

# CONTRAINDICATED DRUG COURTS

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*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 guilty plea and is enrolled in a long-term outpatient treatment program that is supervised closely 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 If the offender completes treatment, his plea is withdrawn and the underlying charges are dismissed.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. The premise of this Article 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 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.<sup>1</sup> 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.<sup>2</sup> The courts vary widely in their specifics,<sup>3</sup> but they tend to share some general operating patterns: The courts closely supervise the participation of nonviolent drug offenders in extended (typically outpatient) treatment regimens.<sup>4</sup> 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 favorable results and award successful program completion either with dismissals of all charges or with no-time sentences on pleas to reduced charges.<sup>5</sup> Conversely, the courts deter poor performance with

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

2. Nat’l Drug Court Inst., *Drug Courts: A National Phenomenon*, <http://www.ndci.org/courtfacts.htm> (last visited July 26, 2007).

3. Miller, *supra* note 1, at 1489 (“[There are] an immense number of local variations on the basic model.”); MICHAEL REMPEL ET AL., CTR. FOR COURT INNOVATION, *THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS*, at ix, xiii, 265–71 (2003), available at [http://www.courtinnovation.org/\\_uploads/documents/drug\\_court\\_eval.pdf](http://www.courtinnovation.org/_uploads/documents/drug_court_eval.pdf) (noting that “practice varies widely from state to state (and county by county)”); see also CAROLINE S. COOPER, U.S. DEP’T OF JUSTICE, *DRUG COURTS: AN OVERVIEW OF OPERATIONAL CHARACTERISTICS AND IMPLEMENTATION ISSUES* 4–7 (1995) (describing varying eligibility requirements).

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

5. *Id.* at ix, xi; see, e.g., CAL. PENAL CODE § 1000.3 (West Supp. 2007) (mandating dismissal following successful program completion); FLA. STAT. ANN. § 948.08(6)(c)(2) (West 2006) (same).

graduated sanctions,<sup>6</sup> and typically punish ultimate failure with alternative termination sentences.<sup>7</sup>

Drug courts have created a few enemies and a great many more supporters from all corners of political and institutional spectra.<sup>8</sup> Supporters maintain that the courts effectively serve several goals: to provide second chances for nonviolent addicts, to preserve systemic resources, and to control crime by disrupting cycles of addiction and recidivism.<sup>9</sup> The common refrain

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6. Graduated sanctions may include more frequent court appearances; more intensive treatment; demotions to earlier treatment phases; shaming sanctions, such as 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., STEVEN BELENKO, THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., RESEARCH ON DRUG COURTS: A CRITICAL REVIEW, 2001 UPDATE 22 (2001), available at <http://www.casacolumbia.org/absolutenm/articleFiles/researchondrug.pdf>; Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1232 (1998); Miller, *supra* note 1, at 1499–1500.

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. See JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 40–41 (2001); Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1462 (2000).

8. See Nolan, *supra* note 7, at 5 (“The model has received almost uniformly positive media coverage and overwhelming public support at both the national and local levels.”). The principal critics of drug courts include academics, a former drug court judge, and a former public defender who represented drug-court defendants. See NOLAN, *supra* note 7, at 40 (sociologist); Hoffman, *supra* note 7 (former drug court judge); Miller, *supra* note 1 (law professor); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000) (former public defender and current law professor). The far-more-numerous drug-court supporters include (among many others) judges, prosecutors, politicians, civil servants, government agencies, and academics from various disciplines. See, e.g., JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS (Bruce J. Winick & David B. Wexler eds., 2003) [hereinafter THERAPEUTIC KEY] (psychiatry professor and clinical psychologist, respectively); John Feinblatt et al., *Institutionalizing Innovation: The New York Drug Court Story*, 28 Fordham Urb. L.J. 277, 291–92 (2000) (Criminal Justice Coordinator for the Office of the Mayor of New York City); John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 Alb. L. Rev. 923 (2000) (criminologist); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 Notre Dame L. Rev. 439, 523 (1999) (former drug court judge); Judith S. Kaye, *Lawyering for a New Age*, 67 Fordham L. Rev. 1, 5 (1998) (Chief Judge of the New York Court of Appeals); Claire McCaskill, *Combat Drug Court: An Innovative Approach to Dealing With Drug Abusing First Time Offenders*, 66 UMKC L. Rev. 493 (1998) (current U.S. Senator and former drug court prosecutor); Drug Courts Program Office, U.S. Dep't of Justice, *Defining Drug Courts: The Key Components* 6 (1997), <http://permanent.access.gpo.gov/lps2154/dkey.pdf>.

9. See DRUG COURTS PROGRAM OFFICE, U.S. DEP'T OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 6 (1997), <http://permanent.access.gpo.gov/lps2154/dkey.pdf>; Feinblatt et al., *supra* note 8, at 291–92; Hora et al., *supra* note 8, at 523 (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”); Kaye, *supra* note 8, at 5; Terance D. Miethe et al., *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 CRIME & DELINQ. 522, 527 (2000) (noting that the “primary goal” of drug courts is to reduce drug use and recidivism); see also Goldkamp, *supra* note 8; McCaskill, *supra* note 8, at 493 (1998). See generally THERAPEUTIC KEY, *supra* note 8.

is that “[w]hat we were doing before simply was not working.”<sup>10</sup> Thus, drug courts are said to offer a necessary and fresh approach to combat 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.<sup>11</sup>

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 the many drug courts that subject failing participants to alternative termination sentences that exceed customary plea prices. Put concretely, drug courts are “contraindicated”<sup>12</sup> for genuine addicts and for other disadvantaged groups that have traditionally filled prisons as part of the war on drugs. The consequent adverse effects may be atypically long prison sentences for the very defendants that drug courts were supposed to keep out of prison and off of drugs.

Worse still, compulsive addicts are not the only ones who face comparatively bad results in drug courts. Studies have shown that other historically disadvantaged groups—for example minorities, the poor, the uneducated, and the socially disconnected—are also more likely 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.”<sup>13</sup>

Conversely, drug offenders who are noncompulsive 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 modify

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10. NOLAN, *supra* note 7, at 106.

11. See NOLAN, *supra* note 7, at 40; Hoffman, *supra* note 7; Miller, *supra* note 1; see also Boldt, *supra* note 6, at 1230–34; Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 283, 288–90; Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002) [hereinafter Hoffman, *Therapeutic Jurisprudence*]; Quinn, *supra* note 8, at 37.

12. See generally MedicineNet.com, Definition of Contraindicate, <http://www.medterms.com/script/main/art.asp?articlekey=26085> (last visited Nov. 6, 2007) (“Contraindicate: 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 how “tilts” in traditional criminal-justice enforcement “target racial or ethnic minorities who live in urban [areas]”).

rationally their behavior in response to external carrots and sticks. Faced with the choice between incarceration and manageable programs, these offenders have every incentive to be strategic and 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 created to break observed cycles of addiction and incarceration by providing a therapeutic response to "a problem that is . . . largely medical in nature."<sup>14</sup> Second, and more subtly, the courts were intended to push back against (or, at least, function as a diversionary supplement to) the decades-long one-dimensional war on drugs that has brought 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 to be receptive rationally 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."<sup>15</sup> 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.<sup>16</sup> Moreover, the courts view diversion from prison and the potential reduction

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14. Hora et al., *supra* note 8, at 467–536 ("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. DEP'T OF JUSTICE, SPECIAL DRUG COURTS 1 (1993), *available at* <http://www.ncjrs.gov/pdffiles/spdc.pdf>; JOHN S. GOLDKAMP, JUSTICE AND TREATMENT INNOVATION: THE DRUG COURT MOVEMENT 8 (1994); NOLAN, *supra* note 7, at 45 (quoting Jeffrey Tauber, President of the National Association of Drug Court Professionals); 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 . . ."); William D. McColl, Comment, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 500 (1996) (noting that the drug-court approach is "primarily medical rather than legal"); sources cited *supra* note 9. *See generally* sources cited *supra* note 8.

15. Hora et al., *supra* note 8, at 463.

16. *See 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, *Science Is Revolutionizing Our View of Addiction—and What to Do About It*, 156 AM. J. PSYCHIATRY 1 (1999).

or dismissal of charges as retributively justified, because addicts possess diminished self-control and therefore diminished responsibility.<sup>17</sup> 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.”<sup>18</sup> 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 participants 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 the 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 respond 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.<sup>19</sup> Indeed, it would be somewhat surprising if it were 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 task as a test of God’s will—measured not culpability, but rather, say, calluses on hands that enabled the accused to carry safely hot iron.<sup>20</sup> Likewise, drug courts measure not culpability, but

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17. See Hora et al., *supra* note 8, at 535 n.520; see also 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.”).

18. Hora et al., *supra* note 8, at 463–64.

19. See *infra* text accompanying notes 207–209.

20. See *infra* text accompanying notes 182–187.

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, 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.<sup>21</sup> As such, the expected failure of addicts to respond to external stimuli seems an odd basis from which 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 exercise effectively 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 uncertain treatment, they are prone to see drug courts as the best means of remaining at, or recapturing, liberty, even when it often 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 anecdotal support for their intuitions.<sup>22</sup> I intend to do more. In this Article, I construct an analytical framework to understand why drug courts fail to screen adequately for addiction and why genuine addicts, nevertheless, elect to enter the courts, even though they often should expect rationally to do much better in the conventional justice system. 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 reconceives of drug courts and how they deliver their benefits. Specifically, I propose uncoupling drug

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21. See *infra* text accompanying notes 86–117.

22. See, e.g., NOLAN, *supra* note 7, at 77–78 (noting that “defense-based fears” of atypically high alternative sentences “are often realized”); Edwards, *supra* note 11; Hoffman, *supra* note 7, at 1493, 1512 (discussing atypically high termination sentences in a Denver drug court); Miller, *supra* note 1.

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 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 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 something akin to a “libertarian-paternal” nudge in the right direction for the addicted ex-convict who found himself ready for treatment but who still required some help to get and to keep clean.<sup>23</sup>

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. I also offer some reasons why these courts (1) came to provide such high termination sentences, and (2) 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 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 accept the drug-court option. In Part III, I compare New York City’s drug courts with early-medieval trials by ordeal. I argue 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.<sup>24</sup> Two limited exceptions are a pair of federally funded studies

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23. 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).

24. See REGINALD FLUELLEN & JENNIFER TRONE, VERA INST. OF JUSTICE, DO DRUG COURTS SAVE JAIL AND PRISON BEDS? 2 (2000), available at [http://www.vera.org/publication\\_pdf/](http://www.vera.org/publication_pdf/)



recently completed by the Center for Court Innovation in collaboration with the New York State Unified Court System.<sup>25</sup> The chief study analyzed drug courts in several New York counties, including Queens, Brooklyn, Manhattan, and the Bronx.<sup>26</sup> The other study looked exclusively at the drug court in Staten Island.<sup>27</sup> Accordingly, the two 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.<sup>28</sup> I limit my focus to felony drug courts because misdemeanor drug courts present their own unique sets of incentives, problems, and advantages<sup>29</sup> 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.)

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drugcourts.pdf (noting the lack of research on the question of whether drug court failures are punished more severely than offenders who never entered treatment).

25. See REMPEL ET AL., *supra* note 3, at ix, 265–71; KELLY O'KEEFE & MICHAEL REMPEL, CTR. FOR COURT INNOVATION, THE STATEN ISLAND TREATMENT COURT EVALUATION: PLANNING, IMPLEMENTATION, AND IMPACTS (2006), available at [http://www.courtinnovation.org/\\_uploads/documents/Staten%20Island%20Treatment%20Court%20Evaluation%20\\_Final\\_.pdf](http://www.courtinnovation.org/_uploads/documents/Staten%20Island%20Treatment%20Court%20Evaluation%20_Final_.pdf).

26. See REMPEL ET AL., *supra* note 3, at ix, 3.

27. See O'KEEFE & REMPEL, *supra* note 25.

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

29. For example, misdemeanor statutes typically prescribe sentences of no more than one year in jail and misdemeanor plea prices are typically no more than a few days in jail. Consequently, prospective participants have less incentive to opt for misdemeanor drug courts over conventional pleas, and the courts therefore run the risk of remaining undersubscribed. See Jennifer Trone & Douglas Young, Vera Institute of Justice, Bridging Drug Treatment and Criminal Justice 6 (1996), available at [http://www.vera.org/publication\\_pdf/dtap.pdf](http://www.vera.org/publication_pdf/dtap.pdf) (noting that felony treatment programs leverage “the credible threat of incarceration,” but that “[t]he same level of coercion cannot be applied to less serious offenders”); REMPEL ET AL., *supra* note 3, at 22, 37 (“In New York City . . . misdemeanor convictions generally result in less jail time, if any, so the option to enter drug court may not be as enticing . . .”). However, one advantage of misdemeanor drug courts is that they can more readily be made available to long time petty-crime recidivists, who are probably the more likely acute addicts. See REMPEL ET AL., *supra* note 3, at 7 (describing agenda of misdemeanor drug court “to extend court mandated treatment to city-based misdemeanor offenders with particularly long rap sheets”).

### 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.<sup>30</sup> 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.<sup>31</sup> Only in Brooklyn were termination sentences anywhere close to the length of customary sentences.<sup>32</sup> Significantly, the Bronx and Staten Island drug-court participants did worse on average even when graduates were included.<sup>33</sup> In fact, in the Bronx, the termination sentences approximated the literal worst-case scenario: The typical failing participant was sentenced

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30. See O'KEEFE & REMPEL, *supra* note 25, at 40; REMPEL ET AL., *supra* note 3, at 270. As detailed in Table 1, in Queens, the sentences for drug court failures were more than two times longer than the sentences for similarly situated (but conventionally adjudicated) defendants. In the Bronx, the sentences were close to four times longer. In Staten Island, they were more than five times longer. Only in Brooklyn did failure sentences come close to approximating conventional sentences. The studies found the same atypically high termination sentences in all but one of the counties outside New York City. See REMPEL ET AL., *supra* note 3, at 25. These findings are corroborated by other observers of New York drug courts. See, e.g., FLUELLEN & TRONE, *supra* note 24, 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., COOPER, *supra* note 3, at 37; 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; Denise C. Gottfredson & M. Lyn Exum, *The Baltimore City Drug Treatment Court: One-Year Results From a Randomized Study*, 39 J. RES. CRIME & 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 atypically high termination sentences in a Denver drug court); see also NOLAN, *supra* note 7, at 56 (quoting Judge Stanley Goldstein of the Miami drug court as he warns defendants: "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.").

31. See O'KEEFE & REMPEL, *supra* note 25, at 40; REMPEL ET AL., *supra* note 3, at 270.

32. See REMPEL ET AL., *supra* note 3, at 270.

33. See O'KEEFE & REMPEL, *supra* note 25, at 40; REMPEL ET AL., *supra* note 3, at 270. Specifically, the comparison defendants in the Bronx study were incarcerated for an average of less than five months. *Id.* The Bronx drug court defendants—combining graduates and failures—were incarcerated for almost seven months on average. *Id.* And the Bronx drug-court failures were incarcerated for over eighteen months. *Id.* Accordingly, one study of the Bronx drug court concluded: "[C]ourt planners' interest in reducing costs associated with unnecessary detention has not been fully realized." RACHEL PORTER, VERA INSTITUTE OF JUSTICE, TREATMENT ALTERNATIVES IN THE CRIMINAL COURT: A PROCESS EVALUATION OF THE BRONX COUNTY DRUG COURT 9 (2001), available at [http://www.vera.org/publication\\_pdf/bronxdrugcourt.pdf](http://www.vera.org/publication_pdf/bronxdrugcourt.pdf).

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.<sup>34</sup>

TABLE 1: COMPARATIVE SENTENCE, INCARCERATION, AND GRADUATION RATES<sup>35</sup>

|   | Staten<br>Island | Bronx | Queens | Brooklyn |
|---|------------------|-------|--------|----------|
| Mean Sentence-Days<br>(all drug-court participants) | 58               | 209   | 79     | 145      |
| Mean Sentence-Days<br>(drug court failures)         | 208              | 558   | 296    | 304      |
| Mean Sentence-Days<br>(comparison group)            | 39               | 142   | 129    | 249      |
| Incarceration Rate<br>(all drug-court participants) | 26%              | 34%   | 25%    | 45%      |
| Incarceration Rate<br>(drug court failures)         | 96%              | 89%   | 94%    | 94%      |
| Incarceration Rate<br>(comparison group)            | 27%              | 54%   | 50%    | 76%      |
| Graduation Rate <sup>36</sup>                       | 75%              | 52%   | 73%    | 52%      |

\* Source: Center for Court Innovation

Significantly, drug court proponents could spin rosy tales from even these data.<sup>37</sup> 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. 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

34. See REMPEL ET AL., *supra* note 3, at 33, 140, 143; PORTER, *supra* note 33, at 12; Quinn, *supra* note 8, at 62–63; see also YOUR GUIDE TO BRONX TREATMENT COURT (2003) [hereinafter, GUIDE TO BXTTC] (pamphlet given to all prospective Bronx Treatment Court participants).

In 2004, Governor Pataki signed the Drug Law Reform Act meliorating some of the statutory punishments under the draconian Rockefeller drug laws. See 2004 N.Y. Laws 3907. Since then, some of the alternative termination sentences may have changed somewhat, but the available studies predated these modifications to the law.

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

36. These graduation rates are fairly consistent with national rates. See BELENKO, *supra* note 6, at 1 (finding an average graduation rate of 47 percent in a national review of thirty-seven drug-court evaluations).

37. See *infra* Part III.A (discussing the shortcomings of global appraisals).

more than twice as long.<sup>38</sup> Such a result sits uncomfortably with defensible notions of distributive justice<sup>39</sup> and cuts against drug-court advocates' professed aim of breaking the cycle of addiction and incarceration.<sup>40</sup>

### 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.<sup>41</sup> In fact, in the relevant studies, drug dealers comprised the overwhelming majority of all participants—an astounding 95 percent in the Bronx drug court and 90 percent in the Brooklyn drug court.<sup>42</sup> Indeed, in the Bronx, practically all of the participants were charged not just with sale, but with B-felony sale—the highest level felony charge that was eligible for drug court.<sup>43</sup>

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.<sup>44</sup> Of course, deep philosophical differences separated those

38. See *supra* p. 793 tbl.1.

39. Cf. Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2013 (1992) (arguing that “losses, especially unjust losses, are better spread than concentrated” and that a contrary premise “stands every known theory of distributive justice on its head”). On that score, the Bronx findings are particularly troubling. The county comprises the city's highest concentrations of minorities and the poor, making it 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.”); cf. sources cited *infra* notes 100, 115 and accompanying text.

40. See *supra* text accompanying notes 9, 14–18 (describing drug courts as a means of diverting recidivist addicts from prison).

41. 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. See Miller, *supra* note 1, at 1539; Alex Stevens et al., *Quasi-Compulsory Treatment of Drug Dependent Offenders: An International Literature Review*, 40 SUBSTANCE USE & MISUSE 269, 272 (2005).

42. REMPEL ET AL., *supra* note 3, at 33. In Manhattan and Queens, almost three-quarters and two-thirds of participants, respectively, were dealers. *Id.* Only in Staten Island were dealers a minority, making up just over one-third of participants. See O'KEEFE & REMPEL, *supra* note 25, at vi.

43. See PORTER, *supra* note 33, at 18–19 (noting that in the first eighteen months of operation, 367 out of 396 defendants in the Bronx drug court were charged with B-felony sales); REMPEL ET AL., *supra* note 3, at 143.

44. See, e.g., 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

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.<sup>45</sup> 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.<sup>46</sup> For the therapeutic community, drug courts provided much-needed alternatives to incarceration—alternatives that emphasized treatment over culpability.<sup>47</sup> For drug warriors, drug courts promoted expeditious case processing, required rigorous treatment,

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attractive alternative.”); 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, *supra* note 1, at 1481 (calling drug courts a “direct response to the ‘severity revolution’” and “an incredibly popular alternative to the War on Drugs”). See generally *People v. Thompson*, 633 N.E.2d 1074, 1080 (N.Y. App. Div. 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); David C. Leven, *Our Drug Laws Have Failed—So Where Is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L.J. 293 (2000); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002) (describing shortcomings of the drug war); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

45. See, e.g., N.Y. STATE COMM’N ON DRUGS AND THE COURTS, *CONFRONTING THE CYCLE OF ADDICTION & RECIDIVISM: A REPORT TO CHIEF JUDGE JUDITH S. KAYE* (2000) [hereinafter COMMISSION], available at <http://www.nycourts.gov/reports/addictionrecidivism.shtml> (“[T]o break the tragic cycle of drugs and crime . . . [w]e must expand drug treatment . . .” (quoting Barry R. McCaffrey, Dir., Office of Nat’l Drug Control Policy, Remarks at the First Annual Criminal Justice and Substance Abuse Conference (June 29, 1999))); NOLAN, *supra* note 7, at 54 (“[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 . . .” (quoting drug court judge William Schma of Kalamazoo, Michigan)); PEELE ET AL., *supra* note 44, at 7 (noting that drug courts are “widely endorsed by the perpetrators of our current repressive drug policy”); U.S. DRUG ENFORCEMENT ADMIN., U.S. DEP’T OF JUSTICE, *SPEAKING OUT AGAINST DRUG LEGALIZATION* (2003), available at [http://www.usdoj.gov/dea/demand/speakout/speaking\\_out-may03.pdf](http://www.usdoj.gov/dea/demand/speakout/speaking_out-may03.pdf) (“A successful drug policy must apply a balanced approach of prevention, enforcement and treatment.”).

46. See Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 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.”); Miller, *supra* note 1, at 1503; T. Cameron Wild et al., *Attitudes Toward Compulsory Substance Abuse Treatment: A Comparison of the Public, Counselors, Probationers and Judges’ Views*, 8 DRUGS: EDUC., PREVENTION & POL’Y 33–34 (2001).

47. See NOLAN, *supra* note 7, at 140; McColl, *supra* note 14, at 500; see also Hora et al., *supra* note 8, at 464 (noting how drug courts “shift the paradigm in order to treat drug abuse as a ‘biopsychosocial disease’”) (internal quotation marks omitted); *id.* at 462–65 (offering drug courts as an alternative to expanding prison population and to 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”); see also *supra* text accompanying 14–18.

ensured traditional incapacitation for failing participants, and also deflated calls for more radical legislative change.<sup>48</sup>

Drug courts, then, are experimentalist institutions born of incremental compromise. They developed from the ground up in ad hoc and undertheorized fashions.<sup>49</sup> But the give and take that characterizes such institutional compromises<sup>50</sup> has the tendency to produce unintended results—for instance, the overabundance of drug dealers in New York City’s felony drug courts. Specifically, the city’s drug courts were intended, at least partially, as a response to (or an end-run around) the unpopular and draconian Rockefeller drug laws.<sup>51</sup> As indicated by a New York State 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

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48. See NOLAN, *supra* note 7, at 51 (noting that “to be therapeutic is not to be soft on crime”); Dorf & Fagan, *supra* note 46, at 1501–02 (describing drug courts as both a reaction to and part of the war on drugs); Hoffman, *supra* note 7, at 1527 (noting that treatment and punishment are not “mutually exclusive weapons in the war against drugs”); see also *infra* note 250 and accompanying text.

49. See Hora et al., *supra* note 8, at 449 (“[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 Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 841 (2000) (describing drug courts as products of local innovation).

50. Cf. Hoffman, *supra* note 7, at 1475 (“[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.”).

51. See Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 806 (2004) (“[T]he 1973 Rockefeller drug laws in New York included harsh mandatory minimums that shocked even prosecutors and the police.”); see also *Rockefeller Drug Laws*, 1973 N.Y. Laws 1040, 1065, 1075, 2190, 3023; Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 10 (1999) (calling the Rockefeller drug laws the “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 punitiveness”). Notably, a study of these laws found that in the three years after the laws’ passage, the rate of dismissals for felony drug arrests more than tripled. See 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* 135, 140 (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, defense attorneys, and police try to recapture preexisting sentencing norms. See MICHAEL TONRY, *SENTENCING MATTERS* 135 (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.”); *id.* at 147 (“Sentencing policy can only be as mandatory as police, prosecutors, and judges choose to make it.”); Feeley & Kamin, *supra*, at 140–45.

is thus whether there is anything—consistent with their adjudicatory role—that our state courts can do.”<sup>52</sup>

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.<sup>53</sup> Conversely, prosecutors had no readily available statutory option to reduce sale charges.<sup>54</sup> 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 an addicted drug user or low-level seller, on the one hand, and a drug trafficker, on the other.”<sup>55</sup> 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 if they failed out. Consequently, drug courts came to welcome many drug dealers because 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.

### C. A Dealer’s Game

Of course, drug dealers may be addicts, too. And there will always be some indeterminacy between those who sell to feed habits and those who

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52. COMMISSION, *supra* note 45; *see also id.* (Stanley S. Arkin, concurring and dissenting from the Commission’s report) (faulting the Commission for not doing more to take on the Rockefeller drug laws directly). *See generally* Hoffman, *Therapeutic Jurisprudence*, *supra* note 11, 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”).

53. *See, e.g.*, N.Y. PENAL LAW § 220.03 (McKinney 2000). Citywide only 46 percent of defendants arrested on felony possession charges were indicted between 1990 and 2006; in Manhattan the fraction hovered around one-quarter. *See* N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., STATISTICS (on file with author); *cf.* TONRY, *supra* note 51, at 145 (describing how prosecutors reduce felonies to misdemeanors to avoid mandatory minimum sentencing laws). For my part, I represented scores of clients initially charged with felony drug possession and not even one was ultimately indicted for possession alone.

54. The lowest level narcotics sale charge is a D-felony. *See* N.Y. PENAL LAW § 220.31. By contrast, sale of marijuana is typically a misdemeanor. *See* N.Y. PENAL LAW § 221.35-40.

55. COMMISSION, *supra* note 45.

sell to fill wallets.<sup>56</sup> But drug dealers are less likely to be addicts than drug possessors.<sup>57</sup> In any event, there is something a bit unsettling about a drug court where drug possessors comprise only one-in-twenty participants.

Moreover, 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 decisionmaking authority over which defendants were permitted to enter drug courts.<sup>58</sup> And prosecutors typically were reluctant to offer treatment to recidivist defendants, but were enthusiastic to offer it to clean-record defendants—a population composed of comparatively fewer genuine addicts.<sup>59</sup> 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.<sup>60</sup>

Unsurprisingly, the overwhelming majority of the city’s drug-court participants had no prior convictions.<sup>61</sup> For example, in the Queens Drug Court, only one-in-five participants in the relevant studies had a prior

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56. Cf. William N. Brownsberger, *Drug Users and Drug Dealers*, in *DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE* 51, 69–70 (Philip B. Heymann & William N. Brownsberger eds., 2001) (noting various incentives to sell drugs).

57. See Michael Rempel & Christine Depies DeStefano, *Predictors of Engagement in Court-Mandated Treatment: Findings at the Brooklyn Treatment Court, 1996–2000*, in *DRUG COURTS IN OPERATION: CURRENT RESEARCH* 87, 106, 114–15 (James J. Hennessy & Nathaniel J. Pallone eds., 2001) (“[T]hose with a history of nonviolent low level offending often have a serious personal drug addiction . . . [Conversely,] persons who are deeply ‘strung-out’ on drugs are not likely to be entrusted to perform major drug sale transactions and therefore are not likely to be caught conducting . . . more serious felon[ies].”).

58. Quinn, *supra* note 8, 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.”) (footnote omitted); see also 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 . . .”) (footnote omitted).

59. See Hoffman, *supra* note 7, at 1509–10 (suggesting that addicts are more likely to be recidivists and therefore excluding recidivist felons makes little sense).

60. See PORTER, *supra* note 33, at 6 (explaining that supervising prosecutors paper screen all drug-related cases and assess eligibility “based on criminal history and current charge”); *id.* at 9 (“These charge-related eligibility criteria are not entirely aligned with the broadest therapeutic goals of [drug] courts.”); Miller, *supra* note 1, at 1541; Quinn, *supra* note 8, 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.”). 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. See PORTER, *supra* note 33, at 9.

61. See REMPEL ET AL., *supra* note 3, at 33.



conviction and only one-in-ten had a prior drug conviction.<sup>62</sup> And the recidivists who did manage to receive offers typically had light records: a mean of two or fewer prior misdemeanor convictions in all city counties.<sup>63</sup> Finally, among the recidivists, few had spent much time in jail or prison before the current arrest.<sup>64</sup> For example, in the Bronx, Queens, and Manhattan, the mean prior incarceration time was twenty-nine days, sixteen days, and seven days, respectively.<sup>65</sup> 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.<sup>66</sup> 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 to felony—charges.

Thus, notwithstanding the supposed first-order drug-court aim to stop 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.<sup>67</sup> And after prosecutors made their non-clinical, paper-based offers to these defendants, drug-court personnel would do little further substantive vetting. While candidates were required to submit to clinical assessments, only a small fraction of candidates were rejected for insufficient addiction or use.<sup>68</sup>

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62. See *id.*

63. See *id.* Indeed, in Queens County, the mean was 0.59 prior convictions. *Id.*

64. See *id.*

65. *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 17 percent of Brooklyn participants had prior felony convictions).

66. See *id.* In these courts, less than 2 percent of defendants were charged with drug sales (compared with 90-plus percent in some New York City courts). *Id.*; see *supra* notes 42–43 and accompanying text.

67. See *supra* notes 9, 14–18, and accompanying text; *infra* text accompanying notes 116, 189, 190.

68. See 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 O’KEEFE & REMPEL, *supra* note 25, at 12 (indicating that only 9 percent were rejected in Staten Island for non-addiction or addiction denial); PORTER, *supra* note 33, at 16–17 (showing that during the first year of the Bronx drug court, less than 5 percent were rejected both for insufficient and too heavy addictions); CTR. FOR DRUG ABUSE TREATMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., Treatment Improvement Protocol (TIP) Series No. 23, 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) . . . .”); Quinn, *supra* note 8, at 60 (“[F]ew of the defendants

There were two principal reasons for this. First, drug courts have every incentive to take in all (or, at least, most) cases, because drug courts are funding-dependent entities, and the money streams hinge on meeting capacity and treatment targets.<sup>69</sup> For example, the Staten Island drug court intended to enroll two hundred participants in its first year, but enrolled only thirty-two.<sup>70</sup> 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.<sup>71</sup> Second, drug courts share with the general public the misperception that all drug use constitutes *abuse*.<sup>72</sup> Accordingly, any paper-eligible defendant is typically permitted entry as long as they are willing to self-report some level (any level) of drug use—whether true or not.<sup>73</sup>

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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.

69. See NOLAN, *supra* note 7, at 59, 65, 97 (describing funding and development efforts as a kind of theater); 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.”); Miller, *supra* note 1, at 1542 (“There are . . . incentives for treatment programs to take non-addicts.”). 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.” Jeffrey S. Tauber, Presentation at the California Continuing Judicial Studies Program: A Judicial Primer on Drug Courts and Court-Oriented Drug Rehabilitation Programs (Aug. 20, 1993), *quoted in* NOLAN, *supra* note 7, at 64.

70. O’KEEFE & REMPEL, *supra* note 25, at 11; *see also* PORTER, *supra* note 33, at 13 (noting that the Bronx drug court planned to enroll 600 in its first 18 months of operation but enrolled only 453).

71. See Hoffman, *Therapeutic Jurisprudence*, *supra* note 11, at 2089 (“[I]f drug addiction really is a disease, then the most diseased addicts are precisely the ones most likely to fail many, if not all, attempts at treatment.”); Hoffman, *supra* note 7, at 1476; Miller, *supra* note 1, at 1542 (“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 . . .”) (footnote omitted). In the extreme, they may even “cherry pick[] the low-risk candidates . . . [over] the high-risk candidates they were originally designed to serve.” Miller, *supra* note 1, at 1553. Unsurprisingly, a Department of Justice study found that half of the surveyed courts targeted even those with “minimum substance dependency.” COOPER, *supra* note 3, at 4–5.

72. See STANTON PEELE, *THE MEANING OF ADDICTION: COMPULSIVE EXPERIENCE AND ITS INTERPRETATION* 6 (1985) (noting the misguided perception that all drug use signifies addiction); *see also id.* at 9 (describing conventional “disbelief” in the notion of non-addictive drug use).

73. Moreover, drug court personnel tend to concur with prosecutorial treatment offers to defendants with light or no records out of (i) fealty to prosecutorial decisionmaking and (ii) the desire, discussed earlier, to craft alternatives to undesirable mandatory drug laws. See *supra* notes 53–55 and accompanying text.

Addiction, however, is in fact a vague and variable phenomenon.<sup>74</sup> Typically, drug users (even addicts) are 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.<sup>75</sup> Addiction strikes different users differently—if at all.<sup>76</sup> It describes a seamless continuum: Individual users act under diverse degrees of compulsion.<sup>77</sup> Among even the heaviest of users of even the heaviest of drugs, some individuals are more compulsive, some less.<sup>78</sup> On each tail of the curve lay the remote few who either have almost complete or almost no ability to stop.<sup>79</sup>

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.<sup>80</sup> What drug courts fail to

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74. See Neil Levy, *Self-Deception and Responsibility for Addiction*, 20 J. APPLIED 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 LAW & PHIL. 3, 8 (2000) (“[T]here is no consensus definition and any definition chosen will be problematic.”); *id.* at 12.

75. For examples 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), and Charles P. O’Brien & A. Thomas McLellan, *Myths About the Treatment of Addiction*, 347 LANCET 237, 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.”).

76. See Morse, *supra* note 74, at 15 (“Perhaps, however, compulsive drug seeking and using is not the indicator of a unitary disease . . .”).

77. See PEELE, *supra* note 72, at 103 (“Addiction can be understood only as a multifactorial phenomenon: It takes place along a continuum, in degrees . . .”); Morse, *supra* note 74, at 45 (“[R]ationality and hard choice are continuum concepts. There are infinite degrees. Consequently, responsibility must be a matter of infinite variation.”) (footnote omitted).

78. See Morse, *supra* note 74, 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, *supra* note 56, at 81, 99–102 (Philip B. Heymann & William N. Brownsberger eds., 2001) (arguing that if addiction qualifies as disease, it is not one that strikes uniformly).

79. See Heyman, *supra* note 78, at 107 (“Recovery from addiction is probably always a struggle, and for a significant minority it is a protracted battle . . .”); PEELE, *supra* note 72, at 25–26, 97, 113, 128–29; Morse, *supra* note 74, at 19.

80. Morse, *supra* note 74, 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 78, at 86; see also MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 234–38 (2002) (discussing cigarette chippers); PEELE, *supra* note 72, at 58–59 (same).

consider adequately is that, even though some heavy users may find cravings irresistible, other users may resist with relative ease.<sup>81</sup> Accordingly, the chipper 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.”<sup>82</sup> He strategically games exit from conventional justice that he does not want, so he can enter into treatment that he does not need.<sup>83</sup> For him, treatment may be laborious, time-consuming, and irritating; but it is probably manageable, because he is able to rationally modify his less-compulsive behavior in order to meet court demands.<sup>84</sup> He

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81. See PEELE, *supra* note 72, 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 74, at 12.

82. Adela Beckerman & Leonard Fontana, *Issues of Race and Gender in Court-Ordered Substance Abuse Treatment*, in DRUG COURTS IN OPERATION: CURRENT RESEARCH, *supra* note 57, at 45, 57; see also BELENKO, *supra* note 6, at 25 (citing a study finding that 96 percent 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. See, e.g., JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT’S PERSPECTIVE 47 (1978); see also Thomas W. Church, Jr., *Examining Local Legal Culture*, 10 AM. B. FOUND. RES. J. 449, 489 (1985) (quoting defendant: “Hell, I’d plead guilty to raping my grandmother if the sentence was probation.”); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 n.86 (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.”); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 82, 85–86 (1995) (noting that defendants “will agree to almost anything to get out of jail”).

83. See NOLAN, *supra* note 7, at 87 (noting that participants are non-addicts “more often than many movement advocates would care to admit”); Edwards, *supra* note 11, at 336–37. 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. See REMPEL ET AL., *supra* note 3, at 41–42; O’KEEFE & REMPEL, *supra* note 25, at 24; see also *supra* text accompanying note 67. Remarkably, the graduation rate in Queens was over three times the rate in Rochester. See REMPEL ET AL., *supra* note 3, at 41–42.

84. See Heyman, *supra* note 78, 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, *Therapeutic Jurisprudence*, *supra* note 11, at 2069 n.25 (“Defendants understand that they have to play the treatment game to pass through the criminal hoops.”); *supra* notes 71, 80, 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.

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.”<sup>85</sup>

## 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 recidivists<sup>86</sup> and hard-drug users<sup>87</sup>—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 over time; and, as it does, the user grows more responsive to treatment.<sup>88</sup> Additionally, studies have shown that graduation rates correlate with wealth,<sup>89</sup> education,<sup>90</sup>

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85. Beckerman & Fontana, *supra* note 82, at 47. 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.”).

86. See REMPEL ET AL., *supra* note 3, at xii (“[P]rior criminal convictions were near universally predictive of future recidivism.”); Miethe et al., *supra* note 9, at 532–33; Rempel & DeStefano, *supra* note 57, at 93; Elaine M. Wolf et al., *Predicting Retention of Drug Court Participants Using Event History Analysis*, 37 J. OFFENDER REHABILITATION 139 (2003); Douglas Young & Steven Belenko, *Program Retention and Perceived Coercion in Three Models of Mandatory Drug Treatment*, 32 J. DRUG ISSUES 297, 316 (2002).

87. Specifically, users of crack and heroin consistently do worse in drug courts. See, e.g., REMPEL ET AL., *supra* note 3, at xii, 41 (indicating the statistically significant effect of heroin habits on chances of completing New York drug courts); Rempel & DeStefano, *supra* note 57, at 92 (citing sources that indicate that the more addictive the participant’s primary drug of choice (for example, heroin, cocaine, and crack) the more difficult it is to break the addiction); Scott R. Senjo & Leslie A. Leip, *Testing and Developing Theory in Drug Court: A Four-Part Logic Model to Predict Program Completion*, 12 CRIM. JUST. POL’Y REV. 66, 82 (2001).

88. See PEELE, *supra* note 72, at 97; *id.* at 125 (describing the aging-out process as “a gradual ripening into remission”); PEELE ET AL., *supra* note 44, at 6 (“Maturing out will occur far more often than not.”); REMPEL ET AL., *supra* note 3, at 41–43 (finding that younger defendants did worse than older defendants in all but one county); 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 & DELINQ. 255, 268–70 (2007); Heyman, *supra* note 78, at 85; Rempel & DeStefano, *supra* note 57, at 91 (“[C]riminal behavior peaks in late adolescence and gradually declines thereafter . . . [An] explanation for the ‘aging out’ phenomenon among a substance-abusing population may be that over time, persons grow tired of their addicted lifestyle.”); Young & Belenko, *supra* note 86, at 297–328.

89. See REMPEL ET AL., *supra* note 3, at 43; Rempel & DeStefano, *supra* note 57, at 92.

90. See REMPEL ET AL., *supra* note 3, at 43; Rempel & DeStefano, *supra* note 57, at 92; Hepburn & Harvey, *supra* note 88, at 270; Mara Schiff & W. Clinton Terry III, *Predicting Graduation From Broward County’s Dedicated Drug Treatment Court*, 19 JUST. SYS. J. 291 (1997).

employment,<sup>91</sup> strength of social networks,<sup>92</sup> and lack of mental illness.<sup>93</sup> To some extent, these categories may overlap with addiction. Accordingly, it is unclear whether the characteristics themselves are reflective of or contribute to profound addiction; or whether these 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 courts' therapeutic and distributive aim to improve circumstances for those most in need of help.<sup>94</sup>

Finally, the impact of race qua race is ambiguous. Several studies have found race to be a significant variable, but some have not.<sup>95</sup> But the latter studies came to the conclusion that race is not a significant variable by controlling for economic, social, and demographic variables.<sup>96</sup> 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.<sup>97</sup> And the war on drugs has only compounded these historical stumbling blocks.<sup>98</sup> Accordingly, to

91. See REMPEL ET AL., *supra* note 3, at 43; Rempel & DeStefano, *supra* note 57, at 92.

92. See Rempel & DeStefano, *supra* note 57, at 93 (noting that participants from communities with weak social networks and widespread poverty do worse in drug courts); Hepburn & Harvey, *supra* note 88, 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.”). See generally Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 588–89 (1997); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998) (discussing the relationship between social isolation and crime); Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1188–89 (2004).

93. See Rempel & DeStefano, *supra* note 57, at 93 (citing studies showing reduced retention rates among those who have both drug dependencies and diagnoses of mental illness). Again, it is notable that those who commit crimes under arguably greater external compulsion (here, the compulsion of mental illness) are the very individuals punished most under the drug-court model.

94. See *supra* notes 14–18, 67; *infra* text accompanying note 116.

95. See Rempel & DeStefano, *supra* note 57, at 91–92 (citing conflicting studies); see also BELENKO, *supra* note 6, at 27 (finding higher retention and completion rates among whites than nonwhites); REMPEL ET AL., *supra* note 3, at 92 (finding no significant effect); Beckerman & Fontana, *supra* note 82, at 48–49 (finding “disproportionally low retention of African Americans”); Miethe et al., *supra* note 9, at 532–33 (2000) (finding recidivism rates to be significantly higher for nonwhite offenders than for white offenders); Schiff & Terry, *supra* note 90, at 304 (same); Dale K. Sechrest & David Shicor, *Determinants of Graduation From a Day Treatment Drug Court in California: A Preliminary Study*, 31 J. DRUG ISSUES 129, 139 (2001) (same); Senjo & Leip, *supra* note 87, at 66–87 (same).

96. See REMPEL ET AL., *supra* note 3, at 92 (finding no effect after controlling for socio-economic factors); Rempel & DeStefano, *supra* note 86, at 91–92.

97. See 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.”).

98. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 690 n.73, 691 n.74, 695 (1995) (“[Social] costs [of the drug

control for economic, social, and demographic factors in urban minority communities is to ignore the everyday realities of life in these communities.<sup>99</sup> 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 diversions from prison for those who face the highest incarceration rates in the conventional war on drugs.<sup>100</sup>

There are related exogenous reasons why addicts, minorities, and the poor do comparatively worse in drug courts. Specifically, coerced treatment overlays conventional justice, and, therefore, conventional institutional and enforcement decisions may profoundly impact what happens ultimately in drug courts.<sup>101</sup> First, with respect to bail, the determination of whether to set bail and in what amount turns principally on prior record and community ties (holding crime-charge constant).<sup>102</sup> Acute

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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.") (footnotes omitted).

99. See 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, homelessness, 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.").

100. See, e.g., BELENKO, *supra* note 6, at 27 (citing studies that whites had two-to-three times higher graduation rates than nonwhites in some drug courts); MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (July 2007), [http://www.sentencingproject.org/Admin/Documents/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/Admin/Documents/publications/rd_stateratesofinbyraceandethnicity.pdf) (finding that nationally, African Americans are incarcerated at six times the rate of whites, and Latinos are incarcerated at double the rate of whites); sources cited *supra* note 96; see also William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1825 (1998) ("[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.").

101. See 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.").

102. See N.Y. CITY CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY, PART 2. BROOKLYN 25–28, 50 (2004), available at <http://www.cjareports.org/reports/bail2.pdf> (discussing the 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 N.Y. CITY CRIMINAL JUSTICE AGENCY, FACTORS INFLUENCING RELEASE AND BAIL DECISIONS IN NEW YORK CITY, PART 1. MANHATTAN 29–43, 48 (2004), available at <http://www.cjareports.org/reports/bail1.pdf> (citing further the importance of criminal history to bail decisions). For example, one national study found that courts set bail on or remanded over three-quarters of all recidivist felony defendants. See THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, NCJ 210818, FELONY DEFENDANTS IN LARGE

addicts, minorities, and the poor are more likely to be recidivists and are less likely to have strong social networks.<sup>103</sup> And, once bail is set, these groups are less likely to have access to the means to satisfy it.<sup>104</sup> Hence, they are more likely to make rash and unwise choices from jail to take or decline drug-court offers.<sup>105</sup>

Second, with respect to arrest, police more frequently come to re-arrest recidivist addicts, minorities, and the poor.<sup>106</sup> And drug courts may use these instances of re-arrest as bases for treatment termination.<sup>107</sup> 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.<sup>108</sup> Likewise, poor and/or minority communities are disproportionate foci of police enforcement.<sup>109</sup> Significantly, such efforts might not be racist or classist in construction.<sup>110</sup> Enforcement may be selective simply because

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URBAN COUNTIES, 2002, at 20 tbl.18 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc02.pdf>. Overall, courts held recidivist defendants until disposition almost 25 percent more frequently than defendants with no criminal records. See *id.*

103. See *supra* notes 86–116 and accompanying text.

104. For example, in New York City in 2004, only 9 percent of defendants held on bail were able to buy release at arraignment. N.Y. CITY CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2004, at 22 (2006), available at <http://www.cjareports.org/reports/annual04.pdf>. Remarkably, the figure rose only to 16 percent even for defendants held only on minimal bail of \$500 or less. See *id.* at 22 exhibit 14. And only an additional 29 percent of all criminal defendants were released at some later date. See *id.* at 24 exhibit 15. 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., COHEN & REAVES, *supra* note 102, at 20 tbl.18.

105. See *infra* Part II.A.2–3 (discussing cognitive biases that lead detained defendants to make poor choices to enter drug courts).

106. Stuntz, *supra* note 100, at 1809–11, 1819–27 (discussing higher arrest rates among minorities and the poor); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. (forthcoming 2008) (manuscript at Part I.A, on file with author), available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=981253](http://papers.ssrn.com/so13/papers.cfm?abstract_id=981253) (discussing higher arrest rates among recidivists).

107. COOPER, *supra* note 3, at 30–31 (noting that many drug courts use re-arrest as a basis for—sometimes mandatory—termination); see also REMPEL ET AL., *supra* note 3, at 142–43 (describing that a new arrest can be grounds for treatment termination); Rempel & DeStefano, *supra* note 57, at 96; GUIDE TO BXTTC, *supra* note 34.

108. See generally Bowers, *supra* note 106 (discussing usual-suspects policing).

109. See 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); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 458 (2000) (“There is now strong empirical evidence that individuals of color are more likely than white Americans to be stopped, questioned, searched, and arrested by police.”). See generally Stuntz, *supra* note 100.

110. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1261–70 (1994); see also Stuntz, *supra* note 100, at 1833 (describing the construction as “misguided paternalism” rather than merely “racist”).



drug crime is everywhere, but the police cannot be.<sup>111</sup> Police rationally concentrate on poor and urban—often minority—communities because drug use is more readily discoverable in these areas.<sup>112</sup> Specifically, in these neighborhoods, drug crimes—like other aspects of life—occur more frequently outdoors.<sup>113</sup> 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).<sup>114</sup> 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,<sup>115</sup> 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 as badly) as their white and affluent counterparts.

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111. See Stuntz, *supra* note 13, at 1875 (“Police and prosecutors have to decide where to invest their time and energy . . .”); Stuntz, *supra* note 100, 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.”).

112. Stuntz, *supra* note 100, 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.”).

113. 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, *supra* note 100, at 1824 (“[P]eople with money enjoy more privacy than people without.”).

114. Stuntz, *supra* note 13, at 1898 and n.64; see also Stuntz, *supra* note 100, at 1820–22.

115. See 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* text accompanying note 100. 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](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996431).

### A. Irrational Addiction

Notably, there is a curious tension at play between the two shortcomings I have described (on the one hand, that drug courts fail to screen adequately for addiction and, on the other, that genuine addicts and other disadvantaged groups are more likely to face termination sentences). Specifically, as long as atypically high termination sentences remain in place, the failure of drug courts to screen adequately for genuine addiction turns out to be somewhat fortuitous: It limits the distributive and retributive effects of the contraindication problem because acute addicts are, to a degree, funneled toward conventional justice where they may be more likely to face less punishment. However, just because drug courts fail to screen adequately for addiction, it does not translate that genuine addicts and other poor treatment prospects will never receive offers. Poor screening may bias the population away from genuine addiction, but there always remains a range of participant types. And the central point is that the participant types that drug courts most want to reach are the types most likely to do poorly.

Nor is it sufficient to claim that these failing participant types 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.<sup>116</sup> 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. First, even rational addicts (to the extent they exist) cannot make informed decisions. Drug court success rates are skewed by the inclusion of un-addicted strategic gamers<sup>117</sup> and the individual genuine addict is, therefore, little more able to determine his own likelihood of success by reference to the entire class of participants than a smoker could determine his own likelihood of death by reference to society-wide cancer rates. Second, and more significantly, addicts are typically not rational, and drug courts thereby

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116. See 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* text accompanying notes 9, 14–18, 67.

117. See Edwards, *supra* note 11, at 336–37 (“[T]he literature does not address the very real probability that coercion encourages attrition and false compliance, thus leaving researchers with an incomplete account of total effects of coercion on treated populations.”); *infra* text accompanying note 212; *supra* notes 72, 85.

end up offering enticing (but often elusive) carrots to the very defendants who are most ill-equipped to make and to comply with rational choices.

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.<sup>118</sup> 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 process adequately even readily available information. Such an addict is self-deceptive (or an irrational thinker); he shapes his perceptions in self-serving ways and typically exhibits denial about drug use and its consequences.<sup>119</sup> 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.<sup>120</sup>

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, and depression.<sup>121</sup> Left unmet, his cravings become a kind of "sheer wanting" that overawes his senses—an ache akin to dehydration or starvation.<sup>122</sup> In

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

119. See George Ainslie, *A Research-Based Theory of Addictive Motivation*, 19 *LAW & PHIL.* 77, 80 (2000) ("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."); Heyman, *supra* note 78, at 108; Levy, *supra* note 74, at 133–36 (arguing that addicts deceive themselves by treating evidence for and against use "in a motivationally biased manner"); see also Morse, *supra* note 74, 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 weigh and assess those that are recognized."). See generally *id.* (noting that "Fundamental components of rationality [ ] [include] the capacities to think clearly and self-consciously to evaluate one's conduct . . .").

120. See Michael Louis Corrado, *Addiction and Responsibility: An Introduction*, 18 *LAW & PHIL.* 579, 583–85, 587 (1999) ("[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 Ainslie, *supra* note 119, at 80 (noting that "[w]illpower often backfires" for addicts); Ole-Jørgen Skog, *The Strength of Weak Will*, 9 *RATIONALITY & SOC'Y* 245 (1997); Wallace, *supra* note 118, at 632, 652 (noting that addiction may be an akratic condition because addicts "fail to comply with their deliberated verdicts in the face of temptation"). See generally DONALD DAVIDSON, *How Is Weakness of the Will Possible?*, in *ESSAYS ON ACTIONS AND EVENTS* 21 (1980) (1970).

121. See Morse, *supra* note 74, at 39.

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

the extreme, then, his desires may prove as irresistible as efforts to “not scratch[ ] an itch, [or] void[ ] one’s bladder.”<sup>123</sup>

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.<sup>124</sup> Put simply, addicts are just “outsized” versions of us all.<sup>125</sup> Their cravings are factors that exacerbate endemic human limitations.<sup>126</sup> 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 a commodity.<sup>127</sup>

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.<sup>128</sup> The addict has a “predisposition” and “vulnerability” that may lead him, on the one hand, to overweight

123. *Id.* at 30.

124. See also Ainslie, *supra* note 119, at 90–92 (arguing that hyperbolic curves pose “innate challenge” to all humans); George Ainslie, Keynote Speech at the Annual Convention of the American Psychological Association: The Effect of Hyperbolic Discounting on Personal Choices 3 (Aug. 22, 2002) [hereinafter Ainslie Speech], available at <http://www.picoeconomics.com/Articles/APA.pdf> (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”). See generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW & ECONOMICS* 13, 39 (Cass R. Sunstein ed., 2000). 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 119, at 89.

125. See Ainslie, *supra* note 119, 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 added)); *supra* notes 124–127 and accompanying text.

126. See Ainslie, *supra* note 119, at 85, 90–92; Heyman, *supra* note 78, 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.”).

127. Heyman, *supra* note 78, at 108 (internal citations omitted); see also Ainslie, *supra* note 119, at 111; *supra* note 125.

128. See Richard J. Bonnie, *Responsibility for Addiction*, 30 J. AM. ACAD. PSYCHIATRY & L. 405, 407 (2002).

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.<sup>129</sup> Put concretely, addicts are prone to optimism bias, risk seeking, and hyperbolic discounting.

### 1. Optimism

On the ambiguous question of whether addicts can master their addictions, they “see what they want to see,”<sup>130</sup> and they disregard the rest. They are “steeped in denial,” harboring self-serving perceptions about strength of habit and capacity to cease use.<sup>131</sup> Even when they have perfect information about risk, they believe that they can magically “beat the odds” and “control chance events.”<sup>132</sup> Put simply, they harbor “‘positive illusions,’ . . . of personal control.”<sup>133</sup>

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129. Wallace, *supra* note 118, at 635 (arguing that whether reason and will can overcome addictive cravings may not be wholly “up to the agent to determine”); see also Bonnie, *supra* note 128, at 407; Morse, *supra* note 74, at 14–15; Michael Louis Corrado, *Behavioral Economics, Neurophysiology, Addiction and the Law* 32 (Univ. of N.C. at Chapel Hill, UNC Legal Studies Research Paper No. 892007, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=892007](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.”).

130. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, in *BEHAVIORAL LAW & ECONOMICS*, *supra* note 119, at 144, 151 (“When there is enough ambiguity to permit it, people naturally ‘see what they want to see.’ And what they want to see is something that is in their self-interest . . .”); SIMON & GARFUNKEL, *The Boxer, on BRIDGE OVER TROUBLED WATER* (Columbia Records 1970) (“Still a man hears what he wants to hear, And disregards the rest.”).

131. Edwards, *supra* note 11, at 329; see also *supra* note 119 and accompanying text.

132. Cass R. Sunstein, *Introduction* to *BEHAVIORAL LAW AND ECONOMICS*, *supra* note 124, 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 . . .”); see also Jolls et al., *supra* note 124, at 39 (“People tend to think that bad events are far less likely to happen to them than to others.”); Ellen J. Langer, *The Illusion of Control*, 32 *J. PERSONALITY & SOC. PSYCHOL.* 311, 323 (1975); Langevoort, *supra* note 130, at 149 & n.19 (“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 risk.”).

133. See generally Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 *HARV. NEGOT. L. REV.* 1 (1999) (surveying literature on optimism bias); Jolls et al., *supra* note 124, at 15–17 (discussing people’s tendency to overestimate their ability to control outcomes that are determined by factors outside of their control); Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives’ Decisions*, *HARV. BUS. REV.*, July 2003, at 56.

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.<sup>134</sup> For example, people prefer to bet on their own future dice rolls over guesses at the past rolls of others.<sup>135</sup> 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. Drug courts aggravate this problem still further by projecting overly sunny images of seemingly inevitable therapeutic success: The interactive and personable judge, the kinder and gentler prosecutor, and 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).<sup>136</sup>

## 2. Risk Seeking

For detained addicts, the problems of irrational decisionmaking are that much worse. Generally speaking, people are not risk seeking; they are risk averse, because losses loom larger than gains.<sup>137</sup> 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.<sup>138</sup> Put differently, in the domain of losses, a fair chance

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134. See 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.”).

135. *Id.* at 8, 22 (citing study); cf. CASPER, *supra* note 82, at 51 (“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 . . . .”).

136. See Hoffman, *supra* note 7, at 1489; see also Langevoort, *supra* note 130, at 150 (explaining how “groups can increase optimistic biases” by cultivating an atmosphere of optimistic thinking).

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

138. See *Advances*, *supra* note 137, 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

of recapturing the preexisting status quo is the preferred option, notwithstanding the potential for substantial downside.<sup>139</sup> 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.<sup>140</sup>

Detained drug offenders exist wholly in the “domain of losses.”<sup>141</sup> Conventional modes of justice probably provide no opportunities for present freedom; some loss is almost certain (albeit potentially less than the loss attendant to treatment failure). Any conventional plea is likely to require some amount of jail or prison;<sup>142</sup> and any trial is likely to require months of waiting behind bars.<sup>143</sup> In comparison, drug courts provide a “short[ ] route to liberty,” typically in the form of immediate release into outpatient treatment programs.<sup>144</sup> Detained addicts

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(“Underweighting of high probabilities contributes . . . to the prevalence of risk seeking in choices between probable and sure losses.”); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981) (describing a 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 133, at 44 n.177 (“Although people are typically risk-averse for moderate to large probability gains and risk-seeking for moderate to large probability losses, this pattern is typically rever[s]ed for low probability gains and losses.”); Emma B. Rasiel et al., *Can Prospect Theory Explain Risk-Seeking Behavior by Terminally Ill Patients?*, 25 MED. DECISION MAKING 609, 612 (2005) (“[O]ne of the key predictions of prospect theory—that people are risk seeking in the domain of losses . . .”).

139. See *Prospect Theory*, *supra* note 137, at 285; *Loss Aversion*, *supra* note 137, at 1042 (noting preference for retention of the status quo over other options).

140. Birke & Fox, *supra* note 133, at 43–44.

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

142. Probation sentences for first-time felony drug offenders are sometimes statutorily permissible, even under the Rockefeller drug laws. See Quinn, *supra* note 8, 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 33, at 18–19, with Quinn, *supra* note 8, 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.

143. See generally Bowers, *supra* note 106 (discussing average waits of several months for misdemeanor trials and more than one year for felony trials).

144. Quinn, *supra* note 8, at 56 n.116 (“[M]any defendants entering treatment are simply accepting the shortest route to liberty. . . . Under these circumstances, is it fair to say that the defendant [in the throes of addiction] is freely making a decision among options?”); see also REMPEL ET AL., *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 the participants began in outpatient programs. See *id.* at xiv; see also Miller, *supra* note 1, at 1495–96 (citing similar national figures). In the Bronx, the figure was 87 percent. REMPEL ET AL., *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

incautiously seek drug-court risks, because treatment is the only game in town—the only available gamble against otherwise certain loss.<sup>145</sup> In such circumstances, detained drug-court candidates come to resemble terminally ill patients who are willing to try almost anything—including experimental, potentially debilitating, and wholly unpredictable treatment—in order to avoid otherwise certain grim fates.<sup>146</sup>

### 3. Hyperbolic Discounting

Several addiction theorists have linked addictive behavior to hyperbolic discounting.<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> This accounts, then, for the addict's commonly observed loss of control, impulsive behavior, and ambivalence toward use.<sup>150</sup>

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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. *See id.* at 268. Conversely, the mean time for the comparison groups was five to six months and the median time was approximately three months. *See id.*

145. 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. *See* Scott & Stuntz, *supra* note 39, at 1967–68 (1992) (arguing that criminals are by nature risk seeking); *see also* Birke, *supra* note 141, 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.”); Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 138 (1995).

146. *See generally* Rasiel et al., *supra* note 138.

147. *See, e.g.,* PEELE, *supra* note 72, at 98–99 (noting that drug users are hyperbolic discounters because they overvalue the immediate comfort of use); Ainslie, *supra* note 119, at 91; Warren K. Bickel & Lisa A. Marsch, *Conceptualizing Addiction: Toward a Behavioral Economic Understanding of Drug Dependence: Delay Discounting Processes*, 96 ADDICTION 73, 75–76 (2001); Corrado, *supra* note 129, at 27 (discussing the argument that addicts may discount hyperbolically because of “distorted reasoning[,] . . . a flaw in our way of approaching future costs and benefits . . . that . . . lands the addict . . . in hot water”); Levy, *supra* note 74, at 138. *See generally* Jolls et al., *supra* note 124, at 46.

148. *See* Bickel & Marsch, *supra* note 147, at 81; *see generally* Ainslie Speech, *supra* note 124, 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)).

149. *See* Ainslie, *supra* note 119, at 83–84 (noting that addiction “can impose motives on a person that she otherwise doesn’t want, and those conditioned motives can overwhelm her normal, ‘rational’ ones”).

150. *See* Bickel & Marsch, *supra* note 147, at 75; Ainslie, *supra* note 119, at 79 (noting that hyperbolic discounting is the product of addicts’ “ambivalence”—that they “ingest [ ] their substance



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 comprehending adequately—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.<sup>151</sup> It is enough to recognize addiction's deleterious effects: that the addict may act 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 to act rationally in the face of pain.<sup>152</sup> 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.<sup>153</sup> 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.<sup>154</sup>

We can look to the Bronx data for an example. There, conventional sentences were a bit less than five months and termination sentences were

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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.” *See id.*

151. *See* Heyman, *supra* note 78, 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 its consequences.”); Morse, *supra* note 74, 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.”); Ainslie, *supra* note 119, at 85 (arguing that whether addiction is a disease is secondary to understanding addiction's impact on motivation).

152. Ainslie, *supra* note 119, at 91. *See generally* Jolls et al., *supra* note 124, at 46.

153. Ainslie, *supra* note 119, at 91.

154. Jolls et al., *supra* note 124, 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 119, at 101–02 (“[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.”).

a bit more than eighteen months.<sup>155</sup> Nevertheless, almost all eligible defendants elected to take the drug-court option.<sup>156</sup> It seems very likely that 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 promise of dismissal upon graduation.<sup>157</sup>

### 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.<sup>158</sup> Specifically, addicts may conclude erroneously that because the court met past slip-ups with slaps on the wrist, it will forgive future relapse as well.<sup>159</sup> 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.”<sup>160</sup> Indeed, Jeffrey Tauber, the President

155. See *supra* p. 793 tbl.1.

156. See REMPEL ET AL., *supra* note 3, at 6 tbl.1.1, 32 tbl.3.2.

157. See Quinn, *supra* note 8, 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.”).

158. See *infra* text accompanying notes 219–223.

159. See Ainslie, *supra* note 119, 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 74, 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. Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, in BEHAVIORAL LAW & ECONOMICS, *supra* note 124, at 288, 292 (explaining that people underestimate their own probability of apprehension for driving drunk); see generally Jolls et al., *supra* note 124, 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. See Ainslie, *supra* note 119, at 99, 104–08 (“[E]xcessive legalism[ ] [is] one of the traits of recovering addicts . . .”).

160. Hoffman, *supra* note 7, at 1463 n.108; REMPEL ET AL., *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 (noting that the judge’s aim is to develop a flexible, individualized, responsive interaction with each offender, in which “there are no hard and fast rules” governing how the judge does so).

of the National Association of Drug Court Professionals, has advised judges to promote a culture of uncertainty: “Uncertainty of outcome after a remand, and its accompanying anxieties, can be a useful motivator for both offender and audience . . . .”<sup>161</sup> 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 release the participant to his program after two days of 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.<sup>162</sup>

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.<sup>163</sup> 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—but on bases of space constraints and other practical demands.<sup>164</sup>

Finally, the overall durations 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.<sup>165</sup> Likewise, they may be demoted for noncompliance to earlier treatment phases.<sup>166</sup> Consequently, treatment often lasts some unknowable period longer than the scheduled term.<sup>167</sup>

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161. NOLAN, *supra* note 7, at 70; *see also* Trone & Young, *supra* note 29, at 12 (“[M]any treatment counselors exaggerate the legal consequences of failure . . .”).

162. *See* Trone & Young, *supra* note 29, 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.”); Rempel & DeStefano, *supra* note 57, at 110 (“[I]t would be sensible for drug courts to make participants aware of the clear and tangible consequences of treatment failure up front.”).

163. *See infra* notes 174–177 and accompanying text.

164. *See* 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 . . .”).

165. *See* REMPEL ET AL., *supra* note 3, at 20–21, 23.

166. *See id.*

167. *See id.* at 59–60 (noting that successful treatment in New York City typically took five-to-ten months longer than the minimum); PORTER, *supra* note 33, at 33.

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. 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 a "team player."<sup>168</sup> 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.<sup>169</sup>

First, the defense lawyer is not a diagnostician who is trained to make 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 the addict's drug habit—not the lawyer's legal knowledge, training, or reason—that will be the chief determinant of failure or success. Yet, with freedom in the balance, the defense lawyer is expected to advise her client with little insight into the client's subjective state of mind and strength of will. The defense lawyer is made to act as an "envoy[] to [the] sovereign country" of her client's psyche.<sup>170</sup> On such foreign ground, the lawyer can make, at best, educated guesses. More often than not, 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).

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168. See Boldt, *supra* note 6, at 1264; Quinn, *supra* note 8.

169. See *infra* text accompanying notes 171–172. 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 81.

170. Ainslie, *supra* note 119, at 112.

Second, the grand compromises that underpin drug courts have left the defense lawyer out of the power-sharing equation. She has been shuttled to the background in a process that largely has been stripped of the procedural formalism that was her stock in trade.<sup>171</sup> Indeed, the defense lawyer is sometimes not expected to attend (or even alerted to) drug-court appearances.<sup>172</sup> 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. Judges talk and joke with them about their families and prospects—their slip-ups and accomplishments.<sup>173</sup> But judges also keep the power to punish participants, and when judges do punish, they are unconstrained by customary procedural rules.<sup>174</sup> Thus, judges can impose sanctions—sometimes of individual invention—without hearings, and based on potentially flimsy, inadmissible

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171. See NOLAN, *supra* note 7, at 77–81 (“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* text accompanying notes 163–167, and note 169 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. See Miller, *supra* note 1, at 1482–85 (“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.”).

172. See DRUG COURTS PROGRAM OFFICE, U.S. DEP’T OF JUSTICE, *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 8, at 64; NOLAN, *supra* note 7, at 85.

173. Quinn, *supra* note 8, at 64 (describing “a 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 . . . [A] client not only talks about his or her drug use but about employment, family, friendships, and financial concerns.”).

174. See Boldt, *supra* note 6, at 1252 (describing the process as “judge-driven . . . coupled with a high degree of procedural informality”); Miller, *supra* note 1, at 1514–15; see also Dorf & Sabel, *supra* note 49, 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. See NOLAN, *supra* note 7, at 94 (describing how judges appreciate freedom from traditional adjudicative functions that they find “too confining, boring, unrewarding, [and] insufficiently responsive to social problems” (quoting MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 151 (1994))); see also *id.* at 105 (quoting Judge Peggy Fulton Hora: “The more you take away judicial discretion, the more you might as well just 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.”).

evidence.<sup>175</sup> When judges are free to construct rewards and sanctions out of whole cloth and to keep participants in treatment for indeterminate lengths,<sup>176</sup> the defense lawyer can do little more to provide effective and informed advice than to 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.”<sup>177</sup>

A final point: Numerous scholars have flagged self-dealing as a significant plea-bargaining concern.<sup>178</sup> Elsewhere, I have posited that the agency concern may be overblown, at least in the context of low-stakes cases.<sup>179</sup> Drug courts, however, are a different matter. The indolent lawyer who wishes to dispose of the substantive case can convince readily the over-optimistic, acutely addicted, poor candidate to take the drug court option, 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

175. See *supra* note 6 and accompanying text; cf. Hoffman, *Therapeutic Jurisprudence*, *supra* note 11, 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 95. 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.*

176. See *supra* text accompanying notes 165–167.

177. See Quinn, *supra* note 8, 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 the sentence. See NOLAN, *supra* note 7, at 102 (“One wonders, given this more intimate relationship between the judge and 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.”).

178. See Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1182–1194, 1201–03 (1975); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2477 (2004); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC’Y REV. 15, 18–24 (1967) (describing the defense attorney as a double agent); David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115, 123 (1994); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 319 (1980).

179. See Bowers, *supra* note 106.

to appear only for a sentencing hearing at which no contested issues are litigated and for which no work need be done.<sup>180</sup>

### III. NEW YORK CITY DRUG COURTS: 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.<sup>181</sup> 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.<sup>182</sup> Clergy deemed the accused innocent if he completed the ordeal unharmed (or, at least, with only wounds that healed quickly and cleanly).<sup>183</sup>

Both trials by ordeal and drug courts are inaccurate checks for blameworthiness. At most, trials by ordeal test for thickness of skin.<sup>184</sup> And drug courts test for strength of will, clarity of reason, and social and economic privilege.<sup>185</sup> Moreover, for both dispositional forms, the very individuals 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

180. Cf. Quinn, *supra* note 8, at 63 n.152 (“[I]f a first-time felony drug offender were advised by her attorney to accept a plea offer involving a sentence of two to six years, most attorneys would agree that such advice was incompetent.”).

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

182. Rebecca V. Colman, *Reason and Unreason in Early Medieval Law*, 4 J. INTERDISC. HIST. 571, 582 n.34 (1974); 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).

183. Pilarczyk, *supra* note 182, at 87–92; Colman, *supra* note 182, at 582 n.34. Other ordeals included the ordeal by combat, the ordeal by immersion in cold water, and the ordeal by morsel (where the accused had to swallow a quantity of food without choking). Colman, *supra* note 182, at 582 n.34.

184. See Langbein, *supra* note 181, at 7 (noting that torture problematically “tests the capacity of the accused to endure pain rather than his veracity”). As a contemporary put it: “Innocence is too closely connected with calluses[!]” Pilarczyk, *supra* note 182, at 102 (quoting John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals*, 36 SPECULUM 613, 629 (1961); see also Colman, *supra* note 182, at 589 (“[S]ome medieval feet would obviously have a better chance than others to make it across.”).

185. See Franklin E. Zimring, *Drug Treatment as a Criminal Sanction*, 64 U. COLO. L. REV. 809, 814 (1993) (noting that imprisoning an offender based on failure to comply with treatment poses the problem that “the prisoner’s punishment is being neither defined nor limited by the culpability of his acts”); see also Hoffman, *Therapeutic Jurisprudence*, *supra* note 11, at 2088 (“[D]rug court . . . requires us to send people to prison not because they violated the law . . . but rather because they resisted our enlightened treatment efforts.”); *supra* Part II.

un-addicted gamer.<sup>186</sup> In the end, 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).<sup>187</sup> 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.<sup>188</sup> In short, participants who need help most (from the standpoint of distributive justice),<sup>189</sup> and who are least volitional and therefore least deserving of punishment (from the standpoint of retributive justice),<sup>190</sup> are the very participants for whom trial by drug court is most onerous and least successful. Thus, "[t]ruly diseased addicts end up going to prison, while those who respond well to treatment, and whose use of drugs may . . . have been purely voluntary, escape punishment."<sup>191</sup>

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

186. See *supra* text accompanying notes 82–83.

187. See Pilarczyk, *supra* note 182, at 106 (noting that "historians have traditionally derided the ordeal as being fundamentally irrational").

188. See *supra* Part II.

189. See *supra* text accompanying notes 98–100, 101–115.

190. See 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 conditions are present . . . ingestion will be more blameworthy."); Morse, *supra* note 74, at 4, 6, 24, 45–47 ("[I]f prohibited activity does not meet the criteria for intentional action[,] . . . the harmdoer will be exculpated."); Wallace, *supra* note 118, at 652 ("Addiction, in other words, should be thought of as producing a condition of potentially diminished accountability."); see also *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *United States v. Moore*, 486 F.2d 1139, 1240–41 (D.C. Cir. 1973) (en banc) (Wright, J., dissenting) (noting that punishment requires culpability and culpability requires an act of "free will"); Bonnie, *supra* note 128, 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 74, at 134 ("Though self-deceivers will sometimes be responsible for their beliefs, we should abandon the presumption of culpability."); see also *supra* text accompanying note 14.

191. Hoffman, *Therapeutic Jurisprudence*, *supra* note 11, at 2089; see also Miller, *supra* note 1, at 1533–34 ("[T]here 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. at 680 (Clark, J., dissenting))).



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,”<sup>192</sup> which raises moral hazards similar to those described in George Akerlof’s seminal *Lemons* article.<sup>193</sup> 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 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.<sup>194</sup> 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.<sup>195</sup> Rationally, then, only un-addicted gamers—who knew they were noncompulsive and could thereby refrain volitionally from drug use—should have chosen to enter.<sup>196</sup> The problem, of course, is that, ideally, drug treatment courts should consist of defendants who require treatment and whose crimes are the product of genuine dependencies, just as used-car markets should consist of quality used 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.<sup>197</sup> Instead, they make the mistake of opting in. This leads to a strange and troubling duality 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.<sup>198</sup> Consequently, drug courts draw in most potential comers.<sup>199</sup> Again, the Bronx data are telling. In that county, only 8 percent of prospective participants rejected drug-court offers; the other 92 percent felt that they were better off with the drug-

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192. Hoffman, *supra* note 7, at 1476; see also Miller, *supra* note 1, at 1547 (discussing the problem of drug-court “over-and under-inclusiveness”).

193. See George A. Akerlof, *The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970). See generally Joseph Stiglitz & Andrew Weiss, *Sorting out the Differences Between Signaling and Screening Models*, in PAPERS IN COMMEMORATION OF THE ECONOMIC THEORY SEMINAR AT OXFORD UNIVERSITY (Michael Dempster ed., 1989); Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 361–74 (1973).

194. Akerlof, *supra* note 193, at 489–90.

195. See *supra* p. 195 tbl.1.

196. See text accompanying notes 82–83.

197. See *supra* Part II.A.

198. See *id.*

199. Cf. Hepburn & Harvey, *supra* note 88, at 256 (“Legal coercion may be a strong motivation to treatment, but it is apparent that many of those legally coerced to treatment fail . . .”).

court option than with trials or conventional pleas, even though, on average, they most certainly were not.<sup>200</sup> This was a costly error for those who failed.

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 reducing overall recidivism and for conserving overall resources.<sup>201</sup> Lost amid the positive generalities are the profound impacts of termination on individual participants and an 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.<sup>202</sup>

There is, however, one caveat to the argument that drug courts provide a reverse screen: The claim is true from the standpoint of retributive and distributive justice only. A separate argument could be made from the standpoint of incapacitation or specific deterrence that drug courts work effectively 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.<sup>203</sup> 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 come with social costs (like fragmented communities) that may create risks not just of more drug crime but of more violent and serious crime as well.<sup>204</sup>

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200. See REMPEL ET AL., *supra* note 3, at 6 tbl.1.1, 32 tbl.3.2 (detailing average drug-court sentences of almost seven months for all drug-court participants and average sentences of almost five months for conventionally adjudicated comparison defendants).

201. See generally 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, 1–42 (1998) [hereinafter Belenko, *Research on Drug Courts*] (reviewing thirty evaluations from twenty-four drug courts); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. EXPERIMENTAL CRIMINOLOGY 459 (2006) (reviewing fifty-five drug court evaluations).

202. See O'KEEFE & REMPEL, *supra* note 25, at 40 tbl.15; REMPEL ET AL., *supra* note 3, at xi, 40, 41 tbl.3.4; see *supra* text accompanying notes 30–40, 80–100.

203. 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.").

204. See sources cited *supra* notes 92, 98–100.

In any event, drug courts claim to be doing something quite different from subjecting recidivist addicts to stiffer sentences.<sup>205</sup>

And this is no mere matter of rhetoric failing to reflect reality. As explained earlier, drug courts are the products of political compromises. Would some stakeholders (such as drug-law reformers or therapeutic advocates) have compromised in the first instance if they had recognized the potential for an inversion of one of drug courts' chief stated intended effects? Quite possibly, the drug-court compromise would never have been reached if these stakeholders had known then what is readily apparent now. There might not have been the necessary political capital for drug courts to form or flourish. By way of comparison, consider another political compromise, the federal sentencing guidelines: Stakeholders of varied political stripes came together to counteract what some saw as racist inequities in sentencing and what others saw as overly lenient discretionary sentencing. Would the left-liberal faction have agreed to the guidelines if it thought the guidelines might create greater racial and economic sentencing disparities? Would the law-and-order faction have agreed if it thought the guidelines might lead to more lenient sentences? The answer to both questions would seem to be no.

#### 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.<sup>206</sup> Significantly, the claim runs up against conventional therapeutic wisdom and a host of studies that have shown voluntary

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205. See, e.g., COMMISSION, *supra* note 45, at 5, 10–11 (arguing that drug court's intent is to target for treatment a "core group" of addicted recidivist offenders whose crimes "stem from their addiction"); see also *supra* text accompanying notes 9, 14–18, 67, 116.

206. See, e.g., Bruce J. Winick, *How Judges Can Use Behavioral Contracting*, in THERAPEUTIC KEY, *supra* note 8, at 227 (noting that, through the process of internalization, participants come to the choice of treatment, even if the initial choice was only to avoid prison); Miller, *supra* note 1, at 1537–38 (describing the argument that external motivation can lead to internal motivation); Edwards, *supra* note 11, at 309–10 (same). Thus, for example, in New York City, seemingly important considerations like "lack of motivation/treatment readiness" are not disqualifying. REMPEL ET AL., *supra* note 3, at 17.

treatment to be superior to compulsory treatment.<sup>207</sup> And, intuitively, that seems right 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.”<sup>208</sup> Indeed, the inadequacy of external stimuli is the very reason that many addicts have hung on to destructive habits for so long, in spite of the numerous good reasons they may have had to quit.<sup>209</sup>

There are strong reasons to doubt the findings of recent studies<sup>210</sup> that have concluded, surprisingly, that coerced treatment is more effective than voluntary treatment. First, many of these studies were methodologically unsound.<sup>211</sup> Second, even more rigorous studies fail to appreciate the impact of un-addicted gamers, who have every incentive to enter into coerced

207. See Ainslie, *supra* note 119, at 112 (“Coercion undermines a person’s will to do what we demand. It replaces the incentive for the person to maintain her credibility to herself with external incentives, thus reducing the motivational basis of her will . . . .”); 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 88, at 273 (finding no difference in retention and completion rates between two courts in the same jurisdiction, where one had the power to sentence failures to jail and the other did not); Hoffman, *Therapeutic Jurisprudence*, *supra* note 11, at 2089 (arguing that state-coerced treatment is ineffective); Hoffman, *supra* note 7, at 1475 n.153 (arguing that drug courts reject the conventional therapeutic view that effective treatment depends on the defendant entering voluntarily); Janet Sansone, *Retention Patterns in a Therapeutic Community for the Treatment of Drug Abuse*, 15 INT’L J. ADDICTIONS 711, 719 (1980) (finding no relationship between probation/parole status and treatment retention); Stevens et al., *supra* note 41, at 274 (citing studies showing that “legal coercion has been shown to harm the prospects of completing treatment”). See generally NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 17 (1974) (“In psychological treatment of abnormal behavior it is widely agreed that conventional psychotherapy . . . must be voluntarily entered into by the patient if it is to be effective.”).

208. Hepburn & Harvey, *supra* note 88, at 256.

209. See *supra* Part I.B. Moreover, there is a distinct danger to telling individuals that 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 ET AL., *supra* note 44, 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 46, at 42 (describing “self-fulfilling prophecies that translate into lower levels of interest in behavior change”).

210. See, e.g., Rempel & DeStefano, *supra* note 57, at 88 (“It was originally believed that participants voluntarily seeking treatment were more motivated and more likely to succeed in treatment than coerced participants. However, evidence is now mounting that coerced treatment is as effective as voluntary treatment at producing favorable outcomes.”); Lawrence O. Gostin, *Compulsory Treatment for Drug-Dependant Persons: Justifications for a Public Health Approach to Drug Dependency*, 69 MILBANK Q. 561, 580 (1991) (“The intuition that compulsory treatment will fail because drug-dependant people must be self-motivated in order to benefit . . . simply is not borne out by the relevant data.”).

211. O’KEEFE & REMPEL, *supra* note 25, at 29; BELENKO, *supra* note 6, at 36–37; Miethe et al., *supra* note 9, at 527; Rempel & DeStefano, *supra* note 57, at 89.

treatment, but who have no incentive to enter voluntary treatment. As a result, the un-addicted skew upward the success rates of coerced treatment regimes.<sup>212</sup>

Why do drug court proponents put such great faith in the false—or at least unfounded<sup>213</sup>—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.<sup>214</sup> Drug court proponents construct a story that seemingly justifies a punitive response: The terminated addict is said to deserve greater punishment because he has shown “consistent disregard for the court’s authority.”<sup>215</sup> 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.”<sup>216</sup>

### C. Incoherence

Even if drug court proponents are somehow right that external coercion is superior to internal motivation, the claim is incoherent with drug-courts’ own professed first-order 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

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212. Edwards, *supra* note 11, at 336–37 (“[T]he literature does not address the very real probability that coercion encourages attrition and false compliance, thus leaving researchers with an incomplete account of total effects of coercion on treated populations.”); see *supra* text accompanying notes 81–85, 117.

213. See Sheila Royo Maxwell, *Sanction Threats in Court-Ordered Programs: Examining Their Effect on Offenders Mandated Into Drug Treatment*, 46 CRIME & DELINQ. 542, 558 (2000) (“[T]he efficacy of these threats in forcing offenders to stay in treatment has not been systematically examined or empirically substantiated.”); see Miller, *supra* note 1, at 1558 (noting the “paucity of much-needed empirical research on the relation between coercion and therapy”); Stevens et al., *supra* note 41, at 276 (“[P]olicy and practical decisions are being made in the absence of conclusive evidence on which to base them.”).

214. See PEELE ET AL., *supra* note 44, at 9 (explaining that participants are compelled by “compromising context” to enter coerced treatment).

215. PORTER, *supra* note 33, at 12 (describing the Bronx district attorney’s position on why atypically high alternative sentences are appropriate).

216. 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 a drug court judge saying that he would “push them, shove them, [and] box them by using the threat of incarceration to get them to start down the path of . . . recovery”).

somewhat compulsive conduct.<sup>217</sup> In this vein, the courts are meant to stake out the elusive middle ground between the extreme views of the addict as an automaton and the addict as a rational actor—to call a truce in “the tired stalemate between disease and utility models of addiction.”<sup>218</sup>

But in the effort to chart the missing center, the courts take a theoretically disjointed approach: They adopt a medical tactic when treating the participating patient, but a penal tactic 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 and responsible when it comes to his success or failure at responding to the carrots and sticks of treatment. On the one hand, drug court defendants are told that they have diseases that drive them to behave in a certain ways, 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.<sup>219</sup> 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.<sup>220</sup> Drug-court judges claim to fill “parent-like” roles.<sup>221</sup> To the extent that this claim is true, however, ultimate termination and consequent sentencing can be seen only as a kind of abandonment. And, just like the early-medieval accused, who was made to pay the price for the offense of allowing himself to be burned by hot iron, the drug-court failure is punished

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217. See *supra* text accompanying notes 14–18, 190.

218. Ainslie, *supra* note 119, at 112; see also Hoffman, *supra* note 7, at 1472 (noting that “the disease model of addiction . . . [is] an enlightened reaction to what historically has been the only other alternative: the view that all drug use is simple, willful misconduct”); Morse, *supra* note 74, at 6 (arguing that monolithic perceptions of addiction are “alluring because they imply that there are technical, ‘clean’ solutions”); *id.* at 21–22 (“There is no reason to believe that our thinking about addiction must be polar, that it 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.”); Wallace, *supra* note 118, at 654 (calling the polar views “cartoonish”).

219. See DRUG COURTS PROGRAM OFFICE, U.S. DEP’T OF JUSTICE, *supra* note 9, at 23–26 (discussing relapse as part of the road to recovery); REMPEL ET AL., *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 the “inevitability of relapse”).

220. See 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.”).

221. NOLAN, *supra* note 7, at 196.

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.<sup>222</sup>

An example of this counter-logical reasoning and theoretical incoherence comes from the New York State Commission on Drugs and the Courts, which endorsed statewide expansion of drug courts.<sup>223</sup> In one telling passage, the Commission offered a dubious syllogism of conflicting claims, made to seem consistent.<sup>224</sup> Specifically, the Commission accepted initially the disease premise: that “[the addict] once addicted, ordinarily cannot overcome his or her addiction simply by ‘choosing’ to become drug-free.”<sup>225</sup> 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.”<sup>226</sup> 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 her addiction. . . . [E]xternal sanctions 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.<sup>227</sup>

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.<sup>228</sup>

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222. See Hoffman, *supra* note 7, at 1514–15 (“[W]e sentence defendants to prison . . . for their failed treatment rather than for their unlawful drug use.”); see also *supra* text accompanying note 184.

223. See COMMISSION, *supra* note 45.

224. See *id.* at 16.

225. *Id.*

226. *Id.*

227. *Id.*

228. 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.305. Thus, the message is that addicts should be punished for *denial of addiction* standing alone. Worse still, the memo further provided that “[t]he 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 Court, then, the simple act of considering ones amenability to treatment has become a punishable offense.

Ultimately, 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 mantra is that the drug-court model is an “innovative form of justice.”<sup>229</sup> But, in operation, the courts share with conventional justice the belief that threats of strong punishment will deter future criminal activity. And drug courts keep conventional justice—often in its most powerful forms—always in the background and close at hand. Drug courts 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.<sup>230</sup> Drug-court proponents claim that “[w]hat we were doing before . . . wasn’t working.”<sup>231</sup> But—at least for the participants that the proponents most want to cure—the courts often do more of the same (and then some).

#### IV. 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, hollow expectations of what they could achieve once there.<sup>232</sup>

Nevertheless, we may not wish to wholly abandon drug courts. It may be that the courts achieve some of their stated objectives. Specifically, the courts may in fact succeed in reducing overall recidivism and preserving overall criminal-justice resources.<sup>233</sup> Put differently, because the conventional drug war is unsustainable and unwise, any halfway defensible alternative

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229. Miller, *supra* note 1, at 1503 n.137 (citing sources that praise the drug court as “innovative”).

230. See Miller, *supra* note 1, at 1481 (“Instead of challenging the drug laws, these courts operate within the current legislative framework . . .”); see also *infra* text accompanying note 250.

231. NOLAN, *supra* note 7, at 44.

232. Cf. Sunstein & Thaler, *supra* note 23, at 1163 (arguing that policy should not be constructed around the false proposition that “almost all people, almost all of the time, make choices that are in their best interest or at the very least are better . . . than the choices that would be made by third parties”).

233. See, e.g., REMPEL ET AL., *supra* note 3, at x, xii, 273–82 (outlining the impact of drug courts in reducing rates of recidivism); Beckerman & Fontana, *supra* note 82, at 58 (describing “limited benefits for some criminal offenders”); Belenko, *Research on Drug Courts*, *supra* note 201, at 17–18 (“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.”); Wilson et al., *supra* note 201, at 471 (reviewing forty-one drug court evaluations and finding a mean reduction in recidivism of 14 percent).



might be welcome for that reason alone.<sup>234</sup> 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.<sup>235</sup> 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 only meliorate the 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.<sup>236</sup> Specifically, as addicts mature toward middle age, they grow more amenable to treatment and, likewise, to consequential thought and action.<sup>237</sup> A more effective and less-problematic drug-court approach might be a non-coercive model that the addict could opt into once he has started the aging-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.<sup>238</sup>

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234. See Zimring, *supra* note 185, at 814–18 (arguing that normative objections to drug court can be measured only comparatively with traditional draconian sentences); see also *supra* note 44 and accompanying text.

235. See Zimring, *supra* note 185, at 818 (arguing that drug courts should not provide atypical sentences unless the 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 treatment success. TRONE & YOUNG, *supra* note 29, at 11 (quoting the general counsel of a 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 Treatment 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 124, 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.

236. See PEELE, *supra* note 72, at 125 (describing the aging-out process as "a gradual ripening into remission"); Rempel & DeStefano, *supra* note 57, at 91 ("[C]riminal behavior peaks in late adolescence and gradually declines thereafter . . . [An] explanation for the 'aging out' phenomenon among a substance-abusing population may be that over time, persons grow tired of their addicted lifestyle."); *supra* text accompanying note 88.

237. Ainslie, *supra* note 119, at 90 ("[O]lder subjects discount the future less steeply than younger ones.").

238. Cf. 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 . . .").

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.”<sup>239</sup> 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.<sup>240</sup>

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.<sup>241</sup> 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.<sup>242</sup> And it would have the power to expunge multiple nonviolent convictions of various types, as long as graduates could show that the convictions were products of past addiction.<sup>243</sup> Most importantly, the model 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.<sup>244</sup>

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

239. Sunstein & Thaler, *supra* note 23, at 1162.

240. *Id.* at 1161–62, 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, *supra* note 23, 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*.”); Corrado, *supra* note 129, 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)).

241. Drug courts have been faulted for adopting an “organizational rhetoric” of reintegration but failing to fulfill that promise. Miethel et al., *supra* note 9, at 522, 536 (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).

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

243. It would probably be difficult for the ex-offender to demonstrate such a link between crimes of passion and drugs, but easier for him to demonstrate a link between non-violent income-generating crimes and drugs. *See* Brownsberger, *supra* note 56, at 67–68; REMPEL ET AL., *supra* note 3, at 280 (“[A] substance abuse addiction can cause non-drug-related crime . . .”).

244. *Cf.* REMPEL ET AL., *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.”).

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 unaddicted ex-offender would lack adequate external incentive to game entry into the drug 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. First, my proposal would provide only an indirect alternative to incarceration. Specifically, the model might succeed in keeping addicts from recidivating and returning to prison, but it would leave unaffected the potentially significant jail or prison sentences that the addicted ex-offenders had already served. Second, my proposal might prove to be an inefficient and unwarranted expenditure of resources for recalcitrant offenders.

Conversely, my proposal might prove more effective because the formerly recalcitrant offenders would now be internally motivated—and, therefore, more ready—to succeed. Indeed, this is the very reason that drug court studies have shown consistently higher graduation rates for older offenders who have begun to age out of their habits.<sup>245</sup> Moreover, my proposal would certainly be less wasteful than the current model that provides unneeded treatment to unaddicted strategic gamers who only enter treatment to avoid incarceration. That aside, these potential problems may be no more than fair tradeoffs that we should be willing to make in exchange for an approach that would alleviate the contraindication and screening problems and that would wholly eliminate the use of 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.<sup>246</sup> By comparison, in the brave new world of robotic space exploration, Rodney Brooks has counseled that we should opt for approaches that are “fast, cheap and out of control.”<sup>247</sup> So too, in the brave new world of therapeutic justice, there is wisdom to taking a biological approach. Indeed, one of the widely-cited benefits of drug courts is their amenability to

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245. See *supra* text accompanying note 88.

246. Cf. Stevens et al., *supra* note 41, at 272 (explaining that “treatment may be applied at any stage of the criminal justice system”).

247. Rodney A. Brooks & Anita M. Flynn, MIT Artificial Intelligence Lab, *Fast, Cheap and Out of Control*, 42 J. BRITISH INTERPLANETARY SOC'Y 478 (1989).

experimentation.<sup>248</sup> I, for one, welcome such innovation, but only as long as the power of the carceral state does not play a role when our experiments fail.

### CONCLUSION

In the enthusiasm to find 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 stated or unstated beneficial purposes; they may or may not have. The problem with drug courts is the false promise ascribed to them: that they can be “all things to all people,”<sup>249</sup> and that they are free of trade-offs and hidden costs. In reality, drug courts are able to realize their claimed 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 are already some of the least well off in 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.<sup>250</sup> They may, therefore, serve as a distraction

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248. Dorf & Sabel, *supra* note 49, at 841 (“Treatment Courts, like many other experimentalist institutions, emerged through a combination of . . . local innovation and . . . central information-pooling and discipline that blurs the distinction between accident and design.”); *supra* text accompanying note 49.

249. Miller, *supra* note 1, at 1503.

250. See Miller, *supra* note 1, at 1481; COMMISSION, *supra* note 45 (Stanley S. Arkin, concurring and dissenting from Commission’s report) (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’”); Dorf & Sabel, *supra* note 49, at 869 (explaining criticism that “drug courts take for granted, and indeed may reinforce, a generally misguided approach to drug addiction . . . by creating incentives for extension of the criminal justice system and entrenching criminalization.”); see also *supra* notes 48, 230 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 74, at 141 (discussing ineffective drug reforms); see also Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENT. 207, 210 (1995) (arguing that many constitutional procedural protections are wholly ineffective and that

from the larger debates we should be having: debates over whether we should focus on harm reduction or use reduction; over whether we should rely on crime-control or regulatory models of enforcement.<sup>251</sup> Perhaps the political reality is that we can do no better than our current drug courts. However, it does not translate from that reality that there are no better options. The first-best solutions remain always the ones we are least ready to engage: to reform the mandatory sentencing laws that undergird our war on drugs, and, more generally, to reimagine radically our failed drug policies.

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“constitutional protections intended to make prosecution more difficult instead serve to make the prosecutor’s job easier”). See generally Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673 (1992).

251. See generally ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES & PLACES* (2001).