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Beyond Problem-Solving Courts

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BEYOND PROBLEM-SOLVING COURTS

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Problem-solving courts were borne out of well-meaning experimentalist spirit, a spirit that is very much in line with the vision of this Symposium on the multi-door criminal courthouse. These courts, which include drug courts, mental health courts, veterans' courts, and many other specialized criminal courts, were created as a way to close one door to the criminal courthouse—the so-called "revolving door" that appeared to bring some people accused of crimes back into court as soon as they exited. Problem-solving court judges sought to open a different door for some of those who entered their courtrooms, a door that they hoped would lead out of the criminal system entirely. The judges attempted to realize this goal by offering treatment instead of, or in addition to, incarceration under the belief that such interventions would prevent people from committing crimes in the future.

The problem-solving court movement is now more than thirty years old and the results of this experiment in court reform are underwhelming. Although these specialized criminal courts are widely celebrated as a successful evidence-based reform with demonstrated success in reducing recidivism, as I have argued elsewhere, "the empirical landscape of problem-solving court efficacy is more complicated than most proponents acknowledge."[1] While drug court outcomes have been subject to robust empirical scrutiny, other problem-solving courts have been tested only sporadically, if at all.[2] The claims of success for these other courts are based on the supposed success of drug courts—but the actual studies of drug courts hardly depict an unmitigated success story. Overall, *some* drug

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[1] Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. Davis L. Rev. 1573, 1577 (2021). My interpretation of the empirical studies of drug courts is hardly uncontroversial, but I have supported it at length in other work. *See id*.

[2] *See, e.g.*, Jack Tsai et al., *A National Study of Veterans Treatment Court Participants: Who Benefits and Who Recidivates*, 45 Admin. & Pol'y Mental Health & Mental Health Serv. Rsch. 236, 236–37 (2018) (noting, in 2018, that although more than 400 veterans courts were in operation, the effectiveness of these courts "on various outcomes, including recidivism, housing, employment, and health is unclear, and comprehensive analyses of VTC outcomes is lacking."). *See also* Collins, *supra* note 1, at 1577 n. 14.

court studies show that *some* of the people who graduate from *some* drug court programs are then arrested for or convicted of crimes less frequently than people who follow traditional punishment paths.

Meanwhile, the 40% to 60% of people who begin but do not complete problem-solving court programs often fare worse than they would have otherwise: many are ultimately incarcerated for at least as long as they would have been if they had been convicted in a traditional court, after having already spent time attempting the treatment court process.[3] Many court participants, regardless of whether they graduate from the court process or not, are saddled with extra debt from the court-imposed cost of participation. Moreover, these underwhelming outcomes cost more money than traditional punishment processes. For nearly as long as these specialized courts have existed, there have been efforts to reform this reform model to increase court retention, decrease recidivism, and save more money.

In this Article, I argue that it is time to stop trying to perfect problem-solving courts and to instead begin to close this door to the criminal courthouse altogether. This will require some radical honesty about what these specialized courts do—and do not do—and the ways this punishment model creates unintended harms. But this reckoning is also an opportunity to revive the experimentalist spirit that animated the earliest problem-solving courts and inspired judges to do things differently in the hopes of building a different future. This Article ultimately is a call to envision new ways to provide services and opportunities that could help people thrive, and an invitation to open doors to new paths that avoid the system altogether. In short, I argue that it is time to move beyond problem-solving courts.

The Article begins with Part I where I briefly describe popular problem-solving court models and then identify reasons to replace them. In Part II, I then offer suggestions for what could replace these courts and consider alternative pathways for reform, both within and beyond the criminal court process itself. As I imagine this future, I look for guidance to principles of carceral abolition. I argue that there is surprising synergy between some of the goals of the problem-solving court movement and the movement for carceral abolition, and that abolitionist principles can help us achieve these overlapping goals in a way that meaningfully advances decarceration and avoids the many harms the problem-solving court model imposes.

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[3] *See infra* text accompanying notes 20–23.

I. Looking Backwards

Problem-solving courts are specialized criminal courts (or, more precisely, court dockets) focused on people who are charged with a particular type of crime or who share a particular characteristic. As I have described in earlier work, problem-solving courts have generally developed along three different models: treatment courts, accountability courts, and status courts.[4] Treatment courts, which include drug courts and mental health courts, are the original and most prevalent type of problem-solving court. Treatment courts aim to treat a condition that is believed to bring the court participant into court, such as substance use disorder or a mental health condition.[5] They feature an extensive treatment plan, which is overseen by the judge, that the court participant must complete in order to avoid a more conventional form of punishment, including incarceration.[6] Accountability courts, which include domestic violence courts and sex offense courts, provide enhanced monitoring to people charged with certain kinds of crimes as a way to increase accountability and victim protection.[7] They generally require increased court appearances so that judges may track a participant's behavior, and while they may require that court participants engage in certain treatment programs, completion of such programs is usually not a substitute for incarceration.[8] The most recently developed model is the status court, which seeks to address the purportedly distinct needs of people in certain status groups such as veterans and girls.[9] Status courts resemble treatment courts in many ways, but with one key difference: the purpose of the court is to improve the ways the system treats people of this particular status group, not to solve a problem believed to be intrinsic to the court participant. Thus, in addition to offering treatment opportunities, status courts explicitly aim to instill honor in and increase respect for the participants.[10]

Problem-solving courts are an incredibly popular criminal system reform. There are currently more than 4,000 drug courts,[11]

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4 *See generally* Erin R. Collins, *Status Courts*, 105 Geo. L. J. 1481 (2017).

5 *Id.* at 1488–89.

6 *Id.*

7 *Id.* at 1490–91.

8 *Id.* at 1491.

9 *Id.* at 1492.

10 Erin R. Collins, *Status Courts*, 105 Geo. L. J. 1481, 1493 (2017).

11 *See What are Drug Courts?*, Nat'l Treatment Ct. Res. Ctr., https://ntcrc.org/what-are-drug-courts/ [https://perma.cc/3UAV-XCLH] (last visited Jan. 28, 2024).

450 mental health courts,[12] and 400 veterans courts[13] across the country. The problem-solving approach is constantly being applied to create specialized courts for new populations, such as emerging adults,[14] and new target offenses, such as crimes involving opioids.[15] In what follows, I offer a number of reasons why we should question our commitment to this popular reform model. As treatment court and treatment court-inspired models are the most prevalent and often considered synonymous with the term "problem-solving courts," my critiques are largely focused on treatment courts.

First and perhaps most controversially, these courts do not work—or, at least not nearly as well as many claim. The original goal of problem-solving courts was to provide services believed to help people avoid future interaction with the criminal system, a goal that has been collapsed into a myopic focus on the courts' impact on the recidivism rates of court participants.[16] The problem-solving court model in general, and drug courts in particular, have been repeatedly and thoroughly assessed through empirical research to discern whether they achieve their recidivism-reduction goal. The decades of empirical scrutiny afforded to these specialized courts simply do not support the success story that court proponents circulate. While the earliest court studies indicated that many courts achieved promising recidivism reductions, these studies were marred by methodological flaws, including small sample sizes and inadequate comparison groups, which undermined or limited their findings. Subsequent studies, conducted in ways that addressed some of these flaws, arrived at conflicting conclusions about whether the courts reduce recidivism. While some outcome assessments revealed recidivism reductions, others showed no impact on recidivism, and still others indicated that court participation increased recidivism.[17] The National Drug Court Resource Center recently summarized meta-analyses of drug court

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12 Sarah Martinson, *Alternative Courts not a Catch-All Fix for Mental Illness Crisis*, Law360 (Mar. 7, 2021, 8:02 PM), https://www.law360.com/articles/1356267/alternative-courts-not-a-catch-all-fix-for-mental-illness-crisis [https://perma.cc/AV5S-WC9A].

13 Tsai et al., *supra* note 2, at 236.

14 *See Emerging Adult Court of Hope Graduates Second Participant*, Hampden Dist. Att'y (Feb. 21, 2023), https://hampdenda.com/emerging-adult-court-of-hope-graduates-second-participant/ [https://perma.cc/AT3Z-SGTA] (describing the creation and operation of the court for emerging adults).

15 Collins, *supra* note 1, at 1587 (describing the creation of the first opioid intervention court).

16 *See generally* Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. Rev. 403, 420–21 (2022) (discussing the emphasis on recidivism reduction).

17 Collins, *supra* note 1, at 1589–90 (summarizing studies). In fact, a recent statewide evaluation of Colorado's problem-solving courts found that recidivism rates were higher for all court participants, including those who graduated, as compared to those who pursued traditional punishment. *See* Erin Collins, *Problem-Solving Courts and The Outcome Oversight Gap*, 92 UMKC L. Rev. 533 (2024).

outcomes as demonstrating there is "moderate evidence" that court participation facilitated recidivism reductions, and summarized the empirical literature as "generally supportive" of adult drug courts.[18] Other analyses have similarly concluded that drug courts achieve "modest" recidivism reductions.[19] I have summarized the relevant literature in previous work as follows: "drug court evaluations seem to demonstrate that some drug courts modestly reduce recidivism for some individuals, some of the time."[20]

A key to these underwhelming results is that many, and sometimes most, people who enter the court programs are dismissed from the court before program completion.[21] Graduation rates for adult drug courts hover around 40% to 60%, and studies have found similar rates for mental health courts.[22] Most specialized courts operate on a post-adjudication model, which means that most of the 40% to 60% who do not complete the process have already pleaded guilty to the underlying crime. When they are terminated from the specialized court program, they face the same original sentencing range from before they entered the program, and often end up with a total sentence that is substantially longer than they would have otherwise faced if they had pursued a traditional path.[23] One study demonstrated that even those who graduate from mental health court serve terms of supervision that exceed the term they would have received from a traditional court by a year or more.[24]

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18 Kristen DeVall et al., *Painting the Current Picture: A National Report on Treatment Courts in the United States, Adult Drug Courts Brief*, Nat'l Drug Ct. Res. Ctr. 35 (2022), https://issuu.com/ndcrc/docs/pcp_adultdrugcourts_brief_2022_digitalrelease [https://perma.cc/6T52-NMJC].

19 Collins, *supra* note 1, at 1590.

20 *Id.*

21 Termination can happen for many reasons, including failure to appear for a court appearance and testing positive for a prohibited substance.

22 *See*, *e.g.*, Lea Johnston & Connor Flynn, *Mental Health Courts and Sentencing Disparities*, 62 Vill. L. Rev. 685, 708 (2017) (finding that 21.4% of participants in the Erie County, Pennsylvania Mental Health Court graduated from the program and received early discharge from probation, 23% graduated but then had their probation revoked, and 35.7% had their probation revoked before graduation); *see also id.* at 705 (discussing earlier studies finding graduation rates of 55.6% and 68.2% in 2005 and 2007, respectively).

23 Defense lawyers have recounted that drug court judges regularly impose the longest possible sentence on those who fail the court program without regard for the sentence they would have imposed under a traditional court process or how long the participant had already spent in treatment. *See* Nat'l Ass'n Crim. Def. Laws., America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform 29 (2009). *See also id.* (comparing the usual ten-to-twenty-day jail sentence for a simple drug possession case with the six-month jail sentence one may receive after failing a treatment program). *See also* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. Rev. 783, 792–93 (2008) (summarizing study of New York City drug courts finding that sentences for those who failed from the court "were typically two-to-five times longer than the sentences for conventionally adjudicated defendants" and that "the typical failing participant [in the Bronx] was sentenced to two-to-six years in prison, which was (at the time of the relevant studies) the maximum sentence on the maximum drug-court eligible charge.").

24 Johnston & Flynn, *supra* note 22, at 693 (summarizing findings).

While many specialized court judges work with an understanding that failure is part of the treatment process, there are no rules specifying how many attempts a court participant is allowed to make at treatment before court participation is revoked. It remains within the judge's discretion to terminate the participant for any failure to adhere to the treatment program. And this termination decision, like all other discretionary decisions that animate the criminal system, can be influenced by the race of the participant, often to the detriment of Black people and other people of color.[25]

In light of these dynamics, those who may benefit the most from the treatment programs made available through court participation may make the rational decision to forego treatment court altogether, knowing that they would likely struggle at times to adhere to the court program.[26] Moreover, the existence of problem-solving courts can widen the net of criminal system involvement for others, who may be arrested and prosecuted in these specialized courts *because* law enforcement and prosecutors know the courts provide a path to otherwise unavailable treatment services .[27] Thus, problem-solving courts are, for many, a "non-alternative alternative to incarceration."[28]

Even if these courts achieved the recidivism reduction they claim, there would remain many other reasons to move beyond problem-solving courts. Medical and public health experts have questioned the propriety, efficacy, and safety of combining therapy

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[25] Nat'l Ass'n Crim. Def. Laws., *supra* note 22, at 43 (recounting observation of defense lawyer that they had seen white drug court participants "offered second and third chances, while members of minority groups are treated immediately as being in violation."). These are hardly the only racial disparities advanced by specialty courts. Problem-solving courts, like other programs aimed at diverting people from incarceration, are plagued with racial disparities in who can participate and on what term. *See* Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 Cardozo L. Rev. 2261, 2261 (2022) (describing how discretionary specialized court entry decisions "result in the re-inscription of already existing privilege and, correspondingly, the reinforcement of biases that permeate much of the criminal legal system, such as those based on racial presentation."). *See generally* Leah Wang, *Racial Disparities in Diversion: A Research Roundup*, Prison Pol'y Initiative (Mar. 7, 2023), www.prisonpolicy.org/blog/2023/03/07/diversion_racial_disparities/ [https://perma.cc/2VVP-V3U5].

[26] *See* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. Rev. 783 (2008). *See* Jasmine Tyler, *Criminal Justice Reformers are Hooked On Drug Courts; They Should Kick the Habit*, The Hill (Aug. 5, 2017, 10:00 AM), https://thehill.com/blogs/pundits-blog/crime/345371-criminal-justice-reformers-are-hooked-on-drug-courts-they-should/ [https://perma.cc/Z749-H2RL] (recalling witnessing people "frequently" requested jail time instead of drug court participation because "they were deeply concerned with their own health and well-being and felt drug courts would cause more problems for them in the long run.").

[27] Jane M. Spinak, *Romancing the Court*, 46 Fam. Ct. Rev. 258, 268 (2008) (arguing that "if the services are more available in the court [through problem-solving courts], prosecutors or child welfare agencies may be more willing to bring cases to court to get those services, even though the particular client might be as successful without court intervention for that purpose.").

[28] James Kilgore, *Repackaging Mass Incarceration*, Counterpunch (June 6, 2014), https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration/ [https://perma.cc/3F4K-K2QH].

with punishment. A 2017 Physicians for Human Rights ("PHR") assessment of drug courts concluded the courts "largely failed at providing treatment to those who truly needed it" while prioritizing participation for those who did not, and documented instances in which "court officials with no medical background mandated inappropriate treatment not rooted in the evidence base."[29] As a result of these and other observations, PHR concluded that drug courts "posed significant human rights concerns."[30] In March of 2019, independent human rights experts for the United Nations Special Rapporteurs similarly warned that drug courts "pose dangers of punitive approaches encroaching on medical and health care matters."[31]

Meanwhile, legal scholars have highlighted concerns about the ways problem-solving courts change the roles and expectations of criminal system actors. Specialized courts embrace an approach that positions the judge, prosecutor, and defense attorney as part of the same "team" dedicated to the defendant's completion of the court program.[32] Accordingly, problem-solving court judges shed their role as a neutral arbiter of a legal dispute, and defense attorneys are expected to swap their identity as zealous advocate and adversary for that of government ally, working alongside the prosecutor to ensure the defendant complies with court mandates.[33] As Professor Mae Quinn has cautioned, this team-based approach raises complicated ethical issues about the role of defense counsel and undermines a defendant's constitutional right to effective counsel.[34]

Moreover, as I have argued previously, problem-solving courts—despite their supposed evidence-based commitments—often fail to embrace scientific evidence that casts doubt on their practices

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29 Physicians for Hum. Rts., Neither Justice nor Treatment: Drug Courts in the United States 3 (2017).

30 *Id.*

31 Press Release, U.N. Hum. Rts. Special Procs., Drug courts pose dangers of punitive approaches encroaching on medical and health care matters, UN Experts say (Mar. 20, 2019).

32 This "nonadversarial approach" is one of the Ten Key Components of drug courts. *See* Nat'l Ass'n Drug Ct. Pros., Defining Drug Courts: The Key Components 3 (1997) (it requires that "the prosecutor and defense counsel . . . shed their traditional adversarial courtroom relationship and work together as a team. Once a defendant is accepted into the drug court program, the team's focus is on the participant's recovery and law-abiding behavior—not on the merits of the pending case."). *Id. See generally* 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, 64–74 (2001) (discussing the team-based approach of drug courts).

33 *See generally* Spinak, *supra* note 27, at 258–59 (comparing judges in traditional courts to problem-solving court judges).

34 Quinn, *supra* note 32. *See also* Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 Am. Crim. L. Rev. 1617, 1618 (2003) (identifying reasons that defense attorneys "may not experience their role in the creation and execution of the courts as equivalent to the other stakeholders, and therefore may be more resistant to reconsidering the ethical framework for zealous advocacy, including their responsibilities to the community.").

or their foundational premises. Once a particular conception of treatment is baked into the court process, those who are dedicated to and vested with authority in the court process may be reluctant or even antagonistic to changing it—even if new or previously overlooked insights from the relevant medical or scientific communities support making such changes.[35] The original drug court model, for example, is based on an abstinence-only treatment model that mandates immediate and complete cessation of intoxicating substances. Drug court judges routinely craft treatment plans that require court participants to complete traditional abstinence-based twelve-step programs and will find that participants violated program requirements if drug tests indicate the presence of any substance in their system, including medications prescribed to treat anxiety, attention deficit disorder, and other conditions.[36] Moreover, many drug court judges prohibit participants from using agonist medication-assisted treatments for opioid addiction, such as methadone or suboxone. Judges reason that agonist treatments, which are administered daily and work in such a way that people may experience a mild high from the medication, are an addictive substance and simply replace one addiction for another.[37] This insistence on abstinence and prohibition of medication-assisted treatement are inconsistent with now-prevailing understandings of effective addiction intervention, which support harm reduction instead of abstinence and the use of agonist treatments as part of the recovery process.

In contrast to their skepticism of agonist medications, many treatment court judges embrace the antiagonist medication-assisted treatment naltrexone—but not because it is more affordable or more effective. In fact, naltrexone, sold under the name Vivitrol, is significantly more expensive than agonist treatments, and

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35 *See* Collins, *supra* note 1, at 1616–20.

36 PHYSICIANS FOR HUM. RTS., *supra* note 29, at 13. *See also id.* at 16 (finding that "a participant's abstinence from all drug use other than (in some cases only) MAT—often measured in terms of drug test results—was a condition for their graduation to the next level of the program.").

37 *See* Collins, *supra* note 1, at 1618–19; Joanna Csete, *United States Drug Courts and Opioid Agonist Therapy: Missing the Target of Overdose Reduction*, 1 FORENSIC SCI. INT'L: MIND & L. 1, 2 (2020). As of 2013, approximately half of all drug courts did not offer MAT. *See* PHYSICIANS FOR HUM. RTS., *supra* note 29, at 12 (discussing studies). In 2015, the federal government implemented a new policy requiring drug courts to allow MAT under certain circumstances as a condition of federal funding. *Id*. Many drug courts, however, are funded by state and local sources and therefore are not impacted by this funding restriction. *See* Csete, *supra* note 37.

experts have questioned its efficacy.[38] One possible reason why this treatment has found a receptive audience with drug court judges is because of how it works. Unlike its agonist counterparts, which bind with the brain's opioid receptors to curb cravings and reduce withdrawal symptoms, Vivitrol completely blocks opioids from reaching receptors in the brain, preventing an opioid-induced high.[39] And Vivitrol, unlike suboxone or methadone, requires a full detox before it can be taken, and is administered monthly, not daily, which can assuage judges its use is not an addiction.[40] One drug court judge in Ohio is so enthusiastic about this treatment method that he has created an even more specialized "Vivitrol Court."[41] And other treatment court judges authorize Vivitrol as the only medication-assisted treatment option, which has resulted in at least one complaint that such policies violate the Americans with Disabilities Act.[42] Public health experts have cautioned that this championing of Vivitrol over other medications is based not on science but on ideology.[43] These experts have suggested that judges may prefer Vivitrol because the way this drug is administered seems more consistent with principles of punishment.[44]

Scientific research also reveals that some problem-solving courts are based on faulty assumptions about the connection between particular characteristics and criminal behavior. As Professor Lea

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[38] Mark Herz, *Mass. Drug Courts Settle with US Attorney's Office Over Interfering with Treatment*, GHB (Mar. 25, 2022), https://www.wgbh.org/news/local/2022-03-25/mass-drug-courts-settle-with-us-attorneys-office-over-interfering-with-treatment [https://perma.cc/9W9M-FEGC] (according to Dr. Andrew Kolodny, the medical director for the Opioid Policy Research Collaborative at Brandeis University's Heller School for Social Policy and Management, "[t]he evidence supporting the effectiveness of Vivitrol is much weaker" than agonist treatments "and there is evidence that in patients with severe opioid use disorder, exposure to naltrexone [the active ingredient of Vivitrol] could potentially increase the risk of death."); *See also* Alec MacGillis, *The Last Shot*, ProPublica (June 27, 2017), https://www.propublica.org/article/vivitrol-opiate-crisis-and-criminal-justice [https://perma.cc/7M6J-KSN6] (discussing cost of Vivitrol).

[39] *See* Abby Goodnough & Kate Zernike, *Seizing on Opioid Crisis, a Drug Maker Lobbies Hard for Its Product*, N.Y. Times (June 11, 2017), https://www.nytimes.com/2017/06/11/health/vivitrol-drug-opioid-addiction.html [https://perma.cc/Q8QR-W9BB] (describing the difference between the drugs); MacGillis, *supra* note 38 ("[w]hereas those "agonists" act by gripping the opioid receptors in the brain, thus delivering their own mild effect while preventing heroin or painkillers from latching on, the "antagonist" naltrexone acts like a glove over the synapses, preventing any opioid from reaching them." Vivitrol's popularity in drug courts has also likely been influenced by targeted marketing of Vivitrol to drug court judges. The manufacturer paid $50,000 to become a "champion" sponsor of the National Association of Drug Court Professionals in 2014).

[40] *See* MacGillis, *supra* note 38.

[41] *Id.*

[42] *See* Herz, *supra* note 38.

[43] Daniel Wolfe, *Vivitrol Offers the Fantasy of Being Drug-Free. But That's Not the Most Important Thing in Tackling Addiction*, STAT (June 29, 2017), https://www.statnews.com/2017/06/29/vivitrol-methadone-opioids/ [https://perma.cc/GPT4-Q44R].

[44] *Id.*

Johnston has revealed, the two foundational premises of mental health courts—namely that there is a strong causal connection between mental illness and criminal behavior and, therefore, that providing mental health treatment instead of incarceration will prevent future criminal activity—is "belied by scientific evidence."[45] Rather, a robust body of scientific research demonstrates that having a mental illness does not cause people to engage in criminal behavior and, in fact, people with mental illness who commit crimes "often simply exhibit the same risk factors—such as substance abuse, family problems, and antisocial tendencies" as other people who commit crimes."[46] Professor Johnston concludes "[i]t is these risk factors, not symptomatic mental illness, that directly contribute to criminal activity for a majority of individuals with mental illness."[47]

Finally, on a conceptual level, these specialized courts recirculate many of the same ideologies that fueled the rise of mass incarceration. The creation of these courts acknowledges that certain conditions or personal circumstances, such as substance addiction or mental illness, may make some people more vulnerable to criminal system involvement. Nevertheless, most specialized court models ultimately reify the notion of individualized responsibility that has animated many contemporary punitive practices.[48] For example, the drug court model is based on the notion that the "problem" the courts should target is drug addiction—a condition intrinsic to the person who engages in behavior deemed criminal. Accordingly, this model places the onus on the individual to fix that problem through court mandated treatment. In other words, the problem the courts want to solve is not with a criminal system that targets people who use drugs or harshly penalizes drug-related crimes. Responsibility for the harsh impact of drug laws remains squarely and solely on the shoulders of those who violate those laws, not those who create and enforce them.[49] Somewhat counterintuitively, however, the benefit that flows from those who successfully complete drug treatment

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45 Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 528 (2012).

46 *Id.*

47 *Id.*

48 *See* Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009) (arguing that the drug court model "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* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 124 (2001) (defining "responsibilization strategies.").

49 Jane Spinak, *No Place for Families*, INQUEST (July 27, 2023), https://inquest.org/no-place-for-families/ [https://perma.cc/N8G4-Z6FN] (Professor Jane Spinak recently made a similar observation about family court. Family court, she argues, "has neither the authority nor the inclination to confront the structural barriers that bedevil the marginalized families appearing there. It focuses instead on the specific child, youth, or parent before it as the problem to be fixed, reinforcing the belief that the court, by fixing the person, will fix the larger systemic problem.").

is justified in systemic, not individual terms. As Professor Jessica Eaglin has explored, drug courts are a type of "neorehabilitative" reform, which are reforms that are concerned with identifying and managing people who commit crimes "for the benefit of society, not the individual."[50]

Status courts, such as veterans courts and girls courts, depart from this framing slightly. These courts seek to address the way that past trauma resulting from external sources, such as military combat or sexual assault, contribute to current behavior and can render people vulnerable to criminal system involvement. Status courts aim to address the purportedly "unique needs" that stem from this trauma and provide a court process that acknowledges the dignity of court participants by treating them with empathy, respect, and honor. The problem these courts attempt to solve, therefore, is the inhumane and careless treatment that a select few receive in the traditional system. However, by providing special treatment for some people based on a notion of desert, these courts, too, ultimately shore up the pathologies of the traditional system in a few key ways. First, their justificatory discourse supports the notion that those who do not fall into these select status groups—in other words, the vast majority of those whom the system targets—deserve the inhumane and dysfunctional treatment they receive.[51] Moreover, the courts overlook the similarities between those they deem deserving of better treatment and those they exclude. For example, many young people who grow up in urban areas experience post-traumatic stress disorder at rates that match or surpass those of military veterans.[52] This trauma, like that of military veterans, often stems from witnessing or being a victim of violence.[53] And people of all genders experience sexual assault, and presumably most if not all who do experience trauma from those experiences. And yet, there has not been a robust effort to extend the status court model to include other populations that suffer from trauma.[54]

Some of the limitations of the problem-solving court model I have just discussed could be solved or at least remediated. Courts could, for example, reduce or remove entry criteria that impede participation by people who could benefit most from an alternative punishment path, such as restrictions based on the severity of the

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50 *See* Jessica M. Eaglin, *Neorehabilitation and Indiana's Sentencing Reform Dilemma*, 47 VAL. L. REV. 867, 874–75 (2013); *see also* Miller, *supra* note 48, at 441 (describing neorehabilitation); *but see* Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189 (2013).

51 *See* Erin R. Collins, *supra* note 4, at 1511.

52 *See id.* at 1501.

53 *See id.* at 1501.

54 *See id.* at 1501–04.

charged offense or the individual's past criminal record.[55] And they could remove other barriers to entry such as those that require participants to pay for court participation and treatment programs. Such measures, especially if coupled with efforts to curb discretion over entry decisions, may also help reduce some of the established racial disparities in specialized court participation.[56] Meanwhile, courts could be more proactive in incorporating new guidance from experts in public health, medicine, and related fields about effective interventions for addiction, mental illness, domestic violence, and the litany of other problems the courts purport to solve.

These reformist measures certainly would improve the administration of problem-solving courts. However, even if all of these suggested reforms were instituted, a fundamental problem would remain for those who are committed to meaningful decarceration and/or carceral abolition: problem-solving courts ultimately reinforce the primacy and legitimacy of incarceration as punishment. Professor Allegra McLeod has identified the range of reformist models that problem-solving courts draw on. She argues that the three prevailing models—therapeutic jurisprudence, judicial monitoring, and order maintenance—"pose a considerable risk of deepening and extending existing pathologies in criminal law administration, exacerbating overcriminalization and potentially expanding incarceration."[57] On this point, I agree. Professor McLeod has expressed optimism that a fourth model for specialized courts—a decarceration model—could "facilitate broader transformative criminal law reform" and ultimately help "reduce reliance on criminal prosecution and incarceration as a way of regulating an array of complex social problems."[58] I do not share Professor McLeod's optimism for a number of reasons.

Despite their diversionary ideals, the authority of problem-solving courts depends on the ever-present threat of incarceration—regardless of whether that threat becomes a reality.[59] The courts

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[55] Some courts are starting to experiment with these kinds of reforms. As Grace Li has documented, a relatively new problem-solving court in New York City allows participation by people charged with felonies, including some violent felonies. *See* Grace Li, *In Place of Prison*, U. Cinn. L. Rev. (forthcoming 2025). And courts in other jurisdictions are moving away from categorical exclusions and towards a case-by-case consideration of whether a particular person will be allowed to participate; *see* Collins, *supra* note 17.

[56] *See* Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 Cardozo L. Rev. 2261, 2290–91 (2022).

[57] Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 Geo. L. J. 1587, 1594–95 (2012).

[58] *Id.* at 1597.

[59] And many scholars have highlighted how the sentences that do not involve time in jail or prison nevertheless retain a carceral character. *See, e.g.*, Kate Weisburd, *Punitive Surveillance*, 108 Univ. Va. L. Rev. 147 (2022) (arguing that many types of "alternatives to incarceration" are a "manifestation of racialized carceral control"); Maya Schenwar & Victoria Law, Prison by Any Other Name: The Harmful Consequences of Popular Reforms (2021).

draw their power of "persuasion" from the prison itself and can and do frequently use that power.[60] While "[t]he judge's range of options for securing compliance with drug treatment or other requirements may range from hugs to jail . . . in the end, jail remains a viable sanction."[61] As problem-solving court judges readily admit, these institutions wield their carceral authority all the time. These courts are not, judges reassure skeptics, soft on crime. This intimate and inextricable relationship between problem-solving courts and incarceration reveals the impossibility of pursuing decarceration through this method of reform.

History casts further doubt on the ability of problem-solving courts to achieve decarceration. Problem-solving courts have entered their fourth decade and, as of yet, have not made an appreciable difference in recidivism rates.[62] And history of other efforts at court specialization also provide a cautionary tale. For example, Professor Jane Spinak has argued that the history of family court, which she identifies as the "paradigmatic problem-solving court,"[63] should make us "cautious in our reliance on any court-based treatment solution," and should lead us to look for community-based initiatives for treatment instead of court-based solutions.[64] Specifically, Professor Spinak has uncovered how family court status offender jurisdiction—intended to improve children's lives through the provision of services—failed to achieve this goal, and caused a range of unintended harms.[65]

Certainly, problem-solving courts benefits for some people. Specialized courts provide a meaningful and impactful experience for some court participants and help some avoid incarceration. And while the overall recidivism data regarding problem-solving court participation is inconsistent, data consistently show that the court succeed on one metric: judicial happiness.[66] And, as candidly acknowledged in a policy paper for the Conference of State Court Administrators, treatment courts come with a "[t]remendous public relations benefit."[67]

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60 Spinak, *supra* note 27, at 264.

61 *Id.*

62 *See supra,* text accompanying notes 16–19 (discussing empirical evaluations of drug courts).

63 Spinak, *supra* note 27.

64 *Id.* at 269 (Professor Spinak has recently amplified this critique, which she originally articulated in 2008, into a call to "abolish family court."); *See* Jane M. Spinak, The End of Family Court: How Abolishing the Court Brings Justice to Children and Families (2023).

65 Spinak, *supra* note 27, at 269.

66 *See* Collins, *supra* note 1, at 1579 (arguing that problem-solving courts "revive a sense of purpose and authority for judges in an era marked by diminishing judicial power.").

67 David W. Slayton, Conf. St. Ct. Adm'rs, 2014–2015 Policy Paper: Problem-Solving Courts in the 21st Century.

But these benefits come at a number of costs: not only the financial expense required to fund these expensive programs, but also the costs imposed on those who end up in the system for longer, and those who are never able to access treatment programs. Meanwhile, the creation and operation of problem-solving courts creates an illusion of progress that can provide reformers, politicians, and even academics with an illusory sense of progress that can alleviate the pressure to search for more effective and systemic reforms. In short: it is time to move beyond the problem-solving court model while retaining its experimentalist spirit. In the next Part, I provide suggestions about what such experiments could look like.

II. Moving Forward

At the most general level, most problem-solving courts aim to provide services and treatment that will render people less vulnerable to future criminal system contact in the future. Access to treatment and services that people need to thrive is a very real, and very extensive, problem.[68] But for all of the reasons discussed in Part I, it is time to look for alternatives to this alternative to incarceration scheme as a mechanism for service provision, while holding fast to the insight that we cannot punish our way out of a criminalization crisis. This section considers alternative models both within and beyond the criminal system itself.

A. *Beyond Criminal Courts*

There are a few existing models within the criminal system that share the specialized court goal of providing treatment and services for certain people, such as people who are exhibiting signs of substance use disorder or mental health illness, or people who are suspected of or charged with certain crimes. Prosecutor-led diversion programs, which allow prosecutors to divert people arrested for certain offenses into treatment instead of instituting official charges, share many similarities with problem-solving courts.[69] Like specialized courts, these programs generally require that the participant admit guilt before entering a mandatory treatment program and threaten

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[68] *See* Physicians for Hum. Rts, *supra* note 29.

[69] *See* Kay L. Levine et al., *Making Deflection the New Diversion for Drug Offenders*, 19 Ohio St. J. Crim. L. 75, 83 (2021) (describing prosecutor-led diversion).

the participant with traditional sanctions if they do not adhere to the program.[70] And prosecutor-led diversion programs, like specialized courts, may widen the net of the criminal system by capturing some people for participation who would otherwise have escaped criminal sanction altogether and keeping others in the system longer than they would have been under a traditional punishment approach.[71] A key difference is that the entity wielding the threat of incarceration to "encourage" treatment is a prosecutor, not a judge, and the diversion attempt occurs before formal adjudication of the charge.

Another model empowers law enforcement officers to refer people to drug or mental health treatment services instead of arresting them for certain low-level crimes. Some of these programs feature Crisis Intervention Teams, which are collaborative efforts by law enforcement and community-based mental health service providers to intervene with services and support instead of arrest when someone is experiencing a mental health crisis.[72] Other programs allow law enforcement to "deflect" people suspected of drug-related crimes to treatment instead of arresting them.[73] The law-enforcement models improve on some of the shortcomings of prosecutor-led diversion. For example, participation in the deflection programs may be less coercive, as individuals are not required to admit guilt to any crime in order to access services. Moreover, those who are deflected into treatment may avoid the stigma and burdens that accompany arrest or conviction.[74] And some deflection programs feature self-referral options that allow people who are not yet under law enforcement surveillance to access treatment services.[75]

Both prosecutor and law-enforcement models have some advantages over specialized courts. For example, both approaches better incorporate advice from public health experts that diversion to treatment services should occur as early in the criminal process as possible. According to the sequential intercept model, which is a "conceptual model based on public health principles [that] has emerged to address the interface between the criminal justice and mental health systems," supportive treatment services should be offered at the earliest possible "intercept point."[76] The model envisions five moments of interception during the criminal system process at which individuals can be provided treatment instead

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70 *Id.* at 83.

71 *Id.* at 84.

72 Mark Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People With Serious Mental Illness*, 57 Psychiatric Servs. 544, 544–49 (2006).

73 *See* Levine et al., *supra* note 69 (describing deflection programs).

74 *Id.*

75 *Id.*

76 Munetz & Griffin, *supra* note 72, at 544–49.

of "entering or penetrating deeper" into the system,[77] as follows: arrest and emergency services ("Intercept 1"); initial detention and hearings ("Intercept 2"); jails and courts ("Intercept 3"); reentry from incarceration ("Intercept 4"); and community corrections ("Intercept 5").[78] The law enforcement and prosecutor-based programs occur at Intercepts 1 and 2, respectively, while specialized court programs do not begin until Intercept 3.[79] Presumably, then, the earlier interception carries greater potential to avoid some of the harms of criminal system involvement.

But there are fundamental shortcomings of both models. First, and perhaps most problematically, both approaches—like problem-solving courts—position criminal system actors as gatekeepers to treatment services, services that are in short supply and often inaccessible independent of the criminal system. This linkage between criminal system actors and services continues to imbue treatment with the specter of carceral consequences for failure to complete treatment. This threat—real or imagined—will necessarily deter participation by those who are skeptical of the criminal system and wary of promises that they will not be arrested, prosecuted, or punished. For example, the Los Angeles Police Department recently launched an Alternatives to Incarceration Diversion Program, which allows police to provide a choice to some people arrested for certain nonviolent crimes to enter a program that provides a range of treatment services instead of facing prosecution.[80] As of May 2022, nearly three-quarters of the 283 eligible people chose not to participate, and only 17 had completed the program.[81]

A primary justification for locating this gate-keeping role in the criminal system is to coerce people into treatment; the coercion that accompanies threat of incarceration is needed, the argument goes, to persuade people who are otherwise reluctant or unwilling to

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77 *Id.*

78 *See* Dan Abreu et al., *Revising the Paradigm for Jail Diversion for People with Mental and Substance Use Disorders: Intercept 0*, 35 Behav. Sci. L. 380, 380–95 (2017).

79 *Id.*

80 Kevin Rector, *Given a Chance to Avoid Jail and Criminal Charges, Mentally Ill, Addicted and Homeless People in L.A. Pass*, L.A. Times (May 20, 2022, 5:50 PM), https://www.latimes.com/california/story/2022-05-20/given-chance-to-avoid-jail-and-criminal-charges-mentally-ill-addicted-and-homeless-people-in-l-a-pass [https://perma.cc/AW2C-LV2A]. Participation is available to people arrested for certain nonviolent crimes who lack a history of violence and have a mental health or substance use disorder or are unhoused. *Id*.

81 *Id.*

enter treatment.[82] This argument is unpersuasive for a few reasons. Coerced treatment—specifically, the requirement that people enroll in drug treatment as a condition imposed by a criminal court—is a "fiercely debated topic in addiction": many expert organizations, including projects with the United Nations, consider it harmful, while others, including the National Institute of Drug Abuse, claim "treatment need not be voluntary to be effective."[83] Some studies have found that coerced treatment is as effective as treatment that is entered into voluntarily, while others have found that some types of coerced treatment are "associated with worsened treatment outcomes and increased criminal activity" and that the impact of mandated treatment is not long-lasting.[84] In any event, even those studies that show similar outcomes between coerced and voluntary treatment cannot and do not prove that coerced treatment is the best way to provide treatment—because that is not the question the researchers have asked.[85] And framing of the empirical question in this way can give a skewed view of any benefit of state-mandated treatment, as it compares outcomes of those who had the ability—financially and logistically—to access treatment on their own to those who were required to participate. Given the significant disparity between the number of people who want to access treatment and the availability of those services, these studies simply cannot show us how the outcomes would compare if treatment was available to all. Presumably more people would "volunteer" for treatment if given the opportunity to pursue it on their own terms, in a way that is compatible with their personal lives.[86]

Positioning criminal system actors as treatment gatekeepers has another significant downside. While prosecutor diversion and law enforcement deflection models change the identity of the diversion

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[82] Versions of this argument are offered in support of California's new conservatorship law, SB43, which expands the state's power to force unwilling people into mental health and drug treatment programs. Governor Gavin Newsom signed the law on October 10, 2023. *See Modernizing Conservatorship Law to Better Help & Protect Californians Most in Need of Care*, ST. CAL.: OFF. GOVERNOR GAVIN NEWSOM (Oct. 10, 2023), https://www.gov.ca.gov/2023/10/10/modernizing-conservatorship-law-sb43/ [https://perma.cc/EM87-XXET]. Compulsory treatment regimes also exist in other states, including New Hampshire, Alabama, and Pennsylvania. *See* Carl Erik Fisher, *People Struggling with Addiction Need Help. Does Forcing Them Into Treatment Work?*, SLATE (Jan. 18, 2018, 9:07 AM), https://slate.com/technology/2018/01/coerced-treatment-for-addiction-can-work-if-you-coerce-correctly.html [https://perma.cc/F7U4-SBLH].

[83] Fisher, *supra* note 82.

[84] *Id*.

[85] Spinak, *supra* note 27, at 268–69 ("[i]n studies of treatment courts, the question that is generally asked is whether the treatment court is having an impact on the defined goals of the case . . . not whether the provision of treatment as a preventative measure would or could have achieved the same or better goals.").

[86] Fisher, *supra* note 82 (discussing the importance of self-determination in substance use treatment).

decision-maker, they do not resolve the problems that arise when we ask system actors to adopt new roles and responsibilities as treatment advocates or managers, roles that conflict with their traditional powers. Furthermore, each of these models involve discretionary decisions by prosecutors and law enforcement to divert people to treatment,[87] decisions that will remain deeply susceptible to racial bias.[88] And by positioning criminal system actors as service gatekeepers, these models, like problem-solving courts, require dedicating *more* money to criminal system actors and programs—money that will further cement the criminal system as a primary provider of much-needed social services.

These system-based diversion approaches are also inherently limited in their view of who is eligible for treatment and under what conditions. Both the police and prosecutor models, like most specialized courts, allow diversion only for people suspected of activity that is deemed sufficiently non-serious, like low-level drug or property crimes,[89] and who are deemed sufficiently low-risk, as evidenced by a limited criminal history record. Under Atlanta's Policing Alternatives and Diversion program, for example, "[w]hen a law enforcement officer has probable cause to arrest someone for a non-violent crime, and that person fits the profile of a potential participant, does not have a violent criminal record, is at least 17 years old, and does not appear to be a threat to other people, the officer has discretion to contact a 'care navigator' rather than make the arrest."[90]

For all of these reasons, it is time to look beyond not just problem-solving courts, but also the criminal system entirely.

B. *Beyond The Criminal System*

The problem-solving court movement emerged as an experiment in helping people avoid contact with the criminal system

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[87] Levine et al., *supra* note 69, at 94 (Atlanta's pre-arrest diversion program, for example, "vests officers with discretion to call case workers, rather than make arrests when encountering people who have committed low-level offenses that are linked with poverty, mental illness, and substance use.").

[88] Wang, *supra* note 25.

[89] Levine et al., *supra* note 69, at 90 (describing Seattle's LEAD participation criteria as follows: "[i]ndividuals are not eligible to participate if they possess more than three grams of drugs, are suspected of dealing above a subsistence income, do not seem amenable to diversion, are suspected of exploiting minors, are suspected of promoting prostitution, are already part of Mental Health or Drug Diversion court, or have a disqualifying criminal history based on crimes of violence."). An exception is Gloucester's Angel Program, which has a self-referral pathway. *Id.* at 92.

[90] *Id.* at 97.

in the future by providing them with access to treatment and other supportive services. Another robust contemporary movement—carceral abolition—shares this experimentalist spirit, the goal of providing people with the services and support they need to thrive, and a vision for the future in which interactions with criminal system are minimized or non-existent. But abolitionist principles provide a different conceptualization of the problem that causes criminalization and a vision for the future that is distinct from that that embraced by the problem-solving court movement. These differences reveal strategies for achieving this shared goal in in ways that can avoid the pitfalls of criminal system-centered approaches.

The system-based approaches discussed above reflect an assumption that criminal behavior results from an issue intrinsic to the individual suspected of such behavior, such as addiction or mental health issues, and focus on providing substance use and mental health treatment, accordingly. Given this narrow conceptualization of the problem that causes criminalization, these approaches are incapable of addressing the systemic factors that render people vulnerable to criminal system involvement, such as structural racism, underfunded education systems, and inadequate housing and health care. Some will inevitably point out that systemic change is not the intended point of these reforms, and that is true. But for those who want to move beyond reforms that tinker at the edge of a deeply rotten system, and towards changes that transform the system, a different vision for reform is necessary. Carceral abolition provides that guiding vision.

Carceral abolition is, as Mariame Kaba has explained, "about making things as much as it is about dismantling."[91] Abolition is a praxis and ideological framework that encourages the dismantling of the carceral state *through the creation of a world in which prison and all of its manifestations are simply unnecessary.*[92] It seeks to do through the building of new structures and responses to harm. A central tenant of an abolitionist approach is to decouple care from carcerality—in other words, to create systems for preventing and responding to harm while providing people with the support they need to thrive, all of which occur independently of the criminal system and outside of the shadow of carceral sanctions. As Dorothy Roberts has explained,

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[91] Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. Rev. 1544, 1550 (2022).

[92] As Marbre Stahly-Butts and Amna A. Akbar explain, an abolitionist future is "expansive" as "[i]t includes both an end to our reliance on prisons, police, and surveillance, *and* a vision to build alternate modes of social provision and norms, collective self-governance, and fundamentally different economic relationships." *Id.* at 1550–51 (emphasis added).

> [a]bolitionists . . . are both developing nonpunitive measures to deal with harm and creating new conditions to prevent harm from occurring in the first place, recognizing both as better approaches to ensuring safety and security than relying on police and prisons. Abolitionists address the root causes of harm by investing in people's basic needs and addressing the causes of interpersonal violence.[93]

While abolitionism and problem-solving courts are both dedicated to providing support as a way to reduce future harm, there are many important differences between the two approaches.

For abolitionists, the problem that must be addressed is not with the people who enter and re-enter the system. Rather, abolitionists focus on the way the system and its many actors repeatedly target the same people and communities for arrest and prosecution while simultaneously creating conditions that leave people particularly vulnerable to state surveillance and intervention, such as lack of meaningful education and employment opportunities, and housing instability. And this conceptual shift leads to a very different, and much more expansive, reform agenda: a demand to change the system itself. In other words, abolition supports providing aid and treatment services in ways that do not perpetuate or enlarge the power, scope, or authority of the carceral state—through "non-reformist reforms."[94] In contrast, abolitionists resist "reformist reforms," or "changes that tinker at the edges of the existing system and fail to target the structural origins of inequality and injustice."[95]

Abolitionists do not believe one unitary reform will replace or cure all of the problems of the current system. Rather, abolitionism is based on a spirit of experimentalism, a belief that we must try many different approaches to achieve a future we want. Or, as explained on One Million Experiments, a website focused on collecting and disseminating information on abolitionist-inspired community-based safety projects, "[t]here is no one answer to how we get free—there are one million."[96] Meanwhile, abolition works with an acknowledgment that some of these experiments may not

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[93] Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 44–45 (2019).

[94] *See* RUTH WILSON GILMORE, GOLDEN GULAG 242 (Earl Lewis et al. eds., 2007) (defining "non-reformist reforms" as "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.").

[95] Collins, *supra* note 16, at 451.

[96] *About One Million Experiments*, ONE MILLION EXPERIMENTS, https://millionexperiments.com/about [https://perma.cc/4XVD-KS8D] (last visited Feb. 24, 2024).

lead where we want, but insists that a fear of failure should not stop us from trying.[97]

With regards to access to drug treatment, mental health care, and other life-sustaining services, however, abolitionist principles do offer a unitary vision: such services should be available to all who want them, independently of the criminal system. Instead of investing resources to train criminal system actors about how to administer and oversee drug treatment, for example, abolition supports efforts to shift funding to community-based experts in substance use disorder who can offer services and treatment that are best for the individual—and not influenced by the expectations or limits of the criminal system. This decoupling of care from carcerality avoids the role confusion inherent in the system-based approaches. Instead of bringing the supposed "social work function" of the law enforcement "out of the shadows" by explicitly investing them with the power to provide social services,[98] for example, an abolitionist approach elucidates that policing and the provision of supportive services are separate functions that should not be performed by a single entity.

The notion that we should emphasize access to treatment outside of the carceral apparatus is consistent with the sequential intercept model, which, as discussed above, provides a theoretical grounding for prosecutor-led diversion and law enforcement deflection programs. Mark Munetz and Patricia Griffin, who created the sequential intercept theory,[99] have acknowledged that an "accessible, comprehensive, effective mental health treatment system focused on the needs of individuals with serious and persistent mental disorders *is undoubtedly the most effective means of preventing the*

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[97] Abolitionist activist and scholar Mariame Kaba has reflected, "I'm a huge fan of failure. It's not a question of if we're going to fail, it's when we fail. If you're taking action, you're going to make mistakes and you're going to fail. Failure is not a bad word. If you're fearful of failing, that often can stop you from taking action but I much prefer taking action over not taking action. Also how glorious is it to fail at something? Then you have an opportunity to learn and move on to making something else informed by the so-called failure." One Million Experiments, *Ep 287 - One Million Experiments Part 1: The Hypothesis with Mariame Kaba*, AirGo, at 34:36 (Oct. 21, 2021), https://airgoradio.com/airgo/2021/11/18/one-million-experiments-part-1-the-hypothesis-with-mariame-kaba [https://perma.cc/SHT9-K5Y2]. Different from mainstream criminal system reforms, however, abolitionism's experimentalism does not require study and proof from accredited "experts" to assess an intervention's success. *See generally* Collins, *supra* note 16, at 451.

[98] *Cf.* Levine et al., *supra* note 69, at 89 (arguing one benefit of deflection programs is that they "bring the social service dimension of police work out of the shadows."). Abolitionists will also stress that state-sanctioned social workers can be seen as part of the carceral apparatus. *See, e.g.*, S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 Colum. L. Rev. 1097 (2022).

[99] *See* Abreu et al., *supra* note 78, at 381 (noting that Munetz & Griffin developed the sequential intercept model in the early 2000s).

criminalization of people with mental illness."[100] They specify that such a system should center "competent, supportive clinicians; community support services, such as case management; medications; vocational and other role supports; safe and affordable housing; and crisis services" and that such services should be "available and easily accessible to people in need."[101] Such a system would be, in their opinion, "the ultimate intercept"—one that would prevent involvement in the criminal system completely.[102] Nevertheless, they lament, few communities offer this level of services, so they then offer recommendations for how to "intercept" people once they come to the attention of criminal system actors.[103]

An abolitionist approach, by contrast, does not lament this observation regarding the lack of independent treatment services, but instead interprets it as a call to action. Instead of accepting that the criminal system may be the most politically palatable site of service provision, abolitionists seek to build a different reality, one in which services are abundant and accessible to such a degree that everyone has the resources and support they need to thrive.

That future is, of course, a ways away. But there are "one million experiments" in abolition underway, united in the goal of working towards that future.[104] These experiments intervene at many different sites, from education to violence interruption and community food programs, but here I will highlight a few that aim to realize the goal of decoupling care from carcerality by providing supportive services and crisis intervention independent of the criminal system.

One such experiment is Mental Health First ("MH First"), a community-based initiative that started in Sacramento, California in 2019 and then expanded to Oakland, California in 2020.[105] The purpose of MH First is to "interrupt and eliminate the need for law enforcement in mental health crisis first response by providing mobile peer support, de-escalation assistance, and non-punitive and life-affirming interventions."[106] MH First's approach is based on the principle of "care not cops," and therefore seeks to intervene

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100 Munetz & Griffin, *supra* note 72, at 545 (emphasis added).

101 *Id.*

102 *Id.*

103 *Id.* at 544.

104 One Million Experiments ("OME") is a website and a podcast showcasing ongoing experiments in building "solutions that are grounded in transformation instead of punishment." The point of OME is "not to find permanent solutions to ever-changing problems, but to gather more ideas, tools, and skills so that we don't have to start from scratch every time." One Million Experiments, *supra* note 96.

105 One Million Experiments, Mental Health First 2 (2021). As MH First co-creator Asantewaa Boykin reflected, this organization grew organically out of already existing community efforts to support each other in times of need without involving law enforcement. *Id.*

106 *Id.* at 3–4.

with people experiencing crisis without involving law enforcement "unless asked by mental health responders as a last resort."[107] Instead of calling law enforcement, people who are experiencing or witnessing someone experiencing a mental health emergency may call MH First's hotline, which is staffed by doctors, nurses, other medical and mental health professionals, and other community member volunteers. The volunteer asks questions to understand what is happening and what kinds of services and support are needed, with an emphasis on ascertaining the safety of everyone involved.[108] When needed, MH First will dispatch a team comprised of three people: a crisis interventionist, who works directly with the person in need, a medic, who can provide basic first aid, and a safety liaison, who watches for potential dangers. If the police are already on the scene, the MH First team will advocate for providing the person in crisis with mental health care instead of jail.[109]

Another abolition-inspired experiment emerged in response to a proposal to build a new, $3.5 billion "treatment facility" to replace Los Angeles County's largest jail facility for men.[110] A group of formerly incarcerated people, their families and communities, and other grassroots organizations and advocates united to create the JusticeLA Coalition to demand "Care, Not Cages."[111] JusticeLA not only successfully persuaded the LA County Board of Supervisors to abandon the plan for the new facility, but also to adopt a "care first" approach to responding to harm. The Board commissioned an Alternatives to Incarceration work group, which included members of JusticeLA. The work group drafted a report identifying 114 recommendations to take steps toward realizing a system that prioritizes "Care First, Jails Last."[112] Informed itself by the sequential intercept model, the report emphasizes recommendations that will support an "Intercept 0" approach, or one that provides services and interventions in a way that avoids the criminal system entirely.[113] Many of the recommendations resonate with abolitionist principles, such as efforts to expand community-based holistic care services, the

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107 *Id.* at 3.

108 *Id.* at 4.

109 *Id.* at 5.

110 Jeremy Levenson et al., *Abolition and Harm Reduction in the Struggle for "Care, Not Cages*," 121 Int'l J. Drug Pol'y 1 (2023).

111 *Id.* at 2. *See also Who We Are*, JusticeLA, https://justicelanow.org/about/ [https://perma.cc/7PRC-DFVX] (last visited Feb. 24, 2024).

112 L.A. Cnty. Alts. Incarceration Work Grp., Care First, Jails Last: Health and Racial Justice Strategies for Safer Communities 10; *see generally* Levenson, *supra* note 110, at 2, 4 (describing the Board's actions and the role of JusticeLA in initiating and drafting the report).

113 L.A. Cnty. Alts. Incarceration Work Grp., *supra* note 112, at 42 (discussing influence of Sequential Intercept Model); *id.* at 22 (describing how the Alternatives to Incarceration Work Group modified the Sequential Intercept Model to add "Intercept 0").

creation of decentralized coordinated service hubs where people can seek a spectrum of supportive services twenty-four hours a day, and support for community-based harm reduction strategies for people with mental health and substance use disorders, including the prescription of psychiatric medications and medication assisted treatment.[114]

Abolitionist principles would also support funding efforts to address other needs that can leave people vulnerable to criminal system targeting, such as safe and secure housing. An abolitionist perspective understands that the experience of being unhoused puts stress on people that may cause or exacerbate other vulnerabilities, such as substance use, which can then lead to criminalization. The Housing First model, for example, focuses on providing permanent supportive housing to people experiencing homelessness.[115] Importantly, this model emphasizes that safe housing—not treatment—should be provided first, with very few barriers to entry, and then people should be given the opportunity to access other supportive services *on a voluntary basis*.[116] It is thus a shift from the "treatment first" model that requires people to complete treatment programs or demonstrate abstinence from all substances before they are offered stable housing.[117]

In sum, abolitionist experiments in supportive service provision can and do look like a lot of different things. Crucially, however, any abolitionist experiment resists restricting access to such services to certain populations based on the notion that only certain people are deserving of support or that others are too risky to merit such access.[118] In other words, abolition experiments work against the assumption imbedded in system-based approaches that supportive services and alternative approaches should be available only to people charged with non-violent, non-serious, non-sex offenses or the "non, non, nons," as identified by Marie Gottschalk.[119]

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114 *Id.* at 42, 69–73.

115 Brian Nam-Sonenstein, *Seeking Shelter from Mass Incarceration: Fighting Criminalization with Housing First*, Prison Pol'y Initiative (Sept. 11, 2023), https://www.prisonpolicy.org/blog/2023/09/11/housing-first/ [https://perma.cc/R7U3-AKZF].

116 Terrance Wooten, *Shelter Abolition and Housing First: Rethinking Dominant Discourses on Homeless Management*, 55 Polity 673, 676 (2023).

117 *See* Nam-Sonenstein, *supra* note 115 (comparing housing first with treatment first); *see also* Wooten, *supra* note 116, at 676 ("[u]nlike earlier 'housing ready' or 'treatment first' models, housing first does not require that residents engage in treatment programs, prove they have acquired a certain set of requisite skills to live independently, or secure a source of income (via work, disability, or other entitlements); nor is participation in support services mandatory in order to obtain or maintain housing.").

118 *See generally* Erin R. Collins, *Punishing Gender*, 71 UCLA L. Rev. (forthcoming April 2024) (discussing abolition's rejection of the "politics of exceptionalism.").

119 *See* Marie Gottschalk, *Raze the Carceral State*, Dissent, Fall 2015, at 55.

III. Conclusion

The problem-solving court model emerged as a genuine experiment aimed at helping some people avoid the harms of traditional punishment. Now, more than thirty years later, it is time to admit that the experiment has not succeeded in achieving its goals for many, and to acknowledge the ways in which this reform model itself can cause unintended harm. It is not time to give up on the experimentalist spirit, but rather to use it as inspiration to seek other ways of achieving these noble goals. Meanwhile, in the decades during which this particular experiment has been underway, it has become increasingly clear that the criminal system enacts deep and enduring harm on the people it targets and their communities. If we want to meaningfully address this problem, we must look for new solutions not just beyond problem solving courts, but beyond the criminal system entirely.