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Romancing the Court

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Problem-solving courts, created at the end of the twentieth century, make court-based solutions central to addressing significant societal problems, such as substance abuse and its impact on criminal activity and family functioning. Yet, lessons gleaned from over 100 years of family court history suggest that court-based solutions to intractable social problems have rarely been effective. This article asks three questions of the problem-solving court movement: What problem are we trying to solve? Is the court the best place to solve the problem? What are the consequences of giving authority to a court for solving the problem? Answering those questions through the lens of specific examples from family court—the original problem-solving court—leads to the conclusion that neither the structural issues that courts face, such as overwhelming numbers of cases, nor the momentous societal issues that problem-solving courts have recently begun to shoulder can be adequately addressed through court-based solutions. The factors that allegedly distinguish new problem-solving courts from earlier exemplars, especially the family court, are both less unique and less successful than they have been portrayed by problem-solving court enthusiasts. These factors alone fail to justify the expansion of problem-solving courts without further evidence of their effectiveness. Moreover, the potential dangers inherent in problem-solving courts are not theoretical. By examining illustrative examples from the history of the family court, the dangers become clearly apparent.

Keywords: *family court*; *status offenses*; *problem-solving courts*; *court reform*; *drug courts*; *judges*

What does it mean to be a judge? Let's look at two models. In the first, the judge rules on procedural issues, considers evidence, applies the law, and renders a decision. The luckier ones sit on a court that hears a relatively small number of cases over the course of the year and are able to structure their schedules to maximize their ability to do their job well. If, on the other hand, a judge presides over a court that processes hundreds of cases a week, such as a misdemeanor criminal court or housing court, that judge spends most of the time rubber-stamping plea bargains or settlements that were negotiated in the hallway outside the courtroom, frequently seeing the same litigants.

Then there is a second model. It may be called a drug court or a mental health court or a domestic violence court. The judge's role shifts to one of an active participant, even the head of a team. All of the court professionals are committed to resolving the underlying problems that bring the litigants to court: substance abuse, mental illness, or domestic violence—conditions that lead to criminal activity, an inability to parent children, or remaining safe. The court continues its oversight after determining the best way to address these problems, monitoring compliance with the team's expectations of the defendant or respondent, who is frequently referred to as "the client." The client appears regularly in court, usually as part of team meetings. There are rewards for progress, including applause, hugs, and cheers. When the client does not comply, sanctions are available, ranging from more frequent court appearances to time in jail. The judge becomes a judicial leader who works to acclimate the public to this new role as a "problem-solving" judge who is concerned with the well-being—rather than just the rights—of the people who appear in the courtroom. While many judges support this second model, others ask whether it is

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appropriate for the judge to lead a team of professionals addressing the underlying dysfunction of a misdemeanor drug user or a neglectful parent rather than determining whether the power of the state can be fairly and meaningfully used to punish crime or protect children. This article investigates that question by examining some of the work of the paradigmatic problem-solving court: the family court.[1]

COURTS AS PROBLEM SOLVERS

When the founders of the juvenile court movement began their courts, they explicitly focused on the needs of the children who would use the courts. In essence, they believed that the criminal court, with its adversarial nature and punitive function, was unfit to address the underlying issues that brought a young person to court: family dysfunction, youthful antisocial behavior, and the larger societal problems manifested particularly by poverty, immigration, and racial status. Nor was the adult court able to distinguish the special developmental needs of children in order to treat them differently than adults. By organizing around developmental and treatment needs, the early court was based on a rehabilitative ideal that was not rooted in the particular actions of the child or parent but focused instead on the potential outcome of right practices on behalf of the youth.[2]

Alfred Kahn noted in his famous 1953 study of New York's Children's Court that the Children's Court is:

> more concerned, in the first instance, not with the offense per se but rather with whether or not the child requires special care of the State and with the nature of his specific needs. This means that social and psychological factors enter the court's consideration at least on a par with legal factors. The court ceases to be a battleground between two individuals or between an individual defending self-interest and a state concerned with the general welfare.[3]

Kahn's depiction is remarkably similar to the underlying rationale for today's problem-solving courts. Greg Berman has captured the essence of these courts as using "the authority of courts to address the underlying problems of individual litigants, the structural problems of the justice system, and the social problems of the communities."[4] But is this new movement founded on something more than the ideas that gave rise to juvenile court? If not, we may be repeating a not very successful history of interventionist family courts.

Perhaps because the modern problem-solving court movement was born in the criminal justice system, the historic importance of the broad family court movement in analyzing the problem-solving court paradigm has been less central than it should be. Scholars have acknowledged similarities between the early juvenile court and the current drug courts—particularly individualized treatment and judicial oversight—but have rarely connected the paradigm to the broader family court experience.[5]

When the New York unified family court was created in 1962, it was created as a problem-solving court to replace, in part, the Children's Court, which was created as a problem-solving court at the beginning of the twentieth century.[6] The unified Family Court Act (FCA) had a specific section to define the problem-solving nature of the court:

> This act defines the conditions on which the family court may intervene in the life of a child, parent and spouse. Once these conditions are satisfied, the court is given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular

> needs of those before it. The judges of the court are thus given a wide discretion and grave responsibilities.[7]

New York's broad interventionist approach exists throughout most of the country. The restrictive language that begins Section 141—"This act defines the conditions on which the family court may intervene in the life of a child, parent and spouse"—should be read cautiously. The legal bases that permit the court to intervene initially in the life of a family are either, in themselves, not very restrictive or have been interpreted to permit intervention without sufficient restraint. So, for example, the conditions that allow a parent to ask the state to control his or her child because the parent is unable to do so are frequently vague and open ended.[8] Yet once the conditions of intervention are met, the court can use a wide range of powers for dealing with the complexities of family life. But as a problem-solving court, family court has been remarkably unsuccessful. While some of that failure can be attributed to the lack of resources—a habitual problem for most courts—insufficient resources can obscure other reasons that family court has not succeeded as a problem-solving court. These reasons, in turn, provide important lessons for the newest problem-solving courts. These lessons must start with some basic questions about the court. What problem are we trying to solve? Is the court the best place to solve the problem? What are the consequences of giving authority to a court for solving the problem?

THE PROBLEM TO BE SOLVED: THE STRUCTURE OF COURTS

Systemic court problems roughly fall into three categories: the substantive issues that the court is being asked to resolve—delinquency, child welfare, or custody—which are generally organized by case type; due process requirements within a case type, such as whether a litigant is entitled to a court-appointed lawyer or the rules about confidentiality in certain types of proceedings; and what Berman identified as "the structural problems of the justice system,"[9] or the process by which the court resolves the issues. Structural issues often come to the fore during a crisis when the court is overwhelmed by cases or when resources are more scarce than usual. When drug courts first began, their immediate goal was to address a case-overload crisis in the courts resulting from punitive "War on Drugs" laws and the ensuing expensive prison population. Only later did the therapeutic and problem-solving nature of the reform begin to take hold.[10] Candace McCoy, who offers a thoughtful historical perspective on the political context of court reform, posits that whatever else drug courts may be accomplishing now, they have not solved the original goals of reducing the caseload crisis and the glut of prisoners. One reason is that the drug courts still remain a small proportion of the criminal court structure. A second reason is that, under the law, most of the crimes being prosecuted in these courts are not drug crimes (which still require mandatory sentencing), but crimes that arise out of drug use.[11]

A third reason may be the very nature of court reform that responds to case crises. Courts are not responsible directly for the number of cases they handle. The ebb and flow of cases are predominantly caused by factors beyond the court's control. While the court has the ability to limit cases that clearly are beyond the court's jurisdiction or to recommend alternative methods of case resolution to minimize unnecessary court involvement, legislative bodies determine whether an action is a crime to be prosecuted or whether modifying a custody decree requires court power, or if "incorrigibility" is a basis for a parent hauling

his or her teenager off to court. Responding to these legislative prerogatives through court restructuring is unlikely to have lasting impact.

In his sweeping thirty-year assessment of California courts, Harry N. Scheiber effectively argued that high volume, congestion, and delay are recurring problems of court systems that will forever be under-resourced and that structural reforms, such as judicial reassignments or new forms of case settlement processes, have had limited (and mostly short-term) effects. Scheiber concluded, "Many changes that are routinely called reforms are not truly reformative in any way but rather are better termed 'adjustments.' "[12]

The family court has a long history of this type of adjustment. For example, in New York between 1932 and 1944, all Children's Court judges heard some truancy cases, but there were too many of these cases for the judges to hear, not enough time to spend on them if they were also going to adjudicate more serious cases, and a lack of uniformity in their approaches to truancy. To improve the situation, a "School Part" with a specialized judge was created to hear all the truancy cases and to provide extra support services to assist the judge. Over time, however, the special part began to work like the rest of the court, having access only to the same services as other parts.[13]

Having created the School Part for the purpose of focusing on one symptom—truancy—the part increasingly had to deal with other issues underlying the child's absence from school. While the child's school attendance improved while the case was open in court, subsequent attendance and other school- or family-related problems were not resolved. Six years later, the system was changed to rotate judges with a particular interest in school-based issues into the School Part. This improved the outcome on these cases but resulted in fewer judges available for the much larger group of cases being heard in the rest of the court. Kahn envisioned that the School Part would eventually be reintegrated into the regular court parts, incorporating the successful practices that had been developed.[14] In fact, in less than ten years, a new law would be written to address truancy and other examples of nondelinquent behavior that nevertheless results in family court jurisdiction.[15] This shift from general to specialized and back continues unabated in contemporary family court reform efforts.

One form of generalization is the "one family, one judge" approach that currently has a powerful place in family court reform ventures across the country. Any case related to a family is sent before the same judge to ensure that overlapping issues related to the family are addressed in a consistent manner. It also diminishes the need for families to appear in multiple courtrooms on multiple days to address those overlapping issues.[16] This approach is consistent with the underlying purpose of a family court "given a wide range of powers for dealing with the complexities of family life so that its action may fit the particular needs of those before it."[17]

Specialization, on the other hand, allows a judge to understand more deeply a narrower but still complex area of law, enabling the judge to develop an expertise that produces wiser decisions. In the late 1990s, following a period of extremely high numbers of child welfare cases, the practice of presiding over the full range of family court cases in New York was altered. Instead, as part of an ambitious court reform program, judges and other judicial hearing officers were assigned to specific types of cases, such as child welfare or delinquency or support. Court administrators declared that, in response to the "epidemic" in child welfare cases, "the court system is taking the lead through a targeted approach to neglect and abuse," by introducing the idea of "specialized treatment of cases."[18] Overall, this specialized treatment was intended to result in more efficient, expeditious and comprehensive adjudication of cases.[19] The alteration "reaches into the heart of Family Court operations"[20]

and "fundamentally changes the way the court conducts its business in order to ensure that the justice needs of children and families are met on a daily basis."[21] The predominant strategy was "to reduce backloads and expedite handling of all proceedings" by creating more efficient judicial mechanisms for case resolutions through specialized parts and the addition of judicial hearing officers to assist the judges in adjudicating cases.[22]

During the next several years, judges began to have greater control over their cases and their courtrooms. Many judges were able to conduct more in-depth hearings and monitor their dispositional orders more frequently and with more attention. Then in early 2006, a child tragically died in New York under living conditions that had been inadequately investigated by child protective services. The number of maltreatment cases being reported on the child abuse hotline rapidly skyrocketed along with the number of cases being prosecuted in court.[23] The child welfare court parts were again overwhelmed. In fact, it quickly became apparent that specialization, for the most part, had ridden the wave of steadily diminishing caseloads in the New York child welfare system during the early years of the twenty-first century.[24] The central reason the specialized child protective judges had a better handle on their cases was that they had significantly fewer cases—a reminder that these types of structural changes, limited as they are by factors beyond the court's control, cannot be the source of enduring court reform.

THE PROBLEM TO BE SOLVED: SOCIAL PROBLEMS OF COMMUNITIES

These social problems are the complicated substantive issues that find themselves at the courthouse door: delinquency, child maltreatment, domestic violence, or substance abuse. When they affect an individual, they might be characterized instead as "the underlying problems of individual litigants."[25] The characterization is less important than the goal: to have a significant impact on a large social problem through court-based solutions. The National Association of Drug Court Professionals (NADCP) was founded to support the goals of drug courts "to reduce the negative social impact of substance abuse, crime, and recidivism" and "primary to NADCP's work among these other [family court] drug court models is its constant drive toward healing broken families devastated by substance abuse."[26] In not shying away from big social goals, like healing broken families devastated by substance abuse, how do courts, as courts, go about achieving them? First they are given permission.

In the case of contemporary problem-solving courts, both the imprimatur of the chief jurists of the land and the deep pockets of the federal government were essential in legitimizing and promoting the problem-solving court enterprise. The Conference of Chief Justices and the Conference of State Court Administrators issued resolutions in 2000 and 2004 hailing the creation of these courts. The 2000 Resolution began by officially naming these courts as "Problem-Solving Courts." While recognizing that "courts have always been involved in attempting to resolve disputes and problems in society . . . the collaborative nature of these new efforts deserve recognition."[27] In fact, with the exception of California, every drug court in the country was created by judges and not legislatures.[28]

Equally important in the creation of problem-solving courts was the funding that poured into the state court systems during the 1990s. In fiscal year 1996, $5.7 million was awarded to local drug courts, growing to $30 million only two years later. As McCoy concluded, "the rapid growth of the movement as a whole was catalyzed by a considerable infusion of resources from the federal government. Once federally supported drug courts had become

entrenched in local legal cultures, state and local governments began to implement drug courts on their own, without federal funding."[29] Problem-solving courts were similarly encouraged in family court systems through federal funding mechanisms, including the State Court Improvement Project (CIP).[30] A central feature of the CIP was to create "model court" family courts, a family court variant of the problem-solving court that included family drug treatment courts. An unprecedented opportunity was being provided to dispirited local courts. Their superiors were telling them that these courts were the wave of the future and the federal government was opening new coffers, both powerful incentives for change. At the same time, the mission of problem-solving courts was shifting perceptibly from management questions to therapeutic ones. In drug courts, for example, McCoy identified this "turn" as normalizing the idea of the drug court shouldering anew a rehabilitative approach to antisocial behavior.[31] Unlike the criminal court, whose rehabilitative function had been discredited for several decades, this function had remained more intact in family court.[32]

STATUS OFFENSES AND THE LIMITS OF THE PROBLEM-SOLVING IDEAL

The truancy laws that resulted in the "School Part" that Kahn examined in 1953 were a precursor to the 1962 Family Court Act establishing court jurisdiction over Persons in Need of Supervision (PINS). In the earlier Children's Court, these children were categorized as either delinquent or neglected. The 1962 law created separate proceedings for children committing what have come to be called status offenses because they are based on the age status of the offender: acts that are not criminal if committed by an adult but which become subject to court jurisdiction if committed by a youth, usually under the age of 18.[33] While New York created one of the first laws that purposefully separated status offenses from delinquent acts, most states quickly followed suit, generating acronyms like JINS, CHINS, or even FINS (juveniles, children, and families in need of supervision). When states created a separate category of status offenses during the 1960s, the family court retained its proprietary responsibilities over these problems, allowing schools, the police, and parents to turn to the court for assistance. The court would exercise its combination of protective and coercive power to support young people and their families facing urgent problems that seemed or were beyond their ability to solve on their own. The court would collaborate with the probation or child welfare departments as well as community-based mental health or treatment providers to craft solutions and then monitor the child's and family's progress. Moreover, the court would, if necessary, order the child out of the home and into some kind of placement.[34]

Status offender jurisdiction had many of the elements of a problem-solving court: collaboration among service providers and the court to improve access to services, a forum designed to resolve disputes with all the necessary parties present, and most important, a judge with both therapeutic and coercive power to require acquiescence to court created solutions to difficult problems. The court was treating the offender, using the potential coerciveness of probation, detention, or placement as a means to ensure compliance with treatment or less serious constraints, like curfews or school attendance.

There are at least four components of problem-solving courts which parallel family court status offender jurisdiction. First, problem-solving courts separate out certain kinds of cases for attention, organized around issues of substance abuse, mental health, domestic

violence, or other symptoms that appear to be central to the reason why the person or family finds itself in court. In criminal courts, similar practices are developing beyond drug courts to include mental health and domestic violence courts. Status offender jurisdiction began the same way. These were cases that needed specialized attention because they were neither delinquency cases nor child maltreatment cases (though they could have been either), but focused on particular behavior, such as truancy, that resulted in court action. Status offender jurisdiction, like its predecessor "School Part," focused on the symptom. The goal of a PINS proceeding was, for example, to get a truant youth back in school. The court plays a key role in achieving that goal.

Second, the court was an alternative forum for treating a symptom that was not addressed or provided through other means. As in the original juvenile court, the court was seen as a way to secure those services, either by creating them within the court system itself or by partnering with service providers. Similarly, problem-solving courts arose, in large part, because the courts were inundated with cases whose underlying problems, such as substance abuse, were not being addressed adequately outside the court system. The lack of available or effective treatment outside the court system spurred the idea of providing that treatment within or through the court system.[35]

Third, both systems rely on a judge-driven—not a client-driven—solution. When the court is given jurisdiction over status offenses, the problem is framed by asking how the court can help parents, schools, or the police control this child. The problem is not framed in terms of the assistance available to support this child and family, as well as the larger community, in tackling the child's school or behavioral or substance abuse problems. As with newer problem-solving courts, the judge in status offense cases plays a central role, using his or her discretion and power to craft and manage the solution.

This leads to the most significant parallel between status offense jurisdiction and problem-solving courts: the revitalization of the rehabilitation model as a legitimate tool for courts to employ. When families, schools, or the police turned to the court for help with status offenders, they knew what might happen. If the youth agreed to straighten up, go to school, listen to his folks, or get help with drugs, the youth was likely to stay home or at least in the community. If not, the judge could remove the youth from home, placing him or her in detention facilities or foster care placements for short or long stays. Removal and detention became so widespread, in fact, that by 1974, barely a decade into status offense jurisdiction, Congress enacted the Juvenile Justice and Delinquency Prevention Act (JJDPA), which banned status offenders from secure detention. Nevertheless, out-of-home placements in nonsecure facilities or other institutions remained a powerful tool to compel obedience.[36]

This coercive power is central to the therapeutic problem-solving court model as well. The judge's range of options for securing compliance with drug treatment or other requirements may range from hugs to jail, but in the end, jail remains a viable sanction. For some civil problem-solving courts, other coercive sanctions, such as increased time spent in the courtroom with the judge or other forms of intrusive monitoring, may take the place of actual incarceration. In either case, the possibility of some form of sanction remains central to the court's coercive power. The failure of a status offender youth to obey the orders of the court eventually results in detention or placement.[37] The same is true for drug treatment courts. The availability of sanctions as serious as incarceration is both its strength and its potential downfall.

In an exhaustive review of rehabilitative punishment and drug courts, Richard Boldt, a scholar of problem-solving courts, has persuasively argued that the liberal critique that

helped to discredit the rehabilitative model of criminal justice in the mid-twentieth century is central to examining the current drug courts.[38] The liberal critique of criminal rehabilitation effectively frames one of the central faults of status offense jurisdiction as well as what may be an inherent limitation of problem-solving courts: the need to have some form of punishment to compel a cure. Boldt elucidates four aspects of the liberal critique of criminal rehabilitation before applying their lessons to drug courts. First, the possibility of curing the individual is both elusive and heavily dependent on society's current beliefs about normality. A cure presupposes the availability of individualized treatment that is usually difficult to identify and secure, especially in a massive court system. A cure also presumes a shared societal understanding of individual pathology rather than challenging that defined understanding. Second, the liberal critique identifies the indeterminacy of the rehabilitation model as a form of punishment itself. The uncertainty of the outcome—whether or not an individual will be "cured"—can itself cause the individual psychological harm. Third, rehabilitation relies on discretion that has little scientific basis. Whether to release a prisoner or determine who will be a recidivist or potentially abuse or maltreat a child is based as much on "hunch, bias, and anecdotal experience" as on knowledge or prognosis for success. Last, but central to this discussion, "rehabilitation collapses into punishment."[39] To put it another way, you can hold out the promise of cure in a court system only if you have the means to enforce that cure. Failure to seek or submit to a cure or even failure to succeed in that cure inevitably leads to escalating punishment.

Four factors that status offenses share with problem-solving courts have been identified: categorizing problems as symptoms, drawing services into the court system, creating court-driven and managed solutions, and utilizing a treatment model that incorporates punitive sanctions. The limitations of a court-based solution to solving societal problems complete the analogy.

Status offenses begin in a predictable way: families come to court at the point of crisis. Their child has run away, ignores curfews, hangs out with troublemakers, uses drugs, or skips school. The police or school authorities either initiate the case or encourage parents to use the court's power to get help; sometimes the family itself has heard that the court can do something to set their kid straight. The court, though, can often do very little to address the immediate crisis. Intake appointments take weeks to schedule. Families often have to come to court on multiple occasions, interfering with work and school. Accessing services through the court often delays service delivery. Courts, moreover, continue to use out-of-home placements as a prime tool of social control over the young person even though research has shown that out-of-home placements often exacerbate the problems that cause family conflict.[40] Because the parent is often the petitioner, an adversarial atmosphere pervades the proceedings.

Following the federal mandate against secure detention for status offenders, many young people were released from incarceration in juvenile institutions and states began to use federal dollars to develop more preventive options. Instead of eliminating status offenses entirely, though, they increased diversion programs with the expectation that most cases would never reach court. In New York, a diversion program that started in the 1980s dramatically reduced the number of PINS cases for several years. Then the number of cases began to rise again as "the enthusiasm and funding" that initially sustained the diversion programs began to wane.[41] By 2001, when the Vera Institute began to study the PINS system in New York in response to legislation in 2000 expanding PINS jurisdiction, approximately half of PINS cases were being referred to court, which used out-of-home placements as a dominant tool for resolving family disputes.[42] Facing as many as 5,300

additional cases as a result of the expanded PINS jurisdiction, New York City entirely revamped its approach to potential PINS cases, shifting precourt responsibility from probation to child protective services and focusing on immediate assistance to families in crisis. Upstate counties created similar reforms.[43] These programs reoriented service providers and families in numerous ways: providing access to assistance as soon as the family identifies the problem, helping the family identify its own strengths and weaknesses in order to create individualized assistance plans, encouraging families to use alternative dispute resolution processes like mediation to resolve issues that brought the family to a crisis point, using out-of-home respite services rather than longer term placements, and forwarding to court only those cases that have failed to settle after significant effort. These programs have significantly reduced the number of cases resulting in court referrals and court placement.[44] Even so, these programs are not a substitute for providing comprehensive services to children and their families which would address their needs prior to reaching the crisis point. Nor can they fully engage those families on a voluntary basis when the threat of court action hangs over their heads: youth are threatened by their parents that they'll get the court to send them away from home; parents are threatened by the police or the school system of being charged with neglect if they don't "take out a PINS petition"; the court threatens parents and children if they don't follow court orders.[45] As long as the police, schools, or parents believe the court can make a youth comply, the court is seen as the place to resolve the problem and the voluntary nature of diversion programs is compromised.

The elimination of status offenses in some states, such as Illinois, and the significant diversion from court in others can reformulate the approach to solving the problem. Rather than seeing the symptom as central to the crisis—truancy, running away, drug use—the youth is considered part of a complex family and community system that needs assistance. In many diversion programs, the support builds on the strengths of the youth and family and not just their weaknesses. Alternative dispute resolution processes can be used to engage the participants in creating solutions that may differ significantly from court-centered solutions.[46] Yet even with diversion programs, substantial numbers of cases continue to flow into the court, limiting both the assistance available for any individual case and the court's ability to distinguish between cases which may actually benefit from court intervention and the ones that would be better addressed outside the court system.[47] Without eliminating or severely limiting access to court in status offense cases, alternative, community-based, or public health solutions are undermined.

THE LIMITS OF PROBLEM-SOLVING COURT SOLUTIONS TO SOCIETAL PROBLEMS

Status offender jurisdiction is a stark but representative example of a court-based model of intervention failing to address a significant societal problem. Turning to the factors that make the newest problem-solving courts theoretically unique, we have to consider whether these distinctive factors can overcome the limitations that have plagued the oldest problem-solving court since its inception. These factors are presented in the following way. First, the new court is considerably less adversarial, with everyone collaborating on a team to solve the problem. Second, the treatment and other services provided are superior, more readily available, and more effective. Finally, there is far more extensive and personal monitoring by the court.

THE LIMITATIONS OF TEAMS

Problem-solving courts should theoretically be created by the stakeholders in the justice system. Defenders or other lawyers representing "the client," however, may not experience their role in the creation and execution of the courts as equivalent to that of the other stakeholders, undermining their ability—and the courts'—to create a real team. From the onset of the process, judges and state officials possess financial and administrative control that defenders do not share. The judicial or executive branches determine whether to create the courts and control the funds used to do so. Defenders may disagree with the decision, preferring that the traditional adversarial system be adequately funded to protect their clients' rights. They may also harbor serious concerns about funding the courts to provide services to their clients that may be more appropriately funded through other treatment and social services systems.[48] Yet these are not options presented to them when problem-solving courts are being created.

Defenders who do choose to participate as part of a problem-solving court team anticipate that the other professionals in the court are willing to think differently about clients, to see the client as more than just a defendant, respondent mother, or a substance-abusing truant. Part of the reason that the informal intermediate sanctions used by these courts are believed to be effective is because the person experiencing them has a more complex and respectful relationship with the professional team.[49] This belief may be hard for defenders to sustain when, for instance, consequences for failing in the problem-solving court—a longer jail term or termination of parental rights—may be more severe than those if the client had never agreed to participate in the problem-solving court. Such results challenge a defender's justification for being a member of the court's team.

Thoughtful scholarly investigations into the role of counsel in problem-solving courts have posited that defense counsel cannot fully participate in the team and still shoulder the ethical obligations of being an independent lawyer for a client.[50] For example, most treatment courts require a guilty plea, admission to child maltreatment, or waiver of other due process rights as conditions of participating in the court.[51] The client has to agree to participate when the case first comes to court before the defender is likely to know whether waiving the client's due process rights would make a difference in the outcome of the case. The team defender is faced with the dilemma of having to present these institutional requirements as the only alternative to a client who may want to participate, but not yet be willing to acknowledge guilt or child maltreatment. The complex factors that contribute to the client succeeding or failing in treatment are also not readily available to the lawyer at the start of a case. Moreover, the defender usually has little opportunity to discuss the choices that the clients face, limiting their ability to provide effective counseling.[52] Rather, as a member of the team, the defender is expected to participate in therapeutic manipulation as part of the approval and sanctioning process, including encouraging clients to tell the judge of their drug use or other misbehavior.[53] In short, a defender may end up urging the client to give information which will result in more jail time, being kicked out of the program, or losing a child.

The dilemma of the defender being required to address the client's more pervasive needs has an apparent parallel in family court. When the Supreme Court determined in *Gault* that a child subject to loss of liberty was entitled to counsel, the Court rejected the therapeutic underpinnings of the family court when it conflicted with fundamental fairness in a delinquency proceeding.[54] Some states, including New York, applied that due process requirement to status offenses as well, recognizing that, when the state has such great power over the

shape of an individual's life, an independent advocate ensuring due process is necessary for the client's protection.[55] The defender cannot be seen as having the same goals or role as the judge, the prosecutor, the probation officer, or any other agent of the state, even if all of them said they only wanted what is best for the child. The lawyer for the child has a different advocacy role, a role that explicitly rejects worrying about what is best. This historical precedent, along with the other factors identified by concerned defenders, conveys an important lesson about the limits of a team model approach in problem-solving courts.

THE LIMITATION OF TREATMENT IN THE COURT SYSTEMS

The second component of problem-solving courts that is supposed to distinguish these courts from their counterparts in criminal and family proceedings is the greater availability of treatment or other services. Given the history of family court, this distinction is weak. From the creation of the earliest juvenile courts, providing services within the court or contracting with outside providers for those services has been a central feature of the court. While most family courts have fluctuated over time in providing services in or out of the court, service provision has always been a component of the court.[56] The nature and extent of those services are critical. Drug treatment courts (and some other problem-solving courts) have drawn down significant treatment resources. The federal and subsequent local funding of drug and family treatment courts has made treatment increasingly available through courts. The question is whether there has been a significant shift of treatment resources from communities to courts. If so, the availability of treatment in the courts skews the provision of services. Treatment that is readily available in the community could be as effective as court-based treatment—or even better—eliminating the need, in many cases, of creating a court-based structure.[57]

Status offenses provide some insight into the potential predicaments and consequences of creating a court-based system to access treatment. First, providing treatment through the court has the potential of net widening. If the court is the best place to get help, the client may be more inclined to submit to the court's jurisdiction or waive certain rights rather than to seek more elusive help outside the court. At the same time, if the services are more available in the court, prosecutors or child welfare agencies may be more willing to bring cases to court to get those services, even though the particular client might be as successful without court intervention for that purpose. Schools, police, and parents are more predisposed to use status offenses to control a child if they know that the court is an available resource. Second, the power of the court to control the child—including setting curfews, establishing other rules, or even by removing the child from home—results in far more intrusion into the child's daily life. Similar restrictions on daily life by drug treatment courts have been reported, including limitations on relationships.[58] Third, despite the recent growth of problem-solving courts, they address a relatively small percentage of the overall criminal or family court docket.[59] Taken to scale, problem-solving courts may face the same limitations as traditional family courts: insufficient funding, inadequate services, and a court-based solution in place without the resources for the clients. Finally, there may be less incentive to create and fund community-based treatment resources.

Almost twenty years after the first drug court was established, the question that has yet to be answered is whether providing treatment through the court system, rather than having treatment readily available in the community for the same clients, makes a difference. In studies of treatment courts, the question that is generally asked is whether the treatment

court is having an impact on the defined goals of the case—reduced drug use, improved school attendance, or the likelihood of reunification of families—not whether the provision of treatment as a preventive measure would or could have achieved the same or better goals. Studies are only now starting to parse out which drug court components matter and in what ways.[60]

As these courts continue to flourish, we need to know, at a minimum, whether individualized treatment can be taken to scale; whether some of the initial successes are based on specific attributes or experiences of the participants; whether the components that were effective for substance-abusing adults in criminal court will also work for juveniles or parents in family court; or even whether evaluations can be funded, developed, and completed to answer these questions.[61] Given the failure of court-based assistance to achieve the goals of status offender jurisdiction—as just one example—to improve the lives of these children, we should be cautious in our reliance on any court-based treatment solution. And we should be asking whether there are community-based public health initiatives that offer better treatment alternatives than court-based solutions.

THE LIMITATION OF THE CHARISMATIC JUDGE

Problem-solving courts cannot exist without the central role of the judge. Consider this description:

> To begin with, the drug court judge deliberately departs from the kind of passive role Tocqueville saw as a defining quality of the American judiciary. Instead, the drug court judge is, on a number of fronts, an activist judge . . . the main actor in the courtroom drama. But the judicial robe of passivity is also shed when the judge is off the bench. That is, the judges actually involve themselves in the lives of clients outside the courtroom. . . . The drug court judge's involvement in the community, however, is not just in relating individually to drug court clients, their relatives, or their employers. The drug court judge also plays a significant leadership role in bringing the whole program together. . . . The very existence of a drug court is often the direct result of the administrative leadership of a judge.[62]

And this one:

> The importance of the work of the judges can hardly be overemphasized. Theirs is the role which sets much of the Court's tone, and they carry the delegated responsibility to promote both community protection and individual welfare. They embody power and prestige which can be used in the Court per se and in the community to protect, to help, and to rehabilitate. In short, they are the leaders of the court "team." For the majority of parents and children the significance of the entire court is largely decided on the bench.[63]

And then this one:

> It is my firm conviction that no juvenile court system can do its work well unless the judge assumes leadership and responsibility for the entire situation: court, probation work, detention and treatment. The judge must interpret the work of the court to the community.[64]

The first quotation is from James Nolan's *Reinventing Justice*, his 2001 investigation of the drug court movement.[65] The second is from Alfred Kahn's description of the New York

City Children's Court in 1953.[66] The third is from Miriam Van Waters' contribution to the 1925 commemoration of the first twenty-five years of juvenile court, *The Child, The Clinic and The Court*.[67] The juxtaposition of the three is illuminating. There is no question that the role of the drug court judge in criminal court is dramatically different from that of his or her colleague across the hall conducting felony trials: the defining qualities of the neutral decision maker are nowhere to be found. But down the hall or across the street, the family court judge conducting child welfare, custody, or status offense hearings is not dramatically different. Since the very earliest days of the juvenile court, the judge has been the leader of the activist team.

Relying on historical accounts of the juvenile court, Nolan identified two central differences between the early juvenile court and the current drug court model. First, the early juvenile court and the clinics associated with them were not as integrated and intensive as the problem-solving treatment providers and the present-day drug court programs and, second, the juvenile court judges were less involved in the daily lives of the clients of the court.[68] Yet these are differences of degree and not of kind. Both models rely fundamentally on the concept of the judge as a charismatic leader, problem solver, team manager, and judicial leader.[69] While there are a number of family court judges who possess the energy, dedication, and abilities to be problem solvers and judicial leaders, "few judges are really temperamentally fitted and few are so eminently endowed as to be able to do the juvenile work and the probation work and all the other work that must be done if the court is to be really successful."[70] That, at least, is what Julian Mack wrote after serving on the Cook County Juvenile Court at the beginning of the twentieth century.[71]

Half a century after Mack presided over the Juvenile Court, Kahn similarly lamented that most of the judges he has observed are unable to integrate the legal and social service tools given to them. They do not understand the psychological assistance provided by mental health professionals, they impose dispositions riddled with personal biases about how families should live their lives or how children should behave, they use "superficial devices" (like an arm around the youngster's shoulder) to show the children that they care, and they lack effective interactive skills for interviewing and explaining what is happening to the child. Kahn concluded:

> Judges are prone to a major occupational hazard—the feeling that they can readily appraise a situation and regularly make wise decisions not subject to question. A court in which there are few attorneys, no representatives of the press, and practically no reviews by higher courts, yet in which judges are called upon daily to make many decisions of major consequences, lends itself particularly to such hazards.[72]

Yet some of the changes that Kahn thinks would limit the court's personal discretion—attorney representation, open courts, and appellate review—have not resulted in eliminating either this "major occupational hazard" or the other limitations he identifies in judges. In the subsequent half century, despite the tremendous growth in knowledge about child development, family dynamics, and the impact of court processes on litigants, many judges remain unable to integrate this knowledge in an effective balance of due process protection and problem-solving dispositions. Nevertheless, judicial leaders continue to herald this paradigm. On receiving the William H. Rehnquist award, Judge Leonard Edwards, a distinguished and extraordinarily dedicated family court judge, reminded his audience that the juvenile court judge is different than the traditional judge because "in deciding the future of a child or family member, the juvenile court judge must, in addition to making a legal

decision, be prepared to take on the role of an administrator, a collaborator, a convener, and an advocate."[73] Given his audience's familiarity with the burgeoning problem-solving court movement, he declared, "Juvenile Court is the original problem-solving court."[74]

Like some of his predecessors, Judge Edwards understands the need to develop resources beyond the court and seriously supports more client-oriented solutions. But that is not enough to stem the tide of judicial activism that situates problem solving in the court itself rather than in the broader structure of how people in need are served by our society. We do not need to wait to see if the warnings about the dangers inherent in problem-solving courts are realized. In the history of family court, they have been clearly apparent.

CONCLUSION

Addressing significant societal problems through court-based and court-structured solutions—in particular the burgeoning problem-solving court movement—requires us to ask whether courts are the best places to solve some of the most intractable social problems of our time. The factors that allegedly distinguish new problem-solving courts from earlier exemplars, especially the family court, are both less unique and less successful than they have been portrayed by problem-solving court enthusiasts. These factors alone fail to justify the expansion of problem-solving courts without further evidence of their effectiveness. Moreover, the potential dangers inherent in problem-solving courts are not theoretical. By examining illustrative examples from the history of the family court, the dangers become clearly apparent.

NOTES

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1. I use the term "family court" to encompass courts variously called juvenile courts, domestic relations courts, dependency courts, children's courts, and so on.

2. David S. Tanenhaus, Juvenile Justice in the Making 3 (2004).

3. Alfred Kahn, A Court for Children: A Study of the New York City Children's Court 20 (1953).

4. Greg Berman, *"What is a Traditional Judge Anyway?" Problem-solving in the State Courts*, 84 Judicature 78 (2000).

5. *See, e.g.*, James L. Nolan, Jr., Reinventing Justice: The American Drug Court Movement (2001); Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 20 Am. Crim. L. Rev. 1513, 1515 (2003) (warning that the tension between therapeutic and disciplinary goals of the early juvenile court led to the juvenile court's failure to accomplish either goal well).

6. Kahn, *supra* note 3, at 31 (describing the creation and recreation of the Children's Court jurisdiction from 1902 until 1933).

7. N.Y. Fam. Ct. Act § 141 (2007).

8. *Id.* § 712 (2007) (includes a person who is "incorrigible, ungovernable or habitually disobedient").

9. Berman, *supra* note 4, at 78.

10. McCoy, *supra* note 5, at 1518.

11. *Id.* at 1528.

12. Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960–1990*, 66 S. Cal. L. Rev. 2049, 2056 (1993).

13. KAHN, *supra* note 3, at 123–27.

14. *Id.*

15. See *infra* for a discussion of status offences.

16. Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 491, 527 (1998).

17. N.Y. FAM. CT. ACT § 141 (2007).

18. HON. JUDITH S. KAYE & HON. JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., FAMILY JUSTICE PROGRAM 9 (1997).

19. N.Y. STATE UNIFIED COURT SYS., FAMILY JUSTICE PROGRAM: PHASE III (2001) [hereinafter FJP III].

20. HON. JUDITH S. KAYE & HON. JONATHAN LIPPMAN, N.Y. STATE UNIFIED COURT SYS., FAMILY JUSTICE PROGRAM: PHASE II 5 (1998).

21. *Id.* at i.

22. FJP III, *supra* note 18, at 4.

23. N.Y. CITY BAR ASSOC., THE PERMANENCY LEGISLATION OF 2005: AN UNFUNDED MANDATE 6–8 (2007).

24. From 2001 until 2005, the number of children in foster care dropped from 30,858 to 18,968, a 38.5% decrease; the following year, the number dropped to 16,706 children. *See* N.Y. City Admin. for Children's Services (ACS), *ACS Update Annual Report 2005: Five Year Trend* (2007), http://www.nyc.gov/html/acs/downloads/pdf/stats_5_year_2006.pdf.

25. Berman, *supra* note 4.

26. National Association of Drug Court Professionals, *Letter from the Chief Executive Officer*, http://www.nadcp.org/about/ (last visited Nov. 12, 2007). Similarly, the early twentieth-century Women's Court and the late twentieth-century Midtown Manhattan Community Court both included in their mission eliminating prostitution. *See* Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665 (2006).

27. Conference of Chief Justices, Conference of State Court Administrators, *Resolution 22: In Support of Problem-Solving Court Principles and Methods* (Jan. 29, 2004), http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf.

28. Hon. Morris B. Hoffman, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567 (2003).

29. McCoy, *supra* note 5, at 1527.

30. Mark Hardin, *Court Improvement for Child Abuse and Neglect Litigation: What Next?* 3 (2003), http://www.abanet.org/child/rclji/ccj_article.pdf.

31. McCoy, *supra* note 5, at 1521; *see also infra* note 37 (for discussion of a liberal critique of rehabilitation).

32. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 544 (1971) (in which Justice Blackmun expressed the concern that imposing the requirement of jury trials in juvenile court would be the final demise of the rehabilitative aspiration of the court).

33. N.Y. FAM. CT. ACT § 712 (2007).

34. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 972–73, 991 (3d ed. 2007).

35. John Roman et al., *American Drug Policy and the Evolution of Drug Treatment Courts*, *in* JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE 27 (Jeffrey A. Butts & John Roman eds. 2004).

36. ABRAMS & RAMSEY, *supra* note 34, at 983, 990 (a 1980 amendment to JJDPA permitted states to authorize secure detention for status offenders who violated certain court orders); JESSE SOUWEINE & AJAY KHASHU, VERA INST. OF JUSTICE, CHANGING THE PINS SYSTEM IN NEW YORK: A STUDY OF THE IMPLICATIONS OF RAISING THE AGE LIMIT FOR PERSONS IN NEED OF SUPERVISION (PINS) 7 (2001) (identifying ways in which status offense courts administered secure detention through hospital placements or delinquency charges).

37. TINA CHIU & SARA MOGULESCU, VERA INS. OF JUSTICE, CHANGING THE STATUS QUO FOR STATUS OFFENDERS: NEW YORK STATE'S EFFORTS TO SUPPORT TROUBLED TEENS 3 (2004).

38. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1206 (1998).

39. *Id.* at 1240.

40. CHIU & MOGULESCU, *supra* note 37, at 3, 6.

41. SOUWEINE & KHASHU, *supra* note 36, at 8.

42. *Id.*

43. CHIU & MOGULESCU, *supra* note 37, at 3–4.

44. *Id.* at 5.

45. Sharon Lerner & Barbara Solow, Ctr. for New York City Affairs, "There's No Such Place": The Family Assessment Program, PINS and the Limits of Support Services for Families with Teens in New York City 9 (2007); Chiu & Mogulescu, *supra* note 37.

46. Chiu & Mogulescu, *supra* note 37, at 4–5.

47. In considering the expansion of service provision through the courts, Edward Mulvey warned, for example, "that family court intake could become another social service provider justifying its existence with success rates of families often not needing services in the first place." *See* Edward P. Mulvey, *Family Courts: The Issue of Reasonable Goals*, 6 Law & Hum. Behav. 49, 59 (1982).

48. Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 Fam. Ct. Rev. 435 (2002).

49. Robert V. Wolf, *Fixing Families: The Story of the Manhattan Family Treatment Court*, 2 J. Ctr. For Fam., Child. & Cts. 5, 13–15 (2000); Steven Belenko, Nat'l Ctr. on Addiction & Substance Abuse At Columbia Univ., Research on Drug Courts: A Critical Review 2001 Update 25 (2001).

50. *See, e.g.*, Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. Rev. L. & Soc. Change 37 (2000); Boldt, *supra* note 38.

51. Quinn, *supra* note 50, at 49; Wolf, *supra* note 49, at 11.

52. Quinn, *supra* note 50, at 62–63.

53. *Id.* at 71; Nolan, *supra* note 5, at 77–81.

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

55. N.Y. Fam. Ct. Act § 249 (2007).

56. Mulvey, *supra* note 47, at 56.

57. *Id.* at 59. In considering the expansion of service provision through the family court intake division, Edward Mulvey warned that these service providers could compete for funds with community-based services and draw clients unnecessarily into the court system, claiming effectiveness for clients who may never have needed to be involved in the court system at all.

58. James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 Am. Crim. L. Rev. 1541, 1562 (2003).

59. McCoy, *supra* note 5, at 1513. Between March 1998 and August 2005, 315 clients graduated from the Manhattan Treatment Court. *See* The Center for Court Innovation, Manhattan Family Treatment Court, http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPage&PageID=598&currentTopTier2=true (last visited Nov. 5, 2007). While the exact number of neglect cases filed during that seven-year period of time is difficult to confirm, from 2000 until 2005, close to 9,000 neglect cases (not including abuse allegations) were filed in the same county. *See* N.Y. State Unified Court System Report, No. JAMBPR36 (2006) (on file with author). While not all of these cases involved issues of substance abuse, the percentages of child protective cases in which substance abuse may be a factor is estimated to be between 40%–70%. NPC Research, Family Treatment Drug Court Evaluation: Final Report 1 (Mar. 2007), http://www.ncsacw.samhsa.gov/files/FTDC%20Evaluation%20Final%20Report.pdf.

60. Jeffrey A. Butts & John Roman, Juvenile Drug Courts and Teen Substance Abuse 272 (2004) ("Despite a growing body of evaluation studies, few solid conclusions can be drawn about the effectiveness of drug court programs, either for adults or for juveniles"); Beth L. Green et al., *How Effective are Family Treatment Drug Courts? Outcomes from a Four-Site National Study*, 12 Child Maltreatment 43, 44 (2007) (Their preliminary findings across four national family treatment drug courts (FTDC) sites support the effectiveness of FTDC in terms of participants entering treatment more quickly, staying in treatment longer, and being more likely to complete treatment, as well as being more likely to be reunified with their children or their children securing permanent living situations. Yet the authors were unable to determine which features of the FTDC model were responsible for these effects).

61. Butts & Roman, *supra* note 60, at 261.

62. Nolan, *supra* note 5, at 94.

63. Kahn, *supra* note 3, at 98.

64. Miriam Van Waters, *The Juvenile Court from the Child's Viewpoint: A Glimpse into the Future*, *in* The Child, the Clinic and the Court 236 (New Republic, Inc. 1925).

65. Nolan, *supra* note 5, at 94.

66. Kahn, *supra* note 3, at 98.

67. Van Waters, *supra* note 64.

68. Nolan, *supra* note 5, at 172–176.

69. Tanenhaus, *supra* note 2, at 26, 30 (describing the activities and perspectives of Cook County's inaugural Juvenile Court Judge, Richard Tuthill).

70. Julian W. Mack, *The Chancery Procedure in Juvenile Court*, *in* The Child, the Clinic and the Court, 313 (New Republic, Inc. 1925).

71. *Id.*

72. Kahn, *supra* note 3, at 115.

73. Hon. Leonard P. Edwards, Super. Ct. of Cal., County of Santa Clara, Remarks on Receiving the William H. Rehnquist Award for Judicial Excellence at the U.S. Supreme Court, Washington, D.C. (Nov. 18, 2004).

74. *Id.*

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