Implementing Harm Reduction Principles In Court-Based Treatment

Summary and Analysis of *Substance Use, Overdose Prevention, and the Courts: A Citywide Collaboration*

RxStat

Reducing overdose deaths in NYC through cross-agency collaboration

Center for Justice Innovation

Authors

Daniel Ades
Center for Justice Innovation

Jessica Kay
Center for Justice Innovation

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For More Information

Visit our website to read *Substance Use, Overdose Prevention, and the Courts: A Citywide Collaboration*, which maps many of the court-based problem substance use interventions utilized across New York City as of September 2023.

Email Jessica Kay: JKay@nycourts.gov

Introduction

3,026 New Yorkers lost their lives as a result of a drug overdose in 2022, a 12% increase from the prior year and the highest number since reporting began in 2000. This increase in overdose deaths was evident across all five boroughs, and it expanded inequities based on race, age, income, and geography.[1]

Throughout the process of conducting quarterly meetings, the RxStat[2] Overdose Fatality Review Committee (OFR) realized that many individuals who fatally overdosed in New York City had previous contact with the criminal justice system. A brief review of the 20 OFR cases examined since June 2021 indicated that only one of them had no recorded criminal justice interaction.[3] According to the New York State Office of Addiction Services and Supports (OASAS), persons with criminal justice involvement account for 47% of all treatment admissions to OASAS-certified programs.[4]

However, for the reasons discussed below, criminal courts are not always the optimal setting for individuals struggling with problem drug use to access treatment services. Ideally, preventive community-based treatment providers would intervene in an individual's problem drug use before the related behavior leads to criminal court involvement. Even so, given the reality of increased overdose deaths and the prevalence of problem substance use among individuals caught up in the criminal justice system, there was a clear need to explore the role of the courts in responding to individuals with substance use issues and preventing overdose fatalities.

On September 19, 2023, RxStat and the Center for Justice Innovation facilitated *Substance Use, Overdose Prevention, and the Courts: A Citywide Collaboration* at New York Law School to address issues related to this epidemic of overdose fatalities. The all-day event[5] focused on the role of the courts as an intercept point in addressing substance use disorder and preventing fatal overdoses, with an emphasis on communication among stakeholders in the criminal justice system, across boroughs, and between the many disciplines and agencies reflected in the event's participants. Indeed, a primary inspiration for the event was bringing together the court-based perspectives with those of clinical and public health professionals to deepen the dialogue and establish connections between participants who struggle daily with the same issues but may not be aware of each other's challenges.

This report not only documents the differing viewpoints and major themes from the day, highlights critical questions raised, and summarizes innovative approaches being employed throughout the city—it is also intended to serve as a catalyst for continued dialogue between participants and make recommendations for court stakeholders to consider in trying to expand the number of individuals who could access potentially life-saving treatment as a result of their court involvement.

Considering Court-Based Treatment Through a Harm Reduction Lens

In order to focus event participants on current policy questions, we centered the discussions around ways in which courts have adopted principles of harm reduction, defined during the event as a "set of practical strategies and ideas aimed at reducing negative consequences associated with drug use." This decision reflected our expectation that understanding the extent to which harm reduction principles have been applied in courts in New York City would illuminate the structural differences between the court setting and the clinical and public health settings in which many RxStat participants address substance use. In other words, harm reduction was a lens through which we sought to understand how the courts play a distinct role in our systemic response to problem substance use, and how courts can balance the need to treat individuals while also maintaining their core public safety function.

Through this framework, several broad themes emerged. First, court-based responses to problem drug use among criminal defendants have evolved considerably in the past several decades, demonstrating that New York City courts that offer drug treatment are in myriad ways already applying some harm reduction principles. Second, questions about ways in which courts can continue to apply those principles are central to the current discourse around court mandated treatment programs. Third, courts are actively grappling with the formidable challenge of identifying the appropriate limits

of applying harm reduction models—which are grounded in person-centered care—in a system built around the premises of individual accountability, mandated treatment, and abstinence. Fourth, given that challenge, court stakeholders from across the ideological spectrum are pursuing innovative strategies and new models to reduce unnecessary harms associated with problem substance use, including by reconsidering the value of the punitive aspects of traditional court-based treatment models.

NYC Courts Are Already Applying Some Harm Reduction Principles

In the traditional drug court model, a participant generally must plead guilty to one or more charges before completing a treatment mandate determined by clinical staff and approved by the presiding judge and/or the county district attorney's office. Successful completion of the treatment mandate results in a dismissal or reduction of the final charges, while failure to complete the treatment mandate can result in a prison or jail sentence. In recent years, problem-solving courts across the city have dramatically altered their policies to improve their alignment with clinical best practices. There was widespread agreement among stakeholders at the conference that treatment recommendations should be made by clinicians, and that treatment should be carefully tailored to meet the needs of the individual.[6] One judge described her typical response to issues that arise during the course of treatment as simply asking the defendant, "What do you need?" One court stakeholder described the approach as the recovery capital model, which involves providing wrap-around services and holistic supports aimed at addressing other challenges in a person's life that may lead to substance use. If medically indicated, courts allow the use of medically assisted treatment (MAT) or medications for opioid use disorder (MOUD). This inclusion of MAT, compared to the practice a decade ago of most treatment courts of not supporting a range of medications approved to support opiate withdrawal, is a clear indication of courts' evolution in adopting harm reduction principles.

In addition, courts have dramatically reduced their reliance on jail as a sanction. For example, while in most cases individuals under a treatment mandate are prohibited from any substance use including cannabis or alcohol, stakeholders from all five counties stated that problem-solving courts are no longer using jail as a punishment in response to individual instances of relapse. Even low-level arrests are unlikely to result in the imposition of a jail or prison sentence, and the practice of sending individuals to Rikers Island for short periods of time as a lesson is seldom used today. Felony arrests, persistent failures to engage with treatment, and an inability to find programs willing to work with participants after multiple prior opportunities can result in a jail or prison sentence being imposed. However, judges in attendance indicated that they offered individuals multiple opportunities at treatment, and that the most likely factor contributing to a decision to sentence an individual, absent a new arrest for a serious offense, is the lack of any (or any further) suitable programs willing to work with that individual. The overwhelming consensus is that treatment court judges are trying to give individuals opportunities to succeed, and only imposing sentences when all other available options have been exhausted.

Overall, these practices reflect a major shift in practice and policy that is consistent with the spirit of the harm reduction approach: reducing the harm of incarceration and criminal justice involvement. They also demonstrate that New York City courts are leading the way in reimagining the traditional drug court model.

Can NYC Courts Go Further In Implementing Harm Reduction Principles?

It is notable that while all but one of the last 20 overdose fatalities selected for review by RxStat prior to the conference reflected recent criminal justice involvement, Office of Court Administration (OCA) data did not indicate that any of these individuals had participated in drug court. One might infer that this small and not statistically significant selection of cases suggests that the current drug court model is effective at connecting individuals in need to life-saving treatment and keeping them engaged. Alternatively, that conclusion runs the risk of ignoring the potential for selection bias: the individuals who opt to participate in drug court may be more willing and able to participate in court-mandated treatment, while those who may be at greater risk of fatal overdose tend to decline treatment mandates in favor of short- and medium-term jail sentences. Thus, one of the main challenges facing courts engaging in ongoing policy discussions is that, while some individuals may need the structure, consistency, and external motivation of the drug court model, others may resist any model that does not afford them considerable autonomy in reducing the harms of their drug use on their own terms. Further, to many harm reduction experts, the focus on achieving abstinence[7] in many court-based treatment models is less effective in achieving recovery, stability, and reduced recidivism than a focus on addressing the social determinants of health that more directly impact problem substance use and the risk of overdose.

Confronting this challenge, participants discussed why some individuals who need drug treatment decline to participate, despite a more forgiving and individually tailored drug court[8] philosophy, and the promise of a dismissal or other significant legal benefit. Stakeholders, primarily from the defense, indicated that many individuals are still fearful of the potential repercussions of failure or relapse. After all, courts do not advertise their more permissive treatment of relapse to potential participants, and plea agreements generally include a mandate to abstain from all substance use, including cannabis. Even if judges are increasingly reluctant to sentence individuals in response to positive toxicology results, they may be inclined to increase the mandated level of care from outpatient to residential, or impose other conditions that participants find excessively onerous or not supportive of recovery. Indeed, stakeholders reported that many court-involved individuals consider treatment, especially residential treatment, more challenging and more demanding than a period of incarceration. From the perspective of these individuals, in some cases the treatment mandate seems to be disproportionate to the seriousness of the charged offense, so accepting a felony plea that involves a possible prison sen-

tence if the person does not complete the mandate, instead of holding out for a fixed jail sentence or going to trial, is not always a sound legal choice. Finally, the daunting prospect of complete abstinence—a common requirement for completion of the program mandate, and a significant challenge even for many people who are not caught up in the criminal justice system—serves as a significant barrier for many individuals.

As a result, proponents of the increased use of harm reduction strategies in the court setting ask whether courts can do more to incorporate the participants' preferences into treatment plans so that more individuals opt into treatment. This policy argument centers around the notion that the problematic behavior that a court should be concerned with is the crime associated with drug use, not the drug use itself. Many clinicians—though certainly not all of them—believe that abstinence is not a realistic or necessary goal for all individuals. This approach also suggests that, since most individuals who engage in drug use do so without committing crimes, the focus should be on supporting a crime-free life, not a drug-free life. Furthermore, by adopting a model that focuses on eliminating criminal behavior and enhancing the community supports that can mitigate the harms of drug use, perhaps we can encourage more individuals who are at heightened risk of overdose but would decline or fail to complete an abstinence-based program to take advantage of court-based treatment. If a person is using substances less, addressing the social determinants of health that are critical for reducing the harms of problem drug use, and not getting re-arrested, isn't that a better outcome for all parties than a jail sentence that involves little or no community support following incarceration?

Finally, questions were raised about whether a mandated treatment model—sometimes described as "coercive"—can ever be truly consistent with a harm reduction approach. However, this criticism begs the fundamental question at play: can and should courts attempt to eliminate coercive influence altogether to align with clinical practices that were not developed within the court setting, or should the principles of harm reduction yield to the court structure because that structure serves a public safety function even within the context of court-based treatment?

What Are The Limits of Harm Reduction Principles in the Court Setting?

Participants identified several conceptual and practical challenges to fully implementing harm reduction principles within courts. Some court stakeholders questioned how—in a courtroom that is supposed to hold accountable individuals who have higher levels of clinical need and present elevated levels of risk—a judge could openly assent to continued substance use, particularly when such use contributed to felony level criminal behavior. For example, how can a judge tolerate the public safety risk of continued alcohol consumption by an individual who was convicted of driving while intoxicated? In addition, some participants questioned how individually tailored abstinence requirements are defensible when the participants who are required to maintain abstinence see the judge tolerate continued drug use by other participants. They also noted the critical element that a sizable portion of the individuals who participate in problem solving courts present with co-occurring mental health issues for whom continued use of substances can affect their behavior and their medication in ways that can pose heightened individual and public safety risks.

These procedural objections highlight the broader considerations about the role of courts as one touch point within the wider spectrum of treatment opportunities. Unlike a clinician treating a patient, a court has responsibilities beyond the well-being of the individual. Traditionally, two fundamental purposes of a criminal justice process are to impose accountability on the individual and promote public safety; these do not necessarily include treating the individual. Of course, one premise of therapeutic jurisprudence underlying a problem-solving court is that treatment results in better public safety outcomes than incarceration. But a defendant who seeks a favorable adjudication of their criminal behavior by addressing a substance use issue is acknowledging that the drug use is at least in part responsible for the criminal behavior. Thus, how can a court not only ignore, but openly condone the very conduct to which a defendant attributes the criminal behavior?

That question is not merely rhetorical. Courts rely on clearly articulated standards as a basic principle of fairness. Achieving 90 days of sobriety, for example, is a clear standard that can be established as the benchmark for successful completion so that participants know exactly what is expected of them in order to graduate and receive the promised legal benefit. Adjudication based on whether an individual is sufficiently 'using less' or 'using more safely' is ripe for inconsistency and bias.

The current discourse surrounding the perceived coercive aspect of court-based drug treatment further highlights the challenges facing courts engaged in treatment. Those

who argue that the coercive nature of court mandates is inherently antithetical to treatment must address the fact that all individuals who are charged with crimes are subject to that coercive element. It is not clear that the court's public safety function can or should give way to a clinical preference for an individual to decide to engage in treatment on their own terms. Put another way, a clinician may be in a position to wait for an individual to seek treatment when they are ready, but a court adjudicating a criminal case—often, a felony case, or an ongoing pattern of criminal cases—may not have that option.

NYC Courts Are Continuing to Innovate to Reduce the Harms of Problem Drug Use While Preserving Their Core Public Safety Function

Despite these challenges—or perhaps because of them—court-based actors throughout the City continue to develop new ways to connect as many people as possible to treatment in lieu of a more punitive response to criminal behavior. Increasingly, courts in New York City have incorporated the notion that most people who engage in problem substance use have significant trauma history, housing instability, mental health issues, and other factors that influence their substance use and criminal behavior. Partly as a result of evolving attitudes toward low level crime, and partly as a result of bail reform laws implemented in New York State in 2020[9] that changed the legal calculus around accepting treatment mandates for misdemeanors and other nonviolent offenses, courts in every county in New York State have been developing pre-plea treatment models that can replace short jail sentences and speedy trial dismissals as the default options for these offenses. Felony problem-solving courts have continued to evolve in their approach to meeting an individual's needs and providing the holistic supports necessary to maintain a drug- and crime-free life, even while taking on more serious cases.

To name just a few of many examples cited of developments in treatment courts across the City,[10] we heard from event participants about Queens County's multiple felony level drug court tracks that modify the treatment mandate—including some abstinence requirements—depending on the individual's circumstances. Queens is also exploring no-plea diversion for lower level offenses. Staten Island has adopted a wide range of diversion options, including pre-arraignment, pre-plea, and post-plea diversion. The Staten Island District Attorney is incorporating harm reduction in its treatment recommendations, has worked to employ recovery coaches in the courts, and relies extensively on a 24/7

resource and recovery center located near the courthouse. Pre-arraignment diversion programs for low level offenses are also operated in Brooklyn and the Bronx. In Manhattan, recent policy and practice changes that are consistent with harm reduction principles—increased use of clinical responses to violations in lieu of punitive sanctions, limited mandate lengths, and additional holistic supports- have correlated with a marked increase in felony drug court participation, and the Felony Alternatives to Incarceration (ATI) Court has been expanding the range of behavioral health needs that can be addressed in the problem-solving court setting. Throughout NYC, Opioid Intervention Courts began operating in 2018, embracing a harm reduction approach and using a person's initial contact with police or the justice system as an opportunity to identify individuals who are at risk of overdosing and engage them in treatment.

Continuing the Collaboration

The September 19 event intentionally brought together many individuals from different disciplines and agencies facing the same issues relating to problem drug use. The aim was not to solve every problem but rather to foster dialogue in service of solutions that unify community-based prevention and court-based responses. To that end, we do not offer a concrete conclusion or set of policy recommendations for courts or others to adopt. Instead, we invite participants to wrestle with the following questions and proposals, and to reach out to one another to continue the work of further consolidating our public safety systems with our public health and clinical systems. Perhaps a follow-up convening can address implementation issues in greater depth.

For the clinicians and public health experts, many of whom were less familiar with court models and the striking evolution over the past several years:

- Given what you heard about the many ways in which court mandated treatment has evolved over the last few decades, what elements of harm reduction do you think have not been adopted but could be, and what specific solutions could help overcome some of the procedural obstacles that court stakeholders raised?
- To what extent are you persuaded that public safety considerations and procedural fairness might outweigh the clinical best practices with respect to treatment mandates. When someone

is not just continuing to use but also continuing to cause harm to others, what should courts do?

To the court-based stakeholders working hard to adapt treatment offerings to clinical best practices:

- To what extent can courts formalize the practical shift away from punitive sanctions around relapse in order to encourage more individuals to accept treatment dispositions?
- What other modifications to the existing treatment models would encourage more individuals to avail themselves of potentially life-saving court-based treatment without undermining the core function of the courts?

Finally, to all of the event participants, can you envision a model in which any of the following suggestions were incorporated? What could that look like in practical terms? What obstacles might make courts reluctant to adopt them? Who did you meet or hear from during the event who can help you figure out how to explore whether and how to implement these ideas?

- Expanding pre-plea treatment offerings across all counties
- Reducing or eliminating toxicology results as a routine element of compliance reporting in order to focus on external harms
- Not sharing toxicology results in open court
- Conducting an individualized assessment of harms in order to develop individualized treatment plans and allow some individuals to graduate even if they are not fully abstinent
- Formally adopting different response standards to the harms of substance use for the individual vs. the public
- Incorporating participants' treatment preferences and goals into the treatment planning
- Dramatically increasing peer support and availability
- Consistently exploring when abstinence may not be required as a mandate
- Increasing coordination between OASAS, the NYS Office of Mental Health (OMH), and the courts
- Considering and communicating the types/modes of service options other than traditional therapeutic community/ residential treatment models
- Increasing access to naloxone and fentanyl test strips through the courts
- Providing overdose prevention education in the courts

A Final Note from the Organizers

Continued progress in expanding access to treatment within the courts requires a broad range of expertise and dedicated collaboration between the many professionals encountering people engaged in problem substance use who may be at risk. Ultimately, it is the mutual dedication to our fellow New Yorkers—every overdose death represents

someone's mother or father, son or daughter, brother or sister—that unites us in the goal of reducing overdose deaths for individuals who come before our courts, and reminds us of the need to expand our collective knowledge in order to save lives.

Following the day's proceedings, as we returned our audio equipment, we thanked the sound technician who was listening to the discussions. He said, "That was amazing."

"What was?"

"This whole day. I lost a cousin and an uncle to overdoses. It's just really good to know that there are all these people working on this. I had no idea. It means a lot to me. Thank you."

Appendices

Endnotes

[1] Unintentional Drug Poisoning (Overdose) Deaths in New York City in 2022, New York City Department of Mental Health and Hygiene, *available* at: https://www.nyc.gov/assets/doh/downloads/pdf/epi/databrief137.pdf

[2] NYC RxStat brings together public health and public safety experts from New York City and State agencies to develop targeted interventions and policy responses aimed at reducing deaths and illness from substance use. This interdisciplinary partnership integrates law enforcement strategies with an epidemiological approach to public safety and public health data, and an increased reliance on harm reduction and other evidence-based approaches to reducing overdose fatalities. For more information, see Appendix C.

[3] These cases reflect a small percentage of the overdose fatalities in NYC during this timeframe.

[4] Office of Addiction Services and Supports: Criminal Justice Involved Individuals https://oasas.ny.gov/treatment/criminal-justice-involved-individuals

[5] For more information about the event, see Appendix B.

[6] However, some stakeholders articulated a concern that, in some instances, court-based clinicians might adjust recommendations based on what they believe judges expect based on legal factors rather than strictly based on clinical need.

[7] All Rise, founded as the National Association of Drug Treatment Court Professionals, offers guidance for court practitioners through its Adult Treatment Court Best Practice Standards. The standards encourage individually tailored goal setting and conditions that allow participants to eventually achieve and sustain abstinence. As participants move through program phases, different standards for abstinence are applied. The guidance notes that abstinence should not be considered a proximal goal until participants with a compulsive substance use disorder have achieved early remission, defined as at least 90 days of clinical stability. They further advise that program completion requires clinical stability for at least 90 days, achievement of abstinence for approximately 90 days (without requiring perfection), and reliable engagement in recovery management activities to sustain abstinence after discharge.

[8] For the purposes of this discussion, we do not distinguish between Article 216 courts, which operate the traditional drug court model as prescribed by state law, and other problem solving courts that employ a similar plea-based model.

[9] Judges are no longer permitted to detain individuals charged with most misdemeanors, including low level drug possession. While this change in the law reduced the number of people incarcerated on low level charges, it may have also reduced the incentive for many individuals to engage in court-based treatment.

[10] To name just a few of many examples cited of developments in treatment courts across the City

Photography by Samiha A. Meah/Center for Justice Innovation, 2023.

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