

REHABILITATIVE PUNISHMENT AND THE DRUG TREATMENT COURT MOVEMENT*

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Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies.¹

—C.S. Lewis

INTRODUCTION

In the 1980s, the United States declared a “war on drugs.”² Provoked in part by the emergence of widespread crack cocaine use in a number of large cities³ and media accounts of open drug trafficking, gang violence, and rampant property crime,⁴ the federal government and many states increased public spending on antidrug law enforcement and dramatically augmented criminal penalties for the sale and possession of illegal drugs.⁵ But these provisions contained few resources for treatment-oriented responses to the problems.⁶

1. C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953).

2. See EVA BERTRAM ET AL., DRUG WAR POLITICS: THE PRICE OF DENIAL (1996); JAMES A. INCIARDI, THE WAR ON DRUGS: HEROIN, COCAINE, CRIME, AND PUBLIC POLICY (1986); see also OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY (1989) [hereinafter NATIONAL DRUG CONTROL STRATEGY].

3. See Steven R. Belenko, *Crack and the Evolution of Anti-Drug Policy*, in CONTRIBUTIONS IN CRIMINOLOGY AND PENOLOGY No. 42, at 10, 13 (James A. Inciardi ed., 1993); see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FACT SHEET: DRUG USE TRENDS 1-2 (1995); DOUGLAS S. LIPTON, U.S. DEP'T OF JUSTICE, THE EFFECTIVENESS OF TREATMENT FOR DRUG ABUSERS UNDER CRIMINAL JUSTICE SUPERVISION 3 (National Inst. of Just. ed., 1995).

4. See Belenko, *supra* note 3, at 10-21; John A. Martin, *Drugs, Crime, and Urban Trial Court Management: The Unintended Consequences of the War on Drugs*, 8 YALE L. & POL'Y REV. 117, 134 (1990); Craig Reinerman & Harry G. Levine, *Crack in Context: Politics and Media in the Making of a Drug Scare*, 16 CONTEMP. DRUG PROBS. 535, 539-43 (1989).

5. See, e.g., Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. “In 1981, the total drug enforcement budget was \$1.5 billion; by fiscal year 1995, this budget had grown to \$13.1 billion.” James R. Brown, Note, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug-Related Crime?*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 63, 70 (1997).

6. Although the official statement of federal government policy was “to disrupt, to dismantle, and ultimately to destroy the illegal market for drugs by attacking both the supply and demand sides of the drug problem,” NATIONAL DRUG CONTROL STRATEGY, *supra* note 2, at 1, the overwhelming bulk

This war on drugs was grafted onto an existing criminal justice system that, in many jurisdictions, was already overburdened by high case volumes.⁷ The increased enforcement efforts and stiffened sentencing provisions of the new drug laws exacerbated this overload, leading to substantial delays in the disposition of cases.⁸ In addition, the elimination of nonincarcerative penalties for some offenses and the designation of statutorily-mandated minimum sentences of imprisonment for many offenses led to a dramatic increase in the number of inmates in state and federal prisons.⁹ Expedited case management strategies emerged for dealing with the expanding number of drug-related cases,¹⁰ and new prison construction was undertaken to house the swelling inmate population.¹¹ Despite these developments, many actors in the system, including a number of judges, prosecutors, and corrections

of appropriated funds went to law enforcement and not to treatment programs. *See id.*; *see also* Brown, *supra* note 5, at 70 (noting that Bush Administration allocated 70% of federal drug budget to enforcement and interdiction).

7. *See* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2316-19 (1992); Brown, *supra* note 5, at 71 (reporting that "[i]n 1993, 1,126,300 arrests were made for drug abuse violations, compared to 661,400 in 1983").

8. *See* GOVERNMENT ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS, REPORT TO THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, AND THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES 14-15 (1997) [hereinafter DRUG COURTS OVERVIEW]; William D. McColl, Comment, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 475 (1996).

Although drug-related cases have long plagued American courts and criminal justice agencies, drug-related felony cases began inundating courts in the late 1980s. The greater volume of cases, along with stiffer penalties for drug-related crimes, "produced a sense of crisis in many American courts." CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TREATMENT IMPROVEMENT PROTOCOL SERIES 23, TREATMENT DRUG COURTS: INTEGRATING SUBSTANCE ABUSE TREATMENT WITH LEGAL CASE PROCESSING 1 (1996) [hereinafter TREATMENT DRUG COURTS].

9. *See generally* BARBARA BOLAND & KERRY M. HEALEY, U.S. DEP'T OF JUSTICE, PROSECUTORIAL RESPONSE TO HEAVY DRUG CASELOADS: COMPREHENSIVE PROBLEM-REDUCTION STRATEGIES 7-8 (1993); LIPTON, *supra* note 3, at 3.

Recently, the *New York Times* reported that the Connecticut Legislature was considering a "major overhaul of its drug laws that would shift the emphasis from punishment toward treatment of drug abuse as a public health problem, in part as an attempt to reduce the costs of imprisonment." Christopher S. Wren, *Hartford Mulls an Overhaul of Drug Laws*, N.Y. TIMES, Apr. 21, 1997, at B5. The article quoted legislative leaders as saying that the impetus for this "politically radioactive" approach was fiscal rather than ideological. The figures provided in support of this claim are significant:

Connecticut, [the legislator] said, now spends more to run its prisons—about \$400 million a year—than its public universities and colleges. The state's prison population, he said, has grown from 3,800 inmates in 1980 to about 15,000, nearly a quarter of whom are locked up for selling or possessing drugs.

Id.

10. *See* BOLAND & HEALEY, *supra* note 9, at 7; DRUG COURTS OVERVIEW, *supra* note 8, at 22 n.1.

11. *See* LIPTON, *supra* note 3, at 10 (reporting that nation's prison population passed one million mark in 1994); *see also* McColl, *supra* note 8, at 476.

officials, expressed interest in devising systematic procedures for diverting drug-addicted defendants out of the traditional criminal justice process and into treatment.¹²

To be sure, in some jurisdictions, individual sentencing judges had for some time made participation in substance abuse treatment a condition of probation for addicted offenders in minor cases.¹³ A number of correctional facilities around the country also experimented with voluntary and mandatory drug treatment for inmates with addiction histories.¹⁴ Beginning in 1989, however, the criminal system in Miami took a new approach to the problem of melding substance abuse treatment and punishment. Described as a "slow-track, court-based treatment progra[m],"¹⁵ the Miami experiment contained several key features that have become central in the design of many "drug treatment courts"¹⁶ now operating throughout the United

12. In addition to concerns about criminal case management and prison overload, these officials were reacting to the growing perception that lengthy mandatory drug sentences are less effective in reducing drug-related crime than treatment and prevention-based responses.

With a new debate beginning over cocaine penalties, a Rand Corp. study concluded yesterday that mandatory minimum sentences are far less effective at reducing drug use and drug-related crime than normal law enforcement and treatment of heavy users.

Mandatory Drug Sentences Are Less Effective, Study Finds, BALTIMORE SUN, May 13, 1997, at 3A. William McColl reports that

there remained a sense in some jurisdictions that despite the new case-management techniques, the criminal justice system was not addressing the heart of the matter. Merely incarcerating drug users more efficiently did little to stop the cycles of recidivism that appeared to account for a majority of crime in these jurisdictions. This inadequacy was unsatisfying to reformers, and perhaps more importantly, to prosecutors and corrections officials, who repeatedly prosecute, incarcerate, and release the same drug defendants back into the community.

McColl, *supra* note 8, at 476 (citations omitted).

13. See JOHN S. GOLDKAMP, JUSTICE AND TREATMENT INNOVATION: THE DRUG COURT MOVEMENT 4 (Nat'l Inst. of Justice's First Nat'l Drug Court Conference Working Paper, 1994); Sally L. Satel, *Observational Study of Courtroom Dynamics in Selected Drug Courts*, 1 NAT'L DRUG COURT INST. REV. 43, 45 (1998).

14. See LIPTON, *supra* note 3, at 5; Harry K. Wexler & Douglas S. Lipton, *From Reform to Recovery: Advances in Prison Drug Treatment*, in 27 DRUG TREATMENT AND CRIMINAL JUSTICE 209 (James A. Inciardi ed., 1993); see also Sandra Tunis et al., EVALUATION OF DRUG TREATMENT IN LOCAL CORRECTIONS (Final Summary Report Presented to the Nat'l Inst. of Justice, 1996) (evaluating effectiveness of several drug treatment programs in local jails).

15. Philip Bean, *Current Topic: America's Drug Courts: A New Development in Criminal Justice*, 1996 CRIM. L. REV. 718, 719. As the longest running drug treatment court, the Miami court reported that by December 31, 1996, 80% of its 11,600 enrolled offenders had completed the program. The Miami court also had a 73% retention rate. See DRUG COURTS OVERVIEW, *supra* note 8, at 58. For more on Miami's drug treatment court, see Brown, *supra* note 5, at 94-95; John S. Goldkamp, *Miami's Treatment Drug Court for Felony Defendants: Some Implications of Assessment Findings*, 73 PRISONS J. 110 (1994).

16. Although many in the field refer to courts based on the Miami model as "drug courts," this Article uses the term "drug treatment courts," in order to distinguish these efforts from courts that offer expedited case management strategies but no treatment component. While there is some variation from one jurisdiction to the next, this well established model is characterized by several common

States.¹⁷

First, treatment courts following the Miami model have adopted a relatively restrictive definition of eligibility. In general, they use screening criteria to insure that only nonviolent defendants thought to be amenable to substance abuse treatment participate.¹⁸ Second, treatment court planners have developed procedures designed to delay the final disposition of cases and have arranged for judges to maintain frequent ongoing contact with defendants. This feature enables treatment court judges to retain jurisdictional leverage over participants as they navigate their way through relapse and recovery.¹⁹ In this respect, the treatment court approach differs

characteristics. Most often, these drug treatment courts target defendants who are substance abusers. Typically, participants are required to undergo addictions treatment and regular urine testing, and their progress is monitored directly by the treatment court judge at periodic status hearings. If these defendants are successful in treatment, they are able to avoid the imposition of lengthy sentences of incarceration. If they fail to adhere to the treatment regime, participants face a series of escalating penalties that may include more frequent contact with the court, more intensive drug treatment, or periods of incarceration.

The U.S. Department of Justice also uses the term "drug treatment courts" to refer to special court calendars or dockets designed to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing offenders by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.

DRUG COURTS OVERVIEW, *supra* note 8, at 22 n.1.

17. See generally DRUG COURT CLEARINGHOUSE & TECHNICAL ASSISTANCE PROJECT, U.S. DEP'T OF JUSTICE, SUMMARY ASSESSMENT OF THE DRUG COURT EXPERIENCE (1997); DRUG COURTS OVERVIEW, *supra* note 8.

18. See DRUG COURTS OVERVIEW, *supra* note 8, at 10 (reporting results of GAO survey of drug court programs which "most frequently reported that program participants were adult, nonviolent offenders with a substance addiction"); Bean, *supra* note 15, at 720 (contrasting Louisville Drug Court, which permits defendants charged with property crimes to participate, with Jacksonville Drug Court, which limits participation to minor possession offenders); McColl, *supra* note 8, at 472, 480 (describing Baltimore Drug Treatment Court, in which potential participants are assessed by "Pre-Trial Services" with recommendations based on current charges, past criminal record, and performance on tests such as "Addiction Severity Index."); see also CAROLINE S. COOPER, DRUG COURTS: AN OVERVIEW OF OPERATIONAL CHARACTERISTICS AND IMPLEMENTATION ISSUES 6-10 (1995) [hereinafter COOPER, OPERATIONAL CHARACTERISTICS]. An expanded, more recent survey of drug treatment courts reports that they are increasingly targeting chronic recidivists as well as first offenders. See CAROLINE S. COOPER, 1997 DRUG COURT SURVEY REPORT: EXECUTIVE SUMMARY 4 (1997) [hereinafter COOPER, 1997 SURVEY].

19. As a procedural matter, this leverage can be accomplished in one of several ways. In a preadjudication diversion program, the defendant undertakes treatment before entering a plea. Usually, the formal proceedings are stayed pending the outcome of treatment. If the defendant is successful, the charges are dismissed and no conviction results. In a probation-based system, the defendant must enter a guilty plea before starting the treatment regime. In this configuration, the various obligations mandated by the court, including participation in treatment, are made conditions of probation. In yet another variation, the required treatment may be scheduled to occur after entry of a plea but before imposition or execution of sentence. See DRUG COURTS OVERVIEW, *supra* note 8, at 23; Bean, *supra* note 15, at 720; Caroline S. Cooper & Joseph A. Trotter, Jr., *Recent Developments in Drug Case Management: Re-engineering the Judicial Process*, 17 JUST. SYS. J. 83, 95-96 (1994); McColl, *supra*

from other “drug courts” by shifting the focus away from the expedited management of cases through consolidation and “fast tracking” of drug prosecutions in one courtroom or division of a criminal court. Instead, the new focus is on the supervised referral of identified defendants into treatment.²⁰

Another important characteristic of most drug treatment courts is the relatively nonadversarial environment within which decisions are made about the imposition of sanctions.²¹ This element directly relates to the management of otherwise confidential information concerning a defendant’s addiction and treatment.²² In place of the adversarial configuration characteristic of a traditional criminal proceeding,²³ the treatment courts adopt an ethic of cooperation, in which judge, prosecutor, defense counsel, corrections personnel, and addictions treatment providers share considerable data concerning defendants and their progress in treatment.²⁴

note 8, at 481.

20. See Cooper & Trotter, *supra* note 19, at 87-93; McColl, *supra* note 8, at 471-72; see also CAROLINE S. COOPER & JOSEPH A. TROTTER, JR., U.S. DEP’T OF JUSTICE, 1 DRUG CASE MANAGEMENT AND TREATMENT STRATEGIES IN THE STATE AND LOCAL COURTS 9 (1994); TREATMENT DRUG COURTS, *supra* note 8, at 2 (describing potential benefits of integrating substance abuse treatment with judicial system case processing).

21. See DRUG COURTS PROGRAM OFFICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS 6 (1997) [hereinafter KEY COMPONENTS] (arguing that traditional adversarial system is ineffective in addressing alcohol and drug abuse and may contribute to these problems rather than helping to solve them).

22. One commentator notes:

Treatment providers give up-to-date, sometimes daily evaluations of the offender’s response to treatment. They are directly responsible to case managers who are . . . officials of the court undertaking all the necessary administrative duties including being responsible for urinalysis, court records, etc. . . .

Bean, *supra* note 15, at 719.

23. See generally MONROE FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM (1975); Gary Goodpaster, *On the Theory of American Adversary Criminal Trials*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1997). For an interesting effort at defining the limits of partisanship in criminal defense practice, see Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987).

24. A recent Department of Justice publication setting out the “key components” of an effective drug treatment court suggests that

the prosecutor and defense counsel must shed their traditional adversarial courtroom relationship and work together as a team. Once a defendant is accepted into the drug court program, the team’s focus is on the participant’s recovery and law-abiding behavior—not on the merits of the pending case.

KEY COMPONENTS, *supra* note 21, at 11; see also COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 39-42 (describing kinds of information provided to drug treatment court judges and lawyers); OFFICE OF STATE COURTS ADMIN., STATE JUSTICE INST., FLORIDA’S TREATMENT BASED DRUG COURTS 6 (1993) (describing cooperative information sharing approach).

In addition to creating a relatively nonadversarial environment at odds with the partisan norms of most criminal courts, this treatment court model also generates information management protocols that fit uncomfortably with the restrictive mandates of federal law governing the confidentiality of

Initially, offenders have an incentive to participate in the program because, if they are successful in treatment and adhere to all of the conditions identified at the start of the process, they can avoid the potential of lengthy incarceration.²⁵ If they stumble along the way, however, they face a system of graduated penalties.²⁶ Although there is variation from one treatment court to the next, these penalties may include more frequent contact with the court, increased urine testing, and short periods of so-called "shock incarceration."²⁷ Because recovery from addiction often involves a pattern of missteps and temporary setbacks by the substance abuser,²⁸ observers think this array of gradually increasing penalties is a better match for the therapeutic goals of the system than the usual all-or-nothing approach found in most criminal sentencing and parole revocation decisions.²⁹

Some endorse the shift from a due process-derived adjudication model to a more informal "treatment team" approach,³⁰ given the identified goal of helping defendants overcome their substance abuse problems and the relative

substance abuse treatment information. *See* Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, § 408, 86 Stat. 65, 79 (codified as amended at 42 U.S.C. § 290dd-2 (1994)). This law and its implementing regulations, Public Health Services, Department of Health and Human Services, Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. §§ 2.1-2.67 (1994), apply to virtually all treatment providers likely to be utilized by drug treatment courts. For further discussion of this regulatory scheme, see Richard C. Boldt, *A Study in Regulatory Method, Local Political Cultures, and Jurisprudential Voice: The Application of Federal Confidentiality Law to Project Head Start*, 93 MICH. L. REV. 2325, 2330-34 (1995); *see also infra* notes 358-63 and 531-37 and accompanying text.

25. *See* Brown, *supra* note 5, at 88-89; *see also* COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 9-10 (setting out typical sanctions for targeted drug treatment court population prior to initiation of program); COOPER, 1997 SURVEY, *supra* note 18, at 23 (same).

26. *See* DRUG COURTS OVERVIEW, *supra* note 8, at 26 (describing typical treatment court responses to relapse); COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 33-34 (reporting on program use of graduated sanctions).

27. *See* DRUG COURTS OVERVIEW, *supra* note 8, at 26. This system of graduated sanctions is said to support the therapeutic goals of the drug treatment court by "creat[ing] immediate consequences for the defendant and return[ing] him to treatment." McColl, *supra* note 8, at 482. Shock incarceration has been described as "a brief period of incarceration designed to force a defendant into entering and remaining in drug treatment programs. In treatment terms, shock incarceration is intended to overcome 'denial,' which is a symptom of the disease of alcoholism." *Id.* at 482 n.129 (citations omitted).

28. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, TREATMENT PROTOCOL EFFECTIVENESS STUDY 12 (1996) [hereinafter TREATMENT EFFECTIVENESS STUDY] (drug addiction is often "a chronic, relapsing disorder"); *see also* DRUG COURTS OVERVIEW, *supra* note 8, at 79-83 (discussing studies of relapse rates among drug treatment court participants).

29. *See* PETER FINN & ANDREA K. NEWLYN, MIAMI'S "DRUG COURT": A DIFFERENT APPROACH 9 (Program Focus by Nat'l Inst. of Justice, 1993).

30. *See* Michael P. Judge, *Critical Issues for Defenders in the Design and Operation of a Drug Court*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), Nov.-Dec. 1997, at 1. Bean provides the following description of a typical drug treatment court:

The Drug Court atmosphere is unique. Applause for success is common. The judge may publicly congratulate, even hug an offender, or hand out court "T" shirts with the Drug Court logo on it.

Bean, *supra* note 15, at 719.

subordination of punishment as a defining feature of this process.³¹ In cases where defendants entirely fail to complete the treatment regime, however, they often risk a total sentence of incarceration longer than that which would have been imposed in a traditionally configured criminal court setting.³²

Many jurisdictions throughout the United States have implemented versions of this model. As of mid-1997, forty-seven states, the District of Columbia, Guam, Puerto Rico, and two federal districts had either established such courts or had plans to do so.³³ In all, about two hundred drug treatment courts have been established across the country.³⁴ In general, this "movement" has enjoyed broad support.³⁵ While some conservatives have expressed concern over the potential inclusion of violent offenders or serious drug traffickers,³⁶ funding and political support for the experiment has remained relatively stable.³⁷

It is unlikely that these innovations mark a full return to the "rehabilitative ideal"³⁸ of a generation ago, given the limiting effect of the eligibility

31. See DRUG COURTS OVERVIEW, *supra* note 8, at 26 ("most drug court programs use sanctions not to simply punish inappropriate behavior but to augment the treatment process").

32. See COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 37 (setting out sanctions imposed for unsuccessfully terminated defendants); COOPER, 1997 SURVEY, *supra* note 18, at 28 (same).

33. See COOPER, 1997 SURVEY, *supra* note 18, at 1. Drug treatment court planning is also underway in twenty Native American tribal courts, located in ten states. As of mid-1997, there were over 370 drug treatment courts in a variety of states of development: 84 had been operating for at least two years; 120 had been implemented more recently; 4 were about to start; 150 were in the planning process; and 13 jurisdictions were exploring the possibility of establishing such courts. *See id.*

34. *See id.* The states which account for the most drug treatment court activity are: "California (sixty-four programs); Florida (thirty programs); Oklahoma (twenty programs); New York (nineteen programs); and Ohio (sixteen programs)." *Id.* at 2.

35. McColl notes:

In December 1993 the First National Drug Court Conference was held in Miami, Florida, attracting more than 400 individuals. As a result of that meeting, the National Association of Drug Court Professionals was formed The working paper produced at the first conference reflected enough confidence about the strength of DTCs to refer to their proliferation as a "Drug Treatment Court Movement."

McColl, *supra* note 8, at 515.

36. Commentators refer to this concern as "net-widening." *Id.* Many of the treatment courts in operation have received funding under Title V of the 1994 Violent Crime Act, which authorized \$1 billion over six years for drug treatment court programs. *See* DRUG COURTS OVERVIEW, *supra* note 8, at 41. That legislation prohibits grants from being awarded to any program that admits violent offenders. *See id.* at 38.

37. The GAO study reported that "since 1989, over \$125 million in resources derived from federal, state, and local governments; private sources; and participant fees have been provided to plan, implement, enhance, and/or evaluate drug court programs." DRUG COURTS OVERVIEW, *supra* note 8, at 38. The 1996 Federal Crime Bill provided funds to bolster drug court development and allowed many local drug court planning efforts to take root. *See* COOPER, 1997 SURVEY, *supra* note 18, at 1.

38. The phrase "the rehabilitative ideal" is generally associated with Francis Allen's classic account of the rise and fall of rehabilitative practice and theory. *See* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981).

restrictions typically built into drug treatment court programs. Nevertheless, many of the defining features of the rehabilitative approach are present to some degree in these undertakings. In light of these parallels,³⁹ it is important to revisit the story of the rise and fall of rehabilitation in American penal practice in the mid-twentieth century. That account provides valuable insights into both the potential advantages and dangers inherent in contemporary efforts to “treat” the problem of drug addiction within an institutional structure ordinarily designed to assign blame and mete out punishment.⁴⁰ Especially insightful in this regard is the critique of rehabilitative practices offered by left-liberal commentators such as the American Friends Service Committee.⁴¹

Development of the treatment court model presents a host of difficult problems for medical personnel, judges, corrections officials, prosecutors, and others.⁴² One of the most intractable of these difficulties has been the

39. There is good reason to believe that drug treatment courts represent but the first of a series of new efforts as reviving the rehabilitative ideal. In a published interview, Judge Jeffrey S. Tauber, a leading proponent of drug treatment courts and the president of the National Association of Drug Court professionals, was asked whether drug courts are “leading a broader movement—away from purely punitive, incarcerative approaches back toward what used to be called rehabilitation?” *An Interview with Judge Jeffrey S. Tauber, President, National Association of Drug Court Professionals*, INDIGENT DEFENSE (National Legal Aid and Defender Association), Nov.-Dec. 1997, at 11. Tauber replied in the following terms:

I think clearly there is a larger movement of programs that address rehabilitation issues, and drug courts are the initial wave. I have every expectation that the drug court model will be duplicated and is being duplicated in domestic violence court, in juvenile drug court, in family drug courts and other courts that are using comprehensive treatment, supervision and judicial monitoring.

Id. For another example of this larger trend, see Dail Willis, *Juvenile Offenders Offered A Break*, BALTIMORE SUN, Aug. 10, 1998, at B1 (describing program begun in 1970s, discontinued and revived recently, in which juvenile offenders are diverted from Juvenile Court in exchange for counseling and supervised community service).

40. For a full discussion of the criminal system’s focus on blame and punishment as opposed to medicine’s focus on diagnosis and treatment, see Boldt, *supra* note 7, at 2304-07.

41. See AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971) [hereinafter STRUGGLE FOR JUSTICE]; see also DAVID FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (2d ed. 1979); Lewis, *supra* note 1.

42. See generally BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, PUB. NO. NCJ-144531, PROGRAM BRIEF: SPECIAL DRUG COURTS (1993). According to a 1997 survey of nearly 100 drug treatment courts, the most serious problems encountered by judges include “difficulties in obtaining stable funding . . . ; breaking down barriers among the coordinating agencies and treatment providers . . . ; and obtaining support from other judges.” COOPER, 1997 SURVEY, *supra* note 18, at 31. The most difficult problems faced by prosecutors involve “developing appropriate eligibility criteria; convincing law enforcement of the merits of the program; and developing procedures to assure prompt disposition of cases involving defendants who are unsuccessfully terminated [sic] from the drug court.” *Id.* at 33-34. Defense counsel reported problems with “the prompt identification of eligible defendants; assuring adequate protection of defendants’ legal rights; and developing a stable funding source for treatment services.” *Id.* at 36. Correctional agency officials identified “overwhelming

question of professional role for defense attorneys charged with representing the interests of drug treatment court defendants.⁴³ This issue forms a direct, conceptual link between the critique of rehabilitation offered in the late 1960s and 1970s and the current effort to merge penal and therapeutic practices within the drug treatment court setting. Nevertheless, few have engaged in searching discussions of the proper role of the drug treatment court defense attorney,⁴⁴ one actor on the “team” who owes a competing set of loyalties and responsibilities that grow out of very different institutional and ideological premises.⁴⁵ Proper management of this clash of expectations and

philosophical differences with other participating agencies; providing bedspace for participants who are sanctioned by the court; difficulties in communication and coordination with other participating agencies; and obtaining adequate space for community-based activities” as the most significant problems they experience. *Id.* at 41.

43. Some of these professional ethics issues were identified initially in working papers from the First National Drug Court Conference, held in December of 1993. *See* GOLDKAMP, *supra* note 13, at 11-16. The Conference papers underscored the point that successful treatment of criminal defendants in a drug treatment court setting requires active participation and open cooperation by defense attorneys. *See id.* at 12; *see also* KEY COMPONENTS, *supra* note 21, at 11-12. Similarly, the Conference documents noted that defense counsel must occasionally continue representation of defendants who fail to complete the treatment process and are returned to the traditional, punishment-oriented adjudication system. *See* GOLDKAMP, *supra* note 13, at 14-15. This mix of cooperation and adversariness raises concerns about the waiver of defendants’ trial rights often built into drug treatment court procedures, including requirements that reverse or at least ameliorate the usual presumption of innocence, and about dangers that participation in the treatment process may result in greater punishment than that imposed on similarly situated defendants who do not participate. *See* ROBERT BURKE, DEFENSE ADVOCACY MEETS TREATMENT: CAN CRIMINAL DEFENSE STANDARDS BE RECONCILED WITH THE IMPLEMENTATION AND OPERATION OF DRUG COURTS (1995); MICHAEL P. JUDGE, CRITICAL ISSUES IN THE DESIGN AND OPERATION OF A DRUG COURT PROGRAM: CURRENT AND EMERGING: THE DEFENSE FUNCTION (1995). The report of the 1995 State Justice Institute’s National Symposium on the Implementation and Operation of Drug Courts identified other concerns regarding the role of defense attorneys in the drug treatment court process. In particular, problems with respect to diminished standards of confidentiality, the potential use of treatment records in other prosecutions, and overarching concerns about paternalism all present difficult theoretical and practical ethics considerations. *See* CAROLINE S. COOPER, 1995 NATIONAL SYMPOSIUM ON THE IMPLEMENTATION AND OPERATION OF DRUG COURTS, REPORT OF SYMPOSIUM PROCEEDINGS: WHERE HAVE WE BEEN? WHERE ARE WE GOING? (1995); ROBERT WARD, CONFIDENTIALITY AND DRUG TREATMENT COURTS: THE PERSPECTIVE OF A DEFENSE LAWYER (1995).

44. To date, several participants in the drug treatment court effort have written “practitioner’s” articles on various aspects of the professional responsibility problems mentioned above. *See* BURKE, *supra* note 43; JUDGE, *supra* note 43; WARD, *supra* note 43. While these papers accurately frame some of the professional ethics problems facing defense counsel, they understandably do not seek to place the issues in a larger historical or theoretical context. This Article attempts to provide some of that context by bringing to bear the lessons of an earlier rehabilitative era on the contemporary treatment court movement.

45. There is an extensive literature on the institutional and ideological foundations of defense counsel’s advocacy role. For a general discussion of advocacy roles, *see* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 52 (1988); William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36-37 [hereinafter Simon, *Ideology of Advocacy*]. For a more detailed analysis of and debate about the limits of criminal defense counsel’s partisan role, *see* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993);

responsibilities is critical to any satisfactory implementation of the drug treatment court model.

Part I of this Article briefly summarizes the history of rehabilitative penal practice in the United States during the twentieth century. The discussion pays special attention to the sustained critique of the rehabilitative ideal offered by left-liberal commentators twenty-five to thirty years ago. The discussion analyzes particular shortcomings that plagued corrections practices at this earlier juncture and explores the relevance of that history to today's drug treatment courts.

Part II builds on the observation of the left-liberal critics that rehabilitative penal regimes, by blending punitive and therapeutic impulses, often seek to accomplish incompatible goals.⁴⁶ This Part suggests that this conflict in objectives manifests itself predominantly in the tension between the norms of adversary adjudication that characterize traditional criminal law practice and the procedural informality and judicial activism that characterize rehabilitative undertakings. The consequences of this tension for defendants are illuminated by examining the role conflicts faced by their attorneys in these settings. This general discussion regarding the distorting effect that rehabilitative penal practice has on defender role also includes a more particular analysis of the special problems facing defense attorneys and, by extension, their clients in drug treatment courts.

Part III examines a similar set of departures from traditional adversarial adjudication in the context of juvenile court proceedings. The analogy between drug treatment courts and juvenile courts is useful because attorney role problems associated with procedural informality have received extensive scholarly discussion in the juvenile court area.⁴⁷ Part III then reviews some of the most relevant literature from that area, giving particular attention to several of the more thoughtful proposals offered for guiding defense attorneys in the formulation of an appropriate role conception. This

John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339 (1987); William H. Simon, *The Ethics Of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) [hereinafter Simon, *Ethics of Criminal Defense*]; Subin, *supra* note 23.

46. See, e.g., STRUGGLE FOR JUSTICE, *supra* note 41, at 27.

47. See, e.g., Wallace J. Mlyniec, *Who Decides: Decision Making in Juvenile Delinquency Proceedings*, in ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 105 (Rodney J. Uphoff ed., 1995); 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 (1991); Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996); Martin Guggenheim, *The Right to Be Represented But Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984).

discussion concludes by arguing that these accounts of attorney role in the juvenile court context do not adequately address the problems faced by defense counsel in drug treatment courts.

Finally, Part IV evaluates whether defense attorneys in drug treatment court can practice in a way that responds to the enduring insights of the left-liberal critics of the rehabilitative ideal. This Part offers a role conception formulated by reference to the critics' assertion that rehabilitative processes are often morally suspect, because they undermine defendants' dignity interests, obscure the unique perspective of those who are the objects of coercive treatment, and deteriorate into unalloyed punishment.⁴⁸ Part IV examines several concrete measures designed to guard against these dangers, particularly by paying specific attention to the special needs of defendants suffering from addiction. Part IV concludes that these minimum requirements for responsible defense practice in drug treatment courts are unlikely to be met on a consistent basis.

This somewhat pessimistic conclusion stems from a premise fundamental to liberal legal theory, that all state-sponsored punishment is inherently suspect.⁴⁹ While liberal theory recognizes that coercive measures may be justified if their use promotes other important public interests,⁵⁰ this perspective relies on the diligent efforts of defense counsel to insure that the state has met its burden of demonstrating a need for such coercive measures in any individual case. By contrast, when the government acts to provide assistance to individuals, rather than to punish them, it is possible to regard the individuals' interests as consistent with those of the state. In such instances, particularly when the government gives individuals a choice either to accept or reject the proffered help, the danger of overreaching is greatly reduced,⁵¹ and the need for vigorous defense advocacy is ameliorated.

This Article draws on the history of rehabilitative penal practice in the recent past, as well as more contemporary information from juvenile courts and drug treatment courts, to support its conclusion that a reduced advocacy role for defense counsel is not warranted. Even though defendants in these settings may receive needed rehabilitative services, they still face the potential of coercive, even punitive, dispositions. This fact alone is sufficient to require the interposition of procedural and substantive legal barriers

48. See ALLEN, *supra* note 38, at 44-56; STRUGGLE FOR JUSTICE, *supra* note 41, at 22-27.

49. See R.A. Duff & David Garland, *Introduction: Thinking About Punishment*, in A READER ON PUNISHMENT 1, 2-3 (R.A. Duff & David Garland eds., 1994); see also *infra* text accompanying notes 175-81.

50. See Duff & Garland, *supra* note 49, at 3.

51. See STRUGGLE FOR JUSTICE, *supra* note 41, at 27.

between the state and individual citizens. Moreover, notwithstanding the fact that these courts may be less punitive than their traditional counterparts, they still pose a danger that "precisely because of their less overtly punitive content, [they] may become the occasion for significantly widening the reach and scope of the social control apparatus."⁵²

This risk, in turn, suggests an additional reason for viewing the drug treatment court movement with skepticism. This final objection applies to drug treatment courts even if all of the conditions for vigorous defense advocacy could be met. Stated simply, the objection is that the drug treatment court movement not only presents difficulties for individual defendants and their attorneys, it also undermines larger efforts to develop an effective drug policy premised on a public health model. There is considerable irony in this claim, given that treatment court officials place relatively greater emphasis on rehabilitative services than do most other actors in the traditional criminal justice system. In this sense, the treatment court approach is a step in the direction urged by many policy makers and academics who have called for a "medicalization" of the drug problem.⁵³ There is an important difference, however, between the removal of some categories of drug-related cases from the criminal system altogether, as called for by advocates of medicalization or decriminalization, and the introduction of treatment functions into the process of criminal prosecution and punishment.⁵⁴

At least since the passage of the Harrison Narcotics Act in 1914,⁵⁵ "patterns of thinking" dominating public policy discourse about addictive drugs have been rooted in what recent commentators have called the

52. Andrew Scull, *Community Corrections: Panacea, Progress, or Pretense?*, in *THE POLITICS OF INFORMAL JUSTICE* (Richard Abel ed., 1982).

53. I include myself among those who have called for such an approach. See Boldt, *supra* note 7, at 2314-16; see also ERIC GOODE, *BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE* (1997); Ethan A. Nadelmann, *Drug Prohibition in the United States: Costs, Consequences, and Alternatives*, 245 *SCI.* 939 (1989); James Ostrowski, *Thinking About Drug Legalization*, 121 *POL'Y ANALYSIS I* (1989); Kurt L. Schmoke, *An Argument in Favor of Decriminalization*, 18 *HOFSTRA L. REV.* 501 (1990) (testimony before U.S. House of Representatives).

It is important to distinguish between a policy of "decriminalization" or "medicalization" on the one hand and "legalization" on the other.

A strategy of decriminalization relies on a recharacterization of chemical dependency as a concern of the public health system, and stresses the continuation and strengthening of regulatory controls governing the manufacture and distribution of addictive substances. Legalization, on the other hand, grows out of libertarian concepts that press toward a more generalized deregulation of the area.

Boldt, *supra* note 7, at 2314 (citations omitted).

54. See Kevin F. Ryan, *Clinging to Failure: The Rise and Continued Life of U.S. Drug Policy*, 32 *L. & SOC'Y REV.* 221, 231-36 (1998).

55. See generally DAVID E. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (1973).

“prohibition model”⁵⁶ or the “punitive paradigm.”⁵⁷ This discourse regards substance abuse as a problem either of individual moral failing or individual pathology. As a consequence, it has been virtually taken for granted that the criminal justice system, with its emphasis on individual blame and responsibility, is an appropriate institutional setting for responding to the problems associated with drugs.

Even though the punitive and therapeutic goals of the treatment court movement are in significant tension, they share one important characteristic: they both proceed from a highly individualistic perspective. Thus, while the criminal law component focuses on matters of individual responsibility and blame, the treatment component defines the problem as one of individual pathology and personal recovery.⁵⁸ By contrast, the removal of some categories of drug-related behavior from the criminal justice system altogether represents an entirely different conception of drug policy, which is built upon a public health model. This alternative “sees drug use as a public, not an individual, problem,”⁵⁹ and focuses on prevention and larger structural change as well as treatment.

The decision of drug treatment court planners to employ the criminal justice system as a site for the provision of treatment not only reflects the dominance of an individualistic perspective, but it also makes it less likely that public discussion of these alternative policy choices will take place. This is but one example of the general claim made by adherents of constructivist social theory that law is “both [a] constituent of social reality and is created by it in a dialective process.”⁶⁰ In the final analysis, this Article asserts that this sort of reinforcement of the dominant discourse governing drug treatment policy is too high a price to pay for the likely benefits that drug treatment courts may produce.⁶¹

I. TWENTIETH CENTURY REHABILITATIVE PENAL PRACTICE IN THE UNITED STATES

The contemporary drug treatment court movement is assessed here in light of the history of an earlier effort at rehabilitative penal practice. This

56. Ryan, *supra* note 54, at 222.

57. BERTRAM ET AL., *supra* note 2, at 61.

58. See Ryan, *supra* note 54, at 234, 237.

59. *Id.* at 238.

60. Ainsworth, *supra* note 47, at 1090.

61. Indeed, as the left-liberal critics pointed out a generation ago, because rehabilitative penal practices tend to obscure the structural causes of crime, they make it less likely that fundamental social change will occur. See ALLEN, *supra* note 38, at 34-36; STRUGGLE FOR JUSTICE, *supra* note 41, at 17-18.

history centers on the rise and precipitous decline of the rehabilitative ideal in the United States and Great Britain in the mid- twentieth century. Although the effort to build treatment into the punishment system at that time drew critics from across the political spectrum, perhaps the most telling attacks came from the left and from liberals.⁶² The left-liberal critics lodged concrete criticisms against American and British penal policy in the 1960s and 1970s.⁶³ These criticisms, although fairly grounded with respect to the system as it functioned in the 1950s and 1960s, play out somewhat differently within the context of the contemporary drug treatment court movement. This historical account explores the ways in which modern drug treatment courts are both alike and significantly different from corrections practices in the middle portion of the century. At the same time, the assault mounted a generation ago is of considerable contemporary interest once the discussion moves beyond the concrete concerns expressed by the critics, in order to consider the larger theoretical perspectives that motivated their analysis. Thus, this assessment concludes by examining both the liberal and radical perspectives⁶⁴ adopted by the critics of rehabilitation in the 1970s. These perspectives offer significant critical purchase today and suggest important reasons to be concerned about the growth of contemporary drug treatment courts.

A. The Development and Repudiation of the Rehabilitative Ideal

As Francis Allen and others have documented in detail,⁶⁵ from the period between the World Wars until the early 1970s, discourse about state-sponsored punishment in the United States and Great Britain was dominated by a consequentialist perspective in general⁶⁶ and by a focus on rehabilitation

62. See, e.g., STRUGGLE FOR JUSTICE, *supra* note 41; FOGEL, *supra* note 41; NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974); Lewis, *supra* note 1; Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968).

63. In particular, these attacks were focused on a trinity of features ordinarily found in rehabilitative or therapeutic criminal law institutions. These features were described as individualized treatment, indeterminate sentencing, and broad discretionary power. See STRUGGLE FOR JUSTICE, *supra* note 41, at 84.

64. For a good discussion of the basic elements of liberal and radical "world-views," see Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 *DUKE L.J.* 413, 426-39.

65. See ALLEN, *supra* note 38, at 5-7; Duff & Garland, *supra* note 49, at 8-12.

66. As used in text, the phrase "consequentialist perspective" is intended to describe a utilitarian approach to punishment. In this sense, a consequentialist account "justif[ies] punishment by its contingent, instrumental, contribution to some independently identifiable good. That is to say, the good that punishment is to promote—whether this is happiness, dominion, autonomy, welfare, or crime prevention—can be identified without reference to punishment itself." Duff & Garland, *supra* note 49, at 6.

in particular.⁶⁷ By 1980, however, striking changes had occurred in both the practice and theory of punishment. Consequentialist (or utilitarian) goals and justifications for punishment fell into a secondary position behind deontological (or nonconsequentialist) goals and justifications, centered on retributive notions of just deserts.⁶⁸

Others have told the story of this dramatic shift in the ideology of punishment with great skill.⁶⁹ Some of these accounts argue that the development of the welfare state from the 1930s through the 1970s, and the adjunct focus of the social sciences on "engineering" human behavior, helped to push aside longstanding notions of fault and blame in favor of the consequentialist goals of rehabilitation and deterrence.⁷⁰ At that time, scientific research into the causes of crime and the utility of "corrective" penal measures was regarded as capable of yielding a new system that could effectively root out and prevent destructive criminal behavior.⁷¹ To be sure, "negative retributivism," the notion that fault was still a precondition for coercive state intervention, continued to shape sentencing practices.⁷²

67. Allen defines the "rehabilitative ideal" as "the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfactions of offenders." ALLEN, *supra* note 38, at 2; *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 5-6 (1987).

68. Allen points to a shift in statutory sentencing provisions in California in the mid-1970s as a prime example of this decline of the rehabilitative ideal in practice.

The California sentencing act of 1976 serves as a useful indicator. The 1976 act repealed older sentencing provisions whose overriding purposes, according to a California court, were to "maximize rehabilitary efforts." The new law states in accents not heard a decade earlier: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances."

ALLEN, *supra* note 38, at 7-8 (quoting *Holder v. Superior Court*, 74 Cal. Repr. 853, 855 (1969)); CAL. CRIM. CODE § 1170(a)(1) (Deering 1977).

A similar shift in the academic literature also occurred during the 1970s. In particular, this shift in the theory of punishment was marked by the work of Andrew von Hirsch and others who pressed the notion of "just deserts" as the proper retributive basis for sentencing practice. *See, e.g.*, ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591 (1981).

69. *See generally* ALLEN, *supra* note 38; Anthony E. Bottoms, *Introduction to THE COMING PENAL CRISIS: A CRIMINOLOGICAL AND THEOLOGICAL EXPLORATION* 1-24 (A.E. Bottoms & R.H. Preston eds., 1980).

70. *See* Duff & Garland, *supra* note 49, at 8-10.

71. *See id.* Some writers have referred to this as "positivistic penology," meaning that it is characterized by "the assumption that external, deterministic factors such as heredity, environment, or social conditions cause criminal behavior, not an evil exercise of free will on the part of the criminal, and that unraveling the causes of crime will tell us what sentencing policies to adopt." Ainsworth, *supra* note 47, at 1104 n.131.

72. *See* Duff & Garland, *supra* note 49, at 7; *see also* H.L.A. HART, PUNISHMENT AND

Nevertheless, "positive retributivism," the idea that the purpose of punishment is primarily to express moral condemnation,⁷³ was treated as an inappropriate and vestigial societal impulse.⁷⁴ In the place of vengeful responses to antisocial conduct, which advocates of the rehabilitative ideal regarded as morally debased, many suggested a new concept of punishment based on the promise of individual therapy.⁷⁵

All of this changed in the mid-1970s, as utilitarian approaches to punishment in general, and rehabilitation in particular, came under searing attack. Some writers have argued that the ensuing decline in the fortunes of consequentialist penal practice and theory was part of a larger reaction against the "scientific social engineering" of a welfare state that had come to be seen as part of the problem and not the solution.⁷⁶ Francis Allen has gone even further in arguing that the two principal preconditions for a rehabilitative regime, which had been in place during the 1950s and 1960s, no longer pertained by the early 1970s.⁷⁷

First, Allen has argued that a general societal belief in the malleability of human nature, essential to a regime focused on the "treatment" of offenders,⁷⁸ was severely shaken due to a loss of confidence in institutions

RESPONSIBILITY 242-44 (1968); cf. Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 L. & CONTEMP. PROBS. 47, 49 (1986) (arguing against mixed theories of punishment because they are necessarily dominated by retributive principles governing the most important question of who is selected for sanctioning).

73. See Duff & Garland, *supra* note 49, at 7.

74. See ALLEN, *supra* note 38, at 5-6 (discussing Justice Black's opinion in *Williams v. New York*, 337 U.S. 241 (1949)).

75. See, e.g., KARL MENNINGER, *THE CRIME OF PUNISHMENT* 28 (1968) ("I suspect that all the crimes committed by the jailed criminals do not equal in total social damage that of all the crime committed against them." (emphasis omitted)).

76. See Duff & Garland, *supra* note 49, at 10. Duff and Garland argue that this disillusionment with the various "institutions of the welfare state" had as much to do with the work of liberal theorists such as Rawls and Dworkin "assert[ing] the importance of justice over utility, and of individual rights against the claims of the state," *id.*, as it did with publicized studies finding that these efforts were ineffective in achieving their goals. See, e.g., Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22 (1974). Ironically, Martinson subsequently amended his earlier conclusions regarding the futility of rehabilitation to hold open the possibility that some corrections undertakings might succeed. See Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979).

77. See ALLEN, *supra* note 38, at 11, 22-24, 30-31.

78. See *id.* at 11; see also DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* 14 (1975) ("Liberals and conservatives alike felt that, as James Q. Wilson put it at the time, '... belief in rehabilitation requires not merely optimistic but heroic assumptions about the nature of man'). In addition, a shared conviction in the ability of institutions to influence individual decision making is an essential prerequisite for a system of punishment with an identified goal of deterrence. See generally John C. Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 347 (1955).

concerned with character development and public education.⁷⁹ Allen's assessment emphasized the "displacement and diminution of family authority" in contemporary American society.⁸⁰ In addition, he asserted that a shift in prevailing attitudes toward public education was significant in preparing the societal context within which a treatment approach to criminal offenders was ultimately rejected. Allen's assessment in this respect is founded on the close relationship he reports between a society's sense of confidence in its institutions of public education and its institutions of penal reform.⁸¹ In contrast to the optimism regarding the socializing potential of public schools, which characterized an earlier era in American social life,⁸² Allen has suggested that the 1970s were a time during which the democratic claims of educators, and by extension, corrections officials, were under fierce attack.⁸³

The second precondition Allen has identified as necessary to the survival of the rehabilitative ideal is a "sufficient consensus of values to make possible a working agreement on what it means to be rehabilitated."⁸⁴ With respect to this requirement, however, he has asserted that the United States had suffered a radical loss of faith in social and political institutions more generally, which had led to a diminished sense of public purpose.⁸⁵ The emergence of the civil rights movement, widespread resistance to the Vietnam War, and Watergate all brought the legitimacy and efficacy of state undertakings into question.⁸⁶ At the same time, perceptions of increasing crime and "a collapse of public order" began to be linked directly to perceptions of the "American crime problem as one principally of race."⁸⁷

79. See ALLEN, *supra* note 38, at 11, 22-24.

80. *Id.* at 19-20. This process was important, says Allen, because the family, along with public education and criminal law, was one of the principal institutions "traditionally relied on for socializing the young and directing human behavior to the achievement of social purposes." *Id.* at 19.

81. *See id.* at 22.

82. *See id.* at 23.

83. *See id.* at 23-24.

84. *Id.* at 11. This, in turn, would depend upon some general agreement about what it means to be unacceptably deviant.

85. See ALLEN, *supra* note 38, at 18, 30-31.

86. *See id.* at 30-31. As Francis T. Cullen and Karen E. Gilbert have observed:

Few in leftist circles doubted that the government lacked the will if not the capacity to "do good" for the casualties of the inequitable order over which it presided. Mistrust and pessimism led all but the most old-fashioned and idealistic liberals to anticipate that harm, not beneficence, will result when the poor, the aged, the sick, the retarded, and the mentally ill are brought under the auspices of state welfare programs or institutional care. The same thinking and sentiment informed the posture taken by the left toward the criminal justice system and its announced attempt to rehabilitate lawbreakers.

FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 107 (1982).

87. ALLEN, *supra* note 38, at 30.

Allen has explained the connection:

It is hardly coincidental that the decline in public support for the rehabilitative ideal accompanies rising percentages of noncaucasian inmates in the prisons. Optimism about the possibilities of reform flourishes when strong bonds of identity are perceived between the reformers and those to be reformed.

Conversely, confidence in rehabilitative effort dwindles when a sense of difference and social distance separates the promoters from the subjects of reform.⁸⁸

These shifts in the way that ordinary citizens, academics, and policymakers perceived the efficacy of state-sponsored welfare initiatives, as well as the possibility of true corrective education, rendered the functioning apparatuses of the rehabilitative ideal vulnerable to attack. One must understand the elements of the attack in order to ascertain the continuing utility of this history for evaluating contemporary efforts at rehabilitative penal practices, including the drug treatment court movement.

B. *The Practical Critique*

Regardless of one's assessment of the foregoing account, one element of the history is relatively clear: the dramatic decline in the influence of rehabilitative theory in everyday penal practice during the 1970s coincided with the articulation by left-liberal critics of a particular practical critique.⁸⁹ Specifically, the American Friends Service Committee's ("Friends") influential 1971 Report, *A Struggle For Justice*, attacked each of the three characteristics central to a rehabilitative approach to criminal justice.⁹⁰

88. *Id.* at 30-31 (citations omitted). For a good contemporary discussion of the disproportionate representation of African-Americans and other persons of color in the criminal justice system, see MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 4* (1995) (reporting that one out of three African-American males between ages of 20 and 29 is under the supervision of criminal justice system). See also *infra* note 555 and accompanying text.

89. To be sure, the left-liberal critique was joined by other attacks mounted from the right. Allen refers to these conservative critics as the "extreme law-and-order advocates." ALLEN, *supra* note 38, at 62. Nevertheless, given the apolitical character of rehabilitative practice claimed by its supporters, see *infra* text accompanying notes 161-64, the left-liberal critique, with its pointed skepticism of the scientific foundations of penal treatment, was especially powerful. This element of the history is particularly apparent in the popular media version of the left-liberal critique expressed in books such as Ken Kesey's *One Flew Over The Cuckoo's Nest* (1962) and films like Stanley Kubrick's *A Clockwork Orange* (1973).

90. STRUGGLE FOR JUSTICE, *supra* note 41, at 84.

1. *The Problems of Diagnosis, Evaluation, and Prognosis*

The first characteristic of the rehabilitative regime to draw the fire of the critics was an emphasis on individualized treatment.⁹¹ Rehabilitation, like other consequentialist approaches to punishment, is forward-looking. For rehabilitation, the question for decision makers is not what should be done to an offender as a normative matter given the past criminal event, but rather what measures will accomplish a future reduction in criminal behavior.⁹² This instrumentalist perspective further recognizes that substantially dissimilar actors often may commit the same or similar offenses, at least as defined by substantive criminal law doctrine.⁹³ This means that dispositions cannot simply be determined according to the gross category of wrongdoing with which the offender has been charged or convicted. Instead, the length and conditions of a criminal sentence must be tailored to effect beneficial change in those traits of the individual defendant's personality, character, or behavioral patterns associated with past untoward conduct and predicted future behavior.⁹⁴ As the critics pointed out, the scientific perspective at the core of this individualized approach only yields satisfactory outcomes if decision makers can accurately assess the offenders' treatment needs, progress toward "rehabilitation," and likely inclination to recidivate. Thus, in the words of the Friends' Report, an individualized treatment model requires effective diagnosis, evaluation, and prognosis.⁹⁵

The central problem associated with diagnosis in the criminal context is practical: society cannot afford to offer each offender a unique treatment plan.⁹⁶ Therefore, even the most flexible system must operate according to a fixed number of diagnostic categories. It must also be capable of sorting offenders into the group leading to the most appropriate treatment.⁹⁷ The left-liberal critics aptly expressed skepticism regarding the ability of mental health professionals, criminologists, and others to make these kinds of

91. *See id.* at 37, 67-68.

92. *See* Duff & Garland, *supra* note 49, at 8.

93. *See* STRUGGLE FOR JUSTICE, *supra* note 41, at 84.

94. *See id.* Under the most extreme version of this therapeutic model developed in the 1950s and 1960s, a judgment at the time of sentencing that an offender is unlikely to pose any future dangerousness would lead to the conclusion that no coercive measures are required or mandated. Thus, offenders convicted of some past criminal event would be entitled to unconditional release from all coercive measures if they were judged by the system's behavioral experts as posing no future dangerousness. *See, e.g.*, BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW*, 32-34 (2d ed. 1981); Jay Campbell, *A Strict Accountability Approach to Criminal Responsibility*, 29 *FED. PROB.* 333 (1965).

95. *See* STRUGGLE FOR JUSTICE, *supra* note 41, at 68; *see also* FOGEL, *supra* note 41, at 56-57.

96. *See* STRUGGLE FOR JUSTICE, *supra* note 41, at 67.

97. *See id.* at 68.

diagnostic judgments,⁹⁸ particularly given the remarkably broad claims made at the time by rehabilitation-oriented corrections officials. Indeed, in its extreme form, the claim was that virtually all crime was the expression of some individual pathology that could be identified and, in most cases, treated.⁹⁹ Further, advocates of this regime asserted that offenders who were likely to be amenable to treatment could be distinguished from those who were not.¹⁰⁰

The critics, however, argued that advocates of a rehabilitative, therapeutic approach based their claims on a fundamental misapprehension about most offenders. The great majority of those who violate legal norms, the critics asserted, do not suffer from some mental health deficit or psychological pathology, and therefore do not need treatment. Instead, offenders "fall into crime only because their social circumstances make this a normal 'not pathological' behavioral choice."¹⁰¹ Moreover, even with respect to those offenders who might have benefited from treatment, the critics argued that the corrections establishment lacked the diagnostic tools to formulate effective individual plans.¹⁰² Their assessment in this regard was stark:

"Morass" is an apt description of the present state of affairs in contemporary criminological science. A survey of the literature reveals that there is no classification system capable of reliable (consistent) diagnostic application that is generally accepted by professionals working in the field.¹⁰³

With respect to evaluation and prognosis, the critics noted that a rehabilitative regime must measure the effects of treatment in an individual case and judge the appropriateness of the termination of therapy and release from supervision or custody.¹⁰⁴ Here again, the critics pointed to the inadequacy of the scientific foundation on which these judgments with respect to "cure" or "success" were to be made. Indeed, the critics asserted

98. See ALLEN, *supra* note 38, at 57-59; STRUGGLE FOR JUSTICE, *supra* note 41, at 69.

99. See ALLEN, *supra* note 38, at 47; STRUGGLE FOR JUSTICE, *supra* note 41, at 40. In its less extreme form, mid-century proponents of rehabilitation described a variety of causes of criminal behavior. "The rationale of these [rehabilitative] programs calls for understanding the sociological, economic, and cultural sources of criminality, the psychology of criminals, and our reactions to criminality . . ." Henry Weihofen, *Retribution Is Obsolete*, 39 NAT'L PROBATION & PAROLE NEWS 1, 4 (1960).

100. In which case, the system typically would shift its focus from rehabilitation to isolation. See, e.g., Robert Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 386 (1952).

101. CULLEN & GILBERT, *supra* note 86, at 113.

102. See STRUGGLE FOR JUSTICE, *supra* note 41, at 69.

103. *Id.* at 69.

104. See *id.* at 68; FOGEL, *supra* note 41, at 57.

that not only was there a generalized absence of scientific information on which to make these critical decisions, there was not even any agreement among criminologists and other social scientists regarding why this lack of data persisted.¹⁰⁵ The best response the corrections system had to offer was the premise that an inmate's behavior while in custody is a good indicator of rehabilitation and likely future behavior on the outside.¹⁰⁶ The critics responded, however, by arguing that an institutionalized corrections environment is not representative of the conditions confronting offenders upon release into the community, and so patterns of conduct while incarcerated cannot accurately predict long-term success.¹⁰⁷

This critique based on the difficulties of making accurate decisions with respect to diagnosis, evaluation, and prognosis supports the adoption of a cautious approach to the contemporary drug treatment court movement. Nevertheless, specific reasons suggest that the hurdles articulated by the 1970s critics were much more daunting in the context of the broad-based rehabilitative regimes then in place than they are in the somewhat more limited setting of modern drug treatment courts.

In the first place, while substance abuse, chemical dependency, and addiction form a complex group of diseases,¹⁰⁸ the likely range of diagnostic categories relevant to the population of offenders in a drug treatment court is considerably narrower than the full spectrum of diagnoses (and treatment regimes) required to describe the needs of all criminal offenders.¹⁰⁹ Moreover, addiction treatment specialists and other healthcare professionals have considerable data regarding the effective diagnosis and treatment of chemically-dependent individuals.¹¹⁰ The best data show, for example, that

105. See STRUGGLE FOR JUSTICE, *supra* note 41, at 70. One group argued that there had been insufficient research, another camp asserted that "unlike cancer or general paresis, crime is viewed as being so complex and research into it so plagued by uncontrollable variables that the prognosis for any significant success must be guarded at best." *Id.*

106. The claim was that "[t]hose who gain 'insight' into their emotional pathology, work to obtain an occupational skill, and avoid making trouble are good candidates for freedom." CULLEN & GILBERT, *supra* note 86, at 113.

107. See *id.* at 114.

108. See generally MARK KELLER ET AL., A DICTIONARY OF WORDS ABOUT ALCOHOL 6-27 (2d ed. 1982) (setting out terms used to describe types of addiction and alcoholism); Aubrey Lewis, *Introduction: Definitions and Perspectives*, in SCIENTIFIC BASIS OF DRUG DEPENDENCE 5, 5-11 (Hannah Steinberg ed., 1969) (defining "drug dependence"); Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 397-98 (1988) (describing addiction in terms of "loss of control"); Frank A. Seixas et al., *Definition of Alcoholism*, 85 ANNALS OF INTERNAL MED. 764 (1976) (setting out definition of "alcoholism").

109. See, e.g., AMERICAN SOC'Y OF ADDICTION MEDICINE, PATIENT PLACEMENT CRITERIA FOR THE TREATMENT OF SUBSTANCE-RELATED DISORDERS (2d ed. 1996).

110. See TREATMENT EFFECTIVENESS STUDY, *supra* note 28; see also A. Thomas McLellan et al., *Increased Effectiveness of Substance Abuse Treatment: A Prospective Study of Patient-Treatment*

younger substance abusers often respond well to therapeutic communities and other similar treatment modalities that remove patients from their everyday lives in order to instill more productive behavioral responses,¹¹¹ while older patients seem to respond more favorably to therapy-based programs, also referred to as "psychiatric inpatient programs."¹¹² Treatment modalities that use pharmacological agents, including programs that use the drugs methadone and naltrexone, either to maintain the dependent patient or to block the effects of the addictive drug, often succeed for high-status persons and others who have sufficient stability and structure in their everyday lives.¹¹³

Unfortunately, it is not entirely clear whether the various drug treatment courts now in operation can meaningfully utilize this diagnostic information in order to direct individuals into the most appropriate therapeutic settings.¹¹⁴ Most publicly-funded treatment providers are already operating at full capacity and have waiting lists.¹¹⁵ Thus, individuals referred into treatment by a drug treatment court likely will be referred to whatever program within the network of affiliated providers happens to have an opening or the shortest wait for admission.¹¹⁶ In addition, some drug treatment courts have been

"Matching," 171 J. NERVOUS & MENTAL DISEASES 597 (1983); Dennis Dwayne Simpson & L. James Savage, *Client Types in Different Drug Abuse Treatments: Comparisons of Follow-Up Outcomes*, 8 AM. J. DRUG & ALCOHOL ABUSE 401 (1982).

111. See Alfred S. Friedman & Nita W. Glickman, *Program Characteristics for Successful Treatment of Adolescent Drug Abuse*, 174 J. NERVOUS & MENTAL DISEASES 669 (1986).

112. See TREATMENT EFFECTIVENESS STUDY, *supra* note 28, at 10-11. Other patients who appear to respond well to psychiatric inpatient programs include middle class persons, "blue collar" workers, and addicted health professionals. See *id.*

113. See *id.* at 6.

114. In its public comments on the Government Accounting Office's ("GAO") 1997 report to Congress regarding the development and operation of drug treatment courts, the Department of Health and Human Services "expressed concerns with the lack of a thorough assessment of the adequacy of treatment being provided to drug court program participants." DRUG COURTS OVERVIEW, *supra* note 8, at 15-16. The GAO report, however, does describe the results of a 1997 survey conducted by the Drug Court Clearinghouse of 72 drug treatment court programs. Those responding to the survey "generally reported using an array of substance abuse and individual rehabilitation services, including detoxification, stabilization, counseling, therapy, drug education, and relapse prevention." *Id.* at 51-52. Significantly, these responses also indicated that most treatment courts do not "maintain the capability to refer program participants to inpatient treatment for more than 30 days," *id.* at 52 n.2, thus effectively precluding the use of some treatment modalities such as therapeutic communities. See also COOPER, 1997 SURVEY, *supra* note 18, at 48-49 (describing very limited capability of drug treatment courts to refer individuals to inpatient treatment for more than thirty days).

115. See COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 52 ("the most serious problem encountered by the responding programs related to the lack of available funding to provide necessary treatment services"); Brown, *supra* note 5, at 82 ("Even as the federal government doubled treatment funding between 1988 and 1993, treatment efforts failed to reach at-risk populations, including inmates.").

116. See COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 52 ("various operational issues were noted relating . . . to the matching of court and treatment resources to the volume (often

designed to operate with dedicated treatment slots, in part because of the inadequate treatment resources now available more generally.¹¹⁷ In these instances, it is unlikely that treatment referrals will be made based solely on decisions regarding individual diagnosis and appropriateness of a given treatment modality; rather, the individual offender frequently will be referred to that provider with whom the treatment court has reserved beds.¹¹⁸

With respect to evaluation and prognosis, an application of the critique of the rehabilitation regime of twenty-five years ago to contemporary drug treatment court efforts once again suggests the need for caution. Instead of vague judgments about future behavior and the likelihood of recidivism, the principal question facing modern treatment court decision makers is whether an individual participant has successfully entered into a pattern of recovery from addiction or chemical dependency.¹¹⁹ The addictions treatment

fluctuating) . . . of eligible drug court participants”).

117. A 1995 survey conducted by the Drug Court Resource Center at American University asked responding treatment courts to identify unanticipated issues encountered and to describe what steps were taken to resolve those problems. The Kansas City drug treatment court reported that “inadequate treatment space,” insufficient “reporting from existing treatment providers,” and the “needs of special populations (pregnant women, homeless, dual diagnosis, etc)” had led them to utilize a single treatment provider under contract with the court. *Id.* at 56-57.

118. The Center for Substance Abuse Treatment of the Department of Health and Human Services, in its 1997 planning guide and checklist for drug treatment courts, identified a number of elements that were critical to the success of such undertakings. Among the elements was the requirement of “[c]omprehensive, client-oriented treatment to include a range of appropriate modalities.” CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP’T OF HEALTH & HUMAN SERVICES, SUBSTANCE ABUSE TREATMENT PLANNING GUIDE AND CHECKLIST FOR TREATMENT-BASED DRUG COURTS (1997) [hereinafter PLANNING GUIDE AND CHECKLIST]. Despite this admonition, the GAO’s 1997 study reported that “[a]ccording to the Drug Court Clearinghouse, in most drug court programs, treatment . . . is generally administered on an outpatient basis with limited inpatient treatment as needed to address special detoxification or relapse situations.” DRUG COURTS OVERVIEW, *supra* note 8, at 24. A review of the appendix to the GAO study in which the results of the Clearinghouse survey are reported reveals a wide variation in the nature of treatment services available through different drug treatment courts. At one end of the continuum is the Denver program in which “[t]reatment is individualized,” and may include outpatient treatment, acupuncture, group therapy, intensive residential treatment, and the use of therapeutic communities. *Id.* app. III. At the other end of the continuum are several treatment courts that provide little more than a twelve-step program and urinalysis. *Id.*

119. Although the text refers to a “pattern of recovery,” it is important to note that experts in the addiction treatment field often define treatment effectiveness to include measures short of complete and permanent abstinence. Thus, effective treatment goals might include “reduced time to relapse, reduced frequency of drug use, and the reduced amount of the drug used in total and during each episode of use.” TREATMENT EFFECTIVENESS STUDY, *supra* note 28, at 2. It is questionable whether this sort of expanded and individualized description of treatment outcome success is acceptable operationally or politically in the context of drug treatment courts. See COOPER, 1997 SURVEY, *supra* note 18, at 57 (summarizing how frequently various criteria (including program attendance, urinalysis results, graduation rates, appearances at court hearings, new arrests, and employment) are used to assess drug treatment programs).

community is still debating how to measure treatment outcomes,¹²⁰ and there is a large and contentious literature with respect to the various rates of long-term success and failure of different treatment modalities.¹²¹ At the same time, however, at least in the nearer-term, more objective, concrete measures of success and failure on which to base decisions in the cases of individual offenders do exist. For example, rates of attendance in outpatient programs and ongoing urine testing for both inpatients and outpatients provide better indicators of an individual's progress in treatment than the data typically used in the past by parole boards and other corrections officials.¹²² The individualization critique, then, is not dispositive in the context of contemporary drug treatment courts. The critique suggests that any therapeutic regime will only be as good as the expert judgments that determine how individual cases are handled. At this point, it is probably fair to conclude that drug treatment court decision makers have somewhat more reliable data than did their earlier counterparts, and consequently are somewhat more likely to make sensible choices with respect to treatment, release from supervision, and the like.¹²³

120. See TREATMENT EFFECTIVENESS STUDY, *supra* note 28, at 2 n.1; cf. Michael T. French et al., *The Impact of Time in Treatment on the Employment and Earnings of Drug Abusers*, 81 AM. J. PUB. HEALTH 904 (1991).

121. See, e.g., McLellan et al., *supra* note 110; Simpson & Savage, *supra* note 110.

122. Indeed, the Drug Court Resource Center's study reports that "[a]t a minimum, the information provided to the drug court judge for each [d]rug [c]ourt participant has included: appearance at scheduled treatment sessions; appearance for requisite urinalyses; urinalyses results; appearance at scheduled court sessions; and new arrests." COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 40.

123. In discussing the lack of reliable data on the possible success or failure of rehabilitative efforts, the American Friends Service Committee noted that treatment-related assessments require, at a minimum, "comparison with control groups of similar subjects who are not treated;" "control of other variables;" and "reasonably reliable criteria for determining success or failure." STRUGGLE FOR JUSTICE, *supra* note 41, at 42. In light of this description of good social science methodology, it is worth noting the critical assessment offered by the GAO's 1997 review of existing drug treatment court studies.

Ideally, responding to issues raised by Congress and others and addressing the efficacy of drug court programs would be more effectively determined by following up on participants and nonparticipants (i.e., eligible offenders who chose not to participate) for some period after they leave the program to see if they committed new crimes or relapsed into drug use. Overall, the evaluation studies we reviewed showed some positive results but did not firmly establish whether drug court programs were successful in reducing drug relapse and offender recidivism. Many of the studies involved very short follow-up periods. Some calculated relapse and/or recidivism rates only for program participants, and only for the period during which they were participating in the program. Others compared rates of recidivism or relapse for program participants and program dropouts or with offenders whose arrests occurred prior to the inception of the program.

DRUG COURTS OVERVIEW, *supra* note 8, at 79.

2. *The Problems of Indeterminacy and Discretion*

As previously noted, the left-liberal critics suggested that rehabilitative systems of punishment necessarily exhibit three related characteristics. In addition to an emphasis on individualized treatment, the other characteristics to draw their fire were the systems' reliance on indeterminate sentences and their allowance for broad discretionary decision making.¹²⁴ The critics argued that the move to indeterminate sentencing, "which made the need for and response to treatment the formal standard for determining whether and for how long to imprison,"¹²⁵ had several negative consequences.¹²⁶ Specifically, as the range of possible sentences available for any given offense widened, the total amount of punishment imposed on offenders typically increased.¹²⁷ Indeed, the data showed that increased indeterminacy in sentencing was directly correlated with increases in the median length of time actually served by prisoners.¹²⁸ More central to the critique was the notion that indeterminacy is itself punitive. The critics argued that the very uncertainty of an indeterminate sentence, particularly when release decisions are highly discretionary and difficult to predict, constitutes a kind of psychological harm.¹²⁹

The left-liberal critics leveled some of their most pointed attacks against the broad discretion held by judges, parole boards, and other decision makers in the rehabilitative regime.¹³⁰ Not surprisingly, given the difficulties of diagnosis, evaluation, and prognosis, the critics found little empirical basis to believe that offenders' actual sentences bore any relationship to their

124. See, e.g., STRUGGLE FOR JUSTICE, *supra* note 41, at 84.

125. *Id.* at 27.

126. See *id.* at 28. They suggested further that, if the "reformers" were "naive" with respect to these outcomes, "managers of the correctional establishment were not." With respect to this latter group, they argued that indeterminacy was supported by corrections officials as a means of gaining power over inmates and maintaining institutional control. See *id.*

127. See CULLEN & GILBERT, *supra* note 86, at 119.

128. See FOGEL, *supra* note 41, at 194; JESSICA MITFORD, *KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS* 92 (1973); Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 303-04 (1974) ("[T]here is evidence, albeit inconclusive, that prisoners incarcerated under indeterminate sentencing laws serve longer terms of imprisonment . . .").

129. The Friends noted:

The middle class person who blanches at the thought of the cat-o'-nine-tails apparently accepts without undue feelings of guilt the cat-and-mouse game whereby the prisoner never knows whether the sentence is three years or ten and discipline is maintained by the threat of more time.

STRUGGLE FOR JUSTICE, *supra* note 41, at 94; see also CULLEN & GILBERT, *supra* note 86, at 119 ("Under the pressure of such uncertainty, family ties often disintegrate, thus precipitating a difficult crisis in an inmate's life and making reintegration into society more problematic once parole is granted.")

130. See STRUGGLE FOR JUSTICE, *supra* note 41, at 92-94 (using California system as example).

amenability to treatment or actual rehabilitation. At the front end of the process, the critics argued, sentencing judges had neither the specialized training nor the scientific expertise to support systematically rational decision making.¹³¹ In fact, researchers found that widely divergent sentences for similar offenses simply could not be explained by any factors clearly related to rehabilitation.¹³² Similarly, at the end of the process, parole decisions were described as based on hunch, bias, and anecdotal experience. As the Friends' Report pointed out, "Decisions on parole readiness . . . must be reached without even [a] minimum of data, for there is no conceivably relevant knowledge in existence to support either the decision to grant parole or to deny it . . ." ¹³³

Taken together, these three features of the rehabilitative regime led the critics to conclude that the criminal system often operated arbitrarily and unfairly. In the absence of sentencing statutes that might have fostered more consistent outcomes, or adequate scientific tools for classification and prediction, decision makers were forced to make choices about the imposition of coercive measures based largely on intuition.¹³⁴ Such intuition, the critics asserted, too frequently turned on the judge's or parole board member's ability to identify and empathize with individual defendants.¹³⁵ As a consequence, especially given the white middle-class background of most criminal justice decision makers, racism and class bias pervaded the system.¹³⁶

Once again, the practical critique partially applies to contemporary drug treatment courts. On the one hand, the broad range of possible sentences for a given offense that drew the attention of critics in the 1970s is virtually impossible today, given the widespread adoption by most American jurisdictions of sentencing guidelines and other forms of determinate sentencing.¹³⁷ Preliminary data from currently operating drug treatment courts suggest the possibility of a wider range of actual sentences among participating offenders than the sentences of similar defendants whose cases are resolved by plea or trial in traditional criminal courts.¹³⁸ This greater

131. See CULLEN & GILBERT, *supra* note 86, at 123; *cf.* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 8 (1972).

132. See CULLEN & GILBERT, *supra* note 86, at 124.

133. STRUGGLE FOR JUSTICE, *supra* note 41, at 71.

134. See CULLEN & GILBERT, *supra* note 86, at 124.

135. See STRUGGLE FOR JUSTICE, *supra* note 41, at 72.

136. See *id.*; see also THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 5 (1976).

137. See generally MICHAEL TONRY, SENTENCING REFORM IMPACTS (1987).

138. As noted earlier, existing studies of drug treatment courts often lack data comparing a study group of participants with a control group of similar offenders who have not participated. See *supra*

variation in outcomes is entirely consistent with the design of modern drug treatment courts, which tend to link decisions regarding the imposition of incarcerative sentences and length of supervision to the performance of offenders in treatment.¹³⁹ In addition, the mere fact that final case dispositions are often delayed beyond the time line typical in traditional criminal courts contributes to the potential variability of actual time served under supervision or in jail.¹⁴⁰

On the other hand, concerns about the abuse of discretion, although relevant to the functioning of modern drug treatment courts, appear to play out differently today than they did in the earlier rehabilitative era. The design of some drug treatment courts requires prosecutors and defendants to enter into an agreement at the beginning of the process.¹⁴¹ Then, if and when the defendant fails to comply with a condition of the agreement, a graduated system of sanctions comes into play.¹⁴² In other treatment courts, a similar system of graduated sanctions is set out for all participants according to a "fixed sanction algorithm."¹⁴³ In either setting, the judge typically exercises considerable discretion in making findings and in selecting from the array of escalating penalties.¹⁴⁴ In still other treatment courts, even greater discretion is permitted because no fixed schedule of penalties is established in advance.¹⁴⁵ All things being equal, however, the range of choices open to the decision makers in the latter treatment courts is probably more limited than

note 122. Nevertheless, some information permitting limited comparisons does exist. For example, the Drug Court Resource Center's 1995 study contains information regarding the sanctions that would have been applicable to the treatment court population prior to the initiation of a drug treatment court in certain identified jurisdictions. See COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 9. In addition, the same study also contains data regarding the disposition of unsuccessful participants, including sentences of incarceration. See *id.* at 35; see also COOPER, 1997 SURVEY, *supra* note 18, at 23, 27.

139. See *supra* text accompanying notes 25-27. Indeed, the GAO's 1997 study reports that "most drug court programs use sanctions not to simply punish inappropriate behavior but to augment the treatment process." DRUG COURTS OVERVIEW, *supra* note 8, at 26.

140. Depending on the design of any given drug treatment court, the final disposition of a participant's case could be an adjudication of guilt, final entry of judgment, or termination of probation. See *supra* note 18.

141. See McColl, *supra* note 8, at 482.

142. See COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 33.

143. See Elizabeth Piper Deschenes & Peter W. Greenwood, *Maricopa County's Drug Court: An Innovative Program for First-Time Drug Offenders on Probation*, 17 JUST. SYS. J. 99, 105 (1994) (providing description of relatively elaborate point system used by Maricopa County, Arizona program in determining both sanctions and rewards for participants based on their performance in treatment); Satel, *supra* note 13, at 62 (reporting on number of treatment courts she studied that use fixed sanctioning algorithms).

144. See COOPER, OPERATIONAL CHARACTERISTICS, *supra* note 18, at 34, 39-44; see also McColl, *supra* note 8, at 502-03. For a more detailed discussion of the problems of discretionary decision making in the drug treatment court setting, see *infra* notes 332-37 and accompanying text.

145. See Satel, *supra* note 13, at 62.

the choices available to judges and other corrections officials during the height of the rehabilitative ideal, when wide ranges of sentences were the norm.¹⁴⁶

Perhaps more important is the institutional environment within which drug treatment judges operate. Advocates of the rehabilitative regime have long observed a basic incompatibility between the adversary system and a therapeutic approach to justice.¹⁴⁷ In large part, the tension grows out of the perception that an offender's assertion of a position adverse to that offered by the state is itself evidence of the offender's pathology and need for treatment.¹⁴⁸ As one proponent of rehabilitation explained, "There will come a point at which a personal approach and the 'educational atmosphere' of good will and cooperation would be frustrated, if prisoner and official regarded their mutual relationship only from the strict legal point of view."¹⁴⁹

This tension between a traditional, due process model and a much more informal "helping" approach to decision making may not have arisen often in the adjudication of cases, even during the height of the rehabilitative regime. But decisions made at the end of the process (concerning probation and parole) clearly evidenced this tension, and it was with respect to these informal processes that the critics offered their most concentrated attacks on

146. McColl reports that the judge in Baltimore City's drug treatment court "almost always follows the recommendations of treatment providers." McColl, *supra* note 8, at 497. One might conclude that this sort of deference to the experts is likely to diminish problems with respect to judicial discretion. Nevertheless, it merely implicates the problems regarding diagnosis and evaluation discussed above. See *supra* text accompanying notes 91-123.

147. See ALLEN, *supra* note 38, at 48; Joel F. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 26.

148. See ALLEN, *supra* note 38, at 48. This poor fit between the adversarial norms of the traditional criminal trial, in which the defendant is expected to resist a finding of responsibility and to put the state to its proof, and the treatment objectives of drug treatment courts is especially apparent given the role that denial plays in the disease model of addiction. Indeed, that a defendant in drug treatment court seeks to resist the assignment of guilt is likely to be understood as strong evidence that the defendant is an addict. See Boldt, *supra* note 7, at 2296-97 (discussing denial and disease model of addiction); see also Margaret H. Bean, *Denial and the Psychological Complications of Alcoholism*, in DYNAMIC APPROACHES TO THE UNDERSTANDING AND TREATMENT OF ALCOHOLISM 55 (Margaret H. Bean & Norman E. Zinberg eds., 1981). Allen notes that criminal blaming practices in the People's Republic of China have also historically equated an accused person's assertion of an adversary position with his need for treatment:

It is said that wise political prisoners in the People's Republic of China understand that insistence on their legal rights of appeal often result in more, rather than less, enforced "political education"; for such insistence is viewed by the authorities as an expression of the very attitudes that the rehabilitative regime is intended to alter or suppress. The high importance accorded full confessions of guilt in the Chinese system likewise reveals the conclusion that the affliction most in need of cure is the propensity of individuals to fend off the benevolent embrace of state power.

ALLEN, *supra* note 38, at 48 (citations omitted).

149. ALLEN, *supra* note 38, at 47 (quoting M. GRUNHUT, PENAL REFORM 117 (1948)).

broad discretionary power.¹⁵⁰ Because the contemporary treatment court approach has so strongly endorsed the norms of procedural informality and cooperation,¹⁵¹ this portion of the left-liberal critique is especially relevant to the modern undertaking. Sorting out the competing advantages and disadvantages of a rights-based adversary process versus an informal treatment team approach is a complicated undertaking. Therefore, in order to gain some additional hold on this problem, it becomes necessary to set out a clearer conception of the theoretical perspectives on which the practical critique rested.

C. The Theoretical Perspective of the Left-Liberal Critics

The American Friends Service Committee's 1971 report, *A Struggle For Justice*, is remarkable in a number of respects.¹⁵² Perhaps its most remarkable feature, which helped to make the report's publication such an influential moment in the decline of the rehabilitative ideal, was its authors' choice to mix insights gained from radical criminologists with those offered by the more traditional liberal skeptics of rehabilitation. Each of these perspectives is considered below.

1. The Radical Perspective

The phrase "radical criminology" captures a broad range of theoretical positions regarding state-sponsored punishment.¹⁵³ Most importantly for

150. See, e.g., FOGEL, *supra* note 41, at 196-99.

151. See *supra* note 22 and accompanying text; see also Bean, *supra* note 15, at 719; McColl, *supra* note 8, at 512-15.

152. STRUGGLE FOR JUSTICE, *supra* note 41.

153. At a minimum, one should include at least three distinct intellectual traditions within the general umbrella of "radical criminology." See generally Albert P. Cardarelli & Stephen C. Hicks, *Radicalism in Law and Criminology: A Retrospective View of Critical Legal Studies and Radical Criminology*, 84 J. CRIM. L. 502 (1993). The first consists of those writers who have argued that state-sponsored punishment cannot be justified under any existing theories given the concrete social and political realities within which blaming practices take place. These thinkers therefore conclude that punishment should be abolished rather than reformed. See, e.g., THOMAS MATHIESEN, *THE POLITICS OF ABOLITION* (1974); Stanley Cohen, *Alternatives to Punishment: The Abolitionist Case*, 25 ISRAEL L. REV. 729 (1991); Louk Hulsman, *The Abolitionist Case: Alternative Crime Policies*, 25 ISRAEL L. REV. 681 (1991). The second group consists of Marxist criminologists who contend that crime is rooted in the material circumstances of capitalist culture and is a manifestation of capitalism's unequal distribution of wealth. See, e.g., WILLEM ADRIAN BONGER, *CRIMINALITY AND ECONOMIC CONDITIONS* (Henry P. Horton trans., 1916). The third intellectual tradition, which is the primary focus of the discussion in the text, centers around the radical sociology of Michel Foucault and others. These thinkers maintain that formal penal practices accomplish a variety of latent functions related to the control of class conflict and the maintenance of existing power relationships. See, e.g., MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1977); see also

present purposes, radical criminology holds that societal blaming practices are inherently ideological and thus political.¹⁵⁴ Building on the work of sociologist Emile Durkheim, the tradition of radical criminology holds that the rituals and practices of punishment perform “latent functions” aside from the overt objectives claimed for the penal system.¹⁵⁵ Radical theorists look far beyond Durkheim’s original claims that state punishment serves to mark out societal boundaries and reinforce social solidarity.¹⁵⁶ They have argued variously that official systems of criminal blaming work to control oscillations in the labor market,¹⁵⁷ pacify the poor and disempowered,¹⁵⁸ and divert attention from the antisocial conduct of powerful actors in society.¹⁵⁹ The most influential radical analysis of punishment in the modern era was offered by Michel Foucault. He argued that the role of the prison, along with schools, factories, and the like, is to “construc[t] and regulat[e] the individual as a self-controlled subject.”¹⁶⁰

This picture of the criminal system as performing a latent political role in addition to the overt functions of retribution, deterrence, rehabilitation, and isolation is (and was) dramatically at odds with the account offered by the mid-twentieth century luminaries of rehabilitation, including Barbara Wootton and Karl Menninger.¹⁶¹ Their claims for corrections practices then in place, and their descriptions of an ideal therapeutic model, not only neglected to consider the latent functions of punishment, but were devoid of any explicit political analysis whatsoever.

THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* (1987); JOHN IRWIN, *THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY* (1985).

154. For a good explanation of the terms “ideology” and “ideological” as they are employed here, see generally KARL MANNHEIM, *IDEOLOGY AND UTOPIA* 9 (1936). See also Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 977 n.42 (1986).

155. See Duff & Garland, *supra* note 49, at 32.

156. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., 1984); see also Boldt, *supra* note 154, at 996-98.

157. See GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (2d ed. 1968).

158. See IRWIN, *supra* note 153.

159. See Duff & Garland, *supra* note 49, at 33.

160. *Id.* Allen describes Foucault’s central theme as follows:

Michel Foucault appears to assert that bourgeois society deliberately creates crime both in order to justify a law-enforcement mechanism quickly adaptable to the suppression of political dissent and also to divert the more aggressive members of the dispossessed classes into the commission of ordinary crimes and away from revolutionary action against the dominant social interests.

ALLEN, *supra* note 38, at 39-40.

161. See MENNINGER, *supra* note 75; WOOTTON, *supra* note 94.

Concerns were focused on the encounter between the convicted prisoner and the therapist or the therapeutic program. The propriety of the prisoner's conviction was assumed, and political issues associated with the definitions of crime and the apprehension, trial, and commitment of offenders were ignored or slighted.¹⁶²

Some of the accounts took on a kind of eery scientific quality. For example, Wootton advocated the complete replacement of the criminal system with a new two-stage process in which the first determination would focus solely on whether the defendant had committed a prohibited act. Once this strict liability determination had been made, Wootton called for the imposition of compulsory measures based entirely on an assessment of the actor's characteristics and potential for future harm. This assessment was to be made by psychiatrists, social workers, and other experts in rehabilitation. Considerations of public safety would govern the choice of measures, without regard to any assessment of moral blame or fault.¹⁶³ Wootton's system constituted a complete merger of penal and therapeutic functions, as well as a complete blurring of the notions of wrongdoing and accident.¹⁶⁴

The radical critique of this apolitical social engineering operated at two related levels. First, the critics asserted that the claimed neutrality of the rehabilitative ideal was false. They focused on a number of topics: the public choices by which some antisocial behavior is designated criminal while other equally harmful conduct is not;¹⁶⁵ the exercise of police and prosecutorial discretion to bring some matters into the system while resolving others informally;¹⁶⁶ and the biases within the mental health professions and the social sciences that describe only some points of view or perspectives as pathological.¹⁶⁷ The critics further argued that the apolitical posture of the proponents of a therapeutic regime was itself deeply political. They claimed that by characterizing crime as a matter of individual pathology, and by characterizing effective responses to criminal violence as therapeutic encounters between individual prisoners and their therapists, the

162. ALLEN, *supra* note 38, at 34.

163. See WOOTTON, *supra* note 94; Barbara Wootton, *Crime, Responsibility, and Prevention*, reprinted in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 164, 164-74 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

164. See WOOTTON, *supra* note 94; see also H.L.A. Hart, *Crime and the Criminal Law*, 74 YALE L.J. 1325, 1327-29 (1965) (book review); Sanford H. Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273, 285-86 (1968).

165. See, e.g., STRUGGLE FOR JUSTICE, *supra* note 41, at 102-07 (discussing "manipulation of the criminal justice system by the powerful").

166. See *id.* at 124-34, 142 (asserting that discretion in application of criminal prohibitions serves interests of members of "politically and economically dominant classes of the society").

167. See generally THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

rehabilitative ideal obscured the structural causes of criminal conduct and the concomitant need for fundamental social change.¹⁶⁸

The radical critique is extraordinarily apt when mapped onto the contemporary drug treatment court movement. The insights it offered the Friends and others still apply to ongoing efforts at rehabilitative penal innovation. Indeed, drug treatment court advocates who urge the adoption of these courts use rhetoric remarkably reminiscent of the mid-century rehabilitationists. Thus, although proponents maintain that specialized diversion programs are cost-effective and efficient measures for the reduction of criminal dockets and prison overcrowding,¹⁶⁹ little attention is given to the political dimensions of the "drug war," including racially discriminatory sentencing provisions, neighborhood police sweeps, and the like.¹⁷⁰ Even more disturbing is the degree to which the structural foundations of the problem are obscured.¹⁷¹ Issues relating to the absence of legitimate employment opportunities, enterprise capital, or adequate educational resources in the disadvantaged communities that produce the bulk of drug defendants,¹⁷² all of which contribute in a direct and immediate way to both the marketing and use of illegal drugs,¹⁷³ are not simply put on a back burner but are rendered irrelevant to a problem that the drug treatment courts help to

168. See ALLEN, *supra* note 38, at 35. Allen draws an interesting parallel between this set of claims regarding rehabilitative blaming practices in the United States and the "political uses of psychiatry in the Soviet Union." *Id.* at 105 n.10; see also Thomas Szasz, *Soviet Psychiatry: Its Supporters in the West*, INQUIRY, Jan. 2, 1978, at 4-5.

169. See Bean, *supra* note 15, at 720-21; Brown, *supra* note 5, at 83-84; McColl, *supra* note 8, at 500.

170. On claims regarding racial discrimination in drug offense sentencing, see Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121 (1994). With respect to the relationship between race and law enforcement efforts in the war on drugs, see John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

171. As the drug treatment court movement matures, it appears that more attention may be given to other individual problems closely related to a defendant's substance abuse. A 1997 survey of treatment courts reports that many have expanded their rehabilitation services in recognition of the fact that "the drug court must treat not only the participants' addiction but the numerous associated personal problems most participants encounter—physical, mental, housing, family, employment, self esteem, etc.—if long-term sobriety and rehabilitation is to be achieved and future criminal activity is to be significantly reduced." COOPER, 1997 SURVEY, *supra* note 18, at 6 (emphasis in original).

172. See generally William Julius Wilson, *Public Policy Research and the Truly Disadvantaged*, in THE URBAN UNDERCLASS 460 (Christopher Jencks & Paul Peterson eds., 1991). To say that disadvantaged communities (especially poor communities of color) produce the bulk of drug defendants is not to say that these communities also produce the bulk of drug users. Indeed, at the height of the war on drugs in the late 1980s, data showed that African-Americans comprised only 12% of the illegal drug users in the country, but accounted fully for 44% of all drug arrests. See Lowney, *supra* note 170, at 131 (citations omitted).

173. See David R. Henderson, *A Humane Economist's Case for Drug Legalization*, 24 U.C. DAVIS L. REV. 655 (1991); Ryan, *supra* note 54, at 221.

redefine as a matter of individual pathology.¹⁷⁴

2. *The Liberal Perspective*

In addition to elements from the radical school of criminology, the Friends and many of the other opponents of rehabilitation in the 1970s also relied heavily on a critique based on traditional liberal notions of individual autonomy and limited state power. The liberal account begins with the notion that punishment is “morally problematic,” and therefore requires an articulable normative justification.¹⁷⁵ All state-sponsored penal practices raise this normative problem because punishment inherently threatens the very core values central to the liberal theory of the state.¹⁷⁶ Liberals place individual freedom at the top of the list of core values and see the citizen’s relationship to the state as properly governed by a system of individual rights that constrain the uses of official power that otherwise might limit individual autonomy, privacy, and choice.¹⁷⁷ The need for moral justification arises because state-sponsored punishment, whether incarceration, probation, or fine, by definition limits the sanctioned individual’s freedom and autonomy.¹⁷⁸ This bundle of related ideas was voiced by the Friends:

Any coercion of another human being goes against our deep respect for every person’s dignity. We believe that all people have the right to

174. See generally DIANA R. GORDON, *THE RETURN OF THE DANGEROUS CLASSES: DRUG PROHIBITION AND POLICY POLITICS* (1994). One of the best, and most moving, descriptions of the larger societal roots of self-destructive drug use is contained in an article by Lucie White on “welfare dependency.” White writes about the range of coping strategies developed by women in poverty whom she interviewed. She describes a set of coping strategies adopted by one of her interviewees as “familiar strategies of self-medication, of defeating the double bind by psychologically or chemically escaping the world.” Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 *GEO. L.J.* 961, 995 (1993). Included in this set of coping techniques are evangelical Christianity, television watching, sleep, and the use of crack cocaine. With respect to the last of these, White writes:

[C]rack is hard to resist. Its salesmen are so persistent, and compared to the alternatives it works—at least for those first few minutes. . . . [T]his drug and the AIDS epidemic that has followed it into despairing African-American communities have mangled lives in ways that defy description. These lives are not being lost through ignorance, or carelessness, or a will to die. Rather, . . . [certain] people . . . must sometimes risk their lives in order to seek relief from their pain.

Id. at 1997. For a second, very different account of the relationship between drugs, poverty, gender and race, see Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 *HARV. L. REV.* 1419 (1991).

175. Duff & Garland, *supra* note 49, at 2.

176. See *id.* at 3.

177. See Boldt, *supra* note 24, at 2358-59; see also Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 *UCLA L. REV.* 999, 1018 (1988).

178. See Duff & Garland, *supra* note 49, at 3; J.G. Murphy, *Retributivism, Moral Education and the Liberal State*, 4 *CRIM. JUST. ETHICS* 3 (1985).

autonomy and privacy, to be left alone to find their own way. The very concept of criminal justice—which inevitably involves coercion—is thus an anomaly for us.¹⁷⁹

Even given this conception of the normative requirements for legitimate coercive state practices, liberal theory recognizes that punishment may be justified to the extent that its use protects the right of other citizens to be free from crime.¹⁸⁰ Because of the background commitments mandated by this perspective, however, the state “must punish no more than is necessary to secure the proper aims of punishment, and its penal institutions must not intrude too far on individual privacy and freedom.”¹⁸¹

The liberal critics of rehabilitation argued that penal practices in the mid-twentieth century often failed this test of moral justification. Their claims fall into three related categories. Their first group of considerations bore on the principle that the state should seek to accomplish its legitimate penal purposes through the least invasive means possible. This argument built on the observation, set out above,¹⁸² that the criminal system, including its adjunct mental health experts, was incapable of performing the accurate and effective diagnosis, evaluation, and prognosis of offenders. Advocates of the rehabilitative ideal conceived of criminal behavior as a symptom of some individual pathology, but the classification of any individual offender’s “disorder,” and the formulation of an appropriate treatment protocol, often exceeded the ability of the experts.

As a consequence of this inherent vagueness of diagnosis and lack of clarity about proper treatment, argued the liberal critics, the scope of the state’s power over individuals was dangerously enlarged.¹⁸³ As Francis Allen has explained, the principle of relevance acts as an important source of restraint on governmental power. When vague notions of “illness” and “treatment” define the ambit of authority that corrections officials may use with respect to offenders, the officials are put at liberty to impose measures directed not just toward effecting offenders’ behavior, but also their “‘soul’: [their] motives, [their] history, [their] social environment.”¹⁸⁴

The liberal critics coupled this argument about the vagueness of the state’s goals and the resulting expansion of state power with the further claim that a rehabilitative enterprise naturally collapses into punishment because

179. STRUGGLE FOR JUSTICE, *supra* note 41, at 22-23.

180. See Duff & Garland, *supra* note 49, at 3.

181. *Id.*

182. See *supra* text accompanying notes 91-107.

183. See STRUGGLE FOR JUSTICE, *supra* note 41, at 39-40; ALLEN, *supra* note 38, at 47.

184. ALLEN, *supra* note 38, at 47 (quoting MICHEL FOUCAULT, *supra* note 153, at 19).

the “natural progress of any program of coercion is one of escalation.”¹⁸⁵ They concluded that, without regard to the good intentions of corrections reformers, rehabilitative regimes necessarily expand and become debased into serving other than therapeutic ends.¹⁸⁶ Such a collapse of purpose is bad enough by itself. But the critics argued that the consequences of systematic debasement in this arena were especially pernicious because of the gaping distances between the claims of the penal reformers and the realities of their practice.

In one place or another solitary confinement has been called “constructive meditation” and a cell for such confinement “the quiet room.” Incarceration without treatment of any kind is seen as “milieu therapy” and a detention facility is labeled “Cloud Nine.” Disciplinary measures such as the use of cattle prods on inmates become “aversion therapy” and the playing of a powerful fire hose on the backs of recalcitrant adolescents “hydrotherapy.” Cell blocks are hospitals, dormitories are wards, latrine cleaning “work therapy.” The catalog is almost endless.¹⁸⁷

If expansion and debasement were the first items on the liberal critics’ bill of particulars, a second set of complaints was equally important to their overall assault on the rehabilitative regime. In one way or another, all of these complaints fell into the general category of dignity concerns. First, the critics argued that coercive therapy is paternalistic and thereby suspect in light of the commitments of liberal theory to individual autonomy and freedom of choice.¹⁸⁸ Second, they argued that this sort of paternalism was especially problematic given that it was invoked by a corrections establishment, largely white and middle-class at that time, to “run the lives of

185. STRUGGLE FOR JUSTICE, *supra* note 41, at 25.

186. See ALLEN, *supra* note 38, at 50-53. The critics argued that debasement is inherent given the “conceptual weakness of the rehabilitative ideal. Vagueness and ambiguity shroud its most basic suppositions.” *Id.* at 51. In addition, they pointed out that “[e]qually serious is the vagueness that surrounds the means to effect rehabilitation,” *id.* at 52, and the fact that “[c]orrectional institutions and programs must serve punitive, deterrent, and incapacitative ends” in addition to therapeutic goals. *Id.* at 53. Finally, they argued that the ready availability of coercive solutions necessarily reduces the likelihood that “more creative but more difficult and problematic voluntary alternatives” will be attempted. STRUGGLE FOR JUSTICE, *supra* note 41, at 25.

187. ALLEN, *supra* note 38, at 51 (citations omitted).

188. See STRUGGLE FOR JUSTICE, *supra* note 41, at 25. For an excellent discussion of paternalism, including an effort to operationalize the concepts of autonomy and freedom of choice by distinguishing an actor’s values from his or her interests or wants, see David Luban, *Paternalism and the Legal Profession*, 1981 WISC. L. REV. 454, 467-74 (“Paternalism imposes constraints on an individual’s liberty for his or her own good.”). For more on paternalism within the context of treatment courts, see *infra* text accompanying notes 246-47.

blacks, Chicanos, Indians, and the poor.”¹⁸⁹ Third, they argued that a program of involuntary treatment undermines human dignity because it treats the recipients of therapy as objects and not as responsible moral agents. In the words of C.S. Lewis, an early and forceful proponent of the liberal critique:

To be “cured” against one’s will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason or those who never will; to be classified with infants, imbeciles, and domestic animals. But to be punished, however severely, because we have deserved it, because we “ought to have known better,” is to be treated as a human person made in God’s image.¹⁹⁰

The notion that penal rehabilitation is offensive because it treats offenders as malleable objects rather than autonomous moral agents illustrates an inherent conflict in any effort to merge the ideologies of free choice and determinism. Ordinarily the criminal law operates according to the premise of individual freedom of choice and grants excuses in those rare instances in which a determinist account is recognized.¹⁹¹ By contrast, the helping professions, including medicine and social work, tend to view human behavior in causal terms.¹⁹² The merger of legal and medical models is problematic because it permits the use of the coercive power of the state for the service of determinist ends, even though the justification for such measures stems from a system of blaming that rests on notions of free will.¹⁹³ This conflating of incompatible ideologies undermines the institutional mechanisms ordinarily used to maintain societal blaming practices capable of sorting out intentional from caused behavior.¹⁹⁴ Thus, rehabilitative penal practices not only treat offenders like children and other groups of actors who are not regarded as responsible moral agents, they also compound this “demeaning” categorization by compelling offenders to undergo therapy designed to “reshap[e] [their] psyche and moral values . . . , something not

189. STRUGGLE FOR JUSTICE, *supra* note 41, at 25.

190. Lewis, *supra* note 1, at 228.

191. See Boldt, *supra* note 7, at 2246, 2304-05 (determinist perspective defined as “hold[ing] that conduct is always the product of some matrix of causal factors that necessarily determines choice”).

192. See *id.* at 2304-05; see also Seymour L. Halleck, *Responsibility and Excuse in Medicine and Law: A Utilitarian Perspective*, 49 LAW & CONTEMP. PROBS. 127 (1986).

193. See ALLEN, *supra* note 38, at 33; Francis A. Allen, *The Law as a Path to the World*, 77 MICH. L. REV. 157, 166 (1978).

194. See Boldt, *supra* note 7, at 2321-30. In this earlier article, I argued that criminal blaming does more than simply reflect social practice in this regard; rather, these practices play an important role in the construction of notions of individual autonomy and freedom of choice. See *id.* at 2278-85.

done to someone whose personhood is respected.”¹⁹⁵

The merger is made no less problematic if it is undertaken in good faith. Although the critics held open the possibility of bad motives on the part of judges, prosecutors, and corrections officials, their essential complaint applied notwithstanding the best of official intentions.¹⁹⁶ This argument was the third and final item in the liberals’ bill of particulars, and it was based on the power of perspective.¹⁹⁷ From the perspective of the corrections establishment, if the imposition of therapeutic measures is accomplished for the purely benign purpose of helping offenders overcome individual pathology, then it is neither punitive nor in conflict with the interests of the recipients of those services.¹⁹⁸ From the perspective of the acted-upon offenders, however, the very fact that treatment is involuntary renders it punitive. This is especially true if treatment involves institutionalization, the loss of privacy, or additional restrictions in other areas ordinarily left to the autonomous choice of individuals.¹⁹⁹ This divergence between the perspectives of the state and the individual offender deeply disturbed the critics, especially given liberal theory’s axiomatic view that state power must be constrained by clearly delineated individual rights in order to protect individual liberties.²⁰⁰ They noted that when the criminal system uses therapeutic practices, two distinct state functions become intertwined. On the one hand, state-sponsored punishment, even when morally justified, is undertaken to benefit society in general and not necessarily to benefit the offender.²⁰¹ In this sense, the state’s role in maintaining a system of blaming and punishing is “always at least potentially adverse to that of the offender.”²⁰² On the other hand, the extension of “helping services,” the provision of benefits by the welfare state in the liberals’ conception, does not generate a conflict—potential or actual—between the interests of the recipient and those of the government. In performing this second function,

195. DRESSLER, *supra* note 67, at 10.

196. See STRUGGLE FOR JUSTICE, *supra* note 41, at 25-26; Lewis, *supra* note 1, at 228.

197. On the importance of perspective in the analysis of legal institutions and legal practices, see Lesnick, *supra* note 64, at 413-15, 439-54.

198. See STRUGGLE FOR JUSTICE, *supra* note 41, at 25-27; MENNINGER, *supra* note 75.

199. See STRUGGLE FOR JUSTICE, *supra* note 41, at 25-27; CULLEN & GILBERT, *supra* note 86, at 116.

200. See Boldt, *supra* note 24, at 2359-60.

201. See STRUGGLE FOR JUSTICE, *supra* note 41, at 26-27.

The essence of punishment is the state’s use of compulsion against the offender for the purported benefit of society in general, that is, to satisfy public retributive urges, to compel conformity to social norms, or to deter future violations by others through a demonstration that the state’s threats of punishment are to be taken seriously.

Id.

202. *Id.* at 27.

they argued, the state merely acts “in behalf of society for the benefit of the recipient who, in the typical situation, can either accept or reject the proffered help.”²⁰³

This set of observations about the confusion of the state’s role in sponsoring systems for blame and punishment on the one hand and for providing help to needy citizens on the other was central to the liberal critique of the rehabilitative ideal. It was the theoretical foundation for the set of practical objections relating to indeterminacy and discretion set out earlier.²⁰⁴ When the state acts in a way at least potentially adverse to the interests of an individual, particularly when that individual is likely among the least advantaged and empowered groups in society, liberal theories of state power call on the legal system to afford that individual a range of procedural rights designed to keep the state from overreaching.²⁰⁵ On the other hand, when the state attempts to assist individual citizens, this account asserts that the need for such rights of orderly process greatly diminishes.²⁰⁶ The extreme indeterminacy of sentencing provisions called for by the rehabilitative approach, coupled with the broad discretion accorded judges, parole boards, and others, was inconsistent with the critics’ procedural vision of a properly limited penal regime.

As with the radical vision, the foregoing liberal account raises troubling questions when applied to the contemporary drug treatment court movement. The claim that therapeutic undertakings tend “in practical application to become debased and to serve other social ends far removed from and sometimes inconsistent with the reform of offenders”²⁰⁷ is particularly apt in illuminating the dangers posed by drug treatment courts. Professor Allen argues that the history of this sort of debasement in the context of mental health institutions and juvenile courts strongly indicates that such debasement is inherent in the rehabilitative ideal.²⁰⁸ He asserts that a chief

203. *Id.*

204. *See supra* text accompanying notes 124-36.

205. *See* STRUGGLE FOR JUSTICE, *supra* note 41, at 26-27. On liberal theory’s conception of procedural rights as important in protecting individuals from abusive state power, see Boldt, *supra* note 24, at 2359-60.

206. *See* STRUGGLE FOR JUSTICE, *supra* note 41, at 27. In contrast, for a good discussion of the serious potential conflicts that exist between actors in the welfare bureaucracy and the recipients of social services, and of the possibility of managing those conflicts so that people “in significantly unequal situations” can “relate to each other as equal moral agents,” see Handler, *supra* note 177, at 1089-93. *See also* Boldt, *supra* note 24, at 2367-76 (arguing for approach that recognizes both advantages of liberal legalism’s rights-based approach and inherently disempowering effects of treating social service recipients solely as autonomous rights-holders).

207. ALLEN, *supra* note 38, at 49.

208. *See id.* at 50; *see also* DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971) (discussing this tendency in context of mental institutions); STEVEN L. SCHLOSSMAN, *LOVE & THE*

cause of this debasement is a persistent confusion or vagueness in defining the goals of such treatment.²⁰⁹

A similar confusion as to the goals of treatment exists in the context of drug treatment courts. Generally, judges, prosecutors, corrections officials, and others associated with treatment courts define the goal for participating offenders as abstinence from illegal drug use and the avoidance of criminal recidivism.²¹⁰ Treatment experts, by contrast, understand the need for individualized treatment goals. Furthermore, they define the goals more appropriately as “reduced time to relapse, reduced frequency of drug use, and the reduced amount of the drug used in total and during each episode of use,”²¹¹ rather than as complete abstinence. Similarly, treatment providers might regard “fewer arrests; fewer convictions; reductions in crimes committed against self or others; and reductions in property crimes committed” as more realistic goals for an individual than an absolute avoidance of future criminality.²¹²

Allen also argues that a persistent “competition between rehabilitation and the punitive and deterrent purposes of penal justice . . . [in which t]he rehabilitative ideal is ordinarily outmatched in the struggle” also accounts for the tendency of penal treatment to devolve into punishment.²¹³ Here again, competition between the punishment and deterrence aspects of drug treatment courts on the one side and the goals of therapy on the other will likely be resolved in favor of the former.²¹⁴ Finally, Allen remarks that the most corrosive feature of the rehabilitative ideal, in terms of its ability to withstand these various pressures toward debasement, has been the practice of advocates of rehabilitation to seek public support by promising savings to taxpayers.²¹⁵ Once again, the parallel with contemporary treatment court initiatives is plain. Indeed, prominent in all of the public efforts to establish and fund these modern rehabilitative enterprises has been the rhetoric of utility and savings promised by an approach designed to clear court dockets and relieve prison overcrowding.²¹⁶

AMERICAN DELINQUENT (1977) (tracing similar developments in treatment of juveniles).

209. See ALLEN, *supra* note 38, at 51-52.

210. See DRUG COURTS OVERVIEW, *supra* note 8, at 50 (defining terms “completion” and “retention” in treatment court context).

211. TREATMENT EFFECTIVENESS STUDY, *supra* note 28, at 2.

212. *Id.*

213. ALLEN, *supra* note 38, at 53-54.

214. See *infra* text accompanying notes 530-44.

215. See ALLEN, *supra* note 38, at 55.

216. See *supra* notes 8-12 and accompanying text. This feature is corrosive if, as is often the case, the initial claims of advocates regarding potential cost savings or other utilitarian outcomes are overstated or excessively ambitious. For a good assessment of the claims made by drug treatment court

Modern drug treatment courts raise questions regarding paternalism and perspective similar to the dignity concerns contained in the arguments of the 1970s critics. With respect to these dangers, the link is most visible in the explicit shifts in role and function urged on defense counsel representing defendants in drug treatment courts. These shifts can be summarized in the following terms. First, the goals of representation are revised so that a traditional attorney focus on "avoiding or minimizing loss of liberty and the imposition of other sanctions"²¹⁷ become instead a focus on helping to effectuate "long term general lifestyle outcomes" in which the "loss of liberty . . . is viewed as one possible part of a total treatment strategy."²¹⁸ Next, the traditional understanding of the system as inherently adversarial is replaced by a revised vision in which the defense lawyer functions as "part of a team with the court, prosecution, treatment provider, correctional officials . . . and others."²¹⁹ Finally, notions of loyalty and partisanship, that traditionally have defined the role of defense counsel,²²⁰ are replaced by a conception of professional role in which defense attorneys may "actively participate in the design of the 'theatre' of the courtroom,"²²¹ including the possibility that they may occasionally join other drug court professionals to "orchestrate their responses sometimes explicitly and sometimes implicitly."²²² In short, defense counsel is no longer primarily responsible for giving voice to the distinct perspective of the defendant's experience in what remains a coercive setting. Rather, defense counsel becomes part of a treatment team working with others to insure that outcomes, viewed from the perspective of the institutional players and not the individual defendant, are in the defendant's best interests.

II. CONFLICTING GOALS OF DRUG TREATMENT COURTS AND THEIR EFFECT ON DEFENSE ATTORNEYS

Many of the theoretical and practical problems implicated by the rehabilitative ideal in general and drug treatment courts in particular are rooted in the fundamentally divergent goals and assumptions of traditional

advocates, see DRUG COURTS OVERVIEW, *supra* note 8, at 67-71.

217. JUDGE, *supra* note 43, at 1.

218. *Id.* at 2.

219. *Id.* at 3.

220. See LUBAN, *supra* note 45, at 7, 11; Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980).

221. JUDGE, *supra* note 43, at 7.

222. *Id.*

Anglo-American criminal blaming practices as compared to the goals and assumptions animating medical practice and the practices of other helping professions.²²³ This conflict is brought into clearer focus when the analysis is centered on the imperfect fit between the adversary system and rehabilitative regimes.²²⁴ The focus becomes sharper still when the role of the defendant's lawyer is made the lens through which that analysis takes place.²²⁵

A. *The Adversary System, Attorney Role, and Rehabilitative Penal Practice*

An adversarial system of decision making has three primary characteristics, and each directly relates to the role of counsel.²²⁶ First, the parties initiate and control the process, by pursuing their respective positions through affirmative presentations of evidence and argument coupled with challenges to their opponent's version of law and fact.²²⁷ Second, these forensic narratives and counternarratives are brought to the attention of the decision maker according to formal procedural rules.²²⁸ Third, the decisional figure is charged with being neutral with respect to the conflict until such time as a decision is rendered through the application of substantive decisional rules to the parties' evidence.²²⁹

Given these characteristics, most adversarial adjudications require the parties to seek the assistance of counsel. Laypersons usually lack the skill to present their partisan account according to formal procedural rules. Additionally, requiring that parties present these accounts with an eye toward satisfying substantive rules of decision generally militates against pro se advocacy by nonlawyer litigants.²³⁰ Taken together, the three defining

223. See, e.g., KEVIN M. SHERIN, TREATMENT DRUG COURTS: INTEGRATING SUBSTANCE ABUSE TREATMENT WITH LEGAL CASE PROCESSING (1996) (discussing "values conflicts" between criminal justice system and treatment and public health systems).

224. See ALLEN, *supra* note 38, at 47-48; see also Handler, *supra* note 147, at 26 (discussing inadequacies in juvenile court system because of conflict between adversarial and rehabilitative goals).

225. For a good general discussion of the nature of professional role, see Richard Wasserstrom, *Roles and Morality*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 28 (David Luban ed., 1983).

226. For a classic account of these characteristics of the adversary system, see Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 34 (Harold J. Berman ed., 2d ed. 1971).

227. See *id.*; see also LUBAN, *supra* note 45, at 56-58.

228. See Fuller, *supra* note 226, at 34-36; see also LUBAN, *supra* note 45, at 57; Martin P. Golding, *Dispute Settling and Justice*, in ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE 106, 108-09 (1979).

229. See Fuller, *supra* note 226, at 35; Martin Shapiro, *The Logic of the Triad*, in COVER & FISS, *supra* note 228, at 284-86.

230. See Simon, *Ideology of Advocacy*, *supra* note 45; see also Stephen L. Pepper, *The Lawyer's "Amoral Ethical Role": A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J.

characteristics of the adversary system have been said to yield a standard conception²³¹ of the lawyer's role that largely is reflected in the A.B.A.'s *Model Code of Professional Responsibility*,²³² the A.B.A.'s *Model Rules of Professional Conduct*,²³³ and various standards governing criminal defense practice.²³⁴

Because the function of a lawyer in an adversarial proceeding is to represent the client by directing his or her expertise toward the accomplishment of the client's self-interested goals,²³⁵ the standard conception imposes upon the lawyer a set of mutually reinforcing duties. The first is a duty of partisanship, which recognizes that the advocate is in some senses standing in the shoes of his or her client. This duty is satisfied, according to this conception, when the lawyer adopts the client's ends as his or her own.²³⁶ Additionally, the attorney is bound to avoid conflicts between the client's interests and his or her own interests or those of another client. This duty to avoid conflicts of interest is designed to insure that the lawyer's partisan zeal, his or her unity of purpose with the client, is not diluted by some competing agenda.²³⁷ Finally, the lawyer is forbidden from disclosing information learned in the course of the representation, unless permitted to do so by the client. This duty of client confidentiality is intended to encourage clients to speak freely with their lawyers, again in order to safeguard the unity of purpose between advocate and the client and to facilitate the lawyers' partisan efforts on their clients' behalf.²³⁸

613, 617 (stating that "for most people most of the time, meaningful access to the law requires the assistance of a lawyer"). Small claims courts represent an important exception to this general rule. These courts have been designed to operate without formal procedural rules or strict rules of evidence, so that litigants can deal directly with the court and without the need for counsel. See Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 295, 302; Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 L. & SOC'Y REV. 219 (1975).

231. See Postema, *supra* note 220, at 73.

232. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983).

233. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.6, 1.7, 3.1 (1996).

234. See, e.g., STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE Standards 4-3.8, 4-5.1, 4-5.2, 4-6.2 (3d ed. 1993).

235. To be sure, the *Code* and *Model Rules* provide that competent representation ordinarily should include advice and counsel to assist the client in formulating goals for the representation, but they also make clear that the final decision in this regard is the client's. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b).

236. See Simon, *Ideology of Advocacy*, *supra* note 45, at 36-37.

237. See LUBAN, *supra* note 45, at 57.

238. See *id.* There is a great deal of debate in the academic literature about the standard attorney role conception. Some scholars support the conception's requirements of partisanship and role amorality, which is the notion that lawyers ordinarily should pursue clients' ends without regard to their own morality. See Simon, *Ideology of Advocacy*, *supra* note 45, at 36; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975). These scholars have attempted

On occasion, each of the defining features of the adversary system comes into conflict with rehabilitative penal practice. As a consequence, the standard role conception sometimes is ill-suited to the tasks facing counsel for defendants in such proceedings. The first feature, that the process is driven by opposing parties who seek to accomplish their respective partisan goals through the vigorous advocacy of their representatives, does not account for cases where a defendant recognizes the need for therapeutic measures and genuinely desires to have the prosecution resolved by way of treatment. In such cases, it is difficult to describe the process as fully adversarial,²³⁹ although the unity of partisan purpose formed by the relationship between the defendant and his or her counsel is not jeopardized by any conflict between the client's expressed desires and judgments by the attorney regarding the client's best interests.²⁴⁰ By contrast, in cases where the defendant's expressed goal is to avoid all coercive measures, including rehabilitative treatment, defense counsel may or may not be able to adopt a familiar partisan role. If the defendant's objective of avoiding therapy is well-grounded, the adversarial model likely will hold, because the defendant's attorney will be able to pursue this outcome without doing violence to the standard role conception. If, on the other hand, the defendant's desire to avoid therapeutic measures is not well-grounded, as is often the case with defendants whose addictive disorders include a fair degree of denial,²⁴¹ the defense attorney will be placed in a difficult situation.²⁴² According to the standard conception, the attorney should adopt

to justify lawyers' divergence from ordinary notions of morality by arguing that such practice serves to maximize client autonomy, which is regarded as a good in itself. See Pepper, *supra* note 230, at 617. Alternatively, scholars have asserted that partisan zeal and role amorality are necessary for lawyers to protect an individual's liberty interests in legal proceedings, where the full power of the state is directed against a relatively powerless client. See, e.g., FREEDMAN, *supra* note 23, at 2; LUBAN, *supra* note 45, at 58. Both attempts at justification have been roundly criticized. See *infra* text accompanying notes 433-81. For a good response to the autonomy justification of the standard role conception, see David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637. For a thoughtful reply to the argument that partisanship and role amorality are specially required of criminal defense attorneys, see Simon, *Ethics of Criminal Defense*, *supra* note 45.

239. Although ancillary issues regarding the formal judgment to be entered, the terms of a sentence of probation, or the like might be a source of some continuing disagreement between the prosecution and the defendant.

240. This assumes, of course, that it is apparent that the defendant needs treatment. See, e.g., Rodney J. Uphoff, *The Decision to Challenge the Competency of a Marginally Competent Client: Defense Counsel's Unavoidably Difficult Position*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER*, *supra* note 47, at 30, 34 ("The lawyer's role is clear in any case in which the client and counsel agree that the client's competence should be challenged.")

241. See *supra* note 148.

242. Cf., David R. Katner, *Raising the Insanity Plea*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER*, *supra* note 47, at 48.

the defendant's goals as his or her own²⁴³ and should pursue them with partisan zeal,²⁴⁴ despite the fact that the lawyer may believe that it would be in the client's best interests to undergo treatment.²⁴⁵ A very different role conception for defense counsel obtains, however, in some institutional settings where the expressed purpose of the proceeding is the provision of treatment rather than the imposition of blame and punishment.²⁴⁶ Attorneys who adopt this alternative role conception often view their clients as incapable of identifying appropriate goals that further their best interests and so impose their own judgments regarding the objectives of the representation.²⁴⁷

This alternative role conception, which treats the defendant as impaired in his or her capacity to make sound decisions, is incompatible with an adjudicatory model characterized by party control.²⁴⁸ It may be possible to avoid this conclusion by locating party control in defense counsel instead of the defendant, but this conceptualization only works if some sort of strong

243. The attorney should only adopt the defendant's goals after reasonable attempts to provide ameliorating advice and counsel, including a thorough discussion of nonlegal considerations. *See, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983).

244. The concept of partisan zeal appears to come from Canon 15 of the A.B.A.'s *Canons of Professional Ethics*, the predecessor to the *Model Code*. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 138 n.1 (1995).

245. The *Model Code* provides somewhat contradictory directions to attorneys faced with this situation. Ethical Consideration 7-7 provides that "it is for the client to decide what plea should be entered" in a criminal matter. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7. On the other hand, Ethical Consideration 7-12 provides in relevant part:

Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for the client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12.

The situation is somewhat clearer in the *Model Rules*. According to Model Rule 1.2(a), "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a). Moreover, Model Rule 1.14 directs the lawyer who represents an impaired client to "maintain a normal client-lawyer relationship with the client." *Id.* Rule 1.14(a).

246. "[W]ithin the D[rug] T[reatment] C[ourt], sanctions are not punishment. They are simply 'adjustments,' a device by which the court teaches addicts responsibility for their actions." McColl, *supra* note 8, at 502 (citation omitted).

247. The description in the text of this alternative role conception clearly implicates the notion of paternalism, which has been defined as "the imposing of constraints on an individual's liberty for the purpose of promoting his or her own good." Dennis F. Thompson, *Paternalism in Medicine, Law, and Public Policy*, in ETHICS TEACHING IN HIGHER EDUCATION 246 (Daniel Callahan & Sissela Bok eds., 1980); *see also* Luban, *supra* note 188.

248. *See, e.g.*, Lee Teitelbaum, *Standards Relating to Counsel for Private Parties*, in JUVENILE JUSTICE STANDARDS ANNOTATED (Robert E. Shepherd, Jr. ed., 1980) (urging advocacy approach for attorneys representing juveniles that permits children to exercise control over representation).

identification between the defendant and his or her lawyer can be found.²⁴⁹ If the defense lawyer has significant links with the other ongoing participants in the process, including prosecutors, corrections officials, and judges, and shares with these actors a common set of interests, this sort of an identification between the defendant and his or her attorney may be difficult to establish or maintain.²⁵⁰ In such circumstances, a key element of the adversarial system is absent.

Rehabilitative penal practices pose similar problems of fit with respect to the requirements that there be neutral, detached decision makers and formal rules of procedure, the other key characteristics of a traditional adversarial system. These tensions further complicate the role problems faced by advocates seeking to represent defendants in such proceedings. In his classic essay exploring the importance of formal decisional rules and neutral adjudication in adversarial disputing,²⁵¹ Professor Martin Shapiro first observes that traditional adversarial processes are essentially triadic in structure.²⁵² He then explains that this structure is inherently unstable because of its tendency to collapse into “two against one,” once the decision maker announces a winner and a loser.²⁵³ It is important to avoid this sort of collapse because it may undermine the legitimacy of the outcome in the eyes of a nonprevailing party, who may believe the outcome resulted from an alliance between the winner and the judge. Thus, Shapiro argues that complex societies develop formal rules to govern the adjudicatory process and rely on the office of the judge to insure that the decision maker remains

249. It may be difficult to define adequate identification for purposes of permitting lawyers to act paternalistically on behalf of their clients. One very interesting attempt has been offered by David Luban, who has proposed that lawyers may act paternalistically in certain circumstances, if they have a sufficient understanding of their clients’ “wants,” “values,” and “interests.” Luban, *supra* note 188, at 467-74.

250. In the drug treatment court setting, for example, we are told that the defendant’s attorney must operate as a member of the treatment “team.” Judge, *supra* note 30, at 1. Membership on this team may undermine the ability of defenders to maintain a strong identification with their clients. One experienced defense lawyer explained this process within the context of Brooklyn, New York’s treatment court as follows:

One attorney is assigned full time to the Treatment Court to handle all Legal Aid cases in that court This one attorney attends the same training programs as the district attorney, the judge and the court personnel, including a recent training trip to Los Angeles. The obvious risk is the erosion of zealous defense advocacy as the three participants—judge, prosecutor and defense attorney—begin to consider themselves “teammates.”

Lisa Schreibersdorf, *The Pitfalls of Defenders as “Team Players,”* INDIGENT DEFENSE (Nat’l Legal Aid & Defender Ass’n), Nov.-Dec. 1997, at 7.

251. Shapiro, *supra* note 229.

252. *See id.* at 284.

253. *Id.* at 284-85.

independent and professional.²⁵⁴

Shapiro's argument depends on the premise that people are more likely to perceive decisions as fair if they are derived through a process in which both parties to the dispute have equal access to the decision maker.²⁵⁵ In this sense, both the formality of the process and the neutrality of the judge are designed to insure that the decision maker maintains appropriate distance from the parties in order to prevent unfair alliances from developing.²⁵⁶ By contrast, rehabilitative penal practice diminishes the stabilizing influence of procedural formality and neutrality precisely because the goals and interests of the parties are not understood to be in conflict.²⁵⁷ To the extent that this characterization is true, as it may be in the relationship of helping professionals and their clients,²⁵⁸ the collapse of the triadic structure may not undermine the client's confidence in the integrity and legitimacy of the system. On the other hand, when treatment is built into a system that has retained at least some of the features of traditional criminal law blaming practices, such as the power to use coercive measures,²⁵⁹ procedural informality and a lack of detachment on the part of the decision maker can result in severe negative consequences for the defendant²⁶⁰ and can present

254. See *id.* at 285-86. Shapiro argues that "the most fundamental device for maintaining the triad is [the] consent [of the disputants]." *Id.* at 285. Complex societies, however, tend to substitute law and office for the particular consent of the parties. See *id.* at 285-86; see also Golding, *supra* note 228, at 111-15 (discussing "procedural justice," which includes formal procedural elements such as notice, the obligation of the decision maker to hear equally from both sides, and the obligation to hear a party only in the presence of the other party).

255. See Golding, *supra* note 228, at 113.

256. This sort of collapse is likely to undermine the very goals of rehabilitation to which a treatment-oriented regime is directed because it may leave the defendant with the clear impression that "no one is seriously interested in hearing her side of the story," and that "the procedure is completely stacked." Handler, *supra* note 147, at 31.

257. In discussing a similar rejection of procedural formality and decision-maker neutrality in the context of mid-1960s juvenile courts, Joel Handler observed:

This foundational concept of *parens patriae* is the theoretical underpinning for the rejection of the criminal law adversary procedures. The adult offender is the enemy of society The delinquent, on the other hand, is not the enemy of society. He is society's child, and therefore the interests of the state and the child do not conflict but coincide. Since the interests coincide there is no need for the criminal adversary adjudicatory procedure.

Handler, *supra* note 147, at 10. In addition, advocates of informality in rehabilitative regimes often argue that the formal application of procedural and evidentiary rules is poorly suited to the "presentation of the relevant scientific behavioral data." *Id.* at 26. They also contend that "the trauma of a trial-by-battle adversary system would destroy rehabilitative goals." *Id.*

258. See *id.* The claim that medical professionals share the goals and interests of their patients may not always be true, especially in an era of managed care in which the professional may be obligated to fulfill a rationing role as well as a helping role.

259. Cf. *id.* at 13-14 (describing juvenile justice system as retaining "power to take an adolescent from his home and confine him in what amounts to a prison").

260. Writing in the juvenile court area, Joel Handler has argued that the "nonadversary, solicitous

significant conflicts for the defendant's advocate.

B. Drug Treatment Courts and Attorney Role

While treatment-based drug courts vary considerably according to each jurisdiction's statutory context, political environment, available resources, and operational goals,²⁶¹ virtually all of these institutions possess certain similar core features. Almost without exception, these courts seek to accomplish their goals by muting the traditional adversarial positions of prosecutor and defendant,²⁶² and by making the process judge-driven rather than lawyer-driven.²⁶³ This inversion of the traditional adversary system paradigm, which ordinarily assumes that the parties' lawyers will play an active, partisan role while the judge remains passive and neutral,²⁶⁴ tends to be coupled with a high degree of procedural informality.²⁶⁵ Taken together, these features yield a setting in which familiar role expectations rarely serve as accurate predictors of actual practice. As one commentator described it:

[W]hat makes these drug treatment calendars unique is the nonadversarial nature of their proceedings and the active and ongoing role that the drug treatment calendar judge plays—generally with the support of both the prosecutor and defense counsel—in working with the treatment provider and motivating the defendant to complete the treatment program. Essentially, these “drug courts” are not courts at all, but diversion-to-treatment programs, which are supervised through regular (usually monthly) quasi-judicial status hearings at which the drug court judge enters into a dialogue with each defendant about his or her progress in the treatment/re-habilitation program.²⁶⁶

The underlying rationale for this situation recalls the thinking of the leading rehabilitationists of a generation ago.²⁶⁷ As noted earlier, a key

procedure” is not only likely to delegitimize the process, but is also “ill-suited for the accurate determination of what the adolescent did or what he is like.” *Id.* at 31.

261. See Cooper & Trotter, *supra* note 19, at 94; see also Brown, *supra* note 5, at 84. One observer has written that drug treatment courts “range[] from crowded dockets in huge courtrooms where participants are managed in a brisk, assembly-line fashion, to more intimate courts where the atmosphere resembles a fellowship meeting.” Satel, *supra* note 13, at 50.

262. See Cooper & Trotter, *supra* note 19, at 93, 96; McColl, *supra* note 8, at 472, 504-14.

263. See generally Satel, *supra* note 13; see also Pamela Casey, *Court-Enforced Drug Treatment Programs: Do They Enhance Court Performance?*, 17 JUST. SYS. J. 117 (1994).

264. See *supra* text accompanying notes 227-29.

265. See Deschenes & Greenwood, *supra* note 143, at 105; Satel, *supra* note 13, at 55.

266. Cooper & Trotter, *supra* note 19, at 93.

267. See, e.g., MENNINGER, *supra* note 75; WOOTTON, *supra* note 94; see also, e.g., BARBARA WOOTTON, *CRIME AND PENAL POLICY: REFLECTIONS ON FIFTY YEARS' EXPERIENCE* (1978);

feature of the rehabilitative ideal was the conviction that antisocial or criminal conduct was the product in part or whole of some pathology operating within the offender.²⁶⁸ Given this starting point, it was entirely logical that rehabilitationist thinkers urged the criminal justice system to respond to offenders with therapeutic treatment instead of retributive punishment, either to assist the offender²⁶⁹ or, in the case of social defense theorists, to protect society from future harmful conduct.²⁷⁰ Furthermore, because rehabilitationists thought that criminal conduct was linked to individual pathology, they concentrated less on the specific facts and circumstances of the completed criminal offense and more on information about the offender's personal characteristics that were necessary for accurately determining the offender's diagnosis and prognosis.²⁷¹

Translated into the contemporary drug treatment court context, these ideas generate a powerful set of related premises:²⁷² Substance abuse is a disease²⁷³ that contributes directly to the commission of criminal conduct.²⁷⁴ Most offenders with drug abuse problems, who are prosecuted and sentenced in the traditional punishment-oriented criminal justice system, do not receive treatment for their disease. Therefore, upon release, they resume the

Wootton, *supra* note 163.

268. See *supra* text accompanying notes 99-100. Professor Allen reports that within the broad definition of the rehabilitative ideal that he employs, "theories of rehabilitation have been advanced by those who view crime as a product of moral default of offenders," as well as by those who "assume the social causation of crime, and even by some who attribute it to individual biological propensities." ALLEN, *supra* note 38, at 3. Allen states that his broad definition "does not resolve the perennial controversies between freedom of the will and determinism." *Id.* Nevertheless, he does concede that "modern expressions of the rehabilitative ideal lean heavily to [determinism]." *Id.*

269. Allen noted:

Treatment is directed toward producing an enduring change in the behavior of an individual as he lives under natural conditions in the community. Included within the concept of treatment is an idea of restoration or improvement rather than restriction or disablement.

ALLEN, *supra* note 38, at 91 n.4 (quoting Schwitzgebel, *Development and Legal Regulation of Coercive Behavior Modification Techniques with Offenders*, NAT'L INST. OF MENTAL HEALTH No. 2067 (1971)).

270. See, e.g., Marc Ancel, *New Social Defense*, reprinted in CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 132 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

271. See Duff & Garland, *supra* note 49, at 8.

272. This set of related assertions is drawn especially from Cooper & Trotter, *supra* note 19, at 94, and McColl, *supra* note 8, at 500.

273. For a good general discussion of the disease model of addiction, see Bruce K. Alexander, *The Disease and Adaptive Models of Addiction: A Framework of Evaluation*, in VISIONS OF ADDICTION 45 (Stanton Peele ed., 1988).

274. See Brown, *supra* note 5, at 66-68; James C. Weissman, *Understanding the Drugs and Crime Connection*, in CRIMINAL JUSTICE AND DRUGS 44 (James C. Weissman & Robert L. DuPont eds., 1982).

addictive use of drugs and associated criminal behaviors.²⁷⁵ If the disease is treated, however, this linked cycle of addiction and criminality can be disrupted.²⁷⁶

Although formal notions of guilt and responsibility as to particular instances of past criminal conduct are not made irrelevant in the drug treatment court setting,²⁷⁷ it is clear that the primary focus, and therefore the design of the system, is centered upon the offender's future conduct and the characteristics of his or her disease and progress in treatment that permit useful predictions as to future criminality.²⁷⁸ This shift in focus is responsible for the push toward a relatively nonpartisan, informal procedural approach by drug treatment courts.²⁷⁹

In light of this redirected emphasis and procedural informality, defense attorneys must make difficult choices in formulating an appropriate role conception. These choices fall into several broad categories. First, attorneys must decide what posture to adopt when their clients are faced with deciding whether to enter a treatment court program or to have the charges resolved through the traditional adjudicatory system.²⁸⁰ Second, attorneys must decide whether to play an active or a passive role in limiting the potentially severe sanctions their clients may receive in instances of relapse.²⁸¹ An important question here is whether defense counsel should interpose himself or herself between the defendant and the treatment court judge, or acquiesce in the common practice of permitting the judge to interact directly with defendants

275. See Brown, *supra* note 5, at 77-78; Deschenes & Greenwood, *supra* note 143, at 100.

276. See Brown, *supra* note 5, at 81-83.

277. One could argue, however, that blame and responsibility for particular illegal acts become irrelevant in deferred prosecution programs, where coercive measures are implemented without any formal adjudication of guilt. See Cooper & Trotter, *supra* note 19, at 95; see also *infra* text accompanying notes 287-90.

278. See McColl, *supra* note 8, at 490, 502.

279. As noted earlier, this is true in part because fact-finding with respect to diagnosis and prognosis arguably does not lend itself to "trial-by-battle." See Handler, *supra* note 147, at 26. Moreover, the typical posture assumed by defendants in the traditional adversary system, in which the criminal denies responsibility for the alleged crime and the state must present persuasive evidence to obtain a conviction, is thought to undermine the basic therapeutic goal of helping the offender overcome unhealthy denial. See ALLEN, *supra* note 38, at 17; McColl, *supra* note 8, at 490. Finally, an adversarial approach founded on formal procedural rights designed to protect defendants against the coercive authority of the state is unsuitable for the sort of cooperative venture contemplated by a treatment court, in which the prosecution and defendant both seek to diagnose the problem and monitor the course of treatment. See Cooper & Trotter, *supra* note 19, at 96.

280. The traditional adjudicatory system includes standard plea negotiations.

281. See Bean, *supra* note 15, at 719 ("if progress is unsatisfactory, offenders may be returned to custody—3 to 7 days is not uncommon, but then neither is 14 to 90 days"). For a further description of the use of graduated sanctions to respond to participant relapse, see *infra* note 306 and accompanying text.

in open court.²⁸² The final choices defense attorneys are likely to face involve the degree to which potentially damaging or inculpatory information will be shared with the court and the prosecutor.

1. *The Decision to Participate in Drug Treatment Court*

Most drug treatment courts operate either as “deferred prosecution programs” or “postdisposition programs.”²⁸³ Treatment courts following the deferred prosecution model attempt to identify suitable defendants within days of their initial arrest in order to capitalize on the therapeutic value of the “trauma and anxiety” associated with being taken into custody.²⁸⁴ If a defendant is deemed appropriate for diversion into treatment, then the court will stay the charges. If the candidate ultimately is successful in treatment, those charges will then be dismissed or *nolle prossed*.²⁸⁵

At first blush it would appear that defendants eligible for a deferred prosecution program have everything to gain and little to lose by participating, given the opportunity to obtain treatment and avoid criminal conviction. Concomitantly, it would appear that defense lawyers, acting in their role as advisors,²⁸⁶ should recommend such participation enthusiastically. In fact, defense attorneys faced with the task of counseling clients at this threshold stage must confront several difficult issues if they wish to proceed in a coherent fashion. For many defendants, the decision to participate in the treatment court process means that they effectively forego the presumption of innocence and the panoply of trial rights guaranteed by the Constitution.²⁸⁷ In a literal sense, defendants who opt to enter a deferred

282. See Satel, *supra* note 13, at 47.

283. See Cooper & Trotter, *supra* note 19, at 95-96. The National Legal Aid and Defender Association reports that the Government Accounting Office has found that 44% of treatment courts defer prosecutions pending the completion of treatment, while 38% require a plea, but withhold sentencing pending the outcome of treatment. Presumably, the others make treatment a condition of probation or use some other hybrid arrangement. See *Feds, Others Scrutinize Drug Courts*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), Nov.-Dec. 1997, at 9.

284. Cooper & Trotter, *supra* note 19, at 95; see also Brown, *supra* note 5, at 88. Being in “crisis” may motivate addicts to enter treatment even if their denial would ordinarily result in their resisting treatment. Supporters of treatment courts point out that patients coerced into treatment tend to do as well or better than those who enter voluntarily. See Satel, *supra* note 13, at 53.

285. See Brown, *supra* note 5, at 88; Cooper & Trotter, *supra* note 19, at 95.

286. See Judge, *supra* note 30, at 1.

287. At a minimum, this list includes the right to a jury trial. See U.S. CONST. art. III, § 2, cl. 3. The Fifth Amendment guarantees the right not to be compelled to be a witness against oneself. See U.S. CONST. amend. V. The Sixth Amendment guarantees the right to a speedy and public trial, the right to confront witness and to have the use of compulsory process for obtaining witnesses, and the right to the effective assistance of counsel. See U.S. CONST. amend. VI. The right to be free from conviction unless the state proves each element of the offense beyond a reasonable doubt is guaranteed

prosecution program may still contest their guilt at a full adversarial trial if they fail to complete the treatment mandated by the drug court.²⁸⁸ Nevertheless, defendants who progress through the entire treatment court regime and who upon “graduation” have their charges dismissed ultimately may have received “a more onerous disposition in terms of the length of time [they are] subject to court control”²⁸⁹ than they would have received if the charges had been resolved through standard plea negotiations or trial. Given that this “more onerous disposition”²⁹⁰ will have been imposed without a formal adjudication of guilt, the “successful” defendant’s decision to participate effectively constitutes at least a partial waiver of trial rights.

The most obvious response to this apparent unfairness is that while the treatment court’s disposition is more onerous in some respects, it is ultimately in defendants’ best interests because it provides them with needed treatment. Moreover, supporters are likely to point to numerous studies that have shown coerced addictions treatment to be even more effective than voluntary treatment in driving the disease into remission.²⁹¹ This response, however, frames the role conflict faced by defense counsel in this setting. If their role is to facilitate the disposition that is in the client’s best interests, then attorneys should urge drug-addicted clients to participate in treatment court.²⁹² On the other hand, if attorneys adopt the standard role conception,

by the due process clause of the Fourteenth Amendment. See *In re Winship*, 397 U.S. 358 (1970).

288. In some jurisdictions, the defendant will be transferred to a different section or part so that a new judge will hear the case, while in other jurisdictions the treatment court judge will retain the case and hear it if it goes to trial. See COOPER, 1997 SURVEY, *supra* note 18, at 28 (reporting that in 50% of programs, the treatment court judge “adjudicates the defendant’s case and imposes a final disposition” when defendant is terminated from treatment regime). In jurisdictions that follow the latter practice, defendants may be disadvantaged by virtue of a judge’s prior knowledge of their participation in, and failure at, the treatment regime.

289. See GOLDKAMP, *supra* note 13, at 11.

290. Cooper and Trotter state that drug treatment court programs “represent a far more intrusive set of obligations imposed on the participating defendant and a far more proactive response than simply doing time.” Cooper & Trotter, *supra* note 19, at 97.

291. See Satel, *supra* note 13, at 53. This description of the treatment regime as “coerced” is not meant to suggest that treatment court participants are denied the opportunity either to grant or withhold their consent before entering the program. Instead, the reference is intended to make clear that that consent is given under circumstances that greatly constrain the defendant’s range of choice.

Many drug court participants have no desire to be in treatment; it was chosen on the basis of expediency. They are resistant to treatment. Nevertheless, they remain in treatment because of the threat of sanctions and/or jail, and while they are literally captive in the program, they acquire genuine, internal motivation.

Id. at 59; cf. George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J. L. & HUMAN. 79, 83-85 (1993) (discussing distinction between compulsion and coercion in context of confessions).

292. “[I]t is in the best interests of both the prosecution and the defense to work together to promote defendants’ entry in and successful completion of drug treatment programs.” Cooper & Trotter, *supra* note 19, at 94 (emphasis added).

they should advise clients about the likely outcomes of available options, and they should point out that rejecting the treatment court route may result in a less intrusive sanction,²⁹³ or a sanction of shorter duration than that which is likely to result from even the most successful encounter with treatment court, and should then act zealously to effectuate their clients' choices.

While one might argue that defense attorneys can reconcile these two alternatives by "provid[ing] thorough advice about the drug court and let[ting] the client decide,"²⁹⁴ this argument fails because many defendants who would benefit from treatment predictably will reject this alternative if they clearly understand the impositions it involves. At least with respect to those clients whose short-term preference is "to avoid or minimize loss of liberty or other sanctions,"²⁹⁵ counsel must choose either to act as an advocate for the treatment court option or as an advocate for the clients' expressed goals.²⁹⁶

This conflict between zealous advocacy and membership on the treatment team²⁹⁷ is likely exacerbated by one of the operational elements said to make drug courts effective in reaching their treatment goals—their capacity to "identify the drug offender and place him or her into the treatment program as soon after arrest as possible."²⁹⁸ Defense lawyers acting within the traditional role conception must attempt at least a rudimentary fact investigation and should evaluate potential legal issues raised by available information. This includes evaluating possible search and seizure arguments, and asking questions about the sufficiency of the charging document, before advising clients to enter a treatment court program.²⁹⁹ By contrast, defense counsel, acting as a member of the treatment team, may conclude that the

293. See Judge, *supra* note 30, at 1 (suggesting that many defenders view "alternatives" like drug treatment "warily, since careful monitoring of clients' behavior can be used to justify imposition of additional punitive measures").

294. *Id.*

295. *Id.*

296. Indeed, the Miami model has been described as requiring "a breakdown in the traditional adversarial roles assumed by defense attorneys and prosecutors as it relies heavily on the defense attorneys *convincing offenders* of the advantages of treatment and *steering them* away from accepting a more traditional plea involving minimal, or no, supervised treatment." Barbara E. Smith et al., *Introduction to Special Issue*, 17 JUST. SYS. J. viii (1994) (emphasis added).

297. See Schreibersdorf, *supra* note 250, at 7. Robert Burke describes this as a shift "from confrontation to cooperation." Robert Burke, *Reconciling Drug Court Participation with Defender Ethical Standards*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), Nov.-Dec. 1997, at 5.

298. See Brown, *supra* note 5, at 87-88.

299. See Burke, *supra* note 297, at 5-6 (discussing ABA Defense Function Standards 4-6.1, 6.2, which require, among other things, that defense counsel "[c]ontinue to prepare the defense of the case during plea negotiations"); Judge, *supra* note 30, at 2 (pointing out that "[a]ssessing legal issues particular to the case, including search and seizure issues, sufficiency of the charges, and timely filing of the complaint must be seen as central to the defense function").

delay necessitated by adequate factual and legal evaluation of the case will undermine the therapeutic goal of instituting treatment while the defendant is still in the midst of the "crisis" occasioned by arrest. To the extent that these goals do come into conflict in individual cases, it is no answer to urge that a balance be struck between them, as some have suggested,³⁰⁰ unless one is willing to countenance a diminution, however slight, in the ordinary obligations of partisanship imposed by the standard role conception and the various performance standards now in place.³⁰¹

Defense counsel's role conflict becomes even more pronounced in a jurisdiction where the treatment court defers prosecution only if the defendant agrees to a stipulated set of facts,³⁰² or in a jurisdiction that has adopted the "postdisposition model" for its treatment court, in which case the defendant must enter a guilty plea.³⁰³ In either of these two contexts, the lawyer's decision to facilitate the client's entry into the drug court program not only exposes the defendant to coercive therapeutic measures that may be more invasive and protracted than traditional dispositions,³⁰⁴ but also necessarily results in the waiver of factual and technical legal defenses, leaving the client "vulnerable if [he or she] ultimately fail[s] treatment."³⁰⁵

2. *The Defender's Role with Respect to Graduated Sanctions*

The second group of issues concerns counsel's role in limiting the potentially severe sanctions a defendant in treatment court may receive upon

300. See Judge, *supra* note 30, at 2.

301. See STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standards 4-6.1, 4-6.2, 4-8.1, 5-1.1 (1993).

302. See McColl, *supra* note 8, at 496-97.

303. See Cooper & Trotter, *supra* note 19, at 96.

304. See *supra* text accompanying notes 289-90; see also McColl, *supra* note 8, at 496.

305. Schreibersdorf, *supra* note 250, at 7; see also Burke, *supra* note 297, at 6 (suggesting that defense counsel could not comply with A.B.A.'s *Defense Function Standards* relating to negotiated pleas if structure of treatment court required lawyer "to counsel a client on a guilty plea without having sufficient legal or factual information"); Cooper & Trotter, *supra* note 19, at 96 ("[D]efense counsel may advise a client to waive the filing of potentially dispositive motions in order to immediately enter a [postdisposition] treatment program."). Counsel's choice may be starker still in those jurisdictions that impose additional disabilities on eligible defendants who reject participation in drug treatment court. In Brooklyn, New York, for example,

defendants who decline treatment will not receive the typical or "usual" plea offers, e.g. split sentences and probation. The defendant retains the option, up until the point of hearing and trial, to accept treatment. However, the longer the defendant waits to opt for treatment, the greater the period of incarceration should the defendant fail to comply with the Court's treatment mandate. If a defendant declines to be interviewed by the Treatment Court's clinical staff . . . the "usual" plea offers will not be made.

Memorandum from Valerie Raine, Project Director Brooklyn Treatment Court, to Criminal Court Practitioners 3 (Oct. 31, 1996) (on file with author).

relapse. As indicated earlier, the fact that recovery from substance abuse often involves relapse has been taken into account in the design of most drug treatment courts through the use of graduated sanctions, rather than the all-or-nothing approach of traditional probation or parole revocation proceedings.³⁰⁶ In some jurisdictions, these escalating sanctions are set out in contracts³⁰⁷ or clearly written policies, so that judges have relatively little flexibility once they find that defendants have failed to adhere to one or more of the conditions of the program.³⁰⁸ In other jurisdictions, treatment court judges have greater discretion in fashioning intermediate sanctions in response to offender relapse.³⁰⁹

Here again, defense attorneys face a difficult set of choices between acting as a zealous partisan, according to the standard role conception, or acting as part of the treatment team. In jurisdictions that permit defendants' attorneys to negotiate some of the terms of the contract,³¹⁰ the standard conception dictates that they seek the mildest sanctions possible that entail the smallest loss of liberty.³¹¹ On the other hand, a role conception that prioritizes the goal of helping defendants to succeed in treatment might lead attorneys to agree to more intrusive sanctions, particularly if they believe that small doses of "shock incarceration" will encourage their clients to take the treatment protocol more seriously.³¹²

306. See *supra* text accompanying notes 26-29; see also Brown, *supra* note 5, at 91. One leader of the drug treatment court movement defined graduated sanctions as "the measured application of a spectrum of sanctions, whose intensity increases incrementally with the number and seriousness of program failures." Jeffrey S. Tauber, *Drug Courts: Treating Drug-Using Offenders Through Sanctions, Incentives*, CORRECTIONS TODAY, Feb. 1994, at 28, 33.

307. See Deschenes & Greenwood, *supra* note 143, at 101, 105; McColl, *supra* note 8, at 482. A typical contract utilized in the Maricopa County, Arizona drug treatment court

spells out the conditions of program compliance and the rewards that are designed to motivate offenders to stay in treatment. The contract specifies the number of drug education classes, counseling sessions, probation officer contacts, negative urine tests, and payment of fees needed to earn the points to progress to the next phase of the program.

Deschenes & Greenwood, *supra* note 143, at 101.

308. See Satel, *supra* note 13, at 63-64 tbl.2 (reporting that 6 of 15 treatment courts within the study employed "fixed sanction algorithm[s]").

309. See *id.*

310. McColl reports that in Baltimore

[t]he Public Defender and the State's Attorney agree before going to court on which track [deferred prosecution or postdisposition] the defendant will enter. They then agree on a contract to be presented to the defendant, which details the program and includes possible sanctions for treatment failure.

McColl, *supra* note 8, at 482.

311. For example, counsel might seek a program that allows the defendant to attend extra counseling sessions or undergo more frequent urine testing if a relapse occurs, rather than requiring a period of confinement in jail. See Brown, *supra* note 5, at 91.

312. There is some research to support this view. Satel interviewed one participant in the Denver Drug Court whom she quotes as saying: "When I relapsed and got disciplined, [the judge] said, 'well,

In jurisdictions that do not permit prenegotiated limits on sanctions, defense lawyers still face difficult choices when their clients are alleged to have violated treatment court rules. Here, the question is whether to engage in traditional forms of advocacy, such as introducing relevant exculpatory evidence or cross-examining inculpatory witnesses, in order to justify a less severe sanction by offering an explanation or justification for the defendant's behavior, or by challenging the factual basis for a finding that a violation has occurred. In drug courts where judges have considerable discretion, this sort of advocacy might significantly impact the sanctions meted out.³¹³ Even in treatment courts that use a rigid sanctioning schedule, counsel's choice either to engage in vigorous advocacy or to take a relatively passive role will be of great moment because judicial discretion will still reside in the interstices of the graduated formula and in the judge's fact-finding that a violation has taken place.³¹⁴

The active role played by drug treatment court judges with respect to the monitoring of defendants and the imposition of intermediate sanctions conspires with the relaxed procedural approach typical of these courts to put great pressure on defense lawyers to adopt the role of "team player" instead of the zealous advocacy approach common in most criminal defense practice.³¹⁵ Indeed, one published report describes the norm in Miami's Drug Court as one in which "all the justice system players are on the same team, making the same demands on the defendant and standing ready to impose the same penalties for noncompliance."³¹⁶ In order to appreciate fully the extent to which the norms of formal triadic disputing are discarded, and the standard defender role conception jeopardized, this Article closely examines how this shift toward judicial activism and procedural informality functions in the treatment court setting.

you still owe me a day.' But he didn't do it out of vindictiveness, you know, like a spanking or something. Actually, it was what I needed." Satel, *supra* note 13, at 56.

313. See Schreibersdorf, *supra* note 250, at 7.

314. See *id.* Indeed, one study found that

[u]nder one Denver Drug Court judge, 66% of participants got "good and passable reviews" and 14% were sent to jail over the course of a year. Under his successor, only 40% received "good and passable reviews" and 40% went to jail. This drug court program was stable over the years examined, save for the switching of judges.

Satel, *supra* note 13, at 50.

315. See Schreibersdorf, *supra* note 250, at 7.

316. FINN & NEWLYN, *supra* note 29, at 4.

3. *Judicial Activism, Procedural Informality, and Defender Advocacy Roles*

Many students of the drug treatment court movement have noted that these courts require a shift in the judicial role.³¹⁷ They note that the conception of the judge “as someone who takes a neutral position in the resolution of conflict”³¹⁸ has been supplanted by a new understanding that “the judge is partisan, aiming to cure the offender of his addiction.”³¹⁹ To a significant extent, this revision of the traditional judicial role results from the very design of these treatment courts, which requires judges to play a central part in the treatment of defendants’ addictions.³²⁰ Before the advent of treatment-based drug courts, when judges ordered addiction treatment as a condition of probation, judges were essentially uninvolved in supervising or monitoring the course of treatment.³²¹ In contrast, drug treatment court judges regularly meet with participants in open court to review defendants’ compliance or noncompliance with the conditions of their treatment.³²² The purpose of these status hearings is to hold defendants publicly accountable for their progress or lack thereof through the use of rewards or graduated sanctions when appropriate.³²³

The fact that drug court judges are directly involved in monitoring defendants’ behavior and imposing sanctions or conferring rewards is more than merely stylistic. There is good reason to believe that many substance abusers, in the initial stages of recovery, are likely to benefit most from a treatment regime focused on “practical problem solving and the acquisition of cognitive-behavioral relapse prevention skills,”³²⁴ which judges are capable of managing. By contrast, recovering addicts are less likely to benefit from the sort of insight-oriented therapy that is the exclusive province of

317. See, e.g., Brown, *supra* note 5, at 85; Casey, *supra* note 263, at 118-19.

318. Bean, *supra* note 15, at 720.

319. *Id.*

320. See Cooper & Trotter, *supra* note 19, at 94; Satel, *supra* note 13, at 44-46.

321. See Satel, *supra* note 13, at 45.

322. See Brown, *supra* note 5, at 85-86; Cooper & Trotter, *supra* note 19, at 93; Satel, *supra* note 13, at 45.

323. See Satel, *supra* note 13, at 45-46.

324. *Id.* at 58.

For addicts—as well as some other individuals whose behavior is self-destructive—insight can follow change, it need not precede it as conventional psychodynamic theory has it—and thus formal exploration of deep-seated psychological conflicts is contraindicated. To put it another way, it often takes a period of abstinence for the addict to understand why he or she needed drugs in the first place.

Id. at 58-59.

mental health professionals.³²⁵ In operational terms, this means that the judge's role in sanctioning and rewarding defendants is to help them understand that their choices have consequences for which they will be held responsible, and that they control their own fate.³²⁶ Thus, when the judge responds promptly with a proportional sanction to a positive urine test or a missed group therapy meeting, the judge is helping to provide treatment for the defendant.³²⁷

The fact that the judge personally performs these therapeutic interventions is critical. In effect, drug treatment courts invoke the moral authority of the judicial office,³²⁸ the "symbolic impact of the black robe,"³²⁹ to show defendants the seriousness with which their behavior is being taken.³³⁰ In order for this model to work, however, judges must be able to establish a functioning therapeutic relationship with each of the defendants they are supervising.³³¹ The formation of this sort of a direct relationship has two significant consequences. First, the judge and the defendant will interact without the formal distance that ordinarily characterizes traditional criminal law adjudications.³³² This, in turn, raises the greater possibility that the judge's reactions to an individual defendant's successes or failures may be influenced by personal considerations or the effects of an unconscious process of counter-transference.³³³ In gross terms, the informality and

325. Although the drug treatment court model appears to be structured around this conception of treatment, it is unclear whether behavior-based therapies must always precede insight-oriented treatment in order to be most effective. Some treatment modalities probably work better for a given individual than others, depending on a range of factors, including the patient's age, social functioning, and treatment history. For a treatment court program to be fully effective, therefore, program officials must use a broad range of diagnostic and therapeutic tools designed to tailor the program to meet the needs of each participant. For a fuller discussion of substance abuse treatment modalities, see *supra* text accompanying notes 110-13.

326. See Satel, *supra* note 13, at 46 (treatment court judge's use of escalating sanctions "demonstrates to the participant that his actions are taken seriously and that he predictably controls his fate"); *An Interview with Judge Jeffrey S. Tauber*, *supra* note 39, at 11 (drug court model permits defendants to "control" outcomes of their cases and holds them "accountable" for "consequences" of their conduct).

327. See GOLDKAMP, *supra* note 13, at 11; Satel, *supra* note 13, at 46-47.

328. See Deschenes & Greenwood, *supra* note 143, at 103; Cooper & Trotter, *supra* note 19, at 94.

329. Satel, *supra* note 13, at 47.

330. See *id.* ("[T]he drug court model creates a very health and transparent system of authority. The actions of the judge depend directly on the patient's own performance; it's all observable . . .").

331. This claim does not mean that drug treatment court judges engage in insight-oriented psychotherapy, see Satel, *supra* note 13, at 58. Rather, "[i]n optimal instances, . . . the judge is genuinely engaged with the participants and has become a central and respected figure in their drug court and recovery experience." *Id.* at 56.

332. See, e.g., Deschenes & Greenwood, *supra* note 143, at 103 ("clients are able to build a personal relationship with the judge").

immediacy of the judge's relationship with the defendant confers a potentially ungovernable discretion similar to that which so riled critics of the rehabilitative ideal nearly thirty years ago.³³⁴ As one keen observer of drug treatment court judges has observed:

[D]rug court is fertile ground for the unfolding of psychological drama. Perhaps, for example, the judge is a recovering alcoholic or has loved a one who is addicted to drugs. This could stir up inappropriately strong feelings of sympathy, impatience or even hostility toward a participant who happens to remind him of his or her former self (or his or her loved one). Consider the participant who casts the judge in the parental role. He or she may elicit deep feelings in the judge, rooted in the latter's own experience as a parent or a once-needed child. Or consider the participant who related to the judge in a provocative manner—or, more precisely, in a manner that the judge finds provocative—stemming from an unconscious desire to be punished or controlled or to elicit concern through censure.

These kind of psychodynamic scenarios are more likely to get played out in a drug court, with its somewhat relaxed structure, than in a standard court where proceedings, expectations and personnel roles are clear, traditional and fairly predictable.³³⁵

A second, related consequence of this more direct, personal relationship between treatment court judges and individual participants is that it tends to complicate participants' relationships with their attorneys. As noted earlier, ordinary criminal proceedings rely on formal procedural rules to help maintain distance between the parties and the decision maker, to insure that

333.

The Freudian concept of transference refers to the patient's "transferring" tightly held attitudes (beliefs) and emotional dispositions forged in childhood onto new individuals in their lives. . . .

Counter-transference is the inverse of transference; it describes the therapist's reaction to the patient. In the context of drug court, "judicial" countertransference would thus refer to the personal reactions that are invoked in the judge by the participant (in the clinical setting, by analogy, it would refer to the therapist's response to the patient). Classically, these reactions are unconscious—that is, outside the awareness of the judge (or therapist)—but are manifested in ideas, feelings or behaviors that are inappropriately intense (in the positive or negative direction) or somehow not fully rational.

Satel, *supra* note 13, at 53-54. For more on the relationship between countertransference and substance abuse treatment, see Howard J. Shaffer, *Denial, Ambivalence, and Countertransference Hate*, in *THE DYNAMICS AND TREATMENT OF ALCOHOLISM: ESSENTIAL PAPERS* 421 (J. Levin & R. Weiss eds., 1994). For more on countertransference in psychotherapy generally, see EDA G. GOLDSTEIN, *EGO PSYCHOLOGY AND SOCIAL WORK PRACTICE* 200-01 (1984).

334. See *supra* text accompanying notes 124-36.

335. Satel, *supra* note 13, at 54-55.

the triadic structure does not collapse into two against one.³³⁶ The defense lawyer's role in such a proceeding is to help the defendant negotiate this formal adjudicatory system and, in the process, to limit the arbitrary exercise of coercive state power by safeguarding the defendant's entitlement to basic procedural rights.³³⁷

In the drug treatment court, this conception of counsel as an intermediary between the lay defendant and the court is likely to be difficult if not impossible to maintain. Indeed, given the active role assumed by the judge in directing the defendant's course of treatment, and given the lack of formally distancing procedural obstacles,³³⁸ observers of these courts not surprisingly report that "some judges discourage the presence of the attorneys" at status hearings and other similar proceedings.³³⁹ In courts where defense attorneys typically attend hearings, questions with respect to their appropriate role are even more difficult. According to one experienced drug treatment court attorney:

[T]he judge has become so accustomed to this "team approach," that in a recent letter to me, she specifically stated that "the automatic nature of the sanction scheme necessarily transforms to some degree the role of defense attorneys from adversary to counselor." . . .

Indeed, she appeared to suggest that defender advocacy on points of law may have no place in her court at all³⁴⁰

This notion that defense attorneys should "take a step back, . . . not intervene actively between the judge and the participant, and allow that relationship to develop and do its work"³⁴¹ makes sense from the perspective of judges who view their role as entirely consistent with the best interests of the defendant. From the perspective of a given defendant, however, even the most well-intentioned interventions by a treatment court judge may seem belittling, punitive, or unfair.³⁴² The conundrum for defenders is how to mediate this clash of perspectives: Should they proceed principally as members of the treatment team and seek to persuade their clients that the

336. See *supra* text accompanying notes 252-56.

337. See, e.g., JUDGE, *supra* note 43, at 1-2 (stating that traditional role of defense counsel is to resist efforts of prosecutor by using protections of Constitution and derivative case law).

338. Some drug treatment court judges even arrange to have out-of-courtroom contacts with defendants, including picnics, Christmas parties, or, in one case, monthly one-mile runs. See Satel, *supra* note 13, at 69.

339. *Id.* at 67.

340. Schreibersdorf, *supra* note 250, at 7.

341. *An Interview with Judge Jeffrey S. Tauber*, *supra* note 39, at 11.

342. Cf. STRUGGLE FOR JUSTICE, *supra* note 41, at 25-27; CULLEN & GILBERT, *supra* note 86, at 116; see also *supra* text accompanying notes 196-99.

court's position has integrity, or should they adopt the point of view of at least some defendants and seek to undermine the judge's efforts by raising potentially available points of law? Moreover, if rehabilitative impulses do have a tendency to become debased into punitive responses,³⁴³ and if individual treatment court judges may on occasion be moved to act out of personal pique or unconscious reactions to an individual defendant, should defense lawyers conceptualize their role as that of a vigilant advocate, even if this sort of advocacy has the tendency to undermine the therapeutic power of an otherwise direct relationship between treatment court judges and the defendants with whom they are working, or should they act to reinforce that relationship in the hopes that it will prove to be in their client's interest in the long run?

One response to these questions is to suggest that they do not lend themselves to resolution in the abstract, but rather require individual defense attorneys to make careful choices in the context of a given treatment court and a particular case.³⁴⁴ Unfortunately, this approach assumes defenders can identify each moment of decision as it arises³⁴⁵ and can act accordingly despite pressure from the very institutions that have created the role tension in the first place.³⁴⁶ In addition, many of these choices effectively culminate in questions over disclosure of information possessed solely by the defendant.³⁴⁷ If the defendant is engaged by the judge in a colloquy in open

343. See *supra* text accompanying notes 185-87.

344. This response finds support in some feminist scholarship, which urges the use of contextualized reasoning as a way to solve problems. Katharine Bartlett, for example, has explained the premise by saying:

Practical reasoning approaches problems not as dichotomized conflicts, but as dilemmas with multiple perspectives, contradictions, and inconsistencies. These dilemmas, ideally, do not call for the choice of one principle over another, but rather "imaginative integrations and reconciliations," which require attention to particular context.

Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 851 (1990) (citation omitted).

345. Deborah Rhode and David Luban, writing about ethics in organizational settings, have made a similar point about the difficulty of identifying moments of decision in a clear, straightforward way. They note that, even though "[v]irtually every theory of normative ethics, from the Ten Commandments to the latest nuance in philosophy journals, presupposes that moral decisions are clearly demarcated" so that decision makers will "recognize that they have come to a crucial fork in the road," the reality in many organizational settings is that such a "condition[] often [is] absent." RHODE & LUBAN, *supra* note 244, at 405-06.

346. Cf. Ainsworth, *supra* note 47, at 1128 (asserting that "defense lawyers who routinely practice in juvenile court face tremendous institutional pressure to cooperate in maintaining a smoothly functioning court system."); Federle, *supra* note 47, at 1673 (stating that "[t]he zealous lawyer also could expect some pressure from the bench to conform to the nonadversarial and informal nature of juvenile proceedings"). For a fuller discussion of the analogous role problems faced by defenders in juvenile court and drug treatment court, see *infra* text accompanying notes 385-416.

347. See generally Robert L. Ward, *Confidentiality and Drug Treatment Courts*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), Nov.-Dec. 1997, at 4; TREATMENT DRUG COURTS,

court, without the benefit of formal rules of procedure or the opportunity to prepare a measured response, it is likely that damaging concessions or other harmful statements will be made before counsel has had the opportunity to review their legal and practical consequences with his or her client.³⁴⁸ Thus, even if the lawyer is able to discern that a critical decisional moment is at hand, he or she may may not be able to intervene in order to preserve the choice or share its significance with the defendant.

These concerns about the untoward disclosure of sensitive information implicate both the partisanship and confidentiality duties that are central to the standard attorney role conception.³⁴⁹ Once again, this tension between zealous advocacy and cooperation derives, in significant part, from the blending of punitive and therapeutic functions in drug treatment courts. Clearly, the open and frank acknowledgment by defendants of their past or continuing abuse of alcohol or illegal substances, their attitudes toward treatment, their involvement in criminal activity, and other like information plays an important role in the recovery process.³⁵⁰ At the same time, much of this information is likely to be relevant to the investigation, prosecution, or sentencing of defendants, either for the charges that are the basis of their involvement in the treatment court or for other crimes.³⁵¹ Defense lawyers practicing in treatment courts necessarily face a host of difficult choices with respect to this information, and these decisions form the final group of role conflicts mentioned earlier.

4. Confidentiality and the Defense Lawyer's Role

If treatment court judges' direct conversations with participants during status hearings have an important therapeutic function, there is good reason for defense attorneys who understand themselves to be members of the treatment team either to encourage or permit their clients to proceed in an unguarded fashion. Clearly, however, some participants will "openly confess[] offenses to the judge."³⁵² According to a recent survey conducted by the National Legal Aid and Defender Association, only half the drug court

supra note 8, at 47-59.

348. See *Profile: Dalit Moskana*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), Nov.-Dec. 1997, at 12; Ward, *supra* note 347, at 4.

349. See *supra* text accompanying notes 236-38.

350. See Ward, *supra* note 347, at 4.

351. As one observer has observed: "[W]here information is provided in open court or through reports available to all drug court team players, the prosecution necessarily gains more knowledge about the stability or instability of the client, use of drugs, home and employment situations, prior history, and continuing information about sobriety and relapse." Ward, *supra* note 347, at 4.

352. *Profile: Dalit Moskana*, *supra* note 348, at 12.

defense attorneys surveyed reported that their clients received immunity for anything said in open court "in the event of a subsequent prosecution."³⁵³ For a considerable number of defendants who do not obtain immunity, these "therapeutic" statements can have severe negative consequences. Thus, defenders who adhere to the standard role conception may feel obliged to depart from the cooperative norms associated with a treatment orientation. In deferred prosecution programs, admissions made by defendants with respect to the facts and circumstances of their pending charges may serve as the basis for a later conviction, if they do not successfully respond to a treatment program.³⁵⁴ Even in jurisdictions that use a postdisposition model, statements made by defendants without immunity may be used in determining their sentences or to institute or support other charges for other offenses in a new or separate prosecution.³⁵⁵

Perhaps the most difficult confidentiality problems for defense attorneys to manage result from the close cooperative relationship typically established between treatment court judges, prosecutors, and treatment providers. In order to carry out the evaluation and prognosis functions inherent in a rehabilitative approach,³⁵⁶ the criminal justice members of the treatment team require considerable information from drug counselors and others regarding defendants' participation and progress in treatment. Often, however, clients reveal "sensitive personal and family information or incidents of relapse and drug activity during therapy sessions."³⁵⁷ Ordinarily, this sort of information is protected by federal laws and regulations governing the confidentiality of substance abuse treatment records.³⁵⁸ These laws exist because the threat of disclosure of this sensitive information to investigators or prosecutors would undermine the treatment providers' ability to create the atmosphere of trust

353. *Defenders Largely Satisfied with Drug Court Experience*, INDIGENT DEFENSE (Nat'l Legal Aid & Defender Ass'n), Nov.-Dec. 1997, at 8.

354. Indeed, a particularly serious admission might provide the basis for a decision to terminate the treatment regime and return the defendant to an ordinary prosecution track.

355. Robert Ward has pointed out, for example, that prosecutors might seek "to disprove the client's sincerity for rehabilitation by introducing statements made during treatment sessions that the client never really wanted to be in the program," or might seek "to use damaging evidence from the drug court treatment records to deny bail or show a similar pattern of conduct," if the client is prosecuted in the future for new crimes after successfully completing a treatment court program. Ward, *supra* note 347, at 4.

356. See *supra* text accompanying notes 91-107.

357. Ward, *supra* note 347, at 4.

358. See Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, § 408, 86 Stat. 65, 79 (codified as amended at 42 U.S.C. § 290dd-2 (1994)). This law and its implementing regulations apply to virtually all treatment providers that are used by drug treatment courts. See 42 C.F.R. §§ 2.1-.67 (1987). For a fuller discussion of this confidentiality scheme, see Boldt, *supra* note 24, at 2330-34.

and safety required for effective therapy.³⁵⁹ Nevertheless, this information sometimes is made available to the court and prosecutor pursuant to broadly-worded patient consent forms that defendants routinely execute when they begin the treatment court program.³⁶⁰ Although such waivers of confidentiality rights are voluntary in the sense that defendants can refuse to grant permission for disclosures,³⁶¹ such a refusal will likely lead to their exclusion from the treatment court program.³⁶²

In the final analysis, the waiver of some confidentiality protections may be a fair trade-off for a great many defendants, but difficulties remain for defense counsel who must give advice on the scope and wording of consent forms.³⁶³ Defense attorneys who seek to negotiate narrowly-worded consent

359. This purpose of encouraging an open and trustful relationship between a substance abuse patient and treatment provider was set out explicitly in the first set of regulations promulgated by the Department of Health, Education and Welfare, which was the agency originally responsible for implementing the federal confidentiality laws. *See* 42 C.F.R. § 2.4 (1975). In addition, the drafters of the regulations also identified a second purpose animating the strict confidentiality requirements that apply to substance abuse treatment, which was to protect the entire treatment system by maintaining the perception "on the street" that addicts and alcoholics can safely seek treatment for their highly stigmatized conditions. *See* Boldt, *supra* note 24, at 2330-31. The regulations allow the disclosure of patient-identifying information without the patient's written consent, but only in limited situations. The most important exceptions to the general rule requiring patient consent is for disclosures made pursuant to an authorizing court order. Before a court may issue such an order, however, it must give notice to the patient. Additionally, the treatment program, must follow elaborate fact-finding procedures, must find "good cause" for disclosing the information, and must strictly limit the disclosure to that information that is essential and that cannot be obtained in any other fashion. These procedural and substantive requirements make it more difficult to obtain an authorizing court order than other, more common, orders, including subpoenas and search warrants. *See* 42 C.F.R. §§ 2.61-.67 (1994). As a result, few courts have ordered disclosure orders. *See, e.g.,* Commissioner of Soc. Servs. v. David R.S., 436 N.E.2d 451, (N.Y. 1982), *rev'd on other grounds*, 439 N.E.2d 396 (N.Y. 1982) (holding that no "good cause" was shown for disclosure of treatment records in child custody matter, and stating in dicta that court will not find good cause in cases where information is sought to support criminal prosecution of patient).

360. The regulatory provisions governing disclosures pursuant to written patient consent are at 42 C.F.R. §§ 2.31-35 (1994).

361. *Cf.* TREATMENT DRUG COURTS, *supra* note 8, at 51-52 (discussing mix of voluntariness and coercion underlying defendants' decisions with respect to their participation in drug treatment courts).

362. This consequence is inherent in the design of drug treatment courts, which rely on the judge's receipt of information from the treatment provider in order to supervise the defendant and conduct regular status hearings. If defendants refuse to consent to such disclosures, then they cannot meet the requirements for participation in the program. *See* Memorandum from Valerie Raine, *supra* note 305, at 4.

363. The consent provisions of the federal confidentiality regulations require that the patient execute a written waiver of confidentiality. This written form must identify the patient, the treatment provider, and the recipient of information. In addition, it must contain a statement of the purpose for the proposed disclosure, a description of the precise information to be communicated, an identification of the date, event or condition on which the consent will expire, and a statement that the consent is subject to revocation at any time unless the program has already acted in reliance on it. *See* 42 C.F.R. § 2.31 (1994). A special provision governing consent forms for "criminal justice system" disclosures modifies somewhat the expiration and revocation rules. *See* 42 C.F.R. § 2.35 (1994).

forms that allow treatment program workers to disclose only objective data relating to a defendant's attendance, participation in treatment, and the results of urine tests may find the court or prosecutor unwilling to circumscribe the information they receive.³⁶⁴ In fact, many treatment courts use standardized confidentiality waiver forms that contain few, if any, limitations on the kinds and amount of information that treatment providers must share with the criminal justice officials involved in the case.³⁶⁵ In these instances, defenders and their clients must make difficult choices, without any assurance that treatment information will be used solely to further the goals of treatment that the state officials share with the defendant, rather than the ends of punishment that they do not hold in common.³⁶⁶

III. THE JUVENILE COURT MODEL OF DEFENSE ADVOCACY

To gain some analytic purchase on the role problems faced by defense counsel in drug treatment courts, and, by extension, on the inherent dangers of merging therapeutic and blaming practices in a single institutional setting, it is helpful to review the longstanding, thoroughly chronicled story of the juvenile court movement in the United States.³⁶⁷ This story depicts an institution that has exhibited virtually all of the characteristics defining the rehabilitative ideal, including individualized treatment of offenders, indeterminacy of sentences, and broad discretion on the part of decision makers.³⁶⁸ Additionally, the juvenile justice system has attracted each of the principal criticisms of rehabilitative practice that dominated liberal penal discourse in the late 1960s and 1970s. These include concerns over unnecessary restrictions of individual liberty, the debasement of good intentions into punitive responses, and the inadequacy of the diagnostic and treatment tools required to accomplish rehabilitative ends.³⁶⁹ Owing to the

364. This limitation to objective data is built into the court order provisions of the federal confidentiality regulations. *See id.* § 2.63 (1994).

365. The Brooklyn, New York Drug Treatment Court, for example, requires participants to "sign an authorization permitting disclosure of information regarding 'diagnosis, attendance, scope of treatment, treatment progress and quality of participation, dates and results of urine testing and termination or completion of treatment.'" *See Memorandum from Valerie Raine, supra note 305, at 4.*

366. For a discussion of the adverse interests of criminal defendants and the state, *see supra* text accompanying notes 201-02.

367. *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); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 *STAN. L. REV.* 1187 (1970).

368. *See STRUGGLE FOR JUSTICE, supra note 41, at 84; see also supra* text accompanying notes 91-151.

369. *See ALLEN, supra note 38, at 34-36; see also supra* text accompanying notes 182-206.

inherent tension between the rehabilitative ideal and traditional notions of adversarial dispute resolution,³⁷⁰ the juvenile justice system also has been the site of a pitched battle between those who have believed that defense attorney advocacy is inappropriate³⁷¹ in juvenile cases³⁷² or that such advocacy should be muted in favor of a cooperative, paternalistic approach,³⁷³ and those who have favored a defense attorney role consistent with the zealous advocacy model that long has predominated in adult criminal court.³⁷⁴

Both the theory and practice governing juvenile court proceedings have changed over time. These changes, particularly as they relate to the relative balance between the system's rehabilitative and punitive tendencies,³⁷⁵ have influenced the ongoing debate over the appropriate role for defense attorneys. Nevertheless, a number of striking parallels exist between the conflicts faced by defenders in juvenile courts and those who seek to represent defendants in drug treatment courts. Therefore, an examination of the solutions proposed by juvenile court experts seeking to overcome these apparent conflicts may reveal a corresponding set of solutions for drug treatment court defenders.

A. *The Juvenile Court Analogy*

Historians of the juvenile justice system generally agree that the concept of a specialized therapeutic court for children was largely created by Progressive-era reformers.³⁷⁶ Reform proposals centered on the notion that, when parental supervision failed to prevent a child from engaging in antisocial conduct, the state should provide a substitute socializing

370. See ALLEN, *supra* note 38, at 47-48; see also *supra* text accompanying notes 239-60.

371. Indeed, some have argued that "children would be better served by nonprofessional advocates," who would better be able to "temper [their] approach to adversarial representation." Federle, *supra* note 47, at 1673 (citation omitted).

372. References throughout this section to "juvenile cases" or "juvenile court" refer to proceedings involving juvenile delinquency.

373. See, e.g., Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401 (1973).

374. See, e.g., Chester James Antieau, *Constitutional Rights in Juvenile Courts*, 46 CORNELL L.Q. 387 (1961); Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233 [hereinafter Paulsen, *Constitutional Domestication*]; Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957) [hereinafter Paulsen, *Fairness to the Juvenile Offender*]; Thomas A. Welch, *Delinquency Proceedings—Fundamental Fairness for the Accused in a Quasi-Criminal Forum*, 50 MINN. L. REV. 653 (1966).

375. See *infra* note 401.

376. Historians of the juvenile court movement have linked the development of juvenile courts to a larger reform movement that led to the creation of "reformatories" and "houses of correction" for adult offenders. In addition, these historians have identified the roots of the juvenile court concept in earlier "houses of refuge" or "almshouses." See PLATT, *supra* note 367, at 108-52; RYERSON, *supra* note 367, at 16-56.

influence.³⁷⁷ This emphasis on benevolent rehabilitation and socialization in lieu of retributive punishment was reflected in the first juvenile court act, promulgated in Illinois in 1899.³⁷⁸ The Illinois model proved extraordinarily attractive and, within two decades, virtually every state enacted legislation creating separate juvenile courts.³⁷⁹

Important elements of the Progressive ideology led to the founding of these early juvenile justice institutions. Of particular importance was the belief that adolescents are not “morally accountable for their behavior”³⁸⁰ and should not be subjected to retributive punishment for their unlawful conduct. The Progressives believed in a disease model of social deviance³⁸¹ and treated such behavior as a “symptom” of a larger “underlying social pathology.”³⁸² Consistent with other iterations of the rehabilitative ideal, the Progressives treated instances of unlawful conduct as appropriate occasions for state intervention, not to punish juvenile offenders, but to help “save them from a life of crime that might otherwise be their fate.”³⁸³ The Progressives were optimistic that rehabilitative measures could “cure” juvenile delinquency. As with other rehabilitative movements, including the drug treatment court efforts now underway, this optimism stemmed from an abiding faith in the malleability of human beings.³⁸⁴

In a number of other respects, the juvenile court movement of the early twentieth century exhibited characteristics similar to those found in the current drug treatment court movement. First, juvenile court judges played an active, partisan role in the development of the juvenile court model and in the

377. See Ainsworth, *supra* note 47, at 1097.

378. See 23 ILL. REV. STAT. 169-189 (Hurd 1899); see also PLATT, *supra* note 367, at 101-36.

379. See RYERSON, *supra* note 367, at 81.

380. Ainsworth, *supra* note 47, at 1097. On the problems of defining what constitutes responsible moral agency, see Boldt, *supra* note 7, at 2254-85.

381. See Ainsworth, *supra* note 47, at 1097. Professor Ainsworth quotes an early twentieth century juvenile court judge as comparing his role to that of a “physician’ engaged in a proper diagnosis of the case, of the ‘outbreak’ of criminal behavior.” *Id.* at 1097 n.90 (quoting HARVEY H. BAKER, PROCEDURE FOR THE BOSTON JUVENILE COURT (1910)).

382. See *id.* The view of early supporters of the juvenile court movement that “squalid urban life” was responsible for much antisocial behavior on the part of children, *id.*, is central to Anthony Platt’s account that juvenile courts were developed in order to exercise social control over poor, largely immigrant juveniles. See PLATT, *supra* note 367. This account is one example of the more general view of the radical critics of the rehabilitative ideal, that correctional practices had more to do with controlling class and race conflict than with crime control in the traditional sense. For a fuller discussion of the radical critique, see *supra* text accompanying notes 153-68.

383. Ainsworth, *supra* note 47, at 1097; cf. McColl, *supra* note 8, at 500 (“To break the cycle of recidivism and crime, there must be effective treatment of addicts.”).

384. See RYERSON, *supra* note 367, at 120. Many early supporters of separate juvenile courts drew a sharp distinction between the juvenile, who was in need of socialization and rehabilitation, and the adult, who was, by definition, a responsible agent subject to ordinary retributive punishment. See Ainsworth, *supra* note 47, at 1098.

day-to-day operation of the juvenile justice system. One commentator noted, "The juvenile court movement gained momentum from the proselytizing efforts of some of its early judges."³⁸⁵ These efforts helped to insure the development of a specialized court for children. Similarly, the current drug treatment court movement is led in important respects by the efforts of charismatic judicial figures.³⁸⁶ Just as early juvenile court judges generally exercised broad discretion in fashioning dispositions for the young offenders who appeared before them, drug treatment judges appear to possess a considerable degree of discretion in individualizing the treatment of addicted offenders.³⁸⁷ To some extent, the scope of juvenile court judges' discretionary authority resulted from an extraordinarily flexible definition of "delinquency." This flexible definition permitted judges to impose coercive measures in response to behavior that was not itself unlawful or criminal.³⁸⁸ This feature of juvenile court practice, which grew out of the premise that the juvenile court's purpose was "not penal but protective,"³⁸⁹ was coupled with a heavy reliance on probation. Because courts could place juveniles on probation until they reached the age of majority and could impose a wide array of conditions pursuant to a probationary disposition, juvenile court judges exercised nearly "total control over every aspect of the probationer's life."³⁹⁰

The early juvenile courts, like contemporary drug treatment courts, relied

385. Ainsworth, *supra* note 47, at 1097.

386. See Bean, *supra* note 15, at 718-19.

Traditionally, judges have played the passive role of objective, impartial referee, only reluctantly stepping beyond the boundaries of their own courtroom. However, where the fair and effective administration of justice is threatened (as in this case by an exploding drug problem), the court has the responsibility to come forward and become a *leader and active participant* in the organization, design and implementation of coordinated criminal justice and community-wide drug control efforts.

Casey, *supra* note 263, at 118-19 (quoting Jeffrey S. Tauber, A Judicial Primer on Unified Drug Courts and Court-Ordered Drug Rehabilitation Programs (Aug. 20, 1993) (paper presented at California Continuing Judicial Studies Program)) (emphasis added).

387. Cooper and Trotter report that the advent of drug treatment courts and the availability of graduated sanctions have "permitted much greater judicial involvement in individualizing sanctioning strategies—a role that judges in many jurisdictions felt they had lost as a result of mandatory sentencing provisions, sentencing guidelines, and the sheer volume of cases before them." Cooper & Trotter, *supra* note 19, at 85.

388. See Ainsworth, *supra* note 47, at 1098 (listing "smoking, sexual activity, stubbornness, running away from home, swearing, and truancy" as sufficient to trigger juvenile court jurisdiction). This "unprecedented expansion of state social control over adolescents" goes both to the liberal and radical critiques of the rehabilitative ideal. *Id.* By defining the pathologies subject to therapeutic state intervention this broadly, traditional restraints on governmental authority derived from the notion of relevance are rendered relatively ineffective. See ALLEN, *supra* note 38, at 47.

389. Ainsworth, *supra* note 47, at 1098 n.97 (citing *In re Holmes*, 109 A.2d 523, 525 (1954)).

390. *Id.* at 1099.

on informal procedures to accomplish their goals. The drug treatment court movement has rejected the use of formal procedural rules because of an abiding conviction that the formal adversarial process undermines the therapeutic goals of the enterprise.³⁹¹ Similarly, the clear pattern in the state statutes creating juvenile courts in the early part of the twentieth century was to eschew the formalities of a regular criminal trial, both because informality was considered a necessary adjunct to the rehabilitative process,³⁹² and because the benevolent aims of the state rendered the protections accorded to adult criminal defendants unnecessary in this forum.³⁹³

The parallel between juvenile courts and drug treatment courts is most apparent, however, with respect to the role of defense counsel. Although a debate between proponents of zealous advocacy and supporters of a relatively nonadversarial role conception for juvenile defenders had existed for some time,³⁹⁴ this contest was joined in earnest following the United States Supreme Court's 1967 decision in the case of *In re Gault*.³⁹⁵ In *Gault*, the Court adopted, at least within the context of the juvenile court system, many of the criticisms that opponents of the rehabilitative ideal had voiced more generally. The Court recognized that, despite its expressed benevolent purpose to socialize and rehabilitate wayward children, the juvenile justice system often imposed dispositions that were as punitive and coercive as those meted out by adult criminal courts.³⁹⁶ Additionally, the Court questioned whether the use of informal procedures and broad judicial discretion could be justified by the need to individualize rehabilitative treatment, given the dangers of arbitrary and unfair dispositions.³⁹⁷ The Court concluded that many of the formal procedural protections accorded to adult criminal defendants were also required as a matter of constitutional right for children in juvenile delinquency proceedings.³⁹⁸

391. See *supra* note 279.

392. See Ainsworth, *supra* note 47, at 1100. In fact, the commitment to informal procedures even expressed itself in the arrangement of the judge and other participants in the courtroom. Thus, the judge was instructed not to sit at a bench, but was to be "[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him." *Id.* at 1100 n.107 (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 117 (1909)). This attention to manipulating the level of informality within the "theater of the courtroom" has been expressly adopted by some within the contemporary drug treatment court movement. See *supra* text accompanying note 220.

393. See RYERSON, *supra* note 367, at 38-39; see also Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1156-61 (1968).

394. See Antieau, *supra* note 374; Paulsen, *Fairness to the Juvenile Offender*, *supra* note 374.

395. 387 U.S. 1 (1967).

396. See *id.* at 17-18, 27.

397. See *id.* at 18-19.

398. See *id.* at 31-57.

Although a right to the assistance of counsel was prominent among the procedural protections mandated by *Gault*,³⁹⁹ the Court's opinion failed to delineate the role that counsel was required to play as a constitutional matter.⁴⁰⁰ Moreover, the opinion neither rejected the notion that rehabilitation was an appropriate goal for the juvenile justice system, nor the premise that juveniles require different treatment than adults charged with criminal offenses.⁴⁰¹ Consequently, the debate over the role of defense counsel in

399. *See id.* at 36. The other procedural protections mandated by the *Gault* court include the right to notice of charges, *see id.* at 31-34, and confrontation of witnesses, *see id.* at 56-57, as well as the privilege against self-incrimination. *See id.* at 44-56.

400. In addition, the Court based its holding on the Due Process Clause rather than the Sixth Amendment. This may have resulted in the Court's subsequent decision not to require trial by jury in delinquency proceedings. *See McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

401. Professor Janet Ainsworth has described in considerable detail changes in both the theory and practice of juvenile courts over the past twenty-five years. *See Ainsworth, supra* note 47, at 1101-18. Her work demonstrates that these fundamental shifts have developed because of changes in the way that society conceptualizes adolescents, *see id.* at 1101-04, and because of a widespread rejection of the rehabilitative ideal as a governing principle of the criminal justice system, which also has influenced the development of the juvenile justice system. *See id.* at 1104-12. With respect to the former cause, Ainsworth argues that over the past decades, there has been a breakdown in the "binary opposition" between the socially-constructed notions of "child" and "adult," *id.* at 1103, so that adolescents in particular are now understood as more like adults than they were at the inception of the juvenile court movement. *See id.* at 1103. As a consequence of this shift in perception, she argues, blaming practices also have evolved in order to reflect the developing consensus that juveniles often have sufficient cognitive and emotional competence to be treated as responsible moral agents. *See id.* at 1101-04. With respect to the general decline in societal support for rehabilitative penal practices, Ainsworth suggests that a growing emphasis on "just desserts" and retributive notions of responsibility and punishment has led many states to amend the statutory provisions governing juvenile courts to make clear that their primary purpose is to hold young offenders accountable for their antisocial conduct. *See id.* at 1105-06. Ainsworth suggests that these changes in perception are directly linked to shifting practices. Among the most important modifications, she identifies a trend toward the promulgation of determinate sentencing schemes that limit the discretion of juvenile court judges to individualize therapeutic measures, *see id.* at 1107, the adoption of formal procedural rules that mirror practice in adult criminal courts, *see id.* at 1108-09, and the development of rules increasing the number of juvenile offenders who are "waived" into ordinary criminal courts where they are tried and punished as adults. *See id.* at 1109-12. Notwithstanding this dramatic evolution of the juvenile justice system, Ainsworth acknowledges that juvenile courts have retained important rhetorical and practical characteristics attributable to their rehabilitative origins. The most important continuing legacy of the past is the fact that separate courts for juveniles have not been abolished. In addition, the attitudes of many participants in the juvenile justice system, including defense attorneys, continue to reflect "decades of paternalistic *parens patriae* ideology." *Id.* at 1129. Ainsworth concludes that this mix of rehabilitative and punitive impulses disservices juveniles, particularly because it leads many defenders to adopt a role conception that fails to provide sufficient protection for their clients from the retributive consequences of the new juvenile justice system. Ainsworth advocates the abolition of a separate juvenile court to guarantee that children will receive the same level of procedural protection accorded adults in the criminal justice system. *See id.* at 1118-32. In addition, and somewhat ironically, Ainsworth has also argued that such a consolidation could have the salutary effect of importing some of the more humane elements of the juvenile court system into a contemporary criminal justice system that has become increasingly harsh and dehumanizing. *See Janet E. Ainsworth, Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995). For a discussion of how this prescription relates to similar concerns about contemporary drug treatment

juvenile proceedings has been fought more vigorously since the *Gault* decision than it was in the period preceding the Court's intervention.⁴⁰²

Notwithstanding the *Gault* Court's observations with respect to the harsh sanctions possible in juvenile court, the available empirical data reveal that most juveniles still do not receive vigorous and effective advocacy by defense counsel. Indeed, some studies demonstrate that a great many children receive no legal representation at all in juvenile court.⁴⁰³ More importantly, other studies show that "juveniles with lawyers fare worse . . . than those proceeding without counsel, [and are] more likely to be incarcerated and jailed for longer periods than if represented pro se."⁴⁰⁴ The studies detail a level of practice by defenders in juvenile court that diverges markedly from the sort of vigorous advocacy envisioned by the standard role conception. A summary composite provided by one commentator reveals that:

[T]rials in juvenile court are frequently "only marginally contested," marked by "lackadaisical defense efforts." Defense counsel generally make few objections, and seldom move to exclude evidence on constitutional grounds. Defense witnesses rarely are called, and the cross-examination of prosecution witnesses is "frequently perfunctory and reveals no design or rationale on the part of the defense attorney." Closing arguments are sketchy when they are made at all. Watching these trials, one gets the overall impression that defense counsel prepare minimally or not at all. The New York Bar Association study estimated that in forty-five percent of all juvenile trials, counsel was "seriously inadequate"; in only five percent could the performance of defense counsel be considered "effective representation."⁴⁰⁵

This less than zealous advocacy is due to a number of factors, including the inexperience of attorneys typically assigned to handle juvenile matters and the crushing caseloads that characterize juvenile court practice.⁴⁰⁶ In addition, it appears that the absence of adversary effectiveness by defenders also may result from the rehabilitative elements that remain in this institutional setting, as well as the attorney role conception that persists as a

courts, see *infra* text accompanying notes 547-52.

402. See, e.g., Norman Lefstein, In re *Gault*, *Juvenile Courts and Lawyers*, 53 A.B.A. J. 811 (1967); Paulsen, *Constitutional Domestication*, *supra* note 374.

403. See Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1199-1200 (1989).

404. See Ainsworth, *supra* note 47, at 1127.

405. *Id.* at 1127-28 (quoting MARVIN FINKELSTEIN ET AL., PROSECUTION IN THE JUVENILE COURT: GUIDELINES FOR THE FUTURE 31-62 (1973)).

406. See *id.* at 1128.

consequence of these therapeutic aims.

Supporters of this nonpartisan role rely on many of the same reasons articulated by supporters of the "team player" approach to drug treatment court defense practice. First, they point out that an insistence on pressing the juvenile's technical legal rights or on following formal procedural rules is likely to produce a hostile response from many juvenile court judges used to informal, cooperative relations with counsel.⁴⁰⁷ Further, they suggest that such an approach often will result in an undue narrowing of the range of possible dispositions for the child, which in turn could lead the court to impose more restrictive measures than necessary.⁴⁰⁸ Some argue that zealous advocacy is inappropriate, even when it is likely to result in the child's release from custody, if the juvenile would benefit from a rehabilitative disposition. From this perspective, the attorney's proper role is "to interpret the philosophy of the juvenile justice system to the child and to assist in the minor's rehabilitation by insuring the child's cooperation with the court's order."⁴⁰⁹

Not all commentators and juvenile court practitioners have endorsed the nonadversarial approach. Even before *Gault*, a number of writers expressed skepticism over the juvenile justice system's rehabilitative objectives, suggesting that the claims of benign intention did little to mitigate the harsh

407. See Federle, *supra* note 47, at 1672. Indeed, such an approach might lead a judge to waive the child into adult criminal court. See William B. McKesson, *Right to Counsel in Juvenile Proceedings*, 45 MINN. L. REV. 843, 846 (1961).

408. See Kay & Segal, *supra* note 373, at 1417. In light of this concern, some commentators have suggested that, even if counsel adopts an adversarial stance during the adjudicative stage of juvenile proceedings, counsel should limit this adversariness at the dispositional stage, when the court evaluates the child's best interests. See Julian Greenspun, *Role of the Attorney in Juvenile Court*, 18 CLEV. ST. L. REV. 599, 601 (1969).

Certainly, assisting the court in searching for the truth does sacrifice some of the client's rights; the child, however, may be advantaged by her lawyer's nonadversarial approach. By presenting the court with information about the child, rather than simply the offense, the attorney may help structure a less punitive disposition. . . . This approach may actually advance the child's right to rehabilitative treatment because the court may be forced to consider the child's needs.

Federle, *supra* note 47, at 1678.

409. Federle, *supra* note 47, at 1672. One writer on this subject has included the following narrative example of this way of thinking:

My own experience as a student attorney in Boston Juvenile Court in the late 1970s is illustrative. In one case, I was representing a teenager accused of possessing drugs that had been seized in an arguably unlawful search. After I presented my motion to suppress, the judge asked me point-blank if I really wanted to bring this motion in light of my client's obvious and untreated drug dependency. He offered to call a recess so I could consult with my supervising attorney, who to his credit encouraged me to press the issue. In granting the motion and dismissing the case, the judge commented on what he saw as my misguided zeal in vindicating my client's constitutional right at the expense of his true best interests

Ainsworth, *supra* note 47, at 1130 n.315.

realities of juvenile incarceration and the other forms of coercive therapy that resulted from uncontested dispositional hearings.⁴¹⁰ In the view of these writers, when the power of the state is brought to bear against the most powerless individuals in society, children, the system should provide these juveniles with zealous advocates.⁴¹¹ A number of writers also suggested that the cooperative, nonadversarial approach is inappropriate for juvenile defenders, because it requires them to make therapeutic judgments, for which they are not trained, regarding the child's best interests.⁴¹² Thus, not only was the nonadversarial role criticized for being paternalistic and insufficiently concerned with limiting state abuses, it was also questioned on the purely instrumental grounds that attorneys are ill-equipped to carry it out.

Since *Gault*, these criticisms have been supplemented by additional arguments drawn from the Court's reasoning that the assistance of counsel is required in juvenile proceedings because of their similarity to adult criminal prosecutions.⁴¹³ Supporters of a more adversarial approach have argued that if a sufficient similarity exists between delinquency proceedings and criminal cases to create a constitutional right to a lawyer, then the constitutionally-required assistance of counsel should include all of the features of the standard conception that go to define zealous advocacy on behalf of adult criminal defendants.⁴¹⁴ At a minimum, they argue, attorneys for juvenile defendants should protect their clients' confidences, should assert all available procedural rights, including the privilege against self-incrimination, and should require the state to meet its constitutional burden of proof.⁴¹⁵ Moreover, they assert, children in juvenile court proceedings should be entitled to exercise the same degree of control over their attorneys' representation as any other client. Thus, while retaining the authority to make strategic litigation choices, defense attorneys should seek whatever ends their juvenile clients have identified, after having received due advice and counsel.⁴¹⁶

410. See, e.g., Antieau, *supra* note 374, at 387; Paulsen, *Fairness to the Juvenile Offender*, *supra* note 374, at 550. Indeed, in some cases, juveniles received longer sentences of incarceration than they would have received for the same offenses in an adult criminal court. This was the situation in *Gault*, where fifteen-year-old Gerald Gault had been committed to a juvenile facility until his twenty-first birthday for making an obscene telephone call, an offense that carried a maximum adult penalty of two months in jail and a fifty dollar fine. See *In re Gault*, 387 U.S. 1, 8-9 (1967).

411. See Antieau, *supra* note 374, at 387.

412. See Paulsen, *Constitutional Domestication*, *supra* note 374, at 262.

413. *Gault*, 387 U.S. at 24, 27-29.

414. See Paulsen, *Constitutional Domestication*, *supra* note 374, at 261-63.

415. See Theodore McMillian & Dorothy L. McMurtry, *The Role of the Defense Lawyer in the Juvenile Court—Advocate or Social Worker?*, 14 ST. LOUIS U. L.J. 561, 598 (1970); Paulsen, *Constitutional Domestication*, *supra* note 374, at 262-63.

416. See Federle, *supra* note 47, at 1675.

*B. Proposed Solutions to the Problem of Inadequate Juvenile Court
Defense Advocacy*

Supporters of the nonadversarial approach have founded their arguments on the essential premise that zealous advocacy is inappropriate in juvenile court because it disrupts the court's ability to formulate and implement rehabilitative dispositions that are in the child's long-term best interests.⁴¹⁷ Their opponents argue that the absence of zealous defense practice undermines the legitimacy of that rehabilitative system altogether.⁴¹⁸ Professor Janet Ainsworth offers one of the most thoroughly worked out versions of this argument, noting that "juvenile defendants invest the legal system with legitimacy only insofar as they see it to be a just system."⁴¹⁹ Ainsworth uses sociological research that demonstrates that participants' perceptions of justice in any decision-making institution turn less on substantive outcomes than on the characteristics of the process by which those outcomes are produced. Ainsworth identifies several elements that must be present for participants to view a process as procedurally fair: "consistency in the process, control of the process by the litigant, respectful treatment of the litigant, and ethicality of the fact-finder."⁴²⁰ For each of these elements, she argues that practices in the juvenile justice system are inadequate.

For example, juveniles are unlikely to perceive the system as consistent because it persists in treating children differently than adults by withholding jury trials and other procedural formalities required in adult criminal prosecutions.⁴²¹ Similarly, Ainsworth argues that a nonpartisan approach to defense advocacy diminishes the juvenile's sense of control, particularly to the extent that it "assume[s] that juvenile accuseds are incapable of exercising sound judgment in making the decisions that affect their cases."⁴²² Because children in juvenile court are not accorded the full complement of procedural rights available to adult defendants in the criminal justice system, Ainsworth suggests that these children are denied respectful treatment.⁴²³ Finally, she argues that the perception of ethicality of juvenile court fact-finders is undercut by an appearance that guilt has been "pre-judged," which

417. See Kay & Segal, *supra* note 373, at 1416-17.

418. See Ainsworth, *supra* note 47, at 1126-30.

419. *Id.* at 1119.

420. *Id.* at 1120.

421. See *id.*

422. *Id.*

423. See *id.* This point is conceptually linked to the dignity critique of rehabilitative regimes generally. See *supra* text accompanying notes 188-95.

results from the absence of a fully adversarial adjudication and from the fact that juvenile court judges serve both as fact-finders and sentencing authorities.⁴²⁴ The consequence of this failure of procedural justice, concludes Ainsworth, is that the juvenile justice system is hampered in its ability to inculcate society's norms and to serve as an effective institution of social control.⁴²⁵

Ainsworth's description of the consequences flowing from the juvenile justice system's partial rejection of adversarial norms is compelling, and her prescription is equally intriguing; she urges the abolition of juvenile courts entirely.⁴²⁶ To date, however, that approach has not been adopted. In the interim, Ainsworth's solution provides little concrete guidance for attorneys who represent clients in juvenile court. Her work clearly suggests that these practitioners should seek to resolve role conflicts in favor of zealous advocacy in order to maximize the sense of litigant control and procedural formality of the proceedings. Nevertheless, her solution, by definition, ignores the concern that a full implementation of the standard role conception within the juvenile court setting would cause more harm than good to individual juveniles who might receive more punitive dispositions as a consequence.⁴²⁷

At the heart of the controversy over the proper role for defenders in the juvenile justice system is the perception that juveniles lack the judgment and insight to make wise choices in their own interest.⁴²⁸ Many in the drug treatment court movement have a similar perception, which helps explain the widely held view that defenders in that setting should mitigate their partisan advocacy in favor of an approach that prioritizes therapeutic dispositions for their clients. As noted earlier, this is true even when addicted defendants do not believe that substance abuse treatment is in their ultimate best interest.⁴²⁹

This fundamental perception, that children in juvenile courts and defendants in drug treatment courts frequently cannot exercise good judgment, conflicts with the principle of autonomy that is central to the

424. See Ainsworth, *supra* note 47, at 1120. In some respects, this is the collapse into two against one discussed earlier. See *supra* text accompanying notes 251-56.

425. See Ainsworth, *supra* note 47, at 1121.

In a legal culture as deeply permeated by due process concepts as ours, strict observance of procedural rights in and of itself contributes to an inculcation of the values of the social and political order. If juveniles perceive their exposure to the legal system as unjust, however, the legal socialization process fails.

Id. (citations omitted).

426. See *id.* at 1118-30.

427. See Kay & Segal, *supra* note 373, at 1417-20.

428. See Ainsworth, *supra* note 47, at 1120; Federle, *supra* note 47, at 1676-77.

429. See *supra* text accompanying note 291-96.

standard attorney role conception.⁴³⁰ One particularly interesting effort to overcome this tension has been offered by Professor Katherine Hunt Federle, whose work seeks to demonstrate that both the standard attorney role conception and its nonadversarial alternative are based on “incoherent” theories of rights.⁴³¹ This conclusion, in turn, permits Federle to suggest a completely different theory of rights that generates a new role conception, which she claims avoids the tension that has plagued juvenile court defenders.⁴³²

Federle begins her analysis by linking each of the attorney role conceptions that have dominated the debate to a corresponding theory of rights. She locates the standard conception of zealous partisanship within a category she terms the “client autonomy model,” while she places the nonpartisan alternative within a category she calls the “lawyer autonomy model.”⁴³³ Her elaboration of the first category is familiar enough, containing descriptions of partisanship, loyalty, zealousness, and role amorality.⁴³⁴ Equally familiar is her assertion that the normative basis for this standard conception is the claim that “the attorney’s act is, in and of itself, a moral one . . . because it promotes the expression of client autonomy within the legal system.”⁴³⁵ Zealous advocacy, in short, is commended regardless of the morality or wisdom of the client’s goals because it promotes individual autonomy, which is itself an independent social good.⁴³⁶

Federle’s second category, the lawyer autonomy model, is distinguishable from the standard conception in a number of respects. First, it rejects the claim that client autonomy is a normative good in and of itself. Instead, supporters of this perspective argue that autonomy is socially valuable only when it facilitates the expression of other values, such as responsibility.⁴³⁷ Moreover, the lawyer autonomy model recognizes that the social goods that result from zealous advocacy often come at the expense of other values of equal or greater moral weight. Even in a criminal prosecution, where the normative value of partisanship is at its greatest, competing interests in “uncovering the truth and in promoting fairness place limitations on zealous

430. For a good discussion of the importance of autonomy to the standard attorney role conception, see Pepper, *supra* note 230. See also *supra* note 238.

431. Federle, *supra* note 47, at 1656, 1693.

432. See *id.* at 1693-97.

433. *Id.* at 1657-58.

434. See *id.* at 1657-63.

435. *Id.* at 1660.

436. See *id.* at 1659-60.

437. See Federle, *supra* note 47, at 1667-68. Responsibility in these terms may include the freedom to exercise choice, but only when that choice is made pursuant to identifiable moral principles. See *id.* at 1668.

advocacy and client loyalty.”⁴³⁸

Perhaps the key distinction between the two models, however, is their very different treatment of role amorality. Under the first model, lawyers are not held morally responsible for pursuing their clients’ objectives, even when these goals are morally suspect, because client autonomy is regarded as an independent moral good.⁴³⁹ Under the second model, by contrast, attorneys remain morally accountable for their actions, even when undertaken on behalf of a client.⁴⁴⁰ The ethical discretion⁴⁴¹ this model accords lawyers allows them to refuse to engage in professional activity that violates their ethical compass, but it also imposes responsibility for those activities that they do undertake.⁴⁴² Given that this second model requires lawyers to make ethical judgments about their clients’ ends, it imposes an obligation on attorneys to enter into a “moral conversation” with clients.⁴⁴³ Through this moral conversation, lawyers must ascertain sufficient information to make an ethical judgement about their clients’ wishes and attempt to reconcile their own ethical positions with those of their clients.⁴⁴⁴

Under either of these two models, the competence of the client is a central concern. This is so, explains Federle, because both perspectives employ notions about the client’s capacity in order to determine who may possess and exercise rights.⁴⁴⁵ The client autonomy model is premised on traditional liberal theory, which holds that civil society consists of separate, self-interested individuals who deal with one another through arm’s-length transactions.⁴⁴⁶ Lawyers who satisfy the duties of partisanship and loyalty, by zealously pressing their clients’ claims of right or resisting demands made on their clients, promote client autonomy by seeking to maximize their clients’

438. *Id.* at 1664.

439. *See id.* at 1659-60.

440. *See id.* at 1664-65.

441. This phrase is taken from an article by William Simon. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988).

442. *See* Federle, *supra* note 47, at 1666. For a fuller discussion of this vision of the lawyer’s role, *see* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1021-22 (1990).

443. *See* Federle, *supra* note 47, at 1666.

444. *See id.* Thomas Shaffer is the leading proponent of this conception of the attorney’s role, in which the lawyer and client engage one another in “moral discourse.” *See generally* Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979). Shaffer suggests that such a conversation is not genuine moral discourse unless it contains both the possibility that the client will be persuaded to adopt the lawyer’s moral position, and the possibility that the lawyer will adopt the client’s position. *See id.* at 248.

445. *See* Federle, *supra* note 47, at 1656.

446. For a discussion of “the liberal paradigm [in which] society is comprised of rational, egoistic individuals,” *see* Boldt, *supra* note 24, at 2358-59.

“freedom to make choices about and to control [their] li[ves].”⁴⁴⁷

By definition, argues Federle, if autonomy involves the exercise of choice, a professional role conception founded on fostering client autonomy becomes incoherent when clients lack the capacity to identify alternatives, consider consequences, and make decisions through rational calculation of the relative advantages of each option.⁴⁴⁸ In addition, she argues, this theoretical tradition conditions the enforcement of rights on the rights holders’ decision to raise a claim of entitlement.⁴⁴⁹ When clients lack the competence either to recognize that such a decision must be made or to make a choice that furthers their self-interest, they have “no status as a rights holder.”⁴⁵⁰ Here again, explains Federle, the theory becomes inadequate, because it necessarily excludes the possibility that children and other disadvantaged groups who are systematically treated as less than fully competent can assume the status of rights holders.⁴⁵¹

The lawyer autonomy model rests on a different conception of rights but is no less problematic in Federle’s view. Because this perspective does not prioritize client autonomy, its theory of rights does not revolve around the client’s capacity to engage in rational decision making. Instead, it determines rights by reference to “interest[s] that the legal or ethical system recognizes as worthy of advancement or protection by imposing duties on others.”⁴⁵² This interest-based theory of rights leads to a lawyer role conception characterized by ethical discretion because its evaluative component—the question whether an interest is worthy of advancement—demands that lawyers evaluate not only the interest of their clients, but also the competing interests of those against whom a demand of right may be made.⁴⁵³

Moreover, this ethical evaluation process necessarily implicates the relationship between the lawyer and the client, because the lawyer must be able to enter into a genuine moral conversation with the client to ascertain whether to advance the client’s interest.⁴⁵⁴ In Federle’s account, this requires that the client be “capable of understanding moral argument, of giving and receiving moral advice.”⁴⁵⁵ With respect to juvenile clients, Federle says that

447. See Federle, *supra* note 47, at 1661.

448. See *id.* at 1661-63.

449. See *id.* at 1661. A right is an entitlement to demand the performance of an obligation owed by another. See *id.*

450. *Id.*

451. See *id.* at 1662.

452. *Id.* at 1668.

453. See *id.* at 1669. In some cases the lawyer may also be required to consider the interests of the public in general. See LUBAN, *supra* note 45, at 160-74.

454. See Federle, *supra* note 47, at 1668.

455. *Id.* at 1669.

there is a strong presumption that they are not competent to engage in moral conversation because many youngsters have not reached the requisite level of moral development.⁴⁵⁶ Given this incompetence, the theory permits the lawyer to act paternalistically. Thus, the lawyer may act on the client's behalf based on what the lawyer believes to be in the client's best interests, notwithstanding the client's expressed wishes to the contrary.⁴⁵⁷ This theory is deemed inadequate to support a fully coherent lawyer role conception because clients who lack the capacity to engage in moral conversation, and thus do not qualify as full rights holders, nevertheless often have interests that deserve protection through the legal system.⁴⁵⁸ Moreover, because this perspective will often result in paternalistic practices by attorneys on behalf of children and other disadvantaged clients, it is criticized by Federle as promoting their "dependent status," thereby increasing their marginalization and powerlessness.⁴⁵⁹

Federle seeks to resolve the debate between advocates of the standard role conception and supporters of morally activist lawyering⁴⁶⁰ by suggesting a unique conception of rights which flows from a reconfigured "lawyering paradigm."⁴⁶¹ In Federle's view, a coherent theory of rights must begin by recognizing that "[p]ower structures the interactions between and among individuals and the state. It is power that permits an individual to assert a claim against another and power that permits the enforcement of that claim."⁴⁶² Given this understanding of the essential role that power plays in all relationships, Federle's theory of rights focuses not on the capacity of a rights holder to exercise choice or to evaluate the relative moral importance of competing interests, but on the disparate positions of power held by parties to a dispute.⁴⁶³ In her conception, rights permit those with less power to enforce their claims, even against those with greater power.⁴⁶⁴ In this sense, a right is an enforceable entitlement to redistribute the power in any given relationship from the more powerful party to the less powerful. "Rights prohibit those who have power from exercising it over those who do not and

456. *See id.* at 1670.

457. *See id.*

458. *See id.*

459. *Id.* at 1694-95.

460. The characterization of this role conception as "moral activism" suggests that attorneys must actively evaluate and take responsibility for the moral consequences of their practices. *See* LUBAN, *supra* note 45, at 160-61.

461. Federle, *supra* note 47, at 1693.

462. *Id.*

463. *See id.*

464. *See id.* at 1693-94.

create zones of respect in which the excluded may be empowered.”⁴⁶⁵

By placing power at the center of her theory of rights, and by making the empowerment of disadvantaged or marginalized clients the principal goal of her vision of lawyer advocacy,⁴⁶⁶ Federle is able to describe a practice for juvenile court defenders that she claims avoids paternalism.⁴⁶⁷ In the abstract, however, power is a broad concept and empowerment is a vague goal. Presumably, these concepts could subsume some of the values held to be important by advocates of both the standard role conception and the morally activist conception of lawyering. Thus, the empowerment of clients could include efforts to assist them to become more autonomous, by helping them to gain control over features of their lives about which they have been unable to exercise meaningful choice. Alternatively, lawyers could help clients attain a sufficient level of moral development to permit them to enter into moral conversations. At a minimum, Federle indicates that an empowering practice is one in which clients are accorded respect, both by their own lawyers and by other participants in the process.⁴⁶⁸

The actual contours of a power-based theory of rights ultimately will depend on how the corresponding lawyer role conception is operationalized in practice. Federle begins this project by describing approaches to interviewing and counseling child clients that she believes are likely to be empowering. With respect to interviewing, Federle notes that client interviews primarily serve an investigatory function under both the client

465. *Id.* at 1694.

466. *See id.* at 1695.

467. *See id.* at 1694.

468. *See id.* at 1694-95. It is possible that Federle envisions her theory of rights as a general conception applicable to situations far beyond the juvenile court context. If she intends to construct a more general theory of rights, this raises questions with respect to the rights of relatively powerful actors. Federle's analysis implies that in the absence of any enforceable rights, the claims of the more powerful would always prevail against the competing claims of those with less power. *See id.* Rights exist, therefore, not to reflect the superior position of the powerful, for that position is already by definition in place; rather, rights function to overcome situations of powerlessness. *See id.* at 1695. Thus, a person becomes a rights holder within this alternative theory only by virtue of powerlessness. *See id.* at 1694. While conceptualizing rights in this fashion may have the advantage of suggesting a lawyer role well-suited to the representation of children and other relatively powerless clients, it is not at all clear that rights always “flow downhill” to the less powerful. *Id.* at 1658. Indeed, it is just as likely that rights serve to advance the interests of more powerful actors in society. Often, for example, powerful parties will advance rights claims not because they wish to gain additional power over others, but because the enforcement of those rights will obviate the need to use force in order to effectuate the powerful parties' goals. If this description is true, then the practice of asserting rights on these occasions does not have a redistributive effect, as Federle suggests. *See id.* at 1693. Rather, it has the effect of reinforcing already existing power relationships. For more on the role of law in reinforcing existing relationships of social power, see generally Mark Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505, 516 (1986).

autonomy and lawyer autonomy approaches.⁴⁶⁹ The first model supports the use of client-centered techniques, such as empathic listening and the avoidance of legal jargon, to promote client autonomy.⁴⁷⁰ But neither model insists on thorough interviewing designed to include the client in the lawyer's decision-making process when the client is clearly incompetent either because of age or some other disabling condition.⁴⁷¹ With regard to counseling, Federle again suggests that both the client autonomy and the lawyer autonomy approaches relieve attorneys of their ordinary responsibility to assist incompetent clients in reaching their own decisions.⁴⁷² Both models permit attorneys to persuade incompetent clients to adopt an alternative that is in their best interests, even though the clients have indicated that their "expressed wishes are to the contrary."⁴⁷³ Indeed, in extreme cases of incapacity, both models "even authorize the attorney to make decisions on behalf of the child."⁴⁷⁴

Federle's reconfigured model of lawyering prohibits these instances of paternalism on behalf of incompetent clients. This model does not conceive of interviewing as primarily investigative in nature. Instead, it treats interviewing as an opportunity to empower the incompetent client to become a "full participat[ant] in both the legal system and the attorney-client relationship."⁴⁷⁵ Federle directs lawyers to foster communication between themselves and their clients and to "utilize whatever techniques may be necessary to accommodate the child client."⁴⁷⁶ Federle describes the counseling function as "focussed not on the correctness of the decision made but on the process by which the client reaches her decision."⁴⁷⁷ Thus, the attorney should use counseling techniques that avoid not only

469. By this she means that the primary purpose of interviewing a client is to gather information that the lawyer needs to conduct the representation. See Federle, *supra* note 47, at 1691.

470. See generally DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 14-18 (1977).

471. See Federle, *supra* note 47, at 1691.

472. See *id.* at 1691-92. Federle acknowledges that both models ordinarily require the lawyer to identify alternatives available to the client, and to evaluate the legal and nonlegal consequences of each alternative, to assist competent clients in making decisions about their cases. See *id.*

473. *Id.* at 1692.

474. *Id.*

475. *Id.* at 1695.

476. *Id.* For a discussion of practical approaches to interviewing and counseling child clients in ways that permit children to participate in the lawyer-client relationship, which incorporates considerations of child cognitive development stages, moral development stages, language barriers, and the like, see Nancy W. Perry & Larry L. Teply, *Interviewing, Counseling, and In-Court Examination of Children: Practical Approaches for Attorneys*, 18 CREIGHTON L. REV. 1369 (1985).

477. Federle, *supra* note 47, at 1696; cf. Simon, *Ideology of Advocacy*, *supra* note 45, at 38 (discussing notion of "procedural justice," which "holds that the legitimacy of a situation may reside in the way it was produced rather than its intrinsic properties").

“[m]anipulative and deceptive practices,”⁴⁷⁸ but also practices that trigger the inherent imbalance of power between lawyers and clients.⁴⁷⁹ The attorney accomplishes this by exhibiting “a deep respect for the client as a rights holder” and by “promoting the client’s status in the face of domination.”⁴⁸⁰ In short, counseling within this new paradigm does not aim to assist clients in reaching decisions that are necessarily correct, rational, or even in their best interests; rather, the goal is to encourage clients to undertake a decision-making process that “ensures that the child, and no other, has truly made her own choice.”⁴⁸¹

IV. ADJUSTING TO DRUG TREATMENT COURTS

For lawyers representing children in the juvenile justice system or adult defendants in drug treatment courts, these proposals regarding interviewing and counseling are helpful but incomplete. Attorneys in the drug treatment court setting, for example, still face difficult questions regarding the concrete steps they should take given the activist role of judges, the informality of procedural rules, and the dangers of disclosing confidential information. The mix of therapeutic and punitive impulses in treatment courts will continue to place pressure on defenders to determine at any given moment whether an adversarial stance or a cooperative approach is more likely to empower their clients. Lawyers must tailor a more fully realized account of an empowering role conception to the specific features of their setting. The next section sets out the beginning of such an account geared toward the drug treatment court context.

A. Responsible Advocacy in Drug Treatment Court: A Vision of Practice for Defenders

Common to both Professor Ainsworth’s analysis of procedural justice and Professor Federle’s account of an empowering defense practice is a relatively greater emphasis on how the defendant is treated during the process than on

478. Federle, *supra* note 47, at 1696.

479. *See id.* at 1695-96.

480. *Id.* at 1696.

481. *Id.* Federle explains:

Of course, this may mean that some decisions will be made by the child that the lawyer believes are wrong or ill-conceived, but then, all clients, not just those of a certain age, are capable of making and have made bad choices. Nevertheless there is value in allowing a client to speak in her own voice and to determine her own goals. This is the essence of empowerment and of ethical lawyering.

Id.

the final outcome reached. In Professor Ainsworth's view, the legitimacy of the process often will turn on whether defendants perceive that they were permitted to exercise control over decisions affecting their cases,⁴⁸² and whether the defendants were accorded respectful treatment by their attorneys and others in the system.⁴⁸³ In Professor Federle's view, a process characterized by a coherent theory of rights must insure that the defendant is allowed "to speak in her own voice and to determine her own goals."⁴⁸⁴ For lawyers representing defendants in drug treatment courts, these injunctions to facilitate client control and promote respectful treatment are a sensible starting point for constructing an operational role conception because they embrace some of the central values that long have animated liberal critics of the rehabilitative ideal. To ascertain the full outlines of a responsible vision of practice, however, defenders must formulate adequate responses to each of the principal criticisms of rehabilitative penal practice as set out earlier in this Article. This approach requires defenders to proceed cautiously before joining with other criminal justice officials in promoting a therapeutic response to drug-involved defendants within the criminal justice system, at least to the extent that such a team player model undermines their ability to protect their clients' dignity interests, their ability to voice their clients' unique perspectives, and their ability to guard against the debasement of rehabilitative impulses into punitive outcomes.⁴⁸⁵

1. Protecting Defendants' Dignity Interests

As noted earlier, the critics' concerns about the dignity interests of defendants in rehabilitative penal practices centered on the fact that involuntary treatment regimes undermine human dignity when they treat the recipients of therapy not as responsible moral agents, but as malleable objects.⁴⁸⁶ Paradoxically, this objection appears to be inapposite to the sort of substance abuse treatment involved in drug courts because the very purpose of this therapeutic approach is to assist defendants in learning how to take responsibility for their conduct.⁴⁸⁷ In this regard, a setting in which addicted defendants are given genuine choices, are helped to understand the likely consequences of competing alternatives, and are held responsible in a predictable and rational fashion for the decisions they make, likely serves

482. See Ainsworth, *supra* note 47, at 1120.

483. See *id.*

484. Federle, *supra* note 47, at 1696 (discussing interviewing and counseling child clients).

485. See *supra* text accompanying notes 182-206.

486. See *supra* text accompanying notes 190-95.

487. See *An Interview with Judge Jeffrey S. Tauber*, *supra* note 39, at 11.

both a therapeutic function and a dignity-enhancing purpose.

For this fortuitous coincidence of purpose to take hold, however, defense attorneys must insure that their clients have the opportunity to exercise genuine choice in making the decision to enter a drug treatment court program. This notion of genuine choice is not meant to suggest that such a decision will be unconstrained or that the defendant's participation will be fully voluntary. Often, defendants on the threshold of drug treatment court will face a set of alternatives in which each choice carries undesired consequences.⁴⁸⁸ If defendants reach a decision with some significant understanding of the costs and benefits of each available alternative, and if defendants are permitted to decide based on their own calculation of the relative weights of these costs and benefits, then their choice will be genuine and consistent with basic notions of human dignity.⁴⁸⁹

But at least three potential problems may impede this sort of responsible decision making by drug court defendants. First, as discussed earlier, many treatment courts pace the initial steps of the program to insure that defendants will begin their participation while still experiencing the sense of "crisis" occasioned by their arrest. This may require defendants to act, sometimes by entering a guilty plea, before counsel can conduct a meaningful factual or legal investigation of the case.⁴⁹⁰ If this push to initiate treatment quickly prevents defense attorneys from adequately evaluating defendants' chances of avoiding conviction in the traditional adjudicatory system, defendants' decisions to enter drug treatment court will not rest on a full consideration of the likely consequences of each available alternative.

The second potential impediment to treatment court defendants making genuine choices relates to the problem just discussed. Even if the goal of substance abuse treatment is to help individuals learn to take responsibility for conduct by anticipating consequences and exercising impulse control in response to predictable outcomes,⁴⁹¹ it is clear that addicts are likely to have significant denial at the start of the process regarding their substance-abusing behavior and their need for treatment.⁴⁹² Thus, many defendants, if given a thorough briefing by counsel on the choice either to enter drug treatment court or to have criminal charges resolved through the traditional system, will opt to avoid treatment court, even though their lawyers, acting in their

488. See generally TREATMENT DRUG COURTS, *supra* note 8, at 25.

489. For a good discussion of the relationship between moral agency and practical reasoning, see Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1139-49 (1985) (asserting that opportunity and capacity to engage in practical reasoning renders one subject to praise and blame).

490. See *supra* text accompanying notes 298-300.

491. See Satel, *supra* note 13, at 58-59.

492. See Boldt, *supra* note 7, at 2297.

clients' best interests, would have decided otherwise.⁴⁹³ Ironically then, in order to gain the assent of those eligible defendants whose denial would otherwise lead them to reject treatment, the process pushes defense counsel to advocate for the treatment court option on the grounds that participation in therapy will ultimately permit clients to assume the status of a responsible moral agent.

The third impediment to genuine choice grows out of a potential lack of transparency in the information defendants receive about the confidentiality consequences that are likely to flow from their agreement to participate in a treatment court program. Virtually all drug treatment courts require participants to sign written consent forms that permit the providers of substance abuse treatment to convey information back to the court, to the prosecutor, and to other members of the criminal justice treatment team. This written consent is required by federal statutes and implementing regulations⁴⁹⁴ that otherwise provide extraordinary protection for persons receiving drug or alcohol abuse treatment,⁴⁹⁵ including persons mandated by judicial authorities to enter treatment.⁴⁹⁶ Because these authorities need some modicum of information about defendants' attendance and participation in treatment programs to adequately perform their supervisory functions, the federal confidentiality laws and regulations permit judges and prosecutors to condition defendants' entry into treatment on their agreement to waive some or all of these rights to confidentiality.⁴⁹⁷

By definition, if the choice to enter treatment is to be genuine, defendants

493. See *supra* text accompanying note 295.

494. See *supra* note 24. Drug Abuse Office and Treatment Act of 1972, Pub. L. No. 92-255, § 408, 86 Stat. 65, 79 (codified as amended at 42 U.S.C. § 290dd-2 (1994); Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. §§ 2.1-2.67 (1994).

495. The regulatory provision governing "unconditional compliance" provides an indication of the extraordinary nature of these confidentiality protections:

The restrictions on disclosure and use in these regulations apply whether the holder of the information believes that the person seeking the information already has it, has other means of obtaining it, is a law enforcement or other official, has obtained a subpoena, or asserts any other justification for a disclosure or use which is not permitted by these regulations.

42 C.F.R. § 2.13(b) (1998). Moreover, the section governing "restriction on use" of confidential information provides:

The restriction on use of information to initiate or substantiate any criminal charges against a patient or to conduct any criminal investigation of a patient applies to any information, whether or not recorded which is drug abuse information obtained by a federally assisted drug abuse program . . . for the purpose of treating alcohol or drug abuse, making a diagnosis for the treatment, or making a referral for the treatment.

42 C.F.R. § 2.12(a)(2) (1998) (citations omitted). Finally, it should be noted that the regulations provide for criminal penalties in the case of violations. See *id.* § 2.4 (1998).

496. See *id.* § 2.35 (1998).

497. See *id.*

must be helped to understand the potential costs and benefits involved, including the potentially harmful consequences that can result from the disclosure to judges or prosecutors of personal and sometimes incriminating information gained in the course of substance abuse treatment.⁴⁹⁸ Defendants must be informed of the considerable benefits in terms of confidentiality to which defendants are entitled if they enter treatment on their own without mandate from the criminal justice system. In other words, a genuine choice with respect to the waiver of confidentiality requires that defendants be informed of the unusually generous privacy protections already in place, which their consent will extinguish.⁴⁹⁹ If defendants are simply presented with a standardized waiver form and told little beyond the fact that their signature is required in order to enter the treatment court program, it is unlikely that they will appreciate the full legal or practical significance of their decision to execute the form or to undertake the treatment court regime.

Drug treatment court defenders who wish to be responsive to the dignity concerns of the critics must address each of these impediments. With respect to the first, a vision of practice centered upon protecting the moral agency of the defendant cannot afford to trade the client's opportunity to consult with an attorney before deciding to participate, in favor of a generalized goal of "expedited disposition."⁵⁰⁰ Therefore, defenders must resist all efforts to force a decision from their clients until such time as they have adequately examined the case and can provide their clients with a good assessment of the likely outcome of each available option, including trial.⁵⁰¹ Even if the defender's insistence on having sufficient time results in the loss of the therapeutic benefits derived from starting treatment while the defendant is in "crisis," and even if the client's eligibility to participate in drug court will be withdrawn altogether, counsel must demand that his or her client receives adequate time to make a fully informed, and therefore, genuine choice.

As to the second impediment, this vision of practice demands that defenders engage in a process of consultation with their clients in which each available option is described in detail, and the consequences of each choice explained in dispassionate terms, so that clients will be able to exercise control over their own cases. Specifically, this means that counsel must:

498. See Ward, *supra* note 347, at 4.

499. The confidentiality regulations recognize the importance of educating patients about their rights in this regard. In fact, they require that patients receive a written summary of the federal law and regulations. See 42 C.F.R. § 2.22(a)(2) (1998). Notwithstanding this injunction, treatment court defendants will not likely appreciate the full extent of the protections they are waiving unless they receive substantial individual counseling.

500. See Judge, *supra* note 30, at 2.

501. See Burke, *supra* note 297, at 5-6.

help the client weigh the value of a relatively short jail term against the possibility of longer involvement with the [drug treatment court]. [The drug treatment court] involvement could include shock incarceration and, in the case of complete failure, imposition of a sentence for probation-track defendants or a trial and possible sentence for diversion-track defendants.⁵⁰²

In some instances, defendants who would benefit from treatment will choose not to enter the drug court program because of this counseling. This may be a poor choice, when viewed from the point of view of the defendant's long range well-being. Nevertheless, this vision of practice includes the process-oriented values of respect and empowerment discussed by Professors Ainsworth and Federle,⁵⁰³ and it demands that these interests receive relatively greater weight in the formulation of an appropriate defender role conception, in order to prevent defendants from being treated as objects rather than as responsible agents.⁵⁰⁴

Finally, this vision of practice calls on treatment court defense lawyers to insure that clients who execute confidentiality waiver forms grant truly informed consent. This requirement directly relates to a frequently identified goal of the drug treatment court model, which is to give defendants sufficient control over their participation so that they can justly be held accountable for their conduct.⁵⁰⁵ Persons with substance abuse problems often experience very little control in their daily lives. Therefore, before they can develop a sense of responsibility for their actions, they must be helped to identify those features within their environment over which they can and should begin to exercise control.⁵⁰⁶ With respect to the waiver of confidentiality protections,

502. McColl, *supra* note 8, at 513.

503. See *supra* text accompanying notes 420-25, 472-81.

504. This conclusion is not meant as a categorical condemnation of paternalism in all instances. As a number of commentators have noted, paternalism is a "persistent feature of much of our law." RHODE & LUBAN, *supra* note 244, at 598. David Luban has persuasively argued, however, that the decision to act paternalistically must be justified in any individual case by attending to the relationship between the "helped" person's immediate desires, his or her objective interests, and his or her values. With respect to the last of these elements, Luban explains that "values . . . are those reasons [for acting] with which the agent most closely identifies—those that form the core of his personality, that make him who he is." Luban, *supra* note 188, at 470. Luban's conclusion is that paternalistic practice based upon a conflict between a person's immediate desires and his or her best objective interests is only justified if it is based upon evidence that those desires do not express the person's "genuine values." *Id.* at 473. This is likely to be a heavy burden for treatment court defenders to satisfy in practice.

505. "It is critical that people be given control of their own rehabilitation or their own lives, and that they understand that they are accountable and that there will be consequences for their actions." *An Interview with Judge Jeffrey S. Tauber, supra* note 39, at 11.

506. See Satel, *supra* note 13, at 58.

this set of ideas requires that defendants be clearly informed of the legal rights that give them virtually exclusive control over a broad array of personal information that might be elicited during the course of treatment.⁵⁰⁷ Further, defendants must understand that they alone can choose whether to permit others to share some or all of this information with criminal justice officials.⁵⁰⁸ In addition, they must realize that each of the alternatives open to them is likely to carry certain predictable consequences, and they must be prepared to accept responsibility for whatever resolution of this difficult choice they adopt.⁵⁰⁹ If defense lawyers insure that each of these elements of informed consent is in place before their clients either sign consent forms or refuse to waive their confidentiality rights, the goal of preserving genuine choice, which is central to maintaining basic notions of dignity, will be furthered.⁵¹⁰ On the other hand, if consent is obtained as a mere bureaucratic formality, with little or no attention given to ascertaining whether defendants actually understand the significance of their decisions, then the process will have failed to accomplish this basic requirement.

2. Representing Defendants' Perspectives

Closely related to the critics' concerns over protecting defendants' dignity interests was their observation that rehabilitative penal regimes tend to submerge the perspectives of individual offenders within the claims of

507. The federal confidentiality laws and regulations are structured around a general prohibition against the communication of any information that is patient identifying, in the absence of properly obtained patient consent. See 42 C.F.R. §§ 2.12, 2.13(a) (1998). There are a few extremely limited exceptions to this general prohibition: for reporting extremely serious medical emergencies to medical personnel, see *id.* § 2.51, for reporting crimes against program staff or on program premises, see *id.* § 2.12(c)(5), for limited reports of suspected child abuse or neglect, see *id.* § 2.12(c)(6), or to comply with an authorizing court order. See *id.* §§ 2.61-.67.

508. This assumes that none of the other exceptions to the prohibition on disclosure apply. See *supra* note 507.

509. For many defendants, the decision to grant consent will mean that harmful information will be made available to criminal justice officials. Conversely, the decision to withhold consent will mean that their eligibility for the drug treatment court program will be withdrawn.

510. For several reasons, this conclusion may be overly optimistic. First, it is at least suspect whether consent obtained from one who is incarcerated or otherwise under state control can ever really be regarded as an expression of that person's autonomous judgment. See ROBERT BURT, *TAKING CARE OF STRANGERS: THE RULE OF LAW IN DOCTOR-PATIENT RELATIONS* (1979). In addition, the very notion of consent, which is "derived from liberal political values," ALLEN, *supra* note 38, at 45, rests on a set of assumptions about the self-interested nature of individual choice that simply may not hold for everyone in society. For example, Robin West has argued that a fundamental assumption of liberal theory, "that human beings consent to transactions in order to maximize their welfare may be false" with respect to the consent granted by many women. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 91 (1987). For an elaboration of West's hypothesis and an application of it to the consent provisions within confidentiality law, see Boldt, *supra* note 24, at 2363-67.

benevolent therapeutic purpose that characterize the enterprise. As discussed earlier, rehabilitative practices, including drug treatment courts, merge two ordinarily distinct state functions—treatment and punishment. Intertwining these functions creates a risk that the absence of any overt conflict of interest between the state and the individual participant which may characterize therapeutic state activities, will mask the inherent conflict present when the state seeks to punish individual defendants.⁵¹¹ Attending to this danger, defenders in rehabilitative penal institutions, including drug treatment courts, must give voice to the individual defendant's experience of the process as potentially coercive and punitive.

Ordinarily, the conflict between the state's penal interests and the individual defendant's liberty interests is managed through the application of formal procedural protections implemented within a stable adversarial system.⁵¹² This due process model is at the core of liberal legal theory, which seeks to restrain state power by granting citizens basic procedural rights.⁵¹³ As the critics noted a generation ago, these essential procedural rights may be jeopardized by the tendency of rehabilitative penal regimes to use an alternative approach, characterized by informality, indeterminacy, and broad discretionary decision making, which is thought better suited to the goal of providing treatment to offenders.⁵¹⁴

The occasion for any defendant's participation in drug treatment court, however, is the state's decision to bring criminal charges. Moreover, under any variation of the treatment court model, the defendant necessarily progresses through the mandated treatment regime under threat of criminal sanction. Indeed, the defendant's participation in each of the various therapeutic activities that constitute this treatment regime is, in some sense, coerced conduct. In short, the individual participant is first and foremost a criminal defendant subject to a loss of liberty as a direct result of the state's exercise of its prosecutorial powers. In order to emphasize their clients' status as criminal defendants, drug treatment court defenders should therefore seek to preserve the basic features of ordinary criminal proceedings. These features of adversary disputing, including formal procedures, clearly defined decisional rules, and detached, neutral decision makers, constitute the fundamental mechanisms by which persons accused of crimes are guaranteed

511. See *supra* text accompanying notes 201-03.

512. See STRUGGLE FOR JUSTICE, *supra* note 41, at 26-27 (discussing conflict between defendant's self-interest and state's role).

513. See Boldt, *supra* note 24, at 2359-60.

514. See ALLEN, *supra* note 38, at 47-48.

a fair opportunity to be heard.⁵¹⁵ In the absence of such formal procedures, defendants' voices are not structurally protected, and their perspectives are likely to be lost within the often sincere claims of the state to be acting in their best interests.

Defense lawyers who wish to be responsive to these perspective concerns should concentrate their efforts on representational tasks. In order to represent their clients' perspectives effectively, however, defenders cannot undertake other roles that require the adoption of competing perspectives.⁵¹⁶ In particular, they must resist invitations to join the treatment team, or to form structural alliances with other repeat players within the treatment court environment,⁵¹⁷ because to do so would deny the essential conflict of interest that exists between those other criminal justice officials and the defender's

515. See *supra* text accompanying notes 251-56; see also Handler, *supra* note 147, at 25 (identifying "procedural safeguards commonly found in the adversary system" to include "a clear and definite charge, the separation of functions between the prosecutor and judge, a meaningful right to counsel, the right of confrontation, proof by competent and relevant evidence, a relatively high degree of burden of proof and the right of appeal").

516. Even under the best of circumstances, the job of representing a criminal defendant is problematic. James Doyle, writing about death penalty cases, has demonstrated that the process of representation often involves two related tasks. The first is to represent the client "in the familiar sense of speaking for him," and the second is to represent the client "by shaping and presenting to a judge or jury a representation of the client." James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 420 (1996). Insuring that a drug treatment court defendant's perspective is "represented" throughout the process necessarily requires the defense lawyer to attend to both of these undertakings. Difficulties with respect to the obligation to speak for the defendant arise from the myriad of ways that attorneys misunderstand or misread their clients' statements, silences, and conduct. See, e.g., Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992). Difficulties with respect to the second task occur because this form of representation inevitably produces a "copy" of the "original," rather than the fully situated real-life defendant. This distance between the client as represented and the client, in reality, is impossible to overcome in criminal defense practice or in anthropology or in art, because "[a] copy can resemble an original more and more, but it can never achieve identity with it." Doyle, *supra*, at 420. Finally, the difficulties attendant on both of these representational tasks are compounded by the distorting effects of social power and race. As Doyle puts it:

Other disciplines acknowledge a "crisis in representation" because they recognize the dangers that hide in any process in which the strong describe the weak, the dominant culture describes the subordinated one. In psychologists' representations of their patients, or anthropologists' representations of native societies, the representations "bear as much on the representer's world as on who or what is represented."

Doyle, *supra*, at 429 (quoting Edward W. Said, *Representing the Colonized: Anthropology's Interlocutors*, 15 CRITICAL INQUIRY 205, 224 (1989)). In light of all the impediments to effective representation that confront even the most zealous advocates, the notion that counsel in a drug treatment court might further fracture his or her identity with the client by serving simultaneously as a member of the treatment team is remarkable indeed.

517. For a thorough discussion of the distinction between participants in litigation who "have only occasional recourse to the courts" and those who are "engaged in many similar litigations over time," see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

client.⁵¹⁸

In addition to forming a singular identification with the defendant and his or her perspective,⁵¹⁹ defense counsel should make choices designed to force an appropriately formal distance between the treatment court judge and the parties.⁵²⁰ At a minimum, defenders should insist on playing a mediating role in any initial proceedings before the judge and in subsequent status hearings involving their clients. Occasionally, it may be appropriate for a defendant to interact directly with the court, but the decision to proceed in this fashion should result from a careful evaluation by counsel with respect to the client's ability to give voice to his or her experience of the process.⁵²¹ In any event, counsel should always attend court proceedings involving the client, and should be prepared to address the court on the client's behalf whenever the client's perspective diverges from that of the other criminal justice officials involved in the case.⁵²² While it is difficult to say in advance what specific interventions might be called for at any given moment, it is clear that even the small rhetorical details of the setting may demand the defender's advocacy. So, for example, counsel may be obligated to raise objections to the practice in some treatment courts of referring to graduated sanctions, including periods of incarceration, as "adjustments" rather than punishments or sanctions.⁵²³ Or, counsel may appropriately insist that the judge refrain from awarding T-shirts to defendants who have been successful in treatment,⁵²⁴ or from sponsoring picnics and other out-of-court activities.⁵²⁵

518. See STRUGGLE FOR JUSTICE, *supra* note 41, at 26-27.

519. For example, this vision of practice would regard as inappropriate any efforts on the part of defense counsel to "actively participate [with the judge and prosecutor] in the design of the 'theater' of the courtroom," in order to encourage the client's compliance with the treatment court program. JUDGE, *supra* note 43, at 7.

520. See *supra* text accompanying notes 328-43.

521. In particular, counsel should be attentive to the danger that power imbalances between participants in informal decisional processes can subvert those processes' outcomes. Cf. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) (discussing disadvantages to mediation in domestic abuse cases); Richard Abel, *Informalism: A Tactical Equivalent to Law?*, 19 CLEARINGHOUSE REV. 375 (1985) (arguing that informal procedures are inferior to formal procedures in law).

522. One student of drug treatment courts has described the failure of defense counsel to fulfill this important role in the following terms:

Generally the defender will argue for leniency if a client is sent to shock incarceration. By definition, however, the defender is part of the systems approach team and is also responsible for treating the client. Therefore, because shock incarceration is defined a treatment, the defender has incentives to mute his dissent. Often the defender is reduced to making arguments destined to be disregarded, and therefore there is no incentive to interfere with the treatment.

McColl, *supra* note 8, 513-14.

523. See *id.* at 502-03.

524. See Bean, *supra* note 15, at 719.

525. See Satel, *supra* note 13, at 69.

At root, the critique about perspective shows that the legitimacy of the criminal justice system and its ultimate effectiveness as an institution for the inculcation of basic societal values⁵²⁶ depends on the rigor with which its formal triadic structure is maintained. The therapeutic goals of a drug treatment court should not disrupt the fundamental elements of a procedurally just process by, for example, undermining the unambiguous loyalty of defense counsel or the neutrality of the judge.⁵²⁷ The core commitments of liberal theory demand that the state justify its coercive practices by reference to legitimate collective interests.⁵²⁸ At the least, the individuals whose liberty is to be restrained deserve a meaningful opportunity to be heard, and their perspectives should be evaluated fairly along with the state's expressed purposes. Finally, this evaluation should be undertaken by a decision maker who is neither a partisan nor an active participant in the state's coercive enterprise.⁵²⁹ To be sure, these requirements may make it more difficult to institute a process of therapy in any given case. All the same, they are essential because they serve instrumental interests in preventing unnecessary restrictions on individual liberty, as well as larger ideological goals with respect to maintaining the integrity of the community's official blaming practices.

526. See Ainsworth, *supra* note 47, at 1121; see also Boldt, *supra* note 7, at 2278-85 (setting out theory of criminal law blaming practices as constitutive of social understandings of responsibility and desert).

527. Professor Ainsworth's observations about juvenile court judges are particularly apt in this regard. She argues that:

Confidence in the ethicality of the fact-finder is undercut by the dual roles of the juvenile court judge as finder of fact and sentencing authority. Particularly for the repeat offender, the judge's knowledge of the accused's background and previous criminal record creates the unseemly appearance that guilt has been pre-judged. In the sentencing role, expressions by the judge of paternalistic concern for the juvenile accused coupled with stern judicial sanctioning likewise is inconsistent with the normative model of adjudicatorial behavior.

Ainsworth, *supra* note 47, at 1120 (footnotes omitted).

528. See STRUGGLE FOR JUSTICE, *supra* note 41, at 22-23.

529. Shapiro, however, points out:

[E]ven in those few societies that seek to insulate the judge from the rest of government, he is expected to administer the criminal law, that is, to impose the will of the regime on a party being prosecuted by the regime. With extremely great care to the various rituals of independence and impartiality, some criminal courts may succeed in maintaining the appearance of thirdness. However, few of the defendants in contemporary Western criminal courts are likely to perceive their judges as anything other than officers of the regime seeking to control them.

Shapiro, *supra* note 229, at 287. Nevertheless, the mere fact that the structure of the triad, and hence the perception of the tribunal as fair, is weakened by virtue of the criminal court judge's membership in the same government as the prosecution, is no reason to give up entirely on larger efforts to prevent a complete collapse into two against one.

3. *Guarding Against the Debasement of Treatment into Punishment*

Insuring that the unique perspectives of defendants in treatment courts are effectively heard serves both to protect their individual entitlement to be treated with dignity and to guard against the debasement of the state's therapeutic goals into purely punitive outcomes. Defense attorneys who insist on the enforcement of basic procedural rights in order to prevent their clients' voices from being silenced can also undertake other activities as well to guard against debasement. Defenders should address two particular measures if this vision of practice is to be operationalized fully.

The first measure to help prevent the debasement of treatment into punishment involves the wording of the written confidentiality waiver form used by the defendants. As noted above, confidential information obtained by a treatment provider and disclosed to criminal justice officials pursuant to written consent may form the basis for the imposition of sanctions, either under a system of graduated penalties governing the charges that are the basis for the treatment court's jurisdiction over the defendant, or by way of additional charges brought against the defendant.⁵³⁰ The regulations implementing the federal confidentiality statutes make clear that information disclosed pursuant to a criminal justice consent form may only be used in connection with the matter for which consent was obtained.⁵³¹ But once inculcating information relating to other events reaches the hands of prosecutorial officials, compliance with this requirement becomes more difficult. Even if the information is not the formal basis for instituting a new investigation or for filing additional charges, it may trigger an investigation that leads to independent evidence available for use in a subsequent prosecution.⁵³²

Because of the likelihood that broadly-worded consent forms that permit wholesale disclosures may lead courts to impose greater sanctions in at least some cases, defenders should insist on narrowly-worded waiver forms at the beginning of their clients' involvement in drug treatment court. Such insistence is entirely consistent with the general philosophy of the confidentiality laws and regulations, which clearly provide that disclosures of confidential information by treatment providers pursuant to patient consent should be limited to information necessary to carry out the purpose of the

530. See *supra* text accompanying notes 356-62.

531. See 42 C.F.R. § 2.35(d) (1998).

532. Cf. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (exclusionary rule applicable to all evidence tainted by unconstitutional search, including evidence subsequently obtained by using information acquired in unconstitutional search).

disclosure.⁵³³ In concrete terms, this means that the drafting of consent forms should not be accomplished in a routinized or standardized fashion, but should be undertaken individually in each case after careful negotiation among the parties to determine the precise scope of the permission that is to be granted.

Given the regulations' insistence on narrowing the scope of disclosures made pursuant to consent, it should not be surprising that the provisions governing the contents of written waiver forms require a clear statement of "the purpose of the disclosure."⁵³⁴ Indeed, the logic of the consent provisions suggests that the drafters of a waiver form should identify the purpose in writing before determining the remaining elements of the document. The purpose statement can then serve as a reference point for delimiting the other items that constitute adequate consent, including the "kind and amount of information to be disclosed,"⁵³⁵ the "name or title of the person or organization to which disclosure is to be made,"⁵³⁶ and the duration of consent.⁵³⁷ In contrast, it is inconsistent with the spirit of the federal confidentiality laws and regulations to adopt a practice of using standardized consent forms that permit the disclosure of virtually all information possessed by the treatment provider without regard to the need that criminal justice officials have for this information in the particular case. Such standardized consent forms increase the danger that rehabilitative intentions will become punitive in operation.

Defenders who insist upon tailoring confidentiality waiver forms in each case, in order to limit the permissible scope of disclosure to the minimum required for the supervision of any given treatment court defendant, are likely to encounter resistance from other officials within the treatment court setting. At the least, these officials may complain that such a process of obtaining written consent is inefficient and unnecessary.⁵³⁸ Even greater resistance is to

533. See 42 C.F.R. § 2.13(a) (1998).

534. *Id.* § 2.31(b) (item five on sample consent form).

535. *Id.* (item three on sample consent form).

536. *Id.* (item two on sample consent form).

537. The duration requirements for written consent in situations where "persons within the criminal justice system . . . have made participation in the [treatment] program a condition of the disposition of any criminal proceedings against the patient or the patient's parole or other release from custody . . .," *id.* § 2.35(a), direct the drafters of the waiver form to "state the period during which it remains in effect . . . taking into account . . . [t]he anticipated length of the treatment . . . , [t]he type of criminal proceeding involved, the need for the information in connection with the final disposition of that proceeding, and when the final disposition will occur . . . and [s]uch other factors as the program, the patient, and the person(s) who will receive the disclosure consider pertinent." *Id.* § 2.35(b)(1)-(3).

538. Indeed, resisting officials may argue that tailored confidentiality waivers are unnecessary because the treatment court's purpose in obtaining this information is not punitive, but rather facilitates the defendant's supervision and encourages his or her recovery.

be expected if defenders demand a second measure to guard against debasement, separately negotiated contracts specifying the limited circumstances under which the imposition of graduated sanctions will occur and defining the possible sanctions.

Certainly, “fixed sanction algorithms,”⁵³⁹ which set out these terms in considerable detail for all defendants, have both efficiency advantages and advantages in terms of limiting judicial discretion. On the other hand, these standardized provisions do not necessarily describe the most restrained incursions into an individual defendant’s liberty required to encourage his or her success in treatment. Thus, defense attorneys who take seriously this vision of practice, including its injunction to guard against the debasement of treatment into punishment, must attempt to negotiate separate sanctioning schemes. These schemes should limit the range of potential punishments the individual client may receive to the minimum required to accomplish the treatment court’s stated therapeutic goals.⁵⁴⁰

In addition, given significant open questions about the quality and range of the addiction treatment services provided by many drug treatment courts,⁵⁴¹ defenders should also seek to negotiate at the inception of the process about the nature of the treatment their clients will receive.⁵⁴² If clients can obtain more appropriate or more extensive treatment outside of the drug treatment court setting, they might be well advised to seek a traditional resolution of the pending criminal charges, so that ongoing treatment needs can be addressed separately.⁵⁴³

Currently, few drug treatment courts are likely to permit either separately

539. See Satal, *supra* note 13, at 63.

540. Paradoxically, this call for the individualization of measures is relevant to another of the liberal critics’ concerns about the rehabilitative ideal—that the push to individualize sentences results in a lack of equality in the treatment that offenders receive. See *supra* text accompanying notes 134–36. Nevertheless, if specialized drug courts are to continue to offer a treatment component, the very definition of rehabilitative practice mandates that treatment regimes be tailored to suit the needs of individual participants. See Judge, *supra* note 30, at 3 (“[o]ne treatment program will not fit the needs of all clients”).

541. See, e.g., Robert Burke & Alvita Eason, *Defender Perspectives on Drug Courts: Successful Programs Which Could Be Doing More* 8 (1996) (unpublished manuscript on file with author) (reporting that survey of lawyers working in drug courts found some complaining about “lack of sufficient resources for treatment”); see also, e.g., PLANNING GUIDE AND CHECKLIST, *supra* note 118.

542. The GAO’s study of drug treatment courts around the country found “wide variation in the types of treatment offered, the types of related services (e.g., job skills, housing, family and medical services), and in the types of graduated sanctions imposed for relapse or program noncompliance.” *Feds, Others Scrutinize Drug Courts*, INDIGENT DEFENSE (Nat’l Legal Aid & Defender Ass’n), Nov.–Dec. 1997, at 9.

543. The clearest example of this would be a defendant in need of intensive residential treatment who is deciding whether to enter a treatment court regime that offers little beyond a twelve-step program and urine testing. See PLANNING GUIDE AND CHECKLIST, *supra* note 118.

negotiated confidentiality waiver forms or sanctioning algorithms, let alone individually tailored treatment plans. Absent these minimum guarantees against the very real dangers of debasement, defenders who embrace this proposed vision of practice should advise their clients not to undertake treatment court programs.⁵⁴⁴

B. Looking Beyond the Drug Treatment Court Model

The contemporary drug treatment court movement owes much to the history of rehabilitative penal practice established at the beginning of the twentieth century.⁵⁴⁵ The fact that the vision of defender advocacy proposed in this article diverges so dramatically from the articulated expectations for defense counsel set out in the various written descriptions of the drug treatment court model, suggests that the liberal critique of the rehabilitative ideal has continued vitality with respect to today's rehabilitative undertakings.⁵⁴⁶ Perhaps, as Professor Ainsworth has argued in connection with juvenile court practice, the inhospitable treatment accorded zealous defense advocacy in contemporary rehabilitative penal regimes is grounds for

544. The recommendation in text, to opt for a traditional resolution of charges if the treatment court is unable to provide essential guarantees of procedural regularity and fairness, raises an important empirical question regarding the quality of ordinary criminal defense practice. Moreover, the prediction in text, that drug treatment courts generate significant risks of debasement because they are unlikely to provide adequate procedural protections, can also be tested empirically. With respect to the former question, it is certainly the case that the American criminal justice system represents

a world of [defense] lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm; a world of minuscule acquittal rates; a world where advocacy is rare and defense investigation virtually nonexistent; a world where lawyers spend minutes, rather than hours, with their clients; a world in which individualized scrutiny is replaced by the indifferent mass-processing of interchangeable defendants.

Luban, *supra* note 45, at 1762. As to the latter inquiry, the danger of debasement in drug treatment courts is only partially apparent from the data currently available from the Government Accounting Office, the Department of Justice, and others. *See supra* notes 123 and 138. Indeed, the conclusions drawn in text are based as much upon extrapolation from analogous experiences with rehabilitative penal practice in the past and ongoing accounts of the juvenile justice system as they are upon the available data regarding drug treatment courts. Notwithstanding the clear inadequacies of traditional criminal defense practice in many jurisdictions and the open empirical questions about comparative outcomes between traditional criminal courts and treatment courts, the structural problems inherent in merging treatment and punishment identified throughout this Article, together with the outcome data we do have, do form a reasonable basis for the conclusions drawn. Clearly, more empirical work must be done in this area before a final resolution of this question can be reached.

545. *See supra* Part I.A.

546. In a recent survey of defenders in drug treatment courts, conducted by the National Legal Aid and Defender Association, 69% of those responding said that they were able to "be adversarial on a constitutional or fact issue and still go to drug court later." *Defenders Largely Satisfied with Drug Court Experience*, *supra* note 353, at 8. At the same time, 31% reported that "they sometimes feel like they are 'selling out' as a defense lawyer." *Id.*

seeking their elimination altogether.⁵⁴⁷ Ainsworth's analysis is heir to earlier accounts of the juvenile court movement by Anthony Platt and others, who suggested an even more radical understanding of the rehabilitative ideal.⁵⁴⁸ This radical perspective, which also bears upon a clear understanding of current drug treatment courts, is built on observations regarding the ways in which socially constructed categories of meaning are reflected in legal institutions,⁵⁴⁹ as well as on observations about the capacity of legal practices to play a role in shaping common understandings of the social world.⁵⁵⁰ For Ainsworth, culturally and historically contingent notions about adolescence and childhood have grounded juvenile court approaches toward young people engaged in antisocial conduct, and in turn have been subject to modification as a consequence of the operation of legal doctrine.⁵⁵¹

547. Ainsworth observes that "[t]he process of cooptation, or being rendered unthreatening to a system by assimilating oneself to its values and practices, has long been a problem for defense attorneys in juvenile court." Ainsworth, *supra* note 47, at 1128 n.307. She continues, "[c]ooptation of defense counsel is not a phenomenon peculiar to juvenile court; it exists to some degree among defense lawyers in all criminal justice systems." *Id.* at 1129 n.307. When the norms of a particular legal institution are dramatically at odds with zealous defense advocacy, however, as they are apparently in many juvenile courts and drug treatment courts, these institutional pressures raise significant concerns about the legitimacy and fairness of the process.

548. See PLATT, *supra* note 367. In Platt's widely cited work, the roots of modern juvenile courts are located in the "child-saving movement" that began at the end of the nineteenth century. He argues that this movement "served to reinforce a code of moral values which was seemingly threatened by urban life, industrialism, and the influx of immigrant cultures," and that "[t]he 'invention' of delinquency consolidated the inferior social status and dependency of lower-class youth." *Id.* at 177. In its more contemporary version, Platt asserts that ongoing social welfare efforts directed at young people "contribute to the maintenance of the subordinate social status of powerless groups." *Id.* at 180. He concludes that "[r]ather than increasing opportunities for the exercise of legitimate power by adolescents, public agencies have opted for closer supervision as a means of decreasing opportunities for the exercise of illegitimate power." *Id.*

549. Ainsworth provides this useful summary of the constructivist perspective:

To the constructivist, categories within which we understand reality do not correspond to [a] reality mapping [based on empiricism alone], but rather are humanly created artifacts, produced by culturally and historically situated participants in a collective social enterprise. These socially [constructed] categories are propagated through social discourse, which is itself a culturally and historically situated practice. Thus, constructivism insists that all human knowledge, whether composed of experientially gathered information or the shared categories that impose meaning on that information, takes its form through social discourse.

Ainsworth, *supra* note 47, at 1086. See generally PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983). For a discussion of the ways that socially constructed understandings influence the criminal law, see Boldt, *supra* note 7, at 2278-85.

550. For a discussion of the ways in which legal practices function to construct social meaning, see GEERTZ, *supra* note 549, at 217-18; Boldt, *supra* note 7, at 2282-83.

551. See Ainsworth, *supra* note 47, at 1091-96, 1101-04 (describing differing viewpoints over time and between cultures as to number of life stages between infancy to adulthood and noting greater number of defined stages between infancy and adulthood in later portion of twentieth century, but then concluding that distinction between children and adults is perhaps no longer relevant when dealing

The analogous set of socially constructed understandings implicated by the drug treatment court movement requires further study. In particular, interrelationships between the notions of criminal responsibility, addiction, social and economic power, and race merit the attention of those concerned about the disabling effects that alcohol and other drugs have had on individuals, families, and communities, especially poor communities of color.⁵⁵² As a starting point, however, it would be well to remember the general observations of the Friends and other left critics challenging the claims of neutrality made by the corrections establishment in the middle portion of this century.

These claims of neutrality, which related both to the processes by which individuals were identified as appropriate subjects for rehabilitation and to the more general assertion that rehabilitative practices were apolitical,⁵⁵³ are deeply troubling when offered today on behalf of the drug treatment court movement, which is but the latest chapter in the United States' ongoing "war on drugs."⁵⁵⁴ Studies conducted over the past ten years demonstrate that African-Americans and Latinos are greatly overrepresented among those who are arrested and convicted of drug-related criminal offenses, relative to the percentage of these groups who engage in the use of illegal drugs.⁵⁵⁵ Assuming that there is no systematic sorting for race or race-correlated factors among drug treatment court officials, defendants of color are likely overrepresented in treatment court programs as well.

The overrepresentation of African-Americans and Latinos in the criminal

with criminal offenders).

552. For a very thoughtful, recent attempt to explore these interrelationships, see GORDON, *supra* note 174. On the particular problems caused by the addictive use of drugs in poor communities of color, see Boldt, *supra* note 24, at 2325 n.2.

553. See *supra* text accompanying notes 161-62.

554. To the extent that the drug treatment court model was devised, at least in part, to respond to the problems of criminal court overload and prison overcrowding exacerbated by the war on drugs, see *supra* text accompanying notes 7-12, this movement must be seen as linked to that earlier set of public policies.

555. See Ryan, *supra* note 54, at 226 ("While whites make up the vast majority of regular users of illegal drugs in the United States, blacks are four times more likely to be arrested on drug charges, making up 41% of all those arrested on drug charges in 1991. In some states, . . . this disparity rises to 7-9 times the probability of arrest for whites."); see also GORDON, *supra* note 174, at 144-47 (drug use among African-Americans and Latinos no higher than among whites); Lowney, *supra* note 170, at 131-32 (setting out criminal justice statistics from late 1980s through mid-1990s). Representative of the studies discussed by Lowney is a report by the United States Sentencing Commission. The study examined the sixty mandatory sentencing statutes enacted by the federal government from about 1984 to 1991. The study noted "that four of these statutes were responsible for 94% of the mandatory sentences imposed. Over 91% of these convictions were for drug offenses. Consequently, over 63% of the defendants convicted for crimes requiring federal mandatory minimum sentences were Black or Latino, and 33% had no prior criminal record." *Id.* (citations omitted).

justice system⁵⁵⁶ may be due in part to the fact that law enforcement efforts often are geared toward sale and distribution offenses and other property crimes or crimes of violence, rather than simple possession offenses.⁵⁵⁷ Nevertheless, larger problems remain with respect to the claimed apolitical nature of public policies governing the control of addictive substances. One consequence of locating principal responsibility for responding to addiction in the criminal justice system is that the problem is inherently characterized as one of individual wrongdoing.⁵⁵⁸ Even when treatment components are built into the criminal system, as the various drug treatment courts around the country are attempting to do, the dominant social construct governing discourse about addiction remains embedded in notions of individual responsibility. Thus, in addition to the ordinary understandings of individual choice and desert that generally guide criminal blaming practices, treatment courts add an additional layer of socially contingent understandings anchored in notions of individual pathology and treatment.⁵⁵⁹ Lost in this web of images is any clear sense that the abuse of addictive substances and the attendant array of harms that result is, or could be viewed as, a public health problem rooted in larger structural dynamics *as well* as individual choice.⁵⁶⁰

To be sure, it is critically important that members of the community who

556. See MAUER & HULING, *supra* note 88, at 4 (reporting that one out of three African-American males between ages of twenty and twenty-nine is under supervision of criminal justice system).

557. Even this explanation for the overrepresentation of African-Americans and Latinos in the criminal system is suspect. Although the data are not entirely clear, it appears that members of these groups do not participate in the "drug trade" at a rate any higher than do whites. See Ryan, *supra* note 54, at 226. What is clear is that "law enforcement attention to the drug trade tends to be concentrated in inner-city, minority neighborhoods, yielding vastly more arrests of minorities than of whites, and fostering the public impression that the drug business is almost entirely the domain of black and Hispanic youth." *Id.*; see also CHRISTINA JAQUELINE JOHNS, POWER, IDEOLOGY AND THE WAR ON DRUGS: NOTHING SUCCEEDS LIKE FAILURE (1992) (describing targeting of poor communities in war on drugs); cf. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255 (1994) (arguing that large percentage of defendants of color in criminal system is not racial discrimination because victims of criminal offenses are also disproportionately persons of color).

558. See Boldt, *supra* note 7, at 2254-85.

559. See BERTRAM ET AL., *supra* note 2, at 186-88; Ryan, *supra* note 54, at 234, 237.

560. See Ryan, *supra* note 54, at 233 ("The punitive paradigm . . . filters out disturbing evidence and narrows public debate."). For a discussion of public health responses to substance abuse, see Boldt, *supra* note 7, at 2314-16.

Public health practitioners are focused on the health of entire communities. Indeed, public health can be defined as organized community activities that promote the improvement of physical, occupational, behavioral, and social health. The public health system is grounded in an epidemiological approach that studies the determinants of disease and health risks, their distribution, and the incidence of disease across and within population subgroups. It is a "big picture" approach quite different from the focus on *individual* clients or defendants that is characteristic of many substance abuse treatment and justice system practitioners.

TREATMENT DRUG COURTS, *supra* note 8, at 9 (emphasis in original).

have lost the capacity to refrain from obtaining and using addictive substances have access to therapeutic services. Addiction does involve problems of individual pathology.⁵⁶¹ But the decision to locate significant treatment resources within the criminal justice system, or to designate the criminal system as a major point of entry into treatment, is not the only method available for structuring these services. Making drug abuse treatment a part of the public health system, and linking these individualized therapeutic efforts conceptually and practically to the full array of structural responses inherent in such an approach, is also a reasonable public policy alternative. For many, however, this alternative appears inappropriate precisely because of historically and socially contingent notions about addiction and addicts that dominate public discourse.⁵⁶² These social constructs regarding individual blame and responsibility make it extraordinarily difficult to generate a public discussion about addiction that does not also impose a vocabulary and a set of policy imperatives directed toward treating addicts as criminals.⁵⁶³

From the point of view of constructivist social theory, however, official governmental practices, including legal blaming practices, do not simply reflect dominant social understandings; they also play a central role in shaping the categories of meaning that either reveal or obscure alternative depictions of reality.⁵⁶⁴ In this sense, a policy decision to maintain the strong association between addiction and criminal responsibility, even as public officials move to increase the treatment resources available to addicts, is not an apolitical choice; rather, it diminishes opportunities for the development of competing understandings of the issues involved in substance abuse and reduces the likelihood that government decision makers will adopt these

561. On the disease model of addiction, see generally Bean, *supra* note 148.

562. See Ryan, *supra* note 54, at 234-35 (describing work of other academic observers of U.S. drug policy who have concluded that it "militate[s] against rational appraisal of alternative drug policies and distract[s] attention from the structural problems of contemporary society").

563. See Ryan, *supra* note 54, at 231-32. See generally Dorothy E. Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945 (1993) (discussing use of race as factor in describing crime and identifying criminals). For a more general discussion of the history of narcotics control in the United States and of the construction of drug-related behaviors as criminal conduct, see MUSTO, *supra* note 55.

564. Ainsworth observed:

Contemporary constructivist legal scholarship carries th[e] insight [of legal realists] one step further, describing law as both constituent of social reality and as created by it in a dialectic process, a kind of constitutive hermeneutics. This constructivist view of law has two corollary implications; first, that the apparent intrinsicity and immutability of basic legal doctrine is illusory; and second, that understanding the process through which reality is constructed provides a mechanism for meaningful change in law.

Ainsworth, *supra* note 47, at 1090.

competing responses.⁵⁶⁵

An array of interventions that are now treated as inappropriate or impossible could become plausible strategies for adoption by public officials if many of the dominant images surrounding the problem of addiction were challenged. These disfavored responses could press beyond the individual characteristics of persons suffering from substance abuse. Self-destructive addictive behaviors could be understood within a larger account of the social and political marginalization that dominates the lives of most of the defendants who now find themselves in the criminal justice system and consequentially in drug treatment courts.⁵⁶⁶ These alternatives fall out along a continuum from relatively modest innovations, such as needle exchange programs,⁵⁶⁷ to more ambitious plans to regulate the availability of all addictive drugs, including alcohol, within a single unified set of public policies.⁵⁶⁸ Additionally, emphasis could be placed on efforts to foster and support grassroots community-based prevention strategies, in which groups within subordinated communities work together to identify alternative responses to the feelings of alienation, despair, and powerlessness that grow out of the concrete realities of life at society's margins.⁵⁶⁹ At its most ambitious, this array of possibilities would include the adoption of public policies targeting the lack of legitimate employment opportunities and enterprise capital that currently make poor communities such fertile sites for the manufacture and sale of illegal drugs.⁵⁷⁰

In the end, the problems of addiction, crime, social and economic powerlessness, and racism are not only interconnected, but they are also made intelligible in public discourse through the mediating influence of official governmental practices. The adoption of drug treatment courts is the

565. See *id.* at 1086; see also Ryan, *supra* note 54, at 235 (“[T]he [punitive] paradigm distorts treatment and prevention. Public support for these alternative strategies is undermined by images and beliefs embodied in the paradigm . . .”).

566. See GORDON, *supra* note 174.

567. See Ryan, *supra* note 54, at 239 (noting that under public health approach to drug policy, “[l]aw enforcement strategies that encourage harmful behaviors such as needle sharing would be eliminated”).

568. See, e.g., *Legalization of Illicit Drugs—Impact and Feasibility, Part I: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 100th Cong., 2d Sess. 190, 201-02 (1988) (testimony of Honorable Kurt L. Schmoke, Mayor of Baltimore).

569. See Boldt, *supra* note 24, at 2372-73 (describing possibility of women building “organic groups within the social spaces created by Head Start,” in order to “undertake the difficult work of sharing, and responding to, their common experiences of subordination,” as means of “grappl[ing] with their chemical dependency”).

570. For a general discussion of the transformation of inner city neighborhoods, see WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996). On the links between declining economic conditions and underground drug manufacturing and distribution businesses, see Henderson, *supra* note 173.

most recent manifestation of a long history in the United States of attempting to manage a great many problems through the relatively limited institutional apparatus of the criminal justice system. As the early critics of rehabilitative penal practice noted, this sort of approach imperils some of the most fundamental commitments of liberal society. These critics also taught a more radical lesson about the consequences of pursuing the rehabilitative ideal in a penal setting. Their insights still have considerable force and serve as the basis for approaching contemporary efforts at rehabilitative punishment with great caution.