

INTRODUCTION TO COMMUNITY-BASED COURT

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THE CONCEPTUAL BASIS OF COMMUNITY-BASED DRUG COURTS

The Three-legged Foundation of Today's Drug Court

For some, it may be hard to accept the idea that today's drug court is more than just another specialized court, intended to work with a specific population, as does the Probate, Juvenile or Traffic court. The truth is that today's Drug Court Program relies on a "troika" of critical functions that guarantee its cooperative and collaborative nature, the sharing of resources and information, and its long term focus and stability.

In the following segment, I will analyze the building blocks of today's drug court: (I) community-involvement; (II) systemic "going to scale"; and (III) Institutionalization. As you will see, what's most profound about these concepts is their relationship to one another. Together they sustain the Drug Court's structure, stability, and long-term effectiveness. Like the three-legged stool, today's drug court would fail without all three.

[Note: there are specialized courts called Problem-Solving Courts" that are modeled after the Drug Court (i.e. Mental Health, DUI Courts, etc.) and share these critical concepts.]

I. A BEHAVIORAL PERSPECTIVE: COMMUNITY-INVOLVEMENT

Community or its absence pervades everything we do. It controls our behavior through a socialization process that begins almost from birth. Where it seriously deteriorates, "niche communities" fill the void, and can prove to be as destructive as the gang cultures of L.A. or as potentially beneficial as the "drug court community". Drug Courts are successful because they (unconsciously for the most part) emulate "traditional community" in its attempts to control anti-social behaviors.

Since the beginning, humans have lived together in "communities". Primitive, communities relied on "Customary Law" (or what is sometimes called the "living law", as it was recognized and accepted by all those living in that community). The 'norms of conduct', "were enforced not by any leadership of the community but rather by the whole." (H.Stuart Madden, The Cultural Evolution of Tort Law, 37Ariz St LJ 831, p835).

Those early communities provided the tools to support acceptable behavior, using affirmation, status, and other tangible and intangible rewards to encourage conformity to societal norms.

And the community also relied heavily on what we would today call "alternative sanctions", to correct an individual's anti-social behaviors. This "traditional" sanctions" approach to misbehavior included admonitions, shaming, restitution (often the family's responsibility), corporal punishment, shunning and finally banishment from the "community".

To this day, Aboriginal communities use shunning and in extreme cases banning from the group, when persons refuse to follow community norms, resulting in destabilization in the community. [It's interesting to note, that as in the drug court model, the Aboriginal community is more interested in the restoration of a peaceful community than the strict identification of the party at fault.] (Id, at p.836).

Finally, the group typically welcomed the reformed miscreant back into the community when the behavior was corrected. The "community" couldn't afford to waste an individual's work contribution. Keeping the individual stigmatized created an unhealthy separation from others and prevented a healing within the community. It made far more sense, to return the outcast to the bosom of the community as soon as possible.

Community Based Sanction in America

Colonial America, made up of many small, insular and stable communities, relied heavily on community-based or "alternative" sanctions to enforce a strict social, economic, and religious code of behavior. While it's true that some of those sanctions may now be unacceptable (i.e., corporal punishment), other forms of alternative sanctions are very much a part of the modern criminal justice system. The use of warnings, servitude, and restoring the victim, may be known by different names today (admonitions, restitution, community service), but share similar functions.

Incarceration, on the other hand, was rarely used as a sanction, and while a conventional sanction today (and some would say traditional), it was a radical departure from the "Community-Based Sanctions" in place some 200 years ago. For example, there were only 19 cases in New York between 1691 and 1776 in which jail was the basic form of punishment applied. (Greenberg, *Crime...in the Colony of New York*, p.125). "And, in fact, loss of liberty was not a standard way of making criminals pay." (See Friedman, below, p.48). It is generally agreed that incarceration only began to achieve acceptance when societal and community-based sanctions began to lose their effectiveness.

According to Professor Lawrence Friedman, widely considered the Dean of American Legal History, "This was a constant in colonial history; criminal justice as social drama".

A trial "was an occasion for repentance and reintegration; a ritual for reclaiming lost sheep and restoring them to the flock"...It was a public, open affirmation of the rules and their enforcement; a kind of divine social theater."

(Lawrence Friedman, *Crime and Punishment in American History*, p.25 (1992).

The parallels to the Drug Court could not be clearer. Living in a time when society has substantially broken down, where people lead isolated lives and where societal pressure may be minimal, the drug court provides a group structure for the drug user, providing support, rehabilitation, resources, and "community" where none had existed before.

Within that “community”, “alternative” or community-based sanctions have a new found importance. Sitting in the jury box for a day is the equivalent of wearing a dunce cap. The admonition from the judge in front of the drug court community is a shaming that all understand. The rehabilitated drug-user is welcomed back into society at a very public graduation ceremony presided over by community leaders.

As one commentator put it,

It is ironic and yet oddly appropriate that although eighteenth century America turned to imprisonment because alternative punishments has lost their ability to shame, late twentieth century America is turning to alternative punishments because imprisonment has lost its ability to deter and rehabilitate.”

(Dan Kahan What do Alternative Punishments Mean; 63 U.Chi.L.Rev.591, p.631)

Of course, colonial America was a very different place than modern America. The family, church, and community were overwhelming presences in an individual's life. Banishment, the final solution of its time, was akin to a death sentence. The controls available to the “community” were far more effective than anything modern jurisprudence has to offer. And yet the promise of community-based incentives and sanctions remains compelling.

It's interesting to note that the Conference of Chief Justice's in their 2004 resolution acknowledges as much, “drug court and problem-solving court principles and methods have demonstrated great success in addressing certain complex social problems, such as recidivism, that are not effectively addressed by the traditional legal process”.

Richard C Boldt, in his treatise on “Alternatives to Incarceration” stated, “The History of the American Penitentiary demonstrates that reliance on “traditional” forms of punishment is a matter of choice, not inevitability”. (111 Harv.L.Rv 1863, p.1874)

...”the American criminal justice system has responded to crime in recent decades primarily with a monolithic answer. This response contrasts to the criminal justice systems of many other countries. The peculiarity of this monolithic panacea is striking given that widespread incarceration of criminals is a relatively recent episode in the history of Anglo-American jurisprudence”.

In other words, there is nothing especially “traditional” or sacrosanct about the use of our most recent “conventional” sanction of choice, “incarceration”; it is a choice that we have made in the past, and one that may make in the future.

II. A SYSTEMS PERSPECTIVE: “GOING TO SCALE”

Even the simplest drug court is a system, reflecting a highly developed capacity to share information, resources, and responsibilities among government agencies, outside organizations, and the courts. The characteristics of drug court systems; linking, informing, sharing, cooperating and collaborating, separate drug court systems from conventional court programs. As Drug Court “Systems” gain acceptance, they must determine whether to limit themselves to their early goals, or “Go To Scale” and involve a substantial percentage of their community’s serious drug abusers.

We’ve all come to recognize that drug courts are successful in reducing the substance abuse and criminality of drug court participants. The Government Accounting Office (Congress’s investigatory arm) says so. Recently, the U.S. Government Accounting Office published an extensive review of drug court research and concluded that adult drug court programs substantially reduce crime by lowering re-arrest and conviction rates among drug court graduates well after program completion, resulting in far better cost/benefits for drug court participants and graduates than comparison group members.

The scientific research says so. The University of Pennsylvania’s “Treatment Research Institute reported in 2003, “To put it bluntly, we know that drug courts outperform virtually all other strategies that have been used with drug-involved offenders.” Dr. Doug Marlowe, of the “Institute”, reporting on the success of Drug courts stated "an average of 60% of drug clients attended twelve months or more of drug treatment and roughly one-half graduated from the program. This represents a six fold increase in treatment retention over most previous efforts" (see Marlowe, A Sober Assessment of Drug Courts). Additionally, Columbia University’s historic analysis of drug courts concluded that drug courts “provide closer, more comprehensive supervision and much more frequent drug testing and monitoring during the program than other forms of community supervision. More importantly, drug use and criminal behavior are substantially reduced while offenders are participating in drug court” (.....)

And all fifty state chief justices unanimously speaking through their Conference of Chief Justices say so. In 2004, the conference of Chief Justices and the Conference of State Court Administrators unanimously passed a new national resolution committing all 50 States to “take steps, nationally and locally, to expand and better integrate the principles and methods of well-functioning drug court into ongoing court operations." Of course, that wasn't the first time the Chief Justices and State Administrators dealt with this issue. Four years earlier, they issued a similar statement declaring, that the methods of problem-solving courts (of which the drug court is the model) be integrated in to all state courts over the next decade. It hasn't happened and doesn't appear to be happening now.

So what's slowing us down and what can we do about it?

A number of communities around the nation have “gone to scale” and others are hard at work at it. But, one would think that there would be a rush to embrace a solution to the substance abuse problem for “the many” that actually works. But that hasn't been the case. There are approximately 2000 drug courts in the U.S., but fewer than 100,000 participants in those programs. That averages out to less than 50 participants per program.

Virtually all drug courts start off small as they try to build successful programs. But staying small threatens the existence of the drug court, as small programs don't benefit from economies of scale that inure to larger drug court populations. Critics attack drug courts as “boutique courts” designed for the few and requiring inordinate outlays of time, effort, and resources. Staying small denies the community the possibility of substantially impacting substance abuse and crime and ultimately weighs against program survival. So why aren't we taking advantage of the obvious benefits of “Taking Drug Court To Scale”

“Conventional Wisdom” tells us to stick with traditional solutions like “incarceration”, even when they're bankrupting government and have proven to be miserable failures (incarceration is a conventional, not traditional sanction, that today imprisons three million drug offenders; ten times the number incarcerated twenty years ago.). Conventional Wisdom tells us that it's too risky to rely on a Community-Based drug court model that's a recent, unreliable, radical, and costly departure from what we do now. Conventional Wisdom tells us that it's better to play it safe and rely on small programs that work with less serious offenders, have a minimal impact, but make us feel like we're doing something.

But Conventional Wisdom is mostly wrong. It was wrong during colonial times when the justice system thought burning witches was good criminal policy. It was wrong when it upheld the rights of slave owners. And it's wrong claiming that Community- Based Sanctions and Incentives (and Drug Courts) are too recent, unreliable, radical, and costly “To Go To Scale”. They, in fact, offer the most “traditional” and cost-effective control of anti-social behavior in human history. (See I; Community-Involvement).

[Note: Conventional Wisdom is also wrong when it suggests that all we need is more resources for drug courts or other programs to solve our problems. I have observed more than one highly resourced drug court ineffectively use resources and show results no better than neighboring counties spending a fraction of the cost per participant. The truth is that resources don't make an effective drug court, people building community-based structures that are rational, realistic, and science-based do.]

Fortunately, the Institutionalization of community-based structures make “going to scale” not only doable but compellingly so. When put in place, they reduce the time, effort and resources necessary to “go to scale”. To fully understand the importance of such Institutionalization, we need to go back to see how the “Founding Fathers” of the Drug Court Movement have fared.

III. THE INSTITUTIONAL PERSPECTIVE: BUILDING STRUCTURE INTO DRUG COURTS

Successful institutionalization of a drug court, means that the program has been successfully integrated within the criminal justice system as well as the greater community; but most importantly, it means that community-based structures have been put in place that assure the programs survival and effectiveness over time.

A TALE OF TWELVE CITIES

The original dozen or so drug courts (those existing at the time of NADCP's formation in 1994) began with great promise. While all had initial success, over time about half of those drug courts have withered on the vine. Drug Courts in Bakersfield CA, St. Joseph Mi, Chicago Ill, Denver, Co, Oakland Ca, and Portland Or. have either disappeared entirely or nearly so.

At the same time, other founding drug courts have matured, expanded and thrived. Miami, FL., Fort Lauderdale, FL., Kalamazoo Mi., Kansas City, Mo., Las Vegas Ne, and San Bernadino Ca, are just a few of the courts that have grown stronger, and more successful, while expanding the populations they reach and their impact on their communities.

The “Innovator’s Effect” and Why some Programs Continue to Thrive

The “Innovator’s Effect”, refers to the effect that strong leadership can have at the beginning of a project, inspiring and motivating practitioners to heights of productivity and effectiveness. Clearly dynamic judicial leadership at the inception of a drug court is desirable, even critical to a drug court’s initial success. While a powerful judicial presence sustains most drug courts for an initial period, when that “innovator judge” moves on, the drug court often has great difficulty in maintaining its focus, structure and viability.

For the most part, those drug courts that continue to flourish have institutionalized community-based structures that insure stability and effectiveness over time. So what are these extraordinary structures that sustain Drug Courts and enable our communities to reach out to far greater number of serious substance abusers?

[It should be noted, that the Kansas City Drug Court was the creation of then District Attorney Claire McCaskill (NADCP’s first Board President and now U.S. Senator from Missouri); an important example of non-judicial leadership in a Drug Court].

STRUCTURALLY ACCOUNTABILITY IN COMMUNITY-BASED DRUG COURTS

The truth is, there is nothing very exceptional about the institutionalization of community-based structures in a drug court system. Simply put, their “community-involvement” makes them capable of sustaining drug court programs over time. As stated in the Introduction, all drug courts substantially reflect such community-based structures.

For example, all drug courts hold regular hearings where “community” participants are present to interact directly with judge and practitioners. Virtually all Drug Courts develop interagency and organizational linkages that promote cooperation and collaboration across the “drug court system”. Most drug courts have “teams” (or communities) of practitioners who meet on a regular basis, at “staffings” before court hearings to monitor participant progress. And many Drug Courts are now associated with non-profit corporations that have been set up by a “community of individuals and organizations” to provide funding and other resources to the program.

It should be noted, that the next generation of Drug Courts are building new structures such as re-entry systems into their programs, that provide a seamless system, moving participants from Drug Court into custody status (when required), to be supervised by Drug Court while in custody, as well as upon release back into the community. All of the above community-involved or community-based structures (as well as new structures like re-entry systems) are important to the long-term success of the drug court.

As I wrote in the 1994 Judge’s Drug Court Manual:

“Maintaining the effectiveness of any court-ordered rehabilitation program is difficult at best. Government agencies tend to see their interests narrowly and are distrustful of others, resentful of outside pressure, and jealous of their prerogatives. For a drug rehabilitation program to be effective, all participants must be able to look beyond their narrow interests, i.e., distributing information freely, collaborating in decision making, sharing resources and coordinating their efforts. While strong leadership and individual commitment may initially create a climate conducive to coordination, over time programs unravel and agencies and organizations revert to accustomed ways.

It is crucial, therefore, to develop permanent structures that will ensure continued program coordination, stability, and success over time. Where such structures exist, it can be said that the program is structurally accountable; that is, its very structure is accountable for continued program effectiveness. In a structurally accountable system, participating organizations and personnel share program responsibilities and are accountable to each other, with each practitioner directly linked to, dependent on, and responsible to the others.”

What I missed in that analysis was that the structures I referenced all worked within a community-based framework. And while I clearly saw the advantages of a “checks and balances” approach in a “structurally accountable” system, I was unaware of the powerful influence that “community” could have on that system (see I: Community Involvement). The following, then, is an updated list of those characteristics necessarily (but not exclusively) found in a “Structurally Accountable” Drug Court Program.

A Structurally Accountable Approach to the Community-Based Drug Court:

1. A Unified Drug Court System

A community of court, treatment, and other organizations design, develop and implement a program that works with substantial numbers of serious substance abusers.

2. An Established Drug court Team

A community of individual practitioners from participating organizations form a stable “team” committed to working together on a long-term and daily basis.[With organizations committed to their personnel’s participation for at least 1 year]

3. Community funding

Community-wide responsibility as to funding decisions promotes an integration of resources and function, resulting in accountability for the total program.

4. Community-wide Planning

Full interagency, organizational, and personnel participation in program design and implementation promotes commitment to, and ownership of the program.

5. Program Procedures and guidelines

Recorded procedures and guidelines (including waivers, contingency contracts, letters of agreement) provides system-wide understandings and expectations

6. Articulated Missions and Goals

Agency and organization leaders as well as practitioners develop and agree on program goals that they can work towards and measure their progress against.

7. Review/Training Meetings

Regular meetings provide opportunities for periodic evaluations of program and participant progress, as well as education and training (both on and off site).

8. The Sharing of Program Information

Full access to participant information (within legal limits) allows more effective coordination and review of participant, practitioner, and program productivity.

9. Linkages between program, practitioners, and participants

Direct, immediate, and seamless linkages prevent participants from falling through the program cracks while promoting program efficacy.

10. Integration with the greater Community

Involvement of the larger community in the drug court program provides psychological, financial, and political support for the program's sustenance

11. Integration on a state wide basis

Linkages across the state with drug courts, state organizations, and the legislature increases opportunities for increased resources, coordination and effectiveness

12. Maintain awareness and connection with State and National Organizations

Involvement with state and national organizations (i.e., CADCP, NADCP, NDCI) provides information and support necessary for an effective program

These and other community-based structures, when put in place establish an institutional and structural framework that ensures stability and effectiveness over time and allows for the program's "going to scale".

CONCLUSION: COMMUNITY IS OUR FRIEND

The concepts we've discussed here, community involvement, institutionalization, and Systemic "Going To Scale" are the building blocks of today's Community-Based Drug Courts. Without all three building blocks embedded in your program, you might suffer the fate of those Founding Drug Courts that failed after their "innovator judges" moved on.

For without Community involvement, Institutionalization would be difficult at best; without Institutionalization of the program, Systemic "Going to Scale" would be virtually impossible; and without "Going to Scale" there would be no rational reason for a community to put in the substantial time, energy, and resources necessary to create a Community-Based Drug Court.

By putting a three-tiered foundation in place, you will be strengthening your program and ensuring that it accomplishes its goal of having a major impact on your community's substance abuse and crime problems, long into the future.