

NEW JERSEY DEVELOPMENTS

NEW JERSEY'S DRUG COURTS:

**A FUNDAMENTAL SHIFT FROM THE WAR ON DRUGS
TO A PUBLIC HEALTH APPROACH FOR DRUG
ADDICTION AND DRUG-RELATED CRIME**

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I. INTRODUCTION

New Jersey's drug courts have been lauded for their "notable success" in addressing "the seemingly intractable social problem presented by the scourge of drugs that has devastated countless families and is the source of so many collateral crimes."¹ This Article

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examines the history and legal development of drug courts in New Jersey from an experimental program in several counties to their current status as full-fledged statewide courts within the criminal part of the New Jersey Law Division. The authors argue that drug courts represent a fundamental shift in New Jersey's "war on drugs" statutory and law enforcement response to drug addiction and drug-related crime. The authors believe that drug courts should be seen as a hybrid of public health law and criminal law because drug courts have incorporated successful public health strategies into the criminal law to achieve better outcomes, such as reduced recidivism, cost-effectiveness, and the optimization of public safety. Lastly, we note the changes that must occur in New Jersey's drug laws and policies if we are to achieve the successful public health approach of drug courts.

II. THE HISTORY AND LEGAL DEVELOPMENT OF DRUG COURTS IN NEW JERSEY

In this section we discuss the enactment of mandatory minimum sentences and excessive incarceration for drug offenses beginning in 1986 and the decimation those policies caused, particularly within low income, urban, minority communities. The failure of those policies led directly to the formation of experimental drug courts in New Jersey. As drug courts continued to produce impressive results, they were formalized and expanded to the entire State. We discuss the mechanics of how drug courts work in New Jersey, as well as the major legal disputes in drug courts and how the Supreme Court of New Jersey resolved those issues.

A. New Jersey's "War on Drugs"

In response to the societal perception in the 1970s and 1980s that there was a growing and overwhelming drug problem in this country, many states waged a "war on drugs."² In contrast to its

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1. *State v. Meyer*, 930 A.2d 428, 433 (N.J. 2007).

2. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 132 (2001) ("Disregarding evidence that the levels of drug use were already in decline, that drug use is not responsive to criminal penalties, that

reputation as a politically moderate state, New Jersey's response was among the most draconian of all the states.³

When enacting the Comprehensive Drug Reform Act of 1986 [hereinafter CDRA] the Legislature declared it to be public policy

to provide for the strict punishment, deterrence and incapacitation of the most culpable and dangerous drug offenders, and to facilitate where feasible the rehabilitation of drug dependent persons so as ultimately to reduce the demand for illegal controlled dangerous substances and the incidence of drug-related crime. It is also the policy of this State to afford special protection to children from the perils of drug trafficking, to ensure that all schools and areas adjacent to schools are kept free from drug distribution activities, and to provide especially stern punishment for those drug offenders who operate on or near schools and school buses, who distribute to juveniles, or who employ juveniles in a drug distribution scheme.⁴

The two primary tools of New Jersey's CDRA were the mandatory nature of incarceration sentences and the excessive length of those sentences.⁵ Both of these tools served to structurally undermine the purported purpose of the drug laws—to curb the use of Controlled Dangerous Substances (“CDS”) and the tangential crime that surrounds the business of illicit substances.⁶ Unfortunately, these tools failed to distinguish between those who deserve strict punishment and those who can be rehabilitated as the path to reducing the demand for CDS.

When enacting New Jersey's version of the war on drugs law, the CDRA, the Legislature focused on mandatory sentencing, ostensibly to give special protection to so-called “school zones.”⁷ New Jersey created a new third degree crime, one that required a three-year

criminalization brings its own pathologies (notably street violence and disrespect for authorities), and that declaring a war on drugs is, in effect, to declare a war against minorities, the US government proceeded to declare such a war and to persist in pursuing it, despite every indication of its failure.”); DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 16 (2008) (discussing statistics indicating the increase in arrests and convictions for drug offenses since 1980).

3. See HUSAK, *supra* note 2, at 44 (listing New Jersey drug-related offenses created since 1994 in addition to possession and distribution offenses, thereby making New Jersey an excellent example of the “phenomenon of overcriminalization”); see also HUMAN RIGHTS WATCH, *TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES* 23 (2008), available at <http://www.hrw.org/sites/default/files/reports/us0508webwcover.pdf> (illustrating that out of thirty-four states studied, New Jersey had the third worst ratio between the rates at which African Americans and whites were sent to prison for drug offenses).

4. N.J. STAT. ANN. § 2C:35-1.1c (West 2005).

5. See *id.*

6. See *id.*

7. See N.J. STAT. ANN. § 2C:35-7 (West 2005), amended by N.J. STAT. ANN. § 2C:35-7b(1)(a)-(d) (West Supp. 2011) (granting judges broader sentencing discretion).

mandatory period of incarceration before parole eligibility for distribution or possession with intent to distribute any type or amount of drugs within 1,000 feet of property owned or used by a school.⁸ Thus, a person who possessed any amount of any drug would be guilty of this new crime, in addition to the substantive drug distribution crime, based on the mere factor of geographic proximity to a school.⁹

The first problem with the statutory definition of a distribution crime is that it is so broad; virtually any mere possession of CDS can be exaggerated by law enforcement to look like a distribution offense. New Jersey considers possession “with intent to distribute” the same offense as the actual distribution or manufacturing of CDS.¹⁰ In reality, it takes very little hard evidence to prove that someone possessed a drug and intended to “distribute” it.¹¹ Moreover, profit motive is not part of New Jersey’s definition of distribution. A distribution is complete if one person simply hands another person a small amount of CDS.¹² It is also enough if the circumstances support a conclusion that one person *intended* to hand the CDS to another.¹³

The school zone law requires no mens rea connecting the crime to school children or even schools. In fact, the statute breaks from the Anglo-Saxon common law principle of defining the severity of a

8. *Id.* Originally, there were only two exceptions to the three year mandatory minimum sentence: (1) less than one ounce of marijuana requires a one-year mandatory minimum, and (2) it is an affirmative defense if the offense took place within a private residence, not for profit, and no juveniles were present. *Id.* The amended school zone law now requires a mandatory minimum sentence in three instances: (1) when the offense actually occurred on school property, (2) the defendant used or threatened violence during the course of the offense, or (3) the defendant was in possession of a firearm during the course of the offense. N.J. STAT. ANN. § 2C:35-7b(2)(a)-(b) (West Supp. 2011).

9. See N.J. STAT. ANN. § 2C:35-5 (West 2005) (enumerating the range of all substantive distribution drug offenses, from fourth degree through first degree, depending on the type and quantity of the CDS).

10. *Id.* at § 2C:35-5a(1).

11. According to *State v. Odom*, 560 A.2d 1198, 1205 (N.J. 1989), an “expert witness” (i.e., a police officer with particularized training) may “characterize[] defendant’s conduct based on the facts in evidence in light of his specialized knowledge [and] the opinion is not objectionable even though it embraces ultimate issues that the jury must decide.” While the expert testimony may not state that the defendant is guilty or use the defendant’s name, *State v. Summers*, 823 A.2d 15, 21 (N.J. 2003), expert testimony may be used to assist the jury’s understanding of techniques used by drug dealers. *State v. Berry*, 658 A.2d 702, 713 (N.J. 1995). See also *State v. McLean*, 16 A.3d 332, 342 (N.J. 2011) (explaining that an expert witness’s testimony is admissible to the extent that it “characterize[s] defendant’s conduct” but not if it “expresses a direct opinion that defendant is guilty”).

12. See *State v. Mclean*, 16 A.3d 332, 335 (N.J. 2011).

13. See, e.g., *State v. S.C.*, 672 A.2d 1264, 1268 (N.J. Sup. Ct. App. Div. 1996); *State v. Varona*, 577 A.2d 524, 533 (N.J. Sup. Ct. App. Div. 1990).

crime by intent or the harm caused.¹⁴ A person's mere presence in the school zone, in possession of CDS with intent to distribute, was sufficient to be convicted of the additional third degree crime and, therefore, receive a mandatory period of incarceration.¹⁵ A person may be convicted without even knowing that he was in a school zone. A factfinder need not even find that the accused reasonably should have known that he was in a school zone. The state is not required to mark school zones,¹⁶ and given the huge area encompassed by 1,000 feet from all parts of school property, it is very likely that a person will be unaware that a school is in the vicinity. The absurdity of this is exemplified by *State v. Ogar*, which upheld a conviction for a school zone offense where an inmate's girlfriend slipped him CDS in a correctional facility that happened to be located within 1,000 feet from school property.¹⁷ Not only is the crime completely independent of school activity, there are, in fact, other statutes that enhance drug distribution offenses based upon the involvement of juveniles, rendering the school zone statute duplicative.¹⁸

Also breaking from a traditional approach to defining crimes, the school zone statute does not require that the CDS distribution offense be serious in terms of the type or amount of illegal substance involved.¹⁹ In other words, a trace amount of a CDS would suffice for a conviction, along with a police officer's "expert" opinion that the circumstances could be interpreted to indicate that the person with that trace gave, sold, or was about to give or sell the substance to someone else.²⁰ Thus, for example, a young person can be caught in the school zone net, if within 1,000 feet of a school, he hands a small amount of drugs to another young person. A conviction requires that the young person serve a significant time in prison and carry a criminal record for the rest of his life.²¹ While it might appear laudatory to deter this type of activity, more flexible laws can offer the same deterrent. As a society we cannot be blind to the fact that

14. See *State v. Ivory*, 592 A.2d 205, 211 (N.J. 1991).

15. *Id.* at 207.

16. See *id.* at 213 (Stein, J., dissenting) ("[I]t is thus *incumbent* upon drug traffickers to ascertain their proximity to schools" (citing *Official Commentary to the Comprehensive Drug Reform Act*, 9 CRIM. JUST. Q. 149, 157 (1987) (emphasis added))).

17. 551 A.2d 1037, 1042-44 (N.J. Super. Ct. App. Div. 1989).

18. See N.J. STAT. ANN. § 2C:35-6 (West 2005) (establishing an additional second degree offense with enhanced sentencing for "Employing a Juvenile in a Drug Distribution Scheme"); *id.* at § 2C:35-8 (requiring the trial court, upon application of the prosecutor, to impose twice the term of imprisonment of the substantive crime for the distribution of CDS to a person under the age of eighteen).

19. *State v. Wearing*, 591 A.2d 1350, 1362 (N.J. Super. Ct. App. Div. 1991).

20. See, e.g., *State v. Odom*, 560 A.2d 1198, 1203 (N.J. 1989); *State v. Berry*, 658 A.2d 702, 713 (N.J. 1995); *State v. Summers*, 823 A.2d 15, 21 (N.J. 2003).

21. N.J. STAT. ANN. § 2C:35-7 (West 2005 & Supp. 2011).

young people frequently engage in this type of activity for some years, but then go on to lead productive lives.²² These were the very children the law was intended to protect, not saddle with a lifetime albatross of a prior record.²³

Also noteworthy is that the law made no allowance for the fact that many people who are nonviolent drug addicts sell small quantities of drugs in order to buy enough to support their own habit.²⁴ The mandatory incarceration provision of the school zone law simply did not distinguish between major drug traffickers, a student handing a CDS pipe to another in a dorm room, or a drug addict who may actually want help to end the cycle of addiction. By making the quantity and type of CDS and the presence of drug addiction irrelevant to the determination of the severity of the sentence, the purpose of the law—to punish drug traffickers and to afford treatment to low-level sellers who are also drug dependent²⁵—is completely undermined.

Another aspect of the original²⁶ school zone law departed from traditional criminal law principles: the prosecution had sole discretion to offer the defendant a lesser sentence rather than the statute's mandatory minimum in exchange for a guilty plea or a postconviction agreement.²⁷ Without this “negotiated plea o post-

22. See generally JERALD G. BACHMAN ET AL., *THE DECLINE OF SUBSTANCE USE IN YOUNG ADULTHOOD: CHANGES IN SOCIAL ACTIVITIES, ROLES, AND BELIEFS* 202-12 (2002) (researching drug usage variables that influence young adults); JERALD G. BACHMAN ET AL., *SMOKING, DRINKING, AND DRUG USE IN YOUNG ADULTHOOD: THE IMPACTS OF NEW FREEDOMS AND NEW RESPONSIBILITIES* 181-82 (1997) (discussing how role changes affect young adult drug usage); Kevin Chen & Denise B. Kandel, *The Natural History of Drug Use from Adolescence to the Mid-Thirties in a General Population Sample*, 85 AM. J. PUB. HEALTH 41, 41-47 (1995) (documenting decreased illicit drug usage as adolescents reach adulthood).

23. See *State v. Shelley*, 15 A.3d 818, 821 (N.J. 2011) (“[T]he legislative design was ‘to afford special protection to children from the perils of drug trafficking [and] to ensure that all schools and [adjacent] areas . . . are kept free from drug distribution activities.’”) (quoting *State v. Gonzalez*, 603 A.2d 516, 518 (N.J. Super. Ct. App. Div. 1992) (internal citations omitted)).

24. See BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUSTICE, *DRUGS AND CRIME DATA, FACT SHEET: DRUG-RELATED CRIME* 3 (1994), <http://bjs.ojp.usdoj.gov/content/pub/pdf/DRRC.PDF>; RYAN S. KING & MARC MAUER, *THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS* 6-7 (2002), http://www.sentencingproject.org/doc/publications/dp_distortedpriorities.pdf (detailing the differences in drug offender behavior and the indifferent application of the law).

25. See N.J. STAT. ANN. § 2C:35-1.1c (West 2005).

26. The school zone law was amended in 2010 to return broader sentencing discretion to judges. See N.J. STAT. ANN. § 2C:35-7b (West Supp. 2011); see also *supra* text accompanying note 8.

27. See N.J. STAT. ANN. § 2C:35-12 (West 2005); *State v. Bridges*, 621 A.2d 1, 7 (N.J. 1993) (holding that a sentencing court that accepts such a plea agreement is precluded from altering “the terms of the prosecutor’s recommended sentence”).

conviction agreement,” the law obligated the trial court to impose the mandatory sentence.²⁸ Frequently this negotiation was grounded on the defendant’s willingness to “cooperate” by providing law enforcement with information that theoretically led to apprehending more major drug traffickers.²⁹ The resulting anomaly upended traditional sentencing principles because the more serious drug sellers avoided criminal penalties since they were able to provide “valuable” information.³⁰ On the other hand, lower-level sellers, who perhaps only sold in order to support a drug dependency, did not possess valuable information and, therefore, served longer sentences.³¹ In the absence of a prosecutor’s recommendation, the statute precluded the trial court from exercising discretion to impose lesser or rehabilitative sentences based on the factors of the case.³²

This sentencing scheme was examined by the Supreme Court of New Jersey and determined to be unconstitutional unless significant safeguards became part of the process.³³ The court recognized that unfettered prosecutorial discretion could lead to sentencing based on factors inconsistent with the constitutional requirements of separation of powers and due process of law.³⁴ Moreover, the New

28. N.J. STAT. ANN. § 2C:35-12.

29. *See, e.g., State v. Gerns*, 678 A.2d 634, 640-41 (N.J. 1996) (holding that it is “neither arbitrary nor capricious” for the prosecutor’s recommendation of a reduced sentence to be based on the “value of the cooperation received from a defendant”).

30. *See State v. Cengiz*, 575 A.2d 504, 509 (N.J. Super. Ct. App. Div. 1990) (“If a defendant is only peripherally involved in criminal activity, he will probably have little or nothing to offer the State. Paradoxically, a defendant who is deeply involved and well-connected to the criminal world and who has been cunning enough to cover his tracks well, will when accused be in a position where he has much to offer to the State, and the State will have good reason to seek his cooperation.”).

31. *Id.*; *see also State v. Gonzalez*, 603 A.2d 516, 520 (N.J. Super. Ct. App. Div. 1992) (suggesting that “the Legislature intended to promote law enforcement goals by encouraging illicit drug dealers to cooperate with the police,” and the prosecutors’ ability to waive mandatory sentencing is such an incentive).

32. *See N.J. STAT. ANN. § 2C:35-12* (permitting lesser-than-mandatory sentences only in the case of a negotiated plea agreement or postconviction agreement made with the prosecution); *Bridges*, 621 A.2d at 7 (upholding a mandatory drug sentence).

33. *See State v. Vasquez*, 609 A.2d 29, 31-35 (N.J. 1992) (without the adoption of plea-offer guidelines and the authority to conduct judicial review, the CDRA, which permits only the prosecutor to deviate from the otherwise mandatory minimum sentence is a violation of the separation of powers clause of the state constitution); *see also State v. Brimage*, 706 A.2d 1096, 1106 (N.J. 1998) (stating that individual county guidelines do not bring CDRA into conformity with the separation of powers clause or rectify the sentencing disparity problem); *State v. Lagares*, 601 A.2d 698, 704-05 (N.J. 1992) (requiring that guidelines be adopted to assist prosecutorial decision making concerning enhanced sentencing under N.J. STAT. ANN. § 2C:43-6f (West 2005 & Supp. 2011)).

34. *Lagares*, 601 A.2d at 705 (“The basis of defendant’s due-process claim is essentially the same as his separation-of-powers argument. The arguments dovetail with their focus on the risk of the prosecutor’s arbitrary application of the sentencing provision. The concerns that both arguments raise are sufficiently addressed through

Jersey Supreme Court recognized that individual prosecutors around the state were treating defendants in a disparate manner in the plea offers they extended.³⁵ In order to save the statute from its constitutional infirmity, the court insisted that the Attorney General adopt statewide plea-offer guidelines.³⁶ Although the court asked that the Public Defender's Office have input into the formulation of guidelines,³⁷ the Attorney General rejected any input that would allow a trial court to weigh individual mitigating factors.³⁸ Without *judicial* authority to consider drug treatment factors, the system was steered solely by the prosecutor's recommendation.³⁹

The CDRA has had a devastating impact on many of New Jersey's urban communities. In January 2004, the New Jersey Legislature created the fifteen-member Commission to Review Criminal Sentencing to review provisions of the penal code "to insure that they advance principles of fairness, public safety, and proportionality."⁴⁰ New Jersey's unique demographics make its urban areas "among the most densely populated" in the United States, and they are disproportionately populated by lower income minorities.⁴¹ Since the mandatory penalties of the CDRA were based on proximity to schools, the Commission conducted an extensive review of geocoded arrest data for drug activity in three primary cities, Newark, Camden, and Jersey City, and a suburban community.⁴² It first found that the urban school zones were enormous because they encompass the entire school property, not just the building, and then 1,000 feet in every direction.⁴³ And, "[g]iven the large concentration of schools in these areas, the protective zones [that] surround them

the articulation of guidelines by the State and by the preservation of adequate judicial review of prosecutorial decisions.").

35. *Brimage*, 706 A.2d at 1106.

36. *Id.*

37. *State v. Gerns*, 678 A.2d 634, 642 (N.J. 1996) (cautioning that separate county guidelines were creating undue disparity in sentencing and requesting that county prosecutors and public defenders participate in the effort to formulate the guidelines).

38. See ATTORNEY GENERAL GUIDELINES FOR NEGOTIATING CASES UNDER N.J.S.A. 2C:35-12, AT 3 (1998), available at <http://www.state.nj.us/oag/dcj/pdfs/agguid.pdf> (explaining that the new system uses a matrix that weighs the offense against the defendant's prior convictions to display "authorized plea offers").

39. The guidelines were revised in 2004 to permit trial courts to impose alternative sentences on first-time drug offenders. See REVISED ATTORNEY GENERAL GUIDELINES FOR NEGOTIATING CASES UNDER N.J.S.A. 2C:35-12 § 6.5.2 (2004), available at http://www.state.nj.us/lps/dcj/agguide/directives/section_1.pdf (restoring judicial sentencing discretion).

40. NEW JERSEY COMMISSION TO REVIEW CRIMINAL SENTENCING, REPORT ON NEW JERSEY'S DRUG FREE ZONE CRIMES & PROPOSAL FOR REFORM 3 (2005) [hereinafter SENTENCING COMMISSION], available at http://sentencing.nj.gov/dfz_report_pdf.html.

41. *Id.* at 5.

42. *Id.* at 13-24.

43. *Id.* at 5.

have overlapped and coalesced to such an extent that the three cities studied by the Commission—Jersey City, Camden, and Newark—have themselves become all-encompassing drug free zones.”⁴⁴

Since so few school zone arrests occurred in rural or suburban communities, the CDRA effectively created a two-tier sentencing scheme: one for urban areas and one for nonurban areas.⁴⁵ Rational laws based on the severity of the offense were applied to the latter, but inflexibly severe mandatory sentencing was applied to the former. “The end result of this cumulative ‘urban effect’ of the drug free zone laws is that nearly every offender (96%) convicted and incarcerated for a drug free zone offense in New Jersey is either Black or Hispanic.”⁴⁶ As a result of the ease with which drug arrests can be made in open-air markets in urban areas, a large percentage of New Jersey’s incarcerated population has become young, nonviolent, minority drug addicted individuals from New Jersey’s urban areas.⁴⁷ The removal of these individuals from families, schools, churches, and other community institutions and mixing them with more violent offenders, some involved in gang activity, has hardly contributed to a solution to the drug problem. Instead, mandatory incarceration in state prison, coupled with the collateral consequences of a drug conviction criminal record, prevented many from escaping the cycle of addiction.⁴⁸ The Commission’s data yielded “no evidence that drug dealers are aware of school zones, much less that they deliberately undertake their criminal activity to evade exposure to the school zone law.”⁴⁹ In fact, of the ninety reported decisions on school zone cases between 1987 and 2005, only two took place on school property;⁵⁰ one in which the defendant was a

44. *Id.*

45. *See id.* at 5-6. The “urban effect” of the drug free zone laws is that African American or Hispanic individuals in urban centers will be subject to more stringent penalties while individuals prosecuted for the same offense in suburban communities will receive lighter sentences. *Id.*

46. *Id.* at 5.

47. *See* MARC MAUER, THE SENTENCING PROJECT, THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM 10 (1999), available at http://www.sentencingproject.org/doc/publications/rd_crisisoftheyoung.pdf (“[I]nner-city [drug] sales tend[] to be neighborhood based, often taking place on street corners.”).

48. *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the effects current imprisonment policies have on the African American community); ECONOMIC MOBILITY PROJECT ET AL., COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY (2010), available at http://www.economicmobility.org/assets/pdfs/EMP_Incarceration.pdf (noting the “barriers to economic progress” erected by a trip through the criminal justice system).

49. SENTENCING COMMISSION, *supra* note 40, at 6.

50. *Id.* at 10.

student,⁵¹ and one in which the defendant was arrested riding a bicycle through a public park that was leased by a municipality's board of education for its athletic fields.⁵²

The repeat offender law,⁵³ one of New Jersey's most draconian drug laws, has somehow managed to remain off of policy-makers' radar screens. This statute requires that any person previously convicted of even one drug distribution offense (including possession with intent to distribute CDS within a school zone), must receive an "extended term" if requested by a prosecutor.⁵⁴ The law requires that a person convicted of a drug offense who was previously convicted of a drug distribution offense be subject to the following mandatory extended term sentences and parole ineligibility terms:

<u>DRUG OFFENSE</u>	<u>ORDINARY SENTENCES</u> ⁵⁵	<u>43-6f EXTENDED TERMS</u> ⁵⁶
1ST DEGREE	10 to 20 Years. ⁵⁷ Presumptive 15 years. ⁵⁸	20 Years to Life. ⁵⁹ Presumptive 50 years. ⁶⁰ Mandatory parole disqualifier from 80 months to 25 years. ⁶¹

51. *Id.*

52. *Id.*

53. N.J. STAT. ANN. § 2C:43-6f (West 2005 & Supp. 2011).

54. *Id.*

55. The ordinary sentence terms are taken from N.J. STAT. ANN. § 2C:43-6a.

56. The extended sentence terms are taken from N.J. STAT. ANN. § 2C:43-6f, and N.J. STAT. ANN. § 2C:43-7 (West 2005).

57. *Id.* § 2C:43-6a(1).

58. N.J. STAT. ANN. § 2C:44-1f(1)(b) (West 2005 & Supp. 2011). Although presumptive terms are no longer in effect in New Jersey, "the sentencing process . . . remain[s] essentially unchanged." *State v. Natale*, 878 A.2d 724, 741 (N.J. 2005). Therefore, "many, if not most, judges will pick the middle of the sentencing range as a logical starting point" for deciding the length of a defendant's sentence, even though they are "no longer . . . required to do so from the fixed point of a statutory presumptive." *Id.* (emphasis omitted).

59. N.J. STAT. ANN. § 2C:43-7a(2).

60. *Id.* § 2C:43-6c; § 2C:44-1f(1).

61. The mandatory parole disqualifiers are taken from N.J. STAT. ANN. § 2C:43-6b, and N.J. STAT. ANN. § 2C:43-7.

2ND DEGREE	5 to 10 Years. ⁶² Presumptive 7 years. ⁶³	10 to 20 Years. ⁶⁴ Presumptive 15 years. ⁶⁵ Mandatory parole disqualifier from 5 to 10 years. ⁶⁶
3RD DEGREE	3 to 5 Years ⁶⁷ Presumptive 4 years. ⁶⁸	5 to 10 Years. ⁶⁹ Presumptive 7 years ⁷⁰ Mandatory parole disqualifier from 3 to 5 years. ⁷¹
4TH DEGREE	18 Month Maximum. ⁷² Presumptive 9 months. ⁷³	3 to 5 Years. ⁷⁴ Mandatory parole disqualifier of 18 months. ⁷⁵

This chart reflects that the current sentence ranges are grossly disproportionate to the offenses. They serve neither the goals of justice nor efficacy.

Finally, similar to the school zone law, the repeat offender law is duplicative.⁷⁶ There are other statutes that give judges the discretion to sentence defendants to extended term sentences and parole ineligibility terms based on a prior record or the individual circumstances of a case.⁷⁷

62. *Id.* § 2C:43-6a(2).

63. *Id.* § 2C:43-6c; § 2C:44-1f(e).

64. *Id.* § 2C:43-7a(3).

65. *Id.* § 2C:43-6c; § 2C:44-1f(1).

66. *See id.* § 2C:43-7c.

67. *Id.* § 2C:43-6a(3).

68. *Id.* § 2C:44-1f(d).

69. *Id.* § 2C:43-7a(4).

70. *Id.* § 2C:44-1f(1).

71. *See id.* § 2C:43-7c.

72. *Id.* § 2C:43-6a(4).

73. *Id.* § 2C:44-1f(e).

74. *Id.* § 2C:43-7a(5).

75. *Id.* § 2C:43-6c.

76. *See supra* text accompanying note 18.

77. *See* N.J. STAT. ANN. § 2C:44-3a (West 2005 & Supp. 2011) (granting judges permission to sentence a “persistent offender,” that is, an individual with at least two prior criminal convictions in the last ten years, to an extended term); N.J. STAT. ANN. § 2C:43-6b (granting judges permission to sentence a defendant to parole ineligibility term when he or she “is clearly convinced that the aggravating factors substantially outweigh the mitigating factors”).

B. Drug Courts Come to New Jersey

After a decade of New Jersey's war on drugs, the results were clear: the war was being lost.⁷⁸ Prisons were being overcrowded, the Department of Corrections' budget had exploded,⁷⁹ and yet the drug problem only appeared worse.⁸⁰ Minority communities were hit the hardest by the CDRA.⁸¹ Against this background, a few people at the grassroots level realized that having more and more incarceration was not the answer, and they started a revolution in New Jersey's drug laws that we now call drug courts.⁸²

The first modern drug court opened its doors in 1989 in Dade County, Florida.⁸³ In 1997, the National Association of Drug Court Professionals ("NADCP")⁸⁴ defined drug courts as having the following ten key components:

- [1] Drug courts integrate alcohol and other drug treatment services with justice system case processing
- [2] Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights
- [3] Eligible participants are identified early and promptly placed in the drug court program
- [4] Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services
- [5] Abstinence is monitored by frequent alcohol and other drug testing
- [6] A coordinated strategy governs drug court responses to participants' compliance
- [7] Ongoing

78. See ADMIN. OFFICE OF THE COURTS, MANUAL FOR OPERATION OF ADULT DRUG COURTS IN NEW JERSEY 1-2 (2002) [hereinafter MANUAL], available at <http://www.judiciary.state.nj.us/directive/dctman.pdf>.

79. See *id.* at 2 ("New Jersey has seen major increases in the number of arrests generally, the number of arrests in drug cases, especially with the enactment of the 'Comprehensive Drug Reform Act of 1986,' and the percentage of offenders being sentenced to serve time in state institutions. Data provided by the New Jersey Department of Corrections show: Total inmate population increased by 457 percent from 1977 to 2000. The Corrections budget grew from \$92.3 million in 1980 to \$845.7 million in 1999. More than 42 percent of New Jersey's inmates report an 'extreme' problem with drugs.").

80. See *id.* ("We are arresting more people, sentencing more people and incarcerating more people, but drug use and crime it generates is still with us despite substantial efforts to eliminate it.").

81. See *id.* ("Our minority communities are hit the hardest as a disproportionate percentage of inmates are minorities. New Jersey's inmate population is 64 percent African-American and 18% Hispanic.").

82. See *id.* at 1.

83. See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POLY 125, 126 (2001) ("The current wave of problem-solving experimentation can be traced back to the opening of the first 'drug court' in Dade County, Florida, in 1989.").

84. The National Association of Drug Court Professionals (NADCP) is "a national non-profit 501(c)(3) corporation founded in 1994 by pioneers from the first twelve Drug Courts in the nation." *About NADCP*, NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, <http://www.nadcp.org/learn/about-nadcp> (last visited May 22, 2012).

judicial interaction with each drug court participant is essential [8] Monitoring and evaluation measure the achievement of program goals and gauge effectiveness [9] Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations [10] Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.⁸⁵

Drug courts began in New Jersey in the mid-1990s when pilot programs were started in Camden, Essex, Union, and Passaic counties.⁸⁶ The pilot programs were modeled after the NADCP's ten key components.⁸⁷ Using the existing sentencing laws, drug-abusing defendants were given the chance to participate in rehabilitative drug treatment under the supervision of a judge in a drug court setting.⁸⁸ Initially, the pilot programs were funded from federal grants, but after 1997, several counties developed programs through a combination of federal and state funding.⁸⁹ The pilot programs were so successful that the Administrative Office of the Courts ("AOC") sought to expand them to all New Jersey counties and obtain regular funding from the New Jersey State Legislature.⁹⁰

The executive and legislative branches were also seeking new ways to support the pilot drug court programs.⁹¹ The New Jersey Attorney General proposed a series of amendments to the CDRA in order to facilitate the work of new drug courts.⁹² The CDRA had a rehabilitative sentencing option, but it was rarely used.⁹³ The proposed amendments would allow a judge to sentence a defendant with an otherwise mandatory minimum sentence or presumption of imprisonment to rehabilitative drug treatment, which could not be done through the general sentencing laws.⁹⁴ In 1999, the Legislature enacted the suggested changes to the CDRA, and the sentencing

85. NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS iii (1997), available at http://www.nadcp.org/sites/default/files/nadcp/Key_Components.pdf.

86. MANUAL, *supra* note 78, at 5.

87. ADMIN. OFFICE OF THE COURTS, A MODEL FOR SUCCESS: A REPORT ON NEW JERSEY'S ADULT DRUG COURTS 18 (2010) [hereinafter MODEL FOR SUCCESS], available at <http://www.judiciary.state.nj.us/drugcourt/DrugCourtReport.pdf>.

88. *Id.* at 6 (offenders eligible for drug court sentencing under "special probation" statute).

89. *Id.*

90. *Id.* at 7.

91. *See, e.g.*, PETER VERNIERO, OFFICE OF THE ATTORNEY GEN. REPORT TO THE GOVERNOR BY THE ATTORNEY GENERAL ON THE NEED TO UPDATE THE COMPREHENSIVE DRUG REFORM ACT OF 1987 (1996).

92. *Id.* at 18.

93. *Id.* at 18-19.

94. *Id.*

option was renamed “special probation.”⁹⁵ However, similar to other provisions of the CDRA, the Legislature gave sentencing discretion to prosecutors, rather than judges.⁹⁶

Meanwhile, the AOC moved forward with the statewide implementation of drug courts.⁹⁷ In September 2001, legislation was enacted to begin the process.⁹⁸ The legislation created a funding source for payment of the treatment providers and established the extra judicial staff necessary to operate each county’s drug court.⁹⁹ On July 22, 2002, the AOC issued Directive #2-02, which promulgated a comprehensive “Manual for Operation of Adult Drug Courts in New Jersey” (“Manual”).¹⁰⁰ The Manual “was intended to implement uniform [policies and procedures] to ensure the equitable operation of” drug courts throughout New Jersey.¹⁰¹

Under the Manual, drug court begins with an application by a defendant,¹⁰² who must be given the opportunity to consult with defense counsel concerning the application.¹⁰³ Upon receipt of an application, the drug court substance abuse evaluator conducts an interview of the defendant.¹⁰⁴ In order to be admitted to drug court, the defendant must be substance dependant as defined by the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*¹⁰⁵ (“DSM-IV-TR”).¹⁰⁶ The substance abuse evaluator also makes a recommendation of the appropriate level of care for defendant based on the *American Society of Addiction Medicine Patient Placement Criteria, Second Edition-Revised*¹⁰⁷

95. 1999 N.J. Laws 376; see N.J. STAT. ANN. § 2C:35-14a (West 2005 & Supp. 2011).

96. See N.J. STAT. ANN. § 2C:35-14c(2) (“[I]f the prosecutor objects . . . [t]he court shall not place a person on special probation over the prosecutor’s objection except upon a finding by the court of a gross and patent abuse of prosecutorial discretion.”).

97. MANUAL, *supra* note 78, at 6.

98. See 2001 N.J. Laws 1532.

99. *Id.*

100. MANUAL, *supra* note 78.

101. *State v. Meyer*, 930 A.2d 428, 434 (2007) (internal quotation marks omitted).

102. MANUAL, *supra* note 78, at 19.

103. *Id.* at 20 (“[A] drug court application must be made with the advice and consultation of defense counsel who will notify eligible candidates of program requirements.”).

104. *Id.* at 22.

105. See generally *Diagnostic and Statistical Manual*, AMERICAN PSYCHIATRIC ASSOCIATION, <http://www.psych.org/MainMenu/Research/DSMIV.aspx> (last visited May 22, 2012) (The *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition, Text Revision* “is the standard classification of mental disorders used by mental health professionals in the United States”).

106. See MANUAL, *supra* note 78, at 22-23 (detailing the findings a substance abuse evaluator must make in order for a candidate to meet the clinical requirements to be accepted into drug court).

107. See generally, *ASAM Patient Placement Criteria (PPC-2R)*, AMERICAN SOCIETY

(“ASAM PPC-2R”).¹⁰⁸

The Manual provides two separate paths or tracks for legal admission into drug court.¹⁰⁹ Defendants must satisfy either the eligibility requirements of the special probation statute (“track one”), or the general sentencing laws (“track two”).¹¹⁰ The prosecutor reviews an application for an initial determination of the defendant’s legal eligibility.¹¹¹ If the defendant disagrees with the conclusions of the prosecutor or the substance abuse evaluator, he or she may file an appeal with the drug court judge.¹¹²

If a defendant is accepted into drug court, he or she is offered a plea bargain with drug court as a recommended sentence.¹¹³ A drug court sentence “consists of four progressive phases which encompass various levels and degrees of substance abuse treatment and probationary supervision.”¹¹⁴ The four phases are: stabilization, positive change, relapse prevention, and commencement.¹¹⁵ Upon successful completion of a drug court sentence, a defendant “graduates” from drug court.¹¹⁶

Unlike other types of probationary supervision, the drug court judge takes an active role in the supervision of defendant’s progress through the phases.¹¹⁷ Participants in drug court are subject to intensive supervision, frequent drug testing, and regular court appearances, combined with treatment and recovery services.¹¹⁸ Another distinctive feature of drug courts is the “team approach.”¹¹⁹ Most drug court business is done in informal team meetings led by

OF ADDICTION MEDICINE, <http://www.asam.org/publications/patient-placement-criteria/ppc-2r> (last visited May 22, 2012) (The *American Society of Addiction Medicine Patient Placement Criteria, Second Edition-Revised* “is the most widely used and comprehensive set of guidelines for placement, continued stay and discharge of patients with addiction disorders”).

108. MANUAL, *supra* note 78, at 23.

109. *Id.* at 10.

110. *Id.* at 10-18; *see* State v. Meyer, 930 A.2d 428, 434-36 (2007).

111. MANUAL, *supra* note 78, at 21.

112. *Id.* at 26.

113. *Id.* at 23.

114. *Id.* at 35.

115. *Id.* at 35-42.

116. *Id.* at 42. In addition to successfully completing the substance abuse treatment program, drug court graduation requires that the participant must have at least one-year of continuous clean time, be employed full-time (or part-time if also attending school or vocational training), be making regular payments on fines and any child support payments, have a history of compliance with any drug court sanctions, demonstrate the ability to participate in a community support network where the participant resides, and have no active warrants or pending criminal charges. *Id.*

117. *Id.* at 3.

118. *Id.* at 3-4.

119. *Id.* at 28.

the drug court judge.¹²⁰ The drug court team consists of court staff, probation officers, treatment counselors, substance abuse evaluators, and the prosecutor and defense attorney.¹²¹ According to the Manual, “the drug court team recognizes that recovery is a complex challenge and that relapse may occur.”¹²² The primary goal of the drug court team is to shepherd the defendant through the complex process of recovery from drug addiction,¹²³ a fundamental shift in the role of the criminal justice system from the war on drugs policies.

By 2005, the statewide implementation plan had been completed, and drug courts were operating in every county in New Jersey.¹²⁴ In 2010, the AOC reported that “[t]he rate at which New Jersey Drug Court graduates [were] re-arrested for a new indictable offense [was] . . . 16 percent,¹²⁵ [t]he rate of reconviction [was] 8 percent[,] and the rate of incarceration in a state prison [was] 4 percent.”¹²⁶ In comparison, “[t]he rate of re-arrest for drug offenders released from prison was reported . . . as 54 percent with a reconviction rate of 43 percent.”¹²⁷ Additionally, the AOC reported that the average annual cost per active drug court participant was approximately \$11,379, compared to an average annual cost of \$38,900 to incarcerate an individual in state prison.¹²⁸

C. Drug Court Appellate Litigation

The first major legal dispute about drug courts concerned the Manual’s format of two separate admission tracks. In *State v. Matthews*,¹²⁹ the defendant’s criminal charges made him eligible for a probation sentence under New Jersey’s general sentencing laws.¹³⁰ Under the Manual’s interpretation of the law, this gave the drug court judge discretion to sentence Matthews to drug court.¹³¹ However, the prosecutor took the position that the defendant had to meet the more stringent requirements of the special probation statute.¹³² Under that statute, the judge could not place an individual

120. *Id.*

121. *Id.* at 28-34.

122. *Id.* at 36.

123. *See id.* at 35-36 (explaining the phases of the recovery program are aimed at helping the individual “develop[] an independent drug-free and crime-free lifestyle”).

124. MODEL FOR SUCCESS, *supra* note 87, at 7.

125. *Id.* at 16.

126. *Id.*

127. *Id.*

128. *Id.*

129. 875 A.2d 1050 (N.J. Super. Ct. App. Div. 2005). *But see* *State v. Meyer*, 192 N.J. 421 (2007) (criticizing *Matthews*).

130. *Matthews*, 875 A.2d at 1051-52.

131. *See* MANUAL, *supra* note 78, at 10-18.

132. *Matthews*, 875 A.2d at 1054.

in drug court “over the prosecutor’s objection except upon a finding by the court of a gross and patent abuse of prosecutorial discretion.”¹³³ The drug court judge agreed with the prosecutor and found that he could not overrule the prosecutor’s objection under the gross and patent abuse standard.¹³⁴

Relying on the Manual, the defendant argued on appeal that there were two separate admission tracks to drug court and, therefore, not everyone had to comply with the strict terms of the special probation statute.¹³⁵ According to the defendant, the special probation statute was only necessary for individuals who could not be sentenced to drug court under the general sentencing laws.¹³⁶ Thus, if an individual could be sentenced to drug court under the general sentencing laws, then there was no need to consider a sentence under the special probation statute.¹³⁷ The defendant argued that the purpose of the special probation statute was to provide additional access to rehabilitative drug treatment for individuals who could not be sentenced to such treatment under the general sentencing laws.¹³⁸

The New Jersey Appellate Division, however, rejected this argument.¹³⁹ Instead, the *Matthews* court found that the special probation statute conflicted with the general sentencing laws.¹⁴⁰ Purporting to read the statutes *in pari materia*, the *Matthews* court held that the special probation statute controlled over the general sentencing laws because it was more specific.¹⁴¹ The Manual’s position that there were two separate admission tracks to drug court was rejected, and the Manual itself was dismissed as a mere “procedural tool.”¹⁴² Under *Matthews*, all applicants to drug court had to comply with the strict requirements of the special probation statute.¹⁴³ The Supreme Court of New Jersey denied certification.¹⁴⁴

For several years after the *Matthews* opinion, drug courts were in disarray. Some drug court judges strictly followed *Matthews*, some found ways to distinguish it, and others just ignored the opinion. In *State v. Meyer*,¹⁴⁵ the defendant’s criminal charges, similar to *Matthews*, made him eligible for a probation sentence under New

133. N.J. STAT. ANN. § 2C:35-14c(2) (West 2005 & Supp. 2011); *see supra* note 96.

134. *Matthews*, 875 A.2d at 1055.

135. *Id.* at 1053.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1055.

140. *Id.* at 1054-55.

141. *Id.* at 1055.

142. *Id.*

143. *Id.*

144. *State v. Matthews*, 889 A.2d 443 (N.J. 2005).

145. 930 A.2d 428 (N.J. 2007).

Jersey's general sentencing laws.¹⁴⁶ The prosecutor objected to Meyer's admission because his prior record disqualified him for sentencing under the special probation statute.¹⁴⁷ Relying specifically on *Matthews*, the prosecutor argued that Meyer could not be admitted to drug court without meeting all the requirements of the special probation statute.¹⁴⁸ The judge, however, disagreed and found that he had authority to sentence Meyer to drug court consistent with the Manual and the general sentencing laws.¹⁴⁹ After considering the drug court substance abuse evaluator's recommendation that Meyer "enter and complete a Long Term Residential treatment program," the judge admitted Meyer to drug court.¹⁵⁰ Meyer was subsequently sentenced to a five-year probationary term with the requirement that he participate in drug court.¹⁵¹

The State eventually appealed the matter to the Supreme Court of New Jersey.¹⁵² There, the State argued that "the only portal" through which a defendant could enter drug court was the special probation statute.¹⁵³ The court found that it could not "accept the premise or the logic of the State's position."¹⁵⁴ The court in *Meyer* traced the history of drug courts in New Jersey¹⁵⁵ and came to the conclusion that drug courts were "a creature of the judiciary."¹⁵⁶ Moreover, the court held that it had properly exercised its own authority under the New Jersey Constitution in creating drug courts.¹⁵⁷ Thus, drug courts were established as an official "subpart of the criminal part of the Law Division."¹⁵⁸

The court additionally endorsed the Manual's interpretation of the sentencing laws and its two-track admission format for drug court, finding that the special probation statute was not intended to govern drug court, but rather was a sentencing option available for individuals who could not be sentenced to drug court under the general sentencing laws.¹⁵⁹ Moreover, the special probation statute was not meant to restrict a court's authority to impose reasonable

146. *Id.* at 430.

147. *Id.*

148. *Id.*

149. *Id.* at 431.

150. *Id.* at 431.

151. *Id.* at 432.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 433-34.

156. *Id.* at 434.

157. *See id.* at 433-34.

158. *Id.* at 434.

159. *Id.* at 430-31, 434-36.

conditions of probation under the general sentencing laws, in particular the condition that a defendant participate in drug treatment under the supervision of drug court.¹⁶⁰ The Manual, which the *Matthews* opinion had rejected as a mere “procedural tool,”¹⁶¹ was elevated to the governing document for drug courts.¹⁶² In fact, the *Meyer* court specifically disapproved of the *Matthews* opinion.¹⁶³ Following *Meyer*, the Legislature amended the special probation statute, making it clear that the Supreme Court’s interpretation was correct and that the statute was not intended to restrict a court’s authority to sentence a defendant to drug court under the general sentencing laws.¹⁶⁴

After almost ten years of drug courts in New Jersey, there still had not been a single published appellate decision that found error in a drug court judge’s decision to deny admission to drug court. However, in 2010, two cases were heard by the Supreme Court of New Jersey that did just that.

In *State v. Clarke*,¹⁶⁵ the defendant, charged with stealing money from his employer from January 2008 to June 2008, sought admission to drug court.¹⁶⁶ During his interview with the drug court substance abuse evaluator, Clarke stated “that he smoked \$200 worth of crack cocaine daily for a year-and-a-half period, but ended his drug abuse without the assistance of any treatment in July 2008.”¹⁶⁷ In his evaluation, “[t]he evaluator noted that there [was] a high likelihood that [Clarke would] relapse to the use of drugs without close outpatient monitoring and structured therapeutic services.”¹⁶⁸ The evaluator recommended an intensive patient/partial hospitalization treatment plan.¹⁶⁹ However, the drug court judge denied Clarke’s application.¹⁷⁰ Relying on a pre-1999 statutory definition of drug dependency, the judge held that “[d]rug court is reserved for those defendants who are drug dependent at the time of sentencing and if [d]efendant is no longer drug dependent, a

160. *Id.* at 437. The court recognized the “absurd” result of the State’s argument: “that the Legislature granted a trial court power to impose a probationary sentence, but not the power to attach the one condition necessary to address the offender’s desperate needs—a drug rehabilitation program.” *Id.* The court found such a result “inconceivable.” *Id.* at 436.

161. *State v. Matthews*, 875 A.2d 1050, 1055 (N.J. Super. Ct. App. Div. 2005).

162. *Meyer*, 930 A.2d at 436-37 (“[T]he New Jersey Supreme Court has the ultimate authority to fashion the criteria for admission into Drug Court.”).

163. *Id.* at 437.

164. N.J. STAT. ANN. § 2C:35-14a (West Supp. 2011).

165. 1 A.3d 607 (N.J. 2010).

166. *Id.* at 609.

167. *Id.*

168. *Id.* (internal quotation marks omitted).

169. *Id.*

170. *Id.* at 610.

probationary sentence is not appropriate for him.”¹⁷¹ The judge also weighed the aggravating and mitigating factors and concluded that a probationary sentence was not appropriate for Clarke under the second track.¹⁷² Clarke appealed and the Appellate Division remanded the matter for a plenary hearing on the issue of whether Clarke was still in need of treatment and otherwise met the criteria for second track admission.¹⁷³ Before the remand was completed, the New Jersey Supreme Court granted the State’s motion for leave to appeal.¹⁷⁴

In *State v. Dolan*,¹⁷⁵ the defendant, charged with several residential and car burglaries, sought admission to drug court.¹⁷⁶ In his interview with the drug court substance abuse evaluator, “Dolan revealed that he had used cocaine and heroin every day during the thirty days preceding his incarceration and that his previous efforts to overcome his addiction failed.”¹⁷⁷ The evaluator recommended high intensity, long-term residential treatment.¹⁷⁸ The drug court judge, however, ignored the substance abuse evaluator’s findings and recommendations and denied Dolan’s application.¹⁷⁹ Focusing on Dolan’s history of residential and car burglaries, the judge found that a danger to the community would result if Dolan was placed on probation.¹⁸⁰ Additionally, the judge weighed the aggravating and mitigating factors and concluded that a probationary sentence was not appropriate for Dolan under the second track.¹⁸¹ Dolan appealed, and the New Jersey Appellate Division remanded the matter for the judge to reconsider “whether Dolan’s history of residential and car burglaries disqualified him” under second track principles.¹⁸² Before the remand was completed, the Supreme Court of New Jersey granted the State’s motion for leave to appeal and consolidated the

171. *Id.* The judge relied on *State v. Soricelli*, 722 A.2d 95 (N.J. 1999), which had interpreted the pre-1999 statutory definition of drug dependency to not include individuals who were completely rehabilitated “at the time of sentencing.” *Clarke*, 1 A.3d at 615-16.

172. *Clarke*, 1 A.3d at 615-16. Under New Jersey’s general sentencing laws, the judge weighs statutorily enumerated aggravating and mitigating factors to “determine whether a probationary or custodial sentence is appropriate.” *Id.* at 613 (quoting *State v. Baylass*, 553 A.2d 326, 328 (N.J. 1989)).

173. *Clarke*, 1 A.3d at 609-10.

174. *Id.*

175. *Id.* at 607-10.

176. *Id.* at 610.

177. *Id.* at 611.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*; see also *supra* note 172 (concerning aggravating and mitigating factors).

182. *Clarke*, 1 A.3d at 611.

case with *Clarke*.¹⁸³

The court disagreed with the appellate court's remedy of remanding for plenary hearings.¹⁸⁴ Viewing the decision on whether or not to approve a drug court application as "essentially a sentencing decision," the New Jersey Supreme Court found that plenary hearings generally were not required.¹⁸⁵ On the merits of each case, however, the court agreed that the judge had not provided each defendant "full and fair consideration" of his application.¹⁸⁶

In *Clarke*, the court discussed how the statutory definition of "drug or alcohol dependent person" had been changed in 1999 to include a person who was drug or alcohol dependent at the time of the offense.¹⁸⁷ Furthermore, the court elevated the importance of the substance abuse evaluator's report in making the sentencing decision of whether to admit an applicant to drug court.¹⁸⁸ The court held that "though the judge may ultimately disagree with the recommendation in the evaluator's report, the reasons for doing so should be made clear in the record."¹⁸⁹ The court found that the "judge did not consider whether [Clarke] was drug dependent at the time of the offense," "did not address the . . . evaluator's findings that . . . there [was] a high likelihood that . . . Clarke [would] relapse" without treatment for his drug dependence, and failed "to appreciate that Clarke's drug dependency . . . was an important factor" in determining the aggravating and mitigating factors.¹⁹⁰ The court held that this "combination of errors . . . deprived Clarke of full and fair consideration of his application" and remanded the matter for reconsideration of the defendant's drug court application.¹⁹¹

In *Dolan*, the Supreme Court went even further in elevating the importance of the substance abuse evaluation:

183. *Id.* at 608-09.

184. *Id.* at 614-15.

185. *Id.* However, the court held that "Drug Court judges have the discretion to permit witnesses to testify when a genuine issue of material fact needs to be resolved." *Id.* at 615.

186. *Id.* at 617. Every applicant is "entitled to full and fair consideration of his application" when applying for supervisory treatment. N.J. STAT. ANN. § 2C:43-12(f) (West 2005 & Supp. 2011).

187. *Clarke*, 1 A.3d at 616.

188. *Id.* at 617.

189. *Id.*

190. *Id.* (internal quotation marks omitted). In overturning a sentencing judge's decision concerning the aggravating and mitigating factors based on a failure to consider drug dependency as an "important factor," the New Jersey Supreme Court has come close to breaking with precedent and declaring drug dependency to actually be a mitigating factor in sentencing. *See id.* *But see* State v. Rivera, 590 A.2d 238, 241 (N.J. 1991) ("Even when, as here, the commission of the offense may be related to the offender's drug or alcohol addiction, the Code does not condone leniency.").

191. *Clarke*, 1 A.3d at 617 (internal quotation marks omitted).

Although a Drug Court judge is not bound by a substance abuse evaluator's recommendation for in-patient drug treatment, the evaluation is a *critical component* of a decision to grant or deny admission into the Drug Court program. The substance abuse evaluator's recommendation can assist in the judge's consideration of a defendant's need for treatment and the probable effect of any addiction on future criminal behavior.¹⁹²

The court held that because the drug court judge failed to consider "the full measure of Dolan's substance abuse history and the written recommendation of the substance abuse evaluator, [the judge] could not have given full and fair consideration" to his drug court application.¹⁹³ Similar to *Clarke*, the matter was remanded for reconsideration.¹⁹⁴

III. A PUBLIC HEALTH FRAMEWORK FOR DRUG COURTS

New Jersey's war on drugs did not occur in a vacuum; it was part of a widespread reaction throughout the United States that began in earnest around 1980. Sociologists call the response to substance abuse that we have described "moral panic."¹⁹⁵ Moral panics focus the attention of the press, the public, legislators, law enforcement, and action groups on a perceived threat or evil, which sociologist Stanley Cohen called a "folk devil."¹⁹⁶

In a moral panic, however, the evil is always exaggerated, as is the case with the fear of drug offenders harming our children. But it is difficult to shake the belief that the focus of a moral panic is not the evil it is made out to be. During times of moral panic,

the behavior of some members of society is thought by others to be so problematic, the evil they do, or are thought to do, is felt to be so wounding to the substance and fabric of the body social that serious steps must be taken to control the behavior, punish the perpetrators, and repair the damage These perpetrators or supposed perpetrators come to be regarded as the enemy – or an enemy – of society, 'folk devils,' deviants, outsiders, the 'Other,' legitimate and deserving targets of self-righteous anger, hostility, and punishment.¹⁹⁷

The exaggerated evil usually triggers political action, sensationalist media attention, and growth of institutional industries, such as the overloaded prison systems required to house

192. *Id.* at 617-18 (emphasis added).

193. *Id.* at 617.

194. *Id.* at 618.

195. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (3d ed. 2002).

196. *Id.* at 2.

197. ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 35 (2d ed. 2009) (internal citations omitted).

incarcerated men and women found guilty of drug offenses.¹⁹⁸ The confluence of panic over drug use, gangs, flooding cities with specific kinds of drugs, and an obsession with law and order became a perfect storm of the elements that make up a moral panic.¹⁹⁹ Even the metaphor “war on drugs” is used to create an exaggerated response to an exaggerated evil—a response that has failed.²⁰⁰

In contrast to the “war on drugs” metaphor, and the moral panic that phrase engenders, we argue that serious drug policies should be framed as public health measures. Criminal law and public health law generally have the same goal: to use the coercive power of the state to optimize public safety.²⁰¹ But they use very different strategies and methods to achieve that goal. In this section, we argue that drug courts use a combination of criminal punishment and treatment to achieve public safety, and in that respect, drug court is a hybrid that uses nonconventional instruments of state power. Those nonconventional instruments include traditional public health methods that are nonpunitive, such as epidemiological studies, health care resources, and community-based mechanisms for reducing risk to public safety. They also include nonpunitive but coercive methods such as compulsory treatments.²⁰² We begin with some provisional definitions of key terms. We then provide a roadmap for a public health law approach to drug offenses. Next we distinguish between our approach and the approach known as “therapeutic jurisprudence.”²⁰³ We conclude that drug courts,

198. In a recent documentary concerning the war on drugs, a “hardened security chief named Mike Carpenter who runs a facility in Oklahoma” stated it this way: “I am very much a law and order kind of guy . . . I think sometimes we have people doing a whole lot of time for not very much crime. It’s almost like they’re paying for our fear instead of paying for their crime.” *Drugs at the Center of ‘The House I Live In’*, NAT’L PUB. RADIO, (Jan. 21, 2012), <http://www.npr.org/2012/01/21/145576387/drugs-at-the-center-of-the-house-i-live-in>.

199. See generally Paul Ashton, *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, JUSTICE POLICY INSTITUTE (2011), <http://www.justicepolicy.org/research/2614> (detailing the growth of privately owned and operated prisons, and their relationship to the “war on drugs”).

200. See Moises Naim, *Mixed Metaphors: Why the Wars on Cancer, Poverty, Drugs, Terror, Drunk Driving, Teen Pregnancy, and Other Ills Can’t be Won*, FOREIGN POL’Y (March/April 2010), available at http://www.foreignpolicy.com/articles/2010/02/22/mixed_metaphors (arguing that the use of the war metaphor inevitably produces bad policy).

201. See Zita Lazzarini, Richard A. Goodman & Kim S. Dammers, *Criminal Law and Public Health Practice*, in *LAW IN PUBLIC HEALTH PRACTICE* 136, 137 (Richard A. Goodman et al. eds., 2d ed. 2007).

202. See *id.* at 137-40.

203. See generally David B. Wexler, *Putting Mental Health Into Mental Health Law: Therapeutic Jurisprudence*, in *ESSAYS IN THERAPEUTIC JURISPRUDENCE* 3, 8-9 (David B. Wexler & Bruce J. Winick eds., 1991) (explaining the classic statement of the theory of therapeutic jurisprudence as an alternative to punitive approaches to criminal justice).

precisely because they are a hybrid of punitive and treatment strategies, serve the interests of two fundamental cornerstones of public policy in a constitutional democracy: justice and cost-effectiveness.

A. *Drug Courts: Treatment Not (Solely) Punishment*

This Article argues that drug courts provide a solution to a problem endemic to a criminal justice approach to drug offenses. While drug offenses are per se nonviolent crimes, the traditional mechanisms for responding to intentional or reckless violations of the criminal code are prototypically designed to protect the public from crimes of violence against people or property. But drug offenses endanger the public not because ingesting or distributing a controlled dangerous substance are violent, but because drugs are widely believed to be causally related to violent crimes such as robbery, theft, or assault.²⁰⁴ Moreover, since drug possession and distribution are legally prohibited,²⁰⁵ they are crimes that on their face subject offenders to criminal punishment. However, the drug-related *conduct* targeted by criminal laws is widely believed to be an expression of mental health problems, notably addiction.²⁰⁶ Understood as a mental health problem, addiction calls for treatment, and treatment is in principle nonpunitive.²⁰⁷ Drug courts straddle the criminal and health aspects of drug offenses. While drug courts are certainly a form of punishment,²⁰⁸ as we shall see, they incorporate public health methods. Drug courts are often regarded as a form of therapeutic jurisprudence,²⁰⁹ but they are also, we shall argue, components of an incipient public health law approach to public safety. To mark these distinctions, we must define certain terms.

A standard definition of punishment that has the virtue of

204. See Jeffrey A. Miron, *Violence and the U.S. Prohibitions of Drugs and Alcohol*, 1 AM. LAW & ECON. REV. 78, 79 (1999); see also N.J. STAT. ANN. § 2C:35-1.1b (West 2005) (declaring legislative findings that drug-related crimes are “directly related to the rate of other violent and non-violent crimes”).

205. N.J. STAT. ANN. § 2C:35-5a(1) (West 2005).

206. STAFF OF S. COMM. ON LAW AND PUB. SAFETY, 208 LEG., 2D SESS., STATEMENT TO S.1253 2 (N.J. 1999), available at http://www.njleg.state.nj.us/9899/Bills/s1500/1253_s1.pdf (amending bill which proposed an option to sentence dependent persons who have committed drug-related offenses to compulsory drug and alcohol treatment). “It is the committee’s understanding that this amendment is necessary because the disease of drug or alcohol dependence is a chronic, relapsing disorder.” *Id.*

207. See EDWIN M. SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA: THE IMPACT OF PUBLIC POLICY 15-42 (1968).

208. HUSAK, *supra* note 2, at 80 (assessing critically the claims that problem-solving courts, including drug courts, are nonpunitive because they enable treatment for certain classes of drug offenders).

209. See generally Wexler, *supra* note 203.

capturing our intuitions about legal punishment is the following: “punishment is, typically, something intended to be burdensome or painful, imposed on a(n) . . . offender for a(n) . . . offense by someone with the . . . authority to do so; and that punishment, as distinct from other kinds of penalty, is typically intended to express or communicate censure.”²¹⁰

For our purposes, this is an adequate definition of punishment because drug courts certainly qualify as a burdensome or painful expression of public censure by a legitimate authority. Compulsory treatment and community surveillance may, for many offenders, be preferable to prison sentences, but they are painful and burdensome because they are serious deprivations of liberty.²¹¹ As described above, diversion of certain drug offenders to drug court under probationary eligibility requirements places defendants under conditions of surveillance and supervision, with enormous power over defendants resting in the courts.²¹² Defendants who fail to complete their courses of treatment to the court’s satisfaction are incarcerated because they were required to plead guilty to the drug offense as a condition of their initial acceptance into the program.²¹³ Drug court is a criminal sentence and is therefore punitive.²¹⁴

“Public health,” too, can be defined intuitively, as does the Institute of Medicine: “Public health is what we, as a society, do collectively to assure the conditions for people to be healthy.”²¹⁵ That very broad definition is far too broad, however. We are interested in a corner of “public health law,” which Lawrence Gostin defines as follows:

[T]he legal powers and duties of the state to assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population) and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for the protection or promotion of community health.²¹⁶

210. R. A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY*, at xiv-xv (2003).

211. See Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809, 813-15 (1993) (discussing the relationship between drug treatment and just punishment).

212. See *supra* text accompanying notes 117-23.

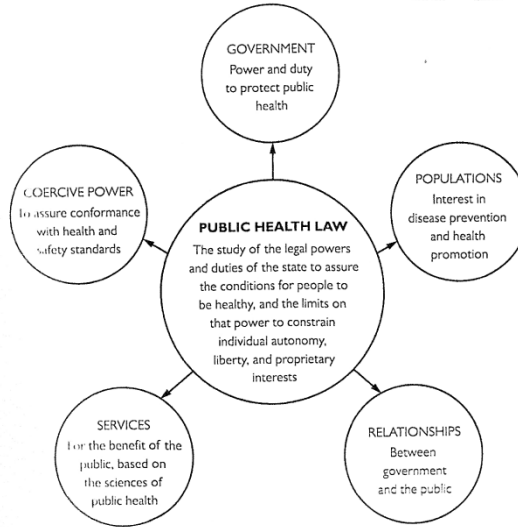
213. See, e.g., OCEAN COUNTY, N.J. DRUG COURT, STATE OF NEW JERSEY DRUG COURT PROGRAM PARTICIPATION AGREEMENT 1 (2012), available at <http://www.judiciary.state.nj.us/ocean/agreement.pdf> (“As a condition of participation, I will be required to enter a guilty plea and a sentence will be imposed . . . I further understand that if I am terminated from the program, I will be sentenced in accordance with the plea agreement.”).

214. See *supra* text accompanying note 113.

215. COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, INST. OF MED., *THE FUTURE OF PUBLIC HEALTH* 19 (1988).

216. LAWRENCE O. GOSTIN, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* 4 (2000).

Gostin represents the five essential characteristics of public health law as follows:



[Source: GOSTIN, *supra* note 216, at 5.]

B. A Public Health Law Framework for Drug Courts

Public health law, like criminal law, is a branch of public law, as distinguished from private law, because its purpose is to help ensure the conditions in which populations can form stable communities, engage in the public interactions that are at the heart of the community, increase productivity, and provide for one another's security.²¹⁷ Indeed, that public health law and criminal law both bring to bear the coercive power of the state on individual liberties to provide for the public good is the primary reason that they may be viewed as different perspectives on some common problems.²¹⁸

As the above definition of "public health law" suggests, the fundamental ethical problem is arriving at the proper balance of individual liberties and the health of the community. In this context, while one goal of public health law is to promote the health of individual members of the community, that goal is entirely secondary to the promotion of the community's health.²¹⁹ Historically, the most important case in the history of public health law in the United States that exemplifies this balancing of individual interests and

217. See generally *id.* at 4.

218. See ANDREW ALTMAN, ARGUING ABOUT LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY 113-14 (2d ed. 2001).

219. GOSTIN, *supra* note 216, at 18-21.

public interests was *Jacobson v. Massachusetts*.²²⁰ Massachusetts exacted a law empowering municipal boards of health to require the vaccination of people if required for public safety.²²¹ Henning Jacobson refused the vaccination and was convicted at trial and sentenced to pay a five-dollar fine.²²² Jacobson argued that compulsory vaccination arbitrarily violated his rights.²²³ Writing for the Court, Justice Harlan opined:

[T]he liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy [in which] real liberty for all could not exist . . .²²⁴

Jacobson located the proper authority for implementing public health laws in the police power of the state.²²⁵

It is precisely this police power of the state that links public health law with criminal law. In both legal domains, the law is based on a conception of justice according to which public safety is conceived as necessary to producing the greatest liberty compatible with similar liberty for others.²²⁶ In addition to the police power, the state also has the *parens patriae* power to protect the interests of individuals who are, for one reason or another, incapable of protecting their own interests.²²⁷ Drug offenses trigger both state powers, and, as we shall argue, public health law is for that reason the best model for addressing drug offenses. Unlike criminal law, public health law therefore combines police power and *parens patriae* power and, as such, can provide a long-term solution to drug offenses while reducing the burden on the liberty interests of the offender.²²⁸

Public health law and criminal law are similar in their sources and authority. They both are articulated in state statutes and regulations, as interpreted and modified by courts, as we saw in *Jacobson*. This dual basis of both public health law and criminal law places both in the same terrain of legal authority. However, public

220. 197 U.S. 11 (1905).

221. *Id.* at 12.

222. *Id.* at 13.

223. *Id.* at 26.

224. *Id.*

225. *Id.* at 34-35.

226. JOHN RAWLS, *THE THEORY OF JUSTICE* 266 (1999).

227. GOSTIN, *supra* note 216, at 47-55.

228. *Id.*; see T. Howard Stone, Heather H. Horton, Robert M. Pestronk, & Montrece M. Ransom, *Considerations for Special Populations*, in *LAW AND PUBLIC HEALTH PRACTICE* 284, 288 (Richard A. Goodman et al. eds., 2d ed. 2007).

health law does not share with criminal law the latter's punitive goals. Public health law does not aim to punish, even if the coercive power of the state may convey a punitive message to those affected by public health laws. State coercion often *seems* punitive even when it is primarily regulatory. Conversely, criminal law does not share the *parens patriae* aim of public health, especially in the context of the shift away from a rehabilitative approach to crime prevention over the past thirty-five years.²²⁹

In particular, public health law and criminal law have very different conceptions of why some people pose preventable and significant risks to public safety. While both criminal law and public health law require assessments of risks posed by behavior, a fundamental assumption of public health law is that a medical model of the risks posed by behavior is presupposed by the best strategies for protecting the public.²³⁰ From a public health perspective, epidemiological data show that drug use and the dangers to the community it poses are best addressed by providing community-based treatment and supports for the user.²³¹ As the Director of the National Institute on Drug Abuse, Nora D. Volkow, put it, “[p]roviding drug-abusing offenders with comprehensive treatment saves lives and protects communities.”²³² In contrast, incarceration has only a limited impact on safety—specific deterrence—and clearly rests on the criminalization of an illness. Moreover, the deterrent effect of criminalization of drug use is highly controversial.²³³ Criminal law and public health law seem, at least with respect to responses to drug offenses, to conflict with one another.

The conflict, however, is only apparent. Criminal law, for the most part, presupposes that a person commits a criminal offense because she chooses to do so.²³⁴ In some sense, criminal offenders “*could have done otherwise*.”²³⁵ Drug offenses, linked as they often are to drug dependency, are widely regarded as caused by a disease over which offenders may have little control.²³⁶ The relationship of

229. See generally GARLAND, *supra* note 2 (discussing the dramatic developments in social response to crime in Great Britain and the United States beginning in the 1970s).

230. GOSTIN, *supra* note 216, at 11-12.

231. See generally Nila Natarajan, et al., JUSTICE POLICY INST., *Substance Abuse Treatment and Public Safety* (2008), available at http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf.

232. *Id.* at 1.

233. HUSAK, *supra* note 2, at 146-48.

234. *But see* HUSAK, *supra* note 2, at 146 (“Criminologists have found that few potential offenders are aware of more than the broadest outline of how the majority of statutes pertain to their conduct.”).

235. See Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. OF PHIL. 829, 829 (1969) (emphasis added).

236. *Robinson v. California*, 370 U.S. 660, 668 n.9 (1962) (stating that someone may

drug offenses to the disease model of drug addiction is inescapable. As Supreme Court Justice Potter Stewart long ago noted in *Robinson v. California*,²³⁷ “[Drug addiction] is apparently an illness which may be contracted innocently or involuntarily.”²³⁸ While the disease model has been contested, the American Psychiatric Association categorizes alcohol dependence as a disease in the DSM-IV-TR, which provides relatively clear and reliable criteria for the diagnosis.²³⁹ Drug courts are a major change in the criminal justice system. As Judge Hora points out in her detailed analysis of drug courts, “[c]oncerns are always raised when a program alters the traditional components of the criminal justice system. But, rather than adhere blindly to tradition, especially when tradition is shown to be ineffective, court systems should strive to improve results.”²⁴⁰

We have shown above that New Jersey is in the forefront of the drug court movement. We now suggest that, because drug courts address drug addiction as a disease that has a powerful impact on the public’s health, New Jersey should also be in the forefront of framing drug offenses as a public health problem. Simply incarcerating drug offenders is an ineffective way to reduce drug offending because it does little to reduce the offenders’ risk of re-offense.²⁴¹ Treatment, behavior monitoring, deployment of objective and scientific risk assessment instruments, statistical data collection on disease risk, marshaling community resources, and other nonpunitive techniques are all traditional public health strategies.²⁴² Drug courts apply those strategies to drug offenses, and in New Jersey the results have been positive on every objective measure.²⁴³ Far from conflicting with the goals of criminal justice, drug courts, understood as a public health measure, have enabled the criminal justice system to better achieve the goal of public safety.

A major reason for the success of drug courts is the new role they specify for the judge. The Supreme Court of New Jersey described that role as follows:

What distinguishes Drug Courts from other courts is the “oversight and personal involvement of the drug court judge in the treatment

be an “addict from the moment of . . . birth”).

237. *Id.* at 660.

238. *Id.* at 660, 667.

239. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA L. REV. 717, 729 (2008).

240. *Id.* at 808.

241. *See* HUSAK, *supra* note 2, at 148-50.

242. *See* GOSTIN, *supra* note 216, at 309-22 (explaining the background of public health law and identifying problem areas that must be fixed to ensure that the public health model continues to be effective).

243. *See supra* text accompanying notes 125-28.

process.” A team approach is a distinctive feature of Drug Court. The judge leads court staff, probation officers, treatment counselors, substance abuse evaluators, and the prosecutor and defense attorney to monitor a participant’s recovery. Participants in drug court programs are subject to intensive supervision, frequent drug testing, and regular court appearances, combined with treatment and recovery services.²⁴⁴

Less commonly understood is the role of the traditional adversarial system in the success of drug courts in New Jersey. One of the criticisms of drug courts is that because they are a form of therapeutic jurisprudence, they point in the direction of transforming the criminal justice system into a nonadversarial, problem-solving system.²⁴⁵ “Therapeutic jurisprudence,” broadly, is an approach to criminal justice that recognizes the powerful impact the criminal justice system can have on the psychological and emotional well-being of offenders.²⁴⁶ Proponents of therapeutic jurisprudence argue that the adversarial system should, wherever possible, be supplanted by a restorative, therapy-based approach because many crimes are caused by psychological problems.²⁴⁷ The venue for such a nonadversarial approach should be specialized courts that attempt to solve the problems that underlay criminal conduct, with the judge playing the dominant role.²⁴⁸

Critics argue that by reducing, if not eliminating, the role of advocacy in the criminal justice system, problem-solving courts, including drug courts, run the risk of reducing the constitutional protections of the rights of defendants, as well as the postconviction rights of convicted offenders.²⁴⁹ For example, sociologist James L. Nolan, after critically examining the rehabilitative claims made by community court advocates, concludes:

As with the formerly dominant rehabilitative ideal, the distinction between punishment and treatment “withers away;” participation in the program is of an indeterminate length; individual constitutional rights are waived, albeit “voluntarily,” in order to participate in the program; and the model widens the net of judicial oversight Though therapeutic jurisprudence scholars and drug court judges contend that therapeutic jurisprudence does not trump traditional goals of criminal justice, the application of therapeutic jurisprudence to the drug court setting illustrates how traditional

244. *State v. Meyer*, 930 A.2d 428, 429 (N.J. 2007) (internal citation omitted). *See also State v. Clarke*, 1 A.3d 607, 612-13 (N.J. 2010) (recognizing the success of drug courts).

245. Hora, *supra* note 239, at 809.

246. Wexler, *supra* note 203, at 8-9.

247. Hora, *supra* note 239, at 810.

248. Hora, *supra* note 239, at 725-26.

249. Hora, *supra* note 239, at 746-47.

views of justice are marginalized in practice.²⁵⁰

In *Meyer*, the Supreme Court of New Jersey highlighted the new role for the judge in drug courts, as well as the participation of treatment specialists, probation officers, and substance abuse evaluators, but the court also noted that prosecutors and defense attorneys represent their clients.²⁵¹ Drug courts in New Jersey, while a creation of the courts and not part of the criminal code, are nonetheless “a subpart of the criminal part of the Law Division.”²⁵² They “are subject to the constitutional purview” of the Supreme Court of New Jersey.²⁵³ A defendant’s admission into drug court occurs under either the “special probation” eligibility requirements or the general sentencing provisions of the Code.²⁵⁴ Because of the close link between drug court and criminal sentencing, a defendant sentenced to drug court continues to have constitutionally protected criminal rights, such as the right to an attorney.²⁵⁵ That can happen only in an adversarial process, as Nolan argues,²⁵⁶ but the adversarial process must be modified to reflect the specific needs of defendants who suffer from addictions. Indeed, New Jersey’s *Drug Court Manual* describes the role of attorneys in the drug court context as an enhancement of, and not a substitute for, the adversarial process.²⁵⁷ The drug court public defender is an essential participant in the drug court team but does not relinquish his or her role as an advocate.²⁵⁸ Taking into account both the rights of defendants and the public safety goals of the criminal justice system, while utilizing cutting-edge methods of treatment, is the overarching ideal of drug courts in New Jersey. This ideal is well-suited to a public health model.

Moreover, a public health model of drug court emphasizes both the treatment resources available to defendants admitted to drug court and the ancillary services available in the communities in which defendants live: employment, housing, religious institutions, and other social resources. The Manual explicitly recognizes the importance of these ancillary services.²⁵⁹

250. James L. Nolan Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1563 (2003) (citation omitted).

251. *State v. Meyer*, 930 A.2d 428, 434 (N.J. 2007).

252. *Id.* at 430.

253. *Id.*

254. MANUAL, *supra* note 78, at 10-18; *see also Meyer*, 930 A.2d at 434-36.

255. MANUAL, *supra* note 78, at 31-32.

256. Nolan, *supra* note 250.

257. MANUAL, *supra* note 78, at app. A.

258. MANUAL, *supra* note 78, at 3.

259. MANUAL, *supra* note 78, at 35-36.

C. *Public Health Law Incorporates Therapeutic Jurisprudence*

While we do not intend to draw a sharp distinction between therapeutic jurisprudence and public health law models, their differences should be apparent. We regard therapeutic jurisprudence to be a component of a broader public health law perspective. As we noted above, public health law has traditionally been concerned with finding the proper balance between individual rights and public safety.²⁶⁰ In order to achieve that balance, therapeutic jurisprudential strategies, such as drug courts, play an important role, but equally important are the protections of defendants' rights. Therapeutic jurisprudence has been the subject of considerable criticism because, by advocating a nonadversarial and normatively neutral approach to criminal justice, it often fails to adequately address the protection of offender rights.²⁶¹ Therein lies the advantage of recognizing explicitly that drug courts are a part of public health.

"[P]ublic health law is concerned with government responsibilities to the community; the well-being of the population; the relationship between the state and the community at large; and a broad range of services designed to identify, prevent, and ameliorate health threats within society."²⁶² An inescapable part of public health law is the role of government to coerce "conformance with publicly established standards of conduct."²⁶³ At times, public health law has permitted isolation and quarantine to protect the health of the republic,²⁶⁴ which is analogous to the use of incarceration in criminal law to protect public safety more generally. It is precisely because of the coercive power of the government, which has a monopoly on legitimate violence in a political democracy, that the right of citizens to due process is necessary in both public health law and criminal law. In particular, the liberty protection of substantive due process has often been deployed in public health law, most notably in *Jacobson*.²⁶⁵ While public health law is concerned also with the identification, prevention, and treatment for health threats, medical intervention is only one component of public health practice.

If we construe drug courts as public health measures, drug

260. See *supra* Part III.2.

261. See Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance is Required*, 78 REV. JUR. U.P.R. 43-56 (2009).

262. GOSTIN, *supra* note 216, at 18.

263. *Id.*

264. *Legal Authorities for Isolation and Quarantine*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 10, 2012), available at <http://www.cdc.gov/aboutlawsregulationsquarantineisolation.html> ("Isolation and quarantine are public health practices used to stop or limit the spread of disease.").

265. See generally *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

courts as a form of therapeutic jurisprudence are compatible with a strong commitment to protection of the due process rights of defendants. As with all public health measures, the rights of citizens must be safeguarded within the general framework of public safety. The same is true for the criminal justice system. In both cases, justice in a constitutional democracy requires no less.

IV. RECOMMENDATIONS

A. *Repeal Remaining “War on Drugs” Statutes and Shift Resources to Support a Public Health Approach*

The most significant impediments to expanding on the success of the drug courts’ public health approach are the sentencing statutes from the “war on drugs” era that remain on the books in New Jersey. All of the CDRA provisions that provide mandatory and excessive sentences²⁶⁶ must be repealed so that the process is driven by judicial discretion based on the science of drug addiction as well as the interests of law enforcement.

Taxpayers have paid a heavy price to incarcerate so many nonviolent drug abusers. In 2010, then New Jersey Governor-Elect Chris Christie’s Transition Office reported that there were approximately 6,600 nonviolent, low-risk state prison inmates who would be better served in community-based treatment or release centers.²⁶⁷ Also in 2010, the AOC reported that the average annual cost per active drug court participant was approximately \$11,379, compared to an average annual cost of \$38,900 to incarcerate an individual in state prison.²⁶⁸ Based on these 2010 figures, incarcerating the 6,600 inmates identified by the Transition Office, rather than sending them to drug court, costs the State approximately \$181,638,600.²⁶⁹ These resources should be shifted to support drug court, community-based programs, and other public health strategies for addressing drug addiction.

The public also has paid a heavy price in terms of public safety. In 2010, the AOC reported that the rate at which New Jersey drug court graduates were re-arrested for a new indictable offense was 16 percent and the rate of reconviction was 8 percent.²⁷⁰ In comparison,

266. See *The New Solutions Campaign*, DRUGPOLICY.ORG, <http://www.drugpolicy.org/about-us/departments-and-state-offices/new-jersey/new-solutions-campaign> (last visited May 20, 2012).

267. TRANSITION OFFICE OF NEW JERSEY GOVERNOR-ELECT, FINAL REPORT OF THE CORRECTIONS AND HOMELAND SECURITY COMMITTEE 10 (2010) [hereinafter TRANSITION REPORT], available at <http://www.njspba.com/RobNixonReports/DOCTransitionReport.pdf>.

268. MODEL FOR SUCCESS, *supra* note 87, at 16.

269. See MODEL FOR SUCCESS, *supra* note 87, at 16; TRANSITION REPORT, *supra* note 267, at 10.

270. See *supra* text accompanying notes 125-26.

the rate of re-arrest for drug offenders released from prison was reported as 54 percent with a re-conviction rate of 43 percent.²⁷¹ The public would be better served by sending more defendants to drug court and other community-based treatment programs rather than incarcerating them because of the “increase in public safety through a potential reduction in recidivism.”²⁷²

Of the remaining war on drugs statutes, the biggest obstacle to implementing the public health approach through drug courts is the repeat offender law.²⁷³ The lengthy terms of incarceration and parole ineligibility terms under the repeat offender law are mandatory upon request by the prosecution based only on a prior record of any drug distribution offense without consideration of factors that distinguish between the major or violent drug trafficker and the individual ready for treatment.²⁷⁴ The statute creates an almost impenetrable barrier to an effective determination of who should be punished by incarceration and who would be better suited for a drug court sentence.

To make matters worse, the New Jersey Attorney General, in response to the 2010 amendments to the school zone law that returned broader sentencing discretion to judges,²⁷⁵ issued a directive to all county prosecutors requiring them to apply the repeat offender law in all school zone cases where defendants are eligible.²⁷⁶ This directive has essentially nullified the 2010 amendments to the school zone law.²⁷⁷ In fact, defendants sentenced for school zone offenses now face longer sentences than prior to the 2010 amendments.²⁷⁸

271. See *supra* text accompanying note 127.

272. TRANSITION REPORT, *supra* note 267, at 10; see also N.J. Governor Chris Christie, The New Jersey Comeback Has Begun, State of the State Address (January 17, 2012), available at <http://www.nj.gov/governor/news/addresses/2010s/approved/20120117.html> (“[C]alling for a transformation of the way we deal with drug abuse and incarceration in every corner of New Jersey” by sentencing nonviolent drug offenders to treatment rather than prison.).

273. See N.J. STAT. ANN. § 2C:43-6f (West 2005 & Supp. 2011).

274. *Id.*

275. See *supra* notes 7-8 and accompanying text.

276. See OFFICE OF THE ATTORNEY GEN., DEP’T. OF LAW AND PUB. SAFETY, DIRECTIVE NO. 2010-4, SUPPLEMENTAL DIRECTIVE REGARDING EXTENDED TERM APPLICATIONS UNDER N.J.S.A. 2C:43-6F IN DRUG-FREE SCHOOL ZONE CASES 5-6 (2010) [hereinafter DIRECTIVE], available at <http://www.nj.gov/oag/dcj/agguide/directives/Dir-2010-4-Brimage-Suppl-070610.pdf>.

277. Only first-time drug offenders may avoid the wide net of the repeat offender law. See N.J. STAT. ANN. § 2C:43-6f. Prior to the 2010 amendments, the Attorney General’s guidelines already permitted trial courts to impose alternative sentences on first-time drug offenders. See *supra* notes 26-30 and accompanying text. Thus, despite the Legislature’s intention to broaden judicial discretion in school zone cases in 2010, as a practical matter, this directive has made the amendments meaningless. See DIRECTIVE, *supra* note 276, at 2.

278. DIRECTIVE, *supra* note 276, at 6 (“[T]he overall sentence imposed by the court

The repeat offender law is a “one size fits all” statute requiring excessively prolonged incarceration. It is contrary to the goal of treating drug-related crime within a balanced public health framework. Frequently, it is the older defendant who has suffered many years of addiction who is ready for treatment.²⁷⁹ This individual will likely have a history of drug convictions.²⁸⁰ The eighteen-year-old who receives his first drug conviction is not necessarily the candidate who is most likely to succeed in drug treatment. Since drug addicted individuals possess a history of drug offenses, the statute reaches too far into the pool of individuals who could be helped by drug courts. Eliminating such large numbers of individuals from the public health framework based on one prior offense stands in the way of real progress. Judges should have discretion to impose a drug court sentence that provides community-based treatment and supports for the drug user when appropriate. The sentencing decision should be based on objective and scientific risk assessment instruments,²⁸¹ not solely on the fact that the defendant has a prior conviction.

As previously noted, the definition of distribution in New Jersey is far too broad and, thus, is an impediment to the justice system treating drug addiction as a public health issue.²⁸² The definition of distribution should involve a for-profit element and should not be provable by subjective testimony of “intent to distribute.” The demarcation between possession of CDS and distribution of CDS should involve clear, objective factors that preclude a finding of distribution when, in fact, mere possession for personal use is all that is involved.

Another price the public has paid for New Jersey’s “war on drugs,” and perhaps the greatest price, is the racially disparate impact that the school zone law has had on poor urban communities. Although the Legislature has attempted to modify this statute,²⁸³ the data clearly indicate that any drug law defined by proximity to schools or public places is duplicative of drug laws based on the seriousness of the offense and targets urban minority populations.²⁸⁴

upon conviction of a third-degree school zone offense must be within the extended term range for a third-degree crime (*i.e.*, five to ten years”); *see also supra* note 56 and accompanying text.

279. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 6 (2005).

280. *See id.* at 69.

281. *See* State v. Clarke, 1 A.3d 607, 617-18 (N.J. 2010) (explaining that substance abuse evaluation is a “critical component” of a judge’s decision of whether or not to sentence an individual to drug court).

282. *See supra* notes 10-13 and accompanying text.

283. *See supra* notes 7-8.

284. *See supra* notes 18, 41-47 and accompanying text.

Indeed, the communities involved are calling for an end to geographically-based mandatory sentence enhancement drug laws.²⁸⁵ It is time to stop burdening these communities with the loss of so many of their young men. All vestiges of the war on drugs' geographically focused statutes²⁸⁶ must be repealed.²⁸⁷

B. Amend Expungement Laws to Support Drug Courts

Successful New Jersey drug court graduates face many post-graduation hurdles, not the least of which is their criminal record.²⁸⁸ In contrast to the war on drugs, a public health approach calls for affirmative measures to support drug court graduates as they reintegrate into the community. One such opportunity is New Jersey's expungement laws.

There are at least three ways in which an expungement may be beneficial to drug court graduates and the community.²⁸⁹ First, an "expungement may serve as an incentive for some individuals to enter drug court."²⁹⁰ Second, expungement may be a way for drug court graduates "to avoid the stigma and collateral consequences of having a criminal arrest record."²⁹¹ "Third, the opportunity for [the] expungement may work as an effective means for extending the positive effects of drug court following completion of the program."²⁹²

285. In 2007, the Newark City Council passed a resolution recognizing that "[d]ue to the high concentration of schools, school buses, public housing facilities, public parks and libraries and museums in urban areas, drug free school and public property zones often cover most of the geographical area of a city. This results in a disproportionate number of urban residents being subject to harsher penalties imposed for drug offenses committ[ed] in school and public property zones as compared to suburban and rural residents." NEWARK, N.J., RESOLUTION NO. 7RCN(AS), at 8 (April 4, 2007). Accordingly, it voted to support the New Jersey Commission to Review Sentence Revision's recommendation to reign in the school zone law. *Id.*

286. New Jersey makes it a second degree crime to distribute CDS within 500 feet of public property. N.J. STAT. ANN. § 2C:35-7.1a (West 2005). This criminal statute has many of the same flaws as the school zone law and should also be repealed.

287. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that, rather than explicitly using race to justify discrimination, apparently race-neutral drug laws discriminate against people of color as effectively as Jim Crow laws of the past).

288. See David S. Festinger et al., *Expungement of Arrest Records in Drug Court: Do Clients Know What They're Missing?*, 5 DRUG COURT REV. 1, 5-6 (2005), available at http://www.ndcrc.org/sites/default/files/dcr.vi_.pdf.

289. *Id.* at 5.

290. *Id.*

291. *Id.* at 5-6. "[Expungement] may improve a drug court graduate's chances of obtaining gainful employment, housing opportunities, student loans and grants, as well as government subsidies such as food stamps and temporary assistance to needy families." *Id.* at 6.

292. *Id.* at 6. "The opportunity to have one's arrest record expunged after an additional waiting period may act as a second 'carrot' to incentivize graduates to remain abstinent from drugs and crime-free even after they are no longer under the

Currently, New Jersey's expungement laws require individuals to wait at least five years before their criminal conviction may be expunged.²⁹³ Also, individuals with more than one criminal conviction may not have any convictions expunged.²⁹⁴

The expungement laws should be amended as follows: (1) successful drug court graduates should be eligible to expunge their current conviction and one prior drug-related conviction upon graduation from drug court, and (2) drug court graduates should be eligible to have all their prior drug-related convictions expunged after three years if they do not commit any subsequent offenses.

C. Provide Access to Medication Assisted Treatment in Drug Courts

A central premise of a public health approach is a reliance on objective measures and full "wrap around" services.²⁹⁵ In most instances, New Jersey's drug courts embrace that principle. However, a notable exception is medication assisted treatment ("MAT"). MAT generally refers to "addiction treatment that utilizes medications that have been proven effective for treatment of opioid dependence."²⁹⁶ In New Jersey, MAT is not provided, nor even permitted, as a treatment option for drug court participants. Not only may this violate federal antidiscrimination laws and constitutional restrictions on cruel and unusual punishment,²⁹⁷ it directly conflicts with a public health approach to drug court.

MAT uses medications "to normalize brain chemistry, block the euphoric effects of opioids, relieve physiological cravings, and normalize body functions without the negative effects of the short-acting drugs of abuse."²⁹⁸ The most common medications associated with MAT are methadone and buprenorphine.²⁹⁹ The National Institute of Health has found that "[o]f the various [opioid dependence] treatments available, [methadone maintenance

jurisdiction of the court." *Id.* at 7.

293. N.J. STAT. ANN. § 2C:52-2a(2) (West Supp. 2011).

294. *Id.* § 2C:52-2a-b.

295. See generally John VanDenBerg et al., *Child, Adolescent, and Family Issues: Team-Based Planning and the Wraparound Process*, available at www.psych.uic.edu/uicnrtc/cmhs/pcp.paper.youth-family.doc.

296. LEGAL ACTION CENTER, LEGALITY OF DENYING ACCESS TO MEDICATION ASSISTED TREATMENT IN THE CRIMINAL JUSTICE SYSTEM 2 (2011) [hereinafter LEGAL ACTION CENTER], available at http://www.lac.org/doc_library/lac/publications/MAT_Report_FINAL_12-1-2011.pdf.

297. *Id.* at 17-19 (arguing that denial of medication assisted treatment by drug courts and prisons violates the Americans with Disabilities Act and Rehabilitation Act of 1973 and could violate the Eighth and Fourteenth Amendments of the United States Constitution).

298. *Id.* at 2.

299. *Id.*

treatment], combined with attention to medical, psychiatric and socioeconomic issues, as well as drug counseling, has the highest probability of being effective.”³⁰⁰ Likewise, buprenorphine has been found to be effective in managing opiate withdrawal and dependence.³⁰¹

Despite its proven benefits, MAT is not provided by most drug courts in New Jersey, and even worse, applicants to drug court currently receiving MAT are told that they must wean themselves off of MAT in order to successfully complete drug court. The most common reason for this practice appears to be misconceptions about MAT, particularly the myth that it “substitutes one addiction for another.”³⁰²

Under a public health approach, New Jersey’s drug courts should apply the best course of drug treatment available. The scientifically proven effectiveness of MAT in treating opioid dependence is undisputable.³⁰³ Drug courts in New Jersey must stop the myth-based practice of refusing to allow MAT and should provide MAT when clinically appropriate.

D. Strengthen Drug Courts’ Community Partnerships

A public health model of drug court emphasizes both the treatment resources available to defendants admitted to drug court and the ancillary services available in the communities where defendants live: employment, housing, religious institutions, and other social resources.³⁰⁴ During the implementation of drug court in New Jersey, partnerships were established between the judiciary, the Office of the Attorney General, County Prosecutors, the Office of the Public Defender, the Department of Corrections, and the Probation Office to implement a team approach.³⁰⁵ Drug courts also established a strong relationship with the treatment providers licensed by the New Jersey Department of Human Services, Division of Addiction Services, who provide residential inpatient and outpatient services for drug court participants.³⁰⁶ Unfortunately,

300. *Effective Medical Treatment of Opiate Addiction*, NIH CONSENSUS STATEMENT 5 (1997), available at <http://consensus.nih.gov/1997/1998TreatOpiateAddiction108html.htm>.

301. Duncan Smith-Rohrberg et al., *Research Note – Review of Corrections-Based Therapy for Opiate-Dependent Patients: Implications for Buprenorphine Treatment Among Correctional Populations*, 41 J. OF DRUG ISSUES 2, 460 (2004).

302. LEGAL ACTION CENTER, *supra* note 296, at 6 (quotation marks omitted).

303. *Id.* at 2 (“Scientific research has firmly established the success of drug treatment in reducing addiction and criminal activity more effectively and at far less cost than incarceration.”).

304. See generally Tracy Velazquez, *The Verdict of Drug Courts*, THE NATION, Dec. 9, 2010.

305. MODEL FOR SUCCESS, *supra* note 87, at 10-11.

306. *Id.*

drug courts have not established similarly strong relationships with employers and community groups. In addition, the general public appears to have a limited knowledge of drug courts, even though they have been a part of the criminal justice system for more than ten years. Drug courts should expand their partnership network beyond the treatment community to help increase enrollment in the program and maximize the benefits for the participants, particularly post-graduation. Strong partnerships should be established with local employers, faith-based organizations, higher education criminal justice programs, fraternal organizations, senior citizens organizations, and drug court alumni groups.

V. CONCLUSION

There is little dispute that there has been no winning side in our war on drugs. History has shown that we can reduce the criminality associated with drug addiction when we address the issue in a way that takes into account the science of addiction and the interest of public safety. Eliminating panic-driven laws will enable drug courts and other treatment-oriented entities to focus on public health solutions that benefit both the individual and society.