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THE FUTURE OF PROBLEM-SOLVING COURTS: INSIDE THE COURTS AND BEYOND

STACY LEE BURNS*

I. INTRODUCTION

I appreciate the invitation from the University of Maryland School of Law to participate in this Symposium on problem-solving courts and thank the faculty and student organizers of the University of Maryland Law Journal of Race, Religion, Gender and Class for arranging the event and for their warm hospitality. Through my participation in the Symposium and the conversations I had with other Symposium participants, I have refined my thinking about problem-solving courts, the problems which find their way into these courts, and the goals of such courts in implementing remedial solutions to social problems. I have increasingly come to value community-based approaches to many of the issues addressed in problem-solving courts. Such strategies reflect that seeking recourse in the formal criminal justice system should, whenever possible, be a measure of “last resort.”¹ This Article considers my experiences conducting field research in a variety of problem-solving courts across southern California and the implications of my observations for understanding how problem-solving courts may improve in the future, including how problem-solving efforts outside the courts can be expanded.

On a micro-analytic level, I have found that not all problem-solving courts or judges are alike and that some practices and courts seem to work better than others. It is thus useful to ground our understanding of “what works” in problem-solving courts in large part on close observations, detailed descriptions, and systematic analysis of the actual day-to-day happenings “inside” specific problem-solving courts in local jurisdictions.² On a macro-analytic level, the operation of the entire criminal justice system, not just the courts, must be considered (e.g., criminalization of “offenses,” policing practices, and

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1. Robert Emerson, *On Last Resorts*, 87 AM. J. SOC. 1, 5–8 (1981) (analyzing when normal remedies have been exhausted and the circumstances in which “last resorts” such as incarceration should be used).

2. See ROBERT EMERSON, RACHEL FRETZ & LINDA SHAW, *WRITING ETHNOGRAPHIC FIELDNOTES* (1995).

prosecutorial charging decisions). The larger context of social problems in the society “outside” of the courts must be addressed as we formulate and implement alternative solutions to social problems. A focus on “what works” in problem-solving courts and in community-based settings should acknowledge the need to grapple with fundamental social and structural inequities. This includes poverty, unemployment, and lack of access to health care and education. These are inextricably connected to the societal and crime “problems” which end up in problem-solving courts. I am one of the first to emphasize that broader structural solutions to these inequities are needed before an adequate remedy to such intractable social problems is possible.

II. INSIDE PROBLEM-SOLVING COURTS: LESSONS FROM THE FIELD

My collaborative research with Mark Peyrot³ relies on close observational studies of how problem-solving courts actually work *in situ*.⁴ We believe more such studies are needed to unpack the “black box” of problem-solving courts and understand what happens moment-by-moment in the daily operation of these courts.⁵ We have been interested in what makes the various problem-solving courts similar to each other,⁶ yet different and unique.⁷ Although all problem-solving

3. See Stacy Burns & Mark Peyrot, *Tough Love: Nurturing and Coercing Responsibility and Recovery in California Drug Courts*, 50 SOC. PROBS. 416, 416 (2003) [hereinafter *Tough Love*] (considering the activities of the participants in California drug courts and how they differ from more traditional courts. The research focuses on how drug court judges and defendants interact to construct, or deconstruct the defendant as a rehabilitated and changed “recovering” person or, alternatively, as an essentially addicted and deficient self. The research also explores broader links between how drug courts operate to accomplish the personal recovery of defendants and the potential complications of mixing coerced treatment and “voluntary” participation); See also Stacy Burns & Mark Peyrot, *Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment*, 37 J. CONTEMP. ETHNOGRAPHY 720, 720 (2008) (considering the effect of Proposition 36 on judicial discretion by focusing on the interaction between judges and defendants).

4. HAROLD GARFINKEL, *STUDIES IN ETHNOMETHODOLOGY* 1–4 (1967).

5. John Goldkamp, *Do Drug Courts Work? Getting Inside the Drug Court Black Box*, 31 J. DRUG ISSUES 27, 66 (2001). See also Douglas Longshore et al., *Drug Courts: A Conceptual Framework*, 31 J. DRUG ISSUES 7, 7–26 (2001) (evaluating drug court characteristics to identify the need for a new approach to drug court characteristics and processes).

6. See *Tough Love*, *supra* note 3, at 416 (comparing California drug treatment courts with traditional criminal courts by focusing on the interaction between judges and defendants); See also Stacy Burns & Mark Peyrot, *Reclaiming Discretion: Judicial Sanctioning Strategy in Court-Supervised Drug Treatment*, 37 J. CONTEMP. ETHNOGRAPHY 720, 739 (2008) [hereinafter *Reclaiming Discretion*] (considering how treatment of drug offenders and the

courts share the common goal of altering participants' so-called "deviant" ways and reforming them into law-abiding citizens, these courts have a future-oriented focus on treatment and recovery (rather than on blame and punishment for past misconduct). Each distinct problem-solving court varies in its activities and in the characteristics of the particular group and population of defendants⁸ being processed there. Each court addresses a specific kind of societal problem in its own way. To understand what works and does not work in problem-solving courts, the researcher must become familiar with the distinctive features of each court and its unique participants, culture, and operations.

I first discuss California drug courts and the expansion of court-supervised drug treatment under California's Proposition 36 ("Prop. 36") program, also known as the Substance Abuse and Crime Prevention Act ("SACPA").⁹ I then focus on two important and evolving types of problem-solving courts—veteran's court and homeless court—and some ethical issues related to these courts and to problem-solving courts more generally. In reflecting on what I have learned about problem-solving courts from my observations, some questions I consider are: whether it is appropriate to locate our primary institutional response to these societal and crime problems inside the courts and the criminal justice system; whether it is fair to single out drug addicts, the mentally disabled, veterans, the homeless, or other vulnerable groups for a different court process; whether it is ethical to use criminal justice sanctions for lapses in treatment; and what "treatment" courts should order, for whom, how much, and for what duration?

discretion of judges has changed from old drug courts to the new courts under California's Prop 36 law).

7. Stacy Burns & Mark Peyrot, *Standardizing Social Problems Solutions: The Case of Court-Supervised Drug Treatment*, in *NEW APPROACHES TO SOCIAL PROBLEMS TREATMENT*, 17 RES. SOC. PROBS. & PUB. POL'Y (Stacy Burns & Mark Peyrot eds., Emerald Publishing Group, 2010) [hereinafter *Standardizing Social Problems Solutions*].

8. Upon entry into the drug court program, defendants are referred to as "clients" of the court. *Tough Love*, *supra* note 3, at 418. This term reflects a change in the defendant-orientation from traditional criminal courts and suggests that drug court clients have become service recipients of the court and members of its organizational "team," oriented to facilitating the client's own recovery from addiction. *Id.* I use the term "defendant" to underscore that despite emphasizing treatment and rehabilitation, drug courts are not completely free from punishment. *Id.* at 419. Judges use a scheme of elevated remedies for program infractions, including more frequent drug monitoring and testing and "shock" incarceration, plus the risk of an incarceration sentence longer than that which typically results from a plea bargain or adjudicative disposition if the defendant fails to complete treatment. *Id.*

9. CAL. PENAL CODE § 1210 (West 2004).

I am a field researcher, or ethnographer, and in ethnographic field research there is a commitment to go “where the action is.”¹⁰ This is why I went inside drug courts where drug cases are handled to study the activities and decisions occurring there. I observed courtroom hearings and graduation ceremonies, interviewed judges, and attended “backstage” treatment team meetings. I watched the interactions between judges and defendants to see what judges were doing to facilitate rehabilitative change. My research analyzed how drug court judges made admissions decisions, negotiated infractions with clients, and decided whether or not to sanction a particular participant.¹¹ An important aim of the research was to examine the routine court operations and the judge’s actions to learn how judges were using their discretion. For example, we discovered that some drug court judges considered the *reasons* why a particular defendant missed a mandatory drug test in deciding whether or not to sanction him or her and judges gave more weight to some excuses than others.¹² In the Prop 36 drug court program, where there are extensive rules and procedures that prevent judges from incarcerating defendants for certain infractions, we found that judges nonetheless exercised discretion by working within the rules to interpret the law and apply pressure in ways that help produce treatment compliance.¹³

In my field work, I am vigilant in trying to maintain continuing and meaningful access to my field sites. Although courtrooms are open to the public, drug court and other problem-solving courts respond to highly personal struggles of defendants who are coping with stigmatizing conditions and complex, multi-faceted problems. The public activities of these courts involve the potential disclosure of very sensitive information and implicate important privacy rights and issues of informed consent. Since the ability of clients to be honest and open about their circumstances and drug use, dependence, and addiction is believed to be a key aspect of recovery, I try to minimize the consequentiality of my on-site presence so as not to interfere with or become part of the ongoing interactions. I strive to blend into the background as much as possible, like a fly on the wall, and to be as

10. Erving Goffman, *On Fieldwork*, 18 J. CONTEMP. ETHNOGRAPHY 123, 125–32 (1989) (discussing participant observation and the manner in which sociologists conduct fieldwork by getting into place to learn about their field hosts).

11. *Tough Love*, *supra* note 3, at 425–31.

12. *Id.* at 428.

13. *Reclaiming Discretion*, *supra* note 6, at 729–32.

unobtrusive as possible in my note taking.¹⁴ I also preserve the anonymity of courtroom participants by using pseudonyms throughout my notes and publications.¹⁵

Our research began by studying drug courts in southern California, a state which is often at the forefront of criminal justice policy innovations and a model for what works, what does not work, and what might be beneficially used in other states. The original drug courts in California operated on a very small scale. They served only about five to seven percent of all drug defendants.¹⁶ In addition, California voters, by the state Initiative process, passed Prop 36, effective July 2001.¹⁷ Prop 36 expands the availability of court-supervised drug treatment in order to address the massive overload of drug cases in the state and reduce costly incarceration and recidivism by mandating treatment in lieu of jail or prison for most possession and use (i.e., non-dealing) offenses.¹⁸ Our observations revealed that the *kind and amount* of judicial supervision is very different in the original drug court than in the Prop 36 programs.

The original drug court is characterized by intensive client supervision with frequent court monitoring and hearings involving substantial interaction between clients and the judge. By contrast, the intensity of court supervision in Prop 36 varies by county and how the particular judge implements the court program. Judicial involvement and supervision is often quite minimal in larger counties. With scarce resources, the judges essentially defer supervision to probation and treatment personnel¹⁹ and, according to some commentators, Prop 36 programs often failed to provide adequate follow-up.²⁰ Nonetheless, in smaller counties without the same caseload and resource constraints as large counties, judges often operate the Prop 36 program like the original drug court, including frequent court appearances and

14. Robert Emerson & Melvin Pollner, *The Dynamics of Inclusion and Distance in Fieldwork Relations*, in CONTEMPORARY FIELD RESEARCH, 235–252 (1983).

15. *Id.*

16. *Tough Love*, *supra* note 3, at 434.

17. CAL. PENAL CODE § 1210 (West 2004). The state initiative process is “the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” Cal. CONST. art. II, § 8(a).

18. *Reclaiming Discretion*, *supra* note 6, at 723.

19. *Standardizing Social Problems Solutions*, *supra* note 7, at 223.

20. David Farabee, Yih-ing Hser, M. Douglas Anglin & David Huang, *Recidivism Among an Early Cohort of California’s Proposition 36 Offenders*, 3 CRIMINOLOGY & PUB. POL’Y 563, 577, 579 (2004); Douglas B. Marlowe, Amiran Elwork, David S. Festinger & A. Thomas McClellan, *Drug Policy by Popular Referendum: This, Too, Shall Pass*, 25 J. SUBSTANCE ABUSE TREATMENT 213, 214 (2003).

personalized interaction with the judge, as well as the use of individualized interventions, rewards and sanctions.²¹

The California legislature recently voted to cut the funding for Prop 36 drug treatment, despite claims and evidence of success in both the original drug courts and the expanded Prop 36 drug treatment program.²² Effective July 2009, Los Angeles County eliminated all dedicated Prop 36 courts, with an eighty percent reduction in treatment resources.²³ After this date, defendants essentially come to court for admission to the program and most will return only for case dismissal.²⁴ This eliminates the dynamic of close judicial supervision, monitoring, and mentoring which treatment experts urge is key to facilitating recovery, and in effect transforms the processing of these drug cases into simple diversion.²⁵ While the detailed cuts in the state and county budgets are still being negotiated and the final result is unclear, the lack of adequate funding for Prop 36 treatment has not meant elimination of treatment in the original smaller-scale drug courts. If Prop 36 is terminated while drug court funding continues, this would return California to the previous, limited drug court model, even though the electorate wanted Prop 36.

III. QUALITY JUDGES MAKE A DIFFERENCE

In the courtroom, some judges are particularly talented at motivating defendants to engage in treatment. This is probably why it is often difficult to keep up the momentum when a highly effective judge retires. Some problem-solving judges have a natural rapport with defendants and are gifted in therapeutic, persuasive and interpersonal skills. They know how to respect the defendant's dignity and how to make him or her feel understood. Some judges are adept at using humor strategically to enhance the defendant's self-esteem, hope and optimism, which is often crucial to successful treatment.²⁶ As the

21. *Compare Standardizing Social Problems Solutions, supra* note 7, at 205 with Douglas Longshore, Angela Hawken, Darren Urada & M. Douglas Anglin, SACPA COST ANALYSIS REPORT, FIRST AND SECOND YEARS, 1, 22, 35 (2006).

22. Zev Yaroslavsky Homepage, *Prop. 36 Treatment Dollars Up in Smoke*, <http://zev.lacounty.gov/news/economy-news/Prop-36-treatment-dollars-up-in-smoke> (last visited on Apr. 17, 2010).

23. *Id.*

24. *Id.*

25. CAL. PENAL CODE § 1000 (West 2009).

26. SUSAN GOLDBERG, NATIONAL JUDICIAL INSTITUTE, JUDGING FOR THE 21ST CENTURY: A PROBLEM-SOLVING APPROACH 1, 8, 14 (2005), <http://www.nji.ca/nji/Public/documents/Judgingfor21scenturyDe.pdf>.

coordinator and “hub” of the multi-disciplinary problem-solving court “team,”²⁷ some judges are acutely interested in what works and what does not and are flexible in making ongoing improvements to their programs and practices.

For example, one Prop 36 drug court judge attempted to remedy the unanticipated absence of treatment personnel from progress hearings. The judge initiated a new procedure of requiring each treatment provider to appear in court once a month on the same day the progress report hearings were scheduled for the defendants receiving treatment from that facility. Similarly, another drug court judge arranged child care services for mothers participating in the court program so they would not miss treatment appointments because of child care obligations as the custodial parent.

Some drug court judges even develop into *de facto* institutional architects who initiate new programs or try to evolve better institutional responses to identifiable problems which emerge in the daily operations of their problem-solving court. For example, one judge received funding to open a community justice center, which was ultimately housed in a former local department store. This center was designed to serve as a “one-stop-shop” with needed treatment and social services (e.g., vocational training, medical, drug and alcohol treatment, housing, etc.) available to the defendant under one roof. This innovation was developed in response to many “no show” clients who were having problems making their appointments. Their failure to make required appointments was due to lack of time or transportation resources to travel to distant locations across the large geographical county to attend group meetings, show up for testing, or be present at other mandatory appointments. In addition, a separate veteran’s court was established in this justice center because the drug court judge noticed that veterans in the criminal justice system with substance abuse issues were not doing well in the regular drug court. As I will discuss, the veteran’s court was implemented to bring veterans together to address their common substance abuse and psychological problems (including post traumatic stress disorder or “PTSD”) as a result of their service in U.S. military combat.

Because judges in problem-solving courts are called upon to perform treatment and “therapeutic” functions in their interactions with defendants, I have come to believe that problem-solving court judges (particularly newer problem-solving judges) would benefit

27. E.g., Douglas B. Marlowe, David. S. Festinger & Patricia. A. Lee, *The Judge is a Key Component of Drug Court*, 4 DRUG CT. REV. 1, 4 (2004).

from participating in training programs in which seasoned and effective problem-solving judges could teach the skills they use in different kinds of circumstances. For example, the experienced judges could model how to nurture and persuade defendants to facilitate treatment, while also understanding and honoring the client's distinctive issues, concerns, and culture.

IV. THE EXPANSION OF DRUG COURTS TO OTHER TYPES OF PROBLEM-SOLVING COURTS

Following our initial research on drug courts and Prop 36 courts, we extended our study to examine some newer, "second generation" problem-solving courts. During the summer of 2009, I went into the field again to observe a wide variety of problem-solving courts in southern California, including Veteran's Court, Homeless Court, DUI Court, and "WIT" ("whatever-it-takes") Mental Health Court. One goal of doing systematic and fine-grained field work on problem-solving courts *in situ* is to discover what is distinctive about the work activities occurring there and what practices are useful in each kind of problem-solving court. The population in each specific problem-solving court varies by education, employment status, marital and family ties, age, gender, parenthood, ethnicity, and other unique demographic and cultural characteristics. Nonetheless, problem-solving court participants share certain similar experiences and are currently going through the kind of things that others in the program are also experiencing. For example, I regularly saw defendants in homeless court being applauded for even the simplest accomplishment by those present in the courtroom who can appreciate the depth of the achievement. Also, at the conclusion of each matter, one might observe the judge handing defendants a brown paper lunch bag containing items like a bottle of water, an apple, some wrapped cheese, and a bag of crackers, in the event that they are hungry.

The observable features of veteran's court are likewise very distinctive. In veteran's court, you see many defendants stand at "parade rest," a recognized military posture, while they address the authority figure of the judge. Such decorum is imported from the client's military background. As a cohort, veterans have a unique and identifiable set of problems. The defendants in this court have committed a crime or crimes as a result of post-traumatic stress, substance abuse, or psychological problems stemming from service in

U.S. military combat.²⁸ As one veteran stated, “Growing up and being in the Marines teaches you not to be emotional [and] not to cry, but in this program, I have learned to deal with pain. And that brings a positive change.”²⁹ The peer dynamic of veteran’s court extends beyond the cohort of veterans currently participating as defendants to include retired veterans who volunteer with the court as “peer-mentors” to other vets in the veteran’s court program.

Nearly one quarter of all Gulf War vets are incarcerated at some point upon their return.³⁰ They have high psychiatric and suicide risks and a five to six fold increased risk of substance abuse disorders.³¹ In Los Angeles County, an estimated 18,000 to 25,000 veterans are homeless, the largest such population in the U.S.,³² and statewide, an estimated forty percent of the homeless are veterans.³³ Recent epidemiological reports indicate that military personnel are returning from Operation Iraqi Freedom and Operation Enduring Freedom (Afghanistan) at a high risk for substance abuse, PTSD, and other psychological problems (including attempted suicide and suicide) produced by prolonged exposure to repeated deployments.³⁴

Soldiers sometimes have multiple deployments, often as many as four or five. Each time they embark upon a tour of duty, they return home more altered. These are not all military career people who come back to an active and supportive community at a military base. Rather, many are Reservists and National Guard. Such personnel with combat exposure have higher rates of new-onset heavy drinking, binge drinking, and alcohol-related problems,³⁵ and consequently require

28. CAL. PENAL CODE § 1170.9 (West 2009).

29. Field note, Veteran’s Court, in Orange County, California.

30. Donald W. Black, Caroline P. Carney, Paul M. Peloso, Robert F. Woolson, Elena Letuchy & Bradley N. Doebbeling, *Incarceration and Veterans of the First Gulf War*, 170 MIL. MED. 612, 612–618 (2005).

31. Isabel G. Jacobson et al., *Alcohol Use and Alcohol-Related Problems Before and After Military Combat Deployment*, 300 J. AM. MED. ASS’N. 663, 669 (2008).

32. Amanda Becker, *Veterans Get Their Day in Court*, LOS ANGELES DAILY J. 1, 2, Jan. 16, 2009.

33. Administrative Office of the Courts, *Fact Sheet: California Homeless Courts* 1, 2 (2006) (on file with author).

34. RAND CENTER. FOR MILITARY POLICY RESEARCH, *INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY* xxii, 134 (Terri Tanielian & Lisa H. Jaycox eds., 2008) [hereinafter RAND CTR REPORT]; Charles S. Milliken et al., *Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning from the Iraq War*, 298 J. AM. MED. ASS’N 2141, 2141 (2007).

35. Jacobson et al., *supra* note 31.

more mental health treatment upon their return in comparison to active-duty personnel.³⁶

In general, the more combat a person is exposed to, the more likely he or she will develop symptoms of PTSD. Researchers at the San Francisco Veteran's Administration and at the University of California, San Francisco, for instance, found that thirty-seven percent of veterans returning from Iraq and Afghanistan who sought treatment at U.S. health facilities between the years 2002 and 2008 were diagnosed with PTSD, depression, alcohol abuse, or other mental health issues.³⁷ In addition, more military personnel survive severe injuries than would have in the past due to advances in battlefield medicine.³⁸ Some of these veterans endure chronic pain and long-lasting symptoms which are associated with mental health and substance use disorders, including exposure to opiates for managing this chronic pain. There are also significant relational impacts on families, with divorces and separations increasing in correlation to the length of deployments.³⁹

The aim of veteran's court is to understand and respond to the specific problems of veterans which manifest themselves in various crimes.⁴⁰ It is therefore not surprising that, unlike most other problem-solving courts (except domestic violence courts and some mental health courts), veteran's court allows defendants with violent offenses to participate. Permitting some violence is appropriate because, as soldiers, veterans were trained in combat and to kill. This makes eligibility decisions somewhat more complex in veteran's court than in other problem-solving courts. A key decision for the court team is making a case-by-case determination of who is able to participate, i.e., *how much* violence in the record is permissible, and factual questions often arise about how many and what kinds of assaults, robberies, or domestic violence cases, or other criminal history, should be allowed.

36. Charles S. Milliken et al., *supra* note 34, at 2146.

37. See generally Karen H. Seal et al., *Getting Beyond "Don't Ask; Don't Tell": An Evaluation of US Veterans Administration Postdeployment Mental Health Screening of Veterans Returning From Iraq and Afghanistan*, 98 AM. J. OF PUB. HEALTH, 714 (2008); Karen H. Seal et al., *Trends and Risk Factors for Mental Health Diagnoses Among Iraq and Afghanistan Veterans Using Department of Veterans Affairs Health Care, 2002-2008*, 99 AM. J. OF PUB. HEALTH 1651, 1651-1652 (2009).

38. Tom Regan, *High Survival Rate for U.S. Troops Wounded in Iraq*, CHRISTIAN SCI. MONITOR, Nov. 29, 2004.

39. RAND CENTER. REPORT 142-144 (Terri Tanielian & Lisa H. Jaycox eds., 2008).

40. SUPERIOR COURT OF ORANGE COUNTY, VETERANS COURT PAMPHLET (2009).

V. HOMELESS COURT AS PART OF THE LARGER CRIMINAL JUSTICE SYSTEM

In addition to understanding the operation of each problem-solving court, it is necessary to consider how problem-solving courts fit within the criminal justice system. This includes criminalization, the policing of certain offenses, and prosecutorial charging patterns in local jurisdictions. One type of problem-solving court that is becoming increasingly important in light of our recent economic disaster and high unemployment is homeless court. Policing the homeless in many cities amounts to a “war on sleep.” Nearly 90,000 people are homeless in Los Angeles County.⁴¹ Indeed, the American Civil Liberties Union (“ACLU”) has recently sued several upscale and presumably progressive southern California cities, including Santa Monica and Laguna Beach, for police harassment of homeless citizens.⁴² In July 2009, the ACLU filed suit in federal court against the City of Santa Monica claiming that “the city does not have enough beds for its homeless, yet authorities cite and arrest them for sleeping in public.”⁴³ Just three weeks earlier, a similar suit was settled in favor of homeless plaintiffs against the City of Laguna Beach, which agreed to repeal a local ordinance that authorized giving homeless people citations for sleeping in public.⁴⁴ However, on a more positive note, another southern California city, Long Beach, has proposed to allow the its homeless population to sleep in their vehicles at night in certain specific zones, essentially de-criminalizing the act of sleeping in vehicles at night.⁴⁵

The work of homeless court judges suggests that tackling the persistent societal and personal problems of homelessness requires a better understanding of policing practices in particular cities, learning about prosecutorial charging patterns, and considering alternatives. We might, for example, consider training police in alternative policing practices regarding the homeless and the mentally disabled, such as how to divert (not arrest) people with mental health and poverty issues who might otherwise end up arrested and in the criminal courts.

41. Kristine Flaherty, *Courts for the Homeless Offer Help and Hope*, CAL. B. J., 7 (2006).

42. Greg Katz, *City Sued Over Alleged Homeless Harassment*, LOS ANGELES DAILY J. 1 (Jul. 15, 2009).

43. *Id.*

44. *Id.*

45. John Canalis, *Long Beach Could Let the Homeless Sleep in their Cars*, CONTRA COSTA TIMES (CALIFORNIA) (Aug. 26, 2009).

Instead of arresting and prosecuting the homeless, police could learn about the range of available community resources to assist vulnerable persons and populations and how to use discretion to provide these resources in ways that minimize stigmatization and social exclusion.

Egon Bittner long ago noted that a police officer on skid row who encounters several publicly intoxicated persons on the street, but only has room for two in the patrol car, will have to decide whether and whom to arrest, versus handle informally, or let go.⁴⁶ Whenever possible, it is important to develop and deliver needed services to vulnerable persons *outside* the courtroom door, before ticketing, arresting them, and invoking the courts and the formal criminal justice system. Yet, as Stanley Cohen cautions in his classic book, *Visions of Social Control*, non-incarceration, welfare-oriented sentencing alternatives create the risk of net widening, expanding the scope, breadth, depth and duration of government monitoring and control over the lives of citizens (disproportionately poor persons of color)⁴⁷ who would otherwise be left out of criminal justice surveillance.⁴⁸ This sometimes amounts to coercing the poor into receiving needed social services by threat of criminal sanctions.⁴⁹

Community justice centers operating outside the courtroom door have the potential to develop a broader view of “problem-solving.” These centers can grapple with how criminal justice processing affects relationships, families, communities, and the public health generally. Community justice centers and community-based approaches could *prevent* various social problems from becoming crime problems that impact families, relationships and communities by effectively providing needed services to community members. Judges, community leaders, professionals, and local institutions could work outside of the court to increase community support, involvement, and resources for outreach efforts to extend available treatment services and provide life sustaining supplies to vulnerable citizens and defendants in the community (e.g., through the involvement of

46. See Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. R. 699, 702–704, 710, 715 (1967); See also Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, in CRIMINAL LAW: THEORY AND PROCESS 562, 563 (Joseph Goldstein, Alan M. Dershowitz & Richard D. Schwartz eds., 1974).

47. RANDALL G. SHELDEN, *CONTROLLING THE DANGEROUS CLASSES: A CRITICAL INTRODUCTION TO THE HISTORY OF CRIMINAL JUSTICE* (2d ed. 2007).

48. STANLEY COHEN, *VISIONS OF SOCIAL CONTROL* 38 (1985).

49. *Id.* at 37–38; Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63, 94–95 (2002).

Chambers of Commerce, schools and higher education, community support groups, local physicians, dentists and attorneys, corporations, faith based groups, etc.), thereby enhancing opportunities for improving their circumstances in the future.

VI. THE FUTURE OF PROBLEM-SOLVING COURTS: THE “PROBLEM” WITH LOCATING SOLUTIONS TO SOCIAL PROBLEMS IN THE COURTS AND CRIMINAL JUSTICE SYSTEM

The development and expansion of problem-solving courts across the United States over the past twenty years offers a revealing glimpse into the changing character of social control, social problems work, and social problems solutions. The problem-solving court movement is replete with lessons about deeply consequential changes in social control that accompany innovative solutions to social problems. The move from more “therapeutic” and “restorative justice” approaches to how a wide variety of societal problems are handled provides perspective on contemporary shifts in social control within and between institutions in the criminal justice, mental health, and public health systems, as well as insight into the changing character and fluctuating intensity of social control and social problems remedies.

As Emerson and Messinger emphasize, social problems and their remedies are reflexively related—the “problem” at issue delineates the remedy (or remedies) undertaken in response—and the remedy which is implemented affects the definition of the problem being addressed.⁵⁰ Previous social control solutions to a particular societal problem create their own unanticipated problems and consequences and form historical contingencies for the subsequent development of new remedial approaches to handle the problem.⁵¹ For example, just as determinate sentencing and mandatory minimum sentences were viewed by many as the solution to perceived abuses of judicial discretion and resultant sentencing disparities by race, class, gender, region, etc., these criminal sentencing provisions in turn created their own unanticipated problems and consequences. The criminal justice policy of mandatory sentencing was the precursor to the development and implementation of problem-solving courts as the

50. Robert M. Emerson & Sheldon L. Messinger, *The Micro-Politics of Trouble*, 25 SOC. PROBS. 121, 121–123 (1977-1978).

51. *Id.* at 130–132; Mark Peyrot, *Cycles of Social Problem Development: The Case of Drug Abuse*, 25 SOC. Q. 83, 83, 92–93 (Winter 1984).

remedial solution to problems of “get tough” sentencing and the fettered judicial discretion occasioned by mandatory minimum sentences. The more “therapeutic” and personalized crime control approach of problem-solving courts allows judges to reclaim much of the discretion they lost under mandatory sentencing requirements, and to have more flexibility in formulating and implementing therapeutic interventions and administering sanctions to defendants in the interest of rehabilitation.

However, the time has now come in the development of problem-solving courts to consider some fundamental questions. Are there problems with locating widespread and persistent social problems like homelessness or mental illness and their solutions primarily in the courts and under the institutional auspices of the criminal justice system? Are we really addressing issues of “criminalization” with homeless courts, mental health courts, and other problem-solving courts? Is it fair to single out the mentally disabled, the homeless, or other groups for a different court process? How “voluntary” is participation in mental health court, drug court, homeless court, or other problem-solving courts? Is it ethical to use criminal justice sanctions for lapses in mental health or drug treatment? What “treatment” should the court order, for whom, how much, and for what duration? Should the central responsibility for these problems be attributed to individual defendants or, alternatively, is it more useful to acknowledge that substance abuse, homelessness, and mental illness are symptoms of much larger social problems, such as poverty, unemployment, lack of access to health care, housing, or education, which manifest themselves in the misconduct of individual defendants who become involved in the criminal justice system?⁵²

If we extend our analytic focus beyond problem-solving courts, problem-solving efforts would include an appreciation of the place of these courts within the wider criminal justice system and would also pay sufficient attention to larger structural inequities outside of the courts and the criminal justice system. As Richard Boldt suggests, “[s]elf-destructive, addictive behaviors could be understood within a larger account of the social and political marginalization that dominates the lives of most defendants who now find themselves in the criminal justice system and consequently in. . . [problem-solving]

52. See generally Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63 (2002).

courts.”⁵³ Under such a perspective, remedial solutions would go beyond the personal rehabilitation of individual defendants and doing justice in the particular case, to eliminating disabling differences and fostering social justice more generally.

Creating community-based solutions could prevent a range of psychological and social problems from arising and worsening because of lack of adequate attention and treatment. Of course, implementing solutions to such large scale social problems is quite a challenge given our current financial crisis. A key question is whether our present economic circumstances will bring about the opportunity to re- envision alternative, more restorative, community-based measures and public health-oriented responses to these seemingly intractable social problems and move us toward more humanitarian solutions, or whether we will instead return to conventional beliefs that enhanced criminalization and punishment is the most appropriate way to control “offensive” behavior and respond to crime and deviance. Time will tell.

Currently, Los Angeles County jail is the nation’s largest mental health treatment center. Police in Los Angeles frequently make “mercy bookings,” in which they arrest homeless people in order to give them shelter (in jail) and take them off the streets and out of view. Surely there are better and more humane alternatives. Based on my field observations and looking toward the future of problem-solving, it may be possible (and more humane) to handle many societal and crime problems involving the mentally disabled, homeless, veterans, or other vulnerable groups outside of the courtroom. This approach would require expanding community outreach efforts and extending the availability of services whenever possible without arresting or prosecuting citizens in need, and with the maximum respect for their dignity and civil liberties. As a sociologist, you cannot understand what is “normal” out of context.⁵⁴ What place does society accord to you? What place does it allow “others”? We need to understand the consequences of social stigma (versus belonging) and grasp the whole picture.⁵⁵ And, we need to be very, very kind to each other. Unfortunately, however, in the absence of fundamental changes to

53. Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 1205, 1305 (1998).

54. GARFINKEL, *supra* note 4, at 35, 124.

55. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

bring about a truly equitable social system, I fear that our problem-solving efforts may amount to Band-Aid solutions.