

**The Rebirth of the Rehabilitative:  
The Emergence of Problem-Solving Courts and  
Therapeutic Jurisprudence**

by

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Class of 2010

An essay submitted to the  
faculty of Wesleyan University  
in partial fulfillment of the requirements for the  
Degree of Bachelor of Arts  
with Departmental Honors in Sociology

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## ACKNOWLEDGEMENTS

First, to my advisor, Jonathan Cutler: my only regret with this project is that I fear it cannot do justice to the extent to which your introductory sociology class (and every course with you thereafter) has changed the way I understand this world of ours. I've never had to think more critically than as your student—it's been an incredible four years of reading with, and learning from you. Thank you, for everything.

I need to acknowledge Jessica Posner, Leah Lucid, Jesse Bordwin and Alex Anthony for their 11<sup>th</sup>-hour editing support, and Irene Bright-Dumm for keeping me awake and in high spirits during my final all-night writing sessions. I feel overwhelmingly lucky to have such brilliant writers and thinkers as friends.

I also would like to thank my father for our wonderful, if unending, Thanksgiving debates, my mother for her wisdom and legal expertise, and my sister for graciously putting up with all three of us.

In addition, I want to express my gratitude to legal scholar and advocate Susan Stefan for her email correspondence about mental health courts, as well as the King County mental health court defense team for answering my questions.

And finally, I'd like to extend a special thank-you to Charles Lemert, for his extensive comments on this paper, years of mentorship, and unrelenting encouragement, as well as the students of his Advanced Social Theory Seminar, "Derrida Beyond Marriage," for their willingness to engage with my work.

## INTRODUCTION

In August, 2006, a National Public Radio broadcast captured the following scene of a Cincinnati mental health court:

***Ari Shapiro [reporting]:** On this day, a woman with stringy, brown hair is standing before Judge Sage's bench for the first time. The court's confidentiality rules prohibit us from using her name. She seems like she's at the bottom of a deep hole.*

***Judge Sage:** You don't like yourself right now, right? You don't feel like you're a very good person right now.*

***Unidentified Woman:** No.*

***Judge Sage:** You're a good person, okay? And you wouldn't be in this program unless you can make it and be successful. We're not going to put you in here so you can fail (Shapiro, 2006).*

At the moment of this recording, the unidentified woman heard in this story was making her first appearance before the judge who would be responsible for overseeing her mental health treatment for the next year. After being arrested for a nonviolent felony, and meeting the court requirements for mental illness, this woman was offered the option to divert her case into a specialized "mental health court." Entry into the mental health court allowed her to avoid a jail sentence that would follow a guilty verdict. But to gain admittance, she had to waive her right to a trial, and agree to undergo months of time-intensive, court-supervised mental health treatment. Unlike a typical court, the judge will continue to speak to this woman directly and informally as he monitors her treatment progress—offering her encouragement, praise, admonishment, or punishment as he deems therapeutically fit. Should she comply with the court treatment guidelines (i.e. taking her medication, attending therapy, etc.), the felony offense that triggered her arrest will be stricken from her record. Should she fail, she will face incarceration.

All across the United States, similar "problem-solving" courts are being instituted at a staggering pace. Today, just twenty years after the first drug court was founded in Miami,

Florida, there are more than 3,000 problem-solving courts nationwide. They include a wide variety of specialized criminal courts that radically break with traditional adjudication procedures. The courts divert criminal defendants away from jail and into court-supervised treatment regimes, all with the intention of fixing some “root” condition presumed to underlie their criminality. Drug abusers are tried in drug courts, the mentally ill in mental health courts, batterers in domestic violence courts, and veterans in veteran’s courts. Armed with unprecedented bipartisan support, these courts are not transient, or small-scale—already they have changed the landscape of criminal justice in America.

Despite the diversity in the populations these different courts serve, and despite the considerable heterogeneity among courts of the same type, problem-solving courts share important common elements. The courts all utilize collaborative and informal court processes to foster a therapeutic environment inside the courtroom (Rottman and Casey 13). Judges are unusually active in monitoring treatment progress: they speak directly to clients, offering them verbal praise (including even the occasional “I love you”) and admonishments; they administer penal sanctions when deemed necessary. Eschewing the adversarial structure that has traditionally defined the American legal system, these specialized courts employ a collaborative structure so that the judge, prosecutor, public defender, and treatment providers are all participants on the same court treatment team. In problem-solving courts, the therapy starts within the courtroom. This medico-judicial phenomenon is encapsulated in the symbol of the biggest lobbying group for problem-solving courts, the National Association of Drug Court Professionals (NADCP): a judicial gavel embraced by two intertwining medical snakes (see Appendix).

How, exactly, are we to understand the rapid expansion of problem-solving courts? To be sure, the story of the emergence of drug courts, the first of the problem-solving courts, has been told countless times. However, I account for the emergence of these courts historically, and examine their socio-political implications, in a way that has not yet been attempted. This project is the first in the field that investigates how and why the particular judicial innovations that took place in the first drug court, Miami-Dade, were captured by a parallel academic development in mental health law, “therapeutic jurisprudence.” An understanding of this pairing is critical, because once coupled, the practices and ideology of therapeutic justice have been able to extend far beyond drug courts—and encroach on the civil rights of an ever-growing population of adults.

In the first section of the paper, I seek to situate and differentiate my project in the context of the most influential existing sociological literature on the drug court movement, and explain my choice of theoretical framework and methodology. Second, I delve into the specific history of the first drug court, with particular attention paid to the way in which the War on Drugs created a multi-faceted crisis for the criminal justice system, and how, pushed to the breaking point—Miami-Dade’s drug court was first instituted. Third, I document the reactionary rise of therapeutic jurisprudence out of mental health law post-deinstitutionalization, and demonstrate that it was only after non-adversarial intra-courtroom transformations took place in the first drug courts that the burgeoning field of therapeutic jurisprudence aligned with the drug courts. I then illustrate how, once therapeutic jurisprudence was able to overlay itself onto pre-existing drug court practices, the success of the movement reflected back onto the legal doctrine, helping to launch a theoretical movement that has applications far beyond the realm of problem-solving courts. In the final section of my paper, I discuss the future of problem-

solving courts and therapeutic jurisprudence, paying attention to current legal contestation of problem-solving courts, and the likelihood and implications of the courts' continued expansion.

### LITERATURE REVIEW

In order to contextualize my project and its significance, it is necessary to examine other contributions in this field. I begin by reviewing the work of James Nolan Jr., who is one of the nation's foremost academic experts on problem-solving courts and therapeutic justice. Nolan has devoted much of his career to studying drug courts as an exemplary manifestation of what he believes is the dominant cultural mode of American society: the "therapeutic ethos." He uses drug courts as a contemporary case of therapeutic state practices, and devotes a section of his book, *The Therapeutic State: Justifying Government at Century's End* (1998), to them. He extends his investigation of drug courts in *Reinventing Justice: The American Drug Court Movement* (2001), which seeks to uncover the structural and cultural underpinnings of the drug court movement in America. In this text, the first monograph on the drug court phenomenon, Nolan traces the historical emergence of the institution and works to map out the implications of the movement on the theory and practice of justice in America. Drug courts, he argues, cannot be understood merely as the latest invention of U.S. drug control policy, but rather as the embodiment of a larger move towards a transformed mode of "therapeutic justice."

Nolan observed dozens of drug treatment courts and the National Association of Drug Court Professionals (NADCP) conferences to prepare for *Reinventing Justice*. His research provided rich material for analysis of both the inner workings of the courts themselves, as well as the larger movement. Nolan alleges that the structural factors (i.e. court and prison

overcrowding) that may have provoked the institution of the first courts are not sufficient to explain the massive proliferation of “problem-solving courts” and their theoretical partner, therapeutic jurisprudence. He believes that drug courts responded in part to a new dominant “therapeutic ethos” of American society, which he characterizes as an “elevated concern with the self, by a conspicuously emotivist form of discourse and self-understanding, by a proclivity to invoke the language of victimhood and to view behaviors in pathological rather than moral/religious terms, and by the elevated social status of psychologists and other therapeutic practitioners” (“Reinventing Justice” 47).

Nolan struggles to draw clear boundaries between the “new” concept of therapeutic justice and the concept of offender rehabilitation, which scholars and political activists alike have fixated on for centuries. He contends that while rehabilitation focused on bringing the offender’s behavior in line with social norms, the contemporary therapeutic ethos calls for individual liberation and self-actualization. His evidence exposes that the emphasis drug courts place on treatment facilitates the circumvention of defendant civil liberties in a strikingly similar fashion to older, largely discredited rehabilitative practices of the 1950s and 60s. However, arguing against his own findings, Nolan insists that drug courts inhabit a new therapeutic ethos that is markedly different than a rehabilitative project of social normalization. Nolan’s efforts to reify the dichotomy between therapeutic and rehabilitative justice causes him to miss the critical continuities between the therapeutic justice of the contemporary drug court and the rehabilitative justice characterized best by pre-1970s civil psychiatric commitment procedures. In this paper, I utilize Nolan’s primary research on the drug court movement precisely because I disagree with his interpretation of the evidence he puts forth. Through analyzing the emergence of drug courts and therapeutic jurisprudence through a contrasting theoretical lens



from Nolan's own, I aim to expose how his own research supports a divergent account of their history and political implications than that which can be found in *Reinventing Justice*.

## TWO TALES OF THE THERAPEUTIC

Conflicting schools of thought emerged in 20<sup>th</sup> century social theory, particularly in the 1960s and 1970s, regarding the implications of a sudden rise of a possible therapeutic culture. One tradition, which Nolan identifies with and relies heavily on, stems from the work of Philip Rieff. Nolan and other scholars, most notably Christopher Lasch, use Rieff's conception of the therapeutic as a starting-point for much of their broader sociological analysis of America's contemporary cultural and political landscape. Rieff's book, *The Triumph of the Therapeutic: Uses of Faith After Freud* (1966) is the exemplary text describing the supposed rise to cultural dominance of this therapeutic impulse. *The Triumph of the Therapeutic* is a lament of what he identifies as the impending death of Western culture—thanks to both the demise of Christian faith as the central moral organizing system in society and an insurgent psychoanalytic attitude that seeks to limit the powers of the “super-ego and, therewith, of culture” (Rieff 13). Rieff argues intellectual elites have misinterpreted Freud's true legacy, and by taking only bits and pieces of his psychoanalytic theory, have contributed to the rise of a new type of self-worshipping “psychological man,” who is resistant to submission to moral demand systems, and thus unable to reach transcendent communal ends. Rieff writes, “All morality, be it ascetic or hedonistic, loses its force with a therapeutic outlook” (Rieff 22). For Rieff, the ascendance of psychoanalysis and its corollary, the “therapeutic ethos,” is devastating for social control.

Even a cursory reading of drug courts suggests that the therapeutics practiced there do little to undermine the social and moral authority. Thus, I contend that another theoretical

tradition proves more useful in critically analyzing the implications of the contemporary drug court movement than Rieff's—that of Philosopher Michel Foucault. Like Rieff, Foucault also documents the rise of “psychological man,” but he argues that the development of the psychiatric apparatus had the opposite effect on the vitality of social and moral authority in Western culture. Rieff himself saw his scholarship as a counterpoint to Foucault's. James Poulos, in a book review of one of Rieff's last works, notes, “Rieff identifies ‘the great Professor Foucault’ as his perverse obverse” (Poulos, 193). Employing Foucault's antithetical theoretical framework allows me to cast new light on an already well-studied case; it opens up a novel way of understanding the continuities drug courts share with rehabilitative practices of pre-1970s judicial system, the functioning of guilt in these courts, and the ways in which they intensify coercive penal practices.

In his book, *Discipline and Punish*, Foucault lays the groundwork for a theory of the therapeutic that stands in stark opposition to Rieff's—one in which the psychological and penal apparatuses have become deeply intertwined. Foucault begins by tracing the decline of the spectacle of public torture and execution along with the concomitant rise of non-corporal penal practices. He asks, “If the penalty in its most severe forms no longer addresses itself to the body, on what does it lay hold?” His answer: “the soul” (16). In this transition, the offense, the crime itself, is no longer the only object of judicial judgment. Instead, he writes, “judgment is also passed on the passions, instincts, anomalies, infirmities, maladjustments, effects of the environment or heredity; acts of aggression are punished, so also, through them is aggressivity; rape, but at the same time perversions; murders, but also drives and desires ” (17).

Foucault argues that the project of judging souls brought about the entrance of psychiatric expertise into the penal apparatus. He writes:

By solemnly inscribing offences in the field of objects susceptible of scientific knowledge, they provide the mechanisms of legal punishment with a justifiable hold not only on offences, but on individuals; not only on what they do, but also on what they are, will be, may be (18).

In this way, punishment became inherently indeterminate and forward-facing; judicial concern for just retribution based on the crime itself was greatly diminished in favor of endless calculation of an offender's rehabilitative prospects. Justice based on precedents could not do this type prognostic work alone, thus we see the emergence of what Foucault calls the "scientifico-judicial complex" (18).

What developments ushered in such an intense transformation of judicial processes? According to Foucault, the practice of soul-saving was fundamental in the shift to a judicial perspective where guilt and innocence became contingent on madness and sanity. Originally, it was understood that there could be no crime or offense if the offender was "of unsound mind at the time of the act" (18). To be mad meant one could not be guilty. However, Foucault maintains that this logic was distorted when it became accepted that "one could be both guilty and mad; less guilty the madder one was; guilty certainly, but someone to be put away and treated rather than punished" (18). This initiated the practice of calling in psychiatric expertise to assess the degree of madness of any particular soul. The effect that this shift had on the penal system was unprecedented. Foucault writes,

...every crime and even every offence now carries within it, as a legitimate suspicion, but also as a right that may be claimed, the hypothesis of insanity...and the sentence that condemns or acquits is not simply a judgment of guilt, a legal decision that lays down punishment; it bears within it an assessment of normality and a technical prescription for a possible normalization. Today the judge—magistrate or juror—certainly does more than judge (20).

To determine the level of cognitive normality, and thus the status of the offender's soul more generally, courts were forced to rely on extra-judicial medical authorities to assess offenders

and advise proper punishment and/or rehabilitation. Foucault argues that psychiatry and related psychological and scientific discourses thus became inevitably entangled with the “practice of the power to punish” (23). Moreover, Foucault believes it is unproductive to study the history of penal law and human sciences separately; instead, one must view the “technology of power the very principle both of the humanization of the penal system and of the knowledge of man” (23).

The medico-judicial matrix that underpins Foucault’s *Discipline and Punish* is also found in his study of the psychiatric asylum, albeit in an inverted form. In his book *Madness and Civilization*, Foucault argues that the birth of the asylum was anything but a liberatory philanthropic psychiatric intervention:

The asylum of the age of positivism, which it is Pinel’s glory to have founded, is not a free realm of observation, diagnosis, and therapeutics; it is a juridical space where one is accused, judged, and condemned, and from which one is never released except by the version of this trial in psychological depth—that is, by remorse. Madness will be punished in the asylum, even if it is innocent outside it. For a long time to come, and until our own day at least, it is imprisoned in a moral world (269).

Here, I propose that far from moving outside of judgments of guilt and innocence, or morality and immorality, the asylum recreates the same punitive judicial processes. Foucault also indicts psychoanalysis (although for entirely opposite reasons as Rieff). Instead of encouraging the “atomized” (Rieff 11) individuals with no concern for the moral authority of Rieff’s fears, Foucault argues that psychoanalysis only recreated the relations between the patient and psychiatrist of the authoritarian asylum. He writes, “Psychoanalysis doubled the absolute observation of the watcher with the endless monologue of the person watched—thus preserving the old asylum structure of non-reciprocal observation but balancing it, in a non-symmetrical reciprocity, by the new structure of language without response” (251).

Unlike Rieff, Foucault finds everything but emancipation from social authority in the emergence of therapeutic psychological apparatuses. The central thesis of *Discipline and Punish* is precisely that the rise of soul-manipulation in offender rehabilitation, despite offering the appearance of a diminution of intensity of punishment, actually opened up the entire social body to penal control. Thus, one sees the initiation of a “carceral archipelago,” spreading into schools and courts, not only the asylum and prison:

The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the ‘social worker’-judge; it is on them that the universal reign of the normative is based; and each individual, wherever he may find himself, subjects to it his body, his gestures, his behavior, his aptitudes, his achievements. The carceral network, in its compact or disseminated forms, with its systems of insertion, distribution, surveillance, observation, has been the greatest support, in modern society, of the normalizing power (304).

Foucault’s conception of the rehabilitation-oriented carceral archipelago underscores the way in which psychological and carceral apparatuses can be thought to act in symbiosis, mutually reinforcing one another other. Again, Rieff’s notion of the “therapeutic ethos,” could not be more opposed to Foucault’s line of thought. If, as Rieff argues, the rise of “psychological man” triggered the death of moral and social authority, would not rehabilitative state practices be expected to suffer as well?

In *Reinventing Justice*, Nolan also cites Francis Allen’s book, *The Decline of the Rehabilitative Ideal* (1981), which takes Rieff’s “therapeutic ethos” to its implicit criminal justice end-point. Allen’s defines the rehabilitative ideal of the criminal justice system 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 satisfaction of offenders” (Allen, 2). In addition to documenting the rapid decline of the rehabilitative ideal and rehabilitative practices in 1960s and 1970s, Allen seeks to uncover the American cultural context that accounted for

ideal's swift fall out of favor. Echoing Rieff, Allen argues that it was the "decline of social purpose," brought on by a myriad of political and social developments—everything from Freudian psychoanalysis and the rise of Rieff's "therapeutic man" to the black radicalism and the Vietnam war—that triggered the collapse of moral authority and thus the rehabilitative ideal in America (Allen 28-30). In order for a judicial regime of rehabilitation to be legitimate, Allen contends, the cultural and political climate must be one in which the criminal justice system (or the government more generally) is endowed with enough moral authority to conduct projects of social normalization. The rise of the "therapeutic ethos," for Allen, is not only compatible with the decline of the rehabilitative ideal, but a considerable factor in its demise (Allen, 28).

Allen accurately documents the considerable decline of rehabilitative state practices in the 1970s; the decade saw enormous political upheaval that helped bring an end to judicial practices in the psychiatric asylums, juvenile courts, and prisons that circumvented civil rights in the name of rehabilitation. Moreover, the determination of the validity of Allen's assessment of the cultural determinates of the decline is outside the scope of this present project. I do, however, wish to explore whether the 1990s emergence of drug courts and therapeutic jurisprudence can be better interpreted in a Foucauldian framework, where the lines between the therapeutic and rehabilitative are blurred and the practices work together to extend penal authority, instead of relying on the cultural analyses of Rieff and Allen, who pit the two in opposition.

#### DRUG COURTS AND THE REBIRTH OF THE REHABILITATIVE IDEAL

Nolan's *Reinventing Justice* is loaded with descriptions of the many ways drug treatment courts embody an exquisite example of rehabilitative justice—and yet, he resists at

every turn critically analyzing it as such. With a cursory glance one sees how the courts offer offender treatment instead of traditional punishment as a means to get to the real root of criminal activity in classic rehabilitative fashion. Even more importantly, Nolan illustrates the way in which drug treatment courts are characterized by non-adversarial courtroom “treatment teams” that lack constitutional protections. In addition, Nolan writes of the way in which drug treatment courts appeal to liberals mainly because in their focus on treatment instead of incarceration, they have “ostensibly more humanitarian and rehabilitative qualities” than traditional courts. If the NADCP website is any indication, the drug court message is precisely one of transforming lives and saving families through sobriety. Nolan also stresses that drug courts may facilitate more state intervention into an individual’s life than traditional modes of punishment. He goes as far as to quote a judge he spoke with, who claimed that drug courts were not only more time-intensive and demanding than traditional probation, but that in some ways, drug courts are more demanding than prison itself (“Reinventing Justice” 55).

In spite of his own evidence, Nolan makes a false therapeutic/rehabilitation distinction for two reasons. His stated reason is because he feels he needs to reconcile the vitality of the drug court movement in the years after 1960s and 1970s, which saw many successful and massive legal and political challenges to the “*parens patriae* doctrine of benevolent coercion” characterized best by state institutionalization of the mentally ill and denial of due process in juvenile courts (“Reinventing Justice” 177). The seeming death of the rehabilitative ideal in the 1970s, however, does not seem sufficient reason for Nolan to avoid asking the question as to whether the explosion of drug treatment courts may actually signal a rehabilitative resurgence. Indeed, as multiple authors were quick to point out in a book of essays that Nolan edited a year later (*Drug Courts: In Theory and Practice*, 2002), drug courts, more than any other recent

judicial phenomenon, may signal a return to the predominance of rehabilitative justice complete with all of the same due-process pitfalls that were elucidated at great length in the 1960s and 1970s.<sup>1</sup> Nolan's resistance to seeing the rise of therapeutic jurisprudence as a resurgence of rehabilitative justice is due to his theoretical commitments to Rieff and Allen and their conception of the "therapeutic ethos" as necessarily opposed to the rehabilitative ideal and social authority more generally. As a consequence, Nolan fails to fully make use of all the extensive scholarship of rehabilitation in his analysis of the rise of drug courts and therapeutic jurisprudence, because he is entrenched in his previous work that relied so heavily on Rieff's conceptualization of the therapeutic.

As Nolan begins to recognize at the end of *Reinventing Justice*, the self-liberation of a therapeutic culture is one that's focused on self-liberation from sickness and disease—not liberation from judicial oversight, or, more generally, social control. In fact, as Nolan acknowledges,

The possibilities for expanded judicial authority in the drug court may extend not only to a growing number of populations in the criminal justice system but to a deeper penetration into the life, mind, psyche, and soul of the individual client. The liberated self, ironically, is now open to the therapeutically defined machinations of judicial oversight (184).

Reading drug courts with more of an eye to Foucault's theoretical tradition than Nolan did, one wouldn't have found the notion of therapy opening up the soul of the individual to more judicial oversight ironic at all, but entirely predictable.

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<sup>1</sup> The following authors with essays in *Drug Courts: In Theory and Practice*, 2001, ed. James Nolan, Jr. all see drug courts as following in the tradition of rehabilitative justice: James McColl, in "Theory and Practice in the Baltimore City Drug Court;" James J. Chriss, in "The Drug Court Movement: An Analysis of Tacit Assumptions," Philip Bean, in "Drug Courts, the Judge, and the Rehabilitative Ideal;" and Richard C. Boldt, in "The Adversary System and Attorney Role in the Drug Treatment Court Movement."



Furthermore, Nolan claims that the therapeutic ideal found in the drug treatment court movement is distinct from traditional rehabilitative justice because drug courts seek to incorporate the therapeutic ideal within the adjudication process itself, whereas rehabilitation was only realized post-disposition ("Reinventing Justice" 37). In this paper, I take an alternate position. I intend to illuminate the way in which it was not until drug courts co-opted the intra-courtroom jurisprudence of pre-1970s civil commitment in the form of non-adversarial "drug court treatment teams" that the drug court movement as we now know it was sparked. I hope to build on the work of James Chriss and Richard Boldt in particular, who argue, in contrast to Nolan, that a number of core features of the adjudication process of drug courts--particularly the non-adversarial role of the defense attorney and procedural informalities--were present in the heavily critiqued "rehabilitative ideal" (Boldt 115). To do so, I will examine the way such intra-courtroom transformations took place in the first drug courts, and why such "innovations" mapped on perfectly with the nascent field of the therapeutic jurisprudence in the early 1990s. Only through embracing such a lens can the current critique of drug treatment courts by legal scholars can be put into context, allowing the ramifications of the continued proliferation of problem-solving courts and therapeutic jurisprudence to be fully appreciated.

#### A NOTE ON METHODOLOGY

To tell the story of the emergence of drug courts, their joining with therapeutic jurisprudence, and the rebirth of the rehabilitative ideal, I will not to rely only on the central actors' accounts of their own history. I am compelled to treat the self-conceptions of the criminal justice players with considerable skepticism because they have such a significant stake in the drug movement's ongoing success. However, because it has been the founding

judicial institutions themselves that have put forth much of the drug court movement's history to date, an alternative method of analysis is necessary. In light of these concerns, I have chosen to adopt elements of Michel Foucault's proposed methodology for the analysis of the history of power relations. In doing so, I am able to instead analyze the causes and implications of the drug court movement in terms of the way in which previously taken-for-granted judicial practices became problematic and necessitated new institutional practices (Foucault, "Fearless Speech" 74).

I hesitate, for example, to take the National Association of Drug Court Professionals' (NADCP) account of the history of drug courts at face value. Their website states:

The first Drug Court was in Miami-Dade County, Florida in 1989. Tired of the same faces and the same cases repeatedly appearing before the court, a **visionary group of justice professionals decided that the system as it existed was broken and there had to be a better way** (NADCP, "History"). [Emphasis in original text].

The NADCP is an enormous lobbying group for the nation's drug courts, so of course much of the information they provide about the courts is to be treated with skepticism. The important point here, however, is that they, like other historians, privilege the history-making force of the decisions of a "visionary group of justice professionals" over, for example, the socio-economic crises that was plaguing the judicial system at the time of the first court's birth.

In his lectures, *Society Must Be Defended*, Foucault presents a method for addressing the concern raised above. He states, "My goal is not to analyze power at the level of intentions or decisions...on the contrary, to study power at the point where his intentions—if, that is, any intention is involved—are completely invested in real and effective practices" (28). In addition, Foucault proposes an ascending analysis of power that also guides this effort:

Our object is not to analyze rule governed and legitimate forms of power which have a single center...our object is, on the contrary, to understand power in its most regional forms and institutions, and especially at the points where this power transgresses the rules of right that

organize and delineate it, oversteps those rules and is invested in institutions, is embodied in techniques, and acquires the material means to intervene, sometimes in violent ways (28).

The drug court movement, I hope to show, is an almost perfect case of the type of phenomenon Foucault is interested in—one where a regional institution transgressed the traditional organizing principles of the United States judicial system and acquired a new mode of intervention. Taken together, Foucault makes a compelling case for employing a paradigm shift away from modes of historical analysis in which theory drives practices, towards one where techniques precede and call forth theoretical rationalization. In *Security, Territory, and Populations*, he cites the case of smallpox vaccination as an example of a practice that while wildly successful, could not be explained or even thought about based on the medical theory of the time. He writes, “We have, then, techniques that can be generalized, are certain, preventative, and absolutely inconceivable in terms of the medical theory (58).

While the techniques of the first drug courts may have been conceivable for legal theorists at the time, as I will show, there was a considerable delay before the burgeoning field of “therapeutic jurisprudence” in the academy discovered the practice of drug courts. The primary aim of this project is the substantive examination of how and why such drug courts emerged, and the consequences that the movement has had on criminal justice in America. However, with an eye towards methodological precautions set forth by Foucault, my secondary goal is to attempt to write a narrative history of the phenomenon that avoids slipping into a documentation of intentions. In doing so, a richer and more accurate portrait of drug courts comes to light—one in which the overlap of actual practices and legal theory is not taken for granted.

## THE EMERGENCE OF DRUG COURTS

Richard Nixon declared the “War on Drugs” in his 1968 campaign for the U.S. presidency as the principal component of his law-and-order platform (Baum, xi). Within just a few years of his presidency, the hefty portion of federal budget spent on the drug war created a situation in which the criminal justice system had been pushed to the breaking point with narcotics cases. Especially in urban centers, the criminal justice system was faced with a two-part problem: the courts were overflowing with drug cases, and the prisons were overcrowded with drug offenders. Today, drug courts are the latest and most successful adaptation the criminal justice has instituted to deal with the economic crisis brought on by the War on Drugs, but they were not the first. Consistent with my proposed methodology, in this section, I put forth a history of the emergence of drug courts that has not yet been told. In contrast to traditional accounts, I will demonstrate how the innovations of Miami-Dade came into being not simply because a new idea was thought-up, but instead because the structural crises of docket-overflow and prison overcrowding, when combined with a intense public demand for a continued War on Drugs, *necessitated* the new practices of the nation’s first drug court.

### Incomplete Fixes: Drug Court Precursors

Almost twenty years before the first drug treatment court was established, New York City created special drug courts in response to the overwhelming rise in drug charges brought about by the draconian “Rockefeller Drug Laws” of 1973. These laws called for a 15-year prison term for anyone selling 2 ounces or possessing 4 ounces of narcotics (Mauer 5). New York City reacted by establishing separate “narcotics courts” in order to concentrate drug case expertise in one courtroom, reduce the time of the disposition of drug cases and relieve

pressures on the non-drug felony caseload. The special narcotics courts, which would later be known as Expedited Drug Case Management (EDCM) courts, increased trial capacity for both drug and non-drug offenses, in part by establishing a “going-rate” for plea bargains. These courts were able to get quicker pleas from the defendants in return for pre-packaged sentences.

In the 1980s, the federal government dramatically increased federal funding for the drug war. The budget increased from \$1.5 billion in 1981 to \$6.6 billion in 1989 (Mauer 6). This increase in funding helped bolster enforcement efforts, which in turn led to an increase in drug arrests (134%) that far exceeded the rate of total arrests (37%), (Belenko and Dumanovsky 2). In response, other cities (Chicago, Milwaukee, Philadelphia) began to use similar “expedited drug case management (EDCM)” courts with the same effects as New York City (Belenko 4). Like New York City, these courts mainly heard non-violent possession cases, although some handled low-level drug sale cases as well (Belenko and Dumanovsky 4). Drastic increases in the United States prison population also accompanied the more punitive criminalization of drug use and abuse in the 1980s. Between 1980 and 1996, the United States prison population tripled, and increases in sentencing severity accounted for 88% of the increase--only 12% was caused by actual increases in criminal activity (Mauer 6). EDCM courts solved issues of court docket overloading, but they failed to address the jail- and prison- overcrowding crisis, as they still relied on incarceration as the main sentencing tool.

The Treatment Alternatives to Street Crime (TASC) program, another drug court antecedent, tackled the prison problem in a way the EDCM courts could not. Initiated in 1972, TASC sought to address prison over-crowding—the second crisis of the criminal-justice system—by diverting drug offenders into community-based treatment, either pre-trial or as a

component of probation. Non-violent offenders who tested positive for drugs while in jail, awaiting trial, could elect to go to outpatient drug treatment instead. TASC officials would report back to the court periodically, and if offenders completed their program, their criminal charges would be dismissed. In this way, TASC linked two very different perspectives on drug abuse, that of treatment providers, who treat drug users as patients instead of offenders, and that of the criminal justice personnel, who understand behavior in legal-rational instead of pathological terms (Nolan, "Therapeutic State" 83). As Nolan writes, "TASC seeks not necessarily to fuse the two orientations but to supplement traditional adjudication with treatment services...with TASC as the link, the courts themselves do not get involved in treating the drug user" (83). Despite its cost-saving measures, the federal government pulled funding for the nation's 130 TASC sites in 1982 (Nolan, "Therapeutic State" 83). Some states and local governments picked up the tab in the following years and the program continued to expand, even in the absence of much federal funding. A government report on TASC highlights the way in the program in 1991 still attempted to push for its maintenance as an independent linkage between the treatment and criminal justice systems. It states, "The critical elements' require that a TASC program be an independent entity—structurally autonomous and self-governing so that it can objectively serve the needs of the client, the treatment system, and the criminal justice system" (Inciardi and McBride 26). Still, TASC never managed to obtain the widespread status and acclaim that the drug court movement has enjoyed. Indeed, it wasn't until Miami-Dade combined the expediency of the separate court docket of the EDCM courts and the TASC model of prison diversion with non-adversarial courtroom proceedings the "drug court revolution" was truly unleashed.

## THE MIAMI-DADE MODEL

In 1989, Miami, Florida was considered the cocaine capital of the world (Orr et al. 16). Drug-related offenses accounted for the majority of all crime in Miami, a city that boasted the second highest crime rate in the nation (“Miami Selected” 1). Nightly police sweeps brought in as many as 200 new drug violators a day to the county jail (Isikoff and Booth 1). As a result, their district court docket was overwhelmed with felony drug cases, and Florida jails and prisons overflowed with drug offenders. By the late 1980s, the costs of massive incarceration could no longer be ignored. A federal mandate gave the Florida Supreme Court an ultimatum: either reduce the inmate population or suffer the loss of federal funds (Florida State Courts). That summer, Miami-Dade County became the first drug treatment court in the nation. The court was a new type of “special drug court” that diverted defendants out of the clogged Miami jails, and into a rigorous court-supervised drug treatment program. The model of Miami-Dade’s drug treatment court would stick—by 2009, just two decades later, 2,301 drug courts have been established in the United States (NADCP, “History”).

The court was initiated with full partnership of State Attorney Janet Reno, Chief Judge Herbert Klein, and Chief Public Defender Bennett Brummer. This collaboration took the criminal justice system’s oversight of drug treatment in a new direction by discarding traditional adversarial courtroom procedure. At its inception, first time drug offenders charged with possession or purchasing drugs were offered the option of waiving their due-process procedural rights to a traditional trial in order to enter an intensive 12-month court-supervised drug treatment program. Once inside the drug court, the defense attorney, prosecutor, and judge work together as a single team to keep the drug court participants adhering to treatment.

In adopting this courtroom procedure, the Miami-Dade drug court was able to avoid costly trials without the loss of coercive power.

Klein publicized the new courts as the latest installment of the War on Drugs in Miami, this time shifting the focus away from “supply” and instead towards “demand.” He stated in the press release announcing the new courts, “All Dade County resources must be mobilized in our war against drug and alcohol abuse...no issue is more critical” (“Dade County” 3). Klein’s invocation of the War on Drugs reflected the political climate of the time. The nation’s appetite for a tough stance on drugs, especially on drug users, remained high. In 1989, drug enforcement efforts were punitive as ever—and the majority of the public was behind it. That year, sixty-two percent of Americans said they would “give up some freedoms” to aid in the fight against drug abuse (Baum, 277). In such a climate, one can see why TASC’s approach to prison diversion was not sufficient: the Miami-Dade court could allow drug users to avoid prison only to the extent that the intensive court-supervision was involved.

Klein handpicked Judge Stanley Goldstein, a Brooklyn-native and former Miami cop and prosecutor to lead the new drug court (Nolan, “Therapeutic State” 92). A 1996 New York Times Article describes the dynamic scene of the seminal court, “Judge Goldstein’s courtroom bustles like many others, but a visitor quickly notices differences. The prosecutor and the public defender work in agreement, tears flow easily among defendants, and the judge often says, “I love you” (Navarro 2). It would be a mistake, however, to read the non-adversarial structure and ultra-personal moments of Goldstein’s court as indicating increased leniency when it came to the handling of drug offenders. Especially in contrast to the many TASC programs present in the state at the time, the Miami-Dade drug court facilitated a new level of court oversight and coercive power over its client’s treatment. Unlike TASC, where treatment



supervision was handled outside the courtroom, Goldstein supervised adherence personally. If he found a participant non-compliant with treatment (i.e. "dirty" urine samples), Goldstein had the ability to subject the individual to periods of "shock incarceration" intended to put the participant back on track. If consistently non-compliant, the participant could be dismissed from the program and sentenced to prison for years, up to the maximum sentencing guidelines allowed. Unsurprisingly, because the threat of incarceration overhangs all treatment, drug treatment defendants are found to have greater rates of treatment completion than those without the intense court-supervision. Drug offenders just provided with the option of treatment without court supervision drop out of programs 60-80% of the time (NADCP "Facts"). In this way, the coercive power of drug treatment courts is understood to be its "underlying strength in terms of successful drug treatment outcomes" (Hora, Schma, and Rosenthal 178).

As Nolan stresses, despite their "therapeutic" aim, drug courts are anything but "soft" on crime.

The Miami-Dade drug court was not the first attempt by states to save money on drug-related prison costs or relieve court docket pressure, but it was the first court to bring drug treatment into the courtroom. As with the EDCM drug courts, the Miami-Dade drug treatment court sought to streamline court dockets, increase case flow, and thus save time and money. Like TASC, it aimed to keep drug offenders out of jail and reduce drug offender recidivism by getting to the "root" of the criminal behavior. And yet, the Miami-Dade drug court also managed to break new ground. The novelty of Miami's court lay in its unorthodox intra-courtroom procedures, wherein the prosecutor and public defender agreed to work together in a non-adversarial fashion, allowing the judge to take an unusually active role in the proceedings and speak directly and frankly with offenders. As an early observer noted, "[the Miami drug court] is a system where traditional rules have been thrown out. The judge talks to the defendant not

the lawyers...And for the biggest change of all, there are no adversaries in Goldstein's court. The prosecutor, the judge, and the public defenders have all agreed to convince the defendant to choose treatment" (Stevenson 2). The payoff of these transformations in the state's handling of drug violations was huge; in 1993, the drug treatment program price-tag was \$600 per year, the cost to keep a drug offender in the county jail per year: \$17,000 (Isikoff and Booth 1).

Although the two programs shared similar goals, TASC officials did not take to the new model of drug treatment court kindly, perhaps largely for fear of being made irrelevant, but also because they found the judicial actors' newfound interest in participating in the drug treatment process disturbing. As one TASC official remarked, "judges should do judging, we do treatment...Let TASC do the treatment part" (Nolan, "Therapeutic State" 84). The TASC critique did not make much of an impact, if any, in stemming the tide of the growing drug court movement. Soon after its inception, the Miami-Dade drug court began to receive national media attention thanks to both its colorful, unusual courtroom practices, and the widespread belief that the innovative practices were less costly and more effective in reducing drug-related crime than traditional methods (Nolan, "Therapeutic State" 86). Undoubtedly intensifying the momentum of the spread of Miami-Dade model to other cities was President Bill Clinton's early and consistent support. Clinton visited the Miami-Dade court while still the Governor of Arkansas, as his brother-in-law, Hugh Rodham, was the Miami-Dade drug court public defender at the time (Isikoff and Booth 2). When Clinton appointed former Dade County State Attorney Janet Reno as Attorney General of the United States in 1993, the Miami-Dade drug court model was assured yet another powerful ally in Washington.

These alliances paid off for drug court professionals when Clinton signed the "Violent Crime Control and Law Enforcement Act of 1994," which provided \$1 billion of federal funding

for the burgeoning drug court movement. Interestingly, Clinton echoed Klein's efforts to re-focus the Drug War on cutting drug "demand" instead of "supply," in his justification for his administration's support of drug courts. In the same bill, he reduced funding aimed at stopping drug trafficking at the border by \$94 million (Nolan, "Therapeutic State" 80). Drug courts' combination of reduced criminal justice expenditures and enhanced court-oversight had substantial bipartisan appeal. With federal funding available and a winning Dade County model to emulate, hundreds of cities around the country began to institute their own drug courts.

### PROBLEM-SOLVING COURTS AND THE EXPANSION OF THE NONADVERSARIAL COURTROOM

As drug treatment courts began to sprout up all over the country, they spawned a paradigm shift in the way the criminal justice system interacted with issues of drug use and abuse; in many ways, criminalization was replaced with medicalization (Nolan, "Reinventing Justice" 204). Evidence of this major judicial transformation can be widely documented. For example, by 1997, there were 230 drug treatment courts in the country, and the Department of Justice commissioned the National Association of Drug Court Professionals to publish what is now one of the key texts in the drug court literature: *Defining Drug Courts: The Key Components*. The document states, "The mission of drug courts is to stop the abuse of alcohol and other drugs related to criminal activity. Drug courts promote recovery through a coordinated response to offenders dependent on alcohol and other drugs" (NADCP, "Key Components" 1). Interestingly, by 1997, the focus of drug courts had already shifted so much that efficient handling of illegal drug cases was completely de-centered, and instead comes a much wider mission—to promote rehabilitation of drug abusers of all kind that come into

contact with the criminal justice system—even those who happen to abuse a legal substance, alcohol.

Additional publications in support of drug treatment courts echo this new mission. For example, Hora, Schma and Rosenthal write,

DTCs view drug offenders through a different lens than the standard court system. In approaching the problem of drug offenders from a therapeutic, medicinal perspective, substance abuse is seen not so much as a moral failure, but as a condition requiring therapeutic remedies. As opposed to using the traditional criminal justice paradigm, in which drug abuse is understood as a willful choice made by an offender capable of choosing between right and wrong, DTCs shift the paradigm in order to treat drug abuse as a “biopsychosocial disease” (122).

Despite the authors’ insistence that drug courts shed a moralizing lens by making drug use a “medical” issue, I argue that these courts simply open up a different kind of moral discourse. The discourse of drug court supporters is laden with moral overtones of personal and family transformation as offenders move from addiction to sobriety through the benevolent hands of drug treatment courts. What may have started as cost-saving measure for cash-strapped local municipalities and state governments has transformed into a national effort to use the states coercive powers of incarceration to normalize the lives of hundreds of thousands of individuals.

Nolan, in his book, *Reinventing Justice*, misreads the impact of medicalization on notions of guilt in the drug court. He describes how in drug courts, though admission of guilt is not a requirement of sentencing, admission of addiction is absolutely necessary to be let free. Nolan observes, the “the drug court demands a therapeutically revised form of confession: ‘I am sick’ instead of ‘I am guilty’” (142). Much in the vein of Rieff, Nolan finds the prospect of guilt’s growing irrelevance in the contemporary drug court disturbing. He writes, “The jettisoning of guilt may well represent the most important, albeit rarely reflected upon, consequence of the drug court. If, as Philip Rieff argued, culture is not possible without guilt,

one wonders what will become of a criminal justice system bereft of what was once its defining quality" ("Reinventing Justice" 143).

Tied to Rieff's work, which has since its inception pitted the therapeutic ethos against moralizing forces, Nolan cannot see the way in which guilt still remains alive and well in the drug courts, just in an internalized form. Foucault, on the other hand, writes of the process by which diagnosis of "sickness" entraps the individual in an intensely oppressive moral apparatus. He writes in *Madness and Civilization*,

...the madman, as a human being originally endowed with reason, is no longer guilty of being mad; but the madman, as a madman, and in the interior of the disease of which he is no longer guilty, must feel morally responsible for everything within him that may disturb morality and society, and must hold no one but himself responsible for the punishment he receives...In fact Tuke created an asylum where he substituted for the free terror of madness the stifling anguish of responsibility; fear no longer reigned on the other side of prison gates, it now raged under the seals of conscience (246).

Because drug courts still demand a confession of addiction, as Nolan notes, participants are not actually released from the forces of moralizing authority. The figures wielding such power are simply transformed. The detached, punitive magistrate of justice may be discarded in the American drug court, but he has only been replaced with a therapeutic courtroom team. And while the new team kindly offers their collective praises upon treatment completion, they wield the constant threat of incarceration in the case of failure. Proudly noted in early literature about Miami-Dade, is the fact that 60% of its clients who eventually graduated the program still spent more time in jail than they would have had they plea bargained the case (Finn and Newlyn 10).

In contrast to Nolan, who finds the "jettisoning of guilt" to be the most problematic transformation of justice present in the drug court model, other authors such as Richard Boldt, James Chriss, and William McColl, center their concern on the solidification of the non-adversarial courtroom structure that was so important to Miami-Dade's success. The second

key component of drug courts, according to the Department of Justice, is precisely the Miami-Dade team-approach. It states,

To facilitate an individual's progress in treatment, 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. (NADCP, "Key Components" 3).

To be on this treatment team, all parties of the courtroom are forced to forgo adherence to their traditional legal roles. Unsurprisingly, the establishment of new drug treatment courts has been often met with resistance from one or more of the courtroom actors. The judge, as previously described, takes on a much more active role in the courtroom, and the roles of the prosecutor and defense counsel are largely minimized. The prosecuting attorney has the potential to be so marginalized that a Rochester drug court observer likened the acting district attorney to a "potted plant" (Nolan, "Reinventing Justice" 83). Nolan describes how prosecutors lose considerable control in how to prosecute defendants; some contend that eligibility criteria should be more narrow, others that there should be more automatic and stiffer penalties. Prosecutors have presented obstacles to the formation of drug courts everywhere from Key West to Charlottesville ("Reinventing Justice" 83). These fights are relatively rare, Nolan writes, and usually "prosecutors are forced to get over their hang-ups and adapt to the overall purposes of the drug court" ("Reinventing Justice" 83) namely, the rehabilitation of the offender.

The transformation of the role of the defense attorney, from one of zealous rights-focused advocate to a conciliatory member of the "treatment team" has garnered the more attention from legal practitioners and scholars than that of any of the other legal actors.

Supporters of drug courts find the new role of defense attorneys absolutely crucial to the new therapeutic mission of the justice system. In a seminal article on drug courts Hora et al. write,

In stark contrast to the traditional role of a defense counsel to minimize a client's exposure to criminal sanctions, the [drug court] defense attorney tries to ensure that the addicted defendant stays in the treatment program until graduation...In accepting the therapeutic concept of the [drug court], defense counsel views success as a drug free client who is less likely to recidivate than the 'business as usual' client...With the consent of the defendant, the [drug court] goal becomes recovery from addiction and not the exercise of the full panoply of the defendant's rights (136).

According to Hora et al., the drug court defense attorney begins to bear very little relation to traditional defense counsel, most importantly because they privilege recovery from addiction over protecting their clients' constitutional rights to minimize state intervention into their lives to the full extent of the law. Hora et al. are far from alone in their positive reading of such a transformation--the U.S. Department of Justice cheered Miami-Dade for the very same innovation. Peter Finn and Andrea Newlyn published a piece through the National Institute of Justice in 1993, "Miami's 'Drug Court': A Different Approach." In it they summarize the achievements of the first few years of Miami-Dade. In one section of the report, "Defendants Cannot Play Their Usual Games," the authors observe,

Arrestees and program participants find they cannot manipulate the court system in the way they anticipate or have done in the past. They cannot ask the public defender to get them off on a technicality, lie to the probation officer, or get away with feigning innocence to the judge...In Drug Court, 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...And because all court officers work together rather than as adversaries, Judge Goldstein believes that defendants feel responsible not only to him but to the public defender and the prosecutor as well (4).

As Finn and Newlyn acknowledge, this transformation of roles and responsibilities does not have a neutral effect on the outcome of the defendants' case. Because defense attorneys have dual loyalty to both their client and the treatment team, they sometimes are forced to make decisions that are not in their client's best interest. For example, William McColl writes of the way in which defenders in drug courts will often mute their dissent to a judge's imposition of "shock incarceration" because it's considered part of the offender's treatment and they are part

of the treatment team (McCull 21). Other defense attorneys may see no problem with the judge speaking directly to the client, but this too potentially makes the client vulnerable, despite the motivational value of the direct contact. Richard Boldt argues that defense attorneys experience tension in their dual-roles when it comes to advising clients about disclosing personal information to the judge. While admission of past or continuing abuse of illegal substances may be important for addiction recovery, it also is information that could be used against their client should they fail in the treatment court, as only half of all drug court clients nationwide receive immunity for anything said in open court should they face future prosecution (Boldt 127). In agreeing to the procedural informalities that facilitate direct communication between the client and judge, the defense attorney lets go of her traditional responsibility to "limit the arbitrary exercise of coercive state power by safeguarding the defendant's entitlement to basic procedural rights" (Boldt 127).

Mental health courts, which use the same non-adversarial "court-team" model as the drug courts, have thus been subject to similar legal critique. When public defenders are accepted onto a collaborative team whose higher goal of "treatment" takes precedence over the "full panoply of defendant's rights," as Hora et al. explain, there is little doubt that negotiations for shorter periods of court-supervision, less frequent court appearances, or reduced instances of drug testing, get swept under the rug. There are additional risks for defendants that include the possibility that when the defense attorney is working full-time as a member of the "court-team," she may be influenced by strong of personal investments that may pressure defendants to choose the specialized court even when it is not in the best interest of their client. For example, Susan Stefan writes,

There is the issue of whether the choice to accept diversion to mental health court is truly voluntary. This assumption is questionable for a number of reasons. The people do not go into



the process understanding what mental health court is all about, and no one explains it to them in terms of benefits and drawbacks. Everyone in the system has a vested interest in these people accepting the mental health court alternative. The public defenders in Broward County, if Howard Finkelstein is any indication, support the mental health court and my student reported that the attorney's appeared to consider themselves part of the mental health court treatment team—all very informal and oriented to the mental health needs of the client. This is not an atmosphere conducive to knowing and intelligent decision making (Stefan and Winick 510).

Other authors have found evidence that Stefan's fears about entrance into these specialized courts may indeed be far from voluntary. For example, studies have shown that 46.3% of defendants in the Broward County, Florida mental health court did not understand that their participation in the court was voluntary, and an additional 29% said they did not know their participation was voluntary until after they had already gone through the court (Redlich 609).

In the end, the "innovative" non-adversarial drug court treatment team that is a key characteristic of the Miami-Dade model may not be so new. It is, in fact, highly reminiscent of a much older tradition of civil commitment, where in the name of patient "well-being," individuals would lose their right to the procedural protection of an adversarial hearing. As James Chriss contends, "the philosophy of drug courts is the same philosophy underlying civil commitment and the notion of *parens patriae*, namely, that the state has the obligation to divert certain defendants who pose a threat to themselves or others into treatment, in the process of circumventing due process" (202). Certainly, as Finn and Newlyn admit, it was the move away from traditional adversarial structure that made the Miami-Dade model so effective in its dual goals of efficiency and coercion. At the same time, this turn towards a "collaborative" criminal court opens up drug courts, and their offspring, problem-solving courts (i.e. mental health courts, veterans courts, domestic violence courts, etc.), to a liberal critique that helped to tear down the old rehabilitative jurisprudence of the asylum. However, as I hope to illustrate in the following section, drug court practices, when combined with a revised mode of rehabilitative

legal theory—therapeutic jurisprudence—may prove surprisingly resilient to such scholarly critique and constitutional legal challenges.

### THE RISE OF THERAPEUTIC JURISPRUDENCE

The 1970s ushered in an unprecedented decline of rehabilitative state practices for the mentally ill. In the 1950s, the state needed no public hearing to involuntarily commit a psychiatric patient to indefinite confinement—only a two-physician “certificate” agreeing that treatment was advisable was required (Wexler “The Law” 3). However, by the end of the 1970s, civil libertarians successfully abolished such practices and instituted procedural protections. By the 1980s psychiatric hospitals had been forced to institute formal commitment hearings, which helped to elicit widespread deinstitutionalization of the mentally ill. The libertarian attacks of the 1960s and 1970s on rehabilitative models of justice had been so successful that by 1989, the same year the first drug treatment court was founded, mental health legal scholars believed that the “psychiatrization” of the law, previously so pervasive, had been completely discarded in favor of protection of civil liberties (Wexler, “The Law” 3). The field of mental health law could now be described as “doctrinal, constitutional, and rights-oriented” (Wexler, “Essays” 17).

In 1987 law professor and mental health scholar David Wexler responded to the rejection of psychiatric influence over legal procedures by coining the term “therapeutic jurisprudence,” defined as “the study of the role of law as a therapeutic agent” (Winick xvii). Wexler argues for the need to put the “mental health back into mental health law:”

The lesson—learning to be skeptical of supposed scientific expertise—is an important one...but to the extent that the legal system---and even legal academics—now *ignore* developments in the mental health disciplines, the lesson of healthy skepticism has been overlearned (Wexler, “Essays” 7).

His prescription for the field was for mental health law scholars to draw on insights from psychology and psychiatry to so as to help the judiciary “better serve as a therapeutic agent” while staying within the bounds of rights-based judicial principles (Wexler 18). Wexler, highly aware of his nascent field’s susceptibility to attack by vigilant civil libertarians dubious of slide back into rehabilitative justice, often qualifies his propositions with the argument that therapeutic initiatives must align with rights-based justice. In fact, perhaps to fend off potential early criticism—his first project in *Therapeutic Jurisprudence: The Study of the Law as a Therapeutic Agent* explores the therapeutic value of the formal civil commitment hearing. He writes of the way in which, “libertarian commitment codes are arguably more therapeutic than are the alternative paternalistic commitment codes” (Wexler, “The Law,” 146).

Not wanting to antagonize the dominant civil libertarian legal framework, Wexler cleverly carves out the new field of therapeutic jurisprudence from within one of the most important libertarian victories with regards to the rights of the mentally ill. His caution certainly helped insulate him from much early criticism, and the field developed rapidly. Over the course of the following two decades, academic interest in therapeutic jurisprudence exploded as legal scholars of all types began to explore what consequences legal rules (e.g. “Don’t Ask, Don’t Tell”), legal procedures (e.g. hearings and trials), and legal actors (e.g. judges and lawyers) may have on the psychological wellbeing of defendants (Wexler “An Overview” 1). Despite the original focus on mental health law, the application of the therapeutic jurisprudence lens in academic literature is now flourishing outside of this original realm, influencing everything from workers compensation to sexual assault cases (Wexler, “An Overview” 5). In fact, therapeutic jurisprudence’s most celebrated victory grew out of a sector of the law foreign to the early proponents—narcotics.

## THERAPEUTIC JURISPRUDENCE MEETS THE DRUG COURT

Although drug courts developed independently without reference to therapeutic jurisprudence, now their association is deeply intertwined. Today, drug courts are widely viewed as the application of therapeutic jurisprudence *par excellence* (Wexler, "Symposium" 2). Drug court practices of non-adversarial treatment teams and procedural informalities, which emerged in isolation of Wexler's legal theory, are now seen as operating under the guidance of therapeutic jurisprudence. Based on the utilization of such tactics, drug courts are read by officials at the U.S. Department of Justice as the "best known example of a court for which therapeutic jurisprudence arguably provides the underlying legal theory" (Rottman and Casey, 13).

In many ways, drug court practices were initially beyond Wexler's imagination. His initial proposal for a more therapeutic judge, for example, does not come close to the transformation of this role that Stanley Goldstein embodied in the Miami-Dade courtroom, for example. In his early work, Wexler suggests, "With little difficulty and without a major change in role, judges can be sensitized to perform in a more therapeutic fashion...hearings will be more therapeutic if matters are more honestly expressed and if mixed messages are avoided" (Wexler, "An Introduction" 18). Similarly, Wexler's number one suggestion for more therapeutically sound attorney practices does not include the "treatment team," an innovative dynamic of the drug court. He proposes that efforts of lawyers to exclude the public if embarrassing material is about to be presented about their client in the courtroom. Early Wexler stresses that "where, like a criminal hearing, liberty is at stake, the adversary nature of an attorney's role is—or at least should be—at its highpoint" (Wexler "

The libertarian restraint characteristic of Wexler's early work almost completely disappears upon the field's discovery of the institutional practices of the early drug court movement. Drug court justices Peggy Hora and William Schma, with John Rosenthal wrote an influential article in the *Notre Dame Law Review*, "Therapeutic Jurisprudence and the Drug Treatment Court Movement," a decade after Miami-Dade. At the writing of that piece, the authors observed that therapeutic jurisprudence scholars "appear to be generally unaware of the existence, breadth, and importance of the drug treatment court movement in this country" (143). The authors acknowledge that the original courts were established to address structural problems plaguing the judicial system, and that "few early practitioners worried about the jurisprudential theory behind the drug treatment movement" (145). In spite of their origins, the authors argue "...Drug treatment courts unknowingly apply the concepts of therapeutic jurisprudence every day in hundreds of courtrooms across America" (145).

Thus, while supporters of therapeutic jurisprudence acknowledge that drug courts were born outside of the theoretical framework, they see the existence of drug courts as the blue-ribbon practical application of what was formerly an "ivory-tower" dominated theoretical movement. As Hora et al. write, "The success of DTCs and their subsequent rapid spread through the country prove that therapeutic jurisprudence can work when applied to legal problems with demonstrable physiological and psychological underpinnings" (186). In this way, the success of drug courts became the success of therapeutic jurisprudence, with the courts functioning as a "natural laboratory" for the application of therapeutic jurisprudence (Wexler, "Symposium" 2). Once therapeutic jurisprudence was able to overlay itself onto pre-existing drug court practices, the success of the movement reflected back onto the theory. This in turn helped to launch a theoretical movement that has applications beyond even the extensive

reach of problem-solving courts: namely in the creation of a new, therapeutic, criminal defense lawyer.

### THE NEW CRIMINAL DEFENSE LAWYER

In spite of existing critique of the role of the defense counsel in problem-solving courts, if Professor Wexler and his supporters have their way, a new type of “rehabilitative” defense lawyer, modeled after the drug court defense lawyer and trained explicitly in therapeutic jurisprudence, will be recognized in the criminal defense bar (Wexler “Rehabilitative” 4). Wexler envisions that these special defense lawyers will serve as “therapeutic change agents within the justice system to actively encourage clients to rehabilitate themselves, modify behaviors, and ultimately change their lives” (Wexler, “Rehabilitative” 8). Although some defense lawyers, especially in the private sector, are already adapting their practices to meet this new challenge, Wexler and his supporters also encourage public defender’s offices to think about how to incorporate a therapeutic jurisprudential approach (Wexler, “Response” 2). In this way, Wexler argues, the “ideal therapeutic jurisprudence (TJ) criminal lawyer will be like the drug court lawyer” (Wexler, “Rehabilitative” 10). He describes the role,

TJ criminal lawyers in whatever setting should, like drug court lawyers, practice with an ethic of care, psychological sensitivity, and ability to work effectively with treatment and mental health professionals...Nowhere do I suggest, however, that a TJ lawyer should serve simply as a member of an interdisciplinary team as, apparently, many drug treatment court lawyers do. Instead, the lawyer should work to create, coordinate, and lead a team, all in service of the client (Wexler, “Rehabilitative”10).

With the aid of the new TJ-criminal defense lawyer, even defendants committing crimes not usually tried in specialized problem-solving courts would be subject to a defense attorney-led treatment team whose primary goal is not the minimization of criminal sanctions, but rehabilitation.

The most notable critic of such a proposal, law professor Mae C. Quinn, published a biting response to Wexler entitled, "An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged." In this seminal article, Quinn argues that a TJ criminal defense model "not only runs the risk of displacing existing defense and clinical community values, but may well conflict with ethical and legal mandates for defense attorneys" (9). Quinn maintains that a defense attorney's constitutional mandate is the zealous representation of his or her client, and that the TJ model proposes a "narrow focus on client rehabilitation, depending upon the situation, may be incongruent with current requirements" (14). Such incongruities of a rehabilitation-centered defense may reside in the latent assumptions that such a position calls forth: that the client is guilty, likely to offend again, and in need of transformation. She argues that all three of these key assumptions may be both untrue, and also lack consideration of the clients best interest. In light of these fundamental problems with a TJ-defense attorney, Quinn suggests that Wexler might re-direct his attempts at making the justice system more therapeutic for defendants by promoting a "[therapeutic] legislature or executive branch to encourage government actors to better fund social service programs in poor communities and provide sufficient resources to already overworked public defenders' offices" (17).

Like Quinn, other legal critics have expressed concern that the privileging of ambiguous "therapeutic" outcomes inevitably undercuts other legal considerations—most importantly a defendants constitutional right to due process. In his article "Therapeutic Jurisprudence—Five Dilemmas to Ponder," Christopher Slobogin writes:

Therapeutic jurisprudence requires a focus on the therapeutic value of a rule, even a rule that is constitutional... Thus, empirical research indicating that adversarial procedures are antitherapeutic and no more accurate than informal procedures will create a strong urge to ignore legal precedent or at least to nullify it (by saying, e.g., that adults with schizophrenia would systematically waive the rights to counsel and confrontation if they knew what was good

for them). The logic of [therapeutic jurisprudence], in other words, may obscure any values encapsulated in the Constitution not connected with therapeutic results (17).

Slobogin and Quinn, like others, both ultimately allege that practices operating under the auspices of therapeutic jurisprudence are subject to the same constitutional challenges that the old psychiatric commitment procedures faced. However, the reworked concept of therapeutic jurisprudence may be even more insidious than the rehabilitative practices of the past. As more and more specialized problem solving courts modeled off of Miami-Dade's drug court take shape across the nation, the doctrine of *parens patriae* no longer applies to only the severely mentally ill or juvenile offenders—but to an exponentially growing number of American adults (Chriss 205).

### CONCLUSION

Whereas previous legal critique of problem-solving courts was largely isolated in the academy, in the past year, at least two significant legal contestations have erupted into the public domain. The first legal challenge to problem-solving courts was initiated in April 2009. Chief Public Defender Nancy S. Forster argued to the Maryland Supreme Court that the drug courts in her state were unconstitutional because they denied defendants due-process in that defendants were not allowed to be present at all “treatment team” meetings with the judges and counsel (violating his right to be present at trial), which allowed defendants to be sentenced to jail multiple times, which Forster argued was also a case of double-jeopardy, (*Brown v. State*). Quinn cheered Forster's challenge in an article about the case published in the *Washington Post*, saying “It's about time... These courts have been operating through the cracks of the law for a long time” (Cauvin B03). By May 18, 2009, however, the appellate court had affirmed the lower courts decision, and problem-solving courts were upheld in the State of



Maryland. Furthermore, by the end of August, Forster had been fired from her position as Chief Public Defender (Morse and Castaneda 1).

In September, 2009 the National Association of Criminal Defense Lawyers (NACDL) opened up another front of attack on problem-solving courts by issuing a highly critical report, "America's Problem Solving Courts: The Criminal Costs of Treatment and the Case for Reform." The report was the product of a task force initiated by the association in 2007 at an annual meeting, after they decided "the organized criminal defense bar could no longer bury its head in the sand and pretend that the problem-solving court movement was some fringe or transient development" (Orr et al. 8). The report's first recommendation—decriminalize all drugs—threatens the vitality of the drug court movement entirely. In lieu of immediate decriminalization, the task force also details dozens of recommendations for the courts and the judges and attorneys working in them so as to preserve constitutional rights. Notably among them: defense attorneys should eschew membership to non-adversarial treatment teams so as to protect their client's constitutional right to competent counsel.

Unsurprisingly, the report has caused substantial stir at the National Association for Drug Court Professionals (NADCP). They've issued a series of responses to the NACDL report in local papers nationwide and on their website—attacking the credibility of the assertions of defense bar. The NADCP is working to fend off the report as they push for another round of major funding for drug courts. However, in spite of the criticism, their ongoing lobbying for a fiscal year 2011 \$250 million federal allocation continues to look strong. If drug courts are indeed the chosen "laboratory" for therapeutic jurisprudence, then the failure of this first legal challenge bodes very well for its future. Indeed, if the tide of public opinion and federal budget allocations is any indication, problem-solving courts, and with it the notion of therapeutic

jurisprudence more generally, will likely continue to expand at an exponential rate. In two decades, the national count of problem-solving courts went from zero to 3,204, the majority (2,147) accounted for by drug courts alone (NADCP "History"). The further establishment of new drug courts is nearly assured thanks nearly overwhelming bipartisan consensus (Maron 1) and a powerful new ally--President Obama's new "Drug Czar" Gil Kerlikowskie. The National Association of Drug Court Professionals new campaign to continue to "put a Drug Court in reach of every American in need" may soon be realized. Kerlikowskie and the Obama administration hope to double the federal funding for drug courts in the next budget cycle (Jaffe 2).

#### BEYOND PRISONS AND PROBLEM-SOLVING

Insofar as problem-solving courts provide an option for many people to avoid long-term formal incarceration, they cannot and should not be considered "worse" than prison from a particular defendant's standpoint. However, to the extent that the success of drug courts facilitated the diffusion of therapeutic jurisprudence into criminal courts historically resistant to rehabilitative intra-courtroom dynamics, I hope I have demonstrated in this paper that uncritical acceptance of these institutions may actually permit the extension of state power into the lives of Americans. In his 1976 lecture, "Alternatives to Prison: Decline or Dissemination of Social Control?" Foucault issued a similar warning. He cautioned that although alternatives to formal incarceration may appear to be liberatory, they may actually facilitate a more expansive and efficient functioning of carceral practices. He argues,

...the effort to reduce the role of prisons could be a way of allowing the carceral functions of the prison to operate without hindrance, shifting from their site inside prisons to extend beyond the space of the re-socialization. The critique of the prison, the search for alternatives, would be politically naive were it not suspicious of this rediffusion of the mechanisms of the prison at the level of the social body (24).

At the time of his lecture, Foucault could not have foreseen the development and vast expansion of the problem-solving court movement. Yet, his critique of earlier alternatives-to-prison programs strikingly maps on to the way in which drug courts and therapeutic jurisprudence have opened up criminal law to formerly-discarded civil commitment adjudication procedures.

In light of the findings of this paper, and Foucault's dismal assessment of general penal reform, what options remain for those who disfavor U.S. policies of mass imprisonment, but are also concerned about the threats problem-solving courts pose to the constitutional rights of its participants? I would offer the following: as the recommendations of NACDL report highlight, any sort of "prison or problem-solving court" ultimatum is a fallacy. Not only does it mask the ways in which problem-solving courts may extend carceral practices more widely into the social body, it silences debate about how criminality is defined and legislated, and shuts down opportunities to radically rethink it. A full discussion of the political viability of decriminalization of drugs, homelessness, and mental illness, is outside the scope of the present project. However, it is worth mentioning that political mobilization around decriminalization remains, at least theoretically, an option—albeit one that often gets lost in the internal debate of the problem-solving court literature.

Utilizing a Foucauldian methodology that de-centers intentions in the study of history, I analyzed the causes and implications in the emergence of problem-solving courts and therapeutic jurisprudence. This approach allowed me to provide new insight into the formation of the first drug court, and expose the significance of the delayed coupling of the practices of the drug courts and the legal theory of therapeutic jurisprudence. Although it may be liable to misinterpretation, this method of analysis does not imply that the rise of problem-solving courts

and therapeutic jurisprudence was in any way inevitable. On the contrary, by offering a systematic analysis of the social crises that necessitated the formation of new judicial practices, this project provides a useful foundation from which those looking to contest such institutions may draw new tactics. It will take more than new or better ideas to re-route this movement; strategic mobilization will need to exploit existing social tensions. Understanding the emergence of the problem-solving court movement is critical not just because it is the most recent innovation of the U.S. medico-judicial apparatus—but because it surely will not be the last.

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## APPENDIX

The National Association of Drug Court Professionals Logo:



[[www.nadcp.org](http://www.nadcp.org), retrieved Feb.11, 2010]