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When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy

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WHEN GOOD INTENTIONS ARE NOT ENOUGH: PROBLEM-SOLVING COURTS AND THE IMPENDING CRISIS OF LEGITIMACY

*Timothy Casey**

Nearly 1700 "problem-solving courts" are currently in planning or operation in the United States. These specialized, alternative courts form at intersections of criminal justice and social policy. While drug courts comprise an overwhelming majority of these courts, specialized courts also address issues of mental health and domestic violence. These courts, collectively known as problem-solving courts, share a central principle: endorsement of the use of judicial power to coerce various programs of treatment.

The problem-solving courts represent a dramatic change in the function of the criminal courts, incorporating an experimentalist theory of governance, where evolving standards, continuous monitoring and collaboration replace existing structures. The procedural due process protections accorded to criminal defendants and traditional barriers to the use of coercion are eliminated, as the adversarial process is abandoned in favor of a collaborative endeavor involving the judge, prosecutor, defense attorney, probation officer, treatment provider and defendant. Significantly, the judge becomes part of the treatment team, rendering decisions not based on law or fact, but on a program of clinical treatment.

What happens when a judge changes from the traditional role of neutral arbiter to a new role as active participant in an ongoing process? Experimentalist governance offers an attractive and pragmatic solution to vexing social problems; when applied to the criminal justice system, legitimacy becomes critical to both the acceptance and the success of institutional reform. This paper describes the problem-solving court model, outlines the experimentalist features, and notes the similarities between current models and original juvenile courts one hundred years ago. The legitimacy challenges faced by the juvenile

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courts forecast impending difficulty for the problem-solving courts. An analysis of the legitimacy of problem-solving courts questions the long-term viability of the current "problem solving" mutation of the criminal courts. Finally, a case study of a recently implemented problem-solving court suggests that the experimentalist structure of these courts can, and should, be utilized to enhance the legitimacy of the problem-solving courts.

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I. INTRODUCTION TO THE PROBLEM SOLVING MODEL

The ideals that keep a social institution alive and functioning are never perceived with complete clarity so that even if there is no failure of good intentions, the existent institution will never be quite what it might have been had it been supported by a clearer insight into its guiding principles.[1]

THE problem-solving courts have been described as experimentalist institutions, founded on a "new" theory of governance—democratic experimentalism.[2] Democratic experimentalism rejects formalist institutions and static standards in favor of a system of rolling standards where efficient results are achieved through collaborative monitoring and a schedule of sanctions and rewards.[3]

1. Professor Lon Fuller describes the difficulty of sustaining legitimacy in decision-making institutions. Lon Fuller, *The Forms and Limits of Adjudication* (1959) (draft prepared for Jurisprudence course, on file with the Columbia Law Library). Edited version available at 92 HARV. L. REV. 353, 356 (1978).

2. Charles Sabel & Michael Dorf, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 834 (2000) [hereinafter Dorf & Sabel, *Drug Courts*].

3. *See supra* note 2, Dorf & Sabel, *Drug Courts*, at 841-42; Michael Dorf & Charles Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM L. REV. 267, 349 (1999);

Problem-solving courts employ the institution of the judiciary to solve socio-legal or public policy problems through the courts. These "alternative" courts have found a toehold where existing social or legal institutions have proven woefully inadequate or have failed altogether.[4] Problem-solving courts address juvenile delinquency, drug abuse, domestic violence, and mental health by promoting programs of treatment designed to address the root causes of criminal behavior. In each of these contexts, treatment presents an attractive alternative to the standard criminal justice system.[5] The focus on treatment means that these courts rely heavily on social and medical science for guidance in the definition, diagnosis, prognosis, treatment, and cure of sickness or disorder.[6]

The problem solving model changes the structure of the court with respect to what is decided and who makes the decision. For most problem-solving courts, the relevant issue is not guilt, but rather who is entitled to treatment and whether the treatment is "successful." The discretionary authority of the judge expands in problem-solving courts because treatment decisions require the judge to rely on extralegal authorities, such as medical or social science.[7] Further, the judge shares decision-making responsibilities with the other participants in the court. In many instances, clinical experts and treatment providers play a significant role in deter-

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Charles Sabel, *A Quiet Revolution of Democratic Governance: Towards Democratic Experimentalism*, *in* GOVERNANCE IN THE 21ST CENTURY 123 (2001); Archon Fung, Bradley Karkkainen & Charles Sabel, *After Backyard Environmentalism: Toward a Performance Based Regime of Environmental Regulation*, 44 BEHAVIORAL SCIENTIST 690 (2000); James Liebman & Charles Sabel, *A Public Laboratory Dewey Barely Imagined: the Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 184 (2003); Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016 (2004).

4. The problem solving model flourishes at intersections of criminal law and social policy, and in categories of cases where criminal convictions are either difficult to obtain or unfair to enforce.

5. For example, it seems unfair to punish children in the same manner as adults, even when they commit the same act. Likewise, in cases where drug offenses are related to a defendant's addiction, it seems unfair to impose long prison sentences. In some cases, it may be difficult to establish a culpable *mens rea* where the defendant suffers from a mental illness. And in many domestic violence cases it is difficult to maintain a cooperative relationship between complainants and prosecutors where a conviction will result in a jail sentence.

6. The increased reliance on treatment might signify a resurgence of the "rehabilitative ideal." *See generally* FRANCIS ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1983) (describing the shift, beginning in the early 1970s, away from the general acceptance of rehabilitation as a recognized penal goal). But note that the problem-solving courts promote "treatment" in a limited number of circumstances, and only as a qualified exception, rather than as a default rule. It would be difficult to infer from the proliferation of these courts a wholesale resurgence of the rehabilitative ideal. More likely, they represent further evidence of its decline. By isolating the most sympathetic classes of criminal cases, they provide an answer to the perceived injustice stemming from non-discretionary sentencing standards.

7. Of course many decisions rely on social or medical science, and it is not new to suggest that social science has gained recognition as a type of authority along with common law precedent or statutory materials. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897); Muller v. Oregon, 208 U.S. 412, 421-23 (1908); Brown v. Board, 347 U.S. 483, 493 (1954); *see generally* JOHN MONAGHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW (The Foundation Press, Inc., 1988).

mining whether a program is working and whether a participant is non-compliant.[8] The expanded discretion and the dilution of power might be of less concern in civil proceedings, but problem-solving courts are tied to criminal proceedings, and non-compliance with a treatment plan results in the criminal penalty of loss of liberty. Further, the problem-solving courts openly advocate the use of coercion as a permissible, and necessary, component of successful treatment.[9]

By permitting judges to step out of the role of neutral arbiter, problem-solving courts differ from traditional courts in ways that arguably define the essential nature of a court.[10] Professor Abram Chayes described the difference between the traditional roles of a court and the roles that courts assumed in large-scale public law litigations.[11] The Chayesian description provides a standard against which the problem solving model can be compared. A traditional court includes a retrospective view, an adversarial environment, a reliance on positive law, a static operational model, appellate review, and a primarily adjudicative function.[12] Problem-solving courts, on the other hand, include a prospective view, collaborative environment, reliance on sociological theory, an adaptive operational model, no appellate review, and a primarily therapeutic function.[13]

Espousing a collaborative approach, problem solving judges actively participate in the recovery process alongside attorneys, social workers and treatment providers.[14] These significant differences raise questions

8. Although social science and medical science frequently visit the traditional courtroom, the science is normally used instrumentally, as a means to determine a particular legal fact or issue. With the problem-solving courts, however, the science is the end-purpose of the court.

9. An article by three well-known advocates of the drug treatment courts describes the role of coercion: "The procedures of the treatment program reflect the premise that the DTC [drug treatment court] utilizes the coercive power of the court to encourage the offender to succeed in completing the treatment program." 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, 475-76 (1999) [hereinafter, Fulton-Hora, et al.].

10. Professor Chayes described the features of traditional courts. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283-84 (1976). Chayes's account of the changes to the judiciary provided evidence that the shift to a more discretionary judiciary was not a new development. *Id.*; *see also infra* Section I, for a discussion of the same type of judicial discretion in the juvenile courts over a hundred years ago.

11. Chayes, *supra* note 10, at 1283-84.

12. *Id.*

13. The key components of a problem-solving court are the integration of treatment services into the criminal justice system through a nonadversarial, collaborative approach. *2000 Drug Court Survey Report. Part I: Judicial Perspectives.* OJP Clearinghouse and Technical Assistance Project. American University, October 2001, at 66 (Draft, *available at* http://spa.american.edu/justice/documentviewer.asp?ID=379.); *see also* Fulton-Hora et al., *supra* note 9, at 476.

14. The active role of the judge differs from the traditional interaction between criminal courts and treatment programs because the judge is not separated from the treatment program. For example, a traditional court might sentence X to probation, with the express condition that X enter and complete a drug program. If the Department of Probation

of whether problem-solving courts are courts at all,[15] and whether the proliferation of this new image of judicial temperament will affect perceptions of legitimacy of the courts.

II. DEVELOPMENT OF THE DOMINANT PROBLEM-SOLVING COURT MODELS: JUVENILE COURTS AND DRUG COURTS

The drug treatment courts increase the discretionary power of the judge. Claims that the shift to a discretionary role for judges is a recent phenomenon ignore the history of another system of discretionary, treatment-based judging: the juvenile courts. In many ways, the juvenile courts were the original problem-solving courts and any discussion of modern forms of discretionary judging should include reference to the history of the juvenile courts. That history foreshadows the challenges for modern problem-solving courts, and provides a cautionary tale of the pitfalls to a discretionary approach.

Similar factors contributed to the development of two dominant models of problem-solving courts. The juvenile courts were seen as a way to efficiently handle the increased numbers of cases involving children. The drug courts emerged from a criminal system plagued by the collateral damage from a war on drugs. Increases in the number of drug cases coincided with legislatively mandated increases in the sentences imposed for cases and restrictions on plea bargaining, such that cases that previously would have settled were litigated furiously.

Both juvenile courts and drug courts emerged concurrently with new scientific theories and shifts in jurisprudential thought. For juvenile courts, the scientific study of causes of criminality merged with a sense of societal responsibility for children. The acceptance of the idea that the state could or should benevolently intervene on behalf of children—that the state should act *en loco parens*—justified separating juveniles from adult offenders.[16] The problems of dependent children and delinquent children were perceived through the same lens—both required the state to accept responsibility as *parens patriae.* For drug courts, the disease

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alleges that X did not comply with the terms of probation, then the case would come before the judge again. The judge might hear witnesses from the department of probation or from the treatment facility in order to determine the legal issue of whether X violated the terms of his probation. In the problem-solving courts, however, the judge herself helps to decide what type of program is best for X. If the defendant does not succeed, then the judge, along with others, will decide that X has failed. The judge thus becomes part of the treatment.

15. Indeed, a number of scholarly commentators have noted that problem-solving courts look more like administrative agencies than courts. *See* Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 948 (2003) [hereinafter Dorf, *Indeterminacy*].

16. Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106-07 (1909); *see generally* David Tanenhaus, *Policing the Child: Juvenile Justice in Chicago, 1870-1925* (1997) (doctoral dissertation, University of Chicago, Department of History) (copy on file with the author) [hereinafter Tanenhaus, *Policing the Child*]; Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* 209 (2003).

theory of addiction, based on the idea that drug addiction is a medical, as opposed to a penological, problem led to the adoption of treatment as an alternative to incarceration. Both models benefited from changing shifts in popular jurisprudential theory, providing judges with a theoretically reasoned justification for their actions. Juvenile courts adopted sociological jurisprudence, and the drug courts, therapeutic jurisprudence.[17]

The development of both models is marked by the extraordinary contributions of a few dynamic individuals who, by virtue of their "charisma," were able to navigate the treacherous waters created by the volatile combination of treatment and punishment theories. Finally, both courts obtained political consensus and financial support from diverse sources.

A. Juvenile Courts

1. The Legal Prehistory

A brief exploration of the era preceding the emergence of the juvenile courts evidences the deep philosophical divide over the proper interventionary role of the state into the lives of citizens. Antebellum America struggled with the manner in which the government could or should intervene in private lives, even where the intrusion was intended to guarantee basic human rights. The legislative and judicial actions in the post-Civil War era highlight the tension between a traditional notion of noninterference and a new recognition of the state as the proper authority to guarantee the welfare and basic rights of its citizens.[18] State interaction with children echoed wider concerns about balancing individual liberty and social policy, and long before the formal establishment of specialized juvenile courts, the courts played an integral part in demarcating the appropriate limits of state intervention.

In the mid-1800s, problems with juveniles, whether based on dependency or delinquency, were usually resolved with commitment to mandatory reform schools. Commitment proceedings were informal and usually final. Complaints about the lack of procedure and claims of arbitrariness were increasingly taken to the courts. Initially, the decisions reflected a preference for the individual liberty interests of the child and the family over the interests of the state. For example, in 1869, the Illinois Supreme Court granted sixteen writs of habeas corpus mandating the release of children who had been committed to reformatory

17. While therapeutic jurisprudence is not a dominant theory, it is one onto which the problem-solving courts have attached. Moreover, other jurisprudential theories, such as restorative justice, might apply at least as well as therapeutic jurisprudence. *See generally* James D. Nolan, Drug Courts In Theory and In Practice (2002); John Braithwaite, Restorative Justice & Responsive Regulation (2002).

18. *See* U.S. Const. amends. XIV, XV; Civil Rights Act of 1866 (vetoed by President Johnson); Civil Rights Act of 1875, Civil Rights Cases, 109 U.S. 3 (1883) (striking down the Civil Rights Act of 1875). These same issues resurfaced in the aftermath of *In re Gault*, 387 U.S. 1 (1967). Tanenhaus, *Policing the Child*, *supra* note 16, at 29-31.

institutions.[19]

In 1870, a landmark Illinois case, *Ex rel O'Connell v. Turner*, overturned the statute that authorized a child's commitment to the reformatory institution for as long as the institution believed the commitment necessary.[20] The petition on behalf of the committed boy relied on the equal protection provisions of the newly enacted Illinois Constitution.[21] The court held that the child was an "individual" within the meaning of the constitution, and therefore accrued all of the civil rights and liberties guaranteed thereunder, including the right to be free from indiscriminate detention.[22] Both the *Turner* decision and the prevalence of habeas petitions reflected national sentiments regarding the importance of individual liberty.[23]

In the decades that followed the *Turner* decision, however, new public policies led to a reordering of liberty interests and social goals. The debate over mandatory public education marked a shift in favor of social policy over individual determinism with respect to juveniles, and foreshadowed the idea that the state was responsible for the well-being of its children.[24] In *In re Ferrier*,[25] the Illinois Supreme Court retreated from the rights-based reasoning in *Turner*, favoring instead a rationale based on the state as *parens patriae*. In *Ferrier*, a nine-year-old girl was found truant and dependent.[26] Because the statute then in effect called for a trial by six jurors, instead of twelve, the girl contended that her commitment to an "industrial school" violated due process.[27] The court held that

19. Tanenhaus, *Policing the Child*, *supra* note 16, at 21 (citing CHICAGO REFORM SCHOOL ANNUAL REPORTS, Fourteenth Annual Report at 6).

20. 55 Ill. 280 (1870).

21. *Id.* at 288. The Illinois Constitution contained provisions analogous to the Federal Constitution. The state constitution, however, went far beyond the federal constitution in the delineation of individual rights. Petitioner cited the right against deprivation of "life liberty or property without due process of law," and the "right of trial by jury." ILL. CONST., art II, §§ 2, 5 (1870). Petitioner also cited the right to penalty "proportioned to the offense," and the right to find a "certain remedy in the law for all injuries and wrongs." ILL. CONST., art. II, §§ 2, 19. *See* Tanenhaus, *Policing the Child*, *supra*, note 16, at 36, citing Brief of Petitioner.

22. *Turner*, 55 Ill. at 281.

23. Historically, the late 1860s and early 1870s reflect a period of optimism in the Reconstruction, where measures (13, 14 and 15th Amendments, Civil Rights Acts of 1866 and 1875, debates over universal suffrage) were undertaken to insure the equal protection of all individuals under the law. Tanenhaus, *Policing the Child*, *supra* note 16, at 26-30. *See* HERBERT SPENCER, SOCIAL STATICS; OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED, 190-97 (1865) (children enjoy basic rights to liberty). *See also* Sanford J. Fox, *Juvenile Justice: An Historical Perspective*, 22 STAN. L. REV. 1187, 1213 (1969-1970).

24. *See In re* Ferrier, 103 Ill. 367 (1882) (recognizing the idea of *parens patriae*, and finding an industrial school constitutional by distinguishing criminal and chancery proceedings). Similar debates occurred in other jurisdictions. *See, e.g.*, Milwaukee Indus. Sch. v. Supervisor of Milwaukee County., 40 Wisc. 328, 337, 371-72 (1876); Prescott v. State, 19 Ohio St. 184, 187-88 (1869); Roth v. House of Refuge, 31 Md. 329 (1869).

25. *Ferrier*, 103 Ill. at 371. *Cf.*, *Ex parte* Crouse, 4 Whart. 9, 11 (Sup. Ct. Pa. 1839).

26. *Ferrier*, 103 Ill. at 368.

27. The statute in question, An Act to Aid Industrial Schools for Girls, (1879), was passed in the aftermath of the *Turner* case, which invalidated the existing statute as unconstitutional.

the state's position "of *parens patirae*" to the child imposed a duty to restrain her liberty interests where "the child's welfare and the good of the community manifestly require."[28] While *Turner* had cast juveniles as individuals in the eyes of the state, the importance of developing an educated society meant that the state should impinge on the liberty of children for their own and society's future good.

In Chicago, and other industrial centers, children were increasingly relegated to "almshouses," private placement centers, and the jails.[29] The growing numbers of children in jails, or otherwise detained, became especially problematic in the industrialized urban centers, with immigrant and poor children disproportionately affected.[30] A growing progressive movement sought change using two policy arguments: first, the state should undertake the education and support of dependent children; and second, the existing, predominantly Protestant, moral order of society should be preserved. In Chicago, Jane Addams, the founder of Hull House and a proponent of education for children, became the dominant voice for education-based reform. The Juvenile Protection Associations, often staffed by the wives of prominent politicians and businessmen, furthered Protestant ideals of morality.[31]

In sum, the juvenile courts emerged from an era characterized by the demarcation of the line of appropriate government intervention into the private lives of its citizens, especially where the intervention was seen as necessary to protect fundamental rights or to advance social policy. More specifically, the juvenile courts appeared at a time when sentiments seem to have shifted in favor of the advancement of social goals such as universal education, integration of immigrant populations, and development of a sustainable industrial workforce within the traditional moral and social framework. Finally, the late nineteenth century saw a dramatic increase in the power of the judiciary.[32] As large-scale disputes found settlement only in the courts, the role of courts as ultimate decision-maker became increasingly socially accepted. These trends converged to create an opportunity for the judiciary to extend its influence into the social fabric of society.

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28. *In re* Ferrier, 103 Ill. at 368.

29. *See* David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE (Margaret Resenheim et al. eds., 2002) [hereinafter Tanenhaus, *Juvenile Courts*].

30. *Id.*; *see also* Michael Willrich, City of Courts (2003), *supra* note 16. Willrich noted the dramatic increase in immigration to Chicago around the turn of the century, and the emergence of dance halls as hotspots of social interaction among immigrant populations. *Id.* at xxx.

31. Willrich, *supra* note 16, at 208.

32. The decisions of the Supreme Court in overruling acts of Congress and state legislatures represented a flexing of judicial power. The trend began in the post Civil War years and culminated with Roosevelt's court packing scheme.

2. *The Emergence of Social Science and Sociological Theory*

Science provided a rationale for state intervention through the courts. The widespread acceptance of the scientific method as the blueprint for rational analysis led to an application of scientific analysis to new and previously untouched fields of study. Human behavior became increasingly subjected to study and analysis, and theories of causation developed, particularly in the field of criminal behavior.

Influenced by social Darwinism and European criminal theory, the idea of predisposition to criminality gained momentum in America. The ideas of Cesare Lombroso—particularly the concept of criminal phenotypes—were seized upon by budding American criminologists to confirm preexisting suspicions of a "criminal class."[33] Although Lombroso acknowledged the effect of social conditions, the dominant view of his work did not include reference to non-biological factors.[34] The treatment of criminality as one of biological determinism fit nicely within a larger vision of science as an operation of identification and classification.[35] Logical inference permitted leaps from biological determinism to eugenics and then to a policy of neutralization and elimination.[36]

The idea of external causation, whether a natural predisposition or a reflection of social conditions, required a rethinking of traditional notions of criminal liability. The system of criminal law developed from a natural law tradition, where it was assumed that people expressed free will and choice. These notions were challenged by biological, social or psychological predispositions. Did criminals choose to break the law, or were they driven by other, discoverable causes? The absence of free choice, of course, dramatically altered the theory of deterrence.[37] The idea that a criminal act did not result from a free choice, but was due to some extrinsic and discoverable force, severed the causal connection necessary to justify some theories of punishment.[38]

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33. ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF JUVENILE DELINQUENCY 20 (1969). Platt also notes the influence of Herbert Spencer. *See also* RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915, 31-50 (1945).

34. For a series of anecdotes that illustrate the popularity of these sentiments, *see* PLATT, *supra* note 32, at 15-45. Platt notes the infatuation of American sociologists with the work of Herbert Spencer and Cesare Lombroso, and their "emphasis on Darwinist and biological images of human behavior." *Id.* at 19. *See also* HOFSTADTER, *supra* note 32, at 5.

35. The effect of this larger vision of science affected the study of law as well, as evidenced by Langdell's scientific approach, and the formalist notion that the law had only to be discovered. *Cf.* OLIVER W. HOLMES, THE COMMON LAW (1881).

36. Criminologist Leon Radzinowicz thus justified "eradication of elements that constituted a permanent and serious danger." IDEOLOGY AND CRIME 55 (1966), quoted in PLATT, *supra* note 32, at 21.

37. As a method of social control, deterrence presupposes that punishment will deter future behavior by the same individual (specific deterrence) or by other people (general deterrence). The application of deterrence theory, however, is somewhat more complicated.

38. The goals of punishment are generally thought of in four ways: incapacitation, rehabilitation, retribution, and deterrence. Deterrence can be both general—the punishment of the individual deters other individuals in society from engaging in the prohibited con-

Ultimately, however, social Darwinism failed to capture the entire spectrum of criminological theory in America. This failure can be attributed to three main factors: the influence of professional classes on the development of criminology; the persistence of religious ideals of salvation, particularly as applied to children; and increased attention to the detrimental effects of an urban, industrial environment on the human condition, again, particularly as applied to the healthy development of children.

The professionals with the closest degree of contact with the study of criminals gained advantage by leaning toward a treatment model. The doctors who directed much of the research in criminology found it difficult to abandon the medical treatment paradigm.[39] Perhaps as a result of subconscious self-promotion, doctors suggested treatments and cures, even for those whose "illness" was the result of a hereditary condition.[40] Another profession, prison guards, organized into "correctional associations" and sought to increase their status by undertaking a role as treatment providers as opposed to "custodians of the pariah class."[41]

Echoes of Christian thought infused a belief in the possibility for rehabilitation, especially for children.[42] The idea that a child could be predisposed to a life of crime was difficult for the religiously inclined to accept, as it precluded salvation and active deific intervention. Since it was impossible to imagine a world with these constraints, the deterministic hypothesis was rejected, or at least modified, to include the possibility of redemption.

As urban centers grew in size and virulence, industrialization and its effect on family life and children was viewed as an important, if not primary, factor in developing criminal behavior. Criminology presented social science with perhaps its most difficult problem in multivariable causation. The complexity of urban society made it impossible to isolate

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duct—or specific—the punishment of the individual deters that individual from engaging in the conduct in the future. *See generally* THOMAS HOBBES, LEVIATHAN; JEREMY BENTHAM, PRINCIPLES OF PENAL LAW; LAFAVE, CRIMINAL LAW (3d ed. 2000). I return to some of these ideas in Part III. The narrow focus of this paper, however, does not permit an expansive discussion of penal theory. Here my aim is only to note the connection between theories of punishment and basic notions of human nature, and not to delve into the legitimacy of any particular penal theory.

39. PLATT, *supra* note 33, at n.29. "The self image of penal reformers as doctors rather than guards and the domination of criminological research in the United States by physicians, helped to encourage the acceptance of 'therapeutic' strategies in prisons and reformatories." *Id.*

40. "Perhaps what is most significant is that physicians furnished the official rhetoric of penal reform. Admittedly, the criminal was 'pathological' and 'diseased,' but medical science offered the possibility of miraculous cures." PLATT, *supra* note 33, at 29.

41. PLATT *supra* note 32, at 29-31. Prison guards stood to gain status and respect if part of their role was the rehabilitation of the criminal as opposed to acting merely as the "custodian of the pariah class." *Id. See generally* LUBOVE, THE PROFESSIONAL ALTRUIST (1965).

42. *See, e.g.*, PLATT, *supra* note 32. But Platt also notes the influence of associations of corrections workers in neutralizing the fatalistic implications of social Darwinism. *Id.* at 29-31.

causal chains and test null hypotheses under purely scientific conditions, but it became increasingly clear that social circumstances could not be ignored as a cause of criminal behavior.

As the century drew to a close, theories of sociological jurisprudence expanded. Roscoe Pound led the academic charge, advocating a more active role for judges and courts.[43] According to Pound and others, judges should take notice of social facts and forces. The era of "mechanical" application of the law had passed forever.[44] Significantly, this jurisprudential theory offered a rational explanation for separating juveniles from adult offenders and for embracing a rehabilitative ideal.[45]

3. *The First Juvenile Courts: Chicago, Illinois*

A group of Chicagoans conspired to improve the treatment of children in the city through the creation of a specialized juvenile court that could supervise all aspects of juvenile delinquency and dependency. This coalition included Julia Lathrop, a newly appointed commissioner for the State Board of Charities; Lucy Flower, a "Gilded Age Patron" with prominent Protestant charity groups (and an orphan herself); Jane Addams, founder of the Hull House, a unique, education-based refuge for children; and Harvey Hurd, a well-known jurist and the author of the original enabling legislation.[46] Like a perfect storm, these actors brought together the critical forces necessary to create a new judicial institution: a commitment to social change, political connections to the power elite, and the promise of financial backing from charitable organizations.[47]

Hurd skillfully crafted the initial legislation so that the new court, though enacted by the state legislature, would only exist in Chicago.[48] On July 1, 1899, the Illinois legislature enacted the statute creating a new court with original jurisdiction over cases involving dependent, delinquent and neglected children.[49] With a specially trained probation staff, the court opened with widespread support from prosecutors, the bar asso-

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43. *See generally*, Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). Sociological jurisprudence recognized that judges do make law, and that the law that judges make should reflect the social realities, and thus arguments based on social science could be made in addition to, or in lieu of, strictly legal arguments. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 112-13 (1922).

44. *See* Pound, *Mechanical Jurisprudence*, *supra* note 42.

45. *See* ALLEN, *supra* note 6.

46. Tanenhaus, *Policing the Child*, *supra* note 16, at 110-28.

47. For example, haggling in committee resulted in a limitation to the court's jurisdiction once a child had been placed with a private school, protecting the financial interests of the schools. *Id.*

48. The statute only applied to counties with a population in excess of 500,000, and thus applied only to Chicago, exempting rural counties from additional expenditures associated with establishing separate courts. ILL. JUVENILE CT. ACT (1899). Tanenhaus, *Policing the Child*, *supra* note 16 at 141. The new court thus enjoyed the legitimacy of legislative enactment.

49. An Act for the Treatment and Control of Dependent, Neglected and Delinquent Children," 1899 Ill. Laws. *See also* Tanenhaus, *Policing the Child*, *supra* note 16, at 121-40.

ciation, and the community at large.[50] Although the court enjoyed the support of politicians, it received no state funding, and as such, depended on Flower and her associates in the Protestant charity world for financial support.

Many states followed the lead of Illinois and passed legislation authorizing specialized juvenile courts. In New York, however, the juvenile courts were established without legislative fiat. In 1901, a judge in Buffalo decided of his own accord to conduct special children's sessions twice each week.[51] And although New York City quickly established children's courts, legislative authority for these courts did not arrive until twenty years later when, in 1924, the legislature established jurisdiction for a children's court.[52]

4. *Juvenile Court in Operation*

William Tuthill headed the juvenile court during the first few years, but it was his replacement, Julian Mack, who proved to be a visionary leader and who greatly shaped the design and implementation of juvenile courts. As one of the first judges in Chicago's Juvenile Court, Mack implemented many of the characteristic features of juvenile courts. His seminal article, *The Juvenile Court*, eloquently described the theory of juvenile court: if the state's authority to intervene in the lives of children stems from the state's sitting in place of a parent, then the state should seek to replicate the environment that the child would enjoy in a family setting.[53] The state, in the form of the judge, accepted the role of father and counselor, looking after the needs of the child and preventing a "downward career."[54]

By and large, the court had to develop its own procedures. For example, Judge Mack found the court overwhelmed by a requirement that the court hear every complaint, so he devised a system where probation officers triaged complaints by conducting quick and informal investigations before filing a formal complaint. This greatly increased the efficiency of the court by reducing arbitrary complaints, but it also vested tremendous unchecked authority in probation officers.[55]

The intentions of the framers of juvenile courts were admirable. They sought to remove the juvenile from "[t]he apparent rigidities, technicalities, and harshness . . . observed in both substantive and procedural crimi-

50. Tanenhaus, *Policing the Child*, *supra* note 16, at 145-46.

51. *See* ALFRED KAHN, A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN'S COURT 30 (1953).

52. *Id.* at 31. In 1924 the New York enacted a statute providing jurisdiction for a children's court separate from the criminal court.

53. *See* Mack, *supra* note 16, at 114.

54. *Id.* at 120.

55. By "unchecked," I refer primarily to false negative errors, where the probation officer did not file a complaint when one should have been filed. A false positive error, where the probation officer filed a complaint that should not have been filed, would, in theory, be caught by the court.

nal law."[56] The model shifted from punishment to treatment: "The child was to be 'treated' and 'rehabilitated,' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."[57] Accordingly, judges were permitted to exercise greater freedom in fashioning individual remedies that were consistent with the treatment goals of the court. Further, early judges altered court processes in order to achieve efficiency. But this increased efficiency permitted a diffusion of judicial power: non-judicial officers made decisions, such as the validity of a complaint, that were previously reserved for judges.

5. *Early Challenges to Legitimacy*

Alteration of procedural process and diffusion of judicial power led to challenges to the legitimacy of the juvenile courts. After the Illinois Supreme Court upheld the state's authority to intervene in the child's life even where the child's liberty interests were compromised, the constitutionality of the juvenile courts' authority was repeatedly challenged, both in Illinois and in other jurisdictions.[58] The *Ferrier* case marked a transition from an era focused on individual liberty to one marked by social progress. But arbitrary exercise of authority and deprivation of liberty without due process were still subject to constitutional challenge.

Early challenges examined whether the statutes provided sufficient procedural protections to satisfy due process concerns. The California Supreme Court found unconstitutional a statute that authorized removal of any case from the criminal court to the juvenile court where the accused was under eighteen, and permitted commitment of the juvenile where the court was "satisfied from the evidence that such commitment ought to be made."[59] Significantly, the California court did not distinguish juvenile commitment from criminal imprisonment with respect to the deprivation of liberty. Further, the court recognized a liberty interest of the parents in holding that the child cannot be taken from their custody without due process.[60] The court found the commitment of a fourteen-year-old boy to the Whittier State School until the age of majority unconstitutional as a "judgment of imprisonment" without a jury trial.[61] The court also noted that the judgment was equally void as an "award of guardianship" because the boy's parents were not parties to the action, and there was no finding that they were unfit.[62]

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56. *In re* Gault, 387 U.S. 1, 15 (1967).

57. *Id.* at 15-16.

58. *Id.* at 17, n.15, 18. *See* Waite, *How Far Can Court Procedure Be Socialized Without Impairing Individual Rights*, 12 J. CRIM. L. & CRIMINOLOGY 339, 340 (1922). *Cf.* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 167, 174 (1966).

59. *Ex Parte* Becknell, 119 Cal. 496, 497-98 (1897).

60. *Id.*

61. *Id.*

62. Thus the California Supreme Court recognized the significance of the liberty interest of the parents in their right to "care, custody, society and services" of their children. *Id.*

Later cases focused on the capricious exercise of power by the juvenile courts. In the highly publicized case of *Lindsay v. Lindsay*, a boy was removed from his mother during a visit to Chicago from another state.[63] The state based its intervention on the allegation that the boy's mother was an improper guardian due to her affiliation with a religious organization and the leader of that organization.[64] The lower courts agreed with the state and upheld the removal of the boy to state facilities.[65] In a sharp rebuke, the Illinois Supreme Court reversed the decision, finding that there was no evidentiary basis to support removal.[66] The *Lindsay* decision was widely reported in the press and had a great impact on the legitimacy of the juvenile court.

In later years, critics of the juvenile courts argued that the high degree of intervention into the family was nothing more than an attempt to control and assimilate an immigrant population. In *The Child Savers*, Anthony Platt questioned the benevolent intentions of the early juvenile court reformers.[67] Instead, he argued, the juvenile courts were instruments of Protestant evangelism directed to controlling the morality of immigrants. An unprecedented degree of access into the intimate details of family life and broad grants of judicial discretion combined to allow the state to dictate normative social behavior, with the threat of separating children from parents as a powerful enforcement tool.[68] Moreover, the power of the state intruded into the most fundamental of relationships in a manner designed to coerce or restrict certain behaviors and morals among a targeted group of people. Platt's critique of the exercise of authority undermined not only the practical result of the juvenile courts, but also their legitimacy.

6. *Idealism Lost*

The experience of Chicago was by no means unique. By the 1920s, most states had developed a form of juvenile courts to resolve the difficulty presented by juvenile delinquents and dependents. These attempts led to frequent challenges to the statutes and their implementation.[69]

The juvenile courts in the 1930s and 1940s seemed to operate under the radar. By the 1950s, however, researchers noted the dramatic failures of the juvenile justice system. Mack's ideal of a "foster" home was replaced with overcrowded houses of detention, complete with bars on the windows and locked doors. Job training resembled forced labor and disci-

63. 257 Ill. 328 (1913).

64. The court noted that "[t]here is no proof in the record that the Mazdaznan religion is an immoral religion or that Hanish himself is an immoral man or engaged in immoral practices. Nor is there any proof that in his relations with the boy or the boy's mother he was guilty of any conduct that rendered him an unfit associate." *Id.* at 340.

65. *Id.* at 331.

66. *Id.*

67. *See generally* PLATT, *supra* note 32.

68. *See* Platt, *supra* note 32. *See also* Tanenhaus, Policing the Child, *supra* note 16, and Allen, *supra* note 6, at 870.

69. Tanenhaus, *Juvenile Courts*, *supra* note 28, 66-69.

pline was harsh and frequently administered. Instead of rehabilitating and healing, juvenile courts were, in fact, punishing.

The transition from a treatment-based ideology to a punishment-based system turned the formative ideology inside out. Children received neither the procedural and substantive due process rights accorded to defendants in criminal court, nor the benefits of a treatment protocol.[70] Children caught in the system did not improve their prospects for gainful employment. Moreover, dependent children drew the same lot as delinquents, for under the treatment philosophy, it mattered little whether the child had committed an offense or not. Just as the asymptomatic should be treated along with the symptomatic, the operative inquiry was whether the child needed treatment, either because of his actions or his status, and not whether he had actually committed an offense.[71] When the treatment model turned punitive, the juvenile courts failed not only as treatment providers, but critically, and more devastating to the judicial institution, they also failed as courts.

Indeed, the argument can be made that the juvenile courts were never designed as courts, but rather, as social control and welfare institutions that took instrumental advantage of the coercive power of the judicial system. The question, which is equally applicable to the drug courts and other forms of problem-solving courts, is what happens when the veil is lifted, and we discover that the institution is not behaving like a court at all? With the juvenile courts, the answer was to mandate procedural rules and to make these courts act more like the judicial institution they professed to be.

7. *Resurrection of Rights: The U.S. Supreme Court Cases*

Until the late 1960s, the juvenile courts functioned in a land of their own. The broad discretion deemed necessary to provide individual solutions for individual children effectively shielded the courts from scrutiny and accountability. What began as authority to deviate from the procedures in criminal court in order to meet the best interests of the child devolved into a system of inequity and arbitrariness, as the juvenile justice system appeared more and more like the criminal justice system from which it originally sought separation. In the early 1950s, a spike in the number of children placed in detention facilities—essentially jails for children—magnified the problem.[72] Worse still, the constitutional due process guarantees of the criminal justice system were noticeably absent from juvenile courts. The system was not working.

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70. *See, e.g.*, Kent v. United States, 383 U.S. 541, 556 (1966) (citing to Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WISC. L. REV. 7 (1965); *see also In re* Gault, 387 U.S. 1 (1967).

71. Karl Menninger, *Verdict Guilty, Now What*, HARPER'S MAGAZINE, Aug. 1959, at 60-64, *reprinted as Therapy, not Punishment, in* PUNISHMENT AND REHABILITATION 134-35 (Jeffrey Murphie, ed. 1973).

72. *See* Tanenhaus, *Juvenile Courts*, *supra* note 29.

In a series of cases in the late 1960s, the U.S. Supreme Court put a spotlight on the failed juvenile court system. While in theory the courts were supposed to be acting in the best interests of the child, in fact, the courts were using their wide discretion to deprive children of liberty without due process.[73] *Kent v. United States* involved the prosecution of a juvenile in adult court.[74] The juvenile was arrested and processed through the juvenile court system, which had none of the procedural protections granted in criminal court. Further, the decision to transfer the case to criminal court was completely discretionary for the judge. The Supreme Court reversed the conviction of the juvenile, holding that procedural safeguards must be imposed to bridge the gap between the juvenile and adult criminal courts. In *In re Gault*, a juvenile was removed from his family and mandated to a state institution without being informed of the charges against him.[75] The Court held that juveniles were entitled to due process rights—specifically the right to notice of the charges,[76] the right to counsel,[77] the right to confrontation and cross-examination,[78] and the privilege against self incrimination.[79] In *In re Winship*, the Court held that delinquents were entitled to the same "beyond a reasonable doubt" standard of proof required in criminal trials.[80] The Court stopped short of complete assimilation, however, and, in *McKiever v. Pennsylvania*, declined to extend the right to a jury trial to delinquency cases.[81]

While the grant of some of the due process rights traditionally reserved for criminal defendants ameliorated unchecked abuses of discretion, the additional procedural protections connoted a shift toward the criminalization of delinquency. Further, the imposition of procedural requirements on the discretionary decisions of juvenile judges removed the very element that distinguished the juvenile courts from the criminal courts. *Gault* and its progeny radically altered the landscape of the juvenile courts, and probably foreclosed forever a return to a pure rehabilitative ideal.

8. Current Trends

In the specialized courts dealing with juvenile delinquency, dependency and other legal issues related to the family,[82] judges enjoy wide discretion

73. From an historical perspective, it makes perfect sense that the rights rhetoric that fueled the 1870 *Turner* decision in the Reconstruction Era resurfaced in the Civil Rights Era of the 1960s.

74. 383 U.S. 541 (1966).

75. 387 U.S. 1, 10 (1967).

76. *Id.* at 31-34.

77. *Id.* at 34-42.

78. *Id.* at 42-57.

79. *Id.* at 42-57.

80. 397 U.S. 358, 368 (1970).

81. 403 U.S. 528, 551 (1971).

82. New York's Family Court has jurisdiction over most, but not all, family-related legal issues. Divorce proceedings, for example, do not fall within the jurisdiction of the Family Court.

to fashion individual remedies that generally comport with a rehabilitative ideal. Courts hear not only juvenile delinquency cases, but also abuse and neglect proceedings, status offenses, and, in many jurisdictions, divorce, adoption and custody filings.[83] The juvenile courts depend on all of the interested parties to supply input to the court. Parents, probation officers, treatment providers, social workers, state attorneys, and attorneys for the children and parents convene in a typical juvenile court proceeding. Juvenile courts continue to struggle with the monumental task of monitoring the well-being of the children within their jurisdictions. News accounts of the missed case of abuse or neglect are too common, and often the cases that begin with a child as the victim frequently progress to instances of the child as victimizer.[84]

The juvenile courts continue to search for creative answers. One example of innovation can be found in New York's Family Treatment Court.[85] Aimed at reuniting families ravaged by drug abuse, the court uses family reunion as a motivational tool for assisting parents with the struggle to overcome their addictions. The Family Treatment Court has enjoyed success in reuniting families much more rapidly than traditional juvenile court.[86] Like the drug courts discussed in the next section, Family Treatment Court uses a system of graduated rewards and sanctions in response to treatment progress, and like the drug courts, reports a high degree of success.[87]

Operating in the shadow of *Gault*, however, most juvenile courts treat delinquency matters separately from dependency matters. Legislation over the last twenty years has drastically increased criminal liability for children: minimum ages for transfer to adult court have been lowered, and the number and type of offenses that require removal to adult court has increased,[88] and, in the ultimate rejection of the formative ideology of juvenile courts, the U.S. Supreme Court upheld the death penalty for juveniles.[89] Thus, the legal treatment of children, at least in the area of

83. Status offenses generally involve a request to the court for assistance in controlling the behavior of a child, but do not involve allegations of criminal behavior. In New York, status offenders are referred to as persons in need of supervision, or PINS.

84. *New Details on Failures in Child Care*, N.Y. TIMES, June 18, 2003 at B1, col. 5.

85. *See, e.g.*, Jane Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WISC. L. REV. 331, 331 (2002).

86. *Id.* at 333.

87. *Id.* at 332-33.

88. *See generally* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT (Jeffrey Fagan and Franklin Zimring, eds., 2000).

89. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (upholding death penalty for 16 and 17- year-olds); *cf.* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (death penalty for 15-year-old violates "cruel and unusual" punishment). This issue has come before the Supreme Court again, invited by the Court's opinion in *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (overturning *Penry v. Lynaugh*, 492 U.S. 302 (1989), by declaring that national consensus against the application of the death penalty to the mentally retarded had reached a point such that execution was barred on 8th amendment "cruel and unusual punishment" grounds). The Missouri Supreme Court applied the *Atkins* rationale to a 17-year-old, overturning his death sentence on grounds that *Atkins*-type national consensus existed with respect to juveniles, and that *Atkins* implicitly overruled *Stanford*. *Ex rel.* Simmons v.

delinquency, has increasingly mirrored the treatment of adult offenders.[90]

B. Drug Courts

Drug courts are not the only form of problem-solving court, but they are by far the most common, and their sixteen-year history allows a longitudinal analysis not yet available for other problem-solving court models. Moreover the drug courts, and their claims of success, provided the impetus for application of the model to other areas. For these reasons, the discussion of problem-solving courts here focuses on drug courts.

1. The Legal Prehistory

Beginning in the mid-1970s, legislatures started to pass statutes that dramatically increased the penalties for substance abuse.[91] New York's Rockefeller Drug Laws were some of the first, and remain among the harshest, of these new statutory structures.[92] At roughly the same time, many states enacted legislation that limited plea bargaining to curb what were perceived as abuses in judicial discretion that created inequity.[93]

Ten years later, in the mid-1980s, the federal sentencing guidelines were enacted.[94] In an effort to restrict the discretion of individual judges, the guidelines sought to nationalize sentences imposed for violation of federal laws, generally by increasing the mandatory minimum sentences and providing judges with a mechanical chart to assess mitigating and aggravating factors to consider.[95]

As new criminal legislation gained popularity, the law enforcement effort directed at drug crime increased tremendously. Federal funds subsidized local efforts to enforce drug laws.[96] Law enforcement budgets ballooned, and the number of drug cases increased dramatically as well.[97] Though the budget increases may have originally been intended as temporary, the additional money soon resembled a production contract:

Roper, 112 S.W.3d 397, 399 (Mo. 2003), *cert. granted*, Roper v. Simmons, 124 S. Ct. 1171 (2004).

90. Not surprisingly, children who enter the juvenile justice system with dependency, abuse or neglect issues often commit acts of delinquency.

91. *See generally* Cal. Penal Law, N.Y. Penal Law, Federal Controlled Substance Abuse Act, 21 U.S.C. § 1101, *et. seq.*

92. *See* N.Y. Penal Law § 220, and N.Y. Penal Law § 70.10, enacted 1973.

93. *See, e.g.*, Cal. Penal Law, N.Y. Penal Law. Several explanations have been offered for this trend; I mention only a couple, as the paper focuses on the aftermath of this trend, not its causes. One explanation holds that as drug usage and abuse became much more visible and prevalent, the legislatures passed strict drug laws in an attempt to shift social behaviors away from the drug culture. Another theory explains that as the Warren Court preempted criminal procedures, the legislature tried to reclaim power in the criminal arena by increasing penalties. William H. Simon, *Criminal Defenders and Community Justice: The Drug Court Example*, 40 Am. Crim. L. Rev. 1595, 1598-99 (2003).

94. *See* The Sentencing Reform Act of 1984 (Title II of the Comprehensive Crime Control Act of 1984), 28 U.S.C. § 991.

95. *Id.*; 18 U.S.C. § 3553(b).

96. *See* Dep't of Justice, Bureau of Statistics, *available at* http://www.ojp.usdoj.gov/bjs/pubalp2.htm.

97. *Id.*

funding was justified only as long as arrest numbers remained high, thus justifying more spending.[98] It is no surprise then, given the incentives, that drug arrests continued to climb at an alarming rate, dramatically increasing through the 1990s.[99]

These forces created an inevitable bottleneck. Drug cases that were once minor offenses now required intensive litigation efforts. Limits on plea bargaining and mandatory sentences meant that judges, prosecutors and defense attorneys could not ease the burden on the system through negotiation. The overwhelming majority of cases in the criminal justice system were drug related.[100]

2. *Developing Social Science*

A robust, interdisciplinary debate fueled deep concerns about the pathology of drug addiction. Traditional concepts of drug use as criminal behavior meriting punishment were challenged by a view of addiction as a disease, supporting the notion that addicts should be treated, not punished. The question of whether to treat or punish revived an ancient theoretical schism between a treatment-based model and a punishment-based system of criminal justice.

On a theoretical level, treatment and punishment appear mutually exclusive. One punishes as a last resort, only when all other incentives have failed to achieve the desired result. Treatment, on the other hand, should be initiated at the earliest possible moment. Punishment should only be inflicted on the guilty,[101] but treatment should be applied in both the post-symptomatic phase and for the sake of prevention. Moreover, at least in the public health context, coerced treatment and deprivations of liberty, such as monitored medication and quarantines, are justified by the benefits to the individual and to society.[102]

In *Robinson v. California*, the Supreme Court found unconstitutional a statute criminalizing the status of addiction.[103] The Court reasoned that because addiction represents a status, and not an action, it falls outside

98. Hoffman noted that the existence of a specialized drug court provoked an increase in the arrest and prosecution of drug cases, an effect he attributes to a lack of discretion by police and prosecutors. Rather than arresting criminals, police were "trolling for patients." Morris Hoffman, Comments at Symposium for Problem-solving Courts, Fordham University School of Law, New York, NY (February 28, 2002).

99. The astronomical cost of incarcerating record numbers of non-violent offenders, however, appears to be an unconsidered consequence of increased penalties and enforcement.

100. *See* Dep't of Justice, Bureau of Statistics, *supra* note 96.

101. Some strict utilitarians may disagree, and propose a hypothetical situation where the utilitarian calculus provides an optimal benefit to society when one person is unjustly punished.

102. *See generally* Lawrence Gostin, *Compulsory Treatment for Drug-dependent Persons: Justifications for a Public Health Approach to Drug Dependency*, 69 MILBANK Q. 561 (1991). Public health models provide a justification for the coercive use of the state's power to restrain liberty in the interests of public safety. For example, the use of quarantine for contagious disease or involuntary commitment for the mentally ill are relatively uncontroversial uses of the state's authority against an individual.

103. 370 U.S. 660, 666 (1962).

the ambit of areas appropriate for criminal penalty.[104] Several years later, however, in *Powell v. Texas*, the Court upheld a statute banning public drunkenness.[105] Thus, while being addicted cannot be punished, the natural effects of addiction could be.

3. *Theoretical Foundations: Therapeutic Jurisprudence*

In mental health law, a theory of therapeutic jurisprudence developed around the idea that state civil commitment hearings were less traumatic when held in a non-adversarial context where the patient had significant voice in the ultimate decision.[106] As the drug courts ultimately searched for a theoretical foundation to support what was occurring in the courts, therapeutic jurisprudence fit the bill.

Therapeutic jurisprudence holds, in essence, that actions in the courtroom have therapeutic and non-therapeutic consequences.[107] To the extent that the court can adapt its practices to assist in the therapeutic process of recovery, the court should do so. Importantly, the corrections and adaptations to court practice should occur within the already established standards of due process: a client should not lose his due process protections by the court's inclusion of therapeutic principles. In practice, the drug treatment courts are prone to adopt the language of treatment, but may not, in fact, strictly adhere to the cautions of therapeutic jurisprudence theory. Many drug courts, for example, view coercion as an acceptable, and necessary, component of the recovery process.

In an important article, Peggy Fulton Hora, William G. Schma, and John T.A. Rosenthal, described the adoption of the concepts of therapeutic jurisprudence by the drug treatment courts.[108] The theory of therapeutic jurisprudence holds that the court itself can be an effective tool in the treatment and recovery process.[109] Judges are encouraged to engage defendants in open and frank discussions about successes and shortcomings in the treatment process.[110] In return, judges become more humanized, and defendants obtain a sense of self-determinism—a feeling that they are in control of their treatment progress.[111]

While the drug treatment court community has self-identified with therapeutic jurisprudence, other theories explain the dynamic process en-

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104. *Id.* at 666-667.

105. 392 U.S. 514, 532 (1968).

106. *See* WINICK & WEXLER, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (1996) [hereinafter WINICK & WEXLER].

107. Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts (Bruce Winick & David Wexler eds.) (2003), at 18-19.

108. Fulton-Hora et al, *supra* note 9, at 442-49. The literature suggests a strong correlation between therapeutic jurisprudence and the drug treatment courts. Significantly, there is a marked *absence* of literature wherein the drug treatment courts disavow a connection to therapeutic jurisprudence. *See also* William Schma, *Judging for the New Millenium*, *in* Winick & Wexler eds., *Judging in a Therapeutic Key*, *supra* note 106, at 87-90.

109. WINICK & WEXLER, *supra* note 103.

110. *Id.*

111. *Id.*

visioned by these courts. For example, similar ideas are raised in the theory of restorative justice, but the United States drug treatment courts fundamentally adhere to a theory of therapeutic jurisprudence.[112] In a detailed analysis of the drug treatment courts, Professors Dorf and Sabel place the drug courts into the category of experimentalist institutions that make up a new form of governance, democratic experimentalism.[113] According to this account, courts provide the forum and some of the preconditions necessary for a democratic process. The court gathers the interested parties together and, at times, acts as a steerer of interests, creating barriers to some desired outcomes in order to align the interests of all of the parties in creating a workable and adaptable solution to the problem. In the typical public law or environmental law case, the court issues a preliminary injunction, or some other default event. The injunction or default event creates incentives for the parties to negotiate a mutually agreed upon solution that is preferable to the option proposed by the court. The central premise holds that a flexible, fully informed and democratically administered standard is preferable to the imposition of a standard by a court. The process is evolving and dynamic in that solutions often prescribe monitoring and adjustment over time in order to achieve the best result.

4. The First Drug Treatment Court: Dade County, Florida

The first drug treatment court was established in 1989 in Dade County, Florida. Over the next fourteen years, almost 800 drug treatment courts opened across the country.[114] These courts differed from the specialized drug courts that had been in operation since the 1950s in some jurisdictions, in that previous models were either case management systems or "last chance" diversion programs.[115] The new drug treatment courts differed from previous models primarily in the degree of the devotion to the study and understanding of drug addiction and the recovery process. In contrast to "last chance" programs, the new courts accepted the scientific view of recovery as a process marked by success and failure.

5. Drug Courts in Operation

Typically, the drug courts enjoyed support from all of the traditional players in the criminal justice system. The promise of a reduced docket

112. For an explanation of restorative justice, see JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION (2002).

113. *See* Dorf & Sabel, *Drug Courts*, *supra* note 2, at 834 n.3.

114. By 1996, 117 drug treatment courts were operational. That number grew to 275 by 1998 and to 688 by 2001. Steven Belenko, *Research on Drug Courts: A Critical Review*, NAT'L DRUG COURT INSTITUTE REV. 1, 1 (1998) [hereinafter, Belenko I]; Steven Belenko, Research on Drug Courts: A Critical Review 2001 Update (2001) [hereinafter, Belenko II]. By 2004, 1677 drug courts were in operation or planning in the United States. DJP Drug Court Clearinghouse and Technical Assistance Project, Summary of Drug Court Activity by State and County, May 27, 2004. American University, Justice Programs Office, School of Public Affairs, *available at* http://spa.american.edu/justice/publications/drychart2k.pdf.

115. Belenko I, *supra* note 114, at 5.

of trial cases attracted judges. Prosecutors, likewise, reaped the benefits of a reduced number of cases to prepare for trial and the additional funding that accompanies a new drug court. Defense lawyers were intrigued by the possibility of a way around mandatory jail sentences, a rationale that obviously speaks to the interests of defendants.[116] Court administrators are attracted by the claims of cost effectiveness. In many states, high-ranking officials in the judiciary have eagerly assisted in the implementation of drug treatment courts.[117]

Conceptually, the juvenile courts disengaged entirely from the criminal courts, forming a separate institutional jurisdiction. The drug courts, however, remained within the existing structure of the criminal justice system. Many of the standard practices were changed or removed for the drug treatment court to operate. Each jurisdiction created its own specific procedures and rules, so there is not a uniform drug court model. Most drug courts, for example, are "post-adjudicative," requiring defendants to enter a guilty plea at an early stage of the proceedings, thereby "waiving" the right to be prosecuted under the old regime and "voluntarily" entering the new system.[118] Some, however, permit a defendant to enter the program without an admission of guilt.

Drug treatment courts differ significantly in selection criteria and eligibility restrictions. Most drug treatment courts disqualify defendants accused of violent crimes, even when drug-related.[119] In many jurisdictions, the consent of the prosecutor is required before the defendant will be permitted to enter the drug treatment court. Some drug treatment courts disqualify defendants who have a violent criminal history.[120]

Once the defendant passes the legal qualification stage, he must consent to an initial clinical evaluation by a treatment provider. The purpose of this interview is to determine whether the defendant has substance abuse issues and is amenable to treatment. In many jurisdictions, the clinical evaluation also attempts to determine whether the defendant has

116. This is not to imply universal support for the drug courts. Defense attorneys and prosecutors have been critical of the programs. *See, e.g.*, Mae Quinn, *Whose Team Am I on Anyway: Musings of a Public Defender about Drug Treatment Court*, 26 N.Y.U. REV. L. SOC. & CHANGE 37 (2000). One public defender office has refused to staff the drug treatment court (though the dispute appears to be related more to funding than a philosophical divide). Missouri Public Defender Commission Findings and Directive Regarding Post Plea Treatment Courts, OJP Drug Court Clearinghouse and Technical Assistance Project, American University, *available at* http://www.spa.american.edu/justice/publications. On the whole, defendants are probably greater proponents of the drug courts than defense attorneys.

117. Judith Kaye, Chief Justice of the New York Court of Appeals, has been an outspoken advocate of problem-solving courts.

118. Fulton-Hora et. al, *supra* note 9, at 521. *See also* OJP Clearinghouse and Technicals Assistance Project, *supra* note 13, http://spa.american.edu/justice/documentviewer.asp?

119. Federal grant money is conditioned upon excluding those offenders charged with violent felonies.

120. OJP Drug Court and Clearinghouse and Technical Assistance Project, *supra* note 13, http://spa.american.edu/justice/documentviewer.asp?10=379, at 33-37.

mental health issues that might impair the treatment process.[121]

Assuming the defendant passes the clinical selection criteria, the defendant must enter a plea, usually to the highest offense alleged, and usually very early in the legal process. An early plea is a critical component of most drug court models. A rapid progression from arrest to treatment facilitates the treatment process, as it stresses the causal connection between drug activity and the consequences of that behavior. In addition, the early plea eases court congestion and satisfies prosecution concerns about conviction rates and case loads.

The plea agreement includes an explanation of the terms of the treatment court. Many jurisdictions use a contract between the court and the defendant, specifying the duties and obligations of each party and the penalties for breach. If the defendant successfully completes the treatment program, the court will expunge the conviction or the defendant will be permitted to withdraw his plea and re-plead to a lesser offense. If the defendant fails to complete the treatment process, the original plea of guilty is enforced, and the defendant is, in most cases, sentenced to a long period of incarceration.

The defendant also must waive a number of rights that would otherwise accrue to him. Federal and state constitutions guarantee a criminal defendant the right to counsel, and protections against coerced self-incrimination and unreasonable searches and seizures.[122] Federal statute provides additional protection for persons in substance abuse rehabilitation programs.[123]

The assistance of independent counsel is relinquished along with any protections against self-incrimination, as the treatment process proceeds with a collaborative, and not an adversarial, model. Under the collaborative model, the prosecutor, defense attorney, judge and treatment provider are all part of the same team, working to help the defendant complete the treatment program. This collaborative approach cannot operate without full disclosures by the defendant, unimpeded by the interference of counsel. Further, in many drug treatment court appearances, defense counsel is *absent*.[124]

The role of defense counsel shifts dramatically from one of "zealous representation" of the client to one of collaboration with other partici-

121. The dual diagnosis of Mentally Impaired, Chemically Addicted (MICA) is so common that most treatment providers have specific MICA policies. Many do not accept MICA patients because of the difficulties in accommodating mental fragility in treatment modalities using confrontational or group therapy techniques.

122. U.S. CONST. amends. V, VI, and analogous provisions in most state constitutions. The right to counsel extends beyond the entry of a guilty plea.

123. 42 U.S.C. § 290dd-2(a) prohibits disclosure of the "identity, diagnosis, prognosis or treatment of any patient [records] maintained in connection with . . . any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation or research. . . ."

124. *See* Elaine M. Wolf, *Systemic Constraints on the Implementation of a Northeastern Drug Court, in* DRUG COURTS IN THEORY AND IN PRACTICE (James Nolan, ed. 2002).

pants in the court.[125] The primary role of defense counsel in the problem-solving courts is to facilitate the treatment process, and ethical questions arise when the wishes of the client differ from what the treatment team perceives to be the best interests of the client.[126]

In addition, the defendant must consent to any searches and drug tests.[127] Random drug testing is the key monitoring mechanism to detect relapse and is thus a fundamental part of the drug treatment courts. As with the protections mentioned above, the goals of the treatment program trump the rights that would ordinarily accrue to the defendant.

Finally, in some jurisdictions, the defendant must waive the right to move to recuse the treatment court judge. For example, in Escambia County, Florida, participants must sign a waiver of the right to bring a future recusal motion based on the judge's personal knowledge or involvement with the defendant's progress in treatment.[128]

6. *The Moment of Failure*

An initial response to the relinquishment of these rights might be, "so what?" At first glance, each exchange of rights is rationally related to a treatment purpose and, in that respect, seems not only justified, but ideal. The key to understanding the potential problems with the problem-solving court model, however, lies in the moment when the defendant is deemed to fail treatment. As long as the treatment program continues, the exchange of due process rights for a treatment opportunity does not appear problematic. But when the moment of failure, or alleged failure, arrives, the process abruptly reverts to an adversarial format. The probation officer, treatment provider, prosecutor or judge may want to discontinue treatment and send the defendant to prison. The defendant presumably disagrees with this option. At this moment, the "traditional" court system has been resurrected and the due process rights and protections must be replaced. The defendant at this point should have the assistance of counsel, protections against self-incrimination, and other procedural and substantive protections. Unfortunately, he has already waived those rights.

This moment of failure is also where the judge exercises the most discretion, and where the power is simultaneously at its greatest and most diffuse. The decision of the court that the defendant did not complete the treatment program is based not on a legal standard, but on a clinical standard, or perhaps on a subjective impression that the defendant is not putting forth sufficient effort.

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125. The Model Code defines the attorney's obligation to her client as "zealous representation." *See* Quinn, *supra* note 116, at 39.

126. *See id.* (describing the dilemma).

127. *But see* U.S. CONST. amend. IV and analogous provisions in most state constitutions, protecting against unreasonable searches and seizures.

128. Waiver of Right to Assert Specified Grounds as a Basis for Motion of Recusal, Circuit Court, Escambia County, Florida, *available at* http://www.spa.american.edu/justice/documentviewer.asp?ID=148.

Just as different drug treatment courts have distinct standards for admittance to the program, they also have disparate standards for failing out of the program. Although one of the principles of the drug treatment courts is that relapse is a part of recovery, the point at which additional relapses result in disqualification from the program is a fuzzy and subjective line.[129] There do not appear to be any uniform standards from jurisdiction to jurisdiction.[130] Most drug treatment courts employ a standardized schedule of rewards and sanctions, but this system, while appealing to those concerned with equal protection and fairness, diverges from the treatment philosophy. The implicit rationale for a standardized schedule is to avoid inequality. Adhering too closely to a standard, however, denies the individualized action necessary for successful treatment.[131] Herein lies the tension between greater discretion and individual attention required in a treatment process and the need for uniformity and fairness in a punitive system.

Scholars have suggested that drug treatment courts employ democratic experimentalist governance to ease this tension.[132] Under these principles the standard becomes nonstatic, and as the court learns what types of treatments, rewards and sanctions work, the standard changes to incorporate the new learning. By avoiding blind adherence to bureaucratic rules, the institution is freed from stasis and permitted to evolve to a more refined process.

7. *Statistical Measures of Effectiveness*

Numerous studies have attempted to measure the effectiveness of the drug treatment courts. Merely defining effectiveness in this context is difficult, and uncovering a means to measure effectiveness is even more arduous. Most studies look to recidivism rates as a measure of whether the drug treatment court was effective. Obviously, if the goal of treatment is to cure the person of the addiction, then re-arrest rates are a blunt instrument to measure success. On the other hand, the cost effectiveness of the drug treatment courts is enhanced by reductions in future cases. If a person who goes through the drug treatment court is less likely to produce future expenses related to future cases, then the drug treatment courts seem effective. The methodological problems with the experimental design do not end here. Some studies fail to maintain consistent measures of "success," and few provide a measure of effectiveness over a period of time. Moreover, many studies suffer internal bias as they are self-reported and linked to the continuation of grant money.

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129. One treatment court judge remarked that she only failed a person out of the program if the person was rearrested on another charge that made him ineligible to continue. Her success rate is relatively high. Other judges, however, do not give unlimited "second chances."

130. *But see* Dorf & Sabel, *Drug Courts*, *supra* note 2, at 837.

131. Here, I assume that treatment does not arrive sized to fit all.

132. *But see* Dorf & Sabel, *Drug Courts*, *supra* note 2, at 838; *see* OJP Drug Court Clearing House and Technical Assistance Project, *supra* note 13, at 36-38.

Several studies comparing the recidivism of defendants who had completed the treatment court with defendants who had proceeded through the regular system demonstrate a minimal, perhaps statistically insignificant, difference between the two groups.[133] The charts below provide a sample of the results that drug treatment courts report. Figures and reports noted here were culled from Steven Belenko's review of studies.[134]

SAMPLE STUDIES (1998)[135]
(ALL STUDIES COVER A ONE-YEAR PERIOD UNLESS OTHERWISE INDICATED).

Location	Comparison Group	Rearrest Rate (%) (Drug Court Participants)	Rearrest Rate (%) (Non-participants)
Maricopa County, AZ	Offenders randomly assigned to probation (36 month study)	33.1	43.7
Denver, CO	Two comparison groups from before establishment of drug court	53	58
Baltimore, MD	Sample created to resemble drug court participants from drug court participants and probation violation cases before the implementation of the treatment court. (6 months)	A: 22.6 B: 26.5 C: 18.5	A: 27.1 B: 30.4 C: 30.2
Travis County, TX	Program eligible defendants arrested before court implemented	38	41

133. One study set the recidivism rate at 53% for drug court defendants and 58% for other defendants, with a 5% margin of error. Another set the rates at 33% and 38%, respectively, with a 5% margin of error. Differences in the two studies may be attributed to the length of the time period covered by the study (at two years, the recidivism rate is higher than at six months).

134. Belenko I, *supra* note 114; Belenko II, *supra* note 114.

135. The sample studies included here tested the re-arrest rates of all drug court participants, whether the participant graduated or not, against a comparison group. Belenko I, *supra* note 114, at 41-43. Other studies have compared re-arrest rates of drug court *graduates* against a comparison group. Those studies, of course, report a greater degree of success for the drug court program, but because of the skimming effect, the studies were excluded here. Also, there are several alternative causal explanations for the decrease in re-arrest rates. For example, one court (Baltimore) found that drug court participants were much more likely to be employed than non-participants. So although the causal connection that is reported attributes drug treatment program to employment and re-arrest, it is also possible that employment is the central causal agent, and that employment reduces re-arrest rate regardless of participation in treatment programs.

SAMPLE STUDIES (2001)[136]
(ALL STUDIES COVER A ONE-YEAR PERIOD UNLESS OTHERWISE INDICATED).

Location	Comparison Group	Rearrest (participants)	Rearrest (Nonparticipants)
Polk County, IA	A: referred to drug court, but did not enter B: offenders in pilot program designed to identify need for drug court	A: 37% (tracked for 416 days) B: 37% (tracked for 416 days)	A: 39% (tracked fro 450 days) B: 75% (tracked for 655 days)
Las Vegas, NV	Random selection of non-drug court cases	26%	16%
Tarrant County, TX	Eligible offenders who "opted out"	13%	17%
Salt Lake County, UT	Clients assessed with ASI but who did not participate	39%	73%
Baltimore, MD	Randomly assigned to either treatment court or "treatment as usual"	48%	65%

COST ANALYSIS:[137]

Location	Cost: Treatment Court	Cost: Diversion	Cost: Traditional Adjudication
Douglas Cty, NE	4352	808	8358

The difference in cost between treatment court and traditional adjudication is almost entirely due to the costs of incarceration. Likewise, the difference in cost between diversion and treatment court is attributable to the cost of incarceration as well as an increased number of court appearances.[138] Imposition of a jail sanction is positively correlated to increased likelihood of re-arrest within a year according to a Portland

136. Belenko II, *supra* note 114, at 31-35. As mentioned above, this series of studies does not include data that might support an alternative causal explanation. Specifically, no study collected data on employment information. All studies tracked offenders over a one year period unless otherwise indicated. One study in Baltimore used a random assignment to either a drug treatment court or "treatment as usual." This provides the strongest methodological design. It should be noted that although re-arrest rates showed a statistically significant difference for participants and non-participants, the re-conviction rates were 31% and 35% for participants and non-participants respectively, and were *not* statistically significant. *Id.* at 36.

137. *Id.* at 42.

138. *Id.* at 41.

court study.[139]

If, as the above studies indicate, there is no appreciable long-term benefit to the drug court model, then the drug courts have a difficult row to hoe in establishing legitimacy and in securing future funding. Indeed, the costs, in terms of individual waiver of due process, and in terms of a more generalized detrimental effect on the perception of judicial authority, as well as fiscal expense, may be unjustifiable.[140] It remains uncontroverted that almost any alternative is fiscally less expensive than incarceration.

8. Initial Challenges to Legitimacy

Two cases reflect the potential challenges to legitimacy that could be levied against the drug courts. In the first, *People v. Avery*, New York's Court of Appeals held that statutes and precedent that would constrain the operation of the drug treatment court were not applicable.[141] In *Avery*, the defendant argued that the extended period between his plea and the ultimate imposition of his sentence—during which he participated in a drug treatment program—constituted a period of unconstitutional "interim probation."[142] Avery also argued that the procedure violated state statutes limiting plea bargaining and requiring speedy sentencing. The defendant appeared to raise valid concerns.[143] The Court of Appeals, however, was not persuaded. The decision does not offer a particularly reasoned approach, but in effect, allows the drug courts, and other problem-solving courts, to function.

In the second, *State v. Alexander*, Oklahoma's Supreme Court heard arguments based on the dangers presented by the structure of the drug courts.[144] The defendant argued that his termination from the drug treatment program by the drug treatment court violated the state constitu-

139. *Id.* at 22-23 (citing J.S. Goldkamp, M.D. White & J.B. Robinson, *Do Drug Courts Work? Getting Inside the Drug Court Black Box*, 31 JOURNAL OF DRUG ISSUES 1, 27-72 (2001)).

140. Some argue that drug treatment courts are a fiscally cheaper alternative. This may be true, but three minor points should be made. First, many of the drug courts receive initial funding from the federal government. After the court is established, the local jurisdiction is saddled with the cost. Second, cost projections usually do not account for the increased number of arrests and prosecutions. Third, the financial savings promised by drug courts often factor not only the current costs of incarceration, but also the saving of the future costs of addiction and law enforcement, in essence assuming that treatment works. If, however, the defendant goes to jail anyway, and if there is no improvement in recidivism rates, then it becomes more difficult to substantiate a savings.

141. 85 N.Y.2d 503, 504 (1995).

142. A few years earlier, in *In re Rodney E.*, the Court of Appeals held that interim probation violated the state constitution. 77 N.Y.2d 672, 673 (1991).

143. The facts of *Rodney* were similar to *Avery*, and the New York intermediate appellate court so held. People v. Avery, 205 A.D.2d 411 (1st Dept. 1994). The statutes do not permit conditional sentences. N.Y. CRIM. PROC. LAW § 220.60 (McKinney 2004). Also, in a statute restricting plea bargaining, any indictment including a class B felony charge *must* include a plea to a class D felony. N.Y. CRIM PROC. LAW § 220.10(5)(a)(iii) (McKinney 1997 & Supp. 2004). Finally, there is no procedure for the withdrawal of a plea and re-entry of a plea to a new offense.

144. 48 P.3d 110, 112-15 (Okla. 2000).

tion's separation of powers provision because the sentencing judge was a member of the treatment team. Although the court denied relief on preservation grounds, a concurring opinion essentially agreed with the defendant's argument that both the Oklahoma constitution and its drug treatment court statute require that any termination procedure be held before a neutral judge.[145]

These two cases present challenges analogous to the early challenges faced by the juvenile courts. At the early stages of both histories, the appellate courts were willing to allow the new courts to operate unimpeded.

The drug treatment courts are entering a critical phase of their development, a point where the juvenile courts disappeared from public scrutiny. The early attention focused on flashy expenditures of creative energy has passed, and the question is whether the drug courts can sustain an orbital velocity. At this stage it is critical to engage in a discussion of the institutional structure and whether that structure is sufficiently robust to sustain a challenge to legitimacy.[146]

C. THE CRITICAL JUNCTURE

With a formal history spanning more than a century, the juvenile courts present the most complete record of a problem-solving court. The history can be divided into several periods: the founding years, the initial challenges to legitimacy, a period of lost idealism, a backlash to the institutional shortcomings, and finally, another period of redevelopment and innovation. Over the last twenty years, the trend in juvenile courts has been toward an increased criminalization of the system, although recent innovations suggest an effort to return to the original rehabilitative ideals.

The juvenile courts and the drug courts developed as a result of similar forces and influences. Just as the juvenile courts faced challenges to legitimacy in the first decade, the drug courts should expect to face increasing scrutiny. But, unlike the juvenile courts, the drug courts should expect to weather this first storm. The drug courts should be wary to avoid the period of decline that the juvenile courts experienced in the years leading up to the Supreme Court decisions. Perhaps the deterioration of loyalty to the founding ideals should be expected as first and second generation leaders pass the mantle to later generations with their own theoretical devotions. The key to the survival of the institution, then, is to entrench the ideals within the institution in ways that prevent later distortions. Entrenchment, of course, is more difficult given the nature of the experimentalist process embodied by the drug courts and other problem-solving courts.

Ultimately, the difficulty lies in the basic question of how to insure that judges make good decisions. To date, no one has arrived at a successful

145. *Id.* at 115-17; OKLA. CONST. of 1907, art. II, §§ 6, 7, 20, 21; art. VII, §1.
146. *See* Gostin, *supra* note 99.

formula to insure careful and even-handed exercise of discretion by judges, or legislators, for that matter, yet all agree that this is a desired attribute in a system of justice.

III. THE IMPENDING LEGITIMACY CRISIS

A. Legitimacy Defined

What is meant by legitimacy and the impending legitimacy crisis? "Legitimacy" describes the dynamic relationship between the entitlement of one party to exercise authority and the obligation of another party to obey. In the legal context, legitimacy describes the authority of the court to make binding decisions, and the extent to which people adhere to the decisions of the court or recognize the court as a proper *locus* for decisional power.[147]

Professor A. John Simmons distinguishes between two senses of legitimacy: the justification for the existence of the state and the justification for particular types or systems of government within an existing state.[148] The former distinction radiates from the natural law arguments against the anarchist, arguments that I do not pursue here.[149] Rather, when I refer to issues of legitimacy, I mean the validity of certain institutions—specifically the institution of the courts—as against other forms of the same institution. More specifically, legitimacy justifies "an act, a strategy, a practice, an arrangement or an institution typically . . . [by] . . . showing it to be prudentially rational, morally acceptable or both."[150]

Further, Professor Simmons observes two relevant types of objections—comparative objections, which rank one institution against another, and non-comparative objections, which determine, on an objective level, whether the institution is wrong or immoral.[151] Here, I focus on comparative objections of the problem-solving courts against the baseline of the existing "traditional" court structure. Further, the questions of legitimacy explored here are distinctly sociological in nature, rather than normative;[152] the operative questions are applied, not abstract.[153]

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147. The legitimacy of a decision-making institution might be equated with the degree to which the losing party will respect the decision and not seek out private revenge to resolve the dispute. Jerome Bruner, Making Stories at 37 (2002).

148. A. John Simmons, *Justification and Legitimacy*, *in* Justification and Legitimacy: Essays on Rights and Obligations 123-43 (2001).

149. An important corollary of the debate against the anarchist is the degree to which consent, either actual or implied, is necessary to impose an obligation of obedience under a Lockean conception of natural law. *Compare* Simmons, *supra* note 148, at 129, *with* Hanna Pitkin, *Obligation and Consent I*, 59 Amer. Pol. Sci. Rev. 990, 995-97 (1965) (arguing that Locke would find hypothetical consent relevant to a standard of legitimacy).

150. Simmons, *supra* note 148, at 123.

151. *Id.* at 123-24.

152. I do not mean to imply that the issue of normative legitimacy or morality should not be addressed, only that I do not extend the current discussion to those areas. I rely here on a Weberian analysis, which is inherently sociological.

153. I am concerned with what "is" and save questions of "ought" for another day.

So how does one determine whether one form of an institution is more legitimate than another form of the institution? First, the different categories of legitimate authority must be identified. Max Weber precisely delineated the "ideal types of legitimate authority," and noted that a legitimate exercise of governmental authority rests on (1) rational grounds, (2) traditional grounds, or (3) charismatic grounds.[154]

> There are three ideal types of legitimate authority. The validity of the claims of legitimacy are based on:
>
> (1) rational grounds—a belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (rational-legal authority);
>
> (2) traditional grounds—an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them (traditional authority); and
>
> (3) charismatic grounds—devotion to the exceptional sanctity, heroism or character of an individual person, and of the normative patterns of order revealed or ordained by him (charismatic authority).[155]

Under the rational basis, the entitlement to exercise authority derives from "the formal legality of their commands and is limited by the scope of authority of that office," and the obligation to obey grows out of the "legally established impersonal order."[156] Under the traditional basis, the entitlement to exercise authority derives from the "traditionally sanctioned position of authority," and the obligation to obey stems from "loyalty to the area of accustomed obligations."[157] Both the rational and the traditional grounds for the exercise of authority have defined limits. Rational grounds are limited by the extent of the actual legal grant of authority, whereas traditional grounds were limited by traditionally acceptable exercises of power, or commonly held perceptions of the extent of power.[158]

The charismatic basis for the exercise of authority relies on the personal characteristics of the leader to engender the entitlement to exercise power and the obligation to obey. Charismatic authority does not depend on the actual or perceived limits on authority imposed by a legal system, but instead relies on the extraordinary abilities (actual or perceived) of the leader, "his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma."[159] The limit of charismatic authority derives not from the perceived or actual authority of the position of power, but from the individual exercising

154. MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 8-9, 336-38 (Edward Shils & Max Rheinstein, trans., Harvard University Press 2d ed. 1925) (1954).

155. *Id.* at 8-9.

156. *Id.*

157. *Id.*

158. The perception of authority is more important to this sociological analysis than the actual authority. A normative description would necessarily be more concerned with actual authority as well as the corresponding perception of authority.

159. WEBER, *supra* note 154, at 124-25.

power. Therefore, the charismatic basis of authority is inherently unstable, lasting only as long as the life or reign of the individual leader.

The problem-solving courts appear "legitimate" because their authority appears to be based in all three Weberian grounds for authority.[160] In most jurisdictions (though not all) a statute or some other form of positive legislation provides the problem-solving court with the rational basis to exercise its authority. Because the problem-solving courts are perceived to hold the same position of traditional courts, people believe in the authority of the court. The traditional basis of authority provides the strongest foundation for the exercise of power. Allegiance is owed not to the problem-solving court per se, but to traditional respect for the institution of the judiciary. Finally, as innovative and creative institutions, these courts tend to draw the most charismatic of judges as early leaders.

On closer examination, however, none of these grounds will be capable of sustaining the legitimacy of these courts over the long term. The Weberian rational basis suffers when the court acts outside of the legal limit of its authority. The legal limit can be either a specific statutory limit placed on the court, or the constitutional limit of authority granted to the judicial branch of government.

B. Challenges to the Rational Basis of Legitimacy

Do problem-solving courts push the limit of either the statutory basis or the constitutional basis of authority? The answer with respect to statutory authority will, of course, depend on the specific statute. The more pressing statutory challenge arises because the problem-solving courts are, in most jurisdictions, created to provide a treatment exception to a pre-existing criminal procedure and sentencing law, and the function of the problem-solving court is to determine to whom the alternative treatment system should apply and to whom the default punishment system should apply. The problem-solving court also determines the success or failure of the alternative treatment system, and the degree to which elements of the default punishment system should be imposed.

The challenge to the rational basis of authority increases as the difference between the two systems increases. Thus, the threat to legitimacy is

160. Several issues should be noted with respect to my reliance on a Weberian concept of legitimacy. First, Weber adeptly provides a structural starting point for an analysis. I do not mean to suggest that the rational-legal, traditional and charismatic are all independent bases for legitimacy; rather, I suggest that these can contribute to the legitimacy of an institution—particularly over the short term—and that this is precisely what has occurred with the problem-solving courts. Second, the Weberian concept is concerned with a sociological description of authority, not necessarily a normative or moral one. His grounding in sociology, rather than political theory, forecasts a preference for the "is" over the "ought," and a focus on the perception of legitimacy, rather than actual legitimacy. Here, I am concerned with the way these courts exert authority. A further discussion of whether these courts are actually legitimate and "ought" to exert authority are interesting questions, but beyond the scope of this paper. *See* David Beetham, The Legitimation of Power (Humanities Press International, Inc. 1991); Lon Fuller, The Morality of Law (Yale University Press 1964); Joseph Raz, The Morality of Freedom (1986).

more pronounced in jurisdictions with reduced judicial discretion and stiff penalties for the type of offenses covered by the treatment courts. For example, if conviction for a certain drug offense requires a long prison sentence, then the decision to opt out of that sentence is much more significant than the decision to opt out of a short sentence. The same holds true for jurisdictions that limit judicial discretion. If a judge cannot exercise discretion in imposing a penalty, then the granting of discretionary power to opt out of the non-discretionary system is much more significant.

The rational basis of authority is subject to challenge because the legislature has created two statutory structures, one that includes the problem-solving courts and one that does not. Thus there is a question as to (1) which structure should apply to a given case, and (2) who should make that decision.[161]

The constitutional challenge to the rational basis of legitimacy arises either when the legislature places legislative decisions in the lap of the executive or the judiciary, or when the executive and the judiciary make those decisions. Constitutional issues arise because the problem-solving courts create judges that act in roles traditionally associated with the executive or the legislature. The decision as to which of two competing systems should apply to a given case is one best left to the legislature.

The *Alexander* case touched on the state constitutional issue when the concurring opinion noted that, because the problem-solving court judge imposed the sentence, the defendant was deprived of his constitutional right to a neutral judge.[162] The judge had assumed a role much more like that of an executive or administrator, and as such, should not have been making a "judicial" decision. Some jurisdictions short-circuit the procedure suggested by the concurrence in *Alexander*. The drug treatment court in Escambia County, Florida, requires that participants waive the right to move to recuse the treatment court judge in a proceeding to terminate the participant from the drug treatment court.[163]

161. Here, I assume that the legislature has the inherent authority to enact a treatment-based system or a punishment-based system, or some combination of the two systems.

162. Some jurisdictions short-circuit the procedure suggested by the concurrence in *Alexander*. *See* State v. Alexander, 48 P.3d 110, 115-16 (Okla. 2000); *supra* notes 141-42 and accompanying text.

163. Specifically, defendant is required to "waive . . . his right to assert as a basis for a motion to recuse the sitting circuit judge on the basis of: 1. That judge's personal involvement with the defendant during the court [sic] of his treatment in the Escambia County Drug Court. 2. That judge's knowledge, both personal and otherwise, of defendant's compliance or non-compliance with the requirements of the Escambia County Drug Court. 3. That judge's decision to eject the defendant from the Escambia County Drug Court Program on the basis of his or her failure to comply with such requirements." The form is accessible at www.american.edu/academic.depts/spa/justice/publications/pensacolawaiver.htm

C. Challenges to the Traditional Basis of Legitimacy

The limit of authority can also be measured with respect to the general perceptions of what courts should do, and erosion to the rational basis of authority spills over to the traditional basis. For example, a court that "crosses the line" and engages in the legislative function of creating law or the executive function of enforcing the law is subject to challenges to the rational basis of authority. Over time, a court subjected to repeated challenges to legitimacy under the rational basis loses the entitlement to exercise authority under the traditional basis. The traditional basis of authority corresponds to the perception of authority, while the rational basis corresponds to actual authority. For our purposes, however, it does not matter whether the authority is actual (rational) or perceived (traditional). It is only important to recognize that either basis can provide legitimacy, and that the rational and the traditional are related such that a decrease in the rational basis of authority, over time, produces a decrease in the traditional basis of authority.

D. Challenges to the Charismatic Basis of Authority

Once the first generation of charismatic judges moves on, the charismatic basis for the exercise of authority disappears. With the juvenile courts, a figure like Julian Mack could not be replaced. Likewise, it is doubtful that a line of Stanley Goldsteins and Peggy Fulton-Horas stand waiting to take the reigns of leadership in the drug courts.[164] The problem-solving courts depend on the discretion of extraordinary judges to steady a course through clear channels of effective treatment and fair punishment. The inability to reliably produce a succession of extraordinary judges will result in decreased efficiency, and the problem-solving courts will lose both the capacity to follow the original vision, and the rationale to deviate from the original system.

E. Assessing Legitimacy

The question, then, is whether the problem-solving courts possess a rational or traditional basis for legitimacy. What qualities are essential to the rational basis of a court? What establishes "the belief in the legality of the enacted rules and the right of those elevated to authority under such rules to issue commands"?[165] What characteristics relate to the traditional basis for the authority of a court? What defines "the established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority"?[166]

Jerome Bruner describes three essential elements of legitimate decision-making bodies as ritualism, fairness and neutrality.[167] Ritualism re-

164. Stanley Goldstein was the first judge in the Dade County, Florida treatment court. Peggy Fulton-Hora presided over the drug court in Alameda County, California.
165. Weber, *supra* note 151.
166. *Id.*
167. Bruner, *supra* note 144, Ch. 2.

fers to the broad idea of consistency or unity[168]—a common and expected manner of resolving issues that is known and expected by the community. Rituals develop in specific communities. In our culture the black robes of judges and the formal atmosphere of courtrooms illustrate the ritualism surrounding the role of judges as decision-makers.[169] The decision maker must be perceived as fair.[170] Fairness refers to an evaluation of whether the process and the decision promote principles of justice and equality. Courts usually accomplish this by adhering to a system of procedural justice. For example, under the common law tradition, courts rely on precedent to interpret laws consistently. An institution that provides reasons for a given outcome promotes fairness and neutrality, especially where the reasoning is subject to appellate review. To the extent that reasons are consistently provided, the element of ritual advances. Fairness is related to the element of neutrality. By neutral I mean that the decision-maker is disinterested in the outcome and maintains no preference for one outcome or party over the other.

In order to compare the degree of legitimacy of problem-solving courts, I make several assumptions to establish a baseline or point of reference. I assume that the traditional courts are legitimate, or at least, that the traditional courts enjoy a certain degree of legitimacy, which is defined as perceived or actual authority engendering an obligation to obey.[171] For present purposes, I am willing to leave alone the issue of whether the degree of obligation to obey rises to the level of moral legitimacy.[172] Here I am only trying to show the potential that problem-solving courts present for a *decline* in the existing level of legitimacy, whatever that level might be.

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168. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (Yale University Press 1986).

169. BRUNER, *supra*, note 144. Further, under a Neo-Realist theory of jurisprudence, the ritual and tradition associated with the judicial office affect the decisions by infusing a sense of restraint and commitment to the duty to follow the "law."

170. Fair could also refer to decisions that are thought to be morally correct. But a morally correct decision reached through improper procedure may present a more immediate threat to the legitimacy of the institution than a morally incorrect decision reached through adherence to proper procedure. Ultimately, the institution gains legitimacy if its decisions are later thought to be morally correct. *See* Brown v. Board of Education, 347 U.S. 483 (1954); Scott v. Sandford, 60 U.S. 393 (1856); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Lochner v. New York, 198 U.S. 45 (1905).

171. My purpose here is not to turn a blind eye to substantial questions regarding the function of our courts, but rather to provide a manageable limit to this discussion. Issues regarding the legitimacy of judicial review are reserved for another time and place. Professor Mark Tushnet noted the degree to which people feel bound by the decisions of the courts, even when they disagreed on a primary level with the decision. Specifically, Professor Tushnet describes President Reagan's underestimation of the degree to which the American people feel bound by the decisions of the courts. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 25 (Princeton University Press 1999).

172. For example, a Razian analysis of the drug treatment courts might find legitimate authority in the court's edict to the defendant to stop abusing drugs because that is something that the defendant should do independent of the court's command. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 26-35, 38-69 (1986).

"Traditional" courts derive legitimacy from Weber's rational and traditional foundations, and often from the charismatic foundation as well. The traditional and the rational are related. Because courts emerged from a democratic process and because they act in accordance with the Bruner principles of fairness, neutrality and ritualism, they exert rational authority and command an obligation to obey. The continued adherence to Brunerian principles of fairness and neutrality develop a correspondence between the rational authority and the rituals associated with this institution.[173] Over time, the institution and its rituals become synonymous with rational authority. Eventually, the rational and the traditional form a symbiotic relationship, with each adding to the legitimacy of the other. Notice, however, that the Weberian traditional foundation of authority is only so strong as the belief that the court is acting in accordance with the rituals that are expected of a court (black robes, formal "bench," austere environment, etc.).[174] Rational authority, then, depends on courts acting as courts—under the powers entrusted or bestowed on them. Traditional authority trails rational authority, but gains strength over time.

The charismatic foundation of authority, though, is inherently unstable as it relies on the individual leader. Individual judges may add to the legitimacy through spectacular performance, and even marginally charismatic judges strengthen the legitimacy of the courts. Yet the charismatic leader can reinforce authority when the traditional or rational foundations are stretched.

In sum, courts depend on an established track record of the Brunerian qualities of neutrality, procedural justice, fairness, and ritualism for legitimacy. In addition, charismatic leaders can provide a temporary infusion of authority to an institution, but only so long as the leader retains the support of the community. Thus, threats to legitimacy occur when one or several of these fundamental Brunerian elements deteriorates to a degree that the outcomes of the decision maker are not respected by the community.

1. Fairness

The problem-solving courts filled the vacuum created by existing systemic dysfunction. If there was no "problem," there would be no need for the problem-solving courts. Just as the juvenile courts formed in response to perceived injustice in the way children were treated,[175] drug treatment courts formed as an alternative to the bottleneck created by huge increases in the number of drug cases and unconscionably long

173. *See supra* note 144 and accompanying text.

174. *See supra* note 154 and accompanying text.

175. Recall Anthony Platt's argument that the juvenile court movement was fueled by desire to monitor and control morals of the new immigrant population. *See generally* PLATT, *supra* note 33.

prison sentences required by new sentencing structures.[176] Other forms of problem-solving courts are responsive to specific social problems that intersect with the criminal justice system.

On one level, the problem-solving courts might be viewed as fair because they are comparatively more lenient or more proportional than the alternative they replace. So one might argue that imposing a treatment program, even coercively, on those charged with drug offenses is more *fair* than imposing a long prison sentence. But this perception is based on an implicit adoption of the punishment regime where fairness, at least regarding criminal sentencing, is judged according to proportionality. A "punishment" of mandatory drug treatment appears proportional, or "fair," for the offense of drug possession or use. Likewise, a punishment of mandatory imprisonment of fifteen years to life for a "first-time" drug possession offense seems unfair because it seems disproportionate.[177]

In a treatment regime, however, the same standards do not apply. Treatment is judged only by efficacy. For example, a treatment is not judged by whether it is fair, or deserved, or proportional. When a child is immunized, there is no discussion about whether she deserves the pain from the needle's prick. The inquiry is only whether the vaccine is effective in preventing the disease. Ideas of liability, fault, guilt and fairness are irrelevant in a treatment regime. Accordingly, the imposition of the same fifteen to life term perceived as unfairly disproportionate would be fitting if it were deemed part of a "treatment" and not a punitive "sentence."[178]

This line of argument leads down a thorny trail. In the drug courts, the threat of punishment is used to coerce treatment. The overall goal of the drug courts, the juvenile courts, and other problem-solving courts is the rehabilitation of the offender.[179] But if treatment does not work, then

176. Again, disagreement may exist over whether an element of religious morality originally motivated and continues to drive the drug court movement. It also seems arguable that, like the juvenile courts, the drug treatment courts are an attempt to extensively intrude into the private lives of immigrant and minority populations.

177. In New York, a first time offender convicted of criminal possession of four ounces of a controlled substance faces a *minimum* sentence of fifteen years to life and a maximum sentence of twenty-five years to life. N.Y. PENAL LAW §§ 70.00(2)(ii), 220.18 (McKinney 1999 & Supp. 2004). Comparatively, the sentence for intentionally killing another person ranges from twenty years to life up to twenty-five years to life. N.Y. PENAL LAW §§ 70.00(2)(i), 125.25 (McKinney 2004).

178. A Kantian theory of justice views punishment as necessary for recognition of the power and value of the free will of the actor. But Kant's theory assumed criminal acts of free will and may not apply in a world populated with diverse theories of the causes of criminal behavior, where free will is but one possible explanation. Note that Kantian theory explains the distinction between Robinson v. California, 370 U.S. 660, 666 (1962) (status as an addict not punishable) and Powell v. Texas, 392 U.S. 514, 536 (1968) (public drunkenness punishable).

179. The rehabilitative ideal emerged with the application of scientific (and medical) principles to the field of criminology. Scientific study increased the use of efficacy as a measure of crime policy. The exploration of natural and environmental causes of criminal behavior supported policies directed at curing the criminal. As treatment became more important, fairness and equity suffered. As the rehabilitative ideal fell out of favor, the courts became more uniform and equal—more fair in administering punishment. But the

punishment ensues.[180] The two theories have grown together, and are almost inseparable. Treatment measures are used to determine effectiveness of punishment.[181] And if treatment does not work, a punishment ensues. Because the drug courts and other problem-solving courts operate primarily on the treatment model, they are susceptible to criticism as unfair.

2. *Deterioration of Adversarial Process*

The problem-solving courts will not work in the criminal context without a substantial departure from the adversarial system.[182] Problem-solving courts propose a collaborative endeavor, quite apart from the traditional adversarial model, where all interested parties work toward a common goal.[183] The court itself becomes a therapeutic instrument, assuming an active role on the treatment team.[184] The infusion of a therapy-based regime requires that defense attorneys surrender the protective barrier they provide for their clients; the court cannot operate without unfiltered communication between defendants and the court. Indeed, a therapeutic model of criminal justice faces insurmountable barriers in the form of the fourth, fifth, sixth and fourteenth (and possibly the eighth) amendments.[185]

Although the model of the treatment courts operates on the assumption of a collaborative process, there are moments that cannot be converted from adversarial to collaborative. For instance, in those cases where a severe sanction is proposed by the court, the defendant may disagree with the severity or rationale for the penalty. Likewise, the decision to terminate a defendant from the treatment program can only be considered adversarial, since the defendant will not ordinarily agree with or

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punishment system was inappropriate where the defendant did not act from choice but as the result of either a disease or an affliction. Drug courts and other problem-solving courts fill that void.

180. Often the punishment after a failed attempt at treatment far exceeds the punishment if treatment was not attempted. *See* Morris Hoffman, *The Denver Drug Court and Its Unintended Consequences*, *in* DRUG COURTS IN THEORY AND IN PRACTICE 82-83 (James D. Nolan, ed. 2002)

181. For example, crime rates and rates of recidivism (and even deterrence) are used to measure the effectiveness of types of punishment.

182. The criminal justice system differs significantly from other public law institutions in that the parties are the state against an individual. So while a collaborative, forward-looking and adaptable model of the judiciary—the Chayesian model of public law litigation—has met with success in other arenas, such as environmental law and prison reform, the nature of the criminal proceeding raises additional concerns.

183. Fulton-Hora et al., *supra* note 9, at 476.

184. In this regard, the problem-solving courts differ significantly from the diversion programs of the past. In diversion programs, the treatment occurs exclusively with the clinical providers and counselors, and the courts maintain a traditional role of neutral overseer of the progress. In problem-solving courts, the court actually engages in the treatment and becomes one of the providers. *Id.*

185. U.S. CONST. amends. IV (random drug testing), V (self-incrimination), VI (counsel), VIII (unusual punishment), XIV (equal protection). The drug courts also require waivers of the defendant's rights under federal statutes that protect the defendant's privacy in drug treatment programs.

freely accept the imposition of the long jail sentence that lies at the end of the termination process.

Counsel serves a number of functions in the traditional judicial model. Initially, the decision to initiate an action normally rests with counsel; later, the issues are narrowed and facts and arguments are developed to support a view of the case that supports the client.[186] The attorney also insures that the decision-maker follows just procedures.[187] By taking these functions out of the hands of the court, the attorney promotes the neutrality of the judge. The problem-solving courts, however, remove the attorney from the process. As the replacement for the attorney, the problem-solving court judge is not neutral.

3. *Coercion*

Proponents of the problem-solving courts maintain that coercion is necessary to motivate the success of treatments.[188] But when the state's coercion takes the form of denial of liberty, it is particularly disconcerting, and if left unchecked, leaves open the possibility for arbitrariness and abuse.[189]

In the criminal justice system, the usual method of protecting an interest is to associate a right with the interest.[190] The interest is not inviolate, but procedural "hoops" are created to insure that the interest is not surrendered merely as a result of the overbearing power of the state. Rights can be waived, and in almost every case, rights are waived. Very few defendants, for instance, exercise the right to a jury trial. At times the procedures used to protect a right may mature into a right. For example the warnings originally used to guard the right to counsel evolved into an entitlement.[191] The process of waiver, therefore, is guarded by rigid adherence to procedures to guarantee that the waiver is knowing, voluntary and intelligent.[192] Indeed, the over-assertion of the power of the state is the very evil that is sought to be avoided by the granting of procedural rights that then require waiver.[193]

In contrast to traditional courts, the problem-solving courts are not particularly concerned with the voluntariness of the defendant's waiver of his rights. In fact, the model depends on the coercive power of the court

186. *See* Fuller, *The Forms and Limits of Adjudication*, *supra* note 1, at 382-85.
187. *Id.*
188. Fulton-Hora, et al., *supra* note 9, at 475-76.
189. Dorf, *Indeterminacy*, *supra* note 15, at 24.
190. Of course, this is not meant to imply that this only occurs in the criminal justice context.
191. *Compare* Miranda v. Arizona, 384 U.S. 436 (1966), *with* Dickerson v. Florida, 530 U.S. 428 (2000).
192. Johnson v. Zerbst, 304 U.S. 458, 467 (1938) (waiver of significant constitutional rights must be knowing, voluntary and intelligent).
193. For example, the right to counsel and the right against self-incrimination are protected by the procedures suggested in the *Miranda* opinion. The interest to be protected is the overbearing power of the state in interrogating suspects. But the right is not absolute, and, in fact, *Miranda* merely requires that a suspect waive the right to counsel or to silence. *See Miranda*, 384 U.S. at 444-45.

to initiate the treatment. Rather than a check on the power of the state, there is an affirmative use of the state's power. The power is used against the most feeble of possible parties, in a manner designed to separate the individual from the areas protected by "rights."[194]

The critical moments in the process are entry to the problem-solving court and exit from it. Against the threat of a long jail sentence, the decision to enter a treatment court is subject to criticism as coercive. In the criminal context, however, the nature of plea-bargaining is inherently coercive, and because of administrative concerns, courts maintain a lesser degree of concern with the nature of the agreements made by criminal defendants.

But even if entry to the treatment courts is treated in the same manner as a plea bargain, the exit cannot be dismissed so easily. In contrast to most plea bargains, the defendant is subject to a subjective standard—whether he has successfully completed the program—in order to receive the benefit of the bargain.[195] And, while counsel will ordinarily be present to assist the defendant at the entry phase, counsel might not be present at the exit stage. Further, the interim measures used to "coerce" compliance with the treatment program are clearly punitive, but do not seem to have any relevance to the treatment program. Defendants are often sent to jail for brief periods of time, but there is no treatment benefit to incarceration.[196] When the coercion is not related to an effective treatment goal, then it borders on cruel punishment. In sum, there is no proven need for the coercive aspects of the treatment courts, and the continued adoption of these measures decreases the legitimacy of the authority exercised by the problem-solving courts.

4. Neutrality

The legitimacy of a traditional court rests on the perception, whether real or not, that the court is neutral and disinterested in the outcome. The problem-solving courts depend on the moral legitimacy of the traditional courts for the authority to coerce individual treatments. The problem-solving courts, however, are not neutral. Rather than creating a space between the litigants and the court, as in the traditional courts, problem-solving courts seek a complete immersion into the case. As a part of the treatment team, the court is decidedly *not* disinterested or neutral.

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194. In many cases, the defendant's decision-making capacity is further decreased by addiction or illness.

195. There are other contexts where the defendant is entitled to performance only if he meets a subjective criteria, such as in a cooperation agreement where the extent to which the defendant provides material and complete assistance to the prosecution is determined by the prosecution alone. These agreements, however, occur within the context of the adversarial system. Defense counsel is available to argue that the defendant complied with the agreement. As noted above, the treatment courts operate outside of the adversarial context.

196. *See* Belenko I, *supra* note 114, at 14-16 (noting no change in treatment success based on interim jail sentences).

Judges in problem-solving courts are actively involved in the issue selection and fact determination, processes undertaken by the attorney-advocates in traditional courts. The separation of these functions critically affects the neutrality of the court. When the judge replaces the attorney as the party responsible for shaping the proceedings, the court must think up the best possible arguments for each side. In the process, the court becomes involved in the process in a way that does not occur when the court allows counsel to present the issues and the arguments.[197] As Professor Fuller explained:

> [T]he integrity of adjudication is impaired if the arbiter not only initiates the proceedings but also, in advance of the public hearing, forms the theories about what happened and conducts his own factual inquiries. In such a case the arbiter cannot bring to the public hearing an uncommitted mind; the effectiveness of participation through proofs and reasoned arguments is accordingly reduced.[198]

One of the precepts of problem-solving courts is that the judge should be an active participant. Indeed, the courts depend on the authority of the judge to promote the treatment progress. The judge cannot be said to be disinterested in an outcome: clearly, the court, as part of the treatment team, has a stake in the success of the treatment process.

These concerns are not merely theoretical. In the juvenile courts, the lack of neutrality was central to early challenges in the *Lindsay* case.[199] In the drug courts, the issue has reared its head as well. In the *Alexander* case, a concurring opinion notes, albeit in dicta, that the treatment judge, as an interested party, should not adjudicate the issue of termination from the treatment program.[200]

As this lack of neutrality becomes transparent, the result will be a loss of legitimacy for the problem-solving courts, and for traditional courts as well. The perception that all courts act neutrally, and without an interest for any particular outcome, is crucial to the acceptance of the decision of the court by all parties. Once that perception deteriorates, through experience with the problem-solving courts, the label of illegitimacy will not be limited to the problem-solving courts, but could spill over to traditional courts as well.

5. *Legislative Mandate*

In some states, New York, for instance, the problem-solving courts are the creation of judges.[201] There is no enabling legislation or mandate: the

197. Fuller, *supra* note 1, at 385-86.
198. *Id.* at 386.
199. Lindsay v. Lindsay, 257 Ill. 328, 332 (1913).
200. 48 P.3d at 115.
201. In 1995 the New York legislature enacted a statute that provided for a treatment alternative for certain felony offenders. In New York Criminal Procedure Law, section 410.91 permits a judge to impose a "sentence of parole supervision" where the offender was convicted on certain drug related class D and class E felonies. The effect of the sentence is to suspend the mandatory prison term in lieu of a 100 day intensive treatment

courts simply open shop.[202] Even where enabling legislation does exist, the problem-solving courts blur the distinction between rule making and rule enforcing, and act in both capacities.[203]

The lack of a legislative mandate diminishes the authority of the court in two ways. First, the action of the legislature provides an element of democratic legitimacy to the functions of the court. The legislature is more accountable to the people as legislators must regularly face re-election. Judges, on the other hand, are usually appointed, and so lack a direct connection to the consent of the people. Even in states where judges are elected officials, the term of office is usually much longer for a judge than the term for a legislator, so the degree of accountability is lessened.[204]

Second, the lack of legislation means that the court becomes responsible for both the enactment and the enforcement of the governing rules and procedures. The desire to avoid vesting power to enact and enforce law in the same branch drove the organization of the federal Constitution.[205] The three branches of government separate law-making and law-enforcing power between the legislative and executive branches. The courts, through judicial review and judicial supremacy, act as a check on the other branches. But what branch can check the assertion of power by the court?

An examination of the issue of whether the judiciary should reign supreme, and if so, by what means, might prove fruitless given the extensive jurisprudential and constitutional theory literature on this topic.[206] Whether in favor or opposed to judicial supremacy, few scholars have approached the topic with the idea that the court itself would create *institutions* that become sources of positive law. The problem-solving courts, at least those without legislative endorsement, represent an astounding leap in power. Rather than reviewing a statute of the legislature or an interpretation by the executive, the judiciary has carved out the authority to act outside of the proscribed limitations of the law. And because the judiciary reigns supreme, the ultimate review of the authority will occur within the judiciary itself.

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program at the Department of Corrections, followed by an "intensive program of parole supervision that will address the parolee's substance abuse history and which shall include periodic urinalysis testing." N.Y. Crim. Proc. Law § 410.91(6) (McKinney 2004). This sentence may only be imposed where the sentencing court finds the defendant has a substance abuse issue that could be addressed by the treatment program. *Id.* at 410.91(3).

202. The New York Criminal Procedure Law was amended to permit certain judges at arraignment to adjourn cases to a "drug court," but there is no statute that governs the structure of the court. *Cf.* Oklahoma and California.

203. Professor Lon Fuller describes the problem of making and interpreting law as one of the eight criteria of a failed legal system. *See* LON FULLER, THE MORALITY OF LAW (1963).

204. In New York, for instance, state representatives hold office for two years, while elected judges of the supreme court hold office for fourteen years.

205. *See generally* THE FEDERALIST NO. 51 (James Madison).

206. *See generally* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); JEREMY WALDRON, LAW AND DISAGREEMENT (Clarendon Press 1999).

Recall the *Avery* case.[207] The drug treatment court was not the creation of the legislature, but of the court itself. The defendant appealed his termination from the program and the imposition of a prison sentence over a year after entry of his plea. The procedural statutes prohibited such a deferral of the imposition of sentence, *and* the prior decisions of the court had *interpreted* the statute to prohibit just the sort of interim probation that define the drug court treatment protocol.[208] With a declaration that the drug treatment courts did not involve interim probation, the defendant's conviction was upheld and the future of the drug courts preserved.[209]

Our constitutional system of checks and balances is unable to function where there is no avenue for review by another branch. Here, the executive and legislative branches are unable to check the moves of the judiciary, since under our system the judiciary conducts the ultimate review. The legislature could codify a format for the drug treatment courts. A legislative endorsement would put the checks and balances back into order, would provide legitimacy through democratic accountability, and would provide the procedural rigor necessary to engender legitimacy.

F. Counter-Argument: Efficacy

The counter argument to the legitimacy concerns mentioned above is that the problem-solving courts find legitimacy because they are more "effective" than the institutions they replaced. Even if the structures that are ordinarily associated with courts are altered, the resulting institution is still entitled to exercise authority because it is either economically efficient or otherwise effective.

Any claim of effectiveness or efficiency depends on a comparative analysis. Drug treatment courts are usually compared to the institutions they replace, frequently according to economic costs. The problem with this argument is twofold. First, the method of measurement is wrong. While economic efficiency is a worthwhile attribute in a court system, it should only be considered as ancillary to the primary objective of providing a fair and neutral method of resolving disputes. If the court is beautiful or efficient, in addition to resolving disputes, then so much the better. But efficiency cannot be the sole measure of success of the court system.

Second, the claims of efficacy are, at best, marginal and fail to include the future cost to the courts of a reduction in legitimacy (or the risk of a loss of legitimacy).[210] As mentioned earlier, the courts measure their success in terms of recidivism rates. If the goal of the drug treatment court is to cure substance abuse, then recidivism is a poor measurement tool. If, however, the goal of the drug treatment courts is merely to reduce recidivism, and therefore reduce future costs, then recidivism rates are an ap-

207. People v. Avery, 85 N.Y.2d 503 (1995).
208. *See In re* Rodney E., 77 N.Y.2d 673 (1991); *see also Avery*, 85 N.Y.2d at 506-08.
209. *Rodney E.*, 77 N.Y.2d at 674; *Avery*, 85 N.Y.2d at 506-08.
210. Here, efficiency is a poor substitute for effectiveness.

propriate measure of success. It is entirely possible, for instance, that the drug treatment courts are economically efficient, but that drug treatment does not work. The changes in recidivism rates as reported in the data are statistically significant, but only by the slightest margin. The end result of changing to a barely-more-effective problem-solving court system is that the marginal cost of the change increases dramatically. Clearly, if there is a dramatic decrease in legitimacy and only a slight increase in efficacy, then each unit of efficacy costs more in the currency of legitimacy than in a comparably more effective system. Likewise, if the marginal gains in efficacy can be maintained, but the decrease in legitimacy can be lessened, then costs decrease.

Finally, any discussion of economic efficiency must include the fairly obvious observation that incarceration is the most costly alternative.[211] In fact, the claimed efficiencies, or cost savings, are based largely on saving the costs of incarceration.[212]

G. Conclusion

In sum, any system of dispute resolution must have legitimacy: an entitlement to exercise authority and an obligation to obey. The problem-solving courts present issues related to each of the three bases of legitimacy. Because of their experimental, avant-garde nature, the problem-solving courts tend to draw natural leaders from among the judiciary. Thus, innovators like Stanley Goldstein and Peggy Fulton Hora are exactly the type of charismatic individuals who would be expected to take the baton and run with it.[213] But once their terms end, the courts may face a crisis because the legitimacy of the institution was based only on the charisma of the first generation of leaders.[214]

As a new institution, the problem-solving courts cannot rely on an independent "traditional basis" of authority. The problem-solving courts rely on the existing cache of legitimacy held by the "courts." The whole idea of therapeutic jurisprudence is based on the concept of directing the authority of the court in a therapeutic manner. This "borrowed legitimacy" is not based on the problem-solving court's current action. Instead, the problem-solving court has authority because it is a "court." As

211. A frank discussion about incarceration has had a fracturing effect on the consensus necessary to promote the drug treatment court model. Judges and prosecutors often reject the model if the threat of incarceration is removed, as evidenced by the response to California's recently enacted Proposition 36. Prop. 36 required drug treatment for all first time offenders without the threat of jail. Some proponents of the drug treatment court opposed the Prop. 36 procedure because of the lack of a significant "stick" to coerce treatment success. Others disagreed with the measure because of the projected strain on treatment resources.

212. *See* Belenko I & II, *supra* notes 134 to 139, and accompanying text.

213. Judge Stanley Goldstein & Judge Peggy Fulton Hora were leaders in implementing drug treatment courts in Miami, Florida, and Oakland, California, respectively. The success reported by those programs can be attributed to the remarkable leadership abilities of these innovators.

214. There is not yet a system of choosing only good discretion wielders as judges—or as legislators or executives, for that matter—nor is there much hope for such magic.

soon as the smoke clears, however, the problem-solving courts will have to justify their exercise of authority without reference to the traditional courts. This will be a difficult, perhaps impossible, task.

The problem-solving courts change the basic nature of the courts. They demonstrate none of the characteristics that would ordinarily add to the rational basis of legitimacy. They are not fair. They are not neutral. In some instances, they are not legislatively enacted. Without a rational basis to exercise authority, the tradition of following the authority of the court, merely because it is a court, will deteriorate. The problem-solving courts are headed for a crisis of legitimacy.

Most importantly, there must be a recognition that legitimacy is necessary to the functioning of the court. Because the court succeeds only if the participants complete a process that has, at its core, a self-realized goal, the court cannot hope for success by forcing or coercing people to complete the treatment program. Rather, the success of the court depends on the legitimacy of the institution in coercing people to start a process that they will want to finish. Thus, the legitimacy of the court *matters* because it is inextricably related to the success of the court.

IV. A CASE STUDY: JUVENILE INTERVENTION COURT AT THE HARLEM COMMUNITY JUSTICE CENTER

A. INTRODUCTION

Only a few years ago, the dilapidated Harlem Courthouse lay in an idle state of disrepair. Today, the Harlem Community Justice Center occupies the beautifully renovated courthouse. Inside, a charismatic judge and a dedicated staff administer dynamic new programs designed to serve the needs of the community. One of those programs, the Juvenile Intervention Court (JIC), combines aspects of juvenile courts, drug courts and community courts to provide treatment, services and activities for local at-risk children. In theory, the JIC presents an ideal combination of problem solving institutions devoted to the rehabilitative ideal. In practice, however, the JIC demonstrates the difficulties of infusing a treatment ideal into a punitive institution.

In February, 2003, the JIC recognized, rather anticlimactically, its first graduation. The "offense" that brought the child into JIC was such a mild act of delinquency that if the case had been processed at the central Family Court downtown, it would have been adjourned in contemplation of dismissal.[215] After almost a year of counseling and programming, in-

215. A wide range of dispositions was possible, from an Adjournment in Contemplation of Dismissal ("ACD") to multi-year restrictive placements. An ACD is the least onerous disposition available in cases of delinquency, and involves an adjournment for up to six months with a view to ultimate dismissal of the petition. N.Y. JUD. CT. ACTS § 315.3 (McKinney 1999 & Supp). The court has the authority to grant an ACD before a fact finding or admission, and does not require the consent of Corp. Counsel. N.Y. JUD. CT. ACTS §§ 315.3(1); 315.3(3). In exchange for an ACD, the court may require that the child fulfill certain terms and conditions, including supervision by Probation. N.Y. JUD. CT. ACTS

formation gathering and monitoring, the youth walked out of JIC still in need of services and treatment. A treatment provider could present a cogent argument that the JIC should have kept monitoring and providing services to the youth. But from a traditional judicial perspective, keeping the youth under the arm of the court any longer would be a grossly disproportionate "punishment" for the "crime."[216]

This type of dilemma is endemic to JIC and to other new problem-solving courts that attempt to infuse principles of treatment into a institutional environment colored by a culture of punishment. Is the court's ultimate function to insure that the treatment process succeeds, or does the court owe an allegiance to fundamental fairness and the rule of law? Even if the terms punishment and crime are inappropriate under the ideological foundations of juvenile courts,[217] should the concept of proportionality and a sense of fairness still apply? Is a court a proper venue for the process of treatment?

B. The Baseline: New York Family Court

In New York, the Family Court has original jurisdiction over proceedings of delinquency, abuse or neglect of children. All matters in Family Court are civil proceedings, not criminal, even where there is a factual determination that a child committed an act that if committed by an adult would constitute a criminal offense. This feature comports with the therapeutic ideal and attempts to avoid the stigmatizing effects of a criminal conviction.

The first issue to address is whether the case will formally move forward in the juvenile justice system. Probation officers with the Department of Probation ("Probation") act as initial gatekeepers to the formal court procedures, much like the probation officers in the Chicago Juvenile Courts under Julian Mack.[218] In a process called "adjustment," Probation has the authority to terminate the proceeding in favor of the child before referring the case to the City's Law Department.[219] To complete the adjustment process, probation must obtain the consent of the complaining witness, and in some instances the complainant must consent to an adjustment.[220] If the complainant consents, then the charges are dropped and may not be re-filed at a later time.[221] In some situations,

§ 315.3(2). Significantly, an ACD does not involve monitoring of any sort, and does not constitute a finding of delinquency.

216. Technically, an offense committed by a youth is classified as an act of delinquency. Likewise, no punishments are meted out in juvenile court, at least in theory.

217. Though an interesting topic, and worthy of further consideration, my treatment of this area is necessarily brief.

218. *See supra* notes 53-54, and accompanying text.

219. N.Y. Jud. Ct. Act § 308.1(1) (McKinney 1999 & Supp. 2004). New York City's Office of Corporate Counsel provides attorneys to represent the interests of the state in juvenile proceedings.

220. Some government agencies, such as the New York City Housing Authority, employ a policy of never consenting to adjustment.

221. *See, e.g., In re* Kendra C., 507 N.Y.S.2d 801, 802-03 (1986).

written approval of the court is required for adjustment.[222]

The adjustment period may continue for sixty days, and may be extended by the court for an additional sixty days.[223] The adjustment process is very similar to the treatment process, with the notable exception that the court is not involved in adjustment. Also noteworthy is the statutory time limit on the adjustment process. Hence, if we could imagine an administrative agency model of treatment—one without the direct involvement or authority of the court—it would probably look like the Department of Probation in the adjustment process. If a case is not adjusted, then Probation sends the case file and a recommendation to a presenting agency of the government.

A Family Court action formally commences with the filing of a petition by the government.[224] The Court appoints counsel to represent the best interests of the child.[225] Parents are involved in the case at the earliest possible time[226] and are represented by attorneys assigned by the court.[227] Probation plays a central role, both in coordinating services for the child and in monitoring the child's progress during the pendency of the case.

The child is informed of the charges contained in the petition, and the child either admits or denies the allegations in the petition.[228] Where the child does not enter an admission, the court conducts a fact-finding hearing to determine whether the child committed the act specified in the

222. N.Y. JUD. CT. ACT § 308.1(13). If, for example, the child has had a prior arrest or if the incoming charge is a designated felony, the Department of Probation must obtain approval from the Court prior to adjustment.

223. N.Y. JUD. CT. ACT § 308.1(9).

224. In New York City, juvenile delinquency petitions are "prosecuted" by the New York City Office of Corporate Counsel. The actions are civil and thus are not handled by the New York City District Attorney. When the government attorney receives the file, she reviews the allegation to determine whether a legally sufficient cause of action has been alleged. The file from Probation contains only information about the alleged offense, not about the child's history and character. If the allegations meet a probable cause threshold, the city attorney files a petition with the Family Court. In many cases, the petition will not be filed for several weeks. In the interim, the child and his parent will be instructed to go home and return to court on a future date.

225. The legal guardian-child relationship differs slightly from the attorney-client relationship, since, at times, the child's interests may take precedence over his wishes.

226. When a child is arrested or detained, the police must either "release the child to the custody of his parents," N.Y. JUD. CT. ACT § 305.2(4)(a), or "forthwith and with all reasonable speed take the child directly, and without his first being taken to the police station house, to the family court located in the county in which the act . . . was committed." § 305.2(4)(b). The police may interview the child before taking him to court, but some debate exists as to whether the police are permitted to conduct an identification procedure before taking the child to court. *Compare In re* Martin S., 429 N.Y.S.2d 1009, 1011 (1980) (police conducting show-up identification procedure at complainant's home held improper), *with In re* Jerold Jabbar L., 537 N.Y.S.2d 398 (1989) (show up conducted at a crime-scene held permissible).

227. Because the interests of the child and parents might conflict, each party is represented by independent counsel.

228. N.Y. JUD. CT. ACT §§ 320.4(1), 321.1(1). This process is the equivalent to a criminal court arraignment and entry of initial plea. The formal reading of the charges is usually waived.

petition.[229] At this adversarial proceeding, the child can make motions disputing the procedural or evidentiary basis of the petition, is represented by counsel, and has an opportunity to confront and cross-examine the witnesses and present a defense. At the conclusion of the hearing, the court makes a determination and adjourns the case for a dispositional hearing.[230]

At the dispositional phase of the proceeding, Probation must prepare an investigation, diagnostic assessment, and recommendation, including:

> the history of the juvenile including previous conduct, the family situation, any previous psychological and psychiatric reports, school adjustment, previous social assistance provided by voluntary or public agencies and the response of the juvenile to such assistance . . . mental capacity and achievement, emotional stability and mental disabilities.[231]

The Family Court Act provides guidance for the judge in making a finding at the conclusion of a dispositional hearing and provides a wide range of discretion. Specifically, if, at the end of the dispositional hearing, the judge determines that the child does not require "supervision, treatment or confinement," then the petition is dismissed.[232] Further, the judge must impose the "least restrictive available alternative."[233]

The court will often include the goals of the supervision, for example obtaining a high school diploma, but the day-to-day monitoring of progress toward those goals is handled by the Department of Probation. Various providers supply the court, or Probation, with educational placements, substance abuse treatment programs, parenting classes and after-school programs. All play a significant role in the diagnosis and monitoring of the child's progress. The probation officer frequently acts as a liaison between the service providers and the court, although the service provider will report directly to the court on occasion.

In sum, the structure of New York's Family Court provides a view to some of the issues facing the problem-solving courts while the Family Court statute relies on a treatment theory for its foundation, but practice in the Family Court seems based on a punitive theory. The drafters of New York's Family Court Act took great pains to create a court separate from the adult criminal court, yet the day to day operations of the courts appear remarkably similar. Thus, the child receives many of the procedural rights that are only relevant in a system based on punishment the-

229. N.Y. JUD. CT. ACT § 345.

230. N.Y. JUD. CT. ACT §§ 350.3, 350.4.

231. N.Y. JUD. CT. ACT § 351.1(1). The report presented by Probation is commonly referred to as an Investigation and Recommendation (I & R).

232. N.Y. JUD. CT. ACT § 352.1(2).

233. N.Y. JUD. CT. ACT § 352.2(2)(a). In specific designated felony cases, the court must consider restrictive placement. I have omitted reference to those sections, and included only the sections relevant to the Juvenile Intervention Court.

ory,[234] including assistance of counsel, notice of the allegations, the opportunity to make motions, and the right to remain silent, while the State establishes the allegations beyond a reasonable doubt. The severity of the offense should not make a difference under a treatment theory, but as a practical matter, the nature of the allegations controls much of the process.

Three identifiable defects emerge in an examination of the way the court functions.[235] First, the process is remarkably similar to a criminal proceeding. In reading through the Family Court Act, it is apparent that the legislature distinguished between the juvenile and the criminal justice systems. Although the procedures are roughly analogous, the statutes utilize different language in an effort to separate the two systems. For example, the petition is equivalent to a complaint or indictment, the fact-finding hearing looks like a trial, and the disposition is analogous to a sentencing. The attempt at differentiation has largely failed. The attorneys representing the government and the child seem to have fallen into the roles of their institutional counterparts in criminal court, and, unfortunately, the child gets the role of the defendant. One of the most damaging aspects of this *criminalization* of the process is the routine request for a pre-dispositional "secure placement," the criminal court equivalent of preventative detention. The removal of the child from the home can have severe consequences.[236] For a casual observer, it is difficult to distinguish between criminal court and Family Court.

Second, the court is often unable to obtain the information that it requires to make a critical decision. In case after case, the judge asks for an update or for information on a specific issue, and in case after case, the information pathway suffers a clog of one sort or another.[237] In many cases, this informational sclerosis results because no one from the specific service provider appears in court; in others, the person in court has no personal knowledge of the facts of the case. From the perspective of the service provider, the amount of in-court time requires a choice between staffing the treatment center or the courtroom.[238] Some have designated

234. This, of course, is due to *In re* Gault, 387 U.S. 1 (1967), and its progeny. *See supra* notes 56-58 and accompanying text.

235. Although there are other criticisms of the Family Court, I describe these three because the Juvenile Intervention Court appears to offer solutions.

236. One non-obvious effect can be described as a sequentiality effect: once the child is in custody, he is less likely to be released with each passing court appearance. The sequentiality effect has been described by Professor Peggy Cooper Davis in another context. *See* Peggy Cooper Davis & Guatam Barua, *Custodial Choices for Children at Risk; Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 146 (1995).

237. It is possible to create two sub-categories of information deficiency. In one, the information exists but does not make its way to the courtroom. In the other the information does not exist. Usually, the information does not exist because the request for the information was not properly transmitted or received. If information is analogous to a circulatory blood flow, the judge, as the brain, remains distressed because of both arterial and venous failure.

238. Other Family Courts have experienced this problem. In an interview with the author, the clerk at the Monroe County Family Court opined that some treatment providers would not accept cases because they were not compensated for their in-court time. Most

court liaisons, but those people have only second-hand, and often incomplete, information.

Third, in order to receive services or treatment, children often must travel significant distances with their parents. The trip to court can be an all-day experience, especially when traveling from neighborhoods further away from the central courts. This *geographical discrimination* takes the heaviest toll on those least able to pay—the children.

C. The Juvenile Intervention Court

1. JIC in Theory

The Juvenile Intervention Court operated under the guidance of the Center for Court Innovation, the experimental wing of the New York Court system, accepting a limited number of cases based on certain criteria, and providing local services, treatment and monitoring.[239] Some cases started at the JIC and others were transferred from the downtown Family Court. *Front-end* cases originated in the JIC. The police gave the child and parent a summons, or desk appearance ticket (DAT), returnable to the JIC if the case met certain general criteria,[240] including whether the youth lived within the catchment area and whether the charge was a drug-related or low level, non-violent offense.[241]

Cases that began at the central Family Court were transferred to JIC either as a condition of the youth's release or as part of the disposition. These were referred to as *back-end* cases. The judge at the central Family Court might release a youth on the condition that the youth report to the JIC for a clinical evaluation. If the child lived in the JIC catchment area, the Family Court judge at times included participation in the JIC as a condition of a disposition of probation or required a child to participate in the JIC program as a condition of parole while a case was pending in Family Court.

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treatment providers receive compensation from Medicaid and are not compensated for court appearances.

239. The JIC accepted only children who live in and around the court, and who were living at home (not in a detention or placement facility). The jurisdiction of the court corresponded to the boundaries of three police precincts in upper Manhattan. Roughly the area extended from the East River to Morningside Park, from 96th Street to 127th Street, and also included the area east of 5th Avenue up to 145th Street.

240. A New York Police Department Command Order directed officers to divert eligible cases to the JIC. As long as the criteria were met, the case must be referred to the JIC, thus there was no discretion in police referrals—in theory. Given the low number of cases at the JIC, however, it was uncertain whether officers in the field followed this directive. Once the child returned on the DAT, he was interviewed by Probation. He was informed of the availability of services and asked to consent to be interviewed by a clinician in order to determine eligibility. If the child and parent did not consent, then the case was sent to Probation at the downtown Family Court. Once a case was referred to *Corp. Counsel* downtown, however, there was no possibility for prejudice since *Corp. Counsel* did not have access to information from Probation.

241. The focus on low-level offenses did not appear to be related to a treatment philosophy, but rather, reflected policy-level concessions made in return for the support of *Corp. Counsel.*

If the child (or parent) consented to participate in the program, the on-site clinician conducted an in-depth interview with the child. This information was shared with the probation officer, who then made an initial decision about whether to adjust the case or to file a recommendation with the government attorneys. The general legal procedures are the same as in Family Court. If the case was not adjusted, the *City Law Department* analyzed the legal basis of the case, and filed a petition where appropriate. The child was assigned counsel and informed of the charges. Where there was an admission or a fact-finding, the judge ultimately had discretion to impose a dispositional order. Initially, neither government attorneys nor counsel for the child had access to the clinical information.

The JIC process deviated from standard Family Court practice with the introduction of a treatment court process. Concurrent with the legal process, the child engaged in a clinical process aimed at identifying and meeting the specific needs of the child. The process was divided into an initial assessment period, three treatment phases and an aftercare program. The initial assessment period included a psycho-social interview with the youth, drug testing, educational assessment and a program orientation. The initial assessment culminated with the formulation of an Individualized Strengthening Plan (ISP). Like the drug courts, the ISP formed the basis of a contract between the child and the court. The contract included a detailed description of the system of rewards and sanctions. It described in detail what is expected initially, and also provided for future adaptation based on changed circumstances, much like the reward and sanction system of the drug treatment courts.

The first phase lasted for approximately two months and addressed behavioral changes, such as school attendance, drug abstinence, and awareness of interpersonal dynamics. The second phase lasted for another two months, and focused on personal development, including strengthening relationships and improving critical thinking. The third phase introduced leadership skills. The aftercare program facilitated a continuation of the skills learned in the earlier phases.

Each phase included a description of the goals that should be met in order to progress to the next phase. The frequency of court appearances dropped from bi-monthly in the first phase to monthly in phases two and three. Participants were expected to improve school attendance, to perform community service, and to interact with the court's computer network. Each phase also included a drug treatment component. Depending on the degree of involvement, the child may attended a day treatment center, an after-school treatment program or weekly counseling sessions. All participants were drug tested.

The JIC theory extended the period between the fact-finding and the ultimate disposition of the case. The ISP became the basis of a contract between the court and the child. A team of legal and clinical personnel monitored compliance and performance of the ISP. A child who successfully completed the program received some consideration in the form of a

less onerous final disposition, but the specific quid pro quo varied from case to case, and unlike the drug treatment courts, there were no up-front promises as to the eventual legal outcome. In this respect, the JIC judge held significantly more discretionary authority than even the drug treatment court judges, who were at least facially constrained by the contractual promises made at the time the defendant entered the drug treatment court.

Critical reviews occurred at weekly meetings, called "staffings," where some of the interested parties gathered to discuss the progress of participants in the JIC. Staffings were envisioned as a collaborative exchange of information between all of the interested parties involved in the case, including the judge, the law guardian, the government attorneys, Probation, the court attorney, the clinical case manager, and the court coordinator. The parents and children, however, were not included in the round table.

For each case, the Court Administrator prepared a Participant Status Report. Probation provided information about the initial intake, follow-up contact and school attendance. The clinical case manager shared information from the initial screening and follow-up meetings. The court coordinator initially assessed the various onsite programs and suggested possible matches, and then reported on the child's progress. The goal was to reach a consensus on a course of action. If, however, no consensus was reachable, then the judge made the decision. The court coordinator was responsible for recording the result of the staffing, and each party had the opportunity to review the court coordinator's summary.

The state-of-the-art computer technology integrated staff activities and provided a unique learning experience for participants in the JIC. For the JIC staff, the computer system provided access to clinical and case information for each participant. Different levels of access insured that information was only available to authorized personnel. The ability of numerous users to contribute to the online case file allowed for access to information even when the specific person was not available. Each participant was assigned a user-name and password for access to the JIC network. Every ISP included computer skills and literacy training, and, in most cases, the participant logged-in to the network weekly or performed other discrete tasks.

2. *JIC in Practice*

The preceding sections sketched the operation of the JIC in theory. In practice, however, several issues prevented a smooth implementation of this theory. Institutional loyalties prevented the type of true collaboration envisioned by the problem-solving court theory. Cases were not referred in the numbers anticipated, resulting in excess capacity. Finally, indicative of the first two issues, cases that made it to the JIC were of such a low level as to eliminate any possible claim to efficiency.

By institutional loyalties, I refer to the sense of identity felt toward institutions to which one maintains affiliations. Part of the problem-solv-

ing court philosophy was to shed institutional identities and loyalties in favor of a new identity. So in theory, the government attorneys should feel a greater sense of loyalty to the problem-solving court than to the prosecutor's office. Defense lawyers, likewise, should adapt their role to place the success of the court above the traditional adversarial representation of their clients. Probation officers and treatment providers should owe allegiance to the court rather than to their respective agencies.

But this shift in loyalty did not happen. Tensions, on occasion, ran high between government attorneys and law guardians. These tensions reflected fundamental differences in priorities of the major institutions involved. From a policy view, New York City agencies prioritized the safety of the community over other concerns, such as rehabilitation and treatment.[242] This policy was not amended to suit the purposes or functions of the JIC, so representative attorneys from the government had no authority to deviate from standard office policies. Thus the collaborative nature of the problem-solving court project is frustrated by the substance of the policy and by the lack of discretion accorded to the government's representative at JIC. There was not much reason to collaborate when options appeared to have been evaluated only in terms of community safety and where the city's lawyer had no ability to change policy.[243]

Law guardians fared no better, as these attorneys were not assigned exclusively to JIC. Although the Legal Aid Society originally assigned two attorneys to act as law guardians for JIC cases, the low number of cases precluded assigning attorneys permanently and exclusively to the JIC. Although the same attorneys handled most of JIC cases, the attorneys also maintained caseloads in other courts. Further, participation in the problem-solving court involved significant issues for lawyers representing the children accused of delinquency.[244] Although the technical nature of the client relationship differed slightly from the attorney-client relationship in drug treatment courts, similar concerns arose for the attorneys at JIC.[245] Moreover, the incentives to capitulate were dramatically weakened by the government's staunch position; other lawyers were less

242. I intend this as a value-neutral statement. Reasonable minds disagree on whether the proper valuation has occurred in fixing community safety as the overarching priority, but the unmistakable consequence is a frustration of the alternative treatment programs such as the JIC.

243. Ironically, or perhaps intentionally, the front-line negotiator's lack of discretion results in a relatively strong negotiating position. For a detailed discussion, see generally, ROBERT MNOOKIN, BEYOND WINNING (2000); ROGER FISHER & WILIAM URY, GETTING TO YES (1991).

244. In a thoughtful article, Mae Quinn highlighted the transformation necessary to operate in the problem-solving court model. *See generally*, Mae Quinn, *Whose Team am I on Anyway: Musings of a Public Defender in Drug Court*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000).

245. Attorneys representing children in Family Court are appointed *ad litem* to represent the best interests of the child. Attorneys representing adults in criminal court represent the person. The guardian *ad litem* stands in a similar place to a court operating under *parens patriae*. The distinction arises when the client's wishes differ from what the attorney considers to be the best course of action. With juveniles, the attorney's better judgment should prevail.

likely to engage in a collaborative process if it was perceived to be one-sided.

Probation, on the other hand, had the right idea. From the formative stages of the court, Probation assigned an individual officer to handle all of the cases from JIC. In addition, the person selected was relatively senior and appeared to have the confidence of her supervisors to make discretionary decisions. Permanent placement at JIC fostered a sense of loyalty to JIC and expanded the sense of allegiance to the problem-solving principles. Clinical advisors and treatment providers were also permanently assigned to JIC. But these two groups were not sufficient to establish real collaboration, especially given the hierarchy in the power structure of the court system, where attorneys held the positions of greatest influence.[246]

3. *Experimentalist Structures and Solutions: Policy Meetings and Back-End Cases*

Structural components of JIC included experimentalist ideas on both a micro level and on a macro level.[247] On a micro level, the cases were managed through an experimentalist process. The data collection system provided the interested parties with information relevant to treatment decisions. The "staffing" meetings provided a forum for the interested parties (lawyers, probation, treatment providers, administrators and the judge) to decide whether to adjust the treatment program. On a macro level, the court was managed through monthly policy planning meetings. At these meetings, interested parties reviewed the success of the court and decided whether to adjust the policies of the court. Staffings and policy meetings were experimentalist because the practices remained in a state of flux, and best practices were determined through a group consensus and reference to monitored data.

The most vivid example of the success of the experimentalist model occurred several months after the JIC opened. After a few months of operation, JIC had only a handful of cases. Either early projections of case numbers were too low or cases that should have been referred to JIC were taken directly to the downtown courts. Both scenarios required determining why the cases were not coming in and how to change that fact. But regardless of the cause of the case shortage, JIC had significant unused capacity to treat and monitor cases.

To resolve this, JIC administrators solicited referrals from the central Family Court, wherein judges at the downtown Family Court could refer cases to JIC for treatment and monitoring. The prototypical case in-

246. If the tables were turned, and the attorneys were operating in a collaborative mode and probation and treatment personnel were not, then the hierarchical forces could be used to induce compliance with problem-solving court principles.

247. By experimentalist, I refer to principles of democratic experimentalism, as described by Professors Dorf and Sabel. *See* Dorf and Sabel, *Drug Courts*, *supra* note 2, 841-43.

volved a child who lived within JIC's Harlem catchment area and who was under probationary supervision. The day-to-day and week-to-week treatment decisions were handled at JIC, but the judge downtown retained jurisdiction over the case. If circumstances required the imposition of a severe sanction, the downtown judge would take the necessary action, whereas the JIC judge would administer low-level sanctions. For example, the downtown court would handle any violation of probation proceeding or any determination about the child's placement in a secure detention facility. Cases that originated downtown were dubbed "back-end" cases, as opposed to the "front-end" cases that originated at JIC.

Accepting "back-end cases" resolved the excess capacity issue, but more critically, it also resolved some of the theoretical difficulties presented by the problem-solving courts.[248] By splitting the treatment decisions from the ultimate imposition of sanctions, back-end cases at JIC avoid, to a large extent, the problems of neutrality and fairness discussed earlier. Assume a case where the treatment has not been successful. Front-end cases followed the model of most problem-solving courts where the same judge that had been monitoring the treatment process decided whether the process had failed and what sanction to impose. In back-end cases, however, the case was referred to a different judge if the treatment program failed, and the ultimate decision as to whether to impose a sanction for program failure was made by a judge who was not intimately involved in the treatment process itself.

Critically, this structure ameliorates concerns about fairness and neutrality and provides a line of demarcation for the application of the adversarial process and procedural protections. The collaborative process and relaxed attention to procedure can be applied at JIC, whereas the adversarial process and greater attention to procedure should apply in the downtown court. The shift reflects the nature of the proceeding—when the proceeding turns "against" the child, then the case should be removed to the downtown court where a greater degree of procedural protections apply.

The application of this model to the drug courts and other courts would be even more poignant. In theory, both JIC and the downtown Family Court are problem-solving courts, and neither court has jurisdiction to "punish" children, even for delinquent acts. But where the problem-solving court is appended to the criminal court, the line between treatment and punishment can be more clearly drawn. When the defendant enters the "treatment" phase of the problem-solving court, procedural protections should be relaxed and the collaborative approach followed. But at the point when treatment is deemed to have failed, and the alternative punishment sought to be imposed, then procedural protections should ap-

248. Excess capacity and the institutional difficulties described above remained significant bariers to the long-term success of the JIC. The significance of the back-end case solution is that it resolved the tension created when the same judge wears both a "treatment hat" and a "punishment hat."

ply and an adversarial model followed. Moreover, the termination or revocation process should occur in a different court with a different judge. To put it simply, the same judge should not play good cop and then play bad cop.

Separating the "treatment" phase and the "punishment" phase of the process to different courts is the exact remedy suggested by the court in the *Alexander* case.[249] The specific argument in *Alexander* focused on the separation of powers issue, but separating the treatment and punishment phases of the drug court resolves the separation of powers concern and increases the appearance of fairness and neutrality.[250]

D. Learning from JIC: Practical Reforms

1. Separate Adversarial and Collaborative Processes

The adversarial nature of a termination should be recognized in light of the significant liberty interests at stake. This should not be a mere pro forma or summary hearing, but rather, should include all of the due process safeguards applicable in traditional courts, such as notice, the assistance of counsel, an opportunity to confront witnesses and a neutral magistrate. By entrenching the procedural safeguards, drug courts and other problem-solving courts can avoid repeating the experiences of the juvenile courts that led to the *Gault* decision.[251] At minimum, the defendant should be informed that he will be terminated from the program and the specific reasons for the termination. He should have access to independent counsel, i.e., an attorney that is not affiliated with the treatment court. The defendant's attorney in treatment court, like the court itself, should be labeled as an interested party. In essence, the attorneys and judges of the treatment court should be separate from the attorneys and judges in the adversarial court. It makes no sense to have a part-time collaborative effort, or a partially adversarial proceeding. Separating collaborative and adversarial proceedings should foster the respective roles of each model.

2. Sanitize the Appearance of Bias

In separating the adversarial and collaborative process, we might achieve superior positions for both. The process of referring a case to another court for a termination hearing arose in the *Alexander* opinion and is evident in the JIC back-end cases. Both models suggest that this can be practically implemented.[252]

I disagree with the *Alexander* court's placement of the burden on the defendant to request an impartial judge. The concurring opinion recognizes that the treatment court is an interested party and that the better

249. State v. Alexander, 48 P.3d 110 (Okla. 2000).
250. *Id.* at 114.
251. *See supra* notes 56-58 and accompanying text.
252. *Alexander*, 48 P.3d at 111.

practice would be for a neutral judge to conduct the hearing. The burden should be placed on the party that is best situated to absorb the cost. If the default position was to send the case to another judge for the termination hearing, then the defendant could avoid the Catch-22 situation of requesting the recusal of the judge about to decide his fate.[253] This procedure also vests the court with the appearance of neutrality and fairness.

The JIC back-end cases are closer to what I envision as a model for separating the collaborative treatment courts from the adversarial traditional courts. Because the violation of probation proceeding occurs at the central Family Court, and not at the JIC, the two processes are effectively separated.

E. The Future of the Problem-solving Courts

The specialized problem-solving courts fill the space created by negative accountability. The drug courts, mental health courts and domestic violence courts, just to name a few, focus on large scale social problems that are difficult to resolve. The failure of various agencies has led to the dumping of all social problems into the lap of the courts.

1. Lessons from the Juvenile Courts

The experience of the juvenile courts provides an historical example of the nature of the impending crisis of legitimacy. The current incarnations of the problem-solving courts are over-driven by the good intentions of the charismatic individuals leading the charge, and there may be evidence of a moderate increase in efficiency. But the increased efficiency does not account for the change in institutional structure and the risk for crisis. Toying with the internal structure of our constitutional system does not come without risk. But tinkering with the system might be necessary when other options have failed to produce acceptable results. If the problem-solving courts represent a new form of governance, and I believe that they do, they should seek to *repair* the system, not change the system, because the replacement might prove to be at odds with not only our constitutional structure, but also with democratic principles and ideals of justice.

Just as the concepts of punishment and treatment are incompatible on a theoretical level, so it is with the practical manifestations of those theories. The adversarial and collaborative processes do not mix and should be segregated where possible. The juvenile courts started with a pure treatment theory, but gradually introduced aspects of punishment theory. The problem-solving courts, on the other hand, start in the punishment world and seek to introduce concepts from treatment theory. In this regard, it does not seem to matter much whether we add water to vinegar

253. Moreover, some drug treatment courts require participants to waive the right to bring a motion for recusal of the treatment court judge from decisions involving termination from the program. *See* Waiver of Right to Recusal, Escambia County, Florida, *available at* http://www.spa.ward.american.edu/justice/publications/pensacola/awaiver.htm.

or vinegar to water, the two will not mix. The entanglement of the courts in the intersection of treatment and punishment forces the court to assume a role that it is not, by constitutional design or practical reality, equipped to perform.

The tragedy of the juvenile court story is the inability of the juvenile justice system to maintain allegiance to its original theoretical underpinnings. Once elements of the treatment theory were implemented, a reversion to punishment theory resulted in an unfair, unpredictable, non-neutral regime lacking stability and ultimately, legitimacy. When the juvenile courts fell into this chasm, the Supreme Court rescued the existence of the courts by re-imposing procedural protections on juvenile justice systems that had become, de facto, punishment-based criminal systems. My warning is that the drug courts, and other problem-solving courts, are headed for the same fate that befell the juvenile courts.

2. *The Legitimacy Deficit*

Legitimacy, the entitlement to exercise authority and the obligation to obey, can be separated into rational, traditional and charismatic bases. The rational and traditional bases are connected, and in the context of a court, are related to the concepts of fairness, neutrality and ritualism. Problem-solving courts do not promote fairness, neutrality or ritualism, and therefore cause a decrease in the legitimacy of the court. Trades of due process protections for the sake of efficiency should be reexamined and recalculated in a manner that takes the court's expenditure of legitimacy capital into account. When such calculation is made, the cost of the marginal gains in efficiency will be too high to justify the loss of legitimacy.

3. *Experimentalism's Capacity to Adapt*

The JIC operated as a local branch of the centralized family court in New York City. The experimentalist structure of the JIC allowed it to adapt to a structure that naturally bifurcated the treatment and punishment roles of the court. While the structural change in the JIC was not undertaken to increase the legitimacy of the court, that effect was obtained. Further, small scale changes that I suggest for the JIC decrease the legitimacy costs of the problem-solving courts without substantially affecting the efficiency of the courts, and therefore offer superior results.[254]

The criminal courts remain the venue of last resort for many social issues, yet significant criminal law reform remains too risky for the political branches. The judiciary is left to cope with the task of sorting out whom to punish and whom to treat. From a realist perspective, the problem solving model is here to stay, and the relevant issue is not whether the

254. The JIC has recently adopted a wholesale restructuring, based, in part, on personnel changes. Hopefully, the new structures will address concerns of legislation, as well as the practical considerations described here.

problem-solving courts should be adopted, but whether existing structures can be exploited to maximize the legitimacy of these courts.

The problem-solving courts present the possibility to mold the judiciary into a more reactive and responsive institution, yet they also present the potential for a loss of the time-gained legitimacy of the courts. As examples of experimentalist structures, the problem-solving courts possess internal mechanisms for mutation to more efficient or pragmatic forms. Problem-solving courts should use this feature to adapt in a manner that maximizes the legitimacy of the court. As the problem-solving courts become entrenched, adoption of the reforms that I suggest will increase the courts' legitimacy. JIC offers an opportunity to observe these suggestions in practice, and demonstrates the capacity of the problem-solving courts to adapt in a manner that adds legitimacy. As such, it presents a model worthy of replication in other problem-solving courts.

The move to separate functions of problem-solving courts might be labeled as a reformation of problem-solving courts as administrative agencies. Questions arise as to whether an existing agency—such as the Department of Probation—already perform the same function, and whether the new "drug court agency" operates as an arm of the executive branch or should somehow retain ties to the judiciary? If there is duplication with the function of problem-solving courts and the mandate of probation departments, then the overwhelming adoption of drug courts suggests that probation is not working in practice. Further, given the high degree of influence that prosecuting agencies hold over the drug courts, it is no great step to explicitly label what are currently de facto branches of the executive. Recognizing the importance of separating the executive and judicial branches, several State legislatures have included similar provisions in their drug court enactment statutes.[255] And while this bicameralization, at first blush, seems inefficient, the experience of the JIC suggests that it is a workable solution. Where lacking, I also suggest that problem-solving courts seek legislative enactment, so that the charter of the court derives from the legislature, not the judicial branch.[256] Finally, problem-solving courts should increase the degree of transparency in the decision making process by providing a rationale for the decision, and appellate review should be expanded to include treatment decisions,[257] with the same type of deference as is accorded to administrative agencies.

V. CONCLUSION

The problem-solving court model alters the traditional role of the judge and the court in order to address issues of drug abuse, juvenile delinquency, mental health and other areas where criminal law and social pol-

255. *See, e.g.*, OKLA. STAT., tit. 22, § 471.1 (2003).

256. Currently most states have specific enabling legislation, but others, such as New York, do not.

257. *See* Dorf, *Indeterminacy*, *supra* note 15, at 954-960 (suggesting a system of appellate review for the problem-solving courts).

icy intersect. While drug treatment courts are usually recognized as the most prevalent form of problem-solving court, the juvenile courts implemented a hundred years ago shared the same core set of principles. As such, the history of the juvenile courts, including the challenges to legitimacy, should serve as a cautionary tale for the drug courts and other newer models of problem-solving courts.

So my message here is first one of trepidation. A state mandated treatment program has a tendency to yield disastrous results when mixed with a punishment theory. In the juvenile courts, the theory was purely rehabilitative and yet punitive aspects crept into the court, ultimately destroying the treatment ideal. The problem-solving courts present an even more audacious experiment: a state sanctioned treatment model *within* a punitive model. Thus the objective potential for illegitimacy runs higher for the drug treatment courts than for the juvenile courts.

My message is also one of practical success. As experimentalist structures, the problem-solving courts have the capacity to adapt in ways that increase their legitimacy. Recognizing that the criminal context, with the great power differentials among the interested parties, presents a less than ideal application of democratic experimentalism, the model still proves successful. The message should be that these courts, with their collaborative structure, are inherently capable of self-reflection, monitoring and adaptation.

Given the political intractability of the types of social problems addressed by problem-solving courts, the experimentalist spirit should be embraced and congratulated, and if these courts are to succeed in the future, that very same experimentalism must be used to continuously adapt the court structure in ways that increase legitimacy.