

A Conversation About Problem-Solving Courts: Take 2

Jane M. Spinak

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/rrgc>



Part of the [Courts Commons](#)

Recommended Citation

Jane M. Spinak, *A Conversation About Problem-Solving Courts: Take 2*, 10 U. Md. L.J. Race Relig. Gender & Class 113 (2010).
Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol10/iss1/7>

This Article is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

A CONVERSATION ABOUT PROBLEM-SOLVING COURTS: TAKE 2

JANE M. SPINAK*

The University of Maryland Law Journal of Race, Religion, Gender and Class symposium on problem-solving courts surfaced a wide array of issues on the meaning and practices of these courts. My prepared remarks at the symposium addressed the first issue discussed in this article: the potential disparate impact of problem-solving courts on minority families who are disproportionately affected by these court processes. The second part of the article draws on the discussion during the symposium to reflect on the difficulty supporters and critics of the problem-solving court movement have in talking and listening to each other.

I. INTRODUCTION

The nationwide problem-solving court reform movement arrived in New York during the nineties, encompassing both criminal and family courts.¹ New York State created its first Family Court Treatment Part (FCTP) in 1997,² which was designated as a “model

Copyright © 2010 by Jane M. Spinak.

* Edward Ross Aranow Clinical Professor of Law, Columbia Law School. I would like to thank Michele Cortese, Esq., Deputy Director of the Center for Family Representation, for answering my endless questions and always providing insights into the workings of Family Court and to congratulate her on being awarded the 2010 New York City Kathryn A. McDonald Award for Excellence in Service to Family Court.

1. The Center for Court Innovation has been the locus for developing problem-solving courts in New York overall, but family problem-solving court projects had multiple sponsors. Center for Court Innovation, About, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=471> (last visited on Feb. 22, 2010); See also Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WISC. L. REV., 331, 362 (2002) [hereinafter *Adding Value to Families*].

2. *Adding Value to Families*, *supra* note 1, at 350. In the original FCTP, “parents accused of neglecting their children because of their substance abuse participate[d] in an extensive court conferencing and monitoring system. Parents eligible for the FCTP [were] assessed by the FCTP clinical staff, [were] required to waive their right to a litigated hearing, and must admit that the neglect was caused by their addiction. The parent then entere[d] into a negotiated treatment plan that [had] been created by the FCTP clinical staff, the parent and her counsel, the lawyer for the children, and the child protective agency’s attorney and caseworker; the plan [had] also been approved by the presiding judge. The parent [was] then referred immediately to treatment providers who [had] contracted with the court to have

court” site under the auspices of the National Council of Juvenile and Family Court Judges Model Courts Project (the Project) in 1998.³ The FCTP and the model court paradigm share several common features: (1) an activist judge who helps to fashion, and then closely monitor, dispositions; (2) a team of lawyers, social workers, and court personnel who try to identify and then work toward common goals with the family; and (3) frequent and meaningful court appearances by relevant parties.⁴

When I first heard about problem-solving courts, I was excited about the potential for these courts to have a positive effect on the way in which Family Court treated the litigants passing through its doors and on the outcomes for families mired in the child welfare and foster care systems. The judges, lawyers, and court personnel most interested in improving the court were leading the efforts and I wanted to join them.⁵ In reality, this was the only game in town, if court reform was

available treatment spaces. What ensue[d] [was] an intensive period of court supervision, with frequent in-court drug testing and appearances by the parent and other FCTP “team” members, including the lawyers and agency caseworkers. Sanctions for positive drug tests or other lapses in compliance with the treatment plan [] range[d] from more frequent drug testing and court attendance to ultimate dismissal from the FCTP, which returne[d] the case to the general case pool. Rewards [would] include longer periods of visitation and less supervision of the parent with her children.” *Id.* at 332–33.

3. National Council of Juvenile and Family Court Judges, *Activities by State*, New York, <http://www.ncjfcj.org/images/stories/dept/states/Aug09/new%20york%20state%20outreach.pdf> (last visited on Apr. 13, 2010). The project’s official name was the National Council of Juvenile and Family Court Judges (NCJFCJ) Permanency Planning for Children’s Department’s Child Victims Act Model Courts Project, which was funded by the U.S. Department of Justice’s Office of Juvenile Justice & Delinquency Prevention. *Adding Value to Families*, *supra* note 1, at 361–62. “The model courts initiative is described by its funder, OJJDP, as “a nationwide effort to improve how courts handle child abuse and neglect cases, [that] is helping children spend less time in foster care and resulting in earlier resolution of cases in dependency courts.” The model courts are part of the larger effort by the NCJFCJ/PPCD “to educate judges and other practitioners on the need to expedite secure safe permanent placements for all maltreated children, either by making it possible for them to safely stay with or return to their own families or by finding them safe adoptive homes.” *Id.* The model court description also includes other key elements seen as essential for success: interdisciplinary training and technical assistance for all youth-serving professionals using the NCJFCJ’s Resource Guidelines as a blueprint for improving court practice; identifying “lead” judges to mobilize all the relevant players within their jurisdictions; developing programs that can be seen as easily replicable in other jurisdictions; piloting innovative alternative dispute resolution methods; and sharing information locally and nationwide through enhanced data systems.” *Id.* The current version of the Project’s work is found at National Council of Juvenile and Family Court Judges, <http://www.ncjfcj.org/content/view/full/81/145/> (last visited on Feb. 22, 2010).

4. *Adding Value to Families*, *supra* note 1, at 332.

5. I have served as a member of the New York State Permanent Judicial Commission on Justice for Children (PJCJC) since 1995. “[T]he New York State Court of Appeals designated [PJCJC] to implement the New York State Court Improvement Project (CIP), a

the game.⁶ The movement was sweeping the entire country, building on what appeared to be remarkable initial success in the adult drug court arena.⁷ In 1996, the number of children in foster care peaked at 52,369 in New York State, which created a compelling urgency to try new ways for the Family Court to address the significant family disruptions that led to foster care.⁸ The problem-solving court movement seemed like the answer.

Even at that early stage of the reform movement, however, I began to wonder whether these courts would preserve the substantive due process right of “family integrity” that protects the rights of parents to raise their children as they choose and allows children to grow up with their own unique family.⁹ In my first article on this subject, I posed two questions. Could model problem-solving courts dismiss cases which did not satisfy the requirements of jurisdictional

federally funded project to assess and improve foster care, termination of parental rights and adoption proceedings.” New York State Permanent Judicial Commission on the Justice for Children, <http://www.courts.state.ny.us/ip/justiceforchildren/index.shtml> (last visited on Feb. 22, 2010). Two of the CIP pilot projects in Erie and New York counties were designated NCJFCJ Model Courts by the National Council of Juvenile and Family Court Judges. NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, ACCOMPLISHMENTS: 15 YEAR REPORT 19 (2006), <http://www.courts.state.ny.us/ip/justiceforchildren/PDF/Final%20Booklet%20to%20Print.pdf>.

6. NEW YORK STATE PERMANENT JUDICIAL COMMISSION ON JUSTICE FOR CHILDREN, *supra* note 6, at 7. *See also*, *Adding Value to Families*, *supra* note 1, at 350.

7. *See* Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1501 (2003).

8. CONNA CRAIG & DEREK HERBERT, NATIONAL CENTER FOR POLICY ANALYSIS, THE STATE OF THE CHILDREN: AN EXAMINATION OF GOVERNMENT-RUN FOSTER CARE 12 (1997), <http://www.ncpa.org/pdfs/st210.pdf>. In September 1998, 560,000 children were in foster care nationwide. National Foster Care Statistics, <http://library.adoption.com/articles/foster-care-national-statistics.html> (last visited on Feb. 22, 2010).

9. In its most recent reaffirmation of family integrity, the Supreme Court concluded: “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel v. Granville*, 530 U.S. 57, 66 (2000). In his dissent, Justice Stevens noted that, while the Court has yet to determine a child’s liberty interest in his or her family bonds (including those beyond a parent), “it seems . . . extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.” *Id.* at 88 (Stevens, J., dissenting). Such an interest was found recently by a federal district court in *Kenny A. v. Perdue*, where the court stated:

[C]hildren have fundamental liberty interests at stake in deprivation and TPR proceedings. These include a child’s interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.

Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).

authority—either because the state could not prove the allegations of neglect or abuse or because the state had not satisfied its own requirements to provide services and assistance prior to filing a case in court?¹⁰ Alternatively, would model problem-solving courts, believing they could assist the families anyway, ignore those constitutional and statutory restrictions?¹¹

In tracking the publicly-stated goals and activities of model courts around the country, I found that the principles for model court practice prioritized “avoiding unnecessary separation of children and families” and supporting “reunification” of families while keeping children safe.¹² During the initial five years that followed the establishment of the Project, however, the model courts focused on goals of efficiency and administrative effectiveness rather than substantive outcomes.¹³ I encouraged the courts to move beyond the administrative process goals to use the specialized nature of the model court structures—collaborative systemic planning, team conferencing and other alternative dispute resolution processes, and significant participation by the families themselves—as tools to achieve family integrity rather than as ends of their own.¹⁴

While I still believe that a problem-solving court must be committed to using these tools to pursue family integrity, child safety and permanency, my belief in the ability of these courts to do so has significantly diminished. I have addressed this concern elsewhere by considering the historical roots of problem-solving courts in the trajectory of the Family Court through the Twentieth Century¹⁵ and by

10. *Adding Value to Families supra* note 1, at 340–42.

11. *Id.* at 340–44, 371–74. An issue I had not considered at the time was whether courts could intervene in family life to assist families without explicit jurisdictional authority. For an example of such a “court,” see Riverside Superior Court - Family Preservation Court, available at <http://www.riverside.courts.ca.gov/famprescrt/index.html#Procedures> (last visited on Apr. 25, 2010).

12. *Id.* at 367 (referring to NCJFCJ’s Resource Guidelines).

13. *Id.* at 364. See *infra* pp. 22–23 for discussion on the continued tension concerning the purpose of problem-solving courts.

14. *Adding Value to Families, supra* note 1, at 370–71. While I made these recommendations in the context of model courts, they apply generally to family court which is considered the original problem solving court. Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 271 (2008) [hereinafter *Romancing the Court*]. See also Hon. Leonard P. Edwards, Super. Ct. of Cal., County of Santa Clara, Remarks on Receiving the William H. Rehnquist Award for Judicial Excellence at the U.S. Supreme Court, Washington, D.C. (Nov. 18, 2004), available at <http://www.improvingoutcomesnetwork.org/viewarticles.jsp> (“Juvenile Court is the original problem-solving court.”).

15. *Romancing the Court, supra* note 14, at 258. (“[L]essons gleaned from over 100 years of family court history suggest that court-based solutions to intractable social problems have rarely been effective . . . [N]either the structural issues that courts face, such as

scrutinizing the limitations of current Family Court reform efforts.¹⁶ For purposes of this article, I want to focus on two somewhat unrelated issues about problem-solving courts. My prepared remarks at the symposium addressed the first issue to be discussed: the potential disparate impact of problem-solving courts on minority families who are disproportionately affected by these court processes.¹⁷ The second part of the article draws on the discussion during the symposium to reflect on the difficulty supporters and critics of the problem-solving court movement have in talking and listening to each other

II. PROBLEM-SOLVING COURTS AND DISPARATE IMPACT

Two aspects of problem-solving courts may exacerbate the disparate impact of their processes on families of color. The first is that by situating the central process of problem-solving for court-involved families in the court rather than in the community, the opportunity for pre-court assistance and services may be lost. The incentives for crafting more local, and potentially more effective and comprehensive solutions, are diminished if the court process is likely to subsume those efforts through its own problem-solving paradigm. At the same time, the court loses the insight that may come from seeing how families address the issues that result in court intervention

overwhelming numbers of cases, nor the momentous societal issues that problem-solving courts have recently begun to shoulder can be adequately addressed through court-based solutions. The factors that allegedly distinguish new problem-solving courts from earlier exemplars, especially the family court, are both less unique and less successful than they have been portrayed by problem-solving court enthusiasts.”)

16. Jane M. Spinak, *Reforming Family Court: Getting It Right between Rhetoric and Reality*, 31 WASH. U. J.L. & POL’Y 11, 19–27 (2010). Current family court reform efforts are limited in their effectiveness for several reasons. Reformers have relied too heavily on stories to identify success, have been unwilling to frame questions about reform differently, have relied on conventional reasons for success or failure, and have not subjected reform efforts to rigorous analysis [hereinafter *Reforming Family Court*]. *Id.* at 38.

17. Professor Eric J. Miller has explored this issue considerably. *See, e.g.*, Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Intervention*, 65 OHIO ST. L.J. 1479, 1568 (2004) [hereinafter *Embracing Addiction*]; *See also* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 427–31 (2009) [hereinafter *New Penology*]; Eric J. Miller, *The Therapeutic Effects of Managerial Reentry Courts*, 20 FED. SENT’G REP. 127 (2007) [*Therapeutic Effects of Managerial Reentry Courts*]. *See also* Emily Wall, *Finding a Right to a Speedy Trial in Child Welfare Cases: Recognizing the Value of Time* 31–34 (Sept. 21, 2009) (summarizing earlier findings of disproportionality of minority families in the child welfare system) (unpublished note, on file with author). The NCJFCJ has recently launched the Courts Catalyzing Change initiative to respond to the disproportionate numbers of children of color in the child welfare and foster care systems and the disparate outcomes these children experience. National Council of Juvenile and Family Court Judges, *Courts Catalyzing Change*, <http://www.ncjfcj.org/content/blogcategory/447/580> (last visited on Feb. 22, 2010).

within their communities, and the potential to use that insight if or when families ultimately require court intervention.¹⁸ Additionally, the creation of problem-solving courts may result in more families being drawn into the court system—often referred to as “net widening”¹⁹—because the lack of community resources leaves the court as the only place to secure help.²⁰ Moreover, the back-end services that a problem-solving court may provide come with additional burdens, including increased surveillance of the family and the stigma attached to being subject to court processes.²¹ Finally, court-based solutions focus on the

18. See CHAPIN HALL CENTER FOR CHILDREN AT THE UNIVERSITY OF CHICAGO, UNDERSTANDING RACIAL AND ETHNIC DISPARITY IN CHILD WELFARE AND JUVENILE JUSTICE 19 (2008) at 19–20 (discussing how focus groups in Texas identified aspects of disproportionality in Texas that included a lack of understanding of the social conditions of communities and the failure to engage with the community.) [hereinafter CHAPIN HALL REPORT].

19. The term has been frequently used in the criminal and juvenile court context to indicate how court-based service or diversion programs may actually bring more people under court surveillance and supervision. See, e.g., Mark Ezell, *Juvenile Arbitration: Net Widening and Other Unintended Consequences*, 26 J.RES. CRIME & DELINQ. 358, 375–76 (1989) (discussing how a juvenile court diversionary arbitration program resulted in more youth being supervised by the court, placed on probation or committed by the judge.) See also, Judge Morris B. Hoffman, *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567, 1567 (2003) (describing the net-widening effect of the Denver Drug Court).

20. See Anne H. Geraghty & Wallace J. Mlyniec, *Unified Family Courts: Tempering Enthusiasm with Caution*, 40 FAM. CT. REV. 435, 435–36, 442, 444 (2002); *Therapeutic Effects of Managerial Reentry Courts*, *supra* note 17, at 127. “Establishing community-based alternatives to detention (and removal from the home) and utilizing the least restrictive supervision options are essential components of reducing racial and ethnic disproportionality in both systems. Unfortunately, too often, to be eligible for services, a youth must already have penetrated deeply into one or both systems. This is not good for children and families, nor is it a cost-effective way to provide supports.” CHAPIN HALL REPORT, *supra* note 18, at 74. See also, U.S. GOV’T ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 31 (2007), <http://www.gao.gov/new.items/d07816.pdf> (“Court officials in California said that initiatives to refer drug offenders to treatment programs instead of incarceration have increased competition for accessing publicly funded substance abuse programs, adding to the difficulties families may face in making changes needed for reunification. In addition, when services are available, it may take 2 years for a parent to complete a substance abuse treatment program, and entry into such programs may be delayed if there are waiting lists for services.”) [hereinafter GAO REPORT].

21. See Corey Shdaimah, *Taking a Stand in a Not-So-Perfect World: What’s a Critical Supporter of Problem-Solving Courts to Do?*, 10 U. MD J. RACE, RELIGION, GENDER & CLASS 89 (2010); see also Carren S. Oler, *Unacknowledged Shame, Unresolved Family Cases*, 38 MD. B. J.12, 14–16 (“Shame is a family of painful emotions which generally are hidden and may include inadequacy, humiliation and embarrassment.”); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453–56 (2002) (on increased court supervision); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1562 (2003) (“Therapeutic jurisprudence also allows the court to extend its authority into the lives of drug court clients in unprecedented ways.”) (using as an example judges who supported a measure to dispense with probable cause in order to randomly search drug court participants’ homes).

responsibility of the individual: did this parent neglect her child? Is this youth a runaway or truant?²² The court is not deciding whether society has provided comprehensive supports for families and children that might eliminate or ameliorate the need for court intervention at all.²³

The second aspect of problem-solving courts that may exacerbate the disparate impact of their processes on families of color emanates from the first: court-based problem solving is predominantly judge-based problem solving. This results in a system in which the traditional due process protections afforded by an impartial judge are exchanged for judicial leadership that creates its own conception of fairness and due process.²⁴ Such a system may be particularly vulnerable to creating a disparate impact on families of color.²⁵

A. Situating Problem-Solving in Courts

A persistent question nagging the problem-solving court movement is whether the problem to be solved is best solved through court processes.²⁶ The National Association of Criminal Defense

22. *New Penology*, *supra* note 17, at 427, 432 (discussing how the individual responsibility therapeutic model in drug courts doesn't engage "with the wider perspective of governmental and social failure that is the backdrop against which many drug addicts live their lives").

23. While family court judges have a statutory duty to determine whether "reasonable efforts shall be made to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child's home; and (ii) to make it possible for a child to safely return to the child's home." 42 U.S.C. § 671(a)(15)(B) (2006) (as amended by the Adoption And Safe Families Act of 1997), a recent report noted that judges found that "reasonable efforts" to achieve permanency for children in foster care were made in all but six out of 463 permanency cases reviewed in the study, raising "questions regarding the threshold used to make these determinations and the relevance of such findings." CHILDREN'S RIGHTS, THE LONG ROAD HOME: STRANDED IN NEW YORK CITY FOSTER CARE 192 (2009), available at http://www.childrensrights.org/wp-content/uploads/2009/11/2009-11-02_long_road_home_full_report_final.pdf. For a discussion of the state of child well being generally in the United States, see UNICEF, AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES: A COMPREHENSIVE ASSESSMENT OF THE LIVES AND WELL-BEING OF CHILDREN AND ADOLESCENTS IN THE ECONOMICALLY ADVANCED NATIONS 2 (2007), http://www.unicef-irc.org/publications/pdf/rc7_eng.pdf (ranking the United States twenty out of twenty-one among the countries surveyed on six measures of child well being).

24. See discussion *infra* at notes 61–63 (discussing an example of the N.Y. treatment parts that still haven't adopted statewide basic protocols on how the courts should work); *Therapeutic Effects of Managerial Reentry Courts*, *supra* note 17, at 127 (pointing out the difficulty of measuring success because of the range of models used in problem solving courts).

25. See discussion *infra* at pp. 8–10.

26. *Romancing the Court*, *supra* note 14, at 259–60. This has been a central query within the family court since its inception. *Id.*

Lawyers (NACDL) recently released a report on drug courts recommending that substance abuse treatment be considered a public health rather than a criminal justice issue.²⁷ The report warns that the criminal justice paradigm for substance abuse treatment “legitimizes drugs (sic) courts while ignoring other smart, fair, effective, and economical approaches.”²⁸ Similarly, in recent years, the practice of diverting adolescent status offenses from family court jurisdiction and dual tracking child protection investigations to community-based assistance by distinguishing between cases likely to need court intervention and those more suited for voluntary provision of services, is based on an understanding that readily available, community crafted assistance that avoids court entirely may be more effective in addressing family needs.²⁹

Nevertheless, the proliferation of problem-solving courts in multiple dimensions of minority and poor peoples’ lives³⁰—from drug courts to truancy courts to homelessness courts to reentry courts—reinforces a belief that these problems are best addressed by judges in

27. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICA’S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 10 (2009), [hereinafter NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS] [http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/\\$FILE/problem-solvingreport_110409_629\(K+PMS3145\).pdf](http://www.nacdl.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/665b5fa31f96bc40852574260057a81f/$FILE/problem-solvingreport_110409_629(K+PMS3145).pdf). See also Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL’Y & L. 590, 595–600 (2005) (arguing for an empirically-based system of assistance to address the multiplicity of factors that produce child maltreatment and subsequent child welfare interventions, including foster care).

28. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *supra* note 27, at 10.

29. *Reforming Family Court*, *supra* note 16, at 35–36 (discussing diversion of status offense cases based on programs developed and evaluated by the Vera Institute of Justice); U.S. DEP’T OF HEALTH AND HUMAN SERVICES, ALTERNATIVE RESPONSES TO CHILD MALTREATMENT: FINDINGS FROM NCANDS 21–22 (2005), <http://aspe.hhs.gov/hsp/05/child-maltreat-resp/report.pdf> (“The findings are consistent with the expectation that these families’ circumstances may not warrant a traditional [Child Protective Services] response, but can benefit from some intervention to prevent potential or future maltreatment . . . It appears that services are being provided to a greater proportion of families who receive an alternative response. It also appears from this data that even though children who had been previously referred to alternative response do experience subsequent reports and responses by CPS, in general they are not at any greater risk for subsequent reports than those who received an investigation. Furthermore, they are not at any greater risk for subsequent victimization. With this knowledge, at the system level, agencies that refer children and families to the alternative response or investigation track may be confident that, if specified guidelines guide the decision, the child’s future safety is no more likely to be compromised.”).

30. The “national phenomenon” of the overrepresentation of minority children and families in child welfare and family court systems has been well documented. THE CENTER FOR THE STUDY OF SOCIAL POLICY, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN’S CHILD WELFARE SYSTEM 1 (2009) [hereinafter THE CENTER FOR THE STUDY OF SOCIAL POLICY]. See also GAO REPORT, *supra* note 20, at 4.

what have been called “therapeutic” court settings rather than by other means.³¹ Writing about criminal reentry courts, Professor Eric Miller questions “whether this therapeutic paradigm unfairly places accountability for reentry issues on individual offenders while minimizing governmental responsibility for a range of institutional failures in the areas of health care, education, housing and employment.”³² Both the standard Family Court and the current problem-solving variations on that standard similarly place accountability on the individual rather than on the predominant causes of neglect and abuse: poverty and its ensuing hardships.³³ Moreover, according to Professor Miller, “[t]herapy and responsibility disaggregate the problem of drug crime from social and governmental forces. They take the emphasis off the increasing racial segregation and class stratification of the inner city, and emphasize the personal characteristics of the addict.”³⁴ Instead, these underlying causes and the broader societal and institutional failures to address them are marginalized when the judiciary shifts the burden of resolution onto the individual through a judge-driven therapeutic mechanism.³⁵

Centering the resolution of these issues on the individual parent in a problem-solving proceeding assumes that the parent has access to and is supported by a system of services and assistance that maximizes the parent’s ability to resolve the child protection issues facing her

31. Candace McCoy, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517–25 (2003). See also JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 57–59 (2001).

32. *Therapeutic Effects of Managerial Reentry Courts*, *supra* note 17, at 127. Professor Miller expresses considerable concern that “[g]iven that the central problem facing ex-prisoners reentering society is the failure of the government to adequately provide medical, education, health, housing, and other social services before they were incarcerated and upon release, it is essential to question the drug and reentry courts’ emphasis on personal responsibility. The therapeutic model, in this setting, appears to have the effect of attempting to convince the ex-inmate that these social failings are of little consequence: the problem is the ex-inmate’s life choices, rather than society’s choices about where and how to distribute its resources to different communities.” *Id.* at 131.

33. Garrison, *supra* note 27, at 612–14 (identifying poverty as the most important risk factor in child maltreatment but also discussing the correlation among multiple risk factors).

34. *New Penology*, *supra* note 17, at 427. Miller also quotes Douglas Massey and Nancy Denton, who state that “one third of all African Americans in the United States live under conditions of intense racial segregation.” *Id.* at 428 (citing DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 77 (1996)).

35. Garrison, *supra* note 27, at 595–99 (outlining the various ways in which social policies and law have failed to understand, prevent or address child maltreatment). The more the burden for addressing child welfare is placed on the individual through the therapeutic-judicial paradigm, the less likely that Garrison’s recommendations will be considered.

family. If, for example, African-American families do not have consistent access to prevention and early intervention services, their communities lack basic services, there is an unequal distribution of state resources to African-American communities, and these families struggle “to find and maintain suitable and affordable housing, reliable transportation, and a legal source of regular income,” the disparate impact on the ability of these families to resolve their child welfare issues is readily apparent. This was a central conclusion of a recent study of decision-making in child welfare cases in Michigan by the Center for the Study of Social Policy.³⁶ The study further concluded that both child protective services and the court system failed to recognize or draw on the strengths of African-American families, to consider community-based, non-traditional resources for these families, to engage the families in authentic participation in decision-making, or to respect family recommendations.³⁷ The study further found that the failure to engage the families and their communities in a discussion about what resources and assistance could assist the families were among the factors that led to disproportionate numbers of children being removed from their families and communities.³⁸

36. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 20 (“While both Caucasian and African American families were living in poverty, this Review observed the particularly pernicious effects of poverty on African American families.”); *Embracing Addiction*, *supra* note 17, at 1568 (“Statistical evidence suggest that poorer offenders are more likely to agree to go to drug court than rich ones . . . The differential impact of the criminal justice system on poor individuals may be exacerbated for minorities, who are much more likely to receive incarcerative sentences than non-minorities. Such factors may lead poor and minority defendants to access diversion into drug court where others would not.”) *New Penology*, *supra* note 17, at 425 (“ I shall suggest that the drug court’s success in generating broad bipartisan appeal stems from its therapeutic approach to drug offenders, one in which responsibility replaces race as the major issue facing individual addicts.”).

37. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 19; *New Penology*, *supra* note 17, at 425 (discussing “what David Garland calls a ‘responsibilization strategy’ placing the onus on individuals to alter their conduct rather than on emphasizing rights to access government social welfare services.”) (citing DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 118, 124 (2001)).

38. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 20–22, 37–38, 43–44. *See also* Alan J Dettlaff & Joan R Rycraft, *Deconstructing Disproportionality: Views From Multiple Community Stakeholders*, 87 *CHILD WELFARE* 37, 55 (2008) (“Finally, findings from these focus groups clearly indicate the need for child welfare agencies to improve their relationship with the community. To reduce disproportionality, child welfare agencies must ally themselves with communities and draw upon the strengths of communities to address this problem. To facilitate meaningful engagement, efforts must be long-term and consistent. Meetings and open forums should be held with community groups, churches, schools, and other community stakeholders on a consistent basis. Agency administrators should establish connections with community agencies to develop collaborative partnerships that work toward the common goal of improving outcomes for children and families. Additional strategies include the establishment of satellite offices within communities and the development of community-based family service centers that emphasize community support and prevention.”).

Equally disturbing, the study found “little evidence of monitoring for the quality and the cultural relevance of the services provided,” and “no evidence of institutional policies and practices to hold these practitioners accountable for the quality of their work.”³⁹ Children were considered better off removed from their families because child protective services and the courts doubted that the children’s communities could take care of them.⁴⁰

Shifting resources and planning to the court system as the problem-solver rather than providing resources and financial support to empower communities to create effective strategies and solutions will do little to eliminate the problem of disparate treatment.⁴¹ In fact, shifting to back-end services increases surveillance of parents that can result in additional monitoring,⁴² additional legal proceedings,⁴³ and even a shift into the criminal justice system with potentially dire consequences, including denying access to many public benefits.⁴⁴ The constant monitoring of parents in many problem-solving court paradigms, such as Family Treatment Drug Courts (FTDC), not only enables the court to assure a parent’s compliance with court ordered treatment and services, but also provides the opportunity to sanction her failure to do so.⁴⁵ Sanctions range from additional court appearances to jail.⁴⁶ The collateral consequences of penetrating the

39. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 37.

40. *Id.* at 17 (“[T]he Review documented both stated and operational assumption that African American children would fare better if removed from their families and communities.”).

41. Garrison’s analysis of the problems with the way in which maltreatment is addressed highlights the need for empirical analyses of the way in which child maltreatment is addressed in child welfare systems. Garrison, *supra* note 27, at 606–11. As difficult as it may be to use rigorous empirical analysis in child welfare systems, analysis of court-based intervention is even more daunting. *Reforming Family Court*, *supra* note 16, at 19–27 (describing the failure to measure federally funded court reform efforts).

42. Shdaimah, *supra* note 21, at 98–99; *See also* Judge Nicolette M. Pach (ret.), *An Overview of Operational Family Dependency Treatment Courts*, 6 DRUG CT. REV., 67, 99–100.

43. Pach, *supra* note 42, at 99.

44. In some FTDCs, failure to comply with treatment or court mandates, sanctions can include jail. *Id.* at 90–91. Some of these courts have concurrent criminal and civil jurisdiction, heightening the possibility of significant collateral consequences. Philip Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1673 (2003). Even if there is no criminal conviction, the impact on families of parents being incarcerated is well documented. *See e.g., id.* at 1671–72.

45. Pach, *supra* note 42, at 90; *see discussion infra* pp. 14–15 on FDTDC.

46. Pach, *supra* note 42, at 90–91. The California Supreme Court recently held that the juvenile dependency court does not have the statutory authority to punish a parent for contempt (and order contempt sanctions such as jail time) solely on the basis that the parent has failed to comply with court-ordered drug treatment. *In re Nolan W.*, 45 Cal.4th 1217

criminal justice system for failure to comply with an FTDC order could result in insurmountable barriers to reunification of the family.⁴⁷ And the ultimate punishment for failure in FTDC is a parent permanently losing custody of her child.⁴⁸

The potential disparate impact on minority families of creating and situating solutions to child welfare issues in problem-solving courts arises out of three interconnected aspects of these courts. The first is that placing accountability on the individual to solve the problem fails to consider the lack of community and governmental resources available within minority communities to address the issues these families face. The second is that community-based solutions that could draw on the strengths of the community are unlikely to be developed if court-based solutions are the norm. This means that help is less likely to be provided until the family reaches court and that the assistance is less likely to be crafted with a deep understanding of community needs or strengths. And lastly, once the family reaches court, the traditional due process protections afforded by an impartial judge no longer serve as a final defense to improper government intervention, as the next section discusses.

B. Judicial Leadership

The role of the judge as a leader of a therapeutic team reinforces the shift of services from the community to the court, as well as the re-characterization of those services from social responsibilities to individualized needs. The team leader role also

(2009). While the court declined to address the impact of its ruling on juvenile court drug courts, *Id.* at 1226 n.3, the Administrative Office of the Courts of California recently issued a “fact sheet” indicating that incarcerative sanctions were no longer available to use in juvenile dependency drug courts as a result of the *Nolan W.* decision. *Changing Behavior: Incentives and Sanctions in Juvenile Dependency Drug Court, March 2010*, <http://www.courtinfo.ca.gov/reference/documents/factsheets/jddc.pdf> (last visited on Apr. 27, 2010).

47. Most FDTCS do not have criminal jurisdiction or sanctions; for those that do, however, the collateral consequences can be devastating. See Reentry Resource Center New York, <http://www.reentry.net/ny/> (last visited on Feb. 22, 2010); See also Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–40 (2006).

48. NPC RESEARCH, FAMILY TREATMENT DRUG COURT EVALUATION: FINAL REPORT 2 (2007); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1239–40 (1998). As Professor Richard Boldt has warned in the criminal court context, failure to be cured results in punishment. In the family court context, that includes termination of parental rights.

fundamentally changes the nature of the judge's job.⁴⁹ While the therapeutic leader is heralded as innovative in the problem-solving court movement, the roots and controversy of this role are deep in the history of the original family court.⁵⁰ In writing about the early development of family courts, one writer opined in 1919:

The judgments of a judicial officer as at present constituted in this country are confined to the pleadings and to the testimony taken in open court. He does not take the initiative in any proceeding brought before him. His sole duty is to determine under the law and the facts the questions presented. The judge of a family court must have larger powers than these. He must be at liberty to investigate or cause to be investigated every anti-social or abnormal act growing out of family disturbances. His duties must necessarily be inquisitorial rather than accusatory. . . To empower a judge to act on his own initiative immediately and without pleadings; to authorize him to become the general supervisor and mentor of the home and its several occupants, will be a new thing in our jurisprudence. It is apparent, therefore, that a judge who is given these extraordinary powers must be a man well versed in the law, of large experience, unswerving firmness, broad sympathies, and clear, quick and accurate judgments. Wanting in any of these elements, his work must fail.⁵¹

The quote describes the judge as the hero who, lacking any of these extraordinary powers or virtues, succumbs to defeat. One way in which defeat has been averted (since having all of these "elements" is

49. NOLAN, *supra* note 31, at 90–110 (analyzing the differences between our conception of a common law judge and the drug court judge. In particular, it highlights a significant departure from the impartial, restrained, objective judge in the common law tradition. Nolan's description is equally applicable to other problem solving courts.). See also NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *supra* note 27, at 27 ("When participants enter drug court they would be well-advised to "[p]repare to turn our life over to this judge and her whims for at least the next year or two." One judge candidly admitted that he did things that were "absolutely over the line in the canons of judicial conduct" such as midnight curfew checks on participants and sitting in on treatment meetings.").

50. *Romancing the Court*, *supra* note 14, at 259, 269–71.

51. Willis B. Perkins, *Family Courts*, 17 MICH. L. REV. 378, 380–81 (1918-1919).

beyond the capacity of most humans, let alone judges),⁵² has been the imposition of significant due process protections in family court proceedings to guard not only the litigants, but also the judge, from his own heroism.⁵³ As a result, the prescribed role of the Family Court judge during the last quarter of the Twentieth Century included serving as a gatekeeper against government overreaching,⁵⁴ a check against bad decision-making on the part of government agents,⁵⁵ a protector of the due process rights of parents and children,⁵⁶ and an insurer of fairness and impartiality.⁵⁷ If the judge's primary role is to revert instead "to investigate. . . every anti-social or abnormal act growing out of family disturbances. . . [and] to authorize him to become the general supervisor and mentor of the home,"⁵⁸ what is the effect on his role of impartial decision-maker and protector against government

52. A description of a family court judge in the mid-Twentieth Century captures the concern about infallibility:

Because each judge must form his own awareness of his lacks, some of those who come to this bench remain entirely untutored and, possibly as a form of self-defense, scornful of what they do not understand. One, for example, proudly says that he had never been in the court in any capacity until the day of this appointment; then he sat on the bench with another judge during a morning's session; and that very afternoon he began hearing and deciding cases without further aid or training. During his years of service, he adds, he has never had a moment's worry about the soundness of a single one of the thousands of cases he has judged. One can only add that his equanimity is not shared by all.

Walter Gellhorn, *Children and Families in the Courts of New York City* 102-03 (1954).

53. Barry C. Feld has called this the "constitutional domestication of the juvenile court," which began with *Kent v. United States* and fully blossomed with *In re Gault* and *In re Winship*. BARRY C. FIELD, *JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL*, 8-13 (Thompson/West ed., 2003). See also Geraghty & Mlyniec, *supra* note 20, at 438. ("As we all know, the Pre-*Gault* juvenile court became a nightmare. The services that it offered often resulted in very coercive sanctions against children and families. Justice was quite irrational and subject to the personality of the particular judge who presided. Due process was secondary to the subjective evaluation of what the judge believed was in the child's 'best interests.'").

54. See e.g., *In re Nassau County Dept. of Social Serv. ex rel Dantia v. Denise J.*, 661 N.E. 2d 138, 139-40 (1995) (finding that a report which shows only child's positive toxicology for controlled substance generally does not in and of itself prove that the child has been neglected).

55. The court must find that "reasonable efforts shall be made to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child's home; and (ii) to make it possible for a child to safely return to the child's home." 42 U.S.C. § 671(a)(15)(B) (2000), amended by Pub. L. No. 105-82, 111 Stat. 2115.

56. *Santosky v. Kramer*, 455 U.S. 745, 747-78 (1982) ("Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence.").

57. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (finding that an unwed father was entitled to hearing on his fitness as parent before his children could be taken from him).

58. *Perkins*, *supra* note 51.

overreaching? In the context we are discussing now, those roles may be the last hope for diminishing the disparate impact of the child welfare system on children and families of color.⁵⁹

The following example will enable me to illustrate my concern.⁶⁰ One of the FTDC in New York City that has been in existence for over ten years employed the following practices until very recently.⁶¹ The FTDC staff would identify potential FTDC parent participants from the cases being filed. After a petition was filed, the FTDC coordinator would discuss with the parent the possibility of entering the FTDC prior to the parent speaking to her attorney (the right to counsel for indigent respondents in New York attaches when a petition is filed).⁶² The FTDC coordinator would explain how the FTDC works but would not discuss the parent's legal rights. If the parent thought she might want to participate, she would agree to an assessment and sign an assessment waiver which indicated that information in the assessment would not be used against her in the future. She would then have the opportunity to speak to her lawyer and learn that the conditions of participation included making an admission of neglect and waiving the statutory right to a preliminary hearing on the removal of any child from the parent's custody. The FTDC staff approved only certain treatment and service programs and their assessment of the programs was accepted at face value by the judge. Family visiting procedures with children were often inflexible.

59. The current due process paradigm has not been implemented in ways that would ensure fairness and impartiality for children and families. But I have suggested elsewhere that there are ways to measure whether such a paradigm would be better for children and families than the problem-solving approach. *Reforming the Court*, *supra* note 17, at 34–38.

60. While I'm using the example of FTDC, other examples of judges creating their own rules could also raise these issues. *See, e.g.*, Joy S. Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127, 151 (2007) (positing that the family court judges' stated policy in Brooklyn to deny joint custody in mediated agreements was not "overtly contemplating that people of a certain class or race could not handle the responsibility of such a determination. However, since we have a kind of *de facto* segregation among the Courts, the impact of what happens in Family Court is certainly felt more in poor, non-white communities than it is in the general population.").

61. Even though several of these practices have changed recently, the requirement of admitting neglect and the inability to conduct a post removal hearing remain in effect. Moreover, this FTDC has ten years of enforcing these particular practices so they were applied to a significant number of respondents over that time period. This example is based on conversations the author has had with attorneys who have practiced in this FTDC. I do not name them because they continue to practice in the FTDC. Not all FTDC, nor other model court problem-solving courts in New York, use all of the same practices as this one. *See, e.g.*, Sara P. Schechter, *Family Court Case Conferencing and Post-Dispositional Tracking: Tools for Achieving Justice for Parents in the Child Welfare System*, 70 FORDHAM L. REV. 427, 427–430 (2001).

62. N.Y. Judiciary, Part 1, Family Court Act § 262(a)(i) (McKinney 2010).

Programs or assistance identified by the parent or her advocate were not options. The case would be monitored in court every thirty days or so. At the point where a decision would be made about whether the goals of the treatment plan had been met and the case should be ended, a meeting would be held with the FTDC staff, the prosecuting attorney, and the judge. Parent's counsel was not invited to participate in this meeting.

The judge's power as leader of the FTDC team in this scenario is pervasive. How is that power created and used? There is no statute establishing the FTDC or court rules governing their practices.⁶³ In 2006, eight years after the FTDC were first introduced in New York, the New York State Office of Court Administration (OCA), the administrative arm of the court system, convened an advisory committee to develop principles and practices for FTDC in the state.⁶⁴ Those principles and practices have yet to be issued by OCA. Without standardized principles and practices—let alone direction from the legislature or administrative rules—individual judges retain enormous discretion in creating and enforcing their own understanding of problem-solving court protocols.⁶⁵ Judges also use what Professor Miller has called “collateral judicial authority,” which “emanates from the repeated interactions between the judge and the variety of court officers and other players in the criminal or civil court system.”⁶⁶ This

63. Problem-solving courts have been created by judicial fiat. Hoffman, *supra* note 22, at 1571 (“almost every drug court in this nation, except for California’s recent initiative, was created by judges rather than legislatures.”); Judith S. Kaye & Jonathan Lippman, N.Y. State Unified Court Sys., Family Justice Program Initiative I, at 11 (1997) (introducing family treatment courts in New York). See also *In re Nolan W.*, *supra* note 46, at 1224 (“[a]llowing juvenile courts to incarcerate parents for failing to comply with reunification orders is problematic because there are no statutory principles to guide or constrain the court.”).

64. I was asked to serve on the advisory committee when it was established in 2006. We met several times a year for about eighteen months. We finalized many of our recommendations in 2007. The process was lively and respectful of a range of very differing views. Our recommendations reflected a balance of concerns, including balancing access to due process protections with the drug court team model approach.

65. Recommendations for safeguarding the judicial role in the drug court context include: “(1) Judges must not directly or indirectly coerce defendants to secure waivers of counsel; (2) Drug courts must do everything possible to ensure that every lawyer who wants to appear in drug court has the opportunity to do so; (3) Sanctions must be imposed in a fair and consistent manner; (4) The Judge who guides treatment should not be the judge who determines termination or hears the underlying case after termination; (5) Ex parte communication must never be permitted; (6) Drug court assignments must go to experiences, interested judges who remain for more than a year.” NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *supra* note 27, at 28–29.

66. *Therapeutic Effects of Managerial Reentry Courts*, *supra* note 17, at 128; See also Melissa L. Breger, *Making Waves or Keeping the Calm: Analyzing the Institutional Culture of Family Courts through the Lens of Social Psychology Theory* (discussing the impact of a

judicial authority places enormous pressure on the other members of the problem-solving team, including parent's counsel, to go along with the program, partly in exchange for influence on the judge or other influential court personnel at other points in time.⁶⁷ Yet in resisting this pressure, counsel for individuals subject to the court have been roundly criticized for their resistance to the program or have been excluded from the process.⁶⁸ Legal representation will not ameliorate all of these concerns, especially if counsel does not fulfill her basic duties to her clients.⁶⁹ At the same time, if the lawyer who should serve as translator, counselor, and protector is not there at crucial decision-making moments or is stripped of those roles, as in the FTDC example, the parent may be making a bargain beyond her capacity to comprehend the risk.⁷⁰

Beginning a court-based process without a legal advocate also reinforces the power differential between the parent and the judge or other members of the court team.⁷¹ This can be silencing, manipulative, and scary. My colleague, Professor Philip Genty, has written about the need for lawyers to empathize with a client's fear of the legal system, particularly that of indigent clients. This empathy requires "an understanding of the client's deep fear and mistrust of the very legal system upon which the client must rely for a solution to her or his legal problem."⁷² This distrust does not suddenly disappear because the judge has offered the parent treatment or services in exchange for due process, a monitor instead of an adjudicator, a leader

variety of modes of informality, including repeat players, on the effectiveness of the court and the fairness to litigants) (forthcoming 34 LAW & PSYCHOLOGY REV. 2010).

67. See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 54–58 (2000).

68. *Id.*; NOLAN, *supra* note 31, at 77–81 (discussing the redefined role of defense counsel); NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *supra* note 27, at 31 (discussing that the defense counsel usually does not participate in post-adjudication staffing with clients).

69. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 39; See also *Reforming Family Court*, *supra* note 16, at 25–27."

70. *Embracing Addiction*, *supra* note 17, at 1568 (factors like being more likely to receive incarcerative sentences "may lead poor and minority defendants to accept diversion into drug court where others would not."); See also Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2003); See also Quinn, *supra* note 67, at 56, 64.

71. *Romancing the Court*, *supra* note 14, at 267–68.

72. Philip M. Genty, *Clients Don't Take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLINICAL L. REV. 273, 275–76 (2000); See also Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999, 1013–19 (2007) (discussing ways in which battered women do not trust the legal system to protect them).

instead of a decider. The distrust does not arise in a vacuum. The parent begins the court process in communities deeply suspicious of government intervention; the line between the child protective investigator removing a child and the judge approving that removal is very thin.⁷³ The Michigan study found that “African American families experience child welfare as intrusive systems that do not fairly assess and fail to appreciate their unique strength and weaknesses, do not examine the detriment of removal to children, and do not adequately explore the least restrictive placement options for their children.”⁷⁴ Their mistrust was highlighted through several examples in which child protective services initiated investigations of African American families who sought assistance from social services when they had nowhere else to turn.⁷⁵

When these families reach court, the price of submitting to the court’s jurisdiction in exchange for help is magnified. In the FTDC, for example, the parent exchanges the right to maintain custody of her child and the right to contest allegations of neglect—including whether efforts were made to assist her prior to the case being filed—for treatment and services.⁷⁶ The parent must admit to neglecting her

73. See Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881 (2007) (describing the distrust of child welfare caseworkers and agencies by residents in an overwhelmingly poor and African-American Chicago neighborhood while also finding the significant dependence on and desire for the assistance and support of these same child welfare officials).

74. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 23; *Id.* at 900–01 (“Poor families are left in the bind of resenting child welfare agencies’ surveillance and interference, yet wanting the agencies’ continued presence as one of the few remaining sources of public aid. Moreover, the child welfare system’s racial geography shows that the agencies’ role as a safety net will be most prominent in black neighborhoods, where high rates of foster care, unemployment, and inadequate social services converge.”).

75. See *e.g.*, THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 21 (discussing an example where a parent was seeking assistance to purchase a stove and was investigated for not feeding her family.); Roberts, *supra* note 73, at 893 (“The child welfare system exacts an onerous price: it requires poor mothers to relinquish custody of their children in exchange for state support needed to care for them”).

76. Roberts, *supra* note 73, at 893; see Oler, *supra* note 21 (discussing the child welfare agency’s statutory requirement of reasonable efforts to preclude the need for foster care). Additionally, the parent may waive her right to challenge whether the state has satisfied the legal mandates for temporary removal of a child from parental care as defined in *Nicholson v. Scopetta*, 3 N.Y. 3d 357, 378 (2004) (“[a] court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child’s best interests. Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means . . .”).

child, a humiliating experience.⁷⁷ The humiliation occurs in several ways. First, the admission acknowledges personal responsibility without the state acknowledging concomitant responsibility.⁷⁸ Second, as Professor Miller and others have identified, the client's real voice is silenced to fit into the drug treatment story with its prescribed script and roles.⁷⁹ Finally, the admission is made in the context of the broader way in which parents are perceived and characterized in Family Court proceedings. The Michigan study found a significant negative mischaracterization of African American youth and families in the child welfare system and court proceedings which was not supported by the facts and at times negatively affected the course of the case.⁸⁰ Language that depersonalizes all families, such as referring to a parent as "Mom" throughout a proceeding rather than by using the parent's name, is magnified with the knowledge that these are disproportionately minority parents.⁸¹

The potential for problem-solving courts—whether the traditional Family Court or the current reform models—to magnify the disparate impact on families of color, particularly African American families, is rooted in the belief that these courts are the best place to resolve the issues that bring these families to court. But if these courts succeed in their goals to be the locus for services and assistance to

77. For examples of parental experiences in the child welfare system and family court see Rise Magazine, available at http://www.risemagazine.org/issues/Issue_3/issue_3.html (last visited on Apr. 15, 2010).

78. See generally Oler, *supra* note 21; Violet Rittenhour, *From the Outside In: Parents need and Independent Voice*, RISE MAGAZINE 4, available at http://www.risemagazine.org/issues/Issue_5/issue_5.html (last visited on Apr. 4, 2010) (discussing a parental advocate disappointment that parents at a child welfare conference blamed only themselves for their problems without also holding the child welfare system accountable and that child welfare officials did not recognize their need to change, too).

79. *Embracing Addiction*, *supra* note 17, at 1566. There is a long history of low income clients accommodating a proscribed speech. See e.g., Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

80. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 31. See also CHAPIN HALL REPORT, *supra* note 18, at 19. The admission is also made in the broader context of societal views of drug use. See Richard C. Boldt, *The "Tomahawk" and the "Healing Balm": Drug Treatment Courts in Theory and Practice*, 10 U. MD J. RACE, RELIGION, GENDER & CLASS 45 (discussing the history of drug policy in the United States including "the totalizing moral judgments that pervasively are directed against drug users throughout American society").

81. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30, at 32–33. One of the starkest illustrations of disparate treatment was found in several case records that contained no documentation of any past or current substance abuse. The Caucasian parents were described as having "no history of substance abuse," while the caseworker records that each time that the African American parent "denies history of substance abuse." *Id.* at 32.

families as well as the ultimate decision-maker, the danger that families of color will disproportionately be affected is hard to deny. These families are less likely to find assistance in their communities,⁸² more likely to be identified and investigated,⁸³ and more likely to have their children removed.⁸⁴ They are, therefore, more likely to find themselves in court and subject to the conditions I have outlined. As court reformers consider the best configurations of Family Courts, they need to address the unanticipated consequence of the disparate impact on their work.

Supporters of problem-solving courts lament analyses such as these, in part, because they believe we are left with the same broken court system we have always had.⁸⁵ How we move beyond this stalemate leads me to take a closer look at the chasm that will have to be bridged if the concerns of both supporters and critiquers are to be addressed.

III. TALKING ABOUT PROBLEM-SOLVING COURTS

The conversation at the heart of the University of Maryland Law Journal of Race, Religion, Gender and Class symposium on problem-solving courts highlights how difficult it is to talk meaningfully and effectively about the problem-solving court reform movement. The participants in the symposium who have been developing and experiencing the court reforms on the ground emphasize the aspects of the reforms that appear to be working,

82. THE CENTER FOR THE STUDY OF SOCIAL POLICY, *supra* note 30 at 17–18, 20; Roberts, *supra* note 73, at 899 (citing a study by Scott Allard who discovered “a striking mismatch between neighborhood need and access to support services such as substance abuse treatment, food assistance, job training, education, and emergency aid.”).

83. Brooks & Roberts, *supra* note 21, at 453–55. There is evidence of racial bias at every stage of child welfare decision making, from reporting child maltreatment to placement of children by caseworkers and judges..

84. Roberts, *supra* note 73, at 882 (stating that “A black child is four times as likely as a white child to be placed in foster care.”).

85. Transcript of Panel Three of *Problem Solving Courts: A Conversation with the Experts*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 139 (2010) (Judge Hueston stating that

I’ll leave my comment with this: I think it’s been well documented that business as usual does not work. Our probation agents have hundreds of probationers on their dockets; they cannot monitor the chronic defendant effectively. And so, we have a choice of, [you] know, we’ve got some warts in drug courts and problem solving courts so let’s just throw the baby out with the bath water and not do them; let’s just do business as usual, which that doesn’t work so well, because look at the recidivism rate; there is very little treatment in jail, people recidivate within 3 months after they get out. It doesn’t really work.).

including cost effectiveness, diminished recidivism, and community satisfaction.⁸⁶ The “critical critics” and the “supportive critics” emphasize ways in which the reforms fail to accomplish their goals or where those goals potentially conflict with other strongly held beliefs about issues like procedural justice, judicial impartiality and individual autonomy.⁸⁷

The inability of supporters and critics to listen to the others’ concerns has limited the effectiveness of both reform efforts and alternative or supplemental reform regimes. This failure may stem in part from what has been called naïve realism: our alacrity in seeing how the values of those with whom we disagree shape their factual beliefs, while we are concomitantly unable to understand how the values we hold shape our own factual beliefs.⁸⁸ As a result, each side distrusts the other because they can only see how the other side’s values shape the facts, not how their own values do so.

The symposium conveners were given considerable credit by the speakers and panelists for putting together a conference where a range of perspectives were presented and discussed, a situation rarely found in the problem-solving court world. Nevertheless, there were two moments when naïve realism captured the discussion. A number of critics (including myself) used the expression “not drinking the Kool-Aid” to indicate that they were not blithely swallowing the tenets of problem-solving courts. Professor Brenda Bratton Blom took the opportunity to point out that using that expression did not engender good will or move the discussion forward. She was right. Soon after,

86. Symposium, *Problem Solving Courts: A Conversation with the Experts*, 10 U. Md. L.J. RACE, RELIGION, GENDER & CLASS (2010); Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 84–85 (2007) (“The outcomes that are most praised by specialty court supporters are a reduction in recidivism rates and an increase in the number of defendants who successfully receive treatment.”).

87. Professor Shdaimah used the term “critical supporter” to indicate her willingness to try to help court reformers institute problem-solving court methods while wanting, at the same time, to point out the potential negative aspects of the reform efforts. See, e.g., Boldt, *supra* note 48, at 1217 (“the objection is that the drug treatment court movement not only presents difficulties for individual defendants and their attorneys, it also undermines larger efforts to develop an effective drug policy premised on a public health model.”) and *Embracing Addiction*, *supra* note 17, at 418. (“The court’s methodology implicates political issues of coercion and freedom in ways that derive from and respond to some of the central policy problems underlying the interaction of race, poverty, and drugs in urban environments . . . [i]n particular, the court’s rejection of due process in favor of treatment expresses the now-classic opposition between positive and negative liberty; that is, the freedom to be left alone and the freedom to ‘determine someone to be . . . this rather than that.’”).

88. Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 895 (2008).

audience members provided several examples of a problem-solving court violating the due process protections that the court's own rules required. A supporter on the panel then in session simply dismissed the examples as outliers. A member of the audience responded that dismissing these examples as outliers without determining whether they represented a more significant problem in the court also undermined good will and stopped discussion. The panelist was unmoved.

The symposium's effort at constructive dialogue, and the specific interactions among participants that I explore here, refocused my attention in two ways. First, I wonder whether our inability to hear the other point of view in professional conversations is a reflection on our deeper inability to consider the multiplicity of viewpoints and experiences of court litigants. Second, has our failure to talk across our differences mean that both sides are ignoring important matters in the evolution of court reform?

Let me propose several ways in which we can begin to address those questions. The first is to ask whether we can reach consensus on the purpose of these courts. Professor Corey Shdaimah and Professor Richard Boldt both pointed out during the conference that the tension between the therapeutic and the punitive aspects of the courts has not been resolved.⁸⁹ Nor have we clearly identified what outcomes we are measuring; administrative and cost efficiencies regularly bump up against the substantive outcomes. Do we prioritize some outcomes—lower recidivism, speedier court processes, and happier judicial personnel—over other equally satisfying results, such as more effective dispute resolution processes or better access to services?

This dilemma inevitably leads to grappling with the distribution of resources: when is it suitable to shift resources to court-based processes and when might resources work more effectively outside the court system? Which issues do we want to divert from the court system and which would be better served through court

89. Symposium, *Problem Solving Courts: A Conversation with the Experts*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS (forthcoming 2010). An example of that tension is found in a footnote in the recent California Supreme Court decision, where the court notes that "The Agency describes these contempt orders as 'therapeutic incarceration' and asserts: "Sometimes it takes a caring consequence, such as court ordered incarceration, to get the parent's attention in a way that enables the parent to hit their own personal rock bottom and become aware of the need to comply with the court's orders for treatment so reunification with their child can be achieved." However, the Agency has offered no empirical support for the proposition that the threat of parental incarceration encourages higher reunification rates. Even if there were such data, the appropriate body to consider whether to modify the family reunification process by incorporating contempt sanctions and parental incarceration is the Legislature." *In re Nolan W.*, *supra* note 46, at 1236 n.8.

processes? None of these questions can be answered without a significant commitment to measuring our efforts and responding honestly to what we have found, even if we don't like the answers.⁹⁰ These courts sprang originally from a heartfelt desire by judges to respond to what they considered a broken criminal justice system. When does the desire to do good have to be tempered by evidence of what works? Recent studies have certainly painted a far more nuanced picture of when drug courts may be effective.⁹¹ Will this data be used to modify or even eliminate the programs that don't work? How can the flexibility of developing innovative approaches to solving problems be balanced by principles of fairness and equality?⁹² And finally, who should make these decisions? Legislatures? Executive agencies? Court systems?⁹³ As a society, who do we want making these decisions?

IV. CONCLUSION

Problem-solving courts have proliferated in multiple dimensions of poor and minority peoples' lives even as supporters and critics of these courts struggle to define the purpose of these courts and to evaluate their effectiveness. In the child welfare arena, less intrusive and more community-based approaches to addressing the complex societal problems that lead to child protection intervention in family life may be thwarted by the expansion of therapeutic court-based solutions. The judge-driven problem-solving paradigm that shifts responsibility from society to the individual to resolve the issues disrupting the family is likely to have a disparate impact on minority families who are less likely to find assistance in their communities, more likely to be identified and investigated, and more likely to have their children removed. In addition, shifting to back-end court-based services increases surveillance of parents that can result in additional monitoring, additional legal proceedings, and even a shift into the

90. *Reforming Family Court*, *supra* note 16, at 16–24 (identifying ways in which court reform efforts have not been critically analyzed for effectiveness).

91. Boldt, *supra* note 80, at 49–60.

92. For example, I would be more supportive of FTDC in New York if the court system had adopted the advisory committee principles and practices that set basic standards of practice for everyone involved in FTDC in the state.

93. *In re Nolan W.*, *supra* note 46, at 1224 where the court notes that “[t]here is no indication that the Legislature intended parents to be punished in this manner. Moreover, as the facts of this case demonstrate, allowing juvenile courts to incarcerate parents for failing to comply with reunification orders is problematic because there are no statutory principles to guide or constrain the court.”

criminal justice system. Once these families find themselves in problem-solving courts, moreover, the traditional due process protections afforded by an impartial judge no longer serve as a final defense to improper or ill advised government intervention. For these reasons, court reformers must consider the unanticipated consequence of the disparate impact of their work on families of color as they strive to expand and improve problem-solving courts.