

Drug Treatment Courts and Emergent Experimentalist Government

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Introduction

In recent years, official drug policy in the United States has amounted to a war by the criminal justice system on traffickers in and users of drugs. More than half of all prison inmates are illegal drug users,¹ and each year brings additional legislation mandating long minimum sentences and other forms of harsh punishment for those who violate the drug laws. Criticism mounts apace. Mindful of the rigors of public opinion, the politically prudent, citing studies of the ratio of costs to benefits of treatment as opposed to incarceration, question the efficacy of addressing drug addiction through the criminal justice system. Other critics less attentive to the polls and influenced by the experiences of countries such as the Netherlands, argue for decriminalization and social policies aimed principally at limiting the harm that long-term addicts do to themselves and those around them.

¹ “According to recent data from the 1997 Arrestee Drug Abuse Monitoring (ADAM) program – which interviews and collects urine samples from arrestees in 23 major metropolitan areas – between 51 and 80 percent of arrested adult males test positive for drugs.” Office of Justice Programs Annual Report 19 (Fiscal Year 1998) (available at <http://www.ojp.usdoj.gov/pubs.htm>) (visited Aug. 6, 1999). Data for 1998, based on an expanded sample, were similar. See 1998 Annual Report on Drug Use Among Adult and Juvenile Arrestees (National Institute of Justice, April 1999) (Available at <http://www.ojp.usdoj.gov/nij/pubs-sum/175656.htm>) (visited Aug. 6, 1999).

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But much of this familiar debate is being mooted by profound changes in the treatment of drug offenders within the very criminal justice system that is at the center of public controversy. The principal instrument of this transformation is variously called a drug court, treatment court, or drug treatment court. Despite differences in nomenclature and the precise details of their operation, treatment courts around the country share the same basic pattern. Persons charged with relatively low-level, non-violent criminal misconduct may opt out of the criminal trial court if the prosecuting attorney consents to the filing of charges in the treatment court. In treatment court the defendant pleads guilty or otherwise accepts responsibility for a charged offense and accepts placement in a court-mandated program of drug treatment. In some model programs offenders may initially choose among different courses of treatment—residential or outpatient—according to their own assessment of their needs and possibilities. The judge and court personnel closely monitor the defendant’s performance in the program and the program’s capacity to serve the mandated client. If progress in the treatment regime is unsatisfactory, courts offering various programs may require the offender to choose another, more intensive one. Upon successful completion of the treatment program, the conviction is typically expunged. The court, moreover, will cease directing defendants to programs that show signs of incompetence and increase referrals to others that show greater promise.

Treatment courts thus provide defendants with alternatives to incarceration without decriminalizing drug use; and in insisting on a high, perhaps increasing quality of care from service providers, they improve the treatment available to drug users. In changing our conception of addiction and how treatment can respond to it, drug courts

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will likely reshape the background ideas that crucially influence what we regard as criminal behavior and how we respond to it.

Drug courts bear a superficial, but ultimately misleading resemblance to long-established judicial and administrative institutions. Thus, treatment courts do have affinities with the many existing courts of specialized jurisdiction – juvenile courts, family courts, bankruptcy courts, and so on – created to handle problems with which generalist judges hearing a wide range of cases are insufficiently familiar. As in treatment courts, judges in these institutions typically cooperate so closely with corresponding administrative, not-for-profit or private-sector organizations as to constitute an integral part of the latter. Alternatively, we might understand the drug courts principally as a kind of administrative body: Given that pleas in these courts are a foregone conclusion, and hence that “sentencing” is automatic, we might see their principal activity to consist in monitoring the behavior of sentenced clients in the manner of a probation agency.

Although treatment courts no doubt build upon prior practices of conventional courts and probation departments, we argue in this Article that they cannot be neatly categorized as either courts or agencies. Unlike traditional courts of specialized jurisdiction, drug courts are creating the framework for a pervasive reform of the service providers with whom they collaborate in the very act of coordinating the services provided. Unlike traditional administrative agencies, the drug courts neither provide services themselves nor regulate in detail by rule-making or other means the activities of those who do. Thus drug courts are more intimately involved in the redirection of the institutions they supervise, and upon which they rely than other, apparently similar

courts. Yet, simultaneously, they are more distant from these institutions—at least as measured by their use of the means of administrative techniques—than agencies with analogous tasks.

What makes the drug courts distinctive and innovative, we argue, is the novel form of monitoring, and governance more generally, upon which they rely.² The central feature of this governance system is that the monitored agents choose their own precise goals and the means for achieving them in return for furnishing a central authority with the information that allows evaluation of their performance. The information in turn allows identification of good and bad performers, improvement of the quality of the

² In focusing on monitoring mechanisms, we do not mean to overlook the attitudinal distinctions between drug courts and traditional courts that have led some to classify the former as practitioners of “therapeutic jurisprudence.” See Peggy Fulton Hora, William G. Schma, and John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *Notre Dame L. Rev.* 439 (1999); David Rottman and Pamela Casey, *Therapeutic Jurisprudence and the Emergence of Problem-Solving Courts*, 240 *Nat’l Inst. of Justice J.* 12, 15 (July 1999) (“Drug treatment courts are the best known example of a court for which therapeutic jurisprudence arguably provides the underlying legal theory.”) See generally **David B. Wexler & Bruce J. Winick, Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence** xvii (1996) (defining therapeutic jurisprudence). But in our view, a therapeutic attitude, if unconnected to systemic monitoring mechanisms, risks capriciousness. See *infra* Part II (discussing the history of juvenile courts).

monitored information, and eventually, of the services provided. Very generally, by collaborating in this way, central authority and decentralized actors can together explore and evaluate solutions to complex problems that neither alone would have been likely to identify, much less investigate or address, without the exchanges with the others. The same exchanges of information, moreover, enable the institutions continually to adjust their means and ends in the light of experience. Because this form of governance and the type of institution-building with which it is associated openly acknowledges the incomplete and ambiguous character of its initial specification of means and ends, and uses this lack of specificity as a prod to inquiry and discovery, we refer to it as experimentalist.³

In the case of drug courts, the experimentalist process occurs iteratively. At the national level, the federal government pools information on the innovative activities of local drug courts and extracts benchmarks and framework rules from these. Within their jurisdictions, in closely monitoring the progress of each client, the drug courts simultaneously monitor and discipline the activities of treatment providers and those with whom they collaborate. We will see that drug courts are able to determine which programs can effectively monitor the progress of individual clients, and which clients are able to take advantage of capable programs. Indeed, the drug court as we describe it below took shape through just such a process of pooled evaluation of local experimentation.

³ See Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998).

Viewed as an instance of experimentalist governance, treatment courts suggest an effective response to a general problem that has beset the judiciary in recent decades. Beginning in the post-*Brown v. Board of Education*⁴ period, courts became increasingly involved in reordering large and complex institutions that were failing to meet constitutional obligations: Racially discriminatory police forces; schools that did not provide a minimally adequate education; and severely overcrowded prisons were prominent examples. There were some notable successes – for instance, the desegregation of schools in the rural South⁵ and the improvement of prison conditions,⁶

⁴ 347 U.S. 483 (1954). To be more precise, the era on which we focus begins with *Brown II*, see *Brown v. Board of Education*, 349 U.S. 294 (1955), in which the Supreme Court delegated to the lower federal courts the task of formulating remedial decrees.

⁵ See *infra* notes ___ - ___.

⁶ See generally **Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*** (1998). Rubin and Feeley argue that courts succeeded in ending some of the most abusive prison conditions because of “their capacity to act like agencies in appropriate circumstances.” *Id.* at 334. We agree with their view that the institutions of American government should not be narrowly circumscribed by pre-conceived notions of role, but we doubt that the conventional administrative model is generalizable. Prisons may have been a particularly good target for top-down reform because they are quintessentially hierarchical entities, and even still, judicial reform of prisons was, as Rubin and Feeley note, significantly constrained by public opinion. See *id.* at 332.

and based on these, optimistic observers of this role shift foresaw an age in which courts would focus on institutional reform rather than individual remedies.⁷

But the successes were limited to unusual contexts. For example, segregation in the rural South typically took the form of one set of schools for white children and a second, duplicative but typically inferior set for black children. Once it was recognized that such a form of apartheid violated the constitutional guarantee of equal protection,⁸ there was a ready solution: When the black schools were closed, there was no practical alternative to educating black and white schoolchildren in the same facilities.⁹ In this instance, stopping a clear constitutional violation proved to be a sufficient remedy.

⁷ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 **Harv. L. Rev.** 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term - Foreword: The Forms of Justice*, 93 **Harv. L. Rev.** 1 (1979); Owen M. Fiss, *Symposium: The Legacy of the New Deal: Problems and Possibilities in the Administrative State: The Bureaucratization of the Judiciary*, 92 **Yale L.J.** 1442, 1442-1450 (1983).

⁸ This “recognition” required more than the Supreme Court’s decision in *Brown*. The pace of desegregation increased dramatically with the passage of the Civil Rights Act of 1964. See **Jack Greenberg, Crusaders in the Courts** 380 – 81 (1994); **Jennifer L. Hochschild, Thirty Years After Brown** 3 (1985) (“Most of the decline in racial isolation occurred between 1968 and 1972.”)

⁹ For this reason, the Court’s repudiation of the *Brown II* formula of “all deliberate speed” enabled swift desegregation in the rural South, despite an at-best ambivalent Nixon Administration. See **Greenberg, supra note** , at 384 – 87. For an instructive case

By contrast, when the scene shifted to urban areas, orders to cease assigning students by race left in place substantial *de facto* segregation (and contributed to an exodus to the suburbs), prompting urgent and politically divisive questions about the goals of desegregation.¹⁰ Addressing these issues called for complex managerial capacities that seemed beyond those possessed by courts.¹¹ Thus, by the mid-1970s, the Supreme Court had placed strict limits on the scope of federal judicial power to remedy segregation. These reflected an unwillingness to embrace any but the most parsimonious interpretation of *Brown* – *de jure* segregation must cease – an unwillingness inspired in large part by a deep skepticism about courts’ legitimacy and abilities in ordering complex and controversial institutional change.¹² Urban school desegregation thus appears as a

study highlighting the role of federal authorities, see **Gary Orfield, *The Reconstruction of Southern Education* 253 – 56 (1969)** (discussing Sussex County, Virginia).

¹⁰ See **Hochschild**, *supra* note , at 17 – 22 (offering three conflicting interpretations of *Brown*).

¹¹ See **Gary Orfield, *Must We Bus? Segregated Schools and National Policy* (1978)**. Although Orfield answers “yes” to the question that is the title of his book, he clearly takes for granted that desegregating urban areas – whether in the South or the North – would be a much more complex undertaking than desegregating the rural South. See, e.g., *id.* at 421 (“There is no simple solution to the problems of school segregation, which flourishes in our aging metropolitan communities.”)

¹² See *Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424 (1976) (holding that a court cannot order racial balance as a remedy for demographic shifts); *Milliken v. Bradley*, 418 U.S. 717 (1974) (invalidating an inter-district remedy for an intra-district

prominent example of a larger phenomenon: Conventionally understood, courts have had difficulty improving the performance of troubled institutions.¹³

To be sure, at least one observer saw in the forms of collaboration indirectly provoked by the courts' efforts at remediation a new model of judicial oversight, more dependent on continual re-elaboration and reconsideration of the favored means and ends of interested parties than typically possible within conventional litigation.¹⁴ But the

violation, despite district court finding that substantial desegregation depended on the former).

¹³ For skeptical accounts of the courts' effect with respect to school desegregation, see **Derrick Bell, *And We Are Not Saved: The Elusive Quest For Racial Justice*** 113 (1987) (expressing skepticism with respect to the judicial role in desegregating schools); **Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*** 9 - 28 (1991) (same); *but see* **Willis D. Hawley, *Strategies For Effective Desegregation: Lessons From Research*** 41 - 43 (1983); **F. Welch and A. Light, *New Evidence on School Desegregation***, U.S. Commission on Civil Rights Clearinghouse 6, 8, 18 - 21, Tables 8 -11, 61, 92 (1987).

¹⁴ See Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 **Geo. L.J.** 1357, 1360 (1991) (developing "a deliberative model of remedial decisionmaking that casts the court in the role of structuring and evaluating the adequacy of a participatory process designed to produce a consensual remedial solution"); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 **U. Pa. L. Rev.** 639, 644 (1993) (in the context of prison reform litigation, "document[ing] a shift from a test case to an implementation model of advocacy, and urg[ing] the development of effective remedial strategies as a

center of gravity of opinion has, since the heady days of the mid-1960s to early 1970s, moved steadily towards an understanding of courts that holds their capacities for implementing reform to be inherently quite limited.¹⁵

In this Article, we argue that treatment courts as open and evolving experimentalist institutions point one way beyond the conventional limitations of courts and other oversight institutions. By pooling information on good and bad performance, and sanctioning when necessary unsatisfactory performers, the courts enable and oblige improvement by the actors both individually and as members of a complex ensemble. Judicial involvement in reform is permanent and continuous in this model. Yet it is, paradoxically, less imperious than traditional methods of court-directed reform for two reasons. First, the court in effect compels the actors to learn continuously and incrementally from each other rather than instructing them to implement a comprehensive remedial plan devised by the court alone or even in consultation with the parties. Second, the court is itself compelled to change in response to the changes it facilitates. This occurs in part through the exchanges with the treatment providers and in part in response to comparisons with experience in other jurisdictions as revealed by national pooling.

method of linking litigation to a broader strategy”); Susan P. Sturm, *The Promise of Participation*, 78 **Iowa L. Rev.** 981 (1993) (challenging the assumption that rights of participation should be the same in the remedial phase of litigation as in the liability phase).

¹⁵ Cass Sunstein makes this point about the United States Supreme Court, *see* **Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court** (1999), but it well describes the standard, chastened view of the judiciary as a whole.

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At the same time, treatment courts – along with other emergent experimentalist bodies – point the way beyond a parallel dilemma that has long been taken to be a defining feature and limit of bureaucratic administration: the conflict between accountability and the flexibility required for effectiveness. Detailed statutes or regulations provide a reliable yardstick against which to measure implementation and so to establish the accountability of agency officials. But in a complex and rapidly changing world it is manifestly impossible to write rules that cover the particulars of current circumstances in any sphere of activity. Indeed the difficulty of achieving tolerably acceptable results is typically a compelling argument against efforts to adjust the rules, once written, to changes in the settings to which they are applied. To harmonize rules and reality, officials consequently often bend the language of their directives to suit the demands of the situation. This increases the effectiveness of the organization, but at the cost of its accountability: the same act of interpretive discretion that (re)establishes the connection between purposes and procedures introduces ambiguities into the overarching directives and thus undermines their utility as the measuring rods of accountability.

Experimentalism avoids this dilemma by authorizing the exercise of discretion under conditions that provide for accountability. As we will see in the case of the relation between the federal government and treatment courts as well as the relation between treatment courts and treatment providers, lower-level units are encouraged to redefine ends in the light of changed understandings of means, and vice versa. But as a condition of this autonomy the respectively local entities must in effect render themselves accountable by providing explanations of their motives and reports on their results rich enough to allow critical comparisons with the different choices of others acting under

similar conditions. Thus, just as the treatment court – viewed as an instance of an experimentalist judiciary – avoids the false dichotomy of managerial meddling versus inaction by reviewing the pooled remedial plans of the actors, so the court and the corresponding units of the federal executive – viewed as instances of experimentalist administration – by the same means avoid the false dichotomy of furtive effectiveness versus formalist accountability.

Part I of this Article describes the way in which treatment courts function, and calls attention to their novel features. Our characterization is based on a review of the literature and discussions with persons working for and with treatment courts throughout the United States. We focused particular attention on the Brooklyn Treatment Court, the nation's largest treatment court and a model for others in New York and beyond. We recount the origins of treatment courts, as well as their philosophy, structure, and connections to the treatment providers. We describe their emergence as well as their spread and modification through the pooling efforts of the federal government. In our description of both the national and local features of the emergent system, we focus on the reconceptualization of addiction as a chronic disease,¹⁶ rather than an expression of

¹⁶ For the view of addiction as a disease, see *Scientists Identify Brain Systems Involved in Drug Craving*, National Institutes of Health (Oct, 14, 1996) <http://www.nih.gov/news/pr/oct96/nida-14.htm> (visited May 25, 1999); J. Madelaine Nash, *Addicted*, 149(18) **Time** (May 5, 1997) (<http://cgi.pathfinder.com/time/magazine/1997/dom/970505/medicine.addicted.html>) (visited May 25, 1999); *Addiction is a Brain Disease* (interview with Dr. Alan Leshner),

moral breakdown. Thus, the court views relapse not as a sign of failure but as an all but inevitable feature of addiction and (potentially) recovery. The chief tool employed by the treatment court consists of finely tuned “treatment bands,” that prescribe measured responses to successes as well as setbacks. We show how the mandate that service providers continually inform the court about the progress (or lack thereof) of each client¹⁷ enables the court to customize the legal system’s response to individuals, while simultaneously monitoring the treatment providers themselves. From the perspective taken by treatment courts, addiction is like many other contemporary problems in that an effective response requires contextualized or situation-specific coordination of many different and changing services. In this sense, promising reform of the treatment of addiction is more generally instructive.

Part II refines the characterization of treatment courts as experimentalist institutions by contrasting that model with two counter-interpretations. In the first of these, treatment courts represent a return to the ideal of individualized sentencing. According to this view, the spread of treatment courts merely reflects the latest pendular swing between accountability – here understood to mean determinate sentences – and effectiveness – understood in this model to mean the vesting of therapeutic discretion in

USIA Electronic Journal (June 1997) (<http://www.usia.gov/journals/itgic/0697/ijge/gj-2.htm>) (visited May 25, 1999).

¹⁷ We refer to persons subject to the jurisdiction of the treatment court as “clients” to emphasize that they are consumers of social services. See Claire McCaskill, *Combat Drug Court: An Innovative Approach to Dealing with Drug Abusing First Time Offenders*, 66 *U. Mo.-K.C. L. Rev.* 493, 495 (1998).

judges or others.¹⁸ We reject this view by showing that there are monitoring mechanisms that overcome the tradeoff between effectiveness and accountability by making actors accountable for the exercise of discretion.

But our rejection of the pendular account leaves open a second possibility, namely that the coordination mechanisms to which we point are just recrudescent professionalism, understood as decentralized coordination of individualized services. In this view, the transformations in role that occur in treatment courts do not mark the emergence of a new kind of institution but simply the redrawing of professional boundaries. We reject this characterization and argue that the boundaries between roles are more open and the kinds of knowledge are more formalized (as opposed to tacit) than in the professionalist model. We will see that these features are intrinsic to what we are calling experimentalist institutions.

Part III pursues criticisms of drug courts from the point of view of both those who would improve them by more thoroughly applying their animating ideas and those with civil libertarian objections to those ideas themselves. The first, sympathetic, critique, focuses on gaps in the monitoring regime and suggests ways of correcting these. The second critique concerns both the civil liberties of those subject to treatment at the hands of the court and the danger that the courts' very success could lead to a menacing extension of the reach of the criminal justice system. We argue that the monitoring

¹⁸ In the version of this argument to which we respond, what we are calling effectiveness and discretion are closely connected to the rehabilitative ideal that the criminal justice system has, in recent years, largely abandoned in favor of deterrence, isolation, and retribution.

regime can address the first but not the second set of concerns. We will see that the answer to these lies not in abandonment of drug courts but in improving the system of drug treatment available outside the criminal justice system.

Part IV raises and responds to questions about the democratic legitimacy of the drug court system and similar experimentalist regimes. Within the conventional model of representative democracy, elected legislatures legitimate policies by enacting them or, in the administrative model, by delegating problem-solving authority to agencies. Yet drug courts and other experimentalist institutions are developing rapidly with apparently minimal input from the polity. We argue that the appearance is false because democratic legitimacy is conferred by the experimentalist institutions' connections to local communities and their use of directly deliberative problem-solving techniques. Moreover, there are points of intersection between the old and new institutions, so that continued interaction may lead to a transformation of the roles of the former. Most prominently, in the fully developed experimentalist architecture we sketch, the legislature's role will consist of authorizing and monitoring experimentalist solutions to broadly defined problems that it identifies. Thus, Part IV concludes that experimentalism does not so much pose a threat of a parallel and unaccountable government, as it offers the opportunity for reimagining accountable government.

Throughout this Article, we argue that within an emergent experimentalist system, courts can play a role that is not traditionally judicial. By way of conclusion we ask whether there is nonetheless a distinctively judicial role for courts within an experimentalist regime, and conclude, with reference to treatment courts, that there is. Because experimentalist courts are better positioned than conventional courts to measure

the effectiveness of the institutions and actors they evaluate, they are also better equipped to carry out the by-now established role of protecting constitutional values and rights than are the latter. Experimentalism thus marries accountability and effectiveness in a way that proves particularly valuable in a judicial setting.

I

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. The immediate impetus for change at the local level was the crack cocaine epidemic of the 1980s and a concurrent reconceptualization of the very nature of addiction. Widespread use of crack cocaine led to state and federal legislation mandating serious penalties for drug traffickers and users.¹⁹ The application of these laws threatened to overwhelm the criminal justice system, and more efficient techniques of case management were at best moderately effective palliatives.²⁰ Thus, many of the actors involved in the criminal justice system actively sought more effective alternatives to incarceration.

¹⁹ See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4231 (codified as amended at 21 U.S.C. § 801 (1988)).

²⁰ See Steven Belenko and Tamara Dumanovsky, Bureau of Justice Assistance, U.S. Dep't of Justice, Pub. No. NCJ-144531 *Program Brief: Special Drug Courts* 11 (1993) (describing “expedited case management courts” as a development parallel to the creation of drug treatment courts); William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 **Md. L. Rev.** 467, 471 – 72 (1996).

Changing ideas about the nature of addiction and the potential for treatment suggested, meanwhile, that the search need not be fruitless. Credible research showed that treatment of many different kinds could measurably reduce the severity, duration, and frequency of spells of addiction.²¹ Refinements in the form of treatment presumably could produce still better results. Perhaps more fundamentally, addiction was coming to be redefined as a chronic relapsing condition. There was unlikely to be a straight path from addiction to recovery; rather, addicts undertaking recovery could be expected to relapse into addiction, often many times. This suggested the need for a counter-intuitive combination of sanctions and forbearance in treatment. Sanctions were necessary to demonstrate palpably that relapse was costly, but forbearance was necessary to help the addict learn through experience to anticipate the conditions that triggered relapse and the mechanisms for effectively avoiding it. Thus, whereas the criminal justice system (and many treatment providers) previously saw infractions of the rules of sobriety as a failure of will that belied the dedication to and capability for recovery (and perhaps demonstrated criminal intent), relapse came to be seen as providing a window into the mechanisms by which the addict could control addiction. The result was a rapprochement between the criminal justice system – which began to abandon the view that deterrence and punishment were the only effective “therapies” – and treatment providers – who not only softened their conviction that an uncoerced will to self-correction was indispensable

²¹ See generally C. Peter Rydell & Susan S. Everingham, *Controlling Cocaine: Supply Versus Demand Programs* (Rand 1994) (finding that drug treatment was substantially more cost-effective than source-country control, interdiction, or domestic enforcement).

to recovery, but came to think that coercion and its associated crisis could, like relapse itself, provoke beneficial self-reflection.²²

²² In part because of the history and remaining potential for abuse of involuntary commitment, the ethics and efficacy of coerced treatment for mental illnesses other than addiction continues to be controversial. Compare **Thomas S. Szasz, *The Myth of Mental Illness*** (1961) with Stephen L. Dilts Jr., *On the Szaszian Argument*, 26(3) **Journal of Psychiatry & Law**. 311 (1998). See also Charles W Lidz., *Coercion in Psychiatric Care: What Have we Learned from Research?*, 26(4) **Journal of the American Academy of Psychiatry & the Law** 631 (1998) (analyzing the limited but growing empirical evidence). Although abuses can occur in the treatment of addiction as well, the addiction treatment community strongly endorses coercion as one useful tool. One treatment provider with whom we spoke emphasized that “people don’t just wake up one morning and decide today is the day I’ll quit my habit. It takes a crisis, like losing a job or going to jail.” Interview of Robert Brennan, Admissions Director, Phoenix House (April 2, 1999). Nearly the same view was expressed by Ronald Capozzoli, Clinical Director of C.I.S. Addiction Center (April 2, 1999), and is a standard observation of the literature. See, e.g., Marianne T. Marcus, *Changing Careers: Becoming Clean and Sober in a Therapeutic Community*, 8 **Qualitative Health Research** 466, 471 (1998) (“Whether participants sought treatment on their own or were coerced to do so, they reported that entering the program involved experiencing a crisis”). Despite the folk wisdom that a desire to recover is central to recovery, there is an emerging consensus that mandated clients actually perform better than voluntary ones. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court*, 76 **Wash. U.L.Q.** 1205, 1256 (1999); David

Drug courts arose to give institutional effect to this new understanding. The first was established in Dade County, Florida in 1989. Its central innovation was to require each client to appear in court regularly, accompanied by the treatment provider's report on the client's performance in its program.²³ This allowed the judge to impose penalties for infractions if deemed necessary, or to reward good behavior. It incidentally allowed the judge and the treatment court staff to gauge the capabilities of the treatment

Farabee, Michael Pendergast, and M. Douglas Anglin, *The Effectiveness of Coerced Treatment for Drug-Abusing Offenders*, 62(1) **Probation Today** 3 (June 1998); Mccoll, *supra* note , at 496, 500 – 01; Sally L. Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts*, 1 **National Drug Court Inst. Rev.** 43, 45 (1998); Jeffrey Tauber, *Treating Drug-Using Offenders Through Sanctions, Incentives*, **Corrections Today** 30 (Feb. 1994). Although they do not dispute the value of coerced treatment, sympathetic but critical observers of treatment courts caution “that if the percent of coerced patients in treatment centers and self-help groups becomes too high, treatment becomes less effective.” *Drug Courts and Coerced Treatment*, Factsheet 11, www.factadvocates.org/factsheets/facts11.html (visited June 23, 1999). *See also* Franklin G. Miller and Glenn A. Miller, *Mandated Addiction Services: Potential Ethical Dilemmas*, in **Practicing in the New Mental Health Marketplace: Ethical, Legal, and Moral Issues** 169 (Richard F. Small, *et al*, ed. 1998) (describing the ethical issues associated with treating mandated clients).

²³ *See* Hora *et al*, *supra* note , at 481 – 85 (citing Peter Finn & Andrea K. Newlyn, U.S. Dep't of Justice, Pub. No. NCJ-142412, *Miami's "Drug Court": A Different Approach* (1993)).

providers, permitting exclusion of those that were unable to meet report deadlines or to provide sufficient or complete information. Thus, the straightforward device of regular court appearances led naturally to simultaneous monitoring of both clients and treatment providers.

These innovations diffused rapidly. They represented an outgrowth of a series of grass-roots initiatives that emphasized similarly community-based team-oriented approaches in probation and parole agencies as well as community policing programs.²⁴

²⁴ See *Defining Drug Courts: The Key Components*, DCPO Grant No. 96-DC-MX-K001, (Jan. 1997), at 6; See Rottman and Casey, *supra* note , at 13. The approach has also spread to treatment of other disorders, such as mental illness. See Catherine Conly, *Coordinating Community Services for Mentally Ill Offenders: Maryland's Community Criminal Justice Treatment Program 3* (National Institute of Justice Program Focus, April 1999) (<http://www.ojp.usdoj.gov/nij/new.htm>) (visited May 14, 1999) (“MCCJTP brings treatment and criminal justice professionals together to screen mentally ill individuals while they are confined in local jails, prepare treatment and aftercare plans for them, and provide community followup after their release.”) In the case of patients dually diagnosed with drug addiction and mental illness, the stakes may be particularly high, as recent research shows that while mentally ill patients are no more likely to commit acts of violence than the general population, mentally ill drug or alcohol abusers do pose a greater risk of violence than non-mentally ill drug or alcohol abusers. See Henry J. Steadman, *et al*, *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 **Archives of General Psychiatry** 393 (May 1998). *But cf.* Bruce G. Link and Ann Stueve, *New Evidence on*

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By 1994, 42 drug courts had been started in the United States.²⁵ Their notable successes led Congress in 1994 to officialize the process of experimentation under the aegis of the Department of Justice's Office of Justice Programs (OJP).²⁶ Simultaneously, in 1994, personnel affiliated with twelve drug courts formed the National Association of Drug Court Professionals (NADCP).²⁷ And in 1995, "The Drug Court Clearinghouse and Technical Assistance Project (DCCTAP) was established by the [OJP] at the U.S. Department of Justice to assist state and local justice system officials and treatment professionals in addressing issues relating to planning, implementing, managing, and evaluating drug court programs in their jurisdictions. The DCCTAP began operating October 1, 1995 under the direction of The American University."²⁸ Together these institutions link three inter-penetrating processes: (1) diffusion of drug court fundamentals; (2) refinement of those fundamentals in operating procedures and

the Violence Risk Posed by People With Mental Illness, 55 **Archives of General Psychiatry** 403 (May 1998) (noting that studies over longer periods do show a link between mental illness and violence, even absent substance abuse).

²⁵ See *Drug Courts: Overview of Growth, Characteristics, and Results*. Washington, D.C.: U.S. General Accounting Office, GAO/GGD-97-106 (July 31, 1997), p. 8.

²⁶ See P.L. 103-322, 108 Stat. 1796, §§ 50001, 50002 (1994).

²⁷ See NADCP Backgrounder, <http://www.drugcourt.org/backgrnd.cfm> (visited June 29, 1999).

²⁸ Fact Sheet, Drug Court Clearinghouse and Technical Assistance Project, <http://gurukul.ucc.american.edu/justice/factsheet.html> (visited June 29, 1999).

framework rules that reflect best practices; and (3) evaluation of the internal discipline and outcomes of various drug courts.

Diffusion occurs through federal planning grants that require applicants to form implementing teams consisting of at least a “judge, prosecutor, defense attorney, treatment provider, project director, and an individual experienced in research, evaluation, or information system development.”²⁹ These team members (and perhaps others) must attend two OJP training conferences on drug courts, and participate in a training session conducted by a peer mentor.³⁰ Once the teams become familiar with the guidelines of basic practice, they are free to elaborate these as local circumstances require. If they have difficulty in implementation, they can turn to consultants with expertise in the large-scale reorganization that the creation of a drug court may require.³¹ As a condition of the federal awards, grantees must furnish periodic reports on their progress. These reports, together with more systematic evaluations, provide current material for continuing redefinition of the drug court.

Thus, even as diffusion occurs, the principles defining drug courts are re-articulated through continuous exchanges of technical materials (through NADCP and DCCTAP) and periodically (and more emphatically), through the articulation of core standards. Thus, for example, the NADCP convened a meeting of a Drug Courts

²⁹ *Drug Court Grant Program Fiscal Year 1999 Program Guidelines and Application Kit* 21 (available at <http://www.ojp.usdoj.gov/dcpo/kits.htm>) (visited Aug. 9, 1999).

³⁰ *See id.*

³¹ *See* The Justice Management Institute, JMI Home Page, <http://members.aol.com/jmidenver/> (visited June 29, 1999).

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Standards Committee under a grant awarded by the federal DCPO. The resulting standards, published in 1997, describe ten key components of drug courts, including providing an integrated, non-adversarial program of treatment and monitoring in which the judge plays a central role and the impacts of programs are continuously evaluated. A typical component states a principle and its motivating ideal in the drug court philosophy, followed by a “benchmark” consisting of minimal operating procedures for implementing the principle. For example, Key Component 6 states generally, “A coordinated strategy governs drug court responses to participants' compliance.”³² It states further:

Purpose: An established principle of AOD treatment is that addiction is a chronic, relapsing condition. A pattern of decreasing frequency of use before sustained abstinence from alcohol and other drugs is common. Becoming sober or drug free is a learning experience, and each relapse to AOD use may teach something about the recovery process.

Implemented in the early stages of treatment and emphasized throughout, therapeutic strategies aimed at preventing the return to AOD use help participants learn to manage their ambivalence toward recovery, identify situations that stimulate AOD cravings, and develop skills to cope with high-risk situations. Eventually, participants learn to manage cravings, avoid or deal more effectively with high-risk situations, and maintain sobriety for increasing lengths of time.

* * *

³² Defining Drug Courts: The Key Components, DCPO Grant No. 96-DC-MX-K001, (Jan. 1997), at 23.

A participant's progress through the drug court experience is measured by his or her compliance with the treatment regimen. Certainly cessation of drug use is the ultimate goal of drug court treatment. However, there is value in recognizing incremental progress toward the goal, such as showing up at all required court appearances, regularly arriving at the treatment program on time, attending and fully participating in the treatment sessions, cooperating with treatment staff, and submitting to regular AOD testing.³³

The corresponding performance benchmarks reduce these general ideas to operating routines. Thus, the first two performance benchmarks under Key Component 6 state:

1. Treatment providers, the judge, and other program staff maintain frequent, regular communication to provide timely reporting of progress and noncompliance and to enable the court to respond immediately. Procedures for reporting noncompliance are clearly defined in the drug court's operating documents.

2. Responses to compliance and noncompliance are explained verbally and provided in writing to drug court participants before their orientation. Periodic reminders are given throughout the treatment process.³⁴

These benchmarks can be further particularized as illustrative suggestions for practice. Thus, the third performance benchmark of key component six, suggests, among other practices, “[c]eremonies and tokens of progress, including advancement to the next

³³ *Id.* at 23

³⁴ *Id.* at 24.

treatment phase” and “[r]educed supervision” as means of rewarding progress, as well as “[d]emotion to earlier program phases” and “[c]onfinement in the courtroom or jury box” to sanction noncompliance.³⁵

As of July 1, 1999, nearly 400 drug courts for adult offenders were operating in the United States, and over 250 were in the planning stages.³⁶ Their structure and operations, as reflected in the principles and benchmarks, are under continuous review through an extensive program of local and pooled evaluation. The evaluations are of two kinds. Process evaluations register the progress of individual drug courts toward achieving the organizational goals they set for themselves, for instance, providing timely and rich information on client behavior or instituting comprehensive and reliable programs of testing for drug use. Impact evaluations, on the other hand, measure the effect of drug courts in achieving their overall targets, such as reducing recidivism, re-arrest, drug use, and fiscal outlays.

³⁵ *Id.* at 24.

³⁶ There were 195 adult drug courts that had been in existence for two or more years and 185 drug courts that had become operational more recently. There were another 277 adult drug courts in the planning stages as well as 88 operational and 79 planned juvenile and family drug courts. Telephone conversation between Michael C. Dorf and Jill Beres, Policy Specialist, Drug Court Programs Office, National Association of Drug Court Professionals (July 1, 1999). *See also* OJP Drug Court Clearinghouse and Technical Assistance Project Summary of Drug Court Activity by State (July 1, 1999) (on file with authors).

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The cumulative impact of this attention to process can be seen in the continual refinement of local procedures that implement framework principles and performance benchmarks in the light of present experience. Consider the two-step process developed by the Brooklyn Treatment Court to implement the key component requiring client compliance with treatment. The first step is to decide what set of rules applies to the particular circumstances of each eligible client.³⁷ In consultation with the client, her attorney, the prosecutor, and the judge, treatment court personnel make an initial assessment and each client is placed in one of seven “treatment bands” that determine the frequency of urine testing, program attendance, court appearances, and case management meetings.³⁸ Successful clients satisfy milestones – set at different points in different treatment bands – that measure their progress through three phases – also having different boundaries depending on the treatment band – culminating in graduation.³⁹

Given the understanding of addiction as a chronic relapsing disease, the second step is to determine what happens to clients when relapse or other rules infractions occur.

³⁷ There are three absolute criteria for a client to be eligible to have her case heard in Brooklyn Treatment Court: (1) It must originate within the court’s geographical jurisdiction; (2) the client “cannot have any violent felony conviction or violent charge;” and (3) the treatment court clinical staff must determine that the client is in fact a substance abuser. Revised Memorandum from Valerie Raine, Brooklyn Treatment Court Project Director, to Criminal Defense Practitioners 2 (Sep. 8, 1998).

³⁸ Brooklyn Treatment Court, *Court Treatment and Supervision Structure 2* (Revised Sep. 12, 1998).

³⁹ *See id.* at 4 – 5.

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Because relapse is expected, only the most egregious violations result in termination. These violations are arrest for a violent offense or other felony that, in the district attorney’s judgment, warrants disqualification, and refusal to enter treatment. For other violations, case managers, or in the event of repeated or more serious violations, the court, imposes one of a set of graduated responses. Below we reproduce the responses to two categories of infractions:⁴⁰

Case Management Responses to Individual Infractions

<p>Case Management (or treatment program) will respond to Each of the following individual infractions:</p> <ul style="list-style-type: none">• Dirty or Missed Urine• Missed Appointment• Rule Breaking at Program (not resulting in termination)• Late Arrivals at BTC	<ul style="list-style-type: none">• Increased Case Management Visits and/or Urine tests• Mandatory TRP or Step-Up Attendance• Mandatory Workshop Attendance• Detox/Rehab• Mandatory NA/AA• Journal Writing• Loss of Privilege at Program (Contract, Learning Experiences, etc.)
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⁴⁰ *Id.* at 10 – 11. We omit the similar tables for “A” and “C” infractions. Both “TRP,” which refers to the “Treatment Readiness Program,” and Step-Up are educational programs. “NA” is Narcotics Anonymous. A client sanctioned with the “Penalty Box” must spend several hours observing the Treatment Court from the jury box. The experience is designed to show the client that the court will impose jail time for further infractions and to provide positive role models as well.

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Infractions	Court Imposed Sanctions	Mandatory Action
<p>Every “B” infraction will result in an immediate court appearance and court imposed sanction.</p> <ul style="list-style-type: none"> • Abscond or Termination From Program with <u>Voluntary</u> Return to Court • Substituted or Tampered Urine 	<p>1st Sanction</p> <ul style="list-style-type: none"> • 2 Days Penalty Box • Journal/Letter writing • Essay • Detox/Rehab • Phase Setback <p>2nd Sanction</p> <ul style="list-style-type: none"> • 1 – 7 Days Jail • Detox/Rehab <p>3rd Sanction</p> <ul style="list-style-type: none"> • 8 – 14 Days Jail <p>4th Sanction</p> <ul style="list-style-type: none"> • 15 – 28 Days Jail <p>5th Sanction:</p> <ul style="list-style-type: none"> • Failure: Alternative Sentence 	<p>At Every Sanction</p> <ul style="list-style-type: none"> • Full Band Review • Return to Beginning of Phase

A similar set of tables sets forth rewards for success – such as journals, certificates, courtroom applause, opportunities to participate in the Speaker’s Bureau or recreational events, and ultimately, graduation resulting in the vacation of the initial guilty plea and the dismissal of the case.⁴¹

It might be tempting to think of the treatment bands and the schedules of sanctions as similar to the Federal Sentencing Guidelines, devices aimed at greatly reducing the discretion of judges in dealing with individual cases. However, the resemblance is quite superficial for two reasons. First, as the range of options illustrates, except in cases of complete failure or success, the treatment court judge (or in the case of less serious infractions, the case manager) has considerably more discretion than does a

⁴¹ See *id.* at 12 – 17.

judge working within a determinate sentencing scheme. The point of the finely tuned bands, phases, penalties, and rewards is to crystallize the experience of judge, clinical staff, and treatment providers, so that, to the extent possible, knowledge about what works can be formalized and rendered accessible, rather than remaining tacit. Second and more importantly, whereas the application of sentencing guidelines marks the termination of a traditional court's involvement in an offender's punishment, the system of bands, phases, penalties, and rewards serves as the mechanism by which the treatment court involves itself in the client's treatment. It is understood, moreover, that this system of categorization may itself require revision from time to time. Thus, for example, the Brooklyn Treatment Court staff are contemplating introducing finer gradations in the transition from intensive residential therapy to outpatient care (band 6 to band 5) because under current criteria it is difficult for the surprisingly large number of severely addicted clients to improve their formal position despite substantial progress within a residential program.⁴²

Treatment courts evaluate outcomes by frequently updated assessments of the their performance as compared with other responses to drug offenders as well as their own goals. The most comprehensive available study, undertaken by Steven Belenko of the National Center on Addiction and Substance Abuse at Columbia University, is characteristically a review of assessments of drug court courts that have already assessed

⁴² Telephone Conversation between Alesia Donner and Michael C. Dorf (July 7, 1999).

themselves within their brief existence.⁴³ Belenko's 1998 study updates a 1997 United States General Accounting Office (GAO) report that found that there were insufficient data to reach a definitive conclusion as to whether drug courts reduce recidivism and relapse.⁴⁴ Belenko considered a wider range of published and unpublished assessments than the GAO study.⁴⁵ His findings were as follows:

[1] Despite the different drug court statutes, jurisdictional differences, methods used by evaluators and the limitations of some data, a number of consistent findings emerge from available drug court evaluations.

* * *

[2] Retention rates for drug courts are much greater than the retention rates typically observed for criminal justice offenders specifically, and treatment clients in general.

* * *

⁴³ Steven Belenko, Research on Drug Courts: A Critical Review, www.drugcourt.org/docs/research.htm (visited June 28, 1999), originally published in Vol. 1(1) *Nat'l Drug Ct. Inst. Rev.* (Summer 1998).

⁴⁴ See *id.*, text accompanying note 11; *Drug Courts: Overview of Growth, Characteristics, and Results*. Washington, D.C.: U.S. General Accounting Office, GAO/GGD-97-106 (July 31, 1997), p. 7 ("GAO . . . could not draw any firm conclusions on the overall impact of drug court programs").

⁴⁵ See Belenko, *supra* note __, text accompanying note 13.

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[3] Although it is generally thought that drug courts target "first-time offenders" many drug court participants have substantial criminal histories and many years of substance abuse.

* * *

[4] Drug courts provide closer, more comprehensive supervision and much more frequent drug testing and monitoring during the program than other forms of community supervision.

* * *

[5] Drug courts generate savings, at least in the short term, from reduced jail/prison use, reduced criminality and lower criminal justice costs.

* * *

[6] Drug use is substantially reduced while offenders are participating in drug court.

* * *

[7] Criminal behavior is substantially reduced while the offenders are participating in drug court.

* * *

[8] Based on more limited data and to a lesser but still significant extent, drug courts reduce recidivism for participants after they leave the program.⁴⁶

Moreover, some drug courts that did not show initial success have improved their performance markedly.⁴⁷

⁴⁶ Id. (Summary)

⁴⁷ See *id.*, text accompanying notes 12 and 13.

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Other assessments of treatment courts' efficacy have ranged from enthusiastic appraisals of specific programs⁴⁸ to cautious calls for more data. Thus, Belenko notes that future studies should collect more post-program data, track outcomes other than re-arrest, quantify effects of specific variations in program design, and develop more informative comparisons.⁴⁹ These valid criticisms, along with self-reflection, have inspired a national impact evaluation currently being conducted by the National Institute of Justice.⁵⁰ Applicants for federal enhancement grants must be able to track the kind of detailed data necessary for sophisticated outcome (as well as process) measures.⁵¹

⁴⁸ For example, of the 4500 offenders ordered into treatment by the Miami treatment court between 1989 and 1993, by the end of that period "two-thirds had remained in treatment (1,270) or graduated (1,700). Among graduates, the rearrest rate one year later was less than 3 percent, compared to 30 percent for similar drug offenders who did not go through drug court." Hora et al, *supra* note , at 456 (citing Drug Strategies, Cutting Crime: Drug Courts in Action 6 (1997)). Like results have been observed elsewhere as well. See Fact Sheet: Drug Treatment in the Criminal Justice System (August 1998) www.whitehousedrugpolicy.gov/drugfact/treatfact/treat7.html (visited April 18, 1999) (noting the results of studies of treatment courts in Santa Clara, California and Washington, D.C., which showed, respectively, reductions in addiction and in the monetary costs to the criminal justice system).

⁴⁹ See Belenko, *supra* note , (Conclusion).

⁵⁰ See *Drug Court Grant Program Fiscal Year 1999 Program Guidelines and Application Kit*, *supra* note , at 39.

⁵¹ See *id.* at 37.

Consequently, new treatment courts are being designed, and existing treatment courts are being re-designed, with the built-in capacity to produce the outcome measures that will enable evaluation of their performance.

This portrait of treatment courts reveals them to be experimentalist local institutions within an experimentalist national framework, although, as we explain in Part III, important steps remain to be taken before it can be said that the treatment courts have fully exploited the potential of information exchange and pooling as a means of experimentalist learning and regulation. Before describing the missing elements, however, we pause to respond to the objection that treatment courts are not, even in prospect, breaking new ground.

II

The case for seeing treatment courts as experimentalist institutions is straightforward. In addition to the points discussed above, one might note how the judge, prosecutor, and defense attorney take on unaccustomed roles in treatment court.⁵² Prosecutors and defense attorneys accustomed to coming together only to strike bargains at arm's length come to see one another as partners in the delivery of a service. The role

⁵² See Hora, *et al*, *supra* note , at 468 - 69, 476 - 80, 516 - 26 (1999); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court*, 76 **Wash. U. L.Q.** 1205, 1246 - 68 (1998); McColl, *supra* note , at 512 - 15; Judith S. Kaye, *Lawyering For a New Age*, 67 **Fordham L.Rev.**1, 4 (1998); *Developments in the Law: Alternatives to Incarceration for Drug-Abusing Offenders*, 111 **Harv. L. Rev.** 1898, 1917 - 19 (1998).

transformation of the judge is even more dramatic. It is truly remarkable to witness a judge standing and applauding for a confessed criminal, or sincerely inquiring into how he is faring in treatment or in a job – all the while demonstrating a genuine familiarity with the lives of the people before her. (During one session we observed, Brooklyn Treatment Court Judge Ferdinand asked a client why his grandmother was not in the courtroom on that occasion.) Nor does the judge merely take on the roles of social worker, cheerleader, and parental authority figure. She also sheds the role of judge, if judging is understood as the articulation of legal principle or the application of law to fact. The treatment court judge adjudicates no disputed issues – not even as to sentencing. With each client’s complete criminal and treatment record appearing on the judge’s computer monitor, there are no contests to resolve – just inquiries to pose to clients, attorneys, and court staff.

Nevertheless, it is possible to describe treatment courts in quite different terms. Thus, we now contrast our initial sketch of treatment courts as experimentalist institutions with two alternative explanations. The first sees treatment courts as, at best, a transient phase in the life cycle of bureaucratic institutions condemned constantly to alter the balance they strike between efficacy and accountability precisely because they cannot, as a matter of principle, achieve a stable reconciliation of the two. The second explanation entertains the possibility of such a reconciliation, but suggests (although it does not compel) an account of this achievement that rests more on the revivification of traditional forms of professional autonomy than on the emergence of novel institutions.

The view of the treatment courts as a transitory and cyclical phenomenon is rooted in the Weberian idea of hierarchy or bureaucracy as an instrument of the sovereign

will, and the criticism of that form of organization which has become a staple of modern sociology and economics. In the Weberian ideal, the sovereign selects the goals of the organization and appoints officials who partition tasks in a way calculated to achieve them. The subdivision of tasks into a hierarchical set of meshed routines allows for the coordination of complex activities without regard to idiosyncrasies of personality, and simultaneously allows superiors to review the decisions of subordinates closely enough to deter or detect abuses of authority. Thus the same rules that make the hierarchy effective make it accountable.⁵³

The criticism of the Weberian model starts with the idea, alluded to above, that it is generally impossible to specify means and ends with the exactitude that the ideal of the effective and accountable bureaucracy supposes. The reason, again very generally, is that the determination of ends will depend on evolving experience of the efficacy of the means used to achieve them, and vice versa: The knowledge gained in collecting certain kinds of taxes or building certain kinds of cars will shape ideas of what kinds of taxes to collect and cars to build. Changes in goals will then suggest further changes in the means, and yet another reevaluation of purposes. But giving subordinates freedom to modify means and ends on the basis of this kind of reciprocating reevaluation plainly opens the door to abuse. Invited to exercise their discretion, the subordinates may prefer

⁵³ See **Max Weber, Economy and Society: An Outline of Interpretive Society** 956 -73 (Guenther Roth & Claus Wittich eds. & Ephraim Fischhoff et al. trans., 1968). We elaborate the critique of the Weberian view of bureaucracy-as-efficient below. For a representative critique based on bureaucracy's tendency to oppress, see Max Horkheimer and Theodor Adorno, *Dialectic of Enlightenment* (1972).

policies that advance their own self interest (perhaps by favoring the expansion of the part of the bureaucracy or firm most hospitable to their own career interests over the expansion of the departments best suited to the new task). Self-interested manipulations will be hard to detect precisely because the only officials with the knowledge of local detail sufficient to review the suspect choices will be those whose expertise was used to motivate them in the first place.

Ideal and criticism define an antinomy: Hierarchy is both an instrument of complex coordination that cannot be accomplished through the market, but also an obstacle to it. Much of the contemporary economics and sociology of organizations accepts this antinomy as definitive, and focuses correspondingly on ways of mitigating, but not resolving it. Thus an influential theory of the firm, associated with the name of Chester Barnard, sees the “function of the executive” precisely in the harmonization, through managerial discretion, of the purposes of the formal organization defined by rules and the purposes of the informal groups that actually comprise the official hierarchy.⁵⁴ Good managers find ways to enlist the informal structure in the official cause, not least by redefining the latter to reflect concerns of the former. After long excursions through principal-agent and game theory, economists concerned with industrial organization—the problems of the boundaries and internal organization of the firm—are arriving at similar conclusions.⁵⁵

⁵⁴ For an introduction, see generally *Organization Theory: From Chester Barnard to the Present and Beyond* (Oliver E. Williamson ed., 1990).

⁵⁵ See George P. Baker, Robert Gibbons and Kevin J. Murphy, *Informal Authority in Organizations*, **Journal of Law, Economics & Organizations** (forthcoming 1999).

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In the setting of public, as opposed to private organizations, the antinomy of hierarchy is often supposed to lead to even less satisfactory results. In the case of firms, there is, in theory at least, an owner—shareholders or proprietor—who, acting under the pressure of competition, has the motive and capacity to intervene when the organization begins manifestly to favor its own purposes over the officially declared ones. In the case of public institutions, the citizen owners are, again in theory, too removed from responsibility to intervene in the case of bad performance. Bad performance is, moreover, hard to detect, because given exclusive jurisdiction in their own domains, public institutions rarely have to compare the results of their operations with the results obtained by “competitors” in other locales or fields.

Hence, as applied to public institutions, the antinomy of hierarchy is thought to lead not to a continuous managerialist balancing of efficiency and accountability, but rather to a fitful oscillation between institutional forms that in effect sacrifice the one for the other. Under the pressure of a political reaction against the consequences, arrangements are eventually reversed in favor of an equal but opposite imbalance, which endures until a contrary political reaction starts the cycle over again.

The history of policing in the United States in recent decades is a well-rehearsed example of such a cycle: It is presumably prudent for the police to inquire into suspicious behavior before it eventuates in crime. But it is notoriously difficult to frame general rules limiting the police exercise of discretion in the identification of suspects by defining just which behavior is suspicious: At the limit, any deviation from the norms of good conduct held by a local community can appear suspicious to members of that community or their law-enforcement agents. Broad definitions favor efficacy over

accountability, narrow ones do the reverse. Thus in the period before the civil rights movement, when minority communities were politically enfeebled, majority communities often preferred the first solution: Local vagrancy ordinances allowed police forces to determine for themselves whom to count as a deviant and therefore a suspect “outsider,” and to force “offenders” out of the community. In the wake of the civil rights movement courts came to see the discretion granted by such ordinances as providing an unacceptable cover for discrimination against minorities, and the local regulations were declared unconstitutional.⁵⁶

In the 1970s and 1980s the old imbalance was replaced by methods of policing that strictly limited the conditions under which officers could challenge citizens not actively engaged in crime. But the resulting sacrifice of efficacy to accountability in turn produced a (counter)counter-reaction: community policing. In part this “new” approach consists of a return to the old methods of just the sort that the cyclical view would lead us to expect: for example the police use of loopholes in constitutional doctrine to harass suspect populations driving on the roads,⁵⁷ paused at highway busstops,⁵⁸ or merely

⁵⁶ See Debra Livingston, *Police Discretion and The Quality Of Life In Public Places: Courts, Communities, And The New Policing*, 97 **Colum. L. Rev.** 551, 595 - 608 (1997). For a discussion of the pervasive role of race in the American criminal justice system, see **David Cole, No Equal Justice: Race and Class in the American Criminal Justice System** (1999).

⁵⁷ In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court upheld the constitutionality of the “stop and frisk” of a suspect on foot on the basis of a “reasonable suspicion” of dangerous criminality. This standard, which is lower than the probable cause required for

loitering.⁵⁹ And these practices in turn provoke calls for new limits on the new discretion—as in protests against the “profiling” that makes suspects of whole populations defined by little more than skin color, dress, and age.⁶⁰

a full-blown search or arrest, has since been extended to other contexts, such as automobile stops. *See* *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). *See* also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment Reasonableness*, 98 **Colum. L. Rev.** 1642, 1693 – 94 (1998) (arguing that the Court improperly extended *Terry* to cases in which there was no suspicion that the person to be stopped was about to commit a violent or otherwise serious crime).

⁵⁸ *See* *Florida v. Bostick*, 501 U.S. 429 (1991).

⁵⁹ The Court’s recent decision in *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), reaffirms earlier limits placed on vagrancy laws, *see* *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), but the stop-and-frisk authority permits considerable circumvention of those limits. *See, e.g.*, Scott E. Sundby, *An Ode To Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 **St. John’s L. Rev.** 1133, 1135-1138 (1998).

⁶⁰ In *United States v. Sokolow*, 490 U.S. 1 (1989), the Supreme Court held that the fact that the police selected a suspect based on a “drug courier profile” did not negate the existence of the reasonable suspicion necessary for a stop. Civil libertarians have long argued, however, that the use of such profiles often provides cover for, among other things, racial discrimination, *see* David A. Harris, *Essay, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 **J. Crim. L. & Criminology** 544 (1997), a charge that was recently confirmed in New Jersey. *See*

Nevertheless, in selected forms of community policing, some of the new methods can be seen as an instance of an experimentalism that escapes the Weberian tradeoff.. Seen that way, they are a counter-example to the cyclical view,⁶¹ as, we argue below, are drug courts.

Variants of the cyclical view can also be used to account for the extension of government services in uncertain environments. The legislative and administrative rule-making processes are typically too slow, the argument goes, to allow for timely responses to the eruption of new problems such as homelessness or HIV infection.⁶² In these circumstances the state has little recourse but to associate itself with non-government or

Iver Peterson, *Whitman Says Troopers Used Racial Profiling*, **N.Y. Times** A1 (Apr. 21, 1999).

⁶¹ See Dorf and Sabel, *supra* note , at 327 – 32; **Archon Fung, Street Level Democracy: A Theory of Popular Pragmatic Deliberation and Its Practice In Chicago School Governance and Community Policing, 1988-97**, ch. 5, 9 (unpublished doctoral dissertation manuscript) (on file with authors). For a more skeptical view of democratic participation in community policing beat meetings in Chicago and more generally, see Wesley G. Skogan & Susan M. Hartnett, *Community Policing: Chicago Style* (1997); Wesley G. Skogan, *The Impact of Community Policing on Neighborhood Residents*, in *The Challenge of Community Policing* 180 (Dennis P. Rosenbaum ed., 1994) ("There are ample examples of failed experiments and cities where the concept has gone awry.").

⁶² Cf. Matthew McCubbins, Roger Noll and Barry Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 **Va. L. Rev.** 431, 442 (1989).

voluntary organizations, rooted in the concerned communities, in the provision of the necessary services. Operating in the penumbra of government authority, often dispersing public monies, yet operating by rules of their own devising, and responsible, if at all, to the nascent communities from which they themselves emerge, the NGOs represent the clearest possible expression of preference for efficacy over accountability. In time, the argument continues, the NGOs will abuse their discretion. Perhaps they will turn away citizens who are entitled to treatment, but are not unambiguously part of the affected community, or perhaps they will simply lose track of government funds. Government agencies, meanwhile, will acquire passing familiarity with the new problems and may be tempted to provide the requisite services themselves. As a condition of continued cooperation with the state, the NGOs will have to submit to the very straightjacket of rules that made the original bureaucracies incapable of responding to the new problem in the first place. When the next problem erupts, the cycle starts again.⁶³

A final and particularly pertinent example of the cyclical explanation at work concerns the criminal justice system generally, and particularly the vicissitudes of courts for juvenile offenders. The story begins with the Progressives in the early decades of this century. Reformers were convinced that the sentences and other rules of criminal justice applied to adults would, if applied equally to juveniles, destroy whatever possibilities for rehabilitation the latter might otherwise have. The remedy was the creation of a distinct tribunal, the juvenile court, explicitly authorized to deviate from the adult model whenever the deviation would contribute directly to, or clear the space for, therapeutic

⁶³ See **Steven Rathgeb Smith and Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (1993).**

efforts aimed at rehabilitation.⁶⁴ In time this system came to be seen as a morass in which judges and social workers have undue discretion in determining the fate of juvenile offenders,⁶⁵ simultaneously if paradoxically depriving them of their rights as (adult) defendants, while depriving society of the consistent protection of the law against potentially dangerous, if youthful criminals.⁶⁶ These costs seldom appear to be offset by

⁶⁴ See generally **Anthony M. Platt, *The Child Savers: The Invention of Delinquency*** (2d ed. 1977); **Ellen Ryerson, *The Best-Laid Plans: America's Juvenile Court Experiment*** (1978). See also Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing The Legal Order: The Case for Abolishing the Juvenile Court*, 69 **N.C. L. Rev.** 1083, 1098 (1991) (noting the distinction between juveniles and adults).

⁶⁵ In addition to the discretion exercised by juvenile court judges, the determination whether to try a particular juvenile as an adult is often arbitrary, either because it is dictated by rigid statutory criteria or because it is not. See Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, **Notre Dame J.L. Ethics & Pub. Pol'y** 267 (1991) (preferring discretion as the lesser evil).

⁶⁶ Arguments that juvenile courts “coddle” offenders are familiar from public discourse. For a statement of the view that juvenile courts neglect juvenile defendants’ need for adversarial representation, see Ainsworth, *supra* note , *passim*. For an effort to connect the drug court movement to this debate, see Boldt, *supra* note , at 1269 – 86. For an interesting counterview that emphasizes a different conception of the defense attorney’s role, see Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of*

gains in rehabilitation. No wonder that the system is seen as a failure, and that further reform is likely to go in the direction of reincorporating juvenile offenders into the adult system.⁶⁷

In the light of these experiences, and the view of the cyclical oscillation between efficacy and accountability in general, the prospects for treatment courts appear bright in the near term, and dim for the long run. Thus the current enthusiasm for and rapid diffusion of treatment courts recalls the salad days of the juvenile system, or the successful, freewheeling period of the initial provision of services to the homeless and the HIV-infected population by NGOs. But just wait, this reading of the history admonishes: In time the protests against the abuse of discretion will mount, and so outweigh any gains in efficacy that the public will eventually insist on a return to accountability by way of the reimposition of bureaucratic methods and fixed (harsh) penalties.

This pessimism rests, we think, on a false dichotomy between accountable acts, so closely aligned with the bright-line rules authorizing them that there can be no question of their legitimacy, and discretionary acts so dependent on the particular contexts of the situation in which they were performed that there can be no hope of legitimizing them. This distinction—a legacy of the old, stalled conflict between the Weberian ideal of bureaucracy and its critics—overlooks the existence of a category of knowledge which

Lawyers in Interviewing and Counseling the Child Client, 64 **Fordham L. Rev.** 1655 (1996).

⁶⁷ See, e.g., H.R. 1501 (approved by the House of Representatives, June 20, 1999) (giving the power to try a juvenile as an adult to prosecutors rather than judges and stiffening penalties for juveniles convicted of firearms, explosives and drug crimes).

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does not admit of summary as a general rule for all cases, yet is a much more productive guide to behavior and reform than a mere collection of nearly ineffable expressions of local experience. The pooled experience of actors undertaking similar activities and reporting on their intentions and progress is an example of just such knowledge. Taken together, the experiences define a range of possibilities that permit fine-grained distinctions among, on the one hand, irresponsible acts (that duplicate efforts that have repeatedly failed) and caprice (where measures are undertaken with scant attention to what the record suggests about the chances of success), and on the other hand, genuine experiments (where analysis of previous failures suggests the possibility of a new demarche.)

Insofar as treatment courts and other experimentalist institutions rely on such pooled information for self reform, they escape the tradeoff between efficacy and accountability, becoming more effective precisely by improving the quality of the very information that also makes them more accountable. More generally, in anticipating the possibilities that experiments growing out of the choice of means can lead to a redefinition of ends, experimentalist organizations make a constitutive principle of—and thereby subject to public discussion and control—the dynamics of change that Weberians and their critics regarded as the dark, disruptive secret of formal coordination. In this sense the dedication noted above of drug courts to documenting their processes and to defining and disseminating best practices is best understood not as an effort to write a definitive rulebook but rather as a method of using self-explication as a prod to

continuing self examination and revision. We will see below how this process can be applied more fully than it currently is to the institutions that drug courts monitor.⁶⁸

This discussion of the formally communicable and inherently inter-disciplinary or open character of the pooled experience on which treatment courts and other experimentalist institutions depend helps us, finally, set these organizations in relation to, and distinguish them from related entities: the professions. Our purpose here goes beyond analytic refinement. The construction of treatment courts has gone hand in hand with the growth of the National Association of Drug Court Professionals, whose title suggests that the architects of the new system legitimate their efforts as an expression of a common professional commitment, but a commitment to a novel, imprecisely defined and perhaps anomalous profession.⁶⁹ An indication of the similarities and differences between experimentalism and professionalism will further resolve the contours of the emerging institution.

First the similarities. Like experimentalist organizations, and unlike bureaucracies, the professions rely on decentralized decision making. Schooled in the background knowledge of the profession (e.g., legal, medical or engineering), and practiced in its application through the resolution of countless concrete cases, professionals, like craft workers, are defined by their ability to bring the principles embodied in certain general problem-solving techniques to bear in particular contexts. In doing this they may consult with colleagues; but to defer to expert superiors is to jeopardize their claim to professionalism. Furthermore, again like experimentalist

⁶⁸ See *infra*, Part III(A) (discussing “relapse reports”).

⁶⁹ See <http://www.drugcourt.org/> (visited May 6, 1999).

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organizations and unlike bureaucracies, professionalism acknowledges the interpenetration of means and ends. “Clinical” evidence, the experience derived from the treatment of disease in living patients, can come to redefine the understanding of the pathology of the disease itself.

But now we come to two closely related differences. First, the decentralized decisionmaking within professions occurs inside relatively closed “jurisdictional” boundaries. The same corpus of scientific understanding and practical problem-solving skills that give professionals their autonomy mark the profession as a whole off from other, even closely neighboring disciplines and occupations. These distinctions are reinforced by the formal mechanisms of self governance including, especially, certification of professional training and licensing of practitioners by which the professions connect control over expertise to control over the labor markets relevant to their economic situation. Cooperation among professions, like cooperation among crafts, is consequently always fragile. Hence, the notion of “treatment court professionals” is aspirational if not self-contradictory because it suggests the possibility of a meta-profession whose members are somehow able to overcome the barriers that have thus far separated them by declaring adherence to a common, as yet unfinished institution, the drug court itself. In fact, in order to become a reliable basis for a profession, the treatment court would have to leap past the experiments by which it is currently defining

itself, and suppose a fixity of purpose and boundaries which would belie the openness of its exploratory activities.⁷⁰

Experimentalist institutions, in contrast, use constant exploration of their relation, at the boundary, with other institutions, as one means among others, of continually re-interpreting core elements of their task. Understood this way, the collaboration between the criminal justice system and the world of addiction treatment is taking place through the treatment courts and has already begun to transform both. Further, as we will see below in the discussion of aftercare, there is every reason to think that associations with other areas of professional activity will result in further transformations of all those concerned.

The second difference between professionalism and experimentalism goes to the character of the pooled expertise that results from decentralized decisionmaking and the relation of this knowledge to the organizational relation between means and ends.

⁷⁰ The NADCP's own literature recognizes that it is more aptly described as an organization that includes members of a variety of professions, rather than a professional organization in the conventional sense:

The National Association of Drug Court Professionals (NADCP) is the principal organization of professionals involved in the development and implementation of treatment-oriented Drug Courts. Organized in 1994, its members include over 3000 judges, prosecutors, defense attorneys, treatment providers and rehabilitation experts, law enforcement and corrections personnel, educators, researchers, and community leaders.

<http://www.drugcourt.org/backgrnd.cfm> (visited May 6, 1999).

Precisely because professions tend to operate within relatively narrow boundaries, much, indeed most clinical knowledge is transmitted informally (if at all) through direct participation in common projects or anecdote. Put another way, this knowledge is regarded as tacit in the sense that it resists any freestanding articulation. This is particularly true in the case of professions such as law and social work where causal models can seldom be brought to bear on actual problems, and where contextualized decisionmaking on the basis of accumulated experience is at a premium. Thus, it has been a commonplace for nearly a century that law school training leaves graduates largely unprepared for the actual practice of law; and yet the profession's response is to leave things as they are rather than to do what is, from the conventional professional perspective impossible, namely, to capture the seemingly inevitably tacit principles of practice. Nor does the emergence of clinical legal education (yet) challenge this view. On the contrary, few people in the legal academy could possibly imagine that the clinical practice of law could do anything but induct students into the professional mysteries,⁷¹ and practicing professionals are only just beginning to look to law school clinics as the Archimedean point from which to transform legal education.⁷²

⁷¹ Teachers of clinical law courses, unlike clinicians in many other professions, are usually disposed to accept their activities as essentially pedagogic (albeit providing a more practical, and thus, it is argued, more effective introduction to the legal world), as opposed to investigatory (uncovering in practice possibilities neglected in theory).

⁷² For a suggestion along these lines, see Report of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap (commonly known as "The McCrate Report") (1992).

In contrast, the knowledge generated by experimentalist institutions is conceived from the start as the vehicle for comparisons with those undertaking like activities or for coordination with those undertaking complementary ones. It is therefore formalized in the limited but crucial sense of being fully enough specified and transmissible to provoke discussion with parties that did not immediately participate in its generation. However far such knowledge may be from science understood as a body of foundational or even very deeply entrenched basic principles, it is also sufficiently far from *tacitness* as to allow for forms of accountability that keep the activity of particular groups of experts open to challenge from groups with other specialties and the lay public alike. In this sense, the open boundaries of experimentalist institutions and the articulability of the knowledge they generate can be thought of as a radicalization of the coordinated decisionmaking expertise which gives professions the suppleness they enjoy with respect to bureaucracy.⁷³

⁷³ This is not to say that experimentalism should be conceived as in any way an outgrowth of professionalism, for the attitudes and procedures it requires can be found outside the professions. Consider technicians. Despite low status and low pay relative to professionals, the demands of the job lead technicians to “value independent thinking, flexibility, and the other attributes of a scientist.” Stephen R. Barley and Beth A. Bechky, *In the Backrooms of Science - The Work of Technicians in Science Labs*, 21(1) **Work and Occupations** 85, 97 (Feb. 1994). Much more than mere helpmates of professionals, technicians “experience their work largely as the management of trouble.” *Id.* at 91.

Consider transformations currently taking place within social work, the profession most closely associated with drug treatment. In the old model, the aspiring social worker studies a body of knowledge – in this case what is known about the human life cycle.⁷⁴ In the new model – as typified by the Western Regional Center for the Application of Prevention Technologies⁷⁵ – prospective counselors and others learn how to work with and learn from those engaged in a wide range of complementary activities. Thus, in this new conception, a profession consists of a loosely defined subject matter, a set of core skills, and generalized partnering disciplines. The very slipperiness of the resulting disciplinary boundaries reveals how starkly such an approach contrasts with the traditional conception of a profession.⁷⁶

⁷⁴ The classic text is **Charlotte Towle, Common Human Needs** (rev. ed. 1987).

⁷⁵ <http://www.unr.edu/unr/colleges/educ/capta/prev/bestprac.htm> Visited July 2, 1999

⁷⁶ For efforts to come to grips with these changes (as of the mid-1990s) while retaining the traditional core conception of a profession as relatively closed and defined by its subject matter and specific skills set, see the essays collected in **New Relationships in the Organized Professions** (Robin Fincham, ed. 1996). The standard text in the field defines professions as “exclusive occupational groups applying somewhat abstract knowledge to particular cases.” **Andrew Abbott, The System of Professions: An Essay on the Division of Expert Labor** 8 (1988). Abbott emphasizes that the internal structure and development of professions depends on their relations with other professions and divisions of labor, *see id., passim*, a point as likely to be true of the new, more fluid conception of professions we propose as of the older model.

Finally, although we do not pursue the point here, a similar blurring of roles is occurring in the private sector outside of the helping professions. In private firms, the distinction between managers who conceive and workers who execute is breaking down. Teams emerge in which members have responsibility for setting goals and choosing the means for executing them. This same process breaks down the distinctions between separate disciplines, as teams combine expertise, as and when the pursuit of changing goals requires that they do so. Indeed, much of the language of benchmarking, collaborative program design, and teamwork that we see in the drug courts is drawn from experience in the corporate sector.⁷⁷ The diffusion of these new methods internationally and across different sectors of the economy and between the economy as a whole and the public sector suggests their broad potential as instruments for problem solving under conditions of complexity. This potential in turn gives added force to our claim that the development of the forms of collaboration typical of treatment courts are institutional novelties and not a return to a temporarily suppressed tradition.

III

The exposition thus far makes plausible the claim that treatment courts have begun to incorporate new principles of collaboration that circumvent the conventional tradeoff between flexibility and accountability. In this Part, we take account of two sorts of criticisms. First we address the concerns of those who take drug courts as they are to be a substantial improvement over the previous response of the criminal justice system to the problem of addiction, but think that applying their own principles more consistently

⁷⁷ See Dorf and Sabel, *supra*, note , at 292 - 314.

and rigorously than they do, drug courts could be made substantially better. Then we address the concerns of some kinds of civil libertarians who believe that drug courts are inherently a menace to the rights of citizens against the state, and that making them better at what they do will only make them more menacing to liberty.

A. Supplying Missing Pieces

Viewed in the light of their own ambitions and animating principles, a first limit to the drug courts' performance is their scant monitoring of treatment providers. Moreover, evaluations of drug courts seldom ask whether they are systematically evaluating treatment providers. Drug court officials with whom we spoke were attentive to the problem, but few had concrete ideas about how to solve it, beyond, for example, the formation of advisory councils where court personnel and treatment providers periodically meet to exchange ideas.⁷⁸

It might seem that this problem is intractable given the diversity of the treatment providers that are likely to be active in any large jurisdiction. For example, the Brooklyn Treatment Court places clients in well over a hundred distinct facilities in the metropolitan New York area.⁷⁹ However, if national entities are capable of evaluating hundreds of different drug courts operating under diverse circumstances, it should be possible for drug courts themselves to develop provisional measures of treatment

⁷⁸ Telephone Conversation between Alesia Donner and Michael C. Dorf (July 7, 1999).

⁷⁹ See Brooklyn Treatment Court Network of Treatment and Social Service Providers 19 (Aug. 5, 1998) (listing 132 providers).

providers' effectiveness, along with mechanisms for continual refinement of the measures themselves.

One candidate measure is a natural extension of data collection that treatment courts already undertake. In exchange for receiving mandated clients, treatment providers must supply the court with regular and detailed reports on each client. These reports have great potential to improve treatment itself. "For years, drug abuse researchers have known that when addicts are exposed to drug-related cues, such as the sight of drug paraphernalia or even a drug-using companion, these stimuli can spark powerful drug craving."⁸⁰ Counselors emphasize to clients the importance of identifying circumstances that present risks of relapse, and developing strategies to avoid using drugs when these circumstances arise.⁸¹ In this sense, treatment providers' reports to the court

⁸⁰ Neil Swan, *NIDA Brain Imaging Research Research Links Cue-Induced Craving to Structures Involved in Memory*, http://165.112.78.61/NIDA_Notes/NNVol11N5/CueInd.html (visited July 2, 1999). See also Brian Carlson, *Brain Imaging: Showing Drug Craving Links to Memory Centers*, 13 **Advanced Imaging**, No.10 (October 1, 1998); Joanna S. Fowler and Nora D. Volkow, *PET Imaging Studies in Drug Abuse*, 36(3) **Journal of Toxicology: Clinical Toxicology**, (April 1, 1998).

⁸¹ See Kathleen M. Carroll, *A Cognitive-Behavioral Approach: Treating Cocaine Addiction*, National Institute on Drug Abuse NIH Publication Number 98-4308 (April 1998)

15 – 17 (listing the kinds of questions therapists should ask in helping each client assess his or her risk factors) (Report available at

may be understood as “relapse reports” that serve a dual role: they are therapeutic devices and also instruments of institutional reform. From one viewpoint, this report is a customized treatment plan, elaborated by the client in collaboration with his counselor. Each relapse indicates gaps in their joint knowledge of the patient’s vulnerability. In time, these gaps are reduced to the point where relapses are infrequent and brief because the patient both knows how to avoid catastrophic situations and how to contain smaller breakdowns when they occur.

At the same time, the relapse report allows assessment of the counselor in relation to others at the same facility, and of the facility with respect to peers. Counselors whose patients experience a disproportionately high number of surprising relapses – those that occur without prior warning by incursion into life situations that the plan marks off as potentially hazardous – are plainly failing in their task of helping the patient to prepare sufficiently detailed and accurate assessments and plans. Facilities that tolerate a disproportionately high number of inattentive counselors are in turn failing in their managerial tasks. Thus the very instrument that renders the program useful to the particular patient can be used to make the program accountable to the broader public it

<http://www.nida.nih.gov/TXManuals/CBT/CBT1.html>) (visited May 7, 1999); Alan J. Budney and Stephen T. Higgins, *A Community Reinforcement Approach: Treating Cocaine Addiction*, National Institute on Drug Abuse NIH Publication Number 98-4309 (April 1998) 55 (“if cocaine use occurs, therapists should encourage patients to analyze [triggering] events to determine how to avoid using in similar situations in the future.”) (Report available at <http://www.nida.nih.gov/TXManuals/CRA/CRA1.html>) (visited May 7, 1999).

serves. Extension of the existing national monitoring regime of the drug courts to include evaluation of their capacity to evaluate treatment providers by this and other metrics would spur them to make full use of the opportunities that their constant collaboration with these latter provide.

A second missing piece in the emerging drug court system concerns relations to the providers of complementary services. The clients of the drug court typically suffer from problems beyond those which put them within the court's jurisdiction. These other problems can include: mental illness; physical illness (itself including H.I.V. infection or AIDS); alcoholism; educational deficits; spotty or no employment record; inadequate housing or homelessness; and child or spousal abuse. Both residential and outpatient treatment providers therefore recognize that drug treatment must be coordinated with a variety of other services, some of which must begin when the clients enter drug treatment and others of which can be deferred until they are about to leave it. These complementary services are all grouped together under the somewhat misleading rubric of aftercare.

In coordinating their activities with the providers of aftercare services, the drug treatment providers face a characteristic dilemma. If the aftercare provider takes no account of the particular needs of drug abusers, the service is unlikely to be effective. If, on the other hand, services such as vocational training or housing are so specialized to the needs of drug using clients that they are in effect part of the treatment program, they may create a sheltered world in which clients receive no help in preparing themselves for independent existence in the larger society. The task for drug treatment programs is to find some form of collaboration with aftercare providers that is specialized enough to

avoid the first trap without being so specialized as to fall into the second. Caseworkers and managers of treatment programs with whom we spoke were well aware of this problem. A few thought that they could solve it by providing the requisite aftercare services themselves,⁸² but most were resigned to reliance upon independent aftercare providers, chosen on the basis general reputation and occasional site visits.

Here too it is easy to imagine extensions of the monitoring regime that would leave ample room for experimentation while making the results of conspicuous successes and failures generally available to the whole system of treatment courts. The most obvious would be for treatment courts to evaluate and rank the aftercare providers with whom they work, based on a series of commonly agreed-upon performance metrics. This would ensure at a minimum that the second tier treatment providers were monitored, in addition to providing an additional vantage point for review of the organizational performance of first tier providers and drug courts themselves. Eventually it should be possible to make more systematic judgments about the whether drug treatment providers are better advised to integrate forward into the provision of aftercare or to contract for such services with independent providers.

B. Criminalization and Civil Liberties

⁸² For example, in 1999 Phoenix House opened a “Career Academy” in Brooklyn, combining “long-term residential treatment, intensive job training, and comprehensive medical and dental services on one site.” Phoenix House Promotional Brochure (on file with the authors).

The monitoring mechanisms we have described address most but not all of the concerns about the civil liberties of those subject to the jurisdiction of treatment courts. The easily addressable concerns include persecution or inadequate service by a treatment provider and errors in judgment by the court, whether malicious or not. Above we argued that the experimentalist articulation of local knowledge meant that there was no necessary tradeoff between efficacy and accountability. Frequent contact with the court ensures that abusive conditions within treatment programs will usually be detected and corrected; certainly treatment providers are subject to much more rigorous oversight than we are accustomed to seeing in the case of other bodies that may abuse individual rights, such as police forces and prisons. And the emerging national system of inter-local comparisons subjects the judicial overseers themselves to a form of oversight at least as effective as conventional case-by-case appellate review. Hence, the form of monitoring characteristic of treatment courts is well-suited for detecting and preventing violations of the rights of persons subject to their jurisdiction.

But there is a more fundamental civil libertarian objection concerning the treatment court. Some readers, particularly those sympathetic to the “harm reduction” position,⁸³ may suspect that drug courts take for granted, and indeed may reinforce, a

⁸³ The harm reduction movement distinguishes itself from more traditional approaches to addiction in rejecting the view that abstinence must be the goal for all addicts. See Robert W. Westermeyer, *Reducing Harm: A Very Good Idea*, <http://www.cts.com/crash/habtsmrt/harm.html> (visited July 12, 1999). As we have seen, however, mainstream treatment providers themselves have, in their acceptance of relapse, adopted much of the pragmatism of harm reduction. The most significant remaining

generally misguided approach to drug addiction: They willfully overlook the possibility that criminalization of drugs itself causes much of the harm associated with their use. From this vantage point, the most charitable interpretation of drug courts is as an institution that makes the best of a bad situation. A less charitable interpretation sees them as actually making the situation worse by creating incentives for the extension of the criminal justice system and entrenching criminalization. Critics may fear that some combination of patronizing officials, who believe they know what is best for addicts, and

difference concerns the use of methadone. Harm reducers typically advocate methadone maintenance at fairly high doses as a permanent solution to heroin addiction, at least for some addicts, *see, e.g., id.*, and there is some clinical evidence to support this approach. *See Eric C. Strain et al, Moderate- vs High-Dose Methadone in the Treatment of Opioid Dependence: A Randomized Trial*, 281 **JAMA** 1000 (1999) (finding that high dose methadone treatment led to significantly greater reduction in illicit opioid use than moderate dose treatment). By contrast, providers accepting placements from treatment court either require abstinence immediately following detoxification or utilize methadone solely as a transitional treatment en route to abstinence. *See Brooklyn Treatment Court, Court Treatment and Supervision Structure 3* (Revised Sep. 12, 1998) (setting forth requirements for treatment band M). However, in recent years, these divisions have become less sharp, as “[t]he general maturation of the drug treatment field in both theory and practice has gradually fostered an integrative perspective across different drug-treatment modalities.” *See George De Leon, Graham Staines, and Stanley Sacks, Passages: A Therapeutic Community Oriented Day Treatment Model for Methadone Maintained Clients*, 27(2) **J. Drug Issues** 341, 342 (1997).

treatment providers seeking to maintain a steady flow of clients will together over-extend the tentacular reach of the criminal justice system.

In our view, this line of argument understates the harms associated with addiction while incorrectly equating coercion with criminalization. As to the harms of addiction independent of the legal status of the abused substance, consider alcoholism. No one disputes that chronic alcohol abuse entails physical degradation of the alcoholic and incalculable psychological and material burdens for his family, friends, and associates. Middle-aged heroin addicts maintained on methadone may be less burdensome to themselves and others than untreated alcoholics. But there is currently no analogous replacement treatment for (alcohol or) non-opioid addictive drugs such as cocaine.⁸⁴ Furthermore, it is difficult to imagine that the profound abdication of self-control inherent in addiction will not have devastating side effects on the self esteem of the addict and through at least that connection, on the entire tissue of his or her relations.

The insistent decriminalizer may be assuming that treatment within the criminal justice system is only coercive and that treatment outside of the criminal justice system is likely to be non-coercive. But we have already seen how treatment courts use coercion as

⁸⁴ Animal studies indicate that gamma vinyl-GABA (“GVG”), commonly used to treat epilepsy in Europe under the name Vigabatrin, and awaiting approval in the United States as Sabril, may be useful in treating cocaine (as well as nicotine) addiction. See <http://www.pet.bnl.gov/GVG.html> (visited Aug. 9, 1999). However, it has not yet been proven safe and effective for humans. See Jamie Talan, *A Clamor From The Desperate / Hundreds Want Role in Human Tests of Anti-Addiction Drug*, **Newsday** C8 (Aug. 25, 1998).

only one of many tools in helping the addict cope with his addiction. Now consider how the forms of coercion associated with drug courts would likely emerge in treatment programs dealing with legal drugs of abuse. Recall the characterization of addiction as a chronic relapsing disease. Despite the diversity of treatment alternatives, it is now nearly conventional among treatment providers that effective treatment combines rewards for successes and graduated sanctions for failures. Prison may be an especially onerous sanction but it exists on a continuum that includes shame and exclusion from the fellowship of others. Drug courts, for their part, recognizing both the special nature of prison, and its continuity with other sanctions, use it very sparingly. It seems more likely that the quick and sure nature of the sanction, rather than the specific character of the punishment itself, determines the therapeutic effect. If this view, which is that of the drug courts themselves, is correct, then treatment programs wholly unrelated to the criminal justice system are likely to adopt forms of monitoring rewards and punishment very similar to those deployed by the drug courts. This convergence is likely to be reinforced by the scarcity of resources available for treatment. Thus, one sanction for non-compliance will be denial of secondary benefits such as housing, employment assistance, or daycare, and the ultimate sanction for repeated failure or disruption would likely be exclusion from all but medically urgent services.⁸⁵ Indeed, the boundary

⁸⁵ Of course, the actual imposition of such a sanction in any particular case, like the remand of a drug treatment client to prison (as opposed to a short jail stay), would constitute a failure. The social cost of terminating treatment, to say nothing of the cost to the addict himself, will almost always be greater than the cost of giving him one more chance. Thus, just as treatment courts are quite reluctant to remand clients to prison, so

between drug court arrangements and the kind of treatment programs about which we are conjecturing here is manifestly porous; the drug treatment community uniformly draws no distinction between treatment for addiction to illegal drugs and addiction to alcohol.⁸⁶ Given this convergence, drug courts represent as effective a response to the problem of addiction as is possible under current law. Judgments will differ but it seems to us a form of political purism to reject the good in the name of the best. Moreover, the demonstration that treatment can be effective may itself prove to be a path to substantial decriminalization.

Granting this, the core to the decriminalizer's argument is the claim that drug courts can lead to a dangerous expansion in the reach of the criminal justice system. Many forces converge to heighten the danger of such an expansion. One is the blurring of professional boundaries. For example, defense attorneys become part of the treatment team, and thus are less likely to press their clients' rights as vigorously as they would under normal adversary assumptions. This argument broadens to the claim that the teamwork inherent in the drug court poses a general threat to the civil liberties of clients who depend precisely on familiar professional antagonisms for the vindication of their rights. Another force for expansion consists of the motives of criminal justice officials

we would expect that treatment programs unrelated to the criminal justice system would likewise be reluctant to impose the penalty of exclusion. A sword of Damocles only serves its function while it hangs, not after it drops.

⁸⁶ For example, the Key Components, discussed above, *supra* notes ___ - ___, consistently refer to "alcohol and other drugs" ("AOD") together. *See also Drug Court Grant Program Fiscal Year 1999 Program Guidelines and Application Kit, supra* note , at 19.

hoping to widen their turf and treatment providers hoping to fill their facilities. A third source of pressure would be family members who denounce one of their own, either selfishly to rid themselves of a burden, or desperately to provide treatment where none is otherwise available.⁸⁷

To make matters still worse, these concerns are more forceful the better the treatment offered. If the police arrest addicts solely for the purpose of placing them into sham treatment, this breakdown will be detected by the treatment court's system of monitoring and through informal mechanisms: word will spread rapidly among the addict population, and they will in large numbers insist on their legal right to trial. But neither

⁸⁷ Even without drug courts, there is the possibility that addicts will be "betrayed" in this way. Most states and the federal government have provisions for the civil commitment of drug addicts who pose a danger to themselves or others. *See* Judith A. Goldberg, Note: *Due Process Limitations on Involuntary Commitment of Individuals Who Abuse Drugs or Alcohol*, 75 **B.U. L. Rev.** 1481; 1483 – 87 (1995) (describing the typical procedure); Thomas L. Hafemeister and Ali John Amirshahi, *Civil Commitment For Drug Dependency: The Judicial Response*, 26 **Loy. L.A. L. Rev.** 39, 42 – 43 & n. 14 (1992) (noting the fairly long history of such statutes) (citing a 1914 New York State statute). Where the civil commitment process for addicts is onerous, one might worry that treatment court will be used to circumvent it. Where it is easy, that fact itself provides reasons to worry about threats to liberty quite similar to those raised by the criminal justice system. *Cf.* Sherry F. Colb, *The Three Faces of Evil*, 86 **Geo. L.J.** 677, 684 - 89 (1998) (noting the similarities between confinement in prison and in a nominally rehabilitative institution).

the system of monitoring nor the informal addicts' network will detect a problem if addicts are systematically offered treatment they regard as useful. Indeed, an addict may decide that it is better to plead guilty to a crime he did not commit than to go untreated, and because a defense attorney working as part of a treatment team will not necessarily wish to divert her client to the ordinary criminal justice system, she may not probe the client for protestations of innocence.⁸⁸ Surely there is something wrong with a system that insists on potentially false confessions of guilt as a condition of receiving effective drug treatment. Association with the criminal justice system is itself a stigma, and furthermore, if a client ultimately fails in treatment, then by virtue of the antecedent guilty plea he will end up in prison.

The availability of a technical legal solution for this unwarranted use of the criminal justice system merely highlights the problem. Although it cannot be a crime to be a drug addict,⁸⁹ possession of heroin, cocaine, and other serious drugs of abuse are crimes under state and federal law, and an addict who appears under the influence of drugs could be stopped on suspicion of illegal possession and arrested if that suspicion is confirmed. Nor is there a constitutional barrier to the enactment of legislation making it a crime to appear in public under the influence of narcotics.⁹⁰ Thus it ought to be possible to make all addicts criminals, putting the criminal justice system within its rights in

⁸⁸ Cf. Robert Burt and Norval Morris, A Proposal for the Abolition of the Incompetency Plea, 40 *U. Chi. L. Rev.* 66, 79 (1972) (noting the tendency of appointed counsel to accede to incompetency findings that result in incarceration of their clients).

⁸⁹ See *Robinson v. California*, 370 U.S. 660 (1962).

⁹⁰ See *Powell v. Texas*, 392 U.S. 514 (1968).

offering its services to all comers. But this is of course a burlesque: In the name of ensuring that only criminal offenders are subject to the coercive power of treatment court, the police and the legislature are invited to expand the scope of criminalization.

The answer to these risks, we believe, is not to attack drug courts, but to fight for treatment as effective as that which they provide outside of the criminal justice system. That some addicts whose rights have been violated may prefer to submit to the supervision of drug courts rather than seek justice is an indictment of the real choices that current social policy affords. The obvious parallel is to persons who find themselves in such desperate circumstances that they commit crimes for the purpose of obtaining food and shelter in prison. But just as no sensible policymaker faced with this latter phenomenon would advocate making prisons more hellish as a solution to poverty and homelessness, so the proper response to the limited availability of treatment outside of the criminal justice system is to increase its availability, rather than to shut down the drug courts.⁹¹ To any but advocates of a *politique dupire*, the objection thus points the way to necessary further steps, rather than a reason for retreat.

⁹¹ Even when Medicaid funding for drug treatment is nominally available on an equal footing for mandated and non-mandated clients, the latter do not usually receive the assistance the former receive in demonstrating eligibility and finding a placement. And for those ineligible for Medicaid, funding is typically inadequate. Despite the enactment of the Mental Health Parity Act of 1996, Pub. L. 104-204, Title VII, 110 Stat. 2944, codified at 29 U.S.C. § 1185, 42 U.S.C. § 300gg-5, most employer-sponsored health insurance plans place severe restrictions on funding for substance abuse treatment. See Jeffrey A. Buck *et al*, *Behavioral Health Benefits in Employer-Sponsored Health Plans*,

IV

In addition to the civil liberties concerns we have just addressed, the blurring of roles among prosecutors, defense attorneys, courts, and treatment providers raises urgent questions about the allocation of power among the branches of government. Bluntly speaking, the fear is of the creation, in the treatment courts, of a parallel government – a set of bodies combining administrative and judicial functions that is sufficiently lodged inside current institutions to be protected by the nimbus of their legitimacy, yet not subject to the familiar rivalries between branches of government that prevent abuses of public power. As with the civil libertarian concerns, these fears are not ungrounded. Recall in particular the collaborative construction and implementation of drug courts through the convocation of teams drawn from the different branches of government (as well as the private and not-for-profit sectors) and induced, as part of the construction of a nascent institution, to form bonds that at least soften, and may completely extinguish, the organizational rivalries that otherwise make them mindful of one another’s overreaching. At a minimum this collaboration creates in every jurisdiction that builds a drug court an implicit coalition of powerful political actors who will tolerate its existence, even if they are themselves unenthusiastic about its purposes and prospects. Surely the creation of

1997, 18(2) **Health Affairs** 67 (Mar./Apr. 1999). The root of the problem may be that the disease model of addiction has not yet gained wide acceptance among the public or in the law. For example, the Americans With Disabilities Act specifically excludes from its coverage “psychoactive substance use disorders resulting from current illegal use of drugs.” 42 U.S.C. § 12211(b)(3).

such a consensus partly explains the insulation of drug courts from the acrimony of public debate about drug use and the treatment of drug offenders. But to passionate advocates of either the decriminalization of drug use or the harshest punishment of drug users, the judicious accommodation of insiders will seem a conspiracy of silence.

Moreover, treatment courts are not alone in posing the threat that the conventional restraints on abuses of government power will be circumvented. Related, and in some variants, plainly convergent, movements for family, juvenile, and community courts, community policing, and reform of institutions like child protective services and public schools are also being built in a way that co-opts potential watchdogs by making them part of the team responsible for generating solutions.⁹² Members of this implicit league of reformers may be willing to gloss over one another's overweening on the charitable grounds that all experiments entail mistakes or out of the cynical expectation that should they encounter difficulties one hand will wash the other.

There is an obvious, but misleading answer to this objection: In each case we can point to formal indicia of accountability. For example, by funding the Department of Justice grant programs, Congress authorized the extension of the drug court model, as did the state and local government officials who created drug courts. And to return to a familiar point, the flow of information and comparison ensures that they operate in plain view. To judge them by the currently operative legal standard, the forms of delegation here result in more accountability than typically associated with the administrative state.

⁹² See Rottman and Casey, *supra* note , at 13. For a flavor of these movements, and the federal role as pooler and disseminator, see the material available at the National Criminal Justice Reference Service website (www.ncjrs.org) (visited Aug. 10, 1999).

But this response is misleading because it invites us to interpret drug courts within conventional categories, when the line of development of drug courts and like institutions transforms the roles of all relevant actors. It would be at best disingenuous to argue on the one hand that treatment courts operate by novel principles, distinct from those of traditional courts and agencies, and yet argue on the other that, as regards their democratic authorization, they are (somehow) sufficiently like these latter to count as legitimate. Thus, we need to face the anomalous character of treatment courts in our democratic order, and to do so we must briefly draw out some implications of experimentalism as a national system of democratic governance.

Earlier we discussed the constant and reciprocal redefinition of means and ends at the heart of experimentalist institutions. Local agents in devising solutions to problems given existing knowledge cumulatively revise both our understanding of the problems to be solved and the means available for their solution. That a condition of this rolling redefinition of means and ends is transparent discussion of successes and failures of simultaneous experiments explains why, we saw, in this system efficacy and accountability can augment, rather than be traded off against, each other. The same logic of redefinition as applied to problems of democratic authorization and the delegation of legislative authority suggests a concomitant redefinition of the roles of Congress and other national entities. An experimentalist Congress will decreasingly enact statutes containing all of the details about implementation. Nor (per the post-New Deal pattern) will it declare policy and delegate to administrative agencies the authority to write rules and bring enforcement actions that ostensibly carry out that policy. Instead, the legislative function will increasingly consist in the identification of a problem and

simultaneous authorization of local experimentation on condition that the experimentalist entities (state, local, or ad hoc assemblies of smaller or larger groups) assure rights of democratic access to relevant participants, fully disclose their methods and results, and submit to evaluations comparing performance across jurisdictions.

The resulting accountability is not of the Madisonian sort, in which power is carefully parceled among separate branches of government and deliberation – in the sense of preference-changing reflection in the service of the public interest – is the province of a senatorial elite buffered from the immediacies of everyday concerns. And yet the experimentalist accountability established by problem-defining legislation and the broad grant of problem-solving authority to local entities could nonetheless be considered *neo-Madisonian* for two reasons. First, it harnesses competition among institutions to ensure that they all act in the public interest. Where the design of the 1787 Constitution relies on the rivalries among the branches and levels of government, the emerging “constitution” of experimentalist institutions like drug courts relies on the pooled experience of diverse, and in some sense competing jurisdictions as the engine of accountability. Second, in place of deliberation at a distance, it emphasizes the capacity of practical problem-solving activity to reveal new possibilities and thus to open the way for solutions that are different from the vector sum of current interests.

As a current example of an effort to achieve this kind of experimentalist accountability and of its potential effects on the respective roles of Congress, administrative agencies, and local actors, consider the pending proposal to amend the Endangered Species Act of 1973.⁹³ The proposed legislation (the “Miller Bill”)⁹⁴ is itself

⁹³ 16 U.S.C. § 1531 (1994).

a response to a burst of experimentalist decentralization in environmental regulation with strong parallels to the developments we have traced in the drug courts. The original Endangered Species Act often created a stalemate. Once species were listed as endangered, development of their habitats had to cease, thereby enraging those interested in development, without actually appeasing those concerned with protecting the environment: By the time a habitat was sufficiently degraded to result in the listing of a species, ceasing development by itself was insufficient to reverse the decline, and absent a program of active habitat restoration, the local economy would languish while the endangered species became extinct. The logjam was eventually broken through the creation of Habitat Conservation Plans (“HCPs”), as a variant on the “incidental take” permitting process established by the ESA.⁹⁵ HCPs allow developers, environmental groups, and public authorities to, in effect, obtain an exemption from the application of the ESA on the condition that they establish a local plan for habitat protection as well as a system for monitoring progress and revising their goals and methods as the need arises. Some development is allowed to continue so long as the overall condition of the relevant habitat is improved.⁹⁶ However, the defect of the HCP process is the absence of a system for monitoring local self-monitoring. HCPs vary greatly in the rigor of the goals they set, the comprehensiveness of their self-evaluations, and the accessibility of their decisionmaking processes to concerned parties.

⁹⁴ H.R. 960, 106th Cong., 1st sess. (Mar. 3, 1999).

⁹⁵ See 16 U.S.C. §§ 1539(a)(1)(B), (a)(2)(B); 50 C.F.R. § 17.22(b)(2)(i), (iv).

⁹⁶ See Bradley C. Karkainen, *Biodiversity and Land*, 83 **Cornell L. Rev.** 1, 101 – 02 (1997).

The Miller Bill would rectify this situation by authorizing the Department of the Interior to permit the formation of HCPs on condition that the HCP participants, along with the agency, set measurable goals for themselves,⁹⁷ monitor actively,⁹⁸ and assure democratic access.⁹⁹ Passage of the Miller Bill would, first, change the role of the Department of the Interior. Instead of relying on its own expertise and judgment to help craft the agreements and determine their acceptability, the Department would be responsible for policing a framework within which a broad and open circle of local and national participants can determine whether particular HCPs are meeting the goals they set for themselves, and whether the institution taken as a whole is likewise meeting its

⁹⁷ H.R. 960, § 105 (proposing to amend 16 U.S.C. § 1533(f)(1)(B)(ii) so as to require “objective, measurable criteria, including habitat needs and population levels, that, when met, would result in a determination [that a] species be removed from the list” of endangered species).

⁹⁸ The Miller Bill contains numerous monitoring requirements. *See, e.g., id.*, § 105 (proposing to amend 16 U.S.C. § 1533(f)(5)(B)(ii) to require HCPs to “set forth specific agency actions, timetables, and funding required to achieve and monitor progress of these recovery goals or management responsibilities”); *id.*, § 108 (proposing to amend 16 U.S.C. § 1539(a)(2)(B)(vii) to require HCPs to include “[m]easures the applicant will take to monitor the effectiveness of the plan's conservation measures in achieving the plan's biological goals and impacts on recovery of each species”).

⁹⁹ *See id.*, § 108 (proposing to amend 16 U.S.C. § 1539(a)(10)(D)(i) to oblige the Secretary of the Interior to “ensure the participation of a broad range of public and private interests in the development of” each HCP).

goals. Accordingly, Congress's role would shift as well. In addition to authorizing the broad experimentalist regime, its oversight activity would consist of checking to see that the Department of the Interior is effectively provoking self-reflection among the local actors. In monitoring the Department's effectiveness in encouraging local HCP plans to monitor themselves, Congress would also obtain highly contextualized knowledge. By what is now a familiar form of seeming paradox, the deep delegation of authority goes hand in hand with a greater capacity for oversight.¹⁰⁰

In the case of drug courts, the infrastructure of national information pooling is being created simultaneously with the drug courts themselves. Instead of a center that issues waivers from its own directives and then reconstitutes itself in light of the needs of the ensuing decentralization, the drug courts are simultaneously constituting themselves with and through the Justice Department's Drug Courts Program Office, the Drug Court Clearinghouse and Technical Assistance Project, and the National Association of Drug Court Professionals. But putting aside the different sequences by which these experimentalist regimes are taking shape, if the Miller Bill is passed, the structural outcomes are likely to be quite similar. In authorizing the award of federal planning and implementation grants for drug courts, Congress required a Government Accounting Office study of their effectiveness,¹⁰¹ and as drug courts continue to proliferate, it is easy

¹⁰⁰ Charles Sabel, Archon Fung, and Bradley Karkkainen, *After Backyard Environmentalism*, **Boston Review** (forthcoming Oct. 27, 1999).

¹⁰¹ See Title V of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322). The resulting report is *Drug Courts: Overview of Growth, Characteristics, and*

to imagine that Congress would require continual reporting by the Department of Justice or other entities directly involved in the drug court system. The resultant system of authorization and monitoring would be architecturally equivalent to the one envisioned by the Miller Bill.

With regard to democratic participation, however, there remains a substantial difference between HCPs and related experimentalist programs on the one hand, and the drug courts on the other. Directly deliberative problem solving is a feature of both. Relapse planning by the user/client and treatment counselor under the supervision of the drug court is, as we saw, an effort to bring general therapeutic principles to bear on the problems of individuals with a view both to helping particular patients and to extracting general lessons from their experience. In this sense it is very much like the kind of analysis of local ecosystems undertaken by developers and conservationists in the HCP setting. The difference, of course, is that addiction almost by definition entails a loss of autonomy, and hence a (temporarily) limited capacity to participate autonomously in problem solving. The acceptance of coercion as a treatment method is a blunt acknowledgment of this condition.

Nonetheless, the difference is less profound than it might at first appear. In settings such as HCPs and other experimentalist programs there are always experts whose expertise in some sense imposes constraints on the autonomy of other participants, even though the emphasis on local knowledge and broader comparisons limit the effect of these differentials. Conversely, in the treatment court setting, even though addicts'

Results. Washington, D.C.: U.S. General Accounting Office, GAO/GGD-97-106 (July 31, 1997).

relapses are expected, over time they typically become shorter and shorter interruptions of longer periods of self-discipline and recovery. Moreover, in the increased attention that treatment providers have, in recent years, been paying to particular client populations – women, juveniles, the homeless, and so forth – we can see an emerging responsiveness to community interests.¹⁰² Finally, treatment courts can be expected to collaborate more and more closely with other (often experimentalist) institutions such as vocational training or community policing programs that are not directed exclusively to addict populations; and thus forms of client participation that develop in these may well be adapted to the specific needs of treatment courts. In short, it is only a slight exaggeration to say that, coercive as they are, treatment courts at their best are potentially more participatory than many wholly uncoercive programs of representative democracy.

And what of large choices between mutually contradictory policies – for example, between a punitive and therapeutic approach to drug offenses – that is central to the familiar politics of representative democracy? Here we can speculate that the legislative fate of the drug courts will provide a crude test of the shaping effect of direct deliberation on politics. The original and continuing authorization for federal funding of drug courts was the result of a classic instance of logrolling. In the same appropriations measures that funded this and other experimentalist programs, Congress also authorized more traditional approaches to drugs and crime, such as building more prisons and hiring more

¹⁰² See **Community as Method: Therapeutic Communities for Special Populations and Special Settings** (George De Leon, ed. 1997).

police, funding these latter much more generously.¹⁰³ The comparative “experiment” is flawed, to be sure: Whereas drug courts and similarly structured institutions provide the information for assessing their performance, many more traditional programs do not.

Nonetheless, we can expect that the experience of the drug courts will transform future debate – partly by provoking questions about why other programs do not self-monitor and self-report, and partly by breaking down the distinction between incarceration and treatment. As illustrations of the latter, consider two examples. The first is an Arizona variant of the typical drug court pattern. “Unlike the drug courts springing up around the country, which offer offenders treatment as an alternative to trial and a criminal record, Arizona sentences drug offenders to treatment once they have been convicted or plead guilty, but tailors the regimen to the kind of drug dependency that the offender has.”¹⁰⁴ Despite this difference, the Arizona approach has yielded results similar to those of the drug courts we have described,¹⁰⁵ indicating that drug courts can stand in a

¹⁰³ See 42 U.S.C. § 3769 et seq. (prison construction); 42 U.S.C. § 3796bb (hiring police). In fiscal year 1998, the Office of Justice Programs was appropriated \$30 million for drug courts and \$ 555.5 million for prison construction grants. *Office of Justice Programs Annual Report* 8 (Fiscal Year 1998) (Available at <http://www.ojp.usdoj.gov/pubs.htm>) (visited Aug. 6, 1999).

¹⁰⁴ Christopher S. Wren, *Arizona Saves Money By Treating, Rather Than Jailing, Drug Offenders*, **N.Y. Times** A14 (Apr. 21, 1999).

¹⁰⁵ See Drug Treatment and Education Fund Legislative Report, Fiscal Year 1997-1998, Arizona Supreme Court, Administrative Office of the Courts, Adult Services Division (March 1999). There is, however, significant room for improvement of self-monitoring.

variety of relations to more traditional approaches to criminal justice. As a second example of the slippage between incarceration and treatment, consider the fact that many of the people active in the drug court movement have argued for increased use of drug treatment within prisons,¹⁰⁶ and the Department of Justice has been charged with helping states pursue this goal.¹⁰⁷

We do not suggest that the appearance of experimentalist institutions heralds the inevitable demise of traditional politics. In the case of the HCP proposal, for example, ranching, lumber, development and other interest groups may conclude that even if the HCP process is preferable to command and control, they can do better still by fighting federal regulation in general, and these groups certainly have means of influencing the political process. So too, drug courts could fall victim to the war on drugs. But given

An independent audit of the Arizona program concluded that the probation system would be improved were it to “[s]upervise probationers with special attention paid to completing substance abuse,” to ensure that a higher percentage of probationers ordered to attend counseling and receive treatment actually do so. Adult Probation Programs, State of Arizona Office of the Auditor General Performance Audit, Report No. 99-4, at 17 (March 1999); *id.* at 16. (The report may be found at <http://www.auditorgen.state.az.us>.) (visited Apr. 21, 1999).

¹⁰⁶ See *A Comprehensive National Drug Court Systems Act* (NADCP) (http://www.drugcourt.org/docs/cmp_act.htm) (visited June 28, 1999).

¹⁰⁷ See 42 U.S.C.A. § 3796ff. The federal fiscal year 1998 appropriation for state prison drug treatment program grants was \$63 million. See *Office of Justice Programs Annual Report*, *supra* note , at 8.

that it is the very success of drug courts (and other experimentalist institutions) that will focus public attention on them, we think it at least as likely that such attention will lead to further express authorization. While there is no guarantee that the conventionally accountable institutions – legislatures – will, when faced with the choice, vote to further institutionalize the experimentalist unconventionally accountable institutions, the political process that makes this choice will necessarily be shaped by the experience of the latter.

Conclusion

Our analysis of treatment courts as part of an emergent neo-Madisonian architecture of democracy, in which the traditional separation of powers plays a subordinate part, invites a final, insistent question rooted in the requirements of our current, Madisonian system: Whatever their other roles, can treatment courts articulate the constitutional and other entrenched values whose protection is now in large measure entrusted to the judiciary? Our answer is that they can. Indeed, precisely because of its experimentalist character, the treatment court can do better as a court in serving this function than traditional judicial institutions.

Courts that collaborate with experimentalist institutions have a considerable advantage over courts in traditional settings: Access to the rich record of the parties' activities that experimentalist monitoring helps to create. In unusual cases such as treatment courts, the advantage is greater still. The reason is that the treatment court is simultaneously part of the monitoring system and responsible for defending entrenched values.

Consider a dramatic example. The pioneering American therapeutic community, Synanon, featured many elements familiar from modern therapeutic communities: group therapy, peer counseling, and patient responsibility for running the home.¹⁰⁸ It also turned out to be a cult whose practices included “forced shaving of heads (of member and nonmembers), sterilization of all males within the group (except the leader, Chuck Dederich), coerced abortions, forced breakups of marriages and other relationships, beatings and other attacks, and harassment of past members and nonmembers.”¹⁰⁹ Nonetheless, prior to the publicization of these abuses, “Synanon had received great acclaim as an unprecedentedly effective drug-rehabilitation group.”¹¹⁰ Suppose a drug court were inadvertently to place clients in a latter-day Synanon. What legal consequences would follow?

Were a prison to inflict upon an inmate the sort of brutality meted out by Synanon, surely the inmate would have a valid claim of cruel and unusual punishment under the Eighth Amendment, nor would that conclusion differ if the prison were

¹⁰⁸ See **Lewis Yablonsky, *The Therapeutic Community*** 17 – 26 (1989). See also Douglas S. Lipton, *Therapeutic Communities: History, Effectiveness and Prospects*, 60(6) **Corrections Today** 106, 107 (1998) (“Synanon . . . bears many similarities to today’s Phoenix House and Daytop Village programs, although these programs tend to be considerably less intense.”)

¹⁰⁹ **Marybeth F. Ayella, *Insane Therapy: Portrait of a Psychotherapy Cult*** 9 (1998).

¹¹⁰ *Id.* See also *Synanon Church v. United States*, 579 F.Supp. 967, 970-71 (D.C. Cir.1984) (revoking Synanon’s tax-exempt status).

nominally private.¹¹¹ The same, it seems quite clear, should be true for someone sent to a treatment facility involuntarily.¹¹² Although it could be argued that by voluntarily submitting to the jurisdiction of the treatment court, defendants waive their rights later to sue, this line of reasoning is plainly implausible: prison inmates do not forfeit their right to be free of cruel treatment by virtue of having pleaded guilty, and thus neither would drug treatment clients.

But although the role of protector of rights is a familiar one for courts, note how in the context of what is arguably the most important right of convicted offenders, the treatment court is actually better suited to this function than the traditional court. The treatment court need not wait for plaintiffs to file suit alleging abusive conditions, nor must it sift through countless frivolous allegations to find the scattered meritorious ones. The treatment court detects abuses in the ordinary course of monitoring – in the now familiar sense of requiring self-monitoring and reporting by – the actors that pose threats to rights. Had Synanon's clients been required to make regular appearances in treatment court, its abuses could not have remained undetected for long.

¹¹¹ The federal courts have found that private prisons and their employees act under color of state law for purposes of 42 U.S.C. § 1983, when sued by inmates. *See, e.g.,* Street v. Corrections Corp. of Am., 102 F.3d 810, 814 (6th Cir.1996); Kesler v. King, 29 F. Supp.2d 356, 370-71 (S.D.Tex.1998); Giron v, Corrections Corp. of Am., 14 F. Supp.2d 1245, 1247-51 (D.N.M.1998).

¹¹² *See also* LeMoine v. New Horizons Ranch and Center, 990 F. Supp. 498, 502-03 (N.D.Tex.1998) (so holding for a juvenile treatment facility), *rev'd in part on other grounds*, 174 F.3d 329 (5th Cir. 1999).

Finally, note again how an experimentalist court's protection for and elaboration of rights connects accountability to effectiveness. The United States Supreme Court has held that "unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment."¹¹³ Although there are cases in which it is obvious that this standard has been met,¹¹⁴ the requirement that pain be "unnecessary" requires the reviewing court to know what is and is not necessary to the achievement of valid penological objectives. This, in turn, leads to the unpalatable alternatives of deference to prison authorities – which ensures that abuses will go uncorrected – or imperious and uninformed pronouncements about the functioning of institutions far removed from the court. By contrast, in an experimentalist setting, the court reviews a record designed specifically to reveal what practices are effective. Thus, far from exacerbating the legitimacy problems surrounding much judicial activity, the role shifts that experimentalism heralds go a substantial way towards alleviating them.

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In public debate, the criminal justice system appears to stand firmly on one side of an intractable ideological disagreement about how even to categorize the problem of drug

¹¹³ *Ingraham v. Wright*, 430 U.S. 651, 670 (1977) (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), in turn quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

¹¹⁴ *See Hudson v. McMillian*, 503 U.S. 1 (1992) (finding that guards' recreational beating of an inmate was cruel and unusual punishment even though the inmate did not suffer permanent injury).

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abuse. Indeed few other divisions in our society appear to be so refractory. The very existence of treatment courts is remarkable, their rapid diffusion, provisional successes, and continual experimentalist self-examination doubly so. Further progress of drug courts and related institutions is hardly assured, but there is no compelling reason to believe that the obstacles they face are greater than the ones they have already overcome. Surely there is hope for the renewal of our public institutions in this surprising success.