Articles

In Place of Prison

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A new, previously unstudied institution is addressing felonies, including violent felonies of the highest levels, without imposing incarceration as the sanction. Attempts to abolish prisons, or at least reduce racialized mass incarceration, must consider how to respond to serious and violent crimes. This Article offers an analysis of a real-world, ongoing experiment in doing so.

The Manhattan Felony Alternative-to-Incarceration Court ("ATI Court") is the first and, thus far, the only court in the country that systematically offers defendants of any demographic and any charge the opportunity to be diverted from the traditional criminal legal system and to avoid prison. Defendants are mandated instead to engage with community-based social services, such as education, mental health treatment, job skills training, substance use programming, and housing support.

This Article is the first academic work to describe and conduct an institutional analysis of this paradigm-shifting phenomenon, and the first text providing an in-depth, publicly available account of the court. I collected empirical data using qualitative methods. Based on my site visits, my interviews and correspondence with court actors, and court documents, this Article describes the court, situates it in the context of existing "alternatives to incarceration," and analyzes the court's design.

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This court has three innovative features that transform the genre of specialized criminal courts, which already provide opportunities to avoid incarceration. First, it is a non-specialized specialized court: It employs no eligibility restrictions based on demographic, need, or charge. Rather than siphoning off low-level cases or sympathetic groups (such as veterans) from the traditional criminal system as older specialized courts do, this court opens the non-incarceration option to all defendants. Second, the court performs the function of probation without probation officers and their law enforcement tools and approaches. Third, the court makes operational changes to the traditional specialized court model that, with the first two innovations, avert the usual effect of specialized courts: widening and strengthening the "net" of carceral supervision.

This court is the latest among a number of approaches already operating on the margins of the criminal system, but some of the court's stakeholders intend for its model to become the default criminal legal response, replacing the current default: prison. This Article assesses the role the court plays within the wider criminal legal system. While imperfect, this new court expands the realm of possible responses to crime and provides further evidence of the obsolescence of prisons.

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INTRODUCTION

Creators of the new Manhattan Felony Alternative-to-Incarceration Court ("ATI Court") believe that public safety comes from connecting people with services they need, rather than incarcerating them. Some of the people who help run and shape this court aim to replace prison with social service provisions as the default response to crime, even for felonies of the highest levels, and some of them even seek to end the criminal sanctioning system as we know it. This Article is the first exploration of this previously unstudied and little-known court, an experiment in unsettling the dominance of prison in our society.

For as long as incarceration has been the main mode of punishment in the United States, alternatives to it have proliferated and evolved. Variations have included probation, pre-trial diversion, and specialized (also called problem-solving) criminal courts, all of which keep people charged with crimes in their communities under state supervision.[1] These approaches often exclude people charged with violent felonies.[2] The alternatives are premised on the view that certain people and certain crimes should be carved out of the traditional criminal system so that incarceration is reserved for serious crimes.[3]

Defendants charged with serious or violent crimes are the very population served by the latest variation, the Manhattan Felony Alternative-to-Incarceration Court.[4] Defendant-participants in this court are charged with felonies, and many with crimes that involve violence, including assault, robbery, sex offenses, and attempted murder.[5]

Launched in 2019,[6] the Manhattan Felony ATI Court borrows the approach of older problem-solving courts—providing defendants with a chance to avoid prison by engaging in individualized community-based social services, which

1. *See, e.g.*, Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1485–86 (2017) [hereinafter Collins, *Status Courts*]; Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295 (2016) [hereinafter Doherty, *Obey All Laws*]; *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827, 827 (1974) [hereinafter *Pretrial Diversion*].

2. *See* Akhi Johnson & Mustafa Ali-Smith, *Diversion Programs, Explained*, VERA INST. OF JUST. 2 (Apr. 28, 2022), https://vera-institute.files.svdcdn.com/production/inline-downloads/diversion-programs-explained.pdf?dm=1651091284; Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1652–53 (2012). Some specialized courts have accepted people charged with certain violent crimes. *See id.* at 1636; *see also* DANIELLE KAEBLE, PROBATION AND PAROLE IN THE UNITED STATES, 2020, U.S. DEP'T OF JUST. OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. 23, 28 (2021), https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf.

3. McLeod, *supra* note 2, at 1652–53; *see also* Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 597 (2016).

4. *See infra* Part.II.

5. *See infra* Part.II.

6. Joseph Barrett, *Manhattan Justice Opportunities Fact Sheet*, CTR. FOR JUST. INNOVATION (Jan. 2024) [hereinafter Barrett, *Fact Sheet*], https://www.innovatingjustice.org/sites/default/files/media/document/2024/MJO_FactSheet_01222024.pdf.

can include therapy, job training, and drug programming.[7] Older problem-solving courts, however, are premised on applying a specialized approach to a specific issue—such as substance use disorder—or addressing problems faced by certain populations—such as veterans or girls.[8] In doing so, older problem-solving courts draw special populations or issues out of the traditional criminal system.[9] The Manhattan Felony ATI Court is the first in the country to use the specialized court model in a non-specialized way: it imposes no categorical eligibility requirements for defendant-participants based on level of felony, need, or demographic.[10] Any defendant charged with any level of felony referred to the court from traditional criminal court is mandated to complete a program of social services in the community.

This Article is the first academic article to discuss this court and the first text of any genre to provide a detailed account of its operations and conduct an institutional analysis. Because this court has received no prior public discussion or analysis, my investigation required using qualitative methods to collect and analyze empirical data, including through site visits; interviews with attorneys, the presiding judge, court staff, and other associated staff; and review of documents created by the court and adjacent institutions.[11] The Article focuses solely on this court, rather than a larger set, because it is the only one of its kind (applying no formal eligibility requirements and being systematically open to felonies of any level).

In addition to providing a descriptive account of the court, the Article conceptually frames how this model contributes to and changes the genres of specialized court and alternatives to incarceration, and in doing so, the Article joins and updates those literatures.[12] The Article surfaces three of the court's main innovations.

First, this court conceptually transforms the specialized court genre. A premise of the specialized court model is that these courts work at the edges of the criminal system with cases that do not warrant being in the system in the first place; the Manhattan Felony ATI Court undoes this premise by serving people with violent charges and who lack sympathetic status. This modification may

7. *See* Collins, *Status Courts*, *supra* note 1, at 1488; *infra* Part.II.

8. *See* McLeod, *supra* note 2, at 1590; Collins, *Status Courts*, *supra* note 1, at 1483.

9. *See* Collins, *Status Courts*, *supra* note 1, at 1488.

10. *See infra* Part.II. Just as this court was previously unstudied, there are no doubt other unstudied courts doing related work. This is the first of its kind as far as I know, as of this writing.

11. The Ohio State University Institutional Review Board granted an exemption for my work.

12. *See, e.g.*, J. Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 719 (2008); McLeod, *supra* note 2, at 1587; Collins, *Status Courts*, *supra* note 1, at 1481; Amy J. Cohen, *Trauma and the Welfare State: A Genealogy of Prostitution Courts in New York City*, 95 TEX. L. REV. 915, 924 (2017); Shanda Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2261 (2022).

partly explain why the court's racial makeup reflects that of the felony docket in Manhattan, unlike traditional drug courts, which favor white defendants.[13] It also allows for a more materially decarceratory effect: While traditional problem-solving courts widen the "net" of criminal legal control by monitoring defendants who might otherwise have had their cases dismissed,[14] the ATI Court serves defendants who would otherwise be facing years of state prison time.[15]

Second, the ATI Court makes ostensibly incremental operational changes that qualitatively transform the problem-solving court model: It employs norms of generally (1) refraining from incarcerating defendants for noncompliance and new arrests; (2) refraining from imposing longer prison sentences if defendants fail the court mandate; and (3) employing a shorter court mandate than the incarceration to which defendants would otherwise be subject.[16] In this way, this court avoids the trap of older problem-solving courts, which promise an illusory non-incarceratory disposition but instead often impose even more incarceration on defendants than the traditional system.[17]

Third, the ATI Court does the work of probation without probation's law enforcement tools: it identifies community-based programming, connects defendants to services, ensures the defendants attend programs and court, troubleshoots noncompliance and program misfit, and liaises with the court—all without the warrantless searches, ankle monitors, revocations, and jail time that traditional probation entails.[18]

In part, the Article tells the story of a major shift in the evolution of alternatives to incarceration—like the evolution of invertebrates into vertebrates. The ATI Court's creators have introduced the specialized court procedures into a new context, thus redefining that the specialized court genre and the arena of possibility for criminal law more generally. This change in form alone is an important advancement to track and study.

In addition, the ATI Court's creators have worked to solve the problems of previous specialized courts, and the new model they have fashioned may succeed where older versions failed at what they purport to do—offer off-ramps from incarceration. Together, the three innovations may have a groundbreaking impact: they allow the court to shrink the "net" of carceral control. Specialized

13. *See infra* Part.II.

14. *See, e.g.*, Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, *in* PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? 13, 17 (Paul Higgins & Mitchell B. Mackinem eds., 2009).

15. *See infra* Part.II.

16. *See infra* Part.II.

17. *See* REBECCA TIGER, JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM 27 (2013); McLeod, *supra* note 2, at 1626.

18. *See* TOO BIG TO SUCCEED: THE IMPACT OF THE GROWTH OF COMMUNITY CORRECTIONS AND WHAT SHOULD BE DONE ABOUT IT, COLUM. UNIV. JUST. LAB 5 (2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf.

courts have been critiqued for expanding the incarceration apparatus rather averting incarceration. This new model may be a rare true alternative to incarceration.

Aside from marking developments in the sub-field of alternatives to incarceration, this Article also tells a story about some of the court stakeholders' ambitions to address some of the central challenges of our criminal legal system—recidivism, and thus public safety, both of which incarceration has failed to solve.[19] Framed differently, by organizing itself around a non-prison sanction even for serious crimes, the ATI Court attempts to tackle the problem of incarceration itself as the state's standard response to crime.

This Article is situated within conversations about what role incarceration should play in the future of criminal justice. Incarceration has been subject to wide-ranging criticisms, including claims that it is a tool of racial and class subordination, [20] exacerbates crime, [21] and represents an obsolete social technology.[22] The ATI Court has emerged as prison abolition becomes more central in conversations about criminal law.[23] Much abolitionist praxis and scholarship concern creating the political, economic, and social conditions for a world that does not need prisons.[24] Even in a radically transformed world, harm is inevitable, and the ATI Court is a real-world experiment in addressing harm through a system of criminal law that imposes non-prison sanctions for felonies, including violent felonies. As such, it can be seen as attempting to address a common retort in response to prison abolition: that we need to incarcerate a so-called "dangerous few."[25]

In recent years, even reforms whose goals fall short of prison abolition have contributed to decarceration: legislation has shortened prison terms,[26] felonies

19. *See, e.g.*, Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA INST. OF JUST. 1 (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf.

20. *See, e.g.*, Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 261 (2021).

21. *See, e.g.*, Stemen, *supra* note 19.

22. *See, e.g.*, ANGELA DAVIS, ARE PRISONS OBSOLETE? 6–8 (2003).

23. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5, n.17, 11–12, 45–51 (2019); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html; MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 191 (2021); Marbre Stahly-Butts & Amna Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1546 (2022). Erin Collins writes specifically about moving past problem-solving courts toward abolition. *See generally* Erin R. Collins, *Beyond Problem-Solving Courts*, 25 CARDOZO J. CONFLICT RESOL. 229 (2023).

24. *See, e.g.*, KABA, *supra* note 23.

25. Thomas Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2018 (2022) (discussing abolitionists' responses to the challenge of "the dangerous few" as well as Frampton's alternative responses).

26. *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

have been reclassified as misdemeanors,[27] and states have employed graduated sanctions or due process protections for those accused of parole and probation violations.[28] But at the current pace of reform, it would take fifty-seven years to cut the United States' prison population in half.[29] Faster decarceration requires addressing the use of prison for violent crimes.[30]

Because some of the ATI Court's stakeholders hope their approach will unseat incarceration, this Article examines what roles the court plays in the wider criminal justice sphere, beyond its innovations on the specialized court model. This Article situates the substantive work of this new court by bringing together scholarship about punishment, coercion, restorative justice, transformative justice, and prison abolition.

One might imagine a criminal justice system that ensures that people grapple with the harm they cause. Like prison, the ATI Court offers no specific mechanism to do so. Instead, its focus on rehabilitation—a more stable future for the defendant—may seem to be unduly lenient, and missing the mark, as a response to severe harm. My analysis reveals that the punishment offered by the court is not squarely rehabilitative, that it contains retributive aspects, and that more generally, the two are not neatly separable.

State control, punishment, and coercion are characteristic of older specialized courts and of prison. The ATI Court replicates and extends coercive traditions, but I argue that by refraining from trying to change the defendants' thoughts and morals, and instead using behavior-based assessments, it avoids the most severe versions of coercion used in the criminal justice system.

One of the ATI Court's key features is that, unlike traditional specialized courts, it generally refrains from using incarceration to punish noncompliance with mandates. Still, the threat of incarceration is its enforcement backstop. As a result, the ATI Court is not straightforwardly abolitionist. However, I argue that the court features promising, even radical, effects that promote prison abolition. These include cognitive reframing for legal system actors and the

27. *See, e.g.*, *Misdemeanor Sentencing Trends*, NAT'L CONF. STATE LEGISLATURES (Jan. 29, 2019), https://www.ncsl.org/civil-and-criminal-justice/misdemeanor-sentencing-trends.

28. *See, e.g.*, *Responding to Community Supervision Violations with Alternatives to Incarceration*, NAT'L CONF. STATE LEGISLATURES (Feb. 18, 2022), https://www.ncsl.org/civil-and-criminal-justice/policy-dashboard-incarceration-alternatives-for-supervision-violations.

29. Nazgol Ghadnoosh, *Can We Wait 60 Years to Cut the Prison Population in Half?*, SENT'G PROJECT 3 (Jan. 22, 2021), https://www.sentencingproject.org/app/uploads/2022/08/60-Years-to-Cut-the-Prison-Population-in-Half.pdf (other reformers have called for the prison population to be cut in half by 2030 or 2024); *see*, *e.g.*, Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015), https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent (describing the Cut50 movement); *JustLeadershipUSA*, OPPORTUNITY STARTS AT HOME, https://www.opportunityhome.org/partners/justleadershipusa (last visited June 1, 2025) (describing the half by 2030 movement).

30. Ghadnoosh, *supra* note 29, at 3.

public by showing that people who commit serious and violent crimes can stay in the community. This court's work implies that so-called "felons," or "violent felons," are not a coherent category and are instead people who, like everyone else, need basic life provisions, such as financial stability, social support, and housing. Perhaps most importantly, by minimizing its use of incarceration, the court has the practical effect of allowing people to maintain relationships, agency, and community with which they can build power and work collectively toward a more just future.

This Article proceeds in four parts. Part I offers context about the landscape of alternatives to incarceration, including probation, diversion, and earlier problem-solving courts. This Part focuses on aspects of these models immediately salient to a discussion of the ATI Court's novel elements. Part II provides an in-depth description of the Manhattan Felony Alternative-to-Incarceration Court, including a conceptual framework that compares it to older problem-solving courts as well as other so-called alternatives to incarceration, such as probation. Part III analyzes how the ATI Court fits into the larger criminal justice system and the current goals of punishment. Part IV situates the ATI Court within current movements for prison abolition and other alternatives. It assesses whether this experiment has the potential to expand to—via more jurisdictions adopting its model. This question is relevant to determining whether the reform represented by this court might create wider change: through decarceration, or as a path toward minimalism[31] or prison abolition.

I. ALTERNATIVES TO INCARCERATION

The Manhattan Felony Alternative-to-Incarceration ("ATI") Court evolved out of earlier alternatives to incarceration. The most prominent of these—probation, diversion, and problem-solving criminal courts—have been mechanisms designed to avoid incarceration as the primary sanction for crime.[32] Much has been and could be written about each alternative. This Part focuses on aspects of these systems pertinent to the ATI Court.

A. PROBATION

Probation, a form of court-ordered community supervision as a criminal penalty, is one precursor to the ATI Court. On probation, people are required to obey criminal laws, avoid committing new crimes, and comply with stipulated

31. *See, e.g.*, Christopher Slobogin, *The Minimalist Alternative to Abolitionism: Focusing on the Non-dangerous Many*, 77 VAND. L. REV. 531, 531 (2024).

32. All of these alternatives use the threat of incarceration—as short-term punishments for noncompliance or as the ultimate outcome for those who are removed from the alternative programs.

conditions,[33] which can be numerous and invasive.[34] Legal scholar Fiona Doherty has termed this process a "testing period": If defendants can pass a "test" proving their ability to abide by the court's rules and mandates, they achieve a desired outcome, such as a lower level conviction than their charge or a dismissal.[35] If they fail, they are incarcerated.[36]

Probation was introduced in the United States around 1830,[37] and its use expanded during the Progressive Era.[38] Its advent allowed for a proliferation of convictions by guilty plea, such that by 2012, ninety-four percent of convictions were by plea.[39] We live in the era of "mass probation";[40] as of 2020, approximately three million adults in the United States were on probation,[41] compared to around 1.2 million in prison.[42] Of the people on probation in 2020, fifty-two percent had felony offenses, and of the total number on probation in the same year, fifteen percent had a violent offense.[43]

Created out of benevolent paternalism, probation's purpose, according to the Progressive Era Probation Commission, was to change the habits of the "unfortunate" to remold them into hard-working, sober, stable members of the middle class.[44] In recent decades, with the development of what sociologist David Garland calls the "new penology," the goal of probation has shifted to

33. Doherty, *Obey All Laws*, *supra* note 1, at 295.

34. *See*, *e.g.*, Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1024 (2013); Doherty, *Obey All Laws*, *supra* note 1, at 294.

35. Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1701 (2019) [hereinafter Doherty, *Testing Periods*]. Testing periods are the central feature of other procedural mechanisms, several used in tandem with probation, that allow for criminal defendants to not be initially incarcerated, including problem-solving courts, conditional plea agreements, deferred adjudication, conditional discharge, and suspended sentences. *Id.* at 1750–51; *see also*, Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1476 (2016) (discussing mechanisms that can result in a defendant's discharge without a judgment of conviction). The "mechanism for deferred judgement in which, after a guilty plea, entry of judgment is stayed while the defendant services a period of probation; successful completion results in discharge without a judgment of conviction." *Id.*

36. Doherty, *Testing Periods*, *supra* note 35, at 1704.

37. *Id.* at 1707; *see also*, Alex Roth, Sandhya Kajeepeta & Alex Boldin, *The Perils of Probation: How Supervision Contributes to Jail Populations*, VERA INST. OF JUST. 2 (Oct. 2021), https://www.vera.org/downloads/publications/the-perils-of-probation.pdf (discussing the beginning of probation in the United States).

38. Doherty, *Testing Periods*, *supra* note 35, at 1711–12 ("By 1925, all forty-eight states and the federal government had enacted probation statutes." (quoting PAUL F. CROMWELL, JR., GEORGE G. KILLINGER, HAZEL B. KERPER & CHARLS WALKER, PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM 12 (2d ed. 1985))).

39. *Id.* at 1713.

40. Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision,* 3 ANN. REV. CRIMINOLOGY 261, 262–63 (2020).

41. Kaeble, *supra* note 2, at 1 (finding that 3,053,700 adults were on probation at the end of 2020).

42. E. ANN CARSON, PRISONERS IN 2021—STATISTICAL TABLES, BUREAU OF JUST. STAT. 1 (Dec. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/p21st.pdf.

43. Kaeble, *supra* note 2, at 23.

44. Riggs v. United States, 14 F.2d 5, 9 (4th Cir. 1926).

protecting the public.[45] Probation officers, who historically served a social work function, have taken on a more explicitly law enforcement role,[46] more intensively surveilling probationers for violations of the conditions of their probation.[47]

The law enforcement response to the "testing period" nests another layer of policing and incarceration within probation. People on probation are, like everyone else, subject to the police and incarceration systems if they commit new crimes. In addition, people on probation are policed by their probation officers, who are able—and are incentivized by overwhelming caseloads—to temporarily jail them or initiate the probation revocation process to imprison them if they violate probation conditions.[48] These conditions include extra-legal requirements, such as reporting to meetings with probation officers, notifying officers of changes in address or workplace, and finding employment.[49]

Many indignities of being on probation derive from this internal policing function. Probation officers can perform warrantless searches of probationers' homes[50] and surveil probationers using technologies such as ankle bracelets and cellphone tracking.[51] This surveillance deprives people of privacy and other fundamental rights.[52] Not only that, but probationers also must pay for their own

45. DAVID GARLAND, CULTURE OF CONTROL 12 (2001).

46. ROTH et al., *supra* note 37, at 2; Anne Stokes, *A System of Support: Sacramento Probation Helps Clients Reintegrate*, SACRAMENTO NEWS & REV. (June 27, 2023), https://sacramento.newsreview.com/spotlight/a-system-of-support-sacramento-county-probation-helps-clients-reintegrate. Patrick Michaels, supervising probation officer and field watch commander of Sacramento County Probation stated "Probation officers wear many hats, from the social work side, to the enforcement side . . . ." *Id.*

47. Stokes, *supra* note 46. There are few limits on the legal authority of probation officers and probation offices.

48. Allison Frankel, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, HUM. RTS. WATCH (July 31, 2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states#_ftn181.

49. ROTH, et al., *supra* note 37, at 6; *see also* Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, 58 HARV. C.R.-C.L. L. REV. 1, 4 (2023) [hereinafter Weisburd, *Carceral Control*] (discussing criminal court supervision procedures).

50. Weisburd, *Carceral Control*, *supra* note 49, at 10.

51. *Id.* at 7–11; *see also* Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts,* 108 J. CRIM L. & CRIMINOLOGY 399, 407 (2018) (discussing adoption of electronic surveillance tools by juvenile courts); Chaz Arnett, *From Decarceration to E-Carceration,* 41 CARDOZO L. REV. 641, 644 (2019) (discussing surveillance through electronic ankle monitors); Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 149–50 (2022) [hereinafter Weisburd, *Punitive Surveillance*] (discussing substitutes for incarceration such as ankle monitors and smartphone tracking).

52. *See generally*, Weisburd, *Punitive Surveillance*, *supra* note 51 (discussing how punitive surveillance methods such as ankle monitors and smartphone tracking, deprive people of their fundamental rights).

supervision, which often includes the cost of the surveillance technologies and drug tests.[53]

These burdens are exacerbated by the common practice of sentencing people to a term of probation that is longer than the incarceration they otherwise would have received,[54] though the actual terms of probation vary widely and are often cut short by revocation.[55] For felony probation, the most common maximum term is five years.[56] However, some states permit up to the maximum sentence of incarceration possible for that offense.[57] As such, probation widens the net of state control: It can act as an alternative to dismissing a criminal case rather than as an alternative to incarceration.[58]

B. DIVERSION

Pretrial diversion represents an attempt to improve probation by moving it earlier in the criminal process. It suspends prosecution for a set period during which defendants are placed in community-based programming[59]—essentially a pretrial (either pre-plea or post-plea) sentence to probation, which was traditionally a post-conviction sentence. Like probation, pretrial diversion uses the testing period mechanism: If the conditions of diversion are satisfied at the end of the period, the prosecution declines to move forward or dismisses the case; otherwise, the defendant returns to traditional criminal processing.[60]

While some diversion programs were run by probation departments,[61] diversion was an attempt to solve some problems of traditional probation. Court actors saw diversion as a solution to case overload,[62] unchecked prosecutorial discretion, the jailing of poor defendants, and unavailability of rehabilitative

53. COLUM. UNIV. JUST. LAB, *supra* note 18, at 4. In New York, the state charges thirty dollars a month to people on probation, and counties can collect additional fees and charges for GPS monitoring, lab tests, and investigation fees. Chris Mai & Maria Rafael, *The High Price of Using Justice Fines and Fees to Fund Government in New York*, VERA INST. OF JUST. 3 (Dec. 2020), https://www.vera.org/downloads/publications/the-high-price-of-using-justice-fines-and-fees-new-york.pdf.

54. ROTH et al., *supra* note 37, at 5.

55. *Id.*

56. *Id.*

57. *Id.*

58. Jyoti Nanda, *Set Up to Fail: Youth Probation Conditions as a Driver of Incarceration*, 26 LEWIS & CLARK L. REV. 677, 686 (2022); s*ee also* Michelle Phelps, *The Paradox of Probation*, 28 FED. SENT'G. REP 283, 283 (2016) (finding that probation acts as a net-widener after the mid-1980s, though not finding this effect for felony probation); Weisburd, *supra* note 49, at 1 ("Almost half of the people entering prison were on probation or parole at the time they entered prison." (quoting *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets*, THE COUNCIL OF STATE GOV'TS JUST, CTR. (June 18, 2019), https://csgjus-ticecenter.org/publications/confined-costly/ [https://perma.cc/M6UC-TUAY]).

59. *See*, *e.g.*, *Pretrial Diversion*, *supra* note 1, at 827.

60. *Id.*

61. *See*, *e.g.*, Bruce J. Cohen, Joseph J. Grau & Laurence T. Baas, *Project Operation Midway Final Evaluation – Phase II*, NASSAU CNTY. PROB. DEP'T. 1 (1974).

62. *Pretrial Diversion*, supra note 1, at 845.

services.[63] First launched as early as the 1940s, diversion programs proliferated, in part, through legislative mandates[64] and reached a zenith in use in the late 1960s and early 1970s.[65] At least forty-four states and Washington D.C. have statutory diversion programs.[66] By virtue of taking place pretrial, diversion developed procedures distinct from those of probation. These procedures involve the screening of participants by a member of the staff of a non-governmental organization; a recommendation by the prosecutor, whose grace is crucial to the defendant's participation; the judge's approval and deference to the prosecutor's recommendation; and the decision of the defendant, with advice from counsel, to take the guilty plea requisite to participating.[67]

In the decades when diversion was most used, eligibility criteria limited participation to sympathetic populations: teenagers and young adults,[68] the unemployed or underemployed, and people with social service needs.[69] During the period of supervision, usually three to twelve months, participants entered programming focused on counseling and job training.[70] Poor attendance in programming, "lack of cooperation," and "abscondence" resulted in unfavorable termination.[71] However, many of the participants who were rearrested during the regimen were not removed from the diversion programs and still received recommendations for the dismissal of charges.[72]

Many programs began with misdemeanors and expanded to include felonies.[73] By the 1980s, diversion programs tended to focus on felony charges to keep from widening the net of carceral control, since providing diversion for misdemeanors was keeping cases in the system that could have been dismissed.[74] Despite the expanded eligibility for people with felony charges, the other eligibility requirements, based on age or need, were retained.

63. Sally Hillsman Baker & Susan Sadd, *Diversion of Felony Arrests: An Experiment in Pretrial Intervention*, VERA INST. OF JUST. 2–3 (1980).

64. *See* Christine Miller, *Exits Off the Criminal System Superhighway: A Taxonomy of Legislative, Criminal Charge Diversion* (manuscript at 3, on file with author).

65. *Id.* at 828; Thomas E. Ulrich, *Pretrial Diversion in the Federal Court System*, 66 FED. PROB. 30 (2002).

66. *Pretrial Diversion*, NAT'L. CONF. OF STATE LEGISLATURES (Apr. 10, 2024), https://www.ncsl.org/civil-and-criminal-justice/pretrial-diversion.

67. *Pretrial Diversion*, *supra* note 1, at 840–42.

68. *Id.* at 832–33.

69. *Id.* at 832.

70. *Id.* at 844–45.

71. *Id.* at 845, 850.

72. *Id.* at 850.

73. *Id.* at 832.

74. *Id.*; *see also* Hillsman Baker & Sadd, *supra* note 63, at 14.

C. PROBLEM-SOLVING COURTS

Problem-solving courts represent another innovation attempting to improve on the existing systems of incarceration, probation, and other alternatives. Problem-solving—or specialized—criminal courts,[75] like probation, substitute the traditional criminal system's procedures and prison terms with treatment, monitoring, and alternative sanctions.[76] Unlike probation, most problem-solving courts craft a specialized approach to address a set of issues that have a causal nexus to criminal behavior and emphasize monitoring by the judge and court personnel.[77] Diversion is sometimes the procedural mechanism that allows defendants to leave traditional criminal court for problem-solving courts, while some defendants go through problem-solving courts at reentry.[78]

An early version of specialized courts appeared at the turn of the twentieth century in the form of "socialized courts," which developed alongside and incorporated probation, parole, and supervised release. In juvenile, family, and women's courts, judges applied the expertise of doctors, psychiatrists, and philanthropists to provide social services to treat social problems[79] and address external and psychological causes of crime through a personalized, discretionary approach.[80]

Contemporary problem-solving courts, beginning with drug courts, emerged in the late 1980s.[81] Through judicial oversight,[82] the therapeutic jurisprudence model (which employs treatment and rehabilitation to reduce criminal behavior),[83] and specialized court personnel,[84] these courts attempted

75. A note on terminology: The terms "problem-solving" court and "specialized court" are used interchangeably. The problem-solving approach, which Kay Levine renames the "problem-oriented" approach, embodies an attempt to address problems arising in the participants' lives in a holistic way rather than narrowly focusing on their legal case. *See* Kay Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1126 (2005) (using the term "problem-oriented").

76. Collins, *Status Courts*, *supra* note 1, at 1482.

77. *Id.* at 1486.

78. *See, e.g.*, McLeod, *supra* note 2, at 1608 (describing reentry courts).

79. Cohen, *supra* note 12, at 924; *see also* McLeod, *supra* note 2, at 1590 (discussing state courts convening specialized criminal courts, such as drug courts, mental health courts, veterans courts, and reentry courts).

80. TIGER, *supra* note 17, at 9.

81. *See* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Crim. Just. Reform*, 31 WASH. U. J. L. & POL'Y 57, 69–80 (2009) (describing Wayward Minors' Court for Girls, funded by the federal Works Progress Administration, which aimed to help young women charged with acts of prostitution and sexual misconduct instead of punishing them); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 126 (2001).

82. *See, e.g.*, Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. L. & POL'Y 63, 82 (2002); REBECCA THOMFORDE-HAUSER & JULI ANA GRANT, CTR. FOR CT. INNOVATION, SEX OFFENSE COURTS: SUPPORTING VICTIM AND COMMUNITY SAFETY THROUGH COLLABORATION 4 (2010).

83. Collins, *Status Courts*, *supra* note 1, at 1488, 1493; Hora & Stalcup, *supra* note 12, at 725.

84. *See, e.g.*, Hora & Stalcup, *supra* note 12, at 726.

to address issues including the unsustainable financial cost of incarceration,[85] high recidivism rates,[86] racial disparities,[87] the emotional toll on judges who felt they were failing to make a positive contribution to the lives of defendants,[88] and the public reaction to the resurgence of retributivism in criminal law.[89]

Drug courts proliferated first, bolstered by federal funding and state and federal legislative support.[90] Since their advent, other specialized courts have formed, including mental health courts, veterans' courts, girls' courts, reentry courts, gun courts, and sex offender courts.[91] As of 2022, there were specialized courts in every state and the District of Columbia;[92] they now number more than four thousand in the country.[93]

While the original Progressive Era courts emerged within the context of a growing welfare state, the problem-solving courts of the 1980s and beyond exist in an era of racialized mass incarceration and at a time when generalized welfare benefits have been reduced.[94] As a result, contemporary problem-solving courts form part of what sociologist Loïc Wacquant calls the "carceral-assistential net"—the provision of welfare services through the criminal justice system,

85. *See, e.g.*, *id.* at 719; Collins, *Status Courts*, *supra* note 1, at 1486.

86. *See, e.g.*, Hora & Stalcup, *supra* note 12, at 719.

87. *Id.* at 722.

88. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1594 (2021) [hereinafter Collins, *The Problem*].

89. *See, e.g.*, LOREN SIEGEL, OPPORTUNITY AGENDA, A NEW SENSIBILITY 6 (2016).

90. CELINDA FRANCO, CONG. RSCH. SERV., R41448, DRUG COURTS: BACKGROUND, EFFECTIVENESS, AND POLICY ISSUES FOR CONGRESS 19 (2010) (finding between 1995 and 2010, Congress provided over $530 million in federal appropriations for state drug court grants, mostly administered by the Bureau of Justice Assistance); United States v. Booker, 543 U.S. 220, 246 (2005). Federal specialized courts have existed since the *United States v. Booker* decision in 2005, which made the sentencing guidelines advisory, and a change from the former Department of Justice policy that drug courts are inappropriate for the federal system. U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 16 (2017); *see, e.g.*, U.S. Dep't of Just., *Problem-solving Courts*, BUREAU JUST. ASSISTANCE, https://bja.ojp.gov/taxonomy/term/84581 (last visited June 1, 2025).

91. *See, e.g.*, Collins, *Status Courts*, *supra* note 1, at 1483. *See generally* Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016) (describing human trafficking intervention courts).

92. KRISTEN DEVALL, CHRISTINA LANIER, LINDSAY J. BAKER, NATIONAL DRUG COURT RESOURCE CENTER, A NATIONAL REPORT ON TREATMENT COURTS IN THE UNITED STATES 24–25 (2022), https://ntcrc.org/wp-content/uploads/2022/08/PCP_2022_HighlightsInsights_DigitalRelease.pdf; DOUGLAS B. MARLOWE ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 37 (2016); JULIE M. BALDWIN, EXECUTIVE SUMMARY: NATIONAL SURVEY OF VETERANS TREATMENT COURTS 4–5 (2013); RAM SUBRAMANIAN, REBECKA MORENO & SHARYN BROOMHEAD, RECALIBRATING JUSTICE: A REVIEW OF 2013 STATE SENTENCING AND CORRECTIONS TRENDS 19–21 (2014).

93. *See Treatment Courts*, U.S. DEP'T JUST. (Apr. 11, 2024), https://www.ojp.gov/feature/treatment-courts/overview.

94. KERWIN KAYE, ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE 14–15 (2020); *see also* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 128 (2011) (pointing to "[b]reakdowns among social and community institutions" as creating a void for problem-solving courts to fill).

which deploys surveillance and enforcement mechanisms to manage individual behavior and to push "low-risk" poor and racialized groups toward low-wage jobs in the formal labor market.[95]

Structurally, like probation, specialized courts use the testing period mechanism. They vacate guilty pleas and dismiss charges or issue non-incarceration sentences if defendants comply with court-imposed rules and successfully complete their individualized programs, social services, or non-incarceration sanctions, such as community service. If defendants fail, they are either returned to the traditional criminal system for processing or sentenced according to their plea agreements. Within the testing period, courts use a system of graduated sanctions and rewards. Sanctions for noncompliance can include increased monitoring, returning to an earlier level of the program, and short periods of jail time.[96] Rewards can include verbal recognition, certificates, and tangible items.[97]

Unlike traditional criminal courts, specialized courts are characterized by their collegial nature and procedurally informal, non-adversarial proceedings administered by a team that includes the judge, prosecutor, and defender, all working in nontraditional roles;[98] they often involve service coordinators and probation staff as well.[99] These courts occupy the role probation was meant to fill,[100] but with the power, resources, and authority of criminal courts—monitoring, administering, and enforcing the mandates they issue.[101] Though one member of the team, the judge is central. Not only does the judge have discretion to decide how and when to incentivize or sanction and whether the defendant completes or fails the mandate, but the courts are also structured to "encourage participants to develop an emotionally charged relationship" with the judge.[102] Under the judge's oversight, case managers or probation officers

95. KAYE, *supra* note 94, at 14, 29 (quoting Loïc Wacquant, *Class, Race, and Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 83 (2010)); *see also* Cohen, *supra* note 12, at 950. David Garland writes about this phenomenon as penal welfarism. *See generally* DAVID GARLAND, PUNISHMENT AND WELFARE (1985).

96. LAUREN ALMQUIST & ELIZABETH DODD, MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 17 (2009).

97. *Id.*

98. Thompson, *supra* note 82, at 77–78; Hora & Stalcup, *supra* note 12, at 725.

99. Hora & Stalcup, *supra* note 12, at 726.

100. KAYE, *supra* note 94, at 13 ("[D]rug courts can perhaps best be said to act as a form of 'judicial probation,' a site where judges closely monitor those who have already plead guilty and ensure that they undergo what the court understands as suitable forms of discipline, training, and self-development."); *see also id.* at 59.

101. *See* John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 934 (2000).

102. KAYE, *supra* note 94, at 47; *see also* Boldt, *supra* note 14, at 25 (finding drug court judges exercise psychological authority in addition to structuring and overseeing the coercive imposition of treatment and monitoring); JAMES NOLAN, REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 61 (2001) (describing drug courts as "theater").

directly supervise defendant-participants, with caseloads that can total ten percent of a typical probation officer's.[103]

This approach constitutes a form of "managerial" judging. According to sociologist and legal scholar Issa Kohler-Hausmann, rather than adjudicating guilt and deciding punishment, the managerial judge uses the "tools of criminal law and procedure to sort, test, and monitor people over time"[104] to decide whether they are governable and the level of social control they require.[105] In addition to monitoring participants' work on underlying issues, specialized courts assess the defendant's ability to comply, report to the court about their compliance, meta-cognate, and adhere to their assigned schedule.

Specialized courts face wide-ranging critiques. For example, sociologist Rebecca Tiger has claimed that drug courts favor white defendants.[106] Black defendants are often ineligible due to prior convictions,[107] and for those who do participate in drug courts, failure rates—correlated with socioeconomic disadvantages—are higher than for non-Black defendants.[108]

Beyond visible racial disparities, drug courts and their progeny place demands on the behaviors of the racialized poor, enforced under threat of incarceration; these demands are based on certain value systems, behavioral norms, and notions of social worth that some critics argue are animated by racial control and domination. Drug courts institute a scheme of personal transformation—including "personal habits, work habits, work relations, self-management, and work values"[109]—in the name of public safety.[110] They aim to address not only substance use disorder alone but rather a set of characteristics: "impulsivity and an inability to delay gratification, an incapacity to establish a normative work ethic, a sense of irresponsibility."[111] Sociologist Kerwin Kaye terms this the "entire drugs lifestyle," which reflects a "para-racial" concept

103. KAYE, *supra* note 94, at 60 (providing an example of a New York City court where case managers supervised thirty to thirty-five cases compared to the one hundred fifty a probation officer in the same jurisdiction would).

104. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 4–5 (2018) (writing about misdemeanor courts).

105. *Id.* at 73, 78.

106. TIGER, *supra* note 17, at 10.

107. *Id.* at 146–47.

108. Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN L. & POL'Y REV. 463, 480 (2009); *see also* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 803–04 (2008) (discussing the traits that correlate with graduation rates, such as "wealth, education, employment, strength of social networks, and lack of mental illness").

109. KAYE, *supra* note 94, at 165.

110. TIGER, *supra* note 17, at 6.

111. KAYE, *supra* note 94, at 20, 70–71.

descended from Senator Daniel Patrick Moynihan's infamous idea of a pathological "black culture."[112]

Intersecting with their racial implications, one of problem-solving courts' worst faults is that they, like probation, tend to widen the net of state surveillance and incarceration by sanctioning defendants whose cases might otherwise be dismissed.[113] Even those who would not have attained dismissal can end up incarcerated for longer than they would have had they never attempted the specialized court—through jail sanctions or through the prison sentence assigned upon failure.[114] Even for those who succeed, the problem-solving court mandates tend to be longer than the length of incarceration the defendant would have faced.[115]

The sanctions imposed by problem-solving courts, which can include incarceration, have been critiqued both for being unnecessary and for integrating incarceration as part of treatment.[116] Moreover, by nominally removing more sympathetic defendants from the traditional system, problem-solving courts may simultaneously legitimize the punishment of those who remain there.[117]

Like probation, diversion, and many other aspects of the criminal legal system, problem-solving courts allow for unchecked prosecutorial and judicial discretion and power of coercion,[118] while also offering reduced procedural protections for defendants, given the post-adversarial nature of the proceedings.[119]

Empirically, specialized courts' therapeutic effects are mixed.[120] Setting that aside, the specialized court theory of treatment bears an inherent tension: It relies on the premise that defendants must be rehabilitated because they are sick

112. *Id.* at 70–71. Kaye's "para-racial" formation is one that "invokes an earlier/continuing racialized formation that has been sheared of its most obvious racial markers." *Id.* at 71; *see also* TIGER, *supra* note 17, at 112.

113. *See, e.g.*, Boldt, *supra* note 14, at 17.

114. KAYE, *supra* note 94, at 10 ("[H]alf of all participants in the courts ultimately fail at treatment and are sentenced for their crimes, generally without receiving any form of credit for the time they have been supervised by the court. . . . [T]his half that fails—disproportionately black and poor (with white graduation rates approximately twice as high as nonwhite)—faces terms in prison that are significantly longer than they would have received had they not undergone court-supervised treatment in the first place." (footnotes omitted)).

115. *Id.*; *see also* TIGER, *supra* note 17, at 26.

116. McLeod, *supra* note 2, at 1618.

117. *Id.* at 1670.

118. Sibley, *supra* note 12, at 2275–81.

119. *See, e.g.*, Quinn, *supra* note 81, at 60, 64 (finding the nonadversarial nature of the defense attorney's role in specialized courts might conflict with their duty of zealous representation); McLeod, *supra* note 2, at 1591 ("[I]n their currently predominant institutional forms, specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration."). *But see, e.g.*, People v. Fiammegta, 923 N.E.2d 1123, 1129 (N.Y. 2010) (providing that due process rights are not terminated upon participation in an alternative to prison program).

120. Collins, *Status Courts*, *supra* note 1, at 1525 n.246.

with an addiction or their behavior has some other external cause, but once they fail to comply with court mandates, the courts revert to a personal responsibility framework and defendants are "processed as rational, culpable adults and sentenced accordingly."[121] By relying on the traditional criminal legal system's model of individual culpability, specialized courts also affirm a schema of individual responsibility for problems with systemic roots, such as racialized absence of educational, employment, health care, and business opportunities, which can contribute to drug use and other criminal behavior.[122]

II. THE NET-SHRINKING SPECIALIZED COURT

The Manhattan Felony Alternative-to-Incarceration Court is the first specialized court designed to be a catch-all for criminal defendants. It has no formal eligibility criteria based on charge, demographics, personal or medical needs, or criminal history.[123] As in a traditional problem-solving court, the ATI Court targets problems that have some causal nexus to each defendant's criminal behavior. Unlike older specialized courts, which focus on narrow sets of issues, the ATI Court aims to address the broad array of intersecting circumstances destabilizing defendants' lives.[124]

Through a plea agreement, the ATI Court diverts defendants from traditional criminal court and has them, instead of being incarcerated, complete a program of assigned social services for a set time under court monitoring. Allowed multiple opportunities to try again after noncompliance or new arrests, defendants who successfully complete the court mandate may replead to a lower-level felony, misdemeanor, or violation, or they may have the case dismissed. Defendants who fail are sentenced according to the plea agreement.

This Part provides an in-depth description of the ATI Court and its workings. Before highlighting its main innovations and limitations, I outline its institutional history and procedures. In many ways, the ATI Court is like older problem-solving courts, and it displays some of the same limitations; it employs a mixed therapeutic and accountability approach that emphasizes structural origins of problems but relies, as does the traditional criminal legal system, largely on solutions rooted in individual responsibility. It employs what Professor Kaye describes as the para-racial framework of changing defendants' entire lifestyles based on racialized ideas, and for too many defendants it remains

121. TIGER, *supra* note 17, at 50; *see also* Collins, *Status Courts*, *supra* note 1, at 1518; Boldt, *supra* note 14, at 14.

122. *See, e.g.*, KAYE, *supra* note 94, at 79; Cohen, *supra* note 12, at 955; Boldt, *supra* note 14, at 14.

123. *See* Julian Adler & Joseph Barrett, *Plenty of Science, Just Not Enough Passion: Accelerating the Pace of Felony Decarceration*, CTR. FOR JUST. INNOVATION 1 (June 2023) [hereinafter *Plenty of Science*], https://www.innovatingjustice.org/sites/default/files/media/document/2023/Article_CJI_TheFelonyATICourt_06212023.pdf.

124. *Id.*

tethered to abstinence-centered mandates. It also shares the challenges that plague the criminal justice system more broadly, such as unchecked judicial and prosecutorial discretion. Without repeating those criticisms, this Part highlights the key ways in which the ATI Court differs from what came before, both in the conceptual model and its operation. These differences include the length of the mandate compared with that of the avoided term of incarceration, the use and duration of incarceration as a sanction during the mandate and for those who fail, the way failure is measured and determined, and the tools of monitoring and enforcement.

A. METHODS

Because of the dearth of publicly available information about the ATI Court,[125] I conducted my own fieldwork and used qualitative methods to learn about the court. Between November 2022 and January 2023, I observed the public court proceedings in the Felony Alternative-to-Incarceration Court part (New York's term for court section) in Manhattan throughout the day on each of the two days a week when the court part was dedicated to felony ATI cases.[126] Because the ATI Court is a criminal court, all proceedings were open to the public. Over this period, I observed every stage of the life of a case, from the plea to the end of the mandate.

I also conducted semi-structured interviews and corresponded with the presiding judge, prosecutors, defense attorneys, and staff members of the non-profit organization and think tank Center for Justice Innovation ("CJI"), which plays a central coordinating role in the court's operations, as I discuss in this Part. I first contacted Joseph Barrett, CJI staff member and Program Director of the ATI program's clinical team,[127] and connected with my other interlocutors through snowball sampling. My interviews tended to last around an hour, and some interloculators agreed to speak with me multiple times. My aim in these

125. Until June of 2023, there was almost nothing published about the ATI Court other than a "one-pager" document on the non-profit organization and think tank Center for Justice Innovation's ("CJI") website outlining that the court created alternatives to incarceration "for all types of felony cases including violent offenses" and a podcast episode produced by the same organization introducing the program. *See* Barrett, *Fact Sheet, supra* note 6, at 2; New Thinking, *Taking Reform Out of Its Comfort Zone*, CTR. FOR JUST. INNOVATION, at 00:50 (Oct. 25, 2021), https://podcasts.apple.com/us/podcast/taking-reform-out-of-its-comfort-zone/id275221709?i=1000539595736. In June 2023, CJI hosted an event to introduce the ATI Court to New York City attorneys and criminal justice professionals, and in February of 2024, the ATI Court featured in the New York high court's State of the Judiciary. Rowan Wilson, Chief Judge of the N.Y. Ct. of Appeals, Remarks (Feb. 27 , 2024), *in* THE STATE OF THE JUDICIARY 2024, at 1, 14.

126. On these days, the judge also presided over cases in Manhattan Drug Court in the same courtroom.

127. Joseph Barrett, CTR. FOR JUST. INNOVATION (last visited June 1, 2025) https://www.innovatingjustice.org/about/people/joseph-barrett. Mr. Barrett is a friend and former colleague of mine.

interviews was to understand the goals and processes of the court, including the work that happens outside of the public court proceedings.

B. PROFILE

The Manhattan Felony ATI Court, which was launched by the New York County Supreme Court, Criminal Term, employs the structure of drug courts and other traditional specialized courts.[128] It features procedurally informal, non-adversarial proceedings administered by a team that comprises a consistent presiding judge, Judge Ellen Biben, and her resource coordinators (akin to clerks and representatives of the judge who can move cases along between in-person court appearances), prosecutors, defense attorneys, and CJI social work and clinical staff members.

The work of the court program is implemented by this team alongside more than one-hundred-and-fifty service providers around New York City's five boroughs.[129] These include non-profit organizations and government agencies that provide the services the court mandates for participant-defendants, such as substance use and mental health treatment, assistance with housing and benefits, job training and placements, therapy, prosocial programs, senior services, and adult protective services.[130] The CJI staff—which includes a program director, a clinical director, and around eighteen additional social workers and case managers and two peer (peers of the participants) staff members—coordinates the court's social service mandates, assesses participants' needs, drafts treatment recommendations, connects participants to services, and monitors participants' compliance.[131]

The Manhattan Felony ATI Court part launched in June 2019.[132] CJI describes the ATI Court as one of "the first all-purpose felony alternative courts in the country."[133] It appears to be unique.

The ATI Court and CJI are currently collecting data for future empirical research on ATI's operations.[134] Thus far, no studies have been completed on

128. *Plenty of Science*, *supra* note 123, at 2.

129. MANHATTAN FELONY ALTERNATIVE TO INCARCERATION COURT NEW YORK COUNTY SUPREME COURT, CRIMINAL TERM POLICIES & PROCEDURES 1 (2023) [hereinafter ATI POLICIES & PROCEDURES] (on file with author).

130. *Id.*

131. Barrett, *Fact Sheet*, *supra* note 6, at 1.

132. *Id.*

133. Joseph Barrett, Project Director, Manhattan Justice Opportunities, Remarks at the Center for Justice Innovation Event, Felony ATI Court: Manhattan and Beyond (June 22, 2023) (notes on file with author).

134. Empirical data on the "effectiveness" of specialized courts generally show mixed results and are themselves varying in quality—the models spread before they are tested and are hard to get quantitative evaluations of due to small sample size, lack of a meaningful control group, and selection-bias. Collins, *The Problem*, *supra* note 88, at 1577–89; *see also* RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT,

key indicators such as recidivism rates and other criminal justice and life outcomes for past participants.

Some basic data are available. Between 2019 and the end of 2024, 985 people participated in CJI social workers' clinical assessments, and of those, 771 took an ATI plea and entered the Felony ATI program.[135] As of June 2023, the ATI Court had an active caseload of over 360 participants.[136] In the history of the program, about fifty percent of participants were Black (including Black Hispanic), thirty-four percent non-Black Hispanic, and ten percent white non-Hispanic, which roughly mirrors the racial breakdown of felony arrests in Manhattan.[137] Of the top arraignment charges, around half are categorized as violent: robbery at twenty-five percent, burglary at fifteen percent, and assault at seventeen percent.[138] Notable among the charges were sex offenses, of which there were twenty-eight, and attempted murders, of which there were nine.[139] The remaining charges, which are not considered violent, include drug possession and sale, grand larceny, and criminal contempt.[140]

Of the 771 cases, 476 cases were closed, with sixty-one percent of participants having finished successfully;[141] this means that the participant completed their mandated programming, demonstrated a stable source of income or financial support, had or was working toward stable housing, and tested negative on drug tests for three months, with some flexibility as to what constitutes each factor on a case-dependent basis (as explained later in this Part).[142] Thirty-four percent of participants failed the program based on that assessment, two percent voluntarily opted out of the program, and two percent had their cases administratively closed due to serious illness or death.[143] Of the

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DRUG COURTS: A REVIEW OF THE EVIDENCE 5 (2009). The Government Accountability Office reported in April 2002 that further study was needed on drug treatment courts, and that the Department of Justice had fallen short of its stated objectives of completing meaningful impact evaluations for the courts. U.S. GOV'T ACCOUNTABILITY OFF., GAO-02-434, BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE THE IMPACT OF DRUG TREATMENT COURT PROGRAMS 15–18 (2002); *see also* Edward J. Latessa & Angela K. Reitler, *What Works in Reducing Recidivism and How Does It Relate to Drug Courts*, 41 OHIO N. U. L. REV. 757, 767–68, 768 tbl.2 (2015); SHELLI B. ROSSMAN JOHN K. ROMAN, JANINE M. ZWEIG, MICHAEL REMPEL & CHRISTINE H. LINDQUIST, URB. INST., THE MULTI-SITE ADULT DRUG COURT EVALUATION: EXECUTIVE SUMMARY 5 (2011), https://www.ojp.gov/pdffiles1/nij/grants/237108.pdf.

135. E-mail from Joseph Barrett, Program Dir., Manhattan Just. Opportunities (April 15, 2025, 10:08 ET) (on file with author).

136. *Plenty of Science*, *supra* note 123, at 2.

137. *See id.*; *Data Dashboard, Arrests*, MANHATTAN DIST. ATT'Y'S OFF. (last visited June 1, 2025), https://data.manhattanda.org.

138. E-mail from Joseph Barrett, *supra* note 135.

139. *Id.*

140. *Id.*

141. *Id.*

142. Telephone Interview with Joseph Barrett, Program Dir., Manhattan Justice Opportunities, Ctr. for Just. Innovation (July 20, 2023) (notes on file with author); ATI POLICIES & PROCEDURES, *supra* note 129, at 1.

143. E-mail from Joseph Barrett, *supra* note 135.

one-hundred sixty-three people who failed, ninety-eight did so due to court or criminal involvement; these individuals typically had multiple new arrests—some in the order of ten—or a new violent felony after having had a chance to engage with programming.[144] Thirty-three participants "absconded"—examples include individuals who left a residential program and were returned on warrants multiple times—and twenty-one failed due to lack of engagement, such as those who struggled with low engagement for an extended time, as long as a year, with multiple opportunities to re-engage.[145]

Of the 293 people who have successfully completed the ATI program, fifty-seven percent had their cases dismissed at the end of the program; twenty-four percent exited the program by being offered and taking a plea to a violation, which is not considered a crime; twenty-seven percent took a misdemeanor plea; and six percent took a plea to a felony of a lower level than their original felony charge.[146] As such, the vast majority of participants avoid the collateral consequences of having a felony on their record, and the majority avoid having a crime at all on their record.

For context, a rough estimate of the active felony case inventory in Manhattan on a given day in 2023 was around 3,000, and the rough number of active cases in Manhattan Felony ATI Court during the same year was around 360.[147] That means the ATI Court at that time was taking something in the order of ten percent of the cases, alongside the considerably larger caseloads of the traditional drug and mental health courts in Manhattan. Moreover, the ATI Court has been expanding its capacity.

C. INSTITUTIONAL HISTORY

Judge Ellen Biben is the ATI Court's presiding judge as well as the administrative (chief) judge of the criminal trial courts of the New York County Supreme Court, Criminal Term. Before the ATI Court was created, Judge Biben saw a need for a catch-all alternative court: "[T]here was a need to create an infrastructure, a real infrastructure, and to model it on some of the great work of our existing problem-solving courts."[148]

144. *Id.*; *see also* Telephone Interview with Joseph Barrett, Program Dir., Manhattan Justice Opportunities, Ctr. for Just. Innovation (Aug. 10, 2023) [hereinafter Telephone Interview with Joseph Barrett, 08/10/2023] (notes on file with author).

145. E-mail from Joseph Barrett, *supra* note 135; *see also* Telephone Interview with Joseph Barrett, 08/10/2023, *supra* note 144.

146. E-mail from Joseph Barrett, *supra* note 135.

147. *State-Paid Trial Court Caseload Trends Dashboard*, N.Y. STATE UNIFIED CT. SYSTEM, https://ww2.nycourts.gov/caseload-trends-36966 (last visited Sept. 25, 2025) (indicating the pending cases at the end of the 2023 reporting period in New York County, Manhattan, Supreme and County-Criminal court was 3,308).

148. New Thinking*, supra* note 125, at 05:05.

Many defendants were not eligible for Manhattan's existing specialized courts, including mental health and drug courts.[149] Nonetheless, defense attorneys and prosecutors often crafted plea deals for these ineligible defendants, and defense attorneys found programs for their clients.[150] As the ad hoc alternative-to-incarceration enterprise grew, the Manhattan District Attorney's Office began hiring social workers to assess and monitor treatment.[151] The district attorney's office and other stakeholders then recognized a need for an independent, non-prosecutorial party to perform this function.[152]

Judge Biben convened prosecutors, defense attorneys, and staff from CJI. CJI had been working to design, implement, and run specialized courts since the creation of the Midtown Community Court in 1993.[153] Collectively, Judge Biben, the attorneys, and CJI held discussions for over a year to develop a catch-all alternative-to-incarceration court that would supplement existing mental health, drug, and other specialized courts. Through a request for proposal solicitation process, they determined that CJI, which had decades of experience designing and operating innovative specialized courts, would serve as the independent assessor, treatment planner, service coordinator and compliance monitor for this new court.[154] They created the Manhattan Justice Opportunities program, which describes itself as embodying "the principles of specialized drug and mental health courts."[155] Manhattan Justice Opportunities houses both the Felony ATI Court and its precursor, the Misdemeanor Alternatives-to-Incarceration program.[156] The Felony ATI Court's work is two-fold: to serve people who do not fit into existing specialized courts, particularly those charged with violent crimes, and to offer them individualized services.[157]

According to Judge Biben and the CJI staff, the ATI Court was created to enhance public safety by addressing recidivism through means more effective than incarceration.[158] CJI asserts, citing a recent meta-analysis, that community

149. Joseph Barrett, Program Dr., Ctr. for Just. Innovation, Remarks at the Center for Justice Innovation Event, Felony ATI Court: Manhattan and Beyond (June 22, 2023) [hereinafter Barrett, Felony ATI Remarks] (notes on file with author).

150. Telephone Interview with anonymous prosecutor, Manhattan District Attorney's Office (Nov. 11, 2023) (notes on file with author).

151. *Id.*

152. Telephone Interview with Toni Mardirossian, Deputy Div. Chief, Pathways to Pub. Safety Div., N.Y. Cnty. Dist. Att'y's Off. (Sept. 27, 2024) (notes on file with author).

153. *About*, CTR. JUST. INNOVATION, https://www.courtinnovation.org/about (last visited June 1, 2025).

154. Telephone interview with Ellen Biben, Admin. J., Crim. Trial Ct., N.Y. Cty. Sup. Ct., Crim. Term (Mar. 26, 2025) (notes on file with author); Telephone Interview with Joseph Barrett, Program Dir., Manhattan Just. Opportunities, Ctr. for Just. Innovation (Dec. 2, 2021).

155. Barrett, *Fact Sheet*, *supra* note 6.

156. *Id.*

157. *Id.*

158. Interview with Ellen Biben, Admin. J., Crim. Trial Ct., N.Y. Cnty. Sup. Ct., Crim. Term, 100 Centre Street, N.Y.C., N.Y. (Jan. 17, 2023) (notes on file with author).

safety is in fact incompatible with incarceration, which shows at best no effect on the commission of new crimes and at worst increases rates.[159]

CJI's primary goal for ATI "is to serve the whole person and to build stability across multiple areas of their life."[160] Judge Biben, too, believes that a "confluence of factors" destabilizes participants—"not profound drug abuse, not profound mental health issues," but rather some drug issues, some mental health issues, and other difficulties in combination, such as a need for stable housing, employment, and education.[161]

CJI's strategy is based on the risk-needs-responsibility model of rehabilitation.[162] The "need" principle holds that recidivism risk can be reduced by addressing needs associated with recidivism; these include not only drug or mental health needs, but also needs for "prosocial peers and activities, familial support, and stable employment or educational opportunities."[163] These needs, CJI persuasively asserts, "can only be meaningfully addressed in the community."[164]

Another of CJI's aims is to reduce incarceration itself. Decarceration, CJI staff suggest, depends on providing alternatives to incarceration for felonies.[165] They point out, citing The Sentencing Project, that "[a]t the current rate of progress, . . . it will take until the year 2098 for the United States to effectively end mass incarceration." [166] Despite the small scale, CJI's introductory document about the ATI Court asserts, "Jurisdictions across the country are watching the [ATI] [C]ourt's progress closely . . . can a treatment-first

159. *Plenty of Science*, *supra* note 123, at 1.

160. *Id.*

161. Interview with Ellen Biben, Admin. J., Crim. Trial Ct., N.Y. Cnty. Sup. Ct., Crim. Term, 100 Centre Street, N.Y.C., N.Y. (Nov. 17, 2022) (notes on file with author). As early as 1999, CJI suggested "the importance of 'extending the judge's authority,' writing that 'perhaps some of the basic elements of aftercare—looking for a job, getting an education, coming up with a plan for housing, family reunification' should be part of the last phase of court supervision. If this were the case, they argue, 'judges could then bring the coercive power of the court to this aspect of recovery, pushing clients towards a firm hold on a stable life and withholding graduation until at least some basics are in place.'" TIGER, *supra* note 17, at 105 (citing Greg Berman & David Anderson, *Drugs, Courts, and Neighborhoods*, CTR. FOR CT. INNOVATION 14 (1999), https://www.innovatingjustice.org/sites/default/files/drugscourtsneighborhoods.pdf).

162. *See* D.A. Andrews, James Bonta & R.D. Hoge, *Classification for Effective Rehabilitation*, 17 CRIM. JUST. & BEHAV. 19, 19–20 (1990); James Bonta & D.A. Andrews, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, PUB. SAFETY CAN., June 2007, at 1, 1; Faye S. Taxman, *Violence Reduction Using the Principles of Risk-Need-Responsivity*, 103 MARQ. L. REV. 1149, 1151 (2020); Devon L. L. Polaschek, *An Appraisal of the Risk-Need-Responsivity (RNR) Model of Offender Rehabilitation and Its Application in Correctional Treatment*, LEGAL & CRIMINOLOGICAL PSYCH., Jan. 2012, at 1, 2; Tony Ward, Joseph Melser & Pamela M. Yates, *Reconstructing the Risk-Need-Responsivity Model: A Theoretical Elaboration and Evaluation*, 12 AGGRESSION & VIOLENT BEHAV. 208, 209 (2007) (offering critiques of the model).

163. *Plenty of Science*, *supra* note 123, at 2.

164. *Id.*

165. *Id.* at 1.

166. *Id.*

individualized approach to felonies be brought to scale . . . ?"[167] Another document expresses hope that other actors "launch similar models in their own contexts."[168] A staff member of CJI has said that he wishes for ATI to become the default response to crime rather than the alternative.[169]

The ATI program has been able to operate thus far without the involvement of legislators, in part because the district attorney's office was for the first five years the primary funder: the salaries of the CJI staff came from the Criminal Justice Investment Initiative, established by the Office of the Manhattan District Attorney Cyrus R. Vance, Jr., to invest criminal asset forfeiture funds in projects that "improve public safety, develop broad crime prevention efforts, and promote a fair, efficient justice system in New York City."[170] As of this writing, the primary funder is the state court system. Some partner service providers, such as therapists, job training educators, and caseworkers, receive federal, state, and local funding as well as private donations; some also receive federal funding in the form of Medicare and Medicaid.[171] The New York County Supreme Court, Criminal Term, which created and houses the ATI Court, has also received funding from the United States Department of Justice's Bureau of Justice Assistance, and an additional funder is the Office of the Special Narcotics Prosecutor for the City of New York.[172]

D. SOLVING SOME PROBLEMS OF PROBLEM-SOLVING COURTS

Procedurally, the ATI Court employs the structure of the specialized court diversion model. At the same time, the ATI Court makes seemingly minor modifications to this procedure that allow the model to avoid the failures of older specialized courts.

1. The Plea Decision

The ATI Court provides an opportunity for defendants who are ineligible for other specialized courts, such as mental health or drug courts, to be considered for community supervision through a plea bargain.[173] The plea deal grants the defendant-participants legal authority to bypass the traditional system

167. New Thinking, *supra* note 125, at 01:31.

168. *Plenty of Science*, *supra* note 123, at 3.

169. Barrett, Felony ATI Remarks, *supra* note 149.

170. *About CJII*, CRIM. JUST. INV. INITIATIVE, https://cjii.org/about/ (last visited June 1, 2025).

171. *See, e.g.*, Scott W. Allard & Steven Rathgeb Smith, *Unforeseen Consequences: Medicaid and the Funding of Nonprofit Service Organizations*, 39 J. HEALTH POLIT., POL'Y & L. 1135, 1136 (2014).

172. *Past Funding*, U.S. DEP'T OF JUST., https://bja.ojp.gov/funding/expired#filter-funding-opportunities-expired (last visited June 1, 2025); *see* Telephone Interview with Joseph Barrett, Program Dir., Manhattan Justice Opportunities, Ctr. Just. Innovation (Apr. 7, 2025).

173. *See* ATI POLICIES & PROCEDURES, *supra* note 129, at 8.

and enter a diversionary court.[174] Either the defense or the prosecution may initiate this conversation, and both sides must agree to the deal.[175] When prosecutors begin the conversation, defense attorneys relay relevant information directly to prosecutors, such as health records, to identify cases suitable for ATI.[176] In some cases, when the needs are not immediately obvious, the defense offices' social workers perform psycho-social evaluations on clients about their trauma history, programs they have done in the past, substance use, and housing needs,[177] and the results are used in negotiations with prosecutors.[178] Cases may be identified and assessed pre-indictment[179] or before the arraignment upon indictment.[180]

The Manhattan District Attorney's Office employed versions of alternatives-to-incarceration before the ATI Court's formal launch in 2019. Alvin Bragg, the Manhattan District Attorney as of 2022, created the Pathways to Public Safety Division of the Manhattan District Attorney's Office, to "enhance and elevate the use of diversion and evidence-based programming, ensuring individuals involved in the criminal justice system receive necessary services to reduce recidivism and enhance public safety."[181] The creation of the new division added "Pathways Division district attorneys" to each trial bureau.[182] In addition to the line prosecutors assessing their own cases, Pathways attorneys review all cases to identify defendants who might benefit from diversion to drug court, mental health court, or the ATI Court.[183] The Pathways deputy attorney reviews each case within two to three days of the writing of the complaint.[184]

According to the ATI Court manual, the ATI Court serves "participants with mental illness and/or co-occurring mental illness and substance use who are ineligible for the existing specialized drug and mental health courts."[185] Notably, "[i]t will also serve participants who may not have behavioral health

174. *Id.*

175. *Id.* at 4.

176. Telephone Interview with Toni Mardirossian, *supra* note 152.

177. Telephone Interview with Danielle Jackson, former public defender at Neighborhood Def. Serv. of Harlem (Jan. 27, 2023) (Ms. Jackson was a defense attorney at the Neighborhood Defender Service of Harlem at the time of our interview).

178. *Id.*

179. ATI POLICIES & PROCEDURES, *supra* note 129, at 5.

180. *See also* Telephone Interview with Toni Mardirossian, *supra* note 152.

181. Alvin L. Bragg, Jr., *Pathways to Public Safety*, OFF. OF MANHATTAN DIST. ATT'Y 1 (Dec. 12, 2022), https://www.manhattanda.org/wp-content/uploads/2023/02/Pathways-One-Pager-12.12.22-ET-Edits-002.pdf.

182. Telephone Interview with Toni Mardirossian, *supra* note 152.

183. Interview with Sherene Crawford, former Exec. Assistant Dist. Att'y, Pathways for Pub. Safety, N.Y. Cnty. Dist. Att'y's Off., N.Y.C., N.Y. (Jan. 17, 2023) (notes on file with author) (Ms. Crawford was the Executive Assistant District Attorney at the time of our interview).

184. Telephone Interview with Toni Mardirossian, *supra* note 152.

185. ATI POLICIES & PROCEDURES, *supra* note 129, at 3.

needs."[186] While a non-incarceratory outcome was always a theoretical option, the added layer of the Pathways attorneys' review now ensures that the district attorney's office assesses every case for a possible alternative.[187] The ATI Court provides an option for any defendant not accommodated by drug, mental health, or other specialized courts.[188]

Prosecutors evaluating cases for ATI apply a two-step decision-making process: First, they determine whether there is evidence in the defendant's criminal history, police reports, or reports from the defense attorney of underlying issues that indicate the defendant can be served by the ATI program.[189] Second, they consider "public safety"—whether the necessary resources exist to serve the person safely in the community and whether the person would be amenable to a court mandate addressing their underlying issues.[190] When assessing public safety, the prosecutors may conduct interviews with the defendant.[191] The prosecutors also consider the opinions of the victims, who do not, however, have veto power, and who, according to a supervising assistant district attorney, tend to be open to ATI.[192] Notably, diversion programs have tended to serve people convicted of low-level, often victimless crimes. As a result, the ATI Court has been creating its own approach to address the role of victims. Judge Biben emphasizes the importance that victims "feel heard."[193] For her, while their consent is not required, it is "favored."[194]

The executive prosecutor of the Pathways Division at the time of our interview stated that the prosecutor's office does not use categorical limits barring any defendants from ATI based on charge.[195] For violent crimes, the prosecutors consider factors like the defendant's other open cases, any history of violence, whether they used a weapon, their age,[196] their mental health record,[197] and whether other unknown needs may be driving criminal behavior.[198] For example, according to the former Pathways executive prosecutor, shootings would "start at a no" because attorneys are unlikely to see those defendants as capable of remaining in the community safely; however, all

186. *Id.*
187. *Id.*; Interview with Sherene Crawford, *supra* note 183.
188. ATI POLICIES & PROCEDURES, *supra* note 129, at 3.
189. *Id.*
190. Interview with Sherene Crawford, *supra* note 183.
191. *Id.*
192. *Id.*
193. Telephone Interview with Ellen Biben, *supra* note 154.
194. *Id.*
195. Interview with Sherene Crawford, *supra* note 183.
196. *Id.*
197. *Id.*
198. Telephone Interview with Toni Mardirossian, *supra* note 152.

evaluations are done on a case-by-case basis.[199] When I asked whether the strength of the case is considered, she answered that all cases the office prosecutes are strong cases; otherwise, they would not move forward.[200]

The ultimate decision to offer a plea lies with the prosecutor. A defense attorney described some reasons their clients have not been offered ATI: the prosecutor has found the case to be too serious; the defendant has failed at programming in the past; the prosecutor has objected to some element of the defendant's criminal history; or the complainant (the victim) has expressed that they do not want the defendant to be in the ATI program.[201] The defense attorney described some instances of "surprising no's," including the first arrest of a defendant who had never had an opportunity to complete programming.[202] The defense attorney I interviewed described the determination as ultimately subjective and varying by prosecutor, trial bureau, or Pathways deputy or supervisor.[203]

While statutes appear to limit who can participate in the Felony ATI program,[204] in practice, anyone is eligible for ATI because the prosecutors can consent to the indictment being dismissed at the end of the process.[205] In fact, most people in ATI face mandatory jail time due to the seriousness of their offense or because of their prior predicate felonies; the ability to withdraw the plea deal is constructed so that the defendant will not incur an additional felony. The ability to replea to a lower level, as discussed later in this Part, allows people to bypass the statutory limitations on non-incarceratory dispositions.

2. Program Placement

The services the ATI Court provides are much more individualized than those offered by older specialized courts and probation. Once a defendant is referred to ATI by the prosecutor and defense attorney, CJI staff assesses the person's needs and recommends a tailored plan for programming and supervision.[206] Reminiscent of the assessments done in the diversion programs of the 1960s and 1970s, this assessment includes a review of criminal history and other records (including Correctional Health Services records), an interview with the defendant, and a conversation with a contact shared by the defendant—

199. *Id.*; Interview with Sherene Crawford, *supra* note 183.

200. *Id.*

201. Telephone Interview with Danielle Jackson, *supra* note 177. Most people accepted into ATI have previously failed at programming. Telephone Interview with Toni Mardirossian, *supra* note 152.

202. Telephone Interview with Toni Mardirossian, *supra* note 152.

203. *Id.*

204. *See* N.Y. PENAL LAW § 70.06(2) (McKinney 2011) (requiring that defendants who have prior predicate felonies within ten years are statutorily disallowed from receiving non-incarceration sentences under the drug court statute).

205. Telephone Interview with Toni Mardirossian, *supra* note 152.

206. ATI POLICIES & PROCEDURES, *supra* note 129, at 3.

typically a family member or friend.[207] The interview with the defendant consists of questions about the defendant's background and life circumstances, including employment, education, mental health, housing, and substance use.[208] The assessment is based on a risk-needs tool developed by CJI[209] using the risk-need-responsivity theory of social work;[210] this theory holds that intervention should be focused on those whose needs are most associated with the risk of recidivism,[211] and treatment should respond to needs profiles, "including factors not directly predictive of recidivism, such as trauma and mental illness."[212] If the defendant has been in treatment in the past, the person conducting the assessment considers past treatment records, and may contact past providers, the defendant, and, if needed, a psychiatrist.[213]

The assessment's results inform the mode and intensity of a defendant's treatment plan rather than their eligibility.[214] The assessor uses the results to make a recommendation for services and to identify the relevant service providers.[215] CJI works with more than one hundred and fifty treatment providers in New York City and surrounding counties.[216]

The length of a participant's service mandate is ultimately determined not by the assessor, but by the district attorney's office, which considers proportionality to the crime and fairness concerns, rather than the person's service needs.[217] Notably, in our interview, the CJI clinical director described that most people have service needs that extend for many years and even for their entire lives, so the district attorney's mandate lengths service as a limit to the duration of compulsory treatment.[218] In the Bragg administration, the service mandates typically have ranged from twelve to fifteen months.[219]

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207. *Id.* at 6–7.

208. *Id.*

209. SARAH PICARD-FRITSCHE, MICHAEL REMPEL, ASHMINI KERODAL & JULIAN ADLER, CTR. CT. INNOVATION, THE CRIMINAL COURT ASSESSMENT TOOL: DEVELOPMENT AND VALIDATION 2 (2018), https://www.innovatingjustice.org/wp-content/uploads/2018/02/ccat_validation.pdf.

210. *See supra* note 162 (collecting articles discussing the risk-needs-responsivity model).

211. The eight central factors that increase such risk are "1. Criminal History, 2. Antisocial Temperament/Impulsivity, 3. Criminal Thinking/Antisocial Beliefs, 4. Criminal Peer Networks, 5. Education/Employment Deficits, 6. Family/Relationship Problems, 7. Substance Abuse, and 8. Lack of Prosocial Leisure Activities." PICARD-FRITSCHE ET AL., *supra* note 209, at 1–2.

212. *Id.* at 2.

213. ATI POLICIES AND PROCEDURES, *supra* note 129, at 7–8.

214. Telephone Interview with Joseph Barrett, *supra* note 154.

215. *Id.*

216. New Thinking, *supra* note 125, at 27:30.

217. Telephone Interview with Joseph Barrett, *supra* note 154.

218. Interview with Michelle Pelan, Clinical Dir., Ctr. for Just. Innovation, 100 Centre St., N.Y.C., N.Y. (Jan. 17, 2023) (notes on file with author).

219. *See* Barrett, Felony ATI Remarks, *supra* note 149.

Former defendant Mr. L. offers an example of a service mandate.[220] Mr. L. was arrested on a gun possession charge. As a result of entering the ATI program, he accepted an 18-month mandate requiring "therapy, employment support, and treatment [for marijuana use]."[221] Under the traditional system, Mr. L. would have been subject to up to four years in a state prison.[222]

At case conferences, the assessor presents the plan to the prosecutor, the defense attorney, and the ATI Court's resource coordinators.[223] Together the group decides whether the case will move forward with the service plan,[224] and if so, the defendant is scheduled for a plea.[225] Before the plea occurs, the defendant is assigned a CJI case manager who connects them with their assigned service providers and monitors their progress through the plan.[226] Services may include residential substance use treatment, outpatient mental health, job training, enrollment in educational programming, and therapy.[227] Service providers are assigned based on the defendant's needs, geography, and identity.[228] While all defendants were arrested in Manhattan, many live or work in other boroughs or jurisdictions, and program assignments are based on locational needs.[229] Although the ATI Court works with people of all demographics, some of its community-based partners work with specialized populations, such as queer youth of color in the Bronx.[230]

A defense attorney who works with the ATI Court described how the ATI Court and probation are each suitable for certain clients. For some, ATI programming is more appropriate because it is individualized and intensive.[231] She explained, "If a client is deemed high risk, especially [with] dual-diagnoses or [is] housing insecure, probation might not be best because that person [is likely to] have a violation. ATI understands that some people are in a moment of instability."[232] On the other hand, probation may be preferable for defendants who are "more stable," because the ATI scheduling requirements are more demanding.[233] For defendants who are in school, for example, probation imposes less of a burden on their time.[234]

220. New Thinking, *supra* note 125, at 02:10.
221. *Id.*
222. *See* N.Y. PENAL LAW §265.01-b (Mckinney 2022).
223. *See* Barrett, Center for Justice Innovation Event (June 22, 2023), *supra* note 133.
224. *See* Telephone Interview with Joseph Barrett, *supra* note 154.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. Telephone Interview with Danielle Jackson, *supra* note 177.
232. *Id.*
233. *Id.*
234. *Id.*

3. The Plea

ATI Court pleas provide an opportunity for a defendant's record to show a lower-level crime than what they were originally charged with or no crime at all, and every possible outcome of the ATI process entails reduced incarceration compared to regular sentencing. This avoids the common specialized court "trap" of a longer sentence upon failure of the mandate than if the defendant had stayed in the traditional system. Pleas are entered using a repleader structure, which is typical of conditional plea bargains under the testing period mechanism.[235] The defendant pleads guilty to a felony crime, but upon successful completion of their court-mandated social services and with the permission of the court, they can replead to a lower-level felony, a misdemeanor, or a violation, or have the case dismissed.[236] Defendants who do not succeed face tiered sanctions, with one set of consequences for those who fail to complete the mandated services and another for those who are rearrested or "abscond" (stop appearing at court and programming). Within the framework of the tiered sanction structure, the particular dispositions are individualized for each defendant and memorialized in the plea agreement. Notably, according to the practices of the ATI Court, defendants do not typically "fail" due to rearrests unless they are rearrested for another felony or multiple new misdemeanors, and even with new arrests for a felony or many misdemeanors, the prosecutors's decision to consent to another chance at ATI and for the judge's decision to grant another chance are based on many factors beyond the fact of rearrest.[237]

For example, one defendant pled to assault in the second degree, a Class D violent felony, along with another misdemeanor. Upon successful completion of the mandate, they would plead guilty to a misdemeanor and receive credit for time served.[238] According to the plea agreement, if this defendant were unsuccessful in completing the court mandate, they would receive three years in prison and five years of supervised release.[239] The plea agreement also stated that if the defendant were rearrested or absconded, they would be subject to up

235. *See infra* Part.II.

236. *See* CJI Plea Agreement Template, N.Y. Sup. Ct. (June 26, 2023) (on file with author).

237. Interview with Michelle Pelan, *supra* note 218. Examples of factors include what the arrest was for, whether there was a new victim, the victim's position as to ATI, the participant's progress in the court mandate, whether the participant took responsibility, and the outcome of CJI's re-assessment and updated treatment recommendation. *Id.*

238. *See* Grace Y. Li, ATI Court Field Notes (Nov. 17, 2022) [hereinafter ATI Court Field Notes 11/07/2022] (notes on file with author).

239. *Id.*

to seven years in prison, the maximum sentence for assault in the second degree.[240]

The plea agreement outlines two main categories of conditions for the mandate to end. First, the defendant must attend and engage in the individually assigned services and programming for the specified length of time and to completion.[241] Second, they must abide by the general rules and requirements of ATI Court.[242] As with other "testing period" mechanisms, such as probation or parole, defendants must generally behave and comply with the court's requirements, including attending court and meetings and "treat[ing] the staff [of the programs] with respect."[243]

Though not a drug court, the ATI Court descends from drug courts and retains elements of their model. Defendants for whom substance use "is a presenting need" are required to abstain from "any habit forming or mood-altering substances including marijuana and alcohol."[244] The practice of the Court is that participant-defendants who undergo drug testing as part of their agreement must show around three months of negative tests before the mandate can end.[245] There are also general rules about financial and housing stability: Defendants must attend educational and vocational training, "secure full-time legal ('on-the-books') employment or disability benefits," and "work towards securing stable housing" to complete their mandates.[246] The practice is that defendants may have the mandate lifted if they have a job, benefits, or another source of sustainable income, such as support from a family member or student loans for those who are in school full time.[247] The defendant must also demonstrate a plan for securing non-shelter housing.[248]

Failing to fulfill these requirements may result in an extension of a defendant's mandate. For example, a participant subject to a twelve-month mandate may have completed their durational term and their individualized programming, but if they have not tested negative on drug tests for three months, or if their disability benefits are pending, their mandate could be extended for

240. *Id.* The plea agreement, as is typical, involves waiving the right to appeal except "as required by law, any constitutional speedy trial claim, the legality of the sentence, his competency to stand trial and the voluntariness of the waiver." *See* CJI Plea Agreement Template, *supra* note 236. Defendants who would have the felony indictment dismissed upon successful completion must waive sealing of records and reports associated with the arrest and prosecution. *See* Grace Y. Li, ATI Court Field Notes (Nov. 22, 2022) [hereinafter ATI Court Field Notes 11/22/2022] (on file with author).

241. *See* CJI Plea Agreement Template, *supra* note 236.

242. *Id.*

243. *See* ATI Court Field Notes 11/22/2022, *supra* note 240.

244. *See* CJI Plea Agreement Template, *supra* note 236.

245. Telephone Interview with Joseph Barrett, *supra* note 142.

246. *See* CJI Plea Agreement Template, *supra* note 236.

247. Telephone Interview with Joseph Barrett, *supra* note 142.

248. *Id.*

weeks or months at the discretion of the prosecutor and court. An extension of the mandate keeps the participant bound to its terms, including the requirement to continue reporting to court appearances.

Notably, this indeterminate aspect of the mandate could theoretically defeat the net-shrinking nature of the ATI Court and lead the ATI defendants to be trapped in the program for longer than they would have been incarcerated, as is the case with probation. However, all parties must agree to extensions,[249] so the defense attorney can push back against excessive extensions, and institutional norms on the part of the judge, prosecutors, and CJI also limit the extensions.

While the plea is the procedural mechanism most central to the program, as with many other aspects of ATI protocol, the court actors ultimately take an individualized approach. Defendants for whom a felony would trigger immigration consequences, for example, may not take a plea upfront.[250]

Judge Biben views the plea as a crucial opportunity for the defendant to take responsibility for the crime. At the plea, she also offers an opportunity for victims to make a victim impact statement, which in the traditional criminal process is offered before sentencing.[251]

4. Program Updates

Unlike many other specialized courts, the ATI Court generally refrains from using jail sanctions. As is the case with other specialized courts, the defendant attends regular court appearances, during which the judge engages in direct colloquies with the defendant about their progress.[252] During these appearances, the judge employs a system of incentives and sanctions which tend to rely on the colloquy itself, rather than the certificates and periods of jailing used in typical problem-solving courts.

For ATI Court participants, the frequency of court appearances varies from every two weeks to every two or three months, depending on the defendant's success and compliance with their service plan.[253] Most often, court appearances occur every six to eight weeks, with regular off-calendar virtual conferences in between.[254] The case manager also holds weekly meetings with the defendant and regular check-ins with providers.[255]

A key feature of the ATI Court is CJI staff's prominent role in administering the program and facilitating updates. Court appearances are formulaic: The CJI staff member typically discusses (1) whether the participant

249. ATI POLICIES & PROCEDURES, *supra* note 129, at 15.
250. Interview with Michelle Pelan, *supra* note 218.
251. Telephone Interview with Ellen Biben, *supra* note 154.
252. Interview with Michelle Pelan, *supra* note 218.
253. Telephone Interview with Joseph Barrett, *supra* note 154.
254. *Id.*; *see also* Telephone interview with Ellen Biben, *supra* note 154.
255. Telephone Interview with Joseph Barrett, *supra* note 154.

has been attending assigned programming, and (2) whether the participant has tested positive for drugs or alcohol.[256] The judge often conferences with the parties at the bench and then explains the results of the conference to the defendant. She evaluates the update and directly asks the defendant for details.

In the prototypical manner of managerial judging, the judge uses the updates to praise or coach defendants. She encourages them to "work the program" and to communicate with their counsel and case manager to resolve problems rather than leaving their programs. She acknowledges that what they're doing requires hard work and reminds them that they will see good results if they put in the effort. Crucially, unlike in traditional specialized courts, updates tend not to lead to sanctions of jailing or in participants failing out of the program. The social coercion and emotional power of the judge are thus paramount.

Some updates are positive. One defendant I observed had completed a year of treatment with full attendance, had all negative toxicology reports, and had been approved for Section 8 housing.[257] When the attorney asked to reduce the time of the mandate, the judge responded that in order to depart from the contract and change the mandate, "What we're looking for is for people to be exceptional," whereas he was merely "meeting the requirements."[258]

Positive updates are not necessarily spotless. When a participant had one positive test for marijuana, the judge noted it was "overall a strong update" and addressed the positive test by asking if the participant was working with the program on ceasing use.[259] Another of the judge's refrains is asking the participant, "Do you feel you're getting the support you need from the program?"[260]

Many updates I observed demonstrated the court's influence on defendants to change their behavior. For example, Mr. M.'s CJI caseworker told the judge about complaints of verbal altercations with staff at his program. She explained that he had not been in touch with his case manager, nor had he been attending group or individual sessions; however, since the day before his court update, he had reconnected with his case manager and attended a group session.[261] Mr. M.

256. *See* ATI Court Field Notes 11/07/2022, *supra* note 238; ATI Court Field Notes 11/22/2022, *supra* note 240; Grace Y. Li, ATI Court Field Notes (Dec. 1, 2022) [hereinafter ATI Court Field Notes 12/01/2022] (on file with author); Grace Y. Li, ATI Court Field Notes (Dec. 6, 2022) [hereinafter ATI Court Field Notes 12/06/2022] (on file with author).

257. *See* ATI Court Field Notes 12/06/2022, *supra* note 256.

258. *Id.*

259. *See* ATI Court Field Notes 11/17/2022, *supra* note 238.

260. *Id.*

261. *See* ATI Court Field Notes 11/22/2022, *supra* note 240.

is one of several examples of participants who disengaged but then reengaged shortly before a court date.[262]

In Mr. M.'s case, the defense attorney explained that the altercation was a misunderstanding—that both sides had apologized.[263] In response to the prosecutor's concerns, the CJI caseworker reported that his program added emotional regulation and anger management classes to his schedule.[264] The judge did not formally sanction Mr. M., coaching him instead: "I expect more from you. I've seen you do better." She continued, "These are all connected issues: when you work the program, when you are abstinent, you'll be able to be your best self."[265] The defense attorney explained that this had been Mr. M's longest consecutive period out of prison or jail, and that he was doing well considering his circumstances.[266] The judge then told Mr. M., "Mr. M., I'm holding you to your word." Mr. M. explained that his altercation with program staff was a miscommunication.[267] The judge responded, "Maybe it was, but make it right. I want an excellent update next time."[268]

Some updates occur when defendants are rearrested. Notably, unlike in many specialized courts, rearrests in ATI Court do not necessarily trigger failure of the program. Mr. B. was rearrested for stealing detergent and dishwashing liquid to resell.[269] The prosecutor used the court update to lecture him, noting that he had had multiple rearrests, which was unacceptable.[270] Unacceptable or not, the multiple rearrests did not result in Mr. B.'s "failing" the program and being subject to state prison as outlined in the plea agreement.[271] While the judge stated that she had already given Mr. B. a last chance, the prosecutor indicated that she was willing to give him one more. But, she said on the record, "[I]f he steals as much as a candy bar or jaywalks, that's the end of it. It's up to him to decide whether to change his life."[272] The CJI caseworker asserted that Mr. B. was engaging with mental health programming, substance use programming, and prosocial groups, and that he was applying for Supplemental Security Income (SSI) benefits.[273] Mr. B. told the court that he had been having trouble with each layer of added responsibility, from living on his own to paying bills

262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*

to finding transportation to programming.[274] The judge responded, "We're connecting you with resources. Talk to [CJI] about transportation. We should connect you with employment. It's hard. Part of what you're doing is work. We're giving you an opportunity because we have faith you can do it. No one is suggesting it's easy. No more arrests. This is it. Today's got to be the day you make the decision to get completely engaged."[275]

Some defendants miss updates. Another salient difference between ATI and other specialized courts, as well as traditional probation, is that missed court appearances do not trigger automatic rearrest or failure of the program. Mr. W. was a defendant whom the court clerk described as having refused to come to court.[276] The defense attorney asserted that he did not refuse and would appear for the next scheduled video conference, and the judge did not issue a warrant.[277] With other missed updates, when a defendant's location is unknown, the judge has issued bench warrants.[278] In the case of another defendant I observed, Mr. T., for example, the judge issued a bench warrant, she explained, not because he had missed a court date but because "he's left his program."[279] Relationships between defendants and their case managers or defense attorneys are crucial for maintaining the trust that allows for additional opportunities to complete the program after episodes of noncompliance.

5. Completion

The norm of the ATI Court is to give defendants many more opportunities to succeed in their programs than a typical specialized court would. This results in the court tolerating noncompliance, relapse, and even new crimes during the course of their mandate. The ATI Court's practice of failing participants only for new felonies or multiple new misdemeanors is notable because it signals a schematic of success focused on improvement and eventual compliance.

Sometimes, this norm leads to the extension of the mandate. As noted above, a defendant's mandate may be extended to allow them to complete their program or test negative on the requisite number of drug tests; it can also be lengthened without any limiting factor other than institutional norms. The defendant may choose to opt out of the mandate at any time, but not without receiving the ensuing prison sentence as agreed upon in the plea. This sentence is shorter than their exposure for the original charge, but a prison sentence nonetheless.

274. *Id.*
275. *Id.*
276. *See* ATI Court Field Notes 12/01/2022, *supra* note 256.
277. *Id.*
278. *Id.*
279. *Id.*

Participants who abide by the mandate for its agreed-upon duration, complete the assigned programming, show three months of negative toxicology tests (for those whose mandate includes drug testing), find a source of sustainable financial support, and develop a plan for stable housing successfully complete the mandate.

Participants who fail are subject to the terms of their plea agreement, which means they are sentenced at the discretion of the prosecutors and the judge. The Deputy Pathways Division Chief expressed to me during an interview that the general practice is that defendants "shouldn't" face sentencing enhancements for failure.[280]

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By making seemingly incremental changes to the specialized court model, the ATI Court avoids some of other specialized courts' worst faults. First, the length of every potential sentence associated with a plea deal is shorter than the traditional baseline. The mandate itself, usually one year to one-and-a-half years, is shorter than felony probation sentences (which in New York are three to five years for most felonies, ten years for felony sexual assault, and much longer for certain drug felonies) and shorter than the prison sentence the defendant would otherwise face.[281] The prison sentence for failing to complete the mandate is shorter than the maximum exposure of the charge.[282] And the prison sentence for a new arrest during the term of the mandate is the exposure of the original charge.[283] In contrast, in traditional specialized courts, the length of the original mandate of court supervision tends to exceed the term of incarceration the defendant faces, and the exposure to incarceration upon failure is often longer still.[284] Second, unlike other specialized courts, ATI Court tends not to punish noncompliance with short periods of incarceration. Third, ATI Court gives defendants multiple chances to reengage with programming, to switch program providers, to comply with the conditions of their plea, and even to be rearrested on new crimes without failing out of the program. In a sense, the court applies a harm reduction model,[285] extending the idea embraced by recent drug courts that "relapse is part of recovery" beyond drug use to other behaviors. It allows for temporary recidivism in an effort to promote public safety in the long run. Thus, while the threat of prison looms in the background, court participation can sometimes feel even more like theater than in traditional specialized courts or

280. Telephone Interview with Toni Mardirossian, *supra* note 152.

281. *See infra* Part.II; *see also* N.Y. PENAL LAW § 65.00(3) (McKinney 2025).

282. *See infra* Part.II.

283. *See infra* Part.II.

284. *See infra* Part.I.

285. Aila Hoss, *Legalizing Harm Reduction*, 80 OHIO ST. L.J. 825, 828 (2019) ("Harm reduction refers to public health strategies that seek to minimize the injury and illness associated with substance use, as opposed to eliminating substance use itself.").

criminal courts: the defendant explains the circumstances, or justifications, that led to a failure to comply; the judge, ostensibly begrudgingly, gives the defendant another chance; and the cycle repeats until the defendant, as is the case in over sixty percent of cases, manages to behave as required.

E. EXPANDING ELIGIBILITY

The ATI Court conceptually redefines the specialized court model that removes low-level crimes or "deserving" populations from the traditional criminal system. It refrains from imposing categorical eligibility requirements based on need or demographic, and it applies the specialized court model to felonies of every level. The catch-all felony alternative court model assumes that any person might have needs answerable through community-based social services and prosocial support, regardless of the person's status or crime. CJI emphasizes that it is the specific risk profile of the defendant that predicts recidivism, that this risk profile can be addressed by meeting the defendant's needs, and that the risks do not depend on the crime of conviction.[286]

1. Avoiding Incarceration

The felonies in ATI court tend to be subject to at least two to seven years of state prison and, by CJI's "back of the envelope" calculation, its programming has saved at least two hundred years of incarceration,[287] which would amount to $23 million.[288] Post-indictment felonies are unlikely to have been dismissed if not for ATI, though more information is needed to assess whether some of the felonies would otherwise have been dismissed without any further intervention. For those that would be subject to probation, ATI is still a better option: Felony probation in New York lasts for five to ten years, compared with the one to one-and-a-half- year ATI mandate.[289]

Shifting the specialized court model away from specialized categories—especially away from low-level crime—can lead to cognitive reframing for the judge, attorneys, defendants and their support network, victims, and, eventually, the public. Some of the felonies faced by ATI defendants are neither serious nor violent—crimes that might be reduced from the felony category to a misdemeanor with legislative change. However, many of these crimes do have victims; these include armed robberies, assaults, and attempted murder. Each successful case offers another example of a defendant able to stay in the

286. *See Plenty of Science*, *supra* note 123, at 1–2.

287. Barrett, Felony ATI Remarks, *supra* note 149.

288. Jullian Harris-Calvin, Sebastian Solomon, Benjamin Heller & Brian King, *The Cost of Incarceration in New York State*, VERA INST. OF JUST. (Oct. 31, 2022), https://www.vera.org/the-cost-of-incarceration-in-new-york-state.

289. *See infra* Part.II.

community without committing another felony, at least for a year or two, and who emerges with the aid of stabilizing forces meant to meet their needs going forward.

2. Racial Implications

A key advancement of the ATI Court is that its racial composition mirrors that of the felonies in Manhattan, whereas drug courts tend to favor white defendants.[290] It is possible that removing the "status"-based eligibility criteria eliminates one layer of the cognitive bias that tends to cast white defendants as members of deserving populations who are ill rather than criminal. However, more research is needed to understand the ATI Court's racial make-up over time.

3. Limitations to Eligibility Expansion

The significant expansion of the specialized court model is limited by the practical realities of the prosecutorial and judicial discretion built into the mechanism of diversion and rife in the criminal legal system more broadly.[291] From the outset, discretion allows each case to be treated in an individualized way, and its exercise in the ATI Court is relatively transparent. Still, prosecutorial and judicial discretion can give way to biased decision-making and asymmetrical processes.

Prosecutorial and judicial discretion determine which defendants benefit from having the opportunity to participate and continue through the ATI program. Prosecutors decide which defendants are chosen for plea offers, the length of the mandate, what counts as compliance, and whether and which changes are made to the mandate along the way. The judge determines the sanctions, the rewards, and the terms of compliance and successful completion.

Technically, prosecutors decide whether ATI is appropriate for a candidate based on whether they can safely remain in the community and whether they can benefit from social services.[292] Under the right circumstances, anyone could be

290. *See infra* Part.II. As drug courts still exist, they pull from the pool of white defendants.

291. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871, 876 (2009) (describing federal prosecutorial discretion and identifying institutional design remedies); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 107 (1994) (describing federal prosecutors' discretion generally and in sentencing after the Sentencing Reform Act); Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry,* 123 DICKINSON L. REV. 589, 589 (2018) (suggesting public discourse to curb prosecutorial discretion).

292. One interesting point about the Pathways process of determining who can receive an ATI plea deal is that the process considers (1) whether the person can safely be kept in the community and (2) whether the person can benefit from services. These factors can be translated into a "dangerousness" inquiry and a "needs" inquiry. Notably, New York is the only state in which judges do not consider "dangerousness" when deciding whether to release someone on bail. *See* Grace Ashford and Jonah E. Bromwich, *New York's Bail Laws, Reconsidered:*

said to satisfy these requirements. In practice, prosecutors typically integrate more factors of consideration, including whether the person has done programming before and failed, criminal history, and the nature of the crime.[293] The significance of certain factors, particularly the nature of the crime, may change based on political shifts in the prosecutor's office: The Vance office referred defendants charged with sexual assault to ATI Court, while in our interview, the former leader of the Pathways division in the Bragg office expressed more hesitancy.[294] Under Bragg, the ATI Court has seen more violent crimes than under the Vance administration.[295]

To reduce prosecutorial discretion, the ATI Court model could move away from diverting cases through plea bargaining. The ATI provisions should be extended to defendants who go through trial, as the theory of the court does not depend on extracting a plea.[296] Defendants who choose to go to trial and have access to the trial procedures meant to protect their rights can, upon conviction, still choose to take responsibility and benefit from services.

While prosecutorial discretion remains a central factor limiting the court's expansiveness, ATI's position as a catch-all alternative allows every case the opportunity for true consideration by the prosecutor's office. This makes the process qualitatively different from protocols that refer cases to a specialized court in an ad hoc manner but based on an obvious defining characteristic of certain defendants, such as veteran status. The Bragg administration has tried to formalize the consideration process by integrating in each trial bureau a Pathways attorney whose sole focus is to consider and recommend defendants for ATI. This attorney acts as a check on prosecutorial reluctance to offer ATI; they have a more neutral stance than the line attorney who received the case from the beginning, whose time and work dedicated to the case might increasingly dissuade them from forgoing trial.[297]

F. PROBATION WITHOUT POLICE

The ATI Court operates as a version of probation that lacks probation's policing function. Although the judge retains the authority to use jail sanctions

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5 Things to Know, N.Y. TIMES (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/nyregion/bail-reform-hochul-ny.html#:~:text=In%20New%20York%2C%20unlike%20every%20other%20state%2C,decline%20in%20the%20use%20of%20cash%20bail. .

293. *See infra* Part.II.

294. Interview with Sherene Crawford, *supra* note 183.

295. *See infra* Part.II.

296. *See infra* Part.II. I note that Judge Biben feels strongly that taking a plea upfront is an important accountability mechanism.

297. This is an example of the sunk cost effect, the "greater tendency to continue an endeavor once an investment in money, effort, or time has been made." Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 ORG. BEHAV. & HUM. DECISION PROCESSES 124, 124 (1985).

and to fail the defendant, CJI assumes probationary roles both at the level of the individual probation officer and at the institutional level.

The probation officer serves as the central coordinating and supervising figure for people on probation. Just as CJI conducts an intake assessment, the probation officer interviews the defendant and other relevant parties to "assess the extent of any physical, psychological or financial injuries" and connects the defendant with services, such as substance use treatment or other programming.[298] The probation officer is the main point of contact who ensures the defendant is attending the services and reports noncompliance to the court.[299]

Probation officers are pushed to aggressively police their charges.[300] The officer responds to noncompliance in probation via administrative sanctions or by initiating probation revocation proceedings.[301] Though charged with supporting the probationer in the community, the officer testifies against the defendant at the revocation hearing,[302] and the hearings often end in the probationer being sentenced to jail or prison.[303] Probation officers are incentivized to revoke probation for small violations to avoid responsibility for more serious violations later[304] and to reduce their overwhelming caseloads. They have tools for rooting out violations of probation conditions, including ankle monitors, cellphone tracking, warrantless searches, and data from surveillance technologies,[305] all of which probationers may be required to pay for themselves.[306]

In contrast, the CJI social workers and caseworkers who are assigned to supervise defendants in the ATI Court do not address noncompliance with revocation. Instead, while they do update the court about compliance, they are responsible for finding a solution, which involves troubleshooting with the

298. *Adult Probation Process*, NYC PROB., https://www.nyc.gov/site/probation/services/adult-court.page (last visited June 1, 2025).

299. *Id.*

300. *See* Doherty, *Obey All Laws*, *supra* note 1, at 296.

301. *See infra* Part.I. Probation revocation proceedings have less stringent standards of proof and procedural protections for the probationer than in criminal proceedings. *See* Gagnon v. Scarpelli, 411 U.S. 778, 789 (1973).

302. *See Gagnon*, 411 U.S. at 789.

303. ROTH ET AL., *supra* note 37, at 11.

304. *See generally* Richard D. Sluder & Rolando V. del Carmen, *Are Probation and Parole Officers Liable for Injuries Caused by Probationers and Parolees?*, 54 FED. PROB. 3 (1990), https://www.ojp.gov/pdffiles1/Digitization/127688NCJRS.pdf (discussing the question of when parole officers can be held liable for injuries caused those they supervise).

305. *See generally* Weisburd, *Punitive Surveillance*, *supra* note 51 (addressing invasive electronic surveillance responses following the COVID-19 crisis).

306. *See infra* Part.I.

defendant and sometimes determining a more compatible program.[307] CJI staff are ostensibly neutral—they stand between the prosecution and defense tables in court—but they play a quasi-advocate role, often highlighting the accomplishments of defendants during court updates and suggesting solutions to noncompliance. The staff members also work with defendants to resolve conflicts in the program, organize their schedules, manage their mandates, and answer general questions in their lives.

The incentives driving the CJI staff differ from those of probation officers. They are not in a policing role; instead they are motivated to support participants in their personal transformations and in navigating the court processes.[308] For one thing, CJI staff are unlikely to be implicated should a defendant commit a new crime. While a high-profile crime by a participant would damage the reputation of the program, the associated judge, prosecutors, and CJI, the CJI staff are not "an investigative and supervising 'arm of the court.'"[309] Because the staff are not law enforcement, unlike probation officers, they are not legally responsible for supervising the people they serve.[310] Moreover, CJI staff—and the ATI Court—do not employ surveillance technologies, and defendants pay nothing to participate.[311] CJI does use urinalysis drug testing, but positive results do not lead to incarceration as a sanction.[312] Further, while probation officers nationwide can have staffing ratios of more than a hundred probationers to one officer,[313] CJI's social workers and case managers work with roughly a thirty-person caseload and a twenty-person caseload for senior or supervising social workers.[314]

From an institutional perspective, CJI plays the same role probation often plays, acting as a hub for community-based organizations that serve the participants and connecting these services to the courts. CJI also innovates new ways to serve its target populations. In a sense, the ATI Court represents a

307. *See* ATI Court Field Notes 11/17/2022, *supra* note 238; ATI Court Field Notes 11/22/2022, *supra* note 240; ATI Court Field Notes 12/01/2022, *supra* note 256; ATI Court Field Notes 12/06/2022, *supra* note 256.

308. *See infra* Part.II.

309. Amanda Rios, *Arms of the Court: Authorizing the Delegation of Sentencing Discretion to Probation Officers*, 21 CORNELL J.L. & PUB. POL'Y 431, 439 (2011) (quoting U.S. v. Davis, 151 F.3d 1304, 1306 (1998)).

310. In contrast, probation officers are statutorily bound to perform their supervisory function. *See, e.g.*, 18 U.S.C. § 3603(4) ("A probation officer shall . . . be responsible for the supervision of any probationer or a person on supervised release who is known to be within the judicial district.").

311. *See* Barrett, *Fact Sheet*, *supra* note 6.

312. *See infra* Part.II.

313. COLUM. UNIV. JUST. LAB, *supra* note 18, at 5.

314. Telephone Interview with Joseph Barrett, *supra* note 142; E-mail from Joseph Barrett, *supra* note 135.

version of probation, insofar as its project is community supervision of people charged with crimes.[315]

The distinct approaches used by CJI and traditional probation arise out of several institutional differences. While both probation and CJI conceive of their tasks as serving individuals and promoting public safety,[316] CJI has a broader mission to "reimagine justice"—specifically, to "reduce crime and incarceration."[317] As such, its approach to individual service provision is guided by these goals and by its role as a think tank. These diverging missions help explain tangible structural differences between the institutions. The CJI attempts to improve upon the work of probation and older specialized courts, and so it caps its own caseworkers' loads, hires social workers rather than law enforcement officers, and hires mission-aligned leadership.

CJI shows that probation's function could be achieved without its law enforcement elements, at least when coupled with judicial oversight. Judge Biben describes CJI as the "secret sauce" of ATI Court; the central coordinating function of the staff is crucial to keeping track of defendants and preventing them from "disappearing" as they move between programs.[318] Staff members prevent disappearance by developing a relationship with the defendants, through weekly check-ins, texting, and phone calls, rather than ankle monitors and GPS tracking.[319]

Many specialized courts work with a probation officer as one of the team members.[320] The ATI Court illustrates how specialized courts and diversionary programs might operate without deploying probation's policing function. It is this policing function that leads many probationers to be incarcerated and suffer dignitary harms.

315. *Services*, NYC PROB., https://www.nyc.gov/site/probation/services/services.page (last visited June 1, 2025) ("Probation is the process whereby the Court has determined that an individual can avoid prison or jail and remain in the community under our supervision.").

316. *See About Probation*, NYC PROB., https://www.nyc.gov/site/probation/index.page (last visited June 1, 2025) ("working . . . to create a safer New York. . . . [W]e hold people on probation accountable and give them opportunities to . . . move out and stay out of the justice system"); *About*, CTR. FOR JUST. INNOVATION, https://www.innovatingjustice.org/about (last visited June 1, 2025) (describing their mission of "helping to build stronger futures for people in the justice system" and the aim to "build safe communities").

317. CTR. FOR JUST. INNOVATION, *supra* note 316.

318. Interview with Ellen Biben, *supra* note 158.

319. Text reminders about court dates have been increasingly used in criminal courts. *See, e.g.*, Associated Press, *Text Message Reminders Help People Remember Their Court Dates*, L.A. TIMES (May 9, 2019), https://www.latimes.com/nation/la-na-court-case-text-reminders-defendants-20190504-story.html.

320. *See, e.g.*, Sibley, *supra* note 12, at 2272.

G. SHRINKING THE NET OF CARCERAL CONTROL

There are diverse and shifting defintions of the "carceral state" and of "carceral control."[321] Court supervision is itself arguably a form of carceral control. Without comparing forms of carceral control in court supervision as opposed to incarceration, the difference the ATI model makes is that it results in strictly less carceral control of any form, rather than trading one version of it for another.

A weakness of specialized courts, as well as diversion and probation, is that they widen the net of carceral control by keeping within the system defendants whose cases might be dismissed entirely. The ATI model can be thought of as reforming the specialized court model along the above-described axes: (1) minimizing the use of carceral elements of problem-solving courts, specifically jail sanctions and incarceration upon failure; (2) shortening the length of incarceration when it is used; (3) refraining from employing surveillance and law enforcement technologies such as ankle monitors; (4) imposing a court mandate that is shorter than the probation and incarceration lengths defendants would otherwise face; *and* (5) expanding eligibility beyond the populations served by other specialized courts to defendants charged with more serious crimes, ones that would otherwise be subject to incarceration or long periods of probation. Without the operational improvements to the problem-solving court model (shorter prison sentences for people who fail and rarely using jail sanctions), merely expanding the problem-solving court model to felonies would not necessarily diminish the power of the court or carceral systems. The amount in time of court supervision tends to be shorter than the status quo sentence of incarceration. Without using strictly shorter court mandates, simply replacing a prison sentence with court monitoring would shrink the prison's footprint but grow that of the court. The ATI Court, however, unites all these modifications. Together, they not only avoid net-widening but shrink the carceral net.

III. PUNISHMENT AND PRISON

The preceding Part discussed the ATI Court's innovations in form; this Part will discuss how the court's substantive work is situated within the existing criminal justice system. The points of focus in contextualizing the ATI Court derive from two of my initial critiques. The first might be driven by a desire for accountability, or framed another way, by a retributive impulse. So goes the chorus of doubt: *This person robbed someone at gunpoint and as a result, they are assigned to go to therapy? How can such a response be adequate to that*

321. *See generally* Esther K. Hong, *The Carceral State(s)*, 30 MICH. J. RACE & L. 1 (2025) (discussing the diversity and fluidity of ideas surrounding the carceral state).

level of crime? Older alternatives-to-incarceration are premised on the idea that they address "junk crimes," which are not morally bad and thus do not warrant a strong response from the state. Felonies, at least violent ones, arguably do warrant a strong state response, a backward-looking one—holding defendants accountable for harms—not just a forward-looking one that aims to improve the defendants' lives. As political philosopher Jean Hampton wrote, "When a serious wrongdoer gets a mere slap on the wrist after performing an act that diminished her victim, the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer."[322] The ATI Court's agenda has no across-the-board accountability mechanism and no retributive foothold: While certain individual's mandates include therapy, restorative justice, or other assigned services that may require the defendant to grapple directly with the harm they caused, there is no over-arching court requirement do so.

A contrasting critique objects to subjugation by the state: The ATI Court mandates are coercive and demeaning. Forcing defendants to choose jail-like in-patient drug treatment under the threat of state prison is neither liberatory nor new. Rather than providing access to services, which may indeed benefit the recipients, the court coerces defendants to partake in these services. All of this was already true of traditional problem-solving courts; expanding that approach expands racialized state control, surveillance, and punishment.

While one might consider a therapeutic approach distinct from punishment, the ATI court contains both. This Part considers both of the concerns referenced above, discussing the theories of punishment that animate the ATI Court. The court's rehabilitative agenda continues traditions of coercion that appear in the criminal justice system writ large and that replicate, but also diverge from, what occurs with incarceration. Rather than trying to bring about any intrusive or deep change, the ATI Court engages the "shallow self," attempting to instill a set of habits and actions.

A. REHABILITATION AND RETRIBUTION

One case I observed, in which the victim's family gave a victim impact statement during a court appearance before the defendant took his plea, illustrates how the ATI Court may lack mechanisms for accountability and retribution. The case was unusual in many ways. Unlike the majority of defendants in the ATI Court, who are Black and brown, this defendant, Mr. M.,[323] was a young white college student who had kicked his date in her face

322. Jean Hampton, *Correction Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1691 (1992).

323. This is a different person than the other Mr. M. previously mentioned.

and body repeatedly for several minutes with steel-toed boots at a diner.[324] The young woman, his classmate, subsequently died. Her death was legally unrelated to her assault, but according to her father, it resulted from a chain of events that linked back to that life-changing experience.[325] The prosecutors explained that they had brought the case to ATI Court because the defendant had a serious alcohol problem, and, as described by the defendant in his statement before the court, the assault was a direct result of his drinking.

In addition to apologizing for "what he did," Mr. M. explained to the court that he "wouldn't have done it if [he] hadn't been drinking."[326] He explained that he had subsequently become sober and begun regular sessions with a recovery coach and therapist, as well as Alcoholics Anonymous ("AA") meetings and in-patient and out-patient alcohol programming.[327] "I cannot change my past and can only try to be the best person I can be," he said.[328] "I use every day to look toward being a better person."[329] Mr. M. will still incur a (lower-level) felony, even upon successful completion of the program, but he is avoiding seven years in prison and three years on supervised release.

While ATI will surely prevent this defendant from losing most of his twenties to incarceration and preclude the immediate and long-term negative impacts that imprisonment would have on his life, many would balk at AA and therapy as his sanctions in response to such a violent crime. Mr. M. is being made to face his addiction, but outside of what his therapists and groups might push him to do, he has been given no mandate to specifically grapple with the act of his crime itself; he will likely never have to face his victim's family again. Another text is needed to analyze cases like this more deeply, but here, I explore a preliminary question: Does retribution play no role in cases such as Mr. M.'s in ATI Court?

1. Reduced Blameworthiness

One answer is that retribution recedes from prominence in ATI Court because the court implicitly treats defendants as less blameworthy for their crimes than other people because of their background circumstances. What renders Mr. M. less deserving of blame is his alcohol use disorder. The retributive case for punishment is that an individual ought to be punished

324. Grace Y. Li, ATI Court Field Notes (Dec. 8, 2022) [hereinafter ATI Court Field Notes 12/08/2022] (on file with author).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

because the person deserves it.[330] But perhaps Mr. M., and other the defendants in the ATI Court, do not deserve harsher retribution because their social service needs show that their circumstances are at least partially to blame for their criminal behavior, and as such they are less personally culpable.

Retributivists link an offender's just deserts, or the punishment deserved, to their moral culpability.[331] To be subject to criminal sanction, one must be blameworthy. According to legal philosopher H.L.A. Hart, one cannot be held blameworthy for criminal acts done involuntarily.[332] Procedurally, reduced blameworthiness is typically addressed in criminal law by the excuse defense, which refers to the presence of some "disability in [one's] freedom to choose the right [thing that] makes it inappropriate to punish" that person.[333] For example, Mr. M. might be considered for an intoxication excuse defense.

In other cases, a confluence of factors might contribute to an offender's behavior. A hypothetical criminal defense called the "Rotten Social Background" excuse proposed to address the effect that an underprivileged or deprived upbringing or social background might have on a defendant's blameworthiness.[334] In the 1973 opinion of *United States v. Alexander*, then-Chief Judge Bazelon discussed the possibility that the mix of deprivation, racism, and poverty in a defendant's upbringing might give rise to a "rotten social background" criminal defense, an extension of the insanity defense.[335]

The Rotten Social Background is not a defense that has been codified by any criminal system.[336] There is no formal procedure to prevent defendants with diminished culpability due to poverty from being convicted of their crimes. But many ATI Court defendants tend to fall under the category that decades ago was

330. HERBERT MORRIS, *Persons and Punishment*, *in* PUNISHMENT AND REHABILITATION 40, 42 (Jeffrie Murphy ed., 1973).

331. *Id.* Others link the desert to the harm caused.

332. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 35–40 (1968).

333. *Id.* at 82.

334. United States v. Alexander, 471 F.2d 923, 957–65 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part, dissenting in part).

335. *Id.* Judge Bazelon discussed his developing view on the Rotten Social Background defense in his Hoover lecture and in an ensuing reply article in a series of articles in the Southern California Law Review with Professor Stephen Morse. David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 389 (1976); David L. Bazelon, *The Morality of the Criminal Law: A Rejoinder to Professor Morse*, 49 S. CAL. L. REV. 1269, 1271 (1976); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1255, 1276 (1976). Much scholarship has ensued on the effects of poverty. *See* Benjamin Ewing, *Recent Work on Punishment and Criminogenic Disadvantage,* 37 LAW & PHIL. 29, 32 (2018).

336. Alternatively, the defense or one like it is reasonable—after all, it is similar to existing defenses, such as "abuse excuse" defenses, based on syndromes of a certain group, such as battered women or victims of child abuse. Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 465 (1996). Perhaps it has failed to be legislated because of the lack of sympathetic poster children, unlike women or children who have suffered abuse.

termed "rotten social background": Most defendants live in poverty and are impacted by structural racism and marginalization.

In a sense, the ATI Court bypasses a formal consideration of culpability and blameworthiness, along with the associated tricky moral questions and practical issues about workability. Moreover, the diversion mechanism also bypasses the sentencing stage and its mitigation considerations.[337] The discretion to make decisions around culpability lies with the prosecutors at the point of offering the plea deal. Although the background conditions that make the defendant a candidate who might benefit from social services are not explicitly considered to be an excuse, one prosecutor described "behavioral health, mental health, substance use, [and] age" as "mitigating" factors.[338]

Motivations differ, however, for different actors within the ATI Court, and agendas have changed with political administrations. Some court actors, for example, appear motivated to fight racialized mass incarceration as one manifestation of systemic racism; others want to reduce incarceration across the board; still others strive to best serve each individual. These divergent motivations all work under the same umbrella of the ATI Court.

Because ATI selection lacks any explicit unifying theory and involves high levels of prosecutorial discretion, it is possible that defendants benefit differently from the program according to demographic factors.

Given the small number of cases that have come through the court and the much smaller sample size I observed, there is no telling whether demographic inequity is a problem that generally plagues the court. The danger of inequities due to discretion has long been at the center of debates about criminal justice reform, and caution should be exercised here as well.

2. The Nature of Punishment in ATI

Legal scholar Dan Kahan claimed that one reason imprisonment has sustained widespread public acceptance is that it holds a diverse array of meanings that can satisfy diverse worldviews.[339] People believe that

337. Mitigation deals with the question of the severity of the punishment based on if the convicted person had an impaired or weakened ability to control their actions as compared with the baseline of a person in the same circumstances. *See* HART, *supra* note 332, at 14. Judges in traditional criminal courts do consider evidence of past personal trauma and social background in deciding the lengths of sentences. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.2, 5H1.5, 5H1.6, 5H1.10, 5H1.12 (U.S. SENT'G COMM'N 2021). Typically, in New York, for example, judges consider mitigating evidence from a Pre-Sentence Report (PSR) written by probation officers, the defense attorney's and prosecutor's sentencing memoranda, and both parties', as well as the victim's, statements at the sentencing hearing. *Sentencing Basics*, N.Y. CTS. (Oct. 18, 2016), https://nycourts.gov/courthelp/criminal/sentencingBasics.shtml; *see also* N.Y. CRIM. PROC. L. § 390.40 (McKinney 2011).

338. Interview with Sherene Crawford, *supra* note 183.

339. Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006).

imprisonment accomplishes their goal of choice.[340] At first blush, the ATI Court offers no such multitudes: it is a rehabilitative project. However, retribution may play a larger role in ATI Court than it appears to.

The first-order goal of the ATI Court is rehabilitation. A punishment's purpose shapes its form; the form then influences the effects. Here, the ATI Court's rehabilitative purpose dictates its design: Mandated programs are meant to improve defendants' lives and combat sources of instability. These sources of instability have some nexus with the crime, but the directness of the link can vary. As an example of a direct link, some defendants go through drug treatment for robberies they committed to pay for drugs. While Mr. M.'s alcohol use was, he and the prosecution suggested, the root cause of the assault, the link is arguably more attenuated. As a result, assigning alcohol treatment as punishment appears more geared toward improving Mr. M.'s life outcomes going forward; it may seem, at least on its face, to fail to directly address Mr. M.'s assault. In this sense, the ATI Court is rehabilitative, not retributive. This lack of obvious backward-looking consequence is a feature of the ATI Court's system, which some might consider a flaw.

At the same time, in response to the suggestion that the ATI Court is merely rehabilitative, court actors insist that its program is in fact *punitive*, a shorthand they use to mean that it is harsh, painful, and difficult for the defendants. My observations supported this claim. They revealed the nature of the ATI Court to be more expansive than it might seem: a punishment designed to be rehabilitative can easily have retributive impacts and resonances.

Of course, the ATI Court cannot be said to be retributive in the same way as older problem-solving courts, which impose sanctions, such as jail stints, as punishment for noncompliance.[341] The ATI Court typically refrains from using such sanctions.[342] Instead, in this Part, I refer to the ATI Court's entire program itself as a punishment of sorts.

First, a word about punishment: Theorists differ as to how to define the concept, one axis of difference being whether punishments must carry an intention to *cause pain* or may instead serve *the benefit* of the punished.[343]

340. As legal scholars Emma Kaufman and Justin Driver have noted, "First-year law students can rattle off the goals of punishment—incapacitation, retribution, deterrence, rehabilitation." Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 557 (2021). Jessica Eaglin has written about interrelationship between rehabilitation and incapacitation. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 222 (2013). Paul Robinson suggests that people will take up vigilante justice in the face of a criminal justice system that fails to "earn 'moral credibility'" with the community. Paul H. Robinson, *The Moral Vigilante and Her Cousins in the Shadows*, 2015 U. Ill. L. Rev. 401, 403.

341. TIGER, *supra* note 17, at 123.

342. *See infra* Part.II.

343. *See, e.g.*, Nathan Hanna, *The Nature of Punishment Revisited: Reply to Wringe*, 23 ETHICAL THEORY & MORAL PRAC. 89, 89 (2020) (arguing that the definition of punishment includes that

Political philosopher Jean Hampton defines punishment as "inflicting upon a wrongdoer an experience which will, in some way, interfere with his ability to satisfy his desires."[344] Philosopher Linda Radzik describes punishment as "a case of harming" that is intentionally harmful, intentionally reactive, and intentionally reprobative, as well as being authorized.[345] She defines the term "harm" partially using a description by philosopher Herbert Fingarette that "punishment [humbles] a person's will by *imposing* something on her she would prefer not to experience."[346] Philosopher R.A. Duff defines a moral reparation, which can be done in a "punitive" manner through "criminal mediation," as an experience "intended to be burdensome or painful," "even if it is a burden that he welcomes."[347]

The ATI Court actors do not share a single working definition of punishment. While the punishment imposed by the court is its program as a whole—completing the service plan and attending court dates—different actors emphasize different aspects of this experience as distinct punishments, appealing variously to each of the theoretical frameworks cited above.

Some prosecutors operate under the more traditional understanding of punishment, wherein the entire program is retributive. We know this because the length of an ATI mandate is based on the severity of the crime. The mandates may not seem painful on their face, especially compared to incarceration. But, as legal scholar Paul Robinson has expressed, any kind of sanction can give rise to "punishment credit," including restorative practices such as an uncomfortable and emotionally difficult meetings "where family and friends have gathered to discuss one's wrongdoing."[348] Other court actors, and some prosecutors, seem to employ the imposition definition of punishment: They believe what make mandates punitive are the onerous and demanding schedules defendants are compelled to keep and restrictions on their movement.[349] Still, others use the burden view of punishment. They believe what is punitive is the burdensome

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the punishment harm and be intended to do so); Bill Wringe, *Punishment, Jesters, and Judges: A Response to Nathan Hanna*, 22 ETHICAL THEORY & MORAL PRAC. 3, 3 (2019) (arguing that punishment need not harm or be intended to do so).

344. Jean Hampton, *Correction Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1694–95 (1992).

345. Radzik attributes this definition to the Flew-Benn-Hart definition that David Boonin develops, which uses "retributive" rather than "reactive." LINDA RADZIK, CHRISTOPHER BENNET, GLEN PETTIGROVE & GEORGE SHER, THE ETHICS OF SOCIAL PUNISHMENT: THE ENFORCEMENT OF MORALITY IN EVERYDAY LIFE 9–10 (2020) (citing DAVID BOONIN, THE PROBLEM OF PUNISHMENT I–36 (2008)).

346. *Id.* at 9–10 (citing Herbert Fingarette, *Punishment and Suffering*, 50 PROC. & ADDRESSES AM. PHILOSOPHICAL ASS'N 499–525 (1977) (emphasis added)).

347. R.A. Duff, *Restorative Punishment and Punitive Restoration*, *in* WHY PUNISH? HOW MUCH? 367, 379–81 (Michael Tonry ed., 2011).

348. Paul Robinson, *The Virtues of Restorative Processes, The Vices of "Restorative Justice," in* WHY PUNISH? HOW MUCH? 337, 363 (Michael Tonry ed., 2011).

349. *See, e.g.*, Interview with Sherene Crawford, *supra* note 183.

and challenging experience of addressing one's own addictions and instabilities.[350] I examine each of these in turn.

a. Negative Retributivism and Indeterminacy

The ATI Court cannot be said to use a solely rehabilitative approach, but instead a mixed-theory view of punishment, which holds that utilitarian aims—like rehabilitation—justify punishment, while negative retribution should limit a punishment's extent.[351] The court mandates are measured in two ways: one is an initial minimum sentence—the mandate measured in time—and the other is the requirement that the defendant meet certain standards. The mandate can be extended by weeks or months if those standards are not met.[352]

The ATI Court's rehabilitative aims exist in tension with the retributive orientations of some prosecutors. The initial lengths of the service mandates are based on the prosecutors' sense of issuing proportional just deserts among defendants based on their crimes.[353]

This proportionality-based ceiling on the sentence contrasts with the second, indeterminate requirement: Defendants must pass drug tests and find employment and housing, even if this takes longer than the time-based mandate.[354] Failure to do so can lead to the mandate to be extended so that the defendant has a chance to meet the requirements. It is up to the prosecutors' and the judge's discretion to decide whether they have met the goals or have sufficiently improved.[355] The indeterminate sentence is thus an example of a forward-looking, rehabilitative approach, since it means that the sentence's ultimate length corresponds to the success of rehabilitation, not the severity of the original offense.

At the ATI Court, the indeterminacy of a sentence can be a source of discontent for defendants who feel the mandate becomes too long or a source of confusion about the discrepancy between the mandated time and the requirement for program completion or negative drug tests. One defendant, Mr. McC., expressed frustration months before his mandate finished. "The contract I signed was only to complete the program. It was not based on time. That is not what I signed."[356] Mr. McC. had been in the system for eight years, a mix of time in the traditional system and the ATI Court.[357] He is one example of a defendant who does not experience the distinction between ATI and standard processing

350. *See, e.g.*, *id.*; *see also* Interview with Michelle Pelan, *supra* note 218.
351. Hart, *supra* note 332, at 25.
352. Drug courts too are indeterminate in the same way. Bowers, *supra* note 108, at 817.
353. Telephone Interview with Joseph Barrett, *supra* note 154.
354. *See infra* Part.II.
355. *Id.*
356. *See, e.g.*, ATI Court Field Notes 11/07/2022, *supra* note 238.
357. *Id.*

so finely. "I feel unholy," he said.[358] "I feel like nothing . . . . I would have had three and a half years on Rikers. I took the drug program to stabilize," he explained.[359] He also described the program's collateral consequences on his relationships: "My grandma doesn't want me to come to her house if I'm associated with the courts. The courts keep dragging it out. I don't want to be a slave anymore."[360] Mr. McC. pointed out what to him was the confusing logic of the court: "You can't send me to jail if I leave [the program]," he insisted. The judge asked his counsel to explain that they could.[361]

Mr. McC.'s intuition was that the mandate should end upon compliance and program completion or the set amount of time, whichever happens first. In fact, it ends with whichever happens *later*. The ATI Court's structure of the indeterminate sentence mimics that used for prison sentences, as well as probation.[362] In prison, an indeterminate sentence may designate a range of terms, and once the minimum term has been served, the person has an opportunity to show a parole board that they have been "rehabilitated" and are deserving of release from prison.[363]

b. Doing Time and Getting Clean

The punishment of having a set of circumstances imposed—in other words, losing one's agency—is another feature of the ATI Court. While the service plans are rehabilitative, meant to improve defendants' lives, their imposition itself is what feels punitive. It occurs as a result of the crime and is occasionally brokered as a sanction for noncompliance. All of this lends a retributive texture to the rehabilitative schedule.

While participating in the court mandates means having an opportunity to avoid prison, it also severely curtails defendants' freedom of movement and agency. The mandates are demanding in ways that limit freedom and choice: They fill defendants' schedules with classes, therapy, and other programming, along with court dates, on top of working or going to school.[364] Often, scheduling conflicts arise: Participants must choose between their court appearance and their methadone appointment,[365] work,[366] and personal matters, like dating and leisure time.

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358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. Bowers, *supra* note 108, at 817.
363. *See* KEVIN R. REITZ, EDWARD E. RHINE, ALLEGRA LUKAC & MELANIE GRIFFITH, ROBINA INST. OF CRIM. LAW AND CRIM. JUST., AMERICAN PRISON-RELEASE SYSTEMS: INDETERMINACY IN SENTENCING AND THE CONTROL OF PRISON POPULATION SIZE 1 (2022) (describing range of indeterminacy in parole systems).
364. *See infra* Part.II.
365. ATI Court Field Notes 12/01/2022, *supra* note 256.
366. ATI Court Field Notes 11/07/2022, *supra* note 238.

In addition to the time-consuming nature of the programming, the very fact that the service plan was imposed as part of a court mandate can make the experience feel punishing. Defendants are welcome to continue participating, cost-free, once they finish the court mandates, but until then they are completing the programs because they are required by the court as a result of their crimes.

Here, too, CJI's rehabilitative goals live in tension with certain prosecutors' retributive approach. CJI's social work theory is that the "least restrictive" level of care should be used in program assignment, with the intensity of schedule depending on level of need.[367] As described in the previous Part, the judge, with the agreement of the prosecutors, implements program assignments as designed by CJI, and generally refrains from using punitive sanctions. Occasionally, however, prosecutors do recommend punishing repeated noncompliance with increased programming.[368] In CJI's view, the programming is tailored to help defendants with specific struggles, but the prosecutors' imposition of additional programming as a sanction shows that they see programming—any programming, regardless of its content—more bluntly, as a punishment that can be doled out in units, just as time can be tacked onto a sentence. On the one hand, prosecutors intend simply to fill time and reduce idleness in order to remove opportunities for noncompliance or crime. On the other hand, however, additional programming also curtails defendants' agency.

More fundamentally, the process by which defendants enter ATI Court involves multiple layers of imposition by a coercive system. At the outset, ATI Court is a criminal court. The ATI Court has its own court "part," or section, within the Manhattan Criminal Courthouse, with a plaque by the door marking it as the "ATI" Court. Despite its unique goals and practices, the work of the court occurs within the physical container—the culture, structures, and norms—of the criminal court. And, like other problem-solving courts, ATI Court is driven by the meta-coercion of the judge managing the performance of defendants in the programs.[369] Defendants face the well-documented problems of plea bargaining, including coerced bartering.[370] Although they have chosen the plea, both incarceration and the alternative involve an imposed set of circumstances. Moreover, although defendants agree to the service plans, these are created collectively by CJI and all parties. While some aspects of the social

367. *See* Interview with Michelle Pelan, *supra* note 218.

368. *See infra* Part.II.

369. *Id.*

370. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2540 (2004).

services include provision of benefits, such as housing support, others are requirements imposed on defendants.[371]

An example of an "imposition" beyond time commitment is the treatment or testing having to do with drug use. An outgrowth of drug court, the ATI Court, at least formally, requires and expects eventual abstinence from drugs and alcohol for those whose initial assessment indicates substance use needs. The court's implicit theory is that everything is connected: Abstinence will help defendants get other parts of their lives on track. In one case, the prosecutor echoed one of the judge's sentiments: "Employment will happen later, after you test negative."[372]

Abstinence is not required immediately, but it is required, almost always, for graduation from ATI—again with exceptions subject to judicial discretion. Mr. R. is an example of a defendant who was complying with all parts of his mandate except that he repeatedly tested positive for THC. "You're close to completing the mandate, but you need negative toxicology reports," the judge reminded him.[373] Mr. R. explained, "If it depends on getting a negative toxicology, that will keep pushing the [completion] date back." The judge responded that "abstinence needs to be your goal." Mr. R. replied, "Y'all created that goal for me. I didn't pick it for myself." The judge explained that nonetheless, he would not be able to finish the mandate without getting negative tests.[374] Another defendant, Mr. D., complained that an issue with missing methadone maintenance was "confusing": "I don't know how [methadone maintenance] got into my case. Why is it tied up with my case?" The judge explained that it was part of his mandate, and so contractually, he had to comply.[375]

Drug testing and treatment are core aspects of the treatment paradigm of criminal justice, a clear rehabilitative goal. But this too shows the changed nature of rehabilitation, or treatment, when wielded as punishment. Rehabilitation encountered as a compulsory consequence of a crime may feel painful even when it ultimately benefits the defendant.

c. The Deep and Shallow Self

A third perspective about punishment within the ATI Court holds that the punishment is the burden of examining and working on oneself by facing one's substance use disorder or other challenges. Although the results will benefit

371. *See infra* Part.I (discussing Kaye's account of the "entire drugs lifestyle" and its roots in a racial project). Though participants tend to appreciate other aspects of the programming, such as education, housing, and job support, for many the drug-related requirements are onerous and unchosen.

372. ATI Court Field Notes 11/22/2022, *supra* note 240.

373. ATI Court Field Notes 12/01/2022, *supra* note 256.

374. *Id.*

375. ATI Court Field Notes 12/06/2022*, supra* note 256.

defendants—they will come out better for having gone through this pain—the process is not an escape from punishment. Instead, participants undertake a task that can be considered more painful than prison time. The implication is that this pain serves as repayment for their crime, aligning with a retributive view of a rehabilitative order.

While the service programs themselves—run by non-profits and agencies that CJI connects defendants to—might compel defendants to reflect on their behavior and make changes, what is formally required by the court is less onerous. The court stipulates only that defendants attend and engage in their assigned programs and report back to their caseworkers and the judge. As such, the ATI Court imports ideas from welfare and managerial misdemeanor court—making people governable and responsible—but stops short of continuing traditions of punishment that try to probe the deep self.

"Punishment gives the offenders an opportunity to examine their souls, but should not invade them,"[376] wrote R.A. Duff, asserting a communicative theory of punishment, namely that ideas about wrongfulness should be communicated to offenders such that they may choose to accept those ideas.[377] Duff suggests that a person's "whole" or "deepest moral or spiritual attitudes or concerns" should be left alone, and that criminal punishment should seek to engage the moral attitudes and feelings of people as "moral agents."[378]

In assessing any kind of personal change, one faces the unknowability of other minds. Duff argues that behavioral markers should be enough evidence of change. With formal punishments, he contends, "insincerity is not an issue . . . if the offender completes the work prescribed by a Community Service Order (a punishment part of whose meaning is that it constitutes a public reparative apology), her fellow citizens should accept that, without inquiring into her reasons for doing so."[379]

The completion of the ATI Court mandate represents a kind of formal apology. Part of what is being pushed is lifestyle change and "responsibilization" in accordance with "the dominant welfarist frame for many, if not all, American problem-solving courts."[380] The defendant must juggle a schedule, figure out logistics, establish priorities, work, and manage a middle-class approach to life—in other words, the inverse of what Kaye calls the "drugs lifestyle."[381]

The other requirement is attending and engaging with programming, which consists of treatment, pedagogy, and services. Treatment, such as substance use

376. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 87 (2001).

377. *Id.*

378. R.A. Duff, *Penance, Punishment, and the Limits of Community*, *in* WHY PUNISH? HOW MUCH? 173, 181–82 (Michael Tonry ed., 2011).

379. DUFF, *supra* note 376, at 110.

380. Cohen, *supra* note 12, at 918.

381. *See infra* Part.II.

or mental health treatment, can be understood as rehabilitative: These programs address what has been deemed a sickness. Here, old critiques of rehabilitation ring true. Herbert Morris wrote that imposing therapy as a response to crime treats people as "but animals who must be conditioned."[382] He noted the dangers of "chang[ing] the person so that he functions in a way regarded as normal by the current therapeutic community"; such an approach "display[s] a lack of respect for the moral status of individuals, that is, a lack of respect for the reasoning and choices of individuals."[383]

On the other hand, the drug treatment programs tend not to expel participants for relapse, making it possible to "mimic the demeanors and behaviors that signal right living without internalization."[384] In fact, participants in other drug programs have described doing the same.[385] Kaye writes that from the perspective of the program staff, it "may not matter whether or not those going through the program were true believers . . . [since] following the daily discipline is understood to have salutary effects in and of itself."[386]

Pedagogical court-ordered programs, such as domestic violence and anger management classes, can be understood as programs of moral education or moral communication, wherein the goal is to "persuade [the defendant] to use his freedom in a way consistent with the freedom of others."[387] That is, defendants can decide to change their behavior and to develop the strategies for doing so. Again, the participants must perform as required, attending the classes and doing the exercises, but do not need to show the court evidence of having accepted a moral message.

Finally, the services provided by the mandate, such as support in finding housing, finding employment, or attending school, tend to push participants into the formal labor market, where available jobs may require workers to "subordinate oneself within the lower tiers of the workforce."[388] Again, though, defendants need only participate, and can do so for reasons of their own.

This behavioral approach uses the testing mechanism to test the "shallow self."[389] The goal is to help create a "managerial self," one that can access a set of responses and behaviors in the face of high-risk situations, regardless of deeper beliefs or motivations.[390] The ATI Court aims to coerce defendants to perform certain actions and behaviors; it does not require them to show with

382. Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475, 487 (1968).
383. *Id.*
384. KAYE, *supra* note 94, at 162.
385. *Id.*
386. *Id.*
387. Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 112, 126 (1984).
388. KAYE, *supra* note 94, at 79.
389. *Id.* at 55.
390. *Id.* at 52.

sincerity that they think or feel any particular way about their crimes to be released from the mandate. One could imagine the state's reach creeping deeper in trying to rehabilitate "violent" defendants. Here, the ATI Court refrains. In contrast, an incarcerated person's application for release on parole involves a hearing where the applicant must authentically show remorse for the crime of conviction.[391] In ATI Court, experiences are imposed and assessed as a measure of internal change, rather than using, as parole boards do, folk heuristics to gauge the sincerity or depth of such change.

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Punishment in ATI Court, and thus punishment in general, cannot be cleanly attributed to rehabilitation or retribution—these concepts blur. In this case, the tangible markers for the duration of the mandate, the experiences of imposition, and the burden of self-transformation all exhibit both rehabilitation and retribution in ways that mimic and diverge from the punishment of prison.

IV. ATI, CRIMINAL JUSTICE, AND THE FUTURE

CJI staff and other stakeholders have voiced an ambition for ATI to become the default criminal justice response rather than the alternative.[392] This aspiration pitches the ATI Court as playing a potentially major role in the future of the criminal justice system. More data from the court is required to understand the capabilities of the model. This Part briefly explores how the ATI Court is situated within the evolving field of criminal justice, especially at a time when movements to abolish prisons, decarcerate, and employ alternative modes of responding to harm—including restorative justice and transformative justice—are taking hold.

A. THE SPECTER OF PRISON

The ATI Court is a reform—a reform of the reform that is the specialized court. Readers may wonder whether it constitutes a non-reformist reform.[393] An

391. *See, e.g.*, Nicholas Goldberg, *Column: Why Do Murderers Have to Show 'Remorse' to Be Granted Parole?*, L.A. TIMES (Jan. 24, 2022, 3:00 AM PST), https://www.latimes.com/opinion/story/2022-01-24/murderers-parole-remorse-sirhan; *see also* Kristen Bell, *A Reparative Approach to Parole-Release Decisions*, *in* RETHINKING PUNISHMENT IN THE ERA OF MASS INCARCERATION 162, 171–72 (Chris W. Suprenant ed., Routledge 2018) ("California lifer parole hearings are laden with . . . questions about whether a person recognizes the depth of her wrongdoing.").

392. *See infra* Part.II.

393. According to 20th Century French socialist André Gorz, whose work provided an early definition of the term, non-reformist reforms are defined as giving power to those who are oppressed within the system and thus opening the possibility for further change. ANDRE GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 41 (1967). Others have built on this idea, including Marbre Stahly-Butts and Amna A. Akbar. *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1552 (2022) ("A radical reform: (1) shrinks the system doing harm . . . (2) relies on modes of political, economic, and

exploration of how this court interacts with prison abolitionist work deserves full treatment in a future text. However, a responsible description of the ATI Court must situate it within the abolitionist conversation, which this Part aims, briefly, to do.

Working against the idea of ATI as a prison abolitionist project is the looming specter of prison. The court actors, especially the judge and prosecutors, describe the central premise of the ATI Court as depending on imprisonment to provide the ultimate threat compelling compliance.[394] Although this threat is rarely carried out—rarely even explicitly evoked in conversations about noncompliance—the prospect of prison still supplies the frame within which all the work happens. The threat of imprisonment makes the mandates enforceable.

But the threat of prison is not necessary to the ATI model. At the conceptual core of the model is the provision of services, with a focus on prosocial services, to people with intersecting needs. This service provision is currently housed within penal welfarism,[395] in the form of a traditional court and incarceration structure. But just as the ATI Court has largely moved away from the specialized court norm of jail sanctions for noncompliance, one can imagine an evolving institution ceasing to tether the provision of services to compliance compelled by an associated punishment system. CJI already offers the same services for free to participant-graduates and their networks.[396]

Currently, the penal welfarist organizational structure provides the connective tissue between welfarist government provision of services and people who need these services. The information gathered from the matching done through ATI Court could contribute to building a more robust social welfarist system by identifying areas of need, increasing access to information about providers, and forming relationships between providers and networks of clients. Eventually, all of this work could occur outside the penal system altogether.

As it currently operates, the ATI Court privileges the power of courts, is run by professionals and elites, and employs prevailing hierarchies and assumptions. At the same time, even within these frames, there are subtle ways in which the court diminishes or contests these traditional sources of power.

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social organization that contradict prevailing arrangements and gesture at new possibilities; (3) builds and shifts power into the hands of those directly impacted, who are often Black, brown, working class, and poor; (4) acknowledges and repairs past harm; and (5) improves, or at least does not harm, the material conditions of directly impacted people."); *see also* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007) (arguing that nonreformist reform requires efforts to create small changes over time as opposed to a single catalyst event); Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2527 (2023) (describing the basic formulation of non-reformist reform).

394. *See* Interview with Ellen Biben, *supra* note 161; Interview with Sherene Crawford, *supra* note 183.

395. *See infra* Part.I.

396. *See infra* Part.II.

Colloquies between defendants and the judge are exchanges, forms of negotiation and brokering, in which the judge is learning and considering, not only managing. Defendants push back,[397] and often the distorted narratives defense attorneys are typically required to construct are replaced by seemingly authentic reflections by defendants.[398]

Even quite literally, the ATI model is compatible with a world without prisons as we know them: that is, without prisons in use. One can imagine a prison that is uninhabited and used merely as a threat, a nuclear option, which exists but is almost an abstraction because it is too gruesome to use.

Setting aside the role of prison in the conceptual model, the reality of the ATI Court's work is abolitionist insofar as it loosens the restraints on the people it directly impacts—those who are more available to work toward political, economic, and social change. As it is currently used, the ATI Court shrinks the reach of the carceral and court systems.

Lessening contact with prisons and jails and lessening surveillance by law enforcement allows people to create, maintain, and strengthen the relationships essential for doing coalitional work and building power. Of course, people in prison organize and protest in forms that range from concerted uprisings and hunger strikes to actions responding to individual situations, such as flooding a floor of the prison to force attention to an individual's medical needs.[399] But prisons work against collective actions not only by their operations but by design.[400] Removing the constraints of prison is a significant way to allow organizing, including abolitionist organizing, to happen.[401]

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397. *See, e.g.*, *infra* Part.III (showing the defendant telling the court that the goal was created by "y'all"—that it wasn't his own goal).

398. *See, e.g.*, Evelyn Lia Malavé, *Distorted Narratives and the Treatment Program Complex*, 93 FORDHAM L. REV. 843, 849 (2024).

399. *See, e.g.*, DAN BERGER & TOUSSAINT LOSIER, RETHINKING THE AMERICAN PRISON MOVEMENT 3 (2018) (examining various movements and efforts by people in prison to challenge prison conditions and inequality). For histories of worker strikes and unionization, see, for example, Heather Ann Thompson, *Rethinking Working-Class Struggle Through the Lens of the Carceral State: Toward a Labor History of Inmates and Guards*, 8 LAB.: STUD. WORKING-CLASS HIST. 15, 21 (2011); Andrea C. Armstrong, *Racial Origins of Doctrines Limiting Prisoner Protest Speech*, 60 HOW. L.J. 221, 226 (2016); Note, *Striking the Right Balance: Toward a Better Understanding of Prison Strikes*, 132 HARV. L. REV. 1490, 1490 (2019). For an account of actions such as the flooding protest, see Sheri-Lynn Sunshine Kurisu, Carceral Civil Society: Citizenship and Communities in a U.S. Prison 88 (2018) (Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with the Illinois Digital Environment for Access to Learning and Scholarship).

400. *See, e.g.*, ORISANMI BURTON, TIP OF THE SPEAR: BLACK RADICALISM, PRISON REPRESSION, AND THE LONG ATTICA REVOLT 3 (2023).

401. For example, family members of incarcerated people have done important organizing with and on behalf of incarcerated loved ones. *See* Kay Gabriel, *Abolition as Method: Ruth Wilson Gilmore's* Abolition Geography *Is Written to Be Used*, DISSENT, Fall 2022, at 146.

B. RESTORATIVE JUSTICE AND TRANSFORMATIVE JUSTICE

The ATI Court is beginning to build a restorative justice aspect of its programming. In addition to social services, a small number of cases involve restorative justice practices as part of the mandate.[402] These typically involve direct communication between victims and defendants, mediated by a facilitator and often involving other people in the affected community. The process is designed to provide an opportunity for the defendant to acknowledge fault and make restitution to the victim through apology, agreed-upon material exchanges, and mutual new understandings.[403] The goal is for the defendant to be reintegrated into the community, with a renewed commitment to shared social norms.[404] In this sense, restorative justice engages with the deep self.

CJI runs restorative justice circles, which involve meetings between the defendant, the victim, other people close to either party, and a facilitator, where parties can come to a point of reconciliation.[405] Generally, participation in restorative justice must be voluntary on the part of the victim and the defendant.[406] Often, the timing is prohibitive: The victim may not be ready to face the issue, or they may have moved on.[407] As a result, the practice is not compatible with every crime. Only a small number of ATI cases thus far have employed restorative justice circles.[408]

Some argue that restorative practices only work when participation is voluntary and that state- or court-run processes are never truly voluntary. Others urge that the state at least ensure the process is available.[409] For the Court and the prosecutor's office, having the option of restorative justice processes produces a structured opportunity to involve and give voice to victims—for the victims to shape the defendants' engagement to a degree and to have their own process for healing.[410]

Transformative justice provides frameworks to consider the prevention of future harm[411] by exploring how interpersonal harm is "mirrored and reinforced

402. Telephone Interview with Joseph Barrett, *supra* note 154.

403. Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 3 ANN. REV. L. & SOC. SCI. 10.1, 10.2 (2007).

404. *Id.*

405. Telephone Interview with Joseph Barrett, *supra* note 154.

406. Lynn S. Branham, *The Overlooked Victim Right: According Victim-Survivors a Right of Access to Restorative Justice*, 98 DENV. L. REV. FORUM 1, 19 (2021).

407. Telephone Interview with Joseph Barrett, *supra* note 154.

408. *Id.*

409. Lode Walgrave, *Restoration in Youth Justice*, *in* WHY PUNISH? HOW MUCH? 319, 326 (Michael Tonry ed., 2011).

410. E-mail from Joseph Barrett, *supra* note 135.

411. MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 149 (2021).

by larger systems."[412] The more systemic work—on violence or misogyny—perhaps should not be taken on by the professionals who work in the court. Moreover, from a transformative justice perspective, the accountability mechanism should not rely on the state; instead, any mediator must derive her power from her relationships with the people involved.[413] Prison cannot be replaced with one institution but instead with a constellation of solutions.[414] Perhaps the ATI Court can provide the services, but the accountability mechanisms should be housed outside of the state-run court processes.

At the same time, some of the ATI Court's practices reflect a transformative justice-inflected worldview. Regardless of each individual's service plan, two of the three non-negotiable standards for graduation are having housing and having a source of financial stability. Rather than using an individualized skills-based requirement, the results-oriented framing recognizes the systemic nature of the problems of housing and employment. It puts the onus on CJI to connect defendants to the relevant social services and allows for solutions that do not depend on notions of individual competency: Defendants may live with relatives, for example, and derive financial stability from sources other than traditional work, including family support and student loans.

C. EXPANSION AND DECARCERATION

Whether the ATI Court model will contribute to decarceration, minimalism, or prison abolition depends on whether it will be used more widely, outside of Manhattan. Thus far it has not been. This Part discusses how the model might expand and the problems it might face in the process.

At the outset, specialized courts of all types, with their existing eligibility requirements, can adopt the improvements piloted by the ATI Court. They can minimize their use of jail sanctions, limit the length of the mandate, and limit the length of incarceration for those who fail. They can also reduce or eliminate their use of surveillance technologies. This way, they too can refrain from widening the net of carceral control.

Probation departments might also experiment with reducing or eliminating their use of surveillance technologies. This approach is not new; older iterations of probation emphasized the model's social worker role until its law enforcement role developed in the 1980s.[415] CJI's approach recalls the diversion movement of the 1960s and 1970s, which operated with or within probation but

412. *Id.*

413. Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 235 (2022).

414. *See, e.g.*, DAVIS, *supra* note 22, at 10.

415. *See infra* Part.I.

was heavily social work focused and emphasized its rehabilitative ends.[416] One key difference is that CJI, an established, well-resourced, and nationally recognized criminal justice think tank in New York City, might attract more highly educated and reform-minded talent than probation offices, though perhaps that would change if probation were to reorient away from its policing functions. Still, CJI can be nimble to develop high levels of expertise, fine-tune its work, and offer a more human-scale experience in part because of its unique position as a small and agile nongovernmental organization. A probation department might not be able to replicate CJI's work for all its probationers, but specialized courts that work with probation might be able to do so given their smaller caseloads.

Extending the purview of problem-solving courts to felonies and relaxing or removing eligibility requirements can also feasibly happen within existing institutional structures. The ATI Court evolved from specialized courts, and already, some existing specialized courts place no explicit bar on violent felonies.[417] While statutory change could also lead to the creation of such courts, bills tend to be more limited in scope, [418] and can unnecessarily limit experimentation.

Regardless of the avenue of creation, political feasibility is a major consideration. The ATI Court would benefit from promoting a public understanding that it takes a serious approach to serious crimes. Considering the public's response, expansion of existing problem-solving courts may be more feasible than legislative change. Another aspect of political feasibility concerns the role of the prosecutor. Some prosecutors' offices may not be willing partners. To circumvent this, a pre-plea model could be explored, allowing the court to admit defendants without the prosecutors' agreement—unlike the ATI Court's post-plea model that relies on prosecutorial approval.[419]

Logistical feasibility is another important consideration that could be prohibitive to expansion. Even in New York City and its five boroughs dense with service providers, a key limiting factor to the ATI Court's work is that the existing service landscape is incomplete and oversubscribed. The same could be true in other jurisdictions, and these service providers operate and are funded independently of the courts that might house ATI-like programs.

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416. *Id.*

417. *See, e.g.*, *Mental Health Court (R.I.S.E.)*, FRANKLIN CNTY., OHIO, CT. OF COMMON PLEAS, GEN. DIV., https://www.fccourts.org/503/Mental-Health-Court (last visited June 1, 2025).

418. *See, e.g.*, N.Y. CRIM. PROC. LAW § 216 (McKinney 2025) (providing judicial diversion for drug felonies).

419. *See, e.g.*, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT ON PROPOSED LEGISLATION BY THE CRIMINAL JUSTICE OPERATIONS COMMITTEE, CRIMINAL COURTS COMMITTEE, AND MASS INCARCERATION TASK FORCE: CREATING A FIRST-TIME FELONY DIVERSION COURT 3 (2020).

Although the cost of such a diversion court is less than the cost of incarceration,[420] a significant portion of the resources for the ATI Court were initially provided by the district attorney's office and now come from the state court system.[421] The work of this type court may save money for the state and impose costs on local and municipal courts and the non-profit sector, a structure that does not provide financial incentives for local courts to take up the project. On the other hand, by connecting participants to social services, the court leverages programming paid for by cities, states, and the federal government.[422] Again, from a financial standpoint, the most feasible way the ATI model might expand is through existing problem-solving courts, which have funding structures in place.

CONCLUSION

The Manhattan Felony Alternative-to-Incarceration Court provides a true alternative to incarceration, unlike older specialized courts and probation, which often expand carceral supervision by acting as alternatives to dismissal. The ATI Court achieves this through operational improvements that decrease the use of incarceration and by making the specialized court model available for crimes that would otherwise be punished with state prison sentences. It therefore transforms the genre of the specialized court from one defined by its former organizing principle—special issues with a causal nexus to criminal behavior—to one premised broadly on non-incarceration responses to crime.

Future work might evaluate the ATI Court's reliance on the logics and norms of the specialized court, especially drug courts from which it evolved. In the context of responding to serious and violent crimes, the breadth and intensity of drug testing as well as the para-racial premise of lifestyle transformation deserve study. Moreover, prosecutorial and judicial discretion have long led to racial disparities. Future research and future versions of this court might also explore ways to cabin both.

Future research should examine the design, implementation, and results of the ATI Court. The restorative practices and relationship to transformative justice movements deserve attention. Additional analysis could explore the role

420. *See, e.g.*, KAYE, *supra* note 94, at 10 (discussing cost savings of using drug court). New York state spends around $115,000 a year to incarcerate each person. Jullian Harris-Calvin, Sebastian Solomon, Benjamin Heller & Brian King, *The Cost of Incarceration in New York State*, THE VERA INSTITUTE (Oct. 31, 2022), https://www.vera.org/the-cost-of-incarceration-in-new-york-state. A back-of-the-envelope calculation estimates the costs to CJI to be around $2 million a year; a conservative estimate of service is that in a year the organization serves something in the order of 100 people—this would mean the cost is roughly $20,000 per person. Telephone Interview with Joseph Barrett, *supra* note 142.

421. *See infra* Part.II.

422. KAYE, *supra* note 94, at 14–15 (critiquing the entrenchment of what Loïc Wacquant calls the "carceral-assistential net").

of victims in the process and the role of non-profit organizations and public-private partnerships in administering the programming. There is also the question of who should decide the nature of the sanction or mandate. If other jurisdictions do take up the ATI model, research about factors contributing to or hindering expansion, such as public response, would be valuable. And, of course, empirical analysis of defendants' life outcomes is key.

The ATI Court expands future possibilities for the criminal sanctioning system. It shows that serious and violent crimes for which incarceration is taken for granted can instead be viably addressed by providing community-based services. A pressing question is how a state can and should respond to serious harm in an abolitionist world. This court provides lessons that help to grapple more concretely with those questions.

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