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Morris Hoffman
Denver District Court

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THERAPEUTIC JURISPRUDENCE, NEO-REHABILITATIONISM, AND JUDICIAL COLLECTIVISM: THE LEAST DANGEROUS BRANCH BECOMES MOST DANGEROUS

*by Morris B. Hoffman**

INTRODUCTION

The movement that calls itself "therapeutic jurisprudence"[1] is both ineffective and dangerous, in almost the same way that its

* District Judge, Second Judicial District (Denver), State of Colorado. The views expressed here are of course my own, and do not necessarily reflect the views of the District Court for the Second Judicial District or any of my colleagues on that court. I would like to thank my law clerk, Steven J. Wienczkowski, for his invaluable contributions to this article, both in his research and his editorial suggestions. I also owe a debt of gratitude to Professor James L. Nolan, Jr., from whose meticulous examinations of the therapeutic jurisprudence paradigm in general, and its drug court variant in particular, I liberally quote. Professor Nolan has become one of the leading academics with the courage to ask whether the emperor of therapeutic jurisprudence has any clothes.

1. The term "therapeutic jurisprudence" is generally credited to David Wexler, a law professor at the University of Arizona, who, as discussed in the text accompanying notes 88-89 *infra*, originally defined the term in a paper first delivered in 1987, but not published until 1992, to mean the study of the therapeutic impacts of mental health law. David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 L. & HUM. BEHAV. 27 (1992). He and others subsequently expanded the idea beyond the mental health realm, arguing not only that virtually all court proceedings can have important therapeutic impacts on the participants, but that judges should craft their decisions with an eye toward those impacts. *See, e.g.*, ESSAYS IN THERAPEUTIC JURISPRUDENCE (D. Wexler & B. Winnick eds., 1991);PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (D. Stolle, D. Wexler & B. Winnick eds., 2000); THERAPEUTIC JURISPRUDENCE: THE LAW AS THERAPEUTIC AGENT (D. Wexler ed., 1990); David A. Wexler, *New Directions in Therapeutic Jurisprudence: Breaking the Bounds of Conventional Mental Health Law Scholarship*, 10 N.Y.L. SCH. J. HUM. RTS. 915 (1993). The phrase "restorative justice" is also sometimes used to connote what appears to be a similar constellation of ideas, though it tends to be used only in the criminal justice arena. *See, e.g.*, John Braithewaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1 (1999); Robert F. Schopp, *Therapeutic Jurisprudence Forum: Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 665 (1998); Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in Criminal Justice Systems*, 72 N.C. L. REV. 1479 (1994). The phrase "collaborative law" is also used to describe the therapeutic approach in law, especially in divorce law. *See generally* Pauline H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 5 PSYCHOL. PUB. POL. & L. 967 (1999). Finally, the phrase "problem-solving courts" seems to be the most recent way to describe various therapeutic courts, espe-

predecessor—the rehabilitative movement that became popular in the 1930s and was abandoned in the 1970s—was both ineffective and dangerous. Drug use, shoplifting, and graffiti are no more treatable today than juvenile delinquency was treatable in the 1930s. The renewed fiction that complex human behaviors can be dealt with as if they are simple diseases gives the judicial branch the same kind of unchecked and ineffective powers that led to the abandonment of the rehabilitative ideal in the 1970s. In fact, this new strain of rehabilitationism has produced a judiciary more intrusive, more institutionally insensitive and therefore more dangerous than the critics of the rehabilitative ideal could ever have imagined.

I. The Real Face of Therapeutic Jurisprudence

In a drug court in Washington, D.C., the judge roams around the courtroom like a daytime TV talk show host, complete with microphone in hand.[2] Her drug treatment methods include showing movies to the predominantly African-American defendants, including a movie called *White Man's Birth*.[3] She often begins her drug court sessions by talking to the "clients"[4] about the movies, and then focusing the discussion on topics like "racism, justice, and equality."[5] The judge explains her cinemagraphic approach to jurisprudence this way:

> Obviously they need to talk about their own problems and what leads to them, but I also think that it's good to have distractions in life. I've found out that if there are periods of your life when you are unhappy, sometimes going out to see an interesting movie or going out with a friend and talking about something else, or going to the gym to work out, these kinds of things can help you through a bad day.[6]

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cially so-called "community-based courts." *See infra* notes 117-120 and accompanying text. One cannot help but chuckle, and think of George Orwell's insights into the politicization of language, at a movement that describes intrusive judicial state action of an unprecedented magnitude as "problem solving."

2. James L. Nolan, Jr., Reinventing Justice: The American Drug Court Movement 7 (2001).

3. *Id.*

4. It is de rigueur for judges and their staff in therapeutic jurisprudence courts to call parties "clients," even criminal defendants. This is not only consistent with the whole approach of therapeutic jurisprudence—to treat rather than to adjudicate—but is also a linguistic expression of the stunning mixing of roles between judge, prosecutor, and defense lawyer. *See infra* notes 110-31 and accompanying text.

5. Nolan, Jr., *supra* note 2, at 7.

6. *Id.*

After the film discussion, the session begins in earnest. Defendants who are not doing well are scolded and sometimes told stories, often apocryphal, about the fates that have befallen other uncooperative defendants or the drug court judge's own friends and family members.[7] Some defendants are jailed for short periods of time and/or regressed to stricter treatment regimens, and eventually some are sentenced to prison.[8] The audience applauds defendants who are doing well, and the judge hands out mugs and pens to the compliant. The judge regularly gives motivational speeches that are part mantra and part pep rally. Here is a typical example:

> Judge: Where is Mr. Stevens? Mr. Stevens is moving right along too. Right?
>
> Stevens: Yep.
>
> Judge: How come? How come it is going so great?
>
> Stevens: I made a choice.
>
> Judge: You made a choice. Why did you do that? Why did you make that choice? What helped you to make up your mind to do it?
>
> Stevens: There had to be a better way than the way I was doing it.
>
> Judge: What was wrong with the way you were living? What didn't you like about it?
>
> Stevens: It was wild.
>
> Judge: It was wild, like too dangerous? Is that what you mean by wild?
>
> Stevens: Dangerous.
>
> Judge: Too dangerous, for you personally, like a bad roller coaster ride. So, what do you think? Is this new life boring?
>
> Stevens: No, not at all.
>
> Judge: Not at all. What do you like about the new life?
>
> Stevens: I like it better than the old.
>
> Judge: Even though the old one was wild, the wild was kind of not a good wild. You like this way.
>
> Stevens: I love it.

7. For a summary of the astonishing storytelling aspects of drug courts, see NOLAN, JR., *supra* note 2, at 111-36.

8. For a general description of the organization, implementation, operation and sentencing models used in drug courts, see Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1462-63 (2000). As discussed in the text accompanying notes 31 to 32 *infra*, drug courts are probably sending considerably more people to prison than traditional courts, because of a combination of net-widening and ineffective treatment.

> Judge: You love it. Well, we're glad that you love it. We're very proud of you. In addition to your certificate, you're getting a pen which says, "I made it to level four, almost out the door."[9]

This is the real face of therapeutic jurisprudence. It is not a caricature. Except for the movie reviews, this Washington, D.C. drug court is typical of the manner in which this particular kind of therapeutic court is operating all over the country. Defendants are "clients"; judges are a bizarre amalgam of untrained psychiatrists, parental figures, storytellers, and confessors; sentencing decisions are made off-the-record by a therapeutic team[10] or by "community leaders";[11] and court proceedings are unabashed theater.[12] Successful defendants—that is, defendants who demonstrate that they can navigate the re-education process and speak the therapeutic language[13]—are "graduated" from the system in festive ceremonies that typically include graduation cake, balloons, the distribution of mementos like pens, mugs, or T-shirts, parting speeches by the graduates and the judge, and often the pièce de résistance—a big hug from the judge.[14]

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9. NOLAN, JR., *supra* note 2, at 8-9.

10. *See infra* notes 123-24 and accompanying text; *see also* Hoffman, *supra* note 8, at 1524, discussing the off-the-record "staffing" ritual, at which neither the defendant nor private defense counsel is present, yet at which presumptive sentencing decisions are made.

11. *See infra* notes 117-120 and accompanying text (discussing community-based courts).

12. Drug court proponents themselves acknowledge that drug courts are a kind of theater, whose audience includes not only the clients to be re-educated but also skeptical prosecutors, media, politicians, and other influential members of the non therapeutic community. "Drug courts, it has been said many times, are theater. And the judge is the stage director and one of the primary actors." NOLAN, JR., *supra* note 2, at 73 (quoting Baltimore drug court judge Jamey Weitzman). Indeed, the theatrical aspects of drug court—both as a therapeutic tool and as tightly scripted propaganda—are a focal point of national drug court training conferences. The titles of some of these conferences are telling: "Damage Control: Dealing with the Media," "Getting Local Government and the Community to 'Buy In' to a Drug Court," "Dealing with the Press/Politics." *Id.* at 62. *See infra* notes 112-113 and accompanying text (discussing particular points of propaganda spread at national conferences).

13. See *infra* note 25 (discussing the fact that therapeutic defendants are well aware that their "treatment" is an attitudinal game they must pretend to play in order to escape the clutches of the criminal justice system).

14. A Compton, California drug court judge's explanation is typical of the parent-child model by which many therapeutic judges see their relationship to their "clients":

> I let [the defendant] come into my chambers. . . . All she wanted was a hug. . . . So, I just gave her a hug. I mean, what would you do if your child came up to you, and said, "May I have a hug?" You wouldn't say, "Well, let me think about this now. You have been bad fifteen times." You would just do it. So, that is what I did. And yes, you should [give hugs]. You get a whole lot back. You really do.

Drug courts are the most visible, but by no means the only, judicial expression of the therapeutic jurisprudence movement. The idea that judges should be in the business of treating the psyches of the people who appear before them is taking hold not only in drug courts but in a host of other criminal and even civil settings. Some therapeutic jurists see bad parenting, domestic violence, petty theft, and prostitution as curable diseases, akin to drug addiction, and argue that divorcing parents, wife-beaters, thieves, and prostitutes should therefore be handled in specialized treatment-based courts.[15] The objects of the treatment efforts include not only the litigants in civil cases, and the criminals and victims in criminal cases, but also the "community" that is "injured" by the miscreant. Petty criminals in many so-called "community-based courts" are in effect sentenced by panels of community members, typically to perform various community services as deemed necessary by the panels, in order to "heal" the damage done to the "community."[16]

It is curious that the existing scope of the therapeutic jurisprudence movement, with the exception of drug offenses, is limited to relatively minor petty and misdemeanor criminal offenses.[17] We might ask ourselves why the movement ignores the entire spectrum of violent felonies, so many of which have an apparent psychiatric component. We don't have specialized child molester courts in which "clients" are hugged and pampered and cajoled into right-thinking. Why not? My suspicion, as discussed in more detail below,[18] is that what much of therapeutic jurisprudence is really about, at least in the criminal arena, is a de facto decriminalization of certain minor offenses which the mavens of the movement do not think should be punished, but which our Puritan ethos commands cannot be ignored. Supporters of the movement recognize that as a political matter they cannot go too far blurring the distinction between acts and excuses.[19]

True to their New Age pedigree, therapeutic courts are remarkably anti-intellectual and often proudly so. For example, the drug court variant is grounded on a wholly uncritical acceptance of the disease model of addiction, a model that is extremely controversial

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NOLAN, JR., *supra* note 2, at 102.

15. *Id.* at 149.

16. *See infra* notes 117-120 and accompanying text.

17. *But see infra* note 120 (discussing proposed extensions of community-based courts).

18. *See infra* Part IV.D.

19. See *infra* notes 107-09 and accompanying text.

in the medical, psychiatric, and biological communities.[20] All of the therapeutic jurisprudence variants presume that the underlying problem in virtually all kinds of cases—drug abuse, domestic violence, delinquency, dependency, divorce, petty crimes—is low self esteem, despite the fact that many psychological studies have shown that violent criminals tend to have high self esteem.[21]

The question asked in these new therapeutic courts is not whether the state has proved that a crime has been committed, or whether the social contract has otherwise been breached in a fashion that requires state intervention, but rather how the state can heal the psyches of criminals, victims, families, dysfunctional civil litigants, and the community. The goal is state-sponsored treatment, not adjudication, and the adjudicative process is often seen as an unnecessary and disruptive impediment to treatment.[22] Because the very object is treatment, rehabilitated criminals deserve no punishment beyond what is necessary to restore them, their victims, and the community to their prior state.[23]

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20. *See generally* Hoffman, *supra* note 8, at 1469-73. Many drug court proponents express a certain ironic pride in the fact that they believe they are much more enlightened on the disease model of addiction than medical professionals:

> It's amazing listening to physicians say, "It's not a disease." It's almost done a reverse. We have people who are normally not trained in the medical field calling it a disease and those who are trained in the medical field saying, "It's not a disease," that it's just a lack of guts or lack of intestinal fortitude of the individual. It's a scary thought.

NOLAN, JR., *supra* note 2, at 137 (quoting unnamed director of treatment at one of the drug courts Professor Nolan visited). It is, indeed, a "scary thought," but not for the reasons this treatment director thinks.

21. *See, e.g.*, ANDREW MECCA ET AL., THE SOCIAL IMPORTANCE OF SELF-ESTEEM (1989); Roy F. Baumeister et al., *Relation of Threatened Egotism to Violence and Aggression: The Dark Side of Self-Esteem*, 5 PSYCHOL. REV. 101 (1995). *See generally* JOHN P. HEWITT, THE MYTH OF SELF-ESTEEM: FINDING HAPPINESS AND SOLVING PROBLEMS IN AMERICA (1998).

22. *See, e.g.*, NOLAN, JR., *supra* note 2, at 141 (quoting Syracuse, New York drug court judge Langston McKinney):

> By volunteering in the drug court program the defendant has circumvented [the adjudicative] part of the judicial process. . . . "[W]e literally leave all that [judicial impartiality, presumption of innocence, etc.] at the doorstep." In the drug court context, "this issue of guilt/innocence is not of concern."

See also infra notes 92-95 and accompanying text (discussing the drug court's eradication of the concept of guilt).

23. In one of the most telling expositions of the therapeutic paradigm, the appellate lawyer for Karla Faye Tucker argued that the state of Texas had no right to execute her because she was no longer the same person who had committed the multiple murders for which the prior Ms. Tucker had been convicted. The lawyer's argument, flush with therapeutic newspeak, was actually published in a law review after his client's execution. Walter C. Long, *Karla Faye Tucker: A Case for Restorative Justice*, 27 AM. J. CRIM. L. 117 (1999). Of course, that argument is precisely the same argument

The therapeutic jurisprudence movement is not only anti-intellectual, it is wholly ineffective. The treatment is a strange combination of Freud, Alcoholics Anonymous, and Amway, whose apparent object is not really to change behaviors so much as to change feelings.[24] Drug courts are a perfect example. The success of drug-court treatment programs is measured more by a defendant's professed attitude adjustment than by the sort of concrete measures one might expect of such programs, such as whether the defendant stops using drugs. As long as defendants are compliant with treatment ("buying into the program," as addiction counselors say), they are moved from treatment phase to treatment phase, often irrespective of whether the treatment is actually working. As James Nolan puts it, drug court success "is evaluated in large measure by whether or not clients adopt a particular perspective."[25]

The particular perspective required is the disease model of addiction. Compliance is almost always measured by a defendant's willingness to admit that his or her drug use is a disease. Any resis-

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made by Bentham and the other utilitarians in the 1800s: if the only purpose of punishment is to deter the punished criminal, then no criminal may morally be punished beyond what it takes to rehabilitate him. *See infra* notes 55-60 and accompanying text. At least Bentham had the courage of his convictions, which is more than can be said for the current devotees of therapeutic jurisprudence, who are so worried that they will be seen as soft on crime that they would never apply their strange principles to serious crime. *See supra* notes 17-19 and accompanying text.

24. In fact, I suspect that it is the improved feelings of the treaters, and not of the treated, that is really driving judges' infatuation with therapeutic courts. The therapeutic jurisprudence movement in general, and the drug court movement in particular, is strewn with discussions of the positive effects therapeutic programs have on the treaters. See *supra* note 14 (reporting emotional benefits the drug court judge realizes from hugging a defendant).

25. *Id.* Nolan reports a stunning example of the extent to which compliance in therapeutic courts is measured more by what a defendant says than by what a defendant does. The Oakland probation department commended a drug court defendant for his compliance in treatment, and recommended that he be graduated from phase 2 to phase 3, even though the defendant had not had a single negative urinalysis in all of phase 2. JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END 296 (1998). Defendants understand that they have to play the treatment game to pass through the criminal hoops. Nolan reports on a particularly embarrassing unraveling of a Washington, D.C. drug court session that was being televised live to a large convention of treatment providers. The session began in stock theatrical form, but at one point an uncooperative defendant began to depart from the script. When asked why his treatment program had been so difficult for him, he said "'Cause I had to come and sit here and listen to this crap." NOLAN, JR., *supra* note 2, at 69. The dam broke, and other defendants started to complain about the therapeutic game. At one point, laughter began to break out amongst the conventioneers. "When it became clear the judge was not going to be able to regain control of the performance, conference officials just cut the video feed. 'We have to stay on schedule,' an organizer deadpanned.'" *Id.* at 70.

tance to the disease model is reported as "denial," a crime apparently much worse than continued drug use.[26]

The therapeutic jurisprudence literature is almost completely devoid of any empirical discussion of whether litigants, defendants, and victims, let alone "communities," are actually being helped by all this perspective-changing treatment, and understandably so. The imprecise words common to the therapeutic language—words like "healed," "restored," and "cured"—are simply incapable of being subjected to rigorous testing.

When investigators have looked at less imprecise measures of success—like recidivism rates—the therapeutic promise has proved wholly ineffective.[27] For example, the very first effectiveness study performed on the very first modern drug court—in Dade County, Florida—showed that drug defendants treated in the drug court and drug defendants processed in the traditional courts suffered statistically identical rearrest rates.[28] Virtually every serious study of drug court effectiveness has reached similarly sobering results,[29]

26. *Id.; see also infra* note 110 and accompanying text (discussing reverse moral screening). Dade County Drug Court officials report that they have had particular difficulty with the willingness of Hispanic clients to admit they have a disease and suggest that the difficulty may somehow be attributable to a cultural resistance to the disease model. NOLAN, JR., *supra* note 25, at 296.

27. The ineffectiveness of involuntary court-based therapy comes as no surprise to people familiar with the ineffectiveness of voluntary psychotherapy in general, especially in an addiction context. Peer-reviewed controlled studies—which are scandalously rare—are virtually unanimous in their conclusion that there is no evidence that twelve-step programs produce better results than clinical treatment or even better results than no treatment at all. *See* William R. Miller & Reid K. Hester, *The Effectiveness of Alcoholism Treatment: What Research Reveals, in* TREATING ADDICTIVE BEHAVIORS: PROCESSES OF CHANGE 121, 135-36 (W. Miller & N. Heather eds., 1986) (reviewing all controlled studies of alcohol treatment programs, finding only two on AA programs, and noting that both of those AA studies showed that members of AA got arrested more often and relapsed more frequently than the control group of untreated problem drinkers). Even clinical treatment seems ineffective. In a famous 1983 study of the effectiveness of inpatient alcohol treatment, the ability of treated patients to stop drinking and stay sober two years and eight years postdischarge was no better than that of the untreated control group. GEORGE VALLIANT, THE NATURAL HISTORY OF ALCOHOLISM 284-94 (1983). The data on the effectiveness of drug treatment is no more encouraging. *See, e.g.*, Stanton Peele, *How People's Values Determine Whether They Become and Remain Addicts, in* VISIONS OF ADDICTION 219-20 (S. Peele ed., 1988).

28. In particular, Dade County drug defendants entering the drug court program suffered a one-year re-arrest rate of 32%, compared to Dade County drug defendants in traditional courts, who suffered a re-arrest rate over the same period of 33%. BARBARA E. SMITH ET AL., STRATEGIES FOR COURTS TO COPE WITH THE CASELOAD PRESSURES OF DRUG CASES 7 (1991).

29. Here, for example, are the results from five major effectiveness studies done by independent outsiders in the mid- and late-1990s:

leading the General Accounting Office to declare in 1997 that there is simply no firm evidence that drug courts are effective in reducing either recidivism or relapse.[30]

Drug courts not only do not reduce recidivism or relapse, they have the unintended consequence of dramatically increasing the number of drug defendants sent to prison. The reason is massive net-widening, that is, the phenomenon whereby new programs targeted for a limited population end up serving much wider populations and thereby losing their effectiveness. In Denver, Colorado, for example, the number of drug cases nearly tripled two years after the implementation of its drug court.[31] That fact, coupled with typically dismal recidivism rates, led to the entirely predictable result that Denver judges sent more than twice the number of drug defendants to prison in 1997, two years after the implementation of the drug court, than they did in 1993, the last year before the implementation of the drug court.[32]

If therapeutic jurisprudence were just a trendy idea that did not work, we could let it die a natural death. But it is not just trendy and ineffective, it is profoundly dangerous. Its very axioms depend on the rejection of fundamental constitutional principles that have protected us for 200 years. Those constitutional principles, based on our founders' profound mistrust of government, and including the commands that judges must be fiercely independent, and that

Date	Drug Court	% Traditional Recidivism	% Drug Court Recidivism
1996	Baltimore		
	District	27.1	22.6
	County	30.4	26.5
1997	Denver	58	53
1994	Phoenix	48.7	33.2
1993	New York City	50.5	53.5
1994	Travis County, TX	41.0	38.0
1998	Wilmington, DE	51.0	33.3

See generally STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, SPECIAL DRUG COURTS: PROGRAM BRIEF 2 (1993); Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 NAT'L DRUG CT. INST. REV. 1 (1998).

30. *See* U.S. GEN. ACCOUNTING OFFICE, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 7-8 (1997).

31. Hoffman, *supra* note 8, at 1501-02.

32. *Id.* at 1510-11. These exploding prison populations were not the result of a general increase in criminal cases. On the contrary, since the Denver Drug Court began its operations, the percentage of drug cases filed in the court has exploded. Here are the complete figures for criminal cases with the Denver District Court from 1991 through 1998 (the drug court became operational in July 1994):

the three branches of government remain scrupulously separate, are being jettisoned for what we are led to believe is an entirely new approach to punishment. In fact, this new approach—state mandated treatment—turns out to be a strangely out-of-touch return to rehabilitative ideals that gained popularity in the 1930s, but were abandoned in the 1970s because they not only did not work but, in the bargain, armed the state with therapeutic powers inimical to a free society.

There are four main reasons why the new therapeutic judges are most dangerous: 1) they are amateur therapists but have the powers of real judges; 2) they act in concert with each other, their communities, prosecutors, defense lawyers, and the self-interested therapeutic cottage industry, contrary to the fundamental principle of judicial independence; 3) they impinge on the executive branch's prosecutorial and correctional functions; and 4) they impinge on the legislative function by making drug policy.

Before I address these four dangers, let me briefly review the history of punishment and the scant theoretical underpinnings of the therapeutic jurisprudence movement in the context of this history.

II. A Brief History of Punishment

The idea of punishment as moral retribution may have its roots in what some anthropologists have called "defilement," the process by which primitive societies interpreted and explained human suffering as punishment by the gods.[33] Such an explanation for otherwise inexplicable suffering can be deeply comforting. It means that our suffering is not meaningless and, more practically, that if we

Year	Criminal Cases	Drug Cases	% Drug Cases
1991	3,795	958	25.2
1992	3,790	1,014	26.7
1993	3,762	1,047	27.8
1994	3,907	1,260	32.2
1995	5,154	2,661	51.6
1996	5,814	3,017	51.9
1997	5,458	2,825	51.8
1998	5,089	2,585	50.8

Hoffman, *supra* note 8, at 1502 n.260.

33. *See, e.g.*, Paul Ricoeur, The Symbolism of Evil 26-27 (1967).

abide by the laws of the gods we will be protected from their wrath.[34]

As humans began to imitate the laws of gods with the laws of men, we also imitated defilement. Punishment became one of the methods by which we not only enforced our common codes of conduct but also comforted one another with the idea that no one would have to endure man-inflicted suffering so long as the codes of conduct were honored. Indeed, in its most profound sense, the rule of law necessarily requires the tyranny of gods over man, or of the many over the few, and that tyranny in turn requires some form of theocratic or group disapproval when norms are violated.[35]

Interestingly, imprisonment as a form of punishment is a relatively recent invention, in contrast to custodial detention pending trial. In the ancient world, most crimes were punished either by banishment, various forms of corporal punishment such as beating or mutilation, or, most often, death.[36] Imprisonment was reserved as punishment only for disobedient slaves, whose execution was uneconomic; political criminals, whose execution risked martyrdom; and petty criminals, whose execution was unwarranted.[37] Even as late as the 1780s, in a society as fully touched by the Enlightenment as England, death was the sanction for virtually every crime, including crimes that we would today deem misdemeanors.[38]

34. The God of the Old Testament was, of course, very much a retributionist. One of the central issues in virtually every religion is how to explain man's discovery that God's retribution does not always appear just.

35. A few commentators contend that the roots of punishment were in fact restorative, rather than retributive, at least until the Norman Conquest. *See, e.g.*, Braithewaite, *supra* note 1, at 2. This view stems from an overbroad, noncriminological use of the word "punishment." It goes without saying that humans have always recognized that some wrongdoers can change their ways, hoped that all wrongdoers could, and suspected that some wrongdoers cannot. Naturally, these views found their way into many human institutions, from families to churches. These views do not shed any real light on the question of criminological punishment—that is, what the state should do to a particular wrongdoer in response to a particular crime. Is the wrongdoer one of us, who must be punished to restore his moral standing? See *infra* notes 50-52 and accompanying text. Or is he diseased, and in need of some kind of treatment? In this sense, it is clear that civilization has always been retributive and not rehabilitative, at least until the 1920s and 1930s, when the confluence of Freud and the Progressives led us to a rehabilitative norm where all people are seen as the diseased products of their past, and therefore fundamentally not responsible for their actions. *See infra* notes 61-62 and accompanying text.

36. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 4 (1974).

37. *Id.*

38. 4 WILLIAM A. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *98 (W.L. Dean ed., 1846). In a famous passage in *A Tale of Two Cities*, Dickens laments that, as late as the French Revolution, English law imposed the death sentence for all manner of criminal offenses, including forgery, bad checks, unlawfully opening a let-

There were many precursors to the modern prison: jails for pretrial detention and short sentences; workhouses for debtors; almshouses for the poor; reformatories for minors; convict ships for banishment; and the gallows for most other crimes.[39]

In fact, the prison—that is, a jail for serving long sentences after conviction—is a uniquely American invention. Prisons were first used by Pennsylvania Quakers in the late 1700s, primarily as a humane alternative to corporal punishment and execution.[40] The first prison was Philadelphia's Walnut Street Jail, which the Quakers opened in 1790 as a "penitentiary" for criminals convicted in the Commonwealth of Pennsylvania.[41] The Quaker notion of a penitentiary was the product of the fortuitous confluence of the Quakers' theological beliefs and their knowledge of Cesare Beccaria's retributionist monograph *On Crimes and Punishment.*[42] The Quakers hoped that long periods of isolation, which provided an opportunity for reflection and solitary Bible study, would ultimately lead to repentance.[43] New York adopted this system in 1796, and prisons soon flourished across America and Europe.[44]

The modern debate about punishment revolves around the primacy of four components: retribution, deterrence, incapacitation, and rehabilitation.[45] In the late 1700s—precisely at the time when the Quakers were experimenting with prisons and, more importantly, when our founders were debating our form of government—the German philosopher Immanuel Kant constructed a philosophy of retribution, giving a rational foundation to what had been the retributional basis of all punishment since the dawn of civilization.[46] He argued that the preeminent goal of criminal law must be retribution, and that punishment should be an end in it-

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ter addressed to another, stealing as little as forty shillings, and horse theft. CHARLES DICKENS, A TALE OF TWO CITIES 50 (Oxford Univ. Press 1953) (1859).

39. MORRIS, *supra* note 36, at 4.

40. *Id.* at 5.

41. *Id.* at 5. Some historians contend that the first true penitentiary was the so-called "People Pen" constructed by the Massachusetts Pilgrims in Boston in 1632. *See, e.g.*, PHILIP D. JORDAN, FRONTIER LAW AND ORDER: TEN ESSAYS 140 (1970). In any event, it is clear that it was the Quaker's Walnut Street Jail, and not the Pilgrims' Boston People Pen, that became the model for the early American penitentiary. MORRIS, *supra* note 36, at 4-5.

42. MORRIS, *supra* note 36, at 5. See the discussion of Baccaria in the text accompanying *infra* notes 53-55.

43. MORRIS, *supra* note 36, at 4.

44. *Id.* at 5.

45. *Id.* at 58.

46. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (Ladd trans., Bobbs-Merrill 1965) (1797).

self.[47] Kant's view was that to punish the criminal defendant as a means to any other utilitarian goal—deterrence or rehabilitation, for example—was to de-humanize him by reducing him to an object.[48] Moreover, Kant viewed punishment as a purely retributive reaction to the crime itself, therefore, the punishment had to be proportionate to the crime.[49]

Georg Hegel concurred with Kant's retributionist ideal, adding the notion that punishment annulled the crime.[50] In Hegel's construct, crime is the negation of moral law, and punishment is necessary to negate that negation to restore the moral right.[51] Hegel continued the Kantian view that criminals themselves are moral beings, entitled to have their crimes negated by proportionate punishment. As Hegel stated:

> [P]unishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.[52]

Cesare Beccaria is generally credited with the first systematic exposition of proportionality.[53] His version, much heralded in Western Europe and the American colonies, took a decidedly political view. Beccaria believed that requiring criminal sentences to be proportionate to the crime was an important limitation on the powers of government.[54]

Thus, retribution not only survived the Enlightenment, it achieved an important philosophical structure, both in its own right and as the basis for proportionality. It continued to flourish in both Europe and America and was consistent with the spread of the Quaker penitentiaries. People were sentenced to penitentiaries to be punished; there was nothing "rehabilitative" about them, except the repentance that was expected to come from enduring the punishment.

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47. *Id.*
48. *Id.*
49. *Id.*
50. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 71 (T.M. Knox trans., Oxford Univ. Press 1942) (1821).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*

The retributionist paradigm lasted thousands of years and did not come under serious philosophical attack until the early 1800s, when a group of English utilitarians led by Jeremy Bentham began to challenge it.[55] For the utilitarians, the *only* purpose of punishment was to prevent crime, that is, to be a deterrent.[56] Bentham, and in America, Justice Oliver Wendell Holmes, Jr., saw the prospective criminal as a rational bad man, who weighed the benefits of his crime against the risks of detection and the costs of punishment.[57] The purpose of punishment under the deterrence model was simply to make the costs of crime so high that they outweighed the benefits.[58]

The utilitarians believed that morality has nothing to with punishment. Bentham argued that if he could be assured that a particular criminal would never commit another crime, any punishment of him would be unjust.[59] Richard Posner has argued that aside

55. JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT (R. Heward & R. Smith et al. eds. and trans., 1830).

56. *Id.*

57. Bentham and Holmes were very much the progenitors of the University of Chicago-based law and economics movement, which extended these utilitarian principles to other areas of the law. Ironically, Holmes also spawned the left-wing "critical legal studies" movement, which is equally devoid of moral principles. *See generally* ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES (2000); Morris B. Hoffman, Book Review, 54 STAN. L. REV. 597 (2001). Holmes rejected not only the retributionists but also those utilitarians whose view of "prevention" included rehabilitation. Holmes's logic, as usual, was compelling: the criminal law will lose all of its deterrent purpose if bad men know they will be treated rather than punished. Indeed, Holmes's notion of the "bad man" was itself a rejection of the rehabilitative ideal. At the very least, Holmes argued that rehabilitation could never be the only purpose of punishment: ("If it were, every prisoner should be released as soon as it appears clear that he will never repeat his offence, and if he is incurable he should not be punished at all.") OLIVER WENDELL HOLMES, JR., THE COMMON LAW 42 (Little, Brown & Co. 1923) (1881). These observations take on an eerily modern significance when we talk about drug courts as devices for reverse moral screening. See *infra* note 110 and accompanying text.

58. HOLMES, *supra* note 57, at 42-43.

59. BENTHAM, *supra* note 55, at 41. "If we could consider an offense which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be adding one evil to another." It seems to me that this conclusion follows only if one takes an unduly narrow view of deterrence. Deterrence is not only about discouraging the particular wrongdoer from committing additional wrongs in the future, but also discouraging other people by example. And, of course, this second kind of deterrence has the potential to be substantially more effective, because it acts on the population as a whole, rather than on a single criminal. For the very same reason, assuming equal rates of success, deterrence is far more efficient than rehabilitation.

from the problem of judgment-proof criminals, all criminal sanctions could be replaced with a system of fines.[60]

Naturally, if punishment is viewed as a utilitarian tool to deter future illegal behavior of potential criminals, then it can also be used, though less efficiently, to shape the behavior of the particular defendant being punished. Not only would punishment deter him from engaging in future crimes, but it could also *change* him. The early beginnings of what became known as the "rehabilitative ideal" thus started, on their face, as a rather simple extension of the deterrence model.

But it was hardly a simple extension. It represented a profound change in the way human behavior was viewed. Criminals were no longer ordinary people, cursed like all of us with original sin, whose own humanity demanded that their crimes against moral consensus be purged with proportionate punishment.[61] Rather, they were morally diseased, quite different from us, and they needed to be cured.

By the end of World War I, this rehabilitative perspective was becoming dominant in American penology, and it remained dominant until after World War II. It is probably no coincidence that the rise and fall of the rehabilitative ideal coincided roughly with the rise and fall of the welfare state.[62] Among the state's increasing New Deal responsibilities toward its citizens was the responsibility to cure all the social ills that were believed to lead to crime, and to treat criminals whose as-yet unreformed social circumstances led them to crime. There was a distinct moral fervor in the early rehabilitationists, as there is in its current devotees, similar to the tenor of the temperance movement: There is a right way and a wrong way to live, and lost souls who choose the path of crime, whether as a result of social circumstance or not, must be shown the right way.

The attacks on the rehabilitative ideal came primarily from the political left, beginning with the jewel of the rehabilitative ideal—the American juvenile court system. With its progressive origins in Chicago in 1899, the juvenile court movement was based on the belief that young offenders were not only ripe for rehabilitation, and needed a more individualized and sensitive justice system in

60. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1203-04 (1985).

61. *See supra* notes 50-52 and accompanying text.

62. *See, e.g.*, R.A. Duff & David Garland, *Introduction: Thinking About Punishment, in* A READER ON PUNISHMENT 1, 2-3 (R.A. Duff & D. Garland eds., 1994).

order to maximize rehabilitative efforts, but also that, unlike adult criminals, they suffered from the curable sociological disease of "delinquency."[63] The function of juvenile courts was not to punish or to deter, but to cure delinquency. The juvenile court movement took the nation by storm, not at all unlike today's drug court movement.[64] By 1920—just twenty years after their invention—juvenile courts were in place in all but three states.[65]

But the sensitive paternalism of the juvenile court movement had an ugly statist face. Commentators began to write about a system in which gentle persuasion was giving way to unchecked judicial powers, and where an abject lack of basic due process "helped to create a system that subjected more and more juveniles to arbitrary and degrading punishments."[66] Even the Supreme Court entered the fray, ruling in 1967 that juvenile defendants are entitled to the protections of the Sixth Amendment's guaranty of counsel.[67]

Critics of both the juvenile and adult rehabilitative ideal also began to express concerns about a governmental regime in which defendants are simultaneously treated and punished. In 1971, the American Friends Service Committee published a scathing attack on rehabilitative penology, and included in their criticisms a fundamental objection to coerced treatment: "When we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely im-

63. *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977).

64. There are other striking similarities between the juvenile court movement and the drug court movement: both were initially led by charismatic judges; both are based on a fundamental therapeutic paternalism; both have liberal political origins but are quick to deny they are "soft" on crime; both rely heavily on pseudo-scientific social principles; both rely on informal proceedings; and both are designed to decrease the role of the defense lawyer and increase the activism and discretion of the judge. NOLAN, JR., *supra* note 2, at 174 ("[S]o similar are the two forms of therapeutic jurisprudence that one is tempted to view the juvenile courts as the direct historical antecedent to drug courts."). Nolan also points out significant differences between the two movements, however, including the fact that juvenile courts relied much less on the therapeutic community and that juvenile judges were much less active in defendants' day-to-day treatment. *Id.* at 174-75; *See generally* Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1206, 1269-77 (1998).

65. NOLAN, JR., *supra* note 2, at 171.

66. PLATT, *supra* note 63, at 162; *see also* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120 (1991).

67. *In re* Gault, 387 U.S. 1, 61 (1967).

prison him for a specific length of time."[68] The Quakers' recantation of the rehabilitative ideal was particularly influential, given their seminal role in the invention of the American penitentiary.

By 1970, forty years after its ascension, the rehabilitative ideal was in theoretical and empirical shambles.[69] Uncoupled to any concept of proportionality, its primary theoretical failure was that it gave the state unchecked powers to "cure" that were unrelated to any notions of criminal responsibility and fundamental justice. If it takes ten years of prison, or any other form of state-imposed therapy or re-education, to cure Jean Valjean of shoplifting, then ten years is what must be imposed. This threat to individual liberty, acceptable to pro-government progressives of the 1930s, was decidedly unacceptable to a post-World War II, post-Nazi, cold war generation becoming increasingly wary of state power. As Norval Morris put it: "[T]he concept of just desert remains an essential link between crime and punishment. Punishment in excess of what is seen by that society at that time as a deserved punishment is tyranny."[70] He further stated: "We cage criminals for what they have done; it is an injustice to cage them also for what they are in order to change them, to attempt to cure them coercively."[71]

The real death knell to the rehabilitative ideal, both in general and in its juvenile incarnation, came not from the theoreticians but from the empiricists. Rehabilitation simply did not work. Crime was mysteriously immune to the entire liberal regimen, from antipoverty programs to prison reform.[72] After four decades of experimentation, the studies rather dramatically illustrated that all of our idealistic efforts to rehabilitate had virtually no effect on the propensity of juveniles or adults to commit crime.[73]

The fiction that imprisonment, even in its most rehabilitation-friendly form, has ever been successful in rehabilitating inmates has come to be called "the noble lie" by some critics.[74] David

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68. AM. FRIENDS SERVI. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 147-48 (1971).

69. *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

70. MORRIS, *supra* note 36, at 76.

71. NOLAN, JR., *supra* note 2, at 163 (quoting Norval Morris and Gordon Hawkins, Letter to the President on Crime Control).

72. Ainsworth, *supra* note 66, at 1104 ("Despite several decades of experience with rehabilitative penology in the adult and juvenile systems, however, criminal recidivism stubbornly refused to whither away.")

73. *Id.* at 1105.

74. *E.g.*, MORRIS, *supra* note 36, at 20-22 (discussing the "abandonment" of the reform of criminals as justification for imprisonment).

Rothman, who coined the term, argued in 1973 that it was long past time to abandon the noble lie:

> The most serious problem is that the concept of rehabilitation simply legitimates too much. The dangerous uses to which it can be put are already apparent in several court opinions, particularly those in which the judiciary has approved of indeterminate sentences . . . . Moreover, it is the rehabilitation concept that provides a backdrop for the unusual problems we are about to confront on the issues of chemotherapy and psychosurgery . . . . This is not the right time to expand the sanctioning power of rehabilitation.[75]

With a swiftness rarely seen in complex institutions, the American penal system dropped rehabilitation almost overnight. What had, as late as 1972, been described in the criminal law treatises as the central justification for punishment,[76] was by 1986, being described in the past tense.[77] This was much more than a theoretical rejection by academics and textbook writers. Correctional officials across America were also abandoning rehabilitation in their day-to-day operations.[78]

The extraordinarily sudden abandonment of the rehabilitative ideal gave way to a kind of fusion of retribution and incapacitation, dubbed by some as "neo-retributionism."[79] The modest goals of punishment as a just dessert, and prevention as the simple act of taking criminals out of society, replaced rehabilitation as the dominant penal theory.[80] These ideas ultimately resulted in the abandonment of indeterminate sentencing schemes and eventually to the controversial Federal Sentencing Guidelines.[81]

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75. David J. Rothman, *Deincarcerating Prisoners and Patients*, 1973 C.L. REV. 8, 24 (1973).

76. *See, e.g.*, WAYNE LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 23 (1972) (noting that "there has been more of a commitment to the 'rehabilitative ideal' in recent years than to other theories of punishment").

77. *See, e.g.*, WAYNE LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 28-29 (2d ed. 1986) (discussing the dearth of criticism of rehabilitative theories beginning in the 1960s).

78. *See, e.g.*, Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1012-13 (1991) (discussing the abrupt rejection of the rehabilitative ideal of punishment).

79. *See*, Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1502 (2000).

80. *See generally* MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979) .

81. The Guidelines began with Congress's 1984 enactment of the Sentencing Reform Act, Pub. L. 98-473, 98 Stat. 1837, 1976 (1984) ("the SRA"). The SRA changed

Almost all modern criminologists acknowledge that each of the four traditional justifications for punishment—retribution, deterrence, rehabilitation, and incapacitation—must continue to play some role in the criminal justice system.[82] However, integrating them into a coherent and sensible system has not been easy, in no small part because they represent incompatible goals.[83] If deterrence and incapacitation were the only considerations, then perhaps all crimes should be punishable by life sentences or death.[84] If rehabilitation were the only consideration, then all crime could be considered forms of social disease, treatable in hospital-like settings, never in prisons.

Only retribution connects the crime with the punishment, treats criminals as moral beings rather than diseased subjects in a utilitarian social experiment, and imposes proportionality limitations on the government's right to punish. As a result, despite all their machinations about a synthesis, most modern criminologists have

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the century-old federal indeterminate sentencing scheme to a determinate one and created the U.S. Sentencing Commission, which ultimately created the Guidelines. West Group, Federal Sentencing Guidelines Manual 1-2 (1999). One can be a neo-retributionist without necessarily being a fan of the Guidelines. The SRA and its Guidelines triggered a whole host of controversies, including constitutional questions about the separation of powers and institutional questions about the role of judicial discretion, the resolution of which do not necessarily depend on one's views on retribution. *See, e.g.*, Charles L. Ogeltree, Jr., *The Death of Discretion?: Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938 (1988) (criticizing the Guidelines for failing to address the complex issues involved in sentencing, such as individual characteristics of the defendant and racial disparity in sentencing); Note, *The Federal Sentencing Guidelines and Confrontation Rights*, 42 Duke L.J. 382 (1992) (advocating that confrontation rights should apply to sentencing under the Guidelines in order to adequately protect defendants); Note, *The Standard of Proof at Sentencing Hearings Under the Federal Sentencing Guidelines: Why the Preponderance of the Evidence Standard is Constitutionally Inadequate*, 1997 U. Ill. L. Rev. 583 (1997). In 1989, the Supreme Court rejected constitutional attacks on the SRA and Guidelines based on arguments that they were a delegation of excess legislative authority and a violation of the separation of powers. United States v. Mistretta, 488 U.S. 361 (1989). Commentators have disagreed about whether the Guidelines allow appropriate rehabilitative consideration, especially in drug cases. Compare Note, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines and the Problem of Drug Rehabilitation*, 91 Colum. L. Rev. 2051 (1991) (describing the disagreement over the interpretation of the Guidelines as allowing downward departures for rehabilitated defendants) with Comment, *Downward Departures from the Federal Sentencing Guidelines Based on the Defendant's Drug Rehabilitative Efforts*, 59 U. Chi. L. Rev. 837 (1992) (arguing that defendant's genuine efforts at rehabilitation can be a valid reason to justify departure from the Guidelines).

82. Nolan, Jr., *supra* note 2, at 159-64.

83. *Id.* at 159-64.

84. A situation which, as described in the text accompanying note 38 *supra*, comes close to describing most European criminal systems from the Middle Ages through the Enlightenment.

found their way back to retribution as the pole star of punishment.[85]

In 1979, Francis Allen delivered the Storrs Lecture at Yale Law School on the topic of the demise of the rehabilitative ideal. That lecture was published in 1981, and it has become a kind of obituary for rehabilitation.[86] Allen impressively documented both the theoretical and empirical failings of rehabilitation. He concluded his lectures with this prediction:

> [A]ttitudes toward [the rehabilitative ideal] are likely to be wary in the closing years of this century. A statement made by Lionel Trilling over a generation ago still possesses acute relevance to the present: "Some paradox of our nature leads us, when once we have made our fellow men the object of our enlightened interest, to go on to make them the objects of our pity, then our wisdom, ultimately our coercion. . . ." Given the history through which American society has recently passed, it is hardly possible that the total benevolence of governmental interventions into persons' lives will be unthinkingly assumed . . . . It is just as well. For modern citizens of the world have learned that the interests of individuals and society are frequently adverse and that the assumption of their identity supplies the predicate for despotism.[87]

Sadly, Professor Allen's prediction could not have been more wrong. Less than ten years after rehabilitation's obituary, the gurus of rehabilitation were back, this time with a vengeance, fueled by a zeal to treat the psychiatrically less fortunate, and in particular to win the war on drugs. These neo-rehabilitationists are pushing judges into unprecedented extremes that Professor Allen could not have imagined. In the flash of an eye judges have become intrusive, coercive, and unqualified state psychiatrists and behavioral policemen, charged with curing all manner of social and quasi-social diseases, from truancy to domestic violence to drug use. By forgetting the most profound lesson of the twentieth century—that the state can be a dangerous repository of collective evil—thera-

85. For example, the utilitarian J.J.C. Smart argues that although deterrence should be the prime consideration of legislators (what he calls "second order" questions), judges should be concerned primarily with retribution (what he calls "first order" questions). J.J.C. Smart, Comment: *The Humanitarian Theory of Punishment* 6 RES JUDICATAE 368 (June 1953). Even Norval Morris, who is associated more with incapacitation than retribution, acknowledges that retribution must play a central role in linking the punishment with the crime. NOLAN, JR., *supra* note 2, at 163.

86. ALLEN, *supra* note 69.

87. *Id.* at 86-87.

peutic jurisprudence poses a serious risk to the kind of individualism and libertarianism upon which our republic was founded.

III. The Theory Behind Therapeutic Jurisprudence

Although therapeutic jurisprudence descends directly from the long-rejected rehabilitative ideal, its proponents rarely talk about its theoretical heritage. The movement is almost devoid of anything resembling serious theoretical self-examination. The questions that have plagued philosophers and criminologists for a thousand years, and whose answers have come to define all major schools of criminology, are questions therapeutic jurisprudence devotees seldom ask.[88] But the movement does have a short history, if not a terribly satisfying theoretical one.

It owes its beginnings to mental health law, where, by definition, the current and prospective mental states of the participants are the primary inquiry. Its initial insights were neither terribly profound nor particularly original: in a system whose very function is to judge the mental state of its subjects, we should think about the mental health effects of the actions we as judges take. Thus, for example, when we remand a criminal defendant for a competency evaluation, we should think about the effects the remand and evaluation might have on the defendant's competence.

These initial formulations about a therapeutic judicial perspective were limited in several important respects. First, they were focused on empirical questions: what effects are our rulings having on the mental health of the chronically mentally ill, insane or incompetent? Proponents, at least initially, never suggested that we should begin to change our rulings or the way we make them in anticipation of effects before we measure what those effects might actually be.

More importantly, these therapeutic ideas were originally proposed exclusively for application to mental health law, where the state has already crossed that thorny boundary of paternalism and already has its hands uncomfortably inside the heads of the unfortunate participants. Of course, many aspects of mental health law involve the judiciary's positive obligation to ensure treatment of the mental conditions of the people appearing in court as a precon-

88. The one exception I found was an article about restorative justice written by an Australian social scientist, John Braithewaite. Braithewaite, *supra* note 1. Professor Braithewaite not only tackles the difficult traditional philosophical and criminological issues underlying punishment, he also attempts to summarize the data behind the claims and criticisms of the model.

dition to moving into its more traditional truth-finding role. By expanding the therapeutic model into nonmental health areas, the therapeutic jurisprudence movement not only intrudes without any basis for intrusion, it profoundly changes the judicial function. Trials are no longer processes to investigate factual guilt and discover truth, they are mere opportunities to treat.

This therapeutic perspective is completely inimical to the judicial function. We should conduct trials guided by the rules of procedure and evidence that have been crafted over centuries to maximize the reliability of the result, not to ensure that the litigants have a meaningful mental health experience. We should impose sentences and assess damages guided by well-settled principles of responsibility, not by fretting about whose feelings will be hurt or how the community can be healed.

The profound and dangerous expansion of the judicial role represented by the therapeutic jurisprudence movement is just a small part of a broad therapeutic trend in all aspects of government and indeed across the entire spectrum of our culture. James Nolan has labeled this trend "the therapeutic ethos."[89] Government's new role is to treat, not to enforce norms. Its success is measured by how it makes us feel, not by what it actually does. And because the couch of State needs patients, citizens are no longer individual participants in a free republic, but sets of victims with complicated diseases in dire need of state-sponsored treatment.

In this "postmodern moral order," as Nolan calls it, suffering is no longer viewed as a part of the human condition, but rather as the inevitable consequence of some disease or injury. Almost all of human behavior has become pathologized. We speak of "addictions" to all manner of behaviors that we would have called "choices" just thirty years ago.[90] Today, cancer and alcoholism are both "diseases"; heroin use now shares an addictive moral equivalence with things like gambling and eating chocolate. Of course, this externalization of behavior is just a new version of our old friend defilement: once we blamed phantom gods for our suffering;[91] now we blame phantom diseases.[92]

In the particular context of drug courts, James Nolan has called this process of pathologization the "eradication of guilt":

89. NOLAN, JR., *supra* note 25, at 17-21.

90. *See, e.g.*, STANTON PEELE, THE DISEASING OF AMERICA: ADDICTION TREATMENT OUT OF CONTROL (1989).

91. *See generally supra* notes 33-35 and accompanying text.

92. *See generally supra* notes 33-35 and accompanying text.

> The drug court's eradication of guilt has been a subtle and insidious process. Guilt is not so much challenged as ignored. It is not so much disputed as it is made irrelevant. But it is the making irrelevant of something that has long been regarded as the crux of criminal justice. . . . 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.[93]

Blaming the pathogens has become the raison d'être for the judicial system, both in criminal and civil cases. An African man who murders his wife blames his anti-divorce culture;[94] a fired employee blames "chronic lateness syndrome."[95] Of course, the judiciary takes its cases as it finds them, and judges cannot be blamed entirely for acting like psychiatrists when the parties insist on it. But the therapeutic jurisprudence movement requires us to act like psychiatrists even when no litigant is insisting on it, and indeed even when all the litigants object (that is, they are in "denial"). It is this aspect of mandated judicial intrusion that makes therapeutic jurisprudence so dangerous and so utterly unacceptable in our constitutional scheme.

IV. THE MOST DANGEROUS BRANCH

The judicial branch was specifically designed to be the least dangerous of the three branches. Hamilton coined that famous phrase in this classic description of the circumscribed powers of the federal judiciary:

> [T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[96]

93. NOLAN, JR., *supra* note 2, at 142-43.

94. Margot Slade, *At the Bar*, N. Y. TIMES, May 20, 1994, at B20.

95. Sch. Dist. of Phila. v. Friedman, 96 PA. COMMW. 267, 270 (1986).

96. THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (B. Wright ed., 1996).

Federal judges are not elected, but appointed for life, helping to decrease the chances they will be influenced either by corrupt forces or, often more subtly, the vagaries of popular will.[97] The case or controversy requirement helps decrease the chances that judges will make abstract law (that is, policy) in the guise of deciding a case.[98] The very architecture of the federal and state systems leaves the judicial branches without the power either to make or enforce laws and further dissipates federal judicial power by imbedding it in a system in which individual states continue to operate in their own spheres of sovereignty.

One might ask why the founders were so keen on such a comprehensive institutional clipping of the judiciary's powers. The answer is that they appreciated, from their own English history, that unchecked judicial power is an evil to avoid at almost any cost. Both the Federalists and the anti-Federalists were acutely aware of the failings of the English system, in which all judges were appointed by the Crown and served at the Crown's pleasure, and in which Parliament was invested with supreme appellate jurisdiction in all cases.[99]

The founders were even more acutely aware of the failings of the Confederation, under which there was no federal judiciary at all.[100] Hamilton wrote extensively about the need for an independent judiciary to house judges capable of defending the new federal Constitution against incursions by the other two branches.[101] Madison's expositions on the separation of powers doctrine were designed to allay the fears of the anti-Federalists that the existing constitutional plan did not do enough to separate the three branches.[102]

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97. U.S. CONST. art. III, § 1.

98. U.S. CONST. art. III, § 2.

99. In *The Federalist No. 47*, which was Madison's first exposition on the separation of powers, he discusses at length the entangled failings of the British judiciary, and even quotes Montesquieu's criticisms:

> "Were the power of the judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

THE FEDERALIST NO. 47, at 338 (James Madison) (B. Wright ed, 1996).

100. "A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation." *Id.* at 187.

101. THE FEDERALIST NO. 22, at 489-96 (Alexander Hamilton) (B. Wright ed., 1996).

102. THE FEDERALIST NO. 47, at 84 (James Madison) (B. Wright ed., 1996).

Our commitment to judicial restraint is not limited to the constitutional design. The mootness[103] and ripeness[104] doctrines give meaning to the case or controversy requirement, and help insure that decisions by judges will be a recourse of last resort. Indeed, the whole paradigm of the common law is built around the notion that precisely because judges have extraordinary powers in single cases—the power to incarcerate and the power to bankrupt—those powers must be limited to single cases and will operate beyond single cases only after surviving the judgment of judicial history.[105]

Along with these structural limitations, judges have developed a powerful ethos of restraint. Although some might say the ring of that ethos has become rather hollow in the years following the New Deal and Warren Courts, the restraining rules have for the most part remained quite vigorous, especially in trial courts. Deference to appellate court precedent effectively constrains even the most independent-minded trial judge, as it does the appellate courts themselves, though of course to a lesser degree. At all levels, we are loath to decide issues we need not decide, are generally committed to deciding cases on the narrowest grounds, and will almost always follow controlling precedent.

All of these constitutional, common law, and normative principles have blended together to create a profound commitment to restraint in responsible judges. We are unrepresentative, mostly unelected, independent magistrates whose function is to decide no more than the necessary issues in the single cases thrust upon us, in accordance with laws and established rules of evidence and procedure with which we may or may not agree. Juries tell us the facts, appellate courts may tell us we were wrong on the law, and legislatures may avoid most effects of our decisions by changing the laws. We have no more valid insight into public policy than the members of any other particular occupation.[106]

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103. *See, e.g.*, Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g, 467 U.S. 138, 157 (1984) ("It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them.").

104. *Id.*

105. *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 33-37 (Harvard Univ. Press 1923) (1881).

106. Holmes is perhaps more responsible than anyone for breathing life back into the founders' commitment to judicial restraint. He wrote powerfully and elegantly about the need for judges to judge rather than legislate, and his commitment to that principle was all the more impressive because he personally disagreed with so much of what the progressive Congress was trying to do in the 1920s and 1930s. In fact, he suggested that his epitaph be "Here lies the supple tool of power." ALSCHULER, *supra*

Yet it seems to be an occupational hazard for judges and other members of the public to confuse our simple role as gatekeepers of the truth-finding function with anything at all having to do with the will of the governed. We do not make public policy; we do not even enforce it. We are, as Madison put it, only the "remote choice of the people."[107] That very remoteness is what both prevents us from becoming, and tempts us to become, the most dangerous of the three branches.

The therapeutic jurisprudence movement requires us to become the kind of involved, hands-on, right-thinking, sure-footed activists that the judicial branch was specifically designed to exclude. It requires us to accept, in a collective fashion entirely inconsistent with the fierce independence of the judiciary, a therapeutic paradigm that is not only a matter of public policy, but about which reasonable public policy makers differ. It is forcing us to collaborate with prosecutors, defense lawyers, and therapists in a fashion that is entirely inconsistent with our adjudicative role. In its most virulent drug court form it requires us to send people to prison not because they violated the law (since the real engine of drug courts is the unstated belief that possession should not be a crime), but rather because they resisted our enlightened treatment efforts. In short, therapeutic jurisprudence is a code phrase for a kind of one-stop-shopping system populated by judges who believe that they have such powerful insights into public policy (insights that have apparently escaped mere legislators) that they cheerfully act as parents, best friends, doctors, psychotherapists, prosecutors, defense lawyers, legislators and then, only if all of that fails, judges. I cannot imagine a more dangerous, or sanctimonious, branch.

A. Real Judges as Amateur Psychiatrists: Acts Versus Excuses and the Paradox of Reverse Moral Screening

One the most disturbing consequences of the therapeutic jurisprudence movement is that while therapeutic judges get to play amateur psychiatrist, in the end the command of the law requires them to punish the patients they cannot cure. Imagine going to see a doctor about a disease, knowing that the doctor might not only be unable to cure you, but will be required to send you to prison if you are not cured. Now imagine a whole system of justice based

note 57, at 82. He also wrote that "[I]f my fellow citizens want to go to Hell I will help them. It's my job." *Id.* (quoting Letter from Holmes to Harold Laski (March 4, 1920)).

107. THE FEDERALIST NO. 39, at 281 (James Madison) (B. Wright ed., 1996).

on that notion, and you will have captured the essence of therapeutic jurisprudence.

State-coerced treatment does not work,[108] and even if it did, it is simply immoral for the state to treat and then punish acts it claims have a disease component, as the critics of the rehabilitative ideal demonstrated thirty years ago.[109] The "diseases" to be treated are not diseases at all, but rather complex behaviors that fall within a broad continuum between "voluntary" and "involuntary" behaviors. If we really believed that all human behavior is the product of the relentless and involuntary spasm of genes and experience, and that free will is a quaint mirage, then the state would have no moral right to punish anyone for any crime. The disease of "chronic armed robbery syndrome" would merit no more punishment than cancer. But of course we don't believe that.

The very existence of law is a reflection of deep-seated and shared notions of free will and individual responsibility. That is not to say, of course, that the retribution demanded of crimes cannot take into consideration all of the specific circumstances of the crime, including the criminal's complete background. Indeed, we must take all those circumstances into consideration to fulfill the requirement that retribution be proportional, and therefore just. But it is one thing to say we will consider an armed robber's I.Q. and childhood in crafting the amount of retribution, and quite another thing to say that the disease of chronic armed robbery syndrome should be treated rather than punished. Therapeutic jurisprudence blurs, and is intended to blur, this fundamental moral distinction between act and excuse.

Even if treatment worked, and could be justly combined with punishment, the therapeutic paradigm punishes the wrong people. For example, if drug addiction really is a disease, then the most diseased addicts are precisely the ones most likely to fail many, if not all, attempts at treatment. Drug courts are thus performing a kind of "reverse moral screening."[110] Truly diseased addicts end up going to prison, while those who respond well to treatment, and whose use of drugs may thus have been purely voluntary, escape punishment.

108. *See supra* notes 24-30, 72-73 and accompanying text.

109. *See supra* notes 64-66, 69 and accompanying text.

110. Hoffman, *supra* note 8, at 1476.

B. Judicial Collectivism

Therapeutic judges not only act ineffectively and immorally as amateur psychiatrists, they also act in a dangerous collective, wholly inconsistent with fundamental axioms of judicial independence. They act in concert with, and therefore abrogate their independence to, each other, their "communities," prosecutors, defense lawyers, and therapists.

One of the starkest examples of the kind of group action that dominates the therapeutic model can be found in the intense political machinations undertaken to create and sustain drug courts. Unlike other legal reform movements, that began with a handful of individual decisions, commentaries, or experiments, and then spread through the power of their own persuasion, the drug court movement has a decidedly top-down pedigree. Though they began as a single experiment in Miami, drug courts spread because of centralized federal funding, not because they were effective. Drug courts exhibit a remarkable uniformity because they must now meet a host of specific federal criteria in order to qualify for federal funds.[111] What once was an opportunity for state and local governments to experiment with drug court reforms has, to a great extent, turned into a lockstep ersatz federal program.

Drug court workshops across the country are "heavily scripted and staged events," designed to give drug court officials an opportunity to "strategize with each other and educate those new to the scene about how best to present the program to sometimes skeptical audiences for the purpose of garnering public support and financial resources to further the movement."[112] There is a five-part liturgy to the drug court movement's rigid political doctrine: 1) convince prosecutors that drug courts are not soft on crime; 2) start off with only low-level drug offenses while building public support; 3) cultivate relationships with the media; 4) hold graduation ceremonies in open court as public relations events; and 5) constantly perform evaluation studies to justify continued funding.[113] This is mindless public relations mantra, not creative judicial reform by independent-minded judges.

When the federal funds run out, as they inevitably seem to do, drug court judges then participate in lobbying legislatures, city councils, and even the private sector for funding. Their partisan

111. Id. at 1528-29.

112. NOLAN, JR., *supra* note 2, at 62.

113. *Id.* at 62-65.

enthusiasm crosses even the most forgiving boundaries of judicial propriety. A Las Vegas, Nevada drug court judge set up his own tax-exempt nonprofit organization through which to solicit private funds for his drug court.[114] A Rochester, New York drug court judge used the local United Way to dispense the private funds he raised for his drug court.[115] A 1997 Justice Department survey showed that nine drug courts had solicited a total of nearly half a million dollars from private sources.[116] Therapeutic jursisprudence is turning some of us into embarrassing hucksters.

The development of so-called "community-based courts" is another example of judicial collectivism at its worst. Modeled after New York City's Midtown Community Court, these courts have been started in many urban areas to deal with what proponents call "quality of life crimes."[117] Generally, defendants convicted of crimes such as shoplifting, prostitution, and some low-level drug offenses are "treated" by being put on probation or given deferred sentences and by performing certain community service obligations. Typically, the precise community service obligations are determined in each individual case not by the judge but by a "community advisory board" consisting of various community leaders.[118] This way, the criminals are not only cured of their rude behaviors by having to do the penance of community service, but the criminal tear in the fabric of the community is also healed. Two therapies for the price of one.

The community service options can be rather interesting. They include not only what one might expect from traditional community service, such as clean-up activities like graffiti removal and trash pickup, but also "stuffing envelopes for non-profit organizations."[119] Through community courts, judges abdicate their sen-

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114. *Id.* at 97.

115. *Id.* The judge explains his funding activities this way:

> Whether you like it or not you as the judge are considered a leader of your drug court team. Your team looks to you for inspiration and guidance. So as a leader of that team you must take a very active part in the raising of funds. For the Rochester court, I went out and raised all the money from local foundations.

116. CAROLINE COOPER ET AL., DRUG COURT RES. CTR., DRUG COURTS: 1997 OVERVIEW OF OPERATIONAL CHARACTERISTICS AND IMPLEMENTATION ISSUES 120-27 (1997).

117. *See, e.g.*, Judith S. Kaye, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1494 (1999).

118. *Id.*

119. *Id.*

tencing authority to self-described community leaders and their pet projects, including their favorite charities.

In addition to the usual therapeutic misanthropy inherent in all therapeutic courts, community-based courts raise particularly disturbing problems about the role of judges and their place in the political firmament. Why are some crimes labeled "quality of life crimes" and others not? Surely a murder effects the "quality of life" of the victim, witnesses, and other members of the community more than shoplifting does. Why does the torn fabric of the community need to be repaired after a shoplifting, but not after a murder? The answer, of course, is not that the former is any more damaging than the latter, but rather that the former is more widespread than the latter. It is this widespread nature of "quality of life crimes" that makes community-based courts so politically attractive. They generate an army of involuntary servants to do free work pleasing to a maximum of community voters. Fundamentally, community-based courts are machines of political payoff, dressed in the garb of the judiciary.[120]

The most widespread, and in many ways, most disturbing, form of judicial collectivism occurs in all therapeutic courts, and is embodied in the very term "therapeutic jurisprudence"—the unholy and wholly unconstitutional washing out of the judge's role in an adversary system. All therapeutic courts presume factual guilt. What is called "the presumption of innocence" in traditional courts is called "denial" in therapeutic courts. The judge, prosecutor, therapist, and to a great extent, even the defense lawyer,[121] join

120. Perhaps the most troubling thing about community-based courts is that their proponents are seriously proposing that they be extended from petty crimes to the entire justice system. Chief Judge Judith S. Kaye of the New York Court of Appeals has suggested just such an unbounded extension. "What about a community court for civil cases? For commercial cases? For family cases? For youth crime? . . . . [T]hese are very very good questions, well worth considering." *Id.* at 1494. With all due respect to Chief Judge Kaye, what is a community-based commercial court? Would Chief Judge Kaye have panels of community activists decide whether defaulting borrowers should clean subways instead of repay their bank loans? Should negligent surgeons have to lick and stuff envelopes for the American Trial Lawyers Association instead of paying damages to their victims? In the end, if the rights that flow to individuals—from their contracts, from common law, from statute or from the constitution—are nothing but the shadows of communal judgment, and if individuals' opportunities to enforce those rights in courts of law are replaced entirely by a system in which those rights mean nothing but a certain level of symbolic community opprobrium, then we might as well disband the judiciary. Indeed, our modern world has already experienced a most advanced form of such unbounded community courts—the People's Courts in China during the cultural revolution.

121. For a discussion of the ethical dilemmas drug courts impose on criminal defense lawyers, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Treat-*

together to "help" the patient over his or her denial in order to concentrate on treatment.[122] As a result, the judge, prosecutor, therapist, and defense lawyer thus form a kind of "treatment team," designed to do what is best for the reluctant patient, not to discover truth in the fires of advocacy.

This joining together is so critical that it is common advice to anyone contemplating the development of a drug court that it will not work without the "cooperation" of judges, prosecutors, police, sheriffs, and public defenders. When judges "cooperate" in the formation of drug courts, what is really happening is that they are agreeing to abandon their roles as neutral gatekeepers of the truth-finding process, and instead to join the therapeutic team for the good of the diseased defendants.

In many drug courts, the team participates in daily rituals euphemistically called "staffing sessions."[123] At these staffing sessions, the judge, prosecutor, public defender, and some representative of the therapeutic community, but typically not private defense counsel, meet together in chambers to discuss that day's upcoming matters. The judge, after hearing from everyone, reaches presumptive decisions. Defendants are not present and the staffing sessions are not on the record. Apart from the obvious constitutional concerns,[124] these staffing sessions symbolize what is wrong with having judges join with prosecutors, defense lawyers, and therapists: substantive decisions are being made about a felony defendant by

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ment Court Movement, 76 WASH. U. L.Q. 1205 (1999); *Developments in the Law—Alternatives to Incarceration for Drug-Abusing Offenders*, 111 HARV. L. REV. 1863 (1998). Professor Boldt summarized the problem this way:

> [D]efense counsel [in the drug court] is no longer primarily responsible for giving voice to the distinct perspective of the defendant's experience in what remains a coercive setting. Rather, defense counsel becomes part of a treatment team working with others to insure that outcomes, viewed from the perspective of the institutional players and not the individual defendant, are in the defendant's best interests.

Bolt, *supra*, at 1245.

122. Indeed, treatment is imposed as a blanket condition of bail in many drug courts, despite the potential constitutional problems with such a non-particularized approach. *See* Hoffman, supra note 8, at 1462 n.7; *cf.* United States v. Salerno, 481 U.S. 739, 751-52 (1987) (upholding the constitutionality of the Bail Reform Act of 1984 because it required a particularized showing of governmental need); *see also* Richard B. Abell, *Pretrial Drug Testing: Expanding Rights and Protecting Public Safety*, 57 GEO. WASH. L. REV. 943, 956 (1989) (arguing that pre-trial drug testing is constitutional).

123. *See* Hoffman, *supra* note 8, at 1524.

124. Criminal defendants, even those labeled as the system's "clients," have a Sixth Amendment right to counsel and to be present at all critical stages of a criminal prosecution. *E.g.* Powell v. Alabama, 287 U.S. 45, 68-72 (1932).

some inter-branch committee acting more like a support group than a court of law.

Judges are not psychiatrists, and psychiatrists are not judges. Whenever judges enter the therapeutic arena we must choose between two unpalatable options: either act beyond our expertise or abdicate our judging to therapeutic experts. Most therapeutic courts are designed to do the latter. Although therapeutic judges typically put on a counseling show in open court,[125] the real therapeutic decisions are often made out of court by members of the therapeutic community.[126] This unelected and unaccountable "new priestly class," as James Nolan describes it,[127] has destroyed what small vestige of independence therapeutic judges may have left after already doling out large chunks of it to one another, to prosecutors, and to defense lawyers. Judges may be comforted by pretending to function as a therapeutic team acting in the best interests of defendants, but what is really happening is that they have abdicated the judging role to the new therapeutic priests.

There may be an argument for sacrificing some judicial independence in minor cases to achieve significant therapeutic results, and indeed judges have been trying to do just that for a long time with things like safe driving classes and anger management programs.[128] It may not be terribly troubling to expand these ideas to misdemeanor shoplifting, graffiti offenses, littering, and other kinds of minor offenses with which most community-based courts deal. But applying them to felony drug charges that can result in a defendant going to prison for decades should be wholly unacceptable. If we are going to continue to treat drug use as a crime, and some drug use as a felony, then we must treat felony drug cases seriously, not like parking tickets in a mill in which the judge, prosecutor, defense lawyer, and therapist spend their days trying to push as many people through as possible.

C. Impinging on the Executive Function

Besides violating the doctrine of the separation of powers by forcing judges and prosecutors to work on treatment teams together, the therapeutic jurisprudence movement impinges on the executive function in two more direct and discrete ways—by de-

125. *See supra* notes 2-14 and accompanying text.
126. *See supra* notes 121-123 and accompanying text.
127. NOLAN, JR., *supra* note 25, at 7-9.
128. Even for these kinds of long-established programs, there is virtually no evidence of their efficacy.

molishing prosecutorial discretion and by interfering with corrections.

It is the long-established privilege of prosecutors to decide what crimes to charge and what plea bargains to offer.[129] Therapeutic courts, especially drug courts, substantially eliminate both of these jealously-guarded areas of prosecutorial discretion.

Before drug courts, prosecutors retained their broad discretion to charge or not charge small possession drug cases, and indeed the realities of our system drove many prosecutors, and even police, to ignore some low-level drug possession and even some drug dealing. But in the postmodern therapeutic world, drug offenders are not wrongdoers whose transgressions might be overlooked if they are sufficiently minor, but rather diseased citizens in need of treatment. Thus, we see massive increases in drug filings after the institution of drug courts,[130] and those explosions correspond directly to police and prosecutors agreeing at the front end to arrest and prosecute every drug offender, regardless of circumstance, in order to meet the therapeutic demand for reluctant patients.

At the plea-bargaining end, prosecutors have likewise abdicated their traditional discretion. Most drug courts recognize only a few different kinds of cookie cutter plea bargains, and the decision to offer a particular plea bargain is driven entirely by a few objective criteria, and not by the exercise of any meaningful prosecutorial discretion.[131] After all, this is treatment, not adjudication; triage, not prosecutorial discretion.

Therapeutic courts also impinge on the executive's corrections functions. Providing medical treatment to persons convicted of crimes, and even to persons in custody awaiting trial, is an execu-

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129. Prosecutorial charging and bargaining discretion is a fundamental principle inherent in the doctrine of separation of powers. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985).

> This broad discretion [afforded the prosecution] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

Id.

130. *See supra* notes 31-32 and accompanying text.

131. In Denver, for example, the dispositional algorithm for defendants charged with simple possession is fairly rigid: (1) if the defendant has two or more prior felonies, he or she is ineligible for drug court; (2) if the defendant is arrested with a small, so-called "personal use," amount of drugs, he or she is offered a deferred judgment; (3) if the defendant is arrested with more than a personal use amount, he or she gets probation. *See also* Hoffman, *supra* note 8, at 1513 nn.297-98.

tive function, not a judicial one. When therapeutic courts mechanically impose treatment conditions on all defendants, both before and after conviction, they blur the fundamental distinction between the accused and the convicted, and therefore between the judicial function of determining guilt and the executive function of carrying out sentences and treating prisoners.

It is entirely inappropriate and inimical to our adjudicative role for judges to be deciding whether defendants have been cured of their diseases and whether for that reason no punishment should be imposed. Criminal courts exist to determine whether the state has met its burden of proving that the defendant has committed a crime, and if so, to mete out appropriate and just punishment. The product of a criminal case should be a verdict and a sentence, not a decision whether John Smith should be treated at Acme House or Metropolis Hospital, or whether he truly suffers from borderline personality disorder or is just a jerk.

If we are really serious about treatment, we should direct our treatment resources to the executive branch's corrections facilities, both pre-conviction (jails) and post-conviction (jails and prisons). That is where the push for treatment, voluntary and semi-voluntary, belongs if it belongs anywhere. If we continue to believe that possession of some drugs is serious enough to warrant incarceration, then we should impose that incarceration without further therapeutic hand-wringing. Prisoners can then take advantage, or not take advantage, of intense in-custody drug treatment programs tied to parole eligibility.

D. Judges as Legislators

The therapeutic jurisprudence movement not only forces judges to act in concert with each other, with their "communities," with prosecutors, with defense lawyers, and with therapists, but it also profoundly subsumes the legislative function. By assuming all manner of human behavior is the product of some set of sociological pathogens, therapeutic courts ignore the principles of free will and individual responsibility upon which the criminal law rests. That is, it is for legislatures, and not self-described therapeutic judges, to decide not only whether certain behavior is a crime or a disease, but also in many circumstances to set a range of punishment. On these matters, the legislatures have spoken. We no longer punish adultery, but we do punish the possession of certain drugs. We no longer execute petty thieves, but shoplifting is still a crime.

In many respects, the therapeutic jurisprudence movement, especially its embodiment in drug courts, is simply a judicial reaction to laws some judges do not like. Some judges do not believe certain crimes should be punished by incarceration, and in fact do not think certain crimes should be considered crimes at all. Thus, crimes become diseases, defendants become patients, judges become therapists, and laws are repealed by therapeutic judicial fiat. There may be good arguments for and against decriminalizing some existing crimes, including some drug crimes, but in the end that debate must be settled by elected legislatures and not by judges who think they have some special insight into either medicine or public policy.

CONCLUSION

The therapeutic jurisprudence movement is not being driven by evil judges thrilled at the prospect of exerting unwarranted and unprecedented control over the private lives of fellow citizens, or even entirely by naïve judges suckered into the therapeutic newspeak. Instead, the therapeutic road we are running down has been paved with the good intentions of judges reacting to the flood of dysfunction we see every day in our courtrooms, hardened with a dash of the kind of judicial hubris that positions us to think that because we control our courtrooms we can control the lives of everyone who appears in them. The unprecedented and unwarranted powers assumed by judges in the name of doing psychological good will make us both profoundly dangerous in our own right and hopelessly incapable of protecting citizens from the therapeutic excesses of the other two branches, just as it did when we tried the more general rehabilitative experiment in the 1930s.

The next time a group of "problem solving" activists tries to set up one of these intrusive courts in your community, remember what the Quakers tried to teach us about the dangers of mixing well-intentioned rehabilitation with well-deserved punishment. Remember that we have met failure in a similar fashion in the past. When we tried to treat crime as if it were a disease, and criminals as if they were moral in-patients, the only thing we accomplished was to create a dangerous judiciary that felt authorized to exert power over these diseased patients for as long as it took to cure them. If we repeat these rehabilitative failures, we will continue to de-humanize the objects of our humanitarianism, to fill our penal

system with our therapeutic failures, to short-circuit what should be the real legislative debate, and to devalue punishment as its own clear social object.