# HAVE PROBLEM-SOLVING COURTS CHANGED THE PRACTICE OF LAW?

*Cynthia Alkon**

> The establishment of drug courts, coupled with [their] judicial leadership, constitutes one of the most monumental changes in social justice in this country since World War II. General Barry McCaffrey, Drug Czar, 1996-2001.[1]

Drug courts started thirty years ago in the United States.[2] The introduction of these courts brought high hopes that they would refocus our criminal legal system to therapeutic and rehabilitative methods while moving away from an otherwise largely punitive and punishment-oriented approach. Has this happened? Has the problem-solving court movement brought widespread change to how criminal cases are processed and how criminal lawyers, both prosecutors and defense lawyers, approach the practice of law? Have these courts actually been, as General McCaffrey expected, a "monumental change"? The simple answer is no. These courts have changed how some defendants are treated some of the time. But, the numbers impacted by these courts, even as the number of these courts has grown dramatically, remains small. And, the rehabilitative approach within these courts has not led to changes in how other courts work within the larger criminal legal system. Problem-solving courts have remained, for the most part, in their

* Professor of Law and Director of the Criminal Law, Justice, & Policy Program at Texas A&M University School of Law. Thank you to Professor Lela Love and the speakers at the symposium for a thought-provoking day. Thank you to the Editor-in-Chief, John Walpole, and the editors and staff of the *Cardozo Journal of Conflict Resolution* for their hard work on this symposium, *Innovations in Justice: Experiments in Restorative Processes*. And, thank you to Professor Andrea Kupfer Schneider for her comments on a draft of this article.

1 Arthur J. Lurigio, *The First 20 Years of Drug Treatment Courts: A Brief Description of Their History and Impact*, 72 FED. PROB. 13, 13 (2008).

2 The first drug court started in Miami, Dade County, Florida in 1989. *See, e.g.*, Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 454 (1999). There are 3,100 drug courts in the United States, *see, e.g.*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, DRUG COURTS (2020), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf (last visited Apr. 21, 2020). There are 461 Veterans Courts in the United States, 116 of which were created in 2015, *Veterans Courts, Resource Guide*, NAT'L CTR. FOR ST. CT., https://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Veterans-Court/Resource-Guide.aspx (last updated Oct. 4, 2018). There are over 300 Mental Health Courts around the country. *See Mental Health Courts,* JUST. CTR, https://csgjusticecenter.org/projects/mental-health-courts/ (last visited Apr. 19, 2020).

own silo while other courts have continued business as usual focusing on punishment, not rehabilitation.

One indication of the failure to bring monumental change is the fact that mass incarceration grew to unprecedented numbers *after* the establishment of these courts. A relatively small percentage of defendants are eligible for these courts and even as the number of these courts has grown in number, the capacity has remained limited. Problem-solving courts have not led to larger or more far reaching reforms in the criminal legal system.[3] Unfortunately, problem-solving courts, without other more far-reaching reforms, are not the solution to mass incarceration. There is also a serious concern that the existence of problem-solving courts has led to net-widening and may have pulled more people into the criminal justice system, particularly as these courts encourage the view that the solution to larger societal problems are within the narrow confines of the criminal legal system and not by other sectors in our society, such as public health.[4] In addition, problem-solving courts have not changed the behaviors of key players in the system that are responsible for mass incarceration. Prosecutors continue to file a larger percentage of cases[5] and continue to think that a key part of their jobs is to put "bad guys" away, and with the exception of some reform-minded prosecutors, continue not to focus on rehabilitation and treatment.[6] Judges continue to look at prison as the default sentence, even for first-time offenders. And, despite the opioid epidemic, the general public largely believes that crime should be punished and that prison is the appropriate punishment.[7] Defense attorneys are left to focus on minimizing the harm the

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[3] *See, e.g.*, ERIN COLLINS, THE PROBLEM OF PROBLEM-SOLVING COURTS 1 (2019), https://ssrn.com/abstract=3492003 or http://dx.doi.org/10.2139/ssrn.3492003.

[4] James L. Nolan Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1562 (2004).

[5] John. F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1237, 1242 (2012) (mass incarceration was not due to more arrests, arrest rates stayed constant, instead prosecution filing rates increased dramatically).

[6] One of the four main motivations for prosecutors deciding to become prosecutors was the public service component, including protecting the community. Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1688–91 (2018) [hereinafter *Career Motivations*]. *See also* WILLIAM R. KELLY, CRIMINAL JUSTICE AT THE CROSSROADS: TRANSFORMING CRIME AND PUNISHMENT 149 (2015) ("My takeaway from these experiences is that first and foremost, the prosecutors I have observed take a hard line regarding punishment as the primary tool of the justice system.").

[7] *See generally* KELLY, *supra* note 6, at 167–68 (describing the public opinion data that Americans support punishment, but describing it as more nuanced with Americans also supporting a balanced approach that includes rehabilitation).

criminal legal system may do to their clients and operate in an environment where treatment is tough to get.[8]

Thirty years after the start of the first drug court, it is a good time to examine what the problem-solving court movement has contributed to our criminal legal system overall. It is also a good time to ask what it would look like if these courts had made "monumental change" in our criminal legal system. This article will start with a discussion of mass incarceration and offer some reasons why problem-solving courts did not prevent, or lessen, mass incarceration. Next this article will discuss how problem-solving courts work, including by looking at the roles of the professionals, the judges and lawyers, within these courts. This article will then consider the impact, or lack of impact that these courts have had on how the larger criminal legal system works. Finally, this article will suggest five key things that problem-solving courts do that would result in "monumental change" if more widely adopted in the rest of our criminal courts.

## I. Mass Incarceration

In 1989, when the first drug court started in Florida, the total number of people incarcerated in the United States was 710,054.[9] The incarceration rate was 274 people per 100,000.[10] At the time that was the highest incarceration rate in the history of the United States.[11] Despite the beginning of the problem-solving court movement, the incarceration rates and raw numbers of people incarcerated increased dramatically during the 1990s, in what has been described as the "punishing decade."[12] During this same basic period, from 1995-2003, the largest percentage of growth in the prison population was for people incarcerated for drug crimes.[13] Overall, our incarceration rate rose over 400 percent, growing at an average

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[8] *See, e.g.*, *id.* at 159 ("Defense lawyers often think in terms of minimal sanction or punishment as the goal for the defendant, and sometimes that may translate into rejecting a diversionary, rehabilitative option in favor of a straight punishment option.").

[9] Bureau of Justice Statistics., Prisoners in 1989 (1990), https://www.bjs.gov/content/pub/pdf/p89.pdf (last visited Apr. 21, 2020).

[10] *Id.*

[11] *Id.*

[12] *See, e.g.*, Just. Pol'y Inst., The Punishing Decade: Prison and Jail Estimates at the Millennium (2000), http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf.

[13] Lurigio, *supra* note 1.

rate of twelve percent a year, from 1970-2000.[14] Crime rates did not increase during this period.[15] In fact, crime rates declined after mass incarceration started, but at most only about a quarter of the reduction in crime could be due to increased incarceration rates, the other three quarters was due to other societal factors.[16]

The United States currently incarcerates more people than any other nation in the world, a total of 2.3 million.[17] The United States also has the highest incarceration rate in the world at 655 people per 100,000.[18] Overall, 6.7 million adults in the United States, one out of every 37, are under some form of correctional supervision, either probation, parole, or in custody.[19] African American and Latino communities are hit harder by mass incarceration.[20] The United States continues to have extraordinarily high incarceration rates despite the small, but steady, decreases in incarceration since 2010.[21] Of those incarcerated, most are not serving life without parole sentences. According to the Bureau of Justice Statistics, "At least 95% of all state prisoners will be released from prison at some point . . . ."[22] For example, in 2017, 622,400 prisoners were released from state and federal prisons.[23] Therefore, questions about what might be done to reduce recidivism will affect the overwhelming majority of those we send to state prison.

There are a few reasons why problem-solving courts did not prevent mass incarceration. The first is, as will be discussed below, that these courts admit only a relatively small number of defendants and were not envisioned to be the dominant approach within

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14 Jacob Kang-Brown et al., *The New Dynamics of Mass Incarceration*, VERA INST. JUSTICE (June 2018), https://www.vera.org/publications/the-new-dynamics-of-mass-incarceration.

15 NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 52–55 (Jeremy Travis & Bruce Western eds., 2014).

16 *See, e.g.*, Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 114 (2018) ("other studies have found [incarceration's effect on reducing crime rates] to be as low as five percent.").

17 CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, NEGOTIATING CRIME: PLEA BARGAINING, PROBLEM SOLVING, AND DISPUTE RESOLUTION IN THE CRIMINAL CONTEXT 4–5 (2019).

18 *Id.* at 4.

19 DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015 (2016).

20 *See, e.g.*, E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 (2018), https://www.bjs.gov/content/pub/pdf/p16.pdf. *See also Criminal Justice Fact Sheet*, NAACP, https://www.naacp.org/criminal-justice-fact-sheet/ (last visited Apr. 19, 2020).

21 *See, e.g.*, JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 (2019), https://www.bjs.gov/content/pub/pdf/p17.pdf.

22 Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States,* BUREAU OF JUST. STAT., www.bjs.gov/content/reentry/reentry.cfm.

23 BRONSON & CARSON, *supra* note 21, at 11.

the criminal legal system. The modern problem-solving court movement developed so that these courts were not a model for all criminal courts, but simply an additional option and alternate court for some. In this way, the modern problem-solving court is different from juvenile courts—which were intended to be the *only* court available to juvenile offenders. Modern problem-solving courts developed as courts for the select few, not the many, and have developed as courts in addition to or instead of traditional courts and traditional approaches. The terminology used with these courts is one indication that these courts were not expected to be mainstreamed. For example, in Texas, these courts are referred to as "specialty courts."[24] These courts have only been available for a smaller, subset of defendants deemed worthy to be admitted and have thus-far not been envisioned as a replacement for traditional approaches or even be a dominant approach.

Another reason problem-solving courts did not prevent mass incarceration is that they need more resources than a traditional court. Problem-solving courts are not quick and they are not lean. A problem-solving court has a "team" which includes the lawyers, often a social worker or counselor, and perhaps a probation officer.[25] The standard model is that before each court session the entire team meets to discuss each defendant, together.[26] They go over test results, reports from probation, drug treatment programs, or counselors. The team will discuss how each participant is doing, and if there are problems, they will discuss possible interventions.[27] Then the court session itself will begin. The judge will take time to speak to each participant individually and this individual attention is considered a key reason that individuals successfully complete the programs provided by problem-solving courts.[28] If a participant is not doing well, the judge will ask them why and often push hard for answers that include some reflection on and acknowledge-

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24 TEX. GOV'T. CODE ANN. §121–26, 129 (West 2015).

25 ALKON & SCHNEIDER, *supra* note 17, at 283. *See also* JAMES L. NOLAN JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT, 7576 (2001) ("Successful treatment-based drug court programs are built on collaboration. To effectively create a courtroom atmosphere that is rehabilitative, the judge, prosecutor, public defender, treatment providers, and others must work as a 'team' to promote rehabilitation . . . ." *Id.* at 77, citing *Cutting Crime: Drug Courts in Action* (Washington D.C.; Drug Strategies, 1997, 30)).

26 *See, e.g.*, NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK 40 (Douglas B. Marlow & William G. Meyer, eds., 2017), https://www.ndci.org/wp-content/uploads/2016/05/Judicial-Benchbook-2017-Update.pdf.

27 *Id.*

28 *See, e.g.*, *id.* at 51 (". . .the relationship between the drug court participant and the judge is a significant factor in recovery.").

ment of the problem.[29] If a participant is doing well, the judge will take time to congratulate the participant and celebrate their success.[30] This often includes applause from everyone in the court from the judge, to fellow participants. Participants may be awarded small prizes or certificates of completion.[31] The lawyers tend to not say very much.[32] It may, in fact, be hard for an outsider to identify who the lawyers are. In addition to the in-court resources, problem-solving courts demand that participants get therapeutic help which often includes finding treatment programs.[33] Most of these courts demand that participants are either in school or a training program or that they have a job.[34] This means the courts may provide resources to help defendants find employment or training programs. Providing this type of individualized treatment and attention takes more time and demands more resources than that of a traditional court. And, this individualized approach means that problem-solving courts are more time consuming. Participants often have to report to court every week or every other week, especially during the early stages. This is compared to a traditional court that may require an occasional "progress report"—which is rarely more frequent than every 6 months or once a year. Fully staffing problem-solving courts and providing resources to the defendants who participate costs more than a traditional court. The argument is that these upfront expenses save

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29 *See, e.g.*, Sarah Beller, *A Day at the Drug Court*, FIX (Mar. 5, 2013), https://www.thefix.com/content/drug-courts91363?page=ALl, *reprinted in* ALKON & SCHNEIDER, *supra* note 17, at 283.

30 *See, e.g.*, Travis Crum, *Four Graduates Celebrate Completion of Drug Court Program*, HERALD-DIPATCH.COM (Oct. 1, 2019), https://www.herald-dispatch.com/_recent_news/four-graduates-celebrate-completion-of-drug-court-program/article_76556c16-f529-5a76-9af7-09ca6966d8fa.html.

31 These can include a supervised day trip to go fishing, to a movie, concert tickets, tickets to sporting events, tattoo removal, and framed graduation diplomas. For a list of different "incentives" given for success in drug courts, *see Incentives and Sanctions*, NAT'L DRUG CT. INST., https://www.ndci.org/resource/training/incentives-and-sanctions/ (last visited Apr. 22, 2020).

32 *See, e.g.*, Nolan Jr., *supra* note 4, at 1543, 1559–60 (". . .lawyers are frequently not even present during regular drug court sessions").

33 *See, e.g.*, ALKON & SCHNEIDER, *supra* note 17, at 282–83 ("Program participants will be assisted with obtaining job placement services, mental health service, 'wraparound' services"). *See also* BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997) ("Component 4: Courts Provide access to a continuum of alcohol, drug and other related treatment and rehabilitation services.").

34 *See, e.g.*, MILWAUKEE CTY. DRUG TREATMENT COURT PLANNING TEAM, MILWAUKEE COUNTRY DRUG TREATMENT COURT PARTICIPANT HANDBOOK 4 (2009), https://county.milwaukee.gov/ImageLibrary/Groups/cntyCourts/documents/Milwaukee_County_Drug_Treatment_CourtParticipant_Manual.pdf ("Program participants will be assisted with obtaining . . . job placement services, mental health service, 'wraparound' services . . . .").

money as problem-solving courts reduce time in prison and therefore save on prison expenses.[35] However, as a society we have already put money into prison infrastructure: we have built a large number of prisons nationwide since the 1980s, so that infrastructure does not need to be created.[36] The infrastructure does not already exist for new problem-solving courts. Limited funding to provide the additional resources, and to devote additional court time, is one reason that there are still relatively few problem-solving courts admitting a relatively small number of defendants.

In addition, there is a concern that the existence of these courts may widen the net and pull more defendants into the criminal system due to a misplaced idea that this might be the only way for some people to get "help."[37]

In the first decade after the first drug court there were 370 drug courts in operation or planned nationwide.[38] The Violent Crime Control and Law Enforcement Act of 1994 allowed for federal funding for these courts which allowed for them to continue to grow.[39] The numbers continued to grow and the numbers increased more significantly in the last decade.[40] There are currently over 3000 drug courts in the United States.[41] But, as will be discussed below, the overall model for problem-solving courts was never intended to be for the entire criminal legal system, or even a significant majority, it was intended to be for the select few.

### A. *Problem-Solving Courts*

The people we arrest and prosecute in the United States have high rates of substance use disorders, mental illness, and/or intellectual disabilities. Up to 80% of those in the criminal legal system are dependent on, abuse, and/or are addicted to a substance (alco-

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35 COLLINS, *supra* note 3, at 40.

36 *See, e.g.*, Keely Herring, *Was a Prison Built Every 10 Days to House a Fast-Growing Population of Nonviolent Inmates?* POLITIFACT (July 31, 2015), https://www.politifact.com/factchecks/2015/jul/31/cory-booker/was-prison-built-every-10-days-house-fast-growing-/ ("'the number of state and federal adult correctional facilities rose from 1,277 in 1990 to 1,821 in 2005, a 43% increase.' That's an increase of 544 new facilities. There are 5,478 days in a 15-year span, which works out to almost exactly one facility every 10 days on average." quoting SUZANNE M. KIRCHHOFF, ECONOMIC IMPACTS OF PRISON GROWTH 15 (Apr. 13, 2010)).

37 ALKON & SCHNEIDER, *supra* note 17, at 319.

38 Lurigio, *supra* note 1, at 16.

39 *Id.*

40 COLLINS, *supra* note 3, at 4.

41 U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *supra* note 2.

hol and/or drugs).[42] Approximately 40% suffer from at least one diagnosable mental illness.[43] This is roughly twice the national rate, and the recidivism rate for mentally ill inmates released from prison is 80%.[44] In addition, there are higher rates of intellectual disabilities, with one survey reporting that 30% of all jail inmates suffer from an intellectual disability.[45] Nearly 60% of prison inmates have had "at least one" traumatic brain injury.[46] In addition to all of the above, the vast majority of criminal defendants are poor and suffer from the disadvantages and trauma associated with poverty.[47] Complicating the picture is that most defendants suffer from a variety of these problems.[48] Criminologists point to the fact that punishment alone does nothing to address these underlying factors that contribute to criminal behavior and to high recidivism rates.[49]

The first problem-solving court was a juvenile court in Illinois in 1899.[50] The juvenile court was intended to treat juveniles, not punish them.[51] These courts developed at a time when the criminal legal system treated juveniles like adults and subjected them to the same punishments as adults (including execution).[52] Juvenile courts were envisioned to replace treating juveniles as adults and were intended to handle all juvenile cases. Juvenile courts, unfortunately, soon became less know for rehabilitative treatment and are today far removed from their original intended therapeutic approach.[53] The modern problem-solving court movement started with the first drug court in Dade County, Florida in 1989.[54] Problem-solving courts treat underlying problems, such as drug addic-

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42 *See, e.g.*, WILLIAM R. KELLY, ROBERT PITMAN, & WILLIAM STREUSAND, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 10 (2017).

43 *Id.*

44 *Id.* at 72.

45 Jim Concannon, *Our Weakest Members: Developmentally Disabled People in the Criminal Justice System*, LEXIPOL (Feb. 13, 2019), https://www.lexipol.com/resources/blog/developmentally-disabled-people-in-the-criminal-justice-system/.

46 KELLY, PITMAN, & STRUESAND, *supra* note 42, at 11.

47 *Id.* at 10.

48 *See, e.g.*, KELLY, *supra* note 6, at 84 ("It is a rare circumstance in which a criminal offender presents with only one primary criminogenic need. Crime is a product of many factors, including disadvantage, poverty, unemployment, educational deficits, mental illness, drug abuse or dependence, neurocognitive deficits and impairments among others." *Id.* at 84).

49 *See e.g.,* KELLY, PITMAN, & STRUESAND, *supra* note 42, at 11.

50 ALKON & SCHNEIDER, *supra* note 17, at 407.

51 *Id.*

52 *Id.*

53 *Id.*

54 *See, e.g.*, Nolan Jr., *supra* note 4, at 1542.

tion or mental illness, that lead to criminal behavior.[55] Problem-solving courts were intended to take a different approach and to address and treat the underlying problems leading to criminal behavior, thereby helping to reduce recidivism rates.[56]

### 1. Underlying Theory of Problem-Solving Courts

Scholars often place problem-solving courts in the category of therapeutic jurisprudence.[57] In 2000, a joint resolution by the Conference of Chief Justices and the Conference of State Court Administrators, stated that problem-solving courts involve "principles and methods grounded in therapeutic jurisprudence . . . ."[58] Others have argued that another theoretical foundation for problem-solving courts is restorative justice.[59] However, Richard Boldt suggests that the better approach is to view problem-solving courts as not being "shaped most prominently . . . by a foundational theoretical perspective but by an essentially pragmatic set of instincts."[60] This recognizes the reality that problem-solving courts generally start due to a judge pushing for the court and are not motivated by some grand theoretical idea, but rather by "practitioners on the ground, struggling to do something better than what they were doing."[61]

Erin Collins divides problem-solving courts into three basic types: treatment courts, accountability courts, and status courts.

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55 *See, e.g.*, Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L. J. 1055, 1055–61 (2002).

56 *But see* Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1122–23 (2014) (There is no one approach as problem-solving courts started under different circumstances and adopted a "diverse set of practices.").

57 *See* David B. Wexler, *Therapeutic Jurisprudence and Its Application to Criminal Justice Research and Development*, 7 IRISH PROB. J. 94, 95 (2010) (Therapeutic jurisprudence is defined as "a perspective regards the law as a social force that produces behaviors and consequences. Sometimes these consequences fall within the realm of what we call therapeutic; other times antitherapeutic consequences are produced. Therapeutic jurisprudence urges us to be aware of this and asks whether the law can be made or applied in a more therapeutic way so long as other values, such as justice and due process, can be fully respected.").

58 CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT, IN SUPPORT OF PROBLEM-SOLVING COURTS (2000), https://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/Resolution-PSC-Aug-00.ashx. *See also*, Peggy Fulton Hora, William G. Schma, & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 440 (1999) (". . .we propose to establish therapeutic jurisprudence as the [Drug Treatment Court] movement's jurisprudential foundation.").

59 Boldt, *supra* note 56, at 1124.

60 *Id.* at 1125.

61 JAMES NOLAN JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 36 (2009) (quoting Greg Berman, one of the founders of the modern Drug Court Movement).

Collins identifies "treatment courts" as the first generation of problem-solving courts and the "most prevalent problem-solving court model."[62] The treatment court model embraces the idea that an underlying issue, such as drug addiction or mental illness, leads to criminal behavior and that treating that problem may "prevent or reduce the offender's future involvement in the criminal justice system."[63] Collins describes accountability courts as the second generation of problem-solving courts. The underlying idea of these courts is that is that "some offenses—such as domestic violence and low-level 'quality-of-life' crimes—have 'slipped through the cracks' of the criminal justice system, allowing certain offenders to escape justice and leaving certain victims insufficiently protected."[64] Domestic violence courts, community courts and gun courts all fall into this category.[65] Unlike treatment courts, accountability courts do not necessarily offer treatment, but instead, focus on offender accountability and victim protection. If treatment is offered it may be "primarily as a way to increase offender monitoring and accountability, not for rehabilitative purposes."[66] The newest form of problem-solving courts is what Collins has labeled status courts. The underlying idea of these courts is that "offenders who belong to certain status groups have unique needs that the conventional justice system does not, but should, meet."[67] The two main groups addressed by status courts are "veterans and girls."[68] Status courts are similar to treatment courts in that they adopt a therapeutic approach to problem solving justice.[69]

### 2. Problem-Solving Courts in Practice

The practice of the modern problem-solving court movement has been to admit a small subset of defendants who qualify (or are deemed worthy) of special treatment, and to create courts to help these subgroups within the criminal legal system. These courts are not open to all defendants, not even to all defendants charged with the same crime or with the same underlying issue (such as drug addiction). Each court has criteria for admission that limit who

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62 Erin R. Collins, *Status Courts*, 105 GEO. L. J. 1481, 1487–88 (2017).

63 *Id.* at 1488.

64 *Id.* at 1490.

65 *Id.* at 1491.

66 *Id.*

67 *Id.* at 1492.

68 NOLAN JR., *supra* note 61, at 1492.

69 *Id.* at 1493–94.

qualifies.[70] Courts may restrict the number of prior convictions;[71] limit what types of prior convictions are disqualifying (such as violent offenses); limit what current offenses qualify (for example, possession, but not sales of a controlled substance); require an honorable discharge for a defendant in a veterans court;[72] and set qualifications that may have little to do with the offense itself, but with the ability of the defendant to complete the requirements (for example, that the defendant has a car if he lives in a rural area).[73] There are special courts for substance abusers, the mentally ill, and veterans.[74] There are also problem-solving courts for gamblers,[75] prostitutes,[76]and, within the juvenile court system, "girls courts."[77]

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[70] For the wide range of different criteria for different courts, *see e.g.*, *Specialty Programs*, TARRANT COUNTY, TEX., https://access.tarrantcounty.com/en/criminal-courts/specialty-programs.html (last visited Apr. 21, 2020) (Criteria for admission for each program is listed in the link).

[71] *See, e.g.*, *First Offender Drug Program*, TARRANT COUNTY, TEX., https://access.tarrantcounty.com/en/criminal-courts/specialty-programs/fodp.html (last visited Apr. 21, 2020).

[72] *See, e.g.*, Martin Kuz, *VA Policy Hinders Veterans Courts in Aiding Thousands of Vets with 'Bad Paper'*, SAN ANTONIO EXPRESS-NEWS (Sept. 1, 2017), https://www.expressnews.com/news/local/article/VA-policy-hinders-veterans-courts-in-aiding-12167681.php.

[73] DRUG POLICY ALL., DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE (2011), https://www.nacdl.org/getattachment/bca8e3e1-c9b4-470c-86d8-7822c6e0a368/dpar.pdf ("A 2008 survey of drug courts found that roughly 88 percent exclude people with any history of violent offending, and half exclude those on probation or parole or with another criminal case. . .The same survey found that 49 percent of drug courts actually exclude people with prior treatment history and almost 69 percent exclude those with both a drug and mental health condition." *Id.*).

[74] *See generally Problem-Solving Courts Guide*, NAT'L CTR. FOR ST. CT., https://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Home.aspx (last visited Apr. 21, 2020).

[75] *See, e.g.*, *What is Gambling Court*, GAMBLING CT., http://gamblingcourt.org/.

[76] For a critical analysis of prostitution courts, *see* Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the 'Problem' of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L. J. 101 (2006) (tracing the history of these courts to the early 20th Century and analyzing Anna Moscowitz's work, advocacy, and reform efforts. Moscowitz had declared that she "was more than ever convinced that the only hope of getting at the roots of the problem of prostitution was to take it out of the courts, out of the category of crime, and 'devise some system of handling it socially." *Id.* at 120.). For a study of prostitution courts, *see also*, Lisa R. Muftic & Alexander H. Updegrove, *The Effectiveness of a Problem-Solving Court for Individuals Charged with Misdemeanor Prostitution in Harris County*, *Texas*, 58 J. OFFENDER REHABILITATION 117 (2019). *See generally* Joan M. Blakey, Daria J. Mueller, & Matt Richie, *Strengths and Challenges of a Prostitution Court Model,* 38 JUST. SYS. J. 364 (2017). For a broader critique, *see* Aya Gruber, Amy J. Cohen, & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (Sept. 2016).

[77] *See, e.g.*, COLLINS, *supra* note 3, at 1492–98 (defining courts intended for special status groups, such as veterans or girls, as the third generation of problem-solving courts and labeling them "status courts" with a critique of a "girls court" in Oahu, Hawaii. *Id.* at 1493).

Each of the defendants who fit the criteria, and agree to go into these courts, are given access to treatment and resources that the average defendant does not have access to and may serve substantially less time in jail or prison.[78]

Despite having over 3100 drug courts in this country, estimates are that less than five percent of those who could benefit from participation in these courts are actually able to participate due to eligibility restrictions and the relatively small number of courts.[79] The same can be said for the relatively small number of veteran's courts and mental health courts, that they only reach a fraction of those who may need help. Another criticism of problem-solving courts, and drug courts, in particular, is that they may be taking resources away from a larger group of defendants and that as a result, fewer people may be getting treatment.[80] And, as has been mentioned, another concern is that problem-solving courts could lead to net widening—as police and prosecutors may bring some people into the criminal legal system thinking it is the best place to give them help. Another broad concern is that problem-solving courts are focused on conditions that would be better handled by health care professionals, not lawyers, whether they are judges or prosecutors or defense attorneys.[81] As one defense lawyer said, "treatment plans were negotiable issues between defense lawyers

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78 *See, e.g.*, RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE (2009), https://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf ("The Vera Institute of Justice is also concerned that the use of sanctions has resulted in participants spending more time in jail than they would have had they never enrolled in the drug court program. Because most individuals who enter drug court are convicted of non-violent offenses, many would have experienced short, if any, periods in jail. Participants who are punished with sanctions sometimes end up with multiple stays in jail." *Id.* at 16).

79 *See, e.g.*, KELLY, *supra* note 6, at 183.

80 DRUG POLICY ALL., *supra* note 73, at 3 ("People who are in prison and have a history of regular drug use are today less than *half as likely* to receive treatment while incarcerated as in 1991." *Id.* at 7 (emphasis in original).).

81 *See generally* MARIANNE MØLLMANN, PHYSICIANS FOR HUMAN RIGHTS, NEITHER JUSTICE NOR TREATMENT: DRUG COURTS IN THE UNITED STATES (2017) ("Overall PHR found that drug courts largely failed at providing treatment to those who truly needed it. . .In many cases court official with no medical background manded inappropriate treatment, or mandated treatment for people who didn't need it." *Id.* at 2); DRUG POLICY ALL., *supra* note 73 ("Most drug courts have done a poor job of addressing participant's health needs according to health principles. . ." *Id.* at 3); NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM (2009), https://www.nacdl.org/getattachment/d15251f8-6dfe-4dd1-9f36-065e3224be4f/americas-problem-solving-courts-the-criminal-costs-of-treatment-and-the-case-for-reform.pdf ("Addiction is an illness. Illnesses should be treated through the public health system—not punished through the criminal justice system." *Id.* at 10).

and prosecutors. . . .[we] suggested treatment options for expediency rather than therapeutic reasons . . . ."[82]

## II. Roles of Professionals Within Problem-Solving Courts

The focus of problem-solving courts is the rehabilitation of the defendant by treating underlying problems that cause criminal conduct.[83] As a part of this process, judges and lawyers have different roles in these courts, and do their jobs differently from a traditional criminal court. Bruce Winick describes problem-solving court judges as judges who "consciously view themselves as therapeutic agents . . . ."[84] Judges are the most active professionals in the problem-solving courts, unlike in traditional courts where judges are often the least active professional in the courtroom. In a traditional adversarial courtroom, the lawyers are active and for example, make motions to admit evidence, to exclude evidence, and inform the judge of plea deals that they negotiated (often with little judicial involvement). In a problem-solving court prosecutors and defense lawyers may sit silent for most of the proceedings, except when asked to confirm a fact. In some problem-solving courts, defense lawyers may be entirely absent. As Richard Boldt has described it, these courts are "judge-driven rather than lawyer-driven."[85]

Judges who work in problem-solving courts report high satisfaction rates, reporting "it is the most satisfying work that [they] have done in [their] career as a judge."[86] This is not surprising as judges have more power and discretion in the problem-solving court context than they do in other contexts and they can be more creative and choose from a variety of approaches.[87] In one study, 96% percent of problem-solving court judges felt that being assigned to a problem-solving court "positively impacted" them, compared to 81% of traditional judges.[88] And, just 4% of problem-solving court judges, compared to 19% of traditional judges,

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82 Møllmann, *supra* note 81, at 11.

83 *See, e.g.*, Winick, *supra* note 55, at 1062–66.

84 *See, e.g.*, *id.* at 1065.

85 Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash. U. L. Rev. 1205, 1252 (Jan. 1998).

86 Collins, *supra* note 3, at 25.

87 *Id.* at 27.

88 *Id.* at 25.

reported that their assignment negatively impacted them.[89] While some of this job satisfaction may be due to the ability to wield power, and some may be due to the status of creating something new and unique, it also seems clear that one motivator is that judges feel that they are helping people.[90] In surveys eighty-three percent of problem-solving court judges, compared to 68% of traditional court judges, thought they were helping litigants.[91] The happiness literature makes it clear that helping others, makes us happier.[92] Judges are clearly no exception.

Critics decry the shift in professional conduct, away from the adversarial model.[93] Critics have questioned whether this shift is ethical.[94] One concern is that defense lawyers may not be able to adequately advise their clients about potential outcomes (how much time might they serve in jail if they are not in compliance with various rules?). Another concern is that defense lawyers may become part of the "team" and more focused on treating their client, then defending them.[95]

Prosecutors, although they may not be active participants once the case goes into a problem-solving court, retain the power to decide which cases are eligible, and in the design process, often successfully insist that problem-solving courts be post-adjudication requiring defendants to plead guilty before they can participate in the court.[96] Defendants may be required to make the decision to plead guilty at a stage that requires them to waive any motions, such as search and seizure motions or before they receive full discovery.[97]

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89 *Id.* at 26.

90 *See, e.g.*, *id.* at 27.

91 *Id.* at 26.

92 *See, e.g.*, Jenny Santi, *The Secret to Happiness is Helping Others*, TIME, https://time.com/collection/guide-to-happiness/4070299/secret-to-happiness/ (last visited Apr. 21, 2020).

93 *See, e.g.*, Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006); Mae C. Quinn, *Whose Team am I on Anyway? Musings of Public Defender about Drug Treatment Court Practice*, 26 NYU REV. L. & SOC. CHANGE 37 (2001).

94 *See, e.g.*, Steven N. Yermish, *An Overview of the Ethical Issues Created by Problem-Solving Courts and the Mentally Ill Client*, *in* 33 THE CHAMPION 14 (2009). For a discussion of the ethical issues and suggestions on how prosecutors and defense lawyers can avoid ethical problems, *see generally* Judy H. Kluger et al., *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L. J. 1892, 1893–96 (2002).

95 Meekins, *supra* note 93, at 4.

96 NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, *supra* note 81.

97 *Id.* at 24–25.

Scholars have interviewed lawyers who work in these courts to better understand how these courts work.[98] However, as will be discussed below, a key question remains: how does working in these courts change a prosecutor or defense lawyer's attitude towards the other cases that they handle outside these courts? Or does it have no impact as prosecutors and defense lawyers consider these cases to be fundamentally different?

## III. Impact of Problem-Solving Courts

Studies of the impact of problem-solving courts focus on the impact on individual defendants and recidivism rates of these defendants.[99] They do not consider the broader question: how have these courts affected, if at all, how the broader criminal legal system works? This section will discuss the impact, or lack of apparent impact, that problem solving courts have had on how the larger criminal legal system works. However, this conclusion is largely based on anecdotal impressions and not hard data.[100] As will be discussed, this is an area that has not been well studied and to better understand the overall impact of problem-solving courts, it is an area that needs to be studied, particularly as problem-solving courts enter their fourth decade and are firmly entrenched in the criminal legal system. It is important to understand not only how they work (which has been studied), but how they influence, or not, the wider criminal legal system (which has largely not been studied).

In 2000, the Conference of Chief Justices and the Conference of State Court Administrators passed a joint resolution which included a recommendation to "encourage, where appropriate, the broad integration over the next decade of the principles and methods employed in the problem-solving courts into the administration of justice to improve court processes and outcomes."[101] Twenty years later, we are still waiting for this "broad integration." The criminal legal system is notoriously difficult to change. For example, efforts to reform plea bargaining, the dominant process for

98 *See generally* Nolan Jr., *supra* note 4.

99 *See, e.g.*, King & Pasquarella, *supra* note 78.

100 The lack of data is a far-reaching problem. *See, e.g.*, Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 New Crim. L. Rev. 434 (2019) (discussing the need for better data to understand how plea bargaining works).

101 Conference of Chief Justices & Conference of State Court, *supra* note 58.

case resolution, have been more difficult than reformers expected.[102]

Plea bargaining itself may be one reason that problem-solving courts remain in their own silo. Defendants enter problem-solving courts through plea deals. Plea bargaining, not jury trials, remains the dominant case resolution process in the United States.[103] Defendants who go into a drug court or mental health court do so as a result of a plea deal, whether with an agreement to plead guilty first, or to defer adjudication until after the program is complete. The flexibility of plea bargaining is why drug courts were able to start and grow before laws providing for their existence.[104] Plea bargaining allows prosecutors and defense lawyers to agree to more innovative outcomes, as long as a judge will approve the sentence and as long as it is not illegal. But, agreeing to a more innovative outcome in specific cases does not mean that the lawyers involved think of innovation as the norm for how cases should be handled. And, because entry to problem-solving courts is through an existing practice, plea bargaining, to the legal professionals involved it may look and feel more like just another sentence, and not like a reform that could, or should, change how other cases are handled.

Erin Collins points to plea bargaining as one reason judges find problem-solving courts so attractive.[105] As plea bargaining has become the dominant process for convictions—over 90% of criminal convictions are due to pleas—there was less for judges to do, fewer cases for them to adjudicate.[106] In addition, sentencing laws decreased, or eliminated, judicial discretion in sentencing.[107] This left judges feeling dissatisfied with their jobs and feeling disempowered.[108] In commenting on their decreased power and discretion, one drug court judge said of drug courts that, "[t]his is one of the few areas that we have where we still have some discretion."[109]

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102 For a general discussion on various plea bargaining reform proposals and the difficulty in implementing, *see* ALKON & SCHNEIDER, *supra* note 17, at 163–96.

103 *See, e.g.*, *id.* at 25. *See also*, *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (The "criminal justice system is for the most part a system of pleas, not a system of trials.").

104 Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and* Frye, 41 HASTINGS CON. L. QRTLY, 561, 591–92 (2014).

105 COLLINS, *supra* note 3, at 18-19.

106 *Id.* at 17.

107 *Id.* at 17–19.

108 *Id.* at 20.

109 *Id.* at 20.

### A. *Prosecutors*

Have thirty years of problem-solving courts changed how prosecutors do their jobs? As discussed above, prosecutors do their jobs differently within the narrow confines of those courts, accommodating to a different way of practicing law where judges are the dominant actor. But, overall, there is no indication that the dominant culture in prosecutors' offices has changed towards one that is focused on rehabilitation. Instead, drug courts, or restorative justice options, are just another possible disposition for individual cases.

Who becomes a prosecutor? Ronald Wright and Kay Levine interviewed prosecutors and found some common themes. Prosecutors have an "intrinsic commitment to rules, structure, and hardened categories of right and wrong . . . they are people who deeply value order and accountability, and who react to violations of rules . . . ."[110] Abbe Smith has a blunter description of her students who become prosecutors as "more conventional, judgmental, and professionally ambitious than my defender-type students . . . They seem surer of themselves and their own worldview. They don't have much interest in discussions about the moral complexity of crime. They believe that people 'make choices.'"[111] Overall, Smith sees prosecutors as "smug, self-important, and lacking in imagination," although she is clear to point out that there are exceptions.[112] Smith bases this on thirty years of experience and a survey of current and former public defenders (Smith herself is a former public defender).[113] Smith is an example of a common defense view of who becomes and remains prosecutors—that prosecutors do not come from the ranks of those who are empathetic to defendants or concerned about rehabilitation overall.

Some recent scholarship has started asking questions about prosecutors' identity from the prosecutors' perspective and why prosecutors do what they do on their cases.[114] Newer prosecutors, roughly half of all state prosecutors, tend to see the world in more black and white terms and are less able to see the individual nature

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110 Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1681 (2018).

111 Abbe Smith, *Are Prosecutors Born or Made?* 25 GEO. J. LEGAL ETHICS 943, 955 (2012).

112 *Id.* at 952–55.

113 *Id.* at 943, 953.

114 Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065 (2014); Wright & Levine, *supra* note 110, at 1692.

of each case.[115] Ronald Wright and Kay Levine found that young prosecutors often "ignore the human dimension of many cases, approaching each file with a standardized view, focusing on the need to punish everyone."[116] Wright and Levine found that later in a prosecutor's career he or she might "strive to help rather than to punish."[117] However, this shift in attitude is due to general experience, not the specific experience of practicing in a problem-solving court.[118]

In a later article, Wright and Levine found that one third of the prosecutors they interviewed, at a variety of experience levels, talked about the "rewards of doing the job to help defendants and their families."[119] This seems a higher number than the standard narrative of the literature would suggest, and Wright and Levine state that this could be due to two reasons, the first that prosecutors may think they are offering help to all the defendants who "deserve" it, but that this is a lower number than other observers, particularly academics, might think is appropriate.[120] The second reason is that the prosecutors interviewed may have thought that the interviewers would like those answers and wanted to give an image that would be more favorable.[121]

Prosecutors, like defense lawyers, routinely handle high caseloads.[122] Unlike defense lawyers, prosecutors' offices have the power to reduce their caseloads by filing fewer cases.[123] However, individual prosecutors may have as little control over their caseloads as individual defense lawyers, particularly in an office culture that frowns on dismissing cases. What this means is that prosecutors are often struggling to manage their caseloads and are not necessarily thinking abstract thoughts about the meaning of justice in each individual case or spending time contemplating how to heal the parade of damaged people whose cases they are reviewing. Routine processing of cases is the norm. Prosecutors do what is routinely done on their cases. They do not look for innovative or creative responses to crimes that they see every day. And, so far,

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115 Wright & Levine, *supra* note 114, at 1068–69.

116 *Id.* at 1084.

117 *Id.* at 1086.

118 *Id.* at 1086–87.

119 Wright & Levine, *supra* note 110, at 1691.

120 *Id.* at 1692.

121 *Id.* at 1692.

122 *See, e.g.*, Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L. J. 513, 538–39 (2012).

123 ALKON & SCHNEIDER, *supra* note 17, at 32–39.

the existence of problem-solving courts does not seem to have made a dent in how prosecutors manage their caseloads or look at defendants. This seems to hold true even for those prosecutors who may talk about wanting to help defendants towards rehabilitation.

It seems instead that prosecutors tend to view problem-solving courts as an option for case disposition, not a guiding theory for caseload management. When talking to junior prosecutors in a local prosecutors' office in Texas, I asked about the full array of problem-solving courts available in the jurisdiction. The answer I got was a version of "we love it when cases qualify to go into those courts, it is a good outcome for everyone."[124] When I asked if they look at other rehabilitative options for defendants who don't qualify for those courts, the answer was: "not unless the defense attorney has a specific request."[125] And, when asked if more defendants should be able to go into problem-solving courts, there are a few answers. Some prosecutors think that only some defendants will benefit from the rehabilitative approach as "not everyone wants to get better."[126] Others focus on the resources and say, "we really can't have more of these courts or open them up to more people; we don't have the resources."[127] Admittedly, these few informal conversations are not solid data. This is an area that would be ripe for further study. How do prosecutors view these courts? Are they bringing the approach from these courts into other cases, or do they want to? Do they see the possibility focusing more on rehabilitation, or do they see only a few defendants of being "worthy" of this approach?[128]

It is important to remember that, for the most part, prosecutors are not rewarded for showing compassion or empathy to defendants and they are not rewarded for stepping outside the norms of their individual offices.[129] Prosecutors' offices tend to be hierarchical places and prosecutors are expected to step in line with office policies and norms.[130] This can make it difficult for prosecutors to focus on rehabilitation, even if they might want to. As Wright and Levine noted, prosecutors who are seen to be devi-

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124 Conversations with the author.

125 *Id*.

126 *Id.*

127 *Id.*

128 These questions may also be important to understand whether prosecutors are ready to support the agenda of a reform minded prosecutor, or when a reform agenda may resonate.

129 *See, e.g.*, Wright & Levine, *supra* note 110, at 1702–03.

130 ALKON & SCHNEIDER, *supra* note 17, at 9.

ating from the norm too often might be accused of sounding "like a defense lawyer" which is not a good thing and can have negative impacts on a prosecutor's career.[131]

## B. *Defense Lawyers*

Defense lawyers have also not fundamentally changed how they approach their jobs in the last thirty years due to problem-solving courts. Defense lawyers tend to be highly pragmatic and focused on the best possible outcome in each individual case.[132] As one of the co-panelists in this symposium, Douglas Ammar, noted, a defense lawyer's job is try to achieve "justice for one person and move on."[133] What this means is that defense lawyers are happy to refer a client to a problem-solving court if it is the best option for that individual client. But they will not waste time referring a client who clearly does not fit the criteria for admission to that particular court. They will also look critically at these courts. In one of the local courts in Texas, there is a problem-solving court run by a judge seen by many defense lawyers to be overly punitive. These defense lawyers do not trust how this judge handles cases or that their clients will be treated fairly in that particular court and those lawyers who are familiar with how this court runs will recommend that their clients take time in jail over going into that court, because, as one said "it is the better, they will do less jail time in the end and not be subjected to the abuse of that court."[134]

Defense lawyers did not start recommending treatment programs only in 1989. This was standard practice long before the first problem-solving courts started. Competent defense lawyers routinely look for rehabilitative options and struggle to find programs that their clients can complete. Diversion, which existed long before problem-solving courts, was often conditioned on drug treatment or other therapeutic approaches.[135] For this reason,

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131 Wright & Levine, *supra* note 110, at 1704–05.

132 *See, e.g.*, Andrea Kupfer Schneider, *Cooperating or Caving in: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?*, 91 MARQ. L. REV. 145 (2007) (discussing survey results showing that criminal lawyers are rated more highly as problem-solving in their approach).

133 Douglas Ammar, Director of the Georgia Justice Project, *The Lawyer's Role in Restorative Processes: Zealous Advocate, Social Worker, Healer, Coach, Collaborative Negotiator?* (Oct. 25, 2019).

134 A conversation with the author.

135 ALKON & SCHNEIDER, *supra* note 17, at 53–56.

problem-solving courts fit firmly into an existing approach for defense lawyers: to find help, and avoid jail, for any client they can. What is different is that these courts have provided a clear road for treatment for some defendants, which may make it easier to access the help. But, the mere existence of these courts has not changed how defense lawyers do their jobs, they have simply opened up other possible options for some of their clients. However, this is not an area that is well studied.

## IV. What Would it Look Like if Problem-Solving Court Practices Were More Widespread?

What would our criminal legal system look like if standard problem-solving court practices were applied to how all criminal cases were handled?[136] Can our traditional legal system learn something from the best-practices of the problem-solving court approach that could improve how we handle criminal cases throughout the system? Could a more widespread use of some of these approaches reduce both recidivism rates and incarceration rates? There are five approaches that would change how our criminal courts currently work. First, if a more problem-solving approach were applied system-wide, defendants would be viewed as whole person, not simply by the offense they committed. Second, defendants would be congratulated for success, not simply punished for shortcomings. Third, prosecutors would focus more on rehabilitation and how to prevent future crime in deciding appropriate sentences. Fourth, we would require our traditional criminal courts to show "success" by reduced recidivism rates. Finally, the overall atmosphere in courtrooms might include more kindness and less openly unpleasant and hostile behavior.

However, by examining how problem-solving courts practices could improve traditional courts, I am not disregarding the serious criticism of problem-solving courts. One of the leading concerns is whether criminal courts are the best place to treat people for drug abuse, mental illness, or a full range of other conditions.[137] Another serious concern is that the existence of these courts may prevent society at large from providing resources to addressing these

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[136] *But see* Jessica M. Eaglin, *The Drug Court Paradigm*, 53 Am. Crim. L. Rev. 595 (2016) (arguing that drug courts have "created a particular paradigm that states have adopted to manage overflowing prison populations" and identifies limitations of this paradigm. *Id*. at 595–96).

[137] *See* Møllmann, *supra* note 81, at 23.

problems in other settings, such as through public health or education.[138] We need to seriously examine what kinds of cases and how many cases we bring into our criminal legal system, both to consider what might be the most appropriate response to certain types of behavior and to work towards more serious reductions in our imprisonment rates. By discussing how problem-solving approaches could be more widely applied in our criminal justice system I do not intend to cut off or ignore the serious criticism of these courts. Rather, my intention is to think about what might change for the better if standard best practices in problem solving courts became standard practices in traditional courts. Taking a more problem-solving approach by definition includes focusing more on rehabilitation and less on punishment. This kind of change in the underlying philosophy and approach of our criminal courts could have far-reaching impact on reducing imprisonment rates. However, this section is not intended to suggest that prison is never an appropriate sentence, but rather that rehabilitation should a goal.[139]

### A. *Viewing the Defendant as a Whole Person*

As Bryan Stevenson has said, "each of us is more than the worst thing we have ever done."[140] Traditional criminal courts rarely see the defendant beyond the worst thing they have done that brought them to court. There may be probation reports and/or "risk assessments" examining the defendant's prior record, his employment history, or current charge. However, these reports rarely dive deeply into the problems and challenges of a particular defendant. Problem-solving courts, when done right, do a fantastic job of seeing the defendant as a whole person and encouraging success from that viewpoint. There are social workers or other court staff whose job it is to help defendants overcome obstacles, such as finding educational programs, drug treatment programs, and employment. The judge speaks to the defendant and gets to know them, often asking questions about their family, their jobs, and their work or school. The judge, and court staff, show an interest

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138 *See, e.g.*, DRUG POLICY ALL., *supra* note 73.

139 Abolition of prisons is one suggestion for reform of the criminal legal system in the United States, *see, e.g.*, Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019), https://www.themarshallproject.org/2019/06/19/the-case-for-abolition.

140 BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014).

in how the defendant is doing and provide encouragement. In one rural court in Virginia, a problem-solving court told me that she visited the homes of the defendants, to get to know them better so she could better understand their circumstances. While home visits may not be advisable for judges to do for a variety of reasons, the underling idea that an effort should be made by the court personnel to get to know the defendant as a human being would be a fundamental change from current approaches.

### B. *Congratulate Defendants for Success*

A judge in one of the problem-solving courts in Texas once said to me, "the participants in this court were never told they did anything right, so now we applaud them for any reason at all so they can feel what it is like to succeed. They know what it is like to fail." Our criminal legal system is more often premised on the ideas of deterrence and retribution.[141] The idea behind these theories is that negative reinforcement and punishment will stop criminal behavior. The thinking has been that if only people understand that they will be punished, they will stop offending. However, we know that the potential for punishment alone, or the knowledge that punishment might be severe, does not stop criminal behavior for a large number of people.[142] A significant number of those that we pull into our criminal legal system face challenges, such as addiction and mental illness, which can make it difficult for them to not act on impulses or engage in criminal behavior regardless of the potential for punishment. But, what might it be like if defendants were congratulated and made to feel like successes when they did something right? What might the impact be of an approach that emphasized positive reinforcement? Clearly, some applause and words of congratulations alone cannot reverse serious drug addictions, mental illnesses, or the long-term impact of trauma. And, equally importantly, resources need to be available for defendants, such as programs and counselors, for any meaningful hope of change. Could a more positive approach encourage defendants to seek help and address their serious challenges? On its own this change in approach may not lead to long-standing change. But it might be a start.

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141 ALKON & SCHNEIDER, *supra* note 17, at 12–14.

142 *See, e.g.*, KELLY, PITMAN, & STREUSAND, *supra* note 42, at 2.

### C. *Prosecutors Focus More on Rehabilitation and Less on Punishment*

What if prosecutors looked at each defendant and asked the question: What would it take to rehabilitate this person? If prosecutors were expected to ask this question with each defendant, they would need more information about each defendant. Prosecutors currently look at a few discreet pieces of information when deciding what plea offer to make (or if to make an offer). They look at the underlying offense, examining how serious the offense is and how strong the evidence is tying the defendant to the crime. Prosecutors also consider the past criminal record of the defendant. And, prosecutors will always have in the back of their mind an awareness of what the office policies are surrounding plea bargains in general, and this type of offense in particular. Is this an offense that has a standard offer? Is this an offense that could cause their elected boss political problems? When they first evaluate a case, prosecutors rarely have much information beyond the race, age, address, and prior convictions of the defendant.[143] What if they had more information? What if they knew if the defendant had children, had a job, had a physical or mental illness, or had suffered trauma? What if each prosecutor was required to examine what might be the underlying cause for the defendant's criminal behavior and make a plea offer designed to focus on those underlying causes? This is not to suggest that in more serious cases jail or prison time might not be part of how to focus on reducing recidivism as incarceration may have some usefulness if used in limited and targeted ways. For example, a younger defendant may "age out" of criminal behavior and it may be useful to consider the data about when there is sharp drop in criminal behavior due to age.[144] But, what if the first question prosecutors asked themselves was not, "how much time should we offer?" But instead, "how do we prevent future criminal behavior by this defendant?"

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143 Prosecutors in San Francisco are experimenting with race-blind case evaluation, using artificial intelligence. Jocelyn Gecker, *San Francisco Prosecutors Turn to AI to Reduce Racial Bias*, PHYS.ORG (June 12, 2019), https://phys.org/news/2019-06-san-francisco-prosecutors-ai-racial.html. Concerns about racial disparities exist throughout the criminal legal system, including in problem solving courts. *See, e.g.*, Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463 (2009) (arguing that restorative justice may be a better way to reduce racial disparities).

144 *See, e.g.*, ALKON & SCHNEIDER, *supra* note 17, at 465, discussing how criminal behavior decreases after the age of 25.

As Wright and Levine found, it can be difficult for prosecutors to focus on rehabilitation of defendants without running contrary to their office culture.[145] Rehabilitation is more often seen as something that is reserved for a few deserving defendants, not something to focus on in most (or all) cases. If every criminal court focused on evaluating defendants for rehabilitation, and sentenced with rehabilitation as a goal, it might start to change the existing culture in prosecutors' offices. It would no longer be an unusual or select defendant who is referred for therapeutic or rehabilitative help. It would become normal. And, if it were normal, prosecutors might more often look for therapeutic or rehabilitative outcomes for cases. This is not to suggest that over time prosecutors will stop thinking that time in prison is an appropriate sentence, but that it could help prosecutors to expand their view of who will benefit from, and be deserving of, rehabilitation.[146] This would be a fundamental change in how prosecutors do their jobs and it might need to be supported through legislative changes that require prosecutors to explain how a particular plea offer is intended to decrease future criminal behavior. However, for this suggestion to have any impact there would need to be more societal resources for rehabilitation programs.

### D. *Demonstrate Success Through Reduced Recidivism Rates*

Related to the above is the suggestion that traditional criminal courts be required to demonstrate success through reduced recidivism rates. Problem-solving courts routinely gather data on how many defendants successfully complete the program and whether they are re-arrested for new offenses.[147] Reduced recidivism rates is one of the important pieces of data that helps to justify continuing particular problem-solving courts.[148] For traditional criminal courts, there is no similar requirement. A traditional criminal court could sentence people to prison, have high recidivism rates

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145 Wright & Levine, *supra* note 110, at 1704–05.

146 Longer terms of imprisonment might have negligible impacts because the older a person gets the less likely they are to continue criminal behavior. *See e.g.*, ALKON & SCHNEIDER, *supra* note 17, at 463–66, 470 (discussing how offenders "age out" of criminal behavior, that once they get older they are less likely to continue offending).

147 *See, e.g.*, KING & PASQUARELLA, *supra* note 78, at 5–6. *But see* DRUG POLICY ALL., *supra* note 73, at 2 ("Drug courts often "cherry pick" people expected to do well. . .drug courts do not typically divert people from lengthy prison terms.").

148 *See, e.g.,* KING & PASQUARELLA, *supra* note 78, at 5–6.

for those defendants and never be asked to report those numbers or to even collect data on recidivism rates.[149]

Requiring reporting of data, and having tangible consequences for negative data, can change practices. U.S. Hospitals were required, under the Affordable Care Act ("ACA"), to start reporting data on patients readmitted to the hospital.[150] Hospital readmissions can be dangerous for patients as they can be due to the hospital failing to discharge the patient with appropriate information about medications, or without appropriate follow up care.[151] Starting in 2012, pursuant to the ACA, hospitals with higher than average readmission rates are financially penalized, with the penalties increasing over time. What this has done is change the incentives.[152] It is no longer simply about spending less on patients while they are hospitalized or moving quickly to free up hospital beds. There is now a clear incentive to make sure patients are discharged with information for follow-up care, and an incentive to not quickly release patients who may not be ready.[153]

Problem-solving courts have a similar incentive in that their funding and continued existence is often tied to demonstrating "success" by lowered recidivism rates.[154] What if traditional courts were placed under a similar system? What if prosecutors had to show reduced recidivism rates from the plea deals they negotiate? What if judges were evaluated based on recidivism rates, not simply on how quickly they can clear their court docket? We know that we do not reduce recidivism rates by imprisoning people without giving them any assistance to address the underlying problems that sent them to prison or jail in the first place. So, in this era of data-driven success, why are we not demanding such data from our criminal courts? If individual courts had to report recidivism rates, it might help to put pressure on judges to look at ways to provide resources to help defendants, not simply to punish them. And, it

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149 *See, e.g.*, FLA. STAT. § 900.05 (2019) (passed in 2018, mandating the collection of criminal legal system data, but not requiring courts to report recidivism rates individually). In general, little data is collected regarding our criminal legal system. *See generally* SCHNEIDER & ALKON, *supra* note 100 (discussing the need for more data collection in plea bargaining).

150 42 U.S.C.S § 1395ww (LexisNexis 2020).

151 Kumar Dharmarajan & Harlan M. Krumholz, *Pushing Hospitals to Reduce Readmissions Hasn't Increased Deaths*, NPR (July 18, 2017, 11:01 AM), https://www.npr.org/sections/health-shots/2017/07/18/537696772/pushing-hospitals-to-reduce-readmissions-hasnt-increased-deaths.

152 *Id.*

153 *Id.*

154 *But see* COLLINS, *supra* note 3, at 39–41 (concluding that problem solving courts' claims that they reduce recidivism may not be accurate as courts can (and do) shape how success is measured by collecting data in ways that put them in "the most favorable light." *Id*. at 37).

could be another way for courts to put pressure on prosecutors to focus more on rehabilitation.

### E. *Improved Overall Atmosphere*

Criminal courts can be extraordinarily unpleasant. Judges can be bullies and otherwise treat lawyers and defendants badly.[155] Although criminal lawyers have been found to have the highest rate of problem solvers among practice areas,[156] and although negotiated outcomes are the norm, prosecutors and defense lawyers are often in an adversarial mode. Defendants are on edge and often lash out at the only person who can talk to them directly: their lawyer. Defendants, as has been discussed, often suffer from a variety of conditions and have difficult and/or tragic backgrounds. Victims have experienced pain and loss and are often struggling with the harm that they experienced. Daily practice for lawyers in any criminal court in this country is not for the faint of heart.[157] Defense lawyers and prosecutors develop a thick skin, if they don't already have one. In most criminal courts there is little laughter, there are few words of kindness or encouragement.

Every year in one of my classes I give my students an assignment to go and observe a problem-solving court. They come back with reports about the specific requirements of the courts and the stories of the defendants they saw in court on the day they observed. Invariably, the most striking thing they see is the very different atmosphere in the court room. They report that there was applause, laughter, joking, and that the judges seemed to care about the defendants and their families. The class where I give this assignment is an upper level class, so my students have all been in traditional courtrooms and they are struck by the different atmosphere in problem-solving courts.

Kindness can have healing powers. In the healthcare context, kindness promotes healing and reduces anxiety.[158] Importantly,

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155 *See generally* Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253 (2017) (". . .I have identified four major categories of judges as bullies as follows: (1) ignorant and incompetent bullies; (2) thin-skinned and ill-tempered bullies; (3) power-hungry bullies; and (4) biased bullies." *Id*. at 257).

156 Schneider, *supra* note 128, at 151 ("Compared against the other practice areas, criminal law had the highest percentage of true problem-solving attorneys at 49.2%." *Id*.).

157 *See* Smith, *supra* note 150, at 261.

158 *See, e.g.*, Nigel Mathers, *Compassion and the Science of Kindness: Harvard Davis Lecture 2015*, 66 BRITISH J. GEN. PRAC. 648 (2016), https://www.ncbi.nlm.nih.gov/pmc/articles/

one study found that caregivers were "found to be more resilient" when practicing kindness.[159] What might this mean for the criminal legal system? As discussed above, judges who preside over problem-solving courts have higher satisfaction rates, in large part because judges feel good about helping people. Why limit this approach to just a smaller subset of defendants? It may be more time consuming to talk to each defendant. And, it would require a change in approach for some judges to be mindful about the atmosphere in their courtrooms and to not act as bullies or accept or reinforce a highly adversarial atmosphere where defendants and their lawyers are treated poorly. Prosecutors, defense lawyers, defendants, witnesses, and victims, would all benefit from courtrooms where people were treated differently than is so often the norm. If we take no other lesson from problem-solving courts, the lesson of treating people in our criminal courts with kindness and decency would, by itself, be a game changer.

## V. Conclusion

Problem-solving courts have not changed the practice of law. Despite their growth and the dramatic increase in how many problem-solving courts exist in the United States, their impact has remained limited and focused on the relatively few defendants who are allowed to go into these courts. There are serious criticisms about how problem-solving courts operate and serious questions about whether they are doing what they claim for the defendants who are admitted. Thirty years after the first problem-solving court was created it is clear that their impact on the wider criminal legal system has been limited. However, some of the approaches taken by problem solving courts, if adopted system-wide, could change how our criminal legal system works in meaningful, and positive, ways.

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PMC4917056/ ("in a randomised controlled trial of 'compassionate care' for the homeless in an emergency department, frequent attenders received either 'usual care' or a compassionate care 'package.' The outcomes included fewer repeat visits and increased satisfaction with their care in the intervention group." *Id*.).

159 Gavin Hanes, *Time to be Kind: Why Kindness Matters*, Positive News (Apr. 1, 2019), https://www.positive.news/lifestyle/time-to-be-kind-why-kindness-matters/.