

Drug Policy Alliance

Criminal Justice Issues and Prisoners' Rights

<https://drugpolicy.org/resource/dpa-podcast-episode-35-kerwin-kaye-how-drug-courts-coerce-control-and-continue-harm>

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Drug courts programs that seek to reduce drug use through mandated treatment and close judicial oversight sound like a good alternative to incarceration. In theory they are thought to save money and increase access to treatment but in practice they cherry-pick eligible participants and allow judges to preside over treatment decisions. Kerwin Kaye, Associate Professor of Sociology, American Studies, and Feminist, Gender, and Sexuality Studies at Wesleyan University, recently published a book entitled "Enforcing Freedom: Drug Courts, Therapeutic Communities, and the Intimacies of the State." He sat down with Deputy Director of DPAs Department of Research and Academic Engagement Dr. Sheila P. Vakharia whose background in social work makes her no stranger to drug courts for a fascinating conversation that dove deep into his ethnographic research and the many issues with the drug court model. They discussed how drug court practices often discriminate against and penalize Black and poor users while insulating those who are white and more class privileged. Kaye's insights are particularly timely, as we see increasing calls for decriminalization and alternatives to incarceration.

Kerwin Kaye's book is available through [Columbia University Press](#).
To read DPAs 2011 report on drug courts, visit <https://www.drugpolicy.org/drugcourts>.

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(Jazzy intro music in)

Welcome to Drugs and Stuff, a podcast from the Drug Policy Alliance.

(Jazzy intro music out)

Gabriella Miyares (0:10)

Hello, and welcome to another episode of Drugs and Stuff. I'm your host, Gabriella Miyares. This week's episode has been a long time coming. Back in March, just before our Manhattan offices closed due to the pandemic, we welcomed Kerwin Kaye for an interview. Kerwin is an associate professor of Sociology, American Studies, and Feminist, Gender, and Sexuality Studies at Wesleyan University, and recently published a book called "Enforcing Freedom: Drug Courts, Therapeutic Communities, and the Intimacies of the State." What strikes me now, listening back to the tape, is how relevant all of this still feels. My colleague Sheila Vakharia, whose background in social work makes her no stranger to drug courts, joined Kerwin for a fascinating conversation that dove deep into the many problems with the drug court model, including how their discrimination against black and poor users intensifies the war on drugs for that population, while mitigating its effects for white and more class privileged users. As we see this widening of already existing gaps occurring all around us as the pandemic continues, this insight seems particularly timely. Let's listen in.

Sheila Vakharia (1:31)

So hello, everyone, and thanks so much for joining us for this episode of Drugs and Stuff. My name is Sheila Vakharia and I'm the Deputy Director of the Department of Research and Academic Engagement here at the Drug Policy Alliance. And it is my pleasure to interview Dr. Kerwin Kaye today about his latest book, "Enforcing Freedom: Drug Courts, Therapeutic Communities, and the Intimacies of the State." Dr. Kaye is an associate professor of Sociology, American Studies, and Feminist, Gender, and Sexuality Studies at Wesleyan University. Thanks so much for joining us today, Kerwin.

Kerwin Kaye (2:02)

Thanks for having me. Very happy to be here.

Sheila Vakharia (2:05)

So for members of our audience who may not be familiar with your work, could you start us off by telling us a bit about your background? And what brought you to explore drug courts and therapeutic communities in your research?

Kerwin Kaye (2:14)

Sure. So it actually is a bit of a roundabout story. I did my master's work on male street prostitution in San Francisco, I had been involved in activism around the issue of sex work, and was really interested in what was happening on the street at the time. And so I was really interested in street life, and what that was for these mostly young guys, mostly 16-19 years old. And one of the things that I found was that almost everyone was doing some pretty hardcore drugs. Marijuana didn't even really count. So, you know, heroin, meth. Crack was

sort of a third, distant third, and even the people who didn't use any drugs had a drug identity of a sort, they were like straight edge. So, and the drugs that you would use really sort of helped shape the social networks that you would participate in on the street, and so on. So I really saw the importance of drugs. And that sort of woke me up to that issue in a way that I hadn't been aware of before. And in terms of how it works socially. And then I also became aware of the guys who I was working with, I was working with a very small harm reduction agency. But they really just hated the larger social service agencies that were supposed to be helping them. And that was very surprising to me. And I was like, Huh, why is that? And it was literally, to a person. There was not one of these guys who I spoke with who was really happy with the services and reception they got at these agencies. And so I started to look more into questions about how street life is governed. So not just about what the experiences of the guys were, but how the social services were participating with the police, and the local shopkeepers, and so on in terms of how all of this is actually governed at a larger institutional level. So that started to turn me towards questions of, sometimes in anthropology it gets called "studying up" rather than "studying down", looking at the institutions of governance and control, and then just sort of through a bit of some flukes, but combining this interest in drugs with social governance, I ended up on drug courts in particular, and taking a look at the both the courts and the treatment centers that they refer people to and work with.

Sheila Vakharia (4:58)

And drug courts are kind of an unusual intervention in these divided times because interestingly enough, they have a lot of bipartisan support. Can you talk about why that is? And what do you think makes them appealing to both sides? Is there something different that appeals to each side?

Kerwin Kaye (5:12)

Yeah, I would say so. So, drug courts began in 1989. And they were initially started as a policy intervention to deal with the fact that the war on drugs was continuing, and they were just arresting a lot of people. And that was causing sort of an institutional bottleneck within the court system. You just had these, you know, very long wait lines that would happen in terms of actually getting in, having your, your case heard. And so Janet Reno was one of the people in, in Miami, in Dade County, to help create the first drug court, and this is part of what propelled her to become later, Attorney General of the state, and then to become President Clinton's Attorney General.. through her fame in this innovation. And the key part of the innovation is that -- and most drug courts continue to work this way -- is that you have to plead guilty in order to participate in the drug courts. And that, so then the, the court then supervises your case and sends you to treatment, but you've already pled guilty, and that resolves a lot of the institutional pressure that was sort of built up on the court, so they're much better able to handle this huge influx of people. So, so partly it was that, but, but it also has this appeal to liberals, insofar as it's treatment instead of incarceration. So it sounds great to a lot of liberals and progressives. There's problems with that, that I'm sure we'll talk about, but, but it certainly sounds very good. And indeed, there are some positive parts of that. People get services, they get some treatment that at least sometimes feels like it's really helpful. And then it took a while to win over more of the conservatives. But when the numbers started to come in about reduce recidivism rates, so, you know, the data typically shows that there might be like an 8 to 13% reduction in recidivism. And that's not huge. But it's enough to, say...

Sheila Vakharia (7:25)

To make a dent.

Kerwin Kaye (7:25)

Yeah, to make a dent. So, so when you have those types of numbers, you get some cost savings, and that's really helped to win over conservatives. They've also really, drug courts have also really positioned themselves as not being soft on crime. And the mode of treatment has a, has a lot to do with what, they would use a rhetoric of something like "holding people accountable," and applying, in fact, those criminal justice options that they have, like maybe throwing somebody in jail for a day if they test positive, and sort of increasing those punishments over time. So they've been able to sell themselves to liberals and progressives as offering treatment instead of punishment. But to the conservatives, they've been able to sell both the cost savings and the fact that actually it's, quote, "tough." And that's been, both of those things have been critical, I think, in getting this sort of bipartisan appeal. And you can still see that today. So the Trump administration continues to support drug courts. You see, Biden has, in some of the debates, has mentioned drug courts as part of his policy. And so you continue to have this sort of wide agreement that this is a good thing with only a few criticisms, people such as -- Drug Policy Alliance has issued a couple of wonderful critiques of drug courts and the problems that they have, that actually were very helpful for my work.

Sheila Vakharia (7:29)

Oh, that's fantastic!

Kerwin Kaye (8:11)

But, so there, there have been some critiques: the Justice Policy Institute has issued one, the National Association of Defense Lawyers has issued another, and National -- or -- New York Academy of Medicine in association with Drug Policy Alliance did another. So there have been some very good critiques. But overall, it's been something that's been very positively received, unfortunately, so I'd say.

Sheila Vakharia (9:28)

Mm hmm. So you mentioned a little bit earlier that you have to plead guilty. Can you actually break it down a little bit? You know, there's some of us who might be listening who don't really understand what it what it means, what this whole process means. So, say I get arrested for drug possession in a jurisdiction that has a drug court, can I just become a participant? What happens? What do you need to do?

Kerwin Kaye (9:49)

So it works a little differently in different areas, and there's approximately 3700 drug courts now, across the US. So each jurisdiction has its own sort of way of doing things. But in general, the procedure would be that you would be arrested. And for particular types of crimes, they would, they would send somebody to talk with them and do an assessment -- is this person seem like a viable candidate -- and then they would give you the option to participate. So you do have this option, but, but typically, I think that that's presented in ways that make it sound like a much better option than it is the and I'll jump ahead just a little bit, but one of the problems with drug courts is that about half of the people nationally fail at drug court. And so when you've pled guilty in order to participate, and most drug courts work, where you have to plead guilty that way, like over 90%, so you've given up your chance to do a plea bargain. You've in fact pled

guilty to the most serious charge that they could possibly, or set of charges that they could possibly level at you.

Sheila Vakharia (11:03)

Whatever the prosecutor throws at you.

Kerwin Kaye (11:05)

Yes! And, and so whatever the most extreme version of the charges based on the situation was, you've now pled guilty to that. So if you're part of the half that fails out, and half -- I mean, that's a big number -- now you're going to prison, you're getting, or jail, you're getting no credit for the time you've done with the drug court. And instead, you're now going to serve a sentence that is longer than ever, than if you had had the opportunity to do a plea bargain. So for half the people going through the drug court, this is actually intensifying the war on drugs against them. And the people that tend to fail disproportionately tend to be disproportionately black, disproportionately poor. And so it's actually intensifying the war on drugs for precisely the people that need relief the most in the war on drugs. Just at a time when more and more sort of working class whites are being caught up within the criminal justice system due to drug involvement, they're sort of getting a way out. And if you do, if you're part of the half that succeeds at drug court, it can be a very good deal. Not only have you gotten those services, but they will upon graduation, they'll remove the charge from your record. And so that's a great deal for the half -- the disproportionately white, disproportionately a little bit better off half -- that is able to succeed at drug courts. But part of the issue too, is drug courts -- this is changing a little bit, but drug courts were really specifically designed to only incorporate people who are considered the lowest risk within the criminal justice system population. So it's non violent crimes. It's part of the, what sometimes gets called the "non non non" -- so non violent, non sexual non serious. And those are the people that like, don't necessarily need to be involved, from my perspective, in the criminal justice system in the first place. And instead, they're taking that population of low risk people, subjecting them to this sort of intensified surveillance that the drug court involves. So you have all these case managers who are observing you, you have to follow all the rules of the court, you have to go to treatment, you're observed by the treatment professionals. And going through this procedure of intensified, you know, sort of, we could call it judicial probation. And, and then, then they're making a single decision about whether they're going to let you go or lock you up for an even longer period of time. So rather than sort of like a system of revolving door justice, where people get arrested for short times and then released, and then that cycle sort of happens, they're -- they've instituted this system that basically spends a lot of time with people, gives them some services, but really surveils them very closely and then makes one single longer term decision about, are they going to let them go, or are they going to lock them up? It's, and again, the the half that they're locking up again, are disproportionately poor, disproportionately black. I sometimes like to say like, the drug courts sound great, but you're making this deal with the devil with the criminal justice system. And so you really need to pay attention to the fine print when you make a deal with the devil. And the fine print here are some of these elements: that lots of people are getting locked up for ever longer.

Sheila Vakharia (14:36)

And I think you kind of answered this question a little bit. But who do we end up excluding? I mean, when we focus on the non non non nons, what happens to the folks who don't check all those boxes?

Kerwin Kaye (14:48)

Well, they end up -- so this is part of the thing, so the drug courts sound really good. It sounds like we're reforming the criminal justice system, but it actually relies on the fact that it has this unreformed prison system and criminal justice system that are backing it up. So it's precisely relying on the fact that lots of people are continuing to get arrested on the street. And it's not changing any of those policing practices. In fact, if you follow the logic of the drug court, which is that being arrested is a benefit, because you're getting all these services and so on, you would want to arrest -- arrest as many people as possible. So it provides a rationale to actually expand the criminal justice system on the street. And then they use the threat of this unreconstituted prison system and jail system, as like, this is what's going to happen to you if you don't participate in this program, if you don't do well in this program. And they will, you know, use what they call shock incarceration, so locking people up for short periods of time, give them if they break a rule or maybe on one of their drug tests, they test positive, give them a little taste of the the nasty future that lies in store for them if they don't abide by the rules of the program, and so on. So they're very much reliant on the fact that they have this unreconstituted, very punitive system, both to bring people in and to threaten people with. So part of what -- another way to look at what the drug courts are doing is they're really using that, that unreconstituted, very punitive system. And they're, they're managing those resources. So they're only using them when they when they really have to, when they feel that they really have to. So they're, they're doling it out very, you know, in very titrated measures in order to maximize the effect of this threat that they have with the criminal justice system. And they are very aware that they're completely dependent upon that threat. So the, the National Association of Drug Court Practitioners, they have taken policies, for example, against any sort of move towards legalization of marijuana, including for medical purposes, they're very much opposed to sort of any sort of reduction in penalties for drug crimes, anything because they're aware that the only way the only reason that people participate in these programs is because there's this huge threat hanging over them. So the larger the threat, the better. So the more people arrested, the larger the threat, the more intensely negative the prison system is, the better for the program because people will participate and they'll have some motivation to do well within the program. So, so the drug courts, while they seem to be offering treatment instead of incarceration, they're actually furthering a logic that allows for these other horrible aspects of the criminal justice system to continue in an unreconstituted, and potentially even more significant, expanded manner.

Sheila Vakharia (18:03)

So I'm going to self disclose a little bit. I actually was a clinical social worker at a 12 step abstinence only treatment facility on an outpatient basis, where, at the time that I worked there, almost a third of our clients were referred through the criminal justice system, many of whom were linked with our drug court. And after some time of working with drug court participants, I was actually nominated to be the agency's drug court rep. So I used to go sit in on drug court meetings every week, and represent kind of the caseload that we carried as an organization, and I can tell you, it was quite eye opening for me as a practitioner, to see the ways in which, on the one hand, obviously, you know, when someone was doing well, and you write about this in your book, that everyone stands up and applauds, you know, someone comes in after maybe hitting a milestone or getting through something really challenging. And you know, the entire team rallies and cheers on the person and, you know, judges hug the participants and, you know, people are made to, you know, feel celebrated. But on the other hand, I totally remember, you know, having to write these detailed reports for the, for the court every week about what they talked about in group, what their drug test results were. And that the penalties could range from, as you were saying, like a night in jail to teach them a lesson, but writing silly letters or lists, taking accountability for, for interpersonal interactions and, and apologizing, and the judge would then determine whether that letter was up to par and showed remorse, or that someone had learned a

lesson. And I was wondering, um, you were behind the scenes. You got, you got access to these kinds of interactions every day. Can you tell us a little bit about what that was like?

Kerwin Kaye (19:49)

Yeah, I mean, well, you just, you just described it very well, but partly what I realized at some point was that, what I was looking at with, with those sessions, where they make a decision about what they're going to do with each person, so is this person doing well, okay, I'm gonna, the judge will say, okay, I'm going to be congratulate -- congratulating them in public, and in front of the court, in front of all the people that are assembled there. Or I'm going to be, you know, coming down hard on them, or what am I going to be doing? Or am I going to put them in jail overnight? But so, or are they going to fail out of the program entirely? So I realized at some point, I had case study after case study, where the court was deciding and usually these decisions are made on a semi consensus basis. I'm sure you saw, where everyone more or less agrees --

Sheila Vakharia (20:44)

We'd have to weigh in.

Kerwin Kaye (20:44)

Yeah, you get to weigh in. The prosecuting office, the DA's office gets to weigh in, the defense, the social workers, the case managers, everyone weighs in. Judge will make an ultimate decision, but usually they try to come to some sort of consensus. And, but I had case study after case study where you could see what are the criteria for this person to be released, for this person to be free? And so I sort of, I call what I did, with the book, an ethnography of freedom. Because there are all of these criteria that liberal political theory has introduced about, who are the people who are viable to be citizens and to be free. And, and so historically, you know, that referred to only white propertied men, for example, and that shifted, but that that history is still with us in a way that that the people who are policed and identified as drug users and obviously the policing is very racially and class targeted and so on. But, and then there are these, among that population, then you have these specific criteria about what is required in order to be free -- in this literal sense, of we're either going to lock you up or we're going to let you go. And so, so a lot of it has to do with the types of demeanors that you're sort of referencing, the types of clothes that people are wearing, the types of gender appropriate behavior, the types of social contacts that they're making. And this is one of the elements where having a drug court and having a procedure that gets talked about as therapeutic jurisprudence, so when the court stops being a system of deciding guilt and innocence, and instead starts to evaluate people's therapeutic improvement, that expands the terrain of the court enormously, so they really are deciding like, what you can wear and who you can live with, who you can be friends with, is this person a good influence or not? And making those types of informal decisions over people's lives. Some of that's already happening in places like probation and parole, but the court really gives these types of decisions a lot more weight, because you have a judge right there, who can, if you don't go along with what's being said they can lock you up. And that's, again, that's part of the design of the court. This is part of what the supposed advantage over, of drug courts is over probation and parole. Is that they can sort of immediately sanction you if they decide that they need to. So you have this vastly enlarged domain in which the court is exercising authority. And so it has to do with all these sorts of issues that, that we're sort of talking about, but sort of the key criteria that I felt the court relied upon was at the end of the day, do you get a job? And that was the key criteria that I that I felt that the court was really relying upon, upon whether you're going to graduate or not from this program. And it's one of the, in most courts, it's one of the explicit criteria that you have to have a job before you can graduate, you have to be looking for a job, if you're not looking for a job in the right way, and with sufficient gusto, that'll get sanctioned. So and then you'll have to have that job. So, you know, so the case managers would tell people things like, okay, you're just gonna have to go get that McDonald's job, and you're just gonna have to take this, you know, very low wage job, just to get out of here right now. Low wage and demeaning job, you know, just to get out of here. So it was really orienting people, I felt in a lot of cases, what it was doing was really taking people who had been involved in street life in a lot of ways, and really doing things to orient them towards the lower end of the formal labor market. That that was sort of the de facto move that the court wanted to see people make. Get them from sort of disreputable street oriented lifestyle, and get them into the respectability of the low wage formal sector. And that was the key criteria with all those sort of cultural changes that are associated with that. And that's also what I saw in the treatment centers. So I felt that, you know, I guess I saw that, given these criteria, you could reduce the so called drug abuse rate, simply by having a jobs program. Yeah, you could have a much greater higher graduation rate out of the drug court just by having a jobs program and doing things like that. So it just struck me that there were so many other ways that you could deliver services, that you could do things that would be relevant for the populations that they were looking at, that, and even achieve that 8 to 13%, lowered recidivism rate. You could do all of that with a public health approach and focus on harm reduction and giving people treatment on demand. And you didn't need to have this coercive aspect. So, you know, some of the downsides that you're getting with that coercive aspect, you're continuing to arrest tons of people who again are, you know, going through this program are low risk offenders, people who really, you know, what are they doing in the criminal justice system to begin with? And, and continuing sort of some justification for expanding the criminal justice system, having this punitive, very punitive orientation sort of waiting in the wings, even though you're doing this nice sort of soft therapeutic approach --

Sheila Vakharia (26:37)

Kind of the carrot - stick, right?

Kerwin Kaye (26:38)

Very much, and it's totally reliant on a carrot stick approach, and it, but it needs the stick, it needs the stick. So, you know, so you, you just, it just struck me that you could accomplish a lot of the positive things that the drug court might be doing, and I do acknowledge that there are some positive things, and there are some people who come through, the people who succeed, some of them, you know, really feel like their life has changed for the better. And that, you know, some people would say thank God I was arrested, you know, things, you know, very strong, you know, I'd be dead if I hadn't gone through this program, you know, so very strong positive statements. But it just struck me that you could achieve a lot of that without needing to have all the downsides of an intensified war on drugs for half the people and all the justification for intense, ongoing intense drug laws and policing and so on.

Sheila Vakharia (27:35)

And I want to follow that thought about how restorative and rehabilitative it can be to be employed and to have a job. I think, you know, you mentioned this in the book, that a significant portion of the drug court participants that you were following and observing were referred to longer term residential therapeutic communities of sorts, and I'm also wondering how much of the confounding variable there is housing, right? So being stably housed, having a roof over your head and having a bed to sleep in, in addition to perhaps getting some

supports, at times when it was being therapeutic, if that also is another factor that gets minimized, and all of this needing to frame it as therapeutic rather than maybe it was just long term housing?

Kerwin Kaye (28:24)

A lot of research showing that housing would you know, a housing first policy that doesn't require abstinence in order to get housing is a great way to reduce. There's sort of a little bit of conflicting evidence, but it really it certainly reduces the harms of drug use. People use drugs in a way that's better for them. And then conflicting evidence about whether it actually reduces the number of people who are using drugs, but I'm more focused on the harms, you know.

Sheila Vakharia (28:52)

We are, too. We are too.

Kerwin Kaye (28:53)

Yeah, but indeed, just in terms of where people get referred to also, whether participants in drug courts get referred to outpatient programs or inpatient programs and the ways that actual "clinical need" which term I'll put in quotes, but some assessment of "clinical need" is that really the determining factor about where people go and it's very much not always the the key factor. So the district attorney's office, so even though decisions are made somewhat on a consensus basis, about where, where people go, and and what's going to happen with people in these sort of collective decision making moments of the court, the District Attorney's Office has a disproportionate say in how things go. And the reason for that is because without the participation of the DA's office, you've got no drug court. So they really get to call the shots a lot. The judge can go against the DA's recommendation in any, in any particular case, they could decide whatever they think, but if they go, you know, if they consistently rule against the things that the DA's office wants, the DA's office could stop participating in the court and then that's the end of your court. So generally, they go along with what the DA's office wants. And when I spoke with the DA's office about well, who do you consider to be a good candidate for outpatient treatment? They very immediately said, without hesitation, somebody with a job is a good candidate for outpatient. So that's not an assessment of clinical need.

Sheila Vakharia (29:34)

Correct.

Kerwin Kaye (29:49)

That, and what that specifically meant was people who are homeless, as you say, who you know, who knows what exactly their situation is with drugs, they would automatically be referred to residential facilities. People, but even more, more commonly in the court that I was looking at. A lot of drug dealers are getting arrested, and they have felony level drug charges that are leveled against them. So they have this incentive to participate in the court. A lot of them, their only use was marijuana. So they smoked periodically, you know, and and that was it. That was the extent of their drug use.

Sheila Vakharia (31:15)

The clinician in me is cringing right now. Cuz I'm thinking through the ASAM criteria of the addictions, the American Society of Addiction Medicine criteria that we were supposed to be using to make these kinds of determinations. And really, you know, long term residential is for folks who've had a longer drug use trajectory and a longer drug use history, probably some unsuccessful attempts at prior treatment, and we can argue about what unsuccessful means, but oftentimes people who also, the severity of their problems is pretty high, and they often have co-occurring mental health or other physical health needs that could also require that kind of structure and stability and monitoring to kind of help them get back on their feet. You know, marijuana use, cannabis use disorder, as we call it. I mean, that is, if that's your sole diagnosis, that should be an outpatient treatment that is done within maybe 12 weeks, you know, six to 12 weeks. So these are absolutely decisions that are made outside of even what insurance would want to be able to pay for. And that is astounding.

Kerwin Kaye (32:20)

So, but the DA's office had very clearly made a decision that this was, in their mind a public safety issue. What they would say is that we don't want to have, we don't want to come have people come out of the drug court and become sober criminals, you know, so that they saw what they were doing, as, you know, sort of an alternative to locking people up in jail, but it was still some sort of facility where people were going to be held, and that that was the entire point. So it was basically turning the treatment, the residential treatment facilities into mini jails. The District Attorney's office was aware of, the case managers at the court were aware of, the treatment professionals at the center, at the residential treatment centers, were aware that, and sometimes used this phrase, of like, we're becoming mini jails. They were very aware that this was happening and that they were receiving a lot of people who really didn't have a huge drug disorder, or if any, you know, and that that was part of what they were charged with, with doing. Now and, and so they, so the dealers, you know, they didn't have a job, from the perspective of the District Attorney's office because they weren't in the formal economy, but a lot of them had a very strong work ethic, and they were, you know, they were basically doing their dealing as if it were a nine to five job, maybe not with those hours. But, but they were, you know, had a very strongly regimented life, that was sort of structured in some of the same ways as formal labor. And so they would tend to do pretty well in the programs actually, you know, they didn't have a big drug issue. Their lives were fairly structured in ways that they're, again, they're trying to if the overall goal is to take people who are heavily involved in street life and move them into formal economy, they were already involved in a part of street life that was the most like the formal economy. So they were able to make the shift pretty well. And a lot of times, they would sort of reformulate the aims of the court. So they would say, Well, I didn't have an a drug addiction, but I was addicted to money.

Sheila Vakharia (34:28)

Mm hmm, I heard that a lot. The lifestyle. You mentioned the drugs lifestyle in the book.

Kerwin Kaye (34:34)

Yeah.

Sheila Vakharia (34:34)

What was it like for you as an anthropologist to be immersed in a setting that was trying to change the culture of people?

Kerwin Kaye (34:42)

Well, I really had to think about like, what, what are they trying to treat and how do they, how do they know when someone's getting better, particularly when they're in a situation when most people aren't doing any drugs, you know, they're testing people, they're in residential facilities, they know that they're not doing any drugs. So how do you know that someone's getting better? And what are the criteria? So indeed the people at the court would talk about, would be very clear, like, we don't just want to stop getting people off of drugs we want people to, we want to deal with this entire, quote, "drugs lifestyle." The people in the treatment facilities sometimes would refer to this as "dope fiend behaviors", but that amounted to the same thing as this drugs lifestyle. So what is the drugs lifestyle? And I was like, What is that? And what they would say is, the drugs lifestyle is -- so the drugs lifestyle somehow is not people on Wall Street doing cocaine to celebrate a good day or --

Sheila Vakharia (35:43)

Sounds like a lifestyle to me!

Kerwin Kaye (35:44)

That sounds like a lifestyle to me, but that is not what they're referencing, because those people aren't getting involved in the, in the court at all. So what they're what they're referencing, what they would say, is an inability to defer gratification and to set long range goals. An incapacity to establish a normative work ethic, a sense of irresponsibility, an unwillingness to follow rules, these types of things, and it at some point I sort of realized, you know, this is exactly the same thing that used to be said about the culture of poverty. And the culture of poverty. It was this idea that came about in the 1960s by people like Oscar Lewis and Daniel Patrick Moynihan, who really promoted this analysis of a culture of poverty. But what the culture of poverty did is it really took a lot of sort of older racial stereotypes, and sort of reformulated them so that they would now be not about race, but about culture, a culture of poverty.

Sheila Vakharia (35:56)

"Race neutral" culture.

Kerwin Kaye (36:01)

A "race neutral" culture of poverty, that just somehow would apply to non whites a lot more than whites. And so it was really right at the moment when the the civil rights movement and the black freedom struggle were sort of making it impossible to be openly racist. They were reformulating a lot of the imagery of racism, and reformulating it into a race neutral, colorblind, supposedly colorblind culture. And then with the idea of the drugs lifestyle, you're taking, again, that imagery that racially charged imagery, and you know, doing even sort of like a second turn. So it becomes even less possible to see, like, oh, yeah, this is completely about race. This has everything to do with those, that history of white supremacy and the ways that that's the imagery that that's that has been developed through that history. And that those racial stereotypes, that imagery, is more than just sort of random stereotypes. You could see that, you could see them as an argument about why people are unfit for civil society or civilized civilization. You know, and why a particular group of people is not suitable to be out walking the streets, for example, why they need to be locked up. So the symmetry about drug users has everything to do with this history about race and the drugs lifestyle. And it's, it's an argument about why people are dangerous, why people are -- what's wrong with them, and so on. And so it sort of takes, not only does it take attention away from sort of the structural issues that are really causing, whether, you know, poverty, sort of racialized forms of poverty, or the way the criminal justice system is policing that, those people who are disruptive to the ordinary forms of racial capitalism that we have, but it's it's also then punishing those people.

Sheila Vakharia (38:51)

It puts it in the person, right?

Kerwin Kaye (38:52)

Yes, rather than in the structure, and sort of calling attention to that. And so addiction, being a brain disease, as we all know, yeah. You know, really takes attention away from any sort of social policy and puts it into the brain, that it's using all of the racial stereotypes and that history of imagery associated with white supremacy and applying it in a way that seems colorblind, but very much is not. And so, and that imagery can be applied to whites in certain cases, you know, but, you know, but then you have a discrepancy, certainly when, when whites go through the program, part of the reason I think that they do better typically than than non whites is precisely because the symmetry that has this long history of association with race gets applied to whites and non whites in very different ways. So, it gets applied with, you know, a special ferocity and, and speed to non whites, whereas with whites, the meaning of whiteness is sort of a meaning of being civilized. Being healthy, you know, all these things that are associated with whiteness. So that has the impact of sort of diffusing some of the imagery even when it's applied. So, so I see the entire drug court as participating in this sort of revamped and revised version of this, these earlier types of exclusions that I happened within, within liberalism. That again, initially were sort of like only white propertied men can participate in civil society. Now, those lines have shifted, but you still have a version of like, who is civilized and who's not, that is very much using that racialized language to exclude the drug users who come in contact with the criminal justice system, which again, is not the typically [unlegible].

Sheila Vakharia (40:53)

And even just going back to that list of characteristics that these people had, right this, lack of structure, the lack of routine, all of all of these things that you just listed, all of that sounds actually really adaptive to me, to circumstances in which you have to think fast, you have to react, every day is going to be different. You don't know what you're going to encounter, you have to be ready for anything. I mean, that's how you survive in the wild. That's how you survive. You know, that's how our ancestors survived. And I think that those are adaptive traits when people are in complicated and sometimes dangerous situations or just unstable circumstances in which they have to be able to do that. And so it's interesting to me to how what you're describing is the pathologizing of survival tactics and being a survivor.

Kerwin Kaye (41:49)

Absolutely. So another one of the supposed elements of the drugs lifestyle is responding in anger and, and when you're challenged. Well, that's something that is completely adaptive in, on the street, you need to sort of manage your street reputation, you need to show that you're not somebody who, somebody who can be taken advantage of. So within the treatment centers, there's there's a lot of yelling that goes on within the treatment centers, the the staff there are yelling at people all the time. And if you respond in a way and try to defend yourself, and particularly if you respond in anger, they'll the staff might immediately say something like, what, your boss is going to yell

at you and you're going to respond like that? You're going to lose your job right away. And so it's really sort of, in a de facto way, getting people used to the idea that you need to be yelled at, you need to be humiliated and you need to learn how to take that as part of your entrance into, particularly these low end sectors of the formal labor that your boss might not be a nice person. And might be yelling at you a lot. And you need to accept that as part of the job, you cannot respond the way that you would on the street. And that, as you say, would be highly adaptive on the street. So you're needing to be completely improvisational, you definitely aren't going to follow any rules that are like in your way just out of, you know, like, why would you do that? Indeed, making long range plans is not something that's viable for a lot of people who are heavily, who are very poor, because you're having to respond to so many contingencies that are happening all the time. So the idea of having long range plans and really enacting those plans and having some sort of organized structure to do that is really something that is beyond a lot of people's position. It's not that it's beyond their capacity, but it's beyond where they're located.

Sheila Vakharia (43:51)

It's not functional, it's not practical.

Kerwin Kaye (43:53)

It's not practical at all, and in fact, something else is completely practical. So it's really pathologizing as you say, exactly, it's pathologizing these things that are adaptive to the life that people have, associating that with drugs, which it really, I think comes more out of the poverty that people are living in. And that type of position that people are living with, and, you know, the drugs, I think, can offer more ways that people deal with the contingencies of street life, you know, the guys that I would see on the street, they would, you know, for example, use meth in order to stay awake for long periods of time. So they would be less vulnerable on the street, very adaptive, totally, you know, functional in its purpose. And also people are doing drugs, obviously, to have pleasure in their life in a life that's not offering them a lot of sources of pleasure. So, these things are, I think, very functional to what's happening on the street and to the, the, the oppressed circumstances that people are put into. And that's precisely what's getting pathologized through the drug court, and turned into what is getting treated psychiatrically or, loosely speaking. Oscar Lewis, when he spoke about the culture of poverty, he actually floated the idea that maybe the culture of poverty should be treated through psychiatry, that this would be a good way to do it. And so rather than dealing, and that's exactly what's happened, effectively, in a de facto way. So rather than dealing with sort of the social problems that sort of create racialized poverty and the types of policing that are required to hold that in place, we have this additional element of rehabilitation. That's just sort of reinforcing the overall system, even as it lets, you know, some people out of the loop.

Sheila Vakharia (45:47)

Do you believe, personally, professionally, if there's any place in our current system for these approaches, and you know, if so, what role should they have and why, or should they be changed or modified? Or not, then what should we aspire to work towards? What do you think are solutions?

Kerwin Kaye (46:05)

Well, the main solution, I think that we need a health approach to drug use, and, you know, the US has a rate of incarceration, that's five times the levels of most other countries of a similar economic level. That's ridiculous. And one element of moving away from that is changing drug policy, toward something that's really focused on harm reduction, providing services, providing treatment on demand, you can get job training through drug court, that's a good thing. Why not just have that available? You know.

Sheila Vakharia (46:38)

Yeah.

Kerwin Kaye (46:39)

Housing policy, providing housing to people, that housing first option, all these types of services, these are all things that you can do without relying on the criminal justice system and you could just remove the criminal justice system from the overwhelming majority having anything to do with drugs, just decriminalize. And to the extent that you still have a problem with, with drugs that people still have problems? I guess I would just say that, because I don't think a public health approach is just going to magically make the whole thing disappear in terms of actual problems that people have. But I would rather have those problems than the problems that you get with the criminal justice system in terms of locking people up in a big way. So, so that would be my main thing that I would say.

Sheila Vakharia (47:21)

Are there any final words that you'd like to kind of leave our audience with, you know, what, what would you like your take home message to be for the folks tuning in today?

Kerwin Kaye (47:31)

I guess the key thing that I would again, say about drug courts is that they're, they're this way of stratifying punishment and stratifying penalization. And it really, you know, I just really want to emphasize that they they intensify the war on drugs on populations, black and brown populations, mostly poor, mostly disenfranchised, that most need relief, and that the way the drug courts operate is entirely backwards in that regard. So for me in terms of criminal justice reform, it's a non starter because it's actually making things worse for the populations that I care about the most.

Sheila Vakharia (48:13)

Great. Well, thank you so much. You heard it here. Thank you to Dr. Kerwin Kaye for spending time with us today, and please feel free to check out his book, "Enforcing Freedom: Drug Courts, Therapeutic Communities, and the Intimacies of the State." Till next time.

Gabriella Miyares (48:35)

Thanks again to Sheila and Kerwin for that incredibly informative discussion. We encourage everyone to check out Kerwin's book, "Enforcing Freedom: Drug Courts, Therapeutic Communities, and the Intimacies of the State." If you're interested in checking out DPA's report on drug courts from 2011, you can visit drugpolicy.org/drugcourts. Thanks so much for tuning in. If you want to suggest new topics or guests, please tweet us. We're @drugsnstuffDPA. We hope you'll keep listening. Until next time, be well.

(Jazzy outro music in)

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