

# The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform

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## INTRODUCTION

There is a chasm between the rhetoric about and the reality of modern court reform movements. It is a deeply troubling divide. This Article, responding to the work of Professor Jane Spinak, is not concerned with innovations within the family court system. Rather, it examines modern criminal justice reforms.<sup>1</sup> It focuses on the claims of the contemporary “problem-solving court” movement—a movement that has resulted in the development of thousands of specialized criminal courts across the country over the last two decades.<sup>2</sup>

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1. At the March 2009 *Access to Equal Justice Colloquium*, I offered remarks in response to the keynote address of Professor Jane Spinak. See *Access to Equal Justice Colloquium Video*, available at <http://abhall.mediasite.com/abhall/Viewer/?peid=bb6a8cfaae8947f1b6fdb173da88deda> (last visited Oct. 25, 2009). Professor Spinak’s important work raises similar questions about family court reform efforts. See also *In re Gault*, 387 U.S. 1, 30 (1967) (identifying differences between the rhetoric offered by the early juvenile court movement and the realities of such institutions in practice).

2. I use the term “problem-solving courts” here, as that is used by proponents of such venues—those whose account this essay seeks to challenge. Like others who question the propriety and efficacy of such institutions, I find this name to be problematic. First, it fails to provide adequate parameters. It is unclear how we are to determine which courts are problem-solving and which courts are not. In addition, as discussed *infra*, as many of these “problem-solving” courts do not necessarily solve the problems they set out to address, the term is

Problem-solving courts, which focus on social concerns like addiction, domestic violence, mental health issues, and prostitution, purport to be a great success. Their proponents assert that such courts cure addiction, address intimate violence, prevent recidivism, reduce costs, and even save lives. But this success story—the seemingly linear and dominant narrative offered primarily by proponents of problem-solving courts—is misleading. The near-singular tale of triumph told by modern court reformers obscures alternative experiences within, and contrary opinions about, these contemporary institutions. It also fails to acknowledge another important story—that is, the checkered history of criminal court experimentation in this country.

We need to mine and carefully consider these currently submerged accounts in order to fully appreciate both the promises and the significant perils of contemporary criminal court reform efforts.<sup>3</sup> This Article is intended to help in that endeavor by urging more meaningful discussions about judicial experiments. It is a project that focuses on the largely untold present and the forgotten past of such institutions, with a view toward helping shape criminal courts and justice in the future.

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somewhat of a misnomer. Perhaps, therefore, a term like “problem-oriented” courts, which I also use in this essay, might be more accurate. *See generally* Kay Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005) (using the term “problem-oriented” to describe such institutions).

3. A few months after I gave my talk at Washington University, which built upon similar presentations I have given across the country over the years, a book was released that purports to examine this very question. *See* PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY? (Paul Higgins & Mitchell B. Mackinam eds., 2009) (Greenwood Publishing Group notes that the new book details “the ‘promise and potential perils’ of problem-solving courts,” and that “the authors represented here examine the development of the problem-solving court movement, the rationale for the courts, the approaches they take, and their anticipated benefits and potential pitfalls.”). The book “begins with an essay by Center for Court Innovation director Greg Berman,” a compelling leading advocate for such courts, *see infra* note 22, and references “numerous Center publications and projects throughout.” *See* Center for Court Innovation, <http://www.courtinnovation.org> (last visited Oct. 25, 2009). In addition, one of the book’s editors, Mitchell Mackinam, is a former South Carolina Drug Court Coordinator. *See* PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra*, at 195. However, the book also includes more concerned and critical voices. Thus, perhaps calls for more open and meaningful discussion around these issues finally are being heeded. As this Article suggests, it is important that they continue.

I. COURT REFORM'S DOMINANT DISCOURSE:  
THE MODERN SUCCESS STORY<sup>4</sup>

The problem-solving court movement, many proclaim, began in this country with the founding of the Miami Drug Treatment Court in 1989.<sup>5</sup> When that court opened two decades ago, it was viewed as groundbreaking in its attempt to remedy a social problem through informal criminal court processes.<sup>6</sup> Developed by the criminal justice community as an alternative to incarceration for qualifying defendants, the Miami Drug Court sought to address the underlying issue that brought narcotics offenders into the system—addiction—as opposed to the specific crime charged.<sup>7</sup>

In the Miami Drug Court, the judge changed from passive arbiter to active participant in helping defendants reach sobriety by rewarding success but sanctioning setbacks with jail terms and other penalties.<sup>8</sup> Prosecutors and defense attorneys changed their roles, too,

4. My friend and colleague, Iris Goodwin, recently reminded me that domination of discourse is, of course, a topic that long has been the focus of discussion and analysis in a variety of fields. *See, e.g.*, BEN AGGER, *THE DISCOURSE OF DOMINATION: FROM THE FRANKFURT SCHOOL TO POSTMODERNISM* (1992); MICHEL FOUCAULT, *ARCHAEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., Pantheon 1972) (1971); JURGEN HABERMAS, *DISCOURSE ETHICS: NOTES ON A PROGRAM OF JUSTIFICATION* (1990); Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 *SIGNS: J. WOMEN CULTURE & SOC'Y* 405 (1988).

5. *See, e.g.*, JAMES L. NOLAN, JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 39 (2001); *see also* John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in *THE EARLY DRUG COURTS: CASE STUDIES IN JUDICIAL INNOVATION* 19, 19 (W. Clinton Terry III ed., 1999); JAMES A. INCIARDI ET AL., *DRUG CONTROL AND THE COURTS* 68 (1996); Miami Dade Drug Court, <http://www.miamidrugcourt.gov> (last visited Oct. 25, 2009) (“In 1989, the Eleventh Judicial Circuit of Florida was the first in the nation to implement Drug Court, a diversion and treatment program for drug offenders which is overseen by the Court.”).

6. Michael Isikoff & William Booth, *Miami “Drug Court” Demonstrates Reno’s Unorthodox Approach*, *WASH. POST*, Feb. 20, 1993, at A1 (calling the 1989 Miami Drug Court Janet Reno’s “most ambitious experiment”); Ronald Smothers, *Miami Tries Treatment, Not Jail, in Drug Cases*, *N.Y. TIMES*, Feb. 19, 1993, at A10 (Miami Court “the first of its kind”).

7. Isikoff & Booth, *supra* note 6, at A1; Smothers, *supra* note 6, at A10.

8. *See* Peggy Fulton Hora, William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *NOTRE DAME L. REV.* 439, 470–77 (1998); James L. Nolan, Jr., *Therapeutic Adjudication*, 39 *SOC’Y* 29, 32–36 (2002); INCIARDI ET AL., *supra* note 5, at 71–73 (describing the judge as “case manager” in modern drug treatment courts); *see also* Deborah Chase & Peggy Fulton Hora, *The Best Seat in the House: The Court Assignment and Judicial Satisfaction*, 47 *FAM. CT. REV.* 209 (2009) (claiming that

shedding their adversarial posture to become part of the treatment court “team.”<sup>9</sup> This model was and is depicted as a success.<sup>10</sup>

Today, twenty years after the Miami Court opened its doors, over 2,300 drug treatment courts are operating across the country and more are on their way.<sup>11</sup> The purportedly “innovative” methods utilized in the Miami Drug Court—concern for remedying a particularized social problem, active judicial involvement through defendant-monitoring and sanctioning, and informal courtroom processes—have been adopted and applied in other problem-solving court settings. Jurisdictions have created everything from domestic violence courts, to community courts, to mental health courts, to gun courts, to smoking courts for juveniles.<sup>12</sup> It would appear that for

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“problem-solving court judges were more likely to report believing that the role of the court should include helping litigants address the problems that brought them” to the court).

9. See New York State Unified Court System: Drug Treatment Courts, [http://www.courts.state.ny.us/courts/problem\\_solving/drugcourts/index.shtml](http://www.courts.state.ny.us/courts/problem_solving/drugcourts/index.shtml) (last visited Oct. 25, 2009) (“What distinguishes drug courts is their uniquely collaborative approach to treatment . . . . This process involves coordination between defense attorneys, prosecutors, treatment and education providers and law enforcement officials.”); INCIARDI ET AL., *supra* note 5, at 73 (“Perhaps even more nontraditional are the roles performed by other Miami drug court officials, activities that have been described variously as ‘unorthodox,’ ‘nonadversarial,’ and ‘team oriented.’”).

10. See, e.g., GREG BERMAN & JOHN FEINBLATT, GOOD COURTS 131–50 (2005) (characterizing problem-solving courts as “good courts” with good results by cataloguing “success stories” from litigants affected by such institutions); ROBERT V. WOLF, PRINCIPLES OF PROBLEM-SOLVING JUSTICE, CENTER FOR COURT INNOVATION 1 (2007) (claiming “a growing body of research literature has begun to validate the[] effectiveness” of problem-solving courts); Drug Enforcement Agency, What Are Drug Treatment Courts?, <http://www.usdoj.gov/dea/ongoing/treatment.html> (last visited Oct. 25, 2009) (explaining why drug treatment courts are a “success” and describing one New York program as a “success story”).

11. See Center for Court Innovation, Drug Treatment Courts, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=576&documentTopicID=21> (last visited Oct. 25, 2009) (noting that over 2,100 drug courts now operate across the United States); *U.S. Drug Czar Addresses 2,500 Drug Court Professionals, Voices Strong Support for Expanding Drug Courts Throughout the Nation*, REUTERS (2009), <http://www.reuters.com/article/pressRelease/idUS146385+11-Jun-2009+PRN20090611> (last visited Oct. 25, 2009) (“There are currently 2,301 Drug Courts annually serving 120,000 people per year.”); see also WOLF, *supra* note 10, at 1 (“[t]oday there are over 2,500 problem-solving courts in the United States.”).

12. See, e.g., Jaclyn O’Malley, *Mental Health Court Seen as Example For State*, RENO GAZETTE-J., Dec. 10, 2006, at 1A; Richard B. Hoffman, *The Viable Alternative: Community Courts*, WASH. LAW. Oct. 2004, at 35; Joan Kenney & Charlotte Whiting, Press Release, New Firearm Session of the Lynn District Court (Jan. 31, 2006), available at <http://www.mass.gov/courts/press/pr013106.html>; EMILY SACK, FAMILY VIOLENCE PREVENTION FUND, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES (2002), [http://endabuse.org/userfiles/file/Judicial/FinalCourt\\_Guidelines.pdf](http://endabuse.org/userfiles/file/Judicial/FinalCourt_Guidelines.pdf); Hanna Sampson, *Court’s Aim is to Extinguish*

nearly every problem in our society, there exists a specialty court within the criminal justice system that is trying to “solve” it.

Yet, proponents of the modern problem-solving court movement continue to call for even more specialized institutions, along with broader acceptance of their nontraditional approach to criminal case processing.<sup>13</sup> Toward this end, many judges broadcast the work of their courts by publicizing drug court graduations and asking those honored to share success stories publically.<sup>14</sup> Newspapers and the Internet are filled with accounts of how problem-solving courts “saved” these individuals.<sup>15</sup>

More systemically, the Conference of Chief Judges, which represents judges from the high courts of every state, has established a “national agenda” to encourage further implementation of problem-solving court programs.<sup>16</sup> The agenda calls for each jurisdiction to develop a particularized “state plan to expand the use of the principles and methods of problem-solving courts.”<sup>17</sup> It also calls for judges to reach beyond the courthouse walls and press law schools to “include the principles and methods of problem-solving courts in their curricula” in order to train lawyers to embrace problem-solving

*Teen Smoking*, MIAMI HERALD, Jan. 11, 2004, at 1BR, available at <http://www.countyjudgets.com/News/schiff3.htm>. At least one city has considered creating a specialized prostitution court. See Bill Harness, *New Prostitution Court Eyed*, NASHVILLE CITY PAPER, Oct. 12, 2004, <http://nashvillecitypaper.com/content/city-news/new-prostitution-court-eyed>.

13. See, e.g., Daniel Becker & Maura D. Corrigan, *Moving Problem-Solving Courts into the Mainstream*, 18 CT. MANAGER 6 (2003).

14. See, e.g., Jim O’Hara, *Drug Court Graduates Celebrate Life and Sobriety*, THE POST-STANDARD (Syracuse, N.Y.), June 25, 2009, at B8, available at [http://syracuse.com/news/index.ssf/2009/06/drug\\_court\\_graduates\\_celebrate.html](http://syracuse.com/news/index.ssf/2009/06/drug_court_graduates_celebrate.html) (reporting that New York State Chief Judge Jonathan Lippman presided over the drug court graduation at the Onondaga County Courthouse and congratulated the graduating defendants on their accomplishments); Press Release, Ky. Court of Justice, Supreme Court Deputy Chief Judge Scott to be Guest Speaker at First Rowan County Drug Court Graduation Dec. 22 (Dec. 21, 2007), <http://courts.ky.gov/pressreleases/Rowan+County+Drug+Court+Graduation.htm>.

15. See, e.g., Video: Watch Trey Anastasio Tell His Drug Court Story (National Association of Drug Court Professionals), <http://www.nadcp.org/learn/do-drug-courts-work> (last visited Oct. 25, 2009); see also Erik Eckholm, *Innovative Courts Give Some Addicts a Chance to Straighten Out*, N.Y. TIMES, Oct. 15, 2008, at A1; Tracy M. Neal, *‘Drug Court Saved My Life’ Benton County Drug Court Offers Second Chances*, HERALD LEADER, May 13, 2009.

16. See Conference of Chief Justices and Conference of State Court Administrators Annual Meeting, July 29, 2004, *Resolution 22*, <http://cosca.ncsc.dni.us/WhitePapers/Resolution-Natl%20Agenda-Final-Aug-04.pdf>.

17. *Id.*

court techniques.<sup>18</sup> Related think tanks and policy shops<sup>19</sup> similarly have dominated the airwaves through white papers, websites, and press accounts—urging us to take the problem-solving court experiment “to scale.”<sup>20</sup>

## II. SUBTEXT AND “OTHER” STORIES OF THE PROBLEM-SOLVING COURT MOVEMENT

The seemingly singular story told about problem-solving courts portrays them as benevolent and exciting alternatives to the traditional case-processing model. It is difficult not to get swept up in the promise offered by those telling this tale. However, other accounts also must be considered.<sup>21</sup> For a more robust understanding, dissenting voices and those who question such assurances also must be heard.<sup>22</sup>

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18. *See id.* (“BE IT FURTHER RESOLVED THAT CCJ and COSCA agree to develop a national agenda that includes . . . [asking] CCJ and COSCA members to request of the law schools in their states that they, as appropriate, include the principles and methods of problem-solving courts in their curricula.”).

19. In the interest of full disclosure, a decade ago I worked for one of the most prominent of these organizations—the Center for Court Innovation—mentioned throughout this essay. *See* Center for Court Innovation, <http://www.courtinnovation.org> (last visited Oct. 25, 2009) (describing the Center as a non-profit think tank that is a “public-private partnership” between the New York State Unified Court System and the Fund for the City of New York”). There are other such organizations. *See, e.g.*, National Association of Drug Court Professionals, <http://www.nadcp.org/nadcp-home> (last visited Oct. 25, 2009).

20. BERMAN & FEINBLATT, *supra* note 10, at 195–98 (“The goal of ‘going to scale’ is to spread key problem-solving principles throughout state court systems.”).

21. *Cf.* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988) (discussing the potential of storytelling to challenge the prevailing discourse); Luz E. Herrera, *Challenging A Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 51–52 (2002) (describing the need to dismantle dominant stories through the telling of broader narratives).

22. Proponents are just beginning to acknowledge publically the possibility of error in their experiments. This recognition is occurring now, after two decades of modern problem-solving court efforts; it follows calls from skeptics, like this author, for the movement to slow down and take better stock of its actions. Even these moments of alleged self-awareness only consider the movement’s failures in narrow, highly controlled ways. *See, e.g.*, Greg Berman & Aubrey Fox, *Embracing Failure: Lessons for Court Managers*, 23 CT. MANAGER 4 (2008) (excerpting interviews with policymakers and practitioners); Greg Berman, *Learning from Failure: A Roundtable on Criminal Justice Innovation*, 1 J. CT. INNOVATION 97 (2008) (providing excerpts of a roundtable convened by the Center for Court Innovation and the United States Department of Justice).

Questions remain about the efficacy and propriety of problem-solving courts. It is not at all clear that specialized courts offer a superior alternative to the traditional case-processing model in preventing recidivism or that they resolve the underlying social problems they are created to address. In addition, there has been insufficient study of the real economic costs of such courts, or the extent to which defendants' legal rights and our system of justice may be undermined by the informal procedures that such institutions use.

As an initial matter, few are aware of the reasons the Miami Drug Court was established. Although reportedly focused on the problems of defendants, it was established largely to address a set of more utilitarian concerns for the system. Miami faced both staggering narcotics-based caseloads for prosecutors and jail overcrowding as a result of the 1980s "drug war."<sup>23</sup> Indeed, at the time it established the "first" drug court, Miami-Dade County was under court order to reduce its enormous jail population.<sup>24</sup> It had to try something new.

Other self-serving reasons may encourage replication of the drug court model, including substantial financial support offered by the federal government to those willing to establish such institutions. These reasons call into question the purportedly pure motives behind the "therapy" being provided by our courts. The various and sometimes disparate goals and incentives underlying specialty courts must be more transparent if we are to understand the real story of these venues. This subtext may affect public perceptions and support, as well as the way outcomes are interpreted. This is a particularly important consideration when proponents of the problem-solving

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23. Goldkamp, *supra* note 5, at 20–22 ("In a most basic sense, the implementation of the Miami Drug Court in 1989 was a response to this extraordinary growth in the drug-related criminal caseload in Dade County, to the strain it placed on most aspects of the criminal justice system, and to the perceived impact of drug-related crime and criminals on public safety in Dade County."); *see also* INCIARDI ET AL., *supra* note 5, at 65 (describing a 1989 state judicial conference, at which leaders from the largest states reported concerns about the backlog of drug cases in their courts).

24. INCIARDI ET AL., *supra* note 5, at 69 (noting that the county's jails were at least 6,000 inmates beyond capacity); *see also* NOLAN, *supra* note 5, at 44–45 (describing the "structural causes" that spurred the drug court experiment and noting "the practical forces of correctional and courtroom costs, the volume of offenders, and limited prison and jail space forced judicial actors to consider alternatives").

court movement claim part of the drive to create such venues is to increase public trust in courts.

The perspectives of the criminal defense bar also were largely missing from initial narratives about these courts. Nearly a decade ago, I was one of the first defense lawyers in the United States to write about my experience practicing in a drug court.<sup>25</sup> I argued that the teamwork approach urged in such institutions could thwart defense attorneys' ethical obligation to zealously defend their clients and undermine defendants' rights to due process of law.<sup>26</sup>

Since that time, more defense attorneys—individually and on an institutional level—have raised similar concerns.<sup>27</sup> Over the past two years the National Association of Criminal Defense Attorneys (“NACDL”) convened a task force to examine potential issues raised by problem-solving courts. It held public hearings across the country to hear testimony from defenders and others based on their experiences within the courts.<sup>28</sup> Just this month it issued its report

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25. See Mae C. Quinn, *Whose Team Am I on Anyway?*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000–01) [hereinafter Quinn, *Whose Team*]; cf. Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 829–30 (1995). Eastman writes:

[w]hile a purely personal voice in our writing would be “as empty” as the purely professional . . . hopefully . . . we find ways to talk that will reflect more fully what we actually know to be true of ourselves and our minds, of our languages and our cultures . . . If a lawyer is well regarded, her voice can be persuasive . . .

Speaking in our personal voices can be persuasive for precisely the reasons the historian and journalist are more persuasive, with speech that is invitation and not coercive. Such speech invites the judge to experience the tragedies as the authors have.

*Id.* (citations omitted).

26. Quinn, *Whose Team*, *supra* note 25, at 50–52.

27. See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008); Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75 (2007); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006); see also AM. COUNCIL OF CHIEF DEFENDERS, TEN TENETS OF FAIR AND EFFECTIVE PROBLEM-SOLVING COURTS (2002), [http://www.nlada.org/DMS/Documents/1019501190.93/document\\_info](http://www.nlada.org/DMS/Documents/1019501190.93/document_info).

28. See NACDL Task Force Holds Hearings on Operations of Specialized Courts, 16 A.B.A. CRIM. JUST. SEC. NEWS. 12 (Spring 2008) (“The task force is charged with looking at the role of defense counsel in these courts, the due process and constitutional rights of defendants in these courts, as well as the courts’ overall effectiveness.”).



summarizing its findings, which include many of the concerns I have raised previously.<sup>29</sup>

In addition, the Maryland State Office of the Public Defender recently filed a lawsuit challenging the very existence of Maryland's Drug Treatment Court.<sup>30</sup> In the suit, defenders argued that the Circuit Court for Baltimore City lacked fundamental jurisdiction to create a drug court for felony charges, and that the court's sanctioning practices violated constitutional double jeopardy principles.<sup>31</sup>

Carefully vetted and well-crafted accounts of reformers also overlook the stories of the thousands of defendants who "fail out" of problem-solving courts. These defendants often are sent to prison for faltering in their treatment efforts—sometimes for longer periods than they would have served had they forgone the problem-solving court option.<sup>32</sup> They are not invited to speak to high school classes or community groups. What becomes of these individuals—and their views on problem-solving courts, or the legal system in general—is largely missing from the conversation.<sup>33</sup>

Also absent is a full accounting of these failures. Indeed, although reformers have declared their success, questions remain about the efficacy of purported problem-solving institutions. Recent estimates suggest that between one-third and one-half of all drug treatment

29. NACDL, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* (Sept. 2009). *See also* Mae C. Quinn, Testimony at the NACDL Problem-Solving Courts Task Force (Nov. 14, 2008) (transcript on file with author).

30. *See* *Brown v. State*, 971 A.2d 932, 932 (Md. 2009); *see also* Henri E. Cauvin, *Public Defender Calls Venues Unconstitutional*, WASH. POST, Apr. 3, 2009, at B3.

31. Ultimately the Court of Appeals of Maryland denied the challenge on procedural and not substantive grounds. First, it found that "Petitioner's 'fundamental jurisdiction' argument overlooks the critical distinction between (1) lack of jurisdiction, and (2) the improper exercise of jurisdiction." *Brown v. State*, 971 A.2d at 936. Second, it found that the double jeopardy claim was not properly preserved for review. *Id.* at 936–37. Indeed, the court suggested that drug court practices might be challenged in individual cases by way of new sentencing hearing requests. *Id.* at 936.

32. *See* Quinn, *Whose Team*, *supra* note 25, at 50.

33. *Cf.* NOLAN, *supra* note 5, at 69 (recounting the story of a drug court judge who brought defendants to speak positively about her program before an audience of over 700 drug-court professionals, only to have the defendants unexpectedly complain about problems they were having in the court—including unfair treatment by drug program counselors and a lack of educational and other rehabilitative services).

court defendants fail out of treatment.<sup>34</sup> Thus, for a large percentage of defendants, the drug court model does not serve as an alternative to incarceration.<sup>35</sup> Despite the nearly 300 million federal dollars spent on these nontraditional experiments, drug court defendants still are largely serving traditional prison sentences.<sup>36</sup> Because drug court sentences often are longer than ordinary drug sentences, it is hard to see how drug courts save money in the long run.<sup>37</sup>

In fact, in April 2002 the General Accounting Office (“GAO”) warned that the returns were not all in on drug treatment courts and that more thorough study was needed.<sup>38</sup> In a lengthy and detailed report, the GAO admonished the Department of Justice for not sufficiently managing the collection and use of operational and outcome data from federally funded drug court programs.<sup>39</sup> It found that the Department fell short of its stated objectives of completing meaningful and comprehensive impact evaluations for such courts.<sup>40</sup>

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34. Eckholm, *supra* note 15, at A1 (noting that in some New York drug courts, more than half of the defendants do not successfully complete the program). *See also* U.S. GEN. ACCT. OFF., GAO-01-187, D.C. CRIMINAL JUSTICE SYSTEM: BETTER COORDINATION NEEDED AMONG PARTICIPATING AGENCIES (2001), *available at* <http://www.gao.gov/new.items/d01187.pdf> [hereinafter BETTER COORDINATION NEEDED] (reporting that in one study “117 of the 279 defendants placed in drug court program successfully graduated”).

35. *See* Quinn, *Whose Team*, *supra* note 25, at 49.

36. *See* U.S. GEN. ACCT. OFF., GOA-02-434, BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED TO MEASURE THE IMPACT OF DRUG TREATMENT COURT PROGRAMS 6 (2002), <http://www.gao.gov/new.items/d02434.pdf> [hereinafter BETTER DOJ COLLECTION AND EVALUATION EFFORTS NEEDED] (“Since fiscal year 1995, Congress has appropriated about \$267 million in Violent Crime Act related funding to DOJ for the federal drug court program.”) (footnote omitted).

37. *See also* Reginald Fluellen & Jennifer Trone, Vera Institute of Justice, *Do Drug Courts Save Jail and Prison Beds?*, SPECTRUM: J. ST. GOV’T, Winter 2001, at 19 (noting that, to date, studies about alleged cost savings on prison bed space fail to account for an important set of variables: whether drug courts have targeted a population already prison-bound or may have simply changed the going sentencing rates for particular kinds of sentences, and whether jail sanctions are sufficiently considered in the calculus).

38. BETTER DOJ COLLECTION AND EVALUATION EFFORTS NEEDED, *supra* note 36, at 8 (“DOJ cannot provide Congress, drug court program stakeholders, and others with reliable information on the performance and impact of federally funded drug court programs.”). This report echoes concerns that first were raised by the GAO in 1997, and again in 2001. *See* U.S. GEN. ACCT. OFF., GAO-97-106, DRUG COURTS: OVERVIEW OF GROWTH, CHARACTERISTICS, AND RESULTS (1997); *see also* BETTER COORDINATION NEEDED, *supra* note 34.

39. BETTER DOJ DATA COLLECTION AND EVALUATION EFFORTS NEEDED, *supra* note 36, at 8–15.

40. *Id.* at 15–18.

In 2005, the GAO reviewed the 117 drug court evaluations—many federally funded—that had been conducted between 1997 and 2004.<sup>41</sup> Of those studies, the GAO considered only twenty-seven methodologically sound for purposes of assessing recidivism and other success factors.<sup>42</sup> The methodologically sound studies showed “fewer incidents of rearrests or reconvictions and a longer time until rearrest or reconviction than comparison group members”;<sup>43</sup> however, there was not conclusive evidence to tie the reduction in recidivism to any particular drug court component or feature, such as judicial involvement or graduated sanctioning.<sup>44</sup> Moreover, the GAO determined that “[e]vidence about the effectiveness of drug court programs in reducing participants’ substance abuse”—the very problem drug courts are supposed to solve—“is limited and mixed.”<sup>45</sup>

Most recently, the Sentencing Project, an independent non-profit organization interested in criminal justice reforms, issued a report reviewing available research on the effectiveness of drug treatment courts.<sup>46</sup> That April 2009 study expressed a number of concerns about drug court proponents’ claims and identified various areas where more research was needed.<sup>47</sup> For instance, the study indicated that although “it is generally accepted that drug courts effectively reduce rearrest rates relative to simple probation or incarceration, there is some reason to be cautious when interpreting these results.”<sup>48</sup> It also explained that “[s]ome studies show little or no impact from drug court participation and it can be difficult to specify which components of the program or the research design may be contributing to these results.”<sup>49</sup>

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41. U.S. GEN. ACCT. OFF., GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 2 (2005), available at <http://www.gao.gov/new.items/d05219.pdf>.

42. *Id.*

43. *Id.* at 5.

44. *Id.* at 5–6.

45. *Id.* at 6. Such studies have prompted some to go so far as to call drug courts a “fraud.” See, e.g., Steven K. Erickson, *The Drug Court Fraud*, <http://www.cjlf.org/publctns/Guest/DrugCourtFraud.pdf>.

46. RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE (2009).

47. *Id.* at 1.

48. *Id.* at 6.

49. *Id.*

As I have argued elsewhere, the problem-solving court movement has oversold its innovations in other ways, too.<sup>50</sup> Even less impressive than drug courts are the batterer intervention programs touted by many domestic violence court advocates as a revolutionary approach to abuse between intimates.<sup>51</sup> The data demonstrate that such programs are ineffectual as a method of treatment—they simply do not work to deter violence.<sup>52</sup> At best, they keep track of alleged batterers for at least the period of time they are in the mandated classes.<sup>53</sup>

And victims' voices have been drowned out, too, by the dominant discourse surrounding domestic violence court practices. Women purportedly protected by the courts' no-drop and mandatory prosecution policies frequently oppose this black-and-white approach to intimate violence.<sup>54</sup> Studies suggest that the courts' practices can even put women's lives at risk.<sup>55</sup> Women's problems frequently are exacerbated rather than solved by a lack of financial and other support from their incarcerated partners.<sup>56</sup>

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50. See Mae C. Quinn, *Anna Moscovitz Kross and the Home Term Part: A Second Look at the Nation's First Criminal Domestic Violence Court*, 41 AKRON L. REV. 733, 734–35 (2008) [hereinafter Quinn, *Home Term*].

51. See, e.g., Robin Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work?*, JUDGES' J., Spring 2003, at 5.

52. See NAT'L INST. OF JUST., DO BATTERER INTERVENTION PROGRAMS WORK? TWO STUDIES (2003), <http://www.ncjrs.gov/pdffiles1/nij/200331.pdf>; see also Quinn, *Home Term*, *supra* note 50, at 734–35.

53. See NAT'L INST. OF JUST., *supra* note 52; see also Quinn, *Home Term*, *supra* note 50, at 734–35.

54. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007); see also G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservation of the Battered Women's Movement*, 42 HOUS. L. REV. 237 (2005).

55. See, e.g., Radha Iyengar, Op-Ed., *The Protection Battered Spouses Don't Need*, N.Y. TIMES, Aug. 7, 2007, at A19 (noting higher homicide rates in states with mandatory arrest policies for domestic violence).

56. See Erin L. Han, Note, *Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases*, 23 B.C. THIRD WORLD L.J. 159 (2003); see also NAT'L COALITION AGAINST DOMESTIC VIOLENCE, ECONOMIC ABUSE REPORT, <http://www.ncadv.org/files/EconomicAbuse.pdf> (discussing economic abuses and challenges faced by victims of intimate violence).

### III. THE FORGOTTEN HISTORY OF UNITED STATES CRIMINAL COURT REFORM

More fundamentally, specialized, problem-oriented criminal courts simply are not new or innovative. Despite claims by today's innovators that they are engaged in a series of firsts, the creation of specialized, problem-oriented courts is an old concept. Experiments with problem-oriented courts originated in this country about a century ago. The checkered history of criminal court reform is conspicuously absent from current conversations about problem-solving courts.

Innovators who came long before today's reformers made similar attempts to engage in social engineering through criminal court reform. Judge Anna Moscowitz Kross, a Russian immigrant who came to the United States at the end of the 1800s, was one of the first women to graduate from New York University School of Law in 1910, one of the first women to practice law in New York, and one of the state's first woman judges.<sup>57</sup> Kross spent the entirety of her legal career trying to reform the criminal justice system in ways that closely parallel the efforts of today's problem-solving court movement.<sup>58</sup>

Kross's innovations took many forms. She established a number of specialized criminal courts that looked very much like what we are seeing today. She engaged in court reform work while she was a judge in New York City's Magistrates' Court, which is where low-level, non-felony cases were prosecuted in New York City until the 1960s.<sup>59</sup> In this way, I argue that Kross was responsible for New

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57. This Article is one of several works that will serve as the basis for a full-length biography examining Kross's life and work. See, e.g., Mae C. Quinn, *Lady Vols Calling the Shots: Judge Anna Moscowitz Kross and Her Auxiliary Army of Criminal Court Case Workers*, in FEMINIST LEGAL HISTORY: NEW PERSPECTIVES ON LAW (unpublished manuscript on file with author) [hereinafter Quinn, *Lady Vols*]; Quinn, *Home Term*, *supra* note 52; Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the 'Problem' of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 669 (2006) [hereinafter Quinn, *Women's Court*].

58. Quinn, *Lady Vols*, *supra* note 57, at 23–24; Quinn, *Home Term*, *supra* note 50, at 736; Quinn, *Women's Court*, *supra* note 57, at 669. See also Joan Cook, Obituary, *Anna M. Kross Dies*, N.Y. TIMES, Aug. 29, 1979, at D19.

59. See Quinn, *Home Term*, *supra* note 50, at 736; Quinn, *Women's Court*, *supra* note 57, at 696.

York's "original" problem-solving court movement—a movement that largely has been forgotten by today's legal community. Looking back at Kross's early attempts at innovation is instructive given the similarities between alleged problem-solving then and now. Many of these parallels suggest that we may be returning to institutions and practices that grew out of paternalistic Progressive Era concerns,<sup>60</sup> and that were subsequently discarded as less than ideal in a modern system of criminal justice.

For instance, in 1936 Kross established the Wayward Minors' Court for Girls to deal with young women accused of violating the law.<sup>61</sup> In much the same way that specialty courts are funded by the Department of Justice today, the Wayward Minors' Court began with the support and backing of the federal Works Progress Administration ("WPA").<sup>62</sup> The court dealt predominantly with women between the ages of sixteen and twenty-one who were charged with acts of prostitution and other "sexual misconduct" under the Wayward Minors' Act.<sup>63</sup>

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60. Quinn, *Women's Court*, *supra* note 57, at 665 (describing Kross's early work as a defense attorney and then as a judge who sought to "save" sexually misguided women).

61. DORRIS CLARKE, *THE WAYWARD MINORS' COURT: AN EVALUATIVE REVIEW OF PROCEDURES AND PURPOSES, 1936-1941*, at 6 (1941); Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 *BROOK. L. REV.* 411, 439-41 (1938) [hereinafter Kross & Grossman, *Suggested Improvements*] (noting that on March 2, 1936, an order of the chief magistrate authorized the creation of the Wayward Minors' Court and that "female wayward minors are almost exclusively sex delinquents"); *Dealing with Delinquents*, *N.Y. HERALD TRIB.*, Mar. 25, 1937, at 20 (indicating that Kross presided over the Wayward Minors' Court since its inception). *See also* Quinn, *Lady Vols*, *supra* note 57, at 6; Quinn, *Home Term*, *supra* note 50, at 741.

62. *See* ANNA M. KROSS, *PROCEDURES FOR DEALING WITH WAYWARD MINORS IN NEW YORK CITY*, U.S. WORKS PROGRESS ADMIN. (1936).

63. *Id.* at 1. *See also* BERNARD C. FISHER, *JUSTICE FOR YOUTH: THE COURTS FOR WAYWARD YOUTH IN NEW YORK CITY* 21 (1955) (the court was "concerned chiefly with the sexually promiscuous girl, the runaway, the undisciplined, defiant youngster, the neglected girl.").

The Wayward Minors' Act, passed in the 1920s, defined a wayward minor in relevant part as "[a]ny person between the ages of sixteen and twenty-one" who is "habitually addicted to the use of drugs or the intemperate use of intoxicating liquors"; "habitually associates with dissolute persons"; "is found of his or her own free will . . . in a house of prostitution"; "habitually associates with . . . pimps" or other criminals; willfully disobeys parents and is "in danger of becoming morally depraved"; "deserts his or her home" and is "in danger of becoming morally depraved"; or "so departs himself or herself as to willfully injure or endanger the morals or health of himself or herself or of others." Wayward Minors' Act, Title VII-A, Code of Criminal Procedure, Section 913-a. Anyone adjudicated a wayward minor was to be

Too old for New York's Children's Court,<sup>64</sup> these young women otherwise would have been processed with adult female defendants in the Women's Court,<sup>65</sup> however, Kross thought it was appropriate to divert and adjust their cases more informally.<sup>66</sup> The Wayward Minors' Court for Girls began by holding sessions "one day each week, at a different location" from the Women's Court.<sup>67</sup> The experimental venue aimed to help young women rather than punish them, employing less "legalistic" court processes<sup>68</sup> which usually included *pro se* representation throughout treatment.<sup>69</sup>

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placed on probation, unless it was determined, based upon prior misconduct or other reasons, that the minor was not "fit" for probation. Section 913-c. In such cases, the wayward minor would be "committed to any religious, charitable or other reformatory institution authorized by law to receive commitments" for a period not to exceed three years. Section 913-c. *See also* FISHER, *supra*, at 82.

64. At the time, New York's Children's Court had jurisdiction over youths until they were sixteen. Children's Court Act of the City of New York, N.Y. LAW ch. 254, art. I, § 7 (1924) (contained as an Appendix to "Children's Court of the City of New York, Annual Report of the Presiding Justice, 1925"). *See also* WALTER GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 149 (1954) ("Under the Domestic Relations Court Act, a 'child' ceases being a child upon his sixteenth birthday . . . Most states have not shared New York's feeling that the differentiation can be made at the sixteen-year age level."); ALFRED J. KAHN, A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN'S COURT 30-35 (1953) (describing the history and development of New York's Children's Court).

65. Kross & Grossman, *Suggested Improvements*, *supra* note 61, at 439 (explaining that the chief magistrate's order permitted "a separate part of the Women's Court, for the arraignment and trial of wayward minors only," but that the cases were later moved to "a location away from the Women's Court"). *See also* Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 BROOK. L. REV. 133, 173-74 (1937) [hereinafter Kross & Grossman, *Magistrates' Courts*].

66. Kross & Grossman, *Suggested Improvements*, *supra* note 61, at 430, 437 ("the Wayward Minors' part . . . seek[s] a scientific differentiation of treatment for the persons who appear therein, on a sound crime prevention theory" and "seek[s] to do for adolescent offenders what the Children's Court does for defendants under the age of 16 years"). *See also* CLARKE, *supra* note 61, at 6-7.

67. Kross & Grossman, *Magistrates' Courts*, *supra* note 65, at 173-74. *See also* CLARKE, *supra* note 61, at 6 (explaining that the court "functions judicially as a separate [part] of the Women's Court, physically separated therefrom").

68. Kross & Grossman, *Suggested Improvements*, *supra* note 61, at 440-41.

69. A person accused of being a wayward minor could only be adjudicated as such by a magistrate "upon competent evidence" at a hearing, and would be afforded "all the rights secured by law to defendants" under New York's Code of Criminal Procedure. Wayward Minors' Act, Section 913-b. *See also* FISHER, *supra* note 63, at 26 ("It is an interesting fact that defense attorneys are nowhere to be seen during proceedings in this court. The diminishing role of the legal counselor is but another corollary of the intention of the social court to minister to those in distress lest they fall into evils ways.").

In a booklet Kross wrote to describe and promote the court, she expressed concerns about preexisting formal and technical adjudication processes for young women alleged to be sexual delinquents.<sup>70</sup> She believed that some young women needed court intervention, even if there was not sufficient evidence to convict them.<sup>71</sup> Accordingly, the Wayward Minors' Court sought to "minimize the strictly legalistic character of the court as a tribunal" while using "individualized and socialized techniques and procedures" to provide assistance to the wayward young women before it.<sup>72</sup>

For instance, at a first appearance in the adult Women's Court, the magistrate decided whether sufficient information existed for a formal complaint; if so, the defendant was arraigned and formal trial held.<sup>73</sup> If sufficient grounds for a complaint did not exist, the court simply dismissed the case.<sup>74</sup> By contrast, in the Wayward Minors' Part:

Upon the first appearance of the girl complete Intake information is presented to the presiding Magistrate. The summary of the Intake Interview sets forth not only the immediate complaint but also the real problems involved,

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70. KROSS, *supra* note 62, at 2. Kross noted that "prior to the establishment of this Wayward Minors' Part of the Women's Court, it was customary for presiding Magistrates to hear charges against Wayward Minors in the Women's Court proper (or in Chambers), and either to dismiss charges or to adjudicate." *Id.*

71. *Id.*

If the case was dismissed, unless a private agency became interested in a special girl, there were no facilities for supervision or assistance. While the private agencies cooperated to some extent, there were no procedures for referral and no concerted effort toward defining, coordinating or centralizing facilities of public or private agencies. No investigation was made of environmental, social, mental or physical background of the defendant. The Magistrate proceeded merely on the evidence technically presented by complaining witnesses.

*Id.*

72. KROSS, *supra* note 62, at 16 (noting that the procedures of the Wayward Minors' Court were "predicated on the theory of the desirability of adjustment without adjudication, thus avoiding the stigma of unnecessary adjudication"). *See also* CLARKE, *supra* note 61, at 17; *id.* at 10 ("From its inception, this court has aimed to ADJUST rather than to adjudicate; and commitment is resorted to only after all other expedients have been tried.").

73. CLARKE, *supra* note 61, at 12-13.

74. KROSS, *supra* note 62, at 5-6.



whether they be economic, vocational, family i[n]compatibility or any other reason. . . . At the first appearance . . . the complaint is formally read to the girl and she is advised of her legal rights. The Judge explains to her that this formal procedure is observed to cover all necessary legal requirements. However, this is the only *formal procedure* observed at this stage.<sup>75</sup>

From that point forward, as in many of today's problem-oriented courts, formal courtroom processes were jettisoned. Instead, the court engaged in therapeutic interventions based upon the individual needs and problems of the accused.<sup>76</sup> Because the Probation Department did not have sufficient resources to adequately investigate these issues on a pretrial basis, and in fact was legally precluded from doing so, Kross created her own "cooperating agency" to do this work.<sup>77</sup> Her organization—the Magistrates' Court Social Services Bureau—was comprised mostly of volunteers whom Kross personally recruited to assist in her experiment.<sup>78</sup>

The Wayward Minors' Court magistrate also determined at arraignment whether the accused "shall be returned home pending investigation or detained elsewhere; and . . . [whether] provision for physical and mental examinations" was necessary.<sup>79</sup> Notably, institutional detention was considered "remand by consent" and seen by the court's workers as an important criminal procedure "innovation."<sup>80</sup> Although there had been no formal adjudication or finding of guilt at this stage, the young women were held at residential facilities like the Florence Crittenton League or the House

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75. *Id.*

76. *Id.* at 6 ("Sufficient Intake Information having been provided, the Magistrate sets an adjourned date, and orders a complete investigation of all pertinent circumstances be made by the Probation Department . . . or any other cooperating agency."). Intake staff were required to complete a lengthy set of forms for the judge noting the accused's educational, religious, and mental health background, "home conditions," and medical history. *Id.* at 10. *See also* CLARKE, *supra* note 61, at 12.

77. *See* Quinn, *Lady Vols*, *supra* note 57, at 3.

78. *Id.*

79. KROSS, *supra* note 62, at 5–6.

80. CLARKE, *supra* note 61, at 14–15.

of Good Shepherd for between one and four weeks so that a more thorough social work investigation could be completed.<sup>81</sup>

In her 1941 evaluation and review of the courts, Dorris Clarke, a liaison officer in the Wayward Minors' Court,<sup>82</sup> noted:

This [initial detention], of course, raised numerous questions as to the legality of detaining a person beyond the statutory period of seventy-two hours, *without hearing*. Questions were also raised as to whether a minor could "consent" to such deprivation of liberty; or whether a parent, who was a complainant against her daughter, could "consent" to such detention.<sup>83</sup>

Given the court's problem-solving orientation, however, Clarke believed the potentially illegal processes were generally defensible:

Actually, no harm was done to any of these girls and all were glad to consent to such shelter—and, as a matter of fact, many, on the adjourned date, requested to be returned to the institution. The question of the legality of the procedure, however, continued to disturb those of us concerned with the proper functioning of this court.<sup>84</sup>

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81. *Id.* This was also considered a way to help reduce tension between the parties. *Id.*

82. In Kross's 1936 booklet, PROCEDURES FOR DEALING WITH WAYWARD MINORS IN NEW YORK CITY, she indicated that Dorris Clarke, an attorney and social worker, was the "Project Supervisor of Works Progress Administration Project Number 165-97-6042, entitled 'A Study of Sex Delinquency and Social Diseases in New York City' [and had] been appointed as a liaison officer between Judge Kross and the Probation Department." KROSS, *supra* note 62, at 7-8. Clarke was one of several women and compatriots of Kross who, I argue in a forthcoming work, was engaged in legal realism in the trenches rather than from the Ivory Tower. See Mae C. Quinn, *Feminist Legal Realism?: Realistic Women in the Trenches, on the Benches, and Beyond* (Sept. 23, 2009) (unpublished draft on file with author); see also Mae C. Quinn, *Further (Ms.) Understanding Legal Realism: Rescuing Judge Anna Moscovitz Kross*, 88 TEX. L. REV. SEE ALSO 43 (2009).

83. CLARKE, *supra* note 61, at 15.

84. *Id.* Clarke called for legislative adoption of the various informal processes used in the Wayward Minors' Court. Dorris Clarke, *Treatment of the Delinquent Adolescent Girl: By Court, or Administrative Tribunal?*, 21 N.Y.U. L. Q. REV. 225, 248 (1946). Her efforts apparently were successful—a 1951 change in the law codified some portion of the informal features of Kross's experimental court. See FISHER, *supra* note 63, at 22 (noting that the Girls' Term Act "became effective June 1, 1951 and validated the court which had been functioning for a number of years under the Wayward Minor Act").

To protect against legal challenges, the court ultimately modified its procedures. Thereafter, the magistrate was required to complete a form at the time of remand indicating that the defendant was “arraigned and advised of [her] rights, [and] has consented to necessary shelter, examination, and care at your institution pending further disposition of the charges at the Wayward Minors’ Court.”<sup>85</sup>

Before the defendant’s next court appearance, the investigating agent presented the gathered information to the presiding judge, usually Kross.<sup>86</sup> This information included further facts underlying the complaint; a full social history of the accused; and additional mental and physical health data, including details about the woman’s sexual history.<sup>87</sup> With this information, the court established an individualized treatment plan and adjourned the matter for further informal supervision.<sup>88</sup> “Further supervision” frequently involved venereal disease testing and treatment, still without any formal finding of guilt.<sup>89</sup>

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85. FISHER, *supra* note 63, at 22. There were a variety of public and private facilities that received the young women, but many of these facilities were religious institutions or placed restrictions on who they would accept. *Id.* at 18–19. Indeed, the only facilities available to African-American defendants were the House of Detention, City Prison, a state reformatory, or the Westfield State farm. *Id.* at 19. See generally Cheryl D. Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working-Class Black Families, and New York State’s Wayward Minor Laws: 1917–1928*, 151 U. PA. L. REV. 2077, 2095–2101 (2003).

86. KROSS, *supra* note 62, at 9–13. Kross explained that previously “special emphasis was laid on the immediate charges” and “[l]ittle effort was made to unearth facts which might indicate the seeming delinquency was motivated by unfortunate or undesirable factors extraneous to the immediate complaint.” *Id.* at 14.

87. KROSS, *supra* note 62, at 9–12. This information would be presented to the judge in a folder along with interview notes, correspondence, and reports from other agencies that may have had prior contact with the accused. *Id.* See also CLARKE, *supra* note 61, at 13 (explaining that the investigation between arraignment and first appearance was “a radical departure from the ordinary adult court routine” and that “question has been raised as to its legality,” but that it appeared to be permitted under section 913 of the Code of Criminal Procedure, which allows a magistrate to have before her “prior to or after adjudication” such information as will assist in deciding the case). Clarke also noted that “[r]egardless of the legal aspects . . . this procedure has more than justified itself socially,” as this information has allowed the court to determine in most instances that adjustment without the “stigma of adjudication” is possible. *Id.* at 28.

88. KROSS, *supra* note 62, at 14.

89. For instance, between March and November, 1936, in 105 of the 172 cases that received court attention, the defendants were examined by the Board of Health for venereal diseases. KROSS, *supra* note 62, at 41. Sixty-two of the young women were determined to be disease-free, while thirty-three were found to be infected. *Id.* Only eight of them were allowed to receive “ambulatory” treatment; the remaining twenty-five were hospitalized. *Id.* See also CLARKE, *supra* note 61, at 16. Clarke noted that, “[w]hile physical examinations are not

While under the court's supervision, the defendant repeatedly returned to court for conferences so the judge could maintain "personal contact in each case . . . until rehabilitation [was] assured."<sup>90</sup> Not unlike practices in today's drug courts, the judge conferenced the matter with court staff and other supervisory agents prior to each court appearance to learn about the defendant's progress.<sup>91</sup> If necessary, "changes of plans [would be] recommended" and defendants might be "remanded during long adjournments, for treatment at a hospital, or for correction and training at a private or public institution."<sup>92</sup>

This method of handling the case "on the basis of preadjudicated, unofficial, probationary supervision," as with the first remand and adjournment, was "predicated on the implied consent of the defendant."<sup>93</sup> Kross conceded that this consent generally was extracted from the defendant using "moral suasion,"<sup>94</sup> and that the court "accomplish[ed] its object[ives] by a resort to expedients, contemplated in [its] inception, but not clearly authorized" by law.<sup>95</sup> One such "expedient," Kross explained, was for "the Magistrate to sign a commitment [order] to the House of Detention, at the time of arraignment to be used if the contingency" arose.<sup>96</sup>

In the end, defendants who were "recalcitrant" or appeared to have "no prospect of an adjustment pursuant to the plans suggested," could be brought to trial, adjudicated wayward minors, and immediately sentenced to an institution.<sup>97</sup> Those who demonstrated that "desired results were underway," would have their cases

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required in all cases, in general, in the case of sex offenders or defendants referred to a place of detention or shelter, an examination for possible venereal infection is made by the Board of Health or by doctors attached to the institution." *Id.* The young women were also frequently tested for pregnancy. *Id.*

90. KROSS, *supra* note 62, at 14.

91. *Id.* at 14–15, 30–31 (explaining that these conferences took place before the defendant appeared in court, "thus providing ample opportunity for a full discussion of all factors without hampering the therapeutic treatment in the case").

92. *Id.* at 14–15.

93. *Id.* at 18.

94. *Id.* at 29.

95. Kross & Grossman, *Suggested Improvements*, *supra* note 61, at 439.

96. KROSS, *supra* note 62, at 30. According to Dorris Clarke, "commitment [was] resorted to only after all other expedients ha[d] been tried." CLARKE, *supra* note 61, at 10.

97. KROSS, *supra* note 62, at 18–19.

dismissed, but would continue to be monitored informally by Kross's volunteers.<sup>98</sup>

Like today's court reform advocates, Kross was a vocal spokesperson for her experiments. She made sure her courts received media attention for their unusual socio-legal approach—sometimes writing news articles herself—while she pressed for their replication across the country.<sup>99</sup> As early as the first year of its operation, Kross announced her hope that the Wayward Minors' Court would “serve as a model for an impetus to the establishment of similar Courts elsewhere . . . .”<sup>100</sup> Similar to today's reformers, she attempted to maintain records and statistics to share with others interested in replicating her experimental venue, claiming they demonstrated the success of her “scientific” approach.<sup>101</sup> In this way, Kross became well-known for her “improvisation” and “zeal.”<sup>102</sup>

Despite Kross's strong advocacy and personal public relations campaign, her criminal court experiments were largely criticized and ultimately abandoned. Kross's use of volunteers and outsiders to run her courts brought them—and her—under tremendous scrutiny.<sup>103</sup> For her alleged personal overreaching and privatization of the judicial system, Kross herself became the center of a Department of Investigation probe.<sup>104</sup>

During the 1950s, a study by various legal and social work experts indicated that Kross's approach to dealing with social issues through criminal courts was too fragmented.<sup>105</sup> It resulted in more confusion

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98. *Id.* at 17. In 1940, 264 of the 330 defendants who came through intake were referred for official court action and arraignment. CLARKE, *supra* note 61, at 51. However, of the 264 arraigned, only 123 had their cases dismissed without adjudication, and twenty-eight remained on “informal” probation at the end of the year. *Id.* Of the rest, ninety-six were adjudicated and placed on formal probation or committed to an institution. *Id.* The remainder absconded or were wanted on warrants. *Id.*

99. See, e.g., Anna M. Kross, *Hypocrisy Scored in Penal Methods*, N.Y. TIMES, Dec. 12, 1937, at 99; *Expand Social Service Work*, N.Y. TIMES, Oct. 12, 1938, at 21; see also Quinn, *Lady Vols*, *supra* note 57, at 8–9.

100. KROSS, *supra* note 62, at 14–15.

101. See *id.*

102. GELLHORN, *supra* note 64, at 227–31.

103. See Quinn, *Lady Vols* *supra* note 57, at 11–12.

104. *Id.*

105. GELLHORN, *supra* note 64; see also CMTY. SERV. SOC'Y OF N.Y., A NEW PATTERN FOR FAMILY JUSTICE: PROPOSAL FOR UNIFICATION OF COURTS DEALING WITH CHILD, YOUTH,

for litigants than help.<sup>106</sup> Similarly, running a variety of individualized, specialized courts—each with its own special social focus—was costly.<sup>107</sup> Indeed, Kross's programs were so costly that they never expanded in the way she envisioned, despite her own rigorous fundraising campaigns.<sup>108</sup>

Moreover, while social work intervention might be helpful for children and families in distress, critics believed this was best accomplished outside of the criminal court system.<sup>109</sup> Important commentators like Paul Tappan argued further that the court's treatment methods were not sufficiently effective or scientific,<sup>110</sup> but rather were reflective of the personal morality and biases of those involved in their creation.<sup>111</sup> When New York's courts were reorganized in the 1960s, the kind of therapeutic intervention common in the Wayward Minors' Court was found to be best suited for the civil family court setting.<sup>112</sup> The Magistrates' Court system was completely abolished in 1962.<sup>113</sup>

Indeed, this criticism and dismantling of Kross's problem-solving courts occurred as legal protections for accused persons were being expanded to include the set of rights well-accepted in today's

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AND FAMILY PROBLEMS 24 (1954) (describing New York City's Magistrates' system social courts, most started by Kross, as "a galaxy of courts with fragmented jurisdiction").

106. GELLHORN, *supra* note 64; *see also* CMTY. SERV. SOC'Y OF N.Y., *supra* note 105, at 5–7.

107. GELLHORN, *supra* note 64, at 227–31.

108. Kross even contributed her own funds to support the courts. KROSS, *supra* note 62, at 24.

109. *See* CMTY. SERV. SOC'Y OF N.Y., *supra* note 105, at 27 ("In general we believe it to be desirable to avoid an interlacing of the purely judicial function of making preliminary and final dispositions of cases with the purely administrative function of performing therapeutic social treatment services.").

110. *See supra* note 98 and accompanying text (referring to the nearly one-third of 1940 defendants whose cases resulted in formal disposition despite their participation in the Wayward Minors' Court, and the less than one-half who were rewarded with case dismissal by the end of the year); *see also* FISHER, *supra* note 63, at 27 (recounting that in 1952, of the 624 girls who were seen in the Girls' Term Court, a modified version of the Wayward Minors' Court, 357 (57.2 percent) were "convicted," with many being sent to reformatories).

111. *See generally* PAUL W. TAPPAN, CRIME, JUSTICE AND CORRECTION (1960); PAUL W. TAPPAN, DELINQUENT GIRLS IN COURT (Patterson Smith 1969) (1947) [hereinafter TAPPAN, DELINQUENT GIRLS]; *see also* Paul W. Tappan, *Unofficial Delinquency*, 29 NEB. L. REV. 547 (1949–50); Paul W. Tappan, *Treatment Without Trial*, 24 SOC. FORCES 306 (1945–46).

112. *See* Quinn, *Women's Court*, *supra* note 57, at 694.

113. *See id.* at 695; *see also* AARON D. SAMUELS, FAMILY COURT LAW AND PRACTICE IN NEW YORK 9 (1964).

criminal justice system.<sup>114</sup> For instance, during this same time period, the Supreme Court decided *Gideon v. Wainwright*, ensuring the right to counsel for indigent criminal defendants in certain cases.<sup>115</sup> The Supreme Court also recognized individual privacy and the right to silence as core values.<sup>116</sup> During this period, civil rights lawyers and the criminal defense bar became more organized and were widely recognized as an important force.<sup>117</sup> Kross's efforts to engage in social engineering through criminal courts were seen by many, including Tappan, as inconsistent with these emerging conceptions of individual civil rights and liberties.<sup>118</sup>

Kross's story has been largely left out of the accounts of contemporary reformers who claim that they have established the first problem-solving courts. But like experimental courts such as the Wayward Minors' Part from decades ago, today's problem-oriented venues utilize informal procedures and the coercive power of the court to try to change the way people live their lives. By adopting a carrot and stick approach in an attempt to "save" people, we again are engaging in social engineering through the criminal courts.<sup>119</sup> In so

114. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 299–303 (1993) ("Under Earl Warren, the Supreme Court moved boldly, using the incorporation doctrine as a sword to slash through state practices that the Court felt were retrograde and unfair... In form, the cases decided by the Supreme Court were often about procedures, due process, and so on; but on a deeper level they were about substance, content.").

115. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

116. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

117. In New York City, for example, the Legal Aid Society came to be assigned the primary defender in criminal court parts.

118. *See supra* note 111 (citing Tappan's work); *see also* FISHER, *supra* note 63, at 59 ("In some of our social courts, the defense counselor has become a peripheral figure in the proceedings, and in one court, at least, he has been discarded altogether."); FISHER, *supra* note 63, at 31 ("Apprised of the immoderate results of proceedings in this court, is it not occasion to question whether crime prevention might be better conducted elsewhere in an agency fashioned for the task? And must we not wonder, too, whether outcomes would be so extreme if girls, for whom court authority is necessary or desirable, were protected by more rigorous legal safeguards."); CMTY. SERV. SOC'Y OF N.Y., *supra* note 105, at 26–27 ("The legal rights of defendants, plaintiffs, respondents and petitioners would be more fully safeguarded by a court which keeps within the traditional limits of adjudication than would be the case were the court to make its dispositions according to the context of plans for remedial treatment, in the outworking of which justices may be occasional participants and for which they may develop a special attachment.").

119. *See* Quinn, *Women's Court*, *supra* note 57, at 713–22; *see also* MICHAEL WILLRICH, *CITY OF COURTS* (2003).

doing, we are returning to anachronistic practices that grew out of the Progressive Era's paternalistic concern for sexually active young women that many, even at the time, argued were deeply troubling.<sup>120</sup> Now, however, we are applying these practices to autonomous adults.<sup>121</sup>

#### CONCLUSION

As we embark on another new era and presidential administration, it is a good time to pause and take stock of our nation's efforts to solve its problems through criminal courts. To be clear, this Article is not written to squelch innovation. Indeed, it calls for innovation in the ways that we innovate.

Policymakers should consider all voices—agnostics, critics, as well as those from days gone by—as they work to improve courts.<sup>122</sup> The missing accounts discussed in this Article suggest that we should stop pouring money into problem-solving courts to simply encourage further experimentation. And true success in specialized courts should be measured not only by improved outcomes, but also by

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120. See, e.g., TAPPAN, *DELINQUENT GIRLS*, *supra* note 111. For a more contemporary critique of the protective, psychoanalytic practices of female-focused courts like Kross's "Home Term", see RACHEL DEVLIN, *RELATIVE INTIMACY: FATHERS, ADOLESCENT DAUGHTERS, AND POSTWAR AMERICAN CULTURE* 50 (2005). According to Devlin:

Assumptions of long standing in which most female delinquency was viewed as sexual in nature and economic in origin was replaced with a perspective that considered sexual behavior and other delinquencies as merely incidental to underlying psychological problems connected to girls' family experiences. Predictably, those disorders were rooted in Oedipal dysfunction—most prominently the problem of "Oedipal impasse," a diagnosis that owed much to ideas about adolescent Oedipal "frustration" and "conflict."

*Id.*

121. See Mae C. Quinn, *Reconceptualizing Competence: An Appeal*, 66 WASH. & LEE L. REV. 259 (2009) [hereinafter Quinn, *Reconceptualizing Competence*].

122. At the June 11, 2009, Anaheim NADCP Conference, Gil Kerlikowske, Director of the Office of the National Drug Control Policy, addressed the 2,500 attendees, congratulating them on their years of hard work and pledging the administration's ongoing support. See R. Gil Kerlikowske, Dir., Office of Nat'l Drug Control Policy, Statement at the National Association of Drug Court Professionals 15th Annual Conference (June 11, 2009) (transcript available at the White House Drug Policy Website, [http://www.whitehousedrugpolicy.gov/news/speech09/061109\\_kerlikowske.pdf](http://www.whitehousedrugpolicy.gov/news/speech09/061109_kerlikowske.pdf)). Indeed, the new "drug czar" publically delivered a letter from President Obama congratulating the attendees on their "life-saving" work, and noting the President's goal to support drug courts with \$117.9 million in federal funds in 2010 alone.



proven compliance with legal standards. New state courts, like new medications, should not receive federal support or approval without proper study, testing, and vetting, as well as delivery of promised results.

Perhaps in each jurisdiction one model problem-solving court could be created and carefully monitored over a substantial period of time with federal financing, not just by the court's planners and proponents, but by a truly cross-cutting panel of both legal and social-science experts.<sup>123</sup> The court's legal practices and therapeutic or other outcomes could be assessed to ensure that the institution complies with existing standards of law and delivers meaningful services that do, in fact, work to solve problems.<sup>124</sup> If necessary, courtroom processes and treatment modes could be modified over time to ensure that particularized best practices are developed and delivered. Further federal funding for replication of these institutions would not be provided until optimum features were established for a given jurisdiction, defendant population, and the like.

Future attempts to solve this country's problems should not be driven solely by the criminal court reformers who have dominated the conversation to date.<sup>125</sup> It is healthy to hope. But if we wish to avoid repeating history's criminal justice mistakes,<sup>126</sup> better informed, more

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123. Cf. Quinn, *Reconceptualizing Competence*, *supra* note 121.

124. See Jeremy Kohomban, Paul Schiller & Patricia O'Gorman, *Evidence-Based Practice—Developing a New Business Model from the Inside Out*, LINK: CONNECTING JUVENILE JUST. & CHILD WELFARE, Spring 2008, at 1, available at <http://www.cwla.org/programs/juvenilejustice/thelink2008spring.pdf>; see also Randal Lea, Mandy Lewis & Steven Hornsby, TEEN. DEP'T OF CHILDREN'S SERVS., PROGRESS TOWARD EVIDENCE-BASED PRACTICES IN DCS FUNDED JUVENILE JUSTICE PROGRAMS: REPORT TO GOVERNOR PHIL BREDESEN AND THE TENNESSEE GENERAL ASSEMBLY (2008), [http://www.tennessee.gov/youth/providers/585\\_12.31.08.pdf](http://www.tennessee.gov/youth/providers/585_12.31.08.pdf).

125. At the June 11, 2009, Training Conference of the National Association of Drug Court Professionals (NADCP) in Anaheim, California, marking the organization's fifteenth Anniversary, its Chief Executive Officer, West Huddleston, stated: "After twenty years of research and results we can now say that Drug Courts are the most successful justice intervention in our nation's history. . . . They are a solution to the vicious cycle of drugs and crime that has ensnared 1.2 million drug-addicted offenders in our criminal justice system. We must put a Drug Court within reach of every American in need." *U.S. Drug Czar Addresses 2,500 Drug Court Professionals, Voices Strong Support for Expanding Drug Courts Throughout the Nation*, REUTERS, June 11, 2009, available at <http://www.reuters.com/article/pressRelease/idUS146385+11-Jun-2009+PRN20090611>.

126. See Quinn, *Women's Court*, *supra* note 57, at 726.

balanced, and truly thoughtful discourse about problem-solving courts must inform our decisions.<sup>127</sup>

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127. In contrast, the Department of Justice's Office of Justice Programs Website currently displays a link to A NEW WAY OF DOING BUSINESS: A CONVERSATION ABOUT THE STATEWIDE COORDINATION OF DRUG COURT. This report is intended to be "a guide to governments as they think about how to coordinate problem-solving courts on a statewide basis." See ROBERT V. WOLF, CENTER FOR CT. INNOVATION, A NEW WAY OF DOING BUSINESS: A CONVERSATION ABOUT THE STATEWIDE COORDINATION OF DRUG COURT 1 (2009), [http://www.ojp.usdoj.gov/BJA/pdf/CCI\\_ps\\_roundtable.pdf](http://www.ojp.usdoj.gov/BJA/pdf/CCI_ps_roundtable.pdf). Its recommendations are drawn from a "roundtable conversation" involving "eighteen policymakers, researchers, and practitioners" brought together by the Center for Court Innovation and the Bureau of Justice Assistance. *Id.* Notably, not a single representative of the practicing defense bar was among the eighteen invitees, nearly all of whom are well-known problem-solving court supporters. See *id.* at 2.