

# DRUGS, COURTS, AND THE NEW PENOLOGY

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## I. INTRODUCTION

Perhaps the most important judicial response to the War on Drugs<sup>1</sup> has been the creation of specialty “drug courts” designed to ameliorate the impact of drug sentencing policy on individual drug users.<sup>2</sup> The drug court’s central goal is to provide a safety valve for the cycle of incarceration-release-recidivism that filled prisons with low-level drug users rather than the dealers and distributors that primarily facilitated drug use in America. Their central methodology is to replace the parole officer with the judge as primary supervisor of each defendant’s treatment program,<sup>3</sup> so that the court takes responsibility for the “supervised referral of identified defendants into treatment.”<sup>4</sup> Drug courts work at the input-end of the incarceration cycle: they intervene to divert offenders to treatment before imprisonment. The goals and methodology are shared at the output-end of the cycle by reentry courts that operate to supervise prisoners on parole or supervised release upon their return to the community.<sup>5</sup>

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1. The only other judicial event of comparative significance is the Supreme Court’s recent decision to allow departures from the Federal Sentencing Guidelines. *Kimbrough v. United States*, 128 S. Ct. 558 (2007) (permitting federal courts to depart downwards from Sentencing Guidelines’ 100:1 crack-to-powder cocaine ratio where appropriate).

2. See, e.g., John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 942 (2000) (“[T]he emergence of the drug court model marks another milestone in the history of American drug control policy.”).

3. See, e.g., *Developments in the Law, Alternatives to Incarceration for Drug-Abusing Offenders*, 111 HARV. L. REV. 1898, 1918 (1998) (describing how judges assume roles traditionally played by probation officers to track progress of participants and administer system of rewards and sanctions *sua sponte*); see also Goldkamp, *supra* note 2, at 932-34 (discussing “the non-relevance of probation”).

4. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1210 (1998).

5. See Jeremy Travis, *But They All Came Back: Rethinking Prisoner Reentry*, 7 NAT’L INST. OF JUST. 1, 4-5 (2000).

The result is the rise of the “problem-solving court”<sup>6</sup> as the hub through which the criminal justice system organizes drug rehabilitation. Thanks to the success of the drug court model, judicial influence has massively expanded in the control of drug policy and social regulation. This judicial power has exploded at a *low level*: the level of state trial courts engaged with local communities, often located in struggling urban districts around the courthouse.<sup>7</sup> These courts aim to restructure the lives of individual addicts in the context of their wider community, and so often seek to include in the rehabilitation process not merely the addict, but also his or her family, friends, and “significant others.”<sup>8</sup>

Drug courts present tremendous opportunities for drug policy, and, in particular, for shaping the social norms that affect community responses to issues of addiction and incarceration. But drug courts also rest upon a series of controversial methodological assumptions underlying the selection of the court as the locus of treatment provision and management. The court’s methodology implicates political issues of coercion and freedom in ways that derive from and respond to some of the central policy problems underlying the interaction of race, poverty, and drugs in urban environments.

Few people have recognized that the drug court’s therapeutic methodology is not a repudiation of politics but one that takes sides by embracing a coercive version of justice based on a version of positive liberty.<sup>9</sup> In particular, the court’s rejection of due process in favor of treatment expresses the now-classic opposition between positive and negative liberty; that is, the freedom to be left alone and the freedom to “determine someone to be . . . this rather than that.”<sup>10</sup>

Most critics who oppose the drug court’s methodology simply call for a return to a courtroom practice centered around due process protections as a form of negative liberty to protect vulnerable defendants against intrusive state pow-

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6. See, e.g., Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003).

7. See, e.g., Boldt, *supra* note 4, at 1302 (discussing the likely over-representation of minorities in drug courts); Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897 (2003) (discussing problem-solving courts’ focus on “citizens and neighborhoods that suffer the everyday consequences of high crime levels”).

8. Philip Bean, *Drug Courts, the Judge, and the Rehabilitative Ideal*, in DRUG COURTS IN THEORY AND PRACTICE 235, 237 (James L. Nolan, Jr. ed., 2002) (“In some courts the offender’s ‘significant other’ . . . may participate in the program, again with no apparent regard for the rules of evidence or other procedural matters, including matters of jurisdiction where ‘significant others’ become subject to the same sanctions as the offenders.”).

9. One exception is Richard Boldt. See Boldt, *supra* note 4, at 1303 (rejecting apolitical nature of drug courts).

10. ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY 7 (1958).

er.<sup>11</sup> My goal is to suggest a third concept of freedom, one that emphasizes a mutual respect for members of the community as peers sharing diverse values.<sup>12</sup> That form of freedom can only emerge through non-coercive interaction in the public sphere through low-level political organizations.<sup>13</sup> This concept of liberty has its roots in the founding fathers' political debates in town halls,<sup>14</sup> a form of political structure that became concretized and constitutionalized in the institution of the grand jury. Accordingly, as an alternative to the current structure of drug courts, I propose both a more radical and a more natural structure for court-based drug rehabilitation: a grand jury model rather than a judicial one.

Adopting the grand jury structure replaces the hierarchical relation between judge, on the one hand, and community and offender, on the other, with a horizontal relationship between community, offender, and law enforcement. The grand jury model envisages a reciprocal relationship between the community, addicts, and service providers, in which those serving on these drug-dedicated grand juries would be educated about the range of problems faced by and resources available to the drug-addicted and would, in turn, educate service providers and law enforcement officials about community needs. Properly constituted, the grand jury may both supervise addicts within a rehabilitation program and redirect others out of the system or onto a more traditional form of court disposition.

In Part II, I provide a brief overview of the genesis of both drug and reentry courts to suggest that each arises from a concern that traditional courts were failing to address successfully the problem of drug use in predominantly poor, minority urban areas. In Part III, I argue that drug courts have turned to the race-neutral justification of therapeutic jurisprudence as a means of building bipartisan agreement through downplaying the racial impact of American drug policy over the past thirty years. The therapeutic methodology adopted by drug and reentry courts, however, cannot address one of the central aspects of urban drug use: those social features of urban drug use that have an economic and racial impact.

In Part IV, I suggest that a central feature of the therapeutic methodology is the drug and reentry courts' characterization of the offender as an individual in need of discipline, rather than medical help. Accordingly, the court embraces

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11. See, e.g., Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007) [hereinafter Quinn, *An RSVP*].

12. See, e.g., Hannah Arendt, *The Public and the Private Realm*, in THE PORTABLE HANNAH ARENDT 198 (Peter Baehr ed., 2000).

13. See Hannah Arendt, *The Revolutionary Tradition and Its Lost Treasure*, in THE PORTABLE HANNAH ARENDT 508, 555-56 (Peter Baehr ed., 2000).

14. See *id.*

the central expertise of the judicial office in the context of sentencing: dispensing punishment. We should thus understand the judicial rhetoric of “tough love”<sup>15</sup> literally, rather than metaphorically: the point of drug courts is discipline-as-treatment. When the court says treatment, it *means* discipline of individual offenders, rather than management of medical opportunities. Finally, in Part V, as a means of promoting the sort of community-centered treatment drug and reentry courts claim as their goal, I suggest that a proceeding used to determine how to treat individuals in the community should embrace the community’s existing method of representation in the criminal justice system, the grand jury, and replace the positive liberty aspect of therapeutic jurisprudence with a conception of political action based on participative democracy.<sup>16</sup>

## II. GENESIS OF DRUG AND REENTRY COURTS

The first drug court was founded in Dade County, Miami, in 1989;<sup>17</sup> soon after, another appeared in Oakland, California.<sup>18</sup> That each was established in an urban and predominantly minority jurisdiction is not accident.<sup>19</sup> By the end of the 1980s, the “War on Drugs” had become the primary cause of the increased rates of arrest, conviction, and incarceration of Americans generally,<sup>20</sup> and of racial minorities in urban environments in particular.<sup>21</sup> The initial drug

15. JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 53 (2001).

16. *See, e.g.*, ARCHON FUNG, *EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY* (2004).

17. *See* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454-55 (1999); Goldkamp, *supra* note 2, at 947; Morris B. Hoffman, *Commentary, The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1461 (2000) [hereinafter Hoffman, *Commentary*].

18. Brooke Bedrick & Jerome H. Skolnick, *From “Treatment” to “Justice” in Oakland, California*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 43 (W. Clinton Terry, III ed., 1999).

19. *See id.* at 43-76 (describing Oakland’s drug court program’s original concern with social costs of failed drug policies on African Americans).

20. Arrests of adults for drug abuse increased from 322,300 in 1970, to 471,200 in 1980, to 742,700 in 1986, to 1,008,300 in 1990, to 1,375,600 in 2000, and to 1,693,100 in 2006. *See* Bureau of Justice Statistics, *Key Facts at a Glance: Estimated arrests for drug abuse violations by age group, 1970-2006*, <http://www.ojp.gov/bjs/glance/tables/drug-tab.htm>. The number of arrests of adults for drug abuse was significantly greater than arrests for non-violent crimes like robbery, which ranged from 93,303 in 1995, to 54,032 in 2000, to 63,794 in 2005, to 70,396 in 2007. Arrest for drug abuse also outnumbered the arrests for larceny-theft, which ranged from 775,838 in 1995, to 538,359 in 2000, to 634,975 in 2005, to 667,789 in 2007. *See* FED. BUREAU OF INVESTIGATION, *CRIME IN THE UNITED STATES*, <http://www.fbi.gov/ucr/ucr.htm>.

21. MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA*

courts were conceived as a means of ameliorating the impact upon vulnerable communities suffering from closing factories, spiraling unemployment, increasing residential segregation,<sup>22</sup> underpolicing,<sup>23</sup> and drug addiction.

Drug prosecutions after the 1980s “utterly transformed law enforcement in [America],”<sup>24</sup> producing a “severity revolution” in penal policy<sup>25</sup> that targeted first drug dealing and then drug users. Most notorious among the provisions was the incredibly harsh punishment for possession of crack cocaine.<sup>26</sup> “Between 1986 and 1991, the number of white drug offenders in state prisons increased by 110 percent, but the number of Black drug offenders rose by 465 percent.”<sup>27</sup> By 1994, less than a decade after Congress enacted the Anti-Drug Abuse Act of 1986,<sup>28</sup> Michael Tonry was able to report that “[d]rug offense sentences are the single most important cause of the trebling of the national prison population since 1980.”<sup>29</sup>

The drug court was explicitly envisaged as a response to the proliferation of court caseloads and prison overcrowding resulting from the War on Drugs.<sup>30</sup>

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104-16 (1995). *See also* Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1485 (2000) (“The United States Public Health Service has estimated that in 1992 76% of illicit drug users were white, 14% were black, and 8% were Hispanic—figures that approximate the racial and ethnic composition of the United States. Yet African-Americans account for 35% of all drug arrests, 55% of all drug convictions, and 74% of all drug sentences.”).

22. *See* WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 25-50 (1996).

23. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006) (discussing the impact of discretion to not enforce the law on minority communities).

24. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 118, 132 (2001). *See also* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4231 (codified as amended at 21 U.S.C. § 801 (1988)).

25. *See generally* Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217 (2001) (providing an overview of the history of the punishment practice in politically and economically developed nations from a practice focused on humanity to a practice focused on severity).

26. CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* 193-94 (1996). *See also* Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 229 (1998) (comparing disparate sentencing of blacks and whites for possession of same weight of cocaine); Note, *supra* note 21, at 1485-1486 (“The dramatic increase in African-American incarcerations has resulted from congressional attempts to stop the devastating epidemic of crack cocaine.”).

27. Kendall Thomas, *Racial Justice: Moral Or Political?*, 17 NAT’L BLACK L.J. 222, 240 (2003). The increase occurred despite the fact that “[i]n 1992, the U.S. Public Health Service reported that 76 percent of the nation’s self-reported illicit drug users were white, 14 percent were black, and 8 percent were Hispanic.” *Id.*

28. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 102 Stat. 4231 (codified as amended at 21 U.S.C. § 801 (1988)).

29. Michael Tonry, *Toward a Rational Drug Policy: Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 26 (1994).

30. *See, e.g.*, NOLAN, *supra* note 15, at 44; Hora et al., *supra* note 17, at 456-57 (“The genesis of the DTC movement developed in response to the increasingly severe ‘War on

Drug court judges and practitioners regularly refer to the rates of drug crimes, arrests, and incarcerations as the primary justification for initiating drug court programs.<sup>31</sup> Two lines of argument predominate: that the failure to treat offenders properly does nothing to ameliorate the rate of drug abuse; and that the arrest and conviction rates for drug crime pose a range of managerial problems for an overloaded criminal justice system.<sup>32</sup> The drug court is a direct response to this failure. "The drug court strategy was conceived as an attempt to do something about the 'root cause' of involvement in crime . . . and as an alternative to processing cases faster with poor results."<sup>33</sup> In response, a growing cadre of judges has recognized that an alternative to traditional case processing methods was required to cope with drug cases.<sup>34</sup>

Drug courts are low-level and localized judicial responses to the incarcerative consequences of national drug policies.<sup>35</sup> The drug court transforms court practice to divert offenders from prison into treatment.<sup>36</sup> It rejects the traditional or adversarial model of courtroom practice that forces the judge into a passive role.<sup>37</sup> Rather, the judge's primary role shifts from the determination of

Drugs' crime policies enacted in the 1980s, coupled with the resulting explosion of drug-related cases that subsequently flooded the courts.").

31. See NOLAN, *supra* note 15, at 44-45 (quoting interviews with Judge Diane Strickland of Roanoke, Virginia; Judge Stanley Goldstein of Miami, Florida; NAACP President Jeffrey Tauber; and Judge Henry Weber of Louisville, Kentucky).

32. See *Developments in the Law*, *supra* note 3, at 1902-04; Sheila M. Murphy, *Drug Courts: An Effective, Efficient Weapon in the War on Drugs*, 85 ILL. B.J. 474, 475 (1997) ("incarceration of drug offenders has done little to stop them from using drugs or committing crimes once freed"). See, e.g., Hora et al., *supra* note 17, at 456-57.

33. Goldkamp, *supra* note 2, at 943.

34. See, e.g., William D. Hunter, *Feature, Drug Treatment Courts: An Innovative Approach to the Drug Problem in Louisiana*, 44 LA. B.J. 418 (1997); William P. Keesley, *Feature, Drug Courts*, S.C. LAWYER, Jul.-Aug. 1998, at 32; William D. Mccoll, *Comment, Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467 (1996); Murphy, *supra* note 32; Steven I. Platt, *Drug Court Experiment*, MD. B.J., Feb. 2001, at 44. See also NOLAN, *supra* note 15, at 42 ("In the case of the drug court movement . . . the major agents of change are . . . the judicial[ ] actors themselves. 'The Drug Court Movement . . . is essentially a judge-led movement.'") (quoting Phillip Bean, *America's Drug Courts: A New Development in Criminal Justice*, CRIM. L. REV. 718, 720 (1996)).

35. See Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 83-84 (2006) ("[I]t is unlikely that the proliferation of these unconventional courts has very much to do with the pronouncements of hubristic Justices on the Supreme Court. Instead, it seems clear that each is the product of a unique process of interaction among political, social, and institutional forces.").

36. See, e.g., James R. Brown, *Note, Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 90-91 (1997); Murphy, *supra* note 32, at 476.

37. "The [ ] [drug court] judges are not neutral factfinders; they actively direct the proceedings, track the progress of participants, and administer a system of rewards and sanctions sua sponte." *Developments in the Law*, *supra* note 3, at 1918. See also Boldt & Singer, *supra* note 35, at 83 (2006) ("[T]he judges who serve on these 'problem-solving' courts

guilt to the provision of therapeutic aid. The judge's dominant concern is to ensure the treatment and rehabilitation of the offender.<sup>38</sup> The court's procedure emphasizes self-knowledge and responsibility on the part of the offender and participation in various drug treatment programs, along with regular drug monitoring.

The drug court judge negotiates the drug treatment plan directly with the offender,<sup>39</sup> and no longer relies upon treatment proposals developed by a probation officer, subject to the prosecutor and defense counsel's arguments over their propriety for the particular defendant.<sup>40</sup> Instead, the drug court incorporates the rehabilitative model within the court system, with the judge at the helm. "[J]ustice and therapy are no longer separate enterprises. Instead, they are fully merged into the common endeavor of therapeutic justice."<sup>41</sup>

In drug court, the judge retains his authority to set the terms of treatment and directly regulates. The court, rather than treatment center, becomes the focal point of the treatment process. The other criminal justice system participants—prosecutor, defender, defendant—are required to adopt non-traditional roles:<sup>42</sup> rather than participating in an adversarial relation, they are supposed to form, along with the judge, a "treatment team"<sup>43</sup> dedicated to the rehabilitation of the drug-addicted defendant, rather than any determination of guilt or innocence.<sup>44</sup>

Although drug court utilizes treatment programs to enable the drug-addicted offender to overcome her addiction, incarceration remains a live option. The judge may intervene in the rehabilitation process to employ a variety

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have largely repudiated the classical virtues of restraint, disinterest, and modesty, replacing these features of the traditional judicial role with bold, engaged, action-oriented norms.").

38. See NOLAN, *supra* note 15, at 141-42 (suggesting the court replaces determination of guilt with therapeutic imperative).

39. See, e.g., Victoria Malkin, *The End of Welfare As We Know It: What Happens When the Judge Is in Charge*, 25 CRITIQUE OF ANTHROPOLOGY 361, 373-74, 379-80 (2005) (describing how judge negotiates with treatment team and directly with offender). See also Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1494 (2004) ("Over the course of his or her participation in drug court, each offender engages in an intense and direct interaction with the judge directed towards hold[ing] the defendant accountable for her actions during the course of treatment and reinforc[ing] one another in actions taken to ensure that the defendant stays in treatment whenever possible and appropriate.") (citations and quotation marks omitted) [hereinafter Miller, *Embracing Addiction*].

40. See Miller, *Embracing Addiction*, *supra* note 39, at 1491 (describing drug court treatment team comprised of judge, prosecutor, defense attorney, and treatment provider).

41. NOLAN, *supra* note 15, at 37.

42. See *id.* at 75-89.

43. *Id.* at 75-76.

44. *Id.* at 140 ("[T]he notion of guilt is made increasingly less relevant. . . . Guilt . . . is philosophically non-germane . . . to such a process.").

of punitive measures in an attempt to ensure that treatment is effective.<sup>45</sup> “This novel judicial role confers great institutional power—including the power to sentence offenders to periods of incarceration—to someone assuming a role traditionally played by a probation officer.”<sup>46</sup>

Under this new model of court practice, “[T]he drug court judge is in reality acting in the role of probation officer.”<sup>47</sup> Formerly, punishment depended upon “the individualization of treatment based upon expert assessment and classification [operated by probation or parole officers experienced in] social work with offenders and their families.”<sup>48</sup> The parole officers would then “provide counseling, job training, and housing assistance,” direct parolees to appropriate community services as needed,<sup>49</sup> and ensure regular supervisory contact and support to facilitate the offender’s reintegration into society.<sup>50</sup> Recently, however, due to increased caseloads and an emphasis on managing risk, the rehabilitative aspects of the parole officer’s job have receded and the supervisory aspect, in particular, “danger management,” has come to dominate.<sup>51</sup> Where face-to-face meetings between offenders and parole officers are sporadic,<sup>52</sup> drug courts often mandate weekly meetings. “What then do problem-solving courts do that probation supervision does not? The answer is nothing, although they may be in a position to do it better.”<sup>53</sup>

Now the drug or reentry court judge takes over the direction of treatment, subordinating the probation or parole officer into a subsidiary member of the treatment team. I will suggest in the next Part, however, that the judicial incorporation of the parole function (and relegation of the parole officer) marks a profound difference from the judge’s role under the traditional model.

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45. *See id.* at 51-57.

46. Developments in the Law, *supra* note 3, at 1918.

47. John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97, 140 (2007) (citing Hoffman, *Commentary*, *supra* note 17, at 1523-25).

48. GARLAND, *supra* note 24, at 34.

49. *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 88 (2003) (“Historically, parole agents . . . mixed authority with help . . . knew the community and brokered services (for example, job training) for needy offenders.”).

50. *See, e.g., id.* at 80.

51. *See, e.g., id.* at 88.

52. According to Joan Petersilia, “85 percent of all U.S. parolees are supervised on regular caseloads, averaging 66 cases to one parole officer, in which they are seen (face to face) less than twice per month.” *Id.* at 84.

53. Bozza, *supra* note 47 at 122. Compare this etiolated notion of probation and parole with that currently advocated by Judge Michael Wolff of the Missouri Supreme Court, in which probation officers are directly and integrally involved in planning the risk-management and reintegration of offenders. *See* Michael A. Wolff, *Missouri’s Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 115 (2006).



## III. FROM RACE TO RESPONSIBILITY

The precursors to drug courts sought to address the social factors of race, poverty, and social circumstances, without utilizing the judge or the court as a locus of treatment provision. Rather, they targeted for improvement the offender's literacy and educational level, job readiness, and level of employment and income.<sup>54</sup> Relatively quickly, however, a therapeutic paradigm began to compete with this race- or class-conscious approach, providing instead a race- and class-neutral approach focused on *individual responsibility* rather than social circumstances.<sup>55</sup>

My claim is that the therapeutic methodology adopted by drug courts cannot address social features of urban drug use that have an economic and racial impact. Drug courts downplay the racial impact of American drug policy even though they cater disproportionately to minority offenders from minority communities. This asocial approach receives liberal support because drug courts appear to reintroduce a rehabilitative ideal that had all but disappeared from mainstream American penal practice. Rehabilitation is, however, tempered by a form of "tough love" that makes the court attractive to conservatives. I shall suggest that the drug court's success in generating broad bipartisan appeal stems from its therapeutic approach to drug offenders, one in which responsibility replaces race as the major issue facing individual addicts

The drug court's embrace of a "therapeutic" paradigm is in large part responsible for its rapid success.<sup>56</sup> The drug court fits, albeit uncomfortably, within what Jonathan Simon has called the "new penology"<sup>57</sup> of risk management and personal responsibility. The drug court's move from community to individual self-control and self-esteem as the primary causes of drug crime and relapse, embraces what David Garland calls a "responsibilization strategy,"<sup>58</sup> placing the onus on individuals to alter their conduct, rather than on emphasizing rights to access government social welfare services. This strategy of res-

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54. See, e.g., Brooke Bedrick & Jerome H. Skolnick, *From "Treatment" to "Justice" in Oakland, California*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 43, 71-72 (W. Clinton Terry, III, ed. 1999) (discussing the Oakland drug court's early emphasis on community relations and education in the context of serving mostly minority clients). Compare James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 *AM. CRIM. L. REV.* 1541, 1550-51 (2003) (referring to the publication of Hon. Peggy Fulton Hora et al., *supra* note 17, as a "a significant and representative work . . . widely cited . . . as a classic example of the benefits of therapeutic jurisprudence to criminal law").

55. Malkin, *supra* note 39, at 361-88.

56. See Goldkamp, *supra* note 2, at 942 (remarking on success of drug courts).

57. Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 *PSYCHOL. PUB. POL'Y & L.* 452, 453 (1998).

58. GARLAND, *supra* note 24, at 124.

ponsibilization is a profoundly political one. According to Victoria Malkin, it serves to reformulate the social contract between state and (certain) citizens. “The state and social responsibility is now replaced with empowerment talk (for individuals and community), . . . individual responsibility and participation.”<sup>59</sup>

The current debate about drug court methodology revolves around conceptions of power and coercion as “the imposition of the will of a powerful individual on a powerless one.”<sup>60</sup> This style of power is “essentially negative”:<sup>61</sup> it consists in repressing social action. Accordingly, the solution is to carve out a zone of negative liberty—essentially to say “no” to power—a stance that in the criminal law is associated with asserting “due process” rights.<sup>62</sup>

There is another facilitative conception of power that exists alongside the repressive model. This second style of power is essentially productive and relational rather than repressive and coercive, and operates at the fringes rather than the center of the state.<sup>63</sup> On this view, a variety of discrete agents and agencies both create and channel our social options, often by more or less explicit forms of discipline. This style of politics is concerned with managing social welfare by using expert knowledge to define the range of valuable social activities and opportunities.<sup>64</sup> The response to this type of power may be to demand the right to access these disparate possibilities through a concept of positive liberty.

My suggestion is that drug courts engage in a move from the first to the second concepts of political power and freedom. Like others, I believe that an uncritical embrace of responsabilization and empowerment creates has malign effects. My solution is not, however, to return to a due-process model of negative liberty as a way of curtailing the power of the drug court officials. That model perpetuates the recycling of drug users through the system without protecting individuals from government and community, rather than locating them within both and advocating for broader change. Unlike the due-process critics, I believe that the drug court model is well motivated and presents an opportunity to engage in a discussion about the politics of policing, social welfare, and

59. Malkin, *supra* note 39, at 368.

60. Amy Allen, *Power, Subjectivity, and Agency: Between Arendt and Foucault*, 10 INT'L J. PHIL. STUD. 131, 132 (2002).

61. *Id.*

62. See, e.g., Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1-23 (1964) (discussing due process and crime control models of criminal procedure).

63. See, e.g., Michel Foucault, *Prison Talk*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977*, at 37, 39 (Colin Gordon ed., 1980) (discussing “capillary form” of power).

64. See, e.g., Michel Foucault, *Governmentality*, 6 IDEOLOGY & CONSCIOUSNESS 5-21 (1979).

community in response to the War on Drugs. My claim is that the current therapeutic orientation of the drug court stifles that debate by discounting social forces outside the individual's control. In other words, a strategy focused on individual responsibility and self-esteem cannot engage with the wider perspective of governmental and social failure that is the backdrop against which many drug addicts live their lives. Accordingly, I seek a third way, one that places the addict within a wider community of peers, in which everyone can equally be held to account.

#### A. *Race and Poverty*

Drug courts seem to envisage themselves as a hub for community problem solving, transforming not only the lives of addicts, but also the family, friends, and neighbors they live among.<sup>65</sup> Supporters of the therapeutic paradigm, however, rarely mention the racial dynamics of drugs and the criminal justice system, nor the predominantly minority, urban communities served by those courts.<sup>66</sup>

Race and class raise partisan political issues. Emphasizing the racial aspects of the drug problem risks alienating those conservatives who support drug courts as a form of "tough love." The tremendous success of the drug court experiment stems, in large part, from its ability to de-politicize drug rehabilitation and achieve broad bipartisan consensus that drug courts are an appropriate response to the problem of drug crime. The central tool in building this consensus is, I would suggest, the therapeutic methodology embraced by the drug courts.<sup>67</sup> Therapy and responsibility disaggregate the problem of drug crime from social and governmental forces. They take the emphasis off the increasing racial segregation and class stratification of the inner city, and emphasize the personal characteristics of the addict.

Whether intentionally or not, then, the politics of therapy competes with and replaces a politics of race and class.<sup>68</sup> This political battle occurs on two

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65. See Nolan, *supra* note 54, at 1562 ("Therapeutic jurisprudence also allows the court to extend its authority into the lives of drug court clients in unprecedented ways."). See also NOLAN, *supra* note 15, at 85 (inquiries into drug use in context of families common).

66. In Oakland, for example, by 1996, five years after its inception, issues of race and social interconnectedness began to compete with responsibility as a means of describing the drug court. See Bedrick & Skolnick, *supra* note 54, at 71-72. By 1999, however, Oakland drug court Judge Peggy Hora published, along with two colleagues, a seminal paper advocating that therapeutic justice become the dominant philosophy for problem-solving courts. See Hon. Peggy Fulton Hora et al., *supra* note 17. That paper did not mention race or class.

67. I think it is more than coincidence that the therapeutic justification emerges as drug courts attain broad national status. Therapy, as practiced in the drug court, pushes race and class out of the political picture.

68. My point is that the public rhetoric of treatment undermines discussion of race and

levels: first at the level of express discussion of the impact of drugs along race and class lines; and second at the level of local and national political organization. Put differently, one justification of drug courts could be that, by removing explicit discussion of controversial political issues from the policy-making arena, drug court advocates are able to attain broad bipartisan consensus while still surreptitiously pushing a reformist agenda along race and class lines. After all, doesn't rehabilitating poor, urban, minority drug users by encouraging them to take responsibility for their lives achieve an important social and political goal, one that has obvious race and class impacts?

My claim is that, while the drug court may be able to promote race- and class-conscious outcomes, the therapeutic paradigm undermines community political organization by excluding adequate participation in the decision making process. The emphasis on specialization adopted by many problem-solving courts isolates the politics of drug crime from larger social issues, and prevents a wider discussion of mutual responsibilities between state and citizen.<sup>69</sup> The therapeutic structure of many drug courts serves to replicate the segregation of poor, minority urban communities from the wider political structure, through the individualizing thrust of their focus on responsibility.

Many minorities in urban America face a bleak social reality. In their study of race and poverty, Douglas Massey and Nancy Denton pointed out that "one-third of all African Americans in the United States live under conditions of intense racial segregation."<sup>70</sup> These African Americans constitute a "hyper-segregated" underclass suffering from crippling, concentrated poverty.<sup>71</sup> Their social isolation is stark: living in densely inhabited and highly impoverished neighborhoods they are "not only unlikely to come into contact with whites within the particular neighborhood where they live; even if they traveled to the adjacent neighborhood they would still be unlikely to see a white face; and if they went to the next neighborhood beyond that, no whites would be there either."<sup>72</sup> During the course of the first decade of the War on Drugs, "[t]he number of African Americans in these ghettos grew by more than one-third from 1980 to 1990, reaching nearly 6 million. Most of this growth involved poor

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class. It may be that many judges who publicly adopt therapeutic rhetoric privately seek to advance race and class goals. I shall not address whether drug court practice is more racially or socially progressive than its rhetoric, in part because the racial and class impacts of the drug courts are not the subject of much study.

69. This is not the case for more traditional courts which are free to comment on the inequities of drug sentencing policy. *See, e.g.*, *United States v. Willis*, 967 F.2d 1220, 1225 (8th Cir. 1992) (Heany, J., concurring) (discussing racial impact of crack/powder cocaine disparity); *United States v. Lattimore*, 974 F.2d 971, 977 (8th Cir. 1992) (Bright, J., dissenting).

70. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 77 (1996).

71. *Id.* at 118.

72. *Id.* at 77.

people.”<sup>73</sup>

Segregated urban neighborhoods are increasingly marked not only by racial isolation, but also by unemployment, particularly among young black men,<sup>74</sup> that William Julius Wilson has termed the “new urban poverty.”<sup>75</sup> Wilson suggests this sort of poverty is characterized by “poor, segregated neighborhoods in which a substantial majority of individual adults are either unemployed or have dropped out of the labor force altogether.”<sup>76</sup> Segregation and unemployment produce social fragmentation, which leads to substantial increases in crime within these communities,<sup>77</sup> and in particular a “new drug culture” in which the “old social order . . . has increasingly broken down and veered off on an independent path dramatically different from that prevailing in the rest of American society.”<sup>78</sup>

Many victims of the new poverty have spent lengthy periods of time in prison as a result of the War on Drugs. These urban residents are not strangers to their communities, but alternatively law-abiding and law-breaking: the friends and neighbors who patronize local shops, churches, schools, and businesses.<sup>79</sup> For these individuals and communities, increased policing and incarceration can have devastating effects. For example, Jeffrey Fagan, Valerie West, and Jan Holland have shown that:

[N]eighborhoods with high rates of incarceration invite closer and more punitive police enforcement and parole surveillance, contributing to the growing number of repeat admissions and the resilience of incarceration, even as crime rates fall. Incarceration begets more incarceration, and incarceration also begets more crime, which in turn invites more aggressive enforcement, which then re-supplies incarceration.<sup>80</sup>

The social problems facing these residents of segregated urban environ-

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73. WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 14 (1996) (concluding that “a vast majority of people (almost seven out of eight) living in metropolitan-area ghettos in 1990 were minority group members”).

74. MASSEY & DENTON, *supra* note 70, at 161.

75. WILSON, *supra* note 73, at 19.

76. *Id.*

77. See MASSEY & DENTON, *supra* note 70, at 166-67; WILSON, *supra* note 73, at 21 (“Neighborhoods plagued by high levels of joblessness are more likely to experience low levels of social organization . . . trigger[ing] other neighborhood problems . . . ranging from crime, gang violence, and drug trafficking to family breakups and problems in the organization of family life.”). See also Jeffrey Fagan, Valerie West & Jan Holland, *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551 (2003).

78. MASSEY & DENTON, *supra* note 70, at 155.

79. See, e.g., SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* 5-8 (2006) (discussing alternately law-abiding and law-breaking lifestyle of segregated urban underclass).

80. Fagan, West, & Holland, *supra* note 77, at 1554.

ments were thus exacerbated by government policies targeted at people with a history in the criminal justice system: precisely the clientele that cycle through problem-solving courts.<sup>81</sup>

For example, a variety of state and federal initiatives preclude individuals with a conviction for a drug crime from living in assisted housing. Tenants can only receive federal funding for low-income housing if they keep their property drug free.<sup>82</sup> Not only must the tenant have no criminal history of drug use, but no one can possess drugs on the tenant's property without subjecting the tenant to eviction.<sup>83</sup> "[T]h[is] law as well as guidelines enacted by the Department of Housing and Urban Development . . . create *incentives* . . . to screen and evict tenants for drug-related or 'safety-threatening' behavior."<sup>84</sup> Thus, people with a record of drug crime often lack the option of public housing. Many are forced to reside in homeless shelters, which are crowded, dangerous, and lack privacy.<sup>85</sup> Others are definitionally homeless, living on the floors and couches of urban renters.<sup>86</sup> Such residences make it harder to find jobs or provide the sort of stability to ensure a stable quality of life within the community.

This racial and social transformation of inner cities throughout the 1980s and into the 1990s not only increased social isolation, but also had a profound impact upon penal policy. Social isolation facilitated a new penal politics of separating out communities as healthy and viable or unhealthy and failing based on evaluations of their relative dangerousness. Dangerousness in turn justified less social development and increased, and increasingly superficial, policing of residents using "stop and frisks" and "buy and busts."<sup>87</sup> That style of policing, as Fagan suggests, simply spins the cycle of criminality.

Under the new penal politics inner cities suffered a reduction in resources and increased criminalization of drug use. The linked issues of poverty, urban location, and race "[fed] the perception that transformational strategies aimed at offenders [we]re both futile and useless."<sup>88</sup> The primary goal of the new politics of risk management was the attempt to control "a permanent poverty [un-

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81. See Malkin, *supra* note 39, at 375-80 (2005).

82. See 42 U.S.C. § 1437d(1)(6) (2004).

83. *Id.*

84. Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 312 (2005) (emphasis in original).

85. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 279 (2004).

86. VENKATESH, *supra* note 79, at 45-58 (discussing the manner in which underclass homeowners rent out floor space to other residents of the urban ghetto).

87. See, e.g., William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

88. Simon, *supra* note 57, at 454.

der]class in American cities.”<sup>89</sup> Based on the belief that “mainstream society cannot or will not absorb the honest poor, there is little need to transform offenders.”<sup>90</sup>

### B. *Therapy and Responsibility*

The early drug courts represented an effort to reject futility and failure, and instead engage with the problems of urban drug culture through addressing the social problems of drug offenders’ illiteracy and low educational level, and providing counseling to increase their level of job readiness, and through that, employment and income.<sup>91</sup> These courts did not immediately adopt the model of therapeutic jurisprudence<sup>92</sup> that was to develop as a later justification for the court’s operation; one, moreover, that is race- and (under)class-neutral where earlier policies had been race- and class-conscious.

In their seminal article on drug courts, Judges Hora, Schma, and Rosenthal drew upon Wexler and Winnick’s definition of therapeutic jurisprudence as the “study of the extent to which substantive rules, legal procedures, and the roles of lawyers and judges produce therapeutic or antitherapeutic consequences for individuals involved in the legal process.”<sup>93</sup> A central feature of the therapeutic process in action and in the drug court is its “require[ment] th[at] participants . . . see the process as therapeutic and treatment-oriented instead of punitive in nature. . . . [T]he team’s focus is on the participant’s recovery and law-abiding behavior—not on the merits of the pending case.”<sup>94</sup>

This emergent therapeutic paradigm identified intervention in the offender’s anti-social lifestyle as the drug court’s core feature.<sup>95</sup> The judge addresses the individual offender, seeking to establish a dynamic, personal relationship with each of them. The goal is to induce self-control and personal responsibility, “hold[ing] the defendant accountable for her actions during the course of treatment . . . [and] ensur[ing] that the defendant stays in treatment whenever

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89. *Id.*

90. *Id.*

91. See Bedrick & Skolnick, *supra* note 54, at 43-76 (W. Clinton Terry, III ed., 1999) (describing Oakland’s drug courts programs originally concerned with social costs of failed drug policies on African Americans).

92. See *id.* at 44 (discussing literacy, employment, and community initiatives in the Oakland court *circa* 1995). See also *id.* at 52-55 (discussing a “reality-based” model in which the dominant method of ensuring accountability and responsibility is contractual). Bedrick and Skolnick note that the reality-based and contractual aspects of the Oakland program outstripped the original goals and have “taken on a life of their own.” *Id.* at 63.

93. Hora et al., *supra* note 17, at 442.

94. *Id.* at 469-70 (citations and internal quotations omitted).

95. NOLAN, *supra* note 15, at 149-50.

possible and appropriate.”<sup>96</sup>

A problem the drug courts never directly address is whether the offender can be held accountable for the conditions that undermine treatment. For example, Professor Gabriel Chin has persuasively documented the racial impact of drug convictions.<sup>97</sup> In particular, the collateral consequences imposed in addition to criminal conviction have a direct and deleterious on the successful rehabilitation of drug offenders.

[U]nder current law drug offenses are subjected to more and harsher collateral consequences than any other category of crime. ... Those convicted of felony distribution of a controlled substance are ineligible to participate in most federally-funded health care programs ... Those convicted of a state or federal felony involving distribution, possession, or use of a controlled substance are ineligible for Temporary Aid to Needy Families and Food Stamps. Persons convicted of a drug-related offense may not receive federal educational aid ... [and] are also ineligible for employment in certain federally-regulated industries such as airlines. ... Congress required public housing agencies and owners of federally subsidized housing to evict tenants if a member of the household is using a controlled substance.<sup>98</sup>

These obstacles are imposed by the government in a manner that seems designed to ensure failure: without healthcare, welfare, educational opportunities, and housing, drug addicts suffer a calamitous breakdown in the social networks that could support their recovery. These hurdles are placed in their way by state-sponsored drug policies outside the responsibility and control of the drug-addicted offender. Drug courts work within and around this system of social deprivation. Rather than tackling these policies head on, the drug court’s therapeutic model encompasses a political decision to promote a treatment model that requires the drug offender to take personal responsibility for circumstances the state has, if not created, then deliberately exacerbated.

By excluding these outside factors, the intense personal interrelation between drug court judge and drug court client becomes political at the same time as being therapeutic. The traditional due process model recognizes this risk by carving out a zone of rights-based liberty to protect the defendant from the judge as much as the prosecutor. The offender even has an ally, the defense counsel, to help her maintain this zone. The therapeutic model rejects those limitations as undermining its instrumental or utilitarian goal of promoting well-being and self-esteem. The therapeutic goal is to create a zone in which the offender has the freedom to participate as a productive member of society.<sup>99</sup> The

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96. Hora et al., *supra* note 17, at 472.

97. See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 262-64 (2002).

98. *Id.* at 262-64.

99. See, e.g., Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 47



relationship is not one between peers engaging in a free and open dialogue, in which the plurality of each other's values commands equal respect.<sup>100</sup> Rather, it is a relationship in which one is dominant, dictating the nature of the courtroom reality,<sup>101</sup> and the other subservient, required to learn to accept that reality and speak in the governing language of therapy.

That this political relation is also personal is part of the drug court's attraction. The personal can operate as a realm for generating bond between self and other, even if it is not on terms of equality. Individuals are able to separate themselves from the world at large in a relationship marked by "exclusivity,"<sup>102</sup> where the person can create a world of one's own, "free from the gaze, and secure from the predations, of other people."<sup>103</sup> In creating a private relation between two individuals, the use of a contract as part of the negotiation operates as part of the power dynamic between the offender and the judge, who both proffers the contract and supervises the offender's compliance with its terms.

There are genuine feelings involved on both sides of the contract that cannot be discounted as incidental to the political aspect of the power dynamic but rather are internal to it.<sup>104</sup> Though the relation between judge and offender is

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(2000–2001) (noting that the defender must modify or mute her traditional role, "take a step back, [and] not intervene actively between the judge and the participant . . . [to] allow that relationship to develop and do its work" (citation omitted)). [hereinafter Quinn, *Whose Team Am I on Anyway?*].

100. Both Jurgen Habermas and Hanna Arendt emphasize this concept of discursive or political freedom. See Jurgen Habermas, *Actions, Speech Acts, Linguistically Mediated Interactions, and the Lifeworld*, in JURGEN HABERMAS, *ON THE PRAGMATICS OF COMMUNICATION* 215 (Maeva Cook ed., 1998); Arendt, *supra* note 12, at 198. Both contrast the instrumental with the discursive. Habermas, for example, suggests that, "[f]rom the point of view of the speakers, agreement cannot be imposed from without, that is, cannot be forced upon one side by the other." Habermas, *supra* note 100, at 222. Habermas contrasts communicative action, which has this quality of intersubjective cooperation, from strategic action, which depends upon force and domination. *Id.* at 222–25. "Seen from the perspective of the participants, the two mechanisms—that of reaching understanding, which motivates convictions, and that of exertion of influence, which induces behavior, must be mutually exclusive." *Id.* at 221–22. The therapeutic method, which works by inducing behavior, thus falls on the strategic side of the ledger.

101. For example, one drug court judge admitted that he would send offenders out of the courtroom to provide a urine sample that would then be tested by the director of treatment in front of the bench. The judge acknowledged that this type of testing was done for effect, and that: "Even some of them who haven't used drugs get so scared they might be willing to say they use, just to not put them through the anxiety of going through the test." NOLAN, *supra* note 15, at 75.

102. Peter Baehr, *Introduction*, in HANNAH ARENDT, *THE PORTABLE HANNAH ARENDT*, at xxxvi (Peter Baehr, ed. 2000). See also Arendt, *supra* note 12, at 185–91.

103. *Id.*

104. That is, personal relationships between people are not world-oriented, or "objective," Arendt, *supra* note 12, at 185–91, but are other-oriented and subjective. See Hanna Arendt, "What Remains? The Language Remains": A Conversation with Günter Gaus, in ARENDT, *supra* note 102, at 16. These are, however, the only relationships capable of friendship or fellow feeling, in a way that politics is not. See *id.*

hierarchical and disciplinary, an underemphasized point is that *both* are disciplined. That is, the drug court judge gets something out of the relationship, too. She also gets a lifestyle change, and is reconstituted as a different type of judge, one engaged in healing rather than punishment, a specialist rather than a grunt.<sup>105</sup> From a political point of view, one should not underestimate the extent to which the drug court judges benefit personally and professionally from the reconfiguration of their role. Nonetheless, the relation is one that dispenses with equality and instead seeks to impose a lifestyle and reality upon the court's clients that is not of their own free choice.<sup>106</sup>

The therapeutic model, with the judge at its center, does hold out advantages to the sorts of repeat-players within the criminal justice system that comprise the ranks of drug addicts or ex-inmates. As Victoria Malkin suggests, their direct interaction with the judge permits them to persuade the court that they are managing their rehabilitation process responsibly and reintegrating into society.<sup>107</sup> The "therapeutic discourse" between judge and offender/client is, however, structured by one central assumption: that "change begins with the individual [rather than society], and is rooted in a narrative of self-esteem, motivation,

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105. See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 3-5 (1992). Feeley describes the sort of lower criminal court that is the alternative to the drug court model: "nearly all of the defendants are failures, both in life and in crime. They are poor, often unemployed, usually young, and frequently from broken homes. Most of them lack self-esteem, motivation, skill and opportunity. A great many of them have come to rely on alcohol and drugs." *Id.* at 4. Feeley is not blind to the racial dynamics of the lower courts in the criminal justice system: "Defendants in these courts, particularly those in urban areas, are disproportionately Black, while court officials are predominantly white." *Id.* But for my purposes, the central aspect of the lower criminal courts that contrasts with drug courts is that, according to Feeley, traditional judges are "bored by their jobs [and] become callous towards defendants who are so different from themselves . . . lower court officials—judges, prosecutors, and public defenders alike—feel frustrated and belittled. Trained to practice law, they are confronted with the kinds of problems that social workers face, but if they respond as social workers would, they are denied respect from their counterparts who do 'practice law' in the higher courts." *Id.* The problem is, then, not only, however, the self esteem of the offenders, but also of the judges who characterize the offenders, cases, and themselves as "'garbage,' 'junk,' 'trash,' 'crap,' 'penny ante,' and the like." *Id.* (emphasis in original). This negative connotation of life in the lower courts contrasts sharply with Judge Hoover's proud response to being accused of doing social work. See NOLAN, *supra* note 15, at 104. It is also very different from the way Judge Jeffrey Tauber describes the drug court as "one of the most challenging and exciting innovations in the Criminal Justice System in a long time," *id.* at 108, and the way in which Judges Hora et al. describe the benefits of the therapeutic approach.

106. See, e.g., Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 328-33 (2000).

107. See Malkin, *supra* note 39, at 380 (discussing the blurring of the line between defendant and client that permits the defendant a role in determining her sentence).

suffering and finally transformation, which is instrumental for change.”<sup>108</sup>

To effect this transformation from incontinent to responsible citizen, problem-solving courts “supervise offenders while they remain in the community. They make arrangements for offenders to obtain treatment and other community services and try to motivate them to be responsible citizens. These courts require offenders to follow specified rules, and the offenders are punished if they fail to do so.”<sup>109</sup> The major goal of therapy is “social adjustment,”<sup>110</sup> produced through behavior modification. As Judge John Bozza acknowledges, “behavior modification is a critical component of the problem-solving court model and has been embraced by judges who favor treatment as the solution to the drug addiction problem.”<sup>111</sup> Judge Stephen Cooper suggests that every successful drug court “[w]ork[s] on modifying [the offender’s] daily behavior in their own home, employment, and within their own family situation where, ultimately, they will have to continue the new behavior.”<sup>112</sup>

The behavioral emphasis of drug court treatment is a feature of the manner in which therapeutic justice conceives of its “client” population (rather than society) as the primary entity in need of transformation.<sup>113</sup> In its focus on behavioral reform “the need that is truly being addressed by these efforts is for a control mechanism to make offenders, and perhaps others who influence their behavior, do what we expect of them when they are released into the community.”<sup>114</sup> The result is an insistence “that intense court supervision” is the primary solution for whatever ails the offender,<sup>115</sup> resulting in a particularly long, invasive, and potentially arduous treatment regime.<sup>116</sup> The offender’s failure to avail themselves of the proffered services thus becomes a matter of court censure that, if it continues, often results in short stints in jail,<sup>117</sup> culminating in

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108. *Id.* at 383.

109. Bozza, *supra* note 47, at 120.

110. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* 774 (David B. Wexler & Bruce J. Winick eds., 1996).

111. Bozza, *supra* note 47, at 111.

112. Hon. Stephen C. Cooper, *The Carrot and the Stick: How Effective Sanctions and Incentives Succeed in Overcoming Addiction*, 82 MICH. B.J. 20, 24 (2003). *See also* Bedrick & Skolnick, *supra* note 18, at 52 (noting that Oakland drug court’s treatment regime was premised on behaviorist theories of B.F. Skinner).

113. Quinn, *An RSVP*, *supra* note 11, at 572 (“For many indigent criminal defendants . . . [n]o rehabilitative plan of service provided through our overworked criminal courts can even begin to address th[e] multifaceted problem [of their extreme poverty].”).

114. Bozza, *supra* note 47, at 139.

115. Nolan, *supra* note 54, at 1545.

116. *See* NOLAN, *supra* note 15, at 194-95; Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008).

117. *See* NOLAN, *supra* note 15, at 194-96; *see also* Bowers, *supra* note 116, at 783.

removal from the program.<sup>118</sup>

The point to note is that the therapeutic paradigm places accountability for reentry issues on individual offenders while minimizing governmental responsibility for a range of institutional failures in the areas of health care, education, housing, and employment. Therapy, in other words, ignores the bureaucratic and political morass that structures the offender's situation, in favor of a personalized, exhortative model of individualized suasion.

The therapeutic focus on the personal rather than social aspects of drug use and drug addiction produces both political and treatment outcomes. At the political level, drug courts isolate the problem of drug crime from the increasing segregation and withdrawal of resources from the inner city, which in turn prompted the drug boom of the 1980s and 1990s and the increased criminalization of drug use. The court, in other words, masks a failed social policy of disinvestment in urban centers and a failed drug policy of increased severity with a norm or discourse of personal responsibility.<sup>119</sup>

At the therapeutic level, this political separation of the social from personal has an impact on the sort of treatment drug offenders receive. There is a tension between a therapeutic paradigm that envisages "substance abuse as a primary causal factor of the problems [urban underclass drug users] encounter in their lives,"<sup>120</sup> and the self-understanding of the offenders, who regard "[a]ddiction[ ] . . . as secondary to the causal factors of racism and poverty."<sup>121</sup> This hierarchical relationship permits the judge not only to describe social and political realities, but also to construct them. The relationship is normative: the addict is supposed to conform to a particular model of addiction. Progress is measured by speaking a relatively structured language of responsibility and self-esteem: to the extent that this narrative fails to match reality it is experienced as inauthentic. And where addicts cannot conform reality to the drug court narrative—where, due to social factors outside their control, taking responsibility is not an option—the normative consequences can be severe.

Accordingly, for many individuals living in hyper-segregated urban communities, particularly those suffering from dual diagnosis, the idea that the option of prison versus social transformation is experienced as a choice can seem insupportable.

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118. See Bowers, *supra* note 116, at 783.

119. Malkin, *supra* note 39, at 365 (noting that discourse is employed by problem-solving courts "to advocate and legitimize court reform . . . while simultaneously avoiding any larger discussion over race and poverty, obscuring it into a conversation about consumer dissatisfaction and consumer rights").

120. Adela Bekcerman & Leonard Fontana, *Issues of Race and Gender in Court-Ordered Substance Abuse Treatment*, in *DRUG COURTS IN OPERATION: CURRENT RESEARCH* 45, 49 (James J. Hennessy & Nathaniel J. Pallone eds., 2001).

121. *Id.*

Contrary to the belief of some, particularly in the judicial community, the failure to graduate from the Drug Court program may not be a willful defiance of judicial authority. Rather, what may be at work in a client's decision to drop out of the Drug Court program and face judicial sentencing for their crime is the failure of the design of the program.<sup>122</sup>

The therapeutic model of transformation and responsibility-for-self does not accommodate this possibility and the consequences of continued relapse, if perceived as a rejection of the court, can be severe.<sup>123</sup>

If the brief overview I provided of the causes of drug proliferation is at all accurate, then it is essential to question the drug and reentry courts' emphasis on personal responsibility. Given that the central problem facing drug addicts in segregated urban settings is the failure of the government to adequately provide medical, educational, health, housing, and other social services, the therapeutic model, in this setting, appears to have the effect of attempting to convince the ex-inmate that these social failings are of little consequence: the problem is the ex-inmate's life choices, rather than social choices about where and how to distribute its resources to different communities.

My point is not to discount the therapeutic paradigm, but to place it within a larger social trend away from welfare rights and onto personal responsibility. If the primary cause for social failure is drug addiction, then individual responsibility and risk management is a legitimate concern. Under this view, we should not blame society and absolve the offender because of the effects of impoverishment, the abandonment by the state, and the larger community that endorses its policies.<sup>124</sup>

This therapeutic attitude in turn mirrors the new penal strategy of responsabilization and separation of classes of dangerous versus safe individuals. No longer is race or poverty an excuse for social failure. The offender is not the victim.<sup>125</sup> Rather, "we" are all victims of irresponsible criminals and high-risk communities.<sup>126</sup> In the criminal justice system, this trend to separate law-abiders from law-breakers is marked by a "new penology" of risk management.<sup>127</sup>

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122. *Id.* at 58 (citation omitted).

123. See Malkin, *supra* note 39, at 369-70 (2005); Bowers, *supra* note 116, at 783.

124. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 104-10 (2007).

125. See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994).

126. SIMON, *supra* note 124, at 108-09.

127. Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 452-55 (1992).

*C. Drug Courts in the Regulatory State*

In the move from society-as-problem to individual-responsibility-as-problem, the drug court's therapeutic erasure of race and poverty is perhaps a central feature of their success. Drug courts, although retaining important features of the old concern with the offender's character, are themselves a product of the new penal emphasis on risk management of dangerous offenders, rather than attacking the social roots of criminal conduct.<sup>128</sup> Feeley and Simon call this "actuarial" model "the new penology"; David Garland characterizes it as part of a new "adaptive" strategy of crime control;<sup>129</sup> and Victoria Malkin identifies it as "a neoliberal model ... requir[ing] self-governing individuals who remain active, empowered and participatory as the state recedes."<sup>130</sup> I have suggested that this new penology indicates a move from a politics of coercion and due process to one of management and empowerment.

The criminal justice system, and in particular drug courts, have mirrored a general social trend away from a welfare model that identifies social factors as the cause of crime and onto an individualistic model that associates criminality with personal or community choices.<sup>131</sup> Criminality becomes a matter of personal control rather than poverty or racial discrimination, and the government's role becomes one of inducing self-discipline rather than ameliorating social ills.

Criminology and crime control have recently undergone a penal revolution, in which the dominant mode of response to crime and criminality switched from a "welfarist" model of criminal justice concerned with the rehabilitation or reform of a "pathological" offender able to benefit from intervention through state-run social programs, to a system of criminal justice increasingly focused

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128. See, e.g., *id.* at 457-58.

129. GARLAND, *supra* note 24, at 110.

130. Malkin, *supra* note 39, at 370.

131. All three of these theorists—Garland, Simon, and Malkin—use, directly or indirectly, a Foucaultian analysis. That is hardly surprising: while Foucaultian approaches often elicit a certain skepticism in the law school academy, as Stanley Cohen notes, "to write today about punishment and classification without Foucault is like talking about the unconscious without Freud." DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 131 (1990) (quoting STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 10 (1995)). Jonathan Simon's concept of "governmentality" is taken directly from Foucault. See Simon, *supra* note 25, at 241 (citing Michel Foucault, *Governmentality*, in 3 ESSENTIAL WORKS OF FOUCAULT, 1965-1984 at 201 (James D. Faubion ed., 2000)). Garland's approach is deeply influenced by the work of Michel Foucault and seeks to uncover the normative bases or animating criteria upon which penal policy is based and justified. See, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan, trans., Vintage Books 2d ed.) (1977); see also GARLAND, *supra* note 24, at 3 ("These questions are inspired, in large part, by the work of Michel Foucault."); GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY, *supra*, at 131-176 (discussing work of Michel Foucault). Malkin also uses the concept of governmentality, and cites to Simon and Garland in her anthropological analysis. See Malkin, *supra* note 39, at 361, 363-66, 372.

on the control and incapacitation of an “incurable” offender.<sup>132</sup> The traditional or “penal-welfarist” model<sup>133</sup> was structured around the welfare state, projecting the belief in a strong, centralized government that acted as a “safety-net” for the weak and as an agent of social reform. This “old penology”<sup>134</sup> had faith in the state’s “capacity . . . to rehabilitate or control crime”<sup>135</sup> through intervention and treatment to transform the individual offender into a responsible member of society.<sup>136</sup>

The new penology appeared over the last thirty or so years in response to the state’s impotence in the face of high crime rates,<sup>137</sup> in part due to the intractability of the new urban underclass. The “underclass is understood as . . . a self-perpetuating and pathological segment of society that is not integratable into the larger whole,”<sup>138</sup> presents what Garland has called a “new predicament” for techniques of crime control hitherto guided by policies of rehabilitation and re-integration.<sup>139</sup> He suggests that state institutions have responded in contradictory ways. On the one hand, the state has adopted an “adaptive”<sup>140</sup> strategy that takes account of high crime and low success. On the other hand, it has embraced an “evasive”<sup>141</sup> strategy that enables it to act as if it can still control crime.

The adaptive strategy consists of a pragmatic attempt to develop public-private partnerships that spread responsibility for crime control between the government and the private sector.<sup>142</sup> It is defined by: the sharing of responsibility for the definition and prosecution of crime among public and private agencies; the organization of crime control towards preventing crime from happening; and a belief that the criminal is a “normal, rational consumer[ ], just like us.”<sup>143</sup>

Adaptation has both institutional and non- or (more accurately) quasi-institutional elements. The institutional strategy consists in an organizational response emphasizing increased systematization to reduce inefficiency and in-

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132. See Simon, *supra* note 57, at 454 (“Latent in this managerialism is a growing sense that little or nothing can be done to change offenders.”).

133. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 15 (2001).

134. Feeley & Simon, *supra* note 127, at 451.

135. *Id.* at 454.

136. See *id.* at 452, 467-68.

137. See GARLAND, *supra* note 133, at 105-06.

138. Feeley & Simon, *supra* note 127, at 467.

139. GARLAND, *supra* note 133, at 105.

140. *Id.* at 110.

141. *Id.* Garland describes the evasive strategy a “politicized reaction” consisting in a “recurring attempt to evade [reality] altogether.” *Id.*

142. *Id.* at 16, 124-26.

143. *Id.* at 137.

equality. This managerial or actuarial aspect of the new penology requires administrators to “identify[ ] and manag[e] unruly groups.”<sup>144</sup> The goal is to ensure that the criminal justice system is better managed and more accountable to the public.<sup>145</sup> Problem-solving courts draw on this managerial impetus when identifying risk groups to target.

The quasi-institutional strategy requires criminal justice agencies to deflect responsibility for crime control from the state and onto the community as a whole. Under this “responsibilization strategy,”<sup>146</sup> government institutions engage in “preventative partnerships”<sup>147</sup> that seek to enlist “community” help in responding to crime rates by forcing private businesses and the general citizenry to alter their behavior and adapt to the new realities of crime. Typical of such initiatives are neighborhood watch schemes, increased reliance on private security services, and pressure on business to alter the manner in which they construct and present goods in order to make them less attractive to criminals.<sup>148</sup>

No longer does the government engage in social regulation of the causes of crime or rehabilitation by trained experts employed to match the criminal with state-sponsored social services addressing the offenders need for housing, employment, education, and the like. Throughout this changed approach to crime control, state organizations retain a certain primacy, but operate to steer, rather than carry out, the functions of crime control: “The state’s new strategy is not to command and control, but rather to persuade and align, to organize, to ensure that other actors play their part.”<sup>149</sup>

#### D. Adapting to the New Penology

Drug courts represent a combination of the managerial and responsibilization aspects of the adaptive strategy, while maintaining the old penology emphasis on individualization and rehabilitation. In part, this may be a matter of “genealogy.”<sup>150</sup> The transformation from penal-welfarism to modern crime control strategies has happened in a piecemeal fashion, facing certain institutional resistances: accordingly, it is only to be expected that some institutions would contain elements of the penal-welfare system as well as share elements

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144. Feeley & Simon, *supra* note 127, at 455.

145. See GARLAND, *supra* note 133, at 115-17 (discussing the “systematization of criminal justice”, “formalization of managerial accountability”; and increased “responsiveness” of criminal justice bureaucracies).

146. *Id.* at 124.

147. *Id.* at 16.

148. *Id.* at 124-27.

149. *Id.* at 126.

150. *Id.* at 16-17.



of a more adaptive form of organization. The success of the drug court has been to rework the old penology of intervention and treatment into what might be called “neorehabilitation,” using supervision and incapacitation as a form of risk management to train individuals as responsible members of society or send the incorrigible to jail or prison.

The primary site of drug court resistance is its continuing emphasis upon individualized treatment of offenders in order to rehabilitate them into the community. The new penology rejects individualization in favor of aggregation,<sup>151</sup> and rehabilitation in favor of crime management.<sup>152</sup> Drug courts appear to be a liberal reaction to the new penology’s “conservatism and the result is a ‘style and scope of [adjudication that] transcend[s] conventional political categories.’”<sup>153</sup> On the other hand, drug courts are attractive to social conservatives, who support drug courts “because of [their] tough intrusive nature and liberals because of [their] ostensibly more humane and compassionate approach toward offenders.”<sup>154</sup>

It is important not to overstate the welfarist aspects of the drug court: that is why I call its methodology “neorehabilitation,” rather than traditional rehabilitation. Take, for example, the drug court’s approach to recidivism or “relapse.” A central feature of the new penology is the “declining significance of recidivism.”<sup>155</sup> Yet in drug court, recidivism, or as it is termed there, relapse, is a central feature of the therapeutic process.<sup>156</sup> A limited amount of recidivism-relapse is regarded as an inevitable part of the treatment process, but is recharacterized as an opportunity to intervene and discipline through “more frequent contact with the court, increased urine testing, and short periods of so-called ‘shock incarceration.’”<sup>157</sup>

The significance of recidivism in drug court is thus slightly different from the traditional welfarist model. Whereas before recidivism was a “nearly universal criterion for assessing successor [sic] failure of penal programs,”<sup>158</sup> the drug court uses recidivism to measure success or failure of self-transformation or responsibilization. It is the offender, not the court or the treatment program,

151. Feeley & Simon, *supra* note 127, at 450.

152. *Id.* at 455 (“The new penology is neither about punishing nor about rehabilitating individuals . . . It is concerned with the rationality not of individual behavior or even community organization, but of managerial processes. Its goal is not to eliminate crime but to make it tolerable through systemic coordination.”).

153. Boldt & Singer, *supra* note 37, at 85 n.15 (quoting James L. Nolan, Jr., *Therapeutic Adjudication*, 39 SOCIETY, Jan./Feb. 29, 29 (2002)).

154. *Id.*

155. Feeley & Simon, *supra* note 127, at 455.

156. See Miller, *Embracing Addiction*, *supra* note 39, at 1494-95 (discussing the role of relapse in drug court methodology).

157. *Id.* at 1491 (citing Boldt, *supra* note 4, at 1211).

158. Feeley & Simon, *supra* note 127, at 455.

that fails when the offender relapses. The ability to detect relapse through intensive supervision becomes, under the drug court's responsabilization strategy, a measure of the court's success, not its failure.<sup>159</sup>

Put differently, while drug court advocates initially attempted to compare recidivism rates for the drug court and traditional court populations, those studies proved inconclusive at best, "leading the General Accounting Office to declare in 1997 that there is simply no firm evidence that drug courts are effective in reducing either recidivism or relapse."<sup>160</sup> Drug courts have since focused on retention rates as an indicator of success, looking merely at the number of offenders that manage to complete the program.<sup>161</sup>

Retention, however, and other performance measures such as "[a] guilty plea accompanied by a treatment mandate," fit the new penology by "decoupling performance evaluation from external social objectives. Instead of social norms like the elimination of crime, reintegration into the community, or public safety, institutions begin to measure their own outputs as indicators of performance."<sup>162</sup> Retention is just such an "operational measure,"<sup>163</sup> as is the relapse version of recidivism. Retention and relapse are, in fact, defining features of the therapeutic model's disciplinary techniques. Accordingly, the drug court's therapeutic methodology transforms traditional measures of rehabilitation into the new penology's managerial measures of success.

Another tension between old and new penological perspectives is the drug court's emphasis on drug treatment rather than simply drug testing. According to Feeley and Simon, under the new penology, treatment has given way to testing so that, instead of having rehabilitation as a goal, "today's practices track drug use as a kind of risk indicator."<sup>164</sup> The drug court's advocates clearly envisage the courtroom as a site of treatment rather than testing alone. The tests confirm drug use and ideally result in allocation to one of the partner treatment

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159. *See id.* at 455 n.12 ("Initially conceived as a way to reintegrate offenders into the community through a close interpersonal relationship between agent and offender, intensive supervision is [under the new penology] considered as an enhanced monitoring technique whose ability to detect high rates of technical violations indicates its success, not failure."). Under the responsabilization justification, relapse is simply an opportunity for further discipline-as-treatment.

160. Judge Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 *FORDHAM URB. L.J.* 2063, 2071 (2002) [hereinafter Hoffman, *Therapeutic Jurisprudence*]. *see also id.* at 2070-71 (discussing drug court recidivism studies); Hoffman, *Commentary, supra* note 17, at 1485-89 (2000) (same). Judge Hoffman is a strong drug court skeptic; however, I do not consider that his skepticism necessarily undermines the validity of his comments and review of the statistics.

161. Hoffman, *Therapeutic Jurisprudence, supra* note 160, at 2071.

162. Feeley & Simon, *supra* note 127, at 456.

163. Hoffman, *Commentary, supra* note 17, at 1489.

164. Feeley & Simon, *supra* note 127, at 462.

services, either on an inpatient or outpatient basis.

I have elsewhere suggested that two features of the referral process are worth noting. The first is the process of matching an offender to an available treatment program. For most drug courts, the range of available programs is limited and so some offenders either cannot be placed in a program or are placed in one that is inappropriate.<sup>165</sup> For some offenders, this inappropriate placement works, not as treatment, but as a form of community-based sanction.<sup>166</sup> Such sanctions have their place within the new penology:

Community-based sanctions can be understood in terms of risk management rather than rehabilitative or correctional aspirations. Rather than instruments of reintegrating offenders into the community, they function as mechanism to maintain control, often through frequent drug testing, over low risk offenders for whom the more secure forms of custody are judged to expensive or unnecessary.<sup>167</sup>

The second feature of the referral process, incapacitation, is related to treatment.<sup>168</sup> Treatment programs require the offender to attend inpatient or outpatient sessions; the drug court monitors the defendant's attendance at such sessions, his or her record of drug tests, and requires attendance at court. Such monitoring requires that the offender spend a lot of time under supervision: it is incapacitatory, though not so much as incarceration. Nonetheless, this form of treatment combines risk management with incapacitation through a therapeutic model of discipline and responsabilization.

Feeley and Simon suggest that incapacitation is "the clearest example of the new penology's method. . . . If [it] can do nothing else, incapacitation theory holds, it can detain offenders for a time and thus delay their resumption of their criminal activity."<sup>169</sup> Accordingly, the incapacitatory nature of inpatient, outpatient, and court-based treatment, combined with close monitoring and lengthy retention in a drug program works to keep the drug offender out of the class of criminals, thus "rearranging the distribution of offenders in society."<sup>170</sup> The drug court's managerial focus on measuring retention rates thus also operates to gauge its effectiveness in managing incapacitation.

The drug court's method of incapacitation works to extend a method primarily associated with the prison into the community. That is, using responsibi-

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165. See Miller, *Embracing Addiction*, *supra* note 39, at 1536-47 (discussing the process of matching offender to treatment).

166. See, e.g., Malkin, *supra* note 39, at 374-75, 381-82 (discussing mismatches between offenders and treatments).

167. Feeley & Simon, *supra* note 127, at 461.

168. See Miller, *Embracing Addiction*, *supra* note 39, 1547-52 (discussing the relation of incapacitation and treatment in drug courts).

169. Feeley & Simon, *supra* note 127, at 458.

170. *Id.*

lization and risk it targets an identifiable social group occupying a particular geographic locality as in need of surveillance and management. These “[s]trategies [of the new penology] focus on certain groups and neighborhoods, identifying and labeling spaces and certain people as potential problems, or criminals-in-the-makings, and managing them before the event.”<sup>171</sup> If incapacitation undermines the distinction of the “inside” of the carceral regime and the “outside,” then the therapeutic undermines the separation of the individual from the community and treatment undermines the distinction between the inside of the courtroom from the outside. The drug court thus extends itself into a variety of public and private spaces, “transform[ing] the liberal discussion about poverty and exclusion into a neoliberal discussion over space, public safety, and crime.”<sup>172</sup>

#### IV. JUDICIAL EXPERTISE: THERAPY AS DISCIPLINE

Why have drug and reentry courts, as low-level and localized judicial responses to national drug policies, managed to expand judicial control when at the highest levels that role has contracted?<sup>173</sup> Why is it that problem-solving courts have proved so adept at adapting to the new metric of “governing through crime”<sup>174</sup> and the responsabilization strategy? One feature associated with the new penology may be the courts’ ability to engage in public-private partnerships with various treatment providers and sources of funds.<sup>175</sup> They are helped in this activity by what I have elsewhere called the “collateral authority” of the judge,<sup>176</sup> the respect commanded by these court officials by virtue of their judicial role.

Perhaps the most striking feature in the emergence of drug courts over the past thirteen years has been the leadership role exercised by judges in founding and leading the “movement.” “The first courts were established because of the emergence of a small network of committed officials, judges, administrators, treatment providers, prosecutors, and defenders who shared their experiences and newfound expertise, who traveled to one another’s courts at their own ex-

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171. Malkin, *supra* note 39, at 367. *See id.* at 371 (“[R]eality bursts into the social space as the ‘community’ being served and the new risk management being applied to improve public safety often target and operate in low-income, majority black and Hispanic neighborhoods.”).

172. *Id.* at 361, 372-73.

173. *See, e.g.,* SIMON, *supra* note 124, at 139-140 (arguing that the courts have played less of a role in regulating crime since the end of the 1970s).

174. *Id.*

175. *See* GARLAND, *supra* note 24, at 16, 124-6.

176. *See* Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 F. SENT’G RPTR. 127, 128 (2007).

pense to observe or to provide assistance.”<sup>177</sup> Drug court judges have worked assiduously and often without government help or funding to find private partners willing to support their efforts. In the rise of the drug court, “the major agents of change are . . . the judicial[ ] actors themselves. ‘The Drug Court Movement is essentially a judge-led movement.’”<sup>178</sup>

The fact that drug courts have emerged as a low-level and local movement, away from the traditional centers of state or judicial power, is perhaps no accident. The idea that power is exercised as much in the “extremit[ies of government] . . . those points where it becomes capillary, that is, in its more regional forms and institutions,”<sup>179</sup> is an important feature of “governmentality.”<sup>180</sup> This description envisages political power as decentralized and multi-faceted, consisting in a network of relationships. Accordingly, not only does the drug court engage in drug politics, drug court judges also use the drug court as a means of engaging in judicial politics and federal funding. The drug court judge is thus enmeshed within a web of relations that both empower and discipline, channel and free.

A more central explanation of judicial leadership, however, is that, due to the judge’s expertise, the drug court fits comfortably within the new penology. That expertise is markedly different from old penology’s paradigmatic agents, the physician and the parole officer. What the judge engages in is not (medical) treatment but judgment;<sup>181</sup> judgment *as* treatment. Rather than passively acting upon the recommendation of medical or social-work experts, the drug court judge *is* the relevant expert, albeit one acting on the advice of her treatment team.<sup>182</sup>

The drug court judge is not, however, an expert in medical treatment or social work, two skills that would seem to be at the forefront of the drug court’s

177. Goldkamp, *supra* note 2, at 947. *See also* NOLAN, *supra* note 15, at 42 (“The drug court movement is ‘a grassroots kind of movement. It’s not something where the bureaucrats in Washington tell you what to do. Each community has developed its own program for its own particular needs and they all deal with it on a local level. . . . It’s a totally grassroots kind of thing.’”) (quoting Louisville, Kentucky, drug court Judge Henry Weber); *id.* (“It’s probably the only movement in the judicial system that has bubbled up from the grassroots to the Federal government.”) (quoting a former director of the Drug Courts Program Office: TIM MURRAY, CUTTING CRIME: DRUG COURTS IN ACTION (1997)).

178. NOLAN, *supra* note 15, at 42 (quoting Bean, *America’s Drug Courts: A New Development in Criminal Justice*, CRIM. L. REV. 718-21 (Oct. 1996)).

179. FOUCAULT, TWO LECTURES, *supra* note 63, at 96.

180. *See* Foucault, *Governmentality*, *supra* note 64, at 5-21.

181. *See* Miller, *Embracing Addiction*, *supra* note 39, at 1496 (“[T]reatment emphasizes counseling instead of medication.”).

182. *See id.* at 1502 (“The judicial role is that of the therapeutic expert empowered to determine the best interests of the offender.”); *id.* at 1514 (“In drug court, the judge is the expert; she is no longer an official tasked with balancing the opinions of expert, prosecutor, and defender.”).

operation. That, however, is not the expertise required or on display. Rather, the drug court judge is an expert in *discipline*: transforming the behavior of recalcitrant offenders, making them *responsible* partners in society through the narrative of self-esteem, motivation, and transformation that Malkin identified as the essential drug court discourse.<sup>183</sup>

Accordingly, if the new penology requires an actuarial accounting for risk, and the drug court seeks to minimize risk using the responsabilization strategy of making both offender and community accountable for controlling criminal activity, then the required expertise is not primarily in addiction but in discipline. In drug court, the idea is that the addict is unpersuadable by ordinary means.<sup>184</sup> The addict, the ex-criminal, the mental patient, or any of the subjects treated by the problem-solving courts are the epitome of recalcitrant subjects indulging their reason-independent desires.<sup>185</sup>

Reason- or thought-independent acts or desires can be contrasted with rational or thought-dependent acts or desires.<sup>186</sup> A thought-dependent desire fluctuates in strength depending upon how good or bad the agent thinks outcome of her action will be for her. The better the agent thinks the outcome will be, the more strongly she will desire it.<sup>187</sup> But there may also be thought-independent desires that do not respond to rational persuasion about the costs or benefits of a course of action. Nonetheless, these thought-independent desires can move an agent to act, albeit in irrational ways. Unlike thought-dependent desires, these

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183. Malkin, *supra* note 39, at 383.

184. Most drug courts adopt a disease model of addiction, characterizing the addict's susceptibility to craving as "permanent, easily triggered, and requir[ing] constant vigilance in order to remain under the addict's control." Miller, *Embracing Addiction*, *supra* note 39, at 1518.

185. On reason-independent desires, see BERLIN, *supra* note 10, at 19 (discussing Kantianism as giving rise to a "positive conception of freedom as self-mastery . . . [of] the empirical bundle of desires and passions to be disciplined and brought to heel"). Under this concept of human rationality, human agency is split in two, with the "rational" or thinking self opposed to the "empirical" or desiring self. *Id.* The whole point of positive freedom, according to Berlin is in "holding off . . . obsessions, fears, neuroses." *Id.* at 43. Others, including the state, are thus justified to intervene in irrational and desire-ridden lives, in order to force the irrational person to do what is really best for them, what they really would want if only they could rationally know it. "By obeying the rational man, we obey ourselves: not indeed as we are, sunk in our ignorance and our passions, weak creatures afflicted by diseases that need a healer, wards who require a guardian, but as we could be if we were rational." *Id.* at 35.

186. *See id.* On the distinction between thought-dependent and thought-independent desires, see Scott Berman, *A Socratic Argument for Psychological Egoism*, in *DESIRE, IDENTITY AND EXISTENCE: ESSAYS IN HONOR OF T.M. PENNER* 143, 145 (Naomi Reshotko ed., 2003).

187. This view is most strongly expressed by Socrates, who believed that knowledge of the good would impel an agent to do the good. *See* Plato, *The Georgias* 456c-460c, in *PLATO, COMPLETE WORKS* 791, 801-04 (John M. Cooper ed., 1997).

irrational desires are not sensitive to what the agent knows about the action or its outcome. Accordingly, education directed at increasing the addict's rational understanding of what it is best to do will make no difference to her conduct. What is required is education of the body, not the mind: behavior modification of the sort provided by surveillance and discipline.<sup>188</sup>

Many drug court judges endorse a disease model of addiction focused upon understanding the addict's pathological behavior as thought-independent.<sup>189</sup> In its therapeutic jurisprudence form, the disease model suggests that the addict has a pathological character for which she is not responsible but which is amenable to treatment. This approach reconstitutes the "therapeutic" not as medicinal but as physical regulation or discipline imposed by an expert in various forms of surveillance and constraint: the judge. The court gains its authority as better able to engage in discipline and surveillance necessary to treat the offender's addictive disease than the other experts, in large part because the court is able to engage in discipline and those other experts are not. Judicial discipline demands responsibility in a manner that medical or social work professionals cannot.<sup>190</sup>

This disciplinary aspect of the drug court has august and beneficent antecedents and is embraced from genuinely therapeutic motivations. It seeks to maximize a certain form of liberty—positive liberty—by freeing the offender from "obsessions, fears, neuroses, irrational forces."<sup>191</sup> The solution to the grip of these "irrational impulses, uncontrolled desires . . . the pursuit of immediate pleasures"<sup>192</sup> is discipline. As Isaiah Berlin puts this conception of positive freedom: "If you fail to discipline yourself, I must do it for you; and you cannot complain of lack of freedom, for the fact that you are [in court] is evidence that . . . like a child, a savage, an idiot, you are not ripe for self-direction."<sup>193</sup> Accordingly, some more rational person, a guardian with your best interests at heart, must intervene to return you to reason, whether you like it or not. The point of such an intervention is precisely to "raise [you] to a 'higher' level of freedom."<sup>194</sup>

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188. Isaiah Berlin, like (in their different ways) Michel Foucault and Hannah Arendt, repeatedly emphasizes the disciplinary aspects of positive freedom. See BERLIN, *supra* note 10, at 10, 17, 19, 38, 43 ("[D]esires and passions [are] to be disciplined and brought to heel."; "Compulsion is also a kind of education.").

189. See Miller, *Embracing Addiction*, *supra* note 39, at 1520.

190. That is, perhaps, one reason for the drug court's remarkable rejection of medicinal therapy, such as, methadone for heroin addicts. See, e.g., Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 869 n. 92 (2000).

191. BERLIN, *supra* note 10, at 43.

192. *Id.* at 17.

193. *Id.* at 38.

194. *Id.* at 17.

Accordingly, Judge Bozza and other drug court judges are correct to boast about the twin abilities of these courts to engage in supervision and behavior modification.<sup>195</sup> Rather than considering these officials as “governing through crime metaphors,”<sup>196</sup> we should take drug court judges as speaking literally when they describe short terms of incarceration (used to force drug offenders to comply with the treatment program) as been called “shock therapy,” “motivational jail” and “not really punishment at all, but a therapeutic response to the realistic behavior of drug offenders in the grip of addiction” or the “restructuring of the defendant's lifestyle.”<sup>197</sup>

One drug court judge says this about training:

Anyone who has tried to train a pet knows how important [are immediate, consistent, and certain consequences for both negative and positive behavior]. If your pet messes up when you are not at home and the sanction comes hours later when you get home, the pet doesn't connect the punishment with the behavior but rather with you and your coming home. If the pet obeys a command, but your praise is not automatic, that reinforcement is lost.<sup>198</sup>

The judge does not mean this metaphorically. The treatment *is* discipline, a form of behavioral re-orientation of the offender's thought-independent desires. Under the therapeutic justice version of drug court procedure, rewards, and sanctions are part and parcel of a disciplinary training process in which the offender is to be weaned off his or her anti-social behavior,<sup>199</sup> and that work on the offender's non-conscious habits rather than his reflective desires.

The drug court is thus firmly in step with the movement from welfare to responsibility that marks, not only penal policy, but modern liberal societies. Drug courts are able to rationalize discipline as therapy in line with the new penology's identification of the risks inherent in failing to control the criminal subject. The effect of the drug court's supervisory model is to extend the shadow of the prison walls into the community served by the problem-solving

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195. John A. Bozza, *Benevolent Behavior Modification: Understanding the Nature and Limitations of Problem-Solving Courts*, 17 WIDENER L.J. 97 (2007). See also Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 594 (2007) (“Judges and a variety of activists working with them are effectively redefining the judicial power in response, they argue, to the changing social context by adding an expanded repertoire of therapeutic techniques to solve a broad range of social, economic and political problems among individuals and entire communities. Judges are transitioning from decision makers to life changers, employing new techniques to manipulate individuals and entire communities for the purpose of modifying individual and collective life.”).

196. Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035 (2002).

197. See Miller, *Embracing Addiction*, *supra* note 39, at 1501.

198. Cooper, *supra* note 10, at 20, 24.

199. See Miller, *Embracing Addiction*, *supra* note 39, at 1499.



court.<sup>200</sup>

I want to emphasize that, while I am obviously worried about some aspects of the drug court's operation, it is not altogether clear to me that drug courts do more harm than good. I am certainly concerned with the manner in which they minimize the social causes of addiction and participate in the creation and management of a risky underclass. On the other hand, the (neo-)rehabilitative aspects of the court do attempt to resist the totalizing effects of the new penology at the same time as, consciously or unconsciously exploiting it to expand the types and influence of problem-solving courts.

Furthermore, as Victoria Malkin demonstrates, under this new therapy of discipline, offenders are encouraged to speak to judges and carve out spaces for themselves to engage with the court and wider community.<sup>201</sup> "For some, it provides them with a space within which they begin to contemplate their life outside of being in a system they have to manipulate."<sup>202</sup> Nonetheless, offenders are forced to negotiate this space within the language of addiction and therapeutic discipline imposed by the drug court and monitored by the judge.

My claim has been that this language and this structure undermine the freedom and autonomy of those whose problems stem, not from addiction, but from race, gender, and poverty. Malkin movingly describes the predicament of immigrant prostitutes forced to use drug-court speak:

[A] large number of the prostitutes were actually Spanish-speaking immigrants... Even the leader of the health group noted that [the mantra of therapeutic redemption, and self-responsibility] was not what these woman needed. Prostitution was not the result of a drug issue, it emerged from vulnerability, lack of job opportunities and other issues. One Colombian woman summed up as she began to cry: "Telling me how to put on a condom tells me that I will be a prostitute for my life." She then asked why the court could not help them find jobs.<sup>203</sup>

The problem with drug court discipline-as-therapy is that it embraces a politics of positive freedom while at the same time suppressing its political nature. My view is that it is precisely the use of therapeutic language to minimize the

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200. See, e.g., MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 301-02 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) ("The most important effect of the carceral system and of its extension well beyond legal imprisonment is that it succeeds in making the power to punish natural and legitimate, in lowering at least the threshold of tolerance to penalty. It tends to efface what may be exorbitant in the exercise of punishment. It does this by playing the two registers in which it is deployed—the legal register of justice and the extra-legal register of discipline—against one another. In effect, the great continuity of the carceral system throughout the law and its sentences gives a sort of legal sanction to the disciplinary mechanisms, to the decisions and judgments that they enforce.").

201. Malkin, *supra* note 39, at 377-78.

202. *Id.* at 378.

203. *Id.* at 380-81.

political nature of this response to drug policy that has made the drug court a bipartisan success story. Nonetheless, drug courts still impose coercion and do so on a mostly poor, minority clientele. So its success comes with a political cost: my position is that it would be well to publicly acknowledge that cost.

If an underlying justification of drug, reentry, community, and other problem-solving courts is to find localized ways of re-integrating, rather than simply managing, the offender and their community, then perhaps it is worth taking the concept of community participation seriously. In the problem-solving court the judge stands as representative of the community. But the criminal justice system has, since the nation's founding, embraced the presence of ordinary citizens through one of its central institutions: the grand jury. If we are really serious about community participation, why not give the grand jury the sort of radical transformation we have given the court?

#### V. SOMETHING OLD, SOMETHING NEW: THE DRUG GRAND JURY

To this point, I have primarily emphasized two concepts of freedom that structure the drug court debate. In their place, I now want to propose a third one that has found influential adherents, not least among this nation's founders. This concept of freedom, which might be called communicative liberty, has been put forward most recently, and in different ways, in the work of Hannah Arendt and Jurgen Habermas. Arendt, for example, describes this concept of communicative liberty, as localized and emerging from the spontaneous interaction, in the public realm, of equals with plural goals and values.<sup>204</sup> Most fatefully for my argument, she claims to find this type of liberty embodied in the town hall meetings of American revolutionaries.<sup>205</sup> This town hall structure is somewhat replicated, and constitutionalized, in the form and function of the grand jury.

The grand jury, understood as occupying a unique place within the constitutional structure and exercising considerable discretion over the charging of crimes, already wields a great deal of power in the criminal justice system.<sup>206</sup> What I propose is to reformulate or redirect some of the grand jury's structure and function, in ways less radical than the restructuring of the judicial role in drug court, as a means of empowering offenders and communities. The goal is to replace the drug court judge, and thus the hierarchical relation between judge on the one hand, and community and offender on the other, with a grand jury

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204. HANNAH ARENDT, *Labor, Work, Action*, in THE PORTABLE HANNAH ARENDT, 167-178 (Peter Baehr, ed., 2000).

205. See HANNAH ARENDT, *The Revolutionary Tradition and Its Lost Treasure*, in THE PORTABLE HANNAH ARENDT 508, 513 (Peter Baehr ed., 2000).

206. See, e.g., Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 726-32 (2008).

made up of randomly selected members of the community. The point is both to increase the democratic participation of community and offender in drug rehabilitation and local drug policy, and to permit a broader discussion of social and individual responses and responsibilities in the face of drug crime.

The problem I seek to address is one of re-incorporating issues of race and poverty within the problem-solving court model. A grand jury version of the drug court, promoting free discussion among members of the community identified by the new penology as “risky,” can encourage the discussion and resolution of, not only individual, but also social and governmental failings or obligations. These all contribute to drug use, not only as a problem, but also as a symptom of wider social isolation and stratification. Organized around a principle of communicative freedom, in which every one is at liberty to account in public for their choice among plural values or goals, individual groups of community members organized into grand juries can develop their *own* drug policy and, under the grand jury subpoena power, hold local government, as well as themselves and their peers, to account. This is not an easy task, and certainly requires some direction, but it is worth considering as a form of empowered community participation.<sup>207</sup>

Concern with the structure of problem-solving courts among the criminal defense bar has prompted a number of articles questioning the treatment team structure. In particular, a range of scholars, including Tamar Meekins,<sup>208</sup> Mae Quinn,<sup>209</sup> Micheal Pinard,<sup>210</sup> and Josh Bowers,<sup>211</sup> have worried about defense counsel’s reduced role in advising clients about the legal consequences of the court’s treatment regime, and providing an independent check upon the drug or reentry court judge. Their goal, in advocating for a more “holistic” approach to drug or reentry court lawyering,<sup>212</sup> is to re-empower the relationship between defense counsel and the offender in having a real choice to select among criminal justice processes, recognizing that drug courts can, in the long run, prove

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207. See ARCHON FUNG, *EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY* 1-18 (2005).

208. Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006).

209. See, e.g., Quinn, *Whose Team Am I On Anyway?*, *supra* note 99; Quinn, *An RSVP*, *supra* note 11.

210. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry Into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004) [hereinafter Pinard, *Broadening*].

211. Bowers, *supra* note 116.

212. See, e.g., Pinard, *Broadening*, *supra* note 210.

much more onerous than traditional procedures.<sup>213</sup> Some, including Tony Thompson,<sup>214</sup> have proposed innovative solutions to the reduced defender role, for example having students and law school clinics make up the difference.<sup>215</sup>

My proposal is more radical than simply restoring the traditional role of public defenders at the disposition stage, in that it seeks to transfer the judge's therapeutic role onto members of the community. At the same time as reducing or eliminating the judge's therapeutic role, I take seriously the criticisms of the defense bar that, "Of the judge, defense counsel, and the prosecutor, drug courts have altered the prosecutor's role the least."<sup>216</sup> Certainly, the current operating procedure in grand jury practice empowers the prosecutor rather than checks her discretion.<sup>217</sup> But it was not always so, and the "new" drug-dedicated grand jury could replicate the old "shield" function rather than the modern "sword" approach.

#### A. Problems and Proposals

My solution depends upon facilitating the "empowered participation"<sup>218</sup> of members of the underclass: rather than managing the segregated urban communities identified as a criminal risk group, the point is to reorient the newly localized process of "governing through crime" using the model of community-level deliberative democracy.<sup>219</sup> Accordingly, the informational problem presented by the diminution of the defense counsel's role is collateral to my concerns and, ideally, can be accommodated within the drug-dedicated grand-jury model.

The idea is a simple one: as part of a deferred adjudication diversion program<sup>220</sup> to authorize a drug-dedicated grand jury to determine whether to offer diversion to drug treatment. Drug courts use two types of programs to channel offenders into treatment during the criminal justice process: deferred prosecu-

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213. See Bowers, *supra* note 116, at 783.

214. Thompson, *supra* note 85, at 298-304 (proposing that law clinics concentrate on reentry issues to provide increased counseling for offenders in reentry courts); see also Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63 (2002) (discussing problems with structure of problem-solving courts).

215. Thompson, *supra* note 85, at 298-304.

216. Thompson, *supra* note 214, at 79.

217. See, e.g., *United States v. Williams*, 504 U.S. 36 (1992) (refusing to permit court to impose limitations on function of grand jury).

218. See FUNG, *supra* note 16, at 1-18.

219. Archon Fung, *Deliberative Democracy, Chicago-Style: Grass-roots Governance in Policing and Public Education*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 111, 111-44 (Archon Fung & Erik Olin Wright eds., 2003).

220. Miller, *Embracing Addiction*, *supra* note 39, at 1489.

tion and post-adjudication diversion. Deferred prosecution requires that the defendant waive her right to a speedy trial and enter treatment as soon as possible after being charged.<sup>221</sup> Under the post-adjudication model, the defendant is, in fact, convicted, either after trial or after a plea bargain. In that event, an incarcerative sentence is deferred pending completion of a drug treatment program. Since the grand jury operates prior to indictment, it is by necessity a deferred prosecution option. The whole point of the process is to determine whether the grand jury will indict based upon the offender's need for treatment and compliance with a treatment program recommended by the grand jury as a condition of avoiding indictment.

If the defendant accepts the treatment option, the grand jury will retain jurisdiction and supervise compliance with treatment objectives. Like the judge-driven drug court, the grand jury will retain its "usual physical location in the courthouse."<sup>222</sup> The grand jury drug court model can even retain an emphasis on therapeutic management of offenders. The goal is, however, to increase the connection between community, offender, criminal justice professionals, and treatment providers in a manner that more directly empowers the community and the addict as the inhabitants of the space that drug courts seek most directly to control.<sup>223</sup>

To a large extent, the drug-dedicated grand jury procedure replicates the functions of the traditional grand jury. It depends upon the fact that the grand jury is a legally unique institution, operating as a sort of communal ombudsman, forming "its own constitutional entity, which checks each of the three branches of government."<sup>224</sup> Most jurisdictions retain the indicting grand jury process as a prerequisite for felony trials.<sup>225</sup> Traditionally, grand juries have possessed, in addition to the power to indict at the request of the prosecutor, the

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221. See, e.g., Boldt, *supra* note 4, at 1255. The Oakland court is a deferred prosecution drug court.

222. Fairfax, Jr., *supra* note 206, at 726.

223. The community justice movement, embodied in community courts, tends to revolve around either the judge-centered model, or a model that "rel[ies] on volunteers and open community meetings that are often dominated by small interest groups." Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 394 (2005). See also Fagan & Malkin, *supra* note 7, at 897; Thompson, *supra* note 214, at 63. While my grand jury model shares some features of the community court approach, it is both more focused, concerned with one set of problems (drug abuse), and, as Professor Lanni notes, provides a more focused form of participation through the grand jury.

224. Fairfax, Jr., *supra* note 206, at 726. See also *id.* at 727 ("As the Supreme Court explained in *United States v. Williams*, the grand jury 'is a constitutional fixture in its own right. In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as kind of a buffer or referee between the Government and the people.'").

225. See Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 VA. J. SOC. POL'Y & L. 67, 121 (1995).

power to make presentments after undertaking their own investigation,<sup>226</sup> as well as the power to issue reports critical of governmental practices.<sup>227</sup> Some states still retain this reporting power, permitting grand juries to “investigate and make recommendations concerning the public welfare or safety.”<sup>228</sup> The current power possessed by grand juries in reporting states is somewhat similar to that I envisage for a drug-dedicated grand jury.

The drug-dedicated grand jury would be permitted to deliberate over state misdemeanor as well as felony cases (even in states that otherwise do not use grand juries),<sup>229</sup> although defendants would retain the right to waive the grand jury and opt for a preliminary hearing if charged with a misdemeanor. At the federal level, it is unclear whether a defendant can waive the right to a grand jury.<sup>230</sup> An argument against waiver extends by analogy from the fact that individuals have no right to obstruct a grand jury in any inquiry, even if the investigation places quite onerous burdens, including social stigma, upon the witness or target of the investigation. Grand juries traditionally have plenary investigative power and access “to every man’s evidence”: waiving the grand jury right would short-circuit that process.

Furthermore, if the grand jury stands as the “voice of the community,”<sup>231</sup> representing its interests in the criminal justice system, a defendant’s waiver of the drug-dedicated grand jury’s ability to consider the range of alternatives to incarceration appears to trample on the community’s interest in ensuring effective prosecution or diversion for drug rehabilitation. Laura Appleman makes

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226. *See id.* at 67, 71, 106 (distinguishing presentments from indictments and discussing states use of presentment power).

227. *See id.* at 67, 71-72 (discussing power of grand jury to issue reports criticizing activities of public officials); Barry J. Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 84 (1987) (discussing English grand jury’s historical practice of issuing reports).

228. Brenner, *supra* note 225, at 118, n.212 (discussing reporting power in Alaska and Nevada).

229. Under my proposal, grand jurors could end up serving as much as eighteen months on the grand jury, based on the standard length of drug court supervision. *See, e.g.*, Cal. Penal Code § 1000.1(a)(3) (West 2009) (drug court program under California deferred entry of judgment system lasts between eighteen months and three years). Some jurisdictions require grand jurors to serve this long or longer. *See* Brenner, *supra* note 225, at 91-92 (discussing different terms of service under different grand jury models). Such lengthy service may necessitate something less frequent than the weekly meeting schedule adopted by many drug courts, or to have some of the role performed by the drug court, such as regular drug testing, carried out independently of the grand jury. Because part of my worry is over the incapacitatory nature of drug court procedure however, I am quite comfortable with a somewhat less onerous meeting schedule, so long as it does not undermine the effectiveness of the program, measured both in terms of treatment goals and democratic process.

230. *See generally* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 430-38 (2006).

231. Brenner, *supra* note 225, at 67.

the argument that, at common law, the grand jury right developed as an individual right, rather than one held by the community.<sup>232</sup> Under the individual-right approach, a defendant should be able to waive the right to a grand jury.

Nonetheless, the policy issue remains: if the traditional right to waive a grand jury is no longer an individual one, as in the federal system, why permit waiver? My worry is essentially that, where the traditional trial process is less onerous and the offender is charged with a misdemeanor, she should be permitted either to take her chances through a normal disposition after a preliminary hearing or to avail herself of the drug-dedicated grand jury. The drug-court grand jury model attempts to ensure greater equality between citizen and offender in the evaluation process. The whole point is to develop a less coercive, more participative forum for drug treatment. Accordingly, respecting the offender's autonomy as an agent with plural values and goals requires permitting her to choose to forgo the grand jury, at least for minor crimes (and perhaps major ones as well). Should the defendant opt for the drug-dedicated grand jury, the charging process would operate on a deferred adjudication model. The drug-dedicated grand jury would thus retain its traditional charging power and so leave the offender with the option of accepting diversion or going to court.

One simple means of conceptualizing the structure and operation of the drug-dedicated grand jury is to suppose that it replaces the judge in the drug-court treatment team. Each grand jury would undergo a training regime, supervised by a judge, with the participation of treatment providers and representatives from the prosecutors' and defenders' offices, to educate them about drug use and the various treatment options. These members of the treatment team would then act to facilitate and inform the grand-jury's charging and supervisory decisions.<sup>233</sup>

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232. See Laura I. Appleman, *The Lost Meaning of the Jury Trial Right* 31 (February 27, 2008) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1084960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1084960).

233. I am grateful to Tony Thompson for pointing out that, if one major criticism of drug court judges is that they are insufficiently well trained in medical or psycho-social drug treatment, then a drug court grand jury staffed by laypersons is likely to have even less expertise. See E-mail from Anthony C. Thompson, Professor of Clinical Law, New York University School of Law, to Eric J. Miller, Associate Professor, Saint Louis University School of Law (January 16, 2009, 11:06:20 AM CST) (on file with author). Thompson's insight highlights the major reorientation I propose: that expertise is itself subjected to strong interrogation by ordinary citizens, and required to justify its proposed interventions both upon the individual and the community. The point is to ensure that neither the judge nor the grand jury takes the place of experts and operates in a therapeutic capacity. Rather, under the model I propose, the treatment provider would need to persuade and educate the grand jury about the treatment options, and the grand jury (perhaps with explanation and help from a lawyer or other official) would be encouraged to evaluate those options. Two recent articles suggest that a demand for evidence for both therapy and punishment are essential to ensuring its success. See The Honorable Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting*

The drug-dedicated grand jury would have to provide, as a major aspect of jury service, a program of education, both in the power and purposes of the grand jury, and the type of democratic process it seeks to promote. A grand jury with the power to indict, present, and report, as well as scrutinize official and individual conduct, particularly when related to the goals of drug policy, has a lot to do. Traditionally, the prosecutor has taken the role of instructing the jury, but that can lead to “capture” of the jury by the prosecutor, so that the grand jury becomes an instrument of the prosecutor’s will.<sup>234</sup> Some states have inserted an attorney dedicated to represent the jury between it and the prosecutor as a means of promoting grand jury independence.<sup>235</sup> My proposal goes somewhat further,<sup>236</sup> requiring grand jurors to receive a short course of instruction explaining what the indictment, presentment, and reporting powers involve, as well as their power to subpoena such witnesses or information as they choose.

In addition, the traditional drug court “treatment team” can explain the causes and features of drug addiction as well as non-addictive drug use, what community resources are available to deal with drug addiction, and the current strategies employed to match those resources to addicts. Members of the local police could explain their strategies for addressing drug crime, and the challenges they face; public health representative could explain some of the treatment options that go beyond drug addiction and implicate wider health concerns. Armed with that knowledge, the grand jurors can then discuss the offender’s options based upon their individualized judgment about the nature of her problem, the available resources, and the variety of social and organizational obstacles that she might face.

The idea that a low-level community group should jointly set local policing policy has been a major aspect of the Chicago Alternative Policing Strategy.<sup>237</sup> The point of that movement was to increase public scrutiny of beat-level policing and permit community direction of its activities.<sup>238</sup> The Chicago experiment depended upon encouraging residents to attend “community beat meetings” which were regularly scheduled for every beat in the city.

In these meetings, neighborhood residents and police discuss the neighborhood’s public safety problems in order to establish, through deliberation, which problems should be counted as priorities that merit the concentrated at-

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*Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389 (2008); Benedict Carey, *The Evidence Gap: Drug Rehabilitation or Revolving Door?*, N.Y. TIMES, Dec. 22, 2008, at D1 (discussing evidence-based drug therapy).

234. Brenner, *supra* note 225, at 104-06.

235. *Id.* at 124-25.

236. Though I am not opposed in principle to having a dedicated attorney for the grand jury, my worry is that “experts” take over the role of decision-making, or otherwise undermine the peer-to-peer nature of drug-dedicated grand jury discussion.

237. Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC. 5, 10 (2001).

238. *Id.*



tention of police and residents ... At successive meetings, participants assess the quality of implementation and effectiveness of their strategies, revise strategies if necessary, and raise new priorities.<sup>239</sup>

Furthermore, as Roger Fairfax has recently emphasized, the grand jury can easily be adapted to facilitate the community direction of police resources.<sup>240</sup>

As described by Archon Fung, a professor of public policy at Harvard, the path to community empowerment was not a simple one. Initially, both citizens and the police were somewhat resistant to or disinterested in the empowered participatory model.<sup>241</sup> To make the beat meetings work, the City had to engage in a concerted effort to educate both police and community members through, in the case of the citizenry, an aggressive outreach program.<sup>242</sup> The drug-dedicated grand jury can provide the same sort of education in an even more targeted manner, by using a period of education in the problems of drug policy, local government, policing, and the functions and powers of the grand jury, as a means of overcoming both suspicion and ignorance. This newly communicated knowledge will not only instruct the grand jurors during their service on the jury, but will operate as a “democratic catalyst”<sup>243</sup> to permit and encourage them to become more active members of the community after jury service, and to impart their new-found knowledge to other members of the community.<sup>244</sup>

Fung’s project is to discuss the possibility of developing low-level institu-

239. *Id.*; see also FUNG, *supra* note 16, at 1-18 (police required to negotiate with local communities as allies, experts, and advisors, and on occasion to act so as to overcome local self-interest or bias).

240. See Fairfax, Jr., *supra* note 206, at 755-56.

241. Archon Fung, *Beyond and Below the New Urbanism: Citizen Participation and Responsive Spatial Reconstruction*, 28 B.C. ENVTL. AFF. L. REV. 615, 618-23 (2001); see also FUNG, *supra* note 16, at 70-73.

242. Fung, *supra* note 241, at 619.

243. *Id.* at 618.

244. Professor Thompson also raised in email correspondence with the author the idea that the localism of community justice (whether community policing or community courts) could lead to balkanization. This seems to me both its attractiveness and its Achilles heel. Patchwork “justice” is a problem to the extent it promotes arbitrary differences across communities. That being said, for some communities, mitigating the impact of drug policing by negotiating with suspects at the grand jury stage before charging might have significant social benefits. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (proposing African Americans on juries nullify drug laws criminalizing possession); see also Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 818 (1998) (arguing for a policing of urban drug crime that is sensitive to the needs of minority residents). Furthermore, I am in favor of relaxing the usual limitations on grand jury service to include former felons in the jury pool. Many states effectively exclude former felons for life from grand jury service, and this exclusion has a significant racial impact. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 168-69 (2003). Localism and community participation may be even more beneficial if it those communities that feel threatened by drug policy are given the means of resisting and redirecting it.

tions that promote democratic participation to generate democratic reform. To that extent, his project jibes closely with Arendt's. For Arendt, the issue was not to develop some uniform agreement over the best policy for all individuals: she believed that the plurality of our goals and values would always undermine any long-term prioritization of one value or goal. Instead, the point was to develop political institutions that would permit coordinated political action while also ensuring that each individual was able publicly to argue for and justify her values or goals as a political equal. The problem was not only a theoretical one, but primarily one of institutional design. This is the problem addressed by Fung. He contends:

[T]he problem [of democratic vitality] has more to do with the specific design of our institutions than with the tasks they face as such. If so, then a fundamental challenge . . . is to develop transformative democratic strategies that can advance our traditional values—egalitarian social justice, individual liberty combined with popular control over collective decisions, community and solidarity, and the flourishing of individuals in ways that enable them to realize their potentials.<sup>245</sup>

Finally, and in line with encouraging democratic participation, the sort of communicative freedom I seek to promote through the grand jury model requires participation by as large a cross section of the community as possible. The current method of selecting grand jurors, which is dependant upon the jury wheel and subject to very limited substantive voir dire by the judge, operates as an acceptable base-line. My goal, however, is to include the whole community, and so to ensure that grand jurors are not screened or filtered for certain attributes, including certain types of criminality. The point is that, in many communities, it is difficult to tell the law-breakers from the law-abiders;<sup>246</sup> and in many poor communities, socially active and important individuals revolve from minor criminality to non-criminal activity dependent upon social and economic factors outside their control.<sup>247</sup> Accordingly, my position is that grand jurors should not be excluded for criminal activity unless such activity intimidates the equal participation of the other members of the grand jury.

Drug-dedicated grand juries provide an opportunity to counterbalance the emphasis on personal transformation and responsibility with a discussion of so-

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245. FUNG & WRIGHT, *supra* note 219, at 6.

246. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 346-47 (1998) (discussing difficulty of telling apart law-breakers and law-abiders).

247. See VENKATESH, *supra* note 79 at 118-26, 136-42 (discussing legal and illegal business practices of business owners in poor, minority, Chicago community); see also Sudhir Alladi Venkatesh, *The Social Organization of Street Gang Activity in an Urban Ghetto*, 103 AM. J. SOC. 82 (1997) (noting the complex nature of mutual reliance between street gangs and the communities in which they are located).

cial transformation and responsibility. A therapeutic paradigm that prioritizes addiction as the primary explanation for social maladaptation would be confronted with the lived experience of community residents: individuals who, like the drug addicts, are struggling to access community or governmental resources. Including community members within the discussion for allocating therapeutic resources serves to educate local residents about the range of resources on offer, at the same time as educating service providers about the types of services or approaches best fitted to the relevant community.

At the center of the drug-dedicated grand jury proposal is the recognition that both government and citizen have a shared interest in managing crime. Both seek to alleviate the effects of drug dealing and drug use on the local communities. The drug-dedicated grand jury could thus be conceived as an attempt to address the problems of over- and under-policing that afflict many segregated urban communities.<sup>248</sup> The relevant sense of over-policing is the “channeling [of] offenders into the criminal justice system.”<sup>249</sup> I have elsewhere suggested that “[t]here are social costs associated with removing extremely large numbers of law-breakers from the community, or incarcerating others for lengthy periods of time.”<sup>250</sup> One result is the perception of race or class bias; or in the drug court, a therapeutically driven race- or class-blindness. Under-enforcement arises when law-enforcement regard certain neighborhoods or communities as incorrigible and zone them out of policing, tolerating a high degree of criminal conduct or responding slowly or sporadically to emergency calls.<sup>251</sup> Under-policing “provides a visceral and often immediate signal of government disinterest in a community . . . . Lacking police protection, law-abiding citizens in under-policed neighborhoods become fearful of retaliation if they report crime, and so the problem spirals out of hand.”<sup>252</sup>

In the traditional drug court, with its “triad of community, court, and services, the police remain somewhat attached by a separate strand. The police . . . remain outside of the Court’s administrative control and political influence, and their practices remain unaffected by the Court.”<sup>253</sup> A major aspect of the sort of empowered democracy practiced through a drug-dedicated grand jury could be its operation as a forum for directing the police to the type of drug crime the community wished to have policed. While it is certainly true that in a public

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248. See, e.g., Fagan & Malkin, *supra* note 7, at 931 (“[R]esidents consistently point to the low levels of patrol or law enforcement that leave drug dealers visibly doing business, even as police arrest what residents see as ‘the wrong people.’”).

249. Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,”* 94 CAL. L. REV. 617, 625 (2006).

250. *Id.*

251. *Id.* at 627-28.

252. *Id.*

253. Fagan & Malkin, *supra* note 7, at 931.

forum certain fears about retaliation could preclude neighborhood residents from identifying criminals, properly handled the drug-dedicated grand jury could be a site of conversation between community, addicts, law-enforcement, and street gangs.<sup>254</sup>

One feature that helps produce the absence of coercion necessary to engage a politically free discussion is the grand jury's traditional secrecy. One of the key rationales for grand jury secrecy is the provision of a forum where witnesses and grand jurors can testify and inquire, free from fear of retaliation. The grand jury thus operates to create a space in which representative members of the community can participate in a relatively public form of discussion, one in which they must expose their opinions to the criticism of their peers, yet at the same time may do so free from wider social pressures that may undermine the sort of consensus building, however provisional, necessary to negotiate a plan of social action, whether it be treatment, diversion to a non-therapeutic regime, or requiring local government to undertake some form of action to ameliorate conditions in the community that undermine the ability of citizens to act as autonomous agents. Of course, part of the grand jury's function may not only to report, but to indict should the offender fail to satisfy the conditions of a program of treatment or other supervision.

The drug-dedicated grand jury could thus serve an important function in providing a negotiation regime mediating between community, local government services, and law-breakers. The problem could then be regarded, not as one of over- and under-policing, but of matching policing to community norms, that is, of permitting the community to participate in the process of (self-) government. This model of empowered, low-level, deliberative democracy acknowledges that the community is not the enemy to be suppressed, but a resource to be channeled in rebuilding social networks between state and citizen. The community perspective—its view of the reality of the social problems facing its residents—would then serve as a bulwark against an over-reliance on self-help, and a means of empowering local perspectives rather than dismissing them as threatening to social order.

## VI. CONCLUSION

The drug court innovation has had a major impact upon low-level judicial attitudes to drug crime. The drug court's success is, I have suggested, primarily achieved through suppressing the larger political debates surrounding drug pol-

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254. For example, Sudhir Venkatesh has reported that, in "community control" meetings in Chicago, council officers agreed that they "would negotiate with the street gangs to end the sale of drugs within buildings" as an intermediate means of increasing resident security. VENKATESH, *supra* note 247, at 94.

icy through the therapeutic emphasis on a politics of personal responsibility. That bipartisan agreement, however, has come at the cost of precluding a discussion of the relation of drug crime to race and class in the urban setting, and ignoring the manner in which the state, through misguided policies, has exacerbated the problems of drug addiction for those caught in the criminal justice system. Perhaps courts are the wrong place for such policy discussions. Nonetheless, they remain essential to addressing the social causes of drug use in the inner cities. As an alternative, I have suggested reformulating the grand jury to take over some of the duties of the drug court judge. My goal is to generate empowered deliberative democracy at the local level, and mitigate some of the effects of the drug court's therapeutic use of discipline, while including more partners in the discussion of urban drug policy.

