**Submission by the Special Rapporteur on Independence of Judges and Lawyers**

**Drug Courts: Dangers of Punitive Approaches Encroaching on Medical Matters**

Drug treatment courts, or “Drug Courts,” are meant to offer court-supervised treatment for drug dependence to people who would otherwise go to prison for a drug-related offense. Their main appeal is the claim that they reduce incarceration and recidivism, and represent a more “humane” approach to traditional criminal justice processes. As the proliferation of Drug Courts in the US – parallel with increasing drug use, jail overcrowding, and drug overdose deaths - would indicate, these courts have not achieved their intended results. At the heart of their failure are a number of myths about how they operate and what they can accomplish. If Drug Courts were merely ineffective perhaps their implementation and heavy promotion by interest groups and the US government could be forgiven, but Drug Courts represent a threat to human rights standards, to procedural due process[[1]](#footnote-1) and to the health systems’ ability to address health issues around drugs.

Lack of Evidence Base

There is no single “model” of Drug Court; jurisdictions differ wildly in their approaches. As of 2017, more than 3,100 Drug Courts operated in the United States.[[2]](#footnote-2)[[3]](#footnote-3) Due to this diversity of approaches any evaluation that attempts to look at their impact as a group will be flawed.

Overall, Drug Courts remain a largely “experimental” approach because the large body of research on their benefit claimed by supporters is questionable due to methodological flaws or because the courts adjust their admission criteria to favor participation of defendants with the lowest need. Drug Court evaluations also generally fail to account for periods of incarceration ordered as “sanctions” by the court, which may negate documented reductions in jail days.[[4]](#footnote-4) Evaluations of Drug Courts are often conducted (or paid for) by Drug Courts operators who have incentives to show results and who may not be versed in research methodology. A study by the Australian Institute of Criminology, a government center, concluded that it was impossible to know whether their drug courts had impact on drug use and drug-related crime because participant follow-up only occurred for the period of participation in the court program, and participants might relapse thereafter.[[5]](#footnote-5)

But the biggest flaw in research on Drug Courts is that the gold standard for research methodology - control groups – isn’t utilized. Drug Courts generally measure someone’s outcome before and after their intervention but this form of measuring doesn’t prove causality. Perhaps that person’s circumstances would have benefited from ANY intervention and something shorter, less expensive, that is not coercive or driven by the criminal justice system, would have been as effective. Without control groups there is simply no way to attribute any improvement to Drug Courts’ interventions.

Because individual evaluations of Drug Courts are often flawed, any meta-analysis looking at them will similarly be flawed. Further as noted, since all Drug Courts are different, meta-analysis cannot capture a coherent narrative on the “model”.

Treatment Provision and Role of Judges

It may be self-evident, but it must be noted that while Drug Courts offer “treatment instead of incarceration”, they are not health-care settings and cannot provide treatment, rather they refer participants to treatment. This is relevant for various reasons: 1) Drug Courts can’t offer participants evidence based treatment if it’s not available in the community, 2) Judges have no oversight over what happens in treatment and cannot assess the quality of services, 3) Drug Court operators are not trained medical personnel and often intervene inappropriately in medical decisions, also without oversight or accountability.[[6]](#footnote-6)

In 2017 *Physicians for Human Rights* (PHR) published a study titled “Neither Justice nor Treatment – Drug Courts in the United States.”[[7]](#footnote-7) PHR assessed the availability and quality of drug treatment through Drug Courts in three US states and found that at the most basic level, access to quality treatment is hampered by the inherent tension between a punitive criminal justice logic and therapeutic concern for participants as patients. Despite the stated intention of Drug Courts to treat people who use drugs as ill rather than deviant, participants are often punished for relapsing, for missing therapy appointments, or otherwise failing to follow court rules.[[8]](#footnote-8)

PHR found that initial treatment plans for Drug Court participants, are often developed by people with no medical training or oversight, sometimes resulting in mandated treatment at odds with medical knowledge. The most egregious example of this is the refusal of medication-assisted treatment (MAT) (also known as substitution or replacement therapy) to people with opioid use disorders, despite this treatment being the gold standard in evidence base.[[9]](#footnote-9) Some Drug Courts also prevent participants from accessing medically prescribed treatment for other chronic health problems. These interventions by justice personnel into the field of medicine, and often into the patient-doctor relationship, are both unethical and dangerous. Ironically, the form of MAT most often used in Drug Courts – Vivitrol – is a heavily marketed product with the weakest evidence base of all US-approved treatments for opioid dependence,[[10]](#footnote-10) and appears to carry a high risk of overdose death.[[11]](#footnote-11)

PHR finds that delivery of essential health care through the justice system raises several concerns, including, specifically, questions regarding patient confidentiality and autonomy (Drug Court participants are regularly asked to waive patient-doctor confidentiality as a condition of participation), dual loyalty, privacy, and the ability of the patient to give meaningful consent to treatment.[[12]](#footnote-12)

Human rights concerns are particularly relevant for Drug Courts, as these courts blur the line between voluntary and coerced treatment. The criminalization of possession of drugs for personal consumption means that many who end up in Drug Courts do not suffer from substance use disorders (meaning they don’t need treatment) or don’t currently want treatment. The criminal justice system’s conflation of drug possession and personal use with clinical need for care does nothing to ensure treatment for those who truly need it. Ultimately, people with substance use disorders who get treatment through the criminal justice system are still “criminals”, and the symptoms of their illness punished as if the illness itself were a crime.[[13]](#footnote-13)

An important area of note in the PHR and other reports is the severe lack of treatment options in jurisdictions with Drug Courts. In communities visited by PHR where evidence-based treatment theoretically was available, all treatment facilities had waiting lists. When Drug Courts jump people into the treatment queue they are creating a perversion in the system whereby the only way to access treatment in a timely manner is through arrest.

Outside the US the situation is more dire. In Southeast Asia and Latin America, where forced internment is used as “treatment” for anything from drug use, to homosexuality and “anti-social behavior” torture takes place in these “centers”. Implementing Drug Courts without investing in proper treatment means that a system of abuse is legitimized through its use by the courts.[[14]](#footnote-14)

Conclusion

In country contexts where treatment is scarce, unaffordable, abusive or not evidence-based – the case in most of the world – it makes little sense to mandate treatment through courts. Unless and until any drug user can step off the street into centers where comprehensive, holistic, compassionate, free and evidence-based treatment can be accessed, courts should not be in the business of mandating people into bad treatment or into treatment that they could not have freely accessed.

While there is consensus in the UN that there should be alternatives to criminal sanctions for some drug infractions, there is nothing in any consensus statement that requires court-determined or court-supervised treatment, as an alternative mechanism.[[15]](#footnote-15)

Drug Courts are depicted as a middle ground between harsh prohibition and liberalization of drug laws, and their evaluations include moving testimonials from judges and participants, but the horror stories do not get the same press.[[16]](#footnote-16) In spite of good intentions, these courts cannot represent reform if they undermine health and human rights, put medical decisions in the hands of justice operators who reject clinically indicated treatment, or impose punishment for relapses that are a normal part of recovery.[[17]](#footnote-17) That judges in these courts can’t hold providers accountable is a life threatening problem, as shown by a string of deaths in sham rehab centers in the state of Florida.[[18]](#footnote-18) Lack of oversight over these courts and judges adds to participant’s risks.[[19]](#footnote-19)

What we know of Drug Courts shows that they have not achieved *en masse* what they set out to do, in spite of individual successes. Real alternatives to incarceration should include removing minor infractions from penal codes and other measures that don’t confer authority for essential health services to the justice system.[[20]](#footnote-20)

1. Problem Solving Courts and the Psycholegal Error, Morris B. Hoffman, University of Pennsylvania Law Review PENNumbra, Vol. 160:129, <https://www.pennlawreview.com/online/160-U-Pa-L-Rev-PENNumbra-129.pdf> [↑](#footnote-ref-1)
2. PHR, “Neither Justice nor Treatment --Drug Courts in the United States”, 2017, available at: [physiciansforhumanrights.org/assets/misc/phr\_drugcourts\_report\_singlepages.pdf](http://physiciansforhumanrights.org/assets/misc/phr_drugcourts_report_singlepages.pdf). [↑](#footnote-ref-2)
3. Drug Courts also exist in Australia, Austria, Belgium, Canada, Ireland, New Zealand, Norway, and the United Kingdom. [↑](#footnote-ref-3)
4. Ibid. See also, E Sevigny, BK Fuleihan, FV Ferdik. Do drug courts reduce the use of incarceration?: A meta-analysis. Journal of Criminal Justice 41(6):416-425, 2013. [↑](#footnote-ref-4)
5. J Payne. Specialty courts in Australia: report to the Criminology Research Council. Canberra, 2005. At: http://bit.ly/1L8XIoI  [↑](#footnote-ref-5)
6. See, “Drug Treatment Courts, 20 Years of Uncounted Deaths”, Elaine Pawlowski, January 8, 2014, Huffington Post, https://www.huffingtonpost.com/entry/drug-treatment-courts-20-\_b\_4555790.html [↑](#footnote-ref-6)
7. PHR, “Neither Justice nor Treatment --Drug Courts in the United States”, 2017, available at: [physiciansforhumanrights.org/assets/misc/phr\_drugcourts\_report\_singlepages.pdf](http://physiciansforhumanrights.org/assets/misc/phr_drugcourts_report_singlepages.pdf). [↑](#footnote-ref-7)
8. PHR, “Neither Justice nor Treatment --Drug Courts in the United States”, 2017, available at: [physiciansforhumanrights.org/assets/misc/phr\_drugcourts\_report\_singlepages.pdf](http://physiciansforhumanrights.org/assets/misc/phr_drugcourts_report_singlepages.pdf). [↑](#footnote-ref-8)
9. Methadone and Buprenorphine are medications with a long safety record and a strong evidence base. For an account of how Drug Courts in Kentucky refused to allow Medication Assisted Treatment to anyone without a medical assessment of need, see; “Dying to be Free” by Jason Cherkis, Huffington Post, <http://projects.huffingtonpost.com/dying-to-be-free-heroin-treatment>. The occurrence of judge denying medically prescribed MAT to participants had become so common-place that in 2016 the Substance Abuse and Mental Health Services Administration [forbade courts that participated in its grant programs from interfering with participants MAT prescriptions](http://atforum.com/2015/02/samhsa-bans-drug-court-grantees-from-ordering-participants-off-mat/). That this statement had to be made demonstrates how comfortable judges had become making medical decisions and, in essence, practicing medicine without a license. [↑](#footnote-ref-9)
10. Ibid [↑](#footnote-ref-10)
11. "Review of Case Narratives from Fatal Overdoses Associated with Injectable Naltrexone for Opioid Dependence.” Saucier R., Wolfe D., Dasgupta N., Drug Saf. 2018 Mar 20. doi: 10.1007/s40264-018-0653-3. <https://www.ncbi.nlm.nih.gov/pubmed/29560596> [↑](#footnote-ref-11)
12. Ibid [↑](#footnote-ref-12)
13. Ibid. Substance Use Disorder is recognized as a treatable illness with [specific symptoms](https://psychcentral.com/disorders/addictions/substance-use-disorder-symptoms/), in the Diagnostic Manual for Mental Disorders, and even the main lobbying group for Drug Courts recognizes it as an “illness”, making sanctions against participants who manifest its symptoms intellectually inconsistent. [↑](#footnote-ref-13)
14. “No Health, No Help: Abuse as Drug Treatment in Latin America”, Open Society Foundations, April 2016. <https://www.opensocietyfoundations.org/reports/no-health-no-help> [↑](#footnote-ref-14)
15. Ibid [↑](#footnote-ref-15)
16. See, “Reevaluating Drug Courts: No Mother Should Have to Go Through What I Did”, Elaine Pawlowski, July 29, 2013, Huffington Post, <https://www.huffingtonpost.com/entry/drug-courts-reform_b_3671505.html> [↑](#footnote-ref-16)
17. Ibid [↑](#footnote-ref-17)
18. “The Rehab Industry needs to Clean up its Act. Here’s How”, Maia Szalavitz, The Influence, February 16, 2016. <https://www.huffingtonpost.com/the-influence/the-rehab-industry-needs-clean-up_b_9210542.html> [↑](#footnote-ref-18)
19. In fact, because drug users are stigmatized and assumed to be untruthful, bad behavior by judges is rarely investigated and the only known cases of bad Drug Court judges being removed have been due to investigative journalism. See for example, “Very Tough Love” from National Public Radio, <https://www.thisamericanlife.org/430/very-tough-love>. The lack of enforceable standards for Drug Court judges and their ignorance of proper treatment and addiction medicine protocols leave participants in a vulnerable position. [↑](#footnote-ref-19)
20. Ibid [↑](#footnote-ref-20)