University of Alberta

Effects of Participation in Toronto's Drug Treatment Court on Criminal Recidivism and Legal Rights

by

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ABSTRACT

This thesis examines effects of participation in Toronto's drug treatment court (DTC) on criminal recidivism and legal rights. While Toronto's DTC has been operating for nearly ten years, it has not been well-established that participation in Toronto's DTC is a more efficient means of reducing criminal offending than case processing in Canadian courts and corrections. Further methodologically sound research is required. More importantly, accused waive several legal rights to participate in Toronto's DTC. The waiver of these rights may be involuntary and the resulting infringement of these rights unconstitutional. With few modifications, Toronto's DTC processes can be amended to comply with legal rights. Expansion of DTCs should only continue when DTC processes comply with legal rights and when methodologically sound evidence demonstrates that DTCs efficiently reduce criminal recidivism.

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INTRODUCTION

There is substantial evidence linking illicit drug use and crime. Many individuals commit crime while under the influence of drugs or to obtain drugs. To illustrate, 16-19% of criminal offenders sentenced to imprisonment in Canadian penitentiaries have reported being intoxicated by drugs at the time of committing their most serious offence.[1] 12% of these offenders reported being intoxicated by cocaine, while 2% reported being intoxicated by heroin.[2] Similarly, 13-16% of these offenders reported having committed their most serious crime to obtain illicit drugs for personal use.[3] Comparable drug use and offending statistics have been reported for Canadian inmates sentenced to incarceration in provincial institutions and for youth and adult prisoners in the United States, Australia, and elsewhere.[4]

Several explanations for the correlation between drug use and crime have been offered. For instance, it has been suggested that there are common etiologies

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[1] Kai Pernanen *et al.*, *Proportions of Crimes Associated with Alcohol and Other Drugs in Canada* (Ottawa: Canadian Centre on Substance Abuse, 2002) at 7-8.
[2] Kai Pernanen *et al.*, *Proportions of Crimes Associated with Alcohol and Other Drugs in Canada* (Ottawa: Canadian Centre on Substance Abuse, 2002) at 55-56.
[3] Kai Pernanen *et al.*, *Proportions of Crimes Associated with Alcohol and Other Drugs in Canada* (Ottawa: Canadian Centre on Substance Abuse, 2002) at 56-58.
[4] For example, see Kai Pernanen *et al.*, *Proportions of Crimes Associated with Alcohol and Other Drugs in Canada* (Ottawa: Canadian Centre on Substance Abuse, 2002); Celia C. Lo & Richard C. Stephens, "The Role of Drugs in Crime: Insights From a Group of Incoming Prisoners" (2002) 37 Substance Use & Misuse 121; Jeremy Prichard & Jason Payne, *Alcohol, drugs and crime: a study of juveniles in detention* (Canberra: Australian Institute of Criminology, 2005); Jenny Mouzos, Lance Smith & Natalie Hind, *Drug use monitoring in Australia: 2005 annual report on drug use among police detainees* (Canberra: Australian Institute of Criminology, 2006); Holly Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders* (Canberra: Australian Institute of Criminology, 2004); Toni Makkai & Jason Payne, *Drugs and Crime: a Study of Incarcerated Male Offenders* (Canberra: Australian Institute of Criminology, 2003); Charles D.H. Parry *et al.*, "The 3-Metros Study of Drugs and Crime in South Africa: Findings and Policy Implications" (2004) 30 The American Journal of Drug and Alcohol Abuse 167.

for drug use and criminal offending; that the cost of obtaining drugs necessitates criminal activity; that criminal behaviour is used to regulate or control the drug trade; etc.[5] However, the hypothesis that drug use causes crime has not been verified. Rather, criminal activity is often initiated prior to drug use.[6] Still, drug use reduces the likelihood that individuals will cease committing criminal offences.[7]

As such, a new approach to addressing drug-related crime has commenced. Some drug-addicted accused are being transferred from traditional criminal courts to drug treatment courts (DTCs) for treatment in addition to punishment for drug-related criminal offences.

DTCs and other problem-solving courts (PSCs) developed alongside an emerging paradigm of the law called therapeutic jurisprudence. Therapeutic jurisprudence is a theoretical construct of the law as a social force that produces therapeutic and anti-therapeutic consequences. According to its proponents, substantive and procedural laws, judges and lawyers, etc. all affect the psychological, mental, and physical well-being of individuals. The aim of therapeutic jurisprudence is to enhance the therapeutic effects and ameliorate the anti-therapeutic effects of the law on participants in the legal system. While DTCs and PSCs are not synonymous with therapeutic jurisprudence, DTCs, PSCs, and

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[5] For example, see Dana C. Brothers, "Substance Abuse and Crime: An Analysis of the Relationship and Its Impact on Canadian Drug Policy" in vol. 1 *Perspectives on Canadian Drug Policy* (Kingston, Ont.: John Howard Society of Canada, 2003) 76 at 86-87; Scott Menard, Sharon Mihalic & David Huizinga, "Drugs and Crime Revisited" (2001) 18 Just. Q. 269 at 271-274.

[6] For example, see Scott Menard, Sharon Mihalic & David Huizinga, "Drugs and Crime Revisited" (2001) 18 Just. Q. 269 at 269-274. Also see Chris Allen, "The Links Between Heroin, Crack Cocaine and Crime" (2005) 45 Brit. J. Criminol. 355.

[7] For example, see Scott Menard, Sharon Mihalic & David Huizinga, "Drugs and Crime Revisited" (2001) 18 Just. Q. 269 at 269-274. Also see Chris Allen, "The Links Between Heroin, Crack Cocaine and Crime" (2005) 45 Brit. J. Criminol. 355.

therapeutic jurisprudence share common approaches to rehabilitating offenders through legal processes, such as judicial supervision of treatment.[8]

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[8] For further reading on therapeutic jurisprudence see David B. Wexler, *Rehabilitating Lawyers: Principles of Therapeutic Jurisprudence for Criminal Law Practice* (Durham, N.C.: Carolina Academic Press, 2008); David B. Wexler, "Therapeutic Jurisprudence and the Rehabilitative Role of the Criminal Defense Lawyer" (2005) 17 St. Thomas L. Rev. 743; George Hampel, "Therapeutic Jurisprudence – An Australian Perspective" (2005) 17 St. Thomas L. Rev. 775; Cait Clarke & James Neuhard, "Making the Case: Therapeutic Jurisprudence and Problem-Solving Practices Positively Impact Clients, Justice Systems and Communities They Serve" (2005) 17 St. Thomas L. Rev. 781; David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, N.C.: Carolina Academic Press, 2003); Bruce J. Winick, "Therapeutic Jurisprudence and Problem Solving Courts" (2003) 30 Fordham Urb. L.J. 1055; Bruce J. Winick & David B. Wexler, "Drug Treatment Court: Therapeutic Jurisprudence Applied" (2002) 18 Touro L. Rev. 479; Dennis P. Stolle, David B. Wexler & Bruce J. Winick, eds. *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham, N.C.: Carolina Academic Press, 2000); David B. Wexler, "The Development of Therapeutic Jurisprudence: From Theory to Practice" (1999) 68 Rev. Jur. U.P.R. 691; Peggy Fulton Hora, William G. Schma & John T. A. Rosenthal, "Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 Notre Dame L. Rev. 439; David B. Wexler, *Therapeutic Jurisprudence Applied: Essays on Mental Health Law* (Durham, N.C.: Carolina Academic Press, 1997); David B. Wexler, *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Durham, N.C.: Carolina Academic Press, 1996); David B. Wexler & Bruce J. Winick, *Essays in Therapeutic Jurisprudence* (Durham, N.C.: Carolina Academic Press, 1991); David B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* (Durham, N.C.: Carolina Academic Press, 1990). Also see Dennis Roderick & Susan T. Krumholz, "Much Ado About Nothing? (2006) 1 S. New Eng. Roundtable Symp. L.J. 201; Bruce A. Arrigio, "The Ethics of Therapeutic Jurisprudence: A Critical and Theoretical Enquiry of Law, Psychology and Crime" (2004) 11 Psychiatry Psychol. & L. 23; Morris B. Hoffman, "Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous" (2002) 29 Fordham Urb. L.J. 2063.
DTCs are one form of PSCs. Other PSCs include domestic violence courts, mental health courts, first Nations courts, etc. These courts are not the subject of this thesis and are not discussed further. For additional reading on these courts see Greg Berman & John Feinblatt, *Good Courts: The Case for Problem-Solving Justice* (New York: New Press, 2005); Greg Berman & John Feinblatt, "Problem-Solving Courts: A Brief Primer" (2001) 23 Law & Pol'y 125; Greg Berman & Anne Gulick, "Just the (Unwieldy, Hard to Gather, But Nonetheless Essential) Facts, Ma'am: What We Know and Don't Know About Problem-Solving Courts" (2003) 30 Fordham Urb. L.J. 1027; Michael C. Dorf & Jeffrey A. Fagan, "Problem-Solving Courts: From Innovation to Institutionalization" (2003) 40 Am. Crim. L. Rev. 1501; Judith S. Kaye, "Delivering Justice Today: A Problem-Solving Approach" (2004) 22 Yale L. & Pol'y Rev. 125; Pamela M. Casey & David B. Rottman "Problem Solving Courts: Models and Trends" (2005) 26 Just. Sys. J. 35; Natasha Bakht, "Problem Solving Courts as Agents of Change" (2005) 50 Crim. L.Q. 224; John B. Van de North, Jr., "Problem-Solving Judges–Meddlers or Innovators?" (2006) 32 Wm. Mitchell L. Rev. 949; Frank Sirotich, "Reconfiguring Crime Control and Criminal Justice: Governmentality and Problem-Solving Courts" (2006) 55 U.N.B.L.J. 11; Tamar M. Meekins, "'Specialized Justice'": The Over-Emergence of Speciality Courts and the Threat of the New Criminal Defense Paradigm" (2006) 40 Suffolk U.L. Rev. 1;Timothy Casey, "When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy" (2004) 57 SMU L. Rev. 1459; James L. Nolan Jr., "Redefining Criminal Courts: Problem-Solving and the Meaning of Justice" (2003) 40 Am. Crim. L. Rev. 1541; Eric Lane "Due Process and Problem-Solving Courts" (2003) 30 Fordham Urb. L.J. 955.

Despite being a recent innovation, DTCs have been instituted in a number of regions. The first DTC was pioneered in Miami, Florida in 1989.[9] Since that time, DTCs have proliferated in the United States[10] and other countries including Australia, England, Ireland, Scotland, etc.[11] In Canada, DTCs have been established in Toronto, Vancouver, Edmonton, Calgary, Regina, Winnipeg, and Ottawa.[12]

There are various types of DTCs. In the United States, for example, there are juvenile DTCs,[13] family DTCs,[14] and driving while impaired or under the

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It is acknowledged that approaches to treating and punishing accused in traditional courts and corrections and DTCs and other PSCs are two of several possible reactions to criminal activity. Extra-legal mechanisms of reacting and preventing criminal activity are outside the scope of this thesis and are not addressed.

[9] "Miami Dade County Drug Court" online: Eleventh Judicial Circuit of Florida <http://jud11.flcourts.org/programs_and_services/drug_court.htm>.

[10] For a recent list of all DTCs currently operating or being established in the United States see "BJA Drug Court Clearinghouse Project Summary of Drug Court Activity by State and County March 19, 2008" online: Bureau of Justice Assistance <http://spa.american.edu/justice/documents/2150.pdf>.

[11] "About the IADTC" International Association of Drug Treatment Courts (IADTC) online: <http://www.iadtc.law.ecu.edu.au/about/index.html>.

[12] "Expanding Drug Treatment Courts in Canada" online: Department of Justice Canada <http://canada.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31552.html>. For more information on DTCs in Canada see "Drug Treatment Courts FAQS" online: Canadian Centre on Substance Abuse <http://www.ccsa.ca/NR/rdonlyres/FFBA90ED-2E2F-408D-A6C9-4F9E9F9B9155/0/ccsa0113482007.pdf>; "Drug Treatment Court of Vancouver Program" online: Department of Justice Canada <http://www.justice.gc.ca/eng/news-nouv/nr-cp/2001/doc_27970.html>; "Drug Treatment Court of Vancouver" online: Public Safety Canada <http://ww4.ps-sp.gc.ca/en/library/features/dtc/facts-van.html>; "Edmonton Drug Treatment & Community Restoration Court" online: Edmonton Drug Treatment & Community Restoration Court <http://www.edtcrc.ca/pages/home/default.aspx>; "A Drug Treatment Court for Edmonton" (2006) *The Reporter* 1; "Regina Drug Treatment Court" online: Courts of Saskatchewan <http://www.sasklawcourts.ca/default.asp?pg=pc_div_regina_drug_treatment>; "What is the Drug Treatment Court (DTC)?" online: Government of Saskatchewan <http://www.gov.sk.ca/news-archive/2006/10/03-700-attachment.pdf>; "Regina and Area Drug Treatment Court" online: Regina Qu'Apelle Health Region <http://www.rqhealth.ca/programs/drug_strategy/pdf_files/court.pdf>; "Winnipeg Drug Treatment Court" online: Addictions Foundation of Manitoba <http://www.afm.mb.ca/Partnerships/documents/DrugCourt.pdf>.

[13] *Juvenile Drug Courts: Strategies in Practice* (Washington, D.C.: U.S. Department of Justice, 2003); John J. Sloan, III & John Oritz Smykla "Juvenile Drug Courts: Understanding the Importance of Dimensional Variability" (2003) 14 Criminal Justice Policy Review 339; Steven Belenko & T.K. Logan, "Delivering more effective treatment to adolescents: Improving the juvenile drug court model" (2003) 25 Journal of Substance Abuse Treatment 189; Caroline S.

influence of alcohol (DUI) DTCs.[15]

With few exceptions, such as the New South Wales Drug Court, DTCs are not borne out of legislative enactment.[16] Instead, DTCs operate as specialty courts within state or provincial court structures.[17]

The scope of this thesis is limited to Canada's first DTC: Toronto's DTC. This thesis is limited to Toronto's DTC because Toronto's DTC has been the subject of research[18] and other literature[19] and serves as an exemplar for the development of other DTCs in Canada.[20]

Toronto's DTC was initiated by a group of criminal justice and mental

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Cooper, "Juvenile Drug Treatment Courts in the United States: Initial Lessons Learned and Issues Being Addressed" (2002) 37 Substance Use & Misuse 1689. Juvenile DTCs have also been established in Australia. "Youth Drug and Alcohol Court New South Wales" online Lawlink New South Wales Government <http://www.lawlink.nsw.gov.au/youthdrugcourt>.

[14] *Juvenile and Family Drug Courts: An Overview* (Washington, D.C.: U.S. Department of Justice, 1996).

[15] Jeff Tauber & C. West Huddleston, *DWI/DUI Drug Courts: Defining a National Strategy* (Alexandria, V.A.: National Drug Court Institute, 1999).

[16] See text accompanying note 94; *Drug Court Act 1998* (N.S.W.); *Drug Court Amendment Act 1999* (N.S.W.); *Drug Court Amendment Act 2002* (N.S.W.). The National Drug Court Institute has proposed model DTC legislation. See Robert Koch *et al.*, *Model State Drug Court Legislation: Model Drug Offender Accountability and Treatment Act* (Alexandria, V.A.: National Drug Court Institute, 2004).

[17] For example, Toronto's DTC is specialty court within the provincial court structure of Ontario. *Ontario Court of Justice: Annual Report 2005* online: Ontario Court of Justice <http://www.ontariocourts.on.ca/ocj/en/annualreport/2005.pdf> at 5-6.

[18] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004).

[19] For example, see Paul Bentley, "Canada's First Drug Treatment Court" (2000) 31 C.R. (5th) 257; Natasha Bakht, "Problem Solving Courts as Agents of Change" at (2005) 50 Crim. L.Q. 224; Darlene James & Ed Sawka, "Drug Treatment Courts: Substance Abuse Intervention Within the Justice System" (2002) 3 Isuma 127; Benedikt Fischer, "'Doing good with a vengeance': A critical assessment of the practices, effects and implications of drug treatment courts in North America" (2003) 3 Criminal Justice 227; Cynthia Kirkby, "Drug Treatment Courts in Canada: Who Benefits?" in *Perspectives on Canadian Drug Policy*, vol. 2 (Kingston, Ont.: John Howard Society of Canada, 2004) 59; Carol La Prairie *et al.*, "Drug Treatment Courts—A Viable Option for Canada? Sentencing Issues and Preliminary Findings from the Toronto Court" (2002) 37 Substance Use & Misuse 1529; Anida L. Chiodo, "Sentencing drug-addicted offenders and the Toronto Drug Court" (2001) 45 Crim. L.Q. 53; Lisa Strauss, "U.S. Drug Court: A Building Block for Canada" (2002) 8 ILSA J. Int'l & Comp. L. 685; Donald G. Evans, "Canada's First Drug Treatment Court" (2001) 63 Corrections Today 30; Ann Simpson, *Closing the 'Revolving Door': The Toronto Drug Treatment Court* (Ottawa: Caledon Institute of Social Policy, 2001).

[20] "A Drug Treatment Court for Edmonton" (2006) *The Reporter* 2.

health practitioners who were concerned that traditional courts and corrections fail to reduce drug-related criminal offending. Unlike traditional courts and corrections, the primary purpose of Toronto's DTC is not to ascribe responsibility and punishment for drug-related criminal offending. Rather, the primary purpose of Toronto's DTC is to provide treatment for drug abuse.[21]

Traditional court processes are therefore moderated in Toronto's DTC with processes aimed to facilitate drug treatment. While accused may accept or contest responsibility for offences in traditional courts, accused must accept responsibility for offences in Toronto's DTC. In addition, while many accused are sentenced without delay upon findings of guilt in traditional courts, in Toronto's DTC sentencing of many accused is deferred until graduation, discharge, withdrawal, or expulsion from the court.[22]

While there are several means of evaluating DTCs,[23] this thesis examines the effects of participating in Toronto's DTC from a crime reduction and a legal rights perspective. The crime reduction effectiveness of traditional Canadian courts and corrections and Toronto's DTC is assessed in the first chapter of the thesis. The legal consequences of moderating traditional court processes in Toronto's DTC is addressed in the second chapter of the thesis.

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[21] Paul Bentley, "Canada's First Drug Treatment Court" (2000) 31 C.R. (5th) 257 at 257-269.
[22] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 63-69.
[23] See text accompanying notes 33-34, 39-40.

LITERATURE REVIEW

Effects on Criminal Recidivism and Costs of Participating in Commonwealth DTCs

Introduction

The literature on DTCs can be broadly divided into two types: literature describing DTCs and literature evaluating DTCs. There is also literature on DTCs spanning this general classification.

Literature describing DTCs discusses the emergence of DTCs in the United States and other countries;[24] describes common DTC principles[25] details DTC processes, including treatment offered in DTC;[26] provides a theoretical, social, philosophical, and/or political context for DTCs,[27] raises legal[28] and

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[24] For example, see James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement* (Princeton: Princeton University Press, 2001); John S. Goldkamp, "The Drug Court Response: Issues and Implications for Justice Change" (2000) 63 Alb. L. Rev. 923; Pamela L. Simmons, "Solving the Nation's Drug Problem: Drug Courts Signal a Move Toward Therapeutic Jurisprudence" (1999/00) 35 Gonz. L. Rev. 237; David Indermaur & Lynne Roberts "Drug Courts in Australia: The First Generation" (2003) 15 Current Issues Crim. Just. 136; Toni Makkai, "The Emergence of Drug Treatment Courts in Australia" (2002) 37 Substance Use & Misuse 1567; Philip Bean, "Drug Treatment Courts, British Style: The Drug Treatment Court Movement in Britain" (2002) 37 Substance Use & Misuse 1595.

[25] For example, see *Defining Drug Courts: The Key Components* (Washington, D.C.: U.S. Department of Justice, 1997); *The Ten Guiding Principles of DWI Courts* online: National Drug Court Institute <http://www.ndci.org/pdf/Guiding_Principles_of_DWI_Court.pdf>.

[26] For example, see Faye S. Taxman & Jeffrey Bouffard, "Treatment Inside the Drug Treatment Court: The Who, What, Where, and How of Treatment Services" (2002) 37 Substance Use & Misuse 1665.

[27] For example, see Clare Cappa, "The Social, Political and Theoretical Context of Drug Courts" (2006) 32 Monash U.L. Rev. 145; Peggy Fulton Hora, "A Dozen Years of Drug Treatment Courts: Uncovering Our Theoretical Foundation and the Construction of a Mainstream Paradigm" (2002) 37 Substance Use & Misuse 1469; John S. Goldkamp, Michael D. White & Jennifer B. Robinson, "Context and Change: The Evolution of Pioneering Drug Courts in Portland and Las Vegas (1991–1998) (2001) 23 Law & Pol'y 141.

[28] For example, see Trent Oram & Kara Gleckler, "An Analysis of the Constitutional Issues Implicated in Drug Courts" (2006) 42 Idaho L. Rev. 471; Andrew Armstrong, "Drug Courts and the De Facto Legalization of Drug Use for Participants in Residential Treatment Facilities" (2003) 94 J. Crim. L. & Criminol. 133.

ethical[29] implications of participation in DTCs; etc. Literature evaluating DTCs includes commentary praising[30] and criticizing[31] the establishment of DTCs and research on DTCs.

Research on DTCs can also be sorted into various categories. For example, there is research on implementing DTCs;[32] research on participants'[33] and practitioners'[34] perceptions of DTCs; research on participants' characteristics in DTCs;[35] research on the role of judges in DTCs;[36] research on factors associated

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[29] For example, see Karen Freeman-Wilson, Robert Tuttle & Susan P. Weinstein, *Ethical Considerations for Judges and Attorneys in Drug Court* (Alexandria, V.A.: National Drug Court Institute, 2001); Joshua Matt, "Jurisprudence and Judicial Roles in Massachusetts Drug Courts" (2004) 30 New Eng. J. on Crim. & Civ. Confinement 151 at 173-174; William H. Simon, "Criminal Defenders and Community Justice: The Drug Court Example" (2003) 40 Am. Crim. L. Rev. 1595. Also see Richard C. Boldt, "Rehabilitative Punishment and the Drug Court Movement" (1998) 76 Wash. U.L.Q. 1205; Cait Clarke & James Neuhard "'From Day One': Who's In Control As Problem-Solving and Client-Centered Sentencing Take Center Stage?" (2004) 29 N.Y.U. Rev. L. & Soc. Change 11.

[30] For example, see Lynne M. Brennan, "Drug Courts: A New Beginning for Non-Violent Drug-Addicted Offenders – An End to Cruel and Unusual Punishment" (1998) 22 Hamline L. Rev. 355; James R. Brown, "Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?" (1997) 23 New England J. on Crim. & Civ. Confinement 63.

[31] For example, see Eric J. Miller, "Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism" (2004) 64 Ohio St. L.J. 1479; John F. Anderson, "What to do about 'much ado' about drug courts?" (2001) 12 Int'l J. Drug Pol'y 469; Morris B. Hoffman, "The Drug Court Scandal" (2000) 78 N.C.L. Rev. 1437.

[32] For example, see David E. Olson, Arthur J. Lurigio & Stephanie Albertson, "Implementing the Key Components of Specialized Drug Treatment Courts: Practice and Policy Considerations" (2001) 23 Law & Pol'y 171; Sam Torres & Elizabeth Piper Deschenes, "Changing the System and Making It Work: The Process of Implementing Drug Courts In Los Angeles County" (1997) 19 Just. Sys. J. 267.

[33] For example, see Douglas B. Marlowe, *et al.*, "Perceived Deterrence and Outcomes in Drug Court" (2005) 23 Behav. Sci. & L. 183; Christine A. Saum *et al.*, "Drug Court Participants' Satisfaction with Treatment and the Court Experience" in vol. 4 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 2002) at 39; Laura Sian Cresswell & Elizabeth Piper Deschenes, "Minority & Non-Minority Perceptions of Drug Court Program Severity and Effectiveness" (2001) 31 Journal of Drug Issues 259; Susan Turner *et al.*, "Perceptions of Drug Court: How Offenders View Ease of Program Completion, Strengths and Weaknesses, and the Impact on Their Lives" in vol. 2 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 1999) at lviii.

[34] For example, see Stephanie Taplin, *The New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002); T.K. Logan *et al.*, "A Drug Court Process Evaluation: Methodology and Findings" (2000) 44 Int'l J. Off. Ther. & Comp. Crim. 369.

[35] For example, see Thomas F. Garrity *et al.*, "Correlates of Subjective Stress Among Drug Court Clients" (2006) 50 Int'l J. Off. Ther. & Comp. Crim. 269.

with drug use, arrest, retention, and/or successful participation in DTCs;[37] research on treatment offered in DTCs;[38] research on effects of participation in DTCs on criminal recidivism[39] and other measures, such as health and general

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[36] For example, see Douglas B. Marlowe, David S. Festinger & Patricia A. Lee, "The Judge is a Key Component of Drug Court" in vol. 4 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 2004) at 1; Sally L. Satel, "Observational Study of Courtroom Dynamics In Selected Drug Courts" in vol. 1 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 1998) 56.

[37] For example, see Adele Harrell & John Roman, "Reducing Drug Use and Crime among Offenders: The Impact of Graduated Sanctions" (2001) 31 Journal of Drug Issues 207; Elaine Wolf & Corey Colyer, *Increasing Our Understanding of the Recovery Process Through Drug Court Narratives, Technical Report* (Washington, D.C.: U.S. Department of Justice 1999); John S. Goldkamp, Michael D. White & Jennifer B. Robinson, "Do Drug Courts Work? Getting Inside the Drug Court Black Box" (2001) 31 Journal of Drug Issues 27; Roger H. Peters, Amie L. Haas & Mary R. Murrin, "Predictors of Retention and Arrest in Drug Courts" in vol. 2 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 1999) at xxx; John R. Hepburn & Angela N. Harvey, "The Effect of the Threat of Legal Sanction on Program Retention and Completion: Is That Why They Stay in Drug Court?" (2007) 53 Crime & Delinquency 255; John S. Goldkamp, Michael D. White & Jennifer B. Robinson, "Do Drug Courts Work? Getting Inside the Drug Court Black Box" (2001) 31 Journal of Drug Issues 27; Merith Cosden *et al.*, "Effects of Motivation and Problem Severity on Court-Based Drug Treatment" (2006) 52 Crime & Delinquency 599; Douglas B. Marlowe *et al.*, "Are Judicial Status Hearings a Key Component of Drug Court? During-Treatment Data From a Randomized Trial" (2003) 30 Criminal Justice and Behavior 141; David S. Festinger *et al.*, "Status hearings in drug court: when more is less and less is more" (2002) 68 Drug and Alcohol Dependence 151; Clifford A. Butzin, Christine A. Saum & Frank R. Scarpitti, "Factors Associated with Completion of a Drug Treatment Court Diversion Program" (2002) 37 Substance Use & Misuse 1615; Christine A. Saum, Frank R. Scarpitti & Cynthia A. Robbins, "Violent Offenders in Drug Court" (2001) 31 Journal of Drug Issues 107; J. Mitchell Miller & J. Eagle Shutt, "Considering the Need for Empirically Grounded Drug Court Screening Mechanisms" (2001) 31 Journal of Drug Issues 91; Mara Schiff & W. Clinton Terry III, "Predicting Graduation from Broward County's Dedicated Drug Treatment Court" (1997) 19 Just. Sys. J. 291.

[38] For example, see Faye S. Taxman & Jeffrey A. Bouffard, "Substance abuse counselors' treatment philosophy and the content of treatment services provided to offenders in drug court programs" (2003) 25 Journal of Substance Abuse Treatment 75; Elizabeth A. Peyton & Robert Gossweiler, *Treatment Services in Adult Drug Courts: Report on the 1999 National Drug Court Treatment Survey* (Washington, D.C.: U.S. Department of Justice, 2001).

[39] For example, see Alyson L. Galloway & Laurie A. Drapela "Are Effective Drug Courts an Urban Phenomenon? Considering Their Impact on Recidivism Among a Nonmetropolitan Adult Sample in Washington State" (2006) 50 Int'l J. Off. Ther. & Comp. Crim. 280; Nancy Rodriguez & Vincent J. Webb, "Multiple Measures of Juvenile Drug Court Effectiveness: Results of a Quasi-Experimental Design" (2004) 50 Crime & Delinquency 292; Toni Makkai & Keenan Veraar *Final Report on the South East Queensland Drug Court* (Canberra: Australian Institute of Criminology, 2003); Linda Truitt *et al.*, *Evaluating Treatment Drug Courts in Kansas City, Missouri and Penascola, Florida: Final Reports for Phase I and Phase II* (Washington, D.C.: U.S. Department of Justice, 2003); Shelley Johnson Listwan *et al.*, "The Effect of Drug Court Programming on Recidivism: The Cincinnati Experience" (2003) 49 Crime & Delinquency 389; John S. Goldkamp, Michael D. White & Jennifer B. Robinson, *From Whether to How Drug Courts Work: Retrospective Evaluation of Drug Courts in Clark County (Las Vegas) and Multnomah County (Portland): Phase II Report from the National Evaluation of Drug Courts (I)* (Philidelphia: U.S.

well-being;[40] research on costs of participating in DTCs;[41] research on DTC funding;[42] etc. In addition, some research on DTCs has been combined in articles,[43] reports,[44] reviews,[45] and meta-analyses.[46]

Department of Justice, 2001); Roger H. Peters & Mary R. Murrin, "Effectiveness of Treatment-Based Drug Courts in Reducing Criminal Recidivism" (2000) 27 Criminal Justice and Behavior 72; Steven Belenko, Jeffrey A. Fagan & Tamara Dumanovsky, "The Effects of Legal Sanctions on Recidivism in Special Drug Courts" (1994) 17 Just. Sys. J. 53.

[40] For example, see Karen Freeman, *New South Wales Drug Court Evaluation: Health, Well-being and Participant Satisfaction* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002).

[41] For example, see Shannon M. Carey & Michael W. Finigan, "A Detailed Cost Analysis in a Mature Drug Court Setting: A Cost-Benefit Evaluation of the Multnomah County Drug Court" (2004) 20 Journal of Contemporary Criminal Justice 315; John Roman & Adele Harrell, "Assessing the Costs and Benefits Accruing to the Public from a Graduated Sanctions Program for Drug-Using Defendants" (2001) 23 Law & Pol'y 237; Adele Harrell, Shannon Cavanagh & John Roman, *Final Report: Findings from the Evaluation of the D.C. Superior Court Drug Intervention Program* (Washington, D.C.: Urban Institute, 1998); *Dedicated Drug Court Pilots: A Process Report* (London, U.K.: Ministry of Justice, 2008) at 34-40.

[42] For example, see James W. Douglas & Roger E. Hartley, "Sustaining Drug Courts in Arizona and South Carolina: An Experience in Hodgepodge Budgeting" (2004) 25 Just. Sys. J. 75.

[43] For example, see J. Scott Sanford & Bruce A. Arrigio, "Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns" (2005) 49 Int'l J. Off. Ther. & Comp. Crim. 239; Susan Turner *et al.*, "A Decade of Drug Treatment Court Research" (2002) 37 Substance Use & Misuse 1489; Lana D. Harrison & Frank R. Scarpitti, "Introduction: Progress and Issues in Drug Treatment Courts" (2002) 37 Substance Use & Misuse 1441; William M. Burdon *et al.*, "Drug Courts and Contingency Management" (2001) 31 Journal of Drug Issues 73; Barry Mahoney, "Drug Courts: What Have We Learned So Far?" (1994) 17 Just. Sys. J. 127.

[44] For example, see Michael W. Finigan & Shannon M. Carey, *Analysis of 26 Drug Courts: Lessons Learned, Final Report* (Portland: U.S. Department of Justice, 2001); Susan Turner *et al.*, *National Evaluation of 14 Drug Courts* (Washington, D.C.: U.S. Department of Justice, 2001); *Drug Courts: Information on a New Approach to Address Drug-Related Crime* (Washington, D.C.: United States General Accounting Office, 1995); *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997); *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* (Washington, D.C.: United States General Accounting Office, 2005).

[45] For example, see Steven Belenko, "Research on Drug Courts: A Critical Review" in vol. 1 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 1998) at 10; Steven Belenko, "Research on Drug Courts: A Critical Review 1999 Update" in vol. 2 *National Drug Court Institute Review* (Alexandria, V.A.: National Drug Court Institute, 1999) at 1; Steven Belenko, *Research on Drug Courts: A Critical Review 2001 Update* (New York: National Center on Addiction and Substance Abuse, 2001).

[46] For example, see David B. Wilson, Ojmarrh Mitchell & Doris L. MacKenzie, "A systematic review of drug court effects on recidivism" (2006) 2 Journal of Experimental Criminology 459; Jeff Latimer, Kelly Morton-Bourgon & Jo-Anne Chrétien, *A Meta-Analytic Examination of Drug Treatment Courts: Do they Reduce Recidivism?* (Ottawa: Department of Justice Canada, 2006). Meta-analyses are statistical analyses of a group of studies that analyze relationships between two or more of the same variables. Meta-analyses are regarded as a superior method of research because concerns regarding the use of small sample sizes in single studies are overcome by synthesizing results of a group of studies and because results are expressed quantitatively. The outcome of meta-analyses is effect size estimates (ESEs), or the estimated effect of the

Despite the vast literature on DTCs, there is little evidence substantiating that participation in DTCs is more efficient at reducing criminal recidivism than case processing in traditional courts and corrections. Yet DTCs were commenced to redress the perceived ineffectiveness with which crime is reduced in traditional courts and corrections.

While there is literature suggesting mechanisms for improving DTC research methods,[47] most research on DTCs has not been conducted using sound methods. Randomized experiments and cost-benefit or cost-effectiveness analyses are the most informative means of analyzing the efficacy with which participation in DTCs reduces criminal recidivism.

In randomized DTC experiments, eligible accused interested in participating in DTCs are randomly assigned to DTCs or traditional courts for

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independent variable on the dependent variable. For example, an average effect size estimate of +0.10 means the independent variable accounted for a 10% change in the dependent variable. One limitation of meta-analyses however, is publication bias: the tendency to include published studies only. This bias may be overcome by including unpublished studies, articles, government and non-government reports, etc. in meta-analyses. For further information on meta-analyses see Robert Rosenthal, *Meta-analytic procedures for social research* (Newbury, C.A.: Sage, 1991).

[47] For example, see Douglas B. Marlowe *et al.*, "A National Research Agenda for Drug Courts: Plotting the Course for Second-Generation Scientific Inquiry" in vol. 5 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 2006) at 1; Cary Heck & Meridith H. Thanner, "Drug Court Performance Measurement: Suggestions from the National Research Advisory Committee" in *Drug Court Review* vol. 5 (Alexandria, V.A.: National Drug Court Institute, 2006) at 33; Cary Heck & Meridith H. Thanner, "Evaluating Drug Courts: A Model for Process Evaluation" in *Drug Court Review*, vol. 5 (Alexandria, V.A.: National Drug Court Institute, 2006) at 51; Michael Rempel, "Recidivism 101: Evaluating the Impact of Your Drug Court" in *Drug Court Review*, vol. 5 (Alexandria, V.A.: National Drug Court Institute, 2006) at 83; Charles Michael Johnson & Shana Wallace, "Critical Elements to Consider for Methodologically Sound Impact Evaluations of Drug Court Programs" in vol. 4 *Drug Court Review* (Alexandria, V.A.: National Drug Court Institute, 2004) at 35; Steven Belenko, "The Challenges of Conducting Research in Drug Treatment Court Settings" (2002) 37 Substance Use & Misuse 1635; Douglas Longshore *et al.*, "Drug Courts: A Conceptual Framework" (2001) 31 Journal of Drug Issues 7; Jeffrey Tauber & Kathleen R. Snavely, *Drug Courts: A Research Agenda* (Alexandria, V.A.: National Drug Court Institute, 1999).

case processing.[48] All accuseds' demographics, drug use, criminal history, and other confounding variables correlated with recidivism are measured.[49] Any significant differences between accused randomly assigned to DTCs and traditional courts are controlled using statistical methods. Distinctions in case processing between accused assigned to DTCs and traditional courts are also observed.[50] After a sufficient follow-up period, outcomes such as rates of re-offending, re-arrest, re-conviction, and/or re-sentencing between accused randomly assigned to DTCs and traditional courts are compared.[51] Statistically significant differences are determined and attributed to distinctions in case processing accused in DTCs and traditional courts.[52]

In cost-benefit analyses of DTCs, social benefits and costs of operating or participating in DTCs are assigned monetary value (monetized). Social benefits include reductions in recidivism while social costs include case processing costs in DTCs. The net benefit of DTCs is subsequently determined by subtracting total social costs from total social benefits and may be compared to net benefits of case processing in traditional courts.

Social costs of participation in DTCs and traditional courts are also monetized in cost-effectiveness analyses. However, effects of participation are not monetized in cost-effectiveness analyses. Rather, effects of participation in DTCs and traditional courts are expressed in non-monetary units. Differences between

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[48] Accused randomly assigned to DTCs are commonly referred to as treatment groups while accused randomly assigned to traditional courts are collectively known as control groups.
[49] Confounding variables are unmeasured items that may influence results of experiments.
[50] Distinctions in case processing between DTCs and traditional courts are known as independent variables.
[51] Measured outcomes are called dependent variables.
[52] For further information on randomized experiments see Robert F. Boruch, *Randomized Experiments for Planning and Evaluation: A Practical Guide* (Thousand Oaks, C.A.: Sage, 1997).

social costs and effects of participation in DTCs and traditional courts are subsequently provided as a ratio of monetized social costs per units.[53] The advantage of using cost-effectiveness analyses over cost-benefit analyses in DTC evaluations is avoidance of assigning value to social benefits that are difficult to monetize.[54]

Time, expense, and legal and ethical implications, etc. may deter some researchers from using randomized experiments and cost-benefit or cost-effectiveness analyses to evaluate DTCs.[55] As such, some research on DTCs fails to incorporate control groups.[56] Other research on DTCs includes inappropriate control groups and compares rates of recidivism of accused participating in DTCs with retrospective samples of accused not participating in DTCs,[57] with accused ineligible for participation in DTCs,[58] with eligible accused not participating in

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[53] For example, in the DTC context, effectiveness may be expressed as a ratio of social costs per crime prevented.

[54] For further information on cost-benefit and cost-effectiveness analyses see Anthony E. Boardman *et al.*, *Cost-Benefit Analysis: Concepts and Practice*, 3d ed. (Upper Saddle River, N.J.: Person Prentice Hall, 2006).

[55] Anthony E. Boardman *et al.*, *Cost-Benefit Analysis: Concepts and Practice*, 3d ed. (Upper Saddle River, N.J.: Person Prentice Hall, 2006) at 7-14; David P. Farrington & Brandon C. Welsh, "Randomized experiments in criminology: What have we learned in the last two decades?" (2005) 1 Journal of Experimental Criminology 9 at 10; Robert F. Boruch, Timothy Victor & Joe S. Cecil, "Resolving Ethical and Legal Problems in Randomized Experiments" (2000) 46 Crime & Delinquency 330; David Weisburd, "Randomized Experiments in Criminal Justice Policy: Prospects and Problems" (2000) 46 Crime & Delinquency 181.

[56] *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 121-123.

[57] *Drug Courts: Information on a New Approach to Address Drug-Related Crime* (Washington, D.C.: United States General Accounting Office, 1995) at 63, 66-67; *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 105-106, 126-128.

[58] *Drug Courts: Information on a New Approach to Address Drug-Related Crime* (Washington, D.C.: United States General Accounting Office, 1995) at 64-66; *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 107-108.

DTCs,[59] or with eligible accused terminated from DTCs.[60] Various confounding variables correlated with criminal recidivism make all of these groups of accused inappropriate control groups.[61] Still, other research on DTCs does not include sufficient follow-up periods, measuring rates of recidivism during but not following participation in DTCs[62] or after an insignificant period following participation in DTCs.[63] In the absence of appropriate follow-up periods, limited information can be drawn from results of these experiments.

This literature review summarizes results from three methodologically sound evaluations of the effects of participation in commonwealth DTCs on criminal recidivism and the costs of participating in DTCs.[64] Conclusions

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[59] *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 106-107, 112-113.

[60] *Drug Courts: Information on a New Approach to Address Drug-Related Crime* (Washington, D.C.: United States General Accounting Office, 1995) at 67-68; *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 102-103, 123-125.

[61] Retrospective samples of accused not participating in DTCs are inappropriate control groups because differences in substantive criminal laws or Crown or police discretion to arrest, charge, and prosecute individuals over time may affect reported results. Accused ineligible for participation in DTCs, eligible accused not participating in DTCs, and eligible accused terminated from DTCs are all inappropriate control groups because pre-existing differences in personal characteristics correlated to criminal recidivism between treatment groups and control groups, such as drug use, criminal history, motivation to change, etc., may affect reported results. Robert F. Boruch, *Randomized Experiments for Planning and Evaluation: A Practical Guide* (Thousand Oaks, C.A.: Sage, 1997); David P. Farrington & Brandon C. Welsh, "Randomized experiments in criminology: What have we learned in the last two decades?" (2005) 1 Journal of Experimental Criminology 9 at 9-10.

[62] *Drug Courts: Information on a New Approach to Address Drug-Related Crime* (Washington, D.C.: United States General Accounting Office, 1995) at 63-64; *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 107-110.

[63] *Drug Courts: Information on a New Approach to Address Drug-Related Crime* (Washington, D.C.: United States General Accounting Office, 1995) at 67-68; *Drug Courts: Overview of Growth, Characteristics, and Results* (Washington, D.C.: United States General Accounting Office, 1997) at 114-115.

[64] Denise C. Gottfredson *et al.*, "Long-term effects of participation in the Baltimore City drug treatment court: Results from an experimental study" (2006) 2 Journal of Experimental Criminology 67; Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55; Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002).

regarding the crime reduction effectiveness of DTCs can be drawn from this research.

Randomized Experiments and Cost-Benefit/Cost-Effectiveness Analyses of Commonwealth DTCs

Maricopa County, Arizona Drug Court Experimental Evaluation by Deschenes, Turner, and Greenwood

Like other DTC programs, the Maricopa County, Arizona First Time Drug Offender (FTDO) program aimed to increase the availability of treatment and probation supervision to convicted drug offenders. While there is some dispute whether the FTDO program constituted a DTC, because the program included drug treatment, drug testing, intensive probation supervision, judicial progress or status hearings, and graduated sanctions for noncompliance with program requirements,[65] for the purposes of this literature review, the FTDO program is considered a DTC.

All first time drug offenders convicted of felony (more serious) offences and sentenced to probation were eligible to participate in the FTDO program.[66] Unlike other felony drug offenders sentenced to probation in Maricopa County, Arizona, offenders participating in the FTDO program were required to attend multi-phase drug treatment and have their progress in drug treatment reviewed by

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[65] Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 59.

[66] For example, offenders may have been convicted of possession of marijuana, dangerous drugs, narcotics, and drug paraphernalia. Offenders previously convicted of non-drug felony offences were not precluded from participating in the FTDO program. However, offenders convicted of drug sales or transportation and offenders requiring intensive supervision and residential treatment were not permitted to participate in the program. Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 58-59.

judges at monthly status hearings. In addition, offenders participating in the FTDO program were also required to honour a behavioural contract. The contract specified a point system of rewards and sanctions for program compliance and noncompliance to help motivate offenders to continue treatment. As specified in the contract, offenders earned points by attending drug treatment, contacting probation officers,[67] and testing negative for drug use.[68] Upon earning a sufficient number of points, offenders were rewarded with reductions in the length of sentences of probation. While the program was designed to last 6-12 months, most offenders were sentenced to 36 months probation and two months deferred jail.[69]

To evaluate the FTDO program, researchers randomly assigned offenders eligible to participate in the FTDO program to the FTDO program (the treatment group) or standard probation (the control group). In total, 176 offenders were randomly assigned to the FTDO program and 454 offenders were randomly assigned to standard probation.[70]

Following random assignment, researchers observed offenders for a period of 12 months, collecting data on their demographic characteristics, drug use, and

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[67] Offenders were required to contact probation officers by telephone once per week. Probation officers also attended offenders' monthly status hearings. Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 58-59, 65.

[68] Offenders were randomly drug tested for cocaine, heroin, alcohol, etc. Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 59, 65-68.

[69] Deferred jail typically consists of a period of community supervision that results in a return to custody if breached. Actual length of participation in the program was not reported. Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 58-59.

[70] Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 60-62.

criminal offending from probation files and other records. Researchers reported no statistically significant differences in demographic characteristics, drug use, or criminal histories between offenders randomly assigned to the FTDO program and offenders randomly assigned to standard probation at the commencement of the 12-month period.[71]

Several distinctions in the implementation of conditions of probation were reported for offenders randomly assigned to the FTDO program and offenders randomly assigned to standard probation. For instance, significantly more offenders randomly assigned to the FTDO program attended treatment than offenders randomly assigned to standard probation.[72] Offenders randomly assigned to the FTDO program also contacted probation officers more frequently than offenders randomly assigned to standard probation.[73] In addition, offenders randomly assigned to the FTDO program were subjected to slightly less frequent drug testing than offenders randomly assigned to standard probation.[74]

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[71] Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 60-64.

[72] The majority of offenders randomly assigned to the FTDO program attended outpatient treatment (88%) and self-help groups such as Alcoholics or Narcotics Anonymous (72%). Few offenders randomly assigned to the FTDO program participated in inpatient residential treatment (3%). Conversely, 10% of offenders randomly assigned to standard probation attended outpatient treatment, 38% attended self-help groups, and 10% attended inpatient treatment. These differences were statistically significant at .05. This means that the probability that these differences were due to chance was less than one in 20. Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 66-67.

[73] On average, offenders randomly assigned to the FTDO program reported to probation officers twice per month via telephone, while offenders randomly assigned to standard probation reported once per month to probation officers in person. These findings were also statistically significant at .05. Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 65-66.

[74] Offenders randomly assigned to the FTDO program were drug tested at random once per month, while offenders randomly assigned to standard probation were drug tested 1-2 times per month. These findings were also statistically significant at .05. Elizabeth Piper Deschenes, Susan Turner

Despite these distinctions in conditions of probation, no statistically significant differences in rates of re-arrest or re-conviction between offenders randomly assigned to the FTDO program and standard probation were reported. Researchers therefore concluded that while the FTDO program met its aim of increasing treatment and probation supervision for felony drug offenders, its effects on recidivism were not "encouraging".[75]

Researchers did not conduct a cost-benefit or cost-effectiveness analysis of the FTDO program. They nevertheless indicated that "because the program did not decrease recidivism, it is not clear whether increased treatment and court supervision of probationers are cost-effective."[76]

Baltimore City DTC Evaluation by Gottfredson et al.

The Baltimore City DTC was established in response to a report estimating that the majority of crime in Baltimore City was fuelled by drug addiction. Like other DTCs, offenders participating in the Baltimore City DTC received drug treatment,[77] intensive probation supervision,[78] drug testing,[79]

& Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 65-67.

[75] Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 69-72.

[76] Elizabeth Piper Deschenes, Susan Turner & Peter W. Greenwood, "Drug Court or Probation?: An Experimental Evaluation of Maricopa County's Drug Court" (1995) 18 Just. Sys. J. 55 at 72.

[77] Treatment consisted of inpatient treatment, outpatient treatment, methadone maintenance, etc. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 69, 71.

[78] Offenders were required to meet with probation officers three times per month. In addition, probation officers made visits to offenders' residences twice per month. Denise C. Gottfredson *et*

graduated sanctions for noncompliance with DTC obligations, etc.[80] In addition, offenders were required to report to DTC for progress or status hearings.[81]

Offenders convicted of both felony (more serious) and misdemeanor (less serious) drug offences and sentenced to probation were eligible to participate in the Baltimore City DTC. Participation in the DTC was designed to last two years.[82]

To evaluate the effects of the Baltimore City DTC on recidivism, researchers randomly assigned all offenders eligible to participate in the DTC to the DTC or standard probation. In total, 139 offenders were randomly assigned to the DTC and 96 offenders were randomly assigned to standard probation.[83]

Researchers observed the offenders for a period of 36 months following random assignment. During this time researchers collected data on offenders' demographic characteristics, criminal offence history, drug treatment and testing, probation supervision, judicial monitoring, and time incarcerated. Data was

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al., "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 70.

[79] Offenders were initially drug tested twice per week. After demonstrating increasing compliance with DTC requirements, offenders were drug tested once per week, once per month, etc. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 70-71.

[80] Graduated sanctions included increased contact with probation officers, status hearings, drug testing, etc. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 71.

[81] Offenders were required to report to court twice per month for progress or status hearings. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 71.

[82] Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 69-70.

[83] Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 73-74.

collected from official records of the Maryland Department of Public Safety and Correctional Services and the Baltimore Substance Abuse Systems, Inc. No statistically significant differences between offenders randomly assigned to the DTC and offenders randomly assigned to standard probation were reported at the commencement of the 36-month follow-up period.[84]

Researchers reported a number of distinctions in the implementation of conditions of probation between the groups of offenders during this period. To begin, offenders randomly assigned to the DTC received more treatment than offenders randomly assigned to standard probation.[85] In addition, offenders randomly assigned to the DTC were drug tested more frequently than offenders randomly assigned to standard probation.[86] Offenders randomly assigned to the DTC also attended more status hearings than offenders randomly assigned to standard probation.[87]

Researchers subsequently reported statistically significant differences in

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[84] Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 73-77.

[85] In total, 71.2% of offenders randomly assigned to DTC and 27.1% of offenders randomly assigned to standard probation received some treatment. These results were statistically significant at .01. This means that the probability that these results were the result of chance is less than one in 100. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 81-82.

[86] 86.9% of offenders randomly assigned to DTC and 40.2% of offenders randomly assigned to standard probation were drug tested at least once. These results were also statistically significant at .01. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 80.

[87] 84.2% of offenders randomly assigned to DTC and 7.3% of offenders randomly assigned to standard probationers attended at least one status hearing. On average, offenders randomly assigned to DTC attended 10.4 status hearings, while offenders randomly assigned to standard probation attended 0.6 status hearings. These results were also statistically significant at .01. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 80-81.

recidivism between offenders randomly assigned to the Baltimore City DTC and offenders randomly assigned to standard probation. On average, offenders randomly assigned to the DTC were less likely to be re-arrested and re-charged for new offences and for drug offences than offenders randomly assigned to standard probation during the 36-month follow-up period. Offenders randomly assigned to DTC were arrested for new offences 2.3 times and charged for new offences 4.4 times (on average). In comparison, offenders randomly assigned to standard probation were arrested for new offences 3.4 times and charged for new offences 6.1 times (on average).[88]

As a more precise measure of recidivism, researchers excluded time spent in custody and re-calculated differences in arrest rates between offenders randomly assigned to the Baltimore City DTC and offenders randomly assigned to standard probation. Researchers reported that offenders randomly assigned to DTC averaged 3.8 new arrests per 1000 days at-risk of re-offending in the community. Offenders randomly assigned to standard probation averaged 5.8 new arrests over the same period.[89]

In addition, researchers calculated statistically significant differences in recidivism rates during and after participation in Baltimore City DTC for offenders randomly assigned to DTC and over comparable time periods for offenders randomly assigned to standard probation. Researchers reported that

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[88] These results were statistically significant at .01. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 82-83.

[89] These results were statistically significant at .01. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 82-83.

offenders randomly assigned to DTC averaged 0.45 new arrests per 100 days at-risk of re-offending in the community while participating in DTC. Offenders randomly assigned to standard probation averaged 0.66 new arrests per 100 days at-risk of re-offending in the community over a comparable time period. In addition, offenders randomly assigned to DTC averaged 0.32 new arrests per 100 days at-risk of re-offending in the community following participation in DTC. Offenders randomly assigned to standard probation averaged 0.56 new arrests per 100 days at-risk of re-offending in the community over a comparable time period.[90]

Researchers also determined which Baltimore City DTC processes likely contributed to these reductions in recidivism by calculating statistically significant differences in rates of recidivism for distinct groups of offenders randomly assigned to DTC over the 36-month follow-up period. Researchers reported that offenders randomly assigned to DTC who received more treatment were re-arrested less often than offenders randomly assigned to DTC who received less treatment; that offenders randomly assigned to DTC who were subjected to more drug testing were re-arrested less often than offenders randomly assigned to DTC who were not drug tested; and that offenders randomly assigned to DTC who attended more status hearings were re-arrested less often than offenders randomly assigned to DTC who attended fewer status hearings. Specifically, offenders randomly assigned to DTC who attended 179 or more days of certified treatment were arrested an average of 1.40 times over the 36-month follow-up period, while

[90] These results were statistically significant at .05. Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 83-84.

offenders randomly assigned to DTC who attended 1-178 days of certified treatment were arrested an average of 1.68 times over the 36-month follow-up period, and offenders randomly assigned to DTC who did not attend certified treatment were arrested an average of 3.28 times over the 36-month follow-up period. Offenders randomly assigned to DTC who were subjected to at least one drug test were arrested an average of 1.92 times over the 36-month follow-up period, while offenders randomly assigned to DTC who were not drug tested were arrested an average of 5.24 times over the 36-month follow-up period. Finally, offenders randomly assigned to DTC who attended 11 or more status hearings were arrested an average of 1.70 times, while offenders randomly assigned to DTC who attended 0-10 status hearings were arrested 2.84 times over the 36-month follow-up period.[91]

All of these results lead researchers to conclude that participation in the Baltimore City DTC lead to reductions in criminal recidivism and that these reductions persisted following participation in the DTC. Researchers also concluded that higher levels of key DTC processes (drug treatment, drug testing, and judicial monitoring) are associated with greater reductions in criminal recidivism.[92]

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[91] Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 84-87.

[92] Denise C. Gottfredson *et al.*, "Long-term Effects of Participation in the Baltimore City Drug Treatment Court: Results from an Experimental Study" (2006) 2 Journal of Experimental Criminology 67 at 88-93.
Researchers subsequently posited that life-course theory and procedural-justice theory may explain these effects. In accordance with life-course theory, social controls, such as employment and strong social bonds with anti-criminal associates, etc. promote the cessation of drug use and criminal offending amongst adult offenders. Following this theory, researchers explained that offenders are required to build relationships or social bonds with judges at status hearings in

Researchers evaluating the Baltimore City DTC did not complete a cost-benefit or cost-effectiveness analysis of the DTC. A cost-effectiveness evaluation of the Baltimore City DTC was completed by Crumpton *et al.* However, this evaluation was not conducted using a randomized experiment.[93] As such, results of this evaluation are not discussed.

New South Wales Drug Court Evaluation by Lind et al.

The NSW drug court commenced operating following legislative enactment. In addition to establishing the drug court, the *Drug Court Act* outlines eligibility and other criteria for participation in the drug court.[94]

In accordance with the *Drug Court Act*, in order to participate in the NSW drug court, amongst other criteria, offenders must plead guilty to a drug-related offence other than violent offences, sexual assaults, or drug trafficking offences and be "highly likely" to be sentenced to incarceration. In addition, all eligible offenders must complete a two week period of detoxification from drugs in jail

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DTCs, including the Baltimore City DTC. These bonds help motivate offenders to desist from using drugs and committing crime because offenders do not want to lose the respect and support of DTC judges. However, researchers also acknowledged that graduated sanctions help motivate offenders to refrain from drug use and criminal activity. In accordance with procedural-justice theory, individuals are more willing to accept unfavourable decisions when they perceive fairness in the decision-making process. Researchers indicated that while procedural-justice theory may play a role in reducing recidivism in DTCs, there was less evidence supporting this supposition. Denise C. Gottfredson *et al.*, "How Drug Treatment Courts Work: An Analysis of Mediators" (2007) J. Res. Crime Delinq. 3.

[93] Crumpton *et al.* used a random sampling technique to calculate the crime reduction effectiveness of the Baltimore City DTC for use in the cost analysis of the DTC. Dave Crumpton *et al.*, *Cost Analysis of Baltimore City, Maryland Drug Treatment Court* online: NPC Research <http://www.npcresearch.com/Files/Baltimore%20City%20Drug%20Court%20Analysis.pdf>.

[94] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 7; *Drug Court Act 1998* (N.S.W.). Also see *Drug Court Amendment Act 1999* (N.S.W.); *Drug Court Amendment Act 2002* (N.S.W.).

prior to participating in the NSW drug court.[95]

Following completion of the detoxification period and other assessments, offenders eligible for participation in the NSW drug court are released from custody. Sentencing is suspended for the duration of participation in the drug court which is expected to last approximately one year.[96]

Offenders are required to provide urine samples for drug testing;[97] attend drug counselling, multi-phase treatment, and progress or status hearings,[98] etc.; and abide by guidelines that specify behaviours which can result in rewards and sanctions for compliance and noncompliance with NSW drug court requirements.[99] Offenders may be terminated from the drug court if "there is no useful purpose to be served" in continuing their participation.[100]

To evaluate the NSW drug court, the availability of in-custody detoxification beds determined whether offenders eligible for participation in the

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[95] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 7-8; Ruth Lawrence & Karen Freeman, "Design and Implementation of Australia's First Drug Court" (2002) 35 Austl. Crim. & N.Z.J. 63 at 68.

[96] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 9-10; Ruth Lawrence & Karen Freeman, "Design and Implementation of Australia's First Drug Court" (2002) 35 Austl. Crim. & N.Z.J. 63 at 68, 71.

[97] Offenders are initially required to submit urine samples for drug testing randomly at least twice per week. Ruth Lawrence & Karen Freeman, "Design and Implementation of Australia's First Drug Court" (2002) 35 Austl. Crim. & N.Z.J. 63 at 71; Stephanie Taplin, *New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 41-42.

[98] In the NSW drug court, progress or status hearings are called "report-backs". Initially, offenders are required to report-back on their progress in the NSW drug court weekly. Thereafter, offenders attend drug court once every second week and once every month to report-back. Stephanie Taplin, *New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 19, 31-32.

[99] Rewards and sanctions include changes in the frequency of counselling, drug treatment, and drug testing, etc. Stephanie Taplin, *New South Wales Drug Court Evaluation: A Process Evaluation* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 37-41.

[100] Ruth Lawrence & Karen Freeman, "Design and Implementation of Australia's First Drug Court" (2002) 35 Austl. Crim. & N.Z.J. 63 at 68, 71.

drug court were randomly assigned to the drug court or traditional court. All eligible offenders were assigned to the drug court when there were a sufficient number of detoxification beds for offenders seeking participation in the drug court. However, eligible offenders were randomly assigned to the drug court or traditional court when the number of offenders seeking participation in the drug court exceeded the number of available detoxification beds. In total, 309 offenders were randomly assigned to the drug court (the treatment group), while 191 offenders were randomly assigned to traditional court (the control group).[101]

Recidivism was measured in time to first drug-related offence and frequency of drug-related offences following random assignment. Drug-related offences included theft, break, enter, and steal; fraud; larceny; motor vehicle theft; unlawful possession of stolen goods; possession or use of opiates, cannabis, other drugs; and dealing or trafficking in opiates. Since all offenders spent some time in custody detoxifying, recidivism was calculated in elapsed time and free time. Elapsed time comprised the entire follow-up period. Free time consisted of time offenders spent out of custody. Offenders randomly assigned to the drug court were observed for an average follow-up period of 369 elapsed days and 243 free days. Conversely, offenders randomly assigned to traditional court were observed for an average follow-up period of 294 elapsed days and 145 free days.[102]

The gender, age, previous imprisonment, and prior convictions of offenders randomly assigned to the drug court and traditional court were

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[101] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 8, 11, 14-15.
[102] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 16, 36.

compared using data contained in a drug court database maintained by drug court staff as well as data from the Department of Corrective Services and the Bureau of Crime Statistics and Research. Gender was the only reported significant difference between offenders randomly assigned to the drug court and offenders randomly assigned to traditional court. Researchers controlled the effects this difference might have on results using statistical analyses.[103]

Researchers reported few significant differences in the time to first offence and the frequency of offences committed by offenders randomly assigned to the drug court and offenders randomly assigned to traditional court at the conclusion of the follow-up period. In the elapsed time analysis, offenders randomly assigned to the drug court took significantly longer to commit any drug offence than offenders randomly assigned to the traditional court. The average elapsed time to the first drug offence was 569 days for offenders randomly assigned to the drug court and 516 days for offenders randomly assigned to traditional court.[104] In the free time analysis, offenders randomly assigned to the drug court took significantly longer than offenders randomly assigned to traditional court to commit a shop stealing and first possession or use of opiates offence. The average time to first shop stealing offence was 537 free days for offenders randomly

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[103] In total, 254 males and 55 females were randomly assigned to the drug court. In contrast, 172 males and 19 females were randomly assigned to traditional court. However, one offender randomly assigned to the drug court and 31 offenders randomly assigned to traditional court spent the entire follow-up period in custody. These accused were subsequently excluded from the analysis. The statistically significant difference in gender between the two groups was 0.016. This means that the probability that these results were due to chance was less than one in 6.25. Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at vii, 16-17, 35, 37.

[104] The statistically significant difference in time to first drug offence between the two groups was .041. This means that the probability that these results were due to chance was less than one in 24.39. Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 37, 40-43.

assigned to the drug court and 469 free days for offenders randomly assigned to traditional court.[105] The average time to first possession or use of opiates offence was 561 free days for offenders randomly assigned to the drug court and 511 free days for offenders randomly assigned to traditional court.[106] The only significant difference in offending frequency between offenders randomly assigned to the drug court and offenders randomly assigned to traditional court was for fraud. Offenders randomly assigned to the drug court had a higher offending rate for fraud than offenders randomly assigned to traditional court. On average, offenders randomly assigned to the drug court committed 0.5 fraud offences in one year of elapsed time while offenders randomly assigned to traditional court committed 0.1 fraud offences over the same elapsed time period.[107]

Researchers subsequently determined the relative cost-effectiveness of the NSW drug court following standard costing techniques from a "provider" or government perspective. Researchers first identified the activities to be included in the cost-effectiveness analysis and the volume of government resources used to provide the activities. Thereafter, they applied a standard cost to estimate the value of the government resources. The following activities were included in the analysis: detoxification and drug treatment costs; drug court appearance costs;

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[105] The statistically significant difference in time to first shop stealing offence between the two groups was 0.016. This means that the probability that these results were due to chance was less than one in 62.5. Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 37-40.
[106] The statistically significant difference in time to first possession or use of opiates offence was 0.022. This means that the probability that these results were due to chance was less than one in 45.45. Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 37-40.
[107] The statistically significant difference in average number of fraud offences between the two groups was .045. This means that the probability that these results were due to chance was less than one in 22.22. Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 44-45.

drug testing costs; costs of sanctioning accused; probation, parole, and sentencing costs; etc. Start-up costs for commencing the drug court and costs to offenders participating in the drug court were excluded from the analysis.[108]

Researchers reported daily costs calculated from the average length of participation in the drug court (including sentencing) for each offender randomly assigned to the drug court and the average length of sentence of incarceration for each offender randomly assigned to traditional court. Costs were measured from the time offenders were assessed for participation in the drug court to the time they completed the sentence for which they were assessed for participation in the drug court or December 31, 2000.[109]

Researchers reported that on average, it cost $144 daily to process an offender in the NSW drug court and $151 daily to process an offender in traditional court. The higher average cost per day per offenders randomly assigned to traditional court resulted primarily from the cost of incarceration.[110]

Researchers used sensitivity analysis to confirm the strength of these results. Sensitivity analysis is employed when there is uncertainty in estimations of the quantity or value of resources used. This analysis revealed little difference in the final costs reported by researchers.[111]

Researchers also calculated processing costs for two sub-groups of offenders randomly assigned to the drug court: offenders terminated from the drug

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[108] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 13-14, 17-34.
[109] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 17-18.
[110] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 56.
[111] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 59-60.

court for non-compliance with drug court conditions (the terminated treatment group) and offenders who graduated from the drug court during the follow-up period or remained in the drug court at the end of the follow-up period (the non-terminated treatment group). Of the 309 offenders randomly assigned to the NSW drug court, 195 had their involvement in the drug court terminated, 23 graduated from the drug court, and 91 were still participating in the drug court at the end of the follow-up period.[112]

Researchers reported higher average daily costs for offenders terminated from the drug court than offenders graduating from the drug court, and offenders continuing in the drug court. Researchers reported an average daily processing cost of $180 for an offender terminated from the drug court, $79 for an offender graduating from the drug court, and $113 for an offender continuing in the drug court (including sentencing). The higher average daily cost for offenders terminated from the drug court resulted in large part from the use of incarceration as a sanction and following termination from the drug court.[113]

From these values researchers concluded that the NSW drug court is as cost-effective as traditional court in reducing shop stealing and possession or use of opiates offences. Researchers also indicated that the efficiency of the NSW drug court may be improved by more timely termination of offenders failing to progress in drug court.[114]

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[112] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 45.
[113] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 56.
[114] Bronwyn Lind *et al.*, *New South Wales Drug Court Evaluation: Cost-Effectiveness* (Sydney: New South Wales Bureau of Crime Statistics and Research, 2002) at 66.

Conclusion

While there is a large body of literature on DTCs, with few exceptions, the effects of participation in DTCs on criminal recidivism and the costs of participating in DTCs have not been evaluated using randomized experiments and cost-benefit or cost-effectiveness analyses. These research methods are the most conclusive means of evaluating the crime reduction effectiveness and efficiency of participation in DTCs, respectively. Further methodologically sound research analyzing the efficacy of DTCs to reduce criminal recidivism is required.

The effects of participation on criminal recidivism in the Maricopa County FTDO program, the Baltimore City DTC, and the NSW drug court have been evaluated using randomized experiments. No statistically significant differences in rates of recidivism between offenders randomly assigned to DTC and offenders randomly assigned to traditional court were reported in the evaluation of the Maricopa County FTDO program. While few statistically significant differences in recidivism between offenders randomly assigned to DTC and offenders randomly assigned to traditional court were reported in the evaluations of the Baltimore City DTC and NSW drug court, these differences were not large.

The costs of participating in the NSW drug court have also been evaluated using cost-effectiveness analysis. While the NSW drug court is as cost-effective as traditional court for certain offences, the efficiency of the drug court may be improved by more timely termination of offenders who fail to progress in treatment from the drug court.

CHAPTER ONE

Effects on Criminal Recidivism and Costs of Participating in Traditional Canadian Courts and Corrections and in Toronto's DTC

Introduction

The extent to which traditional Canadian courts and corrections work to reduce criminal offending is difficult to ascertain. Historically, this difficulty stemmed from a dearth of research on the topic.[115]

While there has been a recent increase in criminal recidivism research in Canada, variable definitions and measures for crime make it difficult to determine the efficacy with which traditional Canadian courts and corrections lessen crime. Crime can be defined by rates of re-offence, re-arrest, re-charge, re-conviction, and/or recommitment to prison for any offence over any length of time. Depending on the definition, crime can be measured using self-reports, victimization reports, arrest reports, court reports, and/or corrections reports, etc.[116]

Finally, disputes regarding best practices for achieving crime reduction also make it difficult to ascertain the extent to which crime is moderated in traditional Canadian courts and corrections. Crime can be diminished by deterrence, rehabilitation, and incapacitation.[117] All of these means of combating

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[115] Nicolas Zay, "Gaps in Available Statistics on Crime and Delinquency in Canada" (1963) 29 The Canadian Journal of Economics and Political Science 75; Philip C. Stenning, "Criminal justice research and policy in Canada: Implications of public service reform" (1999) Can. J. Crim. 179 at 179.

[116] Tanya Nouwens, Larry Motiuk & Roger Boe, "So You Want to Know the Recidivism Rate" (1993) 5:3 Forum on Corrections Research 22; Harry Willbach, "What Constitutes Recidivism" (1942) 33 J. Crim. L. & Criminology 32.

[117] C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987) at 7-8.

crime are codified objectives of sentencing by virtue of s. 718.2 of the *Criminal Code*,[118] and all have been praised and criticized for use in punishing offenders in traditional courts and corrections.[119]

The efficacy with which crime is reduced in traditional Canadian courts and corrections and in Toronto's DTC is examined in this chapter of the thesis. First, explanations for why deterrence, rehabilitation, and incapacitation are not effectively working to reduce crime in traditional courts and corrections are offered. Following these accounts, the approach to tackling drug-related crime in Toronto's DTC is described along with results from a study on the crime reduction effectiveness of Toronto's DTC and the costs of participating in Toronto's DTC. It is acknowledged that participation in Toronto's DTC may decrease drug-related crime. However, this decline in recidivism may not exceed reductions in recidivism in traditional courts and corrections when Andrews' and Bonta's principles of "effective corrections interventions" are employed.[120] Moreover, it may be more costly to reduce drug-related crime in Toronto's DTC.

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[118] *Criminal Code*, R.S.C. 1985, c. C-46.

[119] For example, see Clayton C. Ruby *et al.*, *Sentencing*, 6th ed. (Markham, Ont.: Butterworths, 2004) at 7-16. To be clear, criminal dispositions are often blended to include more than one objective of sentencing and may include all three objectives of sentencing. For example, periods of incarceration may be imposed to temporarily incapacitate and prevent offenders from committing crime and to deter offenders and others from crime. Moreover, offenders sentenced to imprisonment may be offered rehabilitation programs to treat underlying motivations for criminal behaviour.

[120] D. A. Andrews & James Bonta, *The Psychology of Criminal Conduct*, 3d ed. (Cincinnati: Anderson, 2003) at 259-265.

Crime Reduction Effectiveness of Traditional Canadian Courts and Corrections

Deterrence

Deterrence may be accomplished a number of ways. Individuals may be specifically or generally deterred, formally deterred, and/or informally deterred from criminal offending. Criminal offenders may be specifically and formally deterred from crime following the imposition of punishment by the state for criminal offences. Other individuals who observe the state's response to crime may be generally deterred from committing criminal offences. Still, other individuals may be informally deterred from criminal offending by the shame or stigma associated with crime.[121]

Irrespective of the means, all deterrence is ostensibly attained, in part, through rational choice calculations. Individuals may be deterred from committing crime when they perceive that it is more certain than not that criminal offending will be detected and investigated; that this investigation will result in arrest, charge, prosecution, conviction, and punishment; and that the punishment imposed will be greater than the pleasure or reward of committing crime. The key to deterrence therefore rests in subjective perceptions of the certainty of sufficient punishment for criminal offences (punishment that outweighs the pleasure or reward of criminal offending).[122]

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[121] Wayne Renke, Book Review of *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* by A. von Hirsch *et al.*, (2001) 39 Alta. L. Rev. 597 at 599.
[122] C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987) at 7; Andrew Von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford, U.K.: Hart, 1999) at 3-8; James Q. Wilson &

Deterrence is difficult to achieve. Some individuals act on impulse, altogether failing to consider sanctions for criminal offending. Despite the state's response to crime, these individuals are not deterred from committing crime. Other individuals offend following assessments of the certainty of sufficient punishment for criminal offences, concluding that the rewards outweigh the sanctions for criminal offending.[123]

Traditional Canadian courts and corrections have several aspects that diminish the efficacy with which individuals are sufficiently punished for criminal offences. To begin, only a minority of the few crimes reported to police are successfully prosecuted. For example, while 2.8 million crimes were reported to police in 2003, only 310 000 (11%) were completed by way of conviction.[124] Discretion in sentencing also decreases the sufficiency of punishment for criminal offences. Section 717(1) of the *Criminal Code* allows judicial discretion in sentencing. It states:

> Where an enactment prescribes different degrees or kinds of

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Richard J. Herrnstein, *Crime and Human Nature* (New York: Simon & Schuster, 1985) at 375-401; James Q. Wilson, "Crime and Public Policy" in James Q. Wilson & Joan Petersilia, eds., *Crime* (San Francisco: Institute for Contemporary Studies, 1995) at 494. Sufficient punishment is not equated with severe punishment. On the contrary, there is a correlation between severe punishment and increases in crime. To illustrate, Spohn and Holleran compared recidivism rates for drug offenders sentenced to prison or probation for felony offences. Recidivism was measured over a four year period following sentencing and included re-arrest, re-charge, and re-conviction for new criminal offences. While differences in demographic and other characteristics between offenders sentenced to prison and offenders sentenced to probation were measured and reported, statistical analyses were used to control the confounding effects these differences might have had on the likelihood and timing of recidivism. Spohn and Holleran reported that offenders sentenced to imprisonment were 2.3 times more likely to be charged with a new offence and 1.8 times more likely to be convicted of a new offence than offenders sentenced to probation. These results were all statistically significant at 0.5 or greater. Cassia Spohn & David Holleran, "The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders" (2002) 40 Criminol. 329.

[123] James Q. Wilson & Richard J. Herrnstein, *Crime and Human Nature* (New York: Simon & Schuster, 1985) at 401, 515-516.

[124] "Section 7 Statistics: Important Facts to Communicate" online: Correctional Service of Canada <http://www.csc-scc.gc.ca/text/pblct/guideorateur/pdf/sec7_e.pdf>.

> punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts the person who commits the offence.[125]

The majority of offences in the *Criminal Code* prescribe different degrees of punishment. Moreover, no punishment in the *Criminal Code* is a mandatory minimum punishment unless expressly declared a minimum punishment. The majority of *Criminal Code* offences do not carry mandatory minimum punishments.[126] In addition, unlike other jurisdictions, such as the United States, for example, punishment for criminal offences is not dictated by presumptive sentencing guidelines or grids. In accordance with presumptive sentencing guidelines or grids, the intersection of the seriousness of an offence and the offenders' criminal history is the sentence imposed on the offender absent a "substantial and compelling reason" to depart from the sentence. Use of a weapon and passive participation in offences are amongst the "substantial and compelling reasons" to upwardly and downwardly depart from presumptive sentencing

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[125] R.S.C. 1985, c. C-46.

[126] For example, the following *Criminal Code* offences carry mandatory minimum punishments: high treason; certain firearms offences, sexual offences, child pornography, and prostitution offences; criminal negligence causing death; murder; manslaughter; impaired driving; etc. R.S.C. 1985, c. C-46, ss. 718.3(2), 47(4), 85(3), 92(3), 95(2), 96(2), 99(2), 100(2), 102(2), 103(2), 151-152, 153(1.1), 163.1, 170-171, 212(2), 220, 235-236, 239, 244, 255(1).
Parliament is amending the *Controlled Drugs and Substances Act*, 1996, c. 19 [*CDSA*] to create mandatory minimum sentences of imprisonment for certain drug trafficking, importing and exporting, and production offences. In accordance with the proposed amendment, judges are not required to impose the mandatory minimum punishments if accused successfully complete a drug treatment court program. Bill C-26, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 2d Sess., 39th Parl., 2007, cls. 1-5; *infra* note 222. Judges are required to impose mandatory firearms prohibitions for these offences under s. 109(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46. The Supreme Court of Canada held the imposition of mandatory firearms prohibitions following convictions for these offences constitutional and not a violation of the s. 12 *Charter* right to be free from cruel and unusual punishment in *R. v. Wiles*, 2005 SCC 84, [2005] 3 S.C.R. 895, 34 C.R. (6th) 370; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

guidelines or grids, respectively.[127] Starting point approaches to sentencing are used to determine the appropriate range of punishment for certain criminal offences. The starting-point approach to sentencing involves categorizing crimes into "typical cases"; determining a starting sentence for the typical case; and refining the sentence to reflect specific circumstances of the "actual" case.[128] Following the starting point approach to sentencing, the normative punishment for an offence is determined by comparing the offence to similar offences in other cases and by considering the seriousness and prevalence of the offence. The fit and appropriate punishment for the offence is obtained following consideration of the aggravating and mitigating circumstances.[129] Aggravating circumstances include previous convictions for criminal offences, while mitigating circumstances include the entry of an early guilty plea.[130] However, imposing a sentence that is less than a starting point is not necessarily a remedial error in law. In the absence of an error in principle, failure to consider a relevant factor, or overemphasis of appropriate factors, a sentence will only be overturned on appeal

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[127] Following Oregon's sentencing guidelines or grid, an offender convicted of simple drug possession with no previous criminal history is presumptively sentenced to 30-90 days imprisonment and 18 months probation. There is no specified downward departure from the presumptive sentence. Similarly, there is no specified maximum upward departure from the presumptive sentence of imprisonment. However, the maximum upward departure from the presumptive sentence of probation is six months. Online: Oregon Criminal Justice Commission <http://www.oregon.gov/CJC/SG.shtml>.
Under s. 10 of the *CDSA*, judges who do not sentence offenders convicted of certain drug offences to imprisonment must provide reasons for their decision. It may therefore be argued that these offences carry presumptive sentences of imprisonment. *Controlled Drugs and Substances Act*, 1996, c. 19.

[128] *R. v. Sandercock* (1985), 62 A.R. 382, 48 C.R. (3d) 154, 22 C.C.C. (3d) 79, 1985 CarswellAlta 190 at para. 7 (WLeC).

[129] For example, in Alberta, the starting point for unsophisticated armed robberies of small commercial establishments with no actual physical harm resulting to a victim is three years imprisonment. *R. v. Johnas* (*sub nom. R. v. Cardinal*) (1982), 41 A.R. 183, 32 C.R. (3d) 1, 2 C.C.C. (3d) 490, 1982 CarswellAlta 299 at para. 19 (WLeC).

[130] *R. v. Sandercock* (1985), 62 A.R. 382, 48 C.R. (3d) 154, 22 C.C.C. (3d) 79, 1985 CarswellAlta 190 at paras. 23-24 (WLeC).

if it is demonstrably unfit.[131]

The manner in which the media reports crime and punishment also makes deterrence difficult to accomplish. The media regularly reports that conviction rates for criminal offences are poor, undermining the perception of the certainty of sanctions for criminal offending. In addition, media accounts of crime and punishment typically focus on extraordinary offences committed by extraordinary offenders. Specific sensational crimes tend to be over-reported, while more voluminous yet mundane matters garner little media attention. When the media does report more common crimes and punishments, the descriptions are often short, provide little information about offences, offenders, and reasons for imposing sentences, and are not always accurate.[132]

Rehabilitation

Rehabilitation is accomplished when offenders' motivations are transformed and the desire to criminally offend is attenuated.[133] Previous research on lessening crime via rehabilitation yielded mixed results.

Martinson was the first to condemn rehabilitation as ineffective in reducing crime in the mid-1970s with his meta-analysis of over 200 American

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[131] *R. v. M. (T. E.)* (*sub nom. R. v. McDonnell*), [1997] 1 S.C.R. 948, 6 C.R. (5th) 531, 114 C.C.C. (3d) 436, 1997 CarswellAlta 213 at paras. 15-16, 32-33 (WLeC); *R. v. Shropshire*, [1995] 4 S.C.R. 227, 43 C.R. (4th) 269, 102 C.C.C. (3d) 193, 1995 CarswellBC 906 (WLeC); *R. v. M. (C. A.)*, [1996] 1 S.C.R. 500, 46 C.R. (4th) 269, 105 C.C.C. (3d) 327, 1996 CarswellBC 1000 (WLeC).

[132] *Sentencing Reform: A Canadian Approach: Report of the Canadian Sentencing Commission* (Ottawa: Canadian Govt. Pub. Centre, 1987) at 137; Julian V. Roberts & Anthony N. Doob, "News Media Influences on Public Views of Sentencing" (1990) 14 Law and Human Behavior 451 at 452-453.

[133] C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987) at 7-8.

studies of corrections interventions that showed "nothing worked."[134] Martinson was criticized for using poor research methodologies.[135] Subsequently, he renounced his view that "nothing works".[136]

More recent research has been conducted to determine the efficacy with which rehabilitation reduces criminal offending. Researchers have demonstrated that offenders completing treatment adhering to Andrews' and Bonta's principles of effective corrections interventions show reductions in rates of recidivism when compared to similar offenders not completing treatment adhering to these principles observed over the same period.[137]

Andrews' and Bonta's principles of effective corrections interventions follow three principles: risk, need, and responsivity. In accordance with these principles, offenders' risks for criminal offending are assessed using actuarial

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[134] Robert Martinson, "What works?—questions and answers about prison reform" (1974) 35 The Public Interest 22 at 48-50.

[135] For example, see Paul Gendreau, "Treatment in Corrections: Martinson was Wrong!" (1981) 22 Canadian Psychology 332.

[136] Robert Martinson, "New Findings, New Views: A Note of Caution Regarding Sentencing Reform" (1979) 7 Hofstra L. Rev. 243 at 244, 253-254.

[137] Di Placido *et al.*, showed that gang members who completed treatment adhering to Andrews' and Bonta's principles of risk, need, and responsivity were reconvicted of *Criminal Code* offences 20% less than gang members who did not complete treatment adhering to these principles. These results were statistically significant at 0.5. Researchers obtained these results after assigning incarcerated offenders to groups depending on completion of in-custody treatment interventions. Statistical differences in demographic characteristics between offenders were measured and no differences were reported. Chantal Di Placido *et al.*, "Treatment of Gang Members Can Reduce Recidivism and Institutional Misconduct" (2006) 30 Law and Human Behavior 93. Also see Craig Dowden, *A Meta-Analytic Examination of the Risk, Need and Responsivity Principles and their Importance Within the Rehabilitation Debate* (M.A. Thesis, Carleton University, 1998) [unpublished]; James Bonta, *Offender Rehabilitation: From Research to Practice* (Ottawa, Solicitor General of Canada, 1997); Don A. Andrews, "Criminal recidivism is predictable and can be influenced: An update" (1996) 8:3 Forum on Corrections Research 42; Paul Gendreau, Tracy Little & Claire Goggin, "A Meta-Analysis of the Predictors of Adult Offender Recidivism: What Works!" (1996) 34 Criminol. 575; D. A. Andrews, James Bonta & R.D. Hoge, "Classification for Effective Rehabilitation: Rediscovering Psychology" (1990) 17 Crim. Justice Behav. 19; D. A. Andrews *et al.*, "Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis" (1990) 28 Criminol. 369; Don A. Andrews, "Recidivism Is Predictable and Can Be Influenced: Using Risk Assessments to Reduce Recidivism" (1989) 1:2 Forum on Corrections Research 11.

instruments. The results of these assessments are used to deliver treatment to offenders. Low-risk offenders receive little or no treatment, medium-risk offenders receive moderate treatment, and high-risk offenders receive long-term, high-intensity treatment with relapse prevention. Offenders' dynamic (present and changeable) as opposed to static (past and immutable) criminogenic needs are targeted in treatment. Criminogenic needs increase the likelihood that individuals commit crime. Dynamic criminogenic needs include antisocial or pro-criminal attitudes, values, beliefs, and cognitive-emotional states; antisocial personality factors such as impulsiveness, risk-taking, and low self-control; poor educational and vocational achievement, below average verbal intelligence, and weak problem-solving skills; and associations with pro-criminal peers. Static criminogenic needs include age, gender, and ethnicity. Cognitive behavioural[138] or social learning[139] techniques are employed in response to offenders' criminogenic attitudes, beliefs, and social influences, etc. Using treatment tailored to individual characteristics, including ethnicity, gender, age, cognitive ability, mental health, learning style, motivation for change, ability to function in groups, etc., offenders are taught to identify and cope with triggers and high-risk situations that may lead to criminal offending.[140]

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[138] Cognitive behavioural therapy involves recognizing, questioning, and modifying anti-social thoughts, assumptions, beliefs, and behaviours. For information on cognitive behavioural therapy see Aaron T. Beck, *et al.*, *Cognitive Therapy of Substance Abuse* (New York: Guilford Press, 2001).

[139] Social learning or observational learning theory involves learning, retaining, and replicating pro-social behaviours exhibited by others. For information on social learning theory see Albert Bandura, *Social Learning Theory* (Englewood Cliffs, N.J.: Prentice Hall, 1977).

[140] D. A. Andrews & James Bonta, *The Psychology of Criminal Conduct*, 3d ed. (Cincinnati: Anderson, 2003) at 259-265; Gerald Thomas, "Taking the Principles of Effective Corrections Seriously in CSC's Approach to the Rehabilitation of Drug Abusing Prisoners" in *Perspectives on Canadian Drug Policy*, vol. 2 (Kingston, Ont.: John Howard Society of Canada, 2004) 127 at 127-

While two additional principles of effective corrections interventions have been identified by Andrews and Bonta, less research has been conducted validating these principles. The two additional principles of effective corrections interventions are: professional discretion and program integrity. Following these principles, the teaching styles of treatment providers are assessed and matched to the learning styles of offenders. Treatment providers are equipped with knowledge, experience, abilities, and personal characteristics to innovate and adjust interventions to fit offenders' individual characteristics and learning styles. Treatment providers are also expected to believe in the value of all human beings, the ability of people to change and grow in maturity, and the ability to be firm without abusing power. In addition, both treatment providers and corrections interventions are periodically assessed to ensure that Andrews' and Bonta's principles are applied correctly and consistently.[141]

Unlike deterrence, there are few features in traditional Canadian courts and corrections that diminish the efficacy with which rehabilitation can be achieved in individuals who consent to treatment. Treatment adhering to Andrews' and Bonta's principles can be administered both pre-adjudication, through bail or judicial interim release orders, for example;[142] and post-

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129; Mark Gornik, "Moving from Correctional Program to Correctional Strategy: Using Proven Practices to Change Criminal Behavior" online: National Institute of Corrections <http://www.nicic.org/pubs/2001/017624.pdf>.

[141] D. A. Andrews & James Bonta, *The Psychology of Criminal Conduct*, 3d ed. (Cincinnati: Anderson, 2003) at 264-265; Gerald Thomas, "Taking the Principles of Effective Corrections Seriously in CSC's Approach to the Rehabilitation of Drug Abusing Prisoners" in *Perspectives on Canadian Drug Policy*, vol. 2 (Kingston, Ont.: John Howard Society of Canada, 2004) 127 at 128-129.

[142] Judges must order accused to be released from custody on judicial interim release unless the Crown can show why their detention is necessary to ensure attendance in court, to protect the public from harm resulting from the commission of an offence, or to promote public confidence in

adjudication, through probation orders.[143] However, the only means available to judges to impose treatment on non-consenting adult individuals is conditional sentence orders.[144]

Post-adjudication treatment is overseen by sentence administrators. Sentence administration is a divided responsibility in Canada. Various provincial sentence administrators are responsible for supervising offenders remanded to custody or released from custody on conditions of judicial interim release while awaiting trial or sentencing; offenders sentenced to community dispositions, such as probation; and offenders sentenced to incarceration in provincial institutions for a period of two years less a day, including offenders sentenced to conditional sentence orders. Correctional Service of Canada (CSC) is responsible for supervising all other offenders sentenced to incarceration in federal penitentiaries for two years or longer.

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the administration of justice given the strength of the Crown's case and the prospect of the imposition of a lengthy period of imprisonment. *Criminal Code*, R.S.C. 1985, c. C-46, s. 515.

[143] The maximum length of a sentence of probation is three years. While probation may be imposed as a punishment along with a variety of other dispositions including fines, conditional discharges, and imprisonment; probation may not be combined with both a fine and a period of imprisonment as punishment for a single offence. In addition, probation may not be imposed with sentences of two years of imprisonment or longer. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 731, 732.2.

[144] Conditional sentences were introduced by Parliament in 1996 to reduce reliance on incarceration as a punishment. Conditional sentences allow convicted offenders who would otherwise be imprisoned to serve custodial sentences in the community under strict conditions of supervision. To be eligible for conditional sentences, offenders must be sentenced to a period of incarceration of less than two years in duration (excluding credit awarded for pre-trial detention); offenders must not pose a risk of harm to the community; and the offences for which offenders are being sentenced must not carry mandatory minimum sentences or be serious personal injury offences, terrorism offences, or criminal organization offences carrying maximum terms of imprisonment of ten years or longer. Serious personal injury offences involve "the use or attempted use of violence against another person, or conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person". Sexual assault, sexual assault with a weapon, and aggravated sexual assault are designated serious personal injury offences. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 742.1, 752; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, 30 C.R. (5th) 1, 140 C.C.C. (3d) 449, 2000 CarswellMan 32 at paras. 21-122, 127 (WLeC); *R. v. Fice*, 2005 SCC 32, [2005] 1 S.C.R. 742, 28 C.R. (6th) 201, 196 C.C.C. (3d) 97, 2005 CarswellOnt 1983 at para. 40 (WLeC).

The extent to which Andrews' and Bonta's principles of effective corrections interventions have been incorporated in treatment overseen by provincial sentence administrators is difficult to ascertain. There is no known comprehensive research or other literature on topic.

Since 1989, CSC has expended considerable effort incorporating Andrews' and Bonta's principles in treatment offered to offenders incarcerated in federal penitentiaries and offenders supervised in the community by CSC. However, several violations of these principles are apparent. To demonstrate, while CSC uses actuarial instruments to assess offenders' risk for re-offending and criminogenic needs, the predictive validity of some of these instruments worsens when used with women and Aboriginal offenders.[145] In addition, an insufficient number of intervention seats are available to Aboriginal offenders and offenders on parole in the community. Moreover, CSC has failed to ensure that interventions are always matched to offenders' needs. For instance, Weekes *et al.* indicated that nearly one-third of offenders enrolled in the Offender Substance Abuse Pre-Release Program, an intervention offered by CSC to federally incarcerated offenders with severe or intermediate substance abuse problems, had

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[145] Gerald Thomas, "Taking the Principles of Effective Corrections Seriously in CSC's Approach to the Rehabilitation of Drug Abusing Prisoners" in *Perspectives on Canadian Drug Policy*, vol. 2 (Kingston, Ont.: John Howard Society of Canada, 2004) 127 at 129-150; Cheryl Marie Webster & Anthony N. Doob, "Classification without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada" (2004) 46 Can. J. Criminal Crim. Justice 395; "Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women" (Ottawa: Canadian Human Rights Commission, 2003). CSC is responding to these inadequacies by developing more accurate gender and race-specific actuarial instruments. For example, see Kelley Blanchette & Kelly Taylor, *Development and Field-Test of a Gender-Informed Security Reclassification Scale for Women Offenders* (Ottawa: Correctional Service of Canada, 2005); Kelley Blanchette & Kelly Taylor, "Development and validation of a Security Reclassification Scale for women" (2004) 16:1 Forum on Corrections Research 28.

low substance abuse needs or no substance abuse problems.[146]

Incapacitation

Incapacitation reduces opportunities for criminal offending insofar as offenders are prevented from committing crime while imprisoned and supervised in the community.[147] Incapacitation may therefore be accomplished using incarceration and conditional supervision: statutory release, parole, and conditional sentences.

Incapacitation is a limited crime reduction strategy for several reasons. First, because of fixed-term sentences and the possibility of parole, offenders are released from custody.[148] Second, some offenders continue to offend while incapacitated. Third, the criminogenic effects of imprisonment, such as association with negative peers, unemployment, loss of familial ties, etc. may increase as opposed to decrease offenders' risk for criminal offending.[149] Fourth, incapacitation can be costly. For example, in 2003-2004, the average daily cost of incarcerating a single federal offender was $240.18, while the average daily cost of incarcerating a single provincial offender was $141.75 (excluding institutional

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[146] Gerald Thomas, "Taking the Principles of Effective Corrections Seriously in CSC's Approach to the Rehabilitation of Drug Abusing Prisoners" in *Perspectives on Canadian Drug Policy*, vol. 2 (Kingston, Ont.: John Howard Society of Canada, 2004) 127 at 129-150; John R. Weekes, Joel I. Ginsburg & Phil Chitty "Increasing offender participation in programs" (2001) 13:1 Forum on Corrections Research 21.

[147] C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (New York: Oxford University Press, 1987) at 8.

[148] *Code*, R.S.C. 1985, c. C-46, ss. 743.6, 745-746.

[149] *Report of the Auditor General of Canada* (Ottawa: Office of the Auditor General of Canada, 1996) online: Office of the Auditor General of Canada <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/96menu_e.html>.

operating costs).[150] In comparison, the average daily cost of supervising an offender in the community in 2002-2003 was $4.10.[151]

Crime Reduction Efficiency of Toronto's DTC

Toronto's DTC Processes

There are strict eligibility requirements for participation in Toronto's DTC. Only non-violent, drug-addicted accused who accept responsibility for offences and who consent to participate in DTC are eligible to participate in Toronto's DTC. While "violent" is not defined in the *Procedures Manual*, in accordance with the *Procedures Manual*, non-violent accused are accused who do not have criminal records of convictions for violent offences and who do not pose a risk of harm to themselves or others. Drug-addicted accused are accused with a "demonstrable" addiction to cocaine or heroin, and who used either drug within six months prior to their arrest.[152] Like "violent", "demonstrable" is not defined in the *Procedures Manual*. Accused charged with simple possession, possession for the purposes of trafficking, or trafficking in narcotics under the *CDSA*,[153] or prostitution-related offences under the *Criminal Code* are eligible to participate in

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[150] This difference in cost resulted in part from increased treatment interventions offered to offenders in federal institutions. Karen Beattie, *Adult Correctional Services in Canada, 2003/04* (Ottawa: Canadian Centre for Justice Statistics, 2005) at 15.

[151] Donna Calverley & Karen Beattie, *Community corrections in Canada: 2004* (Ottawa: Canadian Centre for Justice Statistics, 2005) at 15.

[152] Accused charged with cannabis-related offences are not eligible to participate in Toronto's DTC but may be eligible for diversion to other programs. *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 24, 33-38, 79-86.

[153] *Controlled Drugs and Substances Act*, 1996, c. 19, ss. 4(1), 5(1), 5(2).

Toronto's DTC.[154] Accused with a history of "serious" drug offences, such as commercial drug trafficking, breach offences (breaches of undertakings, probation, conditional sentences, etc.), offences involving persons under the age of 18 years, offences involving the consumption or possession of drugs in motor vehicles, and offences committed solely for commercial gain or as part of organized criminal activity are generally precluded from participating in Toronto's DTC.[155] Accused who accept responsibility for criminal offences are accused who plead guilty and/or who do not proceed to trial.[156]

Accused eligible for participation in Toronto's DTC must file signed copies of rule and waiver forms in Toronto's DTC. The rules mandate that they:

- attend court appearances and treatment obligations,
- consistently remain drug free (as evidenced by repeated negative drug tests),
- refrain from being re-arrested,
- be law-abiding, and
- comply with all DTC expectations and rules.

The waiver contains statements of some of the legal rights afforded to accused in traditional courts, including the right to be presumed innocent, the right to plead guilty or not guilty, the right to disclosure of evidence, the right to be tried within a reasonable time, etc. and statements that accused voluntarily relinquish these rights.[157] All accused participating in Toronto's DTC are also subjected to the following conditions of judicial interim release:

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[154] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 210-213.
[155] *Controlled Drugs and Substances Act*, 1996, c. 19, s. 5(1); *Criminal Code*, R.S.C. 1985, c. C-46, ss. 524, 733.1, 742.6.
[156] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 24, 33-38, 79-86.
[157] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 63-70.

- attend court appearances,
- attend and participate in drug treatment,
- attend for random and regular drug testing,[158]
- reside at an address directed by the court,
- abide by all curfew, boundary, and non-association conditions,[159]
- report new criminal charges incurred while participating in Toronto's DTC,
- sign appropriate releases/consents to obtain or disclose information to DTC practitioners,
- abstain from possessing and consuming illicit drugs and alcohol,
- report all prescription and non-prescription illicit drug and alcohol use and exposure to high-risk situations where non-prescription drugs are used, and
- be honest with all DTC practitioners.[160]

Before allowing eligible accused to participate in Toronto's DTC, a DTC judge reviews the voluntariness and motivation for accuseds' decision to apply to participate in DTC, and confirms that accused received legal advice from defence counsel prior to signing and filing the waiver in Toronto's DTC. In addition, the DTC judge ensures accused understand the rules and requirements for continued participation in DTC.[161]

Accused permitted to participate in Toronto's DTC are assigned to one of two tracks: Pre-Plea Track I or Post-Plea Track II. Accused assigned to Pre-Plea

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[158] Arguably, there are no express *Criminal Code* provisions enabling judges to impose these conditions of judicial interim release on non-consenting accused. See text accompanying notes 259-270.

[159] Curfews are conditions of judicial interim release requiring accused to remain in approved residences during certain hours of the day, most often hours of the evening when criminal activity occurs. Boundary conditions are conditions of judicial interim release requiring accused to refrain from attending certain locations, usually locations where criminal activity occurs. Non-association conditions are conditions of judicial interim release requiring accused to refrain from direct or indirect contact with individuals involved in criminal activity.

[160] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 63-69.

[161] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 14, 29-30.

Track I are typically charged with simple possession of cocaine or heroin and are not required to enter pleas of guilty to offences in Toronto's DTC. Accused assigned to Post-Plea Track II are typically charged with possession for the purposes of trafficking or trafficking cocaine or heroin and are required to plead guilty to one or more outstanding *Criminal Code* or *CDSA* offences in Toronto's DTC. Accused not permitted to participate in DTC are remanded to traditional courts for case processing.[162]

All accused participating in Toronto's DTC are also subjected to a 30-day probationary period. If at the conclusion of the 30-day probationary period accused are still deemed suitable for participation in Toronto's DTC, they become full participants. Conversely, if at the conclusion of the 30-day probationary period it is apparent that accused are not appropriate participants in Toronto's DTC, they may be sentenced by DTC judges (in accordance with traditional court processes), or apply to withdraw any guilty pleas entered and return to traditional courts for case processing.[163]

Accused receive treatment for cocaine and heroin addiction at the Centre for Addiction and Mental health (CAMH) while participating in Toronto's DTC. Cocaine treatment is divided into four phases and is delivered in group settings. Heroin treatment is delivered individually. Addictions to other substances, such as ecstasy and alcohol, are treated following cocaine and heroin treatment. While

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[162] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 76-77.

[163] No further information regarding the 30-day probationary period is provided in the *Procedures Manual*. It is therefore unknown what additional criteria are used to determine whether or not accused are appropriate for participation in DTC at the conclusion of the probationary period. *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 31.

treatment for cocaine and heroin addiction is explicitly outlined in the *Procedures Manual*, treatment for other substances is unclear.[164]

Accused are initially required to attend biweekly status hearings to have their progress in treatment evaluated in court by the DTC judge. The DTC judge and other practitioners encourage accused to advance in treatment using rewards and sanctions for compliance and non-compliance with treatment and other DTC obligations. Rewards include commendation, a reduction in the frequency of status hearings to once per week and once per month, etc. Sanctions include admonition, an increase in the frequency of status hearings and drug testing, revocation of judicial interim release, etc.[165]

Accused successfully participating in Toronto's DTC may graduate or be discharged from the DTC. To graduate from Toronto's DTC, accused must complete all phases of drug treatment; must remain drug free for four months (as evidenced by negative drug tests); must have stable housing; must be employed, involved in school or job training, engaged in volunteer work, or be a stay at home parent; and must have a strong community support network. Accused who make substantial progress in treatment but are unable to abstain absolutely from using drugs may be discharged from the DTC. Accused eligible for discharge from Toronto's DTC must have stable housing and must be employed. Upon graduation or discharge from Toronto's DTC, Pre-Plea Track I accuseds' criminal charges are stayed or withdrawn and no record of conviction for criminal offences

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[164] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 39-47.
[165] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 49-50.

results. Conversely, Post-Plea Track II accused are sentenced to probation upon graduation or discharge from Toronto's DTC. Accused receiving probation upon graduation or discharge from the DTC are required to continue to attend monthly status hearings. If accused are experiencing difficulty remaining drug-free, DTC judges may vary their terms of probation and increase the frequency with which they are required to attend status hearings.[166]

Accused who do not successfully participate in Toronto's DTC may be expelled from the DTC. For instance, accused who fail to attend treatment or status hearings, fail to provide urine samples for drug testing or tamper with urine samples or drug tests, fail to abstain from using drugs, offer to sell drugs, or incur new criminal charges may be expelled from Toronto's DTC. Accused expelled from Toronto's DTC are sentenced by a DTC judge to custodial or non-custodial dispositions.[167]

Accused may withdraw from Toronto's DTC at any time. Accused who withdraw from Toronto's DTC are returned to traditional courts for sentencing or other case processing.[168]

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[166] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 51-52. As established in an evaluation of Toronto's DTC, lack of affordable housing, employment, and support provide a barrier to graduation and discharge from DTC. Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 156.

[167] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 51, 66-68.

[168] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 67.

Toronto DTC Evaluation Project Final Report

In 2004, researchers with CAMH completed an evaluation of Toronto's DTC. They reported that at the conclusion of a three-year follow-up period, accused who participated in Toronto's DTC showed similar reductions in criminal recidivism as a comparable group of accused who did not participate in DTC. They also reported that costs of operating and sentencing accused participating in Toronto's DTC were greater than costs of case processing and sentencing accused in traditional Canadian courts and corrections.[169]

Researchers did not randomly assign accused to treatment and control groups to determine the crime reduction effectiveness of participating in Toronto's DTC. They indicated that "ethical and legal constraints" prohibited them from using a randomized experimental research design because randomly assigning accused to treatment and control groups would result in granting some accused judicial interim release while denying others release from custody on the basis of chance. Researchers therefore elected to assign accused to treatment and control groups based on participation in DTC, including attendance at CAMH for treatment.[170]

Researchers assigned accused to one of three treatment groups: a graduate group, expelled engaged group, or expelled non-engaged group; or to a control

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[169] Researchers evaluating Toronto's DTC also reported findings related to DTC processes, including perceptions of participation in Toronto's DTC, and other findings, such as effects of participation in Toronto's DTC on general health and well-being, social stability, and substance use, etc. Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 70-130, 148-149.

[170] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 60-69.

group referred to as the judicial comparison group. Accused assigned to the graduate group completed all requirements for graduation from Toronto's DTC, including all phases of treatment at CAMH. Accused assigned to the expelled engaged group did not complete all requirements for graduation from Toronto's DTC or all phases of treatment at CAMH. However, accused assigned to the expelled engaged group completed an intensive treatment phase at CAMH. Accused assigned to the expelled non-engaged group attended an initial court appearance in Toronto's DTC, attended a treatment assessment at CAMH, and re-appeared in Toronto's DTC at least once but did not complete requirements for graduation from Toronto's DTC or an intensive treatment phase at CAMH. Finally, accused assigned to the judicial comparison group attended an initial court appearance in Toronto's DTC and a treatment assessment at CAMH. However, accused assigned to the judicial comparison group failed to make any further appearances in Toronto's DTC, failed to complete any requirements for graduation from Toronto's DTC, and failed to complete any treatment at CAMH. In total, 365 accused were assigned to the experimental groups and 64 accused were assigned to the control group. Specifically, 57 accused were assigned to the graduate group, 78 accused were assigned to the expelled engaged group, and 230 accused were assigned to the expelled non-engaged group.[171]

Researchers subsequently measured demographic characteristics, drug use, criminal histories, and other characteristics correlated to criminal recidivism using court and treatment records for all accused assigned to all treatment and control

[171] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 60-69.

groups. Researchers reported that a statistically significant higher proportion of males were assigned to the treatment groups than the control group; that accused assigned to the treatment groups were, on average, almost five years older than accused assigned to the control group; that fewer accused assigned to the treatment groups were unemployed or likely to report criminal activity as their primary source of income than accused assigned to the control group; that accused assigned to the treatment groups had fewer past convictions for criminal offences and were less likely to be incarcerated at the time of application or first appearance in DTC than accused assigned to the control group; etc. Researchers used statistical methods to control for the effect these differences may have had on reported results of the evaluation and to confirm the significance of reported results of the evaluation.[172]

Researchers measured rates of recidivism for the majority of accused assigned to the treatment and control groups over a three-year follow-up period. Recidivism was measured using charges and convictions recorded in the Canadian Police Information Centre (CPIC) and the Integrated Courts Offences Network (ICON) computer databases. The CPIC database records the outcome of criminal charges for all accused in Canada, including convictions and sentences.[173] The ICON database provides information regarding criminal charges and convictions within the province of Ontario only. Missing data prevented researchers from reporting recidivism rates for all accused assigned to the treatment and control

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[172] These differences were statistically significant at .01 and .05. Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 88-93.

[173] For more information on CPIC see online: Canadian Police Information Centre <http://www.cpic-cipc.ca>.

groups. Researchers reported recidivism rates for 57 accused assigned to the graduate group, 69 accused assigned to the expelled engaged group, 218 accused assigned to the expelled non-engaged group, and all 64 accused assigned to the judicial comparison group. The follow-up period commenced when accused ceased to actively participate in the DTC program (on the date accused assigned to the graduate group graduated from the DTC program, on the date accused assigned to the expelled groups were expelled from the DTC program, and on the date accused assigned to the judicial comparison group failed to re-appear in Toronto's DTC).[174]

Researchers reported that all accused assigned to the treatment and control groups showed reductions in criminal charges and convictions over the three-year follow-up period. Reductions in criminal convictions were greater for accused assigned to the treatment groups than accused assigned to the control group one and two years following active participation/first appearance in Toronto's DTC. However, accused assigned to the treatment and control groups showed similar reductions in criminal convictions three years following active participation/first appearance in DTC.[175]

Researchers indicated that limited information prevented them from conducting a comprehensive cost-effectiveness evaluation of Toronto's DTC. Researchers compared estimated median costs of operating and sentencing

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[174] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 61-62, 65-67.

[175] Researchers also reported that more time elapsed before accused assigned to the treatment groups recidivated than accused assigned to the control group. These results were all statistically significant at .001. This means that the probability that these results were due to chance is less than one in 1000. Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 127-130.

accused participating in Toronto's DTC with case processing and sentencing costs in traditional Canadian courts and corrections. Cost-savings accruing from participation in Toronto's DTC were not included in the analysis. Data collected from DTC practitioners, Statistics Canada, Correctional Service of Canada, and Ontario court services were used to estimate the following costs: criminal justice costs (including court, lawyer, and custodial sanctions); treatment costs (including drug testing); and sentencing costs (including probation and incarceration). Start-up costs for commencing the DTC program, costs to accused participating in the DTC program, and costs of treatment provided by external agencies (other than CAMH) were excluded from the analysis. The median was chosen as the best descriptor of these costs as high costs associated with few accused skewed the average costs of participation in Toronto's DTC.[176]

Researchers reported higher costs of operating and sentencing accused in Toronto's DTC than case processing and sentencing accused in traditional Canadian courts and corrections. The increased costs of participation in Toronto's DTC resulted in large part from accuseds' attendance at treatment.[177]

Researchers ultimately concluded that participation in Toronto's DTC can result in reductions in recidivism for some accused. In addition, researchers noted that "there may be economic benefits [of participation in Toronto's DTC] that are measurable and achievable in the longer term" but were not included in the

[176] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 141-149.
[177] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 149.

present evaluation.[178]

Conclusion

Deterrence and incapacitation are ineffective means of reducing crime following conviction and punishment in traditional Canadian courts and corrections. The efficacy with which crime is reduced by deterrence in traditional courts and corrections is negatively impacted by low conviction rates and disparity in sentencing for criminal offences. The portrayal of crime and punishment in the media compounds these difficulties. The efficiency with which crime is reduced by incapacitation in traditional courts and corrections is also restricted by a number of factors including determinate punishments, criminogenic effects of incarceration, and cost.

Drug-related crime may be reduced following participation in Toronto's DTC. In a recent evaluation of Toronto's DTC, accused showed greater decreases in criminal convictions one and two years following active participation in Toronto's DTC than accused not participating in Toronto's DTC. However, all accused showed similar reductions in criminal convictions three years following active participation/first appearance in Toronto's DTC. Moreover, the immediate costs of operating and sentencing accused in Toronto's DTC appear to be greater than costs of case processing and sentencing accused in traditional Canadian courts and corrections. However, cost-savings accruing from the crime reduction

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[178] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 156-158.

effectiveness of participation in Toronto's DTC have not been evaluated.

Rehabilitation can be used to effectively reduce crime following conviction and punishment in traditional Canadian courts and corrections when offenders receive treatment adhering to Andrews' and Bonta's principles of effective corrections interventions. Effective corrections interventions can be provided to all accused that consent to obtain treatment both pre- and post-adjudication in traditional Canadian courts and corrections and to accused that do not consent to obtain treatment following conviction and punishment for criminal offences using conditional sentence orders.

CHAPTER TWO

Legal Effects of Participation in Toronto's DTC

Introduction

All accused have legal rights, including accused participating in Toronto's DTC. Legal rights are codified in enactments, such as the *Criminal Code*[179] and the *Canadian Charter of Rights and Freedoms* (*Charter*),[180] and clarified in case law.

All accused are also free to waive legal rights, including accused participating in Toronto's DTC. Accused may explicitly waive legal rights orally or in writing. Alternatively, accused may implicitly waive legal rights by certain conduct. For example, accused may waive the right to be tried within a reasonable time by consenting to adjournments of trial dates. However, accused cannot implicitly waive legal rights by silence, inadvertence, or acquiescence, as the criteria for waiving legal rights are onerous. To be valid, waivers of legal rights must be free and voluntary, clear and unequivocal, and "*with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process*".[181]

All accused waive legal rights to participate in Toronto's DTC. The statutory rights to plead not guilty and to be sentenced as soon as practicable are

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[179] *Criminal Code*, R.S.C. 1985, c. C-46.
[180] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[181] *Korponey v. Attorney General of Canada*, [1982] 1 S.C.R. 41, 26 C.R. (3d) 343, 65 C.C.C. (2d) 65, 1982 CarswellQue 7 at para. 16 (WLeC).

explicitly waived by accused participating in Toronto's DTC.[182] Accused may also implicitly waive constitutional rights to participate in Toronto's DTC, including the right to be sentenced within a reasonable time under s. 11(b) of the *Charter* and the right to be free from unreasonable search and seizure under s. 8 of the *Charter*.[183] Many accused waive legal rights to participate in Toronto's DTC in order to obtain drug treatment, to be released from custody on bail, and/or to obtain non-custodial sentences. While the waiver of these rights may be clear and unequivocal and with full knowledge of the rights and the effect the waiver will have on these rights, the waiver of these rights may not be voluntary.

The legal effects of participating in Toronto's DTC are examined in this chapter of the thesis. The discussion begins with a decision emanating from Toronto's DTC that held that an accused who signed and filed a waiver in Toronto's DTC voluntarily waived his right to plead not guilty.[184] Rulings from the Ontario Court of Appeal that cast doubt on the propriety of this decision are subsequently analyzed and suggest that accused may be induced into involuntarily waiving this right in Toronto's DTC.[185] The effect of inducements on implicit waivers of other legal rights, such as the constitutional rights to be sentenced within a reasonable time and to be free from unreasonable search and seizure, is subsequently addressed. Thereafter, forthcoming amendments to the *Criminal*

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[182] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 606(1), 720; *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 64-65.
[183] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[184] *R. v. Earle*, 2002 CarswellOnt 1083 (WLeC), [2002] O.J. No. 1584 (QL).
[185] *R. v. T. (R.)* (1992), 10 O.R. (3d) 514, 17 C.R. (4th) 247, 1992 CarswellOnt 117 (WLeC); *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323, 46 C.R. (4th) 111, 104 C.C.C. (3d) 225, 1996 CarswellOnt 73 (WLeC); *R. v. Djekic* (2000), 35 C.R. (5th) 346, 147 C.C.C. (3d) 572, 2000 CarswellOnt 2891 (WLeC).

Code and *CDSA* that may permit some legal rights to be infringed in Toronto's DTC are discussed.[186] In the event that these amendments do not withstand constitutional scrutiny, suggestions for modifying Toronto's DTC processes to comply with legal rights are provided.

Waiving Legal Rights in Toronto's DTC

The Statutory Right to Plead Not Guilty

The right to plead not guilty is enshrined in s. 606(1) of the *Criminal Code*. Thereafter s. 606(1.1) of the *Criminal Code* states: "a court may accept a plea of guilty only if it is satisfied that the accused is making the plea voluntarily".[187]

As indicated, all accused participating in Toronto's DTC must file a signed copy of the DTC waiver in DTC. Legal counsel and judges presiding in Toronto's DTC review the terms of the waiver with accused. The waiver specifies that accused will be released from custody to obtain drug treatment and that upon successful completion of the DTC program, accused will receive non-custodial sentences. The waiver also states that accused not participating in Toronto's DTC may be sentenced to jail.[188]

In *Earle*, an accused applied to withdraw involuntary guilty pleas to

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[186] Bill C-13, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, 2nd Sess., 39th Parl., 2007, cl. 35; Bill C-26, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 2d Sess., 39th Parl., 2007, cls. 1-5.
[187] *Criminal Code*, R.S.C. 1985, c. C-46.
[188] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 14, 29-30, 63-69.

offences entered in Toronto's DTC. The accused argued that the process by which he entered Toronto's DTC was evidence that he was coerced into pleading guilty to drug offences to obtain drug treatment. Past experience with the criminal justice system led the accused to believe that treatment was only available if he pled guilty to offences and was released from custody to participate in DTC. Otherwise he would remain in custody until trial and would fail to receive drug treatment.[189]

The presiding DTC judge relied on the following definition of coercion from *Black's Law Dictionary* to determine whether to allow the accused's application: "compelling by force of arms or threat...it may be implied...as where one party is constrained by subjugation to other to do what his *free will would refuse*".[190] Following this definition, the judge reasoned that "[f]or a plea to be coerced there must be some evidence that the defendant was forced to admit that he or she committed the offence".[191] After reviewing the transcripts of the proceedings and the accused's affidavit, the judge found no such evidence. He therefore held that there was "no basis to conclude that the promise of entering DTC amounted to coercion".[192]

However, the DTC judge failed to fully consider binding case law from the Ontario Court of Appeal. In *R. v. T. (R.) (T. (R.))*, the Ontario Court of Appeal indicated that coercion or oppression from a person in authority or the offer of a

[189] *R. v. Earle*, 2002 CarswellOnt 1083 at paras. 1-3, 9, 18 (WLeC), [2002] O.J. No. 1584 (QL).
[190] *R. v. Earle*, 2002 CarswellOnt 1083 at para. 19 (WLeC), [2002] O.J. No. 1584 (QL).
[191] *R. v. Earle*, 2002 CarswellOnt 1083 at para. 19 (WLeC), [2002] O.J. No. 1584 (QL).
[192] *R. v. Earle*, 2002 CarswellOnt 1083 at paras. 19-28 (WLeC), [2002] O.J. No. 1584 (QL).

plea bargain or other inducement may affect the voluntariness of a guilty plea.[193] Citing *T. (R.)*, the Court of Appeal subsequently set aside convictions following the entry of involuntary guilty pleas in *R. v. Rajaeefard* (*Rajaeefard*) and *R. v. Djekic* (*Djekic*).[194]

In *Rajaeefard*, an accused pled guilty to assault after his student lawyer informed him that the presiding judge would not grant an application to adjourn his trial and indicated that he could expect a sentence of probation if he pled guilty to the offence and incarceration if he was convicted of the offence post-trial. The majority of the Court of Appeal held that a number of circumstances induced the accused to plead guilty, including the fact that the presiding judge indirectly relayed this sentencing information to the accused through his student lawyer. In pronouncing its decision, the majority of the Court of Appeal adopted the following comment from *R. v. Dubien*:

> With great deference to a very experienced and able trial judge, I am of the view that it is not advisable for a judge to take any active part in discussions as to sentence before a plea has been taken, nor to encourage indirectly a plea of guilty by indicating what his sentence will be. ...[195]

While the minority of the Court of Appeal agreed with the majority that the judge's conduct was improper, the minority did not agree that the accused's guilty

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[193] (1992), 10 O.R. (3d) 514, 17 C.R. (4th) 247, 1992 CarswellOnt 117 at para. 17 (WLeC). While the DTC judge referred to *T. (R.)* for the principle that a guilty plea will not be rendered invalid by lack of full disclosure when full disclosure would not have affected the decision to plead guilty; he failed to consider *T. (R.)* for any other purpose. *R. v. Earle*, 2002 CarswellOnt 1083 at paras. 32, 40 (WLeC), [2002] O.J. No. 1584 (QL).

[194] *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323, 46 C.R. (4th) 111, 104 C.C.C. (3d) 225, 1996 CarswellOnt 73 (WLeC); *R. v. Djekic* (2000), 35 C.R. (5th) 346, 147 C.C.C. (3d) 572, 2000 CarswellOnt 2891 (WLeC).

[195] *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323, 46 C.R. (4th) 111, 104 C.C.C. (3d) 225, 1996 CarswellOnt 73 at para. 21 (WLeC); *R. v. Dubien* (*Dubien*) (1982), 27 C.R. (3d) 378, 67 C.C.C. (2d) 341, 1982 CarswellOnt 71 at para. 20 (WLeC). The issue to be determined in *Dubien* was whether the Attorney General could appeal an accused's sentence after Crown counsel indicated to the accused that he would not recommend an appeal of the sentence. The Court found that Crown counsel had no ability to bind the Attorney General to this position.

plea was caused by the judge's improper conduct. Rather, the minority indicated that the accused's decision to plead guilty could have been caused by any number of factors.[196]

In *Djekic*, an accused pled guilty to fraud after her counsel informed her that the presiding judge agreed to impose a sentence of probation and not take her into custody for an additional offence. In addition, the following exchange took place between the accused and the judge prior to the entry of her guilty plea:

> THE COURT: Try – ma'am, I – I – I can see that you're upset, but I also – I – I have not only a responsibility to be fair to you and I'm going to try to do that as best I can, but I've also got a whole day of court time coming up and at the moment I don't know how to say this politely, we had a pretrial, we discussed the issue with the Crown Attorney and your lawyer, who's very experienced, and we persuaded – your lawyer and the Crown lawyer with a little bit of help at the pretrial persuaded an officer not to arrest you just yet in the hope that we could work out something, but there's a charge there that is going to have to be dealt with unless we can work it out, today. So, you have got to get yourself under control and give some hard thought....
>
> MISS DJEKIC: Well, I didn't know I was coming here today for this.
>
> THE COURT: Well, you were lucky not to be coming in custody. So, I think you need to go and get under control and speak to your mother, get somebody to look after the child and give some really hard thought to this, today. All right? Thank you.[197]

As in *Rajaeefard*, the Court of Appeal considered a number of circumstances prior to deciding that the accused was unduly pressured to plead guilty to the offence, including the fact that the accused was at risk of being placed in custody and the fact that the judge, a person in authority, spoke to the accused in a manner

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[196] *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323, 46 C.R. (4th) 111, 104 C.C.C. (3d) 225, 1996 CarswellOnt 73 (WLeC).

[197] *R. v. Djekic* (2000), 35 C.R. (5th) 346, 147 C.C.C. (3d) 572, 2000 CarswellOnt 2891 (WLeC) at para. 4.

which pressured her to reach a decision regarding plea.[198]

Authors of two Canadian reports have similarly opined that judges ought not to discuss sentence with accused pre-plea. Authors of the *Sentencing Commission Report* explained:

> The basic concern with active judicial participation in plea bargaining is the erosion of a judge's role as an objective, non-partisan arbitrator. One rationale for involving the judge in the negotiation process is that it would enhance the intelligence of the guilty plea by informing the defendant of the anticipated sentence prior to entry of the plea. However, as one study notes, the actual effect of such intervention could have the opposite effect. This research suggests that because the judge is an authoritative, dominating figure in the process (which is confirmed by the results of the inmate survey in British Columbia concerning inmate perception of the importance of the judge in sentencing), the court's intervention could effectively coerce the accused into accepting the agreement and pleading guilty.[199]

Authors of the *Attorney General's Advisory Committee Report on Charge Screening, Disclosure, and Resolution Discussions* (the *Martin Report*) stated:

> 73. The Committee is of the opinion that a judge presiding at a pre-hearing conference should not be involved in plea bargaining in the sense of bartering to determine the sentence, or pressuring any counsel to change their position. The presiding judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low, or within an appropriate range.[200]

English courts have also adopted the view that judges ought not to relay certain sentencing information to accused pre-plea, specifically information that they can expect to receive a lesser sentence upon pleading guilty than the sentence

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[198] *R. v. Djekic* (2000), 35 C.R. (5th) 346, 147 C.C.C. (3d) 572, 2000 CarswellOnt 2891 (WLeC).
[199] *Sentencing Reform: A Canadian Approach: Report of the Canadian Sentencing Commission* (Ottawa: Canadian Govt. Pub. Centre, 1987) at 424-425. The source cited in the *Sentencing Commission Report* is "Plea Bargaining and the Transformation of the Criminal Process" (1977) 90 Harvard Law Rev. 564.
[200] *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Attorney General's Advisory Committee, 1993) at 365. Also see J. O. Wilson, *A Book for Judges* (Ottawa: Canadian Judicial Council, 1980) at 65-73.

they would receive following conviction at trial. In *R. v. Turner* (*Turner*), the Criminal Appeal Court indicated that:

> The Judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of Guilty he would impose one sentence but that on a conviction following a plea of Not Guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, are in the experience of the Court happily rare. What on occasions does appear to happen however, is that a judge will tell counsel that, having read the depositions and the antecedents, he can safely say that on a plea of Guilty he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of Not Guilty. Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done.
>
> The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads Guilty or Not Guilty, the sentence will or will not take a particular form, *e.g.*, a probation order or a fine, or a custodial sentence.[201]

Turner has been followed in a number of English decisions[202] and was recently revisited by the Criminal Appeal Court in *R. v. Goodyear* (*Goodyear*).[203] In *Goodyear* the Court held that a judge may state the maximum sentence likely to be imposed when this information is requested by accused. The judge may also indicate that the sentence will be the same if the accused pleads guilty or is found guilty following conviction at trial.[204]

All of these authorities suggest that accused are induced into entering

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[201] *R. v. Turner*, [1970] 2 All E.R. 281, 54 Cr. App. R. 352, 1970 WL 29826 at 360-361.
[202] See for example *R. v. Atkinson*, [1978] 2 All E.R. 460, 67 Cr. App. R. 200, 1978 WL 57251; *R. v. Cullen*, [1985] Crim. L. R. 107, 81 Cr. App. R. 17, 1985 WL 312497; *R. v. Keily*, [1990] Crim. L.R. 204, 11 Cr. App. R. (S.) 273, 1989 WL 651066; *R. v. Pitts*, 2001 WL 415508; *R. v. Wedlock-Ward* (*sub nom. Re Attorney General's Reference (No. 80 of 2005)*), 2005 WL 3635221.
[203] [2005] 3 All E.R. 117, 2 Cr. App. R. 20, 2005 WL 881822.
[204] *R. v. Goodyear*, [2005] 3 All E.R. 117, 2 Cr. App. R. 20, 2005 WL 881822 at 292-295.

involuntary guilty pleas to offences when judges inform them that they will not go to jail if they plead guilty to offences and may go to jail if they do not plead guilty to offences and are convicted of offences post-trial. The remedy for involuntary guilty pleas is a quashing of the convictions and setting aside of the guilty pleas.

There are a number of inducements that may invalidate the voluntariness of entering guilty pleas to offences in Toronto's DTC. The accused in *Earle* deposed that he entered guilty pleas to offences in order to be released from custody and to obtain treatment.[205] Similarly, researchers evaluating Toronto's DTC found that some accused participate in Toronto's DTC to be released from custody on bail, to obtain non-custodial sentences, and/or to obtain drug treatment.[206]

These inducements are distinct from inducements offered to accused engaged in plea negotiations in traditional courts. While accused may be offered reductions in the length or severity of sentences and/or release from custody in exchange for guilty pleas entered to offences in traditional courts, accused are not offered the benefit drug treatment.

On the contrary, there are facts which suggest that the accused's guilty plea was not induced in *Earle*. On the accused's own admission no one pressured him to participate in Toronto's DTC, he was not immediately released from custody upon entering guilty pleas in Toronto's DTC, and he made 46 appearances in Toronto's DTC without once asking to withdraw his guilty pleas.[207] However, the accused's claim was that he was induced to participate in

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[205] *R. v. Earle*, 2002 CarswellOnt 1083 at para. 30 (WLeC), [2002] O.J. No. 1584 (QL).
[206] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 109-110, 112.
[207] *R. v. Earle*, 2002 CarswellOnt 1083 at para. 28 (WLeC), [2002] O.J. No. 1584 (QL).

Toronto's DTC by DTC processes not practitioners or others. Moreover, the accused was aware that he would be released from custody after completing a previous custodial sentence.[208] Finally, DTC processes required the accused to continue to appear in Toronto's DTC and to maintain his guilty pleas. Otherwise he may have been returned to custody without drug treatment.[209]

The judgment in *Earle* is burdened with omissions. The judge failed to address inducements inherent in DTC processes. The judge also failed to consider relevant decisions from the Ontario Court of Appeal discussing the impropriety of judges providing certain sentencing information to accused prior to plea, particularly information that the accused will likely receive a lesser sentence following guilty plea than ensuing conviction at trial.

Fortunately the ruling in *Earle* does not prevent accused who involuntarily plead guilty to offences in Toronto's DTC from bringing applications to quash convictions and set aside guilty pleas at an appellate court level.[210] Emanating from the lowest level of trial court, the decision in *Earle* is not binding on any court. Given that *T. (R.)*, *Rajaeefard*, and *Djekic* are all judgments from the Ontario Court of Appeal, it is conceivable the judges presiding in this latter Court will not be persuaded by the reasons in *Earle.*

Inducements offered to accused in Toronto's DTC may invalidate the voluntariness of waivers of the right to plead not guilty. If waivers of legal rights

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[208] *R. v. Earle*, 2002 CarswellOnt 1083 (WLeC) at para. 28, [2002] O.J. No. 1584 (QL).
[209] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 65-67, 70.
[210] The authority for making an application to set aside convictions and guilty pleas for indictable (more serious) offences at the appellate court level is found in sections 675 and 686 of the *Criminal Code*, R.S.C. 1985, c. C-46.

are invalidated by inducements inherent in Toronto's DTC processes, the infringement of other legal rights must be assessed, including the statutory right to be sentenced as soon as practicable and the constitutional rights to be sentenced within a reasonable time and to be free from unreasonable search and seizure.

Infringing Other Legal Rights in Toronto's DTC

The Statutory Right to be Sentenced As Soon As Practicable

Section 720 of the *Criminal Code* provides that "[a] court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed."[211] Section 720 of the *Criminal Code* therefore precludes lengthy delays in sentencing.

Several appellate courts have admonished judges for delaying sentencing.[212] The Ontario Court of Appeal allowed an appeal against sentence in *R. v. Brookes* (*Brookes*) following a delay in sentencing of five months to "see how the respondent [accused] would conduct himself" and to await the introduction of certain amendments to the *Criminal Code*.[213] In delivering its

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[211] *Criminal Code*, R.S.C. 1985, c. C-46.

[212] *R. v. C. (A. B.)* (1991), 120 A.R. 106, 14 W.A.C. 106, 1991 CarswellAlta 772 at paras. 26-38 (WLeC); *R. v. Pasquayak*, 1999 ABCA 119, 1999 CarswellAlta 303 at paras. 4-5 (WLeC), [1999] A.J. No. 360 (QL); *R. v. Taylor* (1995), 137 Sask. R. 233, 104 C.C.C. (3d) 346, 1995 CarswellSask 413 at paras. 9-16 (WLeC); *R. v. Urton*, [1974] 5 W.W.R. 476, 1974 CarswellSask 73 at paras. 4-7 (WLeC); *R. v. Fuller* [1969], 67 W.W.R. 78, 3 C.C.C. 348, 1968 CarswellMan 67 at paras. 18-22 (WLeC); *R. v. Nunner* (*sub nom. R. v. A. P. N.*) (1976), 30 C.C.C. (2d) 199, 1976 CarswellOnt 932 (WLeC), [1976] O.J. No. 177 (QL); *R. v. Brookes*, [1970] 3 O.R. 159, 4 C.C.C. 377, 1970 CarswellOnt 2 at para. 4 (WLeC); *R. c. Brisson* (1989), 47 C.C.C. (3d) 474, 19 Q.A.C. 231, 1989 CarswellQue 131 at paras. 4-9 (WLeC); *R. v. B. (R.)* (1988), 13 Q.A.C. 15, 1988 CarswellQue 175 at para. 10 (WLeC); *R. v. Shea* (1980), 55 C.C.C. (2d) 475, 42 N.S.R. (2d) 218, 1980 CarswellNS 163 at para. 6 (WLeC); *R. v. Currie* (1979), 39 N.S.R. (2d) 397, 71 A.P.R. 397, 1979 CarswellNS 317 at para. 25 (WLeC).

[213] [1970] 3 O.R. 159, 4 C.C.C. 377, 1970 CarswellOnt 2 at para. 3 (WLeC).

reasons, the Court adopted the following passage from the Manitoba Court of Appeal in *R. v. Fuller*:

> ... This Court is firmly of the opinion, however, that sentencing should not be postponed for lengthy periods simply for the purpose of determining whether an accused will behave himself during the period of postponement. No such course of conduct is authorized by any provision of the *Criminal Code*.[214]

The Court also held that sentencing should not be postponed for any period of time to allow the *Criminal Code* to be amended.[215]

Brookes and *Fuller* were subsequently cited by the Ontario Court of Appeal in *R. v. Nunner* (*Nunner*).[216] In *Nunner*, a judge postponed sentencing a youth convicted of robbery for five months. The youth was simultaneously completing a sentence of probation with strict conditions for break and enter and theft. The judge intimated that the accused's compliance with these conditions would dictate whether he would be sentenced to a further period of probation or a period of incarceration for the robbery.[217]

While the Court of Appeal did not find that the judge acted without jurisdiction, the Court stated that any further postponement of sentencing would result in an order to compel the judge to immediately sentence the accused. The Court declared:

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[214] *R. v. Brookes*, [1970] 3 O.R. 159, 4 C.C.C. 377, 1970 CarswellOnt 2 at para. 3 (WLeC). In *Fuller*, a judge sentenced an accused to nine months imprisonment and directed that the warrant of committal be withheld for seven days during which time the accused left the province. The Court of Appeal held that withholding of the warrant of committal was illegal, an excess of jurisdiction, and a nullity, as Parliament intended that the warrant of committal be completed immediately following conviction. [1969], 67 W.W.R. 78, 3 C.C.C. 348, 1968 CarswellMan 67 at para. 12 (WLeC).

[215] *R. v. Brookes*, [1970] 3 O.R. 159, 4 C.C.C. 377, 1970 CarswellOnt 2 at para. 4 (WLeC).

[216] (*sub nom. R. v. A. P. N.*) (1976), 30 C.C.C. (2d) 199, 1976 CarswellOnt 932 at para. 6 (WLeC), [1976] O.J. No. 177 (QL).

[217] (*sub nom. R. v. A. P. N.*) (1976), 30 C.C.C. (2d) 199, 1976 CarswellOnt 932 at paras. 3-5 (WLeC), [1976] O.J. No. 177 (QL).

> ... I would also regard that any postponement of sentencing beyond, say, a month or two, as *prima facie* evidence of the exercise of judicial discretion for an illegal purpose and justifying *mandamus*.[218]

While the Court appreciated that the judge was aiming to ensure adequate supervision of the accused's compliance with conditions of probation, the Court also noted that the judge could have accomplished this goal using lawful means. The judge could have suspended sentence on the robbery and ordered the accused to abide by the same strict conditions on probation. In the event of a breach of the conditions, the accused could have been convicted and required to re-appear before the judge, who could have then sentenced the accused to custody for the robbery.[219]

In accordance with these appellate authorities, lengthy delays in sentencing may infringe the statutory right to be sentenced as soon as practicable. The remedy for delays in sentencing is an appeal against sentence.

Sentencing is delayed in Toronto's DTC until accused complete the DTC program or until they are discharged, expelled, or withdraw from the DTC program.[220] According to researchers evaluating Toronto's DTC, on average, accused take 12.2 months to complete the DTC program and participate in DTC for 4.1 months prior to being expelled. However, some accused take up to 23.8 months to complete the DTC program while others are expelled after participating

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[218] *R. v. Nunner* (*sub nom. R. v. A. P. N.*) (1976), 30 C.C.C. (2d) 199, 1976 CarswellOnt 932 at paras. 15-16 (WLeC), [1976] O.J. No. 177 (QL).
[219] *R. v. Nunner* (*sub nom. R. v. A. P. N.*) (1976), 30 C.C.C. (2d) 199, 1976 CarswellOnt 932 at paras.12, 21 (WLeC), [1976] O.J. No. 177 (QL).
[220] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) 51.

in DTC for 24.75 months.[221] Delays in sentencing some accused participating in Toronto's DTC may therefore infringe the statutory right to be sentenced as soon as practicable.

Parliament is currently amending the *Criminal Code* and the *CDSA* to enable judges to delay sentencing while accused participate in treatment. The following amendment to the *Criminal Code* has received third reading by the House of Commons and the Senate:

> **35. Section 720 of the Act is renumbered as subsection 720(1) and is amended by adding the following:**
>
> (2) The court may, with the consent of the Attorney General and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program.[222]

In addition, the first reading of the following amendment to the *CDSA* was passed by the House of Commons:

> **13. If Bill C-13, introduced in the 2nd session of the 39th Parliament and entitled *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)* (the "other Act"), receives royal assent, then, on the first day on which both section 35 of the other Act and subsection 5(2) of this Act are in force, subsections 10(4) and (5) of the *Controlled Drugs and Substances Act* are replaced by the following:**
>
> (4) A court sentencing a person found guilty of an offence under this Part may delay sentencing to enable the offender
>
> (*a*) to participate in a drug treatment court program approved by the Attorney General if the prosecutor consents and none of the factors described in clauses 5(3)(*a*)(i)(A) to (C) or in subparagraph 5(3)(*a*)(ii) have been proven in relation to the offence; or
>
> (*b*) to attend a treatment program under subsection 720(2) of the

[221] Researchers did not report the average length of participation in DTC prior to discharge or withdrawal from Toronto's DTC. Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 84.
[222] Bill C-13, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, 2nd Sess., 39th Parl., 2007.

Criminal Code.

> (5) If the offender successfully completes the drug treatment court program under paragraph (4)(*a*), the court is not required to impose the minimum punishment for the offence for which the person was convicted.[223]

At present there are no mandatory minimum punishments for offences prescribed in the *CDSA*. However, Parliament is also introducing mandatory minimum sentences for certain drug trafficking, importing and exporting, and production offences.[224]

If Toronto's DTC is included within the scope of these amendments, upon proclamation, delays in sentencing accused in Toronto's DTC will no longer infringe the *Criminal Code*.[225] However, delays in sentencing accused in Toronto's DTC may infringe the *Charter*.

The Constitutional Right to be Sentenced Within a Reasonable Time

Section 11(b) of the *Charter* states: "[a]ny person charged with an offence has the right to be tried within a reasonable time."[226] The right to be tried within a

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[223] Bill C-26, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 2d Sess., 39th Parl., 2007, cl. 13.
[224] Bill C-26, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 2d Sess., 39th Parl., 2007, cls. 1-5.
[225] Both of these amendments come into force on a date fixed by the Governor in Council. Bill C-13, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, 2nd Sess., 39th Parl., 2007, cl. 46; Bill C-26, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 2d Sess., 39th Parl., 2007, cl. 14.
[226] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

reasonable time includes the right to be sentenced within a reasonable time.[227] Like the remedy for unreasonable delay in bringing accused to trial, the remedy for unreasonable delay in sentencing is a stay of proceedings.

In *R. v. N. (D.)* (*N. (D.)*), the Yukon Territorial Provincial Court held that delays in sentencing do not infringe the *Charter* right to be sentenced within a reasonable time if all parties to the proceedings consent to or waive the delays.[228] However, the Court also held that delaying sentencing *sine die* or for periods in excess of one year requires legislative amendment to the *Criminal Code*. Keeping with the Ontario Court of Appeal's dicta in *Nunner*, the Court indicated that absent Parliamentary reform, suspended sentences and conditional discharges are available to supervise offenders in the community.[229]

After the Court's ruling in *N. (D.)*, the Supreme Court of Canada released two parallel judgments on the *Charter* right to be sentenced within a reasonable time. In *R. v. MacDougall* (*MacDougall*) and *R. v. Gallant* (*Gallant*), the Supreme Court outlined the purposes for avoiding lengthy delays in sentencing and the procedure for determining whether lengthy delays in sentencing violate the *Charter*.[230]

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[227] *R. v. MacDougall*, [1998] 3 S.C.R. 45, 19 C.R. (5th) 275, 128 C.C.C. (3d) 483, 1998 CarswellPEI 88 (WLeC); *R. v. Gallant*, [1998] 3 S.C.R. 80, 19 C.R. (5th) 302, 128 C.C.C. (3d) 509, 1998 CarswellPEI 86 (WLeC).

[228] In *N. (D.)* sentencing was delayed for six months to allow an accused to participate in two community sentencing circles. The Court limited its reasoning to sentencing offenders to rehabilitative dispositions in northern circuit communities where access to judges, lawyers, probation officers, etc. is limited, where traditional rehabilitative sentencing options are curtailed, and where the community is meaningfully involved in sentencing. (1993), 27 C.R. (4th) 114, 1993 CarswellYukon 6 at paras. 1, 62-78, 88-130 (WLeC), [1993] Y.J. No. 195 (QL).

[229] *R.* v. *N. (D.)* (1993), 27 C.R. (4th) 114, 1993 CarswellYukon 6 at paras. 18, 127 (WLeC), [1993] Y.J. No. 195 (QL).

[230] *R. v. MacDougall*, [1998] 3 S.C.R. 45, 19 C.R. (5th) 275, 128 C.C.C. (3d) 483, 1998 CarswellPEI 88 (WLeC). The Supreme Court adopted the reasons of *MacDougall* in *Gallant*. *R. v.*

Citing *R. v. Askov* (*Askov*) and *R. v. Morin* (*Morin*), the Supreme Court affirmed that liberty, security, and fair trial interests are engaged in the sentencing process.[231] Delays in sentencing affect accuseds' liberty and security interests by extending the time during which they are imprisoned or subjected to restrictive conditions of judicial interim release, the time during which they suffer stress and anxiety as a result of impending sentencing, and/or the time during which they are prevented from proceeding with life while awaiting sentencing.[232] Conversely, delays in sentencing compromise society's interest in speedy and fair trials when accused are granted too much liberty pre-sentencing and the risk of further offending is not attenuated.[233]

The Supreme Court also confirmed, in accordance with *Askov* and *Morin*, that delays in sentencing are unreasonable when (1) after calculating the total delay in sentencing and (2) subtracting (a) inherent time and intake requirements, (b) reasonable institutional or systemic delay, (c) periods of delay that are directly attributable to accuseds' actions, and (d) accuseds' clear and unequivocal waivers of delay; (3) the ideal time required to sentence accused in similar jurisdictions is exceeded; and (4) prejudice to accuseds' liberty or security interests, or society's

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Gallant, [1998] 3 S.C.R. 80, 19 C.R. (5th) 302, 128 C.C.C. (3d) 509, 1998 CarswellPEI 86 (WLeC).

[231] *R. v. Askov*, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, 59 C.C.C. (3d) 449, 1990 CarswellOnt 111 (WLeC); *R. v. Morin*, [1992] 1 S.C.R. 771, 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 1992 CarswellOnt 75 (WLeC).

[232] While the Supreme Court indicated that judges may take pre-trial custody or restrictive conditions of judicial interim release into account in sentencing accused, the Court also acknowledged that judges are not obliged by law to do so. Section 719(3) of the *Criminal Code* states: "[i]n determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence." *R. v. MacDougall*, [1998] 3 S.C.R. 45, 19 C.R. (5th) 275, 128 C.C.C. (3d) 483, 1998 CarswellPEI 88 at paras. 32-34 (WLeC); *Criminal Code*, R.S.C. 1985, c. C-46.

[233] *R. v. MacDougall*, [1998] 3 S.C.R. 45, 19 C.R. (5th) 275, 128 C.C.C. (3d) 483, 1998 CarswellPEI 88 at para. 36 (WLeC).

fair trial interests results. As explained by the Court, inherent time and intake requirements include time typically required to prepare a case for trial (time required to retain counsel, to obtain and review disclosure, to apply for judicial interim release, to hold a preliminary inquiry,[234] etc.). Institutional or systemic delay is inevitable delay arising from an over-burdened criminal justice system (the large volume of case processing and the corresponding under-availability of courtrooms, judges, etc.). An example of delay that is directly attributable to accused is accuseds' requests for adjournments. While guidelines for determining the ideal time to bring accused to trial have been enunciated,[235] similar guidelines for the ideal time required to sentence accused have not been provided, thus giving rise to uncertainty in applications alleging violation of the right to be sentenced within a reasonable time. Finally, prejudice may be inferred from delays that significantly exceed the ideal time required to sentence accused in similar jurisdictions or may be proven by accused leading specific evidence of prejudice such as loss of employment arising from restrictive conditions of judicial interim release.[236]

The delay in sentencing the accused was 21 months in *MacDougall*. In *Gallant*, the delay in sentencing the accused was 17 months. The delays stemmed,

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[234] Preliminary inquiries are pre-trial hearings to determine whether sufficient evidence exists to commit accused to stand trial for certain offences. The procedure governing preliminary inquiries is found in Part XVIII of the *Criminal Code*, R.S.C. 1985, c. C-46.

[235] In *Askov*, the Supreme Court indicated that a period of 6-8 months institutional delay following committal to stand trial in provincial courts is reasonable. *R. v. Askov*, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, 59 C.C.C. (3d) 449, 1990 CarswellOnt 111 at para. 131 (WLeC). In *Morin*, the Court added that a period of 8-10 months institutional delay prior to committal to stand trial is reasonable in provincial courts. *R. v. Morin*, [1992] 1 S.C.R. 771, 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 1992 CarswellOnt 75 at para. 50 (WLeC).

[236] *R. v. MacDougall*, [1998] 3 S.C.R. 45, 19 C.R. (5th) 275, 128 C.C.C. (3d) 483, 1998 CarswellPEI 88 at paras. 40-60 (WLeC); *R. v. Morin*, [1992] 1 S.C.R. 771, 12 C.R. (4th) 1, 71 C.C.C. (3d) 1, 1992 CarswellOnt 75 at paras. 30-59 (WLeC); *R. v. Askov*, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273, 59 C.C.C. (3d) 449, 1990 CarswellOnt 111 at paras. 82-111 (WLeC).

in large part, from judge's illnesses. However, the delays were not sufficiently lengthy for the Supreme Court to infer prejudice and prejudice was not proven. As such, the delays in sentencing the accused in *MacDougall* and *Gallant* were not unreasonable.[237]

Researchers evaluating Toronto's DTC showed some accused are sentenced after 23.8 to 24.75 months of participating in DTC.[238] While the length of delays is not determinative, and while the Supreme Court has countenanced delays as long as 21 months; delays in sentencing accused in Toronto's DTC may infringe the *Charter* right to be sentenced within a reasonable time if accused show sufficient evidence of prejudice to their liberty and security interests.

Prejudice to accuseds' liberty and security interests may be established by leading evidence of restrictive conditions of judicial interim release. Accused participating in Toronto's DTC are required to attend drug treatment and status

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[237] *R. v. MacDougall*, [1998] 3 S.C.R. 45, 19 C.R. (5th) 275, 128 C.C.C. (3d) 483, 1998 CarswellPEI 88 at paras. 2, 71 (WLeC); *R. v. Gallant*, [1998] 3 S.C.R. 80, 19 C.R. (5th) 302, 128 C.C.C. (3d) 509, 1998 CarswellPEI 86 at paras. 1, 16 (WLeC).
Following *MacDougall* and *Gallant*, the Ontario Superior Court of Justice heard an application for unreasonable delay in bringing an accused considered a "good candidate for [Toronto's] DTC" to trial. In *R. v. Richards*, an accused was charged along with two others. The 38-month delay in bringing him to trial resulted primarily from his co-accuseds' change of counsel and an inability to set a preliminary hearing.
While the accused never actually participated in Toronto's DTC, he requested a number of adjournments over a period of 4-5 months to decide whether or not to enter DTC. The Crown prosecutor conceded (and the Court agreed) that the delay arising from these adjournments overlapped in large part with excessive delay in providing the accused with disclosure of the offences, and as such was not attributable to the accused.
While the Court found that minimal prejudice could be inferred from the length of the delay, the Court failed to find any evidence of specific prejudice to the accused's ability to make full answer and defence, any evidence of specific prejudice from the accused's conditions of judicial interim release, and any evidence of specific prejudice from the stress and anxiety associated with the delay. Given that the institutional delay was within the guidelines outlined by the Supreme Court in *Morin*, the minimal prejudice occasioned to the accused did not warrant a finding of unreasonable delay. *R. v. Richards*, 155 C.R.R. (2d) 108, 2007 CarswellOnt 2333 at paras. 1-2, 5-6, 9-16, 62-82, 90-95, 98-101 (WLeC).
[238] Louis Gliksman *et al.*, *Toronto Drug Treatment Court Evaluation Project Final Report* (Toronto: Centre for Addiction and Mental Health, 2004) at 84.

hearings, submit to random and regular drug testing, etc. Additional conditions may be imposed on accused experiencing difficulty completing the DTC program.[239] Alternatively, accused participating in Toronto's DTC may show prejudice by leading evidence of stress or anxiety resulting from impending punishment. If significant prejudice is shown, delays in sentencing accused participating in Toronto's DTC may infringe the *Charter* right to be sentenced within a reasonable time irrespective of Parliament's amendments to the *Criminal Code* and *CDSA*.

Justifications for Infringing the Constitutional Right to be Sentenced Within a Reasonable Time

Limitations of *Charter* rights, including the right to be sentenced within a reasonable time, may be justified under s. 1 of the *Charter*. Section 1 of the *Charter* states: "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[240]

At present, no law justifies limiting accuseds' *Charter* right to be sentenced within a reasonable time in Toronto's *DTC*. If Toronto's *DTC* is included within the ambit of forthcoming amendments to s. 720 of the *Criminal Code* or s. 10 of the *CDSA*, upon proclamation, these new laws may be used to justify infringing accuseds' *Charter* right to be sentenced within a reasonable time

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[239] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 32, 50.
[240] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

in Toronto's DTC.[241]

The Supreme Court of Canada outlined the test for determining whether a law's limitation of a *Charter* right is justifiable in *R. v. Oakes* (*Oakes*).[242] Two criteria must be satisfied. First, the objectives of the law must be "of sufficient importance to warrant overriding the *Charter* right".[243] Objectives that relate to concerns that are "pressing and substantial in a free and democratic society" are sufficiently important to warrant overriding *Charter* rights.[244] Second, the means chosen to limit the *Charter* right must be "reasonable and demonstrably justified".[245] This latter analysis involves a three part "proportionality test".[246] First, the means chosen to limit the *Charter* right must be rationally connected to the objective. The means must be carefully designed to achieve the objective. They must not be arbitrary, unfair, or based on irrational considerations. Second, the means should impair the *Charter* right "as little as possible".[247] Third, there must be proportionality between the effects and objective of the means chosen to limit the *Charter* right. The more severe the deleterious effects, the more

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[241] Bill C-13, *An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)*, 2nd Sess., 39th Parl., 2007; Bill C-26, *An Act to amend the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 2d Sess., 39th Parl., 2007, cls. 1-5.

[242] [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321.

[243] *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 1986 CarswellOnt 95 at para. 73 (WLeC); *R. v. Big M. Drug Mart Ltd*, [1985] 1 S.C.R. 295, 60 A.R. 181, 18 C.C.C. (3d) 385, 1985 CarswellAlta 316 at para. 140 (WLeC).

[244] *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 1986 CarswellOnt 95 at para. 73 (WLeC).

[245] *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 1986 CarswellOnt 95 at para. 74 (WLeC).

[246] *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 1986 CarswellOnt 95 at para. 74 (WLeC); *R. v. Big M. Drug Mart Ltd*, [1985] 1 S.C.R. 295, 60 A.R. 181, 18 C.C.C. (3d) 385, 1985 CarswellAlta 316 at para. 140 (WLeC).

[247] *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 1986 CarswellOnt 95 at para. 74 (WLeC); *R. v. Big M. Drug Mart Ltd*, [1985] 1 S.C.R. 295, 60 A.R. 181, 18 C.C.C. (3d) 385, 1985 CarswellAlta 316 at para. 140 (WLeC).

important the objective of the means chosen to limit the *Charter* right must be.[248]

While the second branch of the proportionality test is the crux of the s. 1 analysis, governments are not required to adopt the absolutely least intrusive means of limiting a *Charter* right in order to succeed on this branch.[249] Rather, the Supreme Court has held that in instances where the government is protecting vulnerable groups' interests, reconciling competing groups' claims, or evaluating social science evidence, a less stringent approach to this branch of the proportionality test is appropriate. Conversely, where the Crown acts as a singular adversary against accused in criminal proceedings, a more rigid approach is required.[250]

The third branch of the proportionality test was reformulated by the Supreme Court in *Dagenais v. Canadian Broadcasting Corp.*[251] Where the objective of the means chosen to limit the *Charter* right is not fully met,[252] the

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[248] *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 1986 CarswellOnt 95 at para. 75 (WLeC).

[249] *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, 16 C.R. (6th) 203, 180 C.C.C. (3d) 353, 2004 CarswellOnt 252 at para. 237 (WLeC); *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, 5 C.R. (6th) 203, 168 C.C.C. (3d) 449, 2002 CarswellNat 2883 at para. 160 (WLeC); *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429, 221 D.L.R. (4th) 257, 2002 CarswellQue 2706 at para. 271 (WLeC); *R. v. Gladstone*, [1996] 2 S.C.R. 723, 50 C.R. (4th) 111, 109 C.C.C. (3d) 193, 1996 CarswellBC 2305 at para. 63 (WLeC); *S. Thibaudeau v. Canada*, [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 449, 1995 CarswellNat 289 at para. 202 (WLeC); *R. v. Swain*, [1991] 1 S.C.R. 933, 5 C.R. (4th) 253, 63 C.C.C. (3d) 481, 1991 CarswellOnt 93 at paras. 64-65 (WLec); *R. v. Chaulk*, [1990] 3 S.C.R. 1303, 2 C.R. (4th) 1, 62 C.C.C. (3d) 193, 1990 CarswellMan 239 at para. 75 (WLeC).

[250] *Irwin Toy Ltd. c. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 1989 CarswellQue 115 at paras. 79-81 (WLeC). See also Errol Mendes, "The Crucible of the Charter: Judicial Principles v. Judicial Deference in the Context of Section 1" in Gérald-A. Beaudoin & Errol Mendes, eds., *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ont.: Butterworths, 2005) 163 at 198-206; Sanjeev S. Anand, "Beyond Keegstra: The Constitutionality of the Wilful Promotion of Hatred Revisited" (1998) 9 N.J.C.L. 117 at 134-135.

[251] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 34 C.R. (4th) 269, 94 C.C.C. (3d) 289, 1994 CarswellOnt 112 (WLeC).

[252] For example, the objective of the means chosen to limit the *Charter* right was not fully met in *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577, 1999 CarswellOnt 1348 at para. 133 (WLeC).

third branch of the proportionality test must also include proportionality between the deleterious and salutary effects of the means chosen to limit the *Charter* right. In order to be justified under the third branch of the proportionality test, the salutary effects must outweigh the deleterious effects of the means chosen to limit the *Charter* right, and the deleterious effects must be outweighed by the objective of the means chosen to limit the *Charter* right.[253]

Following the analysis for justifying limitations of *Charter* rights outlined in *Oakes*, the objective of the proposed amendments to the *Criminal Code* and *CDSA* may be construed as providing access to and monitoring accuseds' participation in treatment. If the objective of the amendments is construed in this manner, it may be of sufficient importance to warrant overriding *Charter* rights, including the right to be sentenced within a reasonable time, because participation in treatment may reduce criminal offending.

The amendments to the *Criminal Code* and *CDSA* may be carefully designed to achieve this objective. Accused who are not sentenced may be more motivated to participate in treatment in order to benefit from less severe punishment upon successful completion of treatment than accused who are sentenced.

However, *Charter* rights may not be minimally impaired by the means chosen to achieve this objective. *Charter* rights, including the right to be sentenced within a reasonable time, may be minimally impaired using current

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In *M. v. H.*, the means chosen to limit the s. 15(1) *Charter* right to be free from discrimination undermined the objectives of the impugned legislation.

[253] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 34 C.R. (4th) 269, 94 C.C.C. (3d) 289, 1994 CarswellOnt 112 at para. 99 (WLeC).

sentencing provisions in the *Criminal Code* to provide access to and monitor accuseds' participation in treatment. These provisions may also be used to motivate accused to participate in treatment and to be rewarded with less severe sentences upon completion of treatment. For instance, accused charged with relatively serious offences may receive conditional sentences. In accordance with the relevant *Criminal Code* provisions, accused receiving conditional sentences may be ordered to attend treatment, to abstain from the consumption of alcohol and drugs, to comply with such other reasonable conditions proscribed by judges, and to return to court frequently for review of compliance with these conditions. Upon hearing from accused and Crown counsel, judges may amend, add, or delete optional conditions. Upon conviction for breaching conditional sentences, judges may vary optional conditions, suspend portions of conditional sentences, or terminate conditional sentences and order accused to serve portions of these sentences or the remainder of these sentences in prison.[254] Accused charged with less serious offences may be sentenced to probation or conditional discharges with probation. With few exceptions, these sentences can include similar conditions.[255]

In addition, there may not be proportionality between the deleterious effects of the means chosen to limit the *Charter* right and the objective of the

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[254] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 742.1, 742.3-742.4, 742.6.

[255] The following differences between conditional sentences of imprisonment, probation, and conditional discharges are legislated in the *Criminal Code*. First, as indicated, judges may compel accused sentenced to conditional sentences to attend treatment. Accuseds' consent is required before judges may add attendance at treatment as an optional condition of probation or conditional discharges. Second, judges may not reduce the length of conditional sentences of imprisonment. However, judges may reduce the length of sentences of probation or conditional discharges. Third, accused sentenced to conditional sentences and probation are convicted of offences. Accused sentenced to conditional discharges are found guilty of offences but not convicted of offences. However, upon conviction of breaching conditional discharges, accused may be convicted of offences and sentenced. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 730-732.2, 733.1, 742.3(2)(e)-742.3(3)(f).

amendments or the salutary effects of the amendments. That is, the deleterious effects of delaying sentencing may not outweigh the objective of providing access to and monitoring accused's participation in treatment and the salutary effects of motivating accused to participate in treatment. While delaying sentencing may motivate accused to participate in treatment, accused will continue to suffer stress and anxiety associated with uncertain and impending punishment. This was evidenced in a written letter to the Manitoba Court of Appeal by the accused in *Fuller*:

> From the date of my arrest (November 25, 1967) until the date of the appeal (October 31, 1968), I have been patiently awaiting the decision of the courts which mete out swift justice to those that appear before them. For eleven months I have felt akin to Damocles, who had a sword above his head, suspended only by a thread. That thread is my life and the courts have toyed with it for almost a year. For eleven months I have been anticipating; for eleven months I have been toyed with in the name of swift justice.[256]

The Ontario Court of Appeal noted an additional deleterious effect of delaying sentencing in *Nunner*: accused and Crown counsel will be prevented from commencing applications to appeal sentences in a timely manner.[257] Accused will also be prevented from proceeding with other applications, including applications for pardoning convictions from criminal records.[258]

Thus, forthcoming amendments to s. 720 of the *Criminal Code* and s. 10 of the *CDSA* may not justify limiting accuseds' *Charter* rights in Toronto's DTC. Accuseds' right to be sentenced within a reasonable time may not be minimally

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[256] *R. v. Fuller* [1969], 67 W.W.R. 78, 3 C.C.C. 348, 1968 CarswellMan 67 at para. 22 (WLeC).
[257] *R. v. Nunner* (*sub nom. R. v. A. P. N.*) (1976), 30 C.C.C. (2d) 199, 1976 CarswellOnt 932 at para. 20 (WLeC), [1976] O.J. No. 177 (QL).
[258] Accused who are convicted of offences must wait 3-5 years after completing their sentences to apply for pardons. *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 4.

impaired by delays in sentencing. In addition, the objective and salutary effects of the amendments may not be outweighed by the deleterious effects of delaying sentencing.

The Constitutional Right to be Free From Unreasonable Search and Seizure

Section 8 of the *Charter* states: "everyone has the right to be free from unreasonable search and seizure".[259] Section 8 of the *Charter* protects reasonable expectations of privacy.[260]

Individuals have different expectations of privacy in different contexts.[261] The Supreme Court of Canada indicated in *R. v. Shoker* (*Shoker*), that offenders sentenced to probation have a reduced expectation of privacy.[262]

The issue to be determined in *Shoker* was whether judges are empowered to compel offenders sentenced to probation with a condition to abstain from consuming drugs or alcohol to provide urine, blood, or breath samples to peace or probation officers. Without determining the constitutionality of this condition under s. 8 of the *Charter*, the majority of the Court found no statutory authority for imposing this condition. Conversely, the minority of the Court held that there was statutory authority for this condition under s. 732.1(3)(*h*) of the *Criminal Code*. This section of the *Criminal Code* permits judges to include as terms of

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[259] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
[260] *R. v. Jackpine*, 2006 SCC 15, [2006] 1 S.C.R. 554, 37 C.R. (6th) 1, 2007 C.C.C. (3d) 225, 2006 CarswellOnt 2498 at para. 25 (WLeC).
[261] *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 76 C.R. (3d) 283, 55 C.C.C. (3d) 530, 1990 CarswellOnt 802 at para. 30 (WLeC).
[262] 2006 SCC 44, [2006] 2 S.C.R. 399, 41 C.R. (6th) 1, 212 C.C.C. (3d) 417, 2006 CarswellBC 2458 at para. 25 (WLeC).

probation: "such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community."[263] However, the minority also indicated that compelling accused to provide blood tests would be "far too intrusive and would breach s. 8 absent a statutory framework consistent with the standards of the *Charter*."[264]

Following *Shoker*, a judge presiding in the Newfoundland and Labrador Supreme Court queried whether a condition to provide urine or blood samples for drug testing could be lawfully included as a term of judicial interim release in *R. v. Pennell* (*Pennell*).[265] In *Pennell*, an accused sought release from custody to attend a drug treatment facility. As a condition of his admission to the treatment facility, the accused was required to abstain from consuming illicit drugs and consented to sporadic drug testing. While the judge included as a condition of the accused's release that he provide results of any drug testing conducted by the facility to the police, the judge indicated that had the accused not provided his consent, lawfully obtaining his consent free of coercion may have been difficult given the Supreme Court's decision in *Shoker*.[266]

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[263] 2006 SCC 44, [2006] 2 S.C.R. 399, 41 C.R. (6th) 1, 212 C.C.C. (3d) 417, 2006 CarswellBC 2458 (WLeC); *Criminal Code*, R.S.C. 1985, c. C-46.

[264] 2006 SCC 44, [2006] 2 S.C.R. 399, 41 C.R. (6th) 1, 212 C.C.C. (3d) 417, 2006 CarswellBC 2458 at para. 42 (WLeC).

[265] 2006 NLTD 185, 261 Nfld. & P.E.I.R. 339, 2006 CarswellNfld 324 (WLeC).

[266] The following condition was also included in the accused's terms of judicial interim release:
15. to submit to a search of yourself, your accommodations and any vehicle occupied or operated by yourself by a police officer or program staff on demand whether by warrant or without a warrant. 2006 NLTD 185, 261 Nfld. & P.E.I.R. 339, 2006 CarswellNfld 324 at paras. 40-41 (WLeC).
In *R. v. Merasty* (*Merasty*), a Saskatchewan Provincial Court judge considered whether to require an accused charged with sexual assault to abide by a condition of judicial interim release to provide a breath sample to a peace officer who had reasonable grounds to believe the accused consumed alcohol. The Crown alleged that alcohol was a motivating factor in the commission of the offence.
The judge cited s. 515(4)(f) of the *Criminal Code* as statutory authority allowing the condition for

As indicated by Professor Quigley in an Annotation to *Shoker*, it is likely that legislative amendment authorizing the seizure of bodily samples from accused for the purpose of monitoring compliance with abstention clauses will be forthcoming.[267] Professor Anand suggests that an onerous standard may be required to justify violating accuseds' s. 8 rights in this context. He states reasonable and probable grounds may be insufficient given the "wide ranging and profoundly personal information" that can be obtained from bodily samples.[268] Moreover, Professor Anand makes the following observation:

> ... All of the legislation cited by the Supreme Court in *Shoker* that authorizes the collection of bodily samples includes detailed provisions concerning the manner in which the samples can be collected, including protections for the safety and security of the person whose sample is sought. Perhaps most importantly the legislation also limits use of the sample to narrow criminal justice purposes.[269]

Accused released from custody on conditions of judicial interim release have a higher expectation of privacy than accused sentenced to probation. Absent consent (free from coercion, inducements, etc.) or detailed statutory amendment, requiring accused to provide bodily samples for drug testing as a condition of

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the protection or safety of the public when an accused has a lengthy criminal record for violent offences, when alcohol is involved in the commission of the offences, and when peace officers have reasonable grounds to believe that alcohol was consumed. Section 515(4)(f) authorizes the Court to compel accused to "comply with such other reasonable conditions ... as the justice considers desirable".
Nonetheless, the judge refused to include the condition as a term of the accused's release because the accused had a "minimal" criminal record and "no pattern of violent offending when under the influence of alcohol". The judge distinguished *Shoker* by stating that conditions of pre-trial release have a wider purpose than conditions of probation. The judge failed to consider the constitutional implications of the condition. 2008 SKPC 28, 2008 CarswellSask 90 at para. 10 (WLeC), [2008] S.J. No. 94 (QL); *Criminal Code*, R.S.C. 1985, c. C-46.

[267] Tim Quigley, "Annotation to *R. v. Shoker*" 2006 SCC 44, 41 C.R. (6th) 1, 2006 CarswellBC 2458 (WLeC).

[268] Sanjeev Anand, "The Validity of Community-Based Sentences Compelling the Production of Bodily Samples" (2007) 49 C.R. (6th) 25 at 30.

[269] Sanjeev Anand, "The Validity of Community-Based Sentences Compelling the Production of Bodily Samples" (2007) 49 C.R. (6th) 25 at 32.

judicial interim release may violate the *Charter* right to be free from unreasonable search and seizure.

All accused participating in Toronto's DTC are required as a condition of judicial interim release to randomly submit urine samples for drug testing.[270] In the absence of constitutional legal authority to infringe accuseds' right to be free from unreasonable search and seizure, compelling accused to provide urine samples for drug testing in Toronto's DTC may violate this right.

Conclusion

Many accused waive legal rights to participate in Toronto's DTC. Some accused may be induced by Toronto's DTC processes into waiving several legal rights in Toronto's DTC, including the statutory rights to plead not guilty and to be sentenced as soon as practicable, and the constitutional rights to be sentenced within a reasonable time and to be free from unreasonable search and seizure. If accused are induced into waiving legal rights to participate in Toronto's DTC, the waiver of these rights is involuntary and unlawful.

At present, there is no law justifying the infringement of accused's legal rights in Toronto's DTC. While Parliament is amending the *Criminal Code* and the *CDSA* to enable judges to infringe accuseds' rights to be sentenced as soon as practicable and within a reasonable time, these amendments may be unconstitutional.

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[270] *Toronto Drug Treatment Court Policies and Procedures Manual* (Toronto: Centre for Addiction and Mental Health, n.d.) at 66.

There are less intrusive means of delivering effective treatment to drug-addicted offenders. Accuseds' participation in treatment, including treatment offered in Toronto's DTC may be monitored while complying with legal rights post-sentence using current provisions in the *Criminal Code*.

CONCLUSION

There is significant evidence for a drug-crime relationship. A large number of crimes are committed while offenders are under the influence of drugs or to obtain drugs.

Deterrence, incapacitation, and rehabilitation are all used to reduce crime in traditional Canadian courts and corrections. Research substantiates the use of rehabilitation to reduce crime when Andrews' and Bonta's principles are employed in traditional courts and corrections.

Nonetheless, a new means of reducing drug-related crime has commenced in North America and other commonwealth countries. Drug-involved offenders are being transferred from traditional courts to DTCs for case processing and punishment and drug treatment.

Yet few DTCs have been informatively evaluated using randomized experiments, cost-benefit, or cost-effectiveness analyses. Further methodologically sound evidence substantiating the efficacy of DTCs to reduce drug-related crime is needed.

Decisions to establish and operate DTCs should not rest purely on whether DTCs are effective at reducing crime. Rather, legal consequences of participation in DTCs must be assessed.

There are significant legal effects of participation in Toronto's DTC. Offenders waive several legal rights to participate in Toronto's DTC, including the statutory rights to plead not guilty and to be sentenced as soon as practicable

and the constitutional rights to be sentenced within a reasonable time and to be free from unreasonable search and seizure. The waiver of these rights may be induced by DTC processes and as such, may be involuntary and unlawful. At present, there is no law justifying the infringement of accuseds' legal rights in Toronto's DTC. Parliament is amending the *Criminal Code* and *CDSA* to enable judges to delay sentencing while accused participate in treatment. If these amendments are proclaimed into force, they may not be constitutional. The amendments do not impair accuseds' rights as little as possible and the objective and salutary effects of the amendments may not be outweighed by the deleterious effects of delaying sentencing. There is no current legislative proposal to limit accuseds' right to be free from unreasonable search and seizure while participating in treatment.

There are means of enabling offenders to participate in Toronto's DTC without violating legal rights. One means is to enable offenders to participate in Toronto's DTC post-plea or post-trial, post-conviction, and post-sentencing in traditional courts. Using current sentencing provisions, offenders can be sentenced to conditional sentences, probation, and conditional discharges with probation, and provided with drug treatment, supervision of drug treatment, and sanctions for non-compliance with drug treatment in DTCs.

In large part, the rapid emergence of DTCs occurred without sound evidence establishing the crime reduction efficiency of DTCs and without careful consideration of the legal implications of participation in DTCs. Expansion of DTCs should continue only when DTC processes comply with all legal rights and

when methodologically sound evidence demonstrates that DTCs efficiently reduce criminal recidivism. Until then, Andrews' and Bonta's principles of effective corrections interventions should be used to reduce criminal recidivism in traditional courts and corrections in compliance with legal rights.

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