.

240. *Blackfeet Tribe v. Rutherford*, No. 00-AC-41 (Blackfeet Ct. App. Aug. 16, 2000) *in OJP Selected Cases, supra* note 227, at 161..

241. Gebelein, *supra* note 29, at 5.

242. “Going to scale” means applying therapeutic justice principles to most offenders rather than a selected few.

grams to serve the estimated seventy to eighty percent of defendants who have substance abuse problems.²⁴³ One court commentator noted: “[W]e must address the fact that we are providing more resources for a misdemeanor drug offense than we are for a non-capital murder offense or a rape offense. Most states can’t afford to continue to do this—politically and fiscally—if problem-solving courts go to scale.”²⁴⁴

Another equal access issue has arisen in the context of evaluating therapeutic justice programs. The most rigorous evaluations would use a system of random assignment of eligible defendants to either a therapeutic justice project or to a control group not receiving comparable services.²⁴⁵ This approach was considered for the Anchorage Felony Drug Court, but it was rejected by planning committee members on the grounds that it would be unfair to exclude some defendants at random.²⁴⁶ Other projects have used random selection of control groups in reported evaluations.²⁴⁷

4. *First Amendment.* Two New York cases do not directly relate to drug courts but address the question of whether defendants can be required to participate in AA programs as a condition of probation or eligibility for other programs while incarcerated. In 1999, the United States Court of Appeals for the Second Circuit held that the Orange County Department of Probation violated the First Amendment by recommending the plaintiff’s participation in

243. See *Wellness Court Byrne Grant*, *supra* note 40, at 1-3.

244. Feinblatt & Denckla, *supra* note 21, at 214.

245. ROGER H. PETERS, EVALUATING DRUG COURT PROGRAMS: AN OVERVIEW OF ISSUES AND ALTERNATIVE STRATEGIES 16 (1996).

The most desirable type of evaluation design for a drug court program is an *experimental model*, in which defendants are randomly assigned to one of two groups: (1) an *experimental group*, that participates in the full range of program activities, and (2) a *control group*, that does not receive services, or that receives services that were available prior to implementation of the drug court program.

Id. (emphasis in original).

246. *Id.* at 17.

For example, the judge, prosecutor, or defense attorney may object to random assignment of defendants in determining who will receive the services of the drug court program. Public defenders may argue that it is unfair to arbitrarily withhold beneficial program services from defendants who have a demonstrated need for treatment simply on the basis of research design factors. Issues of equal protection under the law may also be raised if defendants are randomly assigned to “treatment” or “no treatment” groups.

Id.

247. *Id.* at 16-17.

AA as a condition of a probationary sentence.²⁴⁸ Another case, decided in 1996 by the Court of Appeals of New York, held that because of the religious nature of AA, the prison could not impose a requirement that the defendant participate as a condition of eligibility for a Family Reunion program.²⁴⁹

These cases are important because AA programs or similar programs often are recommended or required as one of the conditions of drug court participation in addition to any other requirements. For example, AA participation may be required as a part of the Wellness Court conditions.²⁵⁰ Participation in AA is not always a requirement for Anchorage Felony Drug Court participants or Court Coordinated Resource Project clients, but it may be required for some individuals. Some judges also impose AA attendance as a condition of probation for some defendants.²⁵¹

5. *Other Issues.* The non-adversarial approach used in therapeutic courts raises questions for many attorneys. Defense attorneys suggest that the drug court environment creates too much pressure to give up suppression motions, legal defenses to the charges and other defense tools before trial.

Some writers, however, suggest that problem-solving courts can protect individual rights prior to trial by using an adversarial approach at that point, saving the collaborative approach for the post-conviction therapeutic activities.²⁵² They suggest that in the traditional plea system, the defense attorney's role is mostly limited to sentencing advocacy because few cases go to trial.²⁵³ Others note

248. *Warner v. Orange County Dep't of Probation*, 173 F.3d 120, 120 (2d Cir. 1999).

249. *Griffin v. Coffin*, 649 N.Y.S.2d 903, 904 (1996).

250. *Naltrexone Treatment Order*, *supra* note 91, at 1 (on file with the Alaska Judicial Council).

251. Interview with the Honorable Stephanie Rhoades, Alaska District Court, Anchorage (July 26, 2001).

252. *See* Feinblatt et al., *supra* note 32, at 32. The authors note:

[T]hroughout the adjudication process—up until a defendant decides, by virtue of pleading to reduced charges, to enter treatment—prosecutors and defenders relate to one another (and the judge) much as they always have: as adversaries. In addition to contesting the merits of each case, advocates in drug courts also argue about eligibility criteria, the length of treatment sentences, and appropriate treatment modalities (for example, outpatient versus residential).

Id.; *see also* Feinblatt & Denckla, *supra* note 21, at 209-10.

253. Feinblatt & Denckla, *supra* note 21, at 212 (“For a long time before problem-solving courts existed, the defense attorney’s function has been mostly limited to sentencing advocacy It’s a rare case that you get to argue that your client is not guilty and go to trial on the merits.”).

that the traditional plea system is coercive for most defendants, allowing relatively little time for defendants to consider plea offers, and argue that drug courts are no more coercive than the existing plea bargaining system.²⁵⁴ Not all are comfortable with the change in the defense attorney's approach from adversarial, focusing on minimizing "a client's exposure to criminal sanctions,"²⁵⁵ to collaborative, focusing on aiding the defendant's "recovery from addiction and not [on] the exercise of the full panoply of the defendant's rights."²⁵⁶

B. Confidentiality

Therapeutic courts in Alaska frequently handle sensitive information concerning participants in the programs. Programs deal with records related to participants' histories of drug or alcohol abuse treatment and records related to participants' histories of mental health treatment. Specific statutory or regulatory confidentiality protections apply to both types of records.

1. *Drug and Alcohol Courts.* Drug and alcohol courts require access to participants' drug and alcohol abuse treatment records. Information concerning a defendant's treatment history is collected as part of the defendant's initial opt-in screening or assessment. The program's treatment assessor uses this information in determining whether the defendant is diagnostically appropriate for inclusion in the program and in designing an appropriate case plan. Once a program has accepted a defendant, the drug or alcohol court team uses reports of that person's ongoing treatment compliance and prognosis to assess the person's progress. The judge uses the reports to award incentives, impose sanctions and determine whether the participant should graduate, continue in the program or be terminated from the program.

Federal statutes and regulations protect information about an individual's participation in drug or alcohol abuse treatment programs.²⁵⁷ These provisions are intended to encourage substance abusers to seek treatment by ensuring that all treatment details, including the fact that a person has participated in a treatment pro-

254. See, e.g., *id.* at 210 ("You have to be realistic. Problem-solving courts are not so different than any other kind of plea-bargaining court. Usually, you have until the next day to decide to take this plea or it's off the table."); Feinblatt, *supra* note 32, at 33 (suggesting that drug courts are no more coercive than the existing plea bargaining system).

255. Hora et al., *supra* note 1, at 479.

256. *Id.* at 480.

257. 42 U.S.C. § 290dd-2 (2000); 42 C.F.R. § 2.20 (2001).

gram, will remain private between the patient and the treatment provider.²⁵⁸ The regulations restrict access to and disclosure of information in the possession of a federally assisted drug or alcohol abuse program that would allow direct or indirect identification of a patient as an alcohol or drug abuser.²⁵⁹ A violation of the statute or its accompanying regulation is a crime, punishable by fines of up to \$5,000, loss of federal funding and loss of licenses under state law.²⁶⁰ These provisions are not absolute, however, because patients may consent to disclosure of their records,²⁶¹ and the rules contain other narrow exceptions to strict confidentiality.²⁶²

Drug and alcohol courts face two significant issues created by this federal regulatory scheme. First, the courts must know the drug and alcohol treatment histories of potential program participants and the current treatment progress of offenders actively participating in the programs. Drug and alcohol courts usually interview potential participants about their treatment histories.²⁶³ Participants consent to release treatment information, both past and future, when they first apply for the programs. The Code of Federal Regulations contains a model release, specifying the elements that a patient must include in a consent to disclose drug or alcohol abuse treatment records.²⁶⁴ These elements include the specific designation of the programs or persons allowed to make the disclosures; the specific persons or organizations to which dis-

258. See NATIONAL DRUG COURT INSTITUTE, FEDERAL CONFIDENTIALITY LAWS AND HOW THEY EFFECT [SIC] DRUG COURT PRACTITIONERS 2 (1999) [hereinafter *Confidentiality Laws*].

259. See *id.* at 6-7. "Federally assisted" is broadly interpreted to include direct or indirect funding. A drug or alcohol court that is an arm of a state or local government that receives federal assistance for any program is considered to be receiving federal assistance. *Id.* at 6.

260. *Id.* at 8.

261. *Id.* at 10. The consent provisions are narrowly drawn and require a variety of conditions, including the defendant's right to revoke consent and the point at which the consent will expire. The discussion notes that "a participant's consent to disclosure is not inherently invalid simply because this consent was a condition of drug court participation and the participant faced a substantial prison sentence if he or she did not enroll in the drug court." *Id.*

262. *Id.* at 13-15. Other exceptions include (among others) medical emergencies, state child abuse reporting requirements, research and audit activities and certain court orders involving specified criminal investigations or prosecutions. *Id.*

263. The federal regulations prevent treatment programs from disclosing patient records to anyone else. Patients are always free to give information about their treatment histories to others. 42 U.S.C. § 290dd-2 (2000).

264. 42 C.F.R. § 2.31(b) (2001).

closure may be made; the purpose of the disclosure; how much and what kind of information may be disclosed; and the date, event or condition upon which the consent will expire if not previously revoked.²⁶⁵ Expiration must occur no later than reasonably necessary to serve the purpose for which the consent is given.²⁶⁶

In Alaska, as in the federal model, the felony drug court obtains consent to release treatment records, based on the federal model, from potential participants at initial opt-in. The felony drug court requires an additional consent as part of the plea agreement. The Wellness Court also obtains a release at the initial opt-in stage, typically using release forms provided by the treatment providers with which it works. Wellness Court releases must be renewed annually.

The second issue facing drug and alcohol courts stems from the fact that the regulatory definition of “program” encompasses virtually all of these courts. This subjects them to the regulatory restrictions on disclosure of information that might identify a patient as an alcohol or drug abuser.²⁶⁷ A problem arises because the courts conduct public proceedings. Although most interactions among judges, attorneys and offenders in drug court do not go into significant detail about a participant’s treatment,²⁶⁸ the mere fact that a person is participating in a drug or alcohol court program indicates that the person has abused alcohol or drugs. One author notes that part of drug court procedure is for the judge to “hold[] the offender publicly accountable for the results of the [drug use] test and the treatment progress.”²⁶⁹ The regulations thus create a conflict between public access to court proceedings and the court’s duty not to identify or discuss drug and alcohol court participants in a public setting.

The regulations require that a written notice to the recipients of information accompany each disclosure, warning them that they may not re-disclose any information they have acquired or use it

265. *Id.*

266. *Id.* § 2.31(a)(9).

267. *Confidentiality Laws*, *supra* note 258, at 6-7.

268. The drug court team and participants typically discuss results of the initial assessment (indicating whether an offender is diagnostically appropriate for a drug or alcohol treatment program), participants’ compliance with treatment program conditions, and the results of drug or alcohol monitoring in open court in a drug or wellness court session.

269. Hora et al., *supra* note 1, at 475.

for law enforcement purposes.²⁷⁰ The regulations require does not clarify the participants' ability to agree to allow the court or others to disclose treatment information in a drug court session.

Use of treatment information by drug and alcohol courts is described in the Code of Federal Regulations in a section titled "[d]isclosures to elements of the criminal justice system which have referred patients."²⁷¹ Drug court team members are permitted to use such information for their "official duties with regard to the patient's conditional release or other action in connection with which the consent was given."²⁷² One authority states that the federal regulations have been interpreted to allow team members to mention confidential information in court.²⁷³ Such discussions constitute the team members' official duties and are related to the action for which the consent to release information was given.²⁷⁴ The authority goes on to say that drug court officials

should be mindful that consent has not been given to disclose confidential information to unnamed third party bystanders in the courtroom (e.g., public, press and law enforcement). Therefore, courtroom discussions should avoid specific, confidential details of a person's treatment experience and, instead, focus on more general concerns such as the participant's progress.²⁷⁵

The same authority notes that the question of whether confidentiality rules apply to drug courts has not been fully resolved. It advises drug courts to

label files (court and program) "confidential" and limit access to the drug court team and staff only, educate drug court team and staff on confidentiality law and how drug court information will be maintained, refrain from posting court calendars [sic] labeled "Drug Court," review your management information system to determine where drug court information is kept and who has access to it, and utilize written consent forms for every possible disclosure.²⁷⁶

270. *Confidentiality Laws*, *supra* note 258, at 9 ("[A] participant's consent to disclosure by a therapist to a probation officer does not thereby permit disclosure by the probation officer to any other person.").

271. 42 C.F.R. § 2.35 (2001).

272. *Id.* § 2.35(d).

273. *Id.*

274. *Id.*

275. *Id.*

276. Justice Programs Office, American University School of Public Affairs, *Frequently Asked Questions*, at <http://www.american.edu/spa/justice/publications/confidentiality1.htm> (last updated Aug. 15, 2001).

2. *Mental Health Courts.* The State plays a more active role in regulating access to, and disclosure of, patient mental health records than does federal law.²⁷⁷ Alaska Statutes section 47.30.590 provides that “[t]he [D]epartment [of Health and Social Services] shall adopt regulations to assure patient rights and to safeguard the confidential nature of records and information about the recipients of [welfare and other social services].”²⁷⁸ Regulations promulgated under this statute give patients the right to confidential treatment of their records²⁷⁹ and allow patients to give written authority to disclose their records.²⁸⁰

The mental health courts, like the felony drug courts and Wellness Court, must have access to treatment histories to determine potential participants’ eligibility for the program. The courts need access to ongoing treatment records to monitor a participant’s compliance with program conditions and progress. Like the other courts’ participants, mental health court participants consent to release treatment information when they are first considering the program. The consent authorizes named treatment providers to exchange specified information with each other and with named court team members and authorizes recipients of the information to further “disclose it only in connection with their official duties.”²⁸¹ The state mental health regulations, unlike the federal drug and alcohol regulations, do not include courts among the programs that must meet disclosure requirements. Thus, the consent form currently used allows court team members to discuss participants’ cases in open court.²⁸²

277. Newly adopted federal regulations promulgated under the Health Insurance Portability and Accountability Act of 1996 may significantly influence the confidentiality and disclosure of patient mental health records. These regulations were published in December 2000 and took effect in April 2001. Covered entities (health plans, health care clearinghouses and health care providers who conduct certain financial and administrative transactions electronically) have until April 14, 2003 to comply. Small health plans have until April 14, 2004 to comply. See Judge David L. Bazelon, Center for Mental Health Law, *New Federal Privacy Regulations*, at <http://www.bazelon.org/privacyregulations.html> (last visited Feb. 13, 2002).

278. ALASKA STAT. § 47.30.590 (Michie 2000).

279. ALASKA ADMIN. CODE tit. 7, § 71.210(b)(5) (2001).

280. *Id.* § 71.215(c).

281. Anchorage District Court/Court Coordinated Resources Project (CRP) Release of Information (May 7, 2001) (draft) (on file with the Alaska Judicial Council).

282. If the mental health court should come into possession of drug or alcohol abuse patient records, the court would not be considered a “program” subject to

C. Peremptory Challenges to Judges

An issue peculiar to Alaska and a handful of other states arises from the statutory rights of parties to peremptorily challenge the judge assigned to a case.²⁸³ The court rule implementing the Alaska statute²⁸⁴ permits parties to challenge the judge within five days of the judge's assignment to a case.²⁸⁵ Each party has a single challenge, available in all types of cases: civil, criminal and domestic. No reason for the challenge need be cited in making the motion to change the judge.

Most judges receive relatively few challenges.²⁸⁶ Occasionally an institutional party such as a prosecutor's office or a defense agency will routinely challenge a judge on certain types of cases. This can rise to a level at which the challenges begin to create substantial administrative problems, especially in smaller courts with only one judge available to hear most cases.²⁸⁷ The peremptory challenge right could create similar problems for therapeutic courts for which only one or two judges are trained and scheduled.²⁸⁸ The collaborative and voluntary nature of the therapeutic courts as they are presently structured may help avoid difficulties at the present time.

III. CONCLUSIONS AND FUTURE DEVELOPMENTS

Therapeutic justice is too new a practice in Alaska to have been evaluated for its effectiveness. Experiences of other jurisdic-

42 C.F.R. § 2, because it does not diagnose drug or alcohol abuse or refer clients for drug or alcohol abuse treatment. *See* 42 C.F.R. § 2.11 (2001). Because the court would be subject to the federal prohibition against redisclosure of such records for those cases, it should follow the confidentiality recommendations set out above for drug and alcohol courts. *Id.* § 2.32.

283. Teresa White Carns, Alaska Judicial Council, *Peremptory Challenges to Judges: Survey of Other Jurisdictions 1* (1983) (unpublished report) (on file with the Alaska Judicial Council).

284. ALASKA STAT. § 22.20.022 (Michie 2000).

285. ALASKA R. CIV. P. 42(c); ALASKA R. CRIM. P. 25(d).

286. *See* Alaska Judicial Council, *Peremptory Challenge Records for Judges Eligible for Retention in 2000* (Apr. 24, 2000), at <http://www.ajc.state.ak.us/Retention00/retgen5.htm>.

287. *See, e.g.,* Hornaday v. Rowland, 674 P.2d 1333 (Alaska 1983) (involving a dispute over the administrative order by a presiding superior court judge to transfer another judge from Homer to Anchorage because of his high rate of peremptory challenges for criminal cases).

288. Even jurisdictions without peremptory challenges must plan for judicial leave and challenges for cause. The opportunity for peremptory challenges exacerbates a situation that most courts will face sooner rather than later.

tions suggest that its principles hold promise for cases in which treatment—either for addictions or for mental health problems—could significantly reduce a defendant’s likelihood of recidivism.²⁸⁹ Although therapeutic justice approaches tend to be resource-intensive in the short run, most appear to cost at least one-third less than the cost of a comparable period of incarceration. They also appear to reduce recidivism significantly more than incarceration, which should result in substantial long-term reductions in prison populations.

In Alaska, the court’s commitment to using therapeutic justice principles has fostered a hospitable atmosphere for innovation. Several formal projects are applying the principles to defendants with drug, alcohol and mental health problems. Other judges are experimenting with therapeutic justice principles informally. Judges are working with other justice system professionals to design therapeutic courts for parties with a variety of problems. Despite skepticism about effectiveness, concerns about costs and questions about the philosophical validity of the therapeutic approach, many practitioners seem willing to agree that other approaches have not lessened recidivism or the ever-growing costs of the justice system.

Most observers agree that therapeutic justice projects must be evaluated to demonstrate their effectiveness. Beyond that, suggestions for improvement are numerous but not necessarily consistent. The greatest agreement is reached on the proposition that more resources for staffing and treatment would enable therapeutic courts to operate more effectively and serve more offenders. Applying therapeutic justice principles to most offenders rather than a selected few—or “going to scale”—suggests a range of issues beyond the basic question of cost. One observer hypothesized that going to scale might involve restoring some balance among judicial discretion, prosecutorial discretion and legislative mandates:

[m]ost courts have had judicial discretion reined in by new penal law provisions passed by legislatures that tend to give greater discretion to the prosecutor. Many problem-solving courts [have] some arrangement between the court and the prosecutor’s office in which the prosecutor cedes some discretion to the court. This dynamic tension between prosecutorial and judicial discretion is important in understanding what’s been happening and what’s going to happen to problem-solving courts in the future.²⁹⁰

Other issues that expanding the programs will raise are likely to include the balancing of sanctions and the difficulty of the program

289. 2001 Update, *supra* note 19, at 7.

290. Feinblatt & Denckla, *supra* note 21, at 214.

with the potential benefits perceived by each defendant, the balancing of the coercive nature of therapeutic courts with constitutionally guaranteed protections for defendants,²⁹¹ and the consequences of applying therapeutic principles in one part of the justice system and the social services system but not in others.²⁹²

291. One proponent of therapeutic justice believes that the balance falls heavily on the side of society's right to control diseases and says that "legalization [of drug use] proponents do not necessarily favor drug treatment, as it would violate the individual's right to personal liberty at all costs They would not quarantine . . . the diseased [of drug . . . addiction] They would allow the disease to spread." TAUBER, *supra* note 36, at 9.

292. For example, a Health Policy professor suggests that using therapeutic justice principles in courts will require changes in the child protection and other social systems in order to be effective. Berman, *supra* note 33, at 85.