Problem-Solving Courts

Richard C. Boldt[*]

Problem-solving courts have emerged as a significant feature within the criminal justice system. This chapter describes the origins of the problem-solving courts movement as a pragmatic response to perceived dysfunction within the criminal justice system in the last part of the 20th century, and reports on research regarding drug-treatment courts and mental-health courts, two of the most prominent examples of the problem-solving methodology. It then offers an assessment of the promise and perils of the problem-solving approach, and describes the "risk-need-responsivity" model, which has been developed to help identify offenders who might benefit from rehabilitative interventions and to identify the particular interventions that are most likely to reduce reoffending in a given case. The chapter recommends that policymakers prioritize alternatives to criminal system-located problem-solving courts for low-level drug offenses and other quality-of-life infractions. Problem-solving courts should focus on higher-risk offenders, offer a menu of services that match the full range of participant needs, and adopt structural features that minimize the tendency of rehabilitative intentions to devolve into punitive practices.

* T. Carroll Brown Professor of Law, University of Maryland Francis King Carey School of Law. Portions of this chapter are drawn directly from the following previously published articles: Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash. U. L.Q. 1205 (1998); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 Md. L. Rev. 82 (2006); Richard C. Boldt, *The "Tomahawk" and the "Healing Balm": Drug Treatment Courts in Theory and Practice*, 10 Md. L.J. Race, Religion, Gender & Class 45 (2010); Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 Md. L. Rev. 1120 (2014).

INTRODUCTION

Problem-solving courts have emerged as a significant feature within the criminal justice system.[1] There are now well over 3,000 specialized courts in the United States that pursue a problem-solving approach.[2] The majority of these problem-solving courts are focused on offenders who misuse drugs.[3] Other specialized courts have been established, however, to address mental illness, intimate violence, and other concerns that proponents believe are suitable to a problem-solving methodology.[4] In addition to the continued expansion of this universe of separate problem-solving courts, advocates eager to see problem-solving jurisprudence "go to scale" are now encouraging court systems to adopt policies that would facilitate the incorporation of problem-solving practices more broadly into ordinary criminal courts and other general jurisdiction courts.[5] These efforts to develop and expand problem-solving jurisprudence have received support from leaders within the bench and bar.[6] In 2000, the United States Conference of Chief Justices and the Conference of State Court Administrators approved a joint resolution calling for the "broad integration"

1. Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 Just. Sys. J. 35, 35 (2005); *see also* Ctr. for Justice Innovation, Problem-Solving Courts: An Evidence Review (2015); Nat'l Ass'n of Criminal Def. Lawyers, America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform (2009).

2. Corey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What's a Critical Supporter of Problem-Solving Courts to Do?*, 10 Md. L.J. Race Religion Gender & Class 89, 89 (2010); *see also* Ojmarrh Mitchell, *Drug and Other Specialty Courts*, *in* The Oxford Handbook of Crime and Criminal Justice 843, 847-48 (Michael Tonry ed., 2011).

3. Ctr. for Justice Innovation, *supra* note 1, at 3.

4. Greg Berman & John Feinblatt, Good Courts: The Case for Problem-Solving Justice 3 (2005); James L. Nolan, Jr., Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement 8 (2009); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 Law & Pol'y 125 (2001).

5. Robert V. Wolf, Ctr. for Court Innovation, Principles of Problem-Solving Justice 1–2 (2007); Donald J. Farole, Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 Just. Sys. J. 57, 57–58 (2005). Jane Donoghue has described a notable effort to mainstream problem-solving methods in the U.K. In 2005, the Home Office introduced a number of specialized "Anti-Social Behaviour Response Courts" in England and Wales. These specialized courts, which pursued a problem-solving approach, were phased out in 2009 and the "ASBRC model was then subsequently embedded into all magistrates' courts in England and Wales." Jane C. Donoghue, *Anti-Social Behaviour, Community Engagement and the Judicial Role in England and Wales*, 52 Brit. J. Criminology 591, 592 (2011). According to Donoghue's research, the results of this effort have not been promising. *See id.*

6. Farole et al., *supra* note 5.

of problem-solving methods into the criminal justice system.[7] Subsequently, the American Bar Association passed a resolution encouraging public and private entities to support "education and training about the principles and methods employed by problem-solving courts."[8]

This chapter describes the origins of the problem-solving courts movement as a pragmatic response to perceived dysfunction within the criminal justice system in the last part of the 20th century, and reports on research regarding drug-treatment courts and mental-health courts, two of the most prominent examples of the problem-solving methodology. It then offers an assessment of the promise and perils of the problem-solving approach, noting the particular challenges presented by efforts to intermix rehabilitative and punitive functions within existing criminal justice institutions, and describes the so-called "risk-need-responsivity" model, which has been developed to help identify offenders who might benefit from rehabilitative interventions and to identify the particular interventions that are most likely to reduce reoffending in a given case. Given the limitations in the research, the inherent risks of the problem-solving approach, and the importance of attending to the risk-need-responsivity criteria, the chapter recommends that policymakers prioritize alternatives to criminal system-located problem-solving courts for those who currently are brought into the system as a consequence of low-level drug offenses and other quality-of-life infractions. These better alternatives include diversion prior to arrest or pre-adjudication, health and social-service interventions in the community, and the removal of some minor offenses altogether from penal codes. Moreover, to the extent that problem-solving courts are employed, either to adjudicate criminal charges or to manage offenders after a plea, they should focus on higher-risk offenders, particularly those with multiple risk factors. If they target this more challenging population, these courts should offer a menu of services that match the full range of needs these participants present, not just their drug-use disorders or mental illnesses, and should draw upon a diverse service-provider network offering a range of modalities of treatment. Finally, this chapter recommends that drug-treatment courts and other problem-solving courts adopt structural features designed to minimize the tendency of these rehabilitative intentions to devolve into punitive practices. These features include a preference for the pre-adjudication version of the problem-

7. Conf. of Chief Justices, Conf. of State Court Administrators, Resolution 22: In Support of Problem-Solving Court Principles and Methods (2000), http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf.

8. Nolan, *supra* note 4, at 7.

solving court model and an expectation that they adopt formal procedures governing the use of graduated sanctions and other responses to participant noncompliance with program requirements.

I. OVERVIEW OF THE ORIGINS AND DEVELOPMENT OF THE PROBLEM-SOLVING COURTS MOVEMENT

A. ORIGINS

The modern origins of the problem-solving courts movement can be traced to the mid-1980s, when specialized drug courts or court calendars began appearing as a consequence of a dramatic increase in the number of criminal cases involving drug offenses that were flooding the system. Originally, these drug courts were designed to expedite or fast-track drug cases in order to reduce the crushing caseloads occasioned by the "war on drugs."[9] Beginning in 1989 in Dade County, Florida, however, a new kind of court began to appear.[10] These drug-treatment courts were different from the expedited drug calendars in that they were designed to integrate traditional criminal case processing features with community-based treatment for substance-use disorders. While many variations on the basic model have developed, certain "key components" of the drug-treatment court approach are regarded by advocates as essential.[11] These key features include: the referral of defendants to substance-use treatment programs; the use of the threat of traditional criminal penalties as leverage to retain defendants in treatment; judicial monitoring of defendants' progress in treatment through the use of regular urinalysis testing and periodic "status hearings" in open court; and the imposition of increasingly severe "graduated sanctions" in instances of noncompliance with the treatment regime and graduated rewards for successes.[12]

The first generation of drug-treatment courts has served as a model for the development of a number of other problem-solving courts, including mental-health courts, community courts, re-entry courts, and others, that also ground

9. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash. U. L.Q. 1205, 1207 (1998); Mitchell, *supra* note 2, at 843; *cf.* Jeffrey A. Miron, "Drug Prohibition and Violence," in Volume 1 of the present Report.

10. Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 Am. Crim. L. Rev. 1513, 1517 (2003); *see also* Ryan S. King & Jill Pasquarella, The Sentencing Project, Drug Courts: A Review of the Evidence (2009).

11. Drug Court Standards Comm., Nat'l Ass'n of Drug Court Prof'ls, Defining Drug Courts: The Key Components (1997).

12. *See* Steven Belenko, Research on Drug Courts 6–7 (1998); Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. Crim. Just. 60, 61 (2012).

their legitimacy on a set of pragmatic assertions about "what works."[13] Over time, advocates and others associated with the problem-solving courts movement have sought to identify a set of core principles shared generally by these undertakings.[14] To this end, researchers at the Center for Court Innovation have developed "performance indicators" for evaluating "problem-solving justice," which they have grouped into three organizing principles.[15] The first is termed a "problem-solving orientation," which they define as "a focus on solving the underlying problems of litigants, victims, or communities."[16] This orientation, they explain, most often "implies an interest in individual rehabilitation," but on occasion "the defining 'problems' of interest belong less to the presenting litigant than to the victims of crime, including the larger community."[17] The second organizing principle is "collaboration."[18] This principle "highlights the role of interdisciplinary collaboration with players both internal and external to the justice system."[19] Consistent with its emphasis on the rehabilitation of offenders and the provision of therapeutic and other social services to individuals enmeshed in the criminal system, the problem-solving model's collaboration principle contemplates the integration of adjudicative, penal, and human services professionals into interdisciplinary teams, often operating under the supervision of criminal court judges.[20] The third principle is "accountability," which "focuses on promoting compliance by participants/litigants, quality services among service providers, and accountability by the court itself to the larger community."[21]

13. Pamela Casey & William E. Hewitt, Court Responses to Individuals in Need of Services: Promising Components of a Service Coordination Strategy for Courts 23, 26–29 (2001).

14. *See generally* Ctr. for Justice Innovation, s*upra* note 1, at 32–33 ("The Common Components of Problem-Solving Courts").

15. Rachel Porter et al., Ctr. for Court Innovation, What Makes a Court Problem-Solving? iii (2010).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. Mitchell B. Mackinem & Paul Higgins, *Introduction* to Problem-Solving Courts: Justice for the Twenty-First Century? i, vii (Paul Higgins & Mitchell B. Mackinem eds., 2009).

21. Porter et al., *supra* note 15, at iv; *see also* Wolf, *supra* note 5, at 7 ("By insisting on regular and rigorous compliance monitoring—and clear consequences for non-compliance—the justice system can improve the accountability of offenders. It can also improve the accountability of service providers by requiring regular reports on their work with participants.").

Despite these efforts to articulate a common set of governing principles, a wide range of institutional structures and a diverse set of practices have been adopted by the various courts associated with the problem-solving courts movement.[22] One leading advocate has observed that "[t]here is no single foundational document, no unified theory, that summoned problem-solving courts into existence."[23] Given the incremental and local nature of their development and the lack of a single authoritative blueprint for their design and operation, it should come as little surprise that the "problems" addressed and the "solutions" attempted by these courts vary considerably.[24] Nevertheless, a consistent theme in the problem-solving courts literature is that they seek "to address a 'broken system' symbolized by a 'revolving door' through which repeat offenders continually circulate while underlying problems remain ignored."[25]

B. THE DEVELOPMENT OF A MOVEMENT: EFFECTIVENESS AND PRAGMATISM[26]

The driving force behind the problem-solving courts movement from its inception has been its express commitment to effectiveness. This is a commitment to doing what works.[27] The focus on effectiveness is apparent both in the critical account of "traditional courts" articulated by advocates of the movement and in the accompanying affirmative counter-story of specialty

22. *See* Porter et al., *supra* note 15, at 2 (recognizing "the wide variation across today's problem-solving court models"). This great local variation in the design and operation of problem-solving courts complicates efforts to generalize research findings on the outcomes of individual programs. *See* King & Pasquarella, *supra* note 10, at 2.

23. Greg Berman, *Problem-Solving Justice and the Moment of Truth*, *in* Problem-Solving Courts: Justice for the Twenty-First Century?, *supra* note 20, at 1, 3–4.

24. *See* Porter et al., *supra* note 15, at 1 (noting that problem-solving courts "each seek to address a different set of problems").

25. Victoria Malkin, *Problem-Solving in Community Courts: Who Decides the Problem?*, *in* Problem-Solving Courts: Justice for the Twenty-First Century?, *supra* note 20, at 139.

26. The Congressional Research Service, in its 2010 review of drug treatment courts, termed the growth of these problem-solving courts a "movement" precisely because it took place "largely in the absence of empirical evidence of benefit." Joanne Csete & Denise Tomasini-Joshi, Drug Courts: Equivocal Evidence on a Popular Intervention 7 (2016), https://www.opensocietyfoundations.org/sites/default/files/drug-courts-equivocal-evidence-popular-intervention-20160928.pdf (citing CRS report).

27. *See, e.g.*, Rekha Mirchandani, *What's So Special About Specialized Courts? The State and Social Change in Salt Lake City's Domestic Violence Court*, 39 Law & Soc'y Rev. 379, 385 (2005) ("Special courts promise new methods to help judges and attorneys process cases quickly and efficiently ... with maximum effectiveness ...."); *cf.* Eric Lane, *Due Process and Problem-Solving Courts*, 30 Fordham Urb. L.J. 955, 956 (2003) (noting that the emergence of problem-solving courts has otherwise engendered serious debate surrounding one of its foundational principles, that is, whether "the problem-solving protocols employed by these courts are effective").

courts that often attends their discussions. According to this narrative of failure and redemption, traditional courts set up to generate a "legal resolution" in time-limited and subject-matter-limited "cases" through the operation of an "adversarial process" have become overwhelmed by a crush of offenders with untreated substance misuse, other mental-health problems, and a host of other unmet human needs who cycle repeatedly through the system.[28] This breakdown of the traditional court system is the result of a perfect storm: the co-occurrence of a broad failure of public and private institutions—including schools, families, religious institutions, and the public health-care system—that should be dealing more effectively with the individual and social pathologies often associated with criminality,[29] and the persistence of punitive national, state, and local policies toward street crime and drug offenses, characterized by the adoption of mandatory minimum sentences and the like, which also have contributed to system overload.[30]

On virtually any reasonable set of criteria, the advocates argue, the traditional criminal court system is in crisis. It fails individual offenders because the system cannot afford consistently to provide effective defense counsel or full adversarial proceedings,[31] instead disposing of the vast majority of cases through a plea-negotiation process that does little to address offenders' underlying human-services and health-care needs.[32] It fails the legal professionals working in the

28. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 128–29 (2004) ("State court dockets tend overwhelmingly to be the stuff of everyday life: defendants who return to court again and again on a variety of minor criminal charges.… Conventional case processing may dispose of the legal issues in these cases, but it does little to address the underlying problems that return these people to court again and again."); Mackinem & Higgins, *supra* note 20, at viii ("Traditional courts aim to move many cases as fast as can be reasonably done."); *see also* NOLAN, *supra* note 4, at 8 (acknowledging "the 'revolving door' phenomenon of repeat offenders").

29. Former Chief Judge Judith Kaye of the New York Court of Appeals, for example, has been quoted as saying: "We've witnessed the breakdown of the family and of other traditional safety nets." Greg Berman, *What Is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000) (quoting Kaye).

30. *See* Berman, *supra* note 23, at 7; *see also* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 421–22 (2009) ("[D]rug court was explicitly envisaged as a response to the proliferation of court caseloads and prison overcrowding resulting from the War on Drugs.").

31. *See, e.g.*, Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1474–75 (2004); *see also* Eve Brensike Primus, "Defense Counsel and Public Defense," in the present Volume.

32. In 2006, 94% of all felony convictions in state courts were resolved by guilty pleas. *See* SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009). *See generally* Jenia I. Turner, "Plea Bargaining," in the present Volume.

system—judges, prosecutors, and defense attorneys—who "feel frustrated and belittled" by the diminished professional discretion left to them in a bureaucratically managed assembly-line process of justice.[33] And it fails the broader community, which is losing confidence in the criminal justice system and other public institutions assigned responsibility for maintaining social cohesion and public safety.[34]

The affirmative counter-story advanced by problem-solving courts advocates promises a "collaborative process" in place of the adversarial, due process-based proceedings that the system no longer can afford consistently to provide.[35] It offers "therapeutic outcomes" for participants, rather than "legal resolutions" for cases.[36] Most importantly, it offers the promise of informal, individualized engagement by judges and other court officials in order to find "what works" instead of settling for the operation of formal, rule-based procedures that do not.[37]

A leading judicial supporter of problem-solving courts, former Chief Judge of the New York Court of Appeals Judith Kaye, captured the essentially pragmatic nature of the movement in her published writing on the subject. These courts, she explained, "bring together prosecution and defense, criminal justice agencies, treatment providers and the like, all working with the judge toward a more *effective* outcome than the costly revolving door."[38] Another problem-solving court judge has observed that "the system from which the problem-solving courts have emerged was a failure on any count. It wasn't a legal success. It wasn't a social success. It wasn't working."[39] Specialized problem-solving courts, on the other hand, are said to work. They save money, they reduce recidivism, and, supporters claim, they save lives.[40]

33. Berman, *supra* note 23, at 4.

34. Nolan, *supra* note 4, at 9.

35. Mackinem & Higgins, *supra* note 20, at viii. *But see* Ursula Castellano, *Courting Compliance: Case Managers as "Double Agents" in the Mental Health Court*, 36 Law & Soc. Inquiry 484, 508–09 (2011) (providing a more problematic account of the collaboration that takes place in mental health courts).

36. Mackinem & Higgins, *supra* note 20, at viii. Donoghue describes ASB courts as "alter[ing] their focus from simply processing cases to improving outcomes for victims, communities and offenders." Donoghue, *supra* note 5, at 595.

37. Nolan quotes a domestic violence court judge as saying: "[T]o me, if it works, do it." Nolan, *supra* note 4, at 144.

38. *Id.* at 224 n.32.

39. *Id.* at 145.

40. *See* Berman, *supra* note 23, at 6–7 (citing drug courts as a practical example of the success of specialized problem-solving courts).

The commitment to pragmatism that virtually all problem-solving courts share is in tension with the values of procedural regularity and retributive (proportional) justice that generally are thought to guide our system of criminal blaming and criminal sentencing.[41] On the process side, the system rests on the premise that individual cases will be resolved through formal adversarial disputing, notwithstanding its pervasive reliance on plea negotiations. Two key features of the traditional adversarial model are its use of neutral, detached decision-makers and formal rules of procedure. Taken together, these two features reflect an understanding that the interests of an individual criminal defendant ordinarily are adverse to those of the state and that the structure of a criminal prosecution is inherently unstable.[42] As Martin Shapiro observed long ago, the triadic configuration of a criminal prosecution (or any adversarial proceeding) is prone to collapse into "two against one" once the decision-maker announces a winner and a loser.[43] To prevent the delegitimating consequences of such a collapse, our system ordinarily relies upon formality and neutrality to prevent even the appearance of an alliance between the judge and the prevailing party.[44] In drug-treatment courts and many other problem-solving courts, by contrast, the stabilizing influence of judicial neutrality and formal rules of procedure are diminished precisely because the interests of the defendant are now seen as consonant with those of the state.[45] The notion that the judge is bound to adopt a "neutral position in the resolution of conflict" is replaced in these courts by a role conception in which "the judge is partisan, aiming to

41. *See generally* Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 Md. L. Rev. 82, 86–88 (2006).

42. *See id.*

43. Martin Shapiro, *The Logic of the Triad*, *in* Handbook of Political Science 321 (Fred I. Greenstein & Newson W. Polsby eds., 1975), *reprinted in* The Structure of Procedure 284, 285 (Robert Cover & Owen Fiss eds., 1979).

44. *Id.* at 286.

45. *See* King & Pasquarella, *supra* note 10, at 12.

cure the offender of his addiction."[46] In effect, the judge is understood to be the leader of the defendant/patient's "treatment team," and to be performing a therapeutic function on his or her behalf.[47]

The judicial undertakings that result from this redefinition of role are remarkable. As James Nolan, a longtime problem-solving court scholar, has pointed out, drug-treatment court judges see themselves as privileged to engage the defendants in their courtrooms on an unmediated, personal level.[48] They prize "empathetic connection," often encourage hugs, and take personally the successes and failures of those who appear before them. And, from time to time, they send their "clients" to jail.[49]

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46. Philip Bean, *America's Drug Courts: A New Development in Criminal Justice*, 1996 Crim. L. Rev. 718, 720.

47. *See* Miller, *supra* note 30, at 417 (drug courts' "central methodology is to replace the parole officer with the judge as primary supervisor of each defendant's treatment program").

> The fact that drug court judges are directly involved in the tasks of monitoring defendants' behavior and imposing sanctions or conferring rewards is more than merely stylistic. Many substance abusers in the initial stages of recovery are most likely to be helped by a treatment regime focused on "practical problem solving and the acquisition of cognitive-behavioral relapse prevention skills," which a judge is capable of managing.... In operational terms, this means that the judge's role in sanctioning and rewarding defendants is to help them understand that their choices have consequences for which they will be held responsible, and that they control their own fate. Thus, when the judge responds promptly to a positive urine test or a missed group therapy meeting with a proportional sanction, he or she is helping to provide treatment to the defendant.

Richard C. Boldt, *The Adversary System and Attorney Role in the Drug Treatment Court Movement*, *in* Drug Courts in Theory and in Practice 115, 124 (James L. Nolan, Jr. ed., 2002).

48. *See* James L. Nolan, Jr., *Therapeutic Adjudication*, 39 Society 29 (Jan.-Feb. 2002).

49. *See id.* at 32:

> A participant in the Syracuse, NY Drug Court lost his job. The judge called the employer and learned that the client was regarded as a "damn good employee"; and that the boss would "hire him back in a heartbeat" if the judge could guarantee that he was drug free and wouldn't miss any work. So the judge made a deal with the employer. He said to him: "Okay, I'll make a deal with you, you take him back and I'll add another weapon to your arsenal. If he doesn't come to work when he is supposed to, doesn't come to work on time, if he comes to work under the influence, I'll put him in jail, on your say so." The judge told the client about the deal. "I'll get your job back for you, but you've got to promise you'll be at work when you're supposed to and not take any drugs. Your employer is now on the team of people who are reporting to me. When he calls up and tells me that you are late or that you're not there, I'm going to send the cops to arrest you." The judge acknowledged that these actions probably violated the canon of judicial ethics ….

The frank pragmatism of problem-solving court judges is also in tension with the substantive claim that criminal blaming and sentencing in the United States is primarily directed toward the accomplishment of retributive justice.[50] Drug-treatment courts and other problem-solving courts place an enormous premium on individualized dispositions, even when this process of individualization comes at the expense of consistency in sentencing,[51] a goal that was at the center of the decline of the rehabilitative ideal 40 years ago and that has played an important role in the dramatic growth of determinate sentencing schemes. In fact, there is good reason to conclude that the energetic support problem-solving courts have received from judges has a great deal to do with their frustration over contemporary sentencing policy.[52] Judges see in these courts an opportunity to redefine their role in response to the diminished judicial discretion and autonomy brought about by the determinate sentencing movement, sentencing grids and guidelines, and the straightjacket of mandatory minimum sentences.[53] "A common frustration expressed by drug-court judges is the unwelcome constraints they experience from legislatively imposed mandatory minimum sentences. Drug courts are liberating in that they allow more flexibility in the way a judge can respond to a client."[54] Many judges who serve in problem-solving courts note the autonomy and sense of efficacy they derive from these courts. "Judges even go so far as to argue that the drug court has positive therapeutic outcomes for the judge. As two judges write, 'judging in this non-traditional form becomes an invigorating, self-actualizing and rewarding exercise.'"[55]

50. *See, e.g.*, Cal. Penal Code § 1170(a)(1) ("The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.").

51. *See* King & Pasquarella, *supra* note 10, at 10.

52. *See* Nolan, *supra* note 48, at 37.

53. *See* McCoy, *supra* note 10, at 1529; Nolan, s*upra* note 48, at 36. *See generally* Douglas A. Berman, "Sentencing Guidelines," in Volume 4 of the present Report; Erik Luna, "Mandatory Minimums," in Volume 4 of the present Report.

54. Nolan, *supra* note 48, at 36.

55. *Id.* at 38. As Miller explains, "the drug court judge gets something out of the relationship, too. She also gets a lifestyle change, and is reconstituted as a different type of judge, one engaged in healing rather than punishment, a specialist rather than a grunt." Miller, *supra* note 30, at 434.

II. RESEARCH ON PROBLEM-SOLVING COURTS

There is a substantial body of quantitative research on drug-treatment courts' effectiveness.[56] While research on other problem-solving courts is beginning to provide some evidence of their respective benefits and costs, the clearest research picture pertains to drug-treatment courts.[57] Overall, the evidence suggests that adult drug-treatment courts can be effective for some participants in reducing substance misuse and future criminal system involvement, particularly for offenders who present a high risk of reoffending.[58] By contrast, the evidence on juvenile drug-treatment courts is inconclusive, with some research indicating that these courts may potentially have a harmful impact on younger participants.[59] The evidence on mental-health courts is incomplete and paints a more complex picture. In general, it suggests that these courts may have an overall positive impact on criminal system re-involvement for some clients, but likely do not measurably improve participants' mental health.[60]

A. RESEARCH LIMITATIONS

Several important limitations characterize much of this research. First, because it is difficult to create a research design in this area with randomly assigned study and control groups, many of the studies use comparisons between study subjects who have participated in problem-solving courts and others who have not but have similar characteristics (in terms of demographic and criminal justice factors).[61] Some recent studies have used fairly sophisticated techniques for controlling for confounding variables,

56. There is a smaller body of qualitative or ethnographic research on drug treatment courts and other problem-solving courts. *See, e.g.*, Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 Soc. Probs. 416 (2003); Stacy Lee Burns & Mark Peyrot, *Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment*, 37 J. Contemp. Ethnography 720 (2008).

57. *See generally* Ctr. for Justice Innovation, *supra* note 1; Nat'l Ass'n of Crim. Def. Lawyers, *supra* note 1; Mitchell et al., *supra* note 12; *see also* Csete & Tomasini-Joshi, *supra* note 26.

58. *See* Ctr. for Justice Innovation, *supra* note 1, at 9–11; Csete & Tomasini-Joshi, *supra* note 26, at 6–7; Mitchell et al., *supra* note 12, at 66.

59. *See* Leslie Blair et al., U.S. Dep't of Justice, Off. of Juv. Just. & Delinq. Prevention, Juvenile Drug Courts: A Process, Outcome, and Impact Evaluation (2015), https://www.ojjdp.gov/pubs/248406.pdf; Mitchell et al., *supra* note 12, at 64.

60. *See* Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Analysis*, 39 J. Crim. Just. 12 (2011); *see also* Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 Crime & Just. 231 (2017).

61. Csete & Tomasini-Joshi, *supra* note 26, at 12. Thus, of the 92 studies included in their meta-analysis of drug treatment court outcomes, Mitchell and colleagues report that only 3 used random control groups. Mitchell et al., *supra* note 12, at 63.

but the gold-standard double-blind methodology is rare in this area.[62] In addition, many of the studies focus on recidivism as the primary or only outcome measure (other measures include court appearances, convictions, or self-reported substance use or criminal behavior).[63] The relatively few studies that have measured outcomes such as employment, housing status, or family attachment have reported mixed success.[64] Moreover, much of the research measures reoffending in the short-term. Some, although not all,[65] of the studies that have measured longer-term recidivism rates have been disappointing.[66] For example, a study of Baltimore's drug-treatment court found that participants were less likely than a control group to be rearrested in the first two years after their initial involvement in the treatment court, but that after three years this difference became statistically insignificant, "with a stunning 78 percent of drug court participants being re-arrested."[67]

62. *See* Richard C. Boldt, *The "Tomahawk" and the "Healing Balm": Drug Treatment Courts in Theory and Practice*, 10 Md. L.J. Race, Religion, Gender & Class 45, 51–52 (2010); *see also* Drug Policy Alliance, Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use 9 (2011). In 2011, the GAO reported that fewer than 20% of the 260 studies of drug courts it reviewed used "sound social science principles." Csete & Tomasini-Joshi, *supra* note 26, at 7.

63. *See* King & Pasquarella, *supra* note 10, at 5–6.

64. *See* Boldt, *supra* note 62, at 57. "A health-centered response to drug use assesses improvement by many measures—not simply by people's drug use levels, but also by their personal health, employment status, social relationships and general wellbeing. 'Success' in the criminal justice context, by contrast boils down to the single measure of abstinence ...." Drug Policy Alliance, *supra* note 62, at 16; *see also* Mitchell, *supra* note 2, at 855 ("Very few evaluations assessed drug courts' effects on non-crime outcomes such as employment, welfare use, or physical health ....").

65. For example, "[s]ix drug courts in New York state averaged a 29% reduction in re-arrest measured over 3 years following participants' initial arrest," and "[a]n evaluation of the Ultnomah County, Oregon drug court found a 24% reduction in drug arrests for participants thirteen years after initial entry into the program." King & Pasquarella, *supra* note 10, at 6 (quoting Michael Rempel & Christine Depies Destefano, *Predictors of Engagement in Court-Mandated Treatment: Findings at the Brooklyn Treatment Court, 1996-2000*, *in* Drug Courts in Operation: Current Research 91–93 (2001)).

66. Mitchell found that "drug courts' recidivism suppressing effects diminish as the length of recidivism tracking period increases." Mitchell, *supra* note 2, at 859.

67. *See* Denise Gottfredson et al., *The Baltimore City Drug Treatment Court 3-Year Self-Report Outcome Study*, 29 Evaluation Rev. 42 (2005) (49.5% percent of Treatment Court participants at the three-year mark report re-arrest within prior 12 months versus 58% of control group; 66% of Baltimore City Drug Treatment Court participants had been rearrested within two years of admission, compared with a rate of 81% for defendants who had been processed through Baltimore's traditional criminal courts system; 78% of Drug Treatment Court participants had been rearrested at the three year mark compared with 88% of controls).

B. DRUG-TREATMENT COURTS: COSTS AND BENEFITS

With these limitations in mind, the scorecard for drug-treatment court success is guardedly optimistic. While a majority of studies show some positive results, ranging from significant to slight, others report no statistically significant effect on recidivism.[68] Among the more promising recent reports is a multisite adult drug-treatment court evaluation sponsored by the National Institute of Justice, a funder of drug-treatment courts. The findings of this study were reported in 2011. Included were 23 courts in six sites. The NIJ study found statistically significant lower rates of self-reported criminal conduct in the 24 months after respondents began their involvement in a drug-treatment court compared to a control group, and somewhat lower rearrest rates, although the difference was not statistically significant. In addition, study subjects underwent an oral-swab drug test at the 18-month mark, and the group that had participated in the treatment court showed a positive test result of 29% versus the control group's 46%.[69]

For a number of reasons, however, the results of most of the individual studies and the available meta-analyses indicating positive recidivism effects for treatment-court participants should be interpreted with caution. Given the limited use of randomly assigned double-blind study and control groups, it is difficult to "attribute causal impact" to the treatment court alone. "Thus, while there is a great deal of research on drug courts, very little of it identifies outcomes that can be said to be the direct result of drug court participation."[70] As one group of observers has pointed out:

68. For example, a 2011 review by the U.S. Government Accountability Office (GAO) determined that 56% of the jurisdictions under study experienced statistically significant reductions in re-arrest rates for drug treatment court participants. *See* U.S. Gov't Accountability Office, Adults Drug Courts: Studies Show Courts Reduce Recidivism, but DOJ Could Enhance Future Performance Measure Revision Efforts (2011), http./wwwgao.gov/assets/590/586793.pdf. Mitchell and colleagues report that "the average effect of participation is analogous to a drop in recidivism from 50% to 38%," but that drug courts' "effectiveness in reducing recidivism remains ambiguous as several issues have not been sufficiently addressed." Mitchell et al., *supra* note 12, at 60.

69. *See* Shelli B. Rossman et al., Urban Inst., The Multi-Site Adult Drug Court Evaluation (2011).

70. Csete & Tomasini-Joshi, *supra* note 26, at 12.

> Gender, age, race, socioeconomic background, criminal history, and substance abuse history have all been shown to impact treatment outcomes. Many of these variables are not accounted for in analyses of drug court effectiveness. Operationalizing drug court variables can be difficult and outcome measures may be reflecting the interaction of these variables with the treatment modality.[71]

Moreover, many of the studies omit data on treatment-court failures or fail to distinguish between those currently in the drug-treatment court process and those who have completed the program.[72] These features of the research are troubling, because drug-treatment court graduates tend to have much better rearrest rates and other recidivism measures than those who drop out or are dismissed.[73] Because the graduation rates vary considerably and can be quite low, these omissions are consequential.[74] Indeed, "[s]ome studies suggest that among drug court dropouts, time spent in treatment had little if any effect on post-program recidivism."[75]

In addition, some experts suggest that the claims of effectiveness urged by drug-treatment court advocates and demonstrated by some of the research reflect in part the practice of courts to "cherry-pick" persons who are most likely to complete the program instead of those who most need the resources they offer.[76] "This, in turn, gives rise to misleading data because it yields drug court participants who are, on the whole, more likely to succeed than a comparison group of conventionally sentenced people who meet drug court eligibility criteria but who are not accepted into the drug court."[77] Indeed, the effects of cherry-picking may be even more pronounced in those jurisdictions that have adopted eligibility criteria that favor easy-to-treat offenders and that exclude others with more severe drug-use histories and more extensive histories of criminal system involvement.[78]

Taken as a whole, while the quantitative research, warts and all, tells a story of modest success, the costs of drug-treatment courts may outweigh their potential benefits. Even given that adult drug-treatment courts appear to

71. King & Pasquarella, *supra* note 10, at 6–7.
72. *See* Drug Policy Alliance, *supra* note 62, at 9–10.
73. *See* Boldt, *supra* note 62, at 57.
74. *See* Drug Policy Alliance, *supra* note 62, at 7, 9 (drug treatment court completion rates range from 30% to 70%); *see also* Mitchell et al, *supra* note 12, at 61 (reporting a graduation range from 36% to 60%).
75. King & Pasquarella, *supra* note 10, at 7.
76. *See* Csete & Tomasini-Joshi, *supra* note 26, at 8.
77. Drug Policy Alliance, *supra* note 62, at 10.
78. *See id.* at 13.

reduce recidivism, the effects are modest and may not be as favorable as other correctional programs that adhere to the principles of effective intervention. For example, "[a]ccording to one major study from the Washington State Institute for Public Policy … adult drug courts reported a reduction in recidivism of 8.7%—significantly less than reductions recorded in probation-supervised treatment programs (18%) and on par with reduction recorded by programs offering community-based drug treatment (8.3%), neither of which used incarceration as a sanction."[79]

Problems with respect to net-widening, implementation and organizational constraints are also worrying.[80] As are reports that drug-treatment courts may increase racial disparities within the criminal justice system.[81] Unnecessarily intensive supervision and monitoring of participants, especially those who are relatively low-risk, together with weak procedural protections, have the potential to undermine the legitimacy of these courts and diminish the criminal system's interest in procedural justice.[82] Finally, for those who fail to graduate, the outcomes often are more punitive and involve longer incarcerative sentences than similarly situated defendants who do not participate in problem-solving courts. Indeed, a 2013 meta-analysis "concluded drug court participants in the jurisdictions studied did not spend less time overall incarcerated than non-participants because of the long sentences imposed on people who 'failed' the court-dictated treatment plan."[83]

C. MENTAL-HEALTH COURTS: THE COMPLEX RELATIONSHIP BETWEEN MENTAL ILLNESS AND OFFENDING

With respect to mental-health courts, advocates frequently assert two rather straightforward premises underlying their efforts to link therapeutic services to criminal-case management. The first is that there is a direct causal relationship

79. *Id.* at 11. In contrast, Mitchell reports that the treatment effects of drug courts, although "modest," are larger than "other widely applied criminal justice based drug treatment program." Mitchell, *supra* note 2, at 859.

80. *See* Ctr. for Justice Innovation, *supra* note 1, at 29–30.

81. *See* Csete & Tomasini-Joshi, *supra* note 26, at 11–12; Drug Policy Alliance, *supra* note 62, at 8; *see also* Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 Stan. L. & Pol'y Rev. 463, 477–87 (2009). For discussions of the impact of race on adjudication and sentencing, see Paul Butler, "Race and Adjudication," in the present Volume; and Cassia Spohn, "Race and Sentencing Disparity," in Volume 4 of the present Report.

82. *See* Ctr. for Justice Innovation, *supra* note 1, at 29–30.

83. Csete & Tomasini-Joshi, *supra* note 26, at 9.

between mental illness and criminal conduct.[84] The second is that the effective treatment of an offender's underlying mental illness is likely to prevent his or her future criminality (or at least reduce recidivism).[85] As it happens, the association between mental illness and criminality is more complex than this account suggests, and, in most cases, is not directly causal.[86] Researchers studying the question have concluded that the group of offenders whose mental disorders can be said to have directly caused their criminal conduct is actually quite small.[87] A second category of offenders, which is much larger, is comprised of offenders whose criminal conduct is best understood as only indirectly the result of mental illness.[88] In the case of these individuals, the effects of their mental disorders generally are mediated by factors either brought about by their underlying illness or at least associated with it, such as homelessness, low educational attainment, weak family and community ties, and the like.[89] A third category is made up of offenders who suffer both from mental illnesses and co-occurring substance-use disorders and/or personality disorders.[90] Here

84. *See* E. Lea Johnston, *Theorizing Mental Health Courts*, 89 Wash. U. L. Rev. 519, 552 (2012) ("At the core of mental health courts is a belief that, were it not for eligible offenders' mental illnesses, these individuals would not have engaged in the criminal behavior that prompted their arrest."). *See generally* Stephen J. Morse, "Mental Disorder and Criminal Justice," in Volume 1 of the present Report.

85. As Johnston explains, most "mental health courts justify segregating and diverting individuals with certain mental illnesses on the ground that their illnesses likely contributed to their criminal behavior[] ... [and] operate under the assumption that the amelioration of symptoms of these mental illnesses will reduce the likelihood of future criminal behavior." Johnston, *supra* note 84, at 551.

86. *See id.* at 528 ("Since many mental health courts do not require a demonstrated nexus between an individual's mental illness and his criminal offense, courts' assumption of a causal link appears misplaced."); *see also* Ctr. for Justice Innovation, *supra* note 1, at 14; Mulvey & Schubert, *supra* note 60, at 9–10.

87. One group of researchers reported that only about 10% of offenders with mental illness who engage in criminal conduct do so as a direct consequence of their disability. *See* Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 Law & Hum. Behav. 110, 117–18 (2010) (identifying a study that found out of 113 arrestees with mental illness, "8% had been arrested for offenses that their psychiatric symptoms probably-to-definitely caused, either directly (4%) or indirectly (4%)").

88. Johnston, *supra* note 84, at 560.

89. *Id.* at 573. A significant percentage of offenders with mental illness become enmeshed in the criminal justice system because their mental disabilities "contributed to their job loss, decline into poverty, and/or movement into environments rife with antisocial influences, all generic risk factors for criminal justice involvement." *Id.* at 560.

90. *Id.*

again, it is difficult to attribute direct causal significance to this group's mental illnesses, given that their co-occurring disorders also contribute in important ways to their criminal-system involvement.[91]

Consistent with this more nuanced understanding, the best evidence is that a number of the risk factors most associated with criminality (substance misuse, weak family ties, and so forth) are also associated with severe mental illness.[92] Understood in this fashion, while mental illness in itself is not highly predictive of criminal recidivism, mental illness does play an important indirect role in fostering a set of circumstances that are positively associated with criminal justice system involvement. Not surprisingly, programs that target this broad spectrum of "criminogenic needs" produce greater "treatment effects" than do programs that are more narrowly focused on mental illness and medication management alone.[93]

Because mental illness does not hold a simple, causal relationship with criminality (the first premise often advocated by mental-health court advocates), medication management and other treatment interventions targeting participants' mental illness, taken in isolation, are unlikely to produce robust and sustainable reductions in recidivism (the second premise).[94] Instead, courts that formulate a broader and more comprehensive understanding of the problem, and thereby seek to address a fuller range of associated needs contributing to the dysfunction and distress of the offenders before them, are more likely to have a measurable impact on the daily functioning of these

91. *See id.* (discussing the findings of William H. Fisher et al., *Community Mental Health Services and Criminal Justice Involvement Among Persons with Mental Illness*, *in* Community-Based Interventions for Criminal Offenders with Severe Mental Illness 43–44 (William H. Fisher ed., 2003)); *see also* Mulvey & Schubert, *supra* note 60, at 12.

92. *See* Skeem et al., *supra* note 87, at 116–18 (identifying evidence "that major predicators of violence and recidivism are not unique to offenders with mental illness, but instead shared with general offenders").

93. *See* Johnston, *supra* note 84, at 574–75 ("Studies show that the most effective programs for reducing recidivism are those that target the specific risks and needs predictive of criminality."); *see also* Mulvey & Schubert, *supra* note 60, at 14. As Francis Cullen explains, "Risk factors are salient because they influence the cognitive decision to commit a crime by making it more rewarding or less costly. Research has confirmed the causal importance of eight factors …. Referred to as the 'central eight,' these risk factors are also called 'criminogenic needs' because they are deficits that must be fixed if recidivism is to be lowered." Francis T. Cullen, "Correctional Rehabilitation," in Volume 4 of the present Report.

94. *See* Skeem et al., *supra* note 87, at 114 (recognizing that different treatments may reduce recidivism, but "there is no evidence that they do so by linking individuals with evidence-based psychiatric treatment or by achieving symptom reduction"); *see also* Johnston, *supra* note 84, at 573 ("[T]he provision of mental health treatment alone is not an effective strategy for reducing the recidivism of offenders with mental illnesses.").

individuals.[95] Moreover, if the definition of the problem is informed by an acknowledgement that the relationship between mental disorder and criminal system involvement is not directly causal in most cases, but instead is mediated by a range of associated characteristics, then the identification of appropriate goals is also likely to take on a broader, more comprehensive cast, to include not just (or even primarily) a reduction in criminal recidivism.[96]

D. THE RISK-NEED-RESPONSIVITY MODEL

The risk-need-responsivity (RNR) model was first developed in the early 1990s to help identify offenders who might benefit from rehabilitative interventions and to identify the particular interventions that would be most likely to reduce reoffending in a given case. Today, although it has been criticized by some and has undergone considerable refinement,[97] the model is considered the "dominant paradigm for working with offenders."[98] The RNR model is comprised of the principles of risk, need, and responsivity. The *risk* principle promotes the use of empirically validated assessment tools that measure both static risk factors such as age and criminal history and dynamic risk factors, including substance misuse, to ensure that intensive case management and intervention services are reserved for high-risk offenders.[99] The *need* principle states that to reduce recidivism, treatment should target a group or package of "criminogenic needs" rather than a single need thought to be a risk factor. Thus, instead of focusing solely on drug-use treatment for persons with drug

95. *See* Skeem et al., *supra* note 87, at 121 (finding that "the effectiveness of correctional programs in reducing recidivism is positively associated with the number of criminogenic needs they target").

96. Johnston explains the point as follows:

> [B]y broadening the stated goals of mental health courts beyond decreasing arrests or incidents of reconviction—which some mental health courts do—a theory of rehabilitation could potentially justify mental health courts as currently constituted.... [O]ther measures of social welfare—such as improvement in aspects of offenders' psychological health, conduct, and life-style—could also serve as viable measures of success. Mental health courts may succeed at enhancing the human potential, psychological health, or welfare of offenders, even in the face of static re-arrest rates.

Johnston, *supra* note 84, at 576–77.

97. *See* Ctr. for Justice Innovation, *supra* note 1, at 4 ("[T]he critique from advocates of the Good Lives Model has been the most important. This critique focuses primarily on the practice of RNR. It suggests that RNR's emphasis on risk and harm focuses practitioners on the public interest, rather [than] on asking critical questions around offender motivation. This can lead to a neglect of the individual as a whole and their self-identity, despite the growing evidence around this being the key to desistance.").

98. *See id.*

99. *See id.*

problems or medication management for offenders with mental illness, the need principle calls for the delivery of an integrated suite of services designed to meet all (or at least most) of the deficits that collectively contribute to their criminal involvement.[100] The *responsivity* principle urges officials to adapt interventions to the specific needs of offenders. In general, treatments based on cognitive-social learning methods are thought to be the most effective at reducing criminal behavior, and intervention strategies tailored to match the offender's individual learning styles, motivations, and abilities (e.g., physical disabilities, mental health, level of intelligence) are encouraged.[101] Research has demonstrated the value of adherence to the RNR model for the purposes of risk reduction in offender populations.[102]

Problem-solving courts increasingly are being structured as post-adjudication programs (thus, typically, requiring a plea), or, occasionally, as probation-based programs.[103] The requirements imposed on participants, therefore, frequently are structured either as conditions associated with a suspended sentence or conditions of probation.[104] Consistent with the set of insights about risk, need, and the importance of matching interventions to the individual characteristics of individuals inherent in the RNR model, and given the high rates of reoffending among persons under supervision generally, the best evidence suggests that treatment-court programs should be targeted to those most likely to need them and limited by length and by the terms of participation so that these interventions do not themselves promote reoffending and inhibit the reintegration of offenders.[105]

100. *See* Mary Ann Campbell et al., *Multidimensional Evaluation of a Mental Health Court: Adherence to the Risk-Need-Responsivity Model*, 39 Law & Hum. Behav. 489, 490–91 (2015); *see also* Michael Rempel, *Evidence-Based Strategies for Working with Offenders*, Ctr. for Ct. Innovation (Apr. 2014), http://www.courtinnovation.org/sites/default/files/documents/Evid%20Based%20Strategies.pdf.

101. *See* Campbell et al., *supra* note 100, at 491.

102. *See* Ctr. for Justice Innovation, *supra* note 1, at 4.

103. *See id.* at 2 ("In the United States, the vast majority of drug courts—an estimated 93 percent—offer treatment 'post adjudication' ... 59 percent of U.S. drug courts had post-adjudication services only."); *see also* Mitchell, *supra* note 2, at 852. There are additional variations among these courts. Some courts require defendants to enter a plea and/or an agreed upon statement of facts, but postpone a final judgment until participants either complete the program or fail to graduate. Others enter judgment but delay the imposition of sentence, and still others make the conditions of the treatment program a part of participants' terms of probation. *See* Miller, *supra* note 30, at 453.

104. *See* Csete & Tomasini-Joshi, *supra* note 26, at 9.

105. *See* Drug Policy Alliance, *supra* note 62, at 13 ("[D]rug courts work better for those who are at an inherently higher risk for future criminal behavior.").

The reporters to a recent American Law Institute project revising the Model Penal Code's provisions on community supervision and intermediate sanctions pointed out that "while probation and other intermediate punishments have often been promoted as alternatives to incarceration, the history of the last several decades is otherwise. Community supervision systems have expanded alongside the nation's prisons and jails since the 1970s and at a comparable pace."[106] So, "[i]nstead of one class of sanctions substituting for the other, all the major forms of punishment have grown in parallel," with the result that today "one of every 50 adults in the U.S. is under community supervision on any given day."[107] The reporters cautioned:

> [L]egislatures, sentencing commissions, courts, and corrections agencies should be watchful that their efforts do not produce more crime than would exist without their interventions. No one wants the effects of legal sanctions to amount to 'public endangerment.' Research suggests, however, that this unintended outcome occurs with unsettling frequency. Much progress in public safety could be made by rethinking current practices in community supervision … and collateral sanctions that are themselves causes of crime.[108]

As applied to problem-solving courts, the evidence suggests that targeting the most intensive services and treatment to higher-risk offenders yields better recidivism outcomes.[109] This works in two directions. First, it turns out that providing intensive treatment and other interventions to lower-risk offenders can increase their rates of recidivism.[110] Especially for offenders with drug-use disorders, while the effectiveness of treatment ordinarily increases with duration, the results can diminish if treatment goes on too long.[111] More generally, the research shows that requiring lower-risk offenders to participate in intensive or multiple programs can disrupt their social functioning and actually introduce new risk factors.[112]

106. Kevin R. Reitz & Cecelia M. Klingele, *Reporters' Introduction*, *in* Model Penal Code: Sentencing xx (Tentative Draft No. 3, 2014).

107. *Id.*

108. *Id.* at xxii. *See generally* Michael Tonry, "Community Punishments," in Volume 4 of the present Report.

109. *See* Ctr. for Justice Innovation, *supra* note 1, at 29–30.

110. *See id.* ("It is clear from studies that where over-dosing occurs, especially with low-risk offenders, we can actually worsen their outcomes. As might be expected, high-risk offenders given low doses of intervention are more likely to reoffend. However, overdosing low-level offenders with interventions can also increase the chances of reoffending ....").

111. *See* King & Pasquarella, *supra* note 10, at 14–15 (attributing much drug treatment court failure to inappropriate treatment matching).

112. *See* Ctr. for Justice Innovation, *supra* note 1, at 29–30.

On the other hand, for offenders with multiple risk factors, including severe mental illness, co-morbid drug or alcohol problems, and/or personality disorders, more intensive interventions may provide better recidivism outcomes. For these individuals, and indeed for most offenders brought into problem-solving courts, it appears that the most effective techniques include cognitive behavioral approaches and structured social learning, where new skills and behaviors are modeled and practiced.[113] Programs that focus on fear, shaming, and other emotional appeals consistently have been found to be ineffective.[114]

III. ANALYSIS AND ASSESSMENT

The contemporary problem-solving court movement may have begun with the first drug-treatment court in Dade County in 1989, but the conceptual roots of the movement can be traced back even further, to a tradition that includes the juvenile-court movement and other still earlier reform efforts.[115] This history alerts us to the dangers inherent in contemporary efforts to meld punishment and treatment. These risks are inherent in the hydraulics of virtually all treatment/punishment hybrids, under which therapeutic impulses tend over time to collapse into punitive practices.[116]

As the broad but ultimately unsuccessful effort to adopt rehabilitative penal approaches in the middle part of the 20th century (and the more particularized failures of the juvenile-court movement over most of the last century) suggests, joining punitive and therapeutic functions within a single hybrid institutional structure is fraught with risks.[117] These risks derive from a number of sources, but especially from what the mid-century critics of the "rehabilitative ideal" referred to as the inherent tendency of these merged enterprises "in practical application to become debased and to serve other social ends far removed from and sometimes inconsistent with the reform of offenders."[118] The critics argued that the "natural

113. *See id.*

114. *See* Edward J. Latessa & Angela K. Reitler, *What Works in Reducing Recidivism and How Does It Relate to Drug Courts?*, 41 Ohio N.U. L. Rev. 757 (2015); *see also* Rempel, *supra* note 100; Steve Aos et al., Wash. St. Inst. for Pub. Pol'y, Evidence-Based Adult Corrections Programs: What Works and What Does Not (Jan. 2006), http://www.wsipp.wa.gov/ReportFile/924.

115. *See* Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 Wash. U. J.L. & Pol'y 57 (2009); Boldt, *supra* note 9, at 1269–78. For a discussion of the juvenile court movement, see Barry C. Feld, "Juvenile Justice," in Volume 1 of the present Report.

116. Boldt, *supra* note 62, at 65.

117. *See* Boldt, *supra* note 9, at 1218–45, 1269–78; *see also* Francis A. Allen, The Decline of the Rehabilitative Ideal (1981); Ellen Ryerson, The Best-Laid Plans: America's Juvenile Court Experiment (1978).

118. Allen, *supra* note 117, at 49.

progress of any program of coercion is one of escalation,"[119] and that a persistent "competition between rehabilitation and the punitive and deterrent purposes of penal justice … [in which the] rehabilitative ideal is ordinarily outmatched in the struggle"[120] helps to explain this inclination toward debasement.[121]

While a "predominant narrative" of the problem-solving court movement is that it turns on "efforts of 'integrating' and 'harmonizing' the professional approaches of justice and treatment," some observers have suggested that "[t]he ontological framework of 'crime' and 'disease,' applied to the problem of drug addiction, makes for fundamentally different assumptions, practices and goals."[122] Indeed, "[t]hese perspectives are not only fundamentally different," they may well be "contradictory and exclusionary in many of their assumptions and principles."[123] Thus, "the actual meaningfulness of jointly applying the figurative 'tomahawk' and the 'healing balm' … to the offender, in principle and practice, remains an open question."[124]

Additionally, the very design of these courts tends to reinforce the primacy of the criminal justice components over the therapeutic/helping elements. Although the judge, attorneys, probation and parole officials and service providers often are described as functioning as a "treatment team," it is significant that the team is headed by the judge, who, by training, professional

119. Am. Friends Serv. Comm., Struggle for Justice: A Report on Crime and Punishment in America 25 (1971).

120. Allen, *supra* note 117, at 53–54.

121. The critics asserted that debasement is virtually inevitable given the "conceptual weakness" of rehabilitative punishment, and the fact that criminal justice institutions "must serve punitive, deterrent, and incapacitative ends." *Id.* at 51–53.

122. Benedikt Fischer, *Doing Good with a Vengeance: A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America*, 3 Crim. Just. Int'l J. Pol'y & Prac. 227, 234–35 (2003).

123. *Id.* at 235.

124. *Id.* Eric Miller makes a related point in describing the methodology of drug treatment courts. He suggests that "a central feature of the therapeutic methodology is the drug ... courts' characterization of the offender as an individual in need of discipline, rather than medical help. Accordingly, the court embraces the central expertise of the judicial office in the context of sentencing: dispensing punishment.... [T]he point of drug courts is discipline-as-treatment." Miller, *supra* note 30, at 419–20. Ojmarrah Mitchell has also noted this feature of drug courts. In his account, the growth of these specialty courts was due in part to the fact that their disposition toward drug use disorders "meshed well with the larger Reagan/Bush philosophy of user accountability: '[I]n a free society we're all accountable for our actions. If this problem is to be solved, drug users can no longer excuse themselves by blaming society. As individuals, *they're responsible*.'" Mitchell, *supra* note 2, at 849 (quoting Reagan). For Miller, "[c]riminality becomes a matter of personal control rather than poverty or racial discrimination, and the government's role becomes one of inducing self-discipline rather than ameliorating social ills." Miller, *supra* note 30, at 438.

culture, and role definition, is bound to enforce legal norms. Thus, unlike treatment services provided voluntarily in the community, fundamental decisions made in problem-solving courts, including decisions about whether a violation of conditions should be met with a therapeutic response or a more punitive imposition of incarceration or expulsion from the program, are made authoritatively by an actor bound to a larger institutional system that takes as its goals deterrence, retribution and incapacitation.[125]

Given this baked-in structural vulnerability to debasement, several more specific concerns associated with the problem-solving model arise. The first, which was especially prevalent in drug-treatment courts in the first decades of their development, is the tendency of these courts to "cherry-pick" low-risk offenders, which may have a net-widening effect and may also actually increase reoffending. Some observers have reported that problem-solving court officials who have an incentive to produce high graduation rates in order to secure or continue public funding "face incentives to cherry pick clients, thereby avoiding individuals who pose the greatest risk."[126] Perhaps as a consequence of this dynamic, other research has suggested that as many as a third of all participants in some drug-treatment courts may not be in need of intensive treatment for a substance-use disorder.[127]

Problem-solving courts may provoke net-widening even when court officials resist cherry-picking clients. Indeed, the presence of these courts may increase the number of low-level drug arrests and other arrests for "quality of life" offenses.[128] "Some studies suggest that since drug courts provide an additional venue in which to process offenders, law enforcement officials are able to make more arrests of lower-level offenders."[129] Ironically, many of these new defendants will face more severe criminal sanctions because of the limited

125. Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, *in* Problem-Solving Courts: Justice for the Twenty-First Century?, *supra* note 20, at 13, 20–21. For discussions of these goals, see Jeffrie G. Murphy, "Retribution," in Volume 4 of the present Report; Daniel S. Nagin, "Deterrence," in Volume 4 of the present Report; and Shawn D. Bushway, "Incapacitation," in Volume 4 of the present Report.

126. Csete & Tomasini-Joshi, *supra* note 26, at 8.

127. *See id.* at 8–9.

128. *See* Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 Md. L. Rev. 1120, 1167 (2014); *cf.* Jeffrey Fagan, "Race and the New Policing," in Volume 2 of the present Report; Henry F. Fradella & Michael D. White, "Stop-and-Frisk," in Volume 2 of the present Report.

129. King & Pasquarella, *supra* note 10, at 17.

capacity and strict eligibility criteria maintained by treatment courts, even though their arrests were in some sense stimulated by the perceived availability of a problem-solving court venue.[130]

A second problem is associated with treatment-court failure. A 2013 meta-analysis of incarceration outcomes, using data from 19 studies in the United States, concluded that drug-treatment court participants overall do not spend less time incarcerated than similarly situated non-participants, primarily because of the relatively long sentences imposed on those who fail to graduate.[131] Given that substance-use disorders tend to be chronic, relapsing conditions, and given that graduation rates vary widely from court to court (and in many courts are extremely low), this means that the reduced time in jail spent by those who succeed may be offset by the additional time triggered by treatment failures. The National Association of Criminal Defense Lawyers reports that "[t]he sentences in many courts are significantly higher for those who seek drug treatment and fail than for those who simply avoid drug treatment and take a plea, at both the misdemeanor and felony level."[132] The costs associated with these increased criminal sentences are borne, of course, by the corrections system, but also by the affected offenders and their families and communities.[133]

In addition, there are costs to system legitimacy incurred as a result of the diminished procedural safeguards and broad procedural informality that characterize the sentencing decisions of problem-solving court judges.[134] "[T]he National Institute of Justice as well as a New York State drug court evaluation noted that many courts do not have a formal system under which sanctions are imposed, nor are records kept for when and why sanctions are

130. *See* Drug Policy Alliance, *supra* note 62, at 14. "[S]ome observers have leveled this concern especially at problem-solving courts for two overlapping reasons. First, problem-solving courts may offer a route to support services such that courts become 'the only place to secure help' for justice-involved people. Second, a court process perceived as a possible route to help for defendants by justice system actors may erode efforts at diversion, such that cases that previously would have avoided court are now actively pushed towards it (i.e., up-tariffing)." Ctr. for Justice Innovation, *supra* note 1, at 29.

131. *See* Eric L. Sevigny et al., *Do Drug Courts Reduce The Use of Incarceration?: A Meta-Analysis*, 41 J. Crim. Just. 416 (2013).

132. Nat'l Ass'n of Criminal Def. Lawyers, *supra* note 1, at 14.

133. *See* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 Stan. L. Rev. 1271, 1281 (2004) ("[A] central focus of this research is community members other than inmates, including family members, friends, and neighbors of prisoners who suffer adverse consequences that flow beyond the prison gates.").

134. *See* Casey, *supra* note 31, at 1483; *see also* Donoghue, *supra* note 5, at 595 ("[T]he court's 'transformed role' presents a number of practical problems ... the 'enhanced' role of sentencers may undermine the principle of judicial neutrality.").

enforced. … While flexibility should be a hallmark of a well-designed drug court, running a court in the manner described above threatens inconsistent and arbitrary outcomes."[135] This relaxed procedural stance may be relatively benign in those instances in which participants adhere to program requirements and thereby avoid further criminal punishment, but it produces a corrosive effect in the class of cases in which participants fail at treatment and are subjected to augmented punishment ordered by a decision-maker whose capacity for formal fairness has been compromised by problem-solving informality.[136]

A third concern, inherent in the design of many of these courts, has to do with the use of criminal punishment as a response to treatment failure. As the Open Society Foundations observed in a recent report on this subject: "Punishment for a subjectively judged treatment 'failure' violates international standards of care of drug dependence and flies in the face of basic tenets of the right to health."[137] Some researchers have noted an increase in the total amount of time that many treatment-court participants spend in jail even when they ultimately are successful in the program, because of the frequent use in some jurisdictions of brief periods of incarceration as a response to program infractions. "In at least some jurisdictions, incarceration is the single most widely utilized sanction despite the range of sanctions available to judges."[138] Thus, participants may be punished with "multiple stays in jail," for offenses that would have resulted in far shorter periods of incarceration if they had never enrolled in the treatment court.[139] Similarly, in the context of mental-health courts, particularly as more of these courts move to a post-plea model, some research has shown that the use of incarceration as a sanction has increased, as well as a shift toward the use of criminal justice mechanisms of supervision as opposed to supervision by mental-health officials.[140]

135. King & Pasquarella, *supra* note 10, at 10.

136. *See id.* (discussing the judge's discretion in sentencing decisions as impacted by "a subjective impression that the defendant [who failed out of drug treatment] is not putting forth sufficient effort"); *see also* King & Pasquarella, *supra* note 10, at 12–13; Casey, *supra* note 31, at 1483 ("Th[e] moment of failure is also where the judge exercises the most discretion .... 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 ....").

137. Csete & Tomasini-Joshi, *supra* note 26, at 10.

138. Drug Policy Alliance, *supra* note 62, at 12.

139. *See* Reginald Fluellen & Jennifer Trone, Vera Inst. of Just., Do Drug Courts Save Jail and Prison Beds? 6 (2000).

140. *See* Lisa Callahan et al., *A Multi-Site Study of the Use of Sanctions and Incentives in Mental Health Courts*, 37 Law & Hum. Behav. 1 (2013).

As noted earlier, a fourth concern is that the operation of some problem-solving courts may increase racial disparities already present in the criminal justice system. Scholars have suggested several reasons for this effect.[141] First, if treatment courts stimulate more low-level arrests (net-widening), then that increased enmeshment in the system may fall disproportionately on communities of color that are already subject to more-intensive policing.[142] In addition, some research has shown that African-Americans are at least 30% more likely than whites to be expelled from drug-treatment courts.[143] This higher rate of failure may be due, at least in part, to a lack of "culturally appropriate treatment programs,"[144] although at least one study has found that it narrows considerably when socioeconomic status, employment and family support are controlled for.[145] In any event, to the extent that persons who fail to complete problem-solving courts tend to receive increased sentences of incarceration relative to those who do not enter these programs, the elevated rates of failure experienced by persons of color ensure that this additional punishment falls disproportionately on African-Americans and Latinos.[146]

A fifth concern has to do with uneven access to appropriate treatment, particularly in drug-treatment courts. "Drug courts often inadequately assess people's needs and, as a result, place them in inappropriate treatment. … Insufficiently trained court staff often send participants to services irrespective of their specific needs. Some courts use a 'shotgun' approach in which they subject participants to several programs with incompatible philosophies."[147] Poor treatment matching not only violates the principles of the RNR model, it also leads to a high rate of program failure.[148] Moreover, individuals may be "harmed more than helped" by treatment programs that are "insensitive to their race, socioeconomic status, gender, sexuality, or, ironically, the severity of their drug problem."[149] At the same time, effective treatment for drug-use disorders and other mental disabilities often requires a group of coordinated interventions that "respond to the complex needs of participants." Too frequently, treatment courts fail to deliver the full range of other medical, legal, and social services necessary for success in the program.[150]

141. *See generally* O'Hear, *supra* note 81.
142. *See* Drug Policy Alliance, *supra* note 62, at 8.
143. *See id.*
144. *Id.*
145. *See* Csete & Tomasini-Joshi, *supra* note 26, at 12.
146. *See* King & Pasquarella, *supra* note 10, at 17–18.
147. Drug Policy Alliance, *supra* note 62, at 12.
148. *See id.* at 13.
149. *Id.*
150. King & Pasquarella, *supra* note 10, at 16..

For many years, a majority of drug-treatment courts did not permit opioid maintenance treatment with methadone or buprenorphine, on the theory that replacing one drug of dependence with another was inconsistent with the abstinence goal by which success in these courts is defined.[151] Indeed, according to a 2013 survey, 44% of drug treatment courts did not offer pharmacotherapies for opioid addiction.[152] In February of 2015, the federal government announced that federal funds would not be allocated to drug courts that refuse to offer treatment with buprenorphine.[153] Nevertheless, the resistance to harm reduction in many drug-treatment courts and other problem-solving courts in the United States stands in stark contrast to the approach reported by those who have studied problem-solving efforts in a comparative context.

James Nolan, for example, has highlighted a dramatic "difference between the U.S. and the other countries as it concerns the salience of defining treatment philosophies."[154] While drug-treatment courts and other problem-solving courts in the United States maintain a stubborn insistence on "total abstinence,"[155] requiring that participants remain drug- and alcohol-free for a specified period of time in order to "graduate,"[156] Nolan reports that problem-solving courts established in recent years in Great Britain, Ireland, Canada, and Australia tend to be much more flexible in defining success and in accommodating participants' partial compliance with program rules.[157] Thus, he quotes an Australian drug-court magistrate, who explains: "'We don't expect participants to be totally drug free. … We do tolerate some cannabis use. And we do tolerate some prescription drugs.'"[158] He also includes the remarks of Canadian commentators who point out that the Toronto court permits participants who have suspended the use of more serious drugs and

151. *See* Csete & Tomasini-Joshi, *supra* note 26, at 10.

152. *See* Harlan Matusow et al., *Medication Assisted Treatment in U.S. Drug Courts: Results from a Nationwide Survey of Availability, Barriers and Attitudes*, 44 J. Substance Abuse Treatment 473 (2013).

153. *See* Csete & Tomasini-Joshi, *supra* note 26, at 10.

154. James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. Health Care L. & Pol'y 31 (2010).

155. *Id.* at 36.

156. *Id.*; *see also* Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 Ga. L. Rev. 717, 761–62 (2008) (discussing the requirement of total abstinence).

157. Nolan, *supra* note 4, at 148. While the focus in text is on participants' use or misuse of drugs and alcohol, a similar approach to harm reduction or harm minimization is reported by Nolan in other non-U.S. problem-solving courts, including, for example, courts centered on the problem of prostitution. *See id.* at 103 (describing harm-reduction philosophy in the prostitution court in Melbourne, Australia).

158. *See id.* at 104 (quoting Libby Wood, magistrate of the Perth drug court).

have reduced their use of marijuana to move forward in the program, even if they are not reliably and totally abstinent.[159] Finally, Nolan shares the story of the development in the United Kingdom of "Drug Treatment and Testing Orders" ("DTTOs"), which were "[i]nspired by the U.S. drug court model" and which served as the forerunners of the drug-treatment courts now in operation in Great Britain.[160] Significantly, the performance of the first DTTOs, which were tested in pilot programs begun in 1998 in Gloucestershire, Liverpool, and South London, were regarded by British officials as a success despite the fact that offenders in these programs "were still using drugs and were still participating in criminal activity, albeit at reduced rates."[161] In the view of the Home Office, the enterprise was a success because the average number of crimes committed per month by offenders on DTTOs was reduced, as was the amount that participants spent each week on illegal drugs.[162]

RECOMMENDATIONS

In light of the instability of the treatment/punishment hybrid and the significant costs incurred when participants fail to complete a problem-solving court regime, policymakers should be thoughtful about the choice between devoting additional resources to problem-solving courts as opposed to investing in programs designed to divert low-risk offenders out of the criminal system and into therapeutic and other social services in the community. As a rule, having a need for substance-use or mental-health treatment should never be a sufficient reason for an individual's entry into the criminal justice system, and the criminal system should never be the only or primary means of obtaining needed treatment.[163] In addition, more conscious attention should be given to designating the "problems" that problem-solving courts are designed to address and the "solutions" they seek to accomplish.[164]

159. *See* Nolan, *supra* note 154, at 45 (quoting Natasha Bakht and Paul Bentley).

160. *See id.* at 44 (detailing the development of drug treatment and testing orders in Britain). For additional discussion of DTTOs, see Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. Rev. 261, 324–25 (2010) (describing the basic features of DTTOs).

161. *See* Nolan, *supra* note 154, at 44.

162. *Id.* at 44–45. For an additional discussion on this issue, see Paul J. Turnbull et al., Home Office Research Study, Drug Treatment and Testing Orders: Final Evaluation Report i (2000) (reporting the reduction in drug use as a result of DTTOs following an eighteen-month evaluation in three pilot locations).

163. *Cf.*, Drug Policy Alliance, *supra* note 62, at 4 (setting out these principles as a component of a "health-centered approach" to drug use).

164. *See generally* Boldt, *supra* note 128.

In the context of substance-use disorders in particular, these inquiries highlight the pressing importance of considering a harm-reduction approach.[165] Court designs that view all drug-use problems through the lens of traditional understandings of addiction, and consequently insistent on complete abstinence as the only acceptable outcome or solution to the problem of drug misuse, are a poor fit for the scores of offenders who can benefit from pharmacotherapies and other harm-reduction interventions that can have meaningful impact on the daily functioning of these individuals.[166]

These basic principles yield a number of conclusions:

1. **Prioritize alternatives for low-level drug offenses and other quality-of-life infractions.** Policymakers should prioritize alternatives to criminal system-located problem-solving courts for those who currently are brought into the system as a consequence of low-level drug offenses and other quality-of-life infractions.[167] These alternatives include "pre-arrest diversion, health and social service interventions, and legislative change to remove these infractions from penal codes."[168] A promising model in this regard is the Law Enforcement Assisted Diversion (LEAD) Program in Seattle, Washington, under which police "encountering low-level, non-violent drug offenders can direct them to a gamut of community services and support without deep involvement with the criminal justice system."[169] Of course, a policy that seeks to direct low-risk offenders into community-based treatment must have adequate resources available outside of the criminal justice system. Unfortunately, the public treatment system has not kept pace with the growth in criminal justice referrals, and "[a]s a result, treatment access for people seeking treatment voluntarily outside of the criminal justice system has diminished."[170] This is a misallocation of valuable resources and a rebalancing is urgently needed.

165. A harm-reduction approach defines goals in this area in terms of reduced alcohol or other drug misuse, higher social functioning, and reduced offending. *See* Nolan, *supra* note 154, at 34–35 (analyzing the harm-reduction theory as it pertains to drug and alcohol treatments); *see also* Gordon Roe, *Harm Reduction as Paradigm: Is Better than Bad Good Enough?*, 15 Critical Pub. Health 243, 243–48 (2005) (discussing the harm-reduction theory and its origins).

166. *See* Drug Policy Alliance, *supra* note 62, at 16.

167. *See* Mulvey & Schubert, *supra* note 60, at 21, 25 (recommending that jurisdictions "[d]ivert seriously mentally ill individuals charged with less serious crimes out of the criminal justice system at the earliest possible stages of official processing, preferably before or in lieu of jail entry").

168. Csete & Tomasini-Joshi, *supra* note 26, at 5.

169. *Id.* at 14.

170. Drug Policy Alliance, *supra* note 62, at 6 (reporting that the proportion of treatment capacity available to those who seek treatment voluntarily fell from 65.1% in 1997 to 62.5% in 2007).

2. **Problem-solving courts should focus on high-risk offenders.** Problem-solving courts should focus on higher-risk offenders, particularly those with multiple risk factors. "[D]rug courts work better for those who are at an inherently higher risk for future criminal behavior."[171] This means resisting the cherry-picking that some observers have noted in many jurisdictions. It also may require treatment courts to refrain from excluding persons with histories of violent offending, or at the least to rework eligibility criteria so that mere possession of a weapon at the time of arrest for a drug offense does not work as an exclusion.[172]

3. **Problem-solving courts should offer a menu of human services to match the full range of needs for this more challenging population.** If they have targeted this more challenging population, these courts should offer a menu of human services that match the full range of needs these participants present with, not just their drug-use disorder or mental illness.[173] These courts should draw upon a diverse service-provider network offering a range of modalities of treatment, including methadone maintenance and/or buprenorphine treatment for some clients with severe opioid use disorders.

4. **Problem-solving courts should adopt structural features to prevent rehabilitative features from turning into punitive practices.** Drug-treatment courts and other problem-solving courts should adopt structural features designed to minimize the tendency of rehabilitative intentions to devolve into punitive practices. Pre-plea or pre-adjudication models should be favored over post-adjudication approaches that require participants to enter a guilty plea before entering treatment. Defense counsel should be accorded sufficient independence from the court's "treatment team" to ensure that participants' essential trial rights are safeguarded.[174] The use of incarceration as a response to relapse should be minimized, and judges should follow written protocols for the imposition of graduated sanctions. Drug testing should never be used as a punishment.[175] Finally, while drug-treatment courts and other problem-solving courts should increase intensity based upon risk, overall the duration of these programs should be reduced. Many participants in drug-treatment courts in particular spend too long going through the

171. *Id.* at 13.
172. *See* King & Pasquarella, *supra* note 10, at 4.
173. *See id.* at 16.
174. *See* Boldt, *supra* note 9, at 1286–1300.
175. *See* Drug Policy Alliance, *supra* note 62, at 19.

program and, as a result, completion rates are often too low.[176] Problem-solving courts, in short, should be reserved for those most likely to benefit from them, and should be designed to maximize the likelihood that participants will succeed.

176. *See* KING & PASQUARELLA, *supra* note 10, at 4; *see also* Miller, *supra* note 30, at 435 (critiquing the tendency of "intense court supervision" to produce a "long, invasive, and potentially arduous treatment regime").