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The Problem of Problem-Solving Courts

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The Problem of Problem-Solving Courts

Erin R. Collins[*]

The creation of a specialized, "problem-solving" court is a ubiquitous response to the issues that plague our criminal legal system. The courts promise to address the factors believed to lead to repeated interactions with the system, such as addiction or mental illness, thereby reducing recidivism and saving money. And they do so effectively — at least according to their many proponents, who celebrate them as an example of a successful "evidence-based," data-driven reform. But the actual data on their efficacy is underwhelming, inconclusive, or altogether lacking. So why do they persist?

This Article seeks to answer that question by scrutinizing the role of judges in creating and sustaining the problem-solving court movement. It contends problem-solving courts do *effectively address a problem — it is just not the one we think. It argues that these courts revive a sense of purpose and authority for judges in an era marked by diminishing judicial power. Moreover, it demonstrates that the courts have developed and proliferated relatively free from objective oversight. Together, these new insights help explain why the problem-solving court model endures. They also reveal a new problem with the model itself — its entrenchment creates resistance to alternatives that might truly reform or transform the system.*

 Associate Professor, University of Richmond School of Law. Many thanks to Rachel Barkow, Monica Bell, Richard Boldt, Jessica Eaglin, Jessica Erickson, Thomas Frampton, Brandon Garrett, Jim Gibson, Eve Hanan, Corinna Lain, Benjamin Levin, Kay Levine, Luke Norris, William Ortman, Shaun Ossei-Owusu, Michael Pappas, Michael Pollack, Jocelyn Simonson, Allison Tait, Ron Wright, the University of Maryland Francis King Carey School of Law faculty, and participants of the CrimFest Conference, the Neighborhood Criminal Justice Roundtable, the Southeastern Association of Law Schools Conference, and the University of Richmond Junior Faculty Forum for their helpful comments and conversations. And thank you to Danny Zemel for his thorough research assistance. Finally, thank you to the Criminal Justice Section of the Association of American Law Schools for honoring this Article with its 2019 Junior Scholar Award.

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INTRODUCTION

A common response to the persistent problem of the overburdened criminal court system is to create a specialized, or "problem-solving,"[1] court to focus on a particular type of offense or offender. In the thirty years since the first modern problem-solving court[2] — the drug court — opened its doors, the problem-solving court movement has gained tremendous momentum. There are now more than 4,000 specialized courts throughout the country dedicated to an ever-expanding roster of issues, which currently includes mental health courts, veterans courts, human trafficking courts, re-entry courts, and opioid intervention courts, along with many others.[3] And while this reform method emerged as a state-court innovation, there is growing interest in expanding its presence in the federal arena. For example, the President's Commission on Combatting Drug Addiction and the Opioid Crisis recommended in 2017 that *every* federal district court establish a drug court and that the Department of Justice "urge states to establish drug

[1] The term "problem-solving" court is itself problematic. *See* Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1483 n.1 (2017) [hereinafter *Status Courts*] (summarizing critiques). However, I will use that term in this Article, as it is the term that is most commonly used in the relevant literature. I will also interchangeably use the term "specialized" or "specialty" court.

[2] Some scholars have suggested juvenile courts were the first "problem-solving" court. *See id.* at 1496; *see, e.g.*, Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008) (identifying family court as the "paradigmatic problem-solving court"); Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056 (2003) (identifying juvenile court as "the forerunner of . . . specialized [problem-solving] courts"). *See generally* Collins, *Status Courts*, *supra* note 1, at 1520 (discussing connection between juvenile courts and problem-solving courts).

[3] As of January 2020, there were more than 3,000 drug courts. *See* U.S. DEP'T OF JUSTICE, DRUG COURTS 1 (2020), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf [https://perma.cc/67XN-KNSK]. As of December 31, 2014, there were 1,311 problem-solving courts other than drug courts. *See* DOUGLAS B. MARLOWE, CAROLYN D. HARDIN & CARSON L. FOX, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 56-57 (2016), https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf [https://perma.cc/7V6L-NTMA]; *Problem-Solving Courts*, NAT'L INST. JUST. (Feb. 20, 2020), https://www.nij.gov/topics/courts/pages/specialized-courts.aspx [https://perma.cc/DM2T-6AZ5] (listing types of courts). And Texas recently created the first public safety employee's court. *See* TEX. GOV'T CODE ANN. § 129.003 (2020) (authorizing the creation of public safety employees' treatment court programs).

courts in every county."[4] And President Biden has expressed his support for drug courts.[5]

A survey of problem-solving court literature leaves little doubt as to why this reform has become so popular.[6] Problem-solving courts purport to harness proven, "evidence-based" practices to address the underlying problems that lead to repeated interactions with the criminal justice system.[7] By doing so, they promise to reduce recidivism and save money.[8] What's more, these laudatory claims are backed with data.[9]

[4] CHRIS CHRISTIE, CHARLIE BAKER, ROY COOPER, PATRICK J. KENNEDY, BERTHA MADRAS & PAM BONDI, THE PRESIDENT'S COMMISSION ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS 10 (Nov. 1, 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Final_Report_Draft_11-1-2017.pdf [https://perma.cc/MF4T-M92H]. And the First Step Act was criticized for not including support for drug courts and other problem-solving courts. *See* Kahryn Riley, *The FIRST STEP Act Is Good; Now States Should Step Up*, HILL (May 20, 2018, 9:00 AM EDT), https://thehill.com/opinion/criminal-justice/388120-the-first-step-act-is-good-now-states-should-step-up [https://perma.cc/ZC35-VWVH].

[5] Dan Adams, *Biden Embraces Drug Courts, But Do They Actually Work?* BOSTON GLOBE (Nov. 2, 2020, 1:17 PM), https://www.bostonglobe.com/2020/11/02/marijuana/biden-embraces-drug-courts-do-they-actually-work/ [https://perma.cc/7AER-4EHQ].

[6] *See generally* KERWIN KAYE, ENFORCING FREEDOM: DRUG COURTS, THERAPEUTIC COMMUNITIES, AND THE INTIMACIES OF THE STATE 7 (2020) (describing widespread, bipartisan support for drug courts).

[7] *See, e.g.*, Samantha Harvell, Jeremy Welsh-Loveman, Hanna Love, Julia Durnan, Josh Eisenstat, Laura Golian, Eddir Mohr, Elizabeth Pelletier, Julie Samuels, Chelsea Thomson, Margaret Ulle & Nancy La Vigne, *Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States, Executive Summary*, 29 FED. SENT'G REP. 175, 177 (2016) (identifying problem-solving courts an "evidence-based" practice); *Scott, Lewis Introduce Bipartisan Criminal Justice Reform Legislation*, CONGRESSMAN BOBBY SCOTT (Nov. 7, 2017), https://bobbyscott.house.gov/media-center/press-releases/scott-lewis-introduce-bipartisan-criminal-justice-reform-legislation [https://perma.cc/Q8NY-GJ2S] (describing drug courts as an "evidence-based" reform). Nebraska, for example, requires all problem-solving courts to "utilize evidence-based practices as identified by applicable scientific research and literature" and to "adhere to best practice standards." NEB. REV. STAT. § 6-1208 (2020).

[8] *See, e.g.*, MARLOWE ET AL., *supra* note 3, at 15; Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 85 (2006) (noting that the "architects and supporters" of drug courts have claimed that they are "a means of reducing the high expenditure of resources by other criminal justice agencies necessitated by the lengthy prison sentences that many drug offenders receive" and "a useful way to insure that the revolving door of addiction and criminality is interrupted through the use of effective therapeutic approaches to drug use disorders").

[9] *See* MARLOWE ET AL., *supra* note 3, at 14 ("More than 25 years of exhaustive scientific research . . . has proven that adult drug courts are effective and cost-effective . . . ."); Mitchell B. Mackinem & Paul Higgins, *Adult Drug Courts: A Hope Realized?*, *in* PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? 33, 41 (Paul Higgins & Mitchell B. Mackinem eds., 2009) ("The body of drug court research

And they are even enshrined in legislation and reiterated in judicial opinions. Nebraska, for example, has declared that "problem-solving courts, including drug, veterans, mental health, driving under the influence, reentry, and other problem-solving courts, *are effective* in reducing recidivism . . . ."[10] In short: problem-solving courts work.[11]

However, the empirical landscape of problem-solving court efficacy is more complicated than most proponents acknowledge.[12] What is perhaps the most striking about problem-solving courts is how little we actually know about their impact. With the exception of drug courts, which have been the subject of great empirical scrutiny,[13] other types of specialized courts have not been rigorously assessed.[14] And the data

supports one fundamental conclusion: drug court reduces recidivism."); *cf.* NAT'L DRUG COURT INST., THE DRUG COURT JUDICIAL BENCHBOOK 29 (Douglas B. Marlowe & William G. Meyer eds., 2011), https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchbook_v6.pdf [https://perma.cc/6KLU-AATT] ("No drug court program is a success if that success cannot be demonstrated through clear, convincing evidence.").

[10] NEB. REV. STAT. § 24-1301 (2020). Similarly, the Idaho Drug and Mental Health Court Act states that drug courts "have proven effective . . . in reducing the incidence of drug use, drug addiction, and crimes committed as a result of drug use and drug addiction," and that mental health courts "have provided a cost-effective approach to addressing the mental health needs of offenders, reducing recidivism, providing community protection, easing the caseload of the courts, and alleviating the problem of increasing prison, jail and detention populations." IDAHO CODE § 19-5602 (2), (4) (2020). *See generally* United States v. Dokmeci, No. 13-CR-00455, 2016 WL 915185, at *6 (E.D.N.Y. Mar. 9, 2016) ("And data from [state drug court] programs prove they work.").

[11] *See* MARLOWE ET AL., *supra* note 3, at 14 (declaring "[t]he [v]erdict [i]s [i]n: [d]rug [c]ourts [w]ork").

[12] *See* Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 84-87 (2017) (summarizing studies).

[13] *See* 1 NAT'L ASS'N OF DRUG COURT PROF'LS, ADULT DRUG COURT BEST PRACTICE STANDARDS, at vi (2013), https://www.nadcp.org/wp-content/uploads/2018/12/Adult-Drug-Court-Best-Practice-Standards-Volume-I-Text-Revision-December-2018-1.pdf [https://perma.cc/RUR9-8VLR] ("In the 24 years since the first Drug Court was founded in Miami/Dade County, Florida, more research has been published on the effects of Drug Court than on virtually all other criminal justice programs combined.").

[14] *See, e.g.*, U.S. SENTENCING COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 13 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf [https://perma.cc/QA3X-DHKF] (noting lack of empirically sound studies of the efficacy of mental health or veterans courts); *see* MARLOWE ET AL., *supra* note 3, at 26 (noting that research on the efficacy of Veteran's Courts is "in its infancy and is based largely on anecdotal reports, pre/post studies lacking comparison groups, or studies that included potentially biased comparison groups"); Julie Marie Baldwin & Erika J. Brooke, *Pausing in the Wake of Rapid Adoption: A Call to Critically Examine the Veterans Treatment Court Concept*, 58 J. OFFENDER REHABILITATION 1, 18 (2019) ("[T]here is a dearth of evaluation research on

regarding drug courts does not actually tell the unmitigated success story their proponents recite. For example, a recent analysis of drug court evaluations found "mixed" results.[15] Some studies showed drug courts reduced recidivism (at "modest" levels), while others indicated they had no impact on recidivism, and one even found they increased recidivism rates.[16] And a recent Federal Judicial Center study found that participation in the federal re-entry courts (which are essentially post-incarceration drug courts) produced *no statistically significant difference* in recidivism rates for court participants.[17] It concluded that the re-entry court model "cannot be said to be a cost-effective method for reducing revocation and recidivism."[18]

Thus, much of the available data about problem-solving court performance undermines or at least tempers the unqualified claims that this is an effective and efficient reform mechanism. Nevertheless, the problem-solving court movement not only persists, but also appears to be gaining momentum.[19] While this reform has been spreading across the country for thirty years, much of the growth has occurred over the

the efficacy, effectiveness, and even cost of the [veterans court] concept and its implementation."); Richard C. Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 273, 284 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/6VGD-YGSU] [hereinafter *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE] (noting that "evidence on mental-health courts is incomplete and paints a more complex picture" than drug court evidence).

[15] *See* Edward J. Latessa & Angela K. Reitler, *What Works in Reducing Recidivism and How Does It Relate to Drug Courts?*, 41 OHIO N.U. L. REV. 757, 767 (2015).

[16] *See id.* at 767-79.

[17] DAVID RAUMA, FED. JUDICIAL CTR., EVALUATION OF A FEDERAL REENTRY PROGRAM MODEL 1-3 (2016). The study defined recidivism as "felony and misdemeanor arrests for new offenses" within twenty-four and thirty months of program completion. *Id.* at 38. Other interesting findings include that approximately 60% of eligible participants declined the opportunity to participate.

[18] *Id.*

[19] For example, Indiana's Chief Justice praised the state for opening its 100th problem-solving court in her 2020 State of the Judiciary, and predicted that 2020 "will see the advent of many more" problem-solving courts. Katie Stancombe, *Rush Highlights Problem-Solving Courts, Pretrial Reform in 2020 State of the Judiciary*, IND. LAW. (Jan. 15, 2020), https://www.theindianalawyer.com/articles/rush-highlights-problem-solving-courts-pretrial-reform-in-2020-state-of-the-judiciary [https://perma.cc/D526-SEEQ]. Ohio's Chief Justice similarly anticipates her state will increase its number of drug courts over the next year. *See* Maureen O'Connor, Opinion, *Put Welfare of the Addicted First with Treatment and Consequences. HB 1 Does That*, CLEVELAND (Dec. 7, 2019), https://www.cleveland.com/opinion/2019/12/put-welfare-of-the-addicted-first-with-treatment-and-consequences-hb-1-does-that-maureen-oconnor.html [https://perma.cc/GC4S-VUPX].

last decade. For example, as of 2012, there were approximately 1,300 drug courts nationwide, and more than 3,400 by 2020.[20]

What explains this disjuncture between the actual data on problem-solving court performance and the sustained — and growing — enthusiasm for this purportedly data-driven practice? Part of the answer, which has been explored in existing scholarly analyses, undoubtedly lies in how the rhetoric (if not the practice) of problem-solving justice aligns with the growing consensus that we should use data-driven practices to ration scarce carceral resources.[21] Indeed, problem-solving courts embody the current "neorehabilitative" impulse in criminal justice reform, which seeks to selectively revive the rehabilitative ideal for those individuals deemed sufficiently low-risk for, or deserving of, non-carceral punishment without sacrificing traditional principles of accountability or judicial authority.[22]

This Article identifies another answer to this question by looking beyond the rhetoric and examining the courts themselves. Specifically, it focuses on the role of the problem-solving court judges in creating and sustaining this reform movement. It argues that problem-solving courts persist in part because they revive a sense of purpose and authority for judges in an era marked by diminishing judicial power.[23] In other words, one factor that explains the growth of problem-solving courts is their positive impact *on judges*. Indeed, while much of the data about problem-solving court efficacy is ambiguous or inconsistent, one metric of success seems clear: judges like them.[24] Problem-solving court judges describe presiding over these courts as the most rewarding and

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[20] *See* SUZANNE M. STRONG, RAMONA R. RANTALA & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, NCJ 249803, CENSUS OF PROBLEM-SOLVING COURTS, 2012, at 1 (2016); NAT'L INST. OF JUSTICE, *supra* note 3.

[21] *See, e.g.*, Collins, *Status Courts*, *supra* note 1, at 1499 (describing how problem-solving courts are portrayed as way to "effectively direct scarce resources to recurring systemic issues"); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 637 (2016) [hereinafter *The Drug Court Paradigm*] (identifying budgetary concerns and "evidence of effectiveness and efficiency" as factors that contributed to the rise of "smart on crime" reforms).

[22] *See* Collins, *Status Courts*, *supra* note 1, at 1520. As Eric Miller has noted in the context of drug courts, they can "appear as all things to all people." Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1503 (2004).

[23] *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (describing the rise of the "fear of judging"). Other scholars have made a similar observation in passing. *See* Boldt & Singer, *supra* note 8, at 84. However, this Article is the first to develop and focus on this observation, and identify the questions it raises as to the propriety of this reform mechanism.

[24] *See infra* Part I.B.

satisfying experiences of their careers.[25] And they report higher job satisfaction than judges in traditional court assignments and are more likely to report that their court assignment has a "positive emotional effect" on them.[26]

This insight helps resolve the puzzle posed above. If a primary impetus for the rise of problem-solving courts is judicial satisfaction, whether the courts actually reduce recidivism or save money is of no moment. In other words, problem-solving courts *do* effectively solve a problem — it is just not the problem we think.

That judges reap professional and personal benefits from presiding over a problem-solving court is not, on its own, troubling. But it becomes so in light of another dynamic this Article uncovers — problem-solving courts are largely unregulated institutions. Despite the voluminous scholarly interest in problem-solving courts, scant attention has been paid to how or whether the courts are regulated.[27] This Article fills that gap, demonstrating that the judges themselves often wield tremendous power over these courts, deciding whether they will open in the first place and how they will operate.

Thus, those who find much satisfaction in this court process also play a central role in creating and sustaining these institutions. As a result, they have become self-reinforcing institutions that are protected from meaningful external scrutiny.[28] Examining problem-solving courts from this new perspective raises new questions and concerns about their propriety. First, it casts doubt on what we know — or think we

[25] *See infra* Part II.B.; *see also* James L. Nolan, *Therapeutic Adjudication*, 39 SOCIETY 29, 37 (2002) [hereinafter *Therapeutic Adjudication*] (quoting a drug court judge saying every drug court judge he has talked to has said drug court is the "most satisfying thing" they have done in their career); Michael Newman, *A Federal Judge Reflects on Reentry Court*, FED. LAW., Dec. 2015, at 40, 41, https://www.fedbar.org/wp-content/uploads/2015/12/Reentry-pdf-1.pdf [https://perma.cc/3UHU-MTFL] (describing his experience sitting on a reentry court as "one of the more rewarding things I have done as a federal judge").

[26] Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 FAM. CT. REV. 209, 209 (2009).

[27] *See* Michael C. Pollack, *Courts Beyond Judging*, 2021 BYU L. Rev. (forthcoming 2021) (manuscript at 30) (on file with author) (noting that there "is in fact little in the way of a sustained or empirical account of the process by which [problem-solving] courts come into being or, critically, of who initiates that process").

[28] A recent study of the governance structure of prosecutor-led diversion programs revealed a similar phenomenon — those who design and operate the programs (namely, prosecutors) exercise largely unbridled and unchecked discretion. *See* Kay L. Levine & Ronald F. Wright, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, ANN. REV. CRIMINOLOGY (forthcoming 2021) (manuscript at 15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3601930, [https://perma.cc/6SKT-PD4F] (describing the "weak accountability of prosecutor-led diversion").

know — about the impact of this reform method, as the judges themselves often influence the metrics of success. Second, it reveals a new cause for concern: the judicial investment in, and control over, problem-solving courts can create resistance to new approaches to reforming or transforming the system.[29] This resistance has taken many forms. For example, some drug court judges have lobbied against statutory reforms that would reduce penalties for low-level drug offenses or create diversion opportunities that do not involve drug court participation.[30] And resistance also occurs more implicitly, through problem-solving court judges' unwillingness to incorporate new knowledge about both the nature of the purported "problem" to be solved and the most effective solutions.[31]

Problem-solving courts were one of the early reforms of this data-driven era of criminal justice reform. One scholar has even suggested that the drug court model has become a "paradigm" for current sentencing reform efforts.[32] Thus, this Article — which suggests that problem-solving courts are not driven by actual data and may in fact resist incorporating new scientific knowledge — raises questions and identifies implications for other purportedly evidence-based, data-driven reforms.[33]

The Article begins in Part I by recounting, and then correcting, the traditional origin story of the problem-solving court movement. Part II tells a different origin story, one that focuses on changes to the role and authority of criminal court judges that made the nascent problem-solving court model attractive to these judges. Drawing on theories of bureaucratic behavior, it then identifies structural and individual factors that encourage the growth of the problem-solving courts, regardless of their external efficacy. Finally, it demonstrates that

[29] Allegra McLeod explains the difference between reformist and transformative approaches as follows: "[w]hereas reformist efforts to redress extreme abuse or dysfunction in the criminal process without further destabilizing existing legal and social systems . . . abolitionist measures recognize justice as attainable only through a more thorough transformation of our political, social, and economic lives." Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1616 (2019).

[30] *See infra* Part III.B.2; *see also* KAYE, *supra* note 6, at 45-46 (discussing opposition by the National Association of Drug Court Professionals to California Proposition 5).

[31] *See infra* Part III.B.1.

[32] Eaglin, *The Drug Court Paradigm*, *supra* note 21, at 595. For analyses of the promise and peril of other evidence-based reforms, see generally Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 803 (2014).

[33] *See* Erin R. Collins, *Against the Evidence-Based Paradigm* (unpublished manuscript) (on file with author).

problem-solving courts are largely unregulated institutions, leaving oversight to the local courts — and in particular the judges who initiate and preside over them. The Article concludes in Part III by identifying how these new insights uncover new concerns for the proliferation of this criminal justice reform model. Specifically, it contends that these courts have become essentially self-reinforcing institutions. As a result, the deep judicial investment in, and influence over, problem-solving courts creates resistance to policies and programs that may actually reform or transform the system.

I. PROBLEMATIZING PROBLEM-SOLVING COURTS

This Part briefly describes problem-solving courts and recites the traditional account of their origins and success. It then complicates this standard narrative by correcting one of its key tenets — that these courts are based on empirically proven methods. This observation raises a question: if the courts are not achieving their stated purpose, what explains their continued growth?

A. Recounting the Traditional Origin Story

Problem-solving courts are specialized criminal or quasi-criminal courts that often offer treatment and enhanced supervision in addition to or in lieu of incarceration.[34] The prototypical problem-solving court — the drug court — opened thirty years ago and has served as a model for courts dedicated to a range of issues. The various courts are "defined by their diversity"; they differ in topic, methodology, and organizing principle.[35] But they generally fall into three categories. Treatment courts, such as mental health courts, drug courts, and homelessness courts, attempt to address an issue that is believed to be criminogenic.[36] Accountability courts, such as domestic violence courts and community courts, stress the need to enhance accountability for certain kinds of

[34] *See* Collins, *Status Courts*, *supra* note 1, at 1485-86; *see also* Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1508 (2003) (defining problem-solving courts as "simply specialized courts that develop expertise with particular problems"). For an overview of how one type of problem-solving court — veterans court — operates, see Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, *in* FUTURE TRENDS IN STATE COURTS: 2009, at 130, 131-32 (Carol R. Flango et al. eds., 2009), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1486/ [https://perma.cc/MCD6-LRHZ] [hereinafter *Throughout the Nation*].

[35] Collins, *Status Courts*, *supra* note 1, at 1486. *See generally id.* at 1485-98 (offering a typology of problem-solving courts).

[36] *Id.* at 1488-89 (describing "treatment courts").

offenses.[37] And status courts, such as veterans courts and girls courts, aim to address the purportedly "unique needs" of certain populations.[38] But despite this diversity, the universe of problem-solving courts is united by a common claim, namely, that these courts solve a problem that would otherwise lead to repeated interaction with the criminal legal system.[39]

Much problem-solving court literature recites a common account of the origins of these specialized courts. A pioneering judge notices a problem with the way the criminal justice system treats a certain kind of offense or offender and creates a specialized court to address that problem.[40] For example, as Judge Robert T. Russell, reflecting on the impetus behind his decision to open the nation's first veterans court, explained, "As presiding Judge over Buffalo's Drug Treatment and Mental Health Treatment courts, I noticed that many of the participants on my docket had something in common — they were veterans."[41] From this observation, Judge Russell extrapolated that veterans are a "niche population with unique needs" that were not being met in the traditional criminal justice system, so he created a new court.[42]

This account is recited anew seemingly every time a jurisdiction opens a new specialty court.[43] In May 2018, the Chief Judge Daniel Guierin of the Eighteenth Judicial Circuit in DuPage County, Illinois reflected on his recent decision to open a court for first-time opioid offenders: "It became apparent to me there was a significant and growing gap in how drug offenders are treated," Guerin said.[44] "The

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[37] *Id.* at 1489-91 (describing "accountability courts").

[38] *Id.* at 1491-98 (describing "status courts").

[39] *See id.* at 1486; E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 521-22 (2012) ("[T]he primary goal of most mental health courts is to reduce recidivism.").

[40] *See, e.g.*, John Adams, Jaye Hobart & Mark Rosenberg, *The Illinois Veterans Treatment Court Mandate: From Concept to Success*, SIMON REV., Oct. 2016, at 1, 3 ("[T]he path forward for these treatment courts had been fairly similar from Alaska to New York: a judge or other passionate court professional would identify a set of problems common to veterans in the criminal justice system, and would then work with treatment professionals to formulate appropriate strategies to help rehabilitate them.").

[41] Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009) [hereinafter *A Proactive Approach*].

[42] *See id.*

[43] *See, e.g.*, Sarah Lustbader, *Are Problem-Solving Courts Impeding Progress*?, APPEAL (Jan. 7, 2020), https://theappeal.org/are-problem-solving-courts-impeding-progress/ [https://perma.cc/E8AC-2KHJ] (describing this phenomenon in the context of New York trafficking courts).

[44] Gary Gibula, *Specialty Court for First-Time Opioid Offenders Planned in DuPage as 'Crisis Reaches Beyond What Many People Realize*,' CHI. TRIB. (May 22, 2018, 4:25 PM),

problem that I saw was that first offenders, predominantly young users with no criminal history, were coming into the system and not being funneled into a specific courtroom. I think it's extremely important to address this."[45] Another recent news account tells the story of the first Treatment Court in Mercer County, Pennsylvania. It begins with Judge John Reed noticing an "ugly pattern": many of the cases that came before him involved substance abuse. He then successfully pushed for the County to open its first treatment court in January 2019.[46]

So told, the story of the modern problem-solving court movement is the story of innovative trial judges who draw on their real-world observations to push back against the inefficiencies of tough criminal justice enforcement policies.[47] This traditional account positions specialized courts as a response to problems caused by systemic issues external to the judicial process.[48] Commentators frame the "problem" that such courts emerged to address in a variety of ways. Many focus on the conditions or issues with the individual offender believed to contribute to their criminal behavior, such as addiction — to controlled substances, alcohol, or gambling, for example — or mental illness.[49] Others point to the societal failures that funnel individuals with shared individual "problems" into the criminal justice system, such as the

https://www.chicagotribune.com/suburbs/naperville-sun/ct-nvs-dupage-opioid-task-force-funding-st-0523-story.html [https://perma.cc/7ES6-ABM4].

[45] *Id.*

[46] Michael Roknick, *County to Form Treatment Court*, HERALD (Nov. 4, 2018), https://www.sharonherald.com/news/local_news/county-to-form-treatment-court/article_39916d6c-dfd7-11e8-9a0d-8fdbfa5f01d6.html [https://perma.cc/SQ6T-6MAQ]. Interestingly, Judge Reed had started the County's first Veterans Court in 2014. *Id.*

[47] *See* GREG BERMAN, *Judicial Innovation in Action: The Rise of Problem-Solving Courts*, *in* REDUCING CRIME, REDUCING INCARCERATION: ESSAYS ON CRIMINAL JUSTICE INNOVATION 51, 54-55 (2014) [hereinafter *Judicial Innovation in Action*]; *see also* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 44 (2001) [hereinafter REINVENTING JUSTICE] (noting that a "common refrain" from drug court officials is: "What we were doing before simply was not working").

[48] *See* NOLAN, REINVENTING JUSTICE, *supra* note 47, at 44 ("[A]dvocates of drug court often speak of the structural pressures that they believe gave birth to the movement").

[49] JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 10 (2009) [hereinafter LEGAL ACCENTS] ("[T]he problems to which people generally refer when speaking of problem-solving courts are those of the individual offenders . . . ."); *see, e.g.*, Patricia A. Griffin & David DeMatteo, *Mental Health Courts: Cautious Optimism*, *in* PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 9, at 91, 92-93 (claiming that the development of mental health courts was "[o]ne response of the criminal justice system to [the] bleak situation" caused by the lack of treatment and management of offenders with mental health needs); *see* Mackinem & Higgins, *supra* note 9, at 33 (identifying "problem drug use" as the reason drug courts emerged).

breakdown of institutions that previously had provided support for issues such as substance abuse and mental illness.[50] And most emphasize the changes in criminal justice enforcement policies that funneled more cases into the system, thus increasing caseloads and pressure to process cases quickly.[51] As a result, the increasingly overburdened criminal justice system failed to address the underlying conditions believed to cause criminal behavior (e.g., substance addiction or mental health issues), allowed certain types of criminal behavior to slip through the cracks (e.g., domestic violence offenses or low-level quality of life offenses), or failed to address certain offenders with the dignity they deserved (e.g., veterans).[52] Thus, despite the diversity of problem-solving courts, they "all seek to use the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of communities."[53]

Crucially, the traditional account depicts the progression of problem-solving court development as largely linear: a particular court form emerges, is effective, and then spreads to other jurisdictions. They are routinely justified as an "evidence-based" approach to criminal justice

[50] BERMAN, *Judicial Innovation in Action*, *supra* note 47, at 54 (identifying "social and historical forces" that contributed to the rise of problem-solving courts, such as programs that "traditionally addressed problems like addiction, mental illness, and domestic violence").

[51] *See id.* (identifying the "most important forces" that led to the rise of problem-solving courts as "rising caseloads and increasing frustration . . . with the standard approach to case processing and case outcomes in state courts"); NOLAN, REINVENTING JUSTICE, *supra* note 47, at 45 ("[T]he institutional realities (e.g., limited prison space, high rearrest rate among drug offenders, overcrowded court calendars) put pressure on judges to come up with other plans for handling this group of offenders."). As Candace McCoy has recounted, these "essentially utilitarian, cost-conscious rationales" concerning the excessive demands on court resources were central to the development of the first drug courts. Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1518 (2003). As the courts evolved, they took on a more "offender-centered and therapeutic" justification. *Id.*

[52] *See* Collins, *Status Courts*, *supra* note 1, at 1485-97 (typologizing problem-solving courts).

[53] Greg Berman, *What Is a Traditional Judge, Anyway?*, 84 JUDICATURE 78, 78 (2000). A panel of judges asked to identify the conditions that "created problem-solving courts" pointed, alternatively, to the "huge" number of cases in the system, the prevalence of particular types of cases (e.g., those involving substance abuse or domestic violence), the sense that the same people were being "recycle[ed] . . . through the system," and "the abject failure of other branches of government," and the failure to provide mental health services to those in need. *See id.* at 80.

reform, one that uses data and best practices to refine and enhance criminal justice interventions.[54]

The traditional account only makes sense if these courts effectively address the systemic issues that prompted their creation. Indeed, claims of increased efficacy and efficiency are central to the legitimization of the problem-solving court movement.[55] That they produce more efficient results than their traditional counterparts is one of the "foundational premises on which problem-solving courts rest . . . ."[56] They are, by definition, consequentialist institutions, justified by their dedication to improving outcomes.[57] Proponents celebrate these endeavors for being purely pragmatic, guided only by a "what works" ethos.[58] As one problem-solving court judge reflected, her dedication to this method flows more from "practical than philosophical considerations"; "if it works, do it."[59]

B. Correcting the Traditional Origin Story

The traditional account, while compelling, does not withstand scrutiny in at least one key respect: these courts have not developed methodically, based on the proven success of their predecessors. Rather, the courts spread quickly, before there is time for meaningful reflection let alone rigorous empirical scrutiny, as to whether they achieve their aims. For example, by 1998 at least 161 adult drug treatment courts had been established, and 159 were in the works.[60] Yet, at that point, "no

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[54] *See infra* note 64 (citing sources).

[55] *See* Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 278 ("The driving force behind the problem-solving courts movement from its inception has been its express commitment to effectiveness.").

[56] Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955, 956 (2003).

[57] For example, Judith Kaye, former Chief Judge of the New York State Court of Appeals, identified the belief "that outcomes — not just process and precedents — matter" as a uniting tenet of problem-solving courts. Judith S. Kaye, *Making the Case for Hands-On Courts*, NEWSWEEK (Oct. 11, 2000), https://www.unl.edu/eskridge/handson.cj211.htm [https://perma.cc/2W32-ERVL]; *see also* NOLAN, REINVENTING JUSTICE, *supra* note 47, at 106 ("[U]tilitarianism is a fundamental justificatory principle legitimating the expansion of the drug court movement."); Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 278 ("The driving force behind the problem-solving courts movement from its inception has been its express commitment to effectiveness.").

[58] NOLAN, LEGAL ACCENTS, *supra* note 49, at 12.

[59] *Id.*

[60] *Developments in Law: Alternatives to Incarceration for Drug-Abusing Offenders*, 111 HARV. L. REV. 1898, 1916 (1998).

one [had] yet systematically reviewed their efficacy."[61] This phenomenon was repeated with veterans courts. Judge Russell opened the first veterans court in 2008, and by 2009 seven more veterans courts had opened in other jurisdictions, with more in the planning stages.[62] Thus, within a year — which is hardly sufficient time to come to any founded conclusions as to whether this court improved outcomes for defendants, as it claimed — the veterans court model had spread across the country. A decade later, the number has now grown to more than 450, despite the continued dearth of research demonstrating their efficacy.[63]

This dynamic, whereby a new court form spreads before it is tested or even critically examined, is currently playing out in the context of one of the newest specialized court forms: opioid intervention courts. A judge in Buffalo, New York opened the first such court in 2016.[64] By January 2018, a judge in New York City had opened a similar court,[65] and within months a judge in DuPage County, Illinois had declared his intent to do the same.[66] As of July 2019, opioid intervention courts had opened in at least five states.[67]

Thus, while the courts are retrospectively data-justified, they are not "data-driven" in the sense that they are not actually built upon data proving they effectively fulfill their mission. Instead, they seem to be fueled — especially in the early years — by anecdotal accounts of success provided by the inaugural judges. For example, Judge Russell

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[61] *Id.*

[62] Russell, *Throughout the Nation*, *supra* note 34, at 130.

[63] Baldwin & Brooke, *supra* note 14, at 1-3 (noting that as of 2016, there were 450 veterans courts with more in planning stages); *see also id.* at 18 (noting, "there is a dearth of evaluation research on the efficacy, effectiveness, and even cost of the VTC concept and its implementation" and veterans courts "do not enjoy their own set of evidence-based practices"); Jack Tsai, Andrea Finlay, Bessie Flatley, Wesley J. Kasprow & Sean Clark, *A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates*, 45 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVICES RES. 236, 237 (2018) (noting, in 2018, that the effectiveness of veterans courts is "unclear, and comprehensive analyses of . . . outcomes is lacking").

[64] DAVID LUCAS & AARON ARNOLD, CTR. FOR COURT INNOVATION, COURT RESPONSES TO THE OPIOID EPIDEMIC: HAPPENING NOW 1 (2019), https://www.courtinnovation.org/sites/default/files/media/documents/2019-07/handout_happeningnow_pageview_07112019.pdf [https://perma.cc/62PR-9KEE].

[65] *See* Andrew Denney, *New Bronx Opioid Treatment Court Looks to Help Addicts Kick Their Addiction*, N.Y. L.J. (Jan. 29, 2018, 7:14 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/29/new-bronx-opioid-treatment-court-looks-to-help-addicts-kick-their-addiction/ [https://perma.cc/Z464-FCCV].

[66] Gibula, *supra* note 44.

[67] LUCAS & ARNOLD, *supra* note 64, at 1-5.

reported, a year into his veterans court experiment, that the fifteen court graduates had a "zero percent recidivism rate."[68] Certainly, this is an encouraging achievement for those graduates and this observation was likely instrumental in persuading other jurisdictions to follow Judge Russell's lead. However, without more, it proves nothing of the efficacy of the veterans court approach. The desistance Judge Russell observed could have been due to the specialized court process; it also could have been due to a number of other factors — including the (perhaps inadvertent) cherry-picking of participants who would have desisted regardless of the specialized court process.[69] Absent more information, including recidivism statistics for a similarly situated comparison group, it is impossible to know what caused this outcome.[70]

Any objective data that purports to prove the ameliorative impact of problem-solving courts has been produced *after* the courts have proliferated and become entrenched. And retrospective studies often reveal that preliminary, court-created reports observing drastic recidivism are drastically overstated or unfounded.[71] Moreover, despite the fact that the problem-solving court approach has existed for thirty years, the data leaves much to be desired. Notably, with the exception of drug courts,[72] it is widely accepted that problem-solving courts have not been analyzed with rigor sufficient to form a conclusion about their impact.[73] Nevertheless, proponents seem to be assuaged that such courts will be effective, as they are based on the purportedly successful drug court model.[74]

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[68] Russell, *A Proactive Approach*, *supra* note 41, at 132. He also noted that 100 defendants had enrolled to date and four had dropped out of the program (two voluntarily, two involuntarily). *Id.*

[69] *See* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 213 (2013) [hereinafter *Against Neorehabilitation*] (discussing literature revealing the tendency of drug courts to "cherry pick" participants).

[70] Early, court-published data recounting remarkable success of problem-solving courts is often later refuted — or at least tempered — by subsequent empirical studies. *See* NOLAN, REINVENTING JUSTICE, *supra* note 47, at 128-31 (providing examples).

[71] *See id.* at 128-130 (providing examples). Levine & Wright recently made a similar observation in the context of prosecutor-led diversion programs. They found that such programs lack robust independent empirical support and are instead justified with technical reports created by program insiders, which "tend to report more cost-savings and lower rates of recidivism than comparable studies by independent researchers." Levine & Wright, *supra* note 28 (manuscript at 27).

[72] NAT'L DRUG COURT INST., *supra* note 9, at 1 ("More research has been published on drug courts . . . than virtually all other correctional programs combined.").

[73] *See supra* note 14.

[74] *See, e.g.*, MARLOWE ET AL., *supra* note 3, at 11-14.

But the available data on drug courts, while extensive,[75] does not depict an unmitigated success story. While some of the earliest studies of drug courts demonstrated recidivism reductions among their participants, it is now widely acknowledged that these studies were marred by methodological flaws that undermine their findings, such as small sample size, lack of a meaningful comparison group, and selection-bias.[76] It is only relatively recently — decades into the problem-solving court movement — that *some* drug court evaluations have been conducted with sufficient scientific rigor to enable assessments of drug court efficacy.

A series of analyses undertaken by the Government Accountability Office ("GAO") illustrates the chronological challenges in assessing drug court efficacy. GAO endeavored to study the impact of federally-funded drug courts in 1997 and again 2002, only to find that it "could not draw any firm conclusions," in large part because the existing studies were limited or flawed and drug courts were not maintaining proper follow-up data.[77] When it tried again in 2005, it determined 27 of 117 existing drug court evaluations were methodologically sound and determined, based on these 27 studies, that drug courts "can reduce recidivism," at least during the time in which the defendant was under court supervision.[78] And in its 2011 study, it identified only 32 of 260

[75] NAT'L DRUG COURT INST., *supra* note 9, at 1 ("More research has been published on drug courts . . . than virtually all other correctional programs combined.").

[76] *See* U.S. SENTENCING COMM'N, *supra* note 14, at 12 (summarizing methodological flaws and providing citations); Michael Rempel, Mia Green & Dana Kralstein, *The Impact of Adult Drug Courts on Crime and Incarceration: Findings from a Multi-Site Quasi-Experimental Design*, 8 J. EXPERIMENTAL CRIMINOLOGY 165, 167-68 (2012) (noting that literature reviews of drug court evaluations conducted in the late 1990s and early 2000s concluded that drug courts reduced recidivism, but "typically qualified their conclusions by lamenting the poor research designs employed by most studies").

[77] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-434, DRUG COURTS: BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE IMPACT OF DRUG COURT PROGRAMS 2 (2002), https://www.gao.gov/assets/240/234379.pdf [https://perma.cc/U4YR-2UHF]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-97-106, DRUG COURT: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS 7-8 (1997), https://www.gao.gov/assets/160/155969.pdf [https://perma.cc/78AF-2P52].

[78] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 2, 7 (2005), https://www.gao.gov/assets/250/245452.pdf [https://perma.cc/P46E-4MVL] [hereinafter GAO-05-219 (2005)]; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-53, ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURE REVISION EFFORTS 8 (2011), https://www.gao.gov/assets/590/586793.pdf [https://perma.cc/63ZM-B4WH] [hereinafter GAO-12-53 (2011)] (summarizing 2005 study).

available evaluations as sufficiently rigorous to include in its analysis.[79] It found that eighteen of these thirty-two studies demonstrated that drug court participation led to statistically significant recidivism reductions.[80]

Thus, the GAO concluded — eventually — that some studies indicate that drug courts reduce recidivism. Another recent analysis of drug court evaluations came to similar conclusions, finding "mixed" results regarding recidivism reductions.[81] While most of the evaluations demonstrated that drug courts reduced recidivism, some indicated drug court participation either had no impact on recidivism or *increased* recidivism.[82] The researchers further concluded, based on a review of meta-analyses of drug courts, that drug courts reduce recidivism by an average of 10%, which they characterized as "modest."[83]

In sum, drug court evaluations seem to demonstrate that some drug courts modestly reduce recidivism for some individuals, some of the time.[84] And even for those studies that indicate recidivism reductions, very little is known about which aspects of drug courts lead to these reductions.[85] Moreover, conclusions of efficacy on other metrics — such as cost-savings or reducing substance use — are even more tentative.[86]

The intent of this discussion is not to prove that drug courts do or do not work. Rather, it is to highlight the ambiguity in the current research findings as to their impact. Contrary to the prevailing narrative, data neither justify nor explain the growth of problem-solving courts. If data are not driving this movement, what is? The following Part offers an answer.

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[79] GAO-12-53 (2011), *supra* note 78, at 5.

[80] *Id.* at 19.

[81] Latessa & Reitler, *supra* note 15, at 767.

[82] *Id.* at 767, 778.

[83] *See id.* at 779-80.

[84] Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 287-88 ("[T]he quantitative research [on drug courts], warts and all, tells a story of modest success . . . .").

[85] JOANNE CSETE & DENISE TOMASINI-JOSHI, OPEN SOC'Y FOUNDS., DRUG COURTS: EQUIVOCAL EVIDENCE ON A POPULAR INTERVENTION 12 (2015) ("[W]hile there is a great deal of research on drug courts, very little of it identifies outcomes that can be said to be the direct result of drug court participation"); *see, e.g.*, GAO-05-219 (2005), *supra* note 78, at 7 (noting that the researchers could not determine which aspects of the drug court program contributed to recidivism reductions).

[86] *See, e.g.*, GAO-05-219 (2005), *supra* note 78, at 25-26 (discussing disparate findings regarding cost savings of drug courts); Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 297 (discussing studies showing that, overall, drug court participation does not reduce incarceration time).

II. JUDGING PROBLEM-SOLVING COURTS

This Part refocuses and supplements the traditional narrative regarding the origins and purpose of the problem-solving court movement. It argues that these courts emerged not only as a response to systemic dynamics external to the judicial process, but also to changes to the nature of judging itself, specifically changes to the scope of judicial authority due to sentencing law reform. In so doing, it positions the rise of problem-solving courts as a response to judicial dissatisfaction and as a judicial reclamation of authority and expertise. Then, drawing on theories of bureaucratic behavior, it identifies institutional and personal factors that encourage the persistence and proliferation of these institutions, regardless of whether they advance the public interest. Finally, it shows that this growth is likely to continue unabated, despite open questions of their efficacy, as the judges themselves remain largely in control of their destiny.

A. Reclaiming Courts

As recounted above, the standard narrative portrays problem-solving courts as a response to systemic problems external to the judicial process, namely unaddressed social issues and the deleterious effect of tough on crime policies on court dockets. This traditional account is not wholly inaccurate, but it is incomplete. It largely overlooks significant transformations internal to the judicial process that emerged alongside problem-solving courts.

As problem-solving courts emerged, there was increasingly little for judges to judge. Over the course of the twentieth century, the proportion of criminal cases that were disposed of through guilty pleas instead of trials was gradually increasing.[87] By 1971, the Supreme Court had accepted plea-bargaining as an "essential component of the administration of justice."[88] Due, at least in part, to the rising number of prosecutions during the subsequent "tough on crime" era, and changes to substantive criminal law and sentencing law that enhanced prosecutorial power, plea-bargaining became even more central to the functioning of the criminal legal system.[89] Currently, more than 97% of

[87] *See* Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5-6 (1979); (noting that plea bargaining had become "common" in the 1920s and "American criminal courts became even more dependent on the guilty plea" in the subsequent decades); *see also id.* at 26-29 (offering statistics).

[88] Santobello v. New York, 404 U.S. 257, 260 (1971).

[89] RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 131 (2019) (noting that the "one-two punch" of the proliferation of

federal convictions are achieved through a guilty plea. And the percentage in many states is even higher.[90]

Unsurprisingly, this shift in the disposition method of criminal cases shifted the locus of judicial activity. Quite simply, in this system of pleas, there was less for judges to adjudicate.[91] Instead, the focus of judicial duties shifted to ensuring pleas were constitutionally sound and then imposing sentence.[92]

Even in a criminal justice system predominated by pleas, judges retain a crucial and exclusive power: the power to sentence.[93] Yet, in the years preceding the emergence of the problem-solving court movement, this core judicial power was diminishing.[94] For most of the twentieth century, judges in state and federal jurisdictions had "nearly unfettered authority" to determine what sentence to impose upon a criminal defendant.[95] Beginning in the 1970s, however, amidst growing concern

criminal laws and severe sentencing laws "virtually knocked jury trials out of the system"); *see also* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1435 (2020) (providing a robust account of the rise of plea bargaining); *cf.* Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 159 (2018) (contending that the "rising caseload" explanation for the prevalence of guilty pleas "fail[s] to fully explain the criminal trial's decline").

90 *See* Brown, *supra* note 89, at 155 n.2 (citing state court statistics).

91 I use the term "adjudicate" in the same manner as Judith Resnik, who defines "adjudication" as "a dispute resolution process in which judges employed by the government make decisions based upon information presented by the parties. Judges decide motions, preside at trials and hearings, and sometimes find facts. When ruling, judges are obliged to provide reasoned explanations for their decisions, and the parties, in turn, are obliged to obey." Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 n.13 (1982).

92 As King and Wright establish in their recent empirical study, in some jurisdictions judges are also actively involved in the plea negotiation process. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 326-27, 332 (2016) (summarizing Albert Alschuler's 1976 study documenting judicial participation in plea bargaining).

93 Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 66 (2018) ("The power to determine the severity of a sentence — to determine how much punishment is due a particular offender for a particular offense — is a core judicial function.").

94 King & Wright, *supra* note 92, at 335-36 ("[O]f all the trends in state criminal justice since the 1970s, restrictions on the sentencing discretion of judges is one of the most prominent.").

95 Douglas A. Berman, *Sentencing Guidelines*, *in* 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 95, 95 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf [https://perma.cc/RF52-66ST] [hereinafter *Sentencing Guidelines*]; *see also* Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, 26 FED. SENT'G REP. 198, 200 (2014).

that these discretionary, indeterminate sentencing systems were so unpredictable and unguided that they were essentially "lawless," many jurisdictions reigned in judicial discretion by adopting guidelines-based, structured sentencing systems.[96] Such sentencing regimes expressly aim to limit judicial discretion by encouraging judges to impose a sentence within a predetermined range, based on an assessment of delineated factors. And for the first fifteen years of the problem-solving court movement, some jurisdictions required judges to issue a sentence within the guidelines range.[97] Meanwhile, federal and state lawmakers were heeding calls to get tough on crime by implementing mandatory sentencing statutes, which prohibit judges from imposing a sentence below the statutory minimum.[98] The resultant transformation of sentencing systems was "remarkable."[99] These legislative changes altered the nature and impact of sentencing in many ways, but one change is particularly pertinent to this analysis: authority over what sentence a defendant received largely shifted to prosecutors.[100]

[96] Berman, *Sentencing Guidelines*, *supra* note 95, at 97-99 (noting that "nearly every state adopted some form of structured sentencing" that responded to concerns of "lawlessness" in sentencing); *see also* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 69 (1999) (noting that, as of 1999, seventeen states had adopted a sentencing guidelines system and at least eight more were considering adopting sentencing guidelines). For current information regarding state sentencing guidelines and commissions, see Alexis Lee Watts, *Timelines of Sentencing Commissions and Sentencing Guidelines Enactments: 1978 to the Present*, SENT'G GUIDELINES RESOURCE CTR. (July 27, 2016), https://sentencing.umn.edu/content/timelines-sentencing-commissions-and-sentencing-guidelines-enactments-1978-present [https://perma.cc/57XA-E5B2].

[97] As a result of the Supreme Court's decision in *Blakeley v. Washington*, 542 U.S. 296 (2004), states could no longer require judges to impose guidelines-based sentences.

[98] Berman, *Sentencing Guidelines*, *supra* note 95, at 99 (noting that "a number" of states adopted of "mandatory sentencing statutes" in the 1980s and 1990s); *see also* Subramanian & Delaney, *supra* note 95, at 200 ("[G]alvanized by a growing belief that tougher penalties can reduce crime, mandatory minimum sentences and recidivist statutes . . . became popular as a means of ensuring that offenders deemed 'dangerous' would receive a sufficiently severe custodial sentence.").

[99] Berman, *Sentencing Guidelines*, *supra* note 95, at 99 ("Though there is considerable variation in the form and impact of structured sentencing reforms, the overall transformation of the sentencing enterprise throughout the United States has been remarkable. The discretionary indeterminate sentencing systems that had been dominant for nearly a century have been replaced by a wide array of sentencing laws and structures that govern and control sentencing decision-making.").

[100] *Id.* at 110-11 ("Scholars have long expressed concerns that structured and determinate sentencing systems will problematically transfer undo sentencing authority and discretion from judges to prosecutors . . . ."); Melissa Hamilton, *McSentencing: Mass Federal Sentencing and the Law of Unintended Consequences*, 35 CARDOZO L. REV. 2199,

Thus, around the same time as the problem-solving court model was emerging, judicial authority over sentencing — the core power allotted to judges in the plea-dominated system — was diminishing. Simultaneously, the war-on-drugs was ramping up, but state trial court judges, who daily witnessed the devastating impacts of these harsh polices, were relatively powerless to counteract their effect.[101] Judges have reflected that these changes to structured sentencing systems left them feeling that they were essentially "rubber-stamp bureaucrats" or "judicial accountants."[102]

It is unsurprising, therefore, that the problem-solving court model emerged and gained popularity as this sense of judicial dissatisfaction and disempowerment was taking hold.[103] Early reflections of drug court judges indicate that they were attracted to the emerging specialty court model precisely because of these systemic changes. Many have noted that they felt frustrated and constrained by mandatory minimum sentences,[104] and that they found the drug court approach "liberating," in contrast, because it offered more flexibility in sentencing.[105] One drug court judge in California reflected:

> You know, the legislature in the state of California has just about taken away all the discretion we have as judges. They now tell us exactly what sentence to impose, and how to do it, and

2233 (2014) ("Many federal criminal law experts have observed that the implementation of determinate sentencing . . . transfers discretion from judges to United States Attorneys.").

101 *See* Eric Miller, Codependency Courts (unpublished manuscript) (on file with author) (discussing the impact of the rise in low-level drug prosecutions on judges).

102 *See* Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992); *see also* STITH & CABRANES, *supra* note 23, at 84 ("The judge who conducts the sentencing is now, by design, little more than the instrument of a distant bureaucracy.").

103 *See* Boldt & Singer, *supra* note 8, at 88 ("[T]here is good reason to conclude that the energetic support drug treatment courts have received from judges has a great deal to do with their frustration over contemporary sentencing policy. Judges see in these courts an opportunity to redefine their role in response to the diminished judicial discretion and autonomy brought about by the determinate sentencing movement, sentencing grids and guidelines, and the straightjacket of mandatory minimum sentences.").

104 NOLAN, REINVENTING JUSTICE, *supra* note 47, at 104 ("The goal of getting the drug court client well, however, now supersedes the goal of consistency and impartiality, and even in some cases, as we will see, strict adherence to statutory law. A common frustration expressed by drug court judges is the unwelcome constraints they experience from legislatively imposed mandatory minimum sentences.").

105 *Id.*

> when to do it, and where to do it. This is one of the few areas that we have where we still have some discretion."[106]

And this claim is further supported by how proponents describe the problem-solving court movement as a whole. They characterize the movement as being a "grassroots" effort, not "something where the bureaucrats in Washington tell you what to do."[107] And it is not just a bottom-up movement, but specifically a "judge-led movement."[108]

Thus, in addition to the many external systemic problems highlighted in the traditional account, problem-solving courts also emerged to solve a problem internal to the judicial process itself: a growing sense of judicial dissatisfaction and disempowerment caused by the rise of structured and mandatory sentencing schemes.

B. Building a Problem-Solving Court Empire

The foregoing observations start to shed light on the puzzle posed in Part I: why do problem-solving courts proliferate, despite the underwhelming empirical support for their efficacy? It suggests that problem-solving courts emerged to solve a problem *with judging*. Building on that observation, this subpart contends that problem-solving courts continue to thrive — regardless of their impact on recidivism or other metrics of success — because the judges who create and preside over them have a professional and personal self-interest in their persistence. In other words, these judges have an interest in building a problem-solving court empire.

The "empire-building hypothesis,"[109] also known as the agency expansion hypothesis, the "self-aggrandizement hypothesis,"[110] and the "'imperial model' of bureaucratic behavior,"[111] was developed in administrative law literature to help explain the behavior of bureaucrats. As these descriptive titles convey, the theory is quite simple: it identifies the possibility that self-interested bureaucrats will seek to expand the realm of their influence in order to maximize their

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[106] *Id.* at 105.

[107] *Id.* at 42 (quoting a drug court judge).

[108] *Id.* ("The Drug Court movement is essentially a judge-led movement.").

[109] Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 924 (2005).

[110] Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1351-52 (2013).

[111] Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1292-93 (2006).

power.[112] Like all public-choice theories, the empire-building hypothesis starts from the premise that governmental actors are primarily self-interested, and that self-interest will lead them to seek to expand their power and influence.[113] In the agency context, the empire-building hypothesis posits that administrators will lobby Congress to increase their budgets and, therefore, the size and influence of their agencies.[114] As a result, bureaucrats will regulate not because such regulation is necessary, but because it benefits the regulators.

At first blush this theory, which posits that administrators retain interests separate from that of the agency, may seem inapposite to judges, who are presumptively neutral actors. Indeed, the presumed neutrality of judges as compared to bureaucrats led Michael Dorf to conclude that problem-solving courts should remain in the judiciary, despite his acknowledgement that these institutions are run "in much the same manner as parallel administrative agencies,"[115] and are "functionally indistinguishable" from such agencies.[116] Dorf defined neutrality as the "even-hande[d]," non-partisan application of principles[117] and "not having a stake in the outcome" of the proceedings.[118] And on this measure, problem-solving court judges may in fact be — or be perceived as — neutral.[119] While they presumably want each individual defendant to succeed in the court-mandated program, we must also presume that they apply the basic tenets of the problem-solving court model even-handedly and would not sacrifice these principles to enable a defendant to escape sanction if she has failed to satisfy the programming requirements. Moreover, whereas the self-interest that motivates imperialistic bureaucrats is presumably and

[112] *See* Levinson, *supra* note 109, at 925.

[113] *See* Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523, 1530 (2006); *see also* Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out that Baby*, 87 CORNELL L. REV. 309, 310 (2002) (describing inherent human self-interest as an essential component of public choice theory).

[114] As Daryl J. Levinson explains, "[t]he size of the budget, the theory goes, might correlate with a number of things that self-interested bureaucrats value: compensation and perquisites, future employment prospects, and the ability of the agency to accomplish policy goals to which the bureaucrat is ideologically committed." Levinson, *supra* note 109, at 932.

[115] Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 954 (2003).

[116] *Id.* at 950.

[117] *See id.* at 953.

[118] *Id.*

[119] As Dorf explains, "courts are the institutions that connote neutrality," and this perception "in large part makes the reality." *Id.* at 952.

primarily financial,[120] problem-solving court judges — and judges generally — do not stand to gain financially from their actions or, specifically, the expanse of the problem-solving court empire.[121]

However, even if problem-solving court judges are neutral as to the outcome in an individual case, it does not follow that they are neutral as to the outcome of the problem-solving court movement. Moreover, "[t]he absence of a patent economic interest does not mean that judges are without self-interest."[122] In fact, problem-solving court judges stand to benefit professionally and personally in many ways from presiding over these specialized courts. And these benefits may motivate them, like their bureaucratic counterparts, to expand the problem-solving court empire, regardless of whether doing so advances the public interest. As the Director of Standards for National Association of Drug Court Professionals ("NADCP") candidly reflected in 2015, "The aim of the first couple decades of drug courts was to *spread drug courts*."[123]

Based on extensive observational research of and interviews with problem-solving court judges, sociologist James Nolan noted, "a discussion with an American problem-solving court judge quickly reveals a great deal of commitment to and personal investment in these programs."[124] He characterized the judges as "true believers" who believe that the problem-solving court movement is of "profound

120 And the strongest critique of this theory is that bureaucrats do not necessarily stand to benefit financially from the expansion of their agency budget. *See* Levinson, *supra* note 109, at 925. As Levinson points out, bureaucrats may be motivated to expand their agency for other, non-monetary reasons, including a genuine dedication to the agency mission. *Id.*

121 *See* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 294-95 (1997) ("A judge cannot increase her salary by doing a better job of judging . . . ."); Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior,* 68 U. CIN. L. REV. 615, 616 (2000) ("Legislators, executives, and bureaucrats are widely understood by scholars and by the public to be motivated by various forms of self-interest, including the desire for re-election, the desire for promotion to higher office, the desire to expand their base of power, and the desire to maximize future even if not current income, but the similarly self-interested judge is largely an absent figure in the academic literature on the judiciary and on judicial decision-making.").

122 Cross, *supra* note 121, at 295.

123 Lauren Kirchner, *Drug Courts Grow Up*, PAC. STANDARD (July 27, 2015), https://psmag.com/news/drug-courts-grow-up#.8mv8crss3z [https://perma.cc/68NQ-VWTH] (emphasis added) (quoting Terrence Walton, Director of Standards at NADCP) (indicating that Walton continued: "We said, 'We want a drug court in the reach of every individual in need.' Well, now that we have almost 3,000 drug courts across the country and in every single state, we want a drug court *that works* in reach of everyone in need").

124 NOLAN, LEGAL ACCENTS, *supra* note 49, at 137.

historical significance."[125] Nolan and others — including commentators and practitioners who are themselves part of the problem-solving court movement — have compared the judges' devotion to the success and spread of the movement to religious conviction. For example, according to Nolan, problem-solving court judges "are often proselytizers, wishing to spread the 'good news' of problem-solving courts to their immediate judicial colleagues and quite literally to the rest of the world."[126] One judge, who had presided over a drug court, mental health court, and domestic violence court, described herself to Nolan as a "disciple" of the movement, adding that "any place that we can expand it, we should."[127] Greg Berman and John Feinblatt, prominent problem-solving court proponents, have reflected that judges often describe their introduction to problem-solving courts in terms reminiscent of a "conversion narrative."[128] Berman and Feinblatt themselves have encouraged others to "preach to the unconverted,"[129] with Berman adding separately that in order to institutionalize problem-solving justice, proponents should look for "every possible opportunity — PSAs, op-eds, public events — to spread the gospel of problem-solving justice."[130]

As suggested above, one reason problem-solving courts emerged was to address a sense of judicial disempowerment and dissatisfaction in an era of plea-bargaining and structured sentencing. And on these measures, if not others,[131] it seems this initiative has succeeded. Problem-solving court judges have immense discretion over how to manage the cases on their docket. This approach "affords them a great deal of power and discretion (beyond what they would have in a regular criminal court)."[132] Those who preside over a treatment-oriented court, for example, can choose from a "myriad" of sanctions for defendants

[125] *Id.*

[126] *Id.*; *see also id.* at 139 (quoting an Irish judge who described American problem-solving court judges' enthusiasm for their courts as "almost evangelical").

[127] *Id.* at 138.

[128] GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, JUDGES AND PROBLEM-SOLVING COURTS 21-22 (2002), https://www.courtinnovation.org/sites/default/files/p-s%20court%20primer%20PDF3.pdf [https://perma.cc/9SK6-M9SJ].

[129] *Id.* at 15.

[130] GREG BERMAN, CTR. FOR COURT INNOVATION, THE HARDEST SELL? PROBLEM-SOLVING JUSTICE AND THE CHALLENGES OF STATEWIDE IMPLEMENTATION 5 (2004), https://www.courtinnovation.org/sites/default/files/Hardest%20Sell1.pdf [https://perma.cc/JUK7-QSSV].

[131] *See supra* Introduction (discussing competing statistics).

[132] *See* NOLAN, LEGAL ACCENTS, *supra* note 49, at 140.

who are straying from their treatment plans,[133] and do so "individually and creatively" because "[o]ften there are no hard and fast rules" about how they can or must respond.[134] One community court judge reflected that the problem-solving court model has "broadened the judicial horizon" and "given judges more choices than [they] have ever had."[135]

Moreover, and perhaps *because* these courts return to judges some of the discretion and authority that diminished as a result of sentencing reform, problem-solving court judges regularly report higher levels of job satisfaction than their conventional peers.[136] A judge who presided over both a drug court and conventional criminal court in Roanoke, Virginia, reflected, "I get more personal satisfaction out of what I'm doing with the drug court population than with anything I do for the remainder of the week."[137] A drug court judge from Louisville, Kentucky, similarly noted that, "When I'm in my regular [conventional] court it's more like work. . . . Drug court, I don't have to do it. I'm there because I want to do it."[138] These individual reflections are not isolated experiences. Jeffrey Tauber, a former drug court judge and the founding president of the NADCP, reflected that he had talked to hundreds of problem-solving court judges and had "not found a judge yet who has done this work for a significant period of time who hasn't said it is the most satisfying work that he has done in his career as a judge."[139]

These anecdotal observations have been substantiated by empirical data. A study compared the job satisfaction of problem-solving court judges with conventional judges.[140] It found that 96% of problem-solving court judges surveyed felt that their assignment to the problem-solving court positively impacted them all (70%) or some (26%) of the time.[141] In contrast, 81% of traditional judges indicated that their job impacted them positively, with only 41% saying it was always positive and 40% saying it was sometimes positive.[142] Only 4% of problem-solving court judges — as opposed to 19% of traditional judges — said

133 For example, they can order a short stint in jail, increased attendance at substance abuse counseling sessions, increased drug testing, and/or community service. *See* Nolan, *Therapeutic Adjudication*, *supra* note 25, at 36.

134 *Id.*

135 NOLAN, LEGAL ACCENTS, *supra* note 49, at 141.

136 *Id.* at 8-9; *see also* Chase & Hora, *supra* note 26, at 209.

137 NOLAN, REINVENTING JUSTICE, *supra* note 47, at 109 (quoting Judge Diane Strickland).

138 *Id.* (quoting Judge Henry Weber).

139 NOLAN, LEGAL ACCENTS, *supra* note 49, at 138-39 (quoting Judge Jeffrey Tauber).

140 Chase & Hora, *supra* note 26, at 209.

141 *See id.* at 227.

142 *See id.*

their assignment negatively impacted them.[143] Specifically, 85% of the problem-solving court judges reported that their judicial assignment had a "positive emotional effect on them," compared to 58% of other judges.[144]

Additional survey findings reveal factors that may explain this discrepancy in satisfaction. For example, problem-solving court judges were significantly more likely (83%) than the other judges (68%) to believe that their courts are actually helpful to the litigants.[145] They also had significantly more positive attitudes towards the litigants (51% as compared to 15%)[146]; had more hope that the litigants can solve the problems that brought them to court (81% as compared to 46%)[147]; felt that the litigants who came before them respected them (85% as compared to 68%)[148]; and were grateful for them (62% as compared to 27%) more than their conventional counterparts.[149]

Furthermore, judges, like other types of legal professionals (and people generally), inevitably care about their professional reputation and will, at times, seek to enhance or maximize their prestige.[150] And presiding over a problem-solving court can increase a judge's notoriety.[151] The first judge to create a certain kind of court or to open a court in a new jurisdiction is often met with abundant praise in the press and the community.[152] He or she is often deemed an expert on the intricacies and best practices for that model and will regularly travel the

[143] *Id.*

[144] *Id.* at 228.

[145] *Id.* at 219.

[146] *Id.* at 221.

[147] *Id.*

[148] *Id.* at 224.

[149] *Id.* at 225.

[150] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 534 (Aspen Publishers 7th ed. 2007) ("Like other people, judges derive utility from nonpecuniary goods such as leisure and prestige, as well as from money."); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation-Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1195 (2003) (noting that judges "have a substantial interest in maximizing their own 'prestige'").

[151] Some commentators have suggested that presiding over a problem-solving court helps judges distinguish themselves from other judges in ways that help them during judicial elections. *See, e.g.*, NOLAN, LEGAL ACCENTS, *supra* note 49, at 143.

[152] *See* BERMAN, *Judicial Innovation in Action*, *supra* note 47, at 53 (describing how an "initial innovation" such as a new problem-solving court "attracts the attention of the press, elected officials and funders").

country and even the world reflecting on their experiences and encouraging other jurisdictions to adopt their court model.[153]

For example, a British official visited the first drug court in Miami in 1995. Impressed with what he saw, he invited the courts' inaugural judge, Stanley Goldstein, to speak at a conference of British police the next year. Inspired by Judge Goldstein's "passion and emotion about how his drug court worked," additional local British officials visited his courtroom and, upon returning to England, secured funding for that country's first drug court.[154] This dynamic also occurs domestically. For example, Judge Robert Russell's 2008 speech about his experience opening the nation's first veteran's court is cited as a significant step in prompting the inaugural veteran's court in Wisconsin.[155]

Thus, many judges who preside over problem-solving courts have a professional self-interest in sustaining and expanding the problem-solving court empire. These personal interests provide an independent reason, apart from the public interest, that judges may seek to entrench the problem-solving court model.

Crucially, however, the suggestion is not that problem-solving court judges are purely or even primarily avaricious and power hungry. Rather, they draw satisfaction from this position not only because it affords them more authority and discretion, but also because they believe that this judicial approach is more effective than the conventional court system.

C. Enabling Problem-Solving Courts

That judges are deeply invested in the problem-solving court movement is not, on its own, concerning. It becomes so, however, in light of this subpart's insight — that there is no meaningful oversight of their impact nor restriction on their continued growth. Thus, it seems the problem-solving court movement will continue to grow unabated, and irrespective of the public interest.

The traditional court oversight mechanism — the appellate review process — is inapplicable to problem-solving courts because, quite simply, they produce no judicial decisions to review. Within these specialty dockets, judicial actions are purely administrative as opposed

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[153] *See, e.g.*, NOLAN, LEGAL ACCENTS, *supra* note 49, at 3 (describing how the first community court in Red Hook, Brooklyn became "the prototype for the development of community courts internationally").

[154] *Id.* at 45.

[155] *Services for Veterans*, WIS. CT. SYS., https://www.wicourts.gov/services/veteran/index.htm (last visited Sept. 25, 2020) [https://perma.cc/C4UX-C4QC].

to adjudicative.[156] During the "problem-solving" phase of the court process (i.e., after the defendant has pled guilty and been admitted to the court),[157] there are no facts to adjudicate, laws to apply, or plea-bargains to review.[158] The sole judicial task is to oversee the administration of the conditions of sentence.

For these reasons, some have suggested that problem-solving courts are not actually "courts," but rather some sort of program or agency.[159] In the agency context, scholars have suggested that robust oversight by an independent body may guard against agencies' self-aggrandizing tendencies.[160] However, in criminal law, generally, and in the problem-solving court context in particular, there is no such independent oversight.[161]

State legislatures may provide a remaining source of potential oversight. As this subpart demonstrates, however, they do not do so. Although legislation regarding problem-solving courts is increasingly common, it largely affirms existing practices. As a result, the judiciary

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[156] *See* Dorf, *supra* note 115, at 940 (noting that problem-solving courts do "very little judging in the sense of making a non-mechanical decision").

[157] The vast majority of problem-solving courts operate on a post-adjudication model; to enter these court dockets, the defendant must plead guilty. *See* CSETE & TOMASINI-JOSHI, *supra* note 85, at 2 (noting that 93% of drug courts follow a post-adjudication model).

[158] *See* John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 952 (2000) ("Generally, adversarial procedures are employed at the screening and admission stage . . . and at the conclusion of drug court when participants are terminated and face legal consequences or graduate. During the drug court process, however, formal adversarial rules generally do not apply.").

[159] For example, in denying a drug court defendant's claim that he was denied his Sixth Amendment right to counsel when he appeared without an attorney at his drug court termination hearing, the Court of Appeals of Kentucky reasoned that this hearing was not a "critical stage of the proceedings" because "the 'Drug Court' is not a 'court' in the jurisprudence sense; *it is a drug treatment program administered by the court system*." Dunson v. Kentucky, 57 S.W.3d 847, 850 (Ky. Ct. App. 2001) (emphasis added); *see also* Dorf, *supra* note 115, at 876 (describing problem-solving courts as "nominally judicial bodies that are more akin to decentralized administrative agencies than to conventional adjudicators").

[160] As Bagley and Revesz explain, "[i]f the [empire building] model is accurate, then an [Office of Information and Regulatory Affairs] process that puts a thumb on the scale against regulation might check that behavior and lead to more rational regulation." Bagley & Revesz, *supra* note 111, at 1293; *see also* Rachel E. Barkow, *Criminal Law as Regulation*, 8 N.Y.U. J.L. & LIBERTY 316, 328-29 (2014) (summarizing argument in favor of Office of Information and Regulatory Affairs ("OIRA") oversight).

[161] Barkow, *supra* note 160, at 328-29 ("There is nothing like OIRA review for criminal law. Instead the criminal law approach is totally driven by stories without any kind of analysis of whether, in fact, the benefits of a particular approach outweigh the costs. There is no check or oversight on these actions.").

— and the individual judges themselves — retain authority over whether to open such a court and how they should operate.

1. Authorization

For the first decades of the problem-solving court movement, state legislatures were largely silent regarding problem-solving courts. Aspiring problem-solving court judges "simply open[ed] shop" as a function of their inherent authority to control the docket and impose punishment.[162] The earliest problem-solving courts resulted from a practice of extreme docket management when a judge docketed a particular type of case — e.g., those involving substance-addicted defendants, or defendants who are veterans — for a particular day.[163] For example, Judge Russell started the first veteran's court in response to a suggestion that he "set aside a day for vets that we're seeing who have a clinical diagnosis of mental health disease or disorder, dependency on substances, or both, and set them on a calendar."[164]

Some states have begun to fill this legislative vacuum with statutes that authorize problem-solving courts and define aspirational or mandatory characteristics of such courts.[165] Authorization legislation is relatively common for drug courts, with approximately 60% of U.S. states and territories reporting that they have legislation enabling the

[162] Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1500-01, 1500 n.201 (2004) (describing the process of opening a drug court in New York State in 2004); *see* Sohil Shah, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine,* 23 S. CAL. INTERDISC. L.J. 67, 81 (2014) ("In most states, state judiciaries have broad discretion to create specialized dockets and courts at the trial level. Under this authority, state judiciaries have created numerous problem-solving courts . . . ."). This "boldness" amongst problem-solving court judges is seemingly unique to the U.S. context. Problem-solving court judges in other countries "have tended to rely on and wait for initiation and direction from the other branches of government." NOLAN, LEGAL ACCENTS, *supra* note 49, at 143. Michael Pollack identifies the judiciary's establishment of new courts — a function traditionally delegated to the legislature — as one of the ways state court judges have moved "beyond judging." *See* Pollack, *supra* note 27 (manuscript at 33-34).

[163] *See, e.g.*, Bernard Edelman, *VVA & Veterans Treatment Courts*, VVA VETERAN ONLINE (Mar./Apr., 2015), http://vvaveteran.org/35-2/35-2_vetcourts.html [https://perma.cc/76SA-XLWA] (explaining the origins of the first Veterans Treatment Court).

[164] *Id.*

[165] And in many states, this legislative vacuum still exists for all problem-solving courts, or particular types of courts. In Kentucky, for example, the judiciary created its first veterans court in 2012 even though the state legislature has not spoken regarding the opening of such a court. *See* Shah, *supra* note 162, at 91.

creation of specialty courts.[166] It remains relatively rare, but increasingly common, for states to have similar legislation authorizing other types of specialty courts.[167] These authorization statutes largely codify existing practices: they simply specify that the judiciary *may* open a specialty court.[168] In Florida, for example, two localities created

[166] MARLOWE ET AL., *supra* note 3, at 9.

[167] For example, a study conducted by the Tennessee Administrative Office of the Courts found that the majority of states did not have legislation that addressed veterans courts. *See* TENN. ADMIN. OFFICE OF THE COURTS, VETERANS TREATMENT COURTS LEGISLATIVE REPORT 3-4 (2012), http://www.tncourts.gov/sites/default/files/docs/vtc_report_-_final.pdf [https://perma.cc/RW4D-UT5X]; *see also* Benjamin Pomerance, *The Best-Fitting Uniform: Balancing Legislative Standards and Judicial Processes in Veterans Treatment Courts*, 18 WYO. L. REV. 179, 201 (2018). Some states have addressed all problem-solving courts in a single statute or set of standards. *See, e.g.*, WASH. REV. CODE §§ 2.30.010-.060 (2015) (regarding "therapeutic courts"); *see also* NAT'L CTR. FOR STATE COURTS, STATE STANDARDS: BUILDING BETTER MENTAL HEALTH COURTS 2 fig.1 (2015), https://ncsc.contentdm.oclc.org/digital/collection/spcts/id/301 [https://perma.cc/T92T-E2ZN] (identifying states that have adopted standards exclusively for mental health courts and those that have adopted generic standards that are applicable to mental health courts). Others have enacted separate legislation or standards for different types of courts. Many, for example, originally enacted legislation regarding drug courts, and later followed up with similar legislation for mental health courts and veterans courts. Arizona, for example, enacted ARIZ. REV. STAT. § 13-3422 (2020), authorizing drug courts, in 1998. *See* 1998 Ariz. Legis. Serv. 1960. In 2010, it passed § 22-601 to authorize the creation of homeless courts, *see* 2012 Ariz. Legis. Serv. 1005, which it amended in 2014 to add authorization for veterans courts and mental health courts. *See* 2014 Ariz. Legis. Serv. 309.

[168] The statutes vary as to who within the judicial branch can decide to create a specialty court. Some states vest the authority in the court of general jurisdiction or the judges who preside over them. *See, e.g.*, ARIZ. REV. STAT. §§ 13-3422, 22-601 (2020) (allowing the presiding judge of the superior court [the trial court of general jurisdiction] to decide whether to establish a drug court, homeless court, veterans court, or mental health court); GA. CODE ANN. § 15-1-15(a)(1) (2020) ("Any court that has jurisdiction over any criminal case" relating to a controlled substance "may establish a drug court division"); TENN. CODE ANN. §§ 16-6-101, -102 (2020) (allowing judges who "exercis[e] criminal jurisdiction" to create a veterans court and specifying that such courts "shall have the same powers as the court that created it."). Others grant the power to create the courts to an individual or court up the hierarchy of judicial authority, such as the chief judge of the judicial district, or the state's high court. *See, e.g.*, COLO. REV. STAT. ANN. § 13-5-144 (2020) (allowing chief judge of a judicial district to establish a program for veterans); ME. REV. STAT. tit. 4, § 433 (2020) ("The Chief Justice of the Supreme Judicial Court may establish veterans treatment courts . . . ."); OKLA. STAT. ANN. tit. 22, § 471.1 (2020) ("Each district court of this state is authorized to establish a drug court program . . . ."). Still others vest authority in the office of court administration or a problem-solving court commission. *See, e.g.*, UTAH CODE ANN. § 78A-5-303 (2020) ("The Judicial Council may create a veterans treatment court . . . .").

veterans courts, and then the state legislature enacted legislation authorizing the creation of similar courts throughout the state.[169]

Thus, whether states have authorizing legislation seems to be of little import: with or without such statutes, the decision of whether to open a specialty court is within the discretion of the judiciary.[170] Tellingly, a few states have determined that authorization legislation is unnecessary, as it grants a power that the judiciary already possesses.[171] For example, California's governor thrice vetoed legislation authorizing the judiciary to develop veterans courts, reasoning that such legislation was "not required"[172] and that the power granted was "already within the courts' authority"[173] and fell "logically within the sound discretion of the courts."[174] And Washington State's law authorizing the creation of "therapeutic courts" (which include drug courts, mental health courts, veterans courts, and gambling courts) specifies that the law is

[169] Shah, *supra* note 162, at 93-94. New York followed a similar path. In 2009, more than a decade after the first drug court opened in New York, the state legislature passed Criminal Procedure Law 216, which authorized the established practice of diverting certain felony offenders into treatment programs. N.Y. CRIM. PROC. LAW § 216.05 (2009) (allowing judicial diversion). That same year, the Chief Administrative Judge adopted a rule permitting the Chief Administrator of the Courts to establish drug courts, and authorizing the local courts to transfer eligible defendants to the drug court. N.Y. CT. R. §§ 143.1, 143.3; *see* John Feinblatt, Greg Berman & Aubrey Foxx, *Institutionalizing Innovation: The New York Drug Court Story*, 28 FORDHAM URB. L.J. 277, 283 (2000) (identifying when New York state opened its first court); *see also* Casey, *supra* note 162, at 1500-01 (noting there was "no enabling legislation or mandate" regarding drug courts in New York state in 2004).

[170] A few states have enacted legislation that seems to *require* every judicial district to open a particular type of problem-solving court. *See, e.g.*, 730 ILL. COMP. STAT. § 166/15(a) (2020) ("The Chief Judge of each judicial circuit must establish a drug court program . . . ."); *id.* § 167/15 (2020) ("The Chief Judge of each judicial district shall establish a Veterans and Service members Court program . . . ."). Others have tried (but failed) to pass such mandatory legislation. *See, e.g.*, H.B. 2234, 53d Leg., 2d Reg. Sess. (Ariz. 2018) (stalled in committee) (proposing section 12-137, which would say: "The presiding judge of the superior court in each county shall establish a veterans court" and "shall establish the eligibility criteria for referral to veterans court"); *see* Pomerance, *supra* note 167, at 219. The California legislature considered legislation that would "*require* superior courts to develop and implement veterans courts" in 2015, but that legislation apparently was stalled in committee. A.B. 983, 2015-2016 Reg. Sess. (Cal. 2015) (emphasis added).

[171] *See* MARLOWE ET AL., *supra* note 3, at 55 ("[M]any states with thriving drug court operations have not seen a need to pass legislation specifically authorizing drug courts.").

[172] A.B. 1925, 2009-2010 Reg. Sess. (Cal. 2010) (stating Governor Schwarzenegger's veto).

[173] A.B. 201, 2011-2012 Reg. Sess. (Cal. 2011) (stating Governor Brown's veto).

[174] A.B. 2611, 2011-2012 Reg. Sess. (Cal. 2012) (stating Governor Brown's veto).

unnecessary, as the judiciary has the "inherent authority" to establish such courts.[175] Nevertheless, the legislature enacted the statute to encourage the judiciary to create therapeutic courts.[176]

2. Affirmation

In addition to authorizing legislation, some states have also adopted statutes that identify certain processes or "key components" that problem-solving courts should or must adopt.[177] The "key components" such statutes reference were originally created in 1996 for drug courts after a small group of drug court practitioners convened to identify a set of guiding principles based on their "instincts, personal observations, and professional experiences" in drug courts.[178] These components were adopted by the NADCP the following year, and soon became the national standard for drug court operation.[179] They have since been adapted for other types of problem-solving courts, including mental health courts, veterans courts, and DUI (driving under the influence) courts.[180]

The components offer overarching principles about how the courts should function. They identify broad mandates about what the courts

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[175] WASH. REV. CODE ANN. §§ 2.30.010-.060 (2020) (regarding "therapeutic courts").

[176] *Id.* § 2.30.010(3).

[177] *See, e.g.*, ALA. CODE § 12-23A-4(f) (2020) ("Drug courts shall include all of the following ten key components . . . ."); ARK. CODE ANN. § 16-10-139(c)(3) (2020) (establishing "an evaluation process that ensures that any new and existing specialty court program that is a drug court meets standards for drug court operation under [the NADCP ten key components]"); FLA. STAT. § 397.334(4) (2020) (requiring that drug courts follow the NADCP ten key components); N.H. REV. STAT. § 490-G:2 (2020) (defining a drug court as "a judicial intervention process that incorporates and substantially complies with the Ten Key Components . . ."); TENN. CODE ANN. § 16-6-103 (2020) ("All veterans treatment court programs in this state shall be established and operated according to the following ten (10) key components as adopted by the National Clearinghouse for Veterans Treatment Courts at the National Association of Drug Court Professionals: . . . ."); UTAH CODE ANN. § 78A-5-303 (2020) (listing criteria for veterans courts).

[178] NAT'L DRUG COURT INST., *supra* note 9, at 2.

[179] *See id.*

[180] *Id.* (noting that the Ten Key Components of drug courts provided the framework for other courts); *see, e.g.*, NAT'L CTR. FOR DWI COURTS, THE TEN GUIDING PRINCIPLES OF DWI COURTS, https://www.dwicourts.org/wp-content/uploads/Guiding_Principles_of_DWI_Court_0.pdf (last visited Oct. 2, 2020) [https://perma.cc/A7A7-YQK4] (adopting the Ten Key Components into DWI courts); *The Ten Key Components of Veterans Treatment Court*, JUST. FOR VETS (Mar. 20, 2017), https://justiceforvets.org/resource/ten-key-components-of-veterans-treatment-courts/ [https://perma.cc/NEZ6-9TA8] (adopting the Ten Key Components into Veterans Treatment Courts).

should do (integrate drug treatment services, identify eligible participants early, provide access to a continuum of services and coordinate strategies, monitor abstinence through drug testing) and how the institutional actors should behave (the parties should use a non-adversarial approach, judges should interact with defendants, the court should monitor and evaluate program goals and forge partnerships with community organizations, all staff should continue education).[181]

Generally, it seems courts adhere to these general components.[182] They are, after all, a codification of the methods that judges had developed and have been attempting to follow for decades. But one of these components remains elusive: data collection and reporting.[183] A nationwide evaluation of fourteen drug courts believed to be "typical of drug treatment court programs across the country," found that the courts largely adhered to the key components — with the exception of the monitoring and evaluation component.[184] This component was "clearly not implemented to the degree of other key elements."[185] Many of the locations, for example, did not have a centralized management information system in place to capture information about the court participants, process, and outcomes.[186] Even Illinois, which *required*

[181] *See* BUREAU OF JUSTICE ASSISTANCE, DEFINING DRUG COURTS: THE KEY COMPONENTS, at iii (1997, reprinted 2004), https://www.ncjrs.gov/pdffiles1/bja/205621.pdf [https://perma.cc/WPC7-8U3L].

[182] *See* Susan Turner, Douglas Longshore, Suzanne Wenzel, Elizabeth Deschenes, Peter Greenwood, Terry Fain, Adele Harrell, Andrew Morral, Faye Taxman, Martin Iguchi, Judith Greene & Duane McBride, *A Decade of Drug Treatment Court Research*, 37 SUBSTANCE USE & MISUSE 1489, 1504-05 (2002).

[183] *See* BUREAU OF JUSTICE ASSISTANCE, *supra* note 181, at 17-20 ("Monitoring and evaluation measure the achievement of program goals and gauge effectiveness."); Pomerance, *supra* note 167, at 191 ("In a number of jurisdictions, Veterans Treatment Courts are not required to develop reliable methods of monitoring court activities, collect relevant data, or report this data in a publicly accessible format.").

[184] Turner et al., *supra* note 182, at 1504-05.

[185] *Id.*

[186] *Id.* at 1509, 1513-14; *see also* Fred L. Cheesman II, Dawn Marie Rubio & Richard Van Duizend, *Developing Statewide Performance Measures for Drug Courts*, NAT'L CTR. FOR ST. CTS. STATEWIDE TECHNICAL ASSISTANCE BULL., Oct. 2004, at 1, 3, https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/970/ [https://perma.cc/6SRX-E7Q3] ("Emerging drug courts tend to focus, by necessity, on operational issues, often at the expense of developing and implementing an evaluation plan and despite the recommendation that evaluation planning should be one of the initial activities of establishing a drug court (see Key Component #8). As a consequence, evaluation planning often tends to take place long after the drug court was implemented and many opportunities to identify control groups and collect data have passed." (citation omitted)).

every judicial district to open a veterans court as of January 2018, does not require these courts to regularly collect or report data about their performance.[187]

Thus, there is a relatively nascent legislative trend towards expressly authorizing the creation of problem-solving courts and a concomitant effort to standardize their operation. However, the courts remain largely immune to meaningful objective oversight or regulation in one key and seemingly crucial area: efficacy. Some states have adopted legislation that requires the collection and reporting of certain information about specialty court performance, including the number of court participants, participant "outcomes," and recommendations for the future.[188] But even those states that legislatively require such reporting often vest reporting responsibility in the judicial branch itself[189] and do not identify what "outcomes" should be measured, let alone how they should be defined.[190] Nor do they require that the courts achieve certain metrics. Thus, despite this recent legislative attention to problem-solving courts, state judiciaries — and local courts themselves — still retain great discretion over whether to start a problem-solving court and how to administer it.[191]

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[187] *See* Adams et al., *supra* note 40, at 10 (noting that "effective data collection" has been missing "from every Illinois [veterans court]").

[188] *See, e.g.*, UTAH CODE ANN. § 78A-5-303(5) (2020) (requiring Veterans Treatment Courts to provide a written report on data, outcomes, and recommendations); *see also* MICH. COMP. LAWS § 600.1210 (2020) (requiring Veterans Treatment Courts to collect data "on each individual applicant and participant and the entire program"); VA. CODE ANN. § 18.2-254.2(A) (2020) (requiring each specialty docket to submit "evaluative reports" to the Office of the Executive Secretary of the Supreme Court, and requiring that Office to submit a "report of such evaluations" annually).

[189] *See, e.g.*, VA. CODE ANN. § 18.2-254.1(E) (2020) ("Administrative oversight for implementation of the Drug Treatment Court Act shall be conducted by the Supreme Court of Virginia.").

[190] One exception is Michigan, which codified a definition of "recidivism" in 2017. MICH. COMP. LAWS § 761.1(s) (2020).

[191] Interestingly, there is one area of problem-solving court practice that most state legislatures have not hesitated to mandate: eligibility criteria for court participants. Many states restrict participation in specialty courts to defendants who are not presently or have not been previously convicted of an offense involving violence or who have a relatively limited criminal history. *See, e.g.*, IDAHO CODE ANN. § 19-5604(2) (2020) ("No person shall be eligible to participate in drug court if . . . [t]he person is currently charged with, has pled or has been adjudicated or found guilty of, a felony crime of violence or a felony crime in which the person used either a firearm or a deadly weapon or instrument . . . [or] a sex offense."); TENN. CODE ANN. § 16-22-113(1) (2020) ("Each participant in a drug court treatment program shall . . . [n]ot be a violent offender . . ."); W. VA. CODE ANN. § 62-15-6 (2020)(a) ("A drug offender shall not be eligible for the drug court program if . . . [t]he underlying offense [or a previous conviction] involves a felony crime of violence . . . [or] an offense that requires registration as a sex

III. QUESTIONING PROBLEM-SOLVING COURTS

The observations made above may seem inconsequential at first blush: regardless of their efficacy, if the courts increase judicial job satisfaction, perhaps there is no cause for concern. This Part contends, however, that the continued and unchecked growth of the problem-solving court model it troubling, for at least two reasons. First, the lack of oversight, combined with the deep judicial investment, has allowed the courts to become largely self-reinforcing institutions. Second, it creates resistance to further reform in at least two ways. It can create resistance to new — or newly nuanced — understandings of issues like substance addiction and mental illness and their relationship to the criminal legal system. Moreover, judicial investment in problem-solving courts can create resistance to other measures that share the reformist aims of problem-solving courts. Ultimately, these observations call into question whether the problem-solving court model should persist.

A. Confirming Courts

The deep judicial commitment to the problem-solving court model provides fertile ground for the influence of confirmation bias, which is the "seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand."[192] It is a largely implicit, unconscious bias that "refers usually to unwitting selectivity in the acquisition and use of evidence."[193] It causes people to seek evidence that supports their position and avoid or discount that which does not.[194] Moreover, confirmation bias can influence how people interpret evidence. For example, it can lead them to "see in data the patterns for which they are looking, regardless of whether the patterns are really there."[195]

One form of confirmation bias is belief persistence, which occurs when one forms a belief and then resists changing that belief, even when confronted with compelling evidence that their belief is wrong.[196] This

offender . . . ."). Even Washington state, which specifies that the therapeutic court judge retains the discretion to determine eligibility criteria, specifies that certain classes of individuals are ineligible for specialty court participation (absent special findings). *See* WASH. REV. CODE § 2.30.030(2)-(3) (2020).

192 Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

193 *Id.*

194 *Id.* at 177-78.

195 *Id.* at 181.

196 *Id.* at 187. This phenomenon is also called belief perseverance. *See* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay between Institutional*

belief becomes self-reinforcing in two ways. First, it shapes how people interpret new evidence. People are likely to believe evidence that supports their belief, skeptical of evidence that challenges it, and tend to interpret ambiguous evidence in a way that supports their belief.[197] Second, the belief influences what new information people seek: they tend to search for and focus on information that supports their belief and disregard or downplay that which challenges their belief. Both of these dynamics — the selective invocation of evidence that supports the problem-solving court model, and the dismissal of that which does not — are present amongst problem-solving court judges and practitioners.

1. Shaping Success

Despite the diversity of problem-solving court forms, most are united in a universal claim: they reduce recidivism. This claim *should* serve as a somewhat objective check on court performance: do the courts actually reduce recidivism? Part I demonstrates that, on a national scale, the answer as to drug courts seems to be that they sometimes reduce recidivism, albeit at "modest" levels, and remains unanswered as to other types of courts. This section explores how, on a more granular scale courts can shape this malleable metric of success and selectively interpret studies to cast their accomplishments in the most favorable light.[198]

Recidivism is generally defined as the "repeated commission of criminal behavior after one has been adjudged a criminal or delinquent."[199] Although this is a straightforward concept, it can be measured in a number of different ways, ranging from arrest, to official charging, to conviction.[200] There are many drawbacks to using arrest to measure recidivism. Most obviously, of course, is that the fact that an arrest does not establish that criminal activity actually took place.[201] Thus, it is overinclusive: it captures contact with police that may be unfounded or that will not lead to formal charging, let alone an official

Incentives and Bounded Rationality in Prosecutorial Decision Making, 74 MO. L. REV. 999, 1011-12 (2009).

197 O'Brien, *supra* note 196, at 1011-12.

198 *See id.*

199 CARY HECK, NAT'L DRUG COURT INST., LOCAL DRUG COURT RESEARCH: NAVIGATING PERFORMANCE MEASURES AND PROCESS EVALUATIONS 3 (2006), https://www.ndci.org/wp-content/uploads/Mono6.LocalResearch.pdf [https://perma.cc/ZX7U-Y9SK].

200 *Id.* ("Various studies have used measures ranging from bookings to full convictions . . . ."); *see* Turner et al., *supra* note 182, at 1510.

201 *See generally* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987 (2019) (identifying and critiquing the use of arrest as a metric of recidivism).

finding that the individual committed a crime. Yet, despite this obvious conceptual shortcoming, re-arrest is commonly used to measure recidivism,[202] in large part, because it is easy to document.[203]

Interestingly, many states use *convictions* instead of re-arrest to measure recidivism when assessing problem-solving courts.[204] Using this metric undoubtedly decreases estimates of the overall recidivism. It excludes those cases that are ultimately dismissed as well as those that are still pending when the drug court treatment program concludes.

And when this traditional metric — regardless of how it is defined — does not support the efficacy story, proponents may invoke other measures to prove their point. A recent evaluation of felony drug courts in Idaho, published by the Idaho Judicial Branch, is illustrative. It acknowledges that recidivism was "the primary outcome of interest" in the evaluation.[205] And on this measure, drug courts fell short; the

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[202] Nora V. Demleitner, *How to Change the Philosophy and Practice of Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission*, 28 FED. SENT'G REP. 231, 236 (2016) ("Many U.S. recidivism data sets are based on re-arrest rather than reconviction.").

[203] HECK, *supra* note 199, at 10.

[204] For example, a survey conducted by the National Center for State Courts found that four of nine states surveyed used conviction as the exclusive measure of recidivism, and one more used both arrest and conviction. *See* 6 DAWN MARIE RUBIO, FRED CHEESMAN & WILLIAM FEDERSPIEL, NAT'L CTR. FOR STATE COURTS, PERFORMANCE MEASUREMENT OF DRUG COURTS: THE STATE OF THE ART 9 tbl.2 (2008), https://ncsc.contentdm.oclc.org/digital/collection/spcts/id/171/ [https://perma.cc/HBM6-CVSJ]. The survey is not exhaustive; at least two states not included in this survey also use conviction. *See, e.g.*, FRED L. CHEESMAN, II, NICOLE L. WATERS, SCOTT E. GRAVES, KATHRYN J. GENTHON & ADRIENNE M. TATEM, NAT'L CTR. FOR STATE COURTS, MARYLAND ADULT DRUG COURT PERFORMANCE MEASURES 51 (2017), https://mdcourts.gov/sites/default/files/import/opsc/dtc/pdfs/evaluationsreports/mdadultdrugperformance2017.pdf [https://perma.cc/TTK4-PS25] (defining recidivism as a new case filing during the reporting period that resulted in a conviction); JUDICIAL BRANCH OF THE STATE OF IDAHO, IDAHO MENTAL HEALTH COURTS EVALUATION REPORT, at iii (2019), https://isc.idaho.gov/psc/reports/2019-MHC-Evaluation-Report.pdf [https://perma.cc/D6W2-T37Q] (defining post-program recidivism for mental health court evaluation as a new case filing that resulted in conviction). And although Michigan codified a definition of recidivism in 2017 as "any rearrest, reconviction, or reincarceration . . . for a felony or misdemeanor offense or a probation or parole violation," MICH. COMP. LAWS § 761.1(s) (2020), its annual Problem Solving Court report for fiscal year 2019 nevertheless only accounts for new convictions when describing outcomes for its drug and sobriety courts. *See* MICH. SUPREME COURT, FY 2019 PROBLEM-SOLVING COURTS ANNUAL REPORT 15-16 (2019), https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Reports/PSCAnnualReport.pdf [https://perma.cc/YE9F-FDSN] [hereinafter FY 2019 REPORT].

[205] ROBERT OWENS, JUDICIAL BRANCH OF THE STATE OF IDAHO, FELONY DRUG COURTS EVALUATION REPORT 8 (2014), https://isc.idaho.gov/psc/reports/Id_Felony_DC_Eval_Report_2014.pdf [https://perma.cc/569E-RC76].

evaluation found that there was no statistically significant difference in recidivism between drug court participants and the comparison group.[206] Nevertheless, the evaluation does not conclude that the drug courts do not work.[207] Rather, it then states that recidivism is an incomplete metric, as it "does not account for some offenders who had undesirable outcomes," such as those who were incarcerated based on a probation revocation.[208] And when these "undesirable outcomes" are accounted for, drug courts become a success. The evaluation found that drug court participants had "the lowest rate of undesirable outcomes" amongst the groups that were studied.[209]

In addition to selectively choosing metrics, problem-solving court practitioners also selectively invoke empirical findings to support their success narrative. The website of the NADCP illustrates this phenomenon. NADCP is the "premier training, membership, and advocacy organization for the treatment court model," and overseen by a Board of Directors comprised primarily of state court judges.[210] It was created in 1994 after a meeting of judges and other professionals working in the twelve drug courts that were then in existence.[211] This organization exercises great influence over the practices and attitudes of problem-solving court judges.[212] One researcher concluded, based on interviews, that the judges "appear to respect and trust the NADCP" *more* than they respect and trust statements and guidance from the federal government.[213] She opined that this respect was because judges are the "primary members" of NADCP.[214]

NADCP proudly declares on its website that treatment courts "save considerable money for taxpayers," and specifies that the courts "produce benefits of $6,208 per participant, returning up to $27 for

206 *Id.* at 9 fig. C2.

207 Indeed, doing so would call into question the state's statutory declaration that drug courts are effective. *See* MARLOWE ET AL., *supra* note 3, at 14.

208 OWENS, *supra* note 205, at v.

209 *Id.*

210 *Board of Directors*, NAT'L ASS'N DRUG CT. PROFESSIONALS, https://www.nadcp.org/about/board-of-directors/ (last visited July 7, 2019) [https://perma.cc/6U63-DCPE].

211 Richard S. Gebelein, *Reflections from a Retired Drug Court Judge: What We Have Learned About Drug Treatment Courts in the Past 25 Years*, DEL. LAW., Spring 2017, at 8, 9.

212 Barbara Andraka-Christou, *What Is "Treatment" for Opioid Addiction in Problem-Solving Courts? A Study of 20 Indiana Drug and Veterans Courts*, 13 STAN. J. C.R. & C.L. 189, 248-49 (2017) (explaining that most survey respondents said that their practices were heavily influenced by information they received at the annual NADCP conference).

213 *Id.* at 251.

214 *Id.*

every $1 invested."[215] In support of this claim, the website links to the National Institution of Justice's 2011 Multi-Site Adult Drug Court Evaluation ("MADCE").[216] The study did find that the "net benefit of drug courts is an average of $5,680 to $6,208 per participant, returning $2 for every $1 of cost."[217] Crucially, however, the MADCE researchers specify, "*these findings are not statistically significant*."[218] Yet, NADCP fails to mention this qualification of the research findings, as well as the researchers' ultimate conclusion that, while drug courts reduce "costly criminal offending," the courts are "also expensive enough to offset those costs."[219] The MADCE researchers explain that drug courts are more costly than traditional courts, but they "do not appear to have much of an effect on resources in two areas where big benefits are possible — improved labor market participation and health."[220]

Nor does the NADCP highlight other less favorable findings of the MADCE study, such as the researchers' conclusions that "it now appears doubtful that drug courts produce a consistent reduction in incarceration" on the case that led to the individual's participation in

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[215] *Treatment Courts Work*, NAT'L ASS'N. DRUG CT. PROFESSIONALS, https://www.nadcp.org/treatment-courts-work/ (last visited June 18, 2019) [https://perma.cc/7QY5-NW76].

[216] *See* SHELLI B. ROSSMAN, MICHAEL REMPEL, JOHN K. ROMAN, JANINE M. ZWEIG, CHRISTINE H. LINDQUIST, MIA GREEN, P. MITCHELL DOWNEY, JENNIFER YAHNER, AVINASH S. BHATI & DONALD J. FAROLE, JR., THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS, VOLUME 4 (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/237112.pdf [https://perma.cc/3YKE-R6VM].

[217] *Id.* at 6. This number reflects the researchers' estimation of "a single individual's total impact on society." They concluded that "the average drug court participant still does more harm to society than benefit," but drug court participation lowers the harm by "between $5,600 and $6,200 per participant." *Id.* at 247.

[218] *Id.* at 6.

[219] *Id.* at 247. The Department of Justice Office of Justice Programs also misleadingly characterized the MADCE findings, claiming that "drug courts saved an average of $5,680 to $6,208 per offender overall," but without noting this finding was statistically insignificant. *See* U.S. DEP'T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, DRUG COURTS 1 (2020), https://www.ncjrs.gov/pdffiles1/nij/238527.pdf [https://perma.cc/NA6H-7PPU]. And a report published by the National Drug Court Institute (which is a division of the NADCP) similarly presents empirical findings in a misleading way. It reports — correctly — that the GAO's 2011 study assessed evaluations of thirty-two drug courts, and that this study found that drug courts reduce recidivism by 6-26%. MARLOWE ET AL., *supra* note 3, at 16. It omits, however, that the GAO determined that these recidivism reductions were statistically significant in only eighteen of these studies. GAO-12-53 (2011), *supra* note 78, at 19. The NDCI's presentation of this material leaves the impression that the GAO determined thirty-two studies, as opposed to eighteen, found that drug court participation caused the recidivism reductions.

[220] ROSSMAN ET AL., *supra* note 216, at 247.

drug court.[221] While drug court participation reduced or eliminated the length of incarceration for those who graduated from the program for the precipitating case, those who failed out of the program faced dramatically higher sentences.[222] Graduates averaged 24.5 days of incarceration as compared to an average of 272.6 for those who failed the program.[223] In a separately published summary of their findings, the researchers explained, "drug courts do *not* appear to operate as a reliable 'alternative to incarceration' on the precipitating case."[224]

This example is not offered to suggest that NADCP intends to mislead its audience about the MADCE study. The point, rather, is that this organization of drug court judges and other drug court professionals emphasize only the parts of the study that support their worldview — that problem-solving courts work, full stop — and disregard the rest.

2. Excusing Failures

While problem-solving court proponents tend to ignore studies that undermine the success narrative, they do, from time to time, acknowledge — and then dismiss — the findings of such studies. They do so in a few different ways. One dismissal strategy is to excuse the failures of unsuccessful courts as aberrational and the product of ineffective individuals — not the model itself. For example, Greg Berman, a leader in the problem-solving court movement, has dismissed empirical critiques of the problem-solving court model as a product of the "shoddy practice effect."[225] He claims that "some of the concerns raised by critics of problem-solving courts are a response to the failings of individual judges, attorneys, and courtrooms rather than an indictment of anything intrinsic to problem-solving courts."[226]

At the same time, problem-solving court practitioners may invoke their personal experience and observations to suggest that quantitative studies — the very studies many invoke to support the success narrative — cannot possibly capture the successful impact of the problem-solving

[221] *Id.* at 80.

[222] *Id.*

[223] *Id.* at 70. In a separately published summary of the study findings researchers explained that, "[i]n short, drug courts provide a clear alternative to incarceration for those who graduate; but the consequences of failing are much more severe than in the absence of a drug court." Rempel et al., *supra* note 76, at 181.

[224] Rempel et al., supra note 76, at 190.

[225] BERMAN, *Judicial Innovation in Action*, *supra* note 47, at 63 ("[A]ny effort to separate the wheat from the chaff with problem-solving courts must take into account what might be called the 'shoddy practice effect.'").

[226] *Id.* at 63-64.

court method. Drug court professionals have said, for example, that quantitative studies cannot "convey the 'ups and downs,' 'zigzags,' and other kinds of 'real-life' behavior actually involved in the treatment progress."[227]

In order to compensate for the purported shortcomings of quantitative studies, problem-solving court judges often focus on qualitative accounts of success. Thus, it is typical for drug court evaluations to include and emphasize individual success stories.[228] These individual narratives of success have become central to judges' defense of the court model.[229]

This focus on individual successes enables judges to continue to believe that *their* court works, even if studies suggest other courts are falling short. And it makes it difficult to criticize the problem-solving court endeavor; if these courts positively change the lives of some people, how could they be wrong?

What gets lost in this qualitative justification of problem-solving courts, however, is that the success stories are themselves rather exceptional. In many states, only approximately 50% of people who leave a problem-solving court program do so because they have successfully completed the program.[230] The remaining half are discharged either because they failed to complete the program requirements or voluntarily decide to leave.[231] And those who fail out of the programs tend to fare much worse than they would have in the

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[227] NOLAN, REINVENTING JUSTICE, *supra* note 47, at 127 (quoting drug court personnel from Goldkamp & Weiland study).

[228] *See id.* at 127-28; *see, e.g.*, MICH. SUPREME COURT, FY 2019 REPORT, *supra* note 204, at 3 (recounting stories of court graduates).

[229] NOLAN, REINVENTING JUSTICE, *supra* note 47, at 128 (noting that narrative-based criteria "are the typical justifications offered by judge and other drug court officials in defending the movement"); *see also* Eric J. Miller, *The Punishment and Treatment Is the Process*, JOTWELL (Sept. 18, 2019) (reviewing Wendy Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809 (2019)), https://crim.jotwell.com/the-punishment-and-treatment-is-the-process/ [https://perma.cc/95TN-TA6H] (describing how problem-solving court judges emphasize individual success stories to "redirect the concept of evidence-based outcomes").

[230] *See, e.g.*, CHEESMAN ET AL., *supra* note 204, at 78 (indicating 47% completion rate for Maryland drug court participants); OWENS, *supra* note 205, at vi (reporting that 51% of felony drug court offenders graduated); MICH. SUPREME COURT, FY 2018 PROBLEM-SOLVING COURTS ANNUAL REPORT 11 (2018) (reporting that, in fiscal year 2018, 47% of all the people who left adult drug court successfully completed the program).

[231] *See* OWENS, *supra* note 205, at vi.

traditional court system.[232] Thus, qualitative accounts of individual successes tell only part of the story: court participation works for those who are successful in the program. They miss that for many, court participation leads to unchanged, or even worse, outcomes.[233]

B. Resisting Reform

Problem-solving court judges' deep commitment to this reform mechanism encourages them to see what they want to see: that these courts work. This subpart contends that this tunnel vision has consequences: it creates resistance to information that casts doubt on the courts' foundational premises and to newer reform proposals, even those that share the goals of problem-solving courts.

1. Institutionalizing Assumptions

Problem-solving courts do not make law; the vast majority follow a post-adjudication model, which requires defendants to plead guilty before they can participate in the specialty court process. However, the courts *do* create and circulate assumptions about the nature of certain social issues and the proper response. These assumptions are often drawn directly from the judge's own observations and intuitions, and become codified in court process and procedure. Because the problem-solving court judge's expertise and authority are central to creating and sustaining the jurisdictional space the courts occupy, judges may be hesitant to adapt and expand their knowledge about the topic, or accept that perhaps the courts are not succeeding. As a result of this dynamic, problem-solving courts may institutionalize a static notion of the nature of the "problem" to be solved and the most effective way to respond to that problem that may be outdated (because it reflects an articulation of the problem as it was understood when a court first emerged), or misguided (because it comports with a judge's personal opinion, but not necessarily social science).

For example, mental health courts are based on two foundational premises: first, that the defendant's underlying mental health condition causes criminal behavior and, second, that treating this underlying

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[232] Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 287 (quoting King and Pasquarella as saying some studies suggest that time spent in treatment had little if any effect on recidivism for dropouts).

[233] *See id.*; *see also* E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 693 (2017).

condition will prevent future criminal behavior.[234] These assumptions are widespread, shared by some advocates for people who live with mental illness,[235] and they may even make sense as a matter of gut-level intuition. They are not, however, supported by contemporary social science research.[236]

People with mental health conditions, like people generally, commit criminal offenses for a range of reasons.[237] Research demonstrates that the criminal behavior of a small class of individuals with mental illness stems directly from their disorder.[238] Much more frequently, however, it is due to other factors that also influence the criminal offending behavior of the general population, like poverty.[239] Moreover, because the relationship between mental illness and criminal behavior is not causal, simply treating mental illness is unlikely to prevent future criminal behavior.[240] One study even declared that there was "no

[234] Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 288-89*; see also* Johnston, *supra* note 39, at 547 ("[M]ental health courts appear to embrace a therapeutic or medical model of rehabilitation, where criminal behavior is viewed as symptomatic of offenders' mental illnesses and mental health treatment is believed necessary to reduce future offending.").

[235] Johnston, *supra* note 39, at 552-53 ("Even some advocates of individuals with mental illnesses have assumed that the crimes committed by these individuals often stem from their disability.").

[236] *Id.* at 528 ("[T]he weight of recent scientific evidence demonstrates that mental illness is not a direct contributor to recidivism for most offenders with mental illnesses. Instead, such offenders often simply exhibit the same risk factors — such as substance abuse, family problems, and antisocial tendencies — as other offenders."); *see also* Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 288-90 (discussing research illuminating problems with the first and second premises of mental health courts, namely that there is a direct causal relationship between mental illness and criminal conduct and that effective treatment of mental illness is likely to prevent future criminality).

[237] Johnston, *supra* note 39, at 553 (describing research finding that "individuals with mental illnesses, like the general offender population, have varying motivations for committing crimes").

[238] One study, for example, found that approximately 8% of 113 arrestees with mental illness had been arrested for offenses that were "probably to definitely caused" by their psychiatric symptoms. Jennifer L. Skeem, Sarah Manchak & Jillian K. Peterson, *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 LAW & HUM. BEHAV. 110, 118 (2011) (discussing study).

[239] Johnston, *supra* note 39, at 558-61 (summarizing research).

[240] *See* Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 290; Johnston, *supra* note 39, at 573-74.

evidence" that controlling or treating symptoms of mental illness reduced recidivism.[241]

Thus, the foundational assumptions upon which the mental health court empire has been constructed seem to be "illusory."[242] Similarly, the veterans court model is based on a number of assumptions that have not been carefully scrutinized, let alone tested.[243] Nevertheless, both mental health courts and veterans courts continue to proliferate and thus circulate ideas about the nature of the "problem" to be solved that reflects intuitive observation, but is not borne out by research.

Problem-solving courts may similarly resist updating assumptions about the best solution to these problems. For example, drug court programs advance an abstinence-based model of recovery[244] and many courts center treatment plans on counseling and twelve-step programs.[245] This response method may reflect the sentiment about best practices in substance addiction treatment that prevailed when drug courts first emerged. The weight of authority, however, now strongly supports a harm-reduction treatment model that allows for, among other things, medication-assisted treatment ("MAT").[246] MAT involves the use of medications to treat substance use disorders.[247] The U.S. Department of Health and Human Services, American Medical Association, and World Health Organization have all concluded MAT is the "most effective" treatment for opioid addiction when combined with counseling."[248]

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241 Skeem et al., *supra* note 238, at 114 ("[T]here is no evidence for the current model's implied link between symptom control or reduction and reduced recidivism."); *see also* Johnston, *supra* note 39, at 558-61 (discussing research).

242 Johnston, supra note 39, at 561.

243 Baldwin & Brooke, *supra* note 14, at 4-12. The assumptions Baldwin & Brooke identify include that there is a link between military service and crime, that traditional court systems are not equipped to deal with military combat and trauma, that veterans are a class, and that veterans deserve special treatment. *Id.*

244 Key Component #5 of the NADCP's Ten Key Components of drug courts is: "Abstinence is monitored by frequent alcohol and other drug testing." BUREAU OF JUSTICE ASSISTANCE, *supra* note 181, at 11.

245 *See* Andraka-Christou, *supra* note 212, at 192.

246 *See id.* at 219. Meanwhile, the efficacy of self-help twelve-step programs like Alcoholics Anonymous ("AA") or Narcotics Anonymous ("NA"), "the most common form of treatment in the U.S.," and a common feature of drug court programming, is suspect. *Id.* at 214. Moreover, some AA and NA groups discourage individuals from participating in MAT. *Id.* at 215-16.

247 *MAT Medications, Counseling, and Related Conditions*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., https://www.samhsa.gov/medication-assisted-treatment/treatment (last visited Jul. 2, 2019) [https://perma.cc/5964-HW85].

248 Andraka-Christou, *supra* note 212, at 219 (providing citations).

Nevertheless, and despite decades of research highlighting the efficacy of MAT, many U.S. drug courts have resisted this treatment method.[249] A nationwide survey of drug courts in 2013 found that nearly half (44%) of all respondents did not permit any form of MAT for court participants.[250] Some respondents indicated they did not provide MAT because it was not available or was cost prohibitive.[251] A sizeable percentage, however, refused to allow agonist MAT medications[252] due to "negative attitudes" or "incorrect information," including opposition from the judge, prosecutor, or local government, because it was the court's policy to not allow it, and because it was not believed to be beneficial to the drug court participant.[253] Some respondents specified that they believed drug court participants would abuse MAT or that MAT would simply replace addiction to one substance with another substance.[254] The attitudinal resistance to MAT highlighted in this study has been reflected in recent journalistic interviews with drug court judges. In 2014, a drug court judge in Nassau County, New York, defended his policy against methadone and suboxone, even after a court participant died of a heroin overdose after the judge ordered him to quit his methadone treatment.[255] The judge described methadone and suboxone as "crutches" and "substitutes for drugs and drug cravings" that constitute another addiction.[256] And more

[249] James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL'Y, 31, 41 (2010). Many drug courts in other countries, by contrast, have incorporated harm-reduction approaches. *Id.* at 31.

[250] *See* Harlan Matusow, Samuel L. Dickman, Josiah D. Rich, Chunki Fong, Dora M. Dumont, Carolyn Hardin, Douglas Marlowe & Andrew Rosenblum, *Medication Assisted Treatment in US Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, 44 J. SUBSTANCE ABUSE TREATMENT 473, 476 (2013) (finding that 56% of the drug courts that responded to their survey "reported at least some of their opioid dependent participants were receiving some type of MAT"). The researchers caution that these results may not be generalizable because of a 50% response rate and 46% completion rate. *Id.* at 479. As of 2015, problem-solving courts that prohibit MAT are not eligible for federal funding. Andraka-Christou, *supra* note 212, at 242.

[251] Matusow et al., *supra* note 250, at 477.

[252] Agonist medications prevent opioid withdrawal, but do not block the euphoric effect of narcotic substances. Methadone and buprenorphine are FDA-approved agonist medications. *See MAT Medications, Counseling, and Related Conditions*, *supra* note 247.

[253] Matusow et al., *supra* note 250, at 477 tbl.5.

[254] *Id.* at 478.

[255] *See* Ann Givens & Chris Glorioso, *Father Faults Judge for Son's Heroin Overdose*, NBC N.Y. (Aug. 29, 2014), https://www.nbcnewyork.com/news/local/Methadone-Judge-Rule-Father-Blame-Lepolszki-Son-Overdose-Heroin-Addict-Ruling-I-Team-Investigation-273213211.html [https://perma.cc/MMG6-KYRM].

[256] *Id.*

recently a drug court judge in Allegheny County, Pennsylvania, explained that he does not allow MAT for his drug court defendants because he believes it is "just another addiction."[257] He claimed it "doesn't solve the problem," adding "I just don't know if there's another answer except abstinence."[258]

Thus, while drug courts purport to be "evidence based," many fail to embrace current medical research about best practices for responding to substance abuse. And even those courts that do allow MAT may administer it in a way that contradicts this same research. A recent survey of Indiana drug court and veteran's court judges, for example, found that while many judges allow some form of MAT, some impose short and arbitrary time limits on its use despite medical literature that demonstrates it is most effective for longer-term use.[259] And a common reason for not allowing agonist MAT in another study was that the drug court participants had detoxed before they were admitted to the court program; however, this policy is also contrary to medical best practices.[260]

These errors in the articulation of the problem and solution become institutionalized in the court practices. And they become further entrenched as other jurisdictions rush to adopt a new court form, often before any actual research has been done to refine or test the court's foundational assumptions.[261]

2. Opposing Alternatives

Many judges and other practitioners herald problem-solving courts not only as an effective reform measure, but as the "universal remedy to society's pressing social difficulties."[262] Both neutral and invested organizational actors circulate this image of problem-solving courts as a "revolutionary panacea."[263] For example, in 2000 and again in 2009,

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[257] Rich Lord, *Drug Courts Divided on Approaches to Addiction Recovery*, PITT. POST-GAZETTE (May 14, 2018, 3:30 AM), https://www.post-gazette.com/news/health/2018/05/14/Drug-courts-divided-addiction-medications-Narcotics-Anonymous-Allegheny-County/stories/201805140003 [https://perma.cc/4XDV-DUN4].

[258] *Id.* A recent survey in Indiana revealed similar beliefs amongst some problem-solving court judges. *See* Andraka-Christou, *supra* note 212, at 237 (discussing responses of some judges that "abstinence while on MAT is not 'complete' sobriety").

[259] *See* Andraka-Christou, *supra* note 212, at 248.

[260] *See* Matusow et al., *supra* note 250, at 478-79.

[261] *See supra* Part II.B.

[262] *See* NOLAN, LEGAL ACCENTS, *supra* note 49, at 126 (characterizing the attitude of U.S. problem-solving court practitioners, based on interviews and observations).

[263] *Id.*

the Conference of Chief Justices and Conference of State Court Administrators passed joint resolutions suggesting "that drug courts and other problem-solving courts are the *most effective strategy* we have for reducing drug abuse, preventing crime, and restoring families."[264] The website of the NADCP similarly declares that treatment courts are "the single most successful intervention in our nation's history for leading people living with substance use and mental health disorders out of the judges system and into lives of recovery and stability."[265] Unsurprisingly, the NADCP's associated organizations, the National Center for DWI (driving while impaired) Courts and Justice For Vets, make similarly unqualified assertions about the unparalleled success of this reform.[266]

This belief that problem-solving courts are the most effective reform strategy is problematic not only because it is inaccurate,[267] but also because it can create active resistance to alternative reforms.[268] For example, in 2000 California adopted ballot initiative Proposition 36, which required eligible individuals convicted of nonviolent drug possession offenses be sentenced to probation and community-based

264 NAT'L DRUG COURT INST., *supra* note 9, at xiii (summarizing resolutions).

265 *Treatment Courts Work*, *supra* note 215.

266 *See* NAT'L CTR. FOR DWI COURTS, *DWI Courts Save Lives*, https://www.dwicourts.org/https://www.dwicourts.org/ (last visited July 2, 2019) [https://perma.cc/YVK6-T8XX] ("DWI Courts are the most successful strategy for holding repeat impaired drivers accountable while ensuring they receive life-saving treatment."); *What Is a Veteran's Treatment Court?*, JUST. FOR VETS, https://justiceforvets.org/whats-at-stake/https://justiceforvets.org/whats-at-stake/ (last visited July 2, 2019) [https://perma.cc/6U8T-H5BA] (describing veterans courts as "the most innovative solution for veterans caught up in the criminal justice system").

267 *See, e.g.*, Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 288 (discussing Drug Policy Alliance study finding that drug court reduced recidivism 8.7%, which was "on par with reduction recorded by programs offering community-based drug treatment (8.3%)" and less than half of the 18% reduction for probation supervised treatment programs. And neither of the other alternatives used incarceration as a sanction). Some problem-solving court proponents have hesitantly acknowledged that there are more effective alternatives. For example, after declaring drug courts "work" and "provide substantial savings to offenders, victims, and taxpayers," Edward J. Latessa & Angela K. Reitler note, "While adult drug courts appear to reduce recidivism and save taxpayers money, *the effects are modest and fall below what we see with other correctional programs that adhere to the principles of effective intervention*." Latessa & Reitler, *supra* note 15, at 787 (emphasis added).

268 *See* KAYE, *supra* note 6, at 218 ("[D]rug courts have the potential to direct attention away from other approaches that better address issues of both racialized mass incarceration and drug misuse, siphoning off energies for criminal justice reform into programs that in fact deepen race- and class- based inequalities."). *See generally* Collins, *Status Courts*, *supra* note 1, at 1508 (characterizing problem-solving courts as "release valve reforms" that decrease pressure for systemic reform).

drug treatment instead of incarceration.[269] This proposition was "largely informed by community experiences with drug courts"[270] and embraced a core drug court tenet: that people convicted of low-level drug-related offenses should be met with treatment in lieu of incarceration. Proposition 36, like the drug court model, recognized that recovery is often a non-linear process. Therefore, it entitled individuals up to three chances to successfully complete treatment before they are incarcerated.[271] Nevertheless, the NADCP opposed Proposition 36.[272] Drug court advocates were concerned that Proposition 36 would diminish the power of drug courts by removing the ability of judges to incarcerate defendants who do not comply with treatment.[273]

These concerns have not been borne out. Nearly twenty years after Proposition 36 was adopted, drug courts continue to thrive in California.[274] And Proposition 36 defendants and drug court defendants

[269] *See* Lisa Rettig Ryan, *Rehabilitation or Decriminalization of Drug Offenses in California?*, CAL. INITIATIVE REV. 1 (2000), https://www.mcgeorge.edu/publications/california-initiative-review/initiatives-prior-to-november-2005/2000-november-initiatives/proposition-36 [https://perma.cc/WXZ7-NE54]; *see also* NOLAN, LEGAL Accents, *supra* note 49, at 126.

[270] Elizabeth Evans, M. Douglas Anglin, Darren Urada & Joy Yang, *Promising Practices for Delivery of Court-Supervised Substance Abuse Treatment: Perspectives from Six High-Performing California Counties Operating Proposition 36*, 34 EVALUATION & PROGRAM PLAN. 124, 125 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3025310/ [https://perma.cc/6W6M-K4Q2].

[271] *See id.* In drug courts, by contrast, the decision of whether or when to incarcerate a defendant is matter of judicial discretion, a discretion that can be exercised at any time. *See* Elizabeth Evans, Libo Li, Darren Urada & M. Douglas Anglin, *Comparative Effectiveness of California's Proposition 36 and Drug Court Programs Before and After Propensity Score Matching*, 60 CRIME & DELINQ. 909, 913-14 (2014) [hereinafter *Comparative Effectiveness*].

[272] *See* KAYE, *supra* note 6, at 45 n.4 (discussing NADCP opposition to Proposition 36); NOLAN, LEGAL ACCENTS, *supra* note 49, at 126; Ryan, *supra* note 269, at 12 (discussing NADCP opposition to Proposition 36).

[273] *See* Ryan, *supra* note 269, at 12 (describing NADCP objections to Proposition 36); Jessie Seyfer, *U.S. Drug Czar Says State Initiative Would Weaken Drug Courts' Power; McCaffrey Says Law Would Take Away Ability to Punish*, SAN DIEGO UNION-TRIB., June 3, 2000, at A-3 (describing speech of drug czar Barry McCaffrey to NADCP); Martin Sheen, *Prop. 36 Would Devastate the Drug Court System*, L.A. TIMES (Aug. 7, 2000, 12:00 AM), https://www.latimes.com/archives/la-xpm-2000-aug-07-me-201-story.html [https://perma.cc/TBC2-DLCQ] (arguing that Proposition 36 will have a "devastating impact" on drug courts by removing drug testing requirements and the ability for the court to hold offenders accountable for failing treatment).

[274] There were 101 drug courts in California in 2000. *See* Seyfer, *supra* note 273. By 2009, there were more than 200. *See* MARLOWE ET AL., *supra* note 3, at 37 fig.3; *see also* Evans et al., *Comparative Effectiveness*, *supra* note 271, at 911 (identifying more than 150 operational drug courts in California).

have succeeded at similar rates on most measures.[275] Nevertheless, drug court proponents repeated many of the same concerns when California considered Proposition 5 in 2008, the Nonviolent Offender Rehabilitation Act ("NORA"), which would have reduced penalties for certain drug offenses, and again in 2014 when the state considered and adopted Proposition 47.[276] Proposition 47 was crafted as part of the state's ongoing effort to reduce prison overcrowding. It reclassified certain drug possession offenses from felonies to misdemeanors, which reduced the sentencing exposure of eligible offenders from a year or more in state prison to up to a year in county jail.[277] The NADCP "strongly oppose[d]" the measure, because it "removes the legal incentive" for offenders to seek treatment.[278] A San Diego drug court judge recently reflected that Proposition 47 "really hurt our numbers" and removed the "hammer to threaten (drug users) with incarceration."[279] Under Proposition 47, some defendants will face a jail sentence of a few months, which the judge opined, they "can do . . . standing on their heads" and therefore would choose jail over drug court.[280]

This resistance to drug sentencing reform is not limited to California. In 2018, Ohio voters considered (and ultimately rejected) Issue One, which would have reclassified certain nonviolent drug offenses from felonies to misdemeanors, and also would have prohibited jail time for these offenses under certain circumstances.[281] The Issue's supporters had said it would "save tax dollars spent on imprisoning some drug

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[275] *See* Evans et al., *Comparative Effectiveness*, *supra* note 271, at 925-26 (describing comparative findings after propensity sore matching).

[276] *See* KAYE, *supra* note 6, at 45 (discussing opposition).

[277] *See* CAL. ATTORNEY GEN., PROPOSITION 47 OFFICIAL TITLE AND SUMMARY: CRIMINAL SENTENCE. MISDEMEANOR PENALTIES. INITIATIVE STATUTE. 34, 34-35 (2014), https://vig.cdn.sos.ca.gov/2014/general/pdf/proposition-47-title-summary-analysis.pdf [https://perma.cc/393X-P9K7] (describing Proposition 47).

[278] NAT'L ASS'N OF DRUG COURT PROF'LS, STATEMENT IN OPPOSITION OF CALIFORNIA'S PROPOSITION 47 BALLOT MEASURE 1 (2014).

[279] Pauline Repard, *Drug Court Participation Drops Four Years After Proposition 47 Reduced Many Drug Crimes to Misdemeanors*, SAN DIEGO UNION-TRIB. (Sept. 15, 2018, 5:00 AM), https://www.sandiegouniontribune.com/news/courts/sd-me-prop47-courts-20180614-story.html [https://perma.cc/WNR8-HG37] (quoting drug court judge Peter Gallagher).

[280] *See id.*

[281] *See* Katie Wendell, *Voters Reject Issue 1, Which Would Keep Low-Level Drug Offenders Out of Prison*, WRAL.COM (Nov. 7, 2018, 2:42 PM EST), https://www.wral.com/voters-reject-issue-1-which-would-keep-low-level-drug-offenders-out-of-prison/17977241/ [https://perma.cc/2Y4V-KB22].

offenders and encourage rehabilitation of addicts."[282] Many Ohio judges publicly opposed the measure based on concerns about its impact on drug courts.[283] Ohio Supreme Court Chief Justice Maureen O'Connor claimed it would "decimate" the drug court process by precluding judges from using "the proven incentive of jail" to "encourag[e]" addicts to participate in drug treatment, and even cautioned that people would die if the measure passed.[284] Ohio Supreme Court Justice Sharon Kennedy encouraged voters to vote "no" on the measure because "an addict's involvement in the criminal-justice system — with freedom on the line — can present a meaningful opportunity for recovery through Ohio's drug treatment courts."[285] One drug court judge expressed "relief" when the measure failed.[286] Some Ohio judges, including Chief Justice O'Connor, have renewed their opposition to a pending sentencing reform proposal that would reclassify certain low-level drug

[282] Mike Gauntner, *Mahoning Drug Court Judge Relieved Over Failure of Ohio Issue One*, WFMJ.COM (Nov. 6, 2018, 9:46 PM EST), http://www.wfmj.com/story/39432064/mahoning-drug-court-judge-relieved-over-failure-of-ohio-issue-one [https://perma.cc/B32F-X6G6].

[283] *See, e.g.*, *id.* (describing concerns of drug court judge John Durkin); Karen Kasler, *Chief Justice Worries Issue 1 Will Take Away Drug Court Option, Overload Court System*, STATEHOUSE NEWS BUREAU (Sept. 4, 2018), https://www.statenews.org/post/chief-justice-worries-issue-1-will-take-away-drug-court-option-overload-court-system [https://perma.cc/6R3Q-H9KX] (describing concerns of Ohio Supreme Court Chief Justice Maureen O'Connor); Maureen O'Connor, *Ohio's Fight Against Drug Abuse Is Saving Lives — If Issue 1 Passes, More Ohioans Will Die: Maureen O'Connor (Opinion)*, CLEVELAND.COM (Oct. 21, 2018), https://www.cleveland.com/opinion/2018/10/no_on_issue_1_ohio_is_well_eng.html [https://perma.cc/CFR5-UTLZ] [hereinafter *Ohio's Fight*] (describing concerns of Ohio Supreme Court Chief Justice Maureen O'Connor); Jim Provance, *Former Drug Court Judge Changes Mind, Opposes Issue 1*, TOLEDO BLADE (Sept. 12, 2018, 2:01 PM), https://www.toledoblade.com/news/politics/2018/09/12/Former-drug-court-judge-changes-mind-opposes-Issue-1-Ohio/stories/20180912148 [https://perma.cc/Z8EE-FG75] (describing concerns of drug court judge Scott VanDerKarr); Marty Schladen, *Critics: Well-Meaning Issue 1 Would Handcuff Those Trying to Help Addicts*, RECORD-COURIER (Sept. 28, 2018, 12:01 AM), https://www.record-courier.com/article/20180928/news/309289861 [https://perma.cc/7MH5-L2FQ] (describing concerns of drug court judge Stephen McIntosh).

[284] O'Connor, *Ohio's Fight*, *supra* note 283; *see also* Maureen O'Connor, *Guest Column: Issue 1 Would Make Ohio a Haven for Drug Dealers*, FREMONT NEWS MESSENGER (Aug. 31, 2018, 11:06 AM EST), https://www.thenews-messenger.com/story/opinion/2018/08/31/chief-justice-maureen-oconnor-issue-1-would-catastrophic-ohio/1147149002/ [https://perma.cc/7BRD-Z66G]) (predicting Issue 1 would "have a devastating consequence on our drug courts").

[285] Sharon Kennedy, Opinion, *Vote 'No' on State Issue 1 to Preserve Drug Courts*, VINDICATOR (Oct. 14, 2018, 12:00 AM), https://vindyarchives.com/news/2018/oct/14/vote-no-on-state-issue—to-preserve-drug/ [https://perma.cc/EWN5-MTRJ].

[286] *See* Gauntner, *supra* note 282.

possession felonies as misdemeanors because defendants "will not take misdemeanors seriously in drug court."[287]

On a more systemic level, the deep judicial investment in this institutional response helps perpetuate the notion that the criminal legal system — and particularly the courts — are the best and most appropriate mechanism for responding to complicated social and structural issues. The creation of a new court for every newly discovered (or newly acknowledged) issue that overlaps with the criminal legal system has been normalized as a natural and effective response. With each iteration of this story of court creation and success, it becomes easier to forget that the decision to respond through the criminal legal system (as opposed to, for example, the public health system) to issues such as substance abuse and mental illness, is in fact a choice.[288] And it is a choice that ultimately strengthens, rather than reduces or dismantles, the tie between these social issues and the criminal legal system.[289]

The relatively new Cambridge Homeless Court illustrates this dynamic. The story starts like most: a few years ago, Massachusetts District Court First Justice Roanne Sragow noticed a problem: when the court moved a few miles from Cambridge to Medford, homeless defendants "couldn't get there. It was ridiculous."[290] And those who

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[287] Laura Hancock, *Ohio Chief Justice Maureen O'Connor Touts Work to Reform Criminal Justice*, CLEVELAND.COM (Sept. 12, 2019), https://www.cleveland.com/open/2019/09/ohio-chief-justice-maureen-oconnor-touts-work-to-reform-criminal-justice.html [https://perma.cc/3LC2-93ZV]; *see also* Eric Boehm, *Why Is the Chief Justice of Ohio's Supreme Court Lobbying Against Sentencing Reforms*?, REASON (Dec. 23, 2019, 1:40 PM), https://reason.com/2019/12/23/why-is-the-chief-justice-of-ohios-supreme-court-lobbying-against-sentencing-reforms/ [https://perma.cc/5GEU-RRNT] (noting that the legislation has been delayed until 2020).

[288] Or, as Richard Boldt, applying the pragmatist theory of the "micro-politics of trouble" describes, the initial choice of the judge as the "troubleshooter" has shaped how the problem — or "trouble" — has been defined, and how the solution has been crafted. *See* Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1168-72 (2014).

[289] *See, e.g.*, Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1337 (2016) (describing how human trafficking intervention courts advance "penal welfare," which is the "practice of providing social benefits through criminal court"); Lustbader, *supra* note 43 ("[I]f [a judge who founded a human trafficking court] is correct that sex workers are 'not criminals' and should not be treated as such, why should they be in a criminal court, facing criminal charges, in the first place?").

[290] Isaiah Thompson, *Justice Wears a Different Style at the Cambridge Homeless Court*, WGBH NEWS (June 13, 2019), https://www.wgbh.org/news/local-news/2019/06/13/justice-wears-a-different-style-at-cambridge-homeless-court [https://perma.cc/QF8M-3C4F].

could make it to court soon became stuck in a "revolving door" to the criminal justice system: "They'd come into court, it's a fineable offense, they can't pay a fine, they'd dismiss the offense, they'd be arrested a week later, we'd see them back."[291] So Justice Sragow fashioned a solution: hold a Homeless Court one day a month at a location in Cambridge.[292] At these court sessions, homeless defendants with pending cases and open warrants appear and are often ordered to complete treatment, job training, or both. If they complete the program, their cases are "dismissed or terminated."[293]

Note, however, that the crimes that typically bring these homeless defendants into court are low-level offenses[294] that are often tied to their houseless status.[295] For example, various news accounts describe individuals who appeared in Homeless Court with cases for trespassing (for using a bathroom of a commercial establishment without purchasing anything),[296] stealing food from a grocery store,[297] breaking and entering a motor vehicle,[298] and drinking in public.[299] Homeless Court, like other problem-solving courts, has been celebrated for providing an alternative to business as usual, for rendering "justice laced with compassion."[300]

Certainly, the Cambridge Homeless Court and others like it are one alternative to the traditional criminalization of poverty and homelessness. But there are other approaches, including completely cutting the tie between conditions of poverty and the criminal legal system, and directing resources towards preventative measures that

[291] *Id.*

[292] This Homeless Court is the second in Massachusetts. The other is in Boston. *See* PINE ST. INN, HOMELESS COURT PROGRAM: A WAY FORWARD (2016), https://www.mass.gov/files/documents/2016/08/pq/homeless-court-brochure.pdf [https://perma.cc/VG6K-3WKP].

[293] *Homeless Court*, MASS.GOV, https://www.mass.gov/service-details/homeless-court (last visited June 19, 2019) [https://perma.cc/9C8W-ZYSN].

[294] Only defendants with charges or warrants for misdemeanor or nonviolent felonies are eligible to participate in Homeless Court. *See* PINE ST. INN, *supra* note 292.

[295] *See* Thompson, *supra* note 290.

[296] *See id.*

[297] *See* Thomas Farragher, *In Cambridge, Mercy and Justice for the Homeless*, BOS. GLOBE (Sept. 20, 2016, 3:52 PM), https://www.bostonglobe.com/metro/2016/09/20/cambridge-mercy-and-justice-for-homeless/K85wyudElozgzVNhUi4tAO/story.html [https://perma.cc/E7V5-EWF6].

[298] *See* Ema R. Schumer, *In Cambridge Homeless Court, Another Chance*, HARV. CRIMSON (Mar. 15, 2019), https://www.thecrimson.com/article/2019/3/15/cambridge-homeless-court/ [https://perma.cc/PGH4-9WVV].

[299] *See id.*

[300] *See* Farragher, *supra* note 297.

support people before they enter the criminal legal system. The Sequential Intercept Model ("SIM") provides guidance. It is a framework that identifies a series of points at which communities can intervene to prevent individuals with mental and substance use disorders from entering or remaining in the criminal legal system.[301] The model maps six interception points ranging from Intercept 0 — the provision of community services to support people in crisis independent of the criminal legal system — to the Intercept 5 — the provision of community correctional services after an individual is released from incarceration.[302] A foundational principle of this model is that interception should occur at the earliest stage possible.[303] While problem-solving courts appear on the sequential intercept model, it is not until the fourth stage, Intercept 3, at which point the individual is deeply enmeshed in the criminal legal process.[304]

Instead of dedicating resources to create a new court that makes it easier for houseless individuals to appear and adjudicate the charges against them, as did Cambridge, the sequential intercept model shows that jurisdictions could focus on providing supportive services and opportunities that would preclude criminal legal system involvement entirely. Indeed, two prominent sequential intercept researchers early on identified an accessible and robust mental health system, one that provides individuals with services, housing, and treatment, and operates independently of the criminal legal system, as "the ultimate intercept" for avoiding the criminalization of individuals with mental illness.[305] This approach, which identifies opportunities to support people in need instead of funneling them into the criminal legal system, resonates with the recent robust calls emanating from the protests

[301] *See* POLICY RESEARCH ASSOCS., THE SEQUENTIAL INTERCEPT MODEL: ADVANCING COMMUNITY-BASED SOLUTIONS FOR JUSTICE-INVOLVED PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS, https://www.prainc.com/wp-content/uploads/2018/06/PRA-SIM-Letter-Paper-2018.pdf (last visited Jan. 4, 2020) [https://perma.cc/U5NE-5RCQ]; Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness*, 57 PSYCHIATRIC SERVICES 544, 544 (2006).

[302] *See* POLICY RESEARCH ASSOCS., *supra* note 301; Dan Abreu, Travis W. Parker, Chanson D. Noether, Henry J. Steadman & Brian Case, *Revising the Paradigm for Jail Diversion for People with Mental and Substance Use Disorders: Intercept 0*, 35 BEHAV. SCI. & L. 380, 382-84 (2017) (describing the interception points). Intercept 0 was added to the model in 2017. *See id.* at 381.

[303] *See* Munetz & Griffin, *supra* note 301, at 544.

[304] *See* POLICY RESEARCH ASSOCS., *supra* note 301.

[305] *See* Munetz & Griffin, *supra* note 301, at 545.

against police violence to defund police and invest in alternatives to law enforcement.

Problem-solving courts are out of step with these popular calls to rethink and transform the system. Indeed, at their core, problem-solving courts hold fast to the message that "justice" means continuing to enforce the criminal laws as usual and threatening (if not imposing) incarceration.[306] Problem-solving courts are not, as judges often assure skeptics, "get out of jail free" programs.[307] The courts, rather, are just a different delivery system for this message about the primacy of carceral punishment. Indeed, prevailing problem-solving court models *require* the existence of a sentence of incarceration as a backdrop to their operation, as an ever-looking threat that judges can strategically invoke to encourage compliance with court programs.[308] And for that reason, amongst many others, problem-solving courts will remain a systemic reform that does not reform the system. For these reasons, and many others,[309] we should question their future.

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306 *See* Boldt, *Problem-Solving Courts*, *in* 3 ACADEMY FOR JUSTICE, *supra* note 14, at 295 (noting that the "very design" of problem-solving courts "tends to reinforce the primacy of the criminal justice components over the therapeutic/healing elements"); *see also* KAYE, *supra* note 6, at 216 ("As a strategy of reform, drug courts leave much of the existing criminal justice system intact, including ongoing police intervention . . . lengthy sentences for nonviolent crimes, and a control-oriented prison system with few services.").

307 *See, e.g.*, NOLAN, REINVENTING JUSTICE, *supra* note 47, at 53 (quoting former drug court judge and NADCP board member Claire McCaskill, "It is tough. It is tougher than the alternatives"); Repard, *supra* note 279 (quoting drug court judge Peter Gallagher, "People call it 'happy-clappy court' and 'kum ba ya court,' . . . People think it's a get-out-of-jail card. But people find it harder than jail"). And on this measure, if not others, I agree with problem-solving court proponents. Studies suggest that court participation does not decrease the likelihood a defendant will be incarcerated. *See* Johnston & Flynn, *supra* note 233, at 693.

308 *See* KAYE, *supra* note 6, at 217 ("The entire therapeutic technique of the [drug] court relies on the threat of punishment . . . Rather than critiquing the warehouse prison, the drug court . . . model attempts to deploy the prison to greater effect, giving persons with low-level crimes a taste of the maltreatment they will receive if they do not adopt the personal practices that the court . . . deem necessary.").

309 For other critiques of the problem-solving court model, see, for example, Collins, *Status Courts*, *supra* note 1, at 1508-13 (arguing that problem-solving courts may "disincentivize long-term, systemic reform"); Eaglin, *Against Neorehabilitation*, *supra* note 69, at 208-10 (identifying drug courts as "the most obvious example of the neorehabilitative model in the context of sentencing policy reform" and offering a critique); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012) (arguing that "specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration"). *See generally* Scott-Hayward, *supra* note

CONCLUSION

Problem-solving courts solve a problem. But the problem they solve has more to do with disaffected judges than the issues for which they are named. This insight helps explain their otherwise perplexing persistence, raises new questions, and uncovers new problems. But it also enables a conversation about what is really driving one of the most celebrated developments in modern criminal justice reform: judicial dissatisfaction and disempowerment. Instead of dealing with the symptom by creating new courts, we should focus on the cause. Perhaps it is time to find ways to allow judges to judge again.

12, at 80-87 (summarizing scholarly critiques); Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 73-75 (2001) (developing procedural critique).