NOTES

THE OUTWARD-FACING COURTROOM: A NATURAL LAW AND INTERPRETIVE APPROACH TO JUDICIAL LEADERSHIP IN REENTRY COURT SETTINGS

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Some wore construction vests, others plaid flannels, and one wore a bandana. Tattoos were a common theme. They had come from work, because even court dates did not guarantee a day off. When they were asked to describe their occupations, they were grueling: railroad and construction work. Some of them still had on vests striped with reflective tape. And above all, hanging in the air was an unspoken question: how many times had these men been in a courtroom before?

Maybe they'd even been in this courtroom.

But mercifully lacking were the green jumpsuits, the jangle of chains, and the hovering presence of two probation officers to a man. These men filed into the jury box, not the defendant's seat. They looked sober, but not downtrodden.

Only the judge remained in an unchanged position, the same seat raised above everyone else at the same height as always, treated with the same perennial deference. And, as always, everyone stood when he entered the room.

But what unfolds next, in the Northern District of New York, and what unfolds in other reentry court proceedings across the country, bears little resemblance to a typical hearing or sentencing. In fact, it may be one of the most promising harbingers of change in a system

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that has too often made judges into grim, omniscient figures who have little involvement in the possibility of felons' recovery. Judges used to have a more hands-on involvement with the felons they convicted, modifying their sentences upon the prisoner's petition,[1] but the practice fell away when "law and order" motivations from the last few decades of the twentieth century led to a more finalistic, draconian approach to sentencing, imprisonment, and release.[2] During a twenty-year period, incarceration rates in the United States skyrocketed, with the number of American prisoners increasing fourfold.[3] Since the vast majority of incarcerated prisoners are eventually released, the number of felons reentering their communities were presented with challenges and stigmas at every turn, even though being a felon had become much more statistically probable.[4] Largely, this trend can be traced to a change in handling drug-related offenses, specifically the now-infamous scheme of New York Governor Nelson Rockefeller's policy, which imposed lengthy mandatory sentences for even relatively minor crimes of drug possession.[5] Rockefeller's plan for an offensive attack on drugs was soon adopted and modeled by other states and by the federal government, effectually reshaping the incarceration system across the United States.[6]

In the face of such a grim reality, there has been recent pushback.[7] Reentry courts and programs, modeled after drug courts,[8] are a potential support that has begun to develop in the past few years.[9] Central to the drug court model is the role of "judge as the leader."[10] This aspect of continuity—for in court proceedings, the judge's power is recognized and omnipresent[11]—suggests the possibility that there is something indispensable about the judge *as* judge. It is a role which, though sometimes weaponized against criminal defendants,

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[1] *See* Daniel M. Fetsco, *Reentry Courts: An Emerging Use of Judicial Resources in the Struggle to Reduce the Recidivism of Released Offenders*, 13 WYO. L. REV. 591, 592 (2013).

[2] Fetsco, *supra* note 1, at 592.

[3] Michael Hallett, *Reentry to What? Theorizing Prisoner Entry in the Jobless Future*, 20 CRITICAL CRIMINOLOGY 213, 214 (2012).

[4] *See id.*

[5] Brian Mann, *The Drug Laws That Change How We Punish*, NPR (Feb. 14, 2013), http://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish.

[6] *Id.*

[7] *See* Peter A. Mancuso, Comment, *Resentencing After the "Fall" of Rockefeller: The Failure of The Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York's Rockefeller Drug Laws and the Compromise of 2009*, 73 ALB. L. REV. 1535, 1536 (2010).

[8] Fetsco, *supra* note 1, at 592.

[9] *See id.*

[10] *Id.*

[11] *See id.* at 594–95.

could also be used to their benefit.[12]

Widening the focus on the issue as a means of better exploring it, there are philosophical underpinnings to the judge's role in rehabilitative contexts that can be used in continuing attempts to reshape the incarceration and post-incarceration interactions between courts and felons.

Why were those men in the Northern District courthouse that day? It was the same sort of reentry program that has been developing around the country.[13] The men were meeting with a judge to determine if they had earned the next credit (out of a possible twelve) that would potentially shorten their probation sentences.[14] To earn these credits, they had to do more than lose a few hours at work. Their personal achievement goals ranged from taking college courses, to connecting with absent or estranged family members, to finally earning a driver's license. The paths they were following were far from easy, and every day they were required to check in with their probation officers.[15] These were men who had a faulty track record when it came to interacting with traditional authority figures.[16] Judges on the bench had never held much promise for them.

This program might be only a small step to changing that. But most compelling of all to witness was a filament of the whole experience—the interaction between the judge and these reentering men was utterly unlike the typical recorded exchanges that end in guilty pleas and acknowledgment of sentences. Instead of dispensing a grim sentence, the judge asked them about their families, their jobs, and their accomplishments. The power disparity was still keenly present, but "justice" felt less like a death knell.

My argument in this paper is that a Natural Law and Interpretive approach derived from Thomas Aquinas, Lon Fuller, and Ronald Dworkin supports increasing direct judicial involvement as a crucial element in rehabilitation and reentry programs for drug offenders. The significance of the judge's authority role can afford indispensable support to this countercultural approach and can allow offenders an opportunity to interact with the obligatory aspect of law as a way of reaching attainable, positive goals.

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[12] *See id.* at 592.

[13] *See, e.g.*, *Offender Reentry*, U.S. PROB. AND PRETRIAL SERVS., N. DIST. OF N.Y., http://www.nynp.uscourts.gov/offender-reentry (last visited Sept. 23, 2017).

[14] *Id.*

[15] *See id.*; ADMIN. OFFICE OF THE U.S. COURTS, PROB. AND PRETRIAL SERVS. OFFICE: OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 14, 15 (Nov. 2016).

[16] *See* Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the "Reentry Court" Concept from a Strengths-based Perspective*, 4 W. CRIMINOLOGY REV. 91, 94 (2003).

I. PERSPECTIVES ON THE JUDICIAL ROLE AND REHABILITATION

A. Natural Law or Legal Positivism?

Thomas Aquinas,[17] living as he did in the thirteenth century, likely never considered judicial roles as they are known to us today.[18] Nonetheless, his role as the progenitor of many precepts of Natural Law provides insight into the philosophical basis for judicial leadership as it connects to larger concepts of equitability and goodness.[19] Aquinas recognized the fundamental "uncertainty of human judgments," and supplied an overarching, attainable goodness and justice inherent in nature and creation.[20] Some of his assessments seem to dance around the authority of judge-like figures, in his discussion of positive law[21] and his statement that "laws are said to be just . . . from the lawgiver, namely when the law passed does not exceed the lawgiver's authority."[22] Therefore, Aquinas seems to acknowledge *some* judicial role. And in so doing, his understanding of the universality of justice reflected judiciousness on the part of law-makers and enforcers. Aquinas's concern was whether human ("positive") law comported with what he described as "divine" and "eternal" law—the underlying truths of existence upon which God had shaped the physical and relational universe.[23] To distill Aquinas's analysis to one that is only relevant in a religious context is to miss the suggested empowerment it gives to each individual's experience and interaction with fellow humankind and the mystery of "law." Could not Aquinas's understanding of "divine law" be read to mean that there are certain truths and common values which individuals can and should protect and model? Certainly there are tenets and themes to the human practice of

[17] ST. THOMAS AQUINAS, THE TREATISE ON LAW (R.J. Henle trans., University of Notre Dame Press 1993), *in* STEPHEN E. GOTTLIEB ET AL., JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS 160 (2015) [hereinafter JURISPRUDENCE CASES AND MATERIALS]. Aquinas saw law as divided into four categories: eternal, natural, divine, and human or positive law. *Id.* at 158. He considered God's wisdom to be inherent in the formation of just laws; tyrannical laws, in contrast, were mere "perversion[s]." *Id.* at 161.

[18] *See id.* at 158 (introducing Aquinas as a leader in Natural Law theory).

[19] *See id.*

[20] *Id.* at 161.

[21] *See id.* at 162–63 (discussing the framing and creation of law for the human community).

[22] *Id.* at 163. Aquinas's depiction of the imperfect and limited "human" law found a supportive symbiosis in the "divine" law he frequently refers to, which could be read in the modern context as a warning against relying on legal moralizing to the extent attempted by harsh schemes that seek to "forbid all evil deeds." *Id.* at 161.

[23] *Id.* at 161–62.

developing legal systems which go back to ancient times and are reflected in our laws today: consider, for example, considerations of fairness, truth, and the need for evidence in the "Laws of Hammurabi," a Mesopotamian text from 1792 B.C.[24] The harshest recorded penalties in Hammurabi's time were linked to the failure of accusers to provide evidence against the accused.[25] This prospect of false charges and unjust treatment of innocent individuals, even long ago, incites particular horror. Though the texts of Hammurabi focused on malicious accusations, underlying this ancient "statute" was the idea that law should not cause unnecessary or unearned suffering.[26] Aquinas reflects this in his admonition that legal oppression lacked any obligatory moral power.[27] Again, though Aquinas does not explicitly describe a judicial authority figure, the need for such a leader is no great stretch. Who else would weigh the dangers of unjust accusers—even if, or maybe especially if, unjust accusations are developed by unfair weighting in the legal system? Fixing a judicial leader in the reentry structure is particularly necessary to bridge the gap for those who are less inclined towards the "divine," religious aspects of Aquinas's theory, and who are therefore left unsatisfied by Aquinas's promise that these unjust laws are without binding merit.[28]

What, therefore, could this mean for the modern era? What would Aquinas say to judges? For one thing, Aquinas would likely hold that judges are not invested with power exceeding reason.[29] Judges, as members of humankind, are bound by the same necessary alignment to "the common well-being" which alone can obligate individuals.[30] That concern for common well-being should not end with a conviction, or a prison sentence served. Indeed, it is arguable that newly released felons are most in need of being redirected towards participating in that search for common wellbeing of humankind.[31] Punishment may awaken fear of law, but not appreciation of it. Infusing a legal or quasi-legal proceeding with at least some degree

[24] MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR (Piotr Michalowski ed., 1995), *in* JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 13.

[25] *Id.* ("If a man accuses another man and charges him with homicide but cannot bring proof against him, his accuser shall be killed. . . . If a man comes forward to give false testimony in a case but cannot bring evidence for his accusation, if that case involves a capital offense, that man shall be killed.").

[26] *See id.*

[27] *See* AQUINAS, *supra* note 17, at 163.

[28] *See id.* at 164.

[29] *See id.* at 165.

[30] *Id.* at 164.

[31] *See id.*

of mercy and mentorship at least sketches out a structural shift that could change views on the law.

But it is not merely those who feel the consequences of the system who can be influenced by procedural changes motivated by these philosophical tenets. Aquinas's Natural Law theory can be synthesized in his own words: "Law has as much force as it has justice."[32] Faced with unjust laws, or unjust abandonment of those who have suffered from the application of law, a Natural Law perspective can lend a great deal of insight into the road to rehabilitation not only of individuals, but also of the system which engages offenders whose crimes have been made reprehensible by legislative scheme alone.[33]

More than one philosophical theory can be discussed in the battle between harsh punitive measures and rehabilitative efforts. It would be an unfair assessment to claim that Legal Positivism, Natural Law theory's ready opponent,[34] has no motivation for reform.[35] It is true that Legal Positivists such as John Austin considered law for what it was, not what it ought to be: "The existence of law is one thing," said Austin; "its merit or demerit is another. . . . A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation."[36] But later theorists such as H.L.A. Hart recognized nuances, issues of the "penumbra" rather than the core, which suggested at least some inclusion of applicative reasoning if not outright interpretation.[37] The penumbra describes the existence of some problems that are not clearly within or without the scope of a law's meaning; in other words, what exactly is covered by a law's specific terms?[38] One example provided by Hart was the breadth of the word "vehicle."[39] The penumbral issue was whether a newer technological innovation, the airplane, was incorporated in the term.[40] Therefore, it was not merely an issue of what the term's creator meant, but also those who had to apply it to changing social understandings.

This take on Legal Positivism could not only suggest that existing

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[32] *Id.* at 162.

[33] *See id.* at 162–63.

[34] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), *reprinted in* JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 118.

[35] *Id.*

[36] *Id.* at 119.

[37] *Id.* at 125.

[38] *See id.*

[39] *Id.* at 127.

[40] *Id.*

laws need not be applied blindly, but also advocates for discretion which the Rockefeller drug laws failed to allow.[41] In an effort to deter drug offenses in the tumultuous culture shifts of the 1970s, the Rockefeller drug laws made incarceration mandatory for drug offenders, regardless of the level of offense.[42] Here, there was no acknowledgment of a "penumbra"—that despite the harms of drug trafficking and use, some of those swept up in the system were a combination of perpetrator and victim.[43] Labeling them all as "criminals" was only statutorily convenient; as evidenced by the immense increase of imprisoned offenders and systemic burden, nothing else was particularly convenient about it.[44]

Legal Positivists, while acknowledging these laws for what they *are*, not what they *ought to be*,[45] can still find a way to critique them. Indeed, Legal Positivists might argue that the very reason that such a harsh, absolutist measure existed was because of too much infusion of moral imperatives into the administration of law. Hart quotes German philosopher Gustav Radbruch's cautioning words: "Law is not morality; do not let it supplant morality."[46] By this argument, it may be that in harnessing laws to wage a war on drugs, lawmakers fashioned a cruel reality based on what they viewed as morality, or at least, an overriding moral prohibition on the proliferation of drug usage and trafficking.[47] The scheme rested on the premise "that harsh and certain punishment would deter and reduce drug abuse and related crime."[48] Its effects instead, as previously touched upon: increased incarceration rates, and sentence lengths that, in some cases, equaled those usually linked to much harsher crimes.[49]

If misguided moral imperialists disregarded the human element of

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[41] *See* Lisa R. Nakdai, *Are New York's Rockefeller Drug Laws Killing the Messenger for the Sake of the Message?*, 30 HOFSTRA L. REV. 557, 558 (2001) (providing a thorough analysis the Rockefeller drug laws, their enactment, conflicting perspectives on their effectiveness and what possible future alternatives might be).

[42] *Id.*

[43] *Id.* at 565.

[44] *See id.* at 560–61.

[45] *See* Hart, *supra* note 34, at 118.

[46] Hart, *supra* note 34, at 130, 132.

[47] James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 610 (1990) ("There are two main bases for supporting prohibition or opposing it—the moral and the practical. 'Prohibitionists' support drug prohibition because they believe that drug use is immoral and that the state should enforce this rule of morality.").

[48] Susan Herman, *Measuring Culpability by Measuring Drugs? Three Reasons to Re-evaluate the Rockefeller Drug Laws*, 63 ALB. L. REV. 777, 777 (2000).

[49] Fetsco, *supra* note 1, at 592; Madison Gray, *A Brief History of New York's Rockefeller Drug Laws*, TIME (Apr. 2, 2009), http://content.time.com/time/nation/article/0,8599,1888864,00.html.

these schemes, however, Natural Law may be the better philosophical route to recovery than Legal Positivism. Grounding a troubled system in a search for truly moral guidance, searching for moral leadership—these are questions to which Natural Law theory at least attempts to answer[50] Again, the danger is that the strict punitive measures of the system may have colored the whole system as nothing but an oppressor in the minds of those who, having served their time, could now benefit from the system's help.[51]

There has been further development in the field since Aquinas's establishment that law, to be truly law, must be framed by justice.[52] A more modern, procedural approach to Natural Law theory comes from Lon Fuller.[53] Fuller believed that law could not be explained without some understanding of the *obligation to obey law*, which he posited necessarily included a moral element.[54] Fuller writes:

> If we felt that the law itself was our safest refuge, would it not be because even in the most perverted regimes there is a certain hesitancy about writing cruelties, intolerances, and inhumanities into law? And is it not clear that this hesitancy itself derives, not from a separation of law and morals, but precisely from an identification of law with those demands of morality that are the most urgent and the most obviously justifiable, which no man need be ashamed to profess?[55]

If guided by the right hands, the "demands of morality" can perhaps stem the tide of "cruelties, intolerances, and inhumanities" which have, despite philosophical objection, been written into law.[56] As established, law is no safe refuge for individuals who have come out on the wrong side of the system and sat in the wrong seat in the courtroom.[57] But if anyone is safe, and empowered, in the courtroom—and in the context of law—it is the judge.[58] Fuller believed that "we must not lose order itself in the attempt to make it

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[50] *See* JURISPRUDENCE CASES AND MATERIALS, *supra* note 17, at 157.

[51] *See* Fetsco, *supra* note 1, at 592–93.

[52] *See* AQUINAS, *supra* note 17, at 162.

[53] *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) *in* JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 176. Fuller developed eight principles, discussed later in this paper, that were viewed by many as "captur[ing] the essence of the rule of law." Colleen Murphy, *Lon Fuller and the Moral Value of the Rule of Law*, 24 L. & PHIL. 239, 240–41 (2005).

[54] Fuller, *supra* note 53, at 179.

[55] *Id.* at 181.

[56] *See id.*

[57] *See* Nakdai, *supra* note 41, at 558.

[58] *See* Fetsco, *supra* note 1, at 594–95.

good."[59] The judicial role, more fully explored, could harness some of the same potency that placed offenders behind bars to create navigable paths in the world they now reenter. Attorney General Janet Reno, an early advocate for drug courts and the like, acknowledged that "[t]here is something magic about [the role of] a judge."[60] Why is the judge so indispensable to the reconstruction of justice in a system that has punished too harshly for too long? In speaking of one of the most infamous of "evil" legal systems, the Nazi state, Fuller noted that perversions of the legal system *itself*, not always some outside influence, are at fault.[61] "The exploitation of legal forms started cautiously and became bolder as power was consolidated."[62]

Perhaps the Rockefeller drug laws and other strict penalization structures began as an attempt to rule with a firm hand; indeed, Governor Rockefeller began by authoring drug rehabilitation programs, but soon submitted to political pressure for a more punitive approach.[63] As these themes of "strike-out" rules got traction in the 1970s and 1980s, discretion was taken from judges at the federal and state level as sentence guidelines were mandated.[64] Because the "get-tough-on-crime" model had little if any room for judicial discretion, the one role that could most prominently temper justice with mercy was prevented from doing so by force of law.[65] To some level, this may have been intentional, because judicial involvement had been much more prominent in the prior system, which had been judged to be ineffective in hindering criminal activity.[66] In hindsight, the standards were shocking: a drug offense could earn a sentence equal to that meted out for a homicide.[67] Furthermore, attempts at reforms in the mid-2000s were arguably superficial; they shifted sentencing guidelines and the gravity of elements, but failed to take into consideration that the entire motivation behind the laws was not one designed for repair, only for retribution.[68]

Fuller had no interest in abandoning the framework of law for some

[59] Fuller, *supra* note 53, at 192.
[60] Fetsco, *supra* note 1, at 594.
[61] Fuller, *supra* note 53, at 193.
[62] *Id.*
[63] *See* Gray, *supra* note 49.
[64] *Id.*
[65] Fetsco, *supra* note 1, at 592.
[66] *See id.*
[67] Spiros A. Tsimbinos, *Is it Time to Change the Rockefeller Drug Laws?*, 13 J. OF CIV. RTS. & ECON. DEV. 613, 617 (1999).
[68] *See* Mancuso, *supra* note 7, at 1536–37.

sort of morally driven free-flight, as legal positivists might have feared. Instead, he believed that law has a list of requirements that ought to be met for it to truly be a cognizable "law."[69] Inherent to this definition of "internal morality" were certain procedural precepts: minimal retroactive laws, for example, and more general concerns—that the citizenry should know the rules that bound them.[70] Thus, Fuller's understanding of law, as a sort of procedural expression of morality and justice, encompasses statutory schemes: but would the Rockefeller drug laws and similarly stringent measures satisfy his test? Likely not. One of the final items on Fuller's list was that "laws should not require conduct beyond the abilities of those affected."[71] A possible reading of this could be that laws must be self-contained, but it could also indicate that laws should not unfairly over-punish, even if it is in the interest of achieving some higher aspiration. If laws exist for the benefit and guidance of those whom the law affects, it follows that laws that harm the governed fail.[72]

Fuller and Aquinas, centuries apart, both had standards for laws—and in some ways their standards are an unabashed establishment of law as it *ought to be*.[73] But the trend of reentry courts in recent years as a response to the unforgiving legacy of the sanction-driven War on Drugs is a hopeful transformation.[74] The pendulum swings back towards judicial discretion and involvement in these courts, and with good effect: drug and other reentry courts, with the increased involvement of judges and other officials, showed marked improvement in former offenders' lives.[75] Re-arrest rates lowered, participants' addictions improved, and they were able to access more opportunities.[76] Early studies were particularly small, but the trend was not one of recidivism or of surly criminals finding loopholes in a too-lenient system.[77] Addressing the needs of offenders, taking concern for their future after their lives had been irrevocably changed—these shifting perspectives seemed to accomplish something that locking them up for years, even decades, had not.[78]

Is that really a surprise? Reformations need leaders. As noted,

[69] JURISPRUDENCE CASES AND MATERIALS, *supra* note 17, at 199.
[70] *Id.*
[71] *Id.*
[72] *See id.*
[73] *Id.* at 158, 199.
[74] *See* Fetsco, *supra* note 1, at 613.
[75] *See id.* at 598–600.
[76] *Id.*
[77] *Id.*
[78] *See id.* (discussing promising trends from studies of various reentry courts).

judges are in a prime position to lead, and their involvement in the reentry court model has been effective. But as for sketching out a philosophical framework for the necessity of judicial integration, Natural Law theorists such as Aquinas and Fuller leave frustratingly sparse accounts: Aquinas is hindered by a long lapse of time,[79] and Fuller's focus speaks more to the development of law than its judicial application.[80] Reading between the lines is much less necessary in a modified theorist's work: Ronald Dworkin's Interpretive theory.[81]

B. Dworkin, Interpretive Theory, and the Judge's Role

Ronald Dworkin, one of the foremost legal theorists of his time, sometimes characterized his Interpretive theory as falling under Natural Law, but it is more often seen as a third possibility in the eternal Natural Law/Legal Positivism debate that has characterized much of the philosophy of jurisprudence.[82] At first glance, Dworkin's Interpretive theory might seem to discourage the judicial discretion inherent in a reentry court model.[83] Dworkin's Interpretive theory "argued for the existence of legal principles . . . by reference to legal practice," and thus appears on the surface to reject the ability of judges to change and develop law.[84] In 2012, when Chief Justice John Roberts was the swing vote on the controversial "Obamacare" case,[85] Dworkin wrote an analysis for *The New York Review of Books*.[86] Here, Dworkin questions why Roberts abandoned his usual "right-wing" tendencies to undercut legislative schemes for the purpose of serving conservative principles—a track record of which Dworkin seems to disapprove.[87] How, then, could Dworkin's theory support rejection of a pervasive policy expressed through state and federal legislative schemes, particularly when the very existence of reentry judges is not a system overhaul, but an alternative response after the fact?

Dworkin believed that the "the purpose of law is to constrain or justify the exercise of government power."[88] Dworkin disapproved of

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[79] JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 158.
[80] *See id.* at 199.
[81] *Id.* at 209 (introducing Ronald Dworkin's Interpretive theory).
[82] *Id.*
[83] *See id.* at 209–10.
[84] *Id.* at 210.
[85] Ronald Dworkin, *Why Did Roberts Change His Mind?*, N.Y. REV. OF BOOKS (July 9, 2012), http://www.nybooks.com/daily/2012/07/09/why-did-roberts-change-his-mind/.
[86] *Id.*
[87] *Id.*
[88] JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 211.

the kind of rogue judging which would lead to abandonment of legal precedent in favor of legally ungrounded moral principles.[89] However, his Interpretive approach arguably allows for and even requires more powerful and precise judicial discretion than other philosophies.[90] The constraints that he deemed necessary operations of law are guided by the hand of the judge, as evidenced by "landmark" cases that overturn even long-standing legal precedent.[91] In these cases, Dworkin posited that the judges were not being rebellious or unfaithful to their duties; rather they were extracting implicit principles of justice and law and being faithful to them.[92] Dworkin viewed this in contrast to the actions of judges who bent the rules to suit their individual political persuasion: in a biting critique of some members of the Supreme Court, he said:

> [J]ustices must interpret those clauses by trying to find principles of political morality that explain and justify the text and the past history of its application. They will inevitably disagree about which principles best satisfy that test, and they will inevitably be influenced, in making that judgment, by their own sense of what a good constitution would provide. But that does not mean that the justices are free to interpret the abstract clauses of the Constitution to match their own political convictions, whatever these are.[93]

Extrapolating this sentiment to other lawmakers, Dworkin would have no doubt disapproved of overreaching attempts by anti-drug political leaders to aggrandize political aims by dramatic sentencing regimes. And, as the pendulum swings back in the direction of rehabilitative measures, judges seeking to steer away from draconian precedents are supported by Dworkin's quest for "a coherent conception of justice and fairness."[94] This conception, demanding implicit consistency and consideration of long-standing fundamental precepts, offers no support for a colossal redirection of a faction of the criminal justice system, predicated on a contemporaneous cultural phenomenon. Nor would Dworkin have been concerned with the

[89] *Id.* at 210.
[90] *See id.* at 211.
[91] *Id.* at 210.
[92] *See Id.*
[93] Ronald Dworkin, *Bad Arguments: The Roberts Court & Religious Schools*, N.Y. REV. OF BOOKS, (Apr. 26, 2011), http://www.nybooks.com/daily/2011/04/26/bad-arguments-roberts-court-religious-schools/ (criticizing the conservative wing of the Supreme Court for focusing on an insupportable, allegedly textual reading of the Constitution, despite the abstract nature of key Constitutional provisions).
[94] *See* JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 212.

infusion of philosophical underpinnings in judicial decision-making; he believed that the "jurisprudential stance is implied in every legal dispute settled."[95]

Of course, Dworkin's conception of the role of judge *does* revolve around the dispute context, and as evidenced by his writings on the Supreme Court, it typically looked to the most hallowed halls of precedent.[96] Reentry courts are a humbler, subtler sort of revolution. As of 2011, the Center for Court Innovation reported only a few dozen such courts across the country (more in the state than federal system),[97] and noted that in 2010, the U.S. Department of Justice's Bureau of Justice Assistance had sponsored a review of the courts' efforts.[98] The courts are modeled after drug courts, but reentry courts are different.[99] The courts don't overhaul the system; their existence cannot expunge harsh sentencing guidelines. They are anomalies, in a way: courts that exist to lead people back into society, not back into prison.[100]

Is this a reach for the judicial role outlined by Dworkin? After all, Dworkin would require an implicit jurisprudential principle that could be applied to explain an unusual outcome for a case.[101] What about an unusual response to an existing, expansive process?

II. MOTIVATION AND MECHANICS OF REENTRY COURTS

A. Purpose and Design

The implicit purpose underlying the formation of reentry courts seems to temper justice with mercy. The traits of judges in these courts are important; Judge Jeffrey Tauber wrote a manual of sorts for "community" court judges that provides analogous guidance.[102] It

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[95] *Id.* at 214.

[96] *See*, Dworkin, *supra* note 85; Dworkin, *supra* note 93 (providing two examples of his Supreme Court analyses).

[97] ROBERT V. WOLF, REENTRY COURTS: LOOKING AHEAD 1 (2011). Wolf is the Director of Communications at the Center for Court Innovation, which published this report. *Staff*, CTR. FOR COURT INNOVATION, http://www.courtinnovation.org/staff (last visited Sept. 26, 2017). The Center is a New York-based non-profit organization dedicated to implementing creative solutions and approaches in American courts. *See Who We Are*, CTR. FOR COURT INNOVATION, http://www.courtinnovation.org/who-we-are. (last visited Sept. 26, 2017).

[98] WOLF, *supra* note 97, at 1.

[99] *Id.* at 9.

[100] *Id.*

[101] *See* JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 210.

[102] *See* JEFFREY TAUBER, THE ROLE OF THE JUDGE IN COMMUNITY-COURT, REENTRY CT. SOLUTIONS 2 (Nov. 2, 2009), http://www.reentrycourtsolutions.com/wp-content/uploads/2009/10/The-Role-of-the-Judge-in-Community-Court.pdf (discussing community-based courts,

is not enough for the judge to act as a typical leader, Tauber says.[103] It is not enough for the judge to fulfill his or her long-standing role, merely dispensing justice—in drug courts or other community-based courts, judges must actually *want* to be there.[104] As already established, the very essence of a reentry court reverses the purpose and process that is taking place.[105] Tauber characterizes the judge in such a court not only as a decision-maker, but also as "communicator," "problem-solver," "community leader," and "institution builder."[106]

The last tenet is an intriguing one, reflecting again how countercultural reentry courts can be, at least when the culture in question has been shaped by the legacy of making all offenders in a category "hardened criminals" by strict mandatory sentences.[107] Tauber points out that community courts introduce community scrutiny, an institutional burden, and much more hands-on involvement, none of which has inherent appeal for judges.[108] However, this concern over the prospect of common popularity is exactly what indicates the indispensable strength of a judge who willingly takes on this weighty charge. Reentry courts don't fix a broken system; their goal is to pick up the pieces.[109] As Tauber advocates, this still-developing, often thankless role needs motivated leaders.[110]

The Center for Court Innovation's 2011 report includes some important findings on how reentry courts and the programs they sponsor can be made most effective.[111] Of primary importance is making a substantial presence in the participants' lives.[112] The report recommended that the program take up between forty and seventy percent of the individual's time.[113] This suggestion alone

which have typically encompassed drug courts but are also instructive on the newer trend of reentry courts).

[103] *See id.* at 3 ("In the beginning, it was assumed that one needed charisma to be a good drug court judge. And there was reason for that belief, as some of the original judges were larger than life figures. In retrospect, we know that a good drug court judge has a passion for fixing broken lives and broken court systems, and the ability to help create drug court communities that support the participant's sobriety.").

[104] *Id.*

[105] *See* Fetsco, *supra* note 1, at 592.

[106] TAUBER, *supra* note 102, at 3.

[107] *See* Mann, *supra* note 5.

[108] TAUBER, *supra* note 102, at 13.

[109] *See* Fetsco, *supra* note 1, at 593.

[110] TAUBER, *supra* note 102, at 11, 15.

[111] WOLF, *supra* note 97, at 3–4.

[112] *Id.* at 5.

[113] *Id.* ("In other words, 40 to 70 percent of their time, they're getting their reintegration,

indicates that reentry courts are not about handing former felons a punch-card and sending them on their way; indeed, such a system would never succeed.[114] The whole purpose of having a judge in a mentoring leadership role, coordinating with other administrators, is to create a meaningful vehicle for community reentry.[115] The Center recounted one participant's experience—in fact, the first female graduate at the Harlem Reentry Court.[116] This reentry court was averaging about eighty cases annually since its inception in 2001;[117] "Debra" was one successful case.[118] In her description of her experiences in the reentry program, she echoed some of the same themes that the Center emphasizes: for example, she relied on a support network of individuals including the judge, her probation officer, and social workers.[119] Debra faced struggles, however, in working with a program that wasn't always attuned to her needs.[120] "[T]he judge and I [were arguing]," Debra said, "because she really didn't understand that my job was really important to me. . . . [S]he's telling me, what is more important to you, the program or the job? And I'm telling her, well[,] my job is more important to me."[121] This tension indicates how important it is to have a judge who will listen, and who recognizes that the strictly implemented authority may be counterproductive. One reentry court judge stated that "change[,] not perfection" is the end goal of the reentry program.[122] Debra's judge recognized this, and the two reached a compromise that allowed Debra to keep her job and provide for her aging mother while also participating in a drug rehabilitation program, as the judge wished.[123]

Balancing supervision presents its own challenges; on the one hand, supervision is necessary because self-motivation levels are low; on the other, too much supervision coupled with too-harsh consequences leads to high revocation numbers.[124] The Center

treatment-oriented job training services . . . [The] worst thing you do is give them . . . a referral card when they leave prison and tell them they really should get some service.").

[114] *See id.* at 5.

[115] *See id.*

[116] *Harlem Reentry Court—One Parolee's Experience*, CTR. FOR COURT INNOVATION, http://www.courtinnovation.org/research/harlem-reentry-court-%E2%80%93-one-parolee%E2%80%99s-experience (last visited Sept. 27, 2017) [hereinafter *Harlem Reentry Court*].

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] WOLF, *supra* note 98, at 12–13.

[123] *Harlem Reentry Court*, *supra* note 116.

[124] *See* WOLF, *supra* note 98, at 3.

recommended a gradation of consequences, emphasizing accountability, not inevitability.[125] Introducing a gradation of consequences and warnings that doesn't automatically move towards revocation is important because increased revocation rates have been one of the negative outcomes revealed by studies of reentry courts.[126] But though the studies conducted were necessarily small-scale, it is worth noting again that results reported throughout the mid-2000s showed some promising trends.[127] In several states (New York, Oregon, Massachusetts, among others),[128] future criminal activity and re-arrest rates were lowered.[129] The participants also showed signs of better decision-making and had less of a chance of relapsing into drug use.[130] Again, these findings were small-scale, sometimes only marginal and preliminary.[131] Since it is responsive to a system fraught with problems, it may not be a "solution" at all in the general meaning of the word. There has been criticism of reentry courts, in part because they are so limited in number and may not represent (at least, thus far) a substantial aid to the vast number of felons reentering society.[132] Reentry programs can pick and choose those eligible to take part in them, frequently excluding, for example, violent offenders.[133] Often, these issues are state-to-state[134]—the Michigan program, for example, excludes not only violent offenders but any drug offenses that involve distribution.[135] The entire purpose of helping offenders re-acclimate to society is muddled if the court system devotes itself to what is known as "skimming," choosing only those felons considered to be a more probable success as a way of sanitizing the program.[136]

But this should not discourage the effort. Surely, the increased normalization of these courts—even if their improvement rates only lift the prospects of relatively few participants—really represent only a small step in the right direction. The burgeoning prison population was not due only to harsher sentencing, but also to institutional

[125] *Id.* at 3.
[126] Fetsco, *supra* note 1, at 598.
[127] *Id.* at 598–600.
[128] *Id.* at 598–99.
[129] *Id.*
[130] *Id.* at 599–600.
[131] *Id.*
[132] *Id.*at 600–01 ("[W]hile encouraging, these findings are considered preliminary due to the small sample size and one year follow-up period.").
[133] *Id.* at 601.
[134] *Id.*
[135] *Id.*
[136] *Id.*

failure in preparing inmates for re-acclimating to society.[137] Reentry courts were in response to this, and even if they continue to grow at a comparatively small rate, even if their successes are not monumental, they offer one of the only real responses to the problem of prisoner inflation paired with no softening of the grim post-prison stigma.[138]

The Federal Northern District of New York ("NDNY"), spotlighted at the outset of this essay, first implemented their Intensive Reentry Court ("IRC") in 2008.[139] In April 2016, the U.S. Attorney for the NDNY, Richard Hartunian, joined in the United States Department of Justice National Reentry Week, hosting a reunion to celebrate and acknowledge the successes fostered by the program and others like it across the country.[140] All ninety-three U.S. Attorneys across the country participated.[141] In honoring program graduates, Hartunian said, "[t]he successful reentry of a defendant is crucial for the individual, the community, and public safety. Recidivism rates that are simply too high, reflecting a revolving door through the criminal justice system and back, must be reduced."[142]

The federal program for the Northern District of New York lasts for twenty-four months, with monthly hearings before a judge.[143] The participants are deemed eligible by an evaluation called the "Risk Prediction Index," which predicts how likely it is that a participant will violate their release conditions.[144] Contrary to the "skimming" concern, the intended group of offenders are those who are at a moderate or high risk, though sex offenders are ineligible.[145] The judge partners with probation officers and representatives from both the U.S. Attorney's Office and the Federal Public Defender's Office.[146] The monthly involvement of the judge includes a review of each participant's case and a determination if a "credit" is earned.[147] As briefly mentioned earlier, twelve credits are earned in total, and upon

[137] Hallet, *supra* note 3, at 214 (accusing Iowa state prisons in the 1990s of causing their own incarceration increases through a lack of preparation for released inmates).

[138] *See id.* at 213.

[139] *U.S. Attorney Hosts "Intensive Reentry Court Reunion"*, U.S. ATT'Y'S OFF. N. DIST. OF N.Y., https://www.justice.gov/usao-ndny/pr/us-attorney-hosts-intensive-reentry-court-reunion (last updated Apr. 28, 2016).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Offender Reentry*, *supra* note 13.

[144] *Id.*

[145] *Id.*; *see also* Fetsco, *supra* note 1, at 601 (discussing the problem "skimming," or selecting only participants who are likely to succeed in reentry programs).

[146] *Offender Reentry*, *supra* note 13.

[147] *Id.*

completion of those credits the level of supervision decreases.[148] If participants are successful, a graduation ceremony is conducted as they have met their goals.[149]

Observing the participants in the Northern District of New York was a poignant experience *because* of the goals they outlined. The participant's goals varied from being better parents for their children to coping with unpleasant jobs with unforgiving schedules. One man was attempting to find his parents, who had remained unknown to him for over forty years. Some were exploring various forms of further education. Some were still struggling with domestic disputes, substance abuse, and checking in with their probation officers according to rigorous schedules. Their lives were like patchwork; they had to organize so many responsibilities, and the consequences for failing in any area were dire. No doubt, for many of these men, the eventual promise of earning credits, "graduating," and shortening their sentences of supervised release seemed far off, even unattainable.

Yet it seemed to mean something to them when the judge spoke to them individually, complimenting their progress and asking about their families. Once more it was a reminder that the judge serves to ground and guide this countercultural approach to post-prison interactions. In urging a holistic approach within the reentry system, Eric J. Miller, an Assistant Professor at the Saint Louis University School of Law, observed that the judge's role was a common thread in the formation of reentry programs, and carried with it an element of leadership not dictated by codified laws:

> By collateral institutional authority, I mean a sort of authority that is not formalized by statute or common law or some other official legal source (or even custom) but emanates from the repeated interactions between the judge and the variety of court officers and other players in the criminal or civil court systems. Collateral authority is thus derived from the judge's role or status as a particularly important actor in the larger legal community.[150]

Certainly, this authority can be used as Miller describes it—to provide momentum and direction to slow-moving, sometimes adversarial governmental elements.[151] But also striking is the

[148] *Id.*

[149] *Id.*

[150] Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT'G REP. 127, 128 (2007).

[151] *Id.*

possibility that this authority may come, too, from the "repeated interactions" with the participants in the reentry programs; those who might have once been at the judge's proverbial mercy in a sentencing hearing.[152] Now, they have the opportunity to encounter mercy in a more practical way, and no one—not the lawyers, not the probation officers, not the former felons themselves—is unaware of that unique authority that the judge exerts over the whole of the court room. When the judge steps up to the challenge of engaging with participants, a new element of relationship is created that may have long-reaching effects.[153] These reentry programs, however imperfect and still frustratingly undeveloped on a national scale, let power be used for a different kind of justice—justice after the fact.[154]

B. Looking to the Future

The future of reentry courts is predicated not only on their ability to survive, but on their ability to increase their effectiveness.[155] In their aforementioned report, back in 2011, the Center for Court Innovation not only provided information as to what the most effective and central aspects of reentry courts were, but also suggested ways to ensure their longevity.[156] One example took place in New York City, through the formation of a supportive reentry taskforce composed of "a collaboration of city and state agencies, community-based organizations, and academic partners."[157] In terms of funding—always a "hot topic"—the Center for Court Innovation claims that the efficiency rationale has been persuasive in gaining Corrections Department dollars in several states.[158] Uniformity in designing reentry courts may not be practical or even desirable, since reentry courts should be attuned to the needs of the communities in which they exist.[159] But no matter how tentative early successes were in reentry courts,[160] they should become the norm across the nation, particularly in the federal system.[161] As evidenced by the turnout of

[152] *Id.*
[153] *Id.*
[154] *Id.* at 129, 130.
[155] WOLF, *supra* note 97, at 12–13.
[156] *Id.* at 4–5, 8–9.
[157] *Id.* at 9.
[158] *Id.* at 11.
[159] *Cf.* TAUBER, *supra* note 102, at 10–13 (describing the judge's role as a leader in the community, both that developed between participants and administrators in the reentry court, and also that in which the court is set).
[160] WOLF, *supra* note 97, at 12.
[161] *See id.*

every U.S. Attorney for National Reentry Week early in 2016, the federal courts have widespread awareness of reentry efforts.[162] But a single week is not enough. It is not enough because no matter how many reentry courts rise up around the country, they remain an incomplete (though necessarily incremental) effort to answer greater atrocities.

Perhaps most central to the increased success of reentry programs is an understanding that diverse and often sobering social forces widen the chasm between felons and non-felons in communities nationwide.[163] In a pointedly titled piece, "Reentry to What? Theorizing Prisoner Reentry in the Jobless Future," Michael Hallett[164] describes incarceration as an "exile" from society.[165] Is release, then, a return to a barren landscape that is little better? Hallett's discussion of the swollen prison population, and, most discouraging of all, America's world-wide lead in prisoner recidivism, (more than seventy-five percent as of 2014) suggests that it is.[166] In short, Hallett describes the community wasteland thusly: "[T]he horrendous policies of the past three decades made it tougher for former prisoners to construct anything approximating a normal life for the first time."[167] A brief discussion can hardly do the expansive topic justice, but one troubling angle to both these imprisonment rates and corresponding post-incarceration joblessness (as an example of one of the many struggles felons face after release) is the disparate impact shown on different racial groups.[168] "[O]nly three percent of white males spend some time in prison during their lives, contrasted with twenty percent of black males [and the] highest concentrations of unemployment in the United States are found among black, urban males."[169] The entrenched patterns of oppression that the almost medieval system of "hard-on-crime" policies have created cannot be resolved without considering the needs of those who suffer from the effects of more than just the supposedly uniform consequences of their criminal guilt.[170] Most sobering of all, perhaps,

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[162] *U.S. Attorney Hosts "Intensive Reentry Court Reunion"*, *supra* note 139.

[163] *See* Hallett, *supra* note 3, at 225.

[164] Dr. Michael Hallett is a professor at the University of North Florida in the Department of Criminology & Criminal Justice. *Id.* at 213.

[165] *Id.* at 225.

[166] *Id.*; Christina Sterbenz, *Why Norway's Prison System is So Successful*, BUS. INSIDER (Dec. 11, 2014), http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12.

[167] Hallett, *supra* note 3, at 225.

[168] *Id.* at 216.

[169] Fetsco, *supra* note 1, at 601.

[170] *See id.* at 602; Hallett, *supra* note 3, at 216–17.

is one explanation Hallett proffers (supported by many scholars, whom he cites) for the enormous incarceration rates that disproportionately affect minorities: that prison may replace welfare programming as a way of answering unemployment and poverty.[171] Hallett calls for theoretical vantage points to design reentry programs that regard these extenuating social circumstances and invisibly embedded hierarchies.[172] As of his 2011 writing, he felt that the theoretical perspective underlying reentry development had been frustratingly "shallow," despite the evidence of converging forces that subverted the rights of some individuals more than others.[173]

Hallett does not speak of philosophical theories.[174] But his gripe that the plan may be too rudderless suggests the need for a theoretical framework to shape more successful outcomes.[175] When damaging and pervasive underpinnings[176] are at play, competing philosophies should provide an answer. He acknowledges criminologists' admittance that supposed scientific design failed to work when applied in cold calculus to the mysteries of human nature.[177] Why shouldn't new responses (if not outright reforms) be founded in some of the same jurisprudential precepts that have been the basis for (or at least, translators of) systems of law throughout history?

III. NORMALIZING REENTRY COURTS FOR JUDGES AND SOCIETY

Implementing a structure for legally sanctioned compassion, by its nature retrospective, is no easy task. My approach in this paper has been to supplement traditional, recognized roles and emerging plans for engagement and guidance with philosophical perspectives. Philosophy, in this context, provides not only an organizational or explanatory lens, but also a means for creating frameworks for reentry courts, grounded in an understanding of what drives their success.[178] Moving forward, this success depends on strategy informed by past and current trends, further community education

[171] Hallett, *supra* note 2, at 216.
[172] *See id.*
[173] *Id.*
[174] *See id.* ("This paper argues that academic research on 'prisoner reentry' has thus far been theoretically shallow and that criminologists must move beyond applied research to additionally focus upon issues of macro sociological change impacting the experience of former prisoners.").
[175] *See id.*
[176] *See supra* Part I.
[177] *See* Hallett, *supra* note 3, at 225.
[178] *See id.* at 216.

about the role reentry courts can play, and an expansion of their focus.[179]

One of the trends for success, as previously discussed, is the centrality of the reentry program to participants' lives.[180] The purpose of the mindfully judge-centered approach advocated by this paper is in part to satisfy the need for a substantially felt presence in reentry participants' lives.[181] The judge's inherent authority is one way to contribute to a stronger presence, adding more heft to the monthly check-ins, such as those held at the Northern District of New York.[182] But since the judge only sees participants once a month, again, as this paper lays out, it is absolutely necessary for the judge to take an active leadership role—"reentry managers," as some coin the term—rather than retreating into a mere passive gatekeeping role.[183] Aside from the oft-repeated guidance for judges in reentry settings, Shadd Maruna and Thomas P. LeBel advocated a more subtly developed "strengths-based" or "restorative" approach, over ten years ago, that remains instructive today.[184] Maruna and LeBel objected to the "stick and carrot" calculus advocated as the driving narrative behind reentry courts by early champions such as Janet Reno;[185] they feared that it would lapse too quickly into the same patterns that the criminal justice system had been entrenched in for decades, with troubling results.[186] This "reward" model is explicitly expressed and adopted by some reentry courts, such as the District of Oregon.[187] Oregon incorporates a list of guiding principles in its reentry program, one of which is "[t]he research-informed use of monitoring, sanctions, and rewards."[188] While the clinical risk/reward-oriented approach makes sense within the complex and highly structured context, Maruna and LeBel's perspective refreshingly shifts the focus to jurisprudence—arguing for reconciliation more than a rehashing of reward motivation.[189]

[179] *See id.* at 217, 225.
[180] WOLF, *supra* note 97, at 3.
[181] *Id.* at 5.
[182] *Offender Reentry*, *supra* note 13.
[183] Maruna & LeBel, *supra* note 16, at 92.
[184] *Id.* at 92.
[185] *Id.* at 93.
[186] *Id.* ("[The] stick and carrot are key symbols of the two reigning paradigms in parole practice over the last 100 years, which can be broken down into the familiar dichotomy of punishment and welfare. . . . We refer to these as 'risk-based' and 'need-based' narratives, respectively. Both are deficit models—that is, they emphasize convicts' problems.").
[187] Kristin Brown Parker, Note, *The Missing Pieces in Federal Reentry Courts: A Model for Success*, 8 DREXEL L. REV. 397, 412 (2016).
[188] *Id.*
[189] *See* Maruna & LeBel, *supra* note 16, at 93, 101.

Maruna and LeBel do not mention Aquinas, but their assignment of the dignity of social engagement to former felons echoes Aquinas's concept of participation.[190] In typically religious terms, Aquinas's idea of participation means, quite simply, that rational creatures can be engaged in "[e]ternal [l]aw" by their own choice.[191] For the purposes of this paper, that eternal law could encompass the societal goods that rise above mere survival and system-savvy navigation. Looking to the future of reentry courts, the kind of evidence-based, practically motivated training for judges is, of course, important.[192] But it is not enough. Compassionate authority requires more than ticking away at details. Maruna and LeBel emphasize "redemption" above rehabilitation; it is here that the judge's power can be most advantageously used, and the end for which judges should be trained, going forward.[193] The judge reaches an apex of influence by exhibiting this redemption to the community, through sincere engagement in certificatory and celebratory acknowledgements of participant accomplishments.[194] "If endorsed and supported by the same social control establishment involved in the 'status degradation' process of conviction and sentencing, this public redemption might carry considerable social and psychological weight for participants and observers."[195] In sum: the power of the judge is recognized widely, and the judge's sentence may be viewed as a defining moment for the criminal process.[196] Therefore, too, the judge can serve an equally symbolic purpose at the other end of the process, approving a *true* reentry into society.[197]

It is also crucial to continue to strengthen the structures in place, which necessitates more involvement and education of the wider community, as well as seeking cooperation from the state.[198] In other words, reentry courts need to be increasingly normalized.[199] The California state reentry courts, for example, have shown promising growth in recent years.[200] Since 2009, the number of reentry

[190] *See id.* at 101; AQUINAS, *supra* note 17, at 160.
[191] AQUINAS, *supra* note 17, at 160.
[192] *See* Parker, *supra* note 187, at 412.
[193] Maruna & LeBel, *supra* note 16, at 101.
[194] *Id.*
[195] *Id.*
[196] *See id.*
[197] *See id.*
[198] WOLF, *supra* note 97, at 10.
[199] *See id.* at 13.
[200] *See* Penne Soltysik, *Reentry Courts Focus on Parolees at Highest Risk*, CAL. CTS. NEWSROOM (June 15, 2016), http://newsroom.courts.ca.gov/news/reentry-courts-on-parolees-at-highest-risk.

programs at the California superior courts has doubled, from six to twelve, and as of 2016, two more were in planning stages.[201] Despite a cessation of judicial branch funding overall, the reentry program has managed to obtain funding from the legislature and, at times, the Judicial Council.[202] Pointing directly to the imperative of education and communication, the California program conducted a roundtable discussion with judges, attorneys, and justice partners in 2013.[203] The purpose of this roundtable—attended by approximately sixty people—was to educate the individuals in these important roles about "establishing and sustaining" the program.[204]

Championing similar growth models from a philosophically supported vantage point may seem redundant, since the role of the judge in reentry programs is widely respected and recognized.[205] However, as Maruna and LeBel point out in their application of a therapeutic rather than mathematical approach, even though common themes may be present in the development of these courts, not all beliefs underlying the purpose of the reentry process are created equal.[206] The risk of reentry courts is that they become merely a form of increased parole supervision, replicating the most bothersome monitoring elements of incarceration.[207] If all reentry courts provide are heightened scrutiny and monitoring, shuffling people like so many casefiles towards a more efficient finish line, they merely scratch the surface of a troubled system. That is the purpose of this paper: to claim that a jurisprudential, and specifically philosophical lens supporting and expanding the authority role of the judge can help make reentry courts more about compassion and real change.

One possible explanation for reentry courts canting towards the rote-model risks articulated above is that they are too closely modeled on their drug-court predecessors.[208] Because drug-courts are focused on solving a very specific and even isolated issue—that of addiction—their focus is sharply and even formulaically directed towards addressing that issue.[209] Reentry needs a broader reach. It needs a broader reach because it is not solely confined to addiction; it is about

201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *See* TAUBER, *supra* note 102, at 3.
206 *See* Maruna & LeBel, *supra* note 16, at 92.
207 *See id.* at 93.
208 *Id.* at 92.
209 *Id.*

reentering a society that has very little openness to those marked by felony records.[210] The magnitude of this far-reaching struggle has contributed to the difficulty that reentry program planners have had (and may well continue to have) in constructing a holistic approach.[211] Maruna and LeBel's "restorative" approach is "strengths-based"—very much in line with the tenets of Natural Law, it focuses on what good an individual is capable of and does not assume the worst of people, or of the existence of attainable justice.[212] The concrete ways in which former felons can engage in this kind of personal amends-making vary widely.[213] Such a restorative approach could include volunteer work to rebuild community resources, assistance to others who are struggling with similar destructive behaviors, and engagement in professional careers that draw on the experiences they have gained (sometimes very painfully).[214] These fit well with the kinds of goals that reentry participants set for themselves, but they take it out of the realm of punishment and penalties, counterproductive continuations of the correctional system.[215] One activist on behalf of individuals who had been formerly incarcerated, Mimi Silbert, poignantly stated, "These are people who have always been passive. The bottom of society is passive. They receive everything. They receive welfare, never enough. They receive therapy, never enough. They receive punishment. But strength and power come from being on the giving end."[216] A properly structured reentry court, led by a judge who allows his or her own authority role to be an inspiration for the participants involved, affords individuals an opportunity to give.

The judge's authority role should not be made directly analogous to a parental role because that impedes too much on participant dignity.[217] However, juvenile reentry courts should not be overlooked as an additional avenue for early engagement.[218] The National Campaign to Reform State Juvenile Justice Systems assessed reentry programming for juvenile offenders in a 2013 report.[219] The

[210] Hallett, *supra* note 3, at 225.

[211] *See* Maruna & LeBel, *supra* note 16, at 96.

[212] *Id.* at 97; *see* AQUINAS, *supra* note 17, at 161–63.

[213] Maruna & LeBel, *supra* note 16, at 98.

[214] *Id.*

[215] *See id.* at 99.

[216] JERR BOSCHEE & SYL JONES, THE MIMI SILBERT STORY: RE-CYCLING EX-CONS, ADDICTS, AND PROSTITUTES 8 (The Inst. for Soc. Entrepreneurs ed., 2000).

[217] *See* Miller, *supra* note 150, at 128.

[218] *See* OFFICE OF JUSTICE PROGRAMS, REENTRY COURTS: MANAGING THE TRANSITION FROM PRISON TO COMMUNITY 7, 14–15 (Nat'l Crim. Just. Reference Serv. ed., 1999).

[219] GIUDI WEISS, THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST

goals outlined for juveniles are less focused on making amends, and more on the swiftest possible return to normal.[220] Hopefully, that normal will address the circumstances that led to destructive behavior patterns in the first place. The importance of future success for juvenile participants in reentry programs is the sure focus: the National Campaign's report stated that, unsurprisingly, "Young offenders who complete programs that focus on structured learning, school achievement, and job skills are less likely to reoffend"—and laid out some broad, basic guidelines to ensuring that end.[221] Because juvenile offenders have key developmental years interrupted, they are even more at risk for dysfunctional futures post-incarceration, if they are not afforded attainable opportunities for social realignment.[222] High school graduation rates are shockingly low among former juvenile offenders; only fifteen percent make it through.[223] Even with division over the proper place for rehabilitative and reentry efforts in society at large, surely in the context of youth, approaches based in unity and mentoring authority should come to the forefront through renewed commitment to providing education, community partnership, and support.[224]

Expanding their focus requires judges and law enforcement working in tandem; although the focus of this paper has been on the crucial nature of the *judicial* role, the involvement of probation officers and others cannot be overlooked.[225] A report from the Bureau of Justice Assistance, surveying the reentry involvement of law enforcement across the nation, provided some "key recommendations" for solidifying the success of reentry programs.[226] Establishing a presence in participants' lives extends the same principles of leadership and positive authority to the roles of those (generally probation officers), since they interact with participants on a more frequent basis.[227] Law enforcement also act as communicators between reentry programs and legislators; their perspectives are highly valuable in developing and expanding legislation providing for

CENTURY 4 (Nat'l Campaign to Reform St. Juv. Just. Sys. ed., 2013).

[220] *Id.*

[221] *Id.*

[222] *Id.* at 18.

[223] *Id.*

[224] *Id.*

[225] BUILDING AN OFFENDER REENTRY PROGRAM: A GUIDE FOR LAW ENFORCEMENT 3 (Bureau of Just. Assistance). This comprehensive report details law enforcement involvement and programming in reentry programs in a number of different states, including Kentucky, Massachusetts, Wisconsin, Washington, and Indiana. *See generally, id*. at 25–49.

[226] *Id.* at 21–22.

[227] *Id.* at 3.

the planning and funding of these ventures.[228]

How can law enforcement officers take advantage of the same kinds of philosophical underpinnings, advocated here, which solidify what judges have to offer? One key aspect of their contribution is to transform their authority.[229] Just as with the judge, the authority of law enforcement is often perceived as an aggressive, all-powerful force that only brings bad fortune and negative consequences.[230] To advance the efficacy of law enforcement roles in the reentry court context, the optics and the substance of those roles need to be visibly changed. The Bureau of Justice Assistance Report recommends first developing a "foundation" of interconnected communication, and then focusing on the needs of the community and the participants in the program, a cooperative approach rather than a punitive one.[231]

Once again, the focus of this paper has been on judges and the unique power that they wield—often as their title suggests, in *judgment*, but increasingly, with opportunities for dealing out compassion and guidance as well. But the lessons of philosophical insight into these authoritative roles extend to all those who are called upon to lead; not just judges.

IV. CONCLUSION

Natural Law (under both Aquinas and Fuller) and the Interpretive approach of Dworkin can all add an element of jurisprudential heft in support of judicial leadership spearheading the increasing reach of reentry courts and similar programs across the country. All three theories encompass the concept of justice inherent in law as it is created by needs between the governing and the governed—whether or not they call it morality.[232] Thus, it is possible to suggest some conceptual holding between these three that law does not receive its power from human-created legal structures, but it infuses with power and authority (explicit and felt) those that are rightly in accord with

[228] *Id.*

[229] *Id.* at 3–4.

[230] *See, e.g.*, *id.* at 4.

[231] *Id.* at 5.

[232] *Compare* AQUINAS, *supra* note 17, at 162–63 (suggesting that Natural Law existed within every just human Positive Law, but only to the extent that the law comported with existing Natural Law principles), *with* Fuller, *supra* note 53, at 179 ("[B]efore he[, Professor Hart,] can attain the goals he seeks he will have to concern himself more closely with a definition of law that will make meaningful the obligation of fidelity to law."), *and* JURISPRUDENCE CASES AND MATERIALS *supra* note 17, at 212–15 (discussing Dworkin's advocacy for consistency and integrity in interpretation of the law—suggesting that it was possible to divine a right answer for every legal problem by assessing what the best outcome would be).

some mysterious, already-existing power. Reentry courts are empowered by that inherent compass of justice when judges recognize a new incarnation of their duties, beyond assigning sentences and overseeing typical procedure. That is one of the most crucial pieces of advice that philosophy offers here. It has been recognized, practically, but this current argument suggests *why* the role of judge remains a constant and why it must increasingly be encouraged to the forefront of the fight for more reentry programming. When judges are called to lead, they are not exiles or outcasts. They are beneficiaries, leaders and even creators of the system. They can—they *must*—make the system more beneficial.

The men in the Northern District of New York courtroom did not delve deeply into what the reentry program meant to them as they stood before the bench for their credit assessment—at least not aloud. Some were still relatively new; others were missing the month's credit because they had tested positive for prohibited substances or other infractions.

Most of them still had a long way to go before their twenty-four months. No doubt, not all of them would make it through. The inconvenience of this program was obvious. One participant apologized for oversleeping on the last court date. Others, the probation officers said, varied in their willingness to cooperate with the supervisory requirements from month to month.

But one man, a father of five, was quiet but proud of his progress—in only two months, he had already managed to meet a few of his goals. He had excelled in his studies. He was working several jobs, as well as helping care for his family. A future aspiration was becoming increasingly involved in a community outreach center, partnering with young, urban boys. He hoped, he said, to help them follow positive paths.

The judge nodded approvingly.

The hope unspoken was that they wouldn't end up here, in this same courtroom.

It was a happier moment. But under the surface, it provoked a myriad thoughts. This man was seeking to create the sort of community that he perhaps had never known. The system hadn't done him any kindness, and if this reentry court was any community at all, it was one he was only beginning to know. Already, though, he had used this opportunity for the good. He had chosen to take on a leadership role, even if it was one that no higher authority had explicitly offered him. In a curious way, that spark of inspiration created in him—even if it had begun as a means of designing and

meeting a prescribed goal—resembled the same kind of moral leadership which, under a Natural Law theory, arguably leaves room for a judge.

I was sitting in the courtroom that day. The scene of the reentry court, momentarily moving, seemed to serve only as the smallest of supports. In contrast with the participants' struggles, it was a drop in the proverbial bucket. I would later discover that critics had often reproached it for just that apparent deficiency. With massive incarceration rates, after-the-fact assistance may seem futile and illusory. No matter the growth of reentry courts around the country, no matter the involvement of a few impassioned judges, the criminal justice system still cripples and crushes many under cruel policies. The landscape, with reentry courts, is still very bleak.

Yet the landscape without them would be even bleaker.