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# Could Specialized Criminal Courts Help Contain the Crises of Overcriminalization and Overincarceration?

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## The Explosion of Specialized Criminal Courts: An Introduction

With aspirations of reducing reliance on incarceration, specialized criminal courts proliferated widely over the past two decades. There are approximately 3,000 specialized criminal courts in the United States, including drug courts, mental health courts, veterans courts, and reentry courts. These courts arose as a judicially-innovated attempt to devise anti-formalist alternatives to traditional probation, jail and prison for particular categories of defendants: drug addicts, mentally ill persons, and veterans, among others. The courts' enduring popularity is due largely to their promise to rationalize and humanize criminal sentencing and lower levels of imprisonment, all while protecting public safety and reducing crime. But it remains unclear what these courts actually portend. How should we understand the vast expansion of specialized criminal courts? Do these courts, as some critics charge, improve judges' experience of criminal law administration without meaningfully addressing the social or legal problems they aim to tackle? Or might specialized criminal courts bring about more fundamental, transformative change through their beneath-the-radar rethinking of the ultimate purposes of criminal law?

My recent Article, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*,<sup>1</sup> reveals that specialized criminal courts have become critical terrain for a contest between at least four competing criminal law reformist models. And, different outcomes in this contest may portend starkly different futures for U.S. criminal law and governance.

In contrast to the existing scholarly commentary on specialized criminal courts, which is largely trapped in the mode of advocacy—alternately celebratory or disparaging, and insufficiently attentive to the remarkable variation between different specialized criminal courts—my Article introduces an analytic framework and critical theoretical account of four contending criminal law reformist models at work in specialized criminal courts. These four criminal law reformist models include:

- (1) a therapeutic jurisprudence model,
- (2) a judicial monitoring model,
- (3) an order maintenance model, and
- (4) a decarceration model.

Based on a multi-method approach consisting of site visits, and an analysis of archived interviews, the courts' promotional materials, ongoing empirical monitoring of the courts, and the legal academic and sociological literature on the courts, I demonstrate how specialized criminal courts, adopting features associated with what I call a decarceration model, may enable significant transformative change in U.S. criminal law. But if configured primarily in accord with the first three models above, these courts threaten to produce a set of undesirable

outcomes—expanding criminal surveillance and possibly even increasing incarceration—despite opposite intended effects.

This analytic framework serves to illuminate the remarkable and underappreciated variation between different specialized criminal courts in ways that should inform both future study of the courts and institutional design. In certain configurations, these courts—and the reformist models they reflect—hold the potential to produce a range of harmful results, even if they improve job satisfaction for judges. But adopting different legal institutional and conceptual arrangements, specialized criminal courts promise to reduce incarceration, shifting resources and attention from criminal law administration to other sectors. The broader ambition of my Article is to suggest that a decarceration model offers not simply a preferable manner of conceptualizing specialized criminal courts, but a normative framework for criminal law reform more generally.

These four models each consist of a combination of legal institutional and ideological features. Multiple models may overlap in one court. For example, a mental health court may have both a therapeutic orientation and rely heavily on judicial monitoring, but the models constitute basic ideal types—bundles of institutional and ideological features—to which existing courts roughly correspond. Although these models operate predominantly in the specialized courts context, they have broader potential applicability. Specialized criminal courts function effectively as grounds for testing reformist possibilities that may be implemented on a larger scale elsewhere.

### **Therapeutic Jurisprudence, Judges as Therapists, and Specialized Criminal Courts**

On the first prominent model of specialized criminal court, a therapeutic jurisprudence model, the judge refers individual defendants to psychotherapy and attempts to engage therapeutically with defendants in court in accord with what is referred to in the legal academic literature as “therapeutic jurisprudence.” A therapeutic model aims to make court proceedings themselves, in the criminal law context and more broadly, part of a therapeutic process.

There are several potential problems with the therapeutic model. First, this approach is questionable even if one concedes court processes should be directed to advancing therapeutic outcomes, because it is particularly unclear how a lay-therapist judge’s interaction with a criminal defendant in a criminal court can be reliably therapeutic even if we would want it to be. A separate institutional problem arises when police and prosecutors understand the court as part of a therapeutic process. This creates a risk of net-widening, that is, that more cases will come to the criminal court for therapy, because institutional actors see the prosecutorial process as therapeutic, even in cases that would otherwise be dropped or referred directly to social services. Additionally, locating therapy within a criminal court presents a risk that the therapeutically oriented but relatively untrained judge will engage in so-called “therapeutic interventions” that are excessively punitive, with punishment trafficking under the guise of therapy, and profoundly distorting both.

One particularly colorful and disturbing example of this latter problem may be found in Judge Amanda Williams’ Glynn County Georgia Drug Court, which pronounced until it was disbanded “indefinite” therapeutic jail sentences for violations of technical conditions such as abstinence

from drugs or alcohol or petty criminal offenses. For infractions as minor as a first offense of forging two of her father's checks totaling 100 dollars, one young woman was sentenced to ten and a half years under criminal supervision: five and one half years in the Glynn County Drug Court, including fourteen months behind bars, and then an additional six months locked up, followed by four and one half years on probation.<sup>2</sup>

This young woman, Lindsay Dills, entered the Glynn County Drug Court, missed a curfew, and failed a drug screen. As a consequence, without further ado, she spent seven days in jail. Dills reported that Drug Court Judge Amanda Williams "would flip out every time [Dills] went before her. . . . [S]he was just . . . screaming . . . in court. . . . [S]he's standing behind the bench, with a microphone and screaming . . ."<sup>3</sup> For subsequent technical violations, such as a missed curfew or dirty urine tests, Dills reported spending 51 days, 90 days, and 104 days incarcerated, until Judge Williams sent Dills away on an "indefinite sentence." In Dills' own words:

So I get to the jail house and I call my dad immediately . . . from the pay phone that's in the booking area. And I hear the phone ring . . . where the booking area is. And they answer it and I heard them say, "Dills." . . . So I'm on the phone and they said, "Dills hang that phone up." And I'm like, "OK." [S]o I turn around and the[y] tell me that Judge Williams has now called and ordered me to have no further contact: no phone, no visitation and no mail. And that I'd be put in their isolation cell. And I'm like, "How long?" [T]hey're like, "We don't know." And I'm like, "Well for the whole 28 days that I'm here?" And they said, "Well your order is now indefinite."

. . . .  
. . . I cried a lot. . . . I was like, "How is this happening? How is this ethical? . . . Have I killed someone that I don't know about?" . . . But there's nothing I can do about it. Because I can't even use the phone. I can't even send a letter.<sup>4</sup>

Dills reportedly came to the attention of the jail authorities when she attempted suicide, after weeks in isolation, by cutting open her wrists.<sup>5</sup>

Although the National Association of Drug Court Professionals discourages such a punitive approach, the malleability of therapeutic jurisprudence when administered by lay-therapist judges makes it all too likely that judges will confuse therapy with punishment and that their unchecked retributive impulses will be brought to bear under the guise of therapeutic jurisprudence. Such potential miscarriages of therapeutic jurisprudence expose another significant overlooked feature of specialized criminal courts operating on a therapeutic model. Therapeutic courts attempt to rid themselves of the various traditional approaches to criminal punishment—retribution, deterrence, and incapacitation—in favor of a therapeutic approach. Although conventional criminal courts generally (at least in principle) administer criminal law with self-conscious reference to a compound of retributive, deterrent, and other punishment approaches, specialized criminal courts adopting a therapeutic cast seek to purify the administration of criminal law to one putatively rehabilitative "therapeutic" variant. The risk of this attempted purification is that it is difficult to disentangle deterrent, therapeutic, and retributive impulses in criminal punishment, and so cordoning off certain courts as purely involved in therapeutic interventions may both misstate what is actually occurring in those courts and undermine judicial self-consciousness about whether the punitive effects of particular

decisions are proportional to the offending conduct and no greater than necessary to deter offending behavior.

Even if the Glynn County court is an extreme example, the result of judicial overreaching in therapeutic courts threatens to recur. This is due to the immense discretionary authority wielded by lay-therapist judges; because of the courts' lack of institutional therapeutic competence, transparency and procedural regularity; and because when these judges' retributive impulses, which may be inherent in criminal proceedings, operate under the rubric of therapy, there is likely to be inadequate attention to proportionality that in principle constrains punishment on a retributive approach.

And even if the problem of disproportionate punitiveness might in principle be resolved by having all specialized criminal courts adopt sentencing ceilings for technical violations, courts operating on a therapeutic model embrace an anti-formalist, problem-oriented, discretionary approach that rejects such externally imposed, pre-fixed constraints. This model, when it comes to predominate over other approaches to criminal law administration, thus promises to place judges with extraordinary power in a position where they act in what they perceive to be defendants' therapeutic interests but with unchecked, potentially punitive effects, unimpeded by principles of proportionality characteristic of a retributive theory of punishment. According to Judge Williams, who resigned last month in response to a wide-ranging ethics investigation into her drug court: "I didn't just decide I was going to be mean to these people. It's all treatment motivated."<sup>6</sup> This is all the more troubling because these judges often lack formal psychotherapeutic expertise and many are likely exhausted by the undoubtedly difficult work of dealing with criminally accused addicted or mentally ill individuals, most frequently in under-resourced environments. The relaxation of procedural safeguards as part of an anti-formalist, team-based, therapeutic approach only stands to exacerbate these problems if judges are not particularly conscientious. With no overriding commitment to avoid incarceration (in fact some have argued incarceration may be therapeutic), the results may well be more incarceration or at least more expansive criminal supervision, not less.

### **Judicial Monitoring, Judges as Probation Officers, and Specialized Criminal Courts**

A second dominant criminal law reformist model at work in specialized criminal courts is the judicial monitoring model. On this model, the court initially assigns a non-prison or jail-based sentence but mandates reporting back to the judge on a regular basis to determine compliance with technical conditions of release. The judge effectively functions as a probation or parole officer. The theoretical basis of this model is a judicially-focused deterrence theory, severed from any therapeutic ends.

Judicial monitoring also presents a number of risks involving judicial overreaching, expanded surveillance, and increased incarceration for technical violations. Sociologist James Nolan's account of the Syracuse Drug Court illustrates some of these problems concretely.<sup>7</sup> Nolan reports how on one occasion, to maintain a defendant's employment in a case in which employment was a condition of supervised release, the Syracuse drug court judge cross-deputized a defendant's employer to report any tardiness or other problems at work to the court. In response, the judge

promised to have the defendant arrested and taken to jail. Accordingly, as with the therapeutic model, the role of the judge expands dramatically. Process decreases. The focus purely on judicially-orchestrated deterrence threatens to blind the judicial monitor to concerns about proportionality or justice. There is no overriding commitment to avoid incarceration. Thus, increased periods of at least short-term incarceration threaten to follow and the reach of the criminal law threatens to radically expand.

### **Order Maintenance, Judges as Beat Cops, and Specialized Criminal Courts**

An order maintenance model, the third criminal law reformist model at work in specialized criminal courts and explored in the Article, is represented most prominently in community courts. Community courts address primarily low-level quality of life offenses. An order maintenance approach draws on the broken windows theory of policing or the order maintenance hypothesis, according to which, addressing minor disorder will prevent more serious crime, and hence reduce criminal arrests and incarceration overall.<sup>8</sup> However, regardless of the long-term effects of order maintenance prosecutions, in the meantime, courts adopting this model widen the net of offenses targeted by criminal courts in a manner distinct from therapeutic courts or judicial monitoring bodies, by focusing on relatively minor offenses that would not otherwise be prosecuted. Disorderly conduct prosecutions are common-place in order maintenance courts for pedicab drivers' obstruction of cross-walks or unlicensed vending of t-shirts or otherwise licit goods.<sup>9</sup> And indeed, empirical analyses establish that increased case filings and increased incarceration for less serious offenses are the unintended outcomes of at least certain courts adopting an order maintenance model.<sup>10</sup>

### **Decarceration, Judges as Monitors of Diversion, and Specialized Criminal Courts**

A decarceration model, by contrast, is committed foremost to reducing incarceration and to a sociologically-informed and empirically-monitored framework that seeks to link court participants to other social sectors, such as mental and public health provision, employment, and housing. The goal is to reduce conventional jail and prison-based sentencing and also to shift to more comprehensive, holistic, sociologically and empirically attuned means of protecting public safety and preventing crime. Courts reflecting a decarceration model are minimalist institutions and are primarily diversionary. They shift the order-maintaining function of criminal sentencing from criminal courts—where surveillance occurs on the therapeutic, judicial monitoring or order maintenance models—to other social sectors where order is maintained less formally. The courts then function as monitors of the diversionary service providers, relying in part on ongoing empirical feedback regarding the results of diversionary assignments. But judges are not involved in day-to-day monitoring of defendants. For example, the Harlem Reentry court, upon recognizing the incarceration-increasing outcomes associated with court monitoring, shifted predominantly to a decarceration approach, working to locate individual employment opportunities throughout the East Harlem corridor, raising funds for treatment and residential programs, and intervening only to increase the intrusiveness of an individual's criminal supervisory regime if there is recurrent noncompliance that threatens public safety.<sup>11</sup> The programs to which participants are sentenced are available to all community residents, not just

court participants. Court staff then monitors the service providers in a manner akin to monitoring in the structural litigation context. Courts that have experimented with this model handle, in at least some jurisdictions, those charged with or convicted of serious felony offenses. This is critical to reducing incarceration, because many misdemeanor offenders already receive minimally invasive probation in conventional courts or are not otherwise pursued. Importantly, this approach accords with sociological and criminological scholarship suggesting that informal surveillance and integration into social institutions—employment, neighborhood organizations, family structures—substantially reduces criminal recidivism while promoting other positive effects.<sup>12</sup>

Operating along these lines, a decarceration model may initiate a set of change processes in criminal law, by beginning to set in motion conceptual, institutional, and systemic shifts. Specialized criminal courts adopting a decarceration approach may begin to cognitively reframe how we think about particular categories of crime and punishment. Starting at the local level, these courts may advance a structural, collectivist, determinist, and public health framing of drug-related offending, offending on the part of persons with mental illness, veterans, and others. Empirical monitoring of the courts' work—in particular of rates of recidivism of defendants processed in specialized courts adopting a decarceration approach as compared to defendants processed in conventional courts—may begin to break down more broadly the association in the public imagination between incarceration and public safety. Therefore, even though it is highly unlikely the courts will be sufficient in number to address a large portion of criminal case filings, they could begin to generate a transformative impact considerably beyond the relatively small number of cases handled.

### **Conclusions and Objections**

Nonetheless, despite their potential to reframe how we understand crime, punishment and the necessity of incarceration for a wide range of cases and defendants, specialized criminal courts also pose a number of underappreciated risks: excessive legalism; a dilution of retributive and deterrent punishment; diminished due process; inefficient proliferating specializations; and legitimization of harshness in conventional courts and unfairness to those persons deemed less sympathetic than veterans or the mentally ill, but who are all things considered also deserving of greater lenience. The latter problem in particular is one that may have racially disproportionate effects. These are all difficult problems and I begin to deal with each in the Article. The general approach I take with respect to all, though, is that despite its limits a decarceration model does fairly well at warding off these concerns relative to other contending criminal law reformist models. On a decarceration model, sociologically-oriented experimentation permits incorporation of more robust procedural protections and navigation with empirical feedback of the risks identified on an ongoing basis. Further, these objections ought to be considered in reference not to some utopian alternative implicit though not explicit in the objection, but relative to the status quo in U.S. criminal law administration really at any point over the past century, and relative to reform proposals that have somewhat comparable plausibility as do specialized criminal courts. It is also important to note that these courts provide only a beginning, a preliminary manner of shifting understandings and resources to address the crises of overcriminalization and overincarceration.

Of course, in the end, it is possible that specialized criminal courts will be unable to successfully harness the decarceration strategies identified, and instead that the courts will expand surveillance and increase incarceration, privatize punishment, or legitimate harshness and unfairness. But given the severe problems at stake in U.S. criminal law, and the pressing challenges the courts aim to address, these strategies and a decarceration model more generally are well worth trying.



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1. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).
2. Judge Amanda Williams challenged this characterization of her drug court on a number of different grounds, but Judge Williams subsequently retired after facing state disciplinary charges related to her drug court. *See, e.g.*, Press Release, Georgia Judge Rebutts Public Radio Story on Drug Court, (Apr. 14, 2011), *available at* <http://www.atlawblog.com/wp-content/uploads/2011/04/Williams-Rebutts-Glass-Press-Release-April-14-2011.pdf>; *see also* Martha Neil, *Longtime Ga. Judge Facing Disciplinary Case After 'This American Life' Broadcast Will Retire*, ABA JOURNAL (Dec. 20, 2011 5:28 PM), [http://www.abajournal.com/mobile/article/longtime\\_ga.\\_judge\\_facing\\_disciplinary\\_case\\_following\\_this\\_american\\_li/](http://www.abajournal.com/mobile/article/longtime_ga._judge_facing_disciplinary_case_following_this_american_li/); *see also* Letter from Michael M. Conway, Foley & Lardner LLP, to Prof. David G. Oedel, Mercer Univ. Law Sch. (Apr. 15, 2011), *available at* [http://www.thisamericanlife.org/sites/default/files/Foley\\_response\\_to\\_Oedel\\_April\\_15\\_2011.pdf](http://www.thisamericanlife.org/sites/default/files/Foley_response_to_Oedel_April_15_2011.pdf); Ira Glass, *Very Tough Love*, THIS AM. LIFE (Mar. 25, 2011), <http://www.thisamericanlife.org/radio-archives/episode/430/transcript>.
3. *See* Glass, *supra* note 2.
4. *See id.*
5. *See id.*
6. Robbie Brown, *Judge Accused of Misconduct Will Resign*, N.Y. TIMES, Dec. 20, 2011, <http://www.nytimes.com/2011/12/21/us/accused-of-misconduct-judge-amanda-williams-of-georgia-will-resign.html>.
7. *See* James L. Nolan, Jr., *Therapeutic Adjudication*, 39 SOCIETY 29, 32 (2002).
8. *See, e.g.*, Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1574 (2003) (“(T)he unifying feature of these community courts is their preoccupation with the ‘quality of life’ in local neighborhoods.”).
9. *See* Author’s Site Visit Notes, Midtown Community Court, September 2011 (on file with author).
10. *See generally* MICHELE SVIRIDORF ET AL., DISPENSING JUSTICE LOCALLY: THE IMPLEMENTATION AND EFFECTS OF THE MIDTOWN COMMUNITY COURT (2000).
11. *See, e.g.*, ZACHARY HAMILTON, CTR. FOR COURT INNOVATION, DO REENTRY COURTS REDUCE RECIDIVISM?: RESULTS FROM THE HARLEM PAROLE REENTRY COURT 29 (2010).
12. *See* ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT 22 (2012) (“(N)eighborhoods are not merely settings in which individuals act out the dramas produced by autonomous and preset scripts . . . but are important determinants of the quantity and quality of human behavior in their own

right.”); *id.* at 423 (“(E)ven the worst-off communities command human assets and organizational potential that have not been fully harnessed. In fact . . . disadvantaged communities sometimes have rather high levels of other-regarding behavior and latent collective efficacy that are otherwise suppressed by the cumulative disadvantages built up after repeated everyday challenges.”). In a study comparing the lives of former juvenile offenders, sociologist Robert Sampson and criminologist John Laub found that:

The majority of men we interviewed desisted from crime largely because they were able to capitalize on key structural and situational circumstances. They often selected these structural and situational circumstances (for example, they decided to get married, get that job, hang out with those friends), but those institutions and relations in turn influenced the men as well. . . . Men who desisted from crime were embedded in structured routines, socially bonded to . . . others . . . and were virtually and directly supervised and monitored. In other words, structures, situations, and persons offered nurturing and informal social control that facilitated the process of desistance from crime. . . .

. . . .

. . . Generally, the persistent offenders we interviewed experienced residential instability . . . job instability . . . and relatively long periods of incarceration. Except when in prison or jail, they were ‘social nomads,’ to use Foucault’s term.

JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70*, at 279–80 (2003) (citations omitted).

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