

## Problem-Solving Courts and Pragmatism

Richard C. Boldt

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## PROBLEM-SOLVING COURTS AND PRAGMATISM

RICHARD C. BOLDT\*

### ABSTRACT

*Problem-solving courts have emerged in the United States as a significant feature on the criminal justice system landscape. Despite efforts to articulate a common set of governing principles, the problem-solving courts movement has been, for the most part, an atheoretical enterprise. The avoidance of theory, however, carries costs, particularly when individual decisionmakers seek to chart a course that is highly discretionary. Suitable tools are available to help organize thinking about the nature of the problems that problem-solving courts address and the solutions they attempt. These tools are derived from the insights of legal and philosophical pragmatism. This Article employs pragmatist theory to press focus on the nature of the problem solving undertaken by drug treatment courts and other specialized courts. It begins with an introduction to problem-solving courts and their embrace of practical pragmatic approaches to justice system dysfunction, and contrasts this ordinary pragmatism with the sort of theoretical pragmatism offered by John Dewey and his intellectual heirs. It then provides a brief overview of the chief arguments that were directed against early pragmatist thinkers and the counterarguments they offered in response, as well as similar arguments and counterarguments that have resurfaced more recently in response to newer forms of legal and philosophical pragmatism. In light of these arguments and counterarguments, the Article considers how pragmatist theory can inform the exercise of judgment by actors engaged in framing legal problems and developing legal solutions. The Article concludes by setting out two examples that help to show how a rigorous pragmatist approach can sharpen*

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\* Professor of Law, University of Maryland Francis King Carey School of Law. For help in planning and developing this Article, I thank Eileen Canfield, Leslie Meltzer Henry, Susan McCarty, and Greg Young. This project was supported by a research grant from the University of Maryland Carey School of Law.

*our understanding of problem-solving courts and the problem-solving courts movement.*

## INTRODUCTION

Problem-solving courts have emerged in the United States as a significant feature on the criminal justice system landscape.<sup>1</sup> There are now well over 3,000 specialized courts in the United States that pursue a problem-solving approach.<sup>2</sup> The majority of these problem-solving courts are focused on offenders who misuse drugs.<sup>3</sup> Other specialized courts have been established, however, to address homelessness, mental illness, family violence, and other concerns that proponents believe are suitable to a problem-solving methodology.<sup>4</sup> 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 around the country to adopt policies that would facilitate the incorporation of problem-solving practices more broadly into ordinary criminal courts and other general jurisdiction courts.<sup>5</sup> These efforts to develop and expand problem-solving jurisprudence have received support from leaders within the bench and bar.<sup>6</sup> 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” of problem-solving methods into the criminal justice system.<sup>7</sup> Subsequently, the American Bar Association

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1. Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 JUST. SYS. J. 35, 35 (2005). Many observers trace the beginning of the problem-solving courts movement to the establishment of the first drug treatment court in Dade County, Florida, in the late 1980s. 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).

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).

3. *Id.*

4. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 3 (2005) (noting that an “innovative group of judges and attorneys ha[ve] begun to test new ways of doing justice, reengineering how courts address such everyday problems as quality-of-life crime, drugs, and domestic violence”); JAMES L. NOLAN, JR., LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT 8 (2009) (same); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 125 (2001) (same).

5. ROBERT V. WOLF, CTR. FOR CT. 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) (some states, including California, New York, Missouri, Louisiana, and Ohio, have adopted this specialized problem solving approach on a statewide level).

6. Farole, Jr. et al., *supra* note 5, at 57–58.

7. CONFERENCE OF CHIEF JUSTICES & CONFERENCE OF STATE COURT ADM'RS, RESOLUTION 22: IN SUPPORT OF PROBLEM-SOLVING COURT PRINCIPLES AND METHODS (adopted

passed a resolution encouraging public and private entities to support “education and training about the principles and methods employed by problem-solving courts.”<sup>8</sup>

Advocates and others associated with the problem-solving courts movement have sought to identify a set of core characteristics shared generally by these undertakings. 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.<sup>9</sup> The first is termed a “problem-solving orientation,” which they define as “a focus on solving the underlying problems of litigants, victims, or communities.”<sup>10</sup> 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.”<sup>11</sup> The second organizing principle is “collaboration.”<sup>12</sup> This principle “highlights the role of interdisciplinary collaboration with players both internal and external to the justice system.”<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup>

Despite these efforts to articulate a common set of governing principles, a wide range of institutional structures and a diverse set of practices

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Aug. 3, 2000), *available at* <http://ccj.ncsc.dni.us/CourtAdminResolutions/ProblemSolvingCourtPrinciplesAndMethods.pdf>.

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

9. RACHEL PORTER ET AL., CTR. FOR CT. INNOVATION, WHAT MAKES A COURT PROBLEM-SOLVING? iii (2010).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. 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).

15. PORTER ET AL., *supra* note 9, 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.”).

have been adopted by the various courts associated with this movement.<sup>16</sup> One leading advocate has observed that “[t]here is no single foundational document, no unified theory, that summoned problem-solving courts into existence.”<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup> This narrative of a “broken system” vexed by a “revolving door” of “repeat offenders” has embedded within it anxieties over a spectrum of “problems” ranging from highly specific individual pathologies to general systemic dysfunction.

There are, of course, deep connections between the problems suffered by individual offenders, including substance misuse and mental disability, that may contribute to their becoming involved in the criminal justice system; the problems associated with the administration of the criminal justice system itself, which are caused in part by the overwhelming volume of recidivating offenders; the problems of institutional legitimacy wrought by the mass processing required in such a system; and the broadest problems of a civil society whose non-legal institutions increasingly have failed to contribute effectively to the management or amelioration of individual and societal pathologies and to the enterprise of maintaining social cohesion and social control.<sup>20</sup> But it matters where on this continuum of problems a legal intervention is focused, even if the problems on the continuum are interrelated. Thus, problem-solving courts that select an individualizing approach targeting the addiction, homelessness, or mental illness of the offenders who appear before them are likely to articulate a different rationale for the

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16. See PORTER ET AL., *supra* note 9, at 2 (recognizing “the wide variation across today’s problem-solving court models”).

17. Greg Berman, *Problem-Solving Justice and the Moment of Truth*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 14, at 1, 3–4.

18. See PORTER ET AL., *supra* note 9, at 1 (noting that problem-solving courts “each seek to address a different set of problems”).

19. Victoria Malkin, *Problem-Solving in Community Courts: Who Decides the Problem?*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 14, at 139.

20. NOLAN, *supra* note 4, at 7–10 (“Ubiquitous, for example, are complaints about overcrowded jails and prisons; the expense and burden of increasing court case loads; the ‘revolving door’ phenomenon of repeat offenders; the impersonal and assembly-line quality of ‘McJustice,’ or expedited case management; fatigue and job dissatisfaction among lawyers and judges; the win-at-all-costs mentality of modern trial advocacy; and the adjudicative restrictions of hyper-proceduralism and mandatory minimum sentencing guidelines.”).

specialized structures and practices they have adopted than other courts aimed at different problems located at other points on the spectrum.<sup>21</sup>

The problem-solving courts movement frequently is associated with two other innovations that have taken root within the criminal justice system over the past several decades. The first is therapeutic jurisprudence, a perspective developed most prominently by Bruce Winick and David Wexler,<sup>22</sup> which seeks to encourage the use of legal processes that are thought to be therapeutic and to discourage those that are likely to undermine the well-being of persons impacted by the legal system.<sup>23</sup> The second is restorative justice, an approach often associated with Australian criminologist John Braithwaite,<sup>24</sup> which promotes a form of legal engagement designed “to repair the harm” suffered by individual victims and by whole communities as a consequence of criminal conduct.<sup>25</sup> While at least one observer has described therapeutic jurisprudence, restorative justice, and problem-solving courts as interrelated phenomena that function together as part of a “comprehensive law movement,”<sup>26</sup> James Nolan has argued persuasively that it is better to conceive of therapeutic jurisprudence and restorative justice as theoretical perspectives distinct from problem-solving courts, which he understands to be “a practical legal innovation.”<sup>27</sup>

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21. See PORTER ET AL., *supra* note 9, at 2 (discussing three problem-solving court paradigms, identified as “(1) therapeutic jurisprudence, (2) accountability, and (3) community justice”).

22. See, e.g., Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 185–86 (1997) (noting that, since its inception, therapeutic jurisprudence has evolved, from “a lens for examining mental health law to a therapeutic approach to the law as a whole”). Therapeutic jurisprudence has similarly attracted a following in other countries: “This emerging comparative law approach holds great promise for enriching the field of therapeutic jurisprudence.” *Id.* at 204.

23. See *id.* at 185 (“Therapeutic jurisprudence proposes the exploration of ways in which, consistent with principles of justice and other constitutional values, the knowledge, theories, and insights of the mental health and related disciplines can help shape the development of the law.”); NOLAN, *supra* note 4, at 32 (stating that therapeutic jurisprudence “understands the law ‘to function as a kind of therapist or therapeutic agent’”); Mackinem & Higgins, *supra* note 14, at viii–ix (“Courts based on therapeutic jurisprudence operate within an ethic of caring. These courts . . . explicitly focus on helping the defendant because the court leaders believe that a healthier defendant is less likely to commit future crime.”).

24. See John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 246 (2002) (“Restorative Justice is a process where all stakeholders involved in an injustice have an opportunity to discuss its effects on people and to decide what is to be done to attempt to heal those hurts.”).

25. Richard Young & Carolyn Hoyle, *Restorative Justice and Punishment*, in THE USE OF PUNISHMENT 199, 200 (Seán McConville ed., 2003).

26. Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS HELPING PROFESSION 465, 466–67 (Dennis P. Stolle et al. eds., 2000).

27. NOLAN, *supra* note 4, at 32. Mackinem and Higgins have observed: “While distinct from restorative justice and therapeutic jurisprudence, problem-solving courts draw support from these other two movements.” Mackinem & Higgins, *supra* note 14, at viii.

To be sure, there may be some relationship between practice within a given problem-solving court and one or the other of these theoretical frameworks. Courts that are focused primarily on helping individual defendants with the mental disabilities or other problems that accompany their criminal conduct<sup>28</sup> are most likely to engage the basic tenets of therapeutic jurisprudence.<sup>29</sup> Other problem-solving courts that are concerned especially about the needs of crime victims and crime-impacted communities, and about the legitimacy of the law enforcement and justice systems, are more likely to adopt both the rhetoric and the instruction of the restorative justice literature.<sup>30</sup> But the general affinity of some problem-solving courts with either therapeutic jurisprudence or restorative justice does not mean that these “practical legal innovations” are either guided directly by those theoretical perspectives or owe their origins to their basic insights.

The problem-solving courts movement has been shaped most prominently not by a foundational theoretical perspective but by an essentially pragmatic set of instincts.<sup>31</sup> As Greg Berman, one of the architects of the movement, has put it: “the movement has not so much been ‘born out of theory’ as advanced by ‘practitioners on the ground, struggling to do something better than what they were doing.’”<sup>32</sup> In this sense, the development of problem-solving specialty courts has been, for the most part, an “atheoretical” enterprise in which legal and human services professionals are guided by the concrete cues of everyday experience and not by the abstract direction suggested by top-down theory.<sup>33</sup> The avoidance of theory, however, carries costs, particularly when individual decisionmakers seek to chart a course that is highly discretionary and that is not hedged in by significant formal procedural constraints.<sup>34</sup>

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28. See Mackinem & Higgins, *supra* note 14, at viii (describing judges in problem-solving courts as “coaches’ in the application of ‘social science principles’ through deliberate ‘planning’”).

29. See PORTER ET AL., *supra* note 9, at 2 (“This paradigm promotes a coordinated and remedial response to the underlying service needs of the involved parties . . . [It] is most commonly associated with drug and mental health courts, whose main purpose is to treat and rehabilitate the individual (i.e., reducing drug use, mental illness, and recidivism).”).

30. See *id.* (“This paradigm focuses less on treatment and more on holding defendants (or other litigants) responsible for their behavior and on increasing judicial supervision to deter future criminal behavior.”).

31. See Mackinem & Higgins, *supra* note 14, at ix (“Problem-solving courts do not derive from therapeutic jurisprudence. Problem-solving courts develop from pragmatic local concerns about specific problematic community conditions.”).

32. NOLAN, *supra* note 4, at 36.

33. *Id.* (quoting JUDGING IN A THERAPEUTIC KEY (Bruce J. Winick & David B. Wexler eds., 2003)).

34. See Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 900 (2003) (observing that “community justice has been under-theorized,” and that “[t]heory matters in this context, offering a causal story about the un-

Tools are available, however, to help organize thinking about the nature of the problems that problem-solving courts address and the solutions they attempt. These tools are derived from the insights of legal and philosophical pragmatism. Although linked in important ways to the instinctive, atheoretical pragmatism that has energized the problem-solving courts movement from its inception, the tradition of legal and philosophical pragmatism brings a potentially useful theoretical perspective to the tasks of defining and organizing the problems and identifying and assessing the solutions that necessarily must be accomplished by actors engaged in a problem-solving jurisprudence.<sup>35</sup> A related set of tools has been offered by a group of scholars who focus on the natural history through which problems are formulated and understood as such both by those in conflict and those who function as third-party interveners. A foundational article in this field published in 1978 by Robert Emerson and Sheldon Messinger, entitled *The Micro-Politics of Trouble*, is a good starting point for comprehending this rigorous approach to the task of problem identification.<sup>36</sup>

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derlying dynamics of change, and identifying potentially enduring and generalizable lessons that help us predict whether the practices that are promising in one place would be equally effective in another"); see also Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1261–62 (1998) (discussing procedural informality and judicial discretion in drug treatment courts).

35. For a good introduction to legal pragmatism, see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1610 (1990) (describing pragmatism as “a school of American philosophic thought . . . committed to examining the consequences and practical effects of conceptions when exploring truth, meaning, and action”); see also Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1653–56 (1990) (“The pragmatist’s real interest is not in truth at all, but in belief justified by social need.”); Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1678–79 (1990) (noting that pragmatists acknowledge the importance of experimentation); Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1704–10 (1990) (drawing a connection between pragmatism and feminism and theorizing that both share a “commitment to finding knowledge in the particulars of experience”—that is, “a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality”). For a general discussion of neopragmatism, see Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1812–14 (1990) (noting that “new pragmatists talk about language instead of experience or mind or consciousness, as the old pragmatists did”); Cornel West, *The Limits of Neopragmatism*, 63 S. CAL. L. REV. 1747, 1747–49 (1990) (“[A]ll neopragmatists are anti-foundationalists; that is, the validation of knowledge-claims rests on practical judgments constituted by, and constructed in, dynamic social practices.”). For a discussion of the origins of philosophical pragmatism, see Richard C. Boldt, *Public Education as Public Space: Some Reflections on the Unfinished Work of Marc Feldman*, 61 MD. L. REV. 13, 23–52 (2002).

36. See Robert M. Emerson & Sheldon L. Messinger, *The Micro-Politics of Trouble*, 25 SOC. PROBS. 121, 121 (1977) (“Our argument assumes that any social setting generates a number of evanescent, ambiguous difficulties that may ultimately be—but are not immediately—identified as ‘deviant.’ . . . Consideration of the natural history of such problems can provide a fruitful approach to processes of informal reaction and to their relation to the reactions of official agencies of social control.”).



Because of their engagement with practice and focus on deriving governing principles from the consequences of practice, these tools are relevant to evaluating and improving a law reform project such as the problem-solving courts movement. Accordingly, this Article seeks to employ pragmatist theory and *The Micro-Politics of Trouble* to press focus on the nature of the problem solving undertaken by drug treatment courts and other specialized courts. Drawing on the work of John Dewey and other more contemporary pragmatists, this Article argues that the notion of problem solving employed in these contexts often is under-theorized, and that a more fully developed pragmatist perspective could usefully inform this practice.

Part I of this Article provides an introduction to problem-solving courts and their embrace of practical pragmatic approaches to justice system dysfunction, and contrasts this ordinary pragmatism with the sort of theoretical pragmatism offered by Dewey and his intellectual heirs. Part II is devoted to pragmatist theory and its critique. This Part provides a brief overview of the chief arguments that were directed against early pragmatist thinkers and the counterarguments they offered in response, as well as similar arguments and counterarguments that resurfaced more recently in response to newer forms of legal and philosophical pragmatism. In light of these arguments and counterarguments, Part II then considers how pragmatist theory might inform the exercise of judgment by legal actors engaged in framing legal problems and developing legal solutions. Part III sets out two examples that help to show how a rigorous, pragmatist jurisprudence could sharpen our understanding of problem-solving courts and the problem-solving courts movement.

#### I. PROBLEM-SOLVING COURTS AND THE FORMS OF PRAGMATISM

The driving force behind the problem-solving courts movement from its inception has been an express commitment to efficacy. This is a commitment to doing what works.<sup>37</sup> The focus on efficacy 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 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 opera-

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37. See 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, “the problem-solving protocols employed by these courts are effective”).

tion 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.<sup>38</sup> 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 healthcare system—that should be dealing more effectively with the individual and social pathologies often associated with criminality,<sup>39</sup> and the persistence of punitive national, state, and local policies toward street crime and drug offenses, characterized by the adoption of mandatory minimum sentences, “three strikes and you’re out” laws, and the like, which also have contributed to system overload.<sup>40</sup>

On virtually any reasonable set of criteria, the traditional criminal court system is a failure. It fails individual offenders who are deprived of procedural justice because the system cannot afford consistently to provide effective defense counsel or full adversarial proceedings,<sup>41</sup> instead disposing of the vast majority of cases through a punitive plea negotiation process that does little to address offenders’ underlying human services and health care needs.<sup>42</sup> It fails the legal professionals working in the 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.<sup>43</sup> And it fails the broader com-

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38. 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 14, 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”).

39. 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).

40. *See* Berman, *supra* note 17, at 7 (suggesting also that “the intellectual climate had grown exceedingly skeptical, if not downright hostile, to the idea of rehabilitation”).

41. *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).

42. In 2006, ninety-four percent of all felony convictions in state courts were resolved by guilty pleas. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009). A classic analysis of the punitive nature of this bureaucratized plea negotiation system was provided some years ago by Malcolm Feeley. *See* MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 25–28 (1979) (discussing “the ‘orthodox’ views of the criminal process . . . the *Due Process Model*, and the other the *Plea Bargain Model*”).

43. Berman, *supra* note 17, at 4.

munity, which is losing confidence in the criminal justice system and other public institutions assigned responsibility for maintaining social cohesion and public safety.<sup>44</sup>

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 to provide.<sup>45</sup> It offers “therapeutic outcomes” for participants, rather than “legal resolutions” for cases.<sup>46</sup> 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.<sup>47</sup>

A leading judicial supporter of problem-solving courts, former Chief Judge of the New York Court of Appeals Judith Kaye, has captured the essentially pragmatic nature of the movement in her published writing on the subject. These courts, she says, “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.”<sup>48</sup> 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.”<sup>49</sup> Specialized problem-solving courts, on the other hand, are said to work. They save money, they reduce recidivism, and they save lives.<sup>50</sup>

This preoccupation with efficacy, with doing what works, invites a consideration of the broader topic of pragmatism. While advocates of problem solving in the realm of courts reform occasionally do associate themselves with the American tradition of legal and philosophical pragmatism,<sup>51</sup>

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44. NOLAN, *supra* note 4, at 9.

45. Mackinem & Higgins, *supra* note 14, 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).

46. Mackinem & Higgins, *supra* note 14, at viii.

47. Nolan quotes a domestic violence court judge as saying: “[T]o me, if it works, do it.” NOLAN, *supra* note 4, at 144 (internal quotation marks omitted).

48. *Id.* at 224 n.32.

49. *Id.* at 145.

50. *See* Berman, *supra* note 17, at 6–7 (citing drug courts as a practical example of the success of specialized problem-solving courts). It should be noted, however, that there is a relative lack of solid outcome research, especially for problem-solving courts other than drug treatment courts. *Id.* at 6; *see also* 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, 49–50 (2010) (suggesting that the data on drug treatment court efficacy is mixed).

51. In a footnote, Nolan reports that problem-solving court advocate Greg Berman noted in an interview that “he had been reading some of the ‘Richard Posner pragmatism stuff’ and said he

the form of pragmatism that has attracted the attention of most problem-solving court proponents tends not to be the philosophical approach, derived from the work of William James and John Dewey, that involves a more exhaustive, rigorous, and continuous rethinking of means and ends.<sup>52</sup> Indeed, pragmatism subsumes more than just a jurisprudential or philosophical perspective. The term pragmatism implicates a range of often interrelated meanings, each of which potentially could be relevant to the problem-solving courts movement. First, a claim of pragmatism could suggest a practical, grounded-in-the-real-world, posture that either is actively opposed to engagement with theory or, at the least, adopts a passive atheoretical stance devoid of abstract thinking.<sup>53</sup> Some of those involved with problem-solving courts have endorsed this approach and have taken the view that theirs is a practical endeavor not particularly suited to theory work.<sup>54</sup> A second potentially relevant meaning is the conventional, nontechnical understanding of pragmatic decisionmaking as inclined toward the “compromise of principles.”<sup>55</sup> A fair amount has been written about the tension between problem-solving practices in specialty courts and the broad principles of due process and procedural fairness.<sup>56</sup> In addition, some attention has been paid to a perceived incompatibility between problem-solving jurisprudence and retributive theory.<sup>57</sup> On these terms, one could say that problem-solving courts are pragmatic to the extent that they dispense with some measure of procedural fairness or retributive justice in exchange for the much-needed practical benefits they are thought to produce with respect to

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thought that ‘there is a lot there’ that is relevant to problem-solving courts.” NOLAN, *supra* note 4, at 225 n.37.

52. See generally WILLIAM JAMES, *SELECTED WRITINGS* (Graham Bird ed., 1995); THE PHILOSOPHY OF JOHN DEWEY (John J. McDermott ed., 1981).

53. MERRIAM-WEBSTER ON-LINE DICTIONARY, <http://www.merriam-webster.com/dictionary/pragmatic> (last visited Mar. 5, 2014) (noting pragmatic relates “to matters of fact or practical affairs often to the exclusion of intellectual or artistic matters”).

54. *But see* NOLAN, *supra* note 4, at 144 (“One rightly questions whether to be pragmatic is to eschew philosophy or theory. Recall Richard Posner’s assertion . . . that legal pragmatism is, in fact, a theory.”).

55. Minow & Spelman, *supra* note 35, at 1610.

56. See Boldt, *supra* note 34, at 1250–52 (“[W]hen treatment is built into a system that has retained at least some of the features of traditional criminal law blaming practices, such as the power to use coercive measures, procedural informality and a lack of detachment on the part of the decision maker can result in severe negative consequences for the defendant . . .”); see also Casey, *supra* note 41, at 1495–1502 (problem-solving courts are “not fair” and “not neutral”); 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, 68–69 (2000) (drawing upon the Sixth Amendment right to counsel and highlighting the importance of defense counsel presence at drug court status hearings).

57. See, e.g., Douglas Husak, *Retributivism, Proportionality, and the Challenge of the Drug Court Movement*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?* 214, 214–29 (Michael Tonry ed., 2011).

reducing recidivism, linking offenders to treatment, safeguarding the needs of crime victims, and the like.

Inherent in this notion of a trade-off between abstract principle on the one hand and instrumental benefit on the other, is a third meaning of pragmatism. A practice can be said to be pragmatic in this third sense if its design and operation are driven primarily by a consideration of outcomes rather than a preoccupation with the regularity of its process.<sup>58</sup> This orientation toward consequences rather than process is captured in the emphasis problem-solving courts place on doing what works. Thus, the Center for Court Innovation, in its *Principles of Problem-Solving Justice*, concludes in just these terms that “the broad spectrum of problem-solving justice initiatives share a common outlook, an outlook that, at its heart, emphasizes outcomes over process.”<sup>59</sup>

Legal and philosophical pragmatism share many of the features associated with conventional, ordinary-language notions of pragmatism, given their focus on the consequences of practice. They are also, however, theoretical perspectives that offer some purchase on the normative dimensions of law and other social undertakings.<sup>60</sup> While pragmatist theory contests the possibility of objective truth claims asserted outside of a particular context, it also contemplates that guiding generalizations or principles can be derived from the data of experience, and insists that these principles should be employed to shape and direct future practice.<sup>61</sup> Pragmatism thus is committed to the proposition that theory necessarily is embedded in practice and becomes most meaningful when it is directed systematically to the solving of problems.<sup>62</sup>

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58. See NOLAN, *supra* note 4, at 36 (“Among the common themes emphasized by legal pragmatists are a result-oriented preoccupation with ‘what works’ . . .”).

59. WOLF, *supra* note 5, at 9.

60. See NOLAN, *supra* note 4, at 36 (stating “[t]hrough perhaps unaware of academic theorizing by legal and philosophical pragmatists, U.S. problem-solving court practitioners often act in a manner commensurate with these themes”); see also Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 790 (1989) (noting that “neo-pragmatists seek a bridge across the divide that has separated Anglo-American from European philosophy”; the divide may be best understood as an enterprise employing, on the one hand, the “scientific method” and, on the other hand, an enterprise seeking meaning through “the exploration of culture and lived experience”); Posner, *supra* note 35, at 1662 (“The pragmatic outlook can help us maintain a properly critical stance toward mysterious entities that seem to play a large role in many areas of law, particularly tort and criminal law.”).

61. See Boldt, *supra* note 35, at 45–46 (explaining that pragmatism involves principles to guide action that are both empirical and abstract); Minow & Spelman, *supra* note 35, at 1628 (“[T]he contextualist uses categories to select which particular details matter. Those categories can be generalized.”).

62. See Minow & Spelman, *supra* note 35, at 1610 (explaining that pragmatists apply practical thinking to solve problems).

The theoretical insights of legal and philosophical pragmatism are of significant potential value to the practical problem-solving activities undertaken by drug treatment courts and other specialty courts precisely because the “problems” addressed by these legal actors are not fixed or intrinsic, but instead are negotiated social phenomena.<sup>63</sup> Work on the micro-politics of trouble suggests that the very interventions designed to resolve or ameliorate problems also function to define and organize participants’ understanding of what the relevant trouble is.<sup>64</sup> An atheoretical approach to problem-solving is likely to be inattentive to the range of choices associated with the identification of relevant problems and acceptable solutions. Pragmatist theory provides valuable insights that have the potential to improve this field of practice by highlighting and informing choices that might otherwise remain below the conscious attention of participants. This greater intentionality goes to the selection of what outcome data to evaluate for purposes of shaping future practice, and to the construction of categories by which that data is organized and comprehended.<sup>65</sup>

## II. PRAGMATIST THEORY AND ITS CRITIQUE

Over two decades ago, Thomas Grey observed that “[p]ragmatism is freedom from theory-guilt.”<sup>66</sup> Grey’s point was not that theory is unimportant; indeed, he and other leading proponents of legal and philosophical pragmatism have engaged theory energetically.<sup>67</sup> Pragmatist theorizing, however, involves more than the rational manipulation of abstract propositions. It also attends to the development, evolution, and fitting together of those propositions in light of continuing experience. It is an empirical, consequential practice.<sup>68</sup>

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63. See Emerson & Messinger, *supra* note 36, at 128 (“It is important to understand how outside intervention radically transforms what were previously private troubles, for this transformation shows most clearly the negotiated (rather than intrinsic) nature of problems. Whereas disagreements about the nature of the trouble and how to remedy it were previously confined to (and under the control of) the initial parties, the involvement of a third party reconstitutes the trouble as a distinctly public phenomenon.”).

64. See *id.* (stating that the participant learns the nature of his problem because “[t]aking a problem to an outside party may provide the first occasion for seeing the trouble as a coherent whole and formulating an explicit history of the trouble”).

65. See Minow & Spelman, *supra* note 35, at 1629 (“[O]nce the pretended distinction between context and abstraction is discarded, the important question becomes which context should matter, what traits or aspects of the particular should be addressed, how wide should the net be cast in colle[c]ting the details, and what scale should be used to weigh them?”).

66. Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990).

67. See *supra* note 35.

68. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 75–76 (2003) (stating “legal pragmatism is empirical in its orientation” and that “[t]he important thing [for pragmatism] is to get a sense of the factual consequences”); Grey, *supra* note 66, at 1569 (“To the pragmatist,

The term “pragmatism” was first used in a formal academic setting by William James, in a lecture he gave at Berkeley in 1898, entitled “Philosophical Conceptions and Practical Results.”<sup>69</sup> James attributed the “principle of pragmatism” to Charles Sanders Peirce, with whom he had worked years earlier while a student at Harvard.<sup>70</sup> He summarized the principle in the following terms: “The ultimate test for us of what a truth means is indeed the conduct it dictates or inspires . . . [t]he effective meaning of any philosophic proposition can always be brought down to some particular consequence, in our future practical experience . . . .”<sup>71</sup> Essentially, James’s project was to reconfigure the criteria for evaluating a truth claim so that the test would not be the “rational self-sufficiency” of an assertion, but instead whether it “leads us into more useful relations with the world.”<sup>72</sup> From Peirce and James, this core idea was passed to John Dewey and George Mead, and was translated into the legal pragmatism of Oliver Wendell Holmes and the legal realism of Jerome Frank, Karl Llewellyn, and Felix Cohen.<sup>73</sup>

During his lengthy professional life as an academic lawyer and judge, Holmes consistently advanced a pragmatist vision that stood in sharp contrast to established jurisprudential thinking of the period.<sup>74</sup> Under the formalist view that predominated in late nineteenth century America, broad areas of the law (or at least private law) were thought to be governed by an underlying system of objective immutable principles that were said to operate through a process of deductive reasoning to produce concrete results in

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theory can be general commentary aimed to teach or reform a practice, or it can be a separate practice itself, pursued for its own rewards. Most often, it will be some mix of the two.”).

69. See generally Louis Menand, *Introduction to PRAGMATISM: A READER* xiii (Louis Menand ed., 1997) (noting William James defined the “principle of pragmatism” as follows: “To attain perfect clearness in our thoughts of an object . . . we need only consider what effects of a conceivably practical kind the object may involve—what sensations we are to expect from it, and what reactions we must prepare.” (internal quotation marks omitted)).

70. *Id.* at xv (internal quotation marks omitted). On the background of the “metaphysical club” in which James, Peirce, Oliver Wendell Homes, and others participated, see *id.* at xvi–xvii.

71. *Id.* at xiii (internal quotation marks omitted).

72. *Id.* at xiv.

73. See Posner, *supra* note 35, at 1654 (“Parallel to and influenced by the pragmatists, legal realism comes on the scene, inspired by the work of Oliver Wendell Ho[lm]es, John Chipman Grey, and Benjamin Cardozo and realized in the work of the self-described realists, such as Jerome Frank, William Douglas, Karl Llewellyn, Felix Cohen, and Max Radin.”).

74. See Catharine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541, 550–51 (1988) (stating that “many legal theorists were troubled ‘that Holmes’ philosophy of law was inconsistent with the highest traditions and aspirations of western thought and that his scale of moral and political values was badly suited to measure the needs of a progressive and civilized society’”).

individual cases.<sup>75</sup> From his earliest articles, to his seminal work *The Common Law*,<sup>76</sup> to his many judicial opinions, Holmes set out a competing perspective captured best, perhaps, in his famous assertion that “[t]he life of the law has not been logic: it has been experience.”<sup>77</sup>

Holmes’s pragmatist perspective did not mean that legal decision-makers were at liberty to resolve a dispute however they wished. The common law did operate in Holmes’s view to guide the exercise of judicial judgment. Instead, consistent with the pragmatist thinking of James and Dewey, Holmes’s understanding was that the shaping character of common law rules was itself the product of a dynamic process grounded in experience and informed by the concrete circumstances of individual disputes. In this respect, Holmes “meant that what guides the direction of the law, from case to case over time, is not immutable reason but changing experience.”<sup>78</sup>

#### A. *John Dewey, Pragmatism, and Moral Judgment*

John Dewey’s pragmatist thought greatly influenced Holmes and the early legal realists.<sup>79</sup> In 1894, Dewey was appointed chair of the philosophy department at the newly established University of Chicago, where he gathered together a remarkable group of pragmatist thinkers.<sup>80</sup> A key feature of their work was the adoption of Charles Darwin’s evolutionary naturalism as a lens through which to view individual human psychology and collective social development. All human activity, including individual cognition, was understood by Dewey and his group as continually in a state of adjustment to the dynamic social and physical environments in which it is situated. Human nature, in this version of evolutionary naturalism, is thus essentially “plastic” and susceptible to the shaping influence of the natural and cultural settings within which individuals and groups live.<sup>81</sup>

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75. *But cf.* Menand, *supra* note 69, at xx (discussing “Holmes’s insight into the insufficiency of general principles”). For a good description and critique of legal formalism, see JEROME FRANK, *LAW AND THE MODERN MIND* (1949).

76. OLIVER W. HOLMES, JR., *THE COMMON LAW* (Little, Brown & Co. 1881).

77. *Id.* at 1.

78. Menand, *supra* note 69, at xxi.

79. *See id.* at xxii (“The one self-proclaimed pragmatist whose writings Holmes admired . . . was John Dewey.”).

80. *See* Boldt, *supra* note 35, at 25 (“In rapid succession, he secured faculty appointments for George Herbert Mead, James Rowland Angell, A.W. Moore, and Edward Scribner Ames. Collectively, these pragmatist thinkers and others who joined them over time became known as the Chicago School of American philosophy.”).

81. *See id.* at 25–26 (“Dewey and his followers regarded humans as part of a larger natural environment that included all of the other animals, and that was characterized by a continuous process of evolution. In this respect, they believed that all human activity, including cognition, had to be understood in dynamic terms. Human psychology, in this account, was always chang-



Moreover, Dewey and his colleagues argued that individuals encounter these environments not in isolation, but as social actors.<sup>82</sup> Thus, the evolutionary process they described necessarily is built up out of the experiences that occur in the context of schools, families, workplaces, community associations, and the like.<sup>83</sup> For Dewey, the education theorist, this belief in the essential plasticity and intrinsic sociability of human beings was central to the program of teaching and learning that he espoused throughout his academic career.<sup>84</sup> For Dewey, the social theorist, it energized a deep commitment to the development of pluralist democratic institutions within which healthy human development could take place.<sup>85</sup>

If evolutionary naturalism informed Dewey's "theory of education" and his "theory of politics," it was also consistent with his "theory of knowledge," which he shared in most respects with Peirce and James.<sup>86</sup> Dewey believed that Enlightenment liberalism had been founded on a false distinction between knowing and doing.<sup>87</sup> In the place of this distinction (and a host of allied dichotomies, including the distinctions between utility and aesthetics, objective fact and subjective experience, means and ends), Dewey urged a monist methodology in which the truth of a proposition was to be figured not by its objective correspondence to *a priori* principles but by its ability to advance the interests of a relevant community of persons.<sup>88</sup>

Although Dewey's voluminous writings on education theory, politics, and philosophy garnered considerable attention and drew a fair amount of

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ing, constantly adjusting to the forces of an environment that itself was the site of flux and change.").

82. *Id.* at 28 (noting that even "the pragmatists' philosophy of education stressed collective and engaged social action" and "urged instead a process of 'learning by doing' designed to 'instill a sense of collective social responsibility'" (footnotes omitted)).

83. *See, e.g.,* JOHN DEWEY, *ETHICAL PRINCIPLES UNDERLYING EDUCATION* 14 (1903) (stating that "[t]he only way to prepare for social life is to engage in social life"). *See generally* Menand, *supra* note 69, at xxiv (explaining how both Dewey and Holmes conceptualized "experience" in the same way: "as a name for culture").

84. *See* JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* 2–3 (1922) (discussing the renewal and re-creation of beliefs through the operation of social groups); *see also* Menand, *supra* note 69, at xxiv ("The non-social individual,' [Dewey] wrote in one of his earliest essays, 'is an abstraction arrived at by imagining what man would be if all his human qualities were taken away.'").

85. *See* ROBERT B. WESTBROOK, *JOHN DEWEY AND AMERICAN DEMOCRACY* 436 (1991) (emphasizing the importance Dewey placed on equality as a "democratic distribution of liberties").

86. Menand, *supra* note 69, at xxiii.

87. *See* Boldt, *supra* note 35, at 28 (noting that Dewey and his colleagues collapsed the categories of thinking and doing).

88. *See id.* at 26–27 ("Instead of employing *a priori* ethical principles or precepts to evaluate human behavior, they urged ethical evaluation based upon experience and utility.").

supportive and critical commentary throughout his active career,<sup>89</sup> perhaps the most spirited and illuminating exchanges took place in the mid-1930s, when Dewey, by then at Columbia University, became locked in a vigorous debate with Robert Maynard Hutchins, a former Yale Law School professor who had become President of the University of Chicago.<sup>90</sup> Their dispute was framed in terms of education theory, but the heart of the controversy centered on Dewey's scientific naturalism and the contextual experimentalist approach to knowledge that was at the foundation of his pragmatist project. Hutchins's approach was based on a rational humanism whose premises were deeply inconsistent with those adopted by Dewey.<sup>91</sup>

Where Dewey assumed that human nature was plastic and subject to the shaping influences of culture and the social environment, Hutchins asserted that “[t]he nature of man, which is the same everywhere, is obscured but not obliterated by the differing conventions of different cultures.”<sup>92</sup> Where Dewey posited that human beings are, like all the animals, part of a broader natural environment and thus subject to an ongoing process of dynamic evolution, Hutchins believed that people are fundamentally different from the other animals because the capacity for rational thought permits men and women to control their environment instead of simply adapting to it over time.<sup>93</sup> Where Dewey questioned the existence of rational objective fact, Hutchins embraced an Aristotelian metaphysics grounded in stable first principles. Where Dewey urged an intellectual practice that is contextual, experimentalist, and utilitarian, Hutchins believed it essential to identi-

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89. For example, Dewey had vigorous exchanges with both Walter Lippmann and Reinhold Niebuhr. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* 156 (1973) (rejecting the pragmatism espoused by Dewey, Niebuhr, “[t]ogether with both Hutchins and Lippmann [that] symbolized a profound shift in American thought from confidence and optimism in social scientific rationalism to some form of philosophical or religious transcendentalism”).

90. See Boldt, *supra* note 35, at 29 (“Dewey’s theory of education, and the pragmatist philosophy and politics that supported it, came under direct attack in Robert Hutchins’s 1936 book, *The Higher Learning in America*.”). For a glimpse into the heart of this debate, see ROBERT MAYNARD HUTCHINS, *NO FRIENDLY VOICE* 39 (1936) (criticizing John Dewey’s views on “abstractionism in science as a defect—something unnecessary, but always regrettable”); John Dewey, *Rationality in Education*, 3 *SOC. FRONTIER* 71, 73 (1936) (responding to Hutchins’s 1936 book); John Dewey, *President Hutchins’ Proposals to Remake Higher Education*, 3 *SOC. FRONTIER* 103, 104 (1937) [hereinafter Dewey, *President Hutchins’ Proposals*] (highlighting Hutchins’s reliance on Plato, Aristotle, and St. Thomas, and in turn arguing that “[i]t is astounding that anyone should suppose that a return to the conceptions and methods of these writers would do for the present situation what they did for the Greek and Medieval eras”).

91. See Boldt, *supra* note 35, at 31 (describing Hutchins’s belief “that human nature is neither plastic, as Dewey had taught, nor entirely subject to the constructive force of social context and culture”).

92. *Id.* at 31.

93. *Id.* at 25–31.

fy *a priori* truths—standards of truth, justice, and goodness—and to engage in reasoning (and practice) consistent with those principles.<sup>94</sup>

Taken together, these divergent perspectives fueled a sharp disagreement between Dewey and his colleagues on one side and Hutchins and his supporters on the other, over “the question of whether moral judgments are relative and contingent, as the pragmatists asserted, or subject to fixed evaluation according to first principles, as Hutchins believed.”<sup>95</sup> Dewey argued that any approach that proceeds from objective *a priori* truths is potentially authoritarian because it requires the selection of one particular set of first principles to the exclusion of other normative starting points. For Dewey, Hutchins’s Aristotelian perspective was not self-evident or essential, but was simply one of many such starting points that one could plausibly select.<sup>96</sup> For his part, Hutchins argued that moral judgment cannot turn simply on the efficacy of a practice or the utility of its outcomes, but must be figured according to some fixed measure of right and wrong.<sup>97</sup> He criticized the relativism and contextualism of Dewey’s pragmatist ethics on the grounds that a purely instrumental approach renders true moral evaluation impossible: “Unless we have the right end before us the means we choose, the acts we perform, cannot be right. We do not praise ingenious murderers or clever thieves.”<sup>98</sup> Truth, declared Hutchins, is not relative and contingent, but fixed and objective.<sup>99</sup>

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94. ROBERT MAYNARD HUTCHINS, *THE HIGHER LEARNING IN AMERICA* 95 (1936).

95. Boldt, *supra* note 35, at 34.

96. *Id.* at 33. Given the partiality inherent in this approach, the key questions for Dewey became, first, who would be authorized to make the selection of first principles, and second, on what basis would that privilege of selection be warranted:

There is implicit in every assertion of fixed and eternal first truths the necessity for some human authority to decide, in this world of conflicts, just what these truths are and how they shall be taught. This problem is conveniently ignored. Doubtless much may be said for selecting Aristotle and St. Thomas as competent promulgators of first truths. But it took the authority of a powerful ecclesiastic organization to secure their wide recognition. Others may prefer Hegel, or Karl Marx, or even Mussolini as the seers of first truths; and there are those who prefer Nazism.

Dewey, *President Hutchins’ Proposals*, *supra* note 90, at 104.

97. See Boldt, *supra* note 35, at 34 (“In order to believe in democracy, then, we must believe that there is a difference between truth and falsity, good and bad, right and wrong, and that truth, goodness, and rights are objective standards even though they cannot be experimentally verified.” (quoting Robert M. Hutchins, *What Shall We Defend? We Are Losing Our Moral Principles*, 6 VITAL SPEECHES, July 1, 1940, at 546)).

98. *Id.* at 32 (quoting Robert M. Hutchins, *Civilization and Politics*, U. CHI. MAG., Apr. 1939, at 8).

99. Robert M. Hutchins, *What Shall We Defend?: We Are Losing Our Moral Principles*, 6 VITAL SPEECHES, July 1, 1940, at 548 (“[W]e must believe that there is such a thing as truth and that in these matters we can discover it. . . . [T]here can be no experimental verification of the proposition that law, equality, and justice are the essentials of a good state.”).

To be sure, Dewey's experiential and contextual approach to moral judgment was at odds with the sort of conventional ethics pursued by Hutchins and his allies. But Deweyan pragmatism was not purely instrumental, nor was it inconsistent with an abiding moral and political commitment to fairness, equality, or justice. In order to ground his pragmatist ethics, Dewey distinguished between "ends-in-themselves" and "end[s]-in-view."<sup>100</sup> The process of "determining the true good cannot be done once for all," he explained, but must "be done, and done over and over and over again, in terms of the conditions of concrete situations as they arise."<sup>101</sup> In these terms, Dewey envisioned the practice of moral decisionmaking as an ongoing enterprise in which any firm distinction between means and ends is always provisional. Thus, when faced with a consequential choice, a pragmatist decisionmaker should proceed on the basis of a plan developed to accomplish an identified end-in-view. Upon completion of the plan, explained Dewey, effective moral judgment requires that the consequences of the choice be examined and the end-in-view revised accordingly, so that the next plan developed for the next moment of decision might reflect the learning derived from prior relevant experience.<sup>102</sup>

Importantly, the system of reflection, assessment, and revision contemplated by Dewey was not devoid of "generalized ideas" or governing principles, as Hutchins had suggested.<sup>103</sup> Indeed, Dewey urged the consideration of generalized principles as "intellectual instrumentalities in judgment of particular cases," although these guiding ideas were to be derived not from *a priori* first principles, but from experience itself.<sup>104</sup> As a product of the sum of the many prior acts of decision and assessment envisioned by Deweyan pragmatism, these guiding principles likely would have the sort of abstract quality characteristic of Aristotelian first principles. They were not to be treated as fixed or immutable, however, but instead as revisable contingent guides to moral evaluation undertaken for now and in context.<sup>105</sup>

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100. JOHN DEWEY, 2 THEORY OF VALUATION, INT'L ENCYCLOPEDIA UNIFIED SCI. 40 (1939).

101. JOHN DEWEY, *Ends, the Good and Wisdom*, in 7 JOHN DEWEY: THE LATER WORKS, 1925–1953, at 184, 212 (Jo Ann Boydston ed., 1985).

102. See Boldt, *supra* note 35, at 45.

103. *Id.*

104. DEWEY, *supra* note 100, at 44.

105. Dewey captured this set of ideas about social practice, moral evaluation, and law in the following metaphor of a river flowing within and also slowly altering its banks:

We may use the analogy, or if one prefers, the metaphor, of a river valley, a stream, and banks. The valley in its relation to surrounding country, or as the 'lie of the land', is the primary fact. The stream may be compared to the social process, and its various waves, wavelets, eddies, etc., to the special acts which make up a social process. The banks are stable, enduring conditions, which limit and also direct the course taken by the stream, comparable to customs. But the permanence and fixity of the banks, as compared with the elements of the passing stream, is relative, not absolute. Given the lie of the land,

*B. The Contemporary Debate*

Richard Posner has observed that pragmatism is not so much a “school” as it is “an umbrella term for diverse tendencies in philosophical thought.”<sup>106</sup> Posner points out that there were important differences between the specific approaches set out by Peirce, James, and Dewey, and a similar range of variation is apparent in the work of more recent pragmatists, including Richard Rorty, Cornel West, and Stanley Fish, and among legal pragmatists such as Martha Minow, Thomas Grey, Daniel Farber, and others.<sup>107</sup> Nevertheless, Posner identifies “three ‘essential’ elements” that tend to characterize the work of all these writers and that link the thinking of earlier pragmatist theorists together with those whose work is more recent. The first element is an anti-essentialism or “distrust of metaphysical entities (‘reality,’ ‘truth,’ ‘nature,’ etc.) viewed as warrants for certitude whether in epistemology, ethics, or politics.”<sup>108</sup> The second is an emphasis on the consequentiality of ideas: “an insistence that propositions be tested by their consequences.”<sup>109</sup> The third is a commitment to evaluating undertakings, including scientific, ethical, political, or legal practices, by reference “to social or other human needs rather than to ‘objective,’ ‘impersonal’ criteria.”<sup>110</sup> Taken together, says Posner, these features tend to make pragmatic work forward-looking, “experimental,” and “commonsensical.”<sup>111</sup>

Because more recent versions of legal and philosophical pragmatism share these “essential” features with an earlier generation of pragmatists, it should come as little surprise that contemporary legal and philosophical pragmatists have been subject to a form of criticism not unlike that directed by Robert Hutchins against the work of John Dewey.<sup>112</sup> Martha Minow and Elizabeth Spelman have described one version of this critique, and have offered a useful response to it. The basic concern of the critics, they explain, is that pragmatists will become “incapacitat[ed] . . . as moral and political critics.”<sup>113</sup> This risk is said to derive from two related features inherent in

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the stream is an energy which carves its way from higher to lower levels and thereby, when viewed as a long run (in time as well as in space) process, it forms and reforms its own banks.

John Dewey, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 73, 78–79 (Julius Rosenthal Found. ed., 1941).

106. Posner, *supra* note 35, at 1653, 1660.

107. *Id.* at 1654.

108. *Id.* at 1660.

109. *Id.*

110. *Id.* at 1660–61.

111. *Id.* at 1661.

112. Thomas Grey characterizes critics as suggesting that pragmatism is deficient because it does not have a “practice-independent evaluative theory.” Grey, *supra* note 66, at 1591.

113. Minow & Spelman, *supra* note 35, at 1616.

pragmatist thought. First, the rejection of *a priori* normative foundations—pragmatism’s anti-foundationalism—yields a kind of moral and political relativism incapable of grounding judgments. Second, pragmatism’s thoroughgoing contextualism—its heightened attention to the contingencies of any moment of decision—undermines the “possibility of criticism across situations, persons, and cultures.”<sup>114</sup>

The moral relativism argument is consonant with Hutchins’s critique from the 1930s. As Minow and Spelman put it, “if a particular moral or political dilemma can be understood and evaluated only in light of the specific details of the circumstances, then we risk abandoning or refusing to acknowledge foundations for moral and political judgment that endure through time.”<sup>115</sup> In the absence of any such normative grounding, critics argue that decisionmaking can neither be stable over time nor insulated from the moral distortions of unequal social, economic, or political power. Pragmatic approaches, they claim, “seem to deny the possibility of trustworthy and legitimate foundations for the exercise of judgment and thereby leave power and politics standing bare.”<sup>116</sup>

The second prong of the critique described by Minow and Spelman is that pragmatist theory is so particularistic that it inhibits the development of abstract thinking necessary for systematic judgment.<sup>117</sup> Pragmatism’s call for the primacy of context, according to this view, undermines the capacity of the decisionmaker to see the forest instead of the trees.<sup>118</sup> This over-individualization critique focuses on pragmatism’s anti-essentialism, its “emphasis on the uniqueness of persons and events and thus on the importance of the differences among them.”<sup>119</sup>

Such an emphasis on the particular characteristics of an individual actor and the circumstances of his or her conduct is said to inhibit the attribution of moral responsibility because moral judgment is, by definition, com-

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114. *Id.*

115. *Id.* at 1617. These enduring foundations that are held to be necessary for supporting a coherent process of normative evaluation can derive from a variety of sources. Foundational principles may be identified by reference to some divine authority or conception of nature. *Id.* at 1619. Alternatively, human-created devices “for transcending subjectivity and power,” *id.*, such as Rawls’s “original position,” JOHN RAWLS: A THEORY OF JUSTICE 18 (1971), may be adopted as the basis for figuring foundational principles. Minow & Spelman, *supra* note 35, at 1619. Alternatively, customary devices such as commercial markets or common law courts could be relied upon to generate persisting bases for moral judgment. *Id.*

116. Minow & Spelman, *supra* note 35, at 1617. Under such circumstances “knowledge and judgment reflect mere power and politics; the results risk not merely intellectual chaos and incoherence, but also social and political disorder and violence.” *Id.* at 1618.

117. *See id.* at 1621–22 (“But, the objection might go, one cannot emphasize contextual details without undermining the importance of commonality of persons and events.”).

118. *Id.* at 1622.

119. *Id.* at 1621.

parative. On this understanding, moral evaluation necessarily involves the application of fixed standards to a class of actions or events that are similar in terms that are relevant to the moral calculation. A radically contextualized assessment of conduct, by contrast, resists the process of abstraction by which an individual event is held to be sufficiently similar to other events to be judged according to some common standard of right and wrong. Attention to the details that render an individual event distinct or an individual actor unique may be helpful as a descriptive matter in coming to understand why the event occurred as it did or why the actor behaved as he or she did, but it is inconsistent with the collective project of maintaining a coherent normative universe.<sup>120</sup>

According to Minow and Spelman:

If terms of moral and political approbation are not to be seen simply as complicated ways of saying “I like that” or “I don’t like that,” i.e., if what we say has any normative status at all, then we are invoking a standard against which a person or an act is measured, a standard that may in principle be appropriately invoked in other relevantly similar situations.<sup>121</sup>

Minow and Spelman respond to these concerns about pragmatism’s anti-foundationalism and contextualism, which converge in the claim that pragmatist methods “disable judgment and produce dangerous relativism,” by arguing that this critique is based on a false “binary distinction between

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120. *Id.* at 1624. In such a universe, like cases are not only treated alike, each set of like cases is also resolved by means that are carefully worked through as serving ends that have received considerable detached thought. *Cf.* ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* 3–7 (1994) (asserting that permitting criminal defendants to use a history of abuse as an excuse for committing certain crimes may explain that individual’s behavior but takes away the responsibilities held by people as a whole).

121. Minow & Spelman, *supra* note 35, at 1624. An alternative version of the over-individualization critique rests not on the difficulty of making moral judgments but on the inherent conservatism of the pragmatist methodology. David Luban, for example, has argued that pragmatism tends to foster a kind of “[c]onceptual conservatism,” precisely because its attention to context encourages a narrow framing of the problems for which solutions are sought. *See* DAVID LUBAN, *LEGAL MODERNISM* 137 (1994). By definition, a highly particularistic analysis is local rather than general. *Id.* It presses focus on the distinctive features of the people and circumstances being addressed, and diminishes the saliency of characteristics that are shared with others caught up in the broader dynamics described by, for example, race, ethnicity, class, gender, or sexual orientation. *See* Minow & Spelman, *supra* note 35, at 1622–23. On these terms, the adoption of a pragmatist approach is likely to dampen efforts to identify and change broad but problematic institutional or cultural structures in society. LUBAN, *supra*, at 137–38. Thinking contextually, it is argued, narrows the set of social, cultural, and political data that are in play, and requires that we hold constant most of the conditions that constitute the context or frame for analysis. *Id.* Thus, a methodology that is local and contextual, by definition, requires that “[a]t any time we must withhold the overwhelming preponderance of our beliefs and concepts from critical scrutiny; and whenever we revise our beliefs, we must revise them minimally.” *Id.* at 138.

abstraction and context.”<sup>122</sup> In their view, pragmatist thinking involves “constant interactions between” abstraction and context.<sup>123</sup> Our environments are too rich with data to permit our encountering them without the organizing heuristics by which we categorize and, ultimately, simplify our understanding of our circumstances.<sup>124</sup> All thought, including theoretical analysis, requires the framing provided by context.<sup>125</sup>

If moral judgment involves the comparative application of normative principles to an actor or event within a class of similar actors or events, some set of organizing ideas must be available to construct the relevant category of comparables. Moreover, we come to each new moment of decision shaped by our individual and group histories. We encounter concrete environments through lenses calibrated and sharpened by our accumulated experiences.<sup>126</sup> A decisionmaker must determine what subset of details within the larger universe of available information to treat as immediately relevant to his decision.<sup>127</sup> This choice of context is not self-evident, it depends upon the decisionmaker’s perspective, his broader view of the world as informed by generalized principles. Pragmatist theory assists the decisionmaker by elucidating the partiality of his perspective. It guides the making of decisions about what details to attend to, how the “problem” should be framed, and how “solutions” to that problem should be described.

### C. Pragmatism and Perspective

As an example, imagine that a state’s chief judicial officer wishes to employ a careful form of pragmatist analysis to evaluate the state’s specialized drug treatment courts for the purpose of determining whether to devote more resources to these courts. The evaluation no doubt will be focused, as such evaluations most often are, on objective outcome measures, including

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122. Minow & Spelman, *supra* note 35, at 1625.

123. *Id.*

124. *Id.* at 1629; *see also* Daan Braveman, *A Cubist Vision of Legal Education*, 43 SYRACUSE L. REV. 997, 1022 (1992) (recognizing that categorization occurs but stressing “that the use of categories is not the problem,” rather “the problem is the lack of desire to examine the categorizations that are made”).

125. *See* Minow & Spelman, *supra* note 35, at 1627–28 (“Arguments and principles presented as if they came from no situation still sit within the contexts of their authors and readers; the absence of overt clues that those contexts exist does not eliminate them or overcome the inevitable limitations of their circumstances.”).

126. *See id.* at 1628 (“[W]e are embodied, historical beings, we are limited by our partial view.”); *see also* Braveman, *supra* note 124, at 1021–22 (emphasizing the importance of “multiple perspectives” when categorizing and breaking down complicated issues).

127. *See* Minow & Spelman, *supra* note 35, at 1605 (“[W]e are always in some context, as are the texts that we read, their authors and readers, our problems, and our efforts to achieve solutions. Typically, therefore, when people advocate looking or deciding ‘in context,’ they advocate a switch from one context to another—from one level of analysis to another, or from a focus on one set of traits or concerns to a focus on another set.”).



participants' criminal recidivism rates, rates of relapse into active drug or alcohol misuse, and the like.<sup>128</sup> If the analysis is rigorous, these outcome data will be developed both for participants and for a control group of offenders who share the same or similar relevant characteristics as participants.<sup>129</sup>

Assuming the data developed in our hypothetical state evaluation are similar to those gathered in a number of other states, they likely will reveal the following: first, a significant subset of the defendants who participate in the drug treatment court process fail to complete the program; second, the criminal re-arrest and re-conviction rates and drug abuse relapse rates of those participants who do complete the program are somewhat lower than those of the comparison group, at least in the first year or so following graduation; and third, the outcome measures for the cohort of defendants who fail in the drug treatment court are likely to be as bad or worse than those for the comparison group of defendants processed through the ordinary criminal justice system.<sup>130</sup>

What conclusions will the careful pragmatist chief judicial officer draw from these statistics? If, on one hand, she takes as the most relevant group for analysis those participants who manage to complete the drug treatment court regime, the conclusion will be a happy one. Viewed in this context, drug courts work.<sup>131</sup> Some number of criminal offenders whose problems with chronic substance misuse likely would have pushed them back through the revolving door of the criminal justice system had they not been intercepted by the specialized treatment court will now manage to stay clear of the police and the courts.<sup>132</sup> Framed in this fashion, the evaluation might seek to identify the costs of the intensive treatment-based interventions provided by the drug treatment court for these defendants, and then compare those costs to the considerable savings produced by the lower

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128. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 1–2 (2005) (assessing recidivism rates, substance use relapse, and program completion rates of participants of adult drug court programs); cf. AMANDA B. CISSNER & DONALD J. FAROLE, JR., CTR. FOR CT. INNOVATION, AVOIDING FAILURES OF IMPLEMENTATION: LESSONS FROM PROCESS EVALUATIONS 2 (2009) (examining criminal justice experiments undertaken by the Center for Court Innovation and the U.S. Department of Justice).

129. In the best of all circumstances (which are exceedingly rare in this field), the study will be “double blind.” See Boldt, *supra* note 50, at 51–52 (discussing the problem of selection bias in studies on the effectiveness of drug courts).

130. *Id.* at 50–57.

131. See Douglas B. Marlowe, *The Verdict on Adult Drug Courts*, ADVOCATE, Sept. 2008, at 14, 15 (“[Results of research on drug courts] confirm beyond a reasonable doubt that drug courts significantly reduce crime and save communities considerable money.”).

132. *Id.* at 14–15.

crime rates and reduced substance misuse exhibited by the court's graduates.<sup>133</sup>

If, on the other hand, the pragmatist chief judicial officer's context is described primarily by the group of drug treatment court participants who fail to complete the program, her attention will be directed to a very different set of data. 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."<sup>134</sup> 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.<sup>135</sup> In addition, a focus on those who fail likely would lead the pragmatist decisionmaker to consider the costs to system legitimacy incurred as a result of the diminished procedural safeguards and broad procedural informality that characterize the sentencing decisions of drug treatment court judges.<sup>136</sup> This relaxed procedural stance may be relatively benign in those instances in which participants graduate 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 decisionmaker whose capacity for formal fairness has been compromised by problem-solving informality.<sup>137</sup>

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133. See, e.g., Michael Rempel et al., *Multi-Site Evaluation Demonstrates Effectiveness of Adult Drug Courts*, 95 JUDICATURE 154, 156 (2012) ("We estimate that the benefits of drug court outweigh the costs: on average, drug courts save \$5,680 to \$6,208 per participant.").

134. NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, *AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM* 29 (2009).

135. 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.").

136. Casey, *supra* note 41, at 1483.

137. 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"). In thinking about the tasks of legal judgment required of judges, Catharine Wells has drawn a useful distinction between the first-order activities that are the subject of legal decisionmaking and the second-order activity of judging itself. Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1729 (1990). Wells argues that judges properly ought to assume the role of agents (active participants) when engaging in the second-order activity of judicial decisionmaking, but should avoid surrendering their status as spectators (disengaged neutrals) when it comes to the underlying events that are the subject of the judicial proceedings. *Id.* Wells's endorsement of second-order agency is consistent with her larger project of developing a theory of "situated decisionmaking" for judges, but the sort of active engagement she has in mind does not include judicial participation in first-order activities such as the provision of therapeutic services assumed by many problem-solving court judges and contemplated by the problem-solving court model. *Id.* Once the problem-solving court judge adopts an agent's stance with respect to first-order activities, deep problems of fairness and legitimacy emerge when the status of

The choice between these competing contexts is not taken in a vacuum. It is governed by perspective, by the generalized understandings (conscious or not) that the decisionmaker brings to the analysis. These generalized understandings not only drive the selection of the relevant context, they also help to shape the pragmatist's conception of the "problem" to be addressed by these specialized problem-solving courts. To oversimplify, the chief judicial officer might view the problem to be that the criminal justice system is overtaxed by a large population of offenders whose criminal offending is exacerbated by drug use disorders and other co-occurring mental disabilities.<sup>138</sup> From this perspective, these offenders are surely blameworthy (they have, after all, committed criminal offenses), but the community will nonetheless be better off if the criminal justice system overload they are producing can be addressed by therapeutic responses designed to ameliorate some of their underlying pathologies.<sup>139</sup> Viewed from an alternative perspective, the problem might be that a significant number of otherwise non-blameworthy individuals have become enmeshed in the criminal justice system because their drug use disorders or other mental disabilities have brought them to the attention of a law enforcement system made over-vigilant by the "war on drugs."<sup>140</sup> From this point of view, the goal of developing effective therapeutic interventions is to rescue these individuals from an inherently punitive system in which they do not belong.<sup>141</sup>

Finally, one could imagine a perspective that represents a mix of these polar positions. Perhaps our pragmatist decisionmaker believes that, of the many offenders in the criminal system who suffer from drug use disorders,

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an offender shifts from that of a participant to that of an offender who has failed the program. *Id.* That shift is associated with a corresponding shift in the stance of the problem-solving court judge from first-order agent to second-order decisionmaker. See Casey, *supra* note 41, 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 . . ."). Unfortunately, the judge's previous involvement as a first-order agent is in tension with the basic model of judicial integrity that is at the heart of his or her obligations as a second-order legal decisionmaker, and thereby destabilizes the architecture upon which the system's legitimacy rests. Wells, *supra*, at 1729.

138. For a nuanced analysis of the relationship between drugs and crime, see Candido da Agra, *The Complex Structures, Processes and Meanings of the Drug/Crime Relationship*, in DRUGS AND CRIME DEVIANT PATHWAYS 9, 9–30 (Serge Brochu et al. eds., 2002).

139. See Berman, *supra* note 17, at 3 ("Problem-solving courts seek to send the message that all criminal behavior should have meaningful consequences.").

140. 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, 288–90 (2010) (discussing the central role played by the "War on Drugs" in the dramatic increase in the United States prison population).

141. See, e.g., H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVS. 483, 485 (1998) ("[M]any uncared-for mentally ill persons may be arrested for minor criminal acts that are really manifestations of their illness, their lack of treatment, and the lack of structure in their lives.").

some deserve punishment while others do not. From this point of view, the problem is to separate the “good addicts” from the “bad addicts,” and the design and evaluation of drug treatment courts accordingly should proceed on that basis.<sup>142</sup>

The exercise of judgment necessarily requires that the unruly universe of information be organized into conceptual categories, which, in turn, reflect the decisionmaker’s perspective.<sup>143</sup> In pragmatist theory, perspective derives not from fixed *a priori* axioms, but instead from experience and observation over time. It is provisional and contingent, and must be open to revision based on the data of ongoing experience.<sup>144</sup> This fluid and dynamic quality is at the core of the relativism critique. Pragmatist perspective may not be essential or foundational, but the pragmatist decisionmaker’s generalized understandings do help to “guide the mind to a clarifying formulation of the problem” and can serve as the basis for the exercise of normative judgment.<sup>145</sup> Thus, the different conceptions of blameworthiness and responsibility embedded in the two polar understandings of the criminal offenders described above can be treated not as fixed, inconsistent *a priori* positions, but instead as fluid co-existing possibilities that each govern a subset of circumstances and that must be managed together within the operation of our criminal blaming practices.<sup>146</sup>

Attending to a perspective that views defendants in drug treatment courts as essentially responsible for their decisions to offend pushes toward one set of practices and supports one notion of what counts as programmatic success. If a significant number of these defendants are able to achieve abstinence (and the lower rates of offending associated with it), then the relatively more severe (and potentially more unpredictable) punishment faced by others who fail the program may be a reasonable practical and moral price to pay for that success. Bringing into focus an alternative perspective, however, that views these defendants as caught in a criminal en-

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142. See Stacy Lee Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 433 (2003) (“Drug court judges try to determine if they are dealing with persons who can be repaired and restored, or with irredeemably deficient selves . . .”).

143. See Minow & Spelman, *supra* note 35, at 1625 (“[T]he contextualist cannot meaningfully talk of context without using categories that simplify, in at least some respects, the particularities under examination.”).

144. *Id.* at 1628 (explaining that proponents of pragmatism derive understanding from context as opposed to abstract moral theories).

145. See Grey, *supra* note 66, at 1589 (noting pragmatist principles “are usually probabilistic or defeasible in form rather than universal and axiomatic”).

146. See Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2295 n.182 (1992) (noting that the subjective experience of free will and the objective reality of determinism are both managed within the blaming practices of the criminal law).

forcement system, ill-suited to their needs or moral status, changes the calculation of acceptable costs and benefits, and supports the adoption of a shifted set of practices and procedures. Pragmatic theory can assist in this setting by helping decisionmakers attend to both perspectives within a set of practices that hold responsible persons reasonably accountable while also insuring individual fairness.<sup>147</sup>

This hypothetical example is meant to ground in a particular setting the description of pragmatist theory set out earlier. It provides a link half-way between the general discussion of pragmatism with which Part II began and its application to more concrete data derived from specific problem-solving courts. In order to further develop this connection between pragmatist theory and problem-solving practice, Part III offers case studies drawn from careful field research of two very different kinds of problem-solving courts.

### III. PRAGMATIST THEORY APPLIED

By design, problem-solving courts vest considerable discretion in the judges and other professionals who make crucial decisions with respect to the disposition of the criminal offenders subject to their jurisdiction.<sup>148</sup> This highly discretionary practice necessarily is shaped by the perspectives these decisionmakers bring to their work. These perspectives frame the decisionmakers' conception of the "problems" to be addressed and the "solutions" to be sought.<sup>149</sup>

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147. For a discussion of the use of harm reduction principles in some problem-solving courts see *infra* text accompanying notes 177–187.

148. See generally Caroline S. Cooper & Joseph A. Trotter, Jr., *Recent Developments in Drug Case Management: Re-engineering the Judicial Process*, 17 JUST. SYS. J. 83, 93–94 (1994) (defining the goals of problem-solving courts "to use *judicial* authority . . . to directly supervise and support the defendant's performance in treatment and rehabilitation programs").

149. See Minow & Spelman, *supra* note 35, at 1598 (stressing the importance of "the context in which a problem arose" and the importance of "the context in which someone proposes a response to it"). The pervasiveness of drug-use disorders among criminal offenders and the persistence of criminal justice system overload have both received attention as "problems" to which the problem-solving courts movement is directed. See Berman, *supra* note 17, at 6. Each of these "problems" has arisen within the context of a "war on drugs" and a broad enforcement-based approach to drug control that has shaped criminal justice policy in the United States for decades. See Boldt, *supra* note 140, at 285–91 (describing the evolution of drug policy in the United States from the 1930s through the "war on drugs," which has "resulted in a public policy environment that has been extremely resistant to other measures that have been effective elsewhere in reducing the harms associated with drug misuse"). The "response" offered by specialized drug treatment courts and other problem-solving courts, particularly the decision to deliver drug treatment and other human services through the criminal adjudication system, in turn, has been formulated within the context of a pronounced fiscal retrenchment that has simultaneously limited the availability of other publicly funded human services resources, Malkin, *supra* note 19, at 142, and created a backlash against the resource-intensive policy of mass incarceration caused by long-standing U.S.

Notwithstanding the frequent references to therapeutic jurisprudence or restorative justice made by some problem-solving courts advocates, most practitioners in these courts have selected a very local or particularistic frame of reference for their work.<sup>150</sup> This close-to-the-ground approach does not render irrelevant the broader perspectives held by these actors, but it does potentially move this more abstract thinking out of their field of active consciousness.<sup>151</sup> Pragmatist theory offers the possibility of opening up this field so that the broader organizing principles that are at work shaping problem-solving court practice can be brought under active consideration and made subject to a process of revision in light of ongoing experience.<sup>152</sup>

Thomas Grey has argued that an “intuitive or self-consciously anti-theoretical pragmatist lawyer[.]” when faced with a challenge to his practice framed in terms of top-down theory, “may retreat into defensive and rhetorically ineffective irrationalism.”<sup>153</sup> Simply grafting a top-down theory, such as therapeutic jurisprudence, onto an essentially atheoretical practice is not much of an improvement. Practical efforts like the problem-solving courts movement that fail to attend adequately to the development of an authentic theoretical perspective “generated by and attached to that practice,”<sup>154</sup> are at risk of falling subject to the danger identified years ago by Robert Hutchins. The risk is one of becoming incapable of making coherent moral or political judgments that persist over reasonably long periods of time and, within those periods, across cases.<sup>155</sup> The designers and managers of problem-solving courts need not adopt a top-down theoretical model in order to avoid this risk. The contextual, revisable form of theory work envisioned by thoughtful legal and philosophical pragmatism is available as a method for integrating general principles and practical experience.

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drug policy. See Berman, *supra* note 17, at 7 (rooting the movement toward problem-solving courts in the failure of punitive drug policies).

150. Nolan reports that problem-solving court “practitioners invoke therapeutic jurisprudence and restorative justice in varying ways, and often demonstrate only nominal understandings of the central tenets of both.” NOLAN, *supra* note 4, at 35. In fact, their efforts more often are directed by a “result-oriented preoccupation with ‘what works,’ an experimentalist approach, a skepticism toward foundationalist claims, and a forward-looking instrumentalism.” *Id.* at 36.

151. See Minow & Spelman, *supra* note 35, at 1628 (describing how abstract theories relate to contextual analysis by guiding the definition of categories, which, in turn, affect the focus of inquiry, even if the contextualist is not aware of the influence of these abstract theories).

152. Cf. Braveman, *supra* note 124, at 1021–23 (discussing the benefits of “[a] Cubist-like emphasis on multiple perspectives” and cautioning that “[t]he effort to place a legal problem in a single box—the pigeonholing aspect of legal analysis—hides other possible perspectives and impedes development of an understanding of the complexities of the subject”).

153. Grey, *supra* note 66, at 1590. Such a challenge has been mounted, for example, by Douglas Husak, whose work has employed retributive theory to challenge the core premises of drug treatment courts. Husak, *supra* note 57, at 215–16.

154. Grey, *supra* note 66, at 1590.

155. See *supra* text accompanying notes 98–99.

*A. Mental Illness and Homeless Courts*

To explore how the adoption of pragmatist theory can yield useful insights into the design and operation of problem-solving courts, it is helpful to consider the example of two mental health/homeless courts in Southern California that are described in detail in a recent ethnographic study by Stacy Burns.<sup>156</sup> Professor Burns's careful observational work is part of a broader project in which she and a colleague, Mark Peyrot, have been examining the operation of a number of drug treatment courts and other problem-solving courts.<sup>157</sup> One of the courts discussed by Burns is the "Whatever it Takes (WIT) Court," which enrolls "justice-involved mentally ill clients/defendants who are also homeless or at significant risk of homelessness."<sup>158</sup> The second is a "Homeless Community Court," which targets a similar population of criminal offenders in a nearby California county.<sup>159</sup> Both of these courts exhibit characteristics that are common generally in problem-solving courts. They are staffed by a collaborative "team," made up of a state court judge, individuals from the probation department, the prosecutor's office, and the public defender's office, state mental health officials, and representatives from the treatment community. The teams meet regularly to evaluate candidates for admission, develop individual treatment plans, and monitor the progress of clients. Both courts utilize frequent court appearances at which clients' compliance with program requirements is assessed by the judge, and sanctions and rewards, as appropriate, are ordered. And, both follow the "post-plea" approach, under which defendants are required to enter a guilty plea in order to undertake the court program.<sup>160</sup>

These mental health/homeless courts make available to clients a variety of services, including mental health treatment, substance abuse treatment, housing and government benefits assistance, family counseling, employment counseling, and job training.<sup>161</sup> Clients are required to undergo regu-

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156. See Stacy Lee Burns, *Mental Health/Homeless Courts: 'Treating' Persons with Mental Disorders and Co-Occurring Homelessness in the Criminal Justice System* (June 12, 2012) (unpublished manuscript) (on file with author).

157. See Stacy Lee Burns & Mark Peyrot, *Standardizing Social Problems Solutions: The Case of Court-Supervised Drug Treatment*, in *NEW APPROACHES TO SOCIAL PROBLEMS TREATMENT* 205 (Stacy Lee Burns & Mark Peyrot eds., 2010) (tracing the evolution of treatment of drug offenders and comparing different forms of court-supervised drug treatment); see also Stacy Lee Burns & Mark Peyrot, *Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment*, 37 *J. CONTEMP. ETHNOGRAPHY* 720, 720 (2008) (describing the strategies employed by judges in response to defendant noncompliance in problem-solving courts); Burns & Peyrot, *supra* note 142, at 433–35 (exploring the interactions between drug court judges and defendants that construct the defendant's personal responsibility for his or her rehabilitation).

158. Burns, *supra* note 156, at 7.

159. *Id.*

160. *Id.* at 9.

161. *Id.*

lar drug testing, to participate in mental health and substance abuse treatment, including maintaining medication regimes, and to make regular court appearances.<sup>162</sup>

A crucial feature of both these courts is their approach to defining a participant's "success" or "failure." Like many other therapeutic problem-solving courts, including drug treatment courts, these courts use a combination of rewards and sanctions that the judge, guided by the input of others on the treatment team,<sup>163</sup> determines to be appropriate based upon a client's compliance or noncompliance with the requirements of the program.<sup>164</sup> Unlike many other problem-solving courts, however, the mental health/homeless court judges observed by Professor Burns "embrace a wider range of creative responses to client non-compliance. In practice, these mental health courts exhibit a strong preference for reinforcing and encouraging client engagement, rather than imposing sanctions."<sup>165</sup> Clients who fail to adhere to medication regimes, attend group sessions, or comply with other program requirements may receive admonishments, be required to attend additional treatment sessions, or be ordered to return to court more frequently;<sup>166</sup> but the judges observed by Burns were notably reluctant to utilize jail sanctions as a response to violations of the program's rules.<sup>167</sup>

In part, this hesitancy to impose punitive measures grows out of an acceptance on the part of the judges and others associated with these courts that the goal of the enterprise is not necessarily to wrestle the clients' mental illnesses or substance use disorders into permanent remission,<sup>168</sup> but instead to reduce to some degree the distress and social dysfunction those conditions often produce.<sup>169</sup> This more modest "harm reduction approach"<sup>170</sup> no doubt is a concession to the severity and chronicity of the

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162. *Id.*

163. In her article, *Courting Compliance: Case Managers as "Double Agents" in the Mental Health Court*, Ursula Castellano offers careful ethnographic data to show how case managers in some mental health courts function as "double agents" challenging judges and other criminal justice actors on mental health court teams to respond in less punitive ways to some noncompliant clients while simultaneously working to enforce court rules against the resistance of other participants. See Castellano, *supra* note 45, at 489.

164. Burns, *supra* note 156, at 5.

165. *Id.*

166. *Id.* at 21–22.

167. *Id.* at 13.

168. *Id.* at 22. According to Burns, approximately half of the justice-involved persons with mental illness in California also have a co-occurring drug or alcohol misuse disorder. *Id.*

169. *Id.* at 18 ("Success" is thus construed realistically, such as the client having achieved psychiatric stabilization and housing, or having received the maximum benefit from care.")

170. *Id.* at 5. 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 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, 34–35 (2010) (analyzing the harm



mental disabilities from which clients in these courts typically suffer. For individuals who are homeless or nearly homeless and whose adult lives have been characterized by a repeating cycle of institutionalization, treatment, and release, followed by decline, decompensation, and re-institutionalization, a realistic version of success may in fact be limited to lengthening the period during which they can live safely in the community, maintain stable housing, and engage in productive activity before the next relapse occurs.<sup>171</sup>

In addition, the tendency of these courts, as compared to the approach taken by other problem-solving judges, to respond in a less punitive fashion to non-compliance by clients, and to define successful outcomes in more modest terms, may reflect a shifted perspective as to the moral status of the clients being assessed. Whereas drug treatment courts and many other problem-solving courts retain the dominant criminal justice focus on “assessing individual blame and meting out proportionate punishment,”<sup>172</sup> the mental health/homeless courts studied by Professor Burns premise judgments about their clients’ performance on an understanding that these individuals may not be fully responsible agents.<sup>173</sup> The defendants in other problem-solving courts may struggle with mental illness, alcohol abuse, or other drug problems, but the structure of those court processes assumes that these individuals are capable of making morally significant choices, either to adhere to program requirements or to depart from express rules and clear obligations.<sup>174</sup> The severely mentally disabled clients in Burns’s mental health/homeless courts, by contrast, are understood to be suffering from disabilities that impair reasoning and limit their capacity to exercise the sort of choice that is essential for full moral agency. In these terms, the clients in these courts are not seen as fully blameworthy, and therefore are exempted from a good deal of the judgment and punishment normally associated with failure in other problem-solving courts.

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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).

171. *See* *Boggs v. N.Y.C. Health & Hosp. Corp.*, 523 N.Y.S. 2d 71, 95 (App. Div. 1987) (Milonas, J., dissenting). In *Boggs*, a New York State judge described this pattern, which he terms “revolving door mental health,” in the following fashion: “forcibly institutionalize, forcibly medicate, stabilize, discharge back into the same environment, and then repeat the cycle.” *Id.*; *see also* BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 7* (2005) (analyzing the therapeutic justice model and its effects on chronic patients).

172. Burns, *supra* note 156, at 6.

173. *See id.* (emphasizing the “impaired reasoning and choice of clients”).

174. *See* Burns & Peyrot, *supra* note 142, at 433 (“By both medicalizing and moralizing the problem(s), judges are less interested in particular actions and more so in what the actions reveal about the selves under consideration.”).

Professor Burns analyzes this feature by paying particular attention to the ways in which these mental health/homeless courts “place into context” their clients’ performance.<sup>175</sup> Burns reports:

Rather than blaming the client/defendant in mental health/homeless court for problems and/or conflicts with the treatment program or personnel, as would be typical in drug court . . . a client’s non-compliance in mental health/homeless court is often *placed in context*, with the recognition that the client’s reasoning, free will and decision-making are impaired.<sup>176</sup>

In essence, the choice to adopt a harm-reduction-based solution to the very severe social, medical, and public safety problems presented by clients in mental health/homeless courts reflects the framing provided by a distinct understanding of their moral agency and autonomy that departs considerably from the more conventional criminal justice perspective regarding choice and culpability one ordinarily encounters in other problem-solving courts.<sup>177</sup> The pragmatist notion that one’s perspective influences the identification of “problems” and the selection of appropriate “solutions,”<sup>178</sup> then, is clearly on display in the nature of the problem-solving work undertaken by these courts.

The resistance to harm reduction in most other problem-solving courts in the United States stands in stark contrast to the approach reported by Professor Burns in the mental health/homeless courts she studied, and further suggests the powerful influence of context and perspective on the design and operation of these institutions. In his book, *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement*, James Nolan highlights a dramatic “difference between the U.S. and the other countries as it concerns the salience of defining treatment philosophies.”<sup>179</sup> While drug treatment courts and other problem-solving courts in the United States maintain a stubborn insistence on “total abstinence,”<sup>180</sup> requiring that par-

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175. Burns, *supra* note 156, at 13.

176. *Id.* (emphasis in original).

177. *But cf.* E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 541 (2012). In this article, Professor Johnston argues that, while “society assumes that an individual’s offense reflects his choice to engage in criminal activity . . . [t]he predominant message expressed by mental health courts” is that offenders with mental illness “so lack autonomy and moral agency that they are inappropriate subjects for the traditional criminal justice system.” *Id.* at 540. Others who have studied mental health courts, however, describe a greater ambivalence in many of these problem-solving courts with respect to the agency, and thus responsibility, of the mentally ill offenders who are subject to their jurisdiction. *See, e.g.*, Castellano, *supra* note 45, at 508–11 (detailing the competing approaches to client non-compliance that coexist in mental health courts).

178. *See* Minow & Spelman, *supra* note 35, at 1605 (analyzing how context can change individual perspectives).

179. Nolan, *supra* note 170, at 31.

180. *Id.* at 36 (internal quotation marks omitted).

ticipants remain drug- and alcohol-free for a specified period of time in order to “graduate,”<sup>181</sup> 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.<sup>182</sup> 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.”<sup>183</sup> 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 have reduced their use of marijuana to move forward in the program, even if they are not reliably and totally abstinent.<sup>184</sup> 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.<sup>185</sup> 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.”<sup>186</sup> 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.<sup>187</sup>

A persistent pejorative moral stance in the United States toward drug misuse, and a corresponding drug policy centered almost entirely on criminal prohibition and enforcement, has led to an approach in which persons

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181. *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).

182. 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).

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

184. See Nolan, *supra* note 170, at 45 (quoting Natasha Bakht and Paul Bentley).

185. See *id.* at 44 (detailing the development of drug treatment and testing orders in Britain). For additional discussion of DTTOs, see Boldt, *supra* note 140, at 324–25 (describing the basic features of DTTOs).

186. Nolan, *supra* note 170, at 44.

187. *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).

with drug use disorders “are forced or frightened into treatment programs and threatened into abstinence during and after treatment.”<sup>188</sup> In the United Kingdom, by contrast, “[t]he whole harm reduction philosophy has dominated . . . drug policy for a long time”<sup>189</sup> because the problem of drug misuse has been framed more as a public health problem requiring medical management than as a criminal justice problem calling for enforcement, blame, and punishment.<sup>190</sup>

This sharp divergence of perspectives is especially apparent in the respective approaches of United States and United Kingdom problem-solving courts toward the use of pharmacotherapies (especially drug maintenance therapies) for the treatment of drug use disorders. The position of a majority of U.S. drug treatment courts has been to reject the use of methadone maintenance and other drug-maintenance therapies, on the grounds that such a pharmacological approach would merely replace one drug of addiction with another, thus frustrating the underlying objective of moving participants to abstinence.<sup>191</sup> In the problem-solving courts in Great Britain, Ireland, Australia, and Canada studied by Nolan, however, methadone treatment and other pharmacotherapies are a primary means by which participants with drug use disorders are managed.<sup>192</sup> To be sure, drug policy in all of the western cultures under consideration is informed by an overarching moral disapproval of drug misuse, but this disapprobation has for many years assumed a far more prominent role in driving the formation of public policy in the United States than it has in Great Britain and the other countries that have experimented with problem-solving courts as a response to drug and alcohol problems.<sup>193</sup> Consequently, the notion that dependence on

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188. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 11–12 (1992).

189. Nolan, *supra* note 170, at 44 (quoting Paul Hayes, Chief Probation Officer of the South-east London Probation Service) (alterations in original).

190. *See* Boldt, *supra* note 140, at 262–63 (describing history in the United Kingdom of treating drug misuse as a medical problem, but noting the partial convergence of British and U.S. policy in recent years).

191. *See* Nolan, *supra* note 170, at 36–37 (stating that use of methadone maintenance in U.S. drug treatment courts is “rare”). Notwithstanding the strong opposition in most problem-solving courts to the use of pharmacotherapies to manage participants’ drug addiction, mental health courts in general and the mental health/homeless courts studied by Burns in particular place a great emphasis on monitoring the participants’ adherence to medication regimes designed to manage their chronic mental illnesses. *See* Burns, *supra* note 156, at 5. Many of these individuals also suffer from co-occurring drug and alcohol misuse disorders, and consequently there may simultaneously be both an encouragement of pharmacotherapies for mental illness and a resistance to chemotherapies for addiction.

192. *See* Nolan, *supra* note 170, at 36 (stating that “[a] central treatment practice in many programs outside of the U.S. is the prescription of a maintenance drug, such as methadone or naltrexone”).

193. *See* Boldt, *supra* note 140, at 265–91, 309–37 (setting out the divergent moral, legal, and political histories of the United States and the United Kingdom with respect to drug policy).

a therapeutic maintenance drug might be morally problematic remains coherent within the context of the cultural, political, and legal background toward drug misuse that continues to define public policy in the United States, while a public health harm-minimization model in place in the United Kingdom and elsewhere makes that sort of moral assessment relatively incoherent.<sup>194</sup>

The perspective that governs the management of defendants in Burns's mental health/homeless courts has more in common with the point of view prevailing in the United Kingdom than with that which predominates in most problem-solving courts in the United States. Not only does this perspective support a harm-minimization approach to defining the goals of the enterprise generally, it also frames the way in which particular facts about the defendants' performance come to be understood. Thus, instead of defaulting to a presumption that a client's non-compliance with treatment must be due to his or her willful resistance to clear obligations (therefore representing a moral failing), these courts are more likely to recognize that non-compliance may be the result of a poor fit between the needs of a client and the features of the particular treatment program to which he or she had been assigned.<sup>195</sup> Viewed in this fashion, an understanding of the capacity of these courts to "place[] in context"<sup>196</sup> participants' behavior as they seek to navigate the problem-solving model—that is, to view that conduct as the product of a broad range of factors, some of which are not within their direct control—may help to stimulate the consideration of a reframed model for other problem-solving courts as well.<sup>197</sup> Under this revised model, the tendency to construct participants who fail to adhere to the program as mor-

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194. Nolan summarizes the point as follows:

As in Scotland, Ireland, Canada, and Australia, methadone maintenance is often a main staple of the treatment program associated with England's drug court and drug court-like programs. Such an orientation is attributable in no small measure to Britain's particular history of drug control, in which doctors have played a more central role, and where providing maintenance drugs for the 'stable addict' has been a more common practice.

Nolan, *supra* note 170, at 39–40.

195. See Burns, *supra* note 156, at 13–14 (“[C]lient’s non-compliance is attributed to a lack of ‘fit’ between the client and the particular treatment or treatment provider.”); see also Richard C. Boldt, *Evaluating Histories of Substance Abuse in Cases Involving the Termination of Parental Rights*, 3 J. HEALTH CARE L. & POL’Y 135, 140 (1999) (“What generally goes begging . . . [in parental termination cases based upon a parent’s failure at drug treatment] is any meaningful information about the kind or kinds of ‘treatment’ that were offered, and whether this ‘treatment’ was appropriate given the particular characteristics of the parent’s disease.”).

196. Burns, *supra* note 156, at 13.

197. In assessing the moral agency of defendants in mental health court, it is worth considering that, even if their problematic behaviors may not be the direct result of their mental illnesses, these individuals “may be as blameless for the generation of their criminogenic needs [associated with those illnesses] as for their illnesses [considered alone].” Johnston, *supra* note 177, at 576.

ally deficient is moderated, thereby permitting dispositions for struggling clients that avoid more punitive sanctions.<sup>198</sup> In addition, the model embraces the possibility that intermediate outcomes short of total abstinence or permanent remission can be a productive result and not necessarily a failure, thus moving these courts toward a harm-minimization approach similar to that which guides practice in other western countries.<sup>199</sup>

Typically, mental health courts in the United States assert two rather straightforward premises underlying their efforts to link therapeutic services to criminal case management. The first premise is that there is a direct causal relationship between mental illness and criminal conduct.<sup>200</sup> 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).<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> A second

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198. *See id.* at 575–76 (asserting that inviting these offenders to participate in mental health courts may serve “to address their criminogenic needs as well as to provide mental health treatment”).

199. *See supra* text accompanying notes 180–182.

200. *See Johnston, supra* note 177, at 552 (“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.”).

201. 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.” *Id.* at 551.

202. *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.”). This direct causal account, in turn, is similar to the perspective that has guided the operation of most drug treatment courts in the United States since they first appeared in 1989. In the context of drug treatment courts, this perspective describes the relationship between drug addiction and criminal conduct as causal, and asserts that effective substance abuse treatment leads to reduced criminal recidivism. *See* J. Scott Sanford & Bruce A. Arrigo, *Lifting the Cover on Drug Courts: Evaluation Findings and Policy Concerns*, 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 239, 251 (2005) (discussing recidivism studies suggesting that “successful graduates of the [drug court] program are less likely to reoffend and, thus, less likely to be reconvicted and incarcerated”). In fact, “[t]he correlation is complex, as there are a number of ‘predisposing’ factors that are common both to substance abuse and to criminal involvement.” Boldt, *supra* note 50, at 45 (citing Candido Da Agra, *The Complex Structures, Processes and Meanings of the Drug/Crime Relationship*, in DRUGS AND CRIME DEVIANT PATHWAYS 9 (Serge Brochu et al. eds., 2002)).

203. One group of researchers reported that only about ten percent of offenders with mental illness engage in criminal conduct 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

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.<sup>204</sup> 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.<sup>205</sup> A third category is made up of offenders who suffer both from mental illnesses and co-occurring substance use disorders and/or personality disorders.<sup>206</sup> Here 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.<sup>207</sup>

The alternative perspective that informs practice in Burns's mental health/homeless courts is consistent with this more nuanced understanding of the complex associations among mental illness, social and economic dislocation, and criminal system involvement. In effect, 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.<sup>208</sup> Understood in this fashion, while mental illness *simpliciter* 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 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.<sup>209</sup>

Because mental illness does not hold a simple, causal relationship with criminality (the first premise typically advocated by mental health court advocates), medication management and other treatment interventions target-

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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%)").

204. Johnston, *supra* note 177, at 560.

205. *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.

206. *Id.* at 560.

207. *See id.* (discussing and citing 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)).

208. *See* Skeem et al., *supra* note 203, at 116-18 (identifying evidence "that major predictors of violence and recidivism are not unique to offenders with mental illness, but instead shared with general offenders").

209. *See* Johnston, *supra* note 177, 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.").

ing participants' mental illness, taken in isolation, are unlikely to produce robust and sustainable reductions in recidivism (the second premise).<sup>210</sup> 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 individuals.<sup>211</sup> 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.<sup>212</sup>

In order to make sense of the contrast between Burns's "Whatever It Takes Court" and other problem-solving courts that offer more punitive responses to noncompliant clients, it is good to recall the essential features of pragmatist theory identified earlier. Pragmatism, in Richard Posner's conception, is distrustful of essentialist thinking, centered on the consequentiality of ideas, and committed to evaluating practices by reference "to social or other human needs rather than to 'objective,' 'impersonal' criteria."<sup>213</sup> In John Dewey's terms, pragmatist theory provides principles to direct social practices, including the operation of legal institutions, by grounding decisions in carefully formulated "ends-in-view."<sup>214</sup> Fundamental choices faced by all problem-solving courts with respect to the nature of the problems they address and the definitions of success and failure that govern their practice "cannot be done once for all," but must "be done, and done over

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210. See Skeem et al., *supra* note 203, 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 177, at 573 ("[T]he provision of mental health treatment alone is not an effective strategy for reducing the recidivism of offenders with mental illnesses.").

211. See Skeem et al., *supra* note 203, at 121 (finding that "the effectiveness of correctional programs in reducing recidivism is positively associated with the number of criminogenic needs they target").

212. 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 177, at 576–77.

213. Posner, *supra* note 35, at 1660–61.

214. DEWEY, *supra* note 101, at 220.



and over and over again, in terms of the conditions of concrete situations as they arise.”<sup>215</sup>

Decisionmakers with responsibility for shaping practice in problem-solving courts, who wish to exploit the potential of pragmatist theory, should explore the divergent perspectives of stakeholders in the process of developing their respective ends-in-view, and should then proceed on the basis of a plan designed to accomplish those identified ends-in-view. Officials in charge of a particular drug treatment court, mental health court, or domestic violence court should be committed to formulating such principles for practice based on their best assessment of what would be most likely to serve the “social or other human needs” of persons affected by their court. But the plan once formulated cannot be the end of the story. Effective moral judgment, explained Dewey, requires that the consequences of one’s choices must be examined and the ends-in-view revised, so that ongoing practice reflects the learning derived from the data of prior experience.<sup>216</sup> It may be that the approach to working with chronic mentally ill homeless clients adopted by the problem-solving courts described by Burns will not fit perfectly the needs of clients and other stakeholders in other problem-solving courts, but attention to this alternative does force into the open an expanded array of ends-in-view that thoughtful planners ought to consider. Pragmatist theory encourages such a process of consideration, mindful always of the important role that perspective and context play in shaping decision-makers’ understandings of the relevance of the information they evaluate.<sup>217</sup>

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215. *Id.* at 212.

216. In some respects this process is consistent with the “democratic experimentalism” urged by Michael Dorf and Charles Sabel. *See generally* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 834 n.3 (2000) (discussing democratic experimentalism’s decentralized approach). Dorf and Sabel’s idea is that “[d]emocratic experimentalism takes place through the pooling of information among individuals from different professions and social positions so as to encourage continuous learning and self-correcting from all perspectives. These internal negotiations permit a new consensus to emerge in relation to an overall goal.” Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1576 (2003). Dorf and Sabel’s suggestion that democratic experimentalism well describes interactions in operating drug treatment courts or other problem-solving courts seems “overly optimistic.” *Id.* at 1580. It “assumes a general consensus about the existence and nature of [the] problem” and “thus assume[s] away much of the normative content” involved in framing the work of these enterprises. David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 553–54 (2008). In addition, in the absence of a conscious decision by those involved in these problem-solving projects with the most political and social power to adopt something like a pragmatist theoretical methodology, this kind of internal democratic negotiation is unlikely to occur. *See id.*

217. *See* Sanford & Arrigo, *supra* note 202, at 248 (explaining how drug court outcomes rely heavily on “the informed and integrated process of the drug court management team”).

*B. The Red Hook Community Justice Center*

Attention to context and perspective is important in assessing problem-solving courts other than drug treatment courts and mental health courts.<sup>218</sup> Community courts are one well-established variation on the problem-solving court model,<sup>219</sup> and the well-publicized community court located in Red Hook, New York, is an especially prominent example of this category.<sup>220</sup> Community courts are an unusual manifestation of the problem-solving courts methodology in that they combine the promise of community development (and consequently evoke a consideration of restorative justice) and individual rehabilitation (thereby creating an association with therapeutic jurisprudence).<sup>221</sup> Although community courts vary considerably along a number of dimensions,<sup>222</sup> one common feature that tends to distinguish these undertakings from most other problem-solving courts is their adoption of either an actual or aspirational goal of involving the community, however defined, in the process by which the court's agenda, priorities, and prac-

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218. AUBREY FOX, CTR. FOR CT. INNOVATION, *A TALE OF THREE CITIES: DRUGS, COURTS, AND COMMUNITY JUSTICE 2* (2010) (describing the development of the problem-solving court movement beyond drug courts).

219. For an early and influential discussion of community courts, see David B. Rottman, *Community Courts: Prospects and Limits*, 231 NAT'L INST. JUST. J. 46, 46 (1996) (claiming that community courts are part of the country's judicial history and that they are on the rise). For a more recent account, see FOX, *supra* note 218, at 2 (reporting that over forty community courts now operate in the nation or are being planned).

220. See Greg Berman & Aubrey Fox, *From the Benches and Trenches: Justice in Red Hook*, 26 JUST. SYS. J. 77, 77 (2005) (describing the origins of the Red Hook Community Justice Center). In 2009, the National Institute of Justice funded a comprehensive evaluation of the Red Hook Community Justice Center. This evaluation, which was conducted by the National Center for State Courts in partnership with the Center for Court Innovation and the John Jay College of Criminal Justice, provides a detailed description of the Red Hook Community Court. The report of this evaluation was published in September of 2013. See CYNTHIA G. LEE ET AL., NAT'L CTR. FOR ST. CTS., *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER (FINAL REPORT)* 4–9 (2013) (describing the Red Hook Community Justice Center through a focus on its principles of deterrence, intervention, and legitimacy). The prominence of the Red Hook project has been due in significant part, no doubt, to its sponsorship by the Center for Court Innovation. See Fagan & Malkin, *supra* note 34, at 915–16 (explaining the Center for Court Innovation's choice to sponsor the Red Hook Community Justice Center). The Center for Court Innovation is a public-private partnership established in 1996 by the New York State Unified Court System and the Fund for New York City, "to promote new thinking about how the justice system can respond more effectively to chronic problems like addiction, delinquency, child neglect, domestic violence, and truancy." Nancy L. Fishman, *Reducing Juvenile Detention: Notes from an Experiment on Staten Island*, 56 N.Y.L. SCH. L. REV. 1475, 1484 (2012).

221. See Fagan & Malkin, *supra* note 34, at 906–07 (discussing the emphasis community courts place on helping the whole community through their sanctions and assisting individual offenders through tailored treatment programs).

222. See Malkin, *supra* note 216, at 1574 (noting that community courts constitute "an amorphous group" with "a wide variety of operational models").

tices are identified and/or formulated.<sup>223</sup> In one respect, these courts are understood as “community courts” because they are community located; that is, they are situated physically in a particular neighborhood or geographical community. More broadly, they can be said to be “community courts” to the extent that they rely on various actors in their relevant communities to provide crucial information that otherwise might not find its way into the operation of the criminal justice system.<sup>224</sup> Most expansively, these courts can be characterized as “community courts” if the communities in which they are located are accorded significant authority (and responsibility) for framing the problems to be addressed and identifying the solutions to be effectuated.<sup>225</sup>

In the case of the Red Hook Community Justice Center, the community has served as the location for the court and as a source of information, but has not consistently exercised significant authority in determining the fundamental design of the project.<sup>226</sup> From the start, the proponents of the Red Hook Court identified community development as a key goal for the day-to-day operation of the court.<sup>227</sup> All the same, there has been “no clear mandate for what role the community should play either in the formulation of the problem to be solved or in the strategies and policies chosen to address these goals.”<sup>228</sup> Project officials have periodically held meetings of a

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223. See ERIC LEE, U.S. DEP’T OF JUST., CMTY. JUST. SERIES, COMMUNITY COURTS: AN EVOLVING MODEL 5, 5 (2000) (explaining how community courts are shaped around the problems of particular communities); Malkin, *supra* note 19, at 142–45 (describing how, in theory, community courts’ programs shift in accordance with community members’ concerns, and how the community is viewed as a participant in the courts’ processes).

224. See Malkin, *supra* note 19, at 144–45 (explaining how community feedback about community courts’ programs may provide important information to the courts to help them design and administer their programs).

225. The Center for Court Innovation’s *Principles of Problem-Solving Justice* include the principles of “[e]nhanced [i]nformation,” which subsumes “knowledge about the community context of crime[,]” and “[c]ommunity [e]ngagement[,]” which focuses on the “important role” that citizens and neighborhood groups have “in helping the justice system identify, prioritize, and solve local problems.” WOLF, *supra* note 5, at 2–5.

226. As Malkin concludes:

My observations demonstrate that the court’s physical integration into the community informs the court about local issues, and encourages community participation and community input, all of which have an impact on courtroom operations. But I also show that while a court and community may agree in their diagnoses of the primary problem, their proposed solutions often diverge considerably.

Malkin, *supra* note 216, at 1578; see also Malkin, *supra* note 19, at 144–45 (noting that, with respect to the Red Hook Court, “community participation did not translate into community authority or power and should not be mistaken for this as was frequently the assumption in popular rhetoric”).

227. See Fagan & Malkin, *supra* note 34, at 924–25 (reporting that community leaders sought a community development role for the Red Hook Court through provision of special programs and social services).

228. Malkin, *supra* note 19, at 144.

“Community Advisory Board,” at which information about the court and its programs has been conveyed to attendees and feedback from members of the community elicited.<sup>229</sup> Significantly, however, these “interactions with the community were focused more on building consensus and support for the court than as a mechanism meant to lead to more power sharing or devise common goals.”<sup>230</sup> As a consequence, “community participation did not translate into community authority or power.”<sup>231</sup>

As Victoria Malkin has pointed out, a true “participatory model” requires a decisionmaking process in which “goals and/or strategies are decided together through a deliberative process between different groups.”<sup>232</sup> For a community court to be participatory in this sense, it would have to extend to the community (or effective representatives of various community interests) “both the authority and the flexibility to change certain taken-for-granted ways of doing things.”<sup>233</sup> Voices from the community, in short, would have to have the capacity to “reset [the] agenda” in a fashion consistent with identified consensus goals.<sup>234</sup> This sort of participatory structure is a central feature of Deweyan pragmatist democratic theory, and characterizes John Dewey’s work on democratic institutions.<sup>235</sup> Inherent in this vision of practice is an obligation to design institutions and social and political processes that facilitate the gathering of data from a variety of stakeholders, so that ongoing decisionmaking reflects the lessons derived from those participating in and impacted by these institutions.<sup>236</sup>

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229. *Id.* (explaining how the Community Advisory Board held meetings, on a quarterly basis when possible, to inform the community about its programs and receive feedback).

230. *Id.* It is clear that these consensus-building efforts have succeeded in gaining local support for the project. The Center for Court Innovation reports that “in a recent door-to-door survey of more than 600 local residents, 94 percent said they approved of the community court in their neighborhood.” FOX, *supra* note 218, at 5. The recently released evaluation of the Red Hook Community Court reports that “the Justice Center [has been successful] in integrating itself into the fabric of the Red Hook community,” and that the Justice Center “is viewed by Red Hook residents as a community institution belonging to the neighborhood itself, not as an outpost of city government placed there by policymakers with little understanding of the community’s needs and priorities.” LEE ET AL., *supra* note 220, at 65, 182. Although gaining this sort of support is important to the success of the project, and likely reflects sincere efforts to engage various stakeholders in the community, “community court processes are still subject to the realities of power. Accordingly, some individuals exert more influence over the ‘consensus’ reached than others for political, structural, economic and cultural reasons.” Malkin, *supra* note 216, at 1580.

231. Malkin, *supra* note 19, at 144–45.

232. *Id.* at 145.

233. *Id.*

234. *Id.*

235. See WESTBROOK, *supra* note 85, at 433 (“All those who are affected by social institutions must have a share in producing and managing them[.]” (internal quotation marks omitted)).

236. See *id.* (discussing the importance to Dewey of individuals’ influence in shaping the institutions that regulate them); see also Boldt, *supra* note 35, at 48–50 (describing Deweyan liberty

Pragmatism's anti-essentialism and contextualism place great emphasis on perspective, the conscious and unconscious lenses through which decisionmakers address the work of moral and political judgment.<sup>237</sup> These judgments necessarily depend on an evaluation of experiential data which, in turn, is sorted, filtered, and assembled into coherent narratives based on the decisionmakers' location within the social, cultural, and physical environments in which they operate.<sup>238</sup> Given the absence of any essential *a priori* foundations for decision, pragmatist theory places a heavy emphasis on the question of who the decisionmakers will be and what the experiential basis is for their exercise of discretion. The process by which important decisions are reached, which includes a consideration of who the decisionmakers are and how they entertain each other's perspectives, therefore is as important as the substance of the decisions themselves.<sup>239</sup> Indeed, pragmatism's anti-essentialist and contextualist premises contemplate that the process and the substance of decisionmaking are not distinct considerations, but rather are integrated components of the enterprise of making moral and political judgments.<sup>240</sup>

Perhaps the most fundamental decision with respect to the design and operation of the Red Hook Community Court has concerned the selection of a vantage point—on a continuum extending from broad, community-wide challenges at one end to individual troubles at the other—from which to

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as requiring a deep level of participation by citizens in governing their social institutions). In the case of the Red Hook project:

During the planning process, the Justice Center's planners sought out the perspective of all segments of the community—not just influential community leaders—in a series of focus groups. Before the court began hearing cases, the Youth Court and the Red Hook Public Safety Corps were established as concrete responses to two areas of community concerns: jobs and a lack of positive development opportunities for youth. The court's handling of housing disputes between residents of public housing and the New York City's Housing Authority helped to establish the court's reputation as a resource for solving community problems. Numerous other community and youth programs, from the court's involvement in cleaning up a nearby park to its summer internship program for youth, further integrate the court into the fabric of the community.

CYNTHIA G. LEE ET AL., NAT'L CTR. FOR ST. CTS., *A COMMUNITY COURT GROWS IN BROOKLYN: A COMPREHENSIVE EVALUATION OF THE RED HOOK COMMUNITY JUSTICE CENTER* (EXECUTIVE SUMMARY) 10 (2013).

237. One of the core assumptions of essentialist thought challenged by pragmatist theory is that there is a clear distinction between objective knowledge and subjective understanding. See Minow & Spelman, *supra* note 35, at 1620 (noting how contextualist theories challenge the objectivity/subjectivity duality, and remain cognizant of the context-influenced perspectives of the producers of texts).

238. See *id.* at 1628 (“[T]he contextualist uses categories to select which particular details matter.”).

239. See JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 45 (1963) (arguing that social inquiry is not outside of social processes, and that conclusions should reflect this fact).

240. See Boldt, *supra* note 35, at 44 (suggesting that Deweyan thought evades the process-substance dualism).

frame the problems selected for attention.<sup>241</sup> Those associated with this project have suggested from its inception that shared problems confronting the community as a whole, including the effects of persistent economic and social disinvestment, would be as salient and entitled to as much attention in the problem-solving agenda as the problems of individual pathology (most prominently drug use disorders) plaguing many of the individual offenders brought before the court.<sup>242</sup> To be sure, the challenges faced by the community as a whole and the difficulties experienced by distinct individuals in that community are not separate pathologies; rather, they are by necessity interconnected problems.<sup>243</sup> The choice of where on this spectrum to focus the resources of this community-based problem-solving enterprise, however, is nonetheless a consequential decision that shapes the very nature of its daily activities.<sup>244</sup> This foundational decision conceivably could be negotiated (and re-negotiated over time as experience informs ongoing practice) by community representatives accorded a meaningful role in the development of this project.<sup>245</sup> Instead, law enforcement officials, court administration personnel, the judge, lawyers, and probation, parole and human services professionals associated with the Red Hook project have, to a significant degree, driven the planning and operation of the court.<sup>246</sup> These actors have pursued this work according to a set of perspectives that are distinct from those that shape the understanding of many community members, and that derive from professional and institutional backgrounds far removed from the neighborhood in Red Hook, Brooklyn, where this court is physically located.<sup>247</sup>

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241. See Malkin, *supra* note 19, at 154–55 (explaining the difference between collective action and action focused on the individual).

242. See Berman & Fox, *supra* note 220, at 81–83 (describing the various programs associated with the Red Hook Justice Center).

243. See Malkin, *supra* note 19, at 148 (describing how individual actions before the court were used to address quality of life problems for the community).

244. See *id.* (listing the types of cases heard by the court).

245. See *id.* at 144–45 (hypothesizing the possible role of the community).

246. See *id.* at 145 (criticizing the court's lack of autonomy, which would have permitted it more effectively to share authority with the community).

247. Red Hook is a waterfront neighborhood situated at the tip of a peninsula between Buttermilk Channel and the Gowanus Canal in the southern part of Brooklyn, New York. Robin L. Wachen, *The Future of Red Hook, Brooklyn: Learning From Evolving New York City Neighborhoods* 84 (June 1, 2012) (unpublished thesis, California Polytechnic State University, San Luis Obispo), available at <http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1820&context=theses>. It is cut off from the rest of Brooklyn by two major highways. *Id.* At one time a busy shipping center, the neighborhood “was home to dockworkers and their families who lived in tenements, row houses, brick townhouses, and a 39-acre public housing complex . . .” *Id.* at 85 (citation omitted). According to the 2010 census, nearly seventy percent of the residents in Red Hook live in the public housing complex, the largest in Brooklyn, called Red Hook Houses. *Id.* at 86, 99. Roughly one-third of the men and women of Red Hook in the labor force are unemployed. Avi Brisman, *Fictionalized Criminal Law and Youth Legal Consciousness*, 55 N.Y.L. SCH. L.

According to Richard Rorty, a pragmatist approach to political and moral judgment “emphasizes the utility of narratives and vocabularies rather than the objectivity of laws and theories.”<sup>248</sup> A narrative functions as a coherent account of a history, a present circumstance calling for action, or a future expected to unfold that is developed by individuals or groups in light of their perspectives and their social, economic, and political positions.<sup>249</sup> The narrative animating decisionmaking with respect to the Red Hook Community Justice Center reflects the perspectives and understandings of the project’s developers and professional agents.<sup>250</sup> Other narratives, however, are also present in the Red Hook community, and, if they were to shape the field of vision of decisionmakers, presumably would yield a somewhat different institutional structure and a somewhat different practice.<sup>251</sup>

The narrative that has dominated practice in the Red Hook court is centered on the concept of “quality-of-life” and on the corrosive effect that certain crimes work on the health of a community.<sup>252</sup> This narrative links the decline in Red Hook and other similar urban communities in the United States in the last quarter of the twentieth century to the aggregate effects of widespread substance misuse, street crime, and dysfunctional families.<sup>253</sup>

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REV. 1039, 1048 (2011). Over sixty percent of families in the neighborhood with children reported incomes below the federal poverty line. *Id.* In the early 1990s, the New York artists’ community began to establish a presence in Red Hook, as the Brooklyn Waterfront Artists Coalition began staging art exhibits and artists moved into the neighborhood seeking inexpensive studio and residential space. Wachen, *supra*, at 103. In the late 1990s, some New York real estate experts predicted that Red Hook would soon experience the sort of gentrification that has been seen in Williamsburg and elsewhere in Brooklyn. *Id.* at 19. By and large, this development has not occurred, probably because the neighborhood is “isolated from the rest of Brooklyn by highways, and [has] few public transportation options . . .” *Id.* Nevertheless, some small condominium development and other signs of economic recovery have been apparent in the neighborhood in recent years. Joseph De Avila, *Pluses and Minuses of Red Hook’s Seclusion*, WALL ST. J. (Nov. 6, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748703805704575594343891065062>.

248. Richard Rorty, *Method, Social Science, Social Hope*, in CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972–1980) 195 (1982).

249. See Carrie Menkel-Meadow, *The Power of Narrative in Empathetic Learning: Post-Modernism and the Stories of Law*, 2 UCLA WOMEN’S L.J. 287, 304–07 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991), and urging use of a narrative).

250. See Malkin, *supra* note 19, at 144–45 (emphasizing how the Justice Center’s developers shaped the program).

251. See *id.* at 152 (describing the way Red Hook community members envisioned the court).

252. See *id.* at 151, 154–55 (describing how the Red Hook Justice Center has approached quality-of-life crimes).

253. See *id.* at 145–47 (relaying the history of crime and urban decay in the United States). Further, as Robin Wachen describes, “[t]he rampant presence of drugs and crime in the neighborhood since the 1980s has been widely reported in the media, including a nine-page article in *Life*

Although broad societal changes, including economic restructuring and the resulting loss of working-class jobs, white flight, and the re-segregation of public schools, have been associated with these problems,<sup>254</sup> the “quality of life narrative” places primary emphasis on public disorder, on low-level individual street crime, as the most salient issue to be addressed.<sup>255</sup> Individual problems such as alcohol and other drug misuse that are thought to contribute to street crime and public disorder, and the consequent diminishing quality of life, are therefore made a centerpiece of public policy initiatives designed to promote the development of healthy urban communities.<sup>256</sup>

The “Broken Windows” theory of crime control, adopted by New York Mayor Rudolph Giuliani in the mid-1990s, reflects the essential power of this narrative.<sup>257</sup> According to the “Broken Windows” theory, small instances of public disorder, including panhandling, loitering, and public substance use, contribute to a more general decline in social control and foster more serious violence and social dislocation.<sup>258</sup> In response, intensive police attention to low-level offenses is deployed in order to stabilize public spaces and encourage social cohesion.<sup>259</sup> As applied in the community court context, the promise of vigorous community policing was coupled with the notion that “many people who commit crimes of particularized concern in the court’s local space can be rehabilitated, and that once rehabilitated, those people who are residents or victims can exert a form of informal social control that will ultimately reduce crime.”<sup>260</sup> Importantly, this model of community policing coupled with community court processing of the resulting criminal cases rested on the assumption “that fear of

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magazine published in July 1988 entitled “Crack: Downfall of a Neighborhood.” Wachen, *supra* note 247, at 87.

254. Robin Wachen has succinctly recounted the striking decline of Red Hook:

By the 1980s, the neighborhood had become desolate and poor with few employment opportunities . . . . In 1985, the Todd Shipyards closed down, which had provided employment opportunities since the 1860s . . . . The closure further limited local employment opportunities . . . .

Gunfire became a common occurrence in the neighborhood in the 1990s and was a constant concern for residents living in public housing.

Wachen, *supra* note 247, at 101 (citations omitted).

255. See Malkin, *supra* note 19, at 146–47 (describing New York City’s approach to quality-of-life policing).

256. See *id.* at 146 (detailing how individual crimes such as fare hopping were thought to contribute to larger crimes and the decline of neighborhoods).

257. See *id.* at 146–47 (analyzing “Broken Windows”).

258. *Id.* at 146.

259. See *id.* at 146–47 (explaining that police had previously not acted on low-level offenses); see also Malkin, *supra* note 216, at 1574 (“The so-called ‘broken windows’ theory links disorder and crime prevention by arguing that signs of social disorder encourage crime and should be managed through coercive social control (policing and the law).”).

260. Fagan & Malkin, *supra* note 34, at 909.



the legal system does not promote compliance in neighborhoods with high crime rates. Social ties among citizens and their dynamic expressions of social control contribute in separate and different ways from legal control to produce lower crime rates.”<sup>261</sup>

The adoption of the “Broken Windows” approach to policing, however, when coupled with a pre-existing set of legal and public policy commitments to fighting a “war on drugs,” ultimately led to a significant increase in the number of arrests, often for relatively minor offenses, in Red Hook and throughout distressed communities in New York City.<sup>262</sup> Court planners in Red Hook “had not anticipated such high numbers of drug arrests,” but when confronted with this reality met the influx of arrested individuals by adopting a drug treatment court model.<sup>263</sup> Pursuant to this model, and given the exigencies of the situation, the court became “more concerned with placing defendants into therapeutic groups” than with providing community services.<sup>264</sup> Meanwhile, “[c]ommunity residents’ expectations that a wide range of services would be available on site became increasingly less of a reality as the Court drifted toward a structural and jurisprudential model already established in other treatment courts.”<sup>265</sup>

In contrast to the quality-of-life narrative that has framed the planning and operation of the Red Hook court, some in this community have understood the challenges they face within the context of a different narrative that places “larger social structural problems” rather than individual behaviors at the center of the story.<sup>266</sup> Where the former narrative depicts quality-of-life violations such as public urination or the possession of an open alcohol container as acts of individual wrongdoing that contribute to broader social disorganization, the latter narrative unsettles that causal account and locates

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261. *Id.* (citations omitted).

262. *See id.* at 925 (“The Court caseloads were dominated . . . by drug arrests made from trespass sweeps taking place in Red Hook public housing and elsewhere . . .”).

263. *Id.* at 926.

264. *Id.* Aubrey Fox, Director for Special Projects at the Center for Court Innovation, has conceded that “the Red Hook Community Justice Center operates much like a drug court.” FOX, *supra* note 218, at 2. He goes on to argue, however, that:

Red Hook differs from the drug court model [in] some crucial ways. It has a broader caseload (many of the offenders at Red Hook are not drug-addicted) and its community location allows it to get involved in a range of crime prevention activities that are beyond the scope of the typical drug court.

*Id.*

265. Fagan & Malkin, *supra* note 34, at 927. This is not to suggest that the goal of providing community services beyond the court function was abandoned. The Red Hook Community Court does serve as a community center offering a range of programs and services. These programs include (or have included in the past) a youth court, a teen leadership and community organizing program, a police-teen theater project, a GED program, an AmeriCorps program, and a youth baseball league. Brisman, *supra* note 247, at 1048–49.

266. Malkin, *supra* note 19, at 150–51.

these individual events within a story primarily about inadequate (and declining) public resources, unacknowledged (and often unconscious) class and race bias in law enforcement practices, and the collapse of an effective economic infrastructure in some portions of urban America.<sup>267</sup> Where the former narrative emphasizes the ways in which disruptive individuals contribute to neighborhood decline, the alternative narrative highlights a more systematic failure of community institutions and the consequent absence of civic engagement, as well as the corrosive effects on families and neighborhoods of a frayed social safety net and an invasive and misdirected criminal enforcement system.<sup>268</sup>

These competing narratives, and, presumably, others, have coexisted within the shared social and political space within which the Red Hook Community Court project has operated. In the absence of a systematic theory of decisionmaking, however, the divergent frames of reference offered by each have not been made readily apparent, and the differing policy choices likely to result from the selection of one perspective or another have not been entertained with full awareness.<sup>269</sup> The analytic force of Emerson and Messinger's work on the *Micro-Politics of Trouble* presses this point into focus and makes clear the consequences of constructing "problem-solving" processes without sufficient attention to how context and perspective, the essential features of pragmatist theory, organize our understanding of problems and their respective solutions.<sup>270</sup>

The starting point for Emerson and Messinger is their recognition that the process by which a problem, or "trouble" in their terms, comes to be understood and responded to is dynamic and interactive, rather than focused on fixed and stable phenomena.<sup>271</sup> In their account:

A difficulty arises, a remedy is sought and applied; it works temporarily or not at all; then some new remedy is sought. The

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267. See *id.* at 154–55; see also Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 90 (2002) (critiquing the community court approach).

268. See Malkin, *supra* note 19, at 155 (comparing generally an individual-focused approach and a collective approach).

269. Fagan & Malkin, *supra* note 34, at 910 n.61 ("While writers . . . see these courts as focusing on quality-of-life issues that nag communities and invite more serious crime, this is a limited perspective that fails to establish a comparative advantage for community courts. To truly depart from regular court parts, drug treatment courts, or other specialized parts, community courts have to be focused on a specific location and guided by the partnerships formed with individuals and groups in this space.").

270. See Emerson & Messinger, *supra* note 36, at 125 (describing as complicating factors the "partial and retrospective character of troubles and accounts of their development" and noting that "[p]articular versions of what the trouble is, how it arose, and what was done in response, are likely to be highly partisan and hotly contested").

271. See *id.* at 128 (referring to this as "the negotiated (rather than intrinsic) nature of problems").

result tends to be a recurring cycle of trouble . . . . As a consequence of these processes, the trouble is progressively elaborated, analyzed, and specified as to type and cause—‘organized’ to use the term Balint . . . has applied to the early stages of illness.<sup>272</sup>

Moreover, they explain, the process of “organizing, identifying, and consolidating the trouble” is itself critically influenced by the very “effort to find and implement a remedy.”<sup>273</sup> As a consequence, and consistent with the insights of Deweyan pragmatism, “any initial formulation of what the trouble ‘really is’ is conditional upon the subsequent effects of the attempted remedy.”<sup>274</sup>

In addition to the dynamic and cyclical nature of problem definition and remedial intervention, Emerson and Messinger point out that “[u]nderstanding these matters is complicated by the partial and retrospective character of troubles and accounts of their development.”<sup>275</sup> In part this is because claims about the existence of a problem, its costs, and its causes are likely to be “embedded in and products of the troubled situation itself.”<sup>276</sup> In addition, the contested understandings of a problem must be read against the often complex and intersecting roles that different agents play with respect to the problem and the various interventions by which it is both brought into focus and potentially resolved.<sup>277</sup> These various roles—“complainant,” “victim,” “troubleshooter,” and “troublemaker”—may be occupied by separate and distinct persons or entities, or they may overlap.<sup>278</sup> The victim, understood as an individual, a collection of individuals, or an entire community, may or may not be the same actor as the complainant, whose role is to announce the presence of the trouble by seeking remedial action.<sup>279</sup> In instances in which the victim and the complainant are separate actors, the latter’s conclusion that a problem is present or is significant enough to call for a solution may not even be shared by the former.<sup>280</sup> Moreover, the individual or entity identified by the complainant as the victim may or may not end up being the same party that the remedy agent or

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272. *Id.* at 122 (citation omitted).

273. *Id.* (emphasis omitted).

274. *Id.* at 123.

275. *Id.* at 125.

276. *Id.*

277. *See id.* at 126 (“[W]hen an outside party moves from giving advice to active intervention the structure of the trouble undergoes significant change.”).

278. *See id.* (stating that “[t]he complainant role may be distinct from the role of victim” and that “one party to the trouble may come to be designated the troublemaker” (emphasis omitted)).

279. *Id.*

280. *See id.* at 125 (stating that the actors may not agree on what the trouble is or that it exists).

troubleshooter designates as the primary object of the remedy.<sup>281</sup> Even the role of the troublemaker potentially is unstable and subject to contest. Indeed, in some problem-solving courts, most notably so-called prostitution courts, the overlap between troublemaker and victim is especially unsettled, as participants seek to work out a coherent account of the relative culpability and responsibilities of those enmeshed in the conflict.<sup>282</sup>

Crucially, Emerson and Messinger point out that “[e]ven the initial choice of troubleshooter may prove highly consequential for the trouble. For the selection of a particular troubleshooter may preemptively impose a definition on a trouble previously open or contested.”<sup>283</sup> Thus, for example, a decision to rely primarily on health-care providers to deal with drug use problems, instead of defaulting to police and criminal justice actors as primary troubleshooters, effectively changes the way in which persons struggling with such problems are understood and alters the range of interventions that are deemed appropriate to “the problem.”<sup>284</sup> Moreover, Emerson and Messinger argue that “whether, where, and how a trouble enters subsequent referral networks” affects the way in which the problem comes to be understood and addressed.<sup>285</sup> Thus, when a problem has proven to be resistant to the initial efforts of the first line of troubleshooters, the tendency is to “pass intractable problems on to new, often more specialized, troubleshooters.”<sup>286</sup> Following Goffman’s notion of a “circuit of agents,”<sup>287</sup> they note, “troubles may be shifted from one agent to another, perhaps moving upward toward greater and greater specialization, perhaps toward increasingly coercive and punitive outcomes.”<sup>288</sup> As this process of referral to increasingly specialized and potentially more coercive troubleshooters proceeds, the nature of the problem to be addressed evolves and the identification of the troublemaker as a “deviant” becomes more likely.<sup>289</sup>

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281. *See id.* at 130 (“A troubleshooter may . . . reverse the proposed allocation of victim and wrongdoer roles.”).

282. *See Shdaimah, supra* note 2, at 99–101 (“Although communities are certainly victims when there is prostitution, a person charged with prostitution is arguably as much a victim as an offender.”).

283. Emerson & Messinger, *supra* note 36, at 127.

284. *See Nolan, supra* note 170, at 39–40 (describing “Britain’s particular history of drug control, in which doctors have played a more central role, and where providing maintenance drugs for the ‘stable addict’ has been a more common practice”).

285. Emerson & Messinger, *supra* note 36, at 127.

286. *Id.*

287. *Id.* (internal quotation marks omitted).

288. *Id.*

289. *See id.* (“In moving through a circuit of troubleshooters, an initially ambiguous trouble tends to crystallize . . . . In this process, an individual may be definitely assigned the role of troublemaker and explicitly identified as deviant.”).

In Red Hook, community leaders were consulted in the community court's planning process and "[t]he Justice Center was the culmination of six years of community needs assessments and planning that included focus groups, surveys, and town hall meetings."<sup>290</sup> The community had made clear that their priorities were "prevention programs and new social services."<sup>291</sup> Also, "Red Hook residents were not expecting the Court to solve crime[;]" instead, they expected it to provide community mediation efforts and to deliver a wide range of human services.<sup>292</sup> That the eventual focus of this problem-solving enterprise turned out to be somewhat different from these community expectations suggests that the informal and often unconscious process of negotiation by which the relevant "problems" were organized and addressed had become at least partly disengaged from those in the community who were held out nominally as both the victims and the complainants of the troubles to be solved.<sup>293</sup> In important respects, key operational choices made by court officials were driven by their need to manage caseloads "produced by police enforcement priorities" and the district attorney's "policy preferences for court-centered treatment of drug cases" rather than by an assessment that reflected the experiences and understandings of community leaders and other stakeholders in the various communities served by the court.<sup>294</sup> Acting pursuant to a "crime reduction narrative"<sup>295</sup> in which quality-of-life crimes were seen by law enforcement officials as the central problem facing the community, these police and prosecutorial figures effectively assumed the role of complainant thereby reframing the problem presented to the court, acting as troubleshooter, as one largely of individual deviance and pathology.<sup>296</sup>

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290. Fagan & Malkin, *supra* note 34, at 924.

291. *Id.*

292. *Id.* at 930.

293. *See id.* at 927 (describing the community court's shift from creative and innovative programs "toward a social service agency that efficiently allocated defendants to therapeutic programs").

294. *Id.*

295. *Id.* at 931.

296. Victoria Malkin tells the following story about one defendant who had received a court summons "for drinking in public during an annual father's day barbecue in a public housing complex." Malkin, *supra* note 19, at 150. The man explained in an interview that:

It was Father's Day. We have this barbecue annually. It was like one or two in the afternoon. We were in a group, people sitting, playing basketball, you know, guys sitting around talking, had the kids there. . . . I mean, people live in public housing. . . . We don't have a porch or backyard. So the grounds is [sic] our porch and our backyard.

*Id.*

## IV. CONCLUSION

Unlike other theoretical positions that begin with a fixed perspective and seek to work out an analysis of a practice according to the logic supplied by that perspective, pragmatist theory directs our attention to the processes through which a governing perspective is selected. A pragmatist approach makes possible adjustments in complex practices in order to accommodate previously under-attended points of view. As Wolff and Pogorzelski put it, “because process is a critical component of socially complex interventions like mental health courts, evaluations must include a qualitative study that examines the internal workings of and the external influences on the court in order to identify the active ingredients within the proverbial ‘black box.’”<sup>297</sup> Emerson and Messinger’s work on the dynamic processes by which problems are organized over time provides one set of lenses for studying the framing by which relevant problems and desired solutions are adopted in problem-solving courts from Red Hook to the “Whatever It Takes Court” in California.

In Red Hook, the shift to a therapeutically-oriented court model, with its associated system of referrals to specialized troubleshooters, has served as a driving force in the process by which the relevant troubles have been organized as problems of individual deviance. This sort of dynamic can be brought into view, and called into question, by interrogating the possibility of empowering other potential complainants and reconceiving the set of potential victims relevant to the problems to be addressed by the court project. Attending to alternative narratives that are not centered on individual wrongdoing, but instead describe broad structural phenomena that either contribute to community cohesion or dysfunction, could support the adoption of a revised agenda for this project that would better serve the human needs of its constituents. Pragmatist theory offers the same opportunity for assessment and revision in other problem-solving courts, by drawing attention to the ways in which the data of everyday experience derived from those impacted by the enterprise can assist in recasting the nature of the problems to be addressed and the solutions to be sought.

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297. Nancy Wolff & Wendy Pogorzelski, *Measuring the Effectiveness of Mental Health Courts: Challenges and Recommendations*, 11 PSYCHOL. PUB. POL’Y & L. 539, 541 (2005).