DISTORTED NARRATIVES IN THE TREATMENT PROGRAM COMPLEX

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Problem-solving courts and alternatives to incarceration have been both celebrated as successful attempts to address the factors that lead to defendants' involvement in the criminal legal system and critiqued as ineffective reforms that worsen mass incarceration. Specifically, critiques of the "treatment program complex" have tended to focus on how it harms defendants by exposing them to higher levels of incarceration if they fail to complete court mandates. But these critiques have failed to account for another way the treatment program complex harms defendants: by suppressing their voices regarding what kind of help they need and how they are affected by court policies.

Defendants' voices are suppressed because, to successfully bargain for and stay in treatment, defendants must conform to a particular narrative of suitability that both reflects and reinforces stereotypes about addiction and recovery. Defendants thus experience epistemic injustice in that they are harmed in their capacity as givers of knowledge. Further, the treatment program complex is insulated from critique by the very voices that stand to offer the most valuable insights.

This Article's novel contribution is to build on the epistemic injustice literature by examining the unique setting of the treatment program complex, where defendants are often encouraged to speak to the court, and yet simultaneously subjected to sweeping requirements that are intended to rehabilitate them, and to which their resistance is viewed as suspect. At a time when the movement for carceral abolition has called for reinvestment

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in social services and for shifting power in criminal legal system reforms toward marginalized people, it is also important to imagine what that might mean for the treatment program complex. To avoid simply replicating the pathologies of the current system, this Article ultimately advocates for power shifting that centers impacted people's voices in the policy-making space by emphasizing harm reduction and self-determination.

INTRODUCTION

"He's never had a chance at a program before."
"I wanna do it for my kids."[1]

1. Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 425 (2003) (citation omitted).

"She turned down a program before, but she has learned her lesson and is committed to staying clean now."

The above statements represent attempts by criminal defendants or their attorneys to bargain for treatment—or a second chance at treatment—rather than jail. They also convey stories that go beyond the criminal case to convey a sense of who defendants are as people: the story of the defendant who has never had a chance, the story of the devoted father who should be with his kids instead of in prison, and the story of the remorseful defendant who is now willing to accept help.

Scholars of narrative have long observed the power of stories to sway decisionmakers.[2] In the criminal legal system, telling a client's story to "humanize" the client is a crucial component of client-centered lawyering.[3] Public defenders bargain "in the shadow of the client," meaning they emphasize "equitable factors" related to their clients' lives in order to persuade a decision-maker to be more lenient—for example, to impose a lower sentence or make a better plea offer.[4]

However, as scholars have observed, even when narratives that humanize defendants are effective in terms of winning trials and garnering relative leniency, these stories can also reify stereotypes and marginalize defendants, even as they ostensibly speak for them. Presenting a defendant as deserving a less punitive outcome ultimately involves engaging with a discourse of

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2. *See, e.g.*, Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

3. *See, e.g.*, Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 485–87 (1994) (describing how clinical theory has "long grounded narrative in the actual practice of lawyering" and how theorists, including critical race theorists, have begun to focus on how clients' voices have been "muted" by the narratives crafted by lawyers on their behalf). With over 95 percent of criminal cases being resolved by plea, humanizing narratives may also often be the best way for a defense attorney to mitigate the outcome of a criminal case. NAT'L ASS'N FOR CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2019). Also central to the creation of these humanizing narratives is the presumption that without them, the decision-maker will be biased against a defendant and will see them as defined solely by the criminal allegations against them. *See, e.g.*, Pamela A. Wilkins, *Confronting the Invisible Witness: The Use of Narrative to Neutralize Capital Jurors' Implicit Racial Biases*, 115 W. VA. L. REV. 305 (2012). Even where decision-makers are not explicitly biased, implicit bias undoubtedly affects their decisions. *See, e.g.*, Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243. Humanizing narratives are thus meant to be an antidote to this bias: telling a defendant's story challenges a judge or prosecutor's assumptions about that person.

4. *See* Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295, 1299 (2021). Of course, many defense attorneys do not weave stories on behalf of their clients at all. They simply convey the offer the prosecution has made. *See* Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 396 (2016) (discussing how "resource-rationing guidelines" for public defenders have identified three types of client representation, including "messenger reputation," which involves merely conveying the prosecution's offer, "pattern representation" which involves categorizing cases strategically by finding patterns from previous cases, and "focus representation," which involves "pushing the rules and creating deeper narratives for a client's defense").

"worthiness" that has historically portrayed low-income people as responsible for their own marginalization.[5]

Moreover, constructing a story that will convince a decision-maker toward mercy can involve the erasure of authentic defendant narratives. These are narratives that defendants may want to tell, but they either self-censor or are censored by their attorneys because these stories will be less credible to decision-makers. The stories can include recounting police harassment or dangerous experiences in jail. Scholars such as Professor M. Eve Hanan,[6] Professor Alexandra Natapoff,[7] Professor Matthew Clair,[8] and Professor S. Lisa Washington[9] have explored the ways in which defendants' voices, and even their emotions, are policed in criminal and family court. Thus, advocacy narratives that ostensibly speak *for* defendants can also operate as mechanisms of epistemic injustice.[10] "Epistemic injustice," a phrase coined by Professor Miranda Fricker but which has deep roots in Black feminist thought, refers to people being harmed or treated unfairly in their "capacity as a knower" or their ability to describe their experience of the world.[11] Thus, in the context of the criminal legal system, a defendant experiences epistemic injustice when a decision-maker finds their narrative less credible because of their social identity.[12]

However, the literature on epistemic injustice in criminal court has not fully accounted for defendant speech in the context of a rapidly expanding sector of the criminal legal system: problem-solving courts and treatment alternatives to incarceration. Contemporary criminal courts are flooded with "problem-solving" courts,[13] and the problem-solving court ethos has spilled

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5. *See, e.g.*, Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

6. M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493 (2021).

7. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

8. MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020).

9. S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523 (2023) [hereinafter Washington, *Pathology Logics*]; S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022) [hereinafter Washington, *Survived and Coerced*].

10. MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 20, 44 (2007).

11. Professor Fricker first coined the term "epistemic injustice" in an Article in 1998. Miranda Fricker, *Rational Authority and Social Power: Towards a Truly Social Epistemology*, 98 PROC. ARISTOTELIAN SOC'Y 159 (1998). She then fleshed the concept out further in her 2007 book. *See* FRICKER, *supra* note 10, at 44. But the concept has deep roots in the work of W.E.B. Du Bois, Marilyn Frye, Frantz Fanon, and Professor Patricia Hill Collins, among others. *See, e.g.*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (2d ed. 2000).

12. Epistemic injustice occurs in other areas of law as well. For instance, Josué López has explored how asylum claimants are required to narrate their indigeneity "in a way that reflects the denial of a U.S. history of genocidal and violent behavior." Josué López, *CRT and Immigration: Settler Colonialism, Foreign Indigeneity, and the Education of Racial Perception*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 134, 135 (2019).

13. *See* Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1575 (2021) (observing that there are "more than 4,000 specialized courts throughout

over into the general jurisdiction courts as well, where therapeutic programs and services are routinely offered as part of pleas.[14] This Article will use the term "treatment program complex" to encompass this combined universe of specialty courts and sentencing alternatives.

The treatment program complex has been lauded for addressing the factors that led defendants to become involved with the criminal legal system, such as a substance abuse or mental health disorder.[15] At the same time, it has been critiqued for excluding the defendants who could most benefit from treatment, such as defendants with severe substance abuse disorders.[16] And scholars have argued that the treatment program complex exacerbates mass incarceration by expanding the reach of the criminal legal system to people who may otherwise not be drawn into it (referred to as "net-widening")[17] and subjecting defendants who "fail" treatment to harsher punishments than they would have otherwise experienced.[18]

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the country dedicated to an ever-expanding roster of issues, which currently includes mental health courts, veterans courts, human trafficking courts, re-entry courts, and opioid intervention courts, along with many others"). As Professor Allegra McLeod has observed, problem-solving courts include both "therapeutic jurisprudence courts," such as drug courts and mental health courts, and courts that focus on accountability and judicial monitoring, such as domestic violence courts. *See* Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1595 (2012).

14. *See* JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 21–22 (2009) (describing how the problem-solving court movement has influenced practice in general jurisdiction courtrooms); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 78 (2007) (describing how "judges and court administrators look for ways to incorporate principles and practices of specialty courts into their own courts"). Many prosecutors' offices also run their own diversion programs, which promise not to prosecute eligible defendants who complete certain programs and/or meet certain conditions. *See* Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 331–51 (2021) (discussing the literature on prosecutor-led diversion programs and calling for greater study and monitoring of such programs). These programs are run without any court involvement; instead, prosecutorial staff screen and monitor defendants. *See id.* at 332–33.

15. *See* Jennifer M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 605–06 (2016) (describing how drug courts have earned accolades from both liberals and conservatives).

16. *See* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 783 (2008).

17. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1561 (2004) (discussing how drug courts provide prosecutors with a "costless alternative to dismissal").

18. *See* Mae C. Quinn, *Whose Team Am I on Anyway?: Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 62 (2000) (describing how the terms of treatment pleas required defendants to be sentenced to two to six years in prison if they failed treatment court, compared to a typical sentence of one to three years if they had pled guilty in a general jurisdiction court). Problem-solving courts have also frequently been established as part of a "bifurcation strategy" where legislators approve treatment-based alternatives to incarceration for low-level offenders while simultaneously increasing sentences for "more serious" offenders. *See* Eaglin, *supra* note 15, at 630. Critics have also argued that the problem-solving court movement's promise of reform ultimately obscures the ways in which criminal court is an inappropriate institution to be solving public health problems such as addiction or mental health. Scholars have alleged that the proliferation of problem-solving court parts, programs, and services have contributed to a

And yet, the literature on epistemic injustice has not sufficiently scrutinized the treatment program context. Such scrutiny is necessary for several reasons. First, by way of an explicit focus on rehabilitation and addressing defendants' needs, actors in the treatment program complex purport to value defendants' voices more than they are valued in the traditional criminal courtroom. Although there is significant variation in how treatment courts operate from one jurisdiction to another, many have cohered under the umbrella of therapeutic jurisprudence, which is a scholarly movement that seeks to maximize the law's therapeutic potential by treating defendants with respect and giving them an opportunity to air their concerns.[19]

In other contexts in the criminal legal system, defendants are punished for speaking at all, whereas in the treatment program complex, defendants are often encouraged to speak. But at the same time, they are also subject to sweeping and invasive requirements to which any resistance is viewed with suspicion. Thus, the narratives defendants choose to tell can be the difference between a second chance at treatment or jail. This Article is the first exploration of the narratives that defendants and defense attorneys generate in this context. Do these narratives communicate defendants' authentic stories regarding what they need and how they are helped or harmed by the criminal legal system in this context? Do they reify or resist stereotypes about low-income people with substance abuse disorders? Do they authentically speak for defendants or silence them in order to mitigate harm? And what implications do these narratives have for how we should view the rapidly expanding treatment program complex?

Second, it is critical to scrutinize epistemic injustice in the treatment program complex because it remains, for better or for worse, the vanguard of reforms in the criminal legal system. The problem-solving court approach continues to be exported as a method of dealing with all sorts of social issues—from domestic violence to mental health to people experiencing homelessness. In the wake of the most recent wave of bail reform, judges increasingly impose pretrial conditions that mirror many treatment court mandates in lieu of bail.[20] And given that one key goal of the treatment

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"penal welfare" model that emphasizes the provision of social services through criminal court rather than through community-based institutions. *See* Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1393–96 (2016) (defining penal welfare as "welfare administration through criminal law" that is legitimized because it "reflects individualist ethics of responsibility instead of principles of distributive justice"). *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 297 (2009).

19. McLeod, *supra* note 13, at 1595 (describing how in a therapeutic jurisprudence-based problem-solving court, "the judge personally attempts to facilitate a therapeutic process in court through routine proceedings, intermediate sanctions, and in some instances jail- or prison-based sentencing").

20. Brook Hopkins, Chiraag Bains & Colin Doyle, *Principles of Pretrial Release: Reforming Bail Without Repeating Its Harms*, 108 J. CRIM. L. & CRIMINOLOGY 679, 688–89 (2018). Many of these conditions are being imposed on people who otherwise would have

program complex is to prevent recidivism by addressing defendants' needs, the narratives it generates can play a powerful role in reinforcing the complex's legitimacy to actors inside and outside of the court system.

Examining the narratives reproduced in the treatment program complex—and how they either speak for defendants or erase their authentic experiences—is thus crucial to holding these reforms accountable and continuing to question whether they are a viable means of combating mass incarceration.

Finally, studying epistemic injustice in the treatment program complex widens our understanding of how defendants experience harm. Critiques of the treatment program complex have tended to focus on the harm to defendants as measured by case outcome. In this view, the treatment program complex harms defendants by putting them on a path to experiencing higher levels of carceral control than they would have in the absence of a treatment plea option. But these critiques have failed to account for the dignitary and epistemic harms of the treatment program complex—the harms that occur when defendants' authentic narratives about what they need and how they are affected by court policies are suppressed.[21]

This Article aims to fill in that gap by assessing how these harms occur and how the resulting epistemic injustice ultimately normalizes and insulates the treatment program complex from critique by the very participants who stand to offer the most valuable insights about it.[22] Defense attorneys are also placed in a quandary—to effectively mitigate harm for their clients, they must both participate in the reproduction of these distorted narratives and work to silence clients' authentic stories of harm. The alternative—weaving authentic narratives of resistance—threatens to subject their clients to harm.

Ultimately, this Article contributes to two ongoing scholarly conversations. First, this Article contributes to the literature on epistemic injustice in carceral spaces, expanding that literature to include a new under-scrutinized area of the criminal legal system that ostensibly values defendants' voices and centers defendants' needs.[23]

Second, this Article contributes to the problem-solving court literature, as the distorted narratives that emerge in the treatment program space reflect the validity of previous critiques of what has been termed the "penal welfare model" of relying on criminal court as a site of social services.[24] At the same time, the Article reveals new epistemic and dignitary harms that have been under examined, and that have troubling implications for the production of knowledge in the criminal legal system.

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been released on their own recognizance, and many arguably do not serve legitimate pretrial interests. For instance, drug testing as a condition of release has not been shown to be effective. *Id.*

21. *See infra* Part II.B.

22. *See infra* Part III.A.

23. *See, e.g.*, Washington, *Pathology Logics*, *supra* note 9; Hanan, *supra* note 6; Natapoff, *supra* note 7.

24. *See* Gruber et al., *supra* note 18.

This Article proceeds in three parts. Part I begins by examining both the centrality of narrative to law generally and how narratives do more than persuade—they also reify or undermine hegemony, amplify or silence clients, and contribute to overall knowledge production, thus implicating epistemic justice.

Part II begins by describing the landscape of what the author of this Article has termed the "treatment program complex." Then, it examines the types of narratives that are generated by the treatment program complex, and how these narratives reflect the suppression and distortion of defendants' stories, thus contributing to epistemic injustice.

Part III examines how the resulting distortion of overall knowledge production insulates the treatment program complex from critique, raising implications for the validity of the penal welfare model. Part III also imagines pathways forward, building on the work of the movement for abolition, which has called for shifting power in criminal legal system reforms toward marginalized people.

I. TELLING STORIES IN CRIMINAL COURT

Storytelling is everywhere in criminal court—in motions and briefs, in open court, and off the record in conversations with prosecutors. Practically speaking, storytelling is both the "primary means" by which lawyers "advance [their] client's causes,"[25] and intuitively the way people explain themselves to other people. Weaving facts into a story persuades in a way simply conveying the facts does not. As cognitive psychologists have observed, humans make decisions based not on purely assessing the probabilities of a conclusion given various pieces of evidence,[26] but rather by "evaluat[ing] and compar[ing] the broader stories offered by the parties in a case, and ask[ing] which is a better explanation of the evidence they have seen."[27]

And yet, the stories told in criminal court are more than tools of persuasion. Rather, they also function to reinforce or undermine subordination, and empower or silence defendants. Stories in criminal court also contribute to knowledge production—ultimately shaping the "common sense" that decision-makers rely on. For all these reasons, legal narrative has long been the subject of study by critical race theorists,[28] critical legal studies scholars,

25. Muneer I. Ahmad, *The Ethics of Narrative*, 11 AM. UNIV. J. GENDER SOC. POL'Y & L. 117, 122 (2002).

26. *See* Kenworthey Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 435.

27. Mark Spottswood, *Bridging the Gap Between Bayesian and Story-Comparison Models of Judicial Inference*, 13 LAW, PROBABILITY & RISK 47, 48 (2013).

28. *See, e.g.*, Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2278 (1992); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331–32 (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

theoretics of practice scholars, clinical scholars, and the client-centered lawyering movement.[29]

A. Narrative and Antisubordination

Critical race theorists, in particular, have long centered narrative as a transformative methodological tool capable of "reveal[ing] and counter[ing] the racial subordination perpetuated by the law" and "providing alternative accounts that can begin to transform the bias."[30] Following in that tradition, Professor Nicole Smith Futrell has urged lawyers to consider how the narratives they put forward can "serve as a platform for marginalized members of society to challenge the legal status quo in order to effect change."[31] Professor Futrell used *Floyd v. City of New York*,[32] the case that successfully challenged the practice of stop and frisk policing in New York City, to shape her argument. She asserts that "it was the detail of the dehumanizing police interactions shared by the men and women most impacted by aggressive policing"—both as part of the testimony in the case, and as part of advocacy around the case—that ultimately transformed the discourse about stop and frisk policing.[33]

However, narratives can also reinforce subordination when defense lawyers are forced to choose between zealous advocacy for their client and their commitment to antisubordination.[34] Given the pervasiveness of racial bias in the criminal legal system,[35] a lawyer who represents a Black teenager

29. *See* Miller, *supra* note 3.

30. *See, e.g.*, Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597, 1608 (2015); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2437–38 (1988).

31. Futrell, *supra* note 30, at 1599.

32. 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

33. Futrell, *supra* note 30, at 1602.

34. The solution, for Professor Muneer I. Ahmad, calls for lawyers to, at the bare minimum, discuss the ethical implications of the narratives they utilize with their clients. *See* Ahmad, *supra* note 25.

35. *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) [hereinafter Henning, *Criminalizing Normal Adolescent Behavior*]. For instance, jurors are more likely to find Black clients guilty and more likely to sentence them to death. *See* Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 657–58 (2017). Judges are more likely to set bail on Black defendants. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987, 992 (1994) (finding that judges set 35 percent higher bail amounts for Black defendants). A 2004 study found that police and probation officers were more likely to judge hypothetical juvenile offenders to be less immature and more culpable if they were primed to believe they were Black. Henning, *Criminalizing Normal Adolescent Behavior*, *supra*, at 421. The researchers in this study hypothesized that this was due to "widely held stereotypes that African American youth are 'violent, aggressive, dangerous, and possess adult-like criminal intent'" which "supersede[d] shared cultural beliefs that adolescence is a 'developmental period characterized by vulnerability, malleability and immaturity in judgment.'" *Id.* A 1998 study found that "probation officers were significantly more likely to attribute crime to internal causes with black rather than white youth and were more likely to view black youth as responsible for their crimes and prone to criminal behavior in the future." *Id.* at 422.

may consciously choose to construct a narrative that minimizes aspects of their client's racial identity, in order to reduce the impact of racial bias on the decision-maker.[36] The client themselves may even choose to "mask" their racial identity to protect themselves from bias.[37] And yet, even if this narrative tactic succeeds in mitigating harm for the client, it has succeeded in reinforcing subordination. By masking the client's racial identity, the narrative fails to challenge the negative connotations the decision-maker associates with Blackness. And, by emphasizing aspects of the client's identity that are stereotypically associated with Whiteness, the narrative reinscribes the stereotype that "White" characteristics are good.

As Professor Muneer I. Ahmad writes, the tendency of narrative to persuade is thus directly connected to how it "resonate[s] with the values, beliefs and assumptions of [the] audience,"[38] and "with stories [the] audience is already familiar with."[39] Thus, stories that confirm racial bias are more likely to succeed, as are stories that draw on stock characters, ranging from the harmless—the "heroic firefighter, the Good Samaritan"—to the more "pernicious"—"the helpless woman victim, the crack whore . . . ."[40] And stories that affirm the court system as a fair and just place are more likely to succeed than stories that call out systemic injustice. Telling a story that is in tension with a decision-maker's values can even lead to retaliation. For instance, public defenders know that naming certain systemic injustices on the record in court risks provoking the court's ire, and thus they may even seek out their client's consent before doing so to avoid potential retaliation.[41] For instance, during an arraignment, before The Legal Aid Society attorney Amanda Jack read into the record the names of the twelve individuals who had died in custody that year during an ongoing humanitarian crisis at Rikers Island, New York City's jail, she obtained her client's consent.[42]

Psychologists have also found that both liberal and conservative White Americans are more likely to support severe sentences for juveniles, such as life without parole, when they believe the juveniles are Black. *Id.* at 423.

36. *See* Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 383 (2017) (discussing an example where two young Black men had different experiences in front of the same decision-maker because of the way they were characterized as "good" or "bad" based on racial characteristics, such as light or dark skin and hairstyle).

37. Scholars have discussed how Black defendants are aware of "stereotype threat" in courtrooms and may even be inhibited from talking in court as a result. L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 124–28 (2014); *see also* Hanan, *supra* note 6, at 534.

38. Ahmad, *supra* note 25, at 122; *see also* Bilz, *supra* note 26, at 434 n.21, 454 n.117.

39. Ahmad, *supra* note 25, at 122.

40. *Id.* at 122–23.

41. *See id.*

42. *See* Nick Pinto, *Judge Tried to Send Immunocompromised Homeless Man Accused of Stealing Blankets to Rikers*, THE INTERCEPT (Sept. 28, 2021, 5:35 PM), https://theintercept.com/2021/09/28/rikers-island-crisis-judges-bail/ [https://perma.cc/ERM5-ML4E] (describing Jack's protest as part of a broader protest that was carried out across all five boroughs of New York City by members of Five Boro Defenders). After nineteen people died in 2022, Rikers Island has been under threat of receivership. Michelle Bocanegra & Samantha Max, *Rikers Reports First Death in 2023 of Person in Custody, After Deadliest Year in*

In this way, choosing what story to tell poses an ethical dilemma for a defense attorney and carries risks for the defendant as they must choose between potentially suffering a material harm in terms of case outcome, or a dignitary harm if telling a particular story benefits their case outcome but involves reinforcing a stereotype against their own group.

B. Narrative and Epistemic Injustice

Narratives can also be evaluated for whether they speak *for* defendants or silence them. In the above example, a defense strategy of "masking" aspects of a defendant's racial identity that may provoke implicit bias can be viewed as a choice to silence the defendant's authentic story. In recent years, a rich literature[43] has emerged that has analyzed the ways in which defendants' stories are policed in criminal court—including by their attorneys. This literature connects the silencing of defendants' speech to the phenomenon of epistemic injustice.

1. Silenced Defendants

Professor Hanan has argued that courts exercise sovereign,[44] disciplinary,[45] and social-emotional power[46] over defendants to induce them to avoid "talking back"—defined as speaking in a way that might "disrupt or challenge authority" or "contest the process or disposition of [a] case."[47] Through both the rigid enforcement of court rules, such as "stand on an 'X'" with your hands clasped behind your back, and softer, yet powerful, social-emotional cues, court actors induce defendants to be "compliant" and

Quarter Century, GOTHAMIST (Feb. 4, 2023), https://gothamist.com/news/rikers-reports-first-death-in-2023-of-person-in-custody-after-deadliest-year-in-quarter-century [https://perma.cc/7DSU-22GN]. Although violence and neglect have always been rampant at Rikers, at the time of this protest, conditions at the jail—which is one of the most well-staffed jails in the country—had deteriorated to the point where inmates were being locked into showers instead of cells, and were given bags to defecate in. Nick Pinto, *At Rikers Island, Inmates Locked in Showers Without Food and Defecating in Bags*, THE INTERCEPT (Sept. 16, 2021, 4:20 PM), https://theintercept.com/2021/09/16/rikers-jail-crisis-de-blasio-reforms/ [https://perma.cc/29KB-R7X8].

43. *See, e.g.*, Natapoff, *supra* note 7, at 1449 (utilizing the lens of testimonial injustice in criminal court to argue that when criminal court actors silence defendants, this excludes defendants from social narratives that shape the system itself).

44. Sovereign power is encapsulated by the court's ability to jail the defendant, which looms in the background in all encounters. Hanan, *supra* note 6, at 523–25. Sometimes, this power literally looms—as it is common practice for court officers to step up and loom behind a defendant whenever they guess that a judge is about to order the defendant into custody.

45. Disciplinary power encompasses the way court actors discipline defendants through the rigid enforcement of various courtroom rules that represent a normative vision of orderliness. *Id.* at 525–31. For instance, defendants are routinely ordered to "stand on an 'X'" and re-instructed where to stand if they stand in the incorrect place when appearing before the court. *Id.* at 494, 528.

46. Social-emotional power encompasses the way court actors "cue" the defendant as to the types of emotions expected: "mildness, agreeability and order." *Id.* at 522, 531–47.

47. *Id.* at 495–96.

"agreeable," and to avoid confrontation, agitation, and even emotion.[48] Professor Hanan observed that defendants who resist these rules and cues are punished. For instance, defendants who smile while being sentenced may be sent back to wait until the end of the day to be sentenced for showing "disrespect."[49]

Talking back by the defendant can also consist of the act of taking up court's time—for example, just by speaking.[50] A defendant seeking to correct something their lawyer has said may be ordered into silence. If the defendant protests, they risk making a bad impression on a judge or even receiving higher bail or a harsher sentence.[51] Defendants who talk back are silenced both literally and in the way Professor bell hooks defined the word as being forced to "speak[] in ways that are compliant."[52]

This phenomenon of silencing extends beyond criminal court to other areas of the carceral state. In the context of family court, Professor Washington has observed how court actors police the speech and emotions of survivors of domestic violence involved in child abuse and neglect cases. Professor Washington observed that survivors are punished if they fail to demonstrate "insight" into their relationships with their abusers, with insight defined in particularly racialized and gendered ways.[53]

As the next section will address, Professor Hanan, Professor Washington, and other scholars have utilized the theory of epistemic injustice to

48. *Id.* at 494–96. It is important to recognize that defendants are often under enormous emotional stress while in court. They may be worried about whether they will lose their job if they are away at court too long, or they may be worried about whether their children are adequately cared for while they are away, or they may simply be experiencing stress simply by virtue of having been charged with a crime.

49. *Id.* at 532–33. Professor Hanan also observed that defendants who cry while explaining their relapse have been punished for ostensibly seeking to manipulate the court. *Id.* at 533; *see also* Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. 1, 15–16 (2022) (describing how a judge increased the bail amount of a defendant who said "yeah" instead of "yes").

50. Court calendars contain dozens of cases a day, and court actors speed through them, frequently allotting mere minutes to each case. In this environment, the defendant who speaks at length is committing the cardinal sin: wasting time. Notably, except for specific, highly scripted moments in the criminal case—such as the plea allocution or sentencing—defendants are not required to speak in criminal court and are actively discouraged from doing so by their lawyers to avoid self-incrimination. However, defendants do speak for themselves and sometimes must speak for themselves, such as when they are asking for more time to complete a court requirement—which is common with treatment pleas. *See* Hanan, *supra* note 6, at 527.

51. *Id.* at 528.

52. *Id.* at 496; *see also* BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 5 (1989).

53. *See* Washington, *Survived and Coerced*, *supra* note 9, at 1146–47 (describing how survivors were punished for not demonstrating "insight" by failing to react in appropriate ways to their abuser, or for failing to cooperate with child welfare investigations). Professor Kathryn Miller has also written about how defendants' speech is policed because defendants have no choice, or no meaningful choice, regarding what choices they may make and what stories they may tell—despite the myth of autonomy rights that protect these choices. *See* Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 404 (2021).

understand the precise harm that occurs when marginalized people's voices are silenced or distorted by legal system actors.[54]

2. Epistemic Injustice

The term "epistemic injustice" was coined by Professor Fricker in 1998[55] to refer to when "knowers are wronged in their capacity as knowers."[56] Specifically, epistemic injustice "refers to those forms of unfair treatment that relate to issues of knowledge, understanding, and participation in communicative practices."[57] Professor Fricker specifically identifies two forms of epistemic injustice: "testimonial injustice" and "hermeneutical injustice."[58] Testimonial injustice occurs when a speaker's social identity—including their race, class, and gender identity, or their identity as a person with a substance abuse disorder—causes a hearer to find their testimony less credible.[59] The speaker is thus harmed as a giver of knowledge. Testimonial

54. Washington, *Survived and Coerced*, *supra* note 9, at 1134; Hanan, *supra* note 6, at 554.

55. *See* Fricker, *supra* note 11, at 170.

56. *See* KAMILI POSEY, CENTERING EPISTEMIC INJUSTICE: EPISTEMIC LABOR, WILLFUL IGNORANCE, AND KNOWING ACROSS HERMENEUTICAL DIVIDES, at xi (2021).

57. Ian James Kidd, José Medina & Gaile Pohlhaus, Jr., *Introduction* to THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 1 (Ian James Kidd, José Medina & Gaile Pohlhaus, Jr. eds., 2017). Professor Fricker argues that because "epistemic practice" (the activity of acquiring, organizing, and sharing truth) is always filtered through the norm of credibility, and because the powerless in society are deemed less credible, their knowledge is thus given less weight. *See* Fricker, *supra* note 11, at 169–70. For example, "the position of powerlessness may place one under general suspicion of being motivated to deceive, in a way which the position of powerfulness does not." *Id.*

58. *See* FRICKER, *supra* note 10, at 1. Numerous scholars since have expanded on Professor Fricker's concept of epistemic injustice. For instance, Professor Rachel McKinnon has identified "gaslighting" as a form of epistemic injustice. Rachel McKinnon, *Allies Behaving Badly: Gaslighting as Epistemic Injustice*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 167, 167–74. Professor Kristie Dotson has reframed Professor Fricker's two forms of epistemic injustice within a larger framework of epistemic oppression, which includes testimonial and hermeneutical injustice as "first and second order" epistemic injustices which can be understood in terms of specific oppressions that caused them, such as racism, misogyny, or transphobia. Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 13, 18–20 (citing Kristie Dotson, *A Cautionary Tale: On Limiting Epistemic Oppression*, 33 FRONTIERS, no. 1, 2012, at 24, 24–47). Professor Dotson also defines "third order epistemic injustices" to include, for instance, contributory injustice which occurs "when knowers utilize epistemic resources that are inapt for understanding the potential contributions of particular knowers . . . [and] thereby engage in a form of willful hermeneutical ignorance." *Id.* at 25–26. Professor Charles W. Mills has critiqued Fricker's concept of epistemic injustice for blaming structural factors for the injustice and failing to locate "a culprit." Charles W. Mills, *Ideology*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 100, 100–13. Professor Mills argues that "moral responsibility must be seen as falling on the beneficiaries of injustice." *Id.* at 105.

59. *See* FRICKER, *supra* note 10, at 17–18. Notably, even the history of the concept of epistemic injustice has been epistemically unjust. The term has deep roots in the literature of epistemic inequality, including Du Bois's work on "veiling and double consciousness," Fanon's discussion of "psychic alienation," and Professor Hill Collins's work on "stereotypes as controlling images." *See* POSEY, *supra* note 56, at xi. And it can also be connected to the work of numerous Black feminist scholars, including Sojourner Truth, Mary Church Terrell,

injustice can be viewed as a "double assault,"[60] as it not only undermines people in their capacity for knowledge—which is "essential to [one's] value as a human being"—but it also "does so on grounds that discriminate . . . in respect of some essential feature," such as race, class, or gender.[61] Hermeneutical injustice occurs "when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences."[62] Unlike testimonial injustice, hermeneutical injustice is not caused by an individual agent who fails to perceive the hearer as credible, but rather is the result of structural social power imbalance.[63] A classic example of hermeneutical injustice is when victims of sexual harassment are unable to name what they are experiencing as a form of harassment because that concept does not exist at an adequate level of prevalence in society.[64]

As Professor Hanan identifies, court actors' punishment of defendants who engage in speech that is viewed as "disruptive" results in epistemic injustice. This is because defendants are harmed in their capacity to share knowledge

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and Fannie Barrier Williams. *Id.* And yet, when Professor Fricker published *Epistemic Injustice: Power and the Ethics of Knowing* in 2007, the book was universally acclaimed as "groundbreaking." *See, e.g.*, Rae Langton, Book Review, 25 HYPATIA 459, 459 (2010) ("In this elegant and groundbreaking work, Miranda Fricker names the phenomenon of epistemic injustice.") And the concept was quickly applied across numerous disciplines, including science, education, medicine, psychology, anthropology, and law. *See, e.g.*, Heidi Glasswick, *Epistemic Injustice in Science*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 313, 313–23 (science); Ben Kotzee, *Education and Epistemic Injustice*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 324, 324–35 (education); Havi Carel & Ian James Kidd, *Epistemic Injustice in Medicine and Healthcare*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 336, 336–47 (medicine); Anastasia Philippa Scrutton, *Epistemic Injustice and Mental Illness*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 347, 348–55 (psychology); Rebecca Tsosie, *Indigenous Peoples, Anthropology, and the Legacy of Epistemic Injustice*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 356, 356–69 (anthropology); Michael Sullivan, *Epistemic Justice and the Law*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 57, at 293, 293 (explaining that uncovering truth is not the primary goal of criminal justice proceedings—as evidenced by, inter alia, plea bargaining—and offering four practical suggestions to promote truth and reduce epistemic injustice during trials).

60. FRICKER, *supra* note 10, at 54.

61. *Id.*

62. *See id.* at 1; Pohlhaus, *supra* note 58, at 18–20 (citing Kristie Dotson, *A Cautionary Tale: On Limiting Epistemic Oppression*, 33 FRONTIERS, no. 1, 2012, at 24, 24–47); *see, e.g.*, Erin Shields, *Countering Epistemic Injustice in the Law: Centering an Indigenous Relationship to Land*, 70 UCLA L. REV. 206 (2023) (explaining how American and Canadian law produce hermeneutical injustice when colonial notions of property together with religious freedom laws collude to functionally exclude Indigenous sacred sites from legal protection altogether).

63. FRICKER, *supra* note 10, at 159.

64. Elinor Mason, *What Is Hermeneutical Injustice and Who Should We Blame?*, SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE, Apr. 2021, at 17, 17, https://social-epistemology.com/2021/04/16/what-is-hermeneutical-injustice-and-who-should-we-blame-elinor-mason/ [https://perma.cc/LY42-88LP] (describing how Professor Fricker theorized hermeneutical injustice as affecting the member of the oppressed group, not the oppressor, but other scholars have argued that it can be understood as affecting the oppressor as well).

with the court—both due to their status as defendants, and due to the multiple marginalized social identities[65] they may hold.[66]

In her examination of domestic violence survivors' experiences in family court, Professor Washington also observed that survivors experience testimonial and hermeneutical injustice when their stories are discredited, and their knowledge is excluded. Significantly, Professor Washington observed that survivors are affected by testimonial injustice not just when their knowledge is discredited, but also when they are *coerced* into participating in knowledge production that is inauthentic.[67] For instance, forcing a survivor to testify against her partner with whom she wants to continue a relationship in order to get her children back produces testimonial injustice. Although it may result in her narrative being credited by the decision-maker, it also results in testimonial injustice because the survivor's testimony is inauthentic.[68] Thus "excess credibility" as well as "credibility deficits" can lead to testimonial injustice.[69]

In sum, defendants must choose between silencing themselves and mitigating harm or choosing to speak up and suffering the results. Or, in the case of a hermeneutical injustice, defendants may even lack the resources necessary to name the harm that is occurring to them.[70]

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65. This is especially true given that the vast majority of criminal defendants are indigent, and disproportionately Black, Latinx, or Indigenous, whereas the majority of decision-makers are middle to upper middle class and White. *See, e.g.*, Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1496–98 (2021). Most criminal defendants are indigent, and a high percentage have been diagnosed with a substance abuse or mental health disorder. Indeed, as Professor Jamelia Morgan has argued "psychiatric disability . . . increases one's risk of ending up in jail or prison." Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169, 189 (2022). As Professor Morgan observes, disabled people are particularly "vulnerable to criminalization and incarceration," for a number of reasons, including the fact that the some of the "causes and consequences of disability," such as poverty and inadequate health care, "might correspond with risk factors for incarceration," and the fact that "neo-liberal policies [have] led simultaneously to the growth of the prison system and to a lack of financial support for people with disabilities to live in the community." *Id.* (quoting LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 36 (2020)). Defendants also tend to come from highly marginalized communities of concentrated poverty, that have historically experienced concentrated poverty, inadequate social resources, and high rates of police and family regulation system contact.

66. *See* Hanan, *supra* note 6, at 551–52; M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1211 (2020); *see also* Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 205 (2019) (discussing how judges' stereotypes about the "undeserving poor" lead them to discredit defendants' explanations that they are unable to pay fines and to find instead that they are "unwilling to pay"); Natapoff, *supra* note 7, at 1452 (discussing how the silencing of defendant speech in criminal doctrine and practice reinforces preexisting psychological gaps between defendants and decision-makers).

67. Natapoff, *supra* note 7, at 1137; *see also* Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 J. CRIM. L. & CRIMINOLOGY 43, 59 (2020).

68. Washington, *Survived and Coerced*, *supra* note 9, at 1137–38.

69. *Id.* (citing Lackey, *supra* note 67). Professor Fricker also originally conceived of epistemic injustice as consisting of excess credibility. *See* FRICKER, *supra* note 10, at 19 n.14. However, she later fleshed out the concept to refer to only credibility deficits. *See id.* at 20.

70. *See* FRICKER, *supra* note 10, at 44.

3. Defense Attorneys and Epistemic Injustice

Theoretically, a defense attorney's role in this context is to assist their client to "talk back" and ensure that their story is heard. However, as Professor Hanan, Professor Washington, and other scholars have observed, defense attorneys instead frequently reproduce epistemic injustice.[71]

As discussed above, defendants who do not "talk back" may be assessed more positively overall—and rewarded with better offers and more second chances—than defendants who critique court requirements as inappropriate, or even cry or smile at moments the court deems not appropriate.[72] Silent clients, or clients who contort their speech into the narrow box of what has been deemed acceptable, are more likely to be deemed compliant—and more likely to be rewarded.

Thus, defense attorneys who seek to mitigate harm are motivated to discipline their clients into either complete silence, or into compliant speech the court finds acceptable.[73] Through their membership in the courtroom workgroup, defense attorneys learn the unwritten rules regarding what types of defendant speech decision-makers find acceptable—in other words, what types of defendant stories resonate—and what types of speech will result in harm.[74] Defense attorneys thus learn when to amplify their clients' voices and when to silence them. As Professor Anthony V. Alfieri has observed, narratives boil down to choices "[of] what to include and what to exclude, what to foreground and what to background."[75] An attorney who has watched her client be disciplined for displays of emotion may exclude from her advocacy valuable information about the client for fear it will be seen as "manipulative" by the court.

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71. *See, e.g.*, Washington, *Survived and Coerced*, *supra* note 9, at 1161 (describing how defense attorneys' "counternarrative" is "constrained by the outer limits of the state's narrative"); Hanan, *supra* note 6, at 558–59 (describing how defense attorneys are "susceptible to the same power dynamics as defendants").

72. *See* Hanan, *supra* note 6, at 526–35. In other words, the process of disciplining defendants into compliance in criminal court does not just make life easier for court actors, but it also yields information that these actors can use when it comes to deciding whether a defendant merits a better offer, or a second chance at a program. Indeed, as Professor Issa Kohler-Hausmann has argued, how a defendant holds up under the "hassle" of repeated court appearances and required programs determines what plea deal a prosecutor may offer: defendants who never miss court, never are late, and attend all required programs are more likely to receive better plea offers, regardless of the strength of the evidence against them. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 201 (2018). And, as Professor Hanan is careful to observe, what matters is not just whether defendants attended court and completed required programming, but also *how* they did it. Hanan, *supra* note 6, at 531. In the context of family court, Professor Washington observes a similar hyperfocus on domestic violence survivors' emotions. Survivors who are understandably upset at the family regulation system for taking their children away are punished for lacking insight and self-control. Washington, *Survived and Coerced*, *supra* note 9, at 1162–63.

73. *See* Hanan, *supra* note 6, at 559 (describing how defense attorneys may urge their clients to be "silent and decorous" because they fear the disciplinary and social-emotional power of the court).

74. *See id.*

75. Ahmad, *supra* note 25, at 122.

Similarly, an attorney crafting a narrative on a client's behalf may choose to foreground their client's work history and omit the fact that they were mistreated by police—based on the assumption that the story of mistreatment is unlikely to be believed. The fact that defense attorneys participate in silencing their clients ultimately generates significant tension in the attorney-client relationship as defendants, who may already mistrust their attorneys, perceive them as rejecting their concerns.[76]

Of course, there are other reasons that attorneys may not amplify their clients' voices. Due to race, class, and gender differences, and other hurdles in the attorney-client relationship, a lawyer may fail to even communicate with their client adequately in the first place.[77] Some of the literature on epistemic injustice in criminal court also emphasizes defense attorneys' limitations in terms of workload and need to retain credibility with judges and prosecutors.[78]

However, even zealous attorneys with good relationships with their clients may be forced to choose between mitigating harm for their clients and contributing to epistemic injustice, or amplifying their clients' voices and compromising their duty of zeal. Thus, the silencing of defendants in criminal court has a chilling effect on the narratives their lawyers construct, despite the fact that lawyers are ostensibly *not* silenced by the court.

4. Knowledge Production in Criminal Court

Viewing defense narratives through the lens of epistemic injustice also compels us to recognize how individual narratives contribute to an overall bank of knowledge production in criminal court. And it requires us to understand how the "common sense" that is produced ultimately devalues the knowledge of criminal defendants.[79]

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76. CLAIR, *supra* note 8, at 68–69 (discussing this tension). Professor Clair also argues that defendants who are disadvantaged along the lines of race and class are both more likely to mistrust their lawyers, and more likely to have their attempts to be involved in the court process "devalued," with the result being that they "withdraw into resistance or resignation." *Id.*

77. The majority of lawyers are White and of higher socioeconomic status, and the majority of criminal defendants are low-income and Black, Latinx, or other people of color. *See, e.g.*, Hoag, *supra* note 65, at 1496–97. Race and class play a prominent role in attorney-client communication as Professor Clair has observed, in that low-income defendants of color are more likely to withdraw from their lawyers and their lawyers are primed to view that withdrawal as evidence of their client being difficult. CLAIR, *supra* note 8. Moreover, legal advocacy, simply by virtue of the way it structures facts into claims, creates incentives for attorneys to alter their clients' stories. In an early study of attorney-client interactions, social science Professor Carl Hosticka observed that lawyers redefine a client's story based on "what is going to happen"—a cognizable legal claim, for example—rather than "what happened." Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979).

78. *See, e.g.*, Natapoff, *supra* note 7, at 1451 (describing how "most defense counsel are overworked, appointed counsel with insufficient time to spend communicating with their clients or fully exploring their clients' personal stories"); CLAIR, *supra* note 8, at 141 (discussing how defense attorneys "describe[] the importance of maintaining their credibility as reasonable negotiators").

79. *See* FRICKER, *supra* note 10, at 44.

Scholars who have examined the silencing of defendant speech have examined the effect that this silencing has on the way criminal court actors "know" the criminal legal system itself. For instance, Professor Natapoff has argued that narratives that suppress defendant speech "maintain[] the ignorance" of "judges and prosecutors who never hear the full story about the individuals before them," and thus, never hear the "full story" about the justice system itself—including more complete information about how law enforcement and the police behave, and reasons why people might commit crime.[80]

And Professor Hanan has pointed out that "[t]hrough silence, criminal legal systems develop narratives, norms, and practices with little appreciation for the experience of people charged with crimes."[81] Professor Washington also observed the effect of the exclusion of survivors' stories on knowledge production, stating that "[d]amaged knowledge reproduces and exacerbates socioeconomic disadvantage by excluding those who are disproportionately impacted from sharing their concerns and contributing to solutions," and ultimately, influences the "collective 'epistemic ecosystem'" by impacting legal policy, legislation, and interpretation.[82]

Silencing defendant speech—including by coercing defendants into telling distorted narratives—ultimately "eliminates the primary voices that might be raised against harsh practices including long sentences [and] inhumane prison conditions . . . ."[83] Moreover, when attorneys convey distorted narratives in court, arguably an even greater harm to collective understanding occurs because decision-makers assume that the narratives lawyers put forth

80. Natapoff, *supra* note 7, at 1499–1500.

81. Hanan, *supra* note 6, at 554; *see also* Natapoff, *supra* note 7, at 1449 (pointing out that the exclusion of defendant voices "excludes defendants from the social narratives that shape the criminal justice system itself, in which society ultimately decides which collective decisions are fair and who should be punished"). Professor Natapoff also argues that "[d]efendant speech . . . has personal, dignitary, and democratic import beyond its instrumental role within the criminal case," and thus the silencing of defendants' speech denies defendants "the cognitive and participatory benefits of expressive engagement in their own cases." *Id.* at 1451. Moreover, silencing defendants' speech can be viewed as a democratic harm because defendant speech is the "constitutionally celebrated" means through which defendants have "their 'day in court'" and tell their stories to a judge or jury. *Id.* The audience in criminal court is also the audience to defendants' speech as well and a democratic harm occurs when the audience is deprived of hearing defendants' voices. *See* Hanan, *supra* note 6, at 556–58. Along these lines, defendant speech is also celebrated by court reformers as a crucial part of procedural justice. *See supra* Part I.

82. *See* Washington, *Survived and Coerced*, *supra* note 9, at 1134, 1140–42 (quoting Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 44 (2017)).

83. Natapoff, *supra* note 7, at 1501–02. It also must be understood in the context of the fact that defendants "rarely speak" in criminal court, in general. *Id.* at 1449. Indeed, the fact that defendants rarely speak is often viewed as a good thing, since defendant speech carries the risk of revealing negative information about the allegations. *Id.* at 1500–01. Thus, defendants are cautioned by judges not to speak to the court, and frequently advised by their attorneys not to testify at trial, in the rare case they may go to trial. *See id.* at 1458–67, 1470 (discussing how defendants are discouraged from speaking at every stage of the criminal court process, ostensibly for their own protection).

on behalf of their clients speak for them, and satisfy "systemic requirements" that defendants be heard.[84]

Ultimately, this cumulative exclusion of the voices of marginalized people not only harms knowledge production, but it also furthers hermeneutical injustice by creating and exacerbating gaps in our collective understanding that then further prevent indigent criminal defendants from being able to communicate their experiences. Thus, even when there is space for defendants' voices, indigent defendants are placed at an asymmetrical disadvantage in being able to communicate—a disadvantage that exists specifically because of a social context that marginalizes them.[85] In other words, it is "no accident"[86] that their voices are not heard, and that the meanings most available to them to make sense of their experiences are "unduly influenced by more hermeneutically powerful groups."[87]

II. EPISTEMIC INJUSTICE IN THE TREATMENT PROGRAM COMPLEX

Even if epistemic injustice is pervasive in the traditional criminal court spaces examined by Professors Hanan and Natapoff, there may be reason to expect that the treatment program complex might be different. In other words, there might be reason to expect that the treatment program complex may make space for defendants' voices in a way that traditional criminal courts do not. This is because the treatment program complex is, in part, portrayed as a humane alternative to the rest of the criminal legal system precisely because it ostensibly values defendants' needs and voices. Drug courts are frequently hailed as the "kinder, gentler"[88] type of courts that uphold the values of procedural justice,[89] including the key value of enabling defendants to have a voice in the proceedings.[90]

And yet, as this part contends, epistemic injustice is pervasive in the treatment program complex as well. That is to say, defendants experience testimonial injustice in that they are harmed in their capacity to give knowledge regarding what they need, how they may be helped, and how their interactions with the court cause them harm. And defendants experience "systematic"[91] hermeneutical injustice in that the collective hermeneutical resources that exist to make sense of their experiences in the treatment program complex are "insufficiently influenced" by defendants themselves due to their social powerlessness, and "unduly influenced" by actors who hold more power along the axes of race, class, disability, and status as a

84. *Id.* at 1451, 1483.
85. FRICKER, *supra* note 10, at 151–53.
86. *Id.* at 153.
87. *Id.* at 155.
88. Hanan, *supra* note 6, at 539.
89. Greg Berman & Julian Adler, *Toward Misdemeanor Justice: Lessons from New York City*, 98 B.U. L. REV. 981, 992–93 nn.55–56 (2018).
90. *Id.* at 993.
91. FRICKER, *supra* note 10, at 155.

defendant or nondefendant.[92] Thus, for example, defendants may only be able to make sense of their difficulty complying with intrusive interventions through collective hermeneutical resources that are unduly influenced by a view that holds them individually responsible for their own success or failure in treatment.

As this part further shows, epistemic injustice also occurs *because* of the way the treatment program complex approaches procedural justice, and not in spite of it. That is to say, treatment program complex actors explicitly treat giving defendants a voice as a means to the end of ensuring compliance.[93] In other words, the idea is that defendants are more likely to comply when they feel as if they have been heard by a decision-maker.[94] But, as Professor Hanan has noted, "feeling empowered to speak" is not the same thing as having power.[95] Although defendants may have more chances to literally speak to the court in the treatment program complex, their voices still are not heard.

This part begins by outlining the contemporary landscape of the treatment program complex—with a focus on drug courts and drug court sentencing alternatives in general jurisdiction courts. Then this part describes the kinds of distorted narratives that emerge in the context of defendants bargaining to receive treatment and to stay in treatment, and then it examines how these narratives contribute to epistemic injustice.

A. The Treatment Program Complex

Beginning with the first drug court, which was founded by a judge in Dade County, Miami, in 1989,[96] problem-solving courts have proliferated across the country.[97] Currently, there are approximately 4,000 drug courts alone in the United States,[98] and drug courts have served as the model for the development of other problem-solving courts such as "mental health courts, domestic violence courts, community courts, homeless courts, truancy courts, reentry courts, and veterans courts."[99] Although these courts differ in that some seek to address the "purportedly 'unique needs'"[100] of certain groups (such as veterans courts) and others focus on accountability for certain types of offenses (such as domestic violence courts), all of these courts seek to "solve a problem that would otherwise lead to repeated interaction with

92. *Id.*
93. Hanan, *supra* note 6, at 540.
94. *Id.*
95. *Id.* at 542.
96. Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 420 (2009).
97. Eaglin, *supra* note 15, at 606. Technically, juvenile courts are considered the first problem-solving courts as they are the first courts to utilize a therapeutic approach. Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1515 (2003).
98. *See What Are Drug Courts?*, NAT'L TREATMENT CT. RES. CTR., https://ntcrc.org/what-are-drug-courts/ [https://perma.cc/K8VY-X8ZQ] (last visited Nov. 14, 2024).
99. Eaglin, *supra* note 15, at 606–07, 607 n.74 and accompanying text.
100. Collins, *supra* note 13, at 1583 (citation omitted).

the criminal legal system."[101] And all seek to provide treatment or services in lieu of, or in addition to, incarceration.

The fact that the problem-solving court movement originated in the late 1980s is not accidental, as this is the same time that judges were beginning to grapple with the "war on drugs" sentencing reforms that limited their discretion, and the resulting explosion in plea bargaining and mass incarceration.[102] Frustrated with the increasingly assembly-line nature of their jobs, judges were drawn to drug courts—the first of the current wave of problem-solving courts[103]—"because [they] offered more flexibility in sentencing."[104] Politically, problem-solving courts appealed to both conservatives and liberals. The "tough love" feature appealed to conservatives, and progressives were drawn to the emphasis on rehabilitation.[105] And across the political spectrum, politicians and advocates were drawn to problem-solving courts' focus on demonstrating effectiveness.[106] Problem-solving courts promised to reduce recidivism by addressing the root causes of crime,[107] while also reducing costs at a time when criminal legal system expenditures were skyrocketing.[108]

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101. *Id.*

102. *See* Eaglin, *supra* note 15, at 600–03.

103. Many commentators have argued that juvenile court was the first problem-solving court. *See, e.g.*, Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1464 (2004) ("In many ways, the juvenile courts were the original problem-solving courts . . . ."). Professor Quinn has also called our attention to a long "checkered" history of problem-solving courts, especially in the Progressive era. Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 69–80 (2009).

104. Collins, *supra* note 13, at 1594. Indeed, Professor Erin R. Collins argues that problem-solving courts proliferated not because they work but because they "solve a problem *with judging*." *Id.* at 1595 (emphasis in original). And problem-solving courts thrive not because of "empirical support for their efficacy" but because "the judges who create and preside over them have a professional and personal self-interest in their persistence." *Id.* Professor Candace McCoy also notes that if drug courts produced any paradigm shift at all, it was in the role of judges who "remain[] involved in the defendant's progress at every step of the process," almost like a "super-probation officer." McCoy, *supra* note 97, at 1529.

105. Miller, *supra* note 96, at 425 (citation omitted). And yet at the same time, the current era is not a repeat of the previous era of rehabilitation-focused punishment, but rather represents a new era of "neorehabilitation." Jessica Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 189 (2013).

106. *See* Eaglin, *supra* note 15, at 606. But the data also shows that drug courts have actually not been effective in addressing substance abuse disorder or reducing recidivism. Collins, *supra* note 13, at 1577–78; *see also* Ojmarrh Mitchell, David B. Wilson, Amy Eggers & Doris L. MacKenzie, *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-traditional Drug Courts*, 40 J. CRIM. JUST. 60, 60 (2012). The growth of drug courts must also be understood in the context of historic disinvestment in social services, and disinvestment in alternatives to incarceration such as probation. Thus, when the "nagging question recurs: Why should judges be coordinators of social services and enforcers of discipline for people serving criminal sentences," proponents of drug courts could answer "because nobody else is doing it, and because it is important work that needs to be done." McCoy, *supra* note 97, at 1529.

107. *See* Miller, *supra* note 96, at 422 (quoting John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 943 (2000)).

108. *See* McCoy, *supra* note 97, at 1518.

Notably, although substance abuse was always seen as a primary problem to be solved, early drug court proponents were more concerned with finding a way to reduce overwhelming caseloads.[109] Diverting as many defendants as possible from the harsh sentences of the war on drugs offered one solution.[110] Only later did therapeutic rationales begin to take precedence due to a combination of grassroots experimentation and federal funding.[111] The Violent Crime Control and Law Enforcement Act of 1994[112] (the "1994 Crime Bill") required courts applying for drug court funding to institute programs that included "addiction treatment, urinalysis and intensive offender monitoring, judge-oriented supervision aided by existing treatment providers and probation offices, [and a] collaborative team approach to prosecution and offender monitoring."[113] Drug courts now receive a majority of their funding from state governments.

Drug courts follow a model where the "locus of treatment" is the court, and treatment decisions are driven by a treatment team,[114] consisting of the judge, prosecution, and defense acting in collaborative, rather than adversarial roles.[115] Defendants are required to attend treatment, which may be inpatient or outpatient, and tends to range from six months[116] to twelve to

109. Professor Quinn notes that when the Miami-Dade County drug court was first established, the county "was under court order to reduce its enormous jail population." Quinn, *supra* note 103, at 63.

110. *See* McCoy, *supra* note 97, at 1519; *see also* Miller, *supra* note 96, at 417, 421–22 (discussing how drug courts were formed as a "safety valve" to reduce the number of low-level drug users serving long sentences under the policies of the war on drugs).

111. *See* McCoy, *supra* note 97, at 1520–24.

112. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered titles and sections of the U.S. Code).

113. *See* McCoy, *supra* note 97, at 1526; *see also* Quinn, *supra* note 18, at 45–46 (describing the development of the Drug Courts Program Office in the U.S. Department of Justice (DOJ) and how the DOJ conditioned funding of new drug courts based on their being designed in accordance with ten key components, including "integration of treatment services with traditional case processing, prompt placement of eligible defendants into treatment, and close monitoring of defendant drug use by the judge"). Professor Quinn argues that proponents of drug courts underappreciate the constitutional and ethical dilemmas the collaborative approach poses for defense attorneys. Quinn, *supra* note 18, at 53–54. For instance, proponents of drug courts suggest that defense attorneys should "after full disclosure to the client, fore[go] legal defense tactics such as motions to suppress evidence, which might delay the process or prevent the defendant from accepting responsibility for drug use," and urge defendants to be honest about their relapses. *Id.* However, such conduct on the part of the defense poses a substantial conflict with the Sixth Amendment and the defense attorney's ethical duty of zealous advocacy. *Id.*

114. Miller, *supra* note 96, at 418. Notably, no medical professional is involved in determining the treatment plan. TAMAR EZER, DAVID STUZIN, KASSANDRA FREDERIQUE & LINDSAY LASALLE, MIA. L. HUM. RTS. CLINIC & DRUG POL'Y ALL., A MISGUIDED APPROACH TO DRUG DEPENDENCE: THE PROBLEMS WITH DRUG COURTS IN THE UNITED STATES, https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/Call/CSOs/Miami_Law_and_Drug_Policy_Alliance.pdf [https://perma.cc/P9YX-7C56]; MARIANNE MØLLMANN & CHRISTINE MEHTA, PHYSICIANS FOR HUM. RTS., NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES (2017), https://phr.org/wp-content/uploads/2017/06/phr_drug courts_report_singlepages.pdf [https://perma.cc/9KE3-J7SL].

115. Eaglin, *supra* note 15, at 603; *see also* Miller, *supra* note 96, at 423, 431.

116. Based on the author of this Article's experience as a public defender, shorter periods of treatment are more common with treatment pleas negotiated outside of treatment court.

eighteen months.[117] Defendants are also required to attend regular court dates, frequently referred to as status hearings, where a representative from their treatment program reports on their progress.

Drug courts use a "carrot and stick" approach—rewarding defendants who successfully complete treatment with dismissed or reduced charges and utilizing an array of "graduated sanctions" to punish defendants who do not comply with program requirements, including by relapsing.[118] Graduated sanctions may involve requiring a defendant to attend more intensive treatment or more frequent court appearances, or "shaming [the defendant with] . . . in-court tongue lashings or public timeouts."[119] The ultimate graduated sanction drug courts utilize is incarceration.[120] Defendants who are alleged to be noncompliant may be remanded to jail for short periods of time. The majority of drug courts also require defendants to plead guilty before beginning treatment.[121] Thus, the reality of multiyear sentences in prison—in addition to short "motivating" stints in jail—hangs above defendants' heads.[122]

The problem-solving court expansion has also not remained siloed away from general jurisdiction courts. Professor James L. Nolan, Jr., has written about how practices developed in problem-solving courts and how general jurisdiction courts have cross-pollinated.[123] Thus, it is now common in many

117. Quinn, *supra* note 18, at 48–49 (discussing eligibility requirements and program requirements for Bronx Treatment Court).

118. Bowers, *supra* note 16, at 784–85, 788; *see also* Quinn, *supra* note 18, at 49 (describing how defendants who are doing well are praised and rewarded and defendants who are not doing well in treatment are sanctioned). Critics have questioned the evidentiary basis behind using graduated sanctions in the treatment program complex. KERWIN KAYE, ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE 53 (2020). Some argue treatment must be voluntary to be effective and thus punishing defendants for failure to comply with treatment mandates can never work. *See, e.g.*, Dan Werb, Adeeba Kamarulzaman, Meredith C. Meacham, Claudia Rafful, Brian Fisher, Steffanie A. Strathdee & Erica M. Wood, *The Effectiveness of Compulsory Drug Treatment: A Systematic Review*, 28 INT'L J. DRUG POL'Y 1, 9 (2016). Others point out that the concept of graduated sanctions is based on behaviorist theories that human beings will respond rationally to consistent incentives that are actually "devoid of any significant link to any theory of addiction" and rely on research conducted in animal laboratories. *See* KAYE, *supra*, at 53. As Professor Kerwin Kaye notes, it is "telling" that the same behaviorist principles are also applied in other areas of the criminal legal system, outside of the treatment context. *Id.*

119. Bowers, *supra* note 16, at 785 & n.6. Notably, the philosophy of graduated sanctions is *not* based, in any way, on the science of addiction, and instead relies on "behaviorist theories that have been developed in other contexts." KAYE, *supra* note 118, at 53.

120. Miller, *supra* note 96, at 423–24 (discussing how judges may "employ a variety of punitive measures," including incarceration, to "ensure that treatment is effective"); *see also* Michael D. Sousa, *Procedural Due Process, Drug Courts, and Loss of Liberty Sanctions*, 14 N.Y.U. J.L. & LIBERTY 733, 741–43 (2021) (describing sample sanctions and incentives in drug court).

121. *See* NOLAN, *supra* note 14, at 40–41 (2001); *see also* Bowers, *supra* note 16, at 785 n.7.

122. *See* Quinn, *supra* note 18, at 62 (describing how treatment court routinely required defendants to agree to be sentenced to two to six years in prison if they failed treatment court, compared to a typical sentence of one to three years if they had pled guilty in general jurisdiction court).

123. *See* NOLAN, *supra* note 14.

general jurisdiction courtrooms for a defendant to be able to pursue a treatment alternative plea without ever being accepted into drug court or mental health court.[124]

As numerous critiques have pointed out, the problem-solving court approach is far from a panacea.[125] First, problem-solving courts adjudicate a very small proportion of drug cases,[126] thus excluding many people who could benefit from them. To be eligible for most drug courts, a defendant must be categorized as a low-level offender,[127] or must only be charged with drug possession charges,[128] despite empirical evidence that people with long records and high-level charges stand to benefit the most from treatment. Certain types of criminal convictions on a defendant's record may also disqualify them.[129]

Moreover, despite the ostensibly team-based model, judges and prosecutors exercise far more power over proceedings in drug courts than their defense attorney teammates. First, judges and prosecutors exercise vast discretionary power over who can enter drug court. This is because, even where defendants are statutorily eligible for drug court, many statutes require the consent of the prosecution, judge, or both for eligible defendants to be accepted into drug court. As Professor Mae Quinn has observed, "drug treatment courts operate at the whim of the prosecution."[130]

Second, the omnipresent threat of incarceration also belies the supposedly collaborative nature of the team-based approach. Because the judge makes the ultimate call over what sanction to impose—just as in a general jurisdiction court—the judge has more power than the defense attorney who may only make the best argument possible to avoid incarceration.

This uneven distribution of power is most striking in drug courts because of their claim to be collaborative and team based. But it also exists in general jurisdiction courts, where prosecutors exercise the same highly unregulated discretionary power over the terms of treatment pleas as they do over the terms of any plea deal.[131] And, often that discretion is used to exclude defendants from treatment deals. Ultimately, as will be discussed in Part II.B, this uneven power distribution among the members of the treatment

124. Victor E. Flango, *Why Problem-Solving Principles Should Not Be Grafted onto Mainstream Courts*, JUDICATURE, Spring 2016, at 31, 33 (critiquing bringing problem-solving approaches into general jurisdiction court).

125. *See supra* notes 16–18 and accompanying text.

126. McCoy, *supra* note 97, at 1530.

127. Eaglin, *supra* note 15, at 211–12; *see also* Quinn, *supra* note 18, at 48 (describing how defendants must be charged with certain felony drug offenses and must have no prior felony or violent crime convictions and no prior felony probation sentences to be eligible for Bronx Treatment Court).

128. *See* Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2265, 2278 (2022).

129. *See, e.g.*, Quinn, *supra* note 18, at 48. The same types of exclusions also apply when it comes to treatment sentencing alternatives in general jurisdiction court—they simply apply at the level of informal prosecutor policies.

130. Quinn, *supra* note 18, at 57; *see also* Sibley, *supra* note 128, at 2275–82 (discussing the high amounts of discretion and variation in the criminal specialty court selection process).

131. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

team is directly related to the types of narratives that defendants must craft to avoid harm.

Another core critique of the treatment program complex points out the various ways in which it contributes to racial disparities. First, by excluding defendants with certain types of records and charges,[132] the treatment program complex exacerbates racial disparities because of structural factors, including poverty and policing tactics, that make Black people and other people of color more likely to be arrested and convicted of more serious charges.[133] Second, the requirements for successful completion of treatment further skew racial disparities as they tend to favor people with resources, education, and social support.[134]

Problem-solving courts also result in "net-widening," where people who would not otherwise be drawn into the criminal legal system are arrested or charged because an official with discretion rationalizes that they will benefit from a treatment plea.[135] For prosecutors, because treatment pleas can be rationalized as "help" rather than punishment, they serve as a "costless alternative to dismissal" for weak cases.[136] Thus, treatment courts and treatment pleas become "case dumping grounds," ultimately expanding rather than reducing the net of carceral control.[137] Treatment pleas also exacerbate mass incarceration because defendants who are found to have failed treatment are punished more severely than if they had pled guilty to a conventional guilty plea.[138]

All of these critiques decry the harm the treatment program complex imposes on defendants by subjecting them to higher levels of incarceration

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132. Stacy Lee Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 73, 82 (2010).

133. Eaglin, *supra* note 105, at 214–18; *see also* ALEJANDRA GARCIA & DAVE LUCAS, BRIDGING THE GAP: A PRACTITIONER'S GUIDE TO HARM REDUCTION IN DRUG COURTS 10 (2021), https://www.innovatingjustice.org/sites/default/files/media/document/2021/Guide_TA_BridgingtheGap_08102021.pdf [https://perma.cc/85UA-ZWUV] (noting that the majority of drug court participants are White).

134. *See* CLAIR, *supra* note 8, at 192–93 (describing how "selection into and completion" of treatment-focused court programs "can be racially and socioeconomically biased"); *see also* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAN. L. REV. 1055, 1096 (2015) (citing Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 462, 480–81 (2009)); Møllman & Mehta, *supra* note 114.

135. McLeod, *supra* note 13, at 1614–15.

136. *See* Miller, *supra* note 17, at 1561 (discussing how drug courts provide prosecutors with a "costless alternative to dismissal"); Natapoff, *supra* note 134, at 1094 ("[T]he very presence of drug court . . . has caused police to make arrests in, and prosecutors to file, the kinds of $10 and $20 hand-to-hand drug cases that the system simply would not have bothered with before . . . ." (quoting CYNTHIA HUJAR ORR, JOHN WESLEY HALL, NORMAN L. REIMER, EDWARD A. MALLETT, KYLE O'DOWD & ANGELYN C. FRAZER, NAT'L ASS'N CRIM. DEF. LAWS., AMERICA'S PROBLEM SOLVING COURTS: THE CRIMINAL COSTS FOR TREATMENT AND THE CASE FOR REFORM 42 (2009))).

137. Quinn, *supra* note 18, at 59–60 (discussing the phenomenon of "case dumping" and how defendants have little leverage to contest it, as they are typically jailed and unable to afford bail when offered treatment, and thus the choice is between treatment and freedom or fighting their case behind bars).

138. *See* Collins, *supra* note 13, at 1614; Quinn, *supra* note 18, at 62.

and contact with the criminal legal system, and by denying treatment to those who need it most. However, when it comes to epistemic injustice, one might assume that the treatment program complex is a more hospitable environment when it comes to ensuring that defendants' voices are heard.

Notably, the rhetoric of the treatment program complex advances the principles of therapeutic jurisprudence, which hold that the court should "adapt its practices to assist in the therapeutic process of recovery," including by ensuring that a defendant's voice is heard.[139] And treatment courts have been lauded for adhering to the principles of procedural justice, including (1) enabling litigants to have a voice in the proceedings; (2) treating litigants with respect; (3) unbiased decision-making; and (4) ensuring that litigants understand their rights, obligations, and the decisions that were made.[140]

However, proponents of treatment courts also view giving defendants a voice as a means to the end of ensuring compliance.[141] As one report stated, defendants are more likely to "defer to or comply with the decisions made by the judge and others in authority" when they perceive a greater degree of procedural justice.[142] Thus, even if treatment courts encourage defendant speech—and defendants may actually speak more frequently during the multiple status hearings each case may entail—in reality, the opportunity provided for defendants to speak is primarily meant to make defendants "feel [as if] they have input when they may not."[143] Moreover, despite offering defendants opportunities to speak, the treatment program complex ultimately embraces a "paternalistic notion that the court is best able to identify and meet the client's best interests and needs."[144] This paternalism is also backed up by the vast power held by judges and prosecutors, in particular, to enact their vision of success.

Judges and prosecutors are thus empowered to view with suspicion any resistance to the treatment program complex's sweeping and invasive requirements that are intended to rehabilitate defendants.[145] These requirements control everything from where defendants work to what types of treatment they may access.[146] Thus, the treatment program complex also perpetrates dignitary and epistemic harms, which have so far gone unrecognized.

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139. Casey, *supra* note 103, at 1479.

140. *See* CLAIR, *supra* note 8, at 192–93 (describing how problem-solving courts "rely on theories of procedural justice, emphasizing how the use of public celebrations, eye contact, giving voice, and meaningful interactions can imbue defendants with feelings of respect for the law"); Berman & Adler, *supra* note 89, at 993.

141. Hanan, *supra* note 6, at 540–43.

142. *Id.* at 541.

143. *Id.* at 542. This is not to say that defendants never have input, but rather that the court's motivation in giving them a voice is driven primarily by the conviction that court actors know what is best for the defendant, and all that is needed from the interaction is an incentive for them to comply.

144. Meekins, *supra* note 14, at 111.

145. *See generally* KAYE, *supra* note 118, at 57–58.

146. *See id.*

As the next section shows, the treatment program complex suppresses defendants' voices and forces them to conform to a particular narrative of the ideal treatment court candidate. This pressure to conform to an idealized narrative deprives defendants of dignity and deprives the larger discourse around treatment courts of the voices that matter the most—the voices of those directly impacted.

B. Distorted Narratives

At every step in the process, from bargaining for treatment to advocating for second chances to stay in treatment, the defense must construct a narrative that can successfully navigate the various institutional barriers that threaten to exclude the defendant from treatment. Utilizing examples from case studies,[147] this section examines, through the lens of epistemic injustice, the specific ways in which defendants must participate in suppressing and distorting their own stories in order to be credited by decision-makers and avoid incarceration.

This section also addresses how this suppression and distortion happens at every stage of the process, beginning with the way defendants must bargain for treatment by presenting just the right size of substance abuse problem, and appearing worthy of treatment. Then it pivots to how defendants must suppress and distort their stories and experiences in order to stay in treatment and avoid sanctions, including through suppressing critiques of treatment and embracing a narrative of substance use as moral failure.

1. Walking the Tightrope of Presenting a Substance Abuse Problem

As discussed above, defendants may be excluded from treatment pleas based on their charges or criminal history.[148] However, prosecutors and judges may also exercise their discretion to exclude defendants who they perceive to be unlikely to meet the demands of drug court due to a particularly severe substance abuse disorder, co-occurring mental illness,[149] lack of housing, or an extensive criminal history.[150] This is despite the fact that empirical evidence indicates that "high-risk" defendants are both more

147. *See infra* Parts II.B.1–2. The majority of the case studies cited in this Article are from drug courts. However, given the similar dynamics that exist across the treatment program complex, the author of this Article contends that these case studies are illustrative of how distorted narratives are likely to develop whenever treatment is provided through criminal court.

148. *See supra* Part II.A.

149. Moreover, in mental health courts, certain mental health conditions are not even eligible for treatment court. Arielle Baskin-Sommers & Jorge Camacho, *The Criminal System Is Full of People with Psychopathy. It Fails to Help Them*, THE APPEAL (Feb. 17, 2023), https://theappeal.org/us-prison-system-doesnt-treath-psychopathy/ [https://perma.cc/7H9M-VNBU].

150. Even if a prosecutor or judge may be open to accepting a "higher" risk defendant, in the case of co-occurring mental illness, Professor Quinn observes that many programs are "not equipped" or are "reluctan[t]" to accept defendants with serious mental health issues. *See* Quinn, *supra* note 18, at 60.

likely to benefit and more likely to receive *greater* benefits from treatment.[151] Defendants who are excluded from drug court for these reasons are still eligible for treatment-based pleas in general jurisdiction court; however, the same dynamics apply there as well. These defendants will still face skepticism from prosecutors as to whether they will be able to successfully complete treatment and may be discretionarily rejected.

Although outright criminal history bars cannot be overcome, the discretionary exclusion of "high-risk" defendants incentivizes the defense to construct a "Goldilocks-style" narrative that presents "just enough" of a need for treatment, while avoiding being perceived as high risk.[152] As Professor Quinn has observed, defense attorneys must thus carefully prepare their clients to be assessed for treatment court, including by potentially "caution[ing] a client to avoid discussing the extent of her mental illness with drug court staff," because such a disclosure could lead to the defendant being screened out.[153]

Defendants with mental illness also face the risk that they may be viewed as more in need of intensive levels of supervision because they are more likely to be viewed as potentially dangerous—as Professor Jamelia Morgan has documented with the concept of "disability suspicion."[154] Particularly for people of color, "nonnormative or nonconforming behaviors and expressions" associated with particular disabilities may be read as "suspicious" during police encounters.[155] The same behaviors may also be read as "suspicious" within a courtroom setting where a judge or prosecutor is evaluating a defendant for a potential treatment plea, and may lead to a conclusion that the defendant is too "high-risk" for treatment. Furthermore, racialized and gendered stereotypes "also serve to link certain disabilities to both criminality and violence."[156] Thus, as Professor Morgan discusses, public justifications for police shootings of Black, Latinx, and Indigenous People have frequently hinged on descriptions of the deceased that evoke both racist stereotypes ("superhuman strength") and "ableist norms" ("deranged and demonic").[157] Thus, not only are mental illnesses associated with violence, but one can understand this link as mediated through racist ideas. In the treatment program complex, defendants who present themselves as having a mental health condition—particularly defendants who are Black

151. *See* Eaglin, *supra* note 105, at 211–12.

152. In mental health courts, certain mental health conditions are not even eligible for treatment court. Baskin-Sommers & Camacho, *supra* note 149.

153. Quinn, *supra* note 18, at 60–61.

154. *See* Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489, 526 (2022).

155. *Id.* (citations omitted). Specifically, the use of the term "nonnormative" connotes the "relational aspect of suspicion" such that "Black and Latinx deemed 'out of place' in white (non-Latino) neighborhoods" are more likely to be stopped by the police, and disabled people are more likely to be stopped "in places where the presence of disabled people is perceived as a type of physio-normative incongruity." *Id.* at 529–30. For instance, disabled people who are visibly disabled in public may be targeted by "aggressive quality-of-life policing." *Id.* at 530.

156. *Id.* at 556.

157. *Id.*

and otherwise negatively racialized—run the risk of being viewed as inherently more likely to be violent or dangerous, and thus more likely to be excluded from treatment altogether.

Such defendants may also be overloaded with intensive requirements. For example, defendants who have a mental health condition that results in a judgment that they are "high-risk" or defendants who have housing instability may be automatically required to do inpatient treatment, regardless of whether such treatment is clinically necessary.[158]

Notably, defendants also seek to avoid such intensive treatment requirements, even when they are clinically appropriate.[159] This is because intensive requirements are harder to comply with and noncompliance with any treatment plea requirement can trigger a jail or prison alternative that is often lengthier than the sentence the defendant would have faced if they had never opted for a treatment plea.[160] Thus, it is in a defendant's interest to minimize intensive treatment plea requirements wherever possible. In the following interaction, observed by Professor Kerwin Kaye in his study of treatment courts, a drug court team's reaction to learning that a participant is living in a shelter demonstrates the risks of revealing too much information:

> "She seems to be living at a shelter so she must go to residential." "She'll have to get off of her antianxiety med before she can go residential," notes the DA. "Residential won't take her?" asks the judge. "No." "Then she'll need to speak with a doctor about finding a substitute," the judge concludes.[161]

In this particular example, the defendant had anticipated the risk of revealing her unstable housing situation and had told the court that she was living at a friend's house instead.[162] In other words, she had sought to conform to a distorted narrative of "suitability" for treatment to mitigate harm.[163]

Notably, as Professor Erin R. Collins has pointed out, proponents of treatment courts also assume that defendants with substance abuse or mental

158. *See* Quinn, *supra* note 18, at 60. Professor Quinn asks, "[W]hat advice should attorneys provide to clients who do not wish to enter an in-patient drug treatment program but lack long-term housing?" *Id.* at 61.

159. As discussed in Part II.B.3, requirements are not necessarily clinically justified. *See infra* Part II.B.3. There are no medical professionals on the treatment court team, and prosecutors routinely impose intensive requirements (such as residential treatment) to punish defendants accused of serious crimes. *See* Gruber et al., *supra* note 18, at 1368–69; *see also* KAYE, *supra* note 118, at 69–70 (noting that district attorneys often successfully demanded that defendants be required to do residential treatment for more serious offenses); Hanan, *supra* note 6, at 546 ("As one problem-solving court official explained, 'We combine punishment and help.'").

160. *See* Quinn, *supra* note 18, at 62 (describing how treatment court routinely required defendants to agree to be sentenced to two to six years in prison if they failed treatment court, compared to a typical sentence of one to three years if they had pled guilty in a general jurisdiction court).

161. *See* KAYE, *supra* note 118, at 57–58.

162. *Id.*

163. This requirement may also originate with the treatment program, as many outpatient treatment programs have expressed reluctance to work with defendants with "unstable housing." *See* Quinn, *supra* note 18, at 60.

illness are committing crimes *because* of their substance abuse or mental illness, rather than because of poverty, unstable housing, or lack of housing, for example.[164] Defendants also may be stuck in the revolving door of the criminal legal system because they live in highly policed neighborhoods, whereas crime in other areas goes unpoliced. And yet defendants whose interactions with the criminal legal system are really being driven by poverty, housing instability, policing tactics, or some combination of the above, have no choice to but to emphasize their use of substances, and de-emphasize these other factors, to avoid jail or to avoid being overloaded with intensive requirements.[165]

From the perspective of treatment program complex actors, intensive treatment requirements are not onerous, but are merely what is necessary to help "break the cycle" of addiction and crime for that particular defendant. But, even setting aside the question of who gets to decide what requirements are necessary,[166] many treatment mandates also go beyond treating substance abuse disorder and are geared toward shaping the defendant into an "economically productive" citizen.[167] Typically, treatment mandates require defendants to obtain employment and/or a GED.[168] In some cases, a mandate may extend even greater control over a defendant's life by, for example, requiring them to cut ties with individuals that the court deems obstacles to recovery.[169] For defendants who are perceived to be high risk, whether because of housing instability or their criminal history, treatment mandates are likely to be particularly intense.

Not only do treatment program complex actors view particular treatment requirements as necessary for recovery, they also view the defendant's attitude toward these requirements to be crucial. As Professor Nolan has observed, a defendant must prove himself as both suffering from a substance abuse disorder *and* as committed to self-improvement to be a suitable

164. Collins, *supra* note 13, at 1616–17.

165. This can lead to arguably absurd results in practice. For example, persons who have legal access to medical marijuana may still be admitted to treatment court for "cannabis use disorder." *See* NAT'L ASS'N DRUG CT. PROS., FREQUENTLY ASKED QUESTIONS: MEDICAL MARIJUANA AND TREATMENT COURTS 7 (2022), https://allrise.org/wp-content/uploads/2023/05/Med_Marijuana_FAQ_.pdf [https://perma.cc/B26R-YUQ5] (describing how a treatment court may be empowered to ban a person from using medical marijuana if it is "antithetical to their recovery."). In one instance in New York City, this resulted in a defendant being in treatment court for marijuana use when they were prescribed medical marijuana. Professor Collins has written about the phenomenon of only certain issues or certain statuses as being worthy of treatment rather than jail. Erin Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017); *see also* Rachel Liebert, *Trauma and Blameworthiness in the Criminal Legal System*, 18 STAN. J.C.R. & C.L. 215 (2022).

166. As discussed above, no medical professional is involved in determining the treatment plan. *See supra* note 114.

167. Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915 (2017).

168. KAYE, *supra* note 118, at 57–58.

169. *See id.* at 75. In another example, a defendant seeks permission to move back in with his mother. *Id.* at 2.

candidate for treatment court.[170] Thus, as discussed in the subsequent sections, portraying unmitigated commitment to treatment court is one of the only arrows a defendant has in their narrative quiver when it comes to bargaining for treatment.

Conversely, the court is not likely to credit a critique of coercive intensive treatment options, but rather view it as evidence of the defendant's *lack* of commitment. This is because criminal court actors are influenced, consciously or unconsciously, by racialized stereotypes[171] about criminal defendants—particularly defendants who have substance abuse disorders—that hold that these defendants are manipulative and seek to avoid accountability. These stereotypes distort the hearer's perception of the defendant's resistance, such that the defendant's legitimate concerns about being too overloaded with requirements are not communicated—a form of testimonial injustice.

At best, judges and prosecutors perceive defendants as in need of the criminal legal system's help,[172] and at worst they perceive them as resisting the system's help, but what they fail to perceive either way is how defendants are harmed by a model that potentially sets them up to fail. The story of the system itself as a source of harm is perpetually discredited—a form of testimonial injustice.

Ultimately, as will be discussed further in Part III, the fact that defendants' legitimate critiques are not communicated also ultimately damages knowledge production, as judges are not exposed to narratives that challenge the beneficence of the treatment program complex.[173]

2. "He's Never Been Offered a Program Before"

In addition to carefully characterizing a defendant's substance abuse disorder and co-occurring issues, the defense must also navigate institutional barriers that exclude defendants who seek treatment too late or have a history of failing or rejecting treatment. Notably, "failure" is a common occurrence

170. *See generally* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 47–48 (2001); *see also* Benedikt Fischer, *'Doing Good with a Vengeance': A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3 CRIM. JUST. 227, 236 (2003).

171. *See* FRICKER, *supra* note 10, at 30–31 (discussing the relationship of stereotypes to testimonial injustice). Due to pervasive bias against criminal defendants, criminal court actors are less likely to credit defendants simply based on their status as defendants. M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 329 (2018). However, defendants are also less likely to be perceived as credible based on their race, class, and status as a person with a mental illness or substance abuse disorder. *Id.* at 303–04. Black and otherwise negatively racialized defendants are more likely to be seen as "inherently" criminal and thus manipulative. *Id.* at 329–31.

172. *See* Gruber et al., *supra* note 18, at 1368 (describing how a defendant left a courtroom crying, and the judge immediately assumed that she had an unmet need, such as counseling or housing, when instead the defendant was actually "upset about the judge saying that if she did not complete services she would get 15 days jail").

173. *See* FRICKER, *supra* note 10, at 43 (discussing how "prejudice can prevent speakers from successfully putting knowledge into the public domain").

given that approximately half of treatment court participants are ultimately deemed unsuccessful. As this section shows, navigating these barriers involves propagating narratives of cooperation, gratitude, and commitment to treatment.

Formal and informal court policies often reserve access to treatment for defendants who seek out treatment early in their case and have no history of "failing" or rejecting treatment.[174] For example, in New York, court policies allow a defendant to request to be sent to treatment court after arraignments, but if the defendant then rejects a treatment offer in treatment court, it is very unlikely that they will be permitted to return to treatment court later in the case. Although this is an example of a formal policy, many judges and prosecutors have informal policies of rejecting "late" requests for treatment court or treatment pleas from defendants, or, similarly, rejecting requests from defendants who were initially offered treatment and turned it down. However, because taking a treatment plea is so high risk,[175] in an ideal world, defendants are incentivized to pursue a treatment plea only once all other viable ways to fight the charges against them have been exhausted. Pursuing access to treatment court only as a last available option often makes sense as a matter of self-preservation.

Ultimately, these formal and informal court policies reflect the premium court actors place on efficiency, even if the cost is that some "deserving" defendants may be excluded from treatment. By limiting access to treatment pleas to defendants who choose to pursue them early, court actors can discourage defendants from pursuing litigation that takes up the court's most precious resource—time. In other words, it is partially *because* so many defendants might otherwise seek treatment as a last resort insurance policy, thus potentially clogging up the court system with litigation, that these policies exist.[176]

But these policies are also connected to a narrative that views defendants who are only choosing treatment as a last resort as somehow unsuitable for treatment. Judges are not incorrect, legally, to consider the issue of "suitability." Statutes that determine eligibility for drug court often list "amenability to correction" as a requirement.[177] But the vagueness of this phrase opens the door to judges coming up with their own criteria regarding

174. Meekins, *supra* note 14, at 89 ("The supporters of this principle argue that capitalizing on the defendant's crisis following arrest may make the defendant more accepting of the treatment, allowing the treatment to have greater effect."). Professor Kaye has compared this to a "shock doctrine" approach to treatment. KAYE, *supra* note 118, at 79.

175. As discussed in Part II.A, taking a treatment plea can be both high risk and high reward. *See supra* Part II.A. If defendants are able to meet all the requirements of the treatment plea, their charges may be dismissed or reduced. If they fail to meet the requirements, they are sentenced to a harsher punishment than they might have faced if they had pursued a conventional plea. *See, e.g.*, Natapoff, *supra* note 134, at 1095.

176. In this sense, these policies are similar to the "trial penalty," in that defendants are punished for perceived excessive use of the court system's resources.

177. Sibley, *supra* note 128, at 2279 (citing State v. Curry, 988 S.W.2d 153, 157 (Tenn. 1999)).

who is amenable to, or suitable for, treatment.[178] This, in turn, leads to blanket exclusions of defendants perceived to be motivated by the "wrong" reasons. As one drug court judge stated, in evaluating which defendants are more likely to be successful in treatment court, "[w]e're trying to sort out the people who are actually trying to get clean and sober . . . and those people who are just trying to get out of jail and trying to flee or not accept responsibility . . . ."[179]

This highly subjective inquiry ultimately opens the door to bias. Professor Hanan has argued that judges' evaluations of whether defendants show remorse at sentencing are impacted by implicit racial bias and, specifically, the racist association of Blackness with criminality.[180] Black men are thus less likely to be judged as remorseful even when exhibiting the same behaviors as White men.[181] Remorse is specifically valued because it is associated with amenability to rehabilitation.[182] For the same reason, Professor Hanan argues, evaluations of remorse are especially susceptible to the influence of stereotypes that judge Black people as less redeemable.[183]

Similarly, in the treatment program complex, judges' evaluations of whether defendants are "actually trying to get clean and sober"[184] function as a proxy of determining whether defendants are amenable to rehabilitation. Thus, one can expect these screening processes to be vulnerable to implicit bias in the same way.

How can defendants seeking treatment—particularly Black defendants and other defendants of color—counter these biases? The dilemma is particularly tricky because defendants are typically evaluated for treatment at the beginning or near the middle of their criminal case, while they are still justifiably considering other options for their defense, such as taking the case

178. *Id.*

179. Burns & Peyrot, *supra* note 1, at 425.

180. Hanan, *supra* note 171.

181. *Id.* at 329–31, 342 (observing that "to the extent that the judge sees the defendant as inherently criminal and dangerous, she will perceive any display of remorse as . . . manipulative[]" and arguing that judges are more likely to view Black defendants as "inherently criminal" due to implicit racial bias and bias against identifying with people outside one's social group).

182. *Id.* at 310.

183. *Id.* at 329–30 (discussing the stereotype with deep roots in the post-emancipation period that Black people are "inherently criminal and, thus, incapable of integrating in the fabric of American life," how this stereotype persists in a less explicit manner today, and how an "assumption of inherent criminality renders all remorse displays inauthentic").

184. Burns & Peyrot, *supra* note 1, at 425. Studies have found this emphasis on commitment to recovery in the context of treatment programs as well, where treatment program staff constantly assess the "genuineness" of defendants' commitment to treatment, and defendants are encouraged to "maintain the appearance of a strong commitment to therapeutic principles" regardless of how they are doing in treatment. *Id.* at 417 (citation omitted). And although it might seem illogical to conclude that any defendant can be assessed as genuinely committed to treatment when a jail sentence is hanging over their head, drug court actors tend to explicitly frame the choice to pursue treatment as a "voluntary" decision. *See id.* at 418 (describing how judges "coerce" defendants into opting for treatment by threatening them with jail, and yet the decision is still framed as defendants making the right choice and "volunteering").

to trial or pursuing suppression issues. And many defendants may wish to pursue these issues before pursuing treatment. And yet, what might otherwise be construed as zealous advocacy—the exhaustion of all legal issues in a case before treatment is pursued—can actually sabotage the defendant's chances at treatment by conveying to decision-makers that the defendant's main goal is "get[ting] out of jail" and defeating the charges against them.[185] Litigating a case through the motion to dismiss or suppression hearing stage can compromise a defense counsel's ability to later present a defendant as a suitable candidate for treatment. Thus, when defendants want to pursue treatment, defense counsel must be strategic from the beginning about how adversarial or cooperative to appear in the eyes of criminal court actors.[186]

This involves both potentially giving up litigating key legal issues—always a tradeoff with the plea-first treatment model—*but also* suppressing any speech that might signal to the court that treatment is a last resort. Because of the ways that criminal court actors' perceptions of defendants' speech are distorted by stereotypes—as will be discussed further in this section—such speech would only be weaponized against a defendant as evidence of their lack of suitability for treatment, rather than based in the desire for self-preservation.

There is a dissonance involved in rejecting defendants for these types of suitability reasons. Judges and prosecutors outwardly accept relapse as a part of recovery and may give second chances to a defendant who is *in* treatment. But, once a defendant has run out of second chances and has been resentenced to incarceration, their alleged failure to succeed is thereinafter viewed as a moral failing.[187] The history of being deemed unsuccessful follows the defendant like a "mark,"[188] automatically rendering them at a disadvantage when it comes to any subsequent attempt to negotiate a treatment plea.

The exclusion of defendants who are potentially using treatment "to get out of jail" or who have rejected treatment in the past can also be viewed as ableist in that it reflects a biased view of disabled people as engaged in a "disability con."[189] As Professor Doron Dorfman explains, disabled people

185. *Id.* at 425. This should be considered in context of the fact that defendants who aggressively litigate their cases can already be penalized by court actors—reflecting both the low value court actors place on defendants' constitutional rights, and the high value placed on efficiency. *See, e.g.*, Hanan, *supra* note 6; CLAIR, *supra* note 8.

186. Notably, problem-solving treatment courts are also designed to be nonadversarial. Thus, in those courts, a defense attorney's zealous advocacy may also compromise their status as a member of the treatment team. Professor Quinn has written about the ethical dilemmas posed by the conflict between the defense attorney's obligation to zealous advocacy and the nonadversarial treatment court model. *See* Quinn, *supra* note 18, at 53. However, these ethical dilemmas can permeate the pretrial process even before defendants have been accepted into treatment or have accepted a treatment plea.

187. *See* Collins, *supra* note 13; REBECCA TIGER, JUDGING ADDICTS, DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM 50 (2012); KAYE, *supra* note 118, at 68.

188. KOHLER-HAUSMANN, *supra* note 72.

189. Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1053 (2019). Although many people do not perceive

face widespread suspicion that they are engaged in a "disability con," or faking their disabilities in order to "take advantage of rights, accommodations, or benefits."[190] Fear of a "disability con" is pervasive, even among people with disabilities or people who have close friends and family with disabilities, and as Professor Dorfman argues, it ultimately "undermines the public legitimacy of rights."[191]

Many defendants who seek entry into treatment court are covered as disabled under the Americans with Disabilities Act of 1990[192] (ADA) due to their mental health conditions or due to their having a history of substance abuse treatment.[193] Thus, when judges and prosecutors view these defendants as seeking treatment merely to get out of jail, judges and prosecutors are evincing a fear of defendants attempting to earn an undeserved benefit—of engaging in a "disability con." Even defendants who are not disabled but still qualify for treatment court may be influenced by this pervasive fear of fraud and may be excluded if they appear to be seeking treatment for the wrong reasons. Interestingly, whereas Professor Dorfman identified the "disability con" as referring to people seeking a benefit they do not actually qualify for, in the treatment program complex, judges and prosecutors view even qualified defendants as seeking an unearned benefit if they are not sufficiently committed to treatment for treatment's sake.

Thus, treatment is only worthy of those who are sufficiently committed, and the logic of suitability for treatment ultimately functions as a filter for who is worthy and who is unworthy. Those who are seeking treatment just to get out of jail or those who, in the past, were "unable to enact [the] vision of freedom" offered by treatment "are deemed both unworthy and dangerous."[194]

In sum, intersecting racist and ableist stereotypes cause criminal court actors to seek to filter out defendants who may not have "earned" treatment, also affecting credibility judgments. Defendants who have "failed" or rejected treatment in the past, particularly defendants of color, experience testimonial injustice when they attempt to access treatment again.

Ultimately, to counterbalance the ways in which they are discredited, defendants must attempt to "perform" in ways that demonstrate their

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people with substance abuse disorders as disabled, any person who has been in treatment for a substance abuse disorder is covered by the Americans with Disabilities Act of 1990 (ADA). Pub. L. No. 101-366, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.); *see* 28 C.F.R. § 35.108(b)(2) (2024). Also considering the fact that many defendants engaging with the treatment program complex also have a mental health diagnosis, a large proportion of defendants in the treatment program complex may be classified as having a disability.

190. Dorfman, *supra* note 189, at 1053.

191. *Id.* at 1051.

192. Pub. L. No. 101-366, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C.).

193. Many people with substance abuse disorders qualify as disabled under the ADA, which includes under its umbrella any person who has been in treatment for a substance abuse disorder. *See* 28 C.F.R. § 35.108(b)(2).

194. *See* KAYE, *supra* note 118, at 80.

worthiness.[195] For example, when a judge accused a defendant in one particular study of not being "ready" to commit to treatment yet, the defendant responded by stating "There's hope" and "I wanna do it for my kids."[196] Thus, the defendant sought to convince the judge by humanizing himself as a dedicated father, the ultimate compensatory narrative.

Similarly, in other cases, a defense attorney may advocate for a defendant who has a history of rejection by emphasizing their employed status. Judges and prosecutors have been known to view employed defendants as more suitable for treatment pleas, ostensibly because they are more likely to be able to commit to the demands of treatment.[197] Employment, not unrelatedly, also sets the defendant apart from the "undeserving poor"—a long-standing trope that has attributed moral deficiency to racialized categories of low-income people.[198]

Looking at these two examples through the lens of epistemic injustice, the defendants sought to draw on the aspects of their social identity that were most credible for the court—again, because they drew on stereotype. Defendants thus experience testimonial injustice, in that their authentic knowledge, including knowledge about how court policies that led them to "fail" or reject treatment in the past were harmful, is discredited. Instead, they are only credited when they conform to the court's preferred—and distorted—narrative.

These narratives also ultimately affect knowledge production in criminal court because they reinforce the idea that defendants without these attributes are less worthy of a second chance at treatment.[199]

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195. Burns & Peyrot, *supra* note 1, at 425. Notably, the defendants who are most likely to be deemed unsuitable are typically the same defendants most in need of a treatment plea.

196. *Id.*

197. *Id.* at 429 (describing how a defendant was deemed suitable for treatment because, among other things, she was employed and "had held numerous other legitimate jobs"); *see also* Sibley, *supra* note 128, at 2279 (discussing judges selecting defendants based on "existence of family support structures, educational attainment, employment history, [and] perceived 'amenability to correction'").

198. *See generally* MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY (2d ed. 2013). As Professor Washington discusses, the history of welfare policy in the United States has been marked since the Industrial Revolution by contrasts between the "deserving" and "undeserving poor." Washington, *Pathology Logics*, *supra* note 9, at 1538–41. Welfare policies in the 1960s and 1970s denied resources to low-income families based on "man-in-the-house" rules, residency requirements, "family cap" rules, and "home suitability standards." *Id.* at 1538–39. The logic underlying these policies, all of which disproportionately impacted Black women and their children, was that low-income people were to blame for their poverty by failing to invest in hard work and family planning. *Id.* at 1538–41. These policies continued through the 1990s with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered titles and sections of the U.S. Code), which created the Temporary Assistance for Needy Families (TANF) program which "imposes mandatory work activities and advertises marriage as a solution for social instability, again linking individual behavior, morality, and poverty." *Id.* at 1539. And they have continued through the present day with reforms that limit who qualifies for food stamps. *Id.* at 1540–41.

199. FRICKER, *supra* note 10, at 43.

Finally, defendants may even genuinely believe that they are less deserving of treatment if they are unemployed, are not supporting children, or are otherwise without markers of social credibility. This is not because of any one person's doing, but rather because structurally discriminatory forces in society have caused there to be a "lacuna"[200] in collective interpretive resources—a hermeneutical injustice—when it comes to expressing the ways in which these defendants deserve treatment. Thus, defendants may suffer both testimonial and hermeneutical injustice.[201]

Stakes are high. Defendants who are rearrested after being offered treatment may not just be excluded from treatment in the future, as this section has so far discussed.[202] But, these defendants may also experience more punitive sentences thereafter, as court actors view them as morally flawed for failing to "capitalize on [their] second chance."[203]

An example of this effect can be found in *Graham v. Florida*,[204] the case in which the U.S. Supreme Court held that life without parole sentences for juveniles convicted of nonhomicide offenses were unconstitutional. The judge who sentenced Terrance Jamar Graham, a Black teenager, to life without parole referred to the fact that he had been diverted in a previous case.[205] The judge stated:

> I don't understand why you would be given such a great opportunity to do something with your life and why you would throw it away. The only thing I can rationalize is that you decided that this is how you were going to lead your life and that there is nothing that we can do for you . . . .[206]

Graham's failure to succeed at diversion is viewed not only as a moral failure, but as *requiring* harsh punishment, as if only harsh punishment can be proportionate to that level of characterological flaw. Although Graham was sentenced to diversion in juvenile court and not treatment court, the example is illustrative of the way criminal court actors view defendants who "fail" at treatment.

And because Black defendants and other defendants of color are more likely to be viewed as unredeemable in the first place,[207] their "failure" to capitalize on a chance at treatment is also even more likely to yield negative outcomes as it will be viewed as confirmation of their lack of redeemability.

3. Suppressing Critiques of Treatment and Accepting Correction

To bargain for and stay in treatment, defendants must also suppress any critique of the actual help offered by the court—particularly while still in the

200. *Id.* at 150.
201. *Id.* at 159.
202. *See* Eaglin, *supra* note 105, at 219.
203. *See id.*
204. 560 U.S. 48 (2010).
205. *See* Eaglin, *supra* note 105, at 219–20.
206. *Id.* at 219 n.208.
207. Hanan, *supra* note 171, at 329–31.

bargaining process or during the status hearings that defendants must periodically attend while in treatment.[208]

Treatment pleas typically require intensive counseling (inpatient or outpatient) and random drug testing.[209] As discussed above, it is also common for treatment pleas to require defendants to obtain employment or their GED, and to participate in other counseling groups as the treatment team deems necessary, including anger management groups, parenting groups, and trauma groups.[210] As discussed previously,[211] length of a treatment mandate is often correlated with the severity of the defendant's offense, rather than their clinical need for treatment.[212] Thus, a defendant charged with a violent offense, or a defendant with a lengthy record, may only be offered a residential treatment plea. The fact that prosecutors are empowered to choose when to "punish" with treatment depending on the offense in question reflects a core tension between rehabilitation and punishment at the heart of the treatment program complex: the way it manages to make punishment "appear and disappear at will."[213]

And yet, if defendants charged with violent or other "severe" offenses are able to work out a treatment plea at all, these defendants and their attorneys are *least* likely to be credited when they argue that such treatment is not clinically justified. Precisely because they have the most to gain in terms of entering the treatment program complex to avoid jail, they are most likely to be written off as "people who are just trying to get out of jail,"[214] rather than people truly committed to treatment.[215] Thus, right off the bat, defendants

208. Defendants who accept a treatment plea must report back to court frequently for "status hearings." *See* Quinn, *supra* note 18, at 49. If program representatives or the prosecutor are alleging that defendants have violated the terms of their plea agreement, these status hearings can end with the defendant being sanctioned, including by being incarcerated. *Id.* at 71. In New York City, defendants are typically represented at status hearings. *Id.* at 49. However, this is not universally the case across the country. *Id.* at 65. In fact, it is not clear that defendants have a right to counsel at status hearings. *Id.* at 67.

209. Barbara Andraka-Christou, *What Is "Treatment" for Opioid Addiction in Problem-Solving Courts?: A Study of 20 Indiana Drug and Veterans Courts*, 13 STAN. J.C.R. & C.L. 189, 191 n.2 (2017). One study of treatment pleas found that almost all treatment pleas required group counseling, and yet few required individual and group counseling, despite evidence that suggests that this is more effective. *Id.* at 209–12. Individual counseling, however, is more costly than group counseling. And, with the exception of veterans who were able to access services through the "Veterans Administration," most defendants in the study had to pay out of pocket for counseling, unless they had private insurance that would cover it. *Id.* at 212.

210. *Id.*

211. *See supra* Part II.B.1.

212. *See* KAYE, *supra* note 118 and accompanying text.

213. *See id.* at 9.

214. *See supra* note 175 and accompanying text; Margareth Etienne, *Remorse, Responsibility and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2162 (2003) (discussing how decision-makers can view the desire for a lower sentence as incompatible with "genuine remorse").

215. *See* Burns & Peyrot, *supra* note 1, at 429 (describing how judges seek to avoid admitting people into drug court who only want to be there "to avoid more serious sanctions"). Moreover, a rejection of residential treatment, when the alternative is prison, risks offending

are limited in terms of how much they can object to treatment based on their particular alleged offense.

Once admitted into treatment, defendants must also quickly align themselves with the goals of the treatment team to minimize their chances of being sanctioned. These goals often go far beyond requiring the defendant to remain drug-free. Rather, success is not simply about achieving sobriety, but about the utter transformation of the self. As part of a study conducted by Professor Rebecca Tiger, one drug court advocate described the goal of drug court as follows:

> We've got to make sure they can work, that they're educated, that they can get a job, that they can keep a job, that they have skills, that they . . . learn how to get up in the morning and go to work. That they learn that when their boss pisses them off, they don't slug them. That they learn behavior they've never learned before.[216]

Professor Kaye has also observed that the goal of drug courts is to change, in the words of case managers and social workers, the defendant's "drugs lifestyle," which is defined as "a series of characteristics—impulsivity and an inability to delay gratification, an incapacity to establish a normative work ethic, a sense of irresponsibility."[217] The goal of these "lifestyle changes," in the words of two drug court judges, is to "provide the defendant with the very best chance of avoiding any further contact with the criminal justice system."[218]

Notably, as Professor Kaye argues, all of these characteristics were also associated with the "culture of poverty" thesis developed by Professor Oscar Lewis and the "Moynihan Report" that infamously pathologized Black families.[219] As Professor Kaye observed, the Moynihan Report took explicitly racist imagery "concerning black shiftlessness, laziness and immorality" and "repositioned" these themes as "cultural."[220] Similarly, Professor Kaye argues that the treatment program complex recycles these themes as related to drug use.[221] Thus, drug court participants are "said to fail to take responsibility, to constantly try to 'get by' (i.e., break the rules), and to lie frequently."[222] The treatment program complex's portrayal of

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the prosecutor. For example, the prosecutor may have had to negotiate an exception to office policies to offer a treatment plea and, as a result, derails the negotiation.

216. Rebecca Tiger, *Drug Courts and the Logic of Coerced Treatment*, 26 SOC. F. 169, 174 (2011). Professor Tiger observes how drug courts extend their coercive power over every aspect of defendants' lives that are deemed relevant to their recovery, from their ability to obtain employment to their ability to develop "healthy relationships." *Id.* at 175. In this way, proponents see drug courts as contributing to the "social health" of the community as well as the individual. *Id.* at 174 (citation omitted).

217. *See* KAYE, *supra* note 118, at 20.

218. *See id.* at 70 (quoting Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 523 (1999)).

219. *Id.*

220. *Id.* at 71.

221. *Id.* at 70.

222. *Id.* at 71 (citation omitted).

defendants as in need of "lifestyle change" thus echoes the ways in which the low income, and particularly the non-White low income, have always been portrayed as deficient.

Because the treatment program complex explicitly views defendants as deficient, skepticism of defendants' understanding of their own needs is baked into its core philosophy. Thus, not only are defendants' critiques of treatment already likely to be discredited due to their multiple marginalized statuses, but these critiques are also discredited because the very mission of the treatment program complex predisposes the hearer to be skeptical. For example, defendants' concerns about poor *quality* treatment tend to be ignored or rebuked by judges. In one study, a defendant reported that he was being "pick[ed] on" by treatment program staff.[223] The judge replied:

> I have worked long and hard to fight for this program. I will not let you stand there and waste my time. You are a grown man and you claim that they are picking on you? Are you fourteen years old? You are twenty-four years old Mr. [client's name] . . . . The [drug treatment] program is a confrontational[224] one-on-one program. The purpose is for the people to pick on the clients and they must learn to deal with that.[225]

Here, the defendant's criticism of treatment was not just rejected but mocked. He was belittled and accused of wasting the court's time. His authentic narrative was immediately discredited—an instance of testimonial injustice—in favor of a new narrative that the hearer constructed in its place. This new narrative assumed that the harm the defendant was experiencing was actually a form of treatment, and thus it was the defendant's resistance to it that was actually suspect.[226] The defendant was thus cast as the obstacle to his own success.[227] In the context of targeted lifestyle change, defendants

223. Burns & Peyrot, *supra* note 1, at 424–25.

224. Many drug treatment programs rely on a combination of confrontation, rigorous discipline, and tough love. *See* Jason Cherkis, *Dying to Be Free: There's a Treatment for Heroin Addiction That Actually Works. Why Aren't We Using It?*, HUFFINGTON POST (Jan. 28, 2015), https://projects.huffingtonpost.com/dying-to-be-free-heroin-treatment [https://perma.cc/X7AA-PEJT] (describing residential programs as consisting of "a hodgepodge of drill-instructor tough love, and self-help lectures, and dull nights in front of a television"). However, these techniques are not evidence based. *Id.*

225. Burns & Peyrot, *supra* note 1, at 424–25.

226. In a similar example in Professor Clair's study of criminal courts in Chicago, a defendant sought to explain that she left the sober house she had been assigned to in part due to its squalid, chaotic, and unstable conditions. CLAIR, *supra* note 8, at 68–69. Upon seeing the judge grow dubious, she "quickly changed her tune: 'I'm trying to learn and be responsible, Your Honor. And also, I want to apologize . . . . I'm doing the best I can.'" *Id.* The judge's response was to give her a second chance and yet at the same time warn her: "Undergirding all of this is you wanting to do things your way. I don't want to find out weeks from now that you violated again." *Id.*

227. Notably, he is *also* cast as an obstacle to the judge's success, as is made clear when the judge references all the "hard work" he has done to build the program. Professor Collins has hypothesized that although problem-solving courts have widely not been effective at addressing the factors that lead people to become involved with the criminal legal system, they have been effective at "reviv[ing] a sense of purpose and authority for judges in an era marked by diminishing judicial power." *See* Collins, *supra* note 13, at 1579. Thus, what is at stake for problem-solving court judges is not just their participants' success, but their own success.

were viewed as simply not knowing what's good for themselves, or, worse, as trying to evade responsibility.

Practically speaking, a secondary effect of testimonial injustice in this case is that resistance to treatment mandates tend to trigger greater attempts at surveillance and control.[228] Another example that demonstrates increased surveillance and control is a defendant who did not register for the required GED classes because the classes conflicted with her job as a telemarketer:

> "She feels that we're not sensitive to her needs," says the case manager. "She wants to live by herself, so she doesn't want to quit. There's certain things she doesn't want to do, and we're trying to convince her to do them and then later it can get better. The last time she came in she had a very negative attitude and ended up crying. She has very low self-esteem because she's overweight." "It sounds like she reacts by getting into conflicts." "She's normally very shy and quiet," interjects the defense attorney. "Telemarketing is a terrible job," says the judge. "She needs to understand that this isn't a long term job." "It's her first job," says the case manager, "She's hanging on. She can't be around her family."[229]

In this case, the defendant's belief that continuing with telemarketing will be better for her than GED classes had a clear rational basis: telemarketing would provide her with an income to continue to be self-sufficient and not rely on her family.[230] The fact that she "can't be around her family" was not contested, but ultimately it was not given any weight in the treatment team's analysis of the situation.[231] However, the court failed to credit the defendant's authentic narrative regarding what she needed to succeed, instead interpreting her as being unable to grasp that pursuit of a GED was beneficial.[232]

Moreover, the defendant was discredited through the pathologizing of her emotional reaction to the court's interference. The case manager described her as having "a negative attitude" and "low self-esteem," and as someone who "reacts by getting into conflicts."[233] This defendant's race was not

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Although problem-solving court judges can already not be expected to be objective about the success of problem-solving courts, this personal investment suggests that they are even less likely to be objective, and thus even more likely to suppress any client resistance that jeopardizes the goals they seek to accomplish. *See id.* at 1581. This will be addressed further in Part III.

228. FRICKER, *supra* note 10, at 47 (describing secondary harms).

229. *See* KAYE, *supra* note 118, at 58.

230. *Id.*

231. *Id.*

232. GED's are required by many treatment mandates and are portrayed as the key to a particular status of economic productivity—of "good" neoliberal citizenship. *See, e.g.*, *id.* at 59. And yet, as Professor Kaye notes, defendants are often limited to jobs in the lowest tiers of the workforce. *Id.* at 79.

233. *Id.* at 58. Notably, defendants must not craft distorted narratives, not simply for legal decision-makers such as judges and prosecutors, but also for case managers and treatment program staff who may convey information about them to the court. As Professor Wendy Bach argues, this ultimately "corrupts" the care relationship that defendants have with their care providers because it transforms a care-based relationship, based on defendants' openness and honesty, into a potential liability. WENDY A. BACH, PROSECUTING POVERTY, CRIMINALIZING CARE 170–71 (2022).

stated in the study, but describing women of color, particularly Black women, as "negative" and prone to conflict is a racialized trope with a long history.[234]

Notably, in response to this critique of his client, the defense attorney stated that she is "normally very shy and quiet[.]"[235] This response challenged the treatment team's portrayal of the client as "negative" and prone to conflict, but it did *not* challenge an underlying narrative that pathologizes defendant displays of emotion, particularly anger.[236] It did not challenge the "stock story," reinforced frequently in criminal court, that court actors should respond to excessive displays of "negative emotions" by sanctioning[237] defendants, rather than engaging in introspection.[238] And by seeking to portray the defendant as "very shy" and "quiet," the defense attorney also sought to gain credibility for his client by emphasizing her compliance, a desired trait in criminal court.[239]

In a final example, a defendant alleged police abuse after a rearrest that occurred when he was out after a court-imposed curfew. The fact that he recently quit his job because he could not get time off to go to a wedding triggered a rebuke from the judge that that was "unacceptable."[240] Unlike the previous example, this defendant did not explicitly oppose his treatment court mandate. Instead, he failed to comply with the court's norms around employment (norms that dictate when it is reasonable to quit a job).[241] This failure was then weaponized against him in the context of the prosecutor's request for resentencing based on the rearrest:

> "It sounds to me like he should be sentenced," says the DA. "He threw a punch at the officer after being arrested. The arrest is valid and he was missing his curfew." . . . [the case manager then said] "He got his GED, and he did both residential and aftercare. He only needs a job. He quit his

234. *See, e.g.*, Charelle Lett, *Black Women Victims of Police Brutality and the Silencing of Their Stories*, 30 UCLA J. GENDER & L. 131, 149 (2023) (referencing the "angry black woman" stereotype); Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1051 n.67 (2018) (same); Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017 (2017) (same).

235. KAYE, *supra* note 118, at 58.

236. *Id.*

237. Notably, in this case, the defendant was sanctioned by being forced to sit on a bench to the side for several hours. *Id.*

238. *See generally* Hanan, *supra* note 6.

239. KAYE, *supra* note 118, at 58. Notably, the defense attorney faces a quandary here as an advocate. Resisting the treatment team's narrative will not only be an uphill battle, but the defense attorney also risks losing credibility as a member of the treatment team, which could lead to harsher consequences for their client. *See* Quinn, *supra* note 18 and accompanying text. Losing credibility in the eyes of the treatment team could harm the defense's ability to be a zealous advocate and mitigate harm for their client, while acting to maintain credibility requires the defense attorney to silence their own client's story. One added layer of complication is that when the defense attorney loses credibility with the treatment team, they may also personally be harmed and subjected to retaliation, and their future clients may be harmed. Thus, the defense attorney has many competing interests in any given interaction with other members of the courtroom workgroup.

240. *See* KAYE, *supra* note 118, at 57.

241. *Id.*

> first job because he couldn't get time off to go to a wedding." "That's unacceptable," says the judge. "What's he charged with?" "Obstruction of justice, assault in the third degree, and resisting arrest." "You're requesting sentencing?" "Yes." "I'll talk with him about it," concludes the judge.[242]

Here, the minor violations of the defendant being out after curfew and quitting his job exacerbated the news of his rearrest to jeopardize his status in treatment court. The defendant's minor violations of the treatment mandate—understood to be integral to the transformation of self that the treatment program complex seeks[243]—also operated to entirely sideline his story of police abuse. If true, this story was a far more serious matter than the defendant's arrest for misdemeanor assault. But it was silenced in favor of the propagation of a narrative of a defendant "on the wrong track" in need of correction. The court was willfully blind to how the structural issue of police violence affected the defendant's life. And the stage had already been set for the defendant to be discredited—to experience further testimonial injustice—if he called further attention to these structural harms: he would be seen as in denial and deflecting from the "real" problem of his own flaws. The only way he would be allowed to stay in treatment, as opposed to jail, would be by conforming to the court's narrative of suitability—specifically, by acknowledging himself as in need of correction.

Notably, this is also an example of how the treatment program complex's goal of lifestyle change resulted in sweeping and intrusive requirements (a curfew and employment norms). Indeed, therapeutic goals have always tended to "legitimate interventions that are more intrusive."[244] This process of legitimation is also cyclical. First, intrusive interventions inevitably lead to violations. Second, these violations then justify the court's exercise of its coercive power via graduated sanctions, such as further intrusive interventions, or resentencing. Any resistance to those sanctions tends to be viewed as confirming the need for sanctions, and the need for an intervention in the first place.

4. Substance Use as Moral Failure

The treatment program complex is frequently heralded for treating addiction as a disease rather than a moral failing. However, it also punishes defendants who fail to recover, thus sending the message that continuing to use substances is a characterological flaw. Defenders of the treatment program complex might argue that it only punishes defendants who

242. *Id.*

243. The requirements of curfew and obtaining employment are also irrelevant to the original charges, and only arguably relevant to the defendant's drug use. Yet, they become central to determining the future for the defendant—whether he will be incarcerated or allowed to continue. *See* Washington, *Survived and Coerced*, *supra* note 9 (how requirements in family court have nothing to do with the original charges, and yet the case becomes about whether the respondent can satisfy those requirements).

244. Gruber et al., *supra* note 18, at 1367; *see also* Victoria Malkin, *The End of Welfare as We Know It: What Happens When the Judge Is in Charge*, 25 CRITIQUE ANTHROPOLOGY 361, 369 (2005) (listing the types of treatment mandated for defendants arrested for prostitution).

"willfully" fail, and thus there is no contradiction between its imposition of punishment on those who fail and its adherence to the medical view of addiction as a disease. And yet, the reality is there is no way of knowing whether someone has "willfully" failed treatment or whether they simply cannot help their behavior.

This section examines some of the various ways in which the treatment program complex reproduces a narrative that equates substance use with moral failure—beginning with the persistent denial of medication-assisted treatment and ending with the punishment of relapse. Defendants who resist this narrative are discredited and punished, while those who embrace it are more likely to receive second chances.

a. Dictating Treatment Options from the Bench

One major flaw in the treatment program complex is the persistent exclusion of evidence-based treatment[245] such as medication-assisted treatment. The evidence is clear that medication-assisted treatment—particularly with methadone and buprenorphine—is highly effective.[246] Methadone is an agonist medication that works by activating the opioid receptors in the brain, thus blocking the effects of illicit opiate drugs without producing the effects of euphoria that those drugs would produce.[247]

245. Critics have alleged that the entire treatment program complex model is not evidence based because it is based in coercion—specifically, the inherent coercion of the post-plea model. *See* TREATMENT NOT JAIL, TREATMENT NOT JAIL CAMPAIGN (2021), https://nycds.org/wp-content/uploads/2021/12/Treatment-Not-Jail-Campaign-One-Pager-Dec-2021.pdf [https://perma.cc/TVL2-RLHJ] (advocating for "[e]liminat[ing] coercive and *ineffective* mandated treatment by permitting participation in treatment court without requiring a guilty plea" (emphasis added)). The evidence is mixed on whether coercive treatment can be effective. Andreas Pilarinos, Brittany Barker, Ekaterina Nosova, M-J Milloy, Kanna Hayashi, Evan Wood, Thomas Kerr & Kora DeBeck, *Coercion into Addiction Treatment and Subsequent Substance Use Patterns Among People Who Use Illicit Drugs in Vancouver, Canada*, 115 ADDICTION 1, 2 (2020). Coercive treatment can harm defendants as they also feel as if they are being victimized and punished for something beyond their control. *See* Gruber et al., *supra* note 18, at 1367–69. And studies indicate that involuntary treatment can actually lead to more harmful health outcomes, such as relapse. Sarah E. Wakeman, *Why Involuntary Treatment for Addiction Is a Dangerous Idea*, STATNEWS (Apr. 25, 2023), https://www.statnews.com/2023/04/25/involuntary-treatment-for-addiction-research/ [https://perma.cc/J477-4JZY]. Involuntary treatment is frequently defined to exclude treatment courts and treatment pleas, where defendants technically have a choice, albeit an extremely coercive one: defendants can choose treatment or prison. Werb et al., *supra* note 118, at 9. Nevertheless, some critics remain skeptical regarding whether treatment can be effective unless it is truly voluntary, whereas others maintain that a certain level of coercion is effective, and the debate must be about where to draw the line. Carl Erik Fisher, *People Struggling with Addiction Need Help. Does Forcing Them into Treatment Work?*, SLATE (Jan. 18, 2018, 9:07 AM), https://slate.com/technology/2018/01/coerced-treatment-for-addiction-can-work-if-you-coerce-correctly.html [https://perma.cc/C24Q-DCW7].

246. Jeneen Interlandi, Opinion, *48 Million Americans Live with Addiction. Here's How to Get Them Help That Works*, N.Y. TIMES (Dec. 13, 2023), https://www.nytimes.com/2023/12/13/opinion/addiction-policy-treatment-opioid.html [https://perma.cc/K3YY-GBJ4].

247. NAT'L INST. DRUG ABUSE, HOW DO MEDICATIONS TO TREAT OPIOID USE DISORDER WORK? (2021), https://nida.nih.gov/publications/research-reports/medications-to-treat-opio

Buprenorphine—also known under the brand name Suboxone—is a partial opioid agonist medication that binds to the same receptors but activates them to a lesser extent than full agonist medications.[248] A newer medication, extended-release naltrexone, is an opioid antagonist which works through blocking the activation of opioid receptors in the brain.[249] It has been available since 2010 as an injectable, long-acting drug under the brand name of Vivitrol.[250]

Half a century of clinical studies and randomized controlled trials have proven that agonist medication-assisted treatment is both the safest and most effective way to treat opioid use disorder.[251] Treatment with agonist medication "is associated with an estimated mortality reduction of approximately 50 percent among people with [opioid use disorder]."[252] Compared to a placebo or non-pharmacological therapy, systematic review of studies of methadone have shown that "people who received methadone were more than four times more likely to stay in treatment and had significantly lower rates of heroin use."[253] In contrast, studies have shown that over "90 percent of opiate addicts in abstinence-based treatment return to opiate abuse within one year."[254]

Despite this evidence, approximately half of drug courts do not permit the use of medication-assisted treatment[255] and require participants who are

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id-addiction/how-do-medications-to-treat-opioid-addiction-work [https://perma.cc/ZX5L-5BHQ]. Methadone is difficult to access, however, because federal law requires that it be disbursed, with very few exceptions, in specialized clinics, thus requiring patients to travel to the clinic every day. *See* 43 C.F.R. § 8.12(i) (2024). An exception was made to permit additional take-home doses during the COVID-19 pandemic; however, this exception has since been rolled back. *Id.* And even when it was in place, few clinics took full advantage of the exception, and continued to require patients to attend multiple times a week. *See* Andrew Joseph, *Under New Rules, Methadone Clinics Can Offer More Take-Home Doses. Will They?*, STATNEWS (Dec. 22, 2022), https://www.statnews.com/2022/12/22/new-rules-methadone-clinics-take-home-doses/ [https://perma.cc/U7LV-7Q88].

248. Buprenorphine may be prescribed by certified physicians, eliminating the need to visit specialized treatment clinics. *See* NAT'L INST. DRUG ABUSE, *supra* note 247. But it also may not be appropriate for more severe substance abuse disorders. *See* Paul J. Whelan & Kimberly Remski, *Buprenorphine vs Methadone Treatment: A Review of Evidence in Both Developed and Developing Worlds*, 3 J. NEUROSCIENCE RURAL PRAC. 45, 46 tbl.2 (2012). And finding a certified physician willing to prescribe it is difficult. *See* Cherkis, *supra* note 224.

249. *See* NAT'L INST. DRUG ABUSE, *supra* note 247.

250. *Id.*

251. NAT'L ACAD. SCI., MEDICATIONS FOR OPIOID USE DISORDER SAVE LIVES (Michelle Mancher & Alan I. Leshner eds., 2019), https://www.ncbi.nlm.nih.gov/books/NBK541393/ [https://perma.cc/7V5D-UMAK].

252. *Id.* "Limited evidence suggests that, compared with a placebo, extended-release naltrexone may be associated with reduced opioid use, but more rigorous studies are needed." *Id.*

253. *Id.* "While buprenorphine maintenance treatment is at least as effective as methadone in suppressing the use of illicit opioids among people who remain in treatment, it appears to be slightly less effective than methadone maintenance treatment at retaining people in treatment." *Id.*

254. *See* Cherkis, *supra* note 224.

255. And, even where courts permit medication-assisted treatment, many defendants have difficulty accessing it for various reasons including lack of transportation, a dearth of providers able and willing to prescribe the treatment, inability to manage work schedules with

already prescribed such medications to wean off in order to participate in treatment court.[256] This is despite the fact that weaning off of such medications can be dangerous for participants. For those with opioid use disorders, relapse after weaning off of opiates can be fatal because, due to lowered tolerance, the same dosage of heroin can now more easily lead to a fatal overdose.[257] This is what happened to Robert Lepolszki, who was arrested for an old offense in New York in 2015, after having successfully overcome his heroin addiction through methadone.[258] The drug court in Nassau County—in which Robert opted for treatment to avoid jail—forced him to wean off of methadone.[259] Evincing a view still common among criminal justice professionals, Judge Frank A. Gulotta told Robert that methadone does not "enable a defendant 'to actually rid him or herself of the addiction.'"[260] Robert died of an overdose soon after stopping his medication.[261] In another well-publicized case, a defendant's mother begged for her son to have access to medication-assisted treatment, after her son relapsed and was sentenced to jail for sixty days.[262] In response, the court forbade her from having communication with him, threatening to incarcerate him for longer if she did not follow the order.[263]

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a schedule that requires attending a clinic every day (for methadone), and the negative perceptions of family and friends. *See* Morgan Coulson, *Methadone Is an Effective Treatment for Opioid Use Disorder, so Why Aren't More Patients Using It?*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Sept. 26, 2023), https://publichealth.jhu.edu/2023/barriers-to-methadone-access [https://perma.cc/FPG9-QZB8].

256. *See generally* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., USE OF MEDICATION-ASSISTED TREATMENT FOR OPIOID USE DISORDER IN CRIMINAL JUSTICE SETTINGS (2019), https://www.hhs.nd.gov/sites/www/files/documents/BH/SAMHSA%20Using%20MAT%20in%20Criminal%20Justice%20Settings.pdf [https://perma.cc/Q6MP-GT6W].

257. *See* Cherkis, *supra* note 224; *see also* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 256, at 4; NAT'L ACAD. SCI., *supra* note 251 ("The period immediately after treatment discontinuation is a particularly high overdose risk period, as is the first 4 weeks of methadone treatment"). Relapse for a heroin addict is no mere setback. It can be deadly. A sober person with substance abuse disorder leaves a treatment program with the physical cravings still strong but their tolerance gone. Shooting the same amount of heroin can easily lead to a fatal overdose. *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *supra* note 256, at 2.

258. Maia Szalavitz, Opinion, *Every Drug Court Should Allow Methadone Treatment*, N.Y. TIMES (July 20, 2015), https://www.nytimes.com/2015/07/20/opinion/every-drug-court-should-allow-methadone-treatment.html [https://perma.cc/V8LS-9SLR].

259. *Id.*

260. *Id.*; *see also* LEGAL ACTION CTR., MEDICATION-ASSISTED TREATMENT IN DRUG COURTS 39 (2015), https://www.lac.org/assets/files/Medication-Assisted-Treatment-in-Drug-Courts-Recommended-Strategies_200313_191131.pdf [https://perma.cc/WUE8-BHEN] (describing a prosecutor who stated that "it would be better for participants not to take medication so they can break free from the 'chain of addiction'" (citation omitted)).

261. Szalavitz, *supra* note 258.

262. Christine Mehta, *How Drug Courts Are Falling Short*, OPEN SOC'Y FOUNDS. (June 7, 2017), https://www.opensocietyfoundations.org/voices/how-drug-courts-are-falling-short [https://perma.cc/8HLE-T3WS].

263. *Id.*

Since 2015, New York state has required drug courts to offer medication-assisted treatment to any individual who desires it.[264] However, many other states have not yet followed suit, and it continues to be controversial in many jurisdictions. Notably, even when treatment court judges are agnostic about medication-assisted treatment, many require defendants to attend self-help groups (like Narcotics Anonymous) that actively discourage participants from pursuing medication-assisted treatment.[265] Ninety percent of treatment options in the United States are abstinence-based.[266]

The stigma around methadone and buprenorphine stems from a belief that permitting access to these drugs "reward[s]" defendants by giving them access to "a drug similar to the one they prefer."[267] Indeed, a study of drug court personnels' opinions in Indiana found that slightly less than half of those surveyed disagreed or were neutral regarding a statement that "methadone does not reward criminals for being drug users" and only a quarter agreed with the statement, "methadone does not prolong addiction."[268]

Significantly, in the same study, court personnel were less likely to view naltrexone as "reward[ing] criminals for being drug users," and were about half as likely to view naltrexone as prolonging addiction.[269] The study's authors theorized that court personnel "may misperceive methadone and oral buprenorphine as 'rewards,' because the medications are agonists, meaning they activate the opioid receptors in the brain, even though they do not produce the level of euphoria of the original drug of abuse," while, naltrexone, an antagonist, functions by blocking the opioid receptors in the brain entirely.[270] As one Ohio legislator in favor of naltrexone put it, "[m]ost people want to see us use a non-opioid type of treatment . . . . Why treat

264. *See* Press Release, N.Y.S. Senate, Gov. Signs Murphy's Bill Expanding Drug Treatment Court Access (Sept. 29, 2015), https://www.nysenate.gov/newsroom/press-releases/2015/terrence-murphy/gov-signs-murphys-bill-expanding-drug-treatment-court [https://perma.cc/SX2F-4VS8]; Joanne Csete & Holly Catania, *Methadone Treatment Providers' Views of Drug Court Policy and Practice: A Case Study of New York State*, HARM REDUCTION J., Dec. 5, 2013, at 1; LEGAL ACTION CTR., *supra* note 260 (an example of recommended practices from 2004 encouraging the consideration of medication-assisted treatment yet acknowledging it as controversial).

265. Andraka-Christou, *supra* note 209, at 213, 216. Professor Barbara Andraka-Christou notes that there is scant evidence to prove these programs are effective. *Id.* at 214. Mandating religious programs also violates the Establishment Clause. *Id.* at 216.

266. *See* Cherkis, *supra* note 224.

267. Maia Szalavitz, Opinion, *Vivitrol, Used to Fight Opioid Misuse, Has a Major Overdose Problem*, SCI. AM. (Sept. 13, 2023), https://www.scientificamerican.com/article/vivitrol-used-to-fight-opioid-misuse-has-a-major-overdose-problem/ [https://perma.cc/75L6-BQBZ].

268. Barbara Andraka-Christou, Meghan Gabriela, Jody Madeirab & Ross D. Silvermanc, *Court Personnel Attitudes Towards Medication-Assisted Treatment: A State-Wide Survey*, 104 J. SUBSTANCE ABUSE TREATMENT 72, 76 (2019).

269. *Id.*

270. *Id.* at 78.

people who have a drug problem with another drug?"[271] The marketers of Vivitrol (extended-release naltrexone) have even relied on this misconception, marketing the drug as an alternative option to methadone that "blocks" any high at all rather than providing a "substitute" high as methadone and buprenorphine are perceived to do.[272] Thus, despite the fact that naltrexone's effectiveness has been found to be limited compared to agonist drugs, its use has shot up in drug courts.[273] Prosecutors have also reported being more likely to not sentence someone to incarceration time if they agree to a naltrexone shot.[274] Notably, many defendants also prefer abstinence or naltrexone due to the same fear that agonist medications are simply replacing one drug with another.

Ultimately, we can understand the treatment program complex's pattern—reflected in the broader society[275]—of forcing people into abstinence or less effective medications like naltrexone as contributing to hermeneutical injustice.[276] Decades of stigma against both opioid users and agonist medication-assisted treatment, like methadone and buprenorphine, have put defendants with opioid use disorders at a disadvantage in terms of making sense of their experiences with these medications. Instead, a dominant narrative has taken hold that agonist medications are just "trading one drug for another."[277] There is thus a gap in collective hermeneutical resources when it comes to making sense of these medications *as* medications and not as addictive substances.

An example of this can be seen in Judge Fred Moses's court in Ohio where Suboxone (buprenorphine) is permitted but naltrexone is heavily promoted.[278] A participant in the court stated:

> With Suboxone, I was just trading one drug for another and it didn't help," said a man gripping a Monster energy drink. "This right here, it blocks everything. I have no worries now, I wake up every morning not sick. I'm a lot happier."

271. Alec MacGillis, *The Last Shot*, PROPUBLICA (June 27, 2017), https://www.propublica.org/article/vivitrol-opiate-crisis-and-criminal-justice [https://perma.cc/YB5G-8XQU].

272. *Id.*

273. *Id.* (describing how as of 2017, "more than 450 public initiatives in 39 states are making use of Vivitrol" and how sales of the drug in Ohio alone increased ninefold over two years).

274. *Id.* (quoting a prosecutor in Ohio as stating that although no one was being forced to take Vivitrol, "I'm a little more comfortable probably not sentencing someone to prison that wants to go on Vivitrol" (citations omitted)).

275. *See supra* notes 245–47 (describing various barriers to accessing medication maintenance treatment).

276. *See* FRICKER, *supra* note 10, at 44.

277. *See* MacGillis, *supra* note 271.

278. *See id.*

> Another man, a 31-year-old also in camo, said, "I'm pretty surprised with how it's going, how easy it is. I tried to quit before. I did the Suboxones and stuff."[279]

Defendants experience not only hermeneutical injustice, but also testimonial injustice when it comes to medication-assisted treatment. Defendants who manage to overcome the gap in collective resources to ask for medication-assisted treatment experience testimonial injustice because they are often discredited.

Conversely, defendants who reject medication-assisted treatment are rewarded as more suitable candidates for treatment.[280] For instance, in response to the participant quoted above, "Moses interjected, 'That's not really quitting, is it?' 'It's not,' the man said. 'Big difference, huh?' Moses said. 'Big-time,' the man said. 'I was on [Suboxone] for six months. Just substitute one drug for another.'"[281]

Drug courts are designed to be "theatres of personal suasion,"[282] where the drug court judge's positive and negative reinforcements for each individual defendant are meant to reverberate into the audience of participants. Thus, when a judge explicitly credits a defendant for refusing effective medication-assisted treatment or discredits a defendant for asking for it or utilizing it, that individual exchange is projected across the entire courtroom. The result is that it is even harder for any defendant observing to make sense of their own experience with medication-assisted treatment in a way that is not unduly influenced by the socially powerful status of the judge. Another result is that the "prejudice" against medication-assisted treatment prevents defendants who have experienced its benefits from "putting [that] knowledge into the public domain."[283] The bias against medication-assisted treatment, when combined with the unequal power relations of the courtroom, "create[s] blockages in the circulation of critical ideas."[284]

Scholars and advocates have long been raising alarms that excluding medication-assisted treatment from the treatment program complex can actively worsen health outcomes,[285] which in turn exacerbates mass

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279. *Id.* Participants frequently shared their success stories with naltrexone in open court. *Id.*

280. Burns & Peyrot, *supra* note 1, at 429 (describing how a defendant was deemed suitable for treatment because she rejected the option of medication-assisted treatment as "another form of getting hooked," she had been "drug-free for seven years," and she was employed and "had held numerous other legitimate jobs").

281. *See* MacGillis, *supra* note 271.

282. Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 128 (2007) (discussing the adoption of therapeutic jurisprudence and principles to problem-solving courts).

283. FRICKER, *supra* note 10, at 43.

284. *Id.*

285. Drug courts' exclusion of medication-assisted treatment has been critiqued because it results in participants being ordered to cease medication-assisted treatment they are already on, which can be very dangerous. *See supra* note 257 and accompanying text; *see also* Collins, *supra* note 13, at 1619 (describing a case where a participant in drug court "died of a heroin overdose after the judge ordered him to quit his methadone treatment"). Other critiques have also noted how the exclusion results in defendants not being connected to medical treatment

incarceration as defendants who do not receive access to medication-assisted treatment are more likely to relapse[286] and be resentenced to incarceration.[287] But the exclusion of agonist medication-assisted treatment not only worsens outcomes, it also perpetuates an entrenched narrative that blames those with opioid use disorders instead of ineffective treatment. This harmful narrative—that even people with opioid use disorders come to believe—erroneously suggests that those with substance use disorders are morally to blame *for* these worse outcomes.

b. Relapse as Moral Failure

Relapse is a major reason that many defendants do not successfully complete their treatment program mandates. Although treatment courts advertise themselves as understanding that relapse is a part of recovery, the very nature of coerced treatment demands that relapse—particularly a continual pattern of relapses—be sanctioned. When exactly a pattern of relapses is no longer a "natural part of recovery" varies from court to court, and even defendant to defendant.[288] Notably, specialty treatment courts are more forgiving of relapse, whereas defendants who take treatment pleas in general jurisdiction courts may be given fewer chances.[289] But in both, the more forgiving treatment context and the stricter context of general jurisdiction courts, defendants who repeatedly relapse are eventually deemed to have "failed" treatment.

Although the treatment program complex employs a variety of sanctions, jail is a typical sanction for relapse because treatment complex actors view it as "rock bottom," or "the crisis that allows us to reach them."[290] In other words, jail is a justifiable form of behavior modification, despite the pain it causes. This again reflects the core tension at the heart of the treatment program complex between rehabilitation and punishment.

The result of this state of affairs is that each relapse is a threat to a defendant's status in the program. Each relapse presents a heightened risk that a defendant may be sanctioned with jail or even resentenced. And for treatment complex actors, each relapse is a moment where they must exercise

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they need. *See, e.g.*, Andraka-Christou, *supra* note 209, at 227–37 (describing how "due to the discrepancy in attitudes towards MAT" compared to "other mental health medications," drug courts in Indiana tended not to refer participants with a substance abuse disorder to a psychiatrist, unless they also had a co-occurring mental health disorder).

286. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., MEDICATION-ASSISTED TREATMENT (MAT) IN THE CRIMINAL JUSTICE SYSTEM: BRIEF GUIDANCE TO THE STATES 1 (2019), https://store.samhsa.gov/sites/default/files/pep19-matbriefcjs_0.pdf [https://perma.cc/U54Y-VB6E] (describing how medication-assisted treatment can reduce drug use).

287. *See supra* notes 122–23 and accompanying text.

288. *See* Casey, *supra* note 103, at 1484 ("Although one of the principles of the drug treatment courts is that relapse is a part of recovery, the point at which additional relapses result in disqualification from the program is a fuzzy and subjective line.").

289. This is based on a conversation with an attorney who works in a treatment court in New York City and the author of this Article's personal experience representing defendants in both treatment court and in treatment pleas outside of treatment court.

290. Burns & Peyrot, *supra* note 1, at 422.

high stakes discretion. Thus, it is imperative to unpack the narratives produced when defendants relapse. What kinds of narratives are credited by court actors in the context of relapse? What kinds of narratives are discredited?

First, it is important to start with the fact that many defendants in the treatment program complex are likely to experience relapse *because* of the prevalent lack of medication-assisted treatment. A typical punishment for relapse is a jail sanction, and many defendants then experience withdrawal symptoms in jail. As a result, their tolerance is lowered, and they are more likely to overdose if they relapse when they are released. Thus, the combination of denying medication-assisted treatment and the use of jail as a sanction poses a serious risk to the lives of treatment court participants. And yet, despite facing this risk to their lives, defendants who attempt to interpose a counternarrative—who argue that medication-assisted treatment is crucial to avoid relapse—are routinely discredited as willfully refusing to engage in treatment, and even subjected to harsher sanctions. Just as resistance to intrusive interventions is used as confirmation of the need for such interventions,[291] defendants' resistance to abstinence only treatment is likely to be viewed as confirming the necessity of such treatment.

A defendant's relapse may also be triggered by traumatic events, housing or job insecurity, or other socioeconomic factors. However, because success in treatment is portrayed as a matter of individual commitment—willpower—courts tend to, again, discount the structural factors that impact defendants' lives. For example, in one study, a defendant told the court that she had relapsed after learning that her father had been shot and left in a coma:

> J: Let's see how long it took you to find your drug dealer.
>
> D: I need this program. [crying].
>
> J: Cut the garbage and save the tears because they are not doing a thing for me.
>
> D: [softly] I know, I know.
>
> J: Who'd you do [the cocaine] with?
>
> D: On Tuesday I used cocaine at somebody else's house after I found out that my father'd been shot and was in a coma.
>
> J: Using cocaine wasn't gonna make your father any better. [addressing the courtroom audience] Notice how she stopped crying when I told her to? Nice way to control your crying Miss [client].[292]

As the authors of the study concluded, the judge appeared to view the defendant's emotional explanation for her relapse as "a strategic move designed to evoke sympathy and relieve her of responsibility."[293] Stereotypes about criminal defendants as manipulative and avoidant of

291. *See supra* Part II.B.3.
292. Burns & Peyrot, *supra* note 1, at 427–28.
293. *Id.* at 428.

responsibility likely influenced, whether consciously or unconsciously, the judge's view of the defendant's apology as not credibly authentic.[294]

Significantly, another judge in the same study stated that when defendants relapse due to traumatic occurrences, he will both "read them the riot act" but also reduce their punishment, because, as he stated, "[w]e don't want to give the impression that says, 'if something *really* bad happens, cocaine is alright.'"[295] Although it is positive that some judges are willing to consider the impact of traumatic events, the overall insistence on holding defendants accountable reflects the persistence of the "responsibilization," which prioritizes holding defendants individually responsible for their own success or failure, and demotes the importance of structural factors, such as gun violence.[296] The result is that defendant narratives that challenge the primacy of individual responsibility are discredited—a testimonial injustice.

When it comes to relapse, defendants are also discredited and punished harshly when they are perceived to be dishonest about their relapse.[297] On the one hand, it may seem to strain common sense to critique judges for perpetuating testimonial injustice when they fail to credit defendants who are dishonest—as dishonesty equates with lack of credibility. On the other hand, interrogating the power dynamics that motivate this emphasis on honesty reveals that the lens of testimonial injustice is still relevant.

The rationale for punishing a relapse that a defendant fails to admit appears to be that even if the relapse was involuntary, the dishonesty is a moral choice that the defendant has made. As one judge states, "[honesty] makes a big difference . . . . Our most severe sanction is [for] perpetuating a fraud upon the program . . . . So usually the sanctions are very, very different when they come forward."[298] In other words, "[a] defendant who demonstrates honesty and repentance is treated differently than a defendant who reveals the violation after being caught and very differently from a defendant who continues to deny wrongdoing."[299] Notably, punishing dishonesty also permits treatment complex actors to explicitly view themselves as not punishing relapse itself.

And yet, an alternative to the narrative of dishonesty as moral choice is that that dishonesty about relapse is actually a rational act of self-preservation, given the extreme harm of jail.[300] Defendants naturally want to avoid the risks of jail, including the risk of assault, medical neglect,

294. The judge was also likely influenced by cognitive biases that predispose people to attribute errors by members of their own social group to "situational factors" and errors by people outside their social group to their character. *See* Hanan, *supra* note 171, at 332. Judges are typically from a different social group than defendants. *See* Hoag, *supra* note 65, at 1496–98, 1534.

295. Burns & Peyrot, *supra* note 1, at 428 (citations omitted).

296. *See generally* Eaglin, *supra* note 15.

297. Burns & Peyrot, *supra* note 1, at 430; *see also* Sousa, *supra* note 120, at 737 (quoting a judge as telling a defendant that dishonesty will lead to "harsher sanction[s]").

298. Burns & Peyrot, *supra* note 1, at 430 (citations omitted).

299. *Id.*

300. *Id.* at 426.

and overdose.[301] And yet, defendants who seek to explain the reasons for their dishonesty are likely to be discredited as simply trying to evade individual responsibility. Indeed, crediting a defendant's authentic narrative that fear of jail led to their dishonesty would force treatment program complex actors to fully confront the harms that the criminal legal system regularly imposes on defendants.

Ironically, the tension between the ostensibly rehabilitative goals of the treatment program complex and the practice of imposing jail—the same tension that might help judges see defendants' points of view—may actually serve to justify even harsher punishment of dishonesty. This is because judges may feel that dishonesty gives them a justifiable outlet to punish in a way that the relapse alone does not.

Given the stakes, defendants who are caught relapsing are incentivized to regain credibility by performing remorse.[302] For example, in one case study, a defendant was on the verge of being resentenced because he had tested positive for alcohol use but refused to admit it, instead explaining that he drank cough syrup.[303] Scrambling for a reason to put his client back in the court's good graces, the defense attorney stated, "He was very polite and remained calm while others were saying bad things about him."[304] The defense attorney thus sought to regain credibility for his client by emphasizing how his client was so remorseful he was willing to tolerate verbal abuse.[305] This demonstrated a narrative of individual responsibility and remorse—to the point where the defendant was willing to be verbally abused.

c. The Ideal "Suitable" Candidate for Treatment

The above sections have sought to provide a comprehensive picture of the ways in which defendants are harmed epistemically in the treatment program complex—through being forced to conform their narratives to the court's vision of what an *ideal* suitable candidate for treatment looks like.

Surfacing epistemic injustice in the treatment program complex thus permits us to interrogate this standard. Who is the ideal suitable candidate for treatment? And what can we learn from this standard about how power functions in the treatment program complex?

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301. Sometimes positive drug tests are also inaccurate. *See* Sousa, *supra* note 120, at 783–84 (quoting a judge discussing the high incidence of false positives with drug tests). This generates, as Professor Michael Sousa has discussed, a procedural due process dilemma: if defendants exercise their rights and lose, a judge will punish them more harshly for failing to take responsibility. *See id.* at 788 (describing how drug court judges in the particular drug court studied would punish defendants more harshly for dishonesty than they would have been punished for the original violation).

302. As Professor Hanan argues, at sentencing, judges typically require a defendant's display of remorse to go hand in hand with a capitulation to the state's narrative, otherwise the remorse is deemed inauthentic or insufficient. Hanan, *supra* note 171, at 326.

303. KAYE, *supra* note 118, at 56.

304. *Id.*

305. *See id.*

The ideal suitable candidate for treatment is not simply eligible for treatment but is emotionally invested in treatment and aligned with the court's specific vision of what success looks like—a vision that encompasses intrusions into the defendant's life that go far beyond the medical and extend to where the defendant works and with whom they socialize.[306] The ideal suitable candidate for treatment also takes responsibility for their own "failures," performing remorse for relapse, and being honest with the court even when honesty cuts against the instinct toward self-preservation.

Understanding another "idealized" standard in the criminal legal system—the ideal victim—can help surface the implications of the "ideal" candidate for treatment standard. Originally conceptualized by Professor Nils Christie, the "ideal victim" is "a person or category of individuals who—when hit by crime—is most readily given the complete and legitimate status of being a victim."[307] The standard of the ideal victim has been utilized to understand how certain victims have been less likely to have their cases prosecuted, or to be judged as credible by juries, including prison rape victims,[308] sex worker victims of rape,[309] and Black and other negatively racialized victims.[310]

The "ideal victim" also cooperates with the prosecution, and victims who "exercise individual agency"[311] by not cooperating are often subjected to punitive and harmful practices, including arrest and incarceration via material witness and contempt warrants, criminal charges, and the "conditioning [of] key assistance" upon their cooperation.[312] As Professor Rachel J. Wechsler has argued, these practices treat victims as instruments and violate their dignitary interests.[313]

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306. Of course, to be eligible for treatment in the first place, defendants must meet eligibility requirements that reflect a particular ideal of a candidate with, typically, nonviolent charges and a nonviolent criminal history. This ideal itself reflects a particularly limiting and moralistic view of who is worthy of treatment rather than incarceration.

307. Hannah Brenner, Kathleen Darcy, Gina Fedock & Sheryl Kubiak, *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521, 533 (2016) (quoting Nils Christie, THE IDEAL VICTIM, *in* CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18 (Ezzat A. Fattah ed., 1986)). For instance, the ideal victim of sexual violence is "(1) [] weak, (2) carrying out a respectable project, and (3) not to be blamed, (4) [] also powerful enough to make her case known without threatening strong countervailing vested interests, [and] victimized by (5) a big bad offender, and (6) the victim and perpetrator are unknown to each other." *See id.* (quoting Joris Van Wijk, *Who Is the Little Old Lady of International Crimes?: Nils Christie's Concept of the Ideal Victim Reinterpreted*, 19 INT'L REV. VICTIMOLOGY 159, 160 (2013)).

308. *See, e.g.*, *id.* (applying the standard of the "ideal victim" to women who are victims of sexual violence while incarcerated).

309. *See, e.g.*, Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429 (2016) (arguing that criminal justice actors utilize "situational and relational methods" to determine whether victimization claims are "legitimate" and thus the "ideal victim" is more than a set of "static" characteristics that automatically excludes victims such as sex workers).

310. *See, e.g.*, Itay Ravid, *Inconspicuous Victims*, 25 LEWIS & CLARK L. REV. 529 (2021).

311. Rachel J. Wechsler, *Victims as Instruments*, 97 WASH. L. REV. 507, 564 (2022).

312. *Id.* at 512.

313. *Id.* at 515–30.

Practices that punish and harm victims for failing to live up to the ideal also have expressive power. These practices send the message that these victims are only worthy of protection when they comply with the state's plan for their protection. Similarly, the standard of the "ideal" candidate for treatment communicates that only certain people with substance abuse disorders are worthy of being diverted from incarceration. People with substance abuse disorders who reject treatment, critique the type of treatment offered to them, or refuse to be remorseful about relapse are considered unworthy.

Like the ideal victim standard, the ideal candidate for treatment standard is not ideologically neutral. By requiring defendants to be wholly committed to treatment and remorseful about relapse, the ideal candidate for treatment standard subordinates a medical view of addiction in favor of a view of addiction as a moral failing. Thus, the defendant who rejects treatment is a moral failure, rather than someone experiencing a disease.

And yet, at the same time, the ideal candidate for treatment standard does more than reinforce a moral view over a medical view. It also reduces vast power imbalances in the treatment program complex to a matter of individual defendant choice. To take the example of the defendant who rejects treatment, it is also possible that the defendant is interested in treatment but is motivated to reject it because of the fear of being harshly punished if they fail—a fear that is borne out by the statistics. The fact that defendants face extreme—and often unpredictable—punishment by incarceration in the treatment program complex reflects the vast power exercised by judges and prosecutors to determine who can get treatment and who can get jail. The landscape for treatment access within the criminal legal system is far more shaped by the discretion of these actors than it is by individual defendants' choices. And yet, the ideal candidate for treatment standard suggests that defendants need simply be committed to get access—it thus obfuscates the ways in which criminal court actors wield power and to what ends.

III. A NEW WAY FORWARD

Examining epistemic injustice in the treatment program complex both compels us to reflect on previously identified problematic policies in new ways and raises new implications that must be considered. For instance, critics have identified how the treatment program complex funnels a substantial percentage of the defendants into higher levels of carceral control—thus focusing on the harm to defendants as measured by case outcome. But, as discussed above, it also reproduces a number of epistemic and dignitary harms. These harms are real, even if they are less able to be captured by statistics.

The suppression and distortion of defendants' voices—along with the wholesale exclusion of defendants' voices who are never accepted into treatment—not only harms defendants, but it also ultimately insulates the treatment program complex from critique by the very participants who stand to offer the most valuable insights. It contributes to hermeneutical injustice

because defendants are less likely to be exposed to the stories of other defendants that might fill in a gap in their hermeneutical resources and help them make sense of their experiences.[314] It also perpetuates damaged knowledge production by excluding critical stories from the public domain.[315]

This part begins by considering whether the treatment program complex can be reformed so that these epistemic and dignitary harms can be avoided and defendants' voices can be heard. Then, concluding that epistemic harm and damaged knowledge production are inevitable byproducts of situating treatment in the criminal legal system, this part looks to see if the movement toward carceral abolition can propose satisfying alternatives.

Specifically, this part considers the strategy of "power-shifting" to impacted people as a means of remedying epistemic harms. However, power-shifting in the context of the treatment program complex must necessarily look beyond the walls of the criminal legal system and even the contemporary health care system. Instead, power-shifting must entail opening up space for new answers to questions about recovery, dignity, and self-determination.

A. Reforming the Treatment Program Complex?

Although epistemic injustice exists across the criminal legal system, there is something uniquely troubling about it occurring in the treatment program complex, where court actors are empowered to make particularly intensive and life-changing demands of defendants on the basis of these interventions being for defendants' own good, and where defendants are supposedly—but not in reality—equal members of the team.

Arguably, epistemic injustice is even more rampant in the treatment program complex because defendant narrative plays such a central role in court actors' evaluations of success and failure, and because judges and prosecutors are frequently called upon to exercise their discretion during the numerous status hearings each case entails.

The case studies cited in this Article come from a variety of treatment courts and represent patterns and dynamics that replicate themselves across the treatment program complex. However, it is also important to emphasize the wide variety of treatment program options—from programs that require defendants to plead guilty to receive treatment to programs that permit defendants to access treatment before they are even charged or arrested. Recognizing the problems in how treatment courts can exclude the people who need help the most and set others up for failure, advocates, including public defenders, have lobbied for reforms in the treatment program complex. One example is the Treatment Not Jail Act in New York,[316] which

314. FRICKER, *supra* note 10, at 43.

315. *See id.*

316. *See* TREATMENT NOT JAIL, *supra* note 245; *see also* Grace Li, *In Place of Prison*, 76 U.C. L. REV. (forthcoming 2025) (describing the Manhattan Felony

would eliminate charge-based exclusions and permit participation in treatment court without a guilty plea.

These reforms are geared toward reducing or eliminating the harm defendants experience in terms of case outcomes when they are excluded unfairly or face harsh sentencing for "failing" treatment. The Treatment Not Jail Act would vastly expand eligibility for treatment.[317] Additionally, defendants who were not able to complete treatment would not immediately face resentencing but could continue to litigate their cases.[318]

How would such reforms affect the issue of epistemic injustice? Arguably, reformed programs that make treatment accessible to more people, with a broader array of charges and criminal histories, would also be more open to accepting defendants with more complex co-occurring issues. If that was the case, then that might eliminate or reduce the need for defendants to "walk the tightrope" of presenting just the right size and type of problem. And defendants who had rejected or failed treatment in the past might be more likely to be accepted into such programs without having to perform narratives of commitment. Arguably, judges in these reformed programs might be more open to listening to defendants' critiques of their programs and more open to giving second chances to defendants who relapse. There are already programs who give more second chances than other programs, and programs that are more encouraging of medication-assisted treatment.

At the same time, in all of these program options, even ones that do not require defendants to plead guilty before beginning treatment, failure to "succeed" leads to punitive consequences for defendants—such as being prosecuted or failing to have one's charges dismissed. As long as that is the case, defendants will still be under pressure to conform to court actors' definitions of success. Thus, defendants will still remain vulnerable to the lopsided power dynamics of the criminal court setting that persist even in "kinder, gentler" courts.[319]

Although providing defendants with the option of criminal legal system-provided treatment, rather than jail, seems like an improvement,[320] it

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Alternative-to-Incarceration Court which is open to defendants of "any demographic and any charge").

317. *See* TREATMENT NOT JAIL, *supra* note 245.

318. *See id.*

319. Hanan, *supra* note 6, at 498. Professor Hanan has argued that the "social-emotional" power of the treatment courts has the capacity to be actually more silencing of criminal defendants. *See id.*

320. It matters, of course, how success is defined. Many commentators have argued that the treatment program complex is a success and have pointed to data to demonstrate that. However, a closer look at the data shows that treatment court outcomes have been mixed, at best. *See* Collins, *supra* note 13, at 1589–91 (assessing data on problem-solving courts). The social science studies on problem-solving courts also proceed based on the assumption that the goal is to reduce recidivism, and thus "leave unexamined 'the extent to which lowered recidivism corresponds with changes in people's lives that they themselves consider positive.'" BACH, *supra* note 233, at 65 (quoting KAYE, *supra* note 118, at 14); *see also* Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 420–23 (2022) (questioning how recidivism as an end goal enshrines an overly narrow definition of public safety).

can also impede more substantive reforms that could address defendants' needs while empowering their voices, and providing for the safety of all in the community.

Thus, this Article joins the chorus of voices that have questioned whether the treatment program complex may justifiably be viewed as a "reformist" reform—a reform that entrenches a particular status quo of power. The heuristic of "non-reformist v. reformist reforms," has been increasingly utilized in recent years to differentiate between reforms that entrench the status quo,[321] and reforms that "aim to undermine the prevailing political, economic, social order," and "seek to redistribute power and reconstitute who governs and how."[322]

In fact, not only are epistemic harms likely to persist even in a "reformed" treatment program complex, epistemic harms actually underlie the treatment program complex's tremendous success in the first place by insulating it from the critique. Thus, it is likely even harder to root out epistemic injustice without a more fundamental rethinking of the entire system.

Specifically, epistemic injustice damages overall knowledge production in the criminal legal system by distorting the types of narratives that enter "the public domain" and ensuring that those narratives portray the treatment program complex itself as a success.

As scholars have observed, the treatment court is consciously set up like a theater,[323] with the waiting participants as the audience. Treatment court judges strategically utilize proceedings in individual cases to incentivize other participants in ways that are not typically done in general jurisdiction courts, where getting through the calendar as quickly as possible is the primary concern.[324]

A prior example illustrates this:

> Another man, a 31-year-old also in camo, said, "I'm pretty surprised with how it's going, how easy it is. I tried to quit before. I did the Suboxones and stuff."
>
> Moses interjected, "That's not really quitting, is it?"
>
> "It's not," the man said.
>
> "Big difference, huh?" Moses said.

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321. Amna A. Akbar, *Non-reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2519 (2023); *see also* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007).

322. Akbar, *supra* note 321, at 2507.

323. Miller, *supra* note 282, at 128; *see also* Sousa, *supra* note 120, at 743 (describing how drug court is "dramaturgical by nature, an orchestrated theater where outcomes and discourses are staged and rehearsed in advance by the drug court team for the intended benefit of the in-court audience comprising not only the individual participant to which they are specifically directed, but also to the entire community of participants of the drug treatment court program").

324. In other words, just as defendants are telling stories to the court, the court is also utilizing the defendant's story to tell a larger story to the audience.

> "Big-time," the man said. "I was on [Suboxone] for six months. Just substitute one drug for another."[325]

With this on the record exchange, the judge does not simply communicate his approval of the defendant's treatment choices to the defendant—he communicates to the audience of participants that success in treatment derives from making the right treatment choices. Thus, what began as an individual defendant telling his narrative to the judge becomes a narrative that the court seizes upon to tell a larger story to the entire courtroom about how success is achieved.

And yet, as discussed in Part II, the individual defendant narratives that the court chooses from in these moments are a distortion of defendants' authentic experiences. The narratives are also built on a foundation of excluded stories. Thus, the narrative of the defendant who overcame his addiction through Vivitrol (naltrexone) is both actively celebrated, and relied upon as a reason that Vivitrol works, whereas the story of the defendant who dropped out of treatment or "chose" incarceration because he could not succeed without methadone is excluded entirely.[326]

In the above example, Judge Moses likely sees the example of a successful defendant who has been saved by the court. He does not see the narratives that are suppressed, or the narratives that are excluded entirely.

Epistemic injustice thus affects the overall pool of stories that judges project to the courtroom, and ultimately the overall pool of stories that policymakers access to make their decisions. As a result, it ensures that only stories that are disproportionately affirming of the court and its tactics enter that pool of knowledge.

It thus functions to legitimate a larger public narrative of treatment program complex success, which is key to the very existence of these programs. As Professor Quinn points out, media is "filled with accounts of how problem-solving courts 'saved' . . . individuals."[327]

Moreover, the sense of self-worth that treatment program complex actors derive from being involved in treatment court hinges on believing in this narrative of success. In other words, the narratives that judges hear in treatment court hold meaning for the judges themselves—and what is meaningful for judges ultimately influences policy. The narratives that judges hear and choose to project to others in the courtroom are the reasons that judges "know" that the court is working. And because judges "know" the court is working, judges are able to advocate to policymakers for the expansion of the model—which is historically how treatment courts have

325. *See* MacGillis, *supra* note 271 (alteration in original).

326. Indeed, these defendants are excluded from being counted altogether when it comes to the data that drug courts track. This is because drug courts do not track the defendants who are not accepted, or who drop out after starting. *See id.* It is as if these defendants simply cease to exist. It can also be difficult to get even basic data from drug courts. *See, e.g.*, Spencer Norris, *New York Drug Courts Are a Black Box*, N.Y. FOCUS (Aug. 4, 2023), https://nysfocus.com/2023/08/04/new-york-drugs-courts-are-a-black-box [https://perma.cc/9LBP-XAPS] (describing the dearth of data on drug courts in New York).

327. *See* Quinn, *supra* note 103, at 61.

expanded across different jurisdictions. The treatment program complex began as a judge-made movement. Indeed, Professor Collins has argued that problem-solving courts have actually managed to persist and expand despite a spotty record of effectiveness precisely *because* they are meaningful to problem-solving court judges.[328]

Arguably, this powerful psychic investment makes it that much harder for criminal court actors and policymakers to recognize epistemic injustice in the treatment program complex—even as compared to traditional criminal court spaces. And it makes it that much easier for the treatment program complex to remain insulated from critique by the voices of those who are most impacted by it.

B. Abolishing the Treatment Program Complex?

What promise can the movement for carceral abolition hold? The movement for carceral abolition calls for the "dismantling of the carceral state"[329] in favor of "address[ing] the root causes of harm by investing in people's basic needs . . . ."[330] Abolitionists call for "nonreformist reform[s]"[331] that "decouple care from carcerality"[332] so that people receive the support they need "independent[] of the criminal system and outside of the shadow of carceral sanctions."[333]

Abolitionists are thus in favor of dismantling the treatment program complex and re-investing in treatment options in the community.[334]

However, it is important to not idealize the treatment options that currently exist in the community.[335] As discussed in Part II, many people lack access to evidence-based medication-assisted treatment.[336] The majority of treatment options emphasize the twelve-step abstinence-based approach and will not permit defendants on methadone or buprenorphine to even talk at meetings.

Drug treatment programs in the United States have a history of exercising punitive forms of control that mirror the totalizing environment of a prison.[337] Even today, abusive practices, such as forcing participants to wear

328. Collins, *supra* note 13, at 1583.

329. Erin R. Collins, *Beyond Problem-Solving Courts*, 25 CARDOZO J. CONFLICT RESOL. 229, 247 (2003).

330. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 44–45 (2019).

331. GILMORE, *supra* note 321, at 242.

332. Collins, *supra* note 329, at 247.

333. *Id.*

334. This may be practically hard as investment in community treatment services will have to initially compete with funding for the treatment program complex. *See* Gruber et al., *supra* note 18, at 1394 ("The danger, then, is that the more states and localities invest in penal welfare, the less that welfare, services, and aid bound not to arrest and prosecution—but redistribution—can gain legitimacy and secure funding.").

335. Disability scholars have noted how "carceral conditions [are] replicated in psychiatric wards, group homes, and nursing homes." Morgan, *supra* note 65, at 185.

336. *See supra* note 255 and accompanying text.

337. *See* KAYE, *supra* note 118, at 129.

diapers or dunce caps, persist, as does an emphasis on discipline and hierarchy.[338] Replacing the treatment program complex with a vastly expanded network of community treatment centers does not guarantee that the people who receive services at those centers will not be subjected to punitive subordination and control.[339] As Professor Benjamin Levin reminds us, we must be careful to avoid "criminal law exceptionalism," a pattern of assuming that the "violence, social control, selective enforcement, and subordination that define the carceral state are exclusive to . . . the criminal system."[340]

Thus, any move towards abolition of the treatment program complex must come with an awareness of what the replacement should be. Reinvestment in the treatment structures that currently exist may well reproduce the same pathologies. Defendants might be able to choose treatment without coercion, but they would still experience a system that devalues their voices.

In addition to seeking to differentiate between reformist and non-reformist reforms, the movement for abolition seeks to shift decision-making power toward marginalized people impacted by the criminal legal system.[341] For instance, scholars have argued that organizers and activists engage in power-shifting in criminal courts when they engage in court watching, participatory defense, and bail fund work.[342] Court watching involves community members observing local criminal court proceedings to both "show support for community members in the courtroom and collect information on judges and prosecutors" in order to "hold courts accountable to the public."[343] Participatory defense projects, such as Silicon Valley De-Bug, have gathered information about defendants from members of their community to be used by public defenders in bail hearings in support of increasing rates of pretrial release.[344] Silicon Valley De-Bug also assists defendants with finding shelter, transportation, employment, and childcare.[345] And community bail funds post bail for people could not otherwise afford it.[346]

In the context of the treatment program complex, some of these power-shifting tactics, such as participatory defense, could help individual defendants get accepted into treatment courts and manage intensive mandates. However, at the same time, these tactics do not address epistemic harms because they do not dislodge the narrative of suitability for treatment to which defendants are forced to conform. By supporting individual

338. *See id.* at 132–35.
339. Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385–86 (2022).
340. *Id.* at 1385.
341. Clair & Woog, *supra* note 49, at 29.
342. *Id.* at 34–35.
343. *Id.* at 35.
344. *Id.* at 35–36.
345. *Id.* at 36.
346. *Id.*

defendants to succeed according to the court's parameters, participatory defense tactics could actually reaffirm the validity of those parameters.

Ascertaining power-shifting tactics that both improve outcomes for defendants while also dislodging epistemic harm is ultimately beyond the scope of this Article. But it is worth noting that effective power-shifting would necessitate finding ways to challenge, rather than normalize, court actors' control over defendants' lives. Power-shifting could entail connecting defendants to medication-assisted treatment where permitted, but not directly facilitated by courts. It could also entail advocating case by case for the elimination of mandates that defendants obtain employment or a GED—instead spotlighting defendants' capacities for self-determination and ability to decide what they need.[347]

Power-shifting can also consist of advocating for the principles of the harm reduction movement to be applied to treatment pleas. Harm reduction accepts that some use of illegal substances is inevitable and focuses on "reducing the negative effects of drug use" through syringe exchange programs, supervised injection sites, and the distribution of overdose-reversing drugs, such as Naloxone.[348] Applying harm reduction to treatment pleas would require a fundamental redefinition of what success looks like. Success would no longer require sobriety, but instead would entail reducing the risk of overdose by providing defendants stable housing, access to supervised injection sites, syringe exchange programs, and voluntary treatment programs.

Notably, some jurisdictions have already implemented pre-arrest diversion programs that do not require that defendants achieve sobriety to be successfully diverted from the criminal legal system, such as Law Enforcement Assisted Diversion (LEAD) programs.[349] Such programs are a step forward in reducing epistemic harm, in that defendants likely have more of a say in terms of what success looks like. However, programs like LEAD typically exclude defendants with past serious or violent charges in their criminal history, thus leaving out a substantial percentage of the defendant

347. To this point, Professors Lara Rusch and Francine Banner explore the potential of problem-solving courts that are cocreated with social action organizations that represent the interests of the people impacted by the court—as was the case with Street Outreach Court Detroit, Detroit's first homeless court. *See* Lara Rusch & Francine Banner, *Homeless Group Presentation in Detroit's Problem-Solving Court*, 49 LAW & SOC. INQUIRY 278, 279, 302 (2024) (noting how "when a community activist organization cocreated a specialty court with attorneys, their representatives prioritized the knowledge, experiences, and preferences of the affected population[]" in a way that was "meaningful both regarding specific case management . . . and in developing institutional procedures"). At the same time, Professors Rusch and Banner note that unanswered questions still remain regarding what organization can represent impacted people, and how the organization's relationship to the state affects their ability to amplify the voices of marginalized individuals. *Id.* at 303.

348. Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 414–15 (2019).

349. *Id.* at 430 (describing how LEAD programs connect eligible defendants to services pre-arrest and prosecutors agree to decline to prosecute as long as defendants make meaningful improvements, even if they continue to use illegal substances). Unlike most of the treatment program complex, LEAD programs also recognize that defendants' substance abuse may not be the primary cause of their involvement with the criminal legal system. *Id.* at 431.

population. To be accepted into LEAD in the first place, defendants, again, have to be considered "amenable to treatment," which ultimately requires defendants to portray themselves as deserving of a chance.[350]

Ultimately, to be successful, power-shifting must require building movement capacity beyond the walls of the criminal legal system. It must involve partnering with organizations that are seeking to improve low-income people's access to housing, health care, and jobs that provide more than poverty wages. It must mean building access to nonpunitive, harm reduction-oriented treatment in the community. To avoid simply affirming the pathologies of the treatment program complex in new packaging, power-shifting must cede control to impacted people on the question of what harm reduction looks like, what recovery means, and how dignity and self-determination can be protected.

Consistent with the framework of hermeneutical injustice,[351] many impacted people in the treatment program complex may not have the collective interpretive resources to be able to answer these questions just yet. Others may have been answering them all along, but simply no one was listening.

To that point, power-shifting as a strategy of dislodging epistemic injustice would also involve a rethinking of how legal scholarship itself generates knowledge. Professor Rachel E. López has made the case that legal scholars should embrace participatory law scholarship—or "scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience."[352] Legal scholarship, including this Article, frequently "evoke[s] the stories of nonlawyers" but legal scholars "almost never share authorship with them."[353] At the same time, legal scholarship puts forward solutions that potentially impact nonlawyers' lives. Participatory law scholarship posits that "true liberation cannot occur unless any reimagination of the law or legal systems involves analyzing the law along with those marginalized by it . . . ."[354]

Thus, shifting power must also entail co-constructing and amplifying "counternarratives"[355] through legal scholarship, as well as through organizing, activism, and policy work.

CONCLUSION

Distorted narratives are everywhere in criminal court. This Article has argued that these narratives merit particular scrutiny in the context of treatment pleas where defendant speech is encouraged, but speech that resists the court's narrative of success is punished.

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350. *Id.* at 399.
351. *See supra* notes 276–82 and accompanying text.
352. Rachel López, *Participatory Law Scholarship*, 123 COLUM. L. REV. 1795, 1803 (2023).
353. *Id.*
354. *Id.* at 1807.
355. *Id.* at 1806.

The treatment program complex continues to grow—most recently to encompass mental health courts that will provide avenues for mentally ill unhoused people to be involuntarily committed to treatment.[356] The suppression, distortion, and wholesale exclusion of defendant voices in the treatment plea model should concern us more than ever—both because of this continued expansion, and because epistemic harms remain less visible than other harms and thus easily overlooked. At the same time, epistemic harms unwittingly shape the "common sense" of policymakers regarding when a reform is working—when someone has been punished and when they have been helped. Only by cultivating an awareness of how this common sense is shaped—and only by shifting power to those most impacted—can we begin to carve a way forward.

356. Jerel Ezell, *California's New Plan to Treat the Mentally Ill May End Up Violating Their Rights*, TIME (Nov. 29, 2023), https://time.com/6340526/california-care-courts-homeless-mentally-ill/ [https://perma.cc/R3LU-NGFT].