

The Myth of Legal Leverage?

Toward a Relational Framework for Court-Based Treatment

By Julian Adler, Joseph Barrett, and Michael Rempel¹

As New York State works to decrease incarceration and treat people's underlying behavioral health needs, it is increasing its use of specialized courts.² But where the threat of a long prison sentence once incentivized engagement in lengthy court-supervised treatment, recent legislative reforms have reduced prosecutors' and courts' leverage.³ In this new legal landscape, can six months (or less) of court-supervised treatment be just as effective as the standard year-long prescription?

In this context, "effective" typically means one of two things: that a (very) brief course of treatment can meaningfully help a person to better cope with and navigate their life circumstances, or that such a time-limited intervention can appreciably reduce that person's risk of recidivism. On both scores, the research is quite encouraging—practitioners have tools at their disposal that are considerably more potent than legal leverage.

Let's start with the recidivism concern. The "risk principle" is one of the few rock-solid empirical findings of criminological research. It states that the level or intensity of intervention (e.g., treatment, social services, supervision) should be commensurate with a person's risk of recidivism.⁴ Although it may seem counterintuitive, research demonstrates that too much intervention can be harmful to lower-risk individuals and actually *increases* their risk of recidivism.⁵ Intensive intervention can interfere with things like school, work, familial obligations, and pro-social relationships, "disrupt[ing] the factors that make [people] low-risk."⁶ Along with the potential stigma and psychological harms of prolonged exposure to the criminal justice system and higher-risk peers, this may lead to iatrogenic effects. That is, intensive treatment can have the unintended consequence of increasing rather than decreasing risk.⁷

Of course, the risk principle also states that higher-risk individuals benefit from more intensive interventions in community-based settings, resulting in proven recidivism reductions in lieu of incarceration.⁸ But how much treatment is the right amount? The question of dosage (i.e., how much intervention is *necessary* to achieve the desired effects at varying risk levels) has eluded researchers and practitioners alike. As Madeline Carter of the Center for Effective Public Policy and Judge Richard Sankovitz, Ret., formerly of the Milwaukee County Circuit Court, observe, "while it is clear that dosage matters, there is less than optimal empirical guidance about how much dosage is desirable."⁹ This is further complicated by the qualitative nuances in the type and delivery of any treatment; as researchers Kimberly Gentry Sperber and Christopher T. Lowenkamp conclude, "[d]osage is more than just counting program hours."¹⁰ Given the importance and complexity of accounting for dosage, some have gone as far as to characterize the project as a "search for the holy grail."¹¹ The bottom-line: research is conclusive that over-programming can be harmful, but it remains inconclusive regarding how much intervention is necessary.

While the studies about the risk principle and dosage complicate our notion of effective treatment length, two other bodies of research point to human interaction, not time, as central to effectiveness. Studies of therapeutic intervention strongly suggest that the quality of the human interaction outweighs the importance of any particular protocol or approach.¹² The effect sizes for factors like goal consensus, empathy, alliance, and positive regard are significantly greater than, say, model fidelity, which is often linked to dosage. For example, most validated cognitive-behavioral interventions for criminal justice settings require a set number of treatment sessions.¹³ Ultimately, however, a robust therapeutic relationship is less a matter of dosage and more a matter of engagement.

Another relevant line of research suggests that the way people are treated in the courtroom can have significant bearing on whether they will comply with court orders in the present and the law in the future.¹⁴ Commonly referred to as “procedural justice” and popularized through the work of Yale law professor Tom Tyler, this research calls on judges and other practitioners to prioritize their interpersonal interactions.¹⁵ Although there is some variation, scholars typically define the experience of procedural justice as someone’s perception of five key elements: voice (the opportunity to tell your side of the story); respect (being treated with dignity); neutrality (decision-makers acting without bias); understanding (comprehending what is happening and the implications of the decision made); and helpfulness (having your personal needs and situation taken into account).¹⁶ Notably absent from this list is legal leverage or the judge’s ability to compel compliance with any particular conditions or programs. In other words, it is the quality of the interpersonal interaction, rather than the quantity of compulsory treatment, that correlates with the desired outcome.

Can these practices replace legal leverage, in whole or in part? To be sure, studies have found that court-mandated treatment outperforms voluntary treatment.¹⁷ But this literature fails to provide compelling answers in favor of leverage on two critical questions. First, how much leverage is required to yield positive benefits? There is little data suggesting that lengthy prison alternatives are necessary to ensure meaningful engagement in treatment. Second, if leverage is somehow reduced below its point of optimum efficacy, will court-supervised treatment fail, generally? Here, research suggests that treatment can still be effective by maximizing the use of evidence-based practices, such as by following the risk principle, building strong therapeutic relationships, and engaging in procedural justice. There is every reason to believe that high levels of leverage can be sacrificed as long as other key ingredients of good treatment are preserved.

Having leaned on the stick of incarceration for years, some practitioners are concerned to see that support weakening. But what if we never relied on the stick as much as we thought? The literature on risk, dosage, therapeutic relationships, and procedural justice supports the idea that court-supervised treatment can be just as effective with minimal legal leverage and, even more, that its effectiveness relies on factors largely unrelated to leverage.

The challenge for practitioners is to reorient their approaches and—to some extent—their models, embracing the idea that less is often more and that positive interactions, rather than length of intervention, may be the key variable in the crime-reduction calculus. At the same time, researchers should continue to suss out the mechanisms for effective short-term intervention and how, for example, a small dose of supervised treatment might be an effective conduit to a longer course of entirely voluntary treatment. This includes more research into variations on the traditional treatment court model, such as pre-plea participation, the absence of punitive sanctions for non-compliance, and a more holistic conception of intervention itself.

Endnotes

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² Sherry Klein Heitler, *New York Courts Respond to the Opioid Epidemic*, New York State Bar Association Journal. (2018) Retrieved January 20, 2020 from https://www.nysba.org/Journal/2018/Dec/New_York_Courts_Respond_to_the_Opioid_Epidemic/.

³ Mike Rempel and Krystal Rodríguez, *Bail Reform in New York: Legislative Provisions and Implications for New York City*, Center for Court Innovation. (2019).

⁴ Christopher T Lowenkamp, Edward J. Latessa, & Alexander M. Holsinger, *The Risk Principle in Action*, 52:1, *Crime & Delinquency*. 77, (2006).

⁵ Christopher T Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, *Topics in Community Corrections*. 3, (2004).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Lowenkamp, Latessa, & Holsinger, *The Risk Principle in Action*.

⁹ Madeline M. Carter & Hon. Richard J. Sankovitz, *Dosage Probation: Rethinking the Structure of Probation Sentences*, *Center for Effective Public Policy*. (2014).

¹⁰ Kimberly Gentry Sperber & Christopher T. Lowenkamp, *Dosage is more than just counting program hours: The importance of role-playing in treatment outcomes*, 56:7, *Journal of Offender Rehabilitation*. 433, (2017).

¹¹ Michael T. Baglivio, Kevin T. Wolff, James C. Howell, Katherine Jackowski, & Mark A. Greenwald, *The Search for the Holy Grail*, 55, *Journal of Criminal Justice*. 46 (2018).

¹² Bruce Wampold, *How Important are the Common Factors in Psychotherapy? An Update*, 14:3, *World Psychiatry*. 270, (2015).

¹³ For example, Jack Bush, Barry Glick, & Juliana Taymans, *Thinking for a Change Integrated Cognitive Behavior Change Program*, (1997).

¹⁴ A. Z. Huq, T. R. Tyler, & S. J. Schulhofer, *Why Does the Public Cooperate with Law Enforcement? The Influence of the Purposes and Targets of Policing*, 17:3 *Psychology, Public Policy, and Law*, 419 (2011).

¹⁵ T.R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of their Courtroom Experience*, 18:1, *Law and Society Review*. 51, (1984).

¹⁶ T. R. Tyler, *Why People Obey the Law*. Yale University. (1990). S. M. Frazer. *The Impact of the Community Court Model on Defendant Perceptions of Fairness*, Center for Court Innovation (2006). D. Malangone, *Integrating Procedural Justice in Domestic Violence Cases: a Practice Guide*, Center for Court Innovation (2017).

¹⁷ See, e.g., G. De Leon, *Legal Pressure in Therapeutic Communities*, 18:4, *Journal of Drug Issues*, 625 (1988). M. Hiller, K. Knight, and D. D. Simpson, *Legal Pressure and Treatment Retention in a National Sample of Long-Term Residential Programs*, 25:4 *Criminal Justice and Behavior*. 463 (1998); D. Young and S. Belenko, S., *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, 22:2, *Journal of Drug Issues*. 297 (2002). S. B. Rossman, J. Roman, J. M. Zweig, M. Rempel, & C. Lindquist, *NIJ's Multi-Site Adult Drug Court Evaluation*, The Urban Institute. (2011).