

Mental Health and the Judiciary: Can Mental Health Court Dockets Increase Peace or Will They Perpetuate Harm?

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Abstract

Mental health courts are a growing initiative to better address individuals with mental illness who are accused of criminal offending. These dockets aim to divert individuals away from incarceration and into community-based treatment programming with the potential for criminal charges to eventually be reduced or dropped. They were largely built off the foundation of drug courts, yet they operate in unique ways, and more research is needed on their operations and impact. In this study, I conducted content analysis of state and local level publicly accessible government documents that detail the structure and operation of behavioral health and therapeutic court dockets in Virginia. With this foundational analysis completed, I then analyzed these dockets through a peacemaking criminology framework and a prison abolition framework. Through these analyses, I sought to answer: 1) How can mental health courts bring more love, forgiveness, and peacemaking into the criminal justice system? 2) How do these dockets align with prison abolition efforts? The results indicate a clear ability for the dockets to increase peacemaking in the criminal justice system. They also represent a pragmatic reform effort that can move the system toward abolition, but this path is not as evident and direct.

Keywords: Mental health; adjudication; diversion; peacemaking; abolition; qualitative

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Introduction

The intersection of mental health and the criminal justice system is a growing concern. Individuals with mental illness are disproportionately represented in American prisons and jails. It is estimated that over half of individuals in state prisons have a mental health challenge (Wang 2022). Despite this over-representation, only about a third of individuals with psychological distress in carceral facilities receive care (Sawyer 2017). Scholars have described the experience of these individuals by comparing it to a 'revolving door'. They are processed through the criminal justice system, do not receive treatment for their underlying mental health

issues, and are released into their community with little support. This increases the likelihood they come into contact with the system again in the future (Anestis and Carbonell 2014). Given the high rate of individuals with mental illness encountering the legal system and their increased recidivism risks, practitioners have explored alternative methods to address this issue.

Localities have searched for places where they can effectively divert individuals with mental health issues away from the criminal justice system into community-based treatment. Sequential intercept models¹ give localities a blueprint to identify where

¹ Sequential intercept models visually map out how individuals with mental illness and substance use disorders come into contact with and are processed through, the criminal justice system. They provide an opportunity for local leaders and service providers to identify where individuals can be diverted away from the criminal justice system into community-based treatment (SAMHSA 2024).

gaps in community resources exist, and how individuals can be diverted into treatment as opposed to being processed further into the system (Munetz and Griffin 2006). The judiciary represents a point of intercept, and many localities have created mental health courts in response. These court dockets represent a new version of problem-solving courts, and they specifically aim to divert individuals away from potential carceral punishment, into community-based mental health treatment programs (Castellano and Anderson 2013). Upon completion of mental health court, the criminal charges that brought that individual into the system are typically dismissed, reduced or the sentence is deferred (Griffin, Steadman, and Petrila 2002). The prevalence of these courts has increased in recent years, and the academic scholarship focused on them is still growing.

Given that these court dockets represent a reform initiative within the criminal justice system, it is important to analyze them to determine their role and potential impact. Peacemaking criminology provides a theoretical framework through which we can analyze if reform initiatives move us toward a less violent system that promotes peacemaking (Pepinsky and Quinney 1991). Prison abolition frameworks, on the other hand, help us determine if reform initiatives are helping a violent system operate more efficiently and effectively or if it is moving us toward less reliance on the harmful carceral system (Mathiesen 1974).

In this article, I analyze the extent to which mental health courts in Virginia align with peacemaking criminology and prison abolition models. In the following sections, I first summarize the existing empirical literature on mental health courts and describe peacemaking criminology and prison abolition frameworks. I then detail the qualitative methodological approach used to determine how Virginia mental health courts are structured and aim to operate, and how they align and do not align with peacemaking criminology and prison abolition. The article concludes with a description of the implications of the results, as well as the limitations of the study and the future research needed.

Literature Review

Empirical and Theoretical Background

There is an existing body of scholarly literature focused on mental health diversion courts, but it is still in its early stages. At the same time, the implementation, and push for implementation, of mental health courts has grown in recent decades (Rossman et al. 2012). States have produced

guidelines for localities that want to implement these courts; however, the dockets tend to vary widely across localities (Hughes and Peak 2012). For example, Virginia produced a publicly available document detailing the standards for localities to follow as they implement and/or adjust their mental health dockets. This document lists broad guidelines regarding the goals, administration, team composition, eligibility criteria, structure, treatment services, and evaluation of successful mental health courts. It also details the need for voluntary and informed participation, the use of advisory committees, the use of evidence-based practices, the way to handle participant compliance and noncompliance, how to maintain confidentiality, and the importance of education of docket teams regarding medical and social science research (Behavioral Health Dockets 2024). This guidance is broad and leaves room for localities to structure and operate their dockets uniquely, while still following the universal guidelines.

Research on Mental Health Courts

Mental health courts exist within the larger umbrella of problem-solving courts. Problem-solving courts understand offending is connected to issues in individuals' lives. They divert individuals away from processing and sentencing into community-based treatment that can address those issues (Castellano and Anderson 2013). Mental health courts aim to reduce recidivism rates among individuals with serious mental illness and divert them away from the criminal justice system (Hughes and Peak 2012). This diversion approach is similar to drug courts, another type of problem-solving court that has received far more attention in the scholarly literature (Rossman et al. 2012). Unlike traditional courts, mental health courts aim not to be adversarial (Boothroyd et al. 2003). They use a team approach to make decisions about individual cases, provide participants rewards for compliance, and punish violations (Hughes and Peak 2012). They rarely use jail as a sanction for treatment program nonadherence (Griffin et al. 2002). Mental health court team members meet regularly to leverage court power to encourage continued engagement with treatment resources and services (Hughes and Peak 2012). Disposition of criminal charges varies by dockets, with some localities pre-adjudicating suspension of the prosecution of the charges, while others suspend sentence post-plea, and others use probation (Griffin et al. 2002). Since mental health courts vary by locality (Erickson, Campbell, and Lamberti 2006), researchers began assessing their impact at the local level.

Early research on mental health courts focused on how participants fared post-completion of local dockets. Trupin and Richards (2003) found positive impacts of Seattle mental health courts, while Cosden and colleagues (2003) found reduced criminal activity among individuals enrolled in a mental health treatment court compared to those who were treated as usual. Moore and Hiday (2006) found mental health court participants, and completers, had lower arrest rates and less severe arrests. Steadman and colleagues (2011) found mental health court graduates had lower rearrest rates when compared to individuals who began but did not complete the program, as well as fewer days in incarceration when compared to individuals who received treatment as usual. Rossman and colleagues (2012) found support for positive outcomes in the Bronx and Brooklyn mental health court programs. In more recent years, Hiday, Ray, and Wales (2015) found that mental health court completers had fewer arrests in a two-year recidivism study when compared to participants who did not complete the mental health court program. Yuan and Capriotti (2019) found recidivism rates were lowered among mental health court participants in Sacramento.

Encouraging patterns have emerged in the mental health court literature. A systematic analysis of the existing literature on mental health courts found that these courts have consistently helped lead to a reduction in recidivism. It also found that the risk of rearrests is likely to be reduced if individuals have access to vocational and housing services, as well as mental health case managers (Loong et al. 2019). Fox and colleagues (2021) conducted a meta-analysis more recently and found a sizable reduction in recidivism risk among mental health court participants. While the body of literature focused on mental health courts is still growing, early indications are positive for their ability to reduce recidivism risk among individuals with mental illness.

Peacemaking Criminology

Peacemaking criminology can provide a lens by which to analyze the ability of mental health courts to promote peaceful conflict resolution. The peacemaking framework is a relatively new area of criminology that is housed within the larger body of positive criminological scholarship.² Peacemaking criminology represents one of the models that believes the criminal justice system can be remade to emphasize positive forces to help victims, offenders,

and their communities (Ronel and Elisha 2020). Specifically, peacemaking criminology begins with the notion that suffering is a consistent component of individuals' lives and that crime represents an expression of suffering. A nonviolent criminology can end suffering and crime through a focus on love, compassion, and empathy (Pepinsky and Quinney 1991). The peacemaking criminology model argues that through individual-level transformations, peacemaking practices can be fostered, and this can lead to broader-scale changes (Trombley 2019). Translating these ideas into practice often aligns with restorative justice approaches. In fact, Pepinsky (2013) indicated that restorative justice programs and practices provide an opportunity for peacemaking to be implemented in practice.

The notion of moving the criminal justice system toward nonviolence, as well as seeking to reduce and end suffering and crime, are lofty goals that can be difficult to translate into practice. Fuller and Wozniak's (2008) peacemaking pyramid helped shape the forthcoming analysis of how mental health courts align, or do not align, with this school of criminological thought. This pyramid brings together the various strains of peacemaking criminology and includes six concepts:

- 1) Nonviolence: The criminal justice system should not perpetuate violence.
- 2) Social justice: The absence of violence does not guarantee a just world.
- 3) Inclusion: Individuals intimately involved in cases should be included.
- 4) Correct means: The system must arrive at its conclusion ethically and morally.
- 5) Ascertainable criteria: Educational outreach should help victims and offenders navigate the system.
- 6) Categorical imperative: Cases should be treated the same no matter social factors.

The judiciary represents a key cog in building the carceral system during the era of mass incarceration (Pfaff 2017). Today, over 1.9 million people are behind bars across local, state, and federal facilities (Sawyer and Wagner 2024). The carceral system is inherently violent and alternatives are needed to better serve individuals and communities impacted by the system (Edgar, O'Donnell, and Martin 2002). Can alternative court models foster a more peaceful, harm-reducing criminal justice process? Can they effectively focus on, and shape, the long-term transformation of the individuals being accused of

² Positive criminology encompasses several criminological theories and models. It focuses on the positive forces that help individuals at risk of offending, or individuals that have been punished by the criminal justice system, from offending in the future. It is juxtaposed against criminological theories and models that only focus on criminogenic needs and risk factors (Ronel and Elisha 2020).

criminal offenses? Can they restore the suffering felt by victims? Pepinsky (2013) noted that peacemaking criminological frameworks had been used to explain an array of theories and programs believed to be positive and not punitive, and he cited alternative courts as one such program. Wozniak (2002) wrote that peacemaking criminologists did not think that courts had to be adversarial and could instead focus on conflict resolution and embrace a restorative justice philosophy. This indicates preliminary consideration of alternative or non-traditional courts' potential to reduce harm and suffering but further analysis is needed.

Prison Abolition

If judiciary reforms of this nature create more peace and less suffering, do they also move the system toward abolitionist goals? While there are various abolition movements surrounding the criminal justice system, this analysis will utilize a prison abolition framework. Since the courts are the gateway to the carceral system, the adjudication process is directly linked to incarceration. Thus, the prison abolition framework provides the best foundation through which to analyze alternative courts, when compared to other movements such as police abolition. Abolitionists argue that prisons are a form of violence in which individuals are forcibly removed from their communities and put in a facility that controls their bodies (Martinot 2014). They also argue that incarceration always harms society (Bagaric, Hunter, and Svilar 2021). Incarceration, and processes that lead to incarceration, do not address underlying harms, such as addiction, mental illness, and interpersonal violence (McLeod 2015). In practice, prison abolition involves three pillars: 1) ceasing the construction of prisons; 2) decarceration to reduce carceral populations; 3) excarceration to move away from the reliance on incarceration in the future (Knopp et al. 1976). These pillars represent broad guidelines to practice and evaluate abolitionist goals.

There are several ways in which the lofty goals of abolition can be pursued. Restorative justice is a commonly used model for reforms to show how individuals, especially those many of which are deemed dangerous, would be addressed in a post-prison world (Bagaric, Hunter, and Svilar 2021). Abolitionist leader Ruth Wilson Gilmore focused on the need to build support systems in communities so that people have access to the resources they need and their likelihood of interacting with the criminal system is decreased (Kushner 2019). In fact, the public money saved by reducing the carceral system could be reinvested into community resources such as schools and health care. Another step toward abolition

involves rethinking what constitutes a crime (Bagaric, Hunter, and Svilar 2021). As more acts are re-defined as non-criminal, it reduces the opportunities for individuals to be processed into the justice system.

Given that leaders recognize that abolition will not be achieved overnight, pragmatic reform efforts offer a pathway of gradual steps toward the end goal. Even abolitionist leaders like Angela Davis (2003) recognized that reforms are necessary as abolition is pursued. For example, pragmatic, short-term reforms that reduce the number of incarcerated individuals, such as jail diversion initiatives, can fit within the longer-term goal of abolition (Knopp et al. 1976). However, there is a potential for prison reform to be co-opted. In fact, some abolitionists are concerned that gradual, more pragmatic reform will grow the prison-industrial complex and undermine abolitionist goals (Ben-Moshe 2013). The tension between reform and abolition can be seen in debates regarding mental health services in prisons. Some abolitionists argue that developing mental health services in prisons will further criminalize individuals, predominantly women with mental health issues. At the same time, the funds being used to design these programs in prisons could be used to build mental health programs outside of the carceral system in communities (Ben-Moshe 2013). This shows a potentially thin line between abolition and reform.

Scholars have provided examples of when reform efforts either align or contradict with abolitionist efforts. Mathiesen (1974) described that criminal justice reform can be done in a 'positive' manner where the reform helps the system operate more effectively. Net widening initiatives, such as electronic monitoring, represent an example of 'positive' reform (Kantorowicz-Reznichenko, 2013; Mathiesen, 1974). On the other hand, Mathiesen (1974) argued that reform could be done in a 'negative' way, in which the need for certain elements of the system is reduced or no longer exists. An example would be an initiative in Pennsylvania where vouchers for housing, drug treatment, or other services were given to individuals on parole. This connected them to community resources and could reduce recidivism risks (Keller, 2019). The recidivism reduction would lead to less need for continuing community monitoring by parole officers, as well as a reduced need for incarceration.

In order to determine the extent to which mental health court dockets align with abolitionist models, a framework for the analysis is needed. Lamusse (2022) built such a framework. The Lamusse (2022) framework consists of five pillars:

- 1) Any negative impacts of alternatives must not be more damaging for society than the current criminal justice system.

- 2) Alternatives must do a better job of identifying, recognizing, and addressing harms experienced by victims.
- 3) The new system must improve life for everyone, including communities that are currently over-criminalized and disproportionately victimized.
- 4) Alternatives should reduce social harm and violence.
- 5) Alternatives cannot create new forms of oppression.

It is important, however, to note that some abolitionists question the ability of the courts to reform in a manner that aligns with abolition. Martinot (2014) argued that the judicial process represents a revenge ethic where individuals found guilty have to 'pay' for their offending, which contradicts abolition efforts. With that caveat considered, the present paper will use Lamusse's (2022) framework to analyze how mental health dockets align, or do not align, with abolitionist models.

The Present Analysis

There are several state guidelines regarding how mental health courts should operate and how they should be structured, monitored, and evaluated. The behavioral health court guidelines in Virginia are broad and provide room for localities to take varying approaches (Behavioral Health Dockets). It is important to note that mental health courts are called behavioral health and/or therapeutic court dockets in Virginia. This can give local officials the flexibility to best address unique challenges among their population of interest; however, variation can lead to issues, such as gender and ethnic biases in the case referral and selection process (Hughes and Peak 2012). While research appears to show a connection between mental health courts and reduced recidivism risks (Fox et al. 2021; Loong et al. 2019), debate exists regarding whether courts that mandate treatment engagement are a violation of civil liberties (Hughes and Peak 2012). In addition, while these courts have been found to increase defendants' access to mental health services, participants have little control over the type and quality of services that defendants receive (Boothroyd et al. 2005). This study aims to expand on the growing body of mental health scholarship by answering the following questions: 1) How can mental health courts bring more love and forgiveness in line with peacemaking criminology efforts? 2) How can mental health courts' mission and operation align with prison abolition efforts?

Methodology

To address the gap in the literature, a qualitative analysis was conducted. Qualitative research can be used to analyze public policy and general governing guidelines, as well as the context and process in which policies are implemented (Maxwell 2020). In this study, content analysis was conducted of behavioral health and therapeutic docket policies in Virginia. These policies dictate the structure and operation of each docket, the composition of docket teams, and the inclusion and exclusion criteria for potential participants, among other areas. The qualitative data was collected from documents on local and state government websites, which are a common outlet used by government officials to post information regarding policies for local entities, such as behavioral health court dockets. The specific policy documents that were publicly accessible varied by locality. In some localities, they provided handouts to mental health court participants regarding the overall rules and regulations of the court. Other localities posted documents regarding the courts' general operating procedures that were intended for the public. State-level documents collected included general guidelines, resources, and standards produced for all courts in Virginia. This produced a base of information regarding how each individual court in Virginia operates, which provided insight into the similarities and differences across localities. Statewide documents helped inform the analysis because they provided information regarding the general standards that all courts must follow to be state-compliant, as well as the recommendations they are receiving from state leadership.

Virginia provides a solid foundation for an analysis of mental health courts and their role in increasing peacemaking and/or abolition efforts. There are currently 19 behavioral health or therapeutic courts across Virginia that are located in general district, circuit, and juvenile and domestic relations courts. They represent all major geographical regions of Virginia and serve urban, rural, and suburban localities. These localities also range in population size and serve varying amounts of individuals in their court systems daily. This provides an adequate basis for the analysis because the dockets are different sizes, they serve localities facing different challenges, and they serve diverse populations. It is also likely that the dockets include criminal justice, government, and other officials shaping them that have different lived experiences and come from varying political perspectives.

The analysis took part in multiple stages. Once the state and local behavioral health and therapeutic court docket policy documents were gathered, they were

analyzed to determine the consistent policies across localities. The analysis also identified policies that varied. These consistent and varied policies were then analyzed through a directed content analysis technique to determine how they align, or do not align, with peacemaking and prison abolition criminological models. Directed content analysis was appropriate because the existing peacemaking and prison abolition theoretical frameworks were used to begin the coding process (Hsieh and Shannon 2005). Once the consistent, and unique, policies across localities were identified and documented, they were first analyzed to determine how closely they aligned, or did not align, with each element of Fuller and Wozniak's (2008) peacemaking pyramid. They were then analyzed to determine how closely they aligned, or did not align, with each tenet of Lamusse's (2022) abolition framework. The implications of these results were explored, while also identifying the limitations and future research needed.

Results

The following results are organized along thematic lines. Each subsection details the most consistent and varied elements of the behavioral health and therapeutic dockets. It then details the analysis regarding how those elements align with or contradict peacemaking and abolition frameworks. The peacemaking analysis was largely guided by Fuller and Wozniak's (2008) peacemaking pyramid. The abolition analysis was largely guided by Lamusse's (2022) five pillars of abolition framework.

Articulated Goals

According to the 2023 Virginia Behavioral Health Dockets Annual report, mental health courts aim to integrate treatment services with the criminal justice system and improve public safety. It specifically states that the dockets slow the 'revolving door' by addressing the underlying issues that contribute to participants' criminal behavior and improving outcomes for victims, defendants, and communities. They claim to do this by connecting justice-involved individuals to substance abuse and mental health treatment services in the community with the potential for criminal charges to be dismissed and/or reduced (Supreme Court of Virginia 2023). Both the Virginia standards for behavioral health dockets document (2024) and the annual report (2023) state that these dockets can reduce recidivism by better addressing individuals with behavioral health issues, as well as co-occurring disorders. They also state that the dockets benefit the individual going through the process, as well as the larger society.

The articulated vision and goals for behavioral health dockets clearly align with peacemaking criminological models. Diverting individuals away from incarceration arguably reduces their potential suffering (Edgar et al. 2002). Providing access to substance abuse and mental health services can also reduce suffering (Bahr, Masters, and Taylor 2012), especially for those individuals that were previously unable to access some, or all, of these services. One thing to note is the written vision and goals contained in the Behavioral Health Documents (2024) do not contain a clear account of restoring the harm and suffering felt by the individual victim impacted by a criminal offense. In other words, the Behavioral Health Documents gathered prioritize attention on the criminal offender, leaving the victim's perspective unaddressed.

While the stated goals of mental health court somewhat align with peacemaking tenants, it does not align as clearly with prison abolition tenants. On one hand, the goal of diversion clearly aligns with decarceration, a core tenet of prison abolition. It also reduces harm and violence felt by defendants and improves their lives and those close to them. On the other hand, diverting individuals into this specialized court docket means there is more space and time for the traditional court docket to process other cases. This could result in more cases being heard by a judge, rather than being dismissed. The increased jail and prison space could also be used for keeping individuals pre-trial and/or sentencing individuals to jail or prison time that may have been placed on some type of community supervision. These scenarios are not a guaranteed outcome; however, abolitionists warn of the potential for reforms of this nature to help the inherently harmful, violent system run more efficiently and create more suffering.

Docket Eligibility

The eligibility criteria for behavioral health court participation are largely consistent across localities. The mere fact that the eligibility criteria are clearly stated and available aligns with the categorical imperative of peacemaking criminology (Lamusse 2022). The clear eligibility criteria can prevent individuals from being excluded from docket participation for reasons not related to their mental illness diagnosis and/or criminal charges. However, a common practice is that the commonwealth attorney decides who is included and excluded from mental health court. Because mental health courts require that participants be referred for consideration, this may leave some potential participants at a disadvantage in that the individuals themselves and/or their attorneys may have to petition the court for participation. By

introducing these subjective decisions, there is potential that the categorical imperative tenant of the peacemaking pyramid (Lamuse 2022) could be violated, and individuals could be excluded for reasons not related to their mental illness diagnosis and/or criminal charges. Eligibility criteria can then align with peacemaking criminological models or violate them due to personal and structural biases regarding docket admission decisions.

Prison abolitionists are likely to be concerned with many, if not all, of the exclusionary criteria laid out by the Behavioral Health Documents (2024). The most consistent exclusion criteria involved individuals with current, or past, charges related to violence or sexual offenses. These are individuals most likely to face harsher punishments and serve longer amounts of time in the carceral system. Their exclusion is particularly concerning given that most individuals currently incarcerated in state prisons were charged with violent offenses (Sawyer and Wagner 2024). The notion that these criteria prevent dangerous individuals from remaining in their community is also undermined by the fact that recidivism rates for individuals who served time for sexual and violent offenses are lower than for individuals who served time for public order, drug, or property offenses (Sawyer 2019).

The fact that ‘nonviolent’ individuals are being diverted into community programs gives the courts more space and time to process cases of individuals charged with violent and/or sexual offenses. This also leads to more space in jails and prisons to house these individuals, and potentially house them longer, which is counterproductive for prison abolition goals. Also, if the goal of these dockets is to address underlying mental health factors related to individuals’ offending, and it is determined that a violent and/or sexual offense is attributable to a serious mental illness, the exclusionary criteria would appear counterproductive to overall goals of mental health court. Also, the mere notion of practicing decarceration for some but not all solidifies the idea that prison is necessary for some individuals and some types of offenses, and this idea clashes with a prison abolition model.

It is also important to note for sexual assaults especially, most victims do not report to law enforcement (RAINN 2024). The majority of these offenses occur between individuals who know each other and/or have some type of relationship (Jones et al. 2004). One of the many reasons victims do not report to law enforcement is that they may not want potential criminal justice punishment for the offender, who often, is somebody with whom they have a current or prior connection (RAINN 2024). This binary approach to justice denies these victims the ability to seek a more nuanced form of justice that they

may desire. In theory, diversionary courts could provide victims another option, where the offender is mandated to engage in various types of treatment to address underlying issues and be held accountable for the harm caused without having to serve jail or prison time. However, including these offenses in the exclusionary criteria reaffirms the notion that these offenses must be processed and punished within the traditional system of justice that operates under the binary options of guilty or innocent and punishment or not. This can also contradict abolitionists' efforts for different, and more restorative, types of justice that encourage victims to come forward without having to fear that the system will then proceed without their input.

Lastly, some dockets, but not all, include driving under the influence (DUI) charges as exclusionary. Again, such exclusion is concerning given that much of the treatment programming for participants involves addressing co-occurring disorders of mental health and substance abuse (Gallagher et al. 2018; Peters et al. 2012). If an individual is diagnosed with a serious mental illness and is being charged with driving under the influence of alcohol or other substances, diversionary programming could be ideal. Processing these cases as usual through the traditional adjudication system would fail to address the underlying reasons why that individual was arrested and charged.

The exclusionary criteria, in short, create the potential for mental health courts to be a reform effort that does not align with, and could undermine, abolitionist efforts. According to Lamuse’s (2022) pillars of abolition, a reform effort should improve the lives of victims and offenders. The exclusionary criteria violate this tenant of abolition. The lives of individuals, families, and communities impacted by non-violent and non-sexual offenses are improved. However, the lives of individuals, families, and communities impacted by violent and sexual offenses remain the same under this reform effort and are not improved. Also, there is a risk that new forms of oppression could be created with this reform effort, which would further violate Lamuse’s (2022) pillars of abolition. This would be the case if the traditional courts system were capable of handling more violent and sexual cases, and the carceral system had more space to house these individuals for punishment and/or pre-trial. This is especially concerning if charges that previously would have been plead down to a lower level are not given that opportunity with the freed-up space on traditional court dockets. With that being said, it is important to note that empirical analysis suggesting mental health courts is more damaging than the traditional court system because of these exclusionary criteria does not exist; however, scholars

have pointed out the need to monitor selection bias (e.g., Ray and Dollar 2014).

Voluntary Participation

The Behavioral Health Dockets (2024) explicitly stated that mental health court participation is voluntary. Before an individual joins the docket, they are instructed on the expectations of participation, what will happen with their charges upon completion, potential punishments if they do not follow their treatment programming, and so on. This clearly aligns with the ‘ascertainable criteria’ tenant of the peacemaking pyramid where educational outreach to help victims and offenders navigate the system is essential (Fuller and Wozniak 2008). The fact that most of the dockets have standardized the educational tools and handouts for participants, as opposed to communication only occurring through attorneys, helps them make an informed decision about whether they want to participate or not. This is especially important for individuals charged with lower-level crimes because they may end up serving more time in mental health court than they would on probation or in jail if they took a plea deal. It is also important to note that some courts specifically require victim approval before an individual can participate in the diversionary court.³ This would again align with the ‘ascertainable criteria’ tenant, given that educational outreach is being made to the victim. It would also align with the ‘inclusion’ tenant, given that victims are being included in the case and process (Fuller and Wozniak 2008). This voluntary participation model paired with educational outreach clearly aligns with a peacemaking model.

At first glance, the voluntary participation standard does not contradict prison abolition models, but abolitionists would question the extent to which participation is actually voluntary. Given the various power dynamics at play, complete voluntary participation is unlikely. Defendants are being offered treatment programming that is court-mandated, and failure to complete the program can result in incarceration. The looming threat of punishment for not fully cooperating with court-mandated programming undermines the potential voluntary nature of participation. It also begs the question of why treatment could not be provided on its own apart from the court system, a true diversion. The counter to this argument is the reality that many qualifying participants are charged with offenses that do not

typically carry lengthy punishment. Committing to a behavioral health treatment program and tying themselves to the court system for a longer period of time than if they accepted a plea deal, appears closer to being truly voluntary. It is important to note that while individual dockets’ guidelines stated length of the docket can vary based on individual circumstances, it was common for dockets to have three to four phases, each of which lasts about 90 days. Some dockets specifically stated that mental health court participation can last from one to two years.

Docket Operations- Pre- and Post- Plea

There was variance across Virginia’s mental health courts in terms of whether they operate a post-plea or pre-plea model. Variations boil down to whether participants must plead guilty before they enter the docket or whether participants enter the docket before they make a plea. For dockets that operate a post-plea model, defendants must first accept a plea deal before participation begins. The plea deal considers what participants will have to do while on the docket, and what happens to the charges if they complete, or do not complete, the program. For dockets that operate a pre-plea model, participants are made aware that if they do not complete the program, they will then be transferred to and processed through the traditional court system as normal, and any plea deal negotiations would have to be done without the opportunity to join the mental health court docket in the future. Across Virginia, dockets varied in terms of which model they used for their locality.

It is not clear which of these two models aligns more with peacemaking criminology. According to Fuller and Wozniak’s (2008) peacemaking criminology pyramid, it is important that reform efforts align with the ‘correct means’ principle, in that the conclusion is arrived at morally and ethically. On the one hand, plea deals themselves can be viewed as unethical when considering the power dynamics that prosecutors can use to tilt the scales and make a plea feel almost mandatory. This unbalanced power dynamic could lead to an unethical process where defendants feel pressured to take a plea deal and enter the program, in the post-plea model. On the other hand, a pre-deal model could heighten the likelihood that a failed attempt to complete the program will influence any plea deal offerings. This could result in the individual receiving a harsher punishment than if they were to have just taken a plea deal and not

³ In these cases, the individual who is the victim of the crime, if there is a victim, must approve of the defendant participating in the behavioral court docket. While the state represents the victim legally, the commonwealth attorney asks the victim if they approve of the defendant participating on the docket. If that victim does not agree, the case will proceed as normal without diversion.

attempted the program. Without diversion as an alternative, defense attorneys may have less leverage in plea deal negotiations, resulting in a worse outcome for their clients. There is also the possibility for the court to see the failed attempt on the behavioral health docket as a reason why incarceration is necessary instead of community-based punishments. There is also the potential for plea deals to violate Fuller and Wozniak's (2008) 'categorical imperative' tenant and treat individuals differently based on social or demographic factors. In short, then, pre- or post-plea models do not necessarily contradict peacemaking approaches on their face but could violate peacemaking tenants if the plea deals are done unethically, in a biased manner, and/or result in harsher punishments for individuals that try but fail to complete the program.

Prison abolition models would highlight the aforementioned power dynamics that exist in plea deals before or after entering mental health court. Prosecutors will always have more power in these negotiations, especially during the era of mass incarceration where the threat of lengthy sentences and mandatory minimums are readily available. Even for the individuals who complete the program and do not serve jail or prison time, they must operate under state supervision for a lengthy time period as they complete the court-ordered treatment plan. There is also the risk that charges are not dropped, but merely reduced, which would still burden those individuals with a criminal record going forward, even if that record was lighter in terms of types and numbers of charges. These power dynamics issues, as well as the reality that state monitoring continues throughout docket participation, pose the question of whether this alternative is less damaging than the status quo and if harms and oppressions related to the carceral system are being reduced by the dockets (Lamusse 2022).

Docket Operations – Team Members

Mental health courts in Virginia largely assembled their teams in a similar manner. The positions most commonly present on the teams are docket coordinators, judges, commonwealth attorneys, mental health experts from community service boards, public defenders, and an official representative from probation, parole, or some other community corrections outlet. Other positions that appeared on teams included case managers, clinicians, social workers, community resource coordinators, reentry style coordinators, and peer recovery specialists dedicated to the mental health court dockets specifically.

The diverse array of professionals serving on docket teams helps them further align with

peacemaking criminology. The inclusion of individuals with varied backgrounds, education, training, and general lived experiences increases the likelihood that various perspectives are being included and decisions are made in an ethical manner, with biases being checked. These differing lived experiences also increase the likelihood that some team members are bringing heightened levels of empathy to the process. It also increases the likelihood that representatives on the team are directly in contact with participants, and potentially victims, to include them in the decisions made and the reasons for those decisions. This continues to align with Fuller and Wozniak's (2008) peacemaking pyramid. It is important that in the general training and continuing education for docket members that they learn about the ways the criminal justice system is inherently violent and harmful. This will especially help docket participants who work for the criminal justice system understand the magnitude of its impact and the need for peaceful alternatives.

Prison abolition models would appreciate the inclusion of individuals on mental health teams who are not employees of the criminal justice system. However, a major concern would be the power dynamics within teams. Since many courts specifically state that a criterion for docket inclusion is the approval of the commonwealth attorney, it is already evident that the state holds a great deal of leverage. There would also be concern regarding whether the judge is an equal member or also wields more power when making crucial decisions. In fact, existing research demonstrates that judges in alternative court settings hold more leverage in the participants' eyes than other mental health team members (e.g., Dollar, et al., 2018; Ray and Dollar 2018). This could vary by docket, but it is likely that a judge has one vote on docket matters, but their opinions hold disproportionate power. However, representation from individuals outside of the criminal justice system will likely help docket teams do a better job identifying and addressing harm experienced by victims, as well as determining how to improve the lives of participants and their communities. This can help reduce the social harm and oppression in the justice system, all of which aligns with Lamusse's (2022) abolition pillars.

Docket Operations – Handling Success and Failure

The way in which mental health courts approach the success and failure of participants is unique when compared to the traditional court system. Mental health courts established an array of rewards for participants as they progressed through the treatment plan. This includes, among other things, gift cards, progressing to new phases with less frequent court

appearances, and graduation celebrations. Common punishments for violations, such as missing mandated appointments and failing drug or alcohol tests, started with things like verbal warnings, mandated writing to reflect upon the failure, and community service. Punishments escalated based on the amount and/or severity of violations to things like being demoted a phase, more frequent reporting and drug or alcohol tests, a short term of jail punishment, and eventual expulsion from the docket.

The fact that there is such an array of rewards and punishments speaks to the unique nature of these court dockets and their peacemaking potential. The simple notion of bringing rewards and celebrations into courts that are historically focused on determining guilt or innocence creates a more peaceful system. In this instance, courts are being remade to be places where individuals are being celebrated for their hard work and the time being taken to address their underlying mental illness. Also, the fact that there are various types of accountability responses, with incarceration appearing to be used only as a tool of last resort, aligns with peacemaking approaches more than traditional court models. This speaks to the nonviolence element of Fuller and Wozniak's (2008) pyramid.

The rewards and punishment system provides more insight into courts' abolition potential and their limitations. The fact that individuals are being celebrated and rewarded by avoiding carceral punishment is clearly in line with abolition. The potential for criminal charges to be dropped upon completion also aligns with abolition models. However, the fact that incarceration is "hanging over participants' heads" as a potential punishment is not fully abolitionist. In a fully abolitionist approach, participants would be diverted into treatment without having to remain on court supervision. However, the approach of using incarceration as a tool of last resort does appear to align with Lamusse's (2022) pillars of being less damaging than the traditional process and thus improving the lives of docket participants and their loved ones. This is another example where parts of the docket approaches are moving toward abolition models, but they are not yet fully abolitionist.

Conclusion

It is evident that behavioral health dockets align with much of the peacemaking criminological models but do not fully represent a prison abolition model. This is normal considering that many abolitionists are pragmatic and recognize that short-term reform efforts can move us toward abolition but are not perfect examples of abolition in practice. In fact, McLeod (2015) made the argument that abolition is likely to be better received if it is viewed as a gradual process of

decarceration with corresponding reinvestments into social support systems. As long as the mental health courts help increase decarceration efforts and the money and time saved from participants being caught in the 'revolving door' are reinvested toward preventive community mental health, they can represent a pragmatic reform effort that does not contradict long-term abolitionist goals.

Behavioral health and therapeutic dockets in Virginia have the same overarching goal but take a mix of similar and varied approaches to achieve it. This goal is to use the power of the judiciary to divert individuals with mental illness away from incarceration into community-based treatment programs and reduce recidivism risks. The dockets are composed of team members from within, and outside of, the criminal justice system. This includes judges, commonwealth attorneys, community service board mental health professionals, and public defenders, among others. Localities set their exclusion criteria in a similar manner, typically preventing individuals charged with violent and sexual offenses from participating on the docket, and often relying on the commonwealth attorney to ultimately make the call on the charges they are willing to drop or reduce upon completion. The dockets provide a host of positive and negative incentives throughout docket participation, with incarceration typically used as a punishment tool of last resort. All of this represents a very different court process than is typical within the judiciary.

The alternative court process and potential outcomes for participants represent a clear move toward peacemaking, with a less clear but possible path toward abolition. According to Fuller and Wozniak's (2008) peacemaking pyramid, behavioral and therapeutic health dockets represent a move toward increased peace in several ways. First, the mental health courts can help promote nonviolence both by reducing potential suffering that a defendant may experience in jail or prison and by addressing their mental health issues, which may have prompted their criminal offense in the first place (e.g., Hiday and Burns 2010). They can create more social justice by giving individuals access to community-based care they previously typically could not access. They can increase inclusion, including family members of defendants, and victims, in the process. The courts typically have handouts and publicly accessible information to educate victims, offenders, and the community about how to navigate mental health court and what participation entails. It is important to note that participants reaching their conclusions ethically and morally relies on an analysis of these courts' practices, which is needed in future research. This is also the case to ensure the courts are not treating individuals differently based on social factors.

In terms of abolitionist frameworks, the dockets both align and do not align with Lamusse's (2022) five pillars of abolition. This diversionary court seems better able to take a restorative justice approach and identify and address harms experienced by victims. This typically does not happen in the court system, which opens in a binary nature of 'innocent' or guilty. This is especially the case for sexual assault survivors when considering that most victims do not report and for those victims that do report, the system does an inadequate job of meeting the needs of victims (Ilea 2018; RAINN 2024). The dockets improve the lives of individuals who complete the dockets and are likely to improve communities as individuals get the mental health care needed. These dockets can also reduce harm and violence without creating new forms of oppression. All of this aligns with a reform that can move us closer to abolition. However, abolitionists need to ensure that diversion for some does not increase adjudication and punishment for others. There are also various power dynamics at play in the docket teams and decision-making process, which can replicate existing issues in these new dockets. The fact that treatment is court-mandated and monitored also must be interrogated as this treatment could be accessed without the surveillance and threat of punishment from the judiciary. This all points toward cautionary encouragement for abolition, but more research is needed.

This analysis is important because the rate of individuals incarcerated with mental health issues has grown (EJI 2024). Traditional forms of court rulings and punishment are not addressing the underlying reasons that individuals are coming into contact with the legal system. Efforts to address this challenge in a different manner are important to analyze as they are likely to grow. Also, the reality that much of the criminal justice system is locally driven means that these innovative approaches will vary, especially when state standards are broad. Analyzes of this nature will help localities that want to take a new approach to address this challenge, and that want to move toward more peaceful alternatives. It will also assist prison abolition advocates in determining whether these alternative approaches should be included or excluded from their platforms.

This analysis, and its limitations, illuminate the need for further work on this topic. The analysis relied on publicly available docket guidelines and future research needs to determine any variance between what is in these docket guidelines and how they are actually being implemented and operated. The analysis was also limited to how the dockets align, and do not align, with peacemaking criminology and prison abolitionist models. The analysis regarding docket inclusion and exclusion criteria clearly paints a

path toward future research. Future research should analyze the specific types of charges that are most consistently being taken into mental health courts and the decision-making process for which specific cases and individuals to select. While these dockets are included in the larger umbrella of problem-solving dockets, they are unique from other alternative courts, like drug courts, which currently command most of the scholarly literature. Yet, mental health courts are likely to continue expanding in the coming years.

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