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Josh Bowers

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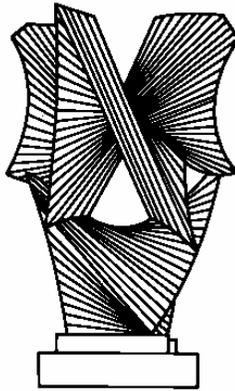
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CONTRAINDICATED DRUG COURTS

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Contraindicated Drug Courts

Josh Bowers*

ABSTRACT

Over the past two decades, drug treatment courts have gained traction as popular alternatives to the conventional war on drugs (and to its one-dimensional focus on incarceration). Specifically, the courts are meant to divert addicts from jails and prisons and into coerced treatment. Under the typical model, a drug offender enters a plea of guilty and is enrolled in a long-term outpatient treatment program that is closely supervised by the drug court. If the offender completes treatment, his plea is withdrawn and the underlying charges are dismissed. But, if he fails, he receives an alternative termination sentence. My premise is that drug courts provide particularly poor results for the very defendants that they are intended to help most. Specifically, the most likely participants to graduate are volitional drug users, who strategically game exit from undesired conventional punishment and game entry into treatment that they, in fact, do not need. By contrast, the most likely treatment failures are genuine addicts and members of historically disadvantaged groups, who thereafter receive harsh termination sentences that often outstrip conventional plea prices. In short, drug courts are contraindicated for target populations and may thereby lead to longer sentences for the very defendants who traditionally have filled prisons under the conventional war on drugs.

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INTRODUCTION

The widespread proliferation of drug treatment courts ranks among the bigger criminal-justice surprises of the past two decades.¹ In an era of unprecedented prison growth and ever-increasing sentences for drug offenders, drug courts have found traction as purported means of diverting some defendants from incarceration. There are now almost two thousand such programs operating nationally.² The courts vary widely in their specifics,³ but they tend to share some general operating patterns: The courts closely supervise the participation of non-violent drug offenders in extended (typically outpatient) treatment regimens.⁴ Drug court judges adopt an active—almost inquisitorial—role. And traditional adversaries come together as part of treatment teams that share the ostensible primary goal of curing defendant addiction. The courts provide positive reinforcement for good results and award successful program completion either with dismissals of all charges or with no-time sentences on pleas to reduced charges.⁵ Conversely, the courts deter poor performance with graduated sanctions⁶ and typically punish ultimate failure with alternative termination sentences.⁷

Drug courts have created a few enemies and a great many more

¹ Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1481 (2004) (calling drug courts perhaps “the most significant penal innovation of the past twenty years”).

² NATIONAL DRUG COURT INSTITUTE, *Drug Courts: A National Phenomenon*, at <http://www.ndci.org/courtfacts.htm> (last visited Jul. 26, 2007).

³ CAROLINE S. COOPER, BUREAU OF JUSTICE ASSISTANCE, DRUG COURTS: AN OVERVIEW OF OPERATIONAL CHARACTERISTICS AND IMPLEMENTATION ISSUES 4-7 (1995). (describing varying eligibility requirements); MICHAEL REMPEL, ET AL., THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS ix, xiii 265-71 (2003) (noting that “practice varies widely state to state (and county by county)”; Miller, *supra* note 1, at 1489 (describing “immense number of local variations on the basic model”).

⁴ REMPEL, *supra* note 3, at ix, xiv, 54.

⁵ *Id.* at ix; see e.g., Fla. Stat. Ann. § 948.08(6)(c)(2) (mandating dismissal following successful program completion); Cal. Penal Code § 1000.3 (same).

⁶ Graduated sanctions may include more frequent court appearances; more intensive treatment; demotions to earlier treatment phases; shaming sanctions, like in-court tongue lashings or public timeouts in the judge’s penalty box (typically, his courtroom jury box); or, more significantly, short remands to jail. See, e.g., Miller, *supra* note 1, at 1499; STEVEN BELENKO, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE, at 22 (2001); Richard C. Boldt, *Rehabilitative Punishment and the Drug court Movement*, 76 WASH. U. L. Q. 1205, 1232 (1998).

⁷ By contrast, drug courts that follow the pre-plea model punish treatment failure with reinstatement of initial charges. However, for present purposes, I focus almost exclusively on the more “typical[]” post-plea model. Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1462 (2000); JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 4 (citing sources).

supporters from all corners of political and institutional spectra.⁸ Supporters maintain that the courts effectively serve several goals: that they provide second chances for non-violent addicts; preserve systemic resources; and control crime by disrupting cycles of addiction and recidivism.⁹ The common refrain is that “[w]hat we were doing before simply was not working.”¹⁰ Thus, drug courts are said to offer a necessary fresh approach to combating drug use and drug crime. Conversely, critics principally raise institutional concerns: that these courts inappropriately convert traditional adversaries into “team players;” subvert judicial function by turning historically impartial judges into therapists and interrogators; and even fail to reduce recidivism and save resources.¹¹

I wish to put to one side the broader debate over the effectiveness and institutional propriety of drug courts. My aim is to draw attention to two related, under-appreciated and troubling facets of these courts: first, that they provide the worst results to their target populations; and, second, that this inversion of intended effect produces particularly toxic consequences in drug courts (of which there seem to be many) that subject failing participants to alternative termination sentences that *exceed* customary plea prices. Put concretely, drug courts are *contraindicated* for genuine addicts and for other disadvantaged groups that have traditionally filled prisons as part of the war on drugs, and the consequent adverse effects may be atypically long prison

⁸ REMPEL, *supra* note 3, at 5 (describing “almost uniformly positive media coverage and overwhelming public support at both the national and local levels”).

⁹ Peggy Fulton Hora., Hon. William G. Schma, John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 N.D. L. REV. 439, 463 (1999) (noting that drug court “affords those with the disease of addiction a chance to break that cycle of drug abuse and crime that traps them in a proverbial revolving door”); U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 6 (1997); John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923 (2000); John Feinblatt, et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 291 (2000); Claire McCaskill, *Combat Drug Court: An Innovative Approach to Dealing with Drug Abusing First Time Offenders*, 66 UMKC L. REV. 493 (1998); Judith S. Kaye, *Lawyering for a New Age*, 67 FORDHAM L. REV. 1, 5 (1998); *See, e.g.*, Miethe, et al., *supra* note 92, at 527 (noting that “primary goal” of drug courts is to reduce drug use and recidivism); *see generally* JUDGING IN THE A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winnick & David B. Wexler, eds. 2003).

¹⁰ NOLAN, *supra* note 7, at 106.

¹¹ *See* NOLAN, *supra* note 7; Miller, *supra* note 1; Hoffman, *supra* note 7; *see also* Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes the Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002); Boldt, *supra* note 6; Mae C. Quinn, *Whose Team am I on Anyway? Musings of a Public Defender About Drug Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000); Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 288 (2000).

sentences for the very defendants that drug courts were supposed to keep *out* of prison and *off* of drugs.¹²

Worse still, compulsive addicts are not the only ones who do comparatively badly in drug courts. Studies have shown that other historically disadvantaged groups—for example minorities, the poor, the uneducated and the socially disconnected—are also likelier to fail. Accordingly, drug courts may regressively tax communities already strained by the incarceration boom, and thereby exacerbate preexisting racial and socio-economic criminal-justice “tilts.”¹³

Conversely, drug offenders who are non-compulsive or less-compulsive ultimately do much better in drug courts. Even if un-addicted offenders do not want to cease drug use, they possess sufficient self-control to rationally modify their behavior in response to external carrots and sticks. Faced with the choice between incarceration and manageable programs, these offenders have every incentive to strategically game entry into treatment that they do not, in fact, need in order to receive favorable dispositions that (from a retributive-justice standpoint) they do not deserve.

At a minimum, such results are incongruous with drug courts’ underlying first-order principles. First, drug courts were intended to break observed cycles of addiction and incarceration by providing a therapeutic response to “a problem that is . . . largely medical in nature.”¹⁴ Second, and more subtly, the courts were intended to pushback against (or, at least, function as a diversionary supplement to) the decades-long one-dimensional war on drugs that has brought such high rates of imprisonment and consequent social fragmentation to historically disadvantaged groups, like young urban African-American males.

The root cause of this contraindication problem is the lack of theoretical coherence in drug courts. On the one hand, drug courts follow the philosophy that addiction is a compulsive disease. On the other, the courts expect addicts

¹² See generally <http://www.medterms.com> (defining “to contraindicate” as: “To make a treatment or procedure inadvisable because of a particular condition or circumstance.”).

¹³ See William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1875, 1893 (2000) (discussing traditional criminal-justice enforcement “tilts . . . that target racial or ethnic minorities who live in urban [areas]”).

¹⁴ Hora, *supra* note 9, at 467, 535 (“Addicted drug users will not respond to incarceration . . . because these actions do not address the drug user's addiction. . . . [The drug-court model] provides access to necessary drug treatment to a portion of the population that is in the most need of treatment, yet is the least likely to receive it.”); see also BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, PUB. NO. NJC-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS 1 (1993); NOLAN, *supra* note 7, at 45 (quoting Jeffrey Tauber, the President of the National Association of Drug Court Professionals); JOHN S. GOLDKAMP, U.S. DEPT OF JUSTICE, JUSTICE AND TREATMENT INNOVATIONS: THE DRUG COURT MOVEMENT—A WORKING PAPER OF THE FIRST NATIONAL DRUG COURT CONFERENCE, DECEMBER 1993, at 8 (1994) (“[P]rison is a scarce resource, best used for individuals who are genuine threats to public safety.”).

to be rationally receptive to external coercion. More specifically, the courts subscribe, at least rhetorically, to the purported belief that addiction is a “brain disease”—a “chronic, progressive, relapsing disorder.”¹⁵ Under this conception, addiction is unresponsive to traditional criminal punishment, because jails and prisons lack the tools to help addicts stop, and addicts lack the volition to stop on their own.¹⁶ Moreover, the courts view diversion from prison and the potential reduction or dismissal of charges as retributively justified, because addicts possess diminished self-control and therefore diminished responsibility.¹⁷ But drug courts have not—as advertised—abandoned the “traditional criminal justice paradigm, in which drug abuse is understood as a willful choice made by an offender capable of choosing between right and wrong.”¹⁸ They have merely relocated the old paradigm to the background. Accordingly, drug courts see addicts as sick “patients” and their crimes as symptomatic of illness only as long as they respond to care. When treatment results run thin, a switch is thrown and drug courts revert to economic conceptions of motivation and to conventional punishment. Pursuant to this mixed message, *addiction controls* addicts’ behavior at the time of crime (at least to a degree), and addicts therefore deserve *less* punishment and more rehabilitation; but *addicts control* their addictions at the time of treatment, and they therefore deserve greater punishment if they fail to exercise control.

Drug courts operate on faith that internal motivation will follow external motivation—that carrots and sticks will jumpstart inner desire. Put differently, drug courts meet addicts’ inability to exercise self-control and reason not only with therapeutic opportunities to address these deficiencies, but also with concurrent external threats to start responding to reason—or *else*. This confidence in addicts’ abilities to discover reason once in drug courts runs counter to well-established therapeutic principles that treatment works better when addicts are internally motivated. Indeed, it would be somewhat surprising if studies showed otherwise. After all, addicts are people for whom the everyday negative external consequences of drug use—the social, economic, legal, and physical costs—have proven insufficient to modify behavior.

Ultimately, when drug courts imprison failing participants, they punish them not for their underlying crimes, but for their inability to get with the program. In this way, drug courts bear some resemblance to early medieval trials by ordeal. These trials—in which the accused performed some onerous

¹⁵ Hora, *supra* note 9, at 463.

¹⁶ *Id.* (“In approaching the problem of drug offenders from a therapeutic, medicinal perspective, substance abuse is seen not so much as a moral failure, but as a condition requiring therapeutic remedies.”); see generally Alan I. Leshner, 156 *Science is Revolutionizing Our View of Addiction – and What to Do About It*, AM. J. OF PSYCH. 1 (1999).

¹⁷ Hora, *supra* note 9, at 535 n.20; *infra* notes ____.

¹⁸ Hora, *supra* note 9, at 463-64.

task as a test of God's will—measured not culpability, but rather, say, calluses on hands that enabled the accused to safely carry hot iron. Likewise, drug courts measure not culpability, but strength of will and social support in the face of addiction. In both dispositional methods, final sentences are principally reflective of innate and preexisting advantages. In one sense, in fact, drug courts may be even more problematic than trials by ordeal: drug-court results are not just haphazard, they are *predictably* worst for the most addicted, the least volitional, and the neediest. As such, the expected failure of addicts to respond to external stimuli seems an odd basis to subject them to alternative sentences that outstrip standard pleas.

Moreover, there is little reason to hope that treatment-resistant offenders might recognize their own fallibility and consequently opt-out of treatment. The most-compulsive addicts are bound to reach the least-sensible decisions; the enticements of drug court are dangled before the very individuals most-easily tempted. When addicts cede to that temptation they effectively exercise the same cognitive limitations and bounded willpower that saddled them with drug dependencies in the first instance. They myopically undervalue the difficulties of recovery and the weight of the distant but heavy stick that awaits termination. And they optimistically grasp treatment's carrots, leaving for tomorrow the question of how to master their own defective rationalities and wills. Faced with the choice between conventional pleas, risky trials, or risky treatment, they are prone to see drug courts as the best means of remaining at or recapturing liberty (even when it is not). Ultimately, then, external motivation may prove sufficient to convince addicts to *take* treatment, but it is less likely to keep them there.

Surprisingly, few scholars have flagged these problems. And most have raised them in passing only and have provided only anecdotal support for their intuitions.¹⁹ I intend to do more. I intend to construct an analytical framework for understanding why drug courts fail to adequately screen for addiction and why genuine addicts, nevertheless, elect to enter the courts—even though they often should have rationally expected to have done much better keeping to conventional justice. For support, I rely on data from New York City's felony drug courts, and I draw on concepts from behavioral law and economics and game theory.

Finally, I offer an innovative proposal that re-conceives of drug courts and how they deliver their benefits. Specifically, I propose uncoupling drug courts from criminal cases. One way this might be done would be to make drug courts available to the addicted ex-convict as a resource that he could opt into at the point in his life-course when he felt ready to do so. Such an “opt-in” model might still use external motivation. For instance, it could offer a kind of absolution for the drug-court graduate, expunging the participant's

¹⁹ See, e.g., NOLAN, *supra* note 7; Miller, *supra* note 1; Hoffman, *supra* note 7; Edwards, *supra* note 11.

record of drug possession convictions (and perhaps other convictions, as well, if he could show that they were products of past addiction). Such a court might, therefore, provide a kind of “libertarian-paternal” nudge in the right direction for the addicted ex-convict who found himself *ready* for treatment but who still required some help getting and keeping clean.²⁰

This article has four parts. In Part I, I analyze New York City’s felony drug courts. I detail the extent to which these courts rely on atypically high alternative termination sentences. And I offer some reasons why these courts (i) came to provide such high termination sentences, and (ii) came to admit predominantly *clean-record drug dealers* (who are more likely than recidivist drug possessors to be strategic gamers). In Part II, I explore the categories of defendants who fare worst in drug courts, and I explain the several reasons why these groups enter drug courts irrationally and then fall out of compliance once there. I also highlight the uncertainties and unique hurdles that defense attorneys face when called upon to advise clients about whether they should take the drug-court option. In Part III, I compare New York City’s drug courts with early-medieval trials by ordeal. I explain that drug courts are ineffective as screening mechanisms and operate on scientifically unfounded and incoherent principles. Finally, in Part IV, I offer some proposals that do away with atypical termination sentences and that also might provide more effective and just opportunities for genuine addicts to overcome their dependencies, expunge their drug records, and reintegrate into productive society.

I. TAKING THE CURE IN NEW YORK CITY

Almost no studies have sought to compare the sentences of failing drug-court participants with the sentences of conventionally adjudicated defendants.²¹ Two limited exceptions are a pair of federally funded studies recently completed by the Center for Court Innovation in collaboration with the New York State Unified Court System.²² The chief study analyzed drug courts in several New York counties, including Queens, Brooklyn, Manhattan, and the Bronx.²³ The other study looked exclusively at the drug

²⁰ See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003).

²¹ JENNIFER TRONE, VERA INSTITUTE OF JUSTICE, DO DRUG COURTS SAVE JAIL AND PRISON BEDS? 2 (2000) at <http://www.vera.org/publications/publications.asp> (noting lack of research on question of whether drug court failures are punished more severely than offenders who never entered treatment).

²² REMPEL, *supra* note 3, at ix, 265-71 (2003); KELLY O’KEEFE & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATEN ISLAND TREATMENT COURT EVALUATION: PLANNING IMPLEMENTATION, AND IMPACTS (2006), both available at www.courtinnovation.org.

²³ REMPEL, *supra* note 3, at ix, 3.

court in Staten Island.²⁴ Accordingly, the studies collectively examined drug courts in all New York City counties.

Before discussing the studies' findings, I offer two brief caveats: First, although the studies provided data for a collection of state drug courts outside New York City, I confine my discussion principally to the city's courts, because—at least at the time of the studies—these courts handled felonies almost exclusively, while several of the other courts principally handled misdemeanors.²⁵ I limit my focus to *felony* drug courts, because misdemeanor drug courts present their own unique sets of problems, advantages, and incentives that are beyond the scope of this article, but that I hope to explore in a future project. Second, I do not claim that New York City's drug-court model is nationally representative; rather, the model spotlights a path to avoid. (Moreover, the model provides an apt point of reference, because I was a public defender in Bronx County for three years, and I practiced often in its drug court.)

A. *The Price of Treatment*

The studies found that the sentences for failing participants in New York City drug courts were typically *two-to-five times* longer than the sentences for conventionally adjudicated defendants.²⁶ At the outer margin, the sentences were well over five times the standard length in Staten Island and almost four times the standard length in the Bronx.²⁷ Only in Brooklyn

²⁴ *Id.*; O'KEEFE & REMPEL, *supra* note 22.

²⁵ The Brooklyn and Staten Island drug courts permitted misdemeanants in very limited circumstances only, typically where charges began as felonies. REMPEL, *supra* note 3, at 14-16; O'KEEFE & REMPEL, *supra* note 22, at v-vi, 32. Recently, most of the city's courts have begun accepting misdemeanors. But these changes post-dated the relevant studies.

²⁶ REMPEL, *supra* note 3, at 270; O'KEEFE & REMPEL, *supra* note 22, at 40. The studies found the same atypically high termination sentences in all-but-one of the counties outside New York City. REMPEL, *supra* note 3, at 25. These findings are corroborated by other observers of New York drug courts. *See e.g.*, TRONE, *supra* note 21, at 6 (“Researchers at the Vera Institute studying drug courts in the Bronx, Manhattan, and Queens agree that judges tend to be harder on offenders who fail than on people who never attempt the program.”). Likewise, anecdotal evidence indicates that atypically high alternative sentences are somewhat common nationwide. *See, e.g.*, Denise C. Gottfredson & M. Lyn Exum, *The Baltimore City Drug Treatment Court: One-Year Results from a Randomized Study*, 39 J. RES. CRIM. & DELINQ. 337, 350, 354 (2002) (finding that alternative sentences for Baltimore drug court participants were six-to-nine months longer than control-group defendants); Hoffman, *supra* note 7, at 1493, 1512 (discussing Denver); NOLAN, *supra* note 7, at 77-78 (noting that “defense-based fears” of atypically high alternative sentences “are often realized.”); Boldt, *supra* note 6, at 1212, 1231; COOPER, *supra* note 3, at 37; *see also* NOLAN, *supra* note 7, at 56 (quoting Judge Stanley Goldstein of Miami drug court: “You could have gone to trial and got convicted and still done less time than you’re going to do here if you keep fooling around with me.”).

²⁷ REMPEL, *supra* note 3, at 270; O'KEEFE & REMPEL, *supra* note 22, at 40.

were termination sentences anywhere close to the length of customary sentences.²⁸ Significantly, in the Bronx and Staten Island, drug-court participants did worse on average *even when* graduates were included.²⁹ In fact, in the Bronx, the termination sentences approximated the literal worst-case scenario: the typical failing participant was sentenced to two-to-six years in prison, which was (at the time of the relevant studies) the *maximum* sentence on the *maximum* drug-court eligible charge.³⁰

Tbl.1. *Comparative Sentences and Incarceration & Graduation Rates*³¹

	Staten Island	Bronx	Queens	Brooklyn
Mean Sentence—days (all drug court participants)	58	209	79	145
Mean Sentence—days (drug court failures)	208	558	296	304
Mean sentence—days (comparison group)	39	142	129	249
Incarceration Rate: (all drug court participant)	26%	34%	25%	45%
Incarceration Rate (drug court failures)	96%	89%	94%	94%
Incarceration Rate (comparison group)	27%	54%	50%	76%
Graduation Rate ³²	75%	52%	73%	52%

* Source: CENTER FOR COURT INNOVATION

²⁸ REMPEL, *supra* note 3, at 270.

²⁹ *Id.* at 270. Specifically, the comparison defendants in the study were incarcerated for an average of less than five months. The drug court defendants—combining graduates and failures—were incarcerated for almost seven months on average. And the drug-court failures were incarcerated for over eighteen months. *Id.*

³⁰ REMPEL, *supra* note 3, at 33, 140, 143; Quinn, *supra* note 11, at 62-63; RACHEL PORTER, VERA INSTITUTE OF JUSTICE, TREATMENT ALTERNATIVES IN THE CRIMINAL COURT: A PROCESS EVALUATION OF THE BRONX COUNTY DRUG COURT 12 (2001), at

<http://www.vera.org/publications/publications.asp>. In 2004, Governor Pataki signed the Drug Law Reform Act meliorating some of the statutory punishments under the draconian Rockefeller drug laws. DLRA, L. 2004, Ch. 738. Since then, some of the alternative termination sentences may have changed somewhat. But the available studies predated these modifications to the law.

³¹ Data comparing ultimate sentences were not made available for Manhattan. REMPEL, *supra* note 3, at 270.

³² These graduation rates are fairly consistent with national rates. BELENKO, *supra* note 6 (finding average graduation rate of forty-seven percent in national review of thirty-seven drug-court evaluations).

Significantly, drug court proponents could spin rosy tales from even these data.³³ Reading quite broadly, they could claim that diversion is working: in all counties, fewer drug offenders went to prison; and, in most counties, the *collective* population of offenders spent less time behind bars.³⁴ But at the individualized level, the positive story does not hold. Take Queens County, for example: there, drug-court defendants were incarcerated at half the rate, but those who did go to jail or prison went away for more than twice as long.³⁵ To say the least, such a result sits uncomfortably with defensible notions of distributive justice.³⁶ In any event, it cuts against drug-court advocates' professed aim of breaking the cycle of addiction and incarceration.³⁷

B. *A Dealer's Court*

To fully understand the reasons for these atypically long termination sentences, one must first appreciate a somewhat unique fact about New York City drug courts: they welcome *drug dealers*.³⁸ In fact, in the relevant studies, drug dealers comprised the overwhelming majority of all participants—an astounding *ninety-five percent* in the Bronx drug court and ninety percent in the Brooklyn drug court.³⁹ Indeed, in the Bronx, practically all of the

³³ See *infra* Part IV.A (discussing the shortcomings of global appraisals).

³⁴ Accordingly, one study of the Bronx drug court concluded: “[C]ourt planners’ interest in reducing costs associated with unnecessary detention have not been fully realized.” PORTER, *supra* note 30, at 9.

³⁵ See *supra* tbl.1.

³⁶ Cf. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 2013 (1992) (arguing that “losses, especially, unjust losses, are better spread than concentrated” and that a contrary premise “stands every known notion of distributional justice on its head”). On that score, the Bronx findings are particularly troubling, because it comprises the city’s highest concentrations of minorities and the poor, and it is therefore the county that has been affected most acutely by the traditional war on drugs and its attendant incarceration boom. Jeffrey Fagan, Valerie West & Jan Holland, *Neighborhood, Crime, and Incarceration in New York City*, 36 COLUM. HUM. RTS. L. REV. 71, 74 (2004) (“[T]he overall excess of incarceration rates over crime rates seems to be concentrated among non-white males living in [New York] City’s poorest neighborhoods.”); see also *supra* note 97, 159 and accompanying text.

³⁷ See *supra* notes 9, 14-18, __; *infra* note 98 __; and accompanying text (describing drug courts as means of diverting recidivist addicts from prison).

³⁸ Several drug courts, nationally, have elected to accept defendants charged with non-possession drug-related crimes. However, only a minority of drug courts accept dealers. Alex Stevens, et al., *Quasi-Compulsory Treatment of Drug Dependent Offenders: An International Literature Review*, 40 SUBSTANCE USE & MISUSE 269, 272 (2005); Miller, *supra* note 1, at 539.

³⁹ REMPEL, *supra* note 3, at 33. In Manhattan and Queens almost three quarters and two thirds of participants, respectively were dealers. Only in Staten Island were dealers a minority, making up just over one third of participants. *Id.*; O’KEEFE & REMPEL, *supra* note 22, at vi.

participants were charged not just with sale, but with B-felony sale—the highest level felony charge that was eligible for drug court.⁴⁰

Why did the city’s felony drug courts so readily accept drug dealers, and, conversely, why did they include so few drug possessors? Over the past two decades, institutional players of various stripes came to see the one-dimensional incapacitation model as unsustainable and inefficient.⁴¹ Of course, deep philosophical differences separated those who saw addiction principally as a public-health problem and those who saw it as a criminal-justice problem, but even some of the most hardened drug warriors had grown weary of harsh sentences as the lone drug-war weapon.⁴² On the surface of it, the drug-court model seemed to provide a third way—a politically feasible middle ground that promised a little bit of something for everyone.⁴³ For the therapeutic community, drug courts would provide much-

⁴⁰ PORTER, *supra* note 30, at 18-19 (noting that in first 18 months of operation, 367 out of 396 defendants in Bronx drug court were charged with B-felony sales); REMPEL, *supra* note 3, at 143.

⁴¹ Hoffman, *supra* note 7, at 1574-75 (“The disease model of addiction and the realities of the failed war on drugs are driving us to two unpalatable policy choices—either continue to fill our prisons with drug users or legalize drugs.”); Miller at 1481 (calling drug courts a “direct response to the ‘severity revolution’” and “an incredibly popular alternative to the War on Drugs”); STANTON PEELE, ET AL., RESISTING 12-STEP COERCION: HOW TO FIGHT FORCED PARTICIPATION IN AA, NA, OR 12-STEP TREATMENT 6-7 (2000) (“Since there is a pervasive sense that we as a society are barking up the wrong tree . . . treatment becomes an attractive alternative.”); *see generally* People v. Thompson, 83 N.Y.2d 477, 487 (1994) (noting that draconian mandatory drug sentences have failed to deter drug trafficking or control drug abuse); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); *see generally* Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002) (describing shortcomings of drug war); David C. Leven, *Our Drug Laws Have Failed—So Where is the Desperately Needed Meaningful Reform?*, 29 FORDHAM URB. L.J. 293 (2000).

⁴² *See, e.g.*, NEW YORK STATE COMMISSION ON DRUGS AND THE COURTS, CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO CHIEF JUDGE JUDITH S. KAYE 12 (2000), at <http://www.nycourts.gov/reports/admin.shtml> (quoting then federal drug-czar Barry McCaffrey: “[T]o break the tragic cycle of drugs and crime . . . [w]e must expand drug treatment.”); NOLAN, *supra* note 7, at 54 (quoting drug court judge “[E]ven dead rock conservatives’ recognize that ‘you can’t keep jailing everybody, that it doesn’t do a damn bit of good for an addict.”); U.S. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT AGENCY, SPEAKING OUT AGAINST DRUG LEGALIZATION (2003), available at <http://www.usdoj.gov/dea/demand/speakout/index.html> (“A successful drug policy must apply a balanced approach of prevention, enforcement and treatment.”); PEELE, *supra* note 41, at 5-7 (noting that drug courts are “widely endorsed by the perpetrators of our current repressive drug policy”).

⁴³ Miller, *supra* note 1, at 1503; Michael C. Dorf & Jeffrey A. Fagan, *Community Courts and Community Justice*, 40 AM. CRIM. L. REV. 1501, 1502 (2003) (“[B]ecause drug courts emphasized both the individual responsibility of drug addicts and the disease model of addiction, they enabled persons with widely divergent views about drug policy to find common ground.”); T. Cameron Wild, et al., *Attitudes Toward Compulsory Substance Abuse*

needed alternatives to incarceration—alternatives that would emphasize treatment over culpability.⁴⁴ For drug warriors, drug courts would promote expeditious case processing, would require rigorous treatment, would ensure traditional incapacitation for failing participants, and might also deflate calls for more radical legislative change.⁴⁵

Drug courts, then, are experimentalist institutions born of incremental compromise. They developed from the ground up in ad-hoc and under-theorized fashions.⁴⁶ But the give-and-take that characterizes such institutional compromises has the tendency to produce unintended results—for instance, the overabundance of drug dealers in New York City’s felony drug courts.⁴⁷ Specifically, the city’s drug courts were at least partially intended as a response to (or an end-run around) the unpopular and draconian Rockefeller drug laws.⁴⁸ As indicated by a New York State

Treatment: A Comparison of the Public, Counselors, Probationers and Judges’ Views, 2 DRUGS: EDUCATION, PREVENTION AND POLICY 33 (2001) (discussing how drug courts are designed to satisfy both those “who believe that . . . the criminal justice system is the most appropriate societal response . . . [for] substance abuse [that] represents willful misconduct . . . [, and] those who believe that substance abuse represents involuntary pathology”).

⁴⁴ NOLAN, *supra* note 7, at 140 (“[T]he notion of guilt is made increasingly less relevant. . . . Guilt . . . is philosophically non-germane . . . to such a process.”); William D. McColl, *Baltimore City’s Drug court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 500 (1996) (noting that drug court approach is “primarily medical rather than legal”); Levy, *supra* note 71, at 135; *see also* Nolan at 49-50 (noting how drug courts ‘shift the paradigm in order to treat drug abuse as a biopsychosocial disease.’); Hora, *supra* note 9, at 462-65 (offering drug court to alternative of expanding prison population and ineffective probation programs); Miller, *supra* note 1, at 1553 (noting “the centrality of diversion from prison among the liberal justifications for establishing and supporting drug courts”).

⁴⁵ NOLAN, *supra* note 7, at 51-56 (noting that “to be therapeutic is not to be soft on crime”); Hoffman, *supra* note 7, at 1527 (noting that treatment and punishment are not “mutually exclusive weapons in the war against drugs”); Dorf & Fagan, *supra* note 43 (describing drug courts as “both a reaction to and part of the war on drugs”); *see also infra* note 232 and accompanying text.

⁴⁶ Hora, *supra* note 9, at 110, 122, 137 (“[F]ew early DTC [drug court] practitioners worried about the jurisprudential theory behind the DTC movement. DTCs seemed to work, and the absence of analysis or debate coming from the ‘ivory towers’ of academia . . . did not much matter.”); Michael C. Dorf & Charles F. Sabel, *Drug Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 841 (2000) (describing drug courts as products of local innovation).

⁴⁷ Hoffman, *supra* note 7, at 1574-75 (“[T]he drug court as a public policy solution to the drug dilemma is . . . a conflicted, and some would say cynical, appeasement of two powerful political forces—the law enforcement community and the treatment community.”).

⁴⁸ Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 806 (2004) (“The Rockefeller drug laws in New York included harsh mandatory minimums that shocked even prosecutors and the police.”); *see also* Rockefeller Drug Laws, N.Y. Laws 276-78, 676, 1051 (1973); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 10 (1999) (calling Rockefeller drug laws “most severe in the nation at the time” of passage, and noting that “[w]ithin just a few years of their adoption, the Rockefeller laws were found wanting both because of their distortions of the court system and their excessive

Commission (made up of prosecutors, defense attorneys, judges, and academics) that endorsed statewide drug-court expansion: “The courts, of course, do not write the state’s drug or sentencing laws. . . . The issue is thus whether there is anything—consistent with their adjudicatory role—that our state courts can do.”⁴⁹

Historically, for felony possession cases, drug courts were not needed to circumvent unwelcome application of the Rockefeller drug laws. Instead, prosecutors would commonly reduce felony possession charges to misdemeanor charges.⁵⁰ Conversely, prosecutors had no readily available statutory option to reduce sale charges.⁵¹ In any event, prosecutors were unwilling to do so: they might have disliked aspects of the Rockefeller drug laws, but they still believed that drug sales were best handled as felonies, not misdemeanors. As such, drug courts offered a way to “draw a distinction,” where the law as written had failed to do so, “between the addicted . . . low-level drug seller, on the one hand, and a drug trafficker, on the other.”⁵² Drug dealers would have the chance to avoid prison and even a criminal record, but—as the *quid-pro-quo* cost of their treatment—they would have to agree to plead guilty prior to entering treatment, and they would have to accept the inevitability of atypically high alternative sentences when they failed out. Consequently, drug courts came to welcome so many drug dealers because

punitiveness”). Notably, a study of the laws found that the rate of felony drug arrests that resulted in drug indictments fell by almost a third in the three years after the laws’ passage and the rate of dismissals more than tripled. Malcolm M. Feeley & Sam Kamin, *The Effect of “Three Strikes and You’re Out” on the Courts: Looking Back to See the Future*, in *THREE STRIKES AND YOU’RE OUT: VENGEANCE AS PUBLIC POLICY* (David Shichor & Dale K. Sechrest, eds. 1996). This effort to bypass the Rockefeller drug laws is just one more example of a well-established trend whereby legislators pass mandatory sentencing schemes and judges, prosecutors, and police try to recapture preexisting sentencing norms. See MICHAEL TONRY, *SENTENCING MATTERS* 135, 147 (1996) (“[M]andatory penalty laws . . . meet with widespread circumvention . . . and too often result in imposition of penalties that everyone involved believes to be unduly harsh. . . . Sentencing policy can only be as mandatory as police, prosecutors, and judges choose to make it.”); Feeley & Kamin, *supra*, at 140-45.

⁴⁹ COMMISSION, *supra* note 42, at 10; see also, COMMISSION, *supra* note 42 (Stanley S. Arkin, concurring and dissenting from commission’s report; and faulting the commission for not doing more to take on the Rockefeller drug laws directly); see generally Hoffman, *supra* note 10, at 2097 (arguing that drug court is “a judicial reaction to laws some judges do not like”—an effort to repeal laws “by therapeutic judicial fiat”).

⁵⁰ See, e.g., N.Y.P.L. § 220.03. Citywide only forty-six percent of defendants arrested on felony possession charges were indicted between 1990 and 2006, in Manhattan the fraction hovered around one quarter. See NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, *STATISTICS* (on file with author); see also Telephone Conversation with Michael Rempel, Research Director, Center for Court Innovation (Jun. 25, 2007). For my part, I represented scores of clients initially charged with felony drug possession and *not one* was ultimately indicted for possession alone.

⁵¹ The lowest level narcotics sale charge is a D-felony. N.Y.P.L. § 220.31. By contrast, sale of marijuana is typically a misdemeanor. N.Y.P.L. § 221.35-40.

⁵² COMMISSION, *supra* note 42, at 7.

the preexisting sentencing options were undesirable; and the courts came to handle so few felony drug possessors, because this defendant population already comprised such a small pool.⁵³

C. *A Dealer's Game*

Of course, a drug dealer may be an addict, too. And there will always be some indeterminacy between those who sell to feed habits and those who sell to fill wallets.⁵⁴ But there is something just a bit unsettling about a drug court where drug possessors comprise only one-in-twenty participants. In any event, prosecutors and court personnel in New York City did almost nothing to ensure that treatment offers went to the addicted.

In the first instance, prosecutors were given unilateral decision-making authority over which defendants were permitted to enter drug courts.⁵⁵ And prosecutors were typically reluctant to offer treatment to recidivist defendants but were enthusiastic to offer it (sight unseen) to clean-record defendants—a population composed of comparatively fewer genuine addicts.⁵⁶ Specifically, before making offers, New York City prosecutors would review cases for “paper eligibility”—a non-clinical paper-based assessment that would turn entirely on the defendant’s current charges and past record—not on his therapeutic need or lack thereof.⁵⁷

⁵³ The effort to bypass the Rockefeller drug laws is just one more example of a well-established trend whereby legislators pass mandatory sentencing schemes and judges, prosecutors, and police try to recapture preexisting sentencing norms. See MICHAEL TONRY, SENTENCING MATTERS 135 147 (1996) (“[M]andatory penalty laws . . . meet with widespread circumvention . . . and too often result in imposition of penalties that everyone involved believes to be unduly harsh. . . . Sentencing policy can only be as mandatory as police, prosecutors, and judges choose to make it.”); Feeley & Kamin, *supra* note 48, 40-45.

⁵⁴ Cf. Brownberger, at 68-60 (noting various incentives to sell drugs).

⁵⁵ Miller, *supra* note 1, at 1540 (“The prosecutor exercises sole power to recommend that a defendant be diverted to drug court, subject to statutory constraints. If the prosecutor decides that the criteria do not apply, the defendant has no further recourse.”); Quinn, *supra* note 11, at 57 (“Like other diversionary programs, most drug treatment courts operate at the whim of the prosecution. In New York, drug courts cannot make promises to defendants without the approval of the Office of the District Attorney.”).

⁵⁶ Hoffman *supra* note 7, at 1509 (noting that addicts are more likely to be recidivists and therefore excluding recidivists felons makes no sense).

⁵⁷ Quinn, *supra* note 11, at 60 (“[I]n the Bronx, drug court eligibility is initially determined on the basis of the charges in the case and the defendant’s criminal record, not a defendant’s drug use or abuse history.”); PORTER, *supra* note 30, at 6, 9 (“explaining that supervising prosecutors paper screen all drug-related cases and assess eligibility “based on criminal history and current charge,” and noting that “[t]hese charge-related eligibility criteria are not entirely aligned with the broadest therapeutic goals of drug courts”); Miller, *supra* note 1, at 1541. For instance, in the Bronx, defendants are ineligible if the charged crime happened within one thousand feet of a school—a circumstance that, in a dense city like New York, may have far more to do with happenstance than culpability or treatment need. PORTER,

Unsurprisingly, the overwhelming majority of the city's drug-court participants had no prior convictions.⁵⁸ For example, in the Queens drug court, only one-in-five participants in the relevant studies had a prior conviction and only one-in-ten had a prior drug conviction.⁵⁹ And the recidivists that did manage to receive offers typically had light records: a mean of two or fewer prior misdemeanor convictions in all city counties.⁶⁰ Finally, among the recidivists, few had spent much of any time in jail or prison before the current arrest.⁶¹ For example, in the Bronx, Queens, and Manhattan the mean prior incarceration time was twenty-nine days, sixteen days, and seven days, respectively.⁶² Comparatively, in Rochester, Syracuse, and Buffalo, where the drug courts handled principally misdemeanor non-sale cases, approximately two-thirds of participants had criminal records; the participants averaged three-to-four prior convictions; and the mean periods of prior incarceration were six-to-eight months.⁶³ In these upstate counties, prosecutors were more willing to extend drug-court offers to long-time recidivists (and thus more likely addicts), because the stakes were lower: treatment was an alternative to misdemeanor—and not felony—charges.

Thus, notwithstanding the supposed first-order drug-court aim of stopping the cycle of addiction and incarceration among *recidivist addicted drug users*, the profile of the typical New York City defendant who received a drug-court offer was something else entirely—a *clean-record dealer*.⁶⁴ And after prosecutors made their non-clinical paper-based offers to these defendants, drug-court personnel would do little substantive further vetting. While candidates were required to submit to clinical assessments, only a small fraction of candidates were rejected for insufficient addiction or use.⁶⁵

supra note 30, at 9.

⁵⁸ REMPEL, *supra* note 3, at 33, tbl.3.2.

⁵⁹ *Id.*

⁶⁰ *Id.* Indeed, in Queens County, the mean was 0.59 prior convictions. *Id.*

⁶¹ *Id.*

⁶² *Id.* In Brooklyn, the mean was approximately three months, but this figure seems skewed by the admission of some predicate felons, many of whom were previously imprisoned. *Id.* (indicating that seventeen percent of Brooklyn participants had prior felony convictions).

⁶³ In these courts less than two percent of defendants were charged with drug sales (compared with the ninety plus percent in some New York City courts. *Id.*; *supra* notes 39-40 and accompanying text.

⁶⁴ See *supra* notes 9, 14-18, __; *infra* note 98 __; and accompanying text.

⁶⁵ Hoffman *supra* note 7, at 1462 n.106 (describing these clinical evaluations as “lenient” and “limited”); Miller, *supra* note 1, at 1541-42; see also U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, TREATMENT DRUG COURTS: INTEGRATING SUBSTANCE ABUSE WITH LEGAL CASE PROCESSING 17 (1996) (“Personnel doing the screening do not have to be social services professionals. . . . The screening can be done quickly (no longer than 20 minutes).”); PORTER, *supra* note 30, at 16-17 (showing that during the first year of Bronx drug court less than five percent were rejected both for insufficient and too heavy addictions); O’KEEFE & REMPEL, at

There were two principal reasons for this. First, drug courts have every incentive to take all (or, at least, most) comers, because drug courts are funding-dependent entities, and the money streams hinge on meeting capacity and treatment targets.⁶⁶ For example, the Staten Island drug court intended to enroll two hundred participants in its first year, but enrolled only thirty-two.⁶⁷ In such circumstances, a court would be unlikely to reject a borderline- or un-addicted defendant, especially since lack of drug dependency correlates with treatment success.⁶⁸

Second, drug courts share with the general public the misperception that all drug use constitutes *abuse*.⁶⁹ Accordingly, any paper-eligible defendant is typically permitted entry so long as they are willing to self-report some level (any level) of drug use—whether true or not.⁷⁰ Addiction, however, is in fact a vague and variable phenomenon.⁷¹ Typically, drug users (even addicts) are

12 (indicating that only nine percent were rejected in Staten Island for non-addiction or addiction denial); *see also* Quinn, *supra* note 11, at 60 (“[F]ew of the defendants routed to the Bronx Treatment Court are rejected because they do not need help with drug or alcohol abuse. . . . The biggest fear of rejection exists . . . for those who . . . seem to need too much help.”). Personally, I represented about twenty clients in the Bronx Treatment Court and never had one rejected for non-addiction.

⁶⁶ Miller, *supra* note 1, at 1542 (“There are . . . incentives for treatment programs to take non-addicts. The program completion rate of the non-addict is likely to be higher than the addict. The non-addict is less prone to relapse, and recidivism is likely to be reduced.”); Hoffman, *supra* note 7, at 1466 (“The literature widely supports the proposition that drug statistics have been inflated by a self-sustaining, public-private partnership interested in keeping use statistics high to justify enormous public expenditures.”); Edwards, *supra* note 11, at 287-88. As Jeffrey Tauber, President of the National Association of Drug Court Professionals, warned prospective drug court judges, “Programs that can’t show immediate and direct results lose out at budget time.” NOLAN, *supra* note 7, at 59, 65, 97 (describing funding and development efforts as kind of theater).

⁶⁷ O’KEEFE & REMPEL, *supra* note 22, at 11; *see also* PORTER, *supra* note 30, at 13 (noting that Bronx drug court planned to enroll six hundred in first eighteen months of operation but enrolled only 453).

⁶⁸ *See infra* notes ____. In the extreme, they may even “cherry pick[] the low-risk candidates . . . [over] the high-risk candidates they were designed originally to served.” Miller, *supra* note 1, at 1553. Unsurprisingly, then, a Department of Justice study found that a majority of the surveyed courts targeted even those with “minimum substance dependency.” COOPER, *supra* note 3, at 4-5.

⁶⁹ PEELE, *supra* note 41, at 6 (noting misguided perception that all drug use signifies addiction); *see also id.* at 9 (describing conventional “disbelief” in the notion of non-addictive drug use).

⁷⁰ Finally, drug court personnel tend to concur with prosecutorial treatment offers to defendants with light or no records out of (i) fealty to prosecutorial decision making and (ii) the desire, discussed earlier, to craft alternatives to undesirable mandatory drug laws. *See supra* notes 50-53 and accompanying text.

⁷¹ Levy, *Self-Deception and Responsibility for Addiction*, 20 J. APP. PHIL. 133, 135 (2003) (“[A]ddiction’ is a colloquial term without an agreed-upon use, either in philosophy, or in medicine.”); Stephen J. Morse, *Hooked on Hype: Addiction and Responsibility*, 19 L. & PHIL.

neither slaves to their poisons, nor are they rational economic actors able to cease drug use the moment long-range interests in abstinence come to outweigh short-term cravings for highs.⁷² Addiction strikes different users differently—if at all.⁷³ It describes a seamless continuum: individual users act under diverse degrees of compulsion.⁷⁴ Among even the heaviest of users of even the heaviest of drugs, some individuals are more compulsive, some less.⁷⁵ On each tail of the curve lay the remote few who either have complete or no ability to stop.⁷⁶

Over time, the probability of developing some type of dependency rises. But even long-time users of highly addictive drugs, like heroin, may (by grace of good brain chemistry) find themselves to be “chippers”: casual users who can put aside habits with little or no effort at all.⁷⁷ What drug courts fail to adequately consider is that, even though some heavy users may find cravings irresistible, other users resist with relative ease.⁷⁸ Accordingly, the chipper

8, 12 (2000) (“[T]here is no consensus definition and any definition chosen will be problematic”).

⁷² For example of these polar views compare Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON. 675 (1988); with Alan I. Leshner, *Addiction is a Brain Disease and It Matters*, 278 SCIENCE 45, 46 (1997); Charles P. O’Brien & A. Thomas McLellan, *Myths About the Treatment of Addiction*, 347 LANCET 237 (1996) (“At some point after continued repetition of voluntary drug taking, the drug ‘user’ loses the voluntary ability to control its use. At that point, the ‘drug misuser’ becomes ‘drug addicted’ and there is a compulsive, often overwhelming involuntary aspect to continuing drug use and to relapse after a period of abstinence.”).

⁷³ Morse, *supra* note 71, at 15 (“Perhaps, however, compulsive drug seeking and using is not the indicator of a unitary disease.”).

⁷⁴ Morse, *supra* note 71, at 45 (“[R]ationality and hard choice are continuum concepts. There are infinite degrees. Consequently, responsibility must be a matter of infinite variation.”); STANTON PEELE, *THE MEANING OF ADDICTION* 103 (1985) (“Addiction can be understood only as a multifactorial phenomenon: It takes place along a continuum, in degrees.”).

⁷⁵ Morse, *supra* note 71, at 20 (“Some users develop the craving soon after initial use; others do so later. For some, the craving is so strong that seeking and using the substance becomes a central life activity and even central to the agent’s identity.”); Gene M. Heyman, *Is Addiction a Chronic, Relapsing Disease*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 99, 102 (Philip P. Heymann & William N. Brownsberger eds., 2001) (arguing that if addiction qualifies as disease, it is not one that strikes uniformly).

⁷⁶ Heyman, *supra* note 75, at 99, 107 (“Recovery from addiction is probably always a struggle, and for a significant minority it is a protracted battle.”); PEELE, *supra* note 74, at 25-26, 97, 113, 128-29; Morse, *supra* note 71, at 19.

⁷⁷ Morse, *supra* note 71, at 19 (discussing heroin chippers and defining chippers as those who “use potentially addicting substances regularly, but do not develop an addiction”); Heyman, *supra* note 75, at 86; see also PEELE, *supra* note 74, at 58-59 (discussing cigarette chippers); MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2002) (same).

⁷⁸ PEELE, *supra* note 41, at 7 (noting “a range of patterns of narcotic use, among which the classic addictive pattern was only one variant that appeared in a minority of cases”); Morse, *supra* note 71, at 12.

has ample opportunity to exploit drug courts. Faced with a choice between prison and treatment, he takes the drug-court option as “the lesser of two evils.”⁷⁹ He strategically games exit from conventional justice that he does not want, so he can enter into treatment that he does not need.⁸⁰ For him, treatment may be laborious, time-consuming, and irritating; but it is probably manageable, because he is abler to rationally modify his less-compulsive behavior in order to meet court demands.⁸¹ He is an actor on the drug-court stage: he dutifully plays the role of acute addict and does at least enough to “go[] along with the program.”⁸²

⁷⁹ Adela Beckerman & Leonard Fontana, *Issues of Race and Gender in Court-Ordered Substance Abuse Treatment*, DRUG COURTS IN OPERATION: CURRENT RESEARCH 57 (James J. Hennessy & Nathaniel J. Pallone, eds. 2001); BELENKO, *supra* note 6, at ___ (citing study finding that 96% of drug-court participants reported drug court to be “easier” than prison); Miller, *supra* note 1, at 1541, 1569 (“[T]here are good reasons for non-addicts to wish to enter the program.”). It is a common observation that incarceration is a “break point” for defendants. JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANTS PERSPECTIVE 47 (1978); *see also* Thomas W. Church, *Examining Local Legal Culture*, AM. B. FOUND. RES. J. 449, 489 (1985) (quoting defendant: “Hell, I’d plead guilty to raping my grandmother if the sentence was probation.”); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 82 (1995) 85-86 (noting that defendants “will agree to almost anything to get out of jail”); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, HASTINGS L. REV. 957, 987 n.84 (1989) (“When the prosecutor offers a sentence that results in immediate release, such as probation or a sentence to time served while awaiting trial, the availability of immediate freedom adds something to the differential which again cannot be captured simply by a number.”).

⁸⁰ NOLAN, *supra* note 7, at 87 (noting that participants are non-addicts “more often than many movement advocates would care to admit”). Indeed, in New York City, where the propensity for gaming is greatest, the data revealed significantly higher graduation rates than in Syracuse, Rochester, and Buffalo, where participants are recidivist misdemeanor drug possessors and, hence, likelier compulsive addicts. REMPEL, *supra* note 3, at 41-42; O’KEEFE & REMPEL, *supra* note 22, at 24. Remarkably, the graduation rate in Queens was over three times the rate in Rochester. REMPEL, *supra* note 3, at 41-42.

⁸¹ Heyman, *supra* note 75, at 86 (noting that chippers are “able to regulate their intake so that their drug use does not interfere with other aspects of their life”); Hoffman, *supra* note 11, at 2069 n.25 (“Defendants understand that they have to play the treatment game to pass through the criminal hoops.”); *supra* note 77 and accompanying text. For example, one study described a “long-term seller, with four felony convictions, [who] was a relatively light user. He used the treatment offer as an opportunity to avoid an almost certain long prison term. . . . He says continuing to stay clean is not a problem because he was never addicted.” NOLAN, *supra* note 7, at 221 n.41. Indeed, one treatment provider conceded that as many as half of the drug court clients in his program were for-profit un-addicted dealers. *Id.* at 87.

⁸² Adela Beckerman & Leonard Fontana, *Issues of Race and Gender in Court-Ordered Substance Abuse Treatment*, DRUG COURTS IN OPERATION: CURRENT RESEARCH 47 (James J. Hennessy & Nathaniel J. Pallone, eds. 2001). Notably, observers have compared the entire drug-court experience to a kind of theater. *See* NOLAN, *supra* note 7, at 61-89 (“Drug court is theater . . . and the actors in it play new and redefined roles. In the backstage, practitioners conspire about how best to make the courtroom theater communicate a particular message to clients and others in the courtroom audience.”).

II. POOR PROSPECTS, POOR CHOICES

Compared to the volitional thrill-seeking chippers and for-profit drug dealers who strategically game into unneeded treatment, acutely addicted defendants and defendants from historically disadvantaged groups are far less likely to succeed in drug courts. Specifically, studies have shown consistently higher termination rates for recidivists⁸³ and hard-drug users⁸⁴—two characteristics reflective of genuine dependency. Likewise, younger participants do worse than older participants—a difference attributed to the “aging out” phenomenon, whereby the grip of addiction slackens overtime; and, as it does, the user grows more responsive to treatment.⁸⁵ Additionally, studies have shown that graduation rates correlate with wealth,⁸⁶ education,⁸⁷ employment,⁸⁸ strength of social networks,⁸⁹ and

⁸³ REMPEL, *supra* note 3, at xii (“[P]rior criminal convictions were near universally predictive of future recidivism.”); Michael Rempel & Christine Depies Destafano, *Predictors of Engagement in Court-Mandated Treatment: Findings at the Brooklyn Drug court, 1996-2000*, DRUG COURTS IN OPERATION: CURRENT RESEARCH 93 (James J. Hennessy & Nathaniel J. Pallone eds. 2001) (citing sources); Young & Belenko; Elaine M. Wolf, et al., *Predicting Retention of Drug Court Participants Using Event History Analysis*, 37 J. OFFENDER REHABILITATION 139-62 (2003); Miethe, et al., *supra* note 92, at 532-33.

⁸⁴ Specifically, users of crack and heroin do consistently worse in drug courts. *See, e.g.*, Rempel & Destafano, *supra* note 83, at 91-92 (citing sources that indicate that the more addictive the participant’s primary drug of choice (e.g., heroin, cocaine, crack) the more difficult it is to break the addiction”); REMPEL, *supra* note 3, at xii, 41 (indicating statistically significant effect of heroin and crack habits on chances of completing New York drug courts); Scott R. Senjo & Leslie A. Leip, *Testing and Developing Theory in Drug Court: A Four-Part Logit Model to Predict Program Completion*, 12 CRIM. JUST. POL’Y REV. 66-87 (2001); Thomas F. Babor, et al., *Unitary versus Multidimensional Models of Alcoholism and Treatment Outcome: An Empirical Study*, 49 J. STUD. ON ALCOHOL 167-77 (1988).

⁸⁵ *See* Heyman, *supra* note 75, at 85, 107 (citing studies); PEELE, *supra* note 41, at 6 (“Maturing out . . . will occur far more often than not.”); Cooper, *supra* note 3; John R. Hepburn & Angela N. Harvey, *The Effect of the Threat of Legal Sanction on Program Retention and Completion: Is That Why They Stay in Drug Court?*, 53 Crime & Delinquency 255, 268-70 (2007); Douglas Young & Steven Belenko, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, 32 J. DRUG ISSUES 297-328 (2002); REMPEL, *supra* note 3, at 41-43 (finding that younger defendants did better than older defendants in all but one county); PEELE, *supra* note 74, at 97; *see infra* note 219.

⁸⁶ Rempel & Destafano, *supra* note 83, at 91 (citing studies); REMPEL, *supra* note 3, at 43 (same); Levy, *supra* note 71, at 138.

⁸⁷ Rempel & Destafano, *supra* note 83, at 91 (citing studies); REMPEL, *supra* note 3, at 43 (same); Mara Schiff & W. Clinton Terry, *Predicting Graduation from Broward County’s Dedicated Drug Treatment Part*, 19 JUST. SYS. J. 291 (1997); Hepburn & Harvey, *supra* note 85, at 270.

⁸⁸ Rempel & Destafano at 91 (citing studies); REMPEL, *supra* note 3, at 43 (same).

⁸⁹ Hepburn & Harvey, *supra* note 85, at 271 (“[T]he consistent predictors of retention and completion were social bonds to the community as measured by being married, having a high school education, and being employed.”); Rempel & Destafano, *supra* note 83 (noting that participants from communities with weak social networks and widespread poverty do worse

lack of mental illness.⁹⁰ To some extent, these categories may overlap with addiction. Accordingly, it is unclear whether the characteristics, themselves, indicate profound addiction; or whether the characteristics pose endogenous obstacles to effective treatment; or whether, more likely, some combination is at play. In any event, the consequences are regressive and clearly undercut drug court's therapeutic and distributive aim of improving circumstances for those most in need of help.⁹¹

Finally, the impact of race *qua* race is ambiguous. Several studies have found race to be a significant variable, but some have not.⁹² But the latter studies came to that conclusion only by controlling for economic, social, and demographic variables.⁹³ Historically, minority communities are overexposed to the kind of socio-economic hurdles—like poverty, social fragmentation, and unemployment—that contribute to addiction and thwart treatment.⁹⁴ And the war on drugs has only compounded these historical stumbling blocks.⁹⁵ Accordingly, to control for economic, social, and demographic factors in urban minority communities is to ignore the everyday realities of life in these

in drug courts); *see generally* Tracey L. Meares, *Place and Crime*, 73 CHICAGO-KENT L. REV. 669 (1998) (discussing relationship between social isolation and crime); Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U.L. REV. 579, 588-89 (1997) (same); Tracey L. Meares, Neal Katyal, Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1188-89 (2004) (same).

⁹⁰ Rempel and Destafano, *supra* note 83, at 93 (citing studies showing reduced retention rates among dually diagnosed). Again, it is notable that those who commit crimes under arguably greater external compulsion (and therefore lesser volition) are the very individuals punished most under the drug-court model.

⁹¹ *See supra* notes __ and accompanying text.

⁹² *See* Rempel & Destafano, *supra* note 83, at 91-92 (citing conflicting studies); *see also* REMPEL, *supra* note 3, at __ (finding no significant effect); Senjo & Leip, *supra* note 94, at 66-87 (finding higher retention and completion rates among whites than nonwhites); Dale K. Sechrest & David Shicor, *Determinants of Graduation from a Day Treatment Drug Court in California: A Preliminary Study*, 31 J. DRUG ISSUES 128-48 (2001) (same); Schiff & Terry, *supra* note 87, at 291-310 (1997) (same); Beckerman & Fontana, *supra* note 82, at 48 (same); Terrance D. Miethe, Hong Lu & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 Crime & Delinquency 522, 532-33 (2000) (same); BELENKO, *supra* note 6, at 27 (same).

⁹³ Rempel & Destafano, *supra* note 83, at 91-92; REMPEL, *supra* note 3, at __ (finding no effect after controlling for socio-economic factors).

⁹⁴ Beckerman & Fontana, *supra* note 82, at 48 (“Addiction professionals have come to realize that powerful cultural and social factors have an impact on addictive behaviors, and the effectiveness of treatments offered to remedy those behaviors.”).

⁹⁵ *See* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 695 & nn.73-74 (“[Social] costs [of the drug war] . . . include the perceived dearth of men ‘eligible’ for marriage, the large percentage of black children who live in female-headed households, the lack of male ‘role models’ for black children . . . , the absence of wealth in the black community, and the large unemployment rate among black men.”); *see also supra* note __ and accompanying text.

communities.⁹⁶ The fact that skin color, by itself, may be insignificant might say something positive about the state of race-based animus in twenty-first-century America, but it is a distinction without a difference when it comes to the *de facto* shortcomings of drug courts as efficient diversion from prison for those who faced highest incarceration rates under the conventional war on drugs.⁹⁷

Nor is it sufficient to claim that failing participants have brought disaster upon themselves and should therefore be held accountable for their poor choices. As an initial matter, the notion that *addicts* should see fit to *opt out* of drug courts (that purportedly were designed expressly for them) runs counter to the principal first-order goal of compelling addicts *to treatment*.⁹⁸ That aside, the objection is hollow, because many drug courts—particularly felony drug courts, such as those in New York City—are constructed to provoke these poor decisions. The courts offer up enticing (but often elusive) carrots to the very defendants who are most ill-equipped to make and comply with rational choices.

A. *Irrational Addiction*

To the extent that the amorphous concept of addiction can be effectively categorized, it is perhaps best understood as a defect or weakness of reason and/or will.⁹⁹ First, the addict may lack the power to think rationally. His ability to reason is distorted by prolonged drug use, such that he is unable to adequately process even readily available information. Such an addict is self-deceptive (or an irrational *thinker*); he shapes his perceptions in self-serving

⁹⁶ Beckerman & Fontana, *supra* note 82, at 50 (“African-American male substance abusers often face multiple chronic problems that ‘feed’ their substance abuse. The presence of unemployment, hopelessness, unstable living conditions, inadequate or non-existent financial resources and health problems are common factors that aggravate and diffuse efforts to arrest addictive behaviors among these client groups.”)

⁹⁷ See, e.g., Marc Mauer & Ryan S. King, *The Sentencing Project, Uneven Justice: State Rates of Incarceration by Race and Ethnicity* (2007), at

<http://www.sentencingproject.org/Publications.aspx>, (finding that nationally African Americans are incarcerated at six times the rate of whites, and Latinos are incarcerated at double the rate of whites); BELENKO, *supra* note 6, at 27 (citing studies that whites had two-to-three times higher graduation rates than nonwhites in some drug courts); *supra* note 93 (citing sources); see also Stuntz, *supra* note 13, at 1825 (“[I]n a society where racial division is all too real, decisions that have no racial *cause* may still have a very powerful racial *meaning*.” (emphasis in original)).

⁹⁸ Hoffman, *supra* note 7, at 1509 (“The original concept . . . was to reach the hardcore addict who, more often than not, has been through the revolving doors of prison on many other drug or drug-driven convictions.”); see also *supra* notes 9, 14-18, __; *infra* notes __; and accompanying text.

⁹⁹ R. Jay Wallace, *Addiction as Defect of the Will: Some Philosophical Reflections*, 18 LAW & PHIL. 621, 622, 655 (1999).

ways and typically exhibits denial about use and its consequences.¹⁰⁰ Second, the addict may lack the strength to act on convictions. Such an addict is *akratic* (or an irrational *actor*); he is unable to exercise sufficient willpower to follow rational courses, even when he knows what those courses are.¹⁰¹

The basis for the addict's irrationality and bounded will is not what transpires while he is on drugs, but rather, what happens to him once he is off of them. He suffers strong dysphoric physical and psychological sensations of withdrawal that are typified by heightened tension, anxiety, depression, nausea, and sweating.¹⁰² Left unmet, his cravings become a kind of "sheer wanting" that overawes his senses—an ache akin to dehydration or starvation.¹⁰³ In the extreme, then, his desires may prove as irresistible as efforts to "not scratch[] an itch, [or] void[] one's bladder."¹⁰⁴

Admittedly, the addict is not alone in his penchant to cede to inadvisable temptation. All people are prone to cognitive limitations and imperfect motivation—even in the presence of perfect information.¹⁰⁵ Put simply,

¹⁰⁰ Ainslie, *supra* note 85, at 80 ("Addicts often fail to notice basic facts about their addictions, such as how much they ingest or that ingestion under some circumstances counts as part of their addiction. . . . In the extreme, they may develop whole dissociated personalities like Jekyll and Hyde."); *supra* note 71, at 133-36 (arguing that addicts deceive themselves by treating evidence for and against use "in a motivationally biased manner"); Heyman, *supra* note 75, at 108; *see also* Morse, *supra* note 71, at 39 ("[I]t's very difficult to concentrate the mind on the good reasons not to use. . . . The agent may not recognize the various options at all or may not be able coherently to weight and assess those that are recognized."); *see generally* Morse, *supra* note 71, at 39 (noting that fundamental components of rationality include "the capacities to think clearly and self-consciously and to evaluate one's conduct").

¹⁰¹ *See* Michael Louis Corrado, *Addiction and Responsibility: An Introduction*, 18 Law & Phil. 579, 583-585, 587 ("[T]he addict might know perfectly well what he ought to do, so that no defect of reason is involved; nevertheless his behavior is not under his control, however that might be construed."); *see also* Wallace, *supra* note 99, at 632, 652 (noting that addiction may be akratic condition because addicts "fail to comply with their deliberated verdicts in the face of temptation."); Ainslie, *supra* note 85, at 80 (noting that willpower often "backfires" for addicts); Ole-Jørgen Skog, *The Strength of Weak Will*, 9 RATIONALITY & SOC'Y 245-271 (1997); *see generally* Donald Davidson, *How is Weakness of the Will Possible?* in *ESSAYS ON ACTIONS AND EVENTS* 21-42 (Donald Davidson, ed. 1980) (exploring *akrasia*).

¹⁰² Morse, *supra* note 71, at 39.

¹⁰³ *Id.* One addict described the craving as like "a buzzing in my ears that prevents me *from focusing*." *Id.* (emphasis added).

¹⁰⁴ *Id.*

¹⁰⁵ *See generally* BEHAVIORAL LAW & ECONOMICS 39 (Cass R. Sunstein ed. 2003); Ainslie, *supra* note 85, at 90-92 (arguing that hyperbolic curves pose "innate challenge" to all humans); Ainslie, *Speech*, at 3 (describing hyperbolic discounting as "natural" and noting that "experiments on both human and animal subjects . . . have unequivocally found a discount curve for delayed rewards different from the one assumed by conventional utility theory"). In this way, the addict operates under the same flaws of reasoning and willpower that lead study subjects, exposed to noxious noise, to choose short periods of immediate silence over longer periods of delayed silence. Ainslie, *supra* note 85, at 89.

addicts are just “outsized” versions of us all.¹⁰⁶ Their cravings are factors that exacerbate endemic human limitations.¹⁰⁷ But the degree of difference between the addict and the garden-variety myopic thinker may be dramatic and debilitating: “[M]yopic . . . mechanisms are usually adequate, producing near optimal outcomes under normal conditions. However, addictive drugs have unusual properties that sabotage optimal outcomes. . . . This combination of properties implies a net loss for decision processes that are biased in favor of the immediate rather than the delayed value of the commodity.”¹⁰⁸

This does not mean that the addict’s condition is hopeless (though there may be extreme instances where it is). But his condition is unpredictable and precarious. To speak of the consequences of addiction, then, is to speak of probabilities, not absolutes.¹⁰⁹ The addict has a “predisposition” and “vulnerability” that may lead him, on the one hand, to overweight his ability to cease use, and, on the other hand, to continue to follow a destructive course of conduct—no matter how many good reasons he may have for forbearance.¹¹⁰ Put concretely, addicts are prone to *optimism bias, risk seeking, and hyperbolic discounting*.

i. Optimism

On the “ambiguous” question of whether addicts can master their addictions, they “see what they want to see,” and they disregard the rest.¹¹¹

¹⁰⁶ See Ainslie, *supra* note 85, at 111 (“The best conclusion is that addiction is just *an outsized case* of a vulnerability that everyone has, and that it may have become outsized either from genetic endowment or a history of bad choices, or both.” (emphasis in original)); *supra* notes 105-108 and accompanying text.

¹⁰⁷ Ainslie, *supra* note 85, at 85, 90-92; Heyman, *supra* note 75, at 108 ([C]hoice is not guided by rational bookkeeping principles, as often assumed in economic theory, but by myopic, psychological principles that reflect partial and distorted information about the competing alternatives.”).

¹⁰⁸ Heyman, *supra* note 75, at 108; see also Ainslie, *supra* note 85, at 111; *infra* note 106.

¹⁰⁹ Richard J. Bonnie, *Responsibility for Addiction*, 30 J. AM. ACAD. PSYCHIATRY & LAW 405, 407 (2002).

¹¹⁰ Wallace, *supra* note 99, at 635 (arguing that whether reason and will can overcome addictive cravings may or may not be wholly “up to the agent to determine”); see also Bonnie at 407; Morse, *supra* note 71, at 14-15; Michael Louis Corrado, *Behavioral Economics, Neurophysiology, Addiction and the Law*, UNC LEGAL STUDIES RESEARCH PAPER 32 (2006), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=892007 (“To say that an agent *chose* a particular course of action is not to say that he had a choice in the matter; his choice may have been dictated by things beyond his control. And to say that he chose a particular course of action, then, cannot exclude the possibility that it would have been extremely difficult to avoid that course of action.”).

¹¹¹ Daniel C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, in BEHAVIORAL LAW & ECONOMICS 151 (Cass R. Sunstein ed. 2003) (“When there is enough ambiguity to permit it,

They are “steeped in denial,” harboring self-serving perceptions about strength of habit and capacity to cease use.¹¹² Even when they have perfect information about risk, they believe magically that they can “beat the odds” and “control chance events.”¹¹³ Put simply, they harbor “‘positive illusions,’ . . . of personal control.”¹¹⁴

Moreover, studies have shown that people tend to exhibit the greatest levels of overconfidence over inadvisable risks in matters that fall within their specific areas of knowledge, and in which they play active parts.¹¹⁵ So, for example, people prefer to bet on their own future dice rolls over guesses at the past rolls of others.¹¹⁶ And, if nothing else, addicts know about drug use and necessarily play active roles in defeating it. Unlike trial, which is the domain of lawyers, addiction belongs to addicts—it is *theirs*. Thus, because they (and not their lawyers) are called upon to act, they are especially prone to make over-optimistic assessments of their *capacities to act*. And drug courts aggravate this problem still further by projecting overly sunny images

people naturally ‘see what they want to see.’ And what they want to see is something that is in their self-interest.”); cf. SIMON & GARFUNKEL, *The Boxer, on BRIDGE OVER TROUBLED WATER* (1970) (“Still, a man hears what he wants to hear and disregards the rest.”).

¹¹² Edwards, *supra* note 10, at 288 (noting that addicts are “incapable of assessing or evaluating the competing pressures that are brought to bear when coercion is applied”); see also *supra* notes __ and accompanying text.

¹¹³ Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311, 323 (1975); Cass at 4 (“Even factually informed people tend to think that risks are less likely to materialize for themselves than for others. Thus, there is systematic overconfidence in risk judgments.”); Christine Jolls, Cass R. Sunstein, and Richard H. Thaler, *A Behavioral Approach to Law and Economics*, BEHAVIORAL LAW & ECONOMICS 39 (Cass R. Sunstein ed. 2003) (“People tend to think that bad events are far less likely to happen to them than to others.”); Langevoort, *supra* note 111, at 149 & n.17 (“One of the most robust findings in the literature of individual decision making is that of the systematic tendency of many people to overrate their own abilities, contributions, and talents. This egocentric bias readily takes the form of excessive optimism and overconfidence, coupled with an inflated sense of ability to control events and risks.”).

¹¹⁴ See generally Jolls et al., *supra* note 113, at 15-17 (discussing people’s tendency to “overestimate their ability to control outcomes that are determined by factors outside of their control”); Daniel Kahneman & Dan Lovallo, *Delusions of Success: How Optimism Undermines Executives’ Decisions*, HARV. BUS. REV. 56-63 (July 2003); Richard Birke & Craig Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEG. L. REV. 1 (1999) (surveying literature on optimism bias).

¹¹⁵ Chip Heath & Amos Tversky, *Preference and Belief: Ambiguity and Competence in Choice Under Uncertainty*, 4 J. RISK & UNCERTAINTY 5, 22 (1991) (“[P]eople are paying a premium of nearly 20% for betting on high-knowledge items. . . . As a consequence, people prefer the high-knowledge bet over the matched lottery, and they prefer the matched lottery over the low-knowledge bet.”).

¹¹⁶ Heath & Tversky, *supra* note 115, at 8, 22 (citing study); cf. JONATHAN D. CASPER, *CRIMINAL COURTS: THE DEFENDANTS PERSPECTIVE* 51 (1978) (“One of the peculiar differences between trial and plea defendants is the greater propensity of those who have had trials to complain that they have not had the chance to present their side of the case. . . . [P]leas may foster a greater sense of participation.”).

of seemingly inevitable therapeutic success: the interactive and personable judge, the kinder and gentler prosecutor, the rhetoric of disease and cure—all lead prospective participants to believe they can get clean (even when cooler heads might conclude that they probably cannot).¹¹⁷

ii. Risk Seeking

For detained addicts, the problems of irrational decision making are that much worse. Generally speaking, people are not risk seeking; they are risk averse, because losses loom larger than gains.¹¹⁸ However, when people are presented with the choice of a guaranteed loss against a medium or medium-to-high probability of a greater loss, they seek risk in the hope of avoiding all loss.¹¹⁹ Put differently, in the “domain of losses,” a fair chance of recapturing the pre-existing status quo is the preferred option, notwithstanding the potential for substantial downside.¹²⁰ For example, people prefer the fifty-fifty risk of losing two thousand dollars (or getting back to even) to the certainty of losing one thousand dollars.¹²¹

Detained drug offenders exist wholly in the “domain of losses.”¹²²

¹¹⁷ See Hoffman, *supra* note 7, at 1489; see also Langevoort, *supra* note 111, at 150 (explaining how “groups can increase optimistic biases” by cultivating atmosphere of optimistic thinking).

¹¹⁸ Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992) [hereinafter, *Advances*]; Daniel Kahneman & Amos Tversky, *Loss Aversion in Riskless Choice: A Reference Dependent Model*, 106 Q. J. OF ECON. 1039 (1991) [hereinafter, *Loss Aversion*]; Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) [hereinafter, *Prospect Theory*].

¹¹⁹ See Kahneman & Tversky, *Advances*, *supra* note 118, at 298 (“[R]isk seeking is prevalent when people must choose between a sure loss and a substantial probability of a larger loss.”); *id.* at 316 (“Underweighting of high probabilities contributes . . . to the prevalence of risk seeking in choices between probable and sure losses.”); Daniel Kahneman & Amos Tversky, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 4538 (1981) (describing pseudocertainty effect wherein people exhibit risk aversion if the expected outcome is positive and risk seeking if the expected outcome is negative); see also Birke & Fox, *supra* note 114, at 44 n.178 (“Although people are typically risk-averse for moderate to large probability gains and risk-seeking for moderate to large probability losses, this pattern is reversed for low probability gains and losses.”); Emma B. Raisal, et al., *Can Prospect Theory Explain Risk-Seeking Behavior by Terminally Ill Patients?*, 25 MED. DECIS. MAKING 612 (2005) (“[O]ne of the key predictions of prospect theory—that people are risk seeking in the domain of losses.”).

¹²⁰ Kahneman & Tversky, *Prospect Theory*, *supra* note 118, at 285; see also Kahneman & Tversky, *Loss Aversion*, *supra* note 118, at 1042 (noting preference for retention of the status quo over other options).

¹²¹ Birke & Fox, *supra* note 114, at 43-44.

¹²² Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 244 (1999) (noting that the defendants may enter “domain of loss” at the time of arrest).

Conventional modes of justice provide no opportunities for present freedom; some loss is certain (albeit potentially less than the loss attendant to treatment failure). Any conventional plea is likely to require some amount of jail or prison;¹²³ and any trial is likely to require months of waiting behind bars.¹²⁴ In comparison, drug courts provide a “short[] route to liberty,” typically in the form of immediate release into outpatient treatment programs.¹²⁵ Detained addicts incautiously seek drug-court risks, because treatment is the only game in town—the only available gamble against otherwise certain loss.¹²⁶ In such circumstances, detained drug-court candidates come to resemble terminally ill patients, who are willing to try most anything—including experimental, potentially debilitating, and wholly unpredictable treatment—in order to avoid otherwise certain grim fates.¹²⁷

¹²³ Probation sentences for first-time felony drug offenders are sometimes statutorily permissible, even under the Rockefeller drug laws. Quinn, *supra* note 11, at 62-63 & nn.145,152. There appears to be some debate over whether such offers are common or the exception. Compare PORTER, *supra* note 30, at 18-19 with Quinn, *supra* note 11, at 62-63 nn.145,152. However, in my experience, even when such offers were permissible, detained defendants were the least likely beneficiaries. At best, prosecutors might offer “split sentences” of several months in jail combined with five years probation.

¹²⁴ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. __ (forthcoming 2008) (discussing average waits of several months for misdemeanor trials and more than one year for felony trials).

¹²⁵ Quinn, *supra* note 11, at 56 n.116 (“[M]any defendants entering treatment are simply accepting the shortest route to liberty. . . . Under these conditions is it fair to say that the defendant . . . in the throes of addiction . . . is freely making a decision among options?”); see also REMPEL, *supra* note 3, at xiv (“When clinically feasible, most courts prefer to begin participants in *outpatient* treatment and then upgrade to inpatient in response to relapses or other compliance problems.”). In almost all New York Courts studied over half of participants began in outpatient. *Id.* at xiv; see also Miller, *supra* note 1, at 1496 (citing similar national figures). In Bronx the figure is 87%. REMPEL, *supra* note 3, at 54. Moreover, it appears that drug court dispositions often can be had more quickly even than conventional pleas. *Id.* at xi (“Drug court cases reach initial disposition more quickly than conventional court cases. Participants in all six drug courts spent significantly *less* time from arrest to initial disposition/program entry than comparison defendants.”). Specifically, the mean time from arrest to disposition was about one month or less in the three New York City courts where such a time period was measured, and the median ranged from three-to-eighteen days. *Id.* at 268. Conversely, the mean time for the comparison groups was five-to-six months and the median time was approximately three months. *Id.*

¹²⁶ Further, there is an additional argument that those who engage in criminal behavior—especially those who (at least at first use) volitionally ingest harmful drugs—tend to be risk seeking by nature. Scott & Stuntz, *supra* note 36, at 1967-68 (1992) (arguing that criminals are by nature risk seeking); see also Birke, *supra* note 122, at 246 & n.132 (“[W]e can see that criminals appear to be more risk seeking than the general population in both the decision to engage in prohibited behavior and in the decision to exacerbate penalties by hiding or running from detection.”); see also Michael K. Block & Vernon E. Gerrety, *Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 138 (1995).

¹²⁷ See Emma B. Raisel, et al., *Can Prospect Theory Explain Risk-Seeking Behavior by Terminally Ill Patients?*, 25 MED. DECIS. MAKING 609 (2005).

iii. Hyperbolic Discounting

Several addiction theorists have linked addictive behavior to hyperbolic discounting.¹²⁸ The addict's preferences have the tendency to reverse as the short-term rewards of use become more immediate. In the moment of temptation, he can *appreciate* nothing but present desire.¹²⁹ Cravings overpower capacity to *listen to* or *follow* contrary reasons that would or should hold sway over conduct—if *only* the addict could keep his head clear and his will responsive.¹³⁰ This accounts, then, for the addict's commonly observed loss of control, impulsive behavior, and ambivalence toward use.¹³¹ In the throes of withdrawal, the addict feeds his demons. But submission to these demons is not rational just because they are close at hand; the demons may simply have crowded out other thoughts and potential courses of action and thereby kept the addict from adequately comprehending—much less comporting behavior to—the greater demons that await continued use. In the face of such consuming desire, it is somewhat beside the point whether addiction distorts thinking and/or weakens the will—or even whether addiction qualifies as a psychosocial and/or physiological disease.¹³² It is enough to recognize addiction's deleterious effects: that the addict may act

¹²⁸ See, e.g., Corrado, *supra* note 110, at 27 (discussing argument that addicts may discount hyperbolically because of “distorted reasoning . . . [.] a flaw in . . . approaching future costs and benefits . . . that . . . lands the addict . . . in hot water”); Ainslie, *supra* note 85, at 91; Bickel & March; PEELE, *supra* note 74, at 98-99 (noting that drug users are hyperbolic discounters, because they overvalue the immediate comfort of use); Levy, *supra* note 71, at 138; see generally Jolls et al., *supra* note 113, at 46.

¹²⁹ Warren K. Bickel & Lisa A. March, *Toward a Behavioral Economic Understanding of Drug Dependence: Delay Discounting Processes*, 96 ADDICTION 73, 81 (2001); see generally Ainslie Speech, at 2 (“[O]rganisms will often form *temporary* preferences for smaller-sooner [] rewards over larger-later [] ones when the [smaller-sooner] rewards are imminent, and thus are innately impulsive.” (emphasis added)).

¹³⁰ Ainslie, *supra* note 85, at 84 (noting that addiction “can impose motives on a person that she otherwise doesn’t want, and those conditioned motives can overwhelm his normal, ‘rational’ ones”).

¹³¹ Bickel & March, *supra* note 129, at 75; Ainslie, *supra* note 85, at 79 (noting that hyperbolic discounting is product of addicts’ “ambivalence”—that they “ingest[] their substance while saying they don’t want to”). Ainslie highlighted one of the chief conundrums for those who advance rational theories of addiction: “Addicts often refuse treatment, or, even more perplexingly, accept it and then work to defeat it.” *Id.* at 79.

¹³² Morse, *supra* note 71, at 39-40 (“For moral and legal purposes, the precise mechanisms by which addiction can compromise rationality are less important, however, than the clear evidence that it can.”); see also Heyman, *supra* note 75, at 99, 102 (“Again, the issue is not whether addiction has a biological basis or whether drugs change the brain. Rather, the issue is whether the biology of addiction results in a state such that drug consumption is no longer significantly influenced by consequences.”); Ainslie, *supra* note 85, at 85 (arguing that whether addiction is disease is secondary to understanding addiction’s impact on motivation).

foolishly on short-term urges that defeat the long-term rewards of self-control.

This is not, then, simply a matter of prioritizing the present over the future—a rational decision to alleviate immediate pain. Standing alone, there is nothing irrational about steep but exponential discounting over time. Instead, hyperbolic discounting involves an inconstant discount rate—it is the product of the inability to think and act rationally in the face of pain.¹³³ And just as the addict “fails to develop a faculty for ‘utility constancy’” when deciding whether to take drugs, he suffers the same limitation when deciding whether to take coerced drug treatment. The addicted defendant’s aversion to immediate loss (that is, continued incarceration) and his undue preference for immediate reward (that is, any type of near-term freedom) compels him to seize the benefits at hand and discount the significant potential termination sentence and long-term difficulties of overcoming addiction.¹³⁴

We can look to the Bronx data by way of example. There, conventional sentences were a bit less than five months and termination sentences were a bit more than eighteen months.¹³⁵ Nevertheless, almost all eligible defendants elected to take the drug-court option.¹³⁶ No doubt, a sizable number of them would have chosen differently if the offers were structured in a fashion that held back all rewards: if the choice were between, say, (i) two years and five months in prison, or (ii) two years in prison plus an intensive one-to-two year outpatient treatment program with the failure threat of an additional eighteen months in prison and the graduation promise of dismissal.¹³⁷

B. *Uncertain Treatment*

Once in treatment, addicts are less likely to respond rationally to information about the consequences of noncompliance and continued use. Notably, the much-celebrated tolerance of drug courts for relapse may backfire.¹³⁸ Specifically, addicts may conclude erroneously that, because the court met past slip-ups with slaps on the wrist, it will abide future relapse, as

¹³³ Ainslie, *supra* note 85, at 91; *see generally* Jolls et al., *supra* note 113, at 46.

¹³⁴ Jolls et al., *supra* note 113, at 46 (“[Hyperbolic discounting] means that impatience is very strong for near rewards (and aversion very strong for near punishments), but that each of these declines over time.”); Ainslie, *supra* note 85, at 101 (“[I]n the middle of a choice between a small, early and larger, later reward, the urge to see your way clear to take the early one is great, which leads people to gamble on . . . shaky grounds.”).

¹³⁵ *See supra* tbl. 1.

¹³⁶ *See infra* notes 189, __ and accompanying text.

¹³⁷ Quinn, *supra* note 11, at 59 (“It is difficult to imagine that many incarcerated clients in the Bronx, even those with potentially ‘winnable’ cases, would opt to exercise the right to go forward to trial when the ‘freedom’ of treatment is knocking at their door.”).

¹³⁸ *See infra* notes 202, __ and accompanying text.

well.¹³⁹ Moreover, even if addicts were capable of informed rational choice, that information is often withheld: “The number of positive urine analyses . . . or other treatment failures that will be tolerated before a defendant is sentenced to prison is not typically written in stone and instead is left to the discretion of the particular drug court judge who happens to be presiding at the time.”¹⁴⁰ Indeed, Jeffrey Tauber, the President of the National Association of Drug Court Professionals, has advised judges to promote just such a culture of uncertainty: “Uncertainty of outcome after a remand, and its accompanying anxieties, can be a useful motivator for both the offender and the audience.”¹⁴¹ But, while ambiguity may serve to motivate some, it is likely to lead others down the primrose path. When a judge remands a participant, with the admonishment that “the gig is up,” only to subsequently release the participant to his program after two days confinement, the wayward participant may come to believe that the judge does not mean what she says and that no number of instances of noncompliance will result in ultimate termination.¹⁴²

Additionally, uncertainty exists *ex ante* over the structure and length of drug-court programs. First, prospective participants may not know what to expect from judges who have unfettered judicial discretion over supervision, participant progression, and the allocation of in-program rewards and sanctions.¹⁴³ Second, prospective participants may not be made aware of the particular treatment provider that will administer care. Often participants are directed to particular providers—not on the basis of therapeutic need—

¹³⁹ Ainslie, *supra* note 85, at 99 (“Acting in my long range interest, how do I keep a short range interest from repeatedly proposing an exception to my rule, ‘just this once?’”); Levy *supra* note 71, at 134 (noting addicts’ susceptibility to confirmation bias and availability bias, which lead addicts to conclude that they can safely take “[j]ust one [more] hit”); *cf.* Jolls at 292 (explaining that people underestimate their own probability of apprehension for driving drunk); *see generally* Jolls et al., *supra* note 113, at 45-46 (noting that criminals, subject to availability bias, assess probabilities of sanctions according to consequences of past misdeeds). Indeed, this may be why addicts sometimes do best by quitting cold turkey. Ainslie, *supra* note 85, at 99, 104-08 (“[O]ne of the traits of recovering addicts . . . [is] excessive legalism.”).

¹⁴⁰ Hoffman, *supra* note 7, at 1463; REMPEL, *supra* note 3, at xiv (“[D]rug court teams frequently make individualized decisions based on what they believe will be most effective with a particular participant rather than adhering to a rigid schedule of graduated sanctions.”); NOLAN, *supra* note 7, at 105 (“The judge’s aim is to develop a flexible, individuated, responsive interaction with each offender, . . . in which ‘there are no hard and fast rules’ governing how the judge does so.”).

¹⁴¹ NOLAN, *supra* note 7, at 70; *see also* TRONE, *supra* note 21, at 12 (“[M]any treatment counselors exaggerate the legal consequences of failure.”).

¹⁴² TRONE, *supra* note 21, at 11 (“[R]esearch . . . indicate[s] that knowing the consequences of failure and the rewards for succeeding has a positive effect on treatment retention and outcomes. Moreover, certainty may be more important than severity.”).

¹⁴³ *See infra* notes __ and accompanying text.

but on bases of space constraints and other practical demands.¹⁴⁴

Finally, the overall duration of drug-court programs are somewhat indeterminate. Drug courts anticipate certain minimum lengths, but defendants typically must satisfy consecutive periods of “clean time,” during which they must not test positive for drugs.¹⁴⁵ Likewise, they may be demoted for noncompliance to earlier treatment phases.¹⁴⁶ Consequently, treatment often lasts some unknowable period longer than the scheduled term.¹⁴⁷

In the face of such uncertainty, addicts may find it all the more difficult to make informed choices about whether to take the drug-court option, and to know, understand, and comply with the parameters of treatment going forward.

C. *Exogenous Influences*

And there are related, exogenous, institutional and societal reasons why addicts, minorities, and the poor do comparatively worse in drug courts—reasons that transcend cognitive limitations, bounded will, and imperfect information. Specifically, because coerced treatment overlays conventional justice, institutional and enforcement decisions may have profound impact on what ultimately happens in drug courts.¹⁴⁸ First, with respect to bail, the determination of whether to set bail and in what amounts turns principally on prior record and community ties (holding crime-charge constant).¹⁴⁹ Acute

¹⁴⁴ Hoffman, *supra* note 7, at 1513 (“[T]he very presence of a fixed array of dispositional and treatment regimens begins to drive a one—or maybe three—size(s)-fit(s)-all philosophy.”); Boldt, *supra* note 6, at 1224, 1227 (“The central problem . . . is practical: society cannot afford to offer each offender a unique treatment plan. . . . [I]ndividuals . . . will be referred to whatever program within the network of affiliated providers happens to have an opening.”).

¹⁴⁵ REMPEL, *supra* note 3, at 20-21, 23.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 59-60 (noting that successful treatment in New York City typically took five-to-ten months longer than minimum); PORTER, *supra* note 30, at 33.

¹⁴⁸ Miller, *supra* note 1, at 1568 (“The differential impact of the criminal justice system on poor individuals may be exacerbated for minorities, who are much more likely to receive incarcerative sentences than non-minorities. Such factors may lead poor and minority defendants to accept diversion into drug court where others would not.”).

¹⁴⁹ See NEW YORK CITY CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY, PART 2. BROOKLYN 25-28, 50 (2004), available at www.nycja.org/research/research.htm (discussing importance of criminal history in bail decisions and concluding that for some judges criminal record is “the strongest factor” in deciding whether to set bail); see also NEW YORK CITY CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY, PART 1. MANHATTAN 29-43, 48 (2004), available at www.nycja.org/research/research.htm. For example, one national study found that courts set bail or remanded over three quarters of all recidivist felony defendants.

addicts, minorities, and the poor are more likely to be recidivists and are less likely to have strong social networks.¹⁵⁰ And, once bail is set, these groups are less likely to have access to the means to satisfy it.¹⁵¹ Hence, they are more likely to make the choice to take or decline drug court from jail.

Second, with respect to arrest, police more frequently come to re-arrest recidivist addicts, minorities, and the poor. And drug courts use these instances of re-arrest as bases for treatment termination.¹⁵² Specifically, recidivists are common first targets of enforcement activities, because they are known personally to the police, they habituate high-crime areas, and/or they are simply more likely to look the criminal part.¹⁵³ Likewise, poor and/or minority communities are disproportionate foci of police enforcement.¹⁵⁴ Significantly, such efforts might not be racist or classist in construction.¹⁵⁵ Enforcement may be selective, simply because drug crime is everywhere, but the police cannot be.¹⁵⁶ Police rationally concentrate on poor and urban—often minority—communities, because drug use is more readily discoverable there.¹⁵⁷ Specifically, in these neighborhoods, drug crime—like other aspects

U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2002, at 20 & tbl. 18 (2006), *available at* <http://www.ojp.usdoj.gov/bjs/abstract>. Overall, courts held recidivist defendants until disposition about fifty percent more frequently than defendants with no criminal records. *Id.*

¹⁵⁰ See *supra* notes 83-97, __ and accompanying text.

¹⁵¹ For example, in New York City in 2004, only nine percent of defendants held on bail were able to buy release at arraignment. CJA, ANNUAL REPORT, *supra* note __, at 22. Remarkably, the figure rose only to sixteen percent even for defendants held only on minimal bail of \$500 or less. *Id.* And only an additional twenty-seven percent were released at some later date. *Id.* at 24. Likewise, national studies show that most recidivist defendants are unable to pay bail, and, as a group, they are substantially less likely to pay bail than defendants without criminal records. See, e.g., DOJ, FELONY DEFENDANTS, *supra* note __, at 20 & tbl.18.

¹⁵² COOPER, *supra* note 3, at 30-31 (noting that many drug courts use re-arrest as basis for—sometimes mandatory—termination); REMPEL, *supra* note 3, at 142.

¹⁵³ Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. __ (forthcoming 2008) (discussing usual-suspects policing).

¹⁵⁴ William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998); Stuntz, *supra* note 13; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 986-87 (1999).

¹⁵⁵ Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1261-70 (1994); see also Stuntz, *Drugs*, at 1833.

¹⁵⁶ See Stuntz, *supra* note 13, at 1875 (“Police and prosecutors have to decide where to invest their time and energy.”); Stuntz, *supra* note 154, at 1819 (“[N]ot only must the police look for the crimes, they must decide *where* to look, in a world where the crimes are happening everywhere. . . . [W]hom they catch depends on where they look.” (emphasis in original)).

¹⁵⁷ Stuntz, *Drugs*, *supra* note 154, at 1810, 1820-22 (“Looking in poor neighborhoods tends to be both successful and cheap. . . . Street stops can go forward with little or no advance investigation. . . . [T]he stops themselves consume little time, so the police have no strong incentive to ration them carefully.”).

of life—occurs more frequently out of doors.¹⁵⁸ And the tactics that police use against such highly visible crime (street stops and sweeps) are cheaper and easier to undertake than the tactics used in more affluent neighborhoods (wiretaps, informant tips, and house searches). Regardless of animus, the effect is the same: for systemically disfavored groups, the police—and not just drug courts and treatment programs—are watching.

In short, contexts matter. Because drug courts are embedded within a society where inequalities exist and onto a justice system that traditionally arrests and punishes minorities and the poor more frequently and harshly than others,¹⁵⁹ coerced treatment that uses conventional justice as a backstop leads to ultimate sentences that are informed by the same social, economic, and institutional pressure points that historically have led to disparate punishment under the conventional (incarceration-focused) war on drugs. Consequently, addicts, minorities, and the underprivileged are terminated more frequently from drug courts, even perhaps in circumstances where they are doing just as well (or badly) as their white and affluent counterparts.

D. *Counsel's Dilemma*

But what of defense counsel? Where are the lawyers to warn against ill-advised coerced treatment *before* candidates reach fateful choices? Much has been made of the defense lawyer's problematic drug-court role as "team player."¹⁶⁰ And the criticism is fair. But the chief problem with teamwork is not the defense lawyer's abandonment of her adversarial role *per se*. It is the fact that drug courts relegate the defense lawyer to a marginalized position where she can, at most, make rough (often counterintuitive) predictions on unanswerable questions that fall outside her expertise and training.¹⁶¹

First, the defense lawyer is not a diagnostician who is trained to make

¹⁵⁸ See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1190 (1996) ("[R]esidents of poor urban neighborhoods tend to make especially heavy use of streets and sidewalks for social interactions."); see also Stuntz, *Drugs*, *supra* note __, at 1824 ("[P]eople with money enjoy more privacy than people without.").

¹⁵⁹ Jeffrey Fagan, *Race, Legitimacy, and Criminal Law*, 4 SOULS 69, 70 (2002) ("Under the recent policies of the New York City Police Department, aggressive stops and searches have been disproportionately aimed at nonwhite citizens, far outpacing their actual involvement in crime."); see also *supra* note 97; see generally Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. __ (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996431.

¹⁶⁰ See Boldt, *supra* note 6; Quinn, *supra* note 11.

¹⁶¹ See *supra* note __ and accompanying text. As one defense lawyer chillingly put it: "The defense lawyer doesn't fit well in this system in his traditional role. . . . [G]et the lawyers out of the process. Defendants tend to use their lawyers to protect them. And in the therapeutic environment, which is kinder and gentler, that is probably not a productive thing." NOLAN, *supra* note 7, at 86.

predictions on the prospects of therapeutic effectiveness. And the courtroom is not the setting to make these clinical assessments, in any event. Instead, the defense lawyer is trained to forecast the chances of trial victory. Moreover, even the most highly trained drug counselor or therapist cannot know *ex ante* with any degree of certainty whether a particular drug-court modality employed at this particular time in this particular addict's life is bound to achieve results. Ultimately, it is addict's drug habit—not the lawyer's legal knowledge, training, or reason—that will dictate failure or success. Yet, with freedom in the balance, the defense lawyer is expected to advise her client with little insight into the most important determinate of all: the client's own subjective state of mind and strength of will. Defense lawyers are made to act as “envoys to [the] sovereign country” of their clients' psyches.¹⁶² On such foreign ground, the lawyer can make, at best, educated guesses: more often than not, that the *less* compulsive the client seems to be, the *more* advisable it is for him to strategically game treatment (that he, in fact, does not need).

Second, the grand compromises that underpin drug courts left the defense lawyer out of the power-sharing equation. She has been shuttled to the background in a process that has largely been stripped of the procedural formalism that was her stock in trade.¹⁶³ Indeed, the defense lawyer is sometimes not even expected at (or alerted to) appearances.¹⁶⁴ Accordingly, the very types of defendants least equipped to reach sound rational decisions are called upon to make—and take responsibility for—largely unguided choices. Instead, judges encourage participants to engage the court personally. The judge talks and jokes with them about their families and prospects—their slip-ups and accomplishments. But the judge also has the power to punish them, and when she does so she is unconstrained by

¹⁶² Ainslie, *supra* note 85, at 112.

¹⁶³ NOLAN, *supra* note 7, at 77-79 (“In the context of the drug court, then, the defense attorney very decidedly jettisons some traditional responsibilities in deference to the defining assumptions of a therapeutic perspective.”); Boldt, *supra* note 6, at 1245 (“[D]efense counsel is no longer primarily responsible for giving voice to the distinct perspective of the defendant's experience in what remains a coercive setting.”); *see also supra* notes 143-147, __ and accompanying text. Perhaps, the defense bar has given into this diminished role, because—living in the “long shadow” of the war on drugs—any politically viable alternative to incarceration is preferable to the status quo. Miller, *supra* note 1, at 1482-84 (“Many advocates of the due process model are simply opposed to the new goals of imprisonment and welcome any form of diversion, especially for victimless drug crimes.”).

¹⁶⁴ DOJ, KEY COMPONENTS, *supra* note 9, at 12 (noting that defense attorneys should advise drug court candidates “that he or she will be expected to speak directly to the judge, not through an attorney”); Quinn, *supra* note 11, at 64 (describing “culture of informality . . . whereby most players in the court view the presence of a defense attorney at status hearings as nonessential”); NOLAN, *supra* note 7, at 85 (“[T]he client directly engages the judge, and is asked to be open and honest with the judge about all sorts of issues . . . not only . . . about his or his drug use but about employment, family, friendships, and financial concerns.”); *see also infra* notes 163, 161, __ and accompanying text.

customary procedural rules.¹⁶⁵ Thus, the judge can met out sanctions—sometimes of individual invention—without hearings and based on potentially flimsy inadmissible evidence.¹⁶⁶ When judges are free to construct rewards and sanctions out of whole cloth and to keep participants in treatment for indeterminate lengths,¹⁶⁷ the defense lawyer can do little more to provide effective and informed advice than to simply throw up her hands and tell her client, “Prepare to turn your life over to this judge and her whims for at least the next year or two.”¹⁶⁸

As a final note, numerous scholars have flagged self dealing as a significant plea-bargaining concern.¹⁶⁹ Elsewhere, I have posited that the

¹⁶⁵ See Boldt, *supra* note 6, at 1252 (describing a “judge-driven . . . process . . . coupled with a high degree of informality”); Miller, *supra* note 1, at 1514-15; see also Dorf & Sabel, *supra* note 46, at 852 (arguing that drug courts are not truly courts because the judge “adjudicates no disputed issues”) Indeed, this informality is one of the aspects of the courts that judges like so much. NOLAN, *supra* note 7, at 94 (describing how judges appreciate freedom from traditional adjudicative functions that they find “too confining, boring, unrewarding, insufficiently responsive to social problems”); see also NOLAN, *supra* note 7, at 105 (quoting Judge Hora: “The more you take away judicial discretion, the more you might as well judge have a computer sitting up there on the bench. You know, just punch in the numbers and tell me how long the sentence is. And it gives you nothing that you went to the trouble of becoming a judge for.”).

¹⁶⁶ See *supra* note 6 and accompanying text; cf. Hoffman, *Danger* at 2088 (“Judges don’t provide helpful advice to voluntary participants on their long-road to recovery, they issue court orders that are backed by the power of the carceral state most drug-courts advocates wished to sidestep.”) For example, one judge jailed a participant based on a letter from his mother that indicated that he had started using drugs again. NOLAN, *supra* note 7, at 94. Another judge informed a participant’s employer: “If he doesn’t come to work on time, if he comes to work under the influence of any kind of drugs, I’ll put him in jail, on your say so.” *Id.*

¹⁶⁷ See *supra* notes 145-147, __ and accompanying text.

¹⁶⁸ Quinn, *supra* note 11, at 55 (“For a client who pleads guilty in treatment court, the defense attorney may not be able to provide the same definitive answers she would for the client accepting a plea offer in a traditional courtroom.” (citing *People v. Parker*, 711 N.Y.S.2d 656, 661 (App. Div. 2000) (explaining that vague sentencing terms that render conditions of compliance open to “subjective interpretation” may violate due process)). The same might be said of probation, but at least defendants typically plead down to lesser charges, so the fear of atypical probation violation sentences is diminished. In any event, probationers are entitled to revocation hearings, at which they can appeal probation decisions to independent judges. Drug court failures have no such recourse; the judge monitors the program, declares it finished, and hands down sentence. NOLAN, *supra* note 7, at 102 (“One wonders, given this more intimate relationship between the judge and the defendant, whether a level of judicial impartiality can be sustained.”); see also Hoffman, *supra* note 7, at 1514: (“[W]hen all the ebbs and flows of treatment are tallied up and labeled as an overall failure . . . all of the failures . . . are sent to prison with virtually no further judicial inquiry.”).

¹⁶⁹ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2477 (2004); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115, 123 (1994); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L. J. 1179, 1182-1194, 1201-03 (1975).; John B. Mitchell, *The*

agency concern may be overblown—at least in the context of low-stakes cases.¹⁷⁰ Drug courts, however, are a different matter. The indolent lawyer who wishes to dispose of the substantive case can readily convince the over-optimistic acutely addicted poor candidate to take drug court, because the offer seems to hold out the promise of everything the defendant could want: immediate freedom and the possibility of dismissal. The lawyer can then monitor compliance with little effort (and often from afar); and, if and when termination comes, the lawyer is required to appear only for a sentencing hearing at which no contested issues are litigated and for which no work need be done.¹⁷¹

III. NEW YORK CITY DRUG COURTS AS TRIALS BY ORDEAL

Years ago, John Langbein wrote a clever, entertaining, and somewhat-disturbing essay comparing the medieval practice of torture and the modern practice of plea bargaining.¹⁷² The more fitting analogy to drug-court practice may be the early- and pre-medieval practice of trials by ordeal. In trials by ordeal, clergy would administer physical tests—which included the ability to carry hot iron, walk over glowing ploughshares, or remove stones from boiling water—to discern divine judgment on the guilt or innocence of the accused.¹⁷³ Clergy deemed the accused innocent if he completed the ordeal unharmed (or, at least, with only wounds that healed quickly and cleanly).¹⁷⁴

Both trials by ordeal and drug courts are inaccurate checks for blameworthiness. At most, trials by ordeal test for thickness of skin.¹⁷⁵ And drug courts test for strength of will, clarity of reason, and social and economic privilege.¹⁷⁶ Moreover, for both dispositional forms, the very individuals

Ethics of the Criminal Defense Attorney—New Answers to Old Questions, 32 STAN L. REV. 293, 319 (1980); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 Law & Soc’y Rev. 15, 18 (1967) (describing defense attorney as a “double agent”).

¹⁷⁰ Bowers, *supra* note 153.

¹⁷¹ Cf. Quinn, *supra* note 11, at __ (“[I]f a first-time felony drug offender were advised by his attorney to accept a plea offer involving a sentence of two to six years, most attorneys would agree that such advice was incompetent”).

¹⁷² John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

¹⁷³ Ian C. Pilarczyk, *Between a Rock and a Hot Place: The Role of Subjectivity and Rationality in the Medieval Ordeal by Hot Iron*, 25 ANGLO-AM. L. REV. 87, 87-92 (1996); Rebecca V. Colman, *Reason and Unreason in Early Medieval Law*, 4 J. Interdiscipl. Hist. 571, 582 (1974).

¹⁷⁴ Pilarczyk, *supra* note 173, at 87-92; Colman, *supra* note 173, at 582. Other ordeals included the ordeal by combat, the ordeal by swimming, and the ordeal by morsel (where the accused had to swallow a quantity of food without choking). Colman, *supra* note 173, at 582.

¹⁷⁵ Cf. Langbein, *supra* note 172, at 7 (noting that torture problematically “tests the capacity of the accused to endure pain rather than his veracity”).

¹⁷⁶ Franklin Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809, 815

burdened least *by the process itself* also suffer the smallest (if any) back-end sanction. With respect to trials by ordeal, hot coals hurt, but they hurt rough hides less. With respect to drug courts, the act of getting and staying clean is agonizing for the genuine addict, but merely annoying for the un-addicted gamer.¹⁷⁷ At bottom, present pain and ultimate fate turn principally on the innate advantages with which given participants enter.

A. *Reverse Screening*

In one important sense, drug courts stand on somewhat worse footing than trials by ordeal. Trials by ordeal are *irrational* practices (in that thick skin bears *no* relationship with blameworthiness).¹⁷⁸ But drug courts—at least felony drug courts of the New York City breed—are not simply arbitrary. Instead, the results are *predictably* regressive: capacity to cease use is proportional to participants' affluence, social support, systemically favored race, and non-existent or weak addiction. In short, participants who need help most (from the standpoint of distributive justice),¹⁷⁹ and who are least volitional and therefore least deserving of punishment (from the standpoint of retributive justice),¹⁸⁰ are the very participants for whom “trial

(1992) (noting that imprisoning offender based on failure to comply with treatment poses problem that “the prisoner's punishment is being neither defined nor limited by the culpability of his acts”); *see also* Hoffman, *supra* note 11, at 2088 (“drug court . . . requires us to send people to prison not because they violated the law . . . but rather because they resisted our enlightened treatment efforts.”).

¹⁷⁷ *See supra* notes 79-80 and accompanying text.

¹⁷⁸ Pilarczyk, *supra* note 173, at 106 (noting that “historians have traditionally derided the ordeal as being fundamentally irrational”). As a contemporary put it: “[I]nnocence is too closely connected with calluses.” *Id.* at 102; *see also* Colman, *supra* note 173, at 589 n.11 (“[S]ome medieval feet would obviously have a better chance than others to make it across.”).

¹⁷⁹ *See supra* notes 95, __ and accompanying text.

¹⁸⁰ Wallace, *supra* note 99, at 652 (“Addiction, in other words, should be thought of as producing a condition of potentially diminished accountability.”); Morse, *supra* note 71, at 4, 6, 24, 45-47 (“[I]f prohibited activity does not meet the criteria for intentional action . . . the harmdoer will be exculpated.”); Miller, *supra* note 1, at 1523-24 (“The retributivist would argue that some kind of moral norm precludes punishing an involuntary act. . . . When . . . the cravings are moderate or few mitigating circumstances are present . . . ingestion will be more blameworthy.”); *see also* Robinson v. California, 370 U.S. 660, 667 (1962) (“Even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.”); Bonnie at 410 (“[M]any judges probably share the moral intuition that addiction should be an occasion for compassion and mitigation, even if it does not qualify as an excuse. . . . Compulsion may diminish responsibility, but it does not erase it.”); Levy, *supra* note 71, at 134; United States v. Moore, 486 F.2d 1139, 1240-41 (D.C. Cir. 1973) (en banc) (Skelly, J., dissenting) (noting that punishment requires culpability and culpability requires an act of “free will”).

There is an argument from the standpoint of incapacitation or deterrence that greater punishment is appropriate for recalcitrant addicts, who are more likely to continue violating

by drug court” is most onerous and least successful. “Truly diseased addicts end up going to prison, while those who respond well to treatment, and whose use of drugs may thus have been purely voluntary, escape punishment.”¹⁸¹

In a rational world, the backward incentives of New York City’s drug courts would function, literally, to *weed out* the genuine addicts that are the purported foci of the drug-court model and to *weed in* for-profit volitional drug dealers. The model is, therefore, an example of “reverse moral screening,”¹⁸² which raises moral hazards similar to those described in George Akerlof’s seminal *Lemons* article.¹⁸³ Specifically, Akerlof explained that a used-car market may be flooded with “lemons,” because buyers cannot effectively screen for quality. Those prospective buyers who concurrently

drug (and other) laws. See Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1074 (2003) (“From a utilitarian perspective . . . an exceptional history of drug abuse might serve as an aggravating factor . . . [a]s at least one indicator of an offender's propensity to commit crimes.”). Indeed, it is this very claim that has led to the harsh sentences that typify the war on drugs. But as this losing (or, at best, stalemated) war has shown, longer sentences are not up to the task. See *supra* notes ___. In any event, drug courts claim to be doing something quite different from subjecting recidivist addicts to *stiffer* sentences. See, e.g., COMMISSION, *supra* note 42, at 5, 10-11 (arguing that drug court’s intent is to target for treatment “core group” of addicted recidivist offenders whose crimes “stem from their addiction”); see also *supra* notes ___.

Of course, there may be a separate argument (from the standpoint of incapacitation or specific deterrence) that drug courts effectively work to provide longer sentences (and to exercise greater consequent social control over) the kinds of recalcitrant addicts who are more likely to continue violating drug (and other) laws. See Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1074 (2003) (“From a utilitarian perspective . . . an exceptional history of drug abuse might serve as an aggravating factor . . . [a]s at least one indicator of an offender's propensity to commit crimes.”). Indeed, it is this very claim that has led to the harsh sentences that typify the war on drugs. But as this losing (or, at best, stalemated) war has shown, longer sentences are not up to the task. See *supra* notes ___. In any event, drug courts claim to be doing something quite different from subjecting recidivist addicts to *stiffer* sentences. See, e.g., COMMISSION, *supra* note 42, at 5, 10-11 (arguing that drug court’s intent is to target for treatment “core group” of addicted recidivist offenders whose crimes “stem from their addiction”); see also *supra* notes ___.

¹⁸¹ Hoffman, *supra* note 11, at 2089; see also Miller, *supra* note 1, at 1533 (“There is a difference between the ‘incipient, volitional’ addict and those who have ‘lost the power of self-control.’ The incipient, moderately rational addict can respond to reason-affecting stimuli; the out-of-control addict can no longer do so.” (quoting *Robinson v. California*, 370 U.S. 660, 680 (1962) (Clark, J., dissenting))).

¹⁸² Hoffman, *supra* note 11, at 2089; see also Miller, *supra* note 1, at 1547 (discussing the problem of drug-court “over- and under-inclusiveness.”).

¹⁸³ George A. Akerlof, *The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism*, 84 QUART. J. ECON. 488-500 (1970); see generally Joseph Stiglitz & Andrew Weiss, *Sorting out the Differences Between Screening and Signaling Models*, in PAPERS IN COMMEMORATION OF THE ECONOMIC THEORY SEMINAR AT OXFORD UNIVERSITY (Michael Dempster, ed. (1989)); Michael A. Spence, *Job Market Signaling*, 87 QUART. J. ECON. 561-72 (1973).

might have high-quality used cars to sell tend to withdraw, thereby keeping the good used cars out of the market and leaving only the clunkers.¹⁸⁴ Analogously, as the Bronx and Staten Island data have revealed, drug-court participants did worse on average than conventionally adjudicated defendants, and drug-court failures did magnitudes worse.¹⁸⁵ Rationally, then, only un-addicted gamers—who *knew* they were non-compulsive and could thereby volitionally refrain from drug use—should have chosen to enter. The problem, of course, is that, ideally, we want drug treatment courts to consist of defendants who require treatment and whose crimes are the product of genuine dependencies, just as we want used-car markets to consist of quality cars (or, at least, cars with only apparent defects).

A difference remains, however: unlike Akerlof's high-quality sellers who saw fit to withdraw, addicted drug offenders (who, as we have seen, are irrational and *akratic*) do not.¹⁸⁶ Instead, they make the mistake of opting in. At bottom, then, a strange and troubling duality is at play in drug courts: the courts present opportunities for strategic gaming to rational un-addicted defendants; and, concurrently, they exploit the penchant of irrational addicted defendants to seek risk, unduly prioritize the present, and over-optimistically rate their own capacities for success.¹⁸⁷ Consequently, drug courts draw in most all potential comers.¹⁸⁸ Again, the Bronx data are telling. In that county, only *eight percent* of prospective participants rejected drug-court offers; the other ninety-two percent felt that they were better off with the drug-court option than with trials or conventional pleas—even though, on average, they most certainly were not.¹⁸⁹ For the forty-eight percent who failed, this was a costly error.¹⁹⁰

Notably, most drug court literature has failed to capture the individualized consequences of such backward screening. In study after study, drug courts are celebrated for *overall* reductions in recidivism and *overall* conservation of resources.¹⁹¹ Lost amid the positive generalities are the profound impacts of termination on individual participants and an

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* notes 79-80, tbl.1 and accompanying text.

¹⁸⁶ *See supra* Part II.B.

¹⁸⁷ *Id.*

¹⁸⁸ *Cf.* Hepburn & Harvey, *supra* note 85, at 256 (“Legal coercion may be a strong motivation to treatment, but it is apparent that many of those legally coerced to treatment fail.”).

¹⁸⁹ REMPEL, *supra* note 3, at ____.

¹⁹⁰ *See supra* tbl.1.

¹⁹¹ *See generally* David B. Wilson, et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. Experimental Criminology 459-87 (2006) (reviewing forty-one drug court evaluations); BELENKO, *supra* note 6 (reviewing thirty-seven drug-court evaluations). Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV. 1-42 (1998).

appropriate understanding of who these failing participants are most likely to be. Proponents claim success as long as comprehensive benefits outweigh total costs (notwithstanding common failure and its inordinately high prices). Systemically, discrete treatment failure goes largely unnoticed; or rather, it is just another negative checkmark on an on-going tally. But for the failing participant it is disaster. Global appraisals, then, run the risk of missing the trees for the forest. They ignore the regressive fact that fewer people—more likely acute addicts and/or members of distressed communities—are sent away for longer periods of time.¹⁹²

B. *Blind Faith*

A principal problem is that drug courts, like trials by ordeal, put great stock in scientifically unfounded principles. There is no need to linger on the methodological flaws of trials by ordeal. Drug courts are less obviously problematic. But there is not much beyond blind faith to support the central drug-court assumption that coerced treatment works just as well (or better) than voluntary treatment—that external motivation effectively leads to internal motivation.¹⁹³ Significantly, the claim runs up against conventional therapeutic wisdom and a host of studies that have shown voluntary treatment to be superior to compulsory.¹⁹⁴ And, intuitively, that seems right,

¹⁹² REMPEL, *supra* note 3, at xi, 40-41; O'KEEFE & REMPEL, *supra* note 22, at 40; *see supra* notes ____.

¹⁹³ *See, e.g.,* Bruce J. Winick, *How Judges Can Use Behavioral Contracting*, in *JUDGING IN THE THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* (Bruce J. Winnick & David B. Wexler, eds. 2003) (noting that, through process of “internalization,” participants come to “choice” of treatment, even if initial choice was only to avoid prison); Miller, *supra* note 1, at 1537 (describing argument that external motivation can lead to internal motivation); Edwards at 309-10 (same). Thus, for example, in the New York City seemingly important considerations like “lack of motivation/treatment readiness” are not disqualifying. REMPEL, *supra* note 3, at 17.

¹⁹⁴ Beckerman & Fontana, *supra* note 82, at 46 (finding no difference between compulsory and voluntary programs and concluding that “[t]he involuntary client is highly resistant to treatment.”); Hepburn & Harvey, *supra* note 85, at 273 (finding no difference in retention and completion rates between two courts in same jurisdiction, where one had the power to sentence failures to jail and the other did not); J. Sansone, *Retention Patterns in a Therapeutic Community for the Treatment of Drug Abuse*, 15 INT’L J. OF ADDICTIONS 711-36 (1980) (finding no relationship between legal status and treatment retention); Stevens et al., *supra* note 38, at 274 (citing studies showing that “legal coercion has been shown to harm the prospects of completing treatment”); Ainslie, *supra* note 85, at 112 (“Coercion undermines a person’s will to do what we demand. It replaces the incentive for the person to maintain his credibility to himself with external incentives, thus reducing the motivational basis of his will.”); Hoffman, *supra* note 7, at 1475 n.153 (arguing that drug courts reject conventional therapeutic view that effective depends on the defendant entering voluntarily); Hoffman, *supra* note 11, at 2089 (arguing that state-coerced treatment is ineffective); *see generally* NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 17 (1974) (“In psychological treatment of

because coerced participants, at least when they have genuine dependencies, “are less likely to believe they need treatment, are less ready for treatment, and are less willing to actively participate in their treatment.”¹⁹⁵ Indeed, the inadequacy of external stimuli is the very reason that many addicts have hung onto destructive habits for so long—in spite of the numerous everyday good reasons they may have had to quit.¹⁹⁶

Why do drug court proponents put such great faith in the false—or at least unfounded¹⁹⁷—contrary premise that internal motivation prompts external motivation? They do so because they must: it is a prerequisite belief, needed to get beyond the bottom-line fact that participants enter drug courts—not because they wish to be there or are ready for treatment—but because they *got caught*.¹⁹⁸ Drug court proponents construct a story that seemingly justifies punitive response: the terminated addict is said to deserve greater punishment because he has shown “consistent disregard for the court’s authority.”¹⁹⁹ Drug court judges, thereafter, can comfortably sentence treatment failures to long alternative sentences, under the ruse that “it must be the defendant’s ‘fault’”—that the failing defendant “must be one of those ‘volunteer’ addicts.”²⁰⁰

abnormal behavior it is widely agreed that conventional psychotherapy . . . must be voluntarily entered into by the patient if it is to be effective.”).

¹⁹⁵ Hepburn & Harvey, *supra* note 85, at 256.

¹⁹⁶ *Supra* Part I.B. Moreover, there is a distinct danger to telling individuals they are diseased and then pushing cure at the barrel of a gun: the most mentally and physically fragile may come to feel helpless and hopeless. PEELE, *supra* note 41, at 1 (“When individuals become subject to coercive judicial or treatment systems, they are likely to be especially confused, self-doubting, and vulnerable.”); *cf.* Wild, et al., *supra* note 43, at 42 (describing “self-fulfilling prophecies that translate into lower levels of interest in behavior change”).

¹⁹⁷ Miller, *supra* note 1, at 1558 (noting “paucity of much-needed empirical research on the relationship between coercion and therapy”); Stevens, et al., *supra* note 38, at 276 “[P]olicy and practical decisions are being made in the absence of conclusive evidence on which to base them.”); Maxwell at 558 (“[T]he efficacy of these threats in forcing offenders to stay in treatment has not been systematically examined or empirically substantiated.”).

¹⁹⁸ PEELE, *supra* note 41, at 9 (explaining that participants are compelled by “compromising context” to enter coerced treatment).

¹⁹⁹ PORTER, *supra* note 30, at 12 (describing Bronx district attorney’s position on why atypically high alternative sentences are appropriate).

²⁰⁰ Hoffman, *supra* note 7, at 1476 (“We compassionate judges can then sentence that defendant to prison, smug with the knowledge that our experts, by the simple device of offering treatment a certain arbitrary number of times, can separate the diseased from the criminal.”); *cf.* Miller, *supra* note 1, at 1497 n.101 (quoting drug court judge that he would “push them, shove them, box them by using the threat of incarceration to get them to start down the path”); NOLAN, *supra* note 7, at 196.

C. *Incoherence*

Even if drug court proponents are somehow right that external coercion is superior to internal motivation, the claim is incoherent with first-order drug-court principles. Drug courts are supposed to provide diversion not only on utilitarian cost-saving grounds, but also on the retributive-justice ground that addicts possess diminished responsibility for somewhat compulsive conduct.²⁰¹ In this vein, the courts are meant to stake out the elusive middle ground between the extreme views of addict as automaton and addict as rational actor—to call a truce in “the tired stalemate between disease and utility models of addiction.”²⁰²

But in the effort to chart the missing center, the courts take a theoretically disjointed approach: they adopt a medical tact when treating the participating “patient,” but a penal tact when disposing of treatment failures. They view the addict as only partially responsible (and, rhetorically, perhaps not even that) when valuing the retributive worth of his crime, but wholly rational when it comes to his success or failure at responding to carrots and sticks. On the one hand, drug court defendants are told that they have a disease that drives them to behave in a certain way, but, on the other, that they are wholly responsible when they fail to recover. Drug courts claim to understand that relapse is an inevitable step in recovery from the affliction of addiction.²⁰³ But such tolerance runs only up to the point of termination. Drug court is ultimately an all-or-nothing proposition: graduation or failure; liberty or prison.²⁰⁴ And, just like the early-medieval accused, who was made

²⁰¹ See *supra* notes ____.

²⁰² Ainslie, *supra* note 85, at 112; see also Wallace, *supra* note 99, at 621, 654 (calling the polar views “cartoonish”); Morse, *supra* note 71, at 22 (“There is no reason to believe that our thinking about addiction must be polar, that is only brain disease or only intentional conduct, that it is best treated only medically or psychologically or only by criminalization. Addiction can be both brain disease and moral weakness, both a proper subject for treatment and for moral judgment.”); Hoffman, *supra* note 7, at 1472 (noting that “the disease model of addiction [i]s an enlightened reaction to what historically has been the only other alternative: the view that all drug use is simple willful conduct”); see also Morse, *supra* note 71, at 6 (arguing that monolithic perceptions of addiction are “alluring because they imply that there are technical, clean solutions”).

²⁰³ NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DRUG COURT STANDARDS COMMITTEE, *DEFINING DRUG COURTS: THE KEY COMPONENTS*, COMPONENT #6 (1997) (discussing relapse as part of road to recovery); REMPLER, *supra* note 3, at xiv (“Relapse and noncompliance are common, even among those who ultimately succeed. . . . This highlights the value of drug courts according multiple chances to participants experiencing early problems.”); Miller, *supra* note 1, at 1485 (discussing “inevitability of relapse”).

²⁰⁴ Hoffman, *supra* note 7, at 1475 (“[T]he treatment community teaches us that recovery is a continuing process of failures and successes. Yet, to appease the law enforcement community, drug courts typically impose an arbitrary number . . . of excusable failures before the drug defendant is treated like any other criminal defendant and sentenced accordingly.”).

to pay the price for the “offense” of allowing himself to be burned by hot iron, the drug-court failure is punished not for the crime he has committed but for the treatment he has resisted—whether or not he had the clarity of mind or strength of will to do better.²⁰⁵

An example of this counter-logical reasoning and theoretical incoherence comes from the New York State Commission that endorsed statewide expansion of drug courts.²⁰⁶ In one telling passage, the Commission offered a dubious syllogism of conflicting claims, made to seem constant.²⁰⁷ Specifically, the Commission initially accepted the disease premise: that “[the addict] once addicted, ordinarily cannot overcome his addiction simply by ‘choosing’ to become drug-free.”²⁰⁸ And, therefore, the compulsive addict cannot be expected to respond appropriately to external demands against use; rather “physical, psychological, social, economic and legal harms . . . are tolerated and accepted by the addict.”²⁰⁹ But then the Commission offered a bizarre conclusion:

What this points to is the need for external influence and coercion: if an addict is willing to tolerate all these self-inflicted harms, it is unreasonable to believe that he or she will—without outside pressure—develop the necessary motivation to overcome his or his addiction. . . . [E]xternal sanction and rewards . . . promote consequential thinking and personal responsibility. . . . [I]t is the coercive leverage provided by the threat of incarceration and other sanctions that is key.²¹⁰

In what way are these self-inflicted harms—such as, arrest, jail, prison, disintegration of social ties, unemployment, homelessness, and/or declining health—not external? This, then, is the drug court philosophy (such as it is) in a nutshell: The addict is incapable of acting rationally (though he may or may not rationally know what he should do). Therefore, we must give him, what? *More reason to start following reason.*²¹¹

²⁰⁵ Hoffman, *supra* note 7, at 1514 (“[W]e sentence defendants to prison . . . for their failed treatment rather than for their unlawful drug use.”); *see also infra* Part II.C.

²⁰⁶ COMMISSION, *supra* note 42.

²⁰⁷ *Id.* at 16.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Some have taken this incoherence one step further. In the Brooklyn Treatment Court, for example, a project director issued a memorandum to practitioners, indicating that “defendants who decline treatment will not receive the typical or ‘usual’ plea offers.” Boldt, *supra* note 6, at 1258 n.3. Thus, the message is that addicts should be punished for *denial of addiction* standing alone. Worse still, the memo further provided that “the defendant retains the option, up until the point of hearing and trial, to accept treatment,” but “the longer the defendant waits to opt for treatment, the greater the period of incarceration should the defendant fail to comply with the Court’s treatment mandate.” *Id.* In Brooklyn Treatment

At bottom, then, the theoretical gap in the drug-court model is less pertinent than the *lack of a gap* between drug courts and conventional justice. The commonly invoked the mantra is that the drug-court model is an “innovative form of justice.”²¹² But, in operation, the courts share with conventional justice the belief that threats of strong punishment will deter future action. And drug courts keep conventional justice—often in its most powerful forms—always in the background and close at hand. Drug courts, then, are not divorced from conventional justice; they are grafted indelibly onto it. Calling drug courts innovative justice is a bit like painting a vibrant mural on a drab brick wall, doubling the wall’s thickness for good measure, and then declaring the wall no more. Just like that wall, punitive drug statutes remain firmly in place.²¹³

Drug courts seize on the mantra that “[w]hat we were doing before . . . wasn’t working.”²¹⁴ But, then—at least for the participants they most want to cure—they often do more of the same (and then some).

V. BETTER MEDICINE?

At least from the standpoints of retributive and distributive justice, it is counterintuitive and incoherent to provide inordinately harsh punishments to addicts, simply because they have (predictably) accepted bewitching invitations to treatment and have (predictably) failed to live up to their own and our own false expectations of what they could achieve once there.²¹⁵ Nevertheless, we may not wish to wholly abandon drug courts. If the courts really do (as it appears) reduce *overall* recidivism and preserve *overall* criminal-justice resources, then these are gains that we should want to keep—notwithstanding the courts’ several shortcomings.²¹⁶ Put differently,

Court, then, the act of even considering ones amenability to treatment has come to be a punishable offense.

²¹² Miller, *supra* note 1, at 1503 n.137 (citing sources that invoke phrase).

²¹³ Miller, *supra* note 1, at 1481 (“Instead of challenging the drug laws, these courts operate within the current legislative framework.”); *see also infra* note 232 and accompanying text.

²¹⁴ NOLAN, *supra* note 7, at 44, 106.

²¹⁵ *Cf.* Sunstein & Thaler, *supra* note 20, at 1163 (arguing that policy should not be constructed around false proposition that “almost all people, almost all of the time, make choices that are in their best interest or at least are better . . . than the choices that would be made by third parties”).

²¹⁶ *See, e.g.,* David B. Wilson, et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459-87 (2006) (reviewing forty-one drug court evaluations and finding mean reduction in recidivism of 14%); Beckerman & Fontana, *supra* note 82, at 58 (describing “limited benefits for some criminal offenders.”); REMPEL, *supra* note 3, at x, xii, 273-82; Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT’L DRUG CT. INST. REV. 17-18 (1998) (“Drug courts have been more successful than other forms of community supervision in closely supervising drug offenders in the community . . . [and] drug courts reduce recidivism for participants after they leave the program.”).

because the conventional drug war is unsustainable and unwise, any halfway defensible alternative might be welcome for that reason alone.²¹⁷ At a minimum, however, drug courts should ensure that termination sentences track customary plea prices, and they should strive to institute more effective screening mechanisms.²¹⁸ However, any such minimal proposal (that operates within the prevailing drug-court paradigm) would do little, ultimately, to address the courts' root problems, but instead, would merely meliorate the courts' most problematic symptoms.

I have in mind a somewhat stronger proposal that would uncouple drug courts entirely from conventional justice. My rough-and-ready idea builds off of a commonly observed addiction phenomenon, known as "aging out," whereby the strength of drug dependency fades overtime.²¹⁹ Specifically, as addicts mature toward middle age, they grow more amenable to treatment and, likewise, to consequential thought and action.²²⁰ A more effective and

²¹⁷ See Zimring, *supra* note 176, at 815-18 (arguing that normative objections to drug court can be measured only comparatively with traditional draconian sentences); see also *supra* note 41 and accompanying text.

²¹⁸ Zimring, *supra* note 176, at 818 (arguing that drug courts should not provide atypical sentences unless participant is convicted of new charges). Significantly, such a proposal would not undermine therapeutic effectiveness. For those participants who were *ready* for external motivation, already-lengthy conventional felony sentences should provide incentive enough to comply with treatment. After all, a number of observers have indicated that longer alternative sentences do not impact on treatment success. TRONE, *supra* note 21, at 11 (quoting general counsel of national treatment provider: "We work with programs where there's an additional penalty if you fail and programs in which participants get the same punishment if they fail as if they never entered the program. I don't think I could say with any degree of confidence that severity alone makes a difference in the outcome."); Denise C. Gottfredson, et al., *How Drug Courts Work: An Analysis of Mediators*, 44 J. RES. CRIME & DELINQ. 3, 26 (2007) (finding that enhanced alternative sentences "do not ultimately influence crime or drug use"); cf. Jolls et al., *supra* note 113, at 46 ("Short punishments will . . . have much more effect than long punishments as a result of the 'priority of the present'; adding years onto a sentence will produce little additional deterrence."). More importantly, for those participants who were not yet ready—for the irrational and *akratic* acute addicts who had not yet come to possess internal motivation (but who erroneously believed they could find it in drug courts)—treatment would provide no gateway to unwarranted atypical punishment.

Notably, as long as atypically high termination sentences remain in place, the failure of drug courts to adequately screen for genuine addiction turns out to be somewhat fortuitous: it limits the distributive and retributive effects of the contraindication problem, because acute addicts are (at least to some degree) funneled toward conventional justice where they are likelier to do better. However, once the problem of atypical termination sentences is rectified, the problem of inadequate screening becomes more pressing.

²¹⁹ See Rempel & Destafano, *supra* note 83, at 91 ("[P]ersons grow tired of their addicted lifestyle . . . criminal behavior peaks in late adolescence and gradually declines thereafter."); PEELE, *supra* note 74, at 125 (describing aging out process as "a gradual ripening into remission"); *supra* note 85 and accompanying text.

²²⁰ George Ainslie, *A Research-Based Theory of Addictive Motivation*, 19 LAW & PHIL. 90 (2000) ("[O]lder subjects discount the future less steeply than younger ones.").

less-problematic drug-court approach might be a non-coercive model that the addict could *opt into* once he had started the age-out process—at the stage of his life when he had begun to internalize a commitment to therapeutic intervention, but when he still required some help to get and keep clean.²²¹ Such an “opt-in” model would function as a voluntary resource, not as a coercive regime. Choices would remain open at the points of entry and exit, “not blocked or fenced off.”²²² In this way, the model would subscribe to something like a “libertarian paternal” philosophy; it would provide “nudges”—but not shoves—down therapeutically beneficial paths.²²³

What types of external motivation (or “nudges”) could such an “opt-in” model provide? There are myriad possibilities. For example, one potential carrot could be the promise of a court order that would expunge the graduate’s past record of drug and drug-related convictions. Such an “opt-in” model would provide a more effective tool for offender reintegration, because it could reach more widely and deeply than the conventional model.²²⁴ It could be made available to a broader population of ex-offenders—including long-time drug offenders with significant records (who are more likely to be addicts but who are also more likely to be barred from traditional drug courts).²²⁵ And it would have the power to expunge *multiple* non-violent convictions of various types (as long as graduates could show that the convictions were products of past addiction).²²⁶ Most importantly, the model

²²¹ Cf. NOLAN, *supra* note 7, at 140 (“The goal of drug court is to bring the defendant to internalize an understanding of his substance-abuse problem.”); see also Miller, *supra* note 1, at 1497, 1543 (“The goal . . . is to encourage the offender to realize that the program is designed for his or his own benefit.”).

²²² Sunstein & Thaler, *supra* note 20, at 1162.

²²³ *Id.* at 1162, 1192 (“[L]ibertarian paternalists urge that people should be ‘free to choose.’ . . . [W]e argue for self-conscious efforts, by public and private institutions, to steer people’s choices in directions that will improve the choosers’ own welfare.”); see also Thaler & Sunstein at 175 (“If no coercion is involved, we think that some types of paternalism should be acceptable to even the most ardent libertarian. We call such actions *libertarian paternalism*.” (emphasis in original)); Corrado, *supra* note 110, at 35 “[I]f the behavioral economist is right we might arrange choices so that people can get what they want for the long run *without our making the choice for them*. . . . [I]t might be possible to arrange things so that the addict who wanted to quit could find a way to do it.” (emphasis added)).

²²⁴ Drug courts have been faulted for adopting an “organizational rhetoric” of reintegration but failing to fulfill that promise. Terrance D. Miethe, Hong Lu & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 *Crime & Delinquency* 522, 536 (2000) (noting that drug courts produce a shaming effect that may serve a reintegrative purpose for some but may cause a “deviance-amplification effect” for others).

²²⁵ Indeed, the courts could also be a treatment resource for non-offenders as well, although (under at least my proposed model) they would get no external reward for graduation.

²²⁶ It would probably be easiest for the ex-offender to demonstrate a link between income-generating crimes and drugs. See Brownberger at 67-68 (citing studies); REMPPEL, *supra* note 3, at 280 (“[A] substance abuse addiction can cause non-drug-related crime.”).

would serve to remove the corollary consequences of conviction and would provide treatment and social services precisely when ex-offenders were most ready to start anew.²²⁷

Finally, such an “opt-in” drug-court model would screen more effectively for addiction. The addicted ex-offender would elect to enter from a baseline of liberty. He would *choose* to place himself in treatment, because the aggregate value of a cleaner record *and* a cure would outweigh the opportunity costs of life under drug-court constraint. The voluntary decision to *opt in* would, thereby, signal genuine therapeutic need. Conversely, the un-addicted ex-offender would lack adequate external incentive to game entry into the court. He would derive no value from cure, and the prospect of a lighter sentence alone would be insufficient to justify the costs of undergoing rigorous and long-term unneeded treatment.

Of course, such an innovative approach might create fresh problems. For example, it might (or might not) prove to be an inefficient and unwarranted expenditure of resources for recalcitrant offenders.²²⁸ And it would, of course, provide only an *indirect* alternative to incarceration.²²⁹ But the problems of the “opt-in” model might well be smaller than the problems at present. And, at a minimum, the model would have the substantial advantage of operating free of conventional justice and atypical termination sentences. In any event, I offer this (loosely formulated) proposal, not as an absolute fix, but as a kind of thought experiment intended to highlight the fact that the drug-court model can—and probably should—be reconsidered in dynamic ways.²³⁰

CONCLUSION

²²⁷ Cf. REMPEL, *supra* note 3, at xiv (“Beyond substance abuse recovery, drug courts seek to promote further achievements and lifestyle changes in the areas of employment, education, vocational training, housing, and family reunification.”).

²²⁸ Conversely, the courts might prove more effective, because the formerly recalcitrant addict would be internally motivated—and therefore readier—to succeed. Indeed, this is the very reason that drug-court studies have consistently shown higher graduation rates for older offenders who have begun to age out of their habits. *See supra* note 85 and accompanying text. That aside, the proposal would certainly be less wasteful than the current model that provides unneeded treatment to gamblers and ineffective treatment to acute addicts—groups that typically are only in treatment because they want to avoid incarceration.

²²⁹ Specifically, the model might succeed in keeping addicts from recidivating and returning to prison, but they would leave unaffected the potentially significant jail or prison sentences that the addicted ex-offenders already had served. Conversely, this is a tradeoff we should be willing to make, because the proposal would alleviate the contraindication and screening problems and would wholly eliminate the potential for atypical termination sentences.

²³⁰ Cf. Stevens, et al., *supra* note 38, at 272 (explaining that “treatment may be applied at any stage of the criminal justice system”). Indeed, one of the widely-cited benefits of drug courts is their amenability to experimentation. Dorf & Sabel, *supra* note 46, at 841-52; *supra* note 46, __ and accompanying text. And, we should be open to such innovation—as long as the power of the carceral state does not play a role when our experiments fail.

In the enthusiasm to find some kind (any kind) of viable option to the inequities and inefficiencies that typify conventional drug justice, there is an understandable tendency to see in drug courts something more than what they actually are. The problem with drug courts, then, is not that they have failed to serve certain good purposes. They may have, or they may not have. The problem with drug courts is the false promise ascribed to them—that they can be “all things to all people.”²³¹ In reality, they are able to realize such tall promise only when the right kinds of participants succeed. When that happens, resources are preserved, recidivism is reduced, and rehabilitated drug offenders are restored to their communities. Everyone comes out a winner. But when participants fail, there are unanticipated downsides—like far longer sentences for the very defendants who historically have faced the greatest rates and lengths of imprisonment under the traditional war on drugs (and who already occupy the bottom rungs of society).

Ultimately, drug courts are no more than politically feasible but imperfect second-order mechanisms that circumvent undesirable sentencing statutes some of the time for some of the defendants. They are mechanisms that operate at all times within—and that may even serve to prop up—the prevailing system.²³² Perhaps, the political reality is that we can do no better. However, it does not translate from that reality that there *is* no better. The first-best solution remains always the one we are least ready to engage: to rethink the mandatory sentencing laws that undergird our failed drug policies.

²³¹ Miller, *supra* note 1, at 1503.

²³² See Miller, *supra* note 1, at 1481; COMMISSION, *supra* note 42 (Stanley S. Arkin, concurring and dissenting from commission’s report; and arguing that the commission’s report endorsing statewide expansion of drug courts “is neither bold nor visionary regarding the most fundamental issue facing the State courts and criminal justice system with respect to drug abuse and drug-related offenses—the enormous expense, dubious morality and questionable efficacy of the draconian mandatory sentencing statutes often referred to as the ‘Rockefeller drug laws.’”); see also *supra* note 45, __ and accompanying text. In other contexts, scholars have raised a similar objection against supposed reforms that are “cheap for society,” but, in fact, “encourage[] us to look away from real social problems.” Levy, *supra* note 71, at 141 (discussing ineffective drug reforms); see also Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207 (1995) (arguing that procedural protections are wholly ineffective, and, instead, that “constitutional protections intended to make prosecution more difficult instead serve to make the prosecutor’s job easier”); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992).

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