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## Crime and Punishment? Judges' Gavels Become the Latest Weapon in the War on Drugs

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## **Abstract**

In 1973 President Richard Nixon declared a "world war" on drugs.<sup>1</sup> This war has resulted in several changes in the criminal justice system which have largely come from the executive and legislative branches.<sup>2</sup> These executive and legislative changes have been predominately concerned with law enforcement and punishment.

**KEYWORDS:** disease, program, orders

## Notes and Comments

### Crime and Punishment? Judges' Gavels Become the Latest Weapon in the War on Drugs\*

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#### I. INTRODUCTION

In 1973 President Richard Nixon declared a "world war" on drugs.<sup>1</sup> This war has resulted in several changes in the criminal justice system which have largely come from the executive and legislative branches.<sup>2</sup> These executive and legislative changes have been predominately concerned with law enforcement and punishment.<sup>3</sup> Recently, however, the judiciary has made some changes of its own.<sup>4</sup>

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1. Symposium, *The War on Drugs: In Search of A Breakthrough* A-3 (Steven Wisotsky & Robert C. Levine, eds., 1986).

2. *Id.* at A-3-A-12.

3. *Id.*

4. See generally *The Drugging of the Courts: How Sick Is the Patient and What*

The Eleventh<sup>5</sup> and Seventeenth Judicial Circuit Courts<sup>6</sup> of Florida have recently created comprehensive pre-trial intervention programs to provide defendants with an alternative to incarceration.<sup>7</sup> To date, these programs, enacted through what have been named "Drug Courts," have been effective in reducing the large number of cases crowding court dockets and consuming a tremendous amount of resources.<sup>8</sup>

This article outlines and evaluates the Drug Court programs by comparing their reported results with official criminal justice statistics. This article also discusses some of the problems that these programs have encountered and what the future holds. The purpose is to expose an innovative approach to handling drug cases in the courts in a cost efficient and effective way. The analysis includes scientific data concerning addiction as disease as well as the merits of these programs and a conclusion as to why they are vital to criminal law.

Although the Dade and Broward programs are similar, there are some differences. Where possible, this article discusses both of these programs together and explores their differences when necessary.

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*Is the Cure?* 73 JUDICATURE 314 (April-May 1990) ("An edited version of the panel presentation at the mid-year meeting of the [American Judicature Society] in Los Angeles on February 10, 1990") [hereinafter *The Drugging of the Courts*]; Editorial, *The Courts and the "War on Drugs"* 73 JUDICATURE 236 (Feb-March 1990) [hereinafter *The Courts and the War on Drugs*].

5. FLA. STAT. § 26.32 (1991)(Dade County, Florida).

6. *Id.* § 26.362 (Broward County, Florida).

7. *The Drugging of the Courts*, *supra* note 4, at 316-17; *The Courts and the "War on Drugs," supra* note 4, at 288; Eleventh Judicial Circuit, Dade County, Florida & Metro-Dade County Government, Strategies for Action: Combating Drug and Alcohol Abuse in Dade County 1 (unpublished, undated pamphlet, on file with the Dade County Office of Substance Abuse Control) [hereinafter *Strategies for Action*]; Metro-Dade Department of Human Resources, Office of Rehabilitative Services, Diversion and Treatment Program: An Overview 1-2 (May 25, 1991) (unpublished pamphlet, on file with the Dade County Office of Substance Abuse Control) [hereinafter *Diversion and Treatment Program: An Overview*]; Seventeenth Judicial Circuit, Broward County, Florida, Drug Court Program, (unpublished, non-paginated pamphlet, on file with Judicial Projects Administrator, Broward County Courthouse) [hereinafter *Drug Court Program*].

8. Herbert M. Klein, Associate Chief Judge, Eleventh Judicial Circuit, Dade County Florida, Strategies for Action: Combating Drug and Alcohol Abuse in Dade County—An Update, June 1990 2-3 (June 1990) (unpublished pamphlet, on file with the Dade County Office of Substance Abuse Control) [hereinafter *Update 1990*]; Eleventh Judicial Circuit, Dade County, Florida, Drug Court: April 1, 1991 (April 1, 1991) [hereinafter *Drug Court: April 1, 1991*].

## II. STATISTICS

In order to clearly understand the enormous stress placed upon the criminal justice system and, hence, the need for the Drug Court programs, it is necessary to be aware of the growing number of people entering the criminal justice system as drug offenders in Florida and nationally. The figures presented to illuminate the scope of the problem which the courts face in dealing with the war on drugs in the United States.

Sixty percent of the drugs produced throughout the world are consumed in the United States which represents only six percent of the world's population.<sup>9</sup> Throughout the last decade, the United States has moved steadily towards tougher enforcement policies.<sup>10</sup> In the eighties, President Reagan brought several government agencies into the war on drugs, including the IRS, CIA, and United States Navy.<sup>11</sup> By 1989, President Bush had expanded the scope of the drug war by pledging to remove the narcotics consumer to reduce the demand for drugs, thereby making the United States a less desirable market for international drug smugglers.<sup>12</sup>

The Florida criminal justice system felt the immediate impact of President Bush's new policy:<sup>13</sup>

Leading a statewide campaign against small time abusers is Broward County Sheriff Nick Navarro by his use of "sweeps"—massive arrests of dozens, and sometimes hundreds, of people for possession or purchase of small quantities of drugs. Navarro's extreme stance

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9. Sandi R. Murphy, *Drug Diplomacy and the Supply Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1260 n.2 (1990) (citing, *Presidential Certifications Regarding international Narcotics Control: Hearing and Markup Before the Sub-committee on Western Hemisphere Affairs of the Committee on Foreign Affairs*, House of Rep. on H.R. 4162 H.J. Res. 491, 493, 495, 497 and 499, 100th Cong. 2d Sess. 200 (1988) (statement of Rep. Peter H. Kostmayer)).

10. See Symposium, *supra* note 1, at A-4-A12.

11. *Id.* at A-4-A10.

12. Owen Ullman & Ellen Warren, *Bush Vows Billions In Drug War President Targets Demand, Suppliers*, MIAMI HERALD, September 6, 1989, at 1A. This article reviewed a speech delivered by President Bush from the Whitehouse during which he displayed a bag of crack. "Targeting both demand and supply, Bush promised an 'aggressive attack from every angle.'" *Id.* (quoting speech from Oval Office, Sept. 5, 1989).

13. *More Cells, Treatment Programs Needed Along With Drug Arrests*, SUN-SENTINEL, September 15, 1989, at 18A (Editorial)[hereinafter *More Cells, Treatment Programs Needed*].

is putting pressure on other parts of the criminal justice system.<sup>14</sup>

Systemic impact occurred on a national level as well.<sup>15</sup> While drug violation arrests, including sale, manufacture, possession and purchase, were down fourteen percent in 1990, as compared to 1989, the figures indicate that there was a seventy percent increase for such arrests since 1980.<sup>16</sup> During 1990, the majority (68.4 percent) of these arrests were for possession.<sup>17</sup>

The result of the increase in drug arrests has been a strain on both the courts and prisons.<sup>18</sup> "Demand-side policy . . . [has resulted in] a skyrocketing prison population that places a burden on the prison system . . . [because of only] a rhetorical commitment to . . . prevention, education and treatment."<sup>19</sup>

Similar figures exist for the Florida prison system.<sup>20</sup> From July, 1986 to April, 1989, the average monthly admissions to Florida prisons for drug violations increased from 380 to 1122 persons, an increase of 295 percent.<sup>21</sup> Furthermore, between 1980 and 1990 the Florida prison population grew from 19,722 to 42,733.<sup>22</sup> During this period, the percentage of inmates incarcerated for drug violations rose from 8.2 percent in 1980 to 36.1 percent in 1990.<sup>23</sup> Finally, "during this decade of dramatic change"<sup>24</sup> the number of "recidivists"<sup>25</sup> escalated from 22.6

14. *Id.*

15. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORT FOR THE UNITED STATES, 173 (1990).

16. *Id.*

17. *Id.*; see Michael E. Young, *S. Florida Drug War Bogs Down: Dealers Become Shrewd as Prices Take a Tumble*, SUN-SENTINEL, April 12, 1992, at 1B (Figures recently released from the Florida Department of Law Enforcement show that the majority of drug arrests in the State of Florida were also for possession. Of the 72,785 drug arrests for all of Florida in 1991, 52,619 were for possession while only 20,566 were for sale of narcotics).

18. *Courts and the "War on Drugs," supra* note 4, at 236; *More Cells, Treatment Programs Needed*, *supra* note 13, at 18A.

19. Murphy, *supra* note 9, at 1308.

20. See generally FLORIDA DEPARTMENT OF CORRECTIONS, ANNUAL REPORT 1989/1990 (Dec. 15, 1990)[hereinafter ANNUAL REPORT].

21. Bureau of Planning, Research & Statistics, Florida Department of Corrections, Prison Admissions and Release Trends, June 10, 1991 (non-paginated leaflet, on file with Florida Department of Corrections, Bureau of Planning Research and Development).

22. ANNUAL REPORT, *supra* note 20, at 30.

23. *Id.* at 32.

24. *Id.* at 31.

percent of the prison population in 1980 to 42.7 percent by 1990.<sup>26</sup> Simply put, the numbers indicate a drastic increase in prison populations due to drug violations.<sup>27</sup>

Initially, these statistics may suggest that enforcement policies are having a positive effect. However, a negative aspect of increasing prison populations is the cost which is now astronomical.<sup>28</sup> During the time from 1989 to 1990, the Florida Department of Corrections spent an average of \$39.73 per inmate, per day.<sup>29</sup> The result was an average annual cost of over \$14,000 per inmate, per year, for all Florida prisons.<sup>30</sup> A recent update for the fiscal year ending June 30, 1991 shows that the per diem rate had increased to \$40.02 resulting in a total of \$14,607.03 per inmate per year.<sup>31</sup> A significant amount of this money could be saved, if the legislature and the courts would view addicts as victims of a disease.

### III. ADDICTION AS A DISEASE

On March 30, 1981, John W. Hinckley, Jr. attempted to assassinate President Ronald Reagan.<sup>32</sup> At trial, Hinckley admitted he intended to kill the President; nonetheless, because he was suffering from a *disease*, he never spent a single day in prison.<sup>33</sup> Criminal laws protect those who are not responsible for their acts if they do not have the

25. BLACK'S LAW DICTIONARY 1269 (6th ed. 1990) (A habitual criminal; a criminal repeater.).

26. ANNUAL REPORT, *supra* note 20, at 32.

27. *Id.*

28. *Id.* at 66.

29. *Id.* Of that figure, \$31.45 was spent on operations (housing, guards, food, etc.), \$7.15 was spent on health services and \$1.12 for education. *Id.* The yearly totals per inmate are \$11,479.25, \$2,609.75 and \$408.08 respectively, for a grand total of \$14,497.08. *Id.*

30. The per diem rate of \$39.73 multiplied by 365 days computes to \$14,500.45 per inmate, per year.

31. Florida Department of Corrections, Summary of Selective Financial Data for the Fiscal Year Ended June 30, 1991 (June 30, 1991) (unpublished, non-paginated leaflet, on file with the Florida Department of Corrections, Bureau of Planning Research and Statistics)[hereinafter Summary of Selective Financial Data].

32. United States v. Hinckley, No. 81-306 (D. D.C., 1982); see PETER W. LOW ET AL., THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 22-30 (1986). There was no question, based on expert testimony, that Hinckley was suffering from a psychological disorder. The focus of the trial, however, was the severity of Hinckley's condition. *Id.*

33. LOW ET AL., *supra* note 32, at 22-30.

ability to control their actions or make “rational choices.”<sup>34</sup> People like Hinckley who suffer from certain disorders are “afforded”<sup>35</sup> a recognized defense within the law, because “criminal punishment is inappropriate unless the defendant can be *blamed* for the offense . . . .”<sup>36</sup>

Drug dependency is a psychiatric disorder and is listed in the *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*.<sup>37</sup> Dependency and abuse disorders are characterized in the *DSM-III-R* by “continued use of . . . psychoactive substance[s] despite . . . [various deleterious effects on one’s health, employment and social life and] . . . the development of withdrawal symptoms following cessation of, or a reduction in use . . . .”<sup>38</sup> A psychoactive substance is a mind or mood altering substance (chemical) such as stimulants, depressants, tranquilizers, and anti-depressants.<sup>39</sup> The *DSM-III-R* includes in its list of psychoactive substances cocaine, cannabis and various other controlled substances and narcotics.<sup>40</sup> The drug addict, as a criminal defendant, certainly fits the *DSM-III-R* definition as someone who risks arrest, loss of occupation and societal stigma, just to get high.<sup>41</sup>

Drug and alcohol addiction can come in two forms.<sup>42</sup> An individual may develop a physiological dependence where the body actually incorporates the drug into the person’s system creating “tolerance”<sup>43</sup> and eventually, withdrawal-type conditions.<sup>44</sup> There is also a “psychological dependence”<sup>45</sup> which may not involve a physiological addiction. Rather, users develop a habit of using a drug or alcohol on a regular

34. *Id.* at 4. See generally Emily Campbell, *The Psychopath and the Definition of “Mental Disease or Defect” Under the Model Penal Code Test of Insanity: A Question of Psychology or A Question of Law?* 69 NEB. L. REV. 190 (1990) (discussing the applicability and standards of the insanity defense); WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.1(b) (1986).

35. LOW ET AL., *supra* note 32, at 4.

36. *Id.* at 3 (emphasis in the original).

37. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 165 (3d ed. rev. 1987)[hereinafter *DSM-III-R*].

38. *Id.*

39. ROBERT JEAN CAMPBELL, M.D., PSYCHIATRIC DICTIONARY 498 (5th ed. 1981).

40. *DSM-III-R*, *supra* note 37, at 169.

41. *Id.* at 165; see *supra* text accompanying note 37.

42. HAROLD E. DOWEIKO, CONCEPTS OF CHEMICAL DEPENDENCY 210-12 (1990).

43. *Id.* at 210.

44. *Id.* at 211.

45. *Id.*



basis because they "need"<sup>46</sup> the drug to relax, have fun, or to cope with daily living.<sup>47</sup>

Once a person becomes addicted to a substance, the disease of addiction takes over and the addict begins to live life for the next high.<sup>48</sup> Everything an addict does is in contemplation of when, how and where the drugs can be obtained.<sup>49</sup> "As the disease of addiction progresses; the individual comes to center his or her life around continued use of the chemical . . . . No price is too high, nor is any behavior unthinkable . . . ." <sup>50</sup>

Whether physiological or psychological, experts agree that addiction is a disease. The disease of addiction is characterized by "compulsion."<sup>51</sup> According to Dr. G. Douglas Talbott,<sup>52</sup> "the alcohol and drug addict is a disaster waiting to happen. They only need abuse to trigger the disease."<sup>53</sup> The compulsion begins as a chemical reaction in the brain whereby euphoria producing chemicals (naturally produced by the brain) are released creating an intense, pleasurable sensation.<sup>54</sup> A person then becomes addicted by attempting to recreate this sensation by using successively larger doses.<sup>55</sup> For the addict, there is no control over drug use because the brain chemicals that create the euphoric sensation also control behavior.<sup>56</sup> The presence of these chemicals is an abnormality that is inherited through one's genes.<sup>57</sup> For this reason, drug addiction, as well as alcoholism, is considered "a biochemical-ge-

46. DOWEIKO, *supra* note 42, at 211.

47. *Id.* at 211-12.

48. *Id.* at 167.

49. *Id.* at 166-67 (citing NARCOTICS ANONYMOUS WORLD SERVICE OFFICE, INC., NARCOTICS ANONYMOUS 11 (1982)).

50. DOWEIKO, *supra* note 42, at 167.

51. *Id.* at 167; *see also* EDWIN M. SCHUR, CRIMES WITHOUT VICTIMS: DEVIANT BEHAVIOR AND PUBLIC POLICY: ABORTION, HOMOSEXUALITY AND DRUG ADDICTION 122 (1965).

52. Dr. G. Douglas Talbott, M.D., F.A.C.P.; Program Director, Georgia's Disabled Doctors Program; Director, Ridgeview Institute Alcohol & Drug Program; Clinical Associate Professor, Emory Medical School.

53. G. Douglas Talbott, M.D., F.A.C.P., Alcoholism Is A Disease! 143 (unpublished, undated report on file with NOVA LAW REVIEW). Although this report is primarily about the disease of alcoholism, there are several relevant issues about drug addiction as well.

54. DOWEIKO, *supra* note 42, at 62.

55. *Id.* at 211.

56. Talbott, *supra* note 53, at 143.

57. *Id.*

netic disease.”<sup>58</sup> Generally, suffering from this disease will not result in community sympathy.<sup>59</sup>

However, society does tolerate the recreational use of some psychoactive substances such as alcohol.<sup>60</sup> Indeed, being addicted to certain chemicals like caffeine and nicotine is also considered to be “normal.”<sup>61</sup> However, society draws the line at addiction when it is a result of illicit substance abuse or the overindulgence of accepted chemicals.<sup>62</sup> Society rebuffs these addicts as non-productive eyesores that litter the “Norman Rockwell” images of our towns and cities.<sup>63</sup> “The very passivity and unproductiveness characteristic of most addicts are strongly disapproved of in the dynamic, work oriented American society.”<sup>64</sup>

This perception of the addict is represented in law and public policy as the federal government seeks to wage war on drugs and drug users.<sup>65</sup> This societal attitude of disdain toward addicts is beginning to show in congressional treatment of civil liberties.<sup>66</sup>

In 1990, Congress enacted the Americans With Disabilities Act (ADA) to protect employees from employer discrimination based on an employee’s disability or handicap.<sup>67</sup> While the United States Senate included narcotics abuse, drug addiction and alcoholism in the list of protected disabilities,<sup>68</sup> the law expressly excludes those addicted to “controlled substances”<sup>69</sup> such as cocaine unless the employee is enrolled in

58. *Id.*

59. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 143 (1963); SCHUR, *supra* note 51, at 162.

60. *DSM-III-R*, *supra* note 37, at 165.

61. *Id.*

62. *Id.*

63. SCHUR, *supra* note 51, at 162.

64. *Id.*

65. Gaylord Shaw, *Bush Maps New Target In Drug War Plan Targets Demand, Seeks New Aid for NYC*, NEWSDAY, Jan. 23, 1990, at 15; *see infra* text accompanying note 70.

66. *See* Frank Greve & Matthew Purdy, *Even First Time Offenders Would Feel Pinch*, MIAMI HERALD, September 6, 1988; *see infra* text accompanying note 70.

67. The Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (1990).

68. Bruce McLanahan, *Who is “Disabled,”* in COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT: A SATELLITE PROGRAM, 714 PRACTICING LAW INSTITUTE, CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 33, at 39 (citing S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989)).

69. 42 U.S.C. § 12101 § 101(6)(A) (1990) (substances controlled under 21 U.S.C. § 812 (1990)).

a treatment program and has ceased use of the substance.<sup>70</sup> This is an excellent example of how the addict is received by society.

If one is addicted, but not to illicit narcotics, that addiction is treated by the Federal Government; at a minimum, as a disability for a limited purpose.<sup>71</sup> Although, the ADA's purpose is the protection of the basic civil liberty to be free of discrimination by an employer,<sup>72</sup> the ADA is one example of how public policy rejects the illicit narcotics addict. "They are perceived as failing to use available opportunity for advancement in the various approved runways of society . . . , they represent failures in the motivational schemes of society."<sup>73</sup>

Because the drug addict is, at most, a societal outcast, an undesirable, laws like the ADA and zealous "demand-side" enforcement policies will, under the cover of a national public hysteria (e.g., the drug war), quickly cast civil liberties aside.<sup>74</sup> There are those who call for an "all out" drug war in which "civil liberties must necessarily be diminished . . . ."<sup>75</sup> However, this response is as irrational as it is frightening, for it is born out of a desire to preserve a "small town"<sup>76</sup> image created in delusions of grandeur inspired by Hollywood and Disneyworld.<sup>77</sup>

"Although the United States has a history of commitment to individual liberties, our nation is not immune to incidents of crisis born hysteria which have impacted adversely upon civil liberties."<sup>78</sup> Once an individual is branded with the stigma of drug abuser, the criminal justice system seeks to attach the "scarlet letter of guilt"<sup>79</sup> upon that per-

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70. *Id.* § 101(b).

71. McInahan, *supra* note 68, at 35.

72. *Id.*

73. GOFFMAN, *supra* note 59, at 144.

74. See Paul R. Joseph, *Civil Liberties in the Crucible: An Essay On AIDS and the Future of Freedom in America*, 12 NOVA L. REV. 1083, 1096-99 (1988). Professor Joseph expressed that this article was written in such a fashion so as to provide a perspective of the future of civil liberties in general as applicable to all facets of law, not just the dilemma of AIDS. Interview with Paul R. Joseph, Professor of law, Nova University Center for the Study of Law, Fort Lauderdale, Florida (Dec. 17, 1991); see *The Drugging of the Courts*, *supra* note 4, at 314; see *supra* text accompanying note 73.

75. Murphy, *supra* note 9, at 1308.

76. Joseph, *supra* note 74, at 1085.

77. *Id.*

78. *Id.* at 1083; see *supra* text accompanying note 70.

79. LOW ET AL., *supra* note 32, at 3.

son. The "majority"<sup>80</sup> then strips the individual of "the benefits of community membership"<sup>81</sup> rendering the individual a "non-member,"<sup>82</sup> "outcast,"<sup>83</sup> or convict.<sup>84</sup>

Even though these labels exact a high price on the individual, it is the community that pays the price of addiction because incarceration costs are very high.<sup>85</sup> One solution is to have addiction established and accepted by the courts as a disease. The next task is to recognize this disease as a defense to the crimes of possession and purchase of narcotics.

#### IV. ADDICTION AS A DEFENSE

Historically, in spite of the revolution in medical and scientific knowledge, the courts' acceptance of addiction as a disease has been limited, at best.<sup>86</sup> Long before the declared war on drugs, the United States Supreme Court dealt with the issue of addiction in *Robinson v. California*.<sup>87</sup>

In *Robinson*, the Court held that addiction is a disease, and to punish a person for having a disease "in light of contemporary human knowledge . . . would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and

80. Joseph, *supra* note 74, at 1086.

81. *Id.*

82. *Id.*

83. *Id.*

84. See generally, Paul R. Joseph, "Our Town" or "Twin Peaks": *The Dark Side of Community*, VI FOCUS ON LAW STUDIES 5 (1990) (discussing how the community, by influence of majority vote, can easily transform the most inalienable of rights into mere privileges).

85. See *supra* text accompanying notes 28-31.

86. See, e.g. *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1978) (court held that congressional intent in enacting criminal sanctions for drug possession did not exclude addicts). See generally STANTON PEELE, *THE DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL* (1989) (refuting the concept of addiction as a disease).

87. 370 U.S. 660 (1962) (holding a California statute making it a crime to be a drug addict (punishable by incarceration) unconstitutional as it violated the Eighth and Fourteenth Amendments of the U.S. Constitution). California later enacted a comprehensive set of statutes that officially recognized addiction as a disease to the effect that successful completion of rehabilitation program results in the exoneration of the defendant of all possession or purchase crimes. CAL. PENAL CODE §§ 1000-1000.5 (Deering 1991).

Fourteenth Amendments.”<sup>88</sup> In his concurrence, Justice Douglas compared the “disease” of drug addiction to insanity.<sup>89</sup>

However, in 1968 the Court clearly distinguished addiction as a non-offense as opposed to a defense to other crimes.<sup>90</sup> In *Powell v. Texas*, the Court affirmed the conviction of a man for being publicly drunk despite that he was an alcoholic with an uncontrollable urge to drink and get drunk.<sup>91</sup> Today, state courts adhere to the rule in *Powell*, recognizing addiction as a disease and providing treatment for addicts who commit crimes, but refusing to recognize addiction as a defense to criminal activity.<sup>92</sup>

The Florida Fifth District Court of appeal has followed suit in a controversial decision.<sup>93</sup> In *Johnson v. State*, the court upheld the conviction of a woman for delivery of a controlled substance to a minor<sup>94</sup> via the umbilical cord after her baby died following a live birth.<sup>95</sup> In

88. *Robinson*, 370 U.S. at 666. The Court went on to state, “‘of course it is generally conceded that a narcotic addict . . . is in a state of physical and mental illness.’” *Id.* at 667 n.8 (quoting brief for appellee—the State of California); *see also* Lindner v. United States, 268 U.S. 5 (1951), where the Court stated that narcotics addicts “are diseased and proper subjects for medical treatment.” *Id.* at 18; Morris Ploscowe, *Methods of Treatment of Drug Addiction*, in *ESSAYS IN CRIMINAL SCIENCE* 357 (Gerhard O.W. Mueller ed., 1961).

89. *Robinson*, 370 U.S. at 668 (Douglas, J., concurring).

90. *Powell v. Texas*, 392 U.S. 514 (1968).

91. *Id.* at 541-44. The Texas statute was not declared unconstitutional and the court distinguished this case from *Robinson* because the Texas law did not make being an alcoholic illegal. *Id.* at 532. The court reasoned that while the defendant may have an “involuntary compulsion” to drink, he did not have such an urge to be drunk in public. *Id.* at 534.

92. *See* Santone v. State, 371 S.E.2d 428 (Ga. Ct. App. 1988) (evidence of cocaine addiction inadmissible in cocaine trafficking case); Goldsmith v. State, 252 S.E.2d 657 (Ga. Ct. App. 1979) (defense of involuntary addiction denied for possession of fraudulently obtained prescription drugs); Franklin v. United States, 339 A.2d 398 (D.C. Cir. 1975) (defense of lack of capacity due to addiction denied); Gorham v. United States, 339 A.2d 401 (D.C. Cir. 1975) (defense of being an automaton as a result of addiction denied); Smith v. State, 219 N.W.2d 655 (Iowa 1974) (court distinguished the crime of possession from the status of being an addict and affirmed a possession of heroin conviction); People v. Davis, 306 N.E.2d 787 (N.Y. 1973) (sentence for personal possession of heroin and a needle not cruel and unusual punishment); People v. Bell, 290 N.E.2d 214 (Ill. 1972) (refusal by trial court to admit expert testimony on addiction was harmless error as it would not exonerate the defendant).

93. *Johnson v. State*, 578 So. 2d 419 (Fla. 5th Dist. Ct. App. 1991).

94. FLA. STAT. § 893.13(1)(c) (1991).

95. *Johnson*, 578 So. 2d 419. *But see* State v. Gethers, 585 So. 2d 1140 (Fla. 4th Dist. Ct. App. 1991) (conviction of mother for child abuse pursuant to section

doing so, the court sent a strong message that drug use is intolerable. The combined message of the Whitehouse, police, prosecutors and the courts to date has been clear. This nation has "zero-tolerance"<sup>96</sup> for drugs and drug offenders whether or not they are addicts.<sup>97</sup>

## V. THE DRUG COURT PROGRAM

### A. *The Need For Change*

Second chances are rarely given to the drug offender.<sup>98</sup> If one is gifted athlete with marketable skill, but also a drug addict, that person may be protected by the same society that otherwise enforces a strict policy against drug use.<sup>99</sup> For those who are not gifted athletically and do not have a monetary value measured in six figures or greater, there is prison.<sup>100</sup> Perhaps, once in prison, the convict may receive drug treatment.<sup>101</sup> However, the chances of receiving treatment are not very good in Florida prisons.<sup>102</sup>

In Florida prisons bed space is limited, sentences don't last long

827.04(1) of the Florida Statutes for poisoning her fetus by ingesting crack-cocaine while pregnant was reversed because the statute did not contemplate fetus abuse). The *Gethers* case is distinguishable on two grounds. First, the infant in *Johnson*, died after being born alive and second, the court in *Gethers* did not find legislative intent to reach the defendant, while in *Johnson*, the court did find such intent. *Id.* at 420.

96. "Zero-tolerance" is a seizure policy begun by the United States in 1988 whereby U.S. Customs, Coast Guard, and other law enforcement agencies seized personal property (yachts, cars etc.) if even minuscule amounts of controlled substances were discovered there-in. See Howard B. Thorsen, *The Coast Guard, Zero Tolerance and the Drug War*, MIAMI HERALD, July 10, 1988, at 6C.

97. See Greve & Purdy, *supra* note 66, at 9A (discussing plan revealed by President Bush in Sept. 5, 1988 speech to attack the "demand" for drugs); see *supra* text accompanying note 91.

98. Jean Dubail, *Prison Crowding Shortens Inmate Drug Treatment*, SUN-SENTINEL, Aug. 22, 1989, at 1A (discussing the case of an individual who begged a Broward County Judge for treatment).

99. See generally SPORTS ILLUSTRATED, *For The Record*, 106 (Jon Scher ed., Dec. 23, 1991). Dexter Manly was banned for life from the National Football League after several infractions of the leagues cocaine policy. *Id.* The lifetime ban only lasted one year after which Manly returned only to violate the rules a fourth time. *Id.* Manly has since retired from football and vows to win his battle with cocaine addiction. *Id.*

100. ANNUAL REPORT, *supra* note 20, at 38 (inmate profiles reveal that approximately 62.4 percent of those in prison were unemployed at the time of their arrest).

101. *Id.* at 18.

102. Dubail, *supra* note 98, at 4A.

enough for treatment to be effective,<sup>103</sup> and "drugs and alcohol are plentiful behind bars. Treatment is not."<sup>104</sup> Any available treatment is usually ineffective because of the prevalence of drugs in the prisons.<sup>105</sup> The bottom line is "Florida Prisons are a breeding ground for addiction."<sup>106</sup>

A significant factor in the lack of drug treatment is overcrowding.<sup>107</sup> As offenders get sent to prison in large numbers, a shortage in bed space results.<sup>108</sup> This in turn creates the need for the early release of not just drug offenders, but those charged with more serious crimes.<sup>109</sup> The conflict here is significant and problematic. The community cries out for tougher laws and longer prison sentences for drug offenders, but as soon as those policies go into effect, the system cannot handle the influx of new inmates, which actually results in shorter prison sentences.<sup>110</sup> As a result, those inmates who do get placed into drug treatment are rarely in prison and prison treatment programs long enough for the treatment to be effective.<sup>111</sup> Compounding the problem, is the drug availability in prisons.<sup>112</sup>

Furthermore, increased police enforcement that crowds the prisons also puts a strain on the courts.<sup>113</sup> Between 1980 and 1989, drug cases in the federal courts rose 270 percent.<sup>114</sup> A similar pattern was noted in state criminal courts.<sup>115</sup> The result is that drug cases have begun to

103. *Id.*

104. Patrick May, *Treatment Is A Must if Convicts Are To Shake Drug Habit*, MIAMI HERALD, Oct. 8, 1991, at 1A.

105. *Id.* at 1A-6A.

106. *Id.*; see also Associated Press, *Prisoners Pass Around "Buck,"* MIAMI HERALD, Aug. 14, 1990, at 4B ("Buck" is homemade grain alcohol that is popular among Florida's incarcerated)[hereinafter *Prisoners Pass Around "Buck"*]; Herald Capital Bureau, *Guards Accused In Drug Case: Probe Uncovers Prison Smuggling*, MIAMI HERALD, Aug. 25, 1990, at 3B (Guards at several prisons and jails throughout Florida were charged with smuggling drugs into the facilities for sale to the inmates)[hereinafter *Guards Accused In Drug Case*].

107. Dubail, *supra* note 98, at 1A, 4A.

108. *Id.*

109. *Id.*

110. *Id.*; see also N. Gary Holten & Roger Handberg, *Florida's Sentencing Guidelines: Surviving—But Just Barely*, 73 JUDICATURE 259, 263 (Feb.—Mar. 1990).

111. Dubail, *supra* note 98, at 4A.

112. May, *supra* note 104, at 6A; *Prisoners Pass Around "Buck," supra* note 106, at 4B; *Guards Accused In Drug Case, supra* note 106, at 3B.

113. *Courts and the "War on Drugs," supra* note 4, at 236.

114. *Id.*

115. *Id.*

absorb much of the courts' money, resources, and personnel to the detriment of other types of cases.<sup>116</sup>

In response, some states have set up "drug courts,"<sup>117</sup> redirecting court dockets to relieve the system of felony narcotics cases.<sup>118</sup> However, creating a separate courtroom with separate judges is not enough, as this type of system inevitably becomes a convenient docket clearing tool, which results in less attention paid to the defendant and his or her needs.<sup>119</sup> There must be more to the administration of justice than a quick resolution of cases.<sup>120</sup> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."<sup>121</sup> In order to provide an efficient method of handling cases with understanding, it has been suggested that courts should depart from their "traditional passive"<sup>122</sup> method of resolving cases and start "search[ing] for creative ways to alleviate the drug crisis through their social service role."<sup>123</sup>

Florida's Eleventh Judicial Circuit<sup>124</sup> and the Seventeenth Judicial Circuit<sup>125</sup> have endeavored to perform that "social service role" and have begun to attack the demand-side of the drug crisis with "understanding."<sup>126</sup> Dade and Broward County have each begun their own

116. *The Drugging of the Courts*, *supra* note 4, at 316.

117. *Id.* at 314-315 (For example, Indiana, Michigan and New Jersey have reported large numbers of drug cases on their dockets.).

118. *Id.*

119. *Id.* at 315.

120. *The Drugging of the Courts*, *supra* note 4, at 314.

121. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)(holding that evidence obtained through an illegal wire-tap was admissible); *see also Skinner v. Railway Labor Executives' Ass'n et al*, 489 U.S. 602 (1989)(holding that compelling government interest outweighed the employees' privacy rights in upholding the constitutionality of drug testing for rail-road employees). In his dissent, Chief Justice Marshall warned: "Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great." *Id.* at 635 (Marshall, C.J., dissenting); *see also The Drugging of the Courts*, *supra* note 4, at 314 (quoting Brandeis' opinion in *Olmstead*); On the issue of drug testing, *see generally* Paul R. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605 (1987).

122. *Courts and the "War on Drugs"*, *supra* note 4, at 236.

123. *Id.*; *The Drugging of the Courts*, *supra* note 4, at 316.

124. In and for Dade County, Florida, under the supervision of Associate Chief Judge Herbert M. Klein.

125. In and for Broward County, Florida under the supervision of the Criminal Division's Administrative Judge, Mark Speizer.

126. *The Drugging of the Courts*, *supra* note 4, at 316-317; *The Courts and the*



"Drug Court" programs which exist for the benefit of those who come before the bench, as opposed to sending them to prison in mass.<sup>127</sup>

Prison is certainly not the cure for the disease of drug addiction. While several thousand people enter the Florida prison system every year at a tremendous cost per inmate, it is probable that close to half of these people will return to prison unless, by good fortune, they happen to receive and complete treatment programs.<sup>128</sup>

Treatment is available through the Drug Court programs at a much lower cost and a much higher success rate as compared to prison. The Drug Court Programs of Dade and Broward County provide an effective solution. While there may not be a perfect solution or cure to drug addiction, one thing is certain, prison is not the solution. Consider whether society wants to support the notion of jailing the disabled or the diseased. Is there justification, for example, in making the disease of cancer or AIDS illegal?

Granted, being an addict is not illegal in Florida, nor anywhere else for that matter.<sup>129</sup> However, to be in possession of cocaine, if one is an addict, is as involuntary as the disease of addiction itself.<sup>130</sup> It is not logical to concede that addiction is a disease of compulsion but not to concede the compulsion itself. After all, one cannot be an addict if one does not use drugs. Furthermore, one cannot use drugs if one does not purchase and possess them. It is time that we move forward as a society and accept the addict as a sick person and treat him or her with the same compassion that we would have for the victim of any other disease.

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"War on Drugs," *supra* note 4, at 288; Diversion and Treatment Program: An Overview, *supra* note 7, at 1-2; Strategies for Action, *supra* note 7, at 1-3; Drug Court Program, *supra* note 7.

127. Diversion and Treatment Program: An Overview, *supra* note 7; *In re* Creation of A Drug Court Division Within the Criminal Division, ADMINISTRATIVE ORDER NO. III-91-E-1, Seventeenth Judicial Circuit in and for Broward County, Florida (June 27, 1991)[hereinafter ADMINISTRATIVE ORDER NO. III-91-E-1]; *In re* Diversion and Treatment Program; Costs and Assessment, ADMINISTRATIVE ORDER NO. 90-9, Eleventh Judicial Circuit in and for Dade County, Florida, Miami Review (April 27, 1990)[hereinafter ADMINISTRATIVE ORDER NO. 90-9]; *In re* creation of Section CF in the Criminal Division of the Circuit Court and Type of Cases to be Heard, ADMINISTRATIVE ORDER NO. 89-9, Eleventh Judicial Circuit in and for Dade County, Florida, Miami Review (June 15, 1989)[hereinafter ADMINISTRATIVE ORDER NO. 89-9].

128. See *supra* text accompanying notes 22-30.

129. *Robinson v. California*, 370 U.S. 660 (1962); see *supra* text accompanying note 90.

130. See *supra* text accompanying notes 53-56.

The alternative, is to digress and become the ultimate police state in which the government destroys all expectations of privacy in an attempt to eradicate crime.<sup>131</sup> The State of Florida has already prosecuted and convicted one mother for poisoning her fetus via the umbilical cord as a result of drug use during pregnancy.<sup>132</sup> Will we next seek to prosecute people for possession of narcotics simply for testing positive for drug use through blood and urine samples?<sup>133</sup>

## B. Background

In 1988, officials in the Dade County government noted that of the 120,000 people incarcerated in the Dade County Jail system, sixty percent were repeat offenders.<sup>134</sup> These statistics are similar for the Broward County Jail which has experienced a 336 percent increase in population over the past ten years despite a decreasing crime rate.<sup>135</sup> Furthermore, it was discovered that over eighty percent of those arrested for felonies were, at the time of arrest, "under the influence of"<sup>136</sup> or tested positive for drugs "other than alcohol."<sup>137</sup>

Armed with this information, Gerald T. Wetherington, Chief Judge of the Eleventh Circuit and Joaquin G. Avino, Dade County Manager, made a proposal to Justice Raymond Ehrlich, Chief Justice of the Florida Supreme Court.<sup>138</sup> This proposal suggested an "innovative approach to attacking" the run away drug problem.<sup>139</sup> As a result,

131. See *Katz v. United States*, 389 U.S. 347 (1967) (holding that using an electronic listening device to gather incriminating evidence without a warrant was a violation of a privacy expectation). Cf. *Olmstead*, 277 U.S. 438 (1928).

132. *Johnson*, 578 So. 2d 419.

133. I use the pronoun "we" for we ratify such governmental policy through the election process. See *Schmerber v. California*, 384 U.S. 757 (1966) (holding that a warrantless intrusion into the body to get blood samples did not offend the Constitution because the task was routine and performed by a medical professional using standard procedures; also, evidence of the crime of drunk driving was rapidly diminishing as the blood alcohol content lessens over time).

134. *Strategies for Action*, *supra* note 7, at 1.

135. Jonathon King, *Pinning Down A Solution to Crack*, SUN-SENTINEL, *Sunshine Magazine*, Oct. 21, 1991, at 7.

136. *Strategies for Action*, *supra* note 7, at 1.

137. *Id.*; The percentage of inmates in the Florida State Prison system who admitted to illicit drug use was 52.2 percent for the year 1989-90. ANNUAL REPORT, *supra* note 20, at 47; see also May, *supra* note 104, at 6A.

138. *Strategies for Action*, *supra* note 7, at 1.

139. *Id.*

the Florida Supreme Court appointed Judge Herbert M. Klein to develop and coordinate anti-drug abuse programs in Dade County.<sup>140</sup> Thus, in an unprecedented move by Florida's judiciary, the Drug Court was born.<sup>141</sup>

### C. *Administrative Orders*

Pursuant to the Florida State Rules of Court, the chief judge of a judicial circuit may make rulings as to the assignment of judges,<sup>142</sup> the use of courtrooms and docket size,<sup>143</sup> and promulgate "administrative orders"<sup>144</sup> to facilitate any function of the chief judge's office.<sup>145</sup> All administrative orders must be approved by the Florida Supreme Court.<sup>146</sup> By using the authority vested in the chief judge, administrative orders were promulgated creating the Drug Court Programs that now exist in both Dade and Broward County.<sup>147</sup>

Judge Klein concedes that the creation and operation of these programs places judges in a "more activist role."<sup>148</sup> However, under the traditional passive role of the court, the system remains unchanged with the exception that, as statistics show, more people go to prison.<sup>149</sup> As long as people perceive judges as possessing authority, they should use that authority in a constructive manner to achieve positive goals that help the community in which they preside by developing creative solutions to problems, such as drug addiction and high recidivism rates.<sup>150</sup> It was this judicial activism that led to the administrative

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140. Herbert M. Klein, Associate Chief Judge, Eleventh Judicial Circuit, Strategies for Action: Combating Drug and Alcohol Abuse in Dade County—An Update, 1 (June 1990)(unpublished pamphlet, on file with Dade County Office of Substance Abuse)[hereinafter Update 1990].

141. Strategies for Action, *supra* note 7, at "Executive Summary."

142. FLA. R. JUD. ADMIN. NO. 2.050(b)(4).

143. *Id.* 2.050(b)(7).

144. *Id.* 2.020(c) (administrative order defined as a "directive" used to facilitate administrative needs and "court affairs").

145. *Id.* 2.050(b)(2).

146. *Id.* 2.050(e).

147. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

148. *The Drugging of the Courts*, *supra* note 4, at 316.

149. ANNUAL REPORT, *supra* note 20, at 30; Strategies for Action, *supra* note 7, at 1.

150. *The Drugging of the Courts*, *supra* note 4, at 316-17.

orders that are the foundation of the Drug Court Program.<sup>151</sup>

Dade County's administrative order became effective on June 19, 1989, and the program has been operating since that date.<sup>152</sup> The Broward County program was established on July 1, 1991 using Dade County's program as a model.<sup>153</sup>

The effect of these administrative orders has been to transfer all first time felony defendants within the respective circuits charged with possession<sup>154</sup> or purchase<sup>155</sup> of cocaine into one courtroom where they have an opportunity to receive drug treatment.<sup>156</sup> More significant, however, is the fact that these orders break with national judicial practice of non-recognition of addiction as a defense to felony purchase and possession of cocaine for first time offenders.<sup>157</sup> In effect, these courts have taken "judicial notice"<sup>158</sup> of drug addiction as a disease with an emphasis on treatment. "There have been no trials in the Drug Court since its inception, as the goal is not to try cases, but to connect defendants with realistic meaningful treatment."<sup>159</sup>

Providing defendants with alternatives to incarceration, such as drug treatment, is consistent with Florida's pretrial intervention (PTI) statute.<sup>160</sup> PTI is available to non-violent felony offenders (third degree felonies) and upon successful completion of a PTI program, a defendant may have the case dismissed "without prejudice"<sup>161</sup> by the state attorney.<sup>162</sup> Furthermore, pursuant to Florida law, the trial judge may refer any defendant to drug treatment "in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any similar

151. *Id.*

152. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127.

153. ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

154. FLA. STAT. § 893.13(1)(f) (1991).

155. § 893.13(1)(a)(1).

156. *The Drugging of the Courts*, *supra* note 4, at 317.

157. See ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127 (defendants charged with sale, manufacture, delivery, or distribution are not "qualified" to enter the program).

158. BLACK'S LAW DICTIONARY, (6th ed. 1990) ("[J]udicial notice [is] [t]he act by which a court . . . recognize[s] the existence and truth of certain facts . . ."); see FLA. STAT. §§ 90.202-205 (1991).

159. Drug Court: April 1, 1991, *supra* note 8.

160. FLA. STAT. § 948.08 (1991)(Pretrial intervention program).

161. BLACK'S LAW DICTIONARY 1179 (6th ed. 1990)(dismissal "without prejudice" means the prosecutor does not waive the right to initiate the prosecution at a later date).

162. FLA. STAT. § 948.08 (1991)(Pretrial intervention program).

action."<sup>163</sup>

By enacting the PTI statute, the legislature expressly intended that those defendants who could avoid prison by being rehabilitated, should be treated as other than criminal.<sup>164</sup> However, the ever increasing numbers of drug offenders sent to Florida prisons indicate that judges do not seem to be exercising this discretionary power very often.<sup>165</sup> Statistics show that drug possession convictions accounted for the second highest number of inmates in Florida prisons by 1990, while those convicted of selling drugs were the highest.<sup>166</sup>

In order to combat this problem, both the Broward County Order and Dade County Order "stress the addictive rather than the criminal nature of the offense . . . ."<sup>167</sup> In fact, on April 27, 1990 Dade County updated its program to include a provision for "client" contributions to rehabilitation cost.<sup>168</sup> In so doing, the court stated that "The Eleventh Judicial Circuit of the State of Florida, in conjunction with the State Attorney and Public Defender, has recognized addiction as a treatable disease . . . ."<sup>169</sup> With these programs, a new era of judicial activism was born.<sup>170</sup>

#### D. Admission Criteria and Treatment Techniques

In order to get into the Drug Court program, a person must be arrested for felony possession or purchase of cocaine.<sup>171</sup> When a de-

163. FLA. STAT. § 397.12 (1991)(reference to drug treatment program).

164. § 397.10 (legislative intent). The statute provides, in relevant part: It is the intent of the Legislature to provide in a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques generally not available in state or federal prison systems . . . . It is further the intent of the Legislature to encourage trial judges to use their discretion to refer persons to a state licensed drug rehabilitation program in lieu of, or in addition to, imposition of criminal penalties.

*Id.*

165. ANNUAL REPORT, *supra* note 20, at 31.

166. *Id.*

167. ADMINISTRATIVE ORDER NO. 90-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

168. ADMINISTRATIVE ORDER NO., 90-9 *supra* note 127 (which is also provided for under Florida Law. FLA. STAT. § 948.09 (1991) (Payment for cost of supervision and rehabilitation).

169. ADMINISTRATIVE ORDER NO. 90-9, *supra* note 127.

170. *The Drugging of the Courts*, *supra* note 4, at 316.

171. Interview with Michael Rocque, Assistant Public Defender, Seventeenth Ju-

fendant is brought into court and is a first offender, the judge will explain to the person how the program works and gives the defendant a choice of either going to trial on the charges and risking conviction, or entering the program as probation for one year.<sup>172</sup> If the defendant prefers trial, he or she is risking a possible five to fifteen years in prison.<sup>173</sup>

Broward County allows a defendant up to sixty-six days from the date of arrest to make the election to enter the program or go to trial.<sup>174</sup> Upon electing to enter the program, a defendant must enter a plea of guilty or *nolo contendere* to the charges against him or her.<sup>175</sup> At this point, the defendant is released on his or her own recognizance.<sup>176</sup> In order to participate, the defendant must not have a record of any other felony convictions including charges on which adjudication was withheld.<sup>177</sup>

Dade County's program is slightly different in this regard. Defendants coming before Drug Court Judge Stanley Goldstein<sup>178</sup> do not have to enter a plea.<sup>179</sup> Depending upon the circumstances, Judge Goldstein may allow a defendant with a prior felony record to get into the program.<sup>180</sup> This is made possible by an "understanding" that exists between the very cooperative State Attorney, Janet Reno, and Judge Goldstein in which both parties agree to get as many people as possible the help that they need to get away from drugs.<sup>181</sup> Judge Goldstein's

dicial Circuit, Broward County, Florida, in Ft. Lauderdale, Florida (Nov. 12, 1991)(Mr. Rocque is also an adjunct Professor of Law, Nova University Center for the Study of Law); see FLA. STAT. § 893.13(1)(a)(1) (1991)(purchase of cocaine—a second degree felony); FLA. STAT. § 893.13(1)(f) (1991) (possession of cocaine—a third degree felony).

172. Interview with Michael Rocque, *supra* note 171.

173. FLA. STAT. §§ 775.082(c), (d) (1991) (Penalties). According to Rocque, upon conviction usually receives up to twenty-two months in prison under the sentencing guidelines. Interview with Michael Rocque, *supra* note 163; see FLA. STAT. § 921.187(1)(b) (1991) (Disposition and sentencing; alternatives; restitution).

174. ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

175. *Id.*

176. Interview with Michael Rocque, *supra*, note 171.

177. *Id.*

178. Judge Goldstein was appointed to preside over the Dade County Drug Court by Judge Klein and Judge Wetherington after a brief tenure in D.U.I Court. Patrick May, *Judge Puts Heart Into Drug Court: 61-Year-Old Jurist is Tough, Tender*, MIAMI HERALD, Oct. 21, 1991, at 2B.

179. Telephone Interview with Judge Stanley Goldstein, Eleventh Judicial Circuit, Dade County, Florida (Nov. 18, 1991).

180. *Id.*

181. *Id.*

only requirement is that the defendant make an effort to "get off" of cocaine.<sup>182</sup> He adds that he "never met an addict yet that didn't want to get off it."<sup>183</sup>

Once a defendant elects to enter the program in either Dade or Broward County, the Probation Department supervises the participant/client along with State licensed treatment programs.<sup>184</sup> Failing to comply with the program rules (or getting re-arrested) will, in the Judge's discretion, result in: a) restarting the program, b) going to the county jail for more intensive "in-house" treatment, or c) a removal from the program completely which results in a transfer to another criminal division for prosecution of the original charges.<sup>185</sup> The program consists of three phases and lasts one year.<sup>186</sup> Since the structure of the Dade and Broward programs is essentially the same,<sup>187</sup> thus, the following discussion of each phase applies to both with various differences highlighted where necessary.

Phase I is the most innovative phase of the program. Participants are assessed as to their amenability to treatment and, at their option and consent, are given acupuncture treatments.<sup>188</sup> The purpose of acupuncture is to relax the addict and curb the desire for drugs.<sup>189</sup> The

182. *Metromagazine: Strategies For Action* (MDTV 34 television broadcast, July 1990, videotape on file with Dade County Office of Substance Abuse Control)[hereinafter *Metromagazine*].

183. *Id.*

184. Drug Court Program, *supra* note 7; see also ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127; Diversion and Treatment Program: An Overview *supra* note 7, at 1.

185. Drug Court Program, *supra* note 7; *Strategies For Action*, *supra* note 7, at 2; see also *A Clean and Sober Look at Drug Court*, COUNTY LINE, Nov./Dec. 1991, at 1; Kathleen Kernicky, *Betting on Pins and Needles: Drug Users Hope Acupuncture Is End For Addiction*, SUN-SENTINEL, Dec. 8, 1991, at 1B, 5B.

186. Drug Court Program, *supra* note 7; *Strategies For Action*, *supra* note 7, at 2; Diversion and Treatment Program: An overview, *supra* note 7, at 1.

187. Telephone Interview with Judge Robert J. Fogan, Drug Court, Seventeenth Judicial Circuit, Broward County, Florida (Nov. 19, 1991).

188. Diversion and Treatment Program: An Overview, *supra* note 7, at 5; *Strategies For Action*, *supra* note 7, at 2; Drug Court Program, *supra* note 7.

189. William F. Moriarty, Jr. & Janet Konefal, Ph.D., C.A., *Innovative Substance Abuse Treatment Options for Criminal Justice Populations That Include Acupuncture Detoxification As A Part of An Overall Treatment Program 3* (presented at American Correctional Congress, San Diego, Cal. Aug. 1990)(unpublished, on file with the Dade County Office of Substance Abuse); Diversion and Treatment Program: An Overview, *supra* note 7, at 1; Kernickey, *supra* note 185, at 5B; see also Patrick May, *Drug Court Specializes in Second Chances*, MIAMI HERALD, Oct. 20, 1990, at 2B;

acupuncture causes a release of chemicals in the brain that calm the client making him or her more amenable to treatment.<sup>190</sup> Acupuncture is also available for those clients who spend time in jail.<sup>191</sup> In fact, "they have become model prisoners where they were once quite a handful."<sup>192</sup>

The idea to use acupuncture came from a field visit to New York.<sup>193</sup> Dr. Michael Smith, Director of New York's Lincoln Center Acupuncture Clinic, has had success for over fifteen years using acupuncture to assist heroin addicts in their attempts at rehabilitation.<sup>194</sup> As a result, both Dade and Broward County have incorporated acupuncture into their programs.<sup>195</sup> In fact, Judge Goldstein credits the success of the Dade County program to the acupuncture treatment technique.<sup>196</sup>

In addition to acupuncture, Phase I also consists of urinalysis on a daily basis as well as several group and individual counseling sessions.<sup>197</sup> Phase I in Dade County usually lasts twelve days while in Broward it lasts three weeks; however, no client moves to Phase II until counselors, probation officers and the judges are satisfied with the client's performance.<sup>198</sup>

Once in Phase II, acupuncture treatments are still required (for those who opted for them), but in decreasing number.<sup>199</sup> This phase concentrates on the more "conventional" methods of drug treatment such as counseling and stress management.<sup>200</sup> Urinalysis takes place

King, *supra* note 135, at 7.

190. Kernickey, *supra* note 185, at 5B.

191. Update 1990, *supra* note 8, at 1-2; Strategies for Action, *supra* note 7, at 2. The jail or "in-house" treatment is more intensive than the probation program with evaluations every thirty days which may result in an early release to the probation program if clients progress so warrants. *Id.*

192. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

193. *Id.*

194. Moriarty & Konefal, *supra* note 189, at 3.

195. Diversion and Treatment Program: An Overview, *supra* note 7, at 1; Update 1990, *supra* note 8, at 3; Drug Court Program, *supra* note 7.

196. May, *supra* note 178, at 2B.

197. Diversion and Treatment Program: An Overview, *supra* note 7, at 5; Drug Court Program, *supra* note 7.

198. Diversion and Treatment Program: An Overview, *supra* note 7, at 5; Drug Court Program, *supra* note 7.

199. Diversion and Treatment Program: An Overview, *supra* note 7, at 8 (Phase II in Dade lasts approximately fourteen weeks); Drug Court Program, *supra* note 7.

200. Diversion and Treatment Program: An Overview, *supra* note 7, at 8; Drug



three times a week, and the client's probation officer is kept informed of the results and the client's attendance at all group sessions and individual counseling appointments.<sup>201</sup> Each participant must make personal appearances before the judge at predetermined dates in order to keep the court informed of the participant's progress.<sup>202</sup> When the judge is satisfied that an individual has successfully completed Phase II, the individual may move into Phase III of the program.<sup>203</sup>

Phase III is the "after care" phase of the program during which acupuncture is available on request, but mandatory urinalysis continues.<sup>204</sup> Once a client begins Phase III, he or she begins to receive vocational training, high school General Equivalency Diploma education, and where possible, job placement.<sup>205</sup>

Along with education and training, this phase emphasizes stress management and "becoming a responsible adult."<sup>206</sup> Clients continue to meet with counselors and attend weekly group meetings which lasts for approximately twenty-six weeks in Broward County.<sup>207</sup> If the judge is satisfied that a client has not broken any the program's rules, has consistently tested negative for drugs, and has a perfect attendance record at all meetings and court appointments, the client may graduate.<sup>208</sup>

Upon graduation from the Dade County program, the charges against the defendant are dropped via *nolle prosequi*<sup>209</sup> by the state attorney.<sup>210</sup> The court will also clear the defendant's arrest record.<sup>211</sup>

Court Program, *supra* note 7.

201. Diversion and Treatment Program: An Overview, *supra* note 7, at 8; Drug Court Program, *supra* note 7.

202. Telephone Interview with Judge Stanley Goldstein, *supra* note 179; Telephone Interview with Judge Robert J. Fogan, *supra* note 187.

203. Diversion and Treatment Program: An Overview, *supra* note 7, at 8-11; Drug Court Program, *supra* note 7.

204. Diversion and Treatment Program: An Overview, *supra* note 7, at 8-11; Drug Court Program, *supra* note 7.

205. Diversion and Treatment Program: An Overview, *supra* note 7, at 8-11; Update 1990, *supra* note 8, at 4, Strategies For Action, *supra* note 7, at 3. Miami Dade Community College has been instrumental in setting up Phase III in Dade County. *Id.*

206. Update 1990, *supra* note 8, at 4.

207. Drug Court Program, *supra* note 7; Diversion and Treatment Program: An Overview, *supra* note 7, at 9 (Phase III in Dade last approximately thirty six weeks).

208. Diversion and Treatment Program: An Overview, *supra* note 7, at 11; Drug Court Program, *supra* note 7.

209. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 13.3(c) (1985)(*nolle prosequi* is a decision made by the prosecutor not to prosecute).

210. Telephone Interview with Judge Stanley Goldstein, *supra* note 179; Drug

Comparatively, graduation from the Broward County Program is not quite as rewarding as graduation from the Dade County Drug Court Program. Upon graduating from the Broward County program, a defendant's arrest records are sealed but the case against him or her is not dismissed.<sup>212</sup> Broward County State Attorney Michael Satz will not *nolle prosequere* the case.<sup>213</sup> Rather, the defendant receives a withheld adjudication status as to the original charges which is not as significant as a dismissal.<sup>214</sup>

## VI. PROGRAM RESULTS, COSTS AND FUNDING

The Drug Court is an example of the judiciary taking an active role in the communities over which it presides. These judicially created<sup>215</sup> programs are helping the victims of drug abuse while at the same time saving money and prison space for those who truly deserve it, such as drug smugglers and dealers. The Dade and Broward County Drug Court Programs are a small but very correct step toward the judiciary becoming active in the community with respect to the administration of justice.

The Broward County program began in July of 1991 and is still in its early stages.<sup>216</sup> As a result, no one has graduated the year long program and a clear determination of success or failure is not yet possible.<sup>217</sup> However, the prognosis is very good according to Judge Fogan, who presides over the Drug Court by appointment.<sup>218</sup> In fact, statistics show that as of September 1991, 181 persons entered into the Broward program while only seven persons dropped out or were removed.<sup>219</sup>

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Court April 1, 1991, *supra* note 8.

211. Telephone Interview with Judge Stanley Goldstein, *supra* note 179; May, *supra* note 184, at 2B; *Metromagazine*, *supra* note 182.

212. Telephone Interview with Robert J. Fogan, *supra* note 187.

213. King, *supra* note 135, at 35.

214. Telephone interview with Judge Robert J. Fogan, *supra* note 187.

215. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127; ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

216. ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127.

217. Interview with Michael Rocque, *supra* note 171.

218. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; see ADMINISTRATIVE ORDER NO. III-91-E-1, *supra* note 127 (Judge Fogan was specifically named in the order to preside over the Broward Drug Court).

219. Drug Court Program, *supra* note 7; Updated statistics have been compiled through March, 1992. However, there are new categories which are now measured making it impossible to calculate the success rate of the Broward County program in a

Thus, there currently is a ninety-six percent success rate over the first three months.

In contrast, the Dade County program has been operating for over two years and its success can more accurately be measured.<sup>220</sup> According to a recent update by the Dade County Office of Substance Abuse, over 4000 persons have entered the Dade County program while only ten percent have been re-arrested.<sup>221</sup> In other words, the Dade County program has a success rate of ninety percent.<sup>222</sup> As a result of this success, State Attorney Janet Reno is attempting to establish a similar program for defendants charged with driving under the influence of alcohol.<sup>223</sup>

Funding for the Dade County Drug Court comes from the Dade County General Fund as well as Traffic Court revenues.<sup>224</sup> Most recently, funds have been collected from participants pursuant to the administrative order mentioned above.<sup>225</sup> The Dade County Office of Substance Abuse estimates the cost at approximately \$500 per year, per client which is paid from the sources just mentioned.<sup>226</sup>

The Broward County Drug Court is funded primarily by the Broward County Sheriff's Office which has committed approximately one million dollars from the Sheriff's Forfeiture Fund to the program over the next three years.<sup>227</sup> Moreover, funding for Broward County's

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fashion similar to that of the first three months. It is noted, however, that there have been no probation revocations since the program began in July, 1991. Drug Court Treatment Program (April 13, 1992) (unpublished, non-paginated leaflet on file with the Judicial Projects Administrator, Broward County Courthouse, Broward County, Florida).

220. ADMINISTRATIVE ORDER NO. 89-9, *supra* note 127.

221. Drug Court: April 1, 1991, *supra* note 8.

222. *ABC's World News Tonight with Peter Jennings: American Agenda* (ABC Television Broadcast, Mar. 24, 1992) (reporting that the Dade County success rate has improved to 97 percent).

223. Marilyn Adams, *Plan to Keep Drunk Drivers Out of Jail*, MIAMI HERALD, Dec. 16, 1991, at 1B (citing a high repeat offender rate and jail overcrowding, Reno anticipates similar success with the D.U.I. program). Just prior to the publication of this article, plans to create the D.U.I. program in Dade County were dropped due to information from similar pilot programs which indicated that success was not probable. Telephone Interview with Janet Reno, State Attorney, Dade County, Florida (Feb. 6, 1992).

224. Strategies for Action, *supra* note 7, at 5; Update 1990, *supra* note 8, at 2-3.

225. ADMINISTRATIVE ORDER NO. 90-9, *supra* note 127 (fees are based on ability to pay via a sliding scale).

226. Drug Court April 1, 1991, *supra* note 8.

227. Drug Court Program, *supra* note 7; Sheriff Navarro fully supports the Drug

program comes from three additional sources: the Broward County General Fund, the Broward County Commission on Substance Abuse and jail population fines.<sup>228</sup> Currently, other sources of funding are being investigated including possible state and federal grants.<sup>229</sup>

Because no one has completed the Broward County program, an accurate yearly cost cannot be determined.<sup>230</sup> However, Judge Fogan is confident that the cost will be similar to the Dade County program's cost and will be cheaper than sending defendants to prison or jail.<sup>231</sup> One estimate puts the Broward County program cost at \$800 per year, per client, as opposed to approximately \$20,000 for a one year sentence in the Broward County Jail<sup>232</sup> or a state prison, which costs over \$14,000 per person, per year.<sup>233</sup> Furthermore, the recidivism rate for prison is almost fifty percent as compared to ten percent for Drug Court which indicates that taxpayers are paying to incarcerate many of the same people time and time again.<sup>234</sup>

This program enables a defendant to stay in the community and "contribute to the tax base instead of deplet[ing] it."<sup>235</sup>

The Florida prison system has its own comprehensive treatment program known as the "Tier Program."<sup>236</sup> The Tier Program is a four

Court program but considers it unfortunate that most people with drug problems get arrested before they get help. Sheriff Nick Navarro, *Phi Alpha Delta International Law Fraternity Speakers' Forum*, Address Before Nova Law Center Student Body (Jan. 29, 1992).

228. Broward County Operating Budget, Dep't Health and Safety, Alcohol and Drug Abuse Division, 7-9 (1992) (on file with Broward Alcohol Rehabilitation Center, Ft. Lauderdale, Florida) (these sources have contributed unequal dollar amounts with the largest coming from the Broward County General Fund). Jail population fines are federal fines charged against the county for exceeding population limitations within the county jail as prescribed by the Eleventh Circuit Court of Appeals. See FLA. STAT. § 951.23 (5)(a) (1991).

229. Drug Court Program, *supra* note 7.

230. Telephone Interview with Judge Robert J. Fogan, *supra* note 187.

231. *Id.*

232. Naftali Bendavid, *New Drug Court Offers Alternative to Prison*, MIAMI HERALD, July 2, 1991, at 2BR.

233. ANNUAL REPORT, *supra* note 20, at 66; Summary of Selected Financial Data, *supra* note 31.

234. *Id.*; Drug Court April 1, 1991, *supra* note 8.

235. *Metromagazine*, *supra* note 182.

236. See G. Abbas Darabi, Substance Abuse Program, Tier Programs Outcome Evaluation: A Recommitment Study (July 1991)(unpublished, on file with Florida Department of Corrections, Bureau of Planning Research and Statistics); see also Dubail, *supra* note 98, at 4A.

phase (tier) drug treatment program that is run by the Florida Department of Corrections and is available to prisoners in various prisons throughout Florida.<sup>237</sup> According to a recent study of the Tier Program's effectiveness, of the inmates who go through the Tier Program, twenty-six percent return to prison after an average of only nine months in the community.<sup>238</sup> The return rate for inmates who did not participate in this program is thirty-six percent after being out of prison for over a year.<sup>239</sup> This study was based on 2646 inmates who left prison after participating in the program.<sup>240</sup> It is important to note the fact that of those inmates who participated, only fifty-six percent completed the program.<sup>241</sup>

Furthermore, statistics also reveal that the average Tier Program participant did not have a high school diploma, yet there is no mention of General Equivalency Diploma training for participants which is available through the Drug Court program.<sup>242</sup> The report suggests that the Tier Program seems to be having an effect on the Florida Prison system's forty-three percent prison recidivism rate.<sup>243</sup> The figures do not compare, however, to the success of the Drug Court Programs.

What the Tier Program statistics do not show is the availability of that program to inmates. Increased enforcement has led to prison overcrowding, early releases and bed shortages.<sup>244</sup> With fewer beds available and more offenders coming in, those in need of treatment will only return again and again.<sup>245</sup> Also, these problems will be aggravated further by recent cuts in Florida's 1992 budget.<sup>246</sup> The result is that those in need of treatment will not be able to get it. Instead, those suffering from the disease of addiction will be branded convicted felons and released to the streets, drug addiction intact, without education, employment or the means to obtain either. The result is re-arrest and

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237. ANNUAL REPORT, *supra* note 20, at 18; Dubail, *supra* note 98, at 4A. See generally Darabi, *supra* note 236.

238. Darabi, *supra* note 236, at 6, 9.

239. *Id.* at 6.

240. *Id.*

241. *Id.*

242. *Id.*

243. Darabi, *supra* note 236, at 13.

244. Dubail, *supra* note 98, at 4A.

245. King, *supra* note 135, at 34; May, *supra* note 104, at 1A, 6A.

246. *What the Legislature Did*, MIAMI HERALD, Dec. 13, 1991, at 33A (Florida Legislature approved a budget cut that reduced the number of proposed prison beds by 75 percent).

another prison sentence. This is cruel, but becoming usual, punishment.

Punishing victims of drug addiction is not justice. Nor is such punishment cheap. For the cost of sending one person to prison for a year, approximately thirty people can enter the Drug Court Program for a year. If those thirty people went to prison, between eight and fourteen of them would return to prison. If those thirty people went through the Drug Court Program, approximately three would return to court.<sup>247</sup>

## VII. HURDLES; PAST, PRESENT AND FUTURE

The only opponent the Dade County Drug Court Program had when it was first proposed was the Dade County Public Defender's Office.<sup>248</sup> Defense attorneys representing their clients' best interests saw a year of intrusive procedures that would be a hassle to go through instead of the usual probation and time served available through a plea bargain.<sup>249</sup> However, Judge Goldstein soon convinced defense attorneys that getting their clients into treatment and out of the criminal justice system *was* in the best interests of their clients.<sup>250</sup>

Similarly, attorneys resisted the Broward County Drug Court Program as well.<sup>251</sup> As the most significant opponent, there was (and still is) State Attorney Michael Satz.<sup>252</sup> "Mr. Satz does not put cocaine cases on diversion."<sup>253</sup> Although Michael Satz eventually agreed to implement the program, he will not authorize the *nolle prosequere* of cases for the future graduates of the Broward County Drug Court Program as does Dade State Attorney Janet Reno.<sup>254</sup>

The incentive for defendants of having their cases dismissed via *nolle prosequere* is a key element of Dade County's success with the program.<sup>255</sup> "The fact that most now opt for the program tells Goldstein that clearing their records and getting help for their addiction is too

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247. See *supra* text accompanying notes 219-23.

248. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

249. *Id.*; May, *supra* note 189, at 2B; King, *supra* note 135, at 34.

250. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

251. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; King, *supra* note 135, at 35.

252. King, *supra* note 135, at 35.

253. *Id.* Diversion is a term that is used synonymously with pre-trial intervention. Interview with Michael Rocque, *supra* note 171.

254. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Bendavid, *supra* note 232, at 2BR; King, *supra* note 135, at 35.

255. May, *supra* note 189, at 2B.

tempting to pass up."<sup>256</sup> However, Judge Fogan cannot offer the same incentive to defendants in Broward County.<sup>257</sup> A withheld adjudication on a criminal charge in a state court "means the same thing as a conviction to federal government agencies which means people can't serve in the military, get civil service jobs, and are repeat offenders for the purposes of federal sentencing. They are second class citizens to the federal government."<sup>258</sup> Florida's statute permitting a trial judge to withhold adjudication<sup>259</sup> on a criminal charge is considered a conviction by the federal courts for sentencing purposes.<sup>260</sup> "Fogan worries that this [refusal by the State Attorney to dismiss the cases against graduates] will remove a crucial incentive for drug users to sign up for the program because most first time offenders get probation anyway, without the hassle of attending treatment sessions."<sup>261</sup>

Another hurdle that the Broward County Program currently faces involves cases in which defendants are charged with possession or purchase of cocaine within 1000 feet of a school.<sup>262</sup> The sentence for such a crime carries a minimum mandatory sentence of three years in prison without parole.<sup>263</sup> In several cases throughout 1990 and 1991,

256. *Id.*

257. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Bendavid, *supra* note 232, at 2BR; King, *supra* note 135, at 35.

258. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; *see* 10 U.S.C. § 504 (1990)(Persons not qualified) (persons convicted of a felony are disqualified from service with the armed forces); *see also* Department of the Army, Personnel Procurement, *Regular Army and Army Reserve Enlistment Program* 38 ARMY REG. 601-210, Ch. 4 § III subsec. 4-13(c) (1991) (*other adverse disposition*) (previous enrollment in a PTI program or record expungement may disqualify an enlistee as if convicted of a felony).

259. FLA. STAT. § 921.187(b)(1) (1991)(Disposition and sentencing; alternatives; restitution).

260. *See* United States v. Jones, 910 F.2d 760 (11th Cir. 1990)(withheld adjudication in a state court considered conviction for career criminal sentencing purposes); Chong v. Immigration and Naturalization Service, 890 F.2d 284 (11th Cir. 1989)(deportation of Defendant affirmed because withheld adjudication and probation for drug possession considered a conviction); United States v. Grinkiewics, 873 F.2d 253 (11th Cir. 1989)(Defendant considered to be a convicted felon under federal firearms statute even though state court withheld adjudication); United States v. Bruscantini, 761 F.2d 640 (11th Cir. 1985)(withheld adjudication in state court considered conviction even though Defendant plead *nolo contendere*).

261. Bendavid, *supra* note 232, at 2BR.

262. FLA. STAT. § 893.13(e)(1) (1991); Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Interview with Michael Rocque, *supra* note 171.

263. FLA. STAT. § 893.13(e)(1) (1991).

Broward County circuit judges have sentenced defendants charged with school zone offenses to probation and treatment, only to have the cases remanded back to the circuit court for resentencing in accordance with the mandatory minimum as a result of appeals by the State Attorney.<sup>264</sup>

Unlike Judge Fogan, Judge Goldstein does not have this problem in Dade County based upon his "agreement" with State Attorney Janet Reno.<sup>265</sup> Judge Goldstein simply places all first offenders in the program and the State does not appeal.<sup>266</sup> Judge Fogan refers to State Attorney Reno as "enlightened."<sup>267</sup>

In Broward County no such agreement with the State Attorney exists.<sup>268</sup> According to Judge Mark Speizer, Administrative Judge of Broward's Criminal Division and Drug Court Program organizer, "the success of the Drug Court requires the cooperation of the D.A."<sup>269</sup> Judge Speizer also points out that the Dade County program is a "true diversion or PTI program" while the Broward program is in effect "merely a condition of probation."<sup>270</sup> In the future, Judge Fogan hopes to have the discretion to dismiss the cases of defendants who successfully complete the Drug Court Program.<sup>271</sup> However, in order for this to occur, the current PTI statute must be amended.<sup>272</sup> That statute gives the state attorney the discretion to go forward with the prosecu-

264. See *State v. Bernadin*, 591 So. 2d 956 (Fla. 4th Dist. Ct. App. 1991); *State v. Kalogeras*, 587 So. 2d 591 (Fla. 4th Dist. Ct. App. 1991); *State v. Greisdorf*, 587 So. 2d 1153 (Fla. 4th Dist. Ct. App. 1991); *State v. Scates*, 585 So. 2d 385 (Fla. 4th Dist. Ct. App. 1991); *State v. Baxter*, 581 So. 2d 937 (Fla. 4th Dist. Ct. App. 1991); see also Tom Davidson, *Man Must Serve Three Year Term*, SUN-SENTINEL, Aug. 22, 1991, at 5B. *But see State v. Regan*, 564 So. 2d 1208 (Fla. 4th Dist. Ct. App. 1990)(court affirmed downward departure to probation due to unreasonable conduct of arresting officer who lured Defendant closer to school). Judge Fogan has recently declared section 893.13(e)(1) unconstitutional. See *State v. Williams*, No. 91-8361CF10A (Fla. 17th Cir. Ct. 1991)(order granting motion to dismiss).

265. Telephone Interview with Judge Stanley Goldstein, *supra* note 179.

266. *Id.*

267. Telephone Interview with Judge Robert J. Fogan, *supra* note 187.

268. *Id.*

269. Telephone Interview with Judge Mark Speizer, Administrative Judge, Criminal Division, Seventeenth Judicial Circuit, Broward County, Florida (Nov. 14, 1991).

270. *Id.*

271. Telephone interview with Judge Robert J. Fogan, *supra* note 187; Interview with Michael Rocque, *supra* note 171.

272. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Interview with Michael Rocque, *supra* note 171.



tion or to drop the charges.<sup>273</sup> In order to amend the statute, Judge Fogan has enlisted the aid of various professionals, such as law professors, who have engaged in a letter writing campaign in order to gain support from Florida lawmakers.<sup>274</sup> Clearing this hurdle will give Judge Fogan the discretion he needs to make the Broward County program as successful as the program in Dade County.<sup>275</sup>

The success that Dade County has experienced with the Drug Court Program has lead other cities throughout the nation to try the program as well.<sup>276</sup> However, in the face of this success, the programs in Dade and Broward County are facing what is perhaps the greatest hurdle—survival. Although both Florida Attorney General Robert A. Butterworth and Florida Governor Lawton Chiles have expressed their approval of the programs, there may be trouble ahead.<sup>277</sup> Even though there are current ongoing investigations concerning funding,<sup>278</sup> the

273. FLA. STAT. § 948.08 (1991).

274. Telephone Interview with Judge Robert J. Fogan, *supra* note 187; Letter from Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida to Steven J. Wisotsky, Professor of Law, Nova University Center for the Study of Law (Oct. 24, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from Steven Wisotsky, Professor of Law, Nova University Center for the Study of Law to Rep. Bill Clark, Florida House of Representatives (Dec. 26, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from Randi Burger, Judicial Projects Administrator, Seventeenth Judicial Circuit, Broward County, Florida to Ms. Susan Bisby, House Criminal Justice Committee, Florida House of Representatives (Oct. 18, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from M. Thomas Adkins, Jr., Criminal Justice Lobbyist to Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida (Dec. 27, 1991).

275. Telephone Interview with Janet Reno, *supra* note 223; Telephone Interview with Judge Stanley Goldstein; *supra* note 179 (neither Reno, nor Judge Goldstein support the proposed change of the PTI statute because they believe that discretion to *nolle prosequere* a case should rest with the prosecution).

276. May, *supra* note 189, at 2B (comments from officials in Nevada and Ohio who have initiated similar programs); Drug Court April 1, 1991, *supra* note 8.

277. Letter from Lawton Chiles, Governor, Florida State to Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida (June 18, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida); Letter from Robert A. Butterworth, Attorney General, Florida State to Judge Robert J. Fogan, Seventeenth Judicial Circuit, Broward County, Florida (July 22, 1991)(on file with Judge Fogan at the Broward County Courthouse, Broward County, Florida).

278. Strategies For Action, *supra* note 7, at 5; Drug Court April 1, 1991, *supra* note 8; Drug Court Program, *supra* note 7.

Drug Court program may come to a swift halt if funding sources cannot be obtained.<sup>279</sup>

### VIII. CONCLUSION

In 1764, it was written that in order to be effective, "there must be a proper proportion between crimes and punishment."<sup>280</sup> In other words, the punishment must fit the crime. Therefore, if one is arrested for the crime of possession of illegal substances as a direct and involuntary result of suffering from the disease of addiction, the best and most fitting "punishment" would be the treatment of the underlying disease as opposed to punishing the possession crime which is merely a symptom.

This question is, perhaps, best left to the courts. It follows that if the courts must make law through precedent, then they must also act in other ways that effect the communities in which they sit. For the criminal defendant, a court may be the only thing that stands between that defendant and liberty (and sometimes life). Given this power, judges should take an active role in their communities.

The crime is possession of narcotics caused by the disease of drug addiction. For too long, the courts have been focusing on the addict instead of the addiction, incarcerating the diseased instead of arresting the disease. To do so, the courts must become active in their communities so that more Drug Court Programs can be set up. In an era when spending too much money makes little sense, the Drug Court is a financial as well as a human remedy.

Drug Court is not a cure for the ills of the world, and it cannot provide an answer to the nation's nightmare with drugs. However, what it can, and does, do is end the nightmare of addiction in a cost effective way for those who are willing to try to make it work. So far, about ninety percent have been so willing.

*Michael E. Coviello*

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279. *Metromagazine*, *supra* note 182.

280. CESARE BECCARIA, ON CRIMES AND PUNISHMENT 62 (Henry Paolucci trans., Bobbs-Merrill Educational Publishing Co.,inc., 1963) (1764).