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Status Courts

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ARTICLES

Status Courts

ERIN R. COLLINS*

This Article identifies and analyzes a new type of specialized “problem-solving” court: status courts. Status courts are criminal or quasi-criminal courts dedicated to defendants who are members of particular status groups, such as veterans or girls. They differ from other problem-solving courts, such as drug or domestic violence courts, in that nothing about the status court offender or the offense he or she committed presents a systemic “problem” to be “solved.” In fact, status courts aim to honor the offender’s experience and strengthen the offender’s association with the characteristic used to sort him or her into court.

This Article positions status courts as both a troubling and promising development in the evolution of problem-solving justice, in particular, and criminal justice reform, generally. It reveals that status courts institutionalize the notion that certain offenders, by virtue of their inclusion in a particular status group, deserve better treatment than others. This “moral sorting” provides an expressive release that may, counterintuitively, disincentivize widespread systemic reform.

And yet, while status courts present cause for concern, they also advance a positive, and possibly transformative, notion: that some individuals commit criminal offenses, at least in part, because of the influence of external factors beyond their control. In this way, status courts challenge the retributive notion that criminal offenders are wholly independent, rational actors and counterbalance the othering effect of many current criminal justice practices. Because the rise of retributive ideals played a prominent role in ramping up the penal machinery over the past few decades, embracing this new, contextualized conceptualization of criminal offenders—beyond the status court context—can temper the tendency to over-incarcerate.

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INTRODUCTION

The rise of retributivism and its rational actor model of criminal behavior helped pave the path toward the current era of mass incarceration. Conceptualizing criminal offenders as wholly independent agents who commit crimes devoid of structural influences provided a theoretical justification for politicized “tough on crime” policies and the harsh sentences they demanded. This alliance between retributivist theory and criminal justice policy was undeniably powerful, leading to a prison population the United States lacks the capacity and political will to sustain. As a result, many are seeking a way to relieve the pressure of the fiscal and emotional costs of our current carceral crisis. In other words, they are searching for a release valve.

An increasingly popular release mechanism is the creation of problem-solving courts. Problem-solving courts are specialized criminal or quasi-criminal courts that often substitute treatment, monitoring, or community service,

alone or in combination, for incarceration,¹ and purport to provide a more effective and efficient criminal justice intervention by focusing scarce resources on recurring, systemic issues. They have emerged in a dizzying variety of forms: drug courts, mental health courts, domestic violence courts, community courts, gun courts, sex offender courts, homelessness courts, human trafficking courts, and gambling courts.²

Many scholars, politicians, judges, and practitioners herald problem-solving courts as a promising solution to the issues that plague our conventional criminal justice system;³ others caution that problem-solving court participation may be detrimental to defendants and question whether problem-solving courts actually provide the release they promise.⁴ While debates ensue over whether problem-solving courts are effective or normatively sound, a new development is occurring that has implications for the future of problem-solving justice and criminal justice reform more broadly: the emergence of a class of courts I call “status courts.”

Status courts are courts dedicated to offenders within a specific status group. To date, two types of status courts have emerged: veterans courts and girls courts. Although status courts have grown out of the modern problem-solving court movement, they revive justifications offered for the creation of juvenile courts many decades ago: that the populations they target are “niche”

1. See *Collaborative Courts*, SUPERIOR CT. OF CAL., COUNTY OF ORANGE (Feb. 3, 2017), <http://www.occourts.org/directory/collaborative-courts/> [<https://perma.cc/ATF2-HLDU>] (defining problem-solving courts as “specialized court tracks that address underlying issues that may be present in the lives of persons who come before the court on criminal, juvenile, or dependency matters”). As will be addressed below, however, problem-solving courts are not a monolithic entity but rather a diverse and varied group.

Many commentators have rightly noted that the term “problem-solving” is overly ambitious and have suggested the “slightly less hubristic” descriptor “problem-oriented.” See JAMES L. NOLAN, JR., *LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT* 102–03, 148 (2009); see also Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *Geo. L.J.* 1587, 1606 n.72 (2012) (describing the decision to use the term “problem-oriented”); Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 *WASH. U. J.L. & POL’Y* 57, 57 n.2 (2009) (critiquing the term “problem-solving”). However problematic, I use the term “problem-solving court” in this Article because that is how most commentators refer to these institutions.

2. See, e.g., *Problem Solving Courts: Addressing a Spectrum of Issues*, NAT’L ASS’N DRUG CT. PROFS., <http://www.nadcp.org/learn/what-are-drug-courts/models/problem-solving-courts> [<https://perma.cc/RL2B-3A88>] (listing types of problem-solving courts); *Problem-Solving Courts*, N.Y. ST. UNIFIED CT. SYS.: OFFICE OF POL’Y & PLANNING, http://www.nycourts.gov/courts/problem_solving/ [<https://perma.cc/GEG5-E8Y6>] (listing types of problem-solving courts in New York state).

3. See, e.g., GREG BERMAN, *Creating Good Courts: Effectiveness, Fairness and Problem-Solving Justice*, in *REDUCING CRIME, REDUCING INCARCERATION: ESSAYS ON CRIMINAL JUSTICE INNOVATION* 83 (2014); Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *NOTRE DAME L. REV.* 439, 468 (1999).

4. See, e.g., Richard C. Boldt, *A Circumspect Look at Problem-Solving Courts*, in *PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* 13 (Paul Higgins & Mitchell B. Mackinim eds., 2009); 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, 50–52 (2000).

groups with “unique” needs the system does not, but should, address.⁵ Status courts differ from their problem-solving court predecessors in a key way: the characteristic used to sort offenders into these courts does not present a systemic “problem” to be “solved.” In fact, the status court process is aimed at strengthening the offenders’ association with their status group and “honoring” their experience.⁶ Toward that end, status courts are often staffed *and even presided over* by other status group members.

Scholars have not yet acknowledged the ways in which status courts differ from earlier generations of problem-solving courts nor considered what their emergence reveals about the systemic consequences of problem-solving justice. This Article embarks on that endeavor.

Examination of the justifications offered for status courts reveals new insights about the distributive equity—or inequity—of the problem-solving court model itself. The claim that the populations status courts target are unique does not withstand scrutiny. And therein lies the danger of status courts: by invoking specious claims that the needs of these populations are unique, status courts obscure the connections between status court offenders and other offenders. Status courts ultimately remove the populations who most highlight the system’s dysfunction, and in so doing they provide an expressive release that may disincentivize systemic reform.

And yet, although status courts present cause for concern, they also reveal a potential path to meaningful systemic reform—one that will not just release pressure on the overburdened system, but fundamentally change how we conceive of justice and punishment. They do so by advancing a new understanding about the relationship between the state, the criminal offender, and the responsibility for criminal behavior. A central move in the entrenchment of the war on crime was the reconceptualization of the criminal offender as an individual who committed crimes because of independent, rational choice uninfluenced by extrinsic experiences or factors.⁷ Although earlier generations of problem-solving courts appear to move away from this model, in fact they actually continue to obscure the role of structural influences on criminal behavior.⁸ Status courts, by contrast, offer a more complex view of offenders as both responsible agents *and* products of external circumstances. As such, they reject the retributivist paradigm and indicate an ability and willingness of system actors to acknowledge that external factors and experiences influence criminal

5. See Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 357, 363 (2009).

6. See *infra* notes 76–78 and accompanying text.

7. See *infra* Part III. See generally Mona Lynch, *The Contemporary Penal Subject(s)*, in *AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 89 (Mary Louise Frampton et al. eds., 2008) (discussing prevailing conceptualizations of the criminal offender during the rehabilitative and retributivist eras).

8. See *infra* Part III. See also Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 *STAN. L. & POL’Y REV.* 417, 425 (2009) (describing drug courts as deemphasizing access to government social welfare services).

behavior. I contend that applying these insights and practices broadly can help guide us out of our current carceral crisis.

The Article proceeds in three parts. Part I surveys the current landscape of problem-solving justice and offers a broad classificatory scheme that categorizes problem-solving courts based on the type of systemic problem they purport to solve. It identifies two generations of courts that preceded status courts: treatment courts, which aim to treat a problem with the defendant believed to cause recidivistic behavior, and accountability courts, which monitor and sanction defendants for offenses that have historically escaped the criminal justice system's attention. It then introduces and contrasts status courts, which depart from the utilitarian rationales that inspired and justified the problem-solving court model. Part II identifies reasons to be concerned about the development of status courts. It scrutinizes justificatory claims of status courts and reveals that the needs said to be unique to veterans and girls are actually shared by many offenders. I argue that by invoking a discourse of difference to remove certain sympathetic populations from the conventional system, status courts counterintuitively entrench the system's dysfunctional treatment of offenders who are not chosen for specialized treatment. Part III explores the promise of status courts. It demonstrates that they depart from their problem-solving court predecessors in a way that has not yet been acknowledged: they advance a contextualized conceptualization of criminality that challenges the presumptions of the retributivist rational actor model. I conclude by considering what it would mean to take this important yet underappreciated development "to scale."⁹ I argue that instead of creating additional specialty courts—status or otherwise—we should encourage system actors to acknowledge, as they do in status courts, that structural factors and experiences influence behavior, and use this insight to guide different kinds of investments in criminal justice reform.

I. THE EVOLUTION OF PROBLEM-SOLVING JUSTICE

At their most general level, problem-solving courts are "simply specialized courts that develop expertise with particular problems,"¹⁰ and often offer treatment, monitoring, or community service as an alternative or supplement to

9. I borrow this phrase from problem-solving court proponents, who often theorize about how to take the lessons learned from problem-solving court experiments "to scale." See GREG BERMAN ET AL., *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* 195 (2005) ("The goal of 'going to scale' is to spread key problem-solving principles throughout state court systems.").

10. Michael C. Dorf & Jeffrey A. Fagan, Foreword, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1508 (2003). The Center for Court Innovation, an organization at the forefront of the problem-solving court movement that sponsors demonstration court projects across the country, has identified three broad performance indicators that unite all problem-solving courts: (1) an orientation toward "solving the underlying problems of litigants, victims, or communities"; (2) interdisciplinary collaboration between individuals internal and external to the criminal justice system; and (3) a focus on accountability. RACHEL PORTER ET AL., *CTR. FOR COURT INNOVATION, WHAT MAKES A COURT PROBLEM-SOLVING?: UNIVERSAL PERFORMANCE INDICATORS FOR PROBLEM-*

incarceration. It is difficult to offer a more specific definition that encompasses the full panoply of problem-solving courts. Indeed, these courts are defined by their diversity. They differ in organizational theory, principle, and ultimate promise.¹¹ Some come into existence through legislation, others by judicial fiat.¹² They employ a range of problem-solving methodologies.¹³ The current and ever-expanding roster of courts includes courts targeting drug addiction, domestic violence, quality-of-life offenses, mental illness, homelessness, and gun crimes.¹⁴

Yet, although problem-solving courts are disparate and diverse, on a macro level all purport to solve the same overarching systemic problem: the inefficient and costly dysfunction that has resulted from decades of tough-on-crime policies. Indeed, a primary justification for the implementation of problem-solving methodologies is that the conventional criminal justice system has devolved into a depersonalized “assembly line” in which system actors struggle to process cases as quickly as possible without regard to the efficacy or the economic toll of such an approach.¹⁵ And each individual court responds to this overarching problem in the same basic way—namely, by crafting a specialized approach to a particular topical problem.¹⁶ They selectively remove particular issues and populations from the conventional assembly line of justice instead of redesigning the line itself.¹⁷ In other words, problem-solving courts are release-valve reforms that seek to relieve strain on the overburdened system.¹⁸

At its core, then, problem-solving justice is selective justice. Surprisingly, however, few have attempted to identify the selections that drive problem-solving justice beyond reciting the ever-growing list of topical problem-solving courts.¹⁹ Scholars have tended to focus on a specific topical court, and those

SOLVING JUSTICE iii–iv (2010), http://www.courtinnovation.org/sites/default/files/What_Makes_A_Court_P_S.pdf [<https://perma.cc/ZH5Z-WEU7>].

11. See Greg Berman, *Problem-Solving Justice and the Moment of Truth*, in PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?, *supra* note 4, at 1, 3–4 (“There is no single foundational document, no unified theory, that summoned problem-solving courts into existence.”).

12. See Sohil Shah, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 S. CAL. INTERDISC. L.J. 67, 84 (2014).

13. See McLeod, *supra* note 1, at 1611 (concluding “there are at least four legal institutional and conceptual reformist models to which the existing [specialized criminal] courts roughly correspond”).

14. See *supra* note 2 and accompanying text.

15. See NOLAN, *supra* note 1, at 8 (listing as “[u]biquitous” among problem-solving court proponents complaints about prison overcrowding, the expense of court case loads, the “‘revolving door’ phenomenon of repeat offenders,” and the “assembly-line quality of ‘McJustice’”).

16. See BERMAN ET AL., *supra* note 9, at 5 (identifying as a “key element[] to the problem-solving reform agenda” the creation of a “[t]ailored [a]pproach to [j]justice”).

17. In describing the rise of the problem-solving movement, prominent problem-solving-court advocates Greg Berman and John Feinblatt explain that the point of the movement is not to decrease the prominence of plea-bargaining justice, but rather to be honest about how the system operates and change how parties act within that system. See *id.* at 20.

18. See Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 585 (2012).

19. See Dorf & Fagan, *supra* note 10, at 1506–07 (“No commentators have yet suggested a heuristic to decide which types of social problems and crimes are amenable to, or appropriate for, problem-

who take a broader approach often “elide[] the differences between and among various problem-solving models.”²⁰ This inattention to the choices that drive problem-solving justice prevents important critical inquiries—including who is included and who is excluded from selective justice and the systemic consequences of these choices.

As a way of starting those conversations, this Part attempts to make visible the choices that drive problem-solving justice. In this way, it joins in the burgeoning scholarly effort to typologize problem-solving courts in a way that acknowledges their diversity while identifying their similarities. But it also departs from that literature, which to date has focused on classifying the courts by the methods they use to solve the specific problems to which they are dedicated.²¹ Instead of offering an on-the-ground look at how courts attempt to solve problems or analyzing the efficacy and consequences of various problem-solving approaches, this Part takes a broader look at the current landscape of problem-solving justice, classifying courts based on the type of systemic problem they purport to solve. It is through this lens that status courts become visible—and their differences come into relief.

A few preliminary notes about the classification are in order. Its purpose is to make sense of the current landscape of problem-solving justice by identifying and categorizing the organizational claims of different topical courts. It captures most—and the most popular—problem-solving courts, and it operates on the level of rhetoric, not practice. It classifies the courts based on what their proponents claim they do, not on how²² or whether they accomplish their stated goals.²³

I have identified particular types of courts as belonging to separate “generations” that begin when each particular organizational orientation emerges. I use this term to help convey the general temporal progression of the emergence of each type of court, but the generations overlap and coexist. For example, even

solving courts, and what conditions must exist for courts to take this step. There are now specialized courts for mentally ill offenders, drunk drivers, parole or probation violators, gun carriers, domestic violence offenders, and several other types of offenses and offenders. Why these problems and not others?” (footnote omitted).

20. BERMAN, *supra* note 3, at 86 (“Drug courts are different than community courts. Community courts are different than mental health courts. Mental health courts are different than domestic violence courts. It is worth keeping these distinctions in mind before drawing broad conclusions.”).

21. For example, Allegra McLeod recently offered an extensive typology that distinguished problem-solving courts based on their “criminal law reformist model”: therapeutic jurisprudence, judicial monitoring, order maintenance, and decarceration. *See* McLeod, *supra* note 1, at 1611–44; *see also* LAWRENCE BAUM, *SPECIALIZING THE COURTS* 96–97 (2011) (distinguishing between specialized criminal courts that treat certain offenses more seriously from those that attempt to address the root causes of crime).

22. For a rich analysis of the diverse criminal law reformist models problem-solving courts employ, *see* McLeod, *supra* note 1, at 1611–44.

23. Whether the problem-solving-court enterprise is effective is a separate and highly contested topic. *See generally infra* Part III.

though drug courts belong to the first generation, they continue to proliferate.²⁴ Finally, while the classification I offer below is unique, existing scholarship has already provided extensive descriptive accounts of the individual courts that fall within the first two generations of courts I identify. However, because status courts are new phenomena that have for the most part escaped scholarly attention, I describe them in greater detail.

A. FIRST GENERATION: TREATMENT COURTS

The treatment court is the prototypical and most prevalent problem-solving-court model.²⁵ The organizational principle of treatment courts is that a specific problem with the defendant or the defendant's circumstances contributes to the defendant's criminal behavior. These courts attempt to solve that problem and, by extension, prevent or reduce the offender's future involvement with the criminal justice system. The paradigmatic treatment court is the drug court, the first of which opened in 1989.²⁶ Drug courts embrace the idea that drug addiction is criminogenic and, therefore, that treating the addiction instead of incarcerating the defendant is a more effective and long-lasting response to drug-related criminal behavior. Most treatment courts, like drug courts, are dedicated to addressing a specific problem internal to the defendant, such as various forms of addiction²⁷ or mental illness,²⁸ but this class of courts also includes those that address problems external to the defendant, such as homeless-

24. For example, six new drug courts were slated to open in Minnesota in 2014. *See Six New Drug Courts to Open in Minnesota*, MINN. JUD. BRANCH (June 30, 2014), <http://www.mncourts.gov/?page=NewsItemDisplay&item=59715%20> [<https://perma.cc/5N34-8GCN>].

25. For example, as of 2015, there were more than 3,000 drug courts in operation in the United States. *See How Many Drug Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR. (June 31, 2015), <http://www.ndcrc.org/content/how-many-drug-courts-are-there> [<https://perma.cc/2PRJ-BAWM>]. In contrast, the combined number of other types of problem-solving courts as of June 2014 was approximately 1,200. *How Many Problem-Solving Courts Are There?*, NAT'L DRUG CT. RESOURCE CTR. (June 30, 2014), <http://www.ndcrc.org/content/how-many-problem-solving-courts-are-there> [<https://perma.cc/JWB4-35ST>].

26. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 126 (2001). *See generally* McLeod, *supra* note 1, at 1605 (noting that drug courts are the "original and most numerous" form of specialized criminal court). As of June 2015, there were more than 3,000 drug courts operating in the United States. *See Drug Courts*, NAT'L INST. JUST., <http://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> [<https://perma.cc/LTW3-PRA5>].

27. In addition to courts addressing drug addiction, some jurisdictions have opened courts for those who commit crimes because of gambling addiction. *See* Ken Belson, *New York Gambling Treatment Court Stresses Help*, N.Y. TIMES (May 1, 2007), http://www.nytimes.com/2007/05/01/nyregion/01gamble.html?pagewanted=print&_r=0 [<https://perma.cc/G28B-FERD>]; *see also* GAMBLING CT., <http://www.gamblingcourt.org/> [<https://perma.cc/2SD9-KVAJ>] (describing gambling court as a "therapeutic, intervention and rehabilitative approach . . . for defendants who commit non-violent crimes because of gambling addiction").

28. Mental health courts are "designed to use problem-solving methods to increase the responsiveness of the criminal justice system to seriously mentally-ill offenders, linking them with needed social and health services in an effort to reduce the likelihood of re-offense." PORTER ET AL., *supra* note 10, at 18. Currently, there are approximately 300 mental health courts in operation nationwide. *See Mental Health Courts*, COUNCIL ST. GOV'TS JUST. CTR., <http://csgjusticecenter.org/mental-health-court-project/> [<https://perma.cc/C475-WA7H>].

ness²⁹ or gang membership.³⁰

The creation of a treatment plan is central to the project of solving the defendant's criminogenic problem, the issue believed to cause his or her criminal behavior. The scope of the plan is within the court's discretion, but usually requires the defendant to participate in rehabilitative programs aimed at addressing the problem believed to have contributed to his or her criminal activity, such as substance abuse, mental illness, or gang membership.³¹ Although ideally, treatment replaces incarceration, it is executed in a carceral shadow; a defendant's failure to complete the treatment plan will result in the imposition of more traditional criminal sanctions, which may include jail or prison time.³²

B. SECOND GENERATION: ACCOUNTABILITY COURTS

Soon after the first drug treatment court opened in 1989, the model was adapted to other problems.³³ By the mid-1990s, a new generation of problem-

29. See Tamar M. Meekins, "Specialized Justice": *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 26 (2006) (discussing the opening of the first homeless court in San Diego, California, in 1989). Currently, there are a few dozen homeless courts in the United States. See *Homeless Courts*, AM. B. ASS'N, http://www.americanbar.org/groups/public_services/homelessness_poverty/initiatives/homeless_courts.html [https://perma.cc/72YK-4E6L] (listing U.S. jurisdictions with presently operating homeless courts).

30. See SUSAN L. HAHN & ROBYN BERNDT, GANG COURT YAKIMA COUNTY, WASHINGTON: A SUMMARY REPORT OF POLICIES AND PROCEDURES APPLICABLE JUNE 7, 2012, at 1 (2012), <http://www.k12.wa.us/safetycenter/Gangs/pubdocs/2012June/GangCourtYakimaCountySummaryReport.pdf> [https://perma.cc/W64A-FXNA] (discussing the first juvenile gang court, which opened in Washington state in 2011).

31. See, e.g., Dylan Goforth, *Tulsa Homeless Court Docket Aims to Provide Counseling*, TULSA WORLD (May 9, 2014, 12:00 AM), http://www.tulsaworld.com/news/local/tulsa-homeless-court-docket-aims-to-provide-counseling/article_f63088e8-2c9e-5957-ba04-9f28562058f2.html [https://perma.cc/PDX4-B5ZT] (explaining that Tulsa's new homeless court requires participants to comply with a treatment plan under court supervision in order for their cases to be dismissed); HAHN & BERNDT, *supra* note 30, at 1 (noting the Yakima County Gang Court requires participants to "engage in a highly therapeutic, structured, intensive" program "geared toward rehabilitation from gang lifestyle and gang-related crime").

32. Most treatment courts ascribe to a post-plea dispositional model, under which the defendant must plead guilty before attempting the treatment plan. See, e.g., WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 24–25 (2011) (noting that, as of 2009, fifty-eight percent of adult drug courts exclusively followed a post-plea model). If the defendant succeeds in treatment and meets all of the criteria the court has set, the court will withdraw the plea or, alternatively, let the conviction stand but reduce or eliminate the defendant's exposure to incarceration. *Id.* A shrinking minority of courts operate on a pre-plea model under which the prosecution or adjudication of the charges are suspended while the defendant attempts treatment. See *id.* at 24–25 (noting that, as of 2009, twelve percent of drug courts followed a pre-plea model while twenty percent followed a hybrid model). Under the pre-plea model, the charges are dismissed if the defendant succeeds. See *id.* at 24.

Many homeless courts are an exception to this model. Often homeless court participants are referred to court to clear up pending criminal matters *after* they have completed therapeutic services, rehabilitative services, or both. See, e.g., *Homeless Court*, COALITION FOR THE HOMELESS, <http://www.homelesshouston.org/homeless-court/homeless-court-details/> [https://perma.cc/8387-EYDN]. The rehabilitative efforts replace custody or fines. See *id.*

33. See, e.g., 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, 1579 (2003) (noting

solving court was emerging: what I will term here “accountability courts.”³⁴ The organizing principle that unites the diverse group accountability courts is that some offenses—such as domestic violence and low-level “quality-of-life” crimes—have “slipped through the cracks” of the criminal justice system,³⁵ allowing certain offenders to escape justice and leaving certain victims insufficiently protected.³⁶ Accountability courts seek to remedy this historical oversight by increasing offender accountability to the victims of their behavior. The victim, for accountability court purposes, may be an individual or the community.³⁷

that the Red Hook Community Justice Center “follows the drug court model” by adopting a collaborative, service-oriented approach).

34. The first community court opened in Midtown Manhattan in 1993. *See Community Court—Overview*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/topic/community-court> [<https://perma.cc/Z85V-SM6N>]. The first felony domestic violence court opened in Brooklyn, New York, in 1996. *See* LISA NEWMARK ET AL., URBAN INSTITUTE, SPECIALIZED FELONY DOMESTIC VIOLENCE COURTS: LESSONS ON IMPLEMENTATION AND IMPACTS FROM THE KINGS COUNTY EXPERIENCE 1 (2001), <http://www.courtinnovation.org/sites/default/files/SpecializedFelonyDomesticViolenceCourts.pdf> [<https://perma.cc/RSJ7-6JV3>].

35. ASS’N OF PROSECUTING ATTORNEYS, STEARNS COUNTY, MN REPEAT FELONY DOMESTIC VIOLENCE COURT: PLANNING AND IMPLEMENTATION BEST PRACTICE GUIDE 1 (2013), http://prosecutingattorneys.org/wp-content/uploads/Stearns-County-DV-Implementation-Guide-FINAL_1-17-13.pdf [<https://perma.cc/9367-8Z4W>] (“[Before the domestic violence court opened,] domestic violence offenders and their victims were falling through the cracks of the criminal justice system—offenders were not being held accountable for their violence and instead were committing multiple felony offenses against their partners. The victims of these violent assaults were not being linked to services and their safety was jeopardized.”); ROBIN CAMPBELL, CTR. FOR COURT INNOVATION, ‘THERE ARE NO VICTIMLESS CRIMES’: COMMUNITY IMPACT PANELS AT THE MIDTOWN COMMUNITY COURT 2 (2000), <http://www.courtinnovation.org/sites/default/files/No%20Victimless%20Crimes1.pdf> [<https://perma.cc/4FL7-QKES>] (contrasting the practices of the Midtown Community Court with the “previous practice in which the city’s overburdened courts let low-level offenders slip through the cracks” and “cases were often dismissed or offenders were sentenced to ‘time served’”); *see also* KELLI HENRY & DANA KRALSTEIN, CTR. FOR COURT INNOVATION, COMMUNITY COURTS: THE RESEARCH LITERATURE 11 (2011) (identifying a goal of community courts as decreasing the number of “‘walks’—sentences such as a fine or ‘time served’ in which offenders receive no ongoing sanction despite pleading guilty to criminal conduct”); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 373 (2005) (noting the “irony” that community court approaches “have been deployed largely against activities that were not previously targeted for any significant sanction”).

36. Interestingly, the two most popular types of accountability courts—domestic violence courts and community courts—both emerged, at least in part, in response to shifting police practices that introduced new types of defendants into the criminal justice system. Domestic violence courts were a response to mandatory arrest policies, especially after the 1994 passage of VAWA, *see* MELISSA LABRIOLA ET AL., CTR. FOR COURT INNOVATION, A NATIONAL PORTRAIT OF DOMESTIC VIOLENCE COURTS 2 (2010), and community courts were responses to “broken windows” policing strategies. *See* Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL’Y 63, 66 (2002) (discussing connection between broken-windows-inspired community-policing strategies and community courts).

37. Community courts reconceptualize some traditionally “victimless” crimes, such as prostitution, as victimizing the surrounding neighborhood, especially the business owners. *See, e.g.*, CAMPBELL, *supra* note 35, at 2 (“The [Midtown Community] Court, founded in 1993 to address crimes like prostitution, shoplifting and drug possession, is guided by the principle that there is no such thing as a victimless crime. The Court views the community as the victim of quality-of-life offenses and, where appropriate, it sentences offenders to perform community service to repair the damage they’ve done.”).

Accountability is a malleable concept;³⁸ I use accountability here to mean holding an offender responsible. Because accountability is such an amorphous goal, the category of accountability courts encompasses a wide range of specialized courts that scholars tend to distinguish, including, most prominently, domestic violence courts³⁹ and community courts,⁴⁰ but also sex offense courts⁴¹ and gun courts.⁴² A key feature that distinguishes accountability courts from treatment courts is an emphasis on the twin and often overlapping goals of offender accountability and victim protection over—or instead of—offender rehabilitation.⁴³ Although some accountability courts offer treatment, the treatment often supplements, but does not replace, a formal sanction—increasing victim safety and offender accountability take precedence.⁴⁴ And many accountability courts that offer treatment programs do so primarily as a way to increase offender monitoring and accountability, not for rehabilitative purposes.⁴⁵

38. See LABRIOLA ET AL., *supra* note 36, at 9.

39. The Center for Court Innovation describes domestic violence and sexual assault courts as designed “to improve the safety of victims and their children, [and] enhance offender accountability.” *Domestic Violence—Overview*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/topic/domestic-violence> [<https://perma.cc/RGM4-LWG4>]. A recent nationwide survey of domestic violence court stakeholders revealed a consensus around the “primary rationales” for creating domestic violence courts: “increased victim safety, offender accountability, and deterring of future violence.” LABRIOLA ET AL., *supra* note 36, at ix.

40. See HENRY & KRALSTEIN, *supra* note 35, at 1 (identifying “greater accountability for low-level, ‘quality-of-life’ offenders” as a goal of community courts).

41. See *Sex Offense Courts: Mission and Goals*, N.Y. ST. UNIFIED CT. SYS.: OFFICE OF POL’Y & PLANNING, http://www.nycourts.gov/courts/problem_solving/so/mission_goals.shtml [<https://perma.cc/E7JY-DSUR>] (“Sex Offense Courts promote justice by providing a comprehensive approach to case resolution, increasing sex offender accountability, enhancing community safety while protecting the rights of defendants.”).

42. DAVID SHEPPARD & PATRICIA KELLY, U.S. DEP’T OF JUSTICE, JUVENILE GUN COURTS: PROMOTING ACCOUNTABILITY AND PROVIDING TREATMENT 3 (2002), <https://www.ncjrs.gov/pdffiles1/ojdp/187078.pdf> [<https://perma.cc/A5GU-RQJ9>] (identifying a primary goal of juvenile gun court as providing “early intervention and greater accountability for juveniles charged with weapons offenses”).

43. See McLeod, *supra* note 1, at 1609 (“In contrast to drug courts, mental health courts, and veterans courts, domestic violence courts and sex offense courts generally operate with less reference to rehabilitative goals.”); PORTER ET AL., *supra* note 10, at 12 (noting that some models of problem-solving courts, “notably domestic violence courts and to a lesser extent community courts, focus less on therapeutic interventions for the defendant and more on defendant responsibility to the party harmed—whether that is an individual or a community”). For example, a recent national survey of domestic violence courts found that eighty-three percent rated increasing victim safety as an “extremely important” goal and seventy-nine percent rated holding offenders accountable as “extremely important.” LABRIOLA ET AL., *supra* note 36, at v–vi. By contrast, only twenty-seven percent identified rehabilitating offenders as “extremely important.” *Id.*

44. See, e.g., REBECCA THOMFORDE-HAUSER & JULI ANA GRANT, CTR. FOR COURT INNOVATION, SEX OFFENSE COURTS: SUPPORTING VICTIM AND COMMUNITY SAFETY THROUGH COLLABORATION 4 (2010) (“Sex offense courts are not designed primarily to provide alternatives to incarceration. Although sex offender treatment is encouraged as part of community release and supervision, the court’s primary goals are to improve consistency, coordination, community collaboration and accountability.”).

45. See BERMAN, *supra* note 3, at 86 (“When community courts sentence low-level offenders to perform community service, it’s not because they’re trying to ‘heal’ the offenders, it’s because they want to pay back the local neighborhood that’s been harmed by crime. When domestic violence courts require batterers to return to court for judicial monitoring of their compliance with orders of protection,

C. THIRD GENERATION: STATUS COURTS

Recently, a new generation of problem-solving courts has begun to emerge: what I call here “status courts.” The organizational principle of status courts is that offenders who belong to certain status groups have unique needs that the conventional justice system does not, but should, meet. Status courts seek to solve this systemic oversight by offering services and treatment options specifically tailored to the needs of the populations they target.

To date, status courts have emerged to address two status groups: veterans and girls. Veterans courts are criminal courts that offer intensive supervision, coordinated services, and treatment as an alternative to incarceration for criminal defendants who have served in the United States military.⁴⁶ Judge Robert Russell opened the nation’s first veterans court in 2008 based on his observation that “veterans are a niche population with unique needs” who require “tailored care.”⁴⁷ The uniqueness of veterans’ needs are said to derive from the impact of military service, in particular the traumatic and potentially criminogenic impact of combat.⁴⁸ This model has proliferated quickly. By July 2014, just six years after the first court’s opening, approximately 200 veterans courts had opened.⁴⁹

Girls courts are gender-specific juvenile courts that adjudicate delinquency charges against female offenders.⁵⁰ Like veterans courts, girls courts reflect a judgment that those who come before them have special, unmet needs that distinguish them from the general offender population and require specialized

it’s not with any therapeutic intent, it’s to try to make sure they don’t continue to abuse their partners.”); *see also* LABRIOLA ET AL., *supra* note 36, at 57 (reporting that ninety-four percent of domestic violence courts participating in the study indicated accountability was an “extremely” or “very” important reason for ordering offenders to attend a batterer program); NOLAN, *supra* note 1, at 201 n.46 (quoting a domestic violence court judge who assigns offenders to drug treatment and batterer intervention programs “for monitoring purposes”).

46. *See* Russell, *supra* note 5, at 364–65.

47. *Id.* at 363.

48. *See infra* notes 100–01 and accompanying text.

49. Kristen Meriwether, *Veterans Treatment Courts Offer Hope, but Only in Three Boroughs*, GOTHAM GAZETTE (Aug. 28, 2014), <http://www.gothamgazette.com/government/5279-veterans-treatment-courts-offer-hope-but-only-in-three-boroughs> [<https://perma.cc/DV8Q-4M6F>] (noting that 197 courts had been created as of July 28, 2014, according to Justice for Vets). Such growth was bolstered by federal support for veterans court initiatives. As part of his 2011 Strengthening Our Military Families initiative, President Obama identified the need to “[m]ake court systems more responsive to the unique needs of Veterans and Families,” and announced a commitment to “address the root causes of criminal behavior and reduce involvement with the criminal justice system” by providing federal support for the further development of the “Veterans Treatment Court concept.” *See* EXEC. OFFICE OF THE PRESIDENT, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA’S COMMITMENT 12 (2011), http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf [<https://perma.cc/79K2-U8JL>].

50. Girls courts are juvenile courts, not criminal courts. However, others have discussed specialty juvenile courts as types of problem-solving courts. *See, e.g.*, SHEPPARD & KELLY, *supra* note 42, at 2 (defining juvenile drug courts as a “specialty court, characterized by small caseloads, frequent hearings, immediate sanctions, family involvement, and treatment services”).

attention.⁵¹ The first modern girls court⁵² opened in Oahu, Hawaii in 2004 because “[g]irls in the juvenile justice system have special needs that were not being met by a system traditionally designed for boys.”⁵³ The Hawaii State Judiciary specifies, “female juvenile offenders tend to be victims of physical, sexual, and emotional abuse and experience depression and low self-esteem that are linked to at-risk behaviors and delinquency.”⁵⁴ It also identifies “[s]ubstance abuse and school failure” as “prominent characteristics of at-risk girls.”⁵⁵

Thus, the Oahu court focuses on programs that address “issues such as healing from physical, sexual and emotional abuse, family conflict, substance abuse, depression, suicidal ideation and attempts, and self-injurious behaviors.”⁵⁶ The court also emphasizes “activities that focus on empowerment, self-respect, and self-efficacy.”⁵⁷ Although girls courts predated the first veterans court by four years, they have spread less rapidly; to date only a handful of girls courts have opened nationwide, most recently in Duval County, Florida, in September 2014.⁵⁸

Status courts resemble treatment courts in both ideology and structure.⁵⁹ Like treatment courts, status courts primarily adopt a therapeutic jurisprudence approach to problem-solving justice, promoting treatment and rehabilitation as a way to reduce recidivism. Veterans courts explicitly model themselves on drug

51. The first “Program Value” of Hawaii Girls Court is “Honoring the Female Experience,” which involves addressing “the unique needs of girls.” *Our Mission*, HAW. GIRLS CT., <http://www.girlscourt.org/mission.html> [https://perma.cc/9QQS-3XPV].

52. A similar venture was undertaken by Chicago’s first female assistant judge, Mary Bartelme, in 1913 to hear cases of dependent and delinquent girls. See Bernardine Dohrn, *Investigating the Rights of Youths: Schooling and the Vexing Social Control of Girls*, AM. B. ASS’N, http://www.americanbar.org/groups/public_education/initiatives_awards/students_in_action/dohrn.html [https://perma.cc/9BRQ-CJAT].

53. *Girls Court*, HAW. ST. JUDICIARY, http://www.courts.state.hi.us/special_projects/girls_court.html [https://perma.cc/J9AH-7GNF]; see also *About Us*, HAW. GIRLS CT., <http://www.girlscourt.org/aboutus.html> [https://perma.cc/W35N-D3XE] (stating that the Girls Court opened as a “laboratory to design gender-specific policies, programs and services to achieve outcomes that more successfully and effectively target at-risk and delinquent girls”).

54. *Girls Court*, *supra* note 53.

55. *Id.*

56. *About Us*, *supra* note 53.

57. *Id.*

58. A report about the September 2014 opening of Girls Court in Duval County, Florida, identified it as the seventh such court in the country. See Ashley Mitchem, *Girls Court Launches in Duval County*, NEWS4JAX (Sept. 17, 2014, 6:25 PM), <http://www.news4jax.com/news/girls-court-launches-in-duval-county/28102998> [https://perma.cc/23D4-C2Z3]; cf. Patricia Leigh Brown, *A Court’s All-Hands Approach Aids Girls Most at Risk*, N.Y. TIMES (Jan. 28, 2014), <https://www.nytimes.com/2014/01/29/us/a-courts-all-hands-approach-aids-girls-most-at-risk.html> [https://perma.cc/9YYB-KNJV] (noting the existence of “a half-dozen or so Girls Courts around the country”).

59. See Tiffany Cartwright, “*To Care for Him Who Shall Have Borne the Battle*”: *The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL’Y REV. 295, 307 (2011) (noting that the treatment of veterans court participants “strongly resembles a program in a drug or mental health court”).

courts,⁶⁰ and aim to “successfully habilitate veterans.”⁶¹ Girls courts similarly adopt a “[t]herapeutic modalit[y] and approach[],”⁶² and embrace the characteristics of many treatment courts, such as intensive supervision and therapeutic services provided by a coordinated, multidisciplinary team.⁶³ And as in treatment courts, status courts regularly monitor participants and mete out positive reinforcement or graduated sanctions, depending on the participant’s progress.⁶⁴

Because status courts are similar to treatment courts, those who have analyzed courts that fall within the category have mistakenly characterized them as simply a new type of treatment court.⁶⁵ However, status courts differ from treatment courts in an important and definitive way: the characteristic used to filter offenders into the court is not a “problem” to be “solved.” So in contrast to drug courts, for example, which aim to treat the underlying drug addiction that contributed to the criminal behavior, status courts do not seek to break the offender’s connection with the characteristic around which the court is organized; when the status court offender is finished with the court process, he or she will not stop being a veteran or a girl. Instead, as the following discussion demonstrates, status courts take affirmative steps to strengthen the offender’s association with his or her status group.

The animating justification for status courts is that neither the conventional court system nor existing problem-solving courts adequately address the purport-

60. See OFFICE OF NAT’L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT, VETERANS TREATMENT COURTS 1 (noting that veterans courts are “modeled after drug courts”). In some jurisdictions, veterans courts are situated within existing drug treatment or mental health courts. See, e.g., *Veterans Courts*, N.Y. ST. UNIFIED CT. SYS.: OFFICE OF POL’Y & PLANNING, http://www.nycourts.gov/courts/problem_solving/vet/index.shtml [<https://perma.cc/87WH-36JE>](explaining that New York veterans courts are “a separate court calendar within an existing drug treatment or mental health court”); *Veterans Court Addresses Special Needs*, ST. MISS. JUDICIARY (Jan. 26, 2012), <https://courts.ms.gov/news/2012/01%2013%2012Krebs%20Veterans%20Court.pdf> [<https://perma.cc/X8Y7-XN45>] (noting that the planned veterans court will operate “within the existing Drug Court”).

61. *Vision and Mission*, BUFFALO VETERANS TREATMENT CT., <http://www.buffaloveteranscourt.org/about/mission> [<https://perma.cc/YSU9-XSJP>].

62. *About Us*, *supra* note 53.

63. See, e.g., Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, NAT’L CTR. FOR YOUTH L. (Oct. 1, 2009), <http://youthlaw.org/publication/gender-and-juvenile-justice-new-courts-programs-address-needs-of-girls/> [<https://perma.cc/ZA7A-8EM5>] (services offered in San Mateo’s GIRLS program include “individual and family counseling, Narcotics Anonymous and Alcoholics Anonymous meetings where needed, counseling for rape and sexual trauma, and regular visits by a speaker from SAGE (Standing Against Global Exploitation), an organization for survivors of commercial sexual exploitation”).

E.S.T.E.E.M. Court offers “intensive supervision, weekly court hearings, individual and group therapy, in-home family therapy, and mentorship with community leaders.” *E.S.T.E.E.M. Court*, DALL. COUNTY JUV. DEP’T, <http://www.dallascounty.org/department/juvenile/esteem.php> [<https://perma.cc/2ZFC-7PSR>].

64. See *About Us*, *supra* note 53 (explaining that “court sessions serve to provide positive reinforcement of their strengths and accomplishments as well as a method for imposing graduated sanctions and creating accountability for the girls”); see also Russell, *supra* note 5, at 364–67 (identifying the “key components” of the Buffalo Veterans Treatment Court’s programming and services).

65. See, e.g., Russell, *supra* note 5, at 365 (describing the Buffalo Veterans Treatment Court as “a hybrid of drug and mental health treatment courts”).

edly unique needs of these particular populations. When Judge Russell opened the first veterans court in Buffalo, New York, he presided over the city's drug and mental health courts but believed that these courts were "limited" in their ability to serve veterans.⁶⁶ Veterans, he concluded, "derive from a unique culture, with unique experiences and needs" and, therefore, require a "unique program" that specifically targets their needs.⁶⁷

Girls courts similarly reflect a judgment that they target a distinctive population whose needs were being overlooked by the conventional system. The first girls court opened in 2004 as part of the effort to "stem" what was perceived to be a "quickly rising tide of female delinquency";⁶⁸ whereas the rates of juvenile delinquency were dropping overall, the rate of girls entering the juvenile system was increasing.⁶⁹ Although the increase eventually was determined to be the result of changes in policing strategies, not behavioral patterns,⁷⁰ the statistics inspired the creation of "gender-responsive" juvenile justice programs,⁷¹ including girls courts. Girls courts embrace the twin presumptions that motivate all gender-responsive programming: that boys and girls are fundamentally different⁷² and the conventional juvenile justice system, including the "[s]taffing patterns, staff training, classification systems, physical design, and the correc-

66. See Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, in *FUTURE TRENDS IN STATE COURTS* 2009 130, 130 (Carol R. Flango et al. eds., 2009), http://www.ndcrc.org/sites/default/files/future_trends_2009.pdf [<https://perma.cc/P4P7-A4ME>] [hereinafter Russell, *Veterans Treatment Courts*]; see also Russell, *supra* note 5, at 364 (describing the founding and mission of the Buffalo Veterans Treatment Court).

67. Russell, *Veterans Treatment Courts*, *supra* note 66, at 130.

68. HAW. GIRLS CT., <http://www.girlscourt.org> [<https://perma.cc/N35L-BCWD>].

69. JEFF SLOWIKOWSKI, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *IN FOCUS: GIRLS' DELINQUENCY 1* (2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/228414.pdf> [<https://perma.cc/347Z-TFY9>] ("In 1980, females represented 11 percent of juvenile arrests for violent offenses. By 2000, that proportion had grown to 18 percent, and by 2004 it had risen to 30 percent. Even though arrest numbers remained higher for boys than girls during that period, arrest rates for girls increased while rates for boys decreased."). OJJDP established the Girls Study Group to "investigate the roots of and solutions to girls' delinquency." *Id.* For more information on female juvenile delinquency statistics see *Frequently Asked Questions*, HAW. GIRLS CT., <http://www.girlscourt.org/faq.html> [<https://perma.cc/EG99-D2GU>] [hereinafter *FAQs*, HAW. GIRLS CT.] (quoting statistics about increasing female juvenile delinquency rates in Hawaii and nationally). For more statistics, see FRANCINE T. SHERMAN, ANNIE E. CASEY FOUND., *PATHWAYS TO JUDICIAL DETENTION REFORM*, SER. NO. 13, *DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS 10-11* (2005), <http://www.aecf.org/m/resourcedoc/AECF-DetentionReformAndGirls-2005.pdf> [<https://perma.cc/8FZP-5VSP>].

70. See Margaret A. Zahn et al., *Violence by Teenage Girls: Trends and Context*, GIRLS STUDY GROUP SERIES (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, D.C.), May 2008, at 8, <https://www.ncjrs.gov/pdffiles1/ojjdp/218905.pdf> [<https://perma.cc/K95L-4HCF>].

71. For further discussion of the emergence of gender-responsive programming, see OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *GENDER-SPECIFIC PROGRAMMING* (2010), http://www.ojjdp.gov/mpg/litreviews/Gender-Specific_Programming.pdf [<https://perma.cc/Y4GQ-K4KH>].

72. See SHERMAN, *supra* note 69, at 16. The Hawaii Girls Court, for example, seeks to "recognize the fundamental differences between male and female juvenile offenders as well as their different pathways to delinquency . . ." HAW. GIRLS CT., *supra* note 68.

tional routine,” were designed “for a male juvenile population.”⁷³

Thus, although they serve very different populations, both veterans courts and girls courts stem from a similar concern. Both justify the specialized justice they offer with claims that the populations they serve have “unique needs” that are not—and cannot be—satisfied in the conventional system, requiring the creation of a new institution dedicated only to members of that status group. In this way, status courts—though they grew out of the modern problem-solving court movement—echo the claims offered in support of the creation of juvenile courts. In some ways juvenile courts were the first problem-solving court. For example, they were the first to make the system respond more effectively to particular types of offenders by carving out separate court processes and procedures.⁷⁴ But there is an even stronger parallel between juvenile courts and status courts. Juvenile courts were created, in large part, because reformers believed the adult criminal court system was “unfit to address the underlying issues that brought a young person to court” and “[un]able to distinguish the special developmental needs of children in order to treat them differently than adults.”⁷⁵

Yet, status courts strive to meet a unique goal that distinguishes them from their problem-solving court predecessors, both modern and historic: they aim to honor the experience of the offenders. The “goal” of the Hot Springs Veterans Treatment court, for example, is to “help those that served our nation and honor their service,”⁷⁶ and the brochure for the Maricopa County, Arizona Veterans Court calls on the reader to “honor our military, [t]he men and women who serve.”⁷⁷ The first “Program Value” upon which the Hawaii Girls Court bases its “decision making and actions” is “[h]onoring the [f]emale [e]xperience.”⁷⁸ Thus, status courts’ process is not just about what the offender should change, but also what they should respect in themselves. If the process succeeds, the offender leaves court proud of the characteristic that brought him or her into the court. As Judge Michael Brennan reminds the defendants who appear in his veterans court: “You are a Marine,” adding, “Once a Marine—always a

73. Sherman, *supra* note 69, at 24 (arguing that the application of this “male model may be particularly damaging” for girls); see also *Girls Court*, *supra* note 53 (“Girls in the juvenile justice system have special needs that were not being met by a system traditionally designed for boys.”).

74. Professor Jane Spinak, for example, has identified family court—a term she uses interchangeably with juvenile court—as the “paradigmatic problem-solving court.” Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 259 (2008); see also Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056 (2003) (identifying juvenile court as “the forerunner of . . . specialized [problem-solving] courts”).

75. Spinak, *supra* note 74, at 259.

76. *Garland County CARES Teams Up with Hot Springs Veterans Treatment Court*, SENTINEL-RECORD, July 27, 2014, at 4C, <http://www.pressreader.com/usa/the-sentinel-record/20140727/282140699510541/TextView>.

77. Brochure, Superior Court of Ariz. in Maricopa Cty., Veterans Court, https://www.superiorcourt.maricopa.gov/MediaRelationsDepartment/docs/brochures/vets_Court_brochure.pdf [<https://perma.cc/ACS8-U4BX>].

78. *Our Mission*, *supra* note 51.

Marine.”⁷⁹

To accomplish this goal, status courts strive to create a courtroom environment in which members of the status group play a prominent role. Veterans court proponents stress that veterans require services administered by people who “are knowledgeable about and able to empathize with the military experience,”⁸⁰ namely other veterans.⁸¹ Toward that end, veterans courts feature a distinctive and definitive programming component: a mentorship program that pairs defendants with noncriminally involved veterans.⁸² These programs aim to provide defendants with support, guidance, and assistance throughout the court process, to provide a “healthy role model who has ‘been there,’” and above all else to remind the defendants that they are not alone.⁸³ Tellingly, the Buffalo mentor program follows the motto “leave no veteran behind.”⁸⁴ Some courts take this effort to instill “camaraderie among those who served” one step further, attempting to staff the courts with judges, court officers, and defense attorneys who have served in the military.⁸⁵ And in Brooklyn, New York, even the appearance of the courtroom is transformed: the usually barren walls are decorated with military posters, and a flag of the U.S. Marine Corps sits on the judge’s bench to signal that the judge too is a veteran.⁸⁶

79. Chuck Gomez, *Brooklyn Treatment Court: A Second Chance for Drug Offenders*, HUFFINGTON POST: THE BLOG (Apr. 22, 2013, 3:52 PM), http://www.huffingtonpost.com/chuck-gomez/brooklyn-treatment-court_b_3053615.html [https://perma.cc/SK6F-PHCT].

80. See Russell, *supra* note 5, at 363 (quoting DEP’T OF DEF. TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION 41 (2007)), <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA469411> [https://perma.cc/H756-LF3C].

81. See Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 570 (2010) (“The veterans concept adds an importantly tailored element: that those who have a shared experience, other veterans, offer the most easily accepted and effective ‘tough love’ support.”); Russell, *supra* note 5, at 364 (“Our experience . . . is that veterans respond more favorably to other veterans in the court.”).

82. *Veterans Courts*, *supra* note 60 (“Peer mentors are a critical component of the Veterans Court/Track By virtue of their military experience, peer mentors provide veteran-defendants with a unique source of support and motivation as they navigate through the court process.”).

83. Steve Tillson, *Veterans Court in Klamath County*, U.S. DEP’T OF VETERANS AFF.: S. OR. REHAB. CTR. & CLINICS (Jan. 12, 2011), http://www.southernoregon.va.gov/features/Veterans_Court_In_Klamath_County.asp [https://perma.cc/L2ZA-V7HJ].

84. *Mentors*, BUFFALO VETERANS TREATMENT CT., <http://www.buffaloveteranscourt.org/mentors> [https://perma.cc/T67A-UAY8].

85. See *What Is a Veterans Treatment Court?*, JUSTICE FOR VETS, <http://justiceforvets.org/what-is-a-veterans-treatment-court> [https://perma.cc/5MMQ-E77H]; see also Meriwether, *supra* note 49 (noting that the judge presiding over the Brooklyn Veterans Treatment Court is a veteran); John Sharp, *Veterans Courts Soaring in Demand as Teams of Volunteers Seek to Help Military Defendants*, AL.COM (Feb. 11, 2015, 7:00 AM), http://www.al.com/news/mobile/index.ssf/2015/02/veterans_courts_soaring_in_dem.html [https://perma.cc/6YAE-KDL4] (noting the defense attorney assigned to the Baldwin County, Alabama veterans court is a veteran); *Veterans Court*, PHILA. CTS. FIRST JUD. DISTRICT PA., <http://www.courts.phila.gov/veteranscourt/> [https://perma.cc/N47Q-WPRZ] [hereinafter *Veterans Court, PA*] (noting that the judges who preside over the Philadelphia Municipal Veterans Court “are Veterans, and fully aware of the burdens and the sacrifices these Veterans made”).

86. See Meriwether, *supra* note 49.

Like veterans courts, many girls courts strive to create a courtroom environment of mutual trust, respect, and understanding by staffing the court with people with whom the offender can identify, in this case women. The Oahu and Alameda County courts, for example, are staffed predominantly by women, featuring female judges, court officers, and attorneys who are expected to act as role models for the girls.⁸⁷ Furthermore, in addition to traditional therapeutic programming aimed at addressing addiction and mental health issues, girls courts offer programs that aim to target what their creators have identified as needs unique to girls, such as building self-esteem and inspiring trust and respect in relationships with family members, other girls, and court personnel. The mission of Dallas County's new E.S.T.E.E.M. (Experiencing Success Through Empowerment, Encouragement and Mentoring) Court is to "provide positive experiences" for the female participants to "foster success and empowerment and thereby prevent further involvement in the legal system."⁸⁸ And Hawaii's court offers activities and services that provide girls with a "powerful context . . . to build relationship skills and maintain healthy relationships,"⁸⁹ which have included group community service projects, mother-daughter retreats for participants and mother figures, and group activities such as surfing lessons and art projects.⁹⁰

II. REVEALING THE TROUBLING RELEASE OF PROBLEM-SOLVING JUSTICE

As discussed in Part I, problem-solving courts are selective reforms that parcel out opportunities and resources to particular offenders or, in the case of accountability courts, particular victims. This increased funding for resources and opportunities—for some—raises the specter of unequal access to a different, and purportedly better, kind of justice for certain offenders or victims in a system that claims to treat all equally.

Surprisingly, this selective distribution of access to resources, opportunities, and perhaps alternatives to incarceration has not been met with abundant outcry. To the contrary, many have hailed problem-solving courts as the most important criminal justice system innovation of our time,⁹¹ with a fervor that has been

87. See Brown, *supra* note 58; see also *About Us*, *supra* note 53. The Santa Clara, California, court originally followed the same model, but abandoned it due to logistical difficulties. See Carroll, *supra* note 63 (noting the presiding judge "still believes that the treatment program is more effective with a unified group of girls").

88. See Presentation, Children at Risk, Policy Lunch: Innovative Juvenile Specialty Courts (June 26, 2013), <http://childrenatrisk.org/wp-content/uploads/2013/04/June-26th-CLE.ppt> [<https://perma.cc/VQ4U-QXDT>].

89. *About Us*, *supra* note 53 ("[G]roup activities promote team-building and positive personal growth as well as help the girls develop decision making and self-confidence skills.").

90. *Activities*, HAW. GIRLS CT., <http://www.girlscourt.org/activities.html> [<https://perma.cc/DN43-844G>].

91. See, e.g., Judith S. Kaye, Keynote Address, *Problem-Solving Courts*, 29 *FORDHAM URB. L.J.* 1925, 1925 (2002) (identifying problem-solving courts as "by far the most exciting, most promising recent development in the law").

compared to evangelism.⁹² Although the problem-solving court enterprise has been subjected to increasing scholarly critique,⁹³ no one has yet questioned the distributive equity of the problem-solving court model itself.

The absence of this particular critique likely emanates, in large part, from problem-solving courts purportedly reducing pressure on the overburdened criminal justice system. In other words, they appear to be release valves that effectively direct scarce resources to recurring systemic issues.

This appearance of efficacy rests on two popular presumptions about problem-solving courts. First, on the front end, problem-solving courts purport to employ evidence-based practices to select whom to include in these nonegalitarian reform efforts. Data—not value judgments—are said to determine who will benefit from these reforms. Mary D. Fan, for example, identifies problem-solving courts as an example of “rehabilitation pragmatism,” which she lauds for using data-driven practices to select “beneficiaries,” and for being “cautious and selective” and attentive to efficacy.⁹⁴

Second, on the back end, proponents promise that such courts provide measurable systemic benefits. Since the creation of the first drug court in 1989, problem-solving justice proponents have heralded specialized courts as an effective, cost-saving alternative to the conventional system.⁹⁵ Though many proponents also laud problem-solving courts for reviving the rehabilitative ideal of the criminal justice system,⁹⁶ the rehabilitation problem-solving courts advance is not the traditional “egalitarian” rehabilitative ideal that strives to “recl[aim] . . . every soul.”⁹⁷ Even when problem-solving courts invest resources in rehabilitative opportunities for certain offenders, it is for the ultimate purpose of making the system run more efficiently—successful rehabilitation is said to reduce recidivism, which leads to increased safety and cost-savings. In other words, problem-solving courts promote a utilitarian rehabilitation or “neorehabilitation” that invests in rehabilitative programs for the sake of the

92. See NOLAN, *supra* note 1, at 137–39.

93. See, e.g., Boldt, *supra* note 4; Quinn, *supra* note 4, at 50–52 (highlighting how the nonadversarial, team-based approach embraced by drug courts may conflict with a defense attorney’s ethical duty to zealously represent her client); see also McLeod, *supra* note 1, at 1591 (“[I]n their currently predominant institutional forms, specialized criminal courts threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration.”).

94. Fan, *supra* note 18, at 633–34.

95. Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1127 (2014) (“The driving force behind the problem-solving courts movement from its inception has been an express commitment to efficacy.”); see also Candace McCoy, Commentary, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1517–18 (2003) (noting that early problem-solving court proponents, concerned primarily with managing the overwhelming number of cases funneled into the system as a byproduct of the war on drugs, emphasized the “essentially utilitarian,” cost-cutting potential of the problem-solving court model); Quinn, *supra* note 1, at 63 (discussing the utilitarian motivations of the first drug court).

96. McCoy, *supra* note 95, at 1521–23 (discussing the rise of therapeutic rationales for problem-solving courts).

97. Fan, *supra* note 18, at 634.

system, not the offender.⁹⁸ Tellingly, problem-solving courts have recently become popular among conservative reformers focused on reducing the fiscal strain on the criminal justice system and a pillar of the “Right on Crime” agenda.⁹⁹

As the following analysis reveals, status courts disrupt the narrative of empiricism and efficiency that inspires and legitimates the problem-solving court movement. These disruptions present cause for concern, which is explored below. At the same time, they reveal the true promise of status courts, which will be uncovered in Part III.

A. STATUS COURTS AND MORAL SORTING

In justifying status courts’ selection mechanisms, proponents invoke a discourse of difference, insisting that status courts are necessary to serve the “unique needs” of particular status groups. Although these courts serve dramatically different populations, the needs of both groups are said to result from the residual influence of traumatic experiences that often accompanies group membership. However, as the following discussion demonstrates, the latent and possibly criminogenic impact of past traumatic experiences is a condition that connects girls and veterans to, rather than separates them from, other offenders. What really distinguishes these offenders from others is not the impact of trauma per se, but rather a judgment that the criminal justice system should account for the impact of trauma upon certain populations because they are more deserving of such treatment. In other words, as this section contends, the sorting in which status courts engage is moral, not empirical.

Veterans court proponents stress that veterans’ unique needs stem from the latent and potentially criminogenic effects of military service. They emphasize the link between military service and emotional and psychological trauma, specifically the staggering rates of traumatic brain injury and posttraumatic stress disorder (PTSD) among veterans who have served in combat.¹⁰⁰ This trauma, in turn, imposes “costs,” including substance addiction, mental illness,

98. See Jessica M. Eaglin, *Neorehabilitation and Indiana’s Sentencing Reform Dilemma*, 47 VAL. U. L. REV. 867, 874–75 (2013) (identifying drug courts as an example of neorehabilitation because they are concerned with identifying and managing offenders “for the benefit of society, not the individual”); see also Miller, *supra* note 8, at 441 (describing neorehabilitation).

99. See, e.g., Newt Gingrich & Pat Nolan, *Prison Reform: A Smart Way for States to Save Money and Lives*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> [<https://perma.cc/3WYG-YFGS>] (identifying drug courts as a positive criminal justice reform measure); Rick Perry, *America Needs to Stop Jailing So Many Non-Violent Offenders*, FEDERALIST (Apr. 1, 2015), <http://thefederalist.com/2015/04/01/america-needs-to-stop-jailing-so-many-non-violent-offenders> [<https://perma.cc/YX66-2U58>] (hailing Texas’s drug courts as an example of the “forward-thinking policy making” that prompted him to join Right on Crime). See generally David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473, 1509 (2014) (discussing the “coalition between conservatives and liberals in support of problem-solving courts”).

100. See, e.g., Cartwright, *supra* note 59, at 299; Jeremiah M. Glassford, Note, “*In War, There Are No Unwounded Soldiers*”: *The Emergence of Veterans Treatment Courts in Alabama*, 65 ALA. L. REV. 239, 243–47 (2013).

homelessness, and unemployment, which then lead to criminal behavior.¹⁰¹

That many veterans experience PTSD and that PTSD can be criminogenic are both accurate observations. Estimates of the rate of PTSD among veterans reach as high as thirty-five percent.¹⁰² Furthermore, studies demonstrate that people with PTSD are “significantly more likely” to be arrested, serve time in jail or prison, and be charged with a violent offense.¹⁰³ One reason for this connection is that those who experience PTSD may exhibit “chronic hyperarousal”—a “distorted sense of always being under extreme threat” that can result in “increased aggression and violent behavior.”¹⁰⁴

Recent data, however, show that other populations experience PTSD at an even higher rate than military veterans. Exposure to violence in one’s community, like exposure to violence in military combat, can cause trauma that results in PTSD.¹⁰⁵ People who live in low-income urban neighborhoods are at a high risk for exposure to community violence.¹⁰⁶ A 2011 study found that forty-three percent of the patients examined at Chicago’s Cook County Hospital displayed symptoms of PTSD,¹⁰⁷ higher than even the highest estimates for veterans. Interviews of inner-city residents in Atlanta, Georgia revealed “rates of PTSD . . . as high or higher than Iraq, Afghanistan or Vietnam veterans.”¹⁰⁸ And another recent study found that “[y]outh living in inner cities show a higher

101. See Russell, *supra* note 5, at 358–61; see also Veterans Treatment Court Act, No. 139, § 1, 2010 Colo. Sess. Laws 464, 464 (referencing studies demonstrating that “combat service may exact a tremendous psychological toll on members of the military” and concluding that “[s]uch combat-related injuries, including the use of drugs and alcohol to cope with such injuries, can lead to encounters with the criminal justice system”).

102. See *Iraq Troops’ PTSD Rate as High as 35 Percent, Analysis Finds*, SCIENCE DAILY (Sept. 15, 2009), <http://www.sciencedaily.com/releases/2009/09/090914151629.htm> [https://perma.cc/G6A7-J3MU]. A study conducted by the RAND Corporation in 2008 found approximately twenty percent of all veterans who returned from Iraq and Afghanistan reported symptoms of PTSD or major depression. See *One in Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP. (Apr. 17, 2008), <http://www.rand.org/news/press/2008/04/17.html> [https://perma.cc/3HJG-EKDR]. A study conducted by the Veterans Administration found that nearly thirty percent of those treated at a VA facility since September 11, 2001, had been diagnosed with PTSD. See Jamie Reno, *Nearly 30% of Vets Treated by VA Have PTSD*, DAILY BEAST (Oct. 21, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/10/21/nearly-30-of-vets-treated-by-v-a-have-ptsd.html> [https://perma.cc/B729-AW5C].

103. Sachiko Donley et al., *Civilian PTSD Symptoms and Risk for Involvement in the Criminal Justice System*, 40 J. AM. ACAD. PSYCHIATRY & L. 522, 524–25 (2012).

104. Lois Beckett, *The PTSD Crisis That’s Being Ignored: Americans Wounded in Their Own Neighborhoods*, PROPUBLICA (Feb. 3, 2014, 2:21 PM), <http://www.propublica.org/article/the-ptsd-crisis-thats-being-ignored-americans-wounded-in-their-own-neighbor> [https://perma.cc/4ZGD-T3QN]. As a result of this sense of imminent threat, PTSD sufferers are more likely to carry a weapon to “restore feelings of safety.” *Id.*

105. See *Community Violence: The Effects on Children and Teens*, NAT’L CTR. FOR PTSD, <http://www.ptsd.va.gov/public/types/violence/effects-community-violence-children.asp> [https://perma.cc/WJ42-EFV7].

106. See *id.*

107. Beckett, *supra* note 104.

108. *Id.* (quoting Dr. Kerry Ressler, lead investigator of the research project).

prevalence of post-traumatic stress disorder than soldiers.”¹⁰⁹ The trauma results from exposure to community violence; in fact, it may be more difficult to address the effects of PTSD for inner-city residents than veterans. Repeated exposure to traumatic experiences increases the likelihood of developing PTSD.¹¹⁰ In contrast to the experience of many veterans, whose exposure to combat trauma ends with their tour of duty, for inner-city youth there may be no delineated end to their exposure to trauma.¹¹¹

The foundational claims about the uniqueness of girls’ needs similarly obscures a point of connection between them and those who are “sorted out” of these courts—boys.¹¹² An organizing principle of girls courts is that girls follow “fundamentally different” pathways to delinquency than boys.¹¹³ The distinguishing factor many proponents invoke is that many girls have experienced past trauma—particularly sexual and physical abuse—and that this trauma contributes to their criminality.¹¹⁴ Toward that end, girls courts, like all gender-responsive juvenile justice reform efforts, seek to provide “[t]rauma-informed services” that respond to the traumatic impact of physical and sexual abuse against girls and young women.¹¹⁵ For example, the Alameda County Girls’ Court dedicates itself to the creation of a “trauma-informed courtroom” that focuses on “addressing the trauma, healing, and empowerment of young women.”¹¹⁶ Trauma-informed service providers aim to “be aware of consumers’ history of past abuse, to understand the role that abuse plays in victims’ lives,

109. *Inner-City Oakland Youth Suffering From Post-Traumatic Stress Disorder*, CBS S.F. BAY AREA (May 16, 2014, 11:59 PM), <http://sanfrancisco.cbslocal.com/2014/05/16/hood-disease-inner-city-oakland-youth-suffering-from-post-traumatic-stress-disorder-ptsd-crime-violence-shooting-homicide-murder/> [<https://perma.cc/3SSB-BTJK>] (quoting testimony of Howard Spivak, M.D., director of the U.S. Centers for Disease Control and Prevention’s Division of Violence Prevention, at an April 2012 congressional briefing).

110. Naomi Breslau et al., *Previous Exposure to Trauma and PTSD Effects of Subsequent Trauma: Results from the Detroit Area Survey of Trauma*, 156 AM. J. PSYCHIATRY 902, 906 (1999).

111. See *Inner-City Oakland Youth Suffering From Post-Traumatic Stress Disorder*, *supra* note 109.

112. An analysis of the theoretical soundness of gender-responsive programming is beyond the scope of this Article. For a critique of the theoretical underpinnings of gender-responsive programming, see generally Sara Goodkind, *Gender-Specific Services in the Juvenile Justice System: A Critical Examination*, 20 AFFILIA 52 (2005).

113. See *supra* Section I.C.

114. For example, a juvenile delinquency administrative judge in Hillsborough County, Florida, explained that a girls court was necessary because girls end up in the juvenile system because of sexual abuse, coercion from an older boy, or “because of some trauma in their past that no one really wants to scratch the surface of.” See Sue Carlton, *Court for Girls? It’s a Start*, TAMPA BAY TIMES (July 24, 2015, 5:52 PM), <http://www.tampabay.com/news/courts/court-for-girls-its-a-start/2238656> [<https://perma.cc/7V4K-KFKC>].

115. See Dana Jones Hubbard & Betsy Matthews, *Reconciling the Differences Between the “Gender-Responsive” and the “What Works” Literatures to Improve Services for Girls*, 54 CRIME & DELINQ. 225, 238–39 (2008).

116. *Juvenile Services*, ALAMEDA COUNTY PUB. DEFENDER, <http://www.co.alameda.ca.us/defender/services/juvenile.htm#juv14> [<https://perma.cc/9C2E-DJQ5>] (last visited Feb. 8, 2016) (describing the mission of the Alameda County Girls’ Court); see also *About Us*, HAW. GIRLS CT., *supra* note 53 (quoting the Girls Court’s presiding judge who says the court provides “trauma-informed care to girls and their families”).

and to use this understanding to create services that facilitate their participation in treatment.”¹¹⁷

As with the link between PTSD and criminal behavior, it is undeniable that sexual and physical abuse can be criminogenic. In response to concerns over the increase in arrest rates for female juveniles, the Department of Justice’s Office of Juvenile Justice and Delinquency Prevention convened the Girls Study Group in 2008 to gain insight into, *inter alia*, the causes of delinquency in girls.¹¹⁸ While the group found that some delinquency risk factors are “gender sensitive,” importantly, it found that “*girls and boys experience many of the same delinquency risk factors.*”¹¹⁹ Crucially, the group found that all types of maltreatment—sexual, physical, and neglect—increase the risk of delinquency in *all* juveniles.¹²⁰ In other words, the experience of sexual victimization may contribute to delinquency for *both* boys and girls. Although sexual victimization is more common among girls,¹²¹ that sexual victimization contributes to delinquency is not “unique” to them.¹²² Moreover, although many girls who come into contact with the juvenile justice system have been subjected to sexual abuse, undoubtedly not all have. The use of gender as a proxy for sexual victimization, therefore, is both under- and overinclusive.

117. Hubbard & Matthews, *supra* note 115, at 238–39. *See generally* Stephanie S. Covington, *Women and Addiction: A Trauma-Informed Approach*, 40 J. PSYCHOACTIVE DRUGS 377, 380–82 (2008) (describing how treatment providers can become “trauma informed”).

118. *See* Margaret A. Zahn et al., *The Girls Study Group—Charting the Way to Delinquency Prevention for Girls*, THE GIRLS STUDY GROUP SERIES (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t of Justice, D.C.), Oct. 2008, at 1–2, <https://www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf> [<https://perma.cc/KY3B-ZT52>].

119. *Id.* at 7 (emphasis added).

120. *Id.* at 4. The Group also found that the child’s neighborhood and family dynamics, the availability of community-based programs, the extent of involvement in school, and the influence of a romantic partner who commits “serious crimes” predict delinquency in both male and female offenders. *Id.* The factors that more strongly influence a girl’s risk of delinquency are early puberty, depression and anxiety, and the influence of a romantic partner who engages in low-level offenses. *Id.*

121. *See* Margaret A. Zahn et al., *Causes and Correlates of Girls’ Delinquency*, THE GIRLS GROUP SERIES (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep’t of Justice), Oct. 2010, at 3, <https://www.ncjrs.gov/pdffiles1/ojjdp/226358.pdf> [<https://perma.cc/QAH6-28QC>].

122. For further analysis of the similarity of risk factors between boys and girls, see Charlene Taylor, *Girls and Boys, Apples and Oranges? A Theoretically Informed Analysis of Gender-Specific Predictors of Delinquency* 112 (July 21, 2009) (unpublished Ph.D. dissertation, University of Cincinnati), <http://cech.uc.edu/content/dam/cech/programs/criminaljustice/Docs/Dissertations/taylor-kindrickC.pdf> [<https://perma.cc/32YX-RH5U>] (refuting the assumption that “the criminogenic needs of females significantly differ from those of males” and finding “general risk factors prove to be as predictive for girls as they are for boys” and “some of the purported female specific risk predictors are significantly related to male delinquency as well”).

This observation of the causes of delinquency in male and female juveniles does not undermine the validity of the observation that the juvenile justice system has historically responded differently to delinquency in girls than in boys. *See generally* Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091 (2014) (describing how the juvenile status offender system is used disproportionately to regulate the conduct of girls).

Thus, the experience of trauma—and its potentially criminogenic influence—is hardly unique to veterans or girls.¹²³ By invoking a discourse of difference, however, status court proponents avoid having to grapple with the difficult and unavoidable conclusion that a history of trauma is one that unites veterans and girls with, rather than separates them from, other offenders.¹²⁴ For example, veterans court proponents insist that the trauma experienced by veterans is qualitatively different than that experienced by civilians.¹²⁵

Once the veil of uniqueness is lifted, the only remaining justification for the separation of these populations into different courts is that these offenders deserve different—and better—treatment than others. Veterans court proponents routinely insist that instead of being “churned through the courts like any common criminal,” veterans “need and *deserve* something *much better*.”¹²⁶ Girls court proponents make similar claims, albeit less directly, by insisting that girls are different from boys and require a more empathetic, relational court experience than boys do.¹²⁷ But it is undeniable that the process girls courts promise, one that values trust, respect, and empowerment, is qualitatively better than the conventional juvenile justice system.

That status courts embody a judgment about moral desert of these offenders is underscored by the intragroup sorting that occurs within status courts. Despite the broad rhetoric about the universal needs of veterans and girls, some of these courts restrict access to only a segment of these status group populations. Most veterans courts, for example, preclude those who were dishonorably discharged

123. Deborah Weissman has highlighted similarities between veteran offenders and another offender population: those who are chronically under- or unemployed. See generally Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL'Y 221, 247–48 (2013) (underscoring the similarities between the emotional and psychological repercussions of combat and chronic economic instability).

124. In this way, the sorting that occurs in status courts is similar to the “death is different” rationale of death penalty law, which the Supreme Court invokes to justify giving death penalty defendants additional procedural protections. As Rachel Barkow highlights, this rationale creates a two-track system that allows the Court to focus myopically on the importance of procedures for death-eligible defendants without having to grapple with the more difficult question of whether it should extend such protections to the rest—and overwhelming majority—of criminal defendants who do not face the death penalty. See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1189 (2009).

125. For example, in explaining the impetus behind the opening of his state’s first veterans court in 2012, Mississippi Circuit Judge Robert Krebs asserted: “[Veterans] have PTSD. They’ve seen death, dying, dismembered body parts, blood. It’s a totally different experience than the street.” *Veterans Court Addresses Special Needs*, *supra* note 60; see also Erinn Gansel, Note, *Military Service-Related PTSD and the Criminal Justice System: Treatment As an Alternative to Incarceration*, 23 S. CAL. INTERDISC. L.J. 147, 156 (2014) (acknowledging that civilians also experience PTSD but arguing that “veterans are a special class that needs extra protection”).

126. Craig Logsdon & Michelle Keogh, *Uncommon Criminals: Why Veterans Need Their Own Court*, 47 ARIZ. ART'Y 14, 24 (2010) (emphasis added).

127. See *supra* Section I.C. This approach embodies a cultural feminist understanding of inherent gender difference, which itself has been subjected to much criticism. See FEMINIST LEGAL THEORY: AN ANTI-ESSENTIALIST READER 10–12 (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

from participating.¹²⁸ This restriction “reflects the sense that participants deserve the help provided in the treatment court because of their honorable service.”¹²⁹

In sum, status courts are concerned with funneling resources not only, or even primarily, to where they can be most effective but rather to where they are most deserved. *This*—the sorting of offenders for rehabilitative opportunities based on a judgment about morality—represents a true paradigm shift. The criminal law supposedly responds to the offense and is not concerned with making moral judgments about the worth of the offender.¹³⁰

Thus, status courts use a discourse of difference and empiricism as a cover for moral judgment. In some ways the moral sorting dynamic at play in status courts is not new at all; rather, it is simply an exaggerated and more explicit version of what occurs with all problem-solving interventions. Judge Judith Kaye, former chief judge of the New York Court of Appeals and ardent supporter of problem-solving courts, noted: “Courts are . . . a mirror of society.”¹³¹ In making that observation, Chief Judge Kaye noted that the criminal court docket reflects what transpires in a community. But criminal courts, generally, and problem-solving courts, particularly, mirror society in a less literal way: who and what we choose to target sends a message about who and what we value and who is worth rehabilitating.

From this perspective, it is possible to see instances of moral sorting at play in earlier generations of problem-solving courts. For example, treatment court proponents employ broad rhetoric about the criminogenic influence of drug addiction or mental illness and the need for treatment instead of incarceration to close the revolving door to the criminal justice system.¹³² If in fact these courts were driven primarily by data, not moral judgment, they would prioritize participation of those offenders with the highest need for rehabilitative interven-

128. See Cartwright, *supra* note 59, at 306. *But see* Chelsea Jensen, *A Second Chance for Vets*, W. HAW. TODAY (Feb. 20, 2014, 1:02 AM), <http://westhawaii.com/news/local-news/second-chance-vets#sthash.cWS0mL0A.dpuf> [<https://perma.cc/QJ8Z-GQRQ>] (noting that the Oahu Veterans Treatment Court is open to “honorably and less-than-honorably discharged” veterans).

129. Cartwright, *supra* note 59, at 306.

130. See, e.g., *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) (identifying as a “basic premise of our criminal justice system” that “[o]ur law punishes people for what they do, not who they are”); Nicola Lacey & Hanna Pickard, *From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame Into the Legal Realm*, 33 OXFORD J. LEGAL STUD. 1, 27 (2013) (“Judgment of the conduct for which an offender is responsible is the business of the criminal process.”); see also Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267, 1311 (2011) (“Imprisoning persons for murder, rape, and robbery, and branding them felons, no doubt expresses a view about the inferiority of the conduct in which murderers, rapists, and robbers engage, without thereby expressing a view about the inherent moral worth of the perpetrators.”).

131. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL’Y REV. 125, 129 (2004).

132. See *supra* Section I.A.

tion.¹³³ Instead, treatment courts employ preliminary selection criteria that focus not on an individual's particular need for rehabilitative services but rather on their perceived risk for recidivism.¹³⁴ Under a risk analysis, those who stand to benefit the most from rehabilitative interventions are often deemed too risky to participate, and are thus funneled into the conventional system. Low-risk offenders, on the other hand, are "cherry picked" for problem-solving court participation.¹³⁵ Judge Morris Hoffman has characterized this as a form of "reverse moral screening": "[T]hose defendants who do not respond to treatment, and therefore may be the most diseased, go to prison, while those defendants who respond well and whose use of drugs truly may have been voluntary, escape prison."¹³⁶

This sorting out of offenders who stand to benefit the most from rehabilitative interventions is troubling not only because it is counterintuitive but also because it has a racially disparate impact. Although race cannot be and is not used directly as a risk factor,¹³⁷ many risk indicators have the impact of sorting out racial minorities, particularly black men.¹³⁸ For example, prior criminal history plays an outsized role in the assessment of risk, with most problem-solving courts prohibiting participation for those with an established criminal record.¹³⁹ Yet black communities and other communities of color are often disproportionately surveilled by the police and, consequently, their members are more likely

133. See Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. Rev. 189, 211 (2013) (discussing empirical studies showing that "the most risky offenders benefit most from rehabilitative treatment").

134. For example, in New York City, prosecutors decide whether to offer a plea that includes drug court participation in the first instance. See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. Rev. 783, 798 (2008); Quinn, *supra* note 4, at 57. They base this determination upon the defendant's "current charges and past record, not on his therapeutic need or lack thereof." Bowers, *supra*, at 798.

135. Josh Bowers makes the counterintuitive observation that "notwithstanding the supposed first-order drug-court aim to stop the cycle of addiction and incarceration among recidivist addicted drug users, the profile of the typical New York City defendant who received a drug-court offer was something else entirely—a clean-record dealer." Bowers, *supra* note 134, at 799.

136. Morris B. Hoffman, Commentary, *The Drug Court Scandal*, 78 N.C. L. Rev. 1437, 1476 (2000).

137. Eaglin, *supra* note 133, at 215 ("While predictive tools explicitly used race as a risk factor as late as 1979, this factor disappeared due to constitutional infirmity." (footnote omitted)).

138. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 13 (2009), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20217&libID=20187> [<https://perma.cc/66LB-769U>] ("Too often it seems that drug court eligibility and admission criteria serve to exclude mostly indigent and minority defendants."); see also Jaros, *supra* note 99, at 1513 (observing that problem-solving court screening requirements may "disproportionately prevent minority defendants from participating in problem-solving courts, leaving them subject to the incarcerative penalties that are issued in conventional courts"). Studies also suggest that these same populations are more likely to fail out of problem-solving court programs. See Bowers, *supra* note 134, at 803–05.

139. See, e.g., Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1554–55 (2004) (discussing eligibility criteria for drug courts in Florida and California). See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007) (discussing significance of criminal history in criminal justice risk assessment).

to have a criminal record.¹⁴⁰ This criminal history will then prevent them from participating in many problem-solving courts.¹⁴¹

A morality tale can also be told about all accountability courts. The organizing principle of these courts is that offenders of certain crimes are not being held accountable. But another way of stating this principle is that certain victims, such as business owners or domestic violence victims, deserve more services and protection than others. Tellingly, the nation's first community court opened to appease the complaints of business owners around New York City's Times Square about the scourge of prostitution and the effect of other low-level street crime on their businesses.¹⁴² The point is not that these courts incorrectly identify that the criminal justice system's response to certain types of offenders or victims is wanting. Instead, it is simply to highlight that these courts result from a *choice* to target certain offenses and victims for selective justice and not others. These choices, in turn, embody a judgment about which communities deserve more justice than they currently receive in the conventional system. Why these courts and not a court that seeks to increase accountability for victims of police violence or harassment? Or for victims of corporate fraud? Nevertheless, invocation of actuarial rhetoric and the prevailing presumption that problem-solving courts are "atheoretical" innovations guided only by a "what works" philosophy obscures these choices and discourages these questions.¹⁴³

B. THE EXPRESSIVE RELEASE OF STATUS COURTS

Release-valve reforms, like back-end sentence reduction programs, tend to be shortsighted emergency measures that are implemented to provide immediate

140. See Bowers, *supra* note 134, at 806 (noting that "poor and/or minority communities are disproportionate foci of police enforcement"). See generally Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 987–91 (1999) (describing the effect of stereotypic judgments and biases on police officers' perceptions of whether an individual's behavior warrants police interaction).

141. This phenomenon is well documented in the drug court context. For example, a study of drug courts in California revealed that white offenders were admitted at rates disproportionate to their representation in the population of individuals arrested for drug crimes. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 138, at 42. A review of Pima County, Arizona's drug court revealed no African-American participants and a dramatic underrepresentation of Hispanic participants. See *id.* at 42. And a drug court judge in Chelsea, Massachusetts, candidly noted that the population of her court did not reflect the "culturally diverse population" of the community; her court had not served a single African-American defendant for about six months. See Robert V. Wolf, *Race, Bias, and Problem-Solving Courts*, 21 NAT'L BLACK L.J. 27, 45 (2009).

142. See Mae C. Quinn, *Revisiting Anna Moscovitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the "Problem" of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 698 (2006).

143. See Boldt, *supra* note 95, at 1132 (noting the presumption that problem-solving courts are "atheoretical" innovations and that this atheoretical discourse obscures "the range of choices associated with the identification of relevant problems and acceptable solutions"). Pragmatism is itself a philosophy, and Richard Boldt recently argued that a robust application of this theory could help make problem-solving courts more effective and coherent. See *id.* at 1147–71.

fiscal relief and enacted without careful consideration of their long-term consequences.¹⁴⁴ Problem-solving courts are arguably different: they aim to reduce reliance on the criminal justice system in the long term, even if reaching that goal requires additional investment in the short term. Unlike emergency sentencing reductions or other release-valve reform efforts, which are envisioned as delimited reforms that enable the system to persist until sufficient pressure has been released (for example, until prison populations decline to a more sustainable rate), problem-solving courts are designed as permanent reforms that will perpetually relieve pressure on the criminal justice system. Because of this extended orientation, Mary D. Fan, who otherwise cautions of the dangers of release-valve reform efforts, identifies drug and veterans courts as “bright spots” on an otherwise bleak landscape of “budget-cut criminal justice.”¹⁴⁵ This section highlights an unaccounted for consequence that dims the promise of problem-solving courts: they may actually disincentivize long-term, systemic reform.

Precisely because problem-solving courts are intended to be permanent, *institutionalized* release valves, they help the broken system continue to operate *in perpetuity* despite its flaws.¹⁴⁶ By purporting to remove from the conventional system populations that dramatically highlight its dysfunction and inefficiencies, problem-solving courts relieve the stress of the greatest systemic failings. This observation provides reason to be concerned with all problem-solving courts—they may release just enough pressure so that a system that by all accounts is broken¹⁴⁷ does not explode.

But, as this section argues, there is reason to be particularly concerned with the release status courts provide. Setting aside, momentarily, critiques of fiscally driven neoliberal reform measures,¹⁴⁸ both treatment and accountability courts purport to address the tangible costs of doing business in an overburdened system.

Although problem-solving justice often is more expensive than conventional approaches,¹⁴⁹ it has gained widespread popularity with scholars, judges, and

144. See Fan, *supra* note 18, at 621–23.

145. *Id.* at 584.

146. See generally Robert Weisberg, *Tragedy, Skepticism, Empirics, and the MPCs*, 61 FLA. L. REV. 797, 804 (2009) (“Regimes of alternative sanctions often end up simply widening the net of criminal supervision and feeding more people into prisons; they serve not as replacements for prisons, but as pressure-release valves to enable the state to retain large prison censuses.” (citing FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 185–86 (1991))).

147. See Boldt, *supra* note 95, at 1128–29 (describing how, according to “virtually any reasonable set of criteria, the traditional criminal court system is a failure”).

148. See *infra* Section III.A.

149. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 71 (2005), <http://www.gao.gov/assets/250/245452.pdf> [<https://perma.cc/H5FM-NQD8>] (finding that the operational costs of seven drug court programs exceeded that of traditional case processing by \$750 to \$8,500 per participant); *Community Court Research: A Literature Review*, CTR. FOR CT. INNOVATION, <http://www.courtinnovation.org/research/community-court-research-literature-review-0> [<https://perma.cc/CG3Q-8TA2>] (citing study

politicians across the political spectrum who believe this upfront investment will pay off with back-end results—namely, reduced recidivism rates and incarceration costs.¹⁵⁰ Although some offenders or victims may receive extra resources or access more attractive opportunities, the investment is intended to improve the system’s functioning *for the system’s sake*.¹⁵¹ Treatment courts, for example, appear to address the efficiency costs of the conventional system.¹⁵² They remove from the assembly line of justice those whose criminogenic circumstances reformers believe can be controlled through treatment and rehabilitative services. Instead of simply punishing and releasing offenders who will inevitably return through the “revolving door” of the criminal justice system, they purport to eliminate the root cause of criminal behavior, thereby reducing recidivism that, in turn, may reduce future operating costs. Accountability courts, by contrast, seek to address the cost of errors—the deficiency costs—by targeting offenses that would otherwise escape sanction because the system is overtaxed.¹⁵³ They sweep in not only those offenses that are so severe, like domestic violence and sex offenses, that they require more attention than is provided in the conventional system, but also those low-level, quality-of-life offenses that the overburdened conventional system has been letting go.

Whether accountability and treatment courts actually make good on their promise to help the system function more efficiently remains the subject of much debate.¹⁵⁴ But on a discursive level, if not in practice, their organizational principles resonate with the utilitarian reasoning that prompted¹⁵⁵ and continue to legitimize the problem-solving court movement.

Unlike treatment and accountability courts, the primary aim of status courts is not to make the system run more efficiently.¹⁵⁶ Instead, they seek to provide certain offenders with a more respectful, thoughtful process—even if doing so does not result in quantifiably improved outcomes. In other words, they seek to improve the system *for the offender’s sake*. Former Attorney General Eric Holder admitted as much when he said that the creation of veterans courts was

finding that the community court in Hennepin County, Minnesota, spent approximately \$704 more per case than traditional courts).

150. See, e.g., BERMAN ET AL., *supra* note 9, at 13 (claiming that the “up-front investment in problem-solving justice reaps significant dividends on the back end”); Fan, *supra* note 18, at 641 (arguing that drug courts “save taxpayers money in the long run despite potentially higher start-up costs”). See generally Jaros, *supra* note 99, at 1509 (discussing the “coalition between conservatives and liberals in support of problem-solving courts”).

151. See *supra* notes 96–99 and accompanying text. For this reason, problem-solving courts have been characterized as an example of “neorehabilitation.” See Eaglin, *supra* note 98, at 874–75.

152. See *supra* Section I.A.

153. See *supra* Section I.B.

154. See *infra* Section III.D (discussing disagreement over whether problem-solving courts actually reduce operating costs).

155. See McCoy, *supra* note 95, at 1517–18.

156. See *supra* Section I.C.

“morally the right thing to do,” regardless of their impact on recidivism rates.¹⁵⁷ Thus, they address a more elusive cost: they relieve the toll on our sense of morality of subjecting sympathetic populations to the indignities of the impersonal assembly line of the overburdened, conventional criminal justice system.

That status courts change the tenor of the court process is not inherently problematic. In fact, as I discuss in Part III, the way these courts respond to offenders reflects a reimagining of the criminal offender identity that should be a guide for future criminal justice reforms. The problem, rather, is that reimagining only incredibly sympathetic populations—and through a discourse of difference that obscures the connection between status court offenders and others—may counterintuitively disincentivize widespread systemic reform.

By directing resources to members of certain status groups through a rhetoric of desert, status courts not only convey that we are dedicating rehabilitative resources to the “right” people, but they also justify leaving those sorted out—the “wrong” people—to the conventional system.

For example, veterans court proponents routinely invoke the image of an otherwise honorable veteran being subjected to “business as usual” and churned through the impersonal court system in support of their contention that these offenders belong in a court that treats them with more respect and individualized attention.¹⁵⁸ This argument has a compelling rhetorical impact: the image of a down-on-his-luck veteran being treated as another face in the criminal court crowd draws sympathy, but subjecting a nonveteran to the same impersonal process does not. But therein lies the problem: this line of reasoning leads to the conclusion that veterans—but not others—are entitled to a different kind of criminal justice process. Veterans court proponents exacerbate this dynamic by asserting that the courts provide veterans with the support they have “earned” through national service.¹⁵⁹ A veterans court in Brooklyn, for example, awards

157. See Ari Melber, *For Vets, Rehab Rather than Prison*, MSNBC (Jan. 29, 2014, 5:30 PM), <http://www.msnbc.com/the-cycle/vets-rehab-rather-prison> [<https://perma.cc/U3NB-EC9Z>].

158. *What Is a Veterans Treatment Court?*, *supra* note 85 (describing veterans courts as an alternative to the “business as usual” approach of “having all veterans appear before random judges who may or may not have an understanding of their unique problems”).

159. See *About Us*, JUSTICE FOR VETS, <http://justiceforvets.org/about> [<https://perma.cc/B4CQ-VY9B>] (stating that the Veterans Treatment Court movement “keep[s] veterans out of jail and connect[s] them to the benefits and treatment they have earned”); R. Gil Kerlikowske, *Veterans Treatment Courts: Providing Our Nation’s Heroes the Support They Have Earned*, WHITE HOUSE (June 1, 2012, 4:45 PM), <http://www.whitehouse.gov/blog/2012/06/01/veterans-treatment-courts-providing-our-nations-heroes-support-they-have-earned> [<https://perma.cc/52BW-S6CA>]; Elliot Blair Smith, *War Heroes Gone Bad Divided by Courts Favoring Prison or Healing*, BLOOMBERG (Nov. 1, 2012, 9:01 PM), <http://bloomberg.com/news/2012-11-02/war-heroes-gone-bad-divided-by-courts-favoring-prison-or-healing.html> [<https://perma.cc/G5SY-DGMA>] (“Veterans who have served their country and are not career criminals deserve a therapeutic approach” (quoting Judge Vance Peterson, a state district judge with a veterans docket)); see also Cartwright, *supra* note 59, at 303 (“Recent legislation in Colorado that will create veterans treatment courts statewide explicitly finds that ‘as a grateful state, we must continue to honor the military service of our men and women by attempting to provide them with an alternative to incarceration when feasible, permitting them instead to access proper treatment for mental health and substance abuse problems resulting from military service.’”); *Veterans Court, PA*, *supra* note 85 (stating

defendants who are graduating from court programs a medallion that reads, “I came with hope and worked and learned. I have a new life—a life that I’ve earned.”¹⁶⁰ An implicit corollary of this argument that defendants who are veterans deserve better is that nonveterans—or the “common criminal” in the parlance of some veterans court proponents¹⁶¹—have not earned the more favorable treatment such courts provide, and therefore should be left to the conventional system.

The reasoning for girls courts is less direct but equally troubling. A foundational principle of girls courts is that male and female juveniles have distinct needs and the traditional juvenile justice system was designed “for boys.”¹⁶² Among the “Gender-Specific Programming for Girls” the Oahu court offers are programs that provide emotional and physical safety, address abuse, are culturally competent, provide positive role models, and are strength- and relationship-based.¹⁶³ And the “gender-responsive” values it seeks to advance include “Healing,” “Instilling Hope,” and “Nurturing Strengths.”¹⁶⁴ It is difficult to imagine how male juvenile offenders would not benefit from programs that emphasize these values. Yet, by justifying the implementation of these programs through a discourse of gender difference, the courts imply that *only* girls need these specialized programs; because the traditional system was designed “for boys,” it already addresses their needs and need not be changed to accommodate them. Male offenders, it follows, do not require the empathetic, relational treatment promoted in the girls court setting.

Thus, by conveying that offenders who do not belong to these status groups do not require or deserve specialized treatment, status courts risk reifying old ways of doing justice for non-status offenders, who comprise the majority of the criminal offender population. Indeed, if non-status offenders deserve the dysfunctional system, it follows that there is no need to change it.

This rhetorical distinction also has immediate and tangible consequences. Problem-solving court involvement is a highly imperfect, though increasingly popular, method of social service delivery.¹⁶⁵ It cannot be a mere coincidence that problem-solving courts began to gain widespread popularity in the 1990s at the same moment that the welfare state was essentially dismantled through the Personal Responsibility and Work Opportunity Act of 1996.¹⁶⁶ Indeed, many

that the veterans treatment court “will witness a tremendous benefit to Veterans, as they overcome the burden carried from service to our country, now exacerbated by involvement with the criminal justice system”).

160. Gomez, *supra* note 79.

161. E.g., Logsdon & Keogh, *supra* note 126, at 24.

162. See *Girls Court*, *supra* note 53.

163. Pamphlet, Family Court of the First Circuit, Hawaii Girls Court: Gender-Specific Programming for Girls, <http://www.girlscourt.org/GirlsCourtHawaii.pdf> [<https://perma.cc/59C2-NQXG>].

164. *Our Mission*, *supra* note 51.

165. See *supra* Section I.A.

166. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.); see Eaglin, *supra* note 133, at 203 (“[T]he disappearance of the welfare state and the social safety net

court proponents point to the failures in social support systems as setting the stage for the emergence of the problem-solving approach to criminal justice. For example, Greg Berman and John Feinblatt have identified the breakdown of “social and community institutions . . . that have traditionally addressed problems like addiction, mental illness, quality-of-life crime, and domestic violence” as one of the “forces” that “helped set the stage for problem-solving innovation.”¹⁶⁷ Problem-solving courts seek to fill this “void” by linking offenders or victims who fall within their purview to otherwise unavailable supportive social services.¹⁶⁸

Those who are sorted into problem-solving courts are afforded access to these benefits—and in principle, if not in practice,¹⁶⁹ are frequently offered an opportunity to avoid an incarceratory sentence—that are denied to those who are sorted out. Many scholars have rightfully criticized this arrangement, suggesting that the resources dedicated to problem-solving justice would be better directed toward bolstering the social service infrastructure separate from the criminal justice system.¹⁷⁰ Even some problem-solving-court proponents note that the provision of social services through court involvement is not “ideal,”

make the neorehabilitative model all the more intriguing to the public, policy makers, and the judiciary because neorehabilitation potentially provides otherwise inaccessible services to overwhelmingly poor subpopulations.”).

167. Berman & Feinblatt, *supra* note 26, at 128; *see also* Arie Freiberg, *Problem-Oriented Courts: Innovative Solutions to Intractable Problems?*, 11 J. JUD. ADMIN. 8, 9 (2001) (arguing that “a breakdown in traditional social and community institutions which have supported individuals in the past” contributed to the need for problem-solving courts); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1541 (2003) (noting that the legal system is called upon to address social ills “because of the failure of ‘traditional nonlegal dispute resolution mechanisms in society,’ such as ‘church, community, neighborhood, friends, and family’” (quoting Professor Susan Daicoff)); Greg Berman, “*What Is A Traditional Judge Anyway?*”: *Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000) (identifying the “breakdown of the family and other traditional safety nets” as one of the “conditions” that brought about the problem-solving court movement) (comments of Hon. Judith Kaye).

168. *See* Nolan, *supra* note 167, at 1541–42 (describing the argument that failures in the traditional support systems left courts with “no choice but to step into the void”); *see also* Susan Stefan & Bruce J. Winick, Foreword, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL’Y & L. 507, 511 (2005) (arguing that one way to frame “the problem that mental health courts are intended to solve” is to compensate for “the lack of access to adequate community mental health services” (comments of Susan Stefan)); Keegan Hamilton, *Washington’s New Juvenile Gang Court Program Already Lacks Funding*, SEATTLE WKLY. (Apr. 11, 2012, 12:00 AM), http://www.seattleweekly.com/dailyweekly/2012/04/juvenile_gang_court_law_lacks_funding.php [<https://perma.cc/VGM8-MGKH>] (“We provide services that aren’t getting met We make sure they’re OK, their power is not shut off. We’re providing for them and meeting their needs. You ain’t going to tell me to stop banging and selling drugs if my power is shut off and there’s not food on my table.” (quoting a Washington juvenile gang court intervention specialist)); *cf.* Berman, *supra* note 167, at 80 (arguing that the system looks to the judicial branch to “solve these problems” because of “the abject failure of the other branches of government” (comments of Hon. Truman Morrison)).

169. *See infra* Section III.D (discussing conflicting data about the efficacy of problem-solving interventions and describing the ways in which problem-solving courts “widen the net” of judicial involvement for those who appear before them).

170. *See, e.g.*, Boldt, *supra* note 4, at 18–19; McCoy, *supra* note 95, at 1532–34; McLeod, *supra* note 1, at 1631–44.

but contend it is preferable to the conventional court system.¹⁷¹ In other words, it is a second-best solution that attempts to compensate for, but does not ameliorate, the systemic failings of the welfare state.

III. UNCOVERING THE TRUE PROMISE OF STATUS COURTS

As the preceding analysis demonstrates, there is reason for concern about the development of status courts. This Part demonstrates that they also represent a positive development in the evolution of criminal justice reform. By moving away from a decontextualized understanding of individual responsibility and toward an acknowledgment that external forces shape an individual's criminal behavior, status courts reinvigorate components of the rehabilitative ideal that may help lead the way out of our current carceral crisis.

A. THE RISE OF RETRIBUTIVISM AND INDIVIDUAL RESPONSIBILITY¹⁷²

From the late-nineteenth century until the 1970s, the American criminal justice system was characterized by the ideology of penal-welfarism, or the notion that “penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments.”¹⁷³ This rehabilitative ideal was the organizing principle that cemented the system together, providing the “all-embracing conceptual net” within and through which the state responded to criminal activity.¹⁷⁴

An essential tenet of the rehabilitative ideal was the notion that the most criminal offenders could and should be rehabilitated.¹⁷⁵ Offenders were seen as psychologically complex individuals whose behavior required correction, but who nonetheless maintained their place in mainstream society.¹⁷⁶ In other words, they were not irredeemable “others” but “innately human” individuals

171. For example, Bruce Winick has argued that a “humane society” would make mental health treatment widely available and would provide better social services for those who require treatment, and has conceded that mental health courts may not be the “best way of providing needed services or of motivating people with mental illness to accept the treatment that they often refuse or cannot obtain otherwise.” Stefan & Winick, *supra* note 168, at 510 (comments of Bruce Winick). However, he concludes that “given the realities of our mental health service delivery system—in which social and medical problems that cannot otherwise be effectively dealt with tend to get dumped at the doorstep of the courthouse,” mental health courts are preferable to conventional courts for people with mental illness. *Id.* at 511.

172. This is a rich topic, a detailed analysis of which is beyond the scope of this Article. For more in-depth treatment, see generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

173. GARLAND, *supra* note 172, at 34.

174. *Id.* at 35 (describing the rehabilitative ideal as “the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure”).

175. Lynch, *supra* note 7, at 90 (“Very simply, underlying the prevailing penal philosophy of that time was a conception of the offender/convict as a reformable being and the state as the appropriate entity to engage in such reform.”). As Lynch notes, the use of the death penalty during this period reflected a belief that some offenders remained “beyond hope for redemption.” *Id.* at 91.

176. *See id.* at 89–90.

who needed to be understood and treated.¹⁷⁷

Under this rehabilitative regime, responsibility for criminality was shared between the offender and the state. David Garland notes that crime was perceived “as a *social problem* that manifested itself in the form of individual, criminal acts.”¹⁷⁸ A “fundamental axiom” of this ideological orientation was that crime was the result of “poverty and deprivation,” a symptom of failings of the social welfare state.¹⁷⁹ Although individual rehabilitation was a necessary component of the response to criminal behavior, the ultimate “cure” for this problem required ameliorative state action, including the “expansion of prosperity and the provision of social welfare.”¹⁸⁰

Beginning in the 1950s and building through the 1970s, the rehabilitative orientation—particularly its manifestation in an indeterminate sentencing scheme—fell into disfavor amongst liberal and conservative scholars alike.¹⁸¹ A concern that united scholars across the political spectrum was that the rehabilitative ideal gave too little weight to the moral agency and responsibility of criminal offenders, which diminished the rights and respect—and undermined the appropriate punishment—that such agency demanded.¹⁸²

These bipartisan critiques, emerging in the context of a changing sociopolitical climate that was increasingly amenable to “tough on crime” policies, contributed to a systemic reorientation of the criminal justice system toward a retributive ideal.¹⁸³ This shift was intended to cure the unrestrained discretion of the rehabilitative-focused system by recalibrating the penal system to administer the level of punishment an individual’s behavior mandated, regardless of the offender’s individual circumstances.¹⁸⁴

177. *Id.* at 89; see also GARLAND, *supra* note 172, at 130 (“[C]orrectional criminology took criminal conduct to be a product of social influences and psychological conflicts . . .”).

178. GARLAND, *supra* note 172, at 41 (emphasis added).

179. *Id.* at 43 (noting also the attendant belief that “its cure . . . lay in the expansion of prosperity and the provision of social welfare”); see also Lacey & Pickard, *supra* note 130, at 6 (stating that “in its purest, theoretical form,” the rehabilitative ideal understood criminal conduct to be “a symptom of some underlying individual or social pathology”).

180. GARLAND, *supra* note 172, at 43.

181. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–28 (1993) (describing three fundamental critiques of the rehabilitative ideal beginning in the 1950s). Many point to an essay by sociologist Robert Martinson questioning the efficacy of certain rehabilitative interventions as the death knell for the rehabilitative ideal. See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, NAT’L AFF., Spring 1974, at 22, 49 (analyzing correctional rehabilitation programs and concluding that the data “give us very little reason to hope that we have in fact found a sure way of reducing recidivism through rehabilitation”).

182. See Lacey & Pickard, *supra* note 130, at 6–7 (noting that the rehabilitative model provided “little scope for responding to offenders as responsible and moral agents and thereby according them the rights and respect—alongside punishment for blameworthy conduct—appropriate to that agency”).

183. See Michael Tonry, *Can Twenty-First Century Punishment Policies Be Justified in Principle?*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?* 3, 8 (Michael Tonry ed., 2011) (noting that consequentialism “lost ground and influence” and “[r]etributivism came into vogue” in the 1970s).

184. See Lacey & Pickard, *supra* note 130, at 7 (stating that under the retributive model, “punishment is justified in response to, by reason of, and in proportion to, the offender’s desert”); see also JOHN

Inherent in the shift to retributivism was a reimagining of the criminal offender. The retributive regime imagines a criminal as an independent, rational actor engaged in the “straightforward process of individual choice.”¹⁸⁵ The retributive criminal offender is a psychologically simplified and wholly independent agent engaged in utility-maximizing decision making, uninfluenced by structural, situational, and contextual influences such as poverty or deprivation.¹⁸⁶ In the inflamed political discourse that prevailed as this shift unfolded, the criminal offender essentially lost his spot on the continuum of humanity. He became a “different species of threatening, violent individual[] for whom we can have no sympathy and for whom there is no effective help.”¹⁸⁷

This redefinition of the criminal offender triggered a redistribution of responsibility for criminal behavior. By framing structural influences as irrelevant to the offender’s calculation, retributivism absolved the state of responsibility for creating conditions that encourage criminal behavior.¹⁸⁸ Responsibility for crime prevention, therefore, came to fall primarily upon the offender himself to refrain from criminal activity and secondarily on the victim to avoid risky scenarios.¹⁸⁹ Consequently, the state’s responsibility vis-à-vis crime was simplified. No longer must the state ameliorate greater structural inequalities, bolster the social welfare system in the name of crime prevention, or dedicate resources to rehabilitating those who offend.¹⁹⁰

This shift toward retributivism—and the concomitant embrace of the decontextualized, rational actor conceptualization of criminal offenders—played an instru-

M. SLOOP, *THE CULTURAL PRISON: DISCOURSE, PRISONERS, AND PUNISHMENT* 139 (1996) (“A just deserts model of punishment holds that, regardless of prisoner attributes (race, gender, socioeconomic background), the punishment must fit the crime, no more and no less.”).

185. GARLAND, *supra* note 172, at 130; *see* Lacey & Pickard, *supra* note 130, at 7–8 (noting that “[c]entral to culpability” under a retributivist model is the notion that offenders “knew what they were doing when they committed the crime, and exercised choice and a sufficient degree of control in doing so”).

186. *See* Lynch, *supra* note 7, at 97.

187. GARLAND, *supra* note 172, at 136. This transition of the offender identity was also racialized. The prototypical offender shifted from the “weak but redeemable white inmate” to a “wholly irredeemable ‘other,’ primarily identified as African American, who is best incarcerated to protect society.” Lynch, *supra* note 7, at 93.

188. *See* Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3216 (2015) (“Depictions of monstrous offenders and opportunistic minority criminals appealed to and reified public sentiment that dysfunction and harm are problems of individual pathology rather than social structure.”).

189. *See* GARLAND, *supra* note 172, at 124–27; *see also* Lynch, *supra* note 7, at 97 (“[S]tate penal administrators and policymakers have shifted responsibility for dealing with the problem of crime onto those subjected to criminal victimization and those subject to punishment.”).

190. *See* Marie Gottschalk, *The Folly of Neoliberal Prison Reform*, *BOS. REV.* (June 8, 2015), <http://bostonreview.net/books-ideas/marie-gottschalk-neoliberal-prison-reform-caught#> [<https://perma.cc/S3ZQ-K64H>] (“Problems such as crime, poverty, mass unemployment, and mass incarceration are no longer seen as having fundamental structural causes that can be ameliorated via policies and resources mobilized by the state. Rather, these problems are regarded as products either of fate or individual action.”).

mental role in the seismic explosion of the United States' prison population.¹⁹¹ If crime is a choice, and if “nothing works” to rehabilitate offenders, then the proper purpose of punishment is to impose a high enough cost for criminal behavior that will deter most.¹⁹² And those who choose to engage in criminal activity, despite the cost, should be incapacitated—and for as long as possible.¹⁹³ Increasingly, harsh treatment came to be seen as part of the offender's “just deserts” as the calculus of punishment came to reflect a judgment of not just the offender's conduct but also the offender's character.¹⁹⁴

Currently, the United States occupies the “unenviable position as the unrivaled leader among advanced economies in the costly business of mass imprisonment,” with an imprisonment rate that far exceeds that of liberal market economies with similar level of development.¹⁹⁵ Liberals and conservatives are, once again, united in calling for reform of the criminal justice system as consensus grows that the country incarcerates at a rate it lacks the capacity,¹⁹⁶ political will,¹⁹⁷ and even constitutional authority¹⁹⁸ to sustain.

The current focus of reform measures is on reducing the fiscal strain of decades of “tough-on-crime” policies. Due, in large part, to these “budget-cut”

191. See Lynch, *supra* note 7, at 89 (discussing connection between the “well-documented late-twentieth-century war on crime,” the punitive sanctions “that came with it,” and “new conceptualizations of the criminal/penal subject”).

192. David Garland aptly describes punishment under this ideology as a “price mechanism” that regulates the supply and demand of crime. GARLAND, *supra* note 172, at 130.

193. See Lynch, *supra* note 7, at 95 (“If the person to be punished has freely made choices . . . punishment, at best, need only function as a deterrent and/or incapacitator to redirect or block the decision to commit crime . . .”).

194. See Lacey & Pickard, *supra* note 130, at 9.

195. Nicola Lacey, *American Imprisonment in Comparative Perspective*, 139 DÆDALUS 102, 102, 103 fig.1 (2010) (demonstrating that between 2008 and 2009 the United States incarcerated at a rate between four and five times higher than other liberal market economies).

196. See Fan, *supra* note 18, at 595–96; Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 416–17 (2012). In 2014, then-Attorney General Eric Holder admitted that the country's “overreliance on incarceration” is “financially unsustainable” and imposes “human and moral costs.” Matt Apuzzo, *Holder Endorses Proposal to Reduce Drug Sentences in Latest Sign of Shift*, N.Y. TIMES (Mar. 13, 2014), http://www.nytimes.com/2014/03/14/us/politics/holder-endorses-proposal-to-reduce-drug-sentences.html?_r=0 [<https://perma.cc/3G4A-NRCW>].

197. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 11 (2007) (noting that recent data suggest “Americans are increasingly skeptical of harsh prison sentences”). Conservative reformers have joined the chorus of those who are critical of overreliance on incarceration. For example, Ken Cuccinelli and Deborah Daniels, self-described “conservatives with backgrounds in law enforcement,” recently wrote, “For many offenders, prison is not the best answer,” so “we would be foolish to ignore the need for a course correction” in our incarceration-oriented criminal justice policies. Ken Cuccinelli & Deborah Daniels, *Opinion, Less Incarceration Could Lead to Less Crime*, WASH. POST (June 19, 2014), http://www.washingtonpost.com/opinions/less-incarceration-could-lead-to-less-crime/2014/06/19/03f0e296-ef0e-11e3-bf76-447a5df6411f_story.html [<https://perma.cc/D9K9-E9EV>].

198. See, e.g., *Brown v. Plata*, 563 U.S. 493, 501–02 (2011) (upholding district court's decision that the Eighth Amendment required California to reduce its prison population by approximately 40,000 prisoners).

reform measures, the system is slowly beginning to correct its course.¹⁹⁹ The latest Bureau of Justice Statistics report indicates that in 2012 the country's correctional population declined for the fourth straight year.²⁰⁰ However, although these emergency reforms may provide temporary relief, they will not bring about the systemic transformations our current carceral crisis demands.²⁰¹ Tellingly, the 2012 decline was the smallest in the four-year stretch of declines,²⁰² and more than half of this decrease is attributable to reductions in California's correctional population under the state's Public Safety Realignment Act.²⁰³ And, despite these recent decreases, the United States continues to far outpace all other nations in its incarceration rate, imprisoning 666 people per 100,000 of the nation's population.²⁰⁴ Moreover, these reforms are a backward-looking effort to undo the mistakes of the past.

To meaningfully reduce our over-reliance on incarceration, we must expand our focus beyond the fiscal bottom line and craft proactive, forward-looking reforms. This will undoubtedly be a complicated project that implicates many factors. But a crucial component of that complex endeavor must involve a genuine reimagination of the criminal offender and a concomitant recalibration of our punishment methodologies. As Marie Gottschalk recently argued:

If there is to be serious reform, we will have to look beyond the short-term economic needs of the federal and state governments. We can't rely on cost-benefit analysis to accomplish what only a deep concern for justice and human rights can. Indeed, cost-benefit analysis is one of the principal tools of the neoliberal politics on which the carceral state is founded.²⁰⁵

B. TREATMENT COURTS, ACCOUNTABILITY COURTS, AND THE ENTRENCHMENT OF INDIVIDUAL RESPONSIBILITY

At first blush, many problem-solving courts appear to represent at least a partial step toward this necessary redefinition of the criminal offender. Indeed, many treatment courts embrace the notion that crime is not the product of rational choice but rather a diseased mind.²⁰⁶ Tellingly, some problem-solving-

199. *See generally* Fan, *supra* note 18 (discussing the future of penal law in the wake of budget-cut criminal justice reforms).

200. LAUREN E. GLAZE & ERINN J. HERBERMAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, at 1 (2013), <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> [<https://perma.cc/2WM5-TJNS>].

201. *See* Fan, *supra* note 18, at 626–33.

202. GLAZE & HERBERMAN, *supra* note 200, at 1.

203. Criminal Justice Realignment Act, A.B. No. 117, 2011 Cal. Stat. ch. 39; Criminal Justice Alignment Act, A.B. No. 109, 2011 Cal. Stat. ch. 15; *see* GLAZE & HERBERMAN, *supra* note 200, at 5.

204. Inst. for Criminal Policy Research, *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/LJ9W-HEMF>] (ranking prison population rates worldwide).

205. Gottschalk, *supra* note 190.

206. *See* Bowers, *supra* note 134, at 787 (“[D]rug courts follow the philosophy that addiction is a compulsive disease.”); Hora et al., *supra* note 3, at 463–64 (“As opposed to using the traditional

court critics have lobbed a critique similar to that made of the old rehabilitative system: that the courts authorize punishment in excess of a defendant's "just deserts" in the name of rehabilitation.²⁰⁷

But, in fact, most problem-solving courts continue the retributivist project in two interrelated and overlapping ways: (1) they further entrench the primacy of individual responsibility, and (2) they continue to obscure the role of external social factors that contribute to criminal behavior. Indeed, most problem-solving courts stray from the rational actor theory only temporarily, if at all. For example, as Josh Bowers has recounted, although drug courts purportedly conceive of drug offenses as the result of a disease, not a calculated decision, they do so only as long as the offender then makes the rational decision to comply with treatment.²⁰⁸ If the offender struggles to comply, "a switch is thrown and drug courts revert to economic conceptions of motivation and to conventional punishment."²⁰⁹ Thus, such courts send a "mixed message": "[A]ddiction controls addicts' behavior at the time of the crime (at least to a degree), . . . but addicts control their addictions at the time of treatment . . ."²¹⁰

In this way, drug courts engage in "responsibilization strategies" similar to those employed by the retributive state.²¹¹ The "therapeutic paradigm" that guides drug courts frames drug crime and relapse as symptoms of individual failings, leaving the onus wholly on the defendant to address the internal condition believed to have caused him to engage in criminal behavior.²¹² In this context, the system continues to envision the defendant as an inherently and ultimately rational actor—albeit one suffering from substance addiction—who can and should choose to better his circumstances by completing a treatment program instead of facing incarceration.²¹³

By focusing myopically on the influence of addiction upon the defendant's actions, these courts decontextualize drug crimes from the external circumstances in which they occur. They provide a "race- and class-neutral approach"

criminal justice paradigm, in which drug abuse is understood as a willful choice made by an offender capable of choosing between right and wrong, DTCs shift the paradigm in order to treat drug abuse as a 'biopsychosocial disease.'").

207. See, e.g., Douglas Husak, *Retributivism, Proportionality, and the Challenge of the Drug Court Movement*, in *RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?*, *supra* note 183, at 214; Judge Morris B. Hoffman, Commentary, *A Neo-Retributionist Concurs with Professor Nolan*, 40 *AM. CRIM. L. REV.* 1567 (2003).

208. See Bowers, *supra* note 134, at 787–88.

209. *Id.* at 788.

210. *Id.* (emphasis omitted).

211. See Miller, *supra* note 8, at 425 ("The drug court's move from community to individual self-control and self-esteem as the primary causes of drug crime and relapse, embraces what David Garland calls a 'responsibilization strategy,' placing the onus on individuals to alter their conduct, rather than on emphasizing rights to access government social welfare services."). See generally GARLAND, *supra* note 172, at 124 (defining "responsibilization strategies").

212. See Miller, *supra* note 8, at 425–26.

213. See Bowers, *supra* note 134, at 828–30 (describing the "theoretically disjointed approach" of drug courts, which "adopt a medical tactic when treating the participating patient, but a penal tactic when disposing of treatment failures").

to crime that is “focused on individual responsibility rather than social circumstances.”²¹⁴ Thus, consistent with the retributivist paradigm, they overlook the influence of racial segregation, class stratification, and ways in which these factors impinge on an individual’s employment opportunities. Instead, they frame the “problem” of drug crime as emanating from the defendant’s “life choices, rather than social choices about where and how to distribute [societal] resources to different communities.”²¹⁵

Anthropologist Victoria Malkin made similar observations about the emphasis on individual responsibility and choice in her study of the Red Hook Community Court. In this context, she noted, a discourse of personal responsibility and individual choice “override debates over social justice and equity, and permit state coercion and control to continue unchallenged.”²¹⁶ It begins with the arraignment, which the court characterizes as an “opportunity” for the defendant to better himself.²¹⁷ He is then told he has a choice: he may choose to help himself by agreeing to and complying with treatment or, alternatively, he may opt for prison.²¹⁸ This message is reiterated at each subsequent counseling session and court appearance, with constant reminders to the defendant that he has chosen his course and the consequences are “[his] and [his] alone.”²¹⁹ By situating offenders as directly and solely responsible for their predicament, Malkin concludes, problem-solving courts strip away the role of “society” in constructing their fate.²²⁰ In the process, all other causal determinates of criminal behavior, including poverty, unfair policing practices, and the role of privilege or advantage, “disappear into rhetoric of failed individual decision-making.”²²¹

214. Miller, *supra* note 8, at 425 (emphasis omitted).

215. *Id.* at 427, 437 (“Therapy and responsibility disaggregate the problem of drug crime from social and governmental forces. They take the emphasis off the increasing racial segregation and class stratification of the inner city, and emphasize the personal characteristics of the addict.”).

216. Victoria Malkin, *The End of Welfare As We Know It: What Happens When the Judge is in Charge*, 25 *CRITIQUE ANTHROPOLOGY* 361, 363 (2005).

217. *See id.* at 371.

218. *See id.* at 373, 377, 380.

219. *Id.* at 380. Malkin also notes that the court separates offenders into “those who want to help themselves” by complying with the court’s treatment and service programs, and the “others,” who are considered to choose prison over the alternative. *Id.* at 382. This separation, she argues, “turns prison into a choice. Individual selves are what matter, and the system is there to engender these and provide them with a chance to change.” *Id.*

220. *Id.* at 370–71.

221. *Id.* at 371; *see also* Boldt, *supra* note 95, at 1172 (noting that the Red Hook Community Court conceives of crimes as “problems of individual deviance”); Richard C. Boldt, *The “Tomahawk” and the “Healing Balm”*: *Drug Treatment Courts in Theory and Practice*, 10 *U. MD. L.J. RACE RELIGION GENDER & CLASS* 45, 63–64 (2010) (discussing study finding that drug court judges engaged in stigmatizing rather than reintegrative practices, focusing on “the individual defendant, not the act itself” with comments such as “Don’t you know what this stuff does to your brain!,” “I’m tired of your excuses,” and “I’m through with you.” (quoting Terance D. Miethe, Hong Lu & Erin Reese, *Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings*, 46 *CRIME & DELINQ.* 522, 537 (2000))); Malkin, *supra* note 216, at 382 (“[T]he problem-solving approach redefines crime as a therapeutic (scientific) problem, where poverty is erased as a causal determinant.

Thus, instead of moving away from a myopic focus on individual responsibility, many problem-solving courts further entrench it. As a result, they fail to account for the influence of structural conditions on criminal behavior. For this reason, scholars have noted that the potential of the problem-solving-court model to bring about widespread and lasting change is, ultimately, limited. For example, Anthony Thompson has noted that, although some promote community courts as a means of addressing homelessness by linking defendants to social services, the courts ignore “the structural and systemic causes of homelessness.”²²² The courts’ narrow focus on the individual and their use of coercive state power to push the individual to get “some form of assistance,” he notes, “can have only a limited effect in eradicating homelessness.”²²³ Richard Boldt recently came to a similar conclusion, arguing that, in contrast to the prevailing problem-solving-court model that focuses on “individual deviance,” a court that accounted for “broad structural phenomena that either contribute to community cohesion or dysfunction . . . would better serve the human needs of its constituents.”²²⁴ These critiques underscore that most problem-solving courts actually reinforce, rather than challenge, the retributivist rational actor model and continue to overlook external, structural factors that influence criminal behavior.

C. STATUS COURTS AND THE REDISTRIBUTION OF RESPONSIBILITY

Status courts represent a more promising step toward the redefinition of the criminal offender and a reconceptualization of his or her relationship to the state. In contrast to treatment and accountability courts, which continue retributivist individualization tactics, status courts take a broader view of the factors and influences that contribute to criminal behavior. Indeed, the entire organizing impetus behind these courts is that *the offender* does not embody a “problem” to be “solved.” The problem, rather, lies in the *external* influences upon an offender’s life that cause trauma. For veterans, the emphasis is on the traumatic influence of military service; for girls, abuse and coercion. For example, the Commander of the first veterans court in Oregon remarked, upon its opening in 2010 that “[v]eterans have a whole different bag of ghosts they carry.”²²⁵ The goal of the court is “to respond in a manner cognizant of those ghosts and the interventions necessary to bring wellness to the veteran defendant.”²²⁶ Judge Jo Ann Ferdinand was moved by a similar sentiment to open New York City’s first veterans court upon observing that a Vietnam veteran defendant in her courtroom was “still carrying . . . invisible wounds” from his military service that

Policing and unfair arrests disappear as the discourse moves into a therapeutic mode. Increased policing and longer criminal records form the backbone as they enable the court to have more leverage and control over individuals, and the unsuccessful ‘clients’ can be sent back into the prison population.”)

222. Thompson, *supra* note 36, at 90.

223. *Id.*

224. Boldt, *supra* note 95, at 1172.

225. Tillson, *supra* note 83.

226. *Id.*

were “effecting [sic] his behavior.”²²⁷ The Oahu girls court similarly embraces the notion that the girls who come before it are complex individuals who, though appearing before the court “as an offender,” are often “victims of physical or sexual abuse or domestic violence themselves.”²²⁸ In other words, girls courts reflect a judgment that girls commit delinquency offenses, at least in part, because of the negative influence of another person or experience.

Thus, although status courts, like other problem-solving courts and criminal courts in general, strive to hold offenders accountable for their actions, they also seek to account for the role of structural factors and external experiences in contributing to criminal behavior. In so doing, they move away from the conceptualization of criminal offenders as disembodied rational actors who independently choose to commit criminal activity. Instead, they advance a contextualized definition of offenders that acknowledges that criminal behavior originates in a “structural causal setting” and results from a complex combination of interrelated factors.²²⁹ According to this more nuanced conceptualization of criminal behavior, individual agency is not irrelevant but rather is exercised in a specific context that is shaped by structural factors and extrinsic experiences.

Through their acknowledgement of the influence of external factors upon criminal offenders, status courts begin to partially redistribute responsibility for criminal behavior. In these courts, unlike conventional courts and other problem-solving courts, the defendant does not bear the sole responsibility for his or her actions; rather, responsibility is shared between the offender and those who caused the trauma that contributed to the criminal behavior. In veterans courts, that “other” is the state. Indeed, proponents of veterans courts explicitly invoke a sense of national responsibility for “breaking” these individuals by sending them into combat and a corresponding duty to “fix” them instead of punishing them.²³⁰ The redistribution that takes place in girls courts is more subtle. By

227. Meriwether, *supra* note 49.

228. *FAQs*, HAW. GIRLS CT, *supra* note 69.

229. See Weissman, *supra* note 123, at 224, 248 (noting that veterans courts consider “the context of crime as [a] condition of addressing [criminal] behavior”).

230. See, e.g., Laura Fong, *Justice Stratton: Ohio Vets Courts Recognize What Society Has Demanded*, WKSU 89.7 (Nov. 11, 2011), <http://www.wksu.org/news/story/29917> [<https://perma.cc/JNG5-WFR8>] (“They come out [of war], they’re damaged. They have all sorts of issues they didn’t have before. We damaged them by sending them to defend us. We have this special extra obligation to really reach out and try to make their lives different.”); Carol Hopkins, *‘We Owe Them a Debt’: Veterans Courts on the Rise in Oakland County*, OAKLAND PRESS (June 29, 2013, 12:01 AM), <http://www.theoaklandpress.com/article/OP/20130629/NEWS/306299977> [<https://perma.cc/J8TN-ETHP>] (“We engage these individuals to go into combat and the next thing you know they have a knife to the throat of their wife from Post-Traumatic Stress Disorder. We owe them a commitment to habilitate [CQ] them . . .” (quoting Waterford Township District Judge Jodi Debbrecht Switalski)); Megan McCloskey, *Veterans Court Takes a Chance on Violent Offenders*, STARS & STRIPES (Sept. 14, 2010), <http://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182> [<https://perma.cc/4VMV-FEB4>].

The Supreme Court echoed this sentiment in *Porter v. McCollum*, finding ineffective assistance of counsel in a capital domestic violence homicide prosecution for failing to present evidence of the defendant’s military service to show not only that “he served honorably under extreme hardship and gruesome conditions” but also “the intense stress and mental and emotional toll that combat took on

acknowledging that many of the girls commit offenses because of trauma resulting from abuse, court actors implicitly shift responsibility to those who have abused or taken advantage of the girls for contributing to their criminal behavior.

In addition to redistributing responsibility, status courts also begin to redefine the criminal offender in another significant way: they literally break down the “othering” effect of the retributivist model that most problem-solving courts replicate. Unlike treatment and accountability courts, which target a negative trait or behavior that separates the defendant from society, status courts are organized around a positive characteristic the offender shares with the others in the community. A distinguishing feature of many status courts is that they are staffed by people who share the offender’s status and who are willing to draw on the shared experiences to offer the offender support and mentorship throughout the court process. Significantly, in both veterans courts and girls courts, state actors—including judges—actively identify with the offenders, despite their wrongdoings. For example, Judge Patrick Dugan, himself a veteran, reflected that he was able to relate to the defendants who come before him in the Philadelphia Municipal Veterans Court because “I’ve been there, done that, walked in their boots—I speak the language.”²³¹ Similarly, Judge Michael Brennan identifies as a mentor to the defendants who appear before him in the veterans court in Brooklyn, New York, noting that he will “come down [from the bench] to [the defendants’] level as a brother and sister and work with [them].”²³²

Status courts properly refocus the criminal justice intervention on the conduct of the offender, not his or her character.²³³ Throughout the court process, status court offenders are reminded that, though they have engaged in wrongdoing, they nevertheless remain “good people.” As the Director of the New York Veterans Service Agency testified before the House of Representatives Committee on Veterans Affairs, veterans in the criminal justice system “are not bad people; they just got caught up with the wrong people, places and things.”²³⁴ With this move, status courts take an important, albeit counterintuitive turn: although they improperly employ moral judgments to sort offenders into the courts, they effectively decouple morality from responsibility as they mete out

[the defendant].” 558 U.S. 30, 43–44 (2009) (per curiam). Significantly, in that same decision, the Court took defense counsel to task for failing to present evidence of the defendant’s abusive childhood, because it may have had “particular salience” for the jury in assessing his abusive behavior toward the decedent. *Id.* at 43.

231. Ines Novacic, *For Veterans in Legal Trouble, Special Courts Can Help*, CBS NEWS (Nov. 10, 2014, 2:32 PM), <http://www.cbsnews.com/news/for-veterans-legal-trouble-special-courts-can-help/> [<https://perma.cc/PPY7-KCV5>].

232. Gomez, *supra* note 79.

233. See Lacey & Pickard, *supra* note 130, at 27 (“Judgement of the conduct for which an offender is responsible is the business of the criminal process.”).

234. Weissman, *supra* note 123, at 247.

punishment.²³⁵

D. IMPLICATIONS FOR FUTURE REFORM

Though status courts are an inherently practical and grounded innovation, this Part establishes that their important impact lies in how state actors theorize offenders. Status courts respond to offenders as complex individuals who come to the criminal justice system with a history as both offenders and, often, victims of an unjust past. The most effective way to take this insight “to scale” is not to create more specialized courts—status or otherwise—but rather to use this contextualized conceptualization to guide different kinds of investments in criminal justice reform.

Some will inevitably suggest that, because status courts are doing something right, the solution is to create more of them. However, the proliferation of status courts is not the best response for many reasons. First, the creation of courts for additional status groups would perpetuate the troubling moral sorting inherent in the status court model itself. Inevitably many—and perhaps most—would be sorted out of such reforms based on judgments that they do not deserve specialized treatment. Although it is easy to imagine the creation of courts for single mothers, peace officers, or other popularly sympathetic populations, mobilizing resources in support of a court for those who grew up in violent neighborhoods, for example, or are influenced by structural racism or homophobia would be “politically problematical,”²³⁶ to say the least. If status courts actually fulfill their promise to close the revolving door to the criminal justice system,²³⁷ it would be unfair and unjust to continue to parcel out rehabilitative possibilities based on the idea that certain populations are more deserving of a chance to avoid incarceration than others. Concomitantly, for the reasons discussed above, the creation of additional courts would further entrench old ways of doing business for those left to the conventional system.

One way to avoid this moral sorting would be to broaden the scope of these courts to allow entry to all offenders who commit crimes as a result of past traumatic experiences. In other words, to create a trauma court. A trauma court would differ from existing mental health courts in that it would take the extra step exhibited in status courts to move away from individual responsabilization strategies and toward a more holistic and complicated view of the circumstances and motivations that led to the immediate offense. A trauma court, unlike a mental health court, would not simply seek to fix a “problem” believed to be internal to the offender but would strive, as status courts do, to understand and

235. See generally Lacey & Pickard, *supra* note 130, at 7–10 (discussing how the current retributivist paradigm conflates morality and criminal responsibility through the emphasis on affective blame which, in turn, justifies the implementation of harsh treatment).

236. See Weissman *supra* note 123, at 247–48 (observing that comparing veterans to others remains “politically problematical”).

237. But see *infra* notes 241–42 and accompanying text (discussing the contested efficacy of status courts).

account for the traumatic experiences beyond the offender's control that contributed to criminal behavior.²³⁸

Such an approach, though more promising, is nevertheless unsatisfactory. Scholars have provided many compelling reasons to believe that the problem-solving court model is itself inherently flawed. For example, many have made the counterintuitive observation that creating a problem-solving court often increases the number of criminal cases that are initiated in a jurisdiction, which, in turn, increases, rather than decreases, the fiscal demands on the system.²³⁹ This occurs as a result of the "net-widening" effect, which occurs when problem-solving courts "pull members of the community into the criminal justice system who would otherwise have avoided it."²⁴⁰

Another body of scholarship highlights the downsides to participation in problem-solving programs for criminal defendants. Many have criticized these courts for requiring defendants to sacrifice important procedural protections, including the zealous advocacy of a defense attorney.²⁴¹ Others have demonstrated that participation in a problem-solving-court program may *increase* the risk that a defendant will be incarcerated. As Allegra McLeod recently concluded based on her extensive analysis of the prevailing criminal law reformist models that prevail in problem-solving courts, most problem-solving courts follow a model that is incarceratory, not decarceratory.²⁴² Problem-solving court participation often imposes a number of demands upon defendants not present in conventional courts, such as reporting and treatment requirements,²⁴³ while it increases the length of the defendant's contact with the criminal justice system.²⁴⁴ This extended exposure to court surveillance, combined with the often onerous participation requirements, provides defendants with ample opportunity to violate the terms of their participation agreement in a way that sends them back to prison. Those who fail to complete programs typically face an incarceratory sentence, and the sentence imposed after program failure tends to be longer than that which would have been imposed in a conventional court.²⁴⁵

238. For the reasons proffered by Youngjae Lee, trauma resulting from one's own culpable conduct would not qualify for entry into a trauma court. *See* Youngjae Lee, *Military Veterans, Culpability & Blame*, 7 CRIM. L. & PHIL. 285, 289–93 (2013).

239. *See, e.g.*, Jaros, *supra* note 99, at 1513–14.

240. *Id.*; *see also* Boldt, *supra* note 4, at 17–18 (discussing how problem-solving courts produce a "net-widening" effect by failing to divert "defendants who would otherwise have avoided [the] criminal justice system").

241. *See, e.g.*, Quinn, *supra* note 4.

242. *See* McLeod, *supra* note 1, at 1591.

243. *See, e.g., id.* at 1662 (quoting former drug court prosecutor as describing the problem-solving court programs as "tougher than the alternatives").

244. *See* Miller, *supra* note 139, at 1559 ("Drug court advocates often maintain that offenders spend more time in drug court than they would in prison."); Nancy Wolff et al., *Mental Health Courts and Their Selection Processes: Modeling Variation for Consistency*, 35 L. & HUM. BEHAV. 402, 408 (2011) (noting that misdemeanor mental health court participants generally are "under court supervision longer than if they plead guilty in criminal court").

245. *See* Boldt, *supra* note 95, at 1143 (concluding that a "significant subset" of drug court defendants fail the treatment program, and their outcome measures are "likely to be as bad or worse"

Finally, there is a lively and ongoing debate as to whether problem-solving courts actually provide the cost savings they promise,²⁴⁶ which provides yet another reason to be “circumspect” of the promises of problem-solving justice²⁴⁷ and counsel against further proliferation of problem-solving courts—status courts or otherwise.

In any event, the promise of status courts lies neither in the separation of populations into specialized courts nor in the provision of therapeutic services to court participation.²⁴⁸ By encouraging system actors to acknowledge the way that structural factors and experiences beyond the offender’s control contribute to criminal behavior, status courts disrupt the retributivist paradigm and advance a new definition of the criminal offender. Because adoption of the independent rational actor model was central to the ratcheting up of sanctions, popularization of the image of the offender advanced by status courts would help reduce its impact. Moreover, acknowledging the influence of other ways in which society is responsible for criminal behavior—for example, through the perpetuation of structural economic and racial inequalities—reduces the state’s

than those who were processed through the conventional court system); Bowers, *supra* note 134, at 792 (discussing studies conducted by the Center for Court Innovation which found that “the sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants”).

246. *See, e.g.*, McLeod, *supra* note 1, at 1591 n.12 (discussing empirical studies that demonstrate problem-solving courts “reduce costs and recidivism”). Other studies, however, suggest otherwise. *See* RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 6 (2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf> [<https://perma.cc/YP8V-LYG2>] (“Some studies show little or no impact from drug court participation”); Hoffman, *supra* note 136, at 1480 (noting that many formal studies of drug court efficacy conclude that drug courts “are effective in speeding drug cases through the system” but have “only a marginal impact, if any, in reducing recidivism”). And still others come to conflicting conclusions. In 2005, for example, the GAO analyzed 27 drug court evaluations. Somewhat unsurprisingly, it found that drug courts reduced recidivism rates *while the participant was involved in the court program*. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 149, at 5. But it identified mixed results in other areas, such as relapse rates. *See id.* at 6. For an in-depth discussion of the GAO study, see Boldt, *supra* note 221, at 50–57.

Thus, current data are, at best, mixed about whether drug courts work. *See id.* at 49–50 (reviewing meta-analyses of drug court efficacy and suggesting the results are mixed). And data available for other types of problem-solving courts are scant and even less conclusive. *See* Mitchell B. Mackinem & Paul Higgins, *Introduction to PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?* vii, ix (Paul Higgins & Mitchell B. Mackinem eds., 2009) (“While adult drug courts have been highly researched and evaluated, others such as domestic violence courts are almost unstudied.”). For example, a 2009 literature review of mental health courts revealed that there was “some research” that had the “potential” to produce cost savings. *See* LAUREN ALMQUIST & ELIZABETH DODD, COUNCIL OF STATE GOV’TS JUSTICE CTR., MENTAL HEALTH COURTS: A GUIDE TO RESEARCH-INFORMED POLICY AND PRACTICE 26 (2009), https://www.bja.gov/Publications/CSG_MHC_Research.pdf [<https://perma.cc/C475-WA7H>]. This review also found that mental health court participants were “as likely to spend additional time in jail as people whose cases were processed in the traditional court system.” *Id.* at 24.

247. *See* Boldt, *supra* note 4, at 14–15.

248. In fact, many have offered compelling arguments about why therapy should be unhinged from punishment altogether. *See, e.g., id.* at 15–18 (critiquing the merger of treatment and punishment in problem-solving courts).

moral standing to punish.²⁴⁹ Importantly, the suggestion is not that we draw on the insight of status courts to absolve offenders of responsibility, but rather that we use it to think about responsibility differently, striving to acknowledge that offenders act both out of agency and circumstance. In other words, it is about how, not whether, to punish.²⁵⁰

Operationalizing this theoretical insight should have a tangible, practical impact. It will require us to reimagine how we mete out justice—both in kind and amount—and change our practices accordingly. The contextualization of criminal behavior should lead, as it does in status courts, to more respectful, compassionate interactions between system actors and the defendants. In large part, the different tenor of status court proceedings results from the willingness of judges to empathize with defendants.²⁵¹ In status courts, empathy flows from the commonality of experience, because judges relate directly and quite literally to an experience of having been a veteran or a girl. Of course, we cannot and should not countenance a criminal justice system in which judges can adjudicate offenses only against defendants with whom they share a common experience. Fortunately, empathy can also be promoted through imagination.²⁵² We should encourage judges to pause the assembly line of justice long enough to both understand and acknowledge the external, traumatic influences that impact those offenders whose experiences they do not share and respond accordingly. This introduction of empathy may well lead to the imposition of less punitive sentences.²⁵³ But at the very least, it should improve the tenor of the court process, showing defendants that system actors strive to understand their circumstances and respond appropriately. This may, in turn, increase defendants' sense of procedural justice,²⁵⁴ which can reduce recidivism regardless of the sentence imposed.

Embracing the notion that criminal behavior results, at least in part, because of past experiences beyond the offender's control should also mitigate the harshness of the criminal sanctions judges impose by tempering the influence of affective blame upon punishment. As Nicola Lacey and Hanna Pickard have recounted, as the retributivist paradigm gained prominence, so too did the

249. See Lacey & Pickard, *supra* note 130, at 24; see also Lee, *supra* note 238, at 300–02 (discussing how society's standing to punish veterans who commit crimes because of service-related PTSD is diminished).

250. In this way, the emphasis of this analysis is different from the strain of “rotten social background” literature that focuses on whether and when a defendant's background should exculpate him of criminal liability. See, e.g., Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQUALITY 9 (1985).

251. See Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown As a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133, 190 (2011) (“[E]mpathy is the ability to see and feel the world through another's eyes.”).

252. *Id.* (citing empirical studies showing that empathy can be promoted through “at least two ways: imagination and experience”).

253. *Id.* at 184 (“[E]mpathy is a prerequisite to compassion, which in turn fosters the impulse to mitigate punishment.”).

254. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 165 (1990).

influence of affective blame, or the “range of hostile, negative attitudes and emotions that are typical human responses to blameworthiness,”²⁵⁵ on sentencing. Affective blame justified the ratcheting up of criminal sanctions as harsh treatment came to be seen as part of the offender’s “just deserts.”²⁵⁶ Drawing insights from the clinical treatment of individuals with agency disorders, Lacey and Pickard observe that clinicians’ ability to take their patients’ histories into account to see them “both as perpetrators and as victims” tempers the influence of affective blame.²⁵⁷ Instead, clinicians practice “detached blame,” or “responsibility without [affective] blame,” through which they require patients to account for their transgressions and impose negative sanctions, if necessary, while avoiding detrimental—and unjustified—harsh treatment and stigma.²⁵⁸

In sum, systemically embracing the insight of status courts requires an investment in a different kind of criminal justice system, but that investment is mainly conceptual and behavioral, not economic. And yet, changing how we envision criminal offenders should change the kinds of economic investments we make. For, as Mona Lynch has noted, “[t]he ways in which the population that is to be punished is imagined by policy makers, court personnel, penal administrators, and others who are in the business of state punishment necessarily shapes the kinds of investments states have made in their penal machinery.”²⁵⁹ Adopting a more holistic view of the factors that contribute to criminal behavior should lead away from additional funding for harsh punitive policies and toward investment in a system oriented toward proactively funding services and opportunities that will prevent people from coming into contact with the criminal justice system altogether.

CONCLUSION

There is no simple solution to our carceral crisis, but it is inevitable that purportedly data-driven, “evidence-based practices” like problem-solving courts will continue to inspire criminal justice reform efforts. Our ability to capture and analyze data has, and will, continue to increase.²⁶⁰ As it does, we should no longer countenance the use of data as a veil for morality-driven decisions. If we are to base programs and policies on data, we must be willing to lead where it follows, even if that means offering rehabilitative opportunities to individuals who are currently deemed too risky for such an investment. Moreover, instead of using data to *exclude* offenders through the creation of specialized tribunals and processes, I propose that we begin to use data to *include* them in the

255. Lacey & Pickard, *supra* note 130, at 3.

256. *See id.* at 9–10.

257. *Id.* at 22–23.

258. *See id.* at 19–20.

259. Lynch, *supra* note 7, at 89.

260. *See* Walter J. Dickey & Peggy A. McGarry, *The Search for Justice and Safety Through Community Engagement: Community Justice and Community Prosecution*, 42 IDAHO L. REV. 313, 338–39 (2006).

rehabilitation process to identify connections and make changes that impact more people.

Meanwhile, it is essential that we embrace a more holistic view of criminal offenders, one that acknowledges that they often are products of a complicated past, influenced by a range of conditions and experiences beyond their control, and that the state often bears some responsibility in the creation of those conditions. Status courts show that system actors can and do put this theory into practice. It is time to take *this* insight “to scale.”