

# IMPROVING THE ODDS: CHANGING THE PERCEPTION OF PROBLEM GAMBLING AND SUPPORTING THE GROWTH OF PROBLEM GAMBLING COURTS

*Amaia Guenaga\**

## I. INTRODUCTION

In the beginning I gambled because it was fun. It was magical the way gambling freed me from the worries, fears and frustrations of everyday living. When I was tense, gambling relaxed me. When I was angry, gambling calmed me down. When I was happy, I celebrated feeling good by gambling. Slowly, over time, gambling became the only coping mechanism I knew. . . . I continued to gamble to ease my pain - the pain of lost money, lost time, lost self-respect, and the pain of losing control. With every futile attempt to stop came more pain, anger, frustration and depression.<sup>1</sup>

In the above personal account, alcohol, drugs or any other addictive substance can replace gambling. Regardless of the replacement, the story remains the same—in the beginning the drug or gambling feels good, but soon the use becomes problematic, and yet it is the only way the individual knows how to cope, and so the destructive cycle continues.

For some individuals, the need for a drug or to gamble leads them to steal to get money to score the next hit or make the “big win.” This may include breaking the law in ways they may never have done or thought of doing otherwise. Some of these individuals may never get caught; however, others end up in the criminal justice system, where, although the differences between substance dependence and a gambling problem may be slight, they are treated vastly different. Drug courts, which offer individuals who have committed crimes because of their substance abuse the option of treatment rather than prison time, are popular, yet parallel problem gambling courts are not. Why does this difference exist? The criminal justice system’s treatment of individuals with problem gambling reflects society’s view of problem gambling. Whereas offenders with drug addictions are viewed as individuals needing

---

\* J.D. Candidate, May 2011, William S. Boyd School of Law, University of Nevada, Las Vegas. Amaia Guenaga received her Master of Science in Counseling from the University of Nevada, Las Vegas in 2006. The author would like to extend a special thanks to Professor Larry Ashley of the University of Nevada, Las Vegas for his tireless advocacy for substance abuse, mental health and substance abuse treatment and for his continued mentorship and a special thanks to Professor Steve Johnson of the William S. Boyd School of Law, University of Nevada, Las Vegas for his enthusiasm and support of this Note.

<sup>1</sup> Carol O’Hare, *The Hidden Addiction*, NEV. COUNCIL ON PROBLEM GAMBLING, [http://www.nevadacouncil.org/hidden\\_addition.php?bi=1179269148](http://www.nevadacouncil.org/hidden_addition.php?bi=1179269148) (last visited Aug. 16, 2010).

treatment, society still often views problem gamblers as having a character flaw that must be punished when a crime is committed. Thus, the conversation regarding the similarities between problem gambling, substance abuse and mental health problems and their treatment continues.

According to the “Comprehensive Problem Gambling Act of 2009” (hereinafter “CPGA”), introduced by the National Council on Problem Gambling (NCPG), problem and pathological gambling should be included among the programs of the Substance Abuse and Mental Health Services Administration (SAMHSA).<sup>2</sup> Additionally, this bill aims “to establish a national program to address the harmful consequences of problem gambling.”<sup>3</sup> According to Congress’ findings, problem gambling is a “public health disorder,” for which over six million adults met the criteria in 2008.<sup>4</sup> Further, in 2008, problem gambling led to \$6.7 billion in social costs to families and communities due to bankruptcy, divorce, job loss, and criminal justice costs.<sup>5</sup> In addition to the high social costs associated with problem gambling, problem gambling is also associated with higher incidences of suicide and domestic abuse. However, there is currently no federal agency or organization to oversee problem gambling.<sup>6</sup>

If passed, CPGA would allow problem gambling to share standing with substance abuse and mental illness. It would lead to an increase in research on problem gambling by a variety of agencies, including the National Institutes of Health, the National Science Foundation, the National Institute of Justice, the Bureau of Justice Statistics, and the Substance Abuse and Mental Health Services Administration. With increased research, a national media campaign and an oversight agency, public awareness and understanding of problem gambling would also likely increase. This would influence the public’s view of problem gambling as an illness or addiction, rather than a moral weakness. Further, not only would SAMHSA develop a treatment protocol specific for problem gambling, as it has for substance abuse and mental illness, but more grants would also become available for comprehensive treatment and prevention services.<sup>7</sup>

This Note will examine what problem gambling is and demonstrate the parallels between problem gambling and substance abuse. The Note will then explore the development and expansion of problem-solving courts for substance abuse and mental health and explore the pros and cons of problem gambling courts, in the end offering support for the further creation and development of problem gambling courts.

## II. WHAT IS PROBLEM GAMBLING?

Problem gambling, compulsive gambling, pathological gambling—all are terms one may find when reading about individuals with gambling problems. Although the general public uses the term “compulsive gambler,” treatment

<sup>2</sup> H.R. 2906, 111th Cong., § 3 (2009).

<sup>3</sup> As of June 16, 2009 the bill had been referred to the House Committee on Energy and Commerce as part of the initial legislative process H.R. 2906, 111th Cong. (2009).

<sup>4</sup> *Id.* § 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* § 6.

professionals use the term “pathological gambler.”<sup>8</sup> The term “problem gambler” can encompass both pathological gamblers and those who have a problem with gambling but whose behavior may not fulfill all of the criteria necessary for a pathological gambling diagnosis. Additionally, the term “problem gambler” may more narrowly refer to only those individuals who have a problem with gambling but whose behavior does not rise to the level of pathological gambling.<sup>9</sup>

According to the American Psychiatric Association (APA), to receive the diagnosis of pathological gambling, an individual must have “persistent and recurrent maladaptive gambling behavior” as demonstrated by five or more of the following:

- (1) is preoccupied with gambling (e.g., preoccupied with reliving past gambling experiences, handicapping or planning the next venture, or thinking of ways to get money with which to gamble)
- (2) needs to gamble with increasing amounts of money in order to achieve the desired excitement
- (3) has repeated unsuccessful efforts to control, cut back, or stop gambling
- (4) is restless or irritable when attempting to cut down or stop gambling
- (5) gambles as a way of escaping from problems or of relieving a dysphoric mood (e.g., feelings of helplessness, guilt, anxiety, depression)
- (6) after losing money gambling, often returns another day to get even (“chasing” one’s losses)
- (7) lies to family members, therapist, or others to conceal the extent of involvement with gambling
- (8) has committed illegal acts such as forgery, fraud, theft, or embezzlement to finance gambling
- (9) has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling
- (10) relies on others to provide money to relieve a desperate financial situation caused by gambling<sup>10</sup>

Further, the gambling behavior must not be better accounted for by a Manic Episode.<sup>11</sup> It is estimated that between 1.6% and 4.0% of the United

<sup>8</sup> Henry R. Lesieur, *Costs and Treatment of Pathological Gambling*, 556 ANNALS AM. ACAD. POL. & SOC. SCI. 153, 154 (1998).

<sup>9</sup> *Id.* There are four main stages to the development of pathological gambling: progression, intolerance, preoccupation, and disregard for consequences. The first stage is progression and is where the gambler is unable to stop gambling. Further, the gambler must spend more time and money gambling in an effort to achieve the same excitement. In the second phase, intolerance, the gambler starts to hide the amount and frequency of the loss and experiences nearly uncontrollable urges to gamble in order to win back the lost money. Next, the preoccupation phase is characterized by continuous obsessive thoughts of gambling and the belief that all problems will be solved by gambling. In the final stage, disregard for consequences, still convinced that the “big win” will solve all problems, the gambler disregards the negative consequences of gambling and commonly may engage in illegal activities such as forgery, theft, and embezzlement. Darren Gowen & Jerri B. Speyerer, *Compulsive Gambling and the Criminal Offender: A Treatment and Supervision Approach*, 59 FED. PROBATION, Sept. 1995, at 36, 36-37.

<sup>10</sup> AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR 674 (4th ed. 2000).

<sup>11</sup> *Id.* A Manic Episode describes a period of time in which an individual has an “abnormally and persistently elevated, expansive, or irritable mood.” *Id.* at 357.

States population are pathological gamblers.<sup>12</sup> Outside the U.S., the rate varies from 0.8% to 6.0%.<sup>13</sup> Furthermore, up to 3% of the U.S. population has “serious gambling problems that will result in significant personal debt, family disruption, job losses, criminal activity, and suicide.”<sup>14</sup> Financially, mortgage, rent, electricity and other bills may be late because of the problem gambling, and in some cases individuals lose their homes, cars and other personal belongings.<sup>15</sup> Thus, problem gambling not only affects the gambler, but it can have devastating effects on the family as well. Spouses of pathological gamblers experience a wide-range of stress-related problems including chronic or severe headaches, insomnia, intestinal disorders and depression.<sup>16</sup> Additionally, the suicide attempt rates for spouses of pathological gamblers are also three times higher than for the general population.<sup>17</sup> Children of pathological gamblers are also more likely than other children to exhibit delinquent behaviors, including drinking and using drugs.<sup>18</sup>

For the pathological gambler, the stresses of financial pressure, family and work can lead to anxiety, depression and cognitive distortions, all of which impair judgment and decision-making.<sup>19</sup> Having spent all of their personal or family’s savings, pathological gamblers may turn to illegal activities such as forging checks, embezzling and fraud. A 1995 Illinois’ survey reports that of the 184 Gambler Anonymous members studied, 56% admitted to stealing, with the average amount stolen being \$60,700.<sup>20</sup> Similarly, in a study of Gambler Anonymous members in Wisconsin, 46% admitted to stealing, with the average amount stolen being \$5,738.<sup>21</sup>

### III. THE PARALLELS BETWEEN PATHOLOGICAL GAMBLING AND SUBSTANCE ABUSE/DEPENDENCE

Pathological gambling and substance dependence are classified in different sections of the American Psychiatric Association’s (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM).<sup>22</sup> However, because of the similarities in criteria of the two groups, some researchers are proposing the inclusion of pathological gambling “within the same classification system as substance use disorders” in the next version of the DSM—DSM V.<sup>23</sup> The current version, DSM-IV-TR, delineates the criteria of substance dependence as:

---

<sup>12</sup> Nancy M. Petry, *Should the Scope of Addictive Behaviors be Broadened to Include Pathological Gambling?*, 101 ADDICTION (SUPPL. 1) 152, 154 (2006).

<sup>13</sup> *Id.*

<sup>14</sup> Gowen & Speyerer, *supra* note 9, at 36 (citations omitted).

<sup>15</sup> Lesieur, *supra* note 8, at 155-56.

<sup>16</sup> *Id.* at 156.

<sup>17</sup> *Id.* (citations omitted).

<sup>18</sup> NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT 4-13 (1999).

<sup>19</sup> Lesieur, *supra* note 8, at 157 (citations omitted).

<sup>20</sup> *Id.* (citations omitted).

<sup>21</sup> *Id.* (citations omitted).

<sup>22</sup> AM. PSYCHIATRIC ASS’N, *supra* note 10.

<sup>23</sup> Petry, *supra* note 12, at 152.

A maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of the following, occurring at any time in the same 12-month period:

- (1) tolerance, as defined by either of the following:
  - (a) a need for markedly increased amounts of the substance to achieve intoxication or desired effect
  - (b) markedly diminished effect with continued use of the same amount of the substance
- (2) withdrawal, as manifested by either of the following:
  - (a) the characteristic withdrawal syndrome for the substance. . .
  - (b) the same (or closely related) substance is taken to relieve or avoid withdrawal symptoms
- (3) the substance is often taken in larger amounts or over a longer period of than was intended
- (4) there is a persistent desire or unsuccessful efforts to cut down or control substance use
- (5) a great deal of time is spent in activities necessary to obtain the substance (e.g., visiting multiple doctors or driving long distances), use the substance (e.g., chain-smoking), or recover from its effects
- (6) important social, occupational, or recreational activities are given up or reduced because of substance use
- (7) the substance use is continued despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance (e.g., current cocaine use despite recognition of cocaine-induced depression, or continued drinking despite recognition that an ulcer was made worse by alcohol consumption)<sup>24</sup>

Not only are the diagnostic criteria of pathological gambling and substance dependence similar, but so, too, are their consequences. Substance dependence and pathological gambling can have a devastating effect on families. For example, substance-dependent individuals and pathological gamblers often lie in order to hide their problems. They often get caught up in a cycle of using or gambling to feel better only to then feel guilty and ashamed, once again turning to their coping mechanism—the substance or the gambling—to numb those feelings. Further, both pathological gambling and substance dependence can lead to confrontations with the criminal justice system.

Due to the similarities between substance dependence and pathological gambling, pathological gambling has been referred to as a behavioral addiction without the drug.<sup>25</sup> In a study of gambling urges and cocaine cravings, the same brain responses were noted when individuals addicted to cocaine were shown drug videotapes and when individuals “addicted” to gambling were shown gambling videos.<sup>26</sup> In addition, many of the psychosocial treatments used for pathological gambling were adapted from the substance abuse treatment field. These psychological treatments include motivation and cognitive-behavioral therapies, pharmacotherapies and 12-Step programs, like Gamblers Anonymous.<sup>27</sup>

<sup>24</sup> AM. PSYCHIATRIC ASS'N, *supra* note 10, at 197.

<sup>25</sup> Marc N. Potenza, *Should Addictive Disorders Include Non-Substance-Related Conditions?*, 101 ADDICTION (SUPPL. 1) 142, 143 (2006).

<sup>26</sup> *Id.* at 145-46.

<sup>27</sup> Petry, *supra* note 12, at 156; Potenza, *supra* note 25, at 146.

The relationship between substance use and pathological gambling extends further than their similarities. There is a high rate of comorbidity between pathological gambling and substance use disorders.<sup>28</sup> Studies show that over 70% of pathological gamblers have an alcohol disorder and over 30% have a drug use disorder.<sup>29</sup> Furthermore, Lesieur found approximately “47-52 percent of pathological gamblers receiv[e] a substance abuse diagnosis,” whereas “between 9 and 14 percent of substance-abusing populations have been diagnosed as pathological gamblers.”<sup>30</sup>

Pathological gambling is also often comorbid with mental health disorders. The most commonly reported mental health disorder among pathological gamblers is major depressive disorder.<sup>31</sup> Between 70% and 76% of pathological gamblers receive a major depressive disorder diagnosis on a lifetime basis.<sup>32</sup> In addition, studies have found high rates of hypomanic and bipolar disorder, as well as panic and anxiety disorders among pathological gamblers.<sup>33</sup> Finally, high rates of suicidal ideation<sup>34</sup> and suicide attempts also occur among pathological gamblers.<sup>35</sup>

#### IV. PROBLEM-SOLVING COURTS

Despite the many similarities and close relationships between substance use, mental illness and pathological gambling, most of the criminal justice system still treats them differently, continuing to view pathological gambling as a moral flaw requiring punishment. Although substance dependence and mental illness are now often viewed as issues requiring treatment rather than just punishment, there are less than a handful of such programs available for similarly situated pathological gamblers. However, the existence of problem gambling courts suggests that the perception of problem gambling as a character flaw that must be punished in prison is changing.

In an effort to address issues related to individuals who were being recycled through the criminal justice system, problem-solving courts originated through a combination of strategies from different disciplines, including alternative dispute resolution, therapeutic jurisprudence and juvenile courts.<sup>36</sup> Therapeutic justice aims not only to “identify the underlying cause of the criminal behavior,” but also to provide the necessary treatment for the individual to become a productive citizen.<sup>37</sup> These aims are driven by the belief that thera-

<sup>28</sup> Petry, *supra* note 12, at 155; Potenza, *supra* note 25, at 144.

<sup>29</sup> Petry, *supra* note 12, at 155.

<sup>30</sup> Lesieur, *supra* note 8, at 158 (citations omitted).

<sup>31</sup> *Id.* at 157.

<sup>32</sup> *Id.* (citations omitted).

<sup>33</sup> *Id.* at 157-58.

<sup>34</sup> *Id.* at 158.

<sup>35</sup> AM. PSYCHIATRIC ASS'N., *supra* note 10, at 672.

<sup>36</sup> Andrea M. Odegaard, Note, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 229 (2007) (citing GREG BERMAN & JOHN FEINBLATT, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 39 (2005)).

<sup>37</sup> Ronald J. Rychlak & Corey D. Hinshaw, *From the Classroom to the Courtroom: Therapeutic Justice and the Gaming Industry's Impact on Law*, 74 MISS. L.J. 827, 832-33 (2005)

peutic alternatives that complement judicial values are more effective in solving an individual's problems, and thus, in serving individuals.<sup>38</sup> Problem-solving courts also share a common underlying premise that courts should not only recognize and understand the social or psychological problems underlying a dispute, but that they should also address these problems in such a manner as to prevent the offender from returning to jail.<sup>39</sup> In line with this view, problem-solving courts not only deal with issues of disputed facts, they also focus on the underlying social or psychological issues which led to the dispute.<sup>40</sup> As of 2007, there were more than 2,000 problem-solving courts,<sup>41</sup> including drug courts, domestic violence courts, unified family courts and mental health courts.

#### A. *Drug Courts*

The nation's first drug court was established in 1989 in Dade County, Florida<sup>42</sup> as a reflection of the times. The sudden increase of cocaine use from the 1980s to the 1990s saw the emergence of two major trends in the justice system: the "war on drugs" and the use of intermediate sanctions.<sup>43</sup> As docket pressure increased from the "war on drugs," judges, attorneys and probation officers grew frustrated with the ineffectiveness of imprisoning alcohol and other drug offenders only to see them return to their drug or alcohol use and reoffend.<sup>44</sup> Thus, support for alcohol and substance treatment options as a component of sentencing grew quickly, resulting in the emergence of drug courts.<sup>45</sup>

The drug court programs were an attempt to reconcile the divergent goals and inherent tension between the criminal justice system and treatment providers.<sup>46</sup> Whereas a treatment provider's goal is to help a client to modify his behavior using the least restrictive means possible, the criminal justice system emphasizes public safety through supervision and surveillance.<sup>47</sup> Further, the basis for the treatment system is establishing rapport with clients, engaging and motivating them, whereas the criminal justice system is concerned with the potential threat the individual may pose to society.<sup>48</sup> Despite these seemingly irreconcilable differences, drug courts appear to have found an effective middle ground.

---

(citing Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 5 (2002)).

<sup>38</sup> Gregory L. Acquaviva, Comment, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 987 (2006) (citations omitted).

<sup>39</sup> Odegaard, *supra* note 36, at 228 (citing BERMAN & FEINBLATT, *supra* note 36, at 32).

<sup>40</sup> *Id.* (citing BERMAN & FEINBLATT, *supra* note 36, at 32).

<sup>41</sup> *Id.* at 230.

<sup>42</sup> Acquaviva, *supra* note 38, at 983 (citations omitted).

<sup>43</sup> Gloria Danziger & Jeffrey A. Kuhn, *Drug Treatment Courts: Evolution, Evaluation, and Future Directions*, 3 J. HEALTH CARE L. & POL'Y 166, 167 (1999) (citations omitted).

<sup>44</sup> Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1501-02 (2003).

<sup>45</sup> *Id.* at 1502.

<sup>46</sup> Danziger & Kuhn, *supra* note 43, at 167-68.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 168.

Although drug courts can vary in terms of their structure and target populations, they have three primary goals in common: to reduce recidivism, to reduce substance abuse, and to rehabilitate participants.<sup>49</sup> While in drug court, the “participants undergo long-term treatment and counseling” as well as frequent court appearances,<sup>50</sup> where, if they have not been complying with the program’s rules or their treatment plan, the judge can apply a variety of sanctions. Those who successfully complete the program can have their charges dismissed or reduced, or their sentences reduced or even set aside.<sup>51</sup> The drug court’s goal is for participants to successfully complete the program and be able to participate productively in society, thereby maintaining their sobriety and avoiding illegal activities.<sup>52</sup>

Although the specifics of each drug court may vary, there are some key components of the drug court model. First, a non-adversarial relationship between the defendant and the court is important,<sup>53</sup> as the focus is rehabilitation rather than punishment. In addition, drug courts seek to identify substance abuse problems and the need for treatment upon arrest, and to refer identified individuals to treatment as soon as possible.<sup>54</sup> This also entails offering access to a continuum of treatment and rehabilitation services.<sup>55</sup> Because the individuals are in the court system and must comply with drug court rules in order to continue to be in the program, the drug court monitors the participants’ abstinence through frequent, mandatory drug testing.<sup>56</sup> Additionally, sanctions, which impose accountability on the offender turned participant, are the cornerstone of drug court programs.<sup>57</sup>

Moreover, drug court personnel—judge, prosecutor, defense counsel, treatment provider and corrections personnel—are considered part of a team which coordinates how the court will respond to participants’ compliance or lack thereof.<sup>58</sup> The drug court judge also takes a hands-on approach, interacting with each drug court participant.<sup>59</sup> Throughout the process the drug court team monitors and evaluates the program’s overall goals and effectiveness, making adjustments when necessary.<sup>60</sup> Further, in an effort to promote local support and increase the drug court’s effectiveness, drug court personnel maintain relationships with various community agencies.<sup>61</sup>

<sup>49</sup> NAT’L CRIM. JUSTICE REFERENCE SERV., *In the Spotlight: Drug Courts*, [http://www.ncjrs.gov/spotlight/drug\\_courts/Summary.html](http://www.ncjrs.gov/spotlight/drug_courts/Summary.html) (last updated Sept. 10, 2009).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, *DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS* (1997)).

<sup>52</sup> Danziger & Kuhn, *supra* note 43, at 168 (citing Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 453 (1999)).

<sup>53</sup> *Id.* (citing Fulton Hora, *supra* note 52, at 453).

<sup>54</sup> *Id.* at 173-74.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 168.

<sup>57</sup> *Id.* at 174 (citations omitted).

<sup>58</sup> *Id.* at 168-69 (citing Fulton Hora, *supra* note 52, at 453).

<sup>59</sup> *Id.* at 169 (citations omitted).

<sup>60</sup> *Id.* at 169.

<sup>61</sup> *Id.* at 171; Odegaard, *supra* note 36, at 230 (citations omitted).

In October 2003, there were 1,091 operating drug courts and 413 more in the planning stage.<sup>62</sup> By June 2009, this number had jumped to “2,038 drug courts operating in all 50 States, the District of Columbia, Northern Mariana Islands, Puerto Rico, and Guam, [with] [a]nother 226 drug court programs . . . in the planning stages.”<sup>63</sup> As suggested by their proliferation throughout the United States, drug courts are generally considered effective in curbing recidivism. One estimate as to the effectiveness of drug court suggests that although the average cost per program participant was \$5,928, \$2,329 was saved in criminal justice costs and another \$1,301 was saved in victimization costs over a period of 30 months.<sup>64</sup> Further, a 2003 Washington State study reports that drug court “participants were 13 percent less likely to become repeat offenders than defendants who went through the regular criminal system.”<sup>65</sup> This led to a savings of “\$3,759 per participant in potential administrative costs and \$3,020 in costs to victims.”<sup>66</sup>

### B. Mental Health Courts

Inspired by the success of drug courts, Broward County, Florida began the country’s first mental health court in 1997.<sup>67</sup> Similar to drug courts, mental health courts were a product of desperation over a criminal justice practice which seemed to “recycle” offenders with mental illness.<sup>68</sup> This recycling occurred because detention facilities were unable to adequately deal with mentally ill offenders.<sup>69</sup> In addition, those individuals with mental illnesses who were sent to prison often served longer sentences than other prisoners who had committed the same crime because treatment in prison requires more time.<sup>70</sup> Studies show that 48% of federal prisoners with a mental illness “have three or more prior probations, incarcerations or arrests, compared to just 28%” of prisoners without a mental illness.<sup>71</sup>

Like drug courts, mental health courts are problem-solving courts. Here, the focus is on diverting individuals with mental illness into long-term mental health treatment, rather than jail.<sup>72</sup> The arresting officer, the defense attorney, the judge, or the prosecution can identify candidates for mental health court.<sup>73</sup> Once identified, the individuals undergo psychiatric evaluations, and if they are

<sup>62</sup> Dorf & Fagan, *supra* note 44, at 1503.

<sup>63</sup> NAT’L CRIM. JUSTICE REFERENCE SERV., *supra* note 49 (citing BUREAU OF JUSTICE ASSISTANCE DRUG CT., CLEARINGHOUSE PROJECT, SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY (2009)).

<sup>64</sup> *Id.* (citing NAT’L INST. OF JUSTICE, DRUG COURTS: THE SECOND DECADE (2006)).

<sup>65</sup> Ken Belson, *Stressing Help, Not Penalties, In Gambling Treatment Court*, N.Y. TIMES, May 1, 2007, at B4, available at [http://www.nytimes.com/2007/05/01/nyregion/01gamble.html?\\_r=1](http://www.nytimes.com/2007/05/01/nyregion/01gamble.html?_r=1).

<sup>66</sup> *Id.*

<sup>67</sup> Acquaviva, *supra* note 38, at 983 (citations omitted).

<sup>68</sup> *Id.* at 974 (citing Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L. J. 1055, 1060 (2003)).

<sup>69</sup> *Id.* at 975 (citations omitted).

<sup>70</sup> Odegaard, *supra* note 36, at 234 (citations omitted).

<sup>71</sup> Acquaviva, *supra* note 38, at 975 (citations omitted).

<sup>72</sup> *Developments in the Law – The Law of Mental Illness*, 121 HARV. L. REV. 1168, 1169 (2008) [hereinafter *Developments in the Law*].

<sup>73</sup> *Id.*

diagnosed with a mental illness that contributed to their offense, they are given the option of long-term treatment rather than prison.<sup>74</sup> The rehabilitative treatment focus considers the mental health court participant a “client” or “court customer” rather than a defendant, and the judge is viewed as someone who offers help instead of imposing punishment.<sup>75</sup> Due to the specialty-focus of the mental health court, all personnel are trained in mental illness and treatment and in understanding the psychology underlying criminal behavior of individuals with a mental illness.<sup>76</sup>

However, not everyone is eligible for mental health court. Mental health courts vary by jurisdiction as to “whether they will accept individuals who have already been convicted or charged with a crime” as opposed to those who have just been arrested.<sup>77</sup> Those who are eligible participate in outpatient treatment, meet regularly with court or probation officers, appear before the judge and take part in group counseling.<sup>78</sup> Upon successful completion of the program, participants can have their criminal records cleared.<sup>79</sup>

Just as with drug courts, there are key components to structuring mental health courts. Similar to drug courts, mental health courts have specialized teams made up of attorneys, mental health workers and the judge.<sup>80</sup> In addition, labeling and stigmatizing the individual with a mental illness is prohibited and there is a reduction of the adversarial approach inside the courtroom which helps maintain a more collaborative and therapeutic environment.<sup>81</sup> Further, in accordance with treatment values, the least restrictive means possible are used to get participants into supportive programs.<sup>82</sup> This is, however, always balanced with protecting the public’s safety.<sup>83</sup> To keep the participants engaged and motivated in the program, mental health court personnel support autonomous decision-making.<sup>84</sup> Whenever possible, and with input from the mental health team, the defendant is allowed to make decisions concerning his mental health issues.<sup>85</sup> In addition, as in drug court, mental health courts strive to offer the participants intervention and treatment immediately upon arrest.<sup>86</sup>

---

<sup>74</sup> *Id.* at 1169-70 (citations omitted).

<sup>75</sup> *Id.* at 1177 (citations omitted).

<sup>76</sup> *Id.* at 1170.

<sup>77</sup> *Id.* at 1171 (citing Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 16-17 (2006)).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (citing Stacey M. Faraci, *Slip Slidin’ Away? Will Our Nation’s Mental Health Court Experiment Diminish the Rights of the Mentally Ill?*, 22 QUINNIPIAC L. REV. 811, 829-30 (2004)).

<sup>80</sup> Odegaard, *supra* note 36, at 238 (citing Judge Randall B. Fritzler, *10 Key Components of a Criminal Mental Health Court*, in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 118 (Bruce J. Winick & David Wexler eds., 2003)).

<sup>81</sup> *Id.* (citing Fritzler, *supra* note 80, at 119-20).

<sup>82</sup> *Id.* (citing Fritzler, *supra* note 80, at 119).

<sup>83</sup> *Id.* (citing Fritzler, *supra* note 80, at 119).

<sup>84</sup> *Id.* (citing Fritzler, *supra* note 80, at 120).

<sup>85</sup> *Id.* (citing Fritzler, *supra* note 80, at 120).

<sup>86</sup> *Id.* at 239 (citing Fritzler, *supra* note 80, at 120).

As of 2007, there were approximately 150 mental health courts across the United States.<sup>87</sup> The increase in the number of mental health courts is due not only to government funding of mental health courts, but also to their effectiveness, particularly in reducing recidivism.<sup>88</sup> In response to the New Freedom Commission on Mental Health's findings, Congress passed bills in 2004 to create and fund mental health court programs.<sup>89</sup> In terms of their effectiveness, compared to individuals with a mental illness with similar backgrounds in jail or prison, participants in mental health courts "often have much lower rates of reoffense while on probation."<sup>90</sup> Studies "show dramatic drops in recidivism for those who complete [mental health court] programs."<sup>91</sup> In a study conducted in King County, Washington over a twelve-month period, individuals who had graduated from mental health court were over 75% less likely to reoffend.<sup>92</sup> Further, those who did reoffend were about 88% less likely to commit a violent offense.<sup>93</sup> In addition, in a study of Clark County, Nevada, the thirty-three individuals studied had amassed 3,529 days in jail and had been arrested 129 times before the formation of the mental health court.<sup>94</sup> After the creation of the mental health court, these numbers dropped to 777 days in jail and only forty-nine arrests.<sup>95</sup> Drops in recidivism from 78% to 16% have also been reported for mental health court.<sup>96</sup>

Inspired by the successes of drug courts and the frustration of a criminal justice policy which appeared to be a revolving door for offenders with a mental illness, the number of mental health courts has been growing and appears to be successful in providing treatment to offenders with a mental illness and thus decreasing the frequency of reoffense.

### C. Problem Gambling Courts

Encouraged by the successes of drug and mental health courts and perceiving a similar need for alternative treatment of pathological gamblers in the criminal justice system, three states—New York, Louisiana, and Nevada—have developed problem gambling courts or similar diversionary programs. In 2001, Senior Justice Mark Farrell of Amherst, New York created the first problem gambling court.<sup>97</sup> The creation of the problem gambling court reflected an

<sup>87</sup> *Id.* at 237 (citations omitted).

<sup>88</sup> Acquaviva, *supra* note 38, at 990 (citations omitted).

<sup>89</sup> *Developments in the Law*, *supra* note 72, at 1173-74 (citations omitted).

<sup>90</sup> *Id.* at 1172.

<sup>91</sup> *Id.* at 1179.

<sup>92</sup> *Id.* at 1173.

<sup>93</sup> *Id.* (citing JOHN R. NEISWENDER, EXECUTIVE SUMMARY OF EVALUATION OF OUTCOMES FOR KING COUNTY MENTAL HEALTH COURT 4 (2004), available at <http://www.metrokc.gov/KCDC/mhcs32.pdf>).

<sup>94</sup> Acquaviva, *supra* note 38, at 992 (citing Sean Whaley, *Clark County: Praises Sung for Mental Health Court*, LAS VEGAS REV. J., Feb. 19, 2005, at 4B).

<sup>95</sup> *Id.*

<sup>96</sup> *Developments in the Law*, *supra* note 72, at 1173 (citing KELLY O'KEEFE, CTR. FOR CT. INNOVATION, THE BROOKLYN MENTAL HEALTH COURT EVALUATION 53 (2006), available at <http://www.courtinnovation.org/uploads/documents/BMHCEvaluation.pdf>).

<sup>97</sup> Corey D. Hinshaw, *Taking a Gamble: Applying Therapeutic Jurisprudence to Compulsive Gambling and Establishing Gambling Treatment Courts*, 9 GAMING L. REV. 333, 334 (2005) (citing Kate Gurnett, *Therapeutic Justice Still a Long Shot*, ALBANY TIMES UNION,

understanding of problem gambling and a recognition that problem gamblers who engaged in illegal activity in order to fund their gambling needed treatment for their underlying disorder, not just punishment in the form of jail time.<sup>98</sup> New York's problem gambling court program handles misdemeanors of \$1,000 or less, or felonies in which charges have been reduced through plea bargains.<sup>99</sup> In order to participate in the problem gambling court, participants must comply with all of the program rules,<sup>100</sup> including pleading guilty and waiving all rights to plea-bargain upon acceptance into the program.<sup>101</sup> If participants are successful in completing the program, all of their charges will be dropped.<sup>102</sup> If they are not compliant, they can be returned to criminal court where they will be charged with a felony.<sup>103</sup>

Since the inception of the problem gambling court in Amherst, two new casinos have opened nearby, leading to a gradually growing caseload.<sup>104</sup> The docket in this court ranges from middle-aged college-educated parents to drug-using youth with criminal records.<sup>105</sup> Justice Farrell's gambling court meets once every other week for an hour, right before drug court.<sup>106</sup> The gambling court shares its funding with drug court and domestic violence court, receiving about \$50,000 a year in grants and donations.<sup>107</sup> The funds pay for urine tests, educational materials, computers, travel expenses and overtime for police officers who search for defendants with outstanding warrants.<sup>108</sup>

Although the Amherst gambling court is still too small and young to statistically demonstrate its effectiveness, the court staff reported that, as of May 2007, over one-half of the more than 100 participants had successfully completed the program, and of those, only one had been rearrested.<sup>109</sup> They also noted that the individual rearrested was arrested for an offense not associated with gambling.<sup>110</sup> Just as drug courts and mental health courts showed promise when they began, problem gambling courts are also showing their potential.

Following New York's example, Louisiana's Department of Health and Hospitals, in 2005, announced a statewide expansion of its Gambling Treatment Referral Program.<sup>111</sup> The purpose of Louisiana's program is to divert first- or second-time offenders who have committed nonviolent crimes, includ-

---

Jan. 13, 2003, available at [http://www.responsiblegambling.org/articles/Therapeutic\\_justice\\_still\\_a\\_long\\_shot.pdf](http://www.responsiblegambling.org/articles/Therapeutic_justice_still_a_long_shot.pdf).

<sup>98</sup> *Id.* (citing I. Nelson Rose, *The World's Only Gambling Court*, [http://www.gamblingandthelaw.com/columns/153\\_gambling\\_court.htm](http://www.gamblingandthelaw.com/columns/153_gambling_court.htm) (last visited Apr. 21, 2004)).

<sup>99</sup> Belson, *supra* note 65.

<sup>100</sup> Rychlak & Hinshaw, *supra* note 37, at 840 (citations omitted).

<sup>101</sup> *Id.* (citations omitted).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* (citations omitted).

<sup>104</sup> Belson, *supra* note 65, at A1.

<sup>105</sup> *Id.* at A1.

<sup>106</sup> *Id.* at B4.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> The Gambling Treatment Referral Program is a pilot project started in the 26th Judicial District Court in November 2004. News Release, Bob Johannessen, La. Dep't Health and Hospitals, Program Emphasizes Treatment, Not Incarceration, for Louisiana's Problem

ing theft and forgery, associated with their problem gambling, into treatment rather than prison.<sup>112</sup> In expanding this program, Louisiana had a number of goals in mind. The program not only endeavored to match an offender with an appropriate sentence to decrease the chances of a repeat offense, but it also sought to help decrease the crowded dockets and reduce the number of people imprisoned.<sup>113</sup> In addition, the state projected that the program would be more cost-effective, because on average, treatment costs are one-tenth of the costs of supporting an imprisoned person.<sup>114</sup> Finally, Louisiana sought to reduce the impact of crime related to pathological gambling on the victims, such as families, employers and colleagues.<sup>115</sup>

As with all diversionary programs, not everyone is eligible for Louisiana's Gambling Treatment and Referral Program. Specifically, individuals who have caused death or serious bodily injury, have prior convictions for a violent crime or who have used force are not eligible for this program.<sup>116</sup> For individuals who are eligible, admission to the voluntary program includes a referral by the District Attorney followed by assessment and acceptance to the program by the Louisiana Association on Compulsive Gambling.<sup>117</sup> The offender must then agree to all of the terms and conditions of the program.<sup>118</sup> If he does not successfully complete all of the conditions of the program, he will return to the judicial system for further proceedings.<sup>119</sup> Louisiana's treatment program receives funds through the Department of Health and Hospitals—Office for Addictive Disorders, Compulsive and Problem Gambling Fund, which receives revenue from the gambling industry as required by state law.<sup>120</sup>

Understanding and support of problem gambling appear to be growing geographically. In 2009, Nevada's legislature passed Assembly Bill 102, which authorizes a court to establish a voluntary treatment program for problem gamblers as an alternative to imprisonment.<sup>121</sup> In order to take part in the program, the individual must first agree to pay the costs of his assigned program.<sup>122</sup> If he is unable to pay, the court can assign that person to a treatment program which receives federal or state funding in order to offset the costs.<sup>123</sup> As with the New York and Louisiana programs, there are exclusionary criteria. In Nevada, an individual is not eligible for the program if the person has committed a crime against a person punishable as a felony or gross misdemeanor, a crime against a child, a sexual offense, or an act which constitutes domestic

---

Gamblers (Jan. 7, 2005), <http://www.dhh.state.la.us/news.asp?ID=1&Detail=422&Arch=2005> [hereinafter Johannessen].

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 20TH JUD. DIST. ATT'Y'S OFFICE, *Pre-Trial Diversion*, <http://www.felicianasda.org/diversion.html> (last visited Aug. 16, 2010).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Johannessen, *supra* note 111.

<sup>120</sup> *Id.*

<sup>121</sup> Assemb. B. 102, 2009 Leg., 75th Sess., 2009 Nev. Stats. 1434 (Nev. 2009).

<sup>122</sup> *Id.* § 6(3).

<sup>123</sup> *Id.*

violence.<sup>124</sup> In addition, if the individual has other pending criminal proceedings for a felony or if he is on probation or parole and the appropriate authority does not consent to his enrollment in the program, he may not participate.<sup>125</sup>

In Nevada, before a defendant is enrolled in the program, the court holds a hearing, during which the District Attorney may present evidence for or against the suitability of the program for the defendant.<sup>126</sup> If the court determines that the defendant is eligible, the defendant is then evaluated for problem gambling and to determine whether treatment would likely help.<sup>127</sup> The court explains to the eligible defendant all the conditions of the program, to which he must agree in order to participate.<sup>128</sup> This includes advising the defendant that if he accepts treatment, a certified counselor could supervise him for a period of one to three years.<sup>129</sup> A counselor evaluates the individual and determines whether the treatment will be inpatient, confined in an institution or on an outpatient basis.<sup>130</sup> While in the Nevada problem gambling court program, defendants participate in counseling and support sessions.<sup>131</sup> Defendants also participate in educational sessions, in which they learn about the social, psychological, medical and financial impact of gambling.<sup>132</sup> Further, if additional services are needed, for example, substance abuse treatment or help with housing, appropriate referrals are made to other agencies.<sup>133</sup>

The emergence of these problem gambling courts/diversionary programs demonstrates the parallels between drug courts, mental health courts and problem gambling courts. All of these programs share the common goal of targeting the underlying disorder, whether that is substance abuse, mental illness or pathological gambling, in order to ensure that the individuals do not reoffend. They demonstrate an understanding of the effects that substance abuse, mental illness and problem gambling can have, not just on the individuals but also the devastating effects they can have on those around the offender. These diversionary programs also demonstrate an acknowledgment that imprisoning someone who committed a nonviolent offense related to his substance use, mental illness or pathological gambling does not solve the problem but only opens the way for the revolving door.

Although there are many similarities between drug courts, mental health courts, and problem gambling courts, problem gambling also has some unique features which must be addressed in a diversionary program. For example, whereas in drug court, urine samples can detect whether an individual has been using in violation of the program's conditions, urine samples cannot be used to detect whether or not someone has been gambling.<sup>134</sup> Instead, alternative approaches need to be used in order to monitor the problem gambler's compli-

---

<sup>124</sup> *Id.* § 7(1).

<sup>125</sup> *Id.* § 7(3)-(4).

<sup>126</sup> *Id.* § 8(1)(b).

<sup>127</sup> *Id.* § 9(1).

<sup>128</sup> *Id.* § 8(2).

<sup>129</sup> *Id.* § 8(2)(b)(1).

<sup>130</sup> *Id.* § 9(1).

<sup>131</sup> *Id.* § 6(2)(a).

<sup>132</sup> *Id.* § 6(2)(a)-(b).

<sup>133</sup> *Id.* § 6(2)(c).

<sup>134</sup> Gowen & Speyerer, *supra* note 9, at 36.

ance. This can include surveillance of the offender's activities, intensive supervision, home confinement or electronic monitoring equipment.<sup>135</sup> In addition, the offender's finances may be monitored.<sup>136</sup>

The defendant may also sign self-exclusion forms to keep him from casinos. While the self-excluding individual is the only one who can execute this option, it could be a component of the treatment requirement.<sup>137</sup> The concept behind the self-exclusion policy is that the gambler recognizes that he has a problem and takes this active step.<sup>138</sup> With self-exclusion, the gambler agrees not to enter the casino and faces a range of sanctions, including being placed on the state's involuntary "Excluded Person List," forfeiture of winnings if the gambler does enter the casino and wins, or being charged with criminal trespass.<sup>139</sup> There are, however, some practical difficulties with the enforcement of self-exclusion lists. It may be unrealistic and unfair to depend upon casinos and casino security to monitor for a specific gambler, especially given casinos' open door policy.<sup>140</sup> Further, there is a potential for abuse of these programs if a problem gambler enters a casino despite the self-exclusion policy, gambles, loses and then sues the casino for not keeping him out.<sup>141</sup>

The emergence of problem-solving courts targeting problem gambling is evidence of the shift in perception of problem gambling from a character flaw which must be punished to an illness or addiction which should be treated. It is also recognition of the devastating effects that problem gambling can have on an individual, his family and society as a whole. Moreover, the emergence of problem gambling courts demonstrates a recognition that sending someone to prison because he forged checks in order to cover his bets does not target the underlying problem—the gambling—and thus does not offer the individual the opportunity for rehabilitation, which would allow that individual to reenter society productively and, having received treatment for his gambling problem, avoid future criminal behavior.

#### D. Criticisms and Concerns of Problem-Solving Courts

Not everyone supports the notion of problem-solving courts. Some judges think of them as an administrative burden, whereas some defense attorneys are often hesitant to allow their clients to admit to an addiction in addition to a particular crime.<sup>142</sup> Opponents of problem-solving courts have also expressed concerns about due process and individual autonomy of the defendants,<sup>143</sup> with

---

<sup>135</sup> *Id.* at 38.

<sup>136</sup> *Id.*

<sup>137</sup> William N. Thompson, Robert W. Stocker, II, & Peter J. Kulick, *Remedying the Lose-Lose Game of Compulsive Gambling: Voluntary Exclusions, Mandatory Exclusions, or an Alternative Method?*, 40 J. MARSHALL L. REV. 1221, 1246 (2007).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 1255.

<sup>141</sup> Joseph M. Kelly & Alex Igelman, *Compulsive Gambling Litigation: Casinos and the Duty of Care*, 13 GAMING L. REV. & ECON. 386, 387 (2009); See Thompson, Stocker, II, & Kulick, *supra* note 137, at 1255 (for discussion on an alternative to the self-exclusion method, "Tell them they are not welcome").

<sup>142</sup> Belson, *supra* note 65, at B4.

<sup>143</sup> *Developments in the Law, supra* note 72, at 1177 (citations omitted).

some critics arguing that this therapeutic model of criminal justice is at odds with the Fourth, Fifth, Sixth, Fourteenth and perhaps the Eighth amendments.<sup>144</sup>

### *1. Constitutional Concerns*

As problem-solving courts focus on treatment rather than punishment, guilt is replaced as a relevant issue by the question of, “who is entitled to treatment and whether treatment is ‘successful.’”<sup>145</sup> Further, in this collaborative court, the judge becomes part of the treatment team, which also consists of the prosecutor, defense attorney, probation officer, treatment provider and defendant. As part of the treatment team, the judge’s discretionary authority expands, as “treatment decisions require the judge to rely on extralegal authorities, such as medical or social science.”<sup>146</sup> Thus, in this capacity, the judge in a problem-solving court is basing decisions on the clinical treatment plan rather than on law or fact.<sup>147</sup> In addition, all of the treatment team members share decision-making responsibilities, with clinical experts and treatment providers having a significant influence in determining whether the treatment program is working or whether the participant is complying.<sup>148</sup> Critics are concerned with this dilution of power because it can result in a range of sanctions to the participant, including his loss of liberty, if the defendant is found to be non-compliant.

#### *a. Coercion*

Critics of problem-solving courts also express concerns over the coercive power of choosing between a criminal trial and participation in treatment. How many would choose the threat of a long jail sentence over entering treatment? However, whereas avoiding prison time may be a strong incentive for defendants to choose to participate in problem-solving court programs, it is ultimately up to the individual whether or not to agree to the program and its terms when a defendant makes a plea bargain. However, critics argue that even if treatment entry is comparable to a plea bargain, the exit from treatment is not.<sup>149</sup> Whereas the standard applied to a defendant as to whether he has successfully completed the program in a plea bargain is an objective one, the standard in a problem-solving court is a subjective one.<sup>150</sup> The judge and the treatment team determine whether the defendant has adequately complied with and completed treatment.<sup>151</sup>

#### *b. Waiver of Rights*

Critics also express concern that defendants must waive certain constitutional rights, which they would otherwise have in a traditional court setting, in

<sup>144</sup> Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1497 (2004).

<sup>145</sup> *Id.* at 1462.

<sup>146</sup> *Id.* (citations omitted).

<sup>147</sup> *Id.* at 1459.

<sup>148</sup> *Id.* at 1462-63.

<sup>149</sup> *Id.* at 1499.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1462-63.

order to participate in problem-solving courts. Although federal and state constitutions provide a criminal defendant protection against coerced self-incrimination and unreasonable searches and seizures, critics argue that the collaborative framework of problem-solving courts cannot function without full disclosures by the defendant, disclosure that is “unimpeded by the interference of counsel.”<sup>152</sup> Moreover, participants in problem-solving courts waive their rights to unreasonable searches and seizures, having to consent to any searches or, for example, random drug tests, in order to be able to participate in the program.<sup>153</sup> Further, critics express concern that “in some jurisdictions the defendant must waive the right to move to recuse the treatment court judge.”<sup>154</sup>

Waiving these rights may not be an issue for the defendant if he is progressing well in treatment and successfully completes the program. However, in those instances when the treatment team believes that the defendant is not putting forth sufficient effort and wants to discontinue the treatment and the defendant disagrees with this evaluation, the collaborative nature of problem-solving courts no longer applies.<sup>155</sup> Instead, there is a return to the more adversarial traditional court.<sup>156</sup> At this time, due process rights and protection should be applied; unfortunately by then, the defendant has already waived these rights.<sup>157</sup> Further, this moment of “failure” is also when the judge has the most discretion and power, and the decision on whether or not the defendant satisfactorily completed the treatment program is based on a clinical or subjective standard rather than on a legal one.<sup>158</sup> Additionally, the judge making this determination is the same one who has been involved with the defendant throughout the treatment process. Although this may give the judge the advantage of knowing the defendant and his case better, it may also work to the detriment of the defendant, who has had to waive the right to move to recuse the judge, if the judge has a bias against him.

### *c. Changing Role of Defense Attorneys*

The collaborative nature of problem-solving courts has led to some concern about the new role of defense attorneys. Traditionally, defense attorneys are supposed to be zealous advocates for their clients, focusing on the best interest of their clients. However, some critics of problem-solving courts point to an inherent tension between a defense attorney’s traditional duty of zealous representation and the problem-solving court’s expectation that the defense attorney collaborate with the other treatment team members.<sup>159</sup> “The primary role of defense counsel in the problem-solving courts is to facilitate the treat-

---

<sup>152</sup> *Id.* at 1482.

<sup>153</sup> *Id.* at 1483.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Symposia, *Problem Solving Courts: From Adversarial Litigation to Innovative Jurisprudence*, 29 *FORDHAM URB. L.J.* 1755, 1920 (2002) [hereinafter *Problem Solving Courts*].

ment process, and ethical questions arise when the wishes of the client differ from what the treatment team perceives to be the best interests of the client.”<sup>160</sup>

Defense attorneys also have to navigate potential ethical dilemmas concerning their duty of loyalty. As part of the treatment team in problem-solving courts, defense attorneys, along with the judge, prosecutor and counselors, attend case conferences during which they discuss the progress of the defendant, who is sometimes not present. During those times when the defendant is not at the meeting, should the defense attorney tell him if his counselor thinks he is being manipulative or if the group determines that the defendant is being non-compliant and is considering sanctioning him?<sup>161</sup> If the defense attorney tells the defendant that the counselor thinks he is being manipulative, this will likely threaten the therapeutic relationship, yet if the counselor does not tell the defendant, then is he not violating his duty of loyalty to the client?<sup>162</sup>

In addition, for treatment to be the most effective, the defendant should enter the program as soon as possible. This can make it difficult for defense attorneys to advocate for their clients. Problem-solving courts strive to identify eligible participants in need of treatment upon arrest and refer them to treatment as soon as possible. Although this quick turnaround may be beneficial for treatment and to free dockets, it can also increase the pressure on defense attorneys.<sup>163</sup> Many problem-solving courts require the defendant to plead guilty in order to enter into the program. Defense attorneys have an ethical duty to advise their clients about any plea offers and to counsel them on whether acceptance of the offer is in their best interest.<sup>164</sup> However, the quick turnaround limits the defense attorney’s ability to investigate, file motions, or engage in significant discovery before the offer must be accepted or refused.<sup>165</sup> This makes it more difficult for the defense attorney to determine the strength of the prosecutor’s case against the defendant and, thus, to advise the defendant accordingly. Further, many times the defendant is incarcerated and unable to afford bail, adding pressure to plead guilty and accept treatment, regardless of the defendant’s innocence or the strength of his case.<sup>166</sup> In addition, according to critics, pleading guilty and entering treatment may not be the best deal for the defendant, considering that the majority of the defendants in similar cases would be given probation in the end regardless of whether they plead early, waited to plead, or went to trial.<sup>167</sup> Although in accepting the diversionary program, the defendant may get his freedom in the short term, he may later suffer from the resulting long-term consequences of a guilty plea, including the risk of losing public housing, eligibility for federal student loans or entry into the military, among others.<sup>168</sup>

<sup>160</sup> Casey, *supra* note 144, at 1483 (citation omitted).

<sup>161</sup> *Problem Solving Courts*, *supra* note 159, at 1920.

<sup>162</sup> *Id.*

<sup>163</sup> Cait Clarke & James Neuhard, “From Day One”: *Who’s in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 30 (2004).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 30-31 (citations omitted).

## 2. Net Widening

Some critics further wonder whether problem-solving courts lead to a process called “net widening.” Net widening is a phenomenon whereby the very existence of the problem-solving court leads to an increase in the number of people brought into the criminal justice system and an increase in prosecutions in cases which would otherwise have been dismissed or not prosecuted as a felony.<sup>169</sup> Minority clients may be particularly vulnerable to net widening not only because drug sweeps often occur in minority and low-income neighborhoods, but also because minority defendants may accept entry into a problem-solving court programs in cases where others might not.<sup>170</sup> On the other hand, for those minority clients who live in underserved communities with limited access to resources such as drug or mental health treatment, a problem-solving court may be their best opportunity for recovery and avoiding incarceration.<sup>171</sup>

## 3. Funding

Opponents of problem-solving courts also argue that the funding and resources necessary to establish and maintain problem-solving courts outweigh the benefits that the courts may provide.<sup>172</sup> While studies do show the effectiveness of problem-solving courts, there is disagreement concerning the magnitude of the effect on recidivism.<sup>173</sup> This is due to methodological limitations.<sup>174</sup> For example, studies often use arrest rates as indicators of program success, however these arrest rates can only account for those individuals who relapsed and were caught; they do not reflect individuals who relapsed and committed a crime but were not caught.<sup>175</sup> In addition, due to the variability in structure, scope, and population served by problem-solving courts, it is not only difficult to compare programs, but research results may not be generalizable.<sup>176</sup> However, at least both opponents and proponents of problem-solving courts agree that more and better research is needed.<sup>177</sup> Longitudinal studies measuring effectiveness need to be conducted.<sup>178</sup> Further, problem-solving courts should adopt on-going self-studies to not only measure their effectiveness but to strive for continual improvement.<sup>179</sup>

<sup>169</sup> Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT'L BLACK L.J. 27, 39 (2009); Clarke & Neuhard, *supra* note 155, at 29 (citing Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1501-03 (2000)).

<sup>170</sup> Wolf, *supra* note 169, at 40 (citing Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionalism*, 65 OHIO ST. L.J. 1479, 1568 (2004) (quotation omitted)).

<sup>171</sup> *Id.* at 42.

<sup>172</sup> Hinshaw, *supra* note 97, at 337 (citations omitted).

<sup>173</sup> Loreen Wolfer & James C. Roberts, *A Theoretical Exploration of a Drug Court Program Based on Client Experiences*, 35 CONTEMPORARY DRUG PROBLEMS 481, 482 (2008) (citations omitted).

<sup>174</sup> *Id.* (citations omitted).

<sup>175</sup> *Id.* (citations omitted).

<sup>176</sup> *Id.*

<sup>177</sup> Dorf & Fagan, *supra* note 44, at 1505.

<sup>178</sup> *Id.* at 1505-06.

<sup>179</sup> *Id.* at 1506.

#### 4. *Not Enough Need*

There are also those critics who specifically oppose problem gambling courts. They argue that because the rate of pathological gambling is not as high as that of substance abuse, pathological gambling is not as big of a social problem and should not be considered the equivalent to substance abuse.<sup>180</sup> Consequently, these critics argue that funds and resources necessary to provide problem gambling court programs for this smaller percentage of people are not worth it.<sup>181</sup> However, the availability of legal gambling has increased significantly in the last thirty years, with more people gambling and increasing their wagers.<sup>182</sup> Legalized gambling can be found in all but two states, Hawaii and Utah.<sup>183</sup> In 1999, pari-mutuel racetracks and betting were legal in over forty states, while thirty-seven states and the District of Columbia had lotteries.<sup>184</sup> In addition, Native American casinos could be found in all regions of the country, and “non-Indian casino gambling had expanded from Nevada and Atlantic City to the Mississippi Gulf Coast, Midwest riverboats, and western mining towns;”<sup>185</sup> not to mention “the proliferation of telephone and on-line gambling.”<sup>186</sup> Studies show that increased availability of gambling leads to an increase in pathological or problem gambling.<sup>187</sup>

#### 5. *Too Cumbersome*

Opponents of problem gambling courts also argue that it is too cumbersome and difficult for courts to identify eligible individuals. This, they argue, is because pathological gambling is harder to identify than substance abuse, and it is more difficult for the court to find a causal connection between pathological gambling and crime than substance abuse and crime.<sup>188</sup> However, while urinalysis may not identify pathological gambling, it also does not detect mental illness, and yet mental health courts have found ways to identify appropriate treatment. Like mental health courts, problem gambling courts rely on clinical evaluations to identify problem gambling and to assess whether the problem gambling is associated with the illegal behavior and if so, whether the individual is likely to benefit from treatment.

#### E. *Proposed Solutions*

While there are criticisms and concerns surrounding problem-solving courts, there are also suggestions for how to resolve them. In January of 2002, the American Council of Chief Defenders (ACCD), a section of the National

<sup>180</sup> Hinshaw, *supra* note 97, at 341.

<sup>181</sup> *Id.*

<sup>182</sup> NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY EXECUTIVE SUMMARY, 8 (1999), <http://govinfo.library.unt.edu/ngisc/reports/execsmry.pdf>.

<sup>183</sup> NAT'L GAMBLING IMPACT STUDY COMM'N, NATIONAL GAMBLING IMPACT STUDY FINAL REPORT, 1-1 (1999), <http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html>.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 4-1 (citing NAT'L RESEARCH COUNCIL, PATHOLOGICAL GAMBLING: A CRITICAL REVIEW Exec-2 (1999)).

<sup>188</sup> Hinshaw, *supra* note 97, at 341.

Legal Aid & Defender Association, compiled “Ten Tenets of Fair and Effective Problem Solving Courts,” which set forth guidelines for improving problem-solving courts.<sup>189</sup> The ACCD proposed that public defenders be included “in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers.”<sup>190</sup> In addition, the ACCD proposed that public defenders also participate in the monitoring and evaluation of the problem-solving courts and in the development of policies and procedures.<sup>191</sup> This would allow public defenders to address privacy concerns and ensure confidentiality.<sup>192</sup>

According to the ACCD, problem-solving courts should also offer the prosecution and the defense equal access and distribution of resources, including resources to hire and train staff to work in the problem-solving court.<sup>193</sup> Further, problem-solving court policies should not interfere with defense counsel’s ethical duty to zealously advocate for his client, including conducting discovery, challenging evidence or recommending alternative treatments or sanctions.<sup>194</sup>

The ACCD guidelines also stress the importance that the defendant’s participation be voluntary.<sup>195</sup> This includes the defendant’s right to review the problem-solving court program requirements and possible outcomes with his counsel and ensuring that counsel has adequate time to investigate the case against the defendant in order to best counsel him about his decision to enter the program.<sup>196</sup> The courts should also implement a policy to protect the defendant’s right against self-incrimination.<sup>197</sup> In addition, according to the ACCD, problem-solving courts should not require a guilty plea in order to enter treatment nor should defendants be locked into the treatment program once they have accepted it.<sup>198</sup> Defendants should be able to voluntarily withdraw from treatment at any time “without prejudice to [their] . . . trial rights.”<sup>199</sup> Further, treatment and other program requirements should be “the least restrictive possible to achieve agreed-upon goals.”<sup>200</sup> Once the defendant has successfully completed the program, the charges should be dismissed and the defendant’s record should be expunged.<sup>201</sup>

In addition to the ACCD guidelines, others suggest increasing the transparency of decision-making in problem-solving courts by requiring judges to provide rationale for their decisions<sup>202</sup> and by making appellate review of prob-

<sup>189</sup> Jim Neuhard & Scott Wallace, *Ten Tenets of Fair and Effective Problem Solving Courts*, NAT’L LEGAL AID & DEFENDER ASS’N (Jan. 1, 2002), available at [http://www.nlada.org/DMS/Documents/1019501190.93/document\\_info](http://www.nlada.org/DMS/Documents/1019501190.93/document_info).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> Casey, *supra* note 144, at 1518 (citation omitted).

lem-solving court decisions available.<sup>203</sup> This would allow the appeals court to examine whether a problem-solving court complied with due process considerations as well as monitor that the problem-solving court is doing its job; that is, that the court is providing treatment to the eligible and is monitoring treatment providers to ensure that they are providing the promised services.<sup>204</sup>

## V. CONCLUSION

Despite the criticisms, problem-solving courts appear to be dealing with their challenges while experiencing success. “[T]he trend toward problem-solving courts is increasing[.]”<sup>205</sup> There are now problem-solving courts for mental health, substance abuse, domestic violence, drunk driving, parole or probation violations and problem gambling, among others.<sup>206</sup>

The Comprehensive Problem Gambling Act of 2009 proposes that problem and pathological gambling should be included along with substance abuse disorders and mental health disorders under the Substance Abuse and Mental Health Services Administration. Given the similarities and the relationship between problem gambling, substance abuse and mental health disorders and the consequences that these conditions can have, problem gambling should be viewed and treated as mental health and substance abuse are.

Passage of the Comprehensive Problem Gambling Act of 2009 would influence society’s perception of problem gambling, continuing the shift towards viewing problem gambling as an illness requiring treatment rather than a weakness requiring punishment. Further, including problem gambling with substance abuse disorders and mental health disorders under SAMHSA would give problem gambling the same priority in funding, which would allow for further research on preventing, treating and raising awareness of problem gambling. In addition, more research could be done on the effectiveness of the already existing problem gambling courts and, given positive results, future problem gambling courts could be created. Crimes committed because of problem gambling should be treated the same as crimes committed due to a substance abuse or mental health illness for the benefit of society, the gambler and the gambler’s family.

---

<sup>203</sup> *Id.* See also Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 956 (2003).

<sup>204</sup> Dorf, *supra* note 203, at 956, 959.

<sup>205</sup> *Developments in the Law*, *supra* note 72, at 1179 (citation omitted).

<sup>206</sup> Odegaard, *supra* note 36, at 228 (citations omitted).