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Pitfalls and Power Dynamics of Court Programs

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While they have important differences (for their specific definitions, check out the glossary), diversion programs, problem-solving courts, and Alternatives to Incarceration (ATIs) have a key similarity: the person being prosecuted enters into, and must successfully complete, some kind of program or requirements (examples can include anger management classes, mental health or drug "treatment," art classes, restorative justice circles, community service, counseling, and payment of fines or restitution) in lieu of a conviction or incarceration. In this discussion of their pitfalls and power dynamics, we will refer to all three with the umbrella term "court programs."

In some jurisdictions, and for certain kinds of cases, the defense needs the prosecutor's approval, and in others, only the judge needs to approve. When the prosecutor's approval is necessary, the defense may have to lobby the prosecutor. As we show in the plea bargaining section, the prosecutor has all the power in these negotiations.

While these programs—whether mandated by prosecutors or judges—often feel like deals or bargains or alternatives to punishment, they actually expand surveillance and supervision, come with fees and other financial obligations, extend the state's control over people's lives for years, and can sometimes be a trap that leads to incarceration. Inpatient programs can especially feel like prison. But, these programs can be tempting because if you can navigate all the requirements, you can often avoid a criminal record or prison time.

Take for example the court in Massachusetts that was set up in fall of 2021 [<https://www.wgbh.org/news/local-news/2021/11/01/i-have-no-place-to-go-hundreds-leave-mass-and-cass-as-city-clears-tents>] to manage the houseless population around the South Bay Jail. This court was set up supposedly to get people who are houseless and congregating in a makeshift encampment "into treatment and housing", and instead it was set up inside a jail, and all it did was stalk, criminalize, and incarcerate the people it was set up to help.

What is also so insidious about these programs is that sometimes people who do really need services and treatment can only access them through the criminal punishment system, and their access to resources is conditioned on being subjected to the system's carceral control.

Generally, to be eligible for programs such as this, the accused person needs to show that something is "wrong" with them, this will require them to prove that they have the symptoms of a mental illness—but it could also be a drug addiction or anger issue, depending on the program. Certain charges and convictions will prevent someone from participating in these programs because they are deemed too "violent" and/or "dangerous." The programs also often require the person to sign up for public benefits to pay for their enrollment or will charge them out of pocket. Individuals who are not eligible for public benefits (like certain non-citizens) can have a harder time accessing the programs. The programs are often run by hospitals and outside social service agencies. Those agencies have their own rules and staff. They tend to be underfunded and -resourced. Because these programs contract with criminal courts, they can sometimes replicate some of the dynamics of prisons and jails: curfews, limitations on visiting, sanctions for not complying with rules, supervision.

Additionally, as law Professor Erin Collins has pointed out [<https://poseidon01.ssrn.com/delivery.php?ID=1621100711271201010790240780811020660040590400680320560941220920280640660850850210070550590040090470580280840280850060700081>] about problem-solving courts specifically, these programs primarily serve to enlarge the power of judges and prosecutors and to expand the scope and control of the criminal punishment system, at the expense of their purported "treatment" goals. The main power of a court is to prosecute someone for a behavior they engaged in; problem-solving courts shift that into something larger as it seeks to prosecute and criminalize someone for who they are or the circumstances of poverty, addiction, or mental health they find themselves in. This kind of court makes it okay, as a matter of principle, to treat people whose status is compromised (i.e. they use drugs, they are a veteran, they are houseless) as something for the court to control and manage. The power creep of these courts can't be overstated.

Source: <https://beyondcourts.org/en/learn/pitfalls-and-power-dynamics-court-programs>

A project of Community Justice Exchange [<https://www.communityjusticeexchange.org/>] and Interrupting Criminalization [<https://www.interruptingcriminalization.com/>]
Built by Research Action Design [<https://rad.cat/>]