

The Role of Alternatives to Incarceration Programs in Reducing Social and Racial Disparities: Problems and Promises

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ABSTRACT

Alternatives-to-incarceration (ATI) programs have the potential not only to reduce incarceration but to address racial and class disparities in sentencing. Past reviews of ATI programs have concluded that such programs have not yet met this promise, but they have given little insight into why ATI programs are vulnerable to (re)producing disparities. Based on in-depth interviews with 39 ATI-involved professionals in New York City, this article analyzes the policies and practices of ATI programs in order to understand the ways in which windows of discretion work either in favor or against marginalized offender categories. The article analyzes whether and how decisions about eligibility, program requirements, compliance and completion make it more difficult for the most marginalized individuals to participate in ATI programs. In addition, requirements for government funding may result in disparities. The article ends with proposing several strategies for strengthening the role of ATI in reducing racial and class inequalities.

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1. ATI Programs and Disparities in the Criminal Justice System

As objections to mass incarceration have been growing louder, policy makers and criminal justice actors across the political spectrum are advocating for reforms that steer justice-involved individuals away from jails and prisons. For those driven by concerns of justice, an inherently connected concern is that past and current sentencing policies and practices have resulted in racial and class disparities. Alternatives-to-incarceration (ATI) programs may offer an effective approach to both diversion and reducing disparities (Weissman, 2009). ATI programs are community-based programs, often provided by non-profit organizations, that work with justice-involved individuals in lieu of the sentencing decision or as part of probation requirements. ATI programs support justice-involved individuals to tackle a wide range of problems, such as homelessness, unemployment, lack of education, substance abuse, mental illness, and other ‘criminogenic needs’ that may stimulate committing crimes.

As ATI programs explicitly aim to address social marginality, they have the potential not only to reduce the reliance on incarceration but also to address racial and class disparities in sentencing. ATI programs intend to target exactly those individuals who are most ‘at risk’ to commit crimes and those who tend to have greater chances of being targeted by criminal justice system. As social marginality corresponds with what in criminal-legal systems are considered ‘risk factors’ (Van Eijk, 2017), ATI programs should in particular divert marginalized offender categories away from incarceration. However, already in 1982, Austin and Krisberg wrote about the ‘unmet promise’ of ATI. More recently, Weissman (2009: 237) repeated that ‘the full realization of this promise is thwarted by the structure and rules of the criminal justice system itself’. Racism and economic crises are deeply ingrained in criminal-legal policies and practices, she noted, producing racial disparities at every stage of the system, from arrest to sentencing. Further limits on ATI were posed by mandatory minimum laws and the continuation of incarceration as ‘the primary response to crime’. In addition, even though programs intend to support individuals, they are still confronted with coercive, intrusive and stigmatizing rules such as curfews and drug testing, which raises concerns that ATI programs ‘set up to fail’ participants and criminalize rather than ameliorate social marginality (Weisman, 2009).

That ATI has not effectively contributed to decarceration may not be surprising given the context in which they emerged. ATI programs were first developed in the 1980s, together with the introduction of intermediate sanctions, as a response to debates about proportionate sentencing and the effectiveness of rehabilitation in a political climate that emphasized ‘law and order’ (Tonry and Lynch, 1996). Hence, rather than being the ‘lenient option’, intermediate sanctions reflected – and in fact facilitated – a shift towards more punitive sentencing that begun in the 1970s. Intermediate sanctions offered sentencing options that were less punitive than incarceration but more punitive than probation. Moreover, then and now, incarceration has a central and robust role in US jurisdictions (Bosworth, 2010), which is demonstrated by the tendency to talk about community sanctions in reference to what they are *not* (Robinson, 2016). The term ‘*alternatives to incarceration*’ emphasizes that there is a primary and preferable option – incarceration – and suggests that ATI is merely a way to put a

‘soft’ face to an otherwise still predominantly tough and custodial approach to crime. This may be so even in a jurisdiction which is seen as leading in reform and ATI: New York City (Berman and Wolf, 2014). Already in 1997, the NYC Council’s Public Safety Committee called for increasing funding and in 2002, the City spend approximately €12.5 million on ATI programs (Porter et al., 2002). However, the number of individuals served in the following 15 years has not seen a significant increase (ATI Coalition, 2015) and, despite a significant drop in the number of people imprisoned, not a single jail or prison has been closed (yet).

Furthermore, Weissman (2009) is concerned with how the regular criminal justice system impacts ATI programs. Studies show that criminal-legal policies and practices may in themselves produce both socioeconomic and racial disparities (Franklin et al., 2015; Kutateladze et al., 2014; Starr, 2014; Western, 2006; Wolf, 2009). Studies on intermediate sentencing show a similar pattern: defendants of color are less likely to receive an intermediate sentence than a custodial sentence, compared to white defendants (Franklin et al., 2015). Hence, within this context, it is not self-evident that ATI programs – or diversion more generally – are equipped to effectively reduce social disparities in sentencing decisions, especially the ‘in/out’ decision. It should be stressed that the sources of such disparities are manifold and often difficult to pinpoint: they may result from overt discrimination, covert biases, or from technical risk-based procedures (Zatz, 1987; Van Eijk, 2017). However, disparate outcomes resulting from unintentionally biased practices are no less unequal in their effects than disparities resulting from overt discrimination.

To understand the (potential) role of ATI programs in reducing disparities, we need insight not only in decision outcomes but into *how* decisions about diversion are made. This article focuses on the policies and practices of ATI programs that shape decisions about eligibility, compliance and completion. The crucial question is: *Do ATI programs give all participants—regardless of race, ethnicity or class—a fair shot at avoiding incarceration?* (cf. Wolf, 2009). Wolf insists we should look at ‘all phases of the process, from intake (when eligibility is determined), to assessment (when participants’ treatment plans are shaped), to treatment (when cultural competency becomes particularly relevant), to court appearances, and to determinations about when (and what kind of) sanctions and rewards should be issued’ (2009: 44; cf. Nellis et al., 2008). This way, we can identify policies and practices that may make ATI programs vulnerable to sentencing decisions that are biased against defendants of color and socioeconomically marginalized defendants.

ATI programs are vulnerable to disparities as, in general, intermediate or alternative sentencing opens or widens ‘windows of discretion’ which leaves more room for extra-legal factors such as the socioeconomic status, race, and gender of justice-involved individuals to shape decision-making (Franklin et al., 2015; Johnson and DiPietro, 2012). Whether intentionally or unintentionally, greater discretion poses challenges in terms of disparities. Building on this observation, in the following paragraphs I address three issues that are specific to ATI programs. First, in the absence of regulation or guidelines around ATI in regular criminal courts, decisions to consider an alternative sentence at all and to determine eligibility of individuals lie with many different actors. I investigate whether and how this complex discretionary space works for or against individuals living in marginalized

circumstances. Second, similar risks arise with decisions following violation of requirements (noncompliance) and noncompletion. Disparity may arise when the most marginalized participants have more difficulty meeting the demands of the program, even more so if they face more requirements to complete the program. That marginalized individuals may have more demanding programs relates to a third issue, namely that ATI providers aim to offer individually targeted programs to address specific criminogenic needs of individuals, which inherently results in a wide variety of programs and requirements. ATI programs thus magnify the tension that is inherent to rehabilitative sentencing, namely between equal justice and individualized justice.

Finally, I pay attention to a higher policy level that affect the working of ATI programs: the requirements for government funding of ATI programs. If funding is based on effectiveness, and if effectiveness is measured in terms of recidivism, an adverse effect may be that high-risk or otherwise ‘difficult’ cases – which are likely to include the most marginalized individuals – are excluded because they are less likely to comply or complete the program. The concluding paragraph discusses several possible strategies for improving the role of ATI programs in reducing disparities.

The analysis is based on a study of ATI programs that operate within the criminal justice system in New York City (all boroughs except Staten Island). NYC has a ‘unique’ and ‘vibrant’ network of ATI programs which is, according to Berman and Wolf (2014: 39) ‘worth replicating’ in other jurisdictions. I focus on ATI in the context of regular criminal courts (rather than problem-solving courts), in which ATI programs are one sentencing option among many. Initially a ‘bottom up’ community-based response to criminal offending (Porter et al., 2002; Berman and Wolf, 2014), the New York State Division of Probation and Correctional Alternatives now funds approximately 165 ATI programs, mostly offered by non-profit organizations, targeting some 3,400 people across the state [DCJS, n.d.; ATI Coalition, 2015). In May-August 2016, I conducted 31 in-depth interviews with 39 professionals who are in various ways committed to ATI programming in NYC. To protect the anonymity of respondents, their roles are described in general terms. Thirteen respondents work at an ATI provider, most of whom have a management role (further to be called ATI professionals); eight respondents work in several courts, among whom assistant DA’s, policy officers and a judge; seven respondents provide legal aid, either as a lawyer or as a forensic social worker; seven respondents are reform advocates in various organizations; and four respondents work for the city government. Interviews were ‘problem-centered’ (Witzel and Reiter, 2012), which means that I invited interviewees to discuss with me, and think out loud about, various possible dilemma’s regarding the problem of disparity in the policy and practice of ATI programs. By tapping into the knowledge and experience of experts, the interviews provide in-depth and practical knowledge about decision-making processes and possible strategies for improvement of policies and practices. My focus in the interviews and analysis was on the role of race/ethnicity, socioeconomic status and social marginality in decisions about individuals. The average duration of interviews was one hour. All interviews were recorded and transcribed for analysis.

2. Discretion: Initiating ATI and Assessing Eligibility

In most sentencing decisions, discretion may cause disparity in sentencing outcomes between individuals and groups. When a defendant goes to court, the first decision is the decision to consider ATI at all. Whether ATI is an option, regardless of whether individuals are eligible, depends first of all on familiarity of the various criminal-justice actors with ATI and, subsequently, their stance towards ATI or alternative sentencing more broadly. This means that when ATI is *not* considered, this is not necessarily a conscious and explicit decision. While ATI programs have existed for decades, there are, according to many interviewees, still judges and prosecutors who don't know about ATI, or know too little about programs to make an informed decision. Almost all ATI providers, lawyers and reform advocates talked about the need to 'educate' judges and prosecutors. Often, 'educating' happens in courts, when professionals or lawyers advocate for their clients, and to a lesser extent by organizing site visits to ATI providers.

For the general acceptance of ATI as a sentencing option, it also matters who is the elected District Attorney at that moment. Some DA's are 'true believers' in ATI, according to a legal professional, others focus more on community safety. The political position of DA's, and also of judges, plays an important role. They might not be confident that ATI is going to guarantee community safety. 'If something goes wrong, nobody wants to get in the *New York Post* the next morning' (court actor). In the words of another ATI professional: 'The whole full spectrum that we see in society is represented in the judges.' In the borough where they work, many judges are concerned about community safety, which means judges need to be 'cultivated' by the ATI professionals to consider an ATI program.

Much depends on the individual judge: 'Some judges have great relationships with some programs, and not so great with others' (ATI professional). One interviewee tells about a judge who apparently had a 'resource coordinator' who referred youths to programs, but when the judge retired 'thinks kind of changed'. Whether judges and DA's are on board with ATI varies between courts. Some interviewees emphasize the need to continuously educate judges and DA's, while others find that more recently judges and DA's have become more open to the idea of ATI. In the words of one lawyer: 'The system is very individual based, what judge you get, what DA you get. That's like a crapshoot on anything' (legal professional). For example, it helps when DA's know about programs, and it matters whether their view is that children in the system are 'gonna be an awful, violent, horrible person who's gonna be killing people by the time they're an adult' or whether they are willing to make 'generous offers'.

Because in many regular courts ATI is not a standard option in the sentencing repertoire, it varies which actor first proposes ATI as an option. Youths and adults may be referred from defense attorneys, forensic social workers, court advocates who represent an ATI provider, the DA, or the judges themselves', although the latter happens less often. An ATI advocate explains that 'we want to be an off-ramp at any point'. Another take is offered by a court actor who thinks it would be good to depend less on whether the defense attorney proposes ATI and their connections with ATI programs. For this to happen, ADA's should learn more about ATI programs and about which programs are evidence-based and effective. This is important

also because research shows that the quality of the defense attorney varies – which is related to whether the attorney is private or public, but also among public defenders – which matters for the sentencing outcome (Kutateladze et al., 2014).

In intermediate sentencing specifically, discretion in determining who is eligible may result in sentencing disparity based on extra-legal factors (including individual characteristics and circumstances of the people who are sentenced) (Johnson and DiPietro, 2012). In problem-solving courts, there is a risk that ‘assessment criteria intended to weed out those considered “high-risk” may have the practical effect of creating a court population that tends to be more white and middle class’ (Wolf, 2009: 44). Decision-makers – judges and DA’s but also public defenders – need not only to think about the risks – or dangerousness – of defendants, as is central in sentencing, but also take into account whether defendants are amenable for the program (Franklin et al., 2015; Wolf, 2009). Decision-makers thus need to assess the defendant’s ‘agency’ (Franklin et al., 2015), which brings with it risks of relying on racial and class stereotypes. As socioeconomic and living circumstances are often taken as a risk factors, individuals living in marginalized circumstances may have more difficulty demonstrating that they are capable of improving their life (unless decision-makers let go of the notion that the past is an indicator for the future).

ATI providers indicate that there are no reasons to think this is a structural problem. Some say that they will take any participant that comes their way, others say they work with people who need intervention the most, thus, ‘high-risk’ individuals, which corresponds to the risk-need-responsivity principle which is the dominant approach in current rehabilitation programming. According to ATI professionals, participants of the ATI programs are mostly people of color from poor communities, which indeed indicates there is no structural or systematic exclusion based on socioeconomic status or race.

From a different viewpoint, ATI programs may actually work in favor of marginalized or minority individuals than the regular procedure, exactly because court advocates present the DA and judge with information about the individual in order to help them access the program they need. Judges and DA’s tend to emphasize dangerousness and risks in their evaluation, while defense attorneys, social workers and ATI court advocates speak in the interest of their client, providing the judge and DA with contextual and perhaps mitigating information. The opportunity to inform judges and DA’s about the often-precarious lives of clients leads public defenders and court advocates to believe that bringing in extra-legal factors *helps* individuals rather than works against them. Provided that ATI court advocates and legal aid encounter a judge and DA who are willing to learn about the personal story of the defendant, they are able to give information about the client that the judge or DA by herself may not have known – about living circumstances, the defendant’s past and their aspirations, motivations, strengths and capabilities. As eligibility is not a given but needs to be negotiated, the fact that many different actors are involved in assessing eligibility may often work as a safeguard against biased decision-making.

When I probed interviewees about possible complicating factors, few could offer factors that would result in structural discrimination based on race or socioeconomic status. However, two socioeconomic factors were mentioned in several interviews that may negatively impact

eligibility: family stability of young offenders, and housing. Legal professionals describe the role of a youth's parents (usually the mother) in deciding eligibility for the program, which requires supervising the youth during the program. A 'stable family', which means a working and 'drug-free' parent, may be a mitigating factor and helps to get a youth into an ATI program. However, a parent who works so many hours so that supervision is not possible may be seen as a problem as well. Socioeconomic deprivation of the family, whether the parent is jobless or needs to work multiple jobs, may thus limit the chances of a youth getting into an ATI program. When a parent is clearly incapable of caring, a child could agree with arranging foster care, but, as the interviewees point out, this of course cannot be asked of a child.

Another requirement for an ATI program about legal professionals talked is housing, and related to this, benefits. Mental health treatment, for example, depends on whether a client has housing, which may not be a shelter (a three-quarter house is sometimes allowed). In order to get housing, an income is needed, which in most cases means that an individual should qualify for benefits. Sometimes this is a problem, either because an individual doesn't qualify ('priors' can be a problem) or because it takes too much time and individuals take their chances with a judge instead of waiting, thus missing out on enrollment in the ATI program.

3. Discretion in Responding to Noncompliance and Noncompletion

An individual's socially marginal situation may also play a role in decisions about noncompliance and noncompletion. There is variation, first, in whether noncompliance of individuals terminates participation in the program or not, and second, in the consequences of noncompliance or noncompletion. Several interviewees told me that noncompletion is followed by a higher sentence than the original sentences (cf. Weissman, 2009; Wolf, 2009). It is unclear whether this is standard practice.

How judges and DA's respond to noncompliance depends on what rules an individual has broken: not attending the program or relapse is less severe than reoffending, and repeatedly breaking rules is deemed more severe than one slip. There seems no one and straightforward way in which DA's and judges deal with noncompliance. The general rule seems to be that participation in the ATI program is terminated when an individual is rearrested for a felony. The consequences are less clear for minor crimes or misdemeanors, including drugs possession: sometimes the program can be continued, sometimes not. Then there is noncompliance in the form of 'program failure': participants do not show up or are not doing well. If participants do not show up, the program will terminate eventually. ATI professionals stress that they will work with individuals not matter what, as long as it takes, but judges may think differently. Ultimately, 'it's up to the judges who's in the program', one ATI professional explains. All ATI professionals, legal professionals and court advocates I interviewed knew about judges who do not tolerate misbehavior where perhaps they could have been more understanding or supportive. As one ATI professional puts it: 'A more serious crime than the robbery [someone has committed] is pissing of the judge.'

From the viewpoint of ATI professionals, noncompliance is not necessarily, and usually not, an issue of unwillingness, as is made clear from the stories of interviewees about their clients. A team of legal professionals I interviewed talk at length about noncompliance and how different judges deal very differently with it. It is clear that socioeconomic and social wellbeing are crucial: ‘Not every kid has the family support or the mental wherewithal’. An ATI professional talks about the importance of ‘family consistency’ and housing for youths to be able to complete the program. Young persons will fare better when parents, or a parent, who is ‘really on top of what they’re doing, always around at court’, compared to ‘a parent who’s like “You know what? I’ve tried everything and I’ve given up”’. This is not necessarily a sign of unwillingness on the part of the parent: the socioeconomic circumstances of the family ‘plays a big role’. In the view of interviewees, parents who are ‘living well below the poverty line and struggling for the daily stuff, their attention, their ability to give consistent attention and consistent guidance is usually minimized by their own frustrations’. Youths may come into the program hungry or they haven’t bathed, which will affect him or her negatively. In other cases, the young person starts selling drugs to gain the necessary family income, for example to pay the rent that the parent has not been paying. In addition, young persons living in a shelter or who are couch surfing will have a more difficult time completing the program.

An ATI professional points out that ‘Sometimes the socioeconomic problems are so severe that it might take them longer [...] to do the program.’ They might not participate at first because they don’t have clothes or commit new crimes because they can’t pay 2.75 dollars for the train. An ATI advocate talks about various reasons people might not follow or complete the program, such as lacking money for transport, lacking stable housing, but also program fees and the language spoken in programs and the hours that it was running. Programs can take away the barriers that affect people living in marginalized conditions by providing MetroCards and lowering or abandoning fees. As securing stable housing can take years, ‘it can’t be that we require housing stability for every single person, that’s something we have to be prepared for’. ATI programs go through great lengths to keep participants in the program. For example, at one provider (ati-5): ‘Think about the biggest things that’ll stop someone coming in. They don’t have transportation money. We have Metro cards. They’re hungry. We have food. They don’t have clothes. We have clothes. They don’t have soap. We have soap. We don’t turn someone away for poverty.’

Here the issue of discretion is at play again. Some judges will consider the family situation while others don’t. Some judges ask the parent how the youth is doing at home, taking a more ‘holistic’ approach, while others never ask such questions because they are focused on the youth not committing crimes (ATI professional). Whether the judge allows for failure and retrying, ‘all depends [on] who the judge is’ (legal professional). Some judges are ‘very patient’, others will say “It’s so simple. Do it”, without understanding’. It requires tailoring advocacy for and information about their client to the particular judge they are negotiating with. Some judges understand, for example, that ‘if you have a disease [substance addiction], part of the disease is relapse’, and they understand the impact of violence in neighborhoods on a youth, or that kids struggle in school when they have no food or their mother tells them to watch their grandma, while other judges need to be ‘educated’ on how the lives of their clients impact their options for complying with the program rules. According to one legal

professionals, disparity arises mostly from the number of chances individuals get from the judge to succeed. One of the problems is the ‘rigidity’ and the consequences of noncompliance: ‘You missed curfew five times, we’re gonna report you’, while ignoring what’s going on in the individual’s life.

To prevent defendants from dropping out prematurely, legal professionals talk to their clients to ‘get a good idea of whether or not they think they can get there’ (legal professionals). Many of the requirements make sense of course – ‘you can’t act like you’re sitting there waiting for the bus’ – but some programs in drug treatment have ‘nitpicky kinds of things’ they demand from participants (e.g. women can’t color their hair in the first 30 days, one has to earn phone calls, hanging artwork in the room is not allowed). It can be hard for individuals to accept the circumstances and rules: ‘You have to explain to your client who’s 40 years old that, “Yeah, you’re gonna have to share a room, there might be a bunk bed, and you’ll have a curfew’’. Making sure that defendants understand their options is also instrumental to legal professionals and court advocates, as it reflects on their professionalism and thus their credibility in court. It is thus not only the role of the judge and DA to assess eligibility but of all professional actors involved.

4. Balancing Individualized Justice and Equal Justice

Once individuals are deemed eligible for ATI, an individual program is designed to address their ‘criminogenic needs’. ATI programs inherently intensify the tension between equal justice and individualized justice, as ATI practitioners are concerned with helping individuals while criminal-legal actors are concerned with legal norms such as proportionality and equal justice. Nolan (2003: 1547), writing about problem-solving courts, asks whether the focus on promoting therapeutic outcomes is reconcilable with sustaining justice values such as proportionality or ‘just deserts’ and honoring ‘upper limits of sanctions’ and human rights. While this is a valid question, I agree with Berman’s (2004) reply that it is not helpful to present this as a ‘dangerous dichotomy’ but that we should rather think about *how* the values of rehabilitation and justice can co-exist: ‘what might this look like?’

Let’s first look at the (potential) variation in programs that is in practice allowed or even common practice. In general, there are some ‘black and white’ requirements (ATI advocate), such as attending the program, staying drug-free and not committing crimes, but a lot is ‘gray’ (court actor). For example, one ATI provider requires participants who enter drug treatment to have clean urine for 90 days, 85 percent attendance in a program, or completion of two or three goals in the treatment plan (ATI professional). These standards are the same for someone who committed a robbery or for someone who sold drugs: ‘Oh yeah, because it’s not the crime that we’re treating. We’re treating the individual.’ However, the duration and content of the program may, and often does, vary for different individuals, which follows from differences in risk and need factors of individuals. ATI programs generally last between six and twelve months. This form of sentencing has, to a certain extent, reintroduced ‘indeterminate sentencing’, as the duration and content of the sentence depends on the

performance of the participant (cf. drug-courts, see Nolan, 2003). Moreover, while the duration is usually six to twelve months, some respondents said that they will work with individuals ‘as long as it takes’. For ATI providers, ‘it’s not about the sentence that involves time, for us, it’s about the risks and needs that we’ve identified’ (ATI professional). One ATI professional indicated that the duration is not related to the length of the original prison or jail sentence but solely to what the individual participant needs and is capable of doing within that time frame. For the ATI provider, the principle is that individual needs should determine what services and programs are offered to a participant.

It is unclear how this practice relates to the viewpoint of court actors, as they put much value on ‘uniformity and consistency’ in ATI programs. The DA’s commitment is both to community safety and fairness. For determining the duration of a program, they do take into account the severity of the crime, not just the needs of the individual, according to one court actor. To make things even more complicated, judges may impose their own criteria. An ATI professional talked about a judge who demanded someone to graduate, which took him years:

“I don’t wanna release this person till this person gets a GED” [the judge said]. We say, “Your Honor, this person is testing at the sixth grade. He’ll be 50 when he gets his GED, if he gets it at 50.” We’ve had to educate them.’

Another ATI professional tells about a man who was in an ATI program for two years because the judge demanded that he would get his GED while ‘it wasn’t for lack of trying, his levels were so low. We applauded when she [judge] retired and she let him go’. While these anecdotes are not necessarily representative of general practice, it does demonstrate the potential influence of individual actors involved in determining the content and duration of ATI programs for individuals: the judge, the DA, legal aid and the ATI provider may all have their own ideas about what is best and what is legitimate and proportionate.

Nonetheless, while I heard several stories of judges who lost sight of proportionality, respondents overall do not seem concerned about disproportionate sentencing under the guise of rehabilitation. Respondents generally express faith in the capability of legal aid, court advocates and ATI professionals to negotiate with the judge and DA a program that is in the best interest of the individual who needs help. In line with Berman’s (2004) observations, public defenders explain that they are in favor of judicial discretion, because it offers opportunities to advocate for a proportionate sentence for their client. Legal professionals, as well as other respondents, echo Adler and Taylor (2012) who argue that public defenders are the best guardians of proportionality: ‘The moment that drug courts start trying to send first-time offenders arrested for shoplifting to eighteen months of in-patient treatment is the moment when public defenders will opt for trial instead of encouraging their clients to plead. Defenders vote with their feet; if drug courts didn’t offer them (and their clients) a good deal, they wouldn’t agree to play.’ Indeed, it is not self-evident that public defenders should be happy with ATI programs; instead, their goal may just be to get their client out of the system as fast as possible (Wolf, 2009: 42).

It is clear that ‘educating’ judges and DA’s is essential as a safeguard to setting people up for failure, particularly those in vulnerable positions. An ATI professional explains:

‘We don’t wanna set up our clients to fail. [...] It’s a balancing act. That’s where the expertise of the advocate also come into play. We gotta figure it out. Having gone through the person background, we kind of have an idea of what they’re capable of doing.’

To prevent too demanding requirements, it is crucial that the district attorneys and judges listen to the professional. Most DA’s and judges do, although in some cases ATI professionals have experienced that judges and DA’s do not follow their advice and have unrealistic demands of individuals.

5. Funding Requirements: Effectiveness and Risk Assessment

A final relevant topic is how government funding shapes the design and executing of ATI programs: eligibility for funding depends on how effective the program is and on whether providers use risk assessment tools. First, not all ATI programs receive funding, but most do. One ATI provider I spoke to did not apply for funding because he did not want to comply with the requirements mentioned above because he did not believe they made for good practice. Some ATI providers were not happy about the requirements but looked for ways to comply with them while still being able to work according to their own views and expertise.

In terms of effectiveness of programs, some interviewees thought that the focus on reducing re-offending was too narrow and did not do justice to their work with individuals. ‘What’s success, right?’, one court actor wondered:

‘There’s a million levels of success’: is it about completing the program, or about people feeling better about themselves, have stronger relationships, a new set of skills, are back in school, getting a job?’

All ATI providers, attorneys and ATI advocates I spoke to agreed with such a statement. In addition, effectiveness may vary for different populations, according to one ATI advocate. ATI programs aim for improving and transforming individual lives, but some interviewees wished the program would go further. In line with Currie’s (2012) argument for ‘transformative intervention’, some interviewees point out the limits of the programs which teach skills mostly, and instead argue for ‘engaging them in dialogue about their communities and how they can be change makers in their communities’ (legal professionals). They believe that such an approach would make participants more committed.

However, funding requirements demand that program effectiveness is measured rather narrowly based on rates of reoffending. It may also be the preferred measure to assess the quality of programs for DAs and judges. An ADA recognized that an individual may be ‘struggling’ to complete the program, but if they are not committing a crime, that is ‘sufficient’. In a way, focusing on reoffending may be preferable, because many individuals will and do struggle during the program, simply because life transformation is difficult, particularly when there are issues of homelessness, addiction, poverty or mental health problems. Being mindful of the marginalized position of many participants, it may not be in

the best interest of participants if the judge or DA was to consider whether a participant is struggling or not, because it might not look convincing or stable, let alone as a success story. However, even if we would agree that the rate of desistance is the best measure of success, it is crucial to define what reoffending in this context means. Is jumping the turnstile, sleeping on the street or even possession of marihuana to be defined as reoffending if the initial crime was a serious felony? There seems no agreement in practice.

A problem of connecting funding to effectiveness, particularly when measured as reoffending rates, is that there is a risk of ‘creaming’: excluding the most difficult cases because they are less likely to complete the program. Based on the interviews, there are no indications that this is a structural problem, as ATI providers say they will work with anyone and also the most ‘challenging’ cases. However, because of lack of monitoring, we have little insight into whether the most marginalized individuals do not fall through the cracks. Also, a few interviewees said that they were suspicious of very high success rates, which indicates funding should not depend on rates of reoffending. Very low levels of reoffending in ATI programs are not realistic if and when ATI programs work with a vulnerable population. Being very successful could mean that the program is selecting the ‘easier’ cases which could hurt the chances of the most marginalized individuals to getting access to ATI.

A second issue related to funding that demands attention is that ATI providers are required to use risk assessment tools such as COMPAS. Not all are happy about this. As one ATI professional put it: ‘Obviously, funders want us to use COMPAS. We’re hamstrung in not being able to move in the way that we want to, because funding drives delivery sometimes’. Interviewees are critical of or skeptical about risk assessment tools for two reasons: first, they recognize that risk assessment tools offer limited insight into the problems and progress of individuals; second, they recognize that the tool may produce bias outcomes, for example evaluating individuals of color as higher risk than they actually are. An ATI professional, talking about COMPAS, says:

‘Well, I don’t know if there’s a set tool, right, that determines someone’s risk. [...] I think it’s a matter of engagement [that matters more]. [...] I don’t care if your risk score was 2000, right. We are here to serve you, to transform your life.’

At the time of the interviews, Pro Publica had just written a critical article about racial bias in COMPAS (Angwin et al., 2016). Several interviewees referred to this article. One ATI professional was very worried about it:

‘There’s an article about how it is, oh horror, it is racially based. [...] It just hurts my head. We scoured the country and we tried to look for something cuz our funder wants us to use evidence-based practices and that’s the one we came up with. [...] Some of the questions they ask, it’s like, really? [...] I don’t think it’s cross-cultural at all’.

Another ATI provider uses LS/CMI, but they don’t look at the risk of recidivism. ‘The risk doesn’t work for us, but the needs work for us very well.’ Another problem with the LS/CMI is that it ‘doesn’t acknowledge small steps’ which may be ‘significant progress’ from the perspective of the participant. For example, someone who starts reading on the second-grade level and moves to the eight-grade level has not made progress that will show up in the

LS/CMI assessment, because it is still not at grade ten or twelve, which is the standard for the LS/CMI. In the words of an ATI professional: ‘Well, that’s one of the questions I have is whether or not it really is a tool that’s shaping the program in the wrong direction, as opposed to listening first to the participant.’ In his view,

‘Needs comes from society’s imagining of what someone needs, educationally or otherwise. Someone might have tremendous strengths which have never been developed, which may have little to do with whether they have a GED or not.’

According to this interviewee, risk-needs assessment tools are developed based upon a ‘generalized idea of what the ideal is, and it may or may not be appropriate when it comes to the individual.’ In other words, the risk model is biased in favor of a middle-class standard for a way of life, which does not recognize the many alternative ways people in marginalized situations get by and give meaning to their life.

6. Towards Reducing Disparities

The purpose of this article is to understand how the policies and practice of ATI programs in the context of regular criminal courts may address the social and racial disparities in the criminal-legal system. The interviews with a range of professional actors involved in ATI have uncovered several policies and practices that shed some light on why ATI programs are still ‘aspiring to the impracticable’, as Weissman (2009) put it ten years ago. She called for an affirmative commitment to tackling disparities. This article points to some concrete strategies.

First, it is clear that the widened windows of discretion, while allowing for tailor-made sentencing, do not work out in favor of all individuals in equal measure. While all actors believe that they work towards the best outcome for defendants, the process from introducing ATI as a sentence to evaluation of completion is not transparent. Decision outcomes in all phases seem dependent on the knowledge of all actors involved about ATI and subsequently the willingness of particular actors, mostly the judge and to a lesser extent the DA, to learn about ATI programs and to work with ATI providers to create an alternative path for people who could be incarcerated. From the viewpoint of defendants, much depends on chance and perhaps goodwill. Whether they will be offered an alternative sentence depends on whether they have been appointed a defense attorney that is committed to ATI and whether they encounter a judge and DA who know about ATI and are willing to consider it, or who are willing to learn about it. In addition, the exact requirements that defendants must meet, the programs and resources that are offered, and the way in which monitoring and noncompliance are dealt with, depend for a good deal on the negotiation between the ATI provider, the judge and the DA. None of these actors, the ATI provider included, is chosen by the defendant.

Nonetheless, while interviewees acknowledged that the ‘chance’ nature of ATI is problematic, when asked about the need for regulation or guidelines, most interviewees were not in favor. This is perhaps understandable given experiences with regulation, notably minimum sentences guidelines, which may have spurred an aversion to standardization of sentencing

procedures. Indeed, discretion in the context of sentencing can be of great benefit to justice-involved individuals. The discretionary room for DA's and judges to take into consideration circumstances of the case and special interests of individuals is a great good. It is for this reason, keeping in mind the interest of individuals involved in the criminal justice system, that most interviewees were not in favor of regulating or standardizing the ATI decision process. However, it is possible to think of ways in which discretion is limited without harming opportunities and benefits for individuals. One way forward is to make sure that in each individual criminal-legal procedure there are various standard moments in which possibilities for alternative sentencing are discussed. This would ensure that the decision to initiate alternative sentencing is independent of the knowledge and willingness of actors involved.

A second conclusion from the interviews is that the balancing of values of rehabilitation vis-à-vis values of justice (notably proportionality) warrants more attention from all actors. It is understandable that professionals who work at ATI providers are mostly concerned with rehabilitation, given their profession (often) as social workers. However, given that they work within a criminal-legal context is their responsibility to be aware of legal principles such as proportionality as well. In the interest of ATI participants, ATI professionals may argue for longer or more intensive treatment, which may be in conflict with the proportionality principle. And while defenders may do a good job at preventing draconian and indeterminate sentences, it may be recommended that the safeguarding of the proportionality – both in terms of duration and content of the program – does not lie with one actor, as it mostly does now.

Third, greater discretion introduces a greater potential role for extra-legal factors such as race, socioeconomic status and other individual characteristics in decision making, particularly in in/out decisions. Given that social marginality is a risk factor as well as criminogenic need – and a factor that is difficult to tackle in the short time period that individuals are in a program – there is a risk that marginalized individuals are either put through too demanding programs or fall through the cracks of alternative sentencing. To make the commitment of ATI providers to tackling disparities concrete, ATI providers could commit to monitoring eligibility, exclusion, decisions and outcomes. Only with sufficient and good quality data we will be able to measure and understand whether ATI programs impact racial and social disparities positively or negatively. Such monitoring should focus not only on racial disparities but also on socioeconomic disparities. The latter are one driver of the first, but they are also in themselves an injustice and of particular concern in the light of the criminalization of poverty (Van Eijk, 2017).

Fourth, given the concerns about and empirical evidence for ethnic/racial and class bias in risk assessment tools (e.g. Angwin et al, 2016; Skeem and Lowenkamp, 2016; Starr, 2014; Van Eijk, 2017), it is essential that ATI providers only use risk assessment tools that are either developed or tested based on the population that they work with. This reduces the risk of biased decision-making. This means that ATI providers should invest in either evaluating existing risk assessment tools based on the actual population that they serve or in developing their own risk assessment tool that is tailored to the needs of the specific population that they work with. However, without sufficient funding, whether from governments or other sources, they will not be able to do so. In this situation, demanding that ATI providers use existing

general risk assessment tools as requirement for funding may be unethical and ultimately not effective in terms of desistance and public safety.

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